

COMMISSIONERS APPROVAL

KANENWISHER

FOSS 

CHILCOTT 

IMAN 

STOLTZ 

Members Presents..... Commissioner Matt Kanenwisher, Commissioner Suzy Foss, Commissioner Greg Chilcott, Commissioner J.R. Iman and Commissioner Ron Stoltz

Date.....April 9, 2012

► Minutes: Glenda Wiles

► The Board met at 9:30 a.m. to review and make approval of a Presentation Agreement with Selkirk Coaching and Training Group for a speaking agreement during the Ravalli County DUI Task Force 8th Grade Transitions Program in the schools. Funds for this agreement come from the Drug Free Communities Grant. Present at this meeting was Charmell Owens, Drug Free Communities Program. **Commissioner Chilcott made a motion to approve the Presentation Agreement with Selkirk Coaching with Chair signature. Commissioner Iman seconded the motion and all voted "aye". (5-0).**

► The Board met at 10:00 a.m. with members of the Historical Society in order to work on a new Memorandum of Understanding between Bitterroot Valley Historical Society and Ravalli County.

► The Board met at 1:30 p.m. to make a final review of the Subdivision Regulations and County Attorney Memo with Discussion and possible decision by Resolution. Present at this meeting was Deputy County Attorney Howard Recht, Planning Administrator Terry Nelson and Planner Kevin Waller. After review it was agreed to place the approval of the Regulations on the calendar for a specific date in order to approve by Resolution.

Glenda Wiles

From: Matt Kanenwisher
Sent: Wednesday, April 04, 2012 1:07 PM
To: Glenda Wiles
Subject: FW: Subdivision Regulation Review
Attachments: Subdivision Reg Review Memo.pdf

Glenda can you place this memo in public correspondence. Then place "Final review of subdivision regulations and county attorney memo, discussion and possible decision". I cant remember how we are adopting these if approved. Just by resolution? If possible let's put this on for Monday at 130-300

From: Matt Kanenwisher
Sent: Friday, March 30, 2012 3:18 PM
To: Commissioners Department
Subject: Fw: Subdivision Regulation Review

From: William Fulbright
Sent: Friday, March 30, 2012 11:28 AM
To: Matt Kanenwisher
Cc: Howard Recht; Dan Browder
Subject: Subdivision Regulation Review

Commissioner Kanenwisher:

Attached for distribution by you is the Subdivision Regulation review as requested.

Then attachment is a .pdf file. Please delete the previous email, where Outlook failed to convert the Word document to a .pdf file. Do not distribute the Word document.

Thank you
Bill Fulbright

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County Attorney:
Bill Fulbright

Deputy Attorneys:
John Bell
Daniel Browder
Howard F. Recht
Ryan Weldon
Angela Wetzsteon

TO: Board of County Commissioners
FROM: Bill Fulbright
DATE: March 29, 2012
RE: Proposed Subdivision Regulations

This memo responds to your request for legal review of the proposed amendments to the Ravalli County Subdivision Regulations. After Planning Department review it was determined that the following three proposed amendments are substantive amendments in need of legal review.

1. Subdivisions for Lease or Rent (Additional Structures)
2. Definitions: "Platted Subdivision"
3. Definitions: "Undue Hardship"

1. Subdivisions for Lease or Rent (Additional Structures)

The proposed Amendment to Chapter 5 (Subdivisions for Lease or Rent) will permit, without the need for full subdivision review, the addition of a second structure with sanitary facilities on a single parcel, if that second structure cannot be separately sold, rented, leased, or otherwise conveyed.

The proposed language is:

5-4. ADDITIONAL STRUCTURE WITH SANITATION FACILITIES

- A. Applicability. An additional structure with sanitation facilities will not be considered a subdivision for lease or rent so long as said structure is not sold, rented, leased, or otherwise conveyed without full subdivision review.*
- B. Application. Applicants shall submit to the Planning Department a completed and signed Additional Structure with Sanitation Facilities Application, available from the Planning Department. Prior to constructing an additional structure with sanitation facilities or hooking an existing additional structure to sanitation facilities, the applicant shall file, with the Clerk & Recorder, an Additional Structure with Sanitation Facilities Affidavit.*
- C. Standards. There may be no more than two structures with sanitation facilities on the subject property.*



In accord with the comments below, this proposed amendment is legally defensible.

By way of background, the Montana Subdivision and Platting Act ("MSPA") requires that all subdivisions be submitted to the BCC for review. The MSPA's definition of "subdivision" is very broad, and includes the creation of any second building for which title or possession may be sold, rented, leased, or otherwise conveyed. §76-3-103(15), MCA. Because this definition is so broad, various exceptions have been developed to define when subdivision review may not be necessary.

The Ravalli County Subdivision Regulations currently in effect provide an alternative to full subdivision review when a second building with sanitary facilities is proposed. That process is a planning department administrative review of the proposed addition, made under certain defined review criteria (Chapter 3, Subpart 5-2). By contrast, the proposed amendment instead shifts the focus to a limitation on the owner's ability to rent, lease or convey the second building, by requiring a covenant prohibiting such a transfer.

A review of Montana court cases shows that the proposed amendment addresses the common element found in every Montana court decision to be found on this subject. That is, in each published decision the courts have considered the question of whether the proposed structure must undergo subdivision review where the new proposed structure(s) will actually be rented or leased. For example, in *Rose v Ravalli County* (2006), the plaintiffs proposed to construct, on a single tract of land, four vacation cabins for rental separate from the existing lodge. The court found that use constituted a subdivision. In *Derick v Lewis & Clark County* (2011), the plaintiffs proposed to build a separate garage with an upstairs apartment, to be leased to a third party. Again, the court found that use to constitute a subdivision. Likewise, Attorney General Opinions have addressed the building of 48 fourplexes (40 Op. Atty Gen. Mont No. 57 (1984)), and a rental duplex (41 Op. Atty Gen. Mont No. 3 (1985)), each of which contemplated the creation of a separate rental or lease interest in the new building(s). By contrast, the proposed amendment places a legal limit on the owner's ability to thereafter sell, lease or rent the second structure, a reasonable measure to limit the impact of an accessory building.

Items for BCC Consideration:

1. The current wording of the proposed amendment should be modified to specify that the limitation is on a *separate* sale, rental, or conveyance of the additional building. Otherwise, as written, the owner's covenant to not sell, rent or lease the additional building could be construed to prevent the owner from ever selling, renting or leasing the first and additional buildings together, a concept surely not contemplated. A simple modification could be adding the following **bold** language:
 - A. **Applicability. An additional structure with sanitation facilities will not be considered a subdivision for lease or rent so long as said structure is not sold, rented, leased, or otherwise conveyed *separately from the primary structure or land upon which the primary structure is situated* without full subdivision review.**
-

2. For this amendment to effectively prevent circumventing the MSPA, the document required of the landowner needs to be in the form of a covenant that, when recorded, will clearly run with the land and bind subsequent transferees of the property. If an owner's affidavit is used, we might face a later argument that only the original owner is bound by the "promise" in an affidavit. We stand ready to assist with the language of that document if you so desire.
3. While it is clearly implied by the overall regulatory scheme, you might consider adding a brief statement noting that this amendment does not affect the applicant's obligation to otherwise comply with all other regulations (septic approval, etc).
4. Concerns have been expressed about the County's ability to enforce the owner's covenant. However, the BCC has regulatory enforcement authority and the resources to carry out enforcement if necessary. While a legitimate topic to consider and for which to plan, the enforcement process does not undermine the validity of the proposed amendment.
5. As discussed, the current proposed amendment shifts the focus to the actual sale, rental, lease or conveyance of an interest in the additional building. If, after discussion, the BCC wants to instead draft the amendment to itemize standards related to proposed uses, temporary occupancies, etc, we stand ready to assist with that language.

2. Definitions: "Platted Subdivision"

The proposed amendment provides a definition to be used in considering certain exceptions to subdivision review under the MSPA. Specifically, there are six exceptions to subdivision review for divisions made inside or outside of "platted subdivisions." §76-3-207(1)-(2), MCA. The proposed amendment would revise the current regulations as follows:

"PLATTED SUBDIVISION: ~~Parcels created by platting both prior to and following July 1, 1973. Ravalli County Subdivision Regulations (2007), §2-6(101) Plats of record created through subdivision review as of July 1, 1974.~~"

[For clarity, if we correctly understand the BCC's intent to define a platted subdivision as any plat of record created under the MSPA, then the phrase "as of July 1, 1974" should be modified to read "*on or after* July 1, 1974."]

For the reasons discussed below, we cannot recommend adopting this proposed amendment. As Montana law currently stands, it appears that a change of this significance will have to be a statewide statutory amendment at the legislature.

By way of history, the MSPA became effective July 1, 1974. The treatment of parcels of land pre-dating this effective date has long been the subject of debate. No less than six Attorney General Opinions, and various Supreme Court cases, have wrestled with the relationship between the MSPA and plats or tracts of land that were created by whatever name prior to July 1, 1974.

The Montana Supreme Court now has definitively answered this broader question, finding that the MSPA applies to acts *now* taken on parcel(s) of land, regardless of when the parcel(s) were created. In *Thornton v Flathead Co* (2009), owners of tracts of land, the boundaries of which were created in the 1940s, argued that the MSPA did not apply to their pre-existing tract land. Instead, the Court held “that no ‘wholesale blanket exemption’ from subdivision review exists for pre-1973 ‘tract land.’” *Thornton v Flathead Co*, 2009 MT 367, ¶22, 353 Mont 252, ¶22. Accordingly, pre-existing plats or tracts of land in Ravalli County (that is, created before enactment of the MSPA) *are* subject to the provisions of the MSPA for any division(s) now contemplated.

This does not, however, end the inquiry. As the Supreme Court did in *Thornton*, having found that actions taken on the pre-existing tracts are subject to the MSPA, the BCC must then determine whether the applicant’s particular project fits within a statutory exemption from subdivision review. It is this second step that is affected by the definition of “platted subdivision.”

There is anecdotal evidence that in the 1990s and early 2000s, the Clerk & Recorder did not treat pre-existing tracts in Ravalli County as “outside of platted subdivisions.” In 2004, Deputy County Attorney James McCubbin wrote a memo to the Clerk & Recorder to treat those tracts as “outside of platted subdivisions” for purposes of exemptions from subdivision review under §76-3-207, MCA. In March 2006, then-County Attorney George Corn issued a memo, referring to the 2004 McCubbin memo as a “preliminary opinion,” and directing the Clerk & Recorder to reverse the prior instruction and *not* treat the pre-existing tracts as “outside of platted subdivisions.” After this 2006 memo, the BCC adopted the November 20, 2006 amended Ravalli County Subdivision Regulations, in which “platted subdivision” was defined for the first and only time in our regulations.

This sequence of events, and the varying legal decisions reviewed in Mr. Corn’s 2006 memo, highlight the longstanding ambiguity surrounding the “platted subdivision” phrase. However, despite the ambiguity, it is likely that the courts will find the proposed amendment strays from the requirements of the MSPA. That is, the MSPA already gives us the following definitions:

“Plat” means a graphical representation of a subdivision showing the division of land into lots, parcels, blocks, streets, alleys, and other divisions and dedications.

and

“Subdivision” means a division of land or land so divided that it creates one or more parcels containing less than 160 acres . . . in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed . . .” (§76-3-103(11) & (15), MCA.)

Neither definition is limited by reference to time, and we are bound by state law to follow these definitions.

“Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.” §1-2-207, MCA.

Any attempt to redefine a term using an administrative regulation, in a way that is contrary to its statutory definition, is void. *State ex rel Dept of Health and Environmental Science v Lasorte*, 182 Mont 257, 596 P.2d 477 (1979). For example, in *Lasorte*, a landowner tried to divide a tract of land by recording 13 certificates of survey, not plats. The Sanitation in Subdivision Act, as it existed at the time, gave the Department authority to approve plats, but the Department tried to block the recording of the certificates of survey asserting that, because “plat” and “certificate of survey” were not defined in the Act, the Department had authority from its own administrative regulations in which a “plat” was defined to include a “certificate of survey.” However, the Court held that “plat” and “certificate of survey” were technical terms with precise statutory definitions, and the Department’s attempt to redefine the terms by regulation was void. Likewise, where the MSPA specifically provides definitions for “plat” and “subdivision,” an attempt to artificially limit or modify the term “platted subdivision” to a specific time period will likely be struck down as void.

While probably not capturing the entire purpose of the BCC’s intent with the proposed amendment, the definition of “platted subdivision” could be appropriately clarified by language such as: *“PLATTED SUBDIVISION: Plats of record created by approval of the local regulatory body in authority on the date of recording and in full compliance with then existing law.”*

Given the current state statutes, we cannot recommend any broader restriction to this definition.

3. Definitions: “Undue Hardship”

This amendment proposes to add a definition of “undue hardship” to the Ravalli County Subdivision Regulations to be used in making variance determinations. The amendment would add the following language:

“UNDUE HARDSHIP: A regulatory burden which requires efforts or resources that are determined to be unreasonable or disproportionate when weighed against the intent of the relevant requirement, and which is not critical to achieving the stated purpose of these regulations. Consideration of this determination includes only the relationship between the application and the regulatory requirement. The financial or logistical disposition of the applicant shall not be considered.”

There are potential legal problems created by this proposed amendment. Following the below discussion, we recommend an alternative course of action.

Montana law allows local subdivision regulations to give the BCC discretionary authority to grant variances from the regulations if strict compliance with a particular regulation:

1. Will result in undue hardship, and
2. Is not essential to the public welfare. (§76-3-506(1), MCA)

Further, our local subdivision regulations must define specific criteria on which the grant of any variance must be based. §76-5-506(2), MCA

The required variance criteria are found in Chapter 15 of the proposed subdivision regulations, which provides for a process by which an applicant may request a variance, and by which the BCC must evaluate that variance request. Under the currently proposed regulations, the BCC must:

1. If the variance will have the effect of nullifying the intent and purpose of the regulations, or permits a structure within the 100-year floodplain, it must be denied. Otherwise, the BCC must continue onto #2. (Chapter 15-2(D))
2. The BCC must then consider whether strict compliance with the particular regulation is essential to the public welfare, by determining if the four specific criteria listed in the regulations are *all* met. If all criteria are not met, then the variance must be denied, because strict compliance with the regulation is deemed essential to the public welfare. If all of the criteria are met, then the BCC continues onto #3. (Chapter 15-2(D)(1))
3. The BCC must then consider whether strict compliance with the regulation will result in an undue hardship to the applicant. The regulations require that the BCC weigh two specific criteria on this question. If, after weighing the two criteria, the BCC finds that an undue hardship will not result, then the variance must be denied. The regulation is silent on whether a finding of undue hardship requires approval of the variance request, but that seems to be implied. The two criteria in the regulations by which undue hardship is evaluated are:
 - a. Conditions that are unique to the affected property; and
 - b. Physical conditions of the property that prevent strict compliance (not of the owner's making). (Chapter 15-2(D)(2))

From reviewing this variance request process, you can see that the proposed regulations set out the criteria (#3a-b) defining when an undue hardship is present. Accordingly, in light of these regulatory criteria, the proposed amendment is conceptually difficult and awkward to apply to the variance process because the proposed definition of "undue hardship" is not consistent with the above criteria that already define when an undue hardship is present.

An example of conflicts that could arise from this proposed amendment might be when an individual applies for a variance, claiming an undue hardship by definition (e.g.: "unreasonable efforts are required to comply"), yet the property itself has no qualifying condition under 15-2(D)(2). As such, the regulations would require a denial of the variance for no undue hardship, where the applicant might fit the separate "definition" of the same.

Recommendations: If the proposed amendment is an indication that the BCC is dissatisfied with the two undue hardship criteria in 15-2(D)(2) as a working definition of "undue hardship," then we recommend that an appropriate modification be made to the criteria themselves, not an extraneous definition. The criteria, and therefore the working definition of "undue hardship," could be best shaped

by the BCC clearly defining its policy objectives in allowing a variance. For example, possible standards to consider might be that the variance should:

- still accomplish the essential purpose of the design and development standard, or at a minimum, not frustrate those purposes;
- only be considered under instances of exceptional and extraordinary circumstances that apply to the property but not to other similarly situated properties;
- be considered if the cost, complexity or practical difficulties of compliance are so disproportionate to the purposes of the design and developmental standard that strict compliance is unreasonable given availability of other alternatives;
- be considered if compliance with the design and development standards greatly decreases or practically destroys the value of the property for any permitted use, so as to deprive the owner of the land of all beneficial use of the property;
- not be considered if the variance would be injurious to neighboring properties;
- not be considered if the variance arises out of the violation of the law or other regulations.

As an alternative, if the BCC still desires a separately stated definition, we can work with the BCC in drafting a definition for “undue hardship” consistent with the criteria stated in the variance process.

Other thoughts for consideration:

1. Comments in the planning department’s markup of the proposed regulations indicate that the BCC did not like the statement that an undue hardship “shall not include personal or financial hardships.” If that is accurate:
 - a. We note that this language still appears unchanged in paragraphs 15-2(D) and 15-2(D)(2); and,
 - b. The BCC then must address the question of whether the individual circumstances of the land owner’s personal or financial hardships can be a factor, where it does not relate to a unique aspect of the affected real property.
 2. As noted in paragraph #3 above, the language of Chapter 15-2(D)(2) does not directly address, upon finding an undue hardship *is* present, whether the BCC *must* then grant the variance, or still retains some sort of defined discretion to grant or deny the variance. It would be best to specifically state the intent of 15-2(D)(2), rather than leaving it for later argument and disagreement.
-