

Law Offices of
McGarvey, Heberling, Sullivan & McGarvey, P.C.

Dale L. McGarvey
Jon L. Heberling
Roger M. Sullivan, Jr.
Allan M. McGarvey
John F. Lacey

745 South Main
Kalispell, Montana
59901-5399

Telephone
(406) 752-5566
1-800-345-1763 (in State)
1-800-406-7544 (out of State)
Fax (406) 752-7124
Emails: rsullivan@mcgarveylaw.com

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**COMMENTS IN OPPOSITION TO APPLICATION
TO AMEND ZONING REGULATIONS
By Roger Sullivan**

Hearing Wednesday, March 19, 2008, at 6:00 p.m.

Good evening. My name is Roger Sullivan. I'm a Kalispell attorney and I have been asked by Flathead Citizens for Quality Growth to represent them this evening in opposing the request for text amendments to Sections 1.04.020 and 4.10.040 of the Flathead County Zoning Regulations as proposed by the Flathead County Planning & Zoning Office. As I hope to make clear, there are a number of very good reasons why this request should be denied.

A. Section 1.04.020

1. The "problem" according to the Planning Department. As stated in the Staff Report (FZTA 08-01 at p. 1), the amendment to Section 1.04.020 is in response to the Montana Supreme Court's decision in the case of *Flathead Citizens for Quality Growth v. Flathead County Board of Adjustment*, 2008 MT 1 (decided January 3, 2008). In that case, the Flathead County Attorney argued that the Growth Policy Act prohibited provisions in Neighborhood Plans from being legally enforceable. In rejecting Flathead County's position, the Montana Supreme Court stated:

We disagree with the Board's assertion that the Plan is not applicable to the Board's decisions by virtue of § 76-1-605(2), MCA. In fact, the opposite is true. Section 76-1-605(2), MCA, provides as follows:

- (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.

Contrary to the Board's contention, this statute does not prohibit the enforcement of growth policies in all circumstances but simply states that a growth policy or master plan only acquires legal force by virtue of another law or regulation. 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.

Flathead Citizens for Quality Growth at ¶¶ 39-41 (emphasis added).

In response to the Montana Supreme Court's decision, the Planning Staff now proposes to throw out the baby with the bath water. Over and over the Staff Report repeats the mantra that "the proposed zoning regulations text amendments are administrative in nature," and that the amendments will have no bearing on any zoning district characteristics. (See Staff Report at p. 2-5.) As currently proposed, nothing could be further from the truth. Let me explain.

2. The real problem is unintended consequences of an alarming magnitude. In essence, the Planning Office argues that the proposed amendments to the zoning regulations are neutral housekeeping amendments that are strictly administrative in nature. However, they will have profound on the ground effects. We need look no further than the West Valley to understand this point. Recall, that because the West Valley Neighborhood Plan's limitation on gravel extraction being limited to uses "accessory to normal farm operations," the industrial gravel mining approved by the Board of Adjustment was reversed. Thus, if the linchpin to the enforceability of this limitation in the West Valley Neighborhood Plan is eliminated by virtue of deleting FCZR § 1.040.020, then the West Valley will once again be invaded by the legions of bulldozers and gravel trucks that previously threatened to disrupt the very fabric of the West Valley community.

One method to avoid this devastating impact would be to amend the West Valley Zoning District Regulations at the same time, so that the limitation on industrial gravel extraction currently found in the West Valley Neighborhood Plan is imported into the West Valley Zoning District Regulations.

Significantly, this apparently unintended consequence of the current proposal has been neither considered nor analyzed by the Planning Staff. Moreover, this kind of unintended consequence is not limited to the West Valley, but indeed threatens to impact neighborhood plan provisions throughout Flathead County. An analysis of these impacts, and curative zoning regulation amendments, should be undertaken before moving forward with the currently proposed text amendments. But there is a more fundamental problem with the proposal that I want to address next.

3. The importance of Neighborhood Plans. According to the Staff Report, "General planning principles acknowledge that a growth policy is a non-regulatory document." (Staff Report at p. 1.) First, this misstates the import of § 76-1-605(2), MCA, as recently construed by the Montana Supreme Court in the *Flathead Citizens for Quality Growth* case, and it entirely ignores 76-1-605(1)(c), MCA, which provides:

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 . . . adoption of zoning ordinances or resolutions. (Emphasis added.)

This is precisely what Section 1.04.020 does. It simply makes no good sense to delete it.

Moreover, the deletion of § 1.04.020 of the Flathead County Zoning Regulations is inconsistent with key provisions of the recently adopted Flathead County Growth Policy. As to Neighborhood Plans, the Growth Policy states as Goal 45: "Honor the integrity and purpose of existing neighborhood plans respecting the time and effort of the community involvement that has taken place." Further, as Policy 45.1, the Growth Policy states that, "Previously existing neighborhood plans are to remain in effect . . . and are deemed consistent with the existing Growth Policy." As the Growth Policy itself acknowledges, "Neighborhood Plans provide more detailed information regarding land uses, policies and issues relevant to that specific neighborhood or geographic area." (*Id.* at p. 142; emphasis added.)

Thus, if the gravel extraction provisions of the existing Flathead County Zoning Regulations are inconsistent with Neighborhood Plan provisions, then it is the Zoning Regulations which must be amended to bring them into conformance with the Growth Policy and Neighborhood Plans, rather than vitiate the Neighborhood Plan provisions as would happen with the current proposal.

Undermining the integrity of Neighborhood Plans would indeed be a disturbing result for several reasons. First, as discussed, it portends significant on-the-ground impacts. Second, it undermines the reasonable expectations of literally thousands of Flathead County residents who have participated in the formulation of some 18 approved Neighborhood and Local Plans. (See Flathead County Growth Policy, adopted 3/19/07, at p. 158.) These Neighborhood Plans have been formulated over the last ten years or more, and they represent an investment of many thousands of hours of work by citizens all across Flathead County. They also form the basis for the settled expectations of those who live in those neighborhoods.

For all of these reasons, I respectfully submit that the Staff Report mischaracterizes “general planning principles” as supporting the unenforceability of Neighborhood Plan provisions. Moreover, Montana jurisprudence is also on the side of following the provisions of the Growth Policy and Neighborhood Plans when enacting zoning regulations. In the seminal case of *Little v. Board of County Commissioners of Flathead County* (1981), 631 P.2d 1282, 193 Mont. 334, Flathead County again argued that the master plan (now growth policy) is advisory only, and that the County Commissioners were free to give it whatever weight it wants. *Id.*, 631 P.2d at 1290-91. As in *Flathead Citizens for Quality Growth*, the Montana Supreme Court rejected this argument and stated:

The statutes are clear enough to send the message that in reaching zoning decisions, the local governmental unit should at least substantially comply with the comprehensive plan (or master plan). . . . As we have explained, the statutes require a reading that the legislature intended the master plan to have substance. If a master plan must be in existence before the county commissioners can permanently zone, and if the right to adopt emergency interim zoning is limited to two years, it makes little sense to then permit the local governing body to ignore the master plan once it has been created. If the master plan is important enough to be a condition precedent to permanent zoning, it is also important enough to be followed once it is in existence. . . . We are

aware that changes in the master plan may well be dictated by changed circumstances occurring after the adoption of the plan. If this is so, the correct procedure is to amend the master plan rather than to erode the master plan by simply refusing to adhere to its guidelines.

Id., 631 P.2d at 1293 (emphasis added). This same standard was recently reaffirmed by the Montana Supreme Court in *North 93 Neighbors v. Board of Commissioners of Flathead County*, 2006 MT 132, ¶ 22, 137 P.3d 557, 332 Mont. 227.

Here, the Planning Staff, I believe inadvertently, proposes to vitiate the West Valley Neighborhood Plan and other Neighborhood Plans, which are integral parts of the Flathead County Growth Policy.¹ If indeed the intent of this proposal is to vitiate the limitations on gravel extraction in the West Valley Neighborhood Plan (or for that matter other neighborhood plans), then the proper legislative process should be initiated to do so. If on the other hand the intention is to simply accomplish neutral housekeeping amendments, then this current proposal is not the way to do it. Rather, § 1.04.020 should remain in place as a keystone to Flathead County planning, and instead those zoning regulations that are inconsistent with individually tailored Neighborhood Plans should be amended to bring them into conformance with the Neighborhood Plans.

B. Section 4.10.040

1. The problem with deleting § 4.10.040. As currently written, there is a “Catch-22” inherent in the Opencut Mining Act and implementing regulations and the County Zoning Act and its implementing regulations.² As pointed out in the Staff Report, the zoning regulations governing the issuance of a conditional use permit for “extractive industries” require that the plan for the development of the site, including the exploitation phase and the reuse phase, first “shall have been approved by the Department of Environmental Quality.” (FCZR § 4.10.040.)

The virtue of this requirement is that the Board of Adjustments, and the interested public, has available to it the documentation, including the Environmental

¹See § 76-1-601(4)(a), MCA; see also Flathead County Growth Policy, Chapter 10: Neighborhood Plans, at pp. 145-160.

²Cf. FCZR § 4.10.040 and ARM 17.24.212(2)(a)(vi), and § 82-4-432(2)(c), MCA.

Assessment, prepared by the Department of Environmental Quality when considering whether or not to grant a conditional use permit in those zoning districts where industrial gravel mining is allowed. The DEQ's Environmental Assessment addresses a host of important environmental considerations, and under certain circumstances can trigger the preparation of a more comprehensive Environmental Impact Statement. In contrast, an Environmental Assessment is not prepared by either the Planning Staff or the Applicant in the conditional use permit review process. Yet, this information can be very important in alerting the public and the Board of Adjustments to potentially significant environmental consequences of the proposed industrial gravel mining operation.

Moreover, the criteria for the issuance of a conditional use permit for an extractive industry requires consideration of whether the proposed site is suitable for the proposed use including "absence of environmental constraints," and that "the proposed use will not be detrimental to surrounding neighborhoods." FCZR § 2.06.080.1.A.B. Ironically, the proposed deletion of FCZR § 4.10.040 will deprive the interested public and the Board of Adjustments from an important source of information in the form of the Environmental Assessment from the Department of Environmental Quality. In other words, this proposal puts the cart before the horse. This information should properly be available to the public and the Board of Adjustments in order for the public to participate in a meaningful way in the process, and in order for the Board of Adjustments to make an informed decision, which must be supported by findings of fact. (FCZR § 2.06.100.)

2. Caution is required. While we acknowledge that as currently written the zoning regulations and Opencut Mining Act regulations are at odds, the "solution" is not to deprive the public and the Board of Adjustments of important information relevant to the determination of whether or not to grant a CUP. Rather, under these circumstances, caution is indicated. Once again, the unintended consequences of the current proposal must be carefully considered. Since the information in an Environmental Assessment is obviously important in the conditional use permit review process, some regulatory mechanism needs to be developed to make sure that the public and the Board of Adjustments has this information available at the time that the local review process is underway.

One method might be to require the Applicant to submit an Environmental Assessment, as is required by Flathead County Subdivision Regulations and the Montana Subdivision and Platting Act. However, it would seem that the more efficient, and less expensive, method would be to have the DEQ's Environmental

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Assessment available during the Board of Adjustment's review process. This could perhaps be accomplished by having a "conditional" zoning compliance form completed and transmitted to DEQ. This would simply indicate whether or not a conditional use permit could be granted under the zoning regulations if all of the criteria are met, including absence of environmental constraints and a determination that the proposed use will not be detrimental to surrounding neighborhoods. This in turn could trigger the DEQ's review, including the preparation of an EA, which would then be available to the interested public and the Board of Adjustments in making the determination as to whether or not to issue a conditional use permit.

This is obviously a complicated problem, which calls for a well thought out response. The current proposal does not do this. Under these circumstances, we request that you recommend denial of this proposed amendment as well.

In conclusion, there are many serious, and apparently unintended, consequences that will accompany the currently proposed amendments to the zoning regulations. On behalf of Flathead Citizens for Quality Growth, I ask that you recognize and appreciate these serious consequences, and recommend denial of the amendments as currently proposed.

Thank you.



Roger M. Sullivan
745 South Main
Kalispell MT 59901
(406) 752-5566