

**M E M O R A N D U M**

**To:** Greg Petesch and Joe Kolman  
**From:** Myra Shults  
**Re:** LC 5004  
**Date:** March 7, 2008

Greg and Joe:

After the Hamilton meeting of the Water Policy Interim Committee I said I would provide some comments to you, which are technical in nature.

**LC 5004, cross-reference to 76-3-511..** Ever since I first saw LC 5004, Section 1, subsection 3 (page 7), I have been concerned about the plan to use 76-3-511 to allow local requirements for community water and septic. That is because I actually tried to use this process once in Park County to allow the county to evaluate water on 20-acre lots, as part of a lawsuit. I have also fought continuing battles with attorneys who think the code section is a requirement for all subdivision regulations—not just those for water and septic.

With respect to 76-3-511 (section 2 in the discussion draft bill), at the very least we have to correct the incorrect cross-reference to 76-3-504 which unfortunately has been in the code since 2005. I am also pleading with you to add subsection 7 after 76-3-501, which will clear up the misconception that we have to follow the entire –511 procedure for all subdivision regulations.

I discussed 76-3-511 in detail with MACo’s Land Use Committee last month at the midwinter meeting. Not that many commissioners attended the meeting but those who were there agreed the code section is hard to understand and almost impossible to use.

When I returned to the office I asked Katrina Martin at the State Law Library to do the legislative history research on the code section. She said it is about 200 pages long and suggested I talk to Michael Kakuk because the sponsor asked him to draft it. I did talk to Michael and he said that section was added to the bill at the request of Andy Skinner, who was in an on-going battle with Lewis and Clark County because the county was requiring a septic system more strict than that required by DEQ.

Although the issue in *Skinner* was about Title 50, please note that 50-2-130 and 76-3-511 were both part of Chapter 471 in 1995. I suspect Mr. Skinner wanted to make sure county commissioners did not have any more authority than the Board of Health to require more stringent septic systems, without an onerous public process.

Now that I know that Mr. Skinner was behind the legislation it is clear why the procedures in 76-3-511 are so difficult—because he did not want to have to comply with Lewis and Clark County requirements.

I have the most problem with the sentence in subsection (3) of 76-3-511 which requires “[t]he written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed local standard or requirement.” Even though that might be easier for local health boards to do, I suspect the costs to one subdivider for a community system might vary greatly from the costs to another subdivider in another location, so I don’t know how a county would comply with this requirement. Also, in trying to use this code section to require community systems, the burden will be on the county to try to determine these costs. All I can see are lawsuits.

Subsection (3) of 76-3-511 also requires that the written finding reference information and peer-reviewed scientific studies in record that forms [sic] the basis for the governing body’s conclusion. The burden will be on the county to come up with these “peer-reviewed scientific studies” if they even exist.

By now you are probably wondering how I ever used this code section in Park County. The County was in the unusual position of having been sued by both the subdivider and the neighbors over a conditional approval of a subdivision. One of the conditions of approval was that a pump test be conducted and evaluated by DEQ and DNRC. The trouble was the DEQ Circular for pump tests only applied to lots less than 20 acres in size. We wanted legal authority for the requirement.

The neighbors had an interest in the pump test the court said we could require, if we had a –511 hearing, but the subdivider didn’t really want to do the pump test. Each of the parties hired a hydrogeologist to testify at the hearing. I have to admit we stumbled through the process, but no one challenged it. The issue was resolved when the Bureau of Mines completed a hydrogeological study of the area and found that the neighbors’ wells were up-gradient from the proposed wells in the subdivision. This demonstrates the need for LC 5007.

Since we jumped through the hoops in Park County the Attorney General seemed to say, in 49 Op. Att’y Gen. No. 7 (2001) that “of course the DEQ regulations apply to lots 20 acres of greater in size.”

I am not familiar with DEQ’s rules and regulations regarding community systems. It may be a county can simply incorporate by reference those regulations or guidelines under subsection (1) and it doesn’t have to use the process in subsection (2) and (3). I am copying Steve Kilbreath on this memo with the hopes he can provide some guidance.

### **LC 5004, Section 1, subsection (3) criteria (page 7)**

The specified criteria in subsection (3) are:

- population density
- soil conditions, or
- public health or environmental concerns

Please look at 76-4-104. Note in subsection (2), the rules and standards adopted by DEQ for Sanitation in Subdivisions are related to:

- size of lots
- contour of land
- porosity of soil
- ground water level
- distance from lakes, streams and wells
- (f) doesn't apply because we are talking about public systems
- other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation and wildlife.

When you compare the items listed in proposed subsection (3) of LC 5004 with subsection (2) of 76-4-104, you can see differences. I would be more comfortable with similarities. I think the new subsection should use the same language as 76-4-104(2), or else 76-4-104 should be amended so DEQ comes up with some rules/regulations local government can merely adopt per 7-3-504(1)(g)(iii), to implement 76-3-504(3).

I believe Jim Rokosh, a commissioner from Ravalli County, already raised the ambiguity about the term "population density" at the Hamilton meeting. We need some clarification if this means the density within the subdivision or the density in the area of the subdivision, and if the latter, how close?

### **LC 5004, Section 3 (page 10)**

I also believe Jim Rokosh asked what "giving priority" means. I think "community water system" and "public sewer and wastewater system" should be connected with an "or" rather than conjunctive.

Perhaps the following language might work:

If, after adopting regulations pursuant to [Section 1, subsection 3], those regulations may specify circumstances in which a subdivision application proposing a community water system or a public sewer and wastewater system may be given priority.

In this way the debate about which subdivisions gets priority occurs when the regulations are adopted, and not when each subdivision is submitted for review.

I know the legislators don't like to hear a bill won't work—they want to know what can be done so it will work. We need your help—with changes to 76-3-511 to make it more user-friendly and with the above proposed language.

Thank you for your considerations of these comments. If they are going to be deemed those of Representative Cohenour, please run them by her first.

cc: Harold Blattie  
Steve Kilbreath