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Legal Opinion 2011-007

TO: John Engen, Mayor; City Council; Bruce Bender, Chief Administrative Officer; Brentt Ramharter, City Finance Director; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Dan Jordan, Public Works; Jessica Miller, Public Works; Mike Barton, OPG Director; Mary McCrea, OPG; Denise Alexander, OPG; Laval Means, OPG

FROM: Jim Nugent, City Attorney

DATE April 11, 2011

RE: Reasonable Fees up to \$200 per Application may be Charged for Subdivision Exemption Application Reviews

FACTS:

Approximately two dozen subdivision exemption applications are submitted to the city each year for review by city Public Works, Office of Planning and Grants and City Attorneys office. The nearly forty (40) year old Montana Subdivision and Platting Act has always authorized subdivision exemptions. The City of Missoula has never charged a subdivision exemption review fee even though three (3) different departments perform review work associated with each subdivision exemption application submitted to the city. This legal opinion is intended to again remind city elected officials that the city may legally charge a subdivision exemption review fee.

ISSUE(S):

May the City of Missoula charge a fee for review of proposed subdivision exemption affidavit applications?

CONCLUSION(S):

Yes. Title 76, Chapter 3, Part 2 MCA of the Montana Subdivision and Platting Act is entitled “Miscellaneous Exemptions”. Within these laws §§76-3-201 and 76-3-207 MCA identify several authorized subdivision exemptions and both allow local governments to establish reasonable fees not exceeding \$200 for the examination of subdivision exemption applications.

LEGAL DISCUSSION:

Sections 76-3-201 and 76-3-207 MCA each statutorily identify subdivision review exemptions that are authorized pursuant to the Montana Subdivision and Platting Act.

While many local governments previously believed they could charge fees for subdivision application reviews, the 2003 Montana State Legislature added subsection (3) to Mont. Code Ann. § 76-3-201 and subsection (4) to Mont. Code Ann. § 76-3-207 expressly authorizing a local government to charge a reasonable fee, up to a maximum of \$200, for examination of subdivision exemption affidavit applications. In part, the 2003 legislation appeared to intend to establish a monetary cap as to what could be charged.

Mont. Code Ann. §§ 76-3-201 and 76-3-207 as amended provide:

76-3-201. Exemption for certain divisions of land -- fees for examination of division. (1) Unless the method of disposition is adopted for the purpose of evading this chapter, the requirements of this chapter may not apply to any division of land that:

(a) is created by order of any court of record in this state or by operation of law or that, in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain, Title 70, chapter 30;

(b) is created to provide security for construction mortgages, liens, or trust indentures;

(c) creates an interest in oil, gas, minerals, or water that is severed from the surface ownership of real property;

(d) creates cemetery lots;

(e) is created by the reservation of a life estate;

(f) is created by lease or rental for farming and agricultural purposes; or

(g) is in a location over which the state does not have jurisdiction.

(2) Before a court of record orders a division of land under subsection (1)(a), the court shall notify the governing body of the pending division and allow the governing body to present written comment on the division.

(3) **The governing body may examine a division of land to determine whether or not the requirements of this chapter apply to the division and**

may establish reasonable fees, not to exceed \$200, for the examination.
(Emphasis added.)

76-3-207. Subdivisions exempted from review but subject to survey requirements -- exceptions -- fees for examination of division. (1) Except as provided in subsection (2), unless the method of disposition is adopted for the purpose of evading this chapter, the following divisions of land are not subdivisions under this chapter but are subject to the surveying requirements of 76-3-401 for divisions of land not amounting to subdivisions:

- (a) divisions made outside of platted subdivisions for the purpose of relocating common boundary lines between adjoining properties;
- (b) divisions made outside of platted subdivisions for the purpose of a single gift or sale in each county to each member of the landowner's immediate family;
- (c) divisions made outside of platted subdivisions by gift, sale, or agreement to buy and sell in which the parties to the transaction enter a covenant running with the land and revocable only by mutual consent of the governing body and the property owner that the divided land will be used exclusively for agricultural purposes;
- (d) for five or fewer lots within a platted subdivision, relocation of common boundaries and the aggregation of lots; and
- (e) divisions made for the purpose of relocating a common boundary line between a single lot within a platted subdivision and adjoining land outside a platted subdivision. A restriction or requirement on the original platted lot or original unplatte parcel continues to apply to those areas.

(2) Notwithstanding the provisions of subsection (1):

- (a) within a platted subdivision filed with the county clerk and recorder, a division of lots that results in an increase in the number of lots or which redesigns or rearranges six or more lots must be reviewed and approved by the governing body and an amended plat must be filed with the county clerk and recorder;
- (b) a change in use of the land exempted under subsection (1)(c) for anything other than agricultural purposes subjects the division to the provisions of this chapter.

(3) A division of land may not be made under this section unless the county treasurer has certified that all real property taxes and special assessments assessed and levied on the land to be divided have been paid.

(4) The governing body may examine a division of land to determine whether or not the requirements of this chapter apply to the division and may establish reasonable fees, not to exceed \$200, for the examination.
(Emphasis added.)

CONCLUSION(S):

Yes. Title 76, Chapter 3, Part 2 MCA of the Montana Subdivision and Platting Act is entitled "Miscellaneous Exemptions". Within these laws §§76-3-201 and 76-3-207 MCA identify several authorized subdivision exemptions and both allow local governments to establish reasonable fees not exceeding \$200 for the examination of subdivision exemption applications.

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/s/

Jim Nugent, City Attorney

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