



## OFFICE OF THE CITY ATTORNEY

435 RYMAN • MISSOULA, MT 59802-4297 • (406) 552-6020 • FAX: (406) 327-2105  
EMAIL: attorney@ci.missoula.mt.us

### **Legal Opinion 2007-020**

**TO:** Roger Millar, Mike Barton, Denise Alexander, Mary McCrea, Jennie Dixon, Pat Keiley

**CC:** Mayor John Engen, City Council, Bruce Bender, Steve King, Kevin Slovarp, Don Verrue, Steve Meismer, Tom Steenberg, Mike Painter, Jason Diehl, Bob Rajala, Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE** November 27, 2007

**RE:** Potential religious discrimination law violations if City I-1 industrial zoning district permits numerous uses involving assembly of people but prohibits church service assembly.

---

#### **FACTS:**

South Hills Evangelical Church (SHEC) is currently leasing a building from Montana Rail Link in an area zoned industrial (I-1) near Southgate Mall on Missoula's south side. SHEC is a religious corporation organized for charitable, educational, and scientific purposes. Reportedly, SHEC uses the building it leases from Montana Rail Link for a variety of purposes, including but not necessarily limited to teen center, skate park, concerts, education, counseling, religious prayers, gatherings, and services.

In addition to I-1 industrial zoning uses specifically identified in the I-1 zoning classification, the I-1 zoning district permits all the zoning uses permitted in C-I, C, and C-II City zoning districts except for a few itemized uses including churches even though churches are allowed in C-I, C, and C-II City zoning districts. The result is that several types of assemblages of people are authorized in the I-1 light industrial zoning district. Examples of assemblage authorized in the I-1 zoning district include but are not limited to auditoriums, bowling alleys, restaurants, retail stores, motels and hotels, cabaret licensed establishments, dance halls, funeral homes, theaters, auction rooms, drive-in theaters, ice and roller skating rinks, etc.. In addition to authorizing numerous uses involving assemblage of people for gatherings, it should also be noted that funeral homes are authorized and funeral homes are regularly a gathering spot for assembling people for prayer and funeral services.

**ISSUE:**

May the City of Missoula prohibit churches in its I-1 industrial zone that authorizes numerous uses that involve gatherings and assemblage of people for a variety of purposes including funeral homes?

**CONCLUSION:**

Pursuant to Montana's human rights laws, section 49-1-102(1)(b) MCA, it is a basic human right to be free from creed and religious discrimination in public accommodation and assemblage. Illegal discrimination laws setting forth prohibited discriminatory practices with respect to public accommodations, services, goods, or facilities pursuant to section 49-2-304 MCA as well as Montana law pursuant to Montana's Governmental Code of fair practices section 49-3-205 MCA pertaining to governmental services provide that it is against the law to discriminate based upon religion or creed. Since the City of Missoula in its I-1 zoning district authorizes numerous types of assemblages of people for various reasons including funeral homes that regularly have prayer and funeral services, the I-1 zoning district prohibiting the assemblage of people in a leased building located in an I-1 industrial zone would appear to constitute illegal discrimination based upon religion or creed.

**LEGAL DISCUSSION:**

Title 49 is entitled "Human Rights." Chapter 1 of title 49 MCA is entitled "Basic Rights," and part 1 of chapter 1 is entitled "Basic Personal Rights." Pursuant to subsection 49-1-102(1)(b) MCA, it is a basic personal right to be free from discrimination because of creed or religion with respect to public accommodation or assemblage. Public accommodation is statutorily defined in subsection 49-2-1011(20)(a) MCA as including services, goods, or facilities.

The City of Missoula's I-1 industrial zone authorizes numerous uses that involve assemblage of people at a single location for a variety of reasons. Included in those numerous uses are funeral homes. Generally, funeral homes regularly perform prayer and funeral services of a religious nature at chapels or meeting rooms within the funeral home. However, the I-1 industrial zone language prohibits churches without identifying any local land use reasons for doing so.

Title 49, chapter 2 MCA is entitled "Illegal Discrimination." Title 49, chapter 3 MCA is entitled "Governmental Code of Fair Practices." The 1974 Montana State Legislature enacted section 49-2-304 MCA identifying illegal discrimination in public accommodations and making it illegal to discriminate based on creed or religion with respect to public accommodations.

The 1975 Montana State Legislature enacted the "Governmental Code of Fair Practices" that included section 49-3-205 MCA requiring that all services of every local government "must be performed without discrimination based upon . . . religion, creed, . . ." Freedom of assemblage is a basic human right in Montana involving public accommodation and public assemblage. Land use regulation, including zoning regulations, is a form of government service.

Sections 49-1-102, 49-2-304, and 49-3-205 MCA provide in full as follows:

**49-1-102. Freedom from discrimination.** (1) The right to be free from discrimination because of race, creed, religion, color, sex, physical or mental disability, age, or national origin is recognized as and declared to be a civil right. This right must include but not be limited to:

- (a) the right to obtain and hold employment without discrimination; and
- (b) the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement.

(2) This section does not prevent the nonarbitrary consideration in adoption proceedings of relevant information concerning the factors listed in subsection (1). Consideration of religious factors by a licensed child-placing agency that is affiliated with a particular religious faith is not arbitrary consideration of religion within the meaning of this section. (Emphasis added.)

**49-2-304. Discrimination in public accommodations.** (1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, agent, or employee of a public accommodation:

- (a) to refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of sex, marital status, race, age, physical or mental disability, creed, religion, color, or national origin;
- (b) to publish, circulate, issue, display, post, or mail a written or printed communication, notice, or advertisement which states or implies that any of the services, goods, facilities, advantages, or privileges of the public accommodation will be refused, withheld from, or denied to a person of a certain race, creed, religion, sex, marital status, age, physical or mental disability, color, or national origin.

(2) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for a licensee under Title 16, chapter 4, to exclude from its membership or from its services, goods, facilities, advantages, privileges, or accommodations any individual on the grounds of race, color, religion, creed, sex, marital status, age, physical or mental disability, or national origin. This subsection does not apply to any lodge of a recognized national fraternal organization.

(3) Nothing in this section prohibits public accommodations from giving or providing special benefits, incentives, discounts, or promotions for the benefit of individuals based on age. (Emphasis added.)

**49-3-205. Governmental services.** (1) All services of every state or local governmental agency must be performed without discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin.

(2) A state or local facility may not be used in the furtherance of any discriminatory practice, nor may a state or local governmental agency become a party to an agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices.

(3) Each state or local governmental agency shall analyze all of its operations to ascertain possible instances of noncompliance with the policy of this chapter and shall initiate comprehensive programs to remedy any defect found to exist.

(4) This section does not prevent the nonarbitrary consideration in adoption proceedings of relevant information concerning the factors listed in this section. (Emphasis added.)

No “reasonable grounds,” in fact no grounds, are identified in the I-1 industrial zone for prohibiting churches when numerous other assemblages of people are authorized for a variety of gatherings and assemblages of people in the City of Missoula’s I-1 industrial zoning district.

In fact included among the uses that are permitted in the I-1 zoning district are auditoriums, auction rooms, motels and hotels, funeral homes, theaters, etc., all of which types of uses may be commonly leased and utilized for prayer or church service assemblage purposes. Thus, the City of Missoula has a significant legal problem attempting to prohibit churches in the I-1 industrial zone based on the activity being church service or prayer service related. It appears that the City of Missoula’s current I-1 zoning district prohibition against churches in the I-1 industrial zone violates Montana’s human rights laws and/or requires the owner of the property, such as Montana Rail Link to illegally discriminate pursuant to Montana state law in order to comply with the City of Missoula’s current I-1 zoning district prohibition on churches even though numerous public assemblages of people are authorized in the I-1 zoning district.

### **CONCLUSION:**

Pursuant to Montana’s human rights laws, section 49-1-102(1)(b) MCA, it is a basic human right to be free from creed and religious discrimination in public accommodation and assemblage. Illegal discrimination laws setting forth prohibited discriminatory practices with respect to public accommodations, services, goods, or facilities pursuant to section 49-2-304 MCA as well as Montana law pursuant to Montana’s Governmental Code of fair practices section 49-3-205 MCA pertaining to governmental services provide that it is against the law to discriminate based upon religion or creed. Since the City of Missoula in its I-1 zoning district authorizes numerous types of assemblages of people for various reasons including funeral homes that regularly have prayer and funeral services, the I-1 zoning district prohibiting the assemblage of people in a leased building located in an I-1 industrial zone would appear to constitute illegal discrimination based upon religion or creed.

OFFICE OF THE CITY ATTORNEY

/s/

---

Jim Nugent, City Attorney

JN:mdg