VOLUME NO. 37 OPINION NO. 169

ADMINISTRATIVE PROCEDURE - Validity of unwritten policies for minor subdivisions; authority to adopt regulations for minor subdivisions; COUNTY COMMISSIONERS - Validity of unwritten policies for minor subdivisions; authority to adopt regulations for minor subdivisions; public park and playground dedication for subdivisions; LAND USE - Minor subdivisions; public park and playground dedication for minor subdivisions; RULES AND REGULATIONS - validity of unwritten policies for minor subdivisions; authority to adopt regulations for minor subdivisions; REVISED CODES OF MONTANA, 1947 - Section 11-3859 et seq.

HELD: 1. A local governing body's unwritten blanket policy or practice of accepting cash donations in lieu of public park and playground dedication with respect to subdivisions of five or fewer parcels is invalid. Minor subdivisions may be exempted from public park and playground dedication requirements only on a case-by-case basis and only if they meet one of the statutory criteria for exemption under section 11-3865, R.C.M. 1947.

2. Where, pursuant to section 11-3864(2), R.C.M. 1947, a cash donation is accepted in lieu of public park and playground land dedication, the amount of cash paid by the subdivider must be based upon the fair market value of the unimproved, unsubdivided land which is to be subdivided. Fair market value is the amount a willing buyer would pay and a willing seller accept for the land where neither buyer or seller is acting under duress.

20 November 1978

Douglas G. Harkin, Esq.
Ravalli County Attorney
Ravalli County Courthouse
Hamilton, Montana 59840

Dear Mr. Harkin:

You have requested an opinion concerning the eligibility of twenty-six, four lot subdivisions for summary review under

section 11-3866(6), R.C.M. 1947, of the Montana Subdivision and Platting Act. Each of the twenty-six subdivisions comprises approximately twenty acres and has been platted into four, approximately five acre lots. Twenty-one of the subdivisions lie within a two thousand acre ranch near the town of Stevensville which was previously subdivided in June 1977, into seventy parcels of twenty or more acres each. The five remaining subdivisions are adjacent to the ranch. Cumulatively, the subdivisions would create a total of one hundred four lots, comprising five hundred twenty total acres.

Additionally, you have requested an opinion regarding the amount of cash donation which must be paid by a subdivider under section 11-3864(2), R.C.M. 1947, where, pursuant to that section, a governing body determines that dedication of land for parks and playgrounds is inappropriate.

A.

Initially, I declined to address your questions because of pending cases in the Supreme Court and the District Court of the Fourth Judicial District. It is my policy to avoid, where possible, issuing any opinion which might be construed as a comment upon or an attempt to influence pending litigation. However, after reviewing subsequent developments in each of the two cases, I have determined that the questions raised in your opinion request, with one exception, are beyond the scope of issues in either of those cases.

One case, Young v. Stillwater County, was recently decided by the Montana Supreme Court, 35 St. Rptr. 1099, 582 P.2d 353 (1978). The Court determined that minor subdivisions are not subject to public hearing requirements of the Montana Subdivision and Platting Act, at least where local regulations do not require a public hearing. The case did not consider minor subdivision eligibility requirements.

The second case, State ex rel. Florence-Carlton School District No. 15 v. Board of County Commissioners, et al, is presently on appeal to the Montana Supreme Court, No. 14365. The questions presented in that case, as they relate to the Montana Subdivision and Platting Act, are whether private easements can be considered "proper access" under section 11-3866(6) and whether minor subdivisions are subject to public interest review under section 11-3866(4), R.C.M. 1947. Although the case involves the same twenty-six subdivisions referred to in your opinion request, the parties stipulated for purposes of that action that each of the

twenty-six subdivisions is eligible for review as a minor subdivision if private easements satisfy the "proper access" requirement of section 11-3866(6). A district court finding in its Order and Memorandum that the twenty-six subdivisions are eligible for summary review as minor subdivisions was related solely to the question of whether the subdivisions meet the "proper access" requirement for minor subdivision review:

> The issues in this litigation revolve around two questions of law.
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> Memorandum
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> First, whether a minor subdivision submitted for approval of a county governing body pursuant to section 11-3866(6), R.C.M. 1947, is required to meet the public interest criteria of section 11-3866(4), R.C.M. 1947, and second, whether a private easement furnishes "proper access" within the meaning of section 11-3866(6), R.C.M. 1947. Since the second issue raises the initial question of whether the subdivisons involved herein are even eligible for review as minor subdivisions under section 11-3866(6), the Court must address that issue as a threshold question. (Emphasis added.)

The district court did not consider whether the twenty-six subdivisions satisfy other prerequisites to treatment as minor subdivisions. However, the decision renders questions concerning the public access prerequisite beyond the scope of this opinion.

B.

Initially, it should be noted that the Montana Subdivision and Platting Act has spawned numerous questions and controversies. It is the subject of five recent Attorney General opinions. 37 OP. ATT'Y GEN. NO.'s 1, 38, 41, 74 and 88. Additionally, the Attorney General's office has received a large number of citizen complaints concerning uses of the various exceptions and exemptions to the Act. These issues and complaints have not arisen for lack of an expression of legislative purpose and intent. The purpose of the Act is express, providing:

> Statement of purpose. It is the purpose of this act to promote the public health, safety, and general welfare by regulating the subdivision of

> land; to prevent overcrowding of land, to lessen congestion in the streets and highways; to provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements; to require development in harmony with the natural environment; to require that whenever necessary the appropriate approval of subdivisions be contingent upon a written finding of public interest by the governing body; and to require uniform monumentation of land subdivisions and transferring interests in real property by reference to plat or certificate of survey.

Section 11-3860, R.C.M. 1947. A general statement of legislative purpose is no substitute for plain and clear statutory language, see In re Estate of Baier, ___ Mont. ___, 567 P.2d 943, 946 (1977), and serves only as a beacon in construing ambiguous provisions, see Corwin v. Bieswanger, 126 Mont. 332, 340, 251 P.2d 232 (1952).

Although the Legislature has generally provided for public review of subdivisions and the preparation of environmental impact statements and dedication of land for public parks and playgrounds, sections 11-3862, 11-3864 and 11-3866, R.C.M. 1947, it has also provided for numerous exceptions to the requirements of the Act. One of those exceptions relates to "minor subdivisions," for which the Legislature has established summary review procedures. Those summary review provisions are set forth in two separate sections. The first is section 11-3863(5), which provides:

> (5) Local subdivision regulations shall include procedures for the summary review and approval of subdivision plats containing five (5) or fewer parcels where proper access to all lots is provided, where no land in the subdivision will be dedicated to public use for parks or playgrounds and which have been approved by the department of health and environmental sciences where such approval is required by sections 69-5001 through 69-5005; provided that reasonable local regulations may contain additional requirements for summary approval. (Emphasis added.)

The second is section 11-3866(6), which provides:

> (6) Subdivisions containing five or fewer parcels where proper access to all lots is provided and in which no land is to be dedicated to the public for parks or playgrounds are to be reviewed as follows:
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> (a) The governing body must approve, conditionally approve, or disapprove the first such subdivision from a tract of record within 35 days of the submission of an application for approval thereof;
> (b) The governing body shall state in writing the conditions which must be met if the subdivision is conditionally approved or, if it disapproves the subdivision, what local regulations would not be met by the subdivision;
> (c) The requirements for holding a public hearing and preparing an environmental assessment shall not apply to the first such subdivision created from a tract of record;
> (d) Subsequent subdivisions from a tract of record shall be reviewed under section 11-3863(5) and regulations adopted pursuant to that section. (Emphasis added.)

Section 11-3863(5) was enacted in 1973. Section 11-3866(6) was enacted in 1977, Laws of Montana (1977), ch. 555, sec. 1, apparently to clarify the procedures and standards to be followed in reviewing first time minor subdivisions. Subsection (c) of section 11-3866(6) expressly exempts the first minor subdivision created from a tract of record from public hearing and environmental assessment requirements which are otherwise required by sections 11-3863(3) and 11-3866(3), R.C.M. 1947. Section 11-3863(5) allows imposition of more stringent requirements where subsequent divisions are involved, but only if those requirements are part of local regulations. Young v. Stillwater County, supra.

Summary treatment under section 11-3863(5) and 11-3866(6) is expressly conditioned upon three things. First, the subdivision must consist of five or fewer lots; second, proper access must be provided to each of the lots; and, third, there can be no dedication of land for public parks and playgrounds. The first criteria is met with respect to each of the twenty-six subdivisions in question, assuming there is no common ownership of adjacent subdivisions, and the second criteria, as previously noted, is beyond the scope of the present opinion. With respect to the third criteria,

the policies and practices of the Ravalli County Commissioners and Planning Board are invalid. It is my opinion that each subdivision of five or fewer parcels which is submitted for review must be considered individually to determine whether it qualifies for an exemption from the dedication requirement.

The Commissioners and Planning Board have an unwritten policy or practice of waiving public park and playground dedication requirements, and extracting cash donations in lieu of dedication, for subdivisions of five or fewer parcels. Initially, you indicated that the practice amounted to a blanket exemption of all such subdivisions from dedication requirements. Subsequently you wrote and advised that the practice extended only to those subdivisions of five or fewer parcels having restrictive covenants which limit lot size to a minimum of five acres and buildings to single family residences. Because of the uncertainty as to the precise policy, at my request investigators of the Planning Division of the Department of Community Affairs recently reviewed records of the Ravalli County Clerk and Recorder, County Commissioners and Planning Board. They were unable to find a single recorded case during the past year in which Ravalli County has required and accepted dedication of land for public parks and playgrounds in conjunction with a subdivision of five or fewer parcels. Moreover, only six of twenty-six subdivisions of five or fewer parcels recorded in Ravalli County during the past year and scrutinized by DCA Investigators were subdivisions of lots of five or more acres. The other twenty-one consisted of lots less than five acres. This information contradicts statments that the commissioners practice or policy has been based upon the existence of restrictive covenants limiting minimum lot size and lot use. In any event, the practice of waiving land dedication and accepting cash donation with respect to subdivisions of five or fewer parcels is inconsistent with the Montana Subdivision and Platting Act, irrespective of whether the policy extends to all subdivisions of five or fewer parcels or is limited to such subdivisions having restrictive covenants.

First, the Subdivision and Platting Act contemplates written regulations adopted after notice and hearing. See section 11-3863(1), R.C.M. 1947. The subdivision regulations of Ravalli County, Montana, heretofore adopted, do not authorize or establish a blanket policy for accepting cash in lieu of dedication of land with respect to minor subdivisions, nor does it appear that such a policy has been formally adopted after notice or hearing.

Second, the practice conflicts with express provisions governing waiver of public park and playground dedication. Any administrative regulation or practice which conflicts with a parent statute is void. See State ex rel. Swart v. Casne, ___ Mont. ___, 564 P.2d 983, 986 (1977).

The public park and playground dedication requirement was the subject of a prior Attorney General opinion found at 37 OP. ATT'Y GEN. NO. 1 (1977). That opinion specifically held the fact that a subdivision consisting of five or fewer parcels is an insufficient basis for waiving the requirement for public park and playground dedication.

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> The Montana Subdivision and Platting Act, at section 11-3864, R.C.M. 1947, comprehensively provides for public dedication of lands in subdivisions for parks and playgrounds. Subsection (1) thereof requires generally that all plats of residential subdivisions contain a portion of the subdivision's lands permanently dedicated to public parks and playgrounds. Subsection (2) provides, however, that where, for good cause shown, the dedication of land to parks and playgrounds is undesirable because of "size, topography, shape, location, or other circumstances," the local governing body may accept a cash donation from the subdivider in lieu thereof, based upon the fair market value of the amount of land that otherwise would have been dedicated. Subsections (5), (6), and (7) of section 11-3864 allow the local governing body to waive these dedication and cash donation requirements in certain specific instances. None of these instances in which waiver is allowed is based upon the fact that the subdivision is a "minor subdivision."
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> Section 11-3863(5) was clearly intended to provide a procedure for summary review, and not to add to or detract from the clear requirements as to parks and playgrounds found in section 11-3864. When sections 11-3863(5) and 11-3864 and the Department's Rule are construed together, it is clear that all subdivisions must comply with the requirements of section 11-3864 relating to parks and playgrounds. There is simply no exemption in that section for minor subdivisions. If, however, a subdivision containing (5) or fewer parcels,

> with proper access provided to all lots, complies with section 11-3864 by either making a cash donation in lieu of dedication and cash donation requirements pursuant to subsection (5), (6), or (7), then it is entitled to enjoy the summary review and approval procedures adopted by the local governing body pursuant to section 11-3863(5). On the other hand, if a subdivision containing five (5) or fewer parcels complies with section 11-3864 by actually dedicating land to public parks and playgrounds, then it is not eligible for summary review and approval under the local governing body's procedures adopted pursuant to section 11-3863(5).

Opinion No. 1 was issued on February 2, 1977, prior to the enactment of section 11-3866(6) by the 1977 Montana Legislature. However, the reasoning and holdings of Opinion No. 1 are equally applicable to proceedings under section 11-3866(6), since the new section has identical eligibility requirements with respect to dedication requirements as those of section 11-3863(5). A blanket practice of accepting cash in lieu of public park and playground dedication with respect to subdivisions of five or fewer parcels is contrary to the express holding of Opinion No. 1.

Such a practice is invalid even if it is linked to the existence of restrictive covenants. Section 11-3864(5) is the sole authority for waiving dedication requirements based upon restrictive covenants limiting parcel and types of buildings. That section provides:

> (5) The local governing body may waive dedication and cash donation requirements where all of the parcels in a subdivision are five (5) acres or more in size and where the subdivider enters a covenant to run with the land and revocable only by mutual consent of the governing body and the property owner that the parcels in the subdivision will never be subdivided into parcels of less than five (5) acres and that all parcels in the subdivision will be used for single family dwellings. (Emphasis added.)

The express mention of a particular power or authority implies the exclusion of any nondescribed power or authority. State ex rel. Jones v. Giles, 168 Mont. 130, 133, 541 P.2d 355 (1975). Thus, the criteria of section

11-3864(5) are exclusive as to consideration of restrictive covenants as a basis for waiving dedication requirements.

Moreover, a restrictive covenant limiting lot size or types of buildings is not a circumstance permitting a blanket policy of accepting cash in lieu of dedication under subsection (2) of section 11-3864. That subsection provides:

> (2) Where, because of size, topography, shape, location, or other circumstances, the dedication of land for parks or playgrounds is undesirable, the governing body may, for good cause shown, make an order to be endorsed and certified on the plat accepting a cash donation in lieu of the dedication of land and equal to the fair market value of the amount of land that would have been dedicated. For the purpose of this section, the fair market value is the value of the unsubdivided, unimproved land. Such cash donation shall be paid into the park fund to be used for the purchase of additional lands or for the initial development of parks and playgrounds. (Emphasis added.)

In defining the "other circumstances" which may be considered by local governing bodies under subsection (2), reference must be made to the enumeration of specific items which precede the general term. The statutory construction doctrine of ejusdem generis is applicable. "The doctrine of ejusdem generis is one of construction and means 'that where an enumeration of specific things is followed by some more general word or phrase, such general phrase is held to refer to things of the same kind and those enumerated.'" Burke v. Sullivan, 127 Mont. 374, 378, 265 P.2d 203 (1954). The specific things enumerated in subsection (2) are physical characteristics of subdivided land. "Other circumstances" must therefore refer to such other physical characteristics of the subdivided land which may be relevant to whether a cash donation in lieu of dedication of land is appropriate. The criteria for waiver under subsection (2) can only be applied on a case by case or subdivision by subdivision basis.

C.

Your second question concerns computation of the amount of cash donation assessed in lieu of public park and playground land dedication in those cases under section 11-3864(2) in which dedication of land is determined to be undesirable.

Section 11-3864(2) expressly provides that the amount of cash donation shall be "equal to the fair market value of the amount of land that would have been dedicated." "Fair market value" has an accepted legal meaning, being the amount a willing buyer would pay and a willing seller would accept for a particular piece of property where neither buyer or seller is acting under duress. State Highway Commission v. Metcalf, 160 Mont. 164, 173, 500 P.2d 951 (1972). An additional provision in subsection (2) that the fair market value be of the "unsubdivided, unimproved land" requires that the land be valued at the price a willing buyer would pay and a willing seller accept for the unimproved land prior to its subdivision. The additional provision eliminates payments based upon any increase in value of the land which may be due to its subdivision or improvement.

The amount of cash donation is computed by multiplying the fair market value of the unsubdivided parcel by the percentage of land which would otherwise be dedicated for public parks and playgrounds. That percentage is fixed in section 11-3864(1), which requires dedication of one-ninth of the combined area of lots of five acres or less and one-twelfth of the combined areas of lots greater than five acres. Thus, in cases of subdivisions creating lots of greater than five acres, the cash donation would be one-twelfth of the amount a willing buyer would pay and a willing seller accept for the land in an unsubdivided and unimproved condition. In the case of subdivisions creating lots of less than five acres, the cash in lieu payment would be one-ninth of the amount a willing buyer would pay and a willing seller accept for the land in an unsubdivided and unimproved condition.

The Ravalli County Commissioners and Planning Board have apparently been applying an improper standard for assessing cash in lieu of donation. DCA investigators found that during the past year the value placed upon land within minor subdivisions for cash in lieu purposes ranged from $9.32 to $896.77 per acre, and averaged $108.01 per acre. Information received by this office indicates that the valued amounts are far less than the market value of unimproved, unsubdivided acreage in Ravalli County, and Planning Board personnel advised the DCA investigators that until recently the Board of County Commissioners had been using the "assessed" value of the land for cash donation purposes. In the case of agricultural land, the difference between the assessed value and its fair market value may be substantial.

See section 84-402(5), R.C.M. 1947. Since the statutory standard for valuing land for purposes of section 11-3864(2) is clear and express, the board must apply that standard.

THEREFORE, IT IS MY OPINION:

1. A local governing body's unwritten blanket policy or practice of accepting cash donations in lieu of public park and playground dedication with respect to subdivisions of five or fewer parcels is invalid. Minor subdivisions may be exempted from public park and playground dedication requirements only on a case by case basis and only if they meet one of the statutory criteria for exemption under section 11-3864, R.C.M. 1947.

2. Where, pursuant to section 11-3864(2), R.C.M. 1947, a cash donation is accepted in lieu of public park and playground land dedication, the amount of cash paid by the subdivider must be based upon the fair market value of the unimproved, unsubdivided land which is to be subdivided. Fair market value is the amount a willing buyer would pay and a willing seller accept for the land where neither buyer or seller is acting under duress.

Very truly yours,

MIKE GREELY
Attorney General