

SENATE BILL NO. 351

INTRODUCED BY G. PERRY

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE SUBDIVISION LAWS; CLARIFYING THE PROCEDURES UNDER LOCAL SUBDIVISION REVIEW FOR IDENTIFYING AREAS THAT BECAUSE OF ACTUAL OR POTENTIAL NATURAL OR HUMAN-CAUSED HAZARDS ARE UNSUITABLE FOR SUBDIVISION DEVELOPMENT; REQUIRING THE DEPARTMENT OF ENVIRONMENTAL QUALITY TO ESTABLISH LISTS OF CERTAIN CONTAMINATED SITES; CLARIFYING PROCEDURES FOR LOCAL GOVERNMENT APPROVAL OF SUBDIVISIONS IN AREAS WITH CONTAMINATION; REQUIRING THE DEPARTMENT OF ENVIRONMENTAL QUALITY TO ADOPT RULES TO ADDRESS ACTUAL OR POTENTIAL NATURAL OR HUMAN-CAUSED HAZARDS IN PROPOSED SUBDIVISIONS THAT ARE EXEMPT FROM LOCAL GOVERNMENT REVIEW; AND AMENDING SECTIONS 76-3-504, 76-3-608, AND 76-4-104, MCA."

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

NEW SECTION. **Section 1. Listing of contaminated sites.** (1) The department shall maintain lists of the following categories of sites:

- (a) sites that the department has determined are abandoned mine sites pursuant to Title 82, chapter 4;
 - (b) sites on the national priorities list maintained by the United States environmental protection agency pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 through 9675;
 - (c) sites under permit or license or under postclosure restrictions pursuant to Title 75, chapter 10, part 2 or 4;
 - (d) sites at which the release of a regulated substance, as defined in 75-11-503, has occurred from a petroleum storage tank, as defined in 75-11-302, or from an underground storage tank, as defined in 75-11-503, and the release has not been categorized as resolved in accordance with Title 75, chapter 11, part 5, and rules adopted under that part; and
 - (e) sites at which the department is pursuing remediation of ground water contamination under Title 75, chapter 5.
- (2) The department shall remove a site from a list maintained pursuant to subsection (1) if it determines

1 that the site no longer meets the criteria in subsection (1). However, the department shall maintain a list of those
2 sites that have been removed from a list maintained under 75-10-704 or subsection (1) of this section, if
3 contamination remains above levels that would allow for unrestricted use or if institutional controls or engineering
4 controls are necessary to prevent exposure to or release of contamination.

5
6 **Section 2.** Section 76-3-504, MCA, is amended to read:

7 **"76-3-504. Subdivision regulations -- contents.** (1) The subdivision regulations adopted under this
8 chapter must, at a minimum:

9 (a) list the materials that must be included in a subdivision application in order for the application to be
10 determined to contain the required elements for the purposes of the review required in 76-3-604(1);

11 (b) except as provided in 76-3-210, 76-3-509, or 76-3-609, require the subdivider to submit to the
12 governing body an environmental assessment as prescribed in 76-3-603;

13 (c) establish procedures consistent with this chapter for the submission and review of subdivision
14 applications and amended applications;

15 (d) prescribe the form and contents of preliminary plats and the documents to accompany final plats;

16 (e) (i) provide for the identification of areas that, because of actual or potential natural or human-caused
17 hazards, including contamination by hazardous or deleterious substances, as defined in 75-10-701, are
18 unsuitable for subdivision development and prohibit subdivisions in these areas unless the hazards can be
19 eliminated or overcome by approved construction techniques or other mitigating actions or conditions;

20 (ii) require the subdivision application to include information that the subdivider may have about any
21 actual or potential hazards in the vicinity of the proposed subdivision, including any information regarding
22 contamination by hazardous or deleterious substances, as defined in 75-10-701, on the property. The application
23 must also disclose whether the proposed subdivision is on or may be affected by a site that is on the priority list
24 maintained pursuant to 75-10-704 or on a list maintained pursuant to [section 1].

25 (iii) for sites identified as having actual or potential natural or human-caused hazards, including
26 contamination by hazardous or deleterious substances, as defined in 75-10-701, provide for consultation with the
27 appropriate state agencies as to whether the hazards can be eliminated or overcome through approved
28 construction techniques or other mitigating actions or conditions;

29 (f) prohibit subdivisions for building purposes in areas located within the floodway of a flood of 100-year
30 frequency, as defined by Title 76, chapter 5, or determined to be subject to flooding by the governing body;

- 1 (g) prescribe standards for:
- 2 (i) the design and arrangement of lots, streets, and roads;
- 3 (ii) grading and drainage;
- 4 (iii) subject to the provisions of 76-3-511, water supply and sewage and solid waste disposal that meet
- 5 the:
- 6 (A) regulations adopted by the department of environmental quality under 76-4-104 for subdivisions that
- 7 will create one or more parcels containing less than 20 acres; and
- 8 (B) standards provided in 76-3-604 and 76-3-622 for subdivisions that will create one or more parcels
- 9 containing 20 acres or more and less than 160 acres; and
- 10 (iv) the location and installation of public utilities;
- 11 (h) provide procedures for the administration of the park and open-space requirements of this chapter;
- 12 (i) provide for the review of subdivision applications by affected public utilities and those agencies of
- 13 local, state, and federal government identified during the preapplication consultation conducted pursuant to
- 14 subsection (1)(q) or those having a substantial interest in a proposed subdivision. A public utility or agency review
- 15 may not delay the governing body's action on the application beyond the time limits specified in this chapter, and
- 16 the failure of any agency to complete a review of an application may not be a basis for rejection of the application
- 17 by the governing body.
- 18 (j) when a subdivision creates parcels with lot sizes averaging less than 5 acres, require the subdivider
- 19 to:
- 20 (i) reserve all or a portion of the appropriation water rights owned by the owner of the land to be
- 21 subdivided and transfer the water rights to a single entity for use by landowners within the subdivision who have
- 22 a legal right to the water and reserve and sever any remaining surface water rights from the land;
- 23 (ii) if the land to be subdivided is subject to a contract or interest in a public or private entity formed to
- 24 provide the use of a water right on the subdivision lots, establish a landowner's water use agreement
- 25 administered through a single entity that specifies administration and the rights and responsibilities of landowners
- 26 within the subdivision who have a legal right and access to the water; or
- 27 (iii) reserve and sever all surface water rights from the land;
- 28 (k) (i) except as provided in subsection (1)(k)(ii), require the subdivider to establish ditch easements in
- 29 the subdivision that:
- 30 (A) are in locations of appropriate topographic characteristics and sufficient width to allow the physical

1 placement and unobstructed maintenance of open ditches or belowground pipelines for the delivery of water for
2 irrigation to persons and lands legally entitled to the water under an appropriated water right or permit of an
3 irrigation district or other private or public entity formed to provide for the use of the water right on the subdivision
4 lots;

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

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

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

10 (A) the average lot size is 1 acre or less and the subdivider provides for disclosure, in a manner
11 acceptable to the governing body, that adequately notifies potential buyers of lots that are classified as irrigated
12 land and may continue to be assessed for irrigation water delivery even though the water may not be deliverable;
13 or

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

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

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

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

30 (o) establish procedures describing how the governing body or its agent or agency will address

1 information presented at the hearing or hearings held pursuant to 76-3-605 and 76-3-615;

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

6 (q) establish a preapplication process that:

7 (i) allows a subdivider to meet with the agent or agency, other than the governing body, that is
8 designated by the governing body to review subdivision applications prior to the subdivider submitting the
9 application;

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

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

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

20 (v) establishes a time limit after a preapplication meeting by which an application must be submitted as
21 provided in 76-3-604.

22 (2) In order to accomplish the purposes described in 76-3-501, the subdivision regulations adopted under
23 76-3-509 and this section may include provisions that are consistent with this section that promote cluster
24 development.

25 (3) The governing body may establish deadlines for submittal of subdivision applications."
26

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

28 **"76-3-608. Criteria for local government review.** (1) The basis for the governing body's decision to
29 approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application, preliminary
30 plat, applicable environmental assessment, public hearing, planning board recommendations, or additional

1 information demonstrates that development of the proposed subdivision meets the requirements of this chapter.
2 A governing body may not deny approval of a proposed subdivision based solely on the subdivision's impacts
3 on educational services.

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

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

7 (a) except when the governing body has established an exemption pursuant to subsection (6) of this
8 section or except as provided in 76-3-509 or in 76-3-609(2) or (4), the impact on agriculture, agricultural water
9 user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety;

10 (b) compliance with:

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

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

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

14 (c) the provision of easements for the location and installation of any planned utilities; ~~and~~

15 (d) the provision of legal and physical access to each parcel within the proposed subdivision and the
16 required notation of that access on the applicable plat and any instrument of transfer concerning the parcel; ~~and~~

17 (e) a prohibition of development in areas that are listed as contaminated under 75-10-704 or [section 1]
18 unless the hazards, including contamination by hazardous or deleterious substances, as defined in 75-10-701,
19 will be eliminated or overcome by mandatory approved construction techniques or other mandatory mitigating
20 actions or conditions that are imposed on the subdivider as a condition of subdivision approval.

21 (4) The governing body may require the subdivider to design the proposed subdivision to reasonably
22 minimize potentially significant adverse impacts identified through the review required under subsection (3). The
23 governing body shall issue written findings to justify the reasonable mitigation required under this subsection (4).

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

28 (b) When requiring mitigation under subsection (4), a governing body shall consult with the subdivider
29 and shall give due weight and consideration to the expressed preference of the subdivider.

30 (6) The governing body may exempt proposed subdivisions that are entirely within the boundaries of

1 designated geographic areas from the review criteria in subsection (3)(a) if all of the following requirements have
2 been met:

3 (a) the governing body has adopted a growth policy pursuant to chapter 1 that:

4 (i) addresses the criteria in subsection (3)(a);

5 (ii) evaluates the impact of development on the criteria in subsection (3)(a);

6 (iii) describes zoning regulations that will be implemented to address the criteria in subsection (3)(a); and

7 (iv) identifies one or more geographic areas where the governing body intends to authorize an exemption
8 from review of the criteria in subsection (3)(a); and

9 (b) the governing body has adopted zoning regulations pursuant to chapter 2, part 2 or 3, that:

10 (i) apply to the entire area subject to the exemption; and

11 (ii) address the criteria in subsection (3)(a), as described in the growth policy.

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

17 **Section 4.** Section 76-4-104, MCA, is amended to read:

18 **"76-4-104. Rules for administration and enforcement.** (1) The department shall, subject to the
19 provisions of 76-4-135, adopt reasonable rules, including adoption of sanitary standards, necessary for
20 administration and enforcement of this part.

21 (2) The rules and standards must provide the basis for approving subdivisions for various types of public
22 and private water supplies, sewage disposal facilities, storm water drainage ways, and solid waste disposal. The
23 rules and standards must be related to:

24 (a) size of lots;

25 (b) contour of land;

26 (c) porosity of soil;

27 (d) ground water level;

28 (e) distance from lakes, streams, and wells;

29 (f) type and construction of private water and sewage facilities; and

30 (g) other factors affecting public health and the quality of water for uses relating to agriculture, industry,

1 recreation, and wildlife.

2 (3) (a) Except as provided in subsection (3)(b), the rules must provide for the review of subdivisions by
3 a local department or board of health, as described in Title 50, chapter 2, part 1, if the local department or board
4 of health employs a registered sanitarian or a registered professional engineer and if the department certifies
5 under subsection (4) that the local department or board is competent to conduct the review.

6 (b) (i) Except as provided in 75-6-121 and subsection (3)(b)(ii) of this section, a local department or
7 board of health may not review public water supply systems, public sewage systems, or extensions of or
8 connections to these systems.

9 (ii) A local department or board of health may be certified to review subdivisions proposed to connect to
10 existing municipal water and wastewater systems previously approved by the department if no extension of the
11 systems is required.

12 (4) The department shall also adopt standards and procedures for certification and maintaining
13 certification to ensure that a local department or board of health is competent to review the subdivisions as
14 described in subsection (3).

15 (5) The department shall review those subdivisions described in subsection (3) if:

16 (a) a proposed subdivision lies within more than one jurisdictional area and the respective governing
17 bodies are in disagreement concerning approval of or conditions to be imposed on the proposed subdivision; or

18 (b) the local department or board of health elects not to be certified.

19 (6) The rules must further ~~provide for~~ address:

20 (a) providing the reviewing authority with a copy of the plat or certificate of survey subject to review under
21 this part and other documentation showing the layout or plan of development, including:

22 (i) total development area; and

23 (ii) total number of proposed dwelling units and structures requiring facilities for water supply or sewage
24 disposal;

25 (b) adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability
26 will be available to ensure an adequate supply of water for the type of subdivision proposed;

27 (c) evidence concerning the potability of the proposed water supply for the subdivision;

28 (d) adequate evidence that a sewage disposal facility is sufficient in terms of capacity and dependability;

29 (e) standards and technical procedures applicable to storm drainage plans and related designs, in order
30 to ensure proper drainage ways;

1 (f) standards and technical procedures applicable to sanitary sewer plans and designs, including soil
2 testing and site design standards for on-lot sewage disposal systems when applicable;

3 (g) standards and technical procedures applicable to water systems;

4 (h) standards and technical procedures applicable to solid waste disposal;

5 (i) criteria for granting waivers and deviations from the standards and technical procedures adopted
6 under subsections (6)(e) through (6)(h);

7 (j) evidence to establish that, if a public water supply system or a public sewage system is proposed,
8 provision has been made for the system and, if other methods of water supply or sewage disposal are proposed,
9 evidence that the systems will comply with state and local laws and regulations that are in effect at the time of
10 submission of the preliminary or final plan or plat; ~~and~~

11 (k) evidence to demonstrate that appropriate easements, covenants, agreements, and management
12 entities have been established to ensure the protection of human health and state waters and to ensure the
13 long-term operation and maintenance of water supply, storm water drainage, and sewage disposal facilities; ~~and~~

14 (l) for subdivisions that are exempt from review under Title 76, chapter 3, but that are subject to review
15 under this part:

16 (i) identification of areas that, because of actual or potential natural or human-caused hazards, including
17 contamination by hazardous or deleterious substances, as defined in 75-10-701, are unsuitable for subdivision
18 development. The rules must require the subdivision application to include information that the subdivider may
19 have about any actual or potential natural hazards in the vicinity of the proposed subdivision, including any
20 contamination by hazardous or deleterious substances, as defined in 75-10-701, on the property. The rules must
21 also require the applicant to disclose whether the proposed subdivision is on or may be affected by a site that
22 is on the priority list maintained pursuant to 75-10-704 or on a list maintained pursuant to [section 1].

23 (ii) and for sites that are identified as having actual or potential natural or human-caused hazards,
24 including any contamination by hazardous or deleterious substances, as defined in 75-10-701, consultation with
25 the appropriate state agencies as to whether the hazards can be eliminated or overcome through approved
26 construction techniques or other mitigating actions or conditions; and

27 (iii) elimination or mitigation of the hazard as a basis for denial or conditional approval of the application.

28 (7) If the reviewing authority is a local department or board of health, it shall notify the department of its
29 recommendation for approval or disapproval of the subdivision not later than 50 days from its receipt of the
30 subdivision application. The department shall make a final decision on the subdivision within 10 days after

1 receiving the recommendation of the local reviewing authority, but not later than 60 days after the submission of
2 a complete application, as provided in 76-4-125.

3 (8) Review and certification or denial of certification that a division of land is not subject to sanitary
4 restrictions under this part may occur only under those rules in effect when a complete application is submitted
5 to the reviewing authority, except that in cases in which current rules would preclude the use for which the lot was
6 originally intended, the applicable requirements in effect at the time the lot was recorded must be applied. In the
7 absence of specific requirements, minimum standards necessary to protect public health and water quality apply.

8 (9) The reviewing authority may not deny or condition a certificate of subdivision approval under this part
9 unless it provides a written statement to the applicant detailing the circumstances of the denial or condition
10 imposition. The statement must include:

11 (a) the reason for the denial or condition imposition;

12 (b) the evidence that justifies the denial or condition imposition; and

13 (c) information regarding the appeal process for the denial or condition imposition.

14 (10) The department may adopt rules that provide technical details and clarification regarding the water
15 and sanitation information required to be submitted under 76-3-622."

16
17 **NEW SECTION. Section 5. Codification instruction.** [Section 1] is intended to be codified as an
18 integral part of Title 76, chapter 4, part 1, and the provisions of Title 76, chapter 4, part 1, apply to [section 1].

19
20 **NEW SECTION. Section 6. Saving clause.** [This act] does not affect rights and duties that matured,
21 penalties that were incurred, or proceedings that were begun before [the effective date of this act].

22 - END -