

Opinion No. 92

**Townsites—Plats—Cities—Towns—
County Commissioners Discretion—
Statutes—Directory—Mandatory—
Chapter 119, Laws 1917—Section
11-608, Revised Codes of
Montana, 1947.**

Held: The intent of the legislature in enacting Chapter 119, Laws of 1917, was that the county commissioners be vested with discretionary powers in respect to the approval or rejection of lands platted outside the boundaries of a city or town.

June 3, 1952.

Mr. Robert T. Hoover
County Attorney
McCone County
Circle, Montana

Dear Mr. Hoover:

You have requested my opinion on the question of whether a plat of a new and original townsite may be filed with the County Clerk, when such proposed plat is contiguous to, and abutting an unincorporated townsite already platted and recorded.

You further request that if the foregoing question be answered in the affirmative, that the following be answered:

“In the instance of submission to the county board of commissioners of a plat of a proposed townsite or additions to existing townsites, as provided for in Section 11-608, subdivision (2), does the board have discretionary powers regarding the approval or rejection of such plat, presuming all statutory requirements as to form and contents have been complied with?”

Section 11-608, Revised Codes of Montana, 1947, reads as follows:

“(1) All such plats must be prepared in duplicate, and when the land platted is within the boundaries of an incorporated city or town, such plats must be submitted to the city or town council for examination and approval or rejection, and when found to conform to law to be approved in duplicate by the council

and the city or town engineer, and a certificate of approval shall be indorsed thereon signed by the mayor and the clerk; and a certificate of the city or town engineer shall be indorsed thereon showing that the plat conforms to the adjoining additions or plats of the city or town already platted, as near as the circumstances will admit; and one of such plats so approved and certified shall be filed with the city or town clerk, and one shall be filed with the county clerk and recorder of the county, which shall be the official plat and survey.

(2) When the land platted is outside of the boundaries of a city or town, such plat must be prepared in duplicate and submitted to the board of county commissioners of the county for its examination and approval or rejection, and when found to conform to law to be approved in duplicate by such board of county commissioners and by the county surveyor, and a certificate of approval shall be signed by the chairman of such board and by the county clerk and by the county surveyor, and both plats shall be filed and recorded with the county clerk and recorder. When such townsite is duly included within the boundaries of an incorporated city or town, upon application of such city or town council to such board of county commissioners showing such incorporation, such board shall by an order direct that one of such plats so approved, certified, and filed shall be delivered to the mayor and city clerk, which shall be filed and become the official plat and survey of such city or town."

This section was first enacted as Section 5007, Political Codes of 1895, re-enacted in Section 3472, Revised Codes of Montana, 1907, and was amended by Section 4, Chapter 119, Laws of 1917. It was not until the 1917 amendment that subdivision (2) above was added.

The question presented was previously considered in an opinion given by Attorney General Galen (Volume 3, Opinions of the Attorney General, p. 403). At the time that his opinion was issued, subdivision (2) was not part of the section and Section 3472, Revised Codes of Montana, 1907 (now as amended 11-608 (1) read thus:

"All such plats must be examined by the council of the city or town, and a copy thereof must be filed with the city or town clerk. A certificate of the approval by the council, signed by the mayor and clerk, and also a certificate of the city or town surveyor, or of the person acting as such, that the plat conforms to the adjoining additions or parts of the city or town already platted, as near as the circumstances will admit, must be written on the plat before the same is filed in the office of the county clerk."

Attorney General Galen recognized the then existing hiatus in the laws with reference to the filing of plats of unincorporated towns, and interpreted Section 3472 as requiring the approval of the council of the city or town on the proffered plat. He further reasoned that in the case of unincorporated towns which had already filed for record a townsite plat, in the absence of a town council, the board of county commissioners would be vested with the power of approval.

The 1917 Legislature also realized the need for a specific enactment on this subject and amended Section 11-608, (Ch. 119, L. 1917, supra). Since there has been no judicial interpretation of this statute, a resort must be made to the customary and established rules of statutory construction. The most basic of these established rules perhaps is that the legislative intent must be given effect. In determining the legislative intent every word must where possible be given their plain and ordinary meaning (*State ex rel. Palagi v. Regan*, 112 Mont. 343, 126 Pac. (2d) 818). A careful examination of Section 11-608, (2), supra, would indicate that the legislature meant to leave a measure of discretion in the board of county commissioners, for it states specifically ". . . submitted to the board of county commissioners of the county for its examination and approval or rejection, . . ." (Emphasis added).

After these words we find the following, "and when found to conform to law to be approved in duplicate . . ." It would seem to me that the emphasized words above can only be interpreted as leaving in the board a discretionary power, for, otherwise, their presence would add nothing to the statute. The statute deprived of the em-

phasized words above would clearly indicate that it was mandatory on the part of the board to approve such plat when found to conform to law. However, since the rule is that every word must be considered and where possible given effect, I can only interpret the same to mean that a discretion does lie in the board of county commissioners to either approve or reject a proposed plat.

The Supreme Court of Montana has voiced its opinion on many occasions on the question of whether a statute should be considered as mandatory or merely directory. Statutes may, of course, be permissive as to some matters and mandatory as to others (*Blackford v. Judith Basin County*, 109 Mont. 578, 98 Pac. (2d) 872, 126 A.L.R. 639). The Montana Court has held that the language of a statute even where mandatory in form, may be deemed directory when the legislative intent does not require a mandatory construction (*Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Fallon County*, 95 Mont. 213, 33 Pac. (2d) 531; *State ex rel. McCabe v. District Court*, 106 Mont. 272, 76 Pac. (2d) 634; *State ex rel. Jaumotte v. Zimmerman*, 105 Mont. 464, 73 Pac. (2d) 548).

In *State ex rel. Jaumotte v. Zimmerman*, supra, it was stated:

"Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form. Accordingly, when a particular provision of a statute relates to some immaterial matter as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition." (Emphasis added).

Also, in the case of *Miller v. Aetna Life Ins. Co.*, 101 Mont. 212, 53 Pac. (2d) 704, it is stated:

"Whether a statutory provision is directory or mandatory depends upon the intention of the legislature, to be ascertained from a consideration of the object of the statute and the consequences that would result from

construing one way or the other."

In the instant problem it is conceivable that great confusion might result were the board of county commissioners to be denied any discretion, and as stated by Attorney General Galen "an unincorporated city or town would be at the mercy and caprice of speculators."

In conclusion, then, and for the foregoing reasons, it is my opinion that where a plat of land, platted outside of the boundaries of a city or town, is submitted to the board of county commissioners for its examination and approval or rejection, the board has a discretion to exercise in the best interests of the public. In no case, however, would a board of county commissioners be justified in arbitrarily refusing to approve a legally sufficient plat. It is further my opinion, based on the words of the statute, that the county clerk and recorder is not required to record such tendered plat until such time as the board of county commissioners has approved the same.

Very truly yours,
ARNOLD H. OLSEN
Attorney General