

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2019-028

**TO:** Mayor John Engen, City Council, Dale Bickell, Ginny Merriam, Leigh Griffing, Jeremy Keen, Denise Alexander, Mary McCrea, Jenny Baker, Andrew Boughan, Jen Gress, Ben Brewer, Laval Means, Department Attorney

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE:** September 26, 2019

**RE:** Montana state law 76-2-412 MCA provides that a day care home, including either a family or group day care home is a residential use that is permitted in all residential zones in Montana.

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### FACTS:

There has been recent city council member inquiry about homeowner association covenants attempting to prohibit home daycares. Typically home owner association covenants are private residential covenants that the City is not a party to. However, private homeowner covenants do not override city zoning regulations and are not binding on the City. Enforcement of homeowner covenants is a civil matter between members of the homeowners association that does not involve the city.

### ISSUE:

Does Montana state law address the zoning status of day care homes serving 12 or fewer children?

### CONCLUSION:

Yes, Montana state law section 76-2-412 MCA provides that day-care homes, including both family and group day care homes, registered by the Montana Department of Public Health and Human Services, are residential uses that are permitted in all residential zones in the State of Montana.

### LEGAL DISCUSSION:

Montana state local government zoning laws are set forth in title 76, chapter 2 MCA entitled “PLANNING AND ZONING”. Part 4 of title 76, chapter 2 MCA is entitled “APPLICATION TO GOVERNMENTAL AGENCIES GROUP AND FOSTER HOMES”.

Section 76-2-412 MCA is entitled “RELATIONSHIP OF FOSTER HOMES, KINSHIP HOMES, YOUTH SHELTER CARE FACILITIES, YOUTH GROUP HOMES, COMMUNITY RESIDENTIAL FACILITIES, AND DAY CARE HOMES.

Pursuant to section 76-2-412 MCA the Montana State Legislature has declared that day-care homes registered by the Montana Department of Public Health and Human Services serving 12 or fewer children are a residential land use for zoning purposes and that they are a permitted use in all residential zones in the State of Montana. Section 76-2-412 MCA states as follows:

**76-2-412. Relationship of foster homes, kinship foster homes, youth shelter care facilities, youth group homes, community residential facilities, and day-care homes to zoning.** (1) A foster home, kinship foster home, youth shelter care facility, or youth group home operated under the provisions of **52-2-621** through **52-2-623** or a community residential facility serving eight or fewer persons is considered a residential use of property for purposes of zoning if the home provides care on a 24-hour-a-day basis.

(2) A family day-care home or a group day-care home registered by the department of public health and human services under Title 52, chapter 2, part 7, is considered a residential use of property for purposes of zoning.

(3) The facilities listed in subsections (1) and (2) are a permitted use in all residential zones, including but not limited to residential zones for single-family dwellings. Any safety or sanitary regulation of the department of public health and human services or any other agency of the state or a political subdivision of the state that is not applicable to residential occupancies in general may not be applied to a community residential facility serving 8 or fewer persons or to a day-care home serving 12 or fewer children.

(4) This section may not be construed to prohibit a city or county from requiring a conditional use permit in order to maintain a home pursuant to the provisions of subsection (1) if the home is licensed by the department of public health and human services. A city or county may not require a conditional use permit in order to maintain a day-care home registered by the department of public health and human services.

The cross reference in section 76-2-412 MCA to Title 52, chapter 2, part 7 MCA is a cross reference to the MONTANA CHILD CARE ACT that is set forth in title 52, chapter 2, part 7 MCA. Key relevant statutory definitions set forth in the MONTANA CHILD CARE ACT in section 52-2-703 MCA include; but are not limited to:

“(2) ‘Day care’ or ‘child care’ means care for children provided by an adult, other than a parent of the children or other person living with the children as a parent, on a regular or irregular basis, as applicable, for daily periods of less than 24 hours, whether that care is for daytime or nighttime hours.”

....

“(6) ‘Family day-care home’ means a private residence in which day care is provided to three to six children on a regular basis.”

“(7) ‘Group day-care home’ means a private residence or other structure in which day care is provided to 7 to 12 children on a regular basis.”

There are three (3) Montana Supreme Court decisions interpreting and applying section 76-2-412 MCA. These Montana Supreme Court decisions are as follows:

- (1) State ex. Rel. Thelen v. City of Missoula, 168 M 375, 543 P2d 173(1975). Section 76-2-412 MCA is constitutional within the purview of the 1972 Montana Constitution and supersedes city ordinances that restrict use of residential areas to one-family dwellings only. The plaintiffs desired to sell their residence and received an offer from the Missoula Developmentally Disabled Community Homes Council, a nonprofit organization. The Missoula City council held hearings before a special committee of the city council and heard both proponents and opponents for allowing the sale to the nonprofit organization. The city council directed city attorney Fred Root to file an action testing the Montana state law amendments to the state zoning laws exempting homes for the developmentally disabled indicating the lawsuit was to challenge the State of Montana taking over city zoning by allowing residential homes for the developmentally disabled in all residential districts. The Montana Supreme Court ruled against the City of Missoula City Council challenge to the Montana state law, stating that the Montana state law was constitutional.
- (2) State ex. El. Region II Child and Family Services, Inc. v. District Court 187 M 126, 609 P 2d 245(1980) indicated that restrictive covenants are to be strictly construed and where residence for developmentally disabled children was structured as a single housekeeping unit and was to all outside appearances a usual, stable, and permanent family unit, it was within the ambit and intent of restrictive covenant limiting use of property to single family dwellings. This case arose out of a Great Falls subdivision restrictive covenant controversy.
- (3) Mahrt v. Kalispell, 213 M 96, 690 P2d 418(1984) the Montana Supreme Court ruled in favor of the regional mental health center seeking a conditional use permit and against the City of Kalispell in one of the shortest written opinions ever issued by the Montana Supreme Court. The Montana Supreme Court stated that there is absolutely no question that under Montana law a group home for eight or fewer people is a residence and may be located in any area in the state zoned residential. The Montana Supreme Court indicated that it would not require community residential facilities to repeatedly defend their well-established right to locate in any residential area. The City of Kalispell’s appeal was dismissed as frivolous and costs of litigation were assessed against the City of Kalispell.

In 1986 the Montana Supreme Court in Carey v. Wallner, 223 Mont. 260 725 P2d 557, 1986 Mont. Lexis 1035 (1986), a lawsuit decision involving rescission of a contract for deed

pertaining to the purchase of an adult foster home in Bozeman that was determined to be a nursing home and not be a community residential facility pursuant to section 76-2-12 MCA of Montana state law and therefore violated a Bozeman zoning ordinance, observed that with respect to community residential facilities pursuant to Montana state law “There is absolutely no question that in Montana a group home for eight or fewer people is a residence and may be located in any area in Montana zoned residential”, citing the Mahrt v. City of Kalispell decision.

**CONCLUSION:**

Yes, Montana state law section 76-2-412 MCA provides that day-care homes, including both family and group day care homes, registered by the Montana Department of Public Health and Human Services, are residential uses that are permitted in all residential zones in the State of Montana.

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Jim Nugent, City Attorney

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