

September 28, 2004

Mr. Richard L. Burns
Glendive City Attorney
100 1/2 South Merrill
P.O. Box 6
Glendive, MT 59330-0006

Re: Request for Attorney General's Opinion

Dear Mr. Burns:

You have requested an Attorney General's Opinion on the following questions:

1. Is the facility proposed by the Department of Corrections for the former Eastmont Human Services Center in Glendive a prerelease center?
2. If it is determined that the proposed facility is a prerelease center must the Department of Corrections follow the Administrative Rules of Montana that govern such facilities?

Because your inquiry is fact specific to the siting of a correctional facility at the former Eastmont Human Services Center in Glendive it has been determined that a letter of advice is the appropriate response.

In addition to the statutes and rules governing your request, I considered the legal memoranda submitted by you and by Diana Leibinger Koch, Chief Legal Counsel for the Department of Corrections, and a memo from Mike Ferriter to Director Bill Slaughter, concerning use of the Eastmont facility.

BACKGROUND

The 2003 Legislature enacted a bill that transferred the former Eastmont Human Services Center ("Eastmont") to the Department of Corrections (the "Department"). House Bill 727, which has been codified as Mont. Code Ann. § 53-1-210, provided, in relevant part:

The former Eastmont human services center at Glendive is the property of the department of corrections, and the building may be used for any purpose determined appropriate by the department.

The Department determined that it was in “critical need” of additional space for offenders requiring intensive chemical dependency counseling and proposed to use Eastmont for that purpose.

It is your position that the facility proposed by the Department is a prerelease center. You correctly note that Mont. Code Ann. § 53-1-203(1)(a) requires the Department to adopt rules governing the siting of prerelease centers and that those rules must state “that the siting is subject to any conditions, covenants, restrictions of record, and zoning regulations.” Based on that requirement, the City of Glendive contends that the Department may not use Eastmont for a prerelease center because the existing zoning regulations restrict use of the proposed location to “One Family Residential” and no procedure for granting a variance exists. The City’s argument is based on the conclusion that the Department’s proposed facility is, in fact, a Prerelease Center and that it must therefore conform to the statutes and rules governing such a facility.

The Department disagrees with your position that the proposed facility at Eastmont is a prerelease center. The Department states that the facility it proposes to locate at Eastmont is a correctional facility/program for the custody and rehabilitation of adult felons who have been convicted of felony DUI.

ANALYSIS

Pursuant to Mont. Code Ann. § 53-1-202(2), the Department is authorized to provide adult correctional services consisting of the following facilities or programs:

- (a) the prisons listed in 53-30-101;
- (b) appropriate community-based programs for the placement, supervision, and rehabilitation of adult felons who meet the criteria developed by the department for placement:
 - (i) in prerelease centers;
 - (ii) under intensive supervisions;
 - (iii) under parole or probation pursuant to Title 46, chapter 23, part 2; or
 - (iv) in other appropriate programs; and
- (c) the boot camp authorized by 53-30-403.

The City relies on the definition of “prerelease center” adopted by the Department in Mont. Admin. Rule 20.7.501 to reach its conclusion that the Department’s proposed facility at Eastmont is a prerelease center as provided for in (2)(b)(i). The rule provides “[p]rerelease center’ means a residential facility for adult offenders located in a community which offers offenders room and board, supervision, counseling, and treatment.” The Department, on the other hand, contends that the proposed facility falls under the “other appropriate programs” provided for in subsection (2)(b)(iv).

Admittedly, the definition of “prerelease center,” particularly if read in isolation, is fairly broad and could encompass a number of different residential programs, including the one proposed at Eastmont. However, when read in context with the body of rules governing prerelease centers and when considered in the context of the purpose and structure of existing prerelease centers, the definition does not support the City’s position.

Title 20, part 7, subchapter 5 of the Montana Administrative Rules govern the siting, establishment, and expansion of prerelease centers. As part of that process, the Department is required to review whether there is a need for such a facility in the city, town, or county being considered. A.R.M. 20.7.502. Before a prerelease center may be established in a particular location, the Department must determine that there are appropriate mental health and chemical dependency services and that there are adequate job, educational, and community service opportunities available to offenders. A.R.M. 20.7.503.

These community resources are all integral components of a prerelease program. A prerelease center will not be established in a location where these resources do not exist. The program proposed by the Department to be located at Eastmont does not require availability of such resources in the community. Unlike a prerelease center, the proposed Eastmont facility will be self-contained and all treatment services will be provided within the confines of the facility. This factor weighs in favor of the Department’s position that the proposed facility is not a prerelease center.

Additionally, as the Department Memo supporting its position points out, offenders in a prerelease program are required to maintain steady employment or school outside of the facility; and, offenders in a prerelease center may leave the facility unsupervised to attend work, school, counseling or group sessions and they may earn passes to visit family or friends, again unsupervised, outside the facility. The Department states that at the proposed Eastmont facility offenders will not be allowed to work or attend school outside the facility, attend any activity outside the facility without supervision, or have visitation with family or friends outside the facility. These distinctions between the purpose and structure of prerelease centers and the proposed Eastmont facility also weigh in favor of the Department’s position that the proposed facility is not a prerelease center.

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The final distinction weighing in favor of the Department's position is that the proposed Eastmont facility will serve only one type of offender: adult felons who have been convicted of felony DUI. Mont. Code Ann. § 61-8-731 sets forth the potential punishment for offenders convicted of felony DUI. Subsection (1)(a) provides, in relevant part, for:

Sentencing the person to the department of corrections for placement in an appropriate correctional facility or program for a term of 13 months. The court shall order that if the person successfully completes a residential alcohol treatment program operated or approved by the department of corrections, the remainder of the 13-month sentence must be served on probation.

The facility the Department proposes to locate at Eastmont would be for the purpose of serving DUI offenders. Conversely, prerelease centers are not limited in the type of offenders they serve. Offenders are typically non-violent offenders who were either sentenced to pre-release, see Mont. Code Ann. § 46-18-201, or who are being transitioned from prison to pre-release in preparation for completion of their sentence. Prerelease centers also house offenders whom the courts sentence to the department and the department deems suitable for prerelease. Where the proposed Eastmont facility's primary purpose would be to provide intensive chemical dependency counseling, pre-release centers are established primarily to facilitate an offender's release from custody and back into the community and to provide necessary structure to facilitate the offender's success in the community.

Weighing all of these factors and taking into consideration the Legislature's broad grant of authority to the Department to use the Eastmont facility for "any purpose determined appropriate" it is my opinion that the proposed Eastmont facility is not a prerelease center and that the administrative rules governing prerelease centers do not apply.

This letter should not be construed as a formal Opinion of the Attorney General.

Sincerely,

CIVIL SERVICES BUREAU

ALI N. BOVINGDON
Assistant Attorney General

anb/jym