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Opinion No. 39

COUNTY COMMISSIONERS — Powers, subdivisions, adoption of sanitation regulations; LAND CLASSIFICATION — Lands, subdivisions, adoption of sanitation regulations. Sections 11-3863, 69-5003 and 69-5005, R.C.M. 1947.

HELD: County commissioners may adopt reasonably stricter sanitation regulations for subdivisions than those adopted by the department of health and environmental sciences.

November 21, 1973

Mr. Thomas A. Olson
Gallatin County Attorney
County Attorney's Office
Bozeman, Montana 59715

Dear Mr. Olson:

You have requested my opinion concerning the following question:

May county commissioners adopt stricter sanitation regulations for subdivisions than those adopted by the Montana department of health and environmental sciences?

The public policy of the state of Montana concerning sanitation in subdivisions is set forth in sections 69-5001 through 69-5009, Revised Codes of Montana, 1947. These statutes provide that the state department of health and environmental sciences must approve subdivision plats, plans, and specifications before they are filed with the clerk and recorder. Section 69-5003, R.C.M. 1947, provides in pertinent part:

(1) A person may not file a subdivision plat with a county clerk and recorder, make disposition of any lot within a subdivision, erect any building or shelter in a subdivision which requires facilities for the supply of water or disposal of sewage or solid waste, or occupy any permanent building in a subdivision when the status of the subdivision is conditional; and a county clerk and recorder may not accept a subdivision plat for filing until:

(a) the person wishing to file the plat has obtained approval of the local health officer having jurisdiction and has filed the approval with the department [of health and environmental sciences]; and

(b) the department has indicated by stamp or certificate, that it has approved the plat and plans and specifications and that the subdivision is subject to no sanitary restrictions. ...

The department of health and environmental sciences is empowered by section 69-5005, R.C.M. 1947, to adopt reasonable rules and sanitation standards necessary for the administration and enforcement of sanitation in subdivisions. Section 69-5005 states in pertinent part:

(1) The department shall adopt reasonable rules, including adoption of sanitary standards, necessary for administration and enforcement of this chapter.

(2) The rules and standards shall provide the basis for approving subdivision plats for various types of water, sewage facilities, and waste disposal, both public and private, and shall be related to size of lots, contour of land, porosity of soil, ground water level, distance from lakes, streams, and wells, type and construction of private water and sewage facilities, and other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife. ...

Section 11-3863, R.C.M. 1947, authorizes the county commissioners to enforce various provisions of the Montana Subdivision and Platting Act of 1973. Section 11-3863 states in pertinent part:

(1) **The governing body of every county, city, and town shall,**

before July 1, 1974, **adopt and provide for the enforcement and administration of subdivision regulations reasonably providing** for the orderly development of their jurisdictional areas; for the coordination of roads within subdivided land with other roads, both existing and planned; ... **for the provision of adequate transportation, water, drainage, and sanitary facilities;** ... (Emphasis supplied)

My research reveals no statutory provision prohibiting county commissioners from adopting stricter sanitation regulations for subdivisions than those adopted by the Montana department of health and environmental sciences. It is apparent that the legislature would not have empowered the county commissioners, through section 11-3863, *supra*, to adopt and provide for the enforcement and administration of subdivision regulations for sanitary facilities if it did not intend such regulations to be in addition to those adopted by the department of health and environmental sciences under section 69-5005, *supra*. If the legislature had merely intended for the county commissioners to enforce the department's regulations, it would have so provided rather than specifically conferring upon the commissioners those powers set forth in section 11-3863, *supra*.

A situation somewhat analogous to your question exists where municipal ordinances regulate or prohibit activities that are also regulated or prohibited by state statutes. The basis of authority for governmental enactment and enforcement of health measures, such as sanitation regulations for subdivisions, is the police power of the state. **Barsky v. Board of Regents**, 347 U.S. 442 at page 449. As a general rule, the mere fact that the state has made some regulations through the exercise of its police power does not prohibit a municipality from enacting additional regulations provided there is no conflict between the two, and the regulations of the municipality are reasonable and not pernicious or discriminatory. **U.S.F. & G. Co. v. Guenther**, 281, U.S. 34; **In re Hoffman**, 155 Cal. 114, 99 Pac. 517.

If a municipal ordinance enlarges upon the provisions of a state statute, there generally is no conflict unless the state statute specifically limits its requirements to its own directives. No such limitation exists with reference to the instant consideration. In **Pipoly v. Benson**, 125 P.2d 482, the California Supreme Court stated at page 484:

The cases in this state have consistently upheld local regulations in the form of additional reasonable requirements not in conflict with the provisions of the general law. *Mann v. Scott*, 182 P. 281; *In re Hoffman*, 99 P. 517; ...

THEREFORE, IT IS MY OPINION:

County commissioners may, through the authority granted them in section 11-3863, R.C.M. 1947, adopt reasonably stricter sanitation regulations for subdivisions than those adopted by the Montana

department of health and environmental sciences under section 69-5005, R.C.M. 1947.

Very truly yours,

ROBERT L. WOODAHL
Attorney General