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Legal Opinion 2017-008

TO: Mike Haynes; Mary McCrea; Denise Alexander; Kevin Slovarp; Don Verrue; Eric Anderson

CC: Mayor John Engen; Dale Bickell; Department Attorney

FROM: Jim Nugent, City Attorney

DATE March 13, 2017

RE: 2003 Amendment to Montana State Subdivision Exemption law addressing security exemptions for mortgages, liens or trust indentures provided that a mortgage security parcel could only be transferred to the entity holding the security interest.

FACTS:

There have been recent subdivision exemption inquiries about mortgage security, some relating to mortgage activities that occurred in 2003 and 2004.

ISSUE(S):

Did the 2003 Montana State Legislature amend 76-3-201, MCA to clarify subdivision exemption law with respect to creation of security for mortgages, liens or trust indentures?

CONCLUSION(S):

Yes. The 2003 Montana State Legislature inserted subsection 76-3-201(3), MCA, into Montana subdivision exemption statutory law pertaining to creating and clarifying a subdivision exemption to provide security for mortgages, liens or trust indentures and provided that a mortgage security parcel could only be transferred to the entity holding the security interest.

LEGAL DISCUSSION:

The Montana Subdivision and Platting Act is set forth in title 76, chapter 3, Montana Code Annotated (MCA). Title 76, chapter 3, part 2 MCA is entitled “MISCELLANEOUS EXEMPTIONS”. Pursuant to subsections 76-3-201(1)(b) and (3)(b) MCA, mortgage, lien, or trust indenture are addressed and created to provide security for mortgages, liens or trust indentures.

76-3-201. Exemption for certain divisions of land -- fees for examination of division. (1) Unless the method of disposition is adopted for the purpose of evading this chapter, the requirements of this chapter may not apply to any division of land that:

- (a) is created by order of any court of record in this state or by operation of law or that, 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, Title 70, chapter 30;
- (b) subject to subsection (3), is created to provide security for mortgages, liens, or trust indentures for the purpose of construction, improvements to the land being divided, or refinancing purposes;
- (c) creates an interest in oil, gas, minerals, or water that is severed from the surface ownership of real property;
- (d) creates cemetery lots;
- (e) is created by the reservation of a life estate;
- (f) is created by lease or rental for farming and agricultural purposes;
- (g) is in a location over which the state does not have jurisdiction; or
- (h) is created for rights-of-way or utility sites. A subsequent change in the use of the land to a residential, commercial, or industrial use is subject to the requirements of this chapter.

(2) Before a court of record orders a division of land under subsection (1)(a), the court shall notify the governing body of the pending division and allow the governing body to present written comment on the division.

(3) An exemption under subsection (1)(b) applies:

- (a) to a division of land of any size;
- (b) if the land that is divided is not conveyed to any entity other than the financial or lending institution to which the mortgage, lien, or trust indenture was given or to a purchaser upon foreclosure of the mortgage, lien, or trust indenture. A transfer of the divided land, by the owner of the property at the time that the land was divided, to any party other than those identified in this subsection (3)(b) subjects the division of land to the requirements of this chapter.
- (c) to a parcel that is created to provide security as provided in subsection (1)(b). The remainder of the tract of land is subject to the provisions of this chapter if applicable.

(4) The governing body may examine a division of land to determine whether or not the requirements of this chapter apply to the division and

may establish reasonable fees, not to exceed \$200, for the examination.
(Emphasis added)

The 2003 Montana State Legislature, pursuant to SB-406(2003), inserted subsection 76-3-201(3) MCA, to provide guidance on exemptions that are created to provide security for mortgages, liens or trust indentures according to part of the title to SB-406(2003). See LAWS OF MONTANA volume II, Chapter No. 549, pages 2241-2243. There does not appear to be a special effective date for this law when enacted, so it became effective October 1, 2003 pursuant to Section 1-2-201 MCA.

SB-406(2003) inserted subsection 76-3-201(3) MCA into the subdivision exemption law stating that a subdivision exemption under subsection 76-3-201(1)(b) MCA pertaining to creating a subdivision exemption to provide security for mortgages, liens or trust indentures for the purpose of construction improvements to the land being divided or refinanced is subject to the provisions of subsection 76-3-201(3) MCA:

“(3)...(b) if the land that is divided is not conveyed to any entity other than the financial or lending institution to which the mortgage, lien, or trust indenture was given or to a purchaser upon foreclosure of the mortgage, lien or trust indenture. A transfer of the divided land, by the owner of the property at the time that the land was divided to any party other than those identified in this subsection (3)(b) subjects the division of land to the requirements of this chapter.” *(NOTE: This chapter is the Montana Subdivision and Platting Act). (Emphasis added)*

The Montana Supreme Court in *Braach v. Missoula County Clerk and Recorder*, 2013 MT 49N, 369 Mont. 541, 2013 Mont. LEXIS 70(2/26/2013) in paragraph 15 of its decision stated that:

“Section 76-3-201 MCA was amended effective in October 2003 to provide that a tract of land created for mortgage security could only be transferred to the entity holding the security interest.”

Clearly, mortgage security parcels created October 1, 2003 or later are subject to the 2003 amendment inserting subsection 76-3-201(3) MCA. However, there is no language in subsection 76-3-201(3) MCA that limits the statutory restriction to mortgage security parcels created commencing October 2003 and thereafter. There is no language in subsection 76-3-201(3) MCA that prevents or prohibits application of subsection 76-3-201(3) MCA to any and all mortgage parcels that have not been transferred or already separately recorded.

The final sentence of 76-3-201(3)(b) MCA requires that you must go through the applicable division of land reviews required by the Montana Subdivision and Platting Act, title 76, chapter 3 MCA in order to be able to create a transferable parcel of land.

CONCLUSION(S):

Yes, the 2003 Montana State Legislature inserted subsection 76-3-201(3), MCA, into Montana subdivision exemption statutory law pertaining to creating and clarifying a subdivision exemption to provide security for mortgages, liens or trust indentures and provided that a mortgage security parcel could only be transferred to the entity holding the security interest.

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/s/

Jim Nugent, City Attorney

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