

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2022-008

TO: City Council, Mayor John Engen, Dale Bickell, Eran Pehan, Mary McCrea, Alex Eidam, Dave DeGrandpre, Cassie Tripard, Ellen Buchanan, Ginny Merriam, Department City Clerk, Jeremy Keene

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE March 22, 2022

RE: An adopted land use growth policy is to be a guide to be considered with respect to general policy and pattern of development. A land use growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations.

FACTS:

Recently there appears to have been some city elected official puzzlement about the role of a land use growth policy with respect to land use development issues.

ISSUE(S):

What is the intended role of a land use growth policy?

CONCLUSION(S):

In Montana a land use growth policy is to be a guide for consideration with respect to general policy and pattern of development and adoption of zoning regulations. A land use growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations.

LEGAL DISCUSSION:

Title 76 Montana Code Annotated (MCA) is entitled LAND RESOURCES AND USE. Title 76 part 6 MCA is entitled GROWTH POLICY. Section 76-1-605 MCA of part 6 is entitled USE OF ADOPTED GROWTH POLICY. Pursuant to section 76-1-605 MCA it in part is stated that a land use growth policy must be a guide to be considered as part of the general policy and pattern

of development. It is also stated that a growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specially authorized by law or regulations.

Section 76-1-605 MCA USE OF ADOPTED GROWTH POLICY states:

76-1-605. Use of adopted growth policy. (1) Subject to subsection (2), after adoption of a growth policy, the governing body within the area covered by the growth policy pursuant to 76-1-601 must be guided by and give consideration to the general policy and pattern of development set out in the growth policy in 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; and
- (c) adoption of zoning ordinances or resolutions.

(2) (a) A growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law.

(b) A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.

Also, pursuant to Montana's municipal zoning law, section 76-2-304 MCA entitled CRITERIA AND GUIDELINES FOR ZONING REGULATIONS it is stated that "(1) Zoning regulations must be (a) MADE IN ACCORDANCE WITH A GROWTH POLICY" (emphasis added). See 76-2-304(1)(a) MCA.

Montana's land use growth policy "contents" law is quite lengthy and is more than 2 pages long in the codified MCA. It is codified in section 76-1-601 MCA entitled GROWTH POLICY-CONTENTS". Even though it is so lengthy, it is set forth below; so that elected city council members can review some of the Montana State Legislature's expectations as to what should be included in a land use growth policy.

76-1-601. Growth policy -- contents. (1) A growth policy may cover all or part of the jurisdictional area.

(2) The extent to which a growth policy addresses the elements listed in subsection (3) is at the full discretion of the governing body.

(3) A growth policy must include:

- (a) community goals and objectives;

(b) maps and text describing an inventory of the existing characteristics and features of the jurisdictional area, including:

- (i) land uses;
- (ii) population;
- (iii) housing needs;
- (iv) economic conditions;
- (v) local services;
- (vi) public facilities;
- (vii) natural resources;
- (viii) sand and gravel resources; and
- (ix) 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 each of the following elements:

- (i) land use;
- (ii) population;
- (iii) housing needs;
- (iv) economic conditions;
- (v) local services;
- (vi) natural resources; and
- (vii) other elements proposed by the planning board and adopted by the governing bodies;

(d) a description of policies, regulations, and other measures to be implemented in order to achieve the goals and objectives established pursuant to subsection (3)(a);

- (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:
 - (i) a timetable for implementing the growth policy;
 - (ii) a list of conditions that will lead to a revision of the growth policy; and
 - (iii) a timetable for reviewing the growth policy at least once every 5 years and revising the policy if necessary;
- (g) a statement of how the governing bodies will coordinate and cooperate with other jurisdictions that explains:
 - (i) if a governing body is a city or town, how the governing body will coordinate and cooperate with the county in which the city or town is located on matters related to the growth policy;
 - (ii) if a governing body is a county, how the governing body will coordinate and cooperate with cities and towns located within the county's boundaries on matters related to the growth policy;
- (h) a statement explaining how the governing bodies will:
 - (i) define the criteria in 76-3-608(3)(a); and
 - (ii) evaluate and make decisions regarding proposed subdivisions with respect to the criteria in 76-3-608(3)(a);
 - (i) a statement explaining how public hearings regarding proposed subdivisions will be conducted; and
 - (j) an evaluation of the potential for fire and wildland fire in the jurisdictional area, including whether or not there is a need to:
 - (i) delineate the wildland-urban interface; and
 - (ii) adopt regulations requiring:
 - (A) defensible space around structures;
 - (B) adequate ingress and egress to and from structures and developments to facilitate fire suppression activities; and

(C) adequate water supply for fire protection.

(4) A growth policy may:

(a) include one or more neighborhood plans. A neighborhood plan must be consistent with the growth policy.

(b) establish minimum criteria defining the jurisdictional area for a neighborhood plan;

(c) establish an infrastructure plan that, at a minimum, includes:

(i) projections, in maps and text, of the jurisdiction's growth in population and number of residential, commercial, and industrial units over the next 20 years;

(ii) for a city, a determination regarding if and how much of the city's growth is likely to take place outside of the city's existing jurisdictional area over the next 20 years and a plan of how the city will coordinate infrastructure planning with the county or counties where growth is likely to take place;

(iii) for a county, a plan of how the county will coordinate infrastructure planning with each of the cities that project growth outside of city boundaries and into the county's jurisdictional area over the next 20 years;

(iv) for cities, a land use map showing where projected growth will be guided and at what densities within city boundaries;

(v) for cities and counties, a land use map that designates infrastructure planning areas adjacent to cities showing where projected growth will be guided and at what densities;

(vi) using maps and text, a description of existing and future public facilities necessary to efficiently serve projected development and densities within infrastructure planning areas, including, whenever feasible, extending interconnected municipal street networks, sidewalks, trail systems, public transit facilities, and other municipal public facilities throughout the infrastructure planning area. For the purposes of this subsection (4)(c)(vi), public facilities include but are not limited to drinking water treatment and distribution facilities, sewer systems, wastewater treatment facilities, solid waste disposal facilities, parks and open space, schools, public access areas, roads, highways, bridges, and facilities for fire protection, law enforcement, and emergency services;

(vii) a description of proposed land use management techniques and incentives that will be adopted to promote development within cities and in an infrastructure planning area, including land use management techniques and incentives that address issues of housing affordability;

(viii) a description of how and where projected development inside municipal boundaries for cities and inside designated joint infrastructure planning areas for cities and counties could adversely impact:

- (A) threatened or endangered wildlife and critical wildlife habitat and corridors;
- (B) water available to agricultural water users and facilities;
- (C) the ability of public facilities, including schools, to safely and efficiently service current residents and future growth;
- (D) a local government's ability to provide adequate local services, including but not limited to emergency, fire, and police protection;
- (E) the safety of people and property due to threats to public health and safety, including but not limited to wildfire, flooding, erosion, water pollution, hazardous wildlife interactions, and traffic hazards;
- (F) natural resources, including but not limited to forest lands, mineral resources, sand and gravel resources, streams, rivers, lakes, wetlands, and ground water; and
- (G) agricultural lands and agricultural production; and

(ix) a description of measures, including land use management techniques and incentives, that will be adopted to avoid, significantly reduce, or mitigate the adverse impacts identified under subsection (4)(c)(viii).

(d) include any elements required by a federal land management agency in order for the governing body to establish coordination or cooperating agency status as provided in 76-1-607.

(5) The planning board may propose and the governing bodies may adopt additional elements of a growth policy in order to fulfill the purpose of this chapter.

CONCLUSION(S):

In Montana a land use growth policy is to be a guide for consideration with respect to general policy and pattern of development and adoption of zoning regulations. A land use growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations.

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/s/ Jim Nugent

Jim Nugent, City Attorney

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