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Legal Opinion 2019-026

TO: Mayor John Engen, Dale Bickell, Eran Pehan, Ellen Buchanan, Jen Gress, Jeremy Keene, Mary McCrea, Denis Alexander, Jenny Baker, Andrew Boughan, Ben Brewer, Marty Rehbein, Kirsten Hands, Kelly Elam

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE: September 13, 2019

RE: Generally establishments of religion are not solely places of worship alone; but may engage in a variety of many other accessory activities, including; but not limited to activities such as homeless food programs, domestic violence and crime victim residency programs, emergency shelters and many other court recognized accessory activities.

FACTS:

Article II, section 5 of the Montana Constitution establishes a freedom of religion Montana Constitutional right stating that “The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” The Missoula City Council may soon be considering zoning related regulations related to emergency shelters or homeless shelters activities that may occur at religious establishments. The City of Missoula must be careful with respect to what any zoning regulation might attempt to provide or require; so that the freedom of religion provisions of the Montana and United States Constitutions are not violated.

ISSUE:

Do religious establishments have some constitutional status or protection pursuant to the Montana and United States Constitutions?

CONCLUSION:

Yes, freedom of religion constitutional protections exist in both the Montana and United States Constitutions for religious establishments.

LEGAL DISCUSSION:

Article II, section 5 of the Montana Constitution States:

“Section 5. FREEDOM OF RELIGION. The state SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION OR PROHIBITING THE FREE EXERCISE THEREOF. (emphasis added).

It is important to be aware that courts throughout the United States have recognized that generally churches or religious uses for land use purposes are not places of worship alone. A variety of permitted accessory activities have been recognized by courts as associated with churches or religious land uses, including; but not limited to accessory activities such as, schools, day care centers, meeting rooms, auditoriums, places of quasi-public assembly, drug rehabilitation centers, counseling facilities, homeless food programs, domestic violence and crime victim residency programs, as well as emergency shelters. Rathkopf THE LAW OF ZONING AND PLANNING by Zeigler, volume 2, chapter 29 entitled LOCAL CONTROL OF RELIGIOUS STRUCTURES, USES, AND DISPLAYS. In Montana pursuant to Montana’s Constitution, city officials must be careful to ensure that any city zoning regulation does not have the effect of prohibiting the free exercise of religion,

The United States Constitution, First Amendment states in pertinent part that: “Congress shall make no law respecting an establishment of religion”.

The United States Supreme Court in *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711(1947) stated that the United States Constitution, First Amendment establishment clause was meant to erect a “wall of separation” between church and state with respect to aiding or preferring a religion. Rathkopf, supra.

Subsequently, noting that this topical area is an “extraordinarily” sensitive area of constitutional law, the United States Supreme Court developed a three part test, commonly referred to as the Lemon Test to utilize to determine whether a particular law or government action violates the United States Constitution establishment clause. Pursuant to its decision in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 745(1971), the United States Supreme Court established Lemon test review and analysis basically provides that in order for a government law, action or practice to pass constitutional muster it must (1) have a secular purpose that neither advances nor inhibits religion, (2) have a direct and immediate effect that neither advances’ or inhibits religion; and (3) avoid excessive entanglement with religion. All three prongs of the Lemon test must be satisfied in order for the government law, action or practice to be valid. Rathkopf, supra.

The Montana Supreme Court provided the following analysis of the three factor balancing test known as the Lemon test as applied in Montana pursuant to the Montana Constitution, Article II, Section 5, with respect to respecting an establishment of religion or prohibiting the free exercise of religion in *Miller v. Catholic Diocese of Great Falls*, 224 M 113, 118; 728 P.2d 794, 797(1986). The Montana Supreme Court indicated that the factors to consider are (1) the

character and purpose of the institution involved; (2) the nature of the law's intrusion into church affairs; and (3) the resulting relationship between the government and the religious authority.

CONCLUSION:

Yes, freedom of religion constitutional protections exist in both the Montana and United States Constitutions for religious establishments.

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/s/

Jim Nugent, City Attorney

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