

MEMO

To: Regulatory Reduction Task Force
From: Jerimiah Rieman, Executive Director, Wyoming
County Commissioners Association
Date: June 13, 2023
Re: Zoning and Local Ordinances



LOCAL GOVERNMENT STRUCTURE

The general powers of counties are articulated at W.S. § 18-3-504 and encompass a wide range of duties and responsibilities to be carried out by county commissioners. As an administrative arm of the state, Wyoming counties may only exercise those powers expressly granted through Wyoming's Constitution, statutory law, or those reasonably implied from powers granted (*Board of County Commissioners of Laramie County v. Dunnegan*, 884 P. 2d 35 (1994)). For example, county commissioners manage the courthouse, establish the county budget, and, through their county road and bridge department, are responsible for construction, maintenance, and operation of county roads. These, among others, are services that are required by state law. Wyoming's 23 counties each have economic, geographical, and social characteristics that influence other types of services provided by county government and the ability of their citizens to support those services.

Additional services provided by county governments, but not necessarily required under state law, include planning and zoning, building codes, fire protection, landfills, animal control, and recreation programs. County libraries, airports, hospitals, public health, and senior citizen centers are further examples of county functions which have expanded to serve the demands of county residents. As requested by residents, there has been significant growth in the provision of these services.

Home Rule vs. Dillon Rule

Home Rule is delegated by state constitution or state statute and allocates broad authority to local governments to manage their affairs. For example, Article 13, Section (as amended) of Wyoming's Constitution, empowers municipalities, but NOT counties, to govern by ordinance. Conversely, Wyoming counties operate under the Dillon Rule – the principle that local government are limited to enacting resolutions and regulations that are (1) expressly granted by state law, (2) necessary and implied from the grant of power, and (3) crucial to the existence of counties.

PLANNING, ZONING, AND RELATED PROVISIONS

As required by law, all 23 Wyoming counties have adopted county comprehensive plans or land use plans to guide future growth. County-level planning authority is authorized by Title 18, Chapter 5 of state statutes ("Planning and Zoning") and pertains to all unincorporated lands situated outside of municipalities.

A comprehensive plan (also called a "master plan" or "general plan") consists of maps, policies, goals, and guidelines intended to direct present and future physical, social, and economic development that occurs within a county's jurisdiction. A land-use plan is any written statement of land use policies, goals, and objectives adopted by counties that represents the long-range plan for the desirable use of land in a jurisdiction. Unlike a comprehensive plan that covers a range of socio-economic and physical topics,

land-use plans are specific to land use. Land-use plans typically address zoning and progressive changes in the zoning of land to meet the changing needs of a community, including subdivisions, use of undeveloped land, and the acquisition of rights-of-way or sites for public purposes such as streets, parks, schools, and public buildings.

The board of county commissioners of each county may regulate and restrict the location and the use of buildings and structures and the use, condition of use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use, and other purposes in the unincorporated area of the county (W.S. § 18-5-201). As provided in Wyoming statute, county planning and zoning exists "to promote the public health, safety, morals and general welfare of the county" (W.S. § 18-5-201). As discussed later herein, county commissioners and planning and zoning commissions are limited in their planning and zoning authority in specific circumstances.

Regulating land use in Wyoming first requires that counties adopt a comprehensive land use plan. Thereafter, counties may adopt zoning regulations to govern implementation of the county's comprehensive land use plan. Reinforcing this, in 1996, the Wyoming Supreme Court concluded that zoning is the only allowed method to enforce the comprehensive plan (*Ford v. Board of County Commissioners of Converse County*, 924 P.2d 91 (1996)). A comprehensive plan is also a prerequisite for ensuring that municipalities cannot exercise jurisdiction in areas outside the city limits (more later).

The first step towards zoning is the appointment of a planning and zoning commission by the board of county commissioners (W.S. § 18-5-202). The planning and zoning commission serves in an advisory capacity to the board of county commissioners. The purpose of this commission is to recommend the boundaries of the zoning district, appropriate regulations to be enforced within the zoning district, and to prepare a comprehensive plan with zoning recommendations. This comprehensive plan shall be submitted to the board of county commissioners for final approval. Before submitting its comprehensive plan, the planning and zoning commission must hold at least one public hearing. Notice of time and place of the hearing shall be published in a newspaper of general circulation in the county at least 30 days before the date of the hearing. Any person has the right to petition the planning and zoning commission for the amendment of any previously adopted land use plan.

The planning and zoning commission is also empowered to make recommendations concerning zoning matters. At least one public hearing must also be held before a recommendation can be adopted by the board. After the hearing, the board of county commissioners shall vote upon the adoption of the planning and zoning commissions report (W.S. § 18-5-202).

As previously mentioned, county commissioners and planning and zoning commissions have limited powers in specific examples. Those limitations include that counties shall not:

- Infringe upon the zoning authority held by any incorporated municipality;
- Prohibit the reasonable use or occupancy necessary for the extraction and production of mineral resources;
- Impede residential or agricultural uses that are permitted for land divisions exempt from subdivision requirements under W.S. § 18-5-303(a)(i) through minimum lot size requirements or any other means;
- Impose different regulations or restrictions on the location and use of buildings, structures, and the use or occupancy of lands for private schools as defined in W.S. § 21-4-101(a)(iii), compared to public schools.

These limitations are outlined in W.S. § 18-5-201(a).

Court and Attorney General Opinions

The county's planning and zoning duty has occasionally been a subject of controversy. The Wyoming Supreme Court, through case law, and the Attorney General, through opinions, have tried to interpret the boundaries of the county commissioner powers and have interpreted county obligations under statutory guidelines.

While allowing a board of county commissioners to retain control over the adoption of a comprehensive plan and to impose restrictions within the plan, W.S. § 18-5-201 does not enable county commissioners to control the division or subdivision of land. Wyoming's subdivision statutes (W.S. § 18-5-301 through 318) authorize the planning and zoning commission and board of county commissioners to receive and evaluate applications for subdivision permits (Attorney General Opinion 79-35, p. 180). Thus, zoning and subdivision controls are separate and distinct control mechanisms with different functions and purposes. The use of the land is controlled by zoning and the division of land is controlled by subdivision regulations. Under W.S. § 18-5-305, the county shall enact local resolutions which impose additional requirements on subdivisions. W.S. § 18-5-315 allows any board to enact subdivision regulations which impose requirements which are more restrictive than the Real Estate Subdivision Act.

In Attorney General Opinion 80-022, the Attorney General recognizes the right of the planning and zoning commission to request mining operations to submit applications for zoning permits in unincorporated areas to establish conformity with zoning restrictions. Under this opinion, counties are limited to control of mining permits and may not impose restrictions outside the county plan itself. However, state statute does not allow counties to use permits to regulate environmental concerns. Nevertheless, before a county requires conformity, a county must develop and adopt a comprehensive plan.

Within the issue of comprehensive planning falls the question of freezing land use (or moratoriums) and the long-term effects of such actions. The Wyoming Supreme Court in *Schoeller v. Board of County Commissioners of Park County*, (568 P.2d 869 (1977)), held that an emergency land freeze cannot be made permanent policy or the plan of the county without hearings and notice according to the statutes. The Court ruled that the county freeze resolution may continue only for a length of time which affords an opportunity to give notice and hold a hearing. After the hearing, the authority for a freeze will not be allowed to be made the permanent plan.

The preparation and adoption of a comprehensive plan must be for the total area of the county but may be adopted with special plans for areas under certain strains (Attorney General Opinion 81-001). For a detailed analysis in this area of county government, see the statutes, cases and opinions: *Schoeller v. Park County*, 568 P.2d 869 (1977); *Snake River Venture v. Teton County*, 616 P.2d 744 (1980); *Snake River Brewing, Inc. v. Town of Jackson*, 70 P.3d 241 (2003); and Attorney General Opinions 79-035, 80-022 and 81-001.

Subdivision Control

The Wyoming State Legislature defines a county level subdivision as "the creation of a division of a lot, tract, parcel or other unit of land for the immediate or future purpose of sale, building development, or redevelopment, for residential, recreation, industrial, commercial, or public uses" (W.S. § 18-5-302).

The subdivision of land in unincorporated Wyoming is regulated and controlled by the board of county commissioners under the authority of the Real Estate Subdivisions Act (W.S. § 18-5-301 through 318).

Zoning typically establishes minimum lot sizes in particular districts. Subdivisions control the actual division of property, including roads, easements, utilities, drainage, layout water and sewerage systems, etc. Except as noted in the Real Estate Subdivisions Act, no person can subdivide land or commence the physical layout or construction of a subdivision without first applying for and obtaining a subdivision permit from the board of the county in which the land is located (W.S. § 18-5-301). Provisions relating to the minimum requirements for a permit, and the rights, powers and duties of the board are detailed in the Real Estate Subdivisions Act. Specific information to be submitted for a subdivision permit includes:

- Evidence of zoning compliance;
- Survey plat;
- Evidence of merchantable title;
- Sewage system study;
- Easements for access and utilities;
- Water supply system study;
- Adequate access documentation;
- Adequate financial resources documentation;
- Public notice of intent;
- Any county-specific information;
- Water rights disposition documentation;
- Conservation district review; and
- Department of Environmental Quality (DEQ) review.

In 2001, the Wyoming Legislature significantly amended the Real Estate Subdivisions Act because of suggestions made by the WCCA, the Wyoming Planning Association, title companies, other county elected officials and developers. The amendment was chiefly aimed at closing loopholes that fostered illegal divisions of land and that allowed counties the discretion to relax subdivision permit submission requirements for small (five or fewer lots) subdivisions. The most significant change was to redefine the term "subdivision". The old definition said any division of land into three or more parcels was a subdivision. That was amended to say that any division of land, with certain exemptions, was a subdivision. However, the Wyoming Legislature did not want to burden someone selling a single lot or two to be held to the standards of a 50 unit subdivision. They added language that allowed county discretion in applying minimum requirements for five or fewer lots. Among other things, a county can exempt a small subdivision from the statutory requirement of the DEQ review.

The DEQ review of a subdivision may have a major financial impact on the cost of subdividing property (W.S. § 18-5-306(c)). The legislature also expanded the list of exemptions to include the sale or transfer of land to a relative, known as the "family exemption". Moreover, property divided into parcels, all of which are 35 acres or more, are exempt from most subdivision regulations. The legislature did require access to be provided to lot sizes more than 35 acre developments, even though the subdivision laws do not apply.

In 2018, the legislature changed the law regarding municipal approval of subdivision and development plats within one mile of the city limits. Beginning in January of 2019, municipal approval of subdivision and development plats is no longer necessary so long as a county has a comprehensive plan. Instead, counties must notify the city and seek comments on issues like street alignment, etc.

Wind and Solar Energy Development

The Wyoming Legislature granted county commissioners the authority to permit wind and solar energy facilities prior to construction (W.S. § 18-5-502). A wind energy facility is any wind powered electrical generation development consisting of an individual wind turbine or multiple wind turbines rated by the manufacturer to generate more than one-half megawatt of electricity and includes all contiguous lands where the owner or developer has rights to erect wind turbines (W.S. § 18-5-501(a)(ii)). A solar energy facility is a commercial facility with a rated power capacity of more than one-half megawatt of electricity from solar power that includes all lands where the owner or developer has rights to erect solar energy facilities, including lands for battery storage (W.S. § 18-5- 501(a)(vi)).

The statutes set out a process for the developer to apply to the county commissioners for a permit and the time frames for which the application must be acted upon by the county commissioners. Also enacted was a statute that specifies the minimum standards for construction of wind and solar projects (W.S. § 18-5-504). These are minimums set by statute. A county can impose more stringent requirements than are articulated in all areas except for decommissioning and reclamation. The Industrial Siting Council (ISC) has promulgated the standards for decommissioning and reclamation that must be adhered to by all projects. These standards are found at W.S. § 35-12-105(d).

In addition to the county permitting process, all wind farms of 20 or more turbines and solar facilities that have a rated power capacity of more than 30 megawatts, would result in at least 100 acres of surface disturbance or is expanded satisfy either of these criteria must go through the ISC permit process. The ISC is a board appointed by the Governor who oversees industrial development within the State of Wyoming. The ISC is included in the DEQ and works in conjunction with the administrator and staff of the Division of Industrial Siting.

Eminent Domain

The Wyoming Eminent Domain Act (W.S. § 1-26-501 through 516) is a tool available to government for the acquisition of property in return for just compensation. The Eminent Domain Act requires that there be prior good faith efforts to negotiate the purchase of property, unless specifically excluded by the statute. The Eminent Domain Act also requires the board of county commissioners to adopt a written resolution which authorizes the commencement of the condemnation action (W.S. § 1-26-512). The statutes allow acquisition of property by eminent domain only if all the following are established:

- a. The public interest and necessity require the project;
- b. The project is planned or located in the manner that will be most compatible with public good and least private injury; and
- c. The property sought to be acquired is necessary for the project.

The Eminent Domain requires compensation equal to the fair market value of the property. In addition to fair market value, the owner of a business whose property is being taken can be compensated for loss of goodwill if he can prove that the taking of the property was a loss and that the loss cannot reasonably be prevented by a relocation of the business. Goodwill benefit consists of benefits that accrue to a business because of its location, reputation, skill, or other qualities resulting in probable retention of old or acquisition of new patronage.

Extra-territorial Jurisdiction

For many years municipalities in Wyoming enjoyed broad authority outside of their city limits. There are three concentric rings around cities – ½ mile, 1 mile, and 5 miles – each with varying degrees of municipal jurisdiction allowed by the state. Since 2013, these so called extra-territorial jurisdictions have been whittled away by the Wyoming Legislature – see W.S. § 15-1-401 through 423.

In 2018, the Wyoming Legislature provided counties a path to end any extra-territorial jurisdiction beginning on January 1, 2019. So long as a county has an officially adopted comprehensive land use plan according to W.S. § 18-5-202, then the county dictates to what extent municipalities participate in the approval of plat developments beyond the city limits.

FEDERAL LANDS AND THEIR MANAGEMENT

NEPA, passed in 1969, declared as a national policy the “Federal Government, in cooperation with State and local governments, and other concerned public and private organizations” will “use all practicable means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”

In Wyoming, when a county is serving as a cooperating agency, it is deemed under state to have special expertise on “all subject matters for which it has statutory responsibility” including “all subject matters directly or indirectly related to the health, safety, welfare, custom, culture, and socio-economic viability of a county (W.S. § 18-5-208(a)).

County commissions that have officially adopted a comprehensive plan pursuant to W.S. § 18-5-202(b) may participate in efforts to coordinate the plan with federal regional forest or other resource management plans as provided in the Federal Land Policy and Management Act of 1976, the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 and any other federal statute which provides for coordination with local governments and federal regulations adopted pursuant to those acts (W.S. § 18-5-208(b)). Having a comprehensive plan that includes natural resource planning on federal lands is a helpful tool, but not required by federal law.