CHAPTER VIII

LAND USE AND PLANNING LAW IN MONTANA

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8.1 AUTHORITY FOR MAKING LOCAL LAND USE DECISIONS

8.101 Police Power

A state and local jurisdiction's authority for enacting local land use regulations, applying them to real property within a jurisdiction, and enforcing them against property owners rests in the police power. As such, the states and local jurisdictions may adopt and enforce land use ordinances and regulations that further the public health, safety, morals, and general welfare of the community. (Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); Freeman v. Board of Adjustment, 97 Mont. 342, 352 (1934)).

> *"The concept of the public welfare is broad and inclusive… the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled" (Berman v. Parker, 348 U.S. 26, 32-33 (1954)).*

8.102 General and Self-governing Powers

In Montana, the extent of a municipality's authority to adopt land use regulations depends on whether it has adopted a self-governing charter or is a general government power. *Self-governing powers* may exercise any power, provide any services, or perform any functions not expressly prohibited by the constitution, law, or charter, Mont. Const., Art. XI, Section 6 and 7-1-101, MCA. Montana's 127 municipalities have self-governing powers (*See Chapter I, Table 1.4*). Where statutes provide the framework for specific actions, self-governing powers must strictly follow those requirements; where discretion is required, self-governing powers must substantially comply with the statute (Gregg v. Whitefish City Council, 2004 MT 262, P20 (2004). An example of express prohibition in Montana state law is the regulation of the location of foster homes, youth homes, and community residential facilities serving eight or fewer persons. Under state law, all local governments must consider such uses a residential use, and allow them in all residential zones, 76-2-412, MCA. (See also 76-2-302, MCA, creating a state-imposed rebuttable presumption that manufactured housing will not affect property values in residentially zoned districts of Montana's municipalities.)

General governing powers have only those powers provided or implied by law (Mont. Const., Art. XI, Section 4(1); D & F Sanitation Serv. v. Billings, 219 Mont. 437, 444-445 (Mont. 1986). Unless the state legislature specifically provides local governments with general government authority to take a particular action, provide a particular service, perform a particular function, etc., a general government municipality has no authority to act. An example of a lack of specific authority to adopt land use regulations was impact fees, prior to the enactment of a state statute in 2005 specifically authorizing the adoption of such fees by local governments (See Southwest Montana Building Industry Association v Bozeman, 2000 Mont. Dist. LEXIS 2670 (2001)).

8.103 Montana Land Use Statutes

Montana law specifically provides municipalities with the authority to adopt a specific statutory framework for a variety of land use and planning regulations:

- Growth policies 76-1-601, et seq., MCA,
- Zoning ordinances for municipal zoning Title 76-2-Part 3
- Subdivision regulations Title 76, chapter 3

- Floodplain regulations 76-5-301, MCA
- Buildings for lease or rent regulations 76-8-101, et seq., MCA
- Impact fees 7-6-1601, et seq., MCA
- Annexation policies and plans 7-2 Parts 42-48, MCA
- Urban renewal plans 7-15 Part 42, MCA

8.104 Federal Pre-emption

In some cases, the federal government regulates a particular land use or activity, and therefore states and local jurisdictions are prohibited from regulating the matter themselves. In order for federal law to pre-empt state or local regulations, the federal statute must either expressly preempt state regulation in the field, or state law must conflict with the operation or objectives of federal law (California Coastal Commission v. Granite Rock Company, 480 U.S. 572 (1987)). In such cases, local regulations that do not conflict with the objectives of the federal regulations, and do not stand as an obstacle to them, may still be a lawful enforcement of local government police power. An example of such regulation is the federal Telecommunications Act of 1996. While the Act allows local jurisdictions to regulate the location and construction of wireless facilities, it prohibits the local jurisdiction from regulating the placement of the facility on the basis of the environmental effects of radio frequency transmissions (47 U.S.C. § 332(c)(7)).

8.105 Legislative v. Quasi-judicial Decisions

The local governing body makes both legislative decisions and quasi-judicial decisions, and the standards and procedures for each are different. Legislative decisions establish rules, policies, or standards of general applicability in a community. Examples in Montana include the adoption or amendment of a growth policy, subdivision regulations, a zoning ordinance, or a zoning map. Legislative acts are "presumed to be valid and reasonable," and will be upheld unless the decision "is so lacking in fact and foundation" that "it is clearly unreasonable and constitutes an abuse of discretion" (Schanz v. City of Billings (1979), 182 Mont. 328, 335; Lake County First v. Polson City Council, 2009 MT 322, P34- P37 (2009)). The "Court does not sit as a super-legislature or super-zoning board" (Town & Country Foods, Inc. v. City of Bozeman, 2009 MT 72, P14 (2009)).

Quasi-judicial decisions apply legislative rules, policies, or standards to one or more particular properties. An example of a quasi-judicial decision is the review and approval or denial of a subdivision application. Courts will review quasi-judicial decisions to determine "whether the record establishes that … [the governing body] acted arbitrarily, capriciously or unlawfully" (MM&I, LLC v. Gallatin County, 2010 MT 274, P29 (2010)).

Almost all legislative and quasi-judicial decisions to adopt and enforce land use regulations in Montana communities are decided by the local elected governing body. In most jurisdictions, that body is the city-commission or council. Commissions range in size from three to six or more councilpersons or commissioners (Butte-Silver Bow and Missoula each have 12) and a mayor (sometimes manager or executive officer). However, there are other boards and committees provided for in state law that play important roles in the land use planning process in Montana.

8.106 Decision Makers

Zoning Commission – Each municipality is required to appoint a Zoning Commission which is responsible for making recommendations to the governing body regarding zoning regulations and zoning maps, 76-2-307, MCA. Municipalities may authorize a city-county planning board to function as the zoning commission, 76-1-108, MCA.

Planning Board – State law also authorizes municipalities to create a Planning Board, an appointed advisory body created by the municipality to serve in an advisory capacity on land use and planning issues to the local decision-makers 76-1-102, MCA. The statute requires the municipality's governing body to notify the county of their intent to create a planning board, which gives the county the opportunity to elect to form a city-county planning board, 76-1-105, MCA. A city-county planning board can also be asked to function as the municipality's zoning commission, 76-1-108, MCA. Whichever type of board is formed, the planning board is required to prepare a growth policy upon request by the municipality's governing body, and may propose policies for subdivisions and subdivision standards. While planning boards are not required, if a city council has created a planning board, it must seek the advice of the planning board in the review of all subdivision applications (although it may delegate that responsibility to staff in the case of minor subdivisions, 76-1-107, MCA). Some municipalities have elected to consolidate existing city, county, or city-county planning boards in order to function as a combined board, 76-1-112, MCA. In some municipalities, planning boards are also expected to review amendments to subdivision regulations, transportation plans, other community plans and provide recommendations to the governing body.

Board of Adjustments – Finally, municipalities may appoint a Board of Adjustment to take action on variances and other special exceptions to the terms of the local zoning ordinance (76-2-321, MCA), hear appeals from administrative decisions (76-2-323, MCA), and provide a forum for public comment on a governmental agency's proposal to use land contrary to local zoning regulations (76-2-402, MCA). The Board of Adjustment must consist of at least five and not more than seven members, 76-2-322, MCA. As opposed to a planning board, a Board of Adjustment has decision-making authority delegated to it by the governing body. The municipality may delegate all, some, or no authority to the Board of Adjustment in this regard, 76-2-321(2), MCA. Final decisions made by the Board of Adjustments are directly appealable to the district court, 76-2-327, MCA.

The state statutes set forth the requirements for the memberships, terms, duties, and procedures of each of these bodies, and their roles are explained in more detail under each of the specific land use regulations discussed in this chapter. In all cases, a municipality's planning staff, attorney, public works staff, and other staff members handle ministerial or administrative land use decisions, ensure application review and decision timelines and procedures are met, and provide the evidentiary support for a local governing body's decision on land use matters.

8.2 GROWTH POLICIES

8.201 Purpose

In land use planning, the long-range comprehensive plan for a community serves as the "blueprint" for how its residents would like to see development occur over a future time period. The comprehensive planning document sets forth the goals, objectives, policies, and implementation strategy for all aspects of development in the community, including land use, population, housing, transportation, economic conditions, natural resources, public services and facilities, public safety, parks and recreation, or community character. In Montana, this comprehensive planning document is called the growth policy. (Citizen Advocates for a Livable Missoula, Inc. v. City Council, 2006 MT 47, P20 (2006)).

In 2003, the state statute was modified to make the growth policy an optional, non-regulatory document, 76-1-605(2), MCA; Chapter 599, Laws 2003. Under this language, local jurisdictions are not required to have a growth policy. If a jurisdiction does adopt a growth policy, that document does not confer any authority on a local jurisdiction to regulate "that is not otherwise specifically authorized by law or regulations adopted pursuant to the law." In particular, the statute prohibits a governing body from denying or imposing conditions on a land use approval based solely on the fact that the development proposal does not comply with the growth policy. That

does not mean that a municipality may disregard its growth policy (Heffernan v. Missoula City Council, 2011 MT 91, P77 (2011)). The governing body must substantially comply with the growth policy in adopting and implementing regulations like zoning and considering proposed land uses (Heffernan v. Missoula City Council, 2011 MT 91, P78 (2011)). A growth policy itself may acquire legal force if a municipality adopts a law or regulation implementing the goals and objectives therein. (Flathead Citizens for Quality Growth, Inc. v. Flathead County Board. of Adjustment, 2008 MT 1, P49 (Mont. 2008).

8.202 Required Content

If a local jurisdiction decides to prepare a growth policy, it must follow the state requirements for content and process. The statute requires the growth policy to identify existing conditions and projected trends in each of eight areas (76-1-601(3)(b), (c), and (d), MCA)

1. Land use
2. Population
3. Housing needs
4. Economic conditions
5. Local services
6. Public facilities
7. Natural resources and
8. Sand and gravel resources.

Local jurisdictions are allowed to add other characteristics, features, or elements to the growth policy, 76-1-601(5), MCA. The growth policy must include an implementation strategy for development, maintenance, and replacement of public infrastructure, and a timetable for implementing the goals and objections set forth in the plan, 76-1-601(e) and (f), MCA. While there is no particular requirement for how far into the future a growth policy must forecast, the statute does require the jurisdiction to identify a timetable for reviewing the policy every 5 years, 76-1-601(f)(iii), MCA.

Growth policies must also contain an evaluation of the potential for fire and wildland fire in the jurisdictional area, which may require the jurisdiction to delineate the wildland-urban interface (colloquially referred to as the "WUI") and adopt regulations to protect structures within the WUI, 76-1-601(3)(j), MCA. Within the growth policy, the jurisdiction must define the primary criteria for reviewing subdivisions within the jurisdiction, set forth how the governing body will evaluate and make decisions regarding those criteria, and how it will conduct public hearings on proposed subdivisions, 76-1-601(3)(h) and (i), MCA. The governing body must also describe how it will coordinate and cooperate with other jurisdictions in the area on the matters within the growth policy, 76-1-601(3)(g), MCA.

8.203 Optional Content and Neighborhood Plans

In addition to the minimum requirements set forth in the statute, growth policies may also contain additional information, policies, goals, or objectives of the community, 76-1-601(4), MCA. For instance, the growth policy may contain an infrastructure plan to help the community project infrastructure needs over the next 20 years, identify a future land use map of where the community seeks to develop into the future, and set forth incentives and techniques for guiding growth into those areas, 76-1--601(4)(c), MCA. In addition, a growth policy may contain one or more neighborhood plans, which can provide more detailed long-term comprehensive planning for a more focused area within the jurisdiction, whose residents may have different or more cohesive goals, objectives, and strategies than elsewhere in the community. A community may have a growth policy in place and

then adopt a separately developed neighborhood plan as an amendment to the growth policy.

8.204 Procedure for Adoption and Amendment

The procedure for adopting a growth policy begins with the governing body requesting the planning board to prepare the document, 76-1-106, MCA. Typically, the planning board is assisted in this endeavor by city staff or a consultant to the city, 76-1-306, MCA. The board, however, is responsible for holding the public hearing or hearings on proposed growth policy, 76-1-602, MCA. After the public hearing, the planning board must make a recommendation to the governing body to adopt, revise, or reject the proposed policy, 76-1-603, MCA. After receiving the planning board recommendation, the governing body then makes the final decision to adopt, revise, or reject the proposed growth policy, 76-1-604(1), MCA. The governing body may also submit the question of whether or not to adopt the policy to electors within the growth policy's jurisdictional area, 76-1-604(2), MCA. The qualified electors of the jurisdiction area may also petition for a growth policy be adopted, revised, or repealed, 76-1-604(4), MCA.

8.3 ZONING

8.301 Types of Zoning

Zoning regulations direct the form and use of land and buildings. Zoning is one of the most common, effective, and flexible tools for implementing the land use goals and objectives identified in a city's or town's growth policy. Zoning began to emerge at the turn of the 20th century, when development was concentrated in cities and conflicts between residential and industrial uses began to appear in earnest. Boston and other cities began to enact restrictions on building heights, followed by Los Angeles and other cities dividing cities into separate districts for separate and incompatible uses. As these ordinances were challenged and upheld by the courts, more comprehensive zoning codes developed. (Welch v. Swasey, 214 U.S. 919 (1909); Hadacheck v. Sebastian, 239 U.S. 394 (1915).) In 1916, New York City adopted the first citywide zoning code in the nation.

In 1921, U.S. Department of Commerce Secretary and future President Herbert Hoover appointed an Advisory Committee on City Planning and Zoning, which included representatives from the U.S. Chamber of Commerce, the National Association of Real Estate Boards, the American Civic Association, the National Municipal League, the National Housing Association, and the National Conference on City Planning. Over the span of approximately 10 years, they created the first state enabling act statute. The first Standard State Zoning Enabling Act (SZEA) was published by the U.S. Department of Commerce in 1924, and the revised edition in 1926. That same year, the U.S. Supreme Court upheld comprehensive zoning as a constitutional exercise of police power. (Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).)

In 1929, Montana adopted the revised SZEA edition essentially in whole. The Act specifically authorized municipalities to adopt zoning for the purpose of promoting the public health, safety, morals, and general welfare 76-2-301, MCA. Under the municipal zoning statute, cities and towns may divide their jurisdictions into districts where "it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land" 7-2-302(1), MCA. As to the specific regulations a municipality may wish to adopt, the statutory scheme is broad and flexible, allowing local governing bodies a great amount of deference in determining the best regulations based on local conditions. The statute specifically acknowledges that if a municipality's zoning regulations impose higher standards than required in any other statute or local ordinance, the municipality's zoning regulations govern 76-2-309, MCA. However, there are eleven specific criteria the

governing body must consider in each decision to adopt or amend a zoning ordinance[1] 76-2-304, MCA. Referred to as the Lowe criterion, the eleven criteria ask whether the new zoning:

1. Was designed in accordance with the growth policy;
2. Will secure safety from fire and other dangers;
3. Will promote public health, public safety, and the general welfare;
4. Will facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements;
5. Will provide adequate light and air;
6. Considers the effect on motorized and non-motorized transportation systems; Promotes compatible urban growth;
7. Gives reasonable consideration to the character of the district;
8. Gives consideration to the peculiar suitability of the property for particular uses;
9. Was adopted with a view to conserving the value of buildings; and
10. Will encourage the most appropriate use of land throughout such municipality.
(Lowe v. Missoula, 165 Mont. 38, 41 (1974); Lake County First v. Polson City Council, 2009 MT 322 (2009).)

8.302 Consistency with Growth Policy

In order to adopt a zoning ordinance, a municipality must first prepare and adopt a growth policy. As set forth in the original SZEA model, zoning regulations adopted by Montana municipalities must be made in accordance with the jurisdiction's growth policy 76-2-304, MCA. Further, in making zoning decisions, the governing body must "substantially comply with its growth policy." (Heffernan v. Missoula City Council, 2011 MT 91, P77-79.)

8.302 Procedure for Adoption and Amendment

The statute also sets forth the procedure for adopting and amending zoning ordinances and regulations. The zoning commission must recommend the district boundaries and regulations to the governing body, 76-2-307, MCA. The zoning commission must prepare a preliminary report and "hold public hearings thereon" before submitting the report to the governing body. After receiving the report of the zoning commission, the governing body must hold a public hearing on the proposed regulations, with at least 15 days prior notice in a paper of general circulation, 76-2-303(2), MCA.

Amendments or changes to the zoning ordinance must follow the same public notice and hearing requirements for adoption, and the statute provides for a protest provision to any such changes, 76-2-305, MCA. The governing body may override such a protest by a two-thirds vote of the present and voting members. As set forth above, the governing body must again consider substantial compliance with the growth policy and each of the eleven Lowe criteria in any zoning amendments or rezoning decisions.

8.304 Variances

The state statute acknowledges the need to permit occasional variances from zoning regulations and provides a specific process. Local governing bodies may make such decisions themselves, or more commonly, appoint a board of adjustment to "make special exceptions to the terms of the ordinance,"76-2-321(1) and 76-2-323(1)(b) and (c), MCA. In accordance with the statute, the local governing body may delegate all, some, or none of this

[1] There were original 12 criteria, but the statutory list was modified subsequent to the *Lowe* decision.

authority to the board of adjustment, 76-2-321(2), MCA. The statute specifically sets forth the grounds for authorizing "…such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done," 76-2-323(1)(c), MCA.) The board can only grant a variance upon a concurring vote of four members, and any final decision of the board is immediately appealable to the district court, 76-2-327, MCA.

8.305 Conditional Use Permits and Nonconforming Uses

While the state statute is broad with respect to the specific form and use requirements that a local governing body can adopt to guide development within its jurisdiction, many of the procedures and requirements common to a zoning ordinance are found only at the local level. Such matters include, but are not limited to:

- Allowable uses in each zone and definitions for each, where the ordinance specifically identifies what types of uses are allowed;
- Development standards, setting specific requirements for the physical development of land uses in the community:
    - lot size (requiring a minimum or maximum size lot within the municipality, or within certain zones in the municipality, or for certain uses within certain zones)
    - building heights (restricting the height of buildings in certain zones or for certain uses),
    - setbacks (requiring minimum or maximum spacing between buildings on adjacent lots, or between a building on a lot and abutting alleys or streets)
    - parking (requiring a minimum or maximum number of spaces per unit or employees or specifying a required number of off-street spaces),
    - landscaping (requiring a minimum percentage of landscaped coverage of a lot, or providing a list of acceptable species, or requiring screening between a use and a neighboring use),
    - signs (e.g., limiting the number of signs allowed per property, or placing a maximum total square footage for signage on a lot, or restricting the illumination of signs in certain zones)
- Conditional use permits (also sometimes called "Special Reviews"), where a proposed use is allowed in a certain zone only through a quasi-judicial review and imposition of conditions to mitigate the effects on the use on surrounding properties, such as noise, traffic, or hours of operation; and
- Legal nonconforming uses, where a use lawfully existing as of the date of a change in the ordinance is allowed to continue under certain conditions. Municipalities employ a variety of options for allowing or restricting the expansion of nonconforming uses and structures or allowing development on nonconforming lots of record under certain conditions.

8.306 Interim Zoning

The Montana zoning statute also authorizes municipalities to adopt "interim" zoning to protect the public safety, health and welfare, 76-2-306, MCA; (State ex rel. Diehl Co. v. Helena, 181 Mont. 306 (1979)). Such zoning may be enacted as an urgency measure in order to prohibit or otherwise restrict uses that may be in conflict with a contemplated zoning proposal that the governing body is considering, studying, or intending to study within a reasonable time, 76-2-306(1), MCA. The governing body may adopt interim zoning without following the normal procedures required for adopting municipal zoning. After holding a properly noticed public hearing, the governing body may adopt interim zoning for a maximum period of 6 months, with the opportunity for two extensions of one year each, 76-2-306(2) and 76-2-306(3), MCA.

8.4 SUBDIVISIONS

8.401 Local Authority and the Montana Subdivision and Platting Act

The Montana Subdivision and Platting Act (MSPA) was enacted in 1973 and requires the governing body of every city, county and town to adopt local subdivision regulations and provide for their administration and enforcement pursuant to statute (Title 76, Chapter 3).

8.402 Purpose of the Act

In its most basic form, the MSPA is intended to regulate the process by which new lots are created. The intent behind regulating the creation of new lots is to ensure orderly growth and development within a jurisdiction. This includes assessing the development of, and impacts to, public services and facilities such as roads and transportation, water, wastewater, stormwater, police, fire and emergency services, as well as education facilities, open space and other environmental constraints including hazard mitigation, impacts to wildlife and wildlife habitat, and impacts to the surrounding community. In evaluating these impacts resulting from development, the MSPA enables local governments to require mitigation for those impacts anticipated, to ensure the public health, safety and welfare needs of the public are met. The MSPA does not strictly govern the use of these new lots, unless the property being subdivided is also zoned.

8.403 Definition of Subdivision and Division of Land

A "division of land" means "the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter," 76-3-103(4) MCA. The definition goes on to state that "the conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land," meaning that a parcel previously created through subdivision or exemption does not require review prior to the transfer of title or ownership.

A "subdivision" is defined as "a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that the title to the parcels may be sold or otherwise transferred and includes any re-subdivision and a condominium, 76-3-103(15) MCA .The term also means an area, regardless of its size, that provides or will provide multiple spaces for rent or lease on which recreational camping vehicles or mobile homes will be placed."

8.404 Restrictions on Land Transfers

The MSPA governs when and how land can be transferred in Montana, subject to the type of review tracts have had to undergo. For example, every final subdivision plat must be filed with the county clerk and recorder before title to the subdivided land can be sold or transferred in any way, 76-3-301(1), MCA. This prevents speculative sales prior to the physical creation of a lot. If a plat is attempted to be filed with the clerk and recorder without having met final plat requirements pursuant to 76-3-611(1), statute allows the clerk to refuse to accept the plat for filing.

There are some minor exceptions to this rule. These restrictions to transfer of title are not applicable when the parcel or tract intended to be transferred is located in an area in which the state has no jurisdiction, such as federal lands. They are also not applicable to parcels that were created prior to the enactment of the MSPA on July 1, 1973, 76-3-302 et al, MCA.

Under certain circumstances, a subdivider may enter into contracts to sell lots following the approval or conditional approval of preliminary plat but prior to final plat pursuant to 76-3-303, MCA. In entering into such contracts, the purchasers of the future lots must make all payments to an escrow agent, which must be a bank or savings and loan association chartered to do business in Montana. Any payments made by the purchasers of the future lots may not be distributed by the escrow agent to the subdivider until the final plat has been reviewed and approved by the local governing body, and filed with the county clerk and recorder. Additionally, if final plat is not approved within two (2) years of establishing the contract, refunds will be made by the escrow agent to the purchaser. The county treasurer must also certify that there are no delinquent taxes on the property in question, and all contracts must contain language stipulating the temporary nature of the agreement and that *"until a final plat identifying the property has been filed with the county clerk and recorder, title to the property may not be transferred in any manner"* per 76-3-303(5), MCA.

8.405 Local Subdivision Regulations

The MSPA requires every municipality to adopt, administer and enforce local subdivision regulations for its respective jurisdiction. Relying on the MSPA generally or another jurisdiction's adopted regulations *does not* meet the intent or requirement of statute. In adopting local regulations, the governing body must first hold a public hearing to provide members of the public an opportunity to review and comment on the proposed regulations. Notice of the hearing must be published in a newspaper of general circulation, not less than 15 or more than 30 days prior to the hearing.

The MSPA sets forth a detailed list of what elements are required to be incorporated within local subdivision regulations; these requirements are set forth under 76-3-504(1), MCA and generally pertain to application contents and format, review timelines, design standards to be met, environmental considerations, the administration of open space requirements, water use and agreements, growth policy compliance, agency coordination and pre-application process, and criteria and design guidelines pertinent to the review of land for rent or lease. In developing local subdivision regulations, the governing body of a jurisdiction is encouraged to establish standards and guidelines that reflect local growth and development desires of the community while also protecting public health, safety, and welfare.

Local regulations are not permitted to be more stringent than the state regulations or guidelines when addressing the same circumstances, 76-3-511(1), MCA. However, a governing body may adopt more stringent regulations if the governing body makes a written finding, after a public hearing and public comment has been taken, and based on evidence within the public record, that the proposed regulation or guideline is necessary to protect public health and safety, or can mitigate harm to the public health or environment and is achievable under current technology, 76-3-511(2), MCA.

8.406 Subdivision Exemptions

The MSPA provides that some divisions of land are exempt from the local review requirements of MSPA. In these cases, the circumstances resulting in the creation of a tract or parcel are not considered to have a significant impact that would trigger the need for comprehensive review of the division. In some instances, neither review

nor recordation of a survey is required for a parcel's creation; in other instances, a certificate of survey (COS) is still required to be filed. The following divisions are exempt from both the surveying and review requirements of the MSPA, although many times the owner or a lender voluntarily obtain a survey of the newly created lot or lots:

- Court-Ordered Divisions 76-3-201, MCA
- Mortgage Security 76-3-201, MCA (no tract of record is created unless and until foreclosure occurs)
- Severing Minerals 76-3-201, MCA
- Cemetery Lots 76-3-201, MCA
- Reservation of Life Estate 76-3-201, MCA
- Agricultural Lease 76-3-201, MCA
- No State Jurisdiction (such as federal, tribal lands) 76-3-201, MCA
- Public Rights of Way and Utilities 76-3-201, MCA
- Condominiums 76-3-203, MCA
- Airport and State-owned Lands 76-3-205, MCA
- Conveyances Prior to July 1, 1974 76-3-206, MCA
- Lands Acquired for state highways 76-3-209, MCA

The following divisions are exempt from local review under the MSPA but must be surveyed:

- Relocation of Common Boundaries Outside a Platted Subdivision 76-3-207(1)(a), MCA
- Gift or Sale to Immediate Family 76-3-207(1)(b), MCA
- Divisions of Land Proposed for Agricultural Use Only 76-3-207(1)(c), MCA
- Relocation of Common Boundaries Within Platted Subdivisions (up to five lots/lines) 76-3-207(1)(d), MCA
- Relocation of Common Boundaries Within and Outside of Platted Subdivisions (amended plat/COS), 76-3-207(1)(e), MCA
- Aggregation of Lots 76-3-207(1)(f), MCA

8.407 Minor Subdivisions

Minor subdivisions, as defined by statute, are subdivisions that create five (5) or fewer lots from a tract of record 76-3-103(9), MCA. In order to qualify for review as a minor subdivision, the parent tract must not have six or more parcels created through subdivision or use of an exemption since July 1, 1973, including the currently proposed division.

First minor subdivision. If the tract of record proposed to be subdivided has not been previously subdivided and was not created by a subdivision under the MSPA, the subdivision is considered a 'first minor subdivision.' First minor subdivisions are reviewed subject to the local regulations adopted pursuant to 76-3-504 MCA by the governing body; however, first minor subdivisions have a shorter review timeframe and are not required to prepare an environmental assessment. First minor subdivisions must still provide a summary of probable impacts based on the 76-3-608(3) MCA review criteria found in statute, unless the proposed first minor subdivision is located in a jurisdictional area that has adopted zoning regulations that address the applicable -608 criteria.

The governing body may not hold a public hearing on a proposed first minor subdivision as part of the review process. The governing body may adopt requirements for the expedited review of a first minor subdivision, following the requirements set forth in statute under 76-3-609(2)(f), MCA.

Subsequent minor subdivision. When a minor subdivision is proposed on a parcel that has been previously subdivided or was created through a previous subdivision or exemption under the MSPA, it can no longer be considered a 'first minor' subdivision and is referred to as a subsequent minor. Subsequent minors

are reviewed as major subdivisions pursuant to statute, unless the local governing body has adopted regulations identifying specific requirements for review of subsequent minors, 76-3-609(4), MCA. These alternative requirements must meet or exceed the review requirements that apply to first minor subdivisions.

8.408 Major Subdivisions

Major subdivisions are divisions of land proposing to create more than five lots at one time, or proposed divisions that will result in six or more lots being created from a single tract of record since July 1, 1973.

Major subdivisions are reviewed subject to the local regulations adopted pursuant to 76-3-504, MCA by the governing body and following the requirements of the local review procedure set forth under Title 76, Chapter 3, Part 6 of statute. Major subdivisions have longer review timeframes than minor subdivisions, require at least one public hearing, and involve the preparation of a complete environmental assessment. These processes and requirements are in place because, generally, major subdivisions are larger subdivisions and have a greater impact – whether cumulative or at one time -- than minor subdivisions.

8.409 Review Process and Timelines

While the subdivision application process typically begins with a pre-application meeting, timelines specific to the review and approval of a proposed subdivision begin with the submittal of a completed application and supplemental materials. An application is considered formally submitted when the governing body and/or their designated reviewing agent receives the application materials and the associated fee; the governing body may establish a reasonable fee to be paid by the subdivider to cover the cost of reviewing a subdivision application, 76-3-602, MCA.

The first step in the review process following application submittal is typically referred to as 'completeness' or 'element' review, and is detailed under 76-3-604(1)(b), MCA. Within five (5) working days of receipt of a subdivision application, the reviewing agent determines whether or not the application contains all of the listed, required materials as required under 76-3-504(1)(a), MCA, and pursuant to the local regulations adopted. If the application contains all materials required, it is deemed complete; if materials are missing, the reviewing agent notifies the applicant in writing, identifying which elements are still needed in order to review the subdivision.

Following a determination of completeness, an application then moves into the second step, referred to as 'sufficiency' review, 76-3-604(2), MCA. The reviewing agent is allowed fifteen (15) working days from the date of the determination of completeness to make a subsequent determination that the application materials contain detailed, supporting information sufficient to allow for the review of the application in its entirety. If the reviewing agent determines the materials provided are sufficient, they will notify the applicant in writing. If additional information is required in order to make a determination of sufficiency, the reviewing agent will similarly notify the applicant of these additional requirements, identifying what information is necessary in order for the application to be deemed sufficient. A determination of sufficiency does not ensure that the proposed subdivision will be approved, or that additional information will not be requested by the governing body or reviewing agent during the review process pursuant to 76-3-604(2)(c), MCA.

Once an application has been determined to be sufficient, the official review timeline begins, 76-3-604(4), MCA. Review timelines differ between major and minor subdivisions. For a minor subdivision, the governing body must approve, conditionally approve or deny the subdivision within 35 working days. While a public hearing is not permitted for minor subdivisions, this 35 working day timeframe includes the reviewing agent's evaluation of the proposed subdivision, preparation of the written report, findings and recommendation, as well as consideration

of and decision by the governing body.

For major subdivisions, the governing body is required to approve, conditionally approve or deny a proposed subdivision within 60 working days if the subdivision contains fewer than fifty (50) lots, and within 80 working days if the subdivision has fifty (50) or more lots. At least one public hearing is required within these timeframes, for public review and consideration of the major subdivision application. Pursuant to 76-3-504(1)(r), MCA, the governing body is required to notify the applicant in writing within thirty (30) working days following the decision to approve, conditionally approve or deny the subdivision application.

If the governing body fails to comply with the review timeframes provided under statute, the governing body will be responsible to pay the subdivider a financial penalty of $50/lot per month, until the governing body makes a decision on the application, and not to exceed the total amount of the subdivision review fee collected. The subdivider and the governing body may, at any time, mutually agree to an extension or suspension of the review timeframes allotted, not to exceed one (1) year.

8.410 Public Review

Major subdivisions and, if reviewed as a major subdivision or required by the governing body, subsequent minor subdivisions are required to have a public hearing as part of the subdivision review process. At minimum, one public hearing must be held by the governing body, their authorized agent or agency, or both, to consider all their designated agents, to serve in an advisory capacity and conduct the public hearing, and provide a recommendation on the proposed subdivision. Some governing bodies choose to hold the public hearing themselves; other jurisdictions have a public hearing by both the advisory planning board and by the governing body. Regardless who holds the hearing, notification must be given not less than fifteen (15) days prior to the scheduled hearing by publication in a newspaper of general circulation within the county. Additionally, each property owner of record whose property is immediately adjoining the land included in the preliminary plat must be notified of the hearing by certified mail, not less than fifteen (15) days prior to the hearing pursuant to 76-3-605, MCA.

8.411 Development Standards and Conditions of Approval

The MSPA sets forth criteria for local government review in 76-3-608, MCA, stating *"the basis for the governing body's decision to approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application, preliminary plat, applicable environmental assessment, public hearing, planning board recommendations, or additional information demonstrates that development of the proposed subdivision meets the requirements of this chapter."* In conducting its review and coming to a decision, the governing body prepares written findings of fact in support of their decision, based on the evidence provided by the applicant, applicable local, state or federal reviewing agencies, as well as written comments submitted by the public or oral testimony given in a public hearing on the application. These findings should address the primary review criteria set forth in statute, evaluating the subdivision's impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety. The governing body will also evaluate and prepare findings that address the proposed subdivision's compliance with the survey requirements set forth under MSPA; the local subdivision regulations, local review procedure, the provision of easements within and to the proposed subdivision for the location and installation of utilities; and the provision of legal and physical access to each parcel within the proposed subdivision.

When reviewing the proposed subdivision and evaluating potential impacts, the governing body may require the subdivision be designed in such a way that will reasonably minimize potential significant impacts identified through

the course of the review process. Any mitigation required must be justified through written findings of fact that document and support the relationship between the impact resulting from the development and the need for the type, and extent, of mitigation required. Mitigation required should be supported through enforceable conditions of approval, to ensure these requirements have been met prior to approving final plat.

The MSPA recognizes that there may be instances where the unmitigable impacts resulting from a proposed development are considered unacceptable, and the governing body may deny proposed subdivision. The governing body must notify the applicant in writing within thirty (30) days of the decision to approve, conditionally approve, or deny the proposed subdivision, 76-3-608(1), MCA. The statute sets forth an appeals process for parties aggrieved by a decision made by the governing body, 76-3-625, MCA.

8.412 Phased Subdivisions

Public participation and the public's right to know are increasingly the subject of litigation in land use processes and decisions. In Montana, the public's right to know and to participate are fundamental rights provided by the Montana Constitution (Art. II Sec. 8 and 9). The *Legacy Ranch* decision out of Ravalli County in July 2015 focused on the public's constitutional right to know and participate, in regards to phased developments. In 2017, the legislature passed HB 445, which created a phased development process to address these issues, 76-3-504, MCA. The following process should be followed for any proposed subdivision that is expected at the outset to take more than three years to obtain final plat approval for all lots.

"Phased development" is defined as a subdivision application and preliminary plat that at the time of submission consists of independently platted development phases that are scheduled for review on a schedule proposed by the subdivider. The subdivider submits an overall phased development preliminary plat application on which independent platted development phases are presented. The application must contain the information required pursuant to parts 5 and 6 of MSPA for all phases and a schedule for when the subdivider plans to submit for review each phase of the development. The subdivider may change the schedule for review of each phase of the development upon approval of the governing body after a public hearing if the change does not negate conditions of approval or otherwise adversely affect public health, safety, and welfare.

The governing body reviews and approves, conditionally approves, or denies an overall phased development application under existing subdivision review process. Each phase or phases of the development must thereafter be submitted for review and approval, conditional approval, or denial within a timeframe set by the governing body, but in no case more than 20 years of the date the overall phased development preliminary plat is approved. The governing body may charge a reasonable fee for each phase review.

When the subdivider is ready to start a phase or phases, he or she must submit a written notice to governing body. The governing body must hold a public hearing with notice by publication and mailing within 30 working days after receipt of the written notice from the subdivider. After the hearing, the governing body shall determine whether any changed primary criteria impacts, or new information exists, since the time of approval of the overall phased development plat that create new potentially significant adverse impacts. The governing body must issue supplemental written findings of fact within 20 working days of the hearing and may impose necessary, additional conditions to minimize potentially significant adverse impacts identified in the review of each phase of the development for changed primary criteria impacts or new information. Any additional conditions must be met before final plat approval for each particular phase and the approval of each phase is in force for not more than 3 calendar years or less than 1 calendar year within the maximum time frame placed on the overall phased development plat.

8.413 Preliminary and Final Plat Approval

After the governing body has made the decision to approve or conditionally approve a preliminary plat, the governing body must provide the subdivider with a written, dated and signed statement of approvalThis statement should include the findings upon which the subdivision was approved, as well as all applicable conditions the subdivider must meet in order to receive final plat approval. Unless a subdivision improvements agreement is required to ensure the construction of all public improvements pursuant to 76-3-507, MCA, no additional conditions can be applied to a subdivision that has received preliminary plat approval (unless such approval expires). Preliminary plat approval is in force for no more than three (3) and no less than one (1) calendar year from the date upon which it received approval.

At the end of this three-year period, the governing body has the option to extend preliminary plat approval for a mutually agreed-upon timeframe; multiple extensions may be issued. Keep in mind that the extension of non-phased developments occurs without additional public review and comment and prohibits the governing body from imposing additional conditions on a previously approved preliminary plat. To address the public's right to know and participate in the subdivision extension process, the governing body should adopt standard criteria for the review and approval of requests for subdivision extensions as part of the local jurisdiction's subdivision regulations. If a subdivision proposal is expected at the outset to take more than 3 years to bring all lots to final plat approval, the municipality should review the subdivision application as a phased subdivision.

Once the subdivider has met the conditions of preliminary plat approval, they may apply for final plat approval to formally create lots. Final plat approval occurs only after the governing body reviews the request for final plat and determines all conditions have been adequately met, all real property taxes and special assessments have been paid, the examining land surveyor has reviewed the final plat for any errors or omissions prior to filing, all public improvements have been constructed or financially secured, and a subdivision improvements agreement entered into.

Upon receiving final plat approval, the subdivider can file the plat with the county clerk and recorder, and the lots are officially recognized as individual parcels for transfer. It is important the governing body recognize that final plat approval is the final step in the review process to create new lots; if a condition of approval has not been met prior to final plat, or is written in a manner that extends the life of the condition past the final plat approval, the governing body should recognize that it loses authority to enforce such conditions once final plat is approved. Ongoing maintenance or restrictions to use should be addressed through zoning other implementing regulations. The subdivision review process applies only to the creation of lots themselves; once a lot has been created, the process (and authority) is inherently complete.

8.5 BUILDINGS FOR LEASE OR RENT

8.501 Local Regulations

In 2013, the subdivision of land for lease or rent was removed from the Montana Subdivision and Platting Act, except for RV parks, campgrounds, and manufactured home parks. Sections 76-8-101, et seq. allows for a more streamlined and easier process for landowners to rent or lease buildings on their property than full major subdivision review.

If a municipality is comprehensively zoned, buildings for lease or rent within that jurisdiction must simply comply with the local zoning requirements. In such a case, there is no additional overview or requirements to follow and the proposal is no longer subject to subdivision review. Otherwise the first 3 buildings for lease or rent on a single tract

require only sanitation review and approval. After that, buildings for lease or rent on a single tract must be reviewed and approved by the local governing body under local regulations adopted pursuant to the statute.

8.502 Exemptions from Buildings for Lease or Rent Review

The statute exempts certain types of buildings for lease or rent from local review under the statute. Buildings that are subject to the lodging facility tax, buildings for farm or agricultural, and buildings that will not be leased or rented do not have to undergo review by the governing body, 76-8-103, MCA. In addition, landowners are allowed to continue renting or leasing the first three buildings that were in existence or under construction before the effective date of the statute (September 1, 2013) without local government review or approval.

8.503 Buildings for Lease or Rent Review Process and Timelines

The local governing body has ten (10) working days to determine whether an application for a building for lease or rent is complete. If the application is deemed incomplete, the local governing body must provide written notification of the missing or insufficient information to the applicant. Once the application is deemed complete, the local governing body has sixty (60) working days to approve, conditionally approve, or deny the application. A building for rent or lease may be approved if it complies with the local regulations and other regulations applicable to the property; any potential significant impacts on the physical environment and human population in the area have been mitigated, the applicant has provided adequate access, emergency, medical, fire protection, police, water, sewer, and solid waste facilities, and the proposal complies with any applicable flood plain regulations.