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REGULATING LAND USE IN FLATHEAD COUNTY:
POLITICAL LIMITATIONS AND ADMINISTRATIVE ALTERNATIVES

By

William C. Carlson

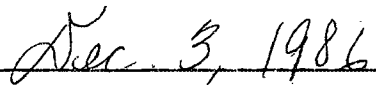
B. A., Western Illinois University, 1975

Presented in partial fulfillment
of the requirements
for the degree of
Master of Public Administration
University of Montana
1986

Approved by


Chairman, Board of Examiners


Dean, Graduate School


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PREFACE

Many of the ideas in this paper came as the result of the author attending numerous public hearings and planning board meetings pertaining to land issues during the period of April 1978 to March 1984. Special thanks are extended to all the public and private participants involved in Flathead County's land development who candidly offered me their opinions and advice.

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CHAPTER I
INTRODUCTION

Subdivision regulation in Flathead County is a major social, environmental, and political issue. The future of Flathead County's resources is a dominant theme in subdivision regulation. Numerous groups have criticized the planning and development trends within Flathead County. One of the objectives of this paper is to promote an understanding of the development issue in Flathead County.

Urban growth and land development have produced significant changes in Flathead County. The parcelling of open countryside into lots for residential and commercial use has altered the social and economic character of the county. Land development is big business. Accommodating the interests of landowners and developers while maintaining and preserving the environmental and aesthetic values of the county presents a great challenge.

To date, land use planning has been unable to accommodate the expectations of all the residents and interest groups. Environmental groups are worried about the water quality of area lakes. Farmers are concerned over the disappearance of area farms. Sportsmen fear that random development will destroy critical wildlife habitat. The forces of growth and change are requiring local

planners and politicians to address the land use issue.

Landowners and developers fear that stronger regulation controls would result in a net loss of future income. Efforts to strengthen the comprehensive land use planning have met with resistance. Broad based support for land use planning has remained fragmented and weak. Therefore, economic incentives should be incorporated in establishing land use policy.

My main purpose in the paper is to identify and evaluate alternative techniques that Flathead County could incorporate in establishing land use policy. These techniques will be viewed in light of their potential appropriateness for Flathead County, and their potential acceptability given the politics of land use in Flathead County. Finally, I will choose and justify one of these alternative methods.

CHAPTER II

PROBLEMS IN REGULATING LAND USE IN FLATHEAD COUNTY

On November 11, 1983, a meeting took place in Kalispell, Montana, to help area residents form and administer a community land trust. During this meeting, Bill Dunham described Flathead County as being in its eleventh hour regarding land development.¹ A year earlier, area farmers had questioned local Grange leaders and political officials over their concerns about disappearing farm land.² Citizens in Whitefish formed their own ad hoc committee to oversee development on and around Whitefish Lake. A well known scientist urged state and local officials to take positive steps in preserving the water quality of Flathead Lake.³

Growth and land development have strained environmental and aesthetic qualities in Flathead County. Fragile ecosystems encompassing the lakes of Whitefish and Flathead appear threatened.⁴ Century-old farms are being subdivided into sprawling tracts. Increased service

¹Daily Interlake (Kalispell), 16 November 1983, p.1.

²Missoulian (Missoula), 6 January 1982, B-1.

³Missoulian (Missoula), 5 May 1981, p. 1.

⁴Ibid.

demands are being placed on city and county government.

The painful externalities of urban growth have been present since the industrial revolution in medieval Europe. Migration from rural to urban centers created a myriad of problems including sewage disposal, fire protection, and transportation. Out of these problems, the concept and practice of urban planning developed.

The traditional view of land use planning in the United States is that planning should set a course of action toward predetermined community goals.⁵ The State of Montana has clarified these goals through planning legislation to include: 1) the promotion of health; 2) prevention of overcrowding; 3) provision of adequate light, air and water; 4) sewage disposal; 5) parks and recreation areas; and 6) to require development in harmony with the natural environment.⁶

In Flathead County, there appears to be widespread disagreement over what planning and subdivision regulation should accomplish.⁷ In the summer of 1983, disgruntled voters initiated recall petitions against two of the three

⁵Blair, Government at the Grass Roots, p. 277.

⁶Montana Department of Community Affairs, Local Planning, p. 31.

⁷Public hearing comments, Flathead Environmental Information Meeting, 15 March 1983, Flathead Valley Community College, Kalispell, Montana.

county commissioners charging malfeasance in land use decisions. Critics of the planning process argued that subdivision regulations were inadequate and planning board recommendations were ignored by the county commissioners.⁸ Flathead County has not been able to accommodate the interests of all the residents to their satisfaction in land use policy and development.

County Description

Flathead County is located in the northwestern section of the State of Montana. Its boundaries include the Canadian border to the north, Lake and Missoula Counties to the south, and Lincoln and Glacier Counties to the west and east. It is the third largest county in total land area in the state, approximately the size of Maryland. Within its boundaries, Flathead County contains alp-like peaks, glacial cirques, majestic valleys, and knife-like mountain ridges. It is blessed with spectacular glacially carved topography that includes Glacier National Park. Over 73 percent of Flathead County is owned by the Federal Government, with the Forest Service and Bureau of Land Management being the principal managers.⁹

⁸Missoulian (Missoula), 8 November 1982, C-1.

⁹U.S., Department of Agriculture, Soil Survey, Upper Flathead Valley Area, Montana, September 1960, Revised 1982.

The original white settlers in Flathead County were Canadian fur trappers. Hudson Bay Trading Company established a small post at the north end of Flathead Lake in 1810. Due to its northern location, development proceeded slowly. In 1891, the Great Northern Railroad built a line through Marias Pass giving the Flathead Valley train service. This event marked the beginning of growth in Flathead County.

The main economic activities in Flathead County are lumbering, mineral production, and agriculture. The taxable value of agricultural land and improvements ranks third in the state. As of 1980, the total county population was 51,966. Of this number, 21,209 resided in urban areas, and 30,757 resided in rural areas.¹⁰ The population grew 51 percent between 1960 and 1980. The number of rural dwellings increased by 66 percent.

The principal urban areas are the cities of Whitefish, Columbia Falls, and Kalispell. The county seat is Kalispell. Columbia Falls is the industrial hub, and Whitefish is the picturesque railroad and recreation center.

¹⁰Ibid.

Planning in Flathead County

Flathead County began work on a comprehensive master plan for land development in 1972. Pursuant to Section 11-3828 of the Montana Codes, a master plan should promote public health, morals, convenience, safety, order, efficiency, and economy in the process of community development.¹¹ In 1973, the State of Montana adopted legislation known as the "Subdivision and Platting Act". This act strengthened Montana planning legislation by requiring land developers to submit their plans to local governing bodies for review and approval.¹² In October 1973, the Flathead County Commissioners adopted subdivision regulations. Four years later, the Montana Legislature passed House Bill 666 which established eight definitive criteria for local review of proposed subdivisions.¹³ In 1978, the voters of Flathead County approved a master plan to guide the overall development and growth within the county.¹⁴

¹¹Montana Department of Community Affairs, Montanas Local Planning Legislation, July 1977, p. 23.

¹²Ibid., p. 31.

¹³Ibid., p. 33.

¹⁴Personal interview with Jerry Jurritus, Planner II, Flathead County, Kalispell, 15 July 1982.

Regional Development Commission

The Regional Development Commission in Flathead County is the agency responsible for land use planning. Specific questions regarding large subdivisions, preliminary plat approvals, interpretation of the county master plan, and the drafting of zoning ordinances are all handled through this office. The commission consists of a director responsible for coordinating the mission of the agency, along with a support staff of professional planners and clerical workers.¹⁵

The responsibilities of the development commission include: 1) maintaining an up-to-date file of county and municipal plans, zoning ordinances, official maps, city building codes, subdivision regulations, and amendments; 2) supplying technical planning information and services to any municipality of the county and the county's elected representatives; and 3) updating and revising the master plan.¹⁶

The method the regional development commission incorporates in reviewing proposed land developments is a system of performance criteria. In formulating opinions

¹⁵Personal interview with Nick Verma, Planning Director, Flathead County, Kalispell, 15 July 1982. Regional Development Commission

¹⁶Ibid.

regarding proposed developments, the commission considers some forty-five different criteria. These multiple standards are weighed with respect to the impact the proposed development will have on the area.¹⁷ Based on these standards, the regional development commission advises the county commissioners on proposed land developments.

Planning Boards

Flathead County also has a countywide planning and zoning board. The principal cities of Whitefish, Kalispell, and Columbia Falls also have their own planning and zoning boards.

The primary function of these boards is to conduct public hearings on proposed subdivisions.¹⁸ Unlike the regional development commission, the members of the planning boards are citizen appointees chosen by the county commissioners. During the public hearings, expressed public opinion, the opinion of the development commission, and comments from the planning board are utilized to base decisions for or against the proposed subdivision. The planning boards are purely advisory and have no real power to grant or deny subdivision approval.¹⁹

¹⁷Ibid.

¹⁸Ibid.

¹⁹Ibid.

County Commissioners

The county commissioners in Flathead County approve, conditionally approve, or deny preliminary plat approval for subdivisions. In reviewing a subdivision request, the commissioners use eight criteria in reaching a decision. These criteria include: 1) the basis of need for the subdivision, 2) expressed public opinion, 3) effects on agriculture, 4) effects on local services, 5) effects on taxation, 6) effects on the natural environment, 7) effects on wildlife and wildlife habitat, and 8) effects on the public health and safety.²⁰

The county commissioners' primary sources of information concerning proposed developments come from: 1) recommendations from the planning boards and commission, 2) expressed public opinion, and 3) information supplied by the developers. The county commissioners must weigh information from these sources with respect to the eight criteria defined in Montana Planning Legislation in formulating land use decisions.²¹

The persistent development pressure that Flathead County is experiencing presents tough problems. The county

²⁰Montana Department of Community Affairs, Local Planning, p. 42.

²¹Personal interview with Nick Verma, 15 July 1982.

commissioners must decide critical land use issues. The Montana Legislature addressed this issue when it drafted the Montana Subdivision and Platting Act. The criteria the commissioners use in reviewing a subdivision are derived from this legislation.

State Law

Subdivision and Platting Act

In essence, the Subdivision and Platting Act is supposed to address the problem of residential encroachment in terms of lost farmland, erosion of the rural quality of life, and adequacy of services that would be provided to meet the needs of new, high-density population areas.²² The state legislature realized that random land development is not consistent with the Montana Constitution which requires that "the state and each person shall maintain and improve the clean and healthful environment in Montana for present and future generations."²³ This act also granted Montana counties the corresponding powers necessary to

²²Montana Department of Community Affairs, Local Planning, p. 31-48.

²³Tony Hadley, "The Montana Subdivision and Platting Act: a suggestion for legislative reform", (M.P.A. professional paper, Department of Political Science, University of Montana, Missoula, 1980), Chapters 1 and 2.

create planning, zoning, and public hearing procedures.²⁴

The Subdivision and Platting Act is a significant step for the Montana Legislature. Requiring local governments to review land subdivisions based on predetermined criteria illustrated the legislature's concern over the problems of urbanization.

Unfortunately, the Subdivision and Platting Act contains several legal exemptions which have limited its effectiveness. In 1977, the Department of Community Affairs reported that 93 percent of the subdivisions statewide had escaped the review process.²⁵ In Flathead County, approximately 80 percent of all the subdivision activity escapes review.²⁶

Legal Exemptions to the Act

The Subdivision and Platting Act defines a land subdivision as a parcel of land containing less than twenty acres. Any land split of twenty acres or more is not considered a legal subdivision, and is, therefore, not subject to any review.

²⁴Ibid.

²⁵Montana Legislative Council, Montanas Subdivision Laws: Problems and Prospectives, November 1978, p. 26.

²⁶Personal interview with Mike Casey, Planner, Flathead County Conservation District, Kalispell, 15 March 1984.

The twenty-acre lot size presents a significant problem in land management. A twenty acre lot is much too large for a single family home and too small to serve as a productive agricultural unit.²⁷ In Flathead County, between July 1, 1974 and December 31, 1976, 319 land splits in excess of twenty acres, equaling a total of 3,779.8 acres, occurred.²⁸ All this happened in a time period of less than two years! None of these land splits received any type of subdivision review.²⁹

Another exemption to the Subdivision and Platting Act is termed an occasional sale. The occasional sale allows a landowner to split one parcel of land of under twenty acres per year without public review. The occasional sale provision in the Act greatly improves the marketability of twenty acre tracts for house lots. A homeowner, having bought a twenty acre lot, could easily sell off several parcels of his original lot on a yearly basis to reduce his mortgage liability. This is a common development pattern in rural Montana.³⁰

²⁷Ibid.

²⁸Montana Legislative Council, Subdivision Laws, p. 28.

²⁹Ibid.

³⁰Personal Interview with Carl Larson, Larson and May Construction, 14 March 1983.

Family transfer, also, is a legitimate exemption in the Subdivision and Platting Act. Under this rule, a parcel of land can be divided and transferred to a member of the landowner's immediate family. The Montana Attorney General's Office has defined the immediate family as "the spouse of the grantor and the children of the grantor by blood or adoption." It is possible under this exemption for a husband and wife to convey land back and forth, creating a new lot with each conveyance. At some point, multiple conveyances to family members would be viewed as an attempt to evade the Act. Currently, the Department of Community Affairs' rules provide that more than one conveyance to a family member constitutes an intent to evade the subdivision law.³¹ Even with this restriction, a large number of land parcels can be created by utilizing the occasional sale in conjunction with the family conveyance.

For example, a landowner with a wife and two children could divide his land in the following manner. The landowner could give each family member part of his acreage (one lot turns into four). Then each of these family members could keep one parcel and convey a piece of their original lot to another family member (spouse), thus

³¹Montana Legislative Council, Subdivision Laws, pp. 21-30

creating two more lots. Depending on the size of the original lot, the occasional sale provision could then be utilized to create even more parcels. A landowner with a large family could create a subdivision of significant size. There is no provision either in the Subdivision Act or the Department of Community Affairs' rules to prevent this type of exchange. These exemptions illustrate how it is possible for approximately 80 percent of all subdivision activity in Flathead County to escape local governmental review.

When the Montana Legislature included the exemptions in the State Subdivision and Platting Act, the intent of the legislation was not to burden the small landowner or rancher with a complex review process involving the sale of a portion of his property. Legislators noted that a few parcels of land split by a rancher or small landowner would not have a negative impact upon the county as a whole.³² Legislators also thought that the size and time requirements would limit the number of land parcels created outside the review process.³³ The large number of subdivisions created outside the review process illustrates the limited effectiveness of the Subdivision and Platting

³²Hadley, "Subdivision and Platting Act", Chapter 2.

³³Ibid.

Act. Land developers and builders are quite adept at manipulating the exemptions within the Act to their own benefit.

The Montana Legislature is well aware of the Subdivision and Platting Act's shortcomings.³⁴ In 1975, the Legislature amended the Act to define a subdivision as anything smaller than twenty acres. Prior to this, the definition of a subdivision was anything smaller than ten acres.

In the next legislative session (1977), legislators introduced several bills relating to land use and subdivisions, but none became law. A bipartisan committee studied Montana land use laws during the interim period between 1977 and 1979. Their conclusions, from public hearings and information gathering, recommended that the exemption clauses in the Subdivision Act be modified and redefined.³⁵ The 1979 legislative session saw several bills aimed at amending state land use laws, but the legislature did not enact any of them. A careful study of the Subdivision and Platting Act as published in the new Montana Codes reveals that it still contains the same exemptions and legislative intent as the prior sessions.

Tony Hadley concluded that subdivision reform failed

³⁴Ibid.

³⁵Ibid.

in the 1977 and 1979 legislatures for three primary reasons: 1) The legislature felt that local governments should not have any additional control over subdivision regulations within their jurisdictions; 2) it considered the current exemptions to the Act have functional merit not needing to be reviewed by any government jurisdiction whatsoever; and 3) that the committee recommendations went too far too fast in dealing with a complex and political issue. Despite the merits of the proposed bills, members of the legislature could not commit themselves to a comprehensive package of reform at that time.

Montanans are referred to as having a simple aversion to planning.³⁶ Unencumbered property rights and land ownership are important values for Montanans. This, plus the geographic diversity within Montana, creates a situation unfavorable to political compromise. Legislators in rural eastern and western counties have little need for stringent subdivision regulations. Development pressure in some areas of Montana is either minimal or nonexistent. In these areas, the Subdivision and Platting Act is probably adequate. As noted above, however, in areas where development pressure is great, like Flathead County,

³⁶Lauren S. McKinsey, "Natural Resource Policy in Montana," in We the People of Montana, ed. James Lopach (Missoula: Mountain Press, 1983), p. 270.

current state law provides gaping loopholes in regulating the subdivision of land.

Zoning

Another area in Montana planning law that is not particularly strong is zoning. Under Montana law, zoning is not mandatory.³⁷ If the governing body wishes to zone an area in Montana, they must satisfy several criteria. First, a notice of intent to zone must be published in a newspaper of countywide circulation. Second, a public hearing must be held about the proposed zoning ordinances. After the public hearing, if the governing body decides to adopt zoning ordinances, a thirty-day protest period begins. If during the protest period, 40 percent of the registered freeholders protest the adoption of the zoning ordinances, the governing body shall not adopt them, nor propose any further zoning for that district for at least a period of one year.³⁸

In Flathead County, there is little zoning.³⁹ Only the principal cities of Whitefish, Kalispell, Columbia

³⁷Montana Department of Community Affairs, Local Planning, p. 6.

³⁸Ibid.

³⁹Personal Interview with Nick Verma, 23 May 1986.

Falls, and Bigfork are zoned. It does not even take a simple majority vote to defeat zoning proposals under current Montana law. Lack of countywide zoning in Flathead County has been cited by several planners as an impediment to the coordination of comprehensive planning policy.⁴⁰

What exactly is this controversial zoning issue? Zoning, simply stated, is merely a tool of planning.⁴¹ A zoning ordinance permits and denies certain types of development. For example, residential areas are segregated from industrial sites. Areas within a planning jurisdiction are identified, a master plan is prepared, and zoning ordinances are one of the methods of effectuating the plan.⁴² The problem some landowners in Flathead County have with zoning ordinances is that they limit the versatility of their property rights. Planning legislation and policy assumes that comprehensive planning will benefit the community as a whole. However, certain landowners feel that property rights are unencumbered and they should not be unduly burdened by the planning process. For example, an area zoned agricultural would be worth far less than an

⁴⁰Personal Interview with Nick Verma and Jerry Jurritus, 15 July 1982.

⁴¹Melville C. Branch, Urban Planning Theory (Stroudsburg: Dowden, Hutchenson and Ross, 1975), p. 78.

⁴²Ibid., pp.78-80.

agricultural area zoned residential. Zoning in Flathead County is a volatile political issue.⁴³

Comprehensive Planning in Flathead County

Significance of the Comprehensive Plan

Both the State of Montana and Flathead County have supported efforts to achieve comprehensive land use planning. The state legislature, through planning legislation, has enabled local governments to create, finance, and administer local planning policy.⁴⁴ Flathead County has supported planning by funding a regional development commission, complete with paid professional planners. The county has also created city- and countywide planning boards and adopted a master plan to guide growth and development.

The master plan is a significant document in the administration of planning policy. The master plan enables policy makers, landowners, and politicians the opportunity to define development objectives within a community. The role of the master plan is to project and guide future development. A master plan ideally should be a blueprint

⁴³Missouliau (Missoula), 6 December 1981.

⁴⁴Montana Department of Community Affairs, Local Planning, pp. 1-47.

for development.⁴⁵

Montana State law requires that the contents of a master plan should include some twenty-two different subsections, ranging from surveys of existing conditions to recommendations for long-term development objectives.⁴⁶ After a governing body (in Flathead County this would be the county commissioners) adopts a master plan, the local governing body shall be guided by and give consideration to the general policy and pattern of development set out in the plan.⁴⁷

Criticism of the Comprehensive Plan

In Flathead County, the master plan has come under attack from both developers and local officials, as well as the Montana Supreme Court. In 1981, the Supreme Court ruled that the county commissioners must follow the county comprehensive plan in zoning cases. The county commissioners argued that the plan was purely advisory and need not be followed. The Supreme Court stated that lack of compliance with an adopted master plan would defeat the

⁴⁵George Blair, Government at the Grass Roots (Pacific Palisades: Palisades Publishers, 1977), p. 283.

⁴⁶Montana Department of Community Affairs, Local Planning, p. 28.

⁴⁷Ibid.

whole idea of planning.⁴⁸

Developers in the past have criticized Flathead County's master plan for not being helpful. They stated that it is hard to infer where development should take place if the plan is used as a guide. Flathead County's master plan is too general.⁴⁹ Dean Jellison, an attorney for several large developers in Flathead County, argues that the plan is not specific and does not deal with development at all.⁵⁰ During one public hearing, he held up a copy of Flathead County's master plan, voicing his criticisms, and promptly dropped it in a garbage can, to a vigorous round of applause. The plan is so general and vague, that it is of little use to anyone.

The Flathead County Commissioners have had a questionable record in following the master plan. In one particular case, the commissioners attempted to rezone land within the City of Kalispell from residential to commercial. According to the plan, the area in question had been zoned medium-density residential construction, but the county commissioners wanted to zone the area for

⁴⁸Missoulian (Missoula), 19 June 1981, p. 6.

⁴⁹Personal interview with Dean Jellison, Attorney representing Crop Hail Management, Eagle Bend Subdivision developers, 10 March 1984.

⁵⁰Ibid.

commercial uses. Adjacent property owners sued the County, and the Montana Supreme Court ruled that adopted comprehensive plans can not be cast aside or taken lightly.⁵¹ The Court did not accept Flathead County's contentions that their master plan is purely advisory and need not be followed.⁵²

In several controversial land use decisions, the county commissioners had voted for the approval of subdivisions that were in direct conflict with the county master plan.⁵³ Reasons cited by the commissioners for not closely following the plan included that it was old and in need of revision.⁵⁴

The Planning Director of Flathead County states that the process involved in adopting a master plan limits the effectiveness of the plan.⁵⁵ After the professional planners gather the necessary data and construct the plan, the county commissioners hold public hearings on the proposal. During these public hearings, recommendations

⁵¹Missoulian (Missoula), 19 June 1981, p. 6.

⁵²Ibid.

⁵³Caroline Point, Eagle Bend, and Lakeview Estates were subdivisions conditionally approved by the Flathead County Commissioners. Mike Casey, personal interview, 15 March 1984.

⁵⁴Personal Interview with Nick Verma, 15 February 1982.

⁵⁵Ibid.

and suggestions from affected citizens are heard. In the past, the landowners, professional planners, and county commissioners have engaged in a political bargaining process over the proposed plan.⁵⁶ A planner's primary function in drafting a comprehensive plan should be to construct a document that is functional and has a broad base of support. In an effort to accommodate the different interests of all the landowners in Flathead County, the final plan has become a general document. Attempts to specify uses and denials for land parcels within the county have raised the ire of affected landowners.⁵⁷ Therefore, the plan has remained vague and general.

Lack of countywide zoning also is an impediment to strengthening Flathead County's master plan.⁵⁸ Zoning is an important tool in the enforcement of land use policy. In Flathead County, large amounts of land are unzoned. Zoning rural lands in Flathead County is achieved only after specific property owners request zoning designations. Flathead County's policy of zoning areas only after property owners seek zoning has been explained as the only practical political solution.⁵⁹

⁵⁶Ibid.

⁵⁷Ibid.

⁵⁸Ibid.

⁵⁹Ibid.

CHAPTER III

INTEREST GROUPS INVOLVED IN FLATHEAD COUNTY'S PLANNING

Many residents of Flathead County are concerned with preserving the aesthetic and environmental attributes of the area. It is obvious that unplanned expansion of the population into and through the countryside produces visual external diseconomies of monumental proportions. Suburban sprawl has been characterized as; a "landscape of tract homes, neon lights, and commercial strip development."⁶⁰ Fears of development patterns such as this have surfaced at numerous public hearings in Flathead County. One particularly outspoken county commissioner succinctly said that Flathead County is "a little Switzerland turning into miles of California-style taco stands."⁶¹

Currently, 80 percent of all development is occurring outside the major urban areas in Flathead County.⁶² This proliferation of rural development has created a checkerboard settlement pattern in Flathead County. Leapfrog development (so-named because subdivisions appear

⁶⁰Douglas C. North and Roger L. Miller, The Economics of Public Issues (New York: Harper and Row, 1976), p. 112.

⁶¹Public hearing comment, Henry Oldenburg, Flathead County Commissioner, Kalispell, Montana, 15 March 1983.

⁶²Personal interview with Mike Casey, 15 March 1984.

on maps to jump over undeveloped areas) occurs primarily as a function of the free market. Real estate developers and land speculators exploit the real estate market through promotion and investment. Fragmented land ownership creates a situation where different parcels of land are on the real estate market at different times. In the absence of enforceable development plans, the marketplace essentially determines where development will occur.⁶³

In Flathead County, it is common practice for a private landowner to split his initially large lot into several smaller tracts. A real estate developer explained the situation as follows. Ideally, a person should be able to buy a large desirable tract of land, parcel several smaller lots out of this tract, and retain the rest of the land at a considerable savings. Some people have even been able to recoup their entire investment by splitting a large tract, and are able to keep a lot for themselves free and clear.⁶⁴

These land splits are usually small with few internalized improvements. The lots are typically split up on a piecemeal basis to enable the landowner to avoid any type of subdivision review. The only substantive

⁶³North and Miller, Economics, p. 114.

⁶⁴Personal interview with Carl Larson, 14 March 1983.

performance criteria these lots must obtain are septic permits from the county sanitarian. If the lot in question passes a soil percolation test, the land split will be recorded by certificate of survey.⁶⁵

Environmentalists

The Montana Environmental Information Center held a meeting March 15, 1983, in Kalispell, Montana, to discuss land use topics. At this meeting, participants expressed fears that haphazard development patterns within Flathead County are creating a rural slum. Many homes are being built on lots accessible only by substandard gravel roads. Flathead County, as of 1981, will not accept any new roads into its maintenance grid.⁶⁶ The proliferation of rural septic tanks is threatening groundwater quality. Studies have shown that the phosphorus content of area lakes is increasing.⁶⁷ Scientists attribute this phenomenon in part to additional demands placed on the aquifer by septic tanks. Increased service demands on gravel roads are creating dust problems during the warmer months of the year.

⁶⁵Personal interview with Jerry Jurritus, 15 July 1982.

⁶⁶Personal interview with Nick Verma, 15 July 1982.

⁶⁷Missoulia (Missoula), 6 January 1982.

Land use planning is an integral factor in maintaining and preserving the environmental qualities of Flathead County. The environmental groups chastised the county commissioners for not taking a stronger stand on planning issues. In response, one county commissioner in attendance at this meeting explained state law and the limitations imposed by both the state and landowners within Flathead County regarding planning issues.⁶⁸ The majority of the people voicing opinions at this meeting favored stronger planning to protect the natural resources of Flathead County.

In 1980, the Flathead Regional Development Commission conducted a public attitude survey. This questionnaire randomly sampled county landowners with specific questions pertaining to development trends. Part of their findings revealed that respondents felt that present subdivision regulations and land use controls had been ineffective in preventing substandard and random development.⁶⁹ The respondents felt that growth within the county should occur in and around the cities. Such a restricted growth pattern they agreed would be most beneficial to preserving the

⁶⁸Public hearing comment, Henry Oldenburg, 15 March 1983.

⁶⁹Personal interview with Jerry Jurritus, 15 July 1982.

environmental and aesthetic qualities of Flathead County.⁷⁰

The Kalispell Environmental Information Center has an active membership of people who consider themselves environmentalists. Many of these people are attracted to Flathead County because of its beautiful scenery and clean environment. The planning director of Flathead County thinks that the environmentalists as a group have not had much impact on the planning process because few of them hold title to large tracts of land.⁷¹ He is of the opinion that few people who want to preserve open space actually own much of it.⁷²

The environmentalists do play an important role in balancing the pluralist mixtures of participants involved in land use politics. It is impossible to quantify whether or not pressure from environmentalists has created a better environment. But, any group that is organized and shares a common mission can serve as a watchdog over other groups pursuing their own self-interests in the political arena.

Farmers and Ranchers

Farmers and ranchers within Flathead County comprise a

⁷⁰Flathead County Public Attitude Survey, 1 June 1980, Office of Flathead County Regional Development Commission.

⁷¹Personal interview with Nick Verma, 15 July 1982.

⁷²Ibid.

large, clearly defined interest group. Other than the Federal and State Governments, and the Burlington Northern Railroad, the farmers and ranchers are the largest single group of landowners in the county. Farmers, environmentalists and local politicians think that a solid agricultural base is essential to a clean rural environment and a stable economy for Flathead County.⁷³ Development pressures have caused many farms to disappear in recent years. Family farms in Flathead County are caught in a squeeze between mounting costs, low commodity prices, and extremely high land values. Demand for suburban tracts has pushed the value of some farmland in Flathead County up to 5 to 10 thousand dollars per acre.⁷⁴ Many Flathead Valley farmers have spent a lifetime working with little equity to fall back on but their land.⁷⁵ It is difficult for some farmers to ignore the potential gains if their farms are converted to development land.

The Flathead Valley Soil Conservation District, supported by farmers, is concerned over the disappearance of area farms. The fewer the farms in the area, the fewer support facilities that will be available to supply farmers

⁷³Personal interview with Mike Casey, 15 March 1984.

⁷⁴Missoulian (Missoula), 6 January 1982, B-1.

⁷⁵Ibid.

with needed equipment.⁷⁶ However, farmers, to date, have been unwilling to support strong comprehensive planning.⁷⁷ At public hearings, the dominant theme among landowners is property rights. Farmers fear that stronger regulatory controls pertaining to land use would affect their land values.⁷⁸ At the present time, land subdivision and development yield much higher returns than agriculture. Farmers and ranchers stand to lose too much by supporting stronger planning policies.⁷⁹ Luke Lalum, of the Flathead County Conservation District, states that if zoning had been done a long time ago, it would have been an equitable system to determine land use policy.⁸⁰ Years ago, development pressures and land values were not nearly as high as they are today. Consequently, lack of sufficient foresight by the State of Montana and the Flathead County Commissioners regarding future land development problems contributed to weak public policy. Flathead County imposed little control over land development. Now, farmers and ranchers are faced with a new set of economic circumstances

⁷⁶Personal interview with Mike Casey, 15 March 1984.

⁷⁷Public hearing comment, Luke Lalum, Flathead County Conservation District, Kalispell, 15 March 1983.

⁷⁸Ibid.

⁷⁹Personal interview with Nick Verma, 15 July 1982.

⁸⁰Public hearing comment, Luke Lalum, 15 March 1983.

and oppose stricter land use controls.

Developers

Real estate developers have a direct, vested interest in land subdivision. To date, 98 percent of all proposed subdivisions that have gone through the subdivision review process in Flathead County have been conditionally approved.⁸¹ The real estate developers' main fear is that stronger land use controls would be costly and time consuming. They argue that, eventually, these costs would be shifted forward to the consumer, making housing more expensive. If housing gets too expensive and people cannot afford it, the developers' business suffers. Dean Jellison, an attorney for several large developers in Kalispell, argues that the planning process is highly subjective. The county master plan does not serve as much of a guide. He also perceives that the criteria that the county commissioners utilize in reaching land use decisions are weighted arbitrarily.⁸²

Developers, in the past, have vigorously opposed stronger land use regulations. The Flathead County Homebuilders Association became upset when the county

⁸¹Personal interview with Nick Verma, 15 July 1982.

⁸²Personal interview with Dean Jellison, 10 March 1984.

commissioners passed a resolution to deny permits in cases of obvious attempts to evade the Subdivision and Platting Act. The Flathead County Homebuilders Association ran quarter-page ads in local newspapers denouncing the stricter regulations as anti-growth and anti-business.

Other interest groups in the county involved in planning and land development issues are not as easily categorized. The terms pro-environmental or pro-development would be most unfair to these groups. Interest groups such as these are formed as a direct result of a development being proposed. Typically, members of the groups are neighbors. Adjacent landowners have formed several protective groups to oppose large developments within Flathead County.⁸³

The Whitefish Basin Project began as a result of area landowners becoming concerned with some proposed developments on and near the lake.⁸⁴ Two realtors in Bigfork, Montana, started recall petitions against two of the county commissioners because of their opinions over the Eagle Bend Subdivision. The two commissioners had different voting records on the project, and two different groups wanted to see the commissioners recalled. One

⁸³Missoulian (Missoula), 16 September 1981, 21 September 1981, 28 April 1983.

⁸⁴Personal interview with Mike Casey, 15 March 1984.

professional planner in Flathead County is of the opinion that the vocal minority opposed to new development attends public hearings regarding specific projects.⁸⁵ People seem to become interested in the planning process only after they become directly affected by it. Open space and scenic views are taken for granted until a developer proposes a project that would convert a cherry orchard or hay field into a suburban tract.

⁸⁵Personal interview with Jerry Jurritus, 15 July 1982.

CHAPTER IV

PROBLEMS OF PLANNING DEFINITION IN FLATHEAD COUNTY

Planners and politicians in Flathead County have the difficult task of addressing two fundamental problems. First, they are often challenged to perceive what careful development would be in the best interest of all the county. What one person perceives as careful development, another could consider to be rampant speculation. Second, the planners and politicians must give consideration to all the competing interests in achieving legitimate, broad-based policy support in planning. Conflicting interests and concerns over land use do not clarify policy. Slogans like "preserving the aesthetic aspects of the valley" or "retaining the charm of the Flathead" are not a guide.

Anthony Downs has argued that leaving most of the control over land use in private hands, especially where private ownership is fragmented into thousands of small parcels as in the United States, makes it impossible to impose any comprehensive development policy.⁸⁶ The planner must tailor development policies and regulations to fit the needs of the community.

⁸⁶Anthony Downs, "Alternative Forms of Future Urban Growth in the United States", Journal of American Institute of Planners 36 (January 1970):7-9.

In Flathead County, the role of the planner is limited. The local political process determines land use. The planner can advise and research, but it is the county commissioners who have the power to grant or deny development proposals. The county commissioners base their decisions on inputs from special interest groups. The Flathead County Homebuilders Association is a well defined and articulate group. Decisions affecting land use and subdivision directly affect their livelihood. Farmers in Flathead County do not want to lose the option of being able to subdivide their land. In some cases, that would be the only profit their business would yield. At the state level, legislators realize that there is a general aversion towards planning.⁸⁷ That is why efforts to close the loopholes in the Subdivision and Platting Act and create stronger planning legislation have failed.

The planning director in Flathead County foresees no significant changes in local planning policy unless changes are made in state laws.⁸⁸ Mandated countywide zoning and a permit system based on performance criteria that the county commissioners must follow would be an improvement over the

⁸⁷McKinsey, "Natural Resource Policy" in We the People, ed. Lopach, p. 263.

⁸⁸Personal interview with Nick Verma, 16 May 1986.

current system.⁸⁹ Charges that the current method of adjudicating land use issues is arbitrary and unpredictable would be alleviated. Without the state mandating such changes in local planning administration, it is highly unlikely that the county commissioners would propose these changes on their own initiative. Rural zoning is a highly charged issue which county residents have opposed in the past. The county commissioners do not want to be bound to a permit system that diminishes their power in regulating land use.⁹⁰

Comprehensive planning can have an impact on the development of the physical environment. Anyone who has wandered through the countryside of Sweden or Switzerland cannot help being struck by the striking contrast to the United States. The political systems, the powers delegated to the planners, and the social consciousness of the people are different. The Flathead County Commissioners must consider a myriad of factors in formulating land use policy. Planning is a relatively new phenomenon in Flathead County.⁹¹ Property rights are viewed by many

⁸⁹Ibid.

⁹⁰Ibid.

⁹¹Work began on the first Flathead County Comprehensive Plan in 1972.

residents as absolute.⁹² State law has addressed planning, but not very forcefully. The county commissioners must weigh the recommendations from the planning staff, the housing speculators, and their constituents. Often, the promise of jobs and increased tax revenues far outweighs their understanding of the potential environmental side effects.⁹³ What determines the physical form of development within the county is the interaction of the developers, planners, and county commissioners. Planners, whose ideas of good planning are often at odds with those elected officials who appoint them, usually have little job security.⁹⁴

The fundamental problem with attempting to strengthen land use regulations in Flathead County is that the controls necessary to ensure compliance inevitably shift some potential land value from the private to the public sector. Who should bear the costs of maintaining the environment? Farmers and ranchers are the largest single group of private landowners in Flathead County. They do

⁹²Missoulia (Missoula), 19 May 1981, 8 November 1982, 16 February 1984; Whitefish Pilot (Whitefish), 28 January 1982.

⁹³Mark Gottdiener, Planned Sprawl--Private and Public Interests in Suburbia (Beverly Hills: Sage Publications), p. 110.

⁹⁴William A. Fishel, The Economics of Zoning Laws (Baltimore: Johns Hopkins Press), p. 33.

not want their land values diminished by stricter land use regulations.

Montana has imposed limited restrictions on property rights. Broad popular support for traditional planning tools like zoning is non-existent. Attempts to accommodate the interests of all the landowners have resulted in vague and nonspecific plans. Such plans in the past have had little utility in formulating comprehensive land use policy. The inertia behind present development remains strong. Groups periodically criticize and question the present system, but little has been done. This could be attributable to the diverse nature of the groups and their inability to reach a consensus on what constitutes good land use.

Since the traditional methods of land use regulation are not working, perhaps an incentive structure could indirectly modify the nature and rates of land use change. Without economic incentives to the landowners, stronger planning regulations would not be politically feasible. Too many landowners stand to gain from development. The next chapter of this paper will describe and evaluate three proposals to incorporate economic incentives into establishing comprehensive land use policy.

CHAPTER V
ASSESSMENT OF THREE ALTERNATIVE APPROACHES
TO LAND USE PLANNING

Farmers, ranchers, and developers have accused the county commissioners of failing to take a strong stand on land use policy and avoiding controversial land use issues.⁹⁵ In light of these charges and assuming that substantive changes in state law are unlikely in the near future, alternative strategies of land use regulation need to be considered.

In Flathead County, it has been the duty of the county commissioners to interpret state law in determining land use policy. As this paper has illustrated, the planning process involves more than administering subdivision regulations. The county commissioners must determine what is good land use. The criteria the commissioners have used in the past have been attacked as inconsistent, subjective, and arbitrary.

Present laws indicate that the Montana Legislature has realized that open space is a valuable commodity and that rapid growth threatens overcrowding of the land in certain

⁹⁵Personal interview with Dean Jellison, 10 March 1984.

areas.⁹⁶ The legislature felt that in order to preserve "natural, ecological, and geographic areas", the preservation of open space lands is necessary.⁹⁷ Recreational, historic, and scenic areas should be preserved in their natural state. The legislature further enabled private organizations and public bodies to acquire open space lands that would fulfill preservation requirements either for a term of years or in perpetuity.⁹⁸ Open space lands are areas that have not been developed and possess non-quantifiable values regarding scenic, recreational, and environmental attributes.

Public bodies (in this case, Flathead County) shall have all the powers necessary and convenient to carry out the purposes and provisions of acquiring open space lands. These powers include the ability to borrow and appropriate funds.⁹⁹ The local government can levy taxes not to exceed 1 mill in the acquisition of open space, and issue and sell general obligation bonds.¹⁰⁰

The State of Montana has granted the necessary powers

⁹⁶Montana Codes, section 76-6-102, revised 1985.

⁹⁷Ibid.

⁹⁸Montana Codes, section 76-6-103, revised 1985.

⁹⁹Montana Codes, section 76-6-109, revised 1985.

¹⁰⁰Ibid.

to local government for the creation of economic incentives in establishing land use policy. The spirit of the legislation states that rapid urbanization is disrupting and altering the remaining natural areas, biotic communities, and geographical formations, providing for the potential destruction of aesthetic and ecological values.¹⁰¹

Conservation Easements

A conservation easement is a right given to a government agency or qualified private organization by a landowner to prevent certain uses of land without actually conveying the title or right of possession. All rights of ownership not specifically transferred by the easements are retained by the owner.

Under Montana law, local governments have the necessary powers to acquire conservation easements that specifically prohibit the development of the property. The easement may prohibit: 1) structures, 2) landfill, 3) removal of vegetation, 4) excavation of gravel, 5) surface use that changes the existing condition of the land, 6) acts detrimental to conservation, and 7) subdivision of

¹⁰¹Montana Codes, section 76-6-102, revised 1985.

land.¹⁰²

Conservation easements may be granted either in perpetuity or for a number of years. If granted for a term of years, the term may not be less than 15 years. An easement granted for a term of years may be renewed for a term of 15 or more years upon the execution of a new granting instrument by the parties.¹⁰³

The conservation easement is a practical method of preserving open space. The landowner stands to benefit because the terms of easement can roll back the value assessment of land to 1973 levels.¹⁰⁴ This would effectively lower his or her property taxes. A conservation easement would retain the integrity of land while rewarding the landowner for forgoing development. Conservation easements are binding on future owners of the land. If at some point urbanization encroaches upon a farm or ranch protected by a conservation easement, the landowner can let the easement expire. In that case, taxes are reassessed on the property to reflect current market value, and the landowner can develop the property.

The conservation easement is a fair method of

¹⁰²Montana Codes, section 76-6-203, revised 1985.

¹⁰³Montana Codes, section 76-6-202, revised 1985.

¹⁰⁴Montana Codes, section 76-6-208, revised 1985.

preserving open space and critical areas. Conservation easements in Montana are either granted in perpetuity or for a term of fifteen years. Depending on the type of easement the landowner has, he or she may be able to develop the land at a future date. The local taxing district is compensating the landowner in some form for forgoing development.

Differential Tax Assessments

There are three basic types of differential assessments: preferential assessment, deferred taxation, and restrictive agreements:

1. Under preferential assessment laws, lands in agriculture and timber are taxed at below market rates as an incentive to retain the integrity of land in its present use.¹⁰⁵
2. Deferred taxation is a variation of preferential assessment. This system would postpone payment of the property tax instead of subsidizing it. The difference in the value of the land between agricultural uses and residential development would be deferred until the land use changed; at that time, the extra taxes would be paid.¹⁰⁶
3. Restrictive agreement is a pact between the local government and the landowner. Under this agreement, the landowner must keep his land in its current use for some specified period of time. If the landowner wishes to withdraw from the program before the specified time

¹⁰⁵Melvin R. Levin, Jerome G. Rose, and Joseph S. Slavet, New Approaches to State Land Use Politics (Toronto: D. C. Heath Co.), Chapter 3 & 6.

¹⁰⁶Ibid.

elapses, he must pay a "roll-back" tax similar to that of the deferred payment program, plus a penalty which is generally a percentage of the roll back tax. Under restrictive agreement laws, after the time period in the agreement expires, a landowner is free to alter the use of the land without having to pay roll back taxes or penalties.¹⁰⁷

Section 76-6-103, subsection 3, of the Montana Codes encourages private participation in an open space program by establishing the policy to be utilized in determining the property tax to be levied upon the real property which is subject to the provisions of the open space legislation.¹⁰⁸ Local governments have the authority to levy taxes and make assessments.¹⁰⁹

Either preferential or deferred tax assessment could be an inducement to preserve open space. Restrictive agreements are similar to conservation easements except that a conservation easement has a longer life. Preferential tax assessments would be particularly useful in preserving scenic areas bordering the urban fringe. These areas are vulnerable to rising property taxes.¹¹⁰ When farmers' taxes increase beyond their ability to produce other income (farming or timber), development

¹⁰⁷Ibid.

¹⁰⁸Montana Codes, section 76-6-103, revised 1985.

¹⁰⁹Montana Codes, section 76-6-109, revised 1985.

¹¹⁰Levin, Rose, and Slavet, New Approaches, Chapters 3 & 6.

pressure intensifies. Preferential tax assessment has not been tested in Flathead County. However, Mike Casey, a planner with the Flathead County Soil Conservation District, stated that area farmers are always interested in some form of tax relief.¹¹¹ Preferential tax assessment has been successful in other states and based on these successes, Flathead County, through the Soil Conservation District has drafted a plan utilizing preferential assessment. To date, the plan has not been incorporated in assessing agricultural land. This could be attributed to the fact that Mike Casey's position expired January 1, 1985 and was not renewed.

Purchase of Development Rights

The local government can purchase the development rights to a piece of property. This approach is analogous to the purchase and sale of mineral rights. To calculate the value of development rights for a given acre of land, its agricultural or timber value is subtracted from its market value. Compensation to a landowner is based on the difference between the development value of the land versus the agricultural value.¹¹² Farmers in Flathead County have

¹¹¹Personal interview with Mike Casey, 15 March 1984.

¹¹²Levin, Rose, and Slavet, New Approaches, pp. 55-63.

borrowed farm loans against the development value of their land.¹¹³ This method would be one technique for preserving sensitive agricultural areas.

Monetary constraints would be the biggest problem Flathead County would have in attempting to purchase development rights. The county budget is already strapped with the decrease in transfer payments from state and federal sources.¹¹⁴ Administratively, this method would be a cumbersome process. The county clerk and recorder would have to establish a file to keep track of the development rights that had been purchased from landowners. Another potential problem would be assessing the fair market value of the development rights. Real estate appraisal is not an exact science and is subject to spirited debate.¹¹⁵

¹¹³Telephone interview with Craig Scott, Real Estate Loan Officer, First National Bank, Whitefish, 23 October 1986.

¹¹⁴personal interview with Nick Verma, 21 May 1986.

¹¹⁵Ibid.

CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

Given the failures of past attempts at land use regulation in Flathead County, I am going to concentrate on preserving open space lands as a method of land use regulation. The ideas presented in the last section of this paper illustrate various methods proposed for preserving open space. Preserving open space does have an effect on the planning process because it directs where development should not occur. Critical and sensitive areas are removed from the development arena. Land use planning efforts in Flathead County have been labeled arbitrary and unpredictable.¹¹⁶ Subdivision regulations have been flagrantly violated, planning board recommendations have been "winked at", and the county commissioners have been inconsistent in adjudicating land use policy.¹¹⁷

The planning department in Flathead County should actively encourage large landowners to participate in open space preservation. Flathead County has issued one

¹¹⁶Personal interview with Dean Jellison, 10 April 1984. Newspaper articles: Whitefish Pilot (Whitefish), 18 January 1982; Daily Intake (Kalispell), 16 November 1983; Missoulian (Missoula), 6 January 1982.

¹¹⁷Ibid.

conservation easement in the last six years.¹¹⁸ There are no programs for the purchase of development rights or differential tax assessment in Flathead County.¹¹⁹

This paper supports the conservation easement as the simplest and least costly method of preserving open space. The Montana Codes sections 76-6-201 through 76-6-211 grant all powers necessary to administer conservation easements. The local governing body has the autonomy to determine the value of the conservation easement and the power to enforce compliance with the easement.¹²⁰

The environmental groups in Flathead County would benefit from an aggressive open space campaign. Many of their fears, such as random development and urban sprawl, would be suppressed if Flathead County would acquire conservation easements on scenic and environmentally sensitive tracts.

The farmers and ranchers would be able to lower their tax liability through utilizing the conservation easement. Farmers and ranchers, in the past, have opposed stronger land use regulations because they are not compensated for their perceived loss in development value. With a

¹¹⁸Personal interview with Nick Verma, 21 May 1986.

¹¹⁹Ibid.

¹²⁰Montana Codes, sections 76-6-201 through 76-6-211, revised 1985.

conservation easement, the landowner is rewarded through favorable tax policies to forgo development. If at a later date, the development value of the land is in excess of the value of the conservation easement, the landowner has the option of letting the easement expire and developing the land.

The developers in Flathead County would also benefit from an aggressive open space program. Currently, development plans within the county are vague and subject to broad interpretations.¹²¹ Developers proposing large projects often raise the ire of adjacent landowners. With critical and scenic areas removed from the threat of development, developers would have a better view of where to plan their projects.

Politicians and planners in Flathead County have made references to preserving the quality of life, environment, and aesthetic values in the county. They should act now. Once a development pattern has been established, it cannot be remade. A combination of factors surrounding land use policy and regulation have limited the role planning has contributed to land development in Flathead County.

A conservation easement clearly identifies how much the public sector as a whole is willing to compensate the

¹²¹personal interview with Nick Verma, 21 May 1986; Dean Jellison, 10 April 1984.

landowner for forgoing development. The State and Flathead County have avoided the issue of compensation in drafting planning legislation. Consequently, there has been considerable resistance to planning. Preserving the environmental and aesthetic qualities of Flathead County has its price. The county commissioners are well aware of how sensitive this issue is. Without some incentive for the landowners, speculators will continue to invest in sites for future development through chance and market place.¹²²

The planning staff should commit themselves to an active conservation easement program. Ecological and environmentally unique areas need to be identified and inventoried. A subsection of the county master plan could include this list. The landowners who hold title to these areas should be encouraged to participate in a conservation easement program. Maintaining and preserving the integrity of the land in Flathead County holds hope for the county's resources which include a beautiful, uncluttered environment.

¹²²North and Miller, Economics, p. 112.

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