

VOLUME NO. 38

OPINION NO. 98

COUNTY COMMISSIONERS - Appeal from zoning Board of Adjustment;

LAND USE - Appeal from zoning Board of Adjustment;

LOCAL GOVERNMENT - Appeal from zoning Board of Adjustment;

MONTANA CODE ANNOTATED - Sections 7-1-101, 7-1-114, 76-2-321, and 76-2-327;

1972 MONTANA CONSTITUTION - Article XI, section 6;

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 68, 37 Op. Att'y Gen. No. 70 (1977).

HELD: Section 7-1-114, MCA, prohibits a local legislative body from providing for an optional appeal of decisions from the local zoning Board of Adjustment to the legislative body.

19 August 1980

John G. Winston, Esq.
Butte-Silver Bow County Attorney
155 West Granite Street
Butte, Montana 59701

Dear Mr. Winston:

You have asked for my opinion on the following question:

May a local legislative body provide for an optional appeal of decisions from the local zoning Board of Adjustment to the legislative body?

Your letter explains that the Butte-Silver Bow Council of Commissioners has passed an ordinance providing for such an appeal procedure, and that the validity of that portion of the ordinance is being questioned.

My understanding is that Butte-Silver Bow is a local government unit with self-government powers, as provided in Article XI, section 6 of the Montana Constitution and section 7-1-101, MCA. Under those provisions, Butte-Silver Bow may exercise any power not prohibited by the constitution, law, or charter. See generally 37 OP. ATT'Y GEN. NOS. 68 and 70 (1977). The question presented, then, is whether any law prohibits Butte-Silver Bow from adopting the ordinance. Section 7-1-114, MCA, provides:

(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.

This statute applies to procedural laws concerning zoning as well as substantive laws. The State Commission on Local Government explained the law as follows:

This subsection limits the land use control and zoning power of self-government local units. These limits are justified both on the basis that exercise of the powers may involve substantial impacts on individuals affected by them, and on the basis that the development of regional and state wide planning makes uniform procedures desirable.

(Emphasis added.) 2 Local Gov't. Rev. Bull. No. 5, at 115 (1975). Whether the zoning ordinance in question is invalid depends on whether its provisions are "other than as provided" by the Legislature.

The ordinance provides:

RIGHT OF APPEAL: Any person or persons, jointly or severally, aggrieved by any decision of the Board, or any taxpayer or any officer, department, board or bureau of the local government, may present to the Council of Commissioners or the District Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the Council of Commissioners or the District Court within thirty (30) days after the filing of the decision in the office of the Board. When the decision of the Board is appealed to the Council, the Clerk and Recorder shall forthwith place the appeal on the agenda of the next regular meeting of the Council at which meeting the Council shall schedule a public hearing on the appeal within twenty-two (22) days. The appeal to the Council of Commissioners will stay proceedings. . . . Upon hearing the appeal, the Council of Commissioners will consider the record and such additional evidence as may be presented and thereupon affirm, revise, or modify the decision in whole and substitute such other determination as it may find warranted under this Ordinance. The final decision by the Council of Commissioners shall be transcribed by the Clerk and Recorder forthwith and a copy thereof served promptly on the appellant and the Board.

Any person aggrieved by the decision of the Council of Commissioners, or any taxpayer, or any office, board or bureau of the local government may appeal such decision to the District Court in the same manner as herein provided for direct court appeal from decision of the Board.

(Emphasis added.)

Section 76-2-327(1), MCA provides:

Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment or any taxpayer or any officer, department, board, or bureau of the municipality may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the board.

(Emphasis added.) A comparison of these two provisions indicates clearly that the optional appeal to the council of commissioners as provided in the ordinance is "other than as provided" in the statute.

However, you have cited another statutory provision as providing the authority for the optional appeal procedure. Section 76-2-321, MCA, provides in part:

(1) Such city or town council or other legislative body may provide for the appointment of a board of adjustment and in the regulations and restrictions adopted pursuant to the authority of this part may provide that the board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purposes and intent and in accordance with the general or specific rules therein contained.

(2) An ordinance adopted pursuant to this section providing for a board of adjustment may restrict the authority of the board and provide that the city or town council or other legislative body

reserves to itself the power to make certain exceptions to regulations, ordinances, or land use plans adopted pursuant to this part.

(Emphasis added.) Subsection (2) was first adopted in 1975, Laws of Montana (1975), chapter 13, section 1, and my research has revealed no previous Attorney General's Opinion nor any decision of the Montana Supreme Court interpreting that provision. With respect to the question you have asked, however, this law is not ambiguous and therefore requires no interpretation. See Dunphy v. Anaconda Company, 151 Mont. 76, 80, 438 P.2d 660, 662 (1968). It is my opinion that section 76-2-321 (2), MCA, authorizes the local legislative body to act instead of the Board of Adjustments in certain cases, not in addition to the Board as the Butte-Silver Bow ordinance provides. Thus, the body serving the adjustment function may vary according to the terms of an ordinance, but the appeal procedure from that body's decision must follow section 76-2-327, MCA, supra.

THEREFORE, IT IS MY OPINION:

Section 7-1-114, MCA, prohibits a local legislative body from providing for an optional appeal of decisions from the local zoning Board of Adjustment to the legislative body.

Very truly yours,

MIKE GREELY
Attorney General