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April 28, 2008

Via e-mail (goppel@montanarealtors.org)

Montana Association of REALTORS

Attn: Glenn Oppel, Government Affairs Director

208 N. Montana Avenue, Suite 203

Helena, Montana 59602

Re: Scope of M.C.A. § 76-3-511
Stewart correspondence of April 22, 2008
Our File No.: 20093.001

Dear Mr. Oppel:

We are providing this written opinion to you per your request during our earlier telephone conference call in which we discussed the issues addressed herein along with several other matters which have been the subject of recent discussions and correspondence.

We are writing in response to Mr. Stewart's correspondence of April 22, 2008 in which he raised certain questions regarding the scope of M.C.A. § 76-3-511 which requires that local regulations are to be no more stringent than state regulations or guidelines.

We understand from Mr. Stewart's inquiry that the Montana Association of Counties (hereinafter "MACo") contends that the scope of M.C.A. § 76-3-511 applies solely to water and waste water systems. We further understand that MACo intends to submit this week to the Water Policy Interim Committee its interpretation and position on the statute.

As a follow up, we reviewed the materials which were provided including the "summary work group" PDF, the applicable statutory scheme, and the legislative history which applies to the statutes at issue.

Based upon our review of the applicable law and legislative history, it is our conclusion that M.C.A. § 76-3-511 applies to the Montana Subdivision and Platting Act (hereinafter the "Act") in its entirety and not just to the water and waste water systems.

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In the discussion set forth in Section I below, we will provide to you our analysis of the applicable provisions of Act and the underlying legislative history.

In addition, as a follow up to Mr. Stewart's request, we reviewed the provided LC5014 for purposes of responding to his inquiry as to whether it constitutes a substantive change to Montana law. In this regard, in the discussion set forth in Section II of this memorandum below, we will respond specifically to the questions which were raised in the April 22nd correspondence.

I. Analysis and interpretation of M.C.A. § 76-3-511

"Local regulations no more stringent than state regulations or guidelines.

(1) Except as provided in subsections (2) through (4) or unless required by state law, a governing body may not adopt a regulation under 76-3-501 or 76-3-504 (1)(f)(iii) that is more stringent than the comparable state regulations or guidelines that address the same circumstances. The governing body may incorporate by reference comparable state regulations or guidelines.

(2) The governing body may adopt a regulation to implement 76-3-501 or 76-3-504 (1)(f)(iii) that is more stringent than comparable state regulations or guidelines only if the governing body makes a written finding, after a public hearing and public comment and based on evidence in the record, that:

- (a) the proposed local standard or requirement protects public health or the environment; and
- (b) the local standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology."

It is a fundamental rule of statutory construction that the intention of the legislature controls. 1-2-102 M.C.A.; United States v. Brooks, 270 Mont 136, 890P.2d 759 (1995). Such intent must be determined first from the plain meaning of the words used, and if interpretation can be so arrived at, a court may go no further to apply other means of interpretation. State ex. Rel. Huffman v. Dist. Ct., 154 Mont. 201, 461 P.2d 847 (1969). A court's duty when interpreting a statute is "not to insert what has been omitted or to omit what has been inserted." See § 1-2-101 M.C.A.. Where ambiguity does exist, the court is permitted to look elsewhere for legislative intent. For example, the court may rely on the legislative history of the ambiguous statute. State v. Legg, 319 Mont. 362, 369, 84 P.3d 648.

When construing a statute, a court is 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, 294 Mont. 17, 26, 977 P.2d 1000, 1006 (1999).

The above provision refers to § 73-6-501, which is entitled "Local subdivision regulations" and § 76-3-504(1)(f)(iii), which states, "subject to the provisions of § 76-3-511, water supply and sewage and solid waste disposal..."

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It is our understanding that the MACo contends that § 76-3-511 applies only to the “regulation of sanitary facilities” based on the language in 504(1)(f)(iii). The plain language of these statutes cannot be construed in that fashion because such an interpretation fails to give effect to all the words used. Butler, Mont. at 26.

Pursuant to § 76-3-511(1), “a governing body may not adopt a regulation under 76-3-501 or § 76-3-504 (1)(f)(iii) that is more stringent than the comparable state regulations or guidelines that address the same circumstances.” To give effect to every word of the statute requires a governing body to make certain findings when adopting a regulation under § 76-3-501 that is “more stringent than the comparable state regulations or guidelines” As suggested above, § 76-3-501 M.C.A. deals with the entire scope of local subdivision regulations and states the following:

“Local subdivision regulations. The governing body of every county, city, and town shall adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for:

- (1) the orderly development of their jurisdictional areas;
- (2) the coordination of roads within subdivided land with other roads, both existing and planned;
- (3) the dedication of land for roadways and for public utility easements;
- (4) the improvement of roads;
- (5) the provision of adequate open spaces for travel, light, air, and recreation;
- (6) the provision of adequate transportation, water, and drainage;
- (7) subject to the provisions of 76-3-511, the regulation of sanitary facilities;
- (8) the avoidance or minimization of congestion; and
- (9) the avoidance of subdivisions that would involve unnecessary environmental degradation and danger of injury to health, safety, or welfare by reason of natural hazard, including but not limited to fire and wildland fire, or the lack of water, drainage, access, transportation, or other public services or that would necessitate an excessive expenditure of public funds for the supply of the services.”

Thus, in virtue of the comprehensive, itemized list contained in 76-3-501 M.C.A., the requirement for more stringent regulations must apply to § 76-3-501(1) – (6) and (8)-(9), rather than to § 76-3-501(7) alone. This interpretation is reinforced by the recent 2005 amendment which itemized in independent sections the areas to be “provid[ed] for” in subdivision regulations. Had the legislature intended for only § 76-3-501(7) to be implicated in § 76-3-511, then § 76-3-511 would have been

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concurrently amended to state, "a governing body may not adopt a regulation under § 76-3-501(7) or § 76-3-504(1)(f)(iii)...," but it was not.

The final issue to resolve is the intent behind the reference in § 76-3-501(7) to § 76-3-511 but the lack of reference in the other eight subparts. A court may refer to legislative history for this explanation. State v. Legg, 319 Mont. 362, 369, 84 P.3d 648.

The opening statement by the sponsor of HB 511 (1995) explained that the bill "was requested by various interest groups who are regulated by federal programs for clean air, clean water, radiation control, and solid and hazardous waste." (House Natural Resources Committee February 15, 1995) The introductory statement also explained that the bill would directly impact the Board of Health and Environmental Sciences (BHES) and the Department of Health and Environmental Sciences (DHES).

The introductory statement and subsequent discussion referred to the BHES and DHES because those were the state agencies which at the time had statutory authority to promulgate rules and regulations in the areas addressed in § 76-3-501 and § 76-3-504(1)(f)(ii). In other words, there is no agency which drafts rules for adequate open space for light and air. Thus, the legislature dealt with the "water supply, sewage, and solid waste disposal" differently because those issues were within the purview of certain state agencies expressly authorized to regulate in that arena. Conversely, where no state agency had express authority to promulgate regulations, none was implicated in the hearing and no direct reference was included in the statute.

The 1995 hearing minutes further support the foregoing interpretation since the sponsor states that the bill addresses clean air, radiation control, and hazardous waste issues, not only the "regulation of sanitary facilities," as MACo suggests.

II. Analysis and Interpretation of LC5014

Mr. Stewart also requested our opinion of whether LC5014 weakened our shared view of § 76-3-511 and whether counties can require a community wastewater system under § 76-3-511 as currently written.

First, to the extent that LC5014 continues to include a direct reference to the entirety of § 76-3-501, it is my conclusion that my interpretation above would apply equally to LC5014 and § 76-3-511 MCA (2007).

Second, the current language of 76-3-511 does not prohibit a county from requiring community water systems in certain instances, under certain conditions; however, LC5014 is nonetheless a substantive change to Montana subdivision law because it would expressly permit a governing body to "require public water systems and/or public sewer systems."

Under current Montana law an applicant may argue that a public water system requirement exceeds the scope of the enabling legislation and/or is properly a matter for the DEQ, DNRC, or Health Departments to regulate. Such arguments are not available under LC5014. Furthermore, an express grant of authority is likely to dramatically increase the cost of development, as we will no doubt see many counties requiring and attempting to require community systems whenever possible.

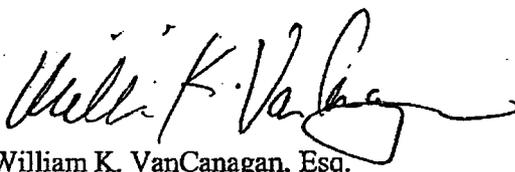
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After you have had an opportunity to review the legal analysis set forth above, please feel free to contact us with any questions or if you desire any further information.

Sincerely,

DATSOPOULOS, MacDONALD & LIND, P.C.

A handwritten signature in black ink, appearing to read "William K. VanCanagan". The signature is fluid and cursive, with a long horizontal stroke at the end.

William K. VanCanagan, Esq.

A handwritten signature in black ink, appearing to read "Joslin E. Monahan". The signature is cursive and somewhat compact.

Joslin E. Monahan, Esq.

WKV/jem/ksh