

# **MONTANA'S SUBDIVISION AND SURVEYING LAWS AND REGULATIONS**

19<sup>TH</sup> Edition



**Prepared and Published by:**

The Joint Powers Insurance Authority of the Montana Association of Counties, the Montana League of Cities and Towns, the Department of Labor & Industry - Montana Board of Professional Engineers and Professional Land Surveyors, and the Department of Commerce – Community Development Division.

**NOVEMBER 2006**

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The front cover photograph was provided by Kurt Luebke, professional land surveyor and Historical Chairman of the Montana Association of Registered Land Surveyors (MARLS). The picture is of an 1895 W. & L.E. Gurley transit with solar attachment.

The information in this publication is also available at [www.engineer.mt.gov](http://www.engineer.mt.gov), at [www.landsurveyor.mt.gov](http://www.landsurveyor.mt.gov), and at <http://maco.cog.mt.us>.

Upon request, the information provided in this publication will be made available in an alternative accessible format.

## **Preface**

## **Abstract**

This publication, Montana Subdivision and Surveying Laws and Regulations, was originally published and updated as a service to private and public parties involved in the land subdivision process, by the Community Technical Assistance Program at the Department of Commerce. However, that program currently no longer exists.

This November 2006 publication was prepared and funded through a collaborative effort of the Joint Powers Insurance Authority of the Montana Association of Counties, the Montana League of Cities and Towns, the Montana Board of Professional Engineers and Professional Land Surveyors, and the Department of Commerce – Community Development Division.

### **Further Information**

Questions pertaining to the Montana Subdivision and Platting Act should be directed to your local county attorney's office.

Questions pertaining to the Montana Sanitation in Subdivisions Act and the DEQ regulations may be answered by contacting:

Montana Department of Environmental Quality  
Public Water Supply and Subdivisions Bureau  
1520 East 6<sup>th</sup> Avenue  
PO Box 200901  
Helena, Montana 59620-0901  
(406) 444-4400

Information concerning the Uniform Standards and the licensing of professional engineers and professional land surveyors may be obtained from:

Montana Department of Labor and Industry  
Business Standards Division  
Business and Occupational Licensing Bureau  
Board of Professional Engineers and Land Surveyors  
301 South Park  
PO Box 200513  
Helena, Montana 59620-0513  
(406) 841-2367

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**THE MONTANA SUBDIVISION  
AND PLATTING ACT**

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**LAND RESOURCES AND USE**  
**CHAPTER 3**  
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**Chapter Cross-References**

- Municipal subdivisions required to conform to subdivision laws, 7-3-4445.
- Duty to notify weed management district when proposed project will disturb land, 7-22-2152.
- Conservation easements preventing subdivision of land, 76-6-203.
- Water user – ground water, Title 85, Ch. 2, part 5.

**Part 1**

**General Provisions**

**Part Cross-References**

- Conservation easements preventing subdivision of land, 76-6-203.

**76-3-101. Short title.** This chapter may be cited as the "Montana Subdivision and Platting Act".  
**History:** En. Sec. 1, Ch. 500, L. 1973; R.C.M. 1947, 11-3859.

**76-3-102. Statement of purpose.** It is the purpose of this chapter to:

- (1) promote the public health, safety, and general welfare by regulating the subdivision of land;
- (2) prevent overcrowding of land;
- (3) lessen congestion in the streets and highways;
- (4) provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements;
- (5) require development in harmony with the natural environment;
- (6) promote preservation of open space;
- (7) promote cluster development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services;
- (8) protect the rights of property owners; and
- (9) require uniform monumentation of land subdivisions and transferring interests in real property by reference to a plat or certificate of survey.

**History:** En. Sec. 2, Ch. 500, L. 1973; amd. Sec. 1, Ch. 498, L. 1975; amd. Sec. 1, Ch. 552, L. 1977; R.C.M. 1947, 11-3860; amd. Sec. 1, Ch. 272, L. 1993; amd. Sec. 2, Ch. 468, L. 1995; amd. Sec. 2, Ch. 348, L. 2001.

**76-3-103. Definitions.** As used in this chapter, unless the context or subject matter clearly requires otherwise, the following definitions apply:

- (1) "Certificate of survey" means a drawing of a field survey prepared by a registered surveyor for the purpose of disclosing facts pertaining to boundary locations.
- (2) "Cluster development" means a subdivision with lots clustered in a group of five or more lots that is designed to concentrate building sites on smaller lots in order to reduce capital and maintenance costs

for infrastructure through the use of concentrated public services and utilities, while allowing other lands to remain undeveloped.

(3) "Dedication" means the deliberate appropriation of land by an owner for any general and public use, reserving to the landowner no rights that are incompatible with the full exercise and enjoyment of the public use to which the property has been devoted.

(4) "Division of land" means the segregation of one or more parcels of land from a larger tract held in single or undivided ownership by transferring or contracting to transfer title to or possession of a portion of the tract or properly filing a certificate of survey or subdivision plat establishing the identity of the segregated parcels pursuant to this chapter. The conveyance of a tract of record or an entire parcel of land that was created by a previous division of land is not a division of land.

(5) "Examining land surveyor" means a registered land surveyor appointed by the governing body to review surveys and plats submitted for filing.

(6) "Final plat" means the final drawing of the subdivision and dedication required by this chapter to be prepared for filing for record with the county clerk and recorder and containing all elements and requirements set forth in this chapter and in regulations adopted pursuant to this chapter.

(7) "Governing body" means a board of county commissioners or the governing authority of a city or town organized pursuant to law.

(8) "Immediate family" means a spouse, children by blood or adoption, and parents.

(9) "Minor subdivision" means a subdivision that creates five or fewer lots from a tract of record.

(10) "Planned unit development" means a land development project consisting of residential clusters, industrial parks, shopping centers, or office building parks that compose a planned mixture of land uses built in a prearranged relationship to each other and having open space and community facilities in common ownership or use.

(11) "Plat" means a graphical representation of a subdivision showing the division of land into lots, parcels, blocks, streets, alleys, and other divisions and dedications.

(12) "Preliminary plat" means a neat and scaled drawing of a proposed subdivision showing the layout of streets, alleys, lots, blocks, and other elements of a subdivision that furnish a basis for review by a governing body.

(13) "Public utility" has the meaning provided in 69-3-101, except that for the purposes of this chapter, the term includes county or consolidated city and county water or sewer districts as provided for in Title 7, chapter 13, parts 22 and 23.

(14) "Subdivider" means a person who causes land to be subdivided or who proposes a subdivision of land.

(15) "Subdivision" means a division of land or land so divided that it creates one or more parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and further includes a condominium or area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles or mobile homes.

(16) (a) "Tract of record" means an individual parcel of land, irrespective of ownership, that can be identified by legal description, independent of any other parcel of land, using documents on file in the records of the county clerk and recorder's office.

(b) Each individual tract of record continues to be an individual parcel of land unless the owner of the parcel has joined it with other contiguous parcels by filing with the county clerk and recorder

(i) an instrument of conveyance in which the aggregated parcels have been assigned a legal description that describes the resulting single parcel and in which the owner expressly declares the owner's intention that the tracts be merged; or

(ii) a certificate of survey or subdivision plat that shows that the boundaries of the original parcels have been expunged and depicts the boundaries of the larger aggregate parcel.

(c) An instrument of conveyance does not merge parcels of land under subsection (16)(b)(i) unless the instrument states, "This instrument is intended to merge individual parcels of land to form the aggregate parcel(s) described in this instrument" or a similar statement, in addition to the legal description of the aggregate parcels, clearly expressing the owner's intent to effect a merger of parcels.

**History:** En. Sec. 3, Ch. 500, L. 1973; amd. Sec. 1, Ch. 334, L. 1974; amd. Sec. 2, Ch. 498, L. 1975; R.C.M. 1947, 11-3861(part); amd. Sec. 140, Ch. 370, L. 1987; amd. Sec. 2, Ch. 272, L. 1993; amd. Sec. 1, Ch. 503, L. 1997; amd. Sec. 3, Ch. 348, L. 2001; amd. Sec. 1, Ch. 298, L. 2005.

**76-3-104. What constitutes subdivision.** A subdivision comprises only those parcels containing less than 160 acres that cannot be described as a one-quarter aliquot part of a United States government section when the parcels have been segregated from the original tract. The subdivision plat must show all the parcels whether contiguous or not.

**History:** En. Sec. 3, Ch. 500, L. 1973; amd. Sec. 1, Ch. 334, L. 1974; amd. Sec. 2, Ch. 498, L. 1975; R.C.M. 1947, 11-3861(part); amd. Sec. 3, Ch. 272, L. 1993.

**76-3-105. Violations.** Any person who violates any provision of this chapter or any local regulations adopted pursuant thereto shall be guilty of a misdemeanor and punishable by a fine of not less than \$100 or more than \$500 or by imprisonment in a county jail for not more than 3 months or by both fine and imprisonment. Each sale, lease, or transfer of each separate parcel of land in violation of any provision of this chapter or any local regulation adopted pursuant thereto shall be deemed a separate and distinct offense.

**History:** En. Sec. 18, Ch. 500, L. 1973; amd. Sec. 2, Ch. 553, L. 1977; R.C.M. 1947, 11-3876.

## Part 2

### Miscellaneous Exemptions

#### Part Cross-References

County taxation, Title 7, Ch. 6, part 25.

Property tax levies, Title 15, Ch. 10.

Unit Ownership Act, Title 70, Ch. 23.

#### **76-3-201. Exemption for certain divisions of land -- fees for examination of division.**

(1) Unless the method of disposition is adopted for the purpose of evading this chapter, the requirements of this chapter may not apply to any division of land that:

(a) is created by order of any court of record in this state or by operation of law or that, in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain, Title 70, chapter 30;

(b) subject to subsection (3), is created to provide security for mortgages, liens, or trust indentures for the purpose of construction, improvements to the land being divided, or refinancing purposes;

(c) creates an interest in oil, gas, minerals, or water that is severed from the surface ownership of real property;

(d) creates cemetery lots;

(e) is created by the reservation of a life estate;

(f) is created by lease or rental for farming and agricultural purposes;  
(g) is in a location over which the state does not have jurisdiction; or  
(h) is created for rights-of-way or utility sites. A subsequent change in the use of the land to a residential, commercial, or industrial use is subject to the requirements of this chapter.

(2) Before a court of record orders a division of land under subsection (1)(a), the court shall notify the governing body of the pending division and allow the governing body to present written comment on the division.

(3) An exemption under subsection (1)(b) applies:

(a) to a division of land of any size;

(b) if the land that is divided is not conveyed to any entity other than the financial or lending institution to which the mortgage, lien, or trust indenture was given or to a purchaser upon foreclosure of the mortgage, lien, or trust indenture. A transfer of the divided land, by the owner of the property at the time that the land was divided, to any party other than those identified in this subsection (3)(b) subjects the division of land to the requirements of this chapter.

(c) to a parcel that is created to provide security as provided in subsection (1)(b). The remainder of the tract of land is subject to the provisions of this chapter if applicable.

(4) The governing body may examine a division of land to determine whether or not the requirements of this chapter apply to the division and may establish reasonable fees, not to exceed \$200, for the examination.

**History:** En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; R.C.M. 1947, 11-3862(9); amd. Sec. 2, Ch. 503, L. 1997; amd. Sec. 1, Ch. 340, L. 2001; amd. Sec. 3, Ch. 549, L. 2003; amd. Sec. 1, Ch. 563, L. 2003.

**76-3-202. Exemption for structures on complying subdivided lands.** Where required by this chapter, when the land upon which an improvement is situated has been subdivided in compliance with this chapter, the sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land and is not subject to the terms of this chapter.

**History:** En. Sec. 3, Ch. 500, L. 1973; amd. Sec. 1, Ch. 334, L. 1974; amd. Sec. 2, Ch. 498, L. 1975; R.C.M. 1947, 11-3861(part); amd. Sec. 10, Ch. 266, L. 1979.

**76-3-203. Exemption for certain condominiums.** Condominiums constructed on land divided in compliance with this chapter are exempt from the provisions of this chapter if:

(1) the approval of the original division of land expressly contemplated the construction of the condominiums and any applicable park dedication requirements in 76-3-621 are complied with; or

(2) the condominium proposal is in conformance with applicable local zoning regulations where local zoning regulations are in effect.

**History:** En. Sec. 3, Ch. 500, L. 1973; amd. Sec. 1, Ch. 334, L. 1974; amd. Sec. 2, Ch. 498, L. 1975; R.C.M. 1947, 11-3861(part); amd. Sec. 1, Ch. 534, L. 2001.

**76-3-204. Exemption for conveyances of one or more parts of a structure or improvement.** The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement, whether existing or proposed, is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter.

**History:** En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; R.C.M. 1947, 11-3862(10); amd. Sec. 1, Ch. 500, L. 1985.

**76-3-205. Exemption for airport land and state-owned lands -- exception.** (1) A division of land created by lease or rental of contiguous airport-related land owned by a city, a county, the state, or a municipal or regional airport authority is not subject to the requirements of this chapter if the lease or rental is for onsite weather or air navigation facilities, the manufacture, maintenance, and storage of aircraft, or air carrier-related activities.

(2) A division of state-owned land is not subject to the requirements of this chapter unless the division creates a second or subsequent parcel from a single tract for sale, rent, or lease for residential purposes after July 1, 1974.

**History:** En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; R.C.M. 1947, 11-3862(5); amd. Sec. 1, Ch. 548, L. 1999.

**76-3-206. Exemption for conveyances executed prior to July 1, 1974.** This chapter shall not be applicable to deeds, contracts, leases, or other conveyances executed prior to July 1, 1974.

**History:** En. Sec. 12, Ch. 500, L. 1973; amd. Sec. 8, Ch. 334, L. 1974; R.C.M. 1947, 11-3870 (part).

**76-3-207. Divisions of land exempted from review but subject to survey requirements and zoning regulations -- exceptions -- fees for examination of division.** (1) Except as provided in subsection (2), unless the method of disposition is adopted for the purpose of evading this chapter, the following divisions of land are not subdivisions under this chapter but are subject to the surveying requirements of 76-3-401 for divisions of land not amounting to subdivisions and are subject to applicable zoning regulations adopted under Title 76, chapter 2:

(a) divisions made outside of platted subdivisions for the purpose of relocating common boundary lines between adjoining properties;

(b) divisions made outside of platted subdivisions for the purpose of a single gift or sale in each county to each member of the landowner's immediate family;

(c) divisions made outside of platted subdivisions by gift, sale, or agreement to buy and sell in which the parties to the transaction enter a covenant running with the land and revocable only by mutual consent of the governing body and the property owner that the divided land will be used exclusively for agricultural purposes;

(d) for five or fewer lots within a platted subdivision, relocation of common boundaries and the aggregation of lots; and

(e) divisions made for the purpose of relocating a common boundary line between a single lot within a platted subdivision and adjoining land outside a platted subdivision. A restriction or requirement on the original platted lot or original unplatted parcel continues to apply to those areas.

(2) Notwithstanding the provisions of subsection (1):

(a) within a platted subdivision filed with the county clerk and recorder, a division of lots that results in an increase in the number of lots or that redesigns or rearranges six or more lots must be reviewed and approved by the governing body and an amended plat must be filed with the county clerk and recorder;

(b) a change in use of the land exempted under subsection (1)(c) for anything other than agricultural purposes subjects the division to the provisions of this chapter.

(3) (a) Subject to subsection (3)(b), a division of land may not be made under this section unless the county treasurer has certified that all real property taxes and special assessments assessed and levied on the land to be divided have been paid.

(b) (i) If a division of land includes centrally assessed property and the property taxes applicable to the division of land are not specifically identified in the tax assessment, the department of revenue shall prorate the taxes applicable to the land being divided on a reasonable basis. The owner of the centrally assessed property shall ensure that the prorated real property taxes and special assessments are paid on the

land being sold before the division of land is made.

(ii) The county treasurer may accept the amount of the tax prorated pursuant to this subsection (3)(b) as a partial payment of the total tax that is due.

(4) The governing body may examine a division of land to determine whether or not the requirements of this chapter apply to the division and may establish reasonable fees, not to exceed \$200, for the examination.

**History:** En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; R.C.M. 1947, 11-3862(6); amd. Sec. 1, Ch. 379, L. 1985; amd. Sec. 1, Ch. 569, L. 1989; amd. Sec. 4, Ch. 272, L. 1993; amd. Sec. 3, Ch. 366, L. 1993; amd. Sec. 3, Ch. 468, L. 1995; amd. Sec. 2, Ch. 436, L. 2003; amd. Sec. 2, Ch. 563, L. 2003; amd. Sec. 1, Ch. 252, L. 2005.

**76-3-208. Subdivisions exempted from surveying and filing requirements but subject to review provisions.** Subdivisions created by rent or lease are exempt from the surveying and filing requirements of this chapter but must be submitted for review and approved by the governing body before portions thereof may be rented or leased.

**History:** En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; R.C.M. 1947, 11-3862(7).

**76-3-209. Exemption from surveying and platting requirements for lands acquired for state highways.** Instruments of transfer of land which is acquired for state highways may refer by parcel and project number to state highway plans which have been recorded in compliance with 60-2-209 and are exempted from the surveying and platting requirements of this chapter. If such parcels are not shown on highway plans of record, instruments of transfer of such parcels shall be accompanied by and refer to appropriate certificates of survey and plats when presented for recording.

**History:** En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; R.C.M. 1947, 11-3862(4).

**76-3-210. Subdivisions exempted from requirement of an environmental assessment.** (1) Subdivisions totally within an area that is covered by all of the following are considered to be in the public interest and are exempt from the requirement of an environmental assessment:

- (a) a growth policy adopted pursuant to chapter 1;
- (b) zoning regulations pursuant to 76-2-201 or chapter 2, part 3; and
- (c) a strategy for development, maintenance, and replacement of public infrastructure pursuant to 76-1-601.

(2) (a) A planning board established pursuant to chapter 1 may exempt a proposed subdivision within its jurisdictional area from the requirement for completion of any portion of the environmental assessment if:

(i) the subdivision is proposed in an area for which a growth policy has been adopted pursuant to chapter 1 and the proposed subdivision will be in compliance with the growth policy; or

(ii) the subdivision will contain fewer than 10 parcels and less than 20 acres.

(b) When an exemption is granted under this subsection (2), the planning board shall prepare and certify a written statement of the reasons for granting the exemption. A copy of this statement must accompany the preliminary plat of the subdivision when it is submitted for review.

(c) If a properly established planning board having jurisdiction does not exist, the governing body may grant exemptions as specified in this subsection (2).

**History:** (1)En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; Sec. 11-3862, R.C.M. 1947; (2)En. Sec. 5, Ch. 500, L. 1973; amd. Sec. 3, Ch. 334, L. 1974; amd. Sec. 20, Ch. 213, L. 1975; Sec. 11-3863, R.C.M. 1947; R.C.M. 1947, 11-3862(8), 11-3863(3.1); amd.

Sec. 20, Ch. 582, L. 1999; amd. Sec. 10, Ch. 599, L. 2003.

## Part 3

### Land Transfers

#### Part Cross-References

County taxation, Title 7, Ch. 6, part 25.  
Property tax levies, Title 15, Ch. 10.

**76-3-301. General restriction on transfer of title to subdivided lands.** (1) Except as provided in 76-3-303, every final subdivision plat must be filed for record with the county clerk and recorder before title to the subdivided land can be sold or transferred in any manner. The clerk and recorder of the county shall refuse to accept any plat for record that fails to have the approval of 76-3-611(1) in proper form unless the plat is located in an area over which the state does not have jurisdiction.

(2) The clerk and recorder shall notify the governing body or its designated agent of any land division described in 76-3-207(1).

(3) If transfers not in accordance with this chapter are made, the county attorney shall commence action to enjoin further sales or transfers and compel compliance with all provisions of this chapter. The cost of the action must be imposed against the party not prevailing.

**History:** En. Sec. 9, Ch. 500, L. 1973; amd. Sec. 7, Ch. 334, L. 1974; amd. Sec. 1, Ch. 553, L. 1977; R.C.M. 1947, 11-3867(part); amd. Sec. 1, Ch. 633, L. 1979; amd. Sec. 2, Ch. 340, L. 2001.

**76-3-302. Restrictions on recording instruments relating to land subject to surveying requirements.** (1) Except as provided in subsection (2), the county clerk and recorder of any county may not record any instrument that purports to transfer title to or possession of a parcel or tract of land that is required to be surveyed by this chapter unless the required certificate of survey or subdivision plat has been filed with the clerk and recorder and the instrument of transfer describes the parcel or tract by reference to the filed certificate or plat.

(2) Subsection (1) does not apply when the parcel or tract to be transferred:

(a) is in a location in which the state does not have jurisdiction; or

(b) was created before July 1, 1973, and the instrument of transfer for the parcel or tract includes a reference to a previously recorded instrument of transfer or is accompanied by documents that, if recorded, would otherwise satisfy the requirements of this subsection. The reference or document must demonstrate that the parcel or tract existed before July 1, 1973.

(3) The reference or documents required in subsection (2) do not constitute a legal description of the property and may not be substituted for a legal description of the property.

**History:** En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; R.C.M. 1947, 11-3862(3); amd. Sec. 1, Ch. 268, L. 1987; amd. Sec. 3, Ch. 340, L. 2001.

**76-3-303. Contract for deed permitted if buyer protected.** Notwithstanding the provisions of 76-3-301, after the preliminary plat of a subdivision has been approved or conditionally approved, the subdivider may enter into contracts to sell lots in the proposed subdivision if all of the following conditions are met:

(1) that under the terms of the contracts the purchasers of lots in the proposed subdivision make any payments to an escrow agent which must be a bank or savings and loan association chartered to do business in the state of Montana;

(2) that under the terms of the contracts and the escrow agreement the payments made by purchasers of lots in the proposed subdivision may not be distributed by the escrow agent to the subdivider until the final plat of the subdivision is filed with the county clerk and recorder;

(3) that the contracts and the escrow agreement provide that if the final plat of the proposed subdivision is not filed with the county clerk and recorder within 2 years of the preliminary plat approval, the escrow agent shall immediately refund to each purchaser any payments he has made under the contract;

(4) that the county treasurer has certified that no real property taxes assessed and levied on the land to be divided are delinquent; and

(5) that the contracts contain the following language conspicuously set out therein: "The real property which is the subject hereof has not been finally platted, and until a final plat identifying the property has been filed with the county clerk and recorder, title to the property cannot be transferred in any manner".

**History:** En. Sec. 9, Ch. 500, L. 1973; amd. Sec. 7, Ch. 334, L. 1974; amd. Sec. 1, Ch. 553, L. 1977; R.C.M. 1947, 11-3867(4); amd. Sec. 2, Ch. 379, L. 1985.

**76-3-304. Effect of recording complying plat.** The recording of any plat made in compliance with the provisions of this chapter shall serve to establish the identity of all lands shown on and being a part of such plat. Where lands are conveyed by reference to a plat, the plat itself or any copy of the plat properly certified by the county clerk and recorder as being a true copy thereof shall be regarded as incorporated into the instrument of conveyance and shall be received in evidence in all courts of this state.

**History:** En. Sec. 12, Ch. 500, L. 1973; amd. Sec. 8, Ch. 334, L. 1974; R.C.M. 1947, 11-3870(3).

**76-3-305. Vacation of plats -- utility easements.** (1) Any plat prepared and recorded as provided in this part may be vacated either in whole or in part as provided by 7-5-2501, 7-5-2502, 7-14-2616(1) and (2), 7-14-2617, 7-14-4114(1) and (2), and 7-14-4115. Upon vacation, the governing body or the district court, as provided in 7-5-2502, shall determine to which properties the title to the streets and alleys of the vacated portions must revert. The governing body or the district court, as provided in 7-5-2502, shall take into consideration the previous platting; the manner in which the right-of-way was originally dedicated, granted, or conveyed; the reasons stated in the petition requesting the vacation; the parties requesting the vacation; and any agreements between the adjacent property owners regarding the use of the vacated area. The title to the streets and alleys of the vacated portions may revert to one or more of the owners of the properties within the platted area adjacent to the vacated portions.

(2) However, when any poleline, pipeline, or any other public or private facility is located in a vacated street or alley at the time of the reversion of the title to the vacated street or alley, the owner of the public or private utility facility has an easement over the vacated land to continue the operation and maintenance of the public utility facility.

**History:** En. Sec. 12, Ch. 500, L. 1973; amd. Sec. 8, Ch. 334, L. 1974; R.C.M. 1947, 11-3870(1); amd. Sec. 1, Ch. 100, L. 1995; amd. Sec. 277, Ch. 42, L. 1997.

**76-3-306. Covenants run with the land.** All covenants shall be considered to run with the land, whether marked or noted on the subdivision plat or contained in a separate instrument recorded with the plat.

**History:** En. Sec. 11, Ch. 500, L. 1973; R.C.M. 1947, 11-3869.

**76-3-307. Donations or grants to public considered a grant to donee.** Every donation or grant to the public or to any person, society, or corporation marked or noted on a plat is to be considered a grant to the donee.

**History:** En. Sec. 13, Ch. 500, L. 1973; R.C.M. 1947, 11-3871.

## Part 4

### Survey Requirements

#### Part Cross-References

Board of Professional Engineers and Professional Land Surveyors – licensing, Title 37, Ch. 67.

**76-3-401. Survey requirements for lands other than subdivisions.** All divisions of land for sale other than a subdivision after July 1, 1974, into parcels which cannot be described as 1/32 or larger aliquot parts of a United States government section or a United States government lot must be surveyed by or under the supervision of a registered land surveyor. Surveys required under this section must comply with the requirements of 76-3-406.

**History:** En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; R.C.M. 1947, 11-3862(1); amd. Sec. 2, Ch. 136, L. 1993.

**76-3-402. Survey and platting requirements for subdivided lands.** (1) Every subdivision of land after June 30, 1973, must be surveyed and platted in conformance with this chapter, including the requirements of 76-3-406, by or under the supervision of a registered land surveyor.

(2) Subdivision plats must be prepared and filed in accordance with this chapter and regulations adopted pursuant to this chapter.

(3) All division of sections into aliquot parts and retracement of lines must conform to United States bureau of land management instructions, and all public land survey corners must be filed in accordance with Corner Recordation Act of Montana (Title 70, chapter 22, part 1). Engineering plans, specifications, and reports required in connection with public improvements and other elements of the subdivision required by the governing body must be prepared and filed by a registered engineer or a registered land surveyor, as their respective licensing laws allow, in accordance with this chapter and regulations adopted pursuant to this chapter.

**History:** En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; R.C.M. 1947, 11-3862(2); amd. Sec. 3, Ch. 136, L. 1993.

**76-3-403. Monumentation.** (1) The board of professional engineers and professional land surveyors shall, in conformance with the Montana Administrative Procedure Act, prescribe uniform standards for monumentation and for the form, accuracy, and descriptive content of records of survey.

(2) It is the responsibility of the governing body to require the replacement of all monuments removed in the course of construction.

**History:** En. Sec. 4, Ch. 500, L. 1973; amd. Sec. 2, Ch. 334, L. 1974; amd. Sec. 19, Ch. 213, L. 1975; amd. Sec. 2, Ch. 552, L. 1977; R.C.M. 1947, 11-3862(11), (12); amd. Sec. 6, Ch. 274, L. 1981; amd. Sec. 211, Ch. 483, L. 2001; amd. Sec. 6, Ch. 190, L. 2003.

**76-3-404. Certificate of survey.** (1) Except as provided in 70-22-105, within 180 days of the completion of a survey, the registered land surveyor responsible for the survey, whether the surveyor is privately or publicly employed, shall prepare and submit for filing a certificate of survey in the county in which the survey was made if the survey:

(a) provides material evidence not appearing on any map filed with the county clerk and recorder or

contained in the records of the United States bureau of land management;

(b) reveals a material discrepancy in the map;

(c) discloses evidence to suggest alternate locations of lines or points; or

(d) establishes one or more lines not shown on a recorded map, the positions of which are not ascertainable from an inspection of the map without trigonometric calculations.

(2) A certificate of survey is not required for any survey that is made by the United States bureau of land management, that is preliminary, or that will become part of a subdivision plat being prepared for recording under the provisions of this chapter.

(3) Certificates of survey must be legibly drawn, printed, or reproduced by a process guaranteeing a permanent record and must conform to monumentation and surveying requirements promulgated under this chapter.

**History:** En. Sec. 14, Ch. 500, L. 1973; R.C.M. 1947, 11-3872; amd. Sec. 2, Ch. 633, L. 1979; amd. Sec. 4, Ch. 549, L. 2003.

**76-3-405. Administration of oaths by registered land surveyor.** (1) Every registered land surveyor may administer and certify oaths when:

(a) it becomes necessary to take testimony for the identification of old corners or reestablishment of lost or obliterated corners;

(b) a corner or monument is found in a deteriorating condition and it is desirable that evidence concerning it be perpetuated;

(c) the importance of the survey makes it desirable to administer an oath to his assistants for the faithful performance of their duty.

(2) A record of oaths shall be preserved as part of the field notes of the survey and noted on the certificate of survey filed under 76-3-404.

**History:** En. Sec. 17, Ch. 500, L. 1973; R.C.M. 1947, 11-3875; amd. Sec. 11, Ch. 266, L. 1979.

**76-3-406. Surveys affecting irrigation districts -- additional survey requirements.** (1) (a) A surveyor who completes a survey identified in subsection (2) that establishes or defines a section line and creates a parcel that crosses the established or defined section line so that an irrigation district assessment boundary is included in more than 1 section shall note on the survey the acreage of the farm unit or created parcel in each section.

(b) The surveyor shall notify the appropriate irrigation district of the existence of the survey and the purpose of the survey.

(2) The requirements of subsection (1) apply only to surveys for which the surveyor determines that, based on available public records, the survey involves land:

(a) traversed by a canal or ditch owned by an irrigation district; or

(b) included in an irrigation district.

(3) For purposes of this section, "irrigation district" means a district established pursuant to Title 85, chapter 7.

**History:** En. Sec. 1, Ch. 136, L. 1993.

## Part 5

### Local Regulations

**76-3-501. Local subdivision regulations.** The governing body of every county, city, and town shall adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for:

- (1) the orderly development of their jurisdictional areas;
- (2) the coordination of roads within subdivided land with other roads, both existing and planned;
- (3) the dedication of land for roadways and for public utility easements;
- (4) the improvement of roads;
- (5) the provision of adequate open spaces for travel, light, air, and recreation;
- (6) the provision of adequate transportation, water, and drainage;
- (7) subject to the provisions of 76-3-511, the regulation of sanitary facilities;
- (8) the avoidance or minimization of congestion; and
- (9) the avoidance of subdivisions that would involve unnecessary environmental degradation and danger of injury to health, safety, or welfare by reason of natural hazard 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.

**History:** En. Sec. 5, Ch. 500, L. 1973; amd. Sec. 3, Ch. 334, L. 1974; amd. Sec. 20, Ch. 213, L. 1975; R.C.M. 1947, 11-3863(part); amd. Sec. 1, Ch. 378, L. 1985; amd. Sec. 17, Ch. 471, L. 1995; amd. Sec. 2, Ch. 298, L. 2005.

**76-3-502. Repealed.** Sec. 4, Ch. 236, L. 1981.

**History:** En. Sec. 5, Ch. 500, L. 1973; amd. Sec. 3, Ch. 334, L. 1974; amd. Sec. 20, Ch. 213, L. 1975; R.C.M. 1947, 11-3863(part); amd. Sec. 6, Ch. 274, L. 1981.

**76-3-503. Hearing on proposed regulations.** Before the governing body adopts subdivision regulations pursuant to 76-3-501 or 76-3-509, it shall hold a public hearing on the regulations and shall give public notice of its intent to adopt the regulations and of the public hearing by publication of notice of the time and place of the hearing in a newspaper of general circulation in the county not less than 15 or more than 30 days prior to the date of the hearing.

**History:** En. Sec. 5, Ch. 500, L. 1973; amd. Sec. 3, Ch. 334, L. 1974; amd. Sec. 20, Ch. 213, L. 1975; R.C.M. 1947, 11-3863(part); amd. Sec. 4, Ch. 348, L. 2001.

**76-3-504. Subdivision regulations -- contents.** (1) The subdivision regulations adopted under this chapter must, at a minimum:

- (a) list the materials that must be included in a subdivision application in order for the application to be determined to contain the required elements for the purposes of the review required in 76-3-604(1);
- (b) except as provided in 76-3-210, 76-3-509, or 76-3-609, require the subdivider to submit to the governing body an environmental assessment as prescribed in 76-3-603;
- (c) establish procedures consistent with this chapter for the submission and review of subdivision applications and amended applications;
- (d) prescribe the form and contents of preliminary plats and the documents to accompany final plats;
- (e) provide for the identification of areas that, because of natural or human-caused hazards, are unsuitable for subdivision development and prohibit subdivisions in these areas unless the hazards can be eliminated or overcome by approved construction techniques;
- (f) prohibit subdivisions for building purposes in areas located within the floodway of a flood of 100 year frequency, as defined by Title 76, chapter 5, or determined to be subject to flooding by the governing body;
- (g) prescribe standards for:
  - (i) the design and arrangement of lots, streets, and roads;

- (ii) grading and drainage;
- (iii) subject to the provisions of 76-3-511, water supply and sewage and solid waste disposal that meet the:
  - (A) regulations adopted by the department of environmental quality under 76-4-104 for subdivisions that will create one or more parcels containing less than 20 acres; and
  - (B) standards provided in 76-3-604 and 76-3-622 for subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres; and
  - (iv) the location and installation of public utilities;
  - (h) provide procedures for the administration of the park and open-space requirements of this chapter;
  - (i) provide for the review of subdivision applications by affected public utilities and those agencies of local, state, and federal government identified during the preapplication consultation conducted pursuant to subsection (1)(q) or those having a substantial interest in a proposed subdivision. A public utility or agency review may not delay the governing body's action on the application beyond the time limits specified in this chapter, and the failure of any agency to complete a review of an application may not be a basis for rejection of the application by the governing body.
  - (j) when a subdivision creates parcels with lot sizes averaging less than 5 acres, require the subdivider to:
    - (i) reserve all or a portion of the appropriation water rights owned by the owner of the land to be subdivided and transfer the water rights to a single entity for use by landowners within the subdivision who have a legal right to the water and reserve and sever any remaining surface water rights from the land;
    - (ii) if the land to be subdivided is subject to a contract or interest in a public or private entity formed to provide the use of a water right on the subdivision lots, establish a landowner's water use agreement administered through a single entity that specifies administration and the rights and responsibilities of landowners within the subdivision who have a legal right and access to the water; or
    - (iii) reserve and sever all surface water rights from the land;
  - (k) (i) except as provided in subsection (1)(k)(ii), require the subdivider to establish ditch easements in the subdivision that:
    - (A) are in locations of appropriate topographic characteristics and sufficient width to allow the physical placement and unobstructed maintenance of open ditches or belowground pipelines for the delivery of water for irrigation to persons and lands legally entitled to the water under an appropriated water right or permit of an irrigation district or other private or public entity formed to provide for the use of the water right on the subdivision lots;
    - (B) are a sufficient distance from the centerline of the ditch to allow for construction, repair, maintenance, and inspection of the ditch; and
    - (C) prohibit the placement of structures or the planting of vegetation other than grass within the ditch easement without the written permission of the ditch owner.
  - (ii) Establishment of easements pursuant to this subsection (1)(k) is not required if:
    - (A) the average lot size is 1 acre or less and the subdivider provides for disclosure, in a manner acceptable to the governing body, that adequately notifies potential buyers of lots that are classified as irrigated land and may continue to be assessed for irrigation water delivery even though the water may not be deliverable; or
    - (B) the water rights are removed or the process has been initiated to remove the water rights from the subdivided land through an appropriate legal or administrative process and if the removal or intended removal is denoted on the preliminary plat. If removal of water rights is not complete upon filing of the final plat, the subdivider shall provide written notification to prospective buyers of the intent to remove the water right and shall document that intent, when applicable, in agreements and legal documents for

related sales transactions.

(l) require the subdivider, unless otherwise provided for under separate written agreement or filed easement, to file and record ditch easements for unobstructed use and maintenance of existing water delivery ditches, pipelines, and facilities in the subdivision that are necessary to convey water through the subdivision to lands adjacent to or beyond the subdivision boundaries in quantities and in a manner that are consistent with historic and legal rights;

(m) require the subdivider to describe, dimension, and show public utility easements in the subdivision on the final plat in their true and correct location. The public utility easements must be of sufficient width to allow the physical placement and unobstructed maintenance of public utility facilities for the provision of public utility services within the subdivision.

(n) establish whether the governing body, its authorized agent or agency, or both will hold public hearings;

(o) establish procedures describing how the governing body or its agent or agency will address information presented at the hearing or hearings held pursuant to 76-3-605 and 76-3-615;

(p) establish criteria that the governing body or reviewing authority will use to determine whether a proposed method of disposition using the exemptions provided in 76-3-201 or 76-3-207 is an attempt to evade the requirements of this chapter. The regulations must provide for an appeals process to the governing body if the reviewing authority is not the governing body.

(q) establish a preapplication process that:

(i) allows a subdivider to meet with the agent or agency, other than the governing body, that is designated by the governing body to review subdivision applications prior to the subdivider submitting the application;

(ii) requires, for informational purposes only, identification of the state laws, local regulations, and growth policy provisions, if a growth policy has been adopted, that may apply to the subdivision review process;

(iii) requires a list to be made available to the subdivider of the public utilities, those agencies of local, state, and federal government, and any other entities that may be contacted for comment on the subdivision application and the timeframes that the public utilities, agencies, and other entities are given to respond. If, during the review of the application, the agent or agency designated by the governing body contacts a public utility, agency, or other entity that was not included on the list originally made available to the subdivider, the agent or agency shall notify the subdivider of the contact and the timeframe for response.

(iv) requires that a preapplication meeting take place no more than 30 days from the date that the agent or agency receives a written request for a preapplication meeting from the subdivider; and

(v) establishes a time limit after a preapplication meeting by which an application must be submitted as provided in 76-3-604.

(2) In order to accomplish the purposes described in 76-3-501, the subdivision regulations adopted under 76-3-509 and this section may include provisions that are consistent with this section that promote cluster development.

(3) The governing body may establish deadlines for submittal of subdivision applications.

**History:** En. Sec. 5, Ch. 500, L. 1973; amd. Sec. 3, Ch. 334, L. 1974; amd. Sec. 20, Ch. 213, L. 1975; R.C.M. 1947, 11-3863(2), (3); amd. Sec. 1, Ch. 236, L. 1981; amd. Sec. 17, Ch. 274, L. 1981; amd. Sec. 238, Ch. 418, L. 1995; amd. Sec. 18, Ch. 471, L. 1995; amd. Sec. 1, Ch. 201, L. 1999; amd. Sec. 21, Ch. 582, L. 1999; amd. Sec. 5, Ch. 348, L. 2001; amd. Sec. 3, Ch. 527, L. 2001; amd. Sec. 1, Ch. 564, L. 2001; amd. Sec. 11, Ch. 599, L. 2003; amd. Sec. 3, Ch. 298, L. 2005; amd. Sec. 1, Ch. 302, L. 2005.

**76-3-505. Repealed.** Sec. 16, Ch. 298, L. 2005.

**History:** En. Sec. 5, Ch. 500, L. 1973; amd. Sec. 3, Ch. 334, L. 1974; amd. Sec. 20, Ch. 213, L. 1975; R.C.M. 1947, 11-3863(5); amd. Sec. 1, Ch. 579, L. 1985; amd. Sec. 1, Ch. 256, L. 1987; amd. Sec. 239, Ch. 418, L. 1995; amd. Sec. 22, Ch. 582, L. 1999; amd. Sec. 12, Ch. 599, L. 2003.

**76-3-506. Provision for granting variances.** Subdivision regulations may authorize the governing body to grant variances from the regulations when strict compliance will result in undue hardship and when it is not essential to the public welfare. Any variance granted pursuant to this section must be based on specific variance criteria contained in the subdivision regulations.

**History:** En. Sec. 5, Ch. 500, L. 1973; amd. Sec. 3, Ch. 334, L. 1974; amd. Sec. 20, Ch. 213, L. 1975; R.C.M. 1947, 11-3863(6).

**76-3-507. Provision for bonding requirements to ensure construction of public improvements.** (1) Except as provided in subsection (2), the governing body shall require the subdivider to complete required improvements within the subdivision prior to the approval of the final plat.

(2) (a) In lieu of the completion of the construction of any public improvements prior to the approval of a final plat, the governing body shall at the subdivider's option allow the subdivider to provide or cause to be provided a bond or other reasonable security, in an amount and with surety and conditions satisfactory to the governing body, providing for and securing the construction and installation of the improvements within a period specified by the governing body and expressed in the bonds or other security. The governing body shall reduce bond requirements commensurate with the completion of improvements.

(b) In lieu of requiring a bond or other means of security for the construction or installation of all the required public improvements under subsection (2)(a), the governing body may approve an incremental payment or guarantee plan. The improvements in a prior increment must be completed or the payment or guarantee of payment for the costs of the improvements incurred in a prior increment must be satisfied before development of future increments.

(3) Approval by the governing body of a final plat prior to the completion of required improvements and without the provision of the security required under subsection (2) is not an act of a legislative body for the purposes of 2-9-111.

**History:** En. Sec. 5, Ch. 500, L. 1973; amd. Sec. 3, Ch. 334, L. 1974; amd. Sec. 20, Ch. 213, L. 1975; R.C.M. 1947, 11-3863(7); amd. Sec. 4, Ch. 468, L. 1995; amd. Sec. 3, Ch. 503, L. 1997.

**76-3-508. Repealed.** Sec. 4, Ch. 236, L. 1981.

**History:** En. Sec. 5, Ch. 500, L. 1973; amd. Sec. 3, Ch. 334, L. 1974; amd. Sec. 20, Ch. 213, L. 1975; R.C.M. 1947, 11-3863(8).

**76-3-509. Local option cluster development regulations and exemptions authorized.** (1) If the governing body has adopted a growth policy that meets the requirements of 76-1-601, the governing body may adopt regulations to promote cluster development and preserve open space under this section.

(2) Regulations adopted under this section must:

(a) establish a maximum size for each parcel in a cluster development;

(b) subject to subsection (3)(d), establish a maximum number of parcels in a cluster development; and

(c) establish requirements, including a minimum size for the area to be preserved, for preservation of open space as a condition of approval of a cluster development subdivision under regulations adopted pursuant to this section. The regulations must require that open space be preserved through an irrevocable conservation easement, granted in perpetuity, as provided for in Title 76, chapter 6, prohibiting further division of the parcel.

- (3) Regulations adopted under this section may:
- (a) establish a shorter timeframe for review of proposed cluster developments;
  - (b) establish procedures and requirements that provide an incentive for cluster development subdivisions that are consistent with the provisions of this chapter;
  - (c) authorize the review of a division of land that involves more than one existing parcel as one subdivision proposal for the purposes of creating a cluster development;
  - (d) authorize the creation of one clustered parcel for each existing parcel that is reviewed as provided in subsection (3)(c); and
  - (e) establish exemptions from the following:
    - (i) the requirements of an environmental assessment pursuant to 76-3-603;
    - (ii) review of the criteria in 76-3-608(3)(a); and
    - (iii) park dedication requirements pursuant to 76-3-621.
- (4) Except as provided in this section, the provisions of this chapter apply to cluster development subdivisions.

**History:** En. Sec. 6, Ch. 348, L. 2001.

**76-3-510. Payment for extension of capital facilities.** A local government may require a subdivider to pay or guarantee payment for part or all of the costs of extending capital facilities related to public health and safety, including but not limited to public roads, sewer lines, water supply lines, and storm drains to a subdivision. The costs must reasonably reflect the expected impacts directly attributable to the subdivision. A local government may not require a subdivider to pay or guarantee payment for part or all of the costs of constructing or extending capital facilities related to education.

**History:** En. Sec. 8, Ch. 468, L. 1995.

**76-3-511. Local regulations no more stringent than state regulations or guidelines.** (1) Except as provided in subsections (2) through (4) or unless required by state law, a governing body may not adopt a regulation under 76-3-501 or 76-3-504(1)(f)(iii) that is more stringent than the comparable state regulations or guidelines that address the same circumstances. The governing body may incorporate by reference comparable state regulations or guidelines.

(2) The governing body may adopt a regulation to implement 76-3-501 or 76-3-504(1)(f)(iii) that is more stringent than comparable state regulations or guidelines only if the governing body makes a written finding, after a public hearing and public comment and based on evidence in the record, that:

- (a) the proposed local standard or requirement protects public health or the environment; and
- (b) the local standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

(3) The written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the governing body's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed local standard or requirement.

(4) (a) A person affected by a regulation of the governing body adopted after January 1, 1990, and before April 14, 1995, that that person believes to be more stringent than comparable state regulations or guidelines may petition the governing body to review the regulation. If the governing body determines that the regulation is more stringent than comparable state regulations or guidelines, the governing body shall comply with this section by either revising the regulation to conform to the state regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 12 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged regulation. The governing body may charge a

petition filing fee in an amount not to exceed \$250.

(b) A person may also petition the governing body for a regulation review under subsection (4)(a) if the governing body adopts a regulation after January 1, 1990, in an area in which no state regulations or guidelines existed and the state government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted governing body regulation.

**History:** En. Sec. 5, Ch. 471, L. 1995; amd. Sec. 278, Ch. 42, L. 1997; amd. Sec. 2, Ch. 302, L. 2005.

## Part 6

### Local Review Procedure

**76-3-601. Submission of application and preliminary plat for review -- water and sanitation information required.** (1) Subject to the submittal deadlines established as provided in 76-3-504(3), the subdivider shall present to the governing body or to the agent or agency designated by the governing body the subdivision application, including the preliminary plat of the proposed subdivision, for local review. The preliminary plat must show all pertinent features of the proposed subdivision and all proposed improvements and must be accompanied by the preliminary water and sanitation information required under 76-3-622.

(2) (a) When the proposed subdivision lies within the boundaries of an incorporated city or town, the application and preliminary plat must be submitted to and approved by the city or town governing body.

(b) When the proposed subdivision is situated entirely in an unincorporated area, the application and preliminary plat must be submitted to and approved by the governing body of the county. However, if the proposed subdivision lies within 1 mile of a third-class city or town, within 2 miles of a second-class city, or within 3 miles of a first-class city, the county governing body shall submit the application and preliminary plat to the city or town governing body or its designated agent for review and comment. If the proposed subdivision is situated within a rural school district, as described in 20-9-615, the county governing body shall provide a summary of the information contained in the application and preliminary plat to school district trustees.

(c) If the proposed subdivision lies partly within an incorporated city or town, the application and preliminary plat must be submitted to and approved by both the city or town and the county governing bodies.

(d) When a proposed subdivision is also proposed to be annexed to a municipality, the governing body of the municipality shall coordinate the subdivision review and annexation procedures to minimize duplication of hearings, reports, and other requirements whenever possible.

(3) The provisions of 76-3-604, 76-3-605, 76-3-608 through 76-3-610, and this section do not limit the authority of certain municipalities to regulate subdivisions beyond their corporate limits pursuant to 7-3-4444.

**History:** En. Sec. 8, Ch. 500, L. 1973; amd. Sec. 6, Ch. 334, L. 1974; amd. Sec. 3, Ch. 498, L. 1975; amd. Sec. 1, Ch. 555, L. 1977; R.C.M. 1947, 11-3866(part); amd. Sec. 1, Ch. 89, L. 1981; amd. Sec. 4, Ch. 506, L. 1995; amd. Sec. 23, Ch. 582, L. 1999; amd. Sec. 67, Ch. 7, L. 2001; amd. Sec. 4, Ch. 298, L. 2005; amd. Sec. 3, Ch. 302, L. 2005.

**76-3-602. Fees.** The governing body may establish reasonable fees to be paid by the subdivider to defray the expense of reviewing subdivision applications.

**History:** En. Sec. 10, Ch. 500, L. 1973; R.C.M. 1947, 11-3868; amd. Sec. 5, Ch. 298, L. 2005.

**76-3-603. Contents of environmental assessment.** When required, the environmental

assessment must accompany the subdivision application and must include:

(1) for a major subdivision:

(a) a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available ground water information, and a description of the topography, vegetation, and wildlife use within the area of the proposed subdivision;

(b) a summary of the probable impacts of the proposed subdivision based on the criteria described in 76-3-608; and

(c) a community impact report containing a statement of anticipated needs of the proposed subdivision for local services, including education and busing; roads and maintenance; water, sewage, and solid waste facilities; and fire and police protection; and

(d) additional relevant and reasonable information related to the applicable regulatory criteria adopted under 76-3-501 as may be required by the governing body;\

(2) except as provided in 76-3-609, for a minor subdivision, a summary of the probable impacts of the proposed subdivision based on the criteria described in 76-3-608.

**History:** En. Sec. 5, Ch. 500, L. 1973; amd. Sec. 3, Ch. 334, L. 1974; amd. Sec. 20, Ch. 213, L. 1975; R.C.M. 1947, 11-3863(4); amd. Sec. 2, Ch. 236, L. 1981; amd. Sec. 5, Ch. 468, L. 1995; amd. Sec. 6, Ch. 298, L. 2005.

**76-3-604. Review of subdivision application -- review for required elements and sufficiency of information.** (1) (a) Within 5 working days of receipt of a subdivision application submitted in accordance with any deadlines established pursuant to 76-3-504(3) and receipt of the review fee submitted as provided in 76-3-602, the reviewing agent or agency shall determine whether the application contains all of the listed materials as required by 76-3-504(1)(a) and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency determines that elements are missing from the application, the reviewing agent or agency shall identify those elements in the notification.

(2) (a) Within 15 working days after the reviewing agent or agency notifies the subdivider or the subdivider's agent that the application contains all of the required elements as provided in subsection (1), the reviewing agent or agency shall determine whether the application and required elements contain detailed, supporting information that is sufficient to allow for the review of the proposed subdivision under the provisions of this chapter and the local regulations adopted pursuant to this chapter and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

(b) If the reviewing agent or agency determines that information in the application is not sufficient to allow for review of the proposed subdivision, the reviewing agent or agency shall identify the insufficient information in its notification.

(c) A determination that an application contains sufficient information for review as provided in this subsection (2) does not ensure that the proposed subdivision will be approved or conditionally approved by the governing body and does not limit the ability of the reviewing agent or agency or the governing body to request additional information during the review process.

(3) The time limits provided in subsections (1) and (2) apply to each submittal of the application until:

(a) a determination is made that the application contains the required elements and sufficient information; and

(b) the subdivider or the subdivider's agent is notified.

(4) After the reviewing agent or agency has notified the subdivider or the subdivider's agent that an application contains sufficient information as provided in subsection (2), the governing body shall approve, conditionally approve, or deny the proposed subdivision within 60 working days, based on its

determination of whether the application conforms to the provisions of this chapter and to the local regulations adopted pursuant to this chapter, unless:

(a) the subdivider and the reviewing agent or agency agree to an extension or suspension of the review period, not to exceed 1 year; or

(b) a subsequent public hearing is scheduled and held as provided in 76-3-615.

(5) If the governing body denies or conditionally approves the proposed subdivision, it shall send the subdivider a letter, with the appropriate signature, that complies with the provisions of 76-3-620.

(6) (a) The governing body shall collect public comment submitted at a hearing or hearings regarding the information presented pursuant to 76-3-622 and shall make any comments submitted or a summary of the comments submitted available to the subdivider within 30 days after conditional approval or approval of the subdivision application and preliminary plat.

(b) The subdivider shall, as part of the subdivider's application for sanitation approval, forward the comments or the summary provided by the governing body to the:

(i) reviewing authority provided for in Title 76, chapter 4, for subdivisions that will create one or more parcels containing less than 20 acres; and

(ii) local health department or board of health for proposed subdivisions that will create one or more parcels containing 20 acres or more and less than 160 acres.

(7) (a) For a proposed subdivision that will create one or more parcels containing less than 20 acres, the governing body may require approval by the department of environmental quality as a condition of approval of the final plat.

(b) For a proposed subdivision that will create one or more parcels containing 20 acres or more, the governing body may condition approval of the final plat upon the subdivider demonstrating, pursuant to 76-3-622, that there is an adequate water source and at least one area for a septic system and a replacement drainfield for each lot.

(8) (a) Review and approval, conditional approval, or denial of a proposed subdivision under this chapter may occur only under those regulations in effect at the time a subdivision application is determined to contain sufficient information for review as provided in subsection (2).

(b) If regulations change during the review periods provided in subsections (1) and (2), the determination of whether the application contains the required elements and sufficient information must be based on the new regulations.

**History:** En. Sec. 8, Ch. 500, L. 1973; amd. Sec. 6, Ch. 334, L. 1974; amd. Sec. 3, Ch. 498, L. 1975; amd. Sec. 1, Ch. 555, L. 1977; R.C.M. 1947, 11-3866(part); amd. Sec. 1, Ch. 236, L. 1999; amd. Sec. 24, Ch. 582, L. 1999; amd. Sec. 4, Ch. 527, L. 2001; amd. Sec. 7, Ch. 298, L. 2005; amd. Sec. 5, Ch. 302, L. 2005.

**76-3-605. Hearing on subdivision application.** (1) Except as provided in 76-3-609 and subject to the regulations adopted pursuant to 76-3-504(1)(o) and 76-3-615, at least one public hearing on the subdivision application must be held by the governing body, its authorized agent or agency, or both and the governing body, its authorized agent or agency, or both shall consider all relevant evidence relating to the public health, safety, and welfare, including the environmental assessment if required, to determine whether the subdivision application should be approved, conditionally approved, or denied by the governing body.

(2) When a proposed subdivision is also proposed to be annexed to a municipality, the governing body of the municipality shall hold joint hearings on the subdivision application and annexation whenever possible.

(3) Notice of the hearing must be given by publication in a newspaper of general circulation in the county not less than 15 days prior to the date of the hearing. The subdivider, each property owner of record whose property is immediately adjoining the land included in the preliminary plat, and each

purchaser under contract for deed of property immediately adjoining the land included in the preliminary plat must also be notified of the hearing by registered or certified mail not less than 15 days prior to the date of the hearing.

(4) When a hearing is held by an agent or agency designated by the governing body, the agent or agency shall act in an advisory capacity and recommend to the governing body the approval, conditional approval, or denial of the proposed subdivision. This recommendation must be submitted to the governing body in writing not later than 10 working days after the public hearing.

**History:** En. Sec. 8, Ch. 500, L. 1973; amd. Sec. 6, Ch. 334, L. 1974; amd. Sec. 3, Ch. 498, L. 1975; amd. Sec. 1, Ch. 555, L. 1977; R.C.M. 1947, 11-3866(part); amd. Sec. 2, Ch. 89, L. 1981; amd. Sec. 21, Ch. 526, L. 1983; amd. Sec. 25, Ch. 582, L. 1999; amd. Sec. 8, Ch. 298, L. 2005.

**76-3-606. Repealed.** Sec. 11, Ch. 468, L. 1995.

**History:** En. Sec. 6, Ch. 500, L. 1973; amd. Sec. 4, Ch. 334, L. 1974; R.C.M. 1947, 11-3864(1), (2); amd. Sec. 1, Ch. 703, L. 1979.

**76-3-607. Repealed.** Sec. 11, Ch. 468, L. 1995.

**History:** En. Sec. 6, Ch. 500, L. 1973; amd. Sec. 4, Ch. 334, L. 1974; R.C.M. 1947, 11-3864(3) thru (7).

**76-3-608. Criteria for local government review.** (1) The basis for the governing body's decision to approve, conditionally approve, or deny a proposed subdivision is whether the subdivision application, preliminary plat, applicable environmental assessment, public hearing, planning board recommendations, or additional information demonstrates that development of the proposed subdivision meets the requirements of this chapter. A governing body may not deny approval of a proposed subdivision based solely on the subdivision's impacts on educational services.

(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) except when the governing body has established an exemption pursuant to subsection (6) of this section or except as provided in 76-3-509 or in 76-3-609(2) or (4), the impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety;

(b) compliance with:

(i) the survey requirements provided for in part 4 of this chapter;

(ii) the local subdivision regulations provided for in part 5 of this chapter; and

(iii) the local subdivision review procedure provided for in this part;

(c) the provision of easements for the location and installation of any planned utilities; and

(d) the provision of legal and physical access to each parcel within the proposed subdivision and the required notation of that access on the applicable plat and any instrument of transfer concerning the parcel.

(4) The governing body may require the subdivider to design the proposed subdivision to reasonably minimize potentially significant adverse impacts identified through the review required under subsection (3). The governing body shall issue written findings to justify the reasonable mitigation required under this subsection (4).

(5) (a) In reviewing a proposed subdivision under subsection (3) and when requiring mitigation under subsection (4), a governing body may not unreasonably restrict a landowner's ability to develop land, but it is recognized that in some instances the unmitigated impacts of a proposed development may be unacceptable and will preclude approval of the subdivision.

(b) When requiring mitigation under subsection (4), a governing body shall consult with the subdivider and shall give due weight and consideration to the expressed preference of the subdivider.

(6) The governing body may exempt proposed subdivisions that are entirely within the boundaries of designated geographic areas from the review criteria in subsection (3)(a) if all of the following requirements have been met:

(a) the governing body has adopted a growth policy pursuant to chapter 1 that:

(i) addresses the criteria in subsection (3)(a);

(ii) evaluates the impact of development on the criteria in subsection (3)(a);

(iii) describes zoning regulations that will be implemented to address the criteria in subsection (3)(a); and

(iv) identifies one or more geographic areas where the governing body intends to authorize an exemption from review of the criteria in subsection (3)(a); and

(b) the governing body has adopted zoning regulations pursuant to chapter 2, part 2 or 3, that:

(i) apply to the entire area subject to the exemption; and

(ii) address the criteria in subsection (3)(a), as described in the growth policy.

(7) A governing body may conditionally approve or deny a proposed subdivision as a result of the water and sanitation information provided pursuant to 76-3-622 or public comment received pursuant to 76-3-604 on the information provided pursuant to 76-3-622 only if the conditional approval or denial is based on existing subdivision, zoning, or other regulations that the governing body has the authority to enforce.

**History:** En. Sec. 8, Ch. 500, L. 1973; amd. Sec. 6, Ch. 334, L. 1974; amd. Sec. 3, Ch. 498, L. 1975; amd. Sec. 1, Ch. 555, L. 1977; R.C.M. 1947, 11-3866(4); amd. Sec. 5, Ch. 272, L. 1993; amd. Sec. 6, Ch. 468, L. 1995; amd. Sec. 26, Ch. 582, L. 1999; amd. Sec. 7, Ch. 348, L. 2001; amd. Sec. 10, Ch. 298, L. 2005; amd. Sec. 6, Ch. 302, L. 2005.

**76-3-609. Review procedure for minor subdivisions -- determination of sufficiency of application -- governing body to adopt regulations.** (1) Minor subdivisions must be reviewed as provided in this section and subject to the applicable local regulations adopted pursuant to 76-3-504.

(2) If the tract of record proposed to be subdivided has not been subdivided or created by a subdivision under this chapter or has not resulted from a tract of record that has had more than five parcels created from that tract of record under 76-3-201 or 76-3-207 since July 1, 1973, then the proposed subdivision is a first minor subdivision from a tract of record and, when legal and physical access to all lots is provided, must be reviewed as follows:

(a) Except as provided in subsection (2)(b), the governing body shall approve, conditionally approve, or deny the first minor subdivision from a tract of record within 35 working days of a determination by the reviewing agent or agency that the application contains required elements and sufficient information for review. The determination and notification to the subdivider must be made in the same manner as is provided in 76-3-604(1) through (3).

(b) The subdivider and the reviewing agent or agency may agree to an extension or suspension of the review period, not to exceed 1 year.

(c) Except as provided in subsection (2)(d)(iii), an application must include a summary of the probable impacts of the proposed subdivision based on the criteria described in 76-3-608(3).

(d) The following requirements do not apply to the first minor subdivision from a tract of record as provided in subsection (2):

(i) the requirement to prepare an environmental assessment;

(ii) the requirement to hold a hearing on the subdivision application pursuant to 76-3-605; and

(iii) the requirement to review the subdivision for the criteria contained in 76-3-608(3)(a) if the minor

subdivision is proposed in the portion of a jurisdictional area that has adopted zoning regulations that address the criteria in 76-3-608(3)(a).

(e) The governing body may adopt regulations that establish requirements for the expedited review of the first minor subdivision from a tract of record. The following apply to a proposed subdivision reviewed under the regulations:

(i) 76-3-608(3); and

(ii) the provisions of Title 76, chapter 4, part 1, whenever approval is required by those provisions.

(3) Except as provided in subsection (4), any minor subdivision that is not a first minor subdivision from a tract of record, as provided in subsection (2), is a subsequent minor subdivision and must be reviewed as provided in 76-3-601 through 76-3-605, 76-3-608, 76-3-610 through 76-3-614, and 76-3-620.

(4) The governing body may adopt subdivision regulations that establish requirements for review of subsequent minor subdivisions that meet or exceed the requirements that apply to the first minor subdivision, as provided in subsection (2) and this chapter.

(5) (a) Review and approval, conditional approval, or denial of a subdivision under this chapter may occur only under those regulations in effect at the time that a subdivision application is determined to contain sufficient information for review as provided in subsection (2).

(b) If regulations change during the period that the application is reviewed for required elements and sufficient information, the determination of whether the application contains the required elements and sufficient information must be based on the new regulations.

**History:** En. Sec. 8, Ch. 500, L. 1973; amd. Sec. 6, Ch. 334, L. 1974; amd. Sec. 3, Ch. 498, L. 1975; amd. Sec. 1, Ch. 555, L. 1977; R.C.M. 1947, 11-3866(6); amd. Sec. 2, Ch. 579, L. 1985; amd. Sec. 2, Ch. 256, L. 1987; amd. Sec. 7, Ch. 468, L. 1995; amd. Sec. 2, Ch. 236, L. 1999; amd. Sec. 11, Ch. 298, L. 2005.

**76-3-610. Effect of approval of application and preliminary plat.** (1) Upon approving or conditionally approving an application and preliminary plat, the governing body shall provide the subdivider with a dated and signed statement of approval. This approval must be in force for not more than 3 calendar years or less than 1 calendar year. At the end of this period the governing body may, at the request of the subdivider, extend its approval for no more than 1 calendar year, except that the governing body may extend its approval for a period of more than 1 year if that approval period is included as a specific condition of a written agreement between the governing body and the subdivider, according to 76-3-507.

(2) After the application and preliminary plat are approved, the governing body and its subdivisions may not impose any additional conditions as a prerequisite to final plat approval if the approval is obtained within the original or extended approval period as provided in subsection (1).

**History:** En. Sec. 8, Ch. 500, L. 1973; amd. Sec. 6, Ch. 334, L. 1974; amd. Sec. 3, Ch. 498, L. 1975; amd. Sec. 1, Ch. 555, L. 1977; R.C.M. 1947, 11-3866(part); amd. Sec. 1, Ch. 223, L. 1981; amd. Sec. 1, Ch. 190, L. 1983; amd. Sec. 12, Ch. 298, L. 2005.

**76-3-611. Review of final plat.** (1) The governing body shall examine each final subdivision plat and shall approve the plat only if:

(a) it conforms to the conditions of approval set forth on the preliminary plat and to the terms of this chapter and regulations adopted pursuant to this chapter; and

(b) the county treasurer has certified that all real property taxes and special assessments assessed and levied on the land to be subdivided have been paid.

(2) (a) The governing body may require that final subdivision plats and certificates of survey be reviewed for errors and omissions in calculation or drafting by an examining land surveyor before

recording with the county clerk and recorder. When the survey data shown on the plat or certificate of survey meets the conditions pursuant to this chapter, the examining land surveyor shall certify the compliance in a printed or stamped certificate on the plat or certificate of survey. The certificate must be signed by the surveyor.

(b) A land surveyor may not act as an examining land surveyor in regard to a plat or certificate of survey in which the surveyor has a financial or personal interest.

**History:** En. Sec. 9, Ch. 500, L. 1973; amd. Sec. 7, Ch. 334, L. 1974; amd. Sec. 1, Ch. 553, L. 1977; R.C.M. 1947, 11-3867(part); amd. Sec. 1, Ch. 273, L. 1981; amd. Sec. 1, Ch. 293, L. 1995.

**76-3-612. Abstract of title required for review process.** (1) The subdivider shall submit with the final plat a certificate of a title abstracter showing the names of the owners of record of the land to be subdivided and the names of lienholders or claimants of record against the land and the written consent to the subdivision by the owners of the land, if other than the subdivider, and any lienholders or claimants of record against the land.

(2) The governing body may provide for the review of the abstract or certificate of title of the land in question by the county attorney where the land lies in an unincorporated area or by the city or town attorney when the land lies within the limits of a city or town.

**History:** En. Sec. 7, Ch. 500, L. 1973; amd. Sec. 5, Ch. 334, L. 1974; R.C.M. 1947, 11-3865; amd. Sec. 186, Ch. 575, L. 1981.

**76-3-613. Index of plats to be kept by county clerk and recorder.** (1) The county clerk and recorder shall maintain an index of all recorded subdivision plats and certificates of survey.

(2) This index shall list plats and certificates of survey by the quarter section, section, township, and range in which the platted or surveyed land lies and shall list the recording or filing numbers of all plats depicting lands lying within each quarter section. Each quarter section list shall be definitive to the exclusion of all other quarter sections. The index shall also list the names of all subdivision plats in alphabetical order and the place where filed.

**History:** En. Sec. 15, Ch. 500, L. 1973; R.C.M. 1947, 11-3873.

**76-3-614. Correction of recorded plat.** When a recorded plat does not definitely show the location or size of lots or blocks or the location or width of any street or alley, the governing body may at its own expense cause a new and correct survey and plat to be made and recorded in the office of the county clerk and recorder. The corrected plat must, to the extent possible, follow the plan of the original survey and plat. The surveyor making the resurvey shall endorse the corrected plat referring to the original plat and noting the defect existing therein and the corrections made.

**History:** En. Sec. 16, Ch. 500, L. 1973; R.C.M. 1947, 11-3874.

**76-3-615. Subsequent hearings -- consideration of new information -- requirements for regulations.** (1) The regulations adopted pursuant to 76-3-504(1)(o) must comply with the provisions of this section.

(2) The governing body shall determine whether public comments or documents presented to the governing body at a hearing held pursuant to 76-3-605 constitute:

(a) information or analysis of information that was presented at a hearing held pursuant to 76-3-605 that the public has had a reasonable opportunity to examine and on which the public has had a reasonable opportunity to comment; or

(b) new information regarding a subdivision application that has never been submitted as evidence or considered by either the governing body or its agent or agency at a hearing during which the subdivision

application was considered.

(3) If the governing body determines that the public comments or documents constitute the information described in subsection (2)(b), the governing body may:

(a) approve, conditionally approve, or deny the proposed subdivision without basing its decision on the new information if the governing body determines that the new information is either irrelevant or not credible; or

(b) schedule or direct its agent or agency to schedule a subsequent public hearing for consideration of only the new information that may have an impact on the findings and conclusions that the governing body will rely upon in making its decision on the proposed subdivision.

(4) If a public hearing is held as provided in subsection (3)(b), the 60-working-day review period required in 76-3-604(4) is suspended and the new hearing must be noticed and held within 45 days of the governing body's determination to schedule a new hearing. After the new hearing, the 60-working-day time limit resumes at the governing body's next scheduled public meeting for which proper notice for the public hearing on the subdivision application can be provided. The governing body may not consider any information regarding the subdivision application that is presented after the hearing when making its decision to approve, conditionally approve, or deny the proposed subdivision.

**History:** En. Sec. 9, Ch. 298, L. 2005.

**76-3-616 through 76-3-619 reserved.**

**76-3-620. Review requirements -- written statement.** In addition to the requirements of 76-3-604 and 76-3-609, following any decision by the governing body to deny or conditionally approve a proposed subdivision, the governing body shall prepare a written statement that must be provided to the applicant, that must be made available to the public, and that:

(1) includes information regarding the appeal process for the denial or imposition of conditions;

(2) identifies the regulations and statutes that are used in reaching the decision to deny or impose conditions and explains how they apply to the decision to deny or impose conditions;

(3) provides the facts and conclusions that the governing body relied upon in making its decision to deny or impose conditions and references documents, testimony, or other materials that form the basis of the decision; and

(4) provides the conditions that apply to the preliminary plat approval and that must be satisfied before the final plat may be approved.

**History:** En. Sec. 2, Ch. 224, L. 1995; amd. Sec. 13, Ch. 298, L. 2005.

**76-3-621. Park dedication requirement.** (1) Except as provided in 76-3-509 or subsections (2), (3), and (6) through (8) of this section, a subdivider shall dedicate to the governing body a cash or land donation equal to:

(a) 11% of the area of the land proposed to be subdivided into parcels of one-half acre or smaller;

(b) 7.5% of the area of the land proposed to be subdivided into parcels larger than one-half acre and not larger than 1 acre;

(c) 5% of the area of the land proposed to be subdivided into parcels larger than 1 acre and not larger than 3 acres; and

(d) 2.5% of the area of the land proposed to be subdivided into parcels larger than 3 acres and not larger than 5 acres.

(2) When a subdivision is located totally within an area for which density requirements have been adopted pursuant to a growth policy under chapter 1 or pursuant to zoning regulations under chapter 2, the governing body may establish park dedication requirements based on the community need for parks

and the development densities identified in the growth policy or regulations. Park dedication requirements established under this subsection are in lieu of those provided in subsection (1) and may not exceed 0.03 acres per dwelling unit.

(3) A park dedication may not be required for:

- (a) a minor subdivision;
- (b) land proposed for subdivision into parcels larger than 5 acres;
- (c) subdivision into parcels that are all nonresidential;
- (d) a subdivision in which parcels are not created, except when that subdivision provides permanent multiple spaces for recreational camping vehicles, mobile homes, or condominiums; or
- (e) a subdivision in which only one additional parcel is created

(4) The governing body, in consultation with the subdivider and the planning board or park board that has jurisdiction, may determine suitable locations for parks and playgrounds and, giving due weight and consideration to the expressed preference of the subdivider, may determine whether the park dedication must be a land donation, cash donation, or a combination of both. When a combination of land donation and cash donation is required, the cash donation may not exceed the proportional amount not covered by the land donation.

(5) (a) In accordance with the provisions of subsections (5)(b) and (5)(c), the governing body shall use the dedicated money or land for development, acquisition, or maintenance of parks to serve the subdivision.

(b) The governing body may use the dedicated money to acquire, develop, or maintain, within its jurisdiction, parks or recreational areas or for the purchase of public open space or conservation easements only if:

(i) the park, recreational area, open space, or conservation easement is within a reasonably close proximity to the proposed subdivision; and

(ii) the governing body has formally adopted a park plan that establishes the needs and procedures for use of the money.

(c) The governing body may not use more than 50% of the dedicated money for park maintenance.

(6) The local governing body shall waive the park dedication requirement if:

(a) (i) the preliminary plat provides for a planned unit development or other development with land permanently set aside for park and recreational uses sufficient to meet the needs of the persons who will ultimately reside in the development; and

(ii) the area of the land and any improvements set aside for park and recreational purposes equals or exceeds the area of the dedication required under subsection (1);

(b) (i) the preliminary plat provides long-term protection of critical wildlife habitat; cultural, historical, or natural resources; agricultural interests; or aesthetic values; and

(ii) the area of the land proposed to be subdivided, by virtue of providing long-term protection provided for in subsection (6)(b)(i), is reduced by an amount equal to or exceeding the area of the dedication required under subsection (1);

(c) the area of the land proposed to be subdivided, by virtue of a combination of the provisions of subsections (6)(a) and (6)(b), is reduced by an amount equal to or exceeding the area of the dedication required under subsection (1); or

(d) (i) the subdivider provides for land outside of the subdivision to be set aside for park and recreational uses sufficient to meet the needs of the persons who will ultimately reside in the subdivision; and

(ii) the area of the land and any improvements set aside for park and recreational uses equals or exceeds the area of dedication required under subsection (1).

(7) The local governing body may waive the park dedication requirement if:

(a) the subdivider provides land outside the subdivision that affords long-term protection of critical wildlife habitat, cultural, historical, or natural resources, agricultural interests, or aesthetic values; and  
(b) the area of the land to be subject to long-term protection, as provided in subsection (7)(a), equals or exceeds the area of the dedication required under subsection (1).

(8) Subject to the approval of the local governing body and acceptance by the school district trustees, a subdivider may dedicate a land donation provided in subsection (1) to a school district, adequate to be used for school facilities or buildings.

(9) For the purposes of this section:

(a) "cash donation" is the fair market value of the unsubdivided, unimproved land; and

(b) "dwelling unit" means a residential structure in which a person or persons reside.

(10) A land donation under this section may be inside or outside of the subdivision.

**History:** En. Sec. 9, Ch. 468, L. 1995; amd. Sec. 27, Ch. 582, L. 1999; amd. Sec. 8, Ch. 348, L. 2001; amd. Sec. 1, Ch. 469, L. 2003; amd. Sec. 2, Ch. 333, L. 2005.

**76-3-622. Water and sanitation information to accompany preliminary plat.** (1) Except as provided in subsection (2), the subdivider shall submit to the governing body or to the agent or agency designated by the governing body the information listed in this section for proposed subdivisions that will include new water supply or wastewater facilities. The information must include:

(a) a vicinity map or plan that shows:

(i) the location, within 100 feet outside of the exterior property line of the subdivision and on the proposed lots, of:

(A) flood plains;

(B) surface water features;

(C) springs;

(D) irrigation ditches;

(E) existing, previously approved, and, for parcels less than 20 acres, proposed water wells and wastewater treatment systems;

(F) for parcels less than 20 acres, mixing zones identified as provided in subsection (1)(g); and

(G) the representative drainfield site used for the soil profile description as required under subsection (1)(d); and

(ii) the location, within 500 feet outside of the exterior property line of the subdivision, of public water and sewer facilities;

(b) a description of the proposed subdivision's water supply systems, storm water systems, solid waste disposal systems, and wastewater treatment systems, including whether the water supply and wastewater treatment systems are individual, shared, multiple user, or public as those systems are defined in rules published by the department of environmental quality;

(c) a drawing of the conceptual lot layout at a scale no smaller than 1 inch equal to 200 feet that shows all information required for a lot layout document in rules adopted by the department of environmental quality pursuant to 76-4-104;

(d) evidence of suitability for new onsite wastewater treatment systems that, at a minimum, includes:

(i) a soil profile description from a representative drainfield site identified on the vicinity map, as provided in subsection (1)(a)(i)(G), that complies with standards published by the department of environmental quality;

(ii) demonstration that the soil profile contains a minimum of 4 feet of vertical separation distance between the bottom of the permeable surface of the proposed wastewater treatment system and a limiting layer; and

(iii) in cases in which the soil profile or other information indicates that ground water is within 7 feet

of the natural ground surface, evidence that the ground water will not exceed the minimum vertical separation distance provided in subsection (1)(d)(ii);

(e) for new water supply systems, unless cisterns are proposed, evidence of adequate water availability:

(i) obtained from well logs or testing of onsite or nearby wells;

(ii) obtained from information contained in published hydrogeological reports; or

(iii) as otherwise specified by rules adopted by the department of environmental quality pursuant to 76-4-104;

(f) evidence of sufficient water quality in accordance with rules adopted by the department of environmental quality pursuant to 76-4-104;

(g) a preliminary analysis of potential impacts to ground water quality from new wastewater treatment systems, using as guidance rules adopted by the board of environmental review pursuant to 75-5-301 and 75-5-303 related to standard mixing zones for ground water, source specific mixing zones, and nonsignificant changes in water quality. The preliminary analysis may be based on currently available information and must consider the effects of overlapping mixing zones from proposed and existing wastewater treatment systems within and directly adjacent to the subdivision. Instead of performing the preliminary analysis required under this subsection (1)(g), the subdivider may perform a complete nondegradation analysis in the same manner as is required for an application that is reviewed under Title 76, chapter 4.

(2) A subdivider whose land division is excluded from review under 76-4-125(2) is not required to submit the information required in this section.

(3) A governing body may not, through adoption of regulations, require water and sanitation information in addition to the information required under this section unless the governing body complies with the procedures provided in 76-3-511.

**History:** En. Sec. 4, Ch. 302, L. 2005.

### **76-3-623 through 76-3-624 reserved.**

**76-3-625. Violations -- actions against governing body.** (1) A person who has filed with the governing body an application for a subdivision under this chapter may bring an action in district court to sue the governing body to recover actual damages caused by a final action, decision, or order of the governing body or a regulation adopted pursuant to this chapter that is arbitrary or capricious.

(2) A party identified in subsection (3) 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 or a final subdivision plat may, within 30 days after the decision, appeal to the district court in the county in which the property involved is located. The petition must specify the grounds upon which the appeal is made.

(3) The following parties may appeal under the provisions of subsection (2):

(a) the subdivider;

(b) 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;

(c) the county commissioners of the county where the subdivision is proposed; and

(d) (i) a first-class municipality, as described in 7-1-4111, if a subdivision is proposed within 3 miles of its limits;

(ii) a second-class municipality, as described in 7-1-4111, if a subdivision is proposed within 2 miles of its limits; and

(iii) a third-class municipality or a town, as described in 7-1-4111, if a subdivision is proposed within 1 mile of its limits.

(4) For the purposes of this section, "aggrieved" means a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specially and injuriously affected by the decision.

History: En. Sec. 10, Ch. 468, L. 1995; amd. Sec. 14, Ch. 298, L. 2005.

# **MONTANA SUBDIVISION LAW DIGEST**

**A Summary of Judicial Decisions and Attorneys General  
Opinions Relating to the Regulation of Land Divisions  
Under the Montana Subdivision and Platting Act**

**Updated by Myra L. Shults, Attorney at Law\***

**May 2006**

**\*Substantially based on Richard M. Weddle's Montana  
Subdivision Law Digest dated March 2000, prepared for the  
Montana Department of Commerce  
Community Technical Assistance Program**

## PREFACE

The *Montana Subdivision Law Digest* is a summary of Montana Supreme Court and district court decisions and attorneys general opinions that have interpreted the provisions of the Montana Subdivision and Platting Act since its enactment in 1973. Decisions and opinions that have been superseded by subsequent decisions, opinions, or legislative action have been omitted unless otherwise noted.

Of these various rulings, Supreme Court decisions have the greatest authority because they are binding on the attorney general, district courts, and the Supreme Court, itself.

Attorneys general opinions have the next greatest weight because, unless they are judicially overruled, they are controlling over contrary opinions issued by city or county attorneys or attorneys employed by state agencies. [See section 2-15-501(7), MCA.] Furthermore, an attorney general's opinion, acquiesced in by the Legislature, while not binding on the courts, is persuasive and will be upheld if not erroneous. [See *State ex rel. Ebel v. Schye*, 130 Mont. 537, 541, 305 P.2d 350 (1957) and *State ex rel. Barr v. District Court*, 108 Mont. 433, 436, 91 P.2d 399 (1930).] The *Digest* summarizes several unpublished attorneys general "letter" opinions but does not purport to be exhaustive with respect to these opinions. Also included are summaries of several unpublished "letters of advice" and one "letter of analysis" issued by assistant attorneys general. These letters, while instructive, are not to be regarded as official attorneys general opinions.

District court decisions, which are also unpublished, have no precedential application. However, they often contain well-reasoned expositions of the law and can provide useful guidance to local officials in carrying out their responsibilities under the Act. The *Digest* does not purport to be exhaustive with respect to these decisions.

Many of the decisions and opinions summarized in the *Digest* contain statutory references to the *Revised Codes of Montana, 1947*, which in 1978 were recodified in the *Montana Code Annotated*. [For the convenience of the reader Mr. Weddle has converted these references to the corresponding provisions of current statute.]

**The information contained in the Digest should not be regarded as a substitute for obtaining competent legal advice concerning specific land-use issues. The author encourages local government officials to consult with their city or county attorney before taking any action relating to the regulation of subdivision development that may have significant legal implications.**

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**SUBDIVISION AND PLATTING ACT, GENERALLY**

**I. Validity of Act**

By enacting the Montana Subdivision and Platting Act the Legislature did not impermissibly delegate its authority to local governments, and the Act is constitutional under Mont. Const. Art. XI, Section 4(1)(b) and (2). *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

**II. Relationship of Act to Other Statutes**

The provisions of the Montana Environmental Policy Act (sections 75-1-101 *et seq.*, MCA) do not extend the Department of Health and Environmental Sciences’ regulatory control over subdivisions under the Sanitation in Subdivisions Act (sections 76-4-101 *et seq.*, MCA) beyond matters of water supply and sewage and solid waste disposal. The Legislature’s intention in enacting the Subdivision and

Platting Act (sections 76-3-101 *et seq.*, MCA) was to place control of subdivision development in local governmental units. *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 559 P.2d 1157 (1976). [Note: Chapter 418, L. 1995, abolished the Department of Health of Environmental Sciences and assigned its duties regarding the state regulation of subdivision development of the new Department of Environmental Quality.]

### **III. Effect of Noncompliance with Act – Curing Defects**

Deeds and contracts that convey land in violation of the Act are voidable. 38 Op. Att’y Gen. No. 106 (1980). [Note: This opinion superseded 35 Op. Att’y Gen. No. 65 (1974) which held that deeds and contracts to convey land in violation of the Act were void.]

Deeds and contracts that convey land in violation of the Act but with the unauthorized approval of the board of county commissioners are voidable. 38 Op. Att’y Gen. No. 106 (1980).

Violations of the Act may be corrected by the parties to the transaction by voiding the improper conveyance and reconveying the land in accordance with the Act. 38 Op. Att’y Gen. No. 106 (1980).

The Act does not prevent an individual who has developed his property contrary to the Act from pursuing a claim for relief against an adjoining subdivision for right-of-access. One who violates state laws or local regulations pertaining to subdivision is guilty of a misdemeanor and, under section 76-3-105, MCA, is subject to fine and imprisonment or both. Furthermore, the county attorney in the county in which the alleged illegal transfers of land have been made is charged with enjoining further sales or transfers [section 76-3-301(3), MCA]. *Smith v. Moran*, 215 Mont. 31, 693 P.2d 1246 (1985).

An attempt to convey a tract of land in violation of the Act is void. *McDonald v. Jones*, 258 Mont. 211, 852 P.2d 588 (1993).

A certificate of survey that is filed in the county clerk and recorder’s office before all of the new monuments shown in the certificate have actually been set is not “properly filed” and, therefore, does not create a “division of land” for purposes of the Act unless the surveyor performing the survey has certified that the monuments that were not set would have been disturbed by the installation of improvements on the surveyed property [section 76-3-103(3), MCA, (currently section 76-3-103(4), MCA); section 76-3-404(3), MCA; ARM 8.94.3001(1)(d)]. The fact that weather conditions made it difficult or impossible to set the monuments does not exempt a certificate from this monumentation requirement. *NFC Partners v. Stanchfield Cattle Co.*, 274 Mont. 46, 905 P.2d 1106 (1995). [Note: In 2000 the Department of Commerce amended its administrative rules governing survey monumentation to allow the deferral of monumentation due to severe weather conditions for up to 240 days following the filing of a survey document; currently found in ARM 24.183.1101(1)(d).]

A person whose title to a parcel of land is void because the parcel was created in violation of the Act may not recover for his loss under a title insurance policy that contains the common provision excepting from coverage losses occasioned by the operation of a law or regulation that restricts the separation of ownership in land. *Insured Titles, Inc., v. McDonald*, 275 Mont. 111, 911 P.2d 209 (1996).

Pledging a 20-acre proposed tract which has not been platted or surveyed, as security for an obligation to construct a man-made lake, violates the Montana Subdivision and Platting Act. This pledge

is not a construction lien, the exemption found in section 76-3-201(1)(b), MCA, is not available to create the 20-acre parcel and the parcel is not transferrable pursuant to section 76-3-302, MCA. *Riverview Homes II, Ltd, v. Canton*, 2001 MT 390, 307 Mont. 517, 38 P.3d 848.

## **AUTHORITY OF LOCAL GOVERNING BODY, GENERALLY**

### **I. Adoption and Scope of Local Subdivision Regulations**

Under the Act a governing body may adopt and enforce sanitary regulations more stringent than those promulgated by the Montana Department of Health and Environmental Sciences [now the Department of Environmental Quality] under the Sanitation in Subdivisions Act (sections 76-4-101 *et seq.*, MCA). 35 Op. Att’y Gen. No. 39 (1973). [Note: section 76-3-511, MCA, and amendments to sections 76-3-501 and 76-3-504, MCA, enacted in 1995, impose conditions on the adoption by local governing bodies of sanitary regulations more stringent than comparable regulations adopted by the state Department of Environmental Quality.]

Local subdivision regulations may not define the term “subdivision” differently than it is defined by the Act. Letter opinion to Chester L. Jones, Esq., August 19, 1974.

The Act’s mandate to local governing bodies to assert local control and to develop their own subdivision regulations clearly contemplates that counties are free, pursuant to their legislative authority, to promulgate regulations which do not necessarily conform exactly to the Act, so long as they do not conflict with it. Local regulations that merely hold subdivision proposals to a stricter set of criteria than does the Act are not in conflict with the Act. *Burnt Fork Citizens Coalition v. Board of County Comm’rs*, 287 Mont. 43, 951 P.2d 1020 (1997).

The 1993 amendments to section 76-3-608, MCA which establishes the criteria for subdivision review, did not implicitly repeal the more restrictive criteria contained in local subdivision regulations that mirrored section 76-3-608, MCA, as it existed before 1993. *Burnt Fork Citizens Coalition v. Board of County Comm’rs*, 287 Mont. 43, 951 P.2d 1020 (1997).

A local board of health is not a “governing body” as contemplated by section 76-3-103(6), MCA [currently section 76-3-103(7)]. Consequently, the Act does not authorize local boards of health to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. *Skinner Enterprises, Inc. v. Lewis and Clark County Board of Health*, 286 Mont. 256, 950 P.2d 733 (1997). [As of 2005 the local board of health has the role indicated in section 76-3-604(6)(b)(ii). Sec. 5, Ch. 302, L. 2005.]

The Act authorizes local governing bodies to regulate sanitation in subdivisions containing parcels of less than 160 acres. *Skinner Enterprises, Inc. v. Lewis and Clark County Board of Health*, 286 Mont. 256, 950 P.2d 733 (1997) [footnote 4].

### **II. Assessment of Review Fees**

If a record of survey has been properly prepared as a certificate of survey rather than as a subdivision plat, it is not subject to review by the planning board, and no review fee may be charged by the county clerk and recorder. *State ex rel. Swart v. Stucky*, 167 Mont. 171, 536 P.2d 762 (1975).

A local governing body with self-government powers may assess fees for the cost of the examining land surveyor's review of certificates of survey. *State ex rel. Swart v. Molitor*, 190 Mont. 515, 621 P.2d 1100 (1980). [Note: This decision is inapplicable to general-powers local governments.]

In 2003 the Legislature [Sec. 2, Ch. 563, L. 2003] added provisions to 76-3-201, MCA, and 76-3-207, MCA, which allow a fee of up to \$200 for the examination by the governing body of a division of land to determine whether or not the Act applies to the division.

### **III. Refusal to Allow Sale of Subdivision Lots**

A governing body may not refuse to allow a subdivider to enter into contracts to sell lots in a proposed subdivision prior to the filing of the final plat if he has satisfied the requirements of section 76-3-303, MCA. Letter opinion to Chester L. Jones, Esq., June 15, 1978.

### **IV. Use of Master Plan to Deny Filing of Certificate of Survey**

The existence of an adopted master plan which calls for a minimum lot size of 40 acres does not authorize a governing body to refuse to file a certificate of survey which depict the creation of parcels containing at least 20 acres or more but less than 40 acres. 42 Op. Att'y Gen. No. 16 (1987). [Note: In 1987 the Act defined "subdivision" to include parcels containing less than 20 acres. The 1993 Legislature redefined the term to include parcels of less than 160 acres. Under the current version of section 76-1-605(2), MCA, a master plan/growth policy is not a regulatory document and a governing body may not withhold, deny, or impose conditions based solely on compliance with a growth policy.]

### **V. Self-Government Powers Local Governments**

A local government with self-government powers may not adopt a subdivision regulation that is inconsistent with the Act. The Act is a law which requires or regulates "planning or zoning" within the meaning of sections 7-1-114(1)(e) and (2), MCA, which prohibit self-government powers local government from "acting other than as provided" in laws requiring or regulating planning or zoning. Letter opinion to Chester L. Jones, Esq., June 15, 1978; 42 Op. Att'y Gen. 16 (1987).

## **APPLICATION OF ACT TO PARTICULAR SITUATIONS**

### **I. Previous Divisions of Land**

The Act does not apply to deeds prepared and executed prior to July 1, 1973, but not presented for recording until after June 30, 1973. 35 Op. Att'y Gen. No. 55 (1973).

Parcels of land for which a certificate of survey has been filed in accordance with the law in force at the time of filing may be conveyed without further compliance with the Act although the requirements of the Act may have changed since the filing. However, the mere surveying of a parcel, without the filing of a certificate of survey (or subdivision plat), creates no rights under the Act. 35 Op. Att'y Gen. No. 96 (1974).

The mere fact that a recorded deed describes the tract conveyed thereby as comprising several small aliquot parts of a section does not segregate these aliquot parts from each other so as to permit their separate conveyance without compliance with the Act. 38 Op. Att’y Gen. No. 66 (1980); 47 Op. Att’y Gen. No. 10 (1997).

The subsequent sale of an undivided parcel of land that was segregated from another parcel to provide security for a construction lien under section 76-3-201(2), MCA [currently 76-3-201(1)(b)], is not subject to the provisions of the Subdivision and Platting Act or the Sanitation in Subdivisions Act (sections 76-4-101, *et seq.*, MCA). 42 Op. Att’y Gen. No. 101 (1988).

A deed in which the grantor and grantee of a portion of a tract of land are the same party is void and therefore does not create a “division of land” for purposes of the Act even though it has been accepted for recording by the clerk and recorder. As a result, the property owner’s subsequent attempt to convey the parcel identified in the void deed is a new division of land subject to the terms of the Act as they exist at the time of the latter conveyance. *Rocky Mountain Timberlands, Inc. v. Lund*, 265 Mont. 463, 877 P.2d 1018 (1994); *Elk Park Ranch, Inc. v. Park County*, 282 Mont. 154, 935 P. 2d 1131 (1997); also see Letter of Advice to Tara DePuy, Esq., from Assistant Attorney General George Schunk, September 26, 1995.

The process by which the federal government surveyed the public domain into sections, aliquot parts of sections, and government lots and prepared maps of this survey work did not constitute a “division of land” for purposes of the Act. 47 Op. Att’y Gen. No. 10 (1997).

## **II. When No Land Is Being Divided**

The definition of “subdivision” [section 76-3-103(15), MCA] not only includes divisions of land, but also any resubdivision, any condominium and areas which provide or will provide multiple space for recreational camping vehicles or mobile homes. 39 Op. Att’y Gen. No. 14 (1981).

Transfers of land which do not constitute “divisions of land” or “subdivisions” as those terms are defined in the Act are not subject to the surveying requirements of the Act. 37 Op. Att’y Gen. No. 88 (1977); 42 Op. Att’y Gen. No. 121 (1988).

If an earlier acquisition of right-of-way for a state highway project has severed a “remainder” parcel from the holdings of a land owner, the owner’s subsequent conveyance of the “remainder” does not constitute a division of land [section 76-3-103(3), MCA] which must be surveyed under section 76-3-401, MCA. Consequently, a clerk and recorder may not require that the parcel be surveyed and a survey document be filed before the clerk will accept for recording an instrument transferring the parcel. 44 Op. Att’y Gen. No. 25 (1992).

## **III. Divisions Created by Certificate of Survey**

If a record of survey has been properly prepared as a certificate of survey rather than as a subdivision plat, it is not subject to review by the planning board, and no review fee may be charged by the county clerk and recorder. *State ex rel. Swart v. Stucky*, 167 Mont. 171, 536 P.2d 762 (1975).

In 2003 the Legislature [Sec. 2, Ch. 563, L. 2003] added subsection (4) to 76-3-207 [divisions of land exempt from subdivision review but subject to surveying requirements] which allows a fee of up to \$200 for the examination by the governing body of a division of land to determine whether or not the Act applies to the division.

#### **IV. Condominiums**

The definition of “subdivision” [section 76-3-103(15), MCA] not only includes divisions of land, but also any resubdivision, any condominium and areas which provide or will provide multiple space for recreational camping vehicles or mobile homes. 39 Op. Att’y Gen. No. 14 (1981).

Condominium developments are not exempted from subdivision review by section 76-3-204, MCA, which provides that the sale, rent, lease or other conveyance of one or more parts of a building is not a division of land. 39 Op. Att’y Gen. No. 28 (1981).

The conversion of existing rental-occupancy apartment houses or office buildings to an individual condominium form of ownership does not constitute a “condominium” which is subject to the requirements of the Act. 39 Op. Att’y Gen No. 74 (1982).

Every condominium development is subject to subdivision review unless it is to be located on a lot specifically approved for condominium development in a subdivision platted since July 1, 1973. 39 Op. Att’y Gen No. 28 (1981). [Although this opinion concerns the application of the Sanitation in Subdivision Act (sections 76-4-101 *et seq.*, MCA) to condominium development, it applies to the Subdivision and Platting Act as well.] Letter opinion to Leo Fisher, Esq., August 2, 1983; affirmed by Letter of Advice to Brent Brooks, Esq. From Assistant Attorney General Carol E. Schmidt, August 18, 1999.

Because section 76-3-103(15), MCA defines the term “subdivision” to include condominiums, a developer’s reliance on a deputy county attorney’s erroneous assurances that the Act did not apply to a condominium development was unreasonable and did not provide a basis for the developer’s action against the county to recover losses suffered by reason of delays in the subdivision review process. *Young v. Flathead County*, 232 Mont. 274, 257 P. 2d 772 (1988).

To be a “condominium” that is subject to regulation under the Act as a “subdivision” [section 76-3-103(15), MCA] a development must have been submitted to the provisions of the Unit Ownership Act (sections 70-23-101 *et seq.*, MCA). Letter of Advice to William Nels Swandal, Esq., from Assistant Attorney General John Paulson, August 14, 1991.

A multiple-unit bomb shelter the units of which are sold to various persons but which has not been submitted to the provisions of the Unit Ownership Act (sections 70-23-101 *et seq.*, MCA) is not a “condominium” and therefore is not regarded as a “subdivision” under section 76-3-103 (15). Letter of Advice to William Nels Swandal, Esq., from Assistant Attorney General John Paulson, August 14, 1991.

Section 76-3-204, MCA, which exempts from subdivision review the sale, rent, or lease of one or more parts of a building does not apply to condominiums. 45 Op. Att’y Gen. No. 12 (1993).

## **V. Construction of Multiple-Unit Residential or Commercial Structures for Rent**

A developer's construction of 48 four-plexes to be used as rental occupancy buildings on a tract of land owned by the developer is a "subdivision" which must be submitted for local review under the Act. 40 Op. Att'y Gen. No. 57 (1984). [Note: This holding has been negated by the subsequent amendment of section 76-3-204, MCA, (Sec. 1, Ch. 500, L. 1985). See Letter of Advice to Jim Nugent, Esq., from Solicitor Clay R. Smith, February 27, 1995.]

Because section 76-3-204, MCA, exempts the rental of both existing and new buildings from subdivision review, the construction of a building for apartment use is not subject to regulation under the Act. *Lee v. Flathead County*, 217 Mont. 370, 704 P.2d 1060 (1985).

The construction of a duplex on a single tract of land for rental or sale purposes constitutes a "subdivision" under the Act unless otherwise excepted from subdivision status under section 76-3-207, MCA. 41 Op. Att'y Gen. No. 3 (1985) [Note: This holding has been negated by the subsequent amendment of section 76-3-204, MCA, (Sec. 1, Ch. 500, L. 1985).]

The construction of a second dwelling for a family member on a single parcel of land constitutes a "division of land" under the Act if the family member is intended to receive a legally enforceable possessory interest in the dwelling. If a division of land has occurred, the construction of the dwelling constitutes a "subdivision" unless otherwise exempted from review. 41 Op. Att'y Gen. No. 3 (1985). [Note: This holding has been negated by the subsequent amendment of section 76-3-204, MCA, (Sec. 1, Ch. 500, L. 1985).]

The construction of an office building with individual office spaces for rent constitutes a "subdivision" under the Act. 41 Op. Att'y Gen. No. 3 (1985) [Note: This holding has been negated by the subsequent amendment of section 76-3-204, MCA, (Sec. 1, Ch. 500, L. 1985).]

The construction of a hotel does not constitute a "subdivision" under the Act. 41 Op. Att'y Gen. No. 3 (1985). [Note: This holding was based on the fact that the law regards a hotel guest is as a "licensee," who does not acquire a possessory interest in real property, rather than as a "tenant" who does acquire a property interest. Although the conclusion reached by the Attorney General is still valid under section 76-3-204, MCA, the 1985 amendments to this section (Sec. 1, Ch. 500, L. 1985), eliminated the need to rely on the distinction between licensees and tenants in reaching this conclusion.]

## **VI. Developments Undertaken by State or Federal Agencies**

In developing public recreational facilities the Montana Department of Fish, Wildlife and Parks is subject to local subdivision review under the Act to the extent that the agency is creating an area which provides or will provide multiple spaces for recreational camping vehicles. 39 Op. Att'y Gen. No. 14 (1981).

The provisions of the Act are inapplicable to transactions in which the federal government is the subdivider. 42 Op. Att'y Gen. No. 36 (1987).

The Montana Department of State Lands (now the Department of Natural Resources and Conservation) is authorized by sections 77-1-204 and 77-2-301, MCA, to subdivide school trust land; and a governing body has control over such a subdivision under the Act. *Kimble Properties v. State of Montana*, 231 Mont. 54, 750 P.2d 1095 (1988).

## **VII. Developments Providing Multiple Spaces for Recreational Camping Vehicles or Mobile Homes**

The definition of “subdivision” [Section 76-3-103(15), MCA] not only includes divisions of land, but also any resubdivision, any condominium and areas which provide or will provide multiple space for recreational camping vehicles or mobile homes. 39 Op. Att’y Gen. No. 14 (1981).

In developing public recreational facilities the Montana Department of Fish, Wildlife and Parks is subject to local subdivision review under the Act to the extent that the agency is creating an area which provides or will provide multiple spaces for recreational camping vehicles. 39 Op. Att’y Gen. No. 14 (1981).

## **VIII. When a Public Official Has Erroneously Advised the Developer as to the Operation of the Act – Equitable Estoppel**

Despite the fact that the county attorney had indicated that one-party deeds purporting to create a number of tracts of land were valid, and that the county had acquiesced in the filing of the deeds with the clerk and recorder, the doctrine of equitable estoppel did not bar the county—from later denying the validity of the deeds and the establishment of the tracts. *Elk Park Ranch, Inc. v. Park County*, 282 Mont. 154, 935 P.2d 1131 (1997). Also see Letter of Advice to Tara DePuy, Esq., from Assistant Attorney General George Schunk, September 26, 1995, and *Young v. Flathead County*, 232 Mont. 274, 257 P.2d 772 (1988).

# **REVIEW OF SUBDIVISIONS**

## **I. Jurisdictional Area of Governing Body**

Section 76-3-601(2)(b), MCA, provides that if a proposed subdivision is located within one mile of a third-class city the county governing body must submit the preliminary plat to the city or town governing body or its designated agent for review and comment. However, the ultimate decision-making power remains with the county governing board. Letter opinion to Arthur W. Ayers, Jr., Esq., September 28, 1983.

Under the Act the board of county commissioners has exclusive authority to approve or disapprove plats subdividing land located within the three-mile area adjacent to the corporate limits of a city which has a commission-manager form of government notwithstanding the provisions of section 7-3-4444, MCA. This section specifies that no subdivision plat of land located within three miles of a commission-manager municipality may be filed unless the director of public service approves the plat. Section 7-3-4444, MCA, grants the city’s director of public service only the limited ministerial power to review plats for sub-divisions in the three-mile area with respect to their technical adequacy. A city with a

commission-manager form of government has two statutorily authorized functions with respect to subdivisions located within the three-mile area (in addition to participating in the master plan process). First, the city's governing body or its designated agent reviews and comments on preliminary plats submitted to it by the county governing body under section 76-3-601(2)(b), MCA. Second, in accordance with section 7-3-4444, MCA, the city's director of public service reviews preliminary plats to ensure their technical adequacy. *City of Bozeman v. Racicot*, 253 Mont. 204, 832 P.2d 767 (1992); sustaining 43 Op. Att'y Gen. No. 26 (1989).

Under section 76-3-601(1)(d), MCA, which provides that if a proposed subdivision is also proposed to be annexed to a municipality, "the governing body of the municipality shall coordinate the subdivision review and annexation procedures," the city is required to coordinate the subdivision review process with the annexation process. This provision does not require the municipality to coordinate either procedure with the county. *Marsh v. City Council of Dillon*, Beaverhead Co., No. DV-96-11899, 1996.

## **II. Review and Approval Process**

### **A. Role of Planning Board, Planning Staff, and Master Plan**

Under section 76-1-107, MCA, if the governing body has formed a planning board and adopted a comprehensive plan under Title 76, Chapter 1, MCA, the governing body must seek the planning board's advice on all subdivision plat reviews in addition to holding a public hearing under section 76-3-605, MCA. 39 Op. Att'y Gen. No. 75 (1982). [Note: The 1999 amendments to section 76-1-107, MCA, substituted the term "growth policy" for the term "comprehensive plan" and authorized the planning board to delegate the board's authority under this section to the board's staff for minor subdivisions. (Sec. 6, Ch. 582, L. 1999)]

It is improper for a governing body to disapprove a subdivision for which the planning board has recommended conditional approval if there is nothing in the subdivision review record to support the governing body's findings and if the governing body has failed to comply with the procedural requirements of section 76-3-604, MCA. *Townsend v. Board of County Comm'rs*, Gallatin Co., No. DV-83-114, 1983.

The governing body is required to weigh the statutory criteria for subdivision approval and issue written findings based on its analysis. It may not delegate this responsibility to a planning board or a planning board's staff although it may adopt the board's or staff's findings and recommendations. 41 Op. Att'y Gen. No. 64 (1986); *Melugin v. Stoll-Anderson*, Lewis and Clark Co., No. CDV-93-1008, 1994.

A governing body's denial of a subdivision application on the grounds that the proposal conflicts with the transportation element of the adopted master plan does not constitute a regulatory "taking" of property if the denial will not: (1) result in a physical occupation of the property, (2) deprive the applicants of all economically viable uses of the property, (3) deny the applicants a fundamental attribute of property ownership, (4) require the applicants to dedicate a portion of the property to the public or to grant a public easement across it, (5) have a severe impact on the value of the property, or (6) otherwise damage the property. Letter of Analysis to Jonathan B. Smith, Esq. From Assistant Attorney General Thomas G. Bowe, April 22, 1996. [In 2003 section 76-1-605 was amended to provide a growth policy is not a regulatory document and

subdivisions may not be denied based solely on non-compliance with a growth policy (Sec. 7, Ch. 599, L. 2003).]

Under section 76-3-605, MCA, a planning board that has been designated by a governing body to review and make recommendations regarding subdivision applications has a clear legal duty to do so. Therefore, the board may not decline to consider an application for an indefinite period solely because the application is incomplete and the subdivider is unable or unwilling to supply the missing information, and a writ of mandamus will issue to compel the board to act on the application. *Borland v. Lang*, Stillwater Co., No. DV 97-143, 1998 [Note: This issue should not arise when subdivision regulations contain the element and sufficiency review found in section 76-3-604, MCA. (Sec. 7, Ch. 298, L.2005).]

If local subdivision regulations specify that the 60-day review period provided for by section 76-3-604(2), MCA, commences when the planning board determines at a regular meeting that a subdivision application is complete, the review period begins as specified in the regulations and not when the application is submitted to the planning office. *Kaltreider v. Park County*, Park Co., No. DV 98-82, 1998. [Note: The 1999 amendments to section 76-3-604(2), MCA, [currently subsection (4)] expanded the time limit for review of subdivisions to 60 “working” days; the 2005 amendments to (4) make it clear the 60-working day period does not begin to run until there is notification an application contains sufficient information (Sec. 7, Ch. 298, L. 2005).]

Even if a proposed subdivision is a permitted use under the governing body’s zoning regulations, under section 76-3-604(1), MCA, the proposed use must also comply with the governing body’s comprehensive plan. *Madison River R. V., Ltd. v. Town of Ennis*, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098.

#### B. Criteria for Approving Subdivisions

In deciding whether to approve a subdivision the governing body must determine whether the proposed development is in the public interest. Section 76-3-608, MCA. *Christianson v. Gasvoda*, 242 Mont. 212, 789 P.2d 1234 (1990) [Note: The former requirement of section 76-3-608, MCA, that a governing body determine that a subdivision will be in “the public interest” before it approves or conditionally approves the subdivision, was deleted in 1993 (Sec. 5, Ch. 272, L. 1993). However, section 76-3-608(3)(a), MCA, currently requires the governing body to weigh substantially the same criteria that were formerly applied in making the determination whether to approve, conditionally approve, or deny a subdivision.]

If, in approving a proposed subdivision, a governing body fails to address all of the review criteria contained in the local subdivision regulations, the governing body acts beyond its jurisdiction under the Act, and the approval is void. The governing body may not ignore its own applicable regulations. *Burnt Fork Citizens Coalition v. Board of County Comm’rs*, 287 Mont. 43, 951 P.2d 1020 (1997).

If the planning staff’s report on a proposed subdivision contains express findings regarding the review criteria contained in section 76-3-608(3), MCA, as well as the proposed subdivision’s compliance with the county’s master plan, the fact that the letter from the governing body to the subdivider denying the subdivision application does not reiterate the

findings but only summarizes them does not render the letter insufficient to support the denial. *Vergin v. Flathead County*, 1999 MT 19N, 996 P.2d 882. [Note: Under the Montana Supreme Court's Internal Operating Rules the *Vergin* decision may not be cited as precedent.]

Where the record of the review of a preliminary plat established that a town's governing body had heard evidence that a proposed recreational vehicle park did not conform to the goals of the town's adopted comprehensive plan and would pose a threat to the health, safety and welfare of the town's residents, the governing body's decision to deny the preliminary subdivision application was not arbitrary, capricious, or unlawful. *Madison River R.V., Ltd. v. Town of Ennis*, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098.

C. Written Findings of Fact

The governing body should file the written findings of fact required by section 76-3-608, MCA, immediately following its decision to approve, conditionally approve, or disapprove a subdivision. *Board of Trustees, Huntley Project School Dist. No. 24 v. Board of County Comm'rs*, 186 Mont. 148, 606 P.2d 1069 (1980).

If in disapproving a minor subdivision a governing body neither issues written finding of fact weighing the subdivision review criteria contained in section 76-3-608(3), MCA, nor notifies the subdivider as to what local subdivision regulations the subdivision would not meet, as required by section 76-3-609(2), MCA, the governing body has not regularly pursued its authority and the district court may issue a writ of review remanding the matter to the governing body for reconsideration of the application. *Melugin v. Stoll-Anderson, Lewis and Clark Co.*, No. CDV-93-1009, 1994.

The fact that the letter from the governing body to the subdivider denying a subdivision application briefly summarizes the detailed findings addressing the criteria set forth in section 76-3-608(3), MCA, contained in a staff report on the proposed subdivision rather than reiterating the findings does not render the letter insufficient to support the denial. *Vergin v. Flathead County*, 1999 MT 19N, 996 P.2d 882. [Note: Under the Montana Supreme Court's Internal Operating Rules the *Vergin* decision may not be cited as precedent.]

The thirty days allowed for appeal under section 76-3-625(2), MCA, does not begin to run until the governing body signs the written findings required under section 76-3-620, MCA. The governing body signed the written findings thirty-six days after it voted to deny the application. *Madison River R.V., Ltd. v. Town of Ennis*, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098.

A City Council's denial of a preliminary plat application without written findings required by section 76-3-608(2), MCA, or a written statement as mandated by section 76-3-620, MCA, contributed to the District Court and the Supreme Court conclusions the denial was arbitrary and capricious. The Supreme Court disallowed as irrelevant after-the-fact opinions of individual council members as to the reasons for the denial. *Kiely Construction, L.L.C. v. City of Red Lodge*, 2002 MT 241, 312 Mont. 52, 57 P.2d 836.

Mistakes in the findings of fact can be fatal to a case. *Pierson, et al. v. Board of County Commissioners of Lewis and Clark County*, Lewis and Clark Co., No. BVD-2002-671, 2002.

D. Term and Extension of Preliminary Plat Approval

Under section 76-3-610, MCA, the governing body may extend preliminary plat approval within a reasonable time following the expiration of the original approval period. A gap of a reasonable length between the expiration of the original approval and the granting of an extension does not result in a lapse of the approval. *Oldenburg v. County of Flathead*, 208 Mont. 128, 676 P.2d 778 (1984).

The governing body is authorized by section 76-3-610(1), MCA, to establish the term of a preliminary plat approval within the statutory minimum and maximum of one and three years. Letter opinion to Jim Nugent, Esq., January 12, 1984.

The term of the approval of a preliminary plat is determined by reference to the statutory term limitation that existed at the time the approval was granted. Letter opinion to Jim Nugent, Esq., January 12, 1984.

E. Negligence of Governing Body in Administering Subdivision Regulations/Immunity

Under section 2-9-111, MCA, a county and board of county commissioners are immune from suit for negligence in the administration of the Act and local subdivision regulations in connection with the approval of a subdivision. *W.D. Construction, Inc. v. Board of County Comm'rs*, 218 Mont. 348, 707 P.2d 1111 (1985). [Note: This decision has been superseded by 1991 amendments to section 2-9-111, MCA, which now grants local governments immunity from suit for legislative acts only.]

A governing body's action on a subdivision application is administrative, not legislative, so the immunity from suit provided by section 2-9-111, MCA, is not available. *Kiely Construction L.L.C. v. City of Red Lodge*, 2002 MT 241, 312 Mont. 52, 57 P.3d 836. [Note: Section 76-3-625, MCA, specifically allows suits and appeals.]

F. Delegation of Authority to Approve Subdivisions

A governing body may not delegate the approval, conditional approval, or disapproval of subdivision plats to a planning board or a planning board's staff. 41 Op. Att'y Gen. No. 64 (1986).

Under section 76-3-608(3), MCA, the governing body must, itself, consider the subdivision review criteria contained in section 76-3-608(3), MCA, and issue written findings of fact weighing these criteria. It may not delegate this responsibility to its planning staff. *Melugin v. Stoll-Anderson*, Lewis and Clark Co., No. CDV-93-1009, 1994.

G. Notice, Hearing, and Open Meeting Law Requirements

The 15-day notice requirement of section 76-3-605(3), MCA, is mandatory, and the giving of even one day less notice than required is inadequate and invalidates the hearing process. The doctrine of “substantial compliance” is inapplicable to this notice requirement. *Friends of Bull Lake, Inc. v. Board of County Comm’rs*, Lincoln Co., No. DV-95-12, 1996.

A subdivision review and approval carried out in violation of Montana’s open meeting law (section 2-3-203, MCA) is invalid. *Board of Trustees, Huntley Project School Dist. No. 24 v. Board of County Comm’rs*, 186 Mont. 148, 606 P.2d 1069 (1980).

#### H. Certificate of Title Requirement

A policy of title insurance does not satisfy the requirement of section 76-3-612, MCA, that the subdivider submit with the final plat a certificate of a title abstractor showing the names of the owners of record of the land to be subdivided and the names of lienholders or claimants of record against the land and the written consent to the subdivision by the owners of the land, if other than the subdivider, and any lienholders or claimants of record against the land. 38 Op. Att’y Gen. No. 48 (1979).

#### I. Role of Environmental Assessment

If the environmental assessment that accompanied a preliminary plat during the local review process is inadequate, the governing body’s approval of the plat is void. *Friends of Bull Lake, Inc. v. Board of County Comm’rs*, Lincoln Co., No. DV-95-12, 1996.

#### J. Time Limit for Review

If local subdivision regulations specify that the 60-day review period provided for by section 76-3-604(2), MCA, commences when the planning board determines at a regular meeting that a subdivision application is complete, the review period begins as specified in the regulations and not when the application is submitted to the planning office. *Kaltreider v. Park County*, Park Co., No. DV 98-82, 1998. [Note: The 1999 amendments to section 76-3-604(2), MCA, [currently subsection (4)] expanded the time limit for review of subdivisions to 60 “working” days; the 2005 amendments to (4) make it clear the 60-working day period does not begin to run until there is notification an application contains sufficient information (Section 7, Chapter 298, L. 2005).]

#### K. Montana Administrative Procedures Act

The Montana Administrative Procedures Act (MAPA) may not serve as the basis for appeal because the county board of commissioners is specifically excluded from the agency definition in MAPA via section 2-4-102(2)(b), MCA. *City of Kalispell v. Flathead County*, 260 Mont. 258, 859 P.2d 458 (1993). [Note: After the adoption of section 76-3-625, MCA, trying to use MAPA is not necessary.]

#### L. Hearings

If the subdivision regulations provide the hearing on the application shall be held by the Planning Board, the County Commissioners cannot condition approval based on the subdivider

providing additional information prior to final plat approval. *Brandborg et al. v. Board of County Commissioners of Ravalli County*, Ravalli Co., No. DV-01-168, 2003.

The law does not allow a hearing before the planning board and another hearing before the county commissioners. *Joseph and Denise Galbraith v. Ravalli County Board of Commissioners*, Ravalli Co., No. DV-98-46, 2000. [Note: Section 76-3-605, MCA, which in 1998 allowed "a hearing" was amended in 2005 to allow more than one hearing. Sec. 8, Ch. 298, L.2005.]

### **III. Minor Subdivisions**

#### **A. Application of Public Interest Criteria to Minor Subdivisions**

Subdivisions eligible for review as minor subdivisions must, nonetheless, be found to be in the public interest under section 76-3-608, MCA, before they may be approved by the governing body. *State ex rel. Florence – Carlton School Dist. v. Board of County Comm’rs*, 180 Mont. 285, 590, P.2d 602 (1978). [Note: The former requirement of section 76-3-608, MCA, that a governing body determine that a subdivision will be in “the public interest” before it approves or conditionally approves the subdivision was deleted in 1993 (Sec. 5, Ch. 272, L. 1993). However, the 1993 amendments require the governing body to review subdivision applications under substantially the same criteria that were formerly applied in determining whether a subdivision would be in “the public interest” (section 76-3-608(3)(a), MCA); Legislative changes in 2005 make it clear both major and minor subdivision applications are subject to the criteria in section 76-3-608(3), MCA, unless a minor subdivision is in an area in which the zoning addresses the criteria in section 76-3-608(3)(a), MCA. (Sec. 11, Ch. 298, L. 2005).]

#### **B. Procedures for Reviewing Minor Subdivisions**

If a subdivision qualifies for summary review under section 76-3-505, MCA, the governing body may not subject it to the public hearing requirement of the Act unless the local regulations provide for the imposition of this requirement. *Young v. Stillwater County Comm’rs*, 177 Mont. 488, 582 P.2d 353 (1978) [Note: section 76-3-505, MCA, was repealed by Sec. 16, Ch. 298, L. 2005.]

#### **C. Eligibility for Minor Subdivision Review**

A subdivision plat which will create six equally sized lots of less than 20 acres is not entitled to minor subdivision treatment simply because one of the lots is labeled “not part of the subdivision.” Letter opinion to Ted O. Lympus, Esq., July 31, 1981. [Note: At the time this opinion was issued the Act’s definition of “subdivision” (section 76-3-103(15), MCA) included only parcels of less than 20 acres. In 1993 this definition was amended to encompass parcels of less than 160 acres.]

## JUDICIAL REVIEW OF DECISION TO APPROVE OR DENY SUBDIVISION

### I. Challenges to subdivision decisions prior to 1995

Neither section 76-2-110, MCA, [providing for an appeal to district court of a decision of the board of county commissioners under statutes authorizing county zoning upon a petition of affected property owners (sections 76-2-101 *et seq.*, MCA)] nor section 2-4-702, MCA, [providing for an appeal to district court of a decision of a state agency] provides a legal basis for an appeal from a governing body's decision to approve a preliminary subdivision plat. *Sourdough Protective Assoc., Inc. v. Board of County Comm'rs*, 253 Mont. 325, 833 P.2d 207 (1992).

The Montana Administrative Procedures Act (MAPA) may not serve as the basis for appeal of a conditional approval of a preliminary plat because the county board of commissioners is specifically excluded from the agency definition in MAPA via section 2-4-102(2)(b), MCA. *City of Kalispell v. Flathead County*, 260 Mont. 258, 859 P.2d 458 (1993).

Because the Act does not expressly provide for the judicial appeal of a governing body's decision to approve or disapprove a preliminary subdivision plat, this decision is not ripe for appeal. Only the approval or disapproval of a final plat may be appealed. *City of Kalispell v. Flathead County*, 260 Mont. 258, 859 P.2d 458 (1993) [Note: Section 76-3-625, MCA, now grants to certain individuals and entities the right to appeal decisions of the governing body regarding both preliminary and final plats to district court (Sec. 10, Ch. 468, L. 1995).]

### II. The use of writs

Because the Act does not provide for appeals of decisions of the governing body regarding subdivision applications, the district court may issue a writ of review to consider whether the governing body has "regularly pursued its authority." *Melugin v. Stoll-Anderson*, Lewis and Clark Co., No. CDV-93-1009, 1994. [Note: Section 76-3-625, MCA, now grants to certain individuals and entities the right to appeal decisions of the governing body to district court (Sec. 10, Ch. 468, L. 1995).] A district court for Lincoln County followed the reasoning in *Melugin* to allow an entity, which did not have standing to bring an appeal under section 76-3-625, MCA, to seek a writ of review because it alleged the Board of Commissioners had not "regularly pursued its authority" by failing to comply with the Subdivision and Platting Act. *Friends of Bull Lake, Inc. v. Board of County Comm'rs*, Lincoln Co., No. DV-95-12, 1996.

If the governing body exceeds its jurisdiction in approving or conditionally approving a proposed subdivision and a person aggrieved by the decision has either no appeal or no plain, speedy, and adequate remedy, the court will issue a writ of review to review the decision. *Burnt Fork Citizens Coalition v. Board of County Comm'rs*, 287 Mont. 43, 951 P.2d 1020 (1997).

Under section 76-3-605, MCA, a governing body has a clear legal duty to approve, conditionally approve, or disapprove subdivision applications. Therefore, a governing body may not decline to act on a subdivision application for an indefinite period solely because the application is incomplete and the subdivider is unable or unwilling to supply the missing information, and a writ of mandamus will issue to compel the governing body to act on the application. *Borland v. Lang*, Stillwater Co., No. DV 97-143, 1998. [This situation may not occur with the addition of the element and sufficiency review to section 76-3-604, subsections (1) through (3), MCA, in 2005. Sec. 7, Ch. 298, L. 2005.]

Courts continue to dismiss writs when the appeal in section 76-3-625(2), MCA is available. *Thompson, et al. v. Ravalli County Board of Commissioners*, Ravalli, Co., No. DV 05-224, 2005.

Writs and declaratory judgment are not appropriate when the statutory appeal is available and utilized. *Sweet Grass Farms v. Board of County Commissioners of Sweet Grass County*, Sweet Grass Co., No. DV 99-23, 2000. In *Pierson, et al., v. Board of County Commissioners of Lewis and Clark County*, Lewis and Clark Co., No. BVD-2000-671, a motion to dismiss the declaratory relief cause of action was granted. In *Thompson, et al. v. Ravalli County Board of Commissioners*, Ravalli Co., No. DV 05-224, 2005, an alternative writ was quashed because the appeal was available.

### **III. Appeals pursuant to section 76-3-625(2), MCA**

The 30-day time limit for appealing a governing body's decision on a subdivision under section 76-3-625(2), MCA does not begin to run until the governing body signs and issues the written findings required under section 76-3-620, MCA. *Madison River R.V., Ltd. v. Town of Ennis*, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098.

Subdivider successfully utilized the appeal pursuant to subsection (2) in order to obtain court approval of his subdivision after extraordinary delays and denial by the Red Lodge City Council. [Until this decision it was thought a court would simply remand a denial to the County Commission to reconsider in light of the Court's decision.] The Supreme Court ruled "[w]e conclude § 76-3-625(2), MCA, vests a district court with the discretion to determine what relief is appropriate based on the facts and circumstances of each appeal." *Kiely Construction v. City of Red Lodge*, 2002 MT 241, 312 Mont. 52, 57 P.3d 836.

Upon appeal, district courts have reversed conditional approvals when they were found not to follow the county's subdivision regulations. *Pierson, et al., v. Board of County Commissioners of Lewis and Clark County*, Lewis and Clark Co., No. BVD-2000-671, 2002; *Brandborg, et al. v. Board of County Commissioners of Ravalli County*, Ravalli Co., No. DV-01-168, 2003.

Writs and declaratory judgment are not appropriate when the statutory appeal is available and utilized. *Sweet Grass Farms v. Board of County Commissioners of Sweet Grass County*, Sweet Grass Co., No. DV 99-23, 2000. In *Pierson, et al., v. Board of County Commissioners of Lewis and Clark County*, Lewis and Clark Co., No. BVD-2000-671, a motion to dismiss the declaratory relief cause of action was granted. In *Thompson, et al. v. Ravalli County Board of Commissioners*, Ravalli Co., No. DV 05-224, 2005, an alternative writ was quashed because the appeal was available.

An appeal of *Collins, et al. v. Board of County Commissioners for Granite County*, Granite Co., No. DV-99-18, was settled by requesting an attorney general opinion which held the county commissioners must consider water supply and sewage at the preliminary plat stage. 49 Op. Att'y Gen. No. 7 (2001). [Several district court cases were filed, alleging failure to follow this opinion. The court's Order in one of them, dismissed on another issue, characterized the opinion as "illogical" because in that case, DEQ will not review water and sanitation issues until the preliminary plat is approved by that County. *Felder, et al., v. Board of County Commissioners, et al.*, Sanders Co., Cause No. DV-04-44, 2005. Senate Bill 290, resulting in the addition of section 76-3-622, MCA, and changes to section 76-3-604 (6), MCA, provided specificity about what information is required at the preliminary plat stage and

how it is addressed by local authorities. Sec. 4, Ch. 302, L. 2005.]

#### **IV. Injunctions**

If a subdivider submits a final plat during an appeal of a conditional approval, an injunction may issue. *Sweet Grass Farms v. Board of County Commissioners of Sweet Grass County*, 2000 MT 147, 300 Mont. 66, 2 P.3d 825.

In a dispute about whether a dedicated subdivision road can be used by an adjacent subdivision, separated only by a one-foot “reserve strip” which had been deeded to the subdivider of the adjacent subdivision, the District Court exceeded the scope of its duties when, after a hearing about whether a preliminary injunction should issue, it entered findings of fact and conclusions of law that ultimately resolved all the issues presented by the parties. *Yockey, et al., v. Kearnes Properties, LLC, et al.*, 2005 MT 27, 326 Mont. 28, 106 P.3d 1185.

#### **V. Suits for damages pursuant to section 76-3-625(1), MCA**

Subdivider combined the statutory appeal with a suit for damages. The Supreme Court not only ordered the subdivision approved under the appeal provision in section 76-3-625 (2), MCA, but also awarded damages for the delay in approving the subdivision. Damages pursuant to 42 U.S.C. § 1983 were not awarded because the Court concluded Kiely did not have a protected property interest at the preliminary approval stage of his plat application process. *Kiely Construction v. City of Red Lodge*, 2002 MT 241, 312 Mont. 52, 57 P.3d 836.

#### **VI. Standard and Scope of Review**

##### **A. Factual Issues**

Prior to approving or disapproving a subdivision the governing body must determine whether the proposed development is in the public interest. In making this decision the governing body, as fact finder, is in the best position to weigh conflicting testimony and determine the credibility of the witness. *Christianson v. Gasvoda*, 242 Mont. 212, 789 P.2d 1234 (1990) [Note: The 1993 amendments to the Act deleted the requirement of section 76-3-608, MCA, that a governing body determine that a subdivision will be in “the public interest” before it approves or conditionally approves the subdivision (Sec. 5, Ch. 272, L. 1993). However, the governing body must still review subdivision applications under substantially the same criteria that were formerly applied in determining whether a subdivision would be in “the public interest” (section 76-3-608(3)(a), MCA). Legislative changes in 2005 make it clear both major and minor subdivision applications are subject to the criteria in section 76-3-608(3), MCA, unless a minor subdivisions is in an area in which the zoning addresses the criteria in section 76-3-608(3)(a), MCA, (Sec. 11, Ch. 298, L. 2005).]

Since section 76-3-625, MCA, specifically provides that a challenge to a governing body’s decision regarding a proposed subdivision is an “appeal” and not a *de novo* review, the court is factually bound by the record developed by the governing body and may not consider additional evidence regarding the subdivision. *Marsh v. City Council of Dillon*, Beaverhead Co., No. DV-96-11899, 1996, citing *Christianson v. Gasvoda*, 242 Mont. 212, 789 P.2d 1234 (1990).

*Christianson v. Gasvoda* and *Madison River R.V., Ltd. v. Town of Ennis* were relied on by the district court in its legal analysis when it found the county commissioners were in the best

position to evaluate conflicting evidence, holding they did not act in an arbitrary, capricious or unlawful manner when they approved a preliminary plat. *Hecht, et al., v. Fergus County*, Fergus Co., No. DV 2004-93, 2005.

**B. Legal Standard**

The standard of review to be applied in an appeal under section 76-3-625(2), MCA, of a governing body's decision to approve, conditionally approve, or disapprove a subdivision plat is whether the governing body's decision was arbitrary, capricious, or unlawful. *Madison River R.V., Ltd. v. Town of Ennis*, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098.

In order to prevail in an action brought under section 76-3-625, MCA, which authorizes an appeal of a governing body's decision to approve or disapprove a subdivision if the decision was "arbitrary or capricious," the person challenging the decision must show that it was random, unreasonable or seemingly unmotivated based on the existing record. If it appears from the record that the governing body had grounds under section 76-3-608, MCA, for denying a subdivision application, the denial cannot be said to be either random or unreasonable. A decision is not "arbitrary or capricious" merely because the evidence upon which the decision is based is inconsistent or might support a different result. *Vergin v. Flathead County*, 1999 MT 19N, 996 P.2d 882 (citing *Silva v. City of Columbia Falls*, 258 Mont. 329, 852 P.2d 671 (1993).) [Note: Under the Internal Operating Rules of the Montana Supreme Court the *Vergin* decision may not be cited as precedent.]

**VII. Law Applicable to Review**

In deciding whether a particular development is subject to review as a subdivision the Supreme Court will apply the law in effect at the time it renders its decision. *Lee v. Flathead County*, 217 Mont. 370, 704 P.2d 1060 (1985). [Note: This aspect of the *Lee* case was overruled by *Porter v. Galarneau*, 275 Mont. 174, 911 P.2d 1143 (1996). The Supreme Court will allow retroactive application of case law, but not changes to statutes, ordinances or regulations.]

**VIII. Standing to Challenge Decision of Governing Body**

**A. Surveyor**

An engineering/surveying company hired to plat subdivisions and having no legal or equitable interest in the land involved has no standing to maintain a mandamus action to force the county to act with respect to the proposed subdivision. *State ex rel. Professional Consultants, Inc. v. Board of County Comm'rs*, 181 Mont. 177, 592 P.2d 945 (1979).

**B. Contingent Purchaser of Property**

A person whose obligation to buy property is contingent on his ability to obtain approval of his proposed subdivision of the property has no standing to sue to challenge the validity of a

denial of subdivision approval. *Christianson v. Gasvoda*, 242 Mont. 212, 789 P.2d 1234 (1990).

C. Corporations

Courts in Ravalli County and Flathead County have been consistent in granting motions to dismiss certain corporations or organizations as plaintiffs for lack of standing when they utilize the appeal pursuant to section 76-3-625(2), MCA. *Fish Hatchery Road HOA and Bitterrooters for Planning v. Board of County Commissioners of Ravalli County*, Ravalli Co., No. DV-01-168, 2001; *Grantsdale Homeowners Group, Inc., et al., v. Board of County Commissioners of Ravalli County*, Ravalli Co., No. DV-03-398m 2003; *Batavia-Kienas Homeowners Association, Inc., et al., v. Flathead County Board of Commissioners, et al.*, Flathead Co., Cause No. DV-05-015B, 2006; *Lower Valley Partnership, Inc. v. County Commissioners of Flathead County*, Flathead Co., Cause No. DV-04-085C, 2005. These dismissals extend to individuals who are not landowners. *Thompson, et al. v. Ravalli County Board of Commissioners*, Ravalli Co., No. DV-05-224, 2005. However this did not hold true in a Lake County case. *Swan Lakers, et al. v. The Board of County Commissioners of Lake County*, Lake Co., Cause No. DV-05-143, 2005.

**IX. Validity of Governing Body's Decision**

A. Approval or Disapproval of Subdivision Contrary to Planning Board's Recommendation

It is improper for a governing body to disapprove a subdivision if the planning board has recommended conditional approval if there is nothing in the subdivision review record to support the governing body's findings and if the governing body has failed to comply with the procedural requirements of section 76-3-604, MCA. *Townsend v. Board of County Comm'rs*, Gallatin Co., No. DV-83-114, 1983.

B. Denial of Subdivision Approval Based on Consideration of Cumulative Problems

A governing body did not abuse its discretion by disapproving a proposed subdivision when previous development in the area had created a drainage problem and when the subdivider had failed to establish that his project would not exacerbate the problem. *Christianson v. Gasvoda*, 242 Mont. 212, 789 P.2d 1234 (1990). [Note: Section 76-3-625(1), MCA, enacted in 1995 gives the subdivider the right to sue for damages if the denial by the governing body is arbitrary or capricious. For an excellent overview of the law of "takings" as it applies to subdivision regulation and a discussion of whether the disapproval of a subdivision on the grounds that it would place residential lots in the path of a planned highway is an unconstitutional taking of property, see Letter of Analysis to Jonathan B. Smith, Esq. from Assistant Attorney General Thomas G. Bowe, dated April 22, 1996.]

C. Failure to Consider All Review Criteria in Approving Subdivision

If, in approving a proposed subdivision, a governing body fails to address all of the review criteria contained in the local subdivision regulations in effect at the time the proposal is

submitted, the governing body acts beyond its jurisdiction under the Act, and the approval is of no force or effect. The governing body may not ignore its own applicable regulations. *Burnt Fork Citizens Coalition v. Board of County Comm'rs*, 287 Mont. 43, 951 P.2d 1020 (1997).

D. Adequacy of Environmental Assessment

If the environmental assessment that accompanied a preliminary plat during the local review process is inadequate, the governing body's approval of the plat is void. *Friends of Bull Lake, Inc. v. Board of County Comm'rs*, Lincoln Co., No. DV-95-12, 1996.

E. Bias or Prejudice of Member of Governing Body

Before a court may overturn the disapproval of a subdivision application on the grounds that a member of the governing body was unduly biased or prejudiced against the proposal, the subdivider must demonstrate that the decision maker had an "irrevocably closed mind" with regard to the proposal. *Madison River R.V., Ltd. v. Town of Ennis*, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098.

F. Denial of Subdivision Approval as a "Taking" of Property

A governing body's denial of a subdivision application on the grounds that the proposal conflicts with the transportation element of the adopted master plan does not constitute a regulatory "taking" of property if the denial will not: (1) result in a physical occupation of the property, (2) deprive the applicants of all economically viable uses of the property, (3) deny the applicants a fundamental attribute of property ownership, (4) require the applicants to dedicate a portion of the property to the public or to grant a public easement across it, (5) have a severe impact on the value of the property, or (6) otherwise damage the property. Letter of Analysis to Jonathan B. Smith, Esq. From Assistant Attorney General Thomas G. Bowe, April 22, 1996.

If there is nothing in the record to suggest that the effect of the disapproval of a subdivision application is to deny the subdivider all economically beneficial use of the property in question, the court will not find that a regulatory "taking," or inverse condemnation, of the property has occurred. It is only when the owner of real property has been called upon to sacrifice all economically beneficial use of the property in the name of the common good that a constitutionally protected taking has occurred. *Madison River R.V., Ltd. v. Town of Ennis*, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098.

**X. Action for Damages Based on Alleged Negligence of Public Official**

When a deputy county attorney's erroneous assurances that the Act did not apply to a condominium development was only one of several factors contributing to delays in the subdivision review process and the resulting financial losses suffered by the developers, the deputy county attorney's representations were not the "proximate cause" of the developers' loss, and they could not recover damages from the county. *Young v. Flathead County*, 232 Mont. 274, 257 P.2d 772 (1988).

## **EFFECTS OF FILING SUBDIVISION PLAT OR CERTIFICATE OF SURVEY**

### **I. Establishment of Boundaries Shown on Plat or Certificate of Survey**

The filling of a certificate of survey showing that the original boundary between parcels has been expunged and depicting the boundaries of a larger aggregate parcel unequivocally establishes the new boundaries. *Erker v. Kester*, 1999 MT 231, 296 Mont. 123, 988 P.2d 1221.

### **II. Creation and Extinguishment of Easement Shown on Plat or Certificate of Survey**

Section 76-3-304, MCA, provides that when land is sold with reference to a properly recorded plat, the plat becomes part of the document conveying the land. If the plat shows the location of a roadway easement, the effect of this section is to create an easement for the purchaser's benefit. *Majers v. Shining Mountains*, 219 Mont. 366, 711 P.2d 1375 (1986); *Benson v. Pyfer*, 240 Mont. 175, 783 P.2d 923 (1989); *Halverson v. Turner*, 268 Mont. 168, 885 P.2d 1285 (1994); *Ruana v. Grigonis*, 275 Mont. 441, 913 P.2d 1247 (1996); *Pearson v. Virginia City Ranches Assoc.*, 2000 MT 12, 298 Mont. 52, 993 P.2d 688.

Under section 76-3-304, MCA, the conveyance of a tract of land by reference to a certificate of survey that depicts the reservation of a private road easement creates the easement. In determining whether an easement has been created under section 76-3-304, MCA, the distinction made by the Act between certificates of survey and subdivision plats is not a "critical element." *Bache v. Owens*, 267 Mont. 279, 883 P.2d 817 (1994); *Halvorson v. Turner*, 268 Mont. 168, 885 P.2d 1285 (1994).

Even though it was clear that the developers of a subdivision intended a long, narrow lot shown on the plat of the subdivision to serve as a roadway to provide access to other lots in the subdivision, because the plat did not identify the lot as a road or road easement, no easement was established by the filing of the plat or the sale of lots by reference to the plat. *Tungsten Holdings, Inc. v. Parker*, 282 Mont. 387, 938 P.2d 641 (1997).

A homeowners' association does not hold title to easements which have been established by the filing of a subdivision plat and, therefore, cannot extinguish an easement without the consent of the owners of all the lots to which the easement is appurtenant. *Pearson v. Virginia City Ranches Assoc.*, 2000 MT 12, 298 Mont. 52, 993 P.2d 688.

If the owners of lots in a subdivision have an easement to cross neighboring lots but have never used this easement, the owners of the servient lots cannot extinguish the easement by prescription unless their adverse uses are clearly inconsistent with the dominant lot owners' future use of the easement. The owner of a dominant lot is not required to use the easement as a condition to retaining his interest in it. Thus, if an easement has been created by the filing of a subdivision plat but no occasion has arisen for its use, the fencing of a servient lot by its owner will not be deemed adverse until the need for the right-of-way arises and the owner of the dominant lot demands that the easement be opened and the servient lot owner refuses to do so. *Pearson v. Virginia City Ranches Assoc.*, 2000 MT 12, 298 Mont. 52, 993 P.2d 688.

### **III. Taxation of Platted Property and Establishment of County Roads**

The filing of a subdivision plat does not, by that fact alone, foreclose the possibility that land within that subdivision may qualify as “agricultural” property for purposes of property taxation under section 15-7-202, MCA. 36 Op. Att’y Gen. No. 51 (1976).

A county’s approval and the subsequent filing of a subdivision plat bearing a certificate of dedication to public use of the streets shown on the plat does not, by itself, establish the streets as county roads for purposes of section 7-14-2601 through 7-14-2615, MCA. Consequently, the procedures prescribed in section 7-14-2615, MCA, for the abandonment of county roads do not apply to the abandonment of the streets in the subdivision. *Smith v. Moran*, 215 Mont. 31, 693 P.2d 1246 (1985).

#### **IV. Obligation of Subdivider to Construct Road Shown on Plat**

Section 76-3-304, MCA, provides that if land is sold with reference to a properly recorded plat, the plat becomes part of the document conveying the land. The effect of this section is not to create an obligation upon the seller to construct improvements, such as roads, represented on the plat but merely to create an easement for the purchaser’s benefit. Whether there is any legally enforceable right to have the developer construct the roads depends not on the designation in the plat but on the use of the plat in inducing purchases. *Majers v. Shining Mountains*, 219 Mont. 366, 711 P.2d 1375 (1986); *Benson v. Pyfer*, 240 Mont. 175, 783 P.2d 923 (1989).

The equitable remedy of specific performance is available to compel a subdivider to construct roads within a subdivision if the subdivider’s sales agents used a plat showing a road system in their presentations to prospective purchases. This is true even though there may not be absolute certainty as to every detail of the obligation of the subdivider. *Majers v. Shining Mountains*, 230 Mont. 373, 750 P.2d 449 (1988).

If the plat designates the route, location, and width of the roadways in question but not the type or nature of the roadways, the obligations generated by sales contracts are sufficiently definite to be enforced through specific performance. *Majers v. Shining Mountains*, 230 Mont. 373, 750 P.2d 449 (1988).

If, as a condition of receiving county approval of a proposed subdivision, a subdivider has executed a “covenant to dedicate” in which he agrees to donate land within the subdivision to the county for use as a county road and to construct the road to county road standards, the covenant runs with land for the benefit of subsequent lot owners, is binding upon the subdivider, and is incorporated in the lot owners’ deeds by the operation of law. *Scherpenseel v. Bitney*, 263 Mont. 68, 865 P.2d 1145 (1993).

Under section 27-2-202, MCA, (which establishes an eight-year statute of limitations for bringing an action based on a written instrument) an action to enforce a subdivider’s covenant to construct roads within a subdivision must be brought within eight years of the date on which lot owners first demanded performance under the covenant – not the date the covenant was signed by the subdivider. *Scherpenseel v. Bitney*, 263 Mont. 68, 865 P.2d 1145 (1993).

#### **V. Ownership of Abandoned Roads Adjacent to Platted Subdivisions**

If a road that separates two subdivisions is abandoned, title to the center of the road reverts to the owners of abutting property in each subdivision. This conclusion is based on section 76-3-305(1), MCA, that specifies that title to streets and alleys located in vacated portions of a subdivision plat revert to the owners of adjacent property within the plat; section 70-16-205, MCA, that establishes the presumption that an owner of land bounded by a road owns to the center of the road; and section 70-20-307, MCA, that establishes the presumption that a transfer of land bounded by a highway passes the title of the transferor to the center of the highway. *Herreid v. Hauck*, 254 Mont. 496, 839 P.2d 571 (1992). Note: The 1995 amendments to section 76-3-305, MCA, (Sec. 1, Ch. 100, L. 1995) repealed the automatic reversion provision relied upon by the Court in *Herreid* and require the governing body or the district court, as the case may be, to consider several criteria in determining to which properties the title to streets and roads will revert when all or part of a platted subdivision is vacated.]

## **VI. Conveyance of Open Space Shown and Dedicated on Plat**

Under section 76-3-307, MCA, the filing of a final plat that dedicates common areas to the use of lot owners and states that the subdivider will deed the common areas of the subdivision to a property owners' association constitutes the conveyance of the common areas to the homeowners' association. *Montana Earth Resources Ltd. Partnership v. North Blaine Estates, Inc.*, 291 Mont. 216, 967 P.2d 376 (1998).

## **PARK DEDICATION AND OTHER DEVELOPMENT EXACTIONS**

### **I. Validity of Dedication Requirements, Generally**

The park dedication upon which the current requirement (section 76-3-621, MCA) is based is valid and does not constitute an impermissible "taking" of property without compensation under the guise of the police power. *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964). [Note: The 1995 amendments to the Act generally revised the Act's park dedication requirement by repealing sections 76-3-606 and 76-3-607, MCA, and enacting section 76-3-621, MCA. For an excellent overview of the law of "takings" as it applies to subdivision regulation and a discussion of whether the disapproval of a subdivision on the grounds that it would place residential lots in the path of a planned highway is an unconstitutional taking of property, see Letter of Analysis to Jonathan B. Smith, Deputy Flathead County Attorney, from Assistant Attorney General Thomas G. Bowe, dated April 22, 1996.]

A governing body may condition approval of a subdivision on the subdivider's dedication of land for a forty-foot frontage road across his property. In insisting on the road dedication in this case the governing body relied on a provision of its subdivision regulations which specifically required that developers provide frontage road approaches to principal or arterial highways. *Vogel v. Board. of County Comm'rs*, 157 Mont. 70, 483 P.2d 270 (1971).

A governing body may not, as a condition of approving a proposed subdivision, require the subdivider to dedicate a portion of his property to the public for the widening of an adjacent road if the

record does not show that the need to widen the road arises “specifically and uniquely” from the proposed subdivision. *Munger v. City of Helena*, Lewis and Clark Co., No. 43004, 1979. [Note: Section 76-3-510, MCA, enacted in 1995 (Sec. 8, Ch. 468) expressly authorizes the governing body to require a subdivider to bear the cost of extending capital facilities to his subdivision.]

## **II. Calculating Area of Land to be Dedicated for Parks**

The phrase “exclusive of all other dedications” as used in the park land dedication requirement of former section 76-3-606(1), MCA, includes only dedications for purposes other than public parks and playgrounds. 37 Op. Att’y Gen. No. 38 (1977) [Note: The 1995 amendments to the Act repealed section 76-3-606, MCA, and established a revised park land dedication requirement in section 76-3-621, MCA. This new provision does not contain the phrase “exclusive of all other dedications”.]

## **III. Application of Park Dedication Requirement to Minor Subdivisions**

“Minor subdivisions” are not exempt from the cash-in-lieu-of-park-land-dedication requirement of section 76-3-606(2), MCA. 37 Op. Att’y Gen. No. 1 (1977). [Note: Section 76-3-621(3)(a), MCA, enacted in 1995, exempts minor subdivisions from the Act’s park dedication requirement.]

The language in section 76-3-621(3)(a) that “[a] park dedication may not be required for a minor subdivision” means that a park dedication shall not be required for a minor subdivision. Letter of Advice to John Flynn, Broadwater County Attorney, from Assistant Attorney General Joslyn M. Hunt, dated March 2, 2006.

## **IV. Decision to Accept Cash in Lieu of Land – Amount of Payment – To Whom Payment is Made**

The decision to accept cash in lieu of dedication of land for parks in subdivisions must be made on a case-by-case basis. Local governing bodies may not adopt, either formally or informally, a blanket policy waiving the dedication of park land and accepting cash in lieu of land in all subdivisions containing five or fewer lots. 37 Op. Att’y Gen. No. 169 (1978). [Note: Although section 76-3-621(3)(a), MCA, enacted in 1995, exempts minor subdivisions from the park dedication requirement, this attorney general’s opinion is relevant to the governing body’s decision under section 76-3-621(4), MCA, to accept land or cash in lieu of land for major subdivisions.]

The amount of cash to be paid by a subdivider under section 76-3-606(2), MCA, in lieu of the dedication of land for use as public parks or playgrounds must be based upon the fair market value of the unimproved, unsubdivided land which is to be subdivided. Fair market value is the amount a willing buyer would pay and a willing seller would accept for the land when neither buyer or seller is acting under duress. 37 Op. Att’y Gen. No. 169 (1978) [Note: Section 76-3-606(2), MCA, was repealed in 1995, but corresponding text is currently found in 76-3-621(1) and (9)(a), MCA.]

If a proposed subdivision lies within one mile of a third-class city, the county is the “governing body” to which a cash-in-lieu-of-land donation is to be paid under section 76-3-606(2), MCA. Letter opinion to Arthur W. Ayers, Jr., Esq., September 28, 1983. [Arguably this opinion also applies to section 76-3-621, MCA, enacted in 1995.]

## **V. Use of Park Fund**

Former section 76-3-606(2), MCA, which required that money paid in lieu of the dedication of land for parks be used to purchase park land or to initially develop parks and playgrounds, precluded the use of the funds to replace a fence, reshingle a roof, or purchase a maintenance tractor, but did allow the funds to be used to initially outfit a baseball diamond. Letter opinion to Robert B. Brown, Esq., June 19, 1981 [Note: The 1995 amendments to the Act repealed section 76-3-606, MCA, and replaced it with section 76-3-621, MCA, which authorizes the use of dedicated park funds to maintain as well as to acquire and develop parks but imposes certain new conditions on these expenditures. However, Section 13, Chapter 468, 1995 Session Laws (an uncodified provision) specifies that funds in excess of \$10,000 which existed in a park fund on October 1, 1995, may be used only for the acquisition and initial development of parks.]

Section 7-16-2107, MCA, which specifies that there is no restriction on the amount of money a county can spend in acquiring, maintaining, and equipping county parks, did not supersede former section 76-3-606(2), MCA, which provided for a cash donation by subdividers in lieu of dedicating land for parks and limited the use of these funds to the “purchase of additional lands or for the initial development of parks and playgrounds.” Letter opinion to Robert B. Brown, Esq., June 19, 1981 [Note: The 1995 amendments to the Act repealed section 76-3-606, MCA, and replaced it with section 76-3-621, MCA, which authorizes the use of the cash donated in lieu of land dedication to maintain as well as to acquire and develop parks but imposes certain new conditions on these expenditures. However, Section 13, Chapter 468, 1995 Session Laws (an uncodified provision) specifies that funds in excess of \$10,000 which existed in a park fund on October 1, 1995, may be used only to acquire or initially develop parks.]

Revenues from the sale of park lands and from cash donations made in lieu of dedication of land for park purposes may be used only for the purchase of additional lands or the initial development of parks and playgrounds. While these revenues are a part of the park fund, they should be accounted for separately from unrestricted park fund revenues and used solely for the authorized purposes. The interest earned from these restricted revenues must be credited to the general county fund in accordance with section 7-6-204(1), MCA. 40 Op. Att’y Gen. No. 49 (1984). [Note: In the 1995 amendments to the Act repealed section 76-3-606, MCA, and replaced it with section 76-3-621, MCA, which authorizes the use of the cash donated in lieu of land dedication to maintain as well as to acquire and develop parks but imposes certain new conditions on these expenditures. However, Section 13, Chapter 468, 1995 Session Laws (an uncodified provision) specifies that funds in excess of \$10,000 which existed in a park fund on October 1, 1995, may be used only to acquire or initially develop parks.]

Cash donations received by a governing body in lieu of park land dedication under former section 76-3-606(2), MCA, may be used to construct capital improvements in parks including restroom facilities. 44 Op. Att’y Gen. No. 13 (1991) [Note: The 1995 amendments to the Act repealed section 76-3-606, MCA, and replaced it with section 76-3-621, MCA, which imposes certain new conditions on using cash donated in lieu of dedication land for parks. However, assuming that the additional statutory requirements are met, this change does not appear to negate this attorney general’s opinion.]

A state-owned recreational facility located within a county may be regarded as a “park” for purposes of expending county park funds under former section 76-3-606(2), MCA. 44 Op. Att’y Gen. No. 13 (1991). [Note: The 1995 amendments to the Act repealed section 76-3-606, MCA, and replaced it with section 76-3-621, MCA, which, in subsection (5)(b), limits a governing body’s expenditure of cash

donated in lieu of land dedication to recreational areas “within its jurisdiction.” If the phrase “within its jurisdiction” is construed to require that the recreational area be under the governing body’s jurisdiction rather than simply within its jurisdictional area, this new language negates 44 Op. Att’y Gen. No. 13.]

## **VI. Ownership of Open Space Shown and Dedicated on Plat**

Under section 76-3-307, MCA, the filing of a final plat that dedicates common areas to the use of lot owners and states that the subdivider will deed the common areas of the subdivision to a property owners’ association constitutes the conveyance of the common areas to the homeowners’ association. *Montana Earth Resources Ltd. Partnership v. North Blaine Estates, Inc.*, 291 Mont. 216, 967 P.2d 376 (1998).

### **EXEMPTIONS AND EXCLUSIONS FROM SUBDIVISION REGULATION**

#### **I. Limitations on Use of Exemptions – Authority of Governing Body**

##### **A. Generally**

Because it was enacted to promote the public health, safety, and general welfare, the Act is entitled to liberal construction with a view toward accomplishing its highly beneficent objectives. Consequently, exemptions should be given a narrow interpretation. *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993); *State ex rel. Florence-Carlton School Dist. v. Board of County Comm’rs*, 180 Mont. 285, 590 P.2d 602 (1978); 47 Op. Att’y Gen. No. 10 (1997).

If an exemption from subdivision review is employed in an attempt to evade the Act, the division of land in question is to be treated as a subdivision. *State ex rel. Department of Health and Environmental Sciences v. LaSorte*, 182 Mont. 267, 596 P.2d 477 (1979) (dictum).

No division of land is exempted from subdivision review by section 76-3-207, MCA, of the Act if the exemption is claimed for the purpose of evading the Act. Letter opinion to Jim Nugent, Esq., September 21, 1983

A certificate of survey which depicts a division of land that otherwise would be a subdivision but for which an exemption from subdivision review is claimed is not entitled to filing by the clerk and recorder unless the certificate of survey complies with the Department of Commerce’s administrative regulations prescribing the form in which the exemption must be invoked. Letter opinion to Arnie A. Hove, Esq., October 14, 1988. [Note: the administrative regulations referred to in this letter opinion are now those of the Department of Labor and are found at ARM 24.183.1104.]

##### **B. Review of Use of Exemptions**

[Note: In 2005 the Attorney General opinions and case law in this section regarding exemptions were codified in section 76-3-504(1)(p), MCA, by requiring subdivision regulations to establish criteria that the governing body or reviewing authority will use to determine whether

a proposed method of disposition using the exemptions provided in section 76-3-201 or 76-3-207 is an attempt to evade the Act (Sec. 3, Ch. 298, L. 2005).]

Because local governing bodies have the burden of determining whether an exemption from subdivision review was invoked for the purpose of evading the Act, they may require persons wishing to claim an exemption to provide evidence of their entitlement to it. 37 Op. Att’y Gen. No. 41 (1977).

Under section 76-3-301(2), MCA, the county clerk and recorder must advise the governing body of a claimed exemption from subdivision review prior to filing a certificate of survey which creates the exempted parcel. The governing body must decide whether the exemption is claimed for the purpose of evading the Act and, if so, deny its use. *Beaverhead County v. Withers*, Beaverhead Co., No. 9212, 1981. [Note: This case is discussed in *Withers v. County of Beaverhead*, 218 Mont. 447, 710 P.2d 1339 (1985).]

The question of whether an exemption is claimed for the purpose of evading review under the Act is one of fact to be decided by the local governing body taking into consideration all of the surrounding circumstances. The local government may require a person claiming an exemption from subdivision review to furnish evidence of entitlement to the exemption. 40 Op. Att’y Gen. No. 16 (1983); *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

If a county has adopted criteria and a review procedure for determining whether an exemption from subdivision review is invoked for purposes of evading the Act, the county clerk and recorder and the county commission do not act arbitrarily in refusing to allow the exemptions to be used in a manner contrary to the criteria. *Withers v. County of Beaverhead*, 218 Mont. 447, 710 P.2d 1339 (1985).

Governing bodies have the power and duty to evaluate and determine from all the circumstances whether the proposed division of land by exemption is for the purpose of evading subdivision requirements. Local subdivision regulations may not, however, set out a *per se* or automatic rule to determine that a proposed division of land is an evasion of the Act. *State ex rel. Leach v. Visser* (Opinion and Order on Petition for Rehearing), 234 Mont. 438, 767 P.2d 858 (1989); *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

Local governments are authorized to establish procedures to evaluate a proposed conveyance to determine if it constitutes an attempt to evade the Act. *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993)

Because exemptions from statutory requirements pertaining to the public health, safety, and welfare should be narrowly construed, a party claiming an exemption from subdivision review has the burden of proving his entitlement to the exemption. *State ex rel. Florence – Carlton School Dist. v. Board of County Comm’rs*, 180 Mont. 285, 590 P.2d 602 (1978); *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

In determining whether a proposed use of an exemption from subdivision review is a violation of the Act and therefore inappropriate, local government officials need to examine the prior history of the developers and the tract in question including any prior use of exemptions

from subdivision review. After such an evaluation, an informed decision can be made regarding whether an application for an exemption is evading the Act. This retrospective consideration of valid subdivision exemptions to establish an impermissible pattern of land divisions does not constitute a retroactive application of evasion criteria, impair the substantive rights of the property owner, or constitute an impermissible taking of property without just compensation because the previous transactions remain unaffected. *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

C. Adoption and Application of Criteria for Determining Whether an Exemption is Claimed for Purposes of Evading the Act

[Note: Section 76-3-504(1)(p), MCA, requires subdivision regulations to establish criteria that the governing body or reviewing authority will use to determine whether a proposed method of disposition using the exemptions provided in section 76-3-201 or 76-3-207, MCA, is an attempt to evade the Act. It further provides the regulations must provide for an appeals process to the governing body if the reviewing authority is not the governing body (Sec. 3, Ch. 298, L. 2005).]

Local subdivision regulations may not establish a *per se* or automatic rule to determine whether a proposed division of land is an evasion of the Act. *State ex rel. Leach v. Visser* (Opinion and Order on Petition for Rehearing), 234 Mont. 438, 767 P.2d 858 (1989).

Locally adopted criteria for determining whether an exemption from subdivision review is being invoked for the “purpose of evading” the Act which establish rebuttable presumptions of evasion in certain circumstances do not violate constitutional guarantees of due process. *State ex rel. Dreher v. Fuller*, 257 Mont. 445, 849 P.2d 1045 (1993).

D. What Constitutes the Use of Exemptions for the Purpose of Evading the Act

The creation of 13 contiguous one-acre parcels in a single day through the multiple use of the occasional sale exemption is an evasion of the Act. *State ex rel. Department of Health and Environmental Sciences v. LaSorte*, 182 Mont. 267, 596 P.2d 477 (1979) (Dictum). [Note: The 1993 amendments to the Act deleted the “occasional sale” exemption formerly contained in section 76-3-207(1)(d), MCA, (Sec. 4, Ch. 272, L. 1993).]

If exemptions from subdivision review have already been used to create several divisions of contiguous tracts under a common scheme, the local governing body is justified in inquiring as to whether the proposed use of the family conveyance exemption [section 76-3-207(1)(b), MCA] was for purposes of evading the Act and in denying the use of the exemption. *Martinson v. Harding*, Lake Co., No. DV-80-294, 1983.

A district court affirmed the City Council’s conclusion that four family members who simultaneously submitted surveys invoking the family transfer exemption found in section 76-3-207(1)(b), MCA, for contiguous land with a common road system, common access and lot pattern and covenants, intended to evade review of a major subdivision, consistent with 40 Op. Att’y Gen. No. 58 (1983). [Note: This Opinion is found at 40 Op. Att’y Gen. No. 16, (1983).] *Muth, et al. v. The City of Missoula, et al.*, Missoula Co., Cause No. DV-01-905, 2002.

If the record shows that property owners have repeatedly, but unsuccessfully, sought to obtain approval of their subdivision plans for the land in question, and if the county has adopted criteria and a review procedure for determining whether exemptions from subdivision review are being used for purposes of evading the Act, the refusal of the county clerk and recorder and county commission to allow the use of the family conveyance exemption [section 76-3-207(1)(b), MCA] to divide the land contrary to the evasion criteria is not arbitrary or capricious. *Withers v. County of Beaverhead*, 218 Mont. 447, 710 P.2d 1339 (1985).

The rearrangement of the common boundary lines between 15 one thirty-second aliquot parts of a section (segregated earlier by deeds) so as to totally obliterate the aliquot parts and replace them with 14 irregularly shaped tracts creates a “subdivision” as a matter of law. The attempted use of the “relocation of common boundary line” exemption [section 76-3-207(1)(a), MCA] to accomplish this rearrangement is for the purpose of evading the Act and, therefore, impermissible. *Meken, Inc. v. Gallatin County Clerk and Recorder*, Gallatin Co., No. DV 93-536, 1993.

## **II. Specific Exemptions**

### **A. Occasional Sales**

[Note: The 1993 amendments to the Act deleted the “occasional sale” exemption formerly contained in section 76-3-207(1)(d), MCA, (Sec. 4, Ch. 272, L. 1993).]

If an occasional sale exemption is employed in an attempt to evade the Act, the division of land in question is to be treated as a subdivision. *State ex rel. Department of Health and Environmental Sciences v. LaSorte*, 182 Mont. 267, 596 P.2d 477 (1979) (dictum).

The 12-month limitation period on occasional sales of land established in former sections 76-3-207(1)(d), MCA, commences with the actual transfer of interest in the parcel of land from the grantor to the grantee. 38 Op. Att’y Gen. No. 117 (1980).

A single certificate of survey cannot reflect the creation of more than one lot to be conveyed under the occasional sale exemption provided in (former) section 76-3-207(1)(d), MCA, nor can a certificate of survey qualify for the occasional sale exemption if it divides a parcel of land more than once regardless of the nature of the other parcels created. 40 Op. Att’y Gen. No. 16 (1983), as clarified by letter opinion to Jim Nugent, Esq., September 21, 1983.

Land within a parcel created without subdivision review pursuant to the occasional sale exemption cannot again benefit from that exemption during the 12-month period following the original transfer. 41 Op. Att’y Gen. No. 21 (1985).

If a parcel of land has been divided into parcels of 20 acres or more, each of the owners of the new parcels is entitled to use the occasional sale exemption once during the 12-month period following the conveyance of the parcels. 41 Op. Att’y Gen. No. 21 (1985). [Note: the 1993 amendments to the Act redefined the term “subdivision” as it is used in the Act to include divisions of land creating parcels of less than 160 acres (section 76-3-103(15), MCA; Sec. 2, Ch. 272, L. 1993). The term formerly included only parcels containing less than 20 acres.]

If a tract of land is divided into two parcels, each under 20 acres in size, and one of the parcels is sold as an occasional sale, the remaining parcel cannot, in the absence of another legitimately claimed exemption, be sold within 12 months of the sale of the first parcel without subdivision review. 41 Op. Att’y Gen. No. 40 (1986).

Because the Legislature has provided that the occasional sale exemption is subject to the condition that it not be used for the purpose of evading subdivision review, the governing body can determine whether this condition had been met. Local subdivision regulations may not, however, set out a per se or automatic rule to determine whether a proposed use of an exemption is an evasion of the Act. *State ex rel. Leach v. Visser*, (Opinion and Order on Petition for Rehearing), 234 Mont. 438, 767 P.2d 858 (1989).

**B. Conveyance to Member of Grantor’s Immediate Family**

“Member of the immediate family” as that term is used in section 76-3-207(1)(b), MCA, means the spouse of the grantor and the children or parents of the grantor by blood or adoption. 35 Op. Att’y Gen. No. 70 (1974) as clarified by letter opinion addressed to Alan L. Joscelyn, Esq., November 8, 1979. [Note: The 1997 Legislature incorporated this definition into the Act at section 76-3-103(7), MCA (currently section 76-3-103(8), MCA).]

Divisions of land exempted from local subdivision review by section 76-3-207(1)(b), MCA, because they are created for the purpose of a gift or sale to a member of the landowner’s immediate family must be surveyed under the terms of section 76-3-401, MCA. In addition, these divisions must be approved for sanitary purposes by the Montana Department of Health and Environmental Sciences (now the Department of Environmental Quality) under section 76-4-122, MCA, before surveys of the divisions may be filed by the county clerk and recorder. *Huttinga v. Pringle*, 205 Mont. 482, 668 P.2d 1068 (1983). [Note: The approval of the Department of Environmental Quality is required only for parcels of land containing less than 20 acres.]

**C. Condominiums Constructed on Land Divided in Compliance with the Act**

In order to qualify for the exemption from review contained in section 76-4-111, MCA, a condominium must be located on a lot that has been specifically approved for condominium development in a subdivision platted since July 1, 1973. 39 Op. Att’y Gen. No. 28 (1981). Although this opinion concerned the application of section 76-4-111(1), MCA, of the Sanitation in Subdivisions Act, it also applies to identically worded section 76-3-203, MCA, of the Subdivision and Platting Act. Letter opinion to Leo Fisher, Esq., August 2, 1983; affirmed by

Letter of Advice to Brent Brooks, Esq. from Assistant Attorney General Carol E. Schmidt, August 18, 1999.

A district court found parcels of land which have been surveyed, only, are not “land divided in compliance with Act” and denied the use of the exemption found in section 76-3-203, MCA. *Shults v. Liberty Cove, Inc.*, Missoula Co., Cause No. DV-03-1060, 2005. The case has been appealed to the Montana Supreme Court, Case No. 06-76.

D. Sale, Rent, or Lease of One or More Parts of a Building

Because section 76-3-204, MCA, exempts the rental of both existing and new buildings from subdivision review, the construction of a building for apartment use is not subject to regulation under the Act. *Lee v. Flathead County*, 217 Mont. 370, 704 P.2d 1060 (1985).

Section 76-3-204, MCA, which provides that the sale, rent, lease or other conveyance of one or more parts of a building is not a division of land, does not exempt condominium developments from subdivision review. 39 Op. Att’y Gen. No. 28 (1981); 45 Op. Att’y Gen. No. 12 (1993).

Section 76-3-208, MCA, requires subdivision created by rent to undergo subdivision review, but exempts them from surveying and filing requirements. Separate rental cabins on a parcel of land are subdivisions and not exempt from subdivision review under section 76-3-204, MCA. *Rose, d/b/a Skalkaho Lodge and Steak House v. Ravalli County*, Ravalli Co., Cause No. DV-05-516, 2006.

E. Divisions Created by Court Order or Operation of Law

The sale by a county of that portion of a subdivision lot which lies within a rural special improvement district to satisfy a lien against the property for unpaid R.S.I.D. assessments is a division of property “by operation of law” which is exempt from the provisions of the Act under section 76-3-201(1), MCA. 39 Op. Att’y Gen. No. 48 (1982).

In a probate proceeding an agreement between coinheritors of a tract of land to divide the tract among themselves under section 72-3-915, MCA, is not exempt from the Act under section 76-3-201(1), MCA, as a division of land by operation of law. However, if the agreement is incorporated into the court’s decree of distribution or other order, the division is exempt under that section as a division by court order. Letter opinion to Robert Zeigler, October 3, 1985.

F. Divisions Which Could Have Been Created Pursuant to the Law of Eminent Domain

The term “the law of eminent domain” as used in section 76-3-201(1), MCA, includes federal condemnation proceedings, and the Act’s eminent domain exemption applies to conveyances of privately owned land to the United States Department of Agriculture pursuant to 16 U.S.C. §485. 42 Op. Att’y Gen. No. 36 (1987).

If a division of land is exempt from the Act’s surveying and subdivision review requirements because it could have been created by order of a court pursuant to the law of

eminent domain [section 76-3-201(1), MCA], a “remainder” parcel created by the division is also exempt from the requirements of the Act. 44 Op. Att’y Gen. No. 25 (1992).

G. Land Acquired for State Highways

If a division of land is exempt from the Act’s surveying and subdivision review requirements because it is created by the acquisition of land for state highways (section 76-3-209, MCA), a “remainder” parcel created by the division is also exempt from the requirements of the Act. 44 Op. Att’y Gen. No. 25 (1992).

H. Relocation of Common Boundary Lines

The rearrangement of the common boundary lines between 15 one thirty-second aliquot parts of a section (segregated earlier by deeds) so as to totally obliterate the aliquot parts and replace them with 14 irregularly shaped tracts creates a “subdivision” as a matter of law. The attempted use of the “relocation of common boundary line” exemption [section 76-3-207(1)(a), MCA] to accomplish this rearrangement is for the purpose of evading the Act and, therefore, impermissible. *Meken, Inc. v. Gallatin County Clerk and Recorder*, Gallatin Co., No. DV 93-536, 1993.

The filing of a certificate of survey showing that the original boundary between parcels has been expunged and depicting the boundaries of a larger aggregate parcel unequivocally establishes the new boundaries. *Erker v. Kester*, 1999 MT 231, 296 Mont. 123, 988 P.2d 1221.

In a challenge to the City of Missoula's practice to allow boundary line adjustments of adjacent nonconforming lots platted before zoning was adopted, to create a street lot and alley lot, the court held boundary line relocations of zoned residential property must be reviewed by the City Council or the Board of Adjustment to consider the interplay with applicable zoning laws--not just whether the boundary line adjustment complied with the Act. *Ballas v. Missoula City Board of Adjustment, et al.*, Missoula County, No. DV-03-867, 2004. [Note: To codify this ruling, text was added to section 76-3-207(1), MCA, that divisions of land pursuant to that section are subject to applicable zoning regulations. Sec. 1, Ch. 252, L. 2005.]

I. Divisions for Agricultural Purposes

The purchasers of a parcel of land that was created without subdivision review under the Act’s agricultural exemption and is subject to an agricultural use covenant, as provided under section 76-3-207(1)(c), MCA, sued the County after the Commissioners refused to lift the covenant. The Hamptons were unsuccessful with their claim the covenant did not run with the land and that the covenant was not valid from its inception due to the County’s failed “duty” to properly determine whether the covenant was used for the purpose of evading subdivision review. The County took the steps required by its regulations to determine whether the exemption was for “evading” rather than merely “avoiding” review; it did not have to hold a hearing to test for evasion. *Hampton v. Lewis and Clark County*, 2001 MT 81, 305 Mont. 103, 23 P.3d 908.

**III. “Remainder” Doctrine**

The Department of Health and Environmental Sciences (now the Department of Environmental Quality) is authorized by the Sanitation in Subdivisions Act (sections 76-4-101, *et seq.*, MCA) to review “remainders” of less than 20 acres and may require that these remainders be shown on plats submitted for the Department’s review. 37 Op. Att’y Gen. No. 74 (1977).

A “remainder” which is created by the segregation of a subdivision from a larger original tract is not part of the subdivision and is not subject to the Act’s surveying requirements regardless of its size. As used in this context a “remainder” is that part of an original tract which is left following the segregation of other parcels from the tract for the purpose of transferring the other parcels. To qualify as a “remainder” a parcel must not have been created for the purpose of transfer and must be retained by the owner. Letter opinion to Robert M. McCarthy, Esq., April 22, 1987. [Note: Although the term “remainder” does not appear in the Act, the possibility that remainder parcels may exist is implicit in the Act’s express provisions.]

The “remainder doctrine” does not allow a subdivider to exclude a parcel of land created by a subdivision from subdivision review by simply declaring that the parcel is not part of the subdivision. *Friends of Bull Lake, Inc. v. Board of County Comm’rs*, Lincoln Co., No. DV-95-12, 1996.

If an earlier acquisition of right-of-way for a state highway project has severed a “remainder” parcel from the holdings of a landowner, the owner’s subsequent conveyance of the “remainder” does not constitute a division of land [section 76-3-103(3), MCA] which must be surveyed under section 76-3-401, MCA. Consequently, a clerk and recorder may not require that the parcel be surveyed and a survey document be filed, before the clerk will accept for recording an instrument transferring the parcel. 44 Op. Att’y Gen. No. 25 (1992).

If a division of land is exempt from the Act’s surveying and subdivision review requirements under section 76-3-201(1), MCA, because it could have been created by order of a court pursuant to the law of eminent domain, a “remainder” parcel created by the division is also exempt from the requirements of the Act. 44 Op. Att’y Gen. No. 25 (1992).

The tenancy at issue, characterized as a “title company’s nightmare” was a swiss-cheese-like remainder parcel of a little over 600 acres and 25 tracts and required a survey to determine how to divide it between the tenants in common. *Kellogg v. Dearborn Information Services, LLC*, 2005 MT 188, 328 Mont. 83, 119 P.3d 20.

The definition of “subdivision” [section 76-3-103(15), MCA] not only includes divisions of land, but also any resubdivision, any condominium and areas which provide or will provide multiple space for recreational camping vehicles or mobile homes. 39 Op. Att’y Gen. No. 14 (1981).

[Note: Some jurisdictions do not allow “remainders” of less than 160 acres in size, considering that parcel part of the subdivision.]

#### **IV. Use of Exemptions Within Platted Subdivisions**

A survey which will increase the number of parcels in a platted subdivision must be filed in the form of a plat amendment under section 76-3-207 (2)(a), MCA. *State ex rel. Swart v. Best*, Gallatin Co., Cause No. 23929, 1977.

Section 76-3-201(2), MCA, [currently section 76-3-201(1)(b), MCA] which exempts from the requirements of the Act divisions of land created to provide security for construction mortgages, liens, or trust indentures, applies both within and outside of platted subdivisions. *West v. Klundt*, Yellowstone Co., No. DV-76-1221, 1979.

A city does not constitute a “platted subdivision” for purposes of section 76-3-207(2), MCA. Consequently, the requirement of that section that any division of land within a platted subdivision which increases the number of lots or rearranges six or more lots be reviewed as a subdivision does not apply to divisions of land within the corporate boundaries of a city but outside any platted subdivision. 38 Op. Att’y Gen. No. 108 (1980).

## **SURVEYING REQUIREMENTS AND FUNCTION OF EXAMINING LAND SURVEYOR**

### **I. Satisfying 180-Day Filing Requirement of Section 76-3-404, MCA**

Section 76-3-404, MCA, requiring surveyors to file a certificate of survey within 180 days of the completion of a survey, is satisfied when the surveyor presents the certificate for filing. The refusal of the clerk and recorder to file a certificate of survey presented within the time limit does not place the surveyor in noncompliance with the statutory requirement. *State ex rel. Swart v. Molitor*, 190 Mont. 515, 621 P.2d 1100 (1980).

### **II. What Constitutes a One Thirty-Second Aliquot Part of a Section**

For purposes of section 76-3-401, MCA, which requires that divisions of land, other than subdivisions, which cannot be described as 1/32 or larger aliquot parts of a section be surveyed, a 1/32 aliquot part need not be contained entirely within the same section. *Timberland Resources, Inc. v. Vaught*, 227 Mont. 247, 738 P.2d 1277 (1987).

### **III. What Parcels Must Be Surveyed – “Remainders”**

Only those parcels that are segregated from an original tract for purposes of transfer are subject to the Act’s surveying requirements. A “remainder,” i.e. that portion of an original tract which is not itself created for transfer but which is left after other parcels are segregated for transfer, is not subject to the Act’s surveying requirements regardless of its size. Letter opinion to Robert M. McCarthy, Esq., April 22, 1987.

If the earlier acquisition of right-of-way for a state highway project has severed a “remainder” parcel from the holdings of a land owner, the owner’s subsequent conveyance of the “remainder” does

not constitute a division of land under section 76-3-103(3), MCA, [currently section 76-3-103(4), MCA] which must be surveyed under section 76-3-401, MCA. Consequently, a clerk and recorder may not require that the parcel be surveyed and a survey document be filed, before the clerk will accept for recording an instrument transferring the parcel. 44 Op. Att’y Gen. No. 25 (1992).

[Note: Some jurisdictions do not allow “remainders” of less than 160 acres in size, considering that parcel part of the subdivision.]

#### **IV. Scope of Examining Land Surveyor’s Review**

Under section 76-3-611(2), MCA, an examining land surveyor may refuse to approve a certificate of survey only because it contains errors in calculations or drafting and may not refuse to approve it on the grounds that the underlying survey does not comply with state monumentation requirements. *State ex rel. Swart v. Stucky*, Gallatin Co., Cause No. 22597, 1976.

#### **V. Effect of Failure to Satisfy Surveying, Monumentation, or Filing Requirements**

In the absence of the necessary approvals from the Department of Health and Environmental Sciences (now the Department of Environmental Quality) under the Sanitation in Subdivisions Act (sections 76-4-101 *et seq.*, MCA) the county clerk and recorder is statutorily required to refuse to file a certificate of survey creating a division of land under the “family conveyance” exemption of section 76-3-207(1)(b), MCA, by section 76-4-122, MCA. Consequently, a writ of mandamus (which may be issued by a court to compel a public official to perform a clear legal duty) is not available to force the clerk and recorder to accept the certificate. *Huttinga v. Pringle*, 205 Mont. 482, 668 P.2d 1068 (1983). [Note: The Sanitation in Subdivisions Act applies only to divisions of land containing less than 20 acres. Section 76-4-102(13), MCA.]

The clerk and recorder has a mandatory statutory duty not to record otherwise proper deeds which fail to comply with the surveying requirements of the Act. *McDonald v. Jones*, 258 Mont. 211, 852 P.2d 588 (1993); *Rocky Mountain Timberlands, Inc. v. Lund*, 265 Mont. 463, 877 P.2d 1018 (1994). A certificate of survey that is filed in the county clerk and recorder’s office before all of the new monuments shown in the certificate have been set is not “properly filed” and, therefore, does not create a “division of land” for purposes of the Act unless the surveyor performing the survey has certified that the monuments that were not set would have been disturbed by the installation of improvements on the surveyed property. The fact that weather conditions made it difficult or impossible to set the monuments does not exempt a certificate from this monumentation requirement [section 76-3-103(3), MCA (currently section 76-3-103(4), MCA); section 76-3-404(3), MCA; ARM 8.94.3001(1)(d)]. *NFC Partners v. Stanchfield Cattle Co.*, 274 Mont. 46, 905 P.2d (1995). [Note: In 2000 the Department of Commerce amended its administrative rules governing survey monumentation to allow the deferral of monumentation due to severe weather conditions for up to 240 days following the filing of a survey document; currently found in ARM 24.183.1101(1)(d).]

#### **VI. Qualifications of Professional Land Surveyor**

A professional land surveyor registered in the state of Montana need not be a resident of Montana to sign certificates of survey. 43 Op. Att’y Gen. No. 9 (1989).

## **SUBDIVISION IMPROVEMENTS AGREEMENTS**

### **I. Interpreting Ambiguous Terms**

A subdivision improvements agreement will be interpreted by the courts according to the rules of construction that apply to any contract. If an essential term of an agreement is ambiguous, the meaning of the term is a question of fact for the jury. *Gray v. City of Billings*, 213 Mont. 6, 689 P.2d 268 (1984).

## **WORDS AND PHRASES DEFINED**

### **I. Arbitrary or Capricious**

The “arbitrary or capricious” standard that a court must apply in considering a challenge under section 76-3-625, MCA, to a governing body’s decision to approve or disapprove a proposed subdivision does not permit a reversal of the decision merely because the evidence upon which it was based was inconsistent or might support a different result. The decision must appear to have been random, unreasonable, or seemingly unmotivated based on the existing record. If it appears from the record that the governing body had grounds under section 76-3-608, MCA, for denying a subdivision application, the denial cannot be said to be either random or unreasonable. *Vergin v. Flathead County*, 1999 MT 19N, 986 P.2d 862, citing *Silva v. City of Columbia Falls*, 258 Mont. 329, 852 P.2d 671 (1993). [Note: Under the Internal Operating Rules of the Montana Supreme Court the *Vergin* decision may not be cited as precedent.]

### **II. Condominium**

The conversion of existing rental-occupancy apartment houses or office buildings to an individual condominium form of ownership does not constitute a “condominium” that is subject to the requirements of the Act. 39 Op. Att’y Gen. No. 74 (1982).

To be a “condominium” that is subject to regulation as a “subdivision” under the Subdivision and Platting Act [section 76-3-103(15), MCA] a development must have been submitted to the provisions of the Unit Ownership Act (sections 70-23-101 *et seq.*, MCA). Letter of Advice to William Nels Swandal, Esq., from Assistant Attorney General John Paulson, August 14, 1991.

### **III. County Road**

A county's approval and the subsequent filing of a subdivision plat bearing a certificate of dedication to public use of the streets shown on the plat does not, by itself, establish the streets as "county roads" for purposes of sections 7-14-2601 through 7-14-2615, MCA, which govern the establishment, alteration, and abandonment of county roads. *Smith v. Moran*, 215 Mont. 31, 693 P.2d 1246 (1985).

#### **IV. Division of Land**

The mere surveying of a parcel, without the filing of a certificate of survey [or subdivision plat], creates no rights under the Act. 35 Op. Att'y Gen. No. 96 (1974).

The mere fact that a recorded deed describes the tract conveyed thereby as comprising several small aliquot parts of a section does not segregate these aliquot parts from each other so as to permit their separate conveyance without compliance with the Act. 38 Op. Att'y Gen. No. 66 (1980); 47 Op. Att'y Gen. No. 10 (1997).

An attempt to divide land by transferring title to or possession of a portion of the tract is ineffective if the grantor and the grantee under the purported conveyance are the same party. The fact that the clerk and recorder's office has filed a deed which is ineffective because the grantor and the grantee are the same party does not render the deed effective. *Rocky Mountain Timberlands, Inc. v. Lund*, 265 Mont. 463, 877 P.2d 1018 (1994).

A certificate of survey that is filed in the county clerk and recorder's office before all of the new monuments shown in the certificate have been set is not "properly filed" and, therefore, does not create a "division of land" for purposes of the Act unless the surveyor performing the survey has certified that the monuments that were not set would have been disturbed by the installation of improvements on the surveyed property. The fact that weather conditions made it difficult or impossible to set the monuments does not exempt a certificate from this monumentation requirement [section 76-3-103(3), MCA (currently section 76-3-103(4), MCA); section 76-3-404(3), MCA; ARM 8.94.3001(1)(d)]. *NFC Partners v. Stanchfield Cattle Co.*, 274 Mont. 46, 905 P.2d 1106 (1995) [Note: In 2000 the Department of Commerce amended its administrative rules governing survey monumentation to allow the deferral of monumentation due to severe weather conditions for up to 240 days following the filing of a survey document; currently found in ARM 24.183.1101(1)(d).]

The process by which the federal government surveyed the public domain into sections, aliquot parts of sections, and government lots and prepared maps of this survey work did not constitute a "division of land" for purposes of the Act. 47 Op. Att'y Gen. No. 10 (1997).

#### **V. Exclusive of All Other Dedications**

The phrase "exclusive of all other dedications" as used in the park-land dedication requirement of former section 76-3-606(1), MCA, included only dedications for purposes other than public parks and playgrounds. 37 Op. Att'y Gen. No. 38 (1977). [Note: The 1995 amendments to the Act repealed section 76-3-606, MCA, and established a revised park land dedication requirement in section 76-3-621, MCA. This new provision does not contain the phrase "exclusive of all other dedications."]

#### **VI. Fair Market Value**

“Fair market value” of land for purposes of the Act’s cash-in-lieu-of-park land dedication provision is the amount a willing buyer would pay and a willing seller would accept for the land if neither buyer nor seller is acting under duress. 37 Op. Att’y Gen. No. 169 (1978).

## **VII. Governing Body**

If a proposed subdivision lies within one mile of a third-class city, the county is the “governing body” to which a cash-in-lieu-of-land donation was to be paid under former section 76-3-606(2), MCA. Letter opinions to Arthur W. Ayers, Jr., Esq., September 28, 1983. [Note: The 1995 amendments to the Act repealed section 76-3-606, MCA, and established a revised park land dedication requirement in section 76-3-621, MCA.]

A local board of health is not a “governing body” as contemplated by section 76-3-103(6), MCA [currently section 76-3-103(7), MCA]. Consequently, the Act does not authorize local boards of health to adopt and enforce regulations governing sanitation in subdivisions, regardless of size. *Skinner Enterprises, Inc. v. Lewis and Clark County Board of Health*, 286 Mont. 256, 950 P.2d 733 (1997).

## **VIII. Law of Eminent Domain**

The term “law of eminent domain” as it is used in section 76-3-201(1), MCA, includes federal condemnation proceedings. 42 Op. Att’y Gen. No. 36 (1987).

## **IX. Member of the Immediate Family**

“Member of the immediate family” as that term is used in the section 76-3-207(1)(b), MCA, means the spouse of the grantor and the children or parents of the grantor by blood or adoption. 35 Op. Att’y Gen. No. 70 (1974) as clarified by letter opinion addressed to Alan L. Joscelyn, Esq., November 8, 1979. [Note: The 1997 Legislature incorporated this definition into the Act at section 76-3-103(7), MCA [currently section 76-3-103(8), MCA].]

## **X. Minor Subdivision**

A subdivision plat which creates six lots each of which contains fewer than 20 acres is not entitled to minor subdivision treatment simply because one of the lots is labeled “not part of the subdivision.” Letter opinion to Ted O. Lympus, Esq., July 31, 1981. [Note: In 1993 the definition of “subdivision” contained in section 76-3-103(15), MCA, was amended to include parcels of less than 160 acres. Prior to this the definition encompassed only parcels of less than 20 acres (Sec. 2, Ch. 272, L. 1993).]

For the first time a definition of “minor subdivision” has been included in the Act in section 76-3-103(9), MCA [a subdivision that creates five or fewer lots from a tract of record]. Sec. 1, Ch. 298, L. 2005.

## **XI. One Thirty-Second or Larger Aliquot Part of a United States Government Section**

A “1/32 or larger aliquot part of a United States Government section,” as that phrase is used in section 76-3-401, MCA, need not be contained entirely within the same section. *Timberland Resources, Inc. v. Vaught*, 227 Mont. 247, 738 P.2d 1277 (1987).

## **XII. Park**

A state-owned recreational facility located within a county may be regarded as a “park” for purposes of expending county park funds under section 76-3-606(2), MCA. 44 Op. Att’y Gen. No. 13 (1991). [Note: The 1995 amendments to the Act repealed section 76-3-606, MCA, and replaced it with section 76-3-621, MCA, which limits a governing body’s expenditure of cash donated in lieu of land dedication to recreational areas “within its jurisdiction.” If the phrase “within its jurisdiction” is construed to require that the recreational area be under the governing body’s jurisdiction rather than simply within its jurisdictional area, this new language negates 44 Op. Att’y Gen. No. 13.]

## **XIII. Platted Subdivision**

A city is not a “platted subdivision” for purposes of section 76-3-207(2), MCA, which provides that within a platted subdivision any division of land which results in an increase in the number of lots or which redesigns or rearranges six or more lots must be reviewed and approved as a subdivision. 38 Op. Att’y Gen. No. 108 (1980).

## **XIV. Properly Filed**

A certificate of survey that is filed in the county clerk and recorder’s office before all of the new monuments shown in the certificate have been set is not “properly filed” and, therefore, does not create a “division of land” for purposes of the Act unless the surveyor performing the survey has certified that the monuments that were not set would have been disturbed by the installation of improvements on the surveyed property. The fact that weather conditions made it difficult or impossible to set the monuments does not exempt a certificate from this monumentation requirement [section 76-3-103(3), MCA (currently section 76-3-103(4), MCA); section 76-3-404(3), MCA; ARM 8.94.3001(1)(d)]. *NFC Partners v. Stanchfield Cattle Co.*, 274 Mont. 46, 905 P.2d 1106 (1995) [Note: In 2000 the Department of Commerce amended its administrative rules governing survey monumentation to allow the deferral of monumentation due to severe weather conditions for up to 240 days following the filing of a survey document; currently found in ARM 24.183.1101(1)(d).]

## **XV. Remainder**

A “remainder” [a concept arising from the Act by implication] is that portion of an original tract which is not itself created for transfer but which is left after other parcels are segregated for transfer. Letter opinion to Robert M. McCarthy, Esq., April 22, 1987.

## **XVI. Subdivision**

The definition of “subdivision” [section 76-3-103(15), MCA] not only includes divisions of land, but also any resubdivision, any condominium and areas which provide or will provide multiple space for recreational camping vehicles or mobile homes. 39 Op. Att’y Gen. No. 14 (1981).

In the definition of “subdivision” in section 76-3-103, MCA, a division of land includes any resubdivision, a condominium, an area, regardless of its size, that provides or will provide multiple space for recreational camping vehicles, and an area, regardless of its size, that provides or will provide multiple space for mobile homes. *Rose, d/b/a Skalkaho Lodge and Steak House v. Ravalli County*, Ravalli Co., Cause No. DV-05-516, 2006.

## **XVII. Tract of Record**

An aliquot part of a section or a government lot depicted on a United States Government survey map is not, by that fact alone, a “tract of record” as that term is defined in section 76-3-103(16), MCA. 47 Op. Att’y Gen. No. 10 (1997)

A United States Government lot or an aliquot part of a government survey section is not a “tract of record” as defined in section 76-3-103(16), MCA, simply by virtue of the fact that its description appears in a deed on file with the clerk and recorder, unless it satisfies the requirement that it be an “individual parcel of land,” either through its having been segregated and conveyed individually prior to the effective date of the Act or through segregation or conveyance in compliance with the Act. A government lot or an aliquot part that is aggregated with other contiguous lots or aliquot parts in an earlier conveyance is not an “individual parcel” and cannot later be segregated from the other lots or aliquot parts without compliance with the Act unless otherwise exempted from review. 47 Op. Att’y Gen. No. 10 (1997).

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**MONTANA DEPARTMENT OF LABOR AND INDUSTRY  
ADMINISTRATIVE RULES FOR  
THE MONTANA SUBDIVISION AND PLATTING ACT**

**UNIFORM STANDARDS FOR SURVEY MONUMENTATION,  
CERTIFICATES OF SURVEY AND  
FINAL SUBDIVISION PLATS  
(ARM 24.183.1101, 1104, and 1107)**

**Uniform Standards for Monumentation, Certificates  
of Survey, and Final Subdivision Plats**

24.183.1101 UNIFORM STANDARDS FOR MONUMENTATION (1) The following standards govern the monumentation of land surveys:

(a) The terms "monument" and "permanent monument" as used in these regulations mean any structure of masonry, metal or other permanent, durable material placed in the ground, which is exclusively identifiable as a monument to a survey point, expressly placed for surveying reference.

(b) All metal monuments must be at least one-half inch in diameter and 18 inches in length with a cap not less than one inch in diameter marked in a permanent manner with the license number of the surveyor in charge of the survey and either the name of the surveyor or the company employing the surveyor. Metal monuments marking a public land survey corner as described in 70-22-101, MCA, must be at least 24 inches long and 5/8 inch in diameter with an appropriately stamped metal cap at least two inches in diameter. A monument marking a public land survey corner may also consist of a cap as described in this rule set firmly in concrete.

(c) Before a subdivision plat or certificate of survey may be filed for record the surveyor shall confirm the location of as many monuments as, in the surveyor's professional judgment, are necessary to reasonably assure the perpetuation of any corner or boundary established by the survey and to enable other surveyors to reestablish those corners and boundaries and retrace the survey. The surveyor shall clearly identify on the face of the plat or certificate of survey all monuments pertinent to the survey, and the descriptions of these monuments must be sufficient to identify the monuments.

(d) The surveyor shall set all monuments prior to the filing of a plat or certificate of survey except those monuments that will be disturbed by the installation of improvements or that, because of severe weather conditions, may, in the surveyor's judgment, be more appropriately and accurately set after the weather has improved. In these two circumstances the surveyor may set monuments after the survey document is filed if the surveyor certifies on the survey document that the monuments will be set by a specified date. The surveyor shall set monuments, the placement of which has been deferred because of severe weather conditions, within 240 days of the date on which the survey document was filed.

(i) If during the later monumentation of the corners of a plat or certificate of survey that were not monumented before the plat or certificate was filed, the surveyor finds that it is necessary to set a reference monument to a corner, the surveyor shall prepare and file an amended certificate of survey or subdivision plat.

(ii) The failure of the surveyor to set the monuments by the date certified on the record of survey will be deemed a violation of these rules.

(e) The surveyor shall set monuments at the following locations:

(i) At each corner and angle point of all lots, blocks and parcels of land created by the survey.

(ii) At every point of intersection of the outer boundary of a subdivision with an existing road right-of-way line of record or a road right-of-way line created by the survey.

(iii) At every point of curve, point of tangency, point of reversed curve, point of compounded curve and point of intersection on each road right-of-way line created by the survey.

(iv) At the intersection of a boundary line and a meander line. Meander line angle points need not otherwise be monumented.

(f) If the placement of a required monument at its proper location is physically impractical, the surveyor may set a reference or witness monument. This monument has the same status as other monuments of record if its location is properly shown. If the surveyor relies upon any existing monument in conducting a survey, he or she shall confirm the location of the monument and show and describe it on the resulting certificate of survey or subdivision plat. (History: 76-3-403, MCA; IMP , 76-3-403, MCA; NEW , Eff. 1/5/74; EMERG , AMD , Eff. 7/1/74; AMD , Eff. 10/5/74; AMD , 1980 MAR p. 2806, Eff. 10/17/80; TRANS , from Dept. of Comm. Affairs, Ch. 274, L. 1981, Eff. 7/1/81; AMD , 2000 MAR p. 462, Eff. 2/11/00; TRANS , from Commerce, 2005 MAR p. 966.)

24.183.1104 UNIFORM STANDARDS FOR CERTIFICATES OF SURVEY (1) A certificate of survey may not be filed by a county clerk and recorder unless it complies with the following requirements:

(a) A certificate of survey must be legibly drawn with permanent ink or printed or reproduced by a process guaranteeing a permanent record and must be 18 inches by 24 inches, or 24 inches by 36 inches, overall to include a 1 1/2 inch margin on the binding side.

(b) One signed copy on cloth-backed material or on 3 mil or heavier matte stable-base polyester film or equivalent and one signed reproducible copy on a stable-base polyester film or equivalent must be submitted.

(c) If more than one sheet must be used to adequately depict the land surveyed, each sheet must show the number of that sheet and the total number of sheets included. All certifications must be placed or referred to on one sheet.

(d) A certificate of survey must show or contain on its face or on separate sheets referred to on its face the following information. The surveyor may, at his or her discretion, provide additional information regarding the survey.

(i) A title or title block including the quarter-section, section, township, range, principal meridian and county, and, if applicable, city or town in which the surveyed land is located. Except as provided in (1)(f)(v), a certificate of survey must not bear the title "plat," "subdivision" or any title other than "Certificate of Survey."

(ii) The name(s) of the person(s) who commissioned the survey and the names of any adjoining platted subdivisions and the numbers of any adjoining certificates of survey previously filed.

(iii) The date the survey was completed and a brief explanation of why the certificate of survey was prepared, such as to create a new parcel, retrace a section line or retrace an existing parcel of land.

(iv) A north arrow.

(v) A scale bar. (The scale must be sufficient to legibly represent the required information and data.)

(vi) The location of, and other information relating to all monuments found, set, reset, replaced or removed as required by ARM 24.183.1101(1)(c).

(A) If additional monuments are to be set after the certificate of survey is filed, these monuments must be shown by a distinct symbol, and the certificate of survey must bear a certification by the surveyor as to the reason the monuments have not been set and the date by which they will be set.

(B) All monuments found during a retracement that influenced the position of

any corner or boundary indicated on the certificate of survey must be clearly shown as required by ARM 24.183.1101(1)(c).

(vii) The location of any section corners or corners of divisions of sections the surveyor deems to be pertinent to the survey.

(viii) Witness and reference monuments and basis of bearings. For purposes of this rule the term "basis of bearings" means the surveyor's statement as to the origin of the bearings shown in the certificate of survey. The basis of bearings may refer to a particular line between monumented points in a previously filed survey document. If the certificate of survey shows true bearings, the basis of bearings must describe the method by which these true bearings were determined.

(ix) The bearings, distances and curve data of all boundary lines. If the parcel surveyed is bounded by an irregular shoreline or a body of water, the bearings and distances of a meander traverse generally paralleling the riparian boundary must be given.

(A) The courses along a meander line are shown solely to provide a basis for calculating the acreage of a parcel that has one or more riparian boundaries as the parcel existed at the time of survey.

(B) For purposes of this rule a line that indicates a fixed boundary of a parcel is not a "meander" or "meander line" and may not be designated as one.

(x) Data on all curves sufficient to enable the reestablishment of the curves on the ground. For circular curves these data must at least include radius and arc length. For nontangent curves, which must be so labeled, the certificate of survey must include the bearings of radial lines or chord length and bearing.

(xi) Lengths of all lines shown to at least tenths of a foot, and all angles and bearings shown to at least the nearest minute. Distance measurements must be stated in English units, but their metric equivalents, shown to the nearest hundredth of a meter, may be noted parenthetically.

(xii) A narrative legal description of the parcel surveyed as follows:

(A) If the parcel surveyed is either an aliquot part of a U.S. government section or a U.S. government lot, the information required by this subsection is the aliquot or government lot description of the parcel.

(B) If the survey depicts the retracement or division of a parcel or lot that is shown on a filed certificate of survey or subdivision plat, the information required by this subsection is the number or name of the certificate of survey or plat and the parcel or lot number of the parcel surveyed.

(C) If the parcel surveyed does not fall within (1)(d)(xii)(A) or (B), above, the information required by this subsection is the metes-and-bounds description of the perimeter boundary of the parcel surveyed.

(D) If the certificate of survey establishes the boundary of a parcel containing one or more interior parcels, the information required by this subsection is the legal description of the encompassing parcel.

(E) The requirement of this rule does not apply to certificates of survey that depict a partial retracement of the boundaries of an existing parcel or establish the location of lines or corners that control the location of an existing parcel.

(xiii) Except as provided by (1)(f)(iv), all parcels created by the survey, designated by number or letter, and the dimensions and area of each parcel. (Excepted parcels must be marked "Not included in this survey.") If a parcel created by the survey is identifiable as a 1/32 or larger aliquot part of a U.S. government section or as a U.S. government lot, it may be designated by

number or letter or by its aliquot part or government lot identification.

(xiv) The location of any easement that will be created by reference to the certificate of survey.

(xv) The dated signature and the seal of the surveyor responsible for the survey. The affixing of this seal constitutes a certification by the surveyor that the certificate of survey has been prepared in conformance with the Montana Subdivision and Platting Act (76-3-101 through 76-3-625, MCA) and the regulations adopted under that Act.

(xvi) A memorandum of any oaths administered under 76-3-405, MCA.

(xvii) Space for the county clerk and recorder's filing information.

(e) Certificates of survey that do not represent a division of land, such as those depicting the retracement of an existing parcel and those prepared for informational purposes, must bear a statement as to their purpose and must meet applicable requirements of this rule for form and content.

(f) Procedures for divisions of land exempted from public review as subdivisions. Certificates of survey for divisions of land meeting the criteria set out in 76-3-207, MCA, must meet the following requirements:

(i) A certificate of survey of a division of land that would otherwise be a subdivision but that is exempted from subdivision review under 76-3-207, MCA, may not be filed by the county clerk and recorder unless it bears the acknowledged certificate of the property owner stating that the division of land is exempt from review as a subdivision and citing the applicable exemption.

(ii) If the exemption relied upon requires that the property owner enter into a covenant running with the land, the certificate of survey may not be filed unless it bears a signed and acknowledged recitation of the covenant.

(iii) If a certificate of survey invokes the exemption for gifts and sales to members of the landowner's immediate family, the certificate must indicate the name of the proposed grantee, the relationship of the grantee to the landowner and the parcel to be conveyed to the grantee.

(iv) If a certificate of survey invokes the exemption for the relocation of common boundary lines:

(A) The certificate of survey must bear the signatures of all landowners whose parcels will be altered by the proposed relocation. The certificate of survey must show that the exemption was used only to change the location of or eliminate a boundary line dividing two or more parcels, and must clearly distinguish the prior boundary location (shown, for example, by a dashed or broken line or a notation) from the new boundary (shown, for example, by a solid line or notation);

(B) The certificate of survey must show the boundaries of the area that is being removed from one parcel and joined with another parcel. The certificate of survey may, but is not required to, establish the exterior boundaries of the resulting parcels. However, the certificate of survey must show portions of the existing unchanged boundaries sufficient to clearly identify both the location and the extent of the boundary relocation;

(C) If a boundary line will be completely eliminated, the certificate must establish the boundary of the resulting parcel.

(v) A survey document that modifies lots in a platted and filed subdivision and invokes an exemption from subdivision review under 76-3-201 or 76-3-207(1)(d) or (e), MCA, must be entitled "amended plat of the (name of subdivision)," but for all other purposes is to be regarded as a certificate of survey. The document must contain a statement signed by the property owner that approval of the local government body is not required and citing the applicable exemption.

(vi) If the certificate of survey invokes an exemption from subdivision review under

76-3-207, MCA, the certificate of survey must bear, or be accompanied by, a certification by the county treasurer that all taxes and special assessments assessed and levied on the surveyed land have been paid.

(vii) For purposes of (1)(f), when the parcel of land for which an exemption from subdivision review is claimed is being conveyed under a contract-for-deed, the terms "property owner", "landowner" and "owner" mean the seller of the parcel under the contract-for-deed.

(g) Procedures for filing certificates of survey of divisions of land entirely exempted from the requirements of the Act. The divisions of land described in 76-3-201, 76-3-205 and 76-3-209, MCA, and divisions of federally owned land made by a United States government agency are not required to be surveyed, nor must a certificate of survey or subdivision plat showing these divisions be filed with the clerk and recorder. A certificate of survey of one of these divisions may, however, be filed with the clerk and recorder if the certificate of survey meets the requirements for form and content for certificates of survey contained in this rule and bears a certificate of the surveyor performing the survey citing the applicable exemption from the Act or, when applicable, that the land surveyed is owned by the federal government. (History: 76-3-403, MCA; IMP , 76-3-403, MCA; NEW , Eff. 1/5/74; EMERG , AMD , Eff. 7/1/74; AMD , Eff. 10/5/74; AMD , Eff. 4/5/76; AMD , 1977 MAR p. 955, Eff. 1/26/77; AMD , 1980 MAR p. 2806, Eff. 10/17/80; TRANS , from Dept. of Comm. Affairs, Ch. 274, L. 1981, Eff. 7/1/81; AMD , 2000 MAR p. 462, Eff. 2/11/00; TRANS , from Commerce, 2005 MAR p. 966.)

24.183.1107 UNIFORM STANDARDS FOR FINAL SUBDIVISION PLATS (1) A final subdivision plat may not be approved by the governing body or filed by the county clerk and recorder unless it complies with the following requirements:

(a) Final subdivision plats must be legibly drawn with permanent ink or printed or reproduced by a process guaranteeing a permanent record and must be 18 inches by 24 inches or 24 inches by 36 inches overall to include a 1 1/2-inch margin on the binding side.

(b) One signed copy on cloth-backed material or on 3 mil or heavier matte stable-base polyester film or equivalent and one signed reproducible copy on a stable-base polyester film or equivalent must be submitted.

(c) If more than one sheet must be used to adequately depict the land subdivided, each sheet must show the number of that sheet and the total number of sheets included. All certifications must be placed or referred to on one sheet.

(d) A survey that modifies a filed subdivision plat must be entitled "amended plat of (lot, block and name of subdivision being amended)," and unless it is exempt from subdivision review by 76-3-201 or 76-3-207(1)(d) or (e), MCA, may not be filed with the county clerk and recorder unless it meets the filing requirements for final subdivision plats specified in this rule.

(2) A final plat submitted for approval must show or contain, on its face or on separate sheets referred to on the plat, the following information. The surveyor may, at his or her discretion, provide additional information regarding the survey.

(a) A title or title block indicating the quarter-section, section, township, range, principal meridian, county and, if applicable city or town, in which the subdivision is located. The title of the plat must contain the words "plat" and either "subdivision" or "addition".

(b) The name of the person(s) who commissioned the survey and the name(s) of the owner of the land to be subdivided if other than the person(s) commissioning the survey, the names of any adjoining platted subdivisions, and the numbers of any adjoining certificates of survey previously filed.

- (c) A north arrow.
- (d) A scale bar. (The scale must be sufficient to legibly represent the required information and data on the plat.)
- (e) The location of, and other information relating to all monuments found, set, reset, replaced or removed as required by ARM 24.183.1101(1)(c).
  - (i) If additional monuments are to be set after the plat is filed, the location of these monuments must be shown by a distinct symbol, and the plat must bear a certification by the surveyor as to the reason the monuments have not been set and the date by which they will be set.
  - (ii) All monuments found during a retracement that influenced the position of any corner or boundary indicated on the plat must be clearly shown as required by ARM 24.183.1101(1)(c).
- (f) The location of any section corners or corners of divisions of sections pertinent to the survey.
- (g) Witness and reference monuments and basis of bearings. For purposes of this rule the term "basis of bearings" means the surveyor's statement as to the origin of the bearings shown on the plat. The basis of bearings may refer to a particular line between monumented points in a previously filed survey document. If the plat shows true bearings, the basis of bearings must describe the method by which these true bearings were determined.
- (h) The bearings, distances and curve data of all boundary lines. If the subdivision is bounded by an irregular shoreline or body of water that is a riparian boundary, the bearings and distances of a meander traverse generally paralleling the riparian boundary must be given.
  - (i) The courses along a meander line are shown solely to provide a basis for calculating the acreage of a parcel with one or more riparian boundaries as the parcel existed at the time of survey.
  - (ii) For purposes of these regulations a line that indicates a fixed boundary of a parcel is not a "meander" or "meander line" and may not be designated as one.
- (i) Data on all curves sufficient to enable the re-establishment of the curves on the ground. For circular curves these data must at least include radius and arc length. For non-tangent curves, which must be so labeled, the plat must include the bearings of radial lines or chord length and bearing.
- (j) Lengths of all lines shown to at least tenths of a foot, and all angles and bearings shown to at least the nearest minute. Distance measurements must be stated in English units, but their metric equivalents, shown to the nearest hundredth of a meter, may be noted parenthetically.
- (k) The location of any section corners or corners of divisions of sections the surveyor deems to be pertinent to the subdivision.
- (l) All lots and blocks in the subdivision, designated by number, the dimensions of each lot and block, the area of each lot, and the total acreage of all lots. (Excepted parcels must be marked "Not included in this subdivision" or "Not included in this plat," as appropriate, and the bearings and lengths of these excepted boundaries must be shown.)
- (m) All streets, alleys, avenues, roads and highways; their widths (if ascertainable) from public records, bearings and area; the width and purpose of all road rights-of-way and all other easements that will be created by the filing of the plat; and the names of all streets, roads and highways.
- (n) The location, dimensions and areas of all parks, common areas and other grounds dedicated for public use.
- (o) The total acreage of the subdivision.
- (p) A narrative legal description of the subdivision as follows:
  - (i) If the parcel being subdivided is either an aliquot part of a U.S. government section or a U.S. government lot, the information required by this subsection is the aliquot or government

lot description of the parcel.

(ii) If the plat depicts the division of a parcel or lot that is shown on a filed certificate of survey or subdivision plat, the information required by this subsection is the number or name of the certificate of survey or plat and the number of the parcel or lot affected by the survey.

(iii) If the parcel surveyed does not fall within (2)(p)(i) or (ii), above, the information required by this subsection is the metes-and-bounds description of the perimeter boundary of the subdivision.

(iv) If the plat establishes the boundaries of a subdivision containing one or more interior parcels, the information required by this subsection is the legal description of the perimeter boundary of the subdivision.

(q) The dated signature and the seal of the surveyor responsible for the survey. The affixing of this seal constitutes a certification by the surveyor that the final plat has been prepared in conformance with the Montana Subdivision and Platting Act (76-3-101 through 76-3-625, MCA) and the regulations adopted under that Act.

(r) A memorandum of any oaths administered under 76-3-405, MCA.

(s) The dated, signed and acknowledged consent to the subdivision of the owner of the land being subdivided. For purposes of this rule when the parcel of land proposed for subdivision is being conveyed under a contract-for-deed, the terms "owner" and "owner of the land" refers to the seller under the contract-for-deed.

(t) Certification by the governing body that the final subdivision plat is approved.

(u) Space for the clerk and recorder's filing information.

(3) The following documents must appear on the face of or accompany the approved final plat when it is presented to the county clerk and recorder for filing:

(a) If applicable, the owner's certificate of dedication of streets, parks, playground easements or other public improvements.

(b) If applicable, a certificate of the governing body expressly accepting any dedicated land, easements or improvements. An acceptance of a dedication is ineffective without this certification.

(c) A certificate of a title abstractor showing the names of the owners of record of the land to be subdivided and the names of any lien holders or claimants of record against the land and the written consent to the subdivision by the owners of the land, if other than the subdivider, and any lien holders or claimants of record against the land.

(d) Copies of any covenants or deed restrictions relating to the subdivision.

(e) If applicable, a certificate from the state department of environmental quality stating that it has approved the plans and specifications for water supply and sanitary facilities.

(f) A certificate from the subdivider indicating which required public improvements have been installed and a copy of any subdivision improvements agreement securing the future construction of any additional public improvement to be installed.

(g) Unless otherwise provided by local subdivision regulations, copies of final plans, profiles, grades and specifications for improvements, including a complete grading and drainage plan, with the certification of a registered professional engineer that all required improvements which have been installed are in conformance with the attached plans. Local subdivision regulations may authorize the subdivider, under conditions satisfactory to the governing body, to prepare these plans and specifications after the final plat has been filed or file them with a government official other than the county clerk and recorder, or both.

(h) If applicable, the certificate of the examining land surveyor.

(i) If a street created by the plat will intersect with a state highway, a copy of the state highway access or encroachment permit.

(j) The certification of the county treasurer that all real property taxes and special assessments assessed and levied on the land to be subdivided have been paid. (History: 76-3-403, MCA; IMP , 76-3-403, MCA; NEW , Eff. 1/5/74; EMERG , AMD , Eff. 7/1/74; AMD , Eff. 10/5/74; AMD , Eff. 4/5/76; AMD , 1977 MAR p. 959, Eff. 11/26/77; AMD , 1980 MAR p. 2806, Eff. 10/17/80; TRANS , from Dept. of Comm. Affairs, Ch. 274, L. 1981, Eff. 7/1/81; AMD , 2000 MAR p. 1041, Eff. 2/11/00; TRANS , from Commerce, 2005 MAR p. 966.)

**THE MONTANA SANITATION IN SUBDIVISION ACT**

**TITLE 76. LAND RESOURCES AND USE**  
**CHAPTER 4. STATE REGULATION OF SUBDIVISIONS**

- 76-4-101. Public policy.
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**Part 1. Sanitation in Subdivisions**

**76-4-101. Public policy.** It is the public policy of this state to extend present laws controlling water supply, sewage disposal, and solid waste disposal to include individual wells affected by adjoining sewage disposal and individual sewage systems to protect the quality and potability of water for public water supplies and domestic uses and to protect the quality of water for other beneficial uses, including uses relating to agriculture, industry, recreation, and wildlife.

**History:** En. Sec. 148, Ch. 197, L. 1967; amd. Sec. 1, Ch. 509, L. 1973; R.C.M. 1947, 69-5001.

**76-4-102. Definitions.** As used in this part, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Adequate municipal facilities" means municipally, publicly, or privately owned facilities that supply water, treat sewage, or dispose of solid waste for all or most properties within the boundaries of a municipality and that are operating in compliance with Title 75, chapters 5 and 6.

- (2) "Board" means the board of environmental review.
- (3) "Department" means the department of environmental quality.
- (4) "Extension of a public sewage system" means a sewerline that connects two or more sewer service lines to a sewer main.
- (5) "Extension of a public water supply system" means a waterline that connects two or more water service lines to a water main.
- (6) "Facilities" means public or private facilities for the supply of water or disposal of sewage or solid waste and any pipes, conduits, or other stationary method by which water, sewage, or solid wastes might be transported or distributed.
- (7) "Mixing zone" has the meaning provided in 75-5-103.
- (8) "Public sewage system" or "public sewage disposal system" means a public sewage system as defined in 75-6-102.
- (9) "Public water supply system" has the meaning provided in 75-6-102.
- (10) "Registered professional engineer" means a person licensed to practice as a professional engineer under Title 37, chapter 67.
- (11) "Registered sanitarian" means a person licensed to practice as a sanitarian under Title 37, chapter 40.
- (12) "Reviewing authority" means the department or a local department or board of health certified to conduct a review under 76-4-104.
- (13) "Sanitary restriction" means a prohibition against the erection of any dwelling, shelter, or building requiring facilities for the supply of water or the disposition of sewage or solid waste or the construction of water supply or sewage or solid waste disposal facilities until the department has approved plans for those facilities.
- (14) "Sewer service line" means a sewerline that connects a single building or living unit to a public sewage system or to an extension of a public sewage system.
- (15) "Solid waste" has the meaning provided in 75-10-103.
- (16) "Subdivision" means a division of land or land so divided that creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and any condominium or area, regardless of size, that provides permanent multiple space for recreational camping vehicles or mobile homes.
- (17) "Water service line" means a waterline that connects a single building or living unit to a public water supply system or to an extension of a public water supply system.

**History:** En. Sec. 149, Ch. 197, L. 1967; amd. Sec. 2, Ch. 509, L. 1973; amd. Sec. 1, Ch. 529, L. 1975; amd. Sec. 2, Ch. 557, L. 1977; R.C.M. 1947, 69-5002(part); amd. Sec. 1, Ch. 490, L. 1985; amd. Sec. 1, Ch. 592, L. 1985; amd. Sec. 240, Ch. 418, L. 1995; amd. Sec. 4, Ch. 280, L. 2001.

**76-4-103. What constitutes subdivision.** A subdivision shall comprise only those parcels of less than 20 acres which have been created by a division of land, and the plat thereof shall show all such parcels, whether contiguous or not. The rental or lease of one or more parts of a building, structure, or other improvement, whether existing or proposed, is not a subdivision, as that term is defined in this part, and is not subject to the requirements of this part.

**History:** En. Sec. 149, Ch. 197, L. 1967; amd. Sec. 2, Ch. 509, L. 1973; amd. Sec. 1, Ch. 529, L. 1975; amd. Sec. 2, Ch. 557, L. 1977; R.C.M. 1947, 69-5002(part); amd. Sec. 2, Ch. 592, L. 1985.

**76-4-104. Rules for administration and enforcement.** (1) The department shall, subject to the provisions of 75-4-135, adopt reasonable rules, including adoption of sanitary standards, necessary for

administration and enforcement of this part.

(2) The rules and standards must provide the basis for approving subdivisions for various types of public and private water supplies, sewage disposal facilities, storm water drainage ways, and solid waste disposal. The rules and standards must be related to:

- (a) size of lots;
- (b) contour of land;
- (c) porosity of soil;
- (d) ground water level;
- (e) distance from lakes, streams, and wells;
- (f) type and construction of private water and sewage facilities; and
- (g) other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife.

(3) (a) Except as provided in subsection (3)(b), the rules must provide for the review of subdivisions by a local department or board of health, as described in Title 50, chapter 2, part 1, if the local department or board of health employs a registered sanitarian or a registered professional engineer and if the department certifies under subsection (4) that the local department or board is competent to conduct the review.

(b) (i) Except as provided in 75-6-121 and subsection (3)(b)(ii) of this section, a local department or board of health may not review public water supply systems, public sewage systems, or extensions of or connections to these systems.

(ii) A local department or board of health may be certified to review subdivisions proposed to connect to existing municipal water and wastewater systems previously approved by the department if no extension of the systems is required.

(4) The department shall also adopt standards and procedures for certification and maintaining certification to ensure that a local department or board of health is competent to review the subdivisions as described in subsection (3).

(5) The department shall review those subdivisions described in subsection (3) if:

(a) a proposed subdivision lies within more than one jurisdictional area and the respective governing bodies are in disagreement concerning approval of or conditions to be imposed on the proposed subdivision; or

(b) the local department or board of health elects not to be certified.

(6) The rules must further provide for:

(a) providing the reviewing authority with a copy of the plat or certificate of survey subject to review under this part and other documentation showing the layout or plan of development, including:

(i) total development area; and

(ii) total number of proposed dwelling units and structures requiring facilities for water supply or sewage disposal;

(b) adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed;

(c) evidence concerning the potability of the proposed water supply for the subdivision;

(d) adequate evidence that a sewage disposal facility is sufficient in terms of capacity and dependability;

(e) standards and technical procedures applicable to storm drainage plans and related designs, in order to ensure proper drainage ways;

(f) standards and technical procedures applicable to sanitary sewer plans and designs, including soil testing and site design standards for on-lot sewage disposal systems when applicable;

- (g) standards and technical procedures applicable to water systems;
- (h) standards and technical procedures applicable to solid waste disposal;
- (i) criteria for granting waivers and deviations from the standards and technical procedures adopted under subsections (6)(e) through (6)(h);

(j) evidence to establish that, if a public water supply system or a public sewage system is proposed, provision has been made for the system and, if other methods of water supply or sewage disposal are proposed, evidence that the systems will comply with state and local laws and regulations that are in effect at the time of submission of the preliminary or final plan or plat; and

(k) evidence to demonstrate that appropriate easements, covenants, agreements, and management entities have been established to ensure the protection of human health and state waters and to ensure the long-term operation and maintenance of water supply, storm water drainage, and sewage disposal facilities.

(7) If the reviewing authority is a local department or board of health, it shall notify the department of its recommendation for approval or disapproval of the subdivision not later than 50 days from its receipt of the subdivision application. The department shall make a final decision on the subdivision within 10 days after receiving the recommendation of the local reviewing authority, but not later than 60 days after the submission of a complete application, as provided in 76-4-125.

(8) Review and certification or denial of certification that a division of land is not subject to sanitary restrictions under this part may occur only under those rules in effect when a complete application is submitted to the reviewing authority, except that in cases in which current rules would preclude the use for which the lot was originally intended, the applicable requirements in effect at the time the lot was recorded must be applied. In the absence of specific requirements, minimum standards necessary to protect public health and water quality apply.

(9) The reviewing authority may not deny or condition a certificate of subdivision approval under this part unless it provides a written statement to the applicant detailing the circumstances of the denial or condition imposition. The statement must include:

- (a) the reason for the denial or condition imposition;
- (b) the evidence that justifies the denial or condition imposition; and
- (c) information regarding the appeal process for the denial or condition imposition.

(10) The department may adopt rules that provide technical details and clarification regarding the water and sanitation information required to be submitted under 76-3-622.

**History:** En. Sec. 152, Ch. 197, L. 1967; amd. Sec. 3, Ch. 509, L. 1973; amd. Sec. 3, Ch. 529, L. 1975; amd. Sec. 3, Ch. 557, L. 1977; R.C.M. 1947, 69-5005(part); amd. Sec. 2, Ch. 378, L. 1985; amd. Sec. 2, Ch. 490, L. 1985; amd. Sec. 1, Ch. 224, L. 1995; amd. Sec. 19, Ch. 471, L. 1995; amd. Sec. 5, Ch. 280, L. 2001; amd. Sec. 7, Ch. 302, L. 2005.

**76-4-105. Subdivision fees -- subdivision program funding.** (1) The department shall adopt rules setting forth fees that do not exceed actual costs for reviewing plats and subdivisions, conducting inspections pursuant to 76-4-107, and conducting enforcement activities pursuant to 76-4-108. The rules must provide for a schedule of fees to be paid by the applicant to the department or, if applicable, to another reviewing authority for deposit in the general fund of the reviewing authority's jurisdiction. The fees must be used for review of plats and subdivisions, conducting inspections pursuant to 76-4-107, and conducting enforcement activities pursuant to 76-4-108. The fees must be based on the complexity of the subdivision, including but not limited to:

- (a) number of lots in the subdivision;
- (b) the type of water system to serve the development;
- (c) the type of sewage disposal to serve the development; and

(d) the degree of environmental research necessary to supplement the review procedure.

(2) The department shall adopt rules to determine the distribution of fees to the local reviewing authority for reviews conducted pursuant to 76-4-104, inspections conducted pursuant to 76-4-107, and enforcement activities conducted pursuant to 76-4-108.

**History:** Ap. p. Sec. 152, Ch. 197, L. 1967; amd. Sec. 3, Ch. 509, L. 1973; amd. Sec. 3, Ch. 529, L. 1975; amd. Sec. 3, Ch. 557, L. 1977; Sec. 69-5005, R.C.M. 1947; Ap. p. Sec. 150, Ch. 197, L. 1967; amd. Sec. 4, Ch. 509, L. 1973; amd. Sec. 2, Ch. 529, L. 1975; amd. Sec. 12, Ch. 140, L. 1977; amd. Sec. 1, Ch. 554, L. 1977; Sec. 69-5003, R.C.M. 1947; R.C.M. 1947, 69-5003(part), 69-5005(part); amd. Sec. 1, Ch. 553, L. 1981; amd. Sec. 33, Ch. 281, L. 1983; amd. Sec. 1, Ch. 696, L. 1983; amd. Sec. 3, Ch. 490, L. 1985; amd. Sec. 3, Ch. 592, L. 1985; amd. Sec. 1, Ch. 708, L. 1985; (5)En. Sec. 2, Ch. 708, L. 1985; amd. Sec. 9, Ch. 645, L. 1991; amd. Sec. 1, Ch. 514, L. 1993; amd. Sec. 6, Ch. 280, L. 2001.

**76-4-106. Cooperation with other governmental agencies.** (1) The reviewing authority may require the use of records of all state, county, and municipal agencies and may seek the assistance of those agencies.

(2) State, county, and municipal officers and employees, including local health officers and sanitarians, shall cooperate with the reviewing authority in furthering the purposes of this part so far as is practical and consistent with their own duties.

(3) A local reviewing authority without a registered sanitarian or a registered professional engineer to conduct a review under this part may contract with another local reviewing authority for the services of its registered sanitarian or registered professional engineer to conduct the review.

**History:** En. Sec. 8, Ch. 509, L. 1973; R.C.M. 1947, 69-5009; amd. Sec. 4, Ch. 490, L. 1985.

**76-4-107. Authority to inspect and monitor -- certification.** (1) In order to carry out the objectives of this part, to monitor the installation of sewage disposal and water supply systems, and to prevent the occurrence of water pollution problems associated with subdivision development, the reviewing authority whenever any water supply or sewage disposal system is proposed or has been constructed may:

(a) enter upon any public or private property, at reasonable times and after presentation of appropriate credentials by an authorized representative of the reviewing authority, to inspect such systems in order to assure that the plans and specifications approved for the system have been adhered to and that the provisions of this part, rules, or orders are being satisfied;

(b) require as a condition of approval that records concerning the operation of a sewage disposal or water supply system be maintained or that monitoring equipment or wells be installed, used, and maintained for the collection of data related to water quality.

(2) The reviewing authority shall require certification from a registered professional engineer that a public water supply system or a public sewage disposal system has been constructed according to approved specifications.

**History:** En. 69-5010 by Sec. 1, Ch. 557, L. 1977; R.C.M. 1947, 69-5010; amd. Sec. 5, Ch. 490, L. 1985; amd. Sec. 1, Ch. 294, L. 1987.

**76-4-108. Enforcement.** (1) If the reviewing authority has reason to believe that a violation of this part or a rule adopted or an order issued under this part has occurred, the reviewing authority may have written notice and an order served personally or by certified mail on the alleged violator or the alleged violator's agent. The notice must state the provision alleged to be violated, the facts alleged to constitute the violation, the corrective action required by the reviewing authority, and the time within which the action is to be taken. A notice and order issued by the department under this section may also assess an administrative penalty as provided in 76-4-109. The alleged violator may, no later than 30 days

after service of a notice and order under this section, request a hearing before the local reviewing authority if it issued the notice of violation or the board if the department issued the notice of violation. A request for a hearing must be filed in writing with the appropriate entity and must state the reason for the request. If a request is filed, a hearing must be held within a reasonable time.

(2) In addition to or instead of issuing an order, the reviewing authority may initiate any other appropriate action to compel compliance with this part.

(3) The provisions of this part may be enforced by a reviewing authority other than the department or board only for those divisions described in 76-4-104(3). If a local reviewing authority fails to adequately enforce the provisions of this part, the department or the board may compel compliance with this part under the provisions of this section.

(4) When a local reviewing authority exercises the authority delegated to it by this section, the local reviewing authority is legally responsible for its actions under this part.

(5) If the department or a local reviewing authority determines that a violation of this part, a rule adopted under this part, or an order issued under this part has occurred, the department or the local reviewing authority may revoke its certificate of approval for the subdivision and reimpose sanitary restrictions following written notice to the alleged violator. Upon revocation of a certificate, the person aggrieved by revocation may request a hearing. A hearing request must be filed in writing within 30 days after receipt of the notice of revocation and must state the reason for the request. The hearing is before the board if the department revoked the certificate or before the local reviewing authority if the local reviewing authority revoked the certificate.

(6) The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing held under this section.

**History:** En. Sec. 6, Ch. 509, L. 1973; R.C.M. 1947, 69-5007; amd. Sec. 6, Ch. 490, L. 1985; (5)En. Sec. 16, Ch. 490, L. 1985; amd. Sec. 4, Ch. 79, L. 2001; amd. Sec. 7, Ch. 443, L. 2005.

**76-4-109. Penalties.** (1) A person who violates a provision of this part, except 76-4-122(1), or a rule adopted or an order issued under this part is guilty of an offense and subject to a fine in an amount not to exceed \$1,000.

(2) (a) In addition to the fine specified in subsection (1), a person who violates any provision of this part or any rule adopted or order issued under this part is subject to an administrative penalty in an amount not to exceed \$250 or a civil penalty in an amount not to exceed \$1,000. Each day of violation constitutes a separate violation.

(b) Penalties assessed under this subsection (2) must be determined in accordance with the penalty factors in 76-4-1001. An action to recover penalties must be brought in the district court of the county in which the violation occurred or, if mutually agreed on by the parties in the action, in the district court of the first judicial district, Lewis and Clark County.

(3) Penalties imposed under subsection (1) or (2) do not bar enforcement of this part or rules or orders issued under it by injunction or other appropriate remedy.

(4) The purpose of this section is to provide additional and cumulative remedies.

**History:** En. Sec. 7, Ch. 509, L. 1973; R.C.M. 1947, 69-5008(part); amd. Sec. 7, Ch. 490, L. 1985; amd. Sec. 8, Ch. 443, L. 2005; amd. Sec. 23, Ch. 487, L. 2005.

**76-4-110. Additional remedies available.** This part does not abridge or alter rights of action or remedies in equity or under the common law or statutory law, criminal or civil, nor does any provision of this part or any act done by virtue of it estop the state, any municipality or other subdivision of the state, or any person in the exercise of his rights in equity or under the common law or statutory law.

**History:** En. Sec. 7, Ch. 509, L. 1973; R.C.M. 1947, 69-5008(part).

**76-4-111. Exemption for certain condominiums.** (1) Condominiums constructed on land divided in compliance with the Montana Subdivision and Platting Act and this part are exempt from provisions of this part.

(2) Whenever a parcel of land has previously been reviewed under either department requirements or local health requirements and has received approval for a given number of living units for rental or lease, the construction of the same or a fewer number of condominium units on that parcel is not subject to the provisions of this part, provided that no new extension of a public water supply system or extension of a public sewage system is required.

**History:** En. Sec. 149, Ch. 197, L. 1967; amd. Sec. 2, Ch. 509, L. 1973; amd. Sec. 1, Ch. 529, L. 1975; amd. Sec. 2, Ch. 557, L. 1977; R.C.M. 1947, 69-5002(part); amd. Sec. 4, Ch. 592, L. 1985; (3)En. Sec. 9, Ch. 592, L. 1985; amd. Sec. 28, Ch. 582, L. 1999; amd. Sec. 7, Ch. 280, L. 2001.

**76-4-112. Easements and restrictive covenants.** (1) The reviewing authority may require the owner of a proposed subdivision to grant an easement or enter into a restrictive covenant pursuant to rules adopted by the department for the purpose of:

(a) ensuring the long-term operation and maintenance of water supply, storm water drainage, and sewage disposal facilities;

(b) protecting state waters; or

(c) prohibiting the placement of water wells within a ground water mixing zone.

(2) An easement or covenant required under this section must run with the land. The easement or covenant may be enforced by the reviewing authority. The easement or covenant may not be terminated without the consent of the reviewing authority.

**History:** En. Sec. 1, Ch. 280, L. 2001.

**76-4-113. Notification to purchasers.** The developer or owner of an approved subdivision shall provide each purchaser of property within the subdivision with a copy of the plat or certificate of survey and the certificate of subdivision approval specifying the approved locations of water supply, storm water drainage, and sewage disposal facilities. Each subsequent seller of property within the subdivision shall include within the instruments of transfer a reference to the conditions of the certificate of subdivision approval. A written verification of notice that is signed by both the seller and the purchaser and is recorded with the county clerk and recorder constitutes conclusive evidence of compliance with this section for that transaction.

**History:** En. Sec. 2, Ch. 280, L. 2001.

**76-4-114 through 76-4-120 reserved.**

**76-4-121. Restrictions on subdivision activities.** A person may not dispose of any lot within a subdivision, erect any facility for the supply of water or disposal of sewage or solid waste, erect any building or shelter in a subdivision that requires facilities for the supply of water or disposal of sewage or solid waste, or occupy any permanent buildings in a subdivision until:

(1) a certificate of subdivision approval has been issued pursuant to 76-4-125 indicating that the reviewing authority has approved the subdivision application and that the subdivision is not subject to a sanitary restriction;

(2) the governing body has provided certification pursuant to 76-4-127 that the subdivision is within a jurisdictional area that has adopted a growth policy pursuant to chapter 1 of this title or within a first-class

or second-class municipality, as described in 7-1-4111, and will be provided with adequate municipal facilities and adequate storm water drainage; or

(3) the subdivision is otherwise exempt from review under 76-4-125.

**History:** En. Sec. 150, Ch. 197, L. 1967; amd. Sec. 4, Ch. 509, L. 1973; amd. Sec. 2, Ch. 529, L. 1975; amd. Sec. 12, Ch. 140, L. 1977; amd. Sec. 1, Ch. 554, L. 1977; R.C.M. 1947, 69-5003(4); amd. Sec. 8, Ch. 490, L. 1985; amd. Sec. 8, Ch. 280, L. 2001; amd. Sec. 1, Ch. 543, L. 2003.

**76-4-122. Filing or recording of noncomplying plat or certificate of survey prohibited. (1)**

The county clerk and recorder may not file or record any plat or certificate of survey subject to review under this part showing a subdivision unless it complies with the provisions of this part.

(2) A county clerk and recorder may not accept a subdivision plat or certificate of survey subject to review under this part for filing until one of the following conditions has been met:

(a) the person wishing to file the plat or certificate of survey has obtained approval of the local health officer having jurisdiction and has filed the approval with the reviewing authority and a certificate of subdivision approval has been issued pursuant to 76-4-125 indicating that the reviewing authority has approved the subdivision application and that the subdivision is not subject to a sanitary restriction;

(b) the person wishing to file the plat or certificate of survey has obtained a certificate from the governing body pursuant to 76-4-127 that the subdivision is within an area covered by a growth policy pursuant to chapter 1 of this title or within a first-class or second-class municipality, as described in 7-1-4111, and will be provided with adequate municipal facilities and adequate storm water drainage; or

(c) the person wishing to file the plat or certificate of survey has placed on the plat or certificate of survey an acknowledged certification that the subdivision is exempt from review under this part. The certification must quote in its entirety the wording of the applicable exemption.

**History:** (1)En. Sec. 151, Ch. 197, L. 1967; R.C.M. 1947, 69-5004; (2)En. Sec. 150, Ch. 197, L. 1967; amd. Sec. 4, Ch. 509, L. 1973; amd. Sec. 2, Ch. 529, L. 1975; amd. Sec. 12, Ch. 140, L. 1977; amd. Sec. 1, Ch. 554, L. 1977; Sec. 69-5003, R.C.M. 1947; R.C.M. 1947, 69-5003(7), 69-5004; amd. Sec. 9, Ch. 490, L. 1985; amd. Sec. 5, Ch. 592, L. 1985; amd. Sec. 29, Ch. 582, L. 1999; amd. Sec. 9, Ch. 280, L. 2001; amd. Sec. 13, Ch. 599, L. 2003.

**76-4-123. Repealed. Sec. 15, Ch. 280, L. 2001.**

**History:** En. Sec. 150, Ch. 197, L. 1967; amd. Sec. 4, Ch. 509, L. 1973; amd. Sec. 2, Ch. 529, L. 1975; amd. Sec. 12, Ch. 140, L. 1977; amd. Sec. 1, Ch. 554, L. 1977; R.C.M. 1947, 69-5003(1); amd. Sec. 10, Ch. 490, L. 1985; amd. Sec. 6, Ch. 592, L. 1985; amd. Sec. 30, Ch. 582, L. 1999.

**76-4-124. Repealed. Sec. 15, Ch. 280, L. 2001.**

**History:** En. Sec. 150, Ch. 197, L. 1967; amd. Sec. 4, Ch. 509, L. 1973; amd. Sec. 2, Ch. 529, L. 1975; amd. Sec. 12, Ch. 140, L. 1977; amd. Sec. 1, Ch. 554, L. 1977; R.C.M. 1947, 69-5003(2), (3); amd. Sec. 11, Ch. 490, L. 1985; amd. Sec. 7, Ch. 592, L. 1985; amd. Sec. 31, Ch. 582, L. 1999.

**76-4-125. Review of subdivision application -- land divisions excluded from review. (1)**

Except as provided in subsection (2), an application for review of a subdivision must be submitted to the reviewing authority. The review by the reviewing authority must be as follows:

(a) At any time after the developer has submitted an application under the Montana Subdivision and Platting Act, the developer shall present a subdivision application to the reviewing authority. The application must include preliminary plans and specifications for the proposed development, whatever information the developer feels necessary for its subsequent review, any public comments or summaries of public comments collected as provided in 76-3-604(6), and information required by the reviewing authority. Subdivision fees assessed by the reviewing authority must accompany the application. If the proposed development includes onsite sewage disposal facilities, the developer shall notify the designated

agent of the local board of health prior to presenting the subdivision application to the reviewing authority. The agent may conduct a preliminary site assessment to determine whether the site meets applicable state and local requirements.

(b) Except as provided in 75-1-205(4) and 75-1-208(4)(b), the department shall make a final decision on the proposed subdivision within 60 days after the submission of a complete application and payment of fees to the reviewing authority unless an environmental impact statement is required, at which time this deadline may be increased to 120 days. The reviewing authority may not request additional information for the purpose of extending the time allowed for a review and final decision on the proposed subdivision. If the department approves the subdivision, the department shall issue a certificate of subdivision approval indicating that it has approved the plans and specifications and that the subdivision is not subject to a sanitary restriction.

(2) A subdivision excluded from the provisions of chapter 3 must be submitted for review according to the provisions of this part, except that the following divisions or parcels, unless the exclusions are used to evade the provisions of this part, are not subject to review:

(a) the exclusions cited in 76-3-201 and 76-3-204;

(b) divisions made for the purpose of acquiring additional land to become part of an approved parcel, provided that water or sewage disposal facilities may not be constructed on the additional acquired parcel and that the division does not fall within a previously platted or approved subdivision;

(c) divisions made for purposes other than the construction of water supply or sewage and solid waste disposal facilities as the department specifies by rule;

(d) divisions located within jurisdictional areas that have adopted growth policies pursuant to chapter 1 or within first-class or second-class municipalities for which the governing body certifies, pursuant to 76-4-127, that adequate storm water drainage and adequate municipal facilities will be provided; and

(e) subject to the provisions of subsection (3), a remainder of an original tract created by segregating a parcel from the tract for purposes of transfer if:

(i) the remainder is served by a public or multiple-user sewage system approved before January 1, 1997, pursuant to local regulations or this chapter; or

(ii) the remainder is 1 acre or larger and has an individual sewage system that was constructed prior to April 29, 1993, and, if required when installed, was approved pursuant to local regulations or this chapter.

(3) Consistent with the applicable provisions of 50-2-116(1)(i), a local health officer may require that, prior to the filing of a plat or a certificate of survey subject to review under this part for the parcel to be segregated from the remainder referenced in subsection (2)(e)(ii), the remainder include acreage or features sufficient to accommodate a replacement drainfield.

**History:** En. Sec. 150, Ch. 197, L. 1967; amd. Sec. 4, Ch. 509, L. 1973; amd. Sec. 2, Ch. 529, L. 1975; amd. Sec. 12, Ch. 140, L. 1977; amd. Sec. 1, Ch. 554, L. 1977; R.C.M. 1947, 69-5003(8), (10); amd. Sec. 12, Ch. 490, L. 1985; amd. Sec. 1, Ch. 289, L. 1997; amd. Sec. 10, Ch. 280, L. 2001; amd. Sec. 9, Ch. 299, L. 2001; amd. Sec. 8, Ch. 302, L. 2005; amd. Sec. 12, Ch. 337, L. 2005.

**76-4-126. Right to hearing.** (1) Upon a denial of approval of subdivision plans and specifications relating to environmental health facilities, the person who is aggrieved by the denial may request a hearing before the board. A hearing request must be filed, in writing, within 30 days after receipt of the notice of denial and must state the reason for the request. The contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, apply to a hearing held under this section.

(2) If the grounds for a denial of approval under this part include noncompliance with local laws or regulations other than those adopting, pursuant to 50-2-116, state minimum standards for the control and disposal of sewage, the board shall upon receipt of a hearing request refer the local compliance issues to

the appropriate local authority. After opportunity for a hearing, the local authority shall issue a determination regarding the local compliance issues, and the board shall incorporate the determination of the local authority in the board's final decision.

**History:** En. Sec. 5, Ch. 509, L. 1973; R.C.M. 1947, 69-5006; amd. Sec. 13, Ch. 490, L. 1985; amd. Sec. 5, Ch. 79, L. 2001.

**76-4-127. Notice of certification that adequate storm water drainage and adequate municipal facilities will be provided.** (1) To qualify for the exemption from review set out in 76-4-125(2)(d), the governing body, as defined in 76-3-103, shall, prior to final plat approval under the Montana Subdivision and Platting Act, send notice of certification to the reviewing authority that a subdivision has been submitted for approval and that adequate storm water drainage and adequate municipal facilities will be provided for the subdivision.

(2) The notice of certification must include the following:

- (a) the name and address of the applicant;
- (b) a copy of the preliminary plat included with the application for the proposed subdivision or a final plat when a preliminary plat is not necessary;
- (c) the number of proposed parcels in the subdivision;
- (d) a copy of any applicable zoning ordinances in effect;
- (e) how construction of the sewage disposal and water supply systems or extensions will be financed;
- (f) certification that the subdivision is within an area covered by a growth policy pursuant to chapter 1 of this title or within a first-class or second-class municipality, as described in 7-1-4111, and a copy of the growth policy, when applicable, if one has not yet been submitted to the reviewing authority;
- (g) the relative location of the subdivision to the city or town;
- (h) certification that adequate municipal facilities for the supply of water and disposal of sewage and solid waste are available or will be provided within the time provided in 76-3-507;
- (i) if water supply, sewage disposal, or solid waste facilities are not municipally owned, certification from the facility owners that adequate facilities are available; and
- (j) certification that the governing body has reviewed and approved plans to ensure adequate storm water drainage.

**History:** En. Sec. 150, Ch. 197, L. 1967; amd. Sec. 4, Ch. 509, L. 1973; amd. Sec. 2, Ch. 529, L. 1975; amd. Sec. 12, Ch. 140, L. 1977; amd. Sec. 1, Ch. 554, L. 1977; R.C.M. 1947, 69-5003(part); amd. Sec. 14, Ch. 490, L. 1985; amd. Sec. 8, Ch. 592, L. 1985; amd. Sec. 32, Ch. 582, L. 1999; amd. Sec. 11, Ch. 280, L. 2001; amd. Sec. 14, Ch. 599, L. 2003; amd. Secs. 1, 2, Ch. 433, L. 2005.

**76-4-128. Repealed.** Sec. 15, Ch. 280, L. 2001.

**History:** En. Sec. 152, Ch. 197, L. 1967; amd. Sec. 3, Ch. 509, L. 1973; amd. Sec. 3, Ch. 529, L. 1975; amd. Sec. 3, Ch. 557, L. 1977; R.C.M. 1947, 69-5005(5); amd. Sec. 2, Ch. 553, L. 1981.

**76-4-129. Joint application form and concurrent review.** (1) Within 90 days after July 1, 1977, the department shall prepare and distribute a joint application form that can be used by an applicant to apply for approval of a subdivision under the provisions of this part and the provisions of chapter 3. When an application is received by either the department or a local government, the department or local government is responsible for forwarding the appropriate parts of the application to the other entity.

(2) The review required by this part and the provisions of chapter 3 shall occur concurrently.

**History:** En. Sec. 150, Ch. 197, L. 1967; amd. Sec. 4, Ch. 509, L. 1973; amd. Sec. 2, Ch. 529, L. 1975; amd. Sec. 12, Ch. 140, L. 1977; amd. Sec. 1, Ch. 554, L. 1977; R.C.M. 1947, 69-5003(11); amd. Sec. 3, Ch. 236, L. 1981; amd. Sec. 6, Ch. 274, L. 1981.

**76-4-130. Deviation from certificate of subdivision approval.** A person may not construct or use a facility that deviates from the certificate of subdivision approval until the reviewing authority has approved the deviation.

**History:** En. Sec. 150, Ch. 197, L. 1967; amd. Sec. 4, Ch. 509, L. 1973; amd. Sec. 2, Ch. 529, L. 1975; amd. Sec. 12, Ch. 140, L. 1977; amd. Sec. 1, Ch. 554, L. 1977; R.C.M. 1947, 69-5003(9); amd. Sec. 15, Ch. 490, L. 1985; amd. Sec. 12, Ch. 280, L. 2001.

**76-4-131. Applicability of public water supply laws.** The exclusions provided for in 76-4-121, 76-4-122, and 76-4-125 do not relieve any person of the duty to comply with the requirements of Title 75, chapter 6. An extension of a public water supply system or an extension of a public sewage system to serve a subdivision must be reviewed in accordance with the provisions of Title 75, chapter 6.

**History:** En. Sec. 150, Ch. 197, L. 1967; amd. Sec. 4, Ch. 509, L. 1973; amd. Sec. 2, Ch. 529, L. 1975; amd. Sec. 12, Ch. 140, L. 1977; amd. Sec. 1, Ch. 554, L. 1977; R.C.M. 1947, 69-5003(6); amd. Sec. 13, Ch. 280, L. 2001.

**76-4-132. Special revenue account -- deposit and use of fees.** (1) All fees collected by the department under 76-4-105 must be deposited in an account in the state special revenue fund.

(2) Funds in the account established in subsection (1) may be used only as provided in 76-4-105.

**History:** En. Sec. 2, Ch. 514, L. 1993; amd. Sec. 14, Ch. 280, L. 2001.

**76-4-133. Installation inspection.** A person who owns or controls a parcel of land that has been approved under this chapter for the installation of an individual or multiple-user sewage system shall:

(1) have the system inspected during installation by the local health officer, as defined in 50-2-101, or by the installer or other person designated by the local health officer; and

(2) file with the local board of health a certification by the inspector that the system has been installed in compliance with the certificate of subdivision approval and any conditions of approval.

**History:** En. Sec. 3, Ch. 280, L. 2001.

**76-4-134 reserved.**

**76-4-135. State regulations no more stringent than federal regulations or guidelines.** (1) After April 14, 1995, except as provided in subsections (2) through (5) or unless required by state law, the department may not adopt a rule to implement this chapter that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The department may incorporate by reference comparable federal regulations or guidelines.

(2) The department may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the department makes a written finding after a public hearing and public comment and based on evidence in the record that:

(a) the proposed state standard or requirement protects public health or the environment of the state; and

(b) the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

(3) The written finding must reference information and peer-reviewed scientific studies contained in the record that forms the basis for the department's conclusion. The written finding must also include information from the hearing record regarding the costs to the regulated community that are directly attributable to the proposed state standard or requirement.

(4) (a) A person affected by a rule of the department adopted after January 1, 1990, and before April 14, 1995, that that person believes to be more stringent than comparable federal regulations or guidelines

may petition the department to review the rule. If the department determines that the rule is more stringent than comparable federal regulations or guidelines, the department shall comply with this section by either revising the rule to conform to the federal regulations or guidelines or by making the written finding, as provided under subsection (2), within a reasonable period of time, not to exceed 12 months after receiving the petition. A petition under this section does not relieve the petitioner of the duty to comply with the challenged rule. The department may charge a petition filing fee in an amount not to exceed \$250.

(b) A person may also petition the department for a rule review under subsection (4)(a) if the department adopts a rule after January 1, 1990, in an area in which no federal regulations or guidelines existed and the federal government subsequently establishes comparable regulations or guidelines that are less stringent than the previously adopted department rule.

(5) This section does not apply to a rule adopted under the emergency rulemaking provisions of 2-4-303(1).

**History:** En. Sec. 3, Ch. 471, L. 1995.

**MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY  
ADMINISTRATIVE RULES FOR THE  
MONTANA SANITATION IN SUBDIVISIONS ACT**

**SUBDIVISION REGULATIONS  
(ARM 17.36.101 through 17.36.805)**

# SUBSURFACE WASTEWATER TREATMENT

## Sub-Chapter 1

### Subdivision Application and Review

17.36.101 DEFINITIONS (1) "Bedrock" means material that cannot be readily excavated by hand tools, or material that does not allow water to pass through or that has insufficient quantities of fines to provide for the adequate treatment and disposal of wastewater.

(2) "Bedroom" means any room that is or may be used for sleeping. An unfinished basement is considered as an additional bedroom.

(3) "Campground" is defined in 50-52-101, MCA.

(4) "Certificate of survey" is defined in 76-3-103, MCA.

(5) "Cesspool" means a seepage pit without a septic tank to pretreat the wastewater.

(6) "Condominium" is defined in 70-23-101, MCA.

(7) "Connection" means a water or wastewater line that connects a single building or living unit to a shared, multiple user or public water or wastewater system.

(8) "Department" means the Montana department of environmental quality.

(9) "Deviation" means a department-approved departure from a requirement contained in a department circular.

(10) "Drainageway" means a course or channel along which storm water moves in draining an area.

(11) "Dry well" means a storm water detention structure that collects surface runoff and discharges the water below the natural ground surface.

(12) "Dwelling" or "residence" means any structure, building, or portion thereof, which is intended or designed for human occupancy and supplied with water by a piped water system.

(13) "Escarpment" means any slope greater than 50% that extends vertically six feet or more as measured from toe to top.

(14) "Experimental system" means a wastewater treatment system for which specific design standards are not provided in department Circular DEQ-4 or DEQ-2.

(15) "Floodplain" means the area adjoining the watercourse or drainway that would be covered by the floodwater of a flood of 100-year frequency except for sheetflood areas that receive less than one foot of water per occurrence and are considered zone b areas by the federal emergency management agency. The floodplain consists of the floodway and the floodfringe, as defined in ARM 36.15.101.

(16) "Ground water monitoring" means measuring the depth from the natural ground surface to the seasonally high ground water for a long enough period of time to detect a peak and then a sustained decline in the ground water level.

(17) "Holding tank" means a watertight receptacle that receives wastewater for retention and does not as part of its normal operation dispose of or treat the wastewater.

(18) "Impervious layer" means any layer of material in the soil profile that has a percolation rate slower than 120 minutes per inch.

(19) "Individual water system" means any water system that serves one living unit or commercial structure. The total number of people served may not exceed 24.

(20) "Individual wastewater system" means a wastewater system that serves one living unit or commercial structure. The total number of people served may not exceed 24.

(21) "Limiting layer" means bedrock, an impervious layer, or seasonally high ground water.

(22) "Living unit" means the area under one roof occupied by a family. For example, a duplex is considered two living units.

- (23) "Local health officer" means health officer as defined in 50-2-101, MCA, or the health officer's designee.
- (24) "Lot" is synonymous with "tract" or "parcel" for purposes of this chapter.
- (25) "Mixing zone" is defined in 75-5-103, MCA.
- (26) "Mobile home" means a trailer equipped with necessary service connections that is designed for use as a long-term residence.
- (27) "Multiple user wastewater system" means a non-public wastewater system that serves or is intended to serve three through 14 living units or three through 14 commercial structures. The total number of people served may not exceed 24. In estimating the population served, the reviewing authority shall multiply the number of living units times the county average of persons per living unit based on the most recent census data.
- (28) "Multiple user water supply system" means a non-public water supply system designed to provide water for human consumption to serve three through 14 living units or three through 14 commercial structures. The total number of people served may not exceed 24. In estimating the population served, the reviewing authority shall multiply the number of living units times the county average of persons per living unit based on the most recent census data.
- (29) "Municipal" means pertaining to an incorporated city or town.
- (30) "Natural soil" means soil that has developed through natural processes and to which no fill material has been added.
- (31) "Parcel" means a part of land which is created by a division of land or a space in an area used for recreational camping vehicles or mobile homes.
- (32) "Percolation test" means a standardized test used to assess the infiltration rate in soils.
- (33) "Piped water system" means a plumbing system that conveys water into a structure from any source including, but not limited to, wells, cisterns, springs, or surface water.
- (34) "Plat" is defined in 76-3-103, MCA.
- (35) "Preliminary plat" is defined in 76-3-103, MCA.
- (36) "Public wastewater system" means a system for collection, transportation, treatment, or disposal of wastewater that serves 15 or more families or 25 or more persons daily for a period of at least 60 days in a calendar year. In estimating the population served, the department shall multiply the number of living units times the county average of persons per living unit based on the most recent census data.
- (37) "Public water supply system" means a system for the provision of water for human consumption from a community well, water hauler for cisterns, water bottling plant, water dispenser, or other water supply that has at least 15 service connections or that regularly serves at least 25 persons daily for any 60 or more days in a calendar year.
- (38) "Recreational camping vehicle" means a vehicle that is used for non-permanent residence and is moved frequently.
- (39) "Redoximorphic features" or "mottling" means soil properties associated with wetness that results from the reduction and oxidation of iron and manganese compounds in the soil after saturation and desaturation with water.
- (40) "Reviewing authority" is defined in 76-4-102, MCA.
- (41) "Sealed pit privy" means an enclosed receptacle designed to receive non-water-carried toilet wastes into a watertight vault.
- (42) "Seasonally high ground water" means depth from the natural ground surface to the upper surface of the zone of saturation, as measured in an unlined hole or perforated monitoring well during the time of the year when the water table is the highest. The term includes the upper surface of a perched water table.
- (43) "Seepage pit" means a covered underground receptacle that receives wastewater after primary

treatment and allows the wastewater to seep into the surrounding soil.

(44) "Septic tank" means a storage settling tank in which settled sludge is in immediate contact with the wastewater flowing through the tank while the organic solids are decomposed by anaerobic action.

(45) "Sewage" is synonymous with "wastewater" for purposes of this chapter.

(46) "Shared wastewater system" means a wastewater system that serves or is intended to serve two living units or commercial structures. The total number of people served may not exceed 24.

(47) "Shared water system" means a water system that serves or is intended to serve two living units or commercial structures. The total number of people served may not exceed 24. In estimating the population served, the reviewing authority shall multiply the number of living units times the county average of persons per living unit based on the most recent census data.

(48) "Site evaluation" means an evaluation to determine if a site is suitable for the installation of a subsurface wastewater treatment system.

(49) "Slope" means the rate that a ground surface declines in feet per 100 feet. It is expressed as percent of grade.

(50) "Soil consistence" means the attributes of soil material as expressed in degree of cohesion and adhesion or in resistance to deformation or rupture. See appendix B of department Circular DEQ-4.

(51) "Soil profile" means a description of the soil strata to a depth of eight feet using the USDA soil classification system.

(52) "Soil structure" means the combination or arrangement of primary soil particles into secondary units or peds. See appendix B of department Circular DEQ-4.

(53) "Soil texture" means the amount of sand, silt or clay measured separately in a soil mixture. See appendix B of department Circular DEQ-4.

(54) "Spring" means natural opening in the earth's surface from which water issues or seeps.

(55) "Septic tank" means a storage settling tank in which settled sludge is in immediate contact with the sewage flowing through the tank while the organic solids are decomposed by anaerobic bacterial action.

(56) "State waters" is defined in 75-5-103, MCA.

(57) "Subsurface wastewater treatment system" means the process of wastewater treatment in which the effluent is applied below the soil surface or into a mound by an approved distribution system.

(58) "Surface water" means any water on the earth's surface including, but not limited to, streams, lakes, ponds, reservoirs, and irrigation ditches, whether fresh or saline.

(59) "Unstable land forms" means areas showing evidence of mass down-slope movement such as hummock hill slopes, debris flows, landslides, and rock falls. Unstable land forms may be evidenced by slip surfaces roughly parallel to the hillside; landslide scars and carving debris ridges; fences, trees, or telephone poles which appear tilted; or tree trunks which bend uniformly as they enter the ground.

(60) "Waiver" means a department-approved departure from a requirement contained in department rules. Granting of waivers must be in accordance with ARM 17.36.601.

(61) "Wastewater" means water-carried waste that is discharged from a dwelling, building, or other facility, including:

- (a) household, commercial, or industrial wastes;
- (b) chemicals;
- (c) human excreta; or
- (d) animal and vegetable matter in suspension or solution.

(62) "Wastewater treatment system" or "wastewater disposal system" means a system that receives wastewater for purposes of treatment, storage, or disposal. The term includes, but is not limited to, pit privies and experimental systems.

(63) "Well" means an artificial excavation that derives water from the interstices of rocks or soil which

it penetrates.

(64) "Zone of saturation" means the area beneath the ground in which all open spaces are filled with groundwater. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1984 MAR p. 1568, Eff. 10/26/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2000 MAR p. 967, Eff. 4/14/00; AMD, 2000 MAR p. 3371, Eff. 12/8/00; AMD, 2002 MAR p. 1981, Eff. 5/17/02; AMD, 2003 MAR p. 221, Eff. 2/14/03.)

17.36.102 APPLICATION--GENERAL (1) To initiate review of a subdivision under 76-4-125, MCA, a person must submit a complete application, signed by the owner of the subdivision or an authorized representative, to the department. If the department has certified a local department or board of health to review subdivisions pursuant to 76-4-104, MCA, the application must be submitted to the local reviewing authority.

(2) A subdivision application must be on a form approved by the department. Copies of the application form may be obtained from the Department of Environmental Quality, PO Box 200901, Helena, MT 59620-0901, <http://www.deq.state.mt.us>, or from the local reviewing authority.

(3) A copy of the complete application, including all supporting information supplied to the reviewing authority, and all resubmittals of the application, must be submitted concurrently to the local health officer having jurisdiction for purposes of reviewing compliance with local laws and regulations, as provided in ARM 17.36.108.

(4) To resume review of an application that has been inactive for more than one year after the issuance of a denial letter by the reviewing authority, the applicant shall reapply and submit fees as required by subchapter 8, unless the file is inactive due to ground water monitoring or other requirements imposed by the reviewing authority.

(5) In addition to meeting the requirements of this chapter, subdivisions designed for the placement of mobile homes or recreational camping vehicles may be subject to the requirements of Title 37, chapter 111, subchapter 2.

(6) If a proposed subdivision includes subsurface wastewater disposal facilities, the developer shall notify the designated agent of the local board of health prior to presenting the subdivision application to the reviewing authority. The designated agent may conduct a preliminary site assessment to determine whether the site meets applicable state and local requirements. (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1981 MAR p. 254, Eff. 3/27/81; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2000 MAR p. 967, Eff. 4/14/00; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.103 APPLICATION--CONTENTS (1) In addition to the completed application form required by ARM 17.36.102, the following information must be submitted to the reviewing authority as part of a subdivision application:

- (a) payment of subdivision review fees as required in subchapter 8;
- (b) plans and specifications for water supply, wastewater treatment, and storm water systems;
- (c) if public or multiple user water supply or wastewater systems are proposed, three copies of final plans and specifications;
- (d) a lot layout document as required by ARM 17.36.104;
- (e) if nonmunicipal water supply or wastewater systems are proposed, a vicinity map or plan showing the locations of the following features within the area impacted by mixing zones or within 100

feet (whichever is greater) of the proposed water supply or wastewater system:

- (i) lakes, streams, irrigation ditches, wetlands, and springs;
- (ii) existing, previously approved, and proposed wells, wastewater treatment systems, and mixing zones;
- (f) evidence that the water source for the proposed subdivision is sufficient in terms of quality, quantity, and dependability, as required by ARM 17.36.331 and 17.36.332;
- (g) if water is to be supplied by means other than individual on-site wells, information about water right ownership and water use agreements;
- (h) if subsurface wastewater treatment systems are proposed:
  - (i) soil profile descriptions, percolation tests if required, and other pertinent soil information for each proposed drainfield;
  - (ii) seasonal high ground water information;
  - (iii) direction and percentage of slope across the treatment area (or a contour map with a minimum contour interval of two feet); and
  - (iv) any other evidence to show whether the wastewater treatment systems are sufficient in terms of capacity and dependability;
- (i) a copy of the nondegradation analysis and calculations as required by ARM 17.30.715;
- (j) a storm drainage map and plan as required by ARM 17.36.310;
- (k) the name of the solid waste disposal site that will serve the subdivision;
- (l) a copy of any environmental assessment required for the subdivision under Title 76, chapter 3, MCA;
- (m) a copy of the plat, certificate of survey, deed, or other document that is consistent with the document that will be, or has been, filed with the county clerk and recorder for the proposed subdivision;
- (n) a copy of applicable letters of approval or denial from local government officials;
- (o) a copy of applicable supporting legal documents, including documents relating to easements, covenants, water rights, water user agreements, and establishment of homeowners' associations and local districts;
- (p) if an application involves a change to the plans and specifications for a subdivision previously approved by the reviewing authority, a copy of the certificate of subdivision approval and a copy of the approved lot layout document; and
- (q) all additional information that is required under this chapter or that the reviewing authority determines is reasonably necessary for the review of the proposed subdivision. (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.104 APPLICATION--LOT LAYOUT DOCUMENT (1) The applicant shall provide four copies of a lot layout document for the proposed subdivision. The lot layout document must be on a sheet no larger than 11" x 17". Multiple lots should be shown on one sheet, at a scale no smaller than 1" = 200'. Multiple sheets may be used for large developments.

(2) The following information must be provided on the lot layout document. Other information (e.g., percolation test results, soil profile descriptions) may be included on the lot layout document only if the document remains legible:

- (a) the name of the subdivision, and the county, section, township and range (e.g., "Sec. 12 T27N R6E") in which the proposed subdivision is located;
- (b) a north arrow and scale;

- (c) the boundaries, dimensions, and total area of each lot;
- (d) an identifier or number for each lot (e.g., "Lot 1, Lot 2", "Tract 1, Tract 2", or "Parcel 1, Parcel 2");
- (e) locations of existing and proposed easements;
- (f) locations of existing and proposed roads;
- (g) locations and sizes of existing and proposed storm water structures (culverts, ponds, dry wells, etc.);
- (h) locations of drainageways;
- (i) name and affiliation of the person who prepared the lot layout;
- (j) information as set out in Table 1 for the specific water supply and wastewater systems in the subdivision. All systems must be labeled as "existing" or "proposed".

TABLE 1  
 REQUIREMENTS FOR LOT LAYOUTS

	Subdivisions served by nonmunicipal wells	Subdivisions served by municipal wastewater systems	Subdivisions served by municipal water	Subdivisions served by municipal wastewater systems
Existing and proposed wells and 100-ft setback	X	X	X	X
Water lines (suction and pressure)			X	X
Water lines (extension and connections)		X	X	
Existing and proposed wastewater systems (drainfield, replacement area, and existing septic tanks)	X	X		

	Subdivisions served by nonmunicipal wells	Subdivisions served by municipal wastewater systems	Subdivisions served by municipal water	Subdivisions served by municipal wastewater systems
Percent and direction of slope across the drainfield	X	X		
Sewer lines (extensions and connections)	X	X	X	X
Lakes, springs, irrigation ditches, wetlands and streams	X	X		
Percolation test locations, if provided, keyed to result form		X		
Soil pit locations keyed to soil profile descriptions		X		
Ground water monitoring wells keyed to monitoring results form		X		
Floodplain boundaries	X	X	X	X
Cisterns		X		
Existing building				

locations		X		
Driveways		X		

	Subdivisions served by nonmunicipal wells	Subdivisions served by municipal wastewater systems	Subdivisions served by municipal water	Subdivisions served by municipal wastewater systems
Road cuts and escarpments or slopes > 25%		X		
Mixing zone boundaries and direction of ground water flow	X	X		

(History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.105 SUBDIVISION AND PLATTING ACT EXCLUSIONS SUBJECT TO DEPARTMENT REVIEW IS REPEALED (History: 76-4-104, MCA; IMP, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; TRANS, from DHES, 1996 MAR p. 1499; REP, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.106 REVIEW PROCEDURES--APPLICABLE RULES (1) The procedures for review of subdivision applications by the reviewing authority are as follows:

(a) Upon receipt of a subdivision application, a resubmittal, or additional information provided by the applicant, the department will have 60 days to deny, approve, or conditionally approve the subdivision application. If an environmental impact statement is required, action must be taken within 120 days.

(b) If a local department or board of health has been certified as the reviewing authority pursuant to 76-4-104, MCA, the local reviewing authority shall, within 50 days after receipt of a subdivision application, review the application and forward the application to the department together with a recommended action for approval, conditional approval, or denial. The department shall take final action on the application within the time remaining in the 60-day or 120- period set out in (1)(a).

(i) If the local reviewing authority recommends denial of an application, the recommendation must be in the form of a denial letter sent to the applicant within 50 days after

receipt of the application. The local reviewing authority shall send a copy of the application and denial letter to the department. A denial letter issued by the local reviewing authority shall constitute the department's final action regarding the denial unless the department finds, pursuant to ARM 17.36.116, that the recommended denial was in error.

(c) If an application is incomplete, the reviewing authority shall deny the application, setting forth, in writing, the deficiencies to the applicant or the applicant's representative. When the additional information is submitted, the reviewing authority shall review such additional information within the timeframes specified in (1)(a) or (b) as applicable.

(2) Subdivision lots recorded with sanitary restrictions prior to July 1, 1973, shall be reviewed in accordance with requirements set forth in this chapter. In cases where any requirements of this chapter would preclude the use for which each lot was originally intended, then the applicable requirements (including the absence thereof) in effect at the time such lot was recorded shall govern except that sanitary restrictions in no case shall be lifted from any such undeveloped lot which cannot satisfy any of the following requirements:

(a) if a subsurface wastewater treatment system is utilized, there must be at least four feet from the natural ground surface to a limiting layer;

(b) the site for any subsurface wastewater treatment system may not exceed 25% in slope;

(c) no part of the lot utilized for the subsurface wastewater treatment system may be located in a 100 year floodplain;

(d) if a subsurface wastewater treatment system is utilized, soil conditions must provide for safe treatment and disposal of wastewater effluent; and

(e) the proposed water supply must comply with the requirements of this chapter. (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

Rule 17.36.107 reserved

17.36.108 COMPLIANCE WITH LOCAL REQUIREMENTS (1) The applicant shall provide the department with evidence, as set out in (2), as to whether facilities for the supply of water, disposal of wastewater, disposal of solid waste, and drainage of storm water are in compliance with applicable laws and regulations of local government. A facility that has an MPDES surface water discharge permit issued pursuant to ARM Title 17, chapter 30, subchapter 13 is exempt from the requirements of this rule.

(2) The evidence required by (1) must show whether the facilities are in compliance with the laws and regulations of local government relating to water quality, water supply, wastewater disposal, solid waste disposal, and storm water drainage, which are in effect at the time of the submittal of the application to the reviewing authority pursuant to this chapter. The evidence must be in one of the following forms:

(a) a certificate of compliance or a denial letter, in a format approved by the department, signed by the local health officer having jurisdiction. A certificate of compliance may contain conditions of approval;

(b) if the proposed subdivision is reviewed by the local health officer under authority delegated by the department under Title 76, chapter 4, MCA, a signed certificate of subdivision approval; or

(c) a written demonstration by the applicant, in a format approved by the department, that the applicant has requested a certificate of compliance from the local health officer having jurisdiction and

the health officer has not issued a denial letter or a certificate of compliance within 50 days of receiving a copy of the application. The department shall presume in such cases that the facilities in the proposed subdivision application are in compliance with the applicable laws and regulations of local government.

(3) The department shall identify, in its certificate of subdivision approval, all conditions of approval imposed by the local health officer in its review pursuant to this rule. Requirements of the local health officer may not be less stringent than state standards for the control and disposal of sewage promulgated pursuant to 75-5-305(2), MCA.

(4) As provided in ARM 17.36.110, the department may not issue a certificate of subdivision approval if non-public facilities for water supply or for the disposal of wastewater are proposed, unless the applicant has submitted evidence, in accordance with this rule, that the design for the non-public water supply and wastewater disposal facilities complies with applicable laws and regulations of local government.

(History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1981 MAR p. 254, Eff. 3/27/81; AMD, 1984 MAR p. 1027, Eff. 7/13/84; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2000 MAR p. 967, Eff. 4/14/00; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

Rule 17.36.109 reserved

17.36.110 CERTIFICATE OF APPROVAL (1) Subject to the local certification requirements set out in (2) and (3), the reviewing authority shall issue a certificate of subdivision approval if:

(a) an applicant has submitted all of the information required by this chapter;  
(b) the requirements of this chapter and of the Montana Environmental Policy Act have been met; and

(c) the reviewing authority determines that:

- (i) wastewater will not pollute or degrade state waters or endanger public health;
- (ii) all wastewater disposal facilities are sufficient in terms of capacity and dependability;
- (iii) the water supply will be sufficient in terms of quality, quantity, and dependability;
- (iv) solid waste disposal will be in accordance with applicable state laws and rules; and
- (v) storm drainage will have proper drainageways and the drainage will not pollute state waters.

(2) The reviewing authority may not issue a certificate of subdivision approval if non-public facilities for water supply or for the disposal of wastewater are proposed, unless the applicant has submitted evidence, in accordance with ARM 17.36.108, that the design for the non-public water supply and wastewater disposal facilities complies with applicable laws and regulations of local government.

(3) The reviewing authority shall identify, in its certificate of subdivision approval, all conditions of approval imposed by the local health officer in its review pursuant to ARM 17.36.108. Requirements of the local health officer may not be less stringent than state standards for the control and disposal of sewage promulgated pursuant to 75-5-305(2), MCA.

(4) Pursuant to a contract between the department and a local reviewing authority, minor changes to a certificate of subdivision approval may be made through an approval by the local reviewing authority of an "as-built" lot layout document. Amendment of the certificate of approval shall be effective upon filing of the approved "as-built" lot layout document with the clerk and recorder's office, with a copy sent to the department. Only the following changes may be made through the "as-built" procedure:

- (a) relocation of structures, water systems, or sewer systems, provided that the changes comply with Title 76, chapter 4, part 1, MCA, this chapter, and all related rules and regulations; and
- (b) changes to structures, water, or wastewater systems that do not significantly affect the

approval statement of the subdivision. (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2000 MAR p. 967, Eff. 4/14/00; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.111 MOBILE HOMES AND RECREATIONAL CAMPING VEHICLES (REPEALED)

(History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; NEW, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; REP, 2002 MAR p. 1465, Eff. 5/17/02.)

Rules 17.36.112 through 17.36.115 reserved

17.36.116 CERTIFICATION OF LOCAL DEPARTMENT OR BOARD OF HEALTH (1) A local department or board of health, if it requests certification, must be certified as the reviewing authority if the following requirements are met and the sanitarian or engineer is qualified as described in (2) of this rule:

(a) the local department or board of health employs a registered sanitarian or a registered professional engineer responsible to perform the actual review. Those local governments employing more than one registered sanitarian or registered professional engineer shall designate one such person to be responsible for the review program; and

(b) the local department or board of health is required, pursuant to a written contract, to review subdivision applications according to:

- (i) the provisions of Title 76, chapter 4, MCA;
- (ii) this chapter;
- (iii) applicable department circulars;
- (iv) Title 75, chapter 5, MCA;
- (v) ARM Title 17, chapter 30, subchapters 5 and 7; and (vi) other applicable laws and regulations.

(2) A registered sanitarian or registered professional engineer, prior to performing subdivision review, shall:

(a) pass, with a score of at least 90%, a written examination administered by the department that demonstrates knowledge of:

- (i) Title 76, chapter 4, MCA;
- (ii) this chapter;
- (iii) applicable department circulars;
- (iv) Title 75, chapter 5, MCA;
- (v) ARM Title 17, chapter 30, subchapters 5 and 7; and
- (vi) other applicable laws and regulations; and

(b) have a minimum of one year's experience performing subdivision review under the direct supervision of the department or of a department-approved registered sanitarian or registered professional engineer.

(3) The department's oversight of a certified local reviewing authority's review of subdivision applications shall be limited to the following:

(a) within the 60-day review period, the department shall determine, by reference to the local reviewing authority's review checklist or by other means, whether the local reviewer has conducted a completeness review of the application and whether the local reviewer has completed a compliance review of all systems designated by the contract between the department and the local reviewing

authority. If the department determines that either of these tasks was not completed, the department may return the application to the local reviewing authority for further review or may itself complete the review;

(b) within the 60-day review period, the department may check the accuracy of the local reviewing authority's review of subdivision applications. The department's accuracy checks must be limited to 10% of the applications submitted to the department by the local reviewing authority, except that the department may also review an application:

(i) upon the request of the local reviewing authority; or

(ii) when the department has reason to question the local reviewing authority's determination for a particular application;

(c) if the department identifies possible errors or discrepancies in the local reviewer's determination regarding an application, the department shall consult with the local reviewer. If, after consultation, the department does not agree with the local reviewer's determination regarding an application's compliance with applicable state laws, rules, and circulars, the department may, prior to the expiration of the review period for the application, modify the local determination regarding the state requirements;

(d) in addition to, or instead of, examining locally reviewed applications during the 60-day review period, the department may conduct an annual audit of a representative sample of locally reviewed applications.

(4) The department retains the right to suspend or revoke the certification of the local department or board of health if the department determines that the local reviewing authority is not complying with the sanitation in subdivisions act or other applicable statutes or rules. (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-105, MCA; NEW, 1986 MAR p. 1509, Eff. 9/12/86; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

## **Subchapter 2 reserved**

## **Subchapter 3**

### **Subdivision Requirements**

17.36.301 LOT SIZES (REPEALED) (History: 76-4-104, MCA; IMP, 76-4-104, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; REP, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.302 PUBLIC WATER AND SEWER (REPEALED) (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; REP, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.303 INDIVIDUAL WATER SUPPLY SYSTEMS (REPEALED) (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1984 MAR p. 1568, Eff. 10/26/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 1997 MAR p. 1458, Eff. 8/19/97; REP, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.304 INDIVIDUAL SEWAGE TREATMENT SYSTEMS (REPEALED) (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1984 MAR p. 1568, Eff. 10/26/84; AMD, 1984 MAR p. 1801, Eff. 12/14/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; REP, 2000 MAR p. 3371, Eff. 12/8/00.)

17.36.305 MULTIPLE USER WATER SUPPLY SYSTEMS (REPEALED) (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1984 MAR p. 1568, Eff. 10/26/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2000 MAR p. 3371, Eff. 12/8/00; REP, 2002 MAR p. 1465, Eff. 5/17/02.)

Rules 17.36.306 through 17.36.308 reserved

17.36.309 SOLID WASTES (1) Solid wastes stored within the subdivision must be placed in adequate containers and removed at a frequency to prevent a nuisance. When removed from the subdivision, the solid wastes must be disposed of at a department-licensed site in accordance with ARM 17.50.508 or an appropriate out-of-state waste disposal site. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.310 STORM DRAINAGE (1) The applicant shall submit a storm drainage plan to the reviewing authority. The plan must conform with the requirements of either (2) or (3).

(2) Except as provided in (3), a storm drainage plan must be designed in accordance with department Circular DEQ-8.

(a) for lots proposed for uses other than as single-family dwellings, a storm drainage plan submitted under (2) must be prepared by a registered professional engineer;

(b) a storm drainage plan submitted under (2) must include a maintenance plan for all drainage structures. The maintenance plan must describe the maintenance structures, provide a maintenance schedule, and designate the entity responsible for performing maintenance. The reviewing authority may require the applicant to create a homeowner's association or other legal entity that will be responsible for maintenance of storm drainage structures and that will have authority to charge appropriate fees. The maintenance plan must include easements and agreements as necessary for operation and maintenance of all proposed off-site storm drainage structures or facilities.

(3) A storm drainage plan is not subject to the requirements of (2) if:

(a) the proposed subdivision has five or fewer lots;

(b) the area of disturbance within the proposed subdivision has a slope of 3% or less;

(c) unvegetated areas including, but not limited to, road surfaces, road cuts and fills, roofs, and driveways, comprise less than 15% of the total acreage of the proposed subdivision;

(d) drainage structures, such as road ditches, will be constructed;

(e) completion of the proposed subdivision will not increase the amount of pre-development storm water runoff from the area;

(f) the proposed subdivision will not alter pre-development water flow patterns; and

(g) the applicant provides the reviewing authority with a 7 1/2 minute USGS topographic map showing the proposed subdivision and, if available, a map with contour intervals no greater than 20 feet that shows drainage patterns.

(4) If fill material will be placed within a delineated floodplain, the applicant shall provide

evidence that the floodplain permit coordinator has been notified and that appropriate approvals have been obtained.

(5) If applicable, the applicant shall obtain an MPDES permit for storm water discharges, pursuant to ARM Title 17, chapter 30.

(6) Storm water that reaches state surface waters must be treated prior to discharge if the reviewing authority determines that untreated storm water is likely to degrade the receiving waters.

(a) minimum treatment of storm water consists of removal of settleable solids and floatable material. The reviewing authority may require more extensive treatment if deemed necessary to protect state waters from degradation;

(b) plans for the treatment facility must be approved by the reviewing authority.

(7) The department may grant a waiver from any of the requirements in this rule pursuant to the provisions of ARM 17.36.601. (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2002 MAR p. 1465, Eff. 5/17/02; AMD, 2003 MAR p. 221, Eff. 2/14/03.)

Rule 17.36.311 reserved

#### 17.36.312 SUBDIVISIONS ADJACENT TO STATE WATERS

(1) Where the department has determined that the disposal of sewage from a proposed subdivision may adversely affect the quality of a lake or other state waters, the department may require additional information and data concerning such possible effects. Upon review of such information, the department may impose specific requirements for sewage treatment and disposal as are necessary and appropriate to assure compliance with the Water Quality Act, Title 75, chapter 5, MCA, and water quality and non-degradation standards, ARM Title 17, chapter 30, subchapters 6, 7, 10 and 12.

(2) The department hereby adopts and incorporates by reference ARM Title 17, chapter 30, subchapters 6, 7, 10 and 12, which set forth water quality standards for state surface waters. Copies of ARM Title 17, chapter 30, subchapters 6, 7, 10 and 12, may be obtained from the Department of Environmental Sciences, PO Box 200901, Helena, MT 59620-0901. (History: 76-4-104, MCA; IMP, 76-4-104, 76-4-125, MCA; NEW, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499.)

17.36.313 CONDOMINIUM CONVERSIONS (1) Except as provided in (2) and (3) of this rule, condominiums, including those to be constructed on parcels of land that are exempted from review under the provisions of Title 76, chapter 3, MCA, and including conversion of existing structures into condominiums, are subject to review under the requirements of this chapter.

(2) Conversions of existing structures into condominiums are not subject to this chapter where the converted units are to be served by existing municipal water and sewer facilities in a Class I or II city as defined in 7-1-4111, MCA.

(3) Where the water or sewage disposal system in an existing building to be converted into condominiums has already been approved under either department requirements or has been approved by the local health department under local requirements, such water or sewage disposal system is not subject to review under this chapter. (History: 76-4-104, MCA; IMP, 76-4-111, 76-4-125, MCA; NEW, 1984 MAR p. 1027, Eff. 7/13/84; TRANS, from DHES, 1996 MAR p. 1499.)

Rules 17.36.314 through 17.36.319 reserved

17.36.320 SEWAGE SYSTEMS: DESIGN (1) All components of subsurface sewage treatment

systems must be designed and installed in accordance with department Circular DEQ-4. As indicated on Table 2 of this rule, public systems and multi-user systems with design flows greater than or equal to 2500 gallons per day must be designed by a registered professional engineer.

(2) A minimum separation of at least four feet of natural soil must exist between the infiltrative surface or the liner of a lined system and a limiting layer, except that at least six feet of natural soil must exist on a steep slope (15% to 25%).

(3) The proposed subsurface sewage treatment area must include an area for 100% replacement of the system. Unless a waiver is approved by the department pursuant to ARM 17.36.601, the replacement area must meet the same requirements as the primary area. If the replacement area is not immediately adjacent to the primary area, or if the department indicates to the applicant that it has reason to believe that site conditions for the replacement area may vary from those for the primary area, the applicant shall submit adequate evidence of the suitability of the replacement area.

TABLE 2  
ALLOWABLE SYSTEMS, REQUIREMENTS

YES - Systems that are allowed			
NO - Systems that are not allowed			
Public: > 5000 gpd (1) (7)	Public or Multiple-user: ≥ 2500 gpd and ≤ 5000 gpd (2) (7)	Public or Multiple-user: < 2500 gpd (3)	Individual/Shared: (6)
NO	NO	YES	YES
NO	NO	YES	YES
YES	YES	YES	YES
NO	NO	NO	YES
YES	YES	YES	YES

NO	NO	NO	NO (5)
NO	YES	YES	YES
YES	YES	YES	YES
YES	YES	YES	YES
YES	YES	YES	YES

SUBSURFACE WASTEWATER TREATMENT

YES - Systems that are allowed				
NO - Systems that are not allowed				
DEQ-4 System	Public: > 5000 gpd  (1)	Public or Multiple-user: □ 2500 gpd and □ 5000 gpd  (2)	Public or Multiple-user: < 2500 gpd  (3)	Individual/Shared:   (6)
Chemical Nutrient Reduction;  Aerobic Sewage Treatment Systems	NO (5)	NO (5)	NO (5)	NO (4)(5)
Pressure Distribution	YES	YES	YES	YES

Sand-lined Absorption Trenches	NO	YES	YES	YES
Experimental Systems	NO (5)	NO (5)	NO (5)	NO (5)

- (1) Public systems with design flow greater than 5000 gallons per day (gpd).
- (2) Public or multiple-user systems with design flow greater than or equal to 2500 gpd and less than or equal to 5000 gpd.
- (3) Public or multiple-user systems with design flow less than 2500 gpd.
- (4) Means of securing continuous operation and maintenance of these systems must be approved by the reviewing authority prior to DEQ approval.
- (5) May be allowed by waiver, pursuant to ARM 17.36.601.
- (6) Individual or shared commercial sewage systems that have a design flow greater than 700 gpd shall be considered multi-user.
- (7) Must be designed by a professional engineer. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2000 MAR p. 3371, Eff. 12/8/00; AMD, 2002 MAR p. 1465, Eff. 5/17/02; AMD, 2003 MAR p. 221, Eff. 2/14/03.)

17.36.321 SEWAGE SYSTEMS: ALLOWABLE NEW AND REPLACEMENT SYSTEMS

- (1) The allowable new sewage treatment systems, together with certain other requirements for such systems, are indicated in Table 2 of ARM 17.36.320. All systems must be designed and installed in accordance with department Circular DEQ-4. The use of sewage systems for replacement systems shall be in accordance with department Circular DEQ-4. Requirements applicable to review of existing sewage treatment systems are set out in ARM 17.36.327.
- (2) Systems designed in accordance with department Circular DEQ-2, may not be used for individual, shared, or multi-user systems.
- (3) The following sewage systems may not be used for new systems:
  - (a) cut systems;
  - (b) fill systems;
  - (c) artificially drained systems;
  - (d) cesspools;
  - (e) pit privies;
  - (f) seepage pits; and
  - (g) holding tanks.
- (i) The department may grant a waiver, pursuant to ARM 17.36.601, to allow holding tanks for recreational vehicle dump stations in facilities owned and operated by a local, state, or federal unit of government, or in facilities licensed by the department of public health and human services and inspected by the local health department. Holding tanks must be designed and maintained in accordance with the requirements in department Circular DEQ-4 and all other requirements imposed by the department and local health department.
- (4) The following systems may be used only as replacement systems, subject to the limitations provided in department Circular DEQ-4:
  - (a) cut systems;

- (b) fill systems; and
- (c) artificially drained systems.

(5) Sealed pit privies may be used only in facilities owned and operated by a local, state, or federal unit of government, or in facilities where use of a sealed pit privy is authorized by the department of public health and human services. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2000 MAR p. 3371, Eff. 12/8/00; AMD, 2003 MAR p. 221, Eff. 2/14/03.)

17.36.322 SEWAGE SYSTEMS: SITING (1) Subsurface sewage treatment systems may not be used if natural slopes are greater than 15%; however, the department may, by waiver granted pursuant to ARM 17.36.601, allow a sewage treatment system with a design flow of 5000 gallons per day or less on slopes between 15% and 25%, if a registered professional engineer or a person qualified to evaluate and identify soil in accordance with ASTM standard D5921-96e1 (Standard Practice for Subsurface Site Characterization of Test Pits for On-Site Septic Systems) submits adequate evidence that there will be no visible outflow of liquid downslope from the subsurface sewage treatment system.

(2) Subsurface sewage systems may not be installed on unstable landforms, as defined in ARM 17.36.320.

(3) No component of any sewage treatment system may be located under structures or driveways, parking areas or other areas subjected to vehicular traffic, except for those components of the system designed to accommodate such conditions. Drainfields must not be located in swales or depressions where runoff may flow or accumulate.

(4) For lots one acre in size or less, the applicant shall physically identify the drainfield location by staking or other acceptable means of identification. For lots greater than one acre in size, the department may require the applicant to physically identify the drainfield location.

(5) The department may require the applicant to show detailed lot layouts on a contour map if the department determines that there is a question about suitability of the drainfield location. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2000 MAR p. 3371, Eff. 12/8/00.)

17.36.323 SEWAGE SYSTEMS: HORIZONTAL SETBACKS; WAIVERS (1) Minimum horizontal setback distances (in feet) shown in Table 3 of this rule must be maintained.

(2) A waiver of the setback distance for a cistern may be granted by the department, pursuant to ARM 17.36.601, if the applicant demonstrates that the elevation of the cistern is higher than the elevation of the septic tank, other components, or drainfield/sand mound.

(3) A waiver of the setback distance between drainfields/sand mounds and surface waters, springs, and floodplains may be granted by the department, pursuant to ARM 17.36.601, only if:

(a) the applicant demonstrates that ground water flow at the drainfield site cannot flow into the surface water or spring; or

(b) the surface water or spring seasonally high water level is a minimum of 100 feet horizontal distance from the drainfield and the bottom of the drainfield will be at least two feet above floodplain elevation.

(4) The department may require more than 100 feet of separation from the floodplain or from surface water or springs if it determines that site conditions or water quality nondegradation requirements indicate a need for the greater distance.

TABLE 3

SETBACK DISTANCES

	Water Supply Wells	Sealed Components (1) and Other Components (2)	Drainfield/ Sand Mounds
Public or Multi-user Wells/Springs	-	100	100
Other Wells	-	50	100
Suction Lines	-	50	100
Cisterns	-	25	50
Roadcuts, Escarpment	-	10 (3)	25
Slopes > 25% (4)	-	10 (3)	25
Property Boundaries	10	10	10
Subsurface Drains	-	10	10
Water Lines	-	10	10
Drainfields/ Sand Mounds	100	10	-
Foundation Walls	-	10	10
Surface Water, Springs	100 (5)	50	100
Floodplains	10	- (1) 100 (2)	100

(1) Sealed components include sewer lines, sewer mains, septic tanks, grease traps, dosing tanks and pumping chambers.

(2) Other components include intermittent and recirculating sand filters, package plants and evapotranspiration systems.

(3) Sewer lines and sewer mains may be located in roadways and on steep slopes if the lines and mains are safeguarded against damage.

(4) Down-gradient of the sealed component, other component, or drainfield/sand mound.

(5) A waiver of this requirement may be granted by the department pursuant to ARM 17.36.601. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2000 MAR p. 3371, Eff. 12/8/00.)

17.36.324 SEWAGE SYSTEMS: FLOODPLAINS (1) The applicant shall identify the

location of any floodplain on the lot layout document. The department may require the applicant to provide additional information, such as elevations at specific locations.

(2) The applicant shall submit evidence adequate to allow the department to establish the location of the floodplain if:

(a) the federal or state government has not designated the floodplain, or if the location of the floodplain is in question with respect to a proposed subdivision; and

(b) the stream is shown as an intermittent or perennial stream on the most current USGS 7 1/2 minute (1:24,000) topographic map (unless the applicant provides adequate information that the stream is not subject to flooding). (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2000 MAR p. 3371, Eff. 12/8/00.)

17.36.325 SEWAGE SYSTEMS: SITE EVALUATION (1) The reviewing authority may require that percolation tests, conducted in accordance with department Circular DEQ-4, must be performed within the boundary of each proposed subsurface sewage treatment system. Percolation tests must be keyed by a number on the lot layout to the results in the report form.

(2) If the applicant or the department has reason to believe that ground water will be within seven feet of the surface at any time of the year within the boundaries of the treatment system, the applicant shall install ground water level observation pipes to a depth of at least eight feet to determine the seasonally high ground water level. The applicant shall monitor the observation pipes through the seasonally high ground water period.

(3) The applicant shall provide descriptions of the soils within 25 feet of the boundaries of each proposed drainfield. Soil descriptions must address the characteristics used in the U.S. Department of Agriculture's National Soil Survey Handbook (USDA, NRCS, September 1999), and the Soil Survey Manual (USDA, October 1993). These characteristics include, but are not limited to, soil texture, soil structure, soil consistence and indicators of redoximorphic features. Soil descriptions must meet the following requirements:

(a) Soil descriptions for the proposed subdivision must be based on data obtained from test holes. Test holes must be at least eight feet in depth;

(b) At least one test hole must be dug for each individual drainfield and for each shared (two-user) drainfield, unless a waiver is approved by the department pursuant to ARM 17.36.601. Before a waiver is requested and granted, the applicant must complete test holes for 25% of the proposed drainfield locations in the subdivision, demonstrate that the soils are consistent throughout the area requested for a waiver, and must obtain the approval of the local reviewing authority for reduction in number of test holes. At least three test holes must be dug for each multiple-user and public drainfield, unless a waiver is approved by the department pursuant to ARM 17.36.601. At least one test hole must be dug in each zone of a pressure-dosed drainfield, unless a waiver is approved by the department pursuant to ARM 17.36.601. The department shall require additional test holes if it determines that there is significant variability of the soils in the proposed drainfield area;

(c) Test holes must be located within 25 feet of the boundaries of the proposed drainfield. The locations must be established by a person qualified to evaluate and identify soil in accordance with ASTM standard D5921-96e1 (Standard Practice for Subsurface Site Characterization of Test Pits for On-Site Septic Systems);

(d) If the applicant or the department has reason to believe that a limiting layer is within seven feet of the ground surface at the site of proposed subsurface sewage treatment systems, additional test pits and soil descriptions sufficient to describe the suitability of the soil must be provided; and

(e) Each test hole must be keyed by a number on a copy of the lot layout or map with the information provided in the report. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2000 MAR p.

3371, Eff. 12/8/00; AMD, 2002 MAR p. 1465, Eff. 5/17/02; AMD, 2003 MAR p. 221, Eff. 2/14/03.)

17.36.326 SEWAGE SYSTEMS: AGREEMENTS AND EASEMENTS

(1) The applicant shall demonstrate that all public, multiple-user, and shared sewage systems will be adequately operated and maintained and shall submit an operation and maintenance manual acceptable to the department.

(2) For public and multiple-user systems, a homeowners' association, county sewer district, or other administrative entity, with the power to charge appropriate fees, must be established as part of the operation and maintenance plan required by department Circular DEQ-4.

(3) For public, multiple-user, and shared systems, easements must be obtained to allow adequate operation and maintenance of the system. Easements must be in a form acceptable to the department.

(4) Users of shared sewage systems must have an agreement that identifies the rights of each user. Shared user agreements must be in a form acceptable to the department. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2000 MAR p. 3371, Eff. 12/8/00; AMD, 2003 MAR p. 221, Eff. 2/14/03.)

17.36.327 SEWAGE SYSTEMS: EXISTING SYSTEMS

(1) If an existing sewage treatment system is present, the department shall review the adequacy of the existing system for the proposed use and the capability of the existing system to operate without risk to public health and without pollution of state waters. To assist the department in making this determination, the applicant shall submit the following information:

(a) evidence demonstrating the proper hydraulic functioning of each existing system;

(b) evidence as to whether each existing system complied with state and local laws and regulations, including permit requirements, applicable at the time of installation; and

(c) evidence that each existing septic tank was pumped within three years prior to the department's review unless the existing septic tank is less than five years old.

(2) Unless a waiver is approved by the department pursuant to ARM 17.36.601, the drainfields and sand mounds for existing systems must be located at least 100 feet from wells.

(3) The applicant shall provide for a replacement area for each existing system. Unless a waiver is approved by the department pursuant to ARM 17.36.601, replacement areas must comply with the requirements of this subchapter.

(4) Existing cesspools, pit privies, and holding tanks must be replaced by a system approved under this subchapter. Existing sealed pit privies must also be replaced, unless they are at a facility owned and operated by a local, state, or federal unit of government, or are at a facility where use of a sealed pit privy is authorized by the department of public health and human services. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2000 MAR p. 3371, Eff. 12/8/00; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.328 PUBLIC WATER SUPPLY AND WASTEWATER SYSTEMS

(1) A proposed subdivision must be connected to a public water supply or wastewater system if any boundary of the subdivision is within 500 feet of the public system and the public system meets the requirements of (2)(a) and (b). The department may grant a waiver, pursuant to ARM 17.36.601, of the requirement to connect to a public system if the applicant demonstrates that connection to the public system is physically or economically impractical, or that easements cannot be obtained. For purposes of this rule, a connection is economically practical if the cost of connection is less than or equal to three times the cost of installation of an approvable system on the site.

(2) The reviewing authority may not approve the connection of a proposed subdivision to an existing public system unless:

(a) the existing public system is approved by the department and is in compliance with the

provisions of Title 75, chapter 6, part 1, MCA, and ARM Title 17, chapters 30 and 38;

(b) the managing entity of the public system certifies to the reviewing authority, on a form acceptable to the department, that:

- (i) the system has an adequate capacity to meet the needs of the subdivision;
- (ii) the connections are authorized;
- (iii) the system is in compliance with ARM Title 17, chapter 38, and all other applicable department regulations; and
- (iv) the appropriate water rights exist for this connection or the managing entity has made application for the appropriate water rights for their system and any connections; and

(c) the applicant submits to the reviewing authority the name and public water supply ID (PWSID) number of the public system.

(3) If the proposed additional connections will create a new public system, the applicant shall submit plans and specifications for the entire system (existing and proposed) for review and approval by the department in accordance with the provisions of Title 75, chapter 6, part 1, MCA, and ARM Title 17, chapters 30 and 38. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2002 MAR p. 1465, Eff. 5/17/02.)

Rule 17.36.329 reserved

17.36.330 WATER SUPPLY SYSTEMS--GENERAL (1) The applicant shall demonstrate that water systems provide an adequate supply by showing that the following criteria are met:

(a) the maximum contaminant levels established in ARM Title 17, chapter 38, subchapter 2 may not be exceeded;

(b) the following flows must be provided:

- (i) for individual and shared water supply systems, the flow indicated in ARM 17.36.332;
- (ii) for multiple family water supply systems, the requirements set out in department Circular DEQ-3; and
- (iii) for public water supply systems, the requirements set out in department Circular DEQ-1;

(c) the necessary quantity and quality of water must be available at all times unless depleted by emergencies.

(2) If ground water is proposed as a water source, the applicant shall submit the following information:

(a) the location of the proposed ground water source must be shown on the lot layout, indicating distances to any potential sources of contamination within 500 feet and any known mixing zone as defined in ARM 17.30.502. If a potential problem is identified, the reviewing authority may require that all potential sources of contamination be shown in accordance with department Circular PWS-6, 1999 edition; and

(b) a description of the proposed ground water source, including approximate depth to water bearing zones and lithology of the aquifer.

(3) The reviewing authority may restrict the volume of water withdrawn from a proposed water source for a subdivision in order to ensure that an adequate water supply will be available at all times. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2002 MAR p. 1465, Eff. 5/17/02; AMD, 2003 MAR p. 221, Eff. 2/14/03.)

17.36.331 NON-PUBLIC WATER SUPPLY SYSTEMS: WATER QUALITY (1) For non-public water supply systems, the following water quality requirements must be met:

(a) The applicant shall demonstrate that water quality is sufficient for the proposed subdivision.

The reviewing authority may not approve a proposed water supply system if there is evidence that, after appropriate treatment, the concentration of any water quality constituent exceeds the human health standards in department Circular WQB-7, 2001 edition or the maximum contaminant levels established in ARM Title 17, chapter 38, subchapter 2.

(b) The applicant shall obtain samples from wells in the proposed subdivision and shall provide analyses of the samples to the reviewing authority. If no wells exist in the proposed subdivision, the reviewing authority may accept samples from nearby water wells that are completed in the same aquifer as that proposed for the subdivision water supply. The samples may not be older than one year prior to the date of application. Water quality data must show the concentration of nitrate (as nitrogen) and specific conductance. The reviewing authority may require testing of wells located near the proposed subdivision for additional constituents for which human health standards are listed in department Circular WQB-7, 2001 edition or in ARM Title 17, chapter 38, subchapter 2, if the reviewing authority believes that those constituents may be present in harmful concentrations. Analyses must be conducted by a laboratory certified by the department of public health and human services for analyses of water samples for public water systems.

(i) the applicant shall provide the well log for every well from which a ground water sample is collected. If a well log is not available, the applicant shall provide information about the well depth and depth to static water level. The reviewing authority may require additional information to demonstrate that ground water quality is sufficient for the proposed subdivision;

(ii) the applicant shall accurately identify, on a topographic map or lot layout document, the location of every well from which a ground water sample is taken; and

(iii) the requirement to sample for nitrate (as nitrogen) and specific conductance does not apply if the reviewing authority determines that information from nearby water wells, which are completed in the same aquifer as that proposed for the subdivision water supply, or a hydrogeological report confirms that the proposed water supply will be of acceptable quality.

(c) The minimum setback distances set out in Table 3 of ARM 17.36.323 must be maintained for all new and existing water sources. A drinking water supply well may not be constructed within a ground water mixing zone granted pursuant to ARM Title 17, chapter 30, subchapter 5.

(d) The reviewing authority may require greater than a 100-foot horizontal separation between a well and surface water if there is a potential that the well may be influenced by contaminants (e.g., giardia lamblia) in the surface water. In determining the appropriate separation between a well and surface water, the reviewing authority may consider factors such as well location, well construction, aquifer material, hydraulic connection between the aquifer and watercourse, and other evidence of the potential for surface water contamination. The reviewing authority may also require that the proposed water source be tested for surface water influence in accordance with department Circular PWS-5, 1999 edition.

(e) Wells must have unperforated casing to a minimum depth of 25 feet below ground surface unless the reviewing authority finds that, based upon geological information provided by the applicant, a lesser depth will ensure that the other requirements of this rule are satisfied. The reviewing authority may require unperforated casing to a depth greater than 25 feet if water of better chemical or microbiological quality can be obtained from a deeper zone.

(f) A surface water or ground water source under the direct influence of surface water, as described in department Circular PWS-5, 1999 edition, may not be used as a water source for a non-public system. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.332 NON-PUBLIC WATER SUPPLY SYSTEMS: WATER QUANTITY AND DEPENDABILITY (1) The applicant shall demonstrate that ground water quantity is sufficient for the

proposed subdivision. The applicant shall show that the following minimum flows are available:

(a) a single-family water system must provide a sustained yield of at least 10 gallons per minute over a one-hour period, six gallons per minute over a two-hour period, or four gallons per minute over a four-hour period. For purposes of the minimum flows identified in this rule, sustained yield must be based on water that is supplied from the aquifer, not from well bore storage; and

(b) a shared water system must provide a sustained yield of at least 15 gallons per minute over a one-hour period or 10 gallons per minute over a two-hour period.

(2) The minimum flows required in (1)(a) and (b) must be demonstrated through one or more of the following:

(a) test wells within the proposed subdivision;

(b) well logs and testing of nearby wells;

(c) hydrogeological reports; or

(d) ground water modeling.

(3) Multiple-user water supply systems must comply with department Circular DEQ-3. For individual and shared water supply systems, the reviewing authority may require pumping tests for one or more wells to demonstrate sufficient quantity and dependability. The tests must be conducted pursuant to department Circular DEQ-3.

(4) When the proposed water supply is an unconfined aquifer and a significant recharge source is from irrigation ditches or irrigated fields, the reviewing authority may require the applicant to demonstrate that the source will produce a water supply that is sufficient in terms of water quality, quantity and dependability for the proposed subdivision if all irrigation-related recharge to the aquifer is eliminated.

(5) The department may allow, pursuant to a waiver under ARM 17.36.601, a lesser flow than those set out in (1)(a) and (b) if the applicant demonstrates that the water supply system provides a sufficient quantity of water to meet demands and that adequate storage is provided to meet peak demand.

(6) The reviewing authority may require the applicant to submit information in addition to that required in (1) through (5) to demonstrate the dependability of the ground water supply if the reviewing authority believes that dependability is questionable. At a minimum, the applicant shall provide evidence that the aquifer can supply, by itself or through recharge from surrounding geologic units, water to wells in an amount equal to the proposed ground water withdrawals.

(7) If water is to be supplied by means other than individual on-site wells, the reviewing authority shall review the applicant's information about water right ownership and water use agreements to determine the quantity and dependability of the water supply. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2002 MAR p. 1465, Eff. 5/17/02; AMD, 2003 MAR p. 221, Eff. 2/14/03.)

#### 17.36.333 NON-PUBLIC WATER SUPPLY SYSTEMS: DESIGN AND CONSTRUCTION

(1) The applicant shall meet the following requirements relating to the design and construction of non-public water supply systems:

(a) individual and shared wells must be constructed in accordance with ARM Title 36, chapter 21, subchapter 6, unless the requirements of this subchapter are more stringent;

(b) multiple-user water supply systems must be designed and constructed in accordance with department Circular DEQ-3, and ARM Title 36, chapter 21, subchapter 6, unless the requirements of this subchapter are more stringent;

(i) multiple user water supply systems with six or more connections, including connections outside of a proposed subdivision, must be designed by a registered professional engineer and as-built plans must be submitted to the department within 90 days after completion of the system. If an existing system is expanded to serve six or more connections, the expansion must be designed

by a registered professional engineer. The reviewing authority may require smaller systems that it determines to be complex (e.g., a water supply system with substantial pressure difference through the distribution system) to be designed by a registered professional engineer;

(ii) if more than one multiple user water system is proposed for a subdivision, the systems must be tied together to ensure greater system reliability. The department may grant a waiver, pursuant to ARM 17.36.601, of this provision if the applicant demonstrates that interconnection of the systems is physically or economically impractical or would create an environmental or public health concern;

(c) the reviewing authority may require additional well construction and/or testing requirements not required in ARM Title 36, chapter 21, subchapter 6 or in department Circular DEQ-3, to ensure that wells within a particular subdivision will provide an adequate water supply. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2002 MAR p. 1465, Eff. 5/17/02; AMD, 2003 MAR p. 221, Eff. 2/14/03.)

#### 17.36.334 WATER SUPPLY SYSTEMS: AGREEMENTS AND EASEMENTS

(1) If a proposed subdivision includes a multiple-user water supply system, the applicant shall submit to the reviewing authority an operation and maintenance plan for the system. The plan must ensure that the multiple-user systems will be adequately operated and maintained. The reviewing authority may require the applicant to create a homeowners' association, county water district, or other administrative entity that will be responsible for operation and maintenance and that will have authority to charge appropriate fees.

(2) If a proposed subdivision includes a shared water supply system, or includes a water supply system shared by two or more commercial facilities, the reviewing authority may require the applicant to submit a draft user agreement that identifies the rights of each user. The user agreement must be signed by all users when the lots are sold. The applicant must also grant or obtain easements to allow adequate operation and maintenance of the system. Shared user agreements and easements must be in a form acceptable to the department. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.335 NON-PUBLIC WATER SUPPLY SYSTEMS: EXISTING SYSTEMS (1) Existing water supply systems within a proposed subdivision must meet all requirements of this chapter or, if previously approved by the reviewing authority, the rules in effect at the time of approval. The department may grant a waiver, pursuant to ARM 17.36.601, from the well construction requirements of ARM 17.36.333 if the applicant provides adequate evidence that compliance with such requirements is not necessary to ensure an adequate water supply.

(2) The applicant shall submit information to allow the reviewing authority to review the quality, quantity, and dependability of the existing system.

(a) The applicant shall submit, for each existing water supply source, water quality analyses for nitrate (as nitrogen) and specific conductance. If an existing well is currently being used as a potable water supply within a proposed subdivision, a total coliform analysis must also be conducted. The nitrate and specific conductance sample may not be older than one year prior to the date of the application. The coliform sample may not be older than six months prior to the date of application. If an existing well is not currently used as a potable water supply but will be converted to a potable water supply, a total coliform analysis must be conducted when it is put into use. The analysis must be performed by a laboratory certified by the department of public health and human services for analyses of water samples for public water systems. The reviewing authority may not approve the use of an existing system if there is evidence that, after appropriate treatment, the concentration of any ground water constituent exceeds

the human health standards in department Circular WQB-7, 2001 edition, or the maximum contaminant levels established in ARM Title 17, chapter 38, subchapter 2.

(b) To characterize the water supply, the applicant must show, through a well log or other means, the depth to static water in the well and the total well depth. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.336 ALTERNATE WATER SUPPLY SYSTEMS (1) A water source other than a well may be developed only if the applicant:

(a) shows that it is not economically feasible to develop a well or that ground water quality, quantity, or dependability is unacceptable; and

(b) complies with the other requirements set out in this rule.

(2) The applicant shall provide evidence to the reviewing authority that the alternate water source is sufficient in terms of quality, quantity, and dependability.

(3) Springs, when developed as an alternate water system, must be constructed in accordance with a plan approved by the reviewing authority and in accordance with department Circular DEQ-11. Springs must also meet the requirements for wells regarding quality, quantity and dependability in ARM 17.36.331 and 17.36.332.

(4) The reviewing authority may require that the applicant collect information regarding quality, quantity, and dependability of the water supply at specified times of the year.

(a) The reviewing authority may require water quality sampling to test for direct influence by surface water. Such sampling may include:

(i) testing for pH, temperature, conductivity, and turbidity;

(ii) testing for parameters with human health standards listed in department Circular WQB-7, 2001 edition;

(iii) testing for organisms that indicate direct influence by surface waters according to department Circular PWS-5, 1999 edition; and

(iv) seasonal bacteriological testing.

(b) The reviewing authority may determine the adequacy of water quantity and water dependability based upon flows during the seasonal low-flow period.

(5) Cisterns may be utilized only for individual water supplies. The reviewing authority may authorize such use only if:

(a) a potable water source is available for hauling within a reasonable distance from the cistern and:

(i) a licensed water hauler supplies water for the cistern and provides a letter verifying that the subdivision will be served by the hauler's business; or

(ii) the water supply is from a public water system and the owner of the public water system certifies that water is available from the public water system to serve the applicant's cistern;

(b) all water is hauled and disinfected in accordance with ARM Title 17, chapter 38, subchapter 5, or a reviewing authority-approved plan; and

(c) the cistern is constructed and installed in accordance with a plan approved by the reviewing authority and in accordance with department Circular DEQ-17. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2002 MAR p. 1465, Eff. 5/17/02; AMD, 2003 MAR p. 221, Eff. 2/14/03.)

Rules 17.36.337 through 17.36.339 reserved

17.36.340 LOT SIZES: EXEMPTIONS (1) This rule sets out, for purposes of the review of proposed subdivisions, the requirements for minimum lot or parcel size and the criteria for varying the

minimum size. Proposed subdivisions involving mobile homes, trailer courts, campgrounds, multiple family dwellings, and commercial or industrial development are also subject to this rule.

(a) If an applicant proposes to use subsurface wastewater treatment systems, as described in department Circular DEQ-4, the minimum lot size must be one acre for each living unit and one acre for up to 700 gallons per day of design wastewater flow for commercial and other non-residential uses. The department may allow smaller lot sizes pursuant to waiver as provided in (1)(b) and ARM 17.36.601. The reviewing authority may, without a waiver, allow smaller lot sizes in accordance with the criteria set out in (1)(c) and (d). The reviewing authority may require larger lot sizes as provided in (1)(e).

(b) The department may allow, pursuant to a waiver under ARM 17.36.601, lot sizes smaller than one acre only for lots created before July 1, 1973 and for alteration of lots created before April 15, 2003 as provided in (1)(b)(i), and only after approval by the local health department. To qualify for a waiver, the applicant shall provide adequate evidence as set out in (1)(b)(ii) and (iii) to demonstrate that water quality is protected.

(i) For purposes of this rule, "alteration" of lots created before April 15, 2003, means combining lots by eliminating common boundaries, redefining lots by relocating common boundaries, or a combination of both. An alteration of lots under this rule must also meet the following requirements:

(d) The reviewing authority may allow lot sizes smaller than one acre, including lots with less than 20,000 ft<sup>2</sup>, if all of the conditions in any one of (1)(d)(i), (ii), or (iii) are met:

(i) the water supply and wastewater treatment are provided by public or municipal systems, and the well or other source for the water supply is not located on a lot that is proposed for lot size reduction;

(ii) the affected ground water beneath and surrounding the subdivision has a specific conductance equal to or greater than 7,000 microSiemens/cm at 25°C, and all existing and anticipated uses of the ground water are protected; or

(iii) the proposed subdivision is within a designated wastewater facility service area, which has been planned for by a local wastewater utility and approved by the department pursuant to Title 75, chapter 6, MCA, and the acreage of lots on which drainfields are located is at least one acre for up to 700 gallons per day of design wastewater flow; and

(A) the local wastewater utility certifies in writing that the collection systems serving the lots meet the utility's design standards and may be connected to the system when public wastewater mains are available. As-built plans for all collection systems must be submitted to the reviewing authority and to the local wastewater utility; or

(B) a dry-laid wastewater main is provided connecting the lots to a planned municipal wastewater main, with appropriate easements, and the local wastewater utility issues written approval of the design and installation of the main, and certifies that the dry-laid wastewater main, service lines, and related appurtenances may be connected to the municipal system when public wastewater mains are available. As-built plans for all dry-laid systems must be submitted to the reviewing authority and to the local wastewater utility.

(e) The reviewing authority may require lot sizes larger than those allowable under (1)(a) or may limit the wastewater flow for a lot if:

(i) wastewater flow exceeds 700 gallons per day per acre;

(ii) wastewater flow exceeds residential strength;

(iii) lots are used for a combination of residential and non-residential uses; or

(iv) if otherwise necessary to protect water quality. (History: 76-4-104, MCA; IMP, 76-4-104,

MCA; NEW, 2002 MAR p. 1465, Eff. 5/17/02; AMD, 2003 MAR p. 221, Eff. 2/14/03; AMD, 2003 MAR p. 1804, Eff. 8/15/03.)

Rules 17.36.341 through 17.36.344 reserved

17.36.345 ADOPTION BY REFERENCE (1) For purposes of this chapter, the department hereby adopts and incorporates by reference the following documents. All references to these documents in this chapter refer to the edition set out below:

- (a) Department Circular DEQ-1, "Standards for Water Works", 1999 edition;
- (b) Department Circular DEQ-2, "Design Standards for Wastewater Facilities", 1999 edition;
- (c) Department Circular DEQ-3, "Standards for Small Water Systems", 1999 edition;
- (d) Department Circular DEQ-4, "Montana Standards for Subsurface Wastewater Treatment Systems", 2004 edition;
- (e) Department Circular WQB-7, "Montana Numeric Water Quality Standards", 2001 edition;
- (f) Department Circular DEQ-8, "Montana Standards for Subdivision Storm Drainage", 2002 edition;
- (g) Department Circular DEQ-11, "Montana Standards for Development of Springs for Individual and Shared Non-public Systems", 2002 edition;
- (h) Department Circular DEQ-17, "Montana Standards for Cisterns (Water Storage Tanks) for Individual Non-public Systems", 2002 edition;
- (i) Department Circular PWS-5, "Ground Water Under the Direct Influence of Surface Water", 1999 edition;
- (j) Department Circular PWS-6, "Source Water Protection Delineation", 1999 edition; and
- (k) the U.S. Department of Agriculture's National Soil Survey Handbook (USDA, NRCS, September 1999), and the Soil Survey Manual (USDA, October 1993), which contain a recognized set of methods for identifying the nature and characteristics of soils.

(2) Copies of the documents incorporated by reference in this rule may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901. (History: 76-4-104, MCA; IMP, 76-4-104, MCA; NEW, 2000 MAR p. 3371, Eff. 12/8/00; AMD, 2002 MAR p. 1465, Eff. 5/17/02; AMD, 2003 MAR p. 221, Eff. 2/14/03; AMD, 2004 MAR p. 2589, Eff. 10/22/04.)

Subchapters 4 and 5 reserved

## **Subchapter 6**

### **Subdivision Waivers and Exclusions**

17.36.601 WAIVERS--DEVIATIONS (1) The department may grant a waiver from a requirement of this subchapter only if a waiver is specifically authorized for that requirement and the applicant demonstrates that the conditions in the specific waiver authorization and in (3) are met.

(2) The department may grant a deviation from a requirement of department circulars only if the applicant demonstrates to the department that all specific waiver conditions in the applicable circular and the conditions in (3) are met.

(3) A request for a waiver or deviation must be in writing and must be accompanied by information substantiating the request and by the appropriate fee. The applicant shall also demonstrate that the waiver or deviation:

- (a) would be unlikely to cause pollution of state water in violation of 75-5-605, MCA;
- (b) would protect the quality and potability of water for drinking water supplies and domestic uses and would protect the quality of water for other beneficial uses, including those uses specified in 76-

4-101, MCA; and

(c) would not adversely affect public health, safety, and welfare. (History: 76-4-104, MCA; IMP, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.602 SUBDIVISIONS IN MASTER PLANNED AREA (REPEALED) (History: 76-4-104, MCA; IMP, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; REP, 2002 MAR p. 1465, Eff. 5/17/02.)

Rules 17.36.603 and 17.36.604 reserved

17.36.605 EXCLUSIONS (1) The exclusions in this rule are in addition to the exclusions set out in 76-4-111 and 76-4-125(2), MCA.

(2) The reviewing authority may exclude the following parcels created by divisions of land from review under Title 76, chapter 4, part 1, MCA, unless the exclusion is used to evade the provisions of that part:

(a) a parcel that has no existing facilities for water supply, wastewater disposal, and solid waste disposal, if no new facilities will be constructed on the parcel;

(b) a parcel that has no existing facilities for water supply, wastewater disposal, or solid waste disposal other than those that were previously approved by the reviewing authority under Title 76, chapter 4, part 1, MCA, or that were exempt from such review, if:

(i) no new facilities will be constructed on the parcel; and

(ii) the division of land will not cause approved facilities to violate any conditions of approval, and will not cause exempt facilities to violate any conditions of exemption.

(History: 76-4-104, MCA; IMP, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.606 EXCLUSIONS--COMPLIANCE WITH PUBLIC WATER SUPPLY ACT (REPEALED) (History: 76-4-104, MCA; IMP, 76-4-125, MCA; Eff. 12/31/72; AMD, Eff. 11/4/73; AMD, Eff. 11/3/75; AMD, Eff. 5/6/76; AMD, 1977 MAR p. 746, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; TRANS, from DHES, 1996 MAR p. 1499; REP, 2002 MAR p. 1465, Eff. 5/17/02.)

Subchapter 7 reserved

## **Subchapter 8**

### **Subdivision Review Fees**

17.36.801 PURPOSE (1) The purpose of this subchapter is to establish a schedule of fees to be paid to the department for the local and state review of subdivision applications. The schedule consists of three sections relating to the collection of fees for the review of divisions of land, condominiums and areas providing permanent multiple space for recreational camping vehicles and mobile homes. The fees are based on the complexity of the subdivision, including the number of lots, the type of water system to serve the development, the type of wastewater disposal to serve the development, and the degree of

environmental research necessary to supplement the review procedure. (History: 76-4-105, MCA; IMP, 76-4-105, MCA; NEW, EMERG, Eff. 5/15/75; NEW, Eff. 9/5/75; AMD, Eff. 5/6/76; AMD, EMERG, 1977 MAR p. 536, Eff. 9/6/77; AMD, 1977 MAR p. 750, Eff. 10/25/77; TRANS, from DHES, 1996 MAR p. 1499; AMD, 1998 MAR p. 646, Eff. 3/13/98; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.802 FEE SCHEDULES (1) An applicant for approval of a division of land into one or more parcels, condominiums, mobile home/trailer courts, recreational camping vehicle spaces and tourist campgrounds shall pay the following fees:

	<u>UNIT</u>	<u>UNIT COST</u>
<u>TYPE OF LOTS</u>		
Subdivision lot	lot/parcel	\$75
Condominium/trailer court/ recreational camping vehicle campground	unit/space	\$30
Resubmittal fee – previously approved lot, boundaries are not changed	lot/parcel	\$50
<u>TYPE OF WATER SYSTEM</u>		
Individual or shared water supply system (existing and proposed)	unit	\$50
Multiple user system - new system	each	\$250 (plus \$50/hour for review in excess of five hours)
- connection to approved existing distribution system	lot/unit	\$ 15
- extension to existing distribution system	lot/unit	\$ 30
- new distribution system	lot/unit	\$ 30

	<u>UNIT</u>	<u>UNIT COST</u>
Public water system New system per DEQ-1	component	per ARM <u>17.38.106</u> fee schedule
- connection to existing system	lot/structure	\$ 15
- extension of existing system	lot/structure	\$ 30
- new distribution system	lot/structure	\$ 30
<b>TYPE OF WASTEWATER DISPOSAL</b>		
Existing systems	unit	\$ 50
New subsurface system	drainfield	\$ 60
New pressure-dosed, elevated sand mound, ET systems, intermittent sand filter, ETA systems, recirculating sand filter, recirculating trickling filter, aerobic treatment unit, and nutrient removal	design	\$150 (plus \$50/hour for review in excess of three hours)
Drainfields for pressured-dosed, intermittent sand filter, recirculating sand filter, recirculating trickling filter, aerobic treatment unit, and nutrient removal	drainfiled	\$30

Multiple user wastewater system	lot/unit	\$ 15
- connection	lot/unit	\$ 30
- extension	lot/unit	\$ 30
- new collection system		
New public wastewater system per DEQ-2	component	per ARM <u>17.38.106</u> fee schedule
- New connection to existing system	lot/structure	\$ 15
- New extension to existing public wastewater system	lot/structure	\$ 30
- New public wastewater collection system	<b><u>lot/structure</u></b>	\$ 30
<u>OTHER</u>		
- Deviation from circular	request or per design	\$100  (plus \$50/ hour for review in excess of two hours)
Waiver from rule	request	\$100 (plus \$50/hour for review in excess of two hours)

	<u>UNIT</u>	<u>UNIT COST</u>
Reissuance of original approval statement	request	\$ 50
Municipal facilities exemption checklist (former master plan exemption)	application	\$ 75
Nonsignificance determinations/ categorical exemption reviews - individual/shared systems - - multiple-user and public systems	drainfield - lot/structure	\$ 40 - \$ 20
Storm drainage plan review - - plans exempt from Circular DEQ-8 - - Circular DEQ-8 review	- - plan - plan	- - \$ 25 - \$ 50 (plus \$ 50/hour for review in excess of one hour)
Preparation of environmental assessments/environmental impact statements	----	actual cost

(History: 76-4-105, MCA; IMP, 76-4-105, 76-4-128, MCA; NEW, EMERG, Eff. 5/15/75; NEW, Eff. 9/5/75; AMD, Eff. 5/6/76; AMD, EMERG, 1977 MAR p. 536, Eff. 9/6/77; AMD, 1977 MAR p. 750, Eff. 10/25/77; AMD, 1980 MAR p. 2967, Eff. 11/29/80; AMD, 1981 MAR p. 1288, Eff. 10/30/81; AMD, 1983 MAR p. 851, Eff. 7/15/83; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; AMD, 1993 MAR p. 542, Eff. 4/16/93; TRANS, from DHES, 1996 MAR p. 1499; AMD, 1998 MAR p. 646, Eff. 3/13/98; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

Rule 17.36.803 reserved

17.36.804 DISPOSITION OF FEES (1) The department shall use the fees collected pursuant to ARM 17.36.802 to fund the following functions:

- (a) review performed pursuant to subchapter 1 to determine whether:
  - (i) the application complies with subchapter 3;
  - (ii) to grant a waiver or deviation pursuant to ARM 17.36.601; or
  - (iii) the proposed subdivision is excluded from review pursuant to ARM 17.36.605;
- (b) review performed pursuant to ARM 17.30.706 to determine whether significant degradation will occur;
- (c) review performed pursuant to ARM 17.30.707, 17.30.708, 17.30.715, or 17.30.716, regarding nondegradation;
- (d) preparation of an environmental assessment pursuant to ARM 17.4.609 and 17.4.610, including costs of gathering data and information, analysis, printing, distribution, and hearing costs;
- (e) preparation of an environmental impact statement pursuant to ARM 17.4.615 through 17.4.629, including costs of analysis, printing, distribution, and hearing costs, and excluding the costs of information and data gathering which are subject to fee assessment pursuant to 75-1-202, MCA;
- (f) reimbursement of local government entities as provided in (2) and (3) of this rule; and
- (g) conducting inspections and enforcement activities pursuant to 76-4-107 and 76-4-108, MCA.

(2) The department shall reimburse local governing bodies under department contract to review subdivisions as follows:

- (a) For subdivisions with individual wastewater treatment systems, the department shall reimburse \$25 per lot plus 80% of the review fee under ARM 17.36.802 for each review of water and wastewater systems and nonsignificance determinations and categorical exemptions performed by the local governing body.

(3) The department may reimburse counties that have not been delegated review authority but that perform review services including, but not limited to, inspection of proposed and approved facilities and assistance to persons in the application procedure as follows:

- (a) \$25 per parcel for subdivisions with individual or shared wastewater treatment systems. A site evaluation must accompany the submittal.

(4) Funds must be reimbursed to the local governing bodies quarterly, based upon the fiscal year starting on July 1 and ending on June 30 of each year. (History: 76-4-105, MCA; IMP, 76-4-105, 76-4-128, MCA; NEW, EMERG, Eff. 5/15/75; NEW, Eff. 9/5/75; AMD, Eff. 5/6/76; AMD, EMERG, 1977 MAR p. 536, Eff. 9/6/77; AMD, 1977 MAR p. 750, Eff. 10/25/77; AMD, 1980 MAR p. 2967, Eff. 11/29/80; AMD, 1981 MAR p. 1288, Eff. 10/30/81; AMD, 1984 MAR p. 1027, Eff. 7/13/84; AMD, 1992 MAR p. 2145, Eff. 9/25/92; TRANS, from DHES, 1996 MAR p. 1499; AMD, 1998 MAR p. 646, Eff. 3/13/98; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

17.36.805 CHANGES IN SUBDIVISION (1) If, during the review process, or after approval, an applicant proposes to change the water supply system, wastewater treatment system, storm water drainage plan, or solid waste disposal plan of a subdivision or if such changes are necessitated by a department determination that proposed plans are inadequate, such changes must be submitted to the

reviewing authority for review and are subject to the resubmittal review fee and fees for the components proposed for change as listed in ARM 17.36.802.

(2) Other changes for plan components not listed in ARM 17.36.802 are also subject to additional review fees. The department shall determine the exact amount of the additional fee based on how much review time the change(s) require. Review time must be charged at the rate of \$50 per hour with a minimum charge of \$50. (History: 76-4-105, MCA; IMP, 76-4-105, MCA; NEW, EMERG, Eff. 5/15/75; NEW, Eff. 9/5/75; AMD, Eff. 5/6/76; AMD, EMERG, 1977 MAR p. 536, Eff. 9/6/77; AMD, 1977 MAR p. 750, Eff. 10/25/77; AMD, 1984 MAR p. 1027, Eff. 7/13/84; TRANS, from DHES, 1996 MAR p. 1499; AMD, 1998 MAR p. 646, Eff. 3/13/98; AMD, 2002 MAR p. 1465, Eff. 5/17/02.)

## **THE MONTANA CORNER RECORDATION ACT**

## TITLE 70. PROPERTY

### CHAPTER 22. CORNER RECORDATION ACT SURVEYS AND COORDINATES

- 70-22-101. Short title.
- 70-22-102. Purpose.
- 70-22-103. Definitions.
- 70-22-104. Filing of corner record required.
- 70-22-105. Filing permitted as to any corner or accessory.
- 70-22-106. Filing of records on corners established before effective date.
- 70-22-107. Form and contents of record -- board to prescribe.
- 70-22-108. Corner records to be certified.
  
- 70-22-201. Coordinate systems adopted -- designation -- division of state into zones.
- 70-22-202. Designation of system by zone.
- 70-22-203. Use of x- and y-coordinates.
- 70-22-204. Description of location.
- 70-22-205. Technical description of zones.
- 70-22-206. Conformity to standards required for use of coordinates in recorded instrument.
- 70-22-207. Use of term Montana coordinate system limited.
- 70-22-208. Public land survey description to prevail.
- 70-22-209. Purchaser or mortgagee not required to rely on description using systems.
- 70-22-210. Limit on use of Montana coordinate system NAD 27.

#### Part 1. Corner Recordation Act

**70-22-101. Short title.** This part may be cited as the "Corner Recordation Act of Montana".  
**History:** En. Sec. 1, Ch. 202, L. 1963; R.C.M. 1947, 67-2001.

**70-22-102. Purpose.** It is the purpose of this part to protect and perpetuate public land survey corners and information concerning the location of such corners by requiring the systematic establishment of monuments and recording of information concerning the marking of the location of such public land survey corners and to allow the systematic location of other property corners thereby providing for property security and a coherent system of property location and identification of ownerships and thereby eliminating the repeated necessity for reestablishment and relocations of such corners where once they are established and located.

**History:** En. Sec. 2, Ch. 202, L. 1963; R.C.M. 1947, 67-2002.

**70-22-103. Definitions.** Except when the context indicates a different meaning, terms used in this part must be defined as follows:

(1) An "accessory to a corner" means any exclusively identifiable physical object whose spatial relationship to the corner is recorded. Accessories may be bearing trees, bearing objects, monuments, reference monuments, line trees, pits, mounds, charcoal-filled bottles, steel or wooden stakes, or other objects.

(2) The "board" means the board of professional engineers and professional land surveyors provided for in 2-15-1763.

(3) A "corner", unless otherwise qualified, means a property corner or a property controlling corner or a public land survey corner or any combination of these.

(4) A "monument" means an accessory that is presumed to occupy the exact position of a corner.

(5) A "property controlling corner" for a property means a public land survey corner or any property corner that does not lie on a property line of the property in question but that controls the location of one or more of the property corners of the property in question.

(6) A "property corner" means a geographic point on the surface of the earth and is on, is a part of, and controls a property line.

(7) A "public land survey corner" means any corner actually established and monumented in an original survey or resurvey used as a basis of legal description for issuing a patent for the land to a private person from the United States government.

(8) A "reference monument" means a special monument that does not occupy the same geographical position as the corner itself but whose spatial relationship to the corner is recorded and that serves to witness the corner.

(9) A "surveyor" means a person who is licensed to practice land surveying under Title 37, chapter 67, and has a paid-up license for that calendar year or who is authorized under Title 37, chapter 67, to practice land surveying.

**History:** En. Sec. 3, Ch. 202, L. 1963; amd. Sec. 320, Ch. 350, L. 1974; R.C.M. 1947, 67-2003; amd. Sec. 3, Ch. 274, L. 1981; amd. Sec. 73, Ch. 83, L. 1989; amd. Sec. 74, Ch. 492, L. 2001.

**70-22-104. Filing of corner record required.** A surveyor shall complete, sign, stamp with his seal, and file with the county clerk and recorder of the county where the corner is situated a written record of corner establishment or restoration to be known as a "corner record" for every public land survey corner and accessory to such corner which is established, reestablished, monumented, remonumented, restored, rehabilitated, perpetuated, or used as control in any survey by such surveyor and within 90 days thereafter unless the corner and its accessories are substantially as described in an existing corner record filed in accordance with the provisions of this part.

**History:** En. Sec. 4, Ch. 202, L. 1963; R.C.M. 1947, 67-2004.

**70-22-105. Filing permitted as to any corner or accessory.** (1) A surveyor may file a corner record to any property corner, property controlling corner, reference monument, or accessory to a corner.

(2) The filing of a properly completed corner record, documenting survey data used to determine the position of the corner, may be filed in lieu of filing a certificate of survey, as provided in 76-3-404, for the following listed corners:

- (a) a single, previously filed or recorded property corner;
- (b) a property controlling corner;
- (c) a reference monument; or
- (d) an accessory to a corner.

**History:** En. Sec. 5, Ch. 202, L. 1963; R.C.M. 1947, 67-2005; amd. Sec. 1, Ch. 549, L. 2003.

**70-22-106. Filing of records on corners established before effective date.** Corner records may be filed concerning corners established, reestablished, or restored before July 1, 1963.

**History:** En. Sec. 10, Ch. 202, L. 1963; R.C.M. 1947, 67-2010.

**70-22-107. Form and contents of record -- board to prescribe.** The board shall by regulation provide and prescribe the information which shall be necessary to be included in the corner record, and the board shall prescribe the form in which such corner record shall be presented and filed.

**History:** En. Sec. 6, Ch. 202, L. 1963; R.C.M. 1947, 67-2006.

**70-22-108. Corner records to be certified.** No corner record shall be filed unless the same is signed by a registered surveyor and stamped with his seal, or in the case of an agency of the United States government or the state of Montana, the certificate may be signed by the survey party chief making the survey and approved, signed, and sealed by the registered surveyor in responsible charge of the agency.

**History:** En. Sec. 9, Ch. 202, L. 1963; R.C.M. 1947, 67-2009.

**70-22-109. Duties of county clerk.** (1) The county clerk and recorder of the county containing the corner must receive the completed corner record and preserve it in a hardbound book. The books must be numbered in numerical order as filled.

(2) The clerk shall number the forms in numerical order as they are filed.

(3) The book and page number in which the corner record is filed must be placed by the clerk near that same corner on a cross-index plat for public land corners or on an index referenced to tract or lot number in a survey of record. The clerk shall provide an index for that purpose.

(4) The county clerk and recorder shall make these records available for public inspection during all usual office hours.

(5) There is no filing fee.

**History:** En. Sec. 7, Ch. 202, L. 1963; R.C.M. 1947, 67-2007; amd. Sec. 1, Ch. 143, L. 1981; amd. Sec. 2, Ch. 549, L. 2003.

**70-22-110. Surveyor to rehabilitate monument.** In every case where a corner record of a public land survey corner is required to be filed under the provisions of this part, the surveyor must reconstruct or rehabilitate the monument of such corner and accessories to such corner so that the same shall be left by him in such physical condition that it remains as permanent a monument as is reasonably possible and so that the same may be reasonably expected to be located with facility at all times in the future.

**History:** En. Sec. 8, Ch. 202, L. 1963; R.C.M. 1947, 67-2008.

**70-22-201. Coordinate systems adopted -- designation -- division of state into zones.** (1) The North American datum systems of plane coordinates that have been established by the national ocean survey/national geodetic survey (formerly the United States coast and geodetic survey) or a successor for defining and stating the positions or locations of points on the surface of the earth within the state of Montana are hereafter to be known and designated as the "Montana coordinate system NAD 27" and the "Montana coordinate system NAD 83".

(2) For the purpose of the use of the Montana coordinate system NAD 27, the state is divided into a north zone and a central zone and a south zone as provided in subsections (3) through (5).

(3) The area now included in the following counties shall constitute the north zone: Blaine, Chouteau, Daniels, Flathead, Glacier, Hill, Liberty, Lincoln, Phillips, Pondera, Roosevelt, Sheridan, Teton, Toole, and Valley.

(4) The area now included in the following counties shall constitute the central zone: Cascade, Dawson, Fergus, Garfield, Judith Basin, Lake, Lewis and Clark, McCone, Meagher, Mineral, Missoula, Petroleum, Powell, Prairie, Richland, Sanders, and Wibaux.

(5) The area now included in the following counties shall constitute the south zone: Beaverhead, Big Horn, Broadwater, Carbon, Carter, Custer, Deer Lodge, Fallon, Gallatin, Golden Valley, Granite,

Jefferson, Madison, Musselshell, Park, Powder River, Ravalli, Rosebud, Silver Bow, Stillwater, Sweet Grass, Treasure, Wheatland, and Yellowstone.

(6) For the purpose of the use of the Montana coordinate system NAD 83, the state is a single zone.

**History:** En. Sec. 1, Ch. 232, L. 1965; amd. Sec. 1, Ch. 73, L. 1975; R.C.M. 1947, 67-2011; amd. Sec. 1, Ch. 137, L. 1987.

**70-22-202. Designation of system by zone.** (1) As established for use in the north zone, the Montana coordinate system NAD 27 shall be named and in any land description in which it is used it shall be designated the "Montana coordinate system NAD 27, north zone".

(2) As established for use in the central zone, the Montana coordinate system NAD 27 shall be named and in any land description in which it is used it shall be designated the "Montana coordinate system NAD 27, central zone".

(3) As established for use in the south zone, the Montana coordinate system NAD 27 shall be named and in any land description in which it is used it shall be designated the "Montana coordinate system NAD 27, south zone".

**History:** En. Sec. 2, Ch. 232, L. 1965; R.C.M. 1947, 67-2012; amd. Sec. 2, Ch. 137, L. 1987.

**70-22-203. Use of x- and y-coordinates.** (1) For the Montana coordinate system NAD 27, the plane coordinate values for a point on the earth's surface used to express the geographic position or location of such point in the appropriate zone of this system shall consist of two distances expressed in terms of a United States survey foot and decimals of a foot.

(2) For the Montana coordinate system NAD 83, the plane coordinate values for a point on the earth's surface used to express the geographic position or location of such point in the zone shall consist of two distances expressed in either meters and decimals of a meter or in feet and decimals of a foot. The international conversion value (1 foot equals 0.3048 meters exactly) shall be used. The unit of measure shall be clearly stated when the coordinate values are expressed.

(3) One of the distances used to express a position or location, to be known as the "x-coordinate", shall give the position in an east-and-west direction; the other, to be known as the "y-coordinate", shall give the position in a north-and-south direction. These coordinates shall be made to depend upon and conform to plane rectangular coordinate values for the monumented points of the North American horizontal geodetic control network as published by the national ocean survey/national geodetic survey or its successors and whose plane coordinates have been computed on the systems designated by this part. Any such station may be used for establishing a survey connection to either Montana coordinate system.

**History:** En. Sec. 3, Ch. 232, L. 1965; R.C.M. 1947, 67-2013; amd. Sec. 3, Ch. 137, L. 1987.

**70-22-204. Description of location.** (1) For the purposes of describing the location of any survey station in Montana, it is considered a complete, legal, and satisfactory description of such location to give the position of the survey station on the system of plane coordinates designated in this part.

(2) When any tract of land to be defined by a single description extends from one into another of the NAD 27 coordinate zones, the positions of all points on its boundaries may be referred to either of such zones, the zone which is used being specifically named in the description.

**History:** En. Sec. 4, Ch. 232, L. 1965; R.C.M. 1947, 67-2014; amd. Sec. 4, Ch. 137, L. 1987.

**70-22-205. Technical description of zones.** For purposes of more precisely defining the Montana coordinate systems NAD 27 and NAD 83, the following description by the national ocean survey/national geodetic survey (formerly the United States coast and geodetic survey) is adopted:

(1) The Montana coordinate system NAD 27, north zone, is a Lambert conformal projection of the Clarke spheroid of 1866, having standard parallels at north latitudes 47° 51' and 48° 43', along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 109° 30' west of Greenwich and the parallel 47° 00' north latitude. This origin is given the coordinates: x = 2,000,000 feet and y = 0 feet.

(2) The Montana coordinate system NAD 27, central zone, is a Lambert conformal projection of the Clarke spheroid of 1866, having standard parallels at north latitudes 46° 27' and 47° 53', along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 109° 30' west of Greenwich and the parallel 45° 50' north latitude. This origin is given the coordinates: x = 2,000,000 feet and y = 0 feet.

(3) The Montana coordinate system NAD 27, south zone, is a Lambert conformal projection of the Clarke spheroid of 1866, having standard parallels at north latitudes 44° 52' and 46° 24', along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 109° 30' west of Greenwich and the parallel 44° 00' north latitude. This origin is given the coordinates: x = 2,000,000 feet and y = 0 feet.

(4) The Montana coordinate system NAD 83 is a Lambert conformal conic projection of the GRS 80 (Geodetic Reference System 1980) ellipsoid, having standard parallels of north latitudes 45° 00' and 49° 00', along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 109° 30' west of Greenwich and the parallel 44° 15' north latitude. This origin is given the coordinates: x = 600,000 meters and y = 0 meters.

**History:** En. Sec. 5, Ch. 232, L. 1965; amd. Sec. 2, Ch. 73, L. 1975; R.C.M. 1947, 67-2015; amd. Sec. 5, Ch. 137, L. 1987.

**70-22-206. Conformity to standards required for use of coordinates in recorded instrument.** Coordinates based on the Montana coordinate system NAD 83 purporting to define the position of a point on a land boundary may not be presented to be recorded in any public land records or deed records unless the coordinates have been tied to or originated from monumented first-order or higher accuracy horizontal control points that are adjusted to and published as part of the national spatial reference system. Public land or deed records presented for recording that purport to define the position of a point on a land boundary based on coordinates from the Montana coordinate system NAD 83 must contain a statement that identifies the first-order or higher accuracy control stations used in the survey, the specific NAD 83 datum adjustment tag of the coordinates used, and the type of equipment and methods used to perform the survey.

**History:** En. Sec. 6, Ch. 232, L. 1965; R.C.M. 1947, 67-2016; amd. Sec. 6, Ch. 137, L. 1987; amd. Sec. 1, Ch. 494, L. 2001.

**70-22-207. Use of term Montana coordinate system limited.** The use of the term "Montana coordinate system NAD 27 north, central, or south zone" or "Montana coordinate system NAD 83" on any map, report of survey, or other document shall be limited to coordinates based on the Montana coordinate systems as defined in this part.

**History:** En. Sec. 7, Ch. 232, L. 1965; R.C.M. 1947, 67-2017; amd. Sec. 7, Ch. 137, L. 1987.

**70-22-208. Public land survey description to prevail.** Whenever coordinates based on the Montana coordinate system are used to describe any tract of land which in the same document is also described by reference to any subdivision, line, or corner of the United States public land surveys, the description by coordinates shall be construed as supplemental to the basic description of such subdivision, line, or corner contained in the official plats and field notes filed of record.

**History:** En. Sec. 8, Ch. 232, L. 1965; R.C.M. 1947, 67-2018; amd. Sec. 8, Ch. 137, L. 1987.

**70-22-209. Purchaser or mortgagee not required to rely on description using systems.**

Nothing contained in this part shall require any purchaser or mortgagee to rely on a description, any part of which depends exclusively upon the Montana coordinate systems.

**History:** En. Sec. 9, Ch. 232, L. 1965; R.C.M. 1947, 67-2019; amd. Sec. 9, Ch. 137, L. 1987.

**70-22-210. Limit on use of Montana coordinate system NAD 27.** The Montana coordinate system NAD 27 north, central, and south zone may not be used after July 1, 1993; the Montana coordinate system NAD 83 is the sole system to be used after this date.

**History:** En. Sec. 10, Ch. 137, L. 1987.

**MONTANA DEPARTMENT OF LABOR AND INDUSTRY  
ADMINISTRATIVE RULES FOR THE  
CORNER RECORDATION ACT  
FORM OF CORNER RECORDS  
(ARM 24.183.1001)**

24.183.1001 FORM OF CORNER RECORDS - INFORMATION TO BE INCLUDED (1)

The form for recordation of corners pursuant to the Corner Recordation Act of Montana (Title 70, chapter 22, part 1, MCA) has been approved by the board of professional engineers and land surveyors. The approved version of the form for public land survey system was adopted by the board on July 1, 1981, and the approved version of the form for filing under the survey of record index was adopted on February 20, 2004. Blank corner record forms can be obtained from the Montana Association of Registered Land Surveyors, P.O. Box 359, Columbia Falls, Montana 59912, by contacting the association directly at (406) 892-4579, or on the internet at [www.marls.com](http://www.marls.com).

(2) The information to be included in a corner record is as follows:

(a) A description or quotation of those portions of the original or subsequent record which were used in evaluating the corner position.

(i) The original record for corners of government surveys will usually be the general land office field notes.

(ii) The original record for non government surveys will usually be subdivision plats, certificates of survey or other surveys of record.

(iii) Subsequent record can come from sources such as previously filed corner records, maps and plats, private and public records, etc. Some of the subsequent record, even though not in the public record, but known to have validity by the surveyor, may be quoted and appropriately noted. The record data help support the reestablished corner position because they clearly show on what history the surveyor based the corner position. In some cases, however, the record may be unknown or not pertinent. A statement to that effect, if applicable, must appear on the corner record.

(b) A description of the original or subsequent record evidence found that locates the corner position.

(i) If portions of the found evidence cannot be reconciled with the record, then the disregarded record must be noted, and if possible, an opinion as to its cause narrated.

(ii) If no physical evidence of the original or subsequent monuments and accessories can be found, then the method used to reestablish the lost or obliterated corner (single proportion, fence intersection, parcel evidence, terrain calls, centerline of road, etc.) shall be indicated.

(iii) Measurements used to establish proportioned positions must be shown on the corner recordation form or on a filed certificate of survey or subdivision plat referenced on the recordation form.

(c) A listing of all details about the corner and its location which will help exclusively identify the corner position, including size and type of monument and accessory, how marked if not shown in sketch, and distinguishing topographic calls which help locate the corner. In many cases, instructions on how to find the corner should be included.

(i) For public land survey system corners requiring recordation, sufficient information must be shown on the form to enable subsequent surveyors to verify the corner position identified on the form, and to reestablish the corner position if the monument is obliterated. Ideally, the references will be to at least two identifiable accessories or surveyed dimensions to two survey monuments.

(ii) References or ties to other corners are optional and may be drawn on the face or back of the corner record form, or references to certificate of survey may be made. Separate drawings may be attached to the corner form. If state plane coordinate values for the corner position are shown, then the control upon which they are based should be indicated.

(d) A sketch of the corner to show how a found or set corner is marked or show topography or accessory monuments found or set and their relation to the corner. There is no stipulated format; the sketch could be transcribed field note entries. For corners which were first shown on subdivision plats or on recorded or filed surveys, enough information must be shown so that the corner can be identified.

(e) The surveyor who performed or directed the field work which is depicted on the corner record shall sign and affix the licensee's seal in the certification.

(i) The affixing of the licensee's seal constitutes a certification by the surveyor that the corner record has been prepared in conformance with the Corner Recordation Act of Montana and the rules implementing the Act.

(ii) The employer blank is optional but useful in tracking down original field note data or adjacent record if, in the future, questions arise about the corner. The name and signature of the ground party chief is also optional information on the record form.

(f) For public land survey system corners, the cross index at the bottom of the page must be completed by the surveyor. Only the single township and range index where the corner is filed is to be completed.

(i) For corner records to be filed under the survey of record index, the index information must be filled in as completely as possible by the surveyor and made clear the name and number(s) of the recorded survey and the lot or parcel designation. The corner location diagram must have the pertinent section number filled in and a closed circle indicating the appropriate corner position in the section. This is intended to be an aid in searching the record once it has been filed. (History: 37-67-202, 70-22-107, MCA; IMP, 70-22-107, MCA; NEW, 1983 MAR p. 645, Eff. 6/17/83; AMD, 2002 MAR p. 1326, Eff. 4/26/02; TRANS, from Commerce, 2002 MAR p. 1756; AMD, 2005 MAR p. 1783, Eff. 9/23/05.)

## **OTHER SURVEYING LAWS**

### OTHER SURVEYING LAWS

In addition to the Montana Subdivision and Platting Act, several other statutes require that certain parcels of land be surveyed. The following are code references to these laws and to the administrative rules adopted pursuant to them. The Montana Code Annotated and the specific administrative rules should be consulted for the full text of these requirements. Please be aware that there may be other laws, not included in this publication, that require surveying of parcels.

<u>Description</u>	<u>State Statute Reference</u>	<u>Administrative Rule Reference</u>
Acquisition of land by cemetery association	35-20-212, MCA	None
Mapping of coal mines	50-73-201, <u>et seq.</u> , MCA	None
Leasing of cabin sites on State land	77-1-208, MCA	_____
Sales of state land	77-2-301 <u>et seq.</u> , MCA	None
Notice of intention to drill Or conduct seismic operation	82-11-122, MCA	DNRC, ARM 36.22.302 and 36.22.602