

CITIES AND TOWNS - Authority of municipal board of building code appeals to grant modifications;  
HEALTH - Authority of municipal board of building code appeals to grant modifications;  
MUNICIPAL GOVERNMENT - Authority of municipal board of building code appeals to grant modifications;  
ADMINISTRATIVE RULES OF MONTANA - Section 8.70.101;  
MONTANA CODE ANNOTATED - Sections 2-4-101 to 2-4-711, 50-60-203(1), 50-60-206, 50-60-301, 50-60-303(1);  
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 81 (1977), 37 Op. Att'y Gen. No. 66 (1977).

- HELD: 1. The procedures in section 50-60-206, MCA, do not apply to boards of building code appeals established by municipalities.
2. A municipal board of building code appeals constituted in accordance with section 204 of the 1982 Uniform Building Code has authority to review the refusal of a building official to allow modifications pursuant to section 106 of the 1985 Uniform Building Code and, if appropriate, to permit such modifications.

11 July 1986

Sam Warren  
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City of Missoula  
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Dear Mr. Warren:

You have requested my opinion concerning the following questions:

1. Does section 50-60-206, MCA, supplement or modify the powers and duties of municipal building code boards of appeal established pursuant to section 204 of the 1982 Uniform Building Code?
2. Does the Missoula Board of Building Code Appeals have the authority to grant a "variance" from section 802(c) of the 1985 Uniform Building Code to an applicant who seeks to conduct a preschool program above the first floor of a building?

I conclude that section 50-60-206, MCA, has no application to the Missoula Board of Building Code Appeals (Board) but that the Board does have the authority to grant modifications to strict application of the 1985 Uniform Building Code if the conditions in section 106 thereof are satisfied.

The Department of Commerce (Department) is required under section 50-60-203(1), MCA, to adopt a state building code. With limited exceptions the Department has designated the 1985 Uniform Building Code as that code. § 8.70.101, ARM. Section 50-60-206(1)(a), MCA, further authorizes the Department to grant variances from application of the state building code "if strict compliance would cause any undue hardship; but no variance or modification shall affect adversely provisions for health, safety, and security, and equally safe and proper alternatives may be prescribed therefor." Any such variance may be granted only after a public hearing conducted in accordance with the Montana Administrative Procedure Act, §§ 2-4-101 to 711, MCA. § 50-60-206(2), MCA.

Municipalities and counties, however, are permitted to adopt and enforce building codes, which must be the same as the state building code, in place of the Department's regulation. § 50-60-301, MCA. See 37 Op. Att'y Gen. No. 81 at 338 (1977); 37 Op. Att'y Gen. No. 66 at 269 (1977). If a municipality does enact its own code, it must also establish an appeal procedure for persons aggrieved by building officials' decisions. § 50-60-303(1), MCA. The City of Missoula has adopted such a municipal building code, and the Board provides the required appellate review. Missoula, Mont. Code, §§ 15.04.010, 15.36.010 to 15.36.060 (1986). The Board's general authority and composition are governed by section 204 of the 1982 Uniform Building Code:

In order to determine the suitability of alternate materials and methods of construction and to provide for reasonable interpretations of this code, there shall be and is hereby created a Board of Appeals consisting of members who are qualified by experience and training to pass upon matters pertaining to building construction. The building official shall be an ex officio member and shall act as secretary of the board. The Board of Appeals shall be appointed by the governing body and shall hold office at its pleasure. The board shall adopt reasonable rules and regulations for conducting its investigations and shall render all decisions and findings in writing to the building official with a duplicate copy to the appellant.

See § 8.70.101(1)(b), ARM; Missoula, Mont. Code, §§ 15.36.020, 15.36.030. The Board's clear purpose, like that of the Department under section 50-60-206, MCA, is to ensure that adequate recourse against improper decisionmaking by municipal building officials exists. The Board thus has the power to do that which, in the first instance, a building official could.

It is quite clear that section 50-60-206, MCA, has reference only to the Department's powers and not to those of the Board. The term "department," as used in such provision, is defined in section 50-60-101(4), MCA, to mean the Department of Commerce, and the authority granted includes the power to reverse the order of any state agency under the state building code and to review

disapproval of applications for permission for the construction of buildings under such code. All hearings under this section, moreover, are governed by the Montana Administrative Procedure Act which has no application to local governmental units such as the Board. §§ 2-4-102(2)(b), 2-4-601 to 631, MCA. Those provisions are irreconcilable with a contention that section 50-60-206, MCA, applies to the Board.

Resolution of your second question is largely dependent upon section 106 of the 1985 Uniform Building Code:

Whenever there are practical difficulties involved in carrying out the provisions of this code, the building official may grant modifications for individual cases, provided he shall first find that a special individual reason makes the strict letter of this code impractical and that the modification is in conformity with the intent and purpose of this code and that such modification does not lessen any fire protection requirements or any degree of structural integrity. The details of any action granting modifications shall be recorded and entered in the files of the code enforcement agency.

Section 106 thus permits, if the conditions specified therein are satisfied, "modifications" to literal application of the code by the involved building official. One such modification could be to the requirements of section 802(c) which prohibits use of certain buildings for kindergarten or first- or second-grade pupils above the first floor. The rule itself provides an exception "[i]n buildings equipped with an automatic sprinkler system throughout ... provided there are at least two exits directly to the exterior for the exclusive use of such occupants." The Board, in turn, has the power under section 204 of the 1982 Uniform Building Code to review the refusal of a building official to allow a modification to literal application of section 802(c) and, if it determines the modification should have been granted, to authorize it. Any other conclusion unnecessarily restricts the substantive scope of the Board's functions and disserves the purpose of section 50-60-303(1), MCA, which is to ensure that an adequate appeal procedure exists. In this instance, whether strict compliance with section 802(c) should be waived is, nonetheless, subject to the

limited grounds provided under section 106, including those requiring no lessening of fire protection standards. The Board thus does not have unfettered discretion in granting modifications and may not simply authorize a "variance" on the basis of claimed or real hardship resulting from compliance with section 802(c).

THEREFORE, IT IS MY OPINION:

1. The procedures in section 50-60-206, MCA, do not apply to boards of building code appeals established by municipalities.
2. A municipal board of building code appeals constituted in accordance with section 204 of the 1982 Uniform Building Code has authority to review the refusal of a building official to allow modifications pursuant to section 106 of the 1985 Uniform Building Code and, if appropriate, to permit such modifications.

Very truly yours,

MIKE GREELY  
Attorney General