



Fire Suppression Interim Committee

60th Montana Legislature

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TO: Representative Bill Wilson
FROM: Leanne Heisel
DATE: January 11, 2008
RE: Statutes and programs related to wildland-urban interface

You requested information on what exists in the Montana Code Annotated with regard to defensible space around structures, standards for construction within the wildland-urban interface (WUI), and whether the Legislature could require that people living in the WUI meet certain requirements. Your questions indicate a need for attention to the larger subject of what laws and programs are currently in existence that local governments and communities can implement to help mitigate fire danger in fire-prone areas. This information is intended to provide a basis for the committee's consideration of options to address development in the WUI.

Defensible space around structures is not required by Montana state law. Standards for structures are governed by building codes for certain buildings, but again, there is no specific state law that requires certain building features for structures in the WUI. A number of methods do exist, however, for local governments to impose requirements on developments and structures and there are programs to assist homeowners in creating defensible space and mitigating fire danger around their homes. Those methods available to governmental bodies include subdivision regulations, zoning regulations, and local adoption of a building code enforcement program. Firewise, Community Wildfire Protection Plans (CWPPs), and grant assistance are some of the voluntary programs, outside of the structure of state law, in which communities can participate to help mitigate fire danger.

One school of thought is that local governments and communities need only to use the tools that are already available to them; that new laws and regulations are unnecessary. Others maintain that there are significant barriers--politically and culturally--to exercising the authority provided in the laws and that the laws are too limited to make any real difference. The committee may choose to build on land use laws that are already in place, propose an entire new and separate area of law, propose a combination of both, or simply propose nothing new and encourage communities to use laws and programs already in place.

Subdivision regulation, growth policies

Title 76, chapter 3 of the Montana Code Annotated governs local regulation of subdivisions that create parcels of land containing less than 160 acres. Before the 2007 session, fire was implied as a hazard that subdivision regulations must address, and subdivision regulations in many jurisdictions contain specific provisions for fire protection. Fire and wildland fire or direct reference to other sections that contain those terms now appears in a handful of subdivision and

growth policy statutes.

1. Section 76-3-501 requires the governing body of every county, city, or town to adopt and enforce subdivision regulations that reasonably provide for "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 necessitate an excessive expenditure of public funds for the supply of the services."
2. Section 76-3-504 provides the list of items that subdivision regulations must contain at a minimum. Subsection (1)(e) requires that the regulations must "provide for the identification of areas that, because of natural or human caused hazards, are unsuitable for subdivision development. The regulations must prohibit subdivisions in these areas unless the hazards can be eliminated or overcome by approved construction techniques or other mitigation measures...". The subsection goes on to provide that approved construction techniques or other mitigation measures may only include building regulations if those regulations are identified by the Department of Labor and Industry (DLI) through rules authorized under section **50-60-901**.
3. Section 50-60-901 requires DLI to "adopt rules identifying appropriate construction techniques that may be used by a local government in mitigation of **identified fire hazards** pursuant to 76-3-504(1)(e)." This section and section 50-60-902 make it clear that these techniques are not part of the state building code and that the rules may be enforced only as provided in Title 76, chapter 3 part 5.
4. Section 76-3-504(1)(g) requires that subdivision regulations prescribe standards for the design and arrangement of lots, streets, and roads. A governing body may use this provision to require appropriate ingress and egress in fire-prone areas.
5. A governing body may exempt subdivisions from certain review criteria if the governing body has adopted a growth policy pursuant to Title 76, chapter 1. Growth policies are not required and are not regulatory, but zoning may not occur in the absence of a growth policy. Section 76-1-601(3)(j) provides that a growth policy must include "an evaluation of the **potential for fire and wildland fire** in the jurisdictional area, including whether or not there is a need to:
 - (i) delineate the wildland-urban interface; and
 - (ii) adopt regulations requiring:
 - (A) defensible space around structures;
 - (B) adequate ingress and egress to and from structures and developments to facilitate fire suppression activities; and
 - (C) adequate water supply for fire protection."

4. Subdivision regulations themselves often have fire protection and mitigation provisions. The September 2006 model regulations, prepared collaboratively by a number of organizations and available through the Montana Association of Counties, contains a section on fire protection that reads:

All subdivisions must be planned, designed, constructed, and maintained so as to minimize the risk of fire and to permit the effective and efficient suppression of fires in order to protect persons, property, and forested areas. Measures must include:

- a. The placement of structures so as to minimize the potential for flame spread and to permit adequate access for fire fighting equipment.
- b. The presence of adequate fire fighting facilities on site, including an adequate water supply and water distribution system.
- c. The availability, through a fire protection district or other means, of fire protection services adequate to respond to fires that may occur within a subdivision.

The model regulations also recommend specific special requirements for subdivisions proposed in areas that have been designated as wildfire hazard areas by the Forest Service, DNRC, a local fire protection authority, or a growth policy.

Some jurisdictions have adopted the model regulations entirely or nearly verbatim. Others barely mention fire. Ravalli County's regulations contain vegetation reduction standards for principal structures.

Local governments have a number of ways to impose development standards and DLI-approved construction techniques for new subdivisions. However, they are not able to apply regulations retroactively and, while the course of the development can be dictated, once the final plat is approved, the governing body no longer has any authority or enforcement capability. Defensible space or water supply standards required in the regulations may not be maintained through the life of the subdivision.

Zoning

Another land use tool available to a local government to address fire is zoning, governed by Title 76, chapter 2.

The Helena city commission recently established a WUI zoning district encompassing the entire city of Helena and adopted regulations for the district that prohibit the use of certain roofing materials within a designated area for new construction and require fire-safe roof materials if more than 50% of a roof is being replaced. The commission amended its growth policy first, then adopted the zoning regulations.

Zoning is divided into three parts in the MCA. Part 1 zoning is also known as "citizen initiated"

zoning. Part 2 is county zoning, and Part 3 is municipal zoning.

1. Part 1 zoning

Section 76-2-101 provides that a county commission may create a planning and zoning district upon receipt of a petition signed by 60% of the affected freeholders. However, if freeholders representing 50% of the titled property ownership protest the establishment of the district within 30 days of its creation, the district may not be created and the area may not be considered again for zoning for 1 year.

2. Part 2 zoning

Section 76-2-201 provides that a county governing body that has adopted a growth policy may adopt zoning regulations for all or parts of the governing body's jurisdictional area. The regulations must be in accordance with the growth policy and must be designed to, among other things, "secure safety from fire, panic, and other dangers."

The procedure for adopting regulations (76-2-205) provides for a public hearing and a protest period. The protest provisions read:

if 40% of the freeholders within the district whose names appear on the last-completed assessment roll or if freeholders representing 50% of the titled property ownership whose property is taxed for agricultural purposes under 15-7-202 or whose property is taxed as forest land under Title 15, chapter 44, part 1, have protested the establishment of the district or adoption of the regulations, the board of county commissioners may not adopt the resolution and a further zoning resolution may not be proposed for the district for a period of 1 year.

3. Part 3 zoning

Section 76-2-301 and 76-2-302 authorize a city or town governing body to establish zoning districts and, within those districts, "regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land." Municipal zoning regulations must also be in accordance with the growth policy and must be designed to, among other things, "secure safety from fire, panic, and other dangers."

Section 76-2-305 governs amendments to zoning regulations and the protest allowed under those circumstances:

An amendment may not become effective except upon a favorable vote of two-thirds of the present and voting members of the city or town council or legislative body of the municipality if a protest against a change pursuant to subsection (1) is signed by the owners of 25% or more of:

- (a) the area of the lots included in any proposed change; or
- (b) those lots 150 feet from a lot included in a proposed change.

Section 76-2-310 allows for extension of municipal zoning and subdivision regulations beyond municipal boundaries if there are no county zoning or subdivision regulations in place.

It has been argued that counties simply need to establish zoning districts in the WUI and regulate development that way. Those who advocate other means maintain that the protest provisions, particularly in county zoning, making that extremely difficult or impossible.

Building Codes

Section 50-60-202 provides that the Department of Labor and Industry (DLI) is the only state agency that may promulgate building regulations, except that the Department of Justice's Fire Prevention and Investigation Section shall review building plans for conformity with DLI rules.

A local government may adopt a building code to apply in its jurisdictional area, but that code may include only codes adopted by DLI and a local government may not enforce a building code unless its code enforcement program has been certified by DLI as provided in 50-60-302.

Section 50-60-102 provides that the state building code "does not apply to residential buildings containing less than five dwelling units or their attached-to structures, any farm or ranch building of any size, and any private garage or private storage structure of any size used only for the owner's own use, located within a county, city, or town unless the local legislative body by ordinance or resolution makes the state building code applicable to those structures." It is clear that a local government that has made the state building code apply to the structures described above and that is certified to enforce the code by DLI may do so.

Other statutory provisions

Section 76-13-104 requires DNRC to adopt rules "addressing development within the wildland-urban interface", including best practices for development in the WUI and criteria for providing grant and loan assistance to local government entities to encourage adoption of best practices for development within the WUI. That rulemaking is in process.

Firewise & CWPPs

Programs outside of the confines of state law exist for communities to plan for fire in the WUI.

Firewise

That national Firewise Communities program is, according to its website "a multi-agency effort designed to reach beyond the fire service by involving homeowners, community leaders, planners, developers, and others in the effort to protect people, property, and natural resources from the risk of wildland fire - before a fire starts." The Firewise organization provides information (including grant and funding source information), contacts, and resources, but the effort is community-driven. The program works in three steps:

1. Wildland fire staff from federal, state or local agencies provide a community with information about coexisting with wildfire along with mitigation information tailored to that specific area.
2. The community assesses its risk and creates its own network of cooperating homeowners, agencies and organizations.
3. The community identifies and implements local solutions.

In Montana, eight areas have been recognized as Firewise Communities. They are:

Sorrell Springs, Frenchtown, 2005

Bigfork, Bigfork, 2005

Em Kayan Village, Libby, 2005

Elkhorn, Whitefish, 2005

Cathedral Mountain Ranch, Nye, 2006

Chain of Lakes, Libby, 2006

North Fork Flathead, Polebridge, 2006

Montana City Fire District, Montana City, 2006

Community Wildfire Protection Plans (CWPPs)

The 2003 federal Healthy Forests Restoration Act (HFRA) defines a CWPP as:

a plan for an at-risk community that:

- (a) is developed within the context of the collaborative agreements and the guidance established by the Wildland Fire Leadership Council and agreed to by the applicable local government, local fire department, and State agency responsible for forest management, in consultation with interested parties and the Federal land management agencies managing land in the vicinity of the at-risk community;
- (b) identifies and prioritizes areas for hazardous fuel reduction treatments and recommends the types and methods of treatment on Federal and non-Federal land that will protect 1 or more at-risk communities and essential infrastructure; and
- (c) recommends measures to reduce structural ignitability throughout the at-risk community.

According to the California Fire Alliance website, "benefits of having a CWPP include National Fire Plan funding priority for projects identified in a CWPP. The United States Forest Service and the Bureau of Land Management can expedite the implementation of fuel treatments, identified in a CWPP, through alternative environmental compliance options offered under the HFRA."

Adoption of a CWPP allows a community to define the WUI to fit its needs, rather than having to adhere to the blanket WUI designation in the HFRA, which is 1/2 mile from the community boundary or 1 1/2 miles under certain circumstances. At least 50% of all funds appropriated for federal fuel mitigation projects must be used within the WUI as it is defined by a CWPP or the HFRA if a CWPP has not been adopted.

Regardless of whether a CWPP has been adopted, however, fuel mitigation funding levels are dependent on federal appropriations therefore variable.

Conclusion

Statutory tools and incentive programs do exist to assist local governing bodies and communities in addressing development in the WUI. The committee needs to determine, based on this information, testimony, and public input, if:

1. those statutes and programs are sufficient and communities need only be educated in their appropriate use;
 2. the Legislature should amend existing statutes in order to facilitate their implementation;
 3. the Legislature should create a new set of statutes tailored specifically for the WUI; or
 4. the Legislature should enact a combination of #2 and #3 above.
- c. FSC Committee members
Joe Murray, Legislative Audit Division

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