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COUNTY ZONING IN MONTANA: A NEW LOOK AT AN OLD CONSTITUTIONAL PROBLEM

by Wilford Lundberg*

The use of the zoning power as a land use control is a twentieth century development. When the first comprehensive zoning ordinance was passed in New York City in 1916, it was widely believed that this kind of interference with the use of private property was unconstitutional unless it was compensated. With the increase of urban congestion, however, the judicial attitude softened so that by 1926 the United States Supreme Court finally upheld a comprehensive municipal zoning ordinance in the famous *Euclid* case.¹ Furthermore, some states adopted constitutional amendments for the purpose of sanctioning the zoning power.² The result has been widespread adoption of zoning enabling statutes, so that in all 50 states zoning powers have been conferred upon at least some classes of municipalities, and that in at least 31 states counties have been given the power to zone.³

BASIC PLANNING AND ZONING LAW

It is the purpose of this article to inquire into county planning and zoning as it is permitted in the state of Montana. Since 1957 there has been legislation in this state which enables county commissioners to exercise some kind of zoning powers. Chapters 38 of Title 11, Revised Codes of Montana, 1947, empowered county commissioners to establish, in conjunction with cities, city-county planning boards. The function of the planning board was to advise the city and the county of appropriate controls; the county commissioners were then empowered to exercise controls within a broadly defined jurisdictional area, an area limited to the land outside the city which, in the judgment of the planning board, bore a reasonable relation to the development of the city. This grant of zoning powers to county commissioners was struck down, however, by the Montana Supreme Court as being in violation of Article IV Section 1 of the Montana Constitution in *Plath v. Hi-Ball Contractors, Inc.*⁴ The gist of the *Plath* decision was the court's anathema to two broad propositions. First, the city-county planning board was given broad powers which, while ostensibly termed advisory only, seemed to the court to be much more. For example, the procedure which was set up required that the master plan as well as proposed ordinances be submitted to the governing bodies. These governing bodies were then required either to reject or to approve and to report the result of their decision to the planning

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¹Village of Euclid v. Amber Realty Company, 272 U.S. 365 (1926).

²These states include Delaware, Georgia, Louisiana, Massachusetts, Missouri, New Jersey, and Pennsylvania. U. S. HOUSING & HOME FINANCE AGENCY, COMPARATIVE DIGEST OF MUNICIPAL AND COUNTY ZONING ENABLING STATUTES, ii (1952).

³*Id.*

⁴139 Mont. 263, 362 P.2d 1021 (1961).

board. In case the advice of the planning board was rejected, reasons had to be supplied to the planning board for such a rejection. Amendments had to follow the same procedure, requiring the planning board to prepare them. It was the presence of these provisions which prompted Justice Castles to say, "Actually the governing bodies must either accept the recommendations or not accept them, whereupon, presumably, the city-county planning board may again exert its discretion in determining whether or not changes should be recommended. In effect all of the actual discretion is lodged and delegated to the city-county planning board." The second problem area that the Supreme Court encountered was the existence of zoning powers in the county commissioners. While the Montana Constitution nowhere defines the type of government that counties have in this state, nevertheless, this subject has been considered in a number of cases. These cases rely upon two sections of the Montana Constitution, Article XVI, Section 6 and Article XIII, Section 4.⁵ It is true that neither of these articles indicates that a county is a branch of the executive department or of any other department of the state. What these sections do, however, is to indicate by referring to counties, cities, townships, municipalities and so on separately that counties are different, therefore, from cities, townships or municipalities. Such at least has been the reasoning of the Montana Supreme Court.⁶ Since, therefore, counties are different from municipal corporations, they may not be classified as such and become mere political subdivisions of the state for governmental purposes. They are subject to legislative power and do not possess powers of local legislation and control which are the distinguishing characteristics of a municipal corporation. Justice Castles was then prompted in the *Plath* case to say: "In all our cases, we think it has been recognized that counties are administrative or executive bodies and the same rules apply as apply to any state agency so far as Article VI of Section 1 is concerned."⁷ Thus, the entire statutory scheme as enacted in the original Chapter 38 of Title 11 was declared unconstitutional as being a delegation of legislative powers to an agency of the executive branch of state government and in violation of Article IV, Section 1 of the Montana Constitution.

Two years later Chapter 38 was extensively revised. Three notable changes were made. One: The jurisdictional area of the city-county

⁵MONT. CONST. art. XVI, § 6: The legislative assembly may provide for the election or appointment of such other county, township, precinct and municipal officers as public convenience may require and their terms of office shall be as prescribed by law, not in any case to exceed two years, except as in this constitution otherwise provided.

MONT. CONST. art. XIII, § 4: The state shall not assume the debt, or any part thereof, of any county, city, town or municipal corporation.

⁶*Hersey v. Neilson*, 47 Mont. 132, 131 P. 30 (1913).

⁷*Plath*, *supra* note 4 at 1024. MONT. CONST. art. IV, § 1: The powers of the government of this state are divided into three distinct departments: the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

planning board was carefully limited and defined. Two: The role of the city-county planning board was more carefully delineated so as to make it eminently clear that the only power the city-county planning board had was to advise. Three: All zoning powers which had been given to county commissioners were removed from Chapter 38. A new chapter, Chapter 47, Title 16, was enacted. This chapter enabled counties to zone within their jurisdictional area. Care was taken in the writing of this chapter to make it conform to the requirement that in delegation of legislative powers to an executive branch of the government, the delegation is accompanied with standards and procedural safeguards, as well as specific enumeration of the powers which in fact have been granted.⁸

A companion case to the *Plath* case was *Missoula v. Missoula County*.⁹ The reason for its significance in this area was that it validated the zoning powers with respect to Chapter 41, Title 16. This particular chapter, which has been referred to as the rural zoning law or the forty acre law, gives county commissioners the power to zone in a given district which exceeds 40 acres and which has been called into existence by a petition of at least sixty percent of the freeholders within the district. Notably the powers which have been granted here, although they are broad in the zoning sense, nonetheless, have been specifically enumerated, and a procedure has been established which requires notice and public hearing. The Supreme Court took special note of this fact in the *Missoula* case. Accordingly, the legislature seems to have taken special notice of the *Missoula* case when it enacted Chapter 47 in 1963 for the purpose of enabling county commissioners to enact zoning controls upon the advice of the city-county planning board. To date, the 1963 law has not been challenged before the courts. Some 36 city-county planning boards are currently in existence in the state. There is one city planning board. The jurisdictional area which the city-county planning boards have taken unto themselves has been in almost all cases limited to the 4 and ½ mile limit which was placed there by the 1963 legislature. While it is true the limit can extend to 12 miles upon petition, nonetheless virtually no city-county planning board has extended its jurisdictional limit that far. One of the reasons which has been given for this lack of activity in extending the area has been a fear of its unconstitutionality. Furthermore, it should be noted that while there are a number of city-county planning boards in existence, virtually no county has gone so far as to adopt controls within the jurisdictional area that it supervises. Again, constitutional fears are often expressed as reasons.

⁸For an excellent discussion of the changes made by the legislature in 1963 with respect to this problem, see Keefer, *City-County Planning in Montana—Its Status and Prospects*, 25 MONT. L.REV. 185 (1964).

⁹139 Mont. 256, 362 P.2d 539 (1961).

RECENT CHANGES IN THE BASIC LAW

In the summer of 1969 an advisory committee was appointed by the Montana State Department of Planning and Economic Development to advise on planning legislation. The result of the activities of this committee was a recommendation to the legislature—the 42nd legislative assembly—that Chapter 38 of Title 11 and Chapter 47 of Title 16 be extensively amended for the purposes of securing countywide planning and zoning. These recommendations were incorporated into what became known as House Bill 79 during the 42nd legislative assembly. Among other things, the bill would have extended the jurisdictional area of the city-county planning boards to include the area which was delineated in the original 1957 act, that is the area which bore a reasonable resemblance to the growth of the city. This provision, however, was not included in the bill as it appeared in final form. Another section that was originally recommended but which did not secure final passage dealt with regional planning activities on the part of counties and cities.¹⁰ What remained, however, and what eventually became law were significant changes in the basic enabling legislation with respect to countywide zoning powers.

EXTRA-TERRITORIAL ZONING POWERS FOR CITIES

R.C.M. 1947, § 11-2702 (2) now provides that a city may zone outside the city limits providing that a county has not already done so.¹¹ The extent to which the city may exercise this power varies with the size of the city, the maximum distance from the city limits being three miles for first-class cities. This concept is relatively new and will no doubt be the subject of much debate. There are, however, in Montana many statutes which grant to municipal corporations powers which are extra-territorial in nature.¹² Additionally other states are experimenting with ways in which cities may extend their zoning powers extra-territorially. For example, South Dakota and Minnesota both have statutes which are very similar to Section 11-2702 (2) as amended. California allows pre-zoning prior to annexation. It should be noted that as a prerequisite to the exercise of extra-territorial zoning powers the city planning board must be increased to include two representatives from the unincorporated area which is to be affected. These representatives are appointed by the board of county commissioners. Furthermore, if the county should ever zone the area pursuant to the adoption of a comprehensive plan as

¹⁰It should be noted that in the flurry of striking amended § 11-3803 from House Bill 79 in its final form, an important definition—that of county planning boards—was eliminated. This should be corrected as soon as possible.

¹¹REVISED CODES OF MONTANA, §11-2702 (2) (1947) [hereinafter cited as R.C.M. 1947]. Additionally, once a city acts under this section, the county is prohibited from acting under Chapter 41, Title 16, although it may proceed under Chapter 47, R.C.M. 1947, §16-4101.

¹²Keefer, *supra* note 8 at 109. Some of these powers include platting of land adjacent to the city, enforcement of health and quarantine regulations, and prohibition of offensive or unwholesome establishments as well as cemeteries.

provided for in Chapter 38, Title 11 the zoning ordinances of the cities will no longer be effective in that area. If the area has already been zoned, either under Chapter 47 or Chapter 41 of Title 16, the city is powerless to act.

MILL LEVY FOR PLANNING PURPOSES

One of the most pressing problems with respect to planning and zoning has been financial. In order to carry out the kind of study necessary to realize a truly worthwhile plan, there is the need to employ professional help. Chapter 38 has always carried with it the power to tax for purposes of planning, but that power to tax has been limited to a one mill levy within the jurisdictional area. The law currently gives greater flexibility.¹³ This means that cities and counties may vary their tax depending upon their classification. For example, a city of the first class may not tax in excess of two mills, a city of the second class in excess of four, and a city of third class in excess of six. In the case of counties, first class counties are limited to two mills, second class to three, third class to four, fourth class to five, and fifth, sixth and seventh classes to a maximum of six. This is ostensibly to give a higher tax limit to those cities and counties which are the smallest, and presumptively the poorest. The financial problem could best be handled, however, on a regional basis.¹⁴ Regional planning is not specifically provided for in this chapter although Section 11-3815¹⁵ does provide for a way in which cities, towns or counties may join together for purposes of planning. Furthermore,

¹³R.C.M. 1947, §11-3830 (6). Parenthetically, it should be noted that this section needs corrective action. Both paragraphs 3 and 5 of this section impose 2-mill maximums while the maximums in paragraph 6 are graduated.

¹⁴Harold Price, Associate Planner, Montana Department of Planning and Economic Development, has suggested that it costs little more to plan for a large multi-county area than for a smaller area comprising only a city and its environs.

¹⁵R.C.M. 1947, §11-3815: Representation of additional cities, towns, or county on existing boards. Any city, county, or town, or any combination thereof wishing to be represented upon an existing planning board, may by agreement of the governing body or bodies then represented upon the board, obtain representation thereon and share in the membership duties and costs of the board upon a basis agreeable to the governing body or bodies creating the board.

The membership as well as the jurisdictional area of any board may be increased to provide for representation and planning of any additional cities, counties, or towns seeking representation.

Any city, county, or town which becomes represented upon an existing planning board pursuant to this section may appropriate funds for expenses necessary to cover the costs of such representation. The governing bodies of any city or county so being represented may levy on all property which is added to the jurisdictional area of an existing board by such representation a tax for planning board purposes under procedures set forth in Title 16, Chapter 19, R.C.M. 1947, or Title 2, Chapter 14, R.C.M. 1947, whichever is applicable, provided such tax shall not exceed the maximum levy authorized in § 11-3825, R.C.M. 1947.

the Interlocal Cooperation Act would seem to provide a device for the exercise of multi-county planning.¹⁶

COUNTY-WIDE PLANNING AND ZONING

The most significant feature of the new law is the provision for county planning boards and county zoning pursuant to their establishment. A county planning board may be created by resolution of the board of county commissioners after public notice of such intent has been published in each newspaper in the county not less than fifteen nor more than thirty days prior to the date set for public hearing. Furthermore, no county planning board may be established if, within sixty days of such a hearing, a majority of the qualified electors of the county residing outside the limits of the jurisdictional area of an existing city-county planning board which has been established pursuant to Section 11-3830 and outside the incorporated limits of any city or town in the county so request by petition.¹⁷ Provision is also made for the constitution of the board, for the filling of vacancies, and for the qualifications of members.¹⁸ The jurisdictional area of a county planning board *must* include all the unincorporated area of the county which is also outside the jurisdictional area of an existing city-county planning board established pursuant to Section 11-3830. Any incorporated city or town, however, may be, upon request, included pursuant to 11-3815 within the jurisdictional area of the county planning board. In case of conflict with respect to an unincorporated area that is within the potential jurisdiction of more than one planning board, an agreement between the planning boards involved with the approval of the respective governing bodies shall determine the line of demarcation. Should a city-county planning board be established subsequent to the establishment of a county planning board, and should the area outside that city be potentially within the jurisdiction of the county planning board, then again an argument between the planning boards involved with the approval of the respective governing bodies shall determine the line of demarcation.¹⁹

¹⁶R.C.M. 1947, §16-4901: Purpose. It is the purpose of this act to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with the local governmental units on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities. R.C.M. 1947, §16-4904 provides in part: Interlocal agreements. Any one or more public agencies may contract with any one or more other public agencies to perform administrative service, activity or undertaking which any of said public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized and approved by the governing body of each party to said contract. (emphasis added).

Additionally, Chapter 44 of Title 2 provides for the establishment of Interlocal Cooperation Commissions, vehicles which could be used for multi-county planning purposes as well.

¹⁷R.C.M. 1947, §11-3801.

¹⁸R.C.M. 1947, §§11-3810—11-3812.

¹⁹R.C.M. 1947, §11-3830.2.

With respect to the power to zone pursuant to this law, one further provision should not be overlooked. This provision deals with sub-division controls.²⁰ Upon approval of a master plan county commissioners are given power to require subdivision plats to conform to the provisions of the master plan. All subdivisions must be presented to the planning board before filing, and the planning board reports to the board of county commissioners, advising it as to the compliance or non-compliance of the plat with the master plan. The board of county commissioners has final authority, but it is required to seek the advice of the county planning board in such matters.²¹ The filing and recording of a plat which has not been approved by either the city council or the board of county commissioners shall be of no effect if in fact a master plan and an ordinance or resolution containing provisions for subdivision controls have been adopted.²²

To enable counties to zone within the jurisdictional area of the newly established county planning board, changes in Chapter 46, Title 16 were required. Keeping in mind that this chapter was originally created in 1963 for the purpose of separating zoning powers from planning powers as a response to the decision of the Supreme Court in the *Plath* case, it would seem necessary at this time to take a closer look at the inherent constitutional problem involved. Furthermore, it is impossible to view this constitutional problem in a vacuum for Chapter 47 seems clearly to have been written in light of the *Missoula* case and its blessing of Chapter 41, Title 16. Since Chapter 47 has not been before the Montana Supreme Court for its consideration, its constitutionality must be a matter of speculation.²³ Furthermore, the recent changes that were made in Chapter 47 do not speak to the constitutional question. In light of the fact that Chapter 47 was originally written in such a way as to conform to the standards that were announced in the *Missoula* case with respect to Chapter 41, nothing was done to Chapter 47 at this time with respect to the separation of powers doctrine. Changes were made in Section 16-4702, Section 16-4703 and Section 16-4705 for the purpose of allowing county commissioners to adopt zoning resolutions in the zoning districts which had been established subsequent to compliance with Chapter 38, Title 11. This was necessary because the original provisions of Chapter 47 allowed county commissioners to adopt zoning resolutions only within the jurisdictional area of city-county planning boards. It should be noted that Section 16-4703 does not require the county commissioners to establish zoning districts throughout the entire jurisdictional area of the county

²⁰For a discussion of the power of counties to adopt subdivision regulations pursuant to Chapter 6 of Title 2, R.C.M. 1947, without inquiry into the existence of County Planning Boards or other compliance with Chapter 38, Title 2, the reader is directed to Lundberg, *Platt Law Analyzed*, MONTANA LAW FORUM, (Spring, 1971).

²¹R.C.M. 1947, §§11-3842, 11-3842.1.

²²R.C.M. 1947, §11-3848.

²³Such speculation has been carried on in print. Keefer appears to adopt the view that Chapter 47 is constitutional. Keefer, *supra* note 8 at 201. This author concurs in that view.

planning board. Thus, if a planning board is in fact established for a county that county planning board must take as its jurisdictional area the entire county, excluding of course incorporated areas and areas already within the jurisdictional area of the city-county planning board, but it is not mandatory for the county commissioners to establish zoning districts throughout the entire county.

THE CONSTITUTIONAL PROBLEM

The separation of powers problem will always be present within a republican form of government. Still, no one can deny the fact that this particular doctrine has become seriously eroded over the years. At the federal level the courts have been very liberal in giving judicial blessing to the delegation of legislative powers to the executive branch of the government. The huge Code of Federal Regulations, for example, was obviously a product of delegated legislative power. There can be no question that as governments become more complex, legislatures find it more difficult to deal with the technical problems that arise in day to day administration. Therefore, agencies are established, and these agencies are given powers, very often legislative in nature. If the separation of powers doctrine has any purpose, its purpose then is to make certain that arbitrary and discretionary power does not become vested in an irresponsible and unresponsive branch of the government. In their efforts to make certain that this arbitrary or discretionary power does not become vested or exercised, the courts have applied various tests for purposes of determining the validity of the legislation. These tests usually go to the question as to whether or not sufficient standards have been provided in the delegation of the power and whether or not sufficient safeguards have been established with respect to the procedure for carrying out the power. This kind of question can only be answered on a piecemeal basis, each piece of legislation standing on its own. That inconsistencies will appear seems obvious. In Montana, two lines of authority have arisen. One line takes a hard view with respect to the delegation question and has resulted in the invalidation of legislation on the theory that insufficient standards and safeguards have been provided. The highpoint of this line of reasoning was the *Plath* case.²⁴ The other line of authority which culminated in the *Missoula* case by no means avoids the question of standards and safeguards; nonetheless it seems to indicate that, in some cases at least, the inquiry with respect to the standards and safeguards will not be as penetrating.²⁵ It would seem, then, that it is not the magic formula that the legislature uses in all cases which will guarantee whether or not a statute is or is not constitutional.

²⁴Immediately preceding and consistent with the *Plath* case was *Bacus v. Lake County*, 138 Mont. 69, 354 P.2d 1056 (1960). See also, *Chicago, M & St. P. Ry. Co. v. Board of Railroad Com'rs.*, 76 Mont. 305, 247 P. 162 (1926).

²⁵In addition to the *Missoula* case, *supra* note 9, the reader is referred to *Northern Pac. Ry. Co. v. Bennett*, 83 Mont. 483, 272 P. 987 (1928); *State ex rel. Missoula v. Holmes*, 100 Mont. 256, 47 P.2d 624 (1935), and *Barbour v. State Board of Education*, 92 Mont. 321, 13 P.2d 225 (1932).

For, if in fact such a question did rest upon the existence of a formula, there could be no question but what the new Chapter 47 is in fact constitutional when placed along side Chapter 41 *vis a vis* the *Missoula* case. What seems really to bother the courts, however, is the spectre of possible arbitrary and discretionary behavior on the part of administrators. If in fact this is the heart of the problem then, should not the inquiry omit statutory standards entirely? Should not the inquiry go much deeper and become one of protecting against unnecessary and uncontrolled discretionary power? Should not the focus ignore standards and be on the totality of the protections against arbitrariness including both safeguards and standards?²⁶ Certainly, at the federal level at least, the present judicial inquiry has resulted in the virtual guarantee of the validity of every piece of legislation that involves the delegation question. Once the statute has been judicially blessed, the check upon discretionary or arbitrary behaviour from that point on becomes another kind of question—one within the general framework of due process. It would seem that what the courts really need to do is to make certain that so far as practicable administrators structure their discretionary power through standards, principles, and rules. A shift from an emphasis upon standards then to one of an emphasis upon safeguards would seem to be the desideratum. There is evidence that this has happened at the federal level; there is also evidence that state courts have followed the trend.²⁷ Should not then the crucial consideration be, not what the statutes say, but what the administrators do? "The safeguards that count are the ones the administrators use, not the ones mentioned in the statutes. The standards that matter are the ones that guide the administrative determination, not merely the ones stated by the legislative bodies. The test should accordingly be administrative safeguards and standards not statutory safeguards and standards."²⁸

There can be no question that such a shift in the judicial attitude would be extremely difficult to realize. That it would eliminate the sometimes artificial striking down of statutes when the delegation question arises seems equally clear. Were such an approach adopted, for example, by the Montana Supreme Court, should it ever have occasion to inquire into the constitutionality of Chapter 47, the inquiry would not stop with the language of the statute itself. Rather the inquiry would go to what in fact has been done by those who are charged with administering the law—that is, what kinds of safeguards have the county commissioners themselves promulgated and followed in the process of adopting zoning resolutions for their jurisdictional areas? To this author at least, this seems a far better approach in that it does in fact come more closely to insuring that power is not being used arbitrarily and capriciously.

²⁶Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713.

²⁷*Id.* at 727 where the author cites *Warren v. Marion County*, 222 Ore. 307, 353 P.2d 257 (1960); *Kugler v. Yocum*, 445 P.2d 303, 71 Col. R. ptv. 687, 690 (1968); *Butler v. United Cerebral Palsy, Inc.*, 352 S.W.2d 203 (Ky. 1961).

²⁸*Id.* at 728.

This problem would not even have arisen were it not for the fact that county governments are viewed as agencies of the executive branch of the state government. While it is true the constitution is silent on this question, it has been seen that the court has by extrapolation defined the county as being something different from the city and, therefore, an agent of the executive branch. Montana is not alone in this attitude. In the state of Illinois, for example, counties have long been viewed as agents of the state and therefore without police powers. This proposition was made clear by the Illinois Supreme Court in 1924.²⁹ Even so, when the Illinois legislature chose to delegate to the counties the power to zone the Illinois Supreme Court was quick to validate the legislation on the theory that while counties did not have police power as a result of any constitutional grant, nonetheless, police power could be given to them by the legislature. Thus the delegation question was eliminated.³⁰ Insofar as the power of zone by counties is concerned in the state of Illinois, the question is not constitutional but political. The *Cook County* case, *supra* note 29, has the effect merely of limiting county governments in terms of the nature of their government. It did not further limit the power of the legislature. This is particularly interesting in view of the fact that the old constitutional provisions in Illinois did not vary significantly from those in the Montana constitution with respect to the nature of county and city governments. It is true, however, that the new constitution in Illinois is significantly different. These differences appeared, not because of a constitutional problem that the courts had been wrestling with for a number of years, but rather because of the growing political climate in favor of home rule. In view of the fact that Montana is about to embark upon a constitutional convention and, furthermore, in view of the fact that there is in this state as well a growing political climate favoring home rule, a closer look at the developments in Illinois seems appropriate.

Beginning with the proposition that Illinois, like most other states, views local governments as creatures of the states and totally subject to its legislative control, Illinois in September of 1970 adopted a new constitution. Article VII of that constitution deals with local government. Of particular importance to Article VII is Section 6 which refers to powers of home rule units, units which include counties.³¹ A home rule unit may "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt."³² This grant of power is dif-

²⁹*County of Cook v. City of Chicago*, 311 Ill. 234, 142 N.E. 512 (1924).

³⁰*The County of Du Page v. Henderson*, 402 Ill. 179, 83 N.E.2d 720 (1949).

³¹ILL. CONST. art. VII, §6(a) provides that any county which has elected a chief executive officer as well as any municipality whose population exceeds 25,000 is designated a home rule unit. The chief executive officer for counties is provided for in section 4 of the same article.

³²ILL. CONST. art. VII, §6(a).

ferent from what is generally found in home rule provisions. Only the provisions of three other states come close to the Illinois concept. These states include Massachusetts, South Dakota, and Alaska.³³ Despite, however, this broad grant of power to home rule units, there remains considerable legislative power over local affairs. Section 6(g)(h)(i) contains the constitutional source of legislative limits.³⁴ These powers generally give the legislative assembly authority to limit the powers of home rule government providing the limit is made by a vote of three-fifths of the general assembly as well as power of the legislative assembly to exercise exclusive control of any power or function of the home rule unit excepting the power to tax or to make local improvements by special assessment. Thus, unless the legislature acts, home rule units are left free to exercise virtually any function pertaining to their governmental affairs. There can be no question but what this is a very broad grant of power limited only to insure that local governments do not become autonomous bodies completely independent of state legislative supervision.³⁵ Since the provision has been in effect for less than a year, no assessment is possible of this significant break with tradition in the state of Illinois.

Additionally, at least three other states have constitutionally solved the problem of legislative power within the county structure. Article XI, Section 11, of the California constitution provides that, "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws." Similar provisions are found in the state of Kansas³⁶ and in the state of Washington.³⁷ In all these cases the grant of police power is sufficient to cover, at the very least, the question of zoning powers. It goes without saying that statutes which have enabled counties to exercise zoning powers have met with no constitutional problems in those states. Furthermore, in the state of Montana there has been for the past several years a movement to amend its constitution for the purpose of clarifying the position of counties with respect to zoning powers. The Association of Montana Planning Boards has been very active in this movement and sought to secure legislation in 1969 for the purpose of

³³Baum, *The Scope of Home Rule: The Views of the Con Con Local Government Committee* 59 ILL. BAR JOURNAL 814, 820 (June, 1971).

³⁴ILL. CONST. art. VII, §6(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State . . .

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (1) of this section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

³⁵Baum, *supra* note 33 at 823.

³⁶KANS. CONST. art. 2, §21: County tribunals. The legislature may confer upon tribunals transacting the county business of the several counties, such powers of local legislation and administration as it shall deem expedient.

³⁷WASH. CONST. art. XI, §11 is identical with that of California.

submitting a constitutional amendment to the voters of the state. They were, however, not successful in 1969, and, with the prospect of a constitutional convention convening in 1972, no action was taken in this past legislative assembly. The language which has been proposed by this group is "notwithstanding the provisions of Section 1, Article IV, of this Constitution, counties shall have the power and authority, within their limits to make and enforce zoning powers, subdivision regulations, and countywide planning acts and procedures, and such other regulations as may be necessary to implement the foregoing powers." The reason that this proposed amendment speaks only to land use controls on the part of counties is that in 1967, the legislative assembly refused to adopt a proposed amendment which would have granted general police powers to counties. Its failure prompted the proponents of the amendment to limit the grant of power to those powers which spoke particularly to their interest, which was in the planning and zoning area. Had they been successful, of course, any further constitutional questions on the zoning issue as they have arisen by virtue of the *Plath* case would now be moot.

What seems to have emerged in the State of Montana is a general political climate that favors some kind of land use control exercised at the county level. The evidence for this lies in the fact that over the past ten years the basic planning and zoning legislation has been steadily strengthened. Lying like the shadow of an albatross across this legislation, however, is the *Plath* case. Since the heart of the matter is in the delegation problem, the solution lies in either making certain that all legislation meets the standards and safeguards tests that courts have traditionally adopted when viewing this problem or in changing the basic constitutional pattern. Considering the general difficulty there is in achieving uniformity and consistency in the courts on separations of powers problems, clearly the most efficient way to resolve the dilemma would be to alter the constitution. A golden opportunity presents itself this coming year. A number of alternatives are available. These alternatives range from the extremes of unlimited home rule as found in the National Municipal League's Model State Constitution⁸⁸ which would empower a municipality to exercise any legislative power or perform any function, to the more limited view that was the subject of the proposed constitutional amendment in 1969 sponsored by the Association of Montana Planning Boards. In order to clarify the situation once and for all, however, it seems incumbent upon the delegates to the constitutional convention to take this matter under serious consideration and to adopt some kind of provision that frees county governments to act.

⁸⁸Baum, *supra* note 33 at 820.

INTERIM ZONING

One of the most sweeping changes that occurred in Chapter 47 was the addition of Section 4711.³⁹ This section allows a county which has proceeded to conduct studies for purposes of planning to adopt interim zoning controls as emergency measures. These controls are valid for one year and may be extended for one more year. This provision has been in force in the state of Minnesota,⁴⁰ a state whose constitutional provision with respect to county powers is silent on the question as to the nature of the powers that have in fact been granted,⁴¹ but nevertheless a state which has by statute conferred upon counties various kinds of powers, one of them being a broad grant of such powers that in fact be conferred upon them by law.⁴² In addition, the state of Washington has an interim zoning provision⁴³ which is very similar to that which now appears in the Montana code. This provision has been the subject of litigation in Washington⁴⁴ in a case which generally upheld its validity. It must be remembered, however, that Washington does constitutionally empower counties to exercise general police powers. There can be little doubt that of all the recent changes heretofore noted, this particular provision runs the greatest risk of unconstitutionality in the state of Montana. The standards to which the county is subject are general police power standards and the procedural safeguards are not delineated at all within the section. Since, however, the purpose of the temporary interim zoning resolution must be to classify and regulate uses in related matters which constitute an emergency, it would seem that this would be a sufficient kind of standard so as to make certain that no arbitrary or discretionary behavior occurs. This should satisfy the constitutional test, absent evidence that in fact county commissioners are acting arbitrarily and capriciously.

CONCLUSION

Enabling legislation which is permissive in character is no guarantee that there will be action. It becomes incumbent upon the local units of government to act on their own initiative. Constitutional fears should not inhibit them. There is good reason to assume, aside from the presumption of constitutional validity, that the legislation considered here is in fact constitutional. It is strongly recommended, however, that the issue be laid to rest in a new constitutional provision.

³⁹R.C.M. 1947, §16-4711: Interim zoning map or regulation. If a county is conducting, or in good faith intends to conduct studies within a reasonable time, or has held or is holding a hearing for the purpose of considering a master plan or zoning regulations or an amendment, extension, or addition to either pursuant to this chapter, the board of county commissioners in order to promote the public health, safety, morals, and general welfare may adopt as an emergency measure a temporary interim zoning map or temporary interim zoning regulation, the purpose of which shall be to classify and regulate uses and related matters as constitutes the emergency. Such interim resolution shall be limited to one (1) year from the date it becomes effective. The board of county commissioners may extend such interim resolution for one (1) year, but not more than one (1) such extension may be made.

⁴⁰M.S.A. §394. 3Y.

⁴¹MINN. CONST. art. XI, §1.

⁴²M.S.A. §375.18 Subd. 13.

⁴³R.C.W.A. §36.70.790.

⁴⁴Smith v. Skagit County, 75 Wash.2d 715, 453 P.2d 832 (1969).