

[To be included in the “Preface” of the Growth Policy following Part 4 - “History of Land Use and Growth in Flathead County”.]

PART 5: Property Rights in Flathead County

The Flathead County Growth Policy has been created to provide guidance for future growth and development in Flathead County. As stated previously and reiterated throughout this document, the Growth Policy has no regulatory authority; instead, it is designed as a conceptual foundation framework upon which future land use decisions and regulations may be based. Because of this, it is critical the Growth Policy be developed as a public document, created by those members of the public who choose to participate in the process, to serve the public accordingly. Montana law clearly states that a growth policy should be prepared “to ensure the promotion of public health, safety, morals, convenience or order of the general welfare and for the sake of efficiency and economy in the process of community development...” (76-1-106, M.C.A.). However, a delicate balance must be achieved to comply with the requirements of state law and also respect the custom and culture of freedom and private property rights in Flathead County.

Property rights have clearly been established as important to residents of Flathead County. This is evidenced by their position as a valued element identified in the public’s vision of the County [reference Chapter 1 – The Character of Flathead County, pg. 3]. Goal 2 and the correlating policies found in Chapter 2 – Land Uses further articulate the importance of property rights when planning for future growth and development. However, defining ‘property rights’ and what those rights entail is less cut and dry, and fully depends fully dependent on the context in which those rights are identified. There is no universally accepted definition of property rights, although understanding differing perspectives and historical background may help to provide a clearer picture of how property rights are generally viewed. While the United State’s economic, legal and governmental systems are based upon all types of property and the associated rights of each, this Growth Policy is primarily a land use document and, as such, is concerned with the rights of real property owners and how they are affected by land use decisions.

Individual property rights represent the very basis of our society, the foundation upon which our Country is built. These rights began as broad, far-reaching constructs, but over time have been limited through regulations developed from a public process. Population growth, increased development and evolving standards regarding the health, safety, welfare and morals of the public have all added to the complexity of individual private property rights. Added complexities have resulted in added restrictions, for the equal protection of property rights for all individuals. For instance, a property owner’s rights in 1890 were assumedly more broad and less restrictive than that same owner’s rights would be in 2011; however, this can be attributed to there being more people – all of whom are entitled to similar rights as our landowner – necessitating government oversight to balance those rights fairly and effectively. Regulation is not intended to limit property rights for the sole purpose of restriction, but to protect those rights enjoyed by all property owners by acknowledging – and balancing – their existence.

Property rights are often seen as a function of what others are willing to acknowledge – in other words, a property owner’s actions are limited by the expectations and rights of others, as formally sanctioned and sustained by law.¹ There is no recognition of property – or individual property rights - without community; in this regard, property rights are rarely absolute and depend on established societal and

¹ Meyer, Neil. “Introduction to Property Rights”; from *Property Rights - A Primer*. Western Rural Development Center, BUL 834, pg. 4.

cultural parameters; ~~most~~ Most definitions of real property rights therefore recognize that they are, in fact, limited. The most common explanation of property rights refers to a “bundle of legal rights” or “bundle of sticks” ~~(see Figure 1 below). These r~~Recognized rights of the holder of title to real property include the right of possession, the right of control, the right of exclusion, the right of enjoyment and the right of disposition; in simpler terms, a landowner may have the right to sell, lease, mortgage, subdivide or grant easement across their property. However, the public also has rights to property that may include the right to tax, take for public use, control (regulate) the use of and/or dispose of in case of death; an example of the exercise of such public right would include a government using eminent domain over real estate to build something for public use, or when land is re-appropriated as a result of unpaid property taxes. While this list is by no means ‘all-inclusive’, it identifies the basic public and private ‘bundles’ of rights that are universally acknowledged.²

~~All of these~~ The rights of both the public and the individual are protected by the governing bodies and are subject to the limitations imposed upon them by those bodies. The role of local government is to uphold the provisions of health, safety, morals and general welfare by weighing the competing and often conflicting rights of the individual with those rights of the public; as previously discussed, this balancing act is often accomplished through rules and restrictions imposed by the governing body. Land use planning documents and regulations related to z Zoning, subdivision, lakeshore and floodplain regulations ~~can~~ directly impact the extent to which an owner may utilize private property; these regulations must be based upon land use planning documents – such as this Growth Policy – that are the products of a lengthy public process. The implementation and administration of these regulations follow a similar public process to ensure the rights of private property owners are respected and maintained. It is paramount local government officials follow the processes set forth within these documents, to provide citizens a venue to voice their opinion on land use issues and decisions that affect them (and their property) directly.

In addition to hearing from members of the public, the public process also provides government officials a structure by which to evaluate land use applications and apply regulations fairly and equally. This evaluation often focuses on the concept of “harm” and how to balance the rights of individual property owners with the sometimes conflicting societal views on property rights. This is especially true in Flathead County, where much of the planning jurisdiction remains unzoned. Zoning is recognized as a mechanism intended to control the use of property to promote public health, safety, morals and welfare. When property is zoned, the limitations placed upon the right to use are clear and applied consistently. When property is unzoned it becomes the responsibility of local government to establish a threshold for evaluating ‘harm’ when weighing the rights of the individual against the public good. This becomes increasingly challenging as the County continues to experience growth, and societal perspectives on what constitutes ‘harm’ continue to evolve.

~~Regulations are typically viewed as an exercise of public property rights, ensuring a delicate balance between the rights of the individual and the rights of the community as a whole.~~

Figure 1: Bundle of sticks representation of property rights.

~~Source: Property Rights – A Primer; BUL834, University of Idaho College of Agriculture & Life Sciences.~~

² Property Rights – A Primer. BUL834, University of Idaho College of Agriculture & Life Sciences.

Nevertheless, preserving and protecting the fundamentals of private property rights for the residents of Flathead County remains paramount in the creation of this Growth Policy as well as the administration of all land use regulations throughout the jurisdiction. As a property owner in Flathead County, you can reasonably expect the following:

- A landowner has the right to make a land use application to the County, and have that land use application ~~be~~ reviewed according to the statutory requirements, in timely manner and in accordance with due process;
 - That all rules and regulations established by the governing body shall be followed in accordance with state law;
 - That all meetings of Boards and Committees appointed by the local governing body will abide by open meeting and record retention laws established by the State of Montana;
 - That open and accountable service will be provided by the Flathead County Planning & Zoning Office as well as all departments of County government;
 - That all landowners will receive fair and equal treatment during their interaction with the County, and during the review and processing of all land use applications.
- Additional points/expectations?

With these rights come corresponding responsibilities, as is clearly identified in Article II, Section 3 of the Constitution of Montana. Just as Flathead County has a responsibility to ensure the rights of private property owners are recognized and respected, private property owners have a responsibility to participate; stay informed; abide by established rules, regulations and procedures; and respect their neighbor's rights to do the same.

Landowners in Flathead County may use this growth policy to help determine permissible uses of property. The Montana Supreme Court has recently reaffirmed that a governing body must substantially comply with its growth policy in making land use decisions. It can be reasonably inferred that landowners have a right to uses of their land that are in substantial compliance with this growth policy, and the land use regulations that have been based upon this document. They certainly have the assurance that Flathead County will not apply this growth policy or any related regulations in an arbitrary or capricious manner. This explanation of real property rights demonstrates their "give and take" nature. No society has absolute property rights. They are subject to the limitations ~~the-that~~ society places upon them. ~~‡~~The growth policy's public process has established a theoretical structure of property rights that have originated from the community through direct participation.~~‡~~ There are 50 goals and several hundred policies in this document, and their application to a particular land use issue or policy decision will not always be black and white. The intent of this document, through its creation and administration, is to respect the rights of all landowners in Flathead County while providing a reasonable framework upon which future land use decisions can be made.