

SENATE BILL NO. 174

INTRODUCED BY G. HERTZ, M. BLASDEL, S. FITZPATRICK, T. GAUTHIER, S. BERGLEE, W. GALT, C.

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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO THE REVIEW AND APPROVAL OF A SUBDIVISION; PROVIDING ADDITIONAL CLARIFICATION OF THE CONDITIONS FOR SUBDIVISION REGULATIONS APPROVAL; PROVIDING THAT THE CONDITIONS OF A CONDITIONALLY APPROVED SUBDIVISION MUST BE CLEARLY DEFINED; AMENDING SECTIONS 76-3-501, 76-3-504, 76-3-604, ~~AND 76-3-608, AND 76-3-620~~, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE ~~AND AN~~ APPLICABILITY PROVISION."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 76-3-501, MCA, is amended to read:

"76-3-501. Local subdivision regulations. (1) The governing body of every county, city, and town shall adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for:

- (1)(a) the orderly development of their jurisdictional areas;
- (2)(b) the coordination of roads within subdivided land with other roads, both existing and planned;
- (3)(c) the dedication of land for roadways and for public utility easements;
- (4)(d) the improvement of roads;
- (5)(e) the provision of adequate open spaces for travel, light, air, and recreation;
- (6)(f) the provision of adequate transportation, water, and drainage;
- (7)(g) subject to the provisions of 76-3-511, the regulation of sanitary facilities;
- (8)(h) the avoidance or minimization of congestion; and
- (9)(i) the avoidance of subdivisions that would involve unnecessary environmental degradation and danger of injury to health, safety, or welfare by reason of natural hazard, including but not limited to fire and wildland fire, or the lack of water, drainage, access, transportation, or other public services or that would

1 necessitate an excessive expenditure of public funds for the supply of the services.

2 ~~(2) Conditions required for the approval of a subdivision must:~~

3 ~~(a) be limited to a defined purpose or objective;~~

4 ~~(b) identify a specific, documentable, and clearly defined purpose or objective related to the PRIMARY~~
 5 ~~criteria set forth in 7-6-3-608(3) (a) THAT FORMS THE BASIS FOR THE CONDITION ;~~

6 ~~(c) be narrowly tailored to achieve each defined purpose or objective; and~~

7 ~~(d) use the least restrictive means to achieve the purpose or objective.~~

8 ~~(3) Except as otherwise provided in subsection (2), additional restrictions governing a subdivision~~
 9 ~~must be set forth in the governing documents of the subdivision, which may include:~~

10 ~~(a) homeowners' association formation documents;~~

11 ~~(b) covenants, conditions, and restrictions;~~

12 ~~(c) architectural or design guidelines; and~~

13 ~~(d) other homeowners' association rules.~~

14 ~~(4) (3) — Unless otherwise provided by law, the governing body and administrative personnel of a~~
 15 ~~county, city, or town may not have review or approval authority of the governing documents OF THE SUBDIVISION,~~
 16 ~~or OF amendments TO THE GOVERNING DOCUMENTS, unless the governing documents directly and materially~~
 17 ~~impact a condition of subdivision approval.~~

18 ~~(4)(2) ANYTHING ANY ACTION THAT IS NOT SPECIFICALLY PROHIBITED IN THE CONDITIONS OF SUBDIVISION~~
 19 ~~APPROVAL IS SPECIFICALLY ALLOWED OR IS OTHERWISE SUBJECT TO ADDITIONAL RESTRICTIONS THAT MAY BE~~
 20 ~~PROVIDED IN THE GOVERNING DOCUMENTS OF THE SUBDIVISION AND APPLICABLE ZONING REGULATIONS.~~

21 ~~(3) IF A LOCAL GOVERNMENT HAS HISTORICALLY INTERPRETED AND ENFORCED OR CHOSEN NOT TO ENFORCE~~
 22 ~~A CONDITION OF SUBDIVISION APPROVAL TO THE BENEFIT OF A PARCEL OWNER, THE LOCAL GOVERNMENT MAY NOT~~
 23 ~~UNDERTAKE A DIFFERENT INTERPRETATION OR ENFORCEMENT ACTION AGAINST A SIMILARLY SITUATED PARCEL OWNER~~
 24 ~~IN THE SAME SUBDIVISION."~~

25

26 **Section 2.** Section 76-3-504, MCA, is amended to read:

27 **"76-3-504. Subdivision regulations -- contents.** (1) The subdivision regulations adopted under this
 28 chapter must comply with the requirements provided for in 76-3-501 and, at a minimum:

- 1 (a) list the materials that must be included in a subdivision application in order for the application to be
2 determined to contain the required elements for the purposes of the review required in 76-3-604(1);
- 3 (b) except as provided in 76-3-509, 76-3-609, or 76-3-616, require the subdivider to submit to the
4 governing body an environmental assessment as prescribed in 76-3-603;
- 5 (c) establish procedures consistent with this chapter for the submission and review of subdivision
6 applications and amended applications;
- 7 (d) prescribe the form and contents of preliminary plats and the documents to accompany final plats;
- 8 (e) provide for the identification of areas that, because of natural or human-caused hazards, are
9 unsuitable for subdivision development. The regulations must prohibit subdivisions in these areas unless the
10 hazards can be eliminated or overcome by approved construction techniques or other mitigation measures
11 authorized under 76-3-608(4) and (5). Approved construction techniques or other mitigation measures may not
12 include building regulations as defined in 50-60-101 other than those identified by the department of labor and
13 industry as provided in 50-60-901.
- 14 (f) prohibit subdivisions for building purposes in areas located within the floodway of a flood of 100-
15 year frequency, as defined by Title 76, chapter 5, or determined to be subject to flooding by the governing body;
- 16 (g) prescribe standards for:
- 17 (i) the design and arrangement of lots, streets, and roads;
- 18 (ii) grading and drainage;
- 19 (iii) subject to the provisions of 76-3-511, water supply and sewage and solid waste disposal that meet
20 the:
- 21 (A) regulations adopted by the department of environmental quality under 76-4-104 for subdivisions
22 that will create one or more parcels containing less than 20 acres; and
- 23 (B) standards provided in 76-3-604 and 76-3-622 for subdivisions that will create one or more parcels
24 containing 20 acres or more and less than 160 acres; and
- 25 (iv) the location and installation of public utilities;
- 26 (h) provide procedures for the administration of the park and open-space requirements of this
27 chapter;
- 28 (i) provide for the review of subdivision applications by affected public utilities and those agencies of

1 local, state, and federal government identified during the preapplication consultation conducted pursuant to
2 subsection (1)(q) or those having a substantial interest in a proposed subdivision. A public utility or agency
3 review may not delay the governing body's action on the application beyond the time limits specified in this
4 chapter, and the failure of any agency to complete a review of an application may not be a basis for rejection of
5 the application by the governing body.

6 (j) when a subdivision creates parcels with lot sizes averaging less than 5 acres, require the
7 subdivider to:

8 (i) reserve all or a portion of the appropriation water rights owned by the owner of the land to be
9 subdivided and transfer the water rights to a single entity for use by landowners within the subdivision who have
10 a legal right to the water and reserve and sever any remaining surface water rights from the land;

11 (ii) if the land to be subdivided is subject to a contract or interest in a public or private entity formed to
12 provide the use of a water right on the subdivision lots, establish a landowner's water use agreement
13 administered through a single entity that specifies administration and the rights and responsibilities of
14 landowners within the subdivision who have a legal right and access to the water; or

15 (iii) reserve and sever all surface water rights from the land;

16 (k) (i) except as provided in subsection (1)(k)(ii), require the subdivider to establish ditch easements
17 in the subdivision that:

18 (A) are in locations of appropriate topographic characteristics and sufficient width to allow the physical
19 placement and unobstructed maintenance of open ditches or belowground pipelines for the delivery of water for
20 irrigation to persons and lands legally entitled to the water under an appropriated water right or permit of an
21 irrigation district or other private or public entity formed to provide for the use of the water right on the
22 subdivision lots;

23 (B) are a sufficient distance from the centerline of the ditch to allow for construction, repair,
24 maintenance, and inspection of the ditch; and

25 (C) prohibit the placement of structures or the planting of vegetation other than grass within the ditch
26 easement without the written permission of the ditch owner.

27 (ii) Establishment of easements pursuant to this subsection (1)(k) is not required if:

28 (A) the average lot size is 1 acre or less and the subdivider provides for disclosure, in a manner

1 acceptable to the governing body, that adequately notifies potential buyers of lots that are classified as irrigated
2 land and may continue to be assessed for irrigation water delivery even though the water may not be
3 deliverable; or

4 (B) the water rights are removed or the process has been initiated to remove the water rights from the
5 subdivided land through an appropriate legal or administrative process and if the removal or intended removal
6 is denoted on the preliminary plat. If removal of water rights is not complete upon filing of the final plat, the
7 subdivider shall provide written notification to prospective buyers of the intent to remove the water right and
8 shall document that intent, when applicable, in agreements and legal documents for related sales transactions.

9 (I) require the subdivider, unless otherwise provided for under separate written agreement or filed
10 easement, to file and record ditch easements for unobstructed use and maintenance of existing water delivery
11 ditches, pipelines, and facilities in the subdivision that are necessary to convey water through the subdivision to
12 lands adjacent to or beyond the subdivision boundaries in quantities and in a manner that are consistent with
13 historic and legal rights;

14 (m) require the subdivider to describe, dimension, and show public utility easements in the
15 subdivision on the final plat in their true and correct location. The public utility easements must be of sufficient
16 width to allow the physical placement and unobstructed maintenance of public utility facilities for the provision of
17 public utility services within the subdivision.

18 (n) establish whether the governing body, its authorized agent or agency, or both will hold public
19 hearings;

20 (o) establish procedures describing how the governing body or its agent or agency will address
21 information presented at the hearing or hearings held pursuant to 76-3-605 and 76-3-615;

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

26 (q) establish a preapplication process that:

27 (i) requires a subdivider to meet with the authorized agent or agency, other than the governing body,
28 that is designated by the governing body to review subdivision applications prior to the subdivider submitting

1 the application;

2 (ii) requires, for informational purposes only, identification of the state laws, local regulations, and
3 growth policy provisions, if a growth policy has been adopted, that may apply to the subdivision review process;

4 (iii) requires a list to be made available to the subdivider of the public utilities, those agencies of local,
5 state, and federal government, and any other entities that may be contacted for comment on the subdivision
6 application and the timeframes that the public utilities, agencies, and other entities are given to respond. If,
7 during the review of the application, the agent or agency designated by the governing body contacts a public
8 utility, agency, or other entity that was not included on the list originally made available to the subdivider, the
9 agent or agency shall notify the subdivider of the contact and the timeframe for response.

10 (iv) requires that a preapplication meeting take place no more than 30 days from the date that the
11 authorized agent or agency receives a written request for a preapplication meeting from the subdivider; and

12 (v) establishes a time limit after a preapplication meeting by which an application must be submitted;

13 (r) require that the written decision required by 76-3-620 must be provided to the applicant within 30
14 working days following a decision by the governing body to approve, conditionally approve, or deny a
15 subdivision;

16 (s) establish criteria for reviewing an area, regardless of its size, that provides or will provide multiple
17 spaces for recreational camping vehicles or mobile homes.

18 (2) In order to accomplish the purposes described in 76-3-501, the subdivision regulations adopted
19 under 76-3-509 and this section may include provisions that are consistent with this section that promote cluster
20 development."

21

22 **SECTION 3. SECTION 76-3-604, MCA, IS AMENDED TO READ:**

23 **"76-3-604. Review of subdivision application -- review for required elements and sufficiency of**

24 **information.** (1) (a) A subdivision application is considered to be received on the date of delivery to the
25 reviewing agent or agency and when accompanied by the review fee submitted as provided in 76-3-602.

26 (b) Within 5 working days of receipt of a subdivision application, the reviewing agent or agency shall
27 determine whether the application contains all of the listed materials as required by 76-3-504(1)(a) and shall
28 notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's

1 or agency's determination. If the reviewing agent or agency determines that elements are missing from the
2 application, the reviewing agent or agency shall identify those elements in the notification.

3 (2) (a) Within 15 working days after the reviewing agent or agency notifies the subdivider or the
4 subdivider's agent that the application contains all of the required elements as provided in subsection (1), the
5 reviewing agent or agency shall determine whether the application and required elements contain detailed,
6 supporting information that is sufficient to allow for the review of the proposed subdivision under the provisions
7 of this chapter and the local regulations adopted pursuant to this chapter and shall notify the subdivider or, with
8 the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

9 (b) If the reviewing agent or agency determines that information in the application is not sufficient to
10 allow for review of the proposed subdivision, the reviewing agent or agency shall identify the insufficient
11 information in its notification.

12 (c) A determination that an application contains sufficient information for review as provided in this
13 subsection (2) does not ensure that the proposed subdivision will be approved or conditionally approved by the
14 governing body and does not limit the ability of the reviewing agent or agency or the governing body to request
15 additional information during the review process.

16 (3) The time limits provided in subsections (1) and (2) apply to each submittal of the application until:

17 (a) a determination is made that the application contains the required elements and sufficient
18 information; and

19 (b) the subdivider or the subdivider's agent is notified.

20 (4) After the reviewing agent or agency has notified the subdivider or the subdivider's agent that an
21 application contains sufficient information as provided in subsection (2), the governing body shall approve,
22 conditionally approve, or deny the proposed subdivision within 60 working days or 80 working days if the
23 proposed subdivision contains 50 or more lots, based on its determination of whether the application conforms
24 to the provisions of this chapter and to the local regulations adopted pursuant to this chapter, unless:

25 (a) the subdivider and the reviewing agent or agency agree to an extension or suspension of the
26 review period, not to exceed 1 year; or

27 (b) a subsequent public hearing is scheduled and held as provided in 76-3-615.

28 (5) (a) If the governing body fails to comply with the time limits under subsection (4), the governing

1 body shall pay to the subdivider a financial penalty of \$50 per lot per month or a pro rata portion of a month, not
2 to exceed the total amount of the subdivision review fee collected by the governing body for the subdivision
3 application, until the governing body denies, approves, or conditionally approves the subdivision.

4 (b) The provisions of subsection (5)(a) do not apply if the review period is extended or suspended
5 pursuant to subsection (4).

6 (6) If the governing body denies or conditionally approves the proposed subdivision, it shall send the
7 subdivider a letter, with the appropriate signature, that complies with the provisions of 76-3-620.

8 (7) (a) The governing body shall collect public comment submitted at a hearing or hearings regarding
9 the information presented pursuant to 76-3-622 and shall make any comments submitted or a summary of the
10 comments submitted available to the subdivider within 30 days after conditional approval or approval of the
11 subdivision application and preliminary plat.

12 (b) The subdivider shall, as part of the subdivider's application for sanitation approval, forward the
13 comments or the summary provided by the governing body to the:

14 (i) reviewing authority provided for in Title 76, chapter 4, for subdivisions that will create one or more
15 parcels containing less than 20 acres; and

16 (ii) local health department or board of health for proposed subdivisions that will create one or more
17 parcels containing 20 acres or more and less than 160 acres.

18 (8) (a) For a proposed subdivision that will create one or more parcels containing less than 20 acres,
19 the governing body may require approval by the department of environmental quality as a condition of approval
20 of the final plat.

21 (b) For a proposed subdivision that will create one or more parcels containing 20 acres or more, the
22 governing body may condition approval of the final plat upon the subdivider demonstrating, pursuant to 76-3-
23 622, that there is an adequate water source and at least one area for a septic system and a replacement
24 drainfield for each lot.

25 (9) (a) Review and approval, conditional approval, or denial of a proposed subdivision under this
26 chapter may occur only under those regulations in effect at the time a subdivision application is determined to
27 contain sufficient information for review as provided in subsection (2).

28 (b) If regulations change during the review periods provided in subsections (1) and (2), the

1 determination of whether the application contains the required elements and sufficient information must be
 2 based on the new regulations.

3 (10) Unless otherwise provided by law, the governing body may review but does not have approval
 4 authority of the governing documents of the subdivision or amendments to the governing documents unless the
 5 governing documents directly and materially impact a condition of subdivision approval."

6

7 **Section 4.** Section 76-3-608, MCA, is amended to read:

8 **"76-3-608. Criteria for local government review.** (1) The basis for the governing body's decision to
 9 approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application,
 10 preliminary plat, applicable environmental assessment, public hearing, planning board recommendations, or
 11 additional information demonstrates that development of the proposed subdivision meets the requirements of
 12 this chapter. A governing body may not deny approval of a proposed subdivision based solely on the
 13 subdivision's impacts on educational services or based solely on parcels within the subdivision having been
 14 designated as wildland-urban interface parcels under 76-13-145.

15 (2) The governing body shall issue written findings of fact that weigh the criteria in subsection (3), as
 16 applicable.

17 (3) A subdivision proposal must undergo review for the following primary criteria:

18 (a) except when the governing body has established an exemption pursuant to subsection (6) of this
 19 section or except as provided in 76-3-509, 76-3-609(2) or (4), or 76-3-616, the specific, documentable, and
 20 clearly defined impact on ~~agriculture, agricultural water user facilities active agricultural production~~
 21 AGRICULTURE, AGRICULTURAL WATER USER FACILITIES, local services, the natural environment, wildlife, wildlife
 22 habitat, and public health and safety;

23 (b) compliance with:

24 (i) the survey requirements provided for in part 4 of this chapter;

25 (ii) the local subdivision regulations provided for in part 5 of this chapter; and

26 (iii) the local subdivision review procedure provided for in this part;

27 (c) the provision of easements within and to the proposed subdivision for the location and installation
 28 of any planned utilities; and

1 (d) the provision of legal and physical access to each parcel within the proposed subdivision and the
2 required notation of that access on the applicable plat and any instrument of transfer concerning the parcel.

3 (4) The governing body may require the subdivider to design the proposed subdivision to reasonably
4 minimize potentially significant adverse impacts identified through the review required under subsection (3).
5 Pursuant to ~~76-3-504~~ 76-3-620, The the governing body shall issue written findings to justify the reasonable
6 mitigation required under this subsection (4).

7 (5) (a) In reviewing a proposed subdivision under subsection (3) and when requiring mitigation under
8 subsection (4), a governing body may not unreasonably restrict a landowner's ability to develop land, but it is
9 recognized that in some instances the ~~unmitigated~~ impacts of a proposed development may be ~~unacceptable~~
10 DEEMED UMMITIGABLE and will preclude approval of the subdivision.

11 (b) When requiring mitigation under subsection (4) and consistent with ~~76-3-504~~ 76-3-620, a
12 governing body shall consult with the subdivider and shall give due weight and consideration to the expressed
13 preference of the subdivider.

14 (6) A governing body may conditionally approve or deny a proposed subdivision as a result of the
15 water and sanitation information provided pursuant to 76-3-622 or public comment received pursuant to 76-3-
16 604 on the information provided pursuant to 76-3-622 only if the conditional approval or denial is based on
17 existing subdivision, zoning, or other regulations that the governing body has the authority to enforce.

18 (7) A governing body may not require as a condition of subdivision approval that a property owner
19 waive a right to protest the creation of a special improvement district or a rural improvement district for capital
20 improvement projects that does not identify the specific capital improvements for which protest is being waived.
21 A waiver of a right to protest may not be valid for a time period longer than 20 years after the date that the final
22 subdivision plat is filed with the county clerk and recorder.

23 (8) A governing body may not approve a proposed subdivision if any of the features and
24 improvements of the subdivision encroach onto adjoining private property in a manner that is not otherwise
25 provided for under chapter 4 or this chapter or if the well isolation zone of any proposed well to be drilled for the
26 proposed subdivision encroaches onto adjoining private property unless the owner of the private property
27 authorizes the encroachment. For the purposes of this section, "well isolation zone" has the meaning provided
28 in 76-4-102.

1 (9) If a federal or state governmental entity submits a written or oral comment or an opinion regarding
 2 wildlife, wildlife habitat, or the natural environment relating to a subdivision application for the purpose of
 3 assisting a governing body's review, the comment or opinion may be included in the governing body's written
 4 statement under 76-3-620 only if the comment or opinion provides scientific information or a published study
 5 that supports the comment or opinion. A governmental entity that is or has been involved in an effort to acquire
 6 or assist others in acquiring an interest in the real property identified in the subdivision application shall disclose
 7 that the entity has been involved in that effort prior to submitting a comment, an opinion, or information as
 8 provided in this subsection.

9 (10) Findings of fact by the governing body concerning whether the development of the proposed
 10 subdivision meets the requirements of this chapter must be based on the record as a whole. The governing
 11 body's findings of fact must be sustained unless they are arbitrary, capricious, or unlawful."
 12

13 **SECTION 5. SECTION 76-3-620, MCA, IS AMENDED TO READ:**

14 **"76-3-620. Review requirements -- written statement.** (1) In addition to the requirements of 76-3-
 15 604 and 76-3-609, following any decision by the governing body to deny or conditionally approve a proposed
 16 subdivision, the governing body shall, in accordance with the time limit established in 76-3-504(1)(r), prepare a
 17 written statement that:

18 (a) must be provided to the applicant;

19 (b) ~~that~~ must be made available to the public, ~~and that~~;

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

21 ~~(2)(d)~~ (d) identifies the regulations and statutes that are used in reaching the decision ~~to deny or impose~~
 22 ~~conditions~~ and explains how they apply to the basis of the decision ~~to deny or impose conditions~~;

23 ~~(3)(e)~~ (e) provides the facts and conclusions that the governing body relied upon in making ~~its the~~
 24 ~~decision to deny or impose conditions~~ and references documents, testimony, or other materials that form the
 25 basis of the decision; and

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

28 (2) If the governing body conditionally approves the proposed subdivision, each condition required for

1 subdivision approval must identify a specific, documentable, and clearly defined purpose or objective related to
2 the primary criteria set forth in 76-3-608(3) that forms the basis for the condition."

3

4 NEW SECTION. Section 6. Effective date. [This act] is effective on passage and approval.

5

6 ~~NEW SECTION. Section 5. Applicability. [This act] applies to all currently approved subdivisions~~
7 ~~and future subdivision applications. If any existing conditions of subdivision approval are in conflict with [this~~
8 ~~act], the homeowners' association or developer may petition the appropriate local governmental entity for~~
9 ~~modifications to the conditions to reflect the changes set forth in [this act].~~

10

- END -