

VOLUME NO. 40

OPINION NO. 76

BUILDING CODES - Authority of the Department of Administration;

CITIES AND TOWNS - Authority to enact building construction regulations;

DEPARTMENT OF ADMINISTRATION - Authority over state building code;

ADMINISTRATIVE RULES OF MONTANA - Section 2.32.202;
MONTANA CODE ANNOTATED - Sections 7-15-4122, 7-33-4203,
50-60-101(2), 50-60-101(3), 50-60-102(1), 50-60-201 to
50-60-203, 50-60-301(2);
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen.
No. 81 (1977), 38 Op. Att'y Gen. No. 3 (1979);
REVISED CODES OF MONTANA, 1947 - Sections 69-2105(14),
69-2107, 69-2111;
SESSION LAWS OF 1969 - Chapter 366, sections 1, 4, 8, 9.

HELD: The authority of city and town councils to
prescribe building construction regulations
pursuant to section 7-15-4122, MCA, and to
prescribe limits within which combustible
buildings must not be erected, pursuant to
section 7-33-4203, MCA, was repealed by the
enactment in 1969 of the state building code,
Tit. 50, ch. 60, pt. 2, MCA.

11 October 1984

Robert E. Kelly
State Fire Marshal
Room 371, Scott Hart Building
303 North Roberts
Helena MT 59620

Dear Mr. Kelly:

You have requested my opinion on the following question:

Is the authority of city and town councils to
prescribe building construction regulations
pursuant to sections 7-15-4122 and 7-33-4203,
MCA, superseded by the state building code,
Tit. 50, ch. 60, pt. 2, MCA?

The state building code was enacted in 1969. Its
purpose, as stated in section 50-60-201, MCA, is to
provide standards for building construction, including
building materials. The Department of Administration is
vested with the power to adopt the state building code
by rule. § 50-60-203, MCA. Title 7, MCA, contains
statutes which appear to give cities and towns
overlapping jurisdiction in the area of building

construction. Specifically, section 7-15-4122, MCA, enacted in 1921, provides that a city or town council has the authority to "(1) prescribe the thickness, strength, and manner of constructing stone, brick, and other buildings; and (2) order the construction of fire escapes thereon." Under section 7-33-4203, MCA, also enacted in 1921, a city or town council may "prescribe limits within which wooden or combustible buildings must not be erected, placed, or repaired and ... establish fire limits within the city or town." Your question concerns whether these two statutes, sections 7-15-4122 and 7-33-4203, MCA, are in conflict with the statutes that comprise the state building code.

As a preliminary matter, it is necessary to determine whether sections 7-15-4122 and 7-33-4203, MCA, deal with the subject of "building regulations" as that phrase is used in Title 50, chapter 60, MCA. "Building regulations," as defined in section 50-60-101(2), MCA, includes, inter alia, any laws or ordinances enacted by a municipality relating to the "design, construction, reconstruction, alteration, conversion, repair, inspection, or use" of buildings. "Construction" includes "requirements or standards relating to or affecting materials used, including provisions for safety ... conditions." § 50-60-101(3), MCA. Section 7-15-4122, MCA, clearly involves "building regulations," since it deals with a local government's authority to prescribe "the manner of constructing ... buildings." Section 7-33-4203, MCA, involves the construction of buildings, specifically the requirements relating to the use of wooden or combustible materials within a prescribed area. I conclude, then, that both section 7-15-4122, MCA, and section 7-33-4203, MCA, are concerned with matters included in the definition of "building regulations" as that phrase is used in the state building code. The remainder of this opinion will deal with whether sections 7-15-4122 and 7-33-4203, MCA, were revoked by the subsequently-enacted state building code. Some background on the history of the state building code is in order.

In 1969 the Legislature adopted statewide building construction standards. 1969 Mont. Laws, ch. 366, codified in Tit. 50, ch. 60, MCA. Included among the 1969 provisions was a state building code, the rules of which were to be adopted by the Department of Administration (formerly the responsibility of a state

building code council). 1969 Mont. Laws, ch. 366, § 8 (§ 50-60-203, MCA; formerly codified as § 69-2111, R.C.M. 1947).

From the time of its initial adoption in 1969 until amendments were adopted in 1981, the state building code's scope of application remained the same. The 1969 Montana Laws, chapter 366, section 8 (codified as § 69-2111, R.C.M. 1947), provided that the state building code should apply to the construction of "all buildings." The 1969 Montana Laws, chapter 366, section 4 (codified as § 69-2107, R.C.M. 1947), created an exception outside a municipal jurisdiction area for buildings that were not "public places," defined in 1969 Montana Laws, chapter 366, section 1 (codified as § 69-2105(14), R.C.M. 1947), as places maintained by the government for the use of the public, or places where the public has a right to be. The state building code's application was not limited with respect to buildings located inside a municipal jurisdictional area. See 38 Op. Att'y Gen. No. 3 (1979). In 1981 the Legislature created a residential exemption to the application of the state building code. See § 50-60-102(1), MCA. This does not mean, however, that local governments may prescribe rules for exempted "residential" buildings within their jurisdictional areas that differ from the state building code. Section 50-60-102(1), MCA, still requires that local governmental bodies that choose to regulate residential buildings must do so by adoption of the state building code. See also § 2.32.202, ARM.

As a result of the 1969 law's application to all buildings within a municipal jurisdictional area, the authority granted local governments under section 7-15-4122, MCA, to "prescribe the ... manner of constructing ... buildings" and under section 7-33-4203, MCA, to "prescribe limits within which ... combustible buildings must not be erected" was repealed by implication. Repeal of an earlier statute by implication will be found if it is unavoidably implied by irreconcilable provisions in two statutes. Kuchan v. Harvey, 179 Mont. 7, 10, 585 P.2d 1298, 1300 (1978); State v. Langen, 151 Mont. 558, 564, 445 P.2d 565, 568 (1968). The existence of an irreconcilable conflict between sections 7-15-4122 and 7-33-4203, MCA, both of which were enacted in 1921, and the state building code provisions, enacted in 1969, is manifested by the language of 1969 Montana Laws, chapter 366, section 9.

That section permitted a local government to adopt a building code incorporating standards equal to or more stringent than the state code, and later, in 1977, was amended to require that a local code include only codes adopted by the state. See § 50-60-301(2), MCA; 37 Op. Att'y Gen. No. 81 (1977). The authority to adopt rules for the construction of all buildings was vested in the state under 1969 Montana Laws, chapter 366, section 8. See §§ 50-60-202, 50-60-203, MCA. These provisions leave no room for a local government to prescribe rules dealing with building construction; therefore, sections 7-15-4122 and 7-33-4203, MCA, must be considered repealed by the enactment and amendment of 1969 Montana Laws, chapter 366.

THEREFORE, IT IS MY OPINION:

The authority of city and town councils to prescribe building construction regulations pursuant to section 7-15-4122, MCA, and to prescribe limits within which combustible buildings must not be erected, pursuant to section 7-33-4203, MCA, was repealed by the enactment in 1969 of the state building code, Tit. 50, ch. 60, pt. 2, MCA.

Very truly yours,

MIKE GREELY
Attorney General