49 Op. Att'y Gen. No. 11

BUILDING CODES - Adoption of building code enforcement program;
BUILDING CODES - Municipal jurisdictional areas;
ELECTIONS - Proper voters in election regarding building code enforcement program;
STATUTORY CONSTRUCTION - Construing plain meaning of words of statute;
STATUTORY CONSTRUCTION - Resort to legislative history materials to find legislative intent;
STATUTORY CONSTRUCTION - Specific provisions control more general ones;
MONTANA CODE ANNOTATED - Sections 2-15-501(7), 13-2-301, 13-19-102, -102(2), -104, -106, 50-6-101, 50-50-101(6), 50-60-101(11), (13), (14).

HELD:

1. The owners of real property who may vote in the elections contemplated by SB 242 are those owners specifically listed within the definition of Mont. Code Ann. § 50-60-101(14) whose interests appear in the real property records in the office of the county clerk and recorder 30 days before the election.

2. Municipal jurisdictional areas existing under Mont. Code Ann. § 50-60-101(11) prior to the effective date of SB 242 lose jurisdiction to enforce municipal building code provisions as of the effective date of the bill, but such jurisdiction may be revived if it is approved by the voters in the election required by section 8 of SB 242 prior to December 31, 2001.

October 19, 2001

Mr. Dennis Paxinos
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Dear Mr. Paxinos:

You have requested my opinion on the following questions, which I have rephrased as follows:

1. Who should vote in the elections authorized by Senate Bill 242?

2. Does a municipality that acquired authority to enforce its building code within a municipal jurisdictional area beyond the city limits prior to the effective date of SB 242 retain that jurisdiction until the election required by section 8 of the bill?

Senate Bill 242 was introduced during the 2001 legislature and amended the statutes governing building construction standards. Prior to the enactment of SB 242, Montana law had provided authority for municipal governments, with the consent of the counties in which they were located, to exercise building code enforcement jurisdiction in an area within 42 miles of the city limits known as the "municipal jurisdictional area," Mont. Code Ann. § 50-60-101(11) (1999), or, more colloquially, as the "donut area." SB 242 was introduced for the purpose of eliminating this extraterritorial municipal jurisdiction. As it made its way through the legislative process, however, amendments were made which have created questions about the effect of the bill.

I.

Your first question involves the several provisions of SB 242 providing for county elections on the various provisions allowing for either county or municipal building code enforcement.

Section 4 of the legislation allows for the designation of a county jurisdictional area. Procedurally, it requires the board of county commissioners to pass a resolution of intent to adopt a county jurisdictional

area. Under SB 242, "county jurisdictional area" is defined as "the entire county, or an area or areas within the county, designated by the board of county commissioners as subject to the county building code, excluding any area that is within the limits of an incorporated municipality." SB 242, § 2, enacting Mont. Code Ann. § 50-50-101(6) (2001).

In order to adopt a county jurisdictional area, the commissioners must give notice to the public, hold a public hearing, and accept written protests and receive general protests and comments. SB 242, § 4. Subsection (2) of section 4 provides:

If a written protest is submitted by owners of real property in the proposed county jurisdictional area representing more than 10% of the owners of real property in the proposed area, the board of county commissioners may not adopt the county jurisdictional area for a county building code in the proposed area without submitting to an election, as provided in [section 6], the question of adoption of the code enforcement program as approved by the department of commerce.

Section 6 is titled "Election on questions of adoption of code enforcement program." It sets forth the manner in which the board of county commissioners must submit the question of whether to adopt the code enforcement program within the county jurisdictional area to an election in which "the record owners of real property located within the designated area" may vote.

Section 8 of SB 242, entitled "Special election required--notice--termination of certain municipal jurisdictional areas," also contemplates an election. As the title suggests, section 8 outlines the procedures by which the county commissioners of a county in which a municipal jurisdictional area had previously been established beyond the corporate limits of the municipality must submit the question of continuation of the municipal jurisdictional area "to a vote by the record owners of real property within the jurisdictional area beyond those limits."

These sections of the bill establish election processes that declare owners of real property in the jurisdictional area in question to be the proper electorate. The term "owner" is defined in the existing statute and was not amended by SB 242. Pursuant to Mont. Code Ann. § 50-60-101(13) (1999), "'Owner' means the owner or owners of the premises or lesser estate, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, or other person, firm, or corporation in control of a building."

Applying the well-accepted principle of statutory construction that "statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required," Dahl v. Uninsured Employers' Fund, 1999 MT 168, 16, 295 Mont. 396, 901 P.2d 363, it is my opinion that the owners of real property who may vote in the elections contemplated by the bill are those persons specifically listed within the definition of Mont. Code Ann. § 50-60-101(13), whose names appear in the property records in the county clerk and recorder's office.

The term "owner" as defined is quite broad, but it is modified by the provision in sections 6 and 8 of SB 242 limiting voting to the "record owner." This provision appears to be intended to allow voting only by persons or entities whose "ownership" interest is recorded in the office of the county clerk and recorder. To hold otherwise would create an administrative nightmare for county election officials, requiring them to investigate, by means not specified in the bill, the ownership of every parcel of real property in the jurisdictional area. I also note that the statute ties the right to vote to ownership, but does not express an intent that persons who may have ownership interests in multiple parcels in the donut area would receive more than one vote. Therefore, it is my opinion that the bill contemplates that persons or entities who fit the definition of "owner" and whose ownership appears of record are entitled to one vote in the elections provided in the bill, regardless of the number of parcels in which they may have an interest. It is also my opinion that where a piece of property has multiple owners, each owner with a recorded interest has the right to vote.

I note that the term "owner" includes "owners of a lesser estate" in the property and "a mortgagee or vendee in possession." The legislature thus clearly intended to extend the right to vote to, for example, mortgagees, grantors of trust indentures, and persons occupying property under a contract for deed, to the extent those interests appear "of record." Thus, when compiling the list of eligible voters to whom mail

ballots must be sent, election officials should review the record documents and include on the list the holders of these lesser interests as shown in the records.

SB 242 also amended Mont. Code Ann. § 13-19-106, which sets forth the general requirements for mail ballot elections. Subsection 2 was amended to read as follows:

13-19-106. General requirements for mail ballot election--exception for county building code jurisdiction election. . . .
. . . .
(2) (a) Except as provided in subsection (2)(b), an official ballot must be mailed to every qualified elector of the political subdivision conducting the election.

(b) In an election to determine whether to adopt a building code enforcement program within a county jurisdictional area, as defined in 50-60-101 and designated by a board of county commissioners pursuant to [section 4], an official mail ballot must be mailed to every record owner of real property in the county jurisdictional area.

Thus, in order to carry out the elections provided for in SB 242, a ballot mailing list must be compiled which includes every record owner of real property in the county or municipal jurisdictional area. In sum, I conclude that every person or entity who fits the definition of "owner" and whose ownership interest appears of record should be on the ballot mailing list. As outlined by section 13-19-102(2) a mail ballot election must be "conducted by mail pursuant to 13-19-104 and in compliance with the procedure set forth in 13-19-106." Since SB 242 makes no provision to the contrary, election officials should use the property records as they exist on the date 30 days prior to the election day to determine who is eligible to vote. Cf. Mont. Code. Ann. § 13-2-301 (registration closes thirty days prior to election day).

Questions have been raised as to whether the limitation of the franchise to property owners in the affected area violates constitutional guarantees of equal protection. Compare Johnson v. Killingsworth, 271 Mont, 1, 11, 894 P.2d 272 (1995) (statutory requirement that irrigation district voters be "freeholders" not violative of equal protection), with Sadler v. Connolly, 175 Mont. 484, 489, 575 P.2d 51 (1978) (statutory requirement that city commission candidate be "freeholder" within city limits violative of equal protection); see also Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (statute limiting franchise in school district elections to real property owners and parents of students held violative of equal protection). It has long been the policy of the Attorney General to refrain from issuing opinions as to the constitutionality of statutes. Two sound policy reasons support this practice. First, only courts have the power to declare statutes unconstitutional. It would violate the doctrine of separation of powers for the Attorney General to issue an opinion, having the force of law until overturned by a court, see Mont. Code Ann. § 2-15-501(7), which declares a statute unconstitutional. Second, when the constitutionality of statutes is challenged, it frequently falls to the Attorney General to defend their constitutionality. Performance of this duty might be impaired if the Attorney General had previously issued an opinion on the matter at issue in such a case.

Under the authorities quoted above, the question of the constitutionality of the franchise limits in SB 242 is a serious one. Nothing in this opinion should be read as expressing the Attorney General's opinion on that question.

II.

Your second question asks, What is the status of the extended municipal jurisdictional areas created prior to the effective date of SB 242- SB 242 amended the definition of "municipal jurisdictional area," limiting the jurisdictional area for a municipal building code to the area within the limits of an incorporated city. As defined by SB 242, municipal jurisdictional area "means the area within the limits of an incorporated municipality." SB 242, § 2(12).

Section 12 of the Bill made this definition retroactively applicable to municipal jurisdictional areas created before the effective date of the act. The Bill had an immediate applicability date and became law when it was signed by Governor Martz on May 1, 2001. Thus, reading the definition of municipal jurisdictional area and applying the retroactive applicability clause, I would ordinarily conclude that the Bill had the effect of

eliminating municipal authority to enforce the building code in any jurisdictional area that lay beyond the limits of an incorporated municipality.

However, this conclusion becomes questionable when the amended definition of "municipal jurisdictional area" is read in conjunction with section 8, which requires that the board of county commissioners submit the question of continuation of the jurisdictional area beyond the corporate limits of the municipality to a vote. Section 8 provides in relevant part:

Section 8. Special election required--notice--termination of certain municipal jurisdictional areas. No later than December 31, 2001, the county commissioners of a county in which a municipal jurisdictional area, as defined in 50-6-101, has been established beyond the corporate limits of a municipality before [the effective date of this act], shall submit the question of the continuation of the jurisdictional area beyond the corporate limits of the municipality, to a vote by the record owners of real property within the jurisdictional area beyond those limits. The election required by this section must be a special election conducted by mail ballot election as defined in 13-19-102.

Section 8 was also made retroactively applicable. SB 242, § 12. Reading the amended definition of municipal jurisdictional area in conjunction with section 8, and applying the retroactive applicability clause to both, creates an ambiguity: Is it the intent of the law immediately to eliminate the extended municipal jurisdictional areas, commonly referred to as donut areas, or is it the intent of the law that the extended municipal jurisdictional areas should continue until the special elections provided for in section 8 are held? Because an ambiguity exists between the amended definition of municipal jurisdictional area and the application of the special election provision found in section 8, I must resort to extrinsic aids to statutory construction. See Dorn v. Board of Trustees of Billings Sch. Dist. No. 2, 203 Mont. 136, 144, 661 P.2d 426, 430 (1983).

In this case, the legislative history of the bill provides some assistance in resolving the ambiguity. It shows that SB 242 as originally introduced would clearly have eliminated all "donut" jurisdiction by deleting from the definition of "municipal jurisdictional area" the language allowing a municipality to assume jurisdiction outside the city limits. This intention remained intact when the bill was placed in a free conference committee after the House and Senate could not agree on amendments to the bill. This free conference committee added the election provisions found in section 8 of the bill. The minutes of the free conference committee, in particular the testimony of the attorney who drafted the amendment which created section 8, suggest that the amendment's intent was to eliminate municipal jurisdiction in the donut areas unless the voters chose to revive it. Mins., Meeting of Free Conference Comm. on SB 242, Apr.18, 2001 (remarks of David Niss). This evidence suggests an intent to eliminate municipal jurisdiction in the donut areas unless the voters choose to revive it in the election provided in section 8.

Arrayed against this legislative history evidence are two considerations drawn from the text of the bill that suggest the contrary conclusion. First, the language of section 8 of the bill suggests that the election's purpose would be to approve the continuation of existing jurisdiction. It refers in subsection 8(1) to holding an election on "the continuation" of the existing municipal jurisdiction, language which implies that municipal jurisdiction was not interdicted by the enactment of SB 242. Similarly, subsection 8(3) requires giving a notice to the voters, which must include "a clear synopsis of the building code *then in effect within the municipal jurisdictional area beyond the corporate limits of the municipality*." (Emphasis added.) The use of the language "then in effect" suggests that the extended municipal jurisdiction would be in effect when the notice was given, a result that would not occur if the extended jurisdiction area terminated on the effective date of SB 242.

Additionally, subsection 8(4) provides: "If a majority of those persons returning mail ballots vote in favor of *retention of the municipal jurisdictional area beyond the corporate limits of the municipality, the area must continue in existence as provided in the law*." (Emphasis added.) The words "retention" and "continue in existence" clearly suggest that the extended jurisdiction area did not terminate on the effective date of SB 242. Finally, subsection 8(5) provides for the possibility that a municipal jurisdictional area outside a city limit may "be terminated pursuant to this section." It allows enforcement of a building permit issued "before the termination of the area." Reading all of these provisions together, it seems plausible that the legislature contemplated that existing "donut areas" would continue in effect unless terminated after the mandatory election provided in section 8 of SB 242.

This conclusion is also consistent with the rule of statutory construction that specific provisions of a statute should control over more general ones. The Supreme Court has stated:

In construing apparently conflicting statutes, the Court has stated that where one statute deals with a subject in general and comprehensive terms, and another deals with a part of the same subject in a more minute and definite way, the latter will prevail over the former to the extent of any necessary repugnancy between them. City of Billings v. Smith (1971), 158 Mont 197, 211, 490 P.2d 221, 229. Further the principle of statutory construction that a specific law controls over the general applies only where the specific statute conflicts with the general statute and then only to the extent of the repugnancy.

Jones v. Jones, 226 Mont. 14, 16, 736 P.2d 94, 95 (1987). Applying the principle of statutory construction outlined above, it could be argued the definition of municipal jurisdictional area is a general provision having application to more than just the municipal jurisdictional areas in existence at the time of the enactment of SB 242. The definition also serves to prevent the creation of any new extended municipal jurisdiction areas after the effective date of the bill. The extended jurisdiction areas in existence are dealt with in the separate and more specific provisions of section 8 of the bill, which, as indicated above, seem to contemplate that the existing regime remain in place until displaced through an election.

In resolving these unclear and conflicting provisions, I am guided by the rule that in construing an ambiguous statute I should adopt the interpretation most consistent with the evident legislative intent. Delaware v. K-Decorators, Inc., 1999 MT 13, 33, 293 Mont. 97, 105, 973 P.2d 818, 824 (1999). Here, that intent cannot be conclusively gleaned from the conflicting language of the statute itself. In such circumstances, the Court has approved resort to legislative history materials for evidence of legislative intent. Dorn, 203 Mont. at 144. The legislative history of the amendment that created section 8 of the bill seems clear in stating that the drafters intended the retroactive application provisions of section 12 of the bill to override the existing municipal jurisdiction pending the outcome of the election. I therefore hold that municipal jurisdictional areas existing under Mont. Code Ann. § 50-60-101(11) prior to the effective date of SB 242 lost jurisdiction to enforce municipal building code provisions as of May 1, 2001, but such jurisdiction may be revived if it is approved by the voters in the election required by section 8 of SB 242 prior to December 31, 2001.

THEREFORE, IT IS MY OPINION:

1. The owners of real property who may vote in the elections contemplated by SB 242 are those owners specifically listed within the definition of Mont. Code Ann. § 50-60-101(14) whose interests appear in the real property records in the office of the county clerk and recorder 30 days before the election.

2. Municipal jurisdictional areas existing under Mont. Code Ann. § 50-60-101(11) prior to the effective date of SB 242 lose jurisdiction to enforce municipal building code provisions as of the effective date of the bill, but such jurisdiction may be revived if it is approved by the voters in the election required by section 8 of SB 242 prior to December 31, 2001.

Very truly yours,

MIKE McGRATH
Attorney General

mm/ans/dm