

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2017-002

**TO:** Mike Haynes; Mary McCrea; Denise Alexander; Drew Larson; Laval Means; Jen Gress; Tom Zavitz; Jenny Baker; Benjamin Brewer; Don Verrue; Kevin Slovarp; John Wilson; Brian Hensel; Lori Hart

**CC:** Mayor John Engen; City Council; Dale Bickell; Marty Rehbein; Kirsten Hands; Steve Johnson; Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** January 10, 2017

**RE:** If necessary to do so, schools have the right of eminent domain to acquire public buildings and grounds for a school site. Therefore, public schools are eligible to utilize a subdivision review exemption pertaining to legal descriptions that could be created pursuant to eminent domain.

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## FACTS:

On November 8, 2016, Missoula County Public Schools, School District #1 electors approved acquisition of a land area site for the construction of a new Cold Springs School, administered by Missoula County Public Schools. The future school site would be an approximate 8.05 acre site that is within a current land area parcel that is approximately 100.78 acres of land. The school would be connecting to the City of Missoula municipal sanitary sewer service. Missoula County Public Schools is only interested in acquiring the approximate 8.05 acres of land for the school building and grounds location. Therefore, the 8.05 acre parcel of land must be created out of the approximate 100.78 acre parcel of land.

## ISSUE(S):

Is a subdivision review exemption option available to Missoula County Public Schools with respect to the creation of a voter approved 8.05 acre parcel of land for the new public school building(s) and public school grounds?

## **CONCLUSION(S):**

Yes. Pursuant to Montana state eminent domain law, public schools have the power of eminent domain that may be exercised for public school buildings and public school grounds. Pursuant to Montana Subdivision and Platting Act subdivision exemptions, a subdivision exemption exists for factual circumstances where the power of eminent domain could be exercised to create a parcel of land for the public school building and public school grounds as well as for parcels of land created by operation of law.

## **LEGAL DISCUSSION:**

Title 70, chapter 30, Montana Code Annotated (MCA) is entitled “EMINENT DOMAIN”. Section 70-30-102 MCA is entitled “PUBLIC USES ENUMERATED” and enumerates the public uses for which the power of eminent domain may be exercised. Subsection 70-30-102 (3) MCA authorizes the following public uses:

“ . . . (3) PUBLIC BUILDINGS AND GROUNDS FOR THE USE OF ANY county, city, town, or SCHOOL DISTRICT;” (*Emphasis added*)

The Montana Subdivision and Platting Act is set forth in title 76, chapter 3 MCA. Title 76, chapter 3, part 2 MCA of the Montana subdivision and Platting Act is entitled “MISCELLANEOUS EXEMPTIONS”. Subsection 76-3-201(1)(a) MCA authorizes a subdivision exemption for both land parcels created “. . .by operation of law” as well as parcels that “could be created by an order of any court in this state pursuant to the law of eminent domain, Title 70, chapter 30 MCA.” Subsection 76-3-201(1)(a) MCA states:

“76-3-201. EXEMPTION FOR CERTAIN DIVISIONS OF LAND-FEES FOR EXAMINATION OF DIVISION. (1) Unless the method of disposition is adopted for the purpose of evading this chapter, the requirements of this chapter may not apply to any division of land that: (a) is created by order of any court of record in this state OR BY OPERATION OF LAW, or that, IN THE ABSENCE OF AGREEMENT BETWEEN THE PARTIES TO THE SALE COULD BE CREATED BY AN ORDER OF ANY COURT IN THE STATE PURSUANT TO THE LAW OF EMINENT DOMAIN, TITLE 70, CHAPTER 30” (*Emphasis added*)

Clearly the parcel of land for the Cold Springs School site could, if necessary, be created through Missoula County Public School’s exercise of its statutory power of eminent domain, which would make the school district eligible to use a subdivision review exemption. The creation of the parcel of land for the public school and public school grounds is eligible to be created pursuant to the subdivision exemption, authorized pursuant to subsection 76-3-201(1)(a) MCA.

While it is clear that a subdivision exemption is available to Missoula County Public Schools pursuant to the existence, if necessary, of the potential exercise of the power of eminent domain; in addition, it should also be noted that November 8, 2016, Missoula County Public Schools, School District #1 voters/electors voted approval of the location for the new Cold Springs School. Pursuant to section 20-6-603 MCA entitled “TRUSTEES’ AUTHORITY TO ACQUIRE OR DISPOSE OF SITES AND BUILDINGS-WHEN ELECTION REQUIRED”, provision is made for electors to approve public school building or public school ground sites. A clause in subsection 20-6-603(2) MCA is “or land acquired ... upon approval by the electorate”. While it is not necessary to do so; because as noted earlier herein, public schools have the power of eminent domain in Montana, it is also interesting to observe that when the electorate (voters) approve acquisition of a public school building or public school grounds site, pursuant to the phrase “or land acquired ... upon approval by the electorate” it might be possible that the subdivision exemption in subsection 76-3-201(1)(a) MCA for “creation of land “by operation of law” might also be available to the public school pursuant to the legal principle “or land acquired ... upon approval by the electorate”. Thus, technically there might potentially be two (2) subdivision review exemptions available to Missoula County Public Schools for the voter approved acquisition site of the Cold Springs School.

Practically speaking, since the only parcel being created is for the public school and the voters approved the acquisition site, there is no evasion of the Montana Subdivision and Platting Act occurring.

Finally, it should also be noted that for expedited municipal annexation purposes pursuant to section 76-2-303 MCA; pursuant to Montana state law sections 76-2-401 and 76-2-402 MCA public schools are not subject to municipal or local government zoning regulations as a government agency entity. Several Montana statutory definitions of governmental entity include school districts.

While some people might not think of a school district as a government entity, there are several statutory definitions in Montana state law defining governmental entities as including school districts. For example, pursuant to Montana’s LOCAL GOVERNMENT AND STATE ENERGY PERFORMANCE CONTRACTS law in Title 90., chapter 4, part 11 entitled “LOCAL GOVERNMENT AND STATE AGENCY ENERGY PERFORMANCE CONTRACTS”, subsection 90-4-1102(6)(b) MCA defines a governmental entity as meaning:

- “(6) ‘Governmental entity’ means:
- (a) a department, board, commission, institution, or branch of state government;
- (b) a county, consolidated city-county government, city, town, OR SCHOOL DISTRICT;
- (c) a special district, as defined in 2-2-102;
- (d) the university system or a unit of the university system; or
- (e) a community college district.” (*Emphasis added*)

Another example of school districts being defined in Montana state law as being included in “governmental entity” is Montana’s tort liability statutory laws. Title 2, chapter 9 MCA is entitled “LIABILITY EXPOSURE AND INSURANCE COVERAGE”. Title 2, chapter 9, part 1 is entitled “LIABILITY EXPOSURE”. Pursuant to the statutory definitions in title 2, chapter 9, part 1, a “governmental entity” is defined in subsection 2-9-101(3) MCA as meaning “the state and political subdivisions”. Then subsection 2-9-101(5) MCA defines the meaning of the term “political subdivisions”: as including “school districts”.

A third example would be Montana’s public construction contract laws set forth in title 18, chapter 2, part 3 MCA. Pursuant to the statutory definition of “government entity” set forth in subsection 18-2-306 (3)(e) MCA the term “government entity” is defined as including a “school district”.

Thus, the phrase “or other entity” of state or local government pursuant to municipal zoning laws sections 76-2-401 and 76-2-402 MCA must include school districts.

Pursuant to section 76-2-402 MCA if a government entity proposes to use public land contrary to local zoning regulations, a public hearing is to be held before the municipal zoning board of adjustment to basically serve as a public hearing public forum for public comment about the proposed government agency land use. However, the municipal zoning board of adjustment has no power to deny the proposed government entity use.

**CONCLUSION(S):**

Yes. Pursuant to Montana state eminent domain law, public schools have the power of eminent domain that may be exercised for public school buildings and public school grounds. Pursuant to Montana Subdivision and Platting Act subdivision exemptions, a subdivision exemption exists for factual circumstances where the power of eminent domain could be exercised to create a parcel of land for the public school building and public school grounds as well as for parcels of land created by operation of law.

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