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NOTE

JUDICIAL EXPANSION OF THE MONTANA SUBDIVISION AND PLATTING ACT IN FLORENCE-CARLTON

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Loopholes in the Montana Subdivision and Platting Act[1] have been a problem for local governments since the act's inception. In *Florence-Carlton School District v. Board of Ravalli County Commissioners,*[2] the Montana Supreme Court adopted a rule of construction that will significantly affect future challenges to the use of the act's many loopholes by land developers. This note discusses *Florence-Carlton*'s impact on local government subdivision review, as well as its potential effect on interpretations of other provisions of the subdivision act and other legislation enacted for the promotion of the public's health, safety, and general welfare.

I. THE AMBIGUITY IN THE ACT

The act requires different review procedures for two types of subdivisions—summary subdivisions and major subdivisions. Summary subdivisions are defined as divisions of land into five or fewer lots.[3] Divisions of land into more than five lots are major subdivisions.[4] Proposed major subdivisions are reviewed more thoroughly by the local governing body in a two-stage procedure.[5] The developer of a major subdivision first submits a preliminary plat and, if preliminary approval is granted, he then submits a final plat for review. In reviewing the preliminary plat, the governing body uses information provided in an environmental assessment, a public

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1. MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 76-3-101 through -614 (1979).

2. ___ Mont. ___, 590 P.2d 602 (1978).

3. Defined in MCA § 76-3-505 (1979) and in the Administrative Rules of Montana § 22-2.4B(2) - S410(1)(e)(ii) [hereinafter cited as A.R.M.].

4. MCA § 76-3-104 (1979). The term "subdivision" in general is defined in MCA § 76-3-103 (1979) as a

> division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and shall include any resubdivision and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles, or mobile homes.

5. MCA §§ 76-3-601 through -608, -611 (1979).

hearing, planning board recommendations, and a determination that the development would be in the public interest.[6] To determine the public interest, the governing body weighs eight criteria: the basis of the need for the subdivision; expressed public opinion; and effects on agriculture, local services, taxation, the natural environment, wildlife, and public health and safety.[7] Summary subdivisions, such as those involved in *Florence-Carlton,* require less exacting public review. For example, summary subdivisions need not be reviewed at a public hearing or be accompanied by an environmental assessment.[8] In addition, no provision in the subdivision act or in the administrative regulations promulgated under it by the Department of Community Affairs expressly requires that summary subdivisions serve the public interest.

The uncertainty of whether summary subdivisions are required to be in the public interest stems from the piece-meal legislative history of the act. The act was adopted in 1973 and was substantially amended in 1975 and 1977. The original provision setting out the procedure for reviewing subdivisions began with the phrase, "[e]xcept where a plat is eligible for summary approval, the subdivider shall present to the governing body. . .the preliminary plat of the proposed subdivision for local review."[9] The remaining subsections concerned procedures for preliminary plats and made no further mention of summary subdivision review requirements. In 1975, the legislature added subsection (4),[10] which requires a determination of public interest using the eight criteria cited above. The 1977 amendment added subsection (6),[11] which provides an abbreviated review procedure for subdivisions of five or fewer parcels. Because subsection (6) was the only portion of the original R.C.M. 1947, § 11-3866[12] that concerned summary subdivisions and because the entire section was introduced with an exception for summary subdivisions, whether the amendment requiring a public interest determination also applied to summary subdivisions was not clear.

II. THE CASE

Florence-Carlton concerned the adequacy of less exacting re-

6. *Id.*
7. MCA § 76-3-608(2) (1979).
8. MCA § 76-3-609 (1979).
9. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 11-3866, now codified at MCA § 76-3-601 (1979).
10. Now codified at MCA § 76-3-608 (1979).
11. Now codified at MCA § 76-3-609 (1979).
12. Now codified at MCA § 76-3-601 (1979).

view requirements for a group of summary subdivisions within a larger tract of land. In June 1977, Wilbur Hensler, a Ravalli County rancher, divided his ranch into a number of parcels, each of which was larger than twenty acres. This initial division of land was exempt from review as a subdivision. However, shortly after the survey was filed, Hensler sold the group of tracts to several Missoula businessmen who resold them to individual buyers. In 1978, the new buyers proposed to further subdivide their tracts into twenty-six subdivisions, each containing five lots. Although each subdivision technically met the definition of a summary subdivision, the cumulative effect of the twenty-six subdivisions resembled a major subdivision. Nevertheless, in considering the plat applications for the entire group of subdivisions, the Ravalli County Planning Board decided that the group of summary subdivisions did not require a public hearing, an environmental assessment, or a determination of public interest. Consequently, the board recommended approval of the subdivisions to the Ravalli County commissioners. Anticipating a detrimental impact on its already overcrowded school, the Florence-Carlton School District filed suit challenging the board's decision that a determination of public interest was not required in order to approve the subdivisions. The district court ruled in favor of the planning board, and the school district appealed to the Montana Supreme Court.

In spite of the technical interpretations advanced by all parties, the Montana Supreme Court looked beyond the individual sections of the act in question and examined the purpose section which originally read:

> It is the purpose of this act to promote the public health, safety, and general welfare by regulating the subdivision of land; to prevent overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress and other public requirements; to encourage development in harmony with the natural environment. . . .[13]

Amendments to the purpose section, made simultaneously with the amendments to the original R.C.M. 1947, § 11-3866[14] in 1975 and 1977, suggested to the court that approval of a subdivision, whether major or summary, is contingent upon a written finding of public interest by the governing body.[15]

In the same chapter to the session laws that established the

13. Originally codified at R.C.M. 1947, § 11-3860.
14. Now codified at MCA § 76-3-601 (1979).
15. — Mont. —, 590 P.2d at 605.

requirement for a determination of public interest, the legislature amended the purpose section in 1975 "to require that approval of *any* subdivision be contingent upon a written finding of public interest by the governing body."[16] In 1977, the purpose section was again amended "to require *whenever necessary,* the appropriate approval of subdivisions be contingent upon a written finding of public interest by the governing body."[17] Also, in the same chapter, the legislature modified the review procedure for certain subdivisions within previously adopted master plan areas, where zoning regulations and a development program of public works had been adopted. These subdivisions would be deemed in the public interest and exempt from the requirement of an environmental assessment.[18]

The court concluded that the amendment to the purpose section was designed to make the section consistent with two other 1977 revisions of the act: the amendment in the same bill that modified the review procedures for some subdivisions in master plan areas,[19] and the amendment contained in a separate bill that shortened review procedures for summary subdivisions.[20]

The court's conclusion that the bill amending the purpose section was designed to create consistency with the summary subdivision bill is questionable. It is more likely that the legislature's change in wording in the purpose section to "appropriate approval of subdivisions" was intended to compensate for only the modified review procedure for subdivisions in master plan areas which was enacted in that same bill. Instead, the court concluded that "[t]he most natural meaning of the clause in the purpose section is that the appropriate form of approval, whether that be formal approval or summary approval, is contingent upon a written finding of public interest by the governing body."[21]

The court's interpretation of legislative intent is overbroad because of an inconsistency in MCA § 76-3-609 (1979) pertaining to review procedures for summary subdivisions. Subsection (3) of that section states that a public hearing and an environmental assessment are not required for the first summary subdivision created from a single tract. This provision suggests that any subsequent summary subdivision is subject to the requirements. However, subsection (4) states that subsequent subdivisions from a tract of re-

16. 1975 Mont. Laws ch. 448 § 1 (emphasis added).
17. 1977 Mont. Laws ch. 552 § 1 (emphasis added).
18. MCA § 76-3-210(1) (1979).
19. __ Mont. __, 590 P.2d at 605.
20. *Id.*
21. *Id.*

cord shall be reviewed under MCA § 76-3-505 (1979), which requires only that local subdivision regulations include provisions for the review of summary subdivisions. It is unclear whether the act subjects subsequent summary subdivisions to the requirements of a public hearing and an environmental assessment. This ambiguity left open a loophole for subdividers, like those in *Florence-Carlton,* who sought to subdivide a group of summary subdivisions within a larger tract of land. Thus, even though the rationale of *Florence-Carlton* is questionable, the result can be justified on policy grounds as covering a significant loophole in the act.

III. A New Rule of Construction

The decision in *Florence-Carlton* requiring that both major and summary subdivisions be found in the public interest was aided by the concurrent adoption by the Montana Supreme Court of a new rule of statutory construction. The court expressly adopted the rule that "[l]egislation enacted for the promotion of public health, safety, and general welfare, is entitled to 'liberal construction with a view towards the accomplishment of its highly beneficent objectives.' "[22] In addition, the court adopted the view that " 'exemptions, provisos, and exceptions are generally given a narrow interpretation.' "[23] Application of these rules in *Florence-Carlton* resulted in the conclusion that the objective of the act as expressed in the purpose section "must be the primary guide to the interpretation of the statute. Thus, where no specific exception to the public interest requirement is mentioned in R.C.M. 1947, § 11-3866(6),[24] the better conclusion is that no such exception is intended."[25]

This new rule opens the way for judicial expansion of general welfare statutes under the guise of effecting broad policy statements enacted by the legislature. While emphasizing purpose sections to determine legislative intent is consistent with prior Montana case law,[26] the adoption of the liberal construction rule in *Florence-Carlton* is likely to significantly affect interpretations of other provisions of the subdivision act and recently enacted general

22. *Id., quoting* 3 Sutherland, Statutory Construction § 71.01 (4th ed. 1974).

23. *Id., quoting* 3 Sutherland, Statutory Construction § 71.01 n.3 (4th ed. 1974).

24. Now codified at MCA § 76-3-609 (1979).

25. ___ Mont. ___, 590 P.2d at 605.

26. The general rule in Montana, most recently stated in Burritt v. City of Butte, 161 Mont. 530, 535, 508 P.2d 563, 566 (1973), is that the goal of statutory interpretation is to give effect to the purpose of the statute. In Mulholland v. Ayers, 109 Mont. 558, 561, 99 P.2d 234, 237 (1940), the rule for construing statutes was that the court must look first "to the object and purpose of the statute and the evil sought to be remedied by it."

welfare statutes such as the Montana Environmental Policy Act,[27] the Clean Air Act,[28] and others.

IV. The Impact of Florence-Carlton on Subdivision Review

Florence-Carlton imposes a substantial burden on local governments in reviewing small subdivisions by requiring that all summary subdivisions be determined to be in the public interest. This conclusion is appropriate in this case where twenty-six summary subdivisions appeared to have the cumulative effect of a major subdivision. However, the term "summary subdivision" includes any division of land creating one or more parcels and resubdivisions of previously platted areas.[29] It is difficult to justify making this determination for most summary subdivisions. For example, it is highly unlikely that a two-lot subdivision adjacent to a public road or a resubdivision of one lot in a previously approved subdivision already being provided public services will have a negative impact on any of the eight criteria contained in MCA § 76-3-608(2) (1979). Furthermore, the process of obtaining information and carefully considering the eight criteria is time-consuming. The governing body is given only thirty-five days to approve a summary subdivision[30] and no environmental assessment is required of the subdivider. In contrast, the governing body is given sixty days to approve a major subdivision,[31] for which a substantial amount of social and environmental information is provided by the applicant. Each type of subdivision requires the same analysis and yet the review period for a major subdivision is nearly twice that of a summary subdivision. Thirty-five days is hardly enough time to conduct an adequate review if all the necessary information is not readily available. As a result, the public interest determination is in danger of becoming a useless exercise, a result certainly not intended by the 1975 legislature.

V. Conclusion

In holding that all summary subdivisions must be reviewed in light of eight statutory criteria and found to be in the public interest, the Montana Supreme Court attempted to cover a significant loophole in the Montana Subdivision and Platting Act. Prior to *Florence-Carlton*, the act appeared to allow approval of groups of

27. MCA § 75-1-101 (1979).
28. MCA §§ 75-20-101 *et seq.* (1979).
29. MCA § 76-3-103 (1979).
30. MCA § 76-3-609(1) (1979).
31. MCA § 76-3-604(2) (1979).

summary subdivisions created from the same larger tract of land without a public hearing, an environmental assessment, or a determination of public interest. In attempting to cover this loophole, the court greatly increased the burden on local governments in reviewing small subdivisions. The better approach would be to amend the act so that all multiple summary subdivisions are reviewed as major subdivisions. The remedy applied to the particular facts of this case is not undesirable, but the adoption of a uniform requirement of a public interest determination for every subdivision is likely to incur procedural difficulties. In addition, the adoption of the liberal construction rule may have consequences that reach far beyond the *Florence-Carlton* holding. The rule may dictate more liberal readings of other provisions of the subdivision act and of other general welfare statutes.