

## SUBDIVISION EXEMPTION REVIEW ISSUES

### I. Title 76, Chapter 3, Part 2, MCA, *Miscellaneous Exemptions*

- Section 76-3-504(1)(p) *Subdivision regulations – contents*:

Establish criteria that the governing body or reviewing authority will use to determine whether a proposed method of disposition using the exemptions provided in 76-3-201 or 76-3-207 is an attempt to evade the requirements of this chapter. The regulations must provide for an appeals process to the governing body if the reviewing authority is not the governing body.

- 2006 Model Subdivision Regulations, Section V, *Division of Land Exempt Subdivision Review*  
<http://www.maco.cog.mt.us/property&liabilityinsurance/MACoModelSubRegsSept2006.doc>
- CTAP in Process of Drafting Updated Model Subdivision Regulations

### II. General Criteria to Determine Whether Proposal Attempts to Evade the Subdivision Act

- The governing body or reviewing authority must consider the evidence related to a proposed use of the proposed exemption in light of all of the surrounding circumstances and the evidence as a whole. Such evidence includes, but is not limited to:
  - ❖ the nature of the claimant's business;
  - ❖ the prior history of the particular tract of record in question;
  - ❖ the previous use of an exemption to create the tract of record in question;
  - ❖ the proposed configuration of tracts of record once the proposed exemption is completed;
  - ❖ the use of an exemption to create more than one additional or remaining parcel of less than 160 acres in size; or
  - ❖ any pattern of exempt transactions that will result in the equivalent of a subdivision without local government review.

### III. Specific Exemptions

#### A. Mortgage Exemption, Section 76-3-201(1)(b), MCA

- ❖ This exemption applies:

1. To a division of land of any size; and

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2. Only if the land that is divided is conveyed to a licensed financial or lending institution to which the mortgage, lien, or trust indenture was given, or to a purchaser upon foreclosure of the mortgage, lien, or trust indenture. A transfer of the divided land, by the owner of the property at the time the land was divided, to any party other than those identified in the preceding sentence subjects the division of land to subdivision review; and
3. Only to the parcel that is created to provide security. Any subsequent division of the remaining tract of land, if applicable, is subject to subdivision review.

❖ *Heads-Up!*

A. Documentation required of landowner:

- ✓ a statement of how many property interests within the original tract will be created by use of the exemption;
- ✓ the mortgage, lien, or trust indenture for the exempted interest must state that the interest is being created only to secure a mortgage, lien, or trust indenture for the purposes of construction, improvements to the land being divided, or refinancing;
- ✓ a statement identifying who will have title to and possession of the balance of the original parcel after title to the exempted parcel is conveyed; and
- ✓ a signed statement from a financial or lending institution registered to do business in the state of Montana that the creation of the interest is necessary to secure a loan for construction, improvements to the land being divided, or refinancing.

B. The use of this exemption is presumed to be to evade subdivision review if the evidence in the record shows:

- ✓ the use of the exemption will create more than one new building site;
- ✓ the financing is not for construction, improvements to the exempted parcel, or refinancing;
- ✓ the person named in the “statement identifying who would have possession of the balance of the original parcel after title to the exempted parcel is conveyed” is anyone other than the financial or lending institution borrowing the funds;
- ✓ title to the exempted parcel will not immediately pass to the financing or lending institution upon foreclosure;
- ✓ there exists a prior agreement to default or a prior agreement to purchase only a portion of the original tract;
- ✓ the principal reason the interest is being created is to create a building site, and the use of the interest to secure a loan is a secondary purpose; or

TARA DEPUY

PO Box 222  
Livingston, MT 59047  
406.223.1803 office • 406.222.7865 fax  
[attorney@riverworks.net](mailto:attorney@riverworks.net)

AND

SUSAN B. SWIMLEY

1807 West Dickerson, Unit B  
Bozeman, MT 59715  
406.586.5544 office • 406.586.3130 fax  
[Swimley@Swimleylaw.com](mailto:Swimley@Swimleylaw.com)

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- ✓ the division of land is created for the purpose of conveyance to any entity other than the financial or lending institution to which the mortgage, lien or trust indenture was given, or to a purchaser upon foreclosure of the mortgage, lien or trust indenture.

C. Research Issues

- ✓ Pull all deeds and surveys from when mortgage was created to present.
- ✓ Prior to 2003, Section 76-3-201 MCA set forth an exemption to the Montana Subdivision Platting Act (MSPA) for construction mortgage surveys that provided no guidance as to whether the MSPA applied if the mortgage survey parcel was transferred.
- ✓ The change to Section 76-3-201 in 2003 generally provides that if a mortgage survey tract is transferred to an entity other than the lending institution or a purchaser at foreclosure, the transfer is considered a division of land that subjects the tract to the MSPA. The 2003 amendment also provides that the remainder of the tract, if a mortgage exemption is claimed, may also be subject to the MSPA.
- ✓ There are two attorney general opinions that reference this issue as well as a district court case. *Westre v. Ravalli County* (2008) distinguished 42 Mont. Op. Atty. Gen. No. 101 (1988) from the facts presented in *Westre* on the basis that the Attorney General opinion provided advise as to the subsequent sale of a mortgage survey tract by the lien holder, holding that the MSPA does not apply if a lien holder has taken possession of the mortgage survey tract. The facts in *Westre* differed from the facts in this Attorney General Opinion because the lien holder had not taken possession of the mortgage survey tracts. The Attorney General opinion also found that a mortgage exemption does not exist after its purpose has been fulfilled; in other words, once the mortgage is paid off the mortgage survey tract no longer exists. In *Westre*, the liens had been released against the mortgage survey tracts and the court found those tracts no longer existed.
- ✓ If the mortgage survey tract has been released from the mortgage and then deeded to a separate party, that brings into consideration an earlier Attorney General Opinion, 37 Mont. Op. Atty. Gen 41 (1977) which discusses the fact pattern where a seller in a contract for deed transfers a portion of the property, subject to contract, to the purchaser so the purchaser can obtain a loan using the released parcel as security. This Attorney General Opinion states that such a bona fide transaction is exempted from the Act, even though the seller actually parts with legal title to a portion of the land. This transaction must be stated as an exception, because the legal effect is in fact to create a division of land since the seller holds legal title to the larger portion and the purchaser holds title to the smaller (section 11-4861(2.1)). If the purchaser then sells the deeded portion to a third party there are technically no subdivision consequences attached. There is simply a transfer of a single undivided tract of land. However, if the whole undertaking was for the purpose of allowing the original owner to dispose of two tracts of land without complying with the Subdivision Act, then plainly the Act has been unlawfully circumvented.

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PO Box 222  
Livingston, MT 59047  
406.223.1803 office • 406.222.7865 fax  
[attorney@riverworks.net](mailto:attorney@riverworks.net)

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SUSAN B. SWIMLEY

1807 West Dickerson, Unit B  
Bozeman, MT 59715  
406.586.5544 office • 406.586.3130 fax  
[Swimley@Swimleylaw.com](mailto:Swimley@Swimleylaw.com)

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D. Reverse Mortgages or Beneficiary Deeds

- ✓ No case law or AG Opinions as to whether mortgage exemption applies
- ✓ Definitional challenges in meeting mortgage exemption

**B. Relocation Common Boundary Exemption**, Section 76-3-207(1)(a), MCA for relocating common boundaries between adjoining properties and Section 76-3-207(1)(d), MCA for five or fewer lots within a platted subdivision, the relocation of common boundary, and Section 76-3-207(1)(e), MCA divisions made for the purposes of relocating a common boundary line between a single lot within a platted subdivision and adjoining land outside the platted subdivision. "A restriction or requirement on the original platted lot or original unplatted parcel continues to apply to those areas."

❖ This exemption applies when:

1. The parcels are located outside of platted subdivisions; and
2. The parcels are adjoining; and
3. The proposed relocation does not create additional tracts of record.

❖ *Heads-Up!*

- ✓ *Is the proposal in a zoning district – will the end result lots comply with the zoning?*
- ✓ *What if the realignment causes conflicts with covenants?*
- ✓ *Commission making a rebuttable presumption that a proposed relocation of common boundary is adopted for the purposes of evasion if the Commission determines that the documentation submitted does not support the stated reasons for relocation or creates an additional parcel.*
- ✓ *Look for consent of mortgage holders*

A. Documentation required:

- ✓ The draft certificate of survey must clearly distinguish between the existing boundary location(s) and the new boundary location(s). This must be accomplished by representing the existing boundary with a dashed line and the new boundary, if applicable, with a solid line. (ARM 24.183.1104 (1)(f).)
- ✓ The certificate of survey must bear the signatures of all landowners whose parcels will be altered by the proposed relocation. (ARM 24.183.1104 (1)(f).)
- ✓ The certificate of survey must show that the exemption was used only to change the location of a boundary line dividing two or more parcels. (ARM 24.183.1104 (1)(f).)
- ✓ The certificate of survey must be accompanied by a quit claim deed, warranty deed, or grant deed conveying the entire newly described parcel(s) or that portion of the tract(s) that is being affected to and from the adjoining property owners.

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PO Box 222  
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406.223.1803 office • 406.222.7865 fax  
[attorney@riverworks.net](mailto:attorney@riverworks.net)

AND

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B. The use of this exemption is presumed to be to evade subdivision review if the evidence in the record shows:

- ✓ the documentation submitted, as required by this section, does not support the stated reason for relocation; or
- ✓ the division would create a new tract of record.

**C. Family Transfer Exemption, Section 76-3-207(1)(b), MCA**

❖ This exemption applies to tracts of record located outside of a platted subdivision. The landowner of such a parcel may gift or sell a single portion thereof to each member of his or her immediate family.

1. The term "immediate family" means the spouse, children (by blood or adoption), or parents of the landowner (§ 76-3-103(8), MCA).
2. This exemption may be used only by landowners who are natural persons and not by non-corporal legal entities such as corporations, companies, partnerships, and trusts unless County Attorney has otherwise stated (for the time being).

❖ *Heads-Up!*

- ✓ *This is most used and abused.*

A. Documentation required:

- ✓ A certificate of survey creating a parcel from a portion of an existing tract of record for conveyance to an immediate family member must show the name of the grantee, relationship to the landowner, and the tract to be conveyed to the grantee. (ARM 24.183.1104 (1)(f).)
- ✓ A certificate of survey creating a parcel from a portion of an existing tract for conveyance to an immediate family member must be accompanied by a deed conveying the newly created tract of record to the grantee named on the certificate of survey.
- ✓ When a certificate of survey is not required to accomplish a family transfer under this section (§ 76-3-401, MCA), the instrument of conveyance transferring a portion of an existing tract of record to an immediate family member must show the name of the grantee, relationship to the landowner, and the tract of record to be conveyed to the grantee.

B. The use of this exemption is presumed to be to evade subdivision review if the evidence in the record shows:

- ✓ The use of the family gift or sale exemption to divide tract(s) of land that are designed with characteristics such as common roads, utility easements, restrictive covenants, open space or common marketing or promotional plan.

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PO Box 222  
Livingston, MT 59047  
406.223.1803 office • 406.222.7865 fax  
[attorney@riverworks.net](mailto:attorney@riverworks.net)

AND

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Bozeman, MT 59715  
406.586.5544 office • 406.586.3130 fax  
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- ✓ The use of a family gift or sale exemption is preceded by the transfer of a tract of record from one family member to another, by quitclaim deed or otherwise.

C. Examples Plats for Discussion

D. **Ag Exemption**, Section 76-3-207(1)(d), MCA

- ❖ This exemption applies to parcels located outside of a platted subdivision.
  1. The landowner of such a parcel may gift, sell, or enter into an agreement to buy and sell a portion thereof to be used exclusively for agricultural purposes.
  2. Residential uses, whether for agricultural purposes or not, are not permitted on a tract of land created pursuant to this exemption.
  3. Any change in the use of the land for anything other than agricultural purposes subjects the parcel to review as a subdivision.
  4. The newly created parcel must meet the criteria for an agricultural designation under Section 15-7-202, MCA (Eligibility of land for valuation as agricultural).

❖ *Heads-Up!*

- ✓ *Vacation of agricultural covenant*
- ✓ *Subdivision review to remove – look at the issues*

A. Documentation required:

- ✓ A certificate of survey creating a parcel for agricultural use must be accompanied by a recorded covenant running with the land, revocable only by mutual consent of the governing body and the landowner. (§ 76-3-207(1)(c), MCA.)
- ✓ A certificate of survey creating a parcel for agricultural use only must bear a signed and acknowledged recitation of the covenant on the face of the survey. (ARM 24.183.1104(1)(f).)
- ✓ The landowner must demonstrate that the planned use of the newly created parcel is for agricultural purposes and no residential use of the newly created parcel will occur.