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VOLUME NO. 45

OPINION NO. 12

LAND USE - Subdivision exemption for condominium construction;
LOCAL GOVERNMENT - - Subdivision exemption for condominium
construction;
PROPERTY, REAL - Subdivision exemption for condominium
construction;
SUBDIVISION AND PLATTING ACT - Applicability of requirements to
proposed condominium developments;
MONTANA CODE ANNOTATED - Sections 1-2-101, 76-3-103(3), 76-3-
103(15), 76-3-204, 76-3-601;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 57 (1984),
39 Op. Att'y Gen. No. 74 (1982), 39 Op. Att'y Gen. No. 28 (1981),
39 Op. Att'y Gen. No. 14 (1981).

HELD: Condominiums are subdivisions which are not exempted
under MCA § 76-3-204 from the provisions of the Montana
Subdivision and Platting Act.

August 18, 1993

Mr. Jim Nugent
Missoula City Attorney
435 Ryman
Missoula, MT 59802-4297

Dear Mr. Nugent:

You have requested my opinion concerning the applicability of the
requirements of the Montana Subdivision and Platting Act, MCA title
76, chapter 3, to proposed condominium developments. Specifically,
you have asked whether MCA § 76-3-204 exempts from review the
construction of eight condominiums consisting of four two-unit
dwellings on property which was platted prior to the adoption of
the Subdivision and Platting Act and which is zoned for duplexes.

The Montana Subdivision and Platting Act [hereinafter "Act"]
generally requires local review and approval of all subdivisions.
MCA § 76-3-601. A subdivision is defined by the Act 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.

MCA § 76-3-103(15). This definition has consistently been interpreted to mean that the following categories of activities are deemed subdivisions:

1. 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 title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed.
2. Any resubdivision.
3. Any condominium.
4. Any area, regardless of size, which provides or will provide multiple space for recreational camping vehicles.
5. Any area, regardless of size, which provides or will provide multiple space for mobile homes.

See 39 Op. Att'y Gen. No. 14 at 50, 52 (1981); 39 Op. Att'y Gen. No. 28 at 108, 111 (1981); 39 Op. Att'y Gen. No. 74 at 282 (1982); 40 Op. Att'y Gen. No. 57 at 229, 230-31 (1984).

As previously held in 39 Op. Att'y Gen. No. 74 at 283 (1982),

the provisions of the Montana Subdivision and Platting Act apply to all condominiums not expressly exempted by one of the provisions of Title 76, chapter 3, part 2.

Two exemptions found within the Act are potentially applicable to the condominium development in question. The express statutory exemption for condominiums is MCA § 76-3-203, which provides:

Condominiums constructed on land divided in compliance with this chapter are exempt from the provisions of this chapter.

This exemption is not applicable as the lands in question were not divided in compliance with the Act. 39 Op. Att'y Gen. No. 28 at 108 (1981).

A second exemption which arguably applies to the proposed development is MCA § 76-3-204, which provides:

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, whether existing or proposed, is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter.

This provision has been the subject of three prior Attorney General's Opinions and one significant legislative amendment that was intended to overrule certain holdings of the prior opinions.

In 39 Op. Att'y Gen. No. 28 at 108 (1981), former Attorney General Greely held that the term "condominium," as it appears in the definition of "subdivision," MCA § 76-3-103(15), must be liberally construed to include *all* condominiums. In so holding, he expressly rejected the argument that a condominium is a division of a building under MCA § 76-3-204 (1981), and is therefore exempt from review under MCA § 76-4-125. Noting that the Legislature provided a specific exemption for condominiums in MCA § 76-3-203, former Attorney General Greely reasoned:

If section 76-3-204, MCA, is a further exemption for condominiums, as has been suggested, the Legislature should have used consistent terminology throughout and referred to condominiums specifically in creating the latter exemption. Since the Legislature did not use consistent terminology, *I must conclude that section 76-3-204, MCA, refers to something other than condominiums and that the section does not exempt condominiums from review, in light of the compelling arguments supporting inclusion.*

39 Op. Att'y Gen. No. 28 at 114 (emphasis supplied).

In 39 Op. Att'y Gen. No. 74 (1982), the question was whether MCA § 76-3-204 (1981) exempted conversions of existing rental occupancy apartment houses or office buildings to individual condominium ownership. Acknowledging his prior opinions which established that condominiums were subdivisions and subject to the provisions of the Act, former Attorney General Greely concluded that the proposed conversion qualified for an exemption under MCA § 76-3-204 (1981), which provided:

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 chapter, and is not subject to the requirements of this chapter.

Former Attorney General Greely construed the phrase "situated on one or more parcels of land" to mean that the Legislature was referring to an existing building, built and utilized prior to the time the division occurs. 39 Op. Att'y Gen. No. 74 at 284. Hence, the conversion to condominiums of an existing apartment or office building used for rental purposes was held to be exempt from the requirements of the Act, as long as the conversion was not the "final step in a plan designed to purposely evade the application of the Act." Id. at 285. The opinion made clear, however, that new condominium developments were to be reviewed and approved prior to construction.

At issue in 40 Op. Att'y Gen. No. 57 (1984) was the application of the Act and its exemptions to the construction of 48 four-plexes to be used as rental occupancy buildings. Former Attorney General Greely concluded that the proposed development constituted a "division of land" as that term is defined in MCA § 76-3-103(3), and was therefore a "subdivision" under MCA § 76-3-103(15). Id. at 231-32. He further concluded that the exemption for division of a building in MCA § 76-3-204 (1981) did not apply because the buildings were not "existing building[s], built *and utilized* prior to the time the division occurs." Id. at 232, citing 39 Op. Att'y Gen. No. 74 at 282, 284 (1982) (emphasis in original).

Not long after the opinion issued in 40 Op. Att'y Gen. No. 57 (1984), the Legislature amended MCA § 76-3-204 (1981). Senate Bill 354, chapter 700 (1985) deleted the phrase "situated on one or more parcels of land," from MCA § 76-3-204 (1981) and substituted in its place the term "whether existing or proposed." According to the bill's sponsor, this amendment was offered in response to a "series of recent attorney general's opinions [which] created problems for planning agencies":

Those opinions . . . stated that under the subdivision and platting act, a duplex is a subdivision and must be reviewed. The bill simply says that a multi-family structure is not a subdivision and should not be reviewed as such[.]

House Committee on Natural Resources, March 22, 1985, at 4.

Proponents of Senate Bill 354 were obviously concerned with the holding in 40 Op. Att'y Gen. No. 57 (1984) that construction of rental units constituted a "subdivision" and was therefore subject to the requirements of the Act. Rather than changing the definition of "subdivision," however, the Legislature expanded the exemption language in MCA § 76-2-304 to include divisions of buildings "whether existing or proposed." This amendment created an exemption for new construction of rental occupancy units which was not available under MCA § 76-3-204 (1981) as that statute was construed in 40 Op. Att'y Gen. No. 57 (1984).

When construing statutes, the intent of the Legislature must control. State ex rel. Neuhausen v. Nachtsheim, 253 Mont. 296, 299, 833 P.2d 201, 204 (1992). To ascertain legislative intent, one must first look to the language employed and the apparent purpose to be served by the statute. State v. Austin, 217 Mont. 265, 268, 704 P.2d 55, 57 (1985). It is apparent from the language of the statute and its history that the Legislature intended to change the state of the law with respect to rental occupancy buildings only. Neither the language of the statute nor its legislative history suggests a legislative intent to exempt condominiums, "whether existing or proposed," from the requirements of the Act. To construe MCA § 76-3-204 in this manner would create an exception which swallows the general rule that condominiums are subdivisions and are subject to review under the Act. MCA § 76-3-103(15); 39 Op. Att'y Gen. No. 28 (1981); 39 Op. Att'y Gen. No. 74 (1982). Although the Act underwent significant change in the 1993 legislative session, none of those changes affected the exemption language at issue here or the definition of a subdivision as specifically including "condominiums." See H.B. 408, ch. 272 (1993).

Statutes relating to the same subject must be harmonized, and none shall be held meaningless if it is possible to give it effect. Crist v. Segna, 191 Mont. 210, 212, 622 P.2d 1028, 1029 (1981); Fletcher v. Paige, 124 Mont. 114, 220 P.2d 484 (1950); Campbell v. City of Helena, 92 Mont. 366, 16 P.2d 1 (1932). Moreover, exemptions within the Act are generally given a "narrow interpretation" so as to fulfill the Act's objective of ensuring that the public health, safety, and welfare are protected. State ex rel. Florence-Carlton Sch. Dist. v. Board of County Comm'rs of Ravalli County, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978), citing 3 Sutherland Statutory Construction § 71.01 (4th ed. 1974). I therefore conclude that the exemption language in MCA § 76-3-204 does not apply to condominiums.


My conclusion is consistent with the opinion of former Attorney General Greely in 39 Op. Att'y Gen. No. 28 at 114 (1981), that MCA § 76-3-204 must apply to "something other than condominiums." The meaning of this phrase is clarified by Senate Bill 354, which expresses a legislative intent to apply the exemption to multi-family dwellings to be used as rental occupancy units. See also Lee v. Flathead County, 217 Mont. 370, 373, 740 P.2d 1060, 1063 (1985) ("[t]he amendment makes it clear that not only is the renting of existing buildings exempt from subdivision review, but so are all new buildings which are to be used as rentals"). Since the construction project proposed herein is for condominiums and not for rental occupancy buildings, I conclude that it is not exempted from the requirements of the Act under MCA § 76-3-204 (1985).

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THEREFORE, IT IS MY OPINION:

Condominiums are subdivisions which are not exempted under MCA
§ 76-3-204 from the provisions of the Montana Subdivision and
Platting Act.

Sincerely,


JOSEPH P. MAZUREK
Attorney General

jpm/ja/mlr