

VOLUME NO. 37

OPINION NO. 41

SUBDIVISIONS - Subdivision and Platting Act, lands purchased under contract for deed, intent to circumvent Act, affidavit of good faith; CONTRACTS FOR DEED - Subdivisions, intent to circumvent Subdivision and Platting Act; Affidavit of good faith; REVISED CODES OF MONTANA, 1947 - Sections 11-3859, 11-3862, 11-3976, 11-4861.

- HELD: 1. A transaction involving a contract for deed which allows the purchaser to acquire title to a portion of the land is subject to the requirements of the Montana Subdivision and Platting Act, section 11-3859 et seq., R.C.M. 1947, if the transaction is undertaken for the purpose of evading the Act.
2. The local governing body may adopt a regulation requiring a person wishing to claim the exemption granted by section 11-3862(9), R.C.M. 1947, to file an affidavit that the transaction is being undertaken in good faith and not with the intent to circumvent the Act.

18 July 1977

Patrick M. Springer, Esq.
Flathead County Attorney
Flathead County Courthouse
Kalispell, Montana 59901

Dear Mr. Springer:

You have requested my opinion on the following questions:

1. Where a purchaser of land under a contract for deed exercises a release provision of the contract and obtains title to a portion of the land, is the transaction subject to the surveying and recording requirements of section 11-3862, R.C.M. 1947?
2. May the purchaser be required to file an affidavit under section 11-3862(8), R.C.M. 1947, that the transfer was not undertaken for the purpose of evading the Montana Subdivision and Platting Act?

As related by your letter, people are buying land under contracts for deed which contain a release provision which allows them to obtain title to a portion of the land upon payment of a stated portion of the purchase price. This allows the purchaser to mortgage that portion of the land to obtain financing for building or other improvements. The apparent problem is that this arrangement might also enable the purchaser to sell the released portion of the land and thereby create a subdivision in contravention of the statute.

The Montana Subdivision and Platting Act, sections 11-3859 through 11-3876, R.C.M. 1947, governs the surveying and platting of subdivisions. Section 11-3862(3) prohibits the recording of any instrument purporting to transfer title to or possession of land unless a certificate of survey or subdivision plat has also been filed. Section 11-3862(9) then provides:

Unless the method of disposition is adopted for the purpose of evading this act, the requirements of this act shall not apply to any division of land:

(b) which is created to provide security for construction mortgages, liens, or trust indentures;

Therefore, a bona fide transaction such as the one described above is exempted from the Act, even though the seller actually parts with legal title to a portion of the land. This transaction must be stated as an exception, because the legal effect is in fact to create a division of land since the seller holds legal title to the larger portion and the purchaser holds title to the smaller (section 11-4861(2.1)).

If the purchaser then sells the deeded portion to a third party there are technically no subdivision consequences attached. There is simply a transfer of a single undivided parcel of land.

However, if the whole undertaking was for the purpose of allowing the original owner to dispose of two tracts of land without complying with the Subdivision Act, then plainly the Act has been unlawfully circumvented. This situation obviously presents difficult problems of proof. For example, the purchaser may have a legitimate need to sell the deeded portion outright, which arose after the contract for deed was entered. In such a situation no intent to circumvent the Act is present. However, the wording of section 11-3862(9), quoted above, appears to create at least an inference of an intent to circumvent the Act when the purchaser does anything besides create a mortgage, lien or trust indenture "to provide security for construction."

The Act thus places a burden upon the local governing body to determine whether the arrangement was entered for the purpose of evasion. Therefore, it would be a legitimate and proper exercise of the local body's duties to require anyone wishing to claim the exemption granted by section 11-3862(9) to provide some justification for entitlement thereto. The local governing body is empowered under section 11-3862 to adopt reasonable regulations governing the orderly development of its jurisdictional area. Such a regulation could require an affidavit that the transaction is being undertaken in good faith and not with the intent to circumvent the statute. Under Rule MAC 22-2.4B(30)-S4090(4), transactions exempted by section 11-3862(9) may already be filed as certificates of survey, since that is required by many lending institutions, and that filing must state the basis of its exemption.

THEREFORE, IT IS MY OPINION:

1. A transaction involving a contract for deed which allows the purchaser to acquire title to a portion of the land is subject to the requirements of the Montana Subdivision and Platting Act, section 11-3859 et seq., R.C.M. 1947, if the transaction is undertaken for the purpose of evading the Act.
2. The local governing body may adopt a regulation requiring a person wishing to claim the exemption granted by section 11-3862(9), R.C.M. 1947, to file an affidavit that the transaction is being undertaken in good faith and not with the intent to circumvent the

Very truly yours,

MIKE GREELY
Attorney General