VOLUME NO. 41 OPINION NO. 86

LAND USE - Nonsuitability determinations under the Subdivision and Platting Act as to access and easements; POLICE DEPARTMENTS - Whether police department services may be prohibited by a nonsuitability determination under the Subdivision and Platting Act;

PROPERTY, REAL - Obligation of an owner to pay taxes as to property subject to nonsuitability determination under the Subdivision and Platting Act;
SHERIFFS - Whether sheriff's department services may be prohibited by a nonsuitability determination under the Subdivision and Platting Act;
SUBDIVISION AND PLATTING ACT - Nonsuitability determinations as to access and easements;
TAXATION AND REVENUE - Obligation of real property owner to pay taxes as to real property subject to nonsuitability determination under the Subdivision and Platting Act;
MONTANA CODE ANNOTATED - Section 76-3-609(2);
MONTANA LAWS OF 1985 - Chapter 579;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 43 (1986).

HELD: 1. A nonsuitability determination under section 76-3-609(2)(a), MCA, with respect to an access or easement prohibits any political subdivision from providing those services specified by the governing body as inappropriate.

2. The term "similar services" in section 76-3-609(2)(a)(ii)(E), MCA, may include, under appropriate circumstances, certain of those services provided by sheriff's or police departments.

3. An owner of real property affected by a nonsuitability determination under section 76-3-609(2)(a), MCA, is not relieved of his obligation to tender all taxes otherwise required of property owners--including those taxes which support governmental services prohibited by the determination.

29 September 1986

Russell R. Andrews
Teton County Attorney
Teton County Courthouse
Choteau MT 59422

Dear Mr. Andrews:

You have requested my opinion concerning the following questions:

1. When a determination of nonsuitability has been made under section 76-3-609(2)(a), MCA, are the involved county, school districts, and other political subdivisions prohibited from providing the services as to which access or easements have been found inappropriate?

2. May services provided by sheriff's or police departments constitute "similar services" under section 76-3-609(2)(a)(ii)(E), MCA?

3. Does the payment of taxes by an owner of real property subject to a nonsuitability determination under section 76-3-609(2)(a), MCA, entitle him to those services financed by such taxes?

4. Do proposed amendments to the Teton County subdivision regulations, which predicate a suitability determination on contiguity with a publicly "maintained" road, contain an appropriate standard for making such determination under section 76-3-609(2)(a), MCA?

Your questions relate to an amendment to section 76-3-609, MCA, of the Montana Subdivision and Platting Act (the Act), made by the 1985 Montana Laws, chapter 579. As amended, section 76-3-609(2)(a), MCA, reads:

> 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:
>
> (i) that the access and easements are suitable for the purposes of providing appropriate services to the land; or
>
> (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:

(A) fire protection;
(B) school busing;
(C) ambulance;
(D) snow removal; and
(E) similar services as determined by the governing body.

I have previously held that review under the above is mandatory. 41 Op. Att'y Gen. No. 43 (1986).

The recent statutory change to section 76-3-609(2)(a), MCA, derived from HB 791. The bill, as initially drafted and passed by the House of Representatives, provided in material part that, for subdivisions consisting exclusively of parcels 20 acres or larger, "[t]he governing body's review and approval [of such subdivisions] must be limited to a written determination that appropriate access and easements are properly provided." The effect of disapproval under the original bill was prohibition of the proposed subdivision. The bill, however, was amended during Senate consideration to that form eventually codified into law. See Senate Journal, 49th Sess., 1228-29. The substantive impact of the amendment was to limit the effect of disapproval to nonprovision of services involving use of access roads or easements found to be unsuitable. The Senate amendment served to emphasize the bill's principal concern: the ability of counties and other political subdivisions to provide vehicular-related services when an access road was, for one or more reasons, inadequate. See Mar. 21, 1985 Minutes of Senate Local Government Committee. The Act, as amended, thus encourages any division of land consisting of parcels 20 acres or larger to be associated with access roads and other easements which permit safe and expeditious provision of important governmental services.

First, the unquestionable intent of the Legislature was to allow local-review governing bodies under the Act to make determinations as to access suitability which, if negative, prohibit the provision of those public services substantially dependent upon adequate roadways. Once such determination is made, the affected services

may not be offered. Any other result effectively negates the governing body's decision and vitiates the underlying purpose of the review process. Consequently, upon issuance of a nonsuitability determination, none of the involved local political subdivisions may extend those services described in the determination.

Second, because the focus of a suitability determination is on the need for adequate access in order that public vehicles can be safely utilized, sheriff's or police department protection may be added by the governing body under section 76-3-609(2)(a)(ii)(E), MCA, when warranted. Careful consideration must, of course, be given to whether an access road is unsuitable for this or any other type of governmental service, and a determination of nonsuitability must be made with particularized reference to the nature of the access road and the demands of the involved service. I note, however, that HB 791 is generally concerned with provision of governmental services which, by their nature, bestow a focused benefit on the landowner. Consequently, even if police or sheriff's department services of this kind are proscribed under a nonsuitability determination, the involved department retains jurisdiction to discharge those functions which relate to general law enforcement; such functions extend beyond the mere provision of benefit to a particular landowner and directly relate to maintenance of overall societal order. A nonsuitability determination including police or sheriff's department services should therefore carefully specify those found inappropriate so as to preserve this distinction.

Third, the mere payment of required taxes does not, in itself, mandate the provision of all governmental services. See generally 71 Am. Jur. 2d State & Local Taxation § 6 (1973) ("even though the duty or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure, this does not mean that a man's property cannot be taxed unless some benefit to him personally can be pointed out"). The Montana Supreme Court accordingly rejected the contention in State ex rel. Woodahl v. Straub, 164 Mont. 141, 149-51, 520 P.2d 776, 781, cert. denied, 419 U.S. 845 (1974), that one county's taxpayers were impermissibly discriminated against because their school system received less direct financial benefit from a statewide tax than the amount of those taxpayers' payments. Similarly here, the mere

fact that an owner of a real property parcel subject to a nonsuitability determination under section 76-3-609(2)(a), MCA, is prohibited from receiving certain public services does not relieve him of the duty to tender those taxes uniformly imposed on other property owners since such obligation is not grounded on a quid pro quo relationship between payments made and benefits received. That owner, moreover is not improperly discriminated against in connection with prohibition of the affected services, if the nonsuitability determination complies with section 76-3-609(2)(a), MCA, in view of the rational basis for such action, i.e., the absence of an access road suitable for the provision of the involved services. See, e.g., White v. State, 40 St. Rptr. 507, 511, 661 P.2d 1272, 1275-76 (1983); Linder v. Smith, 38 St. Rptr. 912, 919, 629 P.2d 1187, 1193 (1981); State v. Jack, 167 Mont. 456, 461, 539 P.2d 726, 729 (1975). Simply stated, by choosing to reside on land subject to a nonsuitability determination under section 76-3-609(2)(a), MCA, the owner has voluntarily forfeited any claim of entitlement to the proscribed public services.

Your final question involves substantial factual issues and is an inappropriate matter for my opinion. As stated above, the determination of whether access is suitable for the provision of various governmental services must be made after consideration of all relevant circumstances. The Legislature, by leaving undefined the term "unsuitable access and easements," clearly intended that each governing body exercise its informed discretion as to what access should be deemed unsatisfactory. See 41 Op. Att'y Gen. No. 43. The model procedure adopted by the Department of Commerce for review under section 76-3-609(2)(a), MCA, thus defers to county standards for deciding whether suitable access exists. Nonetheless, while individual governing body discretion is presumably broad in establishing and applying suitability standards, it must be exercised with an objective of ensuring a safe environment for the operation of public vehicles and not solely to discourage divisions of land. In the absence of a fully-developed factual record, therefore, I decline to issue an opinion on whether Teton County's proposed definition of suitability--which requires parcels to be adjacent to or contiguous with a road "maintained" on a year-round basis by a public entity--is a proper standard under section 76-3-609(2)(a), MCA.

THEREFORE, IT IS MY OPINION:

1. A nonsuitability determination under section 76-3-609(2)(a), MCA, with respect to an access or easement prohibits any political subdivision from providing those services specified by the governing body as inappropriate.

2. The term "similar services" in section 76-3-609(2)(a)(ii)(E), MCA, may include, under appropriate circumstances, certain of those services provided by sheriff's or police departments.

3. An owner of real property affected by a nonsuitability determination under section 76-3-609(2)(a), MCA, is not relieved of his obligation to tender all taxes otherwise required of property owners--including those taxes which support governmental services prohibited by the determination.

Very truly yours,

MIKE GREELY
Attorney General