VOLUME NO. 49 OPINION NO. 23

ANNEXATION - Requirement for growth policy;
CITIES AND TOWNS - Authority for annexation and zoning with growth policy;
COUNTIES - Authority for expedited subdivision review and zoning based on adoption of a growth policy;
LAND USE - Requirements for adoption of growth policy;
MUNICIPAL GOVERNMENT - Authority for annexation and zoning with growth policy;
PLANNING - Requirements for adoption of growth policy;
SUBDIVISION AND PLATTING ACT - expedited review--growth policy requirement;
SUBDIVISIONS - expedited review--growth policy requirement;
ZONING - Requirements for adoption of a growth policy;
MONTANA CODE ANNOTATED - Title 7, chapter 2, parts 2, 42, 43, 44, 45, 46; Title 76, chapters 1, 2, parts 2, 3; sections 7-2-4201, -4301, -4401, -4501, -4601, 76-1-103(4), -107, -504, -601, -601(1), -606, 76-2-201, -203, -203(1), -206, -210, -304, -304(1), -306, -308(2), -4734, 76-3-210, -306, -505, -608;
MONTANA LAWS OF 1999 - Chapter 582;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 37 (1990); 46 Op. Att'y Gen. No. 5 (1995).

HELD:

1. A comprehensive plan adopted prior to October 1, 1999, has no legal effect as the basis for new local zoning or subdivision regulations unless it meets the requirements of a growth policy pursuant to Mont. Code Ann. § 76-1-601.

2. Zoning regulations lawfully adopted pursuant to master plans, comprehensive plans and comprehensive development plans prior to October 1, 2001, are valid and enforceable. However, after October 1, 2001, county and municipal zoning regulations authorized by Title 76, chapter 2, parts 2 and 3, may not be adopted or substantively revised unless a growth policy is adopted for the entire area of the planning board having jurisdiction.

3. A municipal governing body may not extend municipal boundaries, pursuant to the Planned Community Development Act of 1973, without conforming to a growth policy.

4. The expedited review provisions of the Subdivision and Platting Act may not be utilized without a compliant growth policy.

5. If a city or county has not developed a growth policy, interim zoning regulations may be implemented only when: there is an exigent circumstance related to public health, safety and welfare; the zoning measure reasonably relates to the exigency; and more formal planning processes are underway as required by statute. Failure to adopt a growth policy is not, in and of itself, an exigency that permits adoption of emergency interim zoning.

6. A growth policy must cover the entire planning board jurisdiction for zoning decisions to proceed.

September 26, 2002

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Dear Gentlemen:

You have requested my opinion on questions that I have framed as follows:

1. Does a comprehensive plan adopted prior to October 1, 1999, have any continuing legal effect after October 1, 2001, if it does not meet the current requirements of Mont. Code Ann. § 76-1-601?

2. If a city or county fails to adopt a growth policy, is it prohibited from zoning previously unzoned land, rezoning previously zoned land, and amending or enforcing existing zoning regulations?

3. If a city or county fails to adopt a growth policy, what annexation authority or subdivision review is authorized?

4. If a city or county fails to adopt a growth policy, when may an emergency interim zoning regulation be adopted pursuant to Mont. Code Ann. §§ 76-2-206 and 76-3-306?

5. When a city and county have established a joint planning board, must a growth policy be adopted for the planning board's entire jurisdiction in order for zoning decisions to proceed?

In 1999 the Montana Legislature passed a bill generally revising laws relating to local planning and subdivision review. Montana Laws of 1999, chapter 582. Senate Bill 97 amended Mont. Code Ann. § 76-1-601, replacing the terms master plan, comprehensive plan, and comprehensive development plan with "growth policy" and specifying requirements that must be fulfilled for a community to adopt a growth policy. SB 97 also required that a growth policy cover the "entire" jurisdictional area and that it be reviewed every five years. Additionally, SB 97 substituted the term growth policy for "plan" throughout the Montana Code Annotated. 1999 Mont. Laws, chapter 582, section 34.

Pursuant to Mont. Code Ann. § 76-1-103(4), a growth policy is now defined as meaning and being "synonymous with, a comprehensive development plan, master plan, or comprehensive plan that meets the requirements of 76-1-601." SB 97 also included a transition clause as follows:

> **Transition--applicability**. A governing body that adopts a master plan pursuant to Title 76, chapter 1, before October 1, 1999, may adopt zoning regulations that are consistent with the master plan pursuant to Title 76, chapter 2, part 2 or 3, until October 1, 2001. The requirements for a growth policy in [Section 8], amending 76-1-601, apply to the adoption of zoning regulations pursuant to Title 76, chapter 2, part 2 or 3, after October 1, 2001.

1999 Mont. Laws, chapter 582, section 36.

In addressing the above-stated issues, I must follow the well-accepted principle of statutory construction that "statutory language must be construed according to its plain meaning and, if the language is clear and unambiguous, no further interpretation is required." Dahl v. Uninsured Employers' Fund, 1999 MT 168, ¶ 16, 295 Mont. 173, 178,

983 P.2d 363, 366. If language is ambiguous, however, the legislative history may be sought to derive its intent. 43 Op. Att'y Gen. No. 37 (1990).

I.

To implement the provisions of the act, communities must adopt a growth policy as defined in Mont. Code Ann. § 76-1-601. For example, Mont. Code Ann. § 76-3-210 now enables subdivision review to proceed without an environmental assessment *if* a growth policy is adopted, while Mont. Code Ann. § 76-2-201 authorizes county zoning initiated by the Board of County Commissioners *if* a growth policy exists. In both subdivision and zoning statutes, SB 97 inserted the term "growth policy" for master plan, comprehensive plan, and comprehensive development plan. SB 97 standardized code language by replacing all references to a "plan" with "growth policy." Pursuant to Mont. Code Ann. § 76-1-103(4), a growth policy means a plan "that meets the requirements of 76-1-601," which was amended to include a list of requirements for the growth policy.

As noted above, the definition of growth policy states that a master plan is synonymous with a growth policy, but only if it meets the requirements of Mont. Code Ann. § 76-1-601. SB 97 explicitly linked the definition of a growth policy to the list of requirements in Mont. Code Ann. § 76-1-601 as amended. I am unconvinced by the argument that this language can be interpreted to mean that a master plan becomes a growth policy if it met the guidelines of Mont. Code Ann. § 76-1-601 before SB 97 amendments. Such a presumption runs contrary to the clear language of the amended statute. If any confusion persists, it is clear that the legislature understood that master plans in existence would not fully comply with the requirements of SB 97. Revising the Laws Relating to Local Planning and Subdivision Review: Hearing on SB 97 Before Senate Comm. On Local Gov., 56th Leg. Sess. 9 (Mont. 1999) (statement that no counties would comply 100 percent with this bill).

Section 36 of SB 97 also references a pre-SB 97 master plan in the bill's transition clause. The transition clearly allows zoning regulations to be adopted pursuant to a master plan until October 1, 2001, so long as the plan was adopted before October 1, 1999. However, after October 1, 2001, the requirements for a growth policy under Mont. Code Ann. § 76-1-601 apply to the adoption of zoning regulations. There is no language indicating that the legislature intended an old master plan to have continuing legal effect after the transition period expired. To the contrary, the transition explicitly requires local governments to conform to the new growth policy requirements when adopting zoning regulations after October 1, 2001.

Based on the totality of the SB 97 statutory amendments, I conclude that a comprehensive plan has no continuing legal effect as the basis for new local regulations after October 1, 2001, if it does not meet the current requirements of Mont. Code Ann. § 76-1-601. After October 1, 2001, the only mention of a master plan, comprehensive plan, or comprehensive development plan provided by SB 97 is in the growth policy definition that requires conformance with Mont. Code Ann. § 76-1-601. There is simply no statutory basis to conclude that the legislature intended a pre-SB 97 plan to have continuing legal effect when it was so thoroughly removed from all corners of the Montana Code Annotated.

II.

The above conclusion does not unravel lawful zoning implemented previous to October 1, 2001, but merely restricts further planning that is dependent upon adoption of a growth policy. As stated above, SB 97 amended Mont. Code Ann. § 76-2-201 to authorize county zoning without citizen petition only if a growth policy has been adopted for the entire jurisdictional area. For municipal zoning, Mont. Code Ann. § 76-2-304 provides in pertinent part: "(1) Zoning regulations must be made in accordance with a growth policy . . . ." Pursuant to this clear language, when read in context with the Section 36 transition clause, after October 1, 2001, no new zoning regulations may be adopted unless an SB 97-compliant growth policy has been adopted.

Similarly, a city or county does not have authority to substantively amend zoning regulations without an SB 97-compliant growth policy. Before SB 97, amendments to zoning regulations had to be made according to a "plan." An absurd result would be reached if zoning regulations were required to be adopted pursuant to a plan, but could be substantively amended without adhering to a similar planning document. See Little v. Board of County Comm'rs, 193 Mont. 334, 353, 631 P.2d 1282, 1293 (1981) (stating that "in reaching zoning decisions, the local governmental unit should at least substantially comply with the comprehensive plan (or master plan)").

As concluded above, a "plan" has no further legal effect unless it meets the requirements of a growth policy. The clear statutory language of Mont. Code Ann. §§ 76-2-203 and -304 requires zoning regulations to be made in accordance with a growth policy. Such a mandate applies to zoning regulations whether they are newly adopted or substantively amended.

A final part to this question concerns the enforcement of zoning regulations adopted under a master or comprehensive plan prior to October 1, 2001. Enforcement of zoning

provisions is governed by Mont. Code Ann. §§ 76-2-210 and -308(2), which allow county and municipal authorities to institute proceedings to prevent violation of the zoning regulations. Enforcement of regulations is in no way dependent upon the enactment of a growth policy. Zoning regulations lawfully adopted prior to October 1, 2001, remain in full effect.

Moreover, the statutes do not preclude rezoning. The application of the previously adopted zoning regulations to a parcel of property does not constitute the adoption of zoning regulations. Routine, minor revisions that do not have any impact on growth policy could be made without violating the purpose of the law.

III.

SB 97 made substantive changes in subdivision law. In the Subdivision and Platting Act, SB 97 changed: (1) Mont. Code Ann. § 76-3-210, which exempts subdivisions from required environmental assessments if a growth policy exists; (2) Mont. Code Ann. § 76-3-505, which provides for summary review of minor subdivisions in two forms, one of which requires a growth policy; and (3) Mont. Code Ann. § 76-3-608, which exempts both minor and major subdivisions from some local review if a growth policy and other criteria are established. In each of these sections the statutory language clearly states that the streamlined processes and exemptions will apply only if a growth policy exists.

SB 97 also changed sections in Chapter 1 of Title 76 of the Montana Code Annotated to provide expedited subdivision review if a growth policy is established. For minor subdivisions, Mont. Code. Ann. § 76-1-107 now enables a planning board to delegate advisory responsibilities to staff if a growth policy is adopted. And Mont. Code Ann. § 76-1-606 requires that local subdivision regulations be adopted in accordance with the growth policy.

Additionally, Mont. Code Ann. § 7-2-4734 requires that a growth policy cover an area proposed for municipal annexation before a municipality can extend corporate limits under the Planned Community Development Act (Mont. Code Ann., Title 7, chapter 2, part 47). However, the requirement does not apply to annexations conducted under Title 7, chapter 2, parts 42, 43, 44, 45, or 46.

In summary, SB 97 amendments clearly require a growth policy before certain subdivision review procedures and city powers of annexation are authorized. As concluded above, a growth policy requires conformance with Mont. Code Ann. § 76-1-601 as amended by SB 97. However, the SB 97 amendments to subdivision law nowhere

require a growth policy in order to continue subdivision review; the only requirement is that a growth policy exist if a city or county wishes to qualify for the streamlined processes specifically enumerated by SB 97. Additionally, as noted above, SB 97 explicitly amended Mont. Code Ann. § 7-2-4734 to require a growth policy before a municipal governing body can annex new territory. I do note, however, that SB 97 does not require a growth policy for annexations undertaken pursuant to Mont. Code Ann. §§ 7-2-4201, -4301, -4401, -4501, or -4601.

Based on the plain language of these statutes, I conclude that failing to adopt a growth policy does not hamper subdivision review, but merely restricts potential qualification for expedited subdivision review that is provided by the above-stated statutes. However, proposed annexations under the Planned Community Development Act (supra) must conform to a growth policy.

IV.

Both municipal and county zoning statutes provide authority for interim zoning regulations even if the local governing body has not adopted a growth policy and complied with the statutes enabling permanent county zoning. County interim zoning is authorized by Mont. Code Ann. § 76-2-206, which provides:

> (1) The board of county commissioners may adopt an interim zoning map or regulation as an emergency measure in order to promote the public health, safety, morals, and general welfare if:
>
> (a) the purpose of the interim zoning map or regulation is to classify and regulate those uses and related matters that constitute the emergency; and
>
> (b) the county:
>
> (i) is conducting or in good faith intends to conduct studies within a reasonable time; or
>
> (ii) has held or is holding a hearing for the purpose of considering any of the following:
>
> (A) a growth policy;
>
> (B) zoning regulations; or
>
> (C) an amendment, extension, or addition to a growth policy or to zoning regulations pursuant to this part.

Similarly, municipal interim zoning is authorized by Mont. Code Ann. § 76-2-306, which provides:

> (1) The city or town council or other legislative body of such municipality, to protect the public safety, health, and welfare and without following the procedures otherwise required preliminary to the adoption of a zoning ordinance, may adopt as an urgency measure an interim ordinance prohibiting any uses which may be in conflict with a contemplated zoning proposal which the legislative body is considering or studying or intends to study within a reasonable time.

Although the statutory language differs between the county and municipal statutes, their commonalities indicate a similar application. Namely, both statutes specify that interim measures may be adopted (1) where proper zoning procedures have not been satisfied, (2) some matter of urgency requires zoning to protect public safety, health, and welfare, (3) the interim measure addresses the urgent matter, (4) so long as more formal planning processes have been initiated, or will be initiated within a reasonable time. While the absence of a growth policy satisfies step one of the above application, an interim measure cannot be implemented unless the remaining three requirements are fulfilled. The determinative issue of whether interim zoning may be promulgated thus requires analysis of what constitutes an "emergency" or "urgency" measure.

Although not specifically addressing what constitutes a matter of urgency, 46 Op. Att'y Gen. No. 5 (1995), is instructive. In this opinion, Attorney General Mazurek held that Mont. Code Ann. § 76-2-306 imposes various conditions on the use of interim zoning power, including "the existence of an exigency." Further clarifying the issue, Mont. Code Ann. §§ 76-2-203(1) and -304(1) require standard zoning regulations to be designed to:

> lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

In light of Attorney General Mazurek's opinion, when read in context with the entire zoning statute, I conclude that both "emergency" and "urgency" measures exist if there is some exigent circumstance impacting the public health, safety and welfare, and zoning is required to address the exigency pursuant to Mont. Code Ann. §§ 76-2-203(1) and -304(1). See Allen v. Flathead County, 184 Mont. 58, 63, 601 P.2d 399, 402 (1979) (recommending that interim zoning be implemented when zoning regulations were

adopted, implemented and relied upon by residents for five years, and then declared invalid by the court). Thus, interim zoning may be adopted when a community has not adopted a growth policy so long as all proper procedures are followed, more formal planning processes are underway and the interim measure is reasonably related to an exigent circumstance as described in this opinion.

The question of what constitutes an "exigency" is necessarily fact-bound, and under the law it is left largely to the discretion of the local governing body. However, in my opinion, the failure to adopt a growth policy cannot, in and of itself, constitute an "exigency" that would allow adoption of emergency interim zoning. If it were otherwise, the transition provision of SB 97 would be a nullity, because local governments would be allowed to continue to adopt zoning without first adopting a growth policy, justified solely by their failure to adopt the growth policy. If the legislature had intended this result, there would have been no need for the transition language they included in the statute.

V.

SB 97 explicitly amended Mont. Code Ann. § 76-1-601(1) by requiring a planning board to prepare a growth policy for the "entire" jurisdictional area. Further, Mont. Code Ann. § 76-2-201 only authorizes county zoning if a growth policy is adopted for the "entire" jurisdictional area. Pursuant to Mont. Code Ann. § 76-1-504, a city and county may adopt a joint planning jurisdiction including areas designated both within and surrounding incorporated city limits. Thus, if a city-county planning board has countywide jurisdiction, I conclude that the plain statutory language requires a growth policy to be adopted for the entire county before zoning can be adopted. This conclusion is in line with present Montana case law. See Allen v. Flathead County, 184 Mont. 58, 62, 601 P.2d 399, 402 (1979) (holding that county zoning authority may only be exercised if a comprehensive plan (now growth policy) covers the entire jurisdictional area of the county planning board).

THEREFORE IT IS MY OPINION:

1. A comprehensive plan adopted prior to October 1, 1999, has no legal effect as the basis for new local zoning or subdivision regulations unless it meets the requirements of a growth policy pursuant to Mont. Code Ann. § 76-1-601.

2. Zoning regulations lawfully adopted pursuant to master plans, comprehensive plans and comprehensive development plans prior to October 1, 2001, are valid and enforceable. However, after October 1, 2001, county and municipal zoning regulations authorized by Title 76, chapter 2, parts 2 and 3, may not be adopted or substantively revised unless a growth policy is adopted for the entire area of the planning board having jurisdiction.

3. A municipal governing body may not extend municipal boundaries, pursuant to the Planned Community Development Act of 1973, without conforming to a growth policy.

4. The expedited review provisions of the Subdivision and Platting Act may not be utilized without a compliant growth policy.

5. If a city or county has not developed a growth policy, interim zoning regulations may be implemented only when: there is an exigent circumstance related to public health, safety and welfare; the zoning measure reasonably relates to the exigency; and more formal planning processes are underway as required by statute. Failure to adopt a growth policy is not, in and of itself, an exigency that permits adoption of emergency interim zoning.

6. A growth policy must cover the entire planning board jurisdiction for zoning decisions to proceed.

Very truly yours,

MIKE McGRATH
Attorney General

mm/cdt/jym