

VOLUME NO. 44

OPINION NO. 47

CITIES AND TOWNS - Authority of municipal government to prohibit sand and gravel operations in areas zoned as residential;  
LAND USE - Authority of municipal government to prohibit sand and gravel operations in areas zoned as residential;  
LOCAL GOVERNMENT - Authority of municipal government to prohibit sand and gravel operations in areas zoned as residential;  
MINES AND MINING - Regulation of sand and gravel operations through zoning;  
MUNICIPAL GOVERNMENT - Authority of municipal government to prohibit sand and gravel operations in areas zoned as residential;  
NATURAL RESOURCES - Regulation of sand and gravel operations through zoning;  
PROPERTY, REAL - Regulation of sand and gravel operations in areas zoned as residential;  
MONTANA CODE ANNOTATED - Sections 76-1-113, 76-1-113(1), (2), 76-2-209, 82-4-431, 82-4-432;  
MONTANA LAWS OF 1991 - Chapter 408, section 1.

HELD: Consistent with section 76-1-113, MCA, a municipal zoning authority may prohibit future, as defined in section 5, chapter 408, 1991 Montana Laws, sand and gravel operations and operations which mix concrete and batch asphalt in areas zoned as residential, as long as the zoning authority is exercised in accordance with constitutional principles.

December 31, 1992

Jim Nugent  
Missoula City Attorney  
435 Ryman  
Missoula MT 59802-4297

Dear Mr. Nugent:

You have requested my opinion concerning the following issue:

Does section 76-1-113, MCA, allow a municipal zoning authority to prohibit future sand and gravel operations and concrete and asphalt batching operations throughout the local government's jurisdiction or just in areas zoned as residential?

Section 76-1-113(1), MCA, generally exempts property with natural resource value from zoning regulations which would affect the use, development, or recovery of those resources:

(1) Except as provided in subsection (2), nothing in this chapter may be considered to authorize an ordinance, resolution,

or rule that would prevent the complete use, development, or recovery of any mineral, forest, or agricultural resources by the owner thereof.

The exception to this general rule is found in section 76-1-113(2), MCA, which specifically addresses sand and gravel operations and operations which mix concrete or batch asphalt:

(2) The complete use, development, or recovery of a mineral by an operation that mines sand and gravel and an operation that mixes concrete or batches asphalt on a site that is located within a geographic area zoned as residential are subject to the zoning regulations adopted under Title 76, chapter 2.

Subsection (2) was recently enacted following passage of House Bill 952, 1991 Mont. Laws, ch. 408, § 1. Prior to this amendment, section 76-1-113, MCA, contained only the general exemption from zoning regulations set forth in subsection (1). See § 76-1-113, MCA (1989).

House Bill 952 was largely a response to the Montana Supreme Court's opinion in Missoula County v. American Asphalt, Inc., 216 Mont. 423, 701 P.2d 990 (1985). See Minutes, House Committee on Natural Resources, February 22, 1991, at 6; Minutes, Senate Committee on Local Government, March 19, 1991, at 17-18. In American Asphalt, the Montana Supreme Court interpreted section 76-1-113, MCA (1985), to exempt sand and gravel operations from county zoning regulations. Thus, Missoula County zoning authorities were unable to restrict the excavation of sand and gravel from portions of the Clark Fork River floodplain, despite the fact that the area was zoned for single-family residential uses. *Id.*, 216 Mont. at 426-28, 701 P.2d at 991-92.

The stated purpose of the new legislation was to "provide for an orderly development of sand and gravel pits in areas already zoned." See Minutes, Senate Committee on Local Government, March 19, 1991, Exhibit 17. The new law was to have no effect upon an area for which a contract was issued prior to April 9, 1991, or for which an application for contract or contract amendment was filed with the Department of State Lands prior to February 23, 1991. In addition, any existing sand or gravel operation could notify the Department of State Lands by January 1, 1992, of its intention to mine adjacent land which was not then under contract. *Id.* Several statutes were affected by these changes and were amended accordingly. See §§ 76-2-209, 82-4-431, 82-4-432, MCA. Your question is whether, in light of these statutory changes, a municipal zoning authority may, in the future, prohibit sand and gravel operations and concrete and asphalt batching operations throughout the local government's jurisdiction or just in areas zoned as residential.

If the intent of the Legislature is to be given any effect, section 76-1-113, MCA, and its related statutes must be interpreted to mean that a municipal zoning

authority, in addition to other zoning authorities, may regulate the kind of mining operations described in subsection (2) in areas zoned as residential. These regulations may include prohibition of such operations. It is a well-known rule of statutory construction that the intent of the Legislature controls. State ex rel. Roberts v. Public Service Commission, 242 Mont. 242, 790 P.2d 489 (1990). A statute must be construed, if possible, so as to give effect to the intent of the Legislature. Theil v. Taurus Drilling Ltd., 218 Mont. 201, 710 P.2d 33 (1985).

Subsection (2) of section 76-1-113, MCA, was a direct legislative response to the rule announced in American Asphalt, which held that regardless of the nature of an area or the uses for which it is zoned, sand and gravel operations are not subject to restrictions imposed by zoning authorities. The Legislature intended through the enactment of section 76-1-113, MCA, to reverse that opinion by subjecting future, as defined in the legislation, sand and gravel operations, as well as concrete and asphalt batching operations, to zoning regulations contained in Title 76, chapter 2. The result of the Legislature's action is that the general exemption from zoning for property with natural resource value does not apply to such operations on property zoned as residential. Instead, the general grant of zoning authority to a municipal zoning authority in section 76-2-301, MCA, is controlling. That statute, in conjunction with section 76-2-304, MCA, authorizes such an authority to regulate and restrict the use of land in order to promote the health, safety, and general welfare of the community.

Assuming that the zoning restrictions are reasonably related to the health, safety, and general welfare of the community, and are applied consistent with constitutional principles, see Reinman v. Little Rock, 237 U.S. 171 (1915); Hadacheck v. Los Angeles, 239 U.S. 394 (1915); Anderson, American Law of Zoning 3d, vol. III, at 149-52, municipal governments may regulate and even prohibit future sand and gravel operations and operations which mix concrete or batch asphalt in residential areas. To the extent that section 76-1-113, MCA, restricts a municipality's zoning authority, the amendments to this section lift such restrictions in areas zoned as residential with respect to the mining of sand and gravel and the operation of concrete or asphalt batch plants.

THEREFORE, IT IS MY OPINION:

Consistent with section 76-1-113, MCA, a municipal zoning authority may prohibit future, as defined in section 5, chapter 408, 1991 Montana Laws, sand and gravel operations and operations which mix concrete and batch asphalt in areas zoned as residential, as long as the zoning authority is exercised in accordance with constitutional principles.

Sincerely,

MARC RACICOT  
Attorney General