

SUBDIVISION AND PLATTING ACT - The Act is not limited to divisions of land for residential dwellings;

SUBDIVISION AND PLATTING ACT - The exemption at Mont. Code Ann. § 76-3-204 does not apply to the construction or conveyance of more than one building, structure or improvement;

SUBDIVISIONS - The Subdivision and Platting Act is not limited to divisions of land for residential dwellings;

SUBDIVISIONS - The exemption at Mont. Code Ann. § 76-3-204 does not apply to the construction or conveyance of more than one building, structure or improvement;

EXEMPTIONS- The exemption at Mont. Code Ann. § 76-3-204 does not apply to the construction or conveyance of more than one building, structure or improvement;

MONTANA CODE ANNOTATED - Sections 1-2-101, -105(3), 76-3-101 to -625, -102, -103(4), (15), -204, -205(2), -208;

OPINIONS OF THE ATTORNEY GENERAL - 52 Op. Att’y Gen. No. 5 (2008), 45 Op. Att’y Gen. No. 12 (1993), 40 Op. Att’y Gen. No. 57 (1984), 39 Op. Att’y Gen. No. 74 (1982).

- HELD:
1. The term “subdivision” under the Subdivision and Platting Act does not refer only to a division of land for the purpose of providing a “residential dwelling.”
 2. The provision of Mont. Code Ann. § 76-3-204 exempting from subdivision review the “sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement, whether existing or proposed” does not apply to the construction or conveyance of more than one building, structure or improvement on a single tract of record.

January 13, 2012

Mr. Fred Van Valkenburg
Missoula County Attorney
200 West Broadway
Missoula, MT 59802-4292

Dear Mr. Van Valkenburg:

[P1] You have requested my opinion on questions that I have rephrased as follows:

1. Does the term “subdivision” under the Subdivision and Platting Act refer only to a division of land for the purpose of providing a “residential dwelling”?
2. Does the provision of Mont. Code Ann. § 76-3-204 exempting from subdivision review the “sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement, whether existing or proposed” apply to the construction or conveyance of more than one building, structure or improvement on a single tract of record?

[P2] Your letter informs me that your office and the Missoula Office of the City Attorney disagree over the answers to the above questions. As both offices advise the joint city-county Office of Planning and Grants, you are requesting an Attorney General’s opinion. I have also received a letter from the Missoula City Attorney detailing the City’s position.

I

[P3] The Montana Subdivision and Platting Act (“the Subdivision Act”), Mont. Code Ann. §§ 76-3-101, et seq., generally requires local review and approval of all subdivisions. Under the Act,

“Subdivision” means a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and further includes a condominium or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes.

Mont. Code Ann. § 76-3-103(15).

[P4] When interpreting the Subdivision Act, I construe the statutes consistently with the expressed purposes of the Act as articulated by the Legislature and the Montana Supreme

Court. 40 Op. Att’y Gen. No. 57 (1984), citing Mont. Code Ann. § 76-3-102. The Montana Supreme Court refuses to read exceptions into the Act which would subvert the purposes expressed in Mont. Code Ann. § 76-3-102. Mills v. Alta Vista Ranch, 2008 MT 214, ¶ 18, 344 Mont. 212, 187 P.3d 627. Therefore, where no specific exception applies, the presumption is no such exception is intended. Id.

[P5] Because I may not read exceptions into the Act, I cannot read a “residential dwelling” requirement into the definition of a “subdivision” nor simply assume that divisions for nonresidential purposes are exempt. This is particularly true where, as here, implication of such an exception might significantly undermine the purposes of the Act. A subdivision for a commercial rather than a residential purpose could reasonably be expected to implicate any of the purposes of the Act separately stated in Mont. Code Ann. § 76-3-102.

[P6] Neither the definition of “subdivision” nor any other language in the Act uses the term “residential” or directly speaks to the uses for which the divided land will be put in a way that would imply that the Act applies only when the subdivided lots are to be put to residential use. A “subdivision” includes a division of land “in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed,” and there is no separate restriction or exemption within the Act limiting subdivisions for rent or lease to “residential dwellings.” A “subdivision” under the Act is therefore not limited to divisions of land intended to be “residential dwellings.”

II

[P7] Under the Subdivision Act,

a “division of land” means 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 parcels pursuant to this chapter.

Mont. Code Ann. § 76-3-103(4). Part 2 of the Subdivision Act, however, lists a number of actions that are exempt from the Act’s provisions despite the fact that they might otherwise fit within the definition of a “division of land.” Your second question involves one of these exemptions.

[P8] The exemption found at Mont. Code Ann. § 76-3-204 states:

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.

Missoula County argues that the exemption in this provision is limited to a conveyance of one or more parts of a single building on a single tract of record. The City, on the other hand, argues that the provision exempts both several buildings and single buildings. Thus, under the City's interpretation, a developer could construct and sell, rent or lease several buildings on a single tract of record without subdivision review. For the reasons that follow, it is my opinion that the exemption at Mont. Code Ann. § 76-3-204 is limited to the sale, rent or lease of one or more parts of a single building on a single tract of record.

[P9] As noted above, I must construe the Subdivision Act with an eye toward achievement of the Act's objectives. Therefore, I must "narrowly [construe] expressly stated exemptions and exceptions." Alta Vista, ¶ 18. I must also read statutes together in a coherent manner if possible, giving full force and effect to each provision. Mont. Code Ann. § 1-2-101; Oster v. Valley County, 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079 ("[T]he Legislature does not pass meaningless legislation, and accordingly, this Court must harmonize statutes relating to the same subject, as much as possible, giving effect to each").

[P10] If the language of a statute is unambiguous, then of course it controls. Shelby Distrib. v. DOR, 2009 MT 80, ¶ 18, 349 Mont. 489, 206 P.3d 899. The exemption in question refers to: "one or more parts of a building, structure, or other improvement" (Emphasis added.) Thus when read narrowly, the plain language of the exemption applies only to one building. The City, though, argues that while the exemption refers to "a building," it should be construed as including multiple buildings on the same tract because in interpreting statutes the singular can be construed to include the plural. Mont. Code Ann. § 1-2-105(3).

[P11] Your question arises against the backdrop of Attorney General Greely's opinion in 40 Op. Att'y Gen. No. 57 (1984). The question presented was whether construction on a single tract of land of 48 four-plex housing units for residential purposes constituted a "division of land" and whether the exemption at Mont. Code Ann. § 76-3-204 applied. At the time of the opinion, Mont. Code Ann. § 76-3-204 read as follows:

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.

Attorney General Greely concluded that the proposed development constituted a division of land because it would create at least 48 “parcels . . . in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed.” He further concluded that Mont. Code Ann. § 76-3-204 was inapplicable, because the term “situated” in the exemption referred only to the sale, rental or lease of an “existing building.” *Id.* at 232-33 (citing to 39 Op. Att’y Gen. No. 74 (1982)). The opinion did not analyze whether Mont. Code Ann. § 76-3-204 was limited to a single building.

[P12] The next year the Legislature, apparently reacting to Attorney General Greely’s opinion, deleted the phrase “situated on one or more parcels of land” and added the words “whether existing or proposed” to the exemption. The clear purpose of this amendment was to extend the exemption to all conveyances of a part of a building regardless of whether the building currently exists or was proposed for future construction. 45 Op. Att’y Gen. No. 12 (1993); *Lee v. Flathead County*, 217 Mont. 370, 373, 704 P.2d 1060, 1063 (1985) (construing the amendment to clarify that the Subdivision Act applies both to existing and to new buildings). In this respect, the amendment had the effect of overruling Attorney General Greely’s opinion, but only to the extent of its holding that Mont. Code Ann. § 76-3-204 applied only to existing buildings.

[P13] Attorney General Greely observed that the construction of 48 four-plexes would be “a housing development” that would “inevitably result in various social and economic impacts on the community.” He found that “this is the precise type of development which the Legislature intended should be submitted for local review under the Act.” 40 Op. Att’y Gen. No. 57 at 234. Such a “housing development” specifically affects the “overcrowding of land,” “congestion in the streets,” and the “preservation of open space,” as well as “public requirements” such as “adequate light, air, water supply, sewage disposal, parks and recreation areas [and] ingress and egress.” Mont. Code Ann. § 76-3-102. These concerns require that Mont. Code Ann. § 76-3-204 be narrowly construed to apply only to a single building, whether existing or proposed.

[P14] The City points to an unofficial letter of advice issued by an attorney in this office on February 27, 1995. In that letter, the attorney opined that the 1985 legislation had overruled 40 Op. Att’y Gen. No. 57 (1984) in its entirety. Then, applying the interpretive guideline that the singular may be construed to include the plural, Mont. Code Ann. § 1-2-105(3), the attorney concluded that the reference in Mont. Code Ann. § 76-3-204 to “building” in the singular included the plural “buildings” as well, thereby extending the reach of the exemption to multiple buildings on the same tract. For the reasons that

follow, I disagree with that analysis. The February 27, 1995, letter of advice and any later statements based on it therefore should no longer be deemed authoritative.

[P15] The term “building,” as used in the singular in this statute, is not ambiguous. There is no language in the Subdivision Act that suggests that “building” in this context should mean anything other than a single structure. While “[u]se of singular or plural language in legislation is generally not a matter of substantive significance,” 51 Op. Att’y Gen. No. 3 (2005), in the context of the Subdivision Act exemptions must be construed narrowly. General provisions of statutory construction, such as “the singular includes the plural,” are not inflexible rules, but rather guidelines to be applied judiciously to aid in the ultimate pursuit of the intention of the legislature where the language used is unclear. See, e.g., 52 Op. Att’y Gen. No. 5, ¶ 16 (2008). They should not be applied to create ambiguity where none otherwise exists, because “ambiguity must be apparent from the statutory language itself.” In Re Reppert, 84 B.R. 37 (E.D. Penn. 1988); see also Montana Shooting Sports Ass’n v. State, 2008 MT 190, ¶ 34, 344 Mont. 1, 185 P.3d 1003 (the Court “may not create [a statutory] ambiguity where none exists . . .”) (Nelson, J., dissenting).

[P16] Construing Mont. Code Ann. § 76-3-204 to allow the conveyance of several buildings on a single tract of land without subdivision review would create a loophole that swallows the general rule that conveyances by rent or lease are “subdivisions” and subject to review under the Act. Mont. Code Ann. § 76-3-103(15); see 45 Op. Att’y Gen. No. 12 (1993) (construing Mont. Code Ann. § 76-3-204 as exempting condominiums would “swallow the general rule” that condominiums are subdivisions subject to review); Thornton v. Flathead Co., 2009 MT 367, ¶ 22, 353 Mont. 252, 220 P.3d 395 (refusing to create a “wholesale blanket exemption” from subdivision review for condominiums proposed on parcels created prior to the Act’s enactment). Given the express purposes of local subdivision review stated in Mont. Code Ann. § 76-3-102, it is hard to believe, for example, that the legislature would have intended to allow construction of a development such as the one considered in 40 Op. Att’y Gen. No. 57 (1984)--48 four-plexes totaling 192 dwelling units on a tract of less than 20 acres--without subdivision review.

[P17] This conclusion is consistent with, and supported by, the decision of the Montana District Court for the First Judicial District in Derick v. Lewis and Clark County, Cause No. BDV-2007-304 (hereafter “Derick”). In holding that the exemption at Mont. Code Ann. § 76-3-204 applies only to a single building, the District Court in Derick discussed House Bill 494, which was passed by the Legislature during the 2011 session but vetoed by the Governor. HB 494 sought to amend Mont. Code Ann. § 76-3-204 by making “building, structure or other improvement” plural. Derick at 6. As noted by the Governor’s veto letter, this bill “would broaden the Act’s exemptions . . .” Id. at 7. The

Court therefore inferred that Mont. Code Ann. § 76-3-204, which the Legislature sought to change by pluralizing, must be read as only applying to a single building. Id. at 7-8.

[P18] Derick also relies on the reasoning of the Twenty-First Judicial District Court in Rose v. Ravalli Co., Cause No. DV-05-516, 2006 Mont. Dist. LEXIS 1072 (hereafter “Rose”). The District Court in Rose analyzed the history and interpretation of Mont. Code Ann. § 76-3-204 in detail, including the Attorney General Opinions cited here by the City. The Court also relied on the legislative history of Mont. Code Ann. § 76-3-204, which “indicates that the statute was amended to include ‘whether existing or proposed’ in order to exempt a single building containing duplexes or multi-family rental units from subdivision review.” Rose at 14. The Court determined that “[t]he interpretation of § 76-3-204 as [including the rental of one or parts of multiple buildings] would render the portion of § 76-3-208 addressing subdivisions created by rent void of meaning.” These factors, along with the requirement to interpret exemptions narrowly, led the Court to conclude that Mont. Code Ann. § 76-3-204 exempts only “a single building” from subdivision review. Rose at 8-14.

THEREFORE, IT IS MY OPINION:

1. The term “subdivision” under the Subdivision and Platting Act does not refer only to a division of land for the purpose of providing a “residential dwelling.”
2. The provision of Mont. Code Ann. § 76-3-204 exempting from subdivision review the “sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement, whether existing or proposed” does not apply to the construction or conveyance of more than one building, structure or improvement on a single tract of record.

Sincerely,

STEVE BULLOCK
Attorney General

sb/cdt/jym