OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2014-025

TO: Mayor John Engen; City Council; Bruce Bender; Mike Haynes; Dale Bickell; Denise Alexander; Ben Brewer; Drew Larson; Laval Means; Don Verrue; and Kevin Slovarp

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE October 24, 2014

RE: Use of Public Land Contrary to Local Zoning Regulations by a Public Agency Requires a Public Hearing before the Zoning Board of Adjustment. However, the Zoning Board of Adjustment has no Power to Deny the Proposed Use.

FACTS:

Missoula County Public High School is proposing to install a sign for Willard Alternative High School identifying the school. The sign is to be placed in front of the Willard Alternative High School located at 901 South 6th Street West. Several Hellgate High School construction trades students designed and completed the sign that is now ready for installation. However, the sign exceeds the square footage allowed for a sign located in a residential neighborhood.

Pursuant to an October 16, 2014 letter on Willard Alternative High School letterhead, a written request has been made on behalf of students at both Hellgate and Willard Alternative High Schools for a fee waiver for a variance adaption to the zoning board of adjustment. However, a variance is not required. The fee waiver request actually should pertain to a required public forum public hearing before the zoning board of adjustment.

ISSUE:

Pursuant to Montana state law does a public agency proposing to use public land contrary to local zoning regulations need a zoning variance approval?

CONCLUSION:

No zoning variance is required if a public agency proposes to use public land contrary to local zoning regulations. However, a Montana state law does require a public forum public hearing

before the zoning board of adjustment; but the zoning board of adjustment has no power to deny the proposed use of public land.

LEGAL DISCUSSION:

Pursuant to Montana state law section 76-2-402, MCA whenever a public agency/entity proposes to use public land contrary to local zoning regulations a public hearing serving as a public forum must be held before the zoning board of adjustment. However, the zoning board of adjustment has no power to deny the proposed use of public land.

Sections 76-2-401 and 76-2-402, MCA of Montana's state planning and zoning laws provide:

> **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.

These sections of Montana law were enacted in 1981. There has been only one Montana Supreme Court case pertaining to these sections of Montana state law. In Hggfeldt v. Bozeman, 231 M 417, 757 P 2d 753 (1988) the Montana Supreme Court indicated that the public was allowed the opportunity at a public hearing to present their opinions and objections to the City of Bozeman's building of a water tower on City of Bozeman land in violation of City of Bozeman zoning regulations which constituted sufficient notice pursuant to Section 76-2-402, MCA regardless of the fact that the tower was already under construction at the time of the hearing.

Sections 76-2-401 and 76-2-402 MCA are consistent with a February 14, 1975 informal opinion letter written by Montana Attorney General Robert Woodahl to the University of Montana in Missoula indicating that public agencies/entities are not subject to local zoning regulations..

The February 14, 1975 Montana Attorney General opinion letter issued to the University of Montana indicates that "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."

Historically, Montana planning and zoning statutes did not specifically address the relationship between government agencies and municipal zoning regulations. Pursuant to a February 14,

1975, opinion letter issued by former Montana Attorney General Robert L. Woodahl to University of Montana administrative vice president George L. Mitchell, Woodahl noted initially 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, 8 McQuillin, Municipal Corporations, sec. 25.15 (1965). This proposition has been upheld in Colorado where that state's Supreme Court held:
>
> > "…(C)ourts of last resort have recognized that districts, authorities, and other state authorized governmental subdivisions have the power to overrule or disregard the restrictions of county or municipal zoning regulations." Reber v. South Lakewood Sanitary Dist., 147 Colo. 70, 362 P.2d 877, 879-880 (1961). (Emphasis added.)

Attorney General Woodahl then went on to discuss and quote from additional Supreme Court cases from other states such as Delaware, New York, and Arizona before quoting from a New Jersey case and then stating his opinion that the University of Montana is not subject to City of Missoula "municipal zoning ordinances or regulations." Attorney General Woodahl stated as follows at page 4 of his opinion:

> "With regard to a state university, there can be little doubt that, as an instrumentality of the state performing an essential government function for the benefit of all the people of the state, the legislature would not intend that its growth and development should be subject to restriction or control by local land use regulation. Indeed, such will generally be true in the case of all state functions and agencies." Rutgers v. Piluso, 60 N.J. 142, 286 A.2d 697, 703 (1972).
>
> THEREFORE, IT IS MY OPINION THAT:
>
> 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."

A copy of Attorney General Woodahl's letter opinion is attached. Subsequent to this February 14, 1975 opinion letter issued to the University of Montana, some Missoulians unsuccessfully attempted in 1981 to have the Montana State Legislature enact legislation that would require the University of Montana, and other government entities, to be subject to local municipal zoning regulations.

The ultimate legislative outcome in 1981 was the enactment of Mont. Code Ann. §§ 76-2-401 and 76-2-402. It is a well recognized legal principal that local zoning regulations may not prohibit the location of public schools. The legal reasoning is that public education is mandated by state law and educational institutions are generally in the furtherance of the general welfare of society. Thus, public education is a state function with which a municipality cannot interfere

with pursuant to local zoning regulations. See Rathlsopf's The Law of Zoning and Planning, Ziegler Volume 2, Section 30.4 and Volume 3 Section 48.7

CONCLUSION(S):

No zoning variance is required if a public agency proposes to use public land contrary to local zoning regulations. However, a Montana state law does require a public forum public hearing before the zoning board of adjustment; but the zoning board of adjustment has no power to deny the proposed use of public land.

OFFICE OF THE CITY ATTORNEY

/s/
Jim Nugent, City Attorney

JN:tfa

State of Montana
Office of The Attorney General
Helena 59601

ROBERT L. WOODAHL
ATTORNEY GENERAL

February 14, 1975

Mr. George L. Mitchell
Administrative Vice President
University of Montana
Missoula, Montana 59801

Dear Mr. Mitchell:

You have requested my opinion on the following question:

> Whether the University of Montana must comply with municipal zoning ordinanaces or regulations of the city of Missoula in acquiring and utilizing real property contiguous to the central campus for University purposes.

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. 3 McQuillin, Municipal Corporations, sec. 25.15 (1965). This proposition has been upheld in Colorado where that state's Supreme Court held:

> "...(C)ourts of last resort have recognized that districts, authorities, and other state authorized governmental subdivisions have the power to overrule or disregard the restrictions of county or municipal zoning regulations." Feher v. South Lakewood Sanitary Dist., 147 Colo. 79, 362 P.2d 977, 979-980 (1961).

Similarly, in Floyd v. New York State Urban Development Corp., 70 Misc.2d 137, 333 N.Y.S.2d 123 (1972), it was held:

> "State instrumentalities are inherently exempt from local zoning regulations."

Also, in City of Newark v. University of Delaware, Del. Ch., 304 A.2d 347 (1973), it was held that zoning ordinances of a city are not applicable or enforceable against a state university unless the city can show that the university's exercise of its authority is unreasonable or arbitrary.

The Montana Supreme Court has not addressed itself to the question presented. Nor do the Revised Codes of Montana specifically indicate that state agencies and subdivisions are exempt form, or subject to, municipal zoning regulations. The enabling legislation which delegated legislative authority to local governmental entities to promulgate zoning regulations is contained in Chapter 27, title 11, R.C.M. 1947. However, these statutes are silent on the question of the application of municipal zoning regulations to competing sovereignties.

In enumerating the powers of the Board of Regents of Higher Education, the legislature has provided in section 75-8503, R.C.M. 1947, that:

> "The regents of the Montana university system may: (1) purchase, construct, equip, or improve, at any unit of the Montana university system, any of the following types of revenue-producing facilities: land, residence halls, dormitories, houses, apartments and other housing facilities; dining rooms and halls, restaurants, cafeterias and other food service facilities; student union buildings and facilities; and those other facilities specifically authorized by joint resolution of the legislative assembly." (emphasis supplied)

The legislative enumeration of powers delegated to and possessed by the Board of Regents indicates no restriction upon the Regents in terms of their ability to acquire property. Moreover, there is no express or implied restriction in this statute relating to the use to which land and building acquisitions may be put. Certainly no inference can be drawn from this statute that units of the Montana University System must comply with local zoning restrictions in their purchase or construction of facilities designed to enhance the discharge of that institution's educational mission. Therefore, in the absence of a clearly expressed legislative intent to subject state instrumentalities to local zoning restrictions, such as appears in Section 78-1302 (b), R.C.M. 1947, with respect to the development of the Capitol complex, 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.

There are several supportive rationale that underlie the general rule that municipalities may not subject instrumentalities of the state to their zoning restrictions. The usual ground is based upon the theory of conflicting sovereignties. Under this

rationale, a court will simply seek to determine which of the conflicting governmental units is the superior sovereign and will make its judgment with respect to the applicability of zoning restrictions accordingly. This test is set forth in Aviation Services, Inc. v. Board of Adjustment, 20 N.J. 275, 119 A.2d 671, 745 (1956):

> "...(W)here the immunity from local zoning regulation is claimed by an agency or authority which occupies a superior position in the governmental hierarchy, the presumption is that such immunity (from local zoning regulation) was intended in the absence of express statutory language to the contrary."

In disputes in other jurisdictions between state universities and municipalities over the application of local zoning restrictions to campus expansion or building programs, courts have generally observed the general rule set forth above. In Board of Regents v. City of Tempe, 356, P.2d 399, 406-407 (1960), the Arizona Supreme Court, in treating the question of whether a city may apply its building codes to the construction and maintenance of a state university situated within the city, stated:

> "The essential point is that the powers, duties and responsibilities assigned and delegated to a state agency performing a governmental function must be exercised free of control or supervision by a municipality within whose corporate limits the state agency must act. The ultimate responsibility for higher education is reposed by our Constitution in the State... A central, unified agency, responsible to State officials rather than to the officials of each municipality in which a university or college is located, is essential to the efficient and orderly administration of a system of higher education responsive to the needs of all the people of the State."

The Court specifically held in the above case that the City could not apply its building codes to Arizona State University. Regents, supra, at 407.

Similarly, in a case which arose in New Jersey and which involved a dispute between Rutgers University and the township in which a branch campus of that University was located over the matter of the applicability of local zoning restrictions to the construction of additional married student housing facilities, the New Jersey Supreme Court stated:

"With regard to a state university, there can be little doubt that, as an instrumentality of the state performing an essential governmental function for the benefit of all the people of the state, the legislature would not intend that its growth and development should be subject to restriction or control by local land use regulation. Indeed, such will generally be true in the case of all state functions and agencies." Rutgers v. Piluso, 60 N.J. 142, 286 A.2d 697, 703 (1972).

THEREFORE, IT IS MY OPINION that:

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.

Very truly yours,

ROBERT L. WOODAHL
Attorney General

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