EXHIBIT 3
DATE 3/15/07
SB

Elements of Land Use Law

Prepared by JPIA Attorney Myra L. Shults
For use by the House Local Government Committee
March 15, 2007

There are **three aspects of land use law**: planning, zoning and subdivision.

A. Planning.

The first aspect of land use law is planning, which means the law regarding planning boards and for growth policies, both of which are found in Title 76, Chapter 1.

The law about growth policies is found at §76-1-601, *et seq.*, MCA. First the Planning Board develops a growth policy, either on its own or with the help of a consultant, taking into consideration the elements in §76-1-601, MCA. Then the Planning Board holds a hearing following the notice procedure found in §76-1-602, MCA, and adopts a resolution in accordance with §76-1-603, MCA.

After the Planning Board makes its recommendation to the governing body, by resolution, the governing body then adopts a resolution of intention to adopt, adopt with revisions or reject the growth policy in accordance with §76-1-604(1), MCA.

There is not good guidance in the law for the procedure to actually adopt the growth policy. There also is not good guidance in the law for the required notice for adoption of the resolution of intention or the adoption of the growth policy, or whether those decisions should be made at a hearing or at a meeting.

We recommend to our counties it is probably a good idea to adopt the resolution of intention after a hearing [with the notice following §7-1-2121, MCA, for a hearing] and adopt the growth

policy by resolution at a properly noticed meeting (with a minimum of posted notice at least 48 hours prior to the meeting).

As governing bodies perform legislative actions, they must take into consideration *North 93 Neighbors, Inc. v. Board of County Commissioners of Flathead County*, 2006 MT 132, a recent Supreme Court decision which imposes a requirement to make findings about public comment when adopting a master plan amendment or zoning—similar to what the governing body must do when it acts in a *quasi judicial* capacity when it makes a decision on subdivision applications.

B. Zoning

The second aspect of land use law is zoning and there are three types:

1. Part 1, 101 or voluntary, petitioned county zoning

This county zoning law is found in §76-2-101, *et seq.*, MCA. It is antiquated and difficult to understand and interpret. Procedures vary from county to county. Basically freeholders (landowners) in an area decide they want to be zoned, they designate the boundaries of the area of the zoning district, they provide some suggestions for what the zoning regulations will say and they collect signatures from the people who own land in the proposed district. Hopefully the county has adopted procedures about how the petitions should be signed.

Once the petitioners believe they have signatures from at least 60% of the freeholders in the district, they take the petition to the Clerk and Recorder who has to determine how many total

freeholders there are in the district, how many have petitioned to create the zoning district and then certifies the signatures and the percentage to the County Commissioners.

If the petition contains the signatures of at least 60% of the freeholders, the Board of County Commissioners should hold a properly noticed hearing [again the procedure is lacking in the law], determine whether the requisite number of freeholders have signed the petition and create the district, provided the Commissioners are able to make the finding that the district is in the public interest or convenience. If the Commissioners do create the district, at the same time they either appoint a planning and zoning commission in accordance with §76-2-102, MCA, or assign the district to an existing planning and zoning commission.

Section 76-2-101(5), MCA, allows a protest. Counting the freeholders to determine whether 60% have signed a petition in favor of the zoning district is completely different from counting the protests to determine whether 50% of the titled property ownership is protesting.

A growth policy is **not required** for petitioned zoning.

2. Part 2, 201 or County Zoning

Petitioned zoning has been around since 1953. The law has allowed county zoning, found in Part 2, beginning at §76-2-201, MCA, since 1963 but very few counties have adopted this kind of zoning--yet. The procedure set forth in §76-2-201, *et*

seq., MCA, is much easier to follow than that set forth in Part 1 zoning.

Zoning used to be unpopular. Now it is in the minds and on the lips of people in many places. In fact, over the next few years we will see a desire on the part of many interests to move toward zoning, to regulate land use, and away from subdivision regulation, which has historically been the tool to regulate land use.

A growth policy **must** be adopted before a county may enact county zoning. § 76-2-203 (1) (a), MCA.

3. Municipal zoning

Municipal zoning is found at § 76-2-301, *et seq.* Legislation this session includes an attempt to coordinate County Zoning and Municipal Zoning, and to clarify the purposes of zoning, currently found in § 76-2-304, MCA [and in 76-2-203].

Municipal zoning has been in existence since at least the 1920's and its constitutionality was affirmed by the United States Supreme Court in *The Village of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 U.S. 365, Because zoning has been authorized in the law for municipalities in Montana since 1929, that concept is accepted in those jurisdictional areas and is well-developed.

A growth policy **must** be adopted before a municipality may zone. § 76-2-304 (1)(a), MCA.

4. Interim zoning

Both Part 2 (County Zoning) and Part 3 (Municipal Zoning) allow for temporary zoning. It is authorized in §§ 76-2-206 and 76-2-306, MCA, in an emergency, for counties, and as an urgency measure for municipalities.

C. Subdivision law

The third aspect of land use law is that regulating subdivisions.

1. The Montana Subdivision and Platting Act. The Montana Subdivision and Platting Act is found at §76-3-101, *et seq.*, MCA. It was enacted in 1973 and has been amended in almost every legislative session. This is the land use law with which most people are familiar.

The law requires all counties to have subdivision regulations and those regulations should have been updated since the 2005 legislative session when substantial procedural changes were made to the subdivision law. Model Subdivision Regulations were developed after the last legislative session and are posted on the MACo and MAP websites.

Also posted on the MACo website is a link to *Montana's Subdivision and Surveying Laws and Regulations* which was updated this last year. This publication is commonly known as the "Blue Book" and it contains the Montana Subdivision and Platting Act, the Subdivision Law Digest which can familiarize you with the cases and Attorney General opinions interpreting the law, the administrative rules which govern subdivision plats and certificates of surveys, the

Sanitation in Subdivisions Act and the administrative rules interpreting that Act.

If a proposed division of land is not exempt from subdivision review (the exemptions are found in Part 2 of the Subdivision Act) and it involves parcels of land less than 160 acres in size, it will be reviewed as either a minor subdivision (which contains five or fewer lots) or as a major subdivision (which contains more than five lots).

The Subdivision and Platting Act contains six parts—Part 1 contains general provisions—the purpose, definitions and remedies for violations. Part 2 contains exemptions. Part 3 is entitled "Land Transfers" and is an amalgam of provisions. Part 4 contains surveying provisions. Part 5 contains provisions relating to local subdivision regulations. Part 6 relates to the local review procedure and also contains §76-3-625 which is the provision enacted in 1995 which allows suits and appeals of subdivision decisions.

2. The Sanitation in Subdivisions Act

A chapter in Title 76 which is important to sanitarians and to the Department of Environmental Quality is found at § 76-4-101, *et seq.*, MCA. That area of the law is, for the most part, beyond my expertise, but it is important to protect public health and safety when land is divided.