



Land Use Legislation 2013 Session

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Community Technical Assistance Program
Montana Department of Commerce

May 2013



10 Bills Passed into Law

HB 148

- Prohibits (through either Part 2, municipal, or interim) zoning that prevent erection of amateur radio antenna at heights and dimensions sufficient to accommodate amateur radios service communication by a person who holds and unrevoked and unexpired official amateur radio station license and operator's license issued by the FCC.
- Prohibits (through either Part 2, municipal, or interim zoning) establishing a maximum height limit for an amateur radio antenna of less than 100 feet above the ground.
- Immediate effective date

HB 169

- Existing law allows (but does not require) a growth policy to contain (a) neighborhood plans; (b) minimum criteria for a neighborhood plan; and (c) an infrastructure plan.
- HB 169 allows growth policy to be: 1) used as resource management plan for establishing coordination or cooperating agency status with a federal land management agency; and 2) be amended to contain any elements required by that federal agency for the local entity to establish such coordination or cooperating agency status.
- Effective October 1, 2013.

SB 40

- Time period for element review begins to run on “date of delivery” of a subdivision application to the agency (with any review fees paid).
- Removes ability of local governing body to set deadlines for the submittal of subdivision applications.
- Language limiting public consideration of the impacts of proposed mitigation constituting “new information” was removed during the process
- Applies to applications submitted on or after July 1, 2013

SB 146

- Local governing body cannot include oral or written comments from a federal or state agency regarding wildlife, wildlife habitat, or the natural environment in its findings on a subdivision unless supported by “scientific information or a published study.”
- Any federal or state agency submitting such comments or opinions must first disclose whether it has been involved in trying to acquire the property or an interest in the property at issue.
- Applies to applications submitted on or after July 1, 2013

SB 293

- If a subdivider is proposing a shared, multiple user, or public water/wastewater system, the subdivider must state in subdivision application whether the system will be a public utility as defined in 69-3-101, MCA and subject to the jurisdiction of the PSC, or exempt from such jurisdiction (with explanation for the exemption).
- Effective October 1, 2013 and applies to subdivision applications submitted on or after that date.

SB 316

- Adds new definition in Sanitation Act for a “well isolation zone” – the area within a 100-foot radius of a water well
- DEQ or local sanitarian may only issue a septic permit, local government may only approve subdivision, and local board of health may only approve drilling of water well on adequate evidence that the well isolation zone is located wholly within the boundaries of the subdivision or existing tract.
- Well isolation zone may extend onto adjacent property only if private owner grants easement or public owner authorizes.
- Effective October 1, 2013

SB 290

- Applies to parcels in unincorporated areas with Part 2 zoning that are wholly surrounded by a municipality.
- If a “change of use” occurs on the property, the County must notify the city and all landowners in the city within 300 feet
- If 10% or more of those owners or the municipality request a hearing on the change of use, County must hold hearing and make a determination that the regulations in the county zoning are as compatible as possible with the municipal zoning (as required under 76-2-203(3), MCA). County may initiate revisions to the zoning.
- Effective October 1, 2013

HB 562

- Bill aimed at a situation that arose where a Clerk & Recorder was refusing to record a COS for a boundary line adjustment (Section 76-3-207(1)(a)) when the adjoining parcels were both over 160 acres in size and after the adjustment one would be less than 160 acres in size.
- With Governor's amendment, adds language to Section 76-3-207(1) to clarify that all -207(1) exemptions are available regardless of the size of lots resulting from the use of the exemption

SB 324

- Removes subdivisions for lease or rent from MSPA, except for RVs and campgrounds (rent of land)
- First 3 buildings for lease or rent (BLR) on single tract require only sanitation review and approval; 4 or more BLR reviewed under new local regulations adopted under Title 76.
- Exempts certain types of BLR from counting
- Governing body can increase number at which local review begins for all or certain types of BLR, or adopt additional regulations for local review.
- Effective September 1, 2013.

SB 23

- Within 30 working days of adopting interim zoning, county must initiate study to verify the emergency and identify 1) the facts and circumstances constituting the emergency; 2) options for mitigating the emergency; and 3) the course of action the governing body intends to take, if any, during the interim zoning
- Details about emergency must be included in public notice of hearing on interim zoning
- If county wishes to extend interim zoning, must finish the study and provide second public hearing
- Effective October 1, 2013



5 Bills Vetoed by Governor

VETOED

- **SB 41** – Would have prohibited local governments from considering the cumulative impacts of the subdivision together with other potential subdivisions in the area.
- **SB 24** – Would have restricted a county's ability to condition or prohibit sand and gravel operations on a residentially zoned property after the operation had filed for DEQ mining permit.
- **SB 147** – Would have limited primary subdivision review criterion regarding agriculture to the proposed subdivision's impact on adjacent agricultural operations.

VETOED

- **SB 105** – Would have prohibited use of interim zoning to regulate uses subject to state review and approval under Titles 75, 76, and 82.
- **HB 499** – “Grandfather clause” for existing unlawful BLRs (addressed with exemption in SB 324)



Bills Died in Process

Bills Died in Process

- SJ 9 – Discourage policies restricting private property rights without due process
- SB 17– Constitutional amendment adding “right to use property” to clean and healthful environment clause
- HB 156 – Restrict city ability to allow ADUs in SF zones
- HB 452– Authorize new oil and gas development impact fee
- SB 284 – Real property fairness act
- HB 531– Provide SLR exemption for zoned properties (addressed with exemption in SB 324) and modify townhome exemption



Subdivisions for Lease or Rent

Review of Legislative History

***Presented to Education and Local Government
Interim Committee***

September 15, 2011

Legislative History of SLR

- 1973 Passage of Montana Subdivision and Platting Act (SB 208)
- 1974 Amendments to MSPA (HB 1017)
- Conversion from RCMs to MCAs
- AG Opinions and SB 354
- Case Law
- 2009 Request for AG Opinion

SB 208 (1973)

- Creation of Montana Subdivision and Platting Act
- Applied to divisions creating lots less than 10 acres in size
- As introduced, contained four exemptions
 - Court order
 - Mortgage or lien
 - Severing minerals
 - Cemetery lots

SB 208, cont.

- Senate Judiciary passed with amendment adding fifth exemption from review and survey: divisions “created by a rental or lease agreement for a term of three (3) years or less.”
- House Natural Resources Committee removed this exemption, and replaced it with two new exemptions from both review and survey:
 - Lease or rental for agricultural purposes
 - Family transfer

HB 1017 (1974)

- First amendments to MSPA (annual sessions)
- Increase application of MSPA to divisions creating lots 40 acres in size or less
- Added seven exemptions
 - **Subdivisions for rent or lease** must be reviewed but no survey required (language of § 76-3-208, MCA)
 - State-owned lands
 - Reservation of life estate
 - Parcels created by state ROW
 - Common boundary relocations
 - Agricultural land sale or buy-sell agreement

HB 1017, cont.

- House Natural Resources Committee:
 - Added exemption for any land within city limits from requirements of MSPA
 - Added exemption for occasional sale
 - Applied MSPA to all divisions of land regardless of size
 - Added new exemption: *“This chapter does not apply to any condominium created solely by the change of ownership of any existing structures.”*
 - ✓ NOTE - This proposal followed and generated discussion about whether or not condominiums should be exempt from the MSPA and whether existing as opposed to proposed condominiums should be treated the same

HB 1017, cont.

- Senate Judiciary amendments:
 - Removed exemptions for cities and state ROW
 - Replaced the condo exemption added in the House with:
“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.”
 - Added same language to definition of “division of land”:
“Provided that where required by this act the land upon which an improvement is situated has been subdivided in compliance with this act, 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 and is not subject to the *terms* of this act.”

Revised Codes of Montana (1974) conversion to Montana Code Annotated (1978)

Section 11-3862(9). Surveys required – exceptions.

“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.”

BECOMES:

Section 76-3-204. 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 ~~act~~ chapter, and is not subject to the requirements of this ~~act~~ chapter.”

RCM conversion to MCA, cont.

Section 11-3862(7). Surveys required – exceptions.

“Subdivisions created by rent or lease are exempt from the surveying and filing requirements of this act but must be submitted for review and approved by the governing body before portions thereof may be rented or leased.

BECOMES:

Section 76-3-208. Subdivisions exempted from surveying and filing requirements but subject to review provisions.

“Subdivisions created by rent or lease are exempt from the surveying and filing requirements of this ~~act~~ chapter but must be submitted for review and approved by the governing body before portions thereof may be rented or leased.

RCM conversion to MCA, cont.

Section 11-3681(2.1). Definition of “division of land”

“Provided that where required by this act the land upon which an improvement is situated has been subdivided in compliance with this act, 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 and is not subject to the *terms* of this act.”

BECOMES:

Section 76-3-202. Exemption for structures on complying subdivided lands.

~~“Provided that w~~Where required by this act chapter, when the land upon which an improvement is situated has been subdivided in compliance with this act chapter, 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 and is not subject to the terms of this ~~act~~ chapter.”

Attorney General Opinions

- **1981** request by Dept. of Health & Environmental Sciences
 - Does “subdivision” in Sanitation Act apply to all condos or only condos that do not provide “permanent multiple space for recreational camping vehicles?”
 - Yes. Legislature intended definition of “subdivision” to be broad.
 - AG Greeley interpreted Sanitation Act and MSPA in the same manner.
 - 76-3-204 does not exempt condominiums from review.

- **1982** request by Missoula County Attorney
 - Does MSPA require review of conversions of existing apartments or office buildings to individual condos?
 - No. All condos are subject to review unless exempt, but 76-3-204 exempts conversions of an existing, built, and in use apartment or office building to condos.

AG Opinions Cont.

- **1984** request by Missoula City Attorney
 - ▣ Does a proposal to construct 48 four-plexes (192 dwelling units) to be used as rentals on a tract of record need to go through subdivision review?
 - ▣ Yes. Proposal constitutes a “division of land” because the owners sought to segregate parcels from the larger tract by transferring or contracting to transfer possession of portions of the tract to the tenants.
 - ▣ 76-3-204 only applies to existing buildings that were built and used prior to the time of division.
 - ▣ No discussion of 76-3-202 or 76-3-208.

SB 354 (1985)

“AN ACT TO CLARIFY THAT THE CONVEYANCE OF ONE OR MORE PARTS OF A BUILDING IS NOT A SUBDIVISION.”

- SB 354 amended 76-3-204 to overrule 1982 and 1984 AG opinions as to that issue:

“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,~~ whether existing or newly constructed as that term is defined in this chapter, and is not subject to the requirements of this chapter.”

SB 354, cont.

➤ At House Natural Resources Committee, Rep. Raney expresses concern that the language creates a “loophole” that will allow separate residences on one lot to avoid subdivision review. Sponsor Sen. Mazurek assures him that would “not be allowable under the law.”

➤ SB 354 as passed:

Section 76-3-204. 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,~~ whether existing or proposed as that term is defined in this chapter, and is not subject to the requirements of this chapter.”

Lee v. Flathead County (1985)

- April, 1984 – developers sought to construct a four-unit apartment building in Big Fork (originally proposed as condos).
- June, 1984 – AG opinion (48 four plexes) holding that 76-3-204, applied to existing structures, built, and in use prior to division.
- Spring, 1985 – Legislature amended 76-3-204, to apply to both existing and proposed structures. (SB 354).

Lee v. Flathead County, cont.

□ Question:

- Does 76-3-204 apply to proposed structures?

□ Answer:

- Yes. Legislature's amendment of "existing and proposed" to 76-3-204 exempts four-plex apartment from subdivision review.

□ Notes:

- Decision addressed a **single structure** – not an existing building with multiple additional structures.
- Later decisions cite Lee to conclude that 76-3-204, applies to **single structures**.

Rose v. Ravalli County (2006)

- Skalkaho Lodge and Steak House, Ravalli County
- Owners sought to construct four guest cabins – buildings would be separate from the existing guest lodge.
- County denied request for well and septic – project must first undergo subdivision review.
- **Questions:**
 - Does the project meet the definition of subdivision?
 - Is the project exempt from review under 76-3-204?
 - Is the project subject to review under 76-3-208?

Rose v. Ravalli County, cont.

□ Subdivision?

- Yes. Project to build four separate guest cabins for rent or lease on a tract of land is a subdivision under MSPA.
- Project requires separate water supplies and septic.
- “Subdivision” should be liberally construed.

□ Exempt under 76-3-204?

- No. Exemption applies to a single structure.
- Proposal would create several small cabins separate from the existing guest lodge.

□ Subject to review under 76-3-208?

- Yes. “Subdivision” for rent or lease requires subdivision review, but 76-3-208, applies and the project is exempt from surveying and filing requirements.

2009 Request for AG Opinion

Missoula County Attorney requests an AG opinion on the following two questions:

1. Are the definition of “subdivision” in M.C.A. 76-3-103(15), as applied to subdivisions for rent or lease, and the requirement for review of “Subdivisions created by rent or lease” at M.C.A. § 76-3-208, limited to divisions of land where residential dwellings are planned?
2. Does the exemption found at M.C.A. §76-3-204 for “sale, rent, lease, or other conveyance of one or more parts of a building” apply to multiple buildings on a single parcel?

2009 Request for AG Opinion, cont.

Citing the Rose case, the Missoula County Attorney argues that SLR exemption is limited to a single building, structure, or improvement on a parcel:

- ❑ the plain meaning of the statute;
- ❑ the MSC's directive to narrowly construe the exemptions of the Act; and
- ❑ the public policy purposes behind the Act (interpreting the exemption to allow for multiple buildings “would potentially allow for entire cities of rental buildings to be established without any review...”).

2009 Request for AG Opinion, cont.

Missoula City Attorney submitted a conflicting interpretation of the SLR exemption, concluding that the provision exempts multiple rental buildings on a parcel from subdivision review:

- Previous AG Solicitor's letter and advice from CTAP that SLR exemption applied to multiple rental buildings one a parcel;
- Statutory construction – singular includes the plural
- Requiring subdivision review in the city would hamper commercial, university, and low-income housing developments.

2009 Request for AG Opinion, cont.

- AG releases “draft” opinion for review and comment in March 2010, concluding that the SLR exemption does not apply to the conveyance or construction of multiple buildings, structures, or improvements on a single tract of land.
- In May 2010, Chief Civil Counsel for AG informs Missoula County Attorney that the AG’s office will not issue an opinion because Derick v. Lewis and Clark County case involving SLR was pending. Urged Legislature to take up the issue in 2011 session.
- Until April 2011, many working on the issue did not know that the AG would not be issuing an opinion.

2011 Legislative Session

- HB 494
- SB 629
- Local Option Proposal
- Amendatory Veto HB 494

HB 494

- Modifies exemption -204 to make building, structure, and improvement plural
- Clarified the buildings could be located on a single parcel of land or on multiple parcels owned by a single person
- Exemption available in zoned areas only if conveyance in conformance with the zoning
- On second reading, amended to clarify that exemption also available in unzoned areas. Referred to Senate Local Government and then..... nothing.

SB 629

- Proposed new section in MSPA with expedited review process for SLRs, similar to the process set forth in the statute for minor subdivisions.
 - ▣ Reviewing agencies would have 35 days to process an SLR;
 - ▣ SLR exempted from the requirement to be surveyed, to prepare an EA, from park dedication requirements, and from a public hearing.
- Repealed the 76-3-202 exemption
- Modified the § 76-3-201 exemption for lease or rent for farming or agricultural purposes, by adding “including nonresidential agricultural-related structures.” This language was intended to expedite the development of farmworker housing in rural, agricultural counties.

SB 629, cont.

- Modified 76-3-204 to make building, structure, and improvement plural and clarify that buildings could be located on a single parcel of land or on multiple parcels owned by a single person
- Exemption available if the parcel and buildings in conformance with zoning; OR in unzoned areas when:
 - ✓ Original subdivision of the underlying parcel or parcels resulted from a subdivision that contemplated multiple buildings or structures on individual lots;
 - ✓ Maximum of three single dwelling structures in addition to the parcel owner's primary residence; or
 - ✓ No sewage disposal facilities built for the structures
 - ✓ The buildings or structures are intended for rental as storage units or for a single agricultural operation."

SB 629, cont.

House Local Government Committee amendments:

- SLR subdivisions of 6 or more buildings reviewed as major subdivisions;
- No more than 3 of either residential or commercial SLRs;
- Removed storage units and single ag operations from the exemption;
- Provided a method for counting dwellings or places of businesses;
- Limited the use of the exemption to one-time-only;
- Local governments could exempt more than 3 SLRs through local sub regs, so long as the government identifies the number of SLRs that would be exempted

Local Option Proposal

- Never formally introduced
- Modified -208 to allow local agencies to:
 - ❑ exempt all SLRs from review;
 - ❑ exempt certain types or categories of SLRs from review;
 - ❑ impose only certain review criteria and other requirements on SLRs; and/or
 - ❑ provide expedited review for SLRs
- Intended to provide flexibility – e.g., urban growth counties v. eastern oil and gas counties

Amendatory Veto HB 494

- 1) Eliminated the *sale or conveyance of* multiple buildings, structures, or improvements on a single tract of record without subdivision review from -204 exemption;
- 2) Limited the SLR to a maximum of four buildings, structures, or improvements;
- 3) Deleted the section of HB 494 discussing the applicability of zoning regulations to the exemption established under the bill;
- 4) Grandfathered youth camps, as defined in § 50-52-101, under construction or already in operation
- 5) Grandfathered existing buildings, structures, or improvements that are currently being rented or leased and those under construction as of the Act's effective date.

House Joint Resolution (HJ) 39

- Passed and funded by 2011 Legislature
- Interim study of subdivision exemptions, particularly SLR
- Working group of interested parties: cities, counties, building industry, environmental groups, and private citizens
- Report back with recommendations to Education and Local Government interim subcommittee

Derick v. Lewis & Clark County (2011)

- Single-family house and separate garage apartment which owners rented out
- County concludes subdivision review is required, -204 does not apply to more than one building on single parcel
- Garage apartment served by single water and sewer system, County retracts wastewater permit
- **Question:**
 - ▣ Is the proposal a “subdivision?”
 - ▣ Is the proposal exempt from review under 76-3-204?
 - ▣ Does 76-3-208 apply?

Derick v. Lewis & Clark County, cont.

- **Is the proposal a “subdivision?”**
 - ▣ Yes. A “division of land” occurs when one or more parcels are segregated from a larger tract.
 - ▣ Tenants will receive possession of a separate dwelling unit on a tract of land; includes **some interest** in the real estate upon which the apartment is located.
 - ▣ Contrary result would create a regulatory void.
- **Is the proposal exempt from review under 76-3-204?**
 - ▣ No. Exemption applies to a single building.
 - ▣ 76-3-208, would be rendered meaningless.
- **Does 76-3-208 apply?**
 - ▣ Yes.

Lessons Learned

- History and cases support interpretation that -204 exempts portions of single building
- Original intent was to be clear that condo conversions in existing buildings would be exempt, but now condos have their own exemption and -204 doesn't apply (1982 AG Opinion)
- History indicates -202 and -204 were the same
- History indicates some support in past for exempting cities from state subdivision requirements

AG Opinion on SLR

- Released January 2012
- 76-3-204 exemption limited to one or more parts of a single building, structure, or improvement on a parcel

Working Group

December 2011 through June 2012

- Consisted of representative of:
 - Cities
 - Counties
 - MT Association of Planners
 - MT Association of Registered Land Surveyors
 - MT Building Industry Association
 - MT Association of Realtors
 - MT Audubon
 - MT Environmental Information Center
 - Private citizens

- Met 5 times over 6 month period

Working Group, cont.

- Five points of agreement:
 - 1) If complies with zoning, exempt it
 - 2) Grandfather clause for some existing SLRs
 - 3) Maintain local flexibility
 - 4) Expedited review of some or all SLRs
 - 5) DEQ review process should correlate with SLR review

- Working group came up with 5 options for legislation to “fix” SLR – ELG did not request any

- Sen Rosendale had SB 324 drafted and introduced

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