

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2011-012

TO: Mayor John Engen; Missoula City Council; Bruce Bender; Donna Gaukler; Jackie Corday; David Shaw; Steve King; Kevin Slovarp; Gregg Wood; Jessica Miller; Dan Jordan; Marty Rehbein; Nikki Rogers; Kelly Elam; Starr Sullivan

CC: Dept. Atty.

FROM: Jim Nugent, City Attorney

DATE June 20, 2011

RE: Easements are interests in land that can only be disposed of by a 2/3 vote of approval by the entire City Council.

FACTS:

An inquiry has arisen concerning the process or procedure for disposing of a City easement, if the City desired to dispose of an easement.

ISSUES:

1. Is an easement an interest in property?
2. If the City were to dispose of an easement, what is the appropriate process?

CONCLUSIONS:

1. An easement is an interest in land consisting in the right to use and control that land.
2. If the City desired to dispose of an easement interest in property, that would require either a city council ordinance or a resolution approved by at least 2/3 of the entire city council.

LEGAL DISCUSSION:

Subsection 61-1-103(10) MCA of Montana's Highways and Transportation Laws defines easement to mean "a right acquired by public authority to use or control property for a designated purpose." (Emphasis added).

Montana's Open Space Land and Voluntary Conservation Easement Act, pursuant to 76-6-104(2) MCA, defines conservation easement as follows:

“‘Conservation easement’ means an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of

improvements upon the land by the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.”

Black’s Law Dictionary, 8th ed., pg. 548, generally defines an easement as “an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose, (such as to cross it for access to a public road.” (Emphasis added).

Clearly, an easement is considered to be an interest in real property that authorizes its use for a designated purpose.

Montana state law has established a statutory process and procedure pursuant to 7-8-4201 MCA for the disposal of interests in municipal property. City council authorization is required to dispose of City interests in real property pursuant to either a city council “ordinance or resolution passed by a 2/3 vote of all the members of the council.” (Emphasis added).

7-8-4201 MCA provides:

7-8-4201. Disposal or lease of municipal property. (1) Subject to the provisions of subsection (2), the city or town council may sell, dispose of, donate, or lease any property belonging to the city or town.

(2) (a) Except for property described in subsection (3), the lease, donation, or transfer must be made by an ordinance or resolution passed by a two-thirds vote of all the members of the council.

(b) Except for property acquired by tax deed or property described in subsection (3), if the property is held in trust for a specific purpose, the sale or lease must be approved by a majority vote of the electors of the municipality voting at an election called for that purpose. The election must be held in conjunction with a regular or primary election.

(3) If a city or town owns property containing a historically significant building or monument, the city or town may sell or give the property to nonprofit organizations or groups that agree to restore or preserve the property. The contract for the transfer of the property must contain a provision that:

(a) requires the property to be preserved in its present or restored state upon any subsequent transfer; and

(b) provides for the reversion of the property to the city or town for noncompliance with conditions attached to the transfer.

(4) This section may not be construed to abrogate the power of the board of park commissioners to lease all lands owned by the city that were acquired for parks within the limitations prescribed by 7-16-4223.

(5) A city or town may donate land or sell the land at a reduced price to a corporation for the purpose of constructing:

(a) a multifamily housing development operated by the corporation for low-income housing;

(b) single-family houses. Upon completion of a house, the corporation shall sell the property to a low-income person who meets the eligibility requirements of the corporation. Once the sale is completed, the property becomes subject to taxation.

(c) improvements to real property or modifying, altering, or repairing improvements to real property that will enable the corporation, subject to the restrictions of Article X, section 6, of the Montana constitution, to pursue purposes specified in the articles of incorporation of the corporation, including the sale, lease, rental, or other use of the donated land and improvements.

(6) Land that is transferred pursuant to subsection (5) must be used to permanently provide low-income housing. The transfer of the property may contain a reversionary clause to reflect this condition. (Emphasis added).

CONCLUSION:

1. An easement is an interest in land consisting in the right to use and control that land.
2. If the City desired to dispose of an easement interest in property, that would require either a city council ordinance or a resolution approved by at least 2/3 of the entire city council.

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