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2018

MONTANA

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Contributed by Crowley Fleck PLLP **Authors:** Kevin Heaney, Matthew McLean, Michael Tennant, Alissa Chambers

Law and Practice

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Crowley Fleck PLLP is a regional firm serving clients throughout the Northern Rockies region of Montana, North Dakota and Wyoming that traces its beginning to 1895 and has over 150 attorneys throughout its offices in Billings, Bozeman, Helena, Butte and Kalispell, Montana; Williston and Bismarck, North Dakota; and Casper, Cheyenne and Sheridan, Wyoming. The firm historically represented business owners, farmers and ranchers, lending institutions, hospitals and physician groups, energy pioneers, power generators and mining interests. It continues to serve those same clients today, joined by national and international businesses representing virtually every industry with interests in the region. Its attorneys' extensive knowledge covers the intricacies involved in commercial leasing and sales; farm and ranch acquisitions and sales; water rights; conservation easements; real estate lending; planned unit development documents; zoning regulation and permitting; the tax effects of real estate transactions; and all work involved in the acquisition, disposition, development, leasing and access rights associated with commercial, energy, industrial, agricultural and major residential and recreational properties.

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1. General

1.1 Main Substantive Skills

The juxtaposition between Montana's small population and large geography requires real estate attorneys to possess a diverse skill set. The small population generates a wide breadth of real estate matters, but can present challenges for the practitioner wanting to focus on a narrow subspecialty. It is necessary to have substantive skills with the breadth and depth to handle sales and acquisitions, leasing, development, finance and entity formation. The large geography creates a diverse economy and requires that real estate attorneys have experience with commercial, industrial, agricultural, recreational and natural resources enterprises.

1.2 Most Significant Trends

Significant recent trends in Montana's real estate market include:

- high residential real estate demand in urban areas;
- oil development and production recovering, and coal production continuing to decrease;
- access to and management of public lands;
- strong demand for recreational and vacation property; and
- multi-use developments in urban cores.

There have been recent significant transactions in these areas.

1.3 Impact of the New US Tax Law Changes
Commentators anticipate tax reform will lead to an increase in real estate activity, but it is difficult to predict how that will unfold. It appears unlikely any state or local reform will occur that helps or hinders real estate activity. Two relevant ongoing state-level legislative discussions are: 1) whether to give local governments the ability to implement a local option tax that would generate revenue for project and infrastructure development; and 2) reforming tax increment finance districts.

2. Sale and Purchase

2.1 Ownership Structures
Real estate ownership structures vary between the type (ie, an individual or an entity) and number (ie, sole or multiple ownership) of owners. Individuals typically own residential real estate and entities typically own commercial real estate. Those entities are most often limited liability companies, but regularly range between corporations, partnerships and trusts. An owner typically holds real estate in sole ownership, but other types of ownership include joint tenancy, tenancy in partnership and tenancy in common.

2.2 Important Jurisdictional Requirements
Subject to limited exceptions, transfers of real property in Montana must be in writing and the customary transfer instrument is a deed. There is a short form of statutory grant nobody uses (essentially creating what is commonly called a "grant deed" or "limited warranty deed"), but there are no statutory or standard deed forms. Montana has a race-notice recording act and the parties record documents with the county clerk of the county where the real property is situated. Montana's Realty Transfer Act requires that parties transferring real property complete the Montana Department of Revenue's confidential Realty Transfer Certificate and file it with the county clerk and recorder when recording a deed. Because a purpose of the Realty Transfer Certificate is to obtain sales price data to determine real estate assessment levels and uniformity, the parties must disclose the consideration paid for the real estate on the Realty Transfer Certificate unless an exception applies. Another component of the Realty Transfer Certificate incorporates the required water rights disclosure, but to update the ownership of those water rights the transferee must submit a Water Right Ownership Update form to the Department of Natural Resources and Conservation and pay the update fee.

To transfer title, Montana law does not distinguish between specific types of real estate (ie, residential, industrial, office, retail, hotels), so there are no special laws or regulations applicable to a transfer in that regard. Easements and water rights pass with the transfer, but mineral rights reserved in the transfer or an earlier transfer do not.

2.3 Effecting Lawful and Proper Transfer of Title
Subject to limited exceptions, transfers of real property must:

- be in writing;
- identify the transferor and the transferee and state the transferee's address;
- contain an adequate property description;
- contain language of conveyance; and
- be signed by the transferor.

The customary instrument of transfer is a deed, which is valid between the transferor and transferee upon delivery, but does not protect the transferee against third parties unless someone records it with the county clerk of the county where the real property is situated. Montana uses a race-notice recording act for real estate transfers.

2.4 Real Estate Due Diligence
The type and level of due diligence varies widely, partly because it is common to encounter unrepresented parties or parties represented by an attorney with limited real estate experience. It is common for parties to complete residential transactions without an attorney. Due diligence typically involves a property inspection, an appraisal and reviewing title, leases and other business records. An attorney will typically review the title insurance commitment, leases, permits and other agreements relevant to an acquisition. A buyer typically conducts the property inspection, reviews the business records and obtains an appraisal. If the buyer obtains an environmental site assessment, the attorney will typically review the results. The use and character of the real estate affects the due diligence, so it is helpful to be familiar with issues relevant to the character of that real estate (ie, office buildings, farm and ranch transactions, natural resources, recreational property, water rights, grazing permits, conservation easements, liquor and gaming licenses, etc).

2.5 Typical Representations and Warranties for Purchase and Sale Agreements
Montana has no standard or customary form of purchase and sale agreement other than the copyrighted Montana Association of Realtors Forms, which parties typically use when they do not engage real estate counsel (or sign before engaging counsel). Real estate attorneys rarely use the forms, but when using them is unavoidable it is typically necessary to make revisions and insert additional provisions.

Most attorneys treat the technical difference between representations and warranties with indifference and use them together (or interchangeably) to introduce statements of facts by the parties in a purchase and sale agreement. If a statement of fact is inaccurate, it is likely a misrepresentation, not a breach of warranty. Using the word "warranties" or "warrants" probably falls outside of the law of warranties as it is generally understood (ie, the warranties in a deed, sale of goods, negotiable instruments, etc). Here, an inaccurate statement of fact prefaced with "represents and warrants" as misrepresentation (not a breach of warranty) and items that fall within the law of warranties as a breach of warranty (not a misrepresentation) is considered. The purchase and sale agreement typically dictates the remedies for a misrepresentation or a breach of warranty, but under these circumstances a seller can be liable regardless of the language in the agreement: 1) if by its words or conduct the seller creates a false impression about serious impairments and then fails to disclose material facts; or 2) the seller breaches the implied covenant of good faith and fair dealing, which is a mutual promise implied in every contract that the parties will deal with each other in good faith, and not attempt to deprive the other party of contract benefits through dishonesty or abuse of discretion in performance.

Representations

The representations a seller makes in a purchase and sale agreement typically include a combination or variation of the following:

- the seller is in good standing and has the authority to consummate the transaction;
- the transaction will not violate any agreements to which the seller is a party;
- the real estate has no liens or encumbrances that will survive closing (except permitted exceptions/encumbrances);
- there are no unrecorded liens, easements or agreements affecting the property; and
- there are no encroachments, disputes, claims or hazardous substances affecting the property.

The representations a buyer makes in a purchase and sale agreement typically include a combination or variation of the following: 1) the buyer is in good standing and has the authority to consummate the transaction; and 2) the transaction will not violate any agreements to which the buyer is a party.

Warranties

The warranties a seller makes (or has the buyer waive)in a real estate transaction falling under the law of warranties are typically:

- the warranties of title in a deed;
- Uniform Commercial Code warranties in transferring personal property; and
- the warranties a builder or developer provides on new residential construction.

Under the rubric of stating in a purchase and sale agreement that the seller will transfer the real property with "the usual covenants," the seller must make these five common law covenants of title in the deed:

- seisin (scarcely distinguishable from the common law covenant for title or the right to convey);
- against encumbrances;
- quiet enjoyment;
- further assurances; and
- general warranty.

In lieu of making those covenants in the deed using the archaic statutory language, it is customary to instead state: "The grantor provides this warranty deed with the usual covenants expressed in Montana Code Annotated § 30-11-110" or something similar. Montana has no statutory or standard warranty deed form and the statutes do not define or use the term "warranty deed." Rather, the "usual covenants" are what makes a deed into what is commonly called a warranty deed. If the deed does not have those usual covenants, the grantor does not make them. If the grantor does not want to make the usual covenants, the parties use what is called a limited warranty deed or grant deed. Montana has no statutory or standard limited warranty deed form (although there is a statutory form of grant) and the statutes do not define or use the terms limited to a warranty deed or grant deed. Rather, by using the word "grant" in a deed, the grantor makes these implied covenants: 1) the grantor has not conveyed the property to anyone other than the grantee; and 2) the property is free from encumbrances (ie, taxes, assessments and liens) created by the grantor or anyone claiming under the grantor. If the grantor does not want to make any covenants (usual or implied), the parties use what is called a quitclaim deed. Montana has no statutory or standard quitclaim deed form and the statutes do not define or use the term quitclaim deed. A quitclaim deed transfers whatever interest in a property the transferor owns, if any.

Remedies

If a buyer learns of a misrepresentation before closing, it typically has the option to elect one exclusive remedy:

- terminating the purchase and sale agreement and receiving a refund of the earnest money;
- forcing the seller to specifically perform the seller's obligations; or
- breach of contract.

Experienced counsel will attempt to also incorporate an indemnification obligation and make the remedies non-exclusive. If the buyer learns of a post-closing misrepresentation, it will not have a remedy unless the representation survived the closing, but it may have a breach of warranty claim if a warranty made in the deed (or bill of sale) is inaccurate. The purchase and sale agreement typically states that the representations will survive the closing and addresses the remedies for a misrepresentation in a way that also captures the remedies for breach of a warranty. If the representations do not survive, the seller is subject to damages if it breaches a warranty made under a warranty deed or limited warranty deed.

Limitation on Liability
A purchase and sale agreement may impose a limitation on a seller's liability, but it is more common not to include a limitation. If there is a limitation on liability, the parties should know that: 1) they can limit liability by contract if they have equal bargaining power, but cannot omit it entirely by exculpating a party from liability from that party's own negligence, fraud, wilful injury or violation of the law; and 2) Montana has a statute that can prevent the parties from shortening the statute of limitations.

Disclosures
In a purchase and sale agreement, a seller rarely represents that the property is free from these matters, but it can avoid liability for them by making:

- these mandatory disclosures applicable to residential property:
  - (a) radon;
  - (b) smoke and carbon monoxide detectors;
  - (c) lead-based paint; and
  - (d) sexual and violent offenders (mandatory for brokers and salespersons);
- a mould disclosure applicable to occupied property; and
- a mandatory noxious weed disclosure applicable to agricultural property.

2.6 Important Areas of Laws for Foreign Investors
There are many important areas of law for a foreign investor to consider when purchasing real estate in Montana. Although a comprehensive treatment of those areas is not appropriate for this space, the information in the answers to other questions should serve as a good primer.

2.7 Soil Pollution and Environmental Contamination
The allocation of risk for environmental liabilities under a purchase and sale agreement varies widely and ranges from a seller indemnifying a buyer to the buyer accepting the risk of environmental liabilities. Despite that allocation, federal and state laws can implicate both parties for environmental liabilities. CERCLA, commonly known as Superfund, is the primary federal law imposing liability for the remediation of contaminated properties. Under CERCLA, owners of real property are generally liable for the cost of addressing onsite contamination, regardless of fault. Liability under CERCLA is joint and several, so the government can hold a responsible party liable for all clean up costs; although it may be able to seek contribution from other parties potentially responsible for the contamination. The practical consequence of CERCLA's liability scheme is that the government can hold the owner or operator of a property liable for remediation costs even if the contamination pre-dated its ownership or operation. CERCLA has defences and exclusions from liability for: 1) innocent landowners and those who acquire property by inheritance or bequest; 2) bona fide prospective purchasers; and 3) contiguous property owners. A party seeking to assert those defences must perform all appropriate inquiries before acquiring a property and satisfy continuing obligations after the acquisition. A bona fide prospective purchaser or contiguous property owner must also prove that it has no affiliation with a potentially responsible party.

Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA) affords protection for owners of contaminated land that qualify for innocent landowner status by:

- acquiring the property after the disposal or placement of the hazardous substance;
- showing it did not know and had no reason to know of the release or threatened release when it acquired the property; and
- showing the release or threatened release was due to an act or omission of a third party.

To establish that it had no reason to know of the contamination, at the time of the acquisition an owner must undertake all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice to minimise liability. Exclusions from liability may be available for an owner who: 1) can show that the contamination came to be on its property solely because of subsurface migration in an aquifer from sources outside the property; or 2) owns or occupies property of 20 acres or less for residential purposes and did not cause, contribute to, or exacerbate the contamination. Montana's Voluntary Cleanup and Redevelopment Act encourages the voluntary cleanup of facilities where releases or threatened releases of hazardous substances exist by allowing owners or potential owners to apply to Montana's Department of Environmental Quality (MDEQ) for approval of a voluntary clean up plan. This is a useful tool because it provides interested persons with a way to determine what the clean-up responsibilities will be. Once a voluntary clean-up plan is complete, an applicant can petition MDEQ for closure, but because MDEQ has no agreement with the US EPA for its voluntary clean-up program, enforcement at a federal level is still possible.

2.8 Permitted Uses of Real Estate under Zoning or Planning Law
An efficient way to ascertain the zoning classification of real estate is online through the local government website (the municipal website for city zoning or the county website for county zoning). With the zoning classification in hand, the next step (on the same website) is to read the municipal code or county ordinance that describes the uses permitted un-

der that zoning classification. When acquiring real estate, a purchaser may want to obtain a zoning endorsement to the title policy, which states the zoning classification and the uses permitted by that zoning classification. Some local governments will issue a zoning certificate stating the zoning classification and the uses permitted by that zoning classification, but that practice is not uniform. Developers can enter development agreements with public authorities to facilitate a development project ranging from planned development agreements, subdivision improvement agreements to furnishing water and sanitary sewer services.

2.9 Condemnation, Expropriation or Compulsory Purchase

Eminent domain is the State of Montana's sovereign power to take private property for public use. It can use that power and will allow private parties to use it to acquire title to property for public use. Montana codified the items that comprise public use. The condemning authority must pay the affected owner just compensation for the property it takes and the entire process is governed by legal proceedings. The risk of a taking is minimal because they are infrequent, but that risk could increase based upon the real estate location (ie, adjacent road that may expand, being in the path of a proposed pipeline, etc).

2.10 Taxes Applicable to a Transaction

Montana does not have transfer, recordation, stamp or similar taxes. A buyer and seller typically addresses these transaction costs in the following way:

- the parties split closing and recording costs;
- the seller pays the premium for a standard owner's policy of title insurance;
- the buyer pays the portion of the premium applicable to any coverage enhancements;
- the parties are responsible for their own legal and professional fees; and
- the seller pays the real estate commission, which the listing agent and the buyer's agent split.

While that division of transaction costs is customary, there is no reason the parties cannot allocate them in another manner.

2.11 Rules and Regulations Applicable to Foreign Investors

Other than federal requirements under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), there are no state-level rules that apply to foreign investors acquiring real estate in Montana. Unless an exemption applies, a foreign entity may not transact business in Montana unless it obtains a certificate of authority from the Montana Secretary of State. No exemption applies to real estate ownership, but there is an exemption for holding mortgages and security interests in real or personal property. Failing to obtain a certificate of authority does not impair the validity of contracts the entity enters, nor does it prevent it from defending a legal proceeding; but it cannot commence a legal action in a Montana court until it obtains a certificate of authority. Each municipality has its own business license requirements and some require entities conducting business in the municipality to obtain a business license.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Purchasers of commercial real estate generally finance the acquisition with a loan from a bank, insurance company or other institutional lender. The lender secures the loan with the real estate and related assets such as fixtures, leases and rents. The lender may obtain additional security through personal property collateral and guaranties. Documents evidencing and securing the loan typically include: loan agreements, promissory notes, mortgages or deeds of trust, assignments of rents and leases, financing statements, environmental indemnity agreements, guaranties, subordination, non-disturbance and attornment agreements, estoppel certificates, and other ancillary documents.

3.2 Typical Security Created by Commercial Investors

Both mortgages and deeds of trust (called a trust indenture in Montana) are commonly used to create a security interest. The Montana Small Tract Financing Act governs trust indentures and limits the size of the area secured by a trust indenture to 40 acres. A mortgage (or trust indenture) is effective as a financing statement filed as a fixture filing if it has the requisite language and the parties record in the real estate records. Under Montana's Uniform Commercial Code, a lender may obtain a security interest in personal property by additional terms in the mortgage (or trust indenture) or through a separate security agreement. The real property includes its rents and profits so those secure the mortgage (or trust indenture) and render an assignment of rents and leases provision in the mortgage or a stand-alone assignment of rents and leases instrument unnecessary. However, an assignment of rents and leases provision in the lien instrument or separate recorded assignment of rents and leases may enhance the lender's ability to appoint a receiver to collect them. Lenders occasionally control rents from the inception of the loan, applying them first to loan payments and releasing the excess to the borrower, but loan documents typically allow the borrower to control rents until after default. Regardless of structure or whether the assignment of leases and rents is an absolute or collateral assignment, the lender must obtain a court-appointed receiver to collect the rents if the borrower defaults and will not permit the lender to collect them directly. This is because Montana treats assignments of leases and rents as an inchoate lien until the lender effectively perfects its security interest in the rents by appointing a receiver.

3.3 Regulations or Requirements Affecting Foreign Lenders

Montana does not require foreign lenders to obtain a licence or obtain authority to transact business if it limits its activity to making or assuming business loans. The only licensing statute relating to non-bank lending activities is the Montana Consumer Loan Act, which only applies to credit offered or extended to an individual primarily for personal, family or household purposes.

3.4 Taxes or Fees Relating to the Granting or Enforcement of Security

Montana has no mortgage, transfer or documentary taxes.

3.5 Legal Requirements Before an Entity Can Give Valid Security

The statutory scheme applicable to an entity gives it broad power, which includes acquiring real estate, borrowing money and pledging its assets as collateral. The entity's charter documents should state its purpose, which is typically broad enough to encompass the activity described in the preceding sentence, but there may be restrictions on certain activities or borrowing limitations. The borrower should make representations to a lender in the loan documents that it has the power and authority to consummate the transaction and that doing so will not violate its governance documents. It is prudent for the lender to obtain: 1) a certificate of existence from the Montana Secretary of State (this is Montana's equivalent to a certificate of good standing) confirming the domestic entity exists or that the foreign entity may transact business in Montana; and 2) borrowing resolutions or a certificate authoriiing the loan transaction and stating which individuals have the authority to sign the transaction documents (the parties can use a stand alone certificate of incumbency or address those matters in the resolutions).

3.6 Formalities When a Borrower is in Default

If a lender holds a trust indenture, it may pursue a non-judicial or judicial foreclosure proceeding. The holder of a mortgage is essentially limited to pursuing a judicial foreclosure proceeding. Although a mortgage may have a power of sale that gives the lender the right to foreclose non-judicially, the lender rarely uses it because it cannot be a purchaser at a sale conducted under a power of sale. Foreclosing a trust indenture non-judicially requires recording a written notice of sale at least 120 days before the sale, and fulfilling the mailing, posting and publication requirements. A borrower may terminate a non-judicial foreclosure proceeding prior to sale by paying the back payments and foreclosure expenses despite any provision accelerating the debt on default. A non-judicial foreclosure typically takes four to six months to complete. The terms of the non-judicial foreclosure sale are cash, except that the bid of the trust indenture beneficiary by exchange of credit is accepted. There is no redemption following the non-judicial foreclosure and the purchaser may have possession ten days following the sale. Enforcing the right to possession following a non-judicial foreclosure may require the purchaser to initiate an eviction action (called an "unlawful detainer" in Montana). The lender cannot recover a deficiency following the non-judicial foreclosure of a trust indenture.

Judicial foreclosure is an action to enforce an obligation secured together with a request for the equitable remedy of foreclosure of the collateral. Montana has a one-action statute which, subject to certain exceptions, generally requires the holder of an obligation secured by a mortgage to seek enforcement by foreclosure unless the collateral has become valueless. Once the lender obtains a foreclosure judgment, the sheriff will conduct a foreclosure sale. The terms of the sale are cash, except the bid of the judgment creditor by exchange of credit is accepted. The judgment debtor and creditors holding liens subordinate to the lien foreclosed have one year from the sale to redeem the property. If the mortgagor waives its right redemption in the mortgage, the lender cannot enforce that provision. The lender may recover a deficiency after the judicial foreclosure sale except under: a purchase money mortgage; or the judicial foreclosure of a trust indenture on a debtor-occupied single-family residential property. The lender establishes the deficiency through a judgment it dockets at the conclusion of the judicial foreclosure sale.

3.7 Subordinating Existing Debt to Newly Created Debt

Parties can intentionally and unintentionally subordinate existing secured debt to new debt. Subordination occurs intentionally if the parties sign a subordination agreement and record it like a mortgage. Subordination can occur unintentionally, most commonly by modifying a loan in a way that a court characterises the modification as a new loan and causing the original mortgage to lose priority. Another issue relating to unintentional subordination concerns the future advance clause. The mortgage (or trust indenture) does not secure future advances unless the parties: actually contemplate them when the lender makes the loan; and the mortgage provision stating the total indebtedness that may be outstanding and subject to mortgage protection is high enough (in dollar terms) to capture the future advances. There is a distinction between a revolving line of credit (open-end credit) and a loan for a fixed amount (closed-end credit) which contemplates future advances. Sums advanced on a revolving line of credit are not future advances. It is unnecessary for a mortgage (or trust indenture) securing a revolving line of credit to have future advance language, but the instrument should have language reflecting that the loan is a revolving line of credit.

3.8 Lenders' Liability Under Environmental Laws

Environmental laws can impose a liability risk on mortgage lenders who foreclose property outside of the available statutory safe harbors. Generally, the mere lending of money and taking a security interest in real estate does not result in lender liability for contamination associated with a real estate. However, a lender could have liability if it acts more like an owner or operator by participating in the management of the property before foreclosing. After foreclosure, statutory protections can disappear if a lender fails to divest the property at the earliest practicable, commercially reasonably time, on commercially reasonable terms. In addition, secured creditor protections generally do not extend to costs associated with continuing or prospective compliance obligations, such as air emissions or waste water discharges from the foreclosed site, and will not protect a lender from common law liability, such as claims for toxic torts, nuisance or neighboring property damages. Environmental risks can increase the longer a lender holds the property post-foreclosure.

3.9 Effects of Borrower Becoming Insolvent

The primary issue with a pre-bankruptcy security interest is the preference trap. The mortgage (or trust indenture) becomes enforceable between a creditor and debtor when the creditor loans funds, but does not become enforceable against other creditors (including a bankruptcy trustee) until the parties record it. A recorded mortgage lien gives the holder the right to satisfy its claim out of the value of the mortgaged property ahead of junior lien holders and unsecured creditors. However, certain property transfers (ie, creating a lien) the debtor makes within 90 days before it files a bankruptcy petition because of a pre-existing debt are vulnerable to avoidance. To avoid that trap, the lender should perfect its lien soon and avoid taking action within the 90-day preference period that may cause the borrower to declare bankruptcy.

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

Local governments require a building permit for almost any construction and electrical, plumbing and mechanical permits. To obtain those permits, an owner must apply and undergo a plan review process where local officials examine the construction plans for conformance with codes, laws and ordinances in all phases of construction (site, structural, architectural, electrical, plumbing and mechanical). The permits give the owner the legal permission to start construction of a building project under approved drawings and specifications. The local government bases permit fees on a valuation it assigns to the project. A design review board typically reviews plans for the construction or remodelling of commercial structures to ensure a project meets the local design criteria for matters ranging from seismic zones, wind load, foundation depth and roof snow load, to ordinances relating to landscaping, off-street parking and outdoor lighting. Local governments have construction codes and many have adopted a combination of international, national and uniform codes. The owner may need to obtain a Montana state building permit for construction in areas outside of cities certified to issue their own building permits, but exemptions exist for:

- farm and ranch buildings;
- mining buildings on mining property;
- petroleum refineries and pulp and paper mills (except office and shop buildings);
- residential buildings containing less than five dwelling units (unless serving transient guests); and
- private garages and private storage buildings used for the owner's own use (not as part of a commercial enterprise or business).

4.2 Regulatory Authorities

Zoning and subdivision laws regulate the development and use of real estate and Montana addresses them primarily at a local level (ie, city or county). Zoning regulations separate incompatible land uses while subdivision regulations address dividing a parcel of land into separate sub-parcels. The Municipal Zoning Act authorises (but does not require) zoning for cities and towns overseen by a Zoning Commission and approved by the local Council. The County Zoning Act authorises zoning for counties through county ordinances overseen by a Planning Board and approved by the County Commission. All cities, towns and counties must follow Montana's Subdivision and Platting Act, which regulates the division of land into lots of less than 160 acres. Landowners who propose a major subdivision of six or more lots must provide an environmental impact assessment and land or monies for public parks, and the local government must conduct public hearings and document their approval process. Land divided among family members usually qualifies for family transfer exemptions, and is not subject to subdivision requirements. There are other exemptions, but an owner using an exemption should exercise caution with being too creative in this realm because any transfer made to evade the subdivision laws is void.

4.3 Obtaining Entitlements to Develop a New Project

Incentive programs are available for new projects, refurbishments and business development. The State of Montana offers many tax credits, tax abatements, grants and low-interest financing to qualifying new and existing businesses. All major and many smaller Montana communities have local development corporations that: 1) have local revolving loan funds that can enhance total finance packages; 2) assist with business location; and 3) work closely and co-ordinate with Montana's Department of Commerce and other state agencies to assist with business development and location projects by combining resources.

4.4 Right of Appeal Against an Authority's Decision

To appeal an authority's subdivision decision, an owner must file a legal proceeding in the district court in the county where the property is located within 30 days after the governing body signs and issues its written findings approving, conditionally approving or disapproving a subdivision. To appeal:

- an administrative officer's municipal zoning decision, the aggrieved party must file an appeal with the board of adjustment within a reasonable time after the administrative officer's decision; or
- a board of adjustment decision, the aggrieved party must file a legal proceeding with a court of record within 30 days after the board files its decision.

To appeal:

- an administrative officer's county zoning decision, the aggrieved party must file an appeal with the board of adjustment within a reasonable time after the administrative officer's decision;
- a board of adjustment decision, the aggrieved party must file an appeal with the board of county commissioners within 30 days after the board files its decision; or
- a board of county commissioners decision, the aggrieved party must file a legal proceeding in a court of record within 30 days after the board of county commissioners issues its decision.

4.5 Agreements with Local or Governmental Authorities

Developers will contract with local authorities to facilitate a development project. These agreements range between planned development agreements, subdivision improvement agreements to furnishing water and sanitary sewer services. If a project requires a sufficient volume of power, the developer can contract with the utility providers to secure an adequate power supply.

4.6 Enforcement of Restrictions on Development and Designated Use

To enforce zoning provisions, the local authority will attempt to obtain voluntary compliance. If that is unsuccessful, the local authority may initiate legal proceedings to:

- prevent unlawful construction or use;
- restrain, correct or abate a violation;
- prevent occupancy;
- prevent illegal conduct or business in or near the premises; and
- exercise other remedies.

Transfers that violate or evade Montana's Subdivision and Platting Act are void. A party that violates that act is guilty of a criminal misdemeanor offense and the county attorney can file a legal proceeding to enjoin sales or transfers and compel compliance.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Numerous forms of entities are available for investors to hold real estate assets. A common choice is a limited liability company, but entity selection can range between corporations (C and Subchapter S); close corporations; general partnerships; limited liability partnerships; limited partnerships; and trusts.

5.2 Main Features of the Constitution of Each Type of Entity

Many factors influence the entity selection process with the positive and negative features of a particular real estate investment vehicle varying depending on the scenario. These factors include considerations regarding taxes, the lender, ownership structure, asset protection, estate planning, and property use. Limited liability companies are a popular choice because they are flexible and the corporate formalities are less stringent.

5.3 Tax Benefits and Costs

The tax benefits and costs for each type of entity formed to invest in real estate vary widely depending upon a multitude of circumstances too numerous to address here.

5.4 Applicable Governance Requirements

The statutory scheme applicable to an entity gives it broad powers, which includes investing in real estate, borrowing money and pledging its assets as collateral. The entity's charter documents should state its purpose, which is typically broad enough to encompass the activity described in the preceding sentence, but there may be restrictions on certain activities. An entity's governance requirements are in its charter documents and the statutory scheme permitting its creation. The charter documents will indicate if the entity has limitations on making purchases or incurring debt and the individuals with the authority to bind it. It is prudent for the parties in a real estate transaction to obtain: a certificate of existence from the Montana Secretary of State (this is

Montana's equivalent to a certificate of good standing) confirming the domestic entity exists or the foreign entity may transact business in Montana; and resolutions or a certificate authorising the transaction and stating which individuals have the authority to sign the transaction documents (the parties can use a stand alone certificate of incumbency or address those matters in the resolutions).

These entities are available (statutory and common law trusts are also available, but beyond the scope of this discussion):

Corporation
The governance requirements for a corporation (C and Subchapter S) are in: its articles of incorporation; its by-laws; and the Montana Business Corporation Act. It is unnecessary for shareholders of a corporation to be natural persons.

Close Corporation
A Montana close corporation is available if there are 25 or fewer shareholders and it may make a Subchapter S election. It is subject to statutory share transfer restrictions, but it may forgo adopting by-laws and operate without a board of directors. The governance requirements for Montana close corporations are in: its articles of incorporation; its by-laws (if adopted); and the Montana Close Corporation Act. It is unnecessary for shareholders of a corporation to be natural persons. A Montana corporation with 25 or fewer shareholders can become a Montana statutory close corporation by amending its articles of incorporation if two-thirds of the shareholders approve.

Limited Liability Company
The governance requirements for a limited liability companies are in: its articles of organisation; its operating agreement, the adoption of which is optional; and the Montana Limited Liability Company Act. It is unnecessary for members of a limited liability company to be natural persons, it may have a single member and officers are optional.

General Partnership
General partnerships can arise formally by agreement or informally with no agreement. A partnership has a separate legal existence as an entity and can own property and engage in activity. The governance requirements for a general partnership are in: its partnership agreement, if there is one; and the Montana Uniform Partnership Act. It is unnecessary for partners of a general partnership to be natural persons.

Limited Liability Partnership
The governance requirements for a limited liability partnership are in: its application for registration of a limited liability partnership; its partnership agreement, if there is one; and the Montana Limited Partnership Act. A limited liability partnership has a five-year duration unless it files a continuation with the Montana Secretary of State. If it neglects to make that filing, it lapses into general partnership status. It is unnecessary for partners of a limited liability partnership to be natural persons.

Limited Partnership
The governance requirements for a limited partnership are in: its application for registration of a limited partnership; its partnership agreement, if there is one; and the Montana Limited Partnership Act. It is unnecessary for partners of a limited liability partnership to be natural persons. Any general partner can bind the limited partnership.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time
A lease is the mechanism that allows a party to occupy real estate for a limited period without buying it, and is a blend of property and contract concepts. It creates an estate in real property giving a tenant a possessory interest in the premises for a specified period (ie, a conveyance) and provides the terms upon which an owner allows the tenant to occupy the premises (ie, a contract). If the lease term is more than one year, the lease must be in writing. Unless the lease provides otherwise or the tenant is holding over wrongfully, it may occupy the buildings, take annual products from the soil, work mines and quarries open at the beginning of the tenancy, and cultivate and harvest the crops growing at the end of a tenancy. Montana recognises licenses, easements and covenants, which are non-possessory interests that resemble leases. Those non-possessory interests create privilege or use of property for limited purposes, but not a right of possession.

6.2 Types of Commercial Leases
Under Montana law, leases are residential or commercial. There are three basic commercial real estate leases: "gross" or "full service" leases; "net" leases; and "modified gross" or "modified net" leases. The parties organise these leases around two rent calculation methods: gross and net. Under a gross lease, the rent is an all-inclusive lump sum and a landlord pays all or most expenses associated with the property. In a net lease, the landlord charges a lower base rent, and a tenant pays some or all of the expenses associated with operations and maintenance. There are several types of net leases:

- a single net lease where the tenant pays:
  (a) base rent;
  (b) all or a share of the property taxes; and
  (c) utilities and janitorial services;
- a double net lease, which is the same as a single net lease except the tenant pays all or a share of the property insurance premiums;

- a triple net lease, which is the same as a double net lease except the tenant pays all or a percentage share of the operating costs associated with the property; and
- an absolute triple net lease where the tenant pays all expenses and carries all risk.

A modified gross lease is similar to a gross lease because the lump sum rent includes the base rent and some combination of property taxes, insurance and operating expenses (the tenant typically covers utilities and janitorial services).

6.3 Regulation of Rents or Lease Terms

Montana does not regulate rents or the length of lease terms (except that the lease of a lot in a city or town cannot exceed 75 years). The Montana Residential Landlord Tenant Act and statutes governing residential tenant security deposits preclude certain provisions in residential leases, but those preclusions do not relate to rent or the length of the term.

6.4 Typical Terms of a Lease

Term of a Lease

The typical length of a commercial lease term depends on the property character (office, retail, industrial or agricultural) and the parties. A landlord typically prefers a longer term (but not always) and a tenant typically prefers a shorter term (but not always). The parties address that tension in the lease negotiation process, where a good understanding of the local market is helpful. In the 1980s and 1990s it was not uncommon to see 25-year lease terms, but the current trend is toward considerably shorter terms. If a commercial lease does not specify the length of the term, there is a presumption the term is one year. If there is no holdover clause in the lease to the contrary and the tenant remains in possession after the expiration of the term and the landlord accepts rent, there is a presumption the parties renewed the lease on the same terms and for the same time (not exceeding one month when the tenant pays rent monthly, or in any case one year). If a lease does not specify the length of the term, the presumption is that the parties renewed it at the end of the term implied by law, unless one of them notifies the other of the intention to terminate at least one month in advance.

Repairs and Maintenance

A commercial lease typically specifies which party is responsible for performing repairs and maintenance, which are separate but related concepts. Maintenance involves trying to avoid deterioration of a building and its systems through preventive and corrective measures, whereas a repair involves fixing damage the premises suffers. To avoid debate about whether a repair is significant enough to constitute a replacement (or capital improvement) the lease should distinguish those concepts and state the party responsible for making the replacement. If the lease is silent, a landlord has no statutory or common law duty to perform maintenance or make repairs (but as noted below may have an obligation to repair a dilapidation). Commercial leases generally limit the landlord's obligation to maintain and repair the leased premises to certain specific repairs (ie, structural, roof and building systems) and require a tenant to do everything else within the four walls of the premises. If separate HVAC units serve only the premises, it is typical for the lease to obligate the tenant to maintain and repair the HVAC units. The tenant is typically responsible to repair and replace plate glass. The lease typically gives the landlord the right to perform repairs and maintenance the tenant fails to perform, but typically does not give the tenant the right of self-help to cure the landlord's failure to perform repairs or maintenance. This is because the lease generally limits the landlord's maintenance and repair obligations to structural, roof and common areas. Unless the lease provides otherwise, if the landlord does not repair a dilapidation within a reasonable time after the tenant notifies the landlord, the tenant may: make the repair and deduct the expenses from the rent (not to exceed one month's rent); or vacate the premises, in which case it has no further obligations under the lease. A dilapidation is a condition that significantly diminishes the enjoyment of the premises or substantially interferes with the purposes for which the leased premises is intended.

Rent Payments

Most commercial leases have an annual rent a tenant pays in advance through equal monthly instalments by a set day each month (typically the first or fifth day). The parties typically prorate rent for partial months at the beginning or end of the lease term. If the lease is oral or silent, the tenant pays rent at the termination of the holding if the holding does not exceed one year, or if the holding is by the day, week, month, quarter or year, at the termination of the respective periods as it becomes due. If the tenant is responsible for operating expenses, a landlord typically estimates the tenant's share and the tenant pays it in equal monthly instalments with the base rent. The landlord will then perform an annual reconciliation comparing the estimated operating expenses to the actual operating expenses and credit the tenant for an overpayment or bill the tenant for an underpayment.

6.5 Rent Variation

Unless the term of a lease is short, the lease will typically have an escalation clause that increases the base rent. The escalation clause will typically increase rent:

- by a fixed amount or fixed percentage each year;
- by a percentage increase based on an inflationary index; or
- the actual increase in a landlord's operating, maintenance and insurance expenses and real estate taxes.

Some commercial leases use a combination of these methods. If there is a written lease, both parties must agree in writing to a rental increase. If the lease is month-to-month, the landlord may increase the rent for the succeeding month if it notifies a tenant at least 15 days before the expiration of the current month. If the lease has a properly drafted holdover clause and the tenant remains in possession after the lease expiration date without landlord permission (ie, tenancy at sufferance), the clause typically permits the landlord to charge holdover rent of 125% to 300% of base rent. If the lease states that if the tenant stays after the expiry of the term it becomes a month-to-month tenant or tenant at will, the lease creates a periodic tenancy and the tenant is not a holdover tenant and the rent is the regular rent the lease states, not "holdover rent."

6.6 Determination of New Rent

Typically, the terms of a lease determine if and how rent changes or increases. If the lease is month-to-month, a landlord may increase the rent for the succeeding month if it notifies a tenant at least 15 days before the expiration of the current month.

6.7 Payment of VAT

Other than a landlord's state and federal income tax obligations attributable to income the rent generates, there is not value added tax (VAT) or other taxes or governmental levy payable on rent.

6.8 Costs Payable by Tenant at Start of Lease

Other than rent, the rent for the last month of the term (if required), a security deposit (if required) and other customary expenses and improvements associated with occupying a new space, the costs a tenant typically pays at the start of a lease depends upon whether the lease has a tenant improvement allowance. For tenant improvements, the main issues are who will: install them and pay for them. A starting point is to determine the condition in which a landlord agrees to deliver the premises:

- a "turnkey build-out," where the landlord performs all the work for the tenant to occupy and use the space;
- "vanilla shell," where the space has finished floors, ceilings and walls, and lighting and heat/air conditioning; or
- "cold dark shell," where the space has no heat, lighting or finishes.

If the landlord performs the tenant improvement works, the parties typically describe the improvements or attach detailed plans and specifications to a lease. If the tenant performs it, the lease usually has a set period to complete the work before the rent starts. To fund the cost of the tenant improvement works, the landlord often provides an improvement allowance, which is a sum of money usually stated on a per-square-foot basis. If the cost of the work exceeds the allowance, the tenant pays the excess. Either the tenant or the landlord may perform the tenant improvement work under an improvement allowance, but regardless of who performs it the lease should have provisions for bidding, completion, construction and material standards.

6.9 Payment of Maintenance and Repair

In a multi-tenant facility the tenants typically pay for common are expenses through their respective percentage shares of operating costs; while the landlord typically performs the maintenance, upkeep and repair of common areas.

6.10 Payment of Services, Utilities and Telecommunications

In a multi-tenant facility, the tenants typically pay for utility services through their respective percentage shares of operating costs. If the utility sub-meters the service to the premises, the tenant will pay for the service through operating costs on a consumption basis (but is still responsible to pay its percentage share of operating costs attributable to utilities serving the common areas). If the utility directly meters the service to the premises, the tenant will pay the utility charge directly to the utility (but is still responsible to pay its percentage share of operating costs attributable to utilities serving the common areas). For telecommunications, the landlord will typically provide telecommunications service and data lines to the perimeter of the premises, but the tenant is responsible to obtain and pay for the service directly. In the lease, the landlord may designate the telecommunications service providers the tenant must use.

6.11 Insuring the Real Estate That Is Subject to the Lease

The insurance clause in a lease specifies what coverage is required and who is responsible to pay. The lease typically requires both parties to carry insurance. Some insurance requirements are common, such as property damage and liability coverage, while others are more specific to a leased space, such as loss of rent or business interruption coverage. The landlord pays the premiums under a gross lease, but the tenant is responsible to pay the premiums in most other scenarios. The party that the coverage protects has nothing to do with which party pays the premium. For example, a tenant-paid liability policy should cover both the tenant and the landlord. The two basic types of insurance that impact leases are property insurance and liability insurance. A lease should require either a copy of the policy (which may not be practical, since for large companies the policy can be voluminous) or a certificate of insurance. Certificates of insurance are standard forms published by an industry group called ACORD.

Property Insurance

A property insurance policy covers direct physical loss arising from damage to real or personal property owned by the insured (ie, fire). Leases often contain the misnomer casualty insurance when property insurance is intended. In the insurance industry, "casualty insurance" means liability insurance.

Insurance carriers write property insurance in several forms: basic; broad; and special. Property insurance policies cover direct physical loss, but an event that disables a property and disrupts business operations will create broader losses and these endorsements to the property policy provide protection for some of those ancillary losses: 1) a business income endorsement that covers loss of income that results from loss of use of a property damaged by a covered cause of loss; and 2) a loss of rents endorsement that can be a part of the business income endorsement that reimburses the owner of a building for loss of rents. Leases often require a party to carry property insurance at full replacement cost, so the policy will pay the full cost of replacing the damaged property, with certain limitations. The alternative is actual cash value, which is generally the value of the property at the time of the loss based on the replacement cost less depreciation.

Liability Insurance

A liability insurance policy covers bodily injury and property damage to third parties occurring due to the negligence of the insured. Commercial general liability is the industry standard form for leases (sometimes called public liability insurance). The contractual liability coverage extends to the indemnity section of the lease and provides coverage for the assumed liability for bodily injury and property damage (it is no longer necessary to require a contractual liability endorsement, which older lease forms often require). Underwriters write commercial general liability policies with a combined single limit per occurrence for bodily injury and property damage. Older policies used to distinguish between bodily injury and property damage (ie, "USD3 million with respect to bodily injury or death, and USD500,000 with respect to property damage"), but if this language is in a lease it is no longer correct. A properly worded lease would now require the insured to carry "USD3 million combined single limit per occurrence."

Waiver of Subrogation

Where a party's negligence damages the property of the other and the insurance company pays the cost of repair, the insurance policy gives the insurance company a contractual right to assume (ie, become subrogated to) the injured party's right to collect from the negligent party. However, property policies now generally provide that the insured may waive this right of subrogation against the negligent party. The rationale is that the insured already compensated the insurance company for assuming the risk of loss by paying the policy premium. If the parties agree that property insurance will serve as the primary source for recovery for damages to the landlord's building or the tenant's personal property, the lease should have a provision stating that the landlord and tenant agree not to pursue each other for claims covered by property insurance (ie, a mutual waiver of subrogation). Typically, the waiver applies only to losses covered by commercial property insurance. The lease will typically include a provision stating that where the tenant is responsible to address a repair, replacement or restoration, that obligation excludes losses covered by the landlord's property insurance. The property insurance may consist of a single policy (covering the landlord's building and the tenant's personal property) or two separate policies. Some leases have a unilateral waiver of subrogation, which typically benefits the landlord. The parties typically address a waiver of subrogation in a lease pertaining to the liability insurance policy by: 1) naming a party as an additional insured - because an insurer cannot sue its own insured the additional insured is protected; or 2) by endorsement, because unless the policy has a provision allowing the insured to waive the carrier's right to subrogate (by written contract signed before the loss occurs) the party waiving its subrogation right must obtain an endorsement from the carrier or the insured may violate or void the policy.

6.12 Restrictions on Use of Real Estate

A lease is a contract and can restrict a tenant's activity on a premises. Typically, the lease will define those permitted uses. In addition, local ordinances and regulations may restrict the use of the property for certain purposes (ie, zoning ordinances). The lease should have a provision precluding the tenant from engaging in any activity that violates the law, which should encompass any zoning-related restrictions. If there are any private covenants, restrictions or regulations affecting the property, the lease should reference them and require the tenant to follow them. Because a lease is a contract, the parties should be aware these provisions can be problematic under Montana law:

- exempting a party from responsibility for that party's own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent;
- restraining of trade;
- shortening the statute of limitations;
- agreeing to confess judgment; and
- liquidated damages.

6.13 Tenant's Ability to Alter and Improve Real Estate

If a lease is silent, a tenant can make alterations or improvements not constituting waste (ie, activity that decreases the value of a property to a landlord). Leases typically permit a tenant to make internal and non-structural alterations subject to: the landlord's consent; and controls over the process. Generally, the landlord has no obligation to reimburse the tenant for the cost of any improvements the tenant makes to the premises. However, unless the lease provides otherwise there is a suggestion that the landlord must repay the tenant for the cost of improvements if the improvements enhance the premises by making it more valuable to the landlord. Unless the lease provides otherwise, a tenant may generally remove certain trade fixtures from leased property if:

- the removal will not injure the premises;
- the item is not an integral part of the premises; and
- the tenant completes the removal before the lease expires.

6.14 Specific Regulations
Montana's Residential Landlord and Tenant Act regulates residential leasing activity. There are regulations and laws regulating the use of real estate, but other than a relatively limited set of statutes, few specific regulations apply to leasing a particular category of real estate. There are laws that apply to government leases and others pertaining to agricultural leases, primarily relating to termination and entitlement to crops.

6.15 Effect of Tenant's Insolvency
The United States Bankruptcy Code gives a bankrupt tenant the right to assume; assume and assign; or reject an unexpired lease of real property. The first step is to consider whether the lease expired or the landlord terminated it before the tenant filed its bankruptcy petition. If so, it is not an asset of the bankruptcy estate and cannot be assumed or rejected. A default under a lease does not mean the tenant has lost the right to assume or reject if the landlord did not actually terminate the lease. If the lease did not expire or if the landlord did not terminate it, the landlord can take no action to collect unpaid rent, declare a default or attempt an eviction. The tenant has 60 days to decide whether it will assume or reject the commercial lease. If the tenant rejects (or does not act within the 60 days), it must immediately surrender the leased premises to the landlord. If it fails to vacate, the landlord can obtain relief from the automatic stay from the bankruptcy court and evict the tenant. Following the rejection, the landlord may file a claim in the bankruptcy case as a general unsecured creditor. If the tenant wants to assume the lease, it must:

- cure any defaults under the lease, or provide adequate assurance it will promptly cure them;
- compensate, or provide adequate assurance it will promptly compensate, the landlord for any loss to the landlord resulting from any default under the lease; and
- provide adequate assurance of future performance under the lease.

These requirements do not apply to a breach of the lease relating to the tenant's insolvency, financial condition or bankruptcy. After assuming an unexpired lease, the tenant may continue to occupy and possess the leased premises. The tenant may assign its unexpired lease to a third party if the assignee can provide adequate assurances, even if the lease precludes assignment. If a tenant assumes an unexpired lease, it must cure all existing defaults under that lease and timely perform all of its obligations under the lease after filing its bankruptcy petition. Tenants in bankruptcy must continue to pay rent and perform other lease obligations going forward if they intend to continue to possess the leased premises. If not, the landlord can request relief from the automatic stay and evict the tenant. The tenant's failure to satisfy its post-petition obligations constitutes grounds for the bankruptcy court to refuse to extend the time that a tenant must assume or reject a lease. A landlord may have an administrative claim in the bankruptcy case for any unpaid post-petition obligations.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations
Montana does not have statutory landlord liens and abolished the common law landlord lien. In commercial lease transactions, an advance cash deposit at the commencement of a lease is common, with the deposit available for unpaid rent and damages to the premises. If a landlord wants a security interest in a tenant's personal property, it must obtain a security agreement from the tenant (typically in a provision in the lease) and file a UCC-1 financing statement. The most common form of security a landlord can obtain to protect itself against the tenant's default is a lease guaranty.

6.17 Right to Occupy After Termination or Expiry of a Lease
A tenant has no right to continue to occupy a premises after the expiry or termination of a commercial lease, but action or inaction by the parties can create a periodic tenancy enabling the tenant to stay. A tenancy is:

- for a term of years, which means it has a fixed term with a start date and end date, even if the term is less than a year;
- periodic, which does not have a defined end date (ie, month-to-month or year-to-year); or
- at will, which is mutually terminable at any time.

Tenancies at will rarely apply in a commercial lease setting because: 1) if the lease uses the term tenancy at will, it actually describes a periodic tenancy; and 2) terminating a tenancy at will requires a landlord to provide the tenant with one month's notice, while periodic tenancies are subject to different notification periods under the lease or statute. Leases typically begin with a term of years, but upon expiry, a periodic tenancy often follows. If the landlord permits the tenant to stay in possession, it creates a periodic tenancy. If the landlord denies the tenant the right to stay in possession, but the tenant stays, it is a wrongful holdover (ie, a tenancy at sufferance). If the lease states that if the tenant stays after the expiry of the term it becomes a month-to-month tenant or tenant at will: 1) that creates a periodic tenancy and the tenant is not a holdover tenant and has permission to remain until one party gives the other proper notice and the notice time has run; and 2) the lease provisions continue in force and the rent is what the lease states. In this realm, it is critical to know of Montana statutes that create these presumptions of a periodic tenancy: if the tenant remains in possession after the expiry of the term and the landlord accepts rent; or if the lease is silent on the length of the term, there is a presumption of renewal if a party does not send a termination notice.

To ensure a tenant vacates the premises at the end of the tenancy a landlord should:

- insert a properly drafted holdover clause in the lease;
- as the end of the term approaches, read the holdover clause and take any action the lease requires to avoid creating a periodic tenancy; and
- although a tenancy for a term of years ends on a precise date and it is unnecessary for the landlord to notify the tenant of the impending expiration, the landlord should consider:
  - (a) stating that in the lease to avoid any confusion; and
  - (b) providing the tenant with a courtesy expiry notice.

If the tenant does not vacate a landlord should not accept rent and send the tenant notice giving it three days to vacate. Once the three days expires, the landlord has the right to re-enter the premises to recover possession; and initiate an eviction action (called an "unlawful detainer" in Montana). The landlord may re-enter the premises peaceably without resorting to court processes if the tenant abandons the premises or under other limited circumstances, but otherwise cannot use self-help.

6.18 Right to Terminate Lease

Leases typically provide that if a tenant does not cure a default within a specified time after receiving notice of the default, the landlord can terminate the lease; or without terminating the lease, pursue other remedies the lease affords. Typical events of default include not paying amounts owed; and violating the lease.

6.19 Forced Eviction

A landlord cannot force a tenant to vacate a premises prior to the expiration of a lease unless: the lease permits the landlord to terminate it if certain events occur unrelated to a tenant default (ie, the landlord sells the property, condemnation, adjacent development); or the tenant commits an event of default and fails to cure it within three days (or longer, if the lease provides a different cure period) of receiving written notice from the landlord directing it to either: cure the default; or vacate the premises. If the tenant does not cure and then fails to vacate, the landlord has the right: to re-enter the premises to recover possession; and initiate an eviction action (called an unlawful detainer action in Montana). The landlord may re-enter the premises peaceably without resorting to court processes if the tenant abandons the premises or under other limited circumstances, but otherwise cannot use self-help. An expedited eviction process is available that gives the tenant ten days to respond to the complaint and requires the courts to set a trial within ten days of that appearance.

6.20 Termination by Third Party

Other than through a condemnation proceeding, the circumstances where the government could terminate a lease are exceedingly rare. Many leases have provisions addressing condemnation, including how they will handle the proceedings and allocate any proceeds. If the lease is silent, a tenant can negotiate with the condemning authority and participate in the corresponding legal proceedings to address just compensation.

7. Construction

7.1 Common Structures Used to Price Construction Projects

The two primary structures used to price construction projects are the cost-plus and lump sum models. The most common structure is the cost-plus format where an owner accepts the obligation to pay a contractor out-of-pocket costs of construction plus a negotiated fee. Most often, that format will include a maximum price (GMP), which is a not-to-exceed ceiling for the owner's payment obligation. Another common structure is a stipulated sum model (also called a fixed sum or lump sum contract) where the parties fix a price and the owner pays the contractor the lump sum without regard to the actual cost of the work.

7.2 Assigning Responsibility for the Design and Construction of a Project

The project delivery method is the manner in which parties elect to plan, design and construct a project. The common project delivery methods are:

- Design-Bid-Build;
- Design-Bid;
- Construction Manager at Risk; and
- Multi-Prime.

In Montana, the most typical project delivery method is a Design-Bid-Build approach that involves three sequential project phases:

- the design phase requires the services of an architect (ie, designer) who is responsible for completing the design and plans for a project;
- the bid phase, when an owner selects a general contractor (typically based on the low bid); and
- a build or construction phase, when the general contractor builds the project.

This sequence usually leads to a sealed bid, fixed-price contract. Sometimes, the owner will use a Design-Build project delivery method where one entity (the design-builder) signs a single contract with the owner and is responsible for providing the architectural/engineering (design) and construction services. The Design-Build method usually involves either a design professional or a general contractor assuming the role of design-builder and then retaining a party in the other discipline as a subcontractor to complete the other portion of the work.

7.3 Management of Construction Risk

The most common contract clauses parties use to manage construction risk on a project are:

- insurance requirements;
- indemnification;
- limitation of liability;
- consequential damages waivers; and
- safety requirements.

The legal restriction on indemnification is that the contract can only require a party to provide indemnification for its own actions and those of its subcontractors/subconsultants, not those of the other party to the contract. A limitation of liability clause is enforceable, but neither that clause nor the indemnification clause can exculpate a party from that party's liability for its own negligence, fraud, wilful injury or violation of the law. A waiver of consequential damages is enforceable.

7.4 Management of Schedule-Related Risk

The most common way to manage schedule-related risk on construction projects is to use a liquidated damages clause in a construction contract that requires the general contractor to pay the owner a certain amount for each day construction continues beyond the scheduled completion date. For a liquidated damages clause to be enforceable, it must clearly state the liquidated damages are: 1) necessary because it is difficult for the parties to determine the actual damages occasioned by the delay; and 2) intended to compensate an owner and not act as a penalty. By including a liquidated damages clause, the owner elects its remedy for delay and cannot seek to recover actual damages. In lieu of a liquidated damages provision, the parties can remove (or not include) the consequential damages waiver and the owner can retain its right to recover actual damages occasioned by a delay. Owners often include a clause stating that if the delay is the owner's fault, the general contractor's sole remedy for the owner-caused delay is a schedule extension. That clause would preclude the general contractor from seeking additional sums for delay damages.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

Owners do not routinely require performance bonds, but parties sometimes use them on large private commercial projects. Owners rarely require performance bonds on private residential projects. A public project costing more than USD50,000 requires a general contractor to secure a payment and performance bond to ensure both the general contractor's performance and that its subcontractors and suppliers receive payment.

7.6 Liens or Encumbrances in the Event of Non-Payment

Both contractors and design professionals have lien rights if non-payment occurs. A mechanic's lien (called a construction lien in Montana) has priority over mortgage liens securing any loans made to an owner to pay for a construction project, even if the lender files the mortgage lien before the contractor or design professional files a mechanic's (ie, construction lien). The owner can remove the mechanic's lien by: paying the lien amount; or filing a substitution bond for 150% of the lien amount.

7.7 Requirements Before Use or Inhabitation

Before an owner can inhabit or use a structure (other than for construction) it must obtain a certificate of occupancy from the local authority (city, town or county). To do so, the owner must demonstrate that it built the structure in conformance with the drawings and specifications approved in the earlier building permit process and that it complied with the local building codes and ordinances. Each local authority defines its own building code.

8. Tax

8.1 Sale or Purchase of Corporate Real Estate

There is no federal tax, Montana state tax or local tax on the purchase of real estate. There may be taxes payable on the sale of real estate at a federal and Montana state levels, but not at a local level.

Federal

There is no difference in applying federal tax law among the states. The rate for a C corporation is 21% for a gain on the sale or real estate, unless there is Internal Revenue Code § 1231 property (real property used in trade or business and held for one year), which is subject to tax at a maximum rate of 15%. An S corporation is a pass-through entity and that income is taxable at a shareholder level (and potentially subject to more favourable capital gains rates).

Montana

Montana imposes no sales or use tax (except on certain accommodations and rental vehicles). This is a summary of other potentially relevant taxes:

- Franchise tax: Montana imposes a franchise tax on corporations for the privilege of doing business in Montana under which a corporation's net income is taxed at 6.75% (which would include income from the sale of real estate). Certain corporations with international business activity who make a "water's-edge election" are taxed at 7%.

- Multi-state tax compact: Corporations with multi-state activities must allocate and apportion their income under the multi-state tax compact. Montana distinguishes between business income and nonbusiness income. Recognized non-business gain on an exchange of real property in Montana is allocated to Montana. Recognised business income is apportioned to Montana using an apportionment formula.
- Real and personal property tax – generally: As a general rule and subject to exceptions, all real and personal property in the State of Montana is subject to taxation by both the state and its counties, municipalities and other political subdivisions to finance various general and special governmental functions. The state classifies property according to its use and character, and taxes the different classes of property at different percentages of their market valuation (ie, an ad valorem tax). In practice, market value is generally less than a property's appraised value for resale. Montana bills and collects personal property taxes and real property taxes on different schedules. The owners of personal property report the personal property they own as of January 1st each year. Local Department of Revenue representatives assess the personal property in May each year and distribute tax bills in June, which are due within 30 days of receipt.
- Real property tax: The County Assessor assembles tax bills based on the combined mill levies of the city, county, school district and special taxing jurisdiction in which a property is located, in addition to state mill levies and sends those bills to property owners on October 30th. The property taxes are payable in arrears in two instalments that become due on November 30th and May 31st. If not paid by these dates, taxes become delinquent and accrue interest plus a penalty. In a purchase and sale of real property, the parties typically prorate the property taxes. The apportionment of taxes is negotiable between a buyer and seller and is typically set forth in the purchase agreement. Because parties typically want to pay the property taxes attributable to the property for the time in which they own it, they typically prorate the property taxes as of the closing date.

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8.2 Mitigation of Tax Liability

Montana does not have transfer, recordation, stamp or similar taxes. The fees to record the deed and other instruments are nominal and the parties to a transaction typically split those costs. The parties can use like-kind exchanges under §1031 of the Internal Revenue Code to mitigate or defer tax. Montana deploys a claw-back sourcing regime for §1031 exchanges, which means gain realised on transferring Montana real property retains its Montana-source-income character. Although the taxpayer may defer the gain, the taxpayer reports it when it recognizes the gain for federal income tax purposes.

8.3 Municipal Taxes

Subject to minor exceptions, municipalities do not assess taxes for the occupation of a business premises or payment of rent. An example is the City of Billings, which imposes a city business tax ranging from USD55 to USD215 depending on gross revenue. Relating to occupancy but more in the property tax realm, Montana imposes a beneficial use tax upon real property otherwise exempt from property tax used by private parties or for industrial trade or business purposes (ie, property owned and leased by a government entity or tax-exempt organizations). The Montana Department of Revenue imposes and collects the beneficial use tax as it does with property taxes.

8.4 Income Tax Withholding for Foreign Investors

Montana does not require non-residents to withhold income tax on the sale of real property.

8.5 Tax Benefits

At the federal level, an owner cannot depreciate land, but can depreciate buildings and improvements it is renting for income. The owner can generally claim depletion and/or amortization of certain interests in real property (such as timber or mineral rights).

At the Montana level, an owner cannot depreciate land, but can depreciate buildings and improvements it is renting for income. Montana allows a deduction for depletion of certain items and natural deposits. The elections for capitalizing must generally be the same as the elections made for federal income tax purposes.

8.6 Key Changes in Federal Tax Reform

Montana conforms to federal depreciation rules, including bonus depreciation. There is a 100% bonus depreciation for qualified improvement property under § 168(k) of the Internal Revenue Code, but Montana has not yet issued guidance addressing the federal tax reform changes to §179 of the Internal Revenue Code. New federal law imposes a USD10,000 limitation on state and local income and property tax, but does not apply to real property taxes paid or accrued in a trade or business.