From The Environmental Law Section

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Environmental Advocacy Under the Montana Subdivision and Platting Act

Introduction

The Montana Subdivision and Platting Act (Subdivision Act) is intended to ensure that development that expands into rural areas of Montana is done in such a way as to minimize damage to the environment, to surface and subsurface waters, and to agriculture and existing land uses.[1] The Subdivision Act was enacted by the 1973 Montana Legislature immediately following passage of the 1972 Montana Constitution. The Subdivision Act's requirements are consistent with the environmental provisions in the 1972 Montana Constitution directing the Legislature to provide for the administration and enforcement of the duty to maintain and improve a clean and healthful environment.[2] Integral to the achievement of the purposes of the Subdivision Act are the mandatory disclosures the developer is required to provide so the local governing body can make an informed decision to approve, conditionally approve, or deny a proposed subdivision. However, these mandatory disclosures on a host of important environmental factors are often missing in the developer's submissions. Many local governing bodies, in turn, are less than vigilant in requiring the mandated disclosures. As such, this issue is beginning to be litigated more frequently. This article describes how these deficiencies can be successfully challenged in court.

The regulatory framework

The purpose of the Subdivision Act includes promoting the public health, safety, and general welfare; requiring development in harmony with the natural environment; and ensuring adequate provisions for water supply and sewage disposal.[3] Under the Subdivision Act, local governing bodies are required to adopt subdivision regulations that implement the Act's purposes, including "the avoidance of subdivision which would involve unnecessary environmental degradation and the avoidance of danger of injury to health, safety, or welfare. . . ."[4] In furtherance of its conservation-related purposes, the Subdivision Act explicitly provides that subdivision regulations must require an environmental assessment, which must include specific detailed information.[5] Unlike the less demanding requirements for a minor subdivision (five or fewer parcels), the environmental assessment for a major subdivision "must include a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available ground water information . . ." as well as a summary of probable impacts to agriculture, agricultural water-user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety.[6]

In addition to the information required in the environmental assessment, the Subdivision Act also requires the developer to submit to the governing body a substantial amount of information regarding water and sanitation.[7] The required water and sanitation information includes: mixing zones for onsite wastewater treatment systems based on rules adopted by the Board of Environmental Review; evidence of the suitability for new onsite wastewater treatment systems that include soil profile descriptions that comply with standards published by the Department of Environmental Quality; and, for new water supply systems, evidence of adequate water availability and evidence of sufficient water quality that conforms with rules adopted by the Department of Environmental Quality.[8]

Once the developer submits the application for preliminary plat approval, accompanied by an environmental assessment, then the governing body's agent (typically the planning department) must determine whether the application contains all of the required information.[9] Then, pursuant to § 76-3-605(1), MCA, "the governing body or its authorized agent or agency shall hold a public hearing on the preliminary plat and **shall consider all relevant evidence** relating to the public health, safety, and welfare, **including the environmental assessment**, if required, to determine whether the plat should be approved, conditionally approved or **disapproved**" (emphasis added). Section 76-3-608, MCA, in turn, contains the statutory criteria for review of the proposed subdivision by the governing body. Integral to the governing body's decision is the information required to be contained in the subdivision application, preliminary plat, and environmental assessment. This statute emphasizes the importance of the environmental assessment and public hearing as significant components of the basis for the governing body's decision:

1) **The basis for the governing body's decision** to approve, conditionally approve, or disapprove a subdivision is whether the preliminary plat, applicable **environmental assessment, public**

hearing, planning board recommendations, or additional information demonstrates that development of the subdivision meets the requirements of this chapter . . .

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) . . . the effect on **agriculture**, agricultural water user facilities, **local services**, the **natural environment, wildlife** and **wildlife habitat**, and **public health and safety** . . .

§ 76-3-608, MCA (emphasis added).

Judicial review

The Subdivision Act contains a statute providing for judicial review which may be brought by a party "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."[10] The petition for judicial review must be filed within 30 days after the decision and may be brought by the subdivider, the governing body, or "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."[11] It is not uncommon for concerned neighborhood associations or nonprofit conservation organizations to pursue judicial review. One district court decision holds that a nonprofit entity has "associational standing" to pursue judicial review,[12] while another has ruled that associational standing does not apply, resulting in dismissal of the challenge to the approved subdivision where no individual landowner was included as a plaintiff.[13] To avoid this risk, include a landowner as a plaintiff.

Standard of review

In *Madison River R.V. Ltd. v. Town of Ennis*,[14] the Montana Supreme Court held that the standard judicial review of a local governing body's decision approving or denying a preliminary plat for a subdivision is whether the decision was arbitrary, capricious or unlawful.[15] There are **two parts** to this standard, **both** of which the decision under review must pass. Thus, for instance, in *Ravalli County Fish and Game Assn., Inc. v. Montana Dept. of State Lands*,[16] the Montana Supreme Court explained:

> In *North Fork* we divided our review into **two parts**: Whether the agency acted unlawfully, and whether the agency acted arbitrarily or capriciously. *North Fork*, 778 P.2d at 867.

To evaluate the lawfulness of the DSL's actions, we look to the laws and regulations governing the DSL's MEPA review process. (Emphasis added.)

Applying standard of review

Illustrative of the foregoing discussion is the recent case of *Neighbors Over the Aquifer (NOTA), et al. v. Board of County Commissioners of Flathead County*.[17] In *NOTA*, the district court analyzed the two part standard of review, and ruled that the Commissioners' approval of the subdivision at issue was unlawful:

The plaintiffs have demonstrated that, based upon objective standards, the EA is inadequate, and this issue compels the Court to void the subdivision approval. The laws and regulations pertaining to EA's require mandatory information describing every **body** of surface water "that may be affected," and available information on ground water, Section 76-3-603(1)(a), MCA; and Section 76-3-622(1)(b), MCA, requires a description of the proposed water supply and wastewater treatment systems, including whether they are individual, shared, multiple user or public. The Flathead County Subdivision Regulations require information regarding the on-site sewage disposal system, including location of all collection lines, average number of gallons to be generated daily, depth to ground water when ground water is at its highest point and details as to how this information was obtained, minimum depth to bedrock or other impervious material and how the information was obtained, and identity of who will install, own, operate and maintain community systems; and for individual sewer systems, perc tests evenly spaced throughout the subdivision, depth to ground water when ground water is at its highest point and details as to how this information was obtained. FCSR, App. B, p. 80. The Flathead County Subdivision Regulations require evidence as to adequate quantity and quality of the water supply for individually

drilled wells, FCSR, *id.*, at 83, and Section 76-3-622(1)(e), MCA, requires, for new water supply systems, evidence of water availability "obtained from well logs or testing of onsite or nearby wells." Finally, subsection (g) of this statute requires a preliminary analysis of potential impacts to ground water quality from new wastewater treatment systems. (Bolding and underlining supplied by Court.)[18]

Partial compliance with the law not sufficient

Partial compliance with mandatory disclosure requirements in applications of various kinds has long been held legally insufficient.[19] Thus, in *Ravalli County Fish and Game Assn., Inc. v. Montana Dept. of State Lands*,[20] the agency argued that it was allowed to partially comply with its duties under MEPA, which the Montana Supreme Court rejected:

> The District Court was incorrect in agreeing with the DSL that it was not required to engage in a significant impacts analysis on the theory that it was doing a voluntary as opposed to a mandatory EA. Based on our above holding, **full compliance with MEPA is mandated** in this case. Furthermore, **we find no provisions in MEPA, the administrative rules, or case law providing for partial compliance with the law** when compliance with the laws is purportedly voluntary. (Emphasis added.)[21]

The *NOTA* court, *supra*, also rejected the defendants' argument that "substantial compliance" with the requirements of the subdivision statutes and regulations was legally sufficient, explaining:

> There are a myriad of reasons why the legislature has required the applicant to provide the information prescribed for the EA; one being that this is a burden that cannot and should not be placed upon the public who are, predominantly, simply interested citizens without the resources or technical expertise of a developer. To simply say that the Board received some of the omitted information, even if from a different source, so "no harm, no foul," is not persuasive. . . . The bottom line is that the responsibility for submitting a complete EA falls on the developer and, in the instant case, the Board approved a subdivision based upon an incomplete EA. This is not, as the Board suggests, a situation in which the EA "simply . . . does not include all of the information Plaintiffs would like it to include." Response, *supra*, at 12. The Board's consideration and conditional approval of the preliminary plat application in this case was in violation of the applicable statutes and regulations; therefore, the decision of the Board is illegal and void.[22]

The adequacy of an environmental assessment is based on an objective standard

As noted by the District Court in *NOTA v. Flathead County, supra*, the adequacy of an environmental assessment is based on an objective standard. This was also the determination in an earlier subdivision case, *Friends of Bull Lake, Inc. v. Board of County Commissioners of Lincoln County*.[23] The Supreme Courts' construction of the adequacy of environmental disclosure documents under MEPA is also instructive. In *North Fork Preservation Assn. v. Dept. of State Lands*, the Montana Supreme Court held that federal case law interpreting the National Environmental Policy Act (NEPA) is an appropriate guide in interpreting MEPA.[24] This is in accord with *Coalition for Canyon Preservation v. Bowers*, a Ninth Circuit decision which interpreted Montana law and held that the court must use an objective test in determining the adequacy of the environmental document:

> We disagree with the district court's assessment of adequacy. It cannot fairly be said that all of the Coalition's challenges concerned remote or highly speculative matters. Moreover, **subjective good faith is not the test** for determining the adequacy of an EIS. **The test is an objective one**. (Emphasis added.)[25]

The reviewing court is not limited to the administrative record

Montana law is also clear that in determining whether an agency decision was arbitrary, capricious, or unlawful it is appropriate for the reviewing district court to accept new evidence and not to limit its review to the administrative record. Thus, in *Skyline Sportsmen's Assoc. v. Board of Land Commissioners* (1997), the Montana Supreme Court explained:

> In a proceeding to determine whether an agency decision was arbitrary, capricious, or unlawful, **unless the reviewing court looks beyond the record to determine what matters the agency should have considered, it is impossible for the court to determine whether the agency took into consideration all relevant factors in reaching its decision.** (Citations omitted; emphasis added).[26]

In *NOTA v. Flathead County, supra,* the District Court denied the defendants' motion to strike the affidavit and report of the plaintiffs' expert hydrologist, noting that the hydrologist "qualifies as an expert and is competent to provide evidence on the subjects he covers. Furthermore, there is little dispute that he is qualified in the areas that are of the most concern to the Court, as discussed hereinafter."[27]

The governing body's failure to follow the Subdivision Act and County Subdivision Regulations renders void the approval

A long line of Montana decisions establish that the governing body's failure to follow applicable standards and procedures in making land use decisions renders void the approval. Thus, in *Burnt Fork Citizens Coalition v. Board of County Commissioners of Ravalli County,*[28] the court held that the commissioners' failure to review the proposed subdivision according to the criteria in the county subdivision regulations rendered void the commissioners' approval of the preliminary plat for the subdivision. Likewise, both the 1996 district court decision in *Friends of Bull Lake,*[29] and the 2006 district court decision in *NOTA,*[30] held that the commissioners' approval of a preliminary plat was **void** by virtue of the commissioners having failed to follow mandatory provisions of the Subdivision Act.

Conclusion

The Subdivision Act is intended to achieve many laudatory environmental objectives. However, integral to the achievement of these objectives are the mandatory disclosures that the developer is required to make in order for the local governing body to make an informed decision as to whether to approve, conditionally approve, or deny a proposed subdivision. These mandatory disclosures are often lacking in submissions made by the developer. If the local governing body approves a proposed subdivision despite the inadequate disclosures, the deficiencies can be challenged and the reviewing court should declare the approved subdivision void.

Endnotes

1.§§ 76-3-102, -501, -603, MCA.

2. Art. II, § 3, Mont. Const. (1972); see also Art. IX, § 1, Mont. Const. (1972). Accord 38 A.G. Op. 363, 369 (Mont. 1980) (purposes of Subdivision Act are in accord with inalienable right of all Montanans to a clean and healthful environment). It should be noted that the Subdivision Act has been amended on a number of occasions since enactment. To the extent environmental protections and public participation processes are weakened, such amendments raise potential constitutional issues, which subject is beyond the scope of this short primer.

3. § 76-3-102, MCA.

4. § 76-3-501, MCA.

5. § 76-3-504(1)(a), MCA. This is not the same as the environmental assessment provided for under the Montana Environmental Policy Act (MEPA), §§ 75-1-101, et seq., MCA.

6. § 76-3-603(1)(a), MCA, which incorporates by reference the criteria described in § 76-3-608, MCA.

7. § 76-3-622, MCA. See also, §76-3-604, MCA; § 76-3-504(1)(g), MCA; and 49 A.G. Op. 7 (Mont. 2001).

8. § 76-3-622, MCA.

9. § 76-3-604(1), MCA.

10. § 76-3-625(2), MCA.

11. § 76-3-625(3), MCA.

12. Swan Lakers v. Board of County Commissioners of Lake County, 20th Judicial District, Lake County, Cause No. DV-05-143, Order and Memorandum dated October 19, 2005.

13. Lower Valley Partners v. Board of County Commissioners of Flathead County, 11th Judicial District, Flathead County, Cause No. DV-04-085C, Order and Rationale on Motions for Summary Judgment dated November 9, 2005.

14. 2000 MT 15, 298 Mont. 92, 994 P.2d 1098.

15. Id., ¶ 30, citing North Fork Preservation Ass'n v. Dept. of State Lands (1989), 238 Mont. 451, 458-59, 778 P.2d 862, 867.

16. 273 Mont. 371, 377, 903 P.2d 1362, 1336 (1995).

17. 11th Judicial District, Flathead County, Cause No. DV-05-179(B), Order and Rationale and Cross-Motions for Summary Judgment and Motion to Strike Affidavit, dated July 28, 2006. The author was counsel for plaintiffs.

18. Id. at pp. 6-7.

19. See, e.g., Kadillak v. Anaconda Co. (1979), 184 Mont. 127, 139-40, 602 P.2d 147, 154-55.

20. 273 Mont. 371, 377, 903 P.2d 1362, 1336 (1995).

21. Id., 273 Mont. at 380, 903 P.2d at 1368.

22. Id. at p. 9.

23. Nineteenth Judicial District, Lincoln County, Cause No. DV-95-12, Order and Rationale, dated April 19, 1996. The author was counsel for plaintiff.

24. 238 Mont. 451, 457, 778 P.2d 862, 866 (1989).

25. 632 F.2d 774, 782, 784 (1980), citing Concerned About Trident v. Rumsfeld, 555 F.2d 817, 827 (D.C. Cir. 1977).

26. 286 Mont. 108, 113, 951 P.2d 29, 32 (1997).

27. NOTA, Cause No. DV-05-179(B), Order and Rational on Cross-Motions for Summary Judgment and Motion to Strike Affidavit, at p. 2. 28. 287 Mont. 43, 52, 951 P.2d 1020, 1026 (1997).

29. Cause No. DV-95-12, Order and Rationale dated April 18, 1996, at p. 10.

30. Cause No. DV-05-179(B), Order and Rationale dated July 28, 2006, at p. 9. ◆