

LAND USE PLANNING IN MONTANA: THE BASICS



Local Government Interim Committee
September 7, 2023

Police Power

- Power to adopt and enforce regulations that protect the public health, safety, and welfare. (*Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Freeman v. Board of Adjustment*, 97 Mont. 342, 352 (1934).)
- *Self-governing powers* may exercise any power, provide any services, or perform any functions not expressly prohibited by the constitution, law, or charter (Mont. Const., Art. XI, Section 6 and § 7-1-101, MCA) – Anaconda, Billings, Fort Benton, Great Falls, Helena, Missoula
- *General governing powers* limited to authority expressly granted to it by legislature

Types of Decisions

- **Legislative** actions – rules, standards, or policies of general applicability across the community – talk freely with all interested parties – deference to the local decisionmaker
 - Growth policy
 - Sign ordinance
 - Zoning ordinance
 - Subdivision regulations
- **Quasi-judicial** actions – applying those rules, standards, or policies to a particular property – no *ex parte* contact – stricter standard of review
 - Variance
 - Preliminary plat
 - Conditional use permit (CUP)

Types of Decisions, cont.

- **Administrative** (ministerial) actions - Application of legislative policies to specific property or land use based on clear and objective standards - no discretion involved – arbitrary and capricious standard when clear, objective standards
 - Sign permit
 - Compliance permit
 - Building permit
 - Subdivision exemptions

“By right” - a particular use is allowed without further discretionary review

- *NOT a reference to whether a decision is a taking of property*
- *NOT a reference to whether standards may be ignored*

Decisionmakers

- **City Council** – final decisionmakers on most land use decisions
 - Adopt Growth Policy, zoning ordinance, subdivision regulations
 - Make final decision on zoning amendments, preliminary and final plats, conditional use permits
 - May make final decision on variances and appeals from administrative decisions
- **Planning Board** – advisory body only
 - Recommend to council on growth policy and subdivisions
 - May be asked to make recommendations on other land use issues
 - May hold public hearings on legislative documents and quasi-judicial permits

Decisionmakers

- **Zoning Commission** – advisory body only
 - Recommend to council on zoning regulations, zoning map, zoning amendments
 - May be asked to make recommendations on other land use issues – typically conditional use permits, use classifications
 - May hold public hearings on quasi-judicial permits
- **Board of Adjustment** – advisory and/or final decisionmaker
 - Council may create BOA to hear administrative appeals and make special exceptions to the zoning ordinance
 - If final, appeal straight to District Court
 - Council can reserve to itself all or some of final decisions on matters that go to BOA.

Growth Policy

Montana Supreme Court:

“The preeminent planning tool is the comprehensive jurisdiction-wide development plan, which is today known as the growth policy... A growth policy essentially surveys land use as it exists and makes recommendations for future planning.”

Citizen Advocates v. City Council, 2006 MT 47, ¶ 20

Why have a Growth Policy?

1. Public process to create consensus about and support for the community's goals and how to achieve them.
2. Legal foundation for implementing the community's goals (zoning, subdivision review, downtown plans, design review, urban renewal, historic preservation, etc.)
3. Provide data and analysis to support quasi-judicial decisions regarding impacts and mitigation (minimize use of site-specific analysis and conditions).
4. Planning for capital improvements (water, sewer, streets, sidewalks, trails, parks, etc.)

Limitations on Growth Policies

- Not required; not a regulatory document (“A growth policy only acquires legal force by virtue of another law or regulation.” *Flathead Citizens for Quality Growth, Inc. v. Flathead County Bd. of Adjustment*, 2008 MT 1.)
- A governing body may not withhold, deny, or impose conditions on any land use approval based solely on compliance with a growth policy, BUT
- Local land use regulations must “substantially comply” with the growth policy. (*Little v. Flathead County* (1981) 193 Mont. 334; *North 93 Neighbors v. Flathead County*, 2006 MT 132.)
- One statute for all jurisdictions (Title 76, Chapter 1)

Growth Policies – Contents



Growth Policies – the Essentials



Statement about what the community/jurisdiction/area wants to be in the future

“A community maintaining quality embracing change” – C. Falls

“Anaconda-Deer Lodge will, as a Community, preserve our rich heritage and common values while retaining and enhancing our turn-of-the century image.”

Growth Policies – the Essentials



Broad, general expressions of principals or aspirations

“Support provision of housing that is safe, available, accessible, and affordable for all Helena residents.”

“Protect and maintain Cascade County’s rural character and the community’s historic relationship with natural resource development.”

“Capitalize on what makes Deer Lodge unique to increase visitation and the length of stay in downtown.”

Growth Policies – the Essentials



Obtainable, measurable steps to achieve a goal

“Replace Fred Burr Transmission Main.”

“Provide adaptable park and recreation facilities and activities designed for all ages and abilities that accommodate current and long-term recreation trends and needs.”

“Enforce the current community decay ordinance and revise the ordinance to better address Main Street buildings that have deteriorate to the point that they present a public safety hazard.”

Existing and Future:

- *Population and Housing*
 - Types, income levels, conditions, special populations
 - Short-term rentals and other transient population housing
 - Opportunities and constraints

- *Economic and social conditions*
 - Population and demographics of community
 - Local business sectors, labor market, wages, cost of living
 - Jobs-housing relationship
 - Existing and future business needs
 - Opportunities and constraints

Existing and Future:

- *Housing needs*
 - Types, income levels, conditions, special populations
 - Short-term rentals and other transient population housing
 - Opportunities and constraints
- *Local services and public facilities*
 - Water quality and supply
 - Wastewater and stormwater
 - Transportation and transit (multi-modal)
 - Solid waste
 - Law enforcement, fire protection, first response
 - Other municipal facilities – parks and recreation, government buildings, etc.

Existing and Future:

- *Natural resources*
 - Sand and gravel resources
 - Watershed protection
 - Forests and wildland fire potential
 - Agriculture and soils
 - Wildlife and wildlife habitat
- *Other:*
 - Historic resources
 - Neighborhood plans
 - Resiliency/disaster response
 - Capital improvements plan (CIP)

Existing and Future:

- *Land use (and map)*
 - Distribution, location, and extent of land use types
 - Density and intensity of residential, commercial, industrial, agricultural, open space and parks, public facilities, schools
 - Opportunities (population trends, public services, vacant land, lands good for redevelopment or increased densities, or lands for conservation, planning area)
 - Constraints (water supply, wastewater treatment, stormwater, traffic and parking capacity, wildlife, hazards, public services)

Other Components

- Timeline for implementation
- Conditions for amendments
- Timeline for review and updates
- Coordination and cooperation with other jurisdictions
- Define the primary criteria for subdivision review
- Evaluation and decision making with respect to the primary criteria
- Conducting public hearings on subdivisions

Zoning

What is Zoning?

- Zoning regulations direct the form and/or use of land and buildings.
- Most common method for implementing the goals and objectives of the growth policy.
- Apply to all tracts of record – existing or new.
- Flexible - can be crafted to meet each community's development goals.
- Counties and municipalities have separate zoning statutes – Title 76, Chapter 2, Parts 1 (citizen-initiated), 2 (governing body initiated), and 3 (municipal)

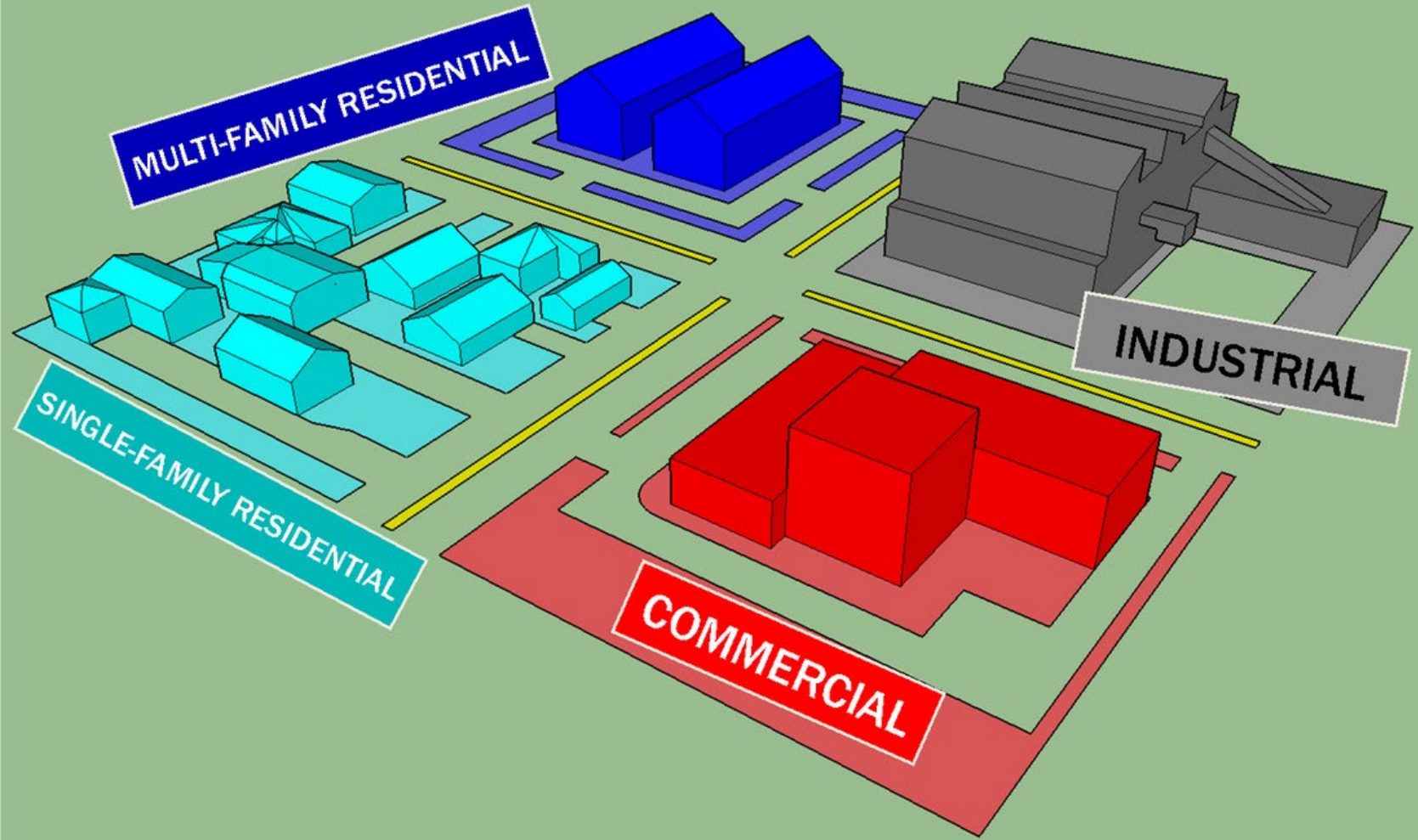
Zoning decisions

- Must be in “substantial compliance” with growth policy documents – vision, goals, objectives, policies
- Valid exercise of a municipality’s police power to protect the public health, safety, and welfare of a community. (*Euclid*; *Williams v Missoula Co.*, 2013 MT 243)
- Zoning and rezoning are legislative decisions “entitled to presumptions of validity and reasonableness.” (*Lake Co. First v Polson City Council*, 2009 MT 322).
- May extend zoning into extra-territorial area if growth policy includes the area and the county has not adopted zoning or subdivision regulations

Types of Zoning

- Euclidean (conventional) zoning
 - Traditional, use-based zoning
 - Uses by right, conditional, prohibited
 - Uses separated from other uses, minimal to no mixing
 - Development standards applied to control physical form and design
- Performance zoning
 - Regulates intensity of use or imposes standards to minimize impacts (hours, noise, parking, etc.) or meet community goals (jobs, housing units, etc.) - leaves design and use to developer
 - Allows greater mix of land use types so long as have similar externalities

Euclidean Zoning



Performance Zoning



Capacity Indicators

Progress of selected performance measurements.

Population

370

Existing

12,270

New

12,000

Target

Target Exceeded: 270

Households

200

Existing

6,626

New

6,500

Target

Target Exceeded: 126

Jobs

500

Existing

14,574

New

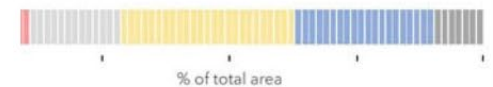
10,000

Target

Target Exceeded: 4,574

Building Space Use

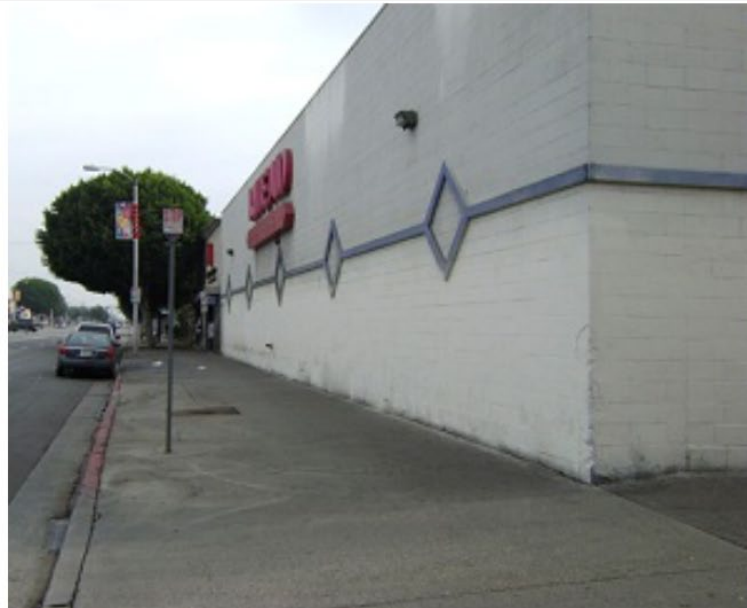
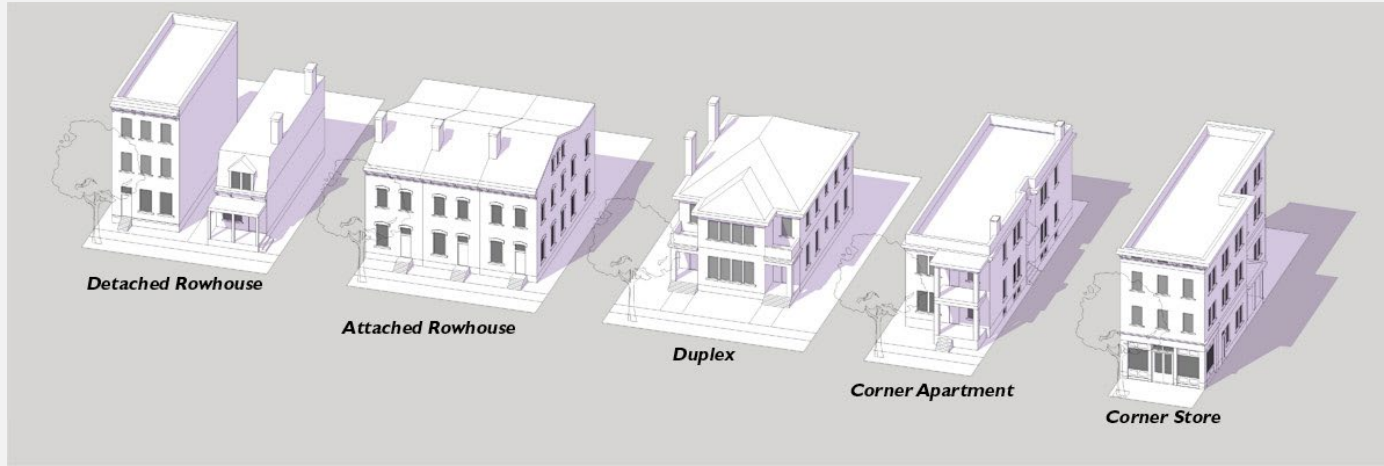
Bar chart showing the variety of total floor area per space use type.



Types of Zoning

- Form-based zoning
 - Addresses the physical form and layout of development and their relationship to public space
 - “Form influences function”
 - Use of graphics and visuals to guide development
 - Use is minimally or not regulated - regulations focus on minimum standards for location, size, height, and aesthetics of the building
- Hybrid zoning
 - Combination of any or all of the above – most common

Form-based zoning



Low criteria

When adopting or amending zoning regulations, must always meet the (now II) *Low criteria*:

1. Substantially complies with growth policy;
2. Safety from fire and other dangers;
3. Promotes public health, safety, and welfare;
4. Adequate transportation, water, sewer, schools, parks, and other public requirements;
5. Adequate light and air;
6. Effects on motorized and non-motorized transportation systems;

Lowe criteria

7. Promotes compatible urban growth;
8. Considers the character of the district;
9. Considers the peculiar suitability of the property for particular uses;
10. Conserves the value of buildings; and
11. Encourages the most appropriate use of land throughout the municipality.

(§ 76-2-304, MCA; *Lowe v. Missoula*, 165 Mont. 38, 41 (1974); *Lake Co. First v. Polson*, 2009 MT 322 (2009).)

Protest and Spot Zoning

- Amendments to municipal zoning can be protested by the owners of 25% or more of:
 - (a) the area of the lots included in any proposed change; or
 - (b) those lots or units located 150 feet from a lot included in a proposed change
- If sufficient protests, amendment can still be passed by two-thirds of the present and voting members of the city council
- County zoning now provides for voter override of zoning decision
- Watch out for illegal spot zoning (need to pass the three-part *Little* test, see *Plains Grains v Cascade County* (2010 MT 155)) – no illegal spot zoning if change is in substantial compliance with the growth policy

Details are up to the Community

- Allowable uses or forms in each district;
- Definitions;
- Development Standards, including:
 - Minimum or Maximum lot size
 - Lot coverage or floor-area ratio
 - Building and structure height
 - Setbacks
 - Parking requirements
 - Landscaping
 - Sign regulations

Variances

- Board of Adjustment hears variances from the zoning regulations
OR may make board *advisory only* and reserve final authority
- Relief from *strict compliance* with development standards:
setbacks, lot coverage, height, width
- Statute provides conjunctive grounds for variance:
 1. Must not be contrary to the public interest;
 2. A literal enforcement of the zoning ordinance must result in unnecessary hardship owing to conditions unique to the property;
and
 3. The spirit of the ordinance must be observed and substantial justice done.
- Variances are not intended to permit *uses* restricted by the zoning –
amend the regulation to either permit the use by right or review as
a conditional use

Conditional Use Permits

- Uses not permitted by right but that may still be appropriate in a zoning district under certain conditions or mitigation
- Can provide relief from strict requirements of the regulations for certain types of uses that create more land use impacts than permitted uses
- Provides detailed review and analysis for public and decision-makers consideration
- Final decisions on CUPs are made by the Council

Nonconforming

- Uses, structures, or lots that were lawful when regulation adopted but now does not conform to the regulations.
- Not illegal so long as in conformance with regulations before they changed - “legally nonconforming”
- Allowed to continue for certain time period (in Montana, typically without limit) unless or until they are expanded, abandoned, or destroyed.
- Legally nonconforming lots typically must be allowed to provide some use for landowner or may constitute taking of property

Interim Zoning

- Municipalities and counties may adopt an interim zoning ordinance to protect the public health, safety, and welfare as an urgency measure. (§ 76-2-306, MCA; *State ex rel. Diehl Co. v. Helena*, 181 Mont. 306 (1979).)
- May prohibit uses that may be in conflict with a contemplated zoning proposal the legislative body is considering or studying or intends to study within a reasonable time
- Must publish at least 7 days notice and hold hearing; not required to have second reading
- Different timelines for cities and counties – generally between 6 months to 1 year.

Getting Creative

- Density bonuses
- Historic resource protection
- Design guidelines or regulations
- Cluster development
- Mixed-use zones
- Prohibit ground floor office space
- Encouraging adaptive reuse
- Tiny homes
- Sign regulation
- Hillside regulations
- Minimum/maximum parking requirements
- Short-term rental regulations
- Marijuana regulations

Resources:

- CDBG Planning Grant – up to \$50,000 – opens next spring?
<https://comdev.mt.gov/Programs-and-Boards/Community-Development-Block-Grant-Program/Planning-Activities>
- Montana Main Street Program – technical assistance and grants for member communities
<https://comdev.mt.gov/Programs-and-Boards/Montana-Main-Street-Program/>
- AARP Livable Communities – Community Challenge grant cycle opens January 2023 <https://www.aarp.org/livable-communities/community-challenge/>

Subdivision

CERTIFICATE OF DEDICATION

We, the undersigned property owners, do hereby certify that we have caused to be surveyed, subdivided and plotted into lots, parcels, blocks, roads and drives, and other divisions and dedications, as shown by the plat hereunto included, the following described tract of land, to-wit:

A tract of land located in the west 1/2 of the southeast 1/4 of Section 18, Township 10 North, Range 3 West, P.M.M., City of Helena, Lewis and Clark County, Montana, being more particularly described as follows:

Beginning of a survey pin located on the east right of way line of Mulhugh Drive which bears N025°23'W, 1755.82 feet, and S82°32'W, 50.00 feet from the south 1/4 corner of Section 18 (a 3-1/4" diameter cap set in concrete, in a 6" corner well);

Thence from said Point of Beginning N82°15'58"E, 1260.72 feet along the south line of the Section Addition No. 2 to a survey pin;

Thence S02°46'28"E, 874.91 feet along the west line of the Section Addition Phase 1 to a survey pin;

Thence along the north and west lines of the Fish, Wildlife and Parks property, CO2 N46°43'00"W;

S88°08'48"W, 263.39 feet to a survey pin;

S00°08'22"W, 132.78 feet to a survey pin;

S01°14'27"W, 358.53 feet to a survey pin;

Thence S87°55'11"W, 300.00 feet along the north line of the Mullen Minor Subdivision to a survey pin;

Thence N40°10'20"W, 10.85 feet along the east line of Lot 5 of River Rock Minor Subdivision to a survey pin;

Thence N82°43'14"W, 899.59 feet along the north line of the River Rock Minor Subdivision to a survey pin at the intersection of said north line of the River Rock Minor Subdivision and the east right of way line of Mulhugh Drive;

Thence N02°52'21"W, 1445.95 feet along the east right of way line of Mulhugh Drive to the survey pin at the Point of Beginning.

The tract contains 39.78 acres subject to and together with all appurtenant easements of record.

The above described tract of land is to be known and designated as the Anderson Business Park Subdivision, City of Helena, Lewis and Clark County, Montana, and the lands included in all roads, avenues, alleys, streets and public squares shown on said plat are hereby granted and donated to the use of the public forever. A separate public pedestrian access easement is hereby granted within the private open space/landscaping buffers shown. Said easement shall be limited to those portions of the buffers improved by trails, sidewalks and other appurtenances meant for the use and enjoyment of the public for pedestrian access purposes.

By: [Signature] Dated: 9/5/03

For Dick Anderson

STATE OF Montana

COUNTY OF Lewis and Clark

On this 5th day of September, 2003, before me a Notary Public for the State of Montana personally appeared [Signature] known to me to be the representative of [Signature] that executed the within instrument, and acknowledged to me that such corporation executed the same.

Notary Public for the State of Montana, reading of [Signature] Montana. My commission expires [Signature] Montana.

CERTIFICATE FOR PRIVATE DRIVE/ACCESS ROAD

The governing body shall not be required to improve or maintain the private drive/access road.

By: [Signature] Dated: 9/5/03

For Dick Anderson

STATE OF Montana

COUNTY OF Lewis and Clark

On this 5th day of September, 2003, before me a Notary Public for the State of Montana personally appeared [Signature] known to me to be the representative of [Signature] that executed the within instrument, and acknowledged to me that such corporation executed the same.

Notary Public for the State of Montana, reading of [Signature] Montana. My commission expires [Signature] Montana.

NOTE: UTILITY EASEMENTS WILL BE PROVIDED AS SPECIFIED BY UTILITY AGENCIES

APPROXIMATE ACREAGE BREAKDOWN

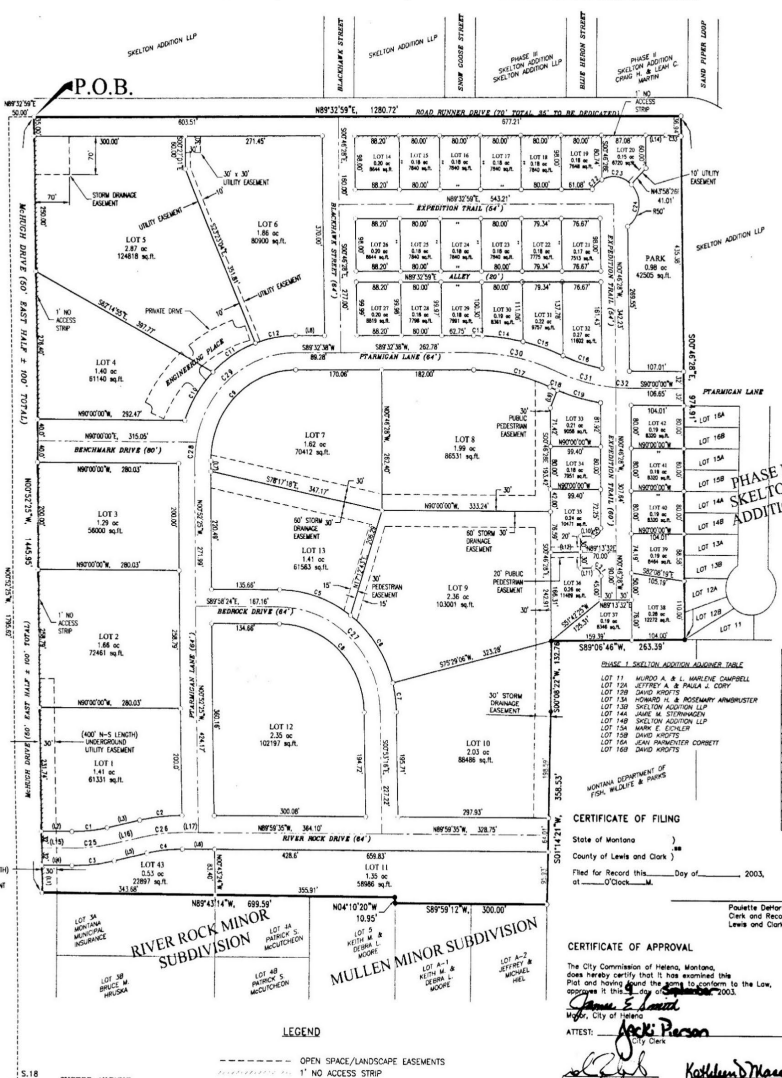
Table with 2 columns: Category (Number of Lots, Area of Park, Area of Right-of-Way, Total Subdivision Area) and Value (43, 344.66 AC, 0.86 AC, 39.78 AC)

OWNERS: ANDERSON DEVELOPMENT, LLC

PURPOSE: TO CREATE LOTS FOR COMMERCIAL AND RESIDENTIAL PURPOSES.

344 HIGHWAY 11 EAST HELENA, MT 59601-9708

ANDERSON BUSINESS PARK SUBDIVISION A TRACT OF LAND LOCATED IN THE WEST 1/2 OF THE SOUTHEAST 1/4 OF SECTION 18, TOWNSHIP 10 NORTH, RANGE 3 WEST, P.M.M., CITY OF HELENA, LEWIS AND CLARK COUNTY, MONTANA



CONVEYANCE: I, it shall be the obligation and the duty of the lot owners to maintain the landscaping buffers, to a standard acceptable to the City of Helena, adjacent to their lots...

CERTIFICATE OF COUNTY TREASURER: I certify pursuant to Section 76-3-811(3)(b), MCA, that all real property taxes and special assessments assessed and levied on the land encumbered by this Deed Anderson Business Park Subdivision have been paid.

CERTIFICATE OF SURVEYOR: DENNIS E. LAY, A LICENSED PROFESSIONAL LAND SURVEYOR IN THE STATE OF MONTANA, DO HEREBY CERTIFY THAT THIS REPRESENTATION OF A SURVEY MADE UNDER MY DIRECT SUPERVISION.

CURVE TABLE: Table with columns CURVE, DELTA, CURVE LENGTH, CHORD, BING, CHORD. Lists curve data for various sections of the subdivision.

LINE TABLE: Table with columns LINE, BEARING, DISTANCE. Lists line data for various sections of the subdivision.

CERTIFICATE OF FILING: State of Montana, County of Lewis and Clark. Filed for Record this [Date] day of [Month], 2003.

CERTIFICATE OF APPROVAL: The City Commission of Helena, Montana, does hereby certify that it has examined this Plat and having found that it conforms to the Law, approved the same on [Date].

MORRISON MAIERLE, Inc. ENGINEERS, SCIENTISTS, SURVEYORS. Includes a graphic scale and a table for lot dimensions.

3050024

Local Subdivision Regulations

- Subdivision regulates the process of creating and designing new lots; ensuring adequate access, water and sewer connections, roads, etc.
- Required for every local jurisdiction since 1973. Must be followed when reviewing an application, but must also follow state law.
- In Montana, subdivision law presents a *de facto* opportunity to regulate land uses without zoning – zoning is the proper and more flexible mechanism for regulating use of land and form of buildings.
- Two statutes – Title 76, Chapter 3 (local lot regulation) and Chapter 4 (state sanitation regulation)

Subdivisions – Types

Exemptions

- Condos/townhomes, BLAs for ≤ 5 lots, mortgage, family transfer
- Subdivisions for lease or rent no longer reviewed under subdivision law unless RV or mobile home park
- May adopt evasion review criteria
- 20 working day review; some can be reviewed administratively with appeal

Minor v. Major subdivision

- Minor – Creates 5 or fewer lots from a tract of record
- First Minor – Tract never before divided ... count all previously created tracts cumulatively – previous exemptions and subdivisions *since 2003* count. If 5 or fewer total, then first minor.
- Subsequent minor – if more than 5 total, then reviewed as major unless local regulations treat as first minors (ex: Missoula, Billings)

Subdivisions – Timeline for Review

- Element review – 5 days; application contains all the material necessary and required under state law and local regulations?
- Sufficiency review – 15 days; is the material provided sufficient for agency to review the application and make a decision?
- First minor subdivisions – 35 working days
- Major subdivisions – 60 days if 49 units or less; 80 if 50 or more
- Expedited review – complies with all development standards – 35 working days
- Preliminary plat – 1 to 3 year approval unless phased, extension
- Phased preliminary plat – up to 20 years, no extension
- Final plat – 20 working days to review; 20 working days to decision

Subdivisions – Approval

- Written findings and decision – must be issued 30 days after decision at public hearing
 - Can require mitigation for identified impacts – adopt these into regulations but can be “ad hoc”
 - Based on the record as a whole
- Extensions of preliminary plats - regulations include criteria for extensions
- Governing body cannot impose additional conditions at final plat approval
- Extensions past the 3-year approval may be unconstitutional (*Bitterrooters for Planning v. Ravalli County* (21st Judicial District, July 2015)) – this is why we created phasing process

Subdivisions – Phasing

- Must identify up front – development that cannot be completed in 1-3 year normal approval timeframe
- Review plat and overall plan just like regular subdivision, can be approved for up to 20 years
- Each phase must come through for review within that timeframe
 - Public hearing
 - Review for changed impacts or new information that creates new potentially significant adverse impacts
 - Supplemental written findings with conditions if necessary
 - Each phase preliminary plat approval is valid for 1-3 year timeframe, must all be done within approval deadline

Planner



What society thinks I do



What my friends think I do



What applicants think I do



What the APA thinks I do



What I think I do



What I really do

QUESTIONS????

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