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RECEIVED
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Ravalli County Commissioners

TO: **Karen Hughes, Planning Department**
CC: **Ravalli County Commissioners**
FROM: **George Corn**
DATE: **February 28, 2007**
RE: **Interpretation of "density" requirement in 1 per 2 Interim Zoning Regulation (now Ravalli County Resolution 2038)**

My office has researched the language in the Interim Zoning Regulation ("1 per 2 Regulation") passed by the Ravalli County voters on November 7, 2006. Significantly, the Regulation itself is entitled "AN INTERIM ZONING REGULATION LIMITING SUBDIVISIONS TO A DENSITY OF 1 RESIDENCE PER 2 ACRES FOR A PERIOD OF ONE YEAR."

The 1 per 2 Regulation provides that **"[no] preliminary plat subdivision applications may be approved that provide for the building of residences at a higher density than one dwelling per two (2) acres."** This Regulation was passed pursuant to §76-2-206, MCA, which expressly authorizes the adoption of interim zoning regulations as an emergency measure to promote the public health, safety, and general welfare while long-term zoning regulations are considered. By such adoptions (as evidenced by the ballot language), the voters have stated that they perceive such an emergency measure is necessary to regulate growth in Ravalli County.

In reviewing this matter I note that, by common definition, density means "the amount of something per unit." *American Heritage Dictionary.* General treatises on zoning law state that "[d]ensity...has a broad meaning which embodies all restrictions on the number of persons or buildings permitted in a particular zone." *Zoning and Land Use Controls*, Patrick J. Rohan, 1977, §42.01. To professional planners, lot size restrictions are identified as a specific form of "density control." *Id.* §3.01; *see also* definition of "density control" in "A Glossary of Zoning, Development, and Planning Terms" published by the American Planning Association. "Density zoning," which is often used synonymously with "cluster zoning," is a more specific term used by professionals when zoning establishes an average residential density over an entire parcel with no restrictions on lot size. *Id.; see also Black's Law Dictionary.* The Ravalli County Planning Office opines that in the parlance of professional planners, "density" is often used to indicate overall or average density within a zoning district, while "minimum lot size" is used to describe specific lot sizes within subdivisions.

In my review I have also considered that zoning regulations, including those establishing a minimum lot size, are presumed valid and are to be strictly construed and "given a fair and reasonable interpretation with some regard given to the proposed use." The drafters of the 1 per 2 Regulation, who circulated the same to the voters, have clearly stated that they intended a minimum lot size be applied to prevent subdivision into smaller lots while long-term zoning was considered. It must be kept in mind that this Regulation was not drafted by planning department professionals, but by citizen advocates during an initiative process addressing an emergency situation. Further, they campaigned for the measure and it was voted on by the Ravalli County electorate in response to that campaign. It is reasonable to assume these voters would be influenced by the campaign preceding the election and understand the terms used according to their common meaning. (On this point, it is significant that voters passed other measures in response to the County's rapid growth, including an open space bond and several measures that significantly restructured the office of county commissioners.)

Thus, to properly construe the language in the 1 per 2 Regulation passed by the voters, the terms must be interpreted according to their plain meaning if such an interpretation is possible. This interpretation should also give as full an effect to its meaning as possible with regard to the proposed use of addressing an emergency situation of unchecked subdivision development in Ravalli County. These principles of statutory construction are designed to "give effect to the legislative will, to avoid an absurd result, to view the statute as part of a whole statutory scheme and to forward the purpose of that scheme." *Orr v. State,* 2004 MT 354, 324 Mont. 391, 106 P.3d 100 ¶ 25. We should "avoid statutory construction that leads to absurd results if a reasonable construction will avoid it." *Gregg v. Whitefish City Council*, 2004 MT 262, 323 Mont. 109, 99 P.3d 151 ¶ 38.

When Ravalli County electors voted to pass the 1 per 2 Regulation this past November, they voted "[f]or adopting an interim zoning regulation limiting subdivisions to a density of 1 residence per 2 acres." Using the general definitions of these terms, the plain language indicates that the voters adopted a general density control measure that limits the size of subdivision lots to 1 residence per 2 acres. Such an interpretation agrees with the common definition of density, as well as the general planning definition of density that embodies all restrictions on the number of persons or buildings permitted in a particular zone. This interpretation also gives full effect to both the language regarding density and the language specifying 1 dwelling per 2 acres size.

To interpret, as some have suggested, the term "density" to establish "density zoning" without further qualification language such as "overall," "maximum," or "average" would be to insert terms that are not included in the express wording of the Regulation itself. Further, to interpret the Regulation as establishing overall or average density would make the "1 per 2 acre" restriction effectively meaningless. As has already started to occur, developers will merely re-

write their proposals to eliminate various lots (or phases) of their initial project, then reapply to divide into smaller lots after the interim regulation has expired. Effectively, subdivision into lots smaller than 2 acres would be allowed to continue even while the interim zoning is in effect, negating the stated purpose of addressing an emergency situation.

It is important to note that the distinction between density and minimum lot size would be arguably less significant with permanent zoning regulations. The sort of chicanery that we are beginning to see would be impossible, or at the very least impracticable, under a permanent regulation. There would be no incentive to create large, open space lots to subdivide later because the zoning regulation would not be expected to change. In fact, the temporary nature of this Regulation (and the relatively rural nature of Ravalli County) makes interpretation of a minimum lot size even more important to give full effect to the stated purpose of temporarily addressing an emergency situation while long-term zoning is considered.

It must be assumed that the voters understood the plain meaning of the terms and meant to control subdivision density by restricting residences to 1 per 2 acres (that is, establishing a temporary minimum lot size). This interpretation gives effect to the plain language and the stated purpose of the 1 per 2 Regulation. Any claimed infringement on individual property rights will be temporary and is again authorized specifically by §76-2-206, MCA, which allows for adoption of an interim zoning regulation in an emergency situation. *See, e.g., Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341-342 (2002) (upholding statutes allowing interim zoning regulations for specific periods of time to prevent destruction of finite natural resources).

Our ultimate goal should be to enforce the honest and fair expression from the voters on the issue submitted to them. The interpretation of the 1 per 2 Regulation which establishes a density control of 2 acre minimum lot size is the only logical and reasonable meaning under the relevant statutes that will make the Regulation effective. Any other interpretation would frustrate the voters' intent and the stated purpose of the interim zoning statute in protecting public heath, welfare and safety while permanent zoning is considered. Therefore, it is my opinion that the 1 per 2 Regulation establishes a temporary minimum lot size of 1 residence per 2 acres and should be strictly enforced accordingly.