

VOLUME NO. 41

OPINION NO. 3

SUBDIVISION AND PLATTING ACT - Applicability to duplexes, hotels, office buildings, and second family dwellings;

MONTANA CODE ANNOTATED - Sections 1-2-101, 70-1-106(2), 76-3-103(3), 76-3-103(15), 76-3-202, 76-3-204, 76-3-207, 76-3-208, 76-3-505;

OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 74 (1982), 40 Op. Att'y Gen. No. 16 (1983), 40 Op. Att'y Gen. No. 57 (1984).

- HELD: 1. The construction of one duplex on a single tract of land for rental or sale purposes constitutes a "subdivision" under the Montana Subdivision and Platting Act unless otherwise excepted from "subdivision" status under section 76-3-207, MCA.
2. The construction of a second dwelling for a family member on a single parcel of land constitutes a "division of land" under the Montana Subdivision and Platting Act if the family member is intended to receive a legally enforceable possessory interest in such dwelling. If a "division of land" has occurred, such construction will constitute a "subdivision" unless otherwise exempted.
3. The construction of an office building, with individual office spaces for rent, constitutes a "subdivision" under the Montana Subdivision and Platting Act.
4. The construction of a hotel does not constitute a "subdivision" under the Montana Subdivision and Platting Act.

18 January 1985

Robert L. Deschamps III  
Missoula County Attorney  
Missoula County Courthouse  
Missoula MT 59802

Dear Mr. Deschamps:

You have requested my opinion concerning a question which I have phrased as follows:

Does the term "subdivision," as defined in section 76-3-103(15), MCA, include (1) conveyance of a possessory interest in one duplex constructed on a single tract of land, (2) use of a second dwelling constructed on a single parcel of land by a family member, (3) renting

office space within an office building, and  
(4) renting a hotel room?

A response to your question must be made with reference to various provisions of the Montana Subdivision and Platting Act, §§ 76-3-101 to 614, MCA (Subdivision Act), and two of my prior opinions.

The Subdivision Act comprehensively regulates the division of land tracts previously held in single or undivided ownership. See 40 Op. Att'y Gen. No. 16 (1983). This regulation is accomplished through survey requirements and, if the division of land creates a "subdivision" as defined in section 76-3-103(15), MCA, through (1) survey and platting requirements and (2) local review procedures intended to ensure that the proposed subdivision promotes the public health, safety and welfare. See §§ 76-3-102, 76-3-401 to 402, 76-3-501, MCA. As a general matter, a "division of land" as defined in section 76-3-103(3), MCA, is distinguished from a subdivision by the size of the resulting parcels. A subdivision is thus "a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways." "Subdivisions" are more carefully regulated than "divisions of land" because, presumably, of their greater potential for seriously impacting on public health, environment and local services through increased population concentration.

In 40 Op. Att'y Gen. No. 57 (1984) I held that construction of 48 four-plex units to be used for rental purposes on a single parcel of land constituted a "subdivision." My holding was partially based upon the nature of the possessory interest which the four-plex unit tenants would assume:

At the very least, the tenants in this case will enjoy possession of that portion of the tract, or "parcel," upon which the four-plex which contains their dwelling unit is constructed. The end result of this construction project will therefore be a "division of land," as a number of parcels will be segregated from the larger tract by means of transference of possession of those parcels to the tenants occupying the four-plexes.

Such holding is fully consistent with the definition of "subdivision." As quoted above, "subdivision" is, in relevant part, defined as a "division of land ... containing less than 20 acres;" the term "division of land" is itself defined in section 76-3-103(3), MCA, as "the segregation of one or more parcels of land 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." In 40 Op. Att'y Gen. No. 57 the "tract" was the land on which all of the four-plex units were constructed, while the "parcels of land" were those individual portions of the "tract" on which the separate buildings were situated. By constructing the units with the purpose of conveying a leasehold interest, transfer of "possession of a portion of the tract" was intended eventually to occur. Because each of the four-plex units was presumed to be less than 20 acres in size, all "subdivision" prerequisites were present.

While my interpretation of the terms "subdivision" and "division of land" is consonant with a precise reading of their statutory definitions, I must also observe that any other interpretation leaves a substantial regulatory void as to multi-family rental properties in what was clearly meant to be a comprehensive land use law preventing imprudent population concentration and ensuring maintenance of basic public health, environmental and local services values. Nothing in the language of the Subdivision Act or its legislative history suggests that the Legislature envisioned nonregulation of this significant aspect of residential construction--especially when that construction raises the same concerns associated with admittedly covered matters as single unit family structures, condominiums, recreational camping vehicle areas and mobile home parks. Moreover, the conclusion that rental properties, created by a "division of land," are included within the scope of the term "subdivision" is required by a literal application of its definition which extends to instances where "title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed." § 76-3-103(15), MCA (emphasis added). See also § 76-3-208, MCA.

The reasoning underlying 40 Op. Att'y Gen. No. 57 further requires inclusion within the scope of the term "subdivision" of single multi-family structures and

single multiple-use commercial structures occupying less than 20 acres. Because each structure occupies a portion of a larger tract and because possession of housing or office units within the structure--and necessarily possession of the land on which it rests--are conveyed by lease, a "subdivision" exists. See § 70-1-106(2), MCA; Wheeler v. McIntyre, 55 Mont. 295, 300-01, 175 P. 892, 894 (1918).

A more troublesome question in 40 Op. Att'y Gen. No. 57 was whether section 76-3-204, MCA, exempted the four-plex rental development from regulation under the Subdivision Act. That section states: "The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter." I concluded that, based on 39 Op. Att'y Gen. No. 74 (1982), the scope of such exemption extends only to the sale, lease or conveyance of existing and utilized structures. This interpretation of section 76-3-204, MCA, not only harmonizes that provision with the definition of "subdivision" but is also consistent with the general purpose of the Subdivision Act to avoid unregulated commercial or residential development. Such interpretation further harmonizes section 76-3-204, MCA, with section 76-3-202, MCA, which states: "Where required by this chapter, when the land upon which an improvement is situated has been subdivided in compliance with this chapter, the sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land and is not subject to the terms of this chapter." Any other conclusion effectively renders section 76-3-202, MCA, superfluous since, if section 76-3-204, MCA, were construed as creating a blanket exception from "division of land" status for all conveyances of possessory interests in portions of buildings, section 76-3-202, MCA, would add nothing to the Subdivision Act. It is, of course, an accepted principle of statutory interpretation that laws should, if possible, be construed to give full force and effect to each of their provisions. McClanathan v. Smith, 186 Mont. 56, 61, 606 P.2d 507, 510 (1980). Montana Automobile Association v. Greely, 38 St. Rptr. 1174, 1180, 632 P.2d 300, 306 (1981); § 1-2-101, MCA.

Whether the construction of the structures described in your question gives rise to "subdivisions" must be resolved in accordance with the above principles. Construction of a duplex for rental or sale purposes nominally falls within the scope of a "subdivision" because a legally enforceable possessory interest in a portion of a formerly integrated parcel of land will be conveyed. However, the duplex project may, under certain circumstances, be excepted from "subdivision" status or subjected to less stringent surveying and filing requirements. See §§ 76-3-207(1)(e), 76-3-208, MCA. The availability of exception from some or all of the act's requirements must be determined by a careful analysis of the particular facts. The construction of an office building for rental purposes will, for similar reasons, constitute a "subdivision." An exemption from full compliance with the act may nonetheless exist under section 76-3-208, MCA. The existence of a legally enforceable possessory interest determines if the construction of a second dwelling for a family member constitutes a "division of land." Whether such a possessory interest exists must be resolved with reference to the involved facts. Again, an exception to "subdivision" status and to full compliance with the act may arise even if a "division of land" has occurred. See §§ 76-3-207(1)(b), 76-3-207(1)(d), 76-3-207(1)(e), 76-3-208, MCA. Summary review procedures applicable to "minor subdivisions" may be available as to each of these projects. See § 76-3-505, MCA.

Rental of hotel rooms will not, however, constitute a "subdivision." Although a hotel or motel guest has a form of possessory right in his room, the involved transaction is actually the sale of "a product or service which is temporary lodging." Montana Innkeepers Association v. City of Billings, 40 St. Rptr. 1753, 1756, 671 P.2d 21, 23 (1983). The guest is instead a licensee:

A principal distinction between the relationship between landlord and tenant and that existing between innkeeper and guest ... exists in the fact that the tenant acquires an interest in the real estate, while the guest ... does not; a guest is a mere licensee, and not a tenant.

43A C.J.S. Inns, Hotels & Eating Places § 5 (1978) (footnotes omitted). Because no possessory interest in real property passes when a hotel room is rented, construction of a hotel does not constitute a "subdivision" under the Subdivision Act.

THEREFORE, IT IS MY OPINION:

1. The construction of one duplex on a single tract of land for rental or sale purposes constitutes a "subdivision" under the Montana Subdivision and Platting Act unless otherwise excepted from "subdivision" status under section 76-3-207, MCA.
2. The construction of a second dwelling for a family member on a single parcel of land constitutes a "division of land" under the Montana Subdivision and Platting Act if the family member is intended to receive a legally enforceable possessory interest in such dwelling. If a "division of land" has occurred, such construction will constitute a "subdivision" unless otherwise exempted.
3. The construction of an office building, with individual office spaces for rent, constitutes a "subdivision" under the Montana Subdivision and Platting Act.
4. The construction of a hotel does not constitute a "subdivision" under the Montana Subdivision and Platting Act.

Very truly yours,

MIKE GREELY  
Attorney General