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## City-County Planning In Montana — Its Status and Prospects

Neil S. Keefer\*

### INTRODUCTION

One of the great challenges facing city and county officials in Montana today is the need to promote, as efficiently and economically as possible, the coordinated growth and development of the communities they serve. The advantages of organized municipal planning are obvious and emphatic. The character of a community is directly determined by the amount and type of development that takes place within it.

Municipal planning and zoning provide the media by which community development can be directed and controlled. While the terms "zoning" and "planning" are complimentary, the two concepts are not entirely duplicative.<sup>1</sup> Zoning is concerned chiefly with the separation of a municipality into districts, and the regulation of buildings and structures and their utilization within those districts. Planning, on the other hand, is of broader scope and significance. Planning contemplates the systematic and orderly development of a community with particular regard to traffic patterns, parks, industrial and commercial undertakings, civic beauty and other kindred matters relative to its future physical growth, progress and needs.<sup>2</sup> A New Jersey decision defines municipal planning as the accommodation of the variant interests seeking expression in the community as a social unit. Planning is both a science and an art concerned with land economics and land policies in terms of social and economic betterment. The control essential to planning is exercised through government ownership or regulation of the use of the locus.<sup>3</sup>

The scope and purpose of this article shall be to examine the laws of the State of Montana relative to municipal planning in its broader sense and zoning in its somewhat narrower and more restricted sense; to discuss certain of the problems, both legal and practical inherent in the planning process; to propose guidelines for effective and comprehensive planning programs which can be conducted within the limitations of existing Montana law; and to propose certain amendments to our laws which might make planning and zoning more effective. Community planning is of considerably more than mere academic interest to Montana communities having an urban population of more than 50,000 people. After July 1, 1965, federal aid for highway construction will not be available to an urban area of more than 50,000 population unless that community carries on a continuing, comprehensive transportation study process. This continuing, comprehensive transportation study process will

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<sup>1</sup>Metzdorf v. Borough of Rumson, 67 N.J. Super. 121, 170 A.2d 249 (1961).

<sup>2</sup>State *ex rel.* Kearns v. Ohio Power Co., 163 Ohio St. 451, 127 N.E.2d 394, 399 (1955); Antonelle Const. v. Milstead, 34 N.J. Super. 449, 112 A.2d 608, 612 (1955). For other cases discussing this concept see 32A WORDS & PHRASES, *Planning*, 214.

<sup>3</sup>Birkfield Realty Co. v. Bd. of Comm'rs, 12 N.J. Super. 192, 79 A.2d 326 (1951), citing Grosso v. Bd. of Adjustment, 137 N.J.L. 630, 61 A.2d 167 (1948).

require community planning in its broadest context.<sup>4</sup> It is imperative that at least our larger Montana communities inaugurate community planning and do so without delay. It would also appear that the "urban area" requirement of federal law will require the creation of city-county planning boards, not merely city planning boards.

### CITY-COUNTY PLANNING AND ITS IMPLEMENTATION

Montana law provides for the creation of planning boards, either by a city alone, or by a city and county joining to create a joint city-county planning board. Planning boards are intended to provide a means whereby a community can orderly study its needs and plan for its future. Under present law the planning board is advisory only. It is delegated the functions of studying community problems and preparing a comprehensive Master Plan of community development. Implementation of the master plan is left to the regular municipal and county governments respectively. The city benefits the most, perhaps, by planning, both within its corporate limits, and through the orderly and systematic development of land adjacent to the city which might someday become a part of the city itself.

City planning boards or city-county planning boards are provided for in Title 11, Chapter 38, *Revised Codes of Montana*, 1947. This chapter was thoroughly revised by the 1963 Legislature,<sup>5</sup> and comprises the basic planning legislation in Montana. Planning boards are intended to provide a means whereby a community can orderly plan for its future development and expansion. The Legislature intended planning boards

\*Federal-Aid Highway Act § 9 (1962) (now 23 U.S.C. § 134) states:

It is declared to be in the national interest to encourage and promote the development of transportation systems embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective the secretary shall cooperate with the states, as authorized in this title, in the development of long-range highway plans and programs which are properly coordinated with plans for improvement in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. *After July 1, 1965, the Secretary shall not approve under Section 105 of this Title any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by states and local communities in conformance with the objectives stated in this section.* (Emphasis supplied).

To date the City-County Planning Boards of Billings and Great Falls have entered into agreements with the Montana Highway Department to undertake appropriate studies to satisfy this requirement. Both communities will receive federal assistance to enable them to undertake the studies. Federal Aid is likewise available under this Act in addition to the programs listed in Appendix A *infra*. Information can be obtained from the Montana Highway Department in Helena, Montana.

Instructional Memorandum 50-2-63(1) issued by the Bureau of Public Roads of the United States Department of Commerce on Sept. 13, 1963, defines what is required in the transportation planning process specified in Federal-Aid Highway Act § 9 (1962) (now 23 U.S.C. § 134). Ten basic studies are required: (1) Economic factors affecting development. (2) Population studies. (3) Land use. (4) Transportation facilities including those for mass transportation. (5) Travel patterns. (6) Terminal and transfer facilities. (7) Zoning ordinances, subdivision regulations, building codes, etc. (8) Financial resources. (9) Traffic engineering features. (10) Social and community value factors. These ten basic studies would seem to envision a broad community planning process.

<sup>5</sup>Laws of Montana 1963, ch. 247.

to serve in an advisory capacity to presently established boards and officials.<sup>6</sup> The planning board is delegated two essential functions: (1) To prepare a master plan;<sup>7</sup> *i.e.*, a comprehensive development plan of land use and zoning, of thoroughfares, of sanitation, of recreation and other related matters, including proposed ordinances and resolutions;<sup>8</sup> and, (2) To serve in an advisory capacity to the local governing bodies, city and county, establishing the planning board.<sup>9</sup>

The planning board therefore prepares a master plan, and renders continuous advice. The governing bodies of the city and county are required to give consideration to recommendations of the planning board, but are not bound by such recommendations.<sup>10</sup> The master plan serves as a guide,<sup>11</sup> but actual implementation is specifically left to the regularly constituted city and county governments respectively.<sup>12</sup>

Provisions are made in the law for either a city planning board<sup>13</sup>, or if the county desires to participate, for a joint city-county planning board.<sup>14</sup> Two or more cities in a county may join with the county in the creation of a joint city-county planning board.<sup>15</sup> Regardless of the type

<sup>6</sup>REVISED CODES OF MONTANA, 1947, § 11-3801. Hereinafter REVISED CODES OF MONTANA will be cited R.C.M.

<sup>7</sup>R.C.M. 1947, § 11-3828.

<sup>8</sup>*Id.* § 11-3803(4).

<sup>9</sup>*Id.* § 11-3828(1).

<sup>10</sup>*Id.* § 11-3828(4).

<sup>11</sup>*Id.* § 11-3840.

<sup>12</sup>R.C.M. 1947, § 11-3801 clearly states that it is the intention of this legislation that the planning board shall serve in an advisory capacity to presently established boards and officials. R.C.M. 1947, § 11-3828 provides that the planning board shall prepare a master plan and shall serve in an advisory capacity to the local governing bodies establishing the board, and may propose policies for subdivision plats, development of public improvements, etc. The governing bodies of the city or county are expressly stated to not be bound by any recommendations of the planning board. Laws of Montana 1963, ch. 246 has been enacted, *for the purpose of promoting the health, safety, morals and general welfare* of the people in cities and towns and counties whose governing bodies have adopted a comprehensive development plan for jurisdictional areas. Pursuant to R.C.M. 1947, tit. 11, ch. 38, the board of county commissioners in such counties are authorized to adopt zoning regulations for all or parts of such jurisdictional areas in accordance with the provisions of this act.

<sup>13</sup>R.C.M. 1947, § 11-3804 provides that a city planning board shall consist of not less than seven (7) members; one member of the city council, one other city council appointee, four citizen appointees by the mayor, and one appointment by the mayor upon the designation of the county commissioners. A county representative is expressly contemplated. If the county commissioners do not designate a county representative within 45 days of the creation of the city planning board, the mayor may appoint a person of his own choosing as a representative of the county. (R.C.M. 1947, § 11-3813).

<sup>14</sup>A city desiring to create a city planning board must notify the county commissioners in writing of their intention to do so, and the commissioners can, within 30 days elect to join with the city in the creation of a city-county planning board. (R.C.M. 1947, § 11-3805). A city-county planning board shall consist of not less than nine (9) members; five (5) appointed by the board of county commissioners, two (2) of which may be employed by or hold public office in the county; two (2) appointed by the city council, who may be employed by or hold public office in the city; and two (2) appointed by the mayor. (R.C.M. 1947, § 11-3810). Citizen members of the city-county planning board must reside within the board's jurisdictional area (R.C.M. 1947, § 11-3811) and may be removed from office by the appointive authority. (R.C.M. 1947, § 11-3813).

<sup>15</sup>R.C.M. 1947, § 11-3815.

of planning board decided upon, the organizational and procedural requirements are the same.<sup>16</sup> To effectuate the purposes of the Act the board is given specific powers and duties.<sup>17</sup>

The jurisdictional area of a city planning board is co-extensive with the limits of the city. The jurisdictional area of a city-county planning board includes the area within the incorporated limits of the city and such contiguous unincorporated area outside the city as, in the judgment of the respective governing bodies, bears a reasonable relationship to the development of the city, not to extend more than 4½ miles beyond the city limits. A map shall be prepared, showing the jurisdictional area, and filed in the office of the County Clerk and Recorder.<sup>18</sup> The activities of the planning board shall be financed through a mill levy, not to exceed one mill, levied upon property located within the jurisdictional area of the board.<sup>19</sup>

After the planning board has been created, financed and organized it is directed to prepare a master plan, and in the discretion of the city

<sup>16</sup>The board shall hold regular meetings, at least once a month during the months of January, April, July, and October. (R.C.M. 1947, § 11-3816). Special meetings may be held upon written notice. (R.C.M. 1947, § 11-3817). A majority constitutes a quorum. (R.C.M. 1947, § 11-3818). The members of the planning board shall receive no salary for service on the planning board (R.C.M. 1947, § 11-3819), but may be reimbursed actual out of pocket expenses. (R.C.M. 1947, § 11-3820). The board organizes, electing a President and Vice-President from its membership. (R.C.M. 1947, § 11-3821). The board may employ a secretary and other necessary employees. (R.C.M. 1947, § 11-3822). Office space shall be provided by either the city or county. (R.C.M. 1947, § 11-3823). The board has authority to expend money (R.C.M. 1947, § 11-3826), and may accept gifts and donations. (R.C.M. 1947, § 11-3827).

<sup>17</sup>R.C.M. 1947, § 11-3824.

*Power and duties.* To effectuate the purpose of this act, the board shall have the power and duty to:

1. Exercise general supervision of and make regulations for the administration of the affairs of the board.
2. Prescribe uniform rules pertaining to investigations and hearings.
3. Supervise the fiscal affairs and responsibilities of the board.
4. Prescribe the qualifications of, appoint, remove, and fix the compensation of the employees of the board, and delegate to employees authority to perform ministerial acts in all cases except where final action of the board is necessary.
5. Keep an accurate and complete record of all departmental proceedings; record and file all bonds and contracts and assume responsibility for the custody and preservation of all papers and documents of the board.
6. Make recommendations and an annual report to any governing bodies represented on the board concerning the operation of the board and the status of planning within its jurisdiction.
7. Prepare, publish, and distribute reports, proposed ordinances and proposed resolutions and other material relating to the activities authorized under this act.
8. Prepare and submit to the governing bodies represented on the board an annual budget in the same manner as other departments of the city and county governments and shall be limited in all expenditures to the provisions made therefor by the governing bodies represented upon the board.

<sup>18</sup>R.C.M. 1947, § 11-3830.

<sup>19</sup>R.C.M. 1947, § 11-3825. The governing body of any city or town represented upon a planning board may levy a tax upon the property located within such city or town not to exceed one (1) mill for planning board purposes, under procedures set forth in R.C.M. 1947, tit. 11, ch. 14.

When a city-county planning board has been established, the board of county commissioners may create a planning district which shall include that property within the jurisdiction areas as established pursuant to Section 11-3820, which lies outside the limits of any incorporated cities and towns; and the board of county commissioners may levy on all property located within such planning district a tax not to exceed one (1) mill for planning board purposes, under procedures set forth

council to function as the city zoning commission.<sup>20</sup> The studies to be conducted in formulating the master plan are quite broad and comprehensive, encompassing: studies of existing conditions and probable future growth; maps, plats and charts presenting basic information about the community; recommendations setting forth plans for development, improvement, etc. of the community. The principal statute specifying the contents of the master plan is R.C.M., 1947, section 11-3831.<sup>21</sup>

<sup>20</sup>R.C.M. 1947, § 11-3828. Master Plan—policies.

1. To assure the promotion of public health, safety, morals, convenience, order, or the general welfare and for the sake of efficiency and economy in the process of community development, the planning board shall prepare a master plan and shall serve in an advisory capacity to the local governing bodies establishing the planning board.
2. The planning board may also 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.
  - d. the laying out and development of public ways and services to platted and unplatted lands.
3. The city council may in its discretion require the city-county planning board to function as the zoning commission authorized under section 11-2706, R.C.M. 1947.
4. The governing bodies of the city or county shall give consideration to recommendations of the city-county planning board but the governing bodies shall not be bound by such recommendations.

<sup>21</sup>R.C.M. 1947, § 11-3831. Master plan—contents. The planning board shall prepare and propose a master plan for the jurisdictional area, which plan may include:

1. Careful and comprehensive surveys and studies of existing conditions and the probable future growth of the city and its environs or of the county.
2. Maps, plats, charts, and descriptive material presenting basic information, locations, extent and character of any of the following:
  - a. History, population, and physical site conditions;
  - b. Land use, including the height, area, bulk, location and use of private and public structures and premises;
  - c. Population densities;
  - d. Community centers and neighborhood units;
  - e. Blighted and slum areas;
  - f. Streets and highways, including bridges, viaducts, subways, park-ways, alleys, and other public ways and places;
  - g. Sewers, sanitation, and drainage, including handling, treatment, and disposal of excess drainage waters, sewage, garbage, refuse, and other wastes;
  - h. Flood control and prevention;
  - i. Public and private utilities, including water, light, heat, communication, and other services;
  - j. Transportation, including rail, bus, truck, air, and water transport, and their terminal facilities;
  - k. Local mass transit, including motor and trolley bus, street, elevated or underground railways, and taxicabs;
  - l. Parks and recreation, including parks, playgrounds, reservations, forests, wild life refuges, and other public grounds, spaces and facilities of a recreational nature;
  - m. Public buildings and institutions, including governmental administration and service buildings, hospitals, infirmaries, clinics, penal and correctional institutions, and other civic and social service buildings;
  - n. Education, including location and extent of schools, colleges and universities;
  - o. Land utilization including areas for manufacturing, and industrial uses, concentration of wholesale, retail business, and other commercial uses, residential, and areas for mixed uses;
  - p. Conservation of water, soil, agricultural, and mineral resources;
  - q. Any other factors which are a part of the physical, economic, or social situation within the city or county.
3. Reports, maps, charts, and recommendations setting forth plans for the development, redevelopment, improvement, extension, and revision of the subjects

Upon completion of the master plan, and before its final submission to the governing bodies, the planning board shall hold a public hearing upon the plan upon ten days notice to the public.<sup>22</sup> The planning board, after considering public comments, must finalize its master plan and formally recommend the proposed master plan and any proposed ordinances and resolutions for its implementation to the governing bodies of the governmental units represented on the board.<sup>23</sup> The governing bodies may then adopt, revise or reject the proposed master plan or any of its parts.<sup>24</sup>

As companion legislation to the basic planning legislation just discussed, the 1963 Legislature also enacted chapter 246, Laws of Montana, 1963,<sup>25</sup> to enable county commissioners to implement the completed master plan at the county level through zoning. Zoning is used in this chapter to mean the separation of county land within the jurisdictional area into districts and the regulation of buildings and structures and their uses within those districts.<sup>26</sup> This chapter is specifically made operative only after counties have adopted a comprehensive master plan of community development, and attempts to provide a media whereby counties can adopt appropriate zoning regulations co-extensive with the jurisdictional area of the city-county planning board.<sup>27</sup>

To effectuate this chapter the city-county planning board is directed to advise and recommend appropriate zoning boundaries and regulations.<sup>28</sup> Rather comprehensive guidelines are spelled out to govern the

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and physical situations of the city or county set out in part 2 of this section so as to substantially accomplish the object of this legislation as set out in section 11-3801.

4. A long-range development program of public works projects, based on the recommended plans of the planning board, for the purpose of eliminating unplanned, unsightly, untimely, and extravagant projects and with a view to stabilizing industry and employment, and the keeping of such program up-to-date, for all separate taxing units within the city or county, respectively, for the purpose of assuring efficient and economic use of public funds.

<sup>22</sup>R.C.M. 1947, § 11-3833.

<sup>23</sup>R.C.M. 1947, § 11-3834.

<sup>24</sup>R.C.M. 1947, § 11-3840. Adoption of master plan—policy and pattern of development. The governing bodies shall adopt, revise or reject such proposed plan or any of its parts. After adoption of the master plan the city council, the board of county commissioners, or other governing body within the territorial jurisdiction of the board shall be guided by and give consideration to the general policy and pattern of development set out in the master plan in the:

1. Authorization, construction, alteration, or abandonment of public ways, public places, public structures, or public utilities;
2. Authorization, acceptance, or construction of water mains, sewers, connections, facilities, or utilities;
3. Adoption of subdivision controls;
4. Adoption of zoning ordinances or resolutions.

<sup>25</sup>Laws of Montana 1963, ch. 246 (now R.C.M. 1947, tit. 16, ch. 47).

<sup>26</sup>*Supra* notes 1 & 2.

<sup>27</sup>R.C.M. 1947, § 16-4701. Purpose of Act—Powers of county commissioners. For the purpose of promoting the health, safety, morals and general welfare of the people in cities and towns and counties whose governing bodies have adopted a comprehensive development plan for jurisdictional areas pursuant to Title 11, Chapter 38, R.C.M. 1947, the board of county commissioners in such counties are authorized to adopt zoning regulations for all or parts of such jurisdictional areas in accordance with the provisions of this act.

<sup>28</sup>R.C.M. 1947, § 16-4702.

discretion of the county commissioners.<sup>29</sup> Procedures for setting up zoning districts, requiring notice and public hearing, are provided.<sup>30</sup> Finally, provision is made for a Board of Adjustment to make special exceptions in appropriate cases.<sup>31</sup> Also in the statutes is another comprehensive law providing for county zoning districts, Title 16, Chapter 41, R.C.M., 1947.<sup>32</sup> The relationship of these two separate and distinct county zoning laws will be discussed later in this article.

In addition to those laws dealing with formal zoning, many other provisions of Montana law can be utilized to effectuate planning objectives. The wide range of statutes available, complimented by vigor and imagination in their employment offer ample opportunity to implement a master plan of community development.

Cities are clothed with broad powers to achieve planning objectives. The city has the right to annex contiguous land<sup>33</sup> and are given broad power to deal generally with streets, alleys, parks, plats, utilities, etc.<sup>34</sup> Specifically, cities are granted power to create Special Improvement Districts,<sup>35</sup> to abate smoke nuisances,<sup>36</sup> to prescribe building regulations and zoning regulations, to establish a zoning commission,<sup>37</sup> to provide off street parking facilities, which shall be subject to overall planning,<sup>38</sup> to undertake urban renewal programs,<sup>39</sup> and to close and fill open ditches.<sup>40</sup> Montana law also grants extra-territorial jurisdiction to cities in certain select instances.<sup>41</sup> Cities, of course, can enact zoning ordinances effective within their city limits. This power will be discussed later in this article.

<sup>29</sup>*Id.* §§ 16-4703, 16-4704.

<sup>30</sup>*Id.* § 16-4705.

<sup>31</sup>*Id.* § 16-4706.

<sup>32</sup>R.C.M. 1947, §§ 16-4101 to 16-4107 inclusive.

<sup>33</sup>R.C.M. 1947, tit. 11, ch. 4.

<sup>34</sup>*Id.* ch's. 9 & 10.

<sup>35</sup>*Id.* ch. 22.

<sup>36</sup>*Id.* ch. 25.

<sup>37</sup>*Id.* ch. 27.

<sup>38</sup>*Id.* ch. 37, § 11-3710.

<sup>39</sup>*Id.* ch. 39.

<sup>40</sup>*Id.* ch. 40.

<sup>41</sup>Many statutes granting to municipal corporations, or cities, certain powers useful in the implementation of planning, grant extraterritorial jurisdiction to the city. Selected examples are as follows: the city has power to control platting of land adjacent to the city. (R.C.M. 1947, §§ 11-401, 11-402); the mayor as the chief executive officer of the city has such power as may be vested in him by ordinance, within five (5) miles of the city boundaries, to enforce health and quarantine ordinances and regulations (R.C.M. 1947, 11-802(17)); the city has power to regulate or prohibit any offensive or unwholesome establishments within three (3) miles of the city limits (R.C.M. 1947, § 11-944); the City Board of Health has jurisdiction within three (3) miles of the city limits (R.C.M. 1947, § 11-946); the city can regulate or prohibit cemeteries within three (3) miles of the city limits (R.C.M. 1947, § 11-948); arrest of persons is authorized within five (5) miles of the city limits (R.C.M. 1947, § 11-960); the city has extraterritorial powers of condemnation for utilities (R.C.M. 1947, § 11-977); the city can acquire land outside of the city for landing fields and parking areas (R.C.M. 1947, § 11-986); the city can furnish water outside of the city limits (R.C.M. 1947, § 11-1001).

No Montana Supreme Court case has expressly ruled on the extraterritorial jurisdiction of cities when conferred by statute. However, the law seems well settled that a legislature may authorize the exercise of municipal powers beyond municipal limits. Where a specific statute does not authorize such exercise, however, the powers of a municipal corporation cease at the municipal boundaries. 62 C.J.S. *Municipal Corporations* § 141 (1955).



Usually one of the first steps to change land utilization from agricultural uses to one of the uses associated with a community of people, is to subdivide the land. At the platting stage the city and the county working together through a city-county planning board can accomplish many of the objectives of their plan of community development, regardless of the legality of county zoning per se. Title 11, Chapter 6, R.C.M., 1947, sets forth platting procedures. When the land platted is within the boundaries of an incorporated city or town, the city or town council has the authority to approve or reject the plat.<sup>42</sup> When the land platted is outside the boundaries of a city or town, the board of county commissioners is granted the power of approval or rejection.<sup>43</sup>

In either case wide discretion is vested in the reviewing authority to determine the composition of the plat and contemplated land usage.<sup>44</sup>

<sup>42</sup>R.C.M. 1947, § 11-608(1) provides as follows:

*Plat to be prepared in duplicate—approval of same by municipal council or county commissioners—filing and recording.* (1) All such plats must be prepared in duplicate, and when the land platted is within the boundaries of an incorporated city or town, such plats must be submitted to the city or town council for examination and approval or rejection, and when found to conform to law to be approved in duplicate by the council and the city or town engineer, and a certificate of approval shall be indorsed thereon signed by the mayor and the clerk; and a certificate of the city or town engineer shall be indorsed thereon showing that the plat conforms to the adjoining additions or plats of the city or town already platted, as near as the circumstances will admit; and one of such plats so approved and certified shall be filed with the city or town clerk, and one shall be filed with the county clerk and recorder of the county, which shall be the official plat and survey.

<sup>43</sup>R.C.M. 1947, § 11-608(2) provides as follows:

When the land platted is outside of the boundaries of a city or town, such plat must be prepared in duplicate and submitted to the board of county commissioners of the county for its examination and approval or rejection, and when found to conform to law to be approved in duplicate by such board of county commissioners and by the county surveyor, and a certificate of approval shall be signed by the chairman of such board and by the county clerk and by the county surveyor, and both plats shall be filed and recorded with the county clerk and recorder. When such town site is duly included within the boundaries of an incorporated city or town, upon application of such city or town council to such board of county commissioners showing such incorporation, such board shall by an order direct that one of such plats so approved, certified, and filed shall be delivered to the mayor and city clerk, which shall be filed and become the official plat and survey of such city or town.

<sup>44</sup>R.C.M. 1947, § 11-602 provides as follows:

*What plat must contain.* The plat must show as follows:

1. All streets, alleys, avenues, and highways and the width thereof.
2. All parks, squares, and all other grounds dedicated or reserved for public uses, with the boundaries and dimensions thereof.
3. All lots and blocks with their boundaries, designating such lots and blocks by numbers, and giving the dimensions of every lot and block.
4. The angles of intersection of all boundary lines of the lots and blocks wherever the angle of intersection is not a right angle.
5. The location of all stone or iron monuments set to establish street lines.
6. The exterior boundaries of the piece of land so platted, giving such boundaries by true courses and distances.
7. The location of all section corners or legal subdivision corners of sections within the limits of said plat.
8. The adjoining block corners of all surveyed and adjoining additions, and the streets, alleys, avenues, and highways of such adjoining additions, for the purpose of showing how the new plat and survey conform to such adjoining addition of surveyed and platted ground.
9. For the purpose of promoting the public comfort, welfare, and safety, such plat and survey must show at least one-ninth of the platted area, exclusive of streets, alleys, avenues, and highways, is forever dedicated to the public for parks and playgrounds; the one-half of such area so dedicated to the public

Specific authority is given by statute to require platting of any tract of land of less than ten acres as a prerequisite to recording a conveyance.<sup>45</sup> It is submitted that these statutes grant to city and county officials wide discretion which, utilized aggressively and with imagination, can be used to conform the use of newly platted lands to that contemplated by the master plan of community development. Streets, alleys, highways, parks and lot sizes can be controlled. As a practical matter subdivision restrictions can often be obtained that will insure utilization of the platted land in conformance with the community master plan.

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for parks and playgrounds may be distributed in small plots of not less than one block in area through the different parts of the area platted; and the one-half shall be consecrated into larger parks on the outer edge of the area so platted. The Board of county commissioners of the county, or the council of the city or town, is hereby authorized to suggest suitable places for such parks and playgrounds, and for good cause shown may make an order in the proceedings of such body (to be indorsed and certified on said plat), diminishing the amount of such area herein required to be dedicated as public parks and playgrounds to not less than one-twelfth thereof, exclusive of streets, alleys, avenues, and highways; provided, that where such platted area consists of a tract of land containing less than twenty acres, such board of county commissioners of the county, or the council of the city or town, may make an order in the proceedings of such body, to be indorsed and certified on said plat, that no park or playground be set aside or dedicated.

<sup>45</sup>R.C.M. 1947, § 11-614 provides as follows:

*Small and irregularly shaped tracts must be platted, surveyed and certified before sale.* Any person who desires to subdivide and sell or transfer any tract of land in small tracts, such as orchard tracts, vineyard tracts, acreage tracts, suburban tracts, or community tracts, containing less than the United States legal subdivision of ten (10) acres, or who shall subdivide and/or sell or transfer any irregularly shaped tract of land, the acreage of which cannot be determined without a survey, must cause the same to be surveyed, platted, certified, and filed in the office of the county clerk and recorder of the county in which said land lies, according to the provisions of this chapter before any part or portion of the same is sold or transferred; except that it will not be necessary to comply with the provisions of this chapter relating to parks and playgrounds, and such sales or transfers must be made by reference to the plat on file and the numbers of the lots and blocks. It is unlawful for any further sales to be made without a full compliance with the provisions of this chapter, and the surveying and platting of the whole tract, showing the lots sold before the filing of the plat; provided further that until the filing of such plat, or survey, the county clerk of any county shall not record any deed which conveyed, or purports to convey, any irregular shaped tract or part of land or parcel of any such platted tract or tracts of less than the United States legal subdivision of ten (10) acres, unless the person presenting such deed for record also delivers to such county clerk for filing a plat or map which has been prepared by a surveyor or civil engineer, which plat or map shall show with particularity the legal description, and area of the land to be conveyed, except that no map or plat shall be required in those cases where the parcel of land being conveyed has been previously conveyed by deed or other instrument recorded ten (10) years or more prior to the passage of this act.

R.C.M. 1947, § 11-614.1 provides as follows:

*Approval of plat before filing—by whom to be done.* The city or town council, if the area lies within or partly within the boundaries of any city or town, or the board of county commissioners, if the area lies wholly outside the boundaries of any city or town, shall inspect all plats prepared under the provisions of Section 11-614 and indicate their approval thereon in writing before the county clerk and recorder shall accept said plats for filing. In all cases where the survey plat indicates that the property is being subdivided or platted for building purposes, the city or town council or the board of county commissioners, as the case may be, may require the plat to be prepared in accordance with all the requirements for plats of cities or towns or additions thereto

In addition to the county zoning procedures set forth in Title 16, Chapter 47, R.C.M., 1947,<sup>46</sup> other statutory devices to effectuate planning objectives are available at the county level. Special powers of counties include protection of forests, granting utility right of ways, construction of roads, and maintenance of civic, youth and recreation centers.<sup>47</sup> Rural Special Improvement Districts may be created.<sup>48</sup> County Water Districts,<sup>49</sup> and Metropolitan Sanitary and/or Storm Sewer Systems<sup>50</sup> are provided for. The creation of county planning and zoning districts is authorized by Title 16, Chapter 41, R.C.M. 1947, upon petition of 60% of the freeholders affected.<sup>51</sup> Last, but not least, the county commissioners can be guided in all avenues of planning by the city-county planning board. The board can study and advise, and the commissioners can follow that advice.<sup>52</sup>

### THE BILLINGS CITY-COUNTY PLANNING BOARD

The City of Billings and Yellowstone County reconstituted their City-County Planning Board on July 1, 1963, to conform to the planning law as thoroughly revised by the 1963 Legislature.<sup>53</sup> Nine members were appointed to the Board to comply with R.C.M., 1947, section 11-3810. In February, 1964, a full time planning director was employed and the City-County Planning Board launched upon an organized and systematic

<sup>46</sup>For the effect of *Plath v. Hi-Ball Contractors, Inc.*, 139 Mont. 263, 362 P.2d 1021 (1961) upon this act see discussion *infra*.

<sup>47</sup>R.C.M. 1947, tit. 16, ch. 11.

<sup>48</sup>*Id.* ch. 16.

<sup>49</sup>*Id.* ch. 45.

<sup>50</sup>*Id.* ch. 44.

<sup>51</sup>The constitutionality of this chapter was upheld by the Montana Supreme Court in *Missoula v. Missoula County*, 139 Mont. 256, 362 P.2d 539 (1961); *Doull v. Wohlschlag*, 141 Mont. 354, 377 P.2d 758 (1963). See discussion *infra*.

<sup>52</sup>The law is clear that the Board of County Commissioners cannot delegate its general statutory powers to implement planning to the City-County Planning Board. This would include all of the powers above enumerated. However, the county can authorize the city-county planning board to study all such items and report to it, and as a matter of policy be guided by the recommendations of the planning board. See 20 C.J.S. *Counties* § 89 (1955); 101 C.J.S. *Zoning* § 9 (1955); *Dickey v. Bd. of Comm'rs*, 121 Mont. 223, 191 P.2d 315 (1948). The same rule also would apply to city government, except as specifically provided by statute. See 101 C.J.S. *Zoning* § 9 (1955).

<sup>53</sup>The City-County Planning Board for the City of Billings and Yellowstone County was originally constituted under the first city-county planning act. (Laws of Montana 1957, ch. 246). A comprehensive planning program was undertaken culminating in adoption of a comprehensive "Master Plan" in December, 1958, and the enactment by the County Commissioners of subsequent zoning ordinances regulating and restricting the use of county land. This 1958 Master Plan and implementing ordinance resulted in the case of *Plath v. Hi-Ball Contractors, Inc.*, *infra* note 65, which declared that counties cannot legislate and hence cannot enact zoning ordinances. After the *Plath* case budget funds for the city-county planning board were drastically curtailed, although the board continued to meet weekly, for the most part considering proposed subdivision plats and advising city and county governmental bodies of their views. Due to the late start in re-organizing the Board it was not possible to obtain the desired budget for 1963-64 with the city and county participating, but such a budget is in prospect for the 1964-65 fiscal year. It is contemplated that a city-county planning program will be retained on a continuing basis. The experience of the Billings planning board's operation under the new law is too inconclusive to warrant extended comment at this time, but inquiry on the part of interested persons is welcomed.

planning program.<sup>54</sup> After considerable thought the Billings Planning Board determined that the most practical procedure was to employ a full time resident planning director, and at the same time consultant to serve

<sup>54</sup>Proposed Planning Program.

A. *Base Maps*

Prepare base mapping of the city and immediate area to such scale as is suitable for subsequent planning and zoning studies.

B. *Land Use Survey*

Carry out land use survey of area and plat information upon base map in color.

C. *Economic Base*

Make studies and surveys into the economic base of the region, emphasizing the retail trading area characteristics, natural resources, climate, topography, employment trends, labor force, and future potential.

D. *Population*

1. Investigate past and present population trends for the area, including spatial distribution, urban and rural classifications, population composition and causes of in or out migration.
2. Forecast urban population trends for the future and their effect on the planning area.

E. *Parks*

1. Plot on a base map the area, condition and present development of all existing public and private park and playground facilities within the area.
2. Study the space and use requirements for recreational facilities in the area based on the characteristics of the population.

F. *Schools*

1. Plot on a base map the location of existing public schools in the area.
2. Analyze enrollment, space and use requirements, condition and extent of these institutions, based on the characteristics of the population.

G. *Central Business District*

1. Conduct a traffic survey of the Central Business District on all major intersections.
2. Study existing parking facilities of the CBD, both offstreet and curb.
3. Prepare a report indicating recommended future treatment of the CBD under the following broad classifications:
  - a. Traffic—projections of flows and volumes, rerouting to ease congestion.
  - b. Land Use—space requirements, appearance.
  - c. Parking—space requirements to meet requirements of projected future population of the trading area.

H. *Report and Recommendations*

Major Thoroughfares Plan

1. Plot on a base map suggested major thoroughfares for the entire area, including extensions into areas of future development.
2. Prepare recommendations for building line setbacks and rights-of-way for minor residential streets, neighborhood collector streets, major arterials, highways and limited-access freeways.

I. *Public Facilities*

1. Prepare a report showing the proposed location and extent of future recreational facilities required to serve the projected future population.
2. Prepare a report showing the location and extent of future school sites required to serve the anticipated future population of the area, including a map of suggested future school sites.

J. *Land Use*

1. Prepare a map, tabulations, charts and text showing the amount and proposed location of land required to meet future land use needs by various classifications. The various land use units to be arranged in such a manner so as to provide the greatest convenience, comfort, safety, economic stability and pleasant environment for the inhabitants.

K. *Land Development Control*

1. Prepare reports on zoning for the area including:
  - a. Discussion of the general concepts of zoning, and of specific problems of land utilization in the area.
  - b. Proposed zoning ordinances for the area, together with maps and explanatory material.

in a supervisory capacity.<sup>55</sup> The Billings Planning Board has also entered into an arrangement with the Montana Highway Commission to obtain supplementary funds to assist in accomplishing the planning objectives necessary to conform to Bureau of Public Roads requirements under the Federal Aid Highway Act of 1962.<sup>56</sup> The Billings Planning Board has not availed itself of other sources of federal funds, but many such sources are available to interested communities.<sup>57</sup>

It is submitted that the comprehensive and systematic study of community problems and the preparation of a comprehensive master plan of community development is a highly important accomplishment in and of itself. The experience of the Billings Planning Board indicates that there will be a great deal of voluntary compliance with planning objectives by persons affected. Rules of Procedure have been developed by the Billings Planning Board for the handling of subdivision plats and other planning problems. The planning director is always available to discuss problems with subdividers and other interested persons at a preliminary stage, and it has been found that most planning problems are resolved at that level.

As we have seen, in its inception a planning board is delegated two basic functions, to prepare a master plan of community development and to serve in an advisory capacity to regularly constituted city and county government. At the study level it is difficult to see how the legality of city-county planning could be successfully questioned. However, after the planning board has completed the master plan and submitted it to the city and county governments respectively, it should be implemented and enforced by appropriate zoning regulations if it is to be totally effective. At the enforcement stage certain constitutional questions present themselves at the county level.

#### CONSTITUTIONAL PROBLEMS INHERENT IN ENFORCEMENT OF THE MASTER PLAN THROUGH ZONING AT THE COUNTY LEVEL

The first comprehensive statutory scheme of city planning and city-county planning in Montana was enacted by the 1957 Legislature.<sup>58</sup> In 1961 the Montana Supreme Court, however, in the case of *Plath v. Hi-Ball Contractors Inc.*,<sup>59</sup> declared so much of this law unconstitutional as delegated legislative zoning powers to counties. In an effort to obviate the objections raised by the *Plath* case, the 1963 Legislature thoroughly revised the law relating to city planning and city-county

<sup>55</sup>A contract was entered into with Harstad Associates, Inc., Engineers—Planners, of Seattle, Washington, for the first six months of 1964. The consultant was to establish a day to day operation of the planning development in such things as the administration of zoning subdivision regulations and general operational planning. It is contemplated that the consultant will phase out as the planning process becomes organized and operational and that the resident planning director can adequately operate the program on a continuing basis.

<sup>56</sup>*Supra* note 4. Information on this type of supplementary financing can be obtained from the Montana Highway Department in Helena.

<sup>57</sup>See Appendix A *infra*.

<sup>58</sup>Laws of Montana 1957, ch. 246.

<sup>59</sup>139 Mont. 263, 362 P.2d 1021 (1961).

planning and its implementation. City planning boards or city-county planning boards are provided for and their functions prescribed.<sup>60</sup> Supplementary thereto the Legislature also enacted a law providing for the implementation of the master plan for community development at the county level through appropriate zoning regulations.<sup>61</sup> Absent any future amendment to the Montana Constitution specifically granting legislative power to counties, any legislation which would effectuate planning through zoning at the county level must conform to the constitutional guidelines set out in the *Plath* case.

Counties and incorporated cities differ generically under the Montana Constitution. A county is the largest political division of the state having corporate power.<sup>62</sup> It has been variously defined as a subdivision of the state with certain definite and fixed powers and duties,<sup>63</sup> and as an agency or arm of state government, created, organized and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the state, and as a matter of public convenience in the administration of government.<sup>64</sup> As subdivisions of state government, counties are bound by the separation of powers provisions of Article IV, Section 1, of the Montana Constitution. As an instrumentality of state government, a county can exercise only such powers as are conferred by statute or are necessarily implied from those expressed. To be constitutional, a statute granting authority to counties must be sufficiently explicit and restrictive, so that its execution requires only administrative action and not an exercise of legislative power. A county has no power to enact local legislation.<sup>65</sup> An incorporated city, on the other hand, is a municipal corporation, and can be delegated the power to enact zoning ordinances.

The Montana Supreme Court in *Freeman v. Board of Adjustment of City of Great Falls*,<sup>66</sup> held specifically that chapter 136, Laws of Montana, 1929 (R.C.M., 1947, sections 11-2701 to 11-2709), which authorized cities to enact zoning ordinances, was constitutional and that ordinances of the city of Great Falls, enacted under the authority of that chapter were lawful exercises of granted power. A municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government. Because of its autonomous character a municipal corporation is largely free to regulate its private and proprietary functions.<sup>67</sup> In any event it is settled by the *Freeman* case that an incorporated city may enact zoning ordinances, so long at least as such ordinances have a real and substantial bearing upon the public health, safety, morals and general welfare of the community.<sup>68</sup> Thus, it would

<sup>60</sup>Laws of Montana 1963, ch. 247 (now R.C.M. 1947, tit. 11, ch. 38).

<sup>61</sup>Laws of Montana 1963, ch. 246 (now R.C.M. 1947, tit. 16, ch. 47).

<sup>62</sup>R.C.M. 1947, § 16-101.

<sup>63</sup>*State v. McGraw*, 74 Mont. 152, 240 Pac. 812 (1925); *Church v. Lincoln County*, 100 Mont. 238, 46 P.2d 681 (1935); *State ex rel. Missoula v. Holmes*, 100 Mont. 256, 47 P.2d 624 (1935); *Bottomly v. Meagher County*, 114 Mont. 220, 133 P.2d 770 (1943).

<sup>64</sup>*Roosevelt County v. State Bd. of Equalization*, 118 Mont. 31, 162 P.2d 887 (1945).

<sup>65</sup>*Plath v. Hi-Ball Contractors, Inc.*, 139 Mont. 263, 362 P.2d 1021, 1022-25 (1961).

<sup>66</sup>*Freeman v. Bd. of Adjustment*, 97 Mont. 342, 34 P.2d 534, 538 (1934).

<sup>67</sup>*Hersey v. Neilson*, 47 Mont. 132, 131 Pac. 30, 32 (1913).

<sup>68</sup>*Supra* note 66.

appear that once a master plan of community development has been adopted a city can immediately implement through zoning so much of the master plan as applies to the area included within its limits.

However, at the county level the holding of the *Plath* case that counties have no power to enact local legislation, must be reckoned with. The City of Billings and Yellowstone County had developed a master plan under the 1957 planning law and, on December 31, 1958, the county commissioners enacted a zoning ordinance regulating and restricting the use of certain land in Yellowstone County. Defendants attempted to erect fuel storage tanks on land zoned residential suburban by this county zoning ordinance. The land in question was located in Yellowstone County, outside the corporate limits of the City of Billings.

Yellowstone County filed suit to enjoin Hi-Ball Contractors from violating the county zoning ordinance. The district court sustained a demurrer to the complaint and the Supreme Court of Montana affirmed.<sup>69</sup> This case holds essentially that counties, as subdivisions of state government, are bound by the separation of powers provisions of Article IV, Section 1, of the Montana Constitution, and hence have no power to enact local legislation. The particular zoning provisions of the 1957 planning law were held to be necessarily legislative because of their broad nature, and hence an unconstitutional delegation of legislative power to counties. The Supreme Court examined the statutes in question and concluded that since these statutes broadly granted to county commissioners unguided and largely unrestricted authority to zone, they necessarily entailed the exercise of legislative discretion and, hence, were unconstitutional.

The Montana Supreme Court decided the *Plath* case in July, 1961. In that decision, however, the court carefully distinguished *City of Missoula v. Missoula County*,<sup>70</sup> decided in March of the same year. The *City of Missoula* case held R.C.M., 1947, sections 16-4101 through 16-4107, to be constitutional in that they set out sufficient guidelines so that their implementation by county commissioners required only action that is in reality administrative, not legislative.<sup>71</sup> The Court in the *City of Missoula* case however, took special note of the limited scope of these provisions and of the procedural safeguards of notice and public hearing attached to their use. The case was reaffirmed by the Montana Supreme Court in January, 1963.<sup>72</sup>

From the standpoint of utilizing chapter 246, Laws of Montana, 1963, as a planning tool, the apparently divergent holdings of the *Plath* and *City of Missoula* cases present somewhat of a dilemma. Chapter 246, Laws of Montana, 1963, was enacted by the Legislature in an obvious attempt to meet the constitutional objections to the zoning provisions of the 1957 planning law raised in *Plath*. The question is whether

<sup>69</sup>*Supra* note 59.

<sup>70</sup>*Missoula v. Missoula County*, 139 Mont. 256, 362 P.2d 539 (1961).

<sup>71</sup>"In each case considered, we have looked to see whether the so-called delegation of power was administrative or legislative, in reality. This alone, of course, does not foreclose further inquiry as to due process, etc." *Plath v. Hi-Ball Contractors, Inc.*, 362 P.2d at 1023.

<sup>72</sup>*Doull v. Wohlschlager*, 141 Mont. 354, 377 P.2d 758 (1963).

the Supreme Court will view a county zoning attempt under this new law as administrative or legislative action.

The basic rule as enunciated by our Supreme Court is that the law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. To avoid being held to be an attempt to delegate legislative power, the legislature in bestowing authority upon an administrative body must set forth a course of procedure and rules of decision for the administrative body to follow. A policy, standard or rule for the guidance of the administrative body must be set forth in the statute. If the act merely authorizes the administrative officer or board to carry out the definitely expressed will of the Legislature, although 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.<sup>73</sup> After discussing these constitutional principles, the Supreme Court in *City of Missoula* analyzed the standards and guides supplied by Title 16, Chapter 41, and concluded that the act did not contravene Article IV, Section 1, of the Montana Constitution by attempting an unlawful delegation of legislative power.<sup>74</sup>

A rather detailed procedure is provided by R.C.M., 1947, section 16-4705,<sup>75</sup> of the 1963 act providing for county zoning. Notice of public

<sup>73</sup>*Missoula v. Missoula County*, 139 Mont. 256, 362 P.2d 539, 540-41 (1961).

<sup>74</sup>The opinion in 362 P.2d 539, at 541-542, discusses this act quite extensively as follows:

We shall not quote the entire act, but, with respect to the procedure, the law provides definite outlines and limitations. The zoning district may come into being only upon petition of sixty percent of the freeholders in the area. The adoption of the development district must be by a majority of the Commission, after definitely prescribed public notice and public hearing. The resolution must refer to maps, charts, and descriptive matters. In other words, quite adequate procedural matters are contained in the act itself. No such outline of procedure appears in the statutes condemned in the Bacus case.

As to the power granted, we have heretofore listed them specifically. The legislature has fixed the area of power within which the Zoning Commission may act. It is required to act only when public convenience and necessity require (section 16-4101) and then only in the interests of health, safety and general welfare (section 16-4102). The Commission is empowered to do three basic things: regulate the business which may be carried on in an area; the kind of buildings which may be erected or altered; and the open areas around the buildings. The power is specifically limited as to presently existing nonconforming uses, agricultural uses and timber uses (section 16-4102).

We are not herewith concerned with the desirability of zoning laws or the methods of attaining orderly development. However, in viewing the problem of delegation of power we are aware of many governmental structures set up to administer legislative acts. In addition to health districts previously discussed in the Bacus case, there are rural improvement districts, mosquito control districts, public hospital districts, public cemetery districts, drainage districts, irrigation districts, insect control districts, fire districts, and others as well as numerous boards, bureaus and commissions in state government which in some sense have been delegated functions by the legislature. It does not do to simply argue that a county government is without legislative power. The inquiry must be as we set out in the Bacus case and the other cases therein cited.

Having examined the act in question as to procedural requirements and definite areas of power granted, we find that the act does not contravene Article IV, § 1, of the Montana State Constitution as an unlawful delegation of power.

<sup>75</sup>Laws of Montana 1963, ch. 246, § 5 (now R.C.M. 1947, § 16-4705) provides as follows:



hearing must first be published. Public hearing must then be held, after which the Board of County Commissioners may pass a resolution of intention to zone, notice of which must in turn be published for two weeks in a newspaper of general circulation. The zoning regulations then become effective unless 40% of the affected resident freeholders protest. It appears that chapter 246, Laws of Montana, 1963, was specially tailored to meet the objections raised by *Plath* to the earlier zoning legislation, and attempts to follow the procedures provided in Title 16, chapter 41, R.C.M. 1947, upheld as constitutional in *City of Missoula*. Chapter 246, Laws of Montana, 1963, appears to differ essentially from Title 16, chapter 41, R.C.M. 1947, only in that zoning pursuant to the later law must originate initially from petition of 60% of the resident freeholders affected, while chapter 246, Laws of Montana, 1963, zoning is initiated by act of the county commissioners, and can be voided upon protest of 40% of the resident freeholders affected. The consent or acquiescence of 60% of the resident freeholders affected is required for valid zoning in either case. The objectionable features of the former law—uncontrolled discretion exercised by the planning board and the county commissioners—criticized by the Supreme Court in *Plath*<sup>76</sup> appear to have been eliminated.

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*Procedure for adoption of regulations and boundaries.* The board of county commissioners shall observe the following procedures in the establishment or revision of boundaries for zoning districts and in the adoption or amendment of zoning regulations:

- (1) Notice of a public hearing on the proposed zoning district boundaries and of regulations for the zoning district shall be published once a week for two (2) weeks in a newspaper of general circulation within the county. The notice shall state:
  - (a) the boundaries of the proposed district
  - (b) the general character of the proposed zoning regulations
  - (c) the time and place of the public hearing
  - (d) that the proposed zoning regulations are on file for public inspection at the office of the county clerk and recorder.
- (2) At the public hearing the board shall give the public an opportunity to be heard regarding the proposed zoning district and regulations.
- (3) After the public hearing the board shall review the proposals of the planning board and shall make such revisions or amendments as it may deem proper.
- (4) The board may pass a resolution of intention to create a zoning district and to adopt zoning regulations for the district.
- (5) The board shall publish notice of passage of the resolution of intention once a week for two (2) weeks in a newspaper of general circulation within the county. The notice shall state:
  - (a) the boundaries of the proposed district
  - (b) the general character of the proposed zoning regulations
  - (c) that the proposed zoning regulations are on file for public inspection at the office of the county clerk and recorder
  - (d) that for thirty (30) days after first publication of this notice the board will receive written protests to the creation of the zoning district or to the zoning regulations from persons owning real property within the district whose names appear on the last completed assessment roll of the county.
- (6) Within thirty (30) days after the expiration of the protest period the board may in its discretion adopt the resolution creating the zoning district and/or establishing the zoning regulations for the district; but if forty (40) percent of the freeholders within such district whose names appear on the last completed assessment roll shall have protested the establishment of the district or adoption of the regulations, the board shall not adopt the resolution and no further zoning resolution shall be proposed for the district for a period of one (1) year.

<sup>76</sup>362 P.2d at 1025 (1961).

Obviously no one can predict how chapter 246, Laws of Montana, 1963, will fare in the Supreme Court or whether the Court will adopt the rationale of *Missoula v. Missoula County* or *Plath v. Hi-Ball*, in determining its validity. Until passed upon chapter 246, Laws of Montana, 1963, must necessarily remain a somewhat doubtful tool to implement county level zoning. It appears, however, to the author of this article that the 1963 law so closely parallels Title 16, Chapter 41, R.C.M. 1947, in its essential characteristics, and departs so basically from the county level zoning provisions of the 1957 law, declared invalid in the *Plath* case, that its constitutionality should be upheld.

### CONCLUSION

It is hoped that the new law will be upheld as constitutional. The practical execution of planning objectives will be greatly facilitated thereby. The continued and orderly development of the State of Montana makes city-county planning an absolute necessity. The Federal-Aid Highway Act of 1962 removes any lingering doubt but that our larger communities must undertake city-county planning and do so now. Somehow such planning must be made to work and must be continued on a permanent basis. It is submitted, moreover, that the wide range of city and county powers discussed in this article can be effectively utilized to accomplish an effective planning process to improve our local communities and State.

When created, a planning board unquestionably has legal existence as a factory of ideas. It has the primary function to develop and continuously review a comprehensive master plan. In order to develop a master plan and keep it up to date extended research and thought must necessarily be invested. The planning board therefore becomes the repository of evaluated ideas and information which would otherwise not be available. A planning board can render valuable service to both county and city governments solely in an advisory capacity.

In the absence of a constitutional amendment specifically conferring legislative powers upon counties, attempts at comprehensive county zoning must continue to raise serious legal questions. One additional possibility, however, deserves mention. Montana statutes are replete with examples of extraterritorial jurisdiction conferred upon cities.<sup>77</sup> No case, however, has been decided by the Montana Supreme Court specifically determining whether incorporated cities can constitutionally exercise extraterritorial jurisdiction per se. Other states have, however, solved some of the problems of area planning simply by granting to municipal corporations the right to exercise police power through zoning within prescribed areas beyond the municipal limits.<sup>78</sup> Such statutes granting to cities extraterritorial jurisdiction to regulate platting and

<sup>77</sup>*Supra* note 41.

<sup>78</sup>*Schlientz v. North Platte*, 172 Neb. 477, 110 N.W.2d 58 (1961); *City Transp. Co. v. Pharr*, 209 S.W.2d 15 (Tenn. 1948); *Murray v. Roanoke*, 192 Va. 321, 64 S.E.2d 804 (1951); *Butler v. Little Rock*, 332 S.W.2d 804 (Ark. 1960); *Petterson v. Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371 (1956); *Prudential Co-op Realty Co. v. Youngstown*, 118 Ohio St. 204, 160 N.E. 695 (1928); *Norfolk County v. Portsmouth*, 45 S.E.2d 136 (Va. 1947). See also note 41 *supra*.

zoning, even though the affected lands be located for a statutory distance beyond the city's limits, have been upheld as giving cities a reasonable voice in the development and improvement of lands which at some future time will probably, or even possibly, be sufficiently developed and occupied by residential or business structures to justify their annexation.<sup>79</sup> Such a law should seriously be considered by the 1965 Legislature.

One of the great challenges facing municipal officials today is to seize to the fullest every opportunity to advance effective and imaginative city-county planning. No community can achieve orderly growth unless it is willing to plan for that growth. Proper community planning is absolutely essential to the development of Montana. It is hoped that this article will be of some assistance in achieving that goal.

<sup>79</sup>Norfolk County v. Portsmouth, 45 S.E.2d 136 (Va. 1947).  
<https://scholarship.law.umt.edu/mlr/vol25/iss2/1>

**Appendix A**

FEDERAL AID PROGRAMS

<i>Title &amp; Purpose Of Law</i>	<i>Administering Agency</i>	<i>Kind Of Funds</i>	<i>Qualifications</i>
701 Section PL 87 Planning Comprehensive Plans	Montana State Planning Board (State of Montana)	Matching Funds Fed. Local 1. Pop. 50,000 Under 2 — 1 2. ARA Area 5 (a) 3 — 1 3. ARA Area 5 (b) See 1 & 2	State, County, Town, City and combination of or parts thereof into areas or regions. Cities & counties of less than 50,000 pop. Cities & counties of more than 50,000 pop. if they have been designated a distressed area by Area Redevelopment Administration.
CFA Public Works Planning Loan for design of Public Works, Sewerage & Water System, Public Buildings, Etc.	Housing & Home Finance Agency, Seattle	Loan — 10% of estimated engineering fee — non-interest bearing. Also loans for construction drawings are available.	State, County, Town, Cities, Water Districts, Sewer Districts, etc. all which have authority to accomplish public works.
Urban Renewal	Housing & Home Finance Agency, San Francisco	Grants for studies & planning of Urban Renewal Projects. Matching funds for property acquisition and construction.	Towns & Cities that have blighted areas as defined by State Law.
P.L. 87-658	Housing & Home Finance Agency + Area Redevelopment Administration	Grants: 50% to 75% of the total net project costs. Net project costs are defined within the Act.	Any local agency which has the authority to perform Public Works. The areas are those designated 5 (a) and 5 (b) by the Area Redevelopment Administration plus those additional areas designated by the U.S. Department of Labor.

**Appendix A (cont'd.)**

FEDERAL AID PROGRAMS

<i>Title &amp; Purpose of Law</i>	<i>Administering Agency</i>	<i>Kind Of Funds</i>	<i>Qualifications</i>
Area Redevelopment Administration intended to assist depressed areas.	Area Redevelopment Administration	Grants & Loans to municipal corporations and private businesses for projects that will reduce unemployment. Also Grants for technical aid (Engineering Studies)	Those areas so designated by the agency.
P.L. 660	State Board of Health	Grants equal to 30% to 50% of cost of Sewer Treatment Plants, Outfall Lines, Intereceptor Sewers.	Those areas designated by the State Pollution Control Commission.
Farmers Home Administration intended for acquisition & construction of Municipal Utilities in Rural Areas.	Department of Agriculture	Loans — Low interest for development of Municipal Utilities in Rural Areas. Limit — \$5,000,000 @ 5% interest on Direct Loans. Limit — \$5,000,000 @ 2.93% interest on Loans through Soil Conservation District.	Towns 2,500 population and under — and all farm and rural areas.
CFA — Loans for Housing of Senior Citizens.	Housing & Home Finance Agency, Seattle	100% Loan including all qualified costs as to Arch. & Engr's fees, Administrative Costs & Land Acquisition.	Any Private or Municipal Non-Profit Organizations.