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**OFFICE OF THE CITY ATTORNEY**

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**Legal Opinion 2008-002**

**TO:** John Engen, Mayor; City Council; Bruce Bender, CAO; Roger Millar, OPG Director; Denise Alexander, OPG; Mary McCrea, OPG; Tim Worley, OPG; Jennie Dixon, OPG; Michele Reinhart, OPG; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Carla Krause, Public Works; Donna Gaukler, Parks & Recreation Director; Jackie Corday, Open Space Manager; Brentt Ramharter, Finance Director; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Ellen Buchanan, MRA Director; Chris Behan, MRA; City BOA members; City-County Planning Board members; Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE:** January 28, 2008

**RE:** When zoning regulations directly incorporate provisions of a neighborhood land use plan into zoning regulation provisions, the incorporated neighborhood plan provisions will have zoning regulation effect

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**FACTS:**

A January 3, 2008 Montana Supreme Court decision, Flathead Citizens for Quality Growth, Inc. v. Flathead County Board of Adjustment, has generated much speculation and opinion from many sources as to what weight is to be given neighborhood land use plans in the future. The case involved the Flathead County BOA issuing a conditional use permit allowing a landowner to extract and crush gravel on a 320 acre parcel of land it owned within the West Valley area of Flathead County in an area that also had a West Valley Neighborhood Plan.

What is generally omitted or not specifically recognized by those advocating that this decision requires more weight be given to land use growth policies and/or neighborhood land use plans is that the applicable Flathead County zoning regulations directly incorporated provisions of the land use neighborhood plan into the applicable zoning regulations thereby providing the neighborhood plan provisions with greater land use stature than merely being a plan. The provisions of the neighborhood plan that were directly incorporated into the applicable Flathead County zoning regulations attained zoning regulation stature when they were incorporated into the applicable Flathead County zoning regulations.

**ISSUE:**

When the provisions of a land use growth policy and/or neighborhood plan are directly incorporated into zoning regulations, does it provide more legal weight to the provisions of the land use plan that are actually incorporated into the zoning regulations?

## CONCLUSION:

Yes. If provisions of a land use plan are directly incorporated into zoning regulations, then those provisions of the land use plan have been adopted as zoning regulations and will have the legal weight of zoning regulations. The Montana Supreme Court recognized this in Flathead Citizens for Quality Growth, Inc. v. Flathead County Board of Adjustment, 2008 MT 1; 2008 Mont. LEXIS 3.

## LEGAL DISCUSSION:

Initially it is important to note that several times in Flathead Citizens for Quality Growth the Montana Supreme Court notes that the applicable Flathead County Zoning Regulations directly incorporated provisions of the West Valley Neighborhood land use plan into the Flathead County Zoning Regulations. Flathead Citizens for Quality Growth, Inc. v. Flathead County Board of Adjustment 2008 MT 1; 2008 Mont. LEXIS 3.

Most importantly, the Court notes several times that Flathead County Zoning Regulation, section 1.04.020 specifically states: "where a neighborhood plan, addendum to a Master Plan, or other adopted document contains aspects related to zoning and is under the jurisdiction of these regulations, the provisions that are more restrictive shall control." (Emphasis added.) The above language is set forth either in its entirety or in part in Flathead Citizens for Quality Growth at ¶ 5 and ¶ 40. Further, this language from the Flathead County Zoning Regulations is specifically referenced at ¶ 34 and ¶ 43 of the decision. It was clearly an important, controlling fact in the Court's decision that provisions of the neighborhood plan were actually incorporated into the zoning regulations.

Mont. Code Ann. § 76-1-605 provides:

**76-1-605. Use of adopted growth policy.** (1) Subject to subsection (2), after adoption of a growth policy, the governing body within the area covered by the growth policy pursuant to 76-1-601 must be guided by and give consideration to the general policy and pattern of development set out in the growth policy in the:

(a) authorization, construction, alteration, or abandonment of public ways, public places, public structures, or public utilities;

(b) authorization, acceptance, or construction of water mains, sewers, connections, facilities, or utilities; and

(c) adoption of zoning ordinances or resolutions.

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

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

Mont. Code Ann. § 76-1-605(2) was new statutory language adopted by the 2003 Montana State Legislature.

After quoting Mont. Code Ann. § 76-1-605(2) in ¶ 40, in Flathead Citizens for Quality Growth the Court states:

Section 1.040.020 of the Regulations provides the type of authority contemplated by this statute by stating 'where a neighborhood plan . . . contains aspects related to zoning and is under the jurisdiction of these regulations, the provisions that are more restrictive shall control.' Because the Plan is "specifically authorized by law or regulations adopted pursuant to the law" by virtue of FCZR § 1.040.20, it does confer authority to regulate and therefore the provisions of the Plan that are more restrictive must indeed control. (Emphasis added.)

It is also noteworthy that the Flathead decision does not discuss CALM the St. Patrick Hospital, Safeway and City of Missoula case. Citizen Advocates for a Livable Missoula, Inc. vs. City Council, 2006 MT 47, 2006 Mont. LEXIS 59. The Court does not discuss or consider its dicta discussion in CALM at ¶ 25 where after quoting Mont. Code Ann. § 76-1-605(2) MCA, the new 2003 state legislatively adopted language pertaining to the use of growth policies, the Court states:

From its plain reading, it may be assumed that the 2003 legislation was intended to reduce in some fashion the reliance which local governing bodies are required to place upon growth policies when making land use decisions. (Emphasis added.)

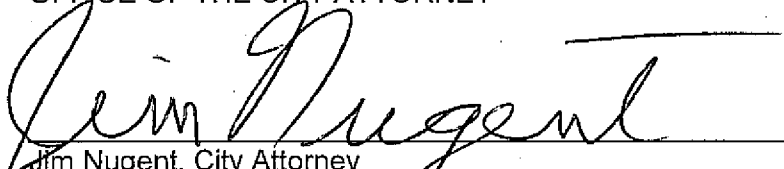
Since the CALM litigation was not specifically based on Mont. Code Ann. § 76-1-605(2), but instead on the previously recognized adopted standard of "substantial compliance" with the growth policy, the Court in CALM stated it would "leave for another day the question of what effect the 2003 legislation has had on the 'substantial compliance' standard."

Obviously the specific facts are quite different between the Flathead Citizens for Quality Growth decision and the CALM decision. The decisions are independent of each other. Thus, the Montana Supreme Court has not specifically revisited the assumption it states in CALM to the effect that "it may be assumed that the 2003 legislation was intended to reduce in some fashion the reliance which local governing bodies are required to place upon growth policies when making land use decisions."

#### **CONCLUSION:**

Yes. If provisions of a land use plan are directly incorporated into zoning regulations, then those provisions of the land use plan have been adopted as zoning regulations and will have the legal weight of zoning regulations. The Montana Supreme Court recognized this in Flathead Citizens for Quality Growth, Inc. v. Flathead County Board of Adjustment, 2008 MT 1; 2008 Mont. LEXIS 3.

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