MONTANA
Department of Justice
Mike McGrath
Attorney General

Opinions of the Attorney General

EXHIBIT 5
DATE 3/29/05
SB 290

49 Op. Att'y Gen. No. 7

LOCAL GOVERNMENT- Adoption of minimum subdivision regulations;
STATUTORY CONSTRUCTION - Construing plain language of words of statute;
SUBDIVISIONS - Compliance with Montana Subdivision and Platting Act;
SUBDIVISIONS - Compliance with Sanitation in Subdivisions Act;
MONTANA CODE ANNOTATED - Sections 76-3-101, -102(1), -102(4), -103(15), -104 -501, -504, -504(6)(c), -511, -601, -604, -608, -610(2), 76-4-101, -102, -102(13), -103 -104;
MONTANA LAWS OF 1995 - Chapter 471.

HELD:

1. Absent the findings required by Mont. Code Ann. § 76-3-511(2), a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the standards adopted by the Department of Environmental Quality under the Sanitation in Subdivisions Act.

2. Mont. Code Ann. § 76-3-511 grants local governments the authority to incorporate by reference comparable state regulations or guidelines, but local governments retain discretion to determine the best method of adopting minimum requirements.

3. Review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage.

August 17, 2001

Mr. J. Allen Bradshaw
Granite County Attorney
P.O. Box 490
Philipsburg, MT 59858

Dear Mr. Bradshaw:

You have presented the following questions for my opinion:

1. Is a local governing body required to adopt subdivision regulation standards for water supply and sewage and solid waste disposal that are at least as stringent as the standards set forth in the Montana Department of Environmental Quality's regulations?

2. Is a local governing body required to incorporate by reference into its subdivision regulations the standards for water supply and sewage and solid waste disposal adopted by the Montana Department of Environmental Quality?

3. When must a proposed subdivision undergo review to show compliance with local subdivision regulations?

The Montana Subdivision and Platting Act is found at Mont. Code Ann §§ 76-3-101 to -625. Its stated purpose is

to "promote the public health, safety, and general welfare by regulating the subdivision of land" and to "provide for adequate light, air, water supply, sewage disposal." Mont. Code Ann. § 76-3-102(1), (4). Subdivision is defined as "a division of land or land so divided that it creates one or more parcels containing less than 160 acres." Mont. Code Ann. § 76-3-103(15).

Local governments are statutorily required to adopt and provide for enforcement and administration of subdivision regulations which reasonably provide for the orderly development of their jurisdictional areas. See Mont. Code Ann. § 76-3-501. Section 76-3-504 sets forth the minimum requirements for subdivision regulations. Relevant to your question is section 76-3-504(6)(c), which provides:

> **76-3-504. Minimum requirements for subdivision regulations**. The subdivision regulations adopted under this chapter must, at a minimum:
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> . . . .
>
> (6) prescribe standards for:
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> . . . .
>
> (c) subject to the provisions of 76-3-511, water supply and sewage and solid waste disposal that, at a minimum, meet the regulations adopted by the Department of Environmental Quality under 76-4-104.

Section 76-3-511 provides that a local governing body may not adopt subdivision rules or regulations that are more stringent than "the comparable state regulations or guidelines that address the same circumstances," unless the local government makes certain specific findings to support the conclusion that more stringent rules are required to protect public health. It also states a local governing body "may incorporate by reference comparable state regulations or guidelines." Mont. Code Ann. § 76-3-511.

Interacting with the Platting Act is the Sanitation in Subdivisions Act found at Mont. Code Ann. §§ 76-4-101 to -135. The stated public policy of the Sanitation Act is to "extend present laws controlling water supply, sewage disposal, and solid waste disposal to include individual wells affected by adjoining sewage disposal and individual sewage systems to protect the quality and potability of water for public water supplies and domestic uses and to protect the quality of water for other beneficial uses, including uses relating to agriculture, industry, recreation, and wildlife." Mont. Code Ann. § 76-4-101.

Pursuant to the Sanitation Act, the Department of Environmental Quality is charged with adopting reasonable rules and sanitary standards necessary for administration and enforcement of sanitation in subdivisions. Mont. Code Ann. § 76-4-104. *Subdivision* for this purpose means "a division of land or land so divided that creates one or more parcels containing less than 20 acres." Mont. Code Ann. § 76-4-102.

Mont. Code Ann. § 76-3-511 was adopted by the Montana legislature in 1995 as part of a comprehensive attempt to address overlapping regulatory jurisdiction of the federal, state, and local governments. 1995 Mont. Laws, ch. 471. The stated intent of this legislation was to preclude, in those instances where it applied, the imposition of differing standards by federal, state, and local governments where more than one level of government had regulatory jurisdiction. While the bill focused primarily on overlaps between state and federal regulation, it specifically addressed the dual regulatory roles of the state and local governments with respect to subdivisions through the enactment of Mont. Code Ann. § 76-3-511. 1995 Mont. Laws, ch. 471, § 5.

Section 76-3-511 seems clear in stating that the locally adopted regulations can be no "more stringent" than the regulations adopted by the state under the Sanitation Act unless the local government makes specific findings to support the conclusion that more stringent standards are needed to protect public health or the environment. See Mont. Code Ann. § 76-3-511(2). The apparent clarity of this provision is clouded, however, by the fact that the legislature left intact language in Mont. Code Ann. § 76-3-504(6) suggesting that the state standards were viewed as "minimum" standards, implying that the local government could enact more restrictive standards if it chose to do so. The legislature amended § 76-3-504(6) in 1995 Mont. Laws, ch. 471, § 18, by adding the words "subject to the provisions of 76-3-511," but left the words "at a minimum" intact.

A court in construing these statutes would be obligated to attempt to find a construction that gives effect to all of the words used. Mont. Code Ann. § 1-2-101; State v. Butler, 1999 MT 70, 25, 294 Mont. 17, 26, 977 P.2d 1000, 1006 (1999). While the usage is certainly awkward, I conclude that the only way to read these statutes in a way

:hat does not render some of the language superfluous is to conclude that they require the local government to ıdopt the state standard, either by reference or in substance, with respect to those matters on which the state ıdopts rules under Mont. Code Ann. § 76-4-104, unless a more restrictive standard is found to be needed under :he exception found in Mont. Code Ann. § 76-3-511(2). See generally Skinner Enterprises Inc. v. Lewis and Clark County, 286 Mont. 256, 950 P.2d 733 (1997) (discussing whether local boards of health may promulgate 'egulations which differ from comparable state regulations). They do not leave the local government the option of ıdopting a less stringent standard than the state standard.

'ou note in your request that the definition of the term "subdivision" in the Platting Act differs from that in the Sanitation Act, since the latter includes only divisions of land of less than 20 acres, while the former includes livisions of land of up to 160 acres. Compare Mont. Code Ann. §§ 76-3-103(15) and -104 with Mont. Code Ann. §§ 76-4-102(13) and -103. It has been suggested that this difference is significant because the Sanitation Act in effect creates no standard for a "subdivision" between 20 and 160 acres in size, and that applying the state rules ıdopted under the Sanitation Act would therefore necessarily adopt a standard for those "subdivisions" which is more stringent" than the state standards. I find this argument unconvincing. Mont. Code Ann. § 76-3-504, which ıpplies to subdivisions of less than 160 acres, specifically requires local governments to meet the state standard ıdopted pursuant to the Sanitation Act. The suggestion that there is no state standard for subdivisions between 20 and 160 acres in size is therefore incorrect.

The differing definitions of the term "subdivision" in the Platting Act and the Sanitation Act are irrelevant to this ›articular question. Requiring subdivisions as defined by the Platting Act to comply with the *same* sanitation 'egulations adopted by the Department of Environmental Quality pursuant to the Sanitation Act is not in violation of section 76-3-511; on the contrary, adoption of such regulations is exactly what is mandated by section 76-3-504(6)(c), which requires adoption of regulations which meet those adopted by the Department of Environmental Quality under the Sanitation Act.

When interpreting statutes, I must follow the well-accepted principle of statutory construction that "statutory anguage must be construed according to its plain meaning and, if the language is clear and unambiguous, no urther interpretation is required." Dahl v. Uninsured Employers' Fund, 1999 MT 168, 16, 295 Mont. 396, 901 .2d 363. The statutes in the present case are clear: local government must adopt regulations that conform with hose adopted by the Department of Environmental Quality. This requirement results in local government ıdopting the *same* standard and does not violate the prohibition against adopting a *more stringent* standard.

Thus, in response to your first question, it is my opinion that, absent the findings required by Mont. Code Ann. § '6-3-511(2), a local governing body must adopt subdivision regulations standards for water supply and sewage ınd solid waste disposal that are as stringent as the standards adopted by the Department of Environmental Quality under the Sanitation Act.

'our second question asks whether a local governing body is required to incorporate by reference into its ubdivision regulations the standards for water supply and sewage and solid waste disposal adopted by the Department of Environmental Quality pursuant to the Sanitation Act. While the Platting Act provides that a local ıoverning body may incorporate by reference a comparable state regulation or guideline, there is no mandate hat it do so. See Mont. Code Ann. § 76-3-511. The governing statutes clearly require that a local government ıdopt minimum requirements for subdivision regulations, but it has left the method of adoption up to the liscretion of the local government.

ıgain, applying the rule of statutory construction stated above, I conclude the plain language of section 76-3-511 ırants local governments the authority to incorporate by reference comparable state regulations or guidelines, ıut local governments retain discretion to determine the best method of adopting minimum subdivision egulations.

'our third question asks when a proposed subdivision must undergo review to show compliance with local ubdivision regulations. In my opinion such review must take place at the preliminary plat stage. Any other onclusion would render local government review meaningless.

Mont. Code Ann. §§ 76-3-601 to -625 sets forth the subdivision review procedure a local government must ollow. Section 76-3-601 requires that a subdivider present to the governing body the preliminary plat of the

proposed subdivision for local review. Section 76-3-604 governs review of the preliminary plat. It provides:

> **76-3-604. Review of preliminary plat.** (1) The governing body or its designated agent or agency shall review the preliminary plat to determine whether it conforms to the local growth policy if one has been adopted pursuant to chapter 1, to the provisions of this chapter, and to rules prescribed or adopted pursuant to this chapter.
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> (2) The governing body shall approve, conditionally approve, or disapprove the preliminary plat within 60 working days of its presentation unless the subdivider consents to an extension of the review period.
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> (3) If the governing body disapproves or conditionally approves the preliminary plat, it shall forward one copy of the plat to the subdivider accompanied by a letter over the appropriate signature stating the reason for disapproval or enumerating the conditions that must be met to ensure approval of the final plat.

Title 76, chapter 3, part 6 goes on to outline the process for preliminary plat review and approval. A public hearing must be held on the preliminary plat and local government must follow the criteria set forth in section 76-3-608. Specifically, a proposal must undergo review to show compliance with "the local subdivision regulations provided in part 5 of this chapter." See Mont. Code Ann. § 76-3-608. Part 5, as discussed above, requires that local government adopt subdivision regulations that conform with certain minimum requirements.

Once the preliminary plat is approved "the governing body and its subdivisions may not impose any additional conditions as a prerequisite to final plat approval providing said approval is obtained within the original or extended approval period as provided in subsection (1)." See Mont. Code Ann. § 76-3-610(2). Review for compliance with water supply and sewage and solid waste disposal regulations at the final plat stage would be rendered meaningless because the governing body could not impose additional conditions for compliance at this stage.

I therefore conclude, based on the plain language of section 76-3-608, that review for compliance with local subdivision regulations must occur at the preliminary plat stage.

THEREFORE, IT IS MY OPINION:

1. Absent the findings required by Mont. Code Ann. § 76-3-511(2), a local governing body must adopt subdivision regulations for water supply and sewage and solid waste disposal that are as stringent as the standards adopted by the Department of Environmental Quality under the Sanitation in Subdivisions Act.

2. Mont. Code Ann. § 76-3-511 grants local governments the authority to incorporate by reference comparable state regulations or guidelines, but local governments retain discretion to determine the best method of adopting minimum requirements.

3. Review of a proposed subdivision for compliance with local subdivision regulations must occur at the preliminary plat stage.

Very truly yours,

MIKE McGRATH
Attorney General

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