

A Critical Analysis of Planning and Land-Use Laws in Montana:

A REPORT OF THE
AMERICAN PLANNING ASSOCIATION
RESEARCH DEPARTMENT
PREPARED FOR THE MONTANA
SMART GROWTH COALITION



January 2001

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The analysis and recommendations contained in this report represent the views of the authors and are not necessarily those of the American Planning Association or the Montana Smart Growth Coalition.

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EXECUTIVE SUMMARY

This report was prepared by the Research Department of the American Planning Association (APA) in Chicago, Illinois for the members of the Montana Smart Growth Coalition (MSGC). It is the result of a project to assess the need for statutory changes to the Montana Code Annotated (MCA) to improve planning and land-use control in the state and to provide a basis for proposed legislation. This project builds upon research conducted by the Montana Legislature's Environmental Quality Council (EQC) Growth Study Subcommittee on land-use planning in its 1999 report, *Planning for Growth in Montana*, and the resultant legislative reforms enacted the same year through S.B. 97.

This report is divided into six sections. Section 1 covers introductory material, including the objectives of the study and the interests of the Montana Smart Growth Coalition. Section 2 is a brief summary of the principal statewide plans prepared by the State of Montana. Section 3 digests the state's enabling legislation for local planning and land-use control, and incorporates an analysis of relevant Montana Supreme Court and Attorney General decisions. Section 4 summarizes the results of six focus groups conducted by APA and the MSGC in March 2000 as well as responses from a survey conducted by APA and the MSGC. Section 5 reviews the recommendations of several previous studies by the EQC. Section 6 sets forth a series of recommendations for changes in the MCA regarding planning and land-use control.

The recommendations are presented in four categories: planning for growth, managing growth, planning and development review, and paying for growth, along with a set of supplemental recommendations for an enhanced state role. They are intended to strengthen the planning basis of land-use regulation and public investment in Montana. Within each category recommendations are listed in order of priority, although many are interdependent with others in the same or other categories. Several recommendations deal with the manner in which a growth policy, the Montana term for a local comprehensive plan, is defined in the statutes and the manner in which that document is applied on a day-to-day basis by Montana local governments. This report assumes that the preparation of a growth policy is a significant public act that, once completed, should have more than a casual or fragmented relationship to development decisions. Consequently, the growth policy should be described in a way that will allow laypersons to understand how to prepare a document that will be useful to guide public and private development decisions. Moreover, this report recommends eliminating long-standing inconsistencies and ambiguities in the application of the growth policy as it relates to different types of development decisions—zoning vs. subdivision or Part 1 and Part 2 zoning, for example. These problems can be easily corrected through language changes in the statutes, and should be.

This report also stresses the importance of planning for relatively populated and rapidly growing counties. Counties and the cities and

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towns within them no longer have the option of treating planning and land-use controls, such as zoning, as a luxury in the face of urbanization and/or rapid growth. While this might have been an acceptable position in the 1920s, when the Montana planning and zoning laws were originally established, it is plainly inadequate now. Today there are far more tools available to analyze and understand the consequences of growth and the use of zoning is commonplace. To this end, the report endorses a variety of tools for funding planning efforts, most of which have been proposed by the Environmental Quality Council's Growth Subcommittee.

The recommendations emphasize using the growth policy to collect and analyze information on factors affecting development. If this is done, it should not be necessary to once again gather the information for site-specific development decisions or to rely on a developer to analyze the information. An example of this is the recommendation that an environmental assessment on the growth policy and alternative development patterns replaces, to the degree possible, most project-by-project environmental assessments. It would do this by explicitly incorporating its findings on mitigating the cumulative impacts of community growth into the zoning, subdivision, and other regulations. In this way, the development regulations themselves incorporate the appropriate mitigation without the necessity of formulating them on an ad hoc basis.

The recommendations also stress a development review process that is consistent and predictable, with objective standards, time limits, and clear routes for appeal and judicial review. In connection with this, a series of additional tools for local governments, such as impact fees, transfers of development rights, incentive zoning, and official maps (or corridor maps) are proposed to be expressly authorized, rather than implied, to remove any question over their use. The state should provide, either through model ordinances developed by the Montana Department of Commerce or through substantive direction in the statutes, guidance in their use.

In a number of areas, the recommendations focus on correcting problems with omissions in the statute. In general, the recommendations have tried to incorporate what has become, in APA's judgment, standard practice for planning and should be expressly authorized to provide clear guidance. For example, the report recommends that planning and zoning boards provide applicants with written decisions on variances and conditional use permits. We recognize that many cities and counties already do this as a matter of course. Without an express requirement to provide a written decision, other cities and counties may legally opt out of providing this important information to an applicant.

Several sections are recommended as candidates for redrafting and/or consolidation because they require the reader to jump back and forth through the Code to understand what is required, what is not required, and what is exempted when certain conditions are present.

Finally, it should be emphasized that, in APA's opinion, there are creative, thoughtful, and good faith efforts underway by the state government and counties, cities, and towns in implementing the provisions of S.B. 97, the 1999 amendment to the state's planning and zoning laws. Much progress is being made in formulating and adopting the growth policies that will serve as a basis for land-use regulation and public investment. Local governments are able to obtain solid, professional technical assistance in interpreting and applying state law from the Department of Commerce. APA has also been impressed by the evaluative studies undertaken by the Montana State Environmental Quality

Council in assessing how well the state laws are working. This report builds on the good foundation for planning established by these two agencies.

Recommendations on Planning for Growth

- (1) Require the preparation of a growth policy and zoning regulations in populous and rapidly growing counties.
- (2) Modernize the description and the elements of a growth policy to reflect contemporary practice and require that it contain a map.
- (3) Provide grants to local governments to prepare growth policies and authorize them to raise money to pay for planning and implementation.
- (4) Require subdivisions, zoning changes, and proposed public facilities and utilities to be consistent with the growth policy.
- (5) Require Part 1 zoning to be consistent with the growth policy.
- (6) Substantially increase the minimum area requirement for establishing new voluntary planning and zoning districts.
- (7) Require local governments to apply the growth policy in the administration of subdivision regulations.

Recommendations on Managing Growth

- (8) Require local governments to incorporate, in the absence of zoning, minimum lot area requirements into subdivision regulations if those lot area requirements are consistent with the growth policy.
- (9) Grant municipalities the authority to adopt adequate public facility requirements for all new development.
- (10) Replace the subdivision-specific environmental assessment with an environmental assessment on the growth policy itself.
- (11) Consolidate and redraft the minor subdivision review sections.
- (12) Remove the family transfer, boundary change, and agricultural use exemptions to subdivision review.
- (13) Authorize innovative land development control techniques and/or charge the Department of Commerce with developing model ordinances.
- (14) Authorize amortization of nonconforming land uses for all types of zoning.
- (15) Authorize official maps and corridor protection.
- (16) Evaluate existing annexation laws and identify options to the current statutory approaches.

Recommendations on Paying for Growth and Planning

- (17) Authorize local option development excise taxes to pay for required planning.
- (18) Authorize either a state level or a local option real estate transfer tax to pay for required planning.
- (19) Clearly authorize impact fees.
- (20) Authorize local governments to levy a fee to pay for the environmental assessment of growth policies in lieu of individual project-by-project assessments.

(21) Strengthen the bonding requirements for public improvements in subdivisions.

Recommendations on Planning Administration and Development Review

(22) Enact a vesting statute.

(23) Require written decisions by boards of adjustment on variances and conditional uses.

(24) Establish training and continuing education requirements for members of planning boards and board of zoning appeals.

(25) Require a uniform development permit review process at the local level.

(26) Establish permit enforcement procedures to provide adequately due process, predictability, and certainty.

Recommendations Providing for an Enhanced State Role

The recommendations above addressed modifications to existing statutes, new statutes to provide additional local authority, and provisions for funding local planning. They do not assume any substantive change on the role of state government in connection with planning. The State of Montana may consider the following recommendations if it wishes that there be an enhanced role for state government in planning, land use, and public investment.

(27) Establish a state planning commission.

(28) Engage Montanans in a statewide goal-setting process for planning and land use, followed by a crosscutting goals document.

(29) Develop an incentive-based state investment program that targets state growth-related expenditures to locally designated compact growth areas.

1.0 INTRODUCTION

In January 2000, the Montana Smart Growth Coalition initiated a year-long project with the American Planning Association's Research Department. The purpose of the project was to assess the need for statutory changes to the Montana Code Annotated (MCA) to improve planning and land-use control in the state that would provide a basis for proposed legislation. This project was to build upon research conducted by the Montana State Environmental Quality Council (EQC) Growth Study Subcommittee on land-use planning in its 1999 report, *Planning for Growth in Montana*, and the resultant legislative reforms enacted the same year through S.B. 97.

The study assignment to APA consisted of three tasks:

Task 1: *A survey and evaluation of state statutes affecting planning and land development control and judicial review of local land-use decisions by the Montana Supreme Court.* This would involve an evaluation of existing statutes in terms of structure, organization, substance, and clarity and an assessment of their regulatory purposes. It would also contain an assessment of state agency studies, proposed (but never enacted) legislation, and other literature that describes, critiques, or contains proposals for changes to Montana's statutes.

The evaluation was to focus on the basic planning, zoning, and subdivision statutes in the Montana Code Annotated (MCA), including the recent amendments contained in S.B. 97 that were introduced at the request of the EQC.

Task 2: *Small group interviews, held at various sites, convened by MSGC.* Candidates for the interviews were to include county and city officials, farmers, environmentalists, planners, home builders, developers, attorneys, and community leaders (depending on availability). The small group interviews would attempt to determine how the state statutes are affecting behavior by local governments, the private sector, and the state, where there are gaps in state law that should be addressed by new statutes, and other areas of potential concern. For the small group interviews, APA was to develop an outline of questions keyed to the statutes and practices in the state that would be provided to the interviewees ahead of time so they could come prepared. APA was to meet with representatives of local government associations and key state agencies in Montana.

Supplementing this task was the development of a questionnaire by APA to be administered on a statewide basis to individuals invited but unable to participate in the small group discussions or with individuals with whom APA staff wished to conduct more probing interviews.

Task 3: *Preparation of a report.* This was to involve preparation of a report, in both draft and final form. The draft report was to be circulated by the MSGC for comment, and APA would make revisions as appropriate. The report would include the results of tasks (1) and (2) above, as well as recommendations for change. The recommendation was to take the form of proposals for legislative changes, or specific language changes in the Montana Code.

1.1 ORGANIZATION OF REPORT

This report is divided into six sections. Section 1 covers introductory material, including the objectives of the study and the interests of the Montana Smart Growth Coalition. Section 2 is a brief summary of the principal statewide plans prepared by the State of Montana. Section 3 digests the state's enabling legislation for local planning and land-use control, and incorporates an analysis of relevant Montana Supreme Court

The State of Montana maintains or authorizes several plans that have land use implications.

and Attorney General decisions. Section 4 summarizes the results of six focus groups and a meeting with planners from the Flathead Indian Reservation conducted by APA and the MSGC in March 2000. Section 5 reviews the recommendations of several previous studies by the EQC. Section 6 sets forth a series of recommendations for changes in the MCA regarding planning and land-use control.

1.2 INTEREST OF MONTANA SMART GROWTH COALITION; MEMBERS

The Montana Smart Growth Coalition is a group of 27 nonprofit public interest organizations. Information on contacts and mission statements for each of the groups appear in Appendix E.

1.3 AMERICAN PLANNING ASSOCIATION; GROWING SMARTSM PROJECT

The American Planning Association (APA) is a nonprofit organization dedicated to advancing the art, science, and profession of urban, rural, and regional planning. APA encourages planning that contributes to the public well-being by developing communities and environments that more effectively meet the needs of all people. APA's 31,000 members include professional planners, planning commissions, elected officials, and citizens who interested in planning. It has offices in Washington, D.C. and Chicago, Illinois, where its 18-person Research Department is located.

The Research Department, established in 1949, provides subscription-based and contract research services on planning. It operates the Planning Advisory Service, which answers inquiries from its 1700 public and private sector subscribers, and publishes the Planning Advisory Report series and the monthly *PAS Memo*. Other Research Department publications include the newsletter, *Zoning News*, and *Land-use Law & Zoning Digest*, the monthly review of planning case law and commentary. The Research Department houses the 5,000-volume Merriam Center library, a specialized collection of books on planning topics. Finally, APA conducts contract research for a variety of public and private clients, including federal and state agencies, nonprofit organizations, and foundations.

The Growing SmartSM project is APA's multiyear effort to draft the next generation of model planning and zoning enabling legislation for the U.S. and to build a capacity within the APA to assist states and interest groups in the use of the model statutes and related information. Begun in 1994, the project has resulted in the release of an interim *Legislative Guidebook*, which contains the model statutes with supporting commentary. The *Guidebook* is intended to replace the *Standard State Zoning Enabling Act* and the *Standard City Planning Enabling Act* drafted in the 1920s by an advisory committee in the U.S. Department of Commerce appointed by then Commerce Secretary (and later President) Herbert Hoover. These two model acts formed the basis for, or influenced the drafting of, the enabling legislation for many states, including Montana.

2.0 RELEVANT STATE PLANS

The State of Montana maintains or authorizes several plans that have land-use implications. One is TransPlan 21, the state's 1995 multimodal transportation plan, which covers a 20-year period contains "policy goals and actions" to guide the state's transportation system. The Montana Department of Transportation (MDOT) also publishes an annual report that provides data on the characteristics of the transportation system in the state and describes progress on achieving the policy goals and actions. For example, under the "Land-use Planning and Transportation" section, a goal is to "encourage responsible jurisdictions to establish land-use planning and development permitting mechanisms to manage trans-

portation by building their planning capacity.” Examples of actions include: working with local jurisdictions to establish and implement a consistent approach for including land use and access management strategies in urban areas and Metropolitan Planning Organization (MPO) plans receiving state funding; working with MPOs and urban areas to develop a consistent land-use-driven travel demand forecasting capability; and consistently applying existing local development review authority to ensure that new development contributes to the cost of resulting transportation system improvements.¹ These actions appear to recognize the role of local land-use planning and the predictability it represents to provide reliable input to state-level transportation modeling.

The Montana Department of Commerce administers U.S. Department of Housing and Urban Development (HUD) grant programs: the Community Development Block Grant program; the Home Investment Partnership Programs; and the Emergency Shelter Grant program. The department publishes an annual action plan that governs the state’s administration of the three programs. For example, the plan contains an explanation of how the state will prioritize CDBG applications for economic development, public facilities, and housing, based on point factor evaluation systems.²

The Montana Department of Environmental Quality (DEQ), with the Department of Natural Resources and Conservation, administers two revolving loan fund programs, one for water pollution control projects (wastewater and nonpoint source projects) and the other for drinking water projects. Both programs provide at or below market interest rate loans to eligible Montana entities. These programs are funded with capitalization grants from the U.S. Environmental Protection Agency and are matched 20 percent with state-issued general obligation bonds. DEQ publishes annually an Intended Use Plan that contains priorities for projects which may need funding for the upcoming year.³ The current project eligibility criteria *do not* discuss relationships of proposed projects to local comprehensive planning.

The Department of Natural Resources and Conservation is authorized by statute to identify existing and potential natural areas on lands under its jurisdiction and annually prepare a register listing the existing natural areas on private, county, state, and federal land. In addition, it may prepare and implement every two years an administrative plan for the state’s natural areas system.⁴

The Department of Fish, Wildlife, and Parks is authorized to prepare a comprehensive state outdoor recreation plan, containing an evaluation of the demand for and supply of outdoor recreational resources and a program for implementation of the plan.⁵ Such a plan is used as a vehicle for distributing park acquisition and development monies to local governments under the federal Land and Water Conservation Fund Act of 1965.

¹Multimodal Planning Bureau, Transportation Planning Division, Montana Department of Transportation, *TransPlan 21: 1999 Annual Report* (Helena, Mont.: The Bureau, 1999), GA-18.

²Montana Department of Commerce, *Montana Consolidated Plan Annual Action Plan for Plan Year Beginning April 1, 1999* (Helena, Mont.: The Department, February 1999).

³www.deq.state.mt.us/ppa/tfa/index.html (August 2, 2000). The DEQ website includes the current Intended Use Plan for both revolving funds. See also MCA 76-5-1102 (Water Pollution Control State Revolving Fund) and MCA-6-221 (Drinking Water State Revolving Fund Act). These sections authorize the Intended Use Plan.

⁴MCA 76-12-121.

⁵MCA 23-2-103(1).

Finally, the state's historic preservation officer, subject to the supervision of the director of the state historical society, is required to prepare and annually review the state preservation plan, historic register nominations, and historic preservation grant activity.⁶

3.0 ANALYSIS OF ENABLING LEGISLATION FOR LOCAL PLANNING AND LAND- USE CONTROL

This section contains an overview of the substantive provisions of the Montana Code Annotated (MCA) as it relates to planning, zoning, subdivision, and related statutes. It integrates relevant Montana Supreme Court decisions and Attorney General opinions. This analysis is intended to provide a context for the analysis of the results of the focus groups and survey respondents as well as the recommendations for change that appear in the following sections.

3.1 PLANNING BOARDS

MCA 76-1-101 authorizes the governing body of any city or town, of more than one city or town, or of any county or combination thereof to create a planning board. The statutes encourage cooperative city-county planning where possible. For example, where a city council intends to create a city planning board, it must notify the county commissioners in writing of its intent to do so. The county commissioners in turn must decide within 30 days whether to form a city-county planning board or to permit the city to establish a city planning board on its own.⁷

The statutes provide that, once established, the planning board “shall prepare a growth policy” (emphasis supplied). “Growth policy” is the Montana term for a local comprehensive plan. The planning board “shall serve in an advisory capacity” to the local governing bodies that create it. The planning board may also propose “policies” for subdivision plats, the development of public ways, public places, public structures, and public and private utilities; the issuance of improvement location permits on platted and unplatted land; or the laying out and development of public ways and services to platted and unplatted lands.⁸

The governing body of any city, town, or county that has formed a planning board and adopted a growth policy and subdivision regulations *must* seek the advice of the appropriate planning board in all matters pertaining to the approval or disapproval of plats or subdivisions. However, the planning board may delegate to its staff the responsibility to advise the governing body on any or all proposed minor subdivisions.⁹ A city-county planning board may serve as the municipal zoning commission at the discretion of the city council.¹⁰ The governing

⁶MCA 22-4-423(5).

⁷MCA 76-1-105. MCA 76-1-112 also authorizes the conversion of existing city, county, or city-county planning boards into a joint city-county planning board with any other similar board or combination of boards. This is accomplished through an interlocal agreement.

⁸MCA 76-1-106. It is not clear whether the “policies” that a planning board may recommend are to be incorporated in the growth policy or are to be separate. The term, “improvement location permits,” is not defined in the statute, but it appears to mean an authorization to construct public improvements.

⁹MCA 76-1-107.

¹⁰MCA 76-1-108, citing MCA 76-2-307. A county planning board cannot be designated, however, as the county zoning commission under MCA 76-2-202, but there is nothing in either the planning or zoning statute to prohibit a person qualified to be on both bodies from being appointed to both. 43 Op. Att’y Gen. 52 (1989).

bodies of the city or county must “give consideration” to the recommendations of the city-county planning board, but are not bound by such recommendations.¹¹

A city-county planning board must consist of not less than nine members, a county planning board not less than five members, and a city planning board not less than seven members; the composition of membership is governed by a statutory formula.¹² A citizen member of a city planning board must be “qualified by knowledge and experience in matters pertaining to the development of the city,” but there is no similar requirement for citizen members of the city-county or county planning board.¹³

The city or county must provide suitable offices for the holding of meetings and the preservation of plans, maps, documents, and accounts for the planning board.¹⁴ The planning board must, among other things, provide an annual report to governing bodies represented on the board concerning the operation of the board and the status of planning within its jurisdiction.¹⁵ The board may appoint and prescribe the duties and fix the compensation of a secretary and any employees as are necessary to perform the duties and responsibilities of the board.¹⁶ Board members do not receive salaries for their duties, but may be reimbursed for transportation and actual expenses in connection with attending board meetings. The board may also pay for board members’ and employees’ actual expenses in attending regional or national conferences dealing with planning in another city, county, or state.¹⁷

A planning board is charged by statute with supervising its fiscal affairs and must submit an annual budget in the same manner as other departments of city and county governments. Funding for board operations are by appropriations made by the city or county governing bodies. The planning statutes authorize governing bodies to levy taxes for planning board purposes; depending on the type of county or city or town, the levy may not exceed between two to six mills.¹⁸ Planning boards may also accept gifts, donations, and grants. An unusual provision also authorizes the planning board to accept “any property (real, personal, or mixed) or any improved or unimproved park or playground.”¹⁹

3.2 GROWTH POLICY

Under MCA 76-1-601, a planning board “shall prepare and propose a growth policy for the entire jurisdictional area.” A “growth policy” is defined as “synonymous with a comprehensive development plan, master plan, or comprehensive plan that meets the requirements of

¹¹MCA 76-1-109

¹²MCA 76-2-101 (city-county planning board); MCA 76-1-211(county planning board); MCA 76-1-221 (city planning board).

¹³MCA 76-1-224 (city planning board). Compare with MCA 76-1-202 (qualifications of citizen members of city-county planning board) and MCA 76-1-212 (citizen members of county planning board).

¹⁴MCA 76-1-303.

¹⁵MCA 76-1-305.

¹⁶MCA 76-1-306.

¹⁷MCA 76-1-307.

¹⁸MCA 76-1-402 to -407.

¹⁹MCA 76-1-408.

76-01-601.”²⁰ The requirement for a growth policy is the result of amendments made to the statutes in 1999.

The statutes require that a growth policy include:

- (a) community goals and objectives;
- (b) maps and text describing an inventory of the existing characteristics and features of the jurisdictional area, including land uses; population; housing needs; economic conditions; local services; public facilities; natural resources; and other characteristics and features proposed by the planning board and adopted by the governing bodies;
- (c) projected trends for the life of the growth policy for the topical areas listed in (b) above;
- (d) a description of policies, regulations, and other measures to be implemented in order to achieve the community goals and objectives;
- (e) a strategy for development, maintenance, and replacement of public infrastructure including drinking water systems, wastewater treatment facilities, sewer systems, solid waste facilities, fire protection facilities, roads, and bridges;
- (f) an implementation strategy that includes a timetable for implementing the growth policy; a list of conditions that will lead to a revision of the growth policy; a timetable for reviewing the growth policy at least once every five years and revising the policy if necessary;
- (g) a statement explaining how governing bodies (cities, towns, and counties) will cooperate and coordinate with other jurisdictions; and
- (h) a statement explaining how the governing bodies will define the “criteria” for subdivision review described in MCA 76-3-603(3)(a). These criteria include “the effect on agriculture, agricultural water user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety.” In addition, the statement must explain how the governing bodies will evaluate and make decisions regarding proposed subdivisions in connection with these subdivisions, and how public hearings regarding proposed subdivisions will be conducted.²¹

The statutes also permit the planning board to include one or more neighborhood plans as part of the growth policy.²² MCA 76-1-601(3)(c) to

²⁰MCA 76-1-103(4).

²¹MCA 76-1-601(2)(a) to (2)(h). This description paraphrases the language in the statutes.

²²MCA 76-1-601(3)(a). But a neighborhood plan “must be consistent with the growth policy” or comprehensive or master plan. See *Ash Grove Cement Company v. Jefferson County*, 943 P.2d 85 (Mont. 1997). Here, the Court held that a “local vicinity plan” (LVP) was inconsistent with and violated the mandate of the master plan, which authorized LVPs only to the extent they were consistent with the master plan and designed to implement it; the LVP described the area it covered as rural residential and, in doing so, ignored the physical presence of a cement plant and the master plan’s classification of area around the cement plant and quarries as mining and industrial, but also purported to change the classification to a designation totally at odds with that contained in the master plan. Noting the requirement in MCA 76-1-601 for a survey of existing land uses, the Court also held that, because the LVP disregarded the actual use of land for areas to which it purported to apply, it was not a proper amendment to the master plan. *Id.*, at 93. The Court, in *Ash Grove*, expresses concern over the “piecemeal” adoption of amendment, commenting that while MCA 76-1-605 authorizes revision of a master plan “nothing in that statute supports the notion that revisions can be made which alter the master plan’s inherent jurisdiction wide nature and result in a patchwork plan for the jurisdictional area,” and quoting Daniel R. Mandelker, “The Role of the Local Comprehensive Plan in Land Use Regulation,” 74 *Mich.L.Rev.* 899, 946 (1976). *Id.*, at 93.

(f), taken together, provide that the growth policy may identify geographic areas where subdivisions would be exempted from the criteria for subdivision review described in MCA 76-3-608(3)(a). This exemption can occur when there is an assessment of the effect of subdivision on the criteria and the local governing body has adopted zoning regulations that are intended to address the subdivision review criteria. While not entirely clear, this language appears to suggest that (a) if a local government conducts an assessment of the overall impact of anticipated subdivision of a geographic area described in the growth policy, and (b) proposes and then adopts zoning regulations (*not* subdivision regulations) that would somehow address mitigation of impacts resulting from the overall pattern of subdivision in that geographic area, then (c) subdivision occurring within that area would be exempt from application of these criteria.

The planning board is charged with holding a public hearing on the growth policy and then recommending to the governing bodies the growth policy and “any proposed ordinances and resolutions for its implementation.”²³ The governing bodies may then adopt or revise a growth policy (or any of its parts), or reject it. They may also repeal it. If the governing bodies adopt a resolution of intention to adopt the growth policy, they may, in their discretion, submit the adoption to a referendum vote at the next general or special election. In addition, the qualified electors of the jurisdictional area included within the growth policy may by initiative or referendum adopt, revise, or repeal a growth policy.²⁴

Upon adoption of the growth policy, the governing bodies “must be guided by and give consideration to the general policy and pattern of development set out in the growth policy.” This is to apply to the: (a) authorization, construction, alteration, or abandonment of public ways, public places, public structures, or public utilities; (b) authorization, acceptance, or construction of water mains, sewers, connections, facilities, or utilities; (c) adoption of subdivision controls; and (d) adoption of zoning ordinances or resolutions.²⁵ The statutes also provide that when a growth policy has been “approved,” the city council or board of county commissioners may by ordinance or resolution, respectively, require subdivision plats to conform to the provisions of the growth policy. The governing bodies must then refer subdivision plats to the planning board to advise it as to compliance or noncompliance with the growth policy.²⁶ In the event of a proposed annexation under MCA Title 2, Part 47 (annexation with provision of services), the municipal governing body can only annex areas that, among other things, “conform to a growth policy.”²⁷

3.3 ZONING IN UNINCORPORATED AREAS

Zoning in unincorporated areas can occur by two methods: (1) the creation of a planning and zoning district, which must be a minimum of 40

²³MCA 76-1-603.

²⁴MCA 76-1-604. This section is problematic because a growth policy is a condition precedent to the adoption of a zoning ordinance under the county (Part 2) and municipal zoning enabling acts. If a growth policy is repealed by initiative, or there are parts of it that are repealed, and the growth policy no longer meets the requirements of the planning statutes, then there will be the question of whether the zoning ordinance remains valid.

²⁵MCA 76-1-605.

²⁶MCA 76-1-606. While this section refers to an “approved” growth policy, the other statutory provisions treat such a policy as “adopted.”

²⁷MCA 7-2-4734(3)

Upon adoption of the growth policy, the governing bodies “must be guided by and give consideration to the general policy and pattern of development set out in the growth policy.”

acres, known as “Part 1 zoning”; or (2) the establishment of county zoning, which can apply to all or part of the unincorporated area, known as “Part 2 zoning,” but which requires the adoption of a growth policy.

Part 1 Zoning. Under Part 1 zoning, the board of county commissioners may create a planning and zoning district upon petition of 60 percent of the freeholders in the affected area. However, if freeholders representing 50 percent of the titled property ownership in the district protest the establishment of the district within 30 days of its creation, the board of county commissioners may not create the district. An area included in a district that is the subject of a protest may not be included in a zoning district petition for a period of one year.²⁸

The planning and zoning district is administered by a commission consisting of the three county commissioners, the county surveyor, and a county official appointed by the county commission.²⁹ The expenses of the commission and its employees must be paid from a levy not to exceed one mill on the taxable valuation of the real property within the district.³⁰ The planning and zoning commission has a duty “to make and adopt a development pattern for the physical and economic development” of the district. The “development pattern” is not, strictly speaking, a plan in the same sense a “growth policy” is, but it may contain “accompanying maps, plats, charts, and descriptive matter,” to show the commission’s recommendation for development of the district. The development pattern may describe lawful and unlawful uses in districts, the height and bulk of future buildings, the areas of yards, courts, and other open spaces, and building setback lines.³¹ Existing nonconforming uses may be continued; there is no authorization for amortization of nonconforming uses in this part of the statutes as well as the rest of the MCA’s zoning provisions.³² The commission may adopt the “development district” after public hearing and notice.³³

Once the district is created, the board of county commissioners (who also sit on the planning and zoning commission) is given the authority to grant variances from the recommendations of the planning and zoning commission. Moreover, the planning and zoning commission may propose to the county commissioners “drafts of resolutions” to carry out the development districts or any part thereof previously adopted by the commission, including “zoning and land-use regulations,” “the making of official maps,” and “procedures for appeals from decisions made under the authority of such regulations.”³⁴ The board of county commissioners may adopt such resolutions. The planning and zoning commission may authorize and provide for the issuance of permits for construction, alteration, or enlargement of any building or structure in a district and to pro-

²⁸MCA 76-2-101. As one reviewer of a draft of this report pointed out, nothing requires the board of county commissioners to approve the establishment of Part 1 zoning, even if all the statutory requirements have been satisfied.

²⁹MCA 76-2-102.

³⁰MCA 75-1-102(3).

³¹MCA 76-2-105.

³²MCA 76-2-105.

³³MCA 76-2-106.

³⁴MCA 76-2-107. The term “official map” is not defined in the statute, so it is not clear whether it means the equivalent of a zoning district map or a regulatory device to prevent construction of new buildings or structures in the proposed rights-of-way of mapped streets.

vide for fees, which go into the county general fund.³⁵ The creation of a planning and zoning district does not abrogate the power of incorporated communities to approve subdivision plats in unincorporated areas adjacent to their corporate limits except and until the board of county commissioners having jurisdiction over such adjacent areas establishes a planning commission and adopts initial regulations for subdivision control within those areas.³⁶ The statutes prohibit a district from regulating lands used for grazing, horticulture, agriculture, and the growing of timber.³⁷

There have been several Montana Supreme Court decisions interpreting the provisions of Part 1 zoning in terms of whether a separate comprehensive plan is necessary or, where a plan exists, whether it is binding, and what the requirements for a “development pattern” mean. In *Montana Wildlife Federation v. Sager*, 620 P. 2d 1189 (Mont. 1980), the Montana Supreme Court held that, while the statutes require the preparation of a “development pattern” adopted by the district’s planning and zoning commission, there is no requirement for a comprehensive development plan under Part 1 zoning. However, the Court has also held that once a “general plan,” or master or a comprehensive plan, which is part of the “development pattern” of a zoning district, is adopted, the planning and zoning commission must substantially comply with that plan.³⁸ In *Petty v. Flathead Board of Commissioners*, 754 P. 2d 496 (Mont. 1988), the Court held that MCA 76-2-104(2), which requires that the development pattern “shall show . . . districts, some of which it shall be lawful and within others of which it shall be unlawful . . . to carry on certain [uses],” did not require that a planning and zoning district be divided into multiple use districts. The plaintiffs had contended that the language of this section precluded a single use zone for the entire district.

The Montana Attorney General has opined that, while a planning and zoning district commission has the authority to determine the development pattern of a district, nothing prohibits the commission from consulting with the county commission or the county planning board. MCA 76-1-603 requires bodies to be “guided by and give consideration to” the master plan and, therefore, the district board may set development patterns but they must be “consistent with” any county master plan.³⁹

Part 2 Zoning. Under Part 2 zoning, a board of county commissioners that has adopted a growth policy for the entire jurisdictional area may adopt zoning regulations for all or part of the jurisdictional area.⁴⁰ Zoning regulations must be made “in accordance with the growth policy”—the term “growth policy” replaced “comprehensive plan” as a result of a 1999 amendment. Regulations also must, “as nearly as possible, be made compatible with the zoning ordinance of the municipality within the jurisdictional area.”⁴¹ Under the statute, the county plan-

³⁵MCA 76-2-108.

³⁶MCA 76-2-112.

³⁷MCA 76-2-109.

³⁸*Bridger County Property Owners’ Association, Inc. v. Planning and Zoning Commission for Bridger Canyon Zoning District*, 890 P.2d 1268, 1277 (Mont. 1995) (holding that planning and zoning commission, in conditionally approving a planned unit development, exceeded its authority as approval did not comply with language of general plan for zoning district and planning documents were internally inconsistent). The plan was not, however, a general plan for the county, but only for the Bridger Canyon zoning district.

³⁹48 Op. Att’y Gen’l No. 5 (1999).

⁴⁰MCA 76-2-201.

⁴¹MCA 76-2-203.

ning board, or the city-county planning board, is required to recommend boundaries and appropriate regulations, but the recommendations are advisory only.⁴² An optional authorization is provided for the appointment of a five-person zoning commission to recommend amendments to the zoning regulations or zoning classifications.⁴³ A board of county commissioners may adopt, on an emergency basis, an interim zoning map or regulations by resolution for a period not to exceed one year if the county is conducting or in good faith intends to conduct studies within a reasonable time, or has held or is holding a hearing for the purpose of considering a growth policy, zoning regulations, or amendments, extensions, or additions to the growth policy. The county can extend the interim resolution for one year, but no more than one extension may be made.⁴⁴

The board of county commissioners may provide for the issuance of “location or conformance permits” and may collect a fee for each permit.⁴⁵ This language, while unclear, appears to authorize what would otherwise be known as a zoning permit, issued before a use is commenced or building or structure is constructed, and a certificate of compliance, which is the determination by the local government that the use, building, or structure complies with the zoning code and may be occupied. The statute also authorizes enforcement of zoning provisions and appointment of enforcing officers.⁴⁶

The county commission must provide for the appointment of a five-person board of adjustment with the power to hear appeals from determinations of administrative officials, to hear and decide special exceptions, and to authorize variances; the language of the statutes is drawn from the Standard State Zoning Enabling Act.⁴⁷ Appeals from decisions of the board may be made to a court of record; the court may reverse or affirm, wholly or partly, or may modify the decision brought up by review.⁴⁸ A court has the power to award costs in an appeal, but only when it appears to the court that the board of adjustment “acted with gross negligence, in bad faith, or with malice in making the decision appealed from.”⁴⁹

3.4 ZONING IN MUNICIPALITIES

The municipal zoning enabling legislation is similar to that for counties. For example, zoning must also be “made in accordance with a growth policy,”⁵⁰ interim zoning is authorized,⁵¹ a board of adjustment must be established,⁵² and the city or town council may provide for enforcement.⁵³

⁴²MCA 76-2-204.

⁴³MCA 76-2-220.

⁴⁴MCA 76-2-206.

⁴⁵MCA 76-2-207.

⁴⁶MCA 76-2-210.

⁴⁷MCA 76-2-221 to -226. Compare with Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act* (Washington D.C.: U.S. G.P.O. 1926, rev'd ed.), Sec. 7.

⁴⁸MCA 76-2-227.

⁴⁹MCA 76-2-228.

⁵⁰MCA 76-2-304.

⁵¹MCA 76-2-306.

⁵²MCA 76-2-321 to -326.

⁵³MCA 76-2-308.

In contrast to the county statutes, however, a city or town council or other legislative body seeking to establish zoning for the first time must appoint a zoning commission to recommend the boundaries of the original districts and appropriate regulations, to hold public hearings, and to make a report to the legislative body.⁵⁴

The municipal zoning statutes contain a protest provision that requires that when a protest is signed by the owners of 25 percent or more of the areas of the lots included in any proposed change or those lots 150 feet from a lot included in a proposal, then the amendment cannot become effective until two-thirds of the present and voting members of the municipal legislative body vote for the change.⁵⁵

Municipalities have, under certain conditions, the ability to extend the application of their zoning and subdivision regulations beyond their corporate limits in any direction, up to three miles for a city of the first class, up to two miles for a city of the second class, and up to one mile for a city or town of the third class. This authority is only conferred on municipalities that have adopted a growth policy, but does not apply in locations where a county has adopted a growth policy and accompanying zoning or subdivision regulations. Under these provisions, a municipality may enforce zoning or subdivision regulations as if the affected property were in its corporate limits.⁵⁶

While local governments cannot control the land use of state government or other local governments, MCA 76-2-402 contains an interesting provision requiring that when an agency proposes to use public land contrary to local zoning regulations, the local board of adjustment must hold a hearing “to allow a public forum for comment on the proposed use.” The board, however, does not have power to deny the proposed use.⁵⁷

In *Lowe v. City of Missoula*, 525 P. 2d 551 (Mont. 1974), the Montana Supreme Court interpreted MCA 76-2-304 (the purpose section of the municipal zoning enabling act) as establishing a 12-point test which a municipal governing body must consider and apply to a rezoning ordinance. One of the factors is whether the new zoning will be “in accordance with a comprehensive plan,” the language in the statute at the time.⁵⁸ There is no difference between an initial zoning and rezoning under the municipal enabling acts, the Court subsequently ruled in *Schanz v City of Billings*, 597 P.2d 67 (Mont. 1979). Both are legislative acts entitled to the presumptions of validity and reasonableness. However, a zoning or rezoning ordinance, is invalid, said the Court, unless it is made in accordance with provisions of MCA 76-2-304, which mandates the consideration of 12 independent factors prior to the passage of any zoning ordinance.⁵⁹

⁵⁴MCA 76-2-307.

⁵⁵MCA 76-2-305(2).

⁵⁶MCA 76-2-310, 76-2-311. The authority granted by these two sections does not apply to a municipality that has established a commission-manager form of government. MCA 76-2-312.

⁵⁷MCA 76-2-402.

⁵⁸MCA 76-2-203 establishes the same criteria for county-initiated zoning. It is important to recognize that the *Lowe* decision interprets the purpose language in the statute, and how that language affects the validity of rezoning, and it not a decision interpreting the federal or state Constitution.

⁵⁹*Schanz* overruled in part *Lowe v. City of Missoula*, 525 P.2d 551 (Mont. 1974), which had held that an initial zoning was legislative, and a rezoning was administrative or quasi-judicial in nature. However, as noted above, *Lowe* initially established the 12-point test for zoning and rezoning. This test does not apply to zoning and rezoning actions taken under MCA 76-2-101 to -112, by county planning and zoning commissions. *Montana Wildlife Fed'n v. Sager*, 620 P.2d 1189 (Mont. 1980).

MCA 76-2-402 contains an interesting provision requiring that when an agency proposes to use public land contrary to local zoning regulations, the local board of adjustment must hold a hearing “to allow a public forum for comment on the proposed use.”

In *Little v. Board of County Commissioners*, 631 P.2d 1282 (Mont. 1981), the Court confirmed that a county must have adopted a “comprehensive development plan” under MCA 76-2-201 before it may engage in zoning, except for interim zoning regulations under the very limited circumstances stated in MCA 76-2-206. Therefore, said the Court, because the zoning regulations, under the language in the state statutes at the time, must be “made in accordance with a comprehensive development plan,” the plan is a prerequisite for, and an essential guide to, county zoning. Nonetheless, strict compliance of the zoning regulations would unduly restrict their flexibility and regulations must instead “substantially comply” with the plan.

Thelen v. City of Missoula, 543 P.2d 173 (Mont. 1975) upheld the constitutionality of statutes providing for community residential facilities for the developmentally disabled in all residential zones, including, but not limited to, residential zones for one-family dwellings (MCA 76-2-411 to -412). The state legislature, said the Court, has the power to modify or withdraw various powers given to a municipality, and a municipality should have revised its zoning regulations with respect to such facilities once the statutes were enacted that modified municipal authority.

In an interpretation of MCA 76-3-310 and -311, the Attorney General has opined that a city of the first class may extend its zoning regulations up to three miles from the city limits even though this would encompass land outside the county where the city lies. 43 Op. Att’y Gen’l 64 (1989). The Attorney General has also interpreted MCA 76-2-327 as barring a legislative body from providing for an optional appeal from a zoning board of adjustment to the legislative body itself; the Montana Code provides only for a judicial appeal from a board of adjustment and a legislative body cannot reserve a right of appeal to itself. 38 Op. Att’y Gen’l 338 (1980).

3.5 MORATORIA

While Montana has no express legislation authorizing moratoria, the Supreme Court found adequate authority for cities to adopt moratoria in MCA 76-2-301, in *Diehl Company v. City of Helena*, 593 P.2d 458 (Mont. 1979). Here, a one-year moratorium on conditional use permits for shopping centers outside the central business district was challenged. The moratorium was proposed and adopted at a session of the City Commission intended to be a hearing on the conditional use application of the plaintiff. The enabling statutes provide adequate authority for a moratorium, so long as they are reasonable in length and scope, limited in purpose to promote the health, safety, morals or general welfare of the community, and meet the purposes of zoning as stated in MCA 76-2-304. However, as a moratorium is a zoning ordinance or amendment, it must be adopted after a public hearing pursuant to MCA 76-2-303. Even if it were adopted as an interim ordinance under MCA 76-2-306, it would still have to be adopted according to specified procedures that include a public hearing. As there was no public hearing, said the Court, the moratorium was invalid.

3.6 FLOODPLAIN AND FLOODWAY MANAGEMENT

Montana has a Floodplain and Floodway Management Act, MCA, Title 76, Chapter 5, and the lead state agency for administering it is the Department of Natural Resources and Conservation. Under MCA 76-5-301, local governments must adopt land-use regulations that meet or exceed minimum standards of the department in regards to controlling development in the designated floodplain or floodway. The department

must enforce its own minimum standards through a state permit system when the local government has failed to adopt such land-use regulations after receiving state notice.

3.7 SUBDIVISION AND PLATTING

Title 76, Chapter 3, of the Montana Code governs subdivision and platting (the Subdivision and Platting Act). MCA 76-3-103(15) defines a “subdivision” as

a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and further includes any resubdivision and further includes a condominium or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes.

The Subdivision and Platting Act provides for exemptions from local review of several types of land divisions. MCA 76-3-207 requires that the following types of land divisions are subject to the surveying requirements of MCA 76-3-401, but do not amount to subdivisions:

- (a) divisions for the purpose of relocating common boundaries;
- (b) divisions made outside of platting subdivisions for the purpose of a single gift or sale in each county to each member of the landowner’s immediate family (this is known as a “family transfer” exemption);
- (c) land divisions exclusively for agricultural purposes.

A report by the State of Montana’s Legislative Audit Division in June 2000 stated that, in several counties it surveyed, family transfers and boundary relocation exemptions account for “a significant portion of land divisions in the county.” For example, in Flathead County, family transfers accounted for 46 percent and boundary relocations were 13 percent of the applications received for land divisions in fiscal year 1998-99. In Gallatin County, family transfers accounted for 33 percent of the applications for land divisions and 43 percent related to boundary relocations during the same fiscal year.⁶⁰

Montana law requires the governing body of every county, city, or town to adopt and provide for the enforcement and administration of subdivisions.⁶¹ Thus, in contrast with zoning, which is *optional*, subdivision regulation is *mandatory* in Montana.

The statutes require that subdivision regulations be adopted by the governing body only after a hearing. Subdivision review is a two-part process, review of a preliminary plat and a final plat, which is recorded. There is also an abbreviated process for review of minor subdivisions. The statutes specify minimum content requirements for subdivision regulations, which include:

- (a) provisions for an environmental assessment;
- (b) procedures for the submission and review of subdivision plats;

⁶⁰Legislative Audit Division, State of Montana, *Performance Audit: Subdivision Approval Process—Department of Environmental Quality* (Helena, Mont.: The Division), 4 (“Performance Audit”).

⁶¹MCA 76-3-501.

- (c) the form and content of preliminary plats and documents to accompany the final plats;
- (d) identification of areas unsuitable for subdivision due to natural or human-caused hazards;
- (e) prohibition of subdivisions for building purposes for areas within the 100-year floodway;
- (f) standards for the design and arrangement of lots, streets and roads, grading and drainage, water supply, sewage, and solid waste disposal that meet regulations adopted by the department of environmental quality, and the location and installation of utilities;
- (g) procedures for review of preliminary plats by affected public utilities and agencies of local, state, and federal government having a “substantial interest” in a proposed subdivision;
- (h) procedures for the administration of park and open-space dedication requirements; and
- (i) provisions for the establishment and recording of ditch easements.⁶²

The governing body must require the subdivider to complete improvements within the subdivision prior to approval of the final plat or to provide a bond or other reasonable security in lieu of completing the improvements.⁶³ The statutes do not, however, authorize a maintenance bond, which would go into effect after the improvements have been constructed, and ensure that they will last for at least one building season.

The governing body may also provide for granting variances from the subdivision regulations “when strict compliance will result in undue hardship and when it is not essential to the public welfare.”⁶⁴

Under MCA 76-3-510, a local government may require a subdivider to pay or guarantee payment for part or all of the costs of extending capital facilities related to public health or safety, including but not limited to public roads, sewer lines, water supply lines, and storm drains to a subdivision. The costs must reasonably reflect the expected impacts directly attributable to the subdivision.

MCA 76-3-511 limits the ability of local governments to adopt regulations for public infrastructure and water and sewer facilities that are more stringent than state rules or guidelines that address the same circumstances.⁶⁵ The statute allows a local government to enact more stringent provisions when the proposed local standard or requirement protects and can mitigate harm to public health or the environment and is achievable under current technology, and provided there are written findings regarding supporting studies and information. The statute allows a person to challenge local government regulations in areas in which no state regulations or guidelines existed and the state subsequently adopts regulations or guidelines that are less stringent than the local requirements.

⁶²MCA 76-3-504.

⁶³MCA 76-3-507.

⁶⁴MCA 76-3-506.

⁶⁵The statute refers to “guidelines,” which are usually nonbinding examples, in contrast to rules.

MCA 76-3-501(2) provides a form of vesting for subdivisions (but not for other types of development permit approvals); review and approval of subdivisions may occur only under those regulations in effect at the time an application for approval of a preliminary plat is submitted or for an extension under MCA 76-3-610.⁶⁶

Under the review procedures, a subdivider must present the preliminary plat to the governing body or to the agent or agency designated by the local government, unless the plat is a minor subdivision subject to a summary review. The plat must show all pertinent features of the proposed subdivision and all proposed improvements.⁶⁷ Counties must refer a preliminary plat that is within a certain distance of a city or town to the governing body or its designated agent for “review and comment”; the distance requirement varies by class of municipality.⁶⁸

Montana law provides for subdivisions to be subject to an environmental assessment that accompanies the preliminary plan. For major subdivisions, this assessment includes a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available groundwater information, and a description of the topography, vegetation, and wildlife within the area of the proposed subdivision; a summary of the probable impacts on the criteria described in MCA 76-3-608; a community impact report that addresses the anticipated needs of the proposed subdivision for local services; and any additional and relevant information related to the public services, infrastructure and other related requirements for the subdivision as may be requested by the governing body.

The Subdivision and Platting Act allows subdivisions to be exempt from an environmental assessment under two sets of conditions: (1) the subdivisions are totally within a jurisdictional area where there is an adopted growth policy, zoning regulations, and a strategy for development, maintenance, and replacement of public infrastructure pursuant to MCA 76-1-601; or (2) the planning board decides to exempt a proposed subdivision from “any portion” of the environmental assessment if: (a) the subdivision is proposed in an area for which a growth policy has been adopted and the proposed subdivision will be in compliance with that growth policy; and (b) the subdivision will contain fewer than 10 parcels and less than 20 acres.⁶⁹

The governing body or designated agent or agency must review the preliminary plat to determine whether it conforms to the growth policy (if one has been adopted), to the provisions of the subdivision and platting act, and to the subdivision regulations. The governing body—not the designated agent or agency—must approve, conditionally approve, or disapprove the preliminary plat within 60 working days of its presentation unless the subdivider consents to an extension of the review period.⁷⁰ The subdivision is subject to a public hearing, with published notice and notice to adjoining property owners.⁷¹ In approving, conditionally approving, or disapproving the subdivision, the governing body must

⁶⁶Preliminary subdivision approvals are valid for not more than three calendar years or less than one calendar year, except that the governing body, at the request of the subdivider, may extend its approval for no more than one calendar year, or longer if the extension is included as a specific condition of a written agreement between the governing body and the subdivider. MCA 76-3-610, citing MCA 76-3-507.

⁶⁷MCA 76-3-601(1).

⁶⁸MCA 76-3-601(2)(b).

⁶⁹MCA 76-3-210.

⁷⁰MCA 76-3-604.

⁷¹MCA 76-3-605.

issue written findings of fact that “weigh” the criteria contained in MCA 76-3-608(3).⁷² After approving the preliminary plat, the governing body and its subdivisions may not impose any additional conditions as a prerequisite to final plan approval, providing the approval is obtained within the original (maximum three calendar years) and extended approval period provided for in the statute.⁷³

The final plat review does not require a public hearing, but the governing body must review the plat to determine whether it meets statutory and local regulatory requirements, including conditions of approval set forth on the preliminary plat.⁷⁴ A governing body may not deny or condition a subdivision approval unless it provides a written statement to the applicant detailing the circumstances of subdivision denial or condition imposition. The written statement must include information regarding the appeal process for denial or condition imposition.⁷⁵

A minor subdivision is one in which the plat contains five or fewer parcels when proper access to all lots is provided, when no land in the subdivision will be dedicated to public use for parks and playgrounds, and when plats have been approved by the state department of environmental quality under part 1 of chapter 4, Title 76, of the MCA (the Sanitation in Subdivisions Act). Local subdivision regulations must include provisions for a summary review of such minor subdivisions. Unless local regulations provide otherwise, such subdivisions are exempt from a hearing and application of the “public interest” criteria in MCA 76-3-608(3)(a) if they are in a jurisdictional area covered by a growth policy and are subject to Part 1, Part 2, or municipal zoning regulations. The governing body must approve, conditionally approve, or disapprove such subdivisions within 35 days of submission.⁷⁶ The first subdivision in a tract of record is not subject to a public hearing and preparation of an environmental assessment, but subsequent subdivisions from the same tract of record must be reviewed under MCA 76-3-505. As is the case for preliminary major subdivisions, the governing body must state in writing the conditions that must be met if the minor subdivision is conditionally approved. If the minor subdivision is disapproved, the governing body must also state what local regulations would not be met by the minor subdivision.

The Subdivision and Platting Act requires a subdivider, under certain conditions, to dedicate to the governing body a cash or land donation for parkland. The statutes provide a detailed formula for the percentage of land to be dedicated. The governing body may not use more than 50 percent of the money for maintenance of parks to serve the subdivision. The statute exempts certain developments from the park dedication requirement, including a minor subdivision, land proposed for subdivision into parcels larger than five acres, and subdivision into parcels that are all nonresidential.⁷⁷

⁷²MCA 76-3-608.

⁷³MCA 76-3-610(2).

⁷⁴MCA 76-3-611.

⁷⁵MCA 76-3-620.

⁷⁶MCA 76-3-505.

⁷⁷MCA 76-3-621. The difficulty with the exemption for nonresidential parcels would occur in a jurisdiction in which there is no zoning and therefore no way of controlling whether or not the parcels will be residential.

MCA 76-3-625 combines a conventional appeal with a separate damages remedy for an arbitrary and capricious final action or regulation. It authorizes a person who has filed an application for a subdivision under the subdivision and platting statutes to bring an action in district court to sue the governing body to recover “actual damages” caused by a “final” action, decision, or order of the governing body or regulation adopted pursuant to Chapter 3 that is “arbitrary and capricious”—in essence a damages remedy for a substantive due process violation. The statute does not define what is “final” or what “actual damages” are.

The statute also authorizes an appeal by a person “aggrieved” of a decision of the governing body to approve, conditionally approve, or disapprove a proposed preliminary plat or final subdivision plat within 30 days after the decision and it specifies who may appeal. The statute requires that the petition must specify the grounds upon which the appeal is made.⁷⁸

A number of Montana Supreme Court decisions have addressed the criteria under which subdivisions must be approved. In *Vergin v. Flathead County*, 996 P.2d. 882 (Mont. 1999) involving an appeal from a denial of a subdivision, the Court examined the language in MCA 76-3-608, which requires local governing bodies to either approve, conditionally approve, or reject applications under criteria enumerated in the statute. The county commission had rejected the plat as having too high a density and for being substantially noncompliant with the Flathead County Master Plan. The developer pointed out that one of the findings of the county commission was not based on the criteria (the five-acre rule—a historic practice of limiting development in agriculture/silvaculture areas to no more than one lot per five acres), but the court found that the five-acre rule only played a minor part in the commission’s decision and that there were other findings supporting the rejection that were founded on the statutory criteria. The developer contended that the commission decision was a mere recitation rather than true findings because it was repeating in summary form what the county development office found in its report. The Court found that the development office that generated the report on which the county commission had relied had conducted detailed fact-finding that related to statutory criteria on the effect of the subdivision on agriculture, the natural environment, wildlife and wildlife habitat. The Court saw no problem with the commission’s approach in summarizing the express findings of the development office in its denial.

In *Burnt Fork Citizens Coalition v. Board of County Commissioners of Ravalli County*, 951 P. 2d 1020 (Mont. 1997), the Court held that county subdivision regulations, which mirrored eight criteria set forth in the state subdivision and platting act prior to a 1993 amendment of the act, which reduced the criteria to five in MCA 76-3-608(3)(a), were not impliedly repealed by amendments to the act. Therefore the board of county commissioners was required to make findings regarding all eight criteria in

⁷⁸There is the question of whether the approval of a preliminary subdivision is a final action, decision, or order that should be the subject of an appeal. A preliminary subdivision approval is just that—preliminary—and could conceivably be modified by the governing body through a petition for a variance under the subdivision regulations, as authorized under MCA 76-3-506. In a decision that predated MCA 76-3-625, which was enacted in 1995, the Montana Supreme Court held that it had no jurisdiction to consider the appeal of a conditional approval of a preliminary plat. *Sourdough Protective Association v. County Commissioners of Gallatin County*, 833 P.2d 207 (Mont. 1992). See also *City of Kalispell v. Flathead County*, 859 P. 2d 458 (1993) (holding that the Subdivision and Platting Act did not expressly provide for the judicial appeal of a governing body’s decision to approve or disapprove a preliminary subdivision plat).

determining whether the subdivision proposal was in the public interest. The Court observed the state standards were referred to in the act were minimum requirements and that county regulations which still contained the additional three criteria were not plainly or irreconcilably repugnant to or in conflict with the act. Local governing bodies, the Court said, are “not necessarily required to maintain their subdivision regulations in precise accordance with the language of the [a]ct,” if the amended 1993 act were considered as a whole. The Court also noted that MCA 7-3-501 provides that subdivision review must occur “under those regulations in effect at the time an application for approval . . . is submitted to the governing body.” Therefore, the county commission was bound to apply its subdivision regulations, including the eight criteria, to the review of the plat, and that in granting the subdivision approval when some of the criteria were not met, the county commission acted outside its jurisdiction.

In *Christianson v. Gasvoda*, 789 P. 2d 1234 (Mont. 1990) the Court, citing MCA 76-3-608(1), upheld a county commission’s denial of a subdivision based on a determination that the proposed development was not in the public interest. Evidence was presented to the commission that indicated that development in the proposed subdivision would increase surface water drainage. There was also evidence that the developer’s supplemental engineering plan, which provided for the building of two water detention ponds to hold surface water temporarily, would not solve the drainage problem. The county commission gathered this evidence from both the developer and protesting neighbors on the drainage issue before making its decision. The county commission, concluded the court, did not therefore abuse its discretion in denying the developer’s application.

The Court has also ruled that a minor subdivision which qualifies for summary review must meet the “public interest” requirements of the Subdivision and Platting Act.⁷⁹ Exceptions in statutes that protect the public welfare are given a narrow construction under Montana case law, and the general rule in the act is that subdivisions must be found to be in the public interest. Therefore, said the Court, the absence of an express exemption of minor subdivisions from the public interest test should be interpreted to mean there is no such exemption.

Lechner v. City of Billings, 797 P.2d 191 (Mont. 1990) upheld the authority of a municipality to assess a “system development fee” for water and sewer purposes. Under the fee requirements, any developer or landowner seeking initial attachment to, or upgrades to their attachment to, the water or sewer system would pay a fee scaled to the size of the property’s water meter. The monies from the fees were placed in a separate fund and spent solely on improvements to the water and sewer systems. The Montana Supreme Court ruled that the municipality had the authority to institute system improvement fees for funding a portion of the cost of future system expansion, although Montana statutes do not specifically provide for this.

3.8 SANITATION IN SUBDIVISIONS ACT

Title 76, Chapter 4 of the MCA is the Sanitation in Subdivisions Act, which is intended to protect the quality and potability of water for public water supplies and individual wells. The act charges the Department of Environmental Quality (DEQ) with adopting rules, including sanitary standards, necessary for administration and enforcement of the act. The rules must provide the basis for approving subdivision plats for various

⁷⁹*State ex rel. Florence-Carlton School District v. Bd. of County Commissioners of Ravalli County*, 590 P.2d. 602 (Mont. 1978).

types of water (including stormwater drainage), sewage facilities, and solid waste disposal, both public and private, and must be related to the size of lots; contour of land; porosity of soil; groundwater level; distance from lakes, streams, and wells; type and construction of private water and sewage facilities, and other facts affecting public health and quality of water for uses relating to agriculture, industry, recreation, and wildlife.⁸⁰ The act affects subdivisions of land that create one or more parcels containing less than 20 acres, exclusive of public roadways.⁸¹ Review authority is shared jointly by the DEQ and local departments or boards of health, which must be certified by DEQ in order to enforce the act.⁸² The authority to inspect and monitor installation of sewage disposal and water supply systems and to prevent the occurrence of water pollution problems associated with subdivision development is granted to the reviewing authority (the DEQ or local health officials).⁸³

Until a local governing body has certified that a subdivision is to be provided with municipal facilities for water supply and disposal of sewage and solid waste, or the reviewing authority has indicated that subdivision is subject to no restrictions, the act bars a person from filing the subdivision plat with the county clerk and recorder, disposing of any lot within a subdivision, constructing facilities for water supply or sewage or solid waste disposal, erecting any building or shelter in the subdivision which requires water, sewer, or solid waste services, or occupying any permanent buildings in the subdivision.⁸⁴ The county clerk and recorder may not file or record any map or plat showing a subdivision unless it complies with the act.⁸⁵ For example, the county clerk and recorder may not accept a subdivision unless the person wishing to file the plat has obtained a certificate from the governing body that the subdivision is inside the jurisdictional area of a growth policy or a class 1 or class 2 municipality and will be provided with municipal facilities for the supply of water and the disposal of sewage and solid waste.⁸⁶

The act gives the DEQ authority to delegate to local government the authority to review a subdivision when the subdivision involves five or fewer parcels and the local government has qualified personnel to adequately review the water supply and sewage and waste disposal facilities proposed for the subdivision.⁸⁷

Skinner Enterprises, Inc. v. Lewis and Clark County Board of Health, 950 P. 2d 733 (Mont. 1997) examined the complex interaction between the Subdivision and Platting Act and the Sanitation in Subdivisions Act as well as the authority of local boards of health with respect to subdivisions. The Montana Supreme Court ruled that a local board of health is not a “governing body” as defined in MCA 76-1-103(6) and therefore does not have the authority to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. Only a board of county commissioners or a governing body of a city or town has that power under the Subdivision and Platting Act. However, the Sanitation in Subdivisions

⁸⁰MCA 76-4-104. The rules appear at ARM 17.36.101 through 17.36.805.

⁸¹MCA 76-4-102(13) (definition of “subdivision”).

⁸²See ARM 17.36.116 (Certification of Local Department or Board of Health).

⁸³MCA 76-4-107.

⁸⁴MCA 76-4-121.

⁸⁵MCA 76-4-122(1).

⁸⁶MCA 76-4-122(2)(b).

⁸⁷MCA 76-4-128(1). See also ARM. 17.36.108 (Local Review).

[The state’s Legislative
Audit Division]
observed that “DEQ
reviews are not adding
value to the sanitation
review and approval
process. . . . [T]he
current dual review
creates time delays in
the approval process.”

Act, at MCA 76-4-104(3)(a), delegates to a local board of health the power to review select subdivisions—those with five or fewer parcels—but not the power to promulgate regulations.

The Court also examined the question of whether the board of health can regulate sanitation in subdivisions, regardless of size. The Court pointed out that MCA 50-2-116(1)(i) states that a local board of health “shall . . . adopt necessary regulations that are not less stringent than standards for the control and disposal of sewage from private and public buildings that is not regulated by . . . Title 76, chapter 4.” As noted above, the DEQ must adopt sanitary standards for subdivisions under the Sanitation in Subdivisions Act, which applies to subdivisions with parcels of less than 20 acres. Therefore, all subdivisions with parcels of 20 acres or more are not regulated under title 76, chapter 4, and are within the jurisdiction of local boards of health. But MCA 76-4-122 (2)(a) provides that no subdivision plat may be recorded without the mark of approval of the “local health official having jurisdiction.” Interpreting the two acts and their legislative history and the general authority given to local health boards, the Court concluded that the purpose of MCA 50-2-116 (1)(i) was to require boards of health to regulate sanitation where the DEQ does not, while authorizing boards of health, at their discretion, to regulate sanitation in subdivisions where the DEQ has jurisdiction.

An audit report by the State of Montana’s Legislative Audit Division released in June 2000 looked at the types of reviews conducted by DEQ and local health department officials. It pointed out that MCA 76-4-104 designates DEQ or a local department or board of health as the primary sanitation reviewing authority, but also requires submission of all proposals to DEQ for review. The audit observed that “DEQ reviews are not adding value to the sanitation review and approval process. . . . [T]he current dual review creates time delays in the approval process.”⁸⁸ The audit recommended that the statute be revised to designate the local review as the only required approval authority and that the DEQ review should be eliminated. The audit recommended that DEQ strengthen the current sanitation review process by: (1) establishing ongoing maintenance and revision of program regulations as a priority; (2) developing a technical circular on nondegradation procedures for local reviewing authorities; and (3) establishing a system to compile cumulative effects and assure compliance with the Montana Environmental Policy Act.⁸⁹ DEQ must also emphasize program consistency by providing regular on-site technical assistance to local reviewing authorities and reviewing local sanitation regulations to highlight potential regulation conflicts.⁹⁰ The audit recommended that the legislature should amend the Sanitation in Subdivisions Act by designating the majority of fees to local authorities and granting the authority to set fees at the local level.⁹¹ Finally, the audit pointed out that the time frames in the act do not allow for review flexibility. The act does not address incomplete applications (a problem shared with the Subdivision and Platting Act), responses for additional information, or even when the review period starts or stops. Thus, the audit recommended the enactment of legislation to clarify required review processing times in the act.⁹²

⁸⁸*Performance Audit*, 15.

⁸⁹*Id.* 25.

⁹⁰*Id.*, 20.

⁹¹*Id.*, 25.

⁹²*Id.*, 28.

3.9 AUTHORITY OF THE DEPARTMENT OF COMMERCE IN PLANNING

Montana statutes assign a variety of planning responsibilities to the state Department of Commerce. In the area of *state planning*, MCA 90-1-102 provides that the department

- (1) make economic and social studies needed to accomplish the purposes of this part;
- (2) coordinate and assist regional development groups in the comprehensive development of the resources of the region to the betterment of Montana;
- (3) assemble and correlate information for the purpose of making long-range plans for economic and resource development of the state and its subdivisions relating to all of the factors that influence the development of new and existing economic enterprises, including taxes and the regulation of industry; . . .
- (6) apply for, accept, and administer grants from the federal government or other public or private sources to accomplish the objectives of this part and enter into contracts, including agreements with adjoining states, with respect to planning involving adjoining states;
- (7) serve as the consultative, coordinating, and advisory agency for state departments, officials, and agencies in state planning and for encouraging and aiding local planning bodies, either directly or by securing planning assistance, consulting services, and technical aid, which may include land use, demographic, and economic studies and surveys and comprehensive plans.

Regarding *community development*, the department, under MCA 90-1-103 is to:

- (1) cooperate with and provide technical assistance to county, municipal, state, and regional planning commissions, zoning commissions, parks or recreation boards, community development groups, community action agencies, and similar agencies created for the purposes of aiding and encouraging orderly, productive, and coordinated development of the communities of the state;
- (2) assist the governor in coordinating the activities of state agencies that have an impact on solution of community development problems and implementation of community plans;
- (3) serve as a clearinghouse for information, data, and other materials that may be helpful or necessary to local governments to discharge their responsibilities and provide information on available federal and state financial and technical assistance;
- (4) carry out continuing studies and analyses of the problems faced by communities within the state and develop those recommendations for administrative or legislative action as appear necessary. In carrying out the studies and analyses and in providing technical assistance to communities, the department shall pay particular attention to the planning and financing of public facilities and to the problems of metropolitan, suburban, and other areas in which economic and population factors are rapidly changing.
- (5) administer the federal community development block grant program and adopt rules to implement the program.

With regard to *housing*, under MCA 90-1-106, the department is to:

- (1) survey and investigate housing needs throughout the state and publish the results and make recommendations to the governor and the legislature as to legislation and other measures necessary, desirable, or advisable to alleviate housing problems;
- (2) maintain and disseminate information on available governmental housing assistance programs, eligibility and development requirements, and other similar information; and
- (3) promote research and development in housing planning design, production, conservation, rehabilitation, and other matters relating to, or affecting the provision of decent, safe, and sanitary housing in a suitable living environment.

The department can contract for consulting assistance for the purpose of undertaking and conducting planning and study projects and may perform research on its own.⁹³ It administers a county land planning fund established by the state. Monies can be used by counties, cities, or joint planning boards for land planning purposes, including, but not limited to comprehensive planning, economic development planning, and capital improvements planning. A statutory formula governs the manner of annual disbursements. At the end of each fiscal year, each local governing body and planning agency receiving funds must provide an accounting of how the money was spent, in a form acceptable to the department of commerce.⁹⁴

The department issues a number of planning-related publications, including a compendium of the state's annexation and planning and zoning legislation, model zoning regulations, a compilation of subdivision and surveying laws and regulations, model county development permit regulations, and a digest of judicial decisions and attorney general opinions relating to planning and zoning. It also promulgates rules containing uniform standards for survey monumentation, certificates of survey, and final subdivision plats.

4.0 ANALYSIS OF RESULTS OF FOCUS GROUP MEETINGS AND QUESTIONNAIRES

In the first three months of the project, several means were used to gather information and solicit opinions from experts in the state about Montana planning and zoning statutes. In January 2000, APA staff attended the "Big Sky or Big Sprawl" Conference in Helena convened by AERO and cosponsored by the organizations that comprise the Montana Smart Growth Coalition. A two-hour roundtable at the conference provided APA with its first opportunity for direct input from Montana individuals and interest groups about what works and what doesn't work in Montana planning and land-use control statutes. Also during that visit, APA met with numerous individuals and organizations with an interest in growth issues in the state, including:

- Montana Association of County Commissioners, land-use Committee (with Gavin Anderson, Montana Department of Commerce)
- Members of Plan Helena
- Helena and Lewis and Clark County planning staff

⁹³MCA 90-1-107.

⁹⁴MCA 90-1-108.

- Paul Reichert, Downtown Helena Business Improvement District
- Byron Roberts, Montana Homebuilders Association
- Mary Vandebosch, Environmental Quality Council staff
- Angie Grove and Joe Murray, Office of the Legislative Auditor, Performance Audit Bureau
- Paul Cartwright, Department of Environmental Quality

In March 2000, six two-hour focus groups were conducted the Bitterroot Valley (Stevensville), Missoula, Kalispell, Three Forks, Bozeman, and Billings, as well as with representatives of the planning staff for the Flathead Indian Reservation. Approximately, 80 people participated overall. Focus group participants were invited by the Montana Smart Growth Coalition. APA staff had requested that local planners, planning board members, elected officials, land-use attorneys, developers, homebuilders, and interested land owners be invited to each. A list of focus group participants may be found in the Appendix. Following the focus groups, a survey, drafted by APA, was mailed to more than 150 persons who were either unable to attend a focus group, who had attended but wished to provide more detailed comments, and others whose comments were regarded as important in soliciting for this project, but had not yet provided input. The survey was mailed to all members of the Montana Association of Planners, some of whom also participated in the focus groups. Questions posed to focus group members and on the survey varied slightly. The feedback received verbally and in writing is presented below in six topical categories: (1) Concerns about Development Patterns and Planning Politics in Montana; (2) Growth Policy; (3) Subdivision, (4) Zoning; (5) Other Tools; and (6) the Role of the State.

The one-on-one meetings, January 2000 roundtable, focus groups, and the survey were all intended by MSGC and APA to solicit comments and opinions from the widest possible spectrum of people in Montana with expertise in Montana land-use planning practice and state law. Below is a general summary of the survey responses and comments received through these various methods. This summary provides a general sense of participants' reactions to the issues, and includes selected quotes elucidating responses. A copy of the questions posed to the focus groups and the mailed survey is provided in Appendix B. APA did not attempt to control the content of the responses, or independently verify the truthfulness of statements that were made.

4.1 CONCERNS ABOUT DEVELOPMENT PATTERNS AND PLANNING POLITICS IN MONTANA

Aside from what changes or improvements people believe need to be made to the Montana planning statutes, a number of common concerns emerged about the general state of land development and its impact on people and the natural environment. Below is a summary of points raised by participants in the focus groups and survey respondents.

- The general pattern of development in the last 10-20 years has been to move away from cities.
- Subdivision regulations and state infrastructure spending—not growth policies—are the key determinants of settlement patterns in Montana.
- The predominant settlement pattern in recent decades has been low-density residential subdivisions, with one, five, and 20-acre lots. This pattern has not always resulted in good neighborhoods.

Subdivision

regulations and state

infrastructure

spending—not growth

policies—are the key

determinants of

settlement patterns in

Montana.

Lack of money is a big stumbling block to preparing local growth policies and achieving smart growth.

- Water quality and supply have both been negatively affected by land subdivision in many areas. Loss of open space, agricultural land, and wildlife habitat, and exacerbation of weed problems—all caused in part by subdivision development—is a common concern.
- There are too many disincentives for urban development and infill, and they push development into unincorporated areas.
- Despite widespread concerns about the impacts of current development patterns, there are some political realities that could make acceptance of change difficult. These involve both the political climate in the state with regard to growth and development, and the planning “culture,” as it exists in the state today. Here is a summary of what we heard:
 - Montana is essentially two states: East and West. Any approach to improving planning or solving sprawl has to acknowledge the different circumstances and political cultures of each side.
 - In some areas, citizens equate growth problems with too much growth happening too quickly. In other areas, “growth problems” are associated with the loss of population and businesses.
 - There is a lack of agreement about how best to preserve private property rights *and* protect the public welfare.
 - There is not a strong constituency for good planning in the state. Communities lack the political will to do proactive planning.
 - Lack of money is a big stumbling block to preparing local growth policies and achieving smart growth.
 - New regulatory *and incentive-based* tools are needed by local governments to manage and direct growth and preserve open space.
 - The new growth policy statute is purposefully vague in the view of many, but does not provide adequate guidance according to others.
 - Local governments do not support or implement their own plans.
 - The annexation statutes are a major problem for cities; they make it difficult to contiguous land when the annexation is opposed by a majority of registered voters in the area that is subject to annexation.
 - Any new legislative proposals to improve planning legislation could jeopardize progress made in earlier sessions.

4.2 THE GROWTH POLICY

Guidance provided by current growth policy statute. A key question about the effectiveness of the current statutes on the growth policy is whether the law (MCA 76-1-601 *et seq.*) provides clear guidance to local governments on how to produce a useful document. For the most part survey respondents indicated that the statute does, in fact, provide enough guidance. A significant number indicated that they are unsure whether it does. A Helena planning consultant said:

It appears that the statute provides sufficient general guidance to address the factors important to “getting a handle” on local growth issues. The difficulty comes with the interpretation of the statute and the competence or ability of local governments to produce the plan. Many small communities and counties just do not have the resources and staff to devote to this daunting task.

A planning board member from Helena responded: “We do not need more statutory requirements. We need a model plan. The state needs to provide grant monies to develop models for local jurisdictions. The state should also provide funding for local mandates.” A professor from the Montana School of Law, who indicated that the statute does not provide adequate guidance wrote: “More specific details would be helpful and would ensure more quality and consistency—even while allowing latitude for local variation.”

In general, focus group participants felt that the growth policy statute provides adequate guidance, but is not overly directive. A participant at the Bitterroot Valley group reflects the view of many: “There’s no cookbook in S.B. 97 for what a growth policy should contain. It’s left vague to accommodate flexibility.” And, in the words of a Bozeman participant: “For better or for worse, it allows local governments to do as much as possible or as little as possible.” That said, there were many recommendations for how to improve the effectiveness of planning in Montana, including the following:

- The state should set minimum standards and local governments could then opt to enact more stringent standards (Bitterroot Valley). A Stevensville resident commented that, if local governments are going to follow the guidance in MCA 76-1-601, “then it may be necessary for some State oversight.” He added that there was a danger that the growth policy “may reflect the State’s priorities, not community priorities. Oversight must be limited to a check on completeness and adherence to current legal statutes. Plans that fail to fulfill the requirements [of the statute] must be returned to the local government for correction.”
- Money for planning should flow to local governments based on their plan contents, for example, whether the plan is coordinated with the capital improvements program (Missoula).
- There is not a strong relationship between growth policies and subdivision regulations, and there needs to be (Kalispell).

And, finally, many focus group participants were in favor of requiring fast-growing and urbanized cities and counties should to prepare a growth policy.

Should local governments prepare a plan map as part of the growth policy? A majority of survey respondents indicated that local governments should prepare a plan map. Most of those people, however, believe that such a statute should *recommend* but not *require* local governments to prepare a map. One planner from Gallatin County, who is in favor of plan maps, wrote: “The growing counties of Montana must provide more predictability for development and nondevelopment of land.” According to a Bitterroot Valley focus group participant: “Currently Montana has little or no planning; instead, development is located at the whim of subdivision developers.” A Sweet Grass County planner, who is in favor of requiring or recommending plan maps, responded: “Our map is titled ‘Preferred Development Pattern.’ This title does not imply any regulatory force.” A staff person from the Montana Department of Environmental Quality (who indicated that he is unsure whether a plan map should be recommended or required) wrote:

Depending on how or if the state sets standards for growth plans, preparing maps with specific locations for future growth will be more

One planner from Gallatin County, who is in favor of plan maps, wrote: “The growing counties of Montana must provide more predictability for development and nondevelopment of land.”

or less difficult. It might be easier to specify where certain sorts of development can't take place. In any event, the state should take a more active role in preparing and—more importantly—maintaining certain GIS data, such as cadastral data, that local governments could use in planning.

Most participants in the focus groups indicated that a plan map would be helpful, but it was repeatedly stated that any such requirement may be burdensome on local governments. Several participants stressed the importance of a map for improving predictability in the development review process. “Without a map local government is less apt to stick with the plan. This may be an explanation as to why so few plans in Montana have maps,” said a Bozeman participant.

Mandatory planning and zoning for urbanized or faster growing counties. A large proportion of survey respondents indicated that, yes, urbanized and fast-growing communities should be required to prepare a plan. Many participants in the focus groups made the point, however, that, for the most part, such jurisdictions are already doing planning and zoning, the real issue is the extent to which those plans and ordinances have been effective that is the real issue. A number interesting points were expressed on this subject. One strong supporter of such a requirement answered: “Absolutely. If we do not, growth will be scattered, destroying good agricultural land, stressing services, and increasing taxes.” A University of Montana Law School professor suggested that “A state mandate [to prepare a growth policy] would relieve local officials of the political issue of whether to plan and zone.” A Billings focus group participant indicated support for such a requirement but expressed concern as to “whether local government (and the general electorate) would feel that such a mandate takes away from local powers.”

A staff person from the Local Government Assistance program in the Montana Department of Commerce, who does not support such a mandate, wrote: “If the State of Montana were to mandate that local jurisdictions create and adopt growth policies, it would only serve to damage the already strained relationship between the state and local governments.”

Criteria for consistency between growth policies and land-use regulations. The current statutes describe the general relationship of a growth policy to zoning and subdivision ordinances (MCA 76-1-605 to -606) and also require a finding of consistency in the event of a proposed annexation (MCA 7-2-4734 (3)). In general, focus group participants and survey respondents were supportive of new statutory language that would clarify the relationship of a growth policy to zoning and subdivision. A participant at the Kalispell focus group stated simply: “Consistency criteria would make it easier for a planning board to make decisions on developments.” A Polson resident wrote: “Consistency is vital.”

Survey recipients and focus group participants were asked to propose specific criteria to help local boards determine consistency between growth policies and regulations. A Butte planning consultant suggested that land-use regulations “should or could include references to specific goals, objectives, and issues and other ‘enabling’ language in the growth policy.” A Stillwater County planner said that consistency legislation should not be limited to “zoning alone.” It should “include a menu of allowable land-use controls and planning policies.”

Another recipient offered two simple but effective criteria: “(1) Require that zoning be consistent with the Growth Policies and (2) Require that any proposed development be reviewed for its impact on the character of the surrounding area.” A planner from Sweetgrass County described how

her jurisdiction handled the consistency issue internally: [In the subdivision regulations] “we included precise definitions for review criteria and listed evaluation criteria to be reviewed. We also stressed how to apply these definitions and evaluation criteria when reviewing subdivision. Our strategy is to implement subdivision regulations that have incorporated these definitions and criteria.”

A Montana Department of Commerce staff person said he “wouldn’t propose specific criteria to determine consistency between growth policies and regulations on a statewide basis. I’m not sure it would be workable for a state as diverse as Montana. You have to allow for the application of human judgment and common sense and each community’s unique concerns and priorities.”

State grants for growth policy preparation. There was strong support from both focus group members and survey respondents to the state providing grants to local governments to prepare growth policies. One Missoula focus group member said there should be “no state policies for growth whatsoever unless the state provides money.” A former staff planner for Stillwater County said, “Without money, it [local planning] won’t happen.” An environmentalist from Bozeman said she believes state funding “will be critical. Many of the fast-growing counties have only one-person planning departments and planning boards with minimal expertise. They need funding to build effective planning capacity.” A representative of a downtown business organization in Helena said, “Even better would be implementation and long-range planning. The State could save money if transportation was linked more closely with local growth management.” Echoing that point, the DEQ staff person maintained that the state should provide grants to local governments for planning “since the consequences of growth affect adjacent jurisdictions, the state government budget, and the state economy.” Finally, a staff attorney at the Department of Commerce made the point that the state should provide “matching grants, but there needs to be local financial participation in any grant program to make sure that they have some commitment to the effort.”

Interesting responses also came from those who said they were unsure if the state should provide such grants. For example, a planner from Sheridan County said the grants should not be used as “a stop gap substitute for adequate funding for an ongoing planning program.”

Local authority to generate funding for planning. There is widespread agreement among survey respondents that cities and counties should be given authority to generate funding to pay for planning and public services. Several people pointed out that local governments already have authority to levy property taxes for such purposes, but that authority is very limited. The DEQ staff person pointed out the “local government can only levy 2-6 mills for planning, depending on which category of city or county government they fall into. Plus, property tax is an increasingly questionable form of taxation because of changes in the economy and tax breaks passed by the legislature. Alternatives such as sales tax, real estate transfer tax, or pollution tax might be preferable.” Focus group participants were not asked about giving authority to local governments to raise money for planning, however, several people suggested exploring both real estate transfer taxes and sales taxes for this purpose.

4.3 SUBDIVISION AND PLATTING STATUTES

Survey respondents and focus group participants had a lot to say about subdivision regulation. The specific issues they were asked to address

There was strong support from both focus group members and survey respondents to the state providing grants to local governments to prepare growth policies.



A Missoula resident noted that EAs “fail to measure the cumulative impacts” of development.

regarded the usefulness of the environmental assessments, the adequacy of the public interest criteria for review of subdivision proposals, exemptions to subdivision review, and prohibition of additional conditions on a final plat.

Environmental Assessment (EA). Opinions regarding the usefulness of information provided through environmental assessments, and the process by which they are prepared, were varied. A larger majority indicated that the EAs are not useful or are unsure of their usefulness. A Gallatin County planner answered that the current EA process provides “no control over the quality or accuracy of the assessment.”

Regarding the quality of the information provided, a Missoula resident noted that EAs “fail to measure the cumulative impacts” of development. This problem was mentioned in all six focus groups and a number of other survey respondents. Participants at the focus group in Three Forks discussed the need for better documentation of the sources of information presented in the EA, as well as the possibility of having an independent agency, such as the Natural Resources Conservation Service, review the document. To make them more useful, a Bozeman planning consultant suggested “a standardized environmental checklist with page limitations on submittals.” A Sweet Grass County planner said that her county now requires certification from developers that the information is complete and accurate.

The larger problem for many people seems to be how the EA is prepared. A planner in Miles City responded that it is “a highly technical, somewhat subjective process in the hands of uninformed self interests that equals garbage.” A Stillwater County planner replied that “the subdivider will provide data which supports approval of the development and rarely provides documentation of the sources. However, there is no other information to go on. The time frame for review and the staffing shortages do not allow planners time to collect other data.” A staff person from the Montana Department of Commerce said the EA process does result in useful information for decision makers, when used “in combination with professional planning staff review and analysis of the information to verify its accuracy.”

Public interest criteria. There is broad agreement that the current statute containing the public interest criteria for subdivision review (MCA 76-3-608(3)(a)) does not provide adequate guidance for those conducting the review. In the words of a Bitterroot Valley participant: “The issues that arise during the review depend on who shows up for the hearing; it shouldn’t be that arbitrary.”

Many people provided recommendations on how to improve this statute. A former Stillwater County planner responded that “administrative rules for the interpretation of the criteria would be helpful, but would need to allow for local differences.” A conservationist from Helena responded that “local governments and planning boards would be greatly assisted by more specific details regarding what is important about these issues and what should be reviewed.” On that same point, the representative of downtown Helena businesses suggested that the statute should be “more prescriptive about the ‘performance’ of these issues. What do we want done with ‘agriculture’? What do we want to happen to ‘local services’?” A representative of the state home building industry said it “may be worthwhile to evaluate subdivisions which are in urban growth areas ([but] outside the incorporated limits of a city) more stringently than those in rural areas.”

An attorney with the Department of Commerce agreed that the statute does not provide guidance but says “they aren’t intended to . . . Rather they are intended to set general parameters within which the governing body may exercise its sound discretion.” A Kalispell focus group participant says the “criteria have, at times, been helpful, although they don’t all always apply.” Another participant in that group said, in fact, the criteria have been used in some instances to deny subdivisions.

Several focus group participants described their dislike of the provision in the statute that prohibits consideration of the impacts on schools during subdivision review.

Cumulative impacts of development. The need to address the cumulative impacts of subdivisions arose so often in the six focus groups that APA queried recipients of the mailed survey on whether a statute containing criteria to review cumulative impacts would be helpful. Most people said yes, although many raised questions as to what the criteria would be. Below are some of the detailed responses:

- “Cumulative impact analysis is very important in light of the increasing use of minor subdivision review in order to avoid major review. Also, given the recent Supreme Court decision in *MEIC v. DEQ*, it may be required eventually.” (conservationist, Helena)
- Cumulative impact analysis would be helpful “especially in regard to water, sewer, and wildlife habitat.” (planner, Gallatin County)
- “Absolutely—it is imperative that the state begin measuring cumulative impacts rather than considering each subdivision in a vacuum.” (Missoula resident)
- “Having written several EISs and numerous EAs, I know the difficulty in assessing cumulative impacts. This is a difficult concept to grasp and any guidance or specific assessment items would be helpful if included in the statute.” (planning consultant, Helena)
- Several people echoed the point of view of this planning advocate from Helena: “Cumulative impacts should really be addressed by *planning*—not by one small piece of planning that is subdivision review. (That’s what SB95/97 is all about, isn’t it?).”

The DEQ staff person responded that the “the statute should require consideration of cumulative impact,” but not contain criteria. “Because the tools and policy goals of assessing cumulative impact will change over time, specifics should be dealt with by regulation.”

The attorney for the Department of Commerce said, “The Montana Supreme Court has upheld the authority of a governing body to consider the cumulative impacts of sequential subdivisions in reviewing a new subdivision proposal, so the addition of language expressly authorizing or requiring consideration may be unnecessary.” Another representative from the Department of Commerce, stated that cumulative impact criteria in the statute could perhaps be helpful, “but I don’t know who or by what means you would be able to make the determinations of what the cumulative impacts of a subdivision or subdivisions would be. For example, in regard to the impact of development on an aquifer, we have such limited information on soils, geology, water recharge, etc., that ‘determinations’ seem to be crystal ball work.”

Exemption from subdivision regulations, particularly the family transfer. A substantial majority of survey respondents agreed that changes were needed in the types of land divisions that are exempted from subdivi-

A Bitterroot Valley participant said small subdivisions do need some environmental assessment because their cumulative impacts can be as problematic as major subdivisions.

vision review. The word “abused” was used by participants in two focus groups and by numerous survey respondents to describe the family transfer exemption. “The statutes currently forbid using exemptions to evade the purpose of the subdivision review (MCA 76-3-201 and -207). Perhaps regulations clarifying what is meant by ‘evading the purpose’ need to be issued,” said a DEQ staff person. “Certainly, the family transfer exemption makes no sense given that the purpose of subdivision law is environmental protection.”

Several others also offered suggestions on what changes should be made to the exemptions. A Polson resident said subdivisions that result from family transfers “need an environmental assessment and a resource evaluation.” A Sheridan planner said the current regulations are acceptable in no growth areas, but “fewer exemptions should be available in high-growth areas.”

“Remove the family transfer option!!!”, urged a Stillwater County planner. “It has been abused shamelessly. If retained, the individual should be required to retain title for a set number of years.” A Missoula attorney agreed, but said “it is hard to restrain alienation [i.e., no sale for a proscribed period of time] . . . maybe some criteria for evaluating evasion should be considered.”

A Miles City/County planner suggested that a “summary review of these exemptions would provide an information base for determining cumulative impacts.” The attorney from the Montana Department of Commerce said that changes are needed to the family transfer exemption, but an attempt to eliminate it “is likely to meet heavy opposition in the 2001 Legislature unless there is a significant change in the makeup of that body.” Another representative of the Department of Commerce warned that “no changes should be made to the exemption, because any attempt to eliminate existing exemptions would be met with a political firestorm, and would probably jeopardize the subdivision law in general.”

Minor subdivisions.⁹⁵ Currently subdivisions of five lots or fewer are eligible for “summary review” (MCA. 76-3-505) rather than being required to undergo an environmental assessment as is required of large subdivisions. At local option, all subdivisions, including minor subdivisions, are also exempt from review if they fall within a jurisdiction with an adopted growth policy that meets certain requirements under MCA 76-3-608 (6) and (7). A number of focus group participants indicated that more thorough review of minor subdivisions is needed for several reasons. For example, a Bitterroot Valley participant said small subdivisions do need some environmental assessment because their cumulative impacts can be as problematic as major subdivisions. A Three Forks participant said the “quality of subdivision applications varies widely, especially with minor subdivisions, which makes it difficult to evaluate them.”

Clarification of Role of DEQ and Local Review of Sanitation in Subdivisions. In preliminary discussions, a number of people mentioned the need for clarification regarding the procedures for reviewing subdivisions by the Department of Environmental Quality under the Sanitation in Subdivisions Act and the local government subdivision review procedures. The State Performance Audit Bureau issued a report on this in June 2000.

⁹⁵A question in the mailed survey regarding minor subdivisions stated inaccurately that minor subdivisions are not subject to any review. The question’s intent was to ask what changes should be made to the statute regarding the summary review.

Survey recipients were asked to recommend changes that would clarify these procedures. In general the respondent's recommendations point to removing DEQ from the process but somehow expanding the capacity of local governments to conduct the sanitation review. "Local governments should be given the resources and authority to do sanitation review. DEQ is largely rubber stamping perc tests and doing an inadequate review. However, local governments would need substantial increases in resources to be able to do the job well," said an environmentalist from Bozeman. A former Stillwater County planner remarked she would like to see local review of sanitation facilities in subdivisions and to charge fees to do so: "Often developers choose to have lots over 20 acres to avoid DEQ review. The 20-acre exemption should be eliminated."

A representative from the Montana Department of Commerce, who also sits on a local planning board said:

We are dependent upon DEQ doing the "right thing" through their technical review, although in many cases county health department staff may be more knowledgeable about site conditions or constraints to development. Most of the planning board members would prefer to see local review authority for water and wastewater and have the review of the proposed water and wastewater provisions take place concurrently or be integrated with the review by the local planning board.

Several people mentioned the audit that was underway and were reserving judgment as to what changes should be made until after a final report was issued by the Performance Audit Bureau.

4.4 ZONING

There were four primary aspects of the existing zoning statutes that focus group participants and survey recipients were asked to address. These include the effectiveness of voluntary planning and zoning districts, the zoning protest provision, the need for more detailed statutes regarding enforcement and permitting procedures, and the desirability of uniform permitting procedures for all cities and counties that have zoning.

Voluntary zoning districts. Current zoning statutes allow the creation of planning and zoning districts (MCA 76-2-101 et seq.; "Part 1 zoning"). About half of the survey respondents indicated that such districts are an effective planning tool, but most qualified their support in written comments. "Since this has, so far, been the only politically palatable way to achieve zoning in Montana, it's extremely valuable. The process ensures [that] people support zoning," said an environmentalist from Bozeman. A Helena conservationist remarked that "This has been a very effective planning tool, and is often the only tool available to local communities because it has become so difficult to pass zoning on a countywide basis."

The tool was characterized overall by survey respondents and focus group members as flawed, but better than nothing in certain circumstances. Numerous people commented that is it most often used by a group of neighbors in reaction to a specific development proposal, and is not based on a "big picture view" of appropriate development for an area in the long term. The prevailing sentiment is well described by the attorney from the Montana Department of Commerce:

The planning and zoning districts aren't as effective a planning tool as zoning based on a comprehensive plan. However, they are probably better than nothing for those areas where property owners would like the protection and predictability of zoning but where the local government is not supportive of adopting zoning based on a plan, where local politics makes adoption of comprehensive zoning impossible, or where a plan has not yet been adopted.

A participant in the Missoula focus group indicated that “the protest provision is the only point of entry for residents” in the development review process. “Maybe a better planning process would help.”

Other issues raised with regard to voluntary districts: A Lewis and Clark County planner says “lack of uniformity in regulations is a challenge in administering different zoning districts.” A Stillwater County planner said the districts “cost the counties significant cash to evaluate and develop without allowing counties to recover costs through processing fees.”

Zoning protest provision. For municipalities, the zoning statute allows owners of 25 percent or more of the area of lots included in a proposed zoning change, or those lots within 150 feet of lots included in a proposed change, to sign a petition protesting the change. Because this provision was recently amended in 1999, at the recommendation of the EQC study, many people are still unsure how well the process works. A preliminary assessment by a Kalispell focus group participant reflects many respondents’ point of view: “It has positive and negative effects, depending on how it is used.” Participants in Three Forks agreed that local governments should be given the option to use the tool. A Montana Dept. of Commerce representative and member of the Helena-Lewis Clark County Planning Board and Helena Zoning Commission, said, based on his experience in Helena, “it is the adjacent property owners that potentially have the most to lose from a change in permitted land use. Since one purpose of zoning is to provide some predictability and protection for property owners from impact of incompatible land uses, the underlying intent of this provision doesn’t seem that unreasonable.”

A participant in the Missoula focus group indicated that “the protest provision is the only point of entry for residents” in the development review process. “Maybe a better planning process would help.” A Bozeman participant said “the process deals well with poorly designed projects” in that it “provides early notification to neighbors and probably results in better-designed projects in the long run.”

As far as critiques of the tool, several people noted that the provision is often used to block infill development and affordable housing projects. Others noted that the boundaries of the area in which people are eligible to protest can be difficult to determine.

Zoning enforcement. Montana statutes do not contain detailed provisions for issuance or enforcement of zoning permits, and in fact do not use the term “zoning permit.” Survey recipients were asked whether the statute should contain such provisions. Although many survey respondents indicated that the enforcement process should be more clear, many believe that the specifics should be left to the discretion of local governments, and not made part of a statute. (None of the focus groups commented on this issue.)

Unified development permit review system. Some states have enacted statutes establishing a uniform permit review system that would clarify the steps in applying for various types of permits, determining when applications are complete, and specifying time limits for decisions. Slightly more than half of the survey respondents said they were either unsure about or against requiring local government to use uniform review procedures for local government review. “All applications are different; local governments need flexibility to deal with simple issues simply, and to take more time with complex ones,” said a Great Falls City/County planner. A Montana Department of Commerce staff person said he “can’t imagine our legislature supporting something like that.”

From the perspective of those who support uniform procedures, a Helena planning consultant responded, “Any opportunity to streamline and clarify permitting is a welcome change.”

4.5 OTHER ISSUES

Adequate public facilities ordinances. Montana does not have a statute specifically authorizing or requiring the adoption of an adequate public facilities ordinance (APFO) for new development. Such a provision could require central water and sewer in areas expected to urbanize outside a municipality but within its extraterritorial authority. The focus groups and survey recipients were asked to comment on whether such a technique is a good idea for Montana, and if so, how it might be implemented. A slight majority of survey respondents said APFOs would be a good idea. A planning advocate from Helena suggested enacting a statute that simply allows, but not requires, local government to enact such ordinances.

A number of recommendations were offered on how to implement APFOs:

- “Establish growth boundaries to insure infill development and limit sprawl” (planner, Sheridan County)
- “Give local governments authority to require APFO under the growth policy or master plan” (planner, Gallatin County)
- “Subdivisions adjacent to city limits could be subjected to different, ‘urbanized’ regulations.” (planning consultant, Butte)
- “Cities and counties need to aggressively expand their water and sewer services and not necessarily require annexation. They need to treat their utilities like a business and charge hook-up fees and surcharges when users are outside the city limits.” (consultant, Great Falls)
- “It would seem incumbent upon local government to do sound planning for its future infrastructure development first. Areas can be identified where the extension of municipal services or the future connection of developer’s installed services are feasible.” (planning consultant, Helena)

Several people who oppose it, or support it in concept but not in execution, envision several unintended consequences of such an ordinance. A Montana Department of Commerce staff person said such a system would not have a “snowball’s chance” of being implemented. “That kind of requirement would only spur leap frog development to avoid compliance with the ordinance.” A Bozeman focus group participant said: “It’s one thing to require that services be present before development goes forward, but it doesn’t answer the question of how local government pays for the services it is bound to provide.” Another person in the same group mentioned the possibility that “developers may use APFO system to tie up capacity for future use.”

Impact fees. Current statutes provide authorization for local governments to require a developer to pay for the extension of capital facilities (MCA 76-3-510) and require parkland dedication or fees-in-lieu of land dedication (MCA 76-3-631). Survey respondents and focus group participants were asked whether new language listing fees that could be levied and outlining procedures for their implementation could be helpful. There was fairly broad support for clarifying this language. In the words of a Polson resident: “The more specific and measurable the better.” An environmentalist from Bozeman answered that “currently there seems to be confusion regarding authority to use impact fees as well as the means for developing defensible and equitable fees. It would help immensely if

A number of people in the focus groups expressed concern about what the legislature would do with the existing impact fee law if any proposal to clarify or broaden it were proposed.

they were clarified.” A Sweet Grass County planner pointed out that “Big Timber has already implemented impact fees. Their authority for doing so has not been tested yet, but it would help if the statutes were more explicit.” The representative of state home building industry agreed that the statute could use clarification but cautions that, wherever impact fees are used, one “must ensure that new home buyers are paying no more than the fair share.”

A number of people in the focus groups expressed concern about what the legislature would do with the existing impact fee law if any proposal to clarify or broaden it were proposed. A Bitterroot Valley participant said he fears that “any new impact fee legislation may actually be more limiting than what exists.” A Stillwater County planner said “it might be best if a model were devised by the Department of Commerce, outside the statutes.”

And several people did not address whether to clarify the impact fee statute, but expressed general opposition to the tool: “the developers already pay for all the new lines and streets. More fees will slow or stop progress.” A Montana Department of Commerce representative noted that “The cost of impact fees just gets passed on to the home buyer. . . . There has to be more of a partnership between local governments and developers if we are going to be able to provide affordable housing for low and moderate income families.” Finally, a Three Forks participant suggested that impact fees should also be allowed to be used to upgrade existing facilities needed to accommodate growth because, as is, they essentially encourage greenfield development.

Tools and incentives for smart growth. Many states and local governments, including Montana communities, are looking toward incentive-based approaches to achieve smart growth. Through the course of discussions, the focus groups, and the survey we asked people their general opinion on incentive based planning tools and to suggest specific incentives that could be provided to developers and landowners to promote compact and contiguous development, protect agricultural land, open space, and critical environmental areas, and encourage infill development. Below is a sample of some of the detailed responses:

- A representative of the Montana Association of Planners noted that “cities tend to have more regulations than counties, so growth is being forced into the counties.” Incentives should be provided “to develop within cities.”
- “Allow reduced fees and reduced review requirements when following adopted land-use plans.” (planner, Sheridan County)
- “State infrastructure programs, such as the Treasure State Endowment Program or the Renewable Resource Grant and Loan Program, could be modified to encourage communities [to] fund extensions of water and sewer facilities to support compact urban development and ‘smart growth.’” (staff person, Montana Department of Commerce)
- “Money. We need more ability to generate revenue to implement tools like purchase of development rights programs. As it stands now, the only options available to local governments are bonds/mill levies which of course are tied to property taxes. Local option sales taxes or bed taxes, would be an important complement to regulations.” (environmentalist, Bozeman)

- “Master planned areas, where infrastructure and design standards apply and developers get first priority . . . connection fees should be waived.” (downtown business group representative, Helena)
- “(1) The state could provide grants to local governments based on the percentage of new houses in that jurisdiction that meet density or affordability targets. The local government could use the grants to reduce the cost of infrastructure for developers building in preferred locations. (2) Allocating the gas tax back to the roads where driving actually takes place. At present, driving on locally administered roads, especially those controlled by city governments, subsidizes construction and maintenance of the state highway system.” (staff person, Montana DEQ)

The DEQ representative also pointed out that “removing existing subsidies to sprawl would, de facto, provide incentives for smarter development. Examples include (1) city residents pay more than their fair share for services shared by county residents and (2) state public school tuition subsidies that allow bedroom communities across county lines to send kids to the urban center schools.”

Other suggestions of incentives recommended in the focus groups and other discussions:

- Transferable development rights
- Purchase of development rights⁹⁶
- Density bonuses
- Cluster development
- Tax incentives
- Differential tax assessment for agricultural preservation
- Municipal participation in extension of public facilities
- Positive local attitudes regarding growth contiguous with cities and urban infill.
- Establishment of a large trust fund using coal tax money that would allow the state to purchase development rights and preserve open space and agricultural lands.
- Regulatory relief, including impact fee waivers, for projects that meet specific public objectives, e.g., affordable housing.
- Removal of barriers to infill, which include development standards, fire protection standards, problems with parcel consolidation due to multiple owners.

Periodic review of land-use regulations. One method some states use (Florida and New Jersey, for example) to ensure that local governments are managing growth is to require that they evaluate their land development regulations (e.g., zoning and subdivision ordinances) on a periodic basis. We asked survey recipients and focus groups if such a requirement would be a good idea in Montana, and if so who should be responsible for

⁹⁶MCA 76-6-201 et seq. deal with acquisition of conservation easements by public bodies and qualified private organizations. As a practical matter, even though the statutes do not use the precise term, these provisions are about purchase of development rights.

Several people said that an initiative to set state goals for growth and development was long overdue.

the review. Many people said it was a good idea, but as with the preparation of a growth policy, many Montana communities simply lack the money to do this. Several also mentioned the absence of political will in many communities to do this. The attorney from the Montana Department of Commerce, indicated that “few, if any, of Montana’s communities can afford this luxury.”

A planner from Poplar City/Daniels County said counties and incorporated areas should be required to do such an evaluation. The review could consist of “a simple hearing process and final review by the planning board, followed by approval.” An environmentalism from Bozeman offered a more extensive suggestion: “Local governments should be responsible and the review should measure development against goals, objectives or regulations and plans. The review should consist of measurable impacts, like the amount of ag land converted, water quality, etc. ‘Periodic’ should be a long-enough period so as not to make local government perpetually engaged in review but short enough so that we don’t end up with hopelessly outdated regs and plans (every 5-10 years).”

Several people suggested that the state, specifically the Department of Commerce, should conduct such reviews. A Helena planning consultant suggests that the state review “should consist of looking at the age of the comprehensive plan, an assessment of whether the basic conditions (population, development pressure, economics, etc.) at the time of the plan have changed significantly enough to make projected trends in the community valid.”

Notification requirements and citizen involvement. A Bozeman resident commented that notification requirements for projects in the Montana Code are insufficient. “Written notification should extend well beyond the immediate areas, and should be more prominently posted in the local paper.” He also commented that “[w]e need revamped procedures that involve the public early on [at the sketch plan stage for major developments] so that constructive input can be given to both the staff and developers prior to public hearings.”

4.6 A ROLE FOR THE STATE

In the last three decades, many states have established a stronger role in their effort to solve problems associated with urban sprawl and unplanned development. Approaches in place around the country include formation of a state planning commission, the development of a state plan or state goals, mandatory local planning programs (sometimes with state oversight), and adoption of urban growth areas or priority growth areas. In preliminary meetings in January and during the March focus groups, we asked people what role the state of Montana could or should take in helping local communities manage growth and change.

The most important thing the state could do at this point in time, according to many, is to provide funding for local planning or, at a minimum, expand the means by which local governments can raise money to pay for it. It does not make sense to talk about expanding the current planning statutes, or requiring local governments to prepare a growth policy, if they have no way to pay for it, said a number of people.

Several people also said that an initiative to set state goals for growth and development was long overdue. “The Growth Policy statute does not represent statewide policy,” said a Bitterroot Valley participant. However, as a Missoula participant indicated, “Skepticism exists as to whether the state has the ability or credibility to formulate such a policy.”

While many agreed the state itself should have goals, the notion of state review or approval of local plans was considered problematic.

Participants at the Three Forks focus group suggested that perhaps “the state could simply acknowledge a plan’s legality.” And while the state “should not be given veto power over local plans, nonbinding review by the Department of Commerce or other agencies is worth considering.” It was also suggested by the Bitterroot Valley group that the state should be held to the requirements of a local plan. “State actions are already directing what happens locally, can the reverse happen?” asked one participant.

Several people indicated that incentives are not as effective as regulation. Providing incentives is “great rhetoric, but implementation of the idea often compromises the goal. Stick with regulation,” said a Stillwater County planner. A Sweet Grass County planner said “there should be no financial incentives for land development other than for low-cost housing. The most local government should do is to ensure there is adequate infrastructure to support growth in designated growth areas.”

In sum, the focus groups, individual meetings, and the mailed survey provided APA with high quality, detailed information on both how land development and existing planning statutes work in the state, as well as numerous suggestions on how state laws can be improved to make planning more effective.

5.0 PREVIOUS STUDIES

There have been two major studies on planning and zoning statutes in Montana, and several minor studies, including one on options for financing required local planning. All were conducted by the Environmental Quality Council (EQC).

The first was the *Montana Land-use Policy Study*, completed in 1974. The study was prompted by a request from the Montana legislature and was funded with a grant from the Ford Foundation.

The study recommended legislation in four areas:

- Areas of critical state concern. An area of critical state concern was defined as “localities or resource systems whose uncontrolled development would result in irreversible loss or damage to a significant resource of a region or state.” They would include areas affected by or affecting substantial public investment, areas having a significant impact on historical, aesthetic, or natural resources, areas where development would endanger life and property, and areas proposed by the state in conjunction with the federal government or private interests as site for new town development. A state land-use commission would make the designation. The system proposed by the report called for local governments to prepare specialized regulations for development in these areas under state supervision, and to issue development permits for them.
- Development of Greater Than Local Impact (DGLI). DGLIs were defined as “proposed developments which, regardless of where they occur, have significant effects beyond the boundaries of the local government having jurisdiction over the development site.” Examples include major shopping centers, large subdivisions, industrial complexes and public works projects. The recommended system would require a specialized review process for large-scale development, under the jurisdiction of the local government, but, again, within state guidelines. The intent of the process is to ensure that, in review of such large scale developments, impacts that crossed jurisdictional lines were taken into account by the local government. The process was also to ensure that any state agency with permit authority over the proposed development would have to complete the investigation and make its

determinations at or before the local government's hearing. Under the procedure, the local government would make a determination whether the proposal's probable benefits outweighed the probable detriments and decide whether or not to permit the proposal. The local government's decision could be appealed to the state land-use commission.

- State land-use commission. The study proposed the establishment of a five-person state land-use commission in the state department of administration. The commission's primary responsibilities would be designating areas of state concern, reviewing development regulations for designated areas and hearing appeals of local government decisions. Appeals could be made concerning decisions on initiating the area of state concern process, the designation of a particular project as a DGLI, the decision on a DGLI, the handling of permits within areas of state concern and the enforcement of regulations developed for a DGLI.
- Creation of a commission on growth and Montana's future. The EQC report recommended the establishment of such a commission to provide an institutional forum to address questions concerning "[w]hat do we want Montana to be like?" and "[w]hat kind of growth should occur where?"⁹⁷

The report's proposals for areas of state concern and DGLI drew on the American Law Institute's draft proposed *Model Land Development Code*.⁹⁸ Recommendations from the EQC report were not enacted.

The EQC's 1985 annual report discussed the impact of subdivision growth in the state and described a survey of the state's 56 counties. Among the concerns reflected in the survey were: Subdivision and Platting Act exemptions; lack of enforcement capability at the state and local level; lack of adequate training at the local level for subdivision review; slow turnaround time in the state office for plat approvals; and the inability of both state and local authorities to limit the cumulative effects of subdivision growth on water quality. The report noted that the EQC had worked to support successful legislation to enable the state's Department of Health and Environmental Sciences (now the Department of Environmental Quality) to maintain a qualified staff in its subdivision review bureau, increase local review enforcement authority, and permit counties to adopt rules providing more autonomy in subdivision review.⁹⁹

The EQC next produced a short account as part of its 1987 annual report that looked at subdivision controls in the state and the history of state legislation to change them. For example, it chronicled the efforts of the 1978 Interim Committee on Subdivision, which recommended ten

⁹⁷State of Montana Environmental Quality Council (EQC), *Montana Land Use Policy Study* (Helena, Mont.: EQC, November 13, 1974), 164-176.

⁹⁸American Law Institute (ALI), *A Model Land Development Code: Complete Text and Commentary* (Philadelphia, Pa.: ALI, 1976). The ALI Code provisions that the EQC report drew on were published in draft form prior to this final version released in 1976. Proposals for area of critical state concern and development of regional impact legislation, similar to the ALI models, appear in *The Growing SmartSM Legislative Guidebook: Model Statutes for Planning and the Management of Change, Phases I and II Interim Edition* (Chicago: APA, September 1998), Ch. 5.

⁹⁹Montana Environmental Quality Council (EQC), *Annual Report Ninth Edition: Montana's Water* (Helena, Mont.: EQC, December 31, 1985), 235.

bills to revamp the laws, including an unsuccessful bill to eliminate the family conveyance exemption and a more specific statement of the public interest criteria in the Subdivision and Platting Act. The report included a comparative analysis of subdivision statutes in western states.¹⁰⁰

The EQC's 1990 Rural Development Study considered the problem of unregulated residential developments in rural areas, especially multiple ownership of a single 20-acre parcel. Among the alternatives it considered were: amending the definition of subdivision to remove the 20-acre subdivision definition and/or removing the "occasional" and "family sale" review exemptions; allowing the local governments to define subdivision on their own, providing the local definition was more restrictive than a state minimum; encouraging local planning and/or zoning; requiring local comprehensive planning and zoning; and implementing statewide land-use plans or the identification of critical areas and areas of special significance. The EQC recommended closing loopholes in the law such as the 20-acre definition of subdivision (which existed at the time, and has since been changed to 160 acres), and eliminating the family and occasional sale review exemptions.¹⁰¹

The other major study, *Planning for Growth in Montana*, was completed in 1999, and some of its recommendations were adopted into law that same year. Among the recommendations proposed by the EQC:

- Change the term "master plan" and "comprehensive plan" to "growth policy" in the planning, zoning, and subdivision laws.
- Amend the planning act to replace the language on the contents of a plan with different language.
- Amend the planning and zoning laws to make it clear that a neighborhood plan can be adopted by a governing body if a growth policy has been adopted that covers the entire jurisdiction.
- Amend the law to require that urban renewal plans, which are authorized by statute, be consistent with the growth policy, if one has been adopted.
- Amend the Subdivision and Platting Act to allow local governments to choose to waive the requirement for review of subdivisions with respect to the public interest criteria under certain conditions.
- Amend the law to enable, but not require, planning boards to delegate to staff their responsibility to review and provide advice to the governing body on proposed minor subdivisions.
- Amend the provisions relating to summary review of minor subdivisions to establish an expedited review process for jurisdictions that have adopted growth policies as well as county (Part 2) or municipal zoning regulations. Unless local regulations provide otherwise, a public hearing and review of the public interest criteria would not be required for subdivisions eligible for summary review.
- Provide more funding options to encourage local governments to invest in the development of growth policies, including:

¹⁰⁰Montana Environmental Quality Council (EQC), *Annual Report Tenth Edition: Research Topics* (Helena, Mont.: EQC, June 30, 1987).

¹⁰¹Montana Environmental Quality Council (EQC), *Rural Development Study: Final Report to the Governor of the State of Montana and the Montana Legislative Council* (Helena, Mont.: EQC, December 1990), 7-8.

(1) an appropriation of \$1.0 million each fiscal year to be used for the development or implementation of growth policies, which would be sufficient to pay for at least 80 grants to local governments. Grants would be for 50 percent of the cost of the developing or implementing growth policy, up to a maximum of \$25,000. To pay for the grant program, the EQC proposed appropriating bed tax and general fund revenues.

(2) additional funding through a local option sales tax, a local option bed tax, or an increase in the special mill levy for planning.

- Amend the municipal zoning enabling act to require three-fifths of the members of city or town council to override a protest of 40 percent of the neighboring landowners. The proposal was intended to make it somewhat easier to change the zoning regulations, while preserving the neighboring landowners' right to protest. At the time, the law required a super majority (3/4ths) vote of the members to override a protest of 20 percent of the neighboring land owners. The EQC's study subcommittee heard testimony that the law was a barrier to changing zoning regulations in order to facilitate infill, cluster development, or innovative design.

Other recommendations in the 1999 EQC report dealt with state-level geographic information systems, development by the Montana Department of Commerce of materials to educate citizens about the benefits of planning and the costs of not planning.

The EQC report, *Funding for Growth Policies*, was released in June 2000 in draft form. That report contained a number of options for funding planning for cities, towns, and counties. One option was state funding in the amount of \$2.0 million per biennium. A variety of sources were identified including allocation of county land planning funds, appropriations from the coal severance tax, appropriation of the lodging tax funds, and appropriation of general fund revenues. A second option was local funding, through a local option sales tax, a local option bed tax, or an increased planning mill levy with exemption from property tax limits. Finally, the report posed a number of questions on the design of a state grant program for planning, including the allocation of monies to rural counties, eligible applicants and activities, and time required for implementation.¹⁰²

6.0 OVERVIEW OF RECOMMENDATIONS

The following recommendations are presented in four categories: planning for growth, managing growth, planning and development review, and paying for growth. There is also a supplemental set of recommendations providing for an enhanced state role appearing in Section 6.1 below. They are intended to strengthen the planning basis of land-use regulation and public investment in Montana. Within each category recommendations are listed in order of priority, although many are interdependent with others in the same or other categories. Several recommendations deal with the manner in which a growth policy is defined in the statutes and the manner in which that document is applied on a day-to-day basis by Montana local governments. The assumption is that the preparation of

¹⁰²Land Use/Environmental Trends Subcommittee of the [Montana] Environmental Quality Council (EQC), *Funding for Growth Policies: A Draft Options Paper for Public Comment* (Helena, Mont.: EQC, June 2000), 20-23.

a growth policy is a significant public act that, once completed, should have more than a casual or fragmented relationship to development decisions. Consequently, the growth policy should be described in a way that will allow laypersons to understand how to prepare a document that will be useful to guide public and private development decisions. Moreover, this report recommends eliminating long-standing inconsistencies and ambiguities in the application of the growth policy as it relates to different types of development decisions—zoning vs. subdivision or Part 1 and Part 2 zoning, for example. These problems can be easily corrected through language changes in the statutes, and should be.

This report also stresses the importance of planning for relatively populated and rapidly growing counties. It takes the position that the state, and its counties and the cities and towns within them, no longer have the option of treating planning and land-use controls, such as zoning, as a luxury in the face of urbanization and/or rapid growth. While this might have been an acceptable position in the 1920s, when the Montana planning and zoning laws were originally established, it is plainly inadequate now. Today there are far more tools available to analyze and understand the consequences of growth and use of zoning is commonplace. To this end, the report endorses a variety of tools for funding planning efforts, most of which have been proposed by the Environmental Quality Council's Growth Subcommittee.

The recommendations emphasize using the growth policy to collect and analyze information on factors affecting development. If this is done, it should not be necessary to once again gather the information for site-specific development decisions or to rely on a developer to analyze the information. An example of this is the recommendation that an environmental assessment on the growth policy and alternative development patterns replaces, to the degree possible, most project-by-project environmental assessments. It would do this by explicitly incorporating its findings on mitigating the cumulative impacts of community growth into the zoning, subdivision, and other regulations. In this way, the development regulations themselves incorporate the appropriate mitigation without the necessity of formulating them on an ad hoc basis.

The recommendations also stress a development review process that is consistent and predictable, with objective standards, time limits, and clear routes for appeal and judicial review. In connection with this, a series of additional tools for local governments, such as impact fees, transfers of development rights, incentive zoning, and official maps (or corridor maps) are proposed to be expressly authorized, rather than implied, to remove any question over their use, and provide, either through model ordinances developed by the Department of Commerce or through substantive direction in the statutes, guidance in their use.

In a number of areas, the recommendations focus on correcting problems with omissions in the statutes that are not readily apparent, or that focus group participants and survey respondents may not have agreed are problematic. In general, the recommendations have tried to incorporate what has become, in APA's judgment, standard practice for planning and should be expressly authorized to provide clear guidance. For example, the report recommends clarification of whether local governments have the ability to require a maintenance bond, which is a bond that guarantees that improvements for a new subdivision will last a certain period of time after construction. The Subdivision and Platting Act does not require any type of professional inspection and report before the legislative body may authorize full or partial release of the performance bond. Nor do the statutes require that a board of adjustment prepare a written

[This report] takes the position that the state, and its counties and the cities and towns within them, no longer have the option of treating planning and land-use controls, such as zoning, as a luxury in the face of urbanization and/or rapid growth.



The challenges facing the state and its local governments are substantial and should not be dodged through optional planning and development control.

decision on variances and special exceptions or allow the board to impose reasonable conditions in connection with the decision.

Several sections are recommended as candidates for redrafting and/or consolidation because they require the reader to jump back and forth through the Code to understand what is required, what is not required, and what is exempted when certain conditions are present.

Finally, it should be emphasized that, in APA's opinion, there are creative, thoughtful, and good faith efforts underway by the state government and counties, cities and towns in implementing the provisions of S.B. 97, the 1999 amendments to the state's planning and zoning laws. Much progress is being made in formulating and adopting the growth policies that are to serve as a basis for land-use regulation and public investment. Local governments are able to obtain solid, professional technical assistance in interpreting and applying state law from the Department of Commerce. APA has also been impressed by the evaluative studies undertaken by the Montana State Environmental Quality Council in assessing how well the state laws are working. This report builds on the good foundation for planning established by these two agencies.

6.1 RECOMMENDATIONS ON PLANNING FOR GROWTH

(1) **Require the preparation of a growth policy and the enactment of zoning regulations in counties that have substantial population concentrations and in rapidly growing counties.** Currently the preparation of a growth policy and zoning regulations is *optional* for local governments under the Montana statutes, although the enactment of subdivision regulations is not. It is the perspective of this report that the point in Montana's history has been crossed where growth and development, at least in the western part of the state, must occur in the context of a local plan and must be implemented by zoning and subdivision regulations, at a minimum, as well as other land development control and public investment techniques. The challenges facing the state and its local governments are substantial and should not be dodged through optional planning and development control.

How should a provision for required preparation of a growth policy and zoning ordinance/resolution adoption be structured? The state of Washington offers a good example of an approach that differentiates between urbanized or rapidly growing counties and counties that are rural or are growing at a slower pace, if at all.¹⁰³ The approach also recognizes regional differences. Under Washington statutes, each county that: (a) had a population of 50,000 or more and, until May 16, 1995, has had its population increase more than 10 percent in the previous ten years; or (b), on or after May 16, 1995, has had its population increase by more than 17 percent in the previous ten years; or (c) has had its population increase by more than 20 percent in the previous ten years, must adopt a comprehensive plan, implement development controls, and meet other requirements of the growth management act.¹⁰⁴ Counties that do

¹⁰³The Washington state approach is also discussed in *Planning for Growth in Montana*. *Id.*, at 68-70.

¹⁰⁴Wash. Rev. Stat. 36.70A.040(1) (Who must plan—Summary of Requirements). The Washington statutes contain sanctions for communities that do not plan, but are required to do so. The governor may cut off a county or city's road-fund distributions and its share of certain state collected sales, use and liquor tax revenues, or rescind the county's or city's ability to collect real estate excise taxes, after a state growth management hearings board finds that the county or city is not compliant and the governor makes finds that the non-compliance is due to bad faith or unreasonable delay. *Id.* 36.70A.330 (1999).

not meet these criteria are not required to plan. However, they may elect to plan by passing a resolution and notifying the state.¹⁰⁵ The growth management provisions also apply to the cities within counties that are required to plan.

An amendment to MCA Chapter 76, Part 6 (Growth Policy) that requires counties, and the cities and towns within them, to plan and to enact development regulations—both zoning and subdivision¹⁰⁶— should contain the following criteria that would activate the requirement:

- a minimum county population level, as of the 2000 census, that would include the more populous or urbanized counties; or
- a county growth rate that exceeds the state growth rate for the period 1990-2000, provided that growth rate resulted in an absolute change of a certain amount, say 500 persons. This would eliminate counties with a small initial base, where a large percentage increase yields small incremental change in population growth.

As the EQC Subcommittee report observes, local governments may be “challenged by the consequences of growth, resulting in demands for infrastructure such as roads and sewer systems, increased conflicts among land uses, and a greater number of regulatory reviews, such as subdivision reviews.” All of these, said the report, “can result in increased costs for local governments.” At the same time, developers and property owners may be concerned about local government restrictions that may increase their costs. When government decisions are not predictable, the risk associated with development proposals rises, according to the report. At the same time, residents may want to find ways to preserve specific aspects of their community’s character. Especially in rapidly growing communities, the availability of housing becomes another concern.¹⁰⁷

The EQC Subcommittee report pointed out that, while the state’s population grew 10 percent between 1980 and 1990, higher than the national growth rate of 7.6 percent during the same period (although somewhat lower than other Rocky Mountain states of Idaho, Utah, Colorado, and New Mexico), some 17 counties had increased by more than that rate during the same period.¹⁰⁸ Of those, seven had projected increases of more than 10 percent between 1998 and 2005.¹⁰⁹

(2) *Modify the description and the elements of a growth policy in MCA 76-1-601 to reflect contemporary practice and require that a growth pol-*

¹⁰⁵Wash. Rev. Stat. 36.70A.040(2).

¹⁰⁶One reviewer of a draft of this report commented that requiring the enactment of a zoning ordinance to cover an entire county that was growing rapidly or had urban concentrations could be problematic in terms of the local ability to administer the ordinance, given the vast size of many Montana counties. This is certainly a legitimate concern, but it presents the same issue that countywide administration of subdivision regulations does.

¹⁰⁷*Id.*, at 11.

¹⁰⁸The counties included: Big Horn, Broadwater, Carbon, Flathead, Gallatin, Golden Valley, Jefferson, Lake, Lewis and Clark, Madison, Mineral, Missoula, Musselshell, Ravalli, Sanders, Stillwater, and Yellowstone. Environmental Quality Council Growth Subcommittee, *Planning for Growth in Montana, Final Report to the 56th Legislature of the State of Montana* (Helena, Mont.: Legislative Environmental Policy Office, January 1999), 4-7.

¹⁰⁹These include: Flathead, Gallatin, Jefferson, Lake, Lewis and Clark, Ravalli, and Stillwater. *Id.*, at 7.

The analysis of housing needs does not suggest whether a community should examine the need for affordable housing and special needs housing, as many state statutes do.

icy contain, in map form, a unified physical design for the adopting local government that can be used as a framework for location-specific decisions. The quality of the growth policy is critical, because a growth policy is a condition for county (Part 2) and municipal zoning. Failure to have an adequate growth policy could lead to challenges to the growth policy itself. The description in the Montana Code should be sufficiently descriptive and helpful so that a planning board member can read it and understand what is called for and how its various elements fit together.

There are a number of changes to the descriptions of a growth policy, its elements, and required underlying studies that would improve their clarity and usability. As a matter of concise drafting, the supporting analyses for individual plan elements should be consolidated with the description of the plan elements.

The analyses should be described in more detail to suggest what would make a good plan. For example, the description of the land-use element does not call for land uses to be categorized or characterized by density (for residences) and/or intensity (for nonresidential uses), which is important for developing zoning regulations, because they control land use on this basis. Nor does the statute suggest the need for uniform classification of land use, so as to be able to monitor growth and change on a statewide basis (since this type of information is now contained in computerized databases).

The analysis of housing needs does not suggest whether a community should examine the need for affordable housing and special needs housing, as many state statutes do, by looking at: (a) the price and rent levels of the existing housing stock; (b) distribution of households by gross annual income; and (c) middle-, moderate- and low-income households that are paying more than (for example) 28 percent of their rent for owner-occupied housing, and (for example) 30 percent for renter-occupied housing.

Similarly, the needs analysis for local services and public facilities should be guided by a set of standards or criteria that would allow a local government to determine existing levels of service (this is particularly important for rapidly growing areas).

Some of the language in the section needs clarification as to intent: what does it say and what does it really mean? For example, MCA (2)(e) calls for “a strategy for development, maintenance, and replacement of public infrastructure, including drinking water systems, wastewater treatment facilities, sewer systems, solid waste facilities, fire protection facilities, roads, and bridges.” The Montana Department of Commerce’s Local Government Assistance Division has interpreted this as authorizing a capital improvement plan or program (CIP),¹¹⁰ but what the statute describes is not really the same as a CIP. A CIP is a schedule, in tabular form, showing specific public works projects and estimated costs (including costs of construction, land, engineering, architecture, and planning), over a five-to-six year period. Accompanying tables may show transfers of funds from various accounts, including funds that employ user fees, like water and sewer. The first year of the CIP is enacted as the local government’s capital budget, and it contains the projects which the local government intends to carry out for the forthcoming fiscal year. While the term “strategy” might mean a discussion of how the local government

¹¹⁰Montana Department of Commerce, Local Government Assistance Division, Community Technical Assistance Program, *Montana’s Annexation and Planning Statutes*, 13th Edition (Helena, Mont.: September 1999, The Department), 105-106.

intends to fund capital improvements (e.g., pay-as-you-go, selling of bonds, user fees, etc.) and what its general priorities are for public facilities, a CIP is specific as to what projects get built, and when. Moreover, the description of the strategy omits important public facilities like county and municipal general administration buildings, libraries, schools, and parks and playgrounds. Indeed, the omission of parks and playgrounds as well as open space acquisition is at odds with other provisions in the Montana Code, which contains an entire section on parkland dedication and fees in lieu¹¹¹ and open space.¹¹²

It should be made clear in the statutes' description of the various plan elements that the growth policy must in fact project growth—both demographic and economic growth—and those forecasts of population and employment (not trends, which simply assume that the rate of growth in most recent years or decades will continue rather than consider external factors that may increase or decrease the rate of growth or decline) must drive the various plan elements; all the plan elements should use the same forecasts.

For example, the growth policy should project land use by type and character, and indicate the assumptions behind the projections so that the public can understand them. Projections for population and economic growth also affect the sizing and phasing of public facilities, like sewer and water facilities and primary and secondary schools.¹¹³

The growth policy description does not explicitly deal with critical and environmentally sensitive areas, like wetlands, special habitats, or aquifer recharge areas, or areas that might be subject to natural hazards, like wild-fires or flooding. Nor does the growth policy description ask that there be an assessment or classification of lands for different types of land use, such as the land-use capability approach popularized nationally by landscape architect Ian McHarg, and commonly employed in contemporary planning.¹¹⁴ This type of analysis has become much simpler to perform with the advent of geographic information systems.

Also omitted in the current description of a growth policy is a requirement for a single plan map at a readable scale that integrates and presents the major proposals in the various plan elements—the general locations of future land uses by type, density, and intensity, the location of existing and future needed public facilities, and the location of existing and proposed roadways and their classification, known as a major thoroughfare plan that is used in subdivision and other reviews (the growth policy statute does not *prohibit* a plan map; it is merely silent on the topic). This is a common feature in local comprehensive plans in the United States.¹¹⁵ The plan map may also show major critical and sensitive and natural haz-

¹¹¹MCA 76-3-621.

¹¹²MCA, Title 76, Chapter 6 (Open-Space Land and Voluntary Conservation Act)

¹¹³The standard text on this approach is Edward J. Kaiser, David R. Godschalk, and F. Stuart Chapin, *Urban Land Use Planning*, 4th ed. (Urbana, Ill.: University of Illinois Press, 1995), 279-287.

¹¹⁴See Ian McHarg, *Design with Nature* (New York: Doubleday/Natural History Press, 1971).

¹¹⁵A publication of the Montana Department of Commerce intended to provide guidance in the interpretation of the growth policy statute states: "A growth policy must contain a current land use map, a proposed land use map or both." The publication also includes a suggested land use classification system, although it is not a requirement to use it. Montana Department of Commerce, Local Government Assistance Division, *Montana's Growth Policy Resource Book* (Helena, Mont.: The Department, June 2000), 3-4. The publication notes that the growth policy statute does not "define the extent to which each element [of the growth policy] must be described." *Id.*, at 2.

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The Montana statutes deal with the question of consistency between the growth policy and development regulations or their application by several contrasting standards.

ard areas (floodplains being a significant type) and areas the local government has designated for special redevelopment. Absent a plan map, which presents a unified physical design for the local government, it is hard, perhaps even impossible, to formulate location-specific regulations like zoning or design standards, or to make location-specific decisions like zoning map amendments, subdivisions, special exceptions or conditional uses, and annexations. Such a plan map gives citizens a graphic representation of what the local community hopes to become through the application of the many written goals and policies contained in the plan document.

(3) **Provide grants to cities, towns, and counties to prepare growth policies and authorize them to raise funds for preparation of growth policies and implementing measures.** The draft report of the Land Use/Environmental Trends Subcommittee of the EQC provided the best available analysis and guidance to the state on this issue. There is no “correct” answer to the mixture of state and local funds to prepare growth policies. Moreover, the estimated costs to prepare a growth policy varied widely, from \$8,500 from Powder River County to \$195,000 for Lewis and Clark County (plus \$30,000 for staff time) to \$200,000 for Bozeman, so that it is virtually impossible to devise a standardized basic cost for a growth policy. However, given the recommendation of this report to make completion of growth policies and supporting development regulations mandatory for more populous and rapidly growing counties, priority should be given to those areas, with a specific allocation for rural areas or slower growing areas. The exact amount will depend on what kind of schedule the state establishes to complete growth policies and implementing regulations. Moreover, this report recommends consideration of a development excise tax and a graduated real estate transfer tax (see below) as other alternatives to fund growth policies. In contrast to, a local sales or bed tax, the development excise tax has the advantage of being related to the activity–development–that is causing the need for the growth policy. Similarly, the transfer tax would also have somewhat the same relation, assuming that real estate transfers in a robust local economy increase.

(4) **Establish criteria to determine consistency of proposed subdivisions, zoning changes, and proposed public facilities and utilities with the growth policy.** The Montana statutes deal with the question of consistency between the growth policy and development regulations or their application by several contrasting standards. One standard, in MCA 76-2-203(1) (county zoning) and 76-2-304 (municipal zoning), is that “[z]oning regulations must be made in accordance with the [or, ‘a’] growth policy.”

A second standard is the requirement, in MCA 76-1-605, that the legislative body must be “guided by and give consideration to the general policy and pattern of development set out in the growth policy” in connection with public facilities, utilities, the adoption of subdivision controls, and the adoption of zoning ordinances or regulations. A third standard, discussed above, is contained in MCA 76-1-606 (1) and (2) for a report from the city or county planning board to the legislative body as to “compliance or noncompliance of the plat with the growth policy.” A fourth standard appears in the annexation legislation, where a proposed annexation area must “conform to a growth policy.”¹¹⁶

Arguably, each of these sections implies a different, and possibly, conflicting standard of review: (1) “in accordance”; (2) “guided by and give

¹¹⁶MCA 7-2-4734(3).

consideration to”; (3) “compliance or noncompliance,” and (4) “conform,” with the first two being the most liberal and the latter two being the most restrictive. To some degree, the Montana Supreme Court has complicated the question of consistency in its *Lowe* decision, which was based on an interpretation of MCA 76-2-304 (purposes of zoning, municipalities). Under the *Lowe* decision, all zoning and rezoning decisions are to be evaluated by a 12-prong test, just one prong of which is the question of consistency with the growth policy or local comprehensive plan. As a practical matter, a 12-prong test is difficult for a lay body, such as a planning board or a local legislature, to apply. Since the language on which *Lowe* relies is based on the statute, as opposed to a constitutional standard, a modification to the zoning statute would streamline and simplify consideration of zoning decisions.

Consequently, this report recommends the establishment of a separate growth policy consistency statute. The statute would apply uniformly to: (a) the adoption and amendment of zoning, subdivision, and other forms of land development regulations; (b) land-use actions (such as the approval of subdivisions, zoning district changes (or initial zoning) and conditional use permits, variances, and other site-specific decisions); and (c) decisions to construct or substantially change a capital improvement and/or acquire land for community facilities (this would include buildings for governmental purposes, public utilities, parks, and transportation facilities). Conceivably, the standard in the statute could also apply to annexations.

The statute should call for a written analysis to be conducted by the local planning board or by the local planning staff when there are land development regulations, amendments, or land-use actions proposed. The analysis would find that the regulations, amendment, or action was consistent with the growth policy if it:

- furthers, or at least does not interfere with, the community goals and objectives in the growth policy;
- is compatible with the proposed future land uses and densities and/or intensities contained in the growth policy; and
- carries out, as applicable, any specific proposals or strategies for community facilities or public infrastructure, including transportation facilities, and other specific public actions, or actions that would be proposed by private organizations (such as sewer lines that would be installed by a developer) that are contained in the growth policy.

This would ensure that positive coordination with the growth policy occurs and that, when proposals involving land development regulations and individual land development decisions (including those by the local government) are made, there is a careful assessment of their relations with the growth policy and that the assessment is part of the public record concerning the legislative or administrative decision.

The written report should state whether or not, in the opinion of the local planning board or planning staff, the regulations, amendment, or action is consistent with the growth policy. The report should contain a recommendation as to whether or not to approve, deny, substantially change, or revise the regulations, amendment, or action. If the board or the staff finds there is an inconsistency between the growth policy and the proposal, it may also recommend ways of modify the growth policy as a matter of last resort. The legislative or administrative body (such as the board of adjustment) may adopt the report, reject the report, or

adopt or reject the report in part. If the body rejects the report or part of it, it must conduct the same analysis that the planning board or staff undertook concerning consistency, and must make its own findings before taking action. This would preserve, for example, the final authority of the legislative body in such matters as zone changes and subdivision plat approval.

An amendment establishing a consistency review procedure would also necessitate changing the purpose language in the county and municipal zoning statutes. Such a change would ensure that the fundamental and overarching purpose of zoning is to implement the growth policy, thereby focusing the inquiry of a local legislative or administrative body (and a reviewing court) on whether the land development regulations, amendments, or land-use actions in fact do that. The other purposes, which are a restatement of police power objectives (and really subordinate to the planning purpose) and now contained in the county and municipal zoning statutes, should be incorporated into the purposes of engaging in planning, at MCA-76-1-102.

(5) **Extend the requirement for consistency with a growth policy to Part 1 zoning in those cases where a growth policy is either required for a local government or has been prepared.** There is debate over whether Part 1 landowner-initiated zoning is a sound approach or whether it allows—as some respondents to APA’s questionnaire and participants in the focus groups contended—property owners to initiate highly restrictive land-use regulation for their own (as opposed to the county’s) benefit. In any case, Part 1 zoning is exempt from any type of serious planning requirement. Indeed, the minimum area required for a district contained in MCA 76-2-101 (3), 40 acres, is so small as to apply to single subdivisions as opposed to larger areas of the county where a case for broader set of benefits can be made. As *Montana Wildlife Federation v. Sager*, 620 P. 2d 1189 (Mont. 1980) confirmed, the only planning requirement for a planning and zoning district is the device called a “development pattern” for which the Montana Code provides no substantive guidance in its preparation.

If a growth policy, which represents a vision of what a community hopes to become, is to provide the official basis for publicly administered land-use controls and is to be implemented, then it must be related not only to county-initiated zoning and subdivision regulation, but also to the landowner-initiated zoning—if such Part 1 zoning, in the language of MCA 76-2-104 (1) is in fact “furthering the health, safety, and general welfare of the county.” Therefore, this section should be amended to clearly provide for consistency with a growth policy, where such a growth policy is either required to be adopted by statute or has been adopted at the initiative of the county.¹¹⁷

An alternative to requiring Part 1 zoning to be consistent with the growth policy is to replace Part 1 zoning with a citizen-initiated petition as a provision of Part 2 zoning. Such an approach would eliminate the confusion of having two forms of county-administered zoning and clarify the relationship between the growth policy and zoning.

(6) **Increase the minimum area requirement for a planning and zoning districts to 640 acres (one square mile).** This will ensure that the resulting

¹¹⁷The statute does not clearly provide for this at present, although the Attorney General has opined that consistency with a county master plan (now growth policy) is required. 48 Op. Att’y Gen. No. 5 (1999). This change will make consistency an express, rather than implied, requirement.

regulations protect the broader public and do not take on the appearance of private restrictive covenants enacted for the benefit of one or a handful of property owners. Exceptions could be made in the statute to allow Part 1 zoning to be smaller parcels, in cases where such an area is bounded by federal or state-owned land or is subject to other geographical constraints.

(7) **Require local governments to apply the growth policy in the administration of subdivision regulations.** The Montana statutes work at cross purposes when it comes to the relationship of the growth policy to the subdivision review process. On the one hand, MCA 76-1-605 requires a local government to “be guided by and give consideration to the general policy and pattern of development set out in the growth policy in the . . . (3) adoption of subdivision controls.” On the other hand, MCA 76-1-606 provides that, once a growth policy has been approved, a local government “may . . . require subdivision plats to conform to the provisions of the growth policy” by adoption of an ordinance (for a city) or a resolution (for a county) (emphasis supplied). The city or county planning board is then to be responsible for making a report to the city council or the board of county commissioners on “compliance or noncompliance of the plat with the growth policy,”¹¹⁸ although the city or county legislative body still retains the final authority for the approval of the plat. The former language mandates that local governments reflect the growth policy in the text of the subdivision regulations; however, the latter language suggests that they are free to ignore the growth policy in the day-to-day review and approval of subdivision plats themselves. Given the pivotal role that growth policy assumes in state’s planning and zoning statutes, the language in the Montana Code should be changed to require consistency of subdivision plats with the growth policy.

6.2 RECOMMENDATIONS ON MANAGING GROWTH

(8) **Require local governments to incorporate, in the absence of zoning, minimum lot area requirements into subdivision regulations if those lot area requirements are consistent with provisions of the growth policy.** Montana does not require a local government that adopts a growth policy to adopt zoning as well. Nonetheless, the recommendation in (1) above, which calls for all local governments in counties of a certain population size, or of certain rate of growth to adopt both growth policies and zoning and subdivision controls, would address this problem in the more developed or rapidly growing counties. Still, it is possible to modify the requirements for subdivision regulations so that they give effect to mapped, location-specific land-use policies contained in the growth policy. If the growth policy is required to contain a land-use plan map that specifies land-use density, as recommended above, the plan map can then be used as a device to set lot sizes so that they are consistent with the growth policy, without need for zoning regulations. While the use of the land would still be outside the purview of the subdivision review process, the density, as determined by lot sizes, would not.

MCA 76-3-504 specifies minimum requirements for subdivision regulations. This section should be amended to provide for minimum lot area requirements that are consistent with designations shown on the growth policy’s plan map, where the local government has not adopted zoning. For example, if the growth policy shows a net density for a certain area of approximately five dwelling units per net acre (assuming 15 percent of each acre would be devoted to public streets or other infrastructure or

Given the pivotal role that growth policy assumes in state’s planning and zoning statutes, the language in the Montana Code should be changed to require consistency of subdivision plats with the growth policy.

¹¹⁸MCA 76-1-606 (2) and (3).

public open space), then a lot size in a proposed subdivision would be approximately 7,500 square feet.¹¹⁹ It should also provide the averaging of density over an entire tract of land, so that residential cluster development, which groups buildings together on a portion of a site and retains open space on the remainder, is possible. By authorizing subdivision regulations to contain minimum lot area requirements that are consistent with growth policy designations, the amendment would sidestep the problem created by the Sanitation in Subdivisions Act. That act effectively gives the Department of Environmental Quality, through the determination of the minimum area for onsite sewage treatment systems such as septic tanks, the ability to fix minimum lot sizes (generally one acre for the entire state for areas lacking central sewer and water) and therefore the pattern of development for the entire state—regardless of the relationship with locally adopted growth policies.¹²⁰ Under such an approach the local government would refer to the plan map when reviewing a subdivision to determine if the lot sizes reflected what the growth policy called for.¹²¹ It would not modify the authority of the DEQ. Instead, the local government could, as a matter of land-use policy, establish lot sizes independent of the DEQ administrative rules.

(9) Grant municipalities that have adopted a growth policy have the authority to adopt adequate public facility requirements for all new development, whether it is inside their boundaries, or within the authorized extraterritorial radius. As noted above, municipalities have, under certain conditions, the ability to extend the application of their zoning and subdivision regulations beyond their corporate limits in any direction, up to three miles for a city of the first class, up to two miles for a city of the second class, and up to one mile for a city or town of the third class. This authority is only conferred on municipalities that have adopted a growth policy, but does not apply in locations where a county has adopted a growth policy and accompanying zoning or subdivision regulations (see comment in footnote).¹²²

The intent of these provisions (MCA 76-2-310 to -311) is to ensure that development on the urban fringe is subject to municipal development standards and requirements, and would be developed at municipal den-

¹¹⁹ $(43,560 \text{ square feet per acre} \times (100\% - 15\%)) \div 7,500 \text{ square feet/dwelling unit} = 4.94 \text{ dwelling units per net acre.}$

¹²⁰The administrative rules for the Sanitation in Subdivisions Act set minimum lot sizes for the entire state of one acre per dwelling unit or business, where on-site water or onsite-site sewage treatment systems are to be used. The Department of Environmental Quality (DEQ) may allow smaller lot sizes for minor subdivisions if its own analysis indicates no sanitary problems will occur. The DEQ may require lot sizes larger than one acre in situations where individual sewage treatment and multiple systems are proposed and the concentration of living units may cause pollution or contamination of state waters or where an adequate water supply cannot be developed for the proposed number of living units. A.R.M. 17.36.301 (Lot sizes).

¹²¹*Vergin v. Flathead County*, 996 P.2d. 882 (Mont. 1999), discussed above, is about a local government's use of the density designations contained in a comprehensive plan (as well as reference to the historic pattern of development in the area) in denying approval of a proposed subdivision.

¹²²MCA 76-2-310, 76-2-311. These two sections conflict with one another, and the conflict needs to be eliminated. MCA 76-2-310(1) exempts areas where a county has adopted zoning or subdivision regulation and MCA 76-2-311 exempts areas where the county board has adopted a growth policy and accompanying zoning or subdivision regulations that includes the area. Compare with MCA 76-3-601(2)(b) (requiring the county governing body to submit a preliminary plat to a city or county governing body or its designated agent for "review and comment").

sities and intensities. However, single-parcel development that does not need subdivision approval, such as shopping centers, would not necessarily be subject to the development standards contained in the subdivision regulations. Moreover, a key consideration for all development is whether it will be served by central water and sewer facilities.

One way to ensure that urban development is supported by urban services is to authorize the municipality to adopt an adequate public facilities ordinance. Such an ordinance ties or conditions development approvals to the availability and adequacy of public facilities. The purpose is to ensure the municipality's public facilities or system of facilities has sufficient available capacity to serve development at a predetermined level of service (LOS). A development is determined to be in compliance with the ordinance if its impacts do not exceed the ability of public facilities to accommodate those impacts at the specified LOS. If the proposed development cannot be supported by the existing system at the required service level, the developer must either install or pay for the required infrastructure improvements or postpone part or all of the development until the municipality provides the needed public facilities. Such an ordinance allows control over the timing of development and clarifies the municipality's role in fulfilling its responsibilities in providing public infrastructure. It also creates a direct linkage between the municipality's growth policy and its long-term capital improvement program and capital budget.

An enabling statute would need to specify the types of facilities covered by such an ordinance, and provide for a mechanism by which the capacity of public facilities covered by the ordinance may be reserved for a reasonable period of time in connection with approval of a development. This is to ensure that wastewater treatment capacity, for example, could not be tied up to prevent other development from occurring. The ordinance should not be able to distinguish between types of development—residential vs. nonresidential; this is to ensure that the cumulative impacts of *all* development are addressed. It would also need to specify the types of development that would not be subject to the ordinance's requirements, such as accessory buildings and structures, or reconstruction or reuse of existing buildings, because of minimal or no impact. Such a statute may also give the authority to a state agency to publish guidelines for levels of service that municipalities could use.

A major advantage of such an ordinance is that it would quantify system capacities and levels of service, removing them, to the extent possible, from a subjective judgment about whether, for example, traffic from a proposed development would overtax roadway systems. A potential disadvantage, however, is that development could be pushed further and further out into unincorporated areas where there is no adequate public facility requirement. For this reason, it is important that municipalities have the ability to impose such requirements on unincorporated land within their area of influence.¹²³ It is also important to note that such an ordinance will require sophistication in administering it, including a reliable inventory of facilities, a good track record in constructing new or expanded facilities on schedule (or ensuring that the developer installs the facility as promised), and good record keeping in order to reserve system capacity.

¹²³A comment on an early draft of this report concerning adequate public facilities ordinances (as well as impact fees and similar tools) noted that “[c]ities and counties need to maintain a level playing field or the more restrictive regulations inside city limits will continue to drive development into rural areas.”

One way to ensure that urban development is supported by urban services is to authorize the municipality to adopt an adequate public facilities ordinance.

(10) Replace the subdivision-specific environmental assessment with an environmental assessment that gauges the cumulative impact of development proposals contained in the growth policy and that incorporates mitigation into local development regulations, as necessary; require consideration of alternatives and their impacts in the local government growth policy.

Currently, the Subdivision and Platting Act requires an environmental assessment for a preliminary plat of major subdivision and a summary assessment for minor subdivisions.¹²⁴ However, a minor subdivision is exempted from the environmental assessment requirement (as well as a public hearing) if it is the first minor subdivision created from a tract of record.¹²⁵

There are a number of flaws with the current environmental assessment requirement. As a preliminary matter, the statutory provisions are poorly organized and drafted. Instead of dealing with the topic thoroughly in a single section, they force the users to jump back and forth between various sections of the Montana Code to attempt to comprehend the requirements. For example, MCA 76-3-603 refers the reader to MCA 76-3-608, 76-3-609, and 76-3-501. MCA 76-3-608 then refers the reader to MCA 76-3-505 and 76-1-601, as well as other parts of Title 76. MCA 76-3-501 refers the reader to MCA 76-3-511 and MCA 76-3-610.

The required environment assessment is prepared by the applicant, not the local government; it is to meet a set of requirements in MCA 76-3-603, which also refers to criteria described in MCA 76-3-608. Participants in focus groups and respondents to APA's questionnaire frequently identified relying on the developer's assessment of data as a flaw in the statute. Under the assessment procedures, the impact is gauged on a case-by-case, not on a cumulative, basis. The statute does not require monitoring by the local government to determine whether the predictions contained in the assessment actually come about—predictions that concern the impacts of and anticipated needs created by the subdivision as well as the effect on the public interest criteria contained in MCA 76-3-608(3)(a) (which must also be addressed in the assessment). Finally, the environmental assessment only applies to subdivision of land, and not other significant types of land development where no environmental assessment occurs. For example, a proposal to develop a regional shopping center on a single 40-acre parcel of land, where there is one building, would be exempt from the environmental assessment requirement.

A better approach would be to require the preparation of the environmental assessment on the growth policy itself and to apply the findings (including those related to the public interest criteria) and recommendations on mitigation actions to changes in the local government's development regulations. The section requiring the environmental assessment should be self-contained so it would not be necessary to jump around the various parts of the Montana Code to interpret it.

¹²⁴MCA 76-3-603.

¹²⁵MCA 76-3-609(3). However, this exemption is not what it appears to be. The Montana Department of Commerce points out that, although the first minor subdivision is exempt from the environmental assessment, it must still be reviewed by the local government as to its "effect on the natural environment" as required by MCA 76-3-608(3)(a). The Department of Commerce recommends that, in order to collect the environmental data required by MCA 76-3-608(3)(a), the local government will need to obtain the data from a source other than the subdivider. For example, the planning staff or a planning consultant under contract to the local government could provide the data. Montana Department of Commerce, Local Government Assistance Division, Community Technical Assistance Program, *Model Subdivision Regulations* (Helena, Mont.: The Department, December 1993, Addendum June 1995), at 19 (of addendum).

How would such an approach work?

- Such a statute should require that, at the time a growth policy is prepared, and prior to its adoption, a report would be prepared that would consider and evaluate the significant environmental effects of the various elements of the growth policy, and alternatives contained in the element. The report should describe the significant environmental effects of each alternative considered in the growth policy and describe how each alternative can avoid, substantially reduce, or mitigate any significant environmental effect of the element at issue. For example, the land-use element in the growth policy could consider different arrangements of land use by use, density, and intensity and alternative patterns of urbanization.
- The statute should contain a series of express standards that the assessment is to consider, and, if the public interest criteria are retained, they should be restated so that they convey to the preparer of the assessment what to look for. MCA 76-3-608 (3)(a) currently requires that the subdivision proposal must be reviewed for “the effect . . . on agriculture, agriculture user water facilities, the natural environment. . . .” This section could be restated to make the criteria clearer since they do not explain the nature of the effect—good or bad—that they are intended to examine. For example, it could be redrafted as: “The environmental assessment shall evaluate the degree to which development proposed by the growth policy and any alternatives considered by the local government in the growth policy would: (a) result in the loss or retention of prime agricultural land; (b) significantly reduce the amount of water available to agricultural water users or facilities; (c) result in the loss or retention of wildlife and wildlife habitat. . . .” etc.
- The statute should require that, to the extent possible, the growth policy itself or the zoning, subdivision, and other land development regulations should incorporate measures that adequately mitigate, as necessary, the development contemplated in the growth policy. Consequently, the development would not be subject to any further site-specific review on the question of mitigation because the development regulations would incorporate provisions that would do so as a matter of course.¹²⁶ For example, the environmental assessment might conclude that a particular type of land use was inappropriate for the location initially proposed in the growth policy, and mitigation would be a change in location, a change in density or intensity, or completely removing it and substituting another land use. Alternately, certain types of development might require strict controls on erosion, which would be incorporated into the subdivision regulations. In some cases, the mitigation requirement would be for the local government to expand a public facility in a certain area, which would be accomplished by including the expansion proposal in a capital improvement program. In still others, the mitigation requirement might be imposed on all developers in the area through a uniform exaction.
- While the general approach is to provide for mitigation, as necessary, in advance of development, it should also be possible for the local gov-

¹²⁶To some degree, the various exemptions for subdivisions from environmental assessments contained in the Montana Code assume that the adoption of a growth policy, and zoning and subdivision regulations means that the mitigation will be incorporated into the development regulations.

The statute should require that, to the extent possible, the growth policy itself or the zoning, subdivision, and other land development regulations should incorporate measures that adequately mitigate, as necessary, the development contemplated in the growth policy.

ernment to decide that, for a given site specific development proposal, such as a subdivision, a supplemental environmental review may be required because the environmental impact assessment on the growth policy did not consider that particular impact, or that the particular impact is not mitigated by the local government's land development regulations or other rules. In such a case, the supplemental assessment would be limited to those classes of impacts not previously considered.

- The local government itself would be responsible for preparing, or causing to be prepared, the environmental impact assessment. The assessment would accompany the growth policy through the public hearing and adoption process and its adequacy and the appropriateness of the mitigating measures would become a subject of discussion during that period. The report would be included with the growth policy after it was adopted as an appendix. The mitigation recommendations would be incorporated into the land development regulations, as necessary.

This approach would have several benefits. First, the local government, and not the developer, would be responsible for the assessment, and the quality and soundness of the entire report would be the subject of public debate. Second, the review of the growth policy would expressly consider alternatives, something that is not currently required in the preparation of the growth policy. Third, the assessment would examine the impact of development that is currently exempt from an environmental assessment—such as shopping centers—on a single parcel of land where no further subdivision is contemplated. Fourth, there would be a connection between the recommendations of the environmental assessment and local government policies and rules, so that the analysis resulted in a change to respond to the impacts it identifies. Fifth, to the extent possible, this approach would encourage local governments to address development-related impacts anticipated in the plan, including cumulative impacts, in advance of development. The major drawback of this approach, however, is the gray area in which it will not be clear whether or not an environmental impact assessment addresses a particular impact, thereby necessitating additional environmental review. In addition, this approach might spawn litigation over the adequacy of environmental assessment itself. Finally, as one reviewer of an early draft of this report noted, a proposal to link the preparation of growth policies with an impact analysis “may discourage community participation and reduce planning to a cost/benefit analysis.” The reviewer noted that this proposal would need to be supported by documentation of the experience in other communities that have used this approach.¹²⁷

It should be emphasized that, under the recommendations contained in this report, this alternative will only be applicable to those local governments that are required to prepare a growth policy or that voluntarily elect to complete one (see the following recommendation on paying for required assessments)

(11) **Consolidate and redraft the minor subdivision review sections.** The minor subdivision procedures are spread out over several sections:

- MCA 76-3-505, which describes the summary review procedure;
- MCA 76-3-603(2), which describes the “summary of probable impacts of the proposed subdivision” and refers to the criteria contained in MCA 76-3-608(3);

¹²⁷For a discussion of this approach in the City of Everett, Washington, see Stuart Meck, “Washington City Adopts Three-for-One Plan,” *Planning*, Vol. 63, No: 6 (June 1997), pp. 22-23.

- MCA 76-3-608(6)(a), which describes the exemption for minor subdivisions in areas that are covered by a growth policy from the review criteria contained in MCA 76-3-608(3)(a); and
- MCA 76-3-609, which describes the time limits for review and the exemption for the first minor subdivision from a tract of record from the public hearing and environmental assessment requirements.

Understanding how these sections fit together is quite difficult—it involves jumping from one section to another to reconcile statutory language—and this could be remedied by consolidating the sections under a single section to address minor subdivision. Moreover, it would be tighter and clearer drafting to define a minor subdivision in MCA 76-3-103 rather than repeat the characteristics of a minor subdivision twice, as the statutes do presently.

The general approach of the Subdivision and Platting Act is to require public hearings on subdivisions, but it is unclear why the first minor subdivision created from a tract of record is exempted from the public hearing and environmental assessment requirements, since the local government must engage in the same type of fact-finding and verification that it would for all other minor subdivisions. For example, in a public hearing, it would be possible to question whether or not the minor subdivision provided “proper access to all lots” as required by MCA 76-3-609, and whether or not the public interest criteria in MCA 76-3-608(3)(a) are satisfied.

(12) **Require that divisions for the purpose of family transfer, boundary change, and agricultural use be subject to subdivision review.** As noted above, MCA 76-3-207 exempts from subdivision review: (1) divisions for the purpose or relocating common boundaries; (2) divisions for a single gift or sale in each county to each member of the landowner’s immediate family; and (3) divisions used exclusively for agricultural purposes. The statute *assumes* that abuse is going to occur and so states: “. . . unless the method of disposition [of land] is adopted for the purpose of evading this chapter . . .”¹²⁸ To combat evasions, local governments in the state adopt “evasion criteria” to ferret out miscreant subdividers. Indeed, the model subdivision regulations promulgated by the Department of Commerce contain model evasion criteria.¹²⁹ A better solution is to eliminate both the family transfer and agricultural use exemptions entirely from the Subdivision and Platting Act. A boundary relocation should be treated as a resubdivision and incorporated into the minor subdivision procedures, with expedited review, including exemptions from environmental assessment and public hearing requirements since no additional lots will be created.¹³⁰

¹²⁸MCA 76-76-207(1).

¹²⁹Montana Department of Commerce, *Model Subdivision Regulations*, Appendix K, Advisory Model Evasion Criteria. For example, the criteria provide: “Exempt divisions of land that would result in a pattern of development equivalent to a subdivision shall be presumed to be adopted for purposes of evading the Act. A ‘pattern of development’ occurs whenever 3 or more parcels of less than 160 acres with common covenants or facilities have been divided from the original tract.” *Id.*, at K-3.

¹³⁰One reviewer of this report pointed out that, under MCA 7-3-207(1)(c), subdivisions for agricultural purposes are required to be subject to a “a covenant running with the land and revocable only by mutual consent of the government body and the property owner that the divided land will be used exclusively for agricultural purposes.” The problem with this language, he noted, is individuals who fail to determine the full extent of deed restrictions on their property and discover that the covenant does not allow the location of a residential structure that requires sewer or water on the property.

Understanding how these [minor subdivision] sections fit together is quite difficult—it involves jumping from one section to another to reconcile statutory language—and this could be remedied by consolidating the sections under a single section.

Focus group participants and questionnaire respondents were uniformly critical of these exemptions (see section 4.3 above), as have been the Environmental Quality Council's Growth and Environmental Subcommittee's 1999 report and the performance audit of the subdivision approval process. The EQC recommended that the family conveyance be studied, with the alternative of eliminating the exemption or prohibiting the sale of a parcel subdivided using this exemption for a period of time, such as two to five years. The performance audit described the impact of the exemptions in stark terms:

In several counties, family transfers and boundary relocation exemptions account for a significant portion of land division in the county. In Flathead County, family transfers accounted for 46 percent of the land divisions in fiscal year 1998-99. In Gallatin County, family transfers accounted for 33 percent of the application during fiscal year 1998-99 and 43 percent related to boundary relocations.

Local government officials and staff expressed concern that many common boundary relocations and family transfers appear to be bypassing formal subdivision review of the land division. When land is sold to a third party soon after the exemptions are granted, they believe the purpose of the family transfer or boundary relocation was to avoid local review. For example, in one county, documentation indicated that the median length of time to sell the land after a family transfer is 4.3 months.

For those lots created with these exemptions, there has been no local review of the land division to ensure the land is suitable for development, water availability, public access to the lots, or that utility easements exist. In addition, impacts on local services were not considered. Furthermore, there is not assurance for fire protection, law enforcement, and road maintenance can be provided. Basically, the "new" subdivision received no local government review to ensure compliance with the requirements of the Platting Act. The legislature may need to study this issue further to ensure the original intent of the exemption is met.¹³¹

These exemptions are unconventional. A search of statutes from the nearby states of Idaho, North Dakota, South Dakota, and Wyoming did not turn up similar provisions, although the division of land for agricultural purposes is exempted in two of the states.¹³²

The difficulty with the current language is that it premises the exemption on the identity of the beneficiary of the division (a member of the immediate family) or on the current or future use of the land, not on any objectively determined conditions existing at the time of subdivision—conditions that would continue regardless of who owns the subdivision. Further, because zoning regulations may not exist, especially in unincorporated areas, there is no way of ensuring that use for "agricultural purposes," a phrase undefined in the Subdivision and Platting Act, will continue and that a change to another type of use would undergo a review. Moreover, the exemption of boundary relocations (moving a lot line back between two lots or adjoining property), normally covered in minor subdivision review, could result in a

¹³¹Legislative Audit Division, *Performance Audit: Subdivision Approval Process*, 4-5.

¹³²See Id. Code, 15-1301-15 (2000); N.D. Cent. Code 11-33.2-01 (Lexis, 1999); S.D. Codified Laws, 11-2-1(8) (1999); and Wy. Stat. 1977 15-1-501(a)(iii), 15-1-302(a)(vii) (2000). Both Idaho and Wyoming do contain exemptions for agricultural use, however. Wyoming also exempts divisions of 35 acres or greater. Id. Code, 15-1301-15; Wy. Stat. 18-5-303.

situation in which a lot is created that does not meet the requirements of the local zoning regulations, where they exist. Conceivably, the statute could be amended to incorporate formal “evasion criteria” into it, but that requirement would still involve detective work on the part of the local government and would inevitably create a climate of distrust between the local government and the subdivider.

(13) Specifically authorize innovative land development techniques and/or charge the Department of Commerce with developing model ordinances that local governments in Montana could adapt for their own use. The Montana statutes are silent or nearly so on a variety of innovative development controls. The statutes say nothing about cluster development,¹³³ transfer of development rights,¹³⁴ bonus provisions and similar incentives,¹³⁵ and development agreements,¹³⁶ to name a few. Planned unit development is defined in the subdivision statutes, but, beyond the definition, there is no explanation of how it would work, especially without zoning.¹³⁷ Many are standard provisions in state enabling statutes, and should be authorized in Montana.

¹³³Residential cluster development is a form of land development in which the principal buildings and structures are grouped together on a site, thus saving the remaining land area for common open space, conservation, agriculture, recreation, and public and semi-public uses.

¹³⁴Transfer of development rights (TDR) is the yielding of some or all of the right to develop or use one parcel of land in exchange for a right to develop or use another parcel of land more intensively. In a TDR program, a local government that wishes to preserve land in an undeveloped or less-developed state may do so without payment of case compensation if it is willing to accept higher densities or more intensive uses elsewhere. The following states expressly authorize TDR: Arizona, Connecticut, Florida, Georgia, Illinois, Kentucky, Maryland, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, Pennsylvania, South Dakota, Tennessee, and Washington. It is necessary to have zoning in order to use TDR because the development rights are based on what local zoning regulations allow.

¹³⁵A bonus provision provides, for example, additional density or land use intensity on a site in exchange for provision of a specific amenity, such as a plaza, provision of affordable housing, or dedication of open space.

¹³⁶A development agreement is a statutorily authorized, negotiated agreement between a local government and a private developer that establishes the respective rights and obligations of each party with respect to certain planning issues or problems related to a specific proposed development or redevelopment project. A development agreement allows terms and conditions different from and more detailed than the requirements of local land development regulations and the statutes authorizing them. All elements of the agreement are enforceable against the local government as well as the developer. Among states expressly authorizing development agreements are California, Florida, Hawaii, Idaho, Maryland, and Nevada.

¹³⁷MCA 76-3-103 (9) defines a planned unit development (PUD) as “a land development project consisting of residential clusters, industrial parks, shopping centers or office or building parks that compose a planned mixture of land uses built in pre-arranged relationship to each other and have open space and community facilities in common ownership and use.” However, it is important to note that the subdivision statutes, where this definition appears, do not authorize the regulation of use, only the platting of land and the arrangement and installation of public improvements in connection with that platting. Neither the zoning nor the subdivision statutes describe how a planned unit development is to be established. The Montana Department of Commerce has incorporated PUD provisions in its model subdivision regulations that refer to PUD provisions in the local government’s zoning regulations, but where those PUD provisions do not exist, the proposed subdivision must be designated as a PUD by the planning board before being reviewed as a PUD. The model subdivision regulations provide that, “[i]n those areas where no zoning exists, the planning board shall determine, in consultation with the subdivider, the overall dwelling unit density.” Montana Department of Commerce, *Model Subdivision Regulations*, 45, 47.

The Montana statutes
are silent or nearly
so on a variety of
innovative development
controls.

Innovative approaches can be authorized in two different ways. The first is simply to describe the specific tool, authorize local governments to use it, and direct the Department of Commerce to develop model ordinances or resolutions that local governments could adapt.¹³⁸ The second is to authorize the tool, but do so in a manner that sufficiently describes the nature of the ordinance or regulation so that it would not be necessary to develop a model ordinance or resolution; the details would be in the statute.¹³⁹ To some degree, this is the approach (i.e., defining minimum requirements) taken in MCA 76-3-504, which lists the basic contents of subdivision regulations, rather than leaving this up to the local government's discretion.

(14) **Expressly authorize amortization of nonconforming uses for Part 1, Part 2, and municipal zoning.** A nonconforming use is a land use, or a structure, which was allowed under a local zoning ordinance when it was established (or which predates the adoption zoning), but would not be permitted under the current ordinance. Currently, MCA 76-2-105 (Part 1 zoning) and MCA 76-2-208 (Part 2 zoning) allow "[a]ny lawful use which is made of land or buildings at the time any zoning resolution is adopted . . . may be continued although such use does not conform to the provisions of such resolution." There is no similar language for municipal zoning under MCA 76-2-301 *et seq.* Moreover, the Montana statutes do not provide for the situation in which a nonconforming use is terminated by the landowner by stating a period after which the nonconforming use cannot be resumed.

Amortization is a technique for the removal of nonconforming uses by which the uses are phased out over a period of time to allow the property owner to recoup all or most of the original investment for a use, on the theory that to do so would eliminate uses or structures that clearly conflict with community goals and objectives in a local comprehensive plan. Amortization has had its greatest success in the removal of nonconforming signs. Amortization may be essential in a local sign program when a local government adopts an improved sign ordinance because landowners who erect new signs will be reluctant to comply with the new ordinance if more prominent nonconforming larger signs are allowed to remain.

Eight states expressly address amortization of nonconforming uses.¹⁴⁰ Some state courts hold that the general statutory authorization for zoning or constitutional or statutory home rule authority may confer the power to amortization without express language. The Montana Supreme Court itself has only addressed the question in *dicta* (a statement or comment by a judge in a case which is not about the precise rule of law that the case is addressing), in *Kensmoe v. City of Missoula*, 480 P.2d 835 (Mont. 1971), which dealt with the vested right a property owner has to maintain a nonconforming use, in this case a trailer home. Here the Court commented, without elaboration: "If the City of Missoula wishes to provide for the

¹³⁸For example, recent (1999) amendments to Wisconsin's planning statutes require local governments of a certain size to adopt regulations providing for conservation or cluster development and traditional neighborhood development. The statutes call for model ordinances implementing these provisions to be developed by the state's agricultural extension service. Wisc. Stat. 66.034 (1999).

¹³⁹This latter approach is the one taken by the American Planning Association in its Growing SmartSM project, which is developing model planning and zoning legislation for the U.S.

¹⁴⁰The states include Colorado, Hawaii, Illinois, Minnesota, Missouri, Oklahoma, South Dakota, and Utah.

eventual attrition of nonconforming structures or land use for residential trailer houses, its zoning ordinance must be amended to so provide.” This suggests that a municipality, at least, has an implied power to phase out nonconforming uses.¹⁴¹ Beyond this, the Court provided no guidelines about how amortization would work in Montana.

An amendment to the zoning statutes to expressly authorize amortization of nonconforming uses should be part of a statute that comprehensively addresses the status of nonconforming uses, including change, expansion, and the time period that the use may be discontinued or abandoned and not resumed. The amendment should provide for inventorying, registering, and issuing certificates for nonconformities, to establish their legal status at the time a zoning ordinance is enacted or substantially amended. Amortization should be authorized, under the condition that there is a growth policy that contains specific policies concerning the desirability of amortization.

There are two alternative approaches to amortization that should be considered for incorporation. In the first approach, the statute could authorize the enactment of an ordinance that adopts a fixed time period for amortization of particular nonconforming uses. At the end of the time period, all nonconforming uses in existence at the time the ordinance was adopted must terminate. The second approach applies amortization on a case-by-case basis. The ordinance contains criteria that the legislative body, board of adjustment, or other official, such as a land-use hearing examiner, applies on a case-by-case basis to set an amortization period for nonconforming uses. If a nonconforming user does not agree with the decision on the amortization time period, it can challenge the decision in court.

(15) **Authorize official maps/corridor protection.** Montana’s statutes do not contain provisions for an official map, which is a regulatory device that allows a local government to reserve designated land areas for later public improvements. Once a local government adopts an official map, it has the authority to prohibit development, subject to constitutional limitations, on the designated land areas, protecting the mapped area from development that would interfere with the future public improvement and, in most cases, increase the cost of the land.

Based on the local government’s comprehensive plan and its plan for major thoroughfares, the local government produces a map of land indicated for future public use. The effect of such an indication is that the public is placed on notice that the local government or some other level of government intends in the future to “take” or formally acquire title to the land under eminent domain in order to provide the indicated public facility. The most common approach is for the local government to forbid, either outright or absent special circumstances, the construction of permanent structures on land indicated on the official map as future public land. At the time of condemnation, the government will not have to pay the added value of land with buildings or structures on it nor incur the substantial cost of removing the structures that are in the path of the project. Also, if permanent buildings and other structures are not allowed to be built in the way of public facilities, there will be fewer persons and businesses displaced by such projects.

¹⁴¹On the other hand, the Court could have meant “eventual attrition” to refer to a hypothetical zoning provision that when a nonconforming structure (such as the mobile home in the instant case) is terminated, any replacement structure has to conform to the present zoning. That would be “eventual attrition,” but would not constitute amortization.

There are two alternative approaches to amortization that should be considered for incorporation.

At least eight states have official map laws.¹⁴² Together, the local comprehensive plan and the official map can provide predictability by identifying in advance the desired location of public facilities. However, the price of that predictability under an official mapping designation is that the landowner is unable to build upon land that has been so designated unless the official map legislation provides some form of relief. This has usually been provided through a variance when hardship can be demonstrated. A landowner banned from constructing permanent buildings or structures on his or her property for an indefinite period of time could argue that the government has deprived him or her of the reasonable use of his or her land. Consequently, such laws must be carefully drafted to prevent a taking claim.

APA has developed a variant on the standard approach that surmounts the taking problem in the standard approach in a “corridor map,” which is limited to transportation corridors, as part of its Growing SmartSM planning statute reform project.¹⁴³ The need for transportation corridors to be protected comes from their linear nature; an obstruction in the intended corridor will necessitate either increased expense or a detour of the corridor. Similar linear public uses, such as drainage facilities, may have a similarly strong need for protection. Although official map legislation has been used to protect parks and open space, and other nonlinear public facilities, as well as thoroughfares, the necessity of protecting such other, nonlinear public uses is not typically as great nor as legally defensible; obstruction on one parcel of land can often be addressed by condemning another nearby parcel instead.

Under such an approach, a local government that has adopted a comprehensive plan with a major thoroughfare plan can prepare a corridor map, which must be consistent with the plan. The map is prepared by the local government but takes effect only upon adoption by the local legislative body after a public hearing. Because governmental units other than the local government itself, such as a state transportation department, may intend to construct roads within the local government’s jurisdiction, and those roads are included in the thoroughfare plan, the local planning agency cooperates with these other governmental units in formulating the corridor map. In addition, before the map can be adopted, other governmental units whose intended roads are indicated on the map can formally object to that indication and have the land that was reserved on their behalf removed from the map.

The effect of reservation is to forbid the construction or expansion of permanent structures in the intended right-of-way of planned transportation facilities as indicated on the map, and the owner of land including reserved land may build on the nonreserved portion of the land and may use the reserved portion as long as no permanent structure built there or expanded. The local government, or the governmental unit on whose behalf the land is reserved, may exercise the power of eminent domain at any time within the reservation period, and may at its discretion employ options to purchase. The designation of land on a corridor map loses effect after five years unless the intended transportation facilities have, in that time, been built or at least eminent domain proceedings have commenced against the reserved land.

¹⁴²States with official map laws include Alabama, Delaware, Massachusetts, New York, New Jersey, Oklahoma, Pennsylvania, and South Carolina.

¹⁴³American Planning Association, *Growing SmartSM Legislative Guidebook: Model Statutes for Planning and the Management of Change, Phases I and II Interim Edition* (Chicago, Ill.: American Planning Association, September 1998), 7-233 to 7-251.

If a landowner applies for a permit for development on reserved land, there must be a hearing, open to the public, on the permit application. The local planning commission, planning agency, or a hearing officer may conduct the hearing, and then recommend a determination of the case from a list of options. These include (1) approving the permit, (2) approving it conditionally, (3) denying it, (4) staying proceedings for a specific period of time, (5) modifying the permit application and then granting it as modified, (6) eliminating or altering the reservation, (7) compensating the owner through transferable development rights or other similar mechanisms, (8) taking the right-of-way by eminent domain, or (9) obtaining voluntarily or by eminent domain a negative easement over the reserved land — that is, a contractual duty, running with the land, on the part of the owner not to build on the land (akin to a conservation easement), or purchasing an option on the land. Its recommendations are forwarded to the local legislative body, which can adopt or reject the recommendations or remand the matter for further hearings. For instance, if the recommendation is made to take the reserved land by eminent domain, and the local government (or other agency) does not commence to do so within thirty days, there must automatically be a new hearing and a reconsideration of the recommendation.

A corridor map or similar provision would give Montana local governments the ability to implement a major thoroughfare plan and minimize the likelihood that potential corridors for new streets or planned street widenings could be built upon. At the same time such a statute would provide procedures that will safeguard property rights and provide certainty and predictability for landowners in areas where such improvements are planned.

(16) Evaluate the effects of existing statutes governing annexation of contiguous areas by municipalities (MCA 7-2-4314) and identify options to the current statutory approaches. A number of focus group participants commented that the existing annexation statute creates a disincentive for municipalities to plan for urban services that would be contiguous to already urbanized areas. The statute provides two ways in which annexation of contiguous, nongovernmental land can occur, depending on the number of recorded parcels contained in the area proposed for annexation.

The statute provides two alternatives. Under the first, which applies to annexations containing 300 or more recorded parcels, if the city or town, after 20-day period and considering all written communication, adopts a resolution approving the annexation, the implementation of the resolution must be approved by a vote of registered voters residing in the area proposed for the annexation. If the voters disapprove the annexation, then the city or town council cannot, on its own initiative, propose further resolutions for annexation of the area or any portion of the area, without petition, for a period of five years from the date of disapproval by the voters.¹⁴⁴

Under the second alternative, if the area to be annexed contains less than 300 parcels, the city or town council may not annex the area if the annexation resolution is disapproved in writing by a majority of real property owners of the area to be annexed. If the resolution is disapproved, further resolutions relating to the annexation of the area or any portion of the area may not be considered or acted on by the council on its own initiative, without petition, for a period of one year.¹⁴⁵

¹⁴⁴MCA 7-2-4314(1)(a) to (c), (2).

¹⁴⁵MCA 7-2-4314(d).

The Montana
Legislature should
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Because of the penalties for failing to obtain landowner or voter approval of the annexation in terms of the time within which any annexation can be considered, the effect of these provisions is to discourage municipalities from attempting annexation on their own. If the annexation is blocked by protesting property owners, then there is no good reason for the municipality to plan to extend services in a comprehensive fashion. Municipalities instead use the provisions for parcel-by-parcel petition annexation by landowners under MCA 7-2-4601 *et seq.* as well as under MCA 7-2-4701 *et seq.*, the Planned Community Development Act of 1973.¹⁴⁶ Unincorporated areas that are developed at urban densities or intensities cannot be provided with urban services on an areawide basis. In some cases, APA was told, further development at urban intensities is limited because, while existing lots may be less than one acre and have on-site systems, new lots must be at least one acre in order to use septic tanks under state DEQ rules. Thus, urban type development that surrounds municipalities is never properly provided with urban services, and infill development in these areas cannot occur because water and/or sewer are not available. Moreover, affordable housing in these outlying areas cannot be built easily because of the large lots required to support septic systems.

Another problem, APA learned, is with the exemption from annexation for certain lands under MCA 7-2-4503, which addresses lands wholly surrounded by a city. This section exempts lands used for agricultural, mining, smelting, refining, transportation, industrial, and manufacturing purposes and for the purposes of maintaining or operating a golf or country club, athletic field or aircraft land field or cemetery, or a place for public or private outdoor entertainment or "any purpose incident thereto." Under this provision, wholly surrounded land that is used for these purposes cannot be subject to a compulsory annexation by a city or town. One reviewer of a draft of this report pointed out that such areas typically utilize or benefit from the surrounding municipal services without paying municipal taxes. Moreover, the exemption tends to create in-holdings of marginal agricultural operations that would become prime infill areas if annexed and developed.

Montana last reexamined its annexation statutes in 1980 in a report by the Montana Legislative Council¹⁴⁷ and the annexation laws underwent amendment at that time. The Montana Legislature should revisit the annexation statutes again, in light of their impact on urban development surrounding municipalities and on certain lands that are wholly surrounded by a city. It should evaluate alternatives to the present laws regarding annexation of contiguous areas to encourage the provision of urban services to land that is essentially urban in nature and stimulate infill. If a new study appears unnecessary, then the Legislature should consider eliminating voter or landowner approval in connection with annexations and changing the exemptions from annexations of land that is wholly surrounded by a city.

¹⁴⁶Telephone interview with Jim Nugent, City Attorney, City of Missoula, Montana, October 31, 2000. Mr. Nugent estimated that, in the Missoula Valley outside the City of Missoula, there are some 15,000-20,000 residents living in what is essential an urban development pattern.

¹⁴⁷Montana Legislative Council, *Montana's Annexation Laws: An Evaluation* (Helena, Mont.: The Council, November 1980). This report noted: "Montana's eight different [annexation] statutes are more complicated than other states—the notable exception being California with its 226-page procedures. . . . Few states have protest provisions as favorable to affected property owners as does Montana." *Id.*, at 22.

6.3 RECOMMENDATIONS ON PAYING FOR GROWTH AND PLANNING

(17) **Authorize local option development excise taxes to pay for required planning.** As noted above, Montana provides several existing ways of funding planning, including grants, property taxes, and proceeds from the coal severance tax, and the EQC's Environmental Trends Subcommittee has proposed several others. An alternative is authorizing a development excise tax. A development excise tax is imposed on the activity of developing land, is proportional to the density or intensity of development, and is an obligation on the developer. This is in contrast to the real property tax, which is assessed against the value of real property and is an obligation on the property owner. Development excise taxes are also distinct from impact fees (see discussion below). The purpose of impact fees is at least partially regulatory—to ensure that the impact of development can be offset by construction of required additional facilities—while the purpose of the development excise tax is to raise revenue. Therefore, a development excise tax is not subject to the constitutional “rational nexus” or “rough proportionality” requirements applicable to impact fees.

Some communities have adopted development excise taxes on their own.¹⁴⁸ Maryland has legislation specifically authorizing development excise taxes for one of its counties.¹⁴⁹ Similar legislation for Montana therefore should:

- give local governments clear authority to adopt such a tax, subject to a public hearing.
- provide a formula for assessing the tax, a procedure for the collection of the tax, a procedure for appealing assessments, and a procedure for refunding the tax when development activity upon which the tax was paid did not actually occur.
- provide that the tax is a one-time obligation on the developer, not the owner of the premises.
- provide that the tax be based on development activity, such as dwelling unit or square feet, and not the value of the property.
- provide that the payment of the tax not be a condition precedent to the issuance of a development permit.
- provide for the earmarking of funds to pay for required planning.

It should be noted that Montana has considered the enactment of a development excise tax in the past. In 1974, the state Environmental Quality Council recommended, in the *Montana land-use Policy Study*, that a “development impact tax” be authorized. In this case, however, the tax was to be used “to ease the burden on local governments trying to provide services demanded by new residents.” Noting that such a tax “may not be appropriate or desired in many Montana communities,” the study proposed that it be allowed as an option for local governments to decide

¹⁴⁸Communities include: Boulder, Colorado; Napa, California, and Overland Park, Kansas. The Overland Park ordinance was the subject of litigation in the Kansas Court of Appeals where the court decided in favor of the local government. *Home Builders Association of Greater Kansas City v. City of Overland Park*, 921 P. 2d 234 (Kan. Ct. App 1996) (holding that the ordinance was not a tax upon the use of real property or upon the rendering of a service, but was nevertheless a revenue measure rather than a regulatory one.)

¹⁴⁹2000 Md. Laws Ch. 163, effective July 1, 2000.

on their own. The problem with such a tax, it noted, was that it could raise building costs during a period of already rapidly increasing building and mortgage costs.¹⁵⁰ This is a legitimate criticism. However, the degree to which this might occur would depend, in part, on the competitive nature of the building market in the area where the tax was imposed.

(18) **Authorize either a state-level or a local option real estate transfer tax to pay for required planning.** A real estate transfer tax is essentially a flat tax to be paid at the time of recordation of a deed or other document that transfers ownership of land within the local government. Arizona, California, Illinois, Massachusetts, and Ohio are examples of states that expressly authorize such taxes.¹⁵¹ If such a tax is authorized, it should exclude certain transactions that constitute an interest in land but in reality do not have the effect of changing ownership. It should also exempt transfers to governmental units and donations of real property to tax-exempt, not-for-profit organizations. Such a tax could either be authorized uniformly at the state level, in which case the monies from the tax would go into a fund to be distributed by the state for planning purposes as well as other purposes the legislature may determine. Alternatively, Montana could authorize local governments to enact such a tax based on their individual needs.

(19) **Clearly authorize impact fees.** Montana's statutes authorize cash exactions in two sections. As noted above, MCA 76-3-510 provides that, as a condition of subdivision approval, a local government may require a subdivider to pay or guarantee payment for part of all of the costs of extending capital facilities related to public health and safety, including but not limited to public roads, sewer lines, water supply lines, and storm drains to a subdivision. The costs must "reasonably reflect the expected impacts directly attributable to a subdivision."¹⁵² In addition, MCA 76-3-621 requires that a subdivider dedicate a portion of a proposed subdivision for use as parks and playgrounds. Alternatively, the statute authorizes a local governing body to require the subdivider to provide a cash donation, which represents the fair market value of the unsubdivided, unimproved land, or some combination of land donation and cash donation.

Apart from those two provisions there is nothing in the statutes that addresses cash payments. Richard Weddle, a staff attorney with the Local Government Assistance Division, Montana Department of Commerce, has pointed out in a monograph that most of Montana's counties and municipalities are "general power" local governments whose power to impose development exactions, if it exists, must either be expressly granted by the Montana Code, or be reasonably inferred from some express statutory provision.¹⁵³ Self-government power local governments, in contrast, may exercise any power not prohibited by their charters, the Montana Constitution, or state statute.¹⁵⁴ Weddle states that, with regard to land-use regulation, self-government local governments may not act other than as provided by statute.¹⁵⁵

¹⁵⁰Environmental Quality Council, *Montana Land Use Policy Study*, 188.

¹⁵¹See Ariz. Rev. Stat. §§ 11-1131 et seq. (1999); Cal. Rev. & Tax Code §§ 11901 et seq. (1999); Mass. Gen. Laws ch. 65D, § 1 et seq. (1999); and Ohio Rev. Code §§ 322.01 et seq. (1999).

¹⁵²It should be noted that this section only appears to deal with subdivision, and not other types of land development, such as shopping centers, where no subdivision occurs.

¹⁵³Richard Weddle, *Legal Status of Development Exactions in Montana* (Helena, Mont.: Montana Department of Commerce, Local Government Assistance Division, September 1998), 1, citing Mont. Const. Art. XI, Sec. 4(1)(b).

¹⁵⁴*Id.*, citing Mont. Const. Art XI, Sec. 6, and MCA 7-1-101.

¹⁵⁵*Id.*, citing MCA 7-1-114 (1)(3) and 7-1-114(2).

The Montana Supreme Court, as noted above, has upheld a municipality's authority to impose "system development fees" on developers requesting new or upgraded water and sewer services in *Lechner v. City of Billings*.¹⁵⁶ The fees in this case were used to defray the inflationary costs of new facilities to replace the capacity consumed by new customers who connected to the system. Attorney Weddle points out that the fees in the *Lechner* case, "were proprietary [nongovernmental] in nature whereas typical development actions find their authority in the power of local governments to regulate the use of land."

Montana does not have legislation expressly authorizing impact fees (and describing them as such), although one city, Bozeman, has enacted and is litigating an impact fee ordinance which contains impact fees for water, sewer, fire, and roads. The ordinance is being challenged by the Southwest Montana Building Industry Association.¹⁵⁷ Absent such legislation, it is not clear whether a local government in Montana has the authority to impose a non-site-specific development impact fee on development, with the exception of parks and recreational facilities. (Nor does the language in the Montana statutes resemble impact fee statutes in other states.) For example, a transportation impact fee could be used to offset the costs of road widening and signalization as a result of new development. A fire prevention impact fee could be used for constructing fire stations in newly developing areas and purchasing related equipment, such as fire trucks.

Consequently, it is recommended that a general statute be enacted authorizing several types of impact fees, including transportation.¹⁵⁸ Such a statute should have the following characteristics:

- The impact fee must be based on a local comprehensive plan (i.e., the growth policy), from which land-use assumptions (including land-use density and intensity as well as use) may be established.
- There must also be a requirement of a capital improvements program, so that the local government makes an assessment of its existing capital facilities, their capacity, planned or projected demand from new development, and planned capital facilities to meet that demand.
- The imposition of a fee must be rationally linked to an impact created by a particular development and the demonstrated need for related capital improvements pursuant to a capital improvement program.
- Some benefit must accrue to the development as a result of the payment of a fee.
- The amount of the fee must be a proportionate fair share of the costs of the improvements made necessary by the development and must not exceed the cost of the improvements.

¹⁵⁶797 P.2d 191 (Mont. 1990).

¹⁵⁷Telephone interview with Chris Saunders, planner with the City of Bozeman, Montana, June 6, 2000.

¹⁵⁸The Environmental Quality Council Growth Study identified impact fees as an issue, but did not include any specific recommendations because it felt that there was express authority for impact fees, citing MCA 76-3-510 and MCA 76-3-631. However, the EQC report does not precisely quote or paraphrase MCA 76-3-510, contending that "impact fees" are authorized when in fact the statute instead uses the phrase "the cost of extending capital facilities related to public health and safety . . ." and not "impact fees." *Planning for Growth in Montana*, 53. In any case, APA does not believe the language in MCA 76-3-510 constitutes an adequate an impact fee statute because the existing language does not incorporate the necessary characteristics described above.

Consequently, it is recommended that a general statute be enacted authorizing several types of impact fees, including transportation.

- A fee cannot be imposed to address existing deficiencies except where they are exacerbated by new development.
- Funds received under such a program must be segregated from the general fund and used solely for the purposes for which the fee is established.
- The fees collected must be encumbered or expended within a reasonable time frame, typically not to exceed five years, to ensure that needed improvements are implemented, and refunds should be authorized if the local government has not expended the funds within that time frame.
- The fee assessed cannot exceed the cost of the improvements, and credits must be given for outside funding sources (such as federal and state grants, developer initiated improvements for impacts related to new development, etc.) and local tax payments which fund capital improvements, for example.
- The impact fee revenues cannot be used to cover normal operation and maintenance or personnel costs (under the theory that such activities are more for the benefit of the entire community, and the impact fee imposed for that purpose is not a fee, but a tax), but must be used for capital improvements, or, under some linkage programs, for affordable housing.
- The fee established for specific capital improvements should be reviewed at least every two years to determine whether an adjustment is required, and similarly the capital improvement plan and budget should be reviewed periodically.
- Provisions must be included in the ordinance to permit refunds for projects that are not constructed, since no impact will have manifested.
- The statute should indicate at what point in the development process the impact fee payments are required to be made—typically at the time of the approval of the building or occupancy permit/certificate of code compliance is issued.
- The statute should expressly state that the payment of impact fees entitles the owners in a development project to use the facilities built with their fees.
- The statute should forbid delaying or denying issuance of development permits or approvals in order to await the adoption of an impact fee system.
- The statute should specify the types of impact fees (e.g., transportation, solid waste) that are authorized.

(20) **Authorize the levying of a fee to pay for the environmental assessment of growth policies in lieu of individual project-by-project assessments.** This recommendation would allow a local government to assess a fee on anyone subdividing land to pay for a proportionate cost of conducting the environmental assessment on the growth policy. The intent is to recoup at least a portion of the local government's cost in preparing the assessment, costs that are attributable to measuring impacts of anticipated private development. The fee would relieve the subdivider of having to conduct the assessment on his or her own. In the event that it was determined that a supplemental environmental assessment would need to be prepared to assess impacts not addressed in the general environmental assessment, the subdivider would be exempted from the fee.

(21) **Strengthen the bonding requirements for subdivision improvements in MCA 76-3-507.** MCA 76-3-507 establishes bonding requirements to ensure construction of public improvements in connection with the approval of a final plat. This section requires no inspection and report by a licensed civil engineer before the bond is released either in whole or in increments by the legislative body. The impression one receives in reading it is that approval of a final plat and establishment and release of the performance bond are lay political matters alone, without any technical content or engineering expertise. Moreover, the bonding requirements only apply to the “construction and installation of the improvements within a period specified by the governing body,” and do not apply to a maintenance bond that applies after the improvements have been installed in order to ensure that they last for at least one building season. These omissions may mean that there is no assurance on ongoing professional monitoring while the subdivision’s improvements are being installed and no way of correcting for faulty construction within a reasonable period of time after completion. This section should be amended to require a professional inspection and report to the legislative body prior to the release of the construction performance bond and to authorize, but not mandate, the local government to require a maintenance bond for a period of not to exceed one year from the date of release of the construction performance bond.¹⁵⁹

6.4 RECOMMENDATIONS ON PLANNING ADMINISTRATION AND DEVELOPMENT REVIEW

(22) **Enact a vesting statute.** A vesting statute is a law that creates criteria for determining when a landowner has achieved or acquired a right to develop his or her property in a particular manner, which cannot be abolished or restricted by regulatory provisions subsequently enacted. This is called a vested right because it is a right that has become fixed and cannot be eliminated or amended. A vesting statute also authorizes a time limit on the validity of the approval of the development permit.

The Montana Supreme Court has given conflicting signals on vesting. One decision is *Mogan v. City of Harlem*, 739 P. 2d 491 (Mont. 1987), involving an application for water and sewer permits, but not zoning. Here the applicant applied and paid for a single water permit and a single sewer permit for a two-story, eight-unit apartment building. The application was denied, and the city amended its ordinance the next day requiring that Mogan apply for a separate permit for each apartment unit, increasing the cost of permits by a factor of eight. The Court held that a builder has a right to rely on the provisions in effect at the time of the application for the water and sewer permits.

In *Town Pump, Inc. v. Board of Adjustment of the City of Red Lodge, Montana*, 671 P. 2d 349 (Mont. 1998), the Montana Supreme Court held that a retroactive change in the city’s zoning code after an owner submitted its application for on-premises consumption of alcohol did not violate the owner’s substantive due process rights. The court held that, as a general rule, the denial of an application for a building permit may be based on a zoning regulation enacted or becoming effective after the application

¹⁵⁹The model subdivision regulations published by the Department of Commerce do include a provision for inspection, but do not mention maintenance guarantees. Montana Department of Commerce, *Model Subdivision Regulations*, Appendix H, Model Subdivision Agreement; Guarantee, at H-2.

A vested rights statute would eliminate ambiguity where the Montana statutes are silent, clarifying rights of permit applicants and local governments, without resorting to litigation and court interpretation.

was made. The new Red Lodge development code, which required conditional use permits in the place of previously required special exceptions for on-premise consumption of alcoholic beverages, contained a clause specifically authorizing retroactive application.

Town Pump, a zoning case, it should be noted, did not refer to or overrule *Mogen*, which dealt with water and sewer permit fees, yet the two decisions clearly are at odds with one another as to whether or not a developer can rely on the regulations in effect at the time of permit application. This conflict could be resolved by legislation.

Montana statutes, as noted above, only expressly establish vesting as part of review of a proposed subdivision, although there is reference to vesting in a special statute governing development in lakes and on lake shore areas.¹⁶⁰ MCA 76-3-501(2) provides that “[r]eview and approval or disapproval of a subdivision . . . may occur only *under those regulations in effect at the time* an application for approval of a preliminary plat or an extension under [MCA] 76-3-610 is submitted to the governing body” (emphasis added). An approval is valid for a period of not more than three calendar years and not less than one calendar year, except that the statutes authorize an extension of no more than one calendar year, or longer if there is a written agreement¹⁶¹ between the governing body and the subdivider. The statutes do not address the period of time for which a final plat approval is valid. Nor do the statutes address vesting in terms of validity for “location or compliance permits,” apparently the term for zoning permits and certificates of code compliance.

A vested rights statute would eliminate ambiguity where the Montana statutes are silent, clarifying rights of permit applicants and local governments, without resorting to litigation and court interpretation. There are several minimum requirements for a good vesting statute:

- As in the provisions for preliminary plats, the basis for the vested right is the development permit application itself.
- When an applicant applies for a development permit, the applicant has the right to rely on the land-use regulations that were in effect on the day the application was filed. Once a permit application is filed, subsequent amendments to the relevant regulations underlying the desired permit do not apply to that permit application. If the application is approved and the permit is granted, development may proceed to the extent of the permit, amendment to the local regulations notwithstanding.
- The vested right, however, should not be made available in the case of a material misrepresentation by the owner, or by the representative or agent of the owner (for example, a faulty survey).
- In addition, the vested right should not be made available or should be terminated if, unknown to the local government at the time the permit was issued, there was a hazard that existed on or near the property that would endanger the public health or safety if development were to commence or proceed under the terms of the development permit statute.

¹⁶⁰MCA 75-7-206, which is part of a statute authorizing permits for construction in a lake or on a lake shore, provides: “Work or development authorized or approved under this part shall not create a vested property right in the permitted development other than in the physical structure, if any, so developed.”

¹⁶¹The provision for a “written agreement” implies a type of development agreement. See the following recommendation on innovative land development control techniques.

(23) **Require a written decision by a county or municipal board of adjustment and allow the imposition of reasonable conditions.** The county and municipal provisions,¹⁶² which are based on the 1926 Standard State Zoning Enabling Act published by the U.S. Department of Commerce,¹⁶³ do not require that the board make a written decision on variances and special exceptions. Instead, the enabling act simply provides that a vote be taken on the variance petition, special exception application, or appeal of an administrative determination. As a consequence, applicants as well as proponents and opponents may never know what the board's reasoning was, only that so many board members voted in favor and so many voted against.

A requirement for a written decision would compel the board members to examine the evidence presented against the standards for variances in the statute or the criteria for special exceptions, and make the board's rationale clear to the applicant, the public, and a reviewing court, should the matter be appealed. Moreover, the provisions do not expressly allow the board to impose reasonable conditions related to the variance or special exception. For example, it may be desirable for a board to require, in the case of a side yard variance to allow a house addition, to require screening along the side lot line. Thus, the board should be granted the authority to adopt such reasonable conditions as, in its opinion, will promote the intent and purpose of the growth policy and land development regulations, including, for example, conditions that minimize the adverse effect of the development on the surrounding area or on any natural resources, or that guarantee the satisfactory completion and maintenance of any required improvements (for example, maintaining a natural landscape screen). The sections should also specify that the imposition of a condition by the board is enforceable, and failure to comply with an approved condition is a violation of the land development regulations.

(24) **Establish training and continuing education requirements for members of planning boards and board of zoning appeals.** Planning board members have substantial, quasi-professional roles to play under Montana statutes. They are responsible for preparing and forwarding a growth policy and other plans to their governing bodies; indeed, *only* a planning board may formulate a growth policy. They may also be involved in the formulation of zoning and subdivision regulations and may provide advice on zoning map amendments and proposed subdivisions. Similarly, board of zoning adjustment members determine legal rights through decisions on variances and authorize special exceptions or conditional uses. For both, not having adequate training could have serious legal (as well as political) consequences for their local government as well as applicants for development permits and lay citizens.

Consequently, this report recommends that Montana statutes set minimum initial training and continuing education requirements for lay planning board and board of zoning appeals members. While training and continuing education may now occur on an informal basis through professional conferences, the recommended approach would require that new board members undergo a certain number of hours of training within a certain period of being appointed in order to continue to be permitted to sit on their respective boards. All board members would periodically receive additional training to ensure that they remain up-to-date on their

¹⁶²MCA 76-2-223 to -226 (counties); MCA 76-2-323 to -326 (municipalities).

¹⁶³See Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act* (U.S. GPO: Washington, D.C., 1926 rev'd ed.), Sec. 7.

A unified development permit review process would provide for a single point of entry at the county or municipal level for all types of development permits and approvals, even though they may be issued by different local entities.

knowledge and skills. Training should encompass a review of state laws and administrative rules affecting them, a review of local ordinances and resolutions, an overview of an existing growth policy or growth policies from other communities, rules of procedure and parliamentary practice, and relevant federal and state judicial decisions.

The Department of Commerce, through its Community Technical Assistance Program, should be charged with formulating and overseeing formal training and continuing education requirements and should receive adequate funding to achieve this goal.¹⁶⁴ Such a program should be kept convenient, affordable, and flexible by the use of self-study materials, videos, Internet sites, and county or regional sessions scheduled on weekends or in the evenings. Moreover, local planning agencies should also be able to participate in the development of training and continuing education curricula and materials.

(25) Require a uniform development permit review process at the local level that incorporates both the Sanitation in Subdivisions Act and the Subdivision and Platting Act as well as other types of development permits; provide for a completeness review procedure. Contemporary land-use regulations provide for all types of development permits: zoning permits, certificates of code compliance, certificates of appropriateness for historic districts, grading permits, conditional use permits, and building permits, for example.¹⁶⁵ The Montana Code does not contain definitions of such development permits and does not provide an express process to be used by cities, towns, and counties in the application for, review of, and decisions on permits, except for subdivision review. MCA 76-2-108 (Part 1 zoning), MCA 76-2-207 (Part 2 zoning), and MCA 76-2-308 (municipal zoning) simply provide, in the case of counties, for the issuance of permits and, in the case of municipalities, for “enforcement” of the zoning regulations. There are no limitations on processing times and no provision for the problem of incomplete applications.

The problem is compounded by the separate review track established by the Sanitation in Subdivisions Act. As the performance audit on the act remarked, there is a duplicate review process by local health officials and the Department of Environmental Quality, a requirement that “creates time delays in the approval process.” Moreover, the audit concluded, the time frames in the act “do not allow for review flexibility. [The] [s]tatute does not address incomplete applications, requests for additional information, or even when the clock starts or stops. . . . Timely reviews were the primary concern raised by land owners and developers . . . because application delays increase project costs.”¹⁶⁶ The performance audit, as noted in section 3.4 above, recommended that the Montana legislature clarify review times. It also recommended that the review process be wholly delegated to local health officials, and that the DEQ’s role be redirected toward technical assistance and away from permitting.

To remedy this problem, this report recommends that the Montana Code incorporate a unified development permit review process that would provide for a single point of entry at the county or municipal level

¹⁶⁴The Department of Commerce’s Community Technical Assistance Program already provides an extensive list of publications on planning and land-use control in the state as well as operating a lending library of audio and videotaped programs.

¹⁶⁵The authority of cities and counties to regulate building construction is governed by MCA 50-60-301 et seq. under the supervision of the Department of Commerce.

¹⁶⁶Legislative Audit Division, *Performance Audit: Subdivision Approval Process*, S-3 to S-4.

for all types of development permits and approvals, even though they may be issued by different local entities, such as health officials (this assumes that local health officials would be delegated the authority to review subdivisions under the Sanitation in Subdivisions Act), a board of zoning appeals, or a historic preservation commission. A unified development review process would have the following characteristics.

- It would require the local government to adopt an ordinance establishing the review process for development permits, including time limits on the validity of permits and the provisions for their extension.
- The ordinance would contain a list of all development permits required by the local government and a reference to the review by the local health officials under the Sanitation in Subdivisions Act.
- The list would include:
 - a citation to the zoning, subdivision regulations, and other local regulations as well as state law under which the development permit is issued.
 - the category of development to which it applies.
 - the stage or sequence of the development process at which it must be obtained.
 - the designation of the officer or body of the local government or the local health official responsible for reviewing and granting the development permit and the subsequent certificate of compliance.
 - what type of hearing, if any, is required, and provisions for appeals.
 - the approximate time necessary for review and grant of such development permits.
- Provisions for a completeness review. A completeness review is a decision by the local government on a development permit application that the information required is or is not complete. If the application is complete, as in a subdivision, then the local permit review process can continue. If the application is incomplete, then the local government can specify to the applicant what information must still be submitted, so that one additional submission should be adequate. No action occurs on the application until additional information is submitted. The statute should specify the period for the completeness review and allow the applicant to waive time limits for making a completeness determination in order to avoid antagonizing the local government that will make the decision on the application.

Apart from the period for the completeness review and for preliminary and final plat approvals, the statute should leave the setting of the review times for other categories of development permits and decisions to the local government. In the case of reviews by local health officials under the Sanitation in Subdivisions Act, the time periods should be specified in the statute.

For example, a unified development permit review ordinance might indicate the time period in order to obtain a certificate of appropriateness for building in a historic district from a historic district commission. A completeness review would be conducted on the application before the commission held a hearing on the application. The permit review ordinance would establish time limits on the decision on the permit, and would designate which body would hear appeals.



Such an approach would have the advantage of identifying in one place all permits required for development to occur. It would also state who is responsible for issuing them, what the requirements are, and what the time limits are. In providing for a single point of entry, it would eliminate multiple sequential reviews and would also provide better coordination among the various permit issuing authorities. An added benefit would occur if, as recommended, the Subdivision and Platting Act is amended to permit subdivision regulations to incorporate minimum lot size requirements that are consistent with the local growth policy. This would deal with the question of lot sizes and their relationship to local health requirements as early as possible in the development review process.

(26) **Establish a procedure for the enforcement of permits to provide adequate due process, predictability, and certainty.** Currently, the Montana statutes contain no express procedures for enforcement of zoning and subdivision regulations; they simply authorize enforcement by counties and municipalities, with no details of how that enforcement is to work. There is an argument to be made for the flexibility of this approach, because it allows local governments the ability to formulate their own procedures. The advantage is that having a greater degree of detail in the statutes will provide a stable base for enforcement measures and a more uniform system throughout the state. This will benefit both local governments and property owners by providing a greater measure of predictability by clarifying the steps to be followed when a violation is alleged, and identifying the respective rights of the parties.

A good enforcement statute has several characteristics:

- It should stress resorting to administrative measures before judicial measures. Thus, informal enforcement should be the initial option to obtain compliance.
- Should more formal means be required, the statute should provide for official notice to alleged violators, procedures for issuing preliminary orders and conducting enforcement hearings for fact-finding, and methods for enforcing final orders.
- It should provide that, if administrative action is not successful, the local government can pursue judicial relief, through civil and criminal proceedings that ensure compliance.

6.5 RECOMMENDATIONS PROVIDING FOR AN ENHANCED STATE ROLE

The recommendations above addressed modifications to existing statutes, new statutes to provide additional local authority, and provisions for funding local planning. They do not assume any substantive change on the role of state government in connection with planning. The State of Montana may consider the following supplemental recommendations if it wishes that there be an enhanced role for state government in planning, land use, and public investment. Recommendations (27) and (28) are similar to recommendations contained in the *Montana Land-use Policy Study*, completed in 1974 by the Environmental Quality Council (see Section 5.0 above).

(27) **Establish a state planning commission.** A state planning commission is an independent body that develops state goals, plans, and broad-based support for planning, and advises the governor, state agencies, and the legislature. It may be composed of members of the governor's cabinet, representatives from various governmental organizations (like the state municipal league, township trustees associations, and county commis-

sioners groups), and lay citizens. Sometimes specific nongovernmental organizations, like those for environmentalists and home builders, are also represented.

The concept of a state planning commission, an appointed advisory body responsible for all state planning, dates back to the 1930s, when many states established them in response to the federal-level National Planning Board which urged governors to create and staff such boards.¹⁶⁷ The early planning boards, in states like Maryland and Pennsylvania, focused on rural and resource-related problems, reflecting state planning's conservation lineage.

A number of states have state planning commissions. Maryland, for example, recast its state planning commission in 1992 as the "Economic Growth, Resource Protection, and Planning Commission," and gave it a number of new duties, including the preparation of an annual report to the governor and general assembly on the achievement of state planning goals.¹⁶⁸ New Jersey's State Planning Commission is responsible for overseeing the preparation of the state development and redevelopment plan.¹⁶⁹ Oregon's Land Conservation and Development Commission oversees the state-mandated local land-use planning program, adopts statewide planning goals, and reviews local comprehensive plans for compliance with those goals.¹⁷⁰

In addition to setting statewide goals and formulating a plan, the commission could be given several key responsibilities. First, it could facilitate cooperation and coordination between state and local agencies with regard to any programs and policies that affect, land use, infrastructure, environment, housing, capital improvements programming, natural hazard mitigation, and economic development issues. Second, it could provide local governments with data and information they need to prepare growth policies, such as population projections and related projections for land development and its impact on the environment. Third, it could coordinate and implement funding mechanisms and other state assistance for local planning and infrastructure needs. Finally, it could serve as an advocate for planning, and evaluate planning-related programs for the legislature and the governor.

Where a state (like Montana) does not have a strong tradition of state planning and requires an independent body to initiate and gain support for a new program, a state planning commission is a helpful mechanism. Moreover, because the commission would continue through different administrations, it can establish a presence and continuity for planning and decision making regarding growth in the state. The most likely and suitable role for a state planning commission in Montana would be to formulate a state plan and state goals and, subsequently, provide support and guidance to local governments which, through growth policies and implementing tools, would help implement the state plan. Thus, despite what would be a much stronger state presence in the land-use arena than exists today, local governments would continue to have ultimate authority to manage growth and development.

¹⁶⁷Harold F. Wise, *History of State Planning—An Interpretive Commentary* (Washington, D.C.: Council of State Planning Agencies, 1977), 11.

¹⁶⁸Md. Code Ann., State Finance and Procurement, §§5-701 to 5-708 (1999). See also Pa. Stat. Ann. §§1049.2 to 1049.3 (1995) (establishment and powers and duties of state planning board).

¹⁶⁹N.J.S.A. §52:18A-196 *et seq.* (1997 Supp).

¹⁷⁰Ore. Rev. Stat. §197.303 *et seq.*, esp. §197.040 (1997).

Where a state (like Montana) does not have a strong tradition of state planning and requires an independent body to initiate and gain support for a new program, a state planning commission is a helpful mechanism.

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Montana—what the
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20 years.

(28) **Undertake a statewide public involvement process to derive state goals for planning and land use, followed by the drafting of a crosscutting goals document.**¹⁷¹ A goal-setting process, and the document articulating those goals, would articulate a unifying vision for Montana—what the state wishes to become in the next 20 years. A goals document is intended to be a direction-setting device, developed out of broad citizen participation,¹⁷² rather than a form of regulation or state mandate.

Such a document is intended to coordinate policy among all levels of government in such areas as economic development, land use, transportation, health, education, public safety, telecommunications, water resources, and intergovernmental relations. Here, the purpose is to infuse plans and actions of various governmental units and levels with policies that are consistent with those the state as a whole desires, with the hope that the state's goals would be, in part, implemented through local action. The goals document can be used, for example, to direct state capital budgeting and location decisions, modify administrative rules, and evaluate or initiate new legislative proposals. The document would either be developed by a new state planning commission and formally adopted, presumably by action of the governor and/or the legislature.

As noted above, a number of states have documents like this in various forms: Rhode Island has a *State Guide Plan*, New Jersey has the *State Development and Redevelopment Plan*. In Oregon, a set of 19 state goals and implementing guidelines developed by the Land Conservation and Development Commission serve as the state plan. Maryland's plan takes the form of seven "visions" (among them the protection and enhancement of the Chesapeake Bay).¹⁷³ Other states, like Minnesota, have attempted to set benchmarks that serve the same purpose.¹⁷⁴ Note that all of these states—like Montana—are quite diverse in and of themselves, in that they contain rapidly growing cities and counties as well as areas of economic stagnation or decline. They also all face broad resource management issues ranging from coastal zone management to farmland protection to aquifer protection.

How would Montana begin a goal-setting process? One approach would be to start with an inventory of goals in existing state plans. The state could revisit plans from agencies such as MDOT including Transplan 21; the Department of Commerce's action plan for federal housing program monies; the DEQ's Intended land-use Plan for federally funded water projects; and the Department of Fish, Wildlife, and Parks plan for outdoor recreation. Any other interagency working agreements and governor's executive orders should also be looked at to determine if they contain state goals regarding land use.

While existing plan goals can form the basis of a statewide effort in the specific areas that each addresses, the most significant step of a statewide goal-setting process would be a broad based public involvement initiative. In order for such an initiative to result in state goals that have credi-

¹⁷¹See American Planning Association, *Growing SmartSM Legislative Guidebook*, Section 4-203.

¹⁷²Procedures for citizen participation have not been described in this report.

¹⁷³For examples of state goals in state plans, see American Planning Association, *Growing SmartSM Legislative Guidebook*, 4-117 to 4-126. Other states with formal goals that are cited in the *Guidebook* include Connecticut, Florida, Georgia, Hawaii, Vermont, and Washington.

¹⁷⁴Minnesota Planning, *Minnesota Milestones: A Report Card for the Future* (St. Paul: Minnesota Planning, 1992).

bility with state agencies, it would need to be undertaken at the request of the governor or legislature. However, to depoliticize the process, it could be administered and conducted by an independent organization, such as the Montana Consensus Council or a university-affiliated research institute.

The advantage of such a document is that it could build a consensus about where the state is going and whether the individual approaches state agencies as well as other governmental units are taking will get the state there. If a state planning commission were to be created, a goal-setting process and preparation of such a document would be an obvious first task for the commission.

(29) ***Develop an incentive-based state investment program that targets state growth-related expenditures to locally designated compact growth areas.*** If Montana wished to influence growth patterns more directly through an incentive-based program, a 1997 Maryland act provides a good example. Adopted in 1997, the “Smart Growth” act¹⁷⁵ is aimed at directing new development into “priority funding areas.” Under the statute, the state will give priority in funding projects with state money in these growth areas as well as existing municipalities and industrial areas. These priority areas must meet state guidelines for intended use (including minimum density requirements) and adequacy of plans for sewer and water systems. Existing communities and areas where economic development is desired are eligible. Counties may also designate growth areas for new residential communities. The priority areas include the state's 154 municipalities, land within the Baltimore and Washington Beltways, 31 enterprise zones, and the locally designated growth areas.¹⁷⁶

Beginning October 1, 1998, the state is prohibited from funding “growth-related” projects not located in these priority growth areas. State funding is also restricted for projects in communities without sewer systems and in rural villages. The intention is, of course, to channel state monies into areas that are suited for growth and limit development in rural areas by not extending sewers or making transportation improvements that would spur growth. In this way, conversion of rural and agricultural lands to urban uses is slowed or at least actively discouraged through state policy. Local governments and private interests can, of course, spend their own funds outside of these priority growth areas, but they cannot expect state monies for infrastructure.

Thus, Maryland's statute establishes a process that targets expenditures to areas that counties designate for compact urban growth. Encouraging development in these areas will result both in less land consumption and in the establishment of a pattern of development that is supported by urban services, such as centralized water and sewer.

If Montana were to employ this approach, it would need to identify those existing state programs that it considers to be growth related.¹⁷⁷ For example, one obvious candidate would be the state revolving loan fund program for wastewater facilities that provides low-interest loans to local governments.

¹⁷⁵The “Smart Growth” legislation is S.B. 389 (1997 Regular Session).

¹⁷⁶Bill Lambrecht, “Maryland's a Contender,” *Planning* 63, No. 11 (November 1997): 12; see also Rob Gurwitt, “The State vs. Sprawl,” *Governing* 12, No. 4 (January 1999): 18-23.

¹⁷⁷However, not all programs should be included, and a degree of flexibility is desired. For example, the Maryland program exempts programs that are necessary to protect public health and safety (a state grant to a community that is been flooded and needs immediate assistance) or that involve federal funds that cannot be constrained by state law.

If Montana added incentive programs, such as monies for infrastructure, open space or development rights acquisition, and affordable housing, the amounts should be sufficient to cause changes in behavior by local governments as well as the private sector.¹⁷⁸

In Maryland, priority funding areas designated by counties must be based on the capacity of land areas for development and the amount of land area that will be necessary to satisfy demand for development.¹⁷⁹ Once this analysis is completed, counties may then designate areas as priority funding areas if they meet specified requirements for type of land use (e.g., industrial), water and sewer services, and residential density.¹⁸⁰ A statute for Montana would need to define similar criteria in order to identify new priority funding areas in order to target expenditures. These criteria would be based on an analysis of characteristics of desirable development patterns in the state and would incorporate the state goals.

Such a statute would also need to provide procedural options that a county could use in reaching agreement with cities and towns on which priority funding areas to designate. For example, a special committee, appointed by the board of county commissioners, could be established. Alternately, an existing county or city-county planning board could be the organization charged with identifying and recommending candidates for designation to the county commissioners. If such an organization was not charged with overseeing the designation process, then it could instead provide technical assistance to local governments within the county in meeting the requirements of the act.

Finally, the state would need to designate a state agency to be in charge of the program (in Maryland, it is the state planning department). Such agency would need to have staff capacity to provide technical assistance to local governments planning agencies, and the ability to coordinate with other state agencies, in particular by providing other state agencies with precise maps of designated priority funding areas based on criteria in the legislation. A review process would need to be established within state government to ensure that state funding for projects, including state funding that is used to match federal and other monies, was consistent with the statute. To that end, the governor may need to issue supplemental executive orders to more fully implement the law—to prod state departments and to align their programs with the goals of the program.¹⁸¹

¹⁷⁸For an example of a program that provides incentive payments to encourage regional cooperation by local governments, see the Virginia Regional Competitiveness Act, Code of Virginia §15.2-1308 et seq. (1998).

¹⁷⁹Md. Code Ann., §5-7B-03(G).

¹⁸⁰The following areas are eligible for county designation under the Maryland statute: (1) areas with industrial zoning (areas with new industrial zoning after January 1, 1997, must be in a county-designated growth area and be served by a sewer system); (2) areas where the principal uses are for employment and which are served by, or are planned for, sewer services (areas zoned after January 1, 1997 must be in a county-designated growth area); (3) existing communities (prior to January 1, 1997) which are served by a sewer or water system and which have an average density of two or more units per acre; (3) "rural villages" designated in a county comprehensive plan as of July 1, 1998; and (4) other areas within county-designated growth areas that reflect a long-term policy for promoting an orderly expansion of growth and an efficient use of land and public services, are planned to be served by water and sewer services, and have a permitted average density of 3.5 or more units per acre for new residential development. *Id.* §5-7B-03.

¹⁸¹See Parris N. Glendening, Governor, State of Maryland, Executive Order 01.01.1998.04, "Smart Growth and Neighborhood Conservation Policy" (January 23, 1998).

An annual reporting system would, of course, be necessary to advise the governor, the legislature, and the public on how well the new program is working.

The advantage of this approach, of course, is that it is voluntary. Under the Maryland program, nothing obligates a county to designate such areas, nor does the program restrict use of county or other local government funds and private-sector development. As a Maryland publication points out, county-designated priority funding areas “are simply areas the county wants to be eligible for State funded projects,” in part “to make these areas more attractive for residents and potential residents, as well as for private sector development and redevelopment.”¹⁸² The disadvantage is that it may limit state agency action; state agencies would see it as an incursion on their discretionary decision-making power and attempt to devise ways to circumvent it (e.g., characterizing a capacity improvement to a road as being essential to protect public safety, as opposed to permitting additional growth). It may also be viewed by local governments as attaching too many strings to state monies. Alternately, the incentives may be insufficient to attract counties and the cities and towns within them to participate.

APA has drafted a “Smart Growth Act” as part of its Growing SmartSM planning statute reform effort. The statute, a refinement of the Maryland law, could easily be adapted to Montana.

¹⁸²Maryland Office of Planning, “Smart Growth Fact Sheet; Smart Growth Areas Act: An Overview” (Baltimore: The Office, n.d.), 2.

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A P P E N D I X A

LIST OF FOCUS GROUP PARTICIPANTS

Stevensville, Monday, March 20, 2000

Ainsworth, Dick	Missoula
Atthowe, Jean, Jack	Stevensville
Bohlig, Vicky	Hamilton
Du Bose, Joel	Stevensville
Kammerer, Jake	Hamilton
Knudsen, Karen	Missoula
Maclay, Tom	Florence
Maechling, Phillip	Florence
McBride, Fred	Stevensville
McKee, Jeanette	Hamilton
Powell, Steve	Hamilton
Sutherland, Barbara	Hamilton
Vanorio, Tom	Florence

Flathead Indian Reservation, Monday, March 20, 2000*

Camel, Janet	Pablo
Swaney, Rhonda	Pablo

Missoula, Tuesday, March 21, 2000

Ashby, Perry	Missoula
Bangs, Collin	Missoula
Broberg, Len	Missoula
Caniculs, Jane	Missoula
Carey, Bill	Missoula
Essene, Ren	Missoula
Goodloe, Martha	Missoula
Heil, Nancy	Missoula
Howlett, Cheryl	Missoula
Hoyt, Wade	Missoula
Kaufman, Nick	Missoula
King, Steve	Missoula
Kleese, Mike	Missoula
Klette, Cindy	Missoula
Kadas, Mike	Missoula
Morgan, Scott	Missoula
Smith, Judy	Missoula

Kalispell, Tuesday, March 21, 2000

Carlson, Milt	Kalispell
Dove, John T	Columbia Falls
Ellis, Bonnie	Polson
Feury, Andy	Whitefish
Fleming, Kim	Whitefish
Greer, David	Kalispell
Harball, Charles	Kalispell
Hull, Rick	Kalispell
Jacobson, Shirley	Whitefish
Jopen, Mike	Kalispell
Marks, Gary	Whitefish
Moyer, Susan	Kalispell
Mulcahy, Eric	Kalispell
Russel, Joe	Kalispell
Smith, Johnathon	Kalispell
Sullivan, Greg	Whitefish
Wilson, Narda	Kalispell

Three Forks, Wednesday, March 22, 2000

Bullock, Megan	Boulder
Cestero, Barb	Bozeman
Fischer, Doris	Virginia City
Hartz, Rick	Dillon
Lane, Mike	Three Forks
Murphy, Terry	Cardwell
Nerlin, Roger	Three Forks
Roginske, Linda	Whitehall

Bozeman, Wednesday, March 22, 2000

Alexander, Archie	Bozeman
Bachman, Don	Bozeman
Barret, Jim	Livingston
Beland, R Dale	Bozeman
Epple, Andy	Bozeman
Forrest, Steve	Bozeman
Kerin, Rick	Bozeman
Leland, Brian	Bozeman
Rasker, Ray	Bozeman
Roberts, Byron	Helena
Shirey, Janet	Pray
Stephenson, Larry	Livingston
Woodbury, Ellen	Livingston
Youngman, Marcia	Bozeman

Billings, Thursday, March 23, 2000

Cumin, Cal	Billings
Davis, Tim	Billings
Hayley, Gayle	Fishtail
Jensen, Kerwin	Billings
Kennedy, Mark	Billings
Leuthold, Rick	Billings
Scanlin, Betsy	Red Lodge
Souther, Joe	Billings
Steiner, Nathan	Billings
Tuss, Mike	Billings

* This was a meeting rather than a focus group, although the representatives had been provided with the same list of questions as the focus group participants.

A P P E N D I X B

MEMO TO FOCUS GROUP INVITEES WITH DISCUSSION QUESTIONS

TO: Participants in Montana Smart Growth Coalition Focus Groups, March 20-24, 2000

FROM: Stuart Meck, AICP, Principal Investigator; Marya Morris, AICP, Senior Research Associate, American Planning Association, Chicago, tel. 312-431-9100

SUBJ: Questions for Focus Groups

DATE: March 13, 2000

As you know, the American Planning Association is conducting a study of the adequacy of Montana's planning and zoning enabling legislation for the Montana Smart Growth Coalition. Based on a review of the Montana statutes as well as the 1999 report of the Environmental Quality Council's Growth Study Subcommittee (including subcommittee minutes), we have developed a series of specific questions for discussion by the focus groups of which you are a participant. The nature of these questions indicates some of the issues we believe are presented by the statutes. We would appreciate your reviewing them in advance of the focus group meeting and, if you have a copy of the Montana Code, comparing the relevant sections of the Code with the questions.

Growth Policy

1. Currently, local governments in Montana, when they prepare a "growth policy" under MCA §§76-1-601 *et seq.* ("growth policy" is the term for a comprehensive or master plan), do not have to incorporate any specific state policies, nor is there a formal mechanism for state agency review of such plans.
Should: (a) the state planning statutes be amended to list specific policies that local plans must address, and, if so, what should those specific state policies be; and
(b) there be a formal mechanism for review of plans by state agencies and adjoining local governments?
2. Are the requirements for a growth policy in MCA §76-1-601 clear enough so that local governments know what to do to produce a quality document that is useful? If not, what needs to be changed? For example, the statute simply calls for the analysis of "housing needs," but not "affordable housing." And the statute calls for "projected trends for the life of the growth policy" for elements addressing "land use" and "local services" but not a specific plan map showing future proposed land uses as well the location of existing and proposed community facilities, including transportation.
3. Under MCA §76-1-601, if there is a "planning board" created, then the planning board must prepare and propose for adoption a growth policy, but there are no deadlines for doing so, and no consequences for legislative bodies that do not adopt a growth policy. Thus, comprehensive planning is only conditionally mandatory. There have been proposals to change this. For example, the state could require certain counties and the municipalities within them that have certain levels of urban development or certain growth rates over the past decade to adopt plans as well as zoning regulations. What are the pros and cons of such a requirement?
4. MCA §§76-1-605 to -606 describe the general relationship of an adopted growth policy to zoning and subdivision, but do not describe criteria to be employed by the local government in determining consistency. If you were to propose specific criteria for determining consistency between a zoning change and a growth policy, what would they be? What would the criteria be for determining consistency between a subdivision and a growth policy?

If a growth policy is in place, and zoning changes must be consistent with the growth policy, should a referendum on proposed zoning changes be permitted?

Subdivision

1. Local governments in the state must adopt subdivision regulations under MCA §76-3-501, but do not have to adopt zoning ordinances. Some have suggested that this results in a situation where subdivision drives planning rather than vice-versa. What steps might be taken to either: (a) make the subdivision process the result of planning; or (b) incorporate other land-use considerations into subdivision standards, such as the adoption of minimum lot size requirements?
2. Montana statutes require, under certain circumstances, an “environmental assessment” for review of a preliminary plat of subdivision under MCA §76-3-603. The assessment must be prepared by the developer, not the local government. How well has this worked?
3. Currently, proposed subdivisions are to be evaluated against a set of public interest criteria in MCA §76-3-608(3)(a). These criteria deal with agriculture, agricultural water user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety. However, if a local government adopts a growth policy that addresses these criteria, evaluates the overall impact of subdivision development against the criteria, and enacts zoning regulations that also address the criteria, then further subdivision development may be exempted from the review criteria. How well does the requirement for the review of subdivisions against the public interest criteria actually work? What other alternatives might be considered, other than incorporating the criteria into the plan?
4. MCA §76-3-610(2) prohibits a governing body and its subdivisions from imposing additional conditions on a final plat that were not imposed on preliminary plat, with the apparent consequence that a final plat must either be approved or denied. Has this language proved to be a problem and should it be changed?
5. MCA §76-3-207 exempts certain divisions of land from formal subdivision review, although they are still subject to survey requirements. These include divisions made outside of platted subdivisions for the purpose of a single gift or sale to each member of the landowner’s immediate family. Should there be any changes in the types of land divisions that are exempt from subdivision review and, if so, what? Should all subdivisions of land receive some type of official review? In addition, MCA §76-3-505 and §76-3-609 apply to minor subdivision review, although they do not expressly define a “minor subdivision.” In particular, §76-3-609 allows multiple minor subdivisions from the same tract of record. How well have these sections worked and should they be changed?

Zoning

1. For municipalities, MCA §76-2-305 allows owners of 25 percent or more of the area of lots included in any proposed zoning or those lots 150 feet from a lot included in a proposed change to sign a petition protesting the change. When that occurs, a zoning amendment can only be enacted by a two-thirds vote of the members of the municipal legislative body. Some have contended that this section interferes with the implementation of plans, and works against proposals for infill and mixed use development. Still others contend that it effectively delegates legislative authority to certain property owners by allowing such property owners to determine when legislation can be enacted, in a manner different than other legislation. Others contend that this disenfranchises people who do not own property.

Is this a good idea? Should it be retained and, if not, what should replace it, if anything?
2. Currently, MCA §§76-2-101 *et seq.* allow the creation of planning and zoning districts that constitute a portion of the area of a local government, upon petition of 60 percent of the freeholders in the area, which must be greater than 40 acres. The zoning regulations are adopted by the board of county commissioners. There is no requirement for a plan, and the regulations can differ from district to district. Some contend that this

allows the protection through zoning for certain sections of the county, without the necessity of imposing zoning countywide. Others suggest that is really exclusionary, and is not much different than public enforcement of private covenants.

Is this a good idea? Should it be retained, and, if not, what should replace it, if anything?

3. Montana statutes do not detail provisions for issuance or enforcement of zoning permits, or the relationship of special exceptions (conditional uses), variances, and other types of development decisions to zoning permits. Instead, there is general authorizing language in MCA §§76-2-108, 76-2-207, 76-2-210, and 76-2-308. Should the process for issuing and enforcing such permits be more detailed, and if so, how? Should local governments be required to establish a uniform permit review system that would clarify the steps in applying for various types of permits, determining when applications are complete, and specifying time limits for decisions?

Other

1. Montana does not have a statute specifically authorizing or requiring the adoption of an adequate public facilities ordinance for new development in certain areas (although there may be an implied authority under MCA §76-3-501 and §76-3-511). For example, an adequate public facilities ordinance could require central water and sewer in areas expected to urbanize outside a municipality but within its extraterritorial authority. Is this a good idea? If you agree, how might such a concept be implemented?
2. Under MCA §76-3-510, there is a general authorization for local governments to require a developer to pay for the extension of capital facilities. This appears to be like a development impact fee statute, although it is not called that, and it appears to apply only to extensions and not to overall upgrades of a facility to accommodate new development (such as expansion of a wastewater treatment plant or to the widening of a road). Should this section be modified, and, if so, how?
3. Some states have authorized a creation of a professional hearing examiner position to conduct hearings normally held by the planning commission or board of adjustment would improve the efficiency and quality of decisions and recommendations. For example, a hearing examiner could be delegated the authority to conduct a hearing for a proposed subdivision, and prepare findings and recommendations in writing to the governing body. Alternately, a hearing examiner could hear appeals from the decision of the governing body in connection with the approval, conditional approval, or denial of a preliminary subdivision or final plat, before the matter goes to court. Is this a good idea, and, if so how should it be implemented?
4. Should Montana communities be required to evaluate their land development regulations on a periodic basis, regardless of whether they have an adopted growth policy? If so, what should this review consist of? Who should be responsible for the review?
5. What planning tools and techniques do you think Montana counties and municipalities should have that they don't have now?
6. Some have suggested that incentives rather than more regulation should encourage private landowners to implement plans. What specific incentives would do that? What specific incentives would persuade local governments in the state to prepare and update plans?
7. MCA §76-3-625 (1) allows a subdivider to sue the governing body to recover "actual damages" caused by a final action, decision, or order of the governing body or a regulation adopted pursuant to the subdivision chapter that is "arbitrary or capricious." MCA §76-3-625 (2) allows an "aggrieved party" to appeal to the district court the approval, conditional approval, or disapproval of a proposed preliminary plat or final subdivision plat. Are these sections problematic? If so, how, and how can they be modified?
8. Are there any other areas of Montana's planning and zoning statutes that need improvement. If so, what are they, and what changes do you think need to be made? For example, how well do the planning and zoning statutes relate to annexation?

A P P E N D I X C

COMMENTS FROM FOCUS GROUPS

Bitterroot Valley

Role of the state

1. If the state were to set goals, they would inevitably override counties and cities.
2. The Dept. of Commerce currently does a good job of technical assistance.
3. State could be more helpful in providing data on ground water, transportation, and housing.
4. The growth policy statute does not represent state policy.
5. Growth issues vary widely between Eastern and Western parts of the state.

Can the state be held to the requirements of a local plan?; State actions are already directing what happens locally, can the reverse happen?

Growth Policy

1. State should set minimum standards and local governments could then opt to enact more stringent standards.
2. There's no cookbook in SB97 for what a growth policy should contain. It's left vague to accommodate flexibility.
3. Fast-growth areas should be required to plan—but the law needs to state what happens if citizens reject the plan once it is in place.
4. New 601 statute does provide good guidance.
5. The new growth policy statute made a point of not being too directive.
Maybe Montana has reached the point where it can consider incentive-based approaches to smart growth.
6. Montana residents need education about planning.

Subdivision/Environmental Assessment/Public Interest Criteria

1. The state land board is developing a statewide policy on subdivisions.
2. For subdivision permit decisions to be consistent with a growth policy, the growth policies would have to be more specific than they are now.
3. Public interest criteria—the issues that arise during the review depend on who shows up for the hearing; it shouldn't be that arbitrary.
4. The Environmental Assessment (EA) is prepared by the developer, this is inherently problematic.
5. The (EA) needs to be a county responsibility, right now their contents are all over the place.
6. The EA only applies to subdivisions of 5 lots or more, which is a problem. Small subdivisions need some level of EA; the cumulative impacts are as problematic in some areas as major subdivisions.
7. The new rules for family transfer exemptions have helped, but there is still no justification for how they are used.
8. Common sense and good science should prevail in subdivision review. Pre-application meetings have helped.
9. A tool and requirement to measure cumulative impacts of subdivisions is needed. Planning boards and boards of adjustment also need a clearer definition of what is an appropriate land use for a given site.

10. Developers need predictability in the review process.
11. The quality of subdivision applications varies widely, especially with minor subdivisions, which makes it difficult to evaluate them.

Zoning

1. Protest provision: Developers rightly assume that the current plan and zoning ordinance dictate what is allowed, the protest provision raises the neighbor's level of influence higher than plans or ordinances.
2. Counties are required to enforce voluntary zoning districts, but it doesn't happen.
3. A good growth policy could make voluntary zones unnecessary.

Other Issues

1. Impact fees: Bozeman, Gallatin Co., have them. Missoula uses a hybrid of fees and improvement districts.
2. A good plan would ideally supplant the need for impact fees.
3. Impact mitigation could take place through the process of preparing a growth policy.
4. The vagueness of the current growth policy statute works well. Plus if the legislature gets a hold of any of this, one never knows what could happen.
5. Hearings examiners: The real problem is the lack of objective standards. Planning boards need better information on which to make decisions.

MISSOULA

General comment about development patterns

1. State infrastructure funds, plus sanitation and subdivision regulations—not growth policies or plans—are the key determinants of settlement patterns.

Role of the State

1. Montana should have a statewide growth policy.
2. Skepticism exists as to whether state has ability/credibility to formulate such a policy
3. Diversity across the state-between east and west—would make it hard to come up with a single approach

Growth Policy

1. No state policies for GPs, unless the state provides money
2. GP statute is sufficiently broad, the problem is the requirement that they be jurisdiction wide

Money for planning should flow to local governments. Based on their plan contents, eg., whether it is coordinated with the CIP

Mandating (planning or zoning) wouldn't help necessarily help provide cities and counties to incorporate smart growth objectives in the development standards.

Subdivision/Environmental Assessment/Public Interest Criteria

1. Consistency between plans and subdivision regulations isn't an issue in counties w/o a plan.
2. Statutes regarding the environmental assessment (EA) and public interest criteria could use clarification.
3. Cumulative impacts of subdivisions need to be addressed, statute doesn't state this—cities and counties need more information about what has already been platted.
4. Public interest criteria need to stay in subdivision regs.; growth policy can't replace them.

5. The provision that prohibits that no changes permitted at final plat is not a problem (it may be an issue with phasing of large projects).
6. Developers of minor subdivisions should be required to help pay for parks.
7. Clarity is needed with regard to subdivision classifications to better deal with exemptions.
8. Performance standards could be applied to exempt subdivisions.
9. Cluster subdivision should be easier for developers to accomplish.

Zoning

1. Protest provision can be used to blackmail a developer.
2. But protest provision is the only point of entry for residents. Maybe a better planning process would help.
3. Protest provision definitely works against infill development and affordable housing projects.
4. The protest provision is likely to stay in place—people like this option and will protect it.
5. Growth policies should provide predictability to circumvent need for protest provision.
6. Protest provision is in there because cities had been placing conditions on projects after courts had overturned development decisions.
7. It might be helpful if statute stated specifically which damages would be paid, e.g., attorneys' fees.
8. Periodic review of zoning regulations:
 1. This already happens in Missoula County—could be useful in places that haven't done zoning or subdivision in many years.

Planning/zoning districts

1. These are not a problem in Missoula County.

Adequate public facilities/Impact fees

1. If a subdivision requires public facilities, then it is required to be annexed.
2. Legislation permitting a "region of impact" would be helpful (cited an Idaho example).
3. Existing authority for impact fees may be enough.
4. Any new impact fee legislation may actually be more limiting than what exists.

Hearings examiners

1. Problem is w/ untrained lay people are boards who don't understand the rules they are applying; volume of development permits is not a problem

Other Issues

1. Local governments would benefit from legislation that allowed them to use the following tools:
 - a. Inclusionary housing ordinances
 - b. TDR
 - c. Special improvement districts
 - d. Incentive-based strategies

KALISPELL

General comments about development patterns:

1. Development is essentially scattered throughout the western part of the state.
2. Widespread use of the family transfer exemption has led to a lot of unplanned development.

3. Cities have very little money for economic development, which means they have trouble saying No to development proposals, even if they may create other problems.
4. Local governments don't support or implement their own plans.
5. Disincentives exist for urban development; it is much easier to develop in unincorporated areas of the county than in in-town locations.
6. Loss of open space and agricultural land is a big problem.
There is a strong distinction between the eastern part of the state and the western part of the state.
7. No agreement in the state about what smart growth is.

Role of the State

1. State is long overdue for developing a set of state goals.
2. If the state were to undertake a goal setting process, whatever comes out may be worse than nothing.
3. Not even clear if such a process could work here.

Growth Policy

1. There is not a strong relationship between growth policies and subdivision regulations, and there needs to be.
2. In general growth policies are assembled on a piecemeal basis, one part doesn't relate to other parts.
3. Growth policy statute has no provisions for instituting urban service limits.

Consistency

1. Consistency criteria would make it easier for planning boards to make decisions on developments.

Subdivision/Environmental Assessment/Public Interest Criteria

1. Good science is not being applied to review of subdivisions proposals.
2. Minor subdivisions do not require an EA.
3. DEQ's EA are worse than the developers.
4. By law, the impacts on school can't be one of the criteria, but should be.
5. The criteria have been used in some instances to deny subdivisions.
6. The criteria have been helpful, although they don't always apply.
7. There are no criteria for when a plan amendment is appropriate.

Zoning Protest Provision

1. Has both positive and negative effects, depending on how it is used.

Impact Fees

1. Municipal use of impact fees only forces development out into the county.

Adequate Public Facilities Ordinances

1. It's one thing to require that services be present before development goes forward, but doesn't answer the question of how local government pays for the services it is bound to provide.
2. Developers may use APFO system to tie up capacity for future use.
3. Sanitation act has actually regressed with regard to required sewer connections.

Other Issues

1. Hearings examiners—this may be a good idea. In some cases the boards of adjustment should be referred to as the "board of favors."

2. Local governments need provisions for amortization.
3. Flathead County hasn't lost a damages case (there have been 3-4 cases).
Incremental amendments to local land development regulations are more practical in Montana.
5. Annexation is nearly impossible in Montana—that statute needs to be looked at.

THREE FORKS

General comments about development patterns:

1. Scattered subdivisions are disrupting wildlife areas and agricultural areas.
2. Growth is costing too much.
There is a lack of agreement about how to protect private property rights and protect the public welfare.
4. Imbalance of growth between east and western part of the state.
5. There is a fear of growth in many small communities.

Role of the State

1. State review and approval of local growth policies would be problematic.
2. Maybe the state could simply acknowledge a plan's legality.
3. Consultation on planning between the state and local governments would be desirable.
4. The state should not be given veto power over local plans; non binding review by DOC is worth considering.

Growth Policy

1. The vagueness of the statute, as currently drafted, allows rural areas to participate. More standards or mandated components would not work for them.
2. The statute doesn't compel a lot but it does allow a lot.
3. It was a mistake to change the name from comprehensive plan to growth policy.
4. Mandatory planning for fast growing cities and counties is a good idea.

Subdivision/Environmental Assessment/Public Interest Criteria

1. EA prepared by engineers do sometimes have some good information in them.
2. Quality varies greatly, especially with minor subdivisions.
3. The information source for what is contained in the EA needs to be better documented.
4. Local governments are prohibited from denying a subdivision on the basis of its impacts on schools or fire protection, this is a problem.
5. Maybe an independent agency (e.g., natural resources conservation service) could review the EA.
6. Jefferson County does seek input on subdivisions from the US Fish and Wildlife Service. This has, at times, led to modifications in the site plan.
7. The old public interest criteria asked the question, "Is there a need for this project?"; the new criteria do not.
8. Public interest criteria do not get at the threshold of impact; or the cumulative impacts of a new subdivision in the context of all previously approved subdivisions.

Conditions on Final Plat

1. This works well and is not a problem; negotiations do occur at that stage.

Adequate Public Facilities Ordinances

1. New statutory language to allow this is worth looking at.

Impact Fees

1. Impact fees should also be allowed to be used to upgrade existing facilities needed to accommodate growth; as is, it essentially encourages greenfield development.

Hearings Examiners

1. Such a system would remove contact between citizens and planning board or board of adjustment members.
2. This would be viewed as an added layer of government.

Zoning Protest Provision

1. Boundary of protest area is difficult to figure.
2. The process deals well with poorly designed projects; provides early notification to neighbors and probably results in better-designed projects in the long run.
3. Local governments should retain the option to use this tool.

Planning/Zoning Districts

1. Should remain an option, but it would be help if such districts were required to be consistent with a plan.

Other Issues

1. Recommend tools for financing open space preservation:
 - a. General obligation bonds
 - b. Property tax relief for conservation easements
2. Recommended tool for financing planning:
 - a. Property transfer tax
 - b. Local option sales tax
3. Local governments should be able to provide regulatory relief, including impact fee waivers, for project that meet specific public objectives, e.g., affordable housing.

BOZEMAN

General comments about development patterns

1. There is no constituency for good planning in the state.
2. Large tract rural development is eating up the open space.
3. Water supply will emerge as the single biggest growth issue in the near future.
4. If all water rights that have already been granted are used, most streams in the state will dry up.
5. Single-use, nonwalkable neighborhoods are proliferating.
6. The pattern of development in the last 10 years has been to move away from cities.
7. Many builders will not build in cities because it costs more and takes longer.
8. We need to move away from regulation and towards a system that encourage good urban form and urban design.
9. Incentives to promote cluster development are needed.
10. Cities in Montana lack a fiscal strategy and are generally unaware of the fiscal impacts of development.
11. Cities have few options when it comes to raising money: sales tax; real estate transfer tax are needed.
12. Any new planning legislation that goes before the legislature is bound to come out worse than what we have now.
13. Existing legislation is adequate; what's missing is the political will.
14. An effort is needed to instill the benefits of planning and to make the case that good planning is good fiscal policy.

Role of the State

1. A statewide growth policy would have to be too homogenized and would not be effective
2. Montana is really two states: East and West
3. State needs to provide money to local governments for planning and for other programs, such as affordable housing.
4. Two issues that need thorough examination before smart growth can go forward in Montana:
 - a. Annexation statutes
 - b. intergovernmental relationships.
5. There is a lot of distrust between city and county governments

Growth Policy

1. Statutory definition does not provide enough guidance
2. Allows local governments to do as much as possible, or as little as possible.
3. A land-use map as part of the plan is necessary to achieve predictability; without a map local government is less apt to stick with the plan. This may be an explanation as to why so few plans have maps.

Subdivision/Environmental Assessment/Public Interest Criteria

1. The existing environmental review process is perfunctory; no baseline data exists.
2. Some planning boards do ask for additional information that what is provided in the EA.
3. The conditions of approval adequate incorporate mitigation measures.
4. Gallatin County does have baseline information.

Zoning

1. There is no enforcement of Part 1 Zoning.
2. Suggested to move to a performance based non zoning system which would better mitigate impacts.

BILLINGS

General Comments about Development Patterns

1. Need to start thinking more about effects of development on the environment.
2. Counties and towns are finally beginning to address problems of rapid influx in population from other states.
3. Timing is right for changes to planning system here in Montana—we have a short window of time to react before sprawl gets out of control.
4. Montana has not learned from mistakes made in other states where subdivisions have popped up everywhere. The whole state could be wall-to-wall subdivision eventually.
5. Rural subdivisions bring a range of problems: 1) noxious weed control, 2) high costs of providing services to these subdivisions 3) negative impact on agricultural economy.

Role of the State

1. Blanket statewide policy might not work.
2. Giving states a time limit in which to provide comments does not work here.
3. State could, at a minimum, provide funding for local governments to inventory local resources.
4. State would work to limit local control if given the opportunity.

Environmental Assessments

1. Cookie-cutter approach.
2. Planners do put information from the EA into the public interest criteria—given it's the only source of info., there's no way to counter it.
3. Public interest criteria: doesn't account for the cumulative impacts of development.

Zoning protest provision

1. Developers often run afoul with high density projects in single family zones.
2. The tool works well for neighborhoods.
3. Local governments should be given the option to use this.

Zoning/Planning Districts

1. These are a good idea, but they are only formed after something has happened and property owners have complaints about the actions of neighboring property owners.
2. Counties have no building permit authority; they should have the same type of authority as cities do.
3. Nothing in the effort should perpetuate increased state involvement in permits.

Impact fees

1. Statute should be clarified.
2. Use impact fees in the county to provide infill incentives in the city.

Other planning tools

1. Use value taxation on speculative properties
2. Streamline city development review processes, which current are providing incentives for developers to build out in the county.
3. Remove barriers to infill, which include development standards, fire protection standards, problems with parcel consolidation due to multiple owners.
4. Need to be able to amortize nonconforming uses

Role of the state

State could suggest periodic review of development regulations

A P P E N D I X D

MAILED SURVEY

Montana Smart Growth Coalition/American Planning Association
Survey of Montana Statutes Regarding
Growth Policies, Planning, Subdivision, and Zoning

Please Respond by May 31, 2000

Prepared by: Name _____ Agency/Organization _____

Address _____

E-mail _____ Date prepared _____

1. GROWTH POLICY [also known as a comprehensive plan or master plan]



1a. Do the requirements for a growth policy in the current statute (MCA §76-1-601) provide clear guidance to local governments on how to produce a useful plan document that will guide growth effectively? Comments:



1b. Should the growth policy legislation, for example, recommend or require local governments to prepare a plan map showing future proposed land uses as well the location of existing and proposed community facilities? Comments:



1c. Under current statutes (MCA §76-1-601), only those local governments that create a planning board must prepare a growth policy. Thus, comprehensive planning is only conditionally mandatory. Should urbanized or fast-growing cities and counties be required to prepare and adopt a growth policy and a zoning ordinance to implement the policies? Comments:



1d. The current statutes describe the general relationship of a growth policy to zoning and subdivision (MCA §§76-1-605 to -606). If you were to propose specific criteria to help local boards determine consistency between growth policies and regulations, what would they be? Comments:



1e. Should the state provide grants to cities and counties to prepare growth policies? Comments:



1f. Should cities and counties be given the authority to generate funding to pay for planning and to provide services? Examples include property taxes, real estate transfer taxes, and sales tax. Comments:

2. SUBDIVISION STATUTES



2a. Montana statutes require, under certain circumstances, an "environmental assessment" for review of a preliminary subdivision plat (MCA §76-3-603). The assessment must be prepared by the developer. Does this process result in useful information for decision makers? Comments:



2b. Currently, proposed subdivisions are to be evaluated against a set of public interest criteria (MCA §76-3-608(3)(a)). These criteria deal with agriculture, agricultural water user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety. Do the public interest criteria provide adequate guidance to for those who review subdivisions? Comments:



2c. The existing subdivision statute does not require, nor does it provide guidance, on how to assess the cumulative impacts of a proposed subdivision? Would such criteria or guidance be helpful if it were included in the statute? Comments:



2d. The existing statute exempts certain divisions of land from formal subdivision review, such as the family transfer exemption (MCA §76-3-207). Should there be any changes in the types of land divisions that are exempt from subdivision review and, if so, what? Comments:



2e. Multiple minor subdivisions from the same tract of record are currently exempt from review (§76-3-6090). Should they be subject to review? Comments:



2f. Do you agree that clarification is needed regarding the procedures for reviewing subdivisions by the Dept. of Environmental Quality (DEQ) under the Sanitation and Subdivision Act and the local government subdivision review procedures under the Subdivision and Platting Act? What changes would you recommend to clarify these procedures? Comments?



2g. Should the statutes be amended to provide that, when the DEQ receives an application for a septic permit under the Sanitation and Subdivision Act, it notifies the county or municipality of the application? Comments:

3. ZONING STATUTES



3a. Current zoning statutes allow the creation of planning and zoning districts (MCA §§76-2-101 *et seq.*). Residents of an area can petition to form such districts and the local government then enacts the zoning and is charged with enforcement. Is this an effective planning tool? Comments:



3b. For municipalities, the zoning statute (MCA §76-2-305) allows owners of 25 percent or more of the area of lots included in any proposed zoning, or those lots 150 feet from a lot included in a proposed change, to sign a petition protesting the change. Does this process work well? Comments:



3c. Montana statutes do not contain detailed provisions for issuance or enforcement of zoning permits. Should the process for issuing and enforcing such permits be more detailed, and if so, how?



3d. Should local governments be required to establish a uniform permit review system that would clarify the steps in applying for various types of permits, determining when applications are complete, and specifying time limits for decisions?

4. OTHER ISSUES



4a. Montana does not have a statute specifically authorizing or requiring the adoption of an adequate public facilities ordinance (APFO) for new development in certain areas (there may be an implied authority at MCA §76-3-501 and §76-3-511). (An APFO could require central water and sewer in areas expected to urbanize outside a municipality but within its extraterritorial authority). Is this a good idea? If you agree, how might such a concept be implemented? Comments:



4b. Current statutes provide authorization for local governments to require a developer to pay for the extension of capital facilities, in other words, impact fees (MCA §76-3-510). Would it be helpful to local governments if this section was modified to describe the types of fees that could be levied and the procedures for implementing them? Comments:



4c. It has been suggested that incentives rather than more regulation should be used to encourage private landowners to implement plans. What specific incentives would do that? Comments:



4d. Should Montana communities be required to evaluate their land development regulations on a periodic basis, regardless of whether they have an adopted growth policy? If so, what should this review consist of? Who should be responsible for the review?

A P P E N D I X E

MONTANA SMART GROWTH COALITION MEMBER ORGANIZATIONS' CONTACT INFORMATION AND MISSION STATEMENTS

AERO (Alternative Energy Resources Organization)

Contact: Marga Lincoln, Smart Growth & Transportation Manager
432 N. Last Chance Gulch
Helena, MT 59601
406-443-7373
406-442-9120 (fax)
aero@aeromt.org

AERO is a Montana-based, nonprofit organization dedicated to sustainable resource use and rural community vitality. We promote sustainable agriculture, "Smart growth" planning and transportation alternatives, renewable energy and conservation, environmental quality and community self-reliance.

American Farmland Trust

Rocky Mountain Field Office
Contact: Jeff Jones
401 Edwards Street
Fort Collins, CO 80524
970-484-8988
970-484-8098 (fax)

American Farmland Trust was founded in 1980 to protect the nations' agricultural resources. AFT works to stop the loss of productive farmland and to promote farming practices that lead to a healthy environment.

Bitterrooters for Planning

Contact: Stuart Brandborg
P.O. Box 505
Corvallis, MT 59828
406-821-3134

Bitterrooters for Planning believes that a comprehensive plan is needed in Ravalli County. Our purpose is to encourage understanding of, clarification of, and support for such a plan.

Brown Bear Resources

222 N. Higgins
Missoula, MT 59802
406-549-4896
406-549-4884 (fax)
ursus@marsweb.com

Brown Bear Resources works proactively to protect the grizzly bear by reducing human-wildlife conflict and by protecting critical wildlife habitat.

Citizens for a Better Flathead

Contact: Mayre Flowers, Program Director
PO Box 771
Kalispell, MT 59904
406-756-8993
406-756-8991 (fax)
citizens@digisys.net

Citizens for a Better Flathead was founded in 1992. It's mission is to promote sustainable development and economic diversity through comprehensive, citizen-driven planning and to protect the ecological and cultural values of the Flathead

Valley. Two fundamental principles have long guided its work. First is its commitment to advocate for accessible, clear and fair decision-making processes in local and state government that encourages broad-based citizen participation. The second is to advocate for Smart Growth. Smart Growth is development that is environmentally, socially, and economically wise. It recognizes that how buildings are built and where development takes place are what make growth a community asset or liability. Smart Growth links development decisions with quality of life.

Clark Fork Coalition

Contact: Tracy Stone-Manning, Executive Director
114 W. Pine
PO Box 7593
Missoula, MT 59807
406-542-0539
<http://www.clarkfork.org>

The Clark Fork Coalition's mission is to protect and restore water quality in the Clark Fork River basin, which drains some 22,000 square miles.

Downtown Billings Partnership

207 N. Broadway
Box 2117
Billings, 59103
406-247-5060
406-247-5061 (fax)
partnership@downtownbillings.com

Mission: to revitalize downtown Billings.

Flathead Lakers

Contact: Robin Steinkrauss, Executive Director
PO Box 70
Polson, MT 59860
406-883-1346
lakers@cyberport.net

The Flathead Lakers is a nonprofit organization that is dedicated to protecting and improving water quality in Flathead Lake and its watershed in Northwest Montana.

Flathead Resource Organization

Contact: Thompson Smith, Director
PO Box 541
St. Ignatius, MT 59865
406-644-2511
406-644-2516 (fax)
fro@blackfoot.net

The Flathead Resource Organization is a grassroots group dedicated to the protection and restoration of the environment of the lower Flathead River drainage system and surrounding area, and to the promotion and support of a sustainable and healthy human relationship with that environment.

Greater Yellowstone Coalition

Contact: Dennis Glick
13 South Willson, Suite 2
P.O. Box 1874
Bozeman, MT 59771
406-586-1593
406-586-0851 (fax)
e-mail: gyc@greateryellowstone.org

The Greater Yellowstone Coalition, formed in 1983, works to conserve and protect the Greater Yellowstone Ecosystem and the full range of its life, now and for future generations. The Coalition helps shape a future where wildlife populations maintain their

diversity and vitality, where ecological processes function with minimal intervention, and where exceptional outdoor recreational opportunities abound for residents and visitors alike. GYC works to ensure a more thoughtful, coordinated process for making decisions that are shaping this region's future.

Highway 93 Citizens' Coalition for Responsible Planning

Contact: Peter Moore, Executive Director

PO Box 521

Stevensville, MT 59870

406-777-3210

hwy93cc@bitterroot.net

Mission: To strive for highway design that is safe, rural-friendly, does not induce sprawl and that benefits the Bitterroot Valley economically.

homeWORD

Contact: Ren Essene, Executive Director

127 N. Higgins

Missoula, MT 59802

406-543-3550

406-721-4584 (fax)

ren@homeWORD.org

homeWORD develops affordable housing and asset building strategies for those most in need through sustainable and replicable methods. Conscious of its impact on the natural and urban environment, homeWORD demonstrates new ways to build by employing resource- and energy-efficient construction methods, utilizing construction sites for on-site training, and relying on local materials and suppliers.

Montana Association of Conservation Districts

Contact: Heather Mumby, Executive Director

501 N. Sanders

Helena, MT 59601

406-443-5711

mail@macdnet.org

To provide leadership, representation, and support enabling conservation district supervisors to fulfill their responsibilities as elected officials implementing locally-led natural resource programs.

Montana Audubon

Contact: Janet Ellis, Executive Director

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Helena, MT 59624

406-443-3949

406-443-7144 (fax)

mtaudubon@mcn.net

Montana Audubon's mission is to enable Audubon's members in all chapters across the state to work together so that Montana's ecosystems will continue to nourish birds, other wildlife and the human spirit for future generations.

Montana Environmental Information Center (MEIC)

Contact: Anne Hedges

PO Box 1184

Helena, MT 59624

406-443-2520

406-443-2507 (fax)

ahedges@meic.org

The Montana Environmental Information Center is a member-supported statewide advocacy and research organization. It was founded by concerned Montanans in 1973 to protect and restore Montana's natural environment. Often referred to as Montana's environmental watchdog, MEIC lobbies the state legislature, monitors state govern-

ment, educates the public about environmental issues and provides citizens and communities with organizing and technical assistance.

Montana Human Rights Network

Contact: Christine Kauffman
PO Box 1222
Helena, MT 59624
406-442-5506
network@mhrn.org

The Montana Human Rights Network is a grassroots, membership-based organization of over 1,400 members and 10 local groups. MHRN's mission is to promote democratic values such as pluralism, equality and justice; challenge bigotry and intolerance; and organize communities to speak out in support of democratic principles and institutions. MHRN seeks to challenge hate groups and other extremists who use violence and intimidation as tools for political activism.

Montana Wildlife Federation

Contact: Ira T. Holt
548 Cielo Vista
Hamilton, MT 59840
406-961-3302
irachar@bitterroot.net

The Montana Wildlife Federation was formed in 1935 and has retained its original mission; "believing that the wildlife resources of Montana are valuable social, recreational, and aesthetic assets which should be restored, perpetuated, and conserved for this and future generations, realizing this can be achieved only through an aroused and enlightened opinion among the people of the state . . ."

National Center for Appropriate Technology

Contact: Mike Kustudia
P.O. Box 3838
Butte, MT 59702
406-327-0705
michaelk@ncat.org

The mission of the National Center for Appropriate Technology is to champion sustainable technologies and community-based approaches that protect natural resources and assist people, especially the economically disadvantaged, in becoming more self-reliant.

Northern Plains Resource Council

Contact: Megan Dishong
2401 Montana Avenue, #200
Billings, MT 59101
406-248-1154
406-248-2110 (fax)

Northern Plains Resource Council is a 28-year-old, grassroots Montana citizens' group dedicated to responsible stewardship of Montana's air, land and water, and to preserving a sustainable system of family agriculture.

Park City Environmental Council

Contact: Jim Barrett, Director
PO Box 164
Livingston, MT 59047
406-222-0723
envirocouncil@imt.net

The mission of the council is to support sound land-use planning and wildland protection; to protect air, water, and wildlife; and to promote public awareness of environmental issues.

Plan Helena

Contact: Stephen Hendricks, Director
401 N. Last Chance Gulch
Helena MT 59601
406-449-0892
406-443-7294 (fax)
StephenBicknell@rocketmail.com

Our mission to preserve those characteristics — natural, urban, rural, historic — that define the desirable quality of life in the Helena area.

Smart Growth Missoula

Contact: Lin Smith
P.O. Box 7342
Missoula, MT 59807
406-543-6997
jlswift@bigsky.net

Mission: to support safe and healthy communities, sustainable economies, conservation of farm, forest and ranch lands, and protection of natural resources and wildlife habitat in the Missoula five valley region.

Soil and Water Conservation Society - Montana Chapter

Contact: Warren Kellogg, President
38 Hidden Valley Drive
Clancy, MT 59634
406-444-4490
wkellogg@state.mt.us

The mission of the Montana Chapter SWCS is to promote the wise use of soil, water, and related natural resources through advocacy, professional development, and educational activities. The Montana members stand for a stewardship ethic that recognizes the interdependence of people and the environment.

Sonoran Institute

Contact: Barb Cestero, Program Associate
201 S. Wallace
Bozeman, MT 59715
406-587-7331
barb@sonoran.org

The Sonoran Institute works with communities in western North America to conserve and restore their unique natural landscapes, wildlife and cultural values. The lasting benefits of the Sonoran Institute's community stewardship work are healthy landscapes and vibrant, livable communities that embrace conservation as an integral element of their quality of life and economic vitality.

Burton K. Wheeler Center for Public Policy

Contact: Julie Hitchcock, Associate Director
P.O. Box 170590
Montana State University
Bozeman, MT 59717
406-994-0336
406-994-0341 (fax)
jhitch@montana.edu

The Center provides a forum for the discussion of critical statewide issues in the form of conferences and roundtables that are free and open to the public.

Women's Opportunity and Resource Development (WORD)

Contact: Judy Smith
127 North Higgins Avenue
Missoula, MT 59802
406-543-3550
406-721-4584 (fax)
jlsswift@bigsky.net

WORD seeks to inform, educate and empower women and their families to make choices that lead toward economic self-sufficiency.

Women's Voices for the Earth

Contact: Bryony Schwan, Program Director
114 W. Pine St.
PO Box 8743
Missoula, MT 59807
406-543-3747
wve@wildrockies.org

WVE's mission is to empower women and others who historically have had little power in affecting environmental policy to create a society that is ecologically sustainable and socially just.