

Opinion No. 19

COUNTY COMMISSIONERS; Powers; Zoning regulations; enforcement—ZONING; Regulations not enforceable by criminal proceedings; Section 16-4102, Revised Codes of Montana, 1947, Chapter 154, Laws of 1963.

HELD: County Planning and Zoning Commission does not have the authority to enforce its rules and regulations by criminal proceedings.

September 16, 1963

Mr. Harold J. Pinsoneault
County Attorney
Missoula County
Missoula, Montana

Dear Mr. Pinsoneault:

You have requested my opinion on the following question:

Does a county planning and zoning commission, established pursuant to Chapter 41, Title 16, Revised Codes of Montana, 1947, have the authority to enforce its regulations by instituting criminal proceedings?

The establishment of county planning and zoning commissions was authorized by the enactment of Chapter 154, Laws of 1953, now Title 16, Chapter 41, R.C.M., 1947. The constitutionality of this Act was upheld by our Supreme Court in the case of **City of Missoula v. Missoula County** (1961) 139 Mont. 256, 261, 362 P. 2d 539. A commission created pursuant to this Act possesses only such powers as are authorized by statute, either expressly or impliedly, **Plath et al. v. Hi Ball Contractors, Inc.**, (1961) 139 Mont. 263, 272, 362 P. 2d 1021.

To answer your question it is necessary to examine the Act to determine the extent of the power which has been conferred upon these commissions by the legislature. The entire Act must be read as a whole to give effect to the legislative intent which promoted its enactment, **Fulton v. Farmers Union Grain Terminal Association** (1962) 140 Mont. 523, 531, 374 P. 2d 231, where the court said:

“We likewise agree that in construing a statute the paramount rule is to give effect to the intention of its makers or, as declared by this court: ‘The intention of the Legislature in enacting a statute is the consideration which must control in its construction.’ ” (citing cases).

We must likewise keep in mind: “**The intention is to be sought in the language employed** and the apparent purpose to be subserved.” (citing cases).

The legislature has stated the purpose of county planning and zoning commissions and has granted such commissions powers to effectuate that purpose. Section 16-4102, R.C.M., 1947, provides in part:

“For the purpose of furthering the health, safety and general welfare of the people of the county, the county planning and zoning commission hereby is empowered, and it shall be its duty to make and adopt a development pattern for the physical

and economic development of the planning and zoning district.

* * *

The statute is clear and unambiguous, county planning and zoning commissions are to prepare and adopt plans for the orderly development of a zoning district. However, it is contended that this grant of power is enhanced by section 16-4104, R.C.M., 1947, which provides:

“The planning and zoning commission, and any of its members, officers and employees in the performance of their functions, may enter upon any land and make examinations and surveys and place and maintain the necessary monuments and markers thereon. **In general, the planning and zoning commission shall have such powers as may be appropriate to enable it to fulfill its functions and duties to promote county planning and to carry out the purposes of this act.** All public officials, departments and agencies, having information, maps, and data deemed by the commission pertinent to county planning are hereby empowered and directed to make such information available for the use of the county planning and zoning commission.” (Emphasis added.)

The most that can be said, for the underscored portion of section 16-4104, *supra*, is that the commission will have such powers as may be appropriate to enable it to fulfill its functions. As the functions of the commission are to prepare and adopt plans for the orderly development of a zoning district, it cannot be said that this portion of the statute authorizes the commission to perform any other purpose than that for which it was created. Nowhere in the Act is the commission given the authority to legislate, nor is the commission specifically authorized to enforce its plans. However, it has long been recognized that zoning regulations which have been promulgated pursuant to law may be enforced even though there is no statutory provision for their enforcement, **City of Stockton v. Frisbie** (1928) 93 C.A. 277, 270 Pac. 270, 274, where the court said:

“The ordinance in controversy, as will be observed, itself does not declare that the violation of its terms shall constitute a crime, nor does it provide a penalty for such violation. This,

however, does not render the ordinance an illegal enactment or unenforceable through the agency of an appropriate civil remedy.”

Moreover, our Supreme Court has recognized that valid zoning regulations may be civilly enforced: **City of Missoula Case, supra; Doull et al. v. Wohlschlager** (1963) 141 Mont. 354, 377 P. 2d 758. Therefore, the county planning and zoning commission has the implied authority to enforce its regulations by civil process. However, the courts generally will not imply a criminal power to a board particularly when such board or agency does not possess legislative authority, **Elias v. City of Tulsa** (1961) _____ Okla. _____, 364 P. 2d 678, 680, the Oklahoma Court said:

“* * * As a general rule when it is necessary to carry into effect the delegated authority of the Legislature this Court will carefully examine the legislative enactment and will liberally construe it in order to give force and effect to the obvious legislative intent. When, however, it clearly appears that the legislature has adequately created both civil and criminal remedies to enforce the rules, regulations and orders, this Court will carefully examine the legislative enactment and if there is no express delegation of authority to enact remedial ordinances we will not infer such authority. **Every citizen's liberty is expressly guarded by our Constitution and will not permit that right to be swept away by implications.**” (Emphasis added.)

Moreover, our Court, in the case of **State v. Lutey Bros.** (1919) 55 Mont. 545, 553, 179 Pac. 457, said:

“An offense is not punishable unless it falls within the condemnation of some penal statute. If it is not plainly and specifically within the Act, it is not against law, and no conviction can be had thereunder. Its provisions are not to be extended by implication, and the act charged as an offense must be unmistakably within the letter as well as the spirit of the law. (citation omitted) ‘The rule is founded upon the principle that the power of punishment vests in the legislature, not in the courts.’ (citation omitted) Penal statutes are not to be extended by implication beyond the legitimate import of

the words used in them, so as to embrace cases or acts not clearly described by such words." (citation omitted).

Therefore, it is my opinion that the county planning and zoning commission does not have the authority to enforce its rules and regulations by criminal proceedings, and I so hold.

Very truly yours,

FORREST H. ANDERSON
Attorney General