

47 Op. Att'y Gen. No. 4

LAND USE - Role of zoning commission in city exercising self- government powers;

LOCAL GOVERNMENT - Conflicts between state zoning statutes and local zoning ordinances of city exercising self-government powers;

MUNICIPAL CORPORATIONS - Conflicts between state zoning statutes and local zoning ordinances of municipality exercising self- government powers;

MONTANA CODE ANNOTATED - Title 76, chapter 2, part 3; sections 7-1-114, 76-1-108, 76-2-307, -327,

OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 57 (1987), 41 Op. Att'y Gen. No. 64 (1986), 38 Op. Att'y Gen. No. 98 (1980).

HELD: A city exercising self-government powers may not vest its municipal planning board with those powers vested in municipal zoning commissions by Mont. Code Ann. § 76-2-307.

July 1, 1997

Mr. Gary R. Thomas
Red Lodge City Attorney
201 South Broadway, Suite D
Red Lodge, MT 59068

Dear Mr. Thomas:

You have asked my opinion on the following question:

Whether a city exercising self-government powers may vest its municipal planning board with those functions and authority normally exercised by a municipal zoning commission described by Mont. Code Ann. § 76-2-307?

Several years ago the City of Red Lodge, a city of the third class which adopted self-government powers in 1986, initiated a land use planning process. This process led to the adoption of a Master Plan by the Red Lodge City Council on December 21, 1995. The formulation of the Master Plan was accompanied by the drafting of a Development Code which contains zoning regulations and enforcement ordinances and serves generally to implement the adopted Master Plan. The Development Code was adopted by the Red Lodge City Council April 8, 1997.

The Development Code establishes a Planning Board that will serve as the city's zoning commission for purposes of implementing municipal zoning authorized by Mont. Code Ann. title 76, chapter 2, part 3. In particular, Mont. Code Ann. § 76-2-307 provides:

Zoning commission. In order to avail itself of the powers conferred by this part, except 76-2-306, the city or town council or other legislative body shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such city or town council or other legislative body shall not hold its public hearings or take action until it has received the final report of such commission.

The Red Lodge Planning Board has been vested by the city with all the authority necessary to fulfill the duties of a zoning commission as detailed in the statute set forth above.

You ask whether the Red Lodge Planning Board may function as the municipal zoning commission described by Mont. Code Ann. § 76-2-307. The question in essence is whether a city with self-government powers may choose to combine the discrete functions and authorities of a planning board and zoning commission into one body, a planning board, thereby eliminating review by a zoning commission.

A city exercising self-government powers "may exercise any power or provide any service except those specifically prohibited by the Constitution, law or the local government's charter." *D & F Sanitation Serv. v. City of Billings*, 219 Mont. 437, 445, 713 P.2d 977, 982 (1986). This office has consistently recognized that Mont. Code Ann. § 7-1-114 prohibits local governments with self-government powers from adopting ordinances that modify procedures set forth in state planning and zoning statutes. See 42 Op. Att'y Gen. No. 57 (1987); 41 Op. Att'y Gen. No. 64 (1986); 38 Op. Att'y Gen. No. 98 (1980).

Montana Code Annotated § 7-1-114 provides in relevant part as follows: **Mandatory provisions.** (1) A local government with self-government powers is subject to the following provisions:

.....

(e) All laws which require or regulate planning or zoning;

.....

(2) These provisions are a prohibition on the self-government unit acting other than as provided.

As was noted in 38 Op. Att'y Gen. No. 98 (1980), this statute applies to procedural zoning laws as well as substantive laws. In that opinion Attorney General Greely interpreted a Butte- Silver Bow self-governing ordinance that created a right of appeal from a Board of Adjustment decision, in addition to the appeal provided by Mont. Code Ann. § 76-2-327. Attorney General Greely found that the optional appeal right was "other than as provided" by statute and thus prohibited by § 7-1-114(2).

In 41 Op. Att'y Gen. No. 64 (1986) this office was asked whether it was appropriate for the Missoula County Commissioners to delegate authority for approving subdivision plats to a planning board. It was noted that no state statute provided for such a delegation and that § 7-1-114 prohibits a self-governing unit from modifying zoning and planning statutes. Attorney General Greely found that Missoula County could not delegate its subdivision review authority to staff or a planning board.

Finally, in 1987 the self-governing power of Butte-Silver Bow was again construed with regard to its subdivision review authority. 42 Op. Att'y Gen. No. 57. Consistent with the reasoning of the preceding Attorney General's Opinions, Butte- Silver Bow was found to not have the authority to review divisions of land consisting of parcels 40 acres or larger, because the Subdivision and Platting Act only contemplated review of 20-acre parcels.

You ask whether Red Lodge may transfer the functions of a zoning commission to a planning board. In light of the established meaning of § 7-1-114, Red Lodge is prohibited from creating a planning and zoning mechanism that is not provided by state statute. Section 76-2-307 states that cities "shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts." While § 76-1-108 allows a city to designate a **city-county** planning board as the city's zoning commission for purposes of § 76-2- 307, no such authorization exists for the designation of a **city** planning board as the zoning commission. Had the legislature wanted to permit this practice, it easily could have drafted § 76-1-108 to say so. Since it did not, I find that a local ordinance that establishes an alternative zoning system is prohibited by § 7-1-114.

In closing, I note that there is no statutory bar which prevents the city from appointing a planning board as required by statute and then naming the same persons to serve as the zoning commission. The two bodies would have to exercise their respective authorities in a manner that clearly identified which body was acting, but procedures could be adopted to achieve this result. Montana law only prevents a city from using a planning board to exercise both planning and zoning functions.

THEREFORE, IT IS MY OPINION:

A city exercising self-government powers may not vest its municipal planning board with those powers vested in municipal zoning commissions by Mont. Code Ann. § 76-2-307.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/gms/dm