

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2009-011

**TO:** John Engen, Mayor; City Council; Bruce Bender, CAO; ; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Don Verrue, Building Division Superintendent Roger Millar, Director of OPG; Mike Barton, OPG; Denise Alexander, OPG; Jennie Dixon, OPG; Mary McCrea, OPG; David Loomis, OPG

**CC:** Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE:** March 11, 2009

**RE:** With respect to use of an adopted growth policy, a 2003 Montana State Legislature amendment provides that a growth policy is not a regulatory document.

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## FACTS:

Some citizens who submit land use comment on land use matters including the current general city zoning regulation update refer to a “substantial compliance” with a comprehensive plan/master plan/growth policy without noting that the 2003 Montana State Legislature adopted an amendment stating that 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 law. The “substantial compliance” standard pertains to zoning decisions compliance with applicable growth policy; not perceived compliances with municipal zoning statutes. It also is important to note and emphasize that with respect to city council adoption of general zoning regulations, the general zoning regulations are generally more specifically providing regulatory detail that is not provided within the more general provisions of a growth policy. Thus, adopting general city zoning regulations in accordance with a growth policy may not involve as much analysis as some citizens may assert because a growth policy is generally a general guide for considering the general policy and pattern of development of an area and the zoning regulations are providing more specific regulatory detail. A growth policy is not a regulatory document.

## **ISSUE:**

With respect to the use of a growth policy, is a growth policy a regulatory document?

## **CONCLUSION:**

The 2003 Montana State Legislature adopted an amendment inserting subsection 76-1-605(2) MCA expressly stating that the growth policy is not a regulatory document.

## **LEGAL DISCUSSION:**

The 2003 Montana State Legislature revised Mont. Code Ann. § 76-1-605 entitled “Use of Adopted Growth Policy” in part by inserting subsection 76-1-605(2) MCA. Section 76-1-605 MCA 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.)

Important points to be noted about the provisions of Mont. Code Ann. § 76-1-605 after the 2003 amendment include:

1. a growth policy (comprehensive/master land use plan) is to be used as a guide to be considered with respect to “the general policy and pattern of development set out in the growth policy” when adopting zoning ordinances;
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 based solely on compliance with a growth policy.

While the Montana Supreme Court discussed the 2003 amendment to §76-1-605 MCA in Citizen Advocates for a Livable Missoula Inc v. City Council and Mayor of Missoula, 2006 MT 47, 331 Mont. 269, 130 P.3d 1259, 2006 Mont. LEXIS 59, §76-1-605(2) was not relied on by the Montana Supreme Court in upholding the Missoula City Council's zoning for the St. Patrick Hospital/Safeway project on West Broadway. The city zoning process for the zoning of the St. Patrick Hospital lands had commenced prior to the 2003 Montana State Legislature's adoption and effective date of the 2003 Montana State Legislature's insertion of subsection 76-1-605(2) MCA; so it was not relied on during the litigation.

The City of Missoula successfully defended the city council zoning of the St. Patrick Hospital lands pursuant to the decades old "substantial compliance" standard with respect to the inter-relationship between a comprehensive plan/master plan/growth policy and the adoption of zoning.

However, it is important to be aware that the Montana Supreme Court did discuss the 2003 legislation and indicated in the Citizen Advocates for a Livable Missoula decision that by the plain meaning of the 2003 language adopted inserting subsection 76-1-605(2) MCA, "it may be assumed that the 2003 legislation was intended to reduce in some fashion reliance which local governing bodies are required to place upon growth policies when making land use decisions." (Emphasis added.)

The lengthy Montana Supreme Court discussion about §76-1-605 MCA provided:

To assist in community planning and the orderly development of its governmental units and environs, local governments are authorized to create planning boards. Section 76-1-101, MCA (2003); *see also Ash Grove Cement Co. v. Jefferson County* (1997), 283 Mont. 486, 494, 943 P.2d 85, 90. Further, "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." <sup>1</sup> 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). The statutory scheme includes § 76-1-605, MCA (2003), entitled "Use of adopted growth policy," which states, in pertinent part, as follows:

**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:

...

(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.

"The establishment of zoning districts is governed by statute in Montana," *Ash Grove*, 283 Mont. at 493, 943 P.2d at 89, and pursuant to those statutes, a municipality such as the City of Missoula may create zoning districts. See § 76-2-301 et seq., MCA (2003). Zoning regulations are to be made, among other things, "in accordance with a growth policy . . . ." Section 76-2-304, 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." (Emphasis added.) On the other hand, § 76-2-304, MCA (2003), states that "zoning regulations must be . . . made in accordance with a growth policy . . . ." (Emphasis added.) 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.<sup>2</sup> 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).<sup>3</sup> 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.<sup>4</sup> 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.

(Emphasis added.)

Thus far, the Montana Supreme Court has not further discussed the 2003 Montana State Legislature's adoption and insertion of subsection 76-1-605(2) MCA stating in part that "a growth policy is not a regulatory document."

Therefore, the only and current detailed Montana Supreme Court comment with respect to the 2003 Montana State Legislature's insertion of subsection 76-1-605(2) MCA is what it stated in paragraph 25 of the Montana Citizens for a Livable Missoula decision, supra, when it stated:

"from its plain meaning, 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."

(Emphasis added.)

**CONCLUSION:**

The 2003 Montana State Legislature adopted an amendment inserting subsection 76-1-605(2) MCA expressly stating that the growth policy is not a regulatory document.

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A handwritten signature in cursive script that reads "Jim Nugent". The signature is written in black ink and is positioned below the text "OFFICE OF THE CITY ATTORNEY".

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Jim Nugent, City Attorney

JN:jlw