



EXHIBIT 16
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HB 542

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Bill Memo

HB 542 – Revise Subdivision and Platting Act

Sponsor: Rep. John Esp

Hearing

House Local Government, Thursday, Feb. 17, 3 p.m., Rm 172

Bill Purpose

The purpose of this legislation is to clarify procedures applicable to subdivision application reviews, and to provide greater protections to applicants in the subdivision application review process. Applicable MCA provisions currently in force subject applicants to unnecessary delays as a result of local government attempts to extend statutorily-mandated time limits. Current law fails to protect applicants from baseless denials by not requiring any scientific support for agency opinions recommending denials. The current lack of standards in review procedures and hearings gives local government unfettered control over a process that deeply affects subdividers and local economies generally.

Local government has created multiple procedural hurdles that must be crossed before the statutorily-mandated five day “element” review period begins. These procedural hurdles violate statutory language specifying that the five day period begins when the application is submitted. Further delay results when local government characterizes evidence regarding mitigation as “new information,” requiring subsequent public comment periods and hearings.

In addition, local government has added grounds for denial beyond those listed in current law, including denial of subdivision applications based upon “cumulative impact.” Not only has local government created new grounds for denial, it has also over broadly interpreted existing review criteria, such as a subdivision’s impact on agriculture.

Currently, agency opinion letters relied upon by the governing body when deciding subdivision applications need not contain any scientific evidence supporting their recommendations. Together, these deficiencies put too much power to delay and ultimately deny subdivision applications in the hands of governing bodies without requiring that their denials are supported by scientific evidence.

This bill seeks to remedy this by 1) creating a “meeting for application submittal” process to commence element review and clarifying that the 5-day time limit for element review begins at the time an application is submitted; 2) clarifying “impact to agriculture” review criterion; 3) clarifying that evidence submitted by the subdivider regarding mitigation is not “new information,”; 4) prohibiting governing bodies from considering “cumulative impact” based on presumption of future development because this consideration is not included in the statutory list of criteria commissioners may consider; and 5) providing for recovery of reasonable attorney’s fees and costs upon successful appeal of a decision denying an application.

Analysis by Section:

Section 1. Section 76-3-604, MCA, is amended to read:

"76-3-604. Review of subdivision application -- review for required elements and sufficiency of information. (1) (a) ~~Within 5 working days of receipt of a subdivision application submitted~~ The

subdivider or the subdivider's agent shall contact the reviewing agent or agency to schedule a meeting for application submittal in accordance with any deadlines established pursuant to 76-3-504(3) and receipt of the review fee submitted as provided in 76-3-602; the reviewing agent or agency shall schedule and hold the meeting for application submittal within 10 working days of the subdivider's request. Within 5 working days after the date of the meeting for application submittal, the reviewing agent or agency shall determine whether the application contains all of the listed materials as required by 76-3-504(1)(a) and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency fails to schedule and hold the meeting for application submittal as provided in subsection (1)(a), the 5-working-day review period commences on the date of the receipt of the subdivision application by the reviewing agent or agency. The application is considered to be received on the date of delivery to the reviewing agent or agency. The date of delivery means the date the subdivision application is hand-delivered by the subdivider or the subdivider's agent to the reviewing agent or agency or the date of the return receipt if the subdivision application is delivered by certified mail, return receipt requested.

~~(b)~~(c) If the reviewing agent or agency determines that elements are missing from the application, the reviewing agent or agency shall identify those elements in the notification.

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

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

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

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

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

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

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

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

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

(5) (a) If the governing body fails to comply with the time limits under subsection (4), the governing body shall pay to the subdivider a financial penalty of \$50 per lot per month or a pro rata portion of a month, not to exceed the total amount of the subdivision review fee collected by the governing body for the subdivision application, until the governing body denies, approves, or conditionally approves the subdivision.

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

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

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

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

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

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

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

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

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

(b) If regulations change during the review periods provided in subsections (1) and (2), the determination of whether the application contains the required elements and sufficient information must be based on the new regulations."

Rationale:

The statute presently requires that within five working days of receiving the subdivision application and fees, the reviewing agent or agency shall determine whether the application contains all of the elements required by § 76-3-504(1)(a), and shall notify the subdivider of its determination. Application of the statute as currently written has been problematic in that local governments, through specific provisions in local subdivision application regulations, dictate the date upon which the five working day period is to commence.

For example, Missoula County's "County Major Subdivision Application," Exhibit 2B, section A(2) provides as follows:

"The subdivider shall schedule a meeting with the Case Planner to submit the formal application packet for Element Review. The meeting shall be scheduled within ten working days of the Case Planner and the subdivider's conversation regarding the element meeting request. *The Element Review period starts the day of the scheduled meeting with the Case Planner.* The subdivider has one year after the pre-application meeting to submit a formal Subdivision Application. Otherwise, a new subdivision pre-application meeting is required."

The language set forth above appears to violate the requirements of MCA 76-3-604(1)(a) in that it conditions the commencement of the five day element review period upon the scheduling of a meeting with a Case Planner. Often, the Case Planner delays these initial meetings for months at a

time, resulting in a delay of the filing date and thereby, delay of the commencement of element review. This delay often occurs despite subdividers' best efforts to schedule a meeting and commence the element review.

The amendments proposed will:

1. Subsection (1)(a) amendments allow a subdivider or subdivider's agent to request a "meeting for application submittal" with the reviewing agent or agency. This would be a new process that will facilitate the commencement of the element review process. The reviewing agent or agency must schedule and hold the meeting for application submittal within 10 working days of the subdivider's request. Including schedule *and* hold in the language will prevent the reviewing agent or agency from merely scheduling, within the 10-working-day time limit, a meeting at a future date. Once the meeting for application submittal has been held, the reviewing agent or agency has five working days to conduct element review.
2. New subsection (1)(b) allows an applicant, in the event that the reviewing agent or agency fails to schedule and hold the meeting for application submittal, to simply deliver the application to invoke a five working day element review.

Section 2. Section 76-3-608, MCA, is amended to read:

"76-3-608. Criteria for local government review -- information from governmental entity -- consideration of future subdivisions. (1) The basis for the governing body's decision to approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application, preliminary plat, applicable environmental assessment, public hearing, planning board recommendations, or additional information demonstrates that development of the proposed subdivision meets the requirements of this chapter. A governing body may not deny approval of a proposed subdivision based solely on the subdivision's impacts on educational services.

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

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

(a) except when the governing body has established an exemption pursuant to subsection (6) of this section or except as provided in 76-3-509, 76-3-609(2) or (4), or 76-3-616, the impact ~~on~~ of the proposed subdivision on agriculture surrounding agricultural operations, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety;

(b) compliance with:

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

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

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

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

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

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

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

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

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

(7) A governing body may not require as a condition of subdivision approval that a property owner waive a right to protest the creation of a special improvement district or a rural improvement district for capital improvement projects that does not identify the specific capital improvements for which protest is being waived. 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 subdivision plat is filed with the county clerk and recorder.

(8) If a federal, state, or local governmental entity submits a written comment, information, or an opinion regarding a subdivision application for the purpose of assisting a governing body's review of a subdivision application, the governmental entity shall provide a scientific, peer-reviewed report that supports the comment, information, or opinion. The governing body may not consider information from a governmental entity that is or has been involved in an effort to acquire or assist others in acquiring an interest in the real property identified in the subdivision application.

(9) A governing body may not consider the impact of a subdivision under review in conjunction with the impact of a future subdivision or subdivisions for which an application is pending or has not yet been filed."

Rationale:

Under MCA § 76-3-608(3), one primary criterion in subdivision application reviews is the subdivision's "impact on agriculture." This phrase is highly ambiguous and has caused much controversy. One example is Missoula County, in which various groups opposing development have appeared at subdivision hearings and argued that the phrase "impact to agriculture" means "economic impact to the price of agricultural commodities as a result of the conversion of the property from agricultural use to residential subdivision." Even if the owner of the property to be developed is unable to continue to farm the parcel profitably, these groups argue that the parcel should not be allowed to be developed if it has specific soil types, or agricultural production has previously occurred on the property. This overly-broad definition of "impact on agriculture" benefits no one, and therefore, we propose to clarify that the phrase "impact to agriculture" means "impact of the proposed subdivision on surrounding agricultural operations." This interpretation is consistent with the legislative history regarding the agriculture criterion whereby the enacting legislature viewed the criterion as necessary to mitigate the impact of development on surrounding agricultural operations.

Counties in Montana regularly solicit opinion letters from state agencies on the primary review criteria, in particular from Montana Fish, Wildlife, and Parks (FWP) regarding potential impacts on wildlife and wildlife habitat posed by any given subdivision application. There are no legislative guidelines whatsoever as to how such opinion letters are to be rendered. Likewise, there are no required protocols with respect to the evaluation of relevant data, journals, treatises or studies. Oftentimes, these opinions are based upon vague generalities made by individuals without requisite experience.

There is a need for a legislative enactment codifying specific requirements with respect to agency opinions in the subdivision application context. The amendment in subsection (8) would serve to protect affected applicants from arbitrary and capricious agency opinions not predicated upon sound scientific data. An inherent unfairness exists where FWP opinions can be offered for ulterior purposes, such as preventing development to serve conservation ends, when there is in fact no credible data

that the subdivision poses an adverse impact on wildlife or wildlife habitat that cannot be mitigated. The end result of commissioners relying upon unsubstantiated agency opinions is that a subdivider's application is denied by commissioners relying upon these opinions where no actual justification for denial exists. Unsubstantiated denials are particularly troubling because these denials often have negative economic consequences to Montana and its local communities, such as decreased jobs.

Proposed subsection (9) also seeks to limit the criteria that commissioners may consider to the criteria specifically listed in subsection (3)(a) by clarifying that "cumulative impact" may not be considered. While subsection 3(a) allows the governing body to consider the proposed subdivision's "impact" on agriculture, it does not authorize the governing body to consider "cumulative impact." Despite this, activists the governing body commonly rely upon a subdivision's "cumulative impact" to deny an application. Allowing subdivision denials on the basis of an undefined term not included in the allowable review criteria essentially allows local government to zone the property without enacting formal zoning regulations, which is clearly impermissible.

Section 3. Section 76-3-615, MCA, is amended to read:

"76-3-615. Subsequent hearings -- consideration of new information -- requirements for regulations. (1) The regulations adopted pursuant to 76-3-504(1)(o) must comply with the provisions of this section.

(2) The governing body shall determine whether public comments or documents presented to the governing body at a hearing held pursuant to 76-3-605 constitute:

(a) information or analysis of information that was presented at a hearing held pursuant to 76-3-605 that the public has had a reasonable opportunity to examine and on which the public has had a reasonable opportunity to comment; or

(b) new information regarding a subdivision application that has never been submitted as evidence or considered by either the governing body or its agent or agency at a hearing during which the subdivision application was considered.

(3) If the governing body determines that the public comments or documents constitute the information described in subsection (2)(b), the governing body may:

(a) approve, conditionally approve, or deny the proposed subdivision without basing its decision on the new information if the governing body determines that the new information is either irrelevant or not credible; or

(b) schedule or direct its agent or agency to schedule a subsequent public hearing for consideration of only the new information that may have an impact on the findings and conclusions that the governing body will rely upon in making its decision on the proposed subdivision.

(4) Information pertaining to mitigation by the subdivider pursuant to 76-3-608(4) may not be considered new information under subsection (2)(b) of this section.

~~(4)~~(5) If a public hearing is held as provided in subsection (3)(b), the 60-working-day review period required in 76-3-604(4) is suspended and the new hearing must be noticed and held within 45 days of the governing body's determination to schedule a new hearing. After the new hearing, the 60-working-day time limit resumes at the governing body's next scheduled public meeting for which proper notice for the public hearing on the subdivision application can be provided. The governing body may not consider any information regarding the subdivision application that is presented after the hearing when making its decision to approve, conditionally approve, or deny the proposed subdivision."

Rationale:

Where "new information" is submitted, significant delay results in the application process. Where a subdivider submits evidence of information regarding mitigation of impact, commissioners sometimes define such evidence as "new information," which triggers significant delays pursuant to subsection 76-3-615(4) (5). Evidence regarding mitigation should not be considered new information because it is

a response to impact concerns raised in the application hearing, and is not an attempt to present "fresh" evidence to the commissioners. Instead, mitigation evidence is an attempt to respond to local government's stated concerns in an ongoing dialogue. To classify evidence regarding mitigation as "new evidence," which necessarily results in delay, provides a disincentive for efficient and constructive dialogue between subdividers and local government.

Section 4. Section 76-3-625, MCA, is amended to read:

"76-3-625. Violations -- actions against governing body. (1) A person who has filed with the governing body an application for a subdivision under this chapter may bring an action in district court to sue the governing body to recover actual damages caused by a final action, decision, or order of the governing body or a regulation adopted pursuant to this chapter that is arbitrary or capricious.

(2) A party identified in subsection (3) who is aggrieved by a decision of the governing body to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat may, within 30 days from the date of the written decision, appeal to the district court in the county in which the property involved is located. The petition must specify the grounds upon which the appeal is made.

(3) The following parties may appeal under the provisions of subsection (2):

(a) the subdivider;

(b) a landowner with a property boundary contiguous to the proposed subdivision or a private landowner with property within the county or municipality where the subdivision is proposed if that landowner can show a likelihood of material injury to the landowner's property or its value;

(c) the county commissioners of the county where the subdivision is proposed; and

(d) (i) a first-class municipality, as described in 7-1-4111, if a subdivision is proposed within 3 miles of its limits;

(ii) a second-class municipality, as described in 7-1-4111, if a subdivision is proposed within 2 miles of its limits; and

(iii) a third-class municipality or a town, as described in 7-1-4111, if a subdivision is proposed within 1 mile of its limits.

(4) If a subdivider prevails on appeal to the district court, the district court shall award the subdivider reasonable costs and attorney fees.

~~(4)~~(5) For the purposes of this section, "aggrieved" means a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision."

Rationale:

In the event of a wrongful denial of a subdivision application, the subdivider is required under 76-3-625 to file an appeal with the district court in the county in which the property involved is located within 30 days from the date of the written denial. Unfortunately, the statute does not allow the subdivider to recover attorneys' fees in the event that a subdivider prevails in the district court action. This amendment allows a subdivider appealing a denial to recover reasonable costs and attorney fees where the district court finds the county improperly denied its application. If counties are aware that they are responsible for a subdivider's costs and attorney fees if the subdivider prevails on appeal, they will be further motivated to issue lawful, well-reasoned and well-substantiated decisions. This will also help to decrease district court caseloads by likely resulting in fewer appeals of decisions on subdivision applications.