

47 Op. Att'y Gen. No. 5

ADMINISTRATIVE LAW AND PROCEDURE - Discretion of agency to interpret statutes which it administers;
ARCHITECTS, BOARD OF - Regulation of practice of architecture;
BUSINESS REGULATION - Regulation of practice of architecture;
COMMERCE, DEPARTMENT OF - Regulation of practice of architecture;
MONTANA CODE ANNOTATED - Title 37, chapter 65; sections 37-1-131, -131(1), 37-65-101, -102, -102(5), -103, -103(4), (4)(c), (4)(d), -204, -301, -303, -322, -323.

HELD:

The Board of Architects has the authority to regulate the practice of architecture as well as the use of the title "architect" or use of other words implying the practice of architecture.

July 8, 1997

Ms. Pamela Hill, Chairman
Montana Board of Architects
Professional and Occupational
Licensing Bureau
Department of Commerce
P.O. Box 200513
Helena, MT 59620-0513

Dear Ms. Hill:

You have requested my opinion on the following question:

Do Mont. Code Ann. §§ 37-65-102 and -103 create a title act, a practice act, or a combination of both under which the Board of Architects may seek criminal prosecution or injunctive relief against unlicensed persons?

My review of the applicable statutes leads to the conclusion that the Board of Architects has the authority to regulate the practice of architecture as well as use of the title "architect" or similar words implying the practice of architecture.

Montana Code Annotated § 37-65-101 describes the purpose and legislative intent for enacting laws governing the practice of architecture and provides:

It is hereby declared, as a matter of legislative policy in the state of Montana, that the practice of architecture is a privilege granted by legislative authority and is not a natural right of individuals and that it is necessary . . . to provide laws covering the granting of that privilege and its subsequent use, control, and regulation for the purpose of protecting the public from the unprofessional, improper, unauthorized, and unqualified practice of architecture.

By its express terms, the legislature set out to create a system to regulate the "practice" of architecture.

Montana Code Annotated § 37-65-301 requires each architect to be licensed and provides:

Except as provided in this chapter, no person may practice architecture in this state or use the title "architect" or "licensed architect" or any words, letters, figures, or other device indicating or intending to imply that he is an architect, without having qualified under this chapter.

By its plain terms, this section prohibits the unqualified "practice" of architecture as well as the unauthorized use of the title "architect" or similar words implying that the person engages in the practice of architecture.

Further, Mont. Code Ann. § 37-65-322, which imposes a penalty for violation of the chapter, provides:

Any person who uses the title "architect" or "licensed architect" or any other words, letters, figures, or device indicating or intending to imply that the person using the same is an architect or who shall engage in the practice of architecture within the meaning of this chapter or shall accept compensation for rendering architectural service without first having complied with the provisions of this chapter shall be deemed guilty of a misdemeanor

This section, by its plain terms, also imposes a penalty for the unauthorized practice of architecture and the unauthorized use of

the title "architect" or similar words implying that the person engages in the practice of architecture. It is a well-established rule of statutory construction that a statute is to be construed according to its plain meaning. *Stratemeyer v. Lincoln County*, 276 Mont. 67, 915 P.2d 175 (1996); *State v. Martel*, 273 Mont. 143, 902 P.2d 14 (1995); *Clarke v. Massey*, 271 Mont. 412, 897 P.2d 1085 (1995). By the plain terms of the above statutes, the legislature established a scheme for the regulation of the practice of architecture as well as the use of the title "architect." Therefore, in answer to your question, Montana law proscribes the unauthorized practice of architecture, as well as the unauthorized use of the title "architect" or similar words implying that a person is engaged in the practice of architecture.

You next state that it is unclear what constitutes the unauthorized practice of architecture and seek advice in this regard. The practice of architecture is defined broadly as

any professional service or creative work requiring the application of advanced knowledge of architectural design, building construction, and standards and involving the constant exercise of discretion and judgment in such activities, in which the safeguarding of life, health, or property is concerned, as consultation, investigation, evaluation, planning, design, or inspection of construction for any public or private building.

Mont. Code Ann. § 37-65-102(5). All practicing architects are required to be licensed. Mont. Code Ann. § 37-65-301. The Board of Architects establishes the standards and qualifications for licensure. Mont. Code Ann. §§ 37-65-303, 37-1-131(1). A person who engages in the practice of architecture without being licensed is subject to conviction for a misdemeanor. Mont. Code Ann. § 37-65-322. The Board may also enjoin the unauthorized practice of architecture if it has reasonable grounds to believe that a person is violating any provision of title 37, chapter 65. Mont. Code Ann. § 37-65-323.

Certain persons and actions have been exempted from regulation. In particular, § 37-65-103(4)(c) exempts any person who plans, designs, alters, repairs, supervises or builds a residential building of less than eight living units. Section 37-65-103(4)(d) exempts the planning, design, alteration, construction, repair, or supervision of construction of a building by its owner, "if the building is not intended for use or used as a public building."

You ask whether the exemption in § 37-65-103(4)(c) means that all commercial buildings must be designed by an architect. It is important to recognize that while the above statutes govern the practice of architecture, they do not purport to establish standards for construction of buildings. The penalties and enforcement provisions allow the Board to regulate only the unauthorized practice of architecture and unauthorized use of the title *architect*. These provisions do not address a situation where an individual or entity fails to hire a licensed architect.

Under § 37-65-103(4)(c), a person who designs and builds a residential building of less than eight units is exempted from the requirements of the chapter. This provision does not impose an affirmative duty upon a person to hire an architect if a residential building is built with eight or more units. Nor does it establish as a building code standard the requirement of an architect's seal. While the provisions of the chapter allow the prosecution and enjoining of individuals who engage in the unauthorized practice of architecture, the provisions do not proscribe penalties for anyone who fails to hire or use an architect. Thus, the Board's authority extends to the person performing the architectural services, not the person for whom those services are performed.

You also ask whether an owner who hires another person to design and build a building is subject to prosecution. Section 37-65- 103(4)(d) exempts the planning, design, alteration, construction, repair or supervision of construction of a building by its owner if the building is not intended for public use.

This exemption does not encompass a situation where the owner hires another person to design and construct the building or where the owner hires someone to supervise the construction. As with the exemption in § 37-65-103(4)(c), this subsection does not impose an affirmative duty upon owners to construct all buildings with the service of an architect. It simply exempts such owners when they do the work themselves or supervise others in doing the construction. When an owner hires another person, then it is the person he hires who may be subject to regulation, depending upon whether that person is engaged in the "practice of architecture" as defined in Mont. Code Ann. § 37-65-102(5).

I note that you have requested my opinion assuming that the Board of Architects "does not have the authority to interpret statutes within the rules of statutory construction" as would a court. Contrary to your assumption, under Mont. Code Ann. § 37-1-131, the Board is charged with the duty to "set and enforce standards and rules governing the licensing, certification, registration, and conduct" of the practice of architecture. The Board similarly has the ability to "adopt, amend, or repeal rules necessary for the implementation and enforcement" of title 37, chapter 65. Mont. Code Ann. § 37-65-204. These sections grant the Board the authority to interpret the statutes which they are to enforce through either rulemaking or the contested case process. Such rules and decisions are given deference by the courts. See *Christenot v. State, Dep't of Commerce*, 272 Mont. 396, 901 P.2d 545 (1995) (administrative agency's interpretation of statutes which it administers presumed controlling); *Montana Dep't of Revenue v. Kaiser Cement Corp.*, 245 Mont. 502, 803 P.2d 1061, 1064 (1990) ("Reasonable constructions must be adopted if possible, with deference shown to the interpretation given to the statutes by the officers or agencies charged with its administration"); see also *Chevron v. Natural Resources Defense*, 467 U.S. 837 (1984) (the power of an agency to administer a program necessarily requires the formulation of policy). Agencies frequently construe the statutes they are charged with enforcing or administering. Such statutory construction is not the sole province of the courts or of this office.

THEREFORE, IT IS MY OPINION:

The Board of Architects has the authority to regulate the practice of architecture as well as the use of the title "architect" or use of other words implying the practice of architecture.

Sincerely,

JOSEPH P. MAZUREK Attorney General

jpm/elg/dm