

July 1988

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Recommended Citation

Allen P. Lanning, *The Occasional Sale Exemption of the Montana Subdivision and Platting Act*, 49 Mont. L. Rev. (1988).

Available at: <https://scholarworks.umt.edu/mlr/vol49/iss2/4>

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COMMENTS

THE OCCASIONAL SALE EXEMPTION OF THE MONTANA SUBDIVISION AND PLATTING ACT

Allen P. Lanning

I. INTRODUCTION

The Montana Subdivision and Platting Act¹ attempts to limit the undesirable effects of uncontrolled development by regulating the subdivision of land.² The Act, as set forth in its statement of purpose, seeks to: “promote the public health, safety, and general welfare” through subdivision regulation; prevent overcrowding; provide for human necessities while limiting environmental impacts; and establish uniformity in lot descriptions.³ To achieve these goals, the Act requires local government to approve all proposed subdivisions.⁴ To receive approval, a proposed subdivision must undergo a complicated and costly review process to determine whether the proposed subdivision is in the public interest. A negative finding will either kill the proposed subdivision or require that the developer substantially amend the plans for the proposed subdivision to correct any deficiencies.

The Act, however, provides exemptions to the local review process.⁵ One section exempts occasional sales.⁶ This provision exempts single divisions of a nonplatted parcel⁷ from subdivision re-

1. MONT. CODE ANN. §§ 76-3-101 through -614 (1987) [hereinafter referred to as the Act]. Enacted in 1973 and originally codified at MONT. REV. CODE §§ 11-3859 through -3874 (1947), the Act was substantially amended in 1975 and 1977. Less substantial amendments were made in 1974, 1981, 1983, 1985, and 1987.

2. MONT. CODE ANN. § 76-3-102 (1987).

3. MONT. CODE ANN. § 76-3-102 (1987).

4. MONT. CODE ANN. §§ 76-3-601 through -614 (1987). Under the Act, a local governing body is “a board of county commissioners or the governing authority of any city or town organized pursuant to law.” MONT. CODE ANN. § 76-3-103(5) (1987). Proposed subdivisions lying partly within an incorporated city or town must undergo review by both the county and the city government. MONT. CODE ANN. § 76-3-601(2)(c) (1987).

5. MONT. CODE ANN. §§ 76-3-201 through -210 (1987).

6. MONT. CODE ANN. § 76-3-207(1)(d) (1987).

7. A nonplatted parcel is one not a part of any platted subdivision.

view.⁸ Property owners may use the occasional sale exemption, like many of the exemptions allowed by the Act, only if not used for the purpose of evading the Act.⁹ One commentator, though, has asserted that "[i]n practice, most occasional sales are made, at least in part, for the purpose of evading the procedural requirements for subdivision review."¹⁰ This comment will briefly examine the occasional sale exemption and its use by subdividers seeking to avoid the procedural requirements of the Subdivision and Platting Act.

II. THE LOCAL REVIEW PROCESS

The Act draws a basic distinction between the division and subdivision of land. A division of land is

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 parcels¹¹

A subdivision of land is any division of land that creates at least one parcel of less than twenty acres.¹² For example, the division of a forty-acre tract into two twenty-acre parcels is a division of land under the Act.¹³ The Act exempts this division of land from subdivision review; it is not a subdivision. To qualify as a subdivision, the division must result in at least one parcel of *less than* twenty acres.¹⁴ However, if the owner divided each twenty-acre parcel into a nineteen-acre parcel and a one-acre parcel for the purpose of selling one or both of the parcels, each resulting parcel would be less than twenty acres. Thus, the subdivision review requirements set forth in the Act would apply unless the division falls under one of the exemptions allowed by the Act.

To begin the formal review and approval process required for

8. MONT. CODE ANN. § 76-3-207(1)(d) (1987). Occasional sales are subject to the survey requirements set forth in the Act.

9. MONT. CODE ANN. § 76-3-207(1)(d) (1987).

10. Goetz, *Recent Developments in Land Use Law*, 38 MONT. L. REV. 97, 105 (1977).

11. MONT. CODE ANN. § 76-3-103(3) (1987).

12. MONT. CODE ANN. § 76-3-103(15) (1987). Note that the creation of condominium units, mobile home lots, and recreational vehicle lots for sale qualifies as subdivision and must undergo the local review process unless otherwise exempt.

13. MONT. CODE ANN. § 76-3-101(3) (1987). The division is only valid if the owner meets the other requirement of filing a survey or plat which transfers title or possession of one resulting tract.

14. MONT. CODE ANN. § 76-3-103(15) (1987); *Timberland Resources, Inc. v. Vaught*, ___ Mont. ___, ___, 738 P.2d 1277, 1280 (1987).

most subdivisions, the subdivider must submit a preliminary plat of the proposed subdivision to the local governing body for review.¹⁵ At this time, the subdivider must also file an environmental assessment¹⁶ and pay a review fee.¹⁷ In addition, plats of residential subdivisions must dedicate land to the public for parks or playgrounds; if the land is unsuitable for playground or park purposes, the subdivider may pay the local governing body an equivalent cash donation instead.¹⁸ The local governing body will then hold a public hearing on the preliminary plat.¹⁹ At the hearing, the governing body considers all evidence presented relating to the proposed subdivision's effect upon the public health, safety, and welfare.²⁰ The local governing body also reviews whether the proposed subdivision conforms to the local master plan, if one exists.²¹

The local governing body considers all of the information and recommendations provided by the preliminary plat, the environmental assessment, the public hearing, and the local planning board to determine whether the proposed subdivision is in the public interest.²² In making that determination, the governing body weighs the following criteria: the basis for the need of the subdivision; expressed public opinion; and effects on agriculture, local services, taxation, the natural environment, wildlife and wildlife habitat, and the public health and safety.²³ The governing body must approve, disapprove, or conditionally approve the preliminary plat within sixty days of presentation by the subdivider,

15. MONT. CODE ANN. § 76-3-601(1) (1987). In some cases, the subdivider may be required to submit a preliminary plat to more than one local governing body. MONT. CODE ANN. § 76-3-601(2) (1987). See statutes cited *supra* note 4.

16. MONT. CODE ANN. § 76-3-603 (1987). Information required in the environmental assessment includes descriptions of surface and groundwater affected; topography; vegetation and wildlife use; soil types; a community impact report of the estimated local services needed by the proposed subdivision (such as education, water, road maintenance, police protection); and any additional information required by the governing body. The environment assessments are proposed by the subdivider and have been criticized as self-serving at best. Goetz, *supra* note 10, at 104.

17. MONT. CODE ANN. § 76-3-602 (1987).

18. MONT. CODE ANN. § 76-3-606 (1987). The land dedication or equivalent cash donation is not required in any division that creates only one additional lot. MONT. CODE ANN. § 76-3-606(3) (1987). It may be waived when sufficient land has already been dedicated for these uses in earlier subdivision of the tract as part of an overall plan or where the subdivider has provided for parks or playgrounds land through means other than public dedication. MONT. CODE ANN. § 76-3-607 (1987).

19. MONT. CODE ANN. § 76-3-605 (1987).

20. MONT. CODE ANN. § 76-3-605 (1987).

21. MONT. CODE ANN. § 76-3-604 (1987).

22. MONT. CODE ANN. § 76-3-608(1) (1987).

23. MONT. CODE ANN. § 76-3-608(2) (1987).

unless the latter consents to an extension.²⁴ A preliminary plat approval remains valid for one to three years.²⁵ After approval, the subdivider must submit an abstract of title and a final plat, reviewed for error by an impartial examining land surveyor. If no real property taxes are delinquent on the subdivision property and the final plat conforms to the conditions of approval set forth on the preliminary plat and the requirements of the Act, then the governing body approves the final plat.²⁶

Any proposed subdivision containing five or fewer parcels qualifies for summary review as a minor subdivision. Under the summary review procedure, the local governing body must approve or disapprove the preliminary plat within thirty-five days of presentation,²⁷ and the subdivider need not submit an environmental assessment. Further, the local governing body need not hold a public hearing on the proposed subdivision.²⁸ Approval, however, still hinges upon a finding of public interest by the local governing body.²⁹ This review process is too cumbersome and costly to be applied to every minor division of land. Recognizing this, the drafters included exemptions to the review process.³⁰ One of the more frequently used provisions is the occasional sale exemption.

III. THE OCCASIONAL SALE EXEMPTION

A. Statutory Definition

Section 76-3-207(1)(d)³¹ of the Act exempts from subdivision review "a single division of a parcel outside of platted subdivisions when the transaction is an occasional sale."³² A single division results in the creation of only two parcels from the original parcel.

24. MONT. CODE ANN. § 76-3-604(2) (1987).

25. MONT. CODE ANN. § 76-3-610 (1987).

26. MONT. CODE ANN. § 76-3-611 (1987).

27. MONT. CODE ANN. § 76-3-609(1) (1987).

28. MONT. CODE ANN. § 76-3-609 (1987).

29. See *State ex rel. Florence-Carlton School Dist. No. 15-6 v. Board of County Comm'rs*, 180 Mont. 205, 590 P.2d 602 (1978); Note, *Judicial Expansion of the Montana Subdivision and Platting Act in Florence-Carlton*, 41 MONT. L. REV. 113 (1980) (authored by Jean E. Wilcox).

30. Part 2 of the Act exempts a number of transactions from some or all of the provisions of the Act. MONT. CODE ANN. §§ 76-3-201 through -210 (1987).

31. 1974 Mont. Laws 334, § 2 added this exemption by amendment.

32. The occasional sale exemption appears by its language to preclude application to the division of a parcel in a platted subdivision, *i.e.*, a resubdivision. But in *State ex rel. Swart v. Casne*, 172 Mont. 302, 546 P.2d 983 (1977), the Montana Supreme Court held that the sale of the east half of a square-shaped parcel composed of five lots was an occasional sale. The court stated that the transaction was a redivision of an existing subdivision but was nevertheless exempt from subdivision review as an occasional sale. *Id.* at 307-08, 564 P.2d at 985.

For example, the division of a twenty-acre parcel into two ten-acre parcels would be a single division of the twenty-acre parcel. An occasional sale is "one sale of a division of land within any twelve-month period."³³ Such sales are exempt from subdivision review only if the sale is not made in an attempt to evade the Act.³⁴

B. Attorney General Opinions

The occasional sale exemption enables landowners to sell a single parcel from a larger tract without undergoing the local review process. The exemption applies to occasional individual sales, which by their nature, have a limited effect upon the local community and environment. To avoid the review process, however, subdividers have tried many schemes in an attempt to uniformly develop large tracts under the occasional sale exemption. Faced with such schemes, and with very little case law defining the exemption, local governing bodies have turned to the Montana Attorney General for guidance.³⁵ Thus, the opinions of the attorney general have to a large extent defined the scope and usage of the occasional sale exemption in Montana.

In a 1986 opinion, the attorney general of the state of Montana held that when a parcel of land is divided into two parcels, each smaller than twenty acres, only one of them may be sold without subdivision review within the statutory twelve-month period under the occasional sale exemption.³⁶ Noting that the occasional sale exemption was limited to a *single* division of a parcel, the attorney general relied on the statutory definition of an occasional sale as "*one sale* of a division of land within any twelve-month period."³⁷ Allowing the sale of both parcels within one year effectively circumvents the purpose of the entire Act, disregards the evasion requirements, and allows the creation of subdivisions

33. MONT. CODE ANN. § 76-3-103(7) (1987).

34. MONT. CODE ANN. § 76-3-207(1) (1987).

35. In Montana, the attorney general must give his written opinion upon request to the legislature, state officers and boards, county commissioners, and city and county attorneys on questions of law relating to their offices. The attorney general's opinion controls over conflicting opinions issued by city, county, and attorneys employed or retained by state government, unless overruled by a state district court or the supreme court. MONT. CODE ANN. § 2-15-501(7) (1987). See 41 Op. Att'y Gen. 33 (1985). Opinions of the attorney general, acquiesced in by the legislature, do not bind the Montana Supreme Court, but are persuasive and will be upheld if not erroneous. *State ex rel. Jenkins v. Carisch Theatres, Inc.*, 172 Mont. 453, 564 P.2d 1316 (1977); *State ex rel. Ebel v. Schye*, 130 Mont. 537, 305 P.2d 350 (1956); *State ex rel. Barr v. District Court*, 108 Mont. 433, 91 P.2d 399 (1939).

36. 41 Op. Att'y Gen. 40 (1986).

37. 41 Op. Att'y Gen. 40 at 2 (1986) (emphasis in original) (quoting MONT. CODE ANN. § 76-3-103(7) (1985)).

within a very short time.³⁸

Therefore, if a property owner divides a parcel under the occasional sale exemption, only one of the resulting parcels could be sold within twelve months without subdivision review. Moreover, the buyer cannot use the occasional sale exemption on that parcel for another twelve months: "[C]learly once a particular parcel of land has benefitted from application of the exception, none of the land contained within that parcel may be exempted from subdivision review by operation of the "occasional sale" exception if subdivided during the next twelve months."³⁹ The twelve-month time period runs from the date of the actual transfer of interest in the parcel of land from the grantor to the grantee.⁴⁰ However, new owners of a parcel resulting from a division that was not a subdivision (i.e., all resulting parcels were greater than twenty acres) need not wait for twelve months to subdivide their parcel and take advantage of the occasional sale provision to sell one of the subdivision parcels.⁴¹

In addition, the attorney general has held that the occasional sale exemption cannot be used when a certificate of survey creates more than one lot.⁴² Thus, a division of land that creates several parcels cannot utilize the occasional sale exemption for any of the parcels, even if the other parcels created may fall under another exemption set forth in the Act, such as the exemption for gift or sale transfers to a member of the landowner's immediate family.⁴³

C. *The Non-Evasion Requirement*

Transactions which meet the technical requirements of the occasional sale exemption may still be disallowed if the method of disposition is adopted for the purpose of evading the provisions of the Act. With the exemptions more clearly defined by attorney general opinions, developers have attempted to engage in a series of transactions which result in the unreviewed equivalent of a subdivision. In *State ex rel. Department of Health v. Lasorte*,⁴⁴ the

38. *State ex rel. Department of Health v. Lasorte*, 182 Mont. 267, 596 P.2d 477 (1979).

39. 41 Op. Att'y Gen. 21 (1985).

40. 41 Op. Att'y Gen. 40 (1986).

41. 41 Op. Att'y Gen. 21 (1985). For example, if the owner of a 100-acre tract divides the tract into five twenty-acre parcels and sells them, the new owner of each parcel can subdivide a parcel into two ten-acre lots and sell one of these lots without waiting for twelve months. However, none of the retained ten-acre lots could be sold for twelve months without subdivision review.

42. 40 Op. Att'y Gen. 16 (1983).

43. MONT. CODE ANN. § 76-3-207(1)(b) (1987).

44. 182 Mont. 267, 596 P.2d 477 (1979).

Montana Supreme Court reviewed a series of transactions in which the owners of a fourteen-acre tract attempted to use the occasional sale exemption to avoid local subdivision review. In 1977, the Kessners, owners of the tract, transferred title to the first grantee who transferred one acre back to the Kessners and transferred the remaining thirteen acres to the second grantee, who transferred one acre back to the original owners and transferred the other twelve acres to yet another grantee; the series of transactions continued until the land was completely transferred back to the Kessners, who ended up with title to thirteen one-plus acre parcels instead of one fourteen-acre parcel.⁴⁵ The court determined that it could not decide the issue of whether the owners had acted to evade the Act, since an amicus brief raised the issue, and not a party. The court indicated, though, that had the issue arisen properly, it would have set aside the conveyances as fraudulent. The court stated that it was obvious that the conveyances were designed to evade the local subdivision review requirements of the Act.⁴⁶ Although not discussed, the court could have disallowed the transactions since the sellers transferred both parcels created by each division of land.⁴⁷

Although neither the statute nor the Montana Supreme Court set forth any criteria for determining whether the seller has structured a transaction to evade the provisions of the Act, the attorney general of Montana has addressed this question.⁴⁸ In a 1983 opinion, he held that the local government must determine whether an exemption is claimed for the purpose of evading the Act.⁴⁹ The attorney general observed that exemptions to the provisions of the Act must be viewed narrowly, since the Act promotes public health and welfare.⁵⁰ A local government may, in its discretion, conduct a hearing procedure to evaluate the evidentiary basis for the claimed exemption,⁵¹ or require an affidavit from the claimant stating that he took the exemption in good faith and not for the purpose of evading the Act.⁵² Circumstances that the local governing body might take into consideration include the prior history of the tract in question, whether prior exemptions have been taken on the tract, whether the claimant is in the business of dividing and selling land and the configuration of the land after the transactions

45. *Id.* at 269, 596 P.2d at 478.

46. *Id.* at 269, 596 P.2d at 479.

47. *See* 41 Op. Att'y Gen. 40 (1986).

48. 40 Op. Att'y Gen. 16 (1983).

49. *Id.*

50. *Id.*

51. *Id.*

52. 37 Op. Att'y Gen. 41 (1977).

are completed.⁵³ Prior local government practice may help to determine the validity of exemptions in a particular county or city.⁵⁴

IV. CONCLUSION

Because the Act requires an expensive and time consuming review process, those wishing to develop and sell portions of land seek to avoid these review requirements by using the exemptions. Since the Act was passed, the occasional sale exemption has been one of the most overused and misused provisions of the Act. Through issuance of opinions, the Montana Attorney General clarified the statutory definition, providing technical limits to use of the exception and listing criteria for determining whether the claimant seeks exemption to evade the purposes of the Act.

The local governing body determines as a question of fact whether a property owner claims an occasional sale exemption for the purpose of evading the Act. Local governments may allow or refuse exemptions outright, or demand a showing of entitlement by affidavit. Relying on dictum of the *Lasorte* case, the attorney general concluded that a claimant who attempts to engage in a pattern of exempt transactions that result in the unreviewed equivalent of a subdivision should be denied exemption.⁵⁵ Taken together, these decisions clearly indicate that where one tract becomes many smaller lots within days or months as in *Lasorte*, the local government should deny the exemption.

53. 40 Op. Att'y Gen. 16 at 4 (1983).

54. Many local governing authorities in Montana have historically been generous in allowing occasional sale exemptions. The recent increase in requests for opinions from the attorney general on these exemptions may suggest that this practice is coming to an end.

55. 40 Op. Att'y Gen. 16 (1983).