

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 75

INTERGOVERNMENTAL COOPERATION - Creation of consolidated planning boards;

INTERLOCAL AGREEMENT - Creation of consolidated planning boards;

LAND USE - Local government discretion to create planning boards;

LAND USE - Local government required to substantially adhere to master plan;

LAND USE - Planning boards, membership, responsibilities;

LOCAL GOVERNMENT - Consolidated planning boards, membership;

LOCAL GOVERNMENT - Discretion to create planning boards and zoning commissions;

OPINIONS OF THE ATTORNEY GENERAL

LOCAL GOVERNMENT - No authority to levy extra mills for planning purposes when planning board is eliminated;

LOCAL GOVERNMENT - Planning board must advise on subdivision plat review;

LOCAL GOVERNMENT - Requirement to substantially adhere to master plan for land use purposes;

PLANNING BOARDS - Consolidated planning boards, membership, responsibilities;

PLANNING BOARDS - Designation of authority;

SUBDIVISIONS - Advice of planning board on subdivision plat review;

MONTANA CODE ANNOTATED - Title 76, chapter 1; Title 76, chapter 2; section 76-3-605.

- HELD:
1. The number of members and length of their terms on a consolidated planning board may be determined by the interlocal agreement forming the board.
 2. If a planning board is eliminated, the governing body has no authority to levy the extra mills for planning board purposes.
 3. If a planning board is eliminated, the governing body must substantially adhere to any master plan previously adopted or amend the plan to its needs.
 4. Any official action or power specifically delegated to the planning board must be approved by the full board.
 5. The creation of planning boards and zoning commissions is within the discretion of the governing body. Once created, however, the statutory mandates as to each board must be followed.
 6. If a planning board exists, a governing body must seek its advice in addition to holding a public hearing on all subdivision plat review.

15 October 1982

Robert L. Deschamps, III
Missoula County Attorney
Missoula County Courthouse
Missoula, Montana 59801

OPINIONS OF THE ATTORNEY GENERAL

Dear Mr. Deschamps:

You have requested my opinion on the following questions:

1. Where a consolidated planning board is formed pursuant to section 76-1-112, MCA, may the number of members and the length of their terms be different from the statutorily prescribed numbers and terms for city-county and county planning boards?
2. If a planning board is completely eliminated, does the governing body have the authority to levy extra mills for planning purposes and to take any action with respect to a previously adopted master plan?
3. May the administrative and regulatory functions of a planning board be handled by a subcommittee of the planning board without review, consideration, and action by the full board?

Planning boards are authorized by statutes set forth in Title 76, chapter 2, MCA. The chapter permits a variety of boards to be formed: city, county, city-county, joint or consolidated planning boards. Your first question concerns the number of members and length of terms on the latter type of board--a consolidated planning board. Membership and length of terms for planning boards are set out in part 2 of the chapter. Consolidated planning boards are formed and governed by interlocal agreement. Section 76-1-112(2)(c), MCA, provides that the agreement shall "specify the representation, means and manner of appointment, membership duties, and manner of sharing costs...which may be on any basis agreeable" to those boards joining forces. (Emphasis added.) The underlined portion of this section contains the crucial language. The section indicates that as long as the parties agree, the terms set forth in the document will control. "Representation" and "means and manner of appointment," without further specific direction, are sufficiently broad terms to allow for the number of members and their

OPINIONS OF THE ATTORNEY GENERAL

terms of service to be determined by interlocal agreement. As you indicated in your opinion request, this interpretation is illustrated in the latest interlocal agreement establishing a consolidated planning board for the city and county of Missoula. That agreement, approved by this office, provided for a thirteen-member board which is within the range established for either city, county, or city-county planning boards, §§ 76-1-201, 76-1-211, 76-1-221, MCA.

Your second question involves the ability of a governing body to levy extra mills for planning purposes in the absence of an established planning board. Part 4 of the planning board chapter concerns financial administration. Sections 76-1-403 through 76-1-407, MCA, give a city or county the authority to levy a property tax for planning board purposes subject to certain restrictions. Your position is that the creation of a planning board is discretionary and since the local government would have to perform many of the tasks with or without the board, the mill levy is necessary for planning board purposes. The levy should still be allowed, therefore, to pay for the extra burden incurred by the local government.

It is a general rule of statutory construction that statutes are to be read in their entirety and considered as a whole without giving particular attention to any one section or sentence. Vita-Rich Dairy, Inc. v. Dept. of Business Regulation, 170 Mont. 341, 553 P.2d 980 (1976). Planning boards are created by statute and must be governed by the authority given them by statute. Sections 76-1-403 and 76-1-404, MCA, both provide that when a planning board has been established, planning districts may be created and a tax may be levied under certain restrictions. Section 76-1-406, MCA, provides that "any city or town represented upon a planning board may levy a tax...." The sections, plainly read, indicate that a planning board and a planning district must be established before a mill levy may be imposed to fund such operations. The fact that planning board functions such as subdivision plat review and approval are statutorily required regardless of the existence of a planning board does not imply that an extra mill levy is permissible. Taxing authority must be explicitly given. No authority exists for the local governing unit to levy extra mills for planning purposes in the absence of a planning board.

OPINIONS OF THE ATTORNEY GENERAL

The second part of this question concerns the actions a governing body may take if a master plan has been adopted but the planning board which created it is eliminated. Section 76-1-601, MCA, provides that "[t]he planning board shall prepare and propose a master plan for the jurisdictional area." The use of the word "shall" is mandatory and requires the planning board to create a master plan. "Master plan" is defined in section 76-1-103(4), MCA, as:

[A] comprehensive development plan or any of its parts such as a plan of land use and zoning, of thoroughfares, of sanitation, of recreation, and of other related matters.

The Montana Supreme Court in Little v. Board of County Commissioners, 38 St. Rptr. 1124, 1134, 631 P.2d 1282, 1291 (1981), found the term "master plan" synonymous with "comprehensive development plan" as used in the zoning statutes. The exact layout of a master plan is not statutorily dictated but section 76-1-601, MCA, lists a number of things the plan may contain. Once the master plan is proposed and adopted by a planning board under sections 76-1-602 and 76-1-603(3), MCA, the governing bodies represented on the board (see § 76-1-103(3), MCA) "shall adopt a resolution of intent to adopt, revise, or reject" the proposed master plan or any of its parts. § 76-1-604, MCA. That section goes on to provide in subsection (3) that "[t]he governing bodies may adopt, revise, or repeal a master plan under this section." (Emphasis added.) Thus, the governing body may take such action as it finds necessary regarding the master plan. This interpretation is supported by section 76-1-605, MCA, which provides that if the master plan is adopted, the governing body within the territorial jurisdiction of the planning board "shall be guided by and give consideration to the general policy and pattern of development set out in the master plan...." The section does not require strict conformance with the master plan. For zoning purposes, however, the Montana Supreme Court's decision in Little clarifies the requirements of the section. The Court ruled that "the governing body must follow the 'comprehensive development plan' [master plan] when creating zoning districts and when promulgating zoning regulations." 631 P.2d at 1291. The requirement is not one of strict adherence to the master plan but rather

OPINIONS OF THE ATTORNEY GENERAL

"the governmental unit, when zoning, must substantially adhere to the master plan." 631 P.2d at 1293. (Emphasis added.) The Court also noted that circumstances may change and thus require changes in the master plan. "If this is so, the correct procedure is to amend the master plan rather than to erode the master plan by simply refusing to adhere to its guidelines." Id. Substantial adherence as a standard is "flexible enough so that the master plan would not have to be undergoing constant change. Yet, this standard is sufficiently definite so that those charged with adhering to it will know when there is an acceptable deviation, and when there is an unacceptable deviation from the master plan." Id. In light of this decision as to zoning and the master plan, it is apparent that governing bodies must give considerable weight to the plan's recommendations in any area it covers.

Your third question concerns the delegation of administrative and regulatory duties of the board to a subcommittee. You wish to know whether a subcommittee could handle such duties without review, consideration, and action by the full board. Section 76-1-304, MCA, provides that a majority of the members of the planning board constitute a quorum and that no action of the board is official unless authorized by a majority of the members of the board at a properly called meeting. However, section 76-1-306(2), MCA, provides the board may delegate authority to employees to perform "ministerial acts in all cases except where final action of the board is necessary." The board also has the power under section 76-1-305, MCA, to "exercise general supervision of and make regulations for the administration of the affairs of the board." Harmonizing these sections to avoid ambiguity, McClanathan v. Smith, 37 St. Rptr. 113, 606 P.2d 807 (1980), it appears that a subcommittee could handle administrative functions of the full board. The full board, however, should exercise general supervision over such a subcommittee and draw up regulations governing its actions, § 76-1-305, MCA. Any official action that carries the board's recommendation, however, must be approved by a majority of the entire board at a properly called meeting.

Thus, a subcommittee may develop proposals, research problems and solutions, keep records, and spend appropriations but the final approval or recommendation must come from the full planning board.

OPINIONS OF THE ATTORNEY GENERAL

The question of what constitutes official action cannot be entirely answered. Title 76, chapter 1, MCA, lists several powers delegated to the planning board such as preparing a master plan, § 76-1-601, MCA, acceptance and administration of gifts and donations, § 76-1-408, MCA, and hiring and firing of employees, § 76-1-306, MCA. The planning board is specifically required to perform these duties and in order for the actions to be official a majority of the entire board must vote to act on them in a certain way. Those actions specifically delegated to the planning board must be considered by the full board and are to be viewed as "official" actions. Information and other material presented to the board to enable them to make their decisions as well as ministerial acts may be performed by employees of the board or a subcommittee.

Finally, you ask several questions regarding zoning commissions and subdivision plat review. You indicate that section 76-2-204, MCA, states that the county commissioners shall require "the county planning board and the city-county planning board" to recommend zoning boundaries and appropriate regulations. There is also authority under section 76-2-220, MCA, for the appointment of a county zoning commission. Your questions concern the authority of each body in the zoning process and the overlap in their duties.

Section 76-2-204, MCA, provides that the county commissioners shall require planning boards to recommend boundaries and appropriate regulations. The section goes on to state that the recommendations shall be advisory only and that if only one planning board has been established it shall make the recommendations, Little v. Board of County Commissioners, 38 St. Rptr. 1124, 631 P.2d 1282 (1981). But there is no absolute mandate that a planning board of any kind exist. § 76-1-101, MCA. In the absence of a planning board, no recommendations must be solicited for zoning decisions. The zoning commission authorized in section 76-2-220, MCA, is also discretionary. "[T]he county commissioners may appoint a zoning commission to recommend amendments to the zoning regulations and classifications." The proviso of subsection (2) requiring a hearing "[i]f a commission is appointed" further clarifies the discretionary creation of such a commission. See also Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 620 P.2d 1189, 1194 (1980). Should a zoning commission

OPINIONS OF THE ATTORNEY GENERAL

be created the section requires that it consist of "five members appointed at large from the zoning district." Since there can be several zoning districts within a county, § 76-2-202, MCA, there may be several zoning commissions, each of which is responsible only for advising the county commissioners on changes within that zoning district. Thus, both planning boards and zoning commissions are discretionary in nature and if neither is created the county commissioners must resolve the problems under their general authority, § 76-2-201, MCA, subject, of course, to the general requirement that a comprehensive plan has been adopted, § 76-2-201, MCA.

The question you raise concerning subdivision plat review involves the interaction of sections 76-1-107 and 76-3-605, MCA. Section 76-1-107, MCA, requires that if a planning board is created and a comprehensive plan and subdivision regulations adopted, the governing body shall seek the planning board's advice. Section 76-3-605, MCA, requires a governing body or its authorized agency to hold a public hearing on a proposed preliminary plan and to consider all relevant evidence to determine whether the plan should be approved. If an agent holds the hearing, the agent shall advise the governing body of its recommendation. This latter statute does not mean the agent's recommendation may be substituted for the planning board's. The statutes do not conflict; there are simply two distinctly separate duties which must be performed. First, if the governing body creates a planning board or boards, their recommendation(s) must be solicited and second, a public hearing shall be held "to solicit evidence on the various effects the proposed plan would have on the public." The recommendation made by an agent under section 76-3-605, MCA, is one made after consideration of the evidence presented at the public hearing. The purpose in soliciting a number of recommendations from a variety of sources is to give the governing body, the ultimate decision maker, a wide range of input. The agency's recommendation cannot be substituted for that of the full planning board if it exists. Both bodies must comply with their statutory duties.

THEREFORE, IT IS MY OPINION:

1. The number of members and length of their terms on a consolidated planning board may be

OPINIONS OF THE ATTORNEY GENERAL

determined by the interlocal agreement forming the board.

2. If a planning board is eliminated, the governing body has no authority to levy the extra mills for planning board purposes.
3. If a planning board is eliminated, the governing body must substantially adhere to any master plan previously adopted or amend the plan to its needs.
4. Any official action or power specifically delegated to the planning board must be approved by the full board.
5. The creation of planning boards and zoning commissions is within the discretion of the governing body. Once created, however, the statutory mandates as to each board must be followed.
6. If a planning board exists, a governing body must seek its advice in addition to holding a public hearing on all subdivision plat review.

Very truly yours,

MIKE GREELY
Attorney General