VOLUME NO. 41 OPINION NO. 43

SUBDIVISION AND PLATTING ACT - Requirement that landowner must apply to the local governing body for a determination of whether access and easements are suitable in divisions of land consisting exclusively of parcels of 20 acres of larger;
MONTANA CODE ANNOTATED - Sections 76-3-505(2), 76-3-609(2);
MONTANA LAWS OF 1985 - Chapter 579.

HELD: 1. In divisions of land consisting exclusively of parcels 20 acres or larger, the landowner must apply to the local governing body for a determination of whether appropriate access and easements are properly provided.

2. Where the landowner elects on his application to accept a written determination that access and easements are not suitable for the

purposes of providing services to the divided parcels, the local governing body may attach this notation to the instrument of transference prior to recordation and forego any review of access suitability.

27 January 1986

William A. Douglas
Lincoln County Attorney
Lincoln County Courthouse
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Dear Mr. Douglas:

You have requested my opinion on the following questions:

1. Whether the provisions of the 1985 Montana Laws, chapter 579, require that an application for review by the governing body, for determination of whether there exist appropriate access and easements, must be made in every case of divisions of land consisting exclusively of parcels 20 acres or larger.

2. Whether the governing body must review the division of land for the purpose of determining whether appropriate access and easements are properly provided in all cases, whether an application for review is or is not submitted by the divider.

Chapter 579 of the 1985 Montana Laws amended two sections of the Montana Subdivision and Platting Act (hereinafter "Act"). Section 76-3-505, MCA, entitled "Provision for summary review of subdivisions and other divisions of land," was amended in part to read:

> (2) Local subdivision regulations must include procedures for review of those divisions of land consisting exclusively of parcels 20 acres or larger subject to this chapter. Rules governing review of these divisions of land shall be limited to a written

determination of whether appropriate access and easements are properly provided.

The procedures for review of such divisions were the subject of an amendment to a second section of the act. Section 76-3-609, MCA, was amended with the following paragraph quoted in part:

> (2)(a) For divisions of land consisting exclusively of parcels 20 acres and larger, the governing body shall review the division of land within 35 days of the submission of an application for review. The governing body's review must be limited to a written determination that appropriate access and easements are properly provided. The review shall provide either:
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> (i) that the access and easements are suitable for the purposes of providing appropriate services to the land; or
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> (ii) that the access and easements are not suitable for the purposes of providing appropriate services to the land, in which case the county, the school district or districts, and other authorities and districts in which the land is located will not provide services that involve use of the unsuitable access and easements. Such services include:
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> (A) fire protection;
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> (B) school busing;
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> (C) ambulance;
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> (D) snow removal; and
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> (E) similar services as determined by the governing body.
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> (b) The governing body shall deliver a copy of the determination of the review to the county clerk and recorder to be reflected on the certificate of survey or deed of conveyance of the land that was subject to review.

The statutory amendments were approved by the Legislature on April 19, 1985, and became effective October 1, 1985.

Your opinion request specifically questions whether there is any requirement in the new law that a landowner dividing his property submit an application for review. You suggest that the review process is only triggered by the submission of an application but that submittal of an application is left to the discretion of the landowner. I do not agree.

Examining the plain language of the amended statute, I find two directives that support a holding that an application and restricted review are now mandatory for the larger parcels. The first directive is in the language of section 76-3-505(2), MCA, which states: "[S]ubdivision regulations must include procedures for review of those divisions of land consisting exclusively of parcels 20 acres or larger subject to this chapter." (Emphasis added.) There is no statutory exemption for particular divisions of land consisting of 20 acres or more where the landowner does not want to invoke the review process by not making application. Review procedures must exist for all divisions regardless of anticipated use.

The second directive is found in section 76-3-609(2)(a), MCA: "[T]he governing body shall review the division of land within 35 days of the submission of an application for review." (Emphasis added.) This language demonstrates that the Legislature intended an application must be submitted. This is not a case where language must be added to give a statute effect. Neither courts nor the Attorney General may insert into a statute what has been omitted or omit what has been inserted. § 1-2-101, MCA.

Accepted rules of statutory construction also guide my interpretation here. In the construction of a statute, the intention of the Legislature is to be pursued, if possible. § 1-2-102, MCA. The title of the act is an indication of the Legislature's intent. In re Coleman's Estate, 132 Mont. 339, 343, 317 P.2d 880, 882 (1957). The act that became chapter 579 was entitled: "An Act Providing Restricted Review Requirements for Minor Subdivisions and Other Divisions of Land; Amending Sections 76-3-505 and 76-3-609, MCA." I note that the

act is entitled "Review Requirements" as opposed to review "options," "guidelines," or other language that could have been used to indicate a discretionary process. If the application process were viewed to be discretionary or elective with the subdivider of land, the plain intent of the Legislature to bring large parcels under review would be nullified.

For the foregoing reasons, I conclude that chapter 579 provides for a mandatory application process. This conclusion is based first on the plain meaning of the words used, and second on the obvious intent of the Legislature in enacting the statute. See Department of Revenue v. Puget Sound Power & Light Co., 179 Mont. 255, 587 P.2d 1282 (1978).

Since I have answered your first question affirmatively, the second question is moot. As discussed, applications must be submitted for statutorily defined divisions of land 20 acres or larger. This act invokes the review process. Where an application is not filed for a division of land, the local governing body's course of action will lie with enforcing the application requirement, not with proceeding with an independent review and access suitability determination.

Your opinion request raises the issue of whether the subdivider who does not wish to benefit from the provision of future services must participate in the review process. I have held that an application for review is mandatory. However, that review may be limited to the final determination of suitability. If a subdivider desires to stipulate to a nonsuitability determination on the filed deed I discern no conflict with the statutes. Furthermore, I can foresee benefits to such an approach since an expedited review process would facilitate transferences where the land vendor recognizes access and easements are physically impossible to provide.

Further questions that have arisen concerning definitions of suitability and what standards are to be applied are beyond the scope of this opinion. I only note that the statutes leave the adoption of review regulations to the local governing body.

THEREFORE, IT IS MY OPINION:

1. In divisions of land consisting exclusively of parcels 20 acres or larger, the landowner must apply to the local governing body for a determination of whether appropriate access and easements are properly provided.

2. Where the landowner elects on his application to accept a written determination that access and easements are not suitable for the purposes of providing services to the divided parcels, the local governing body may attach this notation to the instrument of transference prior to recordation and forego any review of access suitability.

Very truly yours,

MIKE GREELY
Attorney General