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Legal Opinion 2016-005

TO: John Engen, City Council, Mike Haynes, Leslie Schwab, Dale Bickell, Ginny Merriam, Don Verrue, Ellen Buchanan, Chris Behan

CC: City Clerk, Dept Attorney

FROM: Jim Nugent

DATE March 3, 2016

RE: Historic Preservation Permit (HPP) Process for Demolition Permit Pursuant to 20.85.085 Missoula Municipal Code (MMC)

FACTS:

Several city official and city employee inquiries have arisen this week generally pertaining to the application review and decision making pertaining to the process and procedure for an application for a demolition permit for a historic resource

ISSUE(S):

Could important aspects of the City of Missoula Title 20 review process for an application for a demolition permit for a historic resource be condensed into summary form.

CONCLUSION(S):

A condensed summary of the important aspects of City of Missoula, Title 20, Section 20.85.085 Historic Preservation Permit is set forth in this legal opinion to facilitate identification of important aspects of the review process for an application for a demolition permit for a historic resource.

LEGAL DISCUSSION:

Title 20, Missoula Municipal Code (MMC), is entitled, "Zoning". Chapter 20.85 MMC is entitled "Review and Appeal Procedures". Section 20.85.085 MMC is entitled, "Historic Preservation Permit (HPP)" and it is the section that sets forth the City of Missoula process for review of an application for a demolition permit for a historic resource.

The following Missoula Municipal Code highlights appear to be the key steps included in processing a Historic Preservation Permit (HPP) demolition permit. Inherent in each step or ordinance provision is that the action or conduct be performed reasonably in good faith.:

- (1) TO AVOID UNDUE DELAY, the HPP permit review should occur prior to or simultaneous with any other permit reviews the applicant has before the city.” 20.85.085(P)(4) MMC (emphasis added)
- (2) Once a completed application for a Historic Preservation demolition permit is received by the Historic Preservation officer, the Historic Preservation officer ”shall prepare an HPP report”, that in part includes the applicable review criteria triggered by the proposed action. 20.85.085(S)(3)(b) MMC.
- (3) An HPP application for a demolition permit requires Historic Preservation Commission review at a public hearing. 20.85.085(S)(4) MMC.
- (4) The Historic Preservation Commission shall review and decide on an Historic Preservation Permit application at a public meeting. 20.85.085(T) MMC.
- (5) The Historic Preservation Commission’s decision shall occur within 90 days from the date the completed application was received by the Historic Preservation Officer. 20.85.085(T)(1) MMC.
- (6) The Historic Preservation Commission may request an extension of time from the applicant. However, if the extension of time IS NOT GRANTED BY THE APPLICANT to the Historic Preservation Commission, the Historic Preservation PERMIT IS APPROVED. 20.85.085(T)(1) MMC.(emphasis added)
- (7) The Historic Preservation Commission shall deny the application if it determines that the action subject to review does not meet the review criteria. 20.85.085(T)(2)(c) MMC.
- (8) The review criteria for a Historic Preservation demolition permit are set forth in 20.85.085(W) MMC.

20.85.085(W).

1. Criteria for Review:

The Historic Preservation Commission shall review the HPP application for compliance in accordance with the following criteria:

- a. The applicant has consulted with the Historic Preservation Commission and the State Historic Preservation Office, and made a good faith effort to find an alternative that would result in the preservation, renovation, or reuse of the historic resource;
- b. The applicant has advertised the Historic resource for sale in a local

newspaper of general circulation for a period of 30 days;

- c. The applicant's good faith efforts to find a purchaser interested in acquiring and preserving, renovating, or reusing the historic resource have failed
- d. Denying the application would prevent all reasonable economic use of the property; and
- e. The applicant shall provide the historic preservation officer supporting documentation demonstrating that the above criteria are met.

2. Relocation and Demolition Delay:

Upon receipt of a completed HPP application for demolition or relocation, the Historic Preservation Commission may impose a relocation or demolition delay for 90 days to allow sufficient time to explore preservation of the historic resource.

3. Mitigation:

a. If an HPP for relocation or demolition is approved, the applicant shall mitigate the adverse effects of relocation or demolition by providing, to the extent possible, documentation, similar to HABS/HAER, of the historic resource prior to undertaking the relocation or demolition.

b. If relocation or demolition results in conversion to a use not requiring buildings or structures, such as a parking lot, the area shall be buffered from other historic resources by landscaping, walls, or fencing.

(9) One of the review criteria for a historic preservation demolition permit is that the applicant has consulted with the Historic Preservation Commission and State Historic Preservation Office. 20.85.085(W)(1)(a) MMC

(10) Pursuant to 20.85.085(W)(2) MMC the Historic Preservation Commission may impose a demolition delay for 90 days from the receipt of a completed application for demolition to allow sufficient time to explore preservation of the historic resource. Practically and logically this exploration is to be performed in good faith by the Historic Preservation Commission and the Historic Preservation Officer and should commence running from the date the historic preservation commission officer receives the completed application. There is no city ordinance requirement that the applicant for a demolition permit must perform the exploration effort or assist or cooperate with the Historic Preservation Commission and/or Historic Preservation Officer's efforts to explore preservation alternatives. Thus, the burden is solely on the Historic Preservation Commission and Historic Preservation officer to explore and attempt to identify good faith viable feasible alternatives to demolition; otherwise such delay could potentially be deemed unreasonable delay by the courts or by the City Council pursuant to an appeal to the city council. 20.85.085(W)(2) MMC.

- (11) If the Historic Preservation Commission denies the demolition permit the Historic Preservation Commission decision must include written findings of fact and conclusions relied upon in reaching the Historic Preservation Commission decision. 20.85.085((Y)(2) MMC.
- (12) Applicants for historic preservation demolition permits have a right to appeal either the historic preservation officer's decisions and/or the Historic Preservation Commission's decisions to the city council. 20.85.085(CC) MMC.

20.85.085(Z)(CC) Appeals

Appeals to decisions of the historic preservation officer and to decisions of the Historic Preservation Commission may be made to the City Council in accordance with the process described in 20.85.100. Variance requests may be made to the Board of Adjustment in accordance with 20.85.090

- (13) The role of the Historic Preservation Officer as well as the role of the Historic Preservation Commission is limited solely to the demolition aspect of the application for a demolition permit for the historic resource building(s) or structure(s). There is no provision in section 20.85.085 MMC providing any authorization or power for the Historic Preservation Officer and/or the Historic Preservation Commission to review and/or make any decisions or determinations pertaining to any proposed new project, if a new project is being proposed at the time of the application for the demolition permit. Pursuant to title 20 MMC, any proposed new project is otherwise reviewed by city development services staff and any other appropriate staff pertinent to any specific proposed project pursuant to other provisions of title 20 MMC and/or applicable building and fire codes, etc.
- (14) Section 20.80.085 MMC is a city ordinance provision. It is not a state law. The City Council has the sole power or authority to amend or repeal 20.85.085 MMC.

CONCLUSION(S):

A condensed summary of the important aspects of City of Missoula, Title 20, Section 20.85.085 Historic Preservation Permit is set forth in this legal opinion to facilitate identification of important aspects of the review process for an application for a demolition permit for a historic resource.

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