

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2021-001

TO: Mayor John Engen; City Council, Dale Bickell, Donna Gaukler, Neil Minor, Grant Carlton, David Selvage, Eran Pehan, Mary McCrea, Laval Means, Tom Zavitz, Dave Degrandpre, Alex Eidam, Cassandra Tripard, Jen Gress, Marty Rehbein, Kirsten Hands

CC: Department Attorney

FROM: City Attorney, Jim Nugent

DATE February 12, 2021

RE: Park dedication requirements pursuant to Montana Subdivision and Platting Act

FACTS:

During the Missoula City Council Land Use and Planning Committee meeting Wednesday, February 10, 2021 there were several city council questions about Montana Subdivision and Platting Act subdivision park land donation requirements; related primarily to potential cash-in-lieu of donated park land.

ISSUE(S):

- (1) What does the Montana Subdivision and Platting Act indicate with respect to determining the monetary amount of a “cash donation”?
- (2) May any of a cash donation in lieu of park land donation be utilized for park maintenance?

CONCLUSION(S):

- (1) Pursuant to subsection 76-3-621(10)(a) MCA of the Montana Subdivision and Platting Act states that a “cash donation” is the fair market value of the unsubdivided, unimproved lands.
- (2) The Montana Subdivision and Platting Act authorizes up to 50% of cash in lieu of park land donation to be utilized for park maintenance, subject to specific statutory conditions.

LEGAL DISCUSSION:

Section 76-1-101 MCA authorizes local governments may create planning boards “in order to promote the orderly development of its government units and its environs.”

Section 7-1-114 MCA is entitled “MANDATORY PROVISIONS”. Subsection 7-1-114(1)(e) MCA provides that a local government with self-government powers IS SUBJECT TO the following provisions: . . . (e) ALL LAWS THAT REQUIRE OR REGULATE PLANNING AND ZONING. “ (emphasis added).. The Missoula City voters on June 4, 1996 adopted a City of Missoula charter with self-government powers effective January 1, 1997. Thus, subsection 7-1-114(1)(e) MCA is applicable to the City of Missoula.

The Montana Subdivision and Platting Act is a Montana planning regulation that is set forth in title 76, chapter 3, MCA. Section 76-3-621 MCA of the Montana Subdivision and Platting Act is entitled PARK DEDICATION REQUIREMENT. Pursuant to subsection 76-3-621(10)(a) MCA the Montana subdivision and Platting Act provides that:

- (10) “cash donation” is the fair market value of the unsubdivided, unimproved land; and
- (b) ‘dwelling unit” means a residential structure in which a person or persons reside.”

Subsection 76-3-621(10)(b) MCA is included for the reason that all nonresidential parcels as well as a few other instances set forth in the law are not subject to any park dedication requirement. See subsection 76-3-621(3) MCA. There are no Montana Supreme Court decisions or Montana Attorney General opinions that address the application and/or meaning of “fair market value of the unsubdivided, unimproved land”.

Subsections 76-3-621(4), and (5) MCA relate to cash-in-lieu of park lands; including addressing the use of up to 50% cash-in-lieu of donated park land for maintenance of park land subject to several statutory conditions. Subsections 76-2-621(5) and (6) MCA provide:

“(4) The governing body, in consultation with the subdivider and the planning board or park board that has jurisdiction, may determine suitable locations for parks and playgrounds and giving due weight and consideration to the expressed preference of the subdivider, may determine whether THE PARK DEDICATION MUST BE A LAND DONATION, CASH DONATION,, OR A COMBINATION OF BOTH. When a combination of land donation and cash donation is required, THE CASH DONATION MAY NOT EXCEED THE PROPORTIONAL AMOUNT NOT COVERED BY THE LAND DONATION. (emphasis added).

(5) (a) In accordance with the provisions of subsections (5)(b) and (5)(c), the governing body SHALL USE THE DEDICATED MONEY OR LAND FOR DEVELOPMENT. ACQUISITION OR MAINTENANCE OF PARKS TO SERVE THE SUBDIVISION, (B) THE GOVERNING BODY MAY USE THE DEDICATED MONEY TO ACQUIRE, DEVELOP, OR MAINTAIN within its jurisdiction, PARKS OR RECREATIONAL AREAS OR FOR THE PURCHASE OF PUBLIC OPEN SPACE OR CONSERVATION EASEMENTS ONLY IF:

- (i) THE PARK, RECREATION AREA, OPEN SPACE OR CONSERVATION EASEMENT IS WITHIN A REASONABLY CLOSE PROXIMITY TO THE PROPOSED SUBDIVISION; and
 - (ii) the governing body has formally adopted a park plan that establishes the needs and procedures for the use of the money.
- (C) The governing body MAY NOT USE MORE THAN 50% OF THE DEDICATED MONEY FOR PARK MAINTENANCE . (emphasis added)

The Montana Supreme Court in *Fielder v. Board of County commissioners*, 2007 MT 118, 337 M 256, 162 P3d 67(2007) indicated that the Montana Subdivision and Platting Act authorized the County Commissioners to accept either a land or cash donation to satisfy the park dedication requirement and that in the case being litigated, the County Commissioners could require that a developer satisfy the park requirement with a cash-in-lieu payment because the land proposed by the developer was not suitable for use as park land.

Section 76-3-621 MCA entitled PARK DEDICATION REQUIREMENT is a lengthy law that as codified in MCA requires 1 ½ pages. Section 76-3-621 MCA is set forth below in its entirety in order to inform city officials as to the full spectrum of the statutory park dedication requirement.

- 76-3-621. Park dedication requirement.** (1) Except as provided in **76-3-509** or subsections (2), (3), and (6) through (9) of this section, a subdivider shall dedicate to the governing body a cash or land donation equal to:
- (a) 11% of the area of the land proposed to be subdivided into parcels of one-half acre or smaller;
 - (b) 7.5% of the area of the land proposed to be subdivided into parcels larger than one-half acre and not larger than 1 acre;
 - (c) 5% of the area of the land proposed to be subdivided into parcels larger than 1 acre and not larger than 3 acres; and
 - (d) 2.5% of the area of the land proposed to be subdivided into parcels larger than 3 acres and not larger than 5 acres.
- (2) When a subdivision is located totally within an area for which density requirements have been adopted pursuant to a growth policy under chapter 1 or pursuant to zoning regulations under chapter 2, the governing body may establish park dedication requirements based on the community need for parks and the development densities identified in the growth policy or regulations. Park dedication requirements established under this subsection are in lieu of those provided in subsection (1) and may not exceed 0.03 acres per dwelling unit.
- (3) A park dedication may not be required for:
- (a) land proposed for subdivision into parcels larger than 5 acres;
 - (b) subdivision into parcels that are all nonresidential;
 - (c) a subdivision in which parcels are not created, except when that subdivision provides permanent multiple spaces for recreational camping vehicles, mobile homes, or condominiums;
 - (d) a subdivision in which only one additional parcel is created; or
 - (e) except as provided in subsection (8), a first minor subdivision from a tract of record as described in **76-3-609(2)**.

- (4) The governing body, in consultation with the subdivider and the planning board or park board that has jurisdiction, may determine suitable locations for parks and playgrounds and, giving due weight and consideration to the expressed preference of the subdivider, may determine whether the park dedication must be a land donation, cash donation, or a combination of both. When a combination of land donation and cash donation is required, the cash donation may not exceed the proportional amount not covered by the land donation.
- (5) (a) In accordance with the provisions of subsections (5)(b) and (5)(c), the governing body shall use the dedicated money or land for development, acquisition, or maintenance of parks to serve the subdivision.
- (b) The governing body may use the dedicated money to acquire, develop, or maintain, within its jurisdiction, parks or recreational areas or for the purchase of public open space or conservation easements only if:
- (i) the park, recreational area, open space, or conservation easement is within a reasonably close proximity to the proposed subdivision; and
- (ii) the governing body has formally adopted a park plan that establishes the needs and procedures for use of the money.
- (c) The governing body may not use more than 50% of the dedicated money for park maintenance.
- (6) The local governing body shall waive the park dedication requirement if:
- (a) (i) the preliminary plat provides for a planned unit development or other development with land permanently set aside for park and recreational uses sufficient to meet the needs of the persons who will ultimately reside in the development; and
- (ii) the area of the land and any improvements set aside for park and recreational purposes equals or exceeds the area of the dedication required under subsection (1);
- (b) (i) the preliminary plat provides long-term protection of critical wildlife habitat; cultural, historical, or natural resources; agricultural interests; or aesthetic values; and
- (ii) the area of the land proposed to be subdivided, by virtue of providing long-term protection provided for in subsection (6)(b)(i), is reduced by an amount equal to or exceeding the area of the dedication required under subsection (1);
- (c) the area of the land proposed to be subdivided, by virtue of a combination of the provisions of subsections (6)(a) and (6)(b), is reduced by an amount equal to or exceeding the area of the dedication required under subsection (1); or
- (d) (i) the subdivider provides for land outside of the subdivision to be set aside for park and recreational uses sufficient to meet the needs of the persons who will ultimately reside in the subdivision; and
- (ii) the area of the land and any improvements set aside for park and recreational uses equals or exceeds the area of dedication required under subsection (1).
- (7) The local governing body may waive the park dedication requirement if:
- (a) the subdivider provides land outside the subdivision that affords long-term protection of critical wildlife habitat, cultural, historical, or natural resources, agricultural interests, or aesthetic values; and
- (b) the area of the land to be subject to long-term protection, as provided in subsection (7)(a), equals or exceeds the area of the dedication required under subsection (1).
- (8)(a) A local governing body may, at its discretion, require a park dedication for:
- (i) a subsequent minor subdivision as described in **76-3-609(3)**; or

- (ii) a first minor subdivision from a tract of record as described in **76-3-609(2)** if:
 - (A) the subdivision plat indicates development of condominiums or other multifamily housing;
 - (B) zoning regulations permit condominiums or other multifamily housing; or
 - (C) any of the lots are located within the boundaries of a municipality.
- (b) A local governing body that chooses to require a park dedication shall specify in regulations the circumstances under which a park dedication will be required.
- (9) Subject to the approval of the local governing body and acceptance by the school district trustees, a subdivider may dedicate a land donation provided in subsection (1) to a school district, adequate to be used for school facilities or buildings.
- (10) For the purposes of this section:
 - (a) "cash donation" is the fair market value of the unsubdivided, unimproved land; and
 - (b) "dwelling unit" means a residential structure in which a person or persons reside.
- (11) A land donation under this section may be inside or outside of the subdivision.

CONCLUSION(S):

- (1) Pursuant to subsection 76-3-621(10)(a) MCA of the Montana Subdivision and Platting Act states that a "cash donation" is the fair market value of the unsubdivided, unimproved lands.
- (2) The Montana Subdivision and Platting Act authorizes up to 50% of cash in lieu of park land donation to be utilized for park maintenance, subject to specific statutory conditions.

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/s/ Jim Nugent

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