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Legal Opinion 2013-021

TO: Mayor John Engen; City Council; Bruce Bender; Mike Haynes; Tom Zavitz; Jen Gress; Aaron Wilson; Denise Alexander; Mary McCrea; Laval Means; Don Verrue; Gregg Wood; Wade Humphries

CC: Legal Department Staff

FROM: Jim Nugent

DATE September 17, 2013

RE: Community Residential facilities statutorily defined as including group homes for disabled, youth foster homes, kinship foster homes, youth shelter care facilities, transitional living programs and youth group homes, halfway houses, licensed adult family care home, and license assisted living facilities are residential land uses allowed in any residential area in the State of Montana including zones for single family dwellings.

FACTS:

A recently adopted city council interim zoning ordinance pertaining to homeless shelters, meal center/soup kitchens also stated it applied to similar social services uses. There has been inquiry concerning the status of Montana State law authorized Community Residential Facilities authorized pursuant to sections 76-2-411 and 76-2-412 MCA to be located in any residential area in the State of Montana.

ISSUE:

Are group homes/community residential facilities established pursuant to Montana Code Annotated §§76-2-411 and 76-2-412 regulated by the City Council's recently adopted interim zoning ordinance pertaining to homeless shelters or meal center soup kitchens?

CONCLUSION:

No, 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 and are authorized in any residential aera in the State of Montana.

LEGAL DISCUSSION:

Montana State Law pursuant to Section 76-2-411 MCA defines a community residential facility as including a group home for developmentally, mentally, or severely disabled persons youth, foster homes, kinship foster homes, youth shelter facilities, transitional living programs, youth group homes, halfway houses for rehabilitation of alcoholics or drug dependent person's as licensed adult foster family care homes, licensed assisted living facilities. 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. Also, they 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 established pursuant to Sections 76-2-411 and 76-2-412 MCA.

Section 76-2-411 MCA states as follows:

> **76-2-411. Definition of community residential facility**. "Community residential facility" means:
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> (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;
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> (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;
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> (4) a licensed adult foster family care home; or
>
> (5) an assisted living facility licensed under 50-5-227. (Emphasis added.)

More specific definitions pertaining to youth community residential facilities set forth in Section 52-2-602 MCA which is cross referenced to in Subsection 76-2-411(2) MCA include the following:

> **52-2-602. Definitions.** For the purposes of this part, the following definitions apply:
>
> ….
>
> (4) "Kinship foster home" means a youth care facility in which substitute care is provided
> to one to six children or youth other than the kinship parent's own children, stepchildren,
> or wards. The substitute care any be provided by any of the following:
> (a) a member of the child's extended family;

(b) a member of the child's or family's tribe;
(c) the child's godparents;
(d) the child's stepparents; or
(e) a person whom the child, child's parents, or family ascribe a family relationship and with whom the child has had a significant emotional tie that existed prior to the department's involvement with the child or family.

….

(9) "Transitional living program" means a program with the goal of self-sufficiency in which supervision of the living arrangement is provided for a youth who is 16 years of age or older and under 21 years of age.

….

(12) "Youth foster home" means a youth care facility in which substitute care is provided to one to six children or youth other than the foster parents' own children, stepchildren, or wards.
(13) "Youth group home" means a youth care facility in which substitute care is provided to 7 to 12 children or youth.
(14) "Youth shelter care facility" means a youth care facility that regularly receives children under temporary conditions until the court, probation office, department, or other appropriate social services agency has made other provisions for the children's care.

Section 76-2-412 MCA provides:

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.
(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.)

The Montana Supreme Court has not been tolerant of municipal government regulatory efforts 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.
> 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.
>
> 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).

The Montana Supreme Court has made it clear that the State Legislature has 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 recognized this Supreme Power stating:

> 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.)
>
> 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.)

CONCLUSION:

No, 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 and are authorized in any residential aera in the State of Montana.

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/s/
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