

BRANDBORG+ ISSUES

BRANDBORG DECISION: Under the Ravalli Co. subdivision regulations, Planning Board is authorized to collect and analyze data, including receiving and considering public comments and holding hearings related to preliminary subdivision plats . After Planning Board hearing, County Commissioners approved the plat conditioned on obtaining additional ground water data by characterizing the need for the data as a "mitigating" factor.

* If duty is delegated by law to the local "planning board", the county commissioners had no authority to approve the subdivision. Conditional approval based on additional data:

- (a) unlawfully circumvented the Planning Board's authority; and
- (b) eliminated the public's right to comment in a public hearing before the Planning Board on any new data and expert recommendations based on that data.

Why is this Important?

1. Under current law, only one hearing on a preliminary subdivision plat is allowed;
2. Article II, sections 8 and 9, of the Montana Constitution, which provide:

Article II, section 9:

No person shall be deprived of the *right to examine documents or to observe the deliberations of all public bodies* or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. (emphasis added).

* Art. II, section 9, is self-executing...NO legislation is required to give it effect.

Regardless of the topic involved, the public gets to examine the actual documents used by the governing body in reaching its final decision. Ex. Bryan v. Yellowstone Co. School District, 2002 MT 264, 312 M 257 (2002).

Article II, section 8:

The public has a right to expect governmental agencies to afford *such reasonable opportunity for citizen participation* in the operation of the agencies prior to the final decision *as may be provided by law*. (emphasis added).

* The words "as may be provided by law" means that this provision is **NOT** self-executing. The Legislature has enacted law in Title 2, chapter 3, part 1, MCA, to implement this provision of the Constitution, including 2-3-103, MCA, which was amended in 2003 in House Bill No. 94.

How has HB 94 complicated the Brandborg decision?

2-3-103. Public participation -- governor to ensure guidelines adopted. (1) (a) Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public. ***The agenda for a meeting, as defined in 2-3-202, must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. Public comment received at a meeting must be incorporated into the official minutes of the meeting, as provided in 2-3-212.***

(b) For purposes of this section, "public matter" does not include contested case and other adjudicative proceedings.

(2) The governor shall ensure that each board, bureau, commission, department, authority, agency, or *officer of the* executive branch of the state adopts coordinated rules for its programs. The guidelines must provide policies and procedures to facilitate public participation in those programs, consistent with subsection (1). These guidelines must be adopted as rules and published in a manner so that the rules may be provided to a member of the public upon request. **(bolded added by HB 94; underlined for emphasis)**

Scenario Example: A Planning Board that by local regulations has authority to gather and analyze information and hold the public hearing on preliminary plat submits its final report to the Board of County Commissioners. The Board places the issue on its agenda for executive action. At the public meeting, however, a member of the public, pursuant to rights under 2-3-103, testifies and provides evidence that was not presented before the Planning Board at its hearing and is not part of the record given to the Co. Commissioners.

What should Commissioners do?

1. Ignore the Information? Evidence might be valid and critical to their decision.
2. Consider the New Evidence in Making its Decision? Public right to examine documents and reasonable opportunity to participate.
3. Send issue back to Planning Board ? One allowed hearing already completed.

Issue for Working Group: How to balance the right of the public to examine documents, that those documents represent best and most credible evidence, and have a reasonable opportunity to participate with the local governing body's right to know that the process has a predictable "end" or finality?

(See attachment)