2017 MACo/PCT Land Use Update

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I. Setting the Stage

A. Public's Right to Know and Participate

1. Montana Constitution

a. Article II, Section 8. **Right of Participation**. The public has the right to expect government 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. Article II, 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 the state government and its subdivisions, except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure.

2. Montana Open Meeting Laws – Section 2-3-201 et seq., MCA

a. "Meeting" is defined as 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. (§ 2-3-202, MCA.)
b. Public agency is any public or governmental body, board, bureau, commission, agency of the state, *or any organization or agency supported in whole or in part by public funds or expending public funds*. (§ 2-3-203(1), MCA.)
c. Montana Attorney General has held that the Constitution requires "that any meeting [of a public agency] be open to the public, whether the matter being considered involves large issues of policy or the smallest ministerial act." (47 Op. Att'y Gen. No. 13 (1998).)

3. Basic Open Meeting Requirements

a. Hold regular meetings with notice to public. Follow internal operating procedures with respect to notice and participation.
b. All meetings must be open to the public! Meet in place accessible to the public.
c. Exceptions:

- When 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.
- 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 (does not apply when both parties to litigation are public agencies). Applies to any committee appointed by a public body for conducting that agency's business if a quorum of the constituent membership of the public body is present.
- SB 2 (2017):

  The presence of a quorum of members of the board at an event or meeting of another entity or organization or traveling in the same vehicle does not constitute a meeting of the board as long as no issues over which the commission has supervision, control, jurisdiction, or advisory power are discussed or heard. County business may only be conducted during a meeting as defined in 2-3-202 for which notice has been properly given.

  If a quorum of commissioners is present at an event or meeting or is traveling in the same vehicle when it was not possible to provide public notice under 7-1-2123, and issues over which the commission has supervision, control, jurisdiction, or advisory power are discussed or heard, the commissioners present shall provide a report at the commission's next regularly scheduled public meeting. The report must include the name of the event or meeting, the name of the persons involved, the date and location of the event or meeting, and a brief summary of the issues discussed or heard. If the commissioners' presence at the unnoticed meeting or event is reasonably expected to precipitate ensuing consideration of any issue by the board of county

commissioners, details associated with the issue discussed or heard must also be included in the report."

d. Must keep minutes and make available for public inspection; minutes must be approved by the body.

e. Meetings occur anytime a quorum is present, whether agency or a committee is just listening to presentation by staff, discussing item, or taking action. This can be by full meeting; by teleconference; by electronic means – *however, if you are doing it by phone or email it is likely that the open meeting requirement is being violated!*

3. Montana Public Participation in Governmental Operations Act – Section 2-3-101, et seq., MCA

a. "Without public notice, an open meeting is open in theory only, not in practice." Montana Supreme Court, *Board of Trustees vs. Board of County Commissioners* (1980).

b. The Act applies to "governmental agencies," defined as "any board, bureau, commission, department, *authority, or officer of the state or local government authorized by law to make rules…*"

c. The agency may not take action on any matter discussed that is of *significant interest to the public* unless specific that matter is noticed, included on the agenda, and public comment has been allowed on that matter. (§ 2-3-103(1)(a), MCA.)

d. No explicit time requirements - must give *reasonable notice* on actions that are of "*significant interest to the public.*"

e. Exceptions (no or modified notice sufficient):

(1) an emergency situation affecting the public health, welfare, or safety;

(2) to maintain or protect the interests of the agency (filing a lawsuit or becoming a party to an administrative proceeding); or

(3) purely ministerial decisions (no discretion involved).

4. Basic Public Participation Requirements

a. Publication (notice of time and place of hearing, agenda) must occur *reasonable period* before the meeting – "rule of thumb" is 48 hours but think of that as the minimum; the time provided must relate to the nature and extent of the information being considered.

b. New items should not be added to the agenda at the hearing but carried over to the next regularly scheduled meeting, or special meeting with two

days posted public notice. Important role of the chair to control discussion of new items.

c. Public should have the opportunity to obtain information related to every agenda item when notice is published (decision-makers and public should be on equal footing with respect to participation in the decision).

d. Consent agendas should be treated as part of regular agenda with respect to notice and open meetings; however there is no expectation of board discussion or public comment – items should not be of significant interest to the public and no discussion or comment may take place.

e. Provide opportunity for public comment on each agenda item.

f. Some agencies limit comment period allowed for each speaker, but there is no court decision on if these limitations are legal.

g. Public must be given opportunity to comment on items that are not on the agenda (usually done at the beginning of the meeting).

B. Legacy Ranch Decision

Bitterrooters for Planning v. Board of Ravalli County Commissioners, 21st Judicial District, DV 2013-372, July 2015

Subdivision originally applied for in February 2006. In November 2006 interim zoning regulations for a minimum density of 1 residential unit/2 acre minimum were adopted which resulted in litigation. Developers and County settled ("Lords Settlement"), agreeing to process under subdivision regs only and that zoning did not apply. In November 2007 Legacy Ranch developer submitted new application under Lords Settlement for 639 residential units, using original 2006 EA and TIS. Communications regarding insufficiencies continued over next several years. Then in May 2012 County adopted new subdivision regulations, and developer requested review under the new regulations. In December 2012 the application was deemed sufficient and in April 2013, the Planning Board recommended approval of Legacy Ranch. In July 2013 County Commission conditionally approved Legacy Ranch preliminary plat as a 30-year, 15-phase project, subject to 130 conditions. Plaintiff filed suit. District Court held for Plaintiffs.

The Court imposed on County Commission the "Hard Look" Standard:

- The "hard look" standard is defined as: The obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data . . . and articulate a satisfactory explanation for its

action, including a rational connection between the facts found and the choice made. *Bitterrooters for Planning v. Ravalli County*

- The "hard look" standard is from the *Clark Fork Coalition v. DEQ* case which states that government agencies must apply a higher bar and was applied in subdivision review in the *Aspen Trails* case.

County failed to meet the "hard look" standard which automatically made its decision arbitrary or capricious.

The County also violated §76-3-610 (*unlawful decision*) by approving 30-year build-out in 15 phases
(a) -610 unambiguously allows 1-3 year approval of preliminary plat, with extension by mutual consent "at the end of this period."
(b) County improperly approved preliminary plat with 6 years for Phase 1 final plat approval and later years for successive phases (35 years in total).
(c) Only exception to imposing additional conditions after preliminary plat approval is Subdivision Improvements Agreement.
(d) Appropriate remedy for this violation is to void the approval, not shorten the time period to the -610 limitations.

Impacts to Public Health and Safety

- County did not address any of the TIS issues raised by public during review; instead imposed condition to complete new, updated TIS for certain phases prior to final plat approval, when County had no authority to impose additional mitigation if required by updated TIS.
- Court rejects County's argument that it could impose additional conditions after preliminary plat if "necessary" to address "critical public health and safety issues" – language not supported by MSPA, and "critical" not defined.

Public Constitutional Right to Participate

- County violated public's right to participate by deferring the compilation and consideration of relevant information until after preliminary plat approval, when County would be required to approve the final plat regardless of public comment or conflicting information.
- Information provided for a 30 plus year build out subdivision is likely stale when subsequent phases are started and the public has no meaningful way to comment on new or changed information and County cannot impose new or amended conditions.

II. Overview of Land Use Law and 2017 Legislation Affecting It

A. Subdivision Regulations – Title 76, Chapter 3

1. Bills Passed

a. **HB 245** – Require Timelines for Review of a Final Subdivision
   i. Adds timelines for review of final plats to 76-3-611.
   ii. Final plat received on date delivery when accompanied by review fee.
   iii. 20 working days to determine if final plat contains information required in preliminary plat conditions, conforms to MSPA and subdivision regulations and treasurer certifies taxes paid.
   iv. If final plat does not contain information required, notice is given identifying the defects and during re-review can only look at information determined to be deficient in notice. 20 working days applies to re-review.
   v. If examining land surveyor must review final plat, notice shall be given of that review.
   vi. Once determined final plat contains required information, then governing body has 20 working days to review and approve or deny final plat.
   vii. Time periods can be extended by mutual agreement.
   viii. **Effective May 3, 2017.**
   ix. Subdivision Regulations need to be amended.

b. **HB 416** – Subdivision Review Standards
   i. Codifies that "arbitrary, capricious or unlawful" is the standard of review of subdivision findings by the Court based on the record as a whole.
   ii. Clarifies that a subdivision environmental assessment is not the equivalent of environmental assessments/impact under MEPA.
   iii. Legislatively overrides decisions under *Legacy Ranch* and *Aspen Trails* that imposed on governing body a "hard look" standard.
   iv. Effective October 1, 2017.

c. **HB 445** - Subdivision Phasing

i. Creates statutory authority for phased subdivision developments in 76-3-102.

ii. Defines phased subdivision development in 76-3-103 as "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."

iii. Adds new section to address process for phased developments.

- Submit overall phased development plan showing individual phases containing requirements Title 76, Part 3, Chapters 5 and 6, and a schedule for phasing. Schedule amendable after public hearing if doesn't negate conditions or affect public, health, safety or welfare.
- Review of entire phased development is upfront and conditions are imposed for all phases upfront in accordance Title 76, Part 3, Chapters 5 and 6.
- All phases must be completed within 20 years or those phases not completed are void.
- At commencement of each phase(s) subdivider provides written notice to GB and a public hearing is held within 30 working days on that phase(s).
- At hearing GB determines whether there is new information or changes to primary review criteria that create potentially significant adverse impacts for those phase(s) only.
- GB must issue written findings of fact within 20 working days after the public hearing; no matter the decision.
- GB may impose additional conditions on the phase(s) before them to mitigate potentially significant adverse impacts.
- CANNOT impose new conditions on other phases or change conditions on other phases; this is not a re-review of the entire phased development.
- Additional conditions must be met before final plat for that phase(s) within the 1-3 year time period and final plat is reviewed under 76-3-611.

iv. Fee can be imposed to cover the costs of reviewing each phase(s).
v. **Effective May 8, 2017.**
vi. Applies to phased developments after effective date.
viii. Subdivision Regulations need to be amended.

d. **SB 219** – Mortgage Exemptions
i. Codifies the 2013 *Braach v. Missoula County* MSCt decision in 76-3-201.
ii. If one of parcels created by mortgage exemption was conveyed to another party without foreclosure prior to October 1, 2003, the remaining parcel can be conveyed without subdivision review.
iii. October 1, 2003 is when 76-3-201(3)(b) was codified.
iv. **Effective April 7, 2017.**
v. Subdivision Regulations/Exemption Review Criteria may need to be changed.

2. Unsuccessful Bills

a. HB 317 – Allow Public Hearing for First Minor Subdivision – Failed on a tie vote Second Reading in House
b. HB 457 – Exempting Certain Lot Redesign from MSPA – Tabled in House Local Government
c. SB 248 - Family Transfers/Exempt Wells – Vetoed by Governor
d. SB 266 – Revise Subdivision Approval Time Extensions – Tabled in Senate Local Government
e. SB 269 – DEQ Approval before County Approval – Tabled in Senate Local Government
f. SB 306 – Allowing Conversion of Condo to Townhouse – Failed Second Reading in House
g. HJ 31 – Interim Study of Land Use Regulations and Affordable Housing - Failed Second Reading in House

B. Zoning Regulations – Title 76, Chapter 2, Parts 2 and 3

1. Bills Passed

a. **SB 155** –Prohibit Local Government Regulation of Agricultural Seeds

i. Applies to self-governing counties.
ii. Cannot regulate genetically modified seeds.
iii. Can through zoning regulate buildings or facilities.
iv. **Effective May 22, 2017.**

2. Unsuccessful Bills

a. HB 299 - Revise Outdoor Advertising Laws – Tabled in House Transportation
b. HB 531 - Revise Outdoor Advertising Laws – Tabled in Senate Business, Labor and Economic Affairs
c. HB 548 - Revise County Zoning Laws – Tabled in House Local Government

C. Growth Policy – Title 76, Chapter 2, Part 6

1. Bills Passed - None
2. Unsuccessful Bills - None

D. Other Land Use Issues

1. Exempt Wells

a. Bills Passed - None

b. Unsuccessful Bills

i. HB 339 - Define Combined Appropriation for Exempt Wells in Certain Cases- Governor Vetoed

- Defined combined appropriation in state as being two or more wells physically connected into the same system; codifying the 1993 DNRC definition combined appropriation;
- Allows wells to be 660 feet from each other in closed basins and 330 feet in open basins on tracts of record in existence on 10/18/2014 or further divisions;
- Distances do not apply to separate tracts of record in existence on or before 10/17/2014, and pending projects or developments where fees received on or before 10/17/2014.

ii. HB 433 – Prohibit Municipality from Condemning Agricultural Water – Vetoed by Governor
iii. HB 546 – Amend Volume Water for Exempt Wells – Tabled in House Natural Resources
iv. HB 547 – Define Combined Appropriation – Tabled in House Natural Resources
v. HB 629 – State to Retain Control Over Waters of United States - Died Third Reading in House after being amended into a Study Bill
vi. HB 659 - Revise Exempt Well Laws – Tabled in House Natural Resources
vii. SB 248 – Revise Exempt Well Laws for Family Transfers – Vetoed by Governor

2. Floodplain and Floodway Management – Title 76, Chapter 5

a. Unsuccessful Bills
i. SB 313 – Allow Variance for Stream Restoration Projects in Floodplains- Tabled in House Natural Resources

3. RSID/RID and Special District

a. Bills Passed
i. **SB 79** – Revise Laws for Rural Improvements Districts for Road Maintenance
- Adds new subsection to 7-12-2102 (2).
- Special improvement district solely for road maintenance requires a petition and consent of more than 85% of owners of property in proposed district.
- Property in proposed district must be located in residential subdivision, except that owner of property outside of residential subdivision may consent to be included in proposed district.
- Effective October 1, 2017.

ii. **SB 189** – Revise Protest Provisions for Special Districts
- Changes 7-11-1008 to clarify that if a protest form is not returned, it is not construed as support.
- Forms returned with an indication of either support for or opposition against the creation of the district along with protests are used to determine whether a sufficient protest has been made.

- All owners are included in the base to determine the protest percentages.
- Effective October 1, 2017.

b. Unsuccessful Bills

i. SB 188 – Revise Authority to Create Special Districts – Tabled in Senate Local Government

4. Sanitation

a. Bills Passed

i. **HB 300** - Exempt Townhouses from Certain Subdivision Sanitation Regulations

- Adds to 76-4-111 – Exemptions for Condominiums "townhomes, or townhouses" as defined in 70-23-102.
- Exempt if previous review and number of living units not increased and no new extension public water supply or public sewage system.
- Effective October 1, 2017.

ii. **HB 368** – Establish Setbacks for Wells and Lagoons

- Establishes DEQ rulemaking authority for setback requirements between sewage lagoons and water wells to prevent water well contamination.
- Setback in 75-5-605 was 500 feet.
- Effective October 1, 2017.

iii. **HB 407 –** Revise Sanitation in Subdivision Rule Requirements

- Amends 76-4-104 to allow well isolation zones for an individual water system to extend outside boundaries of subdivision into right-of-way for roads, railroads or utilities.
- Individual water system is defined in 76-4-102 as serving one living unit or commercial unit and is not a public water system.
- Individual water system well must be a minimum of 50 feet inside subdivision boundary.
- Public sewage systems may still extend, construct or reconstruct system or improvements within a well isolation zone extending onto the right-of-way.
- **Effective May 3, 2017.**

iv. **HB 456** – Clarify Timelines for Subdivision Review Are Calendar Days

- Applies to timelines in 76-4-125.
- **Effective April 20, 2017.**
- Applies to DEQ Subdivision Applications after April 20, 2017.

v. **HB 507** – Generally Revise Laws Relating to Review of Sanitation in Subdivisions

- DEQ Pilot Program – Terminates Sept. 30, 2019.
- New sections law in Title 76, Chapter 4 and amends numerous other Title 76, Chapter 4 statutes.
- Creates a review process for sanitation subdivision applications similar to review process in Title 76, Chapter 3 regarding element and sufficiency review, notifications if doesn't meet element or sufficiency review, and resubmittals of the application.
- Contents of the application are set forth and before approval must have copy of certificate from local health department, if required, approval from the local GB under Title 76, chapter 3, and any public comments received.
- Annual reporting to environmental quality council summarizing the review procedures and whether statutory changes should be made to the process.
- Effective date October 1, 2017 and applies only to applications for subdivision sanitation approval after that date.

vi. **HB 510** – Revise Exemptions from Sanitation in Subdivision Review

- DEQ in 2014 changed its policy to prohibit the use of the municipal facilities exclusion for a sanitation exemption for subdivisions.
- Bill puts into statute that subdivision can be exempted from Title 76, Chapter 4 if adequate storm water drainage and municipal facilities are available; city certifies they are available; no bonding.
- **Effective May 9, 2017.**

b. Unsuccessful Bills

i. HB 455 - Revise Nondegradation Rules for Subdivisions-Tabled in Senate Local Government

5. Property Rights

a. Unsuccessful Bills
i. SB 98 – Establish Property Ownership Fairness Act– Failed Second Reading in Senate

III. Important Cases since June 2015.

A. Subdivision Cases

1. *Bitterrooters for Planning v. Board of Ravalli County Commissioners*, 21st Judicial District, DV 2013-372, July 2015 (see above)

2. *Gateway Village, LLC v. Gallatin County*, 18th Judicial District, DV 14-123A, September, 2015

The property at issue in this litigation has a long and contentious history regarding the development of the property near Gallatin Gateway, Montana. It had a subdivision approval for minor subdivision and there were issues with water and sanitation involving the newly formed Gallatin Gateway Water and Sewer District which prompted litigation with DEQ. Upset that the community did not support his development, the developer also proposed a gravel pit on the property. The Gallatin County Commission in 2014 after six hours of deliberation on a new major subdivision application denied the subdivision based on fire and traffic safety issues that could not be adequately mitigated. The developer sued and a jury trial was held.

District Court Judge Huss ended the jury trial early and found in favor of the developer stating that the Commissions' findings were not supported by substantial evidence. The Court vacated the findings and conclusion and remanded the decision to the Commission instructing the commission to approve the subdivision with condition from the staff report but adding new conditions and awarding Gateway Village $650,000. The decision was not appealed.

Lesson Learned: Beware District Court judges that impose new conditions on a subdivision that are not supported by facts in the record.

3. *Towe Farms v. Custer County Clerk and Recorder*, 2017 MT 131N, May 2016, NON-CITE case.

Towe Farms claimed that 40/20 acre parcels it sold by contract for deed over the internet were "grandfathered" as a subdivision based on an unrecorded aerial photograph with lines drawn on it and a recorded Contract describing the larger acreage but referencing future sales of the 40/20 acres parcels between the parties. The Contract was recorded prior to the change of law in 1993 wherein a subdivision increased from a tract of land less than 20 acres to less than 160 acres.

District Court determined that the unrecorded aerial photograph was not a recorded certificate of survey as required by the law when the MSPA was passed and that the Contract was not a division of land that would grandfather those parcels. Further, the Clerk and Recorder was not equitably estopped from refusing to record transfers the 40/20 acre parcels as there was no concealment or misrepresentation of fact. Towe claimed that the Clerk and Recorder had stated that the transfers of the 40/20 acres parcels could be recorded, which if true was a legal misrepresentation.

Note: If you need any of the old laws when the MSPA was passed, contact Tara.

B. Zoning Cases

1. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, June 2015

Applies only if you have zoning that regulates signs. If so, be very careful of regulating non-commercial signs differently, such as ideological signs, political signs or temporary directional signs.

Early each Saturday the Good News Community Church would post temporary directional signs throughout the town with church name and the time and location of services. Signs were removed by midday each Sunday. The Town cited the Church for exceeding display time limits and failing to include an event date on the signs. Church filed suit against the Town for violation of free speech.

United Supreme Court applied the strict scrutiny test stating that application of different requirements for the different categories of signs is necessarily content-based and therefore subject to strict scrutiny.
"Strict scrutiny, like a Civil War stomach wound, is generally fatal." –NYT

- Is regulation NECESSARY to further a COMPELLING government interest? and
- Is regulation NARROWLY TAILORED to meet that interest?

- Government's motive, lack of animus, or content-neutral justification **doesn't matter**.

If content-neutral on its face, then can look to motive, animus, or lack of justification. Intermediate scrutiny:

- Is regulation NARROWLY TAILORED to further a SIGNIFICANT government interest?
- Does the regulation LEAVE OPEN AMPLE ALTERNATIVE CHANNELS for speech?

If the Church had decided to support a political candidate, it could have put up larger signs, in more locations, and kept them up longer than signs inviting people to attend its services. "If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government."

This approach to content-neutrality does not (yet?) apply to:

- commercial speech
- speech in limited or non-public forums
- obscenity,
- defamation, libel, and slander.

Lessons Learned:

- Purpose statement – makes sure your zoning regulations have a strong purpose statement regarding the significant government interests being protected by the regulations – traffic safety, parking control, aesthetics, visual clutter, etc.
    - Substitution clause: "Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs."
    - Review your zoning sign regulations for all content-references (prohibitions, exemptions, permit requirements, and differences) in a non-commercial context.
    - How do you treat political v. ideological v. special event signs?
    - Pay special attention to temporary sign regulations
    - Allow for certain amount all the time with restrictions on sign types

- Additional amount with time-restrictions and broader options for sign types
- Base regulations on sign form/site activity/zoning distinctions, not content of the sign.

➢ Ex: Allow for minimum amount of non-commercial signage based on zone (by size, location, lighted, electronic, total amounts, type). Then:
  - ❖ Allow an extra sign on-site when property is for sale or rent
  - ❖ Allow for an additional sign, located within certain amount of distance from street, intersections, and driveways
  - ❖ Allow one small additional sign placed on front of building, on either side of the mailbox, or on a post
  - ❖ Provide process for limited-time sign permit, with date sticker issued by government

2. *Avenue 6E Investments v. City of Yuma*, 2016 U.S. App. LEXIS 5601, 9th Cir. March 25, 2016 (outline by Kelly Lynch)

Developer's 42-acre property was located in white-majority area; zoned low-density residential with 8,000 sf minimum lot size; and bordered by luxury homes, senior housing development, and undeveloped municipal property. Developers sought a rezone to low-density residential at 6,000 sf minimum lot size to build more affordable housing; staff recommended approval of rezone. Residents objected that Developers "catered" to low-income families with *large households,* that *used single-family homes as multi-family dwellings,* allowed *unattended children to roam the streets,* owned *numerous vehicles* which they *park in the streets and their yards, lacked pride of ownership,* with a *higher rate of crime.*

City's Plans acknowledged need for more affordable housing in areas without high concentrations of Hispanic households. Zoning commission unanimously approved the rezone; City Council denied – *only one* denied of 76 requests in previous 3 years. Developer filed §1983 claim against City for disparate treatment and impact under Fair Housing Act. 9th Circuit found that the City's decision resulted in disparate treatment and disparate impact. FHA and Equal Protection Clause prohibit government from zoning land or refusing to zone land out of concern that minorities would enter a neighborhood. Data contained in City's planning documents identified racially concentrated areas of poverty in the City, a direct relationship between housing density and costs, and the historical opposition of local residents to affordable housing projects as impediments to the production of affordable housing in the City. When the developer shows by statistical data that a zoning denial will

have a disparate impact on [protected groups], the city's obligation is to establish a legitimate and credible basis for its decision.

3. *Martinell v. BOCC Carbon County*, 2016 MT 136, June 2016

November 20, 2014 Silvertip Landowners submitted a Part 1 zoning petition for over 2,700 acres near Belfry to maintain the rural and agricultural nature of the district through regulation of oil and gas activity. The petition focused exclusively on regulation of oil and gas activities and did not seek comprehensive land use regulations. The opposing landowners informed the Commission at the public meeting on the petition that more than 50% of the acreage in the proposed district intended to protest the establishment of the district. The Commission voted to grant the petition and establish the zoning district based on a finding of public interest and convenience. The Commission set a date to reconvene to address protests to the petition and take further action on the resolution of intention to create the district (which is not required for Part 1 zoning).

In the meantime, the Commission learned that there was a resolution from 2009 that established a process for Part 1 zoning. When they reconvened they noted that the landowners holding 60.7% of the total acreage had protested the zoning district and that the parties had not complied with the 2009 resolution. The Commission rescinded the resolution of intention and voted to deny the zoning district, citing the formal protests lodged.

The Silvertip Landowners filed a lawsuit citing reliance on an unconstitutional protest provision in 76-2-101(5) based on *Williams v. Missoula County*; arbitrary and capricious reversal of the Commissions' finding of public interest; and unconstitutional deprivation of a right to a clean and healthful environment guaranteed by the Montana Constitution. The County and opposing landowners filed a motion to dismiss, which the District Court granted as the Commission had arbitrarily waived compliance with the 2009 resolution allowing the petitioners to avoid requirements other petitioners would have to meet at the expense of the neighbors and other citizens protesting the petition and limiting information under the petition that would have assisted the Commission in their decision. The constitutional issues were not addressed regarding the protest provision. The Silvertip Landowners appealed.

The MSCt upheld the district court decision stating that the 2009 resolution established a substantive process and that the Commission could not arbitrarily waive that process.

Lesson Learned: Before considering a Part 1 Zoning petition, check for a resolution or policy regarding the substantive process for the petition.

Note: Even though the protest provisions for Part 1 zoning were not addressed in this case, they would likely be held unconstitutional under the *Williams v. Missoula County* case.

4. *Citizens for a Better Flathead v. BOCC Flathead County*, 2016 MT 325, December 2016

The Flathead County Commission amended its zoning regulations (text amendment) to create a new zoning classification, B-2HG (General Business Highway Greenbelt) and then applied the new B-2HG to a property bordering Highway 93 north of Kalispell (map amendment). B-2HG permits many of the same uses as the General Business zoning and establishes conditional uses that require mitigations measures to alleviate impacts between Agricultural and Suburban Agricultural zoning, such as setbacks, landscaping, signage requirements, tiered building heights and lighting restrictions.

The staff report identified three parts of the growth policy that the B-2HG classification would advance, as well as the statutory considerations required by 76-2-203. The report stated that the additional criteria for site development gave consideration to growth of nearby municipalities and was similar to neighboring municipality's standards for highway commercial.

The Commission held a public hearing in May of 2011 and based on public comments, the planning board was asked to address the concerns raised. A few weeks later, the Commission met to discuss changes to the text amendment and further public comment was taken. The Commission adopted changes to the text amendment that had been suggested in public workshops and published notice of intent to adopt the amended text amendment. A final hearing was held a couple of months later. An insufficient number of protests had been received to block the protest. The Commission discussed the public comments and unanimously adopted the text amendment.

Shortly thereafter, landowners owning approximately 63 acres requested the map amendment to change the zoning of their property from Suburban Agricultural to B-2HG. The staff report noted relevant portions of the growth policy and generally concluded that the policies would be furthered by the map amendment, but noted that the proposed zoning change would not provide infill. The staff report noted two problems, being lack of specific guidance regarding the Highway 93 area as there was no neighborhood plan or future use map, and the potential lack of compatible growth with nearby municipalities. The Planning Board voted to approve the map amendment and the Commission after making several changes, adopted the map amendment in February of 2012.

Citizens challenged the adoption of both the text and map amendment. The MSCt adopted legal standards applicable to a text amendment as matter of first impression.

The MSCt looked at "floating zoning" which is a zoning classification that is not delineated on a zoning map until a map amendment . There is a good discussion of floating zoning concepts in the decision. The MSCt held that floating zones must comply with statutory requirements and substantially comply with a growth policy but that review is difficult as location is what permits the analysis to be undertaken. Thus, in a legal challenge to a floating zone, the question is whether the floating zone could satisfy statutory requirements anywhere in the county as facial challenges require a litigant to show "no set of circumstances exists" where the floating zone would be valid.

Citizens had challenged the text amendment on the grounds it did not substantially comply with the growth policy and the Commission failed to satisfy public participation requirements. The MSCt held that because the text amendment would change properties to a more restrictive zoning and the Designated Land Use Map from the growth policy indicates the existence of such areas, the Citizens' challenge to the text amendment was not a proper facial challenge; it was a challenge on the outcome of the new zoning as applied on the ground. Therefore, the text amendment was valid.

In regards to public participation, the MSCt held that for zoning, there is no statutory requirement that public comment be further evaluated as with the adoption of growth policies in 76-1-603. However, Flathead County had adopted a broader requirement for evaluation of public comment by resolution that encompasses all land use decision and requires "summarization and explanation"

by the Commission in response to receipt of public comment. There is no specific requirement as to the form of the summary and explanation. The Commission at the public hearing and subsequent public meetings summarized public comment and responded to public comment with explanations. This satisfied statutory requirements as well as the Flathead County resolution.

The MSCt held that the map amendment must substantially comply with the growth policy in that Commission's analysis did not consider possible conflicts between the map amendment, the growth policy and other pertinent factors raised by the growth policy. One conflict was the concern raised by the municipalities that the text amendment would allow further strip development which was disfavored by the growth policy and the conflict was not properly considered. Traffic considerations were only cursorily addressed even though the growth policy provides many traffic considerations. And little attention was given to the requirement that the county consider compatible urban growth in the vicinity of cities and towns as required by 76-2-203. The map amendment did not contemplate that growth within a B-2HG might result in development inconsistent with planned and potentially imminent Kalispell growth. The MSCt did not reach the issue of whether the map amendment was spot zoning or enacted in violation of public participation requirements.

Lesson Learned: Text amendments (floating zones) must be challenged on the basis that there are no circumstances in the entire jurisdictional area where the zone would be valid. Map amendments must substantially comply with the growth policy and conflicts with the growth policy should be analyzed in full as well as the analysis of whether the map amendment is compatible with urban growth as required by 76-2-203.

5. *Preserve Historic Missoula, Inc. v. Missoula City Council*, 4th Judicial District, DV 16-749, January 2017

This case involves a demolition permit to tear down the Merc (former home of Macy's) in downtown Missoula. The Merc is a historic building regulated under the City of Missoula zoning ordinance – Missoula's Historic Preservation Ordinance. Ultimately a partial demolition permit was issued by the City Council after it reviewed the findings of the Missoula Historic Preservation Commission which voted to deny the permit and found that some of the HPC's findings were in error. The District Court emphasized that the Court may not substitute its discretion for that of the local government and that it reviews a zoning authority's

decision for an abuse of direction – when the information upon which the decision is based is so lacking in fact and foundation that it is clearly unreasonable. Plaintiff's challenged the procedure used by the City but the Court found that the City followed its processes and that there was significant credible evidence to support the City's findings. The District Court also discussed whether the City's decision to issue the demolition permit was in compliance with the Missoula Downtown Master Plan and found that the City balanced the objectives of the DMP and exercised reasonable discretion.

Lessons Learned: While this case involved municipal historic preservation zoning it has a good discussion of the standards the Court uses in evaluating zoning decisions.

6. *City of Whitefish v. BOCC Flathead County and Shaw*, 11th Judicial District, DV 15-625, February 2017

Evan Shaw owns a 62.48 parcel of land in Flathead County southeast of Whitefish. The land is zoned by the county as SAG-10 (Suburban Agricultural with a minimum of 10 acre lots) and Mr. Shaw submitted a Petition for a Zoning Amendment to rezone his property SAG-5 (Suburban Agricultural with a minimum of 5 acre lots. The basics of the change would be that instead of 6 residences, 11 could be built and a few more conditional uses are permitted in SAG-5 being RV parks and high impact recreational facilities.

The Shaw property lies within the Urban Growth Area and is subject to the Flathead County Growth Policy, the Whitefish City-County Master Plan (repealed after this lawsuit was initiated) and the Whitefish Growth Policy. The County's land use map identifies the Shaw property as "important farmlands" and "rural". The City's land use map designated "rural" as having 10-acre and 20-acre minimum lot sizes.

The planning staff report concluded that while the proposal did not meet all of the goals for the various policies, it generally complied with most of the review criteria. The City objected to the proposal on the basis that the zone amendment was incompatible with the City's Growth Policy and a "future land use map". The County Commission found that the City's Growth Policy designated the land as rural and the zone amendment complied with the city's description of a rural designation and granted the zone amendment.

The City sued contending the zone change was contrary to statutory criteria and applicable zoning regulations, the factual record failed to support the zone amendment, and the zone amendment was illegal spot zoning. The City sought a writ of mandamus claiming it had no speedy and adequate remedy as well as a declaratory judgment that the zone change was unlawful, arbitrary and capricious. All three parties moved for summary judgment. The District Court held that amending a zoning designation is a legislative act to be reviewed for an abuse of discretion: whether the information the decision was based upon is so lacking in fact and foundation that it is clearly unreasonable and constitutes and abuse of discretion.

Numerous issues were raised in the summary judgment arguments. The District Court held that the City had standing as the zone amendment affected the City's future land use planning and infrastructure development. The Court also held that while the city-county master plan had been repealed, the City's position was not moot as it relied on the alleged failure of the Commissioners to substantially comply with the City's Growth Policy and its land use maps. The Court struck the affidavit of the City's expert as it offered improper conclusions of law or was designed to determine the wisdom or correctness of the County Commissioner's decision. The Court limited the affidavit to background information, relevant factors and whether the county fully explained its course of conduct or grounds of its decision.

The District Court in evaluating the core issue of whether the County Commissioners considered, with appropriate weight, the statutory criteria regarding zoning regulations being in accordance with the growth policy and compatible urban growth in the vicinity of cities and town held that the County did not ignore the City's Growth Policy and designated land use map; the County interpreted it differently but that interpretation did not rise to an abuse of discretion. Further, the Court held that the change in zoning was relatively minor, being five more additional residences and two conditional-permit activities added.

Finally the District Court did not find the zoning amendment to be spot zoning as the requested use was not significantly different from the prevailing use in the immediate area and while the zone change area was small it was not special legislation at the benefit of the surrounding landowners or the public.

Lessons Learned: It is difficult for a Court to find an abuse of discretion if good findings are made.

C. Growth Policy

1. *Citizens for a Better Flathead v. BOCC Flathead County*, 2016 MT 256, October 2016

Flathead County updated its Growth Policy starting in 2011. 20 public workshops to gather public comments were held by the planning board. A public hearing was held on a first final draft and then four additional workshops were held. A public hearing was held on a second final draft, those public comments were discussed by the planning board who then voted to forward the policy to the Commission for approval. All workshops and meetings were held in Kalispell. Commission passed resolution of intent to adopt and initiated a 30 day public comment period. On October 12, 2012 the Commission held a meeting and approved the revised growth policy. Commission did not issue written findings.

Citizens claimed growth policy violated MCA, Constitutional and Flathead County's own procedures. District Court struck expert's report and on cross-motions for summary judgment, District Court granted County's motion on basis that the growth policy revision did not violate any statutory, constitutional or regulatory provisions. Citizens appealed.

MSCt upheld the striking of the expert report as it offered legal conclusions. MSCt held revisions to GP were an "update" and not an amendment and that the planning board was not limited to the work plan during the revision process. As the revisions were an update, findings were not necessary as required under the Flathead County Growth Policy for amendments. And while the GP required meetings throughout the county for a GP, Citizens did not show that holding all meetings in Kalispell was substantially non-compliant with the GP.

Citizens alleged planning board failed to keep minutes of its meetings, failed to produce a document showing changes made to original growth policy and failed to give adequate notice of what changes it was considering, amounting to statutory violations of Montana's open meeting laws and constitutional violation of the right to know and participate. All of workshops and hearings were recorded and the planning board routinely posted track-change versions of chapters of the growth policy but there was not one single comprehensive document identifying all the proposed changes. Commission recorded and kept minutes at their meeting and discussed public comments. The decision has a good discussion of requirements under the constitution and statutes for open meetings and public participation.

MSCt held that planning board does not have the authority of an agency under the statutes and that is merely an advisory board so its recommendations cannot be invalidated under the open meetings and public participation laws. MSCt stated that planning board and Commission provided public notice, solicited public comment and allowed for public observation of deliberations; and there were ample opportunities for the public to be informed and participate.

Citizens also complained the Commission failed to consider public comments, summarize public comment, incorporate public comment into the decisions making process and explain how the public comments factored into the final decision. MSCt found that planning board considered and incorporated public comment into its drafts of the growth policy. The Commission at its final meeting orally summarized the public comments and explained how they factored the public comments into their decisions. MSCt held that this fulfilled the Commission's obligations under *North 93 Neighbors, Inc*.

Finally Citizens claimed that the revised growth policy contained a "property rights trump card" clause that is unconstitutionally vague and violates Article II, Section 3 constitutional right to a clean and healthful environment. The clause basically states the importance of individual property rights and that if there is a conflict between individual property rights and the growth policy, individual property rights control. MSCt held that because a growth policy is not a regulatory document it cannot conflict with the Constitution.

Lessons Learned: Document, document, document planning processes; record meetings and/or take minutes; make sure public comment is recognized, summarized and analyzed out loud if not in written findings.

D. Exempt Wells

1. *Clark Fork Coalition v. DNRC*, 2016 MT 229, September 2016

The Montana Water Use Act (Act) sets forth a statutory framework by which water rights are obtained, administered, and adjudicated. A critical component of the Act is the permit system, administered by the Department of Natural Resources and Conservation (DNRC), which functions to protect senior water rights from encroachment by prospective junior appropriators. The Act requires that a senior appropriator be given notice and an opportunity to object, and requires that the new appropriation will not adversely affect a senior

appropriator's existing rights. Where water consumption is small, the Legislature provided certain exemptions to this rigorous permitting process. If a well or developed spring does not exceed 35 gallons per minute and 10 acre-feet per year, an appropriator is exempt from having to obtain a permit for water.

However, in 1987 the Legislature determined that the exemption did not apply to a "combined appropriation" from the same source by two or more wells or developed springs which exceed 10-acre feet, regardless of the flow rate. Clark Fork Coalition and senior water right users challenged the validity of a 1993 rule promulgated by the DNRC which interpreted and defined the term "combined appropriation" to require a physical connection between two or more wells or developed springs which appropriated from the same source. The District Court invalidated the 1993 rule because it was inconsistent with the purpose of the Act and impermissibly expanded a narrow legislative exemption to the permitting process. The District Court reinstated the 1987 DNRC rule, which did not contain a requirement that the groundwater developments be physically connected, and required that the DNRC conduct rulemaking to promulgate a new rule consistent with its order.

After conducting oral arguments on the case, the Montana Supreme Court affirmed the District Court's order and held that the plain language of the statute creating the exemption did not contain a requirement that two or more groundwater developments appropriating from the same source be physically connected. The Court determined that the 1993 rule was inconsistent with the purpose of the Act to protect senior appropriators and with the prior appropriation doctrine, and that it added a requirement not otherwise contained within the language of the statute. The term "appropriation" is defined within the Act as a "quantity" of water which may be put to beneficial use. Therefore, the quantity of water which may be appropriated for any "combined appropriation" refers to the combined quantity and may not exceed 10 acre-feet per year when it is from the same source.

The Court upheld the District Court's decision to reinstate the 1987 rule, concluding that the effect of invalidating an agency rule is to reinstate the rule previously in force. Further, while the District Court had the authority to require that any rule promulgated by an agency be consistent with a court order, it did not have authority to require the agency to conduct further rulemaking. It will

be up to the DNRC, which did not appeal the District Court's invalidation of the 1993 rule, to decide whether further rulemaking is necessary.

This is the 1987 rule now, again, in effect:

> An appropriation of water from the same source aquifer by means of two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a "combined appropriation." They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined appropriation.

This the 1993 rule no longer in effect:

> "combined appropriation" means "an appropriation of water from the same source aquifer by two or more groundwater developments that are physically manifold into the same system." ARM 36.12.101(13).

The important distinctions are that:

- In the 1987 definition the two exempt wells do not have to be physically connected or have a common distribution system and
- In the 1987 definition the combined appropriation relates to "project or development" which is undefined in state law or DNRC rule.

2. <u>DNRC Guidance After *Clark Fork Coalition* Case</u>

On November 12, 2014 DNRC first issued guidance on how it will review applications for exempt well certificates, effective as of November 21, 2014. DNRC also has set forth guidelines for receiving a Certificate of Subdivision Approval under Title 76, Chapter 4:

Subdivisions with lot sizes of greater than 20 acres are not subject to DEQ approval and based on the issued DNRC guidance, exempt wells could be the water source for each lot in those subdivisions.

DEQ *also r*eviews:

1. all divisions of land for condominiums/townhomes and permanent spaces for recreational vehicles or mobile homes, no matter the lot size; and

2. leases of airport and state lands, relocation of boundary lines, family transfers and agricultural use restricted divisions of land under 20 acres.

Subdivisions with lot sizes less than 20 acres, condominiums/townhomes, permanent spaces for RV/mobile homes, leases of airport and state lands, relocation of boundary lines, family transfers and ag covenants all require a letter from DNRC stating that exempt wells may be used before DEQ will issue its approval.

DEQ does not review connections to existing public wells and for Building for Lease or Rent unless there is an existing COSA issued by DEQ.

3. Subdivision Review of Water Post *Clark Fork Coalition*

Counties are required by state statute when reviewing subdivisions to determine evidence of adequate water availability and evidence of sufficient water quality in accordance with rules adopted by DEQ. Section 76-3-622(1)(e) and (f), MCA. The governing body may not require other water information beyond what is set forth in Section 76-3-622 unless it holds a public hearing pursuant to Section 76-3-511, MCA.

In evaluating water availability, 76-3-622(1)(e) states evidence can be obtained from well logs or testing of onsite or nearby wells, information contained in published hydrogeological reports, or as otherwise specified in rules adopted by DEQ. State statutes do not allow counties to require evidence of a water right or water certificate unless that regulation is adopted in the local subdivision regulations after a 76-3-511 public hearing.

If the county is reviewing water availability and water quality, during the subdivision review findings should be made that there is available water supply and appropriate water quality. A condition of approval may require that the subdivision covenants advise the lot owners that the wells on the property must comply with DNRC rules and guidelines. As the drilling of the exempt wells will most likely take place after final plat approval, the county has limited options.

Counties do not have the statutory authority to review water supply or quality for divisions of land that are exempt from subdivision review.

Counties may want to develop a standard advisement they provide at the pre-application stating the subdivider/developer should contact DNRC regarding water for the subdivision to aid in the design of the subdivision. As it appears the DNRC guidance is subject to change by DNRC without notice, counties should be very cautious in advising subdividers/developers on the use of exempt wells for subdivisions.

IV. Future Issues in Land Use

A. Zoning Protest Provisions

B. Preliminary Plat Approval Extensions