

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2012-022

**TO:** Mayor John Engen, City Council, Bruce Bender, Mike Barton, Denise Alexander, Aaron Wilson, Steve King, Kevin Slovarp, Don Verrue, Steve Meismer, Gregg Wood, Jessica Miller

**CC:** Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE** December 17, 2012

**RE:** Montana Subdivision and Platting Act Section 76-3-204, MCA subdivision review exemption, with respect to a building, structure, or improvement, potentially not applicable to mobile units that are not permanent additions to land.

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### **FACTS:**

An applicant for a drive through coffee kiosk at 900 East Broadway adjacent to the existing Diamond Jim's Casino at 900 East Broadway indicates that once located at 900 East Broadway, her coffee kiosk can be moved off of the property in less than one hour. Currently, the application for the moveable coffee kiosk is being processed by the Office of Planning and Grants as a minor subdivision review in response to 54 Montana Attorney General Opinion No. 5 (January 13, 2012) that provided an Attorney General narrow interpretation to Section 76-3-204, MCA of the Montana Subdivision and Platting Act entitled "Exemption for Conveyances of one or more parts of a structure or improvement."

This January 13, 2012 Attorney General Opinion reversed "an unofficial letter of advice issued by an attorney in the Montana Attorney General Office on February 27, 1995 indicating that 1985 State Legislation had overruled 40 Montana General Opinion No. 57 (1984) that had been issued to the City of Missoula. The unofficial letter from the Attorney General's office was consistent with what land use attorney Rich Weddle of the Montana Department of Administration Local Government Assistance Division had advised as well to the effect that multiple buildings in the same ownership, such as housing authority or other corporations providing low income housing, could exist on a single parcel, tract or lot without having to go through subdivision review if there was no intent to sell the buildings into separate building ownership.

The recent January 13, 2012 Attorney General Opinion indicated that the Montana Rules of Statutory Construction set forth in Subjection 1-2-105 (3), MCA pertaining to general definition of rules to the effect that “(3) The singular includes the plural and the plural the singular” that the unofficial February 27, 1995 letter from the Attorney General’s Office to the City of Missoula had relied on was not applicable to Section 76-3-204, MCA.

In some instances the effect of the January 13, 2012 Attorney General Opinion was merely to directly impact potential design of a project. For example, a sixteen (16) plex constructed as two eight-plexes, four four-plexes or eight (8) duplexes would require subdivision review even though no new parcels of land were being created for potential separate ownership of separate buildings and the residential density remained the same as a single sixteen plex. A nonresidential example of a potential direct input would be commercial storage units. A thirty-two (32) unit single storage unit building would be acceptable; but dividing the 32 units into two sixteen units or four 8 unit buildings on the same parcel, tract or lot would require subdivision review even though there is no plan or intent to sell the buildings separately.

The current applicant has requested a minor subdivision review fee waiver of the \$6,637.00 fee, which reportedly costs nearly half of what the coffee kiosk will cost according to a Missoulian Newspaper article Sunday, December 16, 2012.

During the Wednesday December 12, 2012 City Council Plat Annexation and Zoning Committee meeting there was an indication made that a building permit would not be required to locate or place the coffee kiosk at 900 East Broadway, possibly because no building foundation was necessary for the coffee kiosk. Steve Meismer of the City Building Official’s Office indicated that if the coffee kiosk was considered a mobile food service type vehicle, then pursuant to health regulations the coffee kiosk could potentially be treated as a vehicle and the parking/locating/placing of the coffee kiosk would not require a building permit.

The City Council has several options it can consider. 1) The City Council could waive the minor subdivision review fee for the coffee kiosk as requested by the applicant, 2) The City Council could consider the coffee kiosk to be a mobile unit/vehicle unit and not consider it to be a permanent fixture to the land and thus not subject to minor subdivision review fees since no parcels of land are being created, or 3) The City Council could consider adopting a general resolution establishing a statement of policy that since the City has such thorough land use regulations and public infrastructure regulations it does not deem it necessary to require a minor subdivision review if no actual parcels are created.

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

May the minor subdivision review fee be waived or be not applicable for a coffee kiosk where no parcels of land are created?

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

Yes, the City Council could either waive the fee or decide the coffee kiosk, as a mobile unit is not subject to minor subdivision review, since no parcels of land are being created.

## **LEGAL DISCUSSION:**

The Montana Subdivision and Platting Act is set forth in Title 76, Chapter 3 M.C.A. Part 2 of this chapter is entitled “Miscellaneous Exemptions”. Section 76-3-204 MCA within the “Miscellaneous Exemptions” part provides:

**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, whether existing or proposed is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter.

There are no definitions of the terms “building”, “structure” or “improvement” set forth in the Montana Subdivision and Platting Act. However, it seems reasonable to expect that at a minimum the building, structure or improvement must be permanently attached to the land.

The only Montana State Law definition for the term “improvements” to real property is set forth in subsection 32-5-306(7)(b) MCA pertaining to consumer loans where “improvements to real property” is defined as meaning:

“(b) ‘Improvement to Real Property’ means a fixture, building, or other structure attached to real property and intended as a permanent addition to the real property” (emphasis added)

No minor subdivision is proposed for creation pursuant to subsection 76-3-103(a) MCA, a minor subdivision is defined as meaning “a subdivision that creates five or fewer lots from a tract of record.” (emphasis added)

It must also be noted that because no minor subdivision is occurring there may not be a park dedication requirement for either nonresidential land uses or in circumstances where no parcels are being created. Subsection 76-3-621(3) MCA pertaining to park dedications as part of subdivision review provides:

- (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;
  - (d) a subdivision in which only one additional parcel is created; or
  - (e) except as provided in subsection (8), a first minor subdivision from a tract of record as described in 76-3-609(2). (emphasis added)

Thus, no park dedication may be required for a coffee kiosk that is nonresidential or when a minor subdivision is not actually being created.

As noted earlier, It would seem reasonable to interpret section 76-3-204 MCA as pertaining to permanent buildings, structures, and improvements permanently attached to the land. Thus, if the coffee kiosk is considered to be a mobile unit because it does not have a permanent foundation or for some other reason that causes City Officials to consider the coffee kiosk to be a mobile unit it may not be subject to minor subdivision review if no parcels are being created that involve filing a plat, amending a plat, or certificate of survey at the County Clerk and Recorder's Office.

Also, the City Council has it within their power to waive the \$6,674.00 minor subdivision review fee; since it is a City Council established fee. This would be inherent in its power to establish fees. See Section 7-1-4123 MCA.

A Third alternative could be for the City Council to adopt a general resolution indicating that unless the application pertains to a proposal that was going to create parcels of land that pursuant to plat, amended plat or certificate of survey would be filed for record at the County Clerk and Recorder's office, no review is necessary because of the City's extensive thorough public regulations through zoning, public infrastructure, subdivision, etc. Thus the City Council as a matter of policy indicates that applications deemed to be multiple buildings, structures or improvements on the same parcel of land with all buildings to be in the same identical ownership and no parcels of land being created, the city does not consider it necessary for a minor subdivision review to be required in factual circumstances that the City Council generally outlines or identifies within its resolution.

Pursuant to Municipal Government Law, subsection 7-1-4121(22) MCA a "resolution" is defined as meaning:

"(22) "Resolution' Means a statement of policy by the governing body or an order by the governing body that a specific action be taken." (Emphasis added)

It is my understanding that even pursuant to OPG minor subdivision review no parcel of land is being created for the coffee kiosk and no filing of plat, amended plat, or certificate of survey is being filed with the County Clerk and Recorder because no parcel of land is being created.

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

Yes, the City Council could either waive the fee or decide the coffee kiosk, as a mobile unit is not subject to minor subdivision review, since no parcels of land are being created.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

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