

VOLUME NO. 38

OPINION NO. 106

LAND - Conveyances, Subdivision and Platting Act;  
SUBDIVISION AND PLATTING ACT - Deeds and contracts in violation of the Act;  
SUBDIVISION AND PLATTING ACT - Procedure for correcting violations of the Act;  
1972 MONTANA CONSTITUTION - Article II, section 3;  
MONTANA CODE ANNOTATED - Sections 76-3-102, 76-3-301, 76-3-401, et seq., 76-3-601, et seq;  
OPINIONS OF THE ATTORNEY GENERAL - 35 Op.Att'y Gen. No. 65 (1974).

- HELD: 1. Deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act are voidable.
2. Deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act, but with the unauthorized approval of the Board of County Commissioners, are voidable.
3. Violations of the Montana Subdivision and Platting Act may be corrected by the parties to the transaction by voiding the prior improper conveyance and conveying the land in accord with the Act.

12 September 1980

Keith D. Haker, Esq.  
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Custer County Courthouse  
Miles City, Montana 59301

Dear Mr. Haker:

You have asked for my opinion concerning 35 Op. Att'y Gen. No. 65, at 156 (1974), and its effect on a particular transaction that occurred in your county. I render no decision on the particular transaction concerned, because such a decision requires factual findings. I have reviewed the legal questions you presented, stated as follows:

1. Are deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act void?

2. Are deeds and contracts to convey land that are made in violation of the Montana Subdivision and Platting Act but with the approval of the Board of County Commissioners void?
3. What is the proper procedure for correcting violations of the Montana Subdivision and Platting Act?

I. CONVEYANCES IN VIOLATION OF THE ACT.

The first question was answered in the affirmative by a former attorney general in 35 Op. Att'y Gen. No. 65, at 156 (1974). That opinion, however, did not address the practical consequences of its holding. Therefore, I have reviewed it in light of your request.

Volume 35 Op. Att'y Gen. No. 65 correctly states the general rule that conveyances of land in violation of statutory provisions are void. My research has revealed no decision of the Montana Supreme Court addressing the application of this rule to conveyances in violation of the Montana Subdivision and Platting Act. I have looked for authority to analogous cases involving other statutory limitations on the sale of land, and to other jurisdictions.

In Johnson v. Kaiser, 104 Mont. 261, 65 P.2d 1179 (1937), the Montana Supreme Court affirmed a judgment declaring certain deeds void, and cancelling those deeds. The land involved had been conveyed in violation of a statute prohibiting a bank officer from personally purchasing bank assets for a sum less than that appearing on the face of the obligations purchased. The bank officer had obtained the property and executed an oil and gas lease that produced gross royalties in excess of \$5,500. One year after the conveyance the bank closed its doors and its assets and property were delivered into the hands of the Superintendent of Banks. The Superintendent, as liquidating officer of the bank, brought this action to cancel and set aside the deeds, and prevailed.

More recently, in Norman v. State, \_\_\_ Mont. \_\_\_, 597 P.2d 715 (1979), the Montana Supreme Court again declared a deed to be void because the land had been conveyed in violation of Montana law. The Department of Highways had sold the property at a private sale, without first giving the statutorily required notice of sale and receiving bids. This

effectively deprived the person who had originally owned the land when the Department obtained it of his statutory right to meet the highest bid received pursuant to the notice. When the Department discovered its error, it took the position that the deed was void, and tendered to the purchaser of the land the purchase price received and the cost of a fence the purchaser had erected. The purchaser refused the tender, and brought this quiet title action. The Montana Supreme Court ruled in favor of the State, finding that the noncompliance with the statutory procedure for the sale of the land rendered the deed void.

In California, the courts have long held that noncompliance with statutory provisions for the sale of subdivided land renders a contract void. See, e.g., Longway v. Newberry, 13 Cal.2d 603, 91 P.2d 110, 112 (1939); Smith v. Bach, 183 Cal. 259, 191 P. 14, 15 (1920); Barrett v. Hammer Builders, Inc., 195 Cal. App. 2d 305, 16 Cal. Rptr. 49, 51 (1961); Annot., 77 A.L.R.3d 1058, § 3 at 1060 (1977).

However, the term "void" is often used when, technically, the term "voidable" is meant. In Stevens v. Woodmen of the World, 105 Mont. 121, 136-37, 71 P.2d 898, 903 (1937), the Montana Supreme Court stated:

When we say that a contract is void as a result of fraud--and many such expressions appear in the books--all that is meant by such term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract. In the case of Ewell v. Daggs, 108 U.S. 143..., it was said: "It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be 'void and of no effect'. But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it had never existed, incapable of giving rise to any rights or obligations under any circumstances. ... It is sometimes said that a deed obtained by fraud is void, meaning that the party defrauded may, at his election, treat it as void. All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which

appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land."

Our own court, in the case of Mutua. Benefit Ins. Co. v. Winne, 20 Mont. 20, 49 P. 446, ... said: "We must not be misled into giving to the words 'void' and 'invalid' too broad a meaning, for, as has been well observed by a learned court, deductions founded on the broadest meaning of the word 'void' would lead to greater errors than are found in the most erroneous cases, while those founded on its narrower and more usual meaning seldom err. (Citation omitted.)...."

The narrower interpretation of the term "void" is appropriate in the case of land transfers in violation of the Montana Subdivision and Platting Act. That interpretation is in accord with the common law treatment of illegal contracts generally. In 17 C.J.S. Contracts, § 189 at 980-81 (1963), it is stated:

The expression "void" as used (in connection with illegal contracts) has the meaning of not affording legal remedy rather than that of absolute nullity, since such contracts when executed may be indirectly effective in that no relief will be granted to either party. (Footnotes omitted.)

That interpretation of the term "void" is also the one adopted by the California courts which have considered contracts made in violation of subdivision laws. In more recent cases, some of those courts have in fact used the technically correct term "voidable" rather than "void." See, e.g., Handeland v. California Department of Real Estate, 58 Cal. App. 3d 513, 129 Cal. Rptr. 810, 812 (1976). My opinion is that deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act are voidable. The effect of the voidability of such an illegal contract or deed varies depending on the circumstances of the case.

Courts have long refused to enforce an illegal contract that has not been fully executed. See, e.g., Builders Supply Co. v. City of Helena, 116 Mont. 368, 154 P.2d 270 (1944); McManus v. Fulton, 85 Mont. 170, 278 P. 126 (1929); State ex rel. Helena Water Co. v. City of Helena, 24 Mont. 521, 63 P. 99 (1900); State ex rel. Lambert v. Coad, 23 Mont. 131, 57

P. 1092 (1899); Lebeher v. Board of Commissioners, 9 Mont. 315, 23 P. 713 (1890); but see Perkins v. Sommers, 119 Cal. App. 2d 89, 254 P.2d 913 (1953); State v. Dickerman, 16 Mont. 278, 40 P. 698 (1895). A court may, prior to full execution of an illegal contract, rescind the contract. Many of the California cases concerning contracts in violation of subdivision laws were actions brought by purchasers seeking rescission and recovery of their partial payments under the contracts. See, e.g., Longway v. Newberry, *supra*; Smith v. Bach, *supra*; Barrett v. Hammer Builders, Inc., *supra*; Annot. 77 A.L.R.3d 1058, § 4(a) at 1062-63 (1977).

Once the contract has been fully executed, a court may still set aside the deed that has conveyed property in violation of the law. See Norman v. State, *supra*; Johnson v. Kaiser, *supra*. Unless such an adjudication is made, however, the deed may be indirectly effective.

[W]here a deed is regarded as...voidable, it is good against everyone...until it has been disaffirmed or set aside by a court of competent jurisdiction; and passes title to the grantee, of a defeasible character....

26 C.J.S. Deeds, § 68, at 787-88 (1956) (footnotes omitted). A court may also indirectly enforce an illegal deed by finding that it has conveyed title. Cf. McCoy v. Love, 382 So.2d 647, 649 (Fla. 1979) (deed that was voidable because of fraud conveyed a legal title); Bicknell v. Jones, 203 Kan. 196, 453 P.2d 127, 133 (1969) (a deed made in fraud of the grantor's rights is effective to pass the estate).

In summary, courts may set aside an illegal conveyance of land, whether the conveyance has been fully performed or not. On the other hand, courts will not enforce a contract for such a conveyance before it has been fully executed, but may indirectly enforce a fully executed deed of conveyance by finding that it has given good title. All of the actions that could be brought to establish the effect of a contract or deed for the conveyance of land in violation of the Montana Subdivision and Platting Act are actions that are governed by equitable principles. Suits to rescind contracts, cancel deeds, or quiet title are all suits in equity. See Warren v. Warren, 127 Mont. 259, 261 P.2d 364, 366 (1953) (quiet title); Dahlberg v. Lannen, 84 Mont. 68, 274 P. 151, 153 (1929) (quiet title); 12 C.J.S. Cancellation of Instruments, § 2, at 943 (1938). The result in any particular case depends, therefore, on the facts. "Courts of

equity are not bound by cast-iron rules. The rules by which they are governed are flexible, and adapt themselves to the exigencies of the particular case." Dutton v. Rocky Mountain Phosphates, 151 Mont. 54, 438 P.2d 674 (1968). "Equity looks at the whole situation and grants or withholds relief as good conscience dictates." Rieckhoff v. Consolidated Gas Co., 123 Mont. 555, 217 P.2d 1076, 1083 (1950). Equitable actions are subject to equitable defenses such as laches, and estoppel. Seifert v. Seifert, 173 Mont. 501, 568 P.2d 155, 158 (1977) ("clean hands" and laches); see Rausser v. Toston Irrigation District, 172 Mont. 530, 565 P.2d 632, 638 (1977) (laches).

The effect of a violation of the Montana Subdivision and Platting Act on a particular disputed contract or deed must be determined by a court.

## II. EFFECT OF APPROVAL BY THE BOARD OF COUNTY COMMISSIONERS.

Your letter describes a situation in which the vendor of subdivided land violated the Montana Subdivision and Platting Act by filing a certificate of survey under the survey requirements of sections 76-3-401, et seq., MCA, for divisions of land other than a subdivision, rather than filing an approved subdivision plat under the requirements of sections 76-3-601, et seq., MCA. None of the subdivision procedures of the Act were satisfied. However, the vendor obtained the approval of the certificate of survey from the Board of County Commissioners prior to filing it. Your questions concern the effect of such approval on the conveyances involved.

It is my opinion that the illegality of a land transfer cannot be cured by an action of the Board that is taken without authority. While sections 76-3-601 et seq., MCA, authorize the governing body of a local government to review and approve preliminary and final subdivision plats, I can find no corresponding authorization for review and approval of surveys of divisions of land that are not subdivisions. See §§ 76-3-401, et seq., MCA. Because the Board's actions were unauthorized, they cannot excuse the noncompliance with the Montana Subdivision and Platting Act.

Two recent opinions of the Montana Supreme Court have dealt with the effect of unauthorized or improper actions of a governmental agency or body in connection with land transactions. In Norman v. State, supra, the court said:

We recognize it was the negligence of the State's agents that caused the situation which gave rise to this appeal. However, the interest we seek to protect is that of the citizens of this State to receive the highest value from the sale of the lands their State government holds in trust for them. Strict compliance with the constitutional and statutory provisions relating to those lands is the best mode to insure that protection.

597 P.2d at 719. And in Chennault v. Sageri, supra, the court said:

Irrespective of the negligence of public employees and officials, however, the foremost consideration in our minds lies with the protection of the public interest. This countervailing public policy has taken on such importance that it is expressed in our Constitution. Where public lands are disposed of and there has been insufficient compliance with laws providing for their disposition, the public interest must be protected.

610 P.2d at 177. While the land involved in those cases was public land, and the land involved in the present case is private land, the public interest is involved in both circumstances. The purpose of the Montana Subdivision and Platting Act is:

[t]o promote the public health, safety, and general welfare by regulating the subdivision of land; to prevent overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements; to require development in harmony with the natural environment; to require that whenever necessary, the appropriate approval of subdivisions be contingent upon a written finding of public interest by the governing body; and to require uniform monumentation of land subdivisions and transferring interests in real property by reference to plat or certificate of survey.

§ 76-3-102, MCA. This purpose is in accord with the inalienable right of all Montanans to "a clean and healthful

environment." 1972 Mont. Const, art. II, § 3. The unauthorized approval of the Board of County Commissioners cannot, by itself, overcome the strong public interest in compliance with the provisions of the Montana Subdivision and Platting Act.

### III. CORRECTION OF DEFICIENCIES.

Your final question concerns the proper procedure for correcting violations of the Montana Subdivision and Platting Act. If all parties to the improper transaction agree, they may void the transaction by rescinding the contract or disaffirming the deed involved, and start anew by filing the required subdivision plat. The subdivision must then go through the appropriate review procedure prior to approval. The governmental entities involved must then review the subdivisions as of the time of the filing of the correct subdivision plat, without being bound by any prior unauthorized approval. Merely filing the correct subdivision plat, while relying on the prior unauthorized approval, does not correct the problem. In Barrett v. Hammer Builders, Inc., 195 Cal. App. 2d 305, 16 Cal. Rptr. 49, 51-52 (1961), the California Court of Appeals held that filing a subdivision report after a sale when the statute required the filing prior to offering the land for sale was not sufficient to "ratify" the prior sales. As in that case, it is clear that here the Montana legislature contemplated filing of subdivision plats and approval by the government prior to the transfer of property. § 76-3-301, MCA. The legislative purpose of protecting the public would not be effectuated by permitting a subdivider to circumvent this legislative mandate.

### THEREFORE, IT IS MY OPINION:

1. Deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act are voidable.
2. Deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act, but with the unauthorized approval of the Board of County Commissioners, are voidable.
3. Violations of the Montana Subdivision and Platting Act may be corrected by the parties to the transaction by voiding the prior improper conveyance and conveying the land in accord with the Act.



Very truly yours,

MIKE GREELY  
Attorney General