

Zoning and the Public Process



What We'll Cover

- Types of Zoning
- The Zoning Administrator
- The Zoning Commission
- Conditional Use Permits
- Zoning Variances
- Public Participation & MT's Open Meeting Law
- Public Notice & Public Comment
- Findings of Fact
- Due Process
- Conflict of Interest & Ex Parte Communication

Introduction - Types of Zoning

- Euclidean or Conventional Zoning
 - Traditional, use-based zoning (most common in MT)
- Performance Zoning
 - Intensity of use and mitigation (ex: Lake Co. density zoning)
- Form-Based Codes
 - Focused on the form development takes, not necessarily use
- Hybrid Zoning Code
 - Combines Euclidean and form-based codes

The Basics

County Zoning

- Title 76. Ch. 2, Parts 1 & 2
- Part 1 – Planning & Zoning Commission
 - ▣ Establishment of a district **requires** 7 member planning & zoning commission.
- Part 2 – County Zoning:
 - ▣ Commissioners **must** appoint planning board to make recommendations; **may** establish a zoning commission for district amendments.

Municipal Zoning

- Title 76, Ch. 2, Part 3 MCA
- **Must** appoint zoning commission to recommend zoning boundaries and regulations to the City Council;
- City Council ultimately renders a decision on the proposed zoning regulation after at least one public hearing.
- Alterations/amendments – process can be very complicated.

The Basics

County Zoning – Part 1

- Upon petition of 60% of more of property owners in proposed district
- County Commission must appoint Planning and Zoning Commission to adopt district boundaries and regulations
- P&Z Commission consists of Commissioners, surveyor or C&R, and two citizens
- P&Z may adopt or amend districts or regulations after public hearing.
- Proposed district may be protested by 50% of titled property ownership in the district
- Does not require growth policy

County Zoning – Part 2

- Initiated by County Commissioners
- Requires County or City-County Planning Board to recommend zoning district boundaries and regulations
- Adoption and amendments must meet the “Lowe” criteria (7-2-203, MCA)
- Must be in conformance with adopted growth policy
- County Commission may adopt or amend districts or regulations after public hearing
- Protest? *Williams* case

The Essentials – The Zoning Administrator

- Staff in support of the zoning commission & advisory committee
- Receives applications for zoning districts & amendments, conditional use permits and variance requests;
- Reviews applications and plans, issues zoning permits and coordinates inspection of properties.
- Enforces the ordinance; provides guidance and interpretation.
- Advises the Zoning Commission (and advisory committees, as applicable) on matters relating to ordinance.
- Prepares staff reports and recommendations as required.
- Prepares and maintains records of all proceedings.

The Essentials – The Zoning Commission

- Per statute, county planning and zoning commission is empowered to make and adopt a development pattern for the physical and economic development of the planning and zoning district;
- Commission has such powers as shall be “appropriate to enable it to fulfill its functions and duties to promote county planning and to carry out the purposes of this part.”
- Generally, review of conditional use permits, variances, amendments to zoning district.

The Essentials – Conditional Use Permits

- Conditional uses are those uses not permitted “as a matter of right” but those which may be appropriate in a zoning district under certain safeguards or conditions.
- Can provide relief from strict requirements of the ordinance.
- CUP process is intended to provide a detailed review of a proposed development that could have adverse impacts on the community or neighborhood.
- In a residential district examples of conditional uses could include:
 - Bed & Breakfast
 - Professional office space (i.e. law, medical)
 - Neighborhood grocery store

The Essentials – Variances

- Provide relief to those who have property that has unusual characteristics that make strict compliance virtually impossible.

- Meant to allow deviations from physical standards such as:
 - Property setbacks
 - Lot coverage
 - Lot size and dimensional requirements
 - Building height & width

The Essentials – Variances

- Not meant to permit uses restricted by the zoning!!
- The “generous” granting of variances, especially use variances, can seriously undermine the purpose and integrity of an ordinance.
- Frequent granting of variances may indicate:
 - ▣ Need to re-evaluate ordinance;
 - ▣ Need to re-evaluate process, review criteria, need;
 - ▣ Amend the ordinance to either permit the use “By Right” or as a potential CUP.

The Essentials – Variances

- Common (& recommended) to prohibit the granting of variances that would allow uses that are not authorized in a district.
 - Make sure this is clearly spelled out in the ordinance.
- Approval of a variance can be “conditioned” to ensure mitigation of any issues identified.

The Essentials – Establishing Hardship

- "Hardship" refers to circumstances peculiar to the particular property.
- To grant a variance, the Zoning Commission must find that an "unnecessary hardship" would otherwise occur with respect to a particular property:
 - Shape, size, topography or configuration.

The Essentials – Establishing Hardship

- Courts have found that financial or economic difficulties by the property owner are not "unnecessary hardships".
- The granting of a variance should not result in de facto rezoning (i.e. variances to use).
 - Under statute, this should be addressed by Zoning Commission through an amendment process.

Public Participation

- Montana Constitution
 - Article II, Section 8. Right of Participation.
 - Article II, Section 9. Right to Know

- Montana Open Meeting Law §§ 2-3-201, *et seq.*, MCA

- Montana Public Participation in Governmental Operations Act §§ 2-3-101, *et seq.*, MCA

- Montana Public Records Act §§ 2-6-101, *et seq.*, MCA

Montana Constitution

- Article II, Section 8. **Right of Participation.** The public has the right to expect government agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.
- Article II, Section 9. **Right to Know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of the state government and its subdivisions, except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure.

Montana Open Meeting Law

§§ 2-3-201, et seq., MCA

- “It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.” (§ 2-3-201, MCA.)
- “Meeting” is defined as the convening of a *quorum* of the constituent membership of a *public agency or association* described in 2-3-203, whether corporal or *by means of electronic equipment*, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power. (§ 2-3-202, MCA.)

Open Meeting Law, cont.

- Public agency is any public or governmental body, board, bureau, commission, agency of the state, or any agency supported in whole or in part by public funds or expending public funds. (§ 2-3-203(1), MCA.)
- Montana Attorney General has held that the Constitution requires “that any meeting [of a public agency] be open to the public, whether the matter being considered involves large issues of policy or the smallest ministerial act.” (47 Op. Att’y Gen. No. 13 (1998).)
- Any decision made in violation of open meeting laws may be **declared void** by the court, and any plaintiff who prevails in an action brought to enforce the plaintiff's rights under constitutional right to know may be awarded **costs and reasonable attorney fees**.

Montana Public Participation in Governmental Operations Act

§§ 2-3-101, et seq., MCA

- Requires public agencies to develop guidelines to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to the final decision of the agency. (§§ 2-3-101 and 2-3-111, MCA.)
- The agency may not take action on any matter discussed that is of *significant interest to the public* unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. (§ 2-3-103(1)(a), MCA.)

Public Participation Act, cont.

- No explicit notice requirements - must give reasonable notice on actions that are of “significant interest to the public”
- “*Significant interest to the public*” not defined in Open Meeting Law or Montana Constitution. Montana Attorney General opinion from 1998 provides guidance (47 Op. Att’y Gen. No. 13)
- Because statute is implementing Constitutional mandates, any doubt as to whether an action is of “significant interest to the public” should be resolved in favor of increased public participation.

Public Participation Act, cont.

- Any non-ministerial decision or action that has meaning to, or affects a portion of the public, requires notice and the opportunity to participate.

- Exceptions (no or modified notice sufficient):
 - (1) an agency decision made to deal with an **emergency situation** affecting public health, welfare, or safety;
 - (2) an agency decision made to **maintain or protect the interests of the agency** (filing a lawsuit or becoming a party to an administrative proceeding);
 - (3) purely **ministerial decisions** (no discretion involved).

- Any decision made in violation of public participation laws may be **set aside** by the court.

Basic Requirements – Open Meetings

- Hold regular meetings with notice to public. Bylaws should address procedure for calling special meetings.
- All meetings must be open to the public! Meet in place accessible to the public.
- Exceptions:
 - When discussion relates to a matter of **individual privacy** and then if and only if the presiding officer **determines that the demands of individual privacy clearly exceed the merits of public disclosure**. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.
 - To discuss a strategy to be followed with respect to **litigation** when an open meeting would have a detrimental effect on the litigating position of the public agency (does not apply when both parties to litigation are public agencies)

Open Meetings, cont.

- Applies to any committee appointed by a public body for conducting that agency's business if a **quorum of the constituent membership of the public body is present**
- Must keep minutes and make available for public inspection; minutes must be approved by the body.
- Meetings occur **anytime a quorum is present**, whether agency or a committee is just discussing or taking action. This can be by full meeting; by teleconference; by electronic means.

Open Meetings, cont.

- Things to remember:
 - Keep the “door” open;
 - Call from a landline, in an place that can be accessible to the public (not a cell phone in a car);
 - Do not “Reply to all” in an email - this can easily constitute an open public meeting in violation of the statute – even if just discussing and not taking an action it constitutes a meeting of a quorum that must be open to the public.

Basic Requirements - Notice

- Publication (notice of time and place of hearing, agenda) must occur reasonable period before the meeting
- New items should not be added to the agenda but carried over to the next regularly scheduled meeting, or special meeting with two days posted public notice.
- Public should have opportunity to obtain information related to every agenda item when notice is published (decision-makers and public should be on equal footing with respect to participation in the decision).
- Consent agendas should be treated as part of regular agenda with respect to notice and open meetings; however there is no expectation of board discussion or public comment – items should not be of significant interest to the public and no discussion or comment may take place.

Basic Requirements – Public Comment

- Provide opportunity for public comment on each agenda item.
- Some agencies limit comment period allowed each speaker, but no court decision on if these limitations are legal.
- Public must be given opportunity to comment on items that are not on the agenda – usually at beginning or end of meeting.

Montana Public Records Act

§§ 2-6-101, et seq., MCA

- What is a public record? Defined by statute as “public writings”:
 - (1) “written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, ... except records that are constitutionally protected from disclosure;
 - (2) public records of private writings, including electronic mail, except for library records, burial site records, and records that are constitutionally protected from disclosure.

- Public has a right to inspect and take a copy of any public record of the state, and every public officer having the custody of a public record is bound to give the citizen on demand a certified copy of it.

Findings of Fact

- "Substance" of a staff report on a proposed land-use change....subdivision application, variance request, zoning amendment etc.
- Information where the planner analyzes the application, supplemental reports and analysis, and comments from agencies.
- Staff uses the information to assess and outline the proposal's compliance with the local regulations and design standards.

Findings, cont.

- Based upon this analysis, staff may make suggestions for changes to the proposal or even recommend denial.
- Ultimately, the governing body must review and approve such findings.
- REMEMBER GENERAL RULE – the evidence must support the findings AND the findings must support the decision

Procedural Due Process

- Idea that laws and legal proceedings must be fair.
- Individuals appearing before a governing body are entitled to receive due process of law
- United States and Montana Constitutions guarantee that the government cannot take away a person's basic rights to use their property, without due process of law.

Elements of Procedural Due Process

- Process must be fundamentally fair

- Adequate notice must be provided to all parties
 - ▣ Statutory and local requirements followed

- Level of formality in hearing
 - ▣ Hearings must follow established processes
 - ▣ All persons have an opportunity to be “heard”

Elements of Procedural Due Process

- Providing findings on application or request
 - ▣ Relate to evidence presented
 - ▣ Relate to existing criteria (subdivision or zoning regulations)
 - ▣ Findings provide for a measure of protection from litigation

- Impartial decision makers
 - ▣ Ex parte
 - ▣ Conflicts of interest
 - ▣ Gifts

- Level of due process depends upon whether the action is legislative or quasi judicial

Legislative v. Quasi-Judicial Decisions

Legislative Decisions

- Establish generally applicable rules, policies, or standards.
- Examples: Adoption of a growth policy, subdivision regulations, and zoning regulations.
- During a legislative decision-making process, members of the governing body can be “lobbied” by individuals or groups who have an interest in the adoption of the regulations - not considered “*ex parte*” communication
- Greater judicial deference to the process and the decision

Legislative v. Quasi-Judicial Decisions

Quasi-judicial Decisions

- Made under circumstances similar to that of a court of law
- Examples: Approval or denial of subdivision application, amendment of zoning, CUP, or variance request
- Governing body applies the legislatively adopted regulations to an individual application based on the facts gathered about and specific to the application, at a noticed public hearing.
- In a quasi-judicial decision, the hearing body must always afford due process (constitutionally fair procedure) to all interested parties.
- This requires that each follow the established procedural rules.

Conflicts of Interest

- "Public employee" includes any member of a quasi-judicial board (§2-2-102, MCA)
- A public employee may not have an interest in any business or undertaking that the employee has reason to believe may be directly, substantially, and economically benefitted by action to be taken by the employee's agency.
- A public employee may not perform an act directly and substantially affecting a business or other undertaking to its economic detriment when the officer or employee has a substantial personal interest in a competing firm or undertaking.

Conflicts of Interest, cont.

- A member of a municipal board or governing body with a conflict of interest should recuse themselves and abstain from voting on the action in question.
- When a public employee is required to take official action on a matter as to which the public employee has a conflict created by a personal or private interest that would directly give rise to an appearance of impropriety as to the public employee's influence, benefit, or detriment in regard to the matter, the public employee shall disclose the interest creating the conflict prior to participating in the official action.
- If you have questions about a potential conflict of interest, discuss the matter with your planning staff and the county attorney's office.

Gifts and Favors

- Public employees may not accept a gift of substantial value or a substantial economic benefit tantamount to a gift that:
 - would tend improperly to influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties; or
 - that the person knows or that a reasonable person in that position should know under the circumstances is primarily for the purpose of rewarding the person for official action taken.

- An economic benefit tantamount to a gift includes:
 - a loan at a rate of interest substantially lower than the commercial rate then currently prevalent for similar loans;
 - compensation received for private services rendered at a rate substantially exceeding the fair market value of the services.

- If in doubt, *decline the gift*. If you have questions about a potential conflict of interest, discuss the matter with your planning staff and the county attorney's office.

Ex Parte Communication

- Information (verbal, written, electronic, or graphic) received outside of the public record is “*ex parte* communication.”
- Applies to quasi-judicial activities.
- No statute addressing *ex parte* communication in local government proceedings, and there is limited case law in the state on the matter.
- Members of a municipal board or governing body should generally avoid receiving testimony or evidence on any pending quasi-judicial matter outside of the official proceedings.
- Many jurisdictions have adopted specific rules prohibiting *ex parte* communication in quasi-judicial proceedings.

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