

48 Op. Att'y Gen. No. 5

CITIES AND TOWNS - Comprehensive master plans, planning and zoning districts;
COUNTIES - Comprehensive master plans, planning and zoning districts;
COUNTY GOVERNMENT - Comprehensive master plans, planning and zoning districts;
FREEHOLDERS - Petitions to create planning and zoning districts;
JURISDICTION - County planning boards and planning and zoning commissions;
LAND USE - Comprehensive master plans, planning and zoning districts;
LAND USE - Jurisdiction of county planning boards and planning and zoning commissions;
LAND USE - Planning and zoning district boundaries;
MONTANA CODE ANNOTATED - Sections 70-20-201(6), 76-1-605, 76-2-101, -103, -104, -106, 76-2-201;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 43 (1987), 41 Op. Att'y Gen. No. 94 (1986).

HELD: 1. Counties which have adopted a comprehensive master plan are authorized to create planning and zoning districts under Mont. Code Ann. §§ 76-2-101 to -112.

2. A county planning board has no statutory authority over a planning and zoning district created within the board's jurisdictional area pursuant to Mont. Code Ann. §§ 76-2-101 to -112. The district's development pattern, which must substantially adhere to the comprehensive master plan, is determined by the planning and zoning commission, subject to the approval of the county commission. However, nothing precludes the planning and zoning commission or the county commission from requesting input from the county planning board during the process of determining and approving the development pattern.

3. The planning and zoning commission has no power to alter unilaterally the district's geographic boundaries from those boundaries contained in the petition. However, the commission may address boundary issues when adopting the district's development pattern. Any changes to the internal boundaries must be made pursuant to procedures set forth in Mont. Code Ann. §§ 76-2-104 and -106.

4. Generally, individual freeholders may not add their names to or withdraw their names from the petition provided for in Mont. Code Ann. § 76-2-101, after the petition has been certified and submitted to the county commissioners for their review. It may, in some circumstances, be permissible for the county commissioners to extend the time for addition to or deletion of names from the petition.

5. When a petition to create a planning and zoning district includes a narrative legal description of the district's boundaries which is inconsistent with the accompanying map of the proposed district, the planning and zoning commission must follow the guidelines found at Mont. Code Ann. § 70-20-201 to determine the appropriate boundaries.

June 28, 1999

Mr. Robert Eddleman
Stillwater County Attorney
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Dear Mr. Eddleman:

The Stillwater County Commissioners, through the office of their staff attorney, have requested my opinion on several questions which I have rephrased as follows:

1. After a county has adopted a comprehensive master plan for its jurisdictional area, is the county authorized to create planning and zoning districts under Mont. Code Ann. §§ 76-2-101 to -112 (Part 1 zoning) or is it limited to zoning pursuant to Mont. Code Ann. §§ 76-2-201 to -228 (Part 2 zoning)?

2. What, if any, authority does a county planning board have with regard to a planning and zoning district created under Part 1 zoning within the jurisdictional area of the county planning board?
3. In a planning and zoning district lawfully created pursuant to Part 1 zoning, what is the extent of the planning and zoning commission's power to alter the district's boundaries from those boundaries contained in the petition?
4. Is it permissible for individuals to add their names to and withdraw their names from a petition to create a planning and zoning district once the petition has been submitted to the county commissioners for review?
5. When a petition to create a planning and zoning district includes a narrative legal description of the district's boundaries and a map showing the district's boundaries which is not consistent with the legal description, which document prevails?

The Town of Columbus and Stillwater County created a City-County Planning Board in 1967. As of January 23, 1995, the jurisdictional area of the City-County Planning Board consisted of the Town of Columbus and certain unincorporated areas contiguous thereto. Stillwater County Commissioners established a County Planning Board in 1994. As of January 23, 1995, the jurisdictional area of the County Planning Board consisted of the entire area within the external boundaries of Stillwater County, except the jurisdictional area adopted by the City-County Planning Board. The Stillwater County Commissioners adopted a comprehensive master plan for the County Planning Board's jurisdictional area on December 30, 1997.

A petition requesting the establishment of a planning and zoning district pursuant to Mont. Code Ann. §§ 76-2-101 to -112 was initially filed with the Stillwater County Commissioners in May 1997. Thereafter, individual names were added to and removed from the petition upon written request of the signatory. The county commissioners gave public notice of a specific date after which no additions or deletions of signatures would be permitted. Subsequent to that date, the county commissioners passed a resolution dated May 19, 1998, creating the "Stillwater River Corridor Planning and Zoning District," and appointing a five-member planning and zoning commission. The questions you pose pertain to the creation and implementation of this planning and zoning district, as well as the responsibilities of the planning and zoning commission.

I.

The first question raised is whether a county with a comprehensive master plan has the authority to create planning and zoning districts pursuant to the petition process established in Mont. Code Ann. §§ 76-2-101 to -112 (Part 1 zoning), or whether that county is required to follow the process set forth in Mont. Code Ann. §§ 76-2-201 to -228 (Part 2 zoning). There is no question but that Part 1 zoning can apply to a governing body which has no comprehensive master plan and that Part 2 zoning is available only to governing bodies which have adopted a comprehensive master plan. Montana Wildlife Fed'n v. Sager, 290 Mont. 247, 257-58, 620 P.2d 1189, 1196 (1980). However, you have not cited and I have not found any case which squarely addresses whether Part 1 zoning is available to a governing body with a comprehensive master plan.

County commissioners may create planning and zoning districts pursuant to Part 1 zoning statutes for districts which exceed 40 acres "whenever the public interest or convenience may require and upon petition of 60% of the freeholders affected." Mont. Code Ann. § 76-2-101(1), (3). The only statutory exceptions to Part 1 zoning are in areas which have been zoned by an incorporated city and when freeholders representing 50 percent of the affected property protest the district within 30 days of its creation. See Mont. Code Ann. § 76-2-101(2), (5). There is nothing in the statutes specifically forbidding the exercise of Part 1 zoning when a comprehensive master plan exists.

Part 1 zoning was initially enacted in 1953, four years prior to legislation creating comprehensive master plans and ten years prior to Part 2 zoning. Part 1 zoning remains intact today despite the legislature's adoption of and amendments to these other methods of planning and zoning. It is a fundamental rule of statutory interpretation that all statutes concerning a subject are to be read together, with each given

effect if reasonably possible. Crist v. Segna, 191 Mont. 210, 212, 622 P.2d 1028, 1029 (1981). Repeals by implication are not favored. Therefore, it cannot be assumed that the legislature silently amended or repealed existing law when it passed legislation on a related subject. State v. Gafford, 172 Mont. 380, 388, 563 P.2d 1129, 1134 (1977).

Several court decisions have addressed the applicability of Mont. Code Ann. §§ 76-2-101 to -112. Part 1 zoning survived a constitutional challenge when the Montana Supreme Court determined the statutes did not constitute an unlawful delegation of legislative authority. City of Missoula v. Missoula County, 139 Mont. 256, 362 P.2d 539 (1961). Then, in Petty v. Flathead County Bd. of County Comm'rs, 231 Mont. 428, 754 P.2d 496 (1988), the Montana Supreme Court recognized that Part 1 zoning may pertain to any district which exceeds 40 acres in size, while Part 2 zoning "involves county-wide planning and zoning by county commissioners working with county planning boards." Petty, 231 Mont. at 432, 754 P.2d at 499, citing Lundberg, County Zoning in Montana, 33 Mont. L. Rev. 63, 65, 68 (1972).

One clear conclusion attainable from these statutes and court decisions is that Part 1 zoning is a planning and zoning vehicle separate and distinct from Part 2 zoning. Part 1 planning and zoning constitutes the mechanism by which freeholders can initiate zoning changes. Thus, it is my opinion Part 1 zoning is a zoning process which should be and is available to freeholders whether or not their county has adopted a comprehensive master plan. See also Lahren v. Park County, No. DV-98-103 (Mont. 6th Jud. Dist., Jan. 20, 1999).

II.

Your second question is whether a county planning board has any authority with respect to a planning and zoning district created under Part 1 zoning statutes. As discussed above, the Part 1 zoning statutes were enacted prior to the county planning board and comprehensive master plan statutes. Thus, although Part 2 zoning mandates the involvement of the county planning board, Part 1 zoning does not.

Part 1 zoning requires the county commissioners to appoint a planning and zoning commission to "adopt a development pattern for the physical and economic development of the planning and zoning district." Mont. Code Ann. §§ 76-2-101(1), -104. Under Part 1 zoning, the planning and zoning commission, not the county planning board, is responsible for promoting planning and zoning in the petitioned district. Mont. Code Ann. § 76-2-103. However, nothing in the statutes precludes the planning and zoning commission, or the county commissioners, from seeking the advice or opinion of an existing county planning board. Furthermore, Mont. Code Ann. § 76-1-605 requires that governing bodies "be guided by and give consideration to the general policy and pattern of development set out in the master plan" when adopting zoning ordinances. Thus, if a comprehensive master plan exists, the planning and zoning commission is obligated to ensure its development patterns are consistent with that master plan. Bridger Canyon Property Owners' Ass'n, Inc. v. Planning & Zoning Comm'n, 270 Mont. 160, 170, 890 P.2d 1268, 1274 (1995), citing Little v. Board of County Comm'rs of Flathead County, 193 Mont. 334, 631 P.2d 1282 (1981).

III.

Next, you question the extent of the planning and zoning commission's power to alter the planning and zoning district's boundaries from those boundaries contained in the petition. The planning and zoning commission cannot alter unilaterally the district's boundaries to include additional land not referenced in the petition. The boundaries are proposed by the petitioners and set by the county commission when it accepts the petition creating the planning and zoning district. See Mont. Code Ann. § 76-2-101(1); Montana Wildlife Fed'n, 290 Mont. at 259, 620P.2d at 1196.

The planning and zoning commission is empowered to create a development pattern for the district. Mont. Code Ann. § 76-2-104(1). Following a public hearing, the planning and zoning commission may issue a resolution adopting the proposed development pattern. The resolution must "refer expressly to the maps, charts, and descriptive matters forming the pattern or part thereof." Mont. Code Ann. § 76-2-106(2). The Montana Supreme Court determined in Doull v. Wohlschlager, 377 P.2d 758, 763, 141 Mont. 354, 363 (1963), that maps and plots are necessary only when the commission divides the planning and zoning district into more than one development district.

Previous attorneys general subsequently recognized the possible need to address boundary issues when determining the development pattern, regardless of the number of development districts being proposed. Attorney General Woodahl determined that Mont. Code Ann. § 76-2-106 permits the planning and zoning commission to change the boundaries within a particular planning and zoning district if the commission finds such change advisable, provided the hearing requirements found in Mont. Code Ann. § 76-2-106 are met. However, changes to the exterior boundaries are prohibited absent an additional petition from the affected freeholders.

[T]he planning and zoning commissioners may change the interior boundaries of a planning and zoning district provided that such change is by affirmative vote of the majority of the whole commission and that proper notice has been given and a public hearing has been held as specified in [Mont. Code Ann. § 76-2-106]. The exterior boundaries of a district may be changed upon receipt of a petition by sixty percent of the freeholders within the area affected by the boundary change.

Letter op. to Mr. Thomas A. Olson, Dec. 2, 1971, at 3.

Attorney General Greely subsequently issued an informal opinion to Charles Graveley on May 15, 1981, holding that the planning and zoning commission could change the planning and zoning district's exterior boundaries when adopting the district's development pattern process, absent a petition from 60 percent of the affected freeholders. I find the reasoning in the letter opinion to Mr. Olson persuasive, as well as consistent with case law, and disapprove the informal opinion issued to Mr. Graveley in 1981.

IV.

Your fourth question concerns whether and when individuals may add or withdraw their names from a petition requesting the creation of a planning and zoning district. It is my understanding the Stillwater County Commissioners gave public notice of a specific date when the petition would be reviewed, and permitted additions to and withdrawal of names from the petition up until that date. The general rule in Montana is that when a certain number of individuals are required to sign a petition "to initiate proceedings for a public purpose, any person signing the petition has an absolute right to withdraw his name at any time before the person or body created by law to determine the matter submitted by the petition has finally acted." 41 Op. Att'y Gen. No. 94 at 406 (1986), citing Ford v. Mitchell, 103 Mont. 99, 113-14, 62 P.2d 815, 821-22 (1936), and State ex rel. Freeze v. Taylor, 90 Mont. 439, 445, 4 P.2d 479, 481 (1931).

The answer to your question thus depends on what constitutes a "final action" for Part 1 zoning petitions. A "final action" for initiative petition purposes has been interpreted by the Montana Supreme Court to mean notification by the secretary of state to the governor that the petition qualified for the ballot. State ex rel. O'Connell v. Mitchell, 111 Mont. 94, 106 P.2d 180 (1940). A consolidation petition saw final action when the county clerk certified the petition to the board of county commissioners. Taylor, 90 Mont. at 445, 4 P.2d at 481. Final action with respect to an annexation petition was determined to be at the time the proper authority assumed jurisdiction. McAlmond v. City of Bremerton, 374 P.2d 181, 183 (Wash. 1962). Applying the above decisions to the Part 1 zoning process, it is my opinion that "final action" with respect to petitions for Part 1 zoning occurs when the clerk certifies the petition to the board of county commissioners.

Here, the commissioners took the additional step of extending until a date certain the period of time in which signatures could be added or deleted from the petition. As the date certain was known to the public and preceded the Commission's decision to create the district, the extension of time, while not a practice to be encouraged, caused no harm. This conclusion assumes the boundaries of the proposed district remained the same and that as of the date certain, the signatures of 60 percent of the freeholders within the boundaries of the proposed district remained on the petition.

V.

Your final question is whether a narrative legal description contained in a Part 1 zoning petition or the accompanying map, which is not consistent with the legal description, defines the boundaries of the

proposed planning and zoning district. Although the facts you present do not deal with a conveyance of real property, I find the situation to be sufficiently similar to permit reliance on Montana's property law. Mont. Code Ann. § 70-20-201 contains the rules for construing the description of real property being conveyed when construction is doubtful and no other sufficient method exists by which to determine it. Subsection (6) provides, "When the description refers to a map and that reference is inconsistent with other particulars, it controls them if it appear [sic] that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars." Mont. Code Ann. § 70-20-201(6). Thus, I conclude that if signatures were obtained on the petition as a result of reference to the map, the map defines the boundaries of the planning and zoning district. However, if the map was created from the narrative legal description set forth in the petition, the narrative controls. The exact facts can be ascertained by the planning and zoning commission through the public hearing process required by Mont. Code Ann. § 76-2-106(1).

THEREFORE, IT IS MY OPINION:

1. Counties which have adopted a comprehensive master plan are authorized to create planning and zoning districts under Mont. Code Ann. §§ 76-2-101 to -112.
2. A county planning board has no statutory authority over a planning and zoning district created within the board's jurisdictional area pursuant to Mont. Code Ann. §§ 76-2-101 to -112. The district's development pattern, which must substantially adhere to the comprehensive master plan, is determined by the planning and zoning commission, subject to the approval of the county commission. However, nothing precludes the planning and zoning commission or the county commission from requesting input from the county planning board during the process of determining and approving the development pattern.
3. The planning and zoning commission has no power to alter unilaterally the district's geographic boundaries from those boundaries contained in the petition. However, the commission may address boundary issues when adopting the district's development pattern. Any changes to the internal boundaries must be made pursuant to procedures set forth in Mont. Code Ann. §§ 76-2-104 and -106.
4. Generally, individual freeholders may not add their names to or withdraw their names from the petition provided for in Mont. Code Ann. § 76-2-101, after the petition has been certified and submitted to the county commissioners for their review. It may, in some circumstances, be permissible for the county commissioners to extend the time for addition to or deletion of names from the petition.
5. When a petition to create a planning and zoning district includes a narrative legal description of the district's boundaries which is inconsistent with the accompanying map of the proposed district, the planning and zoning commission must follow the guidelines found at Mont. Code Ann. § 70-20-201 to determine the appropriate boundaries.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/mas/lrb