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Plath v. Hi-Ball Contractors, Inc., 362 P.2d 1021 (Mont. 1961)

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opinion, the court in a proper case would reject the minority rule. Because the question of how much weight should be given on appeal to contradictory testimony of a party seldom arises in Montana, the supreme court wisely took this opportunity to clarify its position.

It is submitted that the decision in this case was proper; the former rule followed in Montana created a presumption of falsehood as to the party's statements and invaded the province of the lower court as to the findings of fact. The adoption of the majority rule is a step toward uniformity among the states and recognition of the practicalities in the presentation of evidence at the trial.

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MASTER PLAN ZONING STATUTES HELD TO BE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY—The Master Plan Act,[1] enacted by the 1957 legislature, provided for a system of zoning involving the cooperation of the city and county governments. The Act provided for the establishment of a city-county planning board which would be empowered to recommend a plan to include such property in the county as "in the judgment of the board bears reasonable relation to the development of the city";[2] the plan was subject to approval by the county and city governments insofar as their respective lands were affected; the purposes provision also provided "that additional powers be granted legislative bodies of cities and counties to carry out the purposes of this act."[3] Pursuant to these powers and after the adoption of a *Master Plan* for the City of Billings and the County of Yellowstone, the County of Yellowstone sought to enjoin acts violative of the *Plan* as it affected the county areas. Defendant's demurrer to the complaint challenging the constitutionality of the Act and actions taken pursuant to it, was sustained by the district court. On appeal to the Montana Supreme Court, *held,* affirmed. The Master Plan Act does not adequately set the standards and define the bounds within which an administrative body must act and is an unconstitutional delegation of legislative authority. *Plath v. Hi-Ball Contractors, Inc.*, 362 P.2d 1021 (Mont. 1961).[4]

The decision involves a consideration of two basic questions. First, did the legislature intend to grant legislative powers to counties? And second, was the power delegated legislative or were sufficient standards set forth in the statute so that the power delegated could be considered administrative?

Section 11-3801 of the Revised Codes of Montana, 1947, after stating the purposes of the Master Plan Act provides "that additional powers be granted legislative bodies of cities and counties to carry out the purposes of this act." The Montana Supreme Court stated that the legislature in-

[1]REVISED CODES OF MONTANA, 1947, §§ 11-3801 to -3858, as amended. Hereinafter REVISED CODES OF MONTANA are cited R.C.M.
[2]R.C.M. 1947, § 11-3830.
[3]R.C.M. 1947, § 11-3801.
[4]Petition for Clarification of Opinion was denied July 1961.

tended, by these words, to grant legislative powers to counties.[5] The court, basing its conclusion on the aforesaid wording of the statute, held that the legislature actually intended to do an unconstitutional act, *i.e.*, delegate legislative powers to counties. The court considered this intention to be "the crux of the entire matter,"[6] and the primary reason for holding the statutes unconstitutional.

It must always be presumed that the legislature intended to act within the scope of its authority,[7] and if two or more interpretations of a statute are possible the one favoring the constitutionality of the statute must be accepted.[8] It is possible that section 11-3801 could be interpreted as follows: additional powers are granted to *legislative bodies of cities* and additional powers are granted to *counties* to carry out the purposes of this act. Such an interpretation has considerable merit for two reasons. First, the legislature used the word *powers*; it did not say *legislative powers.* Second, such a construction would simply mean that the legislature intended the *legislative* bodies of cities to have these additional powers and not the executive or judicial branches in view of section 11-102 which provides that every city has *legislative, executive,* and *judicial* power. No such qualifying phrase was necessary when referring to counties inasmuch as the only governmental body of a county is the Board of County Commissioners.[9] Furthermore, the court's interpretation must necessarily assume that the legislators who drafted the statute erroneously thought counties had legislative bodies. It seems preferable to avoid such an assumption and the interpretation suggested above would do just that.

Whichever of these interpretations we accept, we are still faced with the second question, *i.e.*, could the power actually delegated be considered administrative rather than legislative? No constitutional problem would be raised if the delegation to the counties was merely that of administrative power. It has been held that powers normally considered legislative can be treated as administrative if they are merely to "fill in the details."[10] If the Master Plan Act merely gives to the planning boards and the counties the task of filling in the details of a statute worded in general terms, the power delegated would be administrative. The delegation of such power would be constitutional regardless of what the statute calls it and regardless of what the legislature intended; merely labeling it legislative power

[5]The clause granting additional powers is referred to several times by the court. The emphasis supplied by the court in the clause as it was quoted at page 1025 of the instant case clearly shows how the court interpreted the clause: "that additional powers be granted *legislative bodies of* cities and *counties*. . . ." At page 1023 the court stated, "[T]he following sections [the sections of the statute following the additional powers clause] purport to grant *counties* legislative powers as such." (Emphasis supplied by the court.)

[6]Instant case at 1023.

[7]State v. Stark, 100 Mont. 365, 368-69, 52 P.2d 890, 891 (1935).

[8]State v. Stark, *supra* note 7. The unconstitutionality of a statute must be proved beyond a reasonable doubt before the court will declare it unconstitutional. Herrin v. Erickson, 90 Mont. 259, 275, 2 P.2d 296, 302-03 (1931).

[9]R.C.M. 1947, § 16-802 provides that the powers exercised by *countuies* "can only be exercised by the board of county commissioners, or by agents, and officers acting under their authority, or authority of law." Furthermore, it has been held that counties have no legislative powers; they are administrative agents of the state. Hersey v. Neilson, 47 Mont. 132, 141-42, 131 Pac. 30, 32 (1913); State *ex rel.* City of Missoula v. Holmes, Ins. Comm'r, 100 Mont. 256, 274, 47 P.2d 624, 628-29 (1935).

[10]United States v. Grimaud, 220 U.S. 506, 517 (1911).

should not make its delegation to a county unconstitutional.[11] No general formula can be followed in determining whether a grant of power is "legislative" or merely "administrative." The Montana rule for such a determination was set out in *Bacus v. Lake County*:[12]

> . . . [A] statute is complete and validly delegates administrative authority when nothing with respect to what is the law is left to the administrative agency, and *its provisions are sufficiently clear, definite, and certain to enable the agency to know its rights and obligations.* (Emphasis supplied by the court.)

Each case must be decided by applying this general rule to the particular facts.[13] The legislature is not confined to that method of executing policy which involves the least possible delegation of discretion to administrative bodies.[14] The legislature is not required to legislate further than is practicable for the guidance of administrative bodies.[15] The policy of the law and the standard of action can be laid down in very broad and general terms,[16] provided it is capable of reasonable application.[17] And the sufficiency of such declarations varies with the complexity of the subject to which the law is to be applied.[18]

Some courts have held that it is not even necessary for the statute to prescribe a specific rule of action.[19] This is particularly true where it is difficult or impractical to state a definite, comprehensive rule or where the discretion to be exercised by the administrative officials relates to regulations imposed for the protection of public health, morals, safety, and the general welfare.[20] Thus, the modern tendency is to sustain delegations of authority to administrative bodies when such bodies are guided only by general standards.[21] For example, *Freeman v. Board of Adjustment*[22] involved a statute which delegated authority to a zoning board to grant "such variances from the terms of this ordinance as will not be *contrary to the public interest,* where owing to special conditions, a literal enforcement of the provisions of this ordinance will result in *unnecessary hardship,* and so that the *spirit of this ordinance shall be observed* and *substantial justice done.*"[23] (Emphasis supplied.) This statute was upheld. And in *State ex rel. Stewart v. District Court*[24] the court upheld a statute which granted

[11]In determining whether a statute is constitutional, regard is to be given substance and not form. Londoner v. Denver, 210 U.S. 373, 385 (1908); Chesebro v. Los Angeles County Flood Control Dist., 306 U.S. 459, 464 (1939).
[12]354 P.2d 1056, 1061 (Mont. 1960). This passage is a direct quotation from 73 C.J.S. *Public Administrative Bodies and Procedure* § 29 (1951).
[13]State v. Vaughan, 30 Ala. App. 201, 4 So.2d 5, 8 (1941).
[14]Yakus v. United States, 321 U.S. 414, 425 (1944); American Power & Light Co. v. Securities & Exch. Comm'n, 329 U.S. 90, 105 (1946).
[15]Lichter v. United States, 334 U.S. 742, 785 (1948); Allegheny Airlines, Inc. v. Village of Cedarhurst, 238 F.2d 812, 816 (1956).
[16]State v. Andre, 101 Mont. 366, 54 P.2d 566 (1936); State v. Stark, 100 Mont. 365, 52 P.2d 890 (1935).
[17]Olp v. Town of Brighton, 19 N.Y.S.2d 546, 550 (1940).
[18]Mitchell v. Morris, 94 Cal. App. 2d 446, 210 P.2d 857, 859 (1949).
[19]Kelleher v. Minshull, 11 Wash. 2d 380, 119 P.2d 302, 309 (1941).
[20]*Ibid.*
[21]Annot. 58 A.L.R.2d 1087 (1958) and cases cited therein.
[22]97 Mont. 342, 34 P.2d 534 (1934).
[23]R.C.M. 1947, § 11-2707.
[24]103 Mont. 487, 63 P.2d 141 (1936).

the Beer Control Board the power to ". . . make such regulations as are *necessary and feasible* for the purpose of carrying into effect the provisions of this Act, and such regulations shall have the full force and effect of law.'"[25] (Emphasis supplied.)

A legislative act granting zoning power to counties with standards remarkably similar to the standards set forth in the Master Plan Act was held constitutional by the Montana Supreme Court in a decision handed down on the same day that the instant case was decided. Under the statutes[26] involved in *City of Missoula v. Missoula County*.[27] the county commissioners were authorized to create a planning and zoning district when sixty percent of the freeholders in the area petitioned for its creation.[28] Unlike the Master Plan Act, the zoning under this act was not restricted by a territorial limitation.[29] However, each act provides for a planning commission or board.[30] The legislative purposes behind each act are definitely expressed and identical, *i.e.,* furthering the health, safety, and general welfare of the people of the county.[31] In both acts the procedural matters and things to be done are expressed in very broad and general terms.[32]

Both acts contain similar provisions limiting the authority of the board or commission. Under the Master Plan Act, the board must adopt a plan which "in the judgment of the board. bears reasonable relation to the de-

[25]R.C.M. 1947, § 4-307.
[26]R.C.M. 1947, §§ 16-4101 to -4107.
[27]362 P.2d 539 (Mont. 1961).
[28]R.C.M. 1947, § 16-4101.
[29]R.C.M. 1947, § 16-4107.
[30]The County Planning and Zoning Districts Act provides for a *planning and zoning commission.* R.C.M. 1947, § 16-4101. The Master Plan Act provides for a *planning board.* R.C.M. 1947, § 11-3801.
[31]R.C.M. 1947, § 16-4102; R.C.M. 1947, § 11-3801. Similar language is also used in R.C.M. 1947, § 11-3828. Actually the guidelines gleaned from the purposes of the acts are more definite in the Master Plan Act; after stating the purpose indicated above, the statute continues, "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." R.C.M. 1947, § 11-3801.
[32]In both acts the board or commission is granted almost complete discretion in determining the area to be zoned and the use to which the land can be put in these zoned areas. The only limitation is that there shall be public notice and hearings and the definitely expressed will of the legislature is to be followed, *i.e.,* furthering the health, safety, and general welfare of the community by the use of a definite plan for development. R.C.M. 1947, §§ 16-4101 to -4105, 11-3801, -3828, -3830, -3833, 3856. The Master Plan Act provided a procedure for approval of the plan by the governing bodies. However, the court in the instant case, while apparently giving reasons why the standards were insufficient, held that all of the discretion in the adoption of a Master Plan was lodged in the planning board. Instant case at 1025. This argument could only be applied to cities and would be of no significance when applied to counties inasmuch as counties can have no greater discretion than the planning board, both of which have only administrative power. In fact, under the County Planning and Zoning Districts Act approval of the plan drawn up by the planning and zoning commission was not required. R.C.M. 1947, § 16-4104. As previously indicated, this statute was upheld.

The Montana Supreme Court has said, ". . . if an Act but authorizes the administrative officers or board to carry out the definitely expressed will of the legislatiure, although procedural directions and the things to be done are specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power." Chicago, Milwaukee, & St. Paul Ry. Co. v. Board of R.R. Comm'rs, 76 Mont. 305, 314-15, 247 Pac. 162, 164 (1926).

velopment of the city.''[83] Under the County Planning and Zoning Districts Act, the commission must adopt a development pattern for ''the physical and economic development of the planning and zoning district.''[84] Moreover, the acts have similar clauses granting additional powers to the board or commission. The Master Plan Act provides ''that additional powers be granted . . . to carry out the purposes of this act.[85] The County Planning and Zoning Districts Act provides that the commission ''shall have such powers as may be appropriate to enable it to fulfill its functions and duties to promote county planning and to carry out the purposes of this act.[86]

The decision reached by the court in the instant case appears to be in direct conflict with the decision in the *City of Missoula* case. Admittedly the standards in both cases are very broad and there is some question as to their sufficiency in either case. Broad standards, however, are permitted, especially when a definite and comprehensive standard is difficult to establish without limiting the effectiveness of the act. The court by its ruling in the instant case has held that standards which were sufficient in one set of zoning statutes are not sufficient in another set of zoning statutes.

Thus, in examining the Master Plan Act, the court in the instant case placed great emphasis on the clause granting additional powers. An interpretation of this clause that would have saved the act's constitutionality could have been adopted. However, regardless of the words found in this additional powers clause, the court should have looked to the substance of the act. The sufficiency of the statutory standards in the delegation of administrative powers would then be put in issue. The standards in this act, although broad, were sufficient. In fact, it is difficult to find any significant difference in the standards set forth in this act and the standards set forth in the County Planning and Zoning Districts Act held constitutional in *City of Missoula v. Missoula County*. To be consistent and to establish guide lines for the drafters of future county zoning legislation, the court should have upheld the statutes in this case.

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[83]R.C.M. 1947, § 11-3830.
[84]R.C.M. 1947, § 16-4102.
[85]R.C.M. 1947, § 11-3801.
[86]R.C.M. 1947, § 16-4104.

The opinion in the *City of Missoula* case alleges a limitation of the zoning power in the County Planning and Zoning District Act to three specified areas, namely, the regulation of business carried on, the kind of buildings erected, and the regulation of open areas around buildings. 362 P.2d at 542. However, § 16-4102 provides that the commission has the power to limit the *"future uses of land or buildings"* located within its jurisdiction. In the light of these words, any limitation as to the types of regulations that are authorized seems illusory, and no distinction can be made on this ground between the two zoning acts.