

SUBDIVISION AND PLATTING ACT - Analysis of whether exemptions are claimed for the purpose of evading review under the act;

SUBDIVISION AND PLATTING ACT - Authority of local governments to require evidentiary showing of entitlement to exemption;

SUBDIVISION AND PLATTING ACT - Propriety of certificate of survey creating more than one lot to be conveyed under "occasional sale" exemption;

MONTANA CODE ANNOTATED - Title 76, chapter 2, part 2; sections 76-3-102, 76-3-105, 76-3-207, 76-3-301, 76-3-501, 76-3-507, 76-3-608;

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 41 (1977), 38 Op. Att'y Gen. No. 106 (1980).

- HELD: 1. A single certificate of survey may not reflect the creation of more than one lot to be conveyed under the "occasional sale" exemption embodied in section 76-3-207(1)(d), MCA.
2. The question of whether an exemption is claimed "for the purpose of evading" review under the act is one of fact to be decided by the local government in the first instance, taking into consideration all of the surrounding circumstances.
3. A local government may require a person claiming exemption from subdivision review to furnish evidence of entitlement to the claimed exemption.

20 July 1983

Jim Nugent
City Attorney
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Dear Mr. Nugent:

You have requested my opinion on several questions arising from the following facts. On September 11, 1980, a developer filed a certificate of survey dividing a tract of land into three parcels. The developer retained title to the largest parcel, comprising roughly three-fourths of the original tract, and disposed of the other two, roughly the southeast quarter, one by gift to a member of his immediate family and one by sale. This first division was exempted from the review provisions of the Subdivision and Platting Act (the Act) under section 76-3-207(1)(b), (d), MCA. On November 17, 1980, the developer filed a certificate of survey showing that a portion of the gifted parcel was reconveyed to the developer. This transaction was exempted from the review provisions of the Act under section 76-3-207(1)(e), MCA, which pertains to relocation of boundaries and aggregation of lots. On November 29, 1982, the developer filed a third certificate of survey creating two additional lots covering roughly the southwest quarter of the original tract. Again, one lot was to be disposed of by gift and one by occasional sale, and, as with the first certificate of survey, the division was exempted from review under section 76-2-207(1)(b), (d), MCA. The developer has now completed and submitted for filing a fourth certificate of survey dividing the balance of the tract into five lots, four of which are to be conveyed to others as "occasional sales." The remaining lot, comprising roughly the area returned to the developer by relocation of boundary in the November 17, 1980, certificate of survey, is to be conveyed by gift to a member of the developer's immediate family.

You raise two questions arising from these facts:

1. May a single certificate of survey show division of a tract of land into more

than one lot to be conveyed under the "occasional sale" exemption embodied in section 76-3-207(1)(d), MCA?

2. Under these facts, are the claimed "occasional sales" subject to review under the Act on the ground that the exemptions are claimed "for the purpose of evading" the Act?

The Montana Subdivision and Platting Act, Tit. 76, ch. 3, MCA, establishes a comprehensive system of local government review for proposed "subdivisions." The term "subdivision" is defined generally to include any "division of land" creating one or more parcels of less than 20 acres to be conveyed by sale, rental, lease, or otherwise. Subdivided lots may not be conveyed until plats of the subdivision have been approved by the appropriate local governing body, applying the public interest criteria set forth in section 76-3-608, MCA. Conveyances in violation of the Act are voidable, 38 Op. Att'y Gen. No. 106 (1980), and they subject the subdividers to actions for injunctive relief, § 76-3-301(3), MCA, as well as criminal penalties, § 76-3-105, MCA.

Pursuant to the Act, a "division of land" occurs when:

[o]ne or more parcels of land [are segregated] from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to or possession of a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the parcels. [Emphasis added.]

In the present circumstances, the filing of the proposed certificate of survey would create a "division of land" which falls within the definition of "subdivision" and which would ordinarily be subject to local government review. Title 76, chapter 2, part 2, however, states numerous exemptions from various requirements of the Act. Section 76-3-207(1), MCA, in particular, defines classes of "divisions of land" which, although within the statutory definition of "subdivision," are not subject to the review provisions of the Act. The pertinent exemption here is set forth in section

76-3-207(1)(d), MCA: "a single division of a parcel outside of platted subdivisions when the transaction is an occasional sale." A filed certificate of survey showing more than one division of a parcel cannot qualify for this exemption because the statute expressly limits the exemption to "a single division of a parcel." A conveyance of a lot by reference to such a certificate of survey without local government subdivision review would be in violation of the Act, because the "division of land" (the filing of the certificate of survey) created a "subdivision" (one or more parcels to be conveyed) which was not a "single division" of one parcel exempt from review under section 76-3-207(1)(d), MCA.

Your second question presents an inappropriate basis for an Attorney General's Opinion. The question of whether a particular exemption is claimed "for the purpose of evading" the Act is manifestly one of fact which is addressed to the discretion of the local government. I have consistently declined to address such questions in the context of an advisory opinion. However, to assist you in analyzing the issue I offer the following observations. As a statute promoting public health and welfare, the Subdivision and Platting Act must be liberally construed to effectuate its objects. Its exemptions must be narrowly applied. State ex rel. Florence-Carlton School District v. Board of County Commissioners, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978). A local government may legitimately require one claiming an exemption from the Act's requirements to make some evidentiary showing that the exemption is justified. In 37 Op. Att'y Gen. No. 41 (1977), I held that a local government could, as part of its rulemaking authority under the Act, §§ 76-3-501 to 507, MCA, require persons claiming an exemption to provide an affidavit to the effect that the exemption was claimed in good faith and not for purposes of evading the Act. It would also be legitimate for the local government to establish by rule some sort of hearing procedure to allow the local government to evaluate the evidentiary basis for the claimed exemption and allow or disallow it. I am aware that the Supreme Court has invalidated regulations adopted under the Act to define the "occasional sale" exemption. State ex rel. Department of Health and Environmental Sciences v. LaSorte, 182 Mont. 267, 596 P.2d 477 (1979); State ex rel. Swart v. Casne, 172 Mont. 302, 564 P.2d 983 (1977). However, the

regulations invalidated in LaSorte and Casne were held to be inconsistent with the express terms of the statute. In contrast, a regulation establishing procedures for evaluation of claimed exemptions gives substance to the Act's policy of local government control of land use, and is certainly consistent with the Act's requirement in section 76-3-301(2), MCA, that the clerk and recorder notify the local governing body when a certificate of survey is presented for filing claiming an exemption under section 76-3-207(1), MCA.

Applying the rule announced in Florence-Carlton, the party claiming the exemption should bear the burden of establishing his entitlement to it. The local governing body should evaluate all relevant circumstances in assessing the claimant's intent. These circumstances might include, inter alia, the nature of the claimant's business (i.e., whether the claimant is in the business of dividing and selling land), the prior history of the particular tract in question (i.e., whether this claimant has engaged in prior exempt transactions involving the tract), and the proposed configuration of the tract after the allegedly exempt transactions are completed. The exemptions in section 76-3-207(1), MCA, were not provided to allow a developer to create a division of land which is for all intents and purposes nothing less than an unreviewed subdivision. Rather, they were provided to deal with exceptional circumstances under which, in the Legislature's judgment, full plenary subdivision review is unnecessary. A claimant who attempts to engage in a pattern of exempt transactions which will result in the equivalent of a subdivision without local government review, see, e.g., State ex rel. Department of Health v. LaSorte, 182 Mont. 267, 269, 596 P.2d 477, 479 (1979) (dictum), should be denied exemption. If necessary, the county attorney may take action to ensure that conveyances do not occur in such circumstances. § 76-3-301(3), MCA. To allow an exemption in such circumstances would obviously subvert the Act's public policy requiring a priori review of divisions of land which may have substantial impact on public health, safety, and general welfare. § 76-3-102, MCA.

THEREFORE, IT IS MY OPINION:

1. A single certificate of survey may not reflect the creation of more than one lot to be

conveyed under the "occasional sale" exemption embodied in section 76-3-207(1) (d), MCA.

2. The question of whether an exemption is claimed "for the purpose of evading" review under the act is one of fact to be decided by the local government in the first instance, taking into consideration all of the surrounding circumstances.
3. A local government may require a person claiming exemption from subdivision review to furnish evidence of entitlement to the claimed exemption.

Very truly yours,

MIKE GREELY
Attorney General