



Montana Legislative Services Division
Legal Services Office

TO: Education and Local Government Committee
FROM: Helen Thigpen, Staff Attorney
DATE: September 10, 2012
RE: HJ 39 interim study -- summary of proposals to revise the subdivision for lease or rent exemption in the Subdivision and Platting Act

Background

In 2011 the Legislature passed House Joint Resolution 39 (HJ 39), which directed a study of the exemption for the sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement in the Montana Subdivision and Platting Act (MSPA). This exemption, found in 76-3-204, MCA, has been interpreted by several courts and the Montana Attorney General as applying to a single building, structure, or improvement on a single tract of record.¹

As the committee charged with studying the subdivision for lease or rent exemption, the Education and Local Government Committee (ELG) reviewed the statutes governing the exemption as directed by HJ 39 as well as the case law and opinions that have interpreted the statute since the MSPA was enacted. Committee staff, along with staff from the Community Technical Assistance Program (CTAP) at the Department of Commerce, also reviewed the legislative history of the exemption and other related items for the committee during the 2011-2012 interim. In addition, the Committee solicited input from a broad group of stakeholders, including representatives of the development industry, planning organizations, local governments, environmental organizations, and private property owners.

As part of this process, and in an effort to gather additional input and participation from stakeholders, the ELG authorized the formation of a working group facilitated by staff from CTAP. The stakeholder groups that were identified in the study were contacted, and the groups selected individuals to participate in working group meetings. Individuals who testified at hearings during the 2011 session were also contacted. Several meetings were held over the course of the interim, and several options for modifying the subdivision for lease or rent exemption were discussed.

During the June 2012 meeting, the ELG received an update from CTAP staff on the status of the working group. Committee staff presented several bills that were generated from the working group meetings. Several members of the working group attended the June ELG meeting and

¹See 54 A.G. Op. 5 issued on January 13, 2012, which stated that the exemption in 76-3-204, MCA, "does not apply to the construction or conveyance of more than one building, structure, or improvement on a single tract of record." See also *Rose v. Ravalli Co.*, 2006 Mont. Dist. LEXIS 1072 (May 2, 2006) and *Derick v. Lewis and Clark Co.*, Cause No. BDV-2007-305 (August 26, 2011), holding that 76-3-204, MCA, exempts one building or structure from MSPA review.

provided input on the drafts. At that time, meeting presenters noted that the working group did not reach a consensus on whether to support any of the options that were discussed for revising the subdivision for lease or rent exemption.

At the conclusion of the review of the five bill drafts, Representative Arntzen designated Senator Facey and Representative Rosendale to work with staff on developing an additional proposal for revising the subdivision for lease or rent exemption. This proposal is not in draft form but is summarized for the committee below. A brief review of the drafts that were presented to the ELG in June is also provided.

Summary of 6th Proposal

▶ Option 6

- Removes the subdivision for lease or rent exemption from the Subdivision and Platting Act and creates a new process in Title 76 for reviewing buildings or units.
- Exempts buildings or units from review if the proposal complies with applicable zoning regulations.
- In areas where zoning regulations are not in effect, authorizes up to three buildings or units on a tract of record, in addition to a primary building or unit, whether existing or proposed, provided the proposal has received sanitation approval by the Department of Environmental Quality (DEQ).
- Allows a local government to raise the threshold number of buildings or units allowed.
- If the local government raises the threshold number, the proposal must receive sanitation approval from DEQ. For example, a local government could allow up to five buildings or units on a single tract of tract of record, but the proposal must be approved by DEQ for sanitation. The local governing body would have to pass regulations establishing the additional number of buildings or units allowed. The Legislature would establish minimum review criteria for reviewing buildings or units above the threshold number that has been established by the local government. The local government may adopt additional criteria for reviewing buildings or units above the threshold number approved by the local government with a supermajority vote of the local governing body.
- If the local government does not raise the threshold number, minimum review criteria established by the Legislature would apply. The local government could also adopt more stringent criteria that would apply to more than four buildings or units with a supermajority vote of the local governing body.
- Certain notice and hearing requirements for adopting the criteria must be followed.
- Defines “building” as a structure with a roof supported by columns or walls that is used for the housing or enclosure of persons, animals, or property of any kind. Defines “unit” as an independent space that has sewage disposal facilities and that

- may be used separately from another building on the same tract of record.
- Repeals sections 76-3-202, 76-3-204, and 76-3-208, MCA.
- Removes references to subdivision for lease or rent from 76-3-103, 76-4-125, 76-6-203, and 76-7-203, MCA.
- Applies to buildings or units created after the effective date of the bill.

Summary of Working Group Options Discussed at June 2012 ELG Meeting

▶ LCEd01

- Leaves the subdivision for lease or rent exemption in the MSPA.
- Defines "subdivision for lease or rent" in the MSPA as "a division of land or land so divided in order that possession of a parcel, building, structure, improvement, or portions thereof may be leased, rented, or otherwise transferred, including an area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes."
- Exempts any other facility that collects a lodging facility use tax.
- Establishes expedited review for subdivisions for lease or rent.
- In zoned areas, exempts the proposal from local subdivision review if it complies with applicable zoning regulations.
- When zoning regulations are not in effect, subdivision for lease or rent is exempt from the surveying and filing requirements but must be reviewed and approved by the governing body.
- Establishes timelines for reviewing applications.
- Authorizes a local government to establish requirements for reviewing subdivisions for lease or rent of six or more buildings, structures, or improvements.
- Provides that subdivisions for lease or rent in existence before the effective date of the act are not subject to review.
- Repeals 76-3-202 and 76-3-204, MCA.

▶ LCEd02

- Repeals the subdivision for lease or rent exemption from the MSPA.
- Repeals 76-3-202, 76-3-204, 76-3-208, MCA.
- Leaves any review of a project that would have been subject to review under the MSPA to local zoning regulations or, if local zoning regulations are not in effect, to review under the property development review statutes in Title 7, chapter 21, MCA.

▶ LCEd03

- Removes subdivision for lease or rent from the MSPA.

- Includes the "creation of second or subsequent buildings or structures on an existing tract of record" within the definition of a site-specific development plan in the property development review statutes in Title 7.
- Authorizes a local government to adopt regulations to review the creation of second or subsequent buildings or structures on existing tracts of record.
- Establishes minimum criteria if a local government adopts regulations to review second or subsequent buildings or structures.
- Provides that regulations adopted by a local government do not apply when the proposal conforms to applicable local zoning regulations (i.e. when the creation of the existing tract created through subdivision expressly contemplated the creation of the second or subject building or structure or when the second or subsequent facility is a facility that is required to collect a lodging facility use tax).
- Applies to applications for site-development review submitted on or after the effective date of the act.

▶ **LCEd04**

- Removes subdivision for lease or rent from the MSPA.
- Creates a new statutory review process for local governments to review the creation of second and subsequent buildings or structures as part of the planning and zoning statutes in Title 76 (i.e. it is not incorporated in Title 7 as provided in Option 3).
- Authorizes a local governing body to adopt regulations for reviewing second or subsequent structures.
- Establishes a process local governments would follow when adopting the regulations (i.e. notice and hearing).
- Establishes an appeal process.
- Applies to applications for site-development review submitted on or after the effective date of the act.

▶ **LCEd05**

- Very similar to Option 1 (LCEd01), except that it also modifies the county zoning protest statute in 76-2-205, MCA, to allow a board of county commissioners to override a successful protest of a proposed zoning district with a 2/3 vote.