VOLUME NO. 39 OPINION NO. 14

LOCAL GOVERNMENT - Subdivisions, authority to review state activities;
RECREATION - State campgrounds, subdivisions, local review;
SUBDIVISIONS - State campgrounds, local review;
MONTANA CODE ANNOTATED - Sections 76-3-101, et seq.; 87-1-209.

HELD: The Department of Fish, Wildlife, and Parks is subject to local subdivision review under sections 76-3-101, et seq., MCA, to the extent that it is creating an area which provides or will provide multiple spaces for recreational camping vehicles.

27 April 1981

Morris Brusett, Director
Department of Administration
S. W. Mitchell Building
Helena, Montana 59601

Dear Mr. Brusett:

You have requested my opinion on the following question:

> Is the proposed extension of the facilities at the Lambeth State Recreation Area subject to local review under the Subdivision and Platting Act?

The Department of Fish, Wildlife and Parks (DFWP) has proposed several improvements to the Lambeth State Recreation Area on the shores of Lake Mary Ronan in Lake County. In addition to a new well and caretaker facilities, DFWP proposes to construct several new campsites at Lambeth. Lake County asserts that this activity falls under the Subdivision and Platting Act, §§ 76-3-101, et seq., MCA, and DFWP, under a variety of theories, argues to the contrary.

The Subdivision and Platting Act generally requires local review and approval of all subdivisions (§ 76-3-601, MCA). All local governments are required to adopt and enforce subdivision regulations (§ 76-3-501, MCA). Some subdivisions may be reviewed in an abbreviated procedure (§ 76-3-505, MCA), and some subdivision activities are wholly exempt from regulations (§§ 76-3-201, et seq., MCA). DFWP, on the other hand, has express authority, with the consent of the Fish and Game Commission, to acquire and develop areas for state parks and recreation areas (§ 87-1-209, MCA).

The present issue is to what extent, if any, the DFWP's activities in expanding Lambeth are subject to regulation as a subdivision by Lake County. While the statutes are not a model of clarity, a coherent construction of legislative intent can be derived. Section 76-3-103(15), MCA, defines the term "subdivision" as follows:

> "Subdivision" means a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of

> public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and shall include any resubdivision and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles, or mobile homes.

On its face this section provides that the following activities are deemed to be subdivisions:

1. A division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed.

2. Any resubdivision.

3. Any condominium.

4. Any area, regardless of size, which provides or will provide multiple space for recreational camping vehicles.

5. Any area, regardless of size, which provides or will provide multiple space for mobile homes.

It is instructive that the original statute (1973 Mont. Laws, ch. 500, § 3) listed condominiums, camping spaces and mobile home sites in a separate sentence, clearly indicating an intent to create a separate class of subdivision activity not necessarily requiring a "division of land." The fact that the language is now all in one sentence does nothing to change the original intent that there are activities deemed to be subdivisions which do not require a division of land.

Section 76-3-104, MCA, immediately following, provides that a subdivision "shall comprise only those parcels less than 20 acres which have been segregated from the original tract...." While this limitation is somewhat confusing, it is clear that it does not apply to categories 4 and 5 of the "subdivision" definition listed above. Those categories of activities or land

uses are subdivisions "regardless of...size." Thus, it is clear that if a private individual wished to construct a recreational vehicle camping area on the banks of Lake Mary Ronan, local subdivision review would be required. The question, then, is whether under the statute or the law DFWP is exempted from local review when doing the same thing. I conclude that there is no exemption.

Activities by the State are mentioned twice in the Act. Section 76-3-205, MCA, provides:

> The provisions of this chapter shall not apply to the division of state-owned land unless the division creates a second or subsequent parcel from a single tract for sale, rent, or lease for residential purposes after July 1, 1974.

This section provides an exemption for certain State activities and an express inclusion of others. It exempts an initial division of state-owned land. A "division of land" is defined in section 76-3-103(3), MCA, and requires segregation of one or more parcels from a larger tract by transferring title or possession. This clearly refers to activities in the first category of covered subdivision activities. The effect of section 76-3-205, MCA, is to allow the State to subdivide and sell one tract from a parcel without local regulation, but to require local review of any subsequent divisions from the same parcel. Similarly, section 76-3-209, MCA, exempts from the survey and platting requirements, lands acquired for state highways.

These two sections, especially section 76-3-205, MCA, are a persuasive indication that the Legislature intended state activities to be covered by the Act. If state activities were intended to be exempt as a blanket matter, there would have been no reason to adopt section 76-3-205, MCA, granting an exemption for certain state activities. While section 76-3-209, MCA, is an exemption not so much for the State as for the person transferring the land, it is a specific and narrow exemption. Thus, since the Legislature chose to mention the State in the Act, and chose to grant exemptions in its favor only in two specific instances, the clear implication is a legislative intent that the State stands in the same footing as a private person in all other matters under the Act.

Section 76-3-201, MCA, creates one additional exemption which should be discussed. That section exempts from review any "division of land" which "in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain...." It has been suggested that since DFWP could have acquired this property on Lake Mary Ronan by eminent domain (§ 87-1-209, MCA), this exemption applies. This is incorrect for two reasons. First, section 76-3-201, MCA, applies expressly to "division of land." As noted above, the instant situation does not involve a division of land, even though it does involve "subdivision" activity. Second, exemptions of this type operate primarily upon the seller of land. That is, if DFWP were acquiring a piece of property on the lake, section 76-3-201, MCA, would probably allow the seller to complete the transaction without local subdivision review and would not directly affect DFWP. That, however, is not the current situation. The land is already owned by DFWP and it wants to engage in a subsequent land use which triggers local subdivision review. Section 76-3-201, MCA, would apply to the original acquisition, but not subsequent uses.

Therefore, the statutes contemplate coverage of state activities, and no applicable statutory exemptions can be found. There remains, however, the question of whether there are general principles of law which would exempt DFWP from local regulation. While no cases could be found dealing with state-local conflicts under subdivision statutes, there is a considerable body of law dealing with state-local conflicts under zoning ordinances. The "traditional view" is that activities of the State may be exercised free of local control or regulation on the theory that the State is the superior sovereign. The analysis and language is much like that found in cases dealing with federal supremacy over state law. See, e.g., Board of Regents v. Tempe, 356 P.2d 399, 406 (Ariz. 1960); Anderson, American Law of Zoning, § 12.06, et seq.

The more recently decided cases show a clear trend toward abandoning the traditional view. In Dearden v. Detroit, 269 N.W.2d 139, 140 (Mich. 1978), the court analyzed and rejected all the traditional mechanical theories for finding state freedom from local control. To the same effect see City of Pittsburg v.

Commonwealth, 360 A.2d 607 (Pa. 1976); City of Temple Terrace v. Hillsborough Ass'n, 322 So. 2d 571 (Fla. App. 1975), aff'd, 332 So. 2d 610 (Fla. 1976); Brown v. Kansas Forestry, Fish & Game Comm., 576 P.2d 230 (Kan. 1978). As the court persuasively argued in City of Pittsburg v. Commonwealth, supra, viewing the conflict as a state-local one is unrealistic since both the local government and the state agency are exercising powers that come from the legislature.

Thus, the first task is simply to determine legislative intent from the applicable statutes. Where there is a discernible intent as to whether the state agency should be subject to local control, that is the end of the matter. See, e.g., Dearden v. City of Detroit, supra. As discussed above, the statutes in the instant case indicate a legislative intent that the state not be immune from local regulation.

In situations in which the legislature is silent, the courts have adopted a balancing of interests test. See City of Temple Terrace v. Hillsborough Ass'n, supra; Rutgers v. Piluso, 286 A.2d 697 (N.J. 1972); Brown v. Kansas Forestry, supra. Even though legislative intent is discernible in the present case, the balancing test as applied in these cases also leans toward the applicability of local regulation. The test announced in Rutgers, and followed in Brown, looks at the following factors:

1. The nature and scope of the instrumentality seeking immunity;

2. The kind of function or land use involved;

3. The extent of public interest to be served thereby;

4. The effect local land use regulation would have upon the enterprise; and

5. The impact upon legitimate local interests.

In the present case the agency seeking immunity is a state agency empowered to acquire and develop land for recreational uses. This function is obviously in the

public interest, but, as the court in Brown observed, does not rise to the level of public education or corrections. In the latter areas the courts have been much more willing to find that important state goals would be frustrated by local regulation. See, e.g., Dearden v. City of Detroit, supra. Third, there is an obvious public interest in outdoor recreation facilities. There is, however, an existing facility at the site in question and even if the local review process resulted in a rejection of the new camping spaces the existing facility and the remainder of the proposed improvements would be unaffected. Fourth, the effect the local land use regulation would have on this project is unknown. In most of the zoning cases the state agency's project is directly prohibited by the local regulations. This is not the case here; we are not dealing with an all or nothing situation. The question is not whether or not the project is prohibited but rather whether or not it must be subjected to local review. Lastly, the impact upon legitimate local interests is great. As noted above, the State has mandated that local governments adopt subdivision regulations to further the comprehensive purposes listed in section 76-3-102, MCA. These purposes are all related directly to local impacts, and the Legislature has determined that the local governments are best able to regulate those impacts.

It should be clear that the balancing of interests test weighs heavily in favor of local regulations. As noted in the cases, however, susceptibility to local regulation cannot be construed as a green light for local efforts to stop state developments. The State, just as a private developer, has every right to expect and demand fair and impartial treatment. There is no indication in this case that the local government will do any more than fulfill its statutory responsibilities.

THEREFORE, IT IS MY OPINION:

> The Department of Fish, Wildlife, and Parks is subject to local subdivision review under sections 76-3-101, et seq., MCA, to the extent that it is creating an area which provides or will provide multiple spaces for recreational camping vehicles.

Very truly yours,

MIKE GREELY
Attorney General