v. Irrigation ditches are not to be used for the dumping of refuse, grass clippings, weeds, stormwater, or other such materials.

vi. Only chemicals approved for aquatic environments should be used near or placed into the waters of irrigation ditches. Application should be in accordance with the requirements included on the bottle/packaging.

vii. Open ditch operations often result in seepage from the ditches and spills from stormwaters in unpredictable locations and at unpredictable times. Landowners, developers, and builders should consider these potential issues when selecting building sites and developing properties containing ditches, natural drainage ways, or where such features are present on adjacent properties as they have the potential to impact and flood development. Appropriate setbacks should be considered to minimize the potential for impacts.

d. Landowners are responsible for the control and treatment of noxious weeds and other pests or pathogens (plant or animal) on their property and should not plant or propagate invasive species. Measures should be taken to address existing or future noxious weed, pest, or pathogen infestations, to reduce potential impacts to public health and safety, agricultural production, and the County's economy.

i. In accordance with 7-22-2116, MCA, landowners are responsible for the control and treatment of noxious weeds. The State of Montana and Lake County both have noxious weed lists and the weeds included on those lists may vary. Landowners are encouraged to obtain and review both lists.

ii. At a minimum, pest and disease management should address the management of crop insects, aquatic invasive species, vertebrates, noxious weeds, and pathogens. If left unchecked, some pests, such as the Western fruit fly, apple scabies, or potato diseases, could have a devastating effect on Lake County's agricultural industry and economy. The Montana State University (MSU) Cooperative Extension Office located in Lake County can provide guidance on appropriate pest management techniques and treatments including approved biological controls.

iii. Vehicles, farm equipment, and recreational equipment should be inspected and any plants and seeds found should be removed prior to relocating the equipment to another property to minimize their spread.

iv. Herbicides, pesticides, insecticides, and other chemicals can significantly impact the environment, water quality, and public health and safety which can harm agricultural utilizers, non-utilizers, and the public alike, so responsible use and application of any types of chemicals is legally required. Of particular issue to agricultural operations is the potential for over spraying or chemical drift which enters agricultural lands when adjacent landowners try to manage their pest or weed situation. Over spraying, chemical drift, or the inappropriate application of chemicals has the potential to harm and sterilize the land, harm or kill crops, harm or kill animals, etc. and the applicator is liable for any such losses resulting outside of the target property. Landowners and all chemical

applicators should be aware that they may need an applicator's license and/or special training prior to applying chemicals. Applicators, including private users, have a legal obligation to always follow each chemical's instructions, which are typically included on the package, container, or attached labels.

e. Organic farming and ranching is a growing component of the agricultural economy in Montana and Lake County. Landowners are responsible to control their use of herbicide, pesticides, fertilizers, and other chemicals so as not to adversely impact adjacent lands, waters, or residents. Landowners planting Genetically Modified Organisms (GMOs) are responsible to mitigate any possible cross pollination with crops on adjacent lands.

f. Alternative agricultural practices are becoming an essential component of agriculture and such methods are continuously changing to meet the needs of the producers and consumers. Such changes are likely to continue as new opportunities are discovered.

   i. Alternative agriculture is defined as agricultural practices or enterprises that are different from prevailing or conventional agricultural activities. Such practices may include, but are not limited to, the following items:
      - nontraditional crops, livestock, and other farm products;
      - service, recreation, tourism, food processing, forest/woodlot, and other enterprises based on farm and natural resources (ancillary enterprises);
      - unconventional production systems such as organic farming or aquaculture; or
      - direct marketing and other entrepreneurial marketing strategies.

   ii. Lake County recognizes the value of alternative agricultural practices since they provide diversification for the County's agricultural industry and they help to provide opportunities to establish other industries that support agriculture.

   iii. Alternative agricultural operations may utilize such practices as being organic, wildlife friendly, non-GMO, natural, or pesticide or material free.

g. Lake County recognizes the benefit of allowing for the production and marketing of value-added agriculture, which entails changing the raw agricultural product into something new through packaging, processing, cooling, drying, extracting, or other type of process that differentiates the product from the original raw commodity.

h. Lake County recognizes that migrant, seasonal, and permanent farm workers are integral components of agricultural operations in this County.

   i. Agricultural operators are responsible for accommodating the needs of their workers and providing the necessary facilities for those workers as required under Federal, State, or local rules and regulations.

   ii. Any type of facilities erected to support agricultural workers are required to comply with all applicable public health, zoning, or land use requirements to be considered as lawfully erected facilities or recognized uses.

   iii. Lake County recognizes there is limited housing available throughout the

County to accommodate the agricultural work force needed to support the County's agricultural operations. As Lake County's zoning and subdivision regulations are developed, revised, and amended, consideration will be given to help to accommodate a reasonable amount of agricultural worker housing by allowing for additional permanent residences, temporary housing, etc. for agricultural workers.

i. Hazards exist in an agricultural environment from items such as farm equipment, irrigation hazards from ditches, seepage, pumps and operations, electrical fences, agricultural chemicals, and animals including dogs and livestock. These present real threats to children and adults. Controlling children's activities should take this into account.

j. To facilitate the diversification of agriculture and economic development within Lake County, the County recognizes and encourages, where appropriate, uses associated with agricultural practices and the use of agricultural lands. Such uses should be reasonable in size, history, and scope and comply with any applicable regulations. Examples of agricultural uses include, but are not limited to:

    i. Development or placement of temporary or permanent housing, sanitation facilities, or other necessary features and facilities onsite to accommodate agricultural workers,

    ii. Storage facilities, processing facilities, or production facilities associated with value added agricultural commodities,

    iii. Small scale fruit and/or vegetable stands

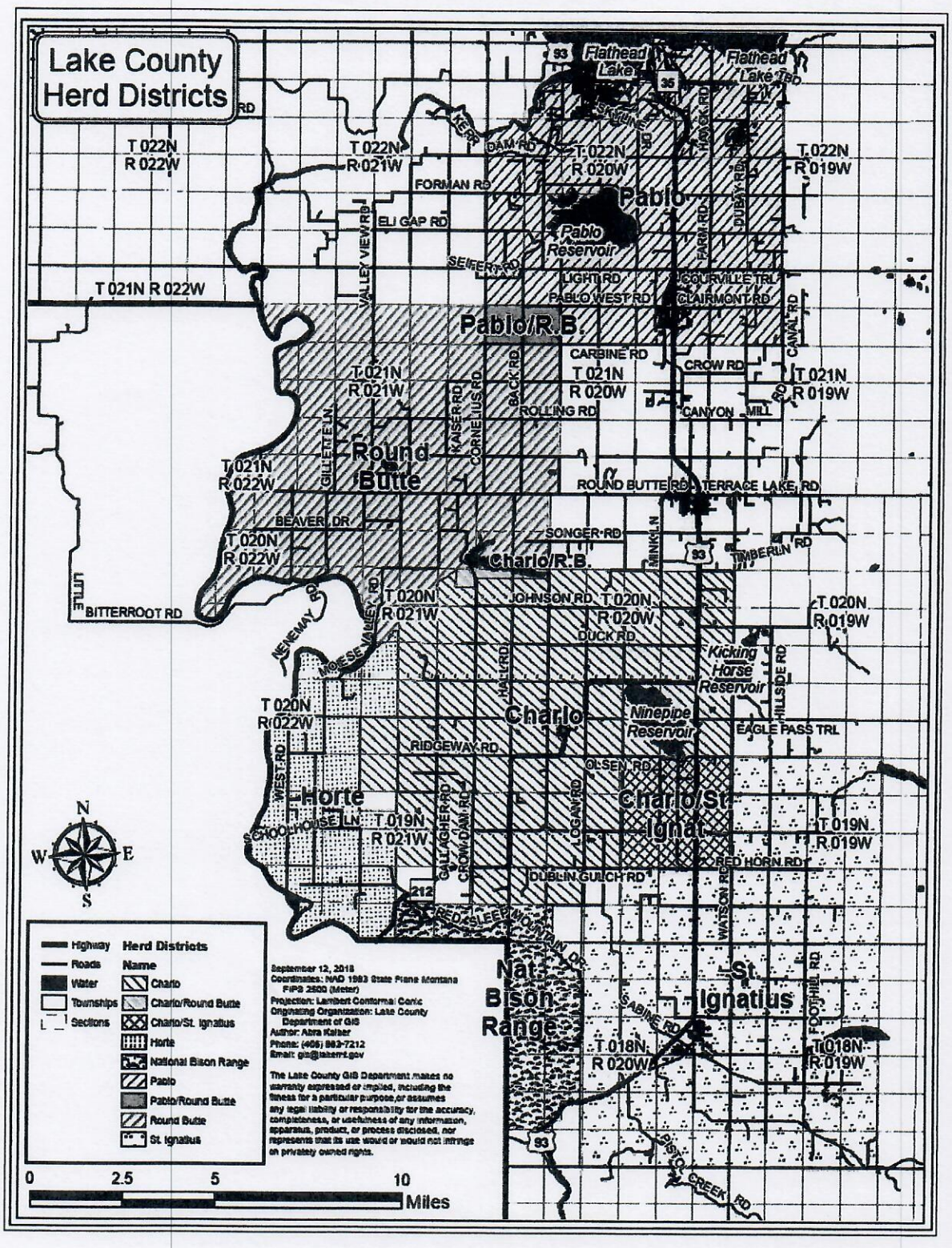
    iv. Vineyards, production, or properly licensed tasting rooms and sales areas for agricultural products,

k. Design standards will be encouraged in subdivisions, energy generation, communication facilities, and other uses to minimize adverse impacts upon rural and agricultural operations, as defined by the custom and culture of the county.

APPENDIX B: GROUPS AND ENTITIES LIST

- Alternative Energy Resources Organization (AERO)
- Confederated Salish & Kootenai Tribes Stockgrowers
- Flathead Lake Cherry Growers
- Intertribal Agriculture Council
- Lake County Conservation District
- Lake County Community Development Cooperation
- Licensed realtors and associations
- Local Ag Producers & Marketing Coops & Associations
- Missoula Community Food & Agriculture Committee (CFAC)
- Montana 4-H and MSU 4-H Foundation
- Montana Association of Conservation Districts
- Montana Cattleman's Association
- Montana Farm Bureau Federation
- Montana Farmers Union
- Montana Future Farmers of America (FFA) Association
- Montana Grape and Winery Association
- Montana Nursery and Landscape Association
- Montana Stockgrowers
- MSU/Lake County Extension Agents
- National Center for Appropriate Technology (NCAT)
- USDA Natural Resources Conservation Service
- Western Montana Growers Coop

APPENDIX C: LAKE COUNTY HERD DISTRICT MAP



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Issues and Alternatives Workshop Participant Guide

Time	Topic
5:00 PM	Welcome and Agenda Overview
5:20 PM	Presentation: Issues and Alternatives
5:50 PM	Small Group Breakouts
7:00 PM	Small Group Report Out
7:25 PM	Next Steps/Closing Comments
7:30 PM	Adjourn

Background: what are issues and alternatives?

A National Environmental Policy Act (*NEPA) "issue"* is a potential environmental, social, or economic effect from all or part of the proposed action, expressed as a cause-effect relationship. *Significant issues* are those directly or indirectly caused by implementing the proposed action, involve potentially significant effects, and could be meaningfully and reasonably evaluated and addressed in the programmatic scope of a Forest Plan. Issues are identified based on public comments provided during scoping. Issues highlight effects or unintended consequences that may occur from the proposed action, giving opportunities during the analysis to reduce adverse effects and compare trade-offs for the decisionmaker and public to understand.

Alternatives are developed around *significant issues* that involved unresolved conflicts concerning alternative uses of available resources (40 CFR 1500.2(e)). A *reasonable range of alternatives* is technically and economically feasible and meets the purpose and need (need for change) for the proposed action. Reasonable alternatives should avoid or minimize adverse impacts or enhance the quality of the human environment. Our expectations for alternatives are that they:

- Focus on outcomes and are organized to facilitate a comparison of key issues.
- Focus on what the public needs to know about tradeoffs and what a line officer needs to know to decide.
- Focus on varying the extent and location of management allocations.
- Focus on varying objectives (the rate at which management will take action to achieve desired conditions).
- Comply with law, policy, and regulation; meet requirements for ecological integrity, plant and animal diversity, and multiple uses; and provide for ecological, social, and economic sustainability.

Possible Range of Alternatives

The following thematic descriptions provide a starting point for a possible range of alternatives:

- No Action Alternative – continuation of the 1986 Forest Plan as amended.
- Modified Proposed Action – modernization of 1986 Forest Plan that responds to the need to change and 2012 rule requirements, and incorporates refinements based on public scoping comments.
- Alternative(s) with more emphasis on passive management and less emphasis on human-caused change. Emphasize primitive, semi-primitive, and various forms of non-motorized recreation.
- Alternative(s) with more emphasis on active management and human-caused change. Emphasize jobs and income, commercial forest products, motorized recreation, and experiences that are less remote or primitive.

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Potential Issue #1: ACTIVE MANAGEMENT ON THE LANDSCAPE

Issue Statement

There are concerns that the proposed action does not provide the necessary pace, scale, and design of active management to restore terrestrial and aquatic ecosystems. Related to this is the role National Forest System (NFS) lands play in the social and economic sustainability of communities dependent upon them and concerns that the proposed action will not adequately support local economies. There are concerns about the national wildfire crisis and that the pace and scale of management to reduce fire risk on the landscape is insufficient, particularly in the wildland urban interface (WUI) and recently acquired lands. Conversely, there are concerns that the proposed action supports too much active management, emphasizing that allowing natural processes to dominate is more appropriate. There are concerns about the effectiveness and negative ecological impacts of management actions such as timber harvest, prescribed burning, and associated road building or improvements.

Potential Indicators for the Issue

- Historic Use
- Active management objectives (e.g., vegetation management acres, timber volume outputs and types, fuels treatment objectives, and amount of treatment in acquired lands).
- Acres of vegetation treated in the WUI.
- Amount and distribution of lands suitable for timber production and timber harvest. See also the Proposed Action Timber Suitability Process Paper.
- Amount and distribution of land allocations that restrict active management activities.
- Aquatic restoration and infrastructure objectives.
- Progress toward ecosystem desired conditions; and effects to all ecosystem elements and species diversity.
- Economic and social impacts (e.g. jobs and income by industrial sectors).
- Inceased wildfire

Potential Alternative Elements around this Issue

- Reconsider the management area (MA) framework to add a MA for old growth; more MAs that restrict logging; create a MA for the WUI; create a MA for restoration and connectivity emphases; or break the General Forest MA into sub-categories.
- Alternative elements that emphasize natural processes and minimize active management include:
    - Identify more recommended wilderness, eligible wild and scenic rivers, and other "protected" land allocations.
    - Minimize lands available for active vegetation management and/or increased constraints on design and implementation of these actions.
    - Emphasize connectivity, habitat, and ecological integrity over other values, including more aggressive aquatic restoration objectives.
- Alternative elements that emphasize active management and economic contributions include:
    - Reduce recommended wilderness and eligible wild and scenic rivers.
    - Maximize suitability for timber production and other lands available for active management; maximize restoration treatments; and maximize opportunities to provide timber supply.
    - Focus on wildfire crisis response and support to county plans and policies.

Potential Issue #2: SUSTAINABLE RECREATION

Issue Statement

There are concerns that the proposed action does not adequately provide for sustainable recreation, including desired recreation opportunities, recreation opportunity spectrum settings, recreation special uses, suitability of specific recreation activities on the landscape, the necessary type and amount of supporting recreation infrastructure, and plan components to guide recreation management. There are concerns about the negative and positive impacts of recreation. There are also concerns the proposed action does not adequately establish which recreation uses are compatible, which should be separated, and how all recreation demands can be met. There are concerns the proposed action does not adequately provide for motorized or non-motorized uses broadly, in the summer, in the winter, or in specific places, including concerns that motorized access restrictions are inappropriate or discriminatory. While many desirable activities were mentioned, there was particularly high interest expressed in Nordic skiing, snowmobiling, mountain biking, E-biking, horseback riding, off-highway vehicle use, and quiet and nonmotorized uses.

Potential Indicators for the Issue

- Desired distribution of recreation opportunity spectrum classes in summer and winter. See also the Preliminary Modified Proposed Action ROS Fact Sheet and the Sustainable Recreation FAQ.
- Objectives for roads and trails work.
- Objectives for developed recreation (e.g., sites, facilities, trailheads, campground improvements).
- The extent and location of the Concentrated Recreation Use management area.
- Opportunities for specific recreation uses (total extent of allocations suitable for the use)
- Effects to connectivity, wildlife habitats, other elements of ecological integrity from recreation.
- Effects to jobs and income and other social elements from recreation.

Potential Alternative Elements around this Issue

- Align with proposals from other entities or legislation, such as the proposed Blackfoot Clearwater Stewardship Act, the Lolo-Bitterroot Partnership Citizen Plan, and the Lolo 2006 Draft Plan.
- Reconsider the MA framework to split the backcountry MA to align with motorized versus nonmotorized settings; replace the backcountry MA with a management area for inventoried roadless areas; add areas of cultural and historic value to Concentrated Recreation Use MA; add an allocation of "recreation emphasis area" for specific sites (such as the Rattlesnake National Recreation Area and Marshall Mountain); or to create individual backcountry and recreation emphasis areas.
- Alternative elements that emphasize primitive, quiet or non-motorized recreation experiences include:
    - More extent and distribution of non-motorized settings broadly or in specific locations.
    - Promotion of non-motorized trails, trailheads, or other infrastructure.
- Alternative elements that emphasize motorized and less remote recreation experiences include:
    - More extent and distribution of motorized settings broadly or in specific locations.
    - Promotion of motorized trails, trailheads, or other infrastructure.

Potential Issue #3: RECOMMENDED WILDERNESS

Issue Statement

There are concerns that the proposed action does not establish the location and amount of recommended wilderness or appropriately guide suitable uses in them (such as motorized and mechanized uses). There are concerns that the proposed action designates too little recommended wilderness, and that more is desired to provide connectivity, habitat and protection of at-risk species, quiet, non-motorized or primitive recreation and associated economic contributions, and other ecosystem values. There were also concerns that the proposed action designates too much recommended wilderness, and that less is desired because designated wilderness is sufficient, motorized or mechanized recreation and their economic contributions are desirable, active management is needed, and that access restrictions are inappropriate or discriminatory. There were also perspectives how various uses impact wilderness characteristics or at-risk wildlife. One of the most highlighted areas of concern was the Great Burn/Hoodoo area, including desires for a variety of approaches.

Potential Indicators for the Issue

- Number, location, and total acres of recommended wilderness areas. See also the Recommended wilderness handout and the LNF Wilderness Process FAQ.
- Specific delineations and management approaches for recommended wilderness areas.
- Suitability statements for the allowable uses in recommended wilderness.
- The effects of recommended wilderness designations on relevant ecological, social, and economic factors.

Potential Alternative Elements around this Issue

- Align with plans or proposals include the 1986 Forest Plan, the 2006 Draft Plan, the Blackfoot Clearwater Stewardship Act, the Lolo Accords, the Northern Rockies Ecosystem Protection Act, and the Lolo-Bitterroot Partnership Citizen Plan.
- Alternative elements that emphasize "more" recommended wilderness include:
    - Designate all inventoried roadless areas as recommended wilderness.
    - Designate recommended wilderness in specific areas, such as Cube Iron-Cataract, Sundance Ridge, Reservation Divide, Lolo Peak, Great Burn, "String of Pearls", Selway-Bitterroot Additions, Bob Marshall Additions, Quigg Peak/Slide Rock, Stony Mountain, Ward Eagle, Meadow Creek/Upper North Fork, Grizzly Basin, Monture Creek, Marshall Creek, Carleton Lake Basin, Swan Range, Sheep Mountain, Marble Point, Gilt Edge-Silver Creek, Wonderful Peak, Stevens Peak, and West Fork Clearwater.
- Alternative elements suggested in scoping that emphasize "less" recommended wilderness include:
    - Not include any recommended wilderness, or as little as possible.
    - Exclude specific areas from recommended wilderness to allow other uses (including the possibility of allocating these as backcountry areas instead) including Cube Iron-Cataract, Carleton Ridge area, Petty Mountain, Sapphire Divide, Otatsy, Center Ridge, and Heart Lake.
- Alternative approaches in the Great Burn area include boundary adjustments to allow for various uses; management approaches and suitability statements for the Stateline Trail and other trails; and alignment with the neighboring Nez Perce-Clearwater National Forest revised plan.

Other Draft Plan and Analysis Issues

Scoping brought forward many considerations for modifying the draft plan (plan components, distinctive roles and contributions, management approaches, and such) to meet requirements for ecological integrity, plant and animal species diversity, and/or social and economic sustainability. These elements are less likely to drive different alternatives but will be considered with respect to modifying the draft plan across all alternatives. In addition, comments pointed to scientific information or methodologies for the environmental analysis or interpretations of science, law, regulation, policy; this type of comment will be considered and addressed in the draft environmental impact statement (DEIS).

Draft plan modifications or DEIS analysis issues include (but are not limited to) those related to connectivity, carbon sequestration, climate change, mature and old growth forest, at-risk species, general species diversity and other specific species of public interest, the Rattlesnake National Recreation Area, fungi and mycorrhiza, soils, geology, air quality, other elements of terrestrial vegetation especially desired conditions, aquatic resources (conservation watershed network, watersheds, riparian management zones, at-risk aquatic species, and other elements), tribal trust responsibilities and areas of importance, cultural and historic resources, eligible wild and scenic rivers, other designated areas (designated wilderness, inventoried roadless areas, research natural areas and special areas), national trails, Lolo Trail Historic Landmark, lands ownership/status/uses, acquired lands, infrastructure (roads, trails), energy and minerals, reserved rights, grazing, invasive plants, monitoring, and focal species.

Workshop Discussion Questions

1. Did we capture the issues correctly?
2. Did we capture appropriate indicators for the issues?
3. Did we identify an appropriate range of alternatives?
4. Is there other input on how to vary the alternatives for each issue?

Montana Code Annotated 2023

TITLE 76. LAND RESOURCES AND USE
CHAPTER 1. PLANNING BOARDS
Part 1. General Provisions

Cooperation With Planning Board By State And Local Governments

76-1-110. Cooperation with planning board by state and local governments. Whenever the board undertakes the preparation of a growth policy, the departments and officials of state, city, county, and separate taxing units operating within lands under the jurisdiction of the board shall make available, upon the request of the board, information, documents, and plans that have been prepared or, upon the request of the board, shall provide any information that relates to the board's activity.

History: En. Sec. 29, Ch. 246, L. 1957; R.C.M. 1947, 11-3829; amd. Sec. 7, Ch. 582, L. 1999.

Montana Code Annotated 2023

TITLE 76. LAND RESOURCES AND USE
CHAPTER 1. PLANNING BOARDS
Part 1. General Provisions

Representation Of County Or Additional Cities Or Towns On Existing Boards

76-1-111. Representation of county or additional cities or towns on existing boards. (1) Any city, county, or town or any combination of cities, counties, or towns wishing to be represented upon an existing planning board may, by agreement of the governing body or bodies then represented on the board, obtain representation on the board and share in the membership duties and costs of the board upon a basis agreeable to the governing body or bodies creating the board.

(2) The membership, as well as the jurisdictional area of any board, may be increased to provide for representation and planning of any additional cities, counties, or towns seeking representation.

(3) Any city, county, or town that becomes represented upon an existing planning board pursuant to this section may appropriate funds for expenses necessary to cover the costs of representation. Subject to **15-10-420**, the governing bodies of any represented city, county, or town may levy on all property that is added to the jurisdictional area of an existing board by representation a tax for planning board purposes under procedures set forth in Title 7, chapter 6, part 40.

History: En. Sec. 15, Ch. 246, L. 1957; amd. Sec. 6, Ch. 273, L. 1971; R.C.M. 1947, 11-3815; amd. Sec. 137, Ch. 584, L. 1999; amd. Sec. 189, Ch. 574, L. 2001.

Montana Code Annotated 2023

TITLE 76. LAND RESOURCES AND USE
CHAPTER 1. PLANNING BOARDS
Part 6. Growth Policy

Use Of Adopted Growth Policy

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.

History: En. Sec. 40, Ch. 246, L. 1957; amd. Sec. 15, Ch. 247, L. 1963; R.C.M. 1947, 11-3840(part); amd. Sec. 12, Ch. 582, L. 1999; amd. Sec. 1, Ch. 527, L. 2001; amd. Sec. 7, Ch. 599, L. 2003.

EXHIBIT tabbies P9

APPENDIX G: DUE PROCESS: The Elements of Fair Play

R. Marlin Smith: Partner, Ross, Hardies, O'Keefe, Babcock & Parsons

Land-use regulation is set against a constitutional backdrop that establishes certain limits for such regulation. Two of the most important of these constitutional limitations come from the Fifth Amendment of the U.S. Constitution, which is made applicable to the state and its instrumentalities by the Fourteenth Amendment and which provides that no person may be "deprived of life, liberty or property, without due process of law . . . ." This requirement of due process has two aspects, commonly called procedural due process and substantive due process.

The constitutional requirement of procedural due process essentially requires that the procedures used in decision making -- whether it be administrative or judicial decision making -- be fair, giving all interested persons an adequate opportunity to make their views heard. Substantive due process is the term sometimes applied to the constitutional requirement that statutes, ordinances, rules, and decisions must not be arbitrary or capricious. That is, there must be a rational relationship between the exercise of legislative or rule-making authority and the achievement of some legitimate public purpose.

PROCEDURAL DUE PROCESS

The constitutional requirement of fair procedures has nine general aspects:

(1) NOTICE. Adequate and timely notice of proceedings and of the proposed decision-making or rule-making process is a fundamental aspect of due process. The U.S. Supreme Court, in a frequently cited decision [Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950)], has said that notice must be ". . . . reasonably calculated, under all the circumstances, to apprise interested parties of the tendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . ."

Both the enabling acts of the various states and municipal zoning ordinances usually provide that notice of both legislative hearings and administrative hearings on zoning matters be given in some fashion to all interested parties. Due process requires that the owner of the land and other interested persons be given prior notice before any action is taken which would make a material change in the regulations applicable to a particular parcel, or group of parcels, of land [Gulf and Eastern Development Corp. v. City of Fort Lauderdale, 354 So.2d 57 (Fla. 1978); American Oil Corp. v. City of Chicago, 331 N.E.2d 67 (Ill. App. 1975); Nesbit v. City of Albuquerque, 575 P.2d 1340 (N.M. 1977)]. Publication is the most commonly required form of notice, although posting on the property affected is also frequently required. In some circumstances, such as where a proposed condemnation is involved, publication and posting have been held insufficient notice [Schroeder v. City of New York, 71 U.S. 208 (1962)]. Increasingly, statutes and municipal ordinances have required that notice be mailed, usually by certified mail, to all property owners (or taxpayers of record) within a specified distance of the property which will be affected by the zoning action.

The notice must be adequate: the average citizen reading it, whose rights may be affected, must understand the general purpose, nature, and character of the proposed action [Moore v. Cataldo, 249 N.E.2d 568 (Mass. 1969); Nesbit v. City of Albuquerque, supra, Note 2; Yoga Society of New York v. Town of Monroe, 392 N.Y.S.2d 81 (App. Div. 1977); Sellers v. City of Asheville, 236 S.E.2d 283 (N.Car.App. 1977); Barrie v. Kitsap County, 527 P.2d 1377 (Wash. 1974)]. Moreover, there is some authority for the view that an application for one type of zoning relief cannot rest on public notice for a different type of relief. Thus, for example, an applicant cannot be given a special-use permit when the notice stated that he was seeking a variation. [See, Foland v. Zoning Board of Appeals, 207 N.Y.S.2d 607 (N.Y.S. Ct. 1960) and Village of Larchmont v. Sutton, 217 N.Y.S.2d 929 (N.Y.S.Ct. 1961).]

The timeliness of the notice is also important. Minimum notice times are ordinarily specified in state enabling legislation and in municipal ordinances. A zoning action that does not comply with these statutory time periods is invalid [Lunt v. Zoning Board of Appeals, 191 A.2d 553 (Conn. 1963); Slagle v. Zoning Board of Appeals, 137 A.2d 542 (Conn. 1957); George v. Edenton, 230 S.E.2d 695 (N.Car.App. 1976); Sibarco Stations, Inc. v. Town Board of Vestal, 288 N.Y.S.2d 8 (N.Y.App. Div. 1968)].

To summarize, procedural due process demands that there must be notice of an action, it must adequately apprise interested persons of the intended action, and it must be given within the prescribed time periods and within sufficient time to allow interested individuals to make appropriate preparations.

(2) OPPORTUNITY TO BE HEARD. It is central to the concept of procedural due process that all persons interested in a prospective decision be given an opportunity to offer their views and to supply evidence in their support. This concept is embodied in the virtually uniform requirement that there be no changes in zoning regulations, and that no special permits, special exceptions, or variations be granted until a public hearing has been held. The failure of a local legislative body to conduct an appropriate hearing that gives everyone a fair opportunity to be heard may invalidate any subsequently adopted ordinance or regulation. [See, e.g., Bowen v. Story County Board of Supervisors, 209 N.W.2d 569 (Iowa 1973); Baltimore v. Mano Swartz, Inc., 299 A.2d 828 (Md. 1973); and Lima v. Robert Slocum Enterprises, 331 N.Y.S.2d 51 (App. Div. 1972).]

The hearing must be open to the public. Any decision that is based on proceedings held in a closed session, with the public excluded, will be held void [Blum v. Board of Zoning and Appeals, 149 N.Y.S.2d 5 (N.Y.S.Ct. 1956)]. While there are some older court decisions that

support the view that private deliberations prior to a public vote are permissible, an increasing number of states have adopted open meeting or "sunshine laws" which require that the deliberations of local governmental bodies, as well as the actual vote, be public. The Washington and Oregon courts have carried this requirement a step further by holding that local boards and commissions may not even receive information outside of the presence of all of the parties [Smith v. Skagit County, 453 P.2d 832 (Wash. 1969) and Fasano v. Board of County Commissioners of Washington County, 507 P.2d 23 (Ore. 1973)].

A hearing in which there is no meaningful opportunity to be heard and which in fact frustrates the right of persons to be heard is no hearing at all. One such case was described by Justice Grice of the Georgia Supreme Court in Pendley v. Lake Harbin Civic Ass'n, [198 S.E.2d 503 (Ga. 1973)].

The evidence in this complaint for injunctive relief shows 36 zoning petitions were scheduled to be heard before the Commissioners of Clayton County on October 11, 1972, at 7:30 o'clock p.m.; that the hearings continued until 3:30 o'clock a.m., October 12, 1972; that from 1,200 to 1,500 people were present to attend the public meeting; that the hearings were held in the commissioners' hearing room, which accommodates approximately fifty people; that there were three other larger rooms in the courthouse where the hearings could have been legally held; that people were packed so closely in the entire corridor outside the hearing room that those interested in various petitions could not get close to the door, much less inside the hearing room.

The record discloses substantial evidence to support the findings of the trial judge, such as the following. One man swore that when he arrived for the hearing there was already an "enormous" crowd gathered in the hearing room and the hallway outside; that it took him thirty-five minutes to get from the hallway into the hearing room, which he managed only through the help of friends who were already inside; that there were no microphones in use and it was difficult to hear the proceedings even inside the hearing room; that when he asked the commissioners to clear the hearing room to let in persons who want to speak pro or con on each petition in turn they took no action on the request; and that he then left the hearing to enable some other interested person to have a chance to get in.

The Georgia court, in holding that there had been no public hearing under such circumstances, referred with approval to this ruling of the trial court:

Zoning is a matter of highest governmental business. The government's business should not be conducted in unreasonable places, at unreasonable hours. To do so would seem to defeat the intent of the General Assembly to insure reasonable, orderly, and public hearings when required

by law. The court finds that conducting the county business of zoning after mid-night and into the early morning hours, and on a day other than as previously advertised, and in one of the small public meeting rooms in the courthouse where only a small number of the approximately 1,200 to 1,500 people present had access, was unreasonable to the extent that the general public was deprived of an effective, meaningful public hearing before the commissioners of Clayton County to which they were entitled by law.

Although the more generally accepted view is still that decisions with respect to the zoning of particular tracts of land are legislative decisions [see Meyer v. County of Madison, 287 N.E.2d 159 (Ill.App. 1972); Golden Gate Corp. v. Town of Narragansett, 359 A.2d 321 (R.I. 1976); and Charlestown Homeowners Ass'n. v. LaCoke, 507 S.W.2d 876 (Tex. Civ.App. 1974)], there have been an increasing number of decisions which have followed the lead of the Oregon Supreme Court in Fasano v. Board of County Commissioners of Washington County [supra, Note 9], in holding that when the local legislative body is considering a rezoning or a request to use a tract of land in a particular way, then the decision is not legislative at all but is in fact a quasi-judicial decision [Snyder v. City of Lakewood, 542 P.2d 371 (Colo. 1975); Lowe v. City of Missoula, 525 P.2d 551 (Mont. 1974); Fleming v. City of Tacoma, 81 Wash.2d 292, 502 P.2d 327 (1972); and Golden v. Overland Park, 224 Kan. 591, 584 P.2d 130 (1978)]. The distinction is of great importance because, as the Fasano decision indicates, if the local hearing is regarded as quasi-judicial or adjudicative, rather than legislative, then all interested persons are entitled to a "trial type" hearing, whereas less rigorous procedures will satisfy due process requirements when the matter to be determined involves issues of legislative fact or recommendations with respect to public policy.

(3) THE RIGHT OF CROSS-EXAMINATION. When the hearing is regarded as adjudicative or quasi-judicial, all parties must be accorded the opportunity to question their opponents and the opposing witnesses. Courts have generally been reluctant to hold that cross-examination is a necessary element of fair procedure in legislative hearings, perhaps because of a concern that local boards are inadequately equipped to deal with evidentiary rules. However, one recent Illinois decision has required that an opportunity to cross-examine be afforded in legislative hearings. In E & E Hauling v. County of Du Page, [396 N.E.2d 1260 (Ill.App. 1979)], the court held that a zoning board of appeals, sitting to consider a proposed rezoning with respect to which it would only make a recommendation to the county board, must not only give interested persons the right to appear and give evidence but must also give them the right to examine witnesses offered by opposing parties. In an earlier Connecticut decision, the Supreme Court of that state had explained why the right to cross-examination was an important aspect of fair procedures:

"....[a zoning board] often deals with important property interests; and a denial of a right to cross-examine may easily lead to the acceptance of testimony at its face value when its lack of creditability or the necessity for accepting it only with qualifications can be shown by cross-examination" [Wadell v. Board of Zoning Appeals, 68 A.2d 152 (Conn. 1949)].

The Wadell decision makes a persuasive argument that, to the greatest extent possible, local zoning boards should not accept testimony offered at its face value. By permitting the cross-examination process to disclose the extent to which the testimony should be credited or qualified, local hearings will be made procedurally fairer.

(4) DISCLOSURE. There must be an opportunity to see, hear, and know all of the statements and evidence considered by the body making the local decision. Private communications with the decision makers, called ex parte communications, destroy the credibility of the hearing process and deprive it of an appearance of fairness. The decisions in the state of Washington have developed the requirement that a public hearing must not only be fair, it must appear to be fair. Thus, in Smith v. Skagit County [supra, Note 9; cf. Fasano v. Board of County Commissioners of Washington County, Supra, Note 9], the court invalidated a decision that rested in part on information received at a meeting from which the public and opponents of the proposal were excluded. In that case, the court explained:

It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, in appearance as well. A public hearing, if the public is entitled by law to participate, means then a fair and impartial hearing. When applied to zoning, it means an opportunity for interested persons to appear and express their views regarding proposed zoning legislation .... The term "public hearing" then presupposes that all matters upon which public notice has been given and on which public comment has been invited will be open to public discussion and that persons present in response to the public notice will be afforded reasonable opportunity to present their views, consistent, of course, with the time and space available. Where the law expressly gives the public a right to be heard . . . the public hearing must, to be valid, meet the test of fundamental fairness, for the right to be heard imports a reasonable expectation of being heeded. Just as a hearing fair in appearance but unfair in substance is no fair hearing, so neither is a hearing fair in substance but appearing to be unfair.

One of the commonest breaches of the right of interested parties to have an opportunity to be acquainted with, and to respond to, all of the information received by the decision-making body is the practice of considering staff reports which have not been circulated to the interested parties or which are not made available in advance of the hearing. It is not unusual for plan commissions and zoning boards to receive such staff reports at the last minute, or even after the public hearing

has closed, without those reports ever having been distributed to members of the public and interested persons given the opportunity to peruse them and to respond to assertions made in them. The failure to disclose all of the information that is taken into account by the decision-making body destroys the fairness of the decision-making process and may be held to deprive the parties of procedural due process.

(5) FINDINGS OF FACT. When an administrative decision is involved, the findings or reasons for the decision are an essential aspect of due process. In some instances, the applicable statute or ordinance requires findings of fact and in others, the courts have imposed that requirement. [See, e.g., Shay v. District of Columbia Board of Zoning Adjustment, 334 A.2d 175 (D.C. App. 1975); Reichard v. Zoning Board of Appeals, 290 N.E.2d 349 (Iii.App. 1972); Metropolitan Board of Zoning Appeals v. Graves, 360 N.E.2d 848 (Ind. App. 1977); Bailey v. Board of Appeals of Holden, 345 N.E. 2d 367 (Mass. 1976); and see generally, 3 Rathkopf, The Law of Zoning and Planning, pp. 37-69 to 37-70 (4th ed., 1980)].

Findings of fact are ordinarily not required where the decision is characterized as a legislative one. This means that in most zoning actions findings of fact are not necessary. However, one consequence of the Fasano rule in the Washington courts has been a requirement that rezoning decisions with respect to particular parcels of land, which are characterized as quasi-judicial, be supported by adequate findings of fact. The Oregon Supreme Court held in South of Sunnyside Neighborhood League v. Board of Commissioners, [569 P.2d 1063 (Ore. 1977)] that while no particular form for such findings is required, there must be a clear statement of what the decision-making body believed to be all of the relevant and important facts on which it based its decision. In that case, the court found that the very generalized findings were too incomplete and speculative to meet the requirement that there be adequate findings. Certainly it is not sufficient for the decision-making body simply to parrot the words of the statute and call its product findings of fact [Harber v. Board of Appeals, 228 N.E.2d 152 (Ill.App. 1967)].

Some years ago, Justice Smith of the Michigan Supreme Court, in Tireman-Joy-Chicago Improvement Ass'n. v. Chernick, [105 N.W.2d 105 (Mich. 1960)], gave vent to an expression of Judicial exasperation with generalized and uninformative "findings" by a local zoning board:

Appellants complain of variances (exceptions) granted by defendant Board of Zoning Appeals without rhyme or reason. They say that the ordinance permitting the grant of variances is vaguely phrased and without specific standards (for example, "unnecessary hardship" is a ground). In addition they complain that the Board's action here was "wholly unwarranted under the facts." What, in truth, was the warrant for the Board's action? We are not told. The Board says we do not have to be told.

Thus, under the Board's argument, the citizen gets it going and coming. Were the legislative standards followed by the Board? There are no specific standards to be followed. What, then, are the reasons for the Board's finding the broad standard of "unnecessary hardship" to be satisfied? No one knows. No reasons are given, In other words it boils down to this: there is unnecessary hardship because there is unnecessary hardship, and, because there is unnecessary hardship, the standard (of unnecessary hardship) is satisfied. Thus by mumbling an incantation the bureaucrat forecloses effective judicial review.

Explicit and careful findings of fact enable all persons interested in the local decision to know just exactly what was decided. That, too, is an essential element of procedural due process.

(6) CONFLICTS ON INTEREST AND THE APPEARANCE OF CONFLICT OR IMPROPRIETY. When a local official has a direct or indirect financial interest in the decision, that decision is infected with the potential bias of the individual and will not be permitted to stand. [See Low v. Madison, 60 A.2d774 (Conn. 1948); Olley Valley Estates, Inc. v. Fussell, 208 S.E.2d 801 (Ga.1974); and Crall v. Leonminster, 284 N.E.2d 610 (Mass. 1972).]

The appearance of fairness doctrine developed by the Washington courts, mentioned above, has been applied quite frequently to invalidate decisions in which the interest of one of the decision makers deprives the decision of the appearance of fairness. In Fleming v. City of Tacoma, [502 P.2d 327 (Wash. 1972)], one of the councilmen was employed as an attorney by the successful petitioners for a rezoning amendment less than 48 hours before the city council voted on the request. The Washington Supreme Court held that the proceeding in which the amendment was approved was fatally infected by the appearance of unfairness created by the councilman's conduct. Consequently, the ordinance was declared invalid--even though the vote of the councilman in question was not necessary to pass the ordinance.

Subsequent Washington decisions have set aside a rezoning ordinance because two members of the planning commission were closely associated with a community organization whose members would benefit financially from the proposed rezoning [Save a Valuable Environment v. City of Bothel, 57 P.2d 401 (Wash. 1978)]. A decision has even been invalidated when it appeared that a member of the local decision-making body had an interest that might have influenced his vote, although in fact it did not [West Slope Community Council v. City of Tacoma, 569 P.2d 1183 (Wash. App. 1977)].

In Buell v. City of Bremerton, [495 P.2d 1358 (Wash. 1972)], the court applied the appearance of fairness rule to invalidate a zoning decision when the chairman had a possible interest because his property might appreciate in value as a result of the zoning. The court noted that the fact that

the action could be carried without counting the chairman's vote was not determinative; the self-interest of one member of the planning commission could affect the action of the other members of the commission regardless of the fact that they themselves were disinterested. A New York court has gone so far as to invalidate a local planning decision because the controlling vote was cast by a town board member who was a vice-president of a large advertising agency that the court assumed might be "a strong contender' for obtaining advertising contracts for the project. The court preferred to believe that the board member's vote was prompted by the "jingling of the guinea' rather than by his conscience. So the court invalidated the decision, saying "like Caesar's wife, a public official must be above suspicion." [See Tuxedo Conservation and Taxpayers Asstn. v. Town Board of the Town of Tuxedo, 418 N.Y.S.2d 638 (App. Div. 1979).]

(7) PROMPT DECISIONS. Even adequate and timely notice, a full and completely fair public hearing, and absolute impartiality (free of any taint of bias) on the part of the decision-making official do not guarantee due process unless a decision is made promptly. The parties to a contested land-use decision have a right to expect prompt decisions, and failure to provide this is itself a failure to provide fair procedures.

In recent years, especially in environmental impact litigation, there has been a tendency for opponents of the project to use the environmental review process solely for the purpose of securing a delay in the ultimate decision. The decision-making body that permits itself to be a party to such procrastination effectively denies one or more of the groups involved the process to which they are constitutionally entitled.

(8) RECORDS OF PROCEEDINGS. Finally, it is central to the concept of procedural due process that complete and accurate records be kept of proceedings -- more than just skeletal minutes of what transpired. All exhibits must be preserved and there must be a stenographic record of all testimony heard and all of the statements made. Anything less will deprive the judiciary of the opportunity to engage in a meaningful review when the dispute finally reaches the judicial system. In McLennan v. Zoning Hearing Board of Mount Pleasant Township, [304 A.2d 520 (Pa. Comm. 1973)], the court expressed its exasperation with being required to review Judicially a local zoning decision on a totally inadequate record: "These ordinances are absent from the record, and we are mystified as to how we are to decide this appeal without them. Additionally the Zoning Hearing Board merely kept a summary of the proceeding before it and made no stenographic record. In Camera, Jr. v. Danna Homes, Inc., 6 Pa. Commwlth. 417, 296 A.2d 283 (1972), we remanded because the testimony was paraphrased by the Board's secretary rather than taken verbatim."

Like the requirement that decisions be made promptly, the requirement that a complete and adequate record be kept is central to due process. No hearing can be considered to have been a fair hearing if the matters taken into account by the decision-making body cannot be reconstructed when its decision is reviewed by others.

(9) SOME GROUND RULES FOR FAIR HEARINGS. No local decision-making body can conduct business in an orderly and efficient manner unless it has a set of rules which are available to any person who appears before the body. Unless the participants in the local hearing process can know the ground rules that will govern the hearing, they cannot adequately prepare themselves for the hearing. Nothing more surely deprives an individual of due process than if the parties to a proceeding are permitted to guess at what the procedures will be or, even worse, to prepare on the assumption that one set of rules will be followed only to have them changed by the decision-making body at the last second.

A local decision-making body, such as a zoning board or a plan commission, should, at the start of every hearing, recite briefly the rules that will be followed during the course of the hearing so that everyone understands in advance what procedures will be employed.

Disclosure of all of the information taken into account by the decision-making body is a critical element of procedural due process. however, disclosure of that information prior to the hearing contributes to the fairness of the hearing and also to the efficiency with which it can be conducted. Parties expecting to present evidence at a hearing should be required to supply in advance a list of the witnesses they propose to call and a brief summary of the testimony that they expect to elicit from those witnesses. Any reports or studies prepared by a party for introduction at the hearing should be on file in advance so that they can be studied by other interested persons and so that copies for review and critique can be made at leisure. Staff reports should not be concealed until the penultimate moment before the decision is made; they should be prepared and circulated in advance. The objective of procedural due process is to guarantee that the decision-making body has before it all of the information that is pertinent to its decision in a fashion that is calculated to ensure, at best it can be done, that the decision-making process will be open, fair, and thorough -- which is the essence of the constitutional concept of procedural due process.

(10) SUBSTANTIVE DUE PROCESS. Plan commissions, zoning boards, and local governing bodies must be concerned not only with whether their procedures are fair, but also with whether the decisions they make are substantively constitutional. In its substantive aspects, the constitutional guarantee of due process is an assurance that no person will be deprived of his property for arbitrary reasons. A restriction on, or a deprivation of, rights in property is consti-

tutionally supportable only if the conduct or use of property is restricted by reasonable legislation reasonably applied. That is, the legislation must be within the scope of the authority of the legislative body, rationally related to the achievement of a legitimate public purpose, and applied for a purpose that is consistent with the purpose of the legislation itself. (See State v. Johnson, 265 A.2d 711 (Maine 1970) and 1 Rathkopf, The Law of Zoning and Planning, pp. 6-10 to 6-11 (4th ed., 1980).]

The rule that regulation must meet substantive due process standards usually means, in the context of zoning ordinances, that the question of whether a zoning ordinance meets or does not meet that test depends, in part, on whether there is a reasonable use to which the property can be devoted under the restrictions in question. Zoning restrictions do not fail substantive due process standards simply because the landowner cannot devote his property to its most profitable use. [Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938); McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 264 P.2d 932 (1953); Trever v. City of Sterling Heights, 53 Mich.App. 144, 218 N.W.2d 810 (1974); Guaclides v. Borough of Englewood Cliffs, 11 N.J.Super. 405, 78 A.2d 435 (1951); Dusi v. Wilhelm, 25 Ohio Misc. 111, 266 N.E.2d 280 (1970). Occasionally, limitations on the use of land that really do not permit any reasonable use have been sustained. See Consolidated Rock Products v. City of Los Angeles, 57 Cal.2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962).]

This is a typical way that the courts phrase the reasonable use rule: "To sustain an attack upon the validity of the ordinance an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions upon his property preclude its use for any purpose to which it is reasonably adapted" [Arverne Bay Construction Co. v. Thatcher, supra, Note 29].

In some decisions, the question of whether regulations meet substantive due process Standards is decided by attempting to balance the burdens imposed on the landowner against the public benefit secured by the regulations. A typical formulation of this "balancing" test is:

> . . . if the gain to the public is small when compared with the hardship imposed upon individual property owners, no valid basis for an exercise of the police power exists. It is not the owner's loss of value alone that is significant but the fact that the public welfare does not require the restriction and the resulting loss. Where, as here, it is shown that no reasonable basis of public welfare requires the restriction and resulting loss, the ordinance must fail and in determining whether a sufficient hardship on the individual has been shown the law does not require that his property be totally unsuitable for the purpose classified. It is sufficient that a substantial decrease in value results from a classification bearing no substantial relation to the public welfare. [Weitling v. County of Du Page, 186 N.E.2d 291 (Ill. 1962).]

In recent years, the courts have increasingly looked for evidence of a comprehensive planning process as the underpinning for municipal land-use regulations and as the best assurance that regulations will meet substantive due process standards. [Udell v. Haas, 288 N.Y.S.2d 888 (N.Y. 1968); Raabe v. City of Walker, 174 N.W.2d 789 (Mich. 1970); Forestview Homeowners Ass'n. v. County of Cook, 309 N.E.2d 763 (Iii.App. 1973); Dayless County v. Snyder, 556 S.W.2d 688 (Ky. 1977); and Fasano v. Board of County Commissioners of Washington County, supra, Note 9.] The courts are recognizing the fact that a decision made in the context of overall land-use policies is much less suspect than a decision made ad hoc, quite frequently in the midst of intense controversy.

CONCLUSION

The procedural and the substantive aspects of due process have become much more important to both landowners and local officials since the U.S. Supreme Court, in Owen v. City of Independence, [445 U.S. 622 (1980)], decided that any constitutional violation by local government, whether procedural or substantive, could subject the municipality to a damage award under Section 1983. The dissent of Justice Brennan in the recent decision by the Court in San Diego Gas and Electric v. City of San Diego, [44 CCH Sup. Bulletin, B 1594, B1635 (1981)] plainly indicates that at least some members of the Court are interested in encouraging municipalities "to err on the constitutional side of police power regulations." Thus municipal officials must continually be aware of the limits imposed on them by both procedural and substantive rules of due process.

January 30, 2002

MEMORANDUM FOR THE HEADS OF FEDERAL AGENCIES

FROM: JAMES CONNAUGHTON
Chair

SUBJECT: COOPERATING AGENCIES IN IMPLEMENTING THE PROCEDURAL REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

The purpose of this Memorandum is to ensure that all Federal agencies are actively considering designation of Federal and non-federal cooperating agencies in the preparation of analyses and documentation required by the National Environmental Policy Act (NEPA), and to ensure that Federal agencies actively participate as cooperating agencies in other agency's NEPA processes. [1] The CEQ regulations addressing cooperating agencies status (40 C.F.R. §§ 1501.6 & 1508.5) implement the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. (42 U.S.C. §§ 4331(a), 4332(2)). Despite previous memoranda and guidance from CEQ, some agencies remain reluctant to engage other Federal and non-federal agencies as a cooperating agency. [2] In addition, some Federal agencies remain reluctant to assume the role of a cooperating agency, resulting in an inconsistent implementation of NEPA.

Studies regarding the efficiency, effectiveness, and value of NEPA analyses conclude that stakeholder involvement is important in ensuring decisionmakers have the environmental information necessary to make informed and timely decisions efficiently.[3] Cooperating agency status is a major component of agency stakeholder involvement that neither enlarges nor diminishes the decisionmaking authority of any agency involved in the NEPA process. This

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[1] Cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage another governmental entity in a consultation or coordination process (e.g., Endangered Species Act section 7, National Historic Preservation Act section 106). Agencies are urged to integrate NEPA requirements with other environmental review and consultation requirements (40 C.F.R. § 1500.2(c)); and reminded that not establishing or ending cooperating agency status does not satisfy or end those other requirements.

[2] Memorandum for Heads of Federal Agencies, Subject: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, dated July 28, 1999; Memorandum for Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process, Subject: Questions and Answers About the NEPA Regulations (NEPA's Forty Most Asked Questions), dated March 16, 1981, published at 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended.

[3] E.g., *The National Environmental Policy Act – A Study of its Effectiveness After Twenty-Five Years*, CEQ, January 1997

memo does not expand requirements or responsibilities beyond those found in current laws and regulations, nor does it require an agency to provide financial assistance to a cooperating agency.

The benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and intergovernmental trust (e.g., partnerships at the community level) and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies' ability to adopt environmental documents. It is incumbent on Federal agency officials to identify as early as practicable in the environmental planning process those Federal, State, Tribal and local government agencies that have jurisdiction by law and special expertise with respect to all reasonable alternatives or significant environmental, social or economic impacts associated with a proposed action that requires NEPA analysis.

The Federal agency responsible for the NEPA analysis should determine whether such agencies are interested and appear capable of assuming the responsibilities of becoming a cooperating agency under 40 C.F.R. § 1501.6. Whenever invited Federal, State, Tribal and local agencies elect not to become cooperating agencies, they should still be considered for inclusion in interdisciplinary teams engaged in the NEPA process and on distribution lists for review and comment on the NEPA documents. Federal agencies declining to accept cooperating agency status in whole or in part are obligated to respond to the request and provide a copy of their response to the Council. (40 C.F.R. § 1501.6(c)).

In order to assure that the NEPA process proceeds efficiently, agencies responsible for NEPA analysis are urged to set time limits, identify milestones, assign responsibilities for analysis and documentation, specify the scope and detail of the cooperating agency's contribution, and establish other appropriate ground-rules addressing issues such as availability of pre-decisional information. Agencies are encouraged in appropriate cases to consider documenting their expectations, roles and responsibilities (e.g., Memorandum of Agreement or correspondence). Establishing such a relationship neither creates a requirement nor constitutes a presumption that a lead agency provides financial assistance to a cooperating agency.

Once cooperating agency status has been extended and accepted, circumstances may arise when it is appropriate for either the lead or cooperating agency to consider ending cooperating agency status. This Memorandum provides factors to consider when deciding whether to invite, accept or end cooperating agency status. These factors are neither intended to be all-inclusive nor a rote test. Each determination should be made on a case-by-case basis considering all relevant information and factors, including requirements imposed on State, Tribal and local governments by their governing statutes and authorities. We rely upon you to ensure the reasoned use of agency discretion and to articulate and document the bases for extending, declining or ending cooperating agency status. The basis and determination should be included in the administrative record.

CEQ regulations do not explicitly discuss cooperating agencies in the context of Environmental Assessments (EAs) because of the expectation that EAs will normally be brief, concise documents that would not warrant use of formal cooperating agency status. However,

agencies do at times – particularly in the context of integrating compliance with other environmental review laws – develop EAs of greater length and complexity than those required under the CEQ regulations. While we continue to be concerned about needlessly lengthy EAs (that may, at times, indicate the need to prepare an Environmental Impact Statement (EIS)), we recognize that there are times when cooperating agencies will be useful in the context of EAs. For this reason, this guidance is recommended for preparing EAs. However, this guidance does not change the basic distinction between EISs and EAs set forth in the regulations or prior guidance.

To measure our progress in addressing the issue of cooperating agency status, by October 31, 2002 agencies of the Federal government responsible for preparing NEPA analyses (e.g., the lead agency) shall provide the first bi-annual report regarding all EISs and EAs begun during the six-month period between March 1, 2002 and August 31, 2002. This is a periodic reporting requirement with the next report covering the September 2002 – February 2003 period due on April 30, 2003. For EISs, the report shall identify: the title; potential cooperating agencies; agencies invited to participate as cooperating agencies; agencies that requested cooperating agency status; agencies which accepted cooperating agency status; agencies whose cooperating agency status ended; and the current status of the EIS. A sample reporting form is at attachment 2. For EAs, the report shall provide the number of EAs and those involving cooperating agency(s) as described in attachment 2. States, Tribes, and units of local governments that have received authority by Federal law to assume the responsibilities for preparing NEPA analyses are encouraged to comply with these reporting requirements.

If you have any questions concerning this memorandum, please contact Horst G. Greczmiel, Associate Director for NEPA Oversight at 202-395-5750, Horst_Greczmiel@ceq.eop.gov, or 202-456-0753 (fax).

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Factors for Determining Whether to Invite, Decline or End Cooperating Agency Status

1. Jurisdiction by law (40 C.F.R. § 1508.15) – for example, agencies with the authority to grant permits for implementing the action [federal agencies shall be a cooperating agency (1501.6); non-federal agencies may be invited (40 C.F.R. § 1508.5)]:

- Does the agency have the authority to approve a proposal or a portion of a proposal?
- Does the agency have the authority to veto a proposal or a portion of a proposal?
- Does the agency have the authority to finance a proposal or a portion of a proposal?

2. Special expertise (40 C.F.R. § 1508.26) – cooperating agency status for specific purposes linked to special expertise requires more than an interest in a proposed action [federal and non-federal agencies may be requested (40 C.F.R. §§ 1501.6 & 1508.5)]:

- Does the cooperating agency have the expertise needed to help the lead agency meet a statutory responsibility?
- Does the cooperating agency have the expertise developed to carry out an agency mission?
- Does the cooperating agency have the related program expertise or experience?
- Does the cooperating agency have the expertise regarding the proposed actions' relationship to the objectives of regional, State and local land use plans, policies and controls (1502.16(c))?

3. Do the agencies understand what cooperating agency status means and can they legally enter into an agreement to be a cooperating agency?

4. Can the cooperating agency participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process?

5. Can the cooperating agency, in a timely manner, aid in:

- identifying significant environmental issues [including aspects of the human environment (40 C.F.R. § 1508.14), including natural, social, economic, energy, urban quality, historic and cultural issues (40 C.F.R. § 1502.16)]?
- eliminating minor issues from further study?
- identifying issues previously the subject of environmental review or study?
- identifying the proposed actions' relationship to the objectives of regional, State and local land use plans, policies and controls (1502.16(c))?

(40 C.F.R. §§ 1501.1(d) and 1501.7)

6. Can the cooperating agency assist in preparing portions of the review and analysis and resolving significant environmental issues to support scheduling and critical milestones?

7. Can the cooperating agency provide resources to support scheduling and critical milestones such as:

- personnel? Consider all forms of assistance (e.g., data gathering; surveying; compilation; research.
- expertise? This includes technical or subject matter expertise.
- funding? Examples include funding for personnel, travel and studies. Normally, the cooperating agency will provide the funding; to the extent available funds permit, the

lead agency shall fund or include in budget requests funding for an analyses the lead agency requests from cooperating agencies. Alternatives to travel, such as telephonic or video conferencing, should be considered especially when funding constrains participation.

- models and databases? Consider consistency and compatibility with lead and other cooperating agencies' methodologies.
- facilities, equipment and other services? This type of support is especially relevant for smaller governmental entities with limited budgets.

8. Does the agency provide adequate lead-time for review and do the other agencies provide adequate time for review of documents, issues and analyses? For example, are either the lead or cooperating agencies unable or unwilling to consistently participate in meetings in a timely fashion after adequate time for review of documents, issues and analyses?

9. Can the cooperating agency(s) accept the lead agency's final decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action? For example, is an agency unable or unwilling to develop information/analysis of alternatives they favor and disfavor?

10. Are the agency(s) able and willing to provide data and rationale underlying the analyses or assessment of alternatives?

11. Does the agency release predecisional information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents? Disagreeing with the published draft or final analysis should not be a ground for ending cooperating status. Agencies must be alert to situations where state law requires release of information.

12. Does the agency consistently misrepresent the process or the findings presented in the analysis and documentation?

The factors provided for extending cooperating agency status are not intended to be all-inclusive. Moreover, satisfying all the factors is not required and satisfying one may be sufficient. Each determination should be made on a case-by-case basis considering all relevant information and factors.

Sample Report to the Council on Environmental Quality
on Cooperating Agency (CA) Status
March 1, 2002 to August 31, 2002

I. Environmental Impact Statements:

	1.	2.	etc.
EIS	**(Title of EIS)**		
Potential CA	**(Name of potential CA)**		
Invited CA	**(Name of potential CA and basis – identify the jurisdiction by law or special expertise)**		
Agency Requesting CA Status	**(Name of potential CA and basis – identify the jurisdiction by law or special expertise)**		
CAs	**(Name of CA engaged in the EIS)**		
CA Status not Initiated or Ended	**(e.g., name of agency – reason status was not initiated or was ended – see examples listed below**		
Status of EIS	**(e.g., begun on mm/dd/yy; DEIS published mm/dd/yy; FEIS published mm/dd/yy; ROD published mm/dd/yy)**		

Examples of reasons CA status was not initiated or why it ended:

1. Lack of special expertise – identify the expertise sought by the lead agency and/or offered by the potential cooperating agency).
2. State, Tribal or local entity lacks authority to enter into an agreement to be a CA.
3. Potential CA unable to agree to participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process.
4. Potential or active CA unable or unwilling to identify significant issues, eliminate minor issues, identify issues previously studied, or identify conflicts with the objectives of regional, State and local land use plans, policies and controls in a timely manner.
5. Potential or active CA unable or unwilling to assist in preparing portions of the review and analysis and resolving significant environmental issues in a timely manner.
6. Potential or active CA unable or unwilling to provide resources to support scheduling and critical milestones.
7. Agency unable or unwilling to consistently participate in meetings or respond in a timely fashion after adequate time for review of documents, issues and analyses.
8. CA unwilling or unable to accept the lead agency's decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action or to develop information/analysis of alternatives they favor and disfavor. w Text

9. Agency unable or unwilling to provide data and rationale underlying the analyses or assessment of alternatives.
10. Agency releases predecisional information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents.
11. Agency consistently misrepresents the process or the findings presented in the analysis and documentation.
12. Other. Identify the other:

Environmental Assessments:

	Total
Number of EAs started during the reporting period	
Number of EAs involving potential CAs	
Number of EAs where agencies were invited to participate	
Number of EAs where agencies requested CA status	
Number of EAs where a CA status was not initiated or was ended for the reasons identified	
Number of EAs involving CAs begun and ongoing during the reporting period	
Number of EAs involving CAs begun and completed during the reporting period	

9. Agency unable or unwilling to provide data and rationale underlying the analyses or assessment of alternatives.
10. Agency releases predecisional information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents.
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