



Land Use Legislation – 2013 Session
Land Use Caselaw – Aug 2012-Jan 2014
SB 324 – Buildings for Lease or Rent

Kelly A. Lynch

Community Technical Assistance Program
Montana Department of Commerce

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Land Use Legislation – 2013 Session

10 Bills Passed into Law

HB 148

- Prohibits (through either Part 2, municipal, or interim) zoning that prevent erection of amateur radio antenna at heights and dimensions sufficient to accommodate amateur radios service communication by a person who holds and unrevoked and unexpired official amateur radio station license and operator's license issued by the FCC.
- Prohibits (through either Part 2, municipal, or interim zoning) establishing a maximum height limit for an amateur radio antenna of less than 100 feet above the ground.
- Immediate effective date

HB 169

- Existing law allows (but does not require) a growth policy to contain (a) neighborhood plans; (b) minimum criteria for a neighborhood plan; and (c) an infrastructure plan.
- HB 169 allows growth policy to be: 1) used as resource management plan for establishing coordination or cooperating agency status with a federal land management agency; and 2) be amended to contain any elements required by that federal agency for the local entity to establish such coordination or cooperating agency status.
- Effective October 1, 2013.

SB 40

- Time period for element review begins to run on “date of delivery” of a subdivision application to the agency (with any review fees paid).
- Removes ability of local governing body to set deadlines for the submittal of subdivision applications.
- Language limiting public consideration of the impacts of proposed mitigation constituting “new information” was removed during the process
- Applies to applications submitted on or after July 1, 2013

SB 146

- Local governing body cannot include oral or written comments from a federal or state agency regarding wildlife, wildlife habitat, or the natural environment in its findings on a subdivision unless supported by “scientific information or a published study.”
- Any federal or state agency submitting such comments or opinions must first disclose whether it has been involved in trying to acquire the property or an interest in the property at issue.
- Applies to applications submitted on or after July 1, 2013

SB 293

- If a subdivider is proposing a shared, multiple user, or public water/wastewater system, the subdivider must state in subdivision application whether the system will be a public utility as defined in 69-3-101, MCA and subject to the jurisdiction of the PSC, or exempt from such jurisdiction (with explanation for the exemption).
- Effective October 1, 2013 and applies to subdivision applications submitted on or after that date.

SB 316

- Adds new definition in Sanitation Act for a “well isolation zone” – the area within a 100-foot radius of a water well
- DEQ or local sanitarian may only issue a septic permit, local government may only approve subdivision, and local board of health may only approve drilling of water well on adequate evidence that the well isolation zone is located wholly within the boundaries of the subdivision or existing tract.
- Well isolation zone may extend onto adjacent property only if private owner grants easement or public owner authorizes.
- Effective October 1, 2013

SB 290

- Applies to parcels in unincorporated areas with Part 2 zoning that are wholly surrounded by a municipality.
- If a “change of use” occurs on the property, the County must notify the city and all landowners in the city within 300 feet
- If 10% or more of those owners or the municipality request a hearing on the change of use, County must hold hearing and make a determination that the regulations in the county zoning are as compatible as possible with the municipal zoning (as required under 76-2-203(3), MCA). County may initiate revisions to the zoning.
- Effective October 1, 2013

HB 562

- Bill aimed at a situation that arose where a Clerk & Recorder was refusing to record a COS for a boundary line adjustment (Section 76-3-207(1)(a)) when the adjoining parcels were both over 160 acres in size and after the adjustment one would be less than 160 acres in size.
- With Governor's amendment, adds language to Section 76-3-207(1) to clarify that all -207(1) exemptions are available regardless of the size of lots resulting from the use of the exemption

SB 324

- Removes subdivisions for lease or rent from MSPA, except for RVs and campgrounds (rent of land)
- First 3 buildings for lease or rent (BLR) on single tract require only sanitation review and approval; 4 or more BLR reviewed under new local regulations adopted under Title 76.
- Exempts certain types of BLR from counting
- Governing body can increase number at which local review begins for all or certain types of BLR, or adopt additional regulations for local review.
- Effective September 1, 2013.

SB 23

- Within 30 working days of adopting interim zoning, county must initiate study to verify the emergency and identify 1) the facts and circumstances constituting the emergency; 2) options for mitigating the emergency; and 3) the course of action the governing body intends to take, if any, during the interim zoning
- Details about emergency must be included in public notice of hearing on interim zoning
- If county wishes to extend interim zoning, must finish the study and provide second public hearing
- Effective October 1, 2013



5 Bills Vetoed by Governor

VETOED

- **SB 41** – Would have prohibited local governments from considering the cumulative impacts of the subdivision together with other potential subdivisions in the area.
- **SB 24** – Would have restricted a county's ability to condition or prohibit sand and gravel operations on a residentially zoned property after the operation had filed for DEQ mining permit.
- **SB 147** – Would have limited primary subdivision review criterion regarding agriculture to the proposed subdivision's impact on adjacent agricultural operations.

VETOED

- **SB 105** – Would have prohibited use of interim zoning to regulate uses subject to state review and approval under Titles 75, 76, and 82.
- **HB 499** – “Grandfather clause” for existing unlawful BLRs (addressed with exemption in SB 324)



Bills Died in Process

Bills Died in Process

- SJ 9 – Discourage policies restricting private property rights without due process
- SB 17– Constitutional amendment adding “right to use property” to clean and healthful environment clause
- HB 156 – Restrict city ability to allow ADUs in SF zones
- HB 452– Authorize new oil and gas development impact fee
- SB 284 – Real property fairness act
- HB 531– Provide SLR exemption for zoned properties (addressed with exemption in SB 324) and modify townhome exemption

Land Use Caselaw – Aug 2012-Jan 2014

- *Grant Creek Heights v. Missoula County* (MSC)
- *Richards v. Missoula County (Richards II)* (MSC)
- *Botz v Bridger Canyon Planning and Zoning Commission* (MSC)
- *Helena Sand and Gravel v. L&C County* (MSC)
- *Arkansas Game & Fish v. United States* (USSC)
- *Wohl v. City of Missoula* (MSC)
- *Hampton v. L&C County* (1st DC)
- *Svee v. City of Helena* (1st DC)
- *Koontz v. St. Johns River Water Management District* (USSC)
- *Citizens for a Better Flathead v. Flathead Co.* (11th DC)
- *Allen v. Lakeside Neighborhood Planning Comm.* (MSC)
- *Williams v. Missoula County* (MSC)

Grant Creek Heights v. Missoula County

2012 MT 177 (August 15, 2012)

- In 1979, County adopted Planned Unit Development for 3,600 Grant Creek property; plaintiff Knie owned 160-acre parcel within the area.
- In 1984, Knie filed COS to divide parcel into 20-acre parcels
- In 1987, County amended the PUD and notified Knie that the PUD applied to his parcel and listing conditions that had to be met within 1 year to proceed with development. Knie failed to meet any conditions. Under Missoula County zoning regulations, PUD zone reverted to original zoning in the area.

Grant Creek Heights, cont.

- In 1998, Grant Creek and Knie filed a complaint which the County settled. Settlement stated that Knie could assert in a separate proceeding whether County properly terminated PUD.

- Grant Creek and Knie filed an amended complaint in 2005 as to the Knie property. District Court rejects the challenge, Supreme Court affirms:
 - Section 76-2-201(1)(b) requires an action to challenge the creation of a zoning district within six months; Grant Creek did not challenge the County's action until six years later.
 - PUD zoning resolution stated property would revert if the owner did not submit a subdivision application; reversion was date SOL began to run.

Richards v. Missoula County

2012 MT 236 (October 2012) (*Richards II*)

- Second decision from Montana Supreme Court involving plaintiffs' attempts to obtain subdivision approval for 200-acres near Clearwater Junction.
- First decision – County denied application for 119-lot subdivision; Richards returned with modified application for 59-lots. County denied for unmitigated impacts on wildlife and wildlife habitat. Richards sued, District Court ruled for County, MT Supreme Court affirmed. (*Richards v. County of Missoula*, 2009 MT 453 (2009).)

Richards, cont.

- Richards worked with FWP regarding mitigation, returned to County with application for another 59-lot subdivision with perimeter fencing around entire subdivision.
- FWP switched its position about a month before the County considered the application. FWP encountered new research regarding black bears, grizzly bears and human-bear conflicts in the proposed subdivision area, and again opposed subdivision, and
- County again denied subdivision on same grounds as previous denial.

Richards II, cont.

- Richard asked court to allow him further discovery to obtain evidence” not contained in the administrative record, mainly to challenge FWP’s information as faulty, inadequate, or unscientific.
- Court reiterates rule from *Richards I* and *MM&I v. Gallatin County* that a challenge to administrative decision of governmental body as arbitrary and capricious is limited to the record before the governing body when it issued its decision.

Richards II, cont.

- Court noted detailed findings described that the subdivision violated the County's growth policy, it would have deleterious impacts on ag water user facilities and failed to comply with state irrigation laws; it failed to comply with the County's primary travel corridor requirement; it would have extensive impacts upon the environment, wildlife, and wildlife habitat pertaining to Blanchard Creek, and the water demand from the subdivision would exceed the carrying capacity of the wells and septic systems.

Richards II, cont.

- Richards claimed that Section 76-3-608(5)(b) required County to provide deference to his proposed mitigation.
 - ▣ Citing MM&I, supra, Court held statute does not require governing body to mitigate impacts to development – denial is always an option. Here, County had no obligation to defer to Richards fencing proposal when it determined that its concerns could not be mitigated adequately.

- Richards claimed County unlawfully relied on information presented in hearings regarding previous applications.
 - ▣ Court noted that no law prohibits the County from considering this information and governing body has broad discretion with regard to a subdivision application.

Richards II, cont.

- Richards also made claim that County's denial was unconstitutional taking of his property
 - ▣ Court held that a person may not recover compensation when he seeks to use land in a manner prohibited by pre-existing rules or regulations, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). But cf. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (existing regulations are not dispositive to takings claim, but to be considered as a factor in *Penn Central* analysis).
 - ▣ In Montana, under *Richards II*, no takings claim for denial of subdivision

Botz v. Bridger Canyon Planning and Zoning Comm.

2012 MT 262 (November 2012)

- Landowner started construction of a horse barn in the Brass Lantern PUD in Bridger Canyon. Part 1 zoning regulations and covenants for the PUD required all homes and outbuildings to be in a designated building site. Barn was approximately
- Code Compliance Specialist determined that the barn violated zoning regulations and applicable covenants. Landowner applied to amend the CUP for Brass Lantern.
- Planning and Zoning Commission affirmed code compliance decision and denied CUP amendment request.

Botz, cont.

- Landowner appealed to District Court and claimed unconstitutional taking. District Court affirmed and ordered removal of the barn.

- Supreme Court upheld Commission's decision:
 - ▣ Property sales documents, zoning regulations, and covenants expressly restricted all buildings, including barn, to building site.
 - ▣ Record supported Commission's finding that modifying the CUP would circumvent the purposes of the PUD and be detrimental to the health, safety, peace, morals, comfort and general welfare of the zoning district.
 - ▣ Takings claim dismissed as landowners did not provide any legal analysis in support of claim

Helena Sand and Gravel v. L&C Co

2012 MT 272 (November 2012)

- In 2008, DEQ issued permit to HSG to mine gravel on 110 acres of its 421 acres of property adjacent to residentially developed area near East Helena. When neighbors learned about the application, they petitioned for and the county formed a Part 1 zoning district prohibiting sand and gravel mining within the district, which included the remaining 311 acres of HSG's property.
- HSG filed complaint alleging the County had illegally spot zoned its property and was a taking.

Helena Sand and Gravel, cont.

- District Court rejected HSG's spot zoning claims, and Montana Supreme Court confirmed. Zoning regulations:
 - ▣ Substantially complied with growth policy. The County considered existing uses in the zoning district and adjacent area and its determination that the prevailing use was residential was not clearly unreasonable (first factor of *Little* test).
 - ▣ Did not single out HSG for disparate treatment. The zoning district's prohibition on sand and gravel operations applied to entire zoning district, and County followed Part 1 zoning procedure.

Helena Sand and Gravel, cont.

- Supreme Court remanded to District Court on takings issue:
 - ▣ District Court held and Supreme Court agreed that HSG could not establish a property right in its ability to apply for a mining permit because DEQ had discretion in granting and denying the permit.
 - ▣ Property owner has constitutionally protected claim of entitlement to permit approval where “local agency lacks *all* discretion to deny issuance of the permit or to withhold its approval.” (Citing *Kiely*.) Permitting criteria are “so narrowly circumscribed that approval of a [proper] application is virtually assured.”
 - ▣ Question remains whether County’s adoption of zoning regulations affected and limited HSG’s land so as to effect a taking of the property. District Court to apply Penn Central factors to application of zoning to HSG’s property – economic impact of the regulations and reasonable investment-backed expectations of the property owner.

Arkansas Game & Fish Commission v. U.S.

133 S. Ct. 511 (December 4, 2012)

- State game and fish commission owned and operated a wildlife management area downstream from Army Corps dam, used mainly for growing and harvesting hardwood oak and recreation
- In 1993, at the request of downstream farmers, Army Corps began deviating from its adopted water control manual, releasing higher flows downstream during tree growing season that damaged and killed over 18 million board feet of timber and interrupted recreational use on Commission's land over 7-year period.

Arkansas Game & Fish, cont.

- After Commission objected, Army Corps studied the issue and ceased water flow deviations in 2000.
- Commission filed suit against Army Corps, alleging flooding was unconstitutional taking and seeking \$5.7 million in damages during the 7-year flooding period to pay for reclamation of the area.
- U.S. Court of Federal Claims ruled for Commission; U.S. Court of Appeals for Federal Circuit reversed and ruled for Army Corps
 - Appellate court ruled compensation for takings can only be sought for permanent or inherently occurring condition; rather than temporary situation.

Arkansas Game & Fish, cont.

- US Supreme Court has already held that temporary takings are compensable (from the date the regulation first effected the taking to the date the regulation is rescinded or amended.) (See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).)
- Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are “incidents of ownership. They cannot be considered as a ‘taking’ in the constitutional sense.” (*Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002).) This includes “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.” *First English*; see also *North Pacifica LLC v. City of Pacifica*, 9th Circuit (2008) (due process claim after *Lingle*)

Arkansas Game & Fish, cont.

- US Supreme Court reversed and held for Commission
 - ▣ Temporary takings are compensable under 5th Amendment, but no *per se* rule
 - ▣ Flooding no different from other government intrusions of property
 - ▣ Analysis of temporary takings involves case-by-case consideration of factors:
 - Time of temporary taking
 - Degree to which invasion of property was intended or was foreseeable result of authorized government action
 - Character of the land
 - Owner's reasonable investment-backed expectations
 - Severity of the inference

Wohl v. City of Missoula

2013 MT 46 (February 27, 2013)

- Plaintiffs owned properties along South Avenue between Reserve and Johnson Street – part of Missoula County until the 1980s, when City began annexing area.
- In mid-1990s, City updated its urban area transportation plan, which encouraged alternative transportation such as biking, walking, and public transit, and the South Avenue Improvement Project, the planned expansion of South Avenue into 3-lane road with bike lanes and sidewalks.
- City hired engineering firm to retrace the boundaries of the South Avenue ROW, and dispute with landowners as to actual width of ROW began.

Wohl, cont.

- Both District Court and MSC rejected landowners §1983 federal constitutional due process and takings claims
 - ▣ Federal case law is clear that if state provides adequate procedure for seeking just compensation, the property owner cannot claim a violation of the 5th amendment until the property owner has used the state procedure and been denied just compensation.
 - ▣ But see *San Remo Hotel v. San Francisco* (545 U.S. 323 (2005)) (takings claim denied in state court cannot be resurrected in federal court; federal full faith and credit statute bars litigants from suing in federal court when that suit was based on issues that had been resolved in state court (the rule of "issue preclusion").)

Hampton v. Lewis and Clark County

1st Judicial District Court (April 2013)

- In 1991, divided a 14-acre parcel into two lots using agricultural covenant exemption. In 1998, Hampton sought to remove the covenant to build a house on the new lot. County denied, and litigation ensued. County prevailed.
- In 2004, Hampton again sought approval to remove the agricultural covenant and received it, but with 13 conditions. Hampton built the home without meeting all of the conditions (mainly road upgrades and access).
- In 2006, Hampton applied to subdivide the parcel again. County refused to review the proposed subdivision due to Hampton's condition violations, and sued to require Hampton to remove the house. Jury found for County, but judge denied relief, requiring Hampton to place permanent restrictions on remaining property and complete conditions.

Svee v. City of Helena

1st Judicial District Court (May 2013)

- City adopted WUI ordinance prohibiting wooden shingles within entire city. Homeowner violated ordinance in replacing shingles.
- Homeowner sued City, argued city exceeded authority in adopting ordinance; roof materials within purview of state building code. City argued it had authority to adopt restrictions under zoning authority – public health and safety.
- District Court agreed with homeowner:
 - City may only adopt building codes adopted by DLI and may not enforce a building code unless certified by DLI. Building code relates to the design, construction, alteration, or repair of buildings and the materials to be used therefore.
 - Zoning ordinance regulates and restricts the erection, construction, reconstruction, alteration or repair of buildings as it relates to their height, number of stories, size, placement of lots, and other zoning concerns.
 - City cannot evade building code restrictions by adopting it as zoning code.

Koontz v. St. John's River Water Management Dist.

568 U.S. ____ (June 25, 2013)

- Landowner sought permits to develop on northern 3.7 acres of site, offering conservation easement over remaining 11 acres
- District concluded that the proposal did not sufficiently protect water resources, and offered Koontz two choices:
 - Reduce development to 1 acre and deed conservation easement to District on remaining 13.9 acres; OR
 - Proceed with development as proposed, with conservation easement over remaining 11 acres, and hire contractors to make improvements to approximately 50 acres of other district-owned wetlands in another area of the County
- Koontz refused to agree to anything other than his proposal, the District denied the permit, and Koontz sued District. Florida SC finds for District, USSC overturns.

Koontz, cont.

- 1) *Nollan/Dolan* applies to a condition where permit denied because applicant refused the condition
 - No distinction between approval with unconstitutional conditions or denial when they are refused
 - Issue is not that “no property was taken,” but rather that the condition impermissibly burdened the constitutional right not to have property taken without just compensation.
 - *“The unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”*

- 2) *Nollan/Dolan* applies to monetary conditions or requirement to make improvements
 - Impact fees are functional equivalent of other land-use exactions
 - Direct link between demand to make a monetary payment and permit for a specific parcel of property

Koontz, cont.

- Permitting authority can still deny permits – but cannot deny a permit because applicant refuses to agree to accept an unconstitutional condition
- At what point has the local government “made a demand” for an exaction? How specific must a condition be before it can be challenged as a demand?
- Does *Koontz* mean that *Nollan/Dolan* applies to all conditions imposed, whether quasi-adjudicative or generally applicable to all via legislative enactment?
 - *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. Wash. 2008) (ordinance requiring minimum of 12-inch storm pipe installation not a taking when applied to permit approval)

Citizens for a Better Flathead v. Flathead Co.

11th Judicial District Court (July 2013)

- At request of 6 property owners, County adopted new business and commercial zoning designation and amended zoning map to change property owners' 12 parcels from Suburban Agricultural to new zoning designation
- Area was designated Suburban Agricultural in County's Growth Policy, which also acknowledged that existing commercial uses were grandfathered
- Staff recommended denial of zoning change, as incompatible with the County Growth Policy, the County's Future Land Use Map, and the growth policies for Kalispell and Whitefish
- Neighbors from nearby residential areas challenged the zone change

Citizens for a Better Flathead, cont.

- District Court – zone change is incompatible with Growth Policy and other area plans, which called for protection of agricultural lands and the viewshed
- Commission failed to address public comments and concerns about the proposed zone change (citing *North 93 Neighbors*)
- Zoning change constituted illegal spot zoning:
 - Requested business and commercial use was significantly different from the prevailing suburban agricultural use of the area
 - Change benefited 13 parcels owned by 6 individuals, totaling 63 acres surrounded by many owners of over 1,200 acres of large lot, suburban agricultural lands
 - Surrounding owners would derive no benefit from the zone change

Allen v. Lakeside Neighborhood Planning Comm.

2013 MT 237 (August 20, 2013)

- Flathead County adopted Lakeside Neighborhood Plan in December 2010. Development of plan was conducted by Lakeside Neighborhood Planning Committee (LNPC), which was designated by and gave its recommendations to the Lakeside Community Council (LCC), which was designated by and gave its recommendations to the County Commission.
- Property owners in Lakeside and Somers area sued County, alleging the process for adoption of the Plan violated the neighborhood planning process set forth in County's growth policy, the process required by the growth policy statute, and the public's constitutional rights to know and to participate.

Allen, cont.

- District Court held and MSC affirmed that the County followed statutory process for development of a neighborhood plan:
 - ▣ Planning Board is advisory body only;
 - ▣ Planning Board holds public hearing and makes recommendations to the governing body;
 - ▣ LNPC and LCC were advisory bodies only;
 - ▣ County was not required to follow process for appointing administrative bodies (Section 7-1-201, MCA).

Allen, cont.

- District Court rejected arguments that public meetings must be held in a public facility, use of Yahoo Group to distribute information and ask questions of the LNPC members, and deletion of Yahoo Group files when website was closed violated open meeting law:

- District Court and MSC held that LNPC violated constitutional and statutory open meeting requirements:
 - ▣ LNPC was a “public or governmental body” per Section 2-3-203(1);
 - ▣ Not all meetings of the LNPC were properly noticed – some meetings the notice indicated the public was not welcome, and other meetings did not indicate where the meeting would be held.

Allen, cont.

- MSC held that violation of constitutional and statutory open meeting requirements does not always require voiding of agency decision:
 - ▣ Once LNPC learned of requirements, followed open meeting process lawfully for 2 years before final decision made

- “We ... caution public officers that conducting official business via email can potentially expose them to claims of violation of open meeting laws.”

Williams v. Missoula County

2013 MT 243 (August 28, 2013)

- Part 2 zoning district for North Lolo Rural Special Zoning District
- 422 acres land north of Lolo, west of Highway 93
- 223 acres within the District taxed for agricultural and forest lands
- In 2008, interim zoning adopted for the district prohibiting sand and gravel mining and asphalt operations within the district.
 - Interim zoning challenged by landowner but upheld by Montana Supreme Court (*Liberty Cove v. Missoula County*, 2009 MT 377)

Williams, cont.

- During interim zoning period, Commissioners began process of adopting permanent Part 2 zoning for the district.
- On April 7, 2010, Commissioners passed resolution of intent to adopt permanent zoning for the district, with public notice of 30 day written protest provision:
 - “However, if 40% of the real property owners within the district whose names appear on the last-completed assessment roll or if real property owners representing 50% of the titled property ownership whose property is taxed for agricultural purposes ... or whose property is taxes as forest land ...have protested the establishment of the district or adoption of the regulations, the board of county commissioners may not adopt the resolution and a further zoning resolution may not be proposed for the district for a period of 1 year.

Williams, cont.

- Under §76-2-205(6), county commissioners must adopt proposed zoning regulations within 30 days of the expiration of the protest period – in this case, would have been June 7.
- On April 20, 2010, five landowners owning more than 50% of the property taxed as agricultural or forestry within the proposed district filed written protests
- On May 14, 2010, Williams, another landowner within the proposed district, filed suit against County:
 - Protest provision unconstitutional (equal protection, due process, voting rights)
 - Restraining order and injunction

Williams, cont.

- On May 20, the County filed an answer, agreeing that the protest provision was unconstitutional.
- On May 21, the Court issued injunction prohibiting County from “taking any actions based on 76-2-205(6)” but permitting them to proceed in accordance with the remainder of -205.
- On May 24, protesting landowners filed motion to intervene
- On May 26, County adopted the permanent Part 2 zoning regulations.
- On May 28, Court granted landowners motion to intervene
- On June 3, landowners filed motion to dismiss for failure to join necessary parties

Williams, cont.

- Later that summer, both Williams and County filed motions for summary judgment declaring the protest provision unconstitutional. County argued for the first time that the protest provision was an unconstitutional delegation of legislative power; Court later allowed Williams leave to amend his complaint to add this argument
- In April 2012, the Court found protest provision unconstitutional:
 - Violated right to vote, because not all landowners were permitted to participate equally in the zoning process;
 - Violated equal protection, because no compelling state interest in providing some landowners opportunity to vote against the zoning regulations while denying others the right to for vote them; and
 - Failed to provide standards or guidelines on grounds for protesting, and failed to provide legislative override of the protest.
- Court severed -205(6) from the remainder of the statute and struck it down

Williams, cont.

- Montana Supreme Court affirmed
- Landowners were a necessary party, but no harm from issuing injunction prior to their joinder
- Statute delegating legislative authority to non-legislative bodies or process:
 - 1) must contain standards or guidelines to ensure that decisions are not made “wholly at the will and whim of others”
 - 2) must provide for an appellate body with the power to override the decision

Williams, cont.

- Previous unconstitutional delegation decisions:
 - Ordinance requiring a petition for variance to include 80% of landowners within 300 feet of location of proposed land use and 100% of all adjoining landowners (*Shannon v. City of Forsyth*, 205 Mont. 111 (1983).)
 - Ordinance requiring city council to adopt building setbacks when requested by 2/3 property owners on a street (*Eubank v. Richmond*, 226 U.S. 137 (1912).)
 - Ordinance requiring consent of 2/3 neighboring property owners to allow facility for elderly to expand (*Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928).)
 - Statute providing that if 40% of property owners within and around zoning district protested change of zoning, city approval of zoning change was prohibited from going into effect. (*Cary v. City of Rapid City*, 1997 SD 18 (1997))

Williams, cont.

- Part 2 zoning protest provision suffers from same infirmities:
 - ▣ “No requirement that protesting landowners consider public health, safety, or the general welfare of the other residents of the district when preventing the board... from implementing zoning regulations. ... landowners can exercise their unfettered power in a proper manner, or in an arbitrary and capricious manner, making zoning decisions dependent wholly on their will and whim.”
 - ▣ Protesting landowners are “granted absolute discretion to make the ultimate determination concerning the public’s best interests with no opportunity for review.”
- Municipal zoning statute provides example of proper legislative bypass, by allowing a city council to override a citizen protest by a 2/3 vote. (Section 76-2-305, MCA.)

Williams, cont.

- Court affirms the district court decision, striking down the protest provision in Section 76-2-205(6). Questions:
 - 1) What exactly did the court strike from the statute? Reasonable reading of the decision and district court decision is that all of 76-2-205(6) has been struck.
 - 2) What do counties do now?
 - Follow zoning process, including notice of intent to adopt and allowing for protests. Adopt zoning within reasonable time period after end of protest period, which was 30 days.
 - Follow zoning process, including notice of intent to adopt and allowing for protests. If 40% of landowners in district protest, then either adopt within 30 days and risk lawsuit from protesting landowners, or do not adopt and risk lawsuit from neighboring landowners. Risk is higher for County, under Williams, to not adopt.
 - Wait until 2015 legislature and hope that statute is clarified.



Subdivisions for Rent or Lease

Review of Legislative History

SB 324 – Buildings for Rent or Lease

Legislative History of SLR

- 1973 Passage of Montana Subdivision and Platting Act (SB 208)
- 1974 Amendments to MSPA (HB 1017)
- Conversion from RCMs to MCAs
- AG Opinions and SB 354
- Case Law
- 2009 Request for AG Opinion

SB 208 (1973)

- Creation of Montana Subdivision and Platting Act
- Applied to divisions creating lots less than 10 acres in size
- As introduced, contained four exemptions
 - Court order
 - Mortgage or lien
 - Severing minerals
 - Cemetery lots

SB 208, cont.

- Senate Judiciary passed with amendment adding fifth exemption from review and survey: divisions “created by a rental or lease agreement for a term of three (3) years or less.”
- House Natural Resources Committee removed this exemption, and replaced it with two new exemptions from both review and survey:
 - Lease or rental for agricultural purposes
 - Family transfer

HB 1017 (1974)

- First amendments to MSPA (annual sessions)
- Increase application of MSPA to divisions creating lots 40 acres in size or less
- Added seven exemptions
 - **Subdivisions for rent or lease** must be reviewed but no survey required (language of § 76-3-208, MCA)
 - State-owned lands
 - Reservation of life estate
 - Parcels created by state ROW
 - Common boundary relocations
 - Agricultural land sale or buy-sell agreement

HB 1017, cont.

- House Natural Resources Committee:
 - Added exemption for any land within city limits from requirements of MSPA
 - Added exemption for occasional sale
 - Applied MSPA to all divisions of land regardless of size
 - Added new exemption: *“This chapter does not apply to any condominium created solely by the change of ownership of any existing structures.”*
 - ✓ NOTE - This proposal followed and generated discussion about whether or not condominiums should be exempt from the MSPA and whether existing as opposed to proposed condominiums should be treated the same

HB 1017, cont.

- Senate Judiciary amendments:
 - Removed exemptions for cities and state ROW
 - Replaced the condo exemption added in the House with:
“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, *as that term is defined in this act*, and is not subject to the *requirements* of this act.”
 - Added same language to definition of “division of land”:
“Provided that where required by this act the land upon which an improvement is situated has been subdivided in compliance with this act, 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 act.”

Revised Codes of Montana (1974) conversion to Montana Code Annotated (1978)

Section 11-3862(9). Surveys required – exceptions.

“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, as that term is defined in this act, and is not subject to the requirements of this act.”

BECOMES:

Section 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 situated on one or more parcels of land is not a division of land, as that term is defined in this ~~act~~ chapter, and is not subject to the requirements of this ~~act~~ chapter.”

RCM conversion to MCA, cont.

Section 11-3862(7). Surveys required – exceptions.

“Subdivisions created by rent or lease are exempt from the surveying and filing requirements of this act but must be submitted for review and approved by the governing body before portions thereof may be rented or leased.

BECOMES:

Section 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 ~~act~~ chapter but must be submitted for review and approved by the governing body before portions thereof may be rented or leased.

RCM conversion to MCA, cont.

Section 11-3681(2.1). Definition of “division of land”

“Provided that where required by this act the land upon which an improvement is situated has been subdivided in compliance with this act, 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 act.”

BECOMES:

Section 76-3-202. Exemption for structures on complying subdivided lands.

~~“Provided that w~~Where required by this ~~act~~ chapter, when the land upon which an improvement is situated has been subdivided in compliance with this ~~act~~ 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 ~~act~~ chapter.”

Attorney General Opinions

- **1981** request by Dept. of Health & Environmental Sciences
 - Does “subdivision” in Sanitation Act apply to **all** condos or only condos that do not provide “permanent multiple space for recreational camping vehicles?”
 - Yes. Legislature intended definition of “subdivision” to be broad.
 - AG Greeley interpreted Sanitation Act and MSPA in the same manner.
 - 76-3-204 does not exempt condominiums from review.

- **1982** request by Missoula County Attorney
 - Does MSPA require review of conversions of existing apartments or office buildings to individual condos?
 - No. All condos are subject to review unless exempt, but 76-3-204 exempts conversions of an **existing, built, and in use** apartment or office building to condos.

AG Opinions Cont.

- **1984** request by Missoula City Attorney
 - ▣ Does a proposal to construct 48 four-plexes (192 dwelling units) to be used as rentals on a tract of record need to go through subdivision review?
 - ▣ Yes. Proposal constitutes a “division of land” because the owners sought to segregate parcels from the larger tract by transferring or contracting to transfer possession of portions of the tract to the tenants.
 - ▣ 76-3-204 only applies to existing buildings that were built and used prior to the time of division.
 - ▣ No discussion of 76-3-202 or 76-3-208.

SB 354 (1985)

“AN ACT TO CLARIFY THAT THE CONVEYANCE OF ONE OR MORE PARTS OF A BUILDING IS NOT A SUBDIVISION.”

- SB 354 amended 76-3-204 to overrule 1982 and 1984 AG opinions as to that issue:

“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,~~ whether existing or newly constructed as that term is defined in this chapter, and is not subject to the requirements of this chapter.”

SB 354, cont.

➤ At House Natural Resources Committee, Rep. Raney expresses concern that the language creates a “loophole” that will allow separate residences on one lot to avoid subdivision review. Sponsor Sen. Mazurek assures him that would “not be allowable under the law.”

➤ SB 354 as passed:

Section 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 ~~situated on one or more parcels of land is not a~~ division of land, whether existing or proposed as that term is defined in this chapter, and is not subject to the requirements of this chapter.”

Lee v. Flathead County (1985)

- April, 1984 – developers sought to construct a four-unit apartment building in Big Fork (originally proposed as condos).
- June, 1984 – AG opinion (48 four plexes) holding that 76-3-204, applied to existing structures, built, and in use prior to division.
- Spring, 1985 – Legislature amended 76-3-204, to apply to both existing and proposed structures. (SB 354).

Lee v. Flathead County, cont.

□ Question:

- Does 76-3-204 apply to proposed structures?

□ Answer:

- Yes. Legislature's amendment of "existing and proposed" to 76-3-204 exempts four-plex apartment from subdivision review.

□ Notes:

- Decision addressed a **single structure** – not an existing building with multiple additional structures.
- Later decisions cite Lee to conclude that 76-3-204, applies to **single structures**.

Rose v. Ravalli County (2006)

- Skalkaho Lodge and Steak House, Ravalli County
- Owners sought to construct four guest cabins – buildings would be separate from the existing guest lodge.
- County denied request for well and septic – project must first undergo subdivision review.
- **Questions:**
 - ▣ Does the project meet the definition of subdivision?
 - ▣ Is the project exempt from review under 76-3-204?
 - ▣ Is the project subject to review under 76-3-208?

Rose v. Ravalli County, cont.

□ Subdivision?

- Yes. Project to build four separate guest cabins for rent or lease on a tract of land is a subdivision under MSPA.
- Project requires separate water supplies and septic.
- “Subdivision” should be liberally construed.

□ Exempt under 76-3-204?

- No. Exemption applies to a single structure.
- Proposal would create several small cabins separate from the existing guest lodge.

□ Subject to review under 76-3-208?

- Yes. “Subdivision” for rent or lease requires subdivision review, but 76-3-208, applies and the project is exempt from surveying and filing requirements.

2009 Request for AG Opinion

Missoula County Attorney requests an AG opinion on the following two questions:

1. Are the definition of “subdivision” in M.C.A. 76-3-103(15), as applied to subdivisions for rent or lease, and the requirement for review of “Subdivisions created by rent or lease” at M.C.A. § 76-3-208, limited to divisions of land where residential dwellings are planned?
2. Does the exemption found at M.C.A. §76-3-204 for “sale, rent, lease, or other conveyance of one or more parts of a building” apply to multiple buildings on a single parcel?

2009 Request for AG Opinion, cont.

Citing the Rose case, the Missoula County Attorney argues that SLR exemption is limited to a single building, structure, or improvement on a parcel:

- ❑ the plain meaning of the statute;
- ❑ the MSC's directive to narrowly construe the exemptions of the Act; and
- ❑ the public policy purposes behind the Act (interpreting the exemption to allow for multiple buildings “would potentially allow for entire cities of rental buildings to be established without any review...”).

2009 Request for AG Opinion, cont.

Missoula City Attorney submitted a conflicting interpretation of the SLR exemption, concluding that the provision exempts multiple rental buildings on a parcel from subdivision review:

- ❑ Previous AG Solicitor's letter and advice from CTAP that SLR exemption applied to multiple rental buildings on a parcel;
- ❑ Statutory construction – singular includes the plural
- ❑ Requiring subdivision review in the city would hamper commercial, university, and low-income housing developments.

2009 Request for AG Opinion, cont.

- AG releases “draft” opinion for review and comment in March 2010, concluding that the SLR exemption does not apply to the conveyance or construction of multiple buildings, structures, or improvements on a single tract of land.
- In May 2010, Chief Civil Counsel for AG informs Missoula County Attorney that the AG’s office will not issue an opinion because Derick v. Lewis and Clark County case involving SLR was pending. Urged Legislature to take up the issue in 2011 session.
- Until April 2011, many working on the issue did not know that the AG would not be issuing an opinion.

2011 Legislative Session

- HB 494
- SB 629
- Local Option Proposal
- Amendatory Veto HB 494

HB 494

- Modifies exemption -204 to make building, structure, and improvement plural
- Clarified the buildings could be located on a single parcel of land or on multiple parcels owned by a single person
- Exemption available in zoned areas only if conveyance in conformance with the zoning
- On second reading, amended to clarify that exemption also available in unzoned areas. Referred to Senate Local Government and then..... nothing.

SB 629

- Proposed new section in MSPA with expedited review process for SLRs, similar to the process set forth in the statute for minor subdivisions.
 - ▣ Reviewing agencies would have 35 days to process an SLR;
 - ▣ SLR exempted from the requirement to be surveyed, to prepare an EA, from park dedication requirements, and from a public hearing.
- Repealed the 76-3-202 exemption
- Modified the § 76-3-201 exemption for lease or rent for farming or agricultural purposes, by adding “including nonresidential agricultural-related structures.” This language was intended to expedite the development of farmworker housing in rural, agricultural counties.

SB 629, cont.

- Modified 76-3-204 to make building, structure, and improvement plural and clarify that buildings could be located on a single parcel of land or on multiple parcels owned by a single person
- Exemption available if the parcel and buildings in conformance with zoning; OR in unzoned areas when:
 - ✓ Original subdivision of the underlying parcel or parcels resulted from a subdivision that contemplated multiple buildings or structures on individual lots;
 - ✓ Maximum of three single dwelling structures in addition to the parcel owner's primary residence; or
 - ✓ No sewage disposal facilities built for the structures
 - ✓ The buildings or structures are intended for rental as storage units or for a single agricultural operation."

SB 629, cont.

House Local Government Committee amendments:

- SLR subdivisions of 6 or more buildings reviewed as major subdivisions;
- No more than 3 of either residential or commercial SLRs;
- Removed storage units and single ag operations from the exemption;
- Provided a method for counting dwellings or places of businesses;
- Limited the use of the exemption to one-time-only;
- Local governments could exempt more than 3 SLRs through local sub regs, so long as the government identifies the number of SLRs that would be exempted

Local Option Proposal

- Never formally introduced
- Modified -208 to allow local agencies to:
 - ❑ exempt all SLRs from review;
 - ❑ exempt certain types or categories of SLRs from review;
 - ❑ impose only certain review criteria and other requirements on SLRs; and/or
 - ❑ provide expedited review for SLRs
- Intended to provide flexibility – e.g., urban growth counties v. eastern oil and gas counties

Amendatory Veto HB 494

- 1) Eliminated the *sale or conveyance of* multiple buildings, structures, or improvements on a single tract of record without subdivision review from -204 exemption;
- 2) Limited the SLR to a maximum of four buildings, structures, or improvements;
- 3) Deleted the section of HB 494 discussing the applicability of zoning regulations to the exemption established under the bill;
- 4) Grandfathered youth camps, as defined in § 50-52-101, under construction or already in operation
- 5) Grandfathered existing buildings, structures, or improvements that are currently being rented or leased and those under construction as of the Act's effective date.

House Joint Resolution (HJ) 39

- Passed and funded by 2011 Legislature
- Interim study of subdivision exemptions, particularly SLR
- Working group of interested parties: cities, counties, building industry, environmental groups, and private citizens
- Report back with recommendations to Education and Local Government interim subcommittee

Derick v. Lewis & Clark County (2011)

- Single-family house and separate garage apartment which owners rented out
- County concludes subdivision review is required, -204 does not apply to more than one building on single parcel
- Garage apartment served by single water and sewer system, County retracts wastewater permit

Derick v. Lewis & Clark County, cont.

- **Is the proposal a “subdivision?”**
 - ▣ Yes. A “division of land” occurs when one or more parcels are segregated from a larger tract.
 - ▣ Tenants will receive possession of a separate dwelling unit on a tract of land; includes **some interest** in the real estate upon which the apartment is located.
 - ▣ Contrary result would create a regulatory void.
- **Is the proposal exempt from review under 76-3-204?**
 - ▣ No. Exemption applies to a single building.
 - ▣ 76-3-208, would be rendered meaningless.
- **Does 76-3-208 apply?**
 - ▣ Yes.

Lessons Learned

- History and cases support interpretation that -204 exempts portions of single building
- Original intent was to be clear that condo conversions in existing buildings would be exempt, but now condos have their own exemption and -204 doesn't apply (1982 AG Opinion)
- History indicates -202 and -204 were the same
- History indicates some support in past for exempting cities from state subdivision requirements

AG Opinion on SLR

- Released January 2012
- 76-3-204 exemption limited to one or more parts of a single building, structure, or improvement on a parcel

Working Group

December 2011 through June 2012

- Consisted of representative of:
 - Cities
 - Counties
 - MT Association of Planners
 - MT Association of Registered Land Surveyors
 - MT Building Industry Association
 - MT Association of Realtors
 - MT Audubon
 - MT Environmental Information Center
 - Private citizens

- Met 5 times over 6 month period

Working Group, cont.

- Five points of agreement:
 - 1) If complies with zoning, exempt it
 - 2) Grandfather clause for some existing SLRs
 - 3) Maintain local flexibility
 - 4) Expedited review of some or all SLRs
 - 5) DEQ review process should correlate with SLR review
- Working group came up with 5 options for legislation to “fix” SLR – ELG did not request any
- Sen Rosendale had SB 324 drafted and introduced

SB 324

- ❑ Removes subdivisions for lease or rent from MSPA, except for RVs and campgrounds (rent of land)
- ❑ First 3 buildings for lease or rent (BLR) on single tract require only sanitation review and approval; 4 or more BLR reviewed under new local regulations adopted under Title 76.
- ❑ Exempts certain types of BLR from counting
- ❑ Governing body can increase number at which local review begins for all or certain types of BLR, or adopt additional regulations for local review.
- ❑ Effective September 1, 2013.

Buildings For Lease or Rent (BLR)

Overview:

- ❑ New Chapter 8 under Title 76, Land Resources & Use, titled “Subdivision Review Alternatives.” **NOT AN ALTERNATIVE**
- ❑ New review process established for the rent or lease of buildings or units within a building, to consider impact of development
- ❑ Identifies exemptions to the new review process
- ❑ Removes subdivisions for lease or rent from the Act, except for RVs and campgrounds (rent of land)

BLR Exemptions

- ❑ Where zoning is in place – no BLR review required, just follow what is required under zoning regulations (§ 76-8-103(1)(a), MCA)
- ❑ Where zoning is not in place (§ 76-8-103(1)(b), MCA):
 - ❑ One of 3 or fewer buildings in existence or under construction prior to September 1st, 2013
 - ❑ Subject to lodging facility tax (except RVs and mobile home parks)
 - ❑ The building is for farm or agricultural use.
 - ❑ If proposed to be served by water/wastewater but not intended for lease or rent – owner declaration to run with land ensuring building(s)/unit(s) will not be leased or rented. (§ 76-8-103(1)(b), MCA)
- ❑ First three (3) or fewer buildings in existence or under construction prior to September 1st, 2013, do not count toward BLR local review requirements

BLR Review Process

- ❑ First three (3) or fewer BLRs on a single tract of record requires review and approval pursuant to Title 50 and Title 76, as applicable (§ 76-8-106, MCA).
- ❑ Four (4) or more BLRs on a single tract of record require local review per (§ 76-8-102, MCA).
- ❑ Application requirements – details in local regulations. Generally requires review fee, deed, evidence of ownership, detailed site plan.

BLR Review Process

- ❑ Application must also contain narrative of:
 - ❑ Existing and proposed buildings and their location on the subject property
 - ❑ Proposed water, sewer, and solid waste disposal facilities
 - ❑ Emergency medical, fire, and police services
 - ❑ Existing and proposed access to and from the site, and onsite circulation
 - ❑ Potential significant impacts on the surrounding physical environment or human population as a result of the proposed building for lease or rent, including proposed mitigation measures

BLR Review Process

- ❑ Ten (10) working days to determine whether application is complete
 - ❑ If application incomplete, written notification of missing or insufficient information
- ❑ Sixty (60) working days from completion to approve, conditionally approve, or deny application

BLR Review Process

- ❑ To approve BLR permit, application must:
 - ❑ Comply with the BLR regulations and other regulations applicable to the property;
 - ❑ Minimize potential significant impacts on the physical environment and human population in the area
 - ❑ Provide adequate access, emergency, medical, fire protection, police, water, sewer, and solid waste facilities
 - ❑ Comply with any applicable flood plain regulations.
- ❑ Written decision must be provided to applicant within 60 day review timeframe.

BLR Adoption Process

- ❑ Local jurisdictions were required to adopt regulations by September 1st, 2013.
- ❑ Regulations must contain requirements of (§ 76-8-107, MCA).
- ❑ 30 day notice prior to public hearing to consider comment and adopt regulations.
- ❑ Governing body can increase number at which local review begins for all or certain types of BLR by majority vote (§§ 76-8-108(1)(a) and (b), MCA)
- ❑ Governing body can adopt additional regulations for local review by supermajority vote (§ 76-8-108(2), MCA)