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Legal Opinion 2013-001

TO: Mayor John Engen, City Council, Bruce Bender, Aaron Wilson, Denise Alexander, Mark Muir, Mike Brady, Chris Odlin, Mike Colyer, Scott Hoffman

CC: Legal Department Staff

FROM: Jim Nugent

DATE January 29, 2013

RE: Pursuant to Missoula Municipal Code, barbed wire fences are only allowed as security fencing for commercial, industrial, or public lands, to secure livestock for agricultural purposes or to protect vegetation from wildlife.

FACTS:

The City Council is currently considering a proposed zoning regulation conditional use for a tavern located at 602 Myrtle Street to be included in the Kettlehouse Brewery and Myrtle Street Taphouse premises. Across the alley from the proposed tavern premises is real property that is utilized for the Kettlehouse Brewery and Myrtle Street Taphouse which has some razor wire providing screening around outdoor storage and equipment, as well as some fencing to an off-site parking lot that has barbed wire on top of the fencing; but for which the entry/exit gates are never closed; therefore, the parking lot is always open and available for public parking. If the barbed wire is no longer providing commercial security, it violates Missoula Municipal Code and should be removed.

ISSUE(S):

Does Missoula Municipal Code limit the instances wherein barbed wire may be utilized as part of fencing located within the Missoula City limits?

CONCLUSION(S):

Yes, Missoula Municipal Court provisions 8.44.010 MMC and 12.30.040 MMC limit the use of barbed wire to security fencing uses used on commercial, industrial or public lands with strands of barbed wire only at the top as well as for the purpose of securing livestock or vegetation with the barbed wire fencing.

LEGAL DISCUSSION:

Title 8, Chapter 8.44 Missoula Municipal Code is entitled “Barbed wire and electrical fences”. This is a short chapter that provides in its entirety as follows:

8.44.010 Barbed wire fences.

- A. Except as set out below, every person who erects or causes to be erected or who maintains any barbed wire fence along or adjacent to any street or alley, or along any dividing line between separate street or alley, or along any dividing line between separate pieces, parcels or lots of land, is guilty of a misdemeanor.
- B. The use of barbed wire fencing is permitted when:
 1. Used as a security fence and the security fence is at least five feet high with strands of barbed wire only at the top;
 2. The barbed wire fencing is used on commercial, industrial or public lands as security fencing;
 3. Used solely to secure livestock for agricultural purposes or when located in an area frequented by wildlife for purposes of protecting vegetation on property from wildlife, such as deer or elk. (emphasis added)

8.44.020 Electrical fences.

- A. Except as set out below, it is unlawful for any person to erect or cause to be erected or to maintain within the limits of the city any electrical fence.
- B. The use of electrical fences is permitted when used to secure animals for agricultural purposes or when located in an area frequented by wildlife for purposes of protecting vegetation on property from wildlife, such as deer or elk.

If the barbed wire fencing is no longer serving an authorized security purpose pursuant to Section 8.44.010, MCC, it violates Section 8.44.010 MMC and must be removed. This removal can be ordered as violating Section 8.44.010 MMC and does not need to be a condition of conditional use zoning to be achieved.

Title 12, Chapter 12.30 is entitled “FENCES” Section 12.30.040 MMC establishes fence restrictions including prohibiting electric or barbed wire fences in a residential area pursuant to subsection 12.30.040(c) MMC. Section 12.30.040 MMC provides:

12.30.040 Restrictions.

- A. No fence shall be installed anywhere which will restrict visibility as described in Section 12.28.110 of this code.

B. Fences in residential areas shall have a maximum height of forty-eight inches adjacent to dedicated street right-of-way in a front or side yard to a point even with the front corner of the house, or the average front corner location of all adjacent houses on the street. The remainder of the fence in the side yard shall have a maximum height of six feet. Fences adjacent to dedicated alley right-of-way shall have a maximum height of six feet. Fences in residential areas that are adjacent to property occupied by more than one set of railroad tracks used daily shall be permitted to be a maximum height of six feet in front and side yards.

Exceptions:

1. Fences constructed with chain link material, without privacy slats, may have a maximum height of five feet in areas where other types of fences are restricted by this section to four feet.
2. Side yard fences restricted by this code to four feet in height may be constructed to a maximum height of five feet starting at a point twenty feet back from the existing sidewalk or location of the potential sidewalk.
3. Fences in the side yard or rear yard between two contiguous residential lots where one or more existing houses have two or more stories shall have a maximum height of eight feet where six foot height is otherwise permitted by this code at the time of the requested permit, if the property owners of both contiguous residential lots agree to the eight foot height. Construction of a fence over six feet high in the above described location shall require both a City Building Permit and a City Fence Permit.

C. No fence in a residential area shall be electrified or be constructed with barbed wire.
(emphasis added)

CONCLUSION(S):

Yes, Missoula Municipal Court provisions 8.44.010 MMC and 12.30.040 MMC limit the use of barbed wire to security fencing uses used on commercial, industrial or public lands with strands of barbed wire only at the top as well as for the purpose of securing livestock or vegetation with the barbed wire fencing.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN:tfa