

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 16

LAND USE - Enforceability of planning and zoning master plan;

LAND USE - Review authority of self-governing local government as to proposed division of land;

LOCAL GOVERNMENT - Enforceability of planning and zoning master plan;

LOCAL GOVERNMENT - Review authority of self-governing local government as to proposed division of land;

PROPERTY, REAL - Enforceability of planning and zoning master plan;

PROPERTY, REAL - Review authority of self-governing local government as to proposed division of land;

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SUBDIVISION AND PLATTING ACT - Review authority of self-governing local government as to proposed division of land;

MONTANA CODE ANNOTATED - Title 76, chapter 1; sections 1-2-101, 1-2-107, 7-1-111, 7-1-112, 7-1-114, 76-1-103, 76-1-604, 76-1-606, 76-3-102, 76-3-103, 76-3-301 to 76-3-303, 76-3-306, 76-3-402, 76-3-404, 76-3-504, 76-3-505, 76-3-602, 76-3-609, 76-3-611, 76-3-613;

MONTANA CONSTITUTION - Article XI, section 6;

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 68 (1977), 37 Op. Att'y Gen. No. 175 (1978), 38 Op. Att'y Gen. No. 98 (1980), 39 Op. Att'y Gen. No. 14 (1981), 39 Op. Att'y Gen. No. 74 (1981), 40 Op. Att'y Gen. No. 57 (1984), 41 Op. Att'y Gen. No. 86 (1986).

HELD: 1. A local government unit with self-governing powers may not refuse to file a certificate of survey because the involved parcel encompasses less than 40, but equal to or more than 20, acres even if its master plan prohibits divisions of land of such size.

2. A local government which has adopted a master plan to regulate future land-use planning and zoning may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with such plan.

13 May 1987

Robert M. McCarthy  
Butte-Silver Bow County Attorney  
Butte-Silver Bow County Courthouse  
Butte MT 59701

Dear Mr. McCarthy:

You have requested my opinion concerning the following questions:

1. May Butte-Silver Bow, a self-governing consolidated governmental unit, refuse to file a certificate of survey because the size of the involved parcel, which is 20 acres or more, is inconsistent with a master plan's requirement?
2. May Butte-Silver Bow refuse to issue permits in connection with the construction, alteration, or enlargement of a structure if such proposed work is

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inconsistent with its planning and zoning master plan even though zoning regulations have not been adopted?

I conclude that Butte-Silver Bow does not have authority to refuse the filing of a certificate of survey because the involved parcels are not at least 40 acres in size. It may, however, condition issuance of building permits on compliance with the master plan when applicable zoning regulations have not yet been adopted.

Pursuant to section 76-1-604, MCA, Butte-Silver Bow has adopted a master plan to guide present and future land use within its boundaries. The plan requires certain residential parcels created after its effective date in what is termed rural district number 1 to encompass at least 40 acres. Recently, however, a landowner submitted a certificate of survey for several residential parcels located in a rural residential area which are slightly more than 20 acres in size. The first question is whether Butte-Silver Bow may refuse to file the certificate of survey.

Butte-Silver Bow is a charter form of government with self-governing powers. Bukvich v. Butte-Silver Bow, 42 St. Rptr. 293, 294, 696 P.2d 444, 445 (1985). As a self-governing entity, it "may exercise any power or provide any service except those specifically prohibited by the constitution, law, or the [local government's] charter." D & F Sanitation Service v. City of Billings, 43 St. Rptr. 74, 80, 713 P.2d 977, 982 (1986); accord Clopton v. Madison County Commission, 42 St. Rptr. 851, 854, 701 P.2d 347, 350 (1985); Billings Firefighters Local 521 v. City of Billings, 42 St. Rptr. 112, 114, 694 P.2d 1335, 1336 (1985); Tipco Corporation v. City of Billings, 197 Mont. 339, 343, 642 P.2d 1074, 1077 (1982); see generally 37 Op. Att'y Gen. No. 68 at 272, 273 (1977) ("[t]he [constitutional] convention notes to [art. XI, sec. 6, Mont. Const.] clearly indicate that local government units with self-government powers have all powers not specifically denied"). The Montana Legislature has enacted various provisions which deny self-governing units certain powers (§ 7-1-111, MCA), require express legislative delegation as a condition of other powers' exercise (§ 7-1-112, MCA), and subject the authority of such units to state statutes in several specified instances (§ 7-1-114, MCA). Among those matters in which self-governing units are subject to state statutory provisions are "[a]ll laws which require or regulate planning or zoning[.]" § 7-1-114(1)(e), MCA. See 38 Op. Att'y Gen. No. 98 (1980) (section 7-1-114(1)(e), MCA, prohibited Butte-Silver Bow from providing for an optional appeal of decisions from its

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local board of adjustment); see also 37 Op. Att'y Gen. No. 175 (1978) (applying section 7-1-114(1)(g), MCA).

I previously held in an unpublished opinion dated June 15, 1978, and issued to the Madison County Attorney that "[t]here can be little dispute that subdivision regulation under the [Montana] Subdivision and Platting Act [§§ 76-3-101 to 614, MCA] is part and parcel of the state laws that 'require or regulate planning or zoning.'" In that opinion I found improper the refusal of a county, which had constituted itself as a self-governing unit, to permit the selling or offering for sale of lots in a subdivision before the final plat was recorded--a prohibition inconsistent with section 76-3-303, MCA. While the Montana Supreme Court expressly refused in State ex rel. Swart v. Molitor, 38 St. Rptr. 71, 75-76, 621 P.2d 1100, 1104 (1981), to decide the question of whether "planning and zoning" includes the function of reviewing certificates of survey under the Subdivision and Platting Act, I adhere to my earlier interpretation of section 7-1-114(1)(e), MCA, since subdivision regulation clearly appears an integral aspect of state and local government land-use planning. See § 76-3-102, MCA; see generally R. Anderson, American Law of Zoning 3d § 25.03 (1986) ("[t]he broad purposes of subdivision controls to guide community development, to protect the prospective residents and neighboring owners from the evils of poorly designed areas, and to advance the orthodox purposes of the police power, have been frequently repeated") (footnotes omitted); P. Rohan, Zoning and Land Use Controls § 45.01 (1986) ("[i]n general, subdivision legislation seeks to guide land development 'through the power to withhold the privilege of public record from plats that do not meet established requirements and standards'" (footnote omitted). Indeed, the Butte-Silver Bow master plan recognizes that subdivision regulation directly affects future land use and attempts to utilize such controls for the purpose of encouraging particular growth patterns and population densities.

Section 76-3-609, MCA, of the Subdivision and Platting Act governs the scope of local authority to review proposed divisions of land creating parcels 20 acres or larger. Subsection 2(a) provides in relevant part that "[t]he governing body's review must be limited to a written determination that appropriate access and easements are properly provided." I recently held that the effect of disapproval by a local governing body of such a proposed division is limited to nonprovision of county services involving the use of access roads or easements found to be unsuitable. 41 Op. Att'y Gen. No.

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86 (1986). Implicit in section 76-3-609(2)(a), MCA, as well as my holding in the earlier opinion, are the negative corollaries that a local governing body may not refuse to file a certificate of survey even if access roads and easements are deemed unsuitable and that no such authority exists when the basis for disapproval rests on the fact a parcel is not at least 40 acres in size. The limited authority of Butte-Silver Bow in this regard is further underscored by section 76-3-505(2), MCA, which restricts local governing body review of divisions of land consisting exclusively of 20 acres or more "to a written determination of whether appropriate access and easements are properly provided."

The presence of the 40-acre limitation in a master plan does not broaden Butte-Silver Bow's authority even though section 76-1-606, MCA, permits Butte-Silver Bow to require, upon a properly enacted resolution, that "subdivision plats" conform with its master plan as a condition to their filing. The word "subdivision" is not defined in section 76-1-103, MCA, which contains definitions of various terms used in chapter 1 of Title 76, but the term is defined in section 76-3-103(15), MCA, of the Subdivision and Platting Act. As defined under the latter statute, "subdivision" means, for presently relevant purposes, a division of land "which creates one or more parcels containing less than 20 acres." See 40 Op. Att'y Gen. No. 57 (1984); 39 Op. Att'y Gen. No. 74 (1981); 39 Op. Att'y Gen. No. 14 (1981). That definition, in the absence of a clear contrary intent, should be deemed applicable to the use of the term "subdivision" in section 76-1-606, MCA. § 1-2-107, MCA; see City of Billings v. Smith, 158 Mont. 197, 212, 490 P.2d 221, 230 (1971) ("[a]ll acts relating to the same subject, or having the same general purpose as the statute being construed, should be read in connection with such statute"); State ex rel. MacHale v. Ayers, 111 Mont. 1, 5, 105 P.2d 686, 688 (1940) ("[i]t is a general rule of law that all acts relating to the same subject, or having the same subject, or having the same general purpose as the statute being construed, should be read in connection with such statute"). I further note the term "subdivision plat" is used throughout the Subdivision and Platting Act and refers to plats reflecting subdivisions and not simply divisions of land as defined in section 76-3-103(3), MCA. §§ 76-3-301(1), 76-3-302, 76-3-306, 76-3-402(2), 76-3-404(2), 76-3-504(2), 76-3-505(1), 76-3-602, 76-3-611(1) and (2)(a), 76-3-613(1) and (2), MCA. This interpretation of the term "subdivision plat" in section 76-1-606, MCA, finally, harmonizes that provision with sections 76-3-505(2) and 76-3-609(2)(a), MCA--a result consonant with well-accepted rules of statutory

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construction. § 1-2-101, MCA; Schuman v. Bestrom, 42 St. Rptr. 54, 57, 693 P.2d 536, 538 (1985) ("[w]hen several statutes apply to a given situation, such a construction, if possible, is to be adopted as will give effect to all"). In sum, Butte-Silver Bow may not refuse to file a certificate of survey because the parcel size fails to satisfy master plan requirements.

The mere fact that Butte-Silver Bow may not deny filing to a certificate of survey in connection with a division of land, which is otherwise not a subdivision, because the resulting parcels are less than 40 acres does not, however, proscribe it from conditioning issuance of permits as to proposed construction, alteration, or enlargement of structures on such parcels upon compliance with the master plan. The Supreme Court held in Little v. Board of County Commissioners, 38 St. Rptr. 1124, 1139, 631 P.2d 1282, 1295 (1981), that city officials were authorized to deny a building permit for certain construction on unzoned land when the proposed use was inconsistent with a master plan. The Court apparently reasoned that, because zoning ordinances must substantially comply with a jurisdiction's master plan, such authority was necessary to preserve the master plan's integrity until appropriate zoning regulation was effected. Consequently, Butte-Silver Bow may deny building permits to applicants in connection with construction for uses inconsistent with its master plan.

THEREFORE, IT IS MY OPINION:

1. A local government unit with self-governing powers may not refuse to file a certificate of survey because the involved parcel encompasses less than 40, but equal to or more than 20, acres even if its master plan prohibits divisions of land of such size.
2. A local government which has adopted a master plan to regulate future land-use planning and zoning may condition issuance of permits for the construction, alteration, or enlargement of structures upon compliance with such plan.

Very truly yours,

MIKE GREELY  
Attorney General