

# **Subdivisions for Lease or Rent**

## ***Education and Local Government Interim Committee***

***September 15, 2011***

# **OUTLINE**

- I. **Community Technical Assistance Program**
- II. **Overview of Land Use Planning in Montana**
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  - B. **Zoning Regulations**
  - C. **Subdivision Regulations**
- III. **Legislative History of SLR**
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# **I. Community Technical Assistance Program (CTAP)**

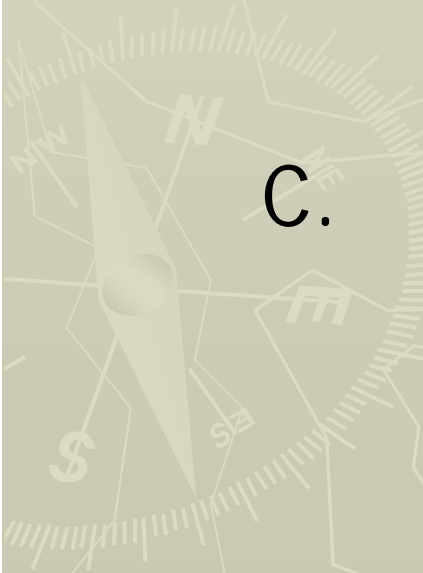
- **Housed at the Montana Department of Commerce.**
- **Provides technical assistance to local governments, planning departments, private developers, non-profit organizations, and the public.**
- **Assist clients in understanding land use statutes and case law in Montana.**

# II. Overview of Land Use Planning In Montana

A. Growth Policies

B. Zoning Regulations

C. Subdivision Regulations



# **A. Growth Policy**

*(Title 76, Chapter 1, Part 6, MCA)*

- A growth policy (aka master plan, general plan, comprehensive plan) is an official public document adopted and used by local governments as a guide for decisions regarding the physical development of a community.
- Public process to build consensus and “buy in” about the community’s goals and how to achieve them.
- Legal foundation for implementing the goals:
  - Zoning, subdivision regulations, etc.
  - Statute and case law require that all implementing regulations adopted be consistent with the growth policy.

## **B. Zoning**

*(Title 76, Chapter 2, Parts 1, 2, & 3)*

- Regulations which can be used to govern the use of land and the placement, spacing and size of buildings.
- Zoning can regulate things like:
  - Incompatible uses
  - Density
  - Vegetation management
- Zoning regulations apply to all tracts of record in a zoning district – existing or not
- Flexible tool.....can be crafted to meet each jurisdiction's needs.

# Authority to implement zoning:

## §76-2-101 (Part 1) *Citizen Initiated Zoning*

- **Does not** require a growth policy
- Protest provision – 50% of property ownership prohibits adoption and imposes 1 year moratorium.

## §76-2-201 (Part 2) *County Zoning*

- Requires a growth policy
- Protest provision - 40% of property owners representing 50% of property ownership taxed for agricultural purposes or forest land prohibits adoption and imposes 1 year moratorium.

## § 76-2-301 *Municipal Zoning*

- Requires a growth policy
- Protest provision for amending the ordinance – 25% of the area of lots included or 25% of lots within 150 feet of change; 2/3 vote of council can adopt over protest

# **C. Subdivision**

*(Title 76, Chapter 3, Parts 1-6)*

- Montana Subdivision and Platting Act (adopted 1973)
- Regulates the process of creating new lots of 160 acres or less.
- Statutory purpose is to promote the public health, safety, and general welfare (§ 76-3-102, MCA.)
- Subdivisions permanently determine the long-term pattern of land development and the provision of services and infrastructure for a community.



# Local Subdivision Regulations

- Every local jurisdiction must adopt its own local subdivision regulations.
  - Focused on minimizing *the impacts* of subdivision development on the local community (increase in traffic, maintenance of roads, provision of public services, availability of water, impacts to surrounding neighbors and land uses, etc.)
  - Can be more restrictive than state statute, but cannot conflict with it
  - Can provide for expedited review of minor subdivisions
  - Can adopt criteria for determining whether use of an exemption is an attempt to evade subdivision review

# Subdivisions – The Essentials

- **Local Regulations** must be followed when reviewing an application
- **Evasion Review for Exemptions**
- **Minor v. Major subdivision**
  - 5 or fewer lots created
  - Must count cumulatively – all previous exemptions (with exemptions!) and subdivisions count
- **Timelines**
  - Element and sufficiency review – 5 days and 15 days
  - Minor subdivisions – 35 working days
  - Major subdivisions – 60 days if 49 units or less; 80 if 50 or more
- **Mitigation** may be required by governing body for identified impacts
- **Written findings and decision** must be issued 30 days after decision at public hearing

# Subdivision Exemptions

- Idea behind exemptions is that there is minimal to no impacts associated with certain types of subdivisions
  
- Three Types:
  1. Exempt from surveying AND review requirements
  2. Exempt from local review, but must be surveyed
  3. Exempt from surveying requirements, but must undergo local review

# Exempt from Review AND Survey

- ▶ Court-Ordered Division (§ 76-3-201, MCA)
- ▶ Mortgage Security (§ 76-3-201, MCA) (But no tract of record is created unless and until foreclosure occurs)
- ▶ Severing Minerals (§ 76-3-201, MCA)
- ▶ Cemetery Lots (§ 76-3-201, MCA)
- ▶ Reservation of Life Estate (§ 76-3-201, MCA)
- ▶ Agricultural Lease (§ 76-3-201, MCA)
- ▶ No State Jurisdiction (federal, tribal lands)(§ 76-3-201, MCA)
- ▶ Public Rights of Way and Utilities (§ 76-3-201, MCA)

# Exempt from Review AND Survey

- ▶ Sale, Rent, Lease or Other Conveyance of A Portion of a Building, Structure or Improvement (§ 76-3-202, MCA)
- ▶ Condominiums (§ 76-3-203, MCA)
  - on land subdivided in compliance with these regulations and parts 5 and 6 of the MSPA, OR
  - on lots within incorporated cities and towns, if:
    - ▶ original approval of subdivision expressly contemplated condominiums  
OR
    - ▶ proposal is in conformance with applicable zoning
- ▶ Sale, Rent, Lease or Other Conveyance of A Portion of a Building, Structure or Improvement, Whether Existing or Proposed (§ 76-3-204, MCA)
- ▶ Airport and State-Owned Lands (§ 76-3-205, MCA)
- ▶ Conveyances Prior to July 1, 1974 (§ 76-3-206, MCA)

# Exempt from Review Only

- ▶ Relocation of Common Boundaries Outside Platted Subdivision (§ 76-3-207(1)(a), MCA)
- ▶ Gift or Sale to Immediate Family (§ 76-3-207(1)(b), MCA)
- ▶ Divisions of Land Proposed for Agricultural Use Only (§ 76-3-207(1)(c), MCA)
- ▶ Relocation of Common Boundaries Within Platted Subdivisions (§ 76-3-207(1)(d), MCA)
- ▶ Relocation of Common Boundaries Within and Outside of Platted Subdivisions (§ 76-3-207(1)(e), MCA)
- ▶ Aggregation of Lots (§ 76-3-207(1)(f), MCA)

# Exempt from Survey Only

- ▶ Subdivision for Lease or Rent (§ 76-3-208, MCA)



# III. Legislative History of SLR

- 1973 Passage of Subdivision and Platting Act (SB 208)
- 1974 Amendments to MSPA (HB 1017)
- Conversion from RCM to MCA
- AG Opinions and SB 354
- Case Law
- 2009 Request for AG Opinion



## SB 208 (1973)

- **Creation of Montana Subdivision and Platting Act**
- **Applied to divisions creating lots less than 10 acres in size**
- **As introduced, contained four exemptions**
  - **Court order**
  - **Mortgage or lien**
  - **Severing minerals**
  - **Cemetery lots**

## SB 208, cont.

- Senate Judiciary passed with amendment adding fifth exemption from review and survey: divisions “created by a rental or lease agreement for a term of three (3) years or less.”
- House Natural Resources Committee removed this exemption, and replaced it with two new exemptions from both review and survey:
  - Lease or rental for agricultural purposes
  - Family transfer

## HB 1017 (1974)

- First amendments to MSPA (annual sessions)
- Increase application of MSPA to divisions creating lots 40 acres in size or less
- Adds seven exemptions
  - **Subdivisions for rent or lease** must be reviewed but no survey required (language of § 76-3-208, MCA)
  - State-owned lands
  - Reservation of life estate
  - Parcels created by state ROW
  - Common boundary relocations
  - Agricultural land sale or buy-sell agreement

## HB 1017, cont.

- **House Natural Resources Committee:**
  - Added exemption for any land within city limits from requirements of MSPA
  - Added exemption for occasional sale
  - Applied MSPA to all divisions of land regardless of size
  - Added new exemption: *“This chapter does not apply to any condominium created solely by the change of ownership of any existing structures.”*
    - ✓NOTE - This proposal followed and generated discussion about whether or not condominiums should be exempt from the MSPA and whether existing as opposed to proposed condominiums should be treated the same

## HB 1017, cont.

### Senate Judiciary amendments:

- Removed exemptions for cities and state ROW.
- Replaced the condo exemption added in the House with:  
**"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 act*, and is not subject to the *requirements* of this act."**
- Added same language to definition of "division of land":  
**"Provided that where required by this act the land upon which an improvement is situated has been subdivided in compliance with this act, 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 act."**

# Revised Codes of Montana (1974)

## **Section 11-3681(2.1). "Division of land."**

"Provided that where required by this act the land upon which an improvement is situated has been subdivided in compliance with this act, 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 act."

## **Section 11-3862(7). Surveys required – exceptions.**

"Subdivisions created by rent or lease are exempt from the surveying and filing requirements of this act but must be submitted for review and approved by the governing body before portions thereof may be rented or leased.

## **Section 11-3862(9). Surveys required – exceptions.**

"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 act*, and is not subject to the *requirements* of this act."

# Montana Code Annotated (1978)

## **Section 76-3-202. Exemption for structures on complying subdivided lands.**

~~“Provided that w~~Where required by this ~~act~~ chapter, when the land upon which an improvement is situated has been subdivided in compliance with this ~~act~~ 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 ~~act~~ chapter.”

## **Section 76-3-204. Exemption for conveyances of one or more parts of a structure or improvement.**

“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 ~~act~~ chapter, and is not subject to the requirements of this ~~act~~ chapter.”

# Montana Code Annotated (1978)

## **Section 76-3-208. Subdivisions exempted from surveying and filing requirements but subject to review provisions.**

“Subdivisions created by rent or lease are exempt from the surveying and filing requirements of this ~~act~~ chapter but must be submitted for review and approved by the governing body before portions thereof may be rented or leased.





# Attorney General Opinions

## ▶ 1981

- Requested by former Dept. of Health & Environmental Sciences.
- Does “subdivision” in Sanitation Act apply to **all** condos or only condos that do not provide “permanent multiple space for recreational camping vehicles?”
- Yes. Legislature intended definition of “subdivision” to be broad.
- AG Greeley interpreted Sanitation Act and MSPA in the same manner.
- 76-3-204, exemption does not apply.

## ▶ 1982

- Requested by Missoula County Attorney.
- Does MSPA require review of conversions of existing apartments or office buildings to individual condos?
- No. All condos are subject to review unless exempt, but 76-3-204, exempts conversions of an apartment or office building to condos.
- Building was **existing, built, and in use** as an apartment building.

# Attorney General Opinions Cont.

## ▶ 1984

- Requested by Missoula City Attorney.
- Does a proposal to construct 48 four-plexes (192 dwelling units) to be used as **rentals** on a tract of record need to go through subdivision review?
- Yes. Proposal constitutes a “division of land” because the owners sought to segregate parcels from the larger tract by transferring or contracting to transfer possession of portions of the tract to the tenants.
- 76-3-204, does not apply because it only applies to **existing** buildings that were built and used prior to the time of division.
- No discussion of 76-3-202 or 76-3-208.

# Lee v. Flathead County (1985)

## ► Facts:

- April, 1984 – developers sought to construct a four-unit apartment building in Big Fork (originally proposed as condos).
- June, 1984 – AG opinion (48 four plexes) holding that 76-3-204, applied to **existing** structures, built, and in use prior to division.
- Spring, 1985 – Legislature amended 76-3-204, to apply to both **existing** and **proposed** structures. (SB 354).
- District court ruled in favor of the developers.
- Developers appealed.

# Lee v. Flathead County (1985) cont...

## ▶ Question:

- Does 76-3-204, apply to proposed structures?

## ▶ Answer:

- Yes. Legislature's amendment of "existing and proposed" to 76-3-204, exempts four-plex apartment from subdivision review.

## ▶ Notes:

- Decision addressed a **single structure** – not an existing building with multiple additional structures.
- Later decisions cite Lee to conclude that 76-3-204, applies to **single structures**.

# Attorney General Opinions

- ▶ 1981 – AG opinion that condominiums are subject to sanitation review, interpreting laws from both Acts the same. Exemption -204 does not exempt condominiums from review.
- ▶ 1982 – AG opinion that conversion of existing, built, and utilized apartment or office building into condominiums falls within exemption -204
- ▶ 1984 – AG opinion (City of Missoula) that proposed 48 four-plexes on single parcel constitutes a division of land and must undergo local subdivision review, because exemption -204 limited to buildings existing, built, and utilized prior to the time the division occurs (“situated”). No discussion of -202 or -208.

## SB 354 (1985)

- “AN ACT TO CLARIFY THAT THE CONVEYANCE OF ONE OR MORE PARTS OF A BUILDING IS NOT A SUBDIVISION.”
- After AG opinion in 1984, some local communities concerned about interpretation of -204 as applying only to existing improvements
- SB 354 amended -204 to overrule 1982 and 1984 AG opinions as to that issue:

“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,~~ whether existing or newly constructed as that term is defined in this chapter, and is not subject to the requirements of this chapter.”

## SB 354, cont.

- At House Natural Resources Committee, Rep. Raney expresses concern that the language creates a “loophole” that will allow separate residences on one lot to avoid subdivision review. Sponsor Sen. Mazurek assures him that would “not be allowable under the law.”
- SB 354 as passed:

**“Section 76-3-204. Exemption for conveyances of one or more parts of a structure or improvement.”**

“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,~~ whether existing or proposed as that term is defined in this chapter, and is not subject to the requirements of this chapter.”

# Rose v. Ravalli County (2006)

## ▶ **Facts:**

- Skalkaho Lodge and Steak House, Ravalli County.
- Owners sought to construct four guest cabins – buildings would be separate from the existing guest lodge.
- County denied request for well and septic – project must first undergo subdivision review.
- Litigation to determine whether subdivision review necessary.

## ▶ **Questions:**

- Does the project meet the definition of subdivision?
- Is the project exempt from review under 76-3-204?
- Is the project subject to review under 76-3-208?



# Rose v. Ravalli County (2006) Cont.

## ▶ **Answers:**

### ■ **Subdivision?**

- ▶ Yes. Project to build four separate guest cabins for **rent** or **lease** in an area is a subdivision under MSPA.
- ▶ Project requires separate water supplies and septic.
- ▶ "Subdivision" should be liberally construed.

### ■ **Exempt under 76-3-204?**

- ▶ No. Exemption applies to a **single structure**.
- ▶ Proposal would create several small cabins separate from the existing guest lodge.

### ■ **Subject to review under 76-3-208?**

- ▶ Yes. "Subdivision" for rent or lease requires subdivision review, but 76-3-208, applies and the project is exempt from surveying and filing requirements.

# 2009 Request for AG Opinion

County Attorney for Missoula requests an AG opinion on the following two questions:

1. Are the definition of “subdivision” in M.C.A. 76-3-103(15), as applied to subdivisions for rent or lease, and the requirement for review of “Subdivisions created by rent or lease” at M.C.A. § 76-3-208, limited to divisions of land where residential dwellings are planned?
2. Does the exemption found at M.C.A. §76-3-204 for “sale, rent, lease, or other conveyance of one or more parts of a building” apply to multiple buildings on a single parcel?

## 2009 Request for AG Opinion, cont.

- Missoula County Attorney concluded that the SLR exemption was limited to a single building, structure, or improvement on a parcel:
  - the plain meaning of the statute,
  - the MSC's directive to narrowly construe the exemptions of the Act, and
  - the public policy purposes behind the Act (interpreting the exemption to allow for multiple buildings “would potentially allow for entire cities of rental buildings to be established without any review...”).
  - The Missoula County Attorney cited the 2006 21<sup>st</sup> District Court decision, Rose v. Ravalli County, in support of its conclusions.

## 2009 Request for AG Opinion, cont.

- Missoula City Attorney submitted a conflicting interpretation of the SLR exemption, concluding that the provision exempts multiple rental buildings on a parcel from subdivision review:
  - previous AG Solicitor's letter and advice from CTAP that concluded the SLR exemption allowed for more than one rental building on a parcel to be exempted from subdivision review,
  - Statutory construction – singular includes the plural
  - requiring subdivision review in the city would hamper commercial, university, and low-income housing developments.

## 2009 Request for AG Opinion, cont.

- AG releases “draft” opinion for review and comment in March 2010, concluding that the SLR exemption does not apply to the conveyance or construction of more than one building, structure, or improvement on a single tract of land.
- In May 2010, Chief Civil Counsel for AG informs Missoula County Attorney that the AG’s office will not issue an opinion because Derick v. Lewis and Clark County case involving SLR was pending. Urged Legislature to take up the issue in 2011 session
- Until April 2011, many working on the issue did not know that the AG would not be issuing an opinion

# **IV. Summary of 2011 Legislative Session**

- HB 494
- HB 629
- Local Option Proposal
- Amendatory Veto HB 494

# HB 494

Sponsored by Champ Edmonds (R-HD 100, Missoula):

- Modifies exemption -204 to make building, structure, and improvement plural
- Clarified the buildings could be located on a single parcel of land or on multiple parcels owned by a single person
- Exemption available in zoned areas only if conveyance in conformance with the zoning

Supported by private landowners, Montana Association of Realtors, Montana Building Industry Association, Montana Association of Registered Land Surveyors; opposed by Montana Association of Counties, Missoula County, and Montana Association of Planners

On second reading, amended to clarify that exemption also available in unzoned areas. Referred to Senate Local Government on March 9.

# HB 629

Sponsored by Austin Knudsen (R-HD 36, Culbertson):

- New section in MSPA that would create an alternative and expedited review process for subdivision review of SLRs, similar to the process set forth in the statute for minor subdivisions.
  - Reviewing agencies would have 35 days to process an SLR;
  - SLR exempted from the requirement to be surveyed, to prepare an EA, from park dedication requirements, and from a public hearing.
- Modified the § 76-3-201 exemption for lease or rent for farming or agricultural purposes, by adding “including nonresidential agricultural-related structures.” This language was intended to expedite the development of farmworker housing in rural, agricultural counties.
- Repealed the 76-3-202 exemption



# HB 629, cont.

## ➤ Modified 76-3-204:

- Like HB 494, made building, structure, and improvement plural
- Clarified the buildings could be located on a single parcel of land or on multiple parcels owned by a single person
- Exemption available if the parcel or parcels and the buildings or structures are in conformance with applicable local zoning regulations; or
- Exemption available in unzoned areas, when:
  - ✓ Original subdivision of the underlying parcel or parcels resulted from a subdivision that contemplated multiple buildings or structures on individual lots;
  - ✓ Maximum of three single dwelling structures in addition to the parcel owner's primary residence; or
  - ✓ No sewage disposal facilities built for the structures
  - ✓ The buildings or structures are intended for rental as storage units or for a single agricultural operation."

# HB 629, cont.

## ➤ **House Local Government Committee amendments:**

- Allowed for SLR subdivisions of six or more buildings to be reviewed as major subdivisions;
- Limited the exemption to no more than 3 of either residential or commercial SLRs;
- Removed storage units and single agricultural operations from the exemption
- Provided a method for counting dwellings or places of businesses;
- Limited the use of the exemption to one-time-only;
- Allowed local governments to exempt more than 3 SLRs through local subdivision regulations, so long as the government identifies the number of SLRs that would be exempted

# Local Option Proposal

- ▶ Never formally introduced
- ▶ Modified -208 to allow local agencies to:
  - 1) exempt all SLRs from review;
  - 2) exempt certain types or categories of SLRs from review;
  - 3) impose only certain review criteria and other requirements on SLRs; and/or
  - 4) provide expedited review for SLRs
- ▶ Intended to provide flexibility – e.g., urban growth counties v. eastern oil and gas counties

# Amendatory Veto HB 494

HB 494 was transmitted to the Governor on April 26. Governor vetoed the bill with the following amendments:

- 1) Eliminated the *sale or conveyance* of multiple buildings, structures, or improvements on a single tract of record without subdivision review from -204 exemption;
- 2) Limited the SLR to a maximum of four buildings, structures, or improvements;
- 3) Deleted the section of HB 494 discussing the applicability of zoning regulations to the exemption established under the bill;
- 4) Grandfathered youth camps, as defined in § 50-52-101, under construction or already in operation
- 5) Grandfathered existing buildings, structures, or improvements that are currently being rented or leased and those under construction as of the Act's effective date.

# Derick v. Lewis & Clark County (2011)

## ► **Facts:**

- Single-family house and separate garage apartment.
- Owners sought to rent the garage apartment.
- County concludes that subdivision review is necessary.
- Garage apartment served by single water and sewer system.
- Dispute over retraction of wastewater permit.
- Litigation ensues (parties settle portion of lawsuit).

## ► **Questions:**

- Is the proposal a "subdivision?"
- Is the proposal exempt from review under 76-3-204?
- Does 76-3-208 apply?

# Derick v. Lewis & Clark County (2011) Cont.

## ▶ **Answers:**

### ■ **Is the proposal a “subdivision?”**

- ▶ Yes. A “division of land” occurs when one or more parcels are segregated from a larger tract.
- ▶ Tenants will receive possession of a separate dwelling unit on a tract of land.
- ▶ The interest conveyed includes **some interest** in the real estate upon which the apartment is located.
- ▶ Contrary result would create a regulatory void.

### ■ **Is the proposal exempt from review under 76-3-204?**

- ▶ No. Exemption applies to a single building.
- ▶ 76-3-208, would be rendered meaningless.

### ■ **Does 76-3-208 apply?**

- ▶ Yes.

## **V. Lessons Learned**

- **History and cases support interpretation that -204 exempts portions of single building**
  - **Original intent was to be clear that condo conversions in existing buildings would be exempt, but now condos have their own exemption and -204 doesn't apply (1982 AG Opinion)**
- **History indicates -202 and -204 were the same**
- **History indicates some support in past for exempting cities from state subdivision requirements**

# **Community Technical Assistance Program**

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