

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 24

COUNTIES - Authority under the Lakeshore Protection Act to regulate effects on natural scenic values;

LAND USE - Authority under the Lakeshore Protection Act to regulate effects on natural scenic values;

LOCAL GOVERNMENT - Authority under the Lakeshore Protection Act to regulate effects on natural scenic values;

NATURAL RESOURCES - Authority under the Lakeshore Protection Act to regulate effects on natural scenic values;

WATER AND WATERWAYS - Authority under the Lakeshore Protection Act to regulate effects on natural scenic values;

MONTANA CODE ANNOTATED - Sections 75-7-201 to 75-7-217, 75-7-201, 75-7-202, 75-7-204, 75-7-204(1), 75-7-207, 75-7-208;

OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 42 (1981), 40 Op. Att'y Gen. No. 47 (1984), 41 Op. Att'y Gen. No. 68 (1986), 41 Op. Att'y Gen. No. 86 (1986).

HELD: The Lakeshore Protection Act, §§ 75-7-201 to 217, MCA, requires a local governing body to

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consider the visual impact which any work subject to permitting under section 75-7-204, MCA, may have on natural scenic values where such values form the predominant landscape elements.

26 August 1987

Larry J. Nistler
Lake County Attorney
Lake County Courthouse
Polson MT 59860

Dear Mr. Nistler:

You have requested my opinion concerning the following question:

Is a local governing body required under the Lakeshore Protection Act, §§ 75-7-201 to 217, MCA, to consider the visual impact of the reconstruction or alteration of an existing structure located on a shoreline upon natural scenic values?

I conclude that, because the reconstruction or alteration of the involved structure constitutes work for which a permit must be secured under section 75-7-204(1), MCA, a local governing body is required to consider natural scenic values in determining whether issuance of a permit is appropriate where such values form the predominant landscape elements.

The proposed construction involves the alteration of an existing structure through, *inter alia*, raising its roof line to a height in excess of 25 feet. The structure itself is located within 20 horizontal feet of the mean annual high-water elevation of a lake as defined in section 75-7-202(1), MCA. The proposed alteration will render the structure inconsistent with Lake County regulations generally limiting the height of lakeshore buildings to 25 feet. The purpose of the height limitation is to preserve the lakeshore from the obstruction of scenic views, and no dispute exists that such views are an essential element of the lake's visual and aesthetic values.

The county's regulations were issued pursuant to section 75-7-207, MCA, of the Lakeshore Protection Act (the Act). The Act, adopted in 1975, is intended to conserve and protect Montana's lakes. § 75-7-201, MCA; see

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generally 39 Op. Att'y Gen. No. 42 (1981). It requires that a person proposing "to do any work that will alter or diminish the course, current, or cross-sectional area of a lake or its lakeshore must secure a permit for the work" from the responsible local governing body. § 75-7-204(1), MCA. The term "lakeshore" is defined in section 75-7-202(2), MCA, to encompass "the perimeter of a lake when the lake is at mean annual high-water elevation, including the land within 20 horizontal feet from that high-water elevation." The Act further requires that local regulations favor issuance of a permit if, in addition to other considerations, "the proposed work will not during either its construction or its utilization ... create a visual impact discordant with natural scenic values, as determined by the local governing body, where such values form the predominant landscape elements." § 75-7-208(5), MCA.

There can be no reasoned dispute that, if the proposed alteration is "work" within the scope of section 75-7-204(1), MCA, the county must consider its effect on natural scenic values in determining whether to permit a particular activity. It is equally clear that the proposed construction, as an expansion of an existing structure, constitutes "work" under such section. This latter conclusion is unavoidable since (1) the impact of the entire structure as altered must be considered in deciding if the course, current, or cross-sectional area of the lake or lakeshore has been modified or diminished, (2) the structure in its proposed form will affect the cross-sectional area of the involved lakeshore, and (3) the alteration itself directly contributes to such effect. Any other result allows incremental changes which render a structure, although initially consistent with valid local regulations, nonconforming. The Act obviously neither contemplates nor sanctions such a palpable evasion of its statutory purposes, and accepted rules of statutory interpretation require the term "work" in section 75-7-204(1), MCA, to be interpreted consonantly with those purposes. See, e.g., Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 1907, 620 P.2d 1189, 1199 (1980) ("[a] statute will not be interpreted to defeat its evident object or purpose; the objects sought to be achieved by the legislation are prime consideration in interpreting statutes"); Dover Ranch v. County of Yellowstone, 187 Mont. 276, 284, 609 P.2d 711, 715 (1980) ("[i]t is a well-established rule of statutory construction that a statute be read as a whole and construed so as to avoid absurd results"); State ex rel. Florence-Carlton School District No. 15-6 v. Board of County Commissioners, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978) ("[l]egislation enacted for the promotion of public health, safety, and

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general welfare, is entitled to 'liberal construction with a view towards the accomplishment of its highly beneficent objectives'").

Finally, nothing in this opinion should be deemed as concluding that the height restriction in the county's regulations does, in the instant matter, protect natural scenic values. The validity of this restriction presents a largely factual issue inappropriate for resolution through an Attorney General's Opinion. Cf. 41 Op. Att'y Gen. No. 86 (1986) (determination of whether suitable access to property provided must be made by local governing body after consideration of all relevant facts); 41 Op. Att'y Gen. No. 68 (1986) (determination of whether a sufficient number of signatures within a zoning protest area constituted a factual question best resolved by responsible city officials). Nonetheless, I reiterate that local governing bodies are expressly given authority under section 75-7-208(5), MCA, to determine whether natural scenic values may be prejudiced by a project subject to permitting. Unless not reasonably related to the preservation of such values, their decisions should be upheld. See 40 Op. Att'y Gen. No. 47 (1984) (State Board of Land Commissioners possesses substantial administrative discretion in determining what elements should be included as part of a reclamation plan).

THEREFORE, IT IS MY OPINION:

The Lakeshore Protection Act, §§ 75-7-201 to 217, MCA, requires a local governing body to consider the visual impact which any work subject to permitting under section 75-7-204, MCA, may have on natural scenic values where such values form the predominant landscape elements.

Very truly yours,

MIKE GREELY
Attorney General