Education and Local Government Inte

62nd Montana Legislature

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TO: Committee members

FROM: Leanne Kurtz

DATE: January 13, 2012

RE: Family Transfer Subdivision Exemption

This memo is intended to provide background information on the exemption from local subdivision review for a division of land made outside of a platted subdivision for the purpose of a gift or sale to the landowner's immediate family, commonly known as the "family transfer exemption". What follows is a refresher of why this matter is before the Education and Local Government committee, a list of the statutes that govern this exemption and how those statutes have evolved over time, and how the Model Subdivision Regulations suggest that local jurisdictions deal with family transfers.

Committee Review

At the committee's September 2011 meeting, Rep. Gary MacLaren asked that the committee add study of the family transfer exemption to the committee's study of the subdivision for rent or lease exemption requested in HJR 39. Rep. MacLaren presented a letter and exhibits from the Ravalli County Clerk and Recorder, Regina Plettenberg, that discussed the reasons why she believes an examination of the family transfer exemption is warranted. These included:

- A family transfer exemption may not be granted if the exemption is sought for the purpose of evading review under the Montana Subdivision and Platting Act (MSPA), but it can be difficult for local officials to determine when an attempt to evade the MSPA is intended.

- There are examples of abuses of the exemption allowance, with a person deeding a parcel to a family member, then that portion being divided into additional parcels which are then gifted to family members, and so on.

- Landowners whose property is adjacent to a parcel or parcels that were exempt from review and on which development may occur have had no notice of the impending development, which can bring with it traffic impacts and complications with irrigation systems.

- Sometimes, property owners do not realize the impacts that splitting a parcel will

have on their property taxes and often request an aggregation exemption shortly after having received a family transfer exemption.

- The county frequently receives requests from individuals who have acquired property by this means to sell the parcels primarily because of financial hardship, at which point a county must decide whether or not this constitutes an attempt to evade the MSPA. A decision either way can expose the county to liability.

After discussing Rep. MacLaren's proposal, ELG decided that rather than expand the HJR 39 study to include family transfers, it would set aside time on an agenda to examine the issues and determine whether changes to the statutes may be appropriate.

A panel of individuals--including Ms. Plettenberg, Tara DePuy representing the Montana Association of Counties, and Glenn Oppel representing the Montana Association of Realtors--will present their perspectives at the January 23 meeting.

Relevant Statutes

Three sections of the Montana Code Annotated directly govern the family transfer exemption: 76-3-103, 76-3-207, and 76-3-504.

Section 76-3-103 contains the definitions that apply to the MSPA, including the exemption provisions. Subsection (8) defines "immediate family" as "a spouse, children by blood or adoption, and parents."

Section 76-3-207 provides for the exemption and allows the local governing body to charge a fee of up to $200 to determine whether or not the exemption may be properly applied. The section states, in part:

> (1) Except as provided in subsection (2), unless the method of disposition is adopted for the purpose of evading this chapter, the following divisions or aggregations of land are not subdivisions under this chapter but are subject to the surveying requirements of 76-3-401 for divisions or aggregations of land other than subdivisions and are subject to applicable zoning regulations adopted under Title 76, chapter 2:
> (a) . . .
> (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) . . .
> (4) The governing body may examine a division or aggregation of land to determine whether or not the requirements of this chapter apply to the division or aggregation and may establish reasonable fees, not to exceed $200, for the examination."

Section 76-3-504 enumerates what, at a minimum, local subdivision regulations must do, including:

". . . (p) establish criteria that the governing body or reviewing authority will use to determine whether a proposed method of disposition using the exemptions provided in 76-3-201 or 76-3-207 is an attempt to evade the requirements of this chapter. The regulations must provide for an appeals process to the governing body if the reviewing authority is not the governing body."

Current law provides that a family transfer is exempt from subdivision review but it is subject to the surveying requirements of the MSPA and applicable local zoning regulations. Another category of exemptions found in section 76-3-201 is exempt from all of the requirements of the MSPA.

Evolution of the Exemption

When it was enacted in 1973, the original MSPA exempted six instances of land division from review under the Act, including a gift or sale to an immediate family member. Evasion language was similar to current law. Section 4(4) of the Act stated:

> (4) Unless the method of disposition is adopted for the purpose of evading this act, the requirements of this act shall not apply to any division of land;
>
> (a) which is created by order of any court of record in this state or by operation of law, or which, 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;
>
> (b) which is created by a lien, mortgage, or trust indenture;
>
> (c) which creates an interest in oil, gas, minerals, or water which is now or hereafter severed from the surface ownership of real property;
>
> (d) which creates cemetery lots;
>
> (e) which is made for the purpose of a gift or sale to any member of the landowner's immediate family;
>
> (f) which is leased or rented for farming and agricultural purposes.

Amendments to the MSPA over time have created additional exemptions, added the definition of "immediate family", and clarified that the exemption applied to a *single* gift or sale *in each county* to *each* member of the landowner's immediate family.

In 2001, then-Sen. Emily Stonington introduced SB 287, an attempt to require that the parties to a family transfer transaction enter into a covenant "running with the land for 5 years that prohibits the division of land from being transferred again within 5 years and that is revocable only by subjecting the division of land to the provisions of this chapter." The bill failed to reach the House on a 24-26 Third Reading vote in the Senate.

In 2005, SB 116 amended numerous sections of the MSPA and added the language in 76-3-504 requiring subdivision regulations to establish evasion criteria. SB 116 was the result of an interim study and the efforts of a "consensus-based" working group that included representatives of planning organizations, developer and realtor organizations, and local governments.

Local Regulations

The Model Subdivision Regulations developed by the Montana Association of Counties Joint Powers Insurance Authority, along with representatives of the Montana Association of Planners, the University of Montana School of Law Land Use Clinic, the Montana Smart Growth Coalition, and the Montana Association of Realtors are intended to "serve as an example and reference for local governments preparing or revising their own regulations." Some local governments have adopted the Model Regulations as is for use in their jurisdictions, while others have tailored them to suit their unique circumstances.

The Model Regulations state, with regard to exemptions in general:

> The governing body and its agents, when determining whether an exemption is claimed for the purpose of evading the MSPA, shall consider all of the surrounding circumstances. These circumstances include the nature of the claimant's business, the prior history of the particular tract in question, the proposed configuration of the tracts if the proposed exempt transaction is completed and any pattern of exempt transactions that will result in the equivalent of a subdivision without local government review.

Specific to family transfers, the Model Regulations provide that:

> A certificate of survey (or recording of an instrument of conveyance) that uses this exemption to create a parcel for conveyance to a family member must show the name of the grantee, relationship to the landowner, and the parcel to be conveyed under this exemption, and the landowner's certification of compliance [ARM 24.183.1104(1)(f)] found in Appendix A. Also, the certificate of survey or instrument of conveyance must be accompanied by a deed or other conveying document.

According to the Model Regulations, uses of the exemption that will be presumed to be for the purpose of evading the MSPA include:

- any proposed use of the family gift or sale exemption to divide a tract that was previously created through the use of an exemption;
- the use of the family gift or sale exemption to divide tracts that were created as part of an overall development plan with such characteristics as common roads, utility easements, restrictive covenants, open space or common marketing or promotional plan;
- a transfer of a parcel of land by one family member to another, by quitclaim deed, followed by an attempted use of this exemption;
- the use of the exemption to create more than one additional or remaining parcel of less than 160 acres in size.

Attached as examples are the procedures that Gallatin County and Lincoln County use to process family transfer exemption claims.

Committee Options

Once the committee has reviewed the background information and has heard from interested individuals, members may wish to request additional information or testimony, may wish to request legislation, or may determine that a statutory revision is not appropriate at this time.

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