

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2013-006

**TO:** Mayor John Engen, City Council, Bruce Bender, Denise Alexander, Laval Means, Tom Zavitz, Jen Gress, Don Verrue, Gregg Wood, Kevin Slovarp.

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** March 26, 2013

**RE:** State v. Stewart zoning decision pertained to a homeowner violating a Missoula County low density resident single family zoning district classification with a triplex use.

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### **FACTS:**

During last evening's city council public comment a citizen made reference to a 2003 Montana Supreme Court zoning decision, State v. Stewart, 2003 MT 108, 315 Mont. 335, 68 P. 3d 712(2003). Subsequently during the city council meeting, a city council member requested more information concerning State v. Stewart. Deborah Stewart leased a 1.28 acre parcel of property from the Montana Department of State Lands in Grant Creek in Missoula County. The land was located outside the city limits and was Missoula County zoned CA-3 pursuant to Missoula County Zoning Resolution, No. 76-113 "a low density residential development of an open and rural character in areas best suited for such purposes and provides for environmental protection of those areas that are fragile and cannot support more intensive urbanized activities due to physiographic, hydrologic and economic conditions". This CA-3 Missoula County zoning classification permitted a "single family dwelling"; but did not authorize a multi-family dwelling.

Deborah Stewart obtained approval of her architectural plans, a building permit, had the dwelling constructed and obtained a certificate of occupancy as a "single family dwelling". Stewart began leasing out the daylight basement of her house and an attached enclosed carport called 'the studio' to tenants. This apparent tri-plex dwelling unit use was clearly a violation of Missoula County zoning classification CA-3 which only explicitly authorized a "single family dwelling".

If the Missoula City Council adopts a general zoning regulation that authorizes an accessory dwelling unit within or attached to a primary residence in any single household or single dwelling unit City of Missoula zoning classification, the city zoning regulations would

obviously be substantively different from the Missoula County CA-3 zoning regulation that was applicable to Deborah Stewart's residence. City council general zoning regulation amendment discussions in recent months have been basically focused on accessory dwelling units no greater than 600 square feet in residential living space size that could potentially include (1) an accessory apartment within a primary residence, (2) an attached accessory dwelling unit, such as above an existing attached garage or a remodel of an existing garage or an extension or expansion of the primary residence or (3) as a detached accessory residence. At this point in time, if the City of Missoula City Council adopts an amended accessory dwelling unit general zoning regulation it cannot be identified with certainty what the general zoning regulation adopted by the City Council will provide for with respect to authorizing accessory dwelling units. There has been city council discussion pertaining to authorizing accessory dwelling units by (1) general zoning regulation, (2) conditional use, or (3) overlay zone. Also, several months ago there was a 4-4 city council committee vote concerning potentially not authorizing detached accessory dwelling units. Thus, at this point in time, there are multiple city council member ideas for the general regulation zoning proposal that is being considered. Thus, no one knows with certainty what an amended general zoning regulation authorizing accessory dwelling units will state.

Municipal government city councils are legislative bodies. Municipal zoning regulations are legislative enactments that are made by a municipal legislative body. Legislative bodies have broad authority to consider legislative proposals that are within the scope of their legislative powers. It is not illegal or unlawful for a municipal city council to discuss, debate, and/or consider adoption of a general zoning regulation pertaining to accessory dwelling units.

**ISSUE(S):**

What were the District Court and Montana Supreme Court rulings with respect to Deborah Stewart utilizing her single family authorized dwelling unit as an apparent tri-plex?

**CONCLUSION(S):**

The District Court and Montana Supreme Court permanently enjoined Deborah Stewart's apparent tri-plex use of her single family residence; because a tri-plex use violated both the applicable Missoula County CA-3 zoning classification and the Certificate of Occupancy that had been issued for Deborah Stewart's single family designed and constructed residence.

**LEGAL DISCUSSION:**

A copy of the 2003 Montana Supreme Court decision in *State v. Stewart*, 2003 MT 108, 315 Mont. 335; 68 P. 3d 712 (2003) is attached. The attached Montana Supreme Court decision is quite a short decision that basically determines that based on the factual circumstances presented, Deborah Stewart's use of her residence violated the applicable CA-3 Missoula County zoning classification. There is not much zoning law discussed in the Montana Supreme Court decision; because the factual circumstances established such an obvious use violation pursuant to the applicable Missoula Zoning classification.

After, in part, describing what transpired at the District Court level in the case including that two former tenants had testified on behalf of the State as well as describing the facts set forth herein above, the Montana Supreme Court in Stewart states in paragraph 9 of its decision that:

“It is undisputed that Stewart’s leased property is zoned CA-3 under the Missoula County Zoning Resolution which provides, at Section 2.08, for the following permitted uses:

1. Single family dwelling.
2. Mobile homes on lots five (5) acres or larger and minimum yard setbacks of fifty (50) feet.
3. Accessory buildings and uses.
4. Agriculture on lots five (5) acres or larger, including any and all structures or buildings needed to pursue such activities, except intensive agricultural use such as feed lots and poultry farms. Minimum yard setbacks of fifty (50) feet shall be maintained to all agricultural buildings.

Section 1.05(28) of the Zoning Resolution defines a ‘Single family dwelling’ as ‘a detached building designed for occupancy by one (1) family,’ and Section 1.05(30) defines a family as ‘one or more persons. . . living and cooking together as a single housekeeping unit.’

The Montana Supreme Court noted in paragraph 10 of its decision the facts that the former tenants testified that they had not resided as one single housekeeping unit while residing in Deborah’s residence and that the residence was being used as a multiple family dwelling. The Montana Supreme Court then noted at the end of paragraph 10 of its opinion that the Missoula County zoning laws “regulate the use of the structure, not the structure itself”.

The Montana Supreme Court in paragraph 11 of its decision stated that the Montana Human Rights Act statutes assume “that a person renting out rooms in a single family dwelling is doing so consistently with applicable zoning regulations”. The Montana Supreme Court in paragraph 13 of its decision concluded that “The testimony before the District Court established that Stewart was using her home as a multiple family dwelling IN VIOLATION OF THE APPLICABLE ZONING LAWS AND CERTIFICATE OF OCCUPANCY”. (emphasis added)

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

The District Court and Montana Supreme Court permanently enjoined Deborah Stewart’s apparent tri-plex use of her single family residence; because a tri-plex use violated both the applicable Missoula County CA-3 zoning classification and the Certificate of Occupancy that had been issued for Deborah Stewart’s single family designed and constructed residence.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN:tfa

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## RELATED TOPICS

Zoning and Planning

Construction, Operation and Effect  
 Ordinance Definition of Single Family  
 Detached Dwelling

State v. Stewart  
 Original Image of 315 Mont. 335 (PDF)  
 Supreme Court of Montana April 24, 2003 315 Mont. 335 88 P.3d 712 (Approx. 4 pages)  
 315 Mont. 335

[Return to list](#) 1 of 20 results [Supreme Court of Montana](#).

STATE of Montana, Plaintiff and Respondent,

v.

Deborah STEWART, Defendant and Appellant.

No. 02-676. Submitted on Briefs Jan. 30, 2003. Decided April 24, 2003.

State brought civil action against homeowner to enjoin her from renting out portions of her home in single-family zoning district. The District Court, Fourth Judicial District, Missoula County, John S. Henson, J., granted summary judgment for state. Homeowner appealed. The Supreme Court, W. William Leaphart, J., held that homeowner violated zoning restrictions.

Affirmed.

## West Headnotes (1)

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1 **Zoning and Planning** One-family, two-family, or multiple dwellings  
 Homeowner violated zoning restrictions that limited her use of her property to a single-family dwelling, although city zoning officer approved architectural plans; homeowner leased part of home to tenants, and zoning restrictions applied to use, not structure.

## Attorneys and Law Firms

\*\*713 \*335 Christopher Daly, Attorney at Law, Missoula, Montana, For Appellant.

Fred Van Valkenburg, County Attorney; \*336 Martha McClain, Deputy County Attorney, Missoula, Montana, For Respondent.

## Opinion

Justice W WILLIAM LEAPHART delivered the Opinion of the Court.

¶ 1 Appellant Deborah Stewart (Stewart) appeals the District Court's grant of summary judgment to the State, which, in part, permanently enjoins Stewart from using her property in violation of applicable residential zoning laws. We affirm.

## Factual and Procedural Background

¶ 2 Deborah Stewart leases a 1.28 acre parcel of property from the Department of State Lands. The property is located in an area of Missoula County that is subject to zoning. The property is classified as CA-3 under the Missoula County Zoning Resolution. This zoning district provides for a "low density residential development of an open and rural character in areas best suited for such purposes and provides for environmental protection of those areas that are fragile and cannot support more intensive urbanized activities due to physiographic, hydrologic, biologic and economic conditions." Missoula County Zoning Resolution, No. 76-113.

¶ 3 In April 1994, a Missoula County City Zoning Officer approved Stewart's proposed architectural plans for the construction of her home. In January of 1995, the City of Missoula, Public Works Department/Building Division, issued Stewart a Certificate of Occupancy for the building. This certificate listed the building's use as "single family dwelling." Following the completion of her home in 1995, Stewart began leasing out the daylight basement of her house and an attached enclosed carport, called "the studio," to tenants. The basement apartment, consisting of two bedrooms, a bath, a kitchenette and a living room was rented to Brock Bowles in August 1998 under a lease with a term of one year. Stewart had Bowles sign a "Residential Lease Agreement for 10570 Grant Creek Road," which provided that "Tenant"

Applicable County Zoning is  
 Low density residential

Triplex use

and "Owner" will "fulfill the duties and responsibilities" contained in the Montana Residential Landlord and Tenant Act. The lease agreement permitted Stewart to run a credit check on prospective tenants and set parameters for various aspects of the tenants' personal conduct.

¶ 4 According to Bowles, he and Stewart did not live together in a communal manner. For example, Bowles was provided with keys to one basement apartment bedroom and to the entry of the basement apartment, but not to the front door accessing the main floor where Stewart resided. Similarly, Bowles did not share meals or groceries with Stewart; he did housework only in the basement apartment; he did not share a telephone with Stewart; he did not watch TV with Stewart; and he did not enter the main floor of the house except as far as the landing at the top of the basement stairs where Stewart left his mail and where the rent checks were to be deposited.

¶ 5 After Bowles moved into the basement apartment, a second tenant, Laurel Hahn, moved into the basement apartment. During the tenancy of Hahn and Bowles, Stewart rented the studio apartment to a tenant who likewise lived independently of Stewart. In June 2000, Stewart rented the basement apartment to David and Myra Gray under an identical Residential Lease Agreement for 10570 Grant Creek Road. During their tenancy, the Grays did not maintain a common household with Stewart or the studio tenant.

\*\*714 ¶ 6 On April 7, 2000, the State commenced a civil action against Stewart challenging her use of a single family unit as a multiple family unit and seeking injunctive relief. Stewart filed a motion to dismiss nearly two years later based on the State's failure to litigate the case. The District Court denied the motion. Next, both parties filed motions for summary judgment and the District Court held a brief hearing in July 2002 regarding the motions. The Court granted the State's motion and issued an injunction against Stewart. Stewart filed this timely appeal.

#### *Standard of Review*

¶ 7 Our standard of review in appeals from summary judgment rulings is *de novo*; and we follow the same criteria applied by the District Court pursuant to Rule 56, M.R.Civ.P. The moving party must establish both the absence of genuine issues of material fact as well as entitlement to judgment as a matter of law. Once this has been accomplished, the burden shifts to the opposing party to prove, by more than mere denial and speculation, that a genuine issue does exist. See *Stockman Bank of Montana v. Potts*, 2002 MT 178, ¶ 3, 311 Mont. 12, ¶ 3, 52 P.3d 920, ¶ 3.

#### *Discussion*

¶ 8 At trial, the State contended that Stewart violated zoning restrictions that limit her use of the property to a single family dwelling by leasing a portion of her single family home and her garage to tenants. The State introduced testimony of former tenants to support this claim. Stewart did not offer any substantial contradictory evidence. Instead, she maintained that the house had in no way been modified since the Missoula County City Zoning Officer approved its \*338 architectural plans in April 1994, and therefore, the structure was still in compliance with zoning restrictions. The State responded that Stewart's argument was misplaced because it was her use of the structure, not the structure itself, which violated the zoning regulations. In its order, the District Court granted the State summary judgment, concluding that the affidavits of her former tenants clearly established that the parties did not live together communally and that the "[d]efendant has not come forward with any evidence to refute the State's charge that [her] use of the real property has been in violation of the applicable zoning."

¶ 9 It is undisputed that Stewart's leased property is zoned CA-3 under the Missoula County Zoning Resolution which provides, at Section 2.08, for the following permitted uses.

1. Single family dwelling.
2. Mobile homes on lots five (5) acres or larger and minimum yard setbacks of fifty (50) feet.
3. Accessory buildings and uses.
4. Agriculture on lots five (5) acres or larger, including any and all structures or buildings needed to pursue such activities, except intensive agricultural use such as feed lots and poultry farms. Minimum yard setbacks of fifty (50) feet shall be maintained for all agricultural buildings.

Section 1.05(28) of the Zoning Resolution defines a "Single family dwelling" as "a detached building designed for occupancy by one (1) family," and Section 1.05(30) defines a family as: "[o]ne or more persons ... living and cooking together as a single housekeeping unit."

*NOTE: Applicable County  
zoning does not specifically  
identify an accessory  
dwelling unit as a  
permitted*

¶ 10 The testimony of two former tenants, Bowles and Gray, confirms that Stewart's home was being used as a multiple family dwelling. Both stated that they did not live and cook together with Stewart as a single housekeeping unit. Bowles specifically testified that he neither shared meals or groceries with Stewart nor did he share a telephone with her. These facts demonstrate that each tenant ran a separate housekeeping unit within the house. For her part, Stewart has not presented sufficient evidence to demonstrate that she and her tenants lived as a single housekeeping unit. Instead, she mistakenly relies on her trial argument that the house at 10570 Grant Creek Road has not been structurally modified since a Missoula County City Zoning Officer approved the home's architectural plans in April 1994. This argument is misguided because, as the State correctly points out, the zoning laws at ¶ 715 issue regulate the use of the structure, not the structure itself.

¶ 11 Next, Stewart argues that Missoula's Zoning Resolution violates § 339 both the Montana Human Rights Act and the Federal Fair Housing Act. Again, Stewart's argument misses the mark. Stewart contends that the Montana Human Rights Act (HRA) at § 49-2-305(2), MCA, preempts Missoula county zoning regulations. This section exempts landlords who rent sleeping rooms in single family dwelling, such as the proprietor of a boarding house, from the Act's prohibition against discriminatory practices. Stewart submits that this statute recognizes the right of landlords to rent rooms out of a single family dwelling; therefore, any inconsistent zoning regulation which precludes such an arrangement is preempted by this statute. The State responds that this argument is neither tenable nor supported by authority in Stewart's brief. We agree. Stewart cites no authority for her argument that the zoning regulations and the HRA are inconsistent. Reading the statutes consistently, as we must, see § 1-2-101, MCA; *E.H. Oftedal and Sons, Inc v. State ex rel. Montana Transp. Comm'n*, 2002 MT 1, ¶ 19, 308 Mont. 50, ¶ 19, 40 P.3d 349, ¶ 19, the HRA assumes that a person renting out rooms in a single family dwelling is doing so consistently with applicable zoning regulations.

¶ 12 Next, Stewart claims the Zoning Resolution's definition of "family" violates the Federal Fair Housing Act. She directs us to the holding of *City of Edmonds v. Washington State Bldg. Code Council* (9th Cir.1994), 18 F.3d 802; however, in that case, the Federal Fair Housing Act was implicated by alleged discrimination and failure to reasonably accommodate handicapped persons. See *City of Edmonds*, 18 F.3d at 806. In this instance, however, Stewart has not offered any evidence that the State sought to enforce its zoning restrictions in a discriminatory manner against handicapped persons or anyone else.

¶ 13 In this case, the State established both the absence of genuine issues of material fact as well as entitlement to judgment as a matter of law. The testimony before the District Court established that Stewart was using her home as a multiple family dwelling in violation of the applicable zoning laws and the Certificate of Occupancy. Stewart did not meet her burden to prove, by more than mere denial and speculation, that a genuine issue of material fact exists. Therefore, we affirm the District Court's grant of summary judgment.

*Violated County zoning regulation.*

We concur: KARLA M. GRAY, C.J., and JAMES C. NELSON, PATRICIA COTTER and JIM RICE, JJ.

#### Parallel Citations

68 P.3d 712, 2003 MT 108

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