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Carbon County Commissioners
Carbon County Attorney
P.O. Box 17
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RE: County Authority to Regulate
Oil & Gas Activities

Dear County Commissioners and County Attorney:

This letter addresses whether Montana counties have authority to regulate oil and gas activities under Part 1 zoning.[1] The short answer is, "Yes, counties generally have such authority, except for specific issues that fall within the exclusive jurisdiction of the Montana Board of Oil & Gas Conservation ("Oil and Gas Board")." I further conclude that Planning and Zoning Commissions, when enacting regulations, should be aware of and ensure that the zoning standards imposed do not directly conflict with or frustrate the purpose of any Oil and Gas Board standard.

Section I discusses a county's general authority to regulate oil and gas activities through zoning. Section II explains that county authority is generally not preempted and is thus concurrent with Oil and Gas Board authority. Section III briefly describes recent cases from other states that also recognize local government authority to regulate oil and gas activities. The letter then concludes that counties may, after a finding of meeting the general welfare and convenience, adopt Part 1 zoning that regulates oil and gas activities, so long as they draft language that: (1) avoids areas of exclusive Oil and Gas Board jurisdiction and (2) harmonizes any potential conflicts between local and state standards that may arise.

I.

As a general proposition, counties have both the responsibility and the authority to protect the health, safety, and welfare of their people. A primary way counties protect their constituents is by regulating land use activities that may potentially harm people or the lands on which they live. In counties that have not adopted county-wide zoning, Montana's Part 1 zoning law provides a process for counties to adopt regulations which protect a group of landowners that specifically request land use protections in their area.

The Montana Constitution supports county authority to protect landowners in several key ways. First, the Constitution provides that county powers can be found either expressly in statute, or implied within those express powers.[2] In the case of zoning authorized by §76-2-101 et seq., MCA, commonly referred to as Part 1 zoning, the county has express statutory powers to regulate

[1] MCA § 76-2-101 to – 117 (2013).
[2] Mont. Const. art. XI, sect. 4; *see also* MCA § 7-1-2101 (2013).

land use activities.[1] Further, the Constitution provides that county powers are liberally construed.[2] This means that when a question of authority arises, the law should be read in favor of finding county authority under Part 1 zoning.

The Montana Constitution also requires the State (and counties as political subdivisions of the State) to "maintain and improve a clean and healthful environment in Montana for present and future generations."[3] The primary way our State fulfills this duty is by passing laws — such as Part 1 zoning, that empowers counties to protect against potentially harmful land use activities in their communities. Additionally, both the right to a clean and healthy environment, and a landowner's right to protect property from harm, are enumerated as inalienable rights in our State Constitution.[4]

Part 1 zoning supports these constitutional protections for landowners by allowing them to petition the county for the "purpose of furthering the health, safety, and general welfare of the people of the county" through zoning.[5] In delegating zoning powers to counties under Part 1, the legislature had the opportunity to delimit those powers in certain areas. Indeed, the legislature did so with respect to grazing, timber, horticulture, and agricultural activities, which are exempt from Part 1 regulation.[6] In contrast, the legislature placed no restrictions on a county's authority to regulate oil and gas, or any other categories of land use activities. This means that oil and gas falls within the broad class of "uses of the land" that a county can regulate.[7] Both a plain reading, and a liberal construction, of Part 1 zoning powers support this conclusion.

II.

When both the local government and the State have authority over an area, their jurisdictions are concurrent. Overlapping spheres of authority arise often in the context of zoning, and require that local governments coordinate with state agencies that share jurisdiction. Some classic examples of concurrent jurisdiction include local review of state-licensed group homes, day care facilities, medical facilities, game farms, landfills, gravel mining, industrial facilities that discharge into air or water, liquor and gaming establishments, and micro-breweries and distilleries. In these instances, the local government complements state agency review with its own land use review to ensure the activity is suitable for the character of the area in which it is proposed. Thus, absent preemption under state law, the standard scenario for local and state governments is shared authority.

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[1] MCA § 76-2-101 to – 117 (2013).
[2] Mont. Const. art. XI, sect. 4.
[3] Mont. Const., art. 9, sect. 1. For a discussion of a county's responsibility to protect the environmental rights of its constituents, see Bryan, *A "Constant and Difficult Task": Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment,* 38 ECOL. L. QUARTERLY 1 (2011).
[4] Mont. Const. art. II, sect. 3.
[5] MCA § 76-2-101 (2013).
[6] MCA § 76-2-109 (2013).
[7] MCA § 76-2-104 (2013).

There are three primary ways that State preemption can arise: (1) express preemption through a statement of the legislature; (2) implied preemption when a statutory scheme reveals a legislative intent to "occupy the field" because of a dominant state interest; or (3) conflict preemption when a local provision directly conflicts with and frustrates the purposes of a state law provision.[1] This last category may be a *partial* preemption, which means that other, non-conflicting provisions of the local law may remain in effect.[2] Courts "must apply preemption analysis narrowly," both as to whether there is preemption, as well as the scope of any preemption.[3]

Based on my review of the Oil and Gas Board statutes, the only area where the legislature has expressly preempted local jurisdiction is class II injection wells. In§ 82-11-111, MCA, which enumerates the Oil and Gas Board's powers, the Oil and Gas Board has "*exclusive jurisdiction over all class II injection wells and all pits and ponds in relation to those injection wells.*" Thus, local governments are specifically precluded from exercising powers reserved to the Oil and Gas Board in that area.

In contrast, all other Oil and Gas Board powers are listed without any limitation on concurrent authority.[4] If the legislature had intended to occupy the field of oil and gas regulation at the state level, it would have applied exclusive jurisdiction to all Oil and Gas Board powers, rather than selectively applying it to the limited area of class II injection wells. When this narrow area of exclusive jurisdiction is placed alongside a county's broadly construed powers to regulate "uses of land" under Part 1 zoning, it becomes clear that the legislature intended concurrent jurisdiction over oil and gas activity.

Consistent with this interpretation, the Oil and Gas Board explicitly recognizes that local governments have concurrent jurisdiction over oil and gas activities. The agency's Form No. 22 "Permit to Drill" requires applicants to identify whether there are any local permits or authorizations required for the regulated activity.[5] Of course, to avoid conflict preemption, local governments should take care to avoid imposing standards that frustrate the purpose of any Oil and Gas Board standard.

III.

Other states addressing this topic in the oil and gas context have reached similar results. In a case most on point, the Colorado Supreme Court upheld county authority to regulate oil and gas activity alongside the state Oil & Gas Conservation Commission.[6] The county's oil and gas rules regulated such matters as setbacks, noise, wellhead spacing, wildlife protection, water quality protection, aesthetics, agricultural protection, and road maintenance.[7] There, the court found that

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[1] *Dukes v. Sirius Construction*, 2003 MT 152, ¶ 20; *see also Board of County Commr's of La Plata County v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 56-57 (Colo. 1992).
[2] *Board of County Commr's of La Plata County*, 830 P.2d at 1059.
[3] *Dukes*, 2003 MT 152 at ¶ 67.
[4] *See generally* MCA § 82-11-111 (2013).
[5] *See* MBOGC Forms at http://bogc.dnrc.mt.gov/testforms.asp.
[6] *Board of County Commr's of La Plata County v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045 (1992).
[7] *Id.* at 1050-51.

state law did not expressly preempt local land use powers and also rejected an implied preemption theory, holding that:

The state's interest in oil and gas activities is not so patently dominant over a county's interest in land use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.[1]

Turning to conflict preemption, the court observed that the county specifically stated in its zoning regulations that it intended to regulate "in a manner that does not hinder achievement of the state's interest."[2] Thus, the zoning on its face did not create conflict preemption because it was designed to harmonize state review of oil and gas activities with "the county's overall plan for land use."[3] The court was careful to note that if there were, in the future, specific instances of conflicts, "the county regulations must yield to the state interest."[4] But those instances, it concluded, must be resolved on an ad hoc, or case-by-case basis as they arise.[5]

Two recent New York cases have similarly concluded that the New York Oil, Gas and Solution Mining Law does not preempt local governments from using zoning powers to ban certain oil and gas activities and practices.[6]

And in Pennsylvania, which has a constitutional environmental right like Montana's, the supreme court recently struck down Act 13, an amendment to the Pennsylvania Oil and Gas Act, that effectively required local governments to allow oil and gas activity throughout their jurisdictional areas.[7] The court concluded that the law was unconstitutional because it violated its citizens' environmental rights by "disabling local government from mitigating the impact of oil and gas development at the local level."[8] Because "constitutional commands . . . cannot be abrogated by statute,"[9] the court concluded that state regulation of oil and gas cannot wholly preempt local governments from using zoning to protect the health, safety, and welfare of their community members and property.[10]

Admittedly, the oil and gas laws of each state are uniquely worded, as are each state's local

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[1] *Id.* at 1057-58.
[2] *Id.*
[3] *Id.* at 1059-60.
[4] *Id.* at 1060.
[5] *Id.*
[6] *Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (2012); *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.2d 722 (2012), *consolidated and affirmed* in *In re Mark S. Wallach v. Town of Dryden*, 23 N.Y.3d 728 (2014).
[7] *Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901 (2013). Among other challenged provisions, Act 13 stated that its provisions "occupy the entire field of regulation, to the exclusion of all local ordinances." *Id.* at 970-73.
[8] *Id.* at 980.
[9] *Id.* at 977.
[10] *Id. generally* at 977-85.

government zoning laws. None of the statutes at issue in the above cases is precisely like Montana's. It is nonetheless noteworthy that the oil and gas laws in Colorado, New York, and Pennsylvania all contain much broader statements of express preemption than Montana's oil and gas laws. And yet in each of those states the courts have, to varying degrees, recognized the basic ability of local governments to apply zoning laws to oil and gas activity. Because Montana has a far more limited statement of express preemption than any of these states, a reasoned analysis suggests that our law leaves even greater room for local government authority.

Conclusion

In conclusion, Montana counties have broad zoning powers under Part 1 zoning, along with a constitutional obligation to protect the health, safety, and welfare of their people and property. The Legislature has expressly preempted that authority in only one instance, dealing with class II wells. This means that counties can exercise concurrent authority to regulate oil and gas activity alongside the Oil and Gas Board. In exercising that authority, however, counties should take certain precautions to avoid conflict preemption. First, a county should not regulate class II injection wells. Second, county regulations should include contain a "harmonizing clause" that states an intention for local zoning standards to work compatibly with Oil and Gas Board standards. Finally, as a county reviews and permits oil and gas activities under its zoning, it should avoid conditions of approval that contradict or frustrate the purpose of Oil and Gas Board permit conditions. By following these steps, Montana counties are in a position to cooperatively regulate oil and gas activities with the Oil and Gas Board.

If you have any questions, please don't hesitate to contact me.

Sincerely,

Susan B. Swimley
Cc: client