SENATE LOCAL GOVERNMENT
EXHIBIT NO. 1
DATE 3.16.09
BILL NO. HB 522

Introduction

Under the Montana Subdivision and Platting Act ("the Act"), a subdivision is "a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed..." [1] In the creation of the Subdivision and Platting Act in 1973, the legislature created exemptions from subdivision review for parcels that were less than 160 acres but were not subdivisions, but the parcels still created an interest wherein the "title to or possession of the parcels...may be conveyed."[2] The exemptions are located in part 2 of the Act, beginning with section 201.[3]

There are presently two primary sections of exemptions: section 201 and section 207. The significant procedural difference between the two sections is that exemptions under section 201 are exempt from all review and all survey requirements. An argument has been made that these exemptions are also precluded from zoning review, even though zoning review is enabled under chapter 2 of the Title and not chapter 3. Section 207 exemptions are required to comply with zoning and with survey requirements under 76-3-401.

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[1] Mont. Code Ann. § 76-3-103(15) (2007).

[2] Id.

[3] Mont. Code Ann. Title 76, chapter 3, part 2 (2007).

Purpose

In the 2003 interim, a committee of land use practitioners and interested parties (the "working group") was created to review the "piecemeal approach to amendment of the Montana Subdivision and Platting Act."[4] The working group met throughout the interim to review the Subdivision and Platting Act and propose substantive and procedural changes to the Act to the Local Government Subcommittee of the Interim Education and Local Government Committee. In the end of the process, the interim committee sponsored Senate Bill 116, which proposed numerous procedural changes to the Act.That bill was enacted, but the working group felt that much work was left to be completed.

In the 2005 interim, the working group again met[5] The working group was given three tasks: (1) to review the definitions of "division of land" and "subdivision," (2) to review the exemptions, and (3) to clarify when subdivision review is required.[6] The working group again committed hundreds of hours of work on changes to the Act, and proposed two substantive bills to the 2007 Legislature. Neither bill was passed as drafted and proposed.

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[4] House Joint Resolution 37, 2003 Legislature

[5] Senate Joint Resolution 11, 2005 Legislature

[6] Id.

Proposed Legislation

This proposed legislation is a remnant of House Bill 425, one of the two bills supported by the working group and the Interim Education and Local Government Committee from the 2007. However there are a few significant differences between the two bills as proposed. HB 425 would have repealed 76-3-201 and 207 in order to separate the new legislation from any prior court decisions.[7] The new proposal does not look to repeal these sections, but rather to embrace recent Supreme Court decisions regarding the definition of a subdivision and use of exemptions, thereby adding to the strength of the new legislation.[8]

The bill as proposed is only concentrating on three sections of exemptions in Title 76, chapter 3. First, the creation of a new section separating the mortgage exemption into its own part of law given the complicated nature of mortgage exemptions. The second section is existing section 201. Finally the third section of exemptions is section 207. Although there are other exemption sections, for condominiums, structures, airports, and other exempt conveyances, the bill chooses to concentrate on the three primary areas of exemption.[9]

A. Proposed New Section 1

The new section 1 is proposed to provide standards for mortgage exemptions. Mortgage exemptions are often used to take advantage of the "Small Tract Financing Act."[10] The Small Tract Financing Act is beneficial to the lender because the foreclosure procedure through a trust

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[7] House Bill 425, 2007 Legislature.

[8] *Mills v. Alta Vista Ranch*, 2008 MT 214,

[9] Mont. Code Ann. §§ 76-3-202 through 206 (2007).

[10] Mont. Code Ann. § 71-1-301, et seq. (2007).

indenture is different than with a traditional "Mortgage."[11] Further, the financing structure may be beneficial to the landowner when a parcel of less than 40 acres can receive financing in a secondary market for a lower interest rate.[12] The idea behind a mortgage exemption is to allow large acreage landowners to provide a lending institution a "secured interest" in just a portion of the parcel that is owned, if the parcel is greater than 40 acres.

One of the concerns facing governing agencies is if a security interest is created that does not comply with zoning. For example, if a landowner owns a parcel that is 60 acres, and the zoning in the district is one residential structure per 40 acres. The landowner uses a mortgage exemption under the current regulations, and creates a "mortgage exemption" of 30 acres to take advantage of the Small Tract Financing Act benefits. After a year, the landowner defaults on the mortgage, and the lending institution proceeds with the foreclosure process. Once the security interest is foreclosed upon, two tracts of 30-acres each have been created. These tracts now do not comply with zoning, if the zoning is one-per-40. The tracts are not "non-conforming" because they were created *after* the zoning regulations, and were created at the request and with the knowledge of the landowner. Further, a variance is not allowed under most regulations because the landowner caused the parcels to not meet the zoning regulations. Now the bank has an undevelopable 30-acre parcel and the landowner has an undevelopable 30-acre parcel. The zoning requirement, however, is only applicable in jurisdictions with zoning. If there is no zoning ordinance or regulations in place, then the zoning requirement does not apply. Ten states appear to have subdivision regulations outside their zoning enabling act.[13] Four other states

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[11] Mont. Code Ann. § 71-1-304 (2007).

[12] Mont. Code Ann. § 71-1-302 (2007).

[13] CO, NV, NM, WY, AZ, ID, IL, MN, NJ, ND

include mortgage exemptions in their subdivision regulations.[14] These four states each require a new parcel to comply with any zoning regulations applicable to the property.

Presently, mortgage exemptions are listed in 76-3-201(b), with additional subsections providing guidance for the use of the mortgage exemption. The language proposed in the bill is the same as section 201, and includes the addition of subsection (2)(c), which requires that in order to use the mortgage exemption provision, the landowner must provide a letter from a registered lending institution governed by Title 32. The additional provision is to do away with unregulated lending by neighbors or family, wherein sometimes the landowner then goes into a "de-fault," which creates an unreviewed parcel under the existing regulations.

B. Proposed Section 2.

The exemptions in 76-3-201, MCA, are presently a mix of hodge-podge exemptions, none of which require a survey or local review.[15] The proposed section 2 would remove any exemptions that create actual tracts, and remove the mortgage exemption. The remaining exemptions in proposed section 2 are "possessory interests." These exemptions must be included in the Act, given the language in the definition of "subdivision," which includes "possession of the parcels."[16] Section 201 would continue to be exempt from the survey requirements and exempt from any local governing body review, unless otherwise indicated in local subdivision regulations.

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[14] CO, NV, NM, WY

[15] Mont. Code Ann. § 76-3-201 (2007).

[16] Mont. Code Ann. § 76-3-103(15) (2007).

C. Proposed Section 3.

The exemptions in 76-3-207, MCA, presently require compliance with zoning regulations and any survey requirements.[17] The proposed bill would leave the existing five exemptions, and add the court ordered exemption, the creation of cemetery lots, and the creation of rights-of-way or utility sites. These exemptions are presently located in 76-3-201, however most jurisdictions require a survey for these exemptions.

A concern has been raised by local governing bodies that parcels created under the court order exemption are not being created in compliance with zoning. Given that the exemption is presently located in 76-3-201, the court may argue that a review for zoning is not required. However, the lack of review for zoning compliance is creating parcels in zoning districts that do not comply with zoning and are not "non-conforming" because they were created after the zoning regulations were put into place and at the request of the landowner. Therefore, once the court order is in place, if the parcel does not meet the minimum zoning requirements, the parcel is undevelopable. The move of the court ordered exemption to 76-3-207 will alleviate this continuing problem.

Conclusion

The Montana Subdivision and Platting Act has been amended every session since enactment in 1973, except for 1991. The continual amendments have led to confusion and a lack of clarity within the Act. Moving the exemptions into three sections may seem like a trivial action, however it may be an action that provides clarity for local governing bodies, landowners, land use practitioners, and the court.

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[17] Mont. Code Ann. § 76-3-207 (2007).