TO: Raph Graybill

Chief Legal Counsel to the Governor

FROM: Becky Dockter

FWP Chief Legal Counsel

DATE: July 31, 2018

RE: Land Board Approval Not Required For Acquisition of Conservation Easements

Question Presented Whether FWP must seek Land Board approval for FWP's acquisitions of conservation easements of more than 100 acres or $100,000 in value.

Brief Answer No. The statute requires Land Board approval for land acquisitions but not for acquisition of conservation easements of the relevant size and value.

Discussion

This memo concurs and incorporates by reference the FWP March 23, 2018 memo which supports the same conclusion. In addition, FWP provides the following analysis to add to the discussion.

Mont. Code Ann. § 87-1-209, **Acquisition and sale of lands or waters**, subsection (1) provides:

> Subject to *87-1-218* and subsection (8) of this section, the department, with the consent of the commission or the board and, *in the case of land acquisition involving more than 100 acres or $100,000 in value, the approval of the board of land commissioners*, may acquire by purchase, lease, agreement, gift, or devise and may acquire easements upon lands or waters for the purposes listed in this subsection.

(Emphasis added.)

This language at MCA §87-1-209 is controlling. The language is clear and unambiguous. FWP is not required to obtain approval from the Land Board for acquisitions of conservation easements as it seeks approval for land acquisitions. Generally, the statute provides authority to the department to obtain land and interests in land through the oversight approval of the Fish and Wildlife Commission (commission) or the Parks and Recreation Board (board). The only additional oversight required by the board of land commissioners (commonly referred to as the Land Board) is for "*land acquisition* involving more than 100 acres or $100,000 in value." MCA 87-1-209(1). The commission and board approve all acquisitions of interests in land and land itself. *See* MCA 87-1-301(1)(e). The Land Board does not approve all acquisitions, just those involving "land" acquisitions of relevant size and value.

While both "land" and "conservations easements" may be acquired, they are not both considered "land." It is true that "land acquisition" is not specifically defined in code. However, this is not relevant. The plain meaning of the statute requires only comparison of an acquisition of "land" and the acquisition of a "conservation easement" to determine whether Land Board oversight is required when the relevant size and value are met. A conservation easement interest is NOT referred to as "land" and the two are not interchangeable terms. In fact, the statute conferring approval authority to the commission refers to their broad authority over "all acquisitions … of interests in lands." There is no question this includes acquisitions of conservation easements. The legislature did not refer similarly to the Land Board authority. *Compare,* MCA §87-1-209(1) ("land acquisitions") to MCA §87-1-301(1)(e) ("all acquisitions … of interests in land). Courts look first to the plain meaning of the words a statute contains to ascertain their meaning. *Clarke v. Massey*, 271 Mont. 412, 416, 897 P.2d 1085 (1995). "In the search for plain meaning, 'the language used must be reasonably and logically interpreted, giving words their usual and ordinary meaning.'" *Gaub v. Milbank Ins. Co*., 220 Mont. 424, 427, 715 P.2d 443, 445) 1986).

The acquisition of *land* and the acquisition of a *conservation easement* are very different in their practical application. Land or property, as it is commonly referred to, is used or possessed by a landowner to the exclusion of others. MCA §70-1-101. By contrast, a conservation easement entitles the holder to a non-possessory interest in land that does not allow the holder the use of the land but solely to restrict its use in particular ways. *See* MCA § 76-6-203. The holder is allowed a limited monitoring right to step foot on land that is subject to the conservation easement, usually defined in the terms of the Deed of Conservation Easement. That limited right is very different from the right conferred to a landowner in land acquisitions. The statute at issue reflects this difference in its plain meaning.

Understanding this difference, the legislature provided commission and board oversight in its enabling statutes by describing it, "the commission …shall approve *all acquisitions* or transfers by the department *of interests in land* or water…" MCA 87-1-301 (emphasis added). If the legislature desired the same oversight of the Land Board, it would have described it similarly in the statute in question here.

While the AGO Memo pays homage to the principle for construing a statute to look first to plain meaning of the words it contains, the legal reasoning fails to apply the principle when it refers to definitions of superfluous words (defining "easement," but not "conservation easement"), when it refers to the meaning of "land acquisitions" but in other jurisdictions, and when it uses FWP's unsupported practice of seeking Land Board approval as a courtesy as authority where it does not otherwise exist.

Legislative History

To the extent there is any ambiguity in the statute, legislative history resolves it. The language regarding "land acquisitions" was added to the statute to address a concern that FWP *fee*

purchases were eroding the local tax base. Conservation easements have no effect on the local tax base and were not contemplated by the legislature when amending §87-1-209.

During legislative sessions in the late 1970s and early 1980s, the legislature considered several bills that would require elected officials to give approval before FWP could remove land from the tax base. In 1981, the legislature passed a bill that required elected officials to approve such transactions, defined as "land acquisition[s] involving more than 100 acres or $100,000 in value." MCA §87-1-209. Early drafts of the bill placed approval authority for these transactions with the Governor. The final bill extended approval authority to the Land Board.

Conservation easements are a creature of statute in Montana dating to the late 1960s. Unlike fee purchases of land, they do not transfer ownership. Conservation easements have no effect on the local tax base.

Conclusion

The plain meaning of MCA 87-1-209 requires that an acquisition of "land" and the acquisition of a "conservation easement" be treated differently. If the legislature intended to require Land Board approval for the acquisition of a conservation easement, it would have referenced the same term, "acquisitions … of interests in land," as it did in the enabling statute for the commission. *See* MCA 87-1-301(1)(e). It did not. Therefore, FWP is not required to seek Land Board approval for the acquisition of conservation easements.