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Legal Opinion 2009-002

TO: **Pat Keiley OPG, Denise Alexander OPG**

CC: **Mayor John Engen; City Council, Bruce Bender; Roger Millar, OPG; Dept. Atty.**

FROM: **Jim Nugent, City Attorney**

DATE **January 30, 2009**

RE: **Replacement of Existing Residential Structure on a Lot Area Zoning Regulation Substandard Parcel of Land**

FACTS:

A member of the Office of Planning and Grants staff has requested a written opinion to address a substandard sized parcel pursuant to zoning regulation lot area size arising out of the following factual circumstances. A two story residential structure at 325 Eddy currently interiorly designed as a tri-plex residence is located on a zoning regulation substandard area sized parcel/ lot area that is only 1,306.8 square feet in size located adjacent to an alley. This two story residence was built prior to 1912 based on a 1912 Sanborn map and the residence has been occupied for approximately 96 years or more when the owner contacted OPG staff. A residence at 323 Eddy was built after the residence at 325 Eddy, sometime between 1912 and 1921. The original residential structures at 323 and 325 Eddy were located on portions of lots 6 and 7, block 3, Hammond Addition prior to any city zoning regulations. Both residences have continued to exist since their respective original construction. At some point in history, a legal description was written for the older residence at 325 Eddy located along the alley when the lady who owned the property was selling the residence at 323 Eddy pursuant to a newly created separate legal description. The legal description was then utilized in a July 6, 1937 warranty deed as land preserved subject to an easement for running a sewer drain across it to the alley to serve the 323 Eddy premises being conveyed. The July 6, 1937 warranty deed was a conveyance of the majority of lots 6 and 7, block 3, Hammond Addition. The preserved legal description land was subsequently separately, independently transferred by warranty deed several times (at least four (4) times) over the decades, commencing August 11, 1941 through February 7, 2008.

The City of Missoula adopted its first zoning ordinance August 9, 1932, which thirty (30) days later would have gone into effect September 8, 1932. The 1932 zoning ordinance pursuant to section 2 of the 1932 zoning ordinance included a minimum lot size provision of 5,800 square feet for the ”A” residence zoning district, which OPG staff indicates was made applicable to the

properties located at 323 and 325 Eddy pursuant to section 10 of the 1932 zoning ordinance. Subsequent zoning regulation amendments now provide for a 5,400 square foot mandatory lot size. While both the residences at 323 and 325 Eddy were already in existence when the City of Missoula's first zoning ordinance was adopted in 1932, it should be noted and emphasized that the 1932 city zoning ordinance pursuant to section 8 entitled "EXCEPTION TO AREA REQUIREMENTS" recognized and authorized residential buildings to be erected in the rear of other buildings on an inside lot in the rear of either an existing or proposed buildings and that "no rear yard need be provided for such rear building". Thus, the existence of both residences at 323 and 325 Eddy, with 325 Eddy constructed in the rear along the alley was specifically authorized pursuant to the 1932 city zoning ordinance.

Ms. Libby Langston purchased 325 Eddy February 7, 2008 and has made inquiry of OPG staff about replacing the current tri-plex residence built prior to 1912 with a single family residence. She would hope or desire to be able to continue to utilize the existing foundation and basement of the current 325 Eddy residence as part of her new single family residential dwelling unit to replace the existing tri-plex. She of course can continue to use the existing residence as a residence. She also could significantly remodel the existing residence at its existing site in phases over a period of time. However, she inquires as to whether she could remove the existing residence saving the basement and existing foundation to utilize as part of the new residence she desires.

ISSUE:

If the owner of the current triplex residence at 325 Eddy removes the residence as part of a project whereby she replaces the current triplex residence with a single family residence, may the owner of 325 Eddy continue to utilize the substandard parcel of land as a separate independent residential parcel of land?

CONCLUSION:

Yes, a vested right for residential dwelling unit use appears to legally exist. The Montana Supreme Court in 1971 in Kensmoe v. City of Missoula, involving a residential trailer house replacement, held that the property owner 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." In this instance a residential use of the residence at 325 Eddy has existed for nearly one hundred (100) years. The zoning regulation substandard square foot lot area parcel legal description has existed in Missoula County Clerk and Recorder records for nearly seventy-two (72) years and has been the subject of several real estate ownership transfers as a separate independent parcel or lot. It is now too late to attempt to prohibit its separate independent use as a residential lot without the city potentially being vulnerable to incurring a regulatory "taking" of the real property.

LEGAL DISCUSSION:

Documentation has been provided to the Office of Planning and Grants (OPG) staff that a separate legal description has existed on file with the Missoula County Clerk and Recorder for the residence at 325 Eddy for more than seven (7) decades pursuant to a warranty deed dated July 6, 1937. Further, this legal description has separately and independently been transferred in ownership several times since 1937 according to the Missoula County Clerk and Recorder records. While there is ample evidence submitted to OPG staff that the residences at both 323 and 325 Eddy predated by more than a decade the first City of Missoula zoning ordinance adopted August 9, 1932, it should also be noted that the 1932 City of Missoula's first zoning ordinance expressly allowed residential houses at the rear of "an inside lot" behind other buildings. Section 8(e) of the 1932 city zoning ordinance in section 8 entitled "EXCEPTION TO AREA REQUIREMENTS" stated:

> "(e) If a residential building is to be erected in the rear of an existing, or proposed building on an inside lot, there shall be side yards provided the same as if the building were on a separate lot, and , there shall be provided a front yard or open space between the rear lot line of the house in front, and the rear house, of not less than twenty feet; and no area shall be included twice in providing the yards for the different buildings; and no rear yard need to be provided for such rear building." (Emphasis added.)

It appears that for many years the existing residences at 323 and 325 Eddy were in common ownership. However, at some point in time the property owner created a separate legal description for each existing residence. Reportedly, it appears that the first time that the separate independent legal descriptions for both the front and rear residences appears in the Missoula County Clerk and Recorder real estate transfer records is pursuant to warranty deed dated July 6, 1937. There are numerous legal descriptions in Missoula County Clerk and Recorder real estate records that describe land by a written legal description including platted lots and/or portions of platted lots. The legal description for the rear residence built prior to 1912 is a zoning regulation substandard sized lot area pursuant to city zoning regulations adopted August 9, 1932. However, this substandard zoning regulation has also been the subject of several separate independent real estate transactions during the nearly seventy-two (72) years since the apparent first evidence in Missoula County Clerk and Recorder records of the legal description being established. The 325 Eddy residence has been used as a residence approximately 96 years or more at the time OPG staff was contacted in 2008 by the owner inquiring about replacement of the existing residence.

The 1971 Montana Supreme Court decision in Kensmoe v. City of Missoula, 156 Mont. 491; 480 P. 2d 835; 1971 Mont. LEXIS 472 involved a Plaintiff residential trailer house owner desiring to replace her trailer with a newer trailer suing the City of Missoula asserting that she had a vested right of nonconforming use for her trailer home on certain property. The Montana Supreme Court, supra, at pages 837-838 stated:

> "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, [. . .]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.

[. . .]

"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 USE OF SUCH TRAILER ITSELF THEREON, under the facts and law presented to the district court together with costs awarded to plaintiff." (Emphasis added.)

Here Ms. Libby Langston likewise likely has a legal vested right to utilize this zoning regulation substandard sized lot as a separate independent residential dwelling unit site.

Rathkopf's THE LAW OF ZONING AND PLANNING, Zeigler. volume 1, section 3.6, page 3-16 provides that zoning lot area restrictions may be "held invalid when found to be unreasonable as applied", and goes on to state in section 6.33 when discussing lot size and road frontage zoning requirements that "Nevertheless, when such restrictions, as applied, DEPRIVE THE OWNER OF ALL REASONABLY BENEFICIAL USE OF THE LAND, either type of RESTRICTION MAY BE HELD CONFISCATORY." (Emphasis added).

Rathkopf's, Volume 3, §49:10 Unreasonable as applied – Confiscatory taking - Generally" provides at pages 49-10 through 49-15 in pertinent part as follows:

§49:10 Unreasonable as applied – Confiscatory taking – Generally

If an isolated substandard lot, which was of a size, width, or frontage that conformed to the requirements of an ordinance at the time that it was created (or which was created in the absence of such zoning), is unable to be used and thus rendered valueless by greater area, width, or frontage provisions of a later zoning ordinance, application of the later adopted ordinance provisions to deny the owner of the substandard lot all reasonable "economically viable" use of the land will likely be held a confiscatory taking of the lot in question."

This constitutional taking analysis is set forth at length in the New Jersey case *Dallmeyer v. Lacey Township Board of Adjustment*.

The Fifth Amendment to the United States Constitution and Article I, Paragraph 20 of the New Jersey Constitution prohibit the taking of property for public use without just compensation. A "taking" may occur without a formal condemnation proceeding or transfer of fee simple. "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The

vitality of that general principle was recognized in Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106 (1980), wherein the Court noted that "[T]he application of general zoning law to particular property effects a taking if the ordinance . . .denies an owner economically viable use of his land. . . ." Restrictions on land use short of total appropriation, if sufficiently extensive and prolonged, may constitute a taking." Such a taking may occur when area restrictions are applied to substandard lots. This doctrine was described well in Graves v. Bloomfield Planning Bd., 97 N.J. Super. 306, 235 A.2d. 51 (Law Div. 1967): It is clear that if this lot, located in a single-family residential zone, cannot be used for construction of the proposed dwelling, it will for all practical purposes be useless. It is settled in this State, as well as in other jurisdictions, that a Municipality may not destroy the economic value of an isolated lot. . .

In the context of a valid nonconforming "isolated substandard lot," courts generally have held that the owner is entitled to a variance to put the lot to a practical "economically viable" developmental use, and that the owner may not constitutionally be denied a variance based on the potential value of the lot if sold to an adjoining owner or on the potential developmental value of the lot if the adjoining land of another is acquired.

Likewise McQuillin, Municipal corporations, 3rd edition revised, volume 8, section 25.140.10 at pages 528-529 states:

> "An area or dimensional requirement or regulation where it is related to public necessity, convenience or welfare, is a proper exercise of the zoning power, and does not per se violate constitutional rights or guarantees. ON THE OTHER HAND, SUCH A REQUIREMENT WILL BE INVALID WHERE IT IS UNREASONABLE, DISCRIMINATORY, OR CONFISCATORY, EITHER IN GENERAL, OR IN ITS APPLICATION TO PARTICULAR PROPERTIES, OWNERS OR CIRCUMSTANCES. (Emphasis added.)

A potential regulatory "taking" could exist in the factual circumstances present here if the City of Missoula does not continue to allow the legal description for the residence at 325 Eddy to continue to be used as a separate independent residential dwelling unit site. The above quoted section from McQuillin's goes on to state that in determining the validity of a minimum area restriction, financial loss to property owners is a factor to consider. Thus, the city non conforming lot zoning ordinance could potentially be declared invalid as applied to the property/property owner at 325 Eddy.

In these factual circumstances based on Montana Supreme Court case law in Kensmoe v. City of Missoula as well as the legal treatises cited above, the 325 Eddy property owner would appear to have a vested right to continue to use the substandard lot as a separate independent residential parcel or lot, even if the current triplex was removed in order to replace it with a single family residence. If the City did not allow a separate independent residential use to continue in these factual circumstances, the City would likely be vulnerable to a regulatory "taking" being found to have occurred

It may be that the property owner's proposed plans might necessitate the need for a variance(s). Thus, it would be important for the property owner to fully determine not only her alternative options, but if an option may necessitate a variance to obtain any variance(s) prior to commencing the project.

CONCLUSION(S):

Yes, a vested right for residential dwelling unit use appears to legally exist. The Montana Supreme Court in 1971 in Kensmoe v. City of Missoula, involving a residential trailer house replacement, held that the property owner 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." In this instance a residential use of the residence at 325 Eddy has existed for nearly one hundred (100) years. The zoning regulation substandard square foot lot area parcel legal description has existed in Missoula County Clerk and Recorder records for nearly seventy-two (72) years and has been the subject of several real estate ownership transfers as a separate independent parcel or lot. It is now too late to attempt to prohibit its separate independent use as a residential lot without the city potentially being vulnerable to incurring a regulatory "taking" of the real property.

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