



# ***Legal Framework – Planning for Wildlife***

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# Topics to Cover



- I. Findings and the Record
- II. Growth Policies
- III. Zoning Regulations
- IV. Subdivision Regulations
- V. Takings

# I. Findings and the Record



- During the review process, staff should prepare a thorough report on the proposal .... subdivision application, CUP, zoning ordinance, etc.
- Staff report should summarize the application, supplemental reports and analysis, and comments from agencies.
- Staff report should outline and analyze the proposal's compliance with each applicable local regulation and development standard, and the reasoning and support behind all mitigation and conditions.

# Findings, cont.



- Based upon this analysis, staff may make suggestions for changes to the proposal or even recommend denial.
- When making its final decision, the governing body must review and approve such findings.

**The evidence must support the findings**

**AND**

**the findings must support the decision**

- Not every land use decision requires findings; it IS required for decisions on subdivision applications (Section 76-3-620, MCA). **ALWAYS NEED TO SHOW YOUR WORK!!**

## II. Growth Policies



*(Title 76, Chapter 1, Part 6, MCA)*

- A growth policy (aka master plan, general plan, comprehensive plan) is an official public document adopted and used by local governments as a guide for decisions regarding the physical development of a community.
- “The preeminent planning tool is the ... growth policy. A growth policy essentially surveys land use as it exists and makes recommendations for future planning.” *Citizen Advocates for a Livable Missoula v. City of Missoula*, 2006 MT 47; *Ash Grove Cement Co. v. Jefferson County* (1997), 283 Mont. 486.

# Growth Policies, cont.



A growth policy **MUST** include

- community goals and objectives;
- maps and text describing an inventory of the existing characteristics and features of the jurisdictional area, including ... (vii) natural resources and (ix) “other characteristics and features proposed by the planning board and adopted by the governing bodies”
- projected trends for the life of the growth policy for ... (vi) natural resources and (vii) “other elements proposed by the planning board and adopted by the governing bodies”

# Growth Policies, cont.



A growth policy **MUST** include

- a description of policies, regulations, and other measures to be implemented in order to achieve the goals and objectives;
- a statement explaining how the governing body will define the subdivision review criteria related to impacts on ... the natural environment, wildlife, and wildlife habitat
- a statement explaining how the governing body will evaluate and make decisions regarding proposed subdivisions with respect to the natural environment, wildlife, and wildlife habitat

# Growth Policies, cont.



A growth policy **MUST** include

- an evaluation of the potential for fire and wildland fire in the jurisdictional area, including whether or not there is a need to delineate the WUI and adopt regulations requiring ... defensible space around structures

A growth policy **MAY** include

- a description of how and where projected development inside cities or designated joint infrastructure planning areas for cities and counties could adversely impact ... (A) threatened or endangered wildlife and critical wildlife habitat and corridors ...

# Growth Policies, cont.



A growth policy **MAY** include

- a description of how and where projected development inside cities or designated joint infrastructure planning areas for cities and counties could adversely impact ... (E) the safety of people and property due to threats to public health and safety, including ... wildfire, flooding, erosion, water pollution, and hazardous wildlife interactions
- a description of how and where projected development inside cities or designated joint infrastructure planning areas for cities and counties could adversely impact ... (F) natural resources, including but not limited to forest lands, ... streams, rivers, lakes, and wetlands

# Growth Policies, cont.



A growth policy **MAY** include

- a description of measures, including land use management techniques and incentives, that will be adopted to avoid, significantly reduce, or mitigate the adverse impacts identified above
- the planning board may propose and the governing bodies may adopt additional elements of a growth policy in order to fulfill the purpose of this chapter.

# Growth Policies, cont.



How closely must a growth policy and neighborhood plan be followed?

- § 76-1-605, MCA: Governing body ***must be guided by and give consideration to*** the policy and pattern of development set forth in the growth policy *when adopting zoning ordinances and resolutions*
- § 76-2-203, -304, MCA: zoning regulations ***must be made in accordance with*** the growth policy

# Growth Policies, cont.



- In 2003, the following language was added to Section 76-1-605, MCA:

*“A growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law.”*

*“A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.”*

# Growth Policies, cont.



- *Little v. Bd. Of County Commissioners* (1981), 193 Mont. 334. County **must “substantially comply” with** the growth policy.
- *Flathead Citizens for Quality Growth v. Bd. of Adjustment*, 2008 MT 1. Section 76-1-605(2) “does not prohibit the enforcement of growth policies in all circumstances but simply states that a growth policy or master plan only acquires legal force by virtue of another law or regulation.”
- *Heffernan et al. v. City of Missoula (Sonata Park)*, 2011 MT 91. City **must “substantially comply” with** the growth policy when approving subdivision/zoning amendment/annexation.

# *Sonata Park, cont.*



- Approval of proposed 37-lot subdivision represented “significant deviations” from the Plan:
  - Plan density for site was 1:2-10, and area is located in lower density area of the valley (approved density was 2:1)
  - Plan recommended limiting traffic congestion to preserve air quality (development would generate @300 VTD, no discussion of AQ)
  - Plan calls for preservation of scenic views of Waterworks Hill (development would disturb the view of Waterworks Hill from the remainder of the valley)
  - Plan identified significant natural woody draw and wildlife corridor on the site (proposal placed road across it, and City’s required public easement corridor and parkland dedication in this resource area)
  - Other goals and recommendations of the Plan contrary to the proposal; not addressed by City; or addressed in “conclusory fashion.”

# III. Zoning Regulations



- 1) §76-2-101 (“Part 1”) *Citizen Initiated Zoning*
  - Does not require a growth policy
  - Protest – 60% of owners to petition; protest requires owners of 50% of the land in district
  
- 2) §76-2-201 (“Part 2”) *County Zoning*
  - Requires a growth policy
  - Protest – 40% of owners or 50% of land taxed as agriculture or forestry
  - Interim zoning – special regulations
  
- 3) § 76-2-301 *Municipal Zoning*
  - Requires a growth policy
  - Protest – 2/3 vote of present and voting council members if a protest is signed by 25% or more of owners of the area of the lots included in the change OR those lots 150 feet from the lot included in the change.
  - Interim zoning

# Zoning, cont.



- Must be made in accordance with a growth policy (76-2-203; 76-2-304);
- Zoning regulations **MUST** be designed to
  - (i) Secure safety from fire and other dangers ...
  - (ii) promote public health, public safety, and the general welfare
- The governing body **MUST** consider
  - (a) reasonable provision of adequate light and air;
  - (b) the effect on transportation systems;
  - (c) promotion of compatible urban growth;
  - (d) the character of the district and its peculiar suitability for particular uses; and
  - (e) conserving the value of buildings and encouraging the most appropriate use of land throughout the jurisdictional area.

# Zoning, cont.



- Zoning is a legislative enactment and thus is presumed to be valid and reasonable. *Lake County First v. Polson City Council*, 2009 MT 322.
- Where the challenge is to the procedure used and the sufficiency of evidence before the governing body, courts will review "whether the information upon which it based its decision 'is so lacking in fact and foundation' that 'it is clearly unreasonable and constitutes an abuse of discretion.'" *Town and Country Foods, Inc. v. Bozeman*, 2009 MT 72.

# Zoning, cont.



- *Lowe v. City of Missoula*, 165 Mont. 38 (1974). “The record is so lacking in information that the action on the part of the City ... could be said to have been based on mistakes of fact.”
- *Schanz v. City of Billings*, 182 Mont. 328 (1979). Information relied upon by the City Council in approving the zoning amendment was “so lacking in fact and foundation” as to render the decision clearly unreasonable and an abuse of discretion.
- *North 93 Neighbors, Inc. v. Bd. of County Comm'rs.*, 2006 MT 132. “Nothing in the record demonstrates that the Board, the Planning Board, or the Planning Office ever considered any issues, other than denying the public the opportunity to vote on the zoning amendment, raised through the more than 4,400 comments received on the proposal.”

# Zoning, cont.



- Where the challenge is to the substantive decision made by the governing body based on the facts in the record, judicial review is limited to a determination of whether the rezone was arbitrary, capricious, or unreasonable, having no substantial relation to the public health, safety or general welfare.
- This is what you get when you have thorough findings – *“Th[e Montana Supreme] Court does not sit as a super-legislature or super-zoning board.”*
- *Lake County First*: Challenge that City improperly determined the *Lowe* criteria were satisfied was reviewed under lower “arbitrary and capricious” standard
- *Town & Country Foods*: “We cannot conclude that the information relied on by the city commission to make its decision lacked foundation or that its decision was unreasonable.”

# IV. Subdivision Regulations



- Purpose of Subdivision and Platting Act to:
  - promote the public health, safety, and general welfare by regulating the subdivision of land;
  - require development in harmony with the natural environment;
  - promote preservation of open space;
- Subdivisions **MUST** be reviewed for impacts on:
  - the natural environment,
  - wildlife, and
  - wildlife habitat
- Governing body **MAY** require mitigation to avoid or minimize those impacts identified in review process. **OR they may deny.**  
*MM&I, LLC v. Gallatin County, 2010 MT 274*

# Subdivision Regulations, cont.



- The Subdivision and Platting Act establishes minimum requirements for local subdivision regulations. Local regulations are preempted only if they are "plainly and irreconcilably repugnant to or in conflict with each other."  
*Burnt Fork Citizens Coalition v. Board of County Comm'rs*, 287 Mont. 43 (1997)
- Local regulations should provide standardized conditions and mitigation for subdivision impacts – your primary goals are to treat applicants substantially equally, and to legislatively adopt your mitigation standards through public review process
- *Written findings and decision* **MUST** be issued 30 days after decision at public hearing. **THIS IS YOUR ONE AND ONLY CHANCE TO TELL YOUR STORY!!** You **CANNOT** spend enough time on this!!!

# Standard of Review - Subdivisions

- *Kiely Construction LLC v. City of Red Lodge*, 2002 MT 241. Under appeal of a subdivision decision, courts review whether the record establishes that the agency acted arbitrarily, capriciously or unlawfully. “*While the record may contain conflicting evidence, as long as a substantial amount of the evidence supports the governing body's decision and the governing body explains why it weighed certain evidence as more credible than other evidence, the governing body's decision should be upheld.*”
- *Hansen v. Granite County*, 2010 MT 107. “[I]t is the developer’s duty to provide all the information to the governing body for its consideration in reviewing an application for preliminary plat approval.”

# *Richards v. Missoula County, 2009 MT 453*



- Plaintiff sought subdivision and development of property near Clearwater Junction – eventual proposal called for 59 lots (1 unit/3.4 acres)
- County Rural Initiatives and FWP staff raised concerns about density, impacts to wildlife and wildlife corridor on the site; sought reduction in density to 1 unit/10 acres.
- County Commission denied the proposal, based in part on concerns about unmitigated wildlife impacts.
- Plaintiff sued County (and FWP), and District Court granted summary judgment for County without a hearing, emphasizing that judicial review is limited to the existing record; Montana Supreme Court agreed.

## *Richards, cont.*



- District Court decision in particular had very detailed analysis of the wildlife impacts, evidence and testimony related thereto, and staff's analysis of that information.
- **IMPORTANCE OF LEADING THE COURT THROUGH YOUR DECISION:** In *Richards*, the District Court and MSC specifically allowed the introduction of County planner's affidavit because it contained a table that indexed documents in the record with each of the Board's corresponding findings of fact and conclusions of law.

# V. Takings



- Just Compensation Clause (5th Amend. U.S. Constitution): “... nor shall private property be taken for public use, without just compensation.”
- Perception of private property rights v. legal parameters of private property rights
- Extremely limited application of two *per se* takings rules:
  - **Physical Takings** - *Loretto v. Teleprompter Manhattan*, 458 U.S. 419, 421 (1982) – “Permanent physical occupation of an owner's property authorized by government constitutes a ‘taking’ of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution.”
  - **Loss of All Economically Viable Use** – *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (U.S. 1992) – “When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”

# *Penn Central* Multi-factor Inquiry



1. “Substantially Advances Legitimate Government Purpose”
  - NO LONGER A TAKINGS ANALYSIS (*Lingle v. Chevron, 2005*)
2. Character of the Harm – Physical taking?
3. Distinct Investment-Backed Expectations
  - The fact that the current owner purchased the property after the regulations were enacted is no longer a bar to bringing a takings claim (*Palazzolo v. Rhode Island, 2001*)
4. Diminution in Value
  - *McElwain, 248 Mont. 231 (1991)* (2/3 reduction in value of property not itself sufficient to constitute takings)
  - Outlier -- *Knight v. City of Billings, 197 Mont. 165, 173 (1982)* (20-30% reduction in value of the properties sufficient to constitute takings, but issues of physical takings involved).

# Exactions



- Courts apply heightened scrutiny in situations where governing body requesting something from owner in return for issuance of permit
  - In 9<sup>th</sup> Circuit, applies to condition of land dedication only – *McClung v. City of Sumner*, 2008)
- Must establish nexus between the condition imposed and the impact of the development. *Nollan v. California Coastal Commission* (1987).
- Must show rough proportionality between the extent of the impact and the condition imposed. *Dolan v. City of Tigard* (1994).

# *Neighborhoods by Design v. City of Missoula,* 4<sup>th</sup> Judicial District (March 15, 2010)



- Plaintiff sought annexation and approval of 33 lot subdivision adjacent to the Clark Fork River
- City approved subdivision subject to 36 conditions
- Plaintiff challenged four of the conditions as arbitrary and capricious, in violation of the Subdivision Act, and unconstitutional taking (all but #19):
  - ✦ Public access easement for trail along southern boundary of subdivision (#12)
  - ✦ Public access easement for trail along river (#15)
  - ✦ Private common area must be converted to public access easement (#17)
  - ✦ Provide specific development envelopes for each lot (#19)
- City admitted “the four conditions were not intended to address or mitigate impacts created by the subdivision.”

**QUESTIONS????**

# **MONTANA COMMUNITY TECHNICAL ASSISTANCE PROGRAM**

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