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Legal Opinion 2019-007

TO: Mayor John Engen, City Council, Dale Bickell, Mary McCrea, Mike Haynes, Kevin Slovarp, Troy Monroe, Donna Gaukler, Elizabeth Erickson, Marty Rehbein, Kirsten Hands, Kelly Elam, Department City Attorney

FROM: Jim Nugent, City Attorney

DATE March 27, 2019

RE: Montana Subdivision and Platting Act statutory prerequisites for utilization of condominium/townhome/townhouse subdivision exemption.

FACTS:

Currently there is some city elected official general discussion pertaining to condominium/townhomes/townhouse subdivision exemptions utilization in the City of Missoula.

ISSUE:

What are the Montana state law statutory prerequisites for utilization of condominium/townhome/townhouse subdivision exemption utilization?

CONCLUSION:

Pursuant to Section 76-3-203 MCA pertaining to subdivision exemption for certain condominiums, townhomes, or townhouses the structural building unit must either (1) be constructed on land subdivided in compliance with parts 5 and 6 of the Montana Subdivision and Platting Act; or (2) be constructed on lots within incorporated cities and towns and are only statutorily eligible if (1) if the approval of the original subdivision of land expressly contemplated the construction of condominiums, townhomes or townhouses and any applicable park dedication requirements in Section 76-3-621 MCA of the Montana Subdivision and Platting Act are complied with; or (2) the condominium, townhome, or townhouse proposal is in conformance with applicable local zoning regulations when local zoning regulations are in effect.

LEGAL DISCUSSION:

The 2011 Montana State Legislature pursuant to HB-460(2011) adopted “AN ACT REQUIRING THE DEPARTMENT OF REVENUE TO ESTABLISH BY RULE A METHOD FOR VALUING

TOWNHOUSES; DEFINING ‘TOWNHOUSE’ AND ‘TOWNHOME’; PROVIDING THAT THE UNIT OWNERSHIP ACT MAY APPLY TO TOWNHOUSES; CONFORMING PROVISIONS OF THE UNIT OWNERSHIP ACT WITH THE DEFINITIONS OF ‘TOWNHOUSE’ AND ‘TOWNHOME’; AMENDING SECTIONS 15-8-111, 70-23-102, 70-23-103, 70-23-301 AND 76-3-203, MCA; PROVIDING AN IMMEDIATE EFFECTIVE DATE AND APPLICABILITY DATE.” The immediate effective date of HB-460(2011) was May 12, 2011. See chapter 373, pages 1575 through 1580, LAWS OF MONTANA, volume II, SIXTY-SECOND LEGISLATURE 2011.

Title 70, chapter 23 MCA is known as the “UNIT OWNERSHIP ACT”. Pursuant to subsection 70-23-102(15) MCA the terms “townhome” and “townhouse” are defined as meaning:

“(15) ‘Townhome’ or ‘townhouse’ means property that is owned subject to an arrangement under which the persons own their own units and hold separate title to the land beneath their units, but under which they may jointly own the common areas and facilities.” (emphasis added)

Pursuant to Section 70-23-103 MCA in order for any property to be subject to the provisions of the “UNIT OWNERSHIP ACT”, the owner(s) or lessee(s) shall execute and acknowledge, and record a declaration in the office of the recording officer of the county in which the property is located. A declaration for a townhome or townhouse may be executed under Section 70-23-103 MCA. The provisions of the “UNIT OWNERSHIP ACT” apply to townhomes or townhouses only if a declaration is executed pursuant to Section 70-23-103 MCA.

Section 70-23-301 MCA sets forth the contents of the declarations required to be filed. Subsection 70-23-301(8) MCA pertaining to the contents of the declaration states as follows:

“(8) an exhibit concerning certification from the applicable local government that the condominiums, townhomes, or townhouses are either exempt from review under 76-3-203 or have been approved following review under Title 76, chapter 3, parts 5 and 6”. (emphasis added)

The Montana Subdivision and Platting Act is set forth in title 76, chapter 3 MCA. See Section 76-3-101 MCA. Part 2 is entitled “MISCELLANEOUS EXEMPTIONS”. In this part, Section 76-3-203 MCA is the subdivision exemption provision that pertains to certain condominiums, townhomes and townhouses. Section 2-3-203 MCA states:

“76-3-203. EXEMPTION FOR CERTAIN CONDOMINIUMS. Condominiums, townhomes, or townhouses, as those terms are defined in 70-23-102, constructed on land subdivided in compliance with parts 5 and 6 of this chapter or on lots within incorporated cities and towns ARE EXEMPT FROM THE PROVISIONS OF THIS CHAPTER IF: (1)the approval of the original subdivision of land expressly contemplated the construction of the condominiums, townhomes, or townhouses and any applicable park dedication requirements in 76-3-621 are complied with, or

(2) the condominium, townhome, or townhouse proposal is in conformance with applicable local zoning regulations when local zoning regulations are in effect.”(emphasis added)

The words “townhomes” and “townhouses” were inserted into Section 76-3-203 MCA pursuant to HB-460(2011). There is no definition of the term “lots” set forth in Montana state laws pertaining to subdivision or zoning.

CONCLUSION:

Pursuant to Section 76-3-203 MCA pertaining to subdivision exemption for certain condominiums, townhomes, or townhouses the structural building unit must either (1) be constructed on land subdivided in compliance with parts 5 and 6 of the Montana Subdivision and Platting Act; or (2) be constructed on lots within incorporated cities and towns and are only statutorily eligible if (1) if the approval of the original subdivision of land expressly contemplated the construction of condominiums, townhomes or townhouses and any applicable park dedication requirements in Section 76-3-621 MCA of the Montana Subdivision and Platting Act are complied with; or (2) the condominium, townhome, or townhouse proposal is in conformance with applicable local zoning regulations when local zoning regulations are in effect.

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/s/ Jim Nugent

Jim Nugent, City Attorney

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