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Legal Opinion 2011-006

TO: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Mike Barton, OPG; Janet Rhoades, OPG; Denise Alexander, OPG; Mary McCrea, OPG; Pat Kieley, OPG; Laval Means, OPG; Tom Zavitz, OPG; Jen Gress, OPG; Tim Worley, OPG

CC: Legal Staff

FROM: Jim Nugent

DATE April 4, 2011

RE: Group homes/community residential facilities are statutorily authorized in any residential area in Montana if established in compliance with applicable Montana Statutes.

FACTS:

The pending Haven subdivision a six (6) lot major subdivision already has one group home constructed within its land area and at least one additional group home is currently planned. Generally group homes are governed by Montana's community residential facility laws as set forth in §§76-2-411 and 76-2-412 MCA. Pursuant to Montana state law pertaining to community residential facilities (group homes) they are allowed in any residential area and may serve eight (8) or fewer persons if care is provided on a 24 hour a day basis, size of bedrooms or residential dwelling unit density up to eight (8) persons are not subdivision review issues.

ISSUES:

1) Are group homes/community residential facilities established pursuant to Montana Code Annotated §§76-2-411 and 76-2-412 considered a residential use for municipal zoning purposes?

2) Are group homes/community residential facilities established pursuant to Montana Code Annotated §§76-2-411 and 76-2-412 a permitted use in all residential zones in the state of Montana?

3) Pursuant to Montana Code Annotated §76-2-411 how many persons is a group home/community residential facility allowed to serve?

CONCLUSIONS:

1) Yes, pursuant to subsection 76-2-412(1) and (2) MCA, group home/community residential facilities established pursuant to sections 76-2-411 and 76-2-412 MCA are statutorily declared to be a residential use of property for purposes of zoning.

2) Yes, pursuant to subsection 76-2-412(3), the community residential facilities identified in subsections 76-2-412(1)&(2) MCA "are a permitted use in all residential zones for single-family dwellings."

3) Pursuant to subsection 76-2-412(1) MCA a group home/community residential facility is allowed by Montana state law to serve eight (8) or fewer persons if the group home provides care on a 24 hour a day basis.

LEGAL DISCUSSION:

Group homes/community residential facilities established pursuant to sections 76-2-411 and 76-2-412 MCA are statutorily declared to be a residential use for zoning purposes and further are statutorily declared to be a permitted residential use in all residential zones including but not limited to residential zones for single-family dwellings. Local governments may not unreasonably impose conditions, limitations or restrictions on statutorily authorized group homes/community residential facilities serving eight (8) persons with 24 hour day care to such an extent that they are not able to reasonably establish the group home/community residential facility in any residential area in Montana.

Sections 76-2-411 and 76-2-412 MCA state as follows:

> **76-2-411. Definition of community residential facility**. "Community residential facility" means:
> (1) a community group home for developmentally, mentally, or severely disabled persons that does not provide skilled or intermediate nursing care;
> (2) a youth foster home, a kinship foster home, a youth shelter care facility, a transitional living program, or youth group home as defined in 52-2-602;
> (3) a halfway house operated in accordance with regulations of the department of public health and human services for the rehabilitation of alcoholics or drug dependent persons;
> (4) a licensed adult foster family care home; or
> (5) an assisted living facility licensed under 50-5-227. (Emphasis added.)
>
> **76-2-412. Relationship of foster homes, kinship foster homes, youth shelter care facilities, youth group homes, community residential facilities, and day-care homes to zoning.**

> (1) A foster home, kinship foster home, youth shelter care facility, or youth group home operated under the provisions of 52-2-621 through 52-2-623 or a community residential facility serving eight or fewer persons is considered a residential use of property for purposes of zoning if the home provides care on a 24-hour-a-day basis.
>
> (2) A family day-care home or a group day-care home registered by the department of public health and human services under Title 52, chapter 2, part 7, is considered a residential use of property for purposes of zoning.
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> (3) The facilities listed in subsections (1) and (2) are a permitted use in all residential zones, including but not limited to residential zones for single-family dwellings. Any safety or sanitary regulation of the department of public health and human services or any other agency of the state or a political subdivision of the state that is not applicable to residential occupancies in general may not be applied to a community residential facility serving 8 or fewer persons or to a day-care home serving 12 or fewer children.
>
> (4) This section may not be construed to prohibit a city or county from requiring a conditional use permit in order to maintain a home pursuant to the provisions of subsection (1) if the home is licensed by the department of public health and human services. A city or county may not require a conditional use permit in order to maintain a day-care home registered by the department of public health and human services. (Emphasis added.)

Generally, the Missoula City Council has historically treated community residential facilities serving nine (9) or more persons as a conditional use in residential districts established pursuant to city council adopted zoning regulations.

The Montana Supreme Court has not been tolerant of municipal government or private homeowner association covenants that attempt to exclude community residential facilities from residential areas. The Montana Supreme Court has ruled in favor of the community residential facilities in the three (3) decisions that have addressed the legal ability of a community residential facility to be located in the residential area where it proposes to locate and operate.

These Montana Supreme Court Cases are as follows:

1. State ex rel. Thelen v. City of Missoula, 543 P.2d 173, 175 (1975) involving a group home for the disabled, the Montana State Supreme Court stated:

> In the instant case, while respondent city may well have acted within the power granted it by the legislature in adopting its "one-family" criteria for zoning, that power was modified by later legislative language and respondent city should have revised its zoning regulations to meet the legislative requirements.
>
> That the legislature has power to modify or withdraw various powers given a municipality has long been recognized in Montana. [. . .]

> Montana's Legislature having determined that constitutional rights of the developmentally disabled to live and develop within our community structure as a family unit, rather than that they be segregated in isolated institutions, is paramount to zoning regulations of any city it becomes our duty to recognize and implement such legislative action. (Emphasis added.)

2. State ex rel. Region II Child and Family Services, Inc. v. District Court, 609 P.2d 245, 248 (1980), held that subdivision covenants limiting use of property in Great Falls subdivision to single-family dwellings could not prohibit community residential home structured as single housekeeping unit. The Montana Supreme Court stated:

> Anticipating local opposition to the implementation of these statutes, the legislature amended Montana's laws relating to zoning by mandating that all community homes be permitted use in residential neighborhoods, including neighborhoods zoned for single family residences. Sections 76-2-313, 76-2-314, MCA. It should be noted that subsection 2 of 76-2-314 states: The homes are permitted use in all residential zones, including, but not limited to residential zones for single-family dwellings.
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> This Court in State ex rel. Thelen v. Missoula (1975), Mont. 375, 543 P.2d 173 interpreted the above-cited sections to permit the operation of conforming group homes in residential areas in Montana. There we noted:
>
> > Montana's legislature having determined that the constitutional rights of the developmentally disabled to live and develop within our community structure as a family unit, rather that that they be segregated in isolated institutions, is paramount to the zoning regulations of any city it becomes our duty to recognize and implement such legislative action.
> >
> > [. . .]
> >
> > The Montana legislature adopted a new policy as applied to the developmentally disabled in an effort to implement a new constitutional mandate, and in so doing it was furthering a permissible state objective. Thelen, supra, 168 Mont. 382-383, 543 P.2d at 177-178. (Emphasis added.)
>
> Moreover, restrictive covenants are to be strictly construed; ambiguities therein are to be construed to allow free use of the property. Courts should not construe the intent of the restrictive covenant when adopted so broadly as to cover the desires of owners confronted with situations developing thereafter. Higdem v. Whitham (1975), 167 Mont. 201, 209, 536 P.2d 1185, 1190.
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> Here the group home, by law, is structured as a single housekeeping unit, and to all outside appearance is a usual, stable and permanent family unit. City of White Plains v. Ferraioli (1974), 34 N.Y.2d 300, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452. Nothing in the language of the restrictive covenant here requires a construction that the "family" should be a biologically single unit. Accordingly, we hold the use allowed here is one within the ambit and intent of the restrictive covenant."

Note that since this case arose, the Montana State Legislature renumbered the applicable statutory sections to 76-2-411 and 76-2-412 MCA. See the above earlier quoted statutory provisions.

3. Mahrt v. City of Kalispell, 690 P.2d 418 (1984), held that a group home serving eight or fewer mentally disabled adults in a residential area was a residence and could be located in any area zoned residential. The Montana Supreme Court stated:

> There is absolutely no question that in Montana a group home for eight or fewer people is a residence and may be located in any area in Montana zoned residential. Article XII, 3(3) of the Montana Constitution, Title 76, Ch. 2, Part 4 of Montana statutory law and case law as stated in Thelen v. Missoula, 168 Mont. 375, 543 P.2d 173, make it clear that this is the rule in Montana. This Court will not require community residential facilities to repeatedly defend their well established right to locate in any residential area in Montana. The Kalispell appeal is meritless and dismissed as frivolous. Costs in the sum of $500 are assessed against the City and in favor of the petitioners under Rule 32, M.R.App.Civ.P., with costs of this appeal, and the usual costs in District Court. (Emphasis added.)

Also, the Montana Attorney General has held that certain community residential facilities are excluded from commercial building code compliance: Subsection 76-2-412(3) MCA excludes from non-residential state building code compliance community residential facilities serving 8 or fewer persons and day-care homes serving 12 or fewer persons. See 45 Op. Att'y Gen. 3 (1993).

A local government agency land use case pertaining to government uses not being subject to zoning further explains somewhat the power of the state legislature as the supreme power over local zoning regulations. The Fourth Judicial District Court in Desmet School District et. al. v. County of Missoula, Missoula City-County Health Department, pertaining to the proposed location of the city-county animal shelter in its June 21, 2001 decision in paragraphs 43 and 44 stated:

> Plaintiffs contend that M.C.A. § 76-2-402 conflicts with M.C.A. §§ 2-3-111 and 2-3-103 and violate their constitutional due process rights. However, the Montana Supreme Court has made it clear that the Legislature has supreme power over local zoning regulations including the power to modify or withdraw regulatory powers previously given. State ex. rel. Thelen v. City of Missoula, 168 Mont. 375, 543, P2d 173 (1975) (affirming the Legislature's power to allow community residential facilities for developmentally disabled or handicapped persons in zoning district designated by the City as RR-1 permitting one-family dwellings, parks, and playgrounds only). See also Mahrt v. City of Kalispell, 213 Mont. 96, 690 P.2d 418 (1984). (Reaffirming the Thelen case.)
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> Here the Legislature has seen fit to adopt M.C.A. § 76-2-402 allowing public agencies to use public lands free of local zoning regulations provided that a local board of adjustment hearing be held to obtain public comment. The hearing need not

> be held prior to construction of the nonconforming use. Hagfeldt, supra. In essence the Legislature has determined that zoning ordinances are inapplicable to public agencies dealing with their own property absent a limited means of public comment. This is certainly within the sovereign power of the Legislature under Hagfeldt. 83 Am.Jur. 2d Zoning and Planning §§ 407-409. See also Edelen v. County of Nelson, 723 S.W.2d 887 (1987). (Emphasis added.)

CONCLUSIONS:

1) Yes, pursuant to subsection 76-2-412(1) and (2) MCA, group home/community residential facilities established pursuant to sections 76-2-411 and 76-2-412 MCA are statutorily declared to be a residential use of property for purposes of zoning.

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