

ORDINANCE Ord # 2019-002
AN ORDINANCE TO AMEND THE
POLSON DEVELOPMENT CODE REGARDING A PROVISION
OF SUBDIVISION EXEMPTION IN COMPLIANCE WITH THE
MONTANA CODE ANNOTATED AND SUBDIVISION
VARIANCE CRITERIA

WHEREAS, 76-3-501, MCA authorizes local subdivision regulations; and

WHEREAS, a change was made to the subdivision laws during the 2019 legislative session and such amendment require action by local government; and

WHEREAS, it appears after further reading by staff and the public that an amendment needs to be made adding a specific criterion to the subdivision variance provision;

WHEREAS, a public hearing upon the proposed amendments to the Polson Development Code (PDC) was held on August 13, 2019 before the Polson City-County Planning Board:

WHEREAS, the City Commission hereby finds that the proposed amendments:

- a. comply with Montana law;
- b. are reasonable and appropriate for the City of Polson: and
- c. serve to correct the ordinance previously adopted.

NOW, THEREFORE, BE IT ORDAINED by the City Commission of the City of Polson, Montana that the amendments attached hereto are adopted into the subdivision regulations of the City of Polson. The Clerk is hereby instructed to make such insertions and to republish the same in the records of the City and on the City's website.

Date: August 19, 2019

First Reading: 7 ayes _____ nays _____ absent

Date: September 5, 2019

Second Reading: 4 ayes _____ nays 3 absent

Effective Date: October 5, 2019

Mayor, Paul Briney

Attest:

City Clerk Cora E. Pritt

EXHIBIT A

Sec. 6.06.700. - Exemptions from the Subdivision and Platting Act (MSPA).

The MSPA provides that certain divisions of land are exempt from local subdivision review and approval, unless the use of the exemption is an attempt to evade the MSPA. The exemptions are found in MCA title 76, chapter 3, part 2. Subdivision regulations, must, at a minimum, establish criteria that the governing body or reviewing authority will use to determine whether a proposed method of disposition, using the exemptions provided in MCA 76-3-201 or 76-3-207, is an attempt to evade comprehensive subdivision review.

1. *General procedures.*

- a. Any person seeking exemption from the requirements of the MSPA shall submit to the administrator a certificate of survey or, where a survey is not required, an instrument of conveyance and evidence of, and an affidavit affirming, entitlement to the claimed exemption. Use of the family transfer exemption (MCA 76-3-207(1)(b)) also requires a separate application (see administrative materials [on file with the city clerk]).
- b. When a certificate of survey, instrument of conveyance and/or family transfer application are submitted, the administrator shall cause the documents to be reviewed by the designated agents of the governing body (e.g., administrator, county sanitarian, city engineer, city manager, city attorney). The agents shall review the proposed use of the exemptions within 30 days of submittal to determine whether it complies with the requirements set forth in this section, the MSPA, and the Montana Sanitation in Subdivisions Act.
- c. If the designated agents find that the proposed use of the exemption complies with the statutes and these criteria, after appropriate review of the survey by the examining land surveyor and when all appropriate signatures are in place, they shall advise the Lake County Clerk and Recorder to file the certificate of survey or record the instrument of conveyance and accompanying documents. If the agents find the proposed use of the exemption does not comply with the statutes and the criteria in this section, the administrator shall advise the clerk and recorder to not file or record the documents and return the documents to the landowner.
- d. Any person whose proposed use of exemption has been denied by the designated agents may appeal the agents' decision to the governing body. The person may request a hearing, and may submit additional evidence to show that the use of the exemption in question is appropriate and not intended to evade the MSPA, and, thereby overcome any presumption of evasion. If the governing body concludes that the evidence and information overcomes the presumption that the exemption is being invoked to evade the MSPA or is otherwise appropriate, they may authorize the use of the exemption in writing. A certificate of survey claiming such an exemption from subdivision review, which otherwise is in proper form, may be filed (or an instrument of conveyance recorded) if it is accompanied by written authorization of the governing body.

If the use of an exemption is denied, the landowner may submit a subdivision application for the proposed land division.

- e. *Advisory examination.* Landowners or their representatives are encouraged to meet with the city's designated agents to discuss whether a proposed land division or use of an exemption is in compliance with these criteria.
- f. The governing body and its agents, when determining whether an exemption is claimed for the purpose of evading the MSPA, 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(s) 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, 50 St. Rpt. 454, 1993)

- g. Identification codes. To assist in the implementation of this review process and to monitor those divisions of land by exemption which are located outside a platted subdivision, the Lake County Clerk and Recorder may cause the following identification codes to be added to the numbering of recorded certificates of survey:

CO	Court Order (MCA 76-3-201(1)(a))
ME	Mortgage Exemption (MCA 76-3-201(1)(b))
MS	Subsurface Ownership Interest (MCA 76-3-201(1)(c))
	Cemetery Lots (MCA 76-3-201(1)(d))
	Life Estate (MCA 76-3-201(1)(e))
	Lease for Agricultural Purpose (MCA 76-3-201(1)(f))
	Other exemptions listed in MCA 76-3-205 and MCA 76-3-209
NJ	Location of no state jurisdiction (MCA 76-3-201(1)(g))
UT	Utility Exemption (MCA 76-3-201(1)(h))
RB	Relocation of Common Boundary (MCA 76-3-207(1)(a) and (e))
FT	Family Transfer (MCA 76-3-207(1)(b))
AE	Agricultural Exemption (MCA 76-3-207(1)(c))
OS	Occasional Sale (used prior to April 6, 1993)
AL	Aggregation of Lots (MCA 76-3-207(1)(f))
RT	Retracement of an existing tract or that provides other material evidence not appearing on any map filed with the county clerk and recorder, reveals a material discrepancy in the map, discloses evidence to suggest alternate location of lines or points, or establishes one or more lines not shown on a recorded map (MCA 76-3-404(1)).

- h. Exempt divisions of land that would result in a pattern of development equivalent to a subdivision may be presumed to be adopted for purposes of evading the MSPA based on the surrounding circumstances in subsection 1.f, above.

- i. All parcels and the use of all parcels created or amended through the use of an exemption shall comply with the zoning and performance standards of the PDC's zoning regulations. This does not allow the City of Polson to require lots resulting from exempt divisions to comply with article 6, division 6, Design and Improvement Standards.

2. *Specific exemptions.*

- a. A gift or sale to a member of the immediate family (MCA 76-3-207(1)(b)).
 - i. Statement of intent. The intention of this exemption is to allow a landowner to convey one parcel to each of member of the immediate family without local subdivision review. A single parcel may be conveyed to each member of the immediate family under this exemption in each county where the landowner owns property.
 - ii. Immediate family means a spouse, children by blood or adoption, and parents of the grantor.
 - iii. Filing of any certificate of survey (or recording of an instrument of conveyance) that would use this exemption to create a parcel for conveyance to a family member must show the name of the grantee, relationship to the landowner, and the parcel to be conveyed under this exemption, and the landowner's certification of compliance.
 - iv. The certificate of survey or instrument of conveyance shall be accompanied by a deed or other conveying document.
 - v. One conveyance of a parcel to each member of the landowner's immediate family is eligible for exemption from subdivision review under this subsection. However, the use of the exemption may not create more than one remaining parcel of less than 160 acres.
 - vi. Any proposed use of family conveyance exemption to divide a tract that was created through use of an exemption will be presumed to be adopted for purposes of evading the MSPA. This presumption is in effect regardless of previous ownership of the tracts and pertains to remaining tracts of less than 160 acres as well as to those tracts that were created through the exemptions.
 - vii. The use of the family conveyance exemption to divide tracts that were created as part of an overall development plan with such characteristics as common roads, utility easements, restrictive covenants, open space or common marketing or promotional plan shall constitute a rebuttable presumption that the use of the exemption is adopted for purposes of evading the Act.
 - viii. Owners of the newly created parcel(s) shall be required to waive their right to sell their parcel(s) for a period of two years from the date of document recordation unless otherwise permitted by the governing body.
- b. Exemption to provide security for a construction mortgage, lien or trust indenture (MCA 76-3-201(1)(b)).
 - i. Statement of intent. Under policies by many lending institutions and federal home loan guaranty programs, a landowner who is buying a tract with financing or through a contract for deed is required to hold title to the specific site on which the residence will be built. The intended purpose of this exemption is to allow a landowner who is buying a tract using financing or contract for deed to segregate a smaller parcel from the tract for security for financing construction of a home on the property. This exemption is not available to simply create a parcel without review by claiming that the parcel will be used for security to finance construction of a home or other structure on the proposed lot. This exemption may not be properly invoked unless (1) the claimant is purchasing a larger tract through financing or a contract for deed (and thus does not hold title) and (2) a lending institution requires the landowner to hold title to a smaller parcel of the tract because the smaller tract is required as security for a building construction loan.

- ii. When this exemption is to be used, the landowner shall submit with the affidavit affirming entitlement to the claimed exemption to the administrator:
 - (A) A statement of how many parcels within the original tract will be created by use of the exemption;
 - (B) The deed, trust indenture or mortgage for the exempt parcel (which states that the tract of land is being created only to secure a construction mortgage, lien or trust indenture);
 - (C) A statement explaining who will have title to and possession of the balance of the original parcel after title to the exempted parcel is conveyed; and
 - (D) A signed statement from a lending institution that the creation of the exempted parcel is necessary to secure a construction loan for buildings or other improvements on the parcel.
- iii. The use of this exemption is presumed to have been adopted for the purpose of evading the Act if:
 - (A) It will create more than one building site;
 - (B) The financing is not for construction on the exempted parcel;
 - (C) The person named in the statement explaining who would have possession of the remainder parcel if title to the exempted parcel is conveyed is anyone other than the borrower of funds for construction.
 - (D) Title to the exempted parcel will not be initially obtained by the lending institution if foreclosure occurs.
 - (E) It appears that the principal reason the parcel is being created is to create a building site and using the parcel to secure a construction loan is a secondary purpose.
- c. Exemption for agricultural purposes (MCA 76-3-207(42)(c)).
 - i. Statement of intent. The intention of this exemption is to allow a landowner to create a parcel without local review where the parcel will be used only for production of ~~livestock or~~ agricultural crops and where no residential, commercial or industrial buildings will be built.
 - ii. Agricultural purpose. For purposes of these evasion criteria, agricultural purpose means the use of land for raising crops ~~or livestock~~, or for the preservation of open space, and specifically excludes residential structures and facilities for commercially processing agricultural products. The parcel must meet Montana Department of Revenue criteria for agricultural land valuation. Agricultural lands are exempt from review by the MDEQ, provided the applicable exemption is properly invoked by the property owner.
 - iii. The following conditions must be met or the use of the exemption will be presumed to have been adopted for the purposes of evading the MSPA
 - (A) The ~~parties to the transaction must~~ landowner enters into a covenant running for the purposes of this chapter with the governing body that runs with the land ~~and revocable only by mutual consent of the governing body and the property owner~~ and provides that the divided land will be used exclusively for agricultural purposes or open space, subject to the provisions of 76-3-207[1]. The covenant must be signed by the property owner, the buyer or lessee and the governing body.
 - (B) The landowner must demonstrate that the planned use of the exempted parcel is for agricultural purposes and that no residential, commercial or industrial buildings will be built (e.g., a statement signed by the buyer).

- (C) Any change in use of the land for anything other than agricultural purposes subjects the parcel to review as a minor subdivision.
 - (D) Residential, commercial and industrial structures, including facilities for commercial processing of agricultural products are excluded uses on parcels created under this exemption unless the covenant is revoked.
- d. Relocation of common boundaries and aggregation of lots (MCA 76-3-207(1)(a), (d),(e), and (f)).
 - i. Statement of intent. The intended purpose of this exemption is to allow a change in the location of one or more boundary line between parcels and to allow transfer of the land without subdivision review.
 - ii. Certificates of survey claiming one of these exemptions must clearly distinguish between the existing boundary location and the new boundary. This shall be accomplished by showing all parcels on the certificate of survey and representing the existing boundary with a dashed line and the new relocated boundary with a solid line. The descriptions and area of relocated parcels shall be shown on the certificate of survey. The appropriate certification must be included on the certificate of survey.
 - iii. If the relocation of common boundaries would result in the permanent creation of an additional parcel of land, the division of land must be reviewed as a subdivision.
- e. Remaining parcels of land.
 - i. Statement of intent. A remaining parcel of land is only that portion of the original tract that is left following the segregation of other parcels from the tract created by the following exemptions from the Montana Subdivision and Platting Act:
 - (A) Divisions are made outside of platted subdivisions for the purpose of a single gift or sale in each county to each member or the landowner's immediate family;
 - (B) Divisions make outside of platted subdivisions by gift, sale or agreement to buy and sell in which the parties to the transaction enter a covenant running with the land and revocable only by mutual consent of the governing body and the property owner that the divided land will be used exclusively for agricultural purposes.
 - ii. To exempt these remaining parcels of land from the requirements of MCA 76-3-401 and 76-4-103, the parcels must be able to be described as a 1/32 or larger aliquot part of a United States Government section.
 - iii. A landowner claiming that a parcel is a remaining parcel must present evidence that the parcel is in fact intended to be retained and is not to be transferred. Examples of such evidence include the existence of the landowner's residence on the parcel and building plans for a structure to be built by or for the landowner. The landowner shall be prohibited from conveying the remaining parcel for a period of two years when a remaining parcel is claimed under this subsection. For the purpose of a remainder parcel created by a subdivision, only those parcels in excess of 160 acres remaining after the subdivision of a single undivided ownership of record would qualify as a remainder.
- f. Condominiums, townhomes, or townhouses.
 - i. Statement of intent. Generally condominiums, townhomes, or townhouses, as those terms are defined in MCA 70-23-102, are subject to review as subdivisions as described in this chapter, but under certain circumstances they may be exempt from review pursuant to MCA 76-3-203.
 - ii. Exemption. Condominiums, townhomes, or townhouses, as those terms are defined in MCA 70-23-102, constructed on land subdivided in compliance with parts 5 and 6 of

the MSPA or on lots within the incorporated city limits of Polson are exempt from subdivision review if:

- (A) The approval of the original subdivision of land expressly contemplated the construction of the condominiums, townhomes or townhouses and any applicable park dedication requirements of MCA 76-3-621 are complied with; or
 - (B) The condominium, townhome, or townhouse proposal is in conformance with applicable local zoning regulations when local zoning regulations are in effect.
- iii. To use the exemption, the declaration of unit ownership must include an exhibit containing certification from the City of Polson that the condominiums are exempt from review under MCA 76-3-203. (See MCA 70-23-301) Only the City of Polson has the authority to determine whether a division of land is exempt from subdivision review. The act of recording a condominium declaration does not establish the declaration's validity simply because the clerk and recorder's office accepted and recorded it.
 - iv. To obtain City of Polson certification that the condominiums, townhomes, or townhouses are exempt from review as a subdivision, the person seeking the use of the exemption shall submit evidence of and an affidavit affirming entitlement to the exemption to the subdivision administrator, who shall cause the documents to be reviewed by the designated agents.
 - v. Within 30 working days of the receipt of the affidavit and evidence, the designated agents shall render a decision certifying or denying the use of the exemption.
 - vi. If the subdivision administrator denies the use of the exemption, the person seeking the use of the exemption may appeal the decision of the subdivision administrator to the governing body under section 6.06.700.1.d.
- g. Exemptions not requiring action by the City of Polson:
- i. A division of land created by lease or rental of contiguous airport-related land owned by a city, a county, the state, or a municipal or regional airport authority is not subject to the subdivision review requirements of this chapter or the MSPA, provided that the lease or rental is for onsite weather or air navigation facilities, the manufacture, maintenance, and storage of aircraft, or air carrier-related activities. (See MCA 76-3-205(1))
 - ii. A division of state-owned land is not subject to the subdivision review requirements of this chapter or the MSPA unless the division creates a second or subsequent parcel from a single tract for sale, rent, or lease for residential purposes after July 1, 1974. (See MCA 76-3-205(2))
 - iii. This chapter and the MSPA do not apply to deeds, contracts, leases, or other conveyances which were executed prior to July 1, 1974.
 - iv. Instruments of transfer of land which is acquired for state highways may refer by parcel and project number to state highway plans which have been recorded in compliance with MCA 60-2-209, and are exempted from the surveying and platting requirements of the MSPA and these regulations. If such parcels are not shown on highway plans of record, instruments of transfer of such parcels shall be accompanied by and refer to appropriate certificates of survey and plats when presented for recording. A survey or plat for the recordation of an instrument transferring title to a remainder that was created when the state obtained property for a highway right-of-way is not required. (44 A.G. Op. 25 (1992)).

Sec. 6.06.250. - Subdivision variances.

The governing body may grant variances from the design and improvement standards of these subdivision regulations when, due to the characteristics of land proposed for subdivision, strict compliance with these standards would result in undue hardship and would not be essential to the public welfare. Additionally, variances may be granted when, the result of the proposed subdivision, there will be a decrease in nonconforming use, and there will be no increase in nonconformity, even though all nonconforming uses will not be eliminated. A variance will not be granted if it would have the effect of nullifying the intent and purpose of these regulations. The governing body will not by variance permit subdivision for building purposes in areas located within the floodway of a flood of 100-year frequency as defined by MCA title 76, chapter 5.

1. *Subdivision variance request.* The subdivider shall include with the submission of the preliminary plat application a written statement (and supporting evidence as necessary) describing and justifying the requested variance in consideration of the criteria listed in subsection 2, below. Except for variance requests for first minor subdivisions, the variance request will be reviewed at a public hearing pursuant to MCA 76-3-506. Approval or denial of the variance will occur as a separate action prior to a motion for approval, approval with conditions or denial of a preliminary plat application. When a variance is recommended for approval or granted, the motion to approve the proposed subdivision must contain a statement describing the variance and the facts and conditions upon which the issuance of the variance is based. A first minor subdivision as provided for in MCA 76-3-609(2), is not subject to the public hearing requirement.
2. *Variance statement of facts.* The governing body will not approve a variance unless it finds:
 - a. The granting of the variance will not be detrimental to the public health, safety, or general welfare or injurious to other adjoining properties;
 - b. Due to the physical surroundings, shape, or topographical conditions of the property involved, strict compliance with the regulations will impose an undue hardship on the owner. Undue hardship does not include personal or financial hardship, or any hardship that is self-imposed;
 - c. The variance will not cause a substantial increase in public costs; ~~and~~
 - d. The variance will not place the subdivision in nonconformance with any adopted zoning regulations or performance standards; ~~and-~~
 - e. When applicable, the subdivision will decrease nonconforming use, and there will be no increase in nonconformity, even though all nonconforming uses will not be eliminated.
3. *Variance conditions.* In granting variances, the governing body may impose reasonable conditions to secure the objectives of these regulations.