

VOLUME NO. 44

OPINION NO. 25

COUNTY OFFICERS AND EMPLOYEES - Clerk and recorder: survey requirements for remainder created when state obtains property for highway right-of-way;

EXEMPTIONS - Survey requirements for remainder created when state obtains property for highway right-of-way;

HIGHWAYS - Survey requirements for remainder created when state obtains property for highway right-of-way;

PROPERTY, REAL - Survey requirements for remainder created when state obtains property for highway right-of-way;

SUBDIVISION AND PLATTING ACT - Survey requirements for remainder created when state obtains property for highway right-of-way;

MONTANA CODE ANNOTATED - Sections 7-4-2613(1), 76-3-103(3), (15), 76-3-201(1), 76-3-209, 76-3-302;

OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 121 (1988), 42 Op. Att'y Gen. No. 101 (1988), 37 Op. Att'y Gen. No. 88 (1977).

HELD: A county clerk and recorder may not require a survey or plat for the recordation of an instrument transferring title to a remainder that was created when the State of Montana obtained property for a highway right-of-way.

February 25, 1992

Blair Jones
Stillwater County Attorney
P.O. Box 179
Columbus MT 59019

Dear Mr. Jones:

You have requested my opinion on the following issue:

May a county clerk and recorder require a survey and plat in order to record an instrument transferring title to a remainder that was created when the State of Montana obtained property for a highway right-of-way?

You have stated that this question arises from the acquisition of rights-of-way by the State of Montana for the construction of two large highway projects in Stillwater County. After a right-of-way is obtained from a landowner, the landowner is left with a remainder parcel which the landowner claims should be surveyed in order to accurately describe the parcel's acreage. The Department of Transportation maintains that the parcel's acreage is described with sufficient accuracy by simply subtracting the area of the right-of-way from the original description of the parcel. The Stillwater County Clerk and Recorder has nonetheless required the remainders to be surveyed and platted as a condition of recordation.

As a general rule, a county clerk and recorder has a statutory duty to record all deeds, regardless of legal description, upon payment of proper fees. § 7-4-2613(1), MCA. Because section 7-4-2613(1), MCA, does not authorize a clerk to refuse to record a deed, such refusal is permissible only if specifically authorized by some other statute.

The Montana Subdivision and Platting Act ("the Act") has survey requirements for divisions of land. Tit. 76, ch. 3, pt. 4, MCA. Section 76-3-302, MCA, requires that a county clerk and recorder not record "any instrument which purports to transfer title to or possession of a parcel or tract of land which is required to be surveyed by this chapter" unless the required certificate of survey or plat is also recorded and the instrument describes the land by reference to

the survey or plat. Because section 76-3-302, MCA, permits a clerk to refuse to record a deed only when the land is required to be surveyed under the Act and the appropriate documentation has not been filed, it is necessary to determine whether the Act mandates a survey of a remainder created by a highway right-of-way acquisition. If the land is not required to be surveyed under the Act, the clerk and recorder may not rely upon the exception in section 76-3-302(1), MCA, in refusing to file an instrument.

Section 76-3-209, MCA, exempts instruments of transfer of land acquired for state highways from the surveying and platting requirements of the Act. While this section does not address the recording requirements of the remainder parcel, section 76-3-201(1), MCA, 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:

(1) is created by order of any court of record in this state or by operation of law or which, in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain (Title 70, chapter 30)[.]

There has been no indication here of any purpose to evade the requirements of the Act. Clearly, the division could have been created by an order of a state court pursuant to the law of eminent domain. See §§ 70-30-101, 70-30-102, MCA. Thus, by its plain language, section 76-3-201(1), MCA, excludes the remainder from the surveying and platting requirements.

You have also inquired about the need for a survey prior to any future sale or transfer of the remainder parcel. A previous Attorney General's Opinion held that sections 76-3-401 and 76-3-402, MCA, require surveys only when there is a "division of land" or "subdivision of land." See 37 Op. Att'y Gen. No. 88 at 368, 369 (1977). A "division of land" or "subdivision of land" necessarily involves the segregation of one or more parcels of land from a larger tract. See §§ 76-3-103(3), (15), MCA. I conclude that a sale or transfer of the entire remainder property does not involve a division or subdivision of land and therefore there is no requirement that the remainder be surveyed prior to the recording of the instrument of sale or transfer.

Previous Attorney General's Opinions have made it clear that exemptions from survey and platting requirements arise when the land is divided and the exemption claimed. See 42 Op. Att'y Gen. No. 101 at 388 (1988) (subsequent sale of undivided parcel of land segregated from another parcel to provide security for construction lien not subject to the Act); 42 Op. Att'y Gen. No. 121 at 476 (1988) (section 76-3-401, MCA, requires survey only when transfer of title involves division of land). Here, the division occurred when the state took

the land for highway purposes and, as mentioned above, sections 76-3-209 and 76-3-201(1), MCA, expressly exempt this division from the requirements of the Act. Any subsequent transfer or sale of the entire remainder would not involve a division of land and thus there would be no requirement for survey or platting prior to recording the instrument of sale or transfer.

THEREFORE, IT IS MY OPINION:

A county clerk and recorder may not require a survey or plat for the recordation of an instrument transferring title to a remainder that was created when the State of Montana obtained property for a highway right-of-way.

Sincerely,

MARC RACICOT
Attorney General