

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2017-021

**TO:** Mayor John Engen; City Council; Dale Bickell; Mike Haynes; Mary McCrea; Anita McNamara; Denise Alexander; Drew Larson; Laval Means; Jen Gress; John Wilson; Kevin Slovarp; Don Verrue; Ellen Buchanan; Chris Behan; Donna Gaukler; Eran Pehan

**CC:** Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** August 11, 2017

**RE:** Pursuant to Montana state law sections 76-2-401 and 76-2-402 MCA, Montana state and local governments are not subject to municipal zoning regulations

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### **FACTS:**

The local government public library in Missoula has county elector voter approval to issue bonds to relocate public library service one block east where a new local government public library will be constructed after the houses on that block are removed. Apparently, as part of the Real Property Land Swap Transfer of Ownership Agreement the public library agreed with the former owner of the block to jointly seek CBD-4 zoning for both blocks.

### **ISSUE(S):**

Is the new local government public library subject to municipal zoning regulations pursuant to Montana state planning and zoning laws?

### **CONCLUSION(S):**

No. Pursuant to Montana state planning and zoning laws, sections 76-2-401 and 76-2-402, MCA, Montana state and local governments are not subject to municipal zoning regulations.

### **LEGAL DISCUSSION:**

Approximately 42 ½ years ago, then Montana Attorney General Robert Woodahl issued a letter opinion dated February 14, 1975 to George Mitchell, University of Montana, administrative vice president pursuant to which Montana Attorney General Woodahl concluded:

“The University of Montana is not subject to local municipal zoning ordinances or regulations of the City of Missoula, in acquiring and utilizing real property contiguous to the central campus for University purposes.”

At page 1 of his 4 page February 14, 1975, letter opinion, Montana Attorney General initiates his letter discussion by observing that:

“It is the general rule of most jurisdictions that municipal zoning regulations or restrictions usually do not apply to the state or any of its subdivisions or agencies, unless the legislature has clearly manifested a contrary intent.”

In part, at page 2 of his letter opinion, Montana Attorney General Woodahl stated:

“Therefore, in the absence of a clearly expressed legislative intent to subject state instrumentalities to local zoning restrictions . . . the general rule cited above should apply and the University of Montana should not be subject to the zoning restrictions of the City of Missoula.”

A copy of this four page February 14, 1975, Montana Attorney General letter opinion is attached hereto.

A few years after Montana Attorney General Robert Woodahl’s February 14, 1975, letter to University of Montana administrative vice president, George Mitchell, a Missoula state legislator introduced state legislation at the Montana State Legislature to address residential constituent concerns about the conclusion stated in the February 14, 1975, attorney general letter opinion. However, what the 1981 Montana State Legislature enacted, when it enacted sections 76-2-401 and 76-2-402, MCA, was instead a statutory provision indicating that Montana state and local governments merely had to participate in a public hearing public forum before the municipal zoning board of adjustment whenever a state or local government agency was proposing a land use that was not compliant with local zoning regulations.

Pursuant to subsection 76-2-402(2) the municipal zoning board of adjustment has no power to deny the state or local government proposed land use; but shall act only to allow a public forum for comment on the proposed use.

Sections 76-2-401 and 76-2-402 MCA state as follows:

**76-2-401. Definitions.** As used in **76-2-402**, the following definitions apply: (1) "Agency" means a board, bureau, commission, department, an authority, or other entity of state or local government. (2) "Local zoning regulations" means zoning regulations adopted pursuant to Title 76, chapter 2.

**76-2-402. Local zoning regulations -- application to agencies.**

Whenever an agency proposes to use public land contrary to local zoning regulations, a public hearing, as defined below, shall be held. (1) The local board of adjustments, as provided in this chapter, shall hold a hearing within 30 days of the date the agency gives notice to the board of its intent to develop land contrary to local zoning regulations.

(2) The board shall have no power to deny the proposed use but shall act only to allow a public forum for comment on the proposed use.

With respect to the public hearing public forum before the municipal zoning board of adjustment, with respect to the City of Bozeman commencing construction of a water storage tower prior to the actual municipal board of adjustment conducting the public forum public hearing, the Montana Supreme Court indicated that the fact that the public was allowed the opportunity at a public hearing to present opinions and objections to the building of a water tower on municipal land in violation of city zoning regulations constituted sufficient notice under section 76-2-402, MCA, regardless of the fact that the tower was already under construction at the time of the hearing. *Hagfeldt v. Bozeman*, 231 M 417, 757 P 2d 753(1988).

**CONCLUSION(S):**

No. Pursuant to Montana state planning and zoning laws, sections 76-2-401 and 76-2-402, MCA, Montana state and local governments are not subject to municipal zoning regulations.

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/s/

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Jim Nugent, City Attorney

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