

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2022-010

**TO:** City Council, Mayor John Engen, Dale Bickell, Eran Pehan, Alex Eidam, David Degrandpre, Cassis Tripard, Dept. City Clerk, Dept Attorney

**CC:** Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** March 31, 2022

**RE: SUBDIVIDER MUST COMPLETE REQUIRED SUBDIVISION PUBLIC IMPROVEMENTS OR ALTERNATIVELY PROVIDE ADEQUATE SECURITY FOR INSTALLATION OF PUBLIC IMPROVEMENTS WITHIN PROPOSED SUBDIVISION PRIOR TO APPROVAL OF FINAL PLAT.**

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### **FACTS:**

Recently during a city council meeting including a city council subdivision review and approval, there was city council concern and discussion about ensuring the installation of public improvements.

### **ISSUE(S):**

Does Montana's Subdivision and Platting Act address the completion of city council required public improvements in relationship to final plat approval.

### **CONCLUSION(S):**

Subdivision preliminary plat required public improvements must either be installed or alternatively the subdivider must provide adequate acceptable security for the installation of the public improvements prior to final plat approval occurring.

### **LEGAL DISCUSSION:**

The Montana Subdivision and Platting Act is set forth in title 76, chapter 3 MCA. Basically there are two major review steps associated with successfully obtaining subdivision review.

Preliminary plat approval and final plat approval. Pursuant to this Subdivision Act, subdivided lots may not be sold and ownership transferred unless and until city council final plat approval has occurred.

Preliminary plat approval includes the city council's imposition of required subdivision conditions in order for the developer to be able to obtain final plat approval. Generally, Preliminary plat conditions are required to be completed prior to final plat approval occurring. Pursuant to subsection 76-3-507(1) MCA "the governing body shall require the subdivider to complete required improvements within the proposed subdivision prior to approval of final plat".

Also, see subsection 76-3-611 (1) MCA that the governing body shall approve the conditions of preliminary plat approval ONLY IF" the preliminary plat conforms to the conditions of approval set forth in the preliminary plat and Montana's Subdivision and Platting Act.

**76-3-507. Provision for security requirements to ensure construction of public improvements.**

- (1) Except as provided in subsections (2) and (4), the governing body shall require the subdivider to complete required improvements within the proposed subdivision prior to the approval of the final plat.
- (2) (a) In lieu of the completion of the construction of any public improvements prior to the approval of a final plat, the governing body shall at the subdivider's option allow the subdivider to provide or cause to be provided a bond or other reasonable security, in an amount and with surety and conditions satisfactory to the governing body, providing for and securing the construction and installation of the improvements within a period specified by the governing body and expressed in the bonds or other security. The governing body shall reduce bond or security requirements commensurate with the completion of improvements.
- (b) In lieu of requiring a bond or other means of security for the construction or installation of all the required public improvements under subsection (2)(a), the governing body may approve an incremental payment or guarantee plan. The improvements in a prior increment must be completed or the payment or guarantee of payment for the costs of the improvements incurred in a prior increment must be satisfied before development of future increments.
- (3) Approval by the governing body of a final plat prior to the completion of required improvements and without the provision of the security required under subsection (2) is not an act of a legislative body for the purposes of **2-9-111**.
- (4) The governing body may require a percentage of improvements or specific types of improvements necessary to protect public health and safety to be completed before allowing bonding or other reasonable security under subsection (2)(a) for purposes of filing a final plat. The requirement is applicable to approved preliminary plats. (Emphasis added)

**76-3-611. Review of final plat.**

- (1) The governing body or the agent or agency designated by the governing body shall examine each final plat, and the governing body shall approve the plat only if:

(a) it conforms to the conditions of approval set forth on the preliminary plat and to the terms of this chapter and regulations adopted pursuant to this chapter; and

(b) the county treasurer has certified that all real property taxes and special assessments assessed and levied on the land to be subdivided have been paid.

(2) (a) The governing body may require that final plats and certificates of survey be reviewed for errors and omissions in calculation or drafting by an examining land surveyor before recording with the county clerk and recorder. When the survey data shown on the plat or certificate of survey meets the conditions pursuant to this chapter, the examining land surveyor shall certify the compliance in a printed or stamped certificate on the plat or certificate of survey. The certificate must be signed by the surveyor.

(b) A land surveyor may not act as an examining land surveyor in regard to a plat or certificate of survey in which the surveyor has a financial or personal interest.

(3) (a) A final plat is considered to be received on the date of delivery to the governing body or the agent or agency designated by the governing body when accompanied by the review fee submitted as provided in **76-3-602**.

(b) Within 20 working days of receipt of a final plat, the governing body or the agent or agency designated by the governing body shall determine whether the final plat contains the information required under subsections (1) and (2) and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of that determination in writing. If the governing body or its agent or agency determines that the final plat does not contain the information required under subsections (1) and (2), the governing body or its agent or agency shall identify the final plat's defects in the notification.

(c) The governing body or its agent or agency may review subsequent submissions of the final plat only for information found to be deficient during the original review of the final plat under subsection (3)(b).

(d) If the governing body determines that an examining land surveyor must review a final plat pursuant to subsection (2)(a), the governing body or its agent or agency shall identify the requirement in its notification.

(e) The time limits provided in subsection (3)(b) apply to each submission of the final plat until a written determination is made that the final plat contains the information required under subsections (1) and (2) and the subdivider or the subdivider's agent is notified.

(4) If a determination is made under subsection (3)(b) that the final plat contains the information required under subsections (1) and (2), the governing body shall review and approve or deny the final plat within 20 working days.

(5) The subdivider or the subdivider's agent and the governing body or its reviewing agent or agency may mutually agree to extend the review periods provided for in this section. (Emphasis added)

If the subdivider does not yet have all public improvements installed at the time of seeking city council final plat approval; the subdivider is allowed pursuant to section 76-3-507 MCA to enter into a subdivision improvements agreement acceptable to the city. Typically, the subdivision improvements agreement is secured by an irrevocable letter of credit issued by a bank or a cashier's check. If the public improvements have not been installed 30 days prior to the expiration of the irrevocable letter of security; the city is allowed to draw on the irrevocable letter of credit to use the monies to install the public improvements.

CONCLUSION: Subdivision preliminary plat required public improvements must either be installed or alternatively the subdivider must provide adequate acceptable security for the installation of the public improvements prior to final plat approval occurring

**CONCLUSION(S):**

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/s/ Jim Nugent

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Jim Nugent, City Attorney

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