



OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2007-023

TO: Mayor John Engen; City Council; Bruce Bender; Donna Gaukler; Jackie Corday; Marty Rehbein; Nikki Rogers; Steve King; Kevin Slovarp; Carla Krause; Jolene Krause; Jolene Ellerton; Dan Jordan; Roger Millar; Mike Barton; Tim Worley; Denise Alexander; Jennie Dixon; Mary McCrea; Dept. Atty

FROM: Jim Nugent, City Attorney

DATE December 10, 2007

RE: Statutory Park Dedication Requirements Within Montana Subdivision and Platting Act

FACTS:

During the fourth calendar quarter of 2007, several parkland dedication controversies have arisen pursuant to subdivision reviews being performed by the Missoula City Council.

ISSUES:

1. What are the statutory parkland dedication amounts set forth in the Montana Subdivision and Platting Act parkland dedication statute?
2. Who determines suitable locations for parks and playgrounds?
3. Who determines whether the park dedication must be a land donation, cash donation, or combination of both?
4. Pursuant to the Montana Subdivision and Platting Act, what statutory restrictions are generally associated with parkland dedications and/or dedications of cash?

CONCLUSIONS:

1. Pursuant to the Montana Subdivision and Platting Act, section 76-3-621 MCA entitled Park Dedication Requirement, the following parkland dedication formula is set forth:

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.

A land developer also could propose to set aside more land for parks, playgrounds, or open space pursuant to their subdivision proposal.

2. Pursuant to §76-3-624(4) MCA of the Montana Subdivision and Platting Act, the local government governing body in consultation with the subdivider planning board and park board may determine suitable locations for parks and playgrounds.

3. Pursuant to §76-3-621(4) MCA of the Montana Subdivision and Platting Act, the local government governing body giving due weight and consideration to the expressed preference of the subdivider may determine whether the park dedication must be land donation, cash donation, or a combination of both.

4. Pursuant to section 76-3-621 MCA of the Montana Subdivision and Platting Act statutory restrictions pertaining to parkland dedications generally include that land or cash must serve the subdivision making the donation, the parkland must be in reasonably close proximity to the subdivision making the donation and if cash donation is made, the governing body may not use more than 50% of the cash for park maintenance.

LEGAL DISCUSSION:

The Montana Subdivision and Platting Act is set forth in title 76, chapter 3 entitled "Local Regulation of Subdivisions." Section 76-3-621 MCA pertains to park dedications and provides in its entirety as follows:

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; or

(d) a subdivision in which only one additional parcel is created.

(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 local governing body may, at its discretion, require a park dedication for a minor subdivision. 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. (Emphasis added.)

Section 76-3-509 MCA cross-referenced in the first line of this section pertains to the statutory authority granted to local governments to adopt regulations to promote cluster development and preserve open space.

CONCLUSIONS:

1. Pursuant to the Montana Subdivision and Platting Act, section 76-3-621 MCA entitled Park Dedication Requirement, the following parkland dedication formula is set forth:

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OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney

JN: mdg