

VOLUME NO. 41

OPINION NO. 42

PARKS - Special dedication to municipality restricts authority of municipality to alienate land without a municipal election;

PROPERTY, PUBLIC - When held by a municipality under specific dedication language "to the use of the public forever," sale must be approved by electors of the municipality;

MONTANA CODE ANNOTATED - Section 7-8-4201.

HELD: Park dedication language in a subdivision plat dedicating certain lands "to the use of the public forever" creates a trust for a specific purpose and under the terms of section

7-8-4201, MCA, a municipal election must be held before the city can dispose of the property.

24 January 1986

Jim Nugent
Missoula City Attorney
201 West Spruce Street
Missoula MT 59801

Dear Mr. Nugent:

You have asked my opinion concerning:

Whether the park dedication language of High Park subdivision creates a public trust for a specific purpose.

This language does create such a trust and therefore the sale of the park property must be approved by the electors of Missoula before the city can dispose of the property.

Before discussing my reasoning I will set forth the background facts upon which your question is based. The park in the High Park subdivision was dedicated to the City of Missoula in 1969 as part of the approval process for this subdivision in the south hills. The park is ten acres in size and has never been developed or used formally as a park. It is surrounded by adjacent landowners, presumably who purchased parcels within the original subdivision. The dedicated park property has poor public access, which may be limited to a single footpath.

The question concerning the park's sale has arisen because one adjacent landowner would like to purchase the property. The dedication language on the plat provides in pertinent part:

High Park No. 1 and the lands included in all streets, avenues, public squares and pedestrian thoroughfares are dedicated, donated and granted to the use of the public forever.

As you have noted, the answer to your question turns on the proper interpretation of the dedication language. Montana statutes provide that property held in trust for a specific purpose must be the subject of a municipal election before it is sold. § 7-8-4201(2)(b), MCA. The entire text of this statute reads as follows:

Disposal or lease of municipal property.

(1) Subject to the provisions of subsection (2), the city or town council may sell, dispose of, or lease any property belonging to the city or town.

(2)(a) Such lease or transfer shall be made by an ordinance or resolution passed by a two-thirds vote of all the members of the council.

(b) If the property is held in trust for a specific purpose, the sale or lease thereof must be approved by a majority vote of the electors of the municipality voting at an election called for that purpose.

(3) Nothing contained herein may be construed to abrogate the power of the board of park commissioners to lease all lands owned by the city heretofore acquired for parks within the limitations prescribed by 7-16-4223.

Montana case law has not specifically interpreted the statutory language "held in trust for a specific purpose." However, the statute has been addressed generally several times, and most recently in Prezeau v. City of Whitefish, 198 Mont. 416, 646 P.2d 1186 (1982).

Prezeau concerned a Whitefish city park that was created in 1909 when the land was conveyed to the city with this language: "[P]roperty to be used exclusively for public park purposes" When Whitefish decided to change part of the park's use to a quasi-public rifle range in 1981, the question arose whether the city had to hold an election prior to issuing a lease.

The Montana Supreme Court held that such an election was necessary. The Court noted that the property was held for a specific use and whether the new use was compatible with the old use as a park was irrelevant to

the application of the statute and thus the need for an election. Prior case law that held otherwise was overruled by the Court. See Hames v. City of Polson, 123 Mont. 469, 215 P.2d 950 (1950); Colwell v. City of Great Falls, 117 Mont. 126, 157 P.2d 1013 (1945).

Prezeau, however, is of limited assistance to our inquiry here because neither party nor the Court disputed that the dedication language created a trust with a "specific purpose."

Consulting treatises and case law from other jurisdictions, it is apparent that the basic language of the High Park plat dedicating streets and squares "to the use of the public forever" does constitute a specific purpose. This conclusion is based upon an examination of underlying general principles.

A municipal corporation can hold property in either a proprietary or governmental capacity. Land held in a governmental capacity is that land held for a public use. Statutes such as section 7-8-4201, MCA, are a reflection of common law prohibitions against the alienation of land held in a governmental capacity. 10 McQuillin Municipal Corporations § 28.38 at 83, 84 (3d ed.), states:

A municipal corporation cannot sell or dispose of property devoted to a public governmental use or purpose, as already has been observed, without special statutory or charter authority, since as to governmental functions the municipality is a mere agent of the state and subject to control by the state legislative authorities. For instance, property may not be sold where it has been acquired or dedicated for public use as a common, or as a park, or for school uses, or for other public governmental uses. In this sense all property is public which has been dedicated to public use, or which may be affected by a public trust, either general or special. Municipal corporations hold all property in which the public is interested, such as streets, alleys, public squares, commons, parks and wharves, in trust for the use of the public; and, on principle, such trust property can be disposed of by the

municipality only in accordance with the terms of the trust, i.e., in the public interest as declared by statute.

Thus the general prohibition on alienation applies to all lands acquired for public uses, regardless of whether there is a more specific dedication, for instance, that designating a public right-of-way, library, or swimming pool.

That the land here in question was dedicated "for the public use" makes the dedication special within the meaning of the statute. Contrasted to this dedication would be an unconditional quit claim conveyance to the City of Missoula. The City of Missoula would then hold the property in a proprietary capacity. Municipalities holding such property in a proprietary capacity are free to dispose of the land to the same extent that a private individual is. 10 McQuillin Municipal Corporations § 28.37 at 77 (3d ed.).

The case law of other jurisdictions reflects the broad notion of inalienability of lands dedicated for public use. An appellate court of New York in Town of Brookhaven v. Arnonauer, 65 A.D.2d 570, 409 N.Y.S.2d 148, 150 (1978), noted:

[T]he principle is well established in this state that park property may not be alienated without express legislative permission. [Citations omitted.]

In the state of Washington the appellate courts have noted that property once acquired and devoted to public use cannot be alienated without legislative authority, either express or implied. Commercial Waterway Dist. v. Permanente Cement Co., 61 Wash. 2d 509, 379 P.2d 178 (1963); Nelson v. Pacific County, 36 Wash. App. 17, 671 P.2d 785 (1983).

To a certain extent the Supreme Court of Montana has also endorsed a strict approach to the conveyance of public lands. In Lloyd v. City of Great Falls, 107 Mont. 442, 447, 86 P.2d 395, 397 (1939), the Court quoted with approval from McQuillin:

Where lands have been dedicated and used for a public park or square, the municipal

corporation holds the title in trust for the public and has no power ... [to sell the lands without legislative authorization].

The legislative authorization referred to in Lloyd is the Montana statutory requirement of a municipal election.

Although the Montana statute does not include an exemption for public lands not presently in use, several states have allowed summary conveyance of specially dedicated public lands where the lands are not publicly used or capable of such use. Oregon has accomplished this result legislatively with a statute that allows the state or political subdivision to sell, exchange, convey, or lease property that is "not needed for public use or when the public interest may be furthered." Or. Rev. Stat. § 271.310(1). In Oklahoma, the Supreme Court accomplished a similar result judicially. In State ex rel. Remy v. Agar, 559 P.2d 1235 (Okla. 1977), the Court took notice of the general rule prohibiting alienation of "land held for the public use" but then recognized that where the public use is abandoned, or the property has become unsuitable or inadequate for that purpose, it may be disposed of.

In Lloyd, the Court did use the qualifying language: "Where lands have been dedicated and used" (Emphasis added.) However, the legislative authority for alienation of public lands, § 7-8-4201, MCA, contains no similar qualification. The statute applies to all land "held in trust for a specific purpose," not just land held in trust and used for a specific purpose.

Subsequent to Lloyd, the Montana Supreme Court cast a strict construction upon the terms of this statute. In the previously discussed case of Prezeau v. City of Whitefish, 198 Mont. 416, 646 P.2d 1186, the Court held that an election must be held upon any sale or lease, not simply those sales or leases that were in abrogation of the specific trust purpose. The Court refused to read terms into the statute and specifically overruled prior precedent that had committed this error.

In summary, I note that the dedication language expressly established a public use. Within the context of a subdivision plat, this use would be considered "a specific purpose" under the terms of the statute. The

disposition of such property requires legislative authority. The direction of section 7-8-4201(2), MCA, is that property held for a specific purpose is not to be summarily disposed of without giving the public affected an opportunity to participate. In this case that participation is a municipal election held on the sale. The fact that the High Park subdivision park has not been used as a public park would not affect the applicability of the alienation statute. While the latter issue has not been addressed judicially in Montana, the Supreme Court has shown an inclination to strictly construe the language of section 7-8-4201, MCA.

THEREFORE, IT IS MY OPINION:

Park dedication language in a subdivision plat dedicating certain lands "to the use of the public forever" creates a trust for a specific purpose and under the terms of section 7-8-4201, MCA, a municipal election must be held before the city can dispose of the property.

Very truly yours,

MIKE GREELY
Attorney General