FROM THE ENVIRONMENTAL LAW SECTION

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Land Use Litigation

1. Introduction

Thirty years ago, trial lawyer Jim Goetz sagely observed, "The State of Montana with its vast open spaces, its scenic grandeur, and its relatively sparse population has escaped much of the environmental degradation resulting from poor land use suffered by other states. It is precisely because Montana has remained unspoiled that it is attractive to land developers and highly susceptible to the abuses of improper land use."[1] Montana has indeed been discovered by land developers, and communities all across Montana are struggling against the abuses of improper land use.

The bulwark of Montana's land use laws consist primarily of the Montana Subdivision and Platting Act[2] and Montana's zoning laws.[3] In the last issue of *Trial Trends* I discussed environmental advocacy under the Montana Subdivision and Platting Act. In this issue I will attempt to summarize the mandatory procedures and legal standards that are involved in land use litigation involving zoning.

2. History

Zoning is of relatively recent origin, the first comprehensive zoning ordinance having been passed in New York City in 1916.[4] In the seminal 1926 case of *Village of Euclid v. Amber Realty Company*,[5] 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.[6] 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.[7]

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 public health, safety, and general welfare. Examples include zoning decisions by the local governing body allowing for more intensive uses, such as the reclassification of land zoned for agriculture to an industrial use or the reclassification of land zoned residential to a commercial classification. The invalidation of such zoning decisions are typically challenged on three grounds, each of which will be addressed below: 1) the zoning decision violates mandatory procedures; 2) the zoning decision was not made in accordance with mandatory criteria; and 3) the zoning constitutes illegal spot zoning.[8]

3. Mandatory procedures

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."[9] 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).[10] The enabling legislation for municipal zoning is codified at §§ 76-2-301, *et seq.*, MCA, which provisions are substantially similar to "Part 2" county zoning.

The Montana Supreme Court has long recognized as mandatory the procedures for the creation or amendment of zoning districts. Thus, in *Little v. Board of County Commissioners of Flathead County*, the Montana Supreme Court explained:

> The mandatory procedure for the creation of zoning districts or promulgation of applicable zoning regulations is set out in section 76-2-205, MCA, and it includes public notice and a hearing.[11]

In *Little,* a developer sought to build a shopping center on unzoned land in Flathead County, adjacent to the City of Kalispell. The developer petitioned the County Commissioners to zone their land as commercial. Pursuant to the provisions of § 76-2-205, MCA, the Commissioners gave notice and a hearing was held. Three days after the public hearing, the County Commissioners adopted a resolution of intent to zone the land as commercial. However, as the *Little* court noted, "In doing so, however, they failed to take a mandatory step."[12]

The commissioners neither demanded, requested, nor received written recommendations from the city-county planning board before they adopted the resolution of intent. Without these recommendations, the county commissioners had no right to proceed with its resolution of intent to zone Cameron Tract as commercial. The applicable statutes clearly mandate that the planning board's recommendations be considered before the commissioners can proceed with a resolution of intent.[13]

Emblematic of the importance of the county commissioners' compliance with the mandatory provisions of § 76-2-205, MCA, the *Little* court invoked the rarely used "plain error" doctrine:

> Although the plaintiffs did not rely at trial on the County's failure to involve the planning board, it is nonetheless clear on the face of the record that the Commissioners' action was invalid.[14]

A second instructive case concerning the mandatory nature of the procedural requirements of Montana's zoning statutes is *Dover Ranch v. County of Yellowstone*.[15] In *Dover Ranch*, a developer applied for a zoning change from agricultural to residential mobile home. Notice of a public hearing was published, and a joint public meeting of the zoning commission and the county commissioners was held to consider the zoning change application. The zoning commission recommended granting the requested zoning change, and two weeks later the Yellowstone County Commissioners passed a resolution granting the zoning change application.[16] Nearby ranchers and other area residents brought suit and the district court invalidated the rezoning. The Montana Supreme Court affirmed, holding that the Yellowstone County Commissioners' violation of the provisions of § 76-2-205, MCA, was determinative. Specifically, the *Dover Ranch* court held that the provisions of the statute were mandatory, and that the County Commissioners did not pass a "resolution of intention" prior to adopting the "resolution" changing the agricultural zoning to residential mobile home as required by § 76-2-205(4), MCA. The *Dover Ranch* court rejected the arguments that passage of a resolution of intention was discretionary and that substantial compliance with the procedural requirements of the statute was sufficient.[17]

Emblematic of the Montana Supreme Court's mandate that the procedural requirements of the zoning statutes must be followed in their entirety in establishing or revising boundaries for zoning districts are several cases wherein the Supreme Court struck down even emergency interim zoning resolutions where the governing body had not complied with the procedures mandated by the zoning statutes. In *Bryant Development Assoc. v. Dagel*,[18] the Lewis and Clark County Commissioners met in emergency session and adopted a temporary interim zoning resolution limiting further development to residential single-family dwelling units in an area where an auto storage and repair shop planned to expand. The *Bryant* court declared the interim zoning resolution void because it failed to comply with the procedures mandated by statute. Likewise, in *State ex rel. Christian v. Montana*,[19] the Powell County Commissioners met in special session and passed a resolution, termed a "Temporary Interim Zoning Regulation," pursuant to §76-2-206, MCA, the purpose of which was to prevent further subdivision for an interim period while planning studies were undertaken. Relying on its ruling in *Bryant Development*, the *Christian* court ruled that:

> The district court erred when it denied appellant's petition for a writ of mandamus. This particular temporary interim zoning regulation is **null and void for the failure to observe the proper procedures** upon its enactment.[20]

In sum, the Montana Supreme Court has made it abundantly clear that each step set forth in the procedural statutes 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.

4. Mandatory criteria

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*,[21] the Montana Supreme Court recognized that under the above-referenced statute a governing body must consider a twelve-step test in making zoning and rezoning decisions. In *Schanz v. City of Billings*,[22] 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:

> An ordinance, whether it is enacted for the purpose of zoning or rezoning areas within City boundaries, **is invalid unless made in accordance with the provisions of section 11-2703, now section 76-2-304, MCA.**[23]

While *Lowe* and *Schanz* addressed the municipal zoning statute, the Montana Supreme Court has made clear that the twelve-step test is equally applicable to the statute which sets forth the criteria that apply to Part 2 county zoning and rezoning, § 76-2-203, MCA.[24]

The twelve statutory criteria that the local governing body **must** consider in 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.[25]

In reversing the zoning decision of the local governing body, the *Lowe* court reviewed each of the 12 criteria in light of the record. Likewise, in the recent case of *North 93 Neighbors, Inc. v. Board of County Commissioners of Flathead County*, after carefully reviewing the record, the Montana Supreme Court upheld the Board of County Commissioners' zoning amendment, noting:

> *Lowe* and *Schanz* **require governing bodies to consider the 12 statutory criteria** for what is now §76-2-203, MCA, **before making changes** to zoning regulations. *Lowe*, 165 Mont. at 40, 525 P.2d at 552; *Schanz*, 182 Mont. at 336, 597 P.2d at 71. **The Planning Office's report outlines each of the 12 statutory criteria in detail as they relate to the Wolford's Amendment.**[26]

In sum, local governing bodies are required to consider the twelve statutory criteria when making zoning and rezoning decisions. Where the governing body fails to consider the mandatory criteria, the zoning or rezoning decision will be held unlawful and declared void.

Although the governing body is required to consider each of the twelve statutory criteria, compliance with one of the criteria in particular is often at issue in zoning litigation. As set forth above, "Zoning regulations **must be . . . made in accordance with the growth policy.**"[27] The fundamental importance of this mandate was emphasized by the Montana Supreme Court in *Little*:

> **The first phrase of section 76-2-203 sets the tone for all that comes after it.** It states that "the zoning regulations shall be made in accordance with a comprehensive development plan . . ." (Emphasis added.) We assume here that the term "zoning regulations" is also meant to cover the term "zoning districts." **We cannot ignore the mandatory language ("shall") of this statute.**[28]

As the court also stated in *Little*, "We hold that the governmental unit, when zoning, must substantially adhere to the master plan."[29] The *Little* court explained the policy underlying this requirement:

> Why have a plan if the local governmental units are free to ignore it at any time? The statutes are clear enough to send

the message that in reaching zoning decisions, the local governmental unit should at least substantially comply with the comprehensive plan (or master plan) [or growth policy]. This standard is flexible enough so that the master plan would not have to be undergoing constant change. Yet, this standard is sufficiently definite so that those charged with adhering to it will know when there is an acceptable deviation, and when there is an unacceptable deviation from the master plan.[30]

How is the determination made as to whether a particular zoning proposal substantially complies with the growth policy? First, the record should be reviewed to determine whether, in making its decision, the local governing body ignored its obligation to consider the fundamental criterion of whether the proposed zoning decision was in accordance with the growth policy. Second, even where the record reflects some discussion of the growth policy, an analysis of the goals and policies in the growth policy at issue could potentially establish that the zoning decision was not in accord with the growth policy. On either of these bases, the zoning decision could be declared void. The same analysis should be undertaken in terms of evaluating the local governing body's consideration of the other mandatory criteria.

5. Spot zoning

As explained in *Greater Yellowstone Coalition, Inc. v. Board of County Commissioners of Gallatin County*,[31] the Montana Supreme Court has established a three-part test to determine whether a decision to zone or rezone constitutes illegal spot zoning.[32]

1. Whether the requested use is significantly different from the prevailing use in the area.
2. Whether the area in which the requested use is to apply is small, although not solely in physical size. An important inquiry under this factor is how many separate landowners will benefit from the zone classification.
3. Whether the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or general public. Under the third factor for spot zoning, the inquiry should also involve whether the requested use is in accord with a comprehensive plan.

As indicated, the first prong of the spot zoning test examines whether the requested use is significantly different from the prevailing use in the area. In analyzing this prong, relevant information can be gained from the zoning application, the staff report, and supplemental materials including expert reports.[33]

As to the second prong of the spot zoning test, in *Greater Yellowstone Coalition* the Court explained:

> The second prong of the *Little* test for spot zoning focuses on the size of the area in which the requested use is to apply, but is not limited to the physical size of the parcel. It also includes analysis of how many separate landowners stand to benefit from the proposed zoning change. The District Court found that the Duck Creek parcel was small in relation to the Hebgen Lake Zoning District the 323 acres at issue comprise a mere 2% of the District's 13,280 acres. * * * More importantly, the *Little* test focuses on the number of owners who stand to benefit from the zoning change.[34]

Thus, even an apparently large tract of land can satisfy the second prong of the spot zoning test if it is small relative to the zoning district of which it is a part. In the recent case of *Plains Grains Limited Partnership, et al. v. Board of County Commissioners of*

Cascade County, et al., plaintiffs advanced the argument that the 800 acres of land that was rezoned from agricultural to industrial met this prong of the test by virtue of the fact that the agricultural zoning district included some 1,500,000 acres of which the subject property constituted only .05 percent of the total district's acreage.[35]

As to the last prong of the spot zoning test, the *Greater Yellowstone Coalition* court explained:

> The issue presented by the third prong is whether the zoning request is in the nature of special legislation designed to benefit one or a few landowners at the expense of surrounding landowners or the general public. *Little*, 193 Mont. at 346, 631 P.2d at 1289. This inquiry should include an evaluation of whether the requested use is consistent with the comprehensive land use plan for the area. *Little*, 193 Mont. at 347, 631 P.2d at 1290.[36]

In establishing this prong, evidence should be marshaled documenting the number of beneficiaries of the zone change. Often the immediate beneficiary is an existing landowner, such as a farm family, who is applying for a zone change that is intended for the benefit of a commercial or industrial interest. In addition, a demonstration should be made that the zoning change will come at the expense of surrounding landowners. Again, this may involve expert testimony or the use of agency reports, such as environmental impact statements, which may document negative impacts and associated loss of values for surrounding land.[37]

The facts of *Greater Yellowstone Coalition* are further instructive on how a zoning decision can satisfy the third prong. There, the area rezoned by the Gallatin County Commissioners was important to wildlife and was adjacent to public land that "includes some of the most significant wildlife habitat in the country."[38] Officials from a number of public agencies opposed the rezoning because of the negative impacts on this nationally important habitat. This was an additional factor relied on by the district court in finding that the rezoning was in the nature of special legislation.[39] Likewise, in the recent *Plains Grains* case, the argument was advanced that the area rezoned from agricultural to industrial included approximately 300 acres within the boundaries of the Lewis & Clark Great Falls Portage National Historic Landmark. As in the *Greater Yellowstone Coalition* case, numerous public agencies submitted comments during the *Plains Grains* rezoning process, noting the significant adverse impacts that the proposal would have on the national historic landmark.[40]

In sum, if each prong of the three-part test is established, then the zoning decision at issue constitutes illegal spot zoning and should be declared void.

6. Conclusion

For those concerned with preserving the quality of life that many Montanans hold dear, zoning is a two-edged sword. On the one hand, it can and should be used to protect the public health and advance the general welfare of our communities. On the other hand, rezoning decisions can actually portend threats to the community's health and welfare. In such instances, successful challenges can be mounted on the basis of the failure of the local governing body to follow required procedures or consider mandatory criteria or on the basis that the action constitutes illegal spot zoning.

Endnotes

1. James H. Goetz, Recent Developments in Montana Land Use Law, 38 Mont.L.Rev. 97, 98 (1977).
2. §§ 76-3-101, et seq. , MCA.
3. Montana law provides two separate procedures for creation of county zoning districts. Cf. §§ 76-2-101, et seq., MCA, and §§ 76-2-201, set seq., MCA. Municipal zoning is provided for at §§ 76-2-301, et seq., MCA.
4. See Wilford Lundberg, County Zoning in Montana: A New Look at an Old Constitutional Problem, 33 Mont.L.Rev. 63 (1971).
5. 272 U.S. 365 (1926).
6. Id. at 397.
7. See Plath v. Hi-Ball Contractors, Inc., 139 Mont. 263, 362 P.2d 1021 (1961).
8. For a primer on the applicable standards of judicial review see John Horwich, "A Decade Plus of Land Use Litigation in Montana (And What 's on the Horizon)," University of Montana School of Law CLE Series (January 2007), at pp. 2-7.
9. 101A C.J.S. Zoning & Land Planning § 11(footnote omitted). Accord , 83 Am.Jur.2d Zoning and Planning § 616.
10. Montana 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).

11. 193 Mont. 334, 341, 631 P.2d 1282, 1286 (1981).

12. Little, 193 Mont. at 341, 631 P.2d at 1286-87.

13. Id., 193 Mont. at 342, 631 P.2d at 1287.

14. Id.

15. 187 Mont. 276, 609 P.2d 711 (1980).

16. Dover Ranch, 187 Mont. at 278-79, 609 P.2d at 712-13.

17. Id., 187 Mont. at 280-85, 609 P.2d at 714-16.

18. 166 Mont. 252, 531 P.2d 1320 (1975).

19. 169 Mont. 242, 545 P.2d 660 (1976).

20. Christian, 169 Mont. at 245-46, 545 P.2d at 662 (emphasis added).

21. 165 Mont. 38, 525 P.2d 555 (1974).

22. 182 Mont. 328, 597 P.2d 67 (1979).

23. Schanz, 182 Mont. at 335, 597 P.2d at 71 (emphasis added).

24. Little v. Flathead County, 193 Mont. 334, 352, 631 P.2d 1282, 1292 (1981); North 93 Neighbors, Inc. v. Board of County Commissioners of Flathead County, 2006 MT 132, ¶¶ 42-45, 332 Mont. 327, 137 P.2d 557.

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

26. North 93 Neighbors, ¶¶ 42, 45 (emphasis added).

27. § 76-2-203(1)(a), and -304(1)(a), MCA (emphasis added). Due to the passage of SB 97 (1999) and SB 326 (2003), the terms "master plan" and "comprehensive plan" have been supplanted by "growth policy."

28. Little, 193 Mont. at 352, 631 P.2d at 1292 (emphasis added).

29. Id., 193 Mont. at 353, 631 P.2d at 1293.

30. Little, 193 Mont. at 353-54, 631 P.2d at 1293 (brackets added).

31. 2001 MT 99, 305 Mont. 232, 25 P.3d 168.

32. Id., ¶ 21 (citing Little, 193 Mont. at 346-47, 631 P.2d at 1289-90).

33. In Greater Yellowstone Coalition, both the district court and supreme court relied on plaintiff's land use experts in concluding that the rezoning at issue constituted illegal spot zoning. More recently, plaintiffs relied on a land use expert's report in arguing that the rezoning of 800 acres of land zoned "Agricultural" to "Industrial" to facilitate construction of a coal-fired power plant constituted spot zoning.

See Plaintiffs' Brief in Support of Motion for Summary Judgment, filed April 13, 2007, Plains Grains Limited Partnership, et al. v. Board of County Commissioners of Cascade County, et al., Montana Eighth Judicial District Court, Cascade County, Cause No. ADV-06-1762. Subsequent to the filing of the plaintiffs' motion for summary judgment and supporting brief, the county commissioners agreed to void their rezoning decision. The author was counsel for plaintiffs.

34. Greater Yellowstone Coalition, ¶¶ 26-28.

35. See Plaintiffs' Brief in Support of Motion for Summary Judgment at p. 69, Plains Grains Limited Partnership, supra.

36. Greater Yellowstone Coalition, ¶ 29.

37. See Plaintiffs' Brief in Support of Motion for Summary Judgment at p. 70, Plains Grains Limited Partnership, supra.

38. Greater Yellowstone Coalition, ¶ 32.

39. Id., ¶¶ 32-34.

40. See Plaintiffs' Brief in Support of Motion for Summary Judgment at pp. 71-72, Plains Grains Limited Partnership, supra. ◆

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character. Article II, Section 16, Montana Constitution.