

CASCADE COUNTY SUBDIVISION REVIEW AND LEGISLATIVE UPDATES TRAINING

June 17, 2022

Presented by:
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AGENDA



Cascade County Subdivision Review and Legislative Updates Training

Great Falls, Montana

June 17, 2022

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| 10:00 a.m. | Sign In and Introductions |
| 10:15 a.m. | Overview of Materials |
| 10:20 a.m. | The Basics: Ethics, Ex Parte Communication, and Public Comment |
| 11:20 a.m. | Land Use Legislative Updates |
| 12:00 p.m. | Lunch Break (lunch provided) |
| 12:30 p.m. | Subdivision Review Process – Findings and Conditions |
| 2:00 p.m. | Break |
| 2:15 p.m. | Exemptions from Subdivision Review |
| 3:00 p.m. | Questions |
| 3:30 p.m. | Adjourn |

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Ethics and Ex Parte Communication

THE APPEARANCE OF IMPROPRIETY BY A GOVERNMENTAL ENTITY OR MEMBER MAY RESULT IN LITIGATION.

A. Ethical Considerations:

1. Conflicts of Interest
2. Gifts and Favors
3. “Ex Parte” communication

B. Conflicts of Interests

- “Conflict of interests” is when a private benefit is derived from your actions.
- Usually the benefit is a financial benefit.
- Just because you are a member in a group or organization is not considered a conflict of interest.
- If a conflict of interest exists, the person should recuse themselves and not participate in the discussion on the action.
- Discuss the matter with planning staff and attorney’s office prior to meeting.
- Don’t taint the other members and discuss your conflict with them.

C. Gifts and Favors

- A person holding a position of public responsibility should not accept gifts or favors.
- Even minor gifts, i.e. lunches, are not acceptable.

D. Ex Parte Communication

- ❖ “Ex Parte” communication can be verbal, written, electronic or visual and is received outside of the public record.
- ❖ “Ex Parte” communication cannot be received in a quasi-judicial activity, i.e. subdivision application review, zoning conditional use permit. Quasi-judicial means that the decision is made under circumstances similar to a court of law.
- ❖ “Ex Parte” communication can be received in a legislative activity, i.e. adoption of growth policy, subdivision regulations or zoning regulations. Legislative activities are similar to those of the legislature where lobbying is allowed.

- ❖ “Ex Parte” communication should not occur with the subdivider or their consultants at any time, including before the subdivision application is submitted.
- ❖ “Ex Parte” communication should not occur during a site visit. The site visit should be noticed as a public meeting. Any information received from the subdivider or consultants during a site visit must be factual only and limited to the physical features of the site.
- ❖ If you have inadvertent “ex parte” communication with the subdivider or the public, this should be disclosed immediately to planning staff and attorney.
- ❖ “Ex Parte” communications may result in the board or commission member being recused from reviewing and participating in the subdivision application review.
- ❖ “Ex Parte” communication may result in litigation.

OPEN MEETING ACT

The Open Meeting Act and Montana law requires counties to properly notice meetings. Violation of the Open Meeting Act can result in the decision being voided and the county paying attorney's fees to the party challenging the county's compliance with the Act.

A. RELEVANT MONTANA LAWS

1. Montana Constitution

a. Section 8. Right of participation. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

b. Section 9. Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

2. Montana Code Annotated, Title 2 Government Structure and Administration, Chapter 3, Public Participation in Governmental Operations, Part 1 NOTICE AND OPPORTUNITY TO BE HEARD

a. 2-3-101. Legislative intent. The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency.

b. 2-3-102. Definitions. As used in this part, the following definitions apply:

(1) "Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except:

- (a) the legislature and any branch, committee, or officer thereof;
- (b) the judicial branches and any committee or officer thereof;
- (c) the governor, except that an agency is not exempt because the

governor has been designated as a member thereof; or

(d) the state military establishment and agencies concerned with civil defense and recovery from hostile attack.

(2) "Agency action" means the whole or a part of the adoption of an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial thereof.

(3) "Rule" means any agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public; or

(b) declaratory rulings as to the applicability of any statutory provision or of any rule.

c. 2-3-103. Public participation -- governor to ensure guidelines

adopted. (1) (a) Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public. The agenda for a meeting, as defined in [2-3-202](#), must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. Public comment received at a meeting must be incorporated into the official minutes of the meeting, as provided in [2-3-212](#).

(b) For purposes of this section, "public matter" does not include contested case and other adjudicative proceedings.

(2) The governor shall ensure that each board, bureau, commission, department, authority, agency, or officer of the executive branch of the state adopts coordinated rules for its programs. The guidelines must provide policies and procedures to facilitate public participation in those programs, consistent with subsection (1). These guidelines must be adopted as rules and published in a manner so that the rules may be provided to a member of the public upon request.

d. 2-3-104. Requirements for compliance with notice provisions.

An agency shall be considered to have complied with the notice provisions of [2-3-103](#) if:

- (1) an environmental impact statement is prepared and distributed as required by the Montana Environmental Policy Act, Title 75, chapter 1;
- (2) a proceeding is held as required by the Montana Administrative Procedure Act;
- (3) a public hearing, after appropriate notice is given, is held pursuant to any other provision of state law or a local ordinance or resolution; or
- (4) a newspaper of general circulation within the area to be affected by a decision of significant interest to the public has carried a news story or advertisement concerning the decision sufficiently prior to a final decision to permit public comment on the matter.

e. 2-3-111. Opportunity to submit views -- public hearings. (1)

Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public.

(2) When a state agency other than the board of regents proposes to take an action that directly impacts a specific community or area and a public hearing is held, the hearing must be held in an accessible facility in the impacted community or area or in the nearest community or area with an accessible facility.

f. 2-3-112. Exceptions. The provisions of [2-3-103](#) and [2-3-111](#) do

not apply to:

- (1) an agency decision that must be made to deal with an emergency situation affecting the public health, welfare, or safety;
- (2) an agency decision that must be made to maintain or protect the interests of the agency, including but not limited to the filing of a lawsuit in a court of law or becoming a party to an administrative proceeding; or
- (3) a decision involving no more than a ministerial act.

g. 2-3-114. Enforcement — attorney fees. (1)

The district courts of the state have jurisdiction to set aside an agency decision under this part upon petition of any person whose rights have been prejudiced. A petition pursuant to this section must be filed within 30 days of the date on which the person learns, or reasonably should have learned, of the agency's decision.

(2) A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 8, of the Montana constitution may be awarded costs and reasonable attorney fees.

3. Montana Code Annotated, Title 2 Government Structure and Administration, Chapter 3, Public Participation in Governmental Operations, Part 2 **OPEN MEETINGS**

a. 2-3-201. Legislative intent -- liberal construction. The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.

b. 2-3-202. Meeting defined. As used in this part, "meeting" means the convening of a quorum of the constituent membership of a public agency or association described in [2-3-203](#), whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power.

c. 2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public -- exceptions. (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds, including the supreme court, must be open to the public.

(2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.

(3) The presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.

(4) (a) Except as provided in subsection (4)(b), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open

meeting would have a detrimental effect on the litigating position of the public agency.

(b) A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2).

(5) The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding.

(6) Any committee or subcommittee appointed by a public body or an association described in subsection (2) for the purpose of conducting business that is within the jurisdiction of that agency is subject to the requirements of this section.

d. 2-3-211. Recording. Accredited press representatives may not be excluded from any open meeting under this part and may not be prohibited from taking photographs, televising, or recording such meetings. The presiding officer may assure that such activities do not interfere with the conduct of the meeting.

e. 2-3-212. Minutes of meetings -- public inspection. (1) Appropriate minutes of all meetings required by [2-3-203](#) to be open shall be kept and shall be available for inspection by the public.

(2) Such minutes shall include without limitation:

- (a) date, time, and place of meeting;
- (b) a list of the individual members of the public body, agency, or organization in attendance;
- (c) the substance of all matters proposed, discussed, or decided; and
- (d) at the request of any member, a record by individual members of any votes taken.

(3) If the minutes are recorded and designated as the official record, a log or time stamp for each main agenda item is required for the purpose of providing assistance to the public in accessing that portion of the meeting.

(4) Any time a presiding officer closes a public meeting pursuant to 2-3-203, the presiding officer shall ensure that minutes taken in compliance with subsection (2) are kept of the closed portion of the meeting. The minutes from the closed portion of the meeting may not be made available for inspection except pursuant to a court order.

f. 2-3-213. Voidability. Any decision made in violation of [2-3-203](#) may be declared void by a district court having jurisdiction. A suit to void a decision must be commenced within 30 days of the date on which the

plaintiff or petitioner learns, or reasonably should have learned, of the agency's decision.

g. 2-3-221. Costs to plaintiff prevailing party in certain actions to enforce constitutional right to know. A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 9, of the Montana constitution may be awarded costs and reasonable attorney fees.

What About Public Comment?

- Public comment in writing to the Board/Commission or presented at a public hearing or meeting must be considered by the Board/Commission.
- Public comment outside this formal process is considered ex-parte contact as the Board/Commission is acting in a quasi-judicial role when reviewing subdivision and cannot be considered.
- All public comments must be analyzed by the Board/Commission and incorporated into findings as appropriate.
- While all public comment must be analyzed not all public comment must be incorporated into findings if the public comment is not relevant or other credible information outweighs the public comment.
- It is not uncommon for the public to submit new information to the Board/Commission that was not part of the subdivision application and thus reviewed by the subdivision administrator.
- The Montana Subdivision and Platting Act does not set forth how to weigh public comment. Many county Subdivision Regulations include the following guidance regarding new information presented to the GB (County Commission) which is instructive. New information or analysis of information is considered to be credible if it is based on one or more of the following:
 - i. physical facts or evidence;
 - ii. supported personal observations;
 - iii. evidence provided by a person with professional competency in the subject matter; or
 - iv. scientific data supported by documentation.
- Public comment may also prompt the subdivider to request an extension to address the public comment or submit an amended application. Section 76-3-605(4)(a), MCA allows the subdivider a one year extension or suspension of the review period of it is agreed to by the subdivider and reviewing agent or agency. This extension request and agreement should be made on the record and preferably be documented in writing.
- Cascade County's Subdivision Regulations set forth a process for amended subdivision applications and set forth that the following changes, although not

an exhaustive list, may be considered material changes that require the subdivision application to be reconsidered in the manner set forth in the local regulations:

- i. configuration or number of lots;
- ii. road layout;
- iii. water and/or septic proposals;
- iv. configuration of park land or open spaces;
- v. easement provisions; and
- vi. designated access.

BEST PRACTICES FOR PLANNING BOARD MEMBERS

1. Planning Board Members Should be Cognizant of Open Meeting Statutes

- a. Electronic meetings by e-mail are a violation of the Open Meeting Act.
- b. All subcommittee meetings must be noticed, public comment must be taken and minutes must be kept.
- c. E-mails regarding Planning Board activities should not be deleted and should be kept in a separate folder. In *Delaney & Co. v. City of Bozeman*, Delaney was awarded \$3,000,000 in damages for abuse of discovery; the abuse was that the City of Bozeman failed to retain e-mails that Delaney alleged would have shown that the City of Bozeman intentionally undermined his purchase of the Mandeville property after he disclosed to the City of Bozeman his intention to purchase and develop this property.
- d. Limit the number of e-mails you use for Planning Board activities.
- e. Copying parties outside of the Planning Board or County on Planning Board Activities may appear to be a conflict of interest and subject that party to e-mail discovery if there is litigation.

2. The Planning Board Should Act as a Board; Not as Individual Members

- a. All information regarding Planning Board activities should be shared with the entire Board so that all Board members have the same information when taking action on issues.
- b. Inviting speakers to present to the Planning Board is Board action; not an individual member action.
- c. If a matter is under the jurisdiction of the Planning Board, stating that you are representing yourself and not the Planning Board in regards to that matter may create a conflict of interest for you to act on that matter as a Planning Board member. The majority of the Zoning Board of Adjustments in Three Forks was recently removed for cause after they signed a petition against a development. The development application included a variance which is heard by the Zoning Board of Adjustments.
- d. The Planning Board acting as a Board should determine Planning Board work plans, agenda items and best use of staff time.
- e. The Planning Board must act in the best interests of the county; not the best interests of certain sectors of the community.

3. Planning Board Members Should Not Hire Outside Consultants to Advise the Planning Board.

a. State statutes states that all “staff” must be approved by resolution. 7-1-201(2)(d), MCA.

b. County employees and county hired contractors have a duty to represent the best interests of the county. Outside consultants hired by private individuals have no duty to represent the best interests of the county.

c. The County has disciplinary control and contract provisions to address county employee and county hired contractor actions. 2-2-121, MCA is a Code of Ethics for Public Employees.

d. County employees and county hired contractors are not allowed to have conflicts of interest in regards to County activities upon which they provide advice to the County.

4. Planning Board Members Should Frequently Review Planning Board Policies and County Regulations.

a. Planning Board By-laws should be consulted in regards to proper protocols for Board actions and activities. By-laws can be amended to include protocols the Board wishes to put in place, subject to County Commission approval.

b. The Growth Policy is a living document that by statute should be updated every 5 years and it should be read frequently so the Planning Board knows what action items it is supposed to address in what time frame and to be familiar with the Growth Policy when reviewing subdivision applications.

c. Outdated regulations are a liability to the County as they do not accurately reflect state law and may misinform the public. Subdivision regulations should be updated to conform to the goals and objectives of the Growth Policy and state statutes.

d. County imposed zoning must be consistent with the goals and objectives of the Growth Policy and cannot be enacted without a Growth Policy.

5. Planning Board Members Should Be Cognizant of when Ex Parte Contact is prohibited.

a. Planning Board members should understand whether they are taking action on a legislative matter or a quasi-judicial matter.

b. Planning Board members do not take action on zoning permits, variances, or enforcement so where zoning is concerned, the Planning Board is only involved in legislative activities.

c. Subdivision review is strictly a quasi-judicial matter:

i. Planning Board members should not meet with a subdivider, neighbors or other agency outside of public meetings on the subdivision that have been noticed correctly.

ii. Site visits must be conducted in such a manner as limit ex parte contact with the subdivider or his representatives. If present, contact with the subdivider or his representatives should be limited to answering specific questions about location of subdivision features on the ground, i.e. where the fire fill site is located.

6. Planning Board Members Should Determine How the Board Interacts with the Press

a. Planning Board members should determine who has the authority to speak to the press on behalf of the entire Board.

b. Planning Board members should make sure that any representations to the press by comments in articles in the newspaper or letters to the editor represent the positions of the entire Board or those comments should be made as an individual and not as a member of the Planning Board.

c. Care should be taken to make sure that information repeated to the press is accurate so as to not misinform the public.

7. Planning Board Members Should Make Sure that Public Comments are Captured and Analyzed

a. While Planning Staff captures all oral public comments at public meetings and written public comments, comments made to Planning Board members on legislative activities should be conveyed to the entire Board and made a part of the record.

b. In *Citizens for a Better Flathead v. Flathead County* the allegations were that both the County Commission and the Planning Board failed to consider and analyze public comment. The MSCt found that all public comments had been captured, made a part of the record, and analyzed.

8. Planning Board Members Should be Cognizant that Land Use Decisions are Frequently Litigated

a. Land use issues are contentious across the State of Montana and Planning Board members should be aware that their activities and decisions will be under intense public scrutiny.

b. Planning Board members should remember that even if they follow proper protocols and processes, they still may be involved in litigation. While this

litigant was not successful, the *Touris II* complaint against Flathead County asserted numerous counts:

I violation of due process by the Bigfork Land Use Advisory Committee;

II negligence/negligence per se by the Bigfork Land Use Advisory Committee;

III violation of equal protection by the Bigfork Land Use Advisory Committee;

III a negligence by the Planning Board;

IV violation of equal protection by the Board of Commissioners;

V negligence by the Board of Commissioners;

VI violation of substantive due process by the Board of Commissioners;

VII negligent misrepresentation by the Flathead County Planning and Zoning Office;

VIII violation of equal protection by the Flathead County Planning and Zoning Office;

IX violation of procedural due process by Jeff Harris; and

X failure by Flathead County to adequately train and supervise employees and board members.

Public Comment Guidelines

If you wish to speak, please line up at the podium. Before you begin your comment, state your name and address. If you are speaking on behalf of other people, groups, or entities, please state the nature of that representation.

All comments should be directed to the Chair of the Planning Board, not to other audience members or the developer. You may have questions. Understand that this public hearing is not a question and answer session. It is an opportunity for you to provide public comment to the Planning Board on the matter before the Planning Board.

Speakers are encouraged to support a previous speaker's comments but not repeat the same point. If you agree with what a previous speaker has said, simply state you agree with the comment and move on to the next issue you wish to address. The Planning Board wishes to hear from as many people as possible. To that end, no person will be permitted to speak a second time until everyone in the room, who wishes to make a public comment, has been provided the opportunity to do so.

Do not interrupt others as they are speaking. Additionally, there should be no applause, whistling, cheering, or booing during or after any particular comment. Such conduct is unduly disruptive and will not be tolerated.

The purpose of this public hearing is to receive comment on these issues:

- [List specific issues for meeting]

Your comments must be limited to these topics. The Planning Board is not collecting public comments on any other issues.

Once the Chair of the Planning Board has closed public comment, no further comments will be received. At that point in time, the public is asked to sit quietly and observe the deliberations of the board. The board may have questions to confirm what a particular member of the public said and may ask that member to clarify; however, that does not mean more comments will be received. If members of the public continuously disrupt the Board's discussions, the disruptive individuals may be asked to leave the meeting.

2021 LAND USE LEGISLATION

BILL NUMBER	EFFECTIVE DATE/APPLICABILITY	TYPE OF LAND USE AFFECTED	SUMMARY
HB0259.pdf (mt.gov)	April 19, 2021	Subdivision and Zoning 76-3-514, 76-2-114, 76-2-203(4) and (5)	Prohibits inclusionary zoning in subdivision review and all zoning
HB0271.pdf (mt.gov)	October 1, 2021 Applies to roads dedicated to public use on plats after October 1, 2021	Subdivision/Roads 7-14-2101(2)(d)	Road on final subdivision plat dedicated to public use is not a county road until County Commissioners approve by resolution the adoption of road as a county road
HB0292.pdf (mt.gov)	October 1, 2021	Subdivision 76-3-612	Changes "abstract of title" in 76-3-612 to "subdivision guarantee"
HB0444.pdf (mt.gov)	May 14, 2021	Sanitation 76-4-125	Allows DEQ to reissue a COSA for a parcel previously approved if an unapproved parcel is aggregated into the original parcel that was approved
HB0496.pdf (mt.gov)	October 1, 2021	Part 2 Zoning 76-2-402	Agencies intending to use public land contrary to zoning regulations shall attend a public hearing before the County Commission
HB0450.pdf (mt.gov)	October 1, 2021	Subdivision Exemptions 76-3-201(2)	Court Ordered Exemption can only create 4 new lots or parcels; otherwise subdivision review is required
HB0498.pdf (mt.gov)	May 14, 2021	Part 1 Citizen Initiated Zoning 76-2-109	Clarifies that zoning regulations cannot prevent complete use, development or recovery of any mineral under jurisdiction of Board of Oil and Gas
HB0527.pdf (mt.gov)	May 14, 2021	Part 1 Citizen Initiated Zoning 76-2-101(6) and 76-2-109	New requirements for submission of a petition for Part 1 Zoning and clarifies that zoning regulations cannot prevent complete use, development or recovery of any mineral under jurisdiction of Board of Oil and Gas
HB0599.pdf (mt.gov)	May 14, 2021	Part 2 County Imposed Zoning 76-2-209	Only zoning regulations adopted and in effect prior to the filing of a permit application or written request for pre-application meeting may reasonably condition sand and gravel operations
HB0701.pdf (mt.gov)	First effective date is January 1, 2022 for	Zoning Title 16, Chapter 12, Part 2	Counties with zoning can consider amending zoning or adopting new zoning to regulate an adult use marijuana

	existing marijuana medical providers		business if they are a county who approved I-190 or opt in by voter approval
SB0044.pdf (mt.gov)	October 1, 2021	Sanitation Various statutes	Minor changes to the Sanitation in Subdivision Act to streamline review process and define terms; streamline process storm water drainage for larger lots (5 acres or greater; less than 5% impervious) DEQ in rule making for these new guidelines
SB0054.pdf (mt.gov)	October 1, 2021	Sanitation 76-4-104	Provides a DEQ review process for experimental wastewater systems
SB0080.pdf (mt.gov)	March 26, 2021	Subdivision and Zoning 7-11-105(2)	Interlocal Agreements between a city or town and a county that govern adoption/enforcement of municipal zoning or subdivision regulations beyond boundaries of a municipality may not exceed a term of 5 years
SB0135.pdf (mt.gov)	October 1, 2021	Part 2 County Imposed Zoning 76-2-227(1)	Establishes that an appeal from the board of adjustments to the county commissioners is a de novo review; new review of the entire record, with new public comment required and new information allowed
SB0161.pdf (mt.gov)	October 1, 2021	Subdivision 76-3-623	<ul style="list-style-type: none"> Establishes expedited review process if County Commission votes to allow the expedited review process. Only applies where county water/sewer district provides both water and sewer, there is an adopted growth policy, and zoning regulations that addresses minimum lot sizes or densities, bulk and dimensional requirements and use standards Clarifies challenge to conditions of preliminary plat approval must be taken within 30 days and that action by subdivider for damages must be within 180 days of the final action
SB0174.pdf (mt.gov)	April 30, 2021	Subdivision 76-3-501(2) and (3) 76-3-604(10) 76-3-608 76-3-620	<ul style="list-style-type: none"> Governing documents for subdivision can allow or restrict any action not specifically prohibited in conditions of subdivision approval

			<ul style="list-style-type: none"> Local government cannot enforce a condition of subdivision approval after final plat approval if they have historically not enforced or chose not to enforce the condition as it relates to a similarly situated parcel owner in the same subdivision Local government can review but does not have approval authority of government document of a subdivision unless they directly and materially impact a condition of subdivision approval Conditions to mitigate impacts on primary review criteria must be specific, documentable and clearly defined BILL SETS FORTH SPECIFIC CRITERIA REQUIRED TO BE MET TO IMPOSE CONDITIONS OF APPROVAL
SB0211.pdf (mt.gov)	April 22, 2021 Applied to Subdivision Applications Submitted after July 1, 2021	Subdivision 76-3-608(3) and (4)	Loss of agricultural soils cannot be considered for the proposed subdivision and set-asides of land or monetary contributions for the loss of agricultural soils cannot be a condition of approval
SB0286.pdf (mt.gov)	October 1, 2021	Subdivisions 70-17-113	Lot owners cannot claim a prescriptive easements across another lot in a subdivision if an existing road or road easement provides access to the lot
SB0294.pdf (mt.gov)	May 3, 2021 Referendum provision applicable to districts created after 1/1/2021	Part 2 County Imposed Zoning and Growth Policy 76-2-229 and 76-2-212	Referendum process to terminate zoning districts; minimum lot size in residential zones not allowed unless within 3 miles of incorporated municipality or minimum lot sizes established in land use map in Growth Policy
SJ0006.pdf (mt.gov)	Joint Resolution Approved by House and Senate	Floodplain	Encourage FEMA/NFIP to implement Montana's Stream Restoration Committee guidance for stream restoration projects that keep rise in 100-year flood levels as close to zero as practical to proceed with a simple analysis instead of unnecessary expensive engineering

_____ SUBDIVISION

_____ County Commission (Planning Board) Meeting/Decision
AGENDA

1. Call Meeting to Order

I, _____, call the meeting to order. This is a public meeting (for minors) or hearing (for majors) to review the _____ Subdivision

2. Public Comment on Matters Not on the Agenda

3. Disclosure of Conflicts of Interest by Commission (Planning Board)

4. Establishment of Record before County Commission (Planning Board)

The Board has received the following documents:

1. Subdivision Application
2. Staff report
3. Agency Comments
4. Staff and/or PB Reports
5. Maps – (state what maps)
6. Attachments – (state what they are, i.e. letters, covenants, etc.)
7. Written Public Comment.
8. Subdivision Regulations
9. Growth Policy
10. Other: _____

This is a public meeting (minor subdivision)/public hearing (major subdivision). Public comment will be taken. If there are questions regarding mitigation of the subdivision proposal, the County Commission (Planning Board) may ask questions of the subdivider or the subdivider's representative. A decision on this subdivision may or may not be made today. A decision will be made no later than _____ (the date in the board report), after due notice.

5. Planner/Planning Board Report

The Board now requests a report from _____, County Planner regarding the application (and recommendations of the [Insert County Name] County Planning Board).

6. Subdivider/Representative Presentation

7. Public Comment on Subdivision (comment only; no questions asked/answered)

(if a public hearing (for a major subdivision) - ask for proponents/opponents)

a. Public Comment

i. General Public Comment

ii. Specific Public Comment on Water and Sanitation

8. Subdivider Response

9. Close Public Comment

10. Commission (Planning Board) Discussion (Commission/Planning Board may ask questions planner/public/subdivider)

- a. Review of Planning Board/Staff report (variances/findings/conditions)
- b. Review of Public Comments
- c. New Information Analysis by Commission (if applicable)
- d. Consideration of Subdivider Preferred Mitigations (if any)

11. Commission (Planning Board) Decision/Motions

a. Variances (Should be dealt with first)

1. The Commission (Planning Board) grants variances when “strict compliance would result in undue hardship and when it is not essential to the public welfare”. A variance shall not have the effect of nullifying the intent and purpose of the subdivision regulations. The Commission (Planning Board) may not grant a variance for building purposes in areas located within the floodway of a flood of 100 year frequency.
2. The Commission (Planning Board) shall not approve a variance unless it makes findings (findings are facts) based upon the evidence in each specific case that:
 - a. The granting of the variance will not be detrimental to the public health, safety, or general welfare, or injurious to other adjoining properties;
 - b. Because of the particular physical surroundings, shape, or topographical conditions of the specific property involved, an undue hardship to the owner would result if the strict letter of the subdivision regulations are enforced;
 - c. The variance will not cause an increase in public costs; and
 - d. The variance will not in any manner place the subdivisions in nonconformance with any adopted zoning regulations or growth policy plan.
3. The Commission (Planning Board) may impose such conditions (conditions mitigate impacts of the findings) as will, in its judgment, secure substantially the objectives of the subdivision regulations and the growth policy plan.

b. Findings and Conditions (Review of Staff/Planning Board Findings and Conditions)

1. The Commission (Planning Board) should go through each group of findings (findings are facts) by the Staff/Planning Board, i.e. effects on agricultural, etc., and the conditions imposed to mitigate those findings. Either the Commission (Planning Board) should state that it is in agreement with the findings and the conditions recommended by the Staff/Planning Board as set forth in the Staff/Board Report and adopt those as the findings and conditions of the Commission (Planning Board); and/or
2. The Commission (Planning Board) should make specific findings on those findings where the Commission (Planning Board) differs from the Staff/Planning Board findings and alter conditions appropriately in accordance with 76-3-608 and 76-3-620.
 - the specific, documentable, and clearly defined impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety, excluding any consideration of whether the proposed subdivision will result in a loss of agricultural soils;
 - identifies the regulations and statutes used in reaching the decision and explains how they apply to the basis of the decision;
 - provides the facts and conclusions that the governing body relied upon in making the decision and references documents, testimony, or other materials that form the basis of the decision;
3. The Commission (Planning Board) should go through each finding/condition on which they differ from the Staff/Planning Board finding/condition in the format where the Chair states that “in my opinion . . . “

and then asks each Commissioner (Planning Board Member) to state their opinion. A finding must be made in which two out of the three Commissioners (three out of five of Planning Board) agree on the finding to support the condition and a condition must be made in which two out of the three Commissioners (three out of five of Planning Board) agree on the condition.

NOTE: FOR EACH CONDITION, THERE MUST BE A FACTUAL FINDING TO SUPPORT THE CONDITION, i.e. in the interests of public health and safety, etc. BUT YOU MAY HAVE A FACT THAT DOESN'T REQUIRE A MITIGATION CONDITION. You should NEVER have a condition which is not supported by a finding which made the condition necessary.

4. After arriving at a finding, and if the finding has an effect on one of the primary criteria for the subdivision, the Chair MUST ask the subdivider/representative if they have any suggestions for mitigation to add to or in lieu of the suggested condition. The Commission (Planning Board) does not have to accept the subdivider's suggested mitigation.

c. Motion to Approve with Conditions/Deny (state why)

Motion to Approve:

The motion to approve can only be made after the findings on variances and conditions are done. The motion to approve the subdivision shall contain a statement describing the variances and the facts and conditions upon which the issuances of the variances are based.

The motion to approve the subdivision shall also contain a statement describing the findings/conditions adopted as set forth in the Staff/Planning Board recommendation and the findings or conditions numbers _____ as just amended or added by the Commission (Planning Board), based upon a short statement of the facts supporting those changes/additions to the conditions.

Example motion:

I move to approve the _____ Subdivision, including the granting of a variance for _____ based upon these facts: _____, and conditions numbers _____ as recommended by the Staff/Planning Board, adopting their findings on said conditions, and with the changes/additions to conditions numbers _____ based upon these facts: _____.

d. Discussion on Motion Before Vote

Each Commissioner (Planning Board member) should state why they are or are not supporting the motion.

e. Vote on Motion

12. Adjourn Meeting

Findings, Conditions and Mitigation

A. General Principles

- In making a decision whether to approve, conditionally approve or deny a subdivision, the board **can only use** the applicable information listed in the “Applicable Information” section set forth in local subdivision regulations and information provided through public comment. Any information other than that listed in the local subdivision regulations is not applicable.
- In all subdivisions, findings will be made regarding impacts resulting from the subdivision. Some findings will have an associated condition of approval. A condition of approval does not need to be made for each finding. However, each condition of approval **must** have a finding that substantially justifies the need for the condition and the specific, documentable and clearly defined impact on the primary review criteria.
- Findings must be made within the framework set forth in state law and the local subdivision regulations. The Board/Commission **cannot** make decisions based on any criteria outside of those listed in the “Subdivision Review Criteria” in the local subdivision regulations.
- Public comment must be taken and analyzed before making findings.
- The County may require the subdivider to design the proposed subdivision to reasonably minimize potential, significant, adverse impacts identified through the review process. When requiring mitigation, while the County may not unreasonably restrict a landowners’ ability to develop land, it is recognized that in some instances the unmitigated impacts of a proposed development may be unacceptable and will preclude approval of the subdivision.

B. What is a Finding?

- A finding is a legally relevant conclusion based on the Board’s/Commission’s analysis of facts, review criteria, applicable information and public comment which bridges the analytical gap between raw data (facts) and the ultimate decision.
- Findings are the legal footprint the Board/Commission must create to explain how it progressed from the information presented to it, factored in regulations and policies as well as public comment, and then came to a final decision.

- Findings are important in the decision making process to provide a framework to provide for an orderly analysis and provide a framework for principled decisions.
- Findings are legally required in order to enable parties to determine whether and on what basis they should seek judicial review and to inform the court of the basis for the Board's/Commission's decision.
- Findings serve as a public relations function by helping to persuade the parties that the Board's/Commission's decision making is careful, reasoned and equitable.
- Findings must identify the regulations and statutes used in reaching the decision and explains how they apply to the basis of the decision;
- Findings must provide the facts and conclusions that the governing body relied upon in making the decision and references documents, testimony, or other materials that form the basis of the decision;

C. What is a Condition?

- ❖ A condition logically follows a finding regarding a potential, significant, adverse impacts impact of a subdivision.
- ❖ The condition mitigates the impact.
- ❖ The condition must provide the specific, documentable, and clearly defined impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety, excluding any consideration of whether the proposed subdivision will result in a loss of agricultural soils;
- ❖ Not all findings or impacts need to be mitigated with a condition.
- ❖ However, each condition must be substantially justified by a finding.
For example, you cannot have a condition that states wildlife friendly fencing is required in the subdivision without having a finding that the subdivision will negatively impact wildlife as the subdivision is in a wildlife corridor.

D. What is Mitigation?

- When requiring mitigation (of a condition) of significant adverse impacts, the Board/Commission must consult with the subdivider and give due weight and consideration to the express preference of the subdivider.

- The Board/Commission does not have to accept the subdivider's express preference; but it must give due weight and consideration to the subdivider's express preference.
- This process takes place during a process set forth in the Board's By-laws or in the subdivision regulations.
- There may be impacts or findings from a subdivision that cannot be mitigated with a condition and thus preclude the subdivision.

SB 174: NEW REQUIREMENTS FOR CONDITIONS OF APPROVAL FOR SUBDIVISIONS

By Tara DePuy, PCT/MACo Land Use Attorney, attorney@riverworks.net

Background: SB 174 adds new requirements in the Montana Subdivision and Platting Act regarding conditions of subdivision approval. SB 174 will be effective when it is signed by the Governor; anticipated to be early May of 2021. While SB 174 is not law yet, if a decision on a subdivision application will be made anytime in May of 2021, SB 174 will most likely apply. The new requirements for conditions of approval will be in state statute, so not following these requirements can be challenged as being “unlawful”, which is easier to prove than that the conditions and decision being “arbitrary and capricious”.

SB 174 states that any action that is not specifically prohibited in the conditions of subdivision approval is specifically allowed; except for restrictions provided by the governing documents of the subdivision (i.e. bylaws, covenants, etc.) and applicable zoning regulations. Also, the governing body may review but does not have approval authority of the governing documents or amendments unless the governing documents directly and materially impact a condition of subdivision approval.

Finally, SB 174 adds a new provision to law that states if a local government has not historically interpreted and enforced, or chose not to enforce, a condition of subdivision approval, the local government may not enforce that condition against a similarly situated lot owner in the same subdivision. As a result, a local government should be very careful in allowing conditions of approval that are not fully satisfied at final plat approval. Enforcement of conditions of subdivision approval will be difficult after final plat approval. A local government may not know or may not be able to ascertain that there are other violations of a condition of subdivision approval in a subdivision before bringing an enforcement action. Again, if the local government violates this provision of the law, the enforcement action may be found “unlawful” by a court.

Specific Requirements for Conditions of Subdivision Approval:

1. 76-3-608(3)(a) Criteria for Local Government Review has been amended and will read:

A subdivision proposal must undergo review for the following primary criteria: except when the governing body has established an exemption pursuant to subsection (6) of this section or except as provided in 76-3-509, 76-3-609(2) or (4), or 76-3-616, **the specific, documentable, and clearly defined** impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety;

2. 76-3-620 Review requirements – written statement has been amended and will read:

(1) In addition to the requirements of 76-3- 604 and 76-3-609, following any decision by the governing body to deny or conditionally approve a proposed subdivision, the governing body shall, in accordance with the time limit established in 76-3-504(1)(r), prepare a written statement that:

- (a) must be provided to the applicant;
- (b) must be made available to the public;

(c) includes information regarding the appeal process for the denial or imposition of conditions;

(d) identifies the regulations and statutes that are used in reaching the decision and explains how they apply to the basis of the decision;

(e) provides the facts and conclusions that the governing body relied upon in making the decision and references documents, testimony, or other materials that form the **basis of the decision**;

(f) **identifies** the conditions that apply to the preliminary plat approval and that must be 27 satisfied before the final plat may be approved.

(2) If the governing body conditionally approves the proposed subdivision, each condition required for subdivision approval must identify a specific, documentable, and clearly defined purpose or objective related to the primary criteria set forth in 76-3-608(3) that forms the basis for the condition.

Guidance: Attached are sample staff reports in a table and narrative format that incorporate the new requirements for SB 174. These sample staff reports provide a mechanism to ensure that the findings and conditions of subdivision approval cross reference the primary review criteria, the subdivision regulations or state statutes relied upon, which conditions of approval must be met before final plat approval and what documentation in the record supports the findings and conditions of subdivision approval. **Any new findings or conditions of subdivision approval imposed by the planning board or the local governing body must also set forth these cross references or the preliminary subdivision approval may be found unlawful.**

It is advisable for the local governing body to adopt in its subdivision regulations as many potential mitigation conditions that may be imposed given the type of impact a subdivision may have, with findings and analysis to support the condition, i.e. citations to journals, FWP proposed mitigation, MDT road standards, etc. Adoption of conditions with the findings and analysis supporting them will aid the planning board and local governing body in making additional findings and conditions and be defensible in litigation as those findings and conditions will have gone through a public process when adopting the subdivision regulations and apply to all other subdivisions in those same circumstances.

IV. Impacts on the Natural Environment - Existing physical conditions relating to land, water, air, plant and animal life of an area and the interrelationship of those elements, such as soils, geology, topography, vegetation, surface water and drainage, floodplains, and ground water and aquifers. Specific impacts include, but are not limited to:

- Impact on air quality.
- Impact of groundwater quality and quantity.
- Impact on surface water features.
- Impact on wetlands.
- Impact on residential ambient exterior light level.
- Impact on historic and prehistoric sites.

(Source: Section _____ of _____ Growth Policy and Section _____ of _____ Subdivision Regulations)

A. Narrative Discussion of Impact on the Natural Environment

B. Findings on Impacts on the Natural Environment

1. Soil disturbance during the construction of this proposed subdivision will increase the potential for the spread of noxious weeds on the property and the surrounding area. (Source: *Reference Subdivision Regulations and State Statutes AND facts supporting finding in the record such as Application, Environmental Assessment, Comment Letter, Public Testimony*).
2. All vegetation disturbed during construction shall be reestablished with vegetation types that have been recommended by the NRCS or MSU Extension Office and approved by the Planning Office. (Source: *Reference Subdivision Regulations and State Statutes AND facts supporting finding in the record such as Application, Environmental Assessment, Comment Letter, Public Testimony*).

C. Condition to Mitigate Impacts on the Natural Environment

1. A **covenant** shall be filed with the final plat requiring control of County declared noxious weeds. (Mitigates Finding 1)
2. A **covenant** shall be filed with the final plat stating: “*Lot owner(s) shall comply with the required Noxious Weed Management Plan, approved by the County Weed Supervisor.*” (Mitigates Finding 1)
3. Any areas disturbed during construction shall be reseeded by the subdivider(s) for the purpose of establishing adequate ground cover prior to final plat approval. The choice of species to be used shall be approved by the MSU Extension Office which reviews the choice of species to ensure it is compatible with the climate and soil types of the subdivision. (Mitigates Finding 2)

CONCLUSION: The impacts to the Natural Environment set forth in the findings are mitigated with the imposed conditions based on the record.

SUBDIVISION EXEMPTION REVIEW ISSUES

I. Title 76, Chapter 3, Part 2, MCA, *Miscellaneous Exemptions*

- Section 76-3-504(1)(p) *Subdivision regulations – contents:*

Establish criteria that the governing body or reviewing authority will use to determine whether a proposed method of disposition using the exemptions provided in 76-3-201 or 76-3-207 is an attempt to evade the requirements of this chapter. The regulations must provide for an appeals process to the governing body if the reviewing authority is not the governing body.

II. Criteria to Determine Whether Proposal Attempts to Evade the Subdivision Act

- The governing body or reviewing authority must consider the evidence related to a proposed use of the proposed exemption in light of all of the surrounding circumstances and the evidence as a whole. Such evidence includes, but is not limited to:
 - ❖ the nature of the claimant’s business;
 - ❖ the prior history of the particular tract of record in question;
 - ❖ the previous use of an exemption to create the tract of record in question;
 - ❖ the proposed configuration of tracts of record once the proposed exemption is completed;
 - ❖ the use of an exemption to create more than one additional or remaining parcel of less than 160 acres in size; or
 - ❖ any pattern of exempt transactions that will result in the equivalent of a subdivision without local government review.

III. Specific Exemptions (Most Commonly Used)

A. Mortgage Exemption, Section 76-3-201(1)(b), MCA

❖ This exemption applies:

1. To a division of land of any size; and
2. Only if the land that is divided is conveyed to a licensed financial or lending institution to which the mortgage, lien, or trust indenture was given, or to a purchaser upon foreclosure of the mortgage, lien, or trust indenture. A transfer of the divided land, by the owner of the property at the time the land was divided, to any party other than those identified in the preceding sentence subjects the division of land to subdivision review; and
3. Only to the parcel that is created to provide security. Any subsequent division of the remaining tract of land, if applicable, is subject to subdivision review.

❖ *Heads-Up!*

A. Documentation required of landowner:

- ✓ a statement of how many property interests within the original tract will be created by use of the exemption;
- ✓ the mortgage, lien, or trust indenture for the exempted interest must state that the interest is being created only to secure a mortgage, lien, or trust indenture for the purposes of construction, improvements to the land being divided, or refinancing;
- ✓ a statement identifying who will have title to and possession of the balance of the original parcel after title to the exempted parcel is conveyed; and
- ✓ a signed statement from a financial or lending institution registered to do business in the state of Montana that the creation of the interest is necessary to secure a loan for construction, improvements to the land being divided, or refinancing.

B. The use of this exemption is presumed to be to evade subdivision review if the evidence in the record shows:

- ✓ the use of the exemption will create more than one new building site;
- ✓ the financing is not for construction, improvements to the exempted parcel, or refinancing;
- ✓ the person named in the “statement identifying who would have possession of the balance of the original parcel after title to the exempted parcel is conveyed” is anyone other than the financial or lending institution borrowing the funds;
- ✓ title to the exempted parcel will not immediately pass to the financing or lending institution upon foreclosure;
- ✓ there exists a prior agreement to default or a prior agreement to purchase only a portion of the original tract;
- ✓ the principal reason the interest is being created is to create a building site, and the use of the interest to secure a loan is a secondary purpose; or
- ✓ the division of land is created for the purpose of conveyance to any entity other than the financial or lending institution to which the mortgage, lien or trust indenture was given, or to a purchaser upon foreclosure of the mortgage, lien or trust indenture.

C. Research Issues

- ✓ Pull all deeds and surveys from when mortgage was created to present.
- ✓ Prior to 2003, Section 76-3-201 MCA set forth an exemption to the Montana Subdivision Platting Act (MSPA) for construction mortgage surveys that provided no guidance as to whether the MSPA applied if the mortgage survey parcel was transferred.
- ✓ The change to Section 76-3-201 in 2003 generally provides that if a mortgage survey tract is transferred to an entity other than the lending institution or a purchaser at foreclosure, the transfer is considered a division of land that subjects the tract to the MSPA. The 2003 amendment also provides that the remainder of the tract, if a mortgage exemption is claimed, may also be subject to the MSPA.
- ✓ There are two attorney general opinions that reference this issue as well as a district court case. *Westre v. Ravalli County* (2008)

distinguished 42 Mont. Op. Atty. Gen. No. 101 (1988) from the facts presented in *Westre* on the basis that the Attorney General opinion provided advise as to the subsequent sale of a mortgage survey tract by the lien holder, holding that the MSPA does not apply if a lien holder has taken possession of the mortgage survey tract. The facts in *Westre* differed from the facts in this Attorney General Opinion because the lien holder had not taken possession of the mortgage survey tracts. The Attorney General opinion also found that a mortgage exemption does not exist after its purpose has been fulfilled; in other words, once the mortgage is paid off the mortgage survey tract no longer exists. In *Westre*, the liens had been released against the mortgage survey tracts and the court found those tracts no longer existed.

- ✓ If the mortgage survey tract has been released from the mortgage and then deeded to a separate party, that brings into consideration an earlier Attorney General Opinion, 37 Mont. Op. Atty. Gen 41 (1977) which discusses the fact pattern where a seller in a contract for deed transfers a portion of the property, subject to contract, to the purchaser so the purchaser can obtain a loan using the released parcel as security. This Attorney General Opinion states that such a bona fide transaction is exempted from the Act, even though the seller actually parts with legal title to a portion of the land. This transaction must be stated as an exception, because the legal effect is in fact to create a division of land since the seller holds legal title to the larger portion and the purchaser holds title to the smaller (section 11-4861(2.1)). If the purchaser then sells the deeded portion to a third party there are technically no subdivision consequences attached. There is simply a transfer of a single undivided tract of land. However, if the whole undertaking was for the purpose of allowing the original owner to dispose of two tracts of land without complying with the Subdivision Act, then plainly the Act has been unlawfully circumvented.

D. Reverse Mortgages or Beneficiary Deeds

- ✓ No case law or AG Opinions as to whether mortgage exemption applies
- ✓ Definitional challenges in meeting mortgage exemption

B. Relocation Common Boundary Exemption, Section 76-3-207(1)(a), MCA for relocating common boundaries between adjoining properties and Section 76-3-207(1)(d), MCA for five or fewer lots within a platted subdivision, the relocation of common boundary, and Section 76-3-207(1)(e), MCA divisions made for the purposes of relocating a common boundary line between a single lot within a platted subdivision and adjoining land outside the platted subdivision. “A restriction or requirement on the original platted lot or original unplatted parcel continues to apply to those areas.”

❖ This exemption applies when:

1. The parcels are located outside of platted subdivisions; and
2. The parcels are adjoining; and
3. The proposed relocation does not create additional tracts of record.

❖ *Heads-Up!*

- ✓ *Is the proposal in a zoning district – will the end result lots comply with the zoning?*
- ✓ *What if the realignment causes conflicts with covenants?*
- ✓ *Commission making a rebuttable presumption that a proposed relocation of common boundary is adopted for the purposes of evasion if the Commission determines that the documentation submitted does not support the stated reasons for relocation or creates an additional parcel.*
- ✓ *Look for consent of mortgage holders*

A. Documentation required:

- ✓ The draft certificate of survey must clearly distinguish between the existing boundary location(s) and the new boundary location(s). This must be accomplished by representing the existing boundary with a dashed line and the new boundary, if applicable, with a solid line. (ARM 24.183.1104 (1)(f).)
- ✓ The certificate of survey must bear the signatures of all landowners whose parcels will be altered by the proposed relocation. (ARM 24.183.1104 (1)(f).)

- ✓ The certificate of survey must show that the exemption was used only to change the location of a boundary line dividing two or more parcels. (ARM 24.183.1104 (1)(f).)
- ✓ The certificate of survey must be accompanied by a quit claim deed, warranty deed, or grant deed conveying the entire newly described parcel(s) or that portion of the tract(s) that is being affected to and from the adjoining property owners.

B. The use of this exemption is presumed to be to evade subdivision review if the evidence in the record shows:

- ✓ the documentation submitted, as required by this section, does not support the stated reason for relocation; or
- ✓ the division would create a new tract of record.

C. **Family Transfer Exemption**, Section 76-3-207(1)(b), MCA

❖ This exemption applies to tracts of record located outside of a platted subdivision. The landowner of such a parcel may gift or sell a single portion thereof to each member of his or her immediate family.

1. The term “immediate family” means the spouse, children (by blood or adoption), or parents of the landowner (§ 76-3-103(8), MCA).
2. This exemption may be used only by landowners who are natural persons and not by non-corporal legal entities such as corporations, companies, partnerships, and trusts.

❖ *Heads-Up!*

- ✓ *This is most used and abused.*

A. Documentation required:

- ✓ A certificate of survey creating a parcel from a portion of an existing tract of record for conveyance to an immediate family member must show the name of the grantee, relationship to the landowner, and the tract to be conveyed to the grantee. (ARM 24.183.1104 (1)(f).)
- ✓ A certificate of survey creating a parcel from a portion of an existing tract for conveyance to an immediate family member must be accompanied by a deed conveying the newly created tract of record to the grantee named on the certificate of survey.
- ✓ When a certificate of survey is not required to accomplish a family transfer under this section (§ 76-3-401, MCA), the instrument of conveyance transferring a portion of an existing tract of record to an immediate family member must show the name of the grantee, relationship to the landowner, and the tract of record to be conveyed to the grantee.

B. The use of this exemption is presumed to be to evade subdivision review if the evidence in the record shows:

- ✓ The use of the family gift or sale exemption to divide tract(s) of land that are designed with characteristics such as common roads, utility easements, restrictive covenants, open space or common marketing or promotional plan.
- ✓ The use of a family gift or sale exemption is preceded by the transfer of a tract of record from one family member to another, by quitclaim deed or otherwise.

D. Ag Exemption, Section 76-3-207(1)(c), MCA

❖ This exemption applies to parcels located outside of a platted subdivision.

1. The landowner of such a parcel may gift, sell, or enter into an agreement to buy and sell a portion thereof to be used exclusively for agricultural purposes.
2. Residential uses, whether for agricultural purposes or not, are not permitted on a tract of land created pursuant to this exemption.
3. Any change in the use of the land for anything other than agricultural purposes subjects the parcel to review as a subdivision.

4. The newly created parcel must meet the criteria for an agricultural designation under Section 15-7-202, MCA (Eligibility of land for valuation as agricultural).

❖ *Heads-Up!*

- ✓ *Vacation of agricultural covenant – see Section 76-3-211, MCA*
- ✓ *Subdivision review to remove – look at the issues*

A. Documentation required:

- ✓ A certificate of survey creating a parcel for agricultural use must be accompanied by a recorded covenant running with the land, revocable only by mutual consent of the governing body and the landowner. (§ 76-3-207(1)(c), MCA.)
- ✓ A certificate of survey creating a parcel for agricultural use only must bear a signed and acknowledged recitation of the covenant on the face of the survey. (ARM 24.183.1104(1)(f).)
- ✓ The landowner must demonstrate that the planned use of the newly created parcel is for agricultural purposes and no residential use of the newly created parcel will occur.

TIPS FOR SUBDIVISION REVIEW

1. An Explanation of *Ex parte* Communication

A. **What it is** *Ex parte* is defined in the Fourth Edition of Black’s Law Dictionary as “on one side only; by or for one party; done for, in behalf of, or on the application of, one party only.” During litigation, there is a prohibition against one side meeting with the judge without the other side present. This prohibition extends to county commissioners when they act in a *quasi-judicial* capacity. It is a concept of fundamental fairness.

B. **When the prohibition against *ex parte* communication applies** The concept only applies when the decision to be made is *quasi-judicial*, or like a decision made by a judge. An example of a *quasi-judicial* action is when the county commissioners, and to some extent the planning board, act on a specific subdivision application or a specific variance request. The commissioners or the planning board are “judging” the application and making a decision on it. The reason I say “to some extent the planning board” is because the planning board is only advisory—the county commissioners make the final decision. However, because of Montana’s Open Meeting Laws, which try to create fairness, it is arguable a planning board is subject to the same prohibition against *ex parte* communication as is the county commission.

Ex parte communication should be avoided. Avoiding the appearance of impropriety by a commissioner is even more important than by a planning board member, because the commission is the decision-making body.

A commissioner who communicates with one side, *ex parte*, may be challenged at the meeting and asked not to participate in the decision.

If a commissioner does communicate *ex parte*, **the commissioner violates the spirit of the open meeting and public participation laws.**

C. **When the prohibition against *ex parte* communication does not apply** It does not apply when a governing body is legislating—it is perfectly permissible for a lobbyist to take a legislator aside and try to convince that legislator he or she should vote the way the lobbyist wants. Therefore it is also permissible to contact one or more of the County Commissioners, one-on-one, if they are legislating.

That being said, counties mainly administer laws and regulations. General powers counties have very limited legislative authority—only that given to them by the Legislature. The ability to adopt growth policies, adopt zoning, adopt subdivision regulations, adopt airport affected area regulations and adopt impact fees

are examples of approved legislative acts. Outside the hearings on any of these proposals anyone is permitted to try to convince the county commissioners to vote the way that person wants.

2. Site Visits

A. It is very difficult to evaluate a subdivision proposal without actually visiting the site. This visit should be on the commissioners' calendar and should be conducted either alone or with the planner. If the commissioners wish the subdivider or the subdivider's consultant to visit the site with them, the visit must be noticed in the newspaper so the public has an opportunity to attend.

B. Under no circumstances should any of the commissioners visit the site with the subdivider or the opponents, alone.

3. Staff Report/Planning Board Recommendation

A. Obtain these documents as far in advance of the meeting or hearing at which the decision will be made as possible.

B. Review these documents and note questions you have. If you meet with the planner prior to the decision meeting and discuss the subdivision, make sure it is at the very least, **on the calendar**. If you have a legal question, consult with your county attorney, **in public**, prior to the meeting or hearing.

4. Public Meeting/Hearing

A. Conduct the meeting/hearing in a professional and predictable manner.

B. Make sure the meeting/hearing was properly noticed and state that, for the record.

C. Either record the meeting/hearing or have minutes taken. If the meeting is recorded, **speaking up**. Try not to shuffle papers near the microphone or cough incessantly. These sounds are magnified on the tape.

D. Make sure speakers identify themselves for the record; encourage speakers to provide written statements.

5. Making the Decision

A. Do not rush to decision. If you are tired or anxious to end the meeting/hearing, try to continue it to another date. Remember, if the continuation will be to a date beyond the statutory time within which to make a decision, obtain an agreement to that effect from the subdivider, in writing, or the county is subject to the financial penalty now found in §76-3-604(5), MCA, which is paying the

subdivider \$50/lot/month, not to exceed the total review fee, until the commissioners act.¹

B. Section 76-3-608 (3)(a), MCA, requires review for impacts on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat and public health and safety.

C. Section 76-3-608(3)(b) requires that the commissioners address compliance with (i) survey requirements, (ii) the local subdivision regulations and (iii) the local subdivision review procedure in Part 6 of the MSPA.

D. Section 76-3-608(3)(c) requires the commissioners to address whether the subdivision application provides easements within and to the proposed subdivision for the location and installation of any planned utilities.

E. Section 76-3-608(3)(d) requires the commissioners to make sure there is legal and physical access to each parcel.

F. Section 76-3-608 (2) requires the governing body to issue written findings of fact that **weigh** the criteria in subsection (3).

G. Counties are making findings about the criteria, but not documenting the weighing process. The staff report may recommend findings and the Planning Board can revise those findings after its public hearing, but only the governing body can do the weighing. This weighing should be done at the public meeting/hearing before the commissioners and should be documented in the decision letter.

H. Sections 76-3-608 (4) and (5), MCA, regarding mitigation were added to the law in 1995 and often are minimally being addressed. If the commissioners require mitigation, they must issue written findings to justify the mitigation. It is difficult for commissioners to specify mitigation if the subdivider does not offer any.

One of findings of fact in the *Hansen v. Granite County* case [Ryan Creek Subdivision, Cause No. DV-07-02] was “When requested by Granite County

¹ Because subsection (5) cross-references subsection (4) and subsection (4) refers to the review period for major subdivisions, arguably this financial penalty does not apply to the review of minor subdivisions.

to more fully address the mitigation of these impacts of traffic volume and traffic speed, Plaintiffs stated they would ‘stand on their application’ as submitted.”

Another finding of fact was “Plaintiffs offered inadequate mitigation of the impact the subdivision would have on the Weston ranch, the impacts on the local educational system, and the impact upon traffic on Beavertail Road.” The conclusions of law addressed both subsections (4) and (5) and the court concluded Granite County did not unreasonably restrict the Plaintiffs’ ability to develop their land as there were immitigable impacts to agriculture, local services, public health and safety and traffic. The plaintiffs lost at trial in district court, appealed and the Montana Supreme Court affirmed the denial. 2010 MT 107.

I. Ideally the staff report will have noted what might need to be mitigated and the Planning Board will have discussed mitigation with the subdivider at its hearing.

J. Make the findings during the public meeting/hearing, on the record. They may be fine-tuned when preparing the decision letter, but not radically changed.

K. Do not impose conditions which are not supported by the Subdivision regulations or by the MSPA.

6. Decision Letter

A. If the planner writes the decision letter, **review it carefully**. It will be an exhibit if a complaint is filed and every word and comma will be scrutinized.

B. Section 76-3-604 (6), MCA, states if the governing body denies or conditionally approves the proposed subdivision, it shall send the subdivider a letter, with the appropriate signature that complies with the provisions of 76-3-620. This letter must be sent within 30 working days of the oral decision.

C. Section 76-3-620, MCA, requires that the written statement must:

--include information about the appeal process

--identify the regulations and statutes used to reach the decision

--provide facts and conclusions relied upon to make the decision and the basis for them

--provide the conditions of approval.