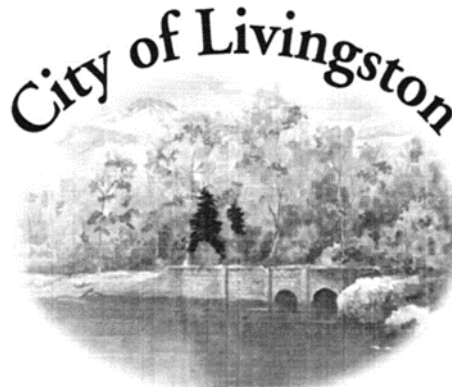


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February 14, 2020

MEMO

To: Mike Kardoes, City Manager

From: Courtney Lawellin, City Attorney

RE: Planning Board – Is the Planning Board mandated by Statute to run the Growth Policy process?

Applicable statutes

TITLE 76. LAND RESOURCES AND USE

CHAPTER 1. PLANNING BOARDS

Part 1. General Provisions

Purpose

76-1-102. Purpose. (1) It is the object of this chapter to encourage local units of government to improve the present health, safety, convenience, and welfare of their citizens and to plan for the future development of their communities to the end that highway systems be carefully planned; that new community centers grow only with adequate highway, utility, health, educational, and recreational facilities; that the needs of agriculture, industry, and business be recognized in future growth; that residential areas provide healthy surroundings for family life; and that the growth of the community be commensurate with and promotive of the efficient and economical use of public funds.

(2) In accomplishing this objective, it is the intent of this chapter that the planning board shall serve in an advisory capacity to presently established boards and officials.

Role Of Planning Board

76-1-106. Role of planning board. (1) To ensure the promotion of public health, safety, morals, convenience, or order or the general welfare and for the sake of efficiency and economy in the process of community development, if requested by the governing body, the planning board shall prepare a growth policy and shall serve in an advisory capacity to the local governing bodies establishing the planning board.

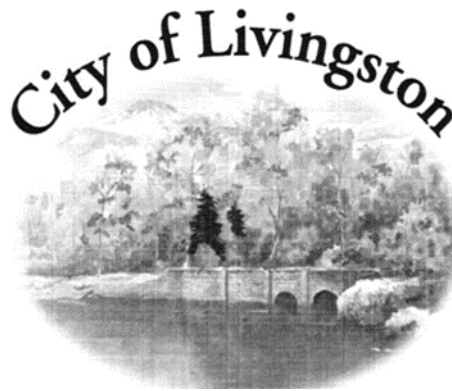
(2) The planning board may propose policies for:

- (a) subdivision plats;
- (b) the development of public ways, public places, public structures, and public and private utilities;
- (c) the issuance of improvement location permits on platted and unplatted lands; or
- (d) the laying out and development of public ways and services to platted and unplatted lands.

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Department of Economic Development

<http://www.ded.state.mo.us>

*186 Montana

State Planning Model

Counties may plan and zone once they have adopted a “growth policy,” which is “synonymous with a comprehensive development plan, master plan, or comprehensive plan that meets the requirements of 76-1-601.”³⁵³ The language authorizing planning and zoning for cities, however, is wholly different from the statute applicable to counties: the language does not require the adoption of a growth policy (comprehensive plan) before planning and zoning,³⁵⁴ rather it requires the appointment of a zoning commission.³⁵⁵ Once a local government has adopted a growth policy, all future actions, including zoning ordinances, must be consistent with the growth policy.³⁵⁶ However, there is no internal consistency requirement.³⁵⁷ Both counties and municipalities are authorized to establish planning boards.³⁵⁸ If a local jurisdiction appoints a planning board, the board must prepare a growth policy.

Smart Growth Efforts

Research did not reveal any relevant information on recent state smart growth efforts in Montana. However, the American Planning Association Research Department recently published a report (“APA report”) analyzing Montana's land use laws and provided recommendations to improve planning and land use control.³⁵⁹ The Montana Smart Growth Coalition, composed of twenty-seven non-profit public interest organizations, requested the study to assess the need for statutory reform. The Coalition intended the report to build on an earlier study on land use planning (released in 1999) by the Montana State Environmental Quality Council Growth Study Subcommittee.

The APA report provides a brief summary of the statewide plans, the enabling legislation for local planning and land use control, Montana Supreme Court and Attorney General decisions, and the results of six focus groups and responses to surveys. Moreover, the report reviews the recommendations provided by previous studies conducted by the Montana State Environmental Quality Council. In the final section of the report, which may be helpful to OPR, the APA sets out twenty-nine recommendations, divided into five categories: (1) planning for growth; (2) managing growth; (3) paying for growth and planning; (4) planning administration and development review; and (5) providing for an enhanced state role.

Contact Information

Department of Natural Resources and Conservation

<http://www.dnrc.state.mt.us/>

Department of Environmental Quality

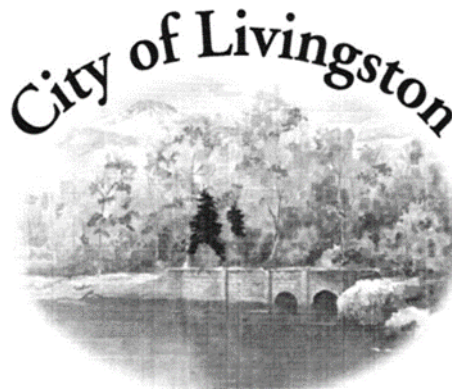
<http://www.deq.state.mt.us/>

Ed Bolen, Kara Brown, David Kiernan, Kate Konschnik, Smart Growth: A Review of Programs State by State, 8 Hastings W.-N.W. J. Env'tl. L. & Pol'y 145, 185–86 (2002)

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¶ 20 To assist in community planning and the orderly development of its governmental units and environs, local governments are authorized to create planning boards. Section 76–1–101, MCA (2003); *see also Ash Grove Cement Co. v. Jefferson County* (1997), 283 Mont. 486, 494, 943 P.2d 85, 90. Further, “[i]n counties ... where a planning board has been created, the preeminent planning tool is the comprehensive jurisdiction-wide development plan ...” which is today known as a “growth policy.”¹ **1263 *Ash Grove*, 283 Mont. at 494, 943 P.2d at 90; *see also* § 76–1–106, MCA (2002). A growth policy “essentially surveys land use as it exists and makes recommendations for future planning...” *Ash Grove*, 283 Mont. at 494, 943 P.2d at 90. By statute, a growth policy may include a neighborhood plan, and that plan must be consistent with the growth policy. Section 76–1–601(4)(a), MCA (2003). The statutory scheme includes § 76–1–605, MCA (2003), entitled “Use of adopted growth policy,” which states, in pertinent part, as follows:

Use of adopted growth policy. (1) Subject to subsection (2), after adoption of a growth policy, the governing body within the area covered by the growth policy pursuant to 76–1–601 must be guided by and give consideration to the general policy and pattern of development set out in the growth policy in the:

...

(c) adoption of zoning ordinances or resolutions.

(2)(a) A growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law.

(b) A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.

8 ¶ 21 “The establishment of zoning districts is governed by statute in Montana,” *Ash Grove*, 283 Mont. at 493, 943 P.2d at 89, and pursuant to those statutes, a municipality such as the City of Missoula may *275 create zoning districts. *See* § 76–2–301 et seq., MCA (2003). Zoning regulations are to be made, among other things, “in accordance with a growth policy...” Section 76–2–304, MCA (2003).

¶ 22 A question we have previously resolved is again raised here, that is, how closely a growth policy and neighborhood plan must be followed by a city when it zones lands pursuant to the statutory scheme. The statutes noted above are somewhat contradictory. Section 76–1–605, MCA (2003), provides that “the governing body within the area covered by the growth policy pursuant to 76–1–601 *must be guided by and give consideration* to the general policy and pattern of development set out in the growth policy in the: ...

(c) adoption of zoning ordinances or resolutions.” (Emphasis added.) On the other hand, § 76–2–304, MCA (2003), states that “[z]oning regulations must be ... made *in accordance* with a growth policy....” (Emphasis added.) The confusion is evident when one tries to reconcile these two statutes, since the former seems to require mere *consideration* of a growth policy in zoning decisions, while the latter seems to require a stricter *adherence* to the growth policy.

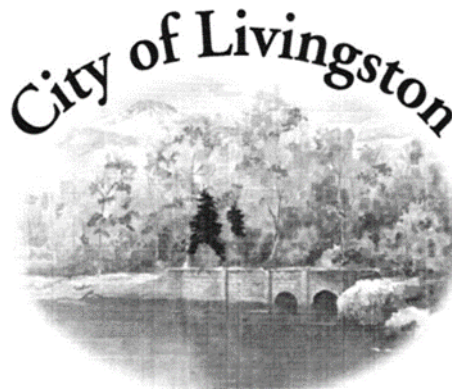
¶ 23 We previously reconciled this statutory incongruence in *Little v. Bd. of County Commissioners* (1981), 193 Mont. 334, 349–53, 631 P.2d 1282, 1290–93.² There, after struggling with the language of the statutes and considering the purposes of planning, we reasoned:

To require strict compliance with the master plan would result in a master plan so unworkable that it would have to be constantly changed to comply with the realities. The master plan is, after all, a plan. On the other

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hand, to require no compliance at all would defeat the whole idea of planning. Why have a plan if the local governmental units are free to ignore it at any time?

Little, 193 Mont. at 353, 631 P.2d at 1293. Ultimately, we concluded that the statutes required governmental zoning bodies to “substantially comply” with the master plan or growth policy. *Little*, 193 Mont. at 353, 631 P.2d at 1293. This “substantial compliance” standard has remained unchanged since *Little*. See *Ash Grove*, 283 Mont. at 497–98, 943 P.2d at 92; *Bridger Canyon Property Owners' Association, Inc. v. Planning & Zoning **1264 Commission* (1995), 270 Mont. 160, 169, 890 P.2d 1268, 1273.

¶ 24 Recently, however, the 2003 Legislature amended *276 § 76–1–605, MCA, adding the following language:

(2)(a) A growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law.

(b) A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.

Section 76–1–605(2), MCA (2003).³ The question then becomes how this new statutory language will affect *Little's* “substantial compliance” standard.

¶ 25 From its plain reading, it may be assumed that the 2003 legislation was intended to reduce in some fashion the reliance which local governing bodies are required to place upon growth policies when making land use decisions. However, although alluding to the passage of the new statute, both Appellants and Respondents have nonetheless framed their arguments regarding the validity of Ordinance 3234 under *Little's* “substantial compliance” standard, and offer no argument in support of a change in the standard.⁴ Consequently, and because the outcome is not dependent upon an interpretation of the new statute, we will undertake the arguments as presented—pursuant to the “substantial compliance” standard. While mindful of the statutory changes, we leave for another day the question of what effect the 2003 legislation has had on the “substantial compliance” standard.

¶ 26 Appellants argue that the zoning proposal does not substantially comply with the Joint Northside/Westside Neighborhood Plan for the following reasons. First, the proposal does not comport with the neighborhood plan's goal to maintain a sense of history and protect key landmarks. Second, the proposal, including Safeway's new facility, will increase traffic congestion and create a pedestrian unfriendly environment, which they claim violate key principles of the neighborhood plan. Finally, the scale of the proposed “big box” style Safeway facility is inconsistent with the residential and small business character of the neighborhood, which they argue the neighborhood *277 plan seeks to preserve.

Citizen Advocates For A Livable Missoula, Inc. v. City Council of City of Missoula, 2006 MT 47, ¶¶ 19–26, 331 Mont. 269, 274–77, 130 P.3d 1259, 1262–64

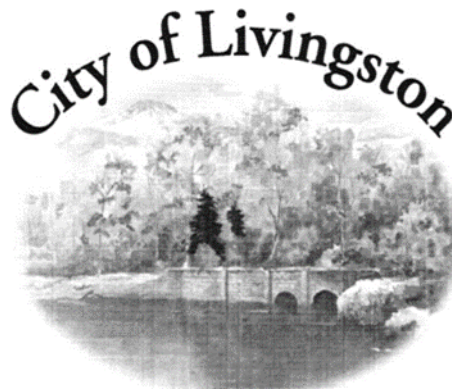
Cooperation With Planning Board By State And Local Governments

76-1-110. Cooperation with planning board by state and local governments. Whenever the board undertakes the preparation of a growth policy, the departments and officials of state, city, county, and separate taxing units operating within lands under the jurisdiction of the board shall make available, upon

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the request of the board, information, documents, and plans that have been prepared or, upon the request of the board, shall provide any information that relates to the board's activity.

History: En. Sec. 29, Ch. 246, L. 1957; R.C.M. 1947, 11-3829; amd. Sec. 7, Ch. 582, L. 1999.

ITILE 76. LAND RESOURCES AND USE

CHAPTER 1. PLANNING BOARDS

Part 6. Growth Policy

Adoption, Revision, Or Rejection Of Growth Policy

76-1-604. Adoption, revision, or rejection of growth policy. (1) The governing body shall adopt a resolution of intention to adopt, adopt with revisions, or reject the proposed growth policy.

(2) If the governing body adopts a resolution of intention to adopt a growth policy, the governing body may submit to the qualified electors of the area covered by the growth policy proposed by the governing body at the next primary or general election or at a special election the referendum question of whether or not the growth policy should be adopted. A special election must be held in conjunction with a regular or primary election.

(3) A governing body may:

(a) revise an adopted growth policy following the procedures in this chapter for adoption of a proposed growth policy; or

(b) repeal a growth policy by resolution.

(4) The qualified electors of the area covered by the growth policy may by initiative or referendum adopt, revise, or repeal a growth policy under this section. A petition for initiative or referendum must contain the signatures of 15% of the qualified electors of the area covered by the growth policy.

(5) A master plan adopted pursuant to this chapter before October 1, 1999, may be repealed following the procedures in this section for repeal of a growth policy.

(6) Until October 1, 2006, a master plan that was adopted pursuant to this chapter before October 1, 1999, may be revised following the procedures in this chapter for revision of a growth policy.

(7) Except as otherwise provided in this section, the provisions of Title 7, chapter 5, part 1, apply to an initiative or referendum under this section.

History: En. Sec. 40, Ch. 246, L. 1957; amd. Sec. 15, Ch. 247, L. 1963; R.C.M. 1947, 11-3840(part); amd. Sec. 1, Ch. 541, L. 1981; amd. Sec. 68, Ch. 387, L. 1995; amd. Sec. 11, Ch. 582, L. 1999; amd. Sec. 1, Ch. 87, L. 2003; amd. Sec. 6, Ch. 599, L. 2003.

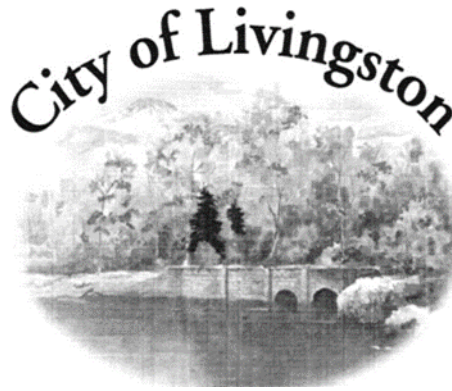
Montana. Counties are required to have a “growth policy” to guide their planning and zoning. The “growth policy” is defined as being “synonymous with the comprehensive development plan, master plan, or comprehensive plan that meets the requirements of [the statute].” Mont. Code Ann. § 76-1-106 (2000). See also *Allen v. Flathead County*, 184 Mont. 58, 601 P.2d 399 (1979) (comprehensive development plan required before adopting county zoning regulations).

§ 15:6.Enabling legislation and initiatives, 2 Rathkopf's The Law of Zoning and Planning § 15:6 (4th ed.)

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Planning and land use regulation is a comprehensive many layered process that is engaged in and overseen by the body that governs the territory jurisdiction

Planning
zoning
collaborative process

Missoula Growth Policy