

Land Use Regulation Should Be Integral to Protection of Water Quality

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1. Introduction.

My simple premise is that land use regulation should be recognized as integral to a successful strategy to protect water quality. The dilemma I face here this afternoon (other than the 4:00 p.m. doldrums) is that my comments may seem too cursory for those of you who labor day in and day out in the regulatory trenches, and may seem too specific for those of you who are unfamiliar with Montana's land use laws and regulations. In any event, before looking at the regulatory "tools" I think it is useful to look at the "tool box."

The Montana Constitution starts with an eloquent nondenominational prayer:

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.¹

In implementation of this vision, the Montana Constitution recognizes a short list of "inalienable rights," the first of which is "the right to a clean and

¹Preamble, 1972 Mont.Const.

healthful environment.”² Significantly, the Montana Constitution also recognizes that in enjoying the benefit of the enumerated inalienable rights, “all persons recognize corresponding responsibilities.”³ In this day and age, most of us look to our local governing bodies, state and federal agencies, or perhaps advocacy groups, to protect our inalienable right to a clean and healthful environment. And in fact, all of these entities have an important role to play since they too are “persons” under our constitution. But so too do each of us here today, who are the actual flesh and blood of these various entities, have the responsibility to protect this inalienable right to a clean and healthful environment, in each of the decisions we make.

As most of you are aware, there is no shortage of statutes and regulations intended to accomplish this most laudable objective. It’s my intention this afternoon to briefly discuss those statutes and implementing regulations which are most commonly involved in decisions made by local governing bodies which affect land use and water quality. The bulwark of Montana’s land use laws consist primarily of the Montana Subdivision and Platting Act (Subdivision Act)⁴ and

²Art. II, § 3, 1972 Mont.Const.

³*Id.*

⁴§§ 76-3-101, *et seq.*, MCA.

Montana's zoning laws.⁵ In addition, Montana's Growth Policy Act,⁶ the Streambed Preservation Act,⁷ and the Lakeshore Protection Act,⁸ also have important roles to play.⁹

2. The Subdivision Act.

The purpose of the Subdivision Act includes promoting the public health, safety, and general welfare; requiring development in harmony with the natural environment; and ensuring adequate provisions for water supply and sewage disposal.¹⁰ Under the Subdivision Act, local governing bodies are required to adopt subdivision regulations that implement the Act's purposes, including "the avoidance of subdivision which would involve unnecessary environmental degradation and the avoidance of danger of injury to health, safety, or welfare. . .

⁵Montana law provides two separate procedures for creation of county zoning districts. *Cf.* §§ 76-2-101, *et seq.*, MCA, and §§ 76-2-201, *et seq.*, MCA. Municipal zoning is provided for at §§ 76-2-301, *et seq.*, MCA.

⁶§§ 76-1-601, *et seq.*, MCA.

⁷§§ 75-7-101, *et seq.*, MCA.

⁸§§ 75-7-201, *et seq.*, MCA.

⁹The nature of the role depends to an important extent on the implementing policies and regulations adopted by the local governing bodies.

¹⁰§ 76-3-102, MCA. For a more thorough discussion, see my article "Environmental Advocacy Under the Montana Subdivision and Platting Act," published in *Trial Trends* (Spring 2007) at pp. 12-15.

.”¹¹ In furtherance of its conservation-related purposes, the Subdivision Act explicitly provides that subdivision regulations must include provisions for the preparation of an environmental assessment, which must include specific detailed information.¹² Unlike the less demanding requirements for a minor subdivision (five or fewer parcels), the environmental assessment for a major subdivision “must include a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available ground water information . . .” as well as a summary of probable impacts to agriculture, agricultural water-user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety.¹³

In addition to the information required in the environmental assessment, the Subdivision Act also requires the developer to submit to the governing body a substantial amount of information regarding water and sanitation.¹⁴ The required water and sanitation information includes: mixing zones for onsite wastewater

¹¹§ 76-3-501, MCA.

¹²§ 76-3-504(1)(a), MCA. This is not the same as the environmental assessment provided for under the Montana Environmental Policy Act (MEPA), §§ 75-1-101, *et seq.*, MCA.

¹³§ 76-3-603(1)(a), MCA, which incorporates by reference the criteria described in § 76-3-608, MCA.

¹⁴§ 76-3-622, MCA. *See also*, § 76-3-604, MCA; § 76-3-504(1)(g), MCA; and 49 A.G. Op. 7 (Mont. 2001).

treatment systems based on rules adopted by the Board of Environmental Review; evidence of the suitability for new onsite wastewater treatment systems that include soil profile descriptions that comply with standards published by the Department of Environmental Quality; and, for new water supply systems, evidence of adequate water availability and evidence of sufficient water quality that conforms with rules adopted by the Department of Environmental Quality.¹⁵

Once the developer submits the application for preliminary plat approval, accompanied by an environmental assessment, then the governing body's agent (typically the planning department) must determine whether the application contains all of the required information.¹⁶ Then, pursuant to § 76-3-605(1), MCA, "the governing body or its authorized agent or agency shall hold a public hearing on the preliminary plat and shall consider all relevant evidence relating to the public health, safety, and welfare, including the environmental assessment, if required, to determine whether the plat should be approved, conditionally approved or disapproved"

Section 76-3-608, MCA, in turn, contains the statutory criteria for review of the proposed subdivision by the governing body. Integral to the governing body's

¹⁵§ 76-3-622, MCA.

¹⁶§ 76-3-604(1), MCA.

decision is the information required to be contained in the subdivision application, preliminary plat, and environmental assessment. This statute emphasizes the importance of the environmental assessment and public hearing¹⁷ as significant components of the local governing body's decision.

The Subdivision Act's requirements for submission of an environmental assessment have long been recognized as a significant component of the Subdivision Act. Goetz, Recent Developments in Montana Land Use Laws, 38 Mont.L.Rev. 97, 99-100 (1977). These requirements, which were enacted by the legislature in 1973, are entirely consistent with the provisions in the 1972 Montana Constitution directing the legislature to provide for the administration and enforcement of the duty to maintain and improve a clean and healthful environment.¹⁸ In fact, a stated purpose of the Subdivision Act is "to require development in harmony with the natural environment." § 76-3-102(5), MCA. See also § 76-3-501, MCA, which states that one of the major purposes of the adoption and enforcement of subdivision regulations by local governing bodies is "for the avoidance of subdivision which would involve unnecessary environmental

¹⁷The Montana Constitution also recognizes the public's right to participate in the decision-making process of local governing bodies and governmental agencies. Art. II, § 8, Mont.Const. (19772).

¹⁸Art. II, § 3, Mont.Const. (1972); see also Art. IX, § 1, Mont. Const. (1972).

degradation.” Of course, these important environmental objectives cannot be achieved unless the mandatory requirements for an environmental assessment are met in regards to a particular major subdivision proposal.

In the recent case of *Neighbors Over the Aquifer v. Board of County Commissioners of Flathead County*, Cause No. DV-05-179(B), the district court recognized the important public policies underlying the disclosure requirements for the environmental assessment, the developer's responsibility for submitting a complete environmental assessment, and the consequences attending the failure to submit a complete environmental assessment:

There are a myriad of reasons why the legislature has **require the applicant to provide the information** prescribed for the EA; one being that **this is a burden that cannot and should not be placed upon the public who are, predominantly, simply interested citizens** without the resources or technical expertise of a developer. To simply say that the Board received some of the omitted information, even if from a different source, so "no harm, no foul," is not persuasive. One can imagine that if interested citizens provided to the Board, and the Board acted upon, information about a subdivision not contained in an EA, and the information turned out to be inaccurate, the developer would not hesitate to fault the Board and demand that the information be disregarded. **The bottom line is that the responsibility for submitting a complete EA falls on the developer and, in the instant case, the Board approved a subdivision based upon an incomplete EA.** That is not, as the Board suggests, a situation in which the EA "simply . . . does not include all of the information Plaintiffs would like it to include." Response, *supra* at 12. **The Board's consideration and conditional approval** of the preliminary plat application in this case was **in**

violation of the applicable of the applicable statutes and regulations; therefore, the decision of the Board is illegal and void.

Order and Rationale on Cross-Motions for Summary Judgment, dated July 28, 2006, at p. 9.

In *Neighbors Over the Aquifer* there were several critical deficiencies which the Court relied on in declaring the Commissioners' approval of the preliminary plat illegal and void. These included the failure of the developer to submit required information on ground water, surface water, sewage treatment, and water supply. *Id.* at pp.8-10.¹⁹ Unfortunately, these mandatory disclosures are often lacking in submissions made by the developer. In Montana's fast growing counties, planning departments often lack the resources to thoroughly review the developer's application materials, including the environmental assessment, and many of the developer's inadequate disclosures are overlooked. And the local governing body too often approves such proposed subdivisions despite the inadequate disclosures. Hence, one of the important tools in the proverbial "tool box" available to local governing bodies to protect a host of environmental

¹⁹These disclosure requirements under the Montana Subdivision and Platting Act and implementing regulations, should not be confused with the authority to approve the sanitation-related components of the proposed subdivision, which the Legislature has assigned to the DEQ under the Sanitation in Subdivisions Act, §§ 76-4-101, *et seq.*, MCA.

amenities, including water quality, is frequently left gathering dust in the bottom of the box.

3. Zoning.

Zoning is of relatively recent origin, the first comprehensive zoning ordinance having been passed in New York City in 1916.²⁰ In the seminal 1926 case of *Village of Euclid v. Amber Realty Company*,²¹ a zoning ordinance was challenged on the basis that it deprived a property owner of liberty and property without due process of law and was a denial of equal protection of the law. The U.S. Supreme Court upheld the zoning ordinance as a valid exercise of the police power asserted for the protection of public health, safety and general welfare.²² In 1929 the Montana legislature adopted this state's first municipal zoning act. Legislation intended to enable counties to zone was first passed in 1957, which was extensively revised in 1963 in response to challenges mounted under the pre-1972 Montana Constitution.²³

²⁰See Wilford Lundberg, *County Zoning in Montana: A New Look at an Old Constitutional Problem*, 33 Mont.L.Rev. 63 (1971). For a more thorough discussion of zoning in Montana see my article entitled "Land Use Litigation" published in *Trial Trends* (Summer 2007) at pp. 10-15.

²¹272 U.S. 365 (1926).

²²*Id.* at 397.

²³See *Plath v. Hi-Ball Contractors, Inc.*, 139 Mont. 263, 362 P.2d 1021 (1961).

Ironically, although zoning finds its justification in the police power designed to protect the public interest, environmental advocates often find themselves challenging zoning decisions made by local governing bodies which threaten increased impacts to the environment. The invalidation of zoning decisions are often challenged on the grounds that the zoning decision violates mandatory procedures, and/or that the zoning decision was not made in accordance with mandatory criteria.

As explained in the treatises, “Municipal zoning authority is conferred solely by state enabling legislation, and failure to comply with a mandatory procedural requirement of the enabling statute renders a zoning ordinance invalid.”²⁴ In Montana, the enabling legislation for county zoning is codified at §§ 76-2-101, *et seq.*, MCA (“Part 1” zoning) and §§ 76-2-201, *et seq.*, MCA (“Part 2” zoning).²⁵ The enabling legislation for municipal zoning is codified at §§ 76-2-

²⁴101A C.J.S. Zoning & Land Planning § 11(footnote omitted). *Accord*, 83 Am.Jur.2d Zoning and Planning § 616.

²⁵Montana law provides two separate procedures for creation of county zoning districts. So-called “Part 1” zoning districts are initiated by petition of at least 60% of the freeholders within a proposed district. Under “Part 2” zoning, boards of county commissioners are authorized to adopt zoning regulations and create districts for all or part of the county, once a growth policy is adopted. *Cf.* § 76-2-101, *et seq.*, MCA, and § 76-2-201, *et seq.*, MCA. Each statutorily authorized method for creating zoning districts and enacting zoning regulations is separate and distinct from the other. *Ash Grove Cement Co. v. Jefferson County*, 283 Mont. 486, 493, 943 P.2d 85, 89 (1997); *Montana Wildlife Federation v. Sager*, 190 Mont. 247, 260, 620 P.2d 1189, 1197 (1980).

301, *et seq.*, MCA, which provisions are substantially similar to “Part 2” county zoning.

The Montana Supreme Court has made it abundantly clear that each step set forth in the procedural statutes, including public notice and a hearing, must be followed by the local governing body when creating or amending a zoning district, and violation of any required step vitiates the governing body’s zoning decision.²⁶

The mandatory criteria and guidelines for county zoning regulations are set forth in § 76-2-203, MCA. The same criteria and guidelines for municipal zoning are set forth in § 76-2-304, MCA. In the seminal case of *Lowe v. City of Missoula*,²⁷ the Montana Supreme Court recognized that under the enabling legislation a governing body must consider twelve criteria in making zoning and rezoning decisions. In *Schanz v. City of Billings*,²⁸ the Montana Supreme Court clarified that there is no elemental distinction between the act of zoning and the act of rezoning, both of which are legislative enactments, and both of which must comply with the twelve-step test set forth in the statute.

The twelve statutory criteria that the local governing body must consider in

²⁶*Little v. Board of County Commissioners of Flathead County*, 193 Mont. 334, 631 P.2d 1282 (1981); *Dover Ranch v. County of Yellowstone*, 187 Mont. 276, 609 P.2d 711 (1980).

²⁷ 165 Mont. 38, 525 P.2d 555 (1974).

²⁸ 182 Mont. 328, 597 P.2d 67 (1979).

making a decision to zone or rezone are as follows:

1. Whether the new zoning was made in accordance with the Growth Policy.
2. Whether the new zoning was designed to lessen congestion in the streets.
3. Whether the new zoning was designed to secure safety from fire, panic, and other dangers.
4. Whether the new zoning will promote public health and general welfare.
5. Whether the new zoning will provide adequate light and air.
6. Whether the new zoning will prevent the overcrowding of land.
7. Whether the new zoning will avoid undue concentration of population.
8. Whether the new zoning is designed to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.
9. Whether the new zoning gives reasonable consideration to the character of the district.
10. Whether the new zoning gives reasonable consideration to the peculiar suitability of the district for particular uses.
11. Whether the new zoning was adopted with a view to conserving the value of buildings.
12. Whether the new zoning will encourage the most appropriate

use of land throughout the jurisdictional area.²⁹

The Flathead County Zoning Regulations (FCZR), require that both the Planning Board and the County Commissioners must evaluate the zoning application and adopt findings of fact based upon the twelve statutory criteria set forth above.³⁰

As indicated, the first criteria is whether the proposed zoning is in accordance with the Growth Policy. Flathead County adopted its new Growth Policy on March 19, 2007. It contains a number of laudable, if somewhat ambiguous, goals and policies intended to protect water quality, including the following:

- G.35 Protect and preserve water resources within the Flathead watershed for the benefit of current residents and future generations.
- P.35.1 Establish public/private partnerships to develop a Flathead basin watershed management plan using scientific data to determine critical areas and evaluate the impacts of future development on water quantity and quality.
- G.36 Protect water quality in lakes, rivers, aquifers, and streams from existing and potential pollution sources.
- P.36.1 Require development to demonstrate compliance with local, State, Tribal, and Federal water quality standards, where applicable.

²⁹ See §§ 76-2-203, and -304, MCA; *Lowe, supra*.

³⁰ FCZR § 2.08.040, which is in accordance with and mandated by § 76-2-203, MCA.

- P.36.2 Review and revise the Lakeshore Protection regulations to expand the lakeshore protection zone to reduce potential harm caused by fertilizers and pesticides entering lakes, streams and rivers.
- P.36.4 Require all public waste water treatment systems to meet applicable DEQ 1 discharge standards.
- P.36.5 Identify and encourage land development practices that do not contribute to increases in Total Maximum Daily Loads.
- P.36.6 Support non-point source pollution reduction within the Flathead basin watershed.
- P.36.7 Identify critical aquifer recharge areas in Flathead County and land uses in those areas that protect water quantity and quality.
- G.37 Prevent untreated storm water from entering into any surface water, stream, river, lake or shallow aquifer.
- G.40 Protect sensitive areas over shallow aquifers.
- P.40.3 Encourage rural residential densities at an average of one dwelling unit per five acres and/or community wastewater treatment systems on sites where the groundwater is less than eight feet unless scientific evidence shows that a greater or lesser density is appropriate.

Once again, these goals and policies are only as good as the follow-through implementation in the zoning and subdivision regulations, as well as in the numerous land use decisions that our local governing bodies make week in and week out. On a positive note, the Flathead County Commissioners have shown a commendable commitment to the use of zoning to advance a host of public interest considerations, including protection of water quality, through the creation of new

zoning districts both on and adjacent to the lakeshore of Flathead Lake. On January 11, 2007, the Flathead County Commissioners adopted the Final Resolution creating the “Interim Old Highway 93 North Shoreline Zoning District,” which established R-2 zoning between the shore of Flathead Lake and U.S. Highway 93 adjacent to Somers Bay and Juniper Bay. Protection of the water quality in Flathead Lake was a paramount consideration in creating this emergency zoning district. The process has already begun to convert this to a permanent zoning district. Likewise, the Flathead County Commissioners also recently approved the Spring Creek Zoning District, which established R-1 zoning for the area west of U.S. Highway 93 above Juniper Bay. The potential diminishment of the water quality of Flathead Lake through dense development of the land played a motivating role in creation of this zoning district as well.

4. Lakeshore Protection Act.

The Lakeshore Protection Act,³¹ was enacted by the 1975 Montana Legislature. The Legislature implemented a policy of conserving and protecting the natural lakes of Montana by delegating to local governments the statutory powers to protect lake areas. The main tool under the Act is to require any person “who proposes to do any work that will alter or diminish the course, current or cross-sectional area of a lake or its lakeshore” to first secure a permit for the work

³¹§§ 75-7-201, *et seq.*, MCA.

from the local governing body.³² On April 13, 1982, pursuant to § 75-7-207, MCA, of the Montana Lakeshore Protection Act, the Flathead County Commissioners adopted the Flathead County Lake & Lakeshore Protection Regulations (FCLPR), which have been amended from time to time thereafter. As stated therein:

The **purpose of these regulations** is to:

- A. **Protect the fragile, pristine character of Flathead County’s lakes and recognize that the ecosystem of these lakes are inseparably intertwined with the adjacent riparian corridor and uplands area;**
- B. **Conserve and protect natural lakes** because of their high scenic and resource value;
- C. Conserve and protect the value of the lakeshore property;
- D. Conserve and protect the value of the lakes for the State’s residents and visitors who use and enjoy them.³³

FCLPR § 4.1, titled “Policy Criteria for Issuance of a Permit,” states:

The proposed action **shall not**, during either its construction or its utilization:

- A. **Materially diminish water quality;**
- B. **Materially diminish habitat for fish or wildlife;**
- C. **Interfere with navigation** or other lawful recreation;
- D. Create a public nuisance
- E. Create a visual impact discordant with natural scenic values, as determined by the governing body, where such values form the predominant landscape elements; and

³²§ 75-7-204(1), MCA.

³³FCLPR § 1.3 (emphasis added).

F. **Alter the characteristics of the shoreline.**³⁴

There have been several litigated cases involving the Lakeshore Protection Act, and its implementing regulations, perhaps most notably *Flathead Lake Protection Association v. Board of County Commissioners of Flathead County*.³⁵ That case involved the Lakeside Marina. In March of 2004, Montana Eagle Development, LLC (Developer) applied to the Board of County Commissioners of Flathead County for a Marina PUD, which was required under the Flathead County Zoning Regulations in order for the developer to reconstruct and expand the Lakeside Marina. According to the developer's PUD application, the proposed Lakeside Marina project would consist of five major structures and an extensive dock system, which would have extended some 650 feet into the lake and provide a 196 enclosed boat slips, compared with the current 56 boat slips.

Later, the developer separately filed an application for major variance from the Flathead County Lake & Lakeshore Protection Regulations governing marinas, for purposes of pursuing work within that part of the PUD area contained within

³⁴The "Policy Criteria" derive from § 75-7-208, MCA. Section 75-7-207(5), MCA, states that the requirements for a permit reflected in and required by § 75-7-208, MCA, "are **minimum requirements** and do not restrict a local governing body from adopting such **stricter** or additional regulations as may be authorized by other statutes."

³⁵Filed April 7, 2005, in the Montana Eleventh Judicial District Court, Flathead County (Cause No. DV-05-253-A).

the Flathead Lake and Lakeshore Protection Zone. Both applications were ultimately approved by the Commissioners. By Order dated March 16, 2005, the Eleventh Judicial District Court determined that the Marina PUD granted by the Commissioners was void.

During the course of the administrative and judicial proceeding, agencies and experts submitted reports confirming that the EIS prepared by the developer,³⁶ in support of the developer's request for major variances from the Lakeshore Protection Regulations, was grossly inadequate in addressing the following: 1) water quality issues; 2) that the proposed marina expansion would dramatically increase wave energy and accelerate erosion to neighboring properties; 3) the only way not to increase the significant water quality impacts to Flathead Lake would be to redesign the proposed marina to stay within the current footprint; and 4) that the proposed marina expansion, increased boater traffic and degradation to water quality would likely negatively impact fish and wildlife habitat, including that of the West Slope Cutthroat Trout and Bull Trout.³⁷

On March 14, 2006, the District Court issued a peremptory Writ of Mandate

³⁶Plaintiffs pointed out that § 75-7-213, MCA, requires that the **governing body** prepare the EIS prior to the grant of a major variance.

³⁷This is a summary of the record in the case, including comments submitted by the Montana Department of Fish, Wildlife & Parks, hydrologist John Muhlfeld of River Design Group, and the Flathead Lake Biological Station.

and declared the major variance and lake and lakeshore construction permit invalid due to violation of procedural requirements. Thereafter, the parties settled the litigation on the basis of a footprint only slightly larger than the historical footprint, as well as implementation of a number of design features intended to address potential impacts to water quality and fish.³⁸

Once again, the problem resolved through this litigation was not with the Lakeshore Protection Regulations that were in the local governing body's tool box, but with the application of those regulations to a particular development proposal.

5. Conclusion.

The purpose of the various statutes and regulations that I have discussed is to protect the public health and safety, including water quality. As noted in the Growth Policy³⁹ recently adopted by Flathead County:

Preservation and improvement of water quality are perhaps the most critical elements when considering surface waters in Flathead County. The high water quality of Flathead County's lakes and rivers is consistently referred to as a prized and cherished characteristic of the Flathead Basin that leads to a high quality of living for residents and visitors.

³⁸See Unopposed Motion to Dismiss with Prejudice, and attached "Settlement Agreement," filed May 8, 2007.

³⁹Flathead County Growth Policy (adopted March 19, 2007), at p. 117.

As pointed out, there are already numerous regulatory tools available to local governing bodies to use in preserving and protecting water quality, including especially the water quality of Flathead Lake. And as is the nature of a democracy, protecting and preserving water quality requires the eternal vigilance of us all. And indeed these efforts affect all of us since, as Aldo Leopold reminded us years ago, we live on the shores of the proverbial “Round River.”

Emblematic of the need for such vigilance is the public hearing which will occur tomorrow evening before the Flathead County Planning Board to consider adoption of stream side and river setbacks as part of Flathead County’s new subdivision regulations. Local scientists have recommended setbacks of 100 feet for smaller streams; 200 feet for the Swan, Whitefish, Stillwater, Pleasant Valley/Fisher Rivers and Ashley Creek; and 300 feet for the Flathead River and its three forks. It remains to be seen what regulatory standards are adopted.

And so the process continues, with both the possibility for using regulatory tools to enhance and protect water quality, or, conversely, allowing development which is incrementally contributing to the decline in water quality that has now been going on for a number of years.

Thank you.