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Legal Opinion 2008-003

TO: Mayor, City Council, Lettie Hunnako, Bruce Bender, Roger Millar, Mike Barton, Dave Loomis, Denise Alexander, Mary McCrea, Pat Keiley, Jamie Erbacher, Michelle Reinhart, Tim Worley, Jen Gress Steve king, Kevin Slovarp, Don Verrue, Steve Meismer, Department Attorney

FROM: Jim Nugent, City Attorney

DATE March 6, 2008

RE: Existing Residence on zoning Regulation Nonconforming 6,112 Square foot lot may be replaced

FACTS:

The residence at 720 City Drive was reportedly constructed in approximately 1960. The property was annexed in 1972. The parcel or tract of land that the residence was located on was further legally divided approximately twenty-seven (27) years ago, in 1981 when the property owner utilized the then statutorily authorized "occasional sale" subdivision exemption to divide the parcel and create a second parcel of land. Pursuant to the 1981 certificate of survey, the remainder of the parcel of land upon which the existing residence at 720 City Drive was located was 6,112 square-feet. In 1981 there were no statutory criteria set forth in Montana state law or City subdivision regulations providing specific criteria, standards, or guidelines for the review of subdivision exemptions and occasional sale divisions were statutorily authorized. Two years later, in 1983, the Montana Attorney General issued 40 A. G. Op. 16 (1983) suggesting some subdivision exemption type criteria that might be considered during any subdivision exemption review for any type of claimed subdivision exemption might include assessing (1) the claimant's intent, (2) the nature of claimant's business, (3) the prior history of the land in question, (4) whether the claimant had engaged in prior subdivision exempt transactions involving the land being reviewed, (5) the proposed configuration of the land after the proposed utilization of subdivision exemptions, and (6) whether there is a pattern of subdivision exempt transactions occurring that in essence will result in a subdivision.

Pursuant to the Montana Subdivision and Platting Act, until April 6, 1993, the Montana Subdivision and Platting Act provisions pertaining to subdivision exemptions statutorily authorized the creation of a single division of a parcel of land outside of a platted subdivision pursuant to the "occasional sale" subdivision exemption for the purpose of "one sale of a

division of land within any 12 month period.” See subsections 76-3-103(8) and 76-3-104(1)(d) MCA (1991). The 1993 Montana State Legislature pursuant to House Bill 408 (1993), Montana Session Law, Chapter 272 (1993), repealed the “occasional sale” subdivision exemption effective upon the governor’s signature on April 6, 1993. After the 1981 subdivision exemption for occasional sale certificate of survey was filed, the remainder parcel upon which the existing house constructed in 1960 was located at 720 City Drive was on a parcel that was 6,112 square-feet in size. The RR-I zoning applicable to this parcel provides for a minimum lot size of 8,000 square-feet. Thus, the remainder parcel at 720 City Drive upon which a residence was built in 1960 is located is on a zoning nonconforming lot with respect to minimum lot size.

The property owner at 720 City Drive proposes to remove the existing house built in 1960 and replace it with a new house.

ISSUE:

May an existing residence on a zoning nonconforming lot that is nonconforming as to minimum lot size be replaced with a new residence?

CONCLUSION:

Yes, a property owner with an existing residence on a zoning nonconforming lot that is nonconforming as to minimum lot size may replace the existing residence with a new residence. Denial of all economically beneficial use of a lot would constitute a regulatory taking of land pursuant to the United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*, (1992) 505 U. S. 1003, 1015. Further, the Montana Supreme Court in *Kensmoe v. City of Missoula* (1971) 156 Mont. 491, 480 P. 2d 835, 1971 Mont. LEXIS 472 held that a property owner desiring to replace their mobile home with a new mobile home “has an existing vested right to a nonconforming, continuous, and unchanging use of the land in question for maintaining one single family residential trailer,” and this vested right’s legal principal is applicable here. Finally, the “occasional sale” division of land occurred in 1981, so both 1981 parcels would be eligible to be utilized as building site lots because each separate parcel already existed prior to the November 22, 2006 effective date of City ordinance 2328, which prohibits the creation of a zoning nonconforming lot that is not in compliance with minimum lot size after the effective date of City Council ordinance 3328.

LEGAL DISCUSSION:

The 6,112 square-foot parcel of land with the address of 720 City Drive has existed for approximately twenty-seven (27) years. It was the remainder parcel of a division of land that was made in 1981 pursuant to the then statutorily authorized “occasional sale” subdivision exemption, exempting it from subdivision review. The certificate of survey for 720 City Drive was filed with the Missoula County Clerk and Recorder in 1981, so the existence of the parcel of land at 720 City Drive has been on file in Missoula County public real property records for approximately twenty-seven (27) years. Clearly the parcel of land at 720 City Drive has significant substantial value to the property owner, and it clearly has been utilized as a residence for nearly fifty (50) years since the residence was constructed in 1960.

The United States Supreme Court has indicated in *Lucas v. South Carolina Coastal Council*, (1992) 505 U. S. 1013, 1015 that a taking of land for which the government must pay just compensation may occur where the government basically denies a property owner all economically beneficial use of a lot or parcel of land, such as by not allowing the property owner to build a residence on their lot or parcel of land, which is what occurred in *Lucas*. In this instance, if the City did not allow this property owner to continue to utilize this 6,112 square foot parcel of land for a residence it would likely constitute a taking for which the City would have to compensate the property owner.

Another very significant Supreme Court decision that favors the property owner is the Montana Supreme Court decision in *Kensmoe v. City of Missoula* (1971), supra, in which a lady had a trailer house on three abutting lots, and in 1965 replaced her first trailer house “when the trailer became untenable, and another trailer was placed on the premises as a replacement.” However, the City of Missoula at that time contended that the maintenance of a residential trailer house on the property was a “nonconforming use” pursuant to City zoning regulations and informed Ms. Kensmoe that she could not replace the nonconforming trailer house use with another trailer house.

The Montana Supreme Court identified the legal issue in the *Kensmoe* lawsuit supra at 402, and 836, to be “whether a residence trailer home maintained upon premises as a nonconforming use can be replaced by a new residential trailer” pursuant to City of Missoula zoning regulations. Later, supra at 404-405, and 837, the Montana Supreme Court stated the City of Missoula’s position in the *Kensmoe* lawsuit as “the fundamental position of the defendant City of Missoula is that replacement of the deteriorated trailer with a newer one constitutes a structural alteration of a nonconforming building subjecting it to existing zoning regulations irrespective of the absence of change in the nonconforming use.” (Emphasis added.)

The Montana Supreme Court in *Kensmoe* then went on immediately thereafter to state supra at 405 and 837 that: “In the instant case, it is undisputed that plaintiff and her predecessors in interest were using the land as a site for a residential trailer prior to enactment of the Missoula zoning ordinance. They had a vested right to use the land for this purpose, which nonconforming use was preserved by subsection (a) of section 32-10. As use of the land for this purpose has been continuous ever since, this vested right has not been abandoned nor lapsed to date. Thus, plaintiff has a present existing right to use the land in question as a site for a residential trailer.” (Emphasis added.) At that time, Missoula City Code section 32-10 provided for the continuation of nonconforming use, but “if such nonconforming use is discontinued for a period of two years, any future use of such premises shall be in conformity with the provisions of this chapter.”

Later, the Montana Supreme Court in *Kensmoe* concluded its decision, supra, at 405 and 838 with its holding by stating, “We hold, therefore, that judgment in the instant case be amended to provide that plaintiff has an existing vested right to a nonconforming, continuous, and unchanging use of the land in question as a site for maintaining one single family residential trailer, including such trailer itself thereon.” (Emphasis added.)

Finally, on October 23, 2006 the Missoula City Council adopted ordinance 3328 which became effective November 22, 2006. Pursuant to ordinance 3328, a lot that fails to meet minimum area requirements of an applicable zoning district may not be used as a residential dwelling unit building site if the land resulted from the redesign or rearrangement of contiguous nonconforming tracts of record pursuant to a boundary line relocation subdivision exemption for boundary line relocations that occur after the effective date of zoning ordinance 3328 which was effective November 22, 2006.


In this instance, the 6,112 square-foot remainder parcel with the address of 720 City Drive was not created by the redesign or rearrangement of contiguous nonconforming lots that were redesigned or rearranged pursuant to a boundary line relocation subdivision exemption. The 6,112 square foot-parcel known as 720 City Drive was created in 1981 by a statutorily authorized division of land subdivision exemption known as an "occasional sale" subdivision exemption. Further, the "occasional sale" subdivision exemption occurred approximately twenty-five years prior to the enactment of City Council ordinance 3328.

Therefore, for the several legal reasons identified and explained herein, the property owner at 720 City Drive may replace their existing residence with a new residence.

CONCLUSION:

Yes, a property owner with an existing residence on a zoning nonconforming lot that is nonconforming as to minimum lot size may replace the existing residence with a new residence. Denial of all economically beneficial use of a lot would constitute a regulatory taking of land pursuant to the United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*, (1992) 505 U. S. 1003, 1015. Further, the Montana Supreme Court in *Kensmoe v. City of Missoula* (1971) 156 Mont. 491, 480 P. 2d 835, 1971 Mont. LEXIS 472 held that a property owner desiring to replace their mobile home with a new mobile home "has an existing vested right to a nonconforming, continuous, and unchanging use of the land in question for maintaining one single family residential trailer," and this vested right's legal principal is applicable here. Finally, the "occasional sale" division of land occurred in 1981, so both 1981 parcels would be eligible to be utilized as building site lots because each separate parcel already existed prior to the November 22, 2006 effective date of City ordinance 2328, which prohibits the creation of a zoning nonconforming lot that is not in compliance with minimum lot size after the effective date of City Council ordinance 3328.

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