

VOLUME NO. 38

OPINION NO. 81

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES - Review of certificates of survey;

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES - Sanitation in Subdivisions Act: Review authority regarding certificates of survey;

LAND USE - Sanitation in Subdivisions Act, review of certificates of survey by Department of Health and Environmental Sciences;

SEWAGE - Sanitation in Subdivisions Act, review of certificates of survey;

SURVEYS - Certificate review by Department of Health and Environmental Sciences;

MONTANA CODE ANNOTATED - Sections 76-3-201, 76-3-204, 76-4-125.

HELD: The Department of Health and Environmental Sciences has authority under Title 76, chapter 4, part 1, MCA, to review certificates of survey.

12 May 1980

James C. Nelson, Esq.
Glacier County Attorney
Glacier County Courthouse
P.O. Box 1244
Cut Bank, Montana 59427

Dear Mr. Nelson:

You have asked whether the Department of Health and Environmental Sciences has authority under the Sanitation in Subdi-

visions Act, Title 76, chapter 4, part 1, MCA, to review certificates of survey before they are filed with a county clerk and recorder.

The Montana Supreme Court in State ex rel. Dept. of Health and Environmental Sciences v. LaSorte, ___ Mont. ___, 596 P.2d 477 (1979), ruled that the Department did not have such authority under the Act's statutory scheme existing prior to July 1, 1977. The Court stated, however, that amendments to the Act which became effective July 1, 1977, would "eliminate the problems involved" in that case. The Court determined that those amendments provided the review authority the Court found lacking in the prior law. Your question indicates that this authority remains unclear, even if the 1977 amendments are taken into account.

In my opinion the Legislature meant to give the Department the review authority in question, with certain limitations, and accordingly I believe the Court's assessment of the 1977 amendments is substantially correct.

The LaSorte case contains a discussion of the history of the Act through the adoption of certain amendments in 1975. The opinion focused on former section 69-5003, R.C.M. 1947, which granted the Department authority to review "subdivision plats" (subsection 1) and "plans and specifications" of certain subdivisions which were excluded from the provisions of the Subdivision and Platting Act (subsection 3). According to the court, neither subsection (1) nor subsection (3) of section 69-5003, MCA, gave the Department authority to review certificates of survey.

The 1977 Legislature amended former section 69-5003, R.C.M. 1947, twice. Section 12, chapter 140, 1977 Montana Laws, was merely a "housekeeping" measure. In chapter 554, however, the Legislature promulgated substantial changes in the statute. Among those changes were the redesignation of subsection (3) as subsection (8), and the addition of subsection (10). Subsections (8) and (10) of 69-5003 were subsequently recodified as subsections (1) and (2), respectively, of section 76-4-125, MCA. The key to your question is section 76-4-125(2), MCA, the amendatory provision the Supreme Court alluded to in LaSorte. Section 76-4-125(2), MCA, states:

A subdivision excluded from the provisions of chapter 3 [the Subdivision and Platting Act] shall be submitted for review by the department accord-

ing to the provisions of this part, except that the following divisions are not subject to review by the department:

(a) the exclusions cited in 76-3-201 and 76-3-204;

(b) divisions made for the purpose of acquiring additional land to become part of an approved parcel, provided that no dwelling or structure requiring water or sewage disposal is to be erected on the additional acquired parcel; and

(c) divisions made for purposes other than the construction of water supply or sewage and solid waste disposal facilities as the department specifies by rule.

(Bracketed material added.)

Subsection (2) of 76-4-125, MCA, applies to subdivisions that are "excluded" from the provisions of the Subdivision and Platting Act. Since portions of that Act refer to divisions for which a certificate of survey must be filed, it has been suggested that such divisions are included in the Act and therefore are not within the purview of section 76-4-125(2), MCA.

Virtually all divisions are included in either the Act's substantive provisions or its specific exemptions. In this sense, virtually no divisions are categorically excluded from the Act. Therefore, if "exclusion" is to be determined in the manner suggested, section 76-4-125(2), MCA, relates to a meaningless class of divisions. Such construction is unacceptable because it must be presumed the Legislature intended to make some change in existing law by adopting section 76-4-125(2), MCA, and the provision should be construed to give it effect. State ex rel. Dick Irvin, Inc. v. Anderson, 164 Mont. 513, 524-25, 525 P.2d 564 (1974).

I note also that the Legislature, in expressly exempting certain divisions from the limited review required under section 76-4-125(2), MCA, referred to "the exclusions cited in 76-3-201 and 76-3-204" as one such exemption. See subsection (2)(a) of 76-4-125. It can be assumed that if the Legislature had intended to exempt other exclusions cited in part 2 of section 4, such as divisions for which a certificate of survey must be filed, it would have done so.

In light of the factors discussed above, I conclude that the Legislature intended section 76-4-125(2), MCA, to apply to

divisions that are excluded from the substantive provisions of the Subdivision and Platting Act, such as platting, dedication and public review requirements. Divisions for which a certificate of survey must be filed that are within that category are therefore subject to the department's review in accordance with the Sanitation in Subdivisions Act.

THEREFORE, IT IS MY OPINION:

The Department of Health and Environmental Sciences has authority under Title 76, chapter 4, part 1, MCA, to review certificates of survey.

Very truly yours,

MIKE GREELY
Attorney General