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## Legal Opinion 2011-023

**TO:** Mayor John Engen, City Council, Bruce Bender, Mike Painter, Jason Diehl, Jeff Brandt, Mike Barton, Mary McCrea, Laval Means, Denise Alexander, Marty Rehbein, Steve King, Kevin Slovarp

**CC:** Dept. Atty.

**FROM:** Jim Nugent, City Attorney

**DATE:** November 18, 2011

**RE:** Local government powers must be exercised consistently with state law or state administrative regulation in areas affirmatively subjected to state-regulation or control.

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### FACTS:

City Fire Department staff is concerned that a recent Planning Board recommendation regarding narrow subdivision streets is inconsistent with Montana administrative rules that adopt the International Fire Code (2009 edition) which has been adopted by both the State of Montana Department of Justice as well as the City of Missoula. Both OPG and City Fire Department staffs have recently indicated that this narrow street will soon be an issue before the City Council when the City/County Planning Board recommendations come before the City Council.

### ISSUE:

What power does a local government self-government entity have regarding any area affirmatively subjected by law to state regulation or control?

### CONCLUSION:

Pursuant to 7-1-113 MCA, a local government entity with self-government powers is prohibited from exercising any power in a manner that is inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.

### LEGAL DISCUSSION:

Title 7, chapter 1, part 1 MCA is entitled "Nature of Self-Government Local Governments." Within this part of Montana self-government laws, there are 4 statutes that

explicitly limit or restrict local government self-government exercises of power. These 4 statutes limiting local government self-government powers are as follows:

- (1) 7-1-111 “Powers Denied”
- (2) 7-1-112 “Powers Requiring Delegation”
- (3) 7-1-113 “Consistency With State Regulation Required”
- (4) 7-1-114 “Mandatory Provisions”

7-1-113, MCA is relevant to addressing the City Fire Department’s concerns about the subdivision street recommendations that might be inconsistent with the State of Montana and City of Missoula adopted fire code regulations. 7-1-113 MCA states as follows.

**7-1-113. Consistency with state regulation required.** (1) A local government with self-government powers is prohibited the exercise of any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.

(2) The exercise of a power is inconsistent with state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation.

(3) An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency. (Emphasis added).

Pursuant to 7-1-113(1) MCA, a local government with self-government powers is prohibited from exercising any power in a manner that is inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control. 7-1-113(2) MCA indicates that the exercise of a local government power is inconsistent with Montana state law or regulation if it establishes standards or requirements which are lower or less stringent than those imposed by either state law or state regulation. The Administrative Rules of Montana (ARM) are an example of state regulations.

7-1-113(3) MCA provides that an area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter, or if enforcement of standards or requirements established by statute is vested in a state officer or agency.

Montana state law does not specifically define the terms “consistent,” “consistency,” or “inconsistent.” However, utilizing the generally accepted dictionary definitions, it would appear that any local government exercise of power with respect to areas affirmatively subjected to state law or state regulation and control must be in uniformity or harmony with the state law or state regulation.

