



## OFFICE OF THE CITY ATTORNEY

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### Legal Opinion 2008-004

**TO:** Mayor John Engen, City Council, Bruce Bender, Roger Millar, Mike Barton, Mary McCrea, Denise Alexander, Lettie Hunnakko, Pat Keiley, Dave Loomis, Jen Gress, Jennie Dixon, Michelle Reinhart, Tim Worley, Steve King, Kevin Slovarp, Don Verrue, Steve Meismer, City Atty

**FROM:** Jim Nugent, City Attorney

**DATE** March 12, 2008

**RE:** Court-recognized property owner right to rebuttable presumption of zoning ordinance provisions discontinuing or abandoning nonconforming uses as well as continuous vested land use rights application to nonconforming uses pursuant to *Kensmoe v. City of Missoula* (1971) to existing decades old continuous land use for which a replacement building is desired.

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### FACTS:

The Prime Time On Broadway business located at 1210 West Broadway is zoned "C," commercial. The property in question has been utilized as a food-eating and on-premises all beverage alcohol consumption business for many decades, approximately forty-five (45) years or more. Restaurants are a permitted use in commercial zones. At least limited cabaret beer and wine alcohol on-premises consumption is authorized at any restaurant in any commercial zone. The existing building structure location has a minor zoning nonconforming setback distance pursuant to current applicable zoning.

The use of this building structure for an eating and all beverage alcohol license for on-premises consumption predates the Missoula City Council's subsequent adoption of a general City zoning overlay zone regulation classification entitled "CLB Commercial on-premises liquor and beer establishment district" in 1977 after the downtown North Higgins Eddie's Club all beverage alcohol license was authorized in 1976 to be transferred to the Silvertip Lounge and Liquor Store that was to be constructed and located at the northwest corner of the intersection of Bancroft and Southwest Higgins. Some property owners within two to three blocks to the north unsuccessfully litigated to the Montana Supreme Court the Montana Department of Revenue authorization to relocate the license to the Bancroft Southwest Higgins area. See *Corette v. Montana Department of Revenue* 176 Mont. 276, 577 P. 2d 1214 1978 Mont. LEXIS 785.

It is important to note that the State of Montana Department of Revenue, Liquor Division regulates the issuance of all beverage alcohol on-premises consumption licenses and, when issued, issues all beverage alcohol licenses for specific locations. The all beverage alcohol on-premises license for Prime Time on Broadway is specifically issued for the 1210 West Broadway location. It is a generally recognized legal principle that legal nonconformity runs with the land and that changes of ownership have no effect on the status of a legal nonconformity. The City of Missoula has codified this legal principle in subsection 19.62.050(e) MMC. OPG staff did not oppose a relatively recent transfer or change of ownership with respect to the all beverage alcohol on-premises license issued to 1210 West Broadway.

The all beverage alcohol on-premises license assigned to 1210 West Broadway is currently being actively utilized at 1210 West Broadway. No one has indicated any intent to transfer the license to another location. The property owners' and license owners' representatives indicate that it is their intent that this all beverage alcohol on premises consumption license is intended to continue to be used at 1210 West Broadway. The Montana Department of Revenue determines the total number of all beverage alcohol on-premises consumption licenses that are allocated to a municipality pursuant to a statutory formula. A municipality must absorb each of the all beverage alcohol on-premises consumption licenses allocated within a municipality.

The current owners of the real property at 1210 West Broadway as well as of the all beverage alcohol on-premises consumption license are interested in enhancing their business operations at 1210 West Broadway either through extensive remodeling or replacement of the existing building with a new building. They do not intend to discontinue or abandon their current all beverage alcohol on-premises consumption service at 1210 West Broadway. Obviously, if replacement of the existing building occurs, there likely will be temporary interruption closures during construction for a time period of less than one year in duration. If they replace the existing building with new building, the property owners' representatives are indicating that any new building would be built in compliance with any applicable zoning setback distances. Thus, a new building would be planned to be built in compliance with applicable zoning set back distances.

The property owners may legally continue to operate the current business operations in the current building as it currently exists or in any enhanced remodeled state as long as any remodeling of the existing building does not increase any existing building legal nonconformity or create any new additional building structure nonconformity. OPG inquiry pertains to the status of the all beverage alcohol on-premises consumption license pursuant to a factual construction alternative involving the replacement of the existing building in factual circumstances in which the construction activity may cause temporary closure of the business operations and temporary non active use of providing all beverage alcohol on-premises consumption services at 1210 West Broadway.

## **ISSUES:**

1. If the property owner at 1210 West Broadway were to remove the existing building where business operations are conducted, would any new building have to be constructed in compliance with applicable City zoning setbacks?
2. Is property owner intent to not abandon or discontinue a nonconforming use a significant factor to consider with respect to local zoning regulations attempting to phase out a zoning regulation nonconforming use on property?
3. Do City of Missoula zoning ordinances establish a minimum time period beyond which a legal nonconforming use shall not be considered to be a nonconforming use?
4. Has the Montana Supreme Court recognized a vested right of a property owner to replace a zoning regulation nonconforming use on property?
5. Are there limitations or restrictions on the continuation of an existing vested right that may be housed in a new replacement building?

## **CONCLUSIONS:**

1. Yes, if the property owner at 1210 West Broadway were to remove the existing building, the new replacement building would be required to be constructed in compliance with applicable zoning setbacks pursuant to section 19.62.040 MMC unless a zoning setback variance was obtained.
2. Yes, there are many court cases indicating that property owner intent to not abandon or discontinue a nonconforming use is an important factor to consider, and also court decisions that such zoning time periods are rebuttable presumptions.
3. Yes, pursuant to subsection 19.62.040 MMC “any legal nonconforming use that is discontinued or abandoned or ceases for a period of one year shall not be considered a legal nonconforming use and thereafter shall comply with all applicable zoning regulations. Rebuttable presumption court case law from other states as well as Montana vested right court case law, caution that this one year time period would also be subject to factual circumstances that indicate no intent to abandon or discontinue a nonconforming use.
4. Yes, the Montana Supreme Court in *Kensmoe v. City of Missoula* (1971) 156 Mont. 401, 480 P. 2d \*35, 1971 Mont. LEXIS 472 recognized a vested right to continue a nonconforming use of land holding that Ms. Kensmoe had “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 use of such trailer itself.”
5. Yes, if the property owner relies on a continuation of an existing nonconforming use rather than seek appropriate CLB overlay zone, the property owner may not expand or increase the existing nonconforming use, for example may not increase the number of tables and seating.

## **LEGAL DISCUSSION:**

There are several types of on-premises consumption alcohol licenses issued by the State of Montana Department of Revenue, Liquor Division. There is no ban or prohibition of on-premises alcohol consumption in City commercial zoning districts. In fact, "cabaret licenses" allowing on-premises consumption of beer and wine is expressly identified as a permitted use in the "C" commercial zoning district classification. Subsequent to the all beverage alcohol on-premises consumption business operation existing at 1210 West Broadway, the Missoula City Council adopted an overlay district for on-premises alcohol consumption alcohol licenses, but the cabaret licenses were later authorized without the necessity of any overlay zone.

The property owners at 1210 West Broadway clearly have a right to continue to operate their business within their existing building, either in the building as is, or as remodeled as long as no expansion of a non-conformity occurs. This business operation includes a State of Montana issued all beverage alcohol on-premises consumption license assigned to 1210 West Broadway. Pursuant to Montana State law, the Montana Department of Revenue, Liquor Division, assigns an all beverage alcohol on-premises consumption license to a specific geographic property location at a specific address. The specific all beverage alcohol on-premises consumption license utilized at 1210 West Broadway is assigned to 1210 West Broadway by the State of Montana Department of Revenue, Liquor Division. There is no indication of any facts that this all beverage alcohol on-premises consumption license is being transferred to another location other than 1210 West Broadway nor is there any indication of any property owner intent to abandon or discontinue the use of the all beverage alcohol on-premises consumption license assigned to 1210 West Broadway for more than one year if the existing building is replaced. The property owners have no desire to change the use of the property at 1210 West Broadway. The property owners desire to either extensively remodel or replace the existing building at 1210 West Broadway. OPG staff inquiry pertains to the provisions of section 19.62.030 MMC and section 19.62.040 MMC entitled "Right of Replacement: Legal Nonconforming Uses" and "Abatement of Legal Nonconforming Uses and Structures: Conditions" These sections provide:

### **19.62.030 Right of Replacement: Legal Nonconforming Uses.**

A legal nonconforming use shall only be replaced by a more conforming use or a conforming use, subject to the following:

A. Any legal nonconforming use may be changed to another nonconforming use, provided that the extent of the nonconformity of the new use, as determined by the increased parking need indicated by Chapter 19.78 or any other clear indicator of nonconformity of use, is not increased by such change. The Planning Office shall determine whether a proposed change from one nonconforming use to another constitutes an increase in nonconformity of use. If the change of use is permitted, the Planning Office shall require compliance with all other requirements of this chapter; and,

B. Any nonconforming use which is replaced by a more conforming land use as determined by this chapter, retains the rights of that replacement use only; and,

C. Any replacement of a legal nonconforming use by another use shall first be approved by the Planning Office and a Zoning Compliance Permit issued for that replacement use; and,

D. Any mobile home within any city zoning district at the time of passage of the ordinance codified in this chapter may be replaced by another mobile home, 1976 or newer, upon issuance of a Zoning Compliance Permit and a Building Permit, pursuant to Section 19.62.040. However, no permits may be issued unless such replacement mobile home meets all setback requirements of the zone or does not infringe upon the setbacks of the original mobile home.

**19.62.040 Abatement of Legal Nonconforming Uses and Structures: Conditions.**

A. Any legal nonconforming use that is discontinued or abandoned or ceases for a period of one year shall not be considered a legal nonconforming use, and thereafter shall comply with all applicable zoning regulations; and,

B. Any legal nonconforming use or structure that is destroyed or damaged by any means to an extent that the cost of repair is more than fifty percent of the cost of replacement (as determined by the building inspector) shall not thereafter be used or reconstructed except in conformance with the regulations applicable to new uses or structures in the district. Restoration, if permitted as provided above, shall be started after issuance of a zoning compliance permit and building permit, and shall be completed within one year after the date of destruction or damage incursion. Failure to comply with this provision shall result in the termination of the use or structure's legal nonconforming status. (Emphasis added.)

Subsection 19.62.040 MMC will require that any replacement building must comply with applicable zoning setbacks. City zoning ordinance specifically provides for a one-year time period of discontinuance or abandonment before a nonconforming use is lost. This time period and property owner intent are both important factors to consider with respect to determining property owner intent to abandon or discontinue a nonconforming use. Further, many courts consider discontinuance or abandonment of nonconforming use zoning provisions to be rebuttable by the factual circumstances, and Montana specifically has a significant "vested rights" decision involving the legal ability of a property owner continuing legal nonconforming uses. This Montana Supreme Court decision involves the City of Missoula and the City of Missoula's nonconforming use ordinance.

A lengthy state statute, section 16-4-203 MCA, entitled "Determination of Public Convenience and Necessity" sets forth a statutory review process for making State of Montana Department of Revenue, Liquor Division, determinations of public convenience and necessity. The City of Missoula, pursuant to its CLB commercial on-premises liquor/beer establishment district overlay zoning classification, purports to review all beverage alcohol on-premises consumption for "public convenience and necessity," but does not set forth any criteria, standards, or guidelines for making such a determination. Further, the City zoning overlay indicates a determination is to be made that the welfare of the people residing in the vicinity "will not be seriously or adversely affected." Again, there are no criteria, standards, or

guidelines. The Prime Time On Broadway location has had an all beverage alcohol on-premises consumption licenses for several years at 1210 West Broadway.

Many courts indicate that local zoning ordinances with nonconforming use discontinuance provisions merely raise rebuttable presumptions because property owner intent must always be considered as well. Many courts indicate that local zoning ordinances that attempt to establish a time period of nonuse, discontinuance, or abandonment of an existing nonconforming use may be rebutted by property owner intent and/or actions that are inconsistent with any intent to discontinue or abandon a nonconforming use.

McQuillin's *Law of Municipal Corporations* provides:

**§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.)

Many courts indicate that local zoning ordinances that attempt to establish a time period of nonuse, discontinuance of abandonment of an existing nonconforming use “merely raises a rebuttable presumption of intent to abandon” which may be rebutted. Rathkopf's *Law of Zoning and Planning*, volume 4, section 74:6, page 74-30 sets forth several sections of text identifying numerous circumstances of facts negating property owner intent to abandon an existing nonconforming use. See sections 74:6 through 74:10, pages 74-30 through 74-37.

**§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 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.)

Some of the examples that Rathkopf cites as examples of property owner intention “not to abandon” a zoning regulation nonconforming use include:



1. Preparations for conversion of a structure to accommodate a different nonconforming use;
2. When the interim cessation of use is extended by delay in completion of alterations caused by litigation;
3. Temporary cessations even for a lengthy period caused by circumstances over which a property owner had no control;
4. Occurrence of a cessation between departure of a lessee and commencement of a new occupancy;
5. Destruction of property used for nonconforming purposes by fire, hurricane, flood, or similar causes;
6. A period of nonuse because of financial inability of owner to continue business;
7. A period of nonuse because of inability to find a tenant;
8. Discontinuance of a nonconforming use while a building or structure is repaired.
9. Land owner replacing old garage, *Smith v. Board of Zoning Appeals City of Scranton*, 74 Pa. Commw 405, 459 A. 2d 1350 (1983); (Emphasis added.)
10. Store renovations at considerable expense, *Board of Zoning Adjustment City of Lanett v. Boykin*, 265 Ala. 504, 92, So. 2d 906 (1957) and *Nassau-Fulton Realty Corp. v. Schlamm*, 67 N. 4.5 2d 501 (Sup 946);

More importantly in Montana, the Montana Supreme Court has recognized a property owner's vested right to replace a structure associated with a nonconforming use in the City of Missoula.

A very significant Supreme Court decision that favors the property owner replacing the building 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.)

In this instance, the all beverage alcohol on-premises consumption license also existed prior to the City’s CLR overlay zone being created and adopted. Further, in this instance, the property owner and license owner intend to continue the existing use. The all beverage alcohol on-premise consumption license issued by the State of Montana is assigned to 1210 West Broadway. *Kensmoe v. City of Missoula* recognizes property owner vested rights to continue a nonconforming use.

However, those vested rights are limited to exactly the current extent of the current nonconforming use if the property owner does not elect to obtain a CLB zoning overlay. The Montana Supreme Court in subsequently discussing the *Kensmoe v. City of Missoula* Supreme Court decision in the subsequent *Russell v. Flathead County* case, (2003 MT 8, 314 Mont. 26, 67 P. 3d 182, 2003 Mont. LEXIS 7) indicated that continuation of a zoning nonconforming use, pursuant to the vested rights legal theory, confined the property owner to the extent of the existing non conforming use. Thus, the property owner would not be able to increase the number of tables or seats pursuant to the vested rights continuation legal theory.

## **CONCLUSIONS:**

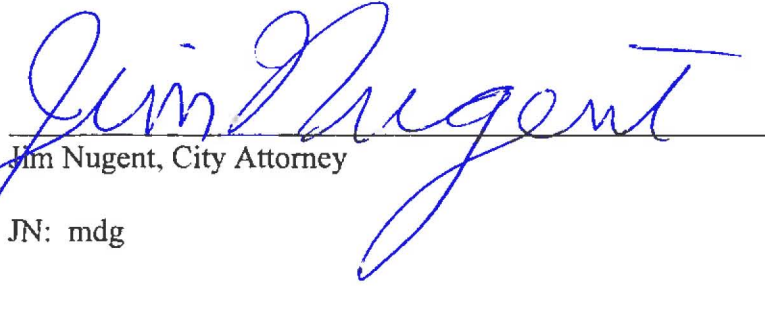
1. Yes, if the property owner at 1210 West Broadway were to remove the existing building, the new replacement building would be required to be constructed in compliance with applicable zoning setbacks pursuant to section 19.62.040 MMC unless a zoning setback variance was obtained.
2. Yes, there are many court cases indicating that property owner intent to not abandon or discontinue a nonconforming use is an important factor to consider, and also court decisions that such zoning time periods are rebuttable presumptions.
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4. Yes, the Montana Supreme Court in *Kensmoe v. City of Missoula* (1971) 156 Mont. 401, 480 P. 2d \*35, 1971 Mont. LEXIS 472 recognized a vested right to continue a nonconforming use of land holding that Ms. Kensmoe had “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 use of such trailer itself.”

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OFFICE OF THE CITY ATTORNEY



Jim Nugent, City Attorney

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