

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 101

EXEMPTIONS - Application of Subdivision and Platting Act and "sanitation in subdivisions" statutes to sale of parcel used as security for construction lien;  
HEALTH AND ENVIRONMENTAL SCIENCES, DEPARTMENT OF - Application of "sanitation in subdivision" statutes to sale of parcel used as security for construction lien;  
LAND USE - Application of Subdivision and Platting Act and "sanitation in subdivisions" statutes to sale of parcel used as security for construction lien;  
LIENS - Application of Subdivision and Platting Act and "sanitation in subdivisions" statutes to sale of parcel used as security for construction lien;  
SUBDIVISION AND PLATTING ACT - Application to sale of parcel used as security for construction lien;  
MONTANA CODE ANNOTATED - Title 76, chapters 3, 4; sections 76-3-102, 76-3-103(3), 76-3-103(15), 76-3-201, 76-3-301, 76-3-601, 76-4-103, 76-4-104;  
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 16 (1983), 37 Op. Att'y Gen. No. 41 (1977).

HELD: The subsequent sale of an undivided parcel of land that was segregated from another parcel to provide security for a construction lien is not subject to the provisions of Title 76, chapters 3 and 4, MCA.

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25 July 1988

Susan Loehn  
Lincoln County Attorney  
Lincoln County Courthouse  
Libby MT 59923

Dear Ms. Loehn:

You requested my opinion on the following issues:

1. Where a parcel of land was divided to provide security for a construction lien, and the exemption from subdivision review and survey requirements found in section 76-3-201, MCA, was properly invoked, does the subsequent sale of the parcel require application of Title 76, chapter 3, MCA?
2. Does the subsequent sale of such a parcel of land require application of Title 76, chapter 4, MCA, regarding sanitation in subdivisions?

The concern here is for the situation where a person has divided land to create a parcel to be used as security for a construction lien. The division was evidenced by either a separate deed for the parcel to be used as security or by a mortgage document which set out the boundaries of the parcel to be used as security. In any case, there was documentation of the boundaries of the parcel that was divided from the whole for purposes of providing security. The division was reviewed by the local governing entity and was deemed exempt from the subdivision review and survey requirements of Title 76, chapter 3, MCA (the Montana Subdivision and Platting Act, hereinafter the Act). Section 76-3-201, MCA, found within the Act, provides:

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

....

(2) is created to provide security for construction mortgages, liens, or trust indentures[.]

Subsequent to the division of land, the lienholder took possession of the parcel offered as security and then

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decided to sell it. The question then arose as to whether the sale of the parcel was subject to the requirements of the Act.

As a preliminary matter, you have asked whether the exemption found in section 76-3-201(2), MCA, exists after the extinguishment of the lien. I note that exemptions from review and survey under the Act arise when the land is divided and an exemption is claimed. The validity of claimed exemptions is to be determined by the governing authority. §§ 76-3-102, 76-3-301, 76-3-601, MCA; 40 Op. Att'y Gen. No. 16 at 58 (1983). The exemption from the Act's requirements for the division of land would not "exist" apart from the division of land or after its purpose had been fulfilled.

I now turn to your primary question of the applicability of the Act to a subsequent sale of a parcel that was originally created to provide security for a construction lien. The Subdivision and Platting Act establishes a system of local government review of proposed subdivisions as well as survey requirements for divided land and subdivisions. Any "subdivision," as defined in section 76-3-103(15), MCA, is subject to the Act and certain divisions of land for sale are subject to the survey requirements found in part 4 of the Act.

There is no requirement in the Act that the subsequent sale of a parcel that was originally used as security for a construction lien pursuant to section 76-3-201(2), MCA, be reviewed or that the parcel be surveyed upon subsequent sale. The words "division of land" as used in section 76-3-201, MCA, are defined as follows:

"Division of land" means 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 or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter.

§ 76-3-103(3), MCA. It is such a "division of land" which triggers the applicability of the Act. Given the above definition, I see no applicability to the sale of an undivided parcel. If the parcel is divided by the seller prior to sale, that division of land would be reviewed under the Act independently and irrespectively of the exemption that was granted in recognition of the

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parcel's prior status as security for a construction lien.

This conclusion is consistent with my holding in 37 Op. Att'y Gen. No. 41 (1977). In that opinion I was asked about the applicability of section 11-3862(9), R.C.M. 1947 (now section 76-3-201(2), MCA), to the situation where a buyer of property on a contract for deed basis obtains title to a portion of the property in order to obtain financing for improvements. In that opinion I stated:

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. ...

....

[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. [Emphasis added.]

37 Op. Att'y Gen. No. 41 at 177-78. In essence you are concerned with the same situation as that discussed in the above opinion. The rationale of the opinion is applicable to the sale of the parcel by the lienholder. Because such a sale does not involve a division of land within the Act's definition, such a transfer would not require review or survey.

You have also asked whether the subsequent sale of such a parcel of land is subject to review under Title 76, chapter 4, MCA, regarding sanitation in subdivisions. Those statutes require review pursuant to rules and standards for water use and sewage disposal.

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§ 76-4-104, MCA. The definition of subdivision found in Title 76, chapter 4, MCA, focuses on parcels of land "which have been created by a division of land." § 76-4-103, MCA. Thus, as with the Subdivision and Platting Act, the applicability of the "sanitation in subdivisions" statutes hinges on whether there is a division of land.

Because there is no division of land in the situation with which you are concerned, Title 76, chapter 4, MCA, would not apply to require review and approval. These statutes do not apply to the sale of a parcel of land that has not been divided.

Finally, some discussion is warranted regarding the division of land that gave rise to the construction mortgage exemption. Both sections 76-3-201 and 76-4-125, MCA, provide that the exemption for construction mortgages is not to be allowed where it is claimed in order to evade the requirements of the statutes. As I stated in 37 Op. Att'y Gen. No. 41 at 176 (1977), it is the local governing body's responsibility to determine whether the division of land is made for the purpose of evading the statutes. In the process of making such a determination, a local governing body should adopt regulations which would establish procedures to ensure that the division is not made with the purpose of evasion.

THEREFORE, IT IS MY OPINION:

The subsequent sale of an undivided parcel of land that was segregated from another parcel to provide security for a construction lien is not subject to the provisions of Title 76, chapters 3 and 4, MCA.

Very truly yours,

MIKE GREELY  
Attorney General