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Ryan Weldon
University of Montana School of Law

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NORTH 93 NEIGHBORS, INC. V. BOARD OF COUNTY COMMISSIONERS OF FLATHEAD COUNTY: A SHOCK TO LAND USE PLANNING AND PUBLIC COMMENT IN MONTANA

Ryan Weldon*

I. INTRODUCTION

Land use has become a hotbed for debate throughout all venues of Montana government.1 One of the catalysts of the land use debate has been the incessant population growth within Montana’s borders.2 Invariably, as the population continues to rise, the amount of land available to each person becomes scarcer. Consequently, Montana land governance trudges dangerously close to the line of intractability3 and is in desperate need of focused and consistent legal direction.

Central mechanisms for moving Montana land use in the appropriate direction are growth policies4 and zoning. Though growth policies and zoning have generally been opposed by Montana residents,5 statutes exist that allow local governments to im-

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* Candidate for J.D. 2009, The University of Montana School of Law. The author wishes to specially thank Heather Weldon, George Weldon, Lee Weldon, and Bekki Weldon for all of their encouragement. The author would also like to thank all members of Montana Law Review for their invaluable advice throughout the development of this note.


plement these tools as needed. The question, however, becomes whether the Montana Supreme Court’s interpretation of these tools is adequate to meet the future goals of “health, safety, convenience, and welfare of the citizens.”

Montana’s legal structure involving growth policy and zoning issues came to light in the case of North 93 Neighbors, Inc. v. Board of County Commissioners. In 2003, Flathead County and the residents of Kalispell were faced with a decision to build a 735,000 square foot regional mall—the largest that would exist in Montana. The decisions arising out of North 93 Neighbors highlight the compelling need to provide clear and logical interpretations of current statutory language not only for the legal community, but also for the county commissioners and citizens deeply entrenched in current and future growth policy and zoning disputes.

This note uses North 93 Neighbors as a case study to justify a greater standard of reliance on growth policies and a more appropriate use of public comment. Part II begins by recounting the events leading Flathead County to amend its growth policy and zoning restrictions in order to open the door for construction of the Glacier Mall. This part then explains the procedural path of North 93 Neighbors and the holdings of the Montana Supreme Court. Part III provides a foundation for North 93 Neighbors by discussing the relevant historical underpinnings, case law, and statutes of growth policies and zoning in Montana and the United States. Part IV critiques the statutory interpretations of North 93 Neighbors that generated two additional steps for county commissioners: (1) commissioners must substantially comply with a growth policy; and (2) commissioners must provide a record proving that all novel public comments were addressed and incorporated into the commissioners’ decisions with respect to growth policies. The note concludes that Montana has the ability by

7. Id. at § 76-1-102 (stating goals sought through growth policies); Id. at § 76-2-201 (also seeking to promote public heath, safety, morals, and general welfare through the use of zoning).
10. Id.
12. Id. at 564.
way of either the judicial or legislative branches to bring about interpretations that promote future stability in growth policies as well as a more realistic approach to using public comment. These steps are necessary in order to ensure that development, or lack of development, within Montana's borders occurs in a planned and inclusive manner.

II. North 93 Neighbors

A. Factual Summary

Wolford Development Montana (Wolford) sought to amend the growth policy and rezone an area outside of Kalispell in order to build the largest mall in Montana to date—the Glacier Mall. After maneuvering through administrative offices and boards to approve the amendment, the Flathead County Board of Commissioners (Commissioners) eventually granted Wolford permission to build Glacier Mall.

Prior to Wolford, the growth policies in Flathead County evolved out of a convoluted and confusing history. The planning process began in 1986 when the City of Kalispell and the Commissioners jointly adopted the City-County Master Plan (City-County Plan). In 1987, the Commissioners continued the process by independently adopting the Flathead County Master Plan (County Plan) for the areas outside of Kalispell. Due to the pressure of growth, the relations between the Commissioners and Kalispell turned sour, and the Commissioners decided to separate administrative offices from Kalispell. The Commissioners then decided in 2003 to adopt a new growth policy surrounding Kalispell by simply combining the County Plan with the City-County Plan. The Commissioners' newly combined growth policy is the policy at issue in North 93 Neighbors.

Wolford entered the equation by proposing to amend the newly created growth policy and zoning that excluded malls ex-

13. Peters, supra n. 9, at 10.
15. Id. at 559.
16. Id.
17. Id.
18. Id.
19. Id. at 560.
ceeding 750,000 square feet.\textsuperscript{21} The area sparking Wolford’s actions was either 300 or 340 acres, depending upon whether referencing the City-County Plan or the County Plan.\textsuperscript{22} The growth policy Wolford sought to amend allowed “construction of a golf course, hotel and conference center, and residential single-family and townhouse development.”\textsuperscript{23} The area was also zoned as “re-sort commercial, residential apartment, and suburban agriculture.”\textsuperscript{24}

As a result, Wolford proposed to amend the growth policy and rezone the area in order to accommodate the proposed Glacier Mall.\textsuperscript{25} Wolford proposed to amend the growth policy from the original 340 acres to 481 acres and to allow construction of “commercial, office, and residential development.”\textsuperscript{26} In similar fashion, Wolford proposed roughly one month later to rezone the area to accommodate the Glacier Mall.\textsuperscript{27}

After trickling through the administrative system, the Commissioners eventually received, considered, and allowed the amendment of the growth policy.\textsuperscript{28} The Commissioners began by giving notice to the public that they intended to consider Wolford’s proposed amendment and allowed one month for public comment on the subject.\textsuperscript{29} After considering over 4,400 public comments (fifty-seven percent of which were in opposition to the proposed amendment), the Commissioners nevertheless voted to adopt the amendment.\textsuperscript{30} One month later the Commissioners held a public meeting and heard fourteen people speak in favor of adopting Wolford’s rezoning proposal and sixteen against adopting it.\textsuperscript{31} Similarly, the Commissioners decided to rezone the area as well.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{21} App. Opening Br. at 6, \textit{North 93 Neighbors, Inc. v. Bd. of Co. Commrs. of Flathead Co.}, 137 P.3d 557 (Mont. 2006).
\item \textsuperscript{22} \textit{North 93 Neighbors}, 137 P.3d at 559–60.
\item \textsuperscript{23} Id. at 560.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Respt. Wolford Dev. Mont., LLC’s Responsive Br. at 4, \textit{North 93 Neighbors, Inc. v. Bd. of Co. Commrs. of Flathead Co.}, 137 P.3d 557 (Mont. 2006).
\item \textsuperscript{26} \textit{North 93 Neighbors}, 137 P.3d at 560.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.; see also App. Opening Br. at 15, \textit{North 93 Neighbors, Inc. v. Bd. of Co. Commrs. of Flathead Co.}, 137 P.3d 557 (Mont. 2006).
\item \textsuperscript{31} \textit{North 93 Neighbors}, 137 P.3d at 560.
\item \textsuperscript{32} Id. at 557.
\end{itemize}
During both the growth policy and zoning amendment processes, each Commissioner reviewed the public comment. While considering the growth policy amendment, the Commissioners thanked the public for commenting, referenced the language in some of the comments, and characterized the public comments as "passionate." Despite the Commissioners' statements, they provided little evidence in the record indicating how they utilized the public comment. The Commissioners followed a similar process with Wolford's proposal to rezone the area. The Commissioners decided "based upon ... the public testimony" to adopt Wolford's proposal and rezone the area in addition to amending the growth policy.

North 93 Neighbors, a citizen's group located in the area where the growth policy and zoning amendments occurred, filed suit in the Eleventh Judicial District Court, Flathead County, regarding the Commissioners' choices to amend the growth policy and rezone the land. Wolford intervened in order to aid in defending the legality of the Commissioners' decisions.

North 93 Neighbors, the Commissioners, and Wolford all filed motions for summary judgment. The District Court denied Neighbors's motion and granted summary judgment in favor of the Commissioners and Wolford.

B. Montana Supreme Court Holdings

1. Majority Opinion

Writing for the majority, Justice Brian Morris addressed four issues of law regarding growth policies and zoning in Montana.

34. North 93 Neighbors, 137 P.3d at 572 (Rice, J., dissenting).
35. Id. at 564 (majority).
37. North 93 Neighbors, 137 P.3d at 559.
38. Id. at 561.
39. Id.
40. Id.
41. Id. at 559. The first three issues, although important, are not the topic of this note and are referenced only to provide the reader with a more informed picture of the case. First, the Montana Supreme Court held that the Commissioners' growth policy combining the County Plan and the City-County Plan was not fatally inconsistent. Id. at 567. Second, the Court held that rezoning the area for the Glacier Mall did not constitute illegal spot zoning. Id. at 570. Third, the Court held that amendments to the growth policy only needed to follow the standard of consistent rather than substantial compliance. Id.
The issue pertinent to this note and discussed in detail is the newly created requirement that commissioners' actions must "substantially comply" with growth policies.\(^{42}\) The Court applied such a standard by interpreting "consistent with"\(^{43}\) to require substantial compliance.\(^{44}\) As a result, the Court held that commissioners must produce a record detailing how they incorporated and addressed novel public comments.\(^{45}\)

2. **Dissenting Opinion**

Justice Jim Rice dissented from the Court's interpretation that "consistent with" required commissioners to substantially comply with the growth policy.\(^{46}\) Justice Rice pointed to statutory language requiring only that "a neighborhood plan must be consistent with the growth policy" and nothing more.\(^{47}\) Additionally, Justice Rice disagreed with the majority's interpretation that commissioners' consideration of public comments requires a record that "flesh[es] out the pertinent facts upon which it relied."\(^{48}\)

III. **BACKGROUND OF GROWTH POLICIES AND ZONING IN MONTANA AND THE UNITED STATES**

Before entering any academic discussion of growth policies and zoning, it is imperative to understand that growth policies and zoning are not the same. Although the two are closely intertwined, "they do not cover identical fields of municipal endeavor."\(^{49}\) A growth policy is "a comprehensive jurisdiction-wide development plan . . . [that] essentially surveys land use as it exists and makes recommendations for future planning."\(^{50}\) Zoning, on the other hand, "is the regulation by the municipality of the use of land . . . in accordance with a general plan."\(^{51}\) Consequently, a growth policy is a plan, whereas zoning is one enforcement mechanism to meet the ends the plan seeks to accomplish.

\(^{42}\) Id. at 562.
\(^{44}\) North 93 Neighbors, 137 P.3d at 562.
\(^{45}\) Id. at 564.
\(^{46}\) Id. at 570 (Rice, J., dissenting).
\(^{47}\) Id. at 571 (emphasis added).
\(^{48}\) Id. at 572.
\(^{49}\) 8 McQuillen Mun. Corp. 3d Zoning § 25.08 (2006).
\(^{50}\) North 93 Neighbors, 137 P.3d at 561.
A. The Foundation of Zoning and Planning

Zoning entered the United States in full force when in 1921 the Department of Commerce created a Standard State Zoning Enabling Act (SSZE) as a template for state legislatures to adopt. Department of Commerce Secretary Herbert Hoover promoted this template because he recognized society's need to regulate "reasonable neighborly agreements as to the use of land," while at the same time ensuring any regulation existed "without injustice and without violating property rights." All fifty states adopted a form of the SSZE, and forty-seven states, including Montana, have continued to follow that precedent.

The landmark case legitimizing zoning, and standing at the front of every conversation of both growth policies and zoning, is Village of Euclid v. Ambler Realty Co. In Euclid, the city zoned a landowner's land and excluded the use of the land for industrial purposes. The landowner argued the zoning violated the due process and equal protection clauses of the U.S. Constitution by substantially lowering the value of the property. The U.S. Supreme Court recognized past perceptions may not have allowed the regulation of private property by way of zoning, but population increases and constant development demanded a new way of thinking. Consequently, the Court found such actions were rooted in "the police power," "asserted for the public welfare," and constructed by "legislative classification."

In Montana, Little v. Board of County Commissioners solidified state law by requiring zoning in local government units to

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56. Id. at 385.
57. U.S. Const. amend. XIV, § 1 (providing "nor shall any state deprive any person of life, liberty, or property without due process of law").
58. Id. (providing "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws").
59. Euclid, 272 U.S. at 385.
60. Id. at 387.
61. Id. at 387–88.
“substantially comply” with growth policies. Similar to North Neighbors, Little originated in Kalispell and consisted of a zoning dispute regarding the construction of a new shopping center. In Little, commissioners attempted to zone a previously unzoned area as commercial. The Court, however, held that the language requiring zoning to be “in accordance with” the established growth policy meant that zoning must substantially comply. This interpretation was reaffirmed in Ash Grove Cement Co. v. Jefferson Co.

B. Amending Growth Policies in Montana

An understanding of zoning and its relationship to growth policies recognizes that growth policies serve as the foundation behind effective zoning. Though Montana counties are not required to zone, growth policies are a prerequisite for lawful zoning in Montana. When a county creates a growth policy, its contents must address nine areas of land use ranging from community goals and objectives to implementation strategies. In short, Montana law provides great deference to growth policies and requires that a county’s zoning be “in accordance with a growth policy,” which is interpreted as requiring substantial compliance with the growth policy.

If a planning board exists, it must follow three specific steps before commissioners may vote on amendments to growth policies.

63. Id. at 1285–86.
64. Id. at 1286.
65. See Mont. Code Ann. § 76-2-201(1) (2005) (explaining that “a board of county commissioners... is authorized to adopt zoning regulations for all parts of the jurisdictional area in accordance with the provisions of this part” (emphasis added)); id. at § 76-2-601(1) (explaining that zoning “must be made in accordance with the growth policy or master plan” (emphasis added)).
66. Little, 631 P.2d at 1293.
67. Ash Grove Cement Co. v. Jefferson Co., 943 P.2d 85, 91 (Mont. 1997) (holding “while a comprehensive master plan need not be strictly complied with, a local government unit must at least substantially comply with the plan” (emphasis added)).
69. Id.; see also Little, 631 P.2d at 1291 (requiring the adoption of a jurisdictional area and growth policy prior to lawful zoning); 49 Mont. Op. Atty. Gen. No. 23 (2002) (requiring growth policies in order for local governments to zone).
71. Id. at § 76-2-304(1).
73. See Mont. Code Ann. §§ 76-1-101 to -102 (authorizing governing bodies to create planning boards to serve in advisory roles).
The first step is to create a growth policy for commissioners to adopt.\textsuperscript{74} Second, the planning board must hold a public meeting prior to submitting proposals and amendments on a growth policy to commissioners.\textsuperscript{75} Finally, the planning board must provide commissioners with a recommendation to adopt, not adopt, or take some other action on the growth policy.\textsuperscript{76}

In the end, the growth policy is handed to the commissioners. The commissioners begin by adopting a "resolution of intention to adopt, adopt with revisions, or reject the growth policy."\textsuperscript{77} In Flathead County, the public may then participate in "a comment period to read and comment."\textsuperscript{78} The commissioners may either hold a public vote on the amendment to the growth policy at a general or special election, or the commissioners may vote on the amendment themselves.\textsuperscript{79} After the commissioners or public adopt the growth policy amendment, the commissioners are then bound and guided by the growth policy.\textsuperscript{80}

\textbf{C. The Difference between Legislative and Administrative Actions}

When commissioners act and their decisions end in litigation, the court reviews the commissioners' actions either as legislative or administrative. Current Montana law perceives commissioners' creation and amendment of growth policies and zoning as a legislative act.\textsuperscript{81} However, prior to the holding in \textit{Shanz v. City of Billings},\textsuperscript{82} zoning was seen as a legislative act and rezoning as administrative.\textsuperscript{83} Some jurisdictions even went as far as to define actions applying to specific tracts of land as administrative.\textsuperscript{84}

\begin{itemize}
  \item \textsuperscript{74} Id. at § 76-1-106.
  \item \textsuperscript{75} Id. at § 76-1-602.
  \item \textsuperscript{76} Id. at § 76-1-603.
  \item \textsuperscript{77} Id. at § 76-1-604.
  \item \textsuperscript{78} Flathead County Commissioners, \textit{Final Draft—Flathead County Growth Policy, Chapter 9: Implementation}, http://www.co.flathead.mt.us/fcpz/growthpolicy.html (last updated Mar. 19, 2007).
  \item \textsuperscript{79} Mont. Code Ann. § 76-1-604.
  \item \textsuperscript{80} Id. at § 76-1-605.
  \item \textsuperscript{81} Id. at § 7-1-104; see also Schanz \textit{v. City of Billings}, 597 P.2d 67, 71 (Mont. 1979) (holding zoning and rezoning are legislative acts); 83 Am. Jur. 2d Zoning and Planning § 6 (2003) (discussing legislative and administrative acts).
  \item \textsuperscript{82} Schanz, 597 P.2d at 71.
  \item \textsuperscript{84} See e.g. McPherson Landfill, \textit{Inc. v. Bd. of Co. Commrs. of Shawnee Co.}, 49 P.3d 522, 524 (Kan. 2002).
\end{itemize}
Such evolutions in Montana law are important to recognize because *North 93 Neighbors* involved the amendment of a growth policy and rezoning on a specific tract of land. Although Montana's old rule would have pegged the amendment of the growth policy and rezoning in *North 93 Neighbors* as an administrative act, the current rule views the actions as legislative in nature.  

**D. Using the Record to Prove Public Inclusion in Amending Growth Policies**

Legislative actors possess an inherent mechanism that includes the public in any of their decisions—they are elected. Commissioners, unlike members of the administrative state, are popularly elected. *Euclid* recognized this important fact and recommended that if citizens are not satisfied with the wisdom or policy decisions of their elected officials, “their recourse is to the ballot—not the courts.”

With that view in mind, it may be argued that voting is one reason why the Montana Administrative Procedures Act does not apply to local governments and elected officials.

In addition to commissioners' actions inherently involving the public, Montana statutory language concerning growth policies and zoning also supports public comment. Three statutes are insightful. First, “the board shall give notice and hold a public meeting on the growth policy.” However, the board serves beneath commissioners, and nowhere does the statute state how the commissioners must use the public comment. Second, the board must consider the recommendations and suggestions elicited at the public hearing. Again, the planning board serves under commissioners, and the statute does not refer to the methods by which the commissioners must consider the public's input. Finally, commissioners must “give the public an opportunity to be heard regarding the proposed zoning district and regulation.”

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87. See Mont. Code Ann. § 2-4-102(2)(b) (2005); see also Sen. 13, 38th Reg. Sess. (1985) (claiming the “Montana Administrative Procedures Act . . . was never intended to apply to local units of government, school districts, or any other political subdivisions” (emphasis added)).

88. *North 93 Neighbors*, 137 P.3d at 573.


90. *Id.* at § 76-1-603 (emphasis added).

91. *Id.* at § 76-2-205.
Although the statute directly considers commissioners, it only requires the public to be heard.

Despite serving as elected officials, commissioners occasionally perform administrative actions that require a record for review by the courts. In *Lowe v. City of Missoula*, for example, the city considered a zoning amendment but failed to complete a record that sufficiently showed a reviewing court how the city complied with the statutory criteria.92 During the time of *Lowe*, rezoning was seen as administrative action;93 therefore, the elected officials were required to create a record for judicial review.94

When reviewing the record, many jurisdictions throughout the United States analyze the record of a legislative act differently than an administrative act.95 For example, the records of legislative acts free from constitutional challenges are typically reviewed with a high sense of deference and respect.96 Records of administrative acts, on the other hand, require more substance; a court may invalidate an administrative action if the record does not provide “substantial evidence” that the action complies with statutory criteria.97

E. Current Status of Montana Law after North 93 Neighbors

*North 93 Neighbors* contributes to Montana’s perceptions of growth policies and zoning in two ways. The first contribution is the extension that commissioners must substantially comply with a growth policy.98 Second, *North 93 Neighbors* requires that in order for commissioners to “flesh out the pertinent facts,” they must “incorporate” any “novel” public comments and “indicate” in the record where those comments were “addressed.”99 Though prior to *North 93 Neighbors* legislative acts were not required to

94. *Id.* at 555.
98. *North 93 Neighbors*, 137 P.3d at 562.
99. *Id.* at 564.
create a record that addressed public comment, such a record is now required in order to facilitate judicial review.\textsuperscript{100}

IV. REASONING AND ANALYSIS

The reasoning and analysis in this section takes place with an eye toward balancing two competing goals of successful governance—stability and flexibility. Stability is the first fundamental goal because the governed hand a portion of their rights to the government as a down payment for the future.\textsuperscript{101} More specifically, Montanans have handed over part of their private property rights to commissioners in exchange for a constant, consistent, and predictable way of planning development in Montana communities. Despite the benefits of stability, it poses the problems of excessive rigidity and preclusion of flexibility’s benefits.\textsuperscript{102} Since Montana communities are constantly changing,\textsuperscript{103} past ideas and directions may no longer serve the community’s best interests. Consequently, stability must couple itself with flexibility in order to keep pace with Montana’s present and future needs.

A. Requiring Substantial Compliance: The Growth Policy as a Guide

In \textit{North 93 Neighbors}, the Montana Supreme Court appropriately required the Commissioners to “substantially comply” with the local growth policy.\textsuperscript{104} The Court began its analysis by relying upon the foundation constructed in \textit{Little}.\textsuperscript{105} However, \textit{Little} required a \textit{zoning amendment} to substantially comply with the growth policy;\textsuperscript{106} it never addressed commissioners’ obligations to substantially comply with a \textit{growth policy}.\textsuperscript{107} This point is significant because growth policy amendments, commissioners’ actions, and zoning amendments are generally analyzed under different standards.\textsuperscript{108} Despite such interpretation problems, the

\textsuperscript{100} Id. at 573 (Rice, J., dissenting).
\textsuperscript{102} Mark Fenster, \textit{The Opacity of Transparency}, 91 Iowa L. Rev. 885, 912 (2006).
\textsuperscript{103} Michelle Crissman, Foreword, 49 S.D. L. Rev. 599, 604 (2003).
\textsuperscript{104} \textit{North 93 Neighbors}, 137 P.3d at 562. “Appropriately” is used here in the context of advantageous policy reasons (such as requiring commissioners to consult and use the growth policy instead of disregarding it) rather than consistency with legal precedent.
\textsuperscript{105} Id. at 561.
\textsuperscript{107} Id.
\textsuperscript{108} See \textit{North 93 Neighbors}, 137 P.3d at 568 (amendments to growth policy must be consistent with growth policy); \textit{Id.} at 562 (commissioners must substantially comply with
Court eventually tightened its analysis by capitalizing on a possibly misstated phrase in *Ash Grove Cement Co.*, which required commissioners to substantially comply with the growth policy.

In extending the substantial compliance standard to commissioners and the growth policy, the Court failed to recognize the difference between the meanings of giving "consideration to" and achieving "substantial compliance" with a growth policy. Evidence of the Court's failure to see the difference exists in its statement that "[w]e see no tension between these two standards." In this case, the plain meaning of the words helps to prove the difference in standards. First, consideration is defined as "a taking into account." As a result, consideration does not prescribe an outcome; it only asks that the growth policy be taken into account. Compliance, on the other hand, requires "a yielding as to desire, demand, or proposal; conformance." When compliance is coupled with the definition of substantial—"firmly established; solidly based,"—the standard requires a firm or solid yielding. Such a standard requires significantly more than a mere taking into account.

Regardless of how the Court arrived at requiring commissioners to substantially comply with a growth policy, the holding creates a sound procedure. Though commissioners are popularly elected, the people still have a right to understand the extent by which they will be governed. If taken to the extreme, thinking of the growth policy as a quasi-constitution may clarify its purpose. The growth policy helps to define the boundaries of the commissioners by ensuring they are not given absolute power

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112. *Id.* at 162.
113. *State v. Branam*, 148 P.3d 635, 639 (Mont. 2006) ("In construing a statute, the intent of the legislature is controlling, and such intent must first be determined from the plain meaning of the words.").
115. *Id.* at 547.
116. *Id.* at 2514.
117. Edward J. Sullivan, *The Role of the Comprehensive Plan*, 31 Urb. Law. 915, 924 (1999) (suggesting "[t]he definite trend appears to be toward finding the plan as a sort of impermanent constitution, flexible in its interpretation, but more than a guide to growth that may be rejected in some circumstances").
while in office. Although current courts do not seem willing to extend the idea of "quasi-constitution" to a growth policy, they have at least found "it makes little sense to then permit the local governing body to ignore the master plan [growth policy] once it has been created."

B. Public Comment: A New Requirement for Montana's County Commissioners

Contrary to the Court's interpretation, the growth policy and zoning statutes do not require commissioners to incorporate and address public comments. The sole statute concerning public comment directly applicable to the commissioners only requires that the public "be heard"—nothing more. Two other statutes require public comment only for the unelected boards serving under the commissioners. The first statute mandates that "the board shall give notice and hold a public hearing on the growth policy." The second statute states, "[a]fter consideration of the recommendations and suggestions elicited at the public hearing, the planning board shall . . . [provide its recommendation]." No where do these statutes refer to the methods by which the commissioners must consider the public's input. Despite the straightforwardness of the above statutes, the Court nevertheless held the commissioners must incorporate and address all novel issues raised by the public. The Court's explicit requirements regarding public comment hint at an implicit misunderstanding between the administrative state and elected officials.

The concept of the administrative state erupted in full force during the Great Depression in order to remedy social issues. However, in order to legitimize the administrative state, the public needed a mechanism to both identify and inject its values into

118. See e.g. Mont. Code Ann. § 76-1-605 (2005) ("A growth policy . . . does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to law.").
120. Id. at 1293.
122. Id. at § 76-1-602(1) (emphasis added).
123. Id. at § 76-1-603 (emphasis added).
The use of public comment answered that call by requiring each agency to permit and encourage "the public to participate in agency decisions that are of significant interest to the public." Commissioner, on the other hand, are completely different: they are elected as well as removed from their positions by the electorate. Such a system inherently connects public comment with the commissioners' decisions, which negates any necessity for the Court's newfound requirement of incorporating novel issues raised by the public.

Worst of all, the Court creates confusing standards for the public comment by requiring commissioners to "address" and "incorporate" public comments that are "novel." Though the Court's propositions might appeal to those sheltered within the confines of a courtroom, they impose untenable requirements on the counties and communities actually charged with implementing them. For example, to what degree must a commissioner "address" the public comment? Must elected officials now address the public more as individuals rather than as a populace? Similarly, to what degree must elected officials "incorporate" the public comment into the decision? Finally, when is a public comment novel? Since we live in a democratic society, is every one of the 4,400 public comments novel? As these questions demonstrate, the Court has left those who are in the trenches of planning Montana's future land use with more questions and confusion than before the issue was presented to the Court.

Even if Montana's government and citizens desire a new requirement that elected officials concretely incorporate public comment, the methods of that incorporation must change. Barbara Tuchman once said, "dead battles, like dead generals, hold the military mind in their dead grip [while they] prepare for the last war." Tuchman's statement sums her argument that World War I was fought with old tactics despite new technologies.

128. North 93 Neighbors, 137 P.3d at 564.
129. Though it is undoubtedly the "province" and "duty" of a court "to say what the law is," Marbury v. Madison, 5 U.S. 137, 177 (1803), the court also has the responsibility to look ahead and ensure its power does not leave the law in shambles and absent a light on the path of appropriate legal action.
131. Id. This note operates under the belief that the democratic system of elections is the best method to incorporate the public. However, assuming that is not the direction Montana desires to pursue, this note offers suggestions for alternative methods.
Similarly, the pastime of the public commenting by standing before a podium or submitting a letter is an old tactic that is sinking amidst new approaches. If Montana wishes to more fully incorporate the public, it must use a system that pursues deliberation rather than mere comment. This note advocates new methods ranging from focus groups to negotiated rulemaking as chosen by the local governments. The point of each method is to sit members down, discuss individual values, and find a solution acceptable to all. These newer methods gain even more importance as the issues become more intractable and people become more frustrated with the public comment process.

C. The Record: A New Requirement for Montana's County Commissioners

The Montana Supreme Court inappropriately compared county commissioners to agencies. The Montana Administrative Procedures Act explicitly states that an agency is not a "unit of local government." Nevertheless, since case law requires an agency to "flesh out the pertinent facts upon which a decision is based" by providing a record for review, the Court thought it only made sense to require commissioners to record their consideration of the public comment as well. The Court supported its new requirement by citing to Lowe. The use of Lowe, however, was misguided because that case occurred when rezoning an area was an administrative act—not a legislative act. As a result, it was appropriate for Lowe to require a city council acting administratively to provide a record for judicial review. Such was not the case before the Court in North 93 Neighbors, when a legislative act was at issue.

138. Id. at 563.
Additionally, if the Court's newly enacted requirement to create a record gains momentum, the growth policy and zoning battleground will shift from the ballot box to the courts. *Euclid* recognized this problem and stated, "[w]e have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts."140 The requirement that commissioners create a record, however, provides a "legal hook"141 for citizens unhappy with a democratic decision to shift venues and bring the matter before a court. Justice Rice was uncomfortable with such a hook because "there is no way to know whether public comments have raised a 'novel' issue unless each comment is individually scrutinized, recorded and compared."142 Since local governments do not have the resources to analyze each comment and record how it was analyzed,143 any person submitting a comment will have standing to challenge the commissioners' decisions.144 Although the courts serve an important function, they have a tendency to create intractable, uncertain, and expensive outcomes.145 Consequently, the courts are not the preferred alternative when popularly elected commissioners are subject to the ballot box and may proactively rather than reactively serve the people.

As a consequence of the Court's mandate to create records, local governments will catch the "analysis paralysis"146 pandemic. An example of analysis paralysis is the administrative state under the guidance of the National Environmental Policy Act.147 Similar to the new requirement that commissioners create a record, the administrative state must provide a record by creating an environmental impact statement (EIS).148 The EIS, however, hamstring the administrative state from acting because it provides such a large procedural hook for citizens to sue and slow the pro-

141. *Nie*, supra n. 3, at 458.
142. *North 93 Neighbors*, 137 P.3d at 572 (Rice, J., dissenting).
143. *Infra* nn. 152–54 (discussing fixed budgets and the lack of resources available to Montana counties).
144. *North 93 Neighbors*, 137 P.3d at 573 (Rice, J., dissenting).
145. *Nie*, supra n. 3, at 463.
148. *Id.* at § 4332(C)(i).
cess. Consequently, the administrative state must spend a tremendous amount of time and money producing a document capable of withstanding judicial scrutiny. While such a document serves as a legitimate check on the administrative state, commissioners do not need an additional check; as stated above, their check is the ballot box.

After stepping back and looking at the big picture, it is evident that local governments do not possess the manpower, money, or time to follow a Court’s whimsical demand for a record. Although lack of funding for a required action is not necessarily a legal argument, the pragmatic mind must nonetheless consider it before changing the law. In particular, Justice Rice was especially concerned with funding issues in North 93 Neighbors. For example, Gallatin County had a 2007 budget of only $89,950,230 and unlike the federal government, counties such as Gallatin County have limits on their debt. As a result, the time-intensive and expensive requirement that counties produce a record for judicial review will force counties to shift money from services that are truly needed by Montanans, such as public health and safety.

The best cure to the problem the Court has created is to lift the requirement that commissioners must create a record of considering public comment for judicial review. The two venues best suited for the task are the legislative and judicial branches. The legislature could enact language for both the growth policy and zoning statutes. The legislature’s enactment of such legislation would preempt any problems before they begin to enter the courts, drain county budgets, and frustrate the stakeholders entangled in growth policy and zoning issues.

151. See e.g. Carty v. Schneider, 986 F. Supp. 933, 938 (D.V.I. 1997) (holding “a lack of funding does not serve as an acceptable excuse for defendants’ noncompliance . . .”).
The second alternative is the court system. As previously mentioned, the Court has created a hook ensuring the arguments of public comment and commissioners' failure to create an adequate record enter their hallowed halls again. When that time arrives, the Court needs only to recognize that commissioners are elected officials performing legislative acts and are inherently forced to consider the public comment via voting. Such reasoning would lead the Court to the harsh, but necessary, decision to over-rule their past holding and allow local governments to focus on governing rather than documenting.

V. CONCLUSION

The decisions Montana makes today and in the future regarding its land use planning will serve as "the biggest decision[s] we've ever had to make."156 Rising population and scarcity of land ensure these decisions will seem unsolvable. In spite of these hamstring problems, the employment of predictable, inclusive, and cost-effective land planning mechanisms provide a counter-balance.

North 93 Neighbors serves as a sobering reminder that courts' statutory interpretations have on-the-ground impacts. For example, the Court's interpretation that commissioners must substantially comply with the growth policy thankfully stakes the commissioners' actions on the land to the parameters established by the growth policy. However, the Court's requirement that commissioners create a record showing they addressed all novel comments will likely soak up county money and burden or disable programs that Montanans truly need.

Though North 93 Neighbors inadvertently started Montana's land use planning down the wrong path, Montana's people and government may change the course. Either the legislature or judiciary has the power to reorient Montana on the path best-suited for the "health, safety, convenience, and welfare of the citizens."157

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