

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 42

ENVIRONMENT - Authority to issue conditional permit to build retaining wall on lakeshore;
LOCAL GOVERNMENT - Authority to issue conditional permit to build retaining wall on lakeshore;
LOCAL GOVERNMENT - City council;
STATUTES - Construction;
MONTANA CODE ANNOTATED - Sections 75-1-201, Title 7, part 2, 75-7-202(2), 75-7-204, 75-7-208, 75-7-212.

HELD: The city council has authority under section 75-7-204, MCA, to regulate, control and issue conditional permits for the construction and installation of a homeowner's retaining wall, constructed for the purpose of preventing erosion to his land by the action of high water, and which is located within 20 horizontal feet of the mean annual high water elevation.

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9 December 1981

Leo Fisher, Esq.
City Attorney
Baker and Second Street
Whitefish, Montana 59937

Dear Mr. Fisher:

You have requested my opinion on whether the city council has statutory authority to regulate, control and issue conditional permits for the construction and installation of a homeowner's retaining wall, built to prevent erosion to his land by action of high water, and which is located within 20 horizontal feet of the mean annual high water elevation.

Chapter 7, part 2 of Title 75, MCA, which pertains to lakes and lakeshores, has not been construed by the Montana Supreme Court. The legislative purpose, which is stated in section 75-7-201, MCA, is to confer statutory authority on local governing bodies to establish policies designed to conserve and protect lakes and lakeshores, in the interest of maintaining public health, welfare and safety. The title of the act states:

An act to protect lakeshores by requiring a permit for any work which would alter or diminish a lake; requiring local governing bodies to adopt regulations governing the issuance of such permits; providing for variances, judicial review and funding; and providing an effective date. [Emphasis added.]

"Lakeshore" is defined as "the perimeter of a lake when the lake is a mean annual high-water elevation, including the land within 20 horizontal feet from that high-water elevation." § 75-7-202(2), MCA.

Section 75-7-204, MCA, provides:

Work for which permit required. (1) A person who proposes to do any work that will alter or diminish the course, current, or cross-sectional area of a lake or its lakeshore must first secure a permit for the

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work from the local governing body. (2) Without limitation, the following activities, when conducted below mean annual high-water elevation, are examples of work for which a permit is required: construction of channels and ditches; dredging of lake bottom areas to remove muck, silt, or weeds; lagooning, meaning the placement of a narrow strip of land across a portion of a lake to create a lagoon; filling; constructing breakwaters of pilings; constructing wharves and docks. [Emphasis added.]

In construing statutes, legislative intent is to be determined from the plain meaning of the words used, if possible. State v. Weese, 37 St. Rptr. 1620, 616 P.2d 371 (1980). Where the language of a statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left to construe. Olson v. Manion's, Inc., 162 Mont. 197, 510 P.2d 6 (1973).

Applying these rules of statutory construction, it is clear that the Legislature intended to confer broad powers upon local governing bodies to promulgate regulations to conserve and protect the lakes and lakeshores. Among the powers provided by the Legislature are minimum requirements which the governing bodies must consider in granting or denying permits. Those requirements are set forth in section 75-7-208, MCA.

The governing body is authorized to deny the application, grant a permit or a conditional permit, pursuant to section 75-7-212, MCA. The Legislature did not specifically define how conditional a permit can be, but it is obvious that the Legislature intended to authorize the governing bodies to require those conditions which would fulfill the act's purpose and objectives heretofore discussed.

The construction and installation of a retaining wall that affects a lakeshore as described in section 75-7-204, MCA, is governed by this act. The governing body is authorized to issue a conditional permit in accordance with section 75-7-212, MCA. The authority conferred on the local governing bodies by the Legislature under this act includes the power to issue a conditional permit to fulfill the purposes and objectives of the act.

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THEREFORE, IT IS MY OPINION:

The city council has authority under section 75-7-204, MCA, to regulate, control and issue conditional permits for the construction and installation of a homeowner's retaining wall, constructed for the purpose of preventing erosion to his land by the action of high water, and which is located within 20 horizontal feet of the mean annual high water elevation.

Very truly yours,

MIKE GREELY
Attorney General