

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2009-005

**TO:** John Engen, Mayor; City Council; Bruce Bender, CAO; Brent Ramharter, Finance Director; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Carla Krause, Engineering; Jolene Ellerton, Engineering; Dan Jordan, Public Works; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Donna Gaukler, Parks & Rec Director; Jackie Corday, Parks & Rec; Roger Millar; OPG Director; Mike Barton, OPG; Tim Worley, OPG; Janet Rhoades, OPG; Mary McCrea, OPG; Denise Alexander, OPG;

**FROM:** Jim Nugent, City Attorney

**DATE** March 6, 2009

**RE:** Montana Subdivision and Platting Act Impact on Agriculture Provisions

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### **FACTS:**

Recently during City Council review of the proposed Chickasaw Subdivision City Council member Dick Haines inquired as to what the provisions of the Montana Subdivision Act provide with respect to “impacts on agriculture”.

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

Does the Montana Subdivision and Platting Act specifically mention “impact on agriculture” within its statutory provisions?

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

Yes, Montana Subdivision and Platting Act Sections 76-3-608 MCA pertaining to criteria for local government review as well as Section 76-3-621 MCA pertaining to park dedication requirements specifically reference agriculture.

### **LEGAL DISCUSSION:**

The Montana Subdivision and Platting Act does not define the term “agriculture”. However, Montana statutes setting forth the rules of statutory construction provide that word

defined in any part of the Montana Code Annotated is applicable to that word throughout the Montana Code except where a contrary intention plainly appears. Section 1-2-107 MCA states:

**1-2-107. Applicability of definitions.** Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.

The only place in the Montana Code Annotated where the word “agriculture” is defined is in the Montana “Child Labor Standards Act” where pursuant to Subsection 41-2-103(1) MCA the term “agriculture” is defined as meaning:

**41-2-103. Definitions.** As used in this part, the following definitions apply:

- (1) “Agriculture” means”:
  - (a) all aspects of farming, including the cultivation and tillage of the soil;
  - (b) (i) dairying; and
  - (ii) the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, including commodities defined as agricultural commodities in the federal Agricultural Marketing Act (12 U.S.C. 1141j(g));
  - (c) the raising of livestock, bees, fur-bearing animals, or poultry; and
  - (d) any practices, including forestry or lumbering operations, performed by a farmer or on a farm as an incident to or in conjunction with farming operations, including preparation for market or delivery to storage, to market, or to carriers for transportation to market. (Emphasis added.)

Also, it must be initially noted that in Montana’s Planning and Zoning Laws, Title 76, Chapter 2, Part 9 is entitled “Agricultural Activities” and the intent of the laws set forth in this part is to “protect agricultural activities” by providing statutory rights to farmers and ranchers to continue their agricultural activities. Pursuant to these provisions of Montana State Law “agricultural activities” include both farmers and ranchers.

Sections 76-2-901 through 76-2-903 MCA provide:

## **Part 9** **Agricultural Activities**

**76-2-901. Agricultural activities – legislative finding and purpose.** (1) The legislature finds that agricultural lands and the ability and rights of farmers and ranchers to produce a safe, abundant, and secure food and fiber supply have been the basis of economic growth and development of all sectors of Montana’s economy. In order to sustain Montana’s valuable farm economy and land bases associated with it, farmers and ranchers must be encouraged and have the right to stay in farming.

(2) It is therefore the intent of the legislature to protect agricultural activities from governmental zoning and nuisance ordinances.

**76-2-902. Definitions.** As used in this part, the following definitions apply:

(1) “Agricultural activity” means a condition or activity that provides an annual gross income of not less than \$1,500 or that occurs on land classified as agricultural or forest land for taxation purposes. The condition or activity must occur in connection with the commercial production of farm products and includes but is not limited to:

- (a) produce marketed as roadside stands or farm markets;
- (b) noise;
- (c) odors;
- (d) dust;
- (e) fumes;
- (f) operation of machinery and irrigation pumps;
- (g) movement of water for agricultural activities, including but not limited to use of existing county road ditches, streams, rivers, canals, and drains, and use of water for agricultural activities;
- (h) ground and aerial application of seed, fertilizers, conditioners, and plant protection products;
- (i) employment and use of labor;
- (j) roadway movement of equipment and livestock;
- (k) protection from damage from wildlife;
- (l) prevention of trespass;
- (m) construction and maintenance of buildings, fences, roads, bridges, ponds, drains, waterways, and similar features and maintenance of streambanks and watercourses;
- (n) conversion from one agricultural activity to another, provided that the conversion does not adversely impact adjacent property owners;
- (o) timber harvesting, thinning, and timber regeneration;
- (p) burning and stubble and slash disposal; and
- (q) plant nursery and commercial greenhouse activities.

(2) “commercial production of farm products” means the growing, raising, or marketing of plants or animals by the owner, owner’s agent, or lessee of land that provides an annual gross income of not less than \$1,500 or that occurs on land that is classified as agricultural or forest land for taxation purposes. The term includes but is not limited to:

- (a) forages and sod crops;
- (b) dairy and dairy products;
- (c) poultry and poultry products;
- (d) livestock, including breeding, feeding and grazing of livestock and recreational equine use;
- (e) fruits;
- (f) vegetables;
- (g) flowers;
- (h) seeds;
- (i) grasses;

- (j) trees, including commercial timber;
- (k) fresh water fish and fish products;
- (l) apiaries;
- (m) equine and other similar products; or
- (n) any other product that incorporates the use of food, feed, fiber, or fur.

**76-2-903. Local ordinances.** A city, county, taxing district, or other political subdivision of this state may not adopt an ordinance or resolution that prohibits any existing agricultural activities or forces the termination of any existing agricultural activities outside the boundaries of an incorporated city or town. Zoning and nuisance ordinances may not prohibit agricultural activities that were established outside the corporate limits of a municipality and then incorporated into that municipality by annexation. (Emphasis added.)

Basically two statutory provisions in the Montana Subdivision and Platting Act pertaining to agriculture are Sections 76-3-608 MCA entitled “Criteria for local government review” and Section 76-3-621 MCA entitled “Park dedication requirement”. Section 76-3-608 MCA provides:

**76-3-608. Criteria for local government review.** (1) The basis for the governing body’s decision to approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application, preliminary plat, applicable environmental assessment, public hearing, planning board recommendations, or additional information demonstrates that development of the proposed subdivision meets the requirements of this chapter. A governing body may not deny approval of a proposed subdivision based solely on the subdivision’s impacts on educational services.

(2) The governing body shall issue written findings of fact that weigh the criteria in subsection (3), as applicable.

(3) A subdivision proposal must undergo review for the following primary criteria:

(a) except when the governing body has established an exemption pursuant to subsection (6) of this section or except as provided in 76-3-509, 76-3-309(2) or (4), or 76-3-616, the impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health safety,

(b) compliance with:

(i) the survey requirements provided for in part 4 of this chapter;

(ii) the local subdivision regulations provided for in part 5 of this chapter;

and

(iii) the local subdivision review procedure provided for in this part;

(c) the provision of easements for the location and installation of any planned utilities; and

(d) the provision of legal and physical access to each parcel within the proposed subdivision and the required notation of that access on the applicable plat and any instrument of transfer concerning the parcel.

(4) The governing body may require the subdivider to design the proposed subdivision to reasonably minimize potentially significant, adverse impacts, identified through the review required under subsection (3). The governing body shall issue written findings to justify the reasonable mitigation required under this subsection (4).

(5)(a) In reviewing a proposed subdivision under subsection (3) and when requiring mitigation under subsection (4), a governing body may not unreasonably restrict a landowner's ability to develop land, but it is recognized that in some instances the unmitigated impacts of a proposed development may be unacceptable and will preclude approval of the subdivision.

(b) When requiring mitigation under subsection (4), a governing body shall consult with the subdivider and shall give due weight and consideration to the expressed preference of the subdivider. Also see Section 76-3-621(4) MCA.

(6) The governing body may exempt proposed subdivisions that are entirely within the boundaries of designated geographic areas from the review criteria in subsection (3)(a) if all of the following requirements have been met:

(a) the governing body has adopted a growth policy pursuant to chapter 1 that:

(i) addresses the criteria in subsection (3)(a);  
(ii) evaluates the impact of development on the criteria in subsection (3)(a);  
(iii) describes zoning regulations that will be implemented to address the criteria in subsection (3)(a); and

(iv) identifies one or more geographic areas where the governing body intends to authorize an exemption from review of the criteria in subsection (3)(a); and

(b) the governing body has adopted zoning regulations pursuant to chapter 2, part 2 or 3, that:

(i) apply to the entire area subject to the exemption; and  
(ii) address the criteria in subsection (3)(a), as described in the growth policy.

(7) A governing body may conditionally approve or deny a proposed subdivision as a result of the water and sanitation, information provided pursuant to 76-3-622 or public comment received pursuant to 76-6-604 on the information provided pursuant to 76-3-622 only if the conditional approval or denial is based on existing subdivision, zoning, or other regulations that the governing body has the authority to enforce. (Emphasis added.)

The Montana State Legislature did not provide any specific statutory criteria, guidelines or standards or a definition identifying what it meant by "the impact on agriculture" in subsection 76-3-608(3) MCA identifying the primary criteria that a subdivision was to be reviewed for.

The Montana State Legislature does identify some vague statutory guidance in subsection 76-3-608(4) MCA pertaining to requiring the subdivider to design the “subdivision to reasonably minimize potentially significant adverse impacts” and requiring the governing body to “issue written findings to justify the reasonable mitigation required.” Subsection 76-3-608(4) MCA provides:

(4) The governing body may require the subdivider to design the proposed subdivision to reasonably minimize potentially significant adverse impacts identified through the review required under subsection (3). The governing body shall issue written findings to justify the reasonable mitigation required under this subsection (4). (Emphasis added.)

The other Montana Subdivision and Platting Act statute with provisions pertaining to “agriculture” is Section 76-3-621 MCA entitled “Park dedication requirement” which references “agricultural interests” twice, once within subsection 76-3-621(6) MCA and once within subsection 76-3-621(7) MCA.

Section 76-3-621 MCA provides:

**76-3-621. Park dedication requirement.** (1) Except as provided in 76-3-509 or subsections (2), (3), and (6) through (9) of this section, a subdivider shall dedicate to the governing body a cash or land donation equal to:

- (a) 11% of the area of the land proposed to be subdivided into parcels of one-half acre or smaller.
- (b) 7.5% of the area of land proposed to be subdivided into parcels larger than one-half acre and not larger than 1 acre.
- (c) 5% of the area of the land proposed to be subdivided into parcels larger than 1 acre and not larger than 3 acres; and
- (d) 2.5% of the area of the land proposed to be subdivided into parcels larger than 3 acres and not larger than 5 acres.

(2) When a subdivision is located totally within an area for which density requirements have been adopted pursuant to a growth policy under chapter 1 or pursuant to zoning regulations under chapter 2, the governing body may establish park dedication requirements based on the community need for parks and the development densities identified in the growth of those provided in subsection (1) and may not exceed 0.03 acres per dwelling unit.

- (3) A park dedication may not be required for:
  - (a) land proposed for subdivision into parcels larger than 5 acres;
  - (b) subdivision into parcels that are all nonresidential;
  - (c) a subdivision in which parcels are not created, except when that subdivision provides permanent multiple spaces for recreational camping vehicles, mobile homes, or condominiums; or
  - (d) a subdivision in which only one additional parcel is created.
- (4) The governing body in consultation with the subdivider and the planning board or park board that has jurisdiction may determine suitable

locations for parks and playgrounds and, giving due weight and consideration to the expressed preference of the subdivider, may determine whether the park dedication must be a land donation, cash donation or a combination of both.

When a combination of land donation and cash donation is required, the cash donation may not exceed the proportional amount not covered by the land donation.

(5) (a) In accordance with the provisions of subsections (5)(b) and (5)(c), the governing body shall use the dedicated money or land for development, acquisition, or maintenance of parks to serve the subdivision.

(b) The governing body may use the dedicated money to acquire, develop or maintain, within its jurisdiction, parks or recreational areas or for the purchase of public open space or conservation easements only if:

(i) the park, recreational area, open space, or conservation easement is within a reasonably close proximity to the proposed subdivision; and

(ii) the governing body has formally adopted a park plan that establishes the needs and procedures for use of the money.

(c) The governing body may not use more than 50% of the dedicated money for park maintenance.

(6) The local governing body shall waive the park dedication requirement if:

(a) (i) the preliminary plat provides for a planned unit development or other development with land permanently set aside for park and recreational uses sufficient to meet the needs of the persons who will ultimately reside in the development; and

(ii) the area of the land and any improvements set aside for park and recreational purposes equals or exceeds the area of the dedication required under subsection (1);

(b) (i) the preliminary plat provides long-term protection of critical wildlife habitat; cultural, historical, or natural resources, agricultural interests; or aesthetic values; and

(c) the area of the land proposed to be subdivided, by virtue of a combination of the provisions of subsections (6)(a) and (6)(b), is reduced by an amount equal to or exceeding the area of the dedication required under subsection (1); or

(d) (i) the subdivider provides for land outside of the subdivision to be set aside for park and recreational uses sufficient to meet the needs of the persons who will ultimately reside in the subdivision; and

(ii) the area of the land and any improvements set aside for park and recreational uses equals or exceeds the area of dedication required under subsection (1).

(7) The local governing body may waive the park dedication requirement if:

(a) the subdivider provides land outside the subdivision that affords long-term protection of critical wildlife habitat, cultural, historical, or natural resources, agricultural interests or aesthetic values; and

(b) the area of the land to be subject to long-term protection, as provided in subsection (7)(a), equals or exceeds the area of the dedication required under subsection (1).

(8) A local governing body may, at its discretion, require a park dedication for a minor subdivision. A local governing body that chooses to require a park dedication shall specify in regulations the circumstances under which a park dedication will be required. See subsection 76-3-621(3)(d) MCA.

(9) Subject to the approval of the local governing body and acceptance by the school district trustees, a subdivider may dedicate a land donation provided in subsection (1) to a school district, adequate to be used for school facilities or buildings.

(10) For the purposes of this section:

(a) “cash donation” is the fair market value of the unsubdivided, unimproved land; and

(b) “dwelling unit” means a residential structure in which a person or persons reside.

(11) A land donation under this section may be inside or outside of the subdivision.

## **CONCLUSION(S):**

Yes, Montana Subdivision and Platting Act Sections 76-3-608 MCA pertaining to criteria for local government review as well as Section 76-3-621 MCA pertaining to park dedication requirements specifically reference agriculture.

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