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LEGAL OPINION

2003-07

TO: Mike Kadas, Mayor; City Council; Janet Stevens, Chief Administrative Officer; Cindy Klette, OPG Director; Philip Maechling, OPG; Pat Kieley, OPG; Denise Alexander, OPG; Mary McCrea, OPG; David Loomis, OPG; Jackie Corday, OPG

FROM: Jim Nugent, City Attorney

DATE January 27, 2003

RE: Private covenants or deed restrictions are immaterial in determining validity of zoning ordinance

FACTS:

The Cunningham Subdivision, a minor subdivision, is pending before the Missoula City Council Monday evening, January 27, 2003. This proposed minor subdivision has generated some controversy because the proposal allegedly may be contrary to private restrictive covenants applicable to the real property.

ISSUE:

What is the land use relationship between restrictive covenants or deed restrictions and zoning ordinance regulations?

CONCLUSION:

Generally, zoning ordinance regulations are governmental serving the public interest and must predominate if in conflict with a private restrictive covenant. Private covenants or deed restrictions are generally privately conceived, controlled and directed and cannot affect the validity of a zoning ordinance enacted by a public entity.

LEGAL DISCUSSION:

As a general rule the use that may be made of land under a zoning ordinance and the use of the same land pursuant to a restrictive covenant are separate and distinct matters. Restrictive covenants are a matter of private contractual rights between parties that are in the nature of private servitudes and easements. Zoning ordinances are legislative enactments pursuant to the exercise of police power which must bear a substantial relation to the public health, safety, morals or general welfare.

McQuillin Mun Corp § 25.09 (3rd Ed) provides in part:

> **25.09 Deeds restrictions compared and contrasted.**
>
> Restrictions under zoning laws and those under deeds or contracts do not have common purposes. Restrictions under contracts or deeds have private ends in view, and although they may in some instances be directed to secure the public welfare or the good of a residential or other property development, they are, nevertheless, privately conceived, controlled and directed. But **zoning legislation is governmental and the public interest must predominate if it is to be constitutional and valid. Accordingly, restrictive covenants that are appropriate in contracts and deeds between private parties, may be wholly inappropriate in zoning regulations, which must be predicated upon a public interest**. Permitting nonconforming uses or the change of a nonconforming use to a higher use or a use of the same class and prohibiting the change of a nonconforming to a lower use are matters peculiarly related to zoning and have nothing to do with restrictive covenants. Furthermore, zoning officials have no power or discretion to refuse a building permit on the ground that the proposed building violates a restrictive covenant, as this is not a matter for them to decide. Similarly, the granting of an exception for a particular property use is not invalidated merely because a restrictive covenant prohibits such use. . . .
>
> Zoning does not and cannot, as a rule, effect or abolish restrictions on the use of lands arising from deeds or contracts. . . .
>
> **While zoning generally has no effect on private restrictions and agreements as to land, it is true that such private restrictions and agreements are not to be considered and are immaterial in determining the validity of a zoning ordinance, neither do they have any influence or part in the administration of a zoning law.**
>
> **Although a zoning ordinance, generally, cannot nullify restrictions previously put on property by those who platted it,**

> **such restrictions in deeds or contracts must yield to a reasonable exercise of the police power through zoning where they stand in the way of reasonable use of the zoning power to promote the public safety, health, morality or welfare**. *(Emphasis added.)*

Generally, pursuant to Montana law, all covenants contained in grants of estates in real property are considered to be appurtenant to such estates in real property and pass with or run with the land so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee in the same manner as if they had personally entered into the covenants. See Mont. Code Ann. §§ 70-17-201, 70-17-203 and 76-3-306.

Mont. Code Ann. § 70-17-204, MCA provides:

> **70-17-204. Who bound by covenant. A covenant** running with the land **binds only those who acquire the whole estate of the covenantor** in some part of the property. *(Emphasis added.)*

The Montana Supreme Court in **Reinke v. Biegel** (1979), 604 P.2d 315, 317 stated that:

> The rights created by restrictive covenants are **contractual rights**. **Sheridan v. Martinsen** (1974), 164 Mont. 383, 523 P.2d 1392, 1395. *(Emphasis added.)*

The Montana Supreme Court in at least three decisions has expressly stated that it will not extend or enlarge the interpretation or construction of a land use regulation or land use restriction (i.e. restrictive covenant) through implication or insertion of what is not expressly stated.

The Montana Supreme Court in **Higdem v. Whitman** (1975), 167 Mont. 201, 536 P.2d 1185, indicated that the overriding policy of individual expression in free and reasonable land use dictates that any attempted land use regulations or restrictions shall not be extended by implication or enlarged by construction (interpretation) stating:

> **The overriding policy of individual expression in free and reasonable land use dictates that restrictions should not be aided or extended by implication or enlarged by construction**. Sporn v. Overholt, 175 Kan. 197, 262 P.2d 828; Flaks v. Wichman, 128 Colo., 45, 260 P.2d 737; Granger v. Boulls, 21 Wash.2d 597, 152 P.2d 325. Three basic rules may be gleaned from these cases: (1) that **restrictive covenants be strictly construed**, (2) that **ambiguities be resolved in favor of free use of property**, and (3)

that **the district court should not have broadly interpreted and imposed these restrictive covenants in terms of what the parties would have desired had they initially been confronted with questions later developing**. *(Emphasis added.)*

The Montana Supreme Court relied on the above language in at least two subsequent land use restriction cases. **State of Montana ex rel, Region II Child and Family Services Inc. v. District Court** (1980), 609 P.2d 245 and **Town & Country Estates Association v. Slater** (1987), 740 P.2d 668 at 670-671.

83 Am Jur 2d, Zoning and Planning, § 1 states in pertinent part as follows:

> . . . whereas zoning ordinances have been enacted for the purpose of promoting the health, safety, morals or general welfare of the community. Similarly, covenants in deeds or leases which restrict the use of property are to be distinguished from zoning ordinances in that such covenants are a matter of contract creating rights in nature of easements or servitudes, whereas zoning regulations constitute an exercise of police power and must bear a substantial relation to the public health, safety, morals, or general welfare.

Rathkopf, *The Law of Zoning and Planning*, Vol 5 § 82:2 describes the legal relationship between zoning regulations and covenants as the "independent operation rule" stating in part as follows:

> **I. RELATIONSHIP BETWEEN ZONING AND COVENANTS**
> **§ 82:2 Zoning Ordinances and Private Covenants Operate Independently: Validity of One Unaffected by the Other**
> . . .As an exercise of the state police power to promote the general welfare, **zoning is entirely divorced in concept, creation, enforcement, and administration from restrictions arising out of agreements between private parties** who, in the exercise of their constitutional right of freedom of contract, can impose whatever lawful restrictions upon the use of the lands that they deem advantageous or desirable. **Zoning restrictions and restrictions imposed by private covenants are independent controls upon the use of land**, the one imposed by the municipality for the public welfare, the other privately imposed for private benefit.
>
> **Both types of land use restrictions are held by courts to legally operate independently of one another.**
> . . .**the general rule adopted by state courts that zoning restrictions and private covenants legally operate independently of one another**.

> An important implication of the "independent operation rule" is the uniformly held view of state courts that a zoning ordinance does not terminate, supersede, or in any way affect a valid private restriction on the use of real property. *(Emphasis added.)*

CONCLUSION:

Generally, zoning ordinance regulations are governmental serving the public interest and must predominate if in conflict with a private restrictive covenant. Private covenants or deed restrictions are generally privately conceived, controlled and directed and cannot affect the validity of a zoning ordinance enacted by a public entity.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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