



Montana Association of Counties

Serving Montana Counties Since 1909

2715 SKYWAY DRIVE, SUITE A, HELENA, MT 59602
(406) 449-4360 Fax (406) 442-5238
www.mtcounties.org

TO: MACo Land Use and Development Committee
FROM: Tara DePuy, PCT Land Use Attorney
RE: Local Government Authority Over Conservation Easements Resolution
DATE: September 11, 2020

ISSUE

Eric Bryson, MACo Executive Director, requested that I provide a legal review of the proposed Local Government Authority Over Conservation Easements Resolution to the Land Use and Development Committee. This proposed resolution is sponsored by Valley County and requests that MACo establish legislation to amend MCA Section 76-6-206 to expressly authorize counties to restrict conservation easements within their jurisdiction.

STATUTORY HISTORY OF CONSERVATION EASEMENTS

MCA Section 76-6-206 is part of what is known as the Open-Space Land and Voluntary Conservation Easement Act. There are two parts to this Act; acquisition and designation of conservations easements by public bodies (state, counties, cities and towns) or acquisition of conservation easements by qualified private organizations.

Underlying the legislative intent of conservation easements are two articles of the Montana Constitution:

- Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the *right to a clean and healthful environment*, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the *right of acquiring, possessing, and protecting property*, and the right of seeking individual safety, health, and happiness in all lawful ways.
- Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a *clean and healthful environment* in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty.

In 2003 the Montana Legislature added the following provision to MCA Section 76-6-102:

(1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Open-Space Land and Voluntary Conservation Easement Act. It is the legislature's intent that the requirements of this chapter provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

The statute at issue in the proposed Resolution, MCA Section 76-6-206, states:

Review by local planning authority. In order to minimize conflict with local comprehensive planning, *all conservation easements shall be subject to review prior to recording by the appropriate local planning authority for the county within which the land lies.* It shall be the responsibility of the entity acquiring the conservation easement to present the proposed conveyance of the conservation easement to the appropriate local planning authority. The local planning authority shall have 90 days from receipt of the proposed conveyance within which to review and to comment upon the relationship of the proposed conveyance to comprehensive planning for the area. *Such comments will not be binding on the proposed grantor or grantee but shall be merely advisory in nature.* The proposed conveyance may be recorded after comments have been received from the local planning authority or the local planning authority has indicated in writing it will have no comments or 90 days have elapsed, whichever occurs first.

LEGAL ANALYSIS

The intent of the proposed Resolution is to allow counties to limit conservation easements to protect the tax base and economic stability of the county. There are two major issues in regards to MACo passing a resolution that would give a county jurisdiction to control or limit conservation easements as proposed in the Resolution.

1. Counties do not have the authority to override the Montana Constitution and its specific direction that the Montana State Legislature provide for the administration and enforcement of a clean and healthful environment without a change to either or both Article II, section 3, and Article IX of the Montana Constitution that would allow counties to override the Montana Constitution's delegation of administration and enforcement of a clean and healthful environment to the Montana State Legislature; and
2. It may be argued that controlling or limiting private conservation easements is a regulatory takings of a private property right which also implicates Article II, Section 3 of the Montana Constitution. If counties were given the ability to control or limit private conservation easements, at the time the county put limitations on a private conservation easement the takings issue would ripen and the county limiting the conservation easement could be subject to litigation regarding a takings of private property rights.

Of the two major issues, the fact that this resolution would require MACo to change the Montana Constitution is the most problematic as amending the Constitution cannot be done through a legislative bill. The [Montana Constitution](#) can be amended through [initiated constitutional amendments](#), [legislatively referred constitutional amendments](#) and [constitutional conventions](#).

Constitutional conventions can be called in three different ways.

- According to, [Section 1, Article XIV](#), the [Montana State Legislature](#), "by an affirmative vote of two-thirds of all the members ... may at any time submit to the qualified electors the question of whether there shall be an unlimited [convention](#) to revise, alter, or amend" the constitution.
- [Section 2, Article XIV](#), says that the state's electors can put a question about whether to hold a convention on a statewide ballot if a petition is signed by at least 10 percent of the qualified electors of the state, including at least 10 percent of the qualified electors in each of two-fifths of the legislative districts.

- [Section 3, Article XIV](#), says that a question about whether to hold a convention shall [automatically](#) go on the ballot every 20 years if it has not otherwise appeared on the ballot in the last two decades.
- If a convention question is approved by voters, a convention is called.
- Any amendments proposed by a convention must be ratified by the voters.

The [Montana state legislature](#) can put a [legislatively referred constitutional amendment](#) on the ballot, according to [Section 8, Article XIV](#).

- Any member of the legislature can propose an amendment.
- The amendment must then be adopted by an affirmative roll call vote of two-thirds of all members of the legislature and approved by state voters.
- The electors of the state can qualify an [initiated constitutional amendment](#), according to [Section 9, Article XIV](#).
- Proposed initiated amendments go on the ballot if petitions are signed by at least 10 percent of the qualified electors of the state, including at least 10 percent of the qualified electors in each of at least one-half of the counties.

The electors of the state can qualify an [initiated constitutional amendment](#), according to [Section 9, Article XIV](#).

- Proposed initiated amendments go on the ballot if petitions are signed by at least 10 percent of the qualified electors of the state, including at least 10 percent of the qualified electors in each of at least one-half of the counties.