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Legal Opinion 2007-022

TO: Mayor John Engen; City Council; Bruce Bender; Roger Millar; Mike Barton; Denise Alexander; Jennie Dixon; Mary McCrea; David Loomis; Steve King; Kevin Slovarp; Don Verrue

cc: Legal Staff

FROM: Jim Nugent, City Attorney

DATE December 10, 2007

RE: Use of adopted growth policy pursuant to Montana law.

FACTS:

Several proposed subdivisions are being considered at public hearings before the City Council during December, 2007. Reference to the current growth policy occurs several times during OPG staff reports, public comment as well as pursuant to City elected official inquiries. Land use plans have been and still often are referred to as a master plan or comprehensive land use plan in addition to growth policy.

ISSUES:

1. Pursuant to Montana law what recognized land use is to be provided a growth policy?

2. What has the Montana Supreme Court indicated to be the standard of compliance a governing body is to strive for with respect to adopting zoning regulations in accordance with a growth policy?

CONCLUSIONS:

1. Pursuant to Montana law, a governing body must be guided by and give consideration to a growth policy. However, a growth policy is not a regulatory document and a governing body may not withhold, deny, or impose conditions on any land use approval based solely on compliance with a growth policy.

2. The Montana Supreme Court for more than two and one-half decades has indicated that governmental zoning bodies are to "substantially comply" with the master plan or growth policy. Since 2003, Montana State Legislature amended section 76-1-605 MCA entitled "use of adopted growth policy," the Montana Supreme Court has indicated an assumption that the 2003 legislation was intended to reduce in some fashion reliance which local governing bodies are required to place upon growth policies, but has not yet directly addressed this issue with a ruling.

LEGAL DISCUSSION:

The 2003 Montana State Legislature revised Mont. Code Ann. §76-1-605 so that it currently provides:

> **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. (Emphasis added.)

The 2003 Montana State Legislature inserted subsection 76-1-605(2) MCA concerning the effect of a growth policy and restrictions on a governing body with respect to the use of a growth policy. Important points to be noted about the provisions of Mont. Code Ann. §76-1-605 include:

1. a governing body "must be guided by and give consideration to the general policy and pattern of development set out in the growth policy;"
2. a growth policy is not a regulatory document;
3. a growth policy does not confer any authority to regulate that is not otherwise specifically authorized by law or regulation; and
4. a governing body may not withhold, deny, or impose conditions on any land use approval or other authority tract based solely on compliance with a growth policy.

The Montana Supreme Court as well as the Montana Attorney General prior to the 2003 Montana State Legislature's amendment to section 76-1-605 MCA indicated that zoning governing bodies' zoning decisions should be in "substantial compliance" with the master plan/comprehensive plan/growth policy. "Substantial compliance" is the zoning regulation

adoption standard for local governments to strive to comply with respect to zoning regulations adopted pursuant to a master plan/comprehensive plan/growth policy. The Montana Supreme Court has stated that "to require strict compliance with the master plan would result in a master plan so unworkable that it would have to be constantly changed to comply with the realities." (Emphasis added.) See paragraph 23 of the 2006 Montana Supreme Court's decision in Citizen Advocates for a Livable Missoula Inc. v. City Council and Mayor of City of Missoula (St. Patrick Hospital/Safeway lawsuit). 2006 MT 47, 331 Mont. 269, 130 P3d 1259, 2006 Mont. LEXIS 59.

When the St. Patrick Hospital/Safeway zoning proposal was occurring the statutory revisions to section 76-1-605 MCA were in the process of being adopted by the Montana State Legislature and were not in effect on the date the city zoning review commenced. Therefore, the City relied on the long established Montana Supreme Court standard of "substantial compliance" with the growth policy during the lawsuit litigation for the determining standard with respect to adoption of zoning regulations, due to uncertainty if the Montana Supreme Court would consider the 2003 law to be applicable to the St. Patrick Hospital/Safeway zoning proposal.

The Montana Supreme Court noted that the new 2003 Montana State law had been adopted amending section 76-1-605 MCA, stating:

> "From its plain reading, it may be assumed that the 2003 legislation was intended to reduce in some fashion the reliance which local governing bodies are required to place upon growth policies when making land use decisions." However, although alluding to the passage of the new statute, both Appellants and Respondents have nonetheless framed their arguments regarding the validity of Ordinance 3234 under Little's 'substantial compliance standard." (Emphasis added.)

Section 76-1-605 MCA entitled "Use of Adopted Growth Policy" specifically provides that the governing body "must be guided by and give consideration to [. . .] the growth policy in the [. . .] adoption of zoning ordinances." (Emphasis added.)

Subsection 76-1-605(2) MCA provides:

> "(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 authority to act based solely on compliance with a growth policy adopted pursuant to this chapter." (Emphasis added.)

Citizen Advocates for a Livable Missoula Inc. (CALM) v. City Council and Mayor of the City of Missoula, 2006 MT 47 held in favor of the City of Missoula with respect to whether a development proposal substantially complied with a neighborhood growth policy plan as well as held that the development proposal was not illegal spot zoning. The Montana Supreme Court stated:

"in counties [. . .] where a planning board has been created, the preeminent planning tool is the comprehensive jurisdiction-wide development plan." which is today known as a "growth policy."[n1] Ash Grove, 283 Mont. at 494, 943 P.2d at 90; see also § 76-1-106, MCA (2002). A growth policy "essentially surveys land use as it exists and makes recommendations for future planning." Ash Grove, 283 Mont. at 494, 943 P.2d at 90. By statute, a growth policy may include a neighborhood plan, and that plan must be consistent with the growth policy. Section 76-1-601(4)(a), MCA (2003).

[. . .]

A question we have previously resolved is again raised here, that is, how closely a growth policy and neighborhood plan must be followed by a city when it zones lands pursuant to the statutory scheme. The statutes noted above are somewhat contradictory. Section 76-1-605, MCA (2003), provides that "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 [. . .] (c) adoption of zoning ordinances or resolutions." On the other hand, § 76-2-304, MCA (2003), states that "[z]oning regulations must be [. . .]made in accordance with a growth policy." The confusion is evident when one tries to reconcile these two statutes, since the former seems to require mere consideration of a growth policy in zoning decisions, while the latter seems to require a stricter adherence to the growth policy.

We previously reconciled this statutory incongruence in Little v. Bd. of County Commissioners (1981), 193 Mont. 334, 349-53, 631 P.2d 1282, 1290-93.[n2] There, after struggling with the language of the statutes and considering the purposes of planning, we reasoned:

> To require strict compliance with the master plan would result in a master plan so unworkable that it would have to be constantly changed to comply with the realities. The master plan is, after all, a plan. On the other hand, to require no compliance at all would defeat the whole idea of planning. Why have a plan if the local governmental units are free to ignore it at any time?

Little, 193 Mont. at 353, 631 P.2d at 1293. Ultimately, we concluded that the statutes required governmental zoning bodies to "substantially comply" with the master plan or growth policy. Little, 193 Mont. at 353, 631 P.2d at 1293. This "substantial compliance" standard has remained unchanged since Little. See Ash Grove, 283 Mont. at 497-98, 943 P.2d at 92; Bridger Canyon Property Owners' Association, Inc. v. Planning & Zoning Commission (1995), 270 Mont. 160, 169, 890 P.2d 1268, 1273.

Recently, however, the 2003 Legislature amended § 76-1-605, MCA, adding the following language:

> (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.

Section 76-1-605(2), MCA (2003).[n3] The question then becomes how this new statutory language will affect Little's "substantial compliance" standard.

[. . .]

From its plain reading, it may be assumed that the 2003 legislation was intended to reduce in some fashion the reliance which local governing bodies are required to place upon growth policies when making land use decisions. However, although alluding to the passage of the new statute, both Appellants and Respondents have nonetheless framed their arguments regarding the validity of Ordinance 3234 under Little's "substantial compliance" standard, and offer no argument in support of a change in the standard.[n4] Consequently, and because the outcome is not dependent upon an interpretation of the new statute, we will undertake the arguments as presented—pursuant to the "substantial compliance" standard. While mindful of the statutory changes, we leave for another day the question of what effect the 2003 legislation has had on the "substantial compliance" standard.

[. . .]

Subsequent to the *Citizen Advocates for a Livable Missoula Inc. v. City Council and Mayor of Missoula*, later in 2006, the Montana Supreme Court decided *North 93 Neighbors, Inc., v. Board of County Commissioners of Flathead County and Wolford Development Montana, LLC*, 2006 MT 132, 332 Mont. 327, 137, P.3d, 557, 2006 Mont. LEXIS 228. A citizen's group challenged the decision of its local elected officials to amend various planning documents to facilitate the development of a large suburban shopping mall on land that formerly had been used for agricultural purposes, 481 acres, 271 acres to be commercial, 64 acres mixed use, 141 acres suburban agriculture and 5 acres for construction of a road. The board developed a factual record sufficient to overcome the claim that it failed to support its decisions to amend the growth policy and the zoning regulations with independently adopted findings of fact. However, the board's sole reliance on the planning office's report prepared before 4,400 members of the public voiced their concerns rendered its decision to amend the growth policy unreasonable and an abuse of discretion. The growth policy provided sufficient consistency for the board to follow. The board did not exceed its authority or jurisdiction in amending the growth policy. The zoning amendment was consistent with the growth policy. Despite the developer's sole ownership of the parcel, the zoning amendment did not constitute illegal spot zoning.

The Montana Supreme Court concluded:

We affirm the District Court's determination that the Board adequately supported its decision to amend the Zoning Regulations with findings of fact. We affirm the District Court's ruling that the Growth Policy documents do not suffer from fatal internal inconsistencies and that the Wolford Amendment is consistent with the Growth Policy. We further affirm the District Court's determination that the Zoning Amendment does not constitute illegal spot zoning. We reverse and remand, however, for the District Court to evaluate whether the extensive public comments raised any new issues not addressed by the Planning Office's report and to determine whether the Board considered any such issues.

[. . .]

Section 76-1-605, MCA, provides that a governing body must be guided by and give consideration to" its growth policy. We held in Little v. Board of County Com'rs, Etc. (1981), 193, Mont. 334, 353, 631 P.2d 1282, 1293, that local government units must substantially comply with comprehensive master plans. We noted that strict compliance would prove unworkable, but that requiring no compliance at all would defeat the whole idea of planning. Little, 193 Mont. At 353, 631 P.2d at 1293. [. . .] The substantial compliance

standard set forth in Little and affirmed in Ash Grove Cement incorporates the statutory standard in § 76-1-605, MCA, of being guided by and considering a growth policy.

The Board failed to address the public comments in its decision-making and thereby failed "to flesh out the pertinent facts upon which [its] decision [was] based in order to facilitate judicial review." Annex Books, 333 F.Supp.2d at 782. Accordingly, we cannot know whether the public raised novel issues not addressed by the Planning Office's report and whether the Board appropriately responded to those issues. The public participation statutes contemplate more than merely eliciting public comment. Section 76-1-603, MCA. Further, the Board must equip reviewing courts with a record of the facts it relied upon in making its decision to avoid judicial intrusion into matters committed to the Board's discretion. Annex Books, 333 F. Supp. 2d at 782.

We conclude that the Board's reliance upon the Planning Office's report was justified and appropriate to an extent. The Board's sole reliance on the report, prepared before over 4,400 members of the public voiced their concerns, however, renders its decision to amend the Growth Policy unreasonable and an abuse of discretion. See Sanchez, 182 Mont. At 336, 5997 P 2.d at 70. The Board has an obligation to consider the public comments and incorporate those comments into its decision-making process.

[. . .]

Absent any indication in the record that the Board considered these public comments, the Board cannot demonstrate that it satisfied its duty to flesh out the pertinent facts upon which it relied in approving the Wolford Amendment.

[. . .]

Neighbors next argue that the Wolford Amendment to the Growth Policy does not substantially comply with the Growth Policy, and therefore must be annulled and set aside. Section 76-1-601(4)(a), MCA, provides that growth policies may contain neighborhood plans. If a growth policy contains a neighborhood plan, such as the Stillwater Neighborhood Plan, such a plan must be consistent with the growth policy. Section 76-1-601(4)(a), MCA. We therefore note that the proper standard is not whether the Wolford Amendment substantially complies with the Growth Policy, as the parties have framed the issue, but whether the Wolford Amendment proved consistent with the Growth Policy.

The 2001 Planning Office report noted that "the development will cannibalize downtown Kalispell commercial operations, force vacancies in the existing business and redirect growth into the unincorporated portions of Flathead County." The Planning Office prepared this report on 2001 for location in a different part of Flathead County. More importantly, factors on the ground have changed significantly since 2001. The area has seen significant population growth. The proposed Mall now comports with the prevailing uses in the area. Thirty-six businesses surround the proposed Mall in all directions, including large box retailers such as Target, Home Depot, TJ Maxx, Lowes, Ross, Borders Books, and Costco. The proposed Mall admittedly may not serve to preserve downtown Kalispell retail operations, a fear expressed by the 2001 report. It will at least be located, however, among other "cannibalizing" sprawl developments that the Board previously had determined to be appropriate for the area.

[. . .]

Neighbors' final argument, that the development of agricultural land at the proposed site conflicts with the Growth Policy, fails to recognize that the Stillwater Plan, and the zoning in effect before the Wolford Amendment, also allowed for significant commercial and

residential development at the proposed Mall location. The Wolford Amendment and Zoning Amendment designate 141 acres north of the proposed mall for suburban agricultural zoning, an increase of 31 acres over the 2002 version of the Stillwater Plan.

We therefore conclude that the Wolford Amendment is consistent with the Growth Policy. We further conclude that the Board complied with this Court's directive in Little. Little dealt with zoning amendments that conflicted with the master plan. We noted that we were "aware that changes in the master plan may well be dictated by changed circumstances occurring after the adoption of the plan. If this is so, the correct procedure is to amend the master plan rather than to erode the master plan by simply refusing to adhere to its guidelines." Little, 193 Mont. At 354, 631 P.2d at 1293. Here the Board amended the Growth Policy directly, rather than attempting to erode it through zoning amendments. We remain mindful of the concerns regarding the pitfalls of piecemeal amendments to comprehensive planning documents expressed by Justice Leaphart and Justice Nelson in Ash Grove Cement, 283 Mont. At 500-01, 943 P.2d at 94-95 (Leaphart, J. and Nelson, J., specially concurring). Nevertheless, the Board followed the procedure we established in Little in amending the Growth Policy and we have not abandoned the Little standard.

CONCLUSIONS:

1. Pursuant to Montana law, a governing body must be guided by and give consideration to a growth policy. However, a growth policy is not a regulatory document and a governing body may not withhold, deny, or impose conditions on any land use approval based solely on compliance with a growth policy.

2. The Montana Supreme Court for more than two and one-half decades has indicated that governmental zoning bodies are to "substantially comply" with the master plan or growth policy. Since 2003, Montana State Legislature amended section 76-1-605 MCA entitled "use of adopted growth policy," the Montana Supreme Court has indicated an assumption that the 2003 legislation was intended to reduce in some fashion reliance which local governing bodies are required to place upon growth policies, but has not yet directly addressed this issue with a ruling.

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