



**Montana Legislative Services Division**  
**Legal Services Office**

PO BOX 201706  
Helena, MT 59620-1706  
(406) 444-3064  
FAX (406) 444-3036

TO: Education and Local Government Committee  
FROM: Helen Thigpen, Staff Attorney  
DATE: August 31, 2011  
RE: HJR 39 -- Study of Subdivisions by Rent or Lease

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**EDUCATION AND LOCAL GOV'T**  
**September 15, 2011**  
**Rm 102, Capitol Bldg, Helena**  
**EXHIBIT 7**

During the upcoming Education and Local Government Committee meeting on September 15, 2011, legislative staff and staff from the Department of Commerce/Community Technical Assistance Program will review the legislative history for the subdivision by rent or lease exemption and provide a summary of legislative proposals set forth during the 2011 session.

Staff will also provide the Committee with a review of litigation pertaining to subdivisions created by rent or lease. As part of this review, staff will discuss two recently issued decisions out of Ravalli and Lewis and Clark Counties that address section 76-3-204, MCA, and subdivisions by rent or lease. Copies of these decisions are attached for review by the Committee in advance of the meeting. The first decision is *Rose v. Ravalli County* (Cause No. DV-05-516), which was issued by Judge Langton on May 2, 2006. The second decision is *Derick v. Lewis and Clark County* (Cause No. BDV-2007-304), which was issued by Judge Sherlock on August 26, 2011. Although the facts and circumstances presented in each case are different, both judges held that the exemption for the conveyance of one or more parts of a structure or improvement (section 76-3-204, MCA) applies to a single structure but not to multiple structures on a single piece of property.

Please feel free to contact me with any questions or concerns. We look forward to seeing you on September 15th.

Sincerely,

A handwritten signature in blue ink, appearing to read "Helen Thigpen".

Helen Thigpen

HON. JEFFREY H. LANGTON  
District Judge, Department No. 1  
Twenty-first Judicial District  
Ravalli County Courthouse, Suite A  
205 Bedford Street  
Hamilton, MT 59840-2853  
Telephone: (406) 375-6241  
Fax: (406) 375-6382

FILED  
DEBBIE HARMON, CLERK

MAY 02 2006

*angie [signature]*  
DEPUTY

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

JOHN ROSE and SANDY ROSE, d/b/a  
SKALKAHO LODGE and STEAK HOUSE,

Plaintiffs,

-vs-

RAVALLI COUNTY,

Defendant.

) Department No. 1

) Cause No. DV-05-516 /24

) **OPINION & ORDER**

This matter comes before the Court upon cross motions for summary judgment. The motions are fully briefed and ready for ruling, and the parties have waived their right to a hearing on the motions. The Court now issues its *Opinion & Order*.

**FACTUAL BACKGROUND**

Plaintiffs John and Sandy Rose ("Roses") operate the Skalkaho Lodge and Steak House and a guiding service on their real property of 200-plus acres in Ravalli County. In early 2005, they reconfigured three adjacent parcels of land they own by relocation of common boundary lines. *Supp. Br. Pursuant to Ct.'s Jan. 12, 2006 Op. and Or., Ex. A.* Planning to construct four

OPINION & ORDER

small guest/vacation cabins on the property, external to the existing guest house/lodge facilities, the Roses submitted an application for well and septic permits to the Ravalli County Environmental Health Department and the Ravalli County Sanitarian's Office. The permits were denied on the basis that the project is a subdivision and therefore requires subdivision review and approval prior to authorization of well and septic permits.

On October 20, 2005, the Roses, represented by Cory R. Gangle of Milodragovich, Dale, Steinbrenner & Binney, P.C., of Missoula, commenced this action by filing a *Complaint and Motion for Declaratory Judgment*. The Roses seek a ruling that their proposed rental guest cabins do not constitute a subdivision and are not subject to local subdivision review.

Defendant Ravalli County ("County"), represented by Ravalli County Deputy Attorney D. James McCubbin, filed an answer in which it seeks a declaratory judgment that the Roses are required to obtain subdivision approval prior to constructing rental guest cabins upon their property.

After cross motions for judgment on the pleadings, with matters outside the pleadings presented to and not excluded by the Court, the Court converted the motions to summary judgment motions and gave the parties 30 days in which to present any further material. *Op. & Or.*, 5 (Jan. 11, 2006). Both parties subsequently filed supplemental briefs.

#### **PARTIES' CONTENTIONS**

The Roses assert that their proposed project to build four small guest cabins, which they claim will not be rented on a permanent basis or sold individually, does not meet the statutory definitions of "subdivision" codified at Mont. Code Ann. §§ 76-3-103(15) and 76-3-104, and is exempted from subdivision review under the plain language of Mont. Code Ann. § 76-4-204.

They further argue that Ravalli County's past pattern and practice of not requiring subdivision review for the erection of small rental cabins should be given consideration in the resolution of this matter.

The County counters that the Roses' proposed project falls within the statutory definitions of "division of land" and "subdivision" codified at Mont. Code Ann. §§ 73-3-103(4) and (15). The County further asserts that Mont. Code Ann. § 73-3-208, which exempts subdivisions created by rent or lease from surveying and filing requirements, but does not exempt subdivisions from review, governs in this matter.

### OPINION

The Court has jurisdiction in this matter pursuant to Rules 12(b)(6), 12(c), and 56, Mont.R.Civ.P. which provide for summary judgment. In a summary judgment proceeding, the moving party has the initial burden of establishing the absence of any genuine issue of material fact which would allow the nonmoving party to recover and entitle it to judgment as a matter of law; where this burden is met, the party opposing summary judgment must come forward with substantial evidence raising a genuine issue of material fact precluding summary judgment. *Spinler v. Allen* (1999), 295 Mont. 139, 983 P.2d 348; Rule 56 (c), Mont.R.Civ.P.

The issue before the Court is whether the Roses' proposed project to build small guest cabins on their property is subject to subdivision review.

#### **I. DOES THE ROSES' PROJECT MEET THE STATUTORY DEFINITION OF A SUBDIVISION?**

In 1973, the Montana Legislature enacted the Montana Subdivision and Platting Act ("MSPA"), codified in Title 76, chapter 3 of the Montana Code Annotated. The stated purpose of the chapter is to:

- (1) promote the public health, safety, and general welfare by regulating the subdivision of land;
- (2) prevent overcrowding of land;
- (3) lessen congestion in the streets and highways;
- (4) provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements;
- (5) require development in harmony with the natural environment;
- (6) promote preservation of open space;
- (7) promote cluster development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services;
- (8) protect the rights of property owners; and
- (9) require uniform monumentation of land subdivisions and transferring interests in real property by reference to a plat or certificate of survey.

Mont. Code Ann. § 76-3-102.

The MSPA statutes relevant to this issue are those that define "subdivision" and "division of land," and the statute that sets forth what constitutes a "subdivision."

**76-3-103(15).** "Subdivision" means 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** and includes any resubdivision and further includes a condominium or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes.

(Emphasis added.)

**76-3-103(4).** "Division of land" means the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to or possession of a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter. The conveyance of a tract of record or

an entire parcel of land that was created by a previous division of land is not a division of land.

A subdivision comprises only those parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section when the parcels have been segregated from the original tract. Mont. Code Ann. § 76-3-104.

The Roses argue that their project does not meet the definition of "subdivision" or of "division of land" because their tract of land in excess of 200 acres will remain unchanged after the cabins are built, with no conveyance of title or possession of any parcel of less than 160 acres of the tract occurring.

The County argues that the building of guest cabins, which will sit on parcels of land less than 160 acres in size, "in order that . . . possession of the parcels may be . . . rented," does constitute a "subdivision" because the rental of each cabin will convey possession of a parcel of land, i.e. the land on which the cabin sits, of less than 160 acres. The County notes its concern that "[w]hile Plaintiffs may currently intend for the proposed cabins to serve only as short term rentals, there is nothing to prevent them, or subsequent property owners, from later renting or leasing them out as full time residences." *Br. in Support of Mot. for J. on the Pleadings*, 7.

The scope of the unwieldy and seemingly contradictory statutory definition of "subdivision" has not been directly addressed by the Montana Supreme Court. At first reading, the provision appears to set forth different classes of activities which constitute subdivisions, some which are obviously divisions of land, and some which appear not to be divisions of land. At least two Montana Attorney General opinions have discussed this definition since MSPA's enactment. In interpreting the statutory definition of "subdivision," Attorney General Mike Greely broke the definition out into the following activities:

- (1) a division of land or land so divided which creates one or more parcels containing less than 20<sup>1</sup> acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed;
- (2) any resubdivision;
- (3) a condominium;
- (4) an area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles; and
- (5) an area, regardless of its size, that provides or will provide multiple space for mobile homes.

39 Mont. Op. Atty. Gen. No. 14 (1981); 40 Mont. Op. Atty. Gen. No. 57 (1984). The Attorney General opined that the Legislature's language indicated "an intent to create" not only subdivisions as a result of divisions of land, but also "a separate class of subdivision activity not necessarily requiring a 'division of land,' " as evidenced by the inclusion of activities (3), (4), and (5) in the definition. 39 Mont. Op. Atty. Gen. No. 14 (1981). This logical interpretation serves to explain away the apparent contradictions in the definition of subdivision.

However, the Court's reading of the statutory definition indicates that the Legislature intended a subdivision to mean that portion of the definition the Attorney General has labeled as (1): "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." Mont. Code Ann. § 76-3-103(15) (2005). The final portion of the definition clarifies that four classes of activities (resubdivisions,

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<sup>1</sup> This language was amended in 1993 to "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." This change is the only substantive change in the definition since its 1973 enactment.

condominiums, RV parks, and mobile home parks) are "included" in this definition. Had the Legislature used "and" as a connector with the remaining four classes, then the Court would agree with the Attorney General's interpretation that a subdivision "means" all five of those activities. A subdivision, though, as strictly read in the statutory definition, "means" a division of land or land so divided . . . "and includes" resubdivisions, condominiums, RV parks, and mobile home parks. Therefore, the Legislature must have intended these four included classes to constitute divisions of land. Such a tortured interpretation, which necessitates a shoehorn to wedge the latter three into the "division of land" definition, is less satisfying than the Attorney General's interpretation, but, nevertheless, is the strict construction of the statute.

If an RV park and a mobile home park constitute subdivisions, then the Roses' project to build separate guest cabins would seem to constitute a subdivision, as well. Like the former two activities, the Roses' project implicates separate water supplies and septic systems. Furthermore, the statutory links of "and includes" between divisions of land and resubdivisions, and "and further includes" between divisions of land and condominiums, RV parks, and mobile home parks, indicate that the list is not exhaustive. Finally, on the basis of the MSPA's purpose, the category of "subdivision" should be liberally interpreted. "Legislation enacted for the promotion of public health, safety, and general welfare is entitled to 'liberal construction with a view towards the accomplishment of its highly beneficent objectives.'" *State ex rel. Florence-Carlton Sch. Dist. v. Bd. of County Commrs. of Ravalli County* (1978), 180 Mont. 285, 291, 590 P.2d 602, 605. Based on the statutory definition of "subdivision," the Court concludes that the Roses' project to build separate guest cabins in an area, regardless of size, constitutes a subdivision for purposes of the MSPA.

**II. IS THE ROSES' PROJECT EXEMPT FROM SUBDIVISION REVIEW UNDER MONT. CODE ANN. § 76-3-204, OR SUBJECT TO SUBDIVISION REVIEW UNDER MONT. CODE ANN. § 76-3-208?**

The MSPA provides exemptions for certain subdivisions from subdivision review. The exemptions relevant to this issue are (1) the exemption for conveyances of one or more parts of a structure or improvement and (2) subdivisions exempted from surveying and filing requirements but subject to review provisions:

**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.

**76-3-208. Subdivisions exempted from surveying and filing requirements but subject to review provisions.** Subdivisions created by rent or lease are exempt from the surveying and filing requirements of this chapter but must be submitted for review and approved by the governing body before portions thereof may be rented or leased.

The Roses assert that the exemption set forth in §76-3-204 applies. The County asserts that the partial exemption set forth in § 76-3-208 applies. The interpretation of § 76-3-204 as urged by the Roses would render the portion of § 76-3-208 addressing subdivisions created by rent void of meaning. Statutes relating to the same subject, as much as is possible, must be harmonized to give effect to each. *Wild v. Fregein Construction*, 2003 MT 115, ¶ 20, 315 Mont. 425, ¶ 20, 68 P.3d 855, ¶ 20.

A court's function in construing and applying statutes is to effect legislative intent. *U.S. v. Brooks* (1995), 270 Mont. 136, 139, 890 P.2d 759, 761. In determining that intent, one must look first to the plain meaning of the words used in the statute. *Id.* Only when the intent cannot be determined from the plain meaning of the words is it necessary to examine the legislative

history. *Id.*

**A. Section 76-3-204**

Section 76-3-204 has been interpreted on several occasions by the Montana Attorney General and the Montana Supreme Court. A chronology of the various interpretations follows.

**1. 39 Montana Opinion Attorney General No. 74 (1982)**

In 1982, an Attorney General Opinion addressing whether conversions of existing rental occupancy apartment houses or office buildings to individual condominium ownership were exempted from review concluded that they were, pursuant to § 76-3-204. 39 Mont. Op. Atty. Gen. No. 74 (1982). At that time, § 76-3-204 provided:

The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land<sup>2</sup> is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter.

*Id.* (Emphasis added.) The Attorney General based his opinion on the rationale that while new condominium developments may physically affect the environment and increase demand upon public services, and therefore are appropriate for review and approval prior to construction, the same physical impacts do not flow from a change in the ownership of existing buildings. *Id.*

**2. 40 Montana Opinion Attorney General No. 57 (1984)**

In 1984, the same Attorney General addressed the issue of whether construction of 48 four-plexes for rental occupancy buildings on land owned by the developer, where the developer planned to retain ownership of all the four-plexes as well as the land upon which they were to be constructed constituted a subdivision and was subject to subdivision review. 40 Mont. Op. Atty.

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<sup>2</sup> The "situated on one or more parcels of land" language was deleted and replaced with the current "whether existing or proposed" language by 1985 Legislative amendment.

Gen. No. 57 (1984). The Attorney General concluded that construction of the four-plexes would constitute a subdivision for the reason that the transference of possession of each individual unit within the four-plexes to tenants also transferred an interest in "that portion of the land necessary for enjoyment of the demised premises." *Id.* "That portion of the land," at the least, was determined to include that portion on which a tenant's unit was constructed. *Id.* The Attorney General determined that the end result of this construction project would be a division of land, "as a number of parcels will be segregated from the larger tract by means of transference of possession of those parcels to the tenants occupying the four-plexes." *Id.*

In addressing the exemption codified at § 76-3-204, the Attorney General concluded that the 48 four-plexes did not fall within the exemption because they were not "situated," or existing buildings, but were proposed buildings. *Id.* He further determined that the exemption, as then codified, did not apply to this project because the project would result in a division of land. *Id.* Finally, he noted that:

A housing development such as the one proposed in this case will inevitably result in various social and economic impacts on the community. I find that this is the precise type of development which the Legislature intended should be submitted for local review under the Act.

*Id.*

### 3. 41 Montana Opinion Attorney General No. 3 (1985)

In January, 1985, the Attorney General issued an opinion in response to a question concerning whether four different activities constituted subdivisions, and thus required subdivision review, unless exempted. 41 Mont. Op. Atty. Gen. 8 (1985). The Attorney General concluded that (1) the construction of a duplex on a single tract of land for rental or sale purposes constitutes a subdivision; (2) the construction of a second dwelling for a family member on a

single parcel of land constitutes a subdivision if the family member is intended to receive a legally enforceable possessory interest in the dwelling; (3) the construction of an office building with individual office spaces for rent constitutes a subdivision; and (4) the construction of a hotel does not constitute a subdivision. *Id.* In finding the first three activities subdivisions, the Attorney General used the same rationale as in his opinions discussed above—that is, because each structure occupies a portion of a larger tract, and because possession of housing or office units within the structure and the parcel of land on which they rest are conveyed by lease, a subdivision exists. *Id.* Noting that the MSPA was intended to be “a comprehensive land use law preventing imprudent population concentration and ensuring maintenance of basic public health, environmental and local services values,” the Attorney General opined that multi-family rental properties raise the same concerns associated with those subdivisions such as single unit family structures, condominiums, RV parks, and mobile home parks. *Id.*

Interestingly, the Attorney General concluded that a hotel was not a subdivision because the transaction involved in that activity:

is actually the sale of “a product or service which is temporary lodging.” (Citation omitted.) The guest is instead a licensee, and that existing between innkeeper and guest . . . exists in the fact that the tenant acquires an interest in the real estate, while the guest . . . does not; a guest is a mere licensee, and not a tenant. 43A C.J.S. Inns, Hotels & Eating Places § 5 (1978) (footnotes omitted). Because no possessory interest in real property passes when a hotel room is rented, construction of a hotel does not constitute a “subdivision” under the Subdivision Act.

*Id.* Neither party in this matter has advanced any argument that the Roses’ proposed guest cabins are distinguishable from rental properties on the basis that guests are merely licensees, while tenants have a possessory interest in the real property. Accordingly, the Court will not address such issue.

4. **Amendment to § 76-3-204 (1985)**

Not long after the opinion discussed in Section 3 above was issued, the Legislature amended § 76-3-204 (1981) by deleting the phrase "situated on one or more parcels of land" and inserting in its place "whether existing or proposed."

According to the bill's sponsor, this amendment was offered in response to "a series of recent attorney general's opinions [which] created problems for planning agencies. Those opinions . . . stated that under the subdivision and platting act, a duplex is a subdivision and must be reviewed. The bill simply says that a multi-family structure is not a subdivision and should not be reviewed as such[.]"

45 Mont. Op. Atty. Gen. No. 12 (1993), quoting from the House Committee on Natural Resources Minutes, 4 (March 22, 1985). When the floor was opened to questions from the committee:

Rep. Raney asked if the allowance for improvements to a structure could become a loophole. For instance, could an improvement under SB 354 be a separate structure, he asked. Sen. Mazurek said that a shed might be construed as an improvement, but that a separate residence would not be allowable under the law. Rep. Raney said he believed there still might be a potential loophole in the bill.

House Committee on Natural Resources Minutes, 5 (March 22, 1985). The legislative history indicates that the bill's sponsor might have initiated a bill to amend the definition of "subdivision"; instead, the introduced bill was to amend the exemption. The amendment's language and its legislative history indicate that the Legislature intended to exempt new construction of duplexes and multi-family rental occupancy units from subdivision review.

5. ***Lee v. Flathead County* (1985)**

The Montana Supreme Court weighed in on this amendment in *Lee v. Flathead County* (1985), 217 Mont. 370, 704 P.2d 1060, overruled in part on other grounds by *Porter v. Galarmeau* (1996), 275 Mont. 174, 911 P.2d 1143. In April, 1984, developers commenced

construction of a building in Bigfork with units originally advertised for sale as condominium units. *Id.*, 217 Mont. at 371, 704 P.2d at 1061. After Flathead County became aware that building's units were to be used as condominiums, a stop-work order was issued until subdivision review could occur. *Id.*, 217 Mont. at 371-72, 704 P.2d at 1061-62. When the developers decided to change the use to an apartment house, the stop-work order was ceased and construction continued. *Id.*, 217 Mont. at 372, 704 P.2d at 1062. On June 27, 1984, the Attorney General's Opinion No. 57 discussed above was issued, holding that construction of an apartment building for rental occupancy constituted a subdivision and required submission for review under the MSPA. *Id.* Because construction of the building had begun prior to the issuance of the Attorney General's opinion, Flathead County determined that the four-plex was not required to undergo subdivision review. *Id.* Plaintiff Lee and other neighbors then filed an action against the developers and Flathead County seeking to enjoin construction of the building until it met compliance with the MSPA. *Id.*, 217 Mont. at 371, 704 P.2d at 1061.

The district court ruled against Lee and the other plaintiffs, and for the developers and Flathead County. *Id.* By the time the Montana Supreme Court reviewed the matter on appeal, § 76-3-204 had been amended to include proposed buildings. *Id.*, 217 Mont. at 373, 704 P.2d at 1062-63. The issue on appeal was whether the 1985 amendment, enacted during the pendency of the lawsuit, governed and therefore allowed the four-plex to escape subdivision review. *Id.*, 217 Mont. at 373, 704 P.2d at 1062. The Montana Supreme Court held that it did and affirmed the district court. *Id.*, 217 Mont. at 374, 704 P.2d at 1063. The court stated:

The amendment makes it clear that not only is the renting of *existing* buildings exempt from subdivision review, but so are all *new buildings* which are to be used as rentals. Thus, had this amendment been in effect when appellants brought this

action, clearly respondents would be exempt from subdivision review because they have declared their building is to be used as apartments.

*Id.*, 217 Mont. at 373, 704 P.2d at 1063. (Emphasis in original.) Concluding that the correct law to apply was the law in effect at the time of review, the court declined to consider whether the Attorney General's Opinion No. 57 was correct. *Id.*, 217 Mont. at 373-74, 704 P.2d at 1063.

#### 6. Discussion

The Roses assert that under the plain language of § 76-3-204, their proposed project is exempted from subdivision review, and they cite the Montana Supreme Court's holding in *Lee v. Flathead County* quoted in Section 5 above as support for their claim. The statutory language refers in relevant part to "one or more parts of a building, whether existing or proposed." "Building" is singular. The legislative history indicates that the statute was amended to include "whether existing or proposed" in order to exempt a single building containing duplexes or multi-family rental units from subdivision review. Likewise, the building at issue in *Lee v. Flathead County* was a single four-plex apartment building. Section 76-3-204 addresses the sale, rent, lease, or other conveyance of one or more parts of a building. Exemptions under the MSPA must be narrowly interpreted. *Hampton v. Lewis and Clark County*, 2001 MT 81, ¶23, 305 Mont. 103, ¶ 23, 23 P.3d 908, ¶ 23, citing *State ex rel. Florence-Carlton Sch. Dist. v. Bd. of County Commrs.* (1978), 180 Mont. 285, 291, 590 P.2d 602, 605. The Roses' proposed project does not entail the construction of a single building containing duplexes or multi-plexes on an undeveloped parcel of land—a lodge already occupies the parcel. Accordingly, the Court concludes they are not exempted from review under § 76-3-204.

#### B. Section 76-3-208

Section 76-3-208 specifically addresses subdivisions created by rent and requires that they undergo subdivision review, but exempts them from surveying and filing requirements. The Roses argue that this statute is inapplicable to this matter because their proposed project is not a subdivision. On the contrary, the Court has determined that it is a subdivision. The Court concludes that § 76-3-208 controls in this matter.

The Court is sympathetic to the Roses' frustration that numerous other lodges and cabins in Ravalli County have escaped subdivision review in years past, but it cannot take into account the County's past practices in resolving this issue. The only issue before the Court is whether the Roses' project is lawfully exempted from subdivision review, and the Court concludes that it is not.

**ORDER**

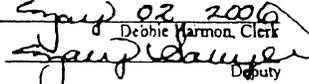
IT IS THEREFORE ORDERED that the County's motion for summary judgment is hereby **GRANTED**, and the Roses' motion for summary judgment is hereby **DENIED**.

DATED this 1st day of May, 2006.

  
HON. JEFFREY H. LANGTON, District Judge

cc: counsel of record

I certify that I forwarded copies of  
this instrument to counsel of record

May 02 2006  
Debbie Harmon, Clerk  
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Deputy

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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

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|---|--|
| BILL DERICK and JOYCE DERICK,<br><br>Plaintiffs,<br><br>v.<br><br>LEWIS AND CLARK COUNTY,<br><br>Defendant. | Cause No. BDV-2007-304<br><br><b>ORDER ON CROSS-MOTIONS<br/>FOR SUMMARY JUDGMENT</b> |
|---|--|

This matter is before the Court on the parties' cross-motions for summary judgment. Oral argument was held on August 10, 2011.

**FACTUAL BACKGROUND**

Plaintiffs Bill and Joyce Derick (hereafter Dericks) own a single lot located on Canyon Ferry Reservoir in Lewis and Clark County, Montana. In addition to their house, located on the property is a separate building containing a garage on the ground floor with an apartment above it. The Dericks propose to lease the apartment to a third party. The County has determined that the Dericks need to go through subdivision review on the basis of the proposed rental.

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1 At the oral argument, both parties agreed that there were no disputed  
2 factual issues that would prevent the Court from issuing summary judgment one way  
3 or the other.

4 **2. Review of the Montana Subdivision Act**

5 At issue here are certain provisions of the Montana Subdivision and  
6 Platting Act, Section 76-3-101, et seq., MCA (hereafter the Act). The Montana  
7 Supreme Court has determined that the Act was enacted to protect the public health,  
8 safety, and welfare. *Dreher v. Fuller*, 257 Mont. 445, 448, 849 P.2d 1045, \_\_\_ (1993).  
9 As such, the Subdivision Act is deemed to be legislation seeking a beneficent purpose  
10 and should be liberally construed. *Id.* In addition, exemptions to the Act are to be  
11 given a narrow interpretation. *Id.*, at 449, 849 P.2d at \_\_\_, *Hampton v. Lewis & Clark*  
12 *County*, 2001 MT 81, ¶ 23, 305 Mont. 103, 23 P.3d 908.

13 **DISCUSSION**

14 **1. Definitions.**

15 The Court will set forth the various sections of the Act that it will apply  
16 and refer to throughout this decision.

17 **76-3-103. Definitions.** As used in this chapter, unless the context  
18 or subject matter clearly requires otherwise, the following definitions  
apply:

19 (4) "Division of land" means the segregation of one or more parcels of  
20 land from a larger tract held in single or undivided ownership by transferring or  
21 contracting to transfer title to or possession of a portion of the tract or properly  
22 filing a certificate of survey or subdivision plat establishing the identity of the  
segregated parcels pursuant to this chapter. The conveyance of a tract of record  
or an entire parcel of land that was created by a previous division of land is not  
a division of land.

23 (15) "Subdivision" means a division of land or land so divided  
24 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  
25 government section, exclusive of public roadways, in order that the title  
to or possession of the parcels may be sold, rented, leased, or otherwise

1 conveyed and includes any resubdivision and further includes a  
2 condominium or area, regardless of its size, that provides or will provide  
multiple space for recreational camping vehicles or mobile homes.

3 **76-3-202. Exemption for structures on complying subdivided**  
4 **lands.** Where required by this chapter, when the land upon which an  
improvement is situated has been subdivided in compliance with this  
5 chapter, the sale, rent, lease, or other conveyance of one or more parts of  
a building, structure, or other improvement situated on one or more  
6 parcels of land is not a division of land and is not subject to the terms of  
this chapter. [Hereafter section 202.]

7 **76-3-204. Exemption for conveyances of one or more parts of**  
8 **a structure or improvement.** The sale, rent, lease, or other conveyance  
of one or more parts of a building, structure, or other improvement,  
9 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. [Hereafter section 204.]

10 **76-3-208. Subdivisions exempted from surveying and filing**  
11 **requirements but subject to review provisions.** Subdivisions created  
by rent or lease are exempt from the surveying and filing requirements of  
12 this chapter but must be submitted for review and approved by the  
governing body before portions thereof may be rented or leased.  
13 [Hereafter section 208.]

## 14 2. Division of Land

15 The Court first must decide whether this proposed rental is a subdivision.  
16 Reference to the definition of subdivision above shows that the statute contemplates  
17 that a subdivision could be created by rent or lease. In order to be a subdivision,  
18 however, there must be a division of land.

19 The Montana Attorney General long ago determined that rental of  
20 buildings could constitute a division of land and thus constitute a subdivision. In 40  
21 Op. Atty Gen. Mont. No. 57 (1984), the attorney general was confronted with a  
22 situation where a developer wanted to build 48 fourplexes. The attorney general noted  
23 that a division of land occurs when one or more parcels was segregated from a larger  
24 tract. He noted that pursuant to the proposal, possession was to be transferred to the  
25 proposed tenants who would not only obtain their dwelling unit, but they would gain

1 an interest in that portion of the land necessary for enjoyment of their premises. *Id.*,  
2 at 5. The attorney general held that the proposal was a division of land, as a number of  
3 parcels would be segregated from a larger tract by transferring possession of those  
4 parcels to the tenants. *Id.*

5           Then in 41 Op. Atty. Gen. Mont. No. 3 (1985), the attorney general held  
6 that the construction of one duplex on a single tract of land for rental or sale  
7 constituted a subdivision. In the 1985 decision, the attorney general held that any other  
8 reading of the Act would leave a regulatory void in what was intended to be a  
9 comprehensive land use law. *Id.*, at 5. The attorney general noted that possession of  
10 the housing unit within the duplex by individual tenants necessarily carried with it a  
11 right to possession of the land on which the structure rested. He also noted that the  
12 proposed duplex was a subdivision because the tenant received a legally enforceable  
13 possessory interest in land. *Id.*, at 8.

14           The Court notes that a similar decision was reached in the Twenty-First  
15 Judicial District Court in *Rose v. Ravalli County*, 2006 Mont. Dist. LEXIS 1072. In  
16 that case, the district court was presented with a situation where the plaintiffs, who  
17 owned a single tract, planned to construct four small vacation cabins on the property,  
18 external to the existing lodge, and rent them out on a seasonal basis. After a lengthy  
19 review of the statutes and the attorney general opinions mentioned above, the district  
20 court held that the proposal constituted a subdivision.

21           In this case, the Dericks suggest that they intend to craft a particular lease  
22 for their tenant that would not convey any interest in the land. Thus, according to the  
23 Dericks, the particular construction of their lease could exempt them from subdivision  
24 review. This Court disagrees.

25 //

1            Whatever the language of the lease may be, the tenants will still get  
2 possession of a separate dwelling unit on one tract of land. Further, despite whatever  
3 the lease may say, the tenants will still get a possessory interest in their dwelling unit  
4 and will get at least some interest in the real estate upon which it is located. For  
5 example, they would get some interest in the lateral support associated with the garage  
6 upon which their dwelling is located. Further, they would have some interest in the  
7 ground on which the stairs leading to their dwelling are located. Further, to allow the  
8 terms of a particular lease to attempt to evade the attorney general opinions, mentioned  
9 above, would allow an interpretation of the Act that would create a regulatory void in  
10 what was intended to be a comprehensive land use law — the Montana Subdivision  
11 and Platting Act.

12            Thus, this Court concludes that Plaintiff's proposal is a division of land  
13 and is a subdivision.

## 14    **2.    Possible Exemptions**

15            As noted above, sections 202 and 204 provide a possible exemption for  
16 rentals. The Dericks suggest that a plain reading of sections 202 and 204 shows that  
17 the rented parts of the building are exempt from review. However, the County,  
18 applying the rules of interpretation applicable to the Act, suggest that sections 202 and  
19 204 only apply to exempt rentals in a single building on a tract.

20            First, both section 202 and 204 talk about a building. Further, the 2011  
21 Montana legislature passed House Bill 494 which provided, in part:

22            **76-3-204. Exemption for conveyances of one or more parts of**  
23 **structures or improvements.** (1) Subject to subsection (2), the sale,  
24 rent, lease, or other conveyance of one or more parts of one or more  
25 buildings, structures, or other improvements, whether existing or  
proposed, on a single parcel of land or on multiple parcels of land in the  
same ownership is not a division of land, as that term is defined in this  
chapter, and is not subject to the requirements of this chapter.

1 (Def.'s Combined Resp. Br. Opp'n Pl.'s' Mot. Summ. J. & Reply Br. Supp. Def.'s  
2 Mot. Summ. J., Ex. C.) This bill, however, was vetoed because "[t]he bill would  
3 broaden the Act's exemptions to allow the placement of an unlimited number of  
4 residential or commercial structures upon a tract or multiple tracts of record the  
5 purpose of sale, rent, or lease." (Id., Ex. D (May 13, 2011 letter from Gov. Brian  
6 Schweitzer to Secretary of State Linda McCulloch)). In addition, if the Dericks are  
7 correct in their contention, section 208 would be rendered largely useless and of no  
8 import. As much as possible, the Court needs to harmonize and give affect to statutes  
9 relating to the same subject. *Wild v. Fregein Const.*, 2003 MT 115, ¶ 20, 315 Mont.  
10 425, 68 P.3d 855.

11 Further, the same result was reached by the district court in *Rose*. In so  
12 holding, the district court relied on the following legislative history of section 204:

13 [T]he Legislature amended § 76-3-204 (1981) by deleting the phrase  
14 "situated on one or more parcels of land" and inserting in its place  
"whether existing or proposed."

15 According to the bill's sponsor, this amendment was offered in  
16 response to "a series of recent attorney general's opinions [which]  
17 created problems for planning agencies. Those opinions . . . stated that  
18 under the subdivision and platting act, a duplex is a subdivision and must  
19 be reviewed. The bill simply says that a multi-family structure is not a  
20 subdivision and should not be reviewed as such[.]" 45 Mont. Op. Atty.  
21 Gen. No. 12 (1993), quoting from the House Committee on Natural  
22 Resources Minutes, 4 (March 22, 1985). When the floor was opened to  
23 questions from the committee:

24 Rep. Raney asked if the allowance for improvements to a structure  
25 could become a loophole. For instance, could an improvement under SB  
354 be a separate structure, he asked. Sen. Mazurek said that a shed  
might be construed as an improvement, but that a separate residence  
would not be allowable under the law. Rep. Raney said he believed there  
still might be a potential loophole in the bill. House Committee on  
Natural Resources Minutes, 5 (March 22, 1985).

26 *Rose*, ¶ 25 (emphasis added).

27 Supporting this Court's conclusion is the Montana Supreme Court case  
28 of *Lee v. Flathead County*, 217 Mont. 270, 704 P.2d 1060 (1985). In that case, the

1 court held that section 204 made subdivision review unnecessary for the respondents'  
2 fourplex, which was the only building on the tract in question. Although not  
3 specifically addressed by the court, to get to its conclusion that section 204 exempted  
4 the fourplex from subdivision review, the court would necessarily have to hold that the  
5 creation of the fourplex was a subdivision. Further, by holding that this single building  
6 was exempt under section 204, the court gives support to this Court's contention that  
7 section 204 and 202 apply to only a single structure located on a tract.

### 8 CONCLUSION

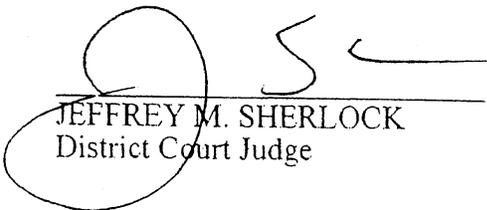
9 The Court holds that the Dericks' proposed rental of their apartment is a  
10 subdivision and is not exempted by either Section 76-3-202 or -204, MCA. The  
11 provisions of Section 76-3-208, MCA, however, would exempt the proposal from  
12 surveying and filing requirements.

13 The Court cannot help but wonder why, after some 38 years after the  
14 passage of the Montana Subdivision and Platting Act was enacted, there is no clear  
15 answer available for the Court and the parties to this question.

### 16 ORDER

17 Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND  
18 DECREED that Defendant Lewis and Clark County's motion for summary judgment is  
19 GRANTED, and Plaintiffs Bill and Joyce Derick's motion for summary judgment is  
20 DENIED.

21 DATED this 26 day of August 2011.

22  
23   
24 JEFFREY M. SHERLOCK  
25 District Court Judge

24 pcs: Frank C. Crowley/Marc G. Buyske  
Jacqueline T. Lenmark

25 T:\MS\derick v l&c co ord x-mots sj.wpd