

VOLUME NO. 35

Opinion No. 25

COUNTY CLERK AND RECORDER — Duties, recording deeds whether or not plat is filed; REAL PROPERTY — Recording deeds, duty of county clerk and recorder. Chapter 500, Session Laws of 1973; sections 16-2902 and 16-2911, R.C.M. 1947.

HELD: County clerk and recorder may not refuse to record a deed that has not met the prerequisite set forth in Chapter 500, Session Laws of 1973, requiring that an approved, certified plat be filed before land is transferred.

August 30, 1973

Mr. Thomas F. Dowling
Lewis & Clark County Attorney
County Courthouse
Helena, Montana 59601

Dear Mr. Dowling:

You have requested my opinion concerning the following question:

May the county clerk and recorder refuse to record a deed that has not met the prerequisite set forth in the Montana Subdivision and Platting Act that an approved, certified plat must be filed before the land may be transferred?

In 20 **Opinions of the Attorney General**, no. 188, then Attorney General Bottomly held that county clerk and recorders must file a deed which was duly executed, regardless of whether or not the plat required by the Revised Codes of Montana was on file. That opinion, rendered in March, 1944, has never been overturned, even though the statute upon which it was based has since been revised. The substance of then section 4805, R.C.M. 1935, has been incorporated into section 16-2911, R.C.M. 1947, which provides, in pertinent part:

When any instrument, paper, or notice, authorized by law to be recorded, is deposited in the office of the county clerk, as ex officio recorder, for record, accompanied by the required fee, he must endorse upon the same, the time it was received, noting the year, month, day, hour and minute of its reception, and the reception of the instrument must be immediately entered in the county clerk and recorder's reception book. The county clerk must record said instrument without delay ... in the order and as of the time when the same was received for record. ... (Emphasis supplied)

What the clerk and recorder is to record is specified in section 16-2902, R.C.M. 1947, which states in pertinent part:

He **must**, upon payment of his fees for the same, record, or photograph, or correctly copy, separately, in large and well-bound, or to be bound, separate books, either in a fair hand or by printing or by typewriting, or by photographic process, or by the use of prepared blank forms:

1. **Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney to convey real estate, leases which have been acknowledged, or proved,**

and abstracts of such instruments which have been acknowledged or proved; ... (Emphasis supplied)

The term "must" has been held by the Montana Supreme Court to be mandatory. A case in point is **State ex rel. McCabe v. District Court**, 106 M. 272, 76 P.2d 634, which states on page 277:

We are reluctant to contravene or construe away terms of a statute which in themselves are mandatory upon their face, except where the intent and purpose of the legislature are plain and unambiguous and clearly signify a contrary construction; the synonymous terms "must" and "shall", in that connection, being generally interpreted as mandatory ...

Pursuant to then Attorney General Bottomly's opinion, the present statutory provisions cited above, and the mandatory interpretation applied to the term "must", the clerk and recorder must accept and record all properly executed and authorized deeds presented to him.

Chapter 500, Session Laws of 1973, the Montana Subdivision and Platting Act, requires that a final plat be approved, certified and filed before any valid transfer of the land in a subdivision can take place. Section 9 of the 1973 act states in pertinent part:

... (2) The governing body shall examine every final subdivision plat and shall approve it when, and only when, it conforms to the conditions of approval set forth on the preliminary plat and to the terms of this act and regulations adopted pursuant thereto. The clerk and recorder of the county **shall refuse to accept any plat for record** that fails to have such approval in proper form.

(3) Every final subdivision plat must be filed for record with the county clerk and recorder before any interest in the subdivided land can be sold, rented, leased, or transferred in any manner or offered for sale, lease, or transfer. If illegal transfers or offers of any manner are made, the county attorney shall commence action to enjoin further sales, transfers, or offers of sale or transfer and compel compliance with all provisions of this act. The cost of such action shall be imposed against the person transferring or offering to transfer the property. (Emphasis supplied)

It is clear from the new act that the clerk and recorder must refuse to accept any **plat** for record if it does not have the necessary approval in proper form. However, the act imposes no duty or authority upon the county clerk and recorder to refuse to file a **deed** to a subdivision area when the required certified plat is not filed prior to transfer, as is demanded by section 9 (3) of the act. The approved plat requirement is a condition precedent to a valid transfer of land. It does not affect the clerk and recorder's duties as set forth in sections 16-2902 and 16-2911, *supra*. The clerk and recorder of a county is not a law enforcement officer and the enforcement of a criminal statute is not within his prescribed

duties. It is the duty of the county attorney to halt all such illegal transfers or offers which are brought to his attention.

THEREFORE, IT IS MY OPINION:

The county clerk and recorder may not refuse to record a deed that has not met the prerequisite set forth in the Montana Subdivision and Platting Act of 1973, requiring that an approved, certified plat be filed before the land is transferred.

Very truly yours,

ROBERT L. WOODAHL
Attorney General