

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2017-013

**TO:** Mayor John Engen; City Council; Dale Bickell; Mike Brady; Scott Hoffman; Mike Colyer; Chris Odlin; Richard Stepper; Laurie Clark; Mike Haynes; Denise Alexander; Mary McCrea; Laval Means

**CC:** Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** May 22, 2017

**RE:** Preservation of established existing commercial vineyard crop pursuant to utilization of helicopter to push warm air downward onto vineyard crop is an agricultural activity entitled to protection from local nuisance ordinances

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### **FACTS:**

Recently the owners of an established existing vineyard in the upper Rattlesnake Valley of the City of Missoula determined that it was necessary to save their vineyard crop to utilize a helicopter twice in the early mornings to force warm air downward into the vineyard in order to save the vineyard crop from being damaged by frost. This is a measure that is expensive and rarely taken by the vineyard owners. However, sometimes weather conditions necessitate such helicopter activity in an effort to protect and save the vineyard crop. The owners of the vineyard indicate that the vineyard is a commercial agricultural operation. Reportedly the vineyard has been operating for at least fourteen (14) years.

### **ISSUE(S):**

If a helicopter is being temporarily utilized to preserve a vineyard crop by forcing warm air downward onto the vineyard crop to prevent frost, does that action constitute an agricultural activity?

### **CONCLUSION(S):**

Utilizing a helicopter to push warmer air downward onto a vineyard crop in order to prevent loss of the crop to frost is an agricultural activity to protect the crop. Further, pursuant to Montana state laws set forth in title 76-2-901 MCA, established existing agricultural activities are protected from governmental zoning and nuisance ordinances.

## **LEGAL DISCUSSION:**

Montana state law title 76, chapter 2, part 9 MCA is entitled “AGRICULTURAL ACTIVITIES”. Section 76-2-901 MCA states that it is the Montana State Legislature’s intent to “protect agricultural activities from governmental zoning and nuisance ordinances. Section 76-2-901 MCA states:

**76-2-901. Agricultural activities -- legislative finding and purpose.** (1)

The legislature finds that agricultural lands and the ability and right of farmers and ranchers to produce a safe, abundant, and secure food and fiber supply have been the basis of economic growth and development of all sectors of Montana's economy. In order to sustain Montana's valuable farm economy and land bases associated with it, farmers and ranchers must be encouraged and have the right to stay in farming.

(2) It is therefore the intent of the legislature to protect agricultural activities from governmental zoning and nuisance ordinances.

Thus, city ordinances intended to regulate perceived nuisances, are not applicable to established agricultural activities.

Section 76-2-902 MCA sets forth definitions applicable to title 76, chapter 2, part 9 MCA. These statutory definitions include definitions of “Agricultural activity” as well as “commercial production of farm products”. Pursuant to these statutory definitions, it is recognized that a condition or activity associated with the commercial production of farm products includes noise as well as operation of machinery. Further, commercial production of farm products includes fruit and any other product that incorporates the use of food or fiber.

**76-2-902. Definitions.** As used in this part, the following definitions apply:

(1) "Agricultural activity" means a condition or activity that provides an annual gross income of not less than \$1,500 or that occurs on land classified as agricultural or forest land for taxation purposes. The condition or activity must occur in connection with the commercial production of farm products and includes but is not limited to:

- (a) produce marketed at roadside stands or farm markets;
- (b) noise;
- (c) odors;
- (d) dust;
- (e) fumes;
- (f) operation of machinery and irrigation pumps;
- (g) movement of water for agricultural activities, including but not limited to use of existing county road ditches, streams, rivers, canals, and drains, and use of water for agricultural activities;
- (h) ground and aerial application of seed, fertilizers, conditioners, and plant protection products;
- (i) employment and use of labor;

- (j) roadway movement of equipment and livestock;
  - (k) protection from damage from wildlife;
  - (l) prevention of trespass;
  - (m) construction and maintenance of buildings, fences, roads, bridges, ponds, drains, waterways, and similar features and maintenance of streambanks and watercourses;
  - (n) conversion from one agricultural activity to another, provided that the conversion does not adversely impact adjacent property owners;
  - (o) timber harvesting, thinning, and timber regeneration;
  - (p) burning and stubble and slash disposal; and
  - (q) plant nursery and commercial greenhouse activities.
- (2) "Commercial production of farm products" means the growing, raising, or marketing of plants or animals by the owner, owner's agent, or lessee of land that provides an annual gross income of not less than \$1,500 or that occurs on land that is classified as agricultural or forest land for taxation purposes. The term includes but is not limited to:
- (a) forages and sod crops;
  - (b) dairy and dairy products;
  - (c) poultry and poultry products;
  - (d) livestock, including breeding, feeding, and grazing of livestock and recreational equine use;
  - (e) fruits;
  - (f) vegetables;
  - (g) flowers;
  - (h) seeds;
  - (i) grasses;
  - (j) trees, including commercial timber;
  - (k) fresh water fish and fish products;
  - (l) apiaries;
  - (m) equine and other similar products; or
  - (n) any other product that incorporates the use of food, feed, fiber, or fur.

Section 76-2-903 MCA prohibits a city from adopting an ordinance that prohibits any existing agricultural activities or forces the termination of any existing agricultural activity outside the boundaries of an incorporated city. Section 76-2-903 MCA states:

**76-2-903. Local ordinances.** A city, county, taxing district, or other political subdivision of this state may not adopt an ordinance or resolution that prohibits any existing agricultural activities or forces the termination of any existing agricultural activities outside the boundaries of an incorporated city or town. Zoning and nuisance ordinances may not prohibit agricultural activities that were established outside the corporate limits of a municipality and then incorporated into that municipality by annexation.

While the City of Missoula noise ordinance is approximately 50 years old, it does not attempt to address aeronautics or aircraft on the ground or in the air. There is no

Montana state law that empowers Montana local governments to either attempt to regulate air space usage with respect to hot air balloons, hang gliders, helicopters, airplanes, etc. Federal law appears to be the source of regulations with respect to aircraft. Montana state law also does not authorize or empower Montana local governments to attempt to address any air borne noise from aircraft in Montana.

**CONCLUSION(S):**

Utilizing a helicopter to push warmer air downward onto a vineyard crop in order to prevent loss of the crop to frost is an agricultural activity to protect the crop. Further, pursuant to Montana state laws set forth in title 76-2-901 MCA, established existing agricultural activities are protected from governmental zoning and nuisance ordinances.

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Jim Nugent, City Attorney

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