

John W. Larson, District Judge
Fourth Judicial District, Dept. 3
Missoula County Courthouse
200 West Broadway
Missoula, MT 59802
(406) 258-4773

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

DISTRICT XI HUMAN RESOURCE
COUNCIL, INC., a Montana non-
profit corporation,

Plaintiff,

vs.

HILLVIEW CROSSING –
MISSOULA, LLC, a Montana
limited liability company, the CITY
OF MISSOULA, a Montana
municipality, MIKE HAYNES,
Director of the City of Missoula
Development Services Department,
and JOHN DOES 1-20,
Defendants.

Dept. 3
Cause No. DV-16-167

**ORDER GRANTING DEFENDANT HILLVIEW'S MOTION FOR PARTIAL
SUMMARY JUDGMENT, GRANTING DEFENDANT CITY AND MIKE
HAYNES MOTION FOR PARTIAL SUMMARY JUDGMENT ON
REMAINING CLAIMS; DENYING PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT; AND DENYING PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE M.C.A. § 76-3-203**

Before the Court are the following summary judgment motions: 1)

Defendant Hillview Crossing-Missoula, LLC's Motion for Partial Summary
Judgment; 2) Defendants' City of Missoula's and Mike Haynes' Motion for
Partial Summary Judgment on Plaintiff's Remaining Claims; 3) Defendant

1 Mike Haynes' Motion for Summary Judgment Based on Mont. Code Ann. §
2 2-9-305(5); 4) Plaintiff's Motion for Partial Summary Judgment, 5) Plaintiff's
3 Motion for Partial Summary Judgment regarding Constitutionality of Mont.
4 Code Ann. § 76-3-203; and 6) Motion for Summary Judgment Re Hillview
5 Crossing-Missoula, LLC's Counterclaim-Count I and Alternative Motion *in*
6 *Limine*.
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8 On September 21, 2016, the parties stipulated to agree to limit the
9 scope of September 26, 2016, oral argument to Defendant Hillview-
10 Crossing, LLC's Motion for Partial Summary Judgment, Defendant City and
11 Mike Haynes' Motion for Partial Summary Judgment on Plaintiff's Remaining
12 Claims, Plaintiff's Motion for Partial Summary Judgment, and Plaintiff's
13 Motion for Partial Summary Judgment regarding Mont. Code Ann. § 76-3-
14 203. Plaintiff's Motion for Declaratory Judgment and Defendants' City of
15 Missoula's, Hillview Crossing-Missoula's and Mike Haynes' Cross-Motion for
16 Declaratory Judgment were previously submitted. The parties are presently
17 scheduled to conduct a settlement conference on February 23, 2017.
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22 **Background**

23 The Court finds the facts alleged in the Complaint as the following. In
24 1995, James M. Rowan gifted a four-acre landlocked parcel to the Plaintiff
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1 District XI Human Resource Council, Inc. (the "HRC"). Adjacent to the east of
2 the HRC parcel is a 25-acre parcel presently owned by Defendant Hillview-
3 Crossing, LLC ("Hillview").

4 In 2006, the Johnson Brothers, prior owners of Hillview's 25-acre parcel,
5 initiated the procedure for subdividing its 25-acre parcel adjacent to the HRC's
6 land-locked parcel pursuant to Mont. Code Ann. § 76-3-601 *et seq.* On May
7 22, 2006, the prior owners of the Hillview parcel received from the Missoula
8 City Council a preliminary plat approval for a 46-lot residential subdivision. On
9 May 19, 2008, the City Council approved a one year extension and plat
10 adjustment. On May 11, 2009, the City Council approved a Phasing Plan for
11 the subdivision. The preliminary plat was never recorded and depicted an
12 access labeled "Southern Way" to Plaintiff's land-locked parcel. On November
13 24, 2014, the City Council approved amending the Phasing Plan, allowing the
14 developer until December 22, 2016, to complete the first phase of the
15 development. HRC's Complaint alleges that in reliance upon the preliminary
16 plat, Plaintiff negotiated a Buy-Sell agreement with a willing buyer. Complaint,
17 ¶ 13.

18 On December 31, 2014, Hillview purchased the twenty-five (25) acre
19 parcel adjoining Plaintiff's land-locked parcel. In August 2015, Hillview
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1 submitted an application to the City to develop the property as a townhouse
2 development utilizing the Townhouse Exemption set forth in Mont. Code Ann.
3 § 76-3-203 (the "Townhouse Exemption") of the Montana Subdivision and
4 Platting Act ("MSPA"). Unlike provisions in the MSPA, the Townhouse
5 Exemption does not require public hearings. Mont. Code Ann. § 76-3-203.
6 Hillview's site plan did not include access to Plaintiff's land-locked parcel.
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8 On October 15, 2015, the City approved Hillview's townhouse proposal
9 and issued a Zoning Compliance Permit, authorizing the development of sixty-
10 eight (68) townhouse units. On February 25, 2016, HRC filed a Complaint
11 against Hillview asserting the following claims: Count (1) Action for
12 Declaratory Judgment, Count (2) Action for Injunction, Count (7) Clouded Title
13 and Implied Covenant, and Count (8) Illegal Transfer. HRC also asserted the
14 following claims against City of Missoula, and Mike Haynes, as director of the
15 City's Development Services Department (collectively "City"): Count (1) Action
16 for Declaratory Judgment, Count (3) Action for Writ of Prohibition, Count (4)
17 Tortious Violation of Statutory Duties, Count (5) 42 U.S.C. Violation of the
18 Equal Protection Clause, and Count (6) Promissory Estoppel/Detrimental
19 Reliance.
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24 On March 17, 2016, Hillview filed an Answer and Counterclaim,
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1 asserting Tortious Interference with Business Relations and Prospective
2 Economic Advantage, Abuse of Process, and Declaratory Judgment. On April
3 27, 2016, the Court held a hearing on Plaintiff's Application for Temporary
4 Restraining Order and Preliminary Injunction, Motion for Writ of Prohibition, or
5 Alternative Relief. On May 3, 2016, the Court denied HRC's Application for
6 Temporary Restraining Order and Preliminary Injunction, Motion for Writ of
7 Prohibition, and deemed HRC's Motion for Declaratory Judgment submitted.
8 Before the Court are the parties competing summary judgment motions, as
9 well as the motions for declaratory judgment previously heard by the Court on
10 April 27, 2016.
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13 **Standard**

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15 Summary judgment is appropriate if the pleadings, the discovery and
16 disclosure materials on file, and any affidavits show that there is no genuine
17 issue as to any material fact and that the movant is entitled to judgment as a
18 matter of law. Rule 56(c)(3), M.R.Civ.P. Conclusory or speculative
19 statements are insufficient basis to raise a genuine issue of material fact.
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21 *Barich v. Ottenstror*, 170 Mont. 38, 42, 550 P.2d 395, 397 (1976).
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23 **Discussion**

24 **I. Hillview's Motion for Partial Summary Judgment (#80)**

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A. Count I – Request for Declaratory Judgment

Hillview argues that HRC's action for declaratory judgment must fail because HRC does not have either an express easement or easement-by-reference across Hillview's property. Hillview argues that there is no dispute that HRC's claim to access is based solely on the unrecorded preliminary plat. HRC responds that an unrecorded preliminary plat is not material to judgment in this case. HRC asserts that while the preliminary plat was not recorded, it was incorporated by reference in the Trustee Deed issued August 8, 2013, which described the property commonly known as Southern Hills Subdivision. See Exh. C to Hillview Motion Partial Summ. Judgmt. HRC argues that the City violated the Missoula Subdivision Regulations in issuing a Zoning Compliance Permit and a Townhouse Certification Letter to Hillview, arguing that "...the City's treatment of townhouse exempt developments is unequal compared to other exempt developments." HRC Response Motion Partial Summary Judgment, p. 3.

HRC's action for declaratory judgment alleges that HRC "possesses an access right pursuant to the preliminary plat and Hillview denies access will be granted under the townhouse exemption." HRC's Complaint, ¶ 25. The June 17, 2016, deposition of Jim Morton provides that HRC does not

1 have a recorded access easement for its property. Morton Depo., 191:17-
2 25, 192:1. HRC also admitted in discovery that the preliminary plat was
3 never filed with the County Clerk and Recorder. Exh. C to Hillview Motion.
4 The Court finds that Hillview abandoned any 2006 preliminary plat that was
5 initiated by the prior owners. The Court finds that there is no genuine issue
6 of material fact that HRC does not have a recorded access right. Therefore,
7 HRC's request for declaratory judgment as to an access right pursuant to a
8 preliminary, unrecorded plat is denied.
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11 HRC also asserts that a question of construction or validity arises in
12 Mont. Code Ann. § 76-3-203 and Mont. Code Ann. § 70-23-101 *et. seq*
13 regarding whether the statutes are facially unconstitutional, unconstitutional
14 as applied to the Plaintiffs, or ambiguous. Complaint, ¶ 26. HRC has no
15 basis for asserting its constitutional claims without a "protected property
16 interest." See *Kiely Const., L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 47,
17 312 Mont. 52, 57 P.3d 836. This Court has determined Article 4, which
18 contains a much more specific statutory scheme dealing exclusively with the
19 review procedures for condominium and townhouse proposals, applies to
20 this case. During summary judgment hearing, both Hillview and the City
21 argued that it is not logical to attempt to harmonize two different procedures
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1 in Article 4 and Article 8 of the Missoula City Subdivision Regulations, and
2 there is no prohibition against a land use owner abandoning a preliminary
3 plat. The Court notes that regulations that control subdivision application
4 pursuant to Mont. Code Ann. § 76-3-504 are separate and distinct from
5 townhome development pursuant to Mont. Code Ann. § 76-3-203. As there
6 are no facts genuinely at issue, Hillview is entitled to summary judgment on
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8 Count I.

9 IT IS HEREBY ORDERED that Hillview's motion as to declaratory
10 judgment is GRANTED.
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12 **B. Count VI – Promissory Estoppel**

13 As to HRC's claim of promissory estoppel/detrimental reliance, Hillview
14 argues it is entitled to summary judgment because HRC judicially admitted it
15 cannot maintain a promissory estoppel claim against Hillview. HRC
16 concedes that "HRC does not allege any promise was made by Hillview."
17 See Pltff. Response to Hillview Motion Part. Summ. Judgmt. at 4:8-9.
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19 Instead, HRC requests the Court rescind the Zoning Compliance Permit
20 issued to Hillview based on its detrimental reliance.
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1 IT IS FURTHER ORDERED that Hillview's motion regarding
2 promissory estoppel is GRANTED because it is pled solely against the City,
3 not Hillview.

4 **C. Count VII – Clouded Title**

5 As to HRC's claim regarding clouded title and the implied covenant,
6 Hillview argues that it is entitled to summary judgment because in Montana,
7 no implied covenant is created unless a complying final plat is recorded.
8 *See Majers v. Shining Mountains*, 219 Mont. 366, 370, 711 P.2d 1375
9 (1986). HRC's response brief did not address this claim of its Complaint,
10 which this Court interprets as a motion well taken.
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12 HRC's Count VII alleges that the title identifying the property at issue
13 in this matter, known as Southern Hills Subdivision, included a preliminary
14 plat granting access to HRC's property via "Southern Hills Way." Complaint,
15 ¶ 66. HRC argues that "[w]hen the property was sold by Trustee's Deed on
16 August 8, 2013, with a reference to a plat designating a street, an implied
17 covenant arose requiring the designated street to be used on the manner
18 designated." Complaint, ¶ 67.
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1 IT IS FURTHER ORDERED that Hillview's motion as to the HRC's
2 claim of clouded title and implied covenant is GRANTED, as HRC has failed
3 to specifically oppose this motion. Mont. R. Civ. P. 56(e)(2).

4 **D. Count VIII – Illegal Transfer**

5 As to HRC's Count VIII, Illegal Transfer, Hillview seeks summary
6 judgment, as there is no evidence that the bank or Hillview sold or attempted
7 to sell any of the individual lots depicted on the face of the unrecorded
8 preliminary plat for the subdivision proposed by the prior owners. Hillview
9 contends that Mont. Code Ann. § 76-3-301 is not implicated in this case
10 because the purpose of the statute is to prevent sellers from attempting to
11 subdivide a larger parcel into smaller lots by language in a deed instead of
12 by compliance with the MSPA. Hillview argues that HRC admits that the
13 warranty deed from the bank to Hillview transferred title to the whole twenty-
14 five-acre parcel.
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19 HRC responds that there is a genuine issue as to whether the land
20 transferred from the bank to Hillview was subdivided land. HRC responds
21 that the illegal transfer claim against Hillview should continue, as there are
22 material issues of fact as to whether Hillview needed to meet "five
23 conditions" to legally take title to the property pursuant to Mont. Code Ann. §
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1 76-3-303. Specifically, HRC argues that the bank did not record a final plat
2 for the Southern Hills Subdivision and did not meet the conditions to transfer
3 the land once the preliminary plat was conditionally approved.

4 HRC's Complaint alleges that the transfer of property by the bank to
5 Hillview violated Mont. Code Ann. § 76-3-301 because the parcel had
6 previously been subdivided, but no final plat for Southern Hills was recorded.
7 Complaint, ¶ 69, ¶ 70. Mont. Code Ann. § 76-3-303, provides that the
8 conditions relied upon by HRC apply where "the subdivider" attempts to
9 "enter into contracts to sell lots in the proposed subdivision." Here, there is
10 no evidence in the record that First Interstate Bank or Hillview sold or
11 attempted to sell any of the individual lots depicted on the face of the
12 unrecorded preliminary plat for the subdivision proposed by the prior
13 owners. HRC admits that the Warranty Deed from the bank to Hillview
14 transferred title to the whole 25-acre parcel. See Morton Depo., 236:21-25,
15 237:1-19. This Court has determined that the Hillview's motion as to HRC's
16 claim of illegal transfer is granted because there is no genuine dispute as to
17 a material fact.
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23 IT IS HEREBY ORDERED that Hillview's motion as to HRC's claim of
24 illegal transfer is GRANTED.
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1 **II. City's Motion for Partial Summary Judgment (ROA #88) on**
2 **Remaining Claims**

3 **A. Count I – Declaratory Judgment**

4 The City argues that HRC does not have a property right in the City's
5 approval of the preliminary plat. The City argues that HRC cannot rely on a
6 promise between the City and the prior owners of the adjoining twenty-five-
7 acre parcel regarding the conditional approval of a preliminary plat because
8 the HRC was not a party to that promise. Therefore, HRC has no basis as
9 an adjoining landowner to claim damages because Hillview chose to
10 abandon the preliminary plat. The City further argues that bald assertions of
11 equal protection are properly disposed of through summary judgment. See
12 *Roe v. City of Missoula, ex rel. Missoula City Council*, 354 Mont. 1, ¶ 38, 221
13 P.3d 1200. HRC responds that the City's failure to perform a subdivision
14 evasion review violated HRC's due process and equal protection rights
15 because the City treated HRC differently as a neighboring landowner to a
16 subdivision than it treated HRC as a neighboring landowner to a townhouse
17 development. HRC argues that the constitutional issues raised are not
18 dependent or related to an access right.
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24 IT IS FURTHER ORDERED that the City's motion as to declaratory
25 judgment is GRANTED, as there was no final plat recorded showing access
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1 to HRC's parcel. Therefore, no protected property interest nor access right
2 resulted from the preliminary plat.

3 **B. Count IV - Tortious Violation of Statutory Duties**

4 The City argues that as to HRC's claim of tortious violation of statutory
5 duties, there is no special relationship between the City and the HRC
6 because the notice requirements for approval of a preliminary plat do not
7 apply to Hillview's townhouse application. The City contends that the
8 submission of Jim Morton's Affidavit dated August 18, 2016, should be
9 stricken because it contains hearsay of alleged conversations with unknown
10 city council members in 2006, and contradicts Mr. Morton's prior discovery
11 responses offered on behalf of the HRC. The City argues that even if the
12 Court relies on the August 18, 2016, Morton Affidavit, HRC cannot show that
13 it justifiably relied on any alleged representations regarding the approval of a
14 subdivision application, as opposed to Hillview's townhouse application.
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19 HRC responds that while Montana has not recognized a cause of
20 action for tortious violations of a statutory duty, it also has not rejected the
21 claim as unactionable. *Roe v. City of Missoula*, 2009 MT 417, ¶ 35, 354
22 Mont. 1, 221 P.3d 1200. HRC asserts that a genuine issue of material fact
23 exists whether a special relationship arises between the City and HRC
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1 because the Missoula Subdivision Regulations are intended to protect a
2 specific class of persons of which HRC is a member. HRC argues that there
3 is an issue of material fact under either the first or the third exception to the
4 public duty doctrine. HRC argues that a special relationship arose between
5 the HRC and the City sometime in early 2006 when the City contacted HRC
6 about the proposal to create the Southern Hills Subdivision. HRC asserts
7 that it relied on the City ward representatives' assurances that major
8 changes to the development of HRC's neighboring property required further
9 public input, including input from HRC.
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12 A special relationship may be established by the following: 1) a
13 statute intended to protect a specific class of persons of which the plaintiff is
14 a member; 2) a government agent undertakes a specific action to protect a
15 person or property; 3) the plaintiff was reasonably induced to rely on
16 government action; or 4) a third person in custody of the government caused
17 harm to the plaintiff. *Prosser v. Kennedy Enterprs.*, 2008 MT 87, ¶ 19, 342
18 Mont. 209,179 P.3d 1178. In order to establish a special relationship under
19 the third exception to the public doctrine duty, a plaintiff must demonstrate 1)
20 direct contact between the public official and the plaintiff; 2) that the official
21 has provided express assurances in response to the plaintiff's specific
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1 inquiry; and 3) that the plaintiff justifiably relied on the representations of the
2 official. *Prosser* at ¶ 36.

3 Here, the August 18, 2016, Affidavit of Morton provides that Mr.
4 Morton spoke with one or more ward representatives, and based on the
5 conversations he understood that HRC would continue to be appraised of
6 major changes to the development adjoining HRC's property. ¶ 7. The
7 Affidavit of Morton also provides that "[b]ased upon my understanding from
8 the ward representative(s), I believed the changes proposed by Hillview
9 required a continuing public process, both in front of the Planning Board and
10 the City Council." ¶ 9.

11 The Court finds there no genuine issue as to whether a special
12 relationship existed between HRC and the City, separate and apart from the
13 public at-large. There is no special relationship between the City and the
14 HRC because the notice requirements for approval of a preliminary plat do
15 not apply to Hillview Crossing's Townhouse Application under Mont. Code
16 Ann. § 76-3-203. The Court does not find that the August 18, 2016, Morton
17 Affidavit, which contradicts prior discovery responses, creates a genuine
18 issue of material fact. HRC also has not adequately demonstrated direct
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1 contact between a public official and HRC, express assurances, and that
2 HRC justifiably relied on the representations. *Prosser* at ¶ 36.

3 IT IS FURTHER ORDERED that the City's motion as to HRC's claim
4 of tortious violation of statutory duties is GRANTED.

5 **C. Count V - Equal Protection**

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7 The City argue that it is entitled to summary judgment on HRC's claim
8 of 42 U.S.C. Violation of the Equal Protection Clause of Amendment XIV,
9 because HRC has acknowledged that it is not challenging the
10 constitutionality of the City's zoning ordinance, which authorizes the
11 issuance of a Zoning Compliance Permit. *Town & Country Foods v. City of*
12 *Bozeman*, 2009 MT 72, 349 Mont. 453, 203 P.3d 1283. The City argues
13 that challenging a municipality's land use decision does not support a claim
14 of substantive due process or equal protection. HRC responds its due
15 process and equal protection rights were violated by the City when it failed
16 to provide notice to HRC and failed to allow HRC to participate in the
17 decisions made about the adjacent property while the subdivision review
18 process remained in force.
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23 Here, HRC has alleged due process and equal protection violations
24 based upon the City's alleged failure to protect HRC's right to know and right
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1 to participate. The City is entitled to summary judgment on HRC's equal
2 protection claim because there were two separate land use procedures, and
3 the Court finds that the City did not violate any notice requirements for
4 Hillview's 2015, townhouse exemption application.

5 IT IS FURTHER ORDERED that the City's motion as to HRC's equal
6 protection claim is GRANTED.
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8 **D. Count VI-Promissory Estoppel/Detrimental Reliance**

9 HRC argues that the original Southern Hills Subdivision preliminary
10 plat was conditionally approved on May 22, 2006, and the City granted
11 Hillview's demand that the subdivision review be extended until December
12 22, 2016. See Exh. A and Exh. H to Pltff. Response to City's Motion Part.
13 Summ. Judgmt. on Remaining Claims. HRC argues it was injured by its'
14 reliance on the City's promise to leave the preliminary plat "in force" until
15 December 22, 2016. HRC alleges that the City made promises to regulate
16 subdivisions in accordance with municipal ordinances and state law; HRC
17 reasonably relied upon the City's promise to enforce municipal ordinances;
18 and HRC was injured as a result of its reliance. HRC argues that the
19 preliminary plat and subdivision review was extended several times after
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1 May 2006, including an extension granted as a condition of Hillview's buy-
2 sell agreement with the bank

3 HRC's Count VI alleges that the City owes the public a duty to regulate
4 subdivision in accordance with municipal ordinances consistent with state
5 law. Complaint, ¶ 57. Next, HRC argues that the City unequivocally
6 promised the Southern Hills Subdivision, including its filed preliminary plat,
7 would be effective until Dec. 22, 2016. Complaint, ¶ 58. HRC claims that it
8 would be unconscionable to allow the City to allow Hillview to construct 68
9 units on the adjacent property without provided access to HRC. Complaint,
10 ¶ 61.
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13 The elements of promissory estoppel are the following: 1) a promise
14 clear and unambiguous in its terms; 2) reliance on the promise by the party
15 to whom the promise is made; 3) reasonableness and foreseeability of the
16 reliance; and 4) the party asserting the reliance must be injured by the
17 reliance. *Keil v. Glacier Park*, 188 Mont. 455, 462, 614 P.2d 502, 506
18 (1980). Upon hearing argument at the summary judgment hearing, the
19 Court has determined that Hillview, as the current property owner, is entitled
20 to develop the parcel how it prefers without obligation to the previous
21 developer's promises. There is no evidence of a promise to HRC under the
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1 current development procedure, therefore, HRC has not made an adequate
2 showing to establish a claim of promissory estoppel against the City.

3 IT IS FURTHER ORDERED that the City's motion regarding HRC's
4 claim of promissory estoppel is GRANTED.

5 **E. VIII-Illegal Transfer**
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7 HRC argues that whether a private right of action exists under the
8 MSPA is a matter of first impression. HRC asserts that because neither the
9 City nor the county attorney has developed regulations implementing the
10 authority granted under § 76-3-301, interpreting the statute in favor of a
11 private right of action is appropriate. *Mark Ibsen, Inc. v. Caring for*
12 *Montanans, Inc.* 2016 MT 111, ¶ 49, 383 Mont. 346, 371 P.3d 446. HRC
13 argues that it is undisputed the preliminary plat depicted lots segregated
14 from the original tract, and a genuine issue exists as to whether Hillview was
15 a "subdivider" as defined in Mont. Code Ann. § 76-3-104 because it
16 proposed a subdivision of land. HRC argues that Mont. Code Ann. § 76-3-
17 303 authorizes the sale of land "after a preliminary plat of a subdivision has
18 been approved or conditionally approved" the developer may only sell lots
19 provided conditions are met. HRC asserts that because the bank did not
20 record a final plat for the Southern Hills Subdivision and did not meet the
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1 conditions to transfer the land once the preliminary plat was conditionally
2 approved, the sale was illegal.

3 IT IS FURTHER ORDERED that HRC's claim as to private right of
4 illegal transfer is dismissed as to the City, as HRC admits that this claim
5 "does not" apply to the City. HRC's Response Brief, p. 14.
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7 **III. Plaintiff's Motion for Partial Summary Judgment (#99)**

8 HRC argues that it is entitled to partial summary judgment that the City
9 violated its own regulations and procedures when it issued a Townhouse
10 Exemption to Hillview to circumvent subdivision review. Hillview responds
11 that HRC's motion is nearly identical to HRC's Motion for Partial Summary
12 Judgment regarding Constitutionality of § 76-3-203, M.C.A., as applied to
13 HRC. HRC argues that the City violated the Missoula Subdivision
14 Regulations in issuing a Zoning Compliance Permit and a Townhouse
15 Certification Letter to Hillview. Hillview argues that the procedures that HRC
16 accuses the City of failing to follow are contained in Article 8 in the City's
17 Regulations; however, Article 8 does not apply to townhouse exempt
18 proposals such as Hillview. Hillview argues that the application of Article 4
19 is fatal to HRC's argument that the City violated its own procedures in Article
20 8. The City concurs with Hillview's arguments that Article 4 of the City's
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1 Subdivision Regulations sets forth a specific review procedure for
2 townhouse proposals, and Article 8 is a general statutory provision that does
3 not reference a townhouse proposal.

4 Article 4, entitled "Review and Approval Procedures," contains a
5 specific section, § 4-040, that sets forth the "Review Procedure for
6 Condominiums or Townhouse Proposals." Subsection 4-040.3 mirrors the
7 language of the Townhouse Exemption set forth at Mont. Code Ann. § 76-3-
8 203 of the MSPA. That statute exempts condominiums, townhomes and
9 townhouses from the MSPA if they are constructed "on lots within
10 incorporated cities and towns" and if the proposal is in conformance with
11 applicable local zoning regulations..." Mont. Code Ann. § 76-3-203. The
12 Court notes that the exemption for townhouses set forth in Mont. Code Ann.
13 § 76-3-203 is not referenced anywhere in Article 8. Here, the Court has
14 determined that the more specific provisions of Article 4, not Article 8 apply
15 to the matters at issue. Article 8 is a more general statute, and specific
16 statutory construction governs over more general statutory construction.
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22 The Townhouse Exemption to the MSPA found at Mont. Code Ann. §
23 76-3-203 does not require an evasion analysis. Article 4 of the Missoula
24 City Subdivision Regulations does not require an evasion analysis to a
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1 townhouse proposal which is consistent with the statutory scheme of the
2 MSPA. Hillview pursued a lawful alternative to subdivision review that was
3 made available by the Montana Legislature, and it was entitled to develop
4 the parcel pursuant to the Townhouse Exemption provision. As a matter of
5 law, the Court finds that Article 4's procedure for review of a townhouse
6 proposal is consistent with the MSPA. HRC's recourse, if any, is to seek
7 legislative remedy.
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9 IT IS FURTHER ORDERED that the Plaintiff's Motion for Partial
10 Summary Judgment is DENIED.
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12 **IV. Plaintiff's Motion for Partial Summary Judgment re:**
13 **Constitutionality of M.C.A. § 76-3-203 (#100)**

14 HRC argues that the City's unequal application of Mont. Code Ann. §
15 76-3-203 is discriminatory because the City treats townhouse exemptions
16 differently than all other exemptions without a compelling state interest.
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18 HRC argues that the Montana Supreme Court has imposed a duty to
19 conduct an evasion review upon local governments. *Dreher v. Fuller*, 257
20 Mont. 445, 451, 849 P.2d 1045, 1048 (1993)
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22 Hillview responds that HRC choose to brief this issue in its prior Motion
23 for Declaratory Judgment when no discovery had been conducted, and the
24 motion should be stricken because HRC already had an opportunity to be
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1 heard on the constitutional issue. Hillview argues that HRC's argument is
2 based on the erroneous conclusion that Article 8 in the City's Subdivision
3 Regulations applies to the review procedures for townhouses. Hillview
4 argues that Section 4-040 does not require the City to conduct any evasion
5 analysis nor does it require the filing of an exemption affidavit prior to the
6 issuance of the ZCP or the Townhouse Certification Letter. Hillview also
7 argues that *Dreher* case cited by Hillview is misplaced as the case pre-dates
8 relevant amendments to Mont. Code Ann. § 76-3-203, by eighteen years
9 and does not involve a townhouse proposal.
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12 The City contends that Plaintiff does not have standing to challenge
13 the constitutionality of the Townhouse Exemption because it does not have
14 either a property right or a civil right in an access depicted on an unrecorded
15 preliminary plat for an adjoining property. The City argues that Plaintiff has
16 not alleged any facts to contradict the City's testimony that Hillview's
17 townhouse proposal complies with the requirements of the Townhouse
18 Exemption and Section 4-040.3.
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21 The Court notes that HRC's motion regarding the constitutionality of
22 Mont. Code Ann. § 76-3-203 is identical to its March 1, 2016, Motion for
23 Declaratory Judgment. ROA # 8. As previously discussed, Mont. Code
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1 Ann. § 76-3-203 provides for exemptions for certain condominiums,
2 townhomes, or townhouses on lots within incorporated cities and towns.
3 The Court finds that the Legislature specifically amended Mont. Code Ann. §
4 76-3-203 to allow for exemptions for subdivision review for certain
5 townhomes, such as Hillview's proposal. The Court notes that there is no
6 reference in the Missoula City Subdivision Regulations Article 4, Section 4-
7 040, to Article 8. There is no express inconsistency between Article 4 and
8 Article 8, and both procedures could have occurred independent of one
9 another. Accordingly, the Court finds no validity to HRC's arguments
10 regarding the constitutionality of Mont. Code Ann. § 76-3-203.
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13 IT IS FURTHER ORDERED that the Plaintiff's Motion for Summary
14 Judgment Regarding Constitutionality of Mont. Code Ann. § 76-3-203 is
15 DENIED.
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17 DATED this 30 day of January, 2017.

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21 JOHN W. LARSON, District Judge
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Copies of the foregoing were sent to:

1 Linda Osorio St. Peter, Esq. - linda@stplawoffices.com

2 Michael O'Brien, Esq. - mike@stplawoffices.com

3 St. Peter Law Offices

4 P. O. Box 17255

5 Missoula, MT 59808

Attorneys for Plaintiff District XI Human Resource Council, Inc.

6 John F. "Jack" Jenks, Esq. - jjenks@cappjenkslaw.com

7 J. Wayne Capp, Esq. - wcapp@cappjenkslaw.com

8 Capp & Jenks, P.C.

9 105 S.W. Higgins, Suite 1

10 Missoula, MT 59801

Attorneys for Defendant City of Missoula and Mike Haynes

11 William K. VanCannagan, Esq. - bvancanagan@dmlaw.com

12 J. R. Casillas, Esq. - jrcasillas@dmlaw.com

13 Datsopoulos, MacDonald & Lind

14 201 West Main, Suite 201

15 Missoula, MT 59802

Attorneys for Defendant Hillview Crossing-Missoula, LLC