

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2013-011

**TO:** Mayor John Engen, City Council, Bruce Bender, Denise Alexander, Laval Means, Gregg Wood, Wade Humphries, Tom Zavitz, Jen Gress, Aaron Wilson, Casey Wilson, Marty Rehbein, Don Verrue, Steve Meismer, Kevin Slovarp, Jessica Miller

**CC:** Legal Department Staff

**FROM:** Jim Nugent, City Attorney

**DATE** April 30, 2013

**RE:** Legal zoning nonconforming land uses are not illegal land uses.

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### **FACTS:**

For several decades prior to the City of Missoula's enactment of its original zoning ordinance in the latter part of 1932 it is likely that many hundreds of residences were built, but the City Title 20 Zoning fails to acknowledge the existence of these facts in its nonconforming uses provision, sub section 20.80.040(A). Some citizens as well as some city elected officials ambiguously make assertions of residential land uses having more than one dwelling unit within a residential building or more than one residence on a visually perceived parcel of land such as a corner lot or even interior lot, as being an illegal residential land use without providing any factual evidence establishing even a *prima fascia* case that the land use is illegal instead of a legal nonconforming land use or even a legal land use. This is especially a potentially important legal issue in the City of Missoula, because the Missoula Valley commenced developing more than 120 years ago, yet the City of Missoula did not adopt its first zoning ordinance, Ordinance 616, until August 9, 1932 several decades after residences being built. It is also important to note that the City of Missoula's First zoning ordinance in 1932 allowed at least both two family dwelling units as well as single family dwelling units in all residential zoning districts.

### **ISSUE(S):**

Are legal zoning nonconforming land uses established prior to the City's original zoning ordinance or established prior to the land in question being zoned solely single dwelling unit illegal?

## **CONCLUSION(S):**

No, legal zoning nonconforming residential land uses built prior to the City's zoning ordinance or built prior to the land being zoned solely single dwelling unit are not illegal land uses for zoning purposes. A land use that existed prior to zoning or lawfully existed prior to current zoning is a legal nonconforming land use and is legal.

## **LEGAL DISCUSSION:**

Black's Law Dictionary, Eighth Edition, page 1577 with respect to zoning defines a nonconforming use as meaning a "land use that is impermissible under current zoning restrictions but that is allowed because the use existed lawfully before the restriction took effect." (emphasis added).

Rathkopf's The Law of Zoning and Planning, by Ziegler, Volume 1 Section 1.3 indicates that the first zoning ordinance in the United States was in 1916 in New York. It was upheld by the New York Court of Appeals. Then in 1924 the U.S. Department of Commerce published a model Standard State Zoning enabling Act which was followed by many state legislatures in delegating police power to municipalities to adopt and administer zoning codes.

Title 76, Chapter 2, Part 3, MCA is entitled "Municipal Zoning" The 1929 Montana State Legislature authorized municipal zoning authority for Montana cities and towns. See Section 76-2-301, MCA legislative history. It was nearly thirty-five (35) years later when in 1963 the Montana State Legislature authorized Montana counties authority to adopt zoning regulations. See legislative history for Section 76-2-201, MCA, Title 76, Chapter 2, Part 2 MCA is entitled "County Zoning". This county zoning date is important because many times in history the City of Missoula has annexed already developed land into the City that was unzoned in the County; since county zoning was not authorized until 1963.

The City of Missoula adopted its original general zoning regulations pursuant to City of Missoula ordinance number 616 August 9. 1932. Development had been occurring in the Missoula Valley for more than four (4) decades. When the first City Zoning ordinance was adopted in 1932, many hundreds of residences would have been constructed by the later part of 1932. However, City Zoning Title 20 does not explicitly acknowledge these pre-zoning residences in its nonconforming uses description in subsection 20.80.040(A) of the Missoula Municipal Code.

It is likely that thousands of buildings or structures, primarily residential were already built in the Missoula Valley or were under construction by Mid-August, 1932. Also, it is important to note that pursuant to ordinance No. 616 adopted August 9, 1932, the City of Missoula's lowest residential density "A Residence District", pursuant to subsection (2)(f), authorized both "two-family dwellings" as well as "single-family dwellings" in the "A Residence District". There was no solely single dwelling unit zoning classification in the original 1932 city zoning ordinance.

There is extensive Court case law indicating/holding that property owner, nonconforming zoning land use rights are protected from local government zoning. There are numerous ways

that an existing land use must be a legal nonconforming land use. For example, a legal nonconforming residential land use involving more than one dwelling unit in a building or on a lot or parcel that is today zoned a single dwelling unit zoning district may have historically been legally established. Some examples include but are not necessarily limited to the following alternative examples:

1. If the land use pre-exists the city's original August 9, 1932 city zoning ordinance, it is a legal nonconforming land use;
2. If the land use pre-exists the city's annexation of the real property, it is a legal nonconforming land use with respect to city zoning regulations;
3. If the land use pre-exists the effective date of the city's initial application of any zoning district classification to the land use it is a legal nonconforming land use if it does not comply with the City zoning classification applied to the real property;
4. If the land use pre-exists the effective date of any general zoning regulation amendment that made the land use zoning nonconforming, it is a legal nonconforming land use;
5. If the land use pre-exists the effective date of any rezoning classification that made the land use zoning nonconforming, the land use is a legal non-conforming land use;
6. If the land use was authorized by a zoning variance, it is a legal non-conforming land use if the property is later rezoned and/or if an applicable general zoning regulation is amended.
7. If the land use is authorized by a court order, if it is not in conformity with the applicable zoning, it is a legal nonconforming land use;
8. Etc., etc. (there likely are other factual circumstance examples as well)

McQuillin, Municipal Corporations, Zoning, Volume 8 Section 25.181 States:

"Generally speaking, a use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by the ordinance, where it is a lawful use of property, is not a public nuisance, or harmful to the public health, safety, morals or welfare.

Nonconforming uses established prior to annexation are protected in the same manner and to the same extent as is true of nonconforming uses established in the annexing municipality. An attempt to eliminate nonconforming uses enforcement of the penal provisions of zoning regulations is unlawful and invalid.

If, when a zoning ordinance was adopted, premises were used for a nonconforming use, the owner or user has a right to continue that use. A zoning ordinance may not operate retroactively to deprive a property owner of previously vested rights; that is to say, a zoning ordinance cannot deprive the owner of the use to which the property was put before the enactment of the ordinance.

McQuillin, Municipal Corporations, Zoning, Section 25.186 goes on to explain that:

"Ordinarily it is essential to the right to a nonconforming use that the use commenced before the restriction was imposed, and that it existed when the restriction became effective. The use must be the same before and after the zoning restriction becomes effective, and this is usually a question of fact"

Rathkopf's The Law of Zoning and Planning by Ziegler, Volume 4, Sections 72.1 through 72.3 state in pertinent part:

72.1. Definitions. While any use of land or structure which does not conform to existing zoning regulations may be considered "nonconforming" – regardless of when it was established or under what circumstances a "protected" or "vested" nonconforming use is ordinarily a zoning ordinance or of an amendment to a theretofore existing zoning ordinance, and which therefore may be maintained after the effective date of the ordinance or amendment although it does not comply with zoning restrictions applicable to the area...

72.2 Vested Right to Continue – Generally. If prior to the adoption of a zoning restriction (either in an original zoning ordinance or an amendment thereto) property was used for a then lawful purpose or in a then lawful manner which the ordinance thereafter prohibits and renders nonconforming, that property is generally held to have acquired a vested right to continue the nonconforming use or to maintain the noncomplying structure. This protected status accorded lawful existing nonconforming uses is based on constitutional interpretation or specific statutory or ordinance provisions.

72.3 Vested right to continue – by constitutional interpretation. The doctrine of vested nonconforming uses is based upon the reluctance of courts to give zoning ordinances a retroactive effect which would destroy substantial, existing property rights; had they been necessarily construed to have such a retroactive effect, in most instances, they would have been held confiscatory and unconstitutional.

A zoning regulation taking of a property owner's property rights to a nonconforming zoning land use could cause the local government to have to compensate the property owner. The property takings provision in the Fourteenth Amendment to the United States Constitution states in pertinent part:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)

The Montana Constitutional takings provision is broader than the United States Constitutional takings provision. Article II, Section 29 of the Montana Constitution states:

**Section 29. Eminent domain.** Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails. (emphasis added)

A zoning regulation may constitute a regulatory taking as could a land use zoning staff person's interpretation and/or application of a zoning regulation with respect to an existing zoning nonconforming land use if the courts determine the zoning staff decision was not supported by adequate evidence, was inconclusive or was shown to be wrong.

**CONCLUSION(S):**

No, legal zoning nonconforming residential land uses built prior to the City's zoning ordinance or built prior to the land being zoned solely single dwelling unit are not illegal land uses for zoning purposes. A land use that existed prior to zoning or lawfully existed prior to current zoning is a legal nonconforming land use and is legal.

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