Montana Law Review

Volume 35
Issue 1 *Winter 1974*

Article 3

1-1-1974

Land Use Planning and the Montana Legislature: An Overview for 1973

Wilford Lundberg
University of Montana School of Law

LAND USE PLANNING AND THE MONTANA LEGISLATURE: AN OVERVIEW FOR 1973

Wilford Lundberg*

Legislation in the area of land use planning continues to be a matter of increasing concern in Montana. Some of the more recent changes have been sweeping, indeed, if not revolutionary. Local government units still retain the bulk of the power to exert land use controls, but they are coming more and more under state influence with the promulgation of minimum standards. The permissive characteristic of land use controls is also retained, at least in part, but it is becoming more difficut for a local government unit simply to do nothing. It is the purpose of this writing to explore some of the more recent changes in the basic enabling legislation in Montana that provide vehicles for proper land use.

THE CONSTITUTIONAL QUESTION

Two years ago there existed a serious constitutional question as to whether or not county government units had power to exert land use controls. This question was explored in an article by this writer.[1] Since the new Constitution has gone into effect, however, the particular constitutional question is put to rest.[2] The new Constitution specifically grants local government units, of which counties are one, legislative powers that are "provided or implied by law." Since the exercise of zoning powers, and, parenthetically, any other device for land use control, is an exercise of the legislative power[3] and, since the county has already been given this "legislative" power in both Chapters 41 and 47 of Title 16, R.C.M. 1947, it follows that the counties have been granted the necessary legislative power. The question then of an improper delegation of legislative powers to an executive branch of the government will not be raised under the new Constitution. City government has traditionally been allowed to exercise both of these powers under the old Constitution as well. What this means insofar as counties are concerned is that county commissioners, or any other county governmental entity that may be established pursuant to the new statutory provisions for optional forms of county government,[4] will increasingly be performing two basic functions. On the one hand they will be executives, administering the usual day-to-day functions of managing the county's business; on the other hand they will be acting as legislators.

*Professor of Law, University of Montana. J.D. University of Southern California Law Center, 1966.

[1]Lundberg, *County Zoning in Montana: A New Look at an Old Constitutional Problem*, 33 MONT. L. REV. 52 (1972).

[2]MONT. CONST. art XI, § 4(1)(b) provides: "A county has legislative, administrative, and other powers provided or implied by law."

[3]Plath v. Hi-Ball Contractors, Inc., 139 Mont. 263, 362 P.2d 1021, 1022 (1961).

[4]REVISED CODES OF MONTANA, §§ 16-5001—16-5019 (1947) (hereinafter cited as R.C.M. 1947).

It would seem to be important that these county officials proceed as legislators do when they are performing a legislative function. The Administrative Procedure Act[5] does not apply to local government units, but it does provide a model for the procedure that an administrative agency, mandatory at the state level, should follow when performing its task of promulgating and enforcing regulations. County officials would be well advised to keep this Act in mind as they become more involved in legislative activity.

Basic to this admonition is the generally-accepted proposition that legislative enactments enjoy a presumption of validity. Once the legislature has acted, there is a presumption that not only has that legislature acted properly, in terms of its internal procedures, but also that it has not exceeded its authority in terms of the substance of its enactment. This dual presumption of validity is extremely important, particularly when it comes to a point where an enactment is under attack in the courts. While it is true that the courts have in recent times been very liberal in their interpretation of this presumption, and have applied it, particularly in the area of land use controls, to give legislatures a broad range of power,[6] nonetheless it would seem wise for county officials to check themselves in the early stages by establishing, at the very minimum, detailed procedures to be followed when the county is in fact exercising a legislative function.

THE EMERGING APPEARANCE OF FAIRNESS REQUIREMENT

Additionally, there is the question of the amount of influence which may be properly exerted upon county officials when they are legising. One of the hallmarks of a democracy is that all citizens have access to their elected representatives, particularly when they are deliberating upon particular pieces of legislation. No one argues with the right of someone to write to his congressman, to hire a lobbyist, or to invite the local legislator home to dinner. But, does this same "right" apply to county officials as they sit down to deliberate upon specific pieces of legislation that affect the use of private property? Does, for example, the fact that the chairman of the board of county commissioners who is a good friend of a land developer, a developer who succeeds in securing favorable land use legislation for his property, have any effect upon the validity of that particular legislative enactment? The typical answer to questions of this kind in the usual legislative area has been to expose the connection and to turn out of office those who seem to be under heavy influence by a particular interest. But even though the legislator

[5]R.C.M. 1947, §§ 82-4201—82-4225.

[6]"The role of the judiciary in reviewing zoning ordinances adopted pursuant to the statutory grant of power is narrow. The court cannot pass upon the wisdom or unwisdom of an ordinance, but may act only if the presumption in favor of the validity of the ordinance is overcome by an affirmative showing that it is unreasonable or arbitrary." Vickers v. Township Committee of Gloucester Township, 37 N.J. 232, 181 A.2d 129, 134 (1962).

is turned out, the validity of the legislation is unquestioned. The state of Washington, through its Supreme Court, has recently taken steps which are directly at variance with the proposition that these kinds of enactments are presumed valid.[7]

In these two Washington cases, an application for a rezoning was at issue. Industrial companies were petitioning county planning boards and county commissioners to rezone what was in essence rural residential propery to property designated for industrial use. Hearings were conducted; and after receiving recommendations from the county planning commission, the property was in fact rezoned. The issue before the courts was whether or not the hearing, though properly conducted, was in fact fair. In the *Smith* case the court said that although the law provides many kinds of hearing—administrative, judicial, and legislative, to name a few—nevertheless once the law does provide for a hearing, that hearing must in fact be fair.[8] Going on, the court said:

> Where the law expressly gives the public a right to be heard—as distinguished from open sessions of the Congress or state legislatures or lesser legislative bodies which, although conducting their session in public, need not as a matter of law allow public participation—the public hearing must, to be valid, meet the test of fundamental fairness, for the right to be heard imports a reasonable expectation of being heeded. Just as a hearing fair in appearance but unfair in substance is no fair hearing, so neither is a hearing fair in substance but appearing to be unfair.[9]

The court concluded that the test for fairness was:

> . . . [W]hether a fair-minded person in attendance at all of the meetings on a given issue, could at the conclusion thereof, in good conscience say that everyone had been heard who, in all fairness, should have been heard and that the legislative body required by law to hold the hearing gave reasonable faith and credit to all matters presented, according to the weight and force they were in reason entitled to receive.[10]

The *Smith* case was reaffirmed in 1971 in the *Chrobuck* Case, a case involving an attempt to rezone a rural residential area for purposes of constructing a refinery. Of particular importance in this case was the accumulated evidence of what had gone on before the hearing, not necessarily what had gone on in the hearing itself. Again the planning commission and the board of county commissioners had agreed to allow the petition. Evidence, however, indicated that the petitioner, Atlantic Richfield Corporation, had had relations not only with a lawyer member of the planning commission, but also had been the host to the chairman of the planning commission and the chairman of the board of county commissioners on an expense-paid trip to Los Angeles, ostensibly for the purpose of examining that company's operation in the southern

[7]Smith v. Skagit County, 75 Wash.2d 715, 453 P.2d 832 (1969). Chrobuck v. Snohomish County, 78 Wash.2d 858, 480 P.2d 489 (1971).

[8]Smith v. Skagit County, *supra* note 7 at 846.

[9]*Id.*

[10]*Id.* at 847.

California area. The court specifically made a finding that it could find no evidence of dishonesty or dishonorable or self-serving motives or conduct on the part of the members of either the planning commission or the board of county commissioners. But, citing *Smith,* a fair hearing means a hearing not only fair in substance but one that is fair in appearance as well; and the court came to the conclusion that the "unfortunate combination of circumstances heretofore outlined and the cumulative impact thereof inescapably casts an aura of improper influence, partiality, and prejudgment over the proceedings thereby creating and erecting the appearance of unfairness."[11]

The fact of basic importance in these decisions is, aside from the appearance of fairness question, that the court is now willing to examine the procedures that a legislative body has followed. This suggests that the court is no longer willing to presume the validity of those procedures. The local governing body must therefore come forth with evidence to indicate that not only has it acted substantively within its proper delegted authority, but that it has also proceeded properly, even though those procedures may not be detailed in the enabling statutes. It would seem that county commissioners and other local governing bodies in Montana might ponder these decisions well and make certain that when they are acting in any legislative capacity that their procedures always be fair.

A NEW SUBDIVISION LAW

The most dramatic result of the 1973 Legislative Assembly insofar as land use legislation is concerned was the much-heralded Senate Bill 208 which became R.C.M. 1947, §§ 11-3860—11-3876. This Act completely replaced the old plat law in Montana which was Chapter 6, Title 11, as well as certain sections dealing with the promulgation of subdivision regulations found in the city-county planning enabling sections, Chapter 38, Title 11.[12] The act outlines a procedure which must be followed before a given subdivision may be recorded and hence offered for sale. Of particular interest are some of the definitions. A "subdivision" is defined as:

> . . . [T]he division of land, or land so divided, into two (2) or more parcels, whether contiguous or not, any of which is ten (10) acres or less, exclusive of public roadways, in size, without regard to the method of description thereof, in order that the title or possession of the parcels or any interest therein may be sold, rented, leased, or otherwise conveyed either immediately or in the future, and shall include any resubdivision of land; and shall further include any condominium or areas providing multiple space for camping trailers or mobile homes; provided further that a division of land is a subdivision when the division creates a second or any subsequent parcel for the purpose of sale, rent, lease, or other conveyance from a tract of land held in single or undivided ownership on July 1, 1973, where

[11]Chrobuck v. Snohomish County, *supra* note 7 at 496.

[12]For a discussion of the old plat law in Montana, see Lundberg, *Plat Amendment Analyzed,* 5 MONT. L. FORUM 2 (1971).

> any of the parcels segregated from the original tract is ten (10) acres or less, exclusive of public roadways, in size, without regard to the method of description thereof. The plat of a subdivision so created shall show all of the parcels segregated from the original tract whether contiguous or not. R.C.M. 1947. 11-3861(12).

By including condominiums and mobile home sites, this definition places virtually every division of land within the act so long as it conforms to the ten-acre requirement, the only exceptions being those specified in R.C.M. 1947, § 11-3862(4).[13] The other striking departure from previous legislation was the alteration in the permissive character of subdivision regulations. Prior to the passage of Senate Bill 208, both Chapter 6, Title 11, and Chapter 38, Title 11, empowered the county commissioners to enact subdivision regulations, the latter grant being circumscribed only by the requirement that the regulations be submitted to a planning board whose jurisdictional area would be affected by the regulations.

Now, however, the commissioners must make regulations pursuant to a timetable. The local governing bodies have until July 1, 1974, to "adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for the orderly development of their jurisdictional areas."[14] Furthermore, the Department of Intergovernmental Relations, Division of Planning and Economic Development, is instructed to promulgate minimum standards no later than December 31, 1973, this authority to be exercised in conformity with applicable portions of the Montana Addministrative Procedure Act.[15] Some very specific elements are required within the minimum standards, particularly with regard to the environmental assessment.[16] These en-

[13]This section provides:

> Unless the method of disposition is adopted for the purpose of evading this act, the requirements of this act shall not apply to any division of land:
>
> (a) which is created by order of any court of record in this state or by operation of law, or which, in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain (§§ 93-9901 through 93-9926);
>
> (b) which is created by a lien, mortgage, or trust indenture;
>
> (c) which creates an interest in oil, gas, minerals, or water which is now or hereafter severed from the surface ownership or real property;
>
> (d) which creates cemetery lots;
>
> (e) which is made for the purpose of a gift or sale to any member of the landowner's immediate family;
>
> (f) which is leased or rented for farming and agricultural purposes. The old law contained no provisions for exceptions; 11-601 simply provided: "Any person, company, or corporation, who may lay out any city or town, or any addition to any city or town, or any tract of land within the limits of any city or town, or townsite, or transfer any lots, blocks, or tracts therein, must cause to be made an accurate survey and plat thereof, and cause the same to be recorded in the office of the county clerk and recorder of the county in which such land lies."

[14]R.C.M. 1947, § 11-3863(1).

[15]R.C.M. 1947, § 11-3863(2).

[16]R.C.M. 1947, § 11-3863(4):

> The environmental assessment shall accompany the preliminary plat and shall include:
>
> (a) a description of every body or stream of surface water as may be affected by the proposed subdivision, together with available ground water in-

vironmental impact statements, common now by virtue of federal legislation in certain areas, will become applicable to developers at every level in the state of Montana. Local governing officials will have the responsibility for enforcing these kinds of requirements, and in the event they have not established their own regulations by July 1, 1974, which meet or exceed the minimum requirements of the Division of Planning and Economic Development, that department shall promulgate its own reasonable regulations to be enforced by the defaulting governing body.[17]

Until the Department of Planning and Economic Development acts, there will necessarily be considerable speculation as to what these minimum standards will be. In 1972, however, the Department published a booklet entitled "Subdivisions"[18] which included as a part of its appendix a set of model subdivision regulations. It seems reasonable to suppose that many of these model subdivision regulations will appear in the minimum standards.[19] R.C.M. 1947, § 11-3864 now contains the provisions for continuing the park dedication requirement that was present in the old Chapter 6, Title 11. One-ninth of the platted area is required as a dedication for parks and playgrounds if any lot in the subdivision is five acres or less. Where the lots are more than five acres, the requirement is one-twelfth of the platted area, exclusive of all other dedications. No dedication is required when the lots or parcels are all greater than ten acres in size. Furthermore, the governing body may, for good cause, accept cash in lieu of a land dedication. The cash must equal the fair market value of the land that would have been dedicated, the fair market value being the value of unsubdivided, unimproved land. Such cash shall be paid into the park fund and used for the purchase of additional lands or for the initial development of parks and playgrounds.[20] There are three major exceptions to this park dedication requirement. One of these involves a planned unit development[21] which contains land permanently set aside for parks and recreational uses sufficient to meet the needs of the persons who will ultimately reside within the subdivision. The second occurs when the land is developed under single ownership and part of the tract has been dedicated to the

---

formation, and a description of the topography, vegetation and wildlife use within the area of the proposed subdivision;

(b) maps and tables showing soil types in the several parts of the proposed subdivision, and their suitability for any proposed developments in those several parts;

(c) a community impact report containing a statement of anticipated needs of the proposed subdivision for local services, including education and busing, roads and maintenance, water, sewage, and solid waste facilities, and fire and police protection;

(d) such additional relevant and reasonable information as may be required by the department through its division of planning and economic development.

[17]R.C.M. 1947, § 11-3863(8).

[18]MONTANA DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, SUBDIVISIONS (1972).

[19]*Id.* at 48-69.

public from the area that has been subdivided to meet the requirements of the section. Finally, the governing body may waive the dedication and cash donation requirements where all the parcels are five acres or more in size and where a covenant running with the land and revocable only by consent of the governing body requires that none of the parcels in the subdivision shall ever be subdivided into parcels of less than five acres. A detailed procedure is established for approval of the preliminary as well as the final plats for all subdivisions. Approval of the final plat is a condition precedent to recordation.[22]

House Bill 465 became law, in a sense, as a complementary measure to Senate Bill 208. This act amends Chapter 50, Title 69, and deals with the power of the Montana State Department of Health and Environmental Sciences to regulate subdivisions. As amended, the act contains the same definition of subdivision that is to be found in Senate Bill 208, R.C.M. 1947, 11-3861(12). Essentially, the 1973 change provides stricter controls upon subdivisions for purposes of maintaining water quality and promoting proper sewage disposal. The Department of Health and Environmental Sciences is instructed to promulgate rules that provide for a number of things with particular emphasis upon availability of water, quality of the available water, and standards for sewage disposal systems.[23] Compliance with these applicable rules is insured by requir-

[20]An interesting question as to whether county commissioners may expend more than $5,000 per year for any park maintenance has been raised by an apparent statutory inconsistency. For a discussion of this problem and the solution of one county, see Lundberg, *County Parks, The Hill County Experience*, 7 MONT. L. FORUM 2 (1973).

[21]R.C.M. 1947, § 11-3861(5):

'Planned unit development' means a land development project consisting of residential clusters, industrial parks, shopping centers, or office building parks, or any combination thereof which comprises a planned mixture of land uses built in a prearranged relationship to each other and having open space and community facilities in common ownership.

[22]R.C.M. 1947, § 11-3866, § 11-3867.

[23]R.C.M. 1947, § 69-5005(3):

The rules shall further provide for:

(a) The furnishing to the Department of a copy of the plat and other documentation showing the layout or plan of development, including:

(i) total development area,

(ii) total number of proposed dwelling units;

(b) adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed;

(c) evidence concerning the potability of the proposed water supply for the subdivision;

(d) standards and technical procedures applicable to storm drainage plans and related designs, in order to insure proper drainage ways;

(e) standards and technical procedures applicable to sanitary sewer plans and designs, including soil percolation testing and required percolation rates and site design standards for on-lot sewage disposal systems when applicable;

(f) standards and technical procedures applicable to water systems;

(g) standards and technical procedures applicable to solid waste disposal;

(h) requiring evidence to establish that, if a public sewage disposal system is proposed, provision has been made for the system and, if other methods of sewage disposal are proposed, evidence that the systems will comply with state and local laws and regulations which are in effect at the time of submission of the preliminary or final plan or plat.

ing that no recording of a subdivision may occur until the developer has, in fact, secured the approval of the local health officer having jurisdiction and that the Department of Health and Environmental Sciences has also indicated by stamp or certificate its approval.[24] Interestingly enough, the original bill called for departmental approval by other interested state departments if a given subdivision seemed to be of concern to other departments. This provision was dropped by Senate amendment, however, from the final bill. There is a grievance procedure which allows an aggrieved party to appeal directly to the Board of Health and Environmental Sciences and request a hearing according to the requirements of the Montana Administrative Procedure Act. There is also an additional method of enforcement aside from the filing procedure, and that is to be found in R.C.M. 1947, § 69-5008 which provides for a maximum penalty of $1,000 fine for violation of any provision of the act.

EXTRATERRITORIAL ZONING — A CLARIFICATION

One of the 1971 amendments to Chapter 27, Title 11, allowed a city or town to exercise extraterritorial zoning powers and soon became the subject of considerable disagreement. Of particular difficulty was the provision[25] that required the city planning board to be increased to include two representatives from the unincorporated area which was to be affected by the impending zoning ordinance. The purpose for this provision in the original amendment was to take care of that one situation in Montana where a city planning board does exist, but where there is no city-county planning board. Obviously, in those cases where city-county planning boards exist, there is representation from the unincorporated area since the jurisdictional area of a city-county planning board goes four and one-half miles outside the city limits. This section was then interpreted to mean that even in those areas where city-county planning boards were functioning, a city planning board had to be established and then increased to include the necessary representation. To clarify this problem, the section was amended in 1973 so that only when no city-county planning board exists, but a city planning board does exist, must there be the two representatives from the unincorporated affected area. The section now reads:

> As a prerequisite to the exercise of this power, a city-county planning board whose jurisdictional area includes the area to be regulated must be formed or an existing city planning board must be increased to include two representatives from the unincorporated area which is to be affected. R.C.M. 1947, § 11-2702(2).

PLANNING BOARD MEMBERSHIP

Membership on the planning boards, both at the county level and at the city-county level, was changed as well in 1973. This was done

[24] R.C.M. 1947, § 69-5003.
[25] R.C.M. 1947, § 11-2702(2).

by amending R.C.M. 1947, § 11-3810 with respect to the membership on the city-county planning board. The provision that allowed county commissioners to appoint two official members was changed to require that these official members reside outside the city limits.[26] With respect to county planning boards, the membership remains at the minimum of five members appointed by the board of county commissioners, but at least three of these members shall be members of the governing board of a conservation district as provided for in R.C.M. 1947, § 76-105 or a state cooperative grazing district, if officers of either reside in the said county.[27] Apparently the purpose of this change is to provide a vehicle for greater liaison among county planners and existing conservation districts. There already is, however, an existing vehicle for cooperation among the various county planning boards. City planning boards, city-county planning boards, and county planning board may combine even to the point of overlapping among the various counties for purposes of enlarging their boundaries and providing for more responsible planning in those areas where political boundaries do not make sense in planning.[28] Indeed, this vehicle has already been used at least in one instance in Flathead County.[29]

EXCLUSIONARY ZONING

The zoning power has often been exercised to exclude particular uses. It has been the exclusion, for example, of industrial uses that makes residential areas attractive, desirable, and healthy. This exclusion has rarely been challenged as an improper use of the zoning power. However, a new question arises when the exclusionary power is used to exclude certain types of housing within a residential area. For example, the total exclusion of mobile homes from a given community means that those persons who can afford only mobile homes are, in fact, being denied the right to live in that community. The first case that decided this question was the *Vickers* case,[30] a much-heralded case which has been heavily criticized since it seems to stand for the rather broad proposition that the power to zone is tantamount to the power to exclude, giving the zoning officials the right not to provide for every use. "We do not think that a municipality must open its borders to a use which it reasonably believes should be excluded as repugnant to its planning scheme," the court concluded.[31] A vigorous dissent set forth an impressive array of facts to indicate the desirability of mobile homes, the need for them,

[26]R.C.M. 1947, § 11-3810(1)(a).
[27]R.C.M. 1947, § 11-3810(2).
[28]R.C.M. 1947, §§ 16-4901—16-4904.
[29]In 1972, a county areadwide planning organization was formed by agreement among Flathead County and the cities of Kalispell and Whitefish pursuant to the Interlocal Cooperation Act, *supra* note 28. This was approved by letter from the Attorney General, August 28, 1972.
[30]Vickers v. Township Committee of Gloucester Township, *supra* note 6.
[31]*Id.* at 158.

and the lack of reasonableness in their exclusion.[32] Despite the criticism of this case, it appears still to be good law in the state of New Jersey[33] even though it does not seem to be extended into areas involving minimum-sized lots. The extension of *Vickers* into other states has had a varied history.[34]

Apparently this problem was the subject of Senate Bill 269 in the 1973 legislature. This bill was an amendment to R.C.M. 1947, § 11-3831. The original bill would have made mandatory as one of the elements in the master plan "a housing study, consisting of surveys and reports upon housing conditions, needs, and family income as a means of establishing housing standards."[35] An amendment in the House, however, struck this particular provision and added a new master plan requirement to R.C.M. 1947, § 11-3831, namely: "Recommendations setting forth the development, improvement, and extension of areas, if any, to be set aside for use as trailer courts and sites for mobile homes."[36] Additionally, the House amendments made this provision one of the optional requirements within the master plan. What clearly seems to be the intent behind this change in the basic law with regard to master plans was to provide a directive to planning officials to make some kind of allowance at least for the presence of mobile homes and trailer parks. It is doubtful, however, that this provision alone would be in itself enough to make an exclusion of the mobile home use an improper use of the zoning power within the state of Montana.

GREEN BELT LAWS AND TAX ABATEMENT

One of the principal obstacles to land use planning in areas that are primarily agricultural but have a potential for more intensive development has been increasing taxes. Once a development occurs within an agricultural or otherwise rural setting, the surrounding property usually increases in value. Property taxes increase correspondingly, forcing the holder of the agricultural property to seek some other use,

[32] *Id.* at 140-150.

[33] While *Vickers* has not been overruled, nevertheless, it has not been extended, either. Oakwood at Madison, Inc., v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971).

[34] Maine and Maryland, at least, have followed the rationale in *Vickers*. Wright v. Michaud, 160 Me. 164, 200 A.2d 543 (1964). County Commissioners of Queen Anne's County v. Miles, 246 Md. 335, 228 A.2d 450 (1967). North Carolina departed from *Vickers* in *Town of Conover v. Jolly*, 277 N.C. 439, 177 S.E.2d 879 (1970).

[35] "Such study shall include a study of presently available types of housing and methods of construction and a recommendation as to the suitability of each type of housing for inclusion within land divisions or zoning areas of the jurisdictional area. Any recommendation for exclusion of a type of housing or method of construction from a land division or a zoning area shall clearly set forth the reasons why such housing or method of construction, if placed in the land area from which its exclusion is recommended, would injuriously affect the public health, safety, and welfare." Senate Bill No. 269, introduced by Turnage, Flynn, Siderius, James, Moore, Boylan, and Lynch in the 43rd Legislative Assembly of the State of Montana, § 1 before amendment.

[36] R.C.M. 1947, § 11-3831(5).

usually a more intensive one. Attempts have been made in the past in Montana to deal with this problem; one came in 1957 when R.C.M. 1947, § 84-429.12 was enacted.[37] This section was substantially altered and expanded by Senate Bill 72 in 1973 with the enactment of the so-called Green Belt Law. This law, in essence, provides for the usual general and uniform method of appraising property for tax purposes and for classification of property according to its use, giving special attention to agricultural lands, specifying that "all agricultural lands must be classified and appraised as agricultural lands without regard to the best and highest value use of adjacent or neighboring land."[38] Certain qualifications are established for designating which property may be assessed as agricultural property. The property must be actually devoted to agricultural use, it must be not less than five contiguous acres producing a gross value of grazing and crops of at least $1,000 per year or providing 15 percent or more of the owner's annual gross income, and the owner of the land must have applied for valuation under this section on or before October 1 of the year immediately preceding the tax year to the local county assessor providing, however, that late applications may be filed for another sixty days upon payment of a $25 fee.[39] Absent an application by the owner of the land, the Department of Revenue shall then revalue the land as nonagricultural land. So long, then, as applications are made and the land otherwise qualifies, it is assessed as agricultural land with a taxable value that is equal to the value of the land as though it had only an agricultural use. When the land which has then been assessed in such a way ceases to be used for agricultural land, it is subject to a roll-back tax which shall be a lien upon the land and become due and payable at the time of the change in the use. This roll-back tax means that the period preceding the change, not to exceed four years, which shall be determined by the assessor will be computed generally by determining what the tax would have been had the property been assessed not as agricultural but as unsubdivided and unimproved land for the period of the roll-back less what in fact had been paid during the period of its assessment under

[37]This section provided:

> It is hereby made the duty of the state board of equalization to implement the provisions of this act by providing:
>
> 1. For the general and uniform method of classifying lands in the state of Montana for the purpose of securing an equitable and uniform basis of assessment of said lands for taxation purposes.
>
> All lands shall be classified according to their use or uses and graded within each class according to soil and productive capacity. In such classification work, use shall be made of soil surveys and maps and all other pertinent available information. All lands must be classified by forty (40)-acre tracts of fractional lots.
>
> 2. For a general and uniform method of appraising city and town lots.
>
> 3. For a general and uniform method of appraising rural and urban improvements.
>
> 4. For a general and uniform method of appraising timberlands.

[38]R.C.M. 1947, § 84-429.12(1).

[39]R.C.M. 1947, § 84-437.2.

this particular procedure.[40] This method does not, of course, guarantee that land will remain as agricultural land and undeveloped. It merely allows a person who owns land, no matter what its potential value, and who chooses to farm it, to do so without confronting an impossible tax problem. Once a change in use occurs, he becomes subject to a potential four-year tax liability as though the land had not been used as agricultural property during that period of time. Obviously this potential liability is not going to stop the developer whose land has appreciated greatly in value since he will usually pass this cost onto the ultimate user. It is, however, as Greenbelt Laws go, a rather liberal provision, since many states require that there be as much as a ten-year roll-back, with a maximum of ten years during which the tax abatement procedure may be used.[41] This, while the Montana Greenbelt Law will be liberal as applied to bona fide farmers, it is also a potential subsidy to speculators. A speculator, buying up large tracts of land in Montana with the idea of holding it for future gain, could conceivably incorporate so as to ensure the lend produced fifteen percent or more of his income, and hold the land indefinitely, knowing that at the time when he sold the property, he would be subject only to a four-year roll-back. It will be interesting to see as events progress just which types of owners do, in fact, make the most extensive use of this law.

It is obvious, considering costs of city and county government, local governmental units will be anxious to take advantage of any increased value in their property for purposes of raising revenue. Such a position is understandable in light of the current cost squeeze. However, county assessors are now agents of the State Department of Revenue, paid by the state, with primary responsibility to the state.[42] The County Board of Equalization is abolished and a County Tax Appeal Board established

[40] "The assessor shall ascertain the following in determining the amount of the roll-back tax chargeable on land which has undergone a change in use:

(1) the full and fair value of the land as determined by the department of revenue under the valuation standard applicable to land in the county not valued, assessed, and taxed under the provisions of this act;

(2) the amount of the land assessment as unsubdivided and unimproved land for the period of the roll-back, by multiplying such full and fair market value by the number of years included in the roll-back and by multiplying the product obtained, by the assessment ratio in effect in the year in which the change in use of land is made as determined by the state;

(3) the average mill levy applied in the taxing district in which the land is located by dividing the aggregate mill levy actually applied in each respective year of the roll-back by the number of years included in the roll-back; and

(4) the amount of the roll-back tax by multiplying the taxable value computed from the amount of the assessment determined under subsection (2) hereof by the average mill levy determined under subsection (3) hereof, less the amount of real property taxes actually paid during the period of the roll-back." R.C.M. 1947, § 84-437.4.

[41] California, for example, has a detailed procedure whereby landowners may contract with local government units to hold land for agricultural purposes, during which time tax abatement is provided. The contract period is ten years, renewable annually for an additional year. In the event the contract is not renewed, full tax impact is felt. CAL. GOVT. CODE, § 51200 (West 1970) and CAL. REV. AND TAX CODE, §§ 421-429 (West 1970).

[42] R.C.M. 1947, § 84-402.

in its stead. The theory here seems to be to provide for uniform statewide enforcement of assessment and appraisal procedures. This removes a great deal of discretion that has been traditional among the counties by virtue of their individually elected and popularly responsible county assessors. It closes an important gap that has been traditional among Montana counties where assessments vary often in proportion to the needs of the county and in some cases according to the personalities of the county assessors themselves.

Tax abatement procedures notwithstanding, the problem of preserving land as open space remains a pressing one in all areas of the United States. This is particularly true in the rapidly developing areas of Montana; local governing officials will be increasingly pressured to preserve more areas in their natural state. Currently, Montana does provide a vehicle for this type of preservation under the Open Space Act.[43] This law allows governmental units to acquire land or "interests in land" for purposes of preserving open space. A one-mill levy is permitted for purposes of making these acquisitions, which probably explains why the law is so little used since one mill in the typical county is next to nothing. One of the interesting questions that arises here, however, is within the provision for acquiring something less than the fee. The act does provide this power, but the question is whether Montana would recognize title to something less than a fee, that is, an easement. Easements for light and air are recognized in Montana,[44] but this specific statutory authorization applies only to easements attached to the land. Since a typical governing unit, if it were to acquire an easement for purposes of preserving the natural landscape, would probably have to take title to an easement in gross, there would be no help in the statutes. Statutory authorization for easements in gross is absent with respect to this type of use.[45] Scenic easements are being used in California, however.[46]

The problem which really needs confrontation is the tax question. The Open Space Act does provide that once an interest has been acquired less than the fee, then the owner of the fee is to receive a new assessment reflecting the absence of that particular interest for purposes of adjusting his property taxes.[47] In some cases, however, the land owner

[43]R.C.M. 1947, §§ 62-201—62-609.

[44]R.C.M. 1947, § 67-601.

[45]R.C.M. 1947, § 67-602.

[46]California has recent specific statutory authority for the grant and acceptance of open-space easements. CAL. GOVT. CODE, §§ 51050—51065 (West 1969). A scenic easement deed has long been used in California, however, approved by the Attorney General in 1946. It purports to grant easements appurtenant. URBAN LAND INSTITUTE, 36 URBAN LAND INSTITUTE TECHNICAL BULLETIN 60. *See* Gion v. City of Santa Cruz, 2 Cal.3d 1, 465 P.2d 50, 84 Cal. Rptr. 173 (1970).

[47]"Where an interest in real property less than the fee is held by a public body for the purposes of this act, assessments made on the property for taxation shall reflect any change in the market value of the property which may result from the interest held by the public body. The value of the interest held by the public body shall be exempt

(particularly the large land owner in scenic areas) is willing to donate or dedicate an interest in his property for purposes of preserving some natural condition. Whether that donation or dedication of an interest to a nonprofit organization or to a governmental entity is a charitable deduction for income tax purposes becomes a matter of definitive importance. The resolution of this problem must certainly be related to the enforceability of the easement which has been the subject of the grant. If the state law is unclear on the subject, the taxing authorities may well decide that nothing has passed since the easement may never be enforced. It would seem that legislation is urgently needed on this subject.

Another potential for controlling development of land in certain areas is the Floodway Management Act.[48] This act as currently amended would absolutely bar development in areas designated as 100-year floodplains. This, of course, will mean that property owners who hold land up to the edges of rivers but whose property is within the floodplain will be required, in a sense, to dedicate a portion of that land. There is no provision for compensating these property owners under the current law, and the law itself has not yet been tested. The problem of compensating property owners has not been completely ignored, however, particularly at the national level. A proposal for a land use commission, for example, which would have as one of its functions the coordination and designation of areas to be used on a national level for both urban development and for open space has been suggested by at least one Congressman.[49] This proposal calls for a method by which property owners whose property does increase in value to be forced to pay the value of the so-called unearned increment.[50] In any event, the answer to preserving land in its natural state is not always to be found in zoning or subdivision control. It would seem to be that once a freeze has been placed upon land, the landowner should in some way be compensated if, in fact, his land decreases in value. A method for providing for this kind of procedure as well as proper tax treatment should be clearly delineated.

CONCLUSION

The 1973 legislature in Montana was extremely active in land use control legislation. Most of this activity was, with the possible exception of Senate Bill 208, a piecemeal attack made by amending existing enabling statutes. Much progress has been made here. The fact remains,

---

from property taxation to the same extent as other property owned by the public body.'' R.C.M. 1947, § 62-608.

[48]R.C.M. 1947, §§ 89-3501—89-3515.

[49]McCloskey, *Preservation of America's Open Space: Proposal for a National Land-Use Commission*, 68 MICH. L. REV. 1167 (1970).

[50]*Id.* at 1174.

however, that the existing zoning-type legislation remains unchanged in the sense that it still requires uniformity, the result of which has been the homogeneous, and sometimes sterile, sprawl of our cities. If flexibility is to be achieved, it would seem that other devices should be allowed, particularly with respect to conditional uses and the planned unit development. Hopefully, another legislative session will direct its attention to these areas as well.[51]

[51]For example, provision should be made for allowing the Planned Unit Development to exist despite the usual uniformity requirement of Chapter 27, Title 11, and Chapter 47, Title 16. Authorization should also be given for the conditional use. Interestingly enough, an attempt was made in the latter case in 1971. It failed.