

LEGAL ANALYSIS

SB 456 – 2005 Legislative Session

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QUESTION ONE

Does section 76-3-504(1)(d), MCA, provide authority for county commissioners in Montana to require installation of sprinkler systems in residential subdivisions proposed in areas of their counties which they have identified as unsuitable for development due to natural or human-caused hazards, especially the threat of wildfire?

SHORT ANSWER

Section 76-3-504(1)(d), MCA only authorizes Montana's county commissioners to identify areas unsuitable for development – unless an area's identified hazards can be "eliminated or overcome by approved construction techniques." It does not authorize county commissioners to approve or even consider construction techniques. Instead, that authority is set forth in section 50-60-201(1), MCA, which requires that the Building Code Bureau;

... (1) provide reasonably uniform standards and requirements for construction and construction materials consistent with accepted standards of design, engineering, and fire prevention practices; ... (emphasis added)

Section 50-60-201(1), MCA (2003)

ANALYSIS

Two principles of statutory construction apply to this question. First, where the meaning of a statute is in question, courts must look first to the plain language of the statute to ascertain its meaning. If the meaning and intent of the statute can be thus determined then courts may look no further to accomplish that purpose. Second, when two or more statutes are in apparent conflict, courts are required to interpret the statutes in question so as to give full meaning and effect, to the extent possible, to each of the statutes involved.

In the present case, the statutes referenced above from Title 76 and Title 50, respectively, are unambiguous. The Title 76 statute plainly authorizes county commissioners to identify areas unsuitable for development, and also allows them to make exceptions when approved construction techniques will mitigate the identified hazard. Concurrently, section 50-60-201(1), MCA, identifies, as one purpose of the state building code, the provision of uniform standards and requirements which are consistent with accepted standards of fire prevention practices. Section 50-60-202, MCA, clearly identifies the Department of Labor and Industry as the sole state agency to promulgate building regulations. Additionally, section 50-60-203(1)(a), MCA, requires the Department to adopt rules relating to, among other things, provisions dealing with safety in the construction of various buildings within this state, presumably related to safety from fire hazards as well as many other such issues.

A hypothetical example best reveals how the questioned provisions of Titles 76 and 50, MCA, may be interpreted so as to avoid conflict, eliminate perceived ambiguities, and serve a common purpose. Assume, to begin, that a board of county commissioners identifies an area within its jurisdiction which

it believes is unsuitable for development due to the hazard of wildfire. Accordingly, the board prohibits development of subdivisions in that area.

However, a land developer retains the services of professional engineers and architects who identify and prescribe construction methods and materials which they believe will overcome or eliminate the wildfire hazard. With this professional advice in hand, the developer also consults with the authority which has building code enforcement jurisdiction as to the applicability of those methods and materials for use in a residential sub-division in this area of the county.¹ Following a detailed review, that authority concurs that the proposed construction methods and materials will significantly reduce or overcome the threat posed by wildfire.

With this information in hand, the developer may then choose to ask the county commissioners to grant an exception to their previous ruling – based upon a formal subdivision plan which details the construction methods and materials that are specifically approved by the appropriate authorities to overcome or eliminate the threat of wildfire. The commissioners may then decide as to the exception based, at least in part, upon their knowledge that building code and construction experts have deemed the threat from wildfires either nullified or eliminated by the development plan. Additionally, the commissioners benefit because they make well-informed findings of fact concerning the requested exception, rather than being perceived as arbitrary or capricious in making a decision that is potentially adverse (and actionable) to the developer's interests.

CONCLUSION

Montana statutes authorize two separate branches of government – a specific state agency and all of Montana's counties – to address two separate aspects of the state's population growth; namely, land development and building construction. The language of these statutes is unambiguous and establishes clear jurisdictional boundaries as to regulatory responsibility in each of these areas. Thus, it is contrary to the regulatory plan contemplated by the legislature for counties to go beyond their land development authority into an area specifically reserved for a state agency.

QUESTION TWO

Are Montana counties exempt from the requirements of section 50-60-101, et. seq., MCA, because they are not municipalities, as apparently required by section 50-60-101(3)(a), MCA?

SHORT ANSWER

Montana counties are not exempt from the requirements of section 50-60-101, et seq., MCA, because they are "other agencies of the state," and because a "special statute" is available which allows counties to lawfully adopt and enforce building regulations within their respective jurisdictions.

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Municipality Issue

Montana law provides that the counties of this state are its political subdivisions, as follows:

Nature of county.

- (1) A county is the largest political subdivision of the state having corporate power.

¹ Authorized by section 50-60-118(1)(2), MCA, (2003) and ARM 24.301.214.

(2) Every county is a body politic and corporate and as such has the power specified in this code or in special statutes and such powers as are necessarily implied from those expressed.

Section 7-1-2101, MCA (2003).

A large and well-settled body of case law underlies and interprets the above statute. For example, the Montana Supreme Court has held:

The fundamental rule is recognized that counties are subdivisions of the state of purely statutory creation, and when they assume to exercise a power, authority therefor must be found in the statute conferring power upon them, or necessarily implied in order to carry out an express power. ...

State ex rel. Blair v. Kuhr, County Attorney, 86 Mont.377, 283 P. 758.

The clear effect of this statute and relevant case law is that counties may not rely upon the fact that they are not municipalities to exempt themselves from compliance with the provision of Title 50, chapter 60, MCA, because, by law, they are sub-divisions of the state. The Court has underscored the importance of this distinction by holding, for example, that because a school district is a subdivision of the state it may not bring an action against another subdivision of the state because then "... the state, in effect, would be suing itself." *District No. 55 v. Musselshell County*, 245 Mont. 525, 802 P.2d 1252. Additionally, the Court has relied upon the rule recognized in *Kuhr* to hold that boards of county commissioners may not take actions which have the effect of usurping the authority of other officials. *Judith Basin County ex rel. Vralsted, County Attorney v. Livingston et al.*, 89 Mont.438, 298 P. 356.

Thus, for purposes of interpreting and applying section 50-60-101(3)(a), MCA, counties must logically and reasonably be viewed as "other agencies of the state."

Specific Building Regulation Authority Available to Counties

Section 7-1-2101, MCA, (quoted above) provides that counties may rely on "special statutes" for authority to conduct activities which might otherwise be outside the scope of their jurisdiction.

Title 50, Chapter 60, Part 3 is one such "special statute."

Under this Title 50 statute, Montana cities, counties and towns may apply to the Building Code Bureau for certification to adopt and enforce building codes and regulations within their respective jurisdictions. As required by section 50-60-302, MCA, the Building Code Bureau has promulgated administrative rules, codified at ARM 24.301., sub-chapter 2, which describe the certification requirements and process, as well as all other aspects of the Bureau's certification program. This program gives certified cities, counties, and towns the option to also enforce the building, electrical, plumbing, and mechanical codes which have been officially adopted by the Bureau. They may do so on a selective basis in commercial buildings and all residential dwellings – regardless of size. Most notably however, a city, county, or town that is certified to enforce a building code may, under that authority, also adopt and enforce the "fire code adopted by the Fire Prevention and Investigation Bureau of the [Montana] Department of Justice. See ARM 24.301.146(6). At present, the Bureau has certified 41 cities and 3 counties to operate their own building regulation programs.

CONCLUSION

Because counties are subdivisions of the state and because a statutorily authorized method exists by which counties can enforce approved building regulations, counties may not infer from their Title 76 authority the power to regulate any aspect of building construction, including fire prevention or suppression. For the same reasons, counties are also not generally exempt from the requirements of Section 50-60-101, MCA, et seq.. To allow counties any form of exemption would violate the intent and purpose of the state's certification statutes and administrative rules, and would also significantly undermine key provisions of the state building code.

QUESTION THREE

Since the Building Code Bureau does not regulate construction of residential dwellings smaller than five-plexes, is it reasonable for counties to provide fire protection measures under their Title 76, MCA, subdivision authority?

SHORT ANSWER

For the reasons set forth in the Question Two analysis, and because Montana law clearly intends that regulatory authority in this area should belong ultimately to the Building Code Bureau, it cannot be reasonably concluded that Montana's legislature intended that counties should use their Title 76 authority to promulgate or enforce building or fire regulations.

ANALYSIS

As previously noted, counties may become certified to operate their own building code enforcement programs and, under those programs, may enforce building codes in any sized residential dwelling. Therefore, since Montana's legislature made this method of residential building code regulation available to counties but did not opt to expressly provide any other similar regulatory authority, it is entirely appropriate to conclude that the legislature wanted the Building Code Bureau have exclusive authority in this area of public service, either directly or through the certification process for Montana cities, counties, and towns. Other provisions of Montana law, discussed below, also support this view.

First, an examination of the relationship between the State Fire Marshall's Office and the Building Code Bureau is useful. For example, section 50-60-202, MCA, not only specifies that the Department of Labor and Industry is the only agency authorized to promulgate building regulations, it also requires that "[t]he state fire prevention and investigation program of the department of justice review building plans and regulations **for conformity with rules promulgated by the department** [of Labor and Industry]." (emphasis added.) Accordingly, section 50-3-103(2), MCA, the state's fire prevention and investigation statute, states:

... If rules [promulgated by the department of justice] relate to building and equipment standards covered by the state building code or a county, city, or town building code, **the rules are effective upon approval of the department of labor and industry** ... (emphasis added.)

By reading these two statutes it becomes quickly apparent that the legislature intended two things. First, that the department of Labor and Industry be the final reviewing authority for any administrative

rules that relate to building standards, even those that relate specifically or generally to fire prevention; and second, that fire prevention rules must always be a subset of building code rules and regulations. This view is supported by reading administrative rules promulgated by Montana's Fire Prevention and Investigation Bureau, which state in pertinent part:

...
(3) This rule establishes a minimum fire protection code to be used in conjunction with the Building Code. ...

(4) The design and construction requirements in NFPA 1 / UFC ² that apply to public buildings or places of employment are not included in this adoption. The Building Code adopted by the building codes bureau of the department of labor and industry controls design and construction in Montana. If there is any conflict between the construction standards in the NFPA 1 / UFC and the construction standards set forth in the Building Code, the provisions of the Building Code control. NFPA 1 /UFC construction standards only apply if no comparable Building Code construction standard exists.

...
ARM 23.7.301 (2003)

Second, among the eight specific objectives which the legislature declared it intended the state building code to accomplish, the first three are the most germane to this analysis. They state:

...
(1) provide reasonably uniform standards and requirements for construction and construction materials consistent with accepted standards of design, engineering, and fire prevention practices;

(2) permit to the fullest extent feasible the use of modern technical methods, devices, and improvements that tend to reduce the cost of construction consistent with reasonable requirements for the health and safety of the occupants or users of buildings

...
(3) eliminate restrictive, obsolete, conflicting, and unnecessary building regulations and requirements that tend to unnecessarily increase construction costs, unnecessarily prevent the use of proven new materials that have been found adequate through experience or testing, or provide unwarranted preferential treatment to types or classes of materials, products, or methods of construction;

...
Section 50-60-201(1)(2)(3), MCA (2003).

Two themes predominate a reading of these objectives. First, the objectives underscore the importance of achieving and maintaining uniformity with respect to the construction standards required and used across the state. Second, they express the legislature's desire that those standards be reasonable both in terms of construction costs and with regard to ensuring the health and safety of the people who use or occupy buildings in this state.

² National Fire Prevention Association / Uniform Fire Code

Obviously, if counties were legitimately able to promulgate and enforce building regulations under their Title 76 authority, the present level of uniformity in construction standards across the state would be quickly eroded. Since this effect is completely contrary to the expressed intent of the legislature, it is most difficult to believe that counties were intended to have any authority in this area of regulation or, indeed, that they should have any such authority.

Given the fact that county commissioners and fire officials are typically not certified as construction plan reviewers or building officials, it is also most difficult to believe they would be sufficiently informed as to which construction costs or building methods are reasonable in Montana or even in their respective counties. In contrast, building officials at both state and local levels are not only well informed in these areas as a function of their professional interests, but they must also participate in mandatory continuing education programs in order to remain certified in these occupations. Thus, they are eminently more qualified to evaluate the reasonableness of construction costs and health and safety measures than county commissioners or fire officials.

CONCLUSION

Viewed from the above perspective, it is very reasonable to conclude that the legislature never intended for county commissioners to regulate in the area of building construction, regardless of the authority they presume to use to justify that activity. If such activity were condoned or even merely allowed, it is also reasonable to conclude that the effectiveness of the state building code would be degraded and that Montana construction consumers and the state's construction industry would be exposed to unnecessarily increased costs and to conflicting regulatory requirements.