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Legal Opinion 2009-001

TO: Jennie Dixon, OPG; Mary McCrea, OPG

CC: Roger Millar, OPG; Denise Alexander, OPG; Pat Keiley, OPG; Lettie Hunnako, OPG; John Engen, Mayor; City Council; Bruce Bender, CAO; Mark Muir, Police Chief; Mike Brady, Assistant Police Chief; Marty Ludemann, Police Captain; Dept. Attorney

FROM: Jim Nugent

DATE: January 28, 2009

RE: Potential Facts Negating Any Presumed Intent to Abandon Nonconforming Use of Land

FACTS:

OPG staff has requested a written legal opinion pertaining to factors to consider with respect to whether or not a non-conforming use has been abandoned or discontinued.

Gay Nineties operated at 1116 West Central in a commercial business area with an all-beverage alcohol on-premises consumption license for several decades. Their on-premises alcohol consumption status predates the City of Missoula's adoption of its overlay zoning districts (1) CLB-1 Commercial On-Premises Wine/Beer Establishment District; or (2) CLB Commercial On-Premises Liquor/Beer Establishment District that were enacted in the mid-1970's in response to the Eddie's Club all-beverage license in downtown Missoula being transferred to the Silvertip Lounge at Southwest Higgins and Bancroft Avenues. Some nearby residents/property owners unsuccessfully sued the Montana Department of Revenue to prevent the transfer of the license to the Southwest Higgins and Bancroft Avenue location. See *Corrette v. Montana Department of Revenue*, 176 Mont. 276, 577 P.2d 1214, 1978 Mont. LEXIS 785. The Gay Nineties was therefore a nonconforming use operation with respect to the on premises sale and consumption of alcohol. Subsection 76-2-302(2) MCA pertaining to municipal zoning regulations provides in pertinent part that "all regulations must be uniform for each class or kind of buildings throughout each district." The City of Missoula's on-premises alcohol overlay zoning districts for on-premises sale and consumption of alcohol does not establish any operating standards, criteria, or guidelines for operators to comply with.

The Gay Nineties ceased operating during November, 2007 and reportedly sold and transferred the on-premises alcohol consumption all beverage alcohol license. June 10, 2008 Boca Rey Wrap restaurant opened for business at 1116 West Central. Boca Rey is owned by

Mission Burritos, LLC whose operating member is Dave Beaton who reportedly is a principal in three Taco del Sol wrap shops. For quite some time, several months, Buku Beverages has been intending to cohabit the former Gay Nineties premises with the existing Boca Rey Wrap restaurant, but has been delayed while they obtained an alcohol on-premises sale and consumption quota license from the State of Montana Department of Revenue, Liquor Division.

An on-premises beer sale and consumption license eligible for a wine endorsement was finally successfully obtained during late 2008, and was being processed by the Montana Department of Revenue during the latter months of 2008. An "intake" form was submitted to OPG staff during November, 2008 for on-premises alcohol sale and consumption at 1116 West Central by attorney James P. Healow, whose wife Linda d/b/a Buku Beverages. There was initial delay at OPG processing the "intake" form because the OPG staff person who was initially assigned the "intake" form was injured in a motor vehicle accident incident and the "intake" was not immediately processed. Further, delay had occurred waiting for a written legal opinion.

ISSUE:

Has the 1116 West Central Avenue on-premises alcohol sale and consumption business location lost its zoning non-conforming use status pursuant to §19.62.040 Missoula Municipal Code because the use may have been discontinued, abandoned or ceased continuously for more than one year?

CONCLUSION:

The factual circumstances presented indicate efforts to obtain a new on-premises alcohol sale and consumption at the commercial property at 1116 West Central Avenue were occurring within one year after Gay Nineties ceased operating. It is possible that factual circumstances may establish a lack of intent to abandon or discontinue a non-conforming use that the courts will recognize constitutes a lack of intent.

The applicant has represented to OPG staff that an ongoing effort to obtain an on-premises alcohol sale and consumption license for 1116 West Central Avenue was occurring for several months prior to the expiration of the one (1) year time period for prima facie discontinuance, abandonment, or cessation of the use. The successful obtainment of such a quota license was not completely controllable by the applicant. Since the State of Montana has statutory quotas and bureaucratic procedural processes for each type of on-premises alcohol sale and consumption license. Some courts have tolled non-conforming use time periods in factual circumstances where the nonuse is involuntary or out of the control of the applicant. Some courts have also tolled the non-conforming use time period when there is factual evidence of a lack of intent to abandon or discontinue the use and have construed or interpreted ordinance language "discontinuances" to mean "abandonment" and require a showing of intent to abandon. In this instance there appears to be an abundance of facts or reasons that could allow OPG staff to recognize a continuation of the non-conforming use or for the applicant to potentially successfully sue to be allowed a continuation of on-premises alcohol sale and consumption as a use.

LEGAL DISCUSSION:

In these factual circumstances evidence has been presented to OPG staff indicating that there was an intent to establish a continuation of on-premises alcohol sales and consumption at 1116 West Central Avenue several months prior to any non-conforming use one (1) year time period expiration through abandonment, discontinuation or cessation pursuant to §19.62.040 MMC. Further, successfully obtaining and procedurally processing an on-premises alcohol sale and consumption license from the Montana Department of Revenue, Liquor Division was not controllable by the applicant because it was controlled by a third party, State of Montana.

McQuillin, Municipal Corporations, 3rd Edition, Revised, Volume 8A, §25.104, pages 92-95 indicates in part:

“Historically, courts have been somewhat reluctant to read intent out of termination of use. A number of courts have construed ‘discontinuance’ to simply mean ‘abandonment’ and to require a showing of intent. However, the contrary conclusion has been held. Courts that are more sympathetic to zoning authorities have held that the running of a discontinuance period does affect an abandonment case by raising a presumption of intent to abandon. Although this undoubtedly helps a challenger’s abandonment case, it still leaves intent a real issue since the non-conforming user may present evidence to rebut the presumption.”

[. . .] Where the nonuse is involuntary, even courts that purport to do away with the intent requirement hesitate before finding a discontinuance. For example, where property is tied up in a court proceeding, the discontinuance period may be tolled. Where a user did not operate a nonconforming business due to an economic slump, some courts have held that the nonuse did not amount to “cessation” of the use. Some courts have tolled a discontinuance period for nonuse due to construction on the strength of the user obtaining a construction permit. (Emphasis added.)

McQuillin, Municipal Corporations, supra, §25.193, pages 89-91 identifies numerous factual circumstances where courts have found a lack of intent to abandon or discontinue a nonconforming use.

§ 25.193 - Temporary nonuse as evidence of intent.

A temporary interruption or suspension of a nonconforming use, without the substitution of a conforming one or such a definite and substantial departure from the previously existing conditions and uses as to suggest an intent to abandon, does not terminate the right to resume the nonconforming use.

There are a number of common examples where nonuse does not imply an intent to abandon. Where rental property is vacant due to eviction of tenants, inability to rent property, or renovations or repairs, intent to abandon is lacking so long as the owner was attempting to seek or attract new tenants who would

perpetuate the nonconforming use. Seasonal inactivity of a seasonal business does not interrupt the legal continuance of a nonconforming use. Courts have found no intent to abandon where a user temporarily closes down a nonconforming business due to renovations, illness, or bad financial conditions. Intent to abandon is ordinarily not inferred from an interruption due to government action. Sporadic use might or might not negate an inference of abandonment. Similarly, continuance of utility hook-ups may suggest a lack of intent to abandon. (Emphasis added.)

McQuillan Mun Corp. §25.193 (3rd Ed).

Rathkopf's *Law of Zoning and Planning* provides:

§ 74:6 Facts negating intent to abandon—Generally

[. . .] Where the intention *not* to abandon nonconforming status is evidenced by overt acts on the part of an owner, the majority of courts in those states in which the discontinuance clause merely raises a rebuttable presumption of intent to abandon holds that the presumption raised by the ordinance provision has been sufficiently rebutted.

§ 74:7 Facts negating intent to abandon—Cessation beyond owner's control

A temporary cessation, even for a lengthy period, caused by circumstances over which a property owner had no control, has been held not to constitute proof of an intent to abandon in the sense of an abandonment within the meaning of zoning ordinance provisions where the circumstances themselves negate an inference of the necessary intention to abandon a use. Thus, the occurrence of a period of inactivity between the departure of a lessee and the commencement of a new occupancy has been held not to evidence an abandonment.

[. . .]

On the assumption that destruction of property by natural disasters was so contrary to the property owner's interest that it could in no sense be presumed that he intended to relinquish his rights, destruction of property used for nonconforming purposes by fire, hurricane, flood, or similar causes beyond the control of an operator of a nonconforming use have been held not to justify a finding that the prior nonconforming use had been abandoned.

§ 74:8 Facts negating intent to abandon—Cessation and business activity

Similarly, where there is a period of nonuse because of the financial inability of the owner to continue in business, or to find a tenant desirous of using the premises for a purpose permissible as a nonconforming use, the requisite intent to abandon is lacking, and the right to resume the nonconforming use when opportunity presents itself is not lost.

Nonuse, intended to be temporary, caused by a depression or a lack of activity in the owner's business is generally held insufficient to show an intention to surrender the

right to continue the nonconforming use. Related to this is nonuse for certain months or seasons of the year caused by the fact that the particular use is seasonal.

[. . .]

§74:9 Facts negating intent to abandon—Cessation and repairs

Where use of the premises is discontinued in order for a structure to be repaired, there is an intention shown to continue the use rather than to abandon it. The right of the owner of property vested with a nonconforming use to make repairs which may be reasonably necessary to continue the use is generally recognized. (Emphasis added.)

CONCLUSION:

The factual circumstances presented indicate efforts to obtain a new on-premises alcohol sale and consumption at the commercial property at 1116 West Central Avenue were occurring within one year after Gay Nineties ceased operating. It is possible that factual circumstances may establish a lack of intent to abandon or discontinue a non-conforming use that the courts will recognize constitutes a lack of intent.

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