


**MEMORANDUM  
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**TO:** Max Best, Planning Director  
Mary Toll, Platting Officer

**FROM:**  Holly B. Montague, Deputy Borough Attorney

**DATE:** September 20, 2006

**SUBJECT:** Advertising lots for sale prior to final plat approval

You have asked whether advertising lots for sale prior to recording a final plat is a violation of AS 29.40.180. This statute provides as follows:

(a) The owner of land located in a subdivision may not transfer, sell, offer to sell, or enter into a contract to sell land in a subdivision before a plat of the subdivision has been prepared, approved, filed, and recorded in accordance with this chapter. A person may not file or record a plat or other document depicting subdivided land in a public recorder's office unless the plat or document has been approved by the platting authority.

AS 29.40.180(a).

Advertising the sale of lots appears not to be prohibited by this section. Advertising is not specifically listed as one of the prohibited acts by the statute. In researching similar provisions in other states, I have found "advertising" to be specifically prohibited. Generally, courts do not read words into a statute. If a word or term is missing, it is presumed to have been intentionally omitted, although the entire context of the statute must be read together and make sense. The question becomes whether advertising is an "offer to sell" within the meaning of AS 29.40.180. I consider the issue a close question because statutory language is not to be interpreted as superfluous, and there is little way to interpret the "offer to sell" language as anything but superfluous if the seller's advertising is not an offer to sell. However, while it may have been the statutory drafters' intent to limit advertising without a recorded final plat, I must conclude at this time that advertising is not prohibited by statute. The Alaska Supreme Court has held that advertising lots for sale did not constitute an offer to sell. Rather, the bids made as a result of the advertising are the offers. It logically follows that the "offers" made by prospective purchasers are not "offers to sell" but rather "offers to buy." Offers to buy are not prohibited by the statute. If I reach a different conclusion at a later time I will advise you accordingly.

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The court was not interpreting AS 29.40.180 so it is possible the court would reach a different conclusion based on the language "offer to sell" within context of the entire statute. The court has opined that the purpose of AS 29.40.180 is to gain compliance with borough planning requirements, not to protect the rights of contracting parties. However, it is challenging to gain compliance if the borough does not have knowledge of the violations. If the platting division is not allowed to regulate advertising, it will lose its ability to enforce the prohibition on sale agreements prior to recordation of the plat since advertising is the signal to the platting division that a sale might be forthcoming.

At the point the seller accepts the offer or enters an agreement to sell the land, even if that sale is contingent on final plat approval, the statute is violated. I understand you have requested but have not received a copy of a "reservation agreement" which sellers assert does not violate the statute. Without having seen the reservation agreement, I cannot evaluate if it successfully avoids the statute's application.