

EVASION CRITERIA
FAMILY TRANSFERSEDUCATION & LOCAL GOV'T IC
JANUARY 23, 2012
Exhibit 4**Comment:**

Local governments can prevent misuse of the exemptions from local subdivision review by adopting criteria that define the proper and improper use of the exemptions. Numerous court cases and Attorney General opinions have provided the legal authority for adopting local evasion criteria. The following resolution is drafted for counties but can be easily tailored to municipalities. Because of 1993 amendments to the Montana Subdivision and Platting Act, Evasion Criteria previously adopted by local governments will need to be amended. The language in italics should be used by jurisdictions that are amending existing Evasion Criteria.

A. PROCEDURES AND GENERAL REQUIREMENTS

1. Any person seeking exemption from the requirements of the Subdivision and Platting Act (76-3-101 *et. seq.*, MCA) shall submit to the County Clerk and Recorder (1) a certificate of survey or, if a survey is not required, an instrument of conveyance, and (2) evidence of, and an affidavit affirming, entitlement to the claimed exemption. Only one type of exemption may be claimed per certificate of survey or instrument of conveyance.
2. When a certificate of survey or instrument of conveyance is submitted to the County Clerk and Recorder, the Clerk and Recorder shall cause the documents to be reviewed by the designated agents of the governing body: (the county planner, sanitarian and clerk and recorder). The agents shall review the proposed land division to determine whether it complies with the requirements set forth in this Resolution, the Montana Subdivision and Platting Act, and the Montana Sanitation in Subdivisions Act.
3. After evaluating the proposed use of the exemption for compliance with the requirements contained in this Resolution, the agents shall submit a written determination whether the use of the exemption is intended to evade the purposes of the Act.
4. If the designated agents find that the proposed use of the exemption complies with the statutes and these criteria, they shall advise the clerk and recorder to file the certificate of survey or record the instrument of conveyance and accompanying documents. If the agents find that the proposed use of the exemption does not comply with the statutes and these criteria, they shall advise the clerk and recorder to not file or record the documents, and the clerk shall return the materials to the landowner.
5. Any person whose proposed use of exemption has been denied by the designated agents because the use of the exemption raised a rebuttable presumption established by these guidelines may appeal the agents' decision to the County Commissioners. The person may request a hearing, and may submit additional evidence to show that the use of the exemption in question is not intended to evade the Act, and, thereby overcome the rebuttable presumption.

If the governing body concludes that the evidence and information overcomes the presumption that the exemption is being invoked to evade the Act, it may authorize the use of the exemption in writing. A certificate of survey claiming an exemption from subdivision review, which otherwise is in proper form, and which the governing body has found not to be an attempt to evade the act, may be filed (or an instrument of conveyance recorded) if it is accompanied by written authorization of the governing body.

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If the person proposing to use an exemption does not seek to rebut the rebuttable presumption or if the governing body determines that the proposed use of the exemption was for the purpose of evading the Act, the landowner may submit a subdivision application for the proposed land division.

6. Advisory Examination. Landowners or their representatives are encouraged to meet with the County's designated agents to discuss whether a proposed land division or use of an exemption is in compliance with these criteria.

The agents may issue an advisory opinion only, and the opinion creates no commitment on the local officials when the documents creating the proposed land division are submitted to the Clerk and Recorder.

7. The County Commission and its agents, when determining whether an exemption is claimed for the purpose of evading the Act, shall consider all of the surrounding circumstances. These circumstances may include but are not limited to: 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 (State ex rel. Dreher v. Fuller, 257 Mont. 445, 849 P.2d 1045 (1993)).
8. To assist in the implementation of this review process and to monitor those parcels by exemption the Clerk and Recorder shall cause the following identification codes to be added to the numbering of recorded certificates of survey filed after the effective date of this resolution.
- a. CO ... Court order [76-3-201(1)(a), MCA]
 - b. ME ... Mortgage Exemption [76-3-201(1)(b), MCA]
 - c. LE ... Life Estate [76-3-201(1)(e), MCA]
 - d. RB ... Relocation of Common Boundary [76-3-207(1)(a), MCA]
 - e. FC ... Family Conveyance [76-3-207(1)(b), MCA]
 - f. AE ... Agricultural Exemption [76-3-207(1)(c), MCA]
 - g. OS ... Occasional Sale (used prior to April 6, 1993)
 - h. AL ... Aggregation of Lots [76-3-207(e), MCA]
9. Exempt divisions of land that would result in a pattern of development equivalent to a subdivision shall be presumed to be adopted for purposes of evading the Act. A "pattern of development" occurs whenever 3 or more parcels of less than 160 acres with common covenants or facilities have been divided from the original tract.

Procedures for Family Transfer Exemption Claims

The Gallatin County Subdivision Regulations (as amended February 7, 1998) provide the following:

- "Certain divisions of land, which would otherwise constitute subdivisions, are exempt from local subdivision review and approval, unless the transactions are an attempt to evade the [Montana Platting and Subdivision] Act, Section 76-3-101 et. seq. MCA." (section 14.A).
- "At the hearing by the Commission . . . , the Claimant may present evidence in support of the exemption." (Section 14.B.5) (Attorney General opinion further provides that the Claimant has the burden of proof in satisfying the Commission that the exemption claim is appropriate. (40 A.G. Op. No. 16)
- "In assessing the Claimant's purpose the Commission will evaluate all relevant circumstances including the nature of the Claimant's business, the prior history of the particular tract in question and the proposed configuration of tracts if the proposed exempt transactions are completed." (Section 14.b.7)

In order to prevent abuses of the family transfer exemption, claims will be evaluated as follows:

- A. Applicant submits complete application to Planning Department.
- B. Planning Department reviews application materials for completeness and appropriateness of exemption.
- C. Planning Department determines that application is complete and acceptable.
- D. Planning Department prepares staff report and schedules consideration of exemption claim with County Commission. Exemption claim is placed on Commission's regular agenda.
- E. Staff member presents a summary of the proposed division of land and any questions about the Claimant's potential intent to evade subdivision review.
- F. Commission Chair requests that Claimant (or representative with power of attorney) come forward, and administers the following oath:

DO YOU SOLEMNLY SWEAR [OR AFFIRM] THAT THE TESTIMONY THAT YOU ARE ABOUT TO GIVE ABOUT THE _____ FAMILY TRANSFER EXEMPTION IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

G. Commission members ask questions about all relevant circumstances, aimed at determining whether the exemption claim is an attempt to evade subdivision review.

Questions may include:

1. Are you or any of your immediate family real estate professionals, developers, builders, etc?
2. Have you made prior subdivision exemption claims on any property in Gallatin County?
3. Is your primary residence located on this parcel?
4. Do you own more than one parcel in Gallatin County?
5. Why are you proposing this division of land?
6. What is the history of this tract?
7. How long have you owned or had an interest in it?
8. Do you own this parcel free and clear?
 - a. If not, tell us about your mortgage or other lending agreement?
9. Are you delinquent at all with regard to the payments for this property?
10. At any time in the last three years have you been delinquent in your payments for this property?
11. Does the retirement of debt influence your desire to divide this land?
12. Was the parcel created or affected by a previous exemption?
13. Please describe any previous family transfers in which you or the intended recipients have been involved.
14. Have you (or a recent owner) previously expressed an interest in subdividing the parcel?

- a. If yes, why didn_t you (or the recent owner) pursue subdivision?
- 15. Have you previously attempted to sell any portion of this parcel?
 - a. When and why did you attempt to sell it?
 - b. When and why did you decide not to sell it?
- 16. Are any persons other than your immediate family members interested in purchasing or developing any of the tracts involved in this division of land?
- 17. Have you, or your immediate family members, had any discussion with a person interested in purchasing a portion of your land?
- 18. Other than the intended disposition set forth in your application on file with the Planning Department, is there any type of agreement, oral or written, regarding the creation, sale or development of the tracts involved in this division of land?
- H. County Commission evaluates whether the claim is an appropriate exemption or an attempt to evade the Montana Subdivision and Platting Act and/or the Gallatin County Subdivision Regulations.
- I. If approved, Chair signs survey (and/or additional documents) confirming the Commission's approval of the exemption, then returns documents to Planning Department.
- J. Claimant picks up signed documents from Planning Department, then records documents with Clerk and Recorder.
- K. The County may file a court action to set aside land transfers which violate either the Montana Subdivision and Platting Act or the County's Subdivision Regulations. Applicants or persons acting on their behalf who misrepresent their intentions regarding a family transfer exemption are subject to criminal prosecution as provided in section 8 of the Application for Subdivision Exemption Claim form.