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APPLICATION OF LAND USE CONTROLS TO  
MISSOULA'S CLARK FORK RIVER CORRIDOR

By

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B.A., University of Montana, 1969

Presented in partial fulfillment of the requirements

for the degree of

Master of Forestry

UNIVERSITY OF MONTANA

1972

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Ronald J. Pagel

Missoula, Montana

December 10, 1972

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## CHAPTER I

### INTRODUCTION

#### The Problem

As our society develops, the demand for resources and various land uses increases. In recent years a number of methods have been devised to reduce the conflicts created by these rising demands. Land use planning is becoming an increasingly important tool in the allocation of resources to meet these demands and reduce user conflicts.

Modern technology, through the use of satellites and computers, has greatly facilitated the development of land use planning. State and local governments have been working to make their planning laws effective land management tools, and various federal agencies are beginning to look to planning for solutions to some of their land use problems.

There is currently a planning effort in Missoula aimed at establishing a series of parks along the river corridors in Missoula County. The purpose of this effort is to develop a master plan for a series of linear parks, known as The Five Valleys River Park System, along the Clark Fork River Corridor from Bonner Dam to the conflu-

ence of the Clark Fork and Bitterroot Rivers. Eventually, this plan would be expanded to include parts of Rattlesnake Creek, Grant Creek, Pattee Creek, and Miller Creek Canyons, and the lower Bitterroot River. When completed the park system would provide a broad range of facilities and recreational opportunities in order to accommodate the wide variety of purposes and interests found in the community's recreational activities (20, p. 5).

Since most of the land that would be included in The Five Valleys River Park System is privately owned, implementation of the plan will be a major problem. Some of the questions that will have to be considered in the implementation of the proposed park system's plan include: (1) How can the use of private property be controlled to facilitate development of the park system? (2) Who has the authority and responsibility for regulating land use along the river corridor? (3) How can control of the land and development of the park system be financed?

Plan implementation is one of the most difficult parts of the planning process (15, p. 60). All too frequently, the time and money spent to develop a plan are wasted because the plan cannot be implemented. One of the reasons for this is that the people who do the planning are not the people who own the land. Plan implementation often requires placing some sort of control or restriction on private property. Traditionally, Americans have believed

in the landowner's right to do whatever he pleases with his property. They look upon land use controls as an infringement on this right, and therefore consider them to be in opposition to the principles on which the free enterprise system is built (13, p. 24).

Another difficulty encountered in the implementation of plans is the reluctance of government officials to enforce the controls. Many elected officials seem to think that the public does not understand planning. They feel that supporting land use planning and enforcing controls might alienate voters and jeopardize their political careers (5, p. 21). Local governments are particularly reluctant to reserve areas for open spaces and parks. Such action may preclude economic growth through commercial or industrial development within the reserved areas and is thus considered harmful to the community.

A third factor involved in the failure of planning efforts during implementation is the ineffective application of land use controls. The effectiveness of some of the methods of control is limited by the way they are used. For example, development in an area may be restricted by zoning in order to protect the public welfare; however, the courts have ruled that zoning solely to obtain a public benefit, such as open space for parks and recreation areas, is depriving the landowner of his property and therefore is



unconstitutional (9, p. 5).

### Objective

The objective of this study is to develop a proposal for implementation of part of The Five Valleys River Park System Plan. This proposal will consist of: (1) a system of land use controls to facilitate development of a park system, and (2) a description of the application of these controls.

## CHAPTER II

### THE FIVE VALLEYS RIVER PARK SYSTEM

Missoula's Clark Fork River Corridor is ideally suited for use as parks and open space for a number of reasons. The first of these is the outstanding recreation potential of the river corridor. The variety of recreational opportunities that an area can provide depends upon the environmental diversity of the area. The greatest environmental diversity, and therefore the greatest recreation potential, is found in or near river corridors (8). Second, the increasing recognition of the hazards caused by various land uses within certain ecologically sensitive areas emphasizes the importance of restricting the use of these areas (10, pp. 55-65). Thus, while the floodplain along the Clark Fork River Corridor cannot be safely used for commercial or residential development, it could be used as parks and open space. A third reason the river corridor is well suited for use as parks and open space deals with its aesthetic and economic potential as open space. The creation of parks and recreation areas along the river would scenically enhance the entire river corridor and significantly increase the value of developable property along the corridor. In Minneapolis, Minnesota, for example, greenbelt parks have been

used effectively along lakefronts to provide recreational facilities adjacent to the lakefront preserves, subsequently increasing property values and thereby providing high class residential developments in the vicinity of the parks.

In the fall of 1971 John Toole, Chris Field, Robert McKelvey, and George Turman revived the interest in establishing a system of waterfront parks along Missoula's Clark Fork River Corridor. These men felt that the neglected lands along Missoula's principal waterways could be best used to the benefit of the community as parks and recreation areas. Their argument was based in part on a 1916 report on riverfront improvement citing the value of a park along the river (17). In December 1971, a group of Missoula citizens formed the Community Improvement Commission (CIC) to develop aesthetic consciousness in Missoula. The CIC adopted the establishment of a riverfront park system as a project and developed the proposal for the creation of The Five Valleys River Park System which was submitted to the Missoula Resource Conservation and Development Program Committee (RC&D). The proposal was accepted by the RC&D and The Five Valleys River Park System designated as a community project early in 1972. Acceptance of the project by the RC&D enables various federal and state government agencies to provide professional and technical assistance to the project. In order to get local citizens and businessmen involved a steering committee of sixteen members was selected from

the community at large to coordinate the project. Initial action of The Five Valleys River Park System Steering Committee included formation of a Technical Action Committee and establishment of a timetable for completion of the project.

The Technical Action Committee was composed of professional and technical people of the community for conducting technical studies of the river corridor and developing alternatives for the park system. Figure 1 shows the initial study area for the development of The Five Valleys River Park System. The first task of the Technical Action Committee was to inventory the river corridor. Included in this inventory were studies of the geology, soils, climate, hydrology, vegetation, wildlife, ownership, and history of the land along the river corridor. Their second task will be to analyze the data collected from the inventory to determine the potential of various uses of the river corridor. Finally, the Technical Action Committee will be responsible for developing some alternatives for the development of The Five Valleys River Park System.

While the Technical Action Committee is conducting its inventory, analyzing the data, and developing alternatives, The Five Valleys River Park System Steering Committee will be seeking community support and trying to get the public and various government agencies involved in the project. The alternatives developed by the Technical Action

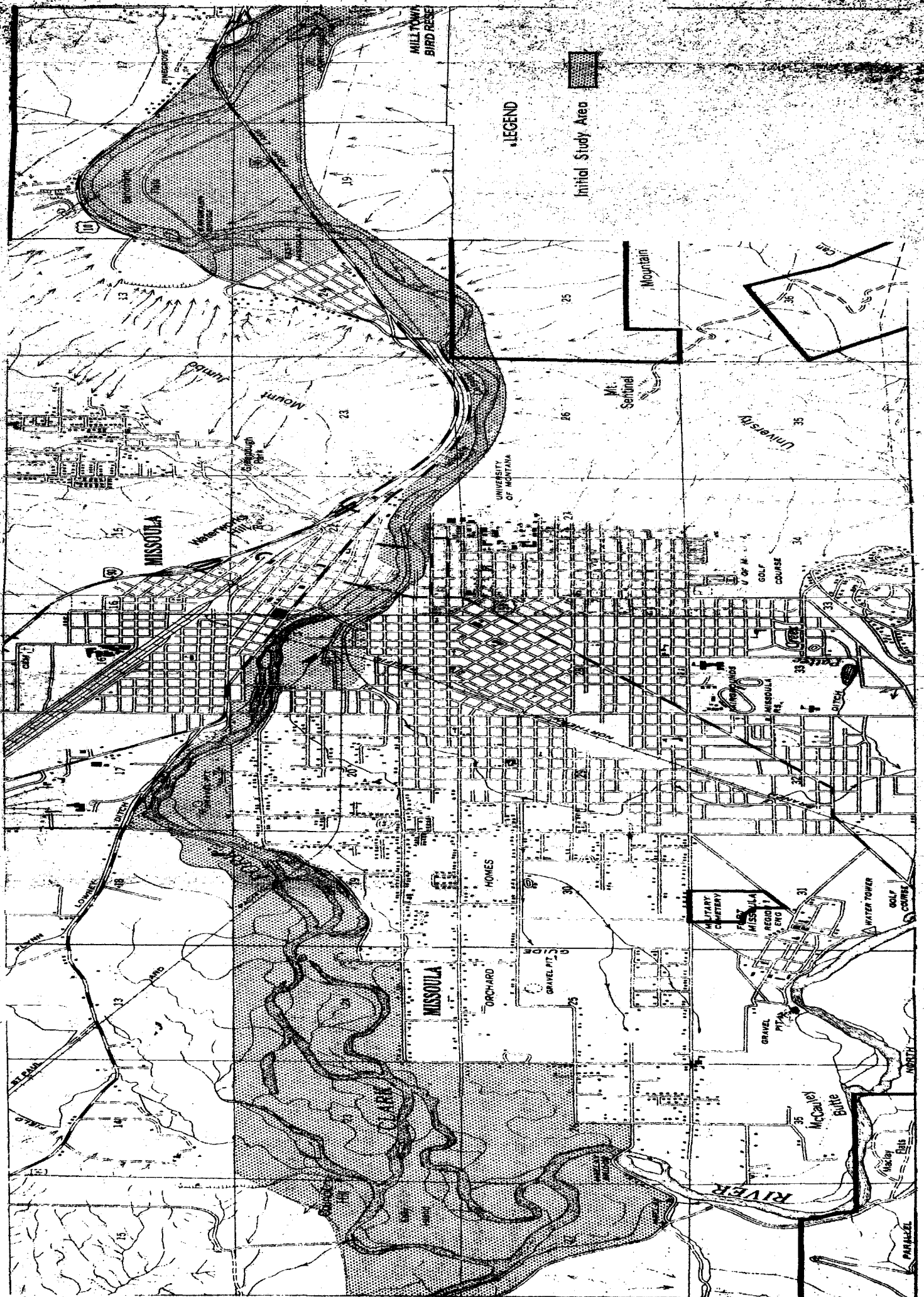


Figure 1. The Five Valleys River Park System Initial Study Area

Committee will then be presented to the public for revision and approval just prior to the development of the final master plan which will be turned over to the proposed Missoula County Park Commission for further planning and implementation (20, p. 7). Figure 2 shows the organization and tentative timetable of activities for the project from the formation of the CIC to the development of the final master plan.

Development of a master plan is only the first step in the creation of a system of parks along the Clark Fork River Corridor. The Park Commission will still have to deal with such problems as site planning, controlling land use, financing acquisition and development of the park system, and maintenance of the parks as they become established. Success in this endeavor will only be realized through a concerted community effort. So far this effort has been largely confined to professional individuals concerned with land use and planning and to interested faculty and students from the University of Montana. For this reason, the planning process for the park system is considerably behind its tentative schedule. The longer it is delayed, the more difficult and expensive the project becomes. The only way the project can succeed is to get the support of the community in the planning and development of the system.

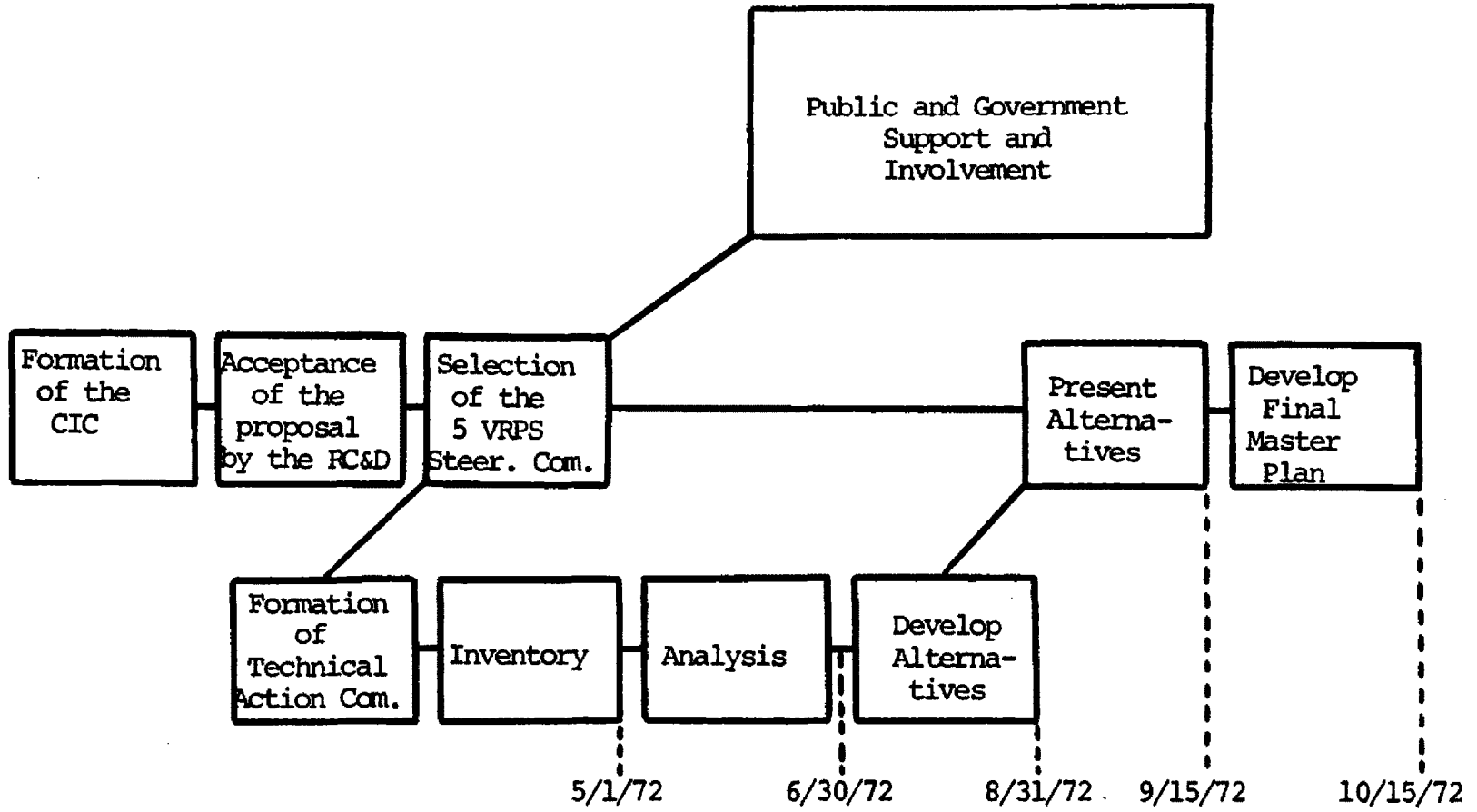


Figure 2. Organization and Tentative Timetable of Activities for The Five Valleys River Park System

## CHAPTER III

### LAND USE CONTROLS

Controlling the use of the land along the Clark Fork River Corridor so that parks can be established will be one of the principal problems facing The Five Valleys River Park System. Ideally, fee simple acquisition would be the best way to control the use of the land, but there simply is not enough money available to purchase all of the land the community might need or want. In order to effectively regulate land use, a system of land use controls will have to be devised and adapted specifically to Missoula's Clark Fork River Corridor. Such a system could include the application of police powers, fee simple, and less than fee acquisition, and the use of taxation to encourage the preservation of open space and the provision of public recreation areas.

#### The Police Powers

Traditionally, the most common method of controlling land has been through the use of the police powers (26, p. 19). Police power is the right of a governmental unit to control the use of property to protect the public welfare (27, p. 39). One reason for the popularity of police power in controlling



land use is that the responsibility for applying and enforcing the police powers is borne by the local government. This way individual citizens or groups do not have to take the blame for placing restrictions on a landowner's property. Another reason police powers are such popular methods for controlling land use is that they are the least expensive of the common controls to apply. Simply by passing a set of ordinances, a community can control land use without having to endure the costs associated with other methods of control.

The greatest weaknesses of police powers are the limitations of their use. The Fifth and Fourteenth Amendments to the United States Constitution state that no person shall be deprived of private property without due process of the law and just compensation for that property (9, p. 5). The restriction of land by the use of police power is considered legitimate as long as the restrictions are not so severe as to deprive an individual of the use of his property. The courts have held that such restrictions constitute taking an individual's property; thus he must be accorded due process of the law and just compensation for his loss. Consequently, certain types of development may be prohibited within a floodplain to protect a community from the hazards of flooding, but restricting development of an area to preserve it as open space is illegal. The courts have said a community may use police power to protect

the public welfare, but not to obtain public benefits, such as open space for recreation areas (27, pp. 47-60).

The police powers are tools Missoula could use to control land use along the Clark Fork River Corridor. Even though they cannot be used to gain control of land for the purpose of developing parks along the corridor, the police powers of zoning, subdivision regulation, and the official map could benefit the proposed park system indirectly by restricting the development of the river corridor.

### Zoning

Zoning has been the workhorse of land use controls in America (22, p. 6). The first zoning ordinance was established in New York in 1916 through the efforts of a group of Fifth Avenue merchants who were opposed to the building of garment factories in their area (27, p. 40). Since then it has spread throughout the nation and become an effective tool for such things as separating industrial and residential areas, protecting property values, and preventing development in certain natural areas.

Floodplain Zoning. One type of zoning that could be used to control land use along Missoula's Clark Fork River Corridor is floodplain zoning. In general, floodplain zoning restricts development in areas subject to flooding in an attempt to reduce flood damage. Floodplain zoning is a

legitimate use of police power in that it does not prohibit the use of the floodplain land, but rather restricts uses to those which neither will be damaged by, nor will increase the hazard to other property during flooding. Development within a floodplain creates a hazard to the public welfare in that:

People building on flood plains may subject the local community and the federal government to considerable financial loss. If they suffered the entire loss themselves, it would be of less concern to the various branches of government except as a moral responsibility to prevent individuals from suffering because of ignorance of the hazard. This, however, is rarely the case. Various government units suffer expense in flood fighting, evacuation, and rehabilitation of the people, their property, and the community's utilities in times of flood. Heavy public investment may follow private investment--in streets, sewers, power lines, and other utilities (14, p. 10).

Furthermore, development within a floodplain increases the hazard to the public welfare during flooding by altering the natural flow of floodwaters in two ways. One is by clearing and straightening the streambed, causing the floodwaters to be shot through the development faster and collect more downstream, increasing the hazard downstream. Another way developments alter the natural flow of floodwater is by blocking the flow and slowing it up. This results in collection of floodwaters and increased floodlevels in the vicinity of the development.

In view of the hazards of floodplain development, the 1971 Montana Legislature passed a law encouraging local governments to manage floodplain use and authorizing Montana

Water Resources Board to institute a statewide floodplain management program. This law authorizes the Montana Water Resources Board to delineate floodplains with a fifty year flood frequency<sup>1</sup> along all the waterways in the state and apply land use restrictions to these floodplains if the local governments fail to do so (18, pp. 2-6). Encouraged by the passage of Montana's Floodplain Management Law, the Missoula City-County Planning Board proposed an ordinance to regulate land use of Missoula's Clark Fork River floodplain with a one hundred year flood frequency.<sup>2</sup> This ordinance, which is currently being considered by the City Council, would restrict use of the floodplain to open space, recreation, agriculture, commercial uses, such as parking areas and airport landing strips, and residential uses, such as lawns and gardens (12, pp. 7-12).

Conservation Zoning. A second type of zoning that could be used to control land use along Missoula's Clark Fork Corridor is conservation zoning. With conservation zoning, control of land use could be expanded to include wetlands, steep slopes, and unique natural features, not

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<sup>1</sup>A fifty year flood frequency refers to a flood magnitude expected to occur once every fifty years, or a flood magnitude which has a two percent chance of occurring in any given year.

<sup>2</sup>A one hundred year flood frequency refers to a flood magnitude expected to occur once every one hundred years, or a flood magnitude which has a one percent chance of occurring in any given year.

within the floodplain. Use of the land in the conservancy district could be restricted to open spaces, recreation, agriculture, and other uses that would not damage the landscape or result in a large public expense to maintain the development.

Even though zoning cannot be used to acquire control of land for developing parks and recreation areas, the establishment of floodplain and conservation zones along the Clark Fork River Corridor would help the development of The Five Valleys River Park System. Most of the land being considered for inclusion in the park system lies within the one hundred year floodplain. The remaining lands for the park system could probably be included because of some natural feature that could be protected by conservation zoning. The importance of zoning to The Five Valleys River Park System is that development could be restricted in the areas best suited for use as parks and open spaces. In addition, zoning the river corridor would stop the spiraling increase in land values by discouraging land speculation based on the potential for development. Figure 3 shows the areas where land use could be controlled through either floodplain or conservation zoning.

#### Subdivision Regulations

Subdivision regulations are another form of police power which could be applied to control land use along Mis-

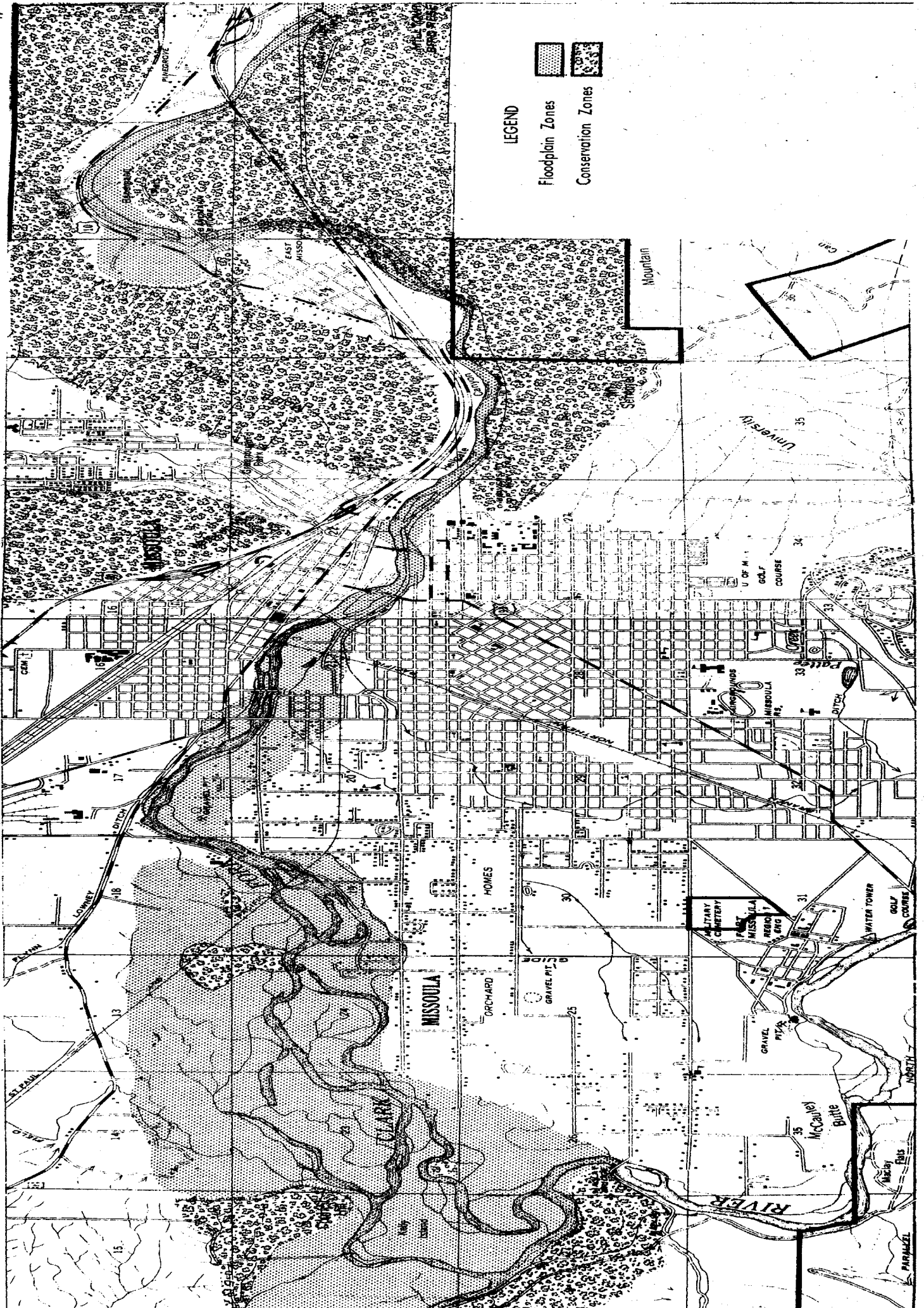


Figure 3. Possible Floodplain and Conservation Zones

Missoula's Clark Fork River Corridor. Subdivision regulations involve controlling the layout of developments, and delineating public improvements that are to be provided by the developer (21, p. 39).

One of the types of subdivision regulations that could be used in the creation of The Five Valleys River Park System would be to prohibit building where it could increase the hazard to health, life, or property. This type of subdivision regulation would consist of restrictions similar to those placed on land in floodplain or conservation zones, except that they would cover all lands under the jurisdiction of the government applying the regulations, not just those in the specified zones. Restricted sites could include areas subject to flood, fire, or earthquake, wetlands, steep slopes, and areas with unstable soil or vegetative conditions where development might result in excessive erosion. As with zoning, subdivision regulations could be used to channel development into other areas and retard the development of Missoula's Clark Fork River Corridor.

A more common type of subdivision regulation that could be used in creation of Missoula's riverfront park system requires developers to provide certain facilities as part of the development. These facilities commonly include streets, alleys, curbs, gutters, sidewalks, watermains, sewers, and parks or open space areas. The use of police power to require developers to provide these facilities is

justified by the fact that each subdivision increases the community's demand for these facilities; therefore, each subdivider should furnish these facilities in relation to the demand created by his development (21, p. 39). Montana law requires that at least one-ninth of the total area of a subdivision, excluding streets and alleys, must be permanently dedicated for public parks and playgrounds. In the event such a dedication is "unsuitable, uneconomical, difficult to develop or maintain, or otherwise unusable for park and playground purposes," a cash donation equal to the fair market value of the required parkland may be made in lieu of the land dedication. These donations are to be paid into a special fund to be used to purchase additional land for parks and recreation areas for the community (1, p. 631).

This second type of subdivision regulation could contribute to the creation of The Five Valleys River Park System in two ways. First, by requiring the developers to provide facilities such as watermains and sewers, subdivisions can be discouraged in areas where connections to the community's systems are not readily available. Thus, by controlling the placement of certain facilities, the community could discourage the development of some areas and encourage the development of others (21, p. 22). Secondly, by requiring developers to make a cash donation instead of land dedication, Missoula could build a program for the



acquisition of parks and recreation areas. In this way, as more land is subdivided to accommodate the community's growth, more funds will be available for acquisition of land for parks and recreation areas.

### Official Map

In addition to zoning and subdivision regulations, another form of police power that could contribute to the establishment of The Five Valleys River Park System is the official map. An official map is an indication of a local government's intention to acquire specific sites for public purposes. It usually includes descriptions of the sites to be acquired, along with regulations prohibiting their development. The traditional use of the official map has been to reserve land for street and road systems. While this has been held as an acceptable use of police power, there is some doubt about the legality of using the official map to reserve land for parks and open space areas. The application of the official map to reserve lands for streets has been upheld because a relatively small portion of the total land area involved is affected. Conversely, the application of the official map to reserve land for parks results in restrictions on the use of much larger tracts of land. Consequently, the use of the official map for parks and recreation areas may be considered so severe as to deprive an individual of the use of his property and may be declared

unconstitutional by the courts (21, p. 41).

While the use of the official map to reserve large areas along Missoula's Clark Fork River Corridor indefinitely for the future development of parks would probably be declared illegal, it could still be of some benefit in the development of The Five Valleys River Park System. Through the official map specific sites for park development could be reserved for a short time until the community can acquire them. This would probably be considered a legitimate use of police power, as long as the landowner is not deprived of a fair return on the value of his property, and the community acquires the property within a reasonable length of time. Usually, three years is the limit (28, pp. 24-25).

Using police power for controlling land use to develop parks or to preserve open space has two major limitations. First, the restriction of land use through police power is temporary at best. Since the police powers are applied by local government officials as a result of political pressures, they can be changed by these same officials as the political pressure changes. The second major limitation on the use of police power involves the extent to which land use may be restricted. The courts have held that using police power to gain a public benefit or prohibit uses of property that pose no threat to the public welfare constitutes depriving an individual of his property without due

process of the law or just compensation for that property and is therefore illegal. However, while police power cannot be used to provide land for the development of The Five Valleys River Park System, it can indirectly benefit the project. Not only would restricting development along the Clark Fork River Corridor protect the public welfare from a variety of natural hazards, it would also preserve aesthetic values important to the park system. In addition, restrictions on development would limit the development potential of land along the corridor and take it off the market for commercial and residential development. As a result, while land speculators are bidding up the price of surrounding land, the value of restricted land would remain stable or perhaps even decline, making parkland easier to acquire.

Due to limitations on its use, police power alone cannot be relied upon to prevent development of Missoula's Clark Fork River Corridor. However, its use should not be disregarded either; rather the police powers should be incorporated into a system of land use controls for the river corridor.

### Acquisition

The surest way for Missoula to control use of land along the Clark Fork River Corridor is for the community to own it. By owning the land along the river corridor, Missoula could control development of the corridor while pre-

serving the unique natural features of the landscape and providing recreational opportunities for the community. In order to develop The Five Valleys River Park System, Missoula will have to acquire ownership of some of the land along the Clark Fork River Corridor. The community can acquire this land by receiving it as a gift, purchasing it through an agreement with the landowners, or purchasing it by condemnation (27, p. 61).

### Donations

The cheapest way for Missoula to acquire land for The Five Valleys River Park System would be to have it given to the community. In the past land donations have been the principal means of providing land for Missoula's park system (3, pp. 22-24). In view of this, a plan to encourage land donations should be included in the program of land acquisition for The Five Valleys River Park System. Such a plan should include the provision of tax benefits to donors and assurance that the land will be preserved and protected from development. Many landowners would contribute parts of their estates to the community just to have it protected from development. By making land donations tax deductible, even more landowners could be encouraged to give part of their land to the community (27, pp. 79-87).

While land donations could constitute a major contribution to The Five Valleys River Park System, heavy reli-

ance on donations to furnish the land for the project should be avoided. Donations cannot be counted on to get all the land, nor the specific sites needed for the proposed park system. In some cases the community will probably have to resort to alternative methods to acquire the land it needs. Another disadvantage of using land donations for the park project is that they are frequently conditional. Many landowners stipulate that the land must be kept in its natural state as a condition of the gift. Such stipulations could severely handicap park development to suit the community's needs.

#### Fee Simple Acquisition

The best way for Missoula to insure that it gets the land it needs for The Five Valleys River Park System is for the community to purchase the fee simple: that is, to buy the land and all rights to it outright (27, p. 61). The easiest way for Missoula to acquire the fee simple would be through an agreement between the community and the respective landowners along the river corridor. However, if a landowner is reluctant to sell, or wants an exorbitant price for his property, it will become a great deal more difficult for the community to acquire his property. In such cases the community will have to use its right of eminent domain and condemn the land. Through the right of eminent domain, the community can take private property for public

use. To do so, however, requires that due process of the law and just compensation for the property be accorded the owners. The process of condemnation fulfills the due process of the law requirement, but to meet the just compensation requirement the community must pay the owners the fair market value of the property they lose.

The limiting factor to fee simple acquisition of land for The Five Valleys River Park System is the lack of funds to pay for it. Missoula simply does not have money available for a land acquisition program of this magnitude. One of the duties of the organizations responsible for implementing the plan for this project will be to raise money for the acquisition of key sites for development of parks. However, it probably would not be possible to raise enough money to buy all the land needed for the park system. Besides the costs of acquisition, two additional expenses frequently associated with public ownership of land that will have to be dealt with are maintenance and the loss of property tax revenues.

#### Less Than Fee Acquisition

There are a number of techniques of acquisition available that Missoula could use to preserve land for The Five Valleys River Park System without having to endure all the costs of fee simple acquisition. These less than fee devices include purchase and leaseback, purchase and sellback, and a variety of easements.

Purchase and leaseback. One of the less than fee acquisition techniques Missoula could use to reduce the costs of land ownership while preserving land for future inclusion in its proposed park system is purchase and leaseback. Purchase and leaseback would involve acquisition of land along the Clark Fork River Corridor by the community, followed by its lease, either back to the former owner or to another individual. Conditions of the lease could insure that the land's use would remain compatible with the community's plans for a park system, while the individual leasing the property maintains it and the community receives revenue from it in the form of rent. The rent should be modest enough to permit the individual to make profitable use of the land, and yet provide the community with an appreciable return on its investment (27, p. 74). In addition, the community can terminate the lease if it wishes to make active use of the land at some future date.

Purchase and sellback. Another technique of less than fee acquisition that Missoula could use to control land use along the Clark Fork River Corridor while avoiding the expense of land ownership is purchase and sellback. This technique would involve community acquisition of land along the river corridor followed by its resale, either back to the former owner or to another individual with certain restrictions on its use included in the deed (27, p. 75).

Through this technique Missoula could restrict land uses along the river corridor to those which would be compatible with the proposed park system without having to endure all the costs of ownership. The principal disadvantage of using purchase and sellback to control land use is that while the community must pay for land values lost by the restrictions placed on the property and must forfeit potential tax revenues from these values, it still cannot make any positive use of the land. However, this does not mean the community cannot benefit through the use of this method. The public can enjoy benefits from property without physically going on it (28, p. 15). Missoula could use purchase and sellback to keep land adjacent to future park sites from being developed in ways that might be detrimental to the park system.

Easements. A third less than fee device that could be used to control the use of land along the Clark Fork River Corridor is the easement. Easements are simply partial rights in land (24, p. 64). Through an easement one or more of a landowner's property rights can be acquired without having to acquire the entire bundle of rights in fee simple. Since the private owner retains title to the land, it remains on the tax rolls, although at perhaps a lower rate due to restrictions imposed by the easement, and the responsibility for maintenance remains with the owner (9, p. 8).



In general there are two basic classes of easements: affirmative or positive easements, and negative easements. Positive easements grant the holder of the easement the right to use the land for the purposes stated in the easement. Positive easements can be used to provide access for public hunting or fishing, to permit streambank and channel improvements, or to allow the spraying of weeds or planting of shrubs. Negative easements give no public rights to use the land, instead they prohibit the landowner from doing certain things with or to his land, such as destroying wetlands or erecting nonconforming buildings or structures (7, p. 359).

Easements may be acquired by the public in three ways: through donation, through purchase by voluntary agreement, and through purchase by condemnation. One of the principal problems in the acquisition of easements is determining the value of the easement. The law of eminent domain holds that the value of an easement should be based on what the landowner is giving up, not on what the public is gaining.

One of the most frequent objections raised against the use of easements is that they cost nearly as much as the fee simple. This belief stems from the fact that the greatest use of easements in the past has been for things such as road right of ways and flooding private land behind

dams. Obviously, in cases like these the landowner is giving up a great deal in the easement, so the cost is high. However, in most kinds of conservation easements the landowners are not losing nearly as much, so the costs should be considerably lower (27, pp. 98-102), (28, pp. 30-55).

There are a number of different easements that could be used in the preservation of open space along Missoula's Clark Fork River Corridor. One of these is the scenic easement. The principal use of scenic easements has been to provide buffer zones between developments and public parks and recreation areas. They are negative easements containing prohibitions against residential or commercial developments, the erection of nonconforming buildings or structures, or the destruction of natural features of the landscape. In general, scenic easements are applied in undeveloped areas to restrict land use to the existing uses (24, p. 64). Unfortunately, the use of scenic easements near rapidly developing areas is severely limited by cost. Since the skyrocketing land values in these areas is directly related to the land's development potential, easements restricting development will cost almost as much as the fee simple. For this reason the use of scenic easements is not justified for areas ripe for development, but rather for those areas where development is expected in the future (19, pp. 58-59).

Another type of easement that could be used to expand the recreation potential of The Five Valleys River

Park System and preserve open space along the river corridor is the access easement. Access easements are positive easements granting the public access to private land for a variety of purposes. They could be particularly useful in gaining access to various elements of the park system, and for providing road and trail systems to link the various elements of the park system together. Access easements could also be useful in conserving the remaining open space of the river corridor through the use of existing private roads and trails as access to the park instead of developing new ones. Additional public benefits that could be obtained through access easements include the rights to use private land for fishing, hiking, or hunting at certain times of the year.

While there can be no substitute for outright public ownership of parkland, the use of less than fee acquisition, particularly through easements, can greatly complement and protect the proposed park system (28, p. 17). These devices should become an integral part of any program to control land use for the preservation of open space. Used discriminately they can provide many benefits to the community at low to moderate costs.

### Taxation

Many people believe that the best way to save open

space is to provide some sort of tax relief to the people who own it (27, p. 117). However, attempts at preserving open space by taking some of the tax pressures off of it have been largely unsuccessful. One of the principal reasons for this is that landowners cannot be required to keep their land open by taxation alone. At best, taxation can only be used to encourage landowners to keep their land open, but it cannot keep them from selling out to developers when the price is right. A second difficulty encountered in trying to preserve open space through taxation involves the tax laws. In most states the law requires that real property be taxed uniformly and at its highest and best value. Therefore, giving a benefit to landowners for not developing their land usually requires some change in the law (21, p. 54). Even so, there are a variety of ways taxation has been used in attempts to preserve open space. Among these have been preferential assessment, deferred taxation, tax exemption, and allowing charitable deductions to landowners who make voluntary land donations to the public (22, pp. 26-27).

Preferential assessment is an attempt to keep taxes on open space land low by assessing the land according to its value for its existing use rather than its fair market value. Unfortunately, this device has not been able to save open space land. The best it has been able to do is merely slow development with the landowner enjoying

a tax benefit while awaiting for the best market conditions for subdivision (21, pp. 54-55).

Deferred taxation is another form of tax relief designed to encourage landowners to maintain open space. It involves the deferral or postponement of some of the taxes on the land as long as it is kept open. Under deferred taxation land is assessed at its fair market value, but is only taxed at the value of its existing use. The difference in taxes between the fair market value and the existing use value is deferred as long as the land remains open. In the event the land is developed, the taxes that have been deferred come due. While this device is generally more effective than preferential assessment because of the penalty for developing, it still cannot prevent the development of open space in the long run (21, pp. 55-57).

Tax exemption is a form of tax relief that encourages landowners to keep their land open by granting tax exemptions on private property used for public purposes. The two principal conditions for obtaining an exemption are that the land be open for active public use, and that this use be free of charge. As with preferential assessment and deferred taxation, there is nothing in tax exemption to prevent the landowner from developing the land whenever he chooses (19, p. 67).

Another method of tax relief that could be used in the preservation of open space is the allowance of charitable

deductions for voluntary gifts to public open space programs (22, p. 27). These deductions could be applied to donations of land, easements, or cash for various public programs to preserve open space and provide parks and recreation areas. The deductions could be taken out of the individual's personal income tax and be spread out over a number of years to compensate for large donations. While such gifts would be strictly voluntary, they could be useful in the permanent preservation of open space.

In general, tax relief is not an effective tool for preserving open space. The principal value of preferential assessment or deferred taxation to the establishment of Missoula's Five Valleys River Park System would be to temporarily delay development. Tax exemption could be used to expand the recreation potential of the park system by providing supplemental facilities for recreation. Since these three forms of tax relief are ineffective and would require changes in Montana law, they are not recommended for use. In addition, their use is voluntary on the part of a landowner and is only effective as long as the landowner wishes to keep the land open. Consequently, these tools are practically useless for the development of parks and recreation areas.

Two forms of tax relief which could be useful to the development of The Five Valleys River Park System in-

clude allowing tax deductions for gifts of money, land, or property rights to the park system, and permitting property restricted by easements or police power to be taxed only according to its highest permitted use. These devices are legal in Montana and could be used to provide incentives to individuals interested in making donations to Missoula's proposed park system.

## CHAPTER IV

### RECOMMENDATIONS FOR THE DEVELOPMENT OF THE FIVE VALLEYS RIVER PARK SYSTEM

The development of a master plan represents the initial step toward the establishment of a system of linear parks along Missoula's Clark Fork River Corridor. The purpose of the master plan will be to evaluate the recreation potential of the river corridor and delineate sites for the development of recreational facilities. It should also give some indication of how the various sites for these facilities can be controlled. Some of the major features that should be included in The Five Valleys River Park System are: intensive recreation areas, picnic areas, botanical gardens, natural areas, scenic overlooks, and interlinking trail systems.

For the purpose of illustrating some possible applications of land use control for the development of a park system, potential sites for various recreational facilities are indicated in Figure 4. Descriptions of these facilities and the techniques that should be used to control the land are as follows:

(1) Milltown Overlook

This site is ideally suited for development as



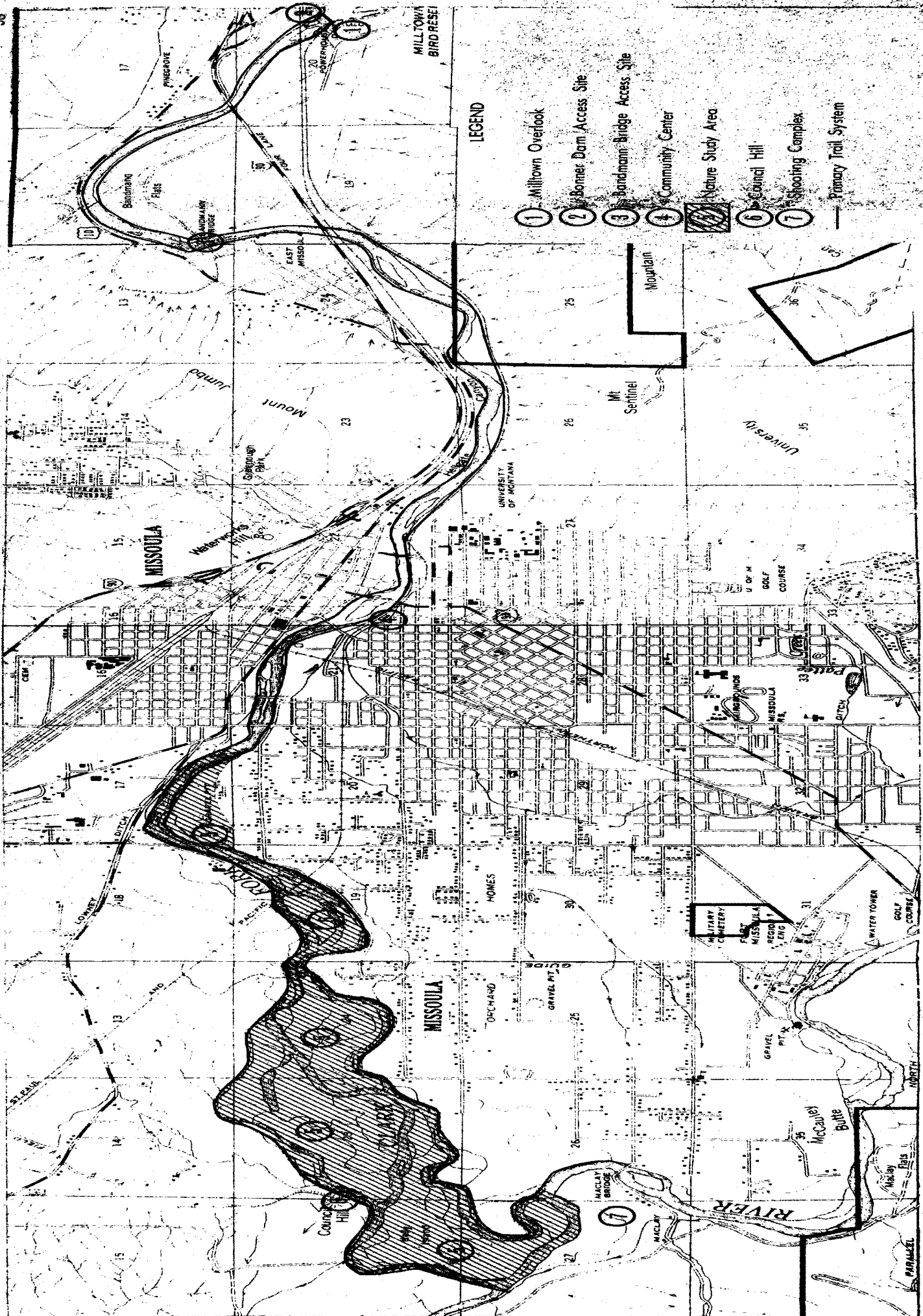


Figure 4. A Master Plan for the Initial Development of The Five Valleys River Park System

a scenic viewpoint overlooking Bonner Dam and the Milltown Reservoir. The site currently receives limited use as a scenic overlook and access to the river immediately below the dam, but lacks any type of facility. Facilities that could be developed to make the site more useable include an access road and parking area, walkways and resting facilities, such as benches suitable for handicapped and elderly people, and a fence or restraining railing along the edge of the overlook. Access could also be provided by a secondary trail linking the overlook with the primary trail system.

The development of the facilities recommended on this site will require the acquisition of public interests in the land. Since this development will significantly alter the land and preclude its use or development by the current owner, the site should be acquired in fee simple. Because the surrounding area is composed predominantly of steep slopes and lowland subject to flooding, this area should be protected from residential and commercial development by conservation and floodplain zoning. This would also benefit the park system by keeping much of the area visible from the overlook open and by stabilizing land values and keeping land prices down. However, since the current development potential of the overlook site is low,

acquisition could be made without the benefit of zoning.

(2) Bonner Dam Access Site

The Bonner Dam and Bandmann Bridge Access sites should serve as the primary access points to the upper end of the park system. The Bonner Dam site should include facilities for a parking area and picnic grounds with boat launches for rafts, kayaks, and canoes on both the Clark Fork River and Milltown Reservoir. A footbridge should be constructed across the top of the dam to connect the primary trails on both sides of the river and link the Bonner Dam Access site with the Milltown Overlook.

Bonner Dam and the adjacent land recommended for recreational development are the property of The Montana Power Company. Since the proposed development of this site would not significantly affect the company's use of the property and could even enhance it, Montana Power might be encouraged to donate easements to the public to develop the site. In any event some type of public interest should be acquired in the site. Perhaps it will be necessary to acquire land for the parking and picnic areas in fee simple and acquire access easements for the boat launches and footbridge.

(3) Bandmann Bridge Access Site

The primary purpose of the Bandmann Bridge

Access site would be to provide access to the river and primary trail system. The bridge would also serve as the principal crossing for vehicular access to the Milltown Overlook. Parking and picnic areas should be provided to facilitate and encourage use of the site. Short secondary trails should be developed to connect the parking and picnic areas with the primary trails and provide access to the river.

Land that is intended to be used for the development of the parking and picnic areas should be owned by the public in fee simple. Other land that will be developed less intensively should have partial rights granted to the public. Rights to land used for the trail systems or such things as vegetative landscaping should be acquired through easements.

(4) Community Center

A possible addition to the historic and cultural assets of the community could be the conversion of the old Chicago Milwaukee St. Paul and Pacific Railroad Depot into a community center. This center should emphasize the cultural and historical heritage of Missoula. It should include a visitor center, a museum and historical center, an art gallery, and a small theater. A small cafe and gift shop could also be established, and an area for various displays and exhibits set aside.

To establish the community center, the community should acquire the buildings and adjoining land in fee simple. The adjoining land should be developed as part of the current Island Park, possibly with fountains, sculptures, and ornamental gardens included. Access should be provided to the trail system and any adjacent parks through easements. Since the railroad currently has very little use for the depot and some of the surrounding land, it might be persuaded to donate the site to the park system.

(5) Nature Study Area

Much of the land along the lower end of the initial Five Valleys River Park System Study Area seems best suited for use as a nature study area and wildlife refuge. The area should basically be left as it is. A small lake could be created at the site of the Ready to Pour Concrete Company's gravel pit, and a trail system should be developed throughout the area. Use should be controlled through the availability of access and the design of the trails in the area. Parking and picnic areas should be established at all the major access points. The trail system should vary from special trails for handicapped and elderly people near the access points to small footpaths near totally undeveloped areas. Additional features could include day camps, semi-secluded rest areas, and vegetative cover to

provide habitat for various species of wildlife.

Since the use of this land as a wildlife refuge would exclude almost all uses that could be made of the land by the current landowners, the community should acquire the land in fee simple. The site intended for the future creation of the lake could then be leased back to the Ready to Pour Concrete Company until their excavation is complete. Access easements should be acquired to permit the public to use existing private roads and trails to gain access to the area.

(6) Council Hill

The Council Hill area could be developed as one of the major outdoor recreation sites of the park system. Parking and picnic areas, a boat launch, and access to the primary trail system and nature study area should be developed at the base of the hill with a scenic overlook at the top. Access to the overlook should be by a good trail from the picnic area with scenic rest stops available for handicapped and elderly people.

Access to the Council Hill area should be acquired through an easement allowing the public to use an existing private road to the area. The sites for the parking and picnic areas, and the boat launch should be acquired by the community in fee simple. Access easements should be acquired on land to be used for access

to the scenic overlook and to provide access to the primary trail system.

(7) Shooting Complex

A site near Maclay Bridge could be developed as a public shooting complex. Facilities could include an indoor smallbore rifle and pistol range, outdoor large and smallbore rifle and pistol ranges, trap and skeet shooting ranges, and an archery range. Additional facilities could include vegetative landscaping to buffer the noise, parking, picnic, and play areas, and a clubhouse containing locker rooms, restrooms, a snack bar, an equipment rental center, and an administrative office (25, pp. 3-4). The complex should be designed to facilitate individual shooters, club and competition shooting, gun safety instruction, and law enforcement training and practice.

The land on which the recommended facilities are to be developed should be acquired in fee simple. Easements should be acquired on adjacent land to prevent development behind the ranges and allow vegetative screening. Easements could also be acquired to allow the development of a field archery course with a variety of targets in natural settings on land adjacent the complex.

(8) Trail System

The Five Valleys River Park Trail System should

serve as the principal means of access to parts of the park system and provide connecting linkages between the various elements of the park system. The primary trails should link the different parts of the park system together and provide public access to the river. All primary trails should be suitable for activities such as hiking, bicycling, or simply strolling. Secondary trails should be used to provide access from the primary trail system to the various elements of the park system and to facilitate the use of these elements. The secondary trails would range from small footpaths to specially designed nature trails for handicapped and elderly people. Facilities provided in conjunction with the trail system should include footbridges, rest areas, and vegetative landscaping to screen the park system from other developments and to provide cover for wildlife.

The development of the trail systems should be accomplished through the extensive use of access easements. Except where the public owns the land along the river, easements should be acquired to allow the development of the primary trails and permit access to the river. Access easements should also be used for the development of secondary trails connecting various facilities with the primary trail system.



In addition to the recreational development of specific sites, adjacent land should also be used to the advantage of the community. A buffer zone should be provided along the river and around all the elements of the park system. This could be accomplished in part as a windfall benefit of floodplain and conservation zoning. Another way to provide a buffer zone around the park system could be to purchase the land and then sell it back with restrictions in the deed to preserve the open nature of the land. However, the best way for the community to provide a buffer zone for The Five Valleys River Park System would be through scenic easements. Private land adjoining the park system could also be used to expand the recreation potential of the river corridor. This could be attained by acquiring easements for such purposes as establishing and maintaining wildlife habitat along roads, fences, and ditches, or granting the public hunting rights at certain times of the year.

## CHAPTER V

### APPLICATION OF THE CONTROLS

The application of land use controls is as important to plan implementation as the controls themselves. As has been previously pointed out, the effectiveness of land use controls frequently depends on how they are applied. Two of the biggest problems commonly associated with the application of controls are administration of the controls and financing their application.

#### Administration of Controls

The administration of land use controls on land affected by Missoula's Five Valleys River Park System would be shared by a number of organizations. Regulatory controls such as zoning, subdivision regulation, and the official map can only be administered by government organizations, while the various techniques of acquisition and some of the methods of taxation could be administered by both government and private organizations.

Since The Five Valleys River Park System would involve land under both city and county jurisdiction, the administration of regulatory controls would have to be shared by both the city and county governments. Administration of regula-

tory controls involves primarily the passing and enforcement of regulations. The creation of these regulations is the responsibility of the legislative bodies of the local governments. The enforcement of these regulations should not be the responsibility of the legislative body, but rather of an enforcement officer (6, p. 347). In Missoula County the passage of land use control regulations is the responsibility of the County Commissioners, while enforcement has been delegated to the County Zoning Administrator by the commissioners (11, p. 117). In the city of Missoula the passage of these regulations is the responsibility of the City Council with enforcement delegated to the City Building Inspector and the City Engineer (12, p. 13). Boards of Adjustment have been established by both the Missoula City Council and County Commissioners to hear appeals and grant variances in the enforcement of land use control regulations (11, pp. 121-124), (12, pp. 15-16).

The bulk of the plan implementation for The Five Valleys River Park System will probably be accomplished through the various acquisition techniques discussed in Chapter 3. The application of these techniques will probably be administered by both government and private organizations. Missoula's City Department of Parks and Recreation currently administers the acquisition of parkland for the community under Montana's law requiring a portion of all subdivisions to be dedicated as parks and recreation areas

(4, p. 6). With the creation of a County Park Commission, which is presently being considered by the County Commission, another authority for administering the acquisition of park-land would be established. This commission would also be responsible for the administration of land and funds acquired through subdivision dedication. In addition, any private organization could acquire land and donate it to the community for a park. The Five Valleys River Park System Steering Committee has recently obtained classification as a nonprofit organization. This will enable the committee to obtain land, easements, and cash through donation, and permit the donor to deduct the value of his gift from his taxes. The intent of the Steering Committee seems to be to turn all such gifts, except cash, over to the proposed County Park Commission for development of the park system. Cash donations are to be used to acquire additional land which in turn will be given to the Park Commission.

The application of taxation to control land use is predominantly the authority of government organizations. The administration of preferential assessment, deferred taxation, and tax exemption can be delegated to local government by the state legislative authority. Montana, however, has no such legislation at this time. Therefore, the only method of tax relief currently available for the preservation of open space in Montana is to grant tax deductions for gifts to park programs. The Steering Committee of The Five

Valleys River Park System now has such a status, and it could also be obtained by Missoula's City and County Park Commissions.

The administration of land use controls for Missoula's Five Valleys River Park System would be most effective through the cooperative efforts of all the organizations involved. If all the different groups work together, they could develop a coordinated program for controlling the land and eliminate the costly duplication of efforts that would surely result if they work independently.

#### Financing Land Use Control

The second major problem of controlling land use, financing the controls, will probably be the most difficult phase of the development of The Five Valleys River Park System. The principal costs associated with controlling land for the development of the park system would be the acquisition of fee and less than fee interests in the land. The organizations responsible for the application of controls to the river corridor would have to establish programs to finance these costs plus the costs of administering the controls. These programs should be composed of a number of alternative measures for financing the control and development of land for the proposed park system.

One of these alternatives would be to use donated funds. Previous discussion of donations indicates that

while they are not very reliable, they can be a valuable supplement to funds for the acquisition and development of parks and recreation areas. Both government and private organizations can encourage donations by offering tax deductions for them. In addition, local governments can accumulate funds by requiring cash donations to be made in lieu of land dedications for open spaces under Montana's subdivision regulations (1, p. 631).

A second alternative would be to appropriate funds from Missoula's city and county general funds. While this would be the most direct method of financing available, the amount of money available would probably be small due to the large demands already made on this limited source (28, p. 47).

Another alternative would be for the city and county governments to levy special taxes and assessments. Under Montana law both the city and county could levy up to one mill for the acquisition and development of parks and open spaces (2, pp. 174-178). For Missoula a levy of one mill could raise approximately \$27,000 from the city and \$59,000 from the county. While this alternative might be unpopular with the citizens of the community, they must realize that in order to have parks and recreation areas they will have to pay for them.

The sale of general obligation bonds is another

alternative for financing the control of land use for Missoula's proposed park system. By a simple majority vote of the electorate, the city and county governments can be authorized to issue and sell bonds for acquisition and development of parks and open spaces. By passing the bond issue the voters would approve a special tax levy to pay off the bond and its interest. The principal disadvantage of general obligation bonds is that they must be approved by the community through an election (16, pp. 34-37).

One of the most popular alternatives for financing open space acquisition and development is through federal grants. There are many types of grants available by which "local governments can multiply every dollar they put up for open space by three or four matching state and federal dollars." (27, p. 63). The principal disadvantage of using federal grants is that the local governments must put up funds for the federal agencies to match. Even so, federal grants can be one of the best sources of funds for the development of park programs.

While this is not a complete listing of the methods to finance control and development of a park system along Missoula's Clark Fork River Corridor, these are the principal alternatives currently available. The critical factor in determining the amount of money available for development of the park system will be the community's willingness to pay for it. Through the combination of the available alternatives

and an extensive program to gain public support, a viable program could be established to finance the park system.



## CHAPTER VI

### SUMMARY AND CONCLUSIONS

The implementation of The Five Valleys River Park System Master Plan will be one of the principal problems associated with the development of the park system. The success of implementation will depend heavily on the application of a coordinated program of land use controls adapted specifically for the river corridor. This program should include all of the major land use controls. The community should have a variety of control techniques available for application to any particular site.

The initial action for controlling land use along Missoula's Clark Fork River Corridor should be the adoption of Missoula's proposed County Zoning Resolution (11) and the establishment of floodplain and conservation zones by Missoula's County Commission. This would not only protect the community from the hazards of development on the floodplain and certain other natural features, but would also benefit the proposed park system by tending to keep the river corridor open and removing the potential for commercial and residential development from the land along the corridor. Indirect results of floodplain and conservation zoning could include the preservation of existing

aesthetic values of open space along the corridor and reduced prices on land for the park system. An official map should be developed in conjunction with zoning to show how the community intends to use various sites and provide a schedule for public acquisition of land.

The actual development of facilities for the park system will require the acquisition of some type of interest in the land by the community. Those sites which are intended for immediate park development or intensive public use should be acquired in fee simple. The possibility exists that certain rights, such as water or mineral rights, are not held by the current owners of some of the land along the river corridor. If these conditions exist on land the community wishes to acquire, the community should also acquire these extraneous rights in order to have complete control of the land.

Land that is intended for future recreational development, land that can be used by the public without significantly detracting from the owner's use of it, and land which will be adjacent to the park system but will not receive active public use should be controlled by the less than fee devices. An undeveloped buffer zone should be established around the park system through the use of purchase and sellback and scenic easements. The use of sites intended for future park development, such as the gravel pit

proposed for future development as a lake, should be controlled either through purchase and leaseback or some type of easement. Extensive use should also be made of access easements to facilitate the development of trails and provide access to the river and various elements of the park system. Additional easements should be acquired granting the public the rights to such things as preserving wildlife habitat or gaining public hunting rights on private land at certain times of the year.

Missoula can acquire land and partial interests in land for its park system in three ways: through donation, purchase by voluntary agreement, and through purchase by condemnation. Acquisition through donation can and should be encouraged by providing tax relief as an incentive for gifts to the community's park program. Through tax relief the community may be able to persuade certain companies, such as the Chicago Milwaukee St. Paul and Pacific Railroad, to donate land or access easements to their riverfront properties to the park system. Most of the land for the park system will have to be purchased through a voluntary agreement between the community and the landowners. However, in some cases where the landowner either refuses to sell or wants an exorbitant price for his property, the community may have to use its power of eminent domain and condemn the land.

The greatest limitation to the amount of land that

can be acquired for the development of the park system will be the amount of money available. Efforts to finance Missoula's Five Valleys River Park System should be maximized through the use of all available sources of revenue. Missoula's city and county governments should: (1) take advantage of Montana's subdivision regulations and require cash donations in lieu of land dedication for subdivisions; (2) make appropriations to the park system; (3) levy special taxes for the park system; and, (4) issue and sell general obligation bonds for the park system. The money raised from these sources and from donations by various groups and individuals should then be used as a basis for obtaining grants from various agencies of the state and federal governments. Additional special programs to finance acquisition and development of the park system may be developed through the assistance of agencies such as the Bureau of Outdoor Recreation, the Department of Housing and Urban Development, the Montana State Department of Planning and Economic Development, or the Montana Fish and Game Department.

The application of land use controls to Missoula's Clark Fork River Corridor will be accomplished most effectively and efficiently through the cooperative efforts of Missoula's city and county governments, various community organizations, and the citizens of the community. A county park commission should be established to coordinate this effort and should be given the primary responsibility for

developing The Five Valleys River Park System. Finally, a comprehensive planning effort should be undertaken by the community to coordinate all phases of the community's growth and development, including parks and recreation areas.

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