OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2012-009

TO: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Mike Barton; Denise Alexander; Laval Means; Jen Gress; Tom Zavitz; Pat Keiley; Steve King; Kevin Slovarp; Don Verrue; Steve Meismer; Ellen Buchanan; Chris Behan

CC: Legal Staff

FROM: Jim Nugent, City Attorney

DATE August 16, 2012

RE: Potential creation of accessory apartments or accessible dwelling units in single family homes in single family zoning districts pursuant to zoning regulations that require at least one of the dwelling units to be owner occupied.

FACTS:

Newly elected city council member Alex Taft has expressed interest in having the city council and planning staff gather information and review the potential for the City of Missoula city council to consider whether pursuant to title 20 City Zoning regulations, accessory dwelling units should be allowed or authorized in Single Family Zoning districts. City council interest has been expressed in obtaining more public input and information concerning this possibility; but no specific city zoning ordinance regulation has been drafted yet by OPG staff for city council consideration and deliberation. Some opponents to such city council consideration or adoption assert that owner occupancy of one of the dwelling units is not legal.

ISSUE(S):

1.) If creation of accessory apartments or accessory dwelling units were allowed in single family zoning districts could the city council require that one of the two dwelling units be owner occupied?

CONCLUSION(S):

Legal research indicates that there are local government zoning regulations emerging nationwide that authorize accessory apartments or accessory dwelling units in single family zoning districts or neighborhoods in factual circumstances where one of the dwelling units is required to be owner occupied.

LEGAL DISCUSSION:

Generally it is not legal to create a single family zoning district that requires every dwelling unit within the single family zoning district to be owner occupied. There are numerous compelling reasons why a single family residence intended to be owner occupied, practically speaking is not owner occupied such as 1.) owner called to active military duty; 2.) owner working out of town, out of state, or out of country, 3.) owner in nursing home; rehabilitation facility or, home for aged; 4.) owner is a corporation that acquired residence when it transferred employee out of town; 5.) Bank or lending institution owns residence; 6.) owner only a seasonal resident of community; 7.) residence is in bankruptcy or foreclosure proceedings; 8.) residence is in estate proceedings; 9.) owner is part of a teacher or other work exchange with another teacher or worker from elsewhere; 10.) owner inherited residence but already has a residence, etc.

Generally zoning ordinances are concerned with the use of property and not with the ownership of it nor the purposes of the owners or occupants. McQuillin, Municipal Corporations, 3rd Edition Revised, Volume 3, Section 25.19, pages 92-93.

Rathkopf The Law of Zoning and Planning, volume 1, sections 2:16 and 2:17 as well as volume 5, section 81.4 likewise notes that generally zoning regulations focus on land use not ownership of the land,

> **§ 2:16 Zoning regulates the use of land – Identity or status of land users**
>
> **"**Despite widespread zoning practice to the contrary, zoning restrictions, conditions, or decisions which limit the use of land based on the identity or status of the users of the land generally will be held invalid by the courts. Zoning regulations which limits the use of land based on the race, ecomonic status, age, blood, relationship, or identity of the user or owner may be held invalid on either due process or equal protection grounds as a restriction by classification that is unrelated to any legitimate public purpose. Such restrictions also may be held ultra vires as beyond the scope of authority delegated by a zoning enabling act…." (emphasis added)
>
> See pages 2-44 through 2-46
>
> **§ 2:17 Zoning regulates the use of land – Form of ownership – Time sharing**

"As discussed above, a number of courts have ruled that zoning enabling acts authorize local regulation of land use but not regulation of the identity or status of owners or persons who occupy land. This ultra vires rule also has been extended by courts to hold zoning restrictions invalid which are designed to control the form of land ownership or the alienability of possessory or other interests in land….." (Emphasis added)

See page 250

§ 81.4 Occupancy or ownership – Identify of occupant or owner

Zoning restrictions or conditions that limit the use of land based on the identity or status of the owner or occupant of the land generally are held invalid by the courts. Zoning regulation that limits the use of land based on race, economic status, age, blood relationship, or identity of the user or owner may be held invalid on either due process or equal protection grounds as an arbitrary restriction unrelated to any legitimate public purpose.

Restrictions based on the identity of the owner or occupant also may be held ultra vires as beyond the scope of authority delegated by a zoning enabling act…..(emphasis added)

See page 81-5

However, in part as a result of "changing economic and social conditions" there are emerging local government zoning ordinances, that are authorizing accessory apartments or accessory dwelling units in single family zoning districts, or neighborhoods that are requiring that in these factual circumstances involving multiple dwelling units one of the multiple dwelling units must be owner occupied.

Rathkopf, "The Law of Zoning and Planning," volume 1, Sections 23.3 and 23.4 discusses this emerging creation of accessory apartments in single family homes as follows:

§ 23:3 Permitted alternative residential uses

…. Developments such as the increased cost of new housing and the changing nature of American households have already contributed to the emergence of alternative residential uses and living arrangements in many neighborhoods throughout the country. A decreasing number of neighborhoods today can be said to epitomize the traditional neighborhood vision of on-site built, detached, single-unit homes occupied primarily by nuclear families with children. Alternative residential uses and living arrangements such as group homes, shared housing, attached and

detached accessory apartments, and manufactured housing are increasingly found in neighborhoods zoned for single-family use.

The economic necessity for, and desirability of, the shared household living arrangement is likely to affect both urban and outlying suburban areas, where there has been a dramatic increase in the number of elderly "empty-nest" households and where large homes are increasingly occupied by fewer and fewer people. The build up of surplus space in single-unit homes and the housing affordability problem have also contributed to the tremendous increase in the number of houses that are being converted to two-unit dwellings. Recent reports indicated that accessory apartments are being added to existing single-family homes at a rate unprecedented since the post-World War II period. The National Association of Homebuilders has estimated that such conversions are occurring at a rate of 300,000 a year – nearly one-half of the estimated number of new houses sold in 1983. According to one report, the creation of accessory apartments in single-family homes is "a sweeping new phenomenon" that "touches all types of localities – large, and small; suburban and exurban; old and young, wealthy and not-so-wealthy." A less widespread development is the use of detached accessory units so called "ECHO housing," in single-family neighborhoods. ECHO housing – the residential use of a small factory-built or conventionally constructed dwelling unit located on the same lot with an existing, single-family home – is reported to be increasing as new households and elderly persons choose this form of living arrangement as a less expensive alternative housing option.

The integrity of single-family zoning has also been undermined by the location of group homes in many neighborhoods. This is the result of the widespread movement to either deinstitutionalize or rehabilitate disabled or depended persons through the normalization process of a group home living environment in residential neighborhoods.

….

Many local communities are responding to these changes, particularly the housing affordability problem and the changing nature of households, by revising their zoning codes to allow for the location of one or more of these alternative residential uses in areas that were formerly zoned exclusively for single-family use. In many cases, local communities have voluntarily revised their zoning codes to allow one or more of these alternative uses in residential areas, subject to zoning restrictions and standards which attempt to protect against the alleged adverse impact of such uses on neighborhoods.

….

§ 23:4 Regulation of alternative residential uses

> The traditional zoning policy of restriction and exclusion of alternative residential uses in single-family areas has begun to give way to an emerging policy of accommodation through regulation. Sound planning and land use regulation are increasingly perceived as compatible with the development of alternative forms of housing and living arrangements in areas of detached single –unit dwellings. New strategies for development and for infilling and adaptive reuse of housing in both urban and suburban neighborhoods have emerged which increasingly provide for the use of shared housing and accessory apartments, ECHO housing, group homes, and manufactured housing. Whether zoning codes are revised voluntarily or as the result of judicial or legislative mandate, local communities generally have the discretion to impose reasonable restrictions on alternative uses and often regulate parking, exterior appearance, owner occupancy, and lot and dwelling size.
>
> Many communities have revised their zoning codes to allow accessory apartments in single-family homes, but impose a number of restrictions on such conversions to protect the residential character of neighborhoods. Owners usually must occupy such housing, and codes often restrict eligible tenants, lot and apartment size, exterior appearance, and parking. Where ECHO housing is permitted in areas of detached homes, it is commonly subject to zoning restrictions on occupancy, floor space, height, setback, and parking. Similar zoning restrictions, often apply to shared housing and manufactured housing. Group homes, shared housing, and accessory apartments may also be subject to special or conditional use permits and site plan review. The due process and equal protection issues that may arise as a result of the imposition of special zoning restrictions on these alternative residential uses are discussed in the following sections.

See pages 23-9 through 23-17. Footnote 2 for Section 23-4 on page 23-16 identifies six (6) criteria that are commonly associated with these accessory apartments/dwelling units, one of which is that the home must remain owner occupied. The pertinent part of the footnote provides:

> A study conducted of communities in New York, New Jersey, and Connecticut showed that those communities which have legalized additional dwelling units have set forth regulations which meet six criteria the homes must remain owner-occupied; there may be only one front entrance; sufficient off-street parking must be provided; the new units must comply with rigid building code requirements; adequate water supply and drainage facilities must be available; and new homes must be excluded to prevent traditional two-family style homes from being built. Legalizing Single-Family Conversions (Tri-State Regional Planning Comm'n, 1981). See also Department of Planning, Westchester County, A Guide to Accessory Apartment Regulations: Meeting Smaller

Household Needs (1981); Department of Planning and Community Development, Town of Babylon, Report on Illegal Two-Family Dwellings in the Town of Babylon (1979); Hare, “Carving up the American Dream,” Planning, July 1981, at 14; Hare, “Outline for a Housing Conversion Bank for Creation of New Accessory Apartment Housing in Single-Family Units” (a paper, 1980). (Emphasis added).

Pursuant to Section’s 76-2-411 and 76-2-412 MCA pertaining to community residential facilities, Montana state law authorizes quite a broad spectrum of community group homes to be located in all residential zones within the state of Montana.

Multiple legal treatises note and discuss the local zoning requirement associated with accessory apartments or dwelling units in single family zones having an owner occupancy requirement:

Matthew Bender & Company, Inc. is a legal treatise that discusses zoning regulation required owner occupancy of accessory apartments or dwelling units in single family zoning districts. Stating in part as follows in chapter 40 A accessory uses and structures, 7-40A2 owing and land use controls §40A.05.

“A number of communities have experimented with allowing "accessory dwelling units" in some zoning districts otherwise limited to single-family dwellings. Such units are sometimes called "granny flats," "mother-in-law apartments," or simply "accessory apartments." Planners and housing advocates urge that they provide a number of benefits: they offer senior citizens in large homes a possible way to maintain their homes and age in place, renting out part of the home and, perhaps, requiring the tenant to provide some basic maintenance such as lawn care; they can provide affordable housing for college students or young singles or couples; and, as the colloquial names for them suggest, they provide a form of somewhat independent living for an aging family member.

Zoning for such units is an issue only in exclusively single-family districts. In districts that allow duplexes or apartment houses, such units are generally allowed. Some modern zoning ordinances, however, allow accessory units in some districts that are otherwise limited to single-family dwellings. Accessory dwelling units are often allowed in the same building as the principal residence; in other cases they may be allowed above a garage, following a tradition of "carriage house apartments" that once provided housing for servants and young adult family members.

In concept, a residence with an accessory dwelling unit is significantly different from a duplex. A duplex typically has two units of similar size, both rented out. The intent of programs encouraging accessory dwelling units is to maintain the dominant single-family character of the principal residence, with the additional unit having the "subordinate" nature of other accessory uses (see § 40A.01). Despite these efforts, neighbors may oppose the creation of a particular accessory unit, because it represents an increase in density in a neighborhood. In typical suburban neighborhoods, the only

evidence of the increase in density likely to be apparent will be an increase in the number of vehicles to be parked. [26.1]

One of the challenges in regulating such units is in defining them. They are typically defined to include full bathing and cooking facilities. A significant number of large homes today, however, have multiple bathrooms and relatively complete second kitchens attached to recreation rooms. Thus, any definition that treats a residence with a second kitchen as having a second dwelling unit can be problematic in some areas. The City of Boulder has provided the following criteria for accessory dwelling units:

> Criteria: The accessory dwelling unit is clearly incidental to the principal dwelling unit and meets the following criteria:
>
> > (i) The accessory dwelling unit is created only in a single-family detached dwelling unit on a lot of six thousand square feet or more.
> >
> > (ii) The accessory dwelling unit is a minimum of three hundred square feet, and does not exceed one-third of the total floor area of the principal structure, unless a variance is granted pursuant to section 9-2-3, "Variances and Interpretations," B.R.C. 1981, or one thousand square feet, whichever is less.
> >
> > (iii) The accessory dwelling unit utilizes only those utility hookups and meters allotted to the detached dwelling unit.
> >
> > (iv) The accessory dwelling unit is created only through internal conversion of the principal structure. Minor exterior changes may be made on the building, however, if the square footage added constitutes no more than five percent of the principal structure's existing foundation area.
> >
> > (v) If there is an interior connection between the accessory dwelling unit and the principal dwelling prior to the creation of the accessory dwelling unit, the connection shall be maintained during the life of the accessory dwelling unit. Any additional entrance resulting from the creation of an accessory dwelling unit may face the side of the lot fronting on the street only if such entrance is adequately and appropriately screened in a manner that does not detract from the single-family appearance of the principal dwelling.

In an effort to ensure that accessory dwelling units remain subordinate to the principal unit, some communities allow accessory dwelling units only in an owner-occupied residence. In general, zoning regulates the use of property, not the ownership (see, for example, the discussion of this issue regarding variances in §43.01[6]). Courts addressing the validity of such owner-occupancy restrictions have split.

The courts that have upheld the owner-occupancy requirements have looked at the purposes of such requirements have looked at the stated benefits of the adopted ordinances. For example, an appellate court in New York cited favorably these recited purposes of the ordinance adopted by the Town of Brookhaven:

> "to provide the opportunity and encouragement for the development of small rental housing units designed, in particular, to meet the special housing needs of single persons and couples of low and moderate income, both young and old, and of relatives of families presently living in the Town of Brookhaven. Furthermore, it is the purpose and intent of this local law to allow the more efficient use of the town's existing stock of dwellings to provide economic support of present resident families of limited income and to protect and preserve property values"

Similarly, the Utah high court quoted this language from the purpose statement of an overlay zoning district allowing accessory dwelling units in Provo as it upheld the owner occupancy requirement:

> to recognize the unique character of Provo City as a "university community" and to accommodate supplementary living accommodations in some appropriate single family residential areas of the community. The[] [S Overlay] provisions are intended to meet community demands for residential accommodations for semitransient residents in areas of the community adjacent to major educational and institutional uses. This overlay zone is designed to provide an alternative living environment for said semitransient residents to that normally found within the higher density multiple residential zones. The (S) overlay zone will therefore protect and enhance the desirable aesthetic characteristics of the underlying single family residential zone. ... The sole function of the overlay is to permit alternate methods of housing the occupancy otherwise permitted in an R1 [single-family residential] zone.

In contrast, in striking down a similar owner-occupancy requirement and expressly rejecting the views of the New York and Utah courts, the North Carolina Supreme Court looked to traditional provisions of zoning law to hold:

> Here, the owner occupancy requirement of WLDC § 18-285(g) is at odds with our precedents, as it is "beyond the power of the municipality to regulate the manner of ownership of the legal estate."

It is difficult to draw conclusions from these three cases that will guide the results in other states. The clearest message is that a strong purpose statement is important to support this type of regulation. (Emphasis added)

Pertinent footnotes to the above quoted text from Mathew Bender & Company Inc. provide:

See, for example, City of Wilmington v. Hill, 189 N.C. App. 173, 657 S.E.2d 670 (2008) , where the local ordinance allowed "garage apartments" in certain districts provided that the owner resided either in the principal dwelling unit or in the garage apartment. And see Kasper v. Brookhaven, 142 A.D.2d 213, 535 N.Y.S.2d 621 (N.Y. App. Div. 2d Dep't 1988):

> Moreover, Brookhaven Town Code § 85-411 (B) (1) sets forth an owner occupancy requirement as follows: "Owner occupancy required. The owner(s) of the lot upon which the accessory apartment is located shall reside within the principal dwelling building." 142 A.D.2d at 216, 535 N.Y.S.2d at 622. (Emphasis added)
>
> Footnote 26.4. See Anderson v. Provo City Corp., 2005 UT 5, 108 P.3d 701, 706 (Utah 2005) (upholding such a requirement); Kasper v. Town of Brookhaven, 142 A.D.2d 213, 220-21, 535 N.Y.S.2d 621 (N.Y. 1988) (also upholding an owner occupancy requirement) and City of Wilmington v. Hill, 189 N.C. App. 173, 657 S.E.2d 670 (2008) (citing the other two cases and rejecting their view). (Emphasis added)
>
> Footnote 26.5. Kasper v. Brookhaven, 142 A.D.2d 213, 215, 535 N.Y.S.2d 621, 622 (N.Y. App. Div. 2d Dep't 1988) , quoting Town of Brookhaven Code § 85-411 (A). The material part of the court's opinion on this subject were these two paragraphs:

There can be no dispute that Town of Brookhaven Code § 85-411 distinguishes between those homeowners who occupy their premises and those who do not. It accords these two groups different treatment by providing owner-occupants with an opportunity to obtain rental income while failing to offer a similar opportunity to nonoccupying owners, many of whom are already leasing their homes to outside tenants. Hence, the focus of our inquiry must of necessity come to rest upon whether the classification is rationally related to the permissible goals of zoning legislation. While the statement of purpose found in Town of Brookhaven Code § 85-411 (A) emphasizes the importance of supplying moderately priced, desperately needed housing in a small and unobtrusive rental setting, it attaches equal significance to providing single-family homeowner-occupants of limited means, who must continue to pay the carrying costs on their homes, with additional income so as to ameliorate their financial burdens. We discern nothing improper in the goal of alleviating the growing shortage of affordable housing within the town while at the same time providing financial relief to those homeowners who may be of modest means and who will be better able to retain ownership of their residences and to maintain them in aesthetically acceptable condition by leasing the available, unused living space in their homes.

Similarly, we perceive nothing arbitrary or irrational in the inclusion of an owner-occupancy requirement within Town of Brookhaven Code § 85-411 in order to achieve this goal. Indeed, only a finite number of accessory apartments are authorized by the

law so as not to disrupt the single-family home character of the zoning districts affected. In view of this limitation, it is not altogether improbable that were nonoccupying homeowners who maintain their properties for investment purposes allowed to take advantage of the accessory apartments legislation, many occupying homeowners of lesser financial means would be denied the opportunity to supplement their income with rental funds. A major goal of the challenged legislation clearly would be frustrated under such a scheme, for the owners who occupy their homes would be left without the moneys needed to retain ownership of their residences and to maintain them in appropriate fashion, while nonoccupying owners such as the plaintiff would merely gain increased income from additional tenants, thereby effectively creating multiple rental properties with absentee landlords. The Town of Brookhaven had the right to find such a situation undesirable and legitimately seek to prevent its occurrence by inserting an owner-occupancy requirement in the accessory apartments law. Hence, it cannot be said that the distinction drawn between those owners who occupy their homes and those who do not bears no rational relationship to the legitimate purposes of the challenged legislation. 142 A.D.2d at 218-19, 535 N.Y.S.2d at 624 (internal citations omitted). (emphasis added)

Footnote 26.6. Anderson v. Provo City Corp., 108 P.3d 701, 703-04 (Utah 2005) , quoting Provo City Code § 14.30.010. There the court held in part:
For purposes of our analysis here, we believe the generally-applicable owner occupancy restriction imposed by the S Overlay amendment is equivalent to an individually-applicable owner occupancy restriction on a variance or conditional use permit that allows an otherwise prohibited use. Like the latter, the restriction here does not prevent nonoccupying owners from renting their houses for single-family residential use; it merely prevents such owners from engaging in the supplemental activity of renting accessory dwellings--an activity that would not be permitted at all in the absence of the S Overlay provisions. Because the restriction serves to control only this supplemental use while not interfering with any owner's use of his primary residence, we believe the restriction is reasonably related to the underlying purposes of Provo's land use regulation. 108 P.3d at 706-07. (emphasis added)

Owner occupancy of a dwelling unit associated with an accessory apartment or accessory dwelling unit pertains to a privilege or special benefit associated with unique factual circumstances that the city council has the ability to consider and deliberate about.

CONCLUSIONS:

Legal research indicates that there are local government zoning regulations emerging nationwide that authorize accessory apartments or accessory dwelling units in single family zoning, districts or neighborhoods in factual circumstances where one of the dwelling units is required to be owner occupied.

THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN:TFA