

**EVASION CRITERIA
FAMILY TRANSFERS**

Comment:

Local governments can prevent misuse of the exemptions from local subdivision review by adopting criteria that define the proper and improper use of the exemptions. Numerous court cases and Attorney General opinions have provided the legal authority for adopting local evasion criteria. The following resolution is drafted for counties but can be easily tailored to municipalities. Because of 1993 amendments to the Montana Subdivision and Platting Act, Evasion Criteria previously adopted by local governments will need to be amended. The language in italics should be used by jurisdictions that are amending existing Evasion Criteria.

A. PROCEDURES AND GENERAL REQUIREMENTS

1. Any person seeking exemption from the requirements of the Subdivision and Platting Act (76-3-101 *et. seq.*, MCA) shall submit to the County Clerk and Recorder (1) a certificate of survey or, if a survey is not required, an instrument of conveyance, and (2) evidence of, and an affidavit affirming, entitlement to the claimed exemption. Only one type of exemption may be claimed per certificate of survey or instrument of conveyance.
2. When a certificate of survey or instrument of conveyance is submitted to the County Clerk and Recorder, the Clerk and Recorder shall cause the documents to be reviewed by the designated agents of the governing body: (the county planner, sanitarian and clerk and recorder). The agents shall review the proposed land division to determine whether it complies with the requirements set forth in this Resolution, the Montana Subdivision and Platting Act, and the Montana Sanitation in Subdivisions Act.
3. After evaluating the proposed use of the exemption for compliance with the requirements contained in this Resolution, the agents shall submit a written determination whether the use of the exemption is intended to evade the purposes of the Act.
4. If the designated agents find that the proposed use of the exemption complies with the statutes and these criteria, they shall advise the clerk and recorder to file the certificate of survey or record the instrument of conveyance and accompanying documents. If the agents find that the proposed use of the exemption does not comply with the statutes and these criteria, they shall advise the clerk and recorder to not file or record the documents, and the clerk shall return the materials to the landowner.
5. Any person whose proposed use of exemption has been denied by the designated agents because the use of the exemption raised a rebuttable presumption established by these guidelines may appeal the agents' decision to the County Commissioners. The person may request a hearing, and may submit additional evidence to show that the use of the exemption in question is not intended to evade the Act, and, thereby overcome the rebuttable presumption.

If the governing body concludes that the evidence and information overcomes the presumption that the exemption is being invoked to evade the Act, it may authorize the use of the exemption in writing. A certificate of survey claiming an exemption from subdivision review, which otherwise is in proper form, and which the governing body has found not to be an attempt to evade the act, may be filed (or an instrument of conveyance recorded) if it is accompanied by written authorization of the governing body.

EVASION CRITERIA
FAMILY TRANSFERS

If the person proposing to use an exemption does not seek to rebut the rebuttable presumption or if the governing body determines that the proposed use of the exemption was for the purpose of evading the Act, the landowner may submit a subdivision application for the proposed land division.

6. Advisory Examination. Landowners or their representatives are encouraged to meet with the County's designated agents to discuss whether a proposed land division or use of an exemption is in compliance with these criteria.

The agents may issue an advisory opinion only, and the opinion creates no commitment on the local officials when the documents creating the proposed land division are submitted to the Clerk and Recorder.

7. The County Commission and its agents, when determining whether an exemption is claimed for the purpose of evading the Act, 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 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, 257 Mont. 445, 849 P.2d 1045 (1993)).
8. To assist in the implementation of this review process and to monitor those parcels by exemption the Clerk and Recorder shall cause the following identification codes to be added to the numbering of recorded certificates of survey filed after the effective date of this resolution.
- a. CO ... Court order [76-3-201(1)(a), MCA]
 - b. ME ... Mortgage Exemption [76-3-201(1)(b), MCA]
 - c. LE ... Life Estate [76-3-201(1)(e), MCA]
 - d. RB ... Relocation of Common Boundary [76-3-207(1)(a), MCA]
 - e. FC ... Family Conveyance [76-3-207(1)(b), MCA]
 - f. AE ... Agricultural Exemption [76-3-207(1)(c), MCA]
 - g. OS ... Occasional Sale (used prior to April 6, 1993)
 - h. AL ... Aggregation of Lots [76-3-207(e), MCA]
9. Exempt divisions of land that would result in a pattern of development equivalent to a subdivision shall be presumed to be adopted for purposes of evading the Act. A "pattern of development" occurs whenever 3 or more parcels of less than 160 acres with common covenants or facilities have been divided from the original tract.

**EVASION CRITERIA
FAMILY TRANSFERS**

B. EXEMPTION AS A GIFT OR SALE TO A MEMBER OF THE IMMEDIATE FAMILY [76-3-207(1)(b), MCA]

1. Statement of Intent: The intention of this exemption is to allow a landowner to convey one (1) parcel to each member of his or her 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.
2. The term “immediate family” means the spouse, children (by blood or adoption), or parents of the grantor [76-3-103(8), MCA]. This exemption may be used only by grantors who are natural persons and not by non-corporal legal entities such as corporations, partnerships, and trusts.
3. 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 and that the parcel will not be transferred back to the grantor within 24 months of filing without written consent of the governing body. Also, the certificate of survey or instrument of conveyance must be accompanied by a deed or other conveying document.
4. One conveyance of a parcel to each member of the landowner’s immediate family is eligible for exemption from subdivision review under this Resolution. However, the use of the exemption may not create more than one remaining parcel of less than 160 acres.
5. Any proposed use of the family conveyance exemption used in conjunction with a five lot minor subdivision will imply association with the minor subdivision and cause the exempted parcels to be included in the number of subdivision lots for the purposes of subdivision review. The family conveyance(s) will not necessarily be considered an evasion and will be exempt from local subdivision review, however the effects of the entire development will be reviewed as cumulative.
6. 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 raises a rebuttable presumption that the use of the exemption is adopted for purposes of evading the Act.