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Legal Opinion 2012-005

TO: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Don Verrue, Building Official; Steve Meismer, Building Division; Steve King, Public Works Director; Jessica Miller, Public Works; Mike Barton, Director of OPG; Denise Alexander, Principal Planner, Permits & Projects OPG; Laval Mean, OPG; Mary McCrae, OPG

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE March 9, 2012

RE: Vested rights related to land development projects involving multiple buildings in identical ownership on same lot(s), parcel(s) and tract(s)

FACTS:

January 13, 2012, pursuant to 54 Op. Att'y Gen. No. 22, the Montana Attorney General ("AG") disagreed with prior written advice provided to the City of Missoula pursuant to a February 27, 1995 letter from the AG's Office. The letter held in part that "Section 76-3-204 MCA exempting from subdivision review the 'sale, rent, lease or other conveyance of one or more parts of a building, structure, or other improvement, whether existing or proposed' does not apply to the construction or conveyance of more than one building, structure or improvement on a single tract of record." (Copy attached of 2/27/95 letter.)

The AG stated that the prior letter of advice issued February 27, 1995, to the City of Missoula on the identical, specific topic that reached a contrary conclusion "should no longer be deemed authoritative." The letter basically reduced to writing, legal advice given verbally by staff attorneys at the Attorney General's Office; legal counsel of the Montana Department of Commerce, Local Government Assistance Division; and staff attorneys at the Missoula County Attorney's Office. That advice had been provided since 1985 when the Montana State Legislature amended Mont. Code Ann. § 76-3-204. The amendment came a year after the AG issued an opinion to the City of Missoula holding that the City of Missoula could require Bill and Dennis Curran to submit their development proposal to construct 48 four- plexes (192 residential dwelling units) in the South Hills for subdivision review. The legal advice given verbally by the aforementioned state officials was known to not only City of Missoula officials, professional engineers, architects, and developers but also many other persons throughout the

state. Many people relied on the AG's verbal advice as well as the letter of advice issued February 27, 1995.

Currently there are several development projects involving multiple buildings for lease or rent involving all buildings in the same identical ownership located on the same land area that were already under construction and/or had already incurred significant monetary expenditures with respect to the planning, design, preparation, financing, etc. for commencement of construction. Examples include a multi-building apartment complex along the north side of 39th Street a short distance east of Safeway as well as an apartment complex along Mullan Road a short distance west of Wal-Mart. Known projects that have significant monetary advance preparation already performed include a Missoula Housing Authority residential partnership project north of South Third Street and west of Russell Street as well as an additional building that may have rental or lease space within it on the Community Medical Center campus in the Fort Missoula area. There very well may be others.

ISSUE:

Pursuant to the factual circumstances described above, is it possible for a land owner and/or developer proceeding in good faith reliance on local government guidance and representations to obtain vested rights that may estop the local government from attempting to stop a development project and require it to go through subdivision review pursuant to 54 Op. Att'y Gen. No. 22?

CONCLUSION:

Multiple Montana Supreme Court decisions have held that municipalities may be estopped from halting a land development project involving interpretation of land use regulations where persons acting in good faith made a substantial change in position in reasonable reliance upon conduct or representations of municipal officials or agents. *Barker v. Town of Stevensville* held it was fundamentally unfair for Stevensville officials to deny a building permit for a double wide mobile home. *State ex rel. Barker v. Town of Stevensville,* 523 P.2d 1388, 1391 (Mont. 1974). *May v. Hartson* and *Town of Boulder v. Bullock,* both involved Montana Supreme Court decisions wherein the municipality was estopped from revoking a building permit for construction projects that had already commenced. *State ex rel. May v. Hartson*, 539 P.2d 376, 380 (Mont. 1975); *Town of Boulder v. Bullock*, 632 P.2d 716, 720 (Mont. 1981).

LEGAL DISCUSSION:

Each instance requires a review of case by case factual circumstance. A determining factor is whether there was any good faith adverse or detrimental reliance on the former interpretation of Mont. Code Ann. § 76-3-204 as administered by City of Missoula agents and representatives. Mont. Code Ann. § 76-3-204 provides:

> **76-3-204**. Exemption for conveyances of one or more parts of a structure or improvement

> The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement, whether existing or proposed, is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter.

Three significant Montana Supreme Court decisions involving third parties' good faith detrimental reliance on the representations of municipal government officials, employees or agents pertaining to municipalities and land improvement projects are:

State ex rel. Barker v. Town of Stevensville.

Barkers desired to move from California to Stevensville. Mr. Barker was confined to a wheelchair. Barkers purchased two lots in Stevensville, then purchased a double wide mobile home in Hamilton. Their representative appeared before the town council to obtain a building permit for the double wide mobile home. The town council wanted more information and asked the police chief to view the double wide mobile home. The mayor also volunteered to go view the mobile home. When the mayor returned he instructed a town official to issue building permits. Permits were issued for town water main and sewer taps to accept connections from Barkers double wide mobile home. However, the town official did not have enough information yet to issue the building permit. The mayor also told the Barkers agent that the building permit had been issued. The agent wrote the Barkers informing them that the building permit was issued.

The town council then denied the building permit. One half of the mobile home was moved onto the two lots. Barkers did not yet know of the town council's rejection of the building permit. Pursuant to advice of private legal counsel the second half of the double wide was moved onto Barkers' property. Barkers came from California. Neighbors sued Barkers about the double wide mobile home. The Town of Stevensville joined the neighbors' lawsuit. Town council ordered removal of the double wide. The mobile home was repossessed but Barkers still owned the two lots.

The Montana Supreme Court held:

> We find the issue raised by the record, briefs, and argument is whether the conduct of the town council and the mayor of Stevensville was so fundamentally unfair to the Barkers as to require reversal. We hold that it was.
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> . . .
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> Where any danger to the public is slight and a citizen has made a good faith and substantial change in position in reasonable reliance upon the conduct or representations of municipal officials and agents, several courts have estopped the local government from exercising their 'police power' in a way inconsistent with their prior representations on actions.' We agree with this approach. In cases of this kind there should be a balancing of the municipal corporation's unwarranted assumption of risk of liability for acts or statements of its agents or employees made in excess of their authority against the harm done to good faith, innocent and

> unknowledgeable third parties who act in reliance upon those representations. It follows that each case will necessarily have to be judged upon its own unique factual situation.
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> . . .
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> Applying what has been said heretofore to the instant case, we find that a town official, the mayor, represented to Barkers' agent that a building permit had issued, when in fact it had not, thereby resulting in a course of action by the Barkers and their agent leading to a substantial loss.

State ex rel. Barker v. Town of Stevensville, 523 P.2d 1388, 1391 (Mont. 1974). (Emphasis added.)

State ex rel. May v. Hartson.

City of Havre officials received a request to build a 12-plex apartment building on each of two parcels of land contiguous to each other each with four platted lots within each parcel in an area zoned commercial-local. City officials determined that the set back requirement from the alley of 30' for commercial buildings applied rather than the 40' for residential and considered each 12-plex to be a commercial building. Building excavation occurred, footings for the foundations were poured, daylight basement partitions were framed and framing of exterior walls up to the second floor level was completed, when in response to neighborhood concerns, a city official informed the builders that there might be a possible error in the setback determination; but he did not issue a stop work order. However, after additional review, city building engineer decided the land use was a commercial use that complied with zoning. Neighbors sued. The district court concluded that city officials were estopped from taking the action which the residents sought to require of them and denied the residents writ of mandate.

The Montana Supreme Court concluded:

> Further, in light of our decision in *State ex rel. Barker v. Town of Stevensville,* (citations omitted), we hold that the city of Havre was estopped in revoking its building permit after it was issued and the Builders relied on it to their detriment and we affirm the district court finding. Even if Builders had reviewed the zoning ordinance themselves as argued by Residents, nowhere could they have discovered the building permit was erroneously issued, if indeed it had been.

State ex rel. May v. Hartson, 539 P.2d 376, 380 (Mont. 1975). (Emphasis added.)

Town of Boulder v. Bullock.

Owners obtained a building permit allowing them to erect a home and an office on their property. No survey was performed prior to the issuance of the permit. Bullock determined the boundary of the property on the street by observing the position of the lots and the state of the physical features of longstanding, including a fence erected prior to the purchase of the property as well as other facilities located along the street and power and telephone poles. A drawing was submitted as a plan that in part measured a distance from a corner of an existing building. A building permit was issued. Bullocks ordered materials, hired contractors and

completed the excavation of their proposed home and office, had the footings poured on the foundation and walls, and had the foundation walls themselves poured

After construction commenced it was discovered that the building encroached onto a town street. During the additional review that occurred the minutes of the town council indicate that there was a representation by the town council that they "would never make a man tear down his house." Bullock continued with the work and completed the basement floor, which was poured by a member of the city council. A land survey then indicated that Bullocks were encroaching 18' into the street right of way, which was an 80 foot right of way. Bullocks continued building their home and office putting up trusses and other wood elements of the buildings. Approximately one year after a building permit had been issued and much work had occurred, the town of Boulder without informing Bullocks discussed the survey and encroachment and determined to require Bullocks to tear down the encroachment and sought an injunction against the construction. The district court refused to grant an injunction as well as denied the town of Boulder's request for relief to have the new construction tore down.

The Montana Supreme Court in Bullock affirmed the District Court judge. The district court judge had found that some acts of the town of Boulder constituted a representation or concealment of material facts. The Montana Supreme Court stated:

We agree with the District Court that the facts are sufficient to deny the Town's request for removal of the structure. In particular the judge found: that the building permit constituted an authorization to proceed and a representation that the plans submitted by the Bullocks were proper; that the acts and representations of the city council constituted a representation reasonably taken by the Bullocks as authorization to proceed with their construction after the presence of the encroachment was discovered . . . .

Town of Boulder v. Bullock, 632 P.2d 716, 720 (Mont. 1981). (Emphasis added.)

Pursuant to many factual circumstances that must be reviewed on a case by case basis, there has been action taken in good faith by third party land owners and/or developers and/or their agents, at significant monetary expense, that is now potentially adversely affected by the 2012 AG opinion. The AG opinion revises the decades old interpretation of Mont. Code Ann. § 76-3-204 by state officials. City consideration of landowner and/or developer vested rights that may estop the city from imposing the new AG interpretation of Mont. Code Ann. § 76-3-204 MCA must be weighed on a case by case basis analysis to ascertain if there has been any factual circumstances that occurred that establish a good faith detrimental reliance that caused monetary expenses or potential losses to a property owner or developer, etc.

Obviously, the examples of land use development projects already issued building permits and under construction, such as the multi-building apartment buildings in the same identical ownership on the same parcels, lots, or tracts are easily determined to be allowed to continue on with their projects. There also are known to exist proposed development projects for which significant expenses were already incurred prior to the new January 13, 2012 AG Opinion. The planned land development projects for which building permits have not yet been issued, will be a bit more challenging to review and their respective factual circumstances will

have to be reviewed on a case by case basis. However, if it can be established that good faith detrimental reliance occurred prior to January 13, 2012, projects will be allowed to proceed without subdivision review.

CONCLUSION:

Multiple Montana Supreme Court decisions have held that municipalities may be estopped from halting a land development project involving interpretation of land use regulations where persons acting in good faith made a substantial change in position in reasonable reliance upon conduct or representations of municipal officials or agents. *Barker v. Town of Stevensville* held it was fundamentally unfair for Stevensville officials to deny a building permit for a double wide mobile home. *State ex rel. Barker v. Town of Stevensville,* 523 P.2d 1388, 1391 (Mont. 1974). *May v. Hartson* and *Town of Boulder v. Bullock,* both involved Montana Supreme Court decisions wherein the municipality was estopped from revoking a building permit for construction projects that had already commenced. *State ex rel. May v. Hartson*, 539 P.2d 376, 380 (Mont. 1975); *Town of Boulder v. Bullock*, 632 P.2d 716, 720 (Mont. 1981).

OFFICE OF THE CITY ATTORNEY

/s/

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JN:kmr

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February 27, 1995

Mr. Jim Nugent
Missoula City Attorney
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Missoula, MT 59802-4297

Re: January 9, 1995 Opinion Request Concerning Application of Mont. Code Ann. § 76-3-204 (1993) to Multi-Family Residential Structures

Dear Mr. Nugent:

You have requested an Attorney General's Opinion concerning whether 1985 Montana Laws chapter 500 (codified at Mont. Code Ann. § 76-3-204 (1993)) effectively overruled 40 Op. Att'y Gen. No. 57, at 229 (1984). Because the 1985 amendment had that effect, it has been determined that issuance of a formal opinion is unnecessary.

The question in 40 Op. Att'y Gen. No. 57 was whether the construction of 48 four-plex housing units for residential purposes constituted a "division of land" within the scope of Mont. Code Ann. § 76-3-103(3) (1983). Attorney General Greely held that it was a division of land and, in so concluding, rejected applicability of the exemption in Mont. Code Ann. § 76-3-204 (1983). His latter conclusion was based on 39 Op. Att'y Gen. No. 74, at 262 (1982), in which the term "situated" in § 76-3-204 was construed to refer only to the sale, rental or lease of a building existing and utilized prior to the act of subdivision.

The 1985 amendment to § 76-3-204 added the words "whether existing or proposed." The unmistakable import of the addition was to extend the exemption to all conveyances of part of a building without reference to whether the structure was actually utilized before the subdivision. See 45 Op. Att'y Gen. No. 12 (1993).

Your letter also asked whether the exemption in § 76-3-204 applies to a project involving multiple units--here 18 residential structures located on an 11.45-acre parcel. As was implicit in 40 Op. Att'y Gen. No. 57 and otherwise warranted by ordinary rules of statutory construction (Mont. Code Ann.

§ 1-2-105(3) (1993)), use of the singular in "building, structure, or other improvement" includes the plural under the circumstances here. The purpose of § 76-3-204 is to exclude from subdivision review transactions which involve only the convevance of parts of the building, and I see nothing in the provision's language which suggests that the exemption is forfeited merely because a landowner conveys interests in more than one building located on a parcel of land. This letter may not be construed as an official opinion of the Attorney General.

Sincerely,

CLAY R. SMITH
Solicitor

crs/mlr