

SB 174: NEW REQUIREMENTS FOR CONDITIONS OF APPROVAL FOR SUBDIVISIONS

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Background: SB 174 adds new requirements in the Montana Subdivision and Platting Act regarding conditions of subdivision approval. SB 174 will be effective when it is signed by the Governor; anticipated to be early May of 2021. While SB 174 is not law yet, if a decision on a subdivision application will be made anytime in May of 2021, SB 174 will most likely apply.

The new requirements for conditions of approval will be in state statute, so not following these requirements can be challenged as being “unlawful”, which is easier to prove than that the conditions and decision being “arbitrary and capricious”.

SB 174 states that any action that is not specifically prohibited in the conditions of subdivision approval is specifically allowed; except for restrictions provided by the governing documents of the subdivision (i.e. bylaws, covenants, etc.) and applicable zoning regulations. Also, the governing body may review but does not have approval authority of the governing documents or amendments unless the governing documents directly and materially impact a condition of subdivision approval.

Finally, SB 174 adds a new provision to law that states if a local government has not historically interpreted and enforced, or chose not to enforce, a condition of subdivision approval, the local government may not enforce that condition against a similarly situated lot owner in the same subdivision. As a result, a local government should be very careful in allowing conditions of approval that are not fully satisfied at final plat approval. Enforcement of conditions of subdivision approval will be difficult after final plat approval. A local government may not know or may not be able to ascertain that there are other violations of a condition of subdivision approval in a subdivision before bringing an enforcement action. Again, if the local government violates this provision of the law, the enforcement action may be found “unlawful” by a court.

Specific Requirements for Conditions of Subdivision Approval:

1. 76-3-608(3)(a) Criteria for Local Government Review has been amended and will read:

A subdivision proposal must undergo review for the following primary criteria: except when the governing body has established an exemption pursuant to subsection (6) of this section or except as provided in 76-3-509, 76-3-609(2) or (4), or 76-3-616, **the specific, documentable, and clearly defined** impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety;

2. 76-3-620 Review requirements – written statement has been amended and will read:

(1) 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, in accordance with the time limit established in 76-3-504(1)(r), prepare a written statement that:

(a) must be provided to the applicant;

(b) must be made available to the public;

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

(d) identifies the regulations and statutes that are used in reaching the decision and explains how they apply to the basis of the decision;

(e) provides the facts and conclusions that the governing body relied upon in making the decision and references documents, testimony, or other materials that form the **basis of the decision**;

(f) **identifies** the conditions that apply to the preliminary plat approval and that must be 27 satisfied before the final plat may be approved.

(2) **If the governing body conditionally approves the proposed subdivision, each condition required for subdivision approval must identify a specific, documentable, and clearly defined purpose or objective related to the primary criteria set forth in 76-3-608(3) that forms the basis for the condition.**

Guidance: Attached are sample staff reports in a table and narrative format that incorporate the new requirements for SB 174. These sample staff reports provide a mechanism to ensure that the findings and conditions of subdivision approval cross reference the primary review criteria, the subdivision regulations or state statutes relied upon, which conditions of approval must be met before final plat approval and what documentation in the record supports the findings and conditions of subdivision approval. **Any new findings or conditions of subdivision approval imposed by the planning board or the local governing body must also set forth these cross references or the preliminary subdivision approval may be found unlawful.**

It is advisable for the local governing body to adopt in its subdivision regulations as many potential mitigation conditions that may be imposed given the type of impact a subdivision may have, with findings and analysis to support the condition, i.e. citations to journals, FWP proposed mitigation, MDT road standards, etc. Adoption of conditions with the findings and analysis supporting them will aid the planning board and local governing body in making additional findings and conditions and be defensible in litigation as those findings and conditions will have went through a public process when adopting the subdivision regulations and apply to all other subdivisions in those same circumstances.

IV. Impacts on the Natural Environment - Existing physical conditions relating to land, water, air, plant and animal life of an area and the interrelationship of those elements, such as soils, geology, topography, vegetation, surface water and drainage, floodplains, and ground water and aquifers. Specific impacts include, but are not limited to:

- Impact on air quality.
- Impact of groundwater quality and quantity.
- Impact on surface water features.
- Impact on wetlands.
- Impact on residential ambient exterior light level.
- Impact on historic and prehistoric sites.

(state what the definition for natural environment is in subdivision regulations/growth policy)

Recommended Findings (reference the state statute or subdivision regulations supporting the finding)		Recommended Conditions (state which conditions must be satisfied before final plat approval)	What Document(s) in Record Support Findings and Conditions (i.e. application, EA, comment letter, public testimony)
A	Soil disturbance during the construction of this proposed subdivision will increase the potential for the spread of noxious weeds on the property and the surrounding area.	Section 7-22-2116, MCA states; "it is unlawful for any person to permit any noxious weeds to propagate on their property." 1 A covenant shall be filed with the final plat requiring control of County declared noxious weeds. 2 A covenant shall be filed with the final plat stating: <i>"Lot owner(s) shall comply with the required Noxious Weed Management Plan, approved by the County Weed Supervisor."</i>	
B	All vegetation disturbed during construction shall be reestablished with vegetation types that have been recommended by the NRCS or MSU Extension Office and approved by the Planning Office.	3 Any areas disturbed during construction shall be reseeded by the subdivider(s) for the purpose of establishing adequate ground cover prior to final plat approval. The choice of species to be used shall be approved by the MSU Extension Office which reviews the choice of species to ensure it is compatible with the climate and soil types of the subdivision.	

CONCLUSION: The impacts to the Natural Environment set forth in the findings are mitigated with the imposed conditions based on the record.

IV. Impacts on the Natural Environment - Existing physical conditions relating to land, water, air, plant and animal life of an area and the interrelationship of those elements, such as soils, geology, topography, vegetation, surface water and drainage, floodplains, and ground water and aquifers. Specific impacts include, but are not limited to:

- Impact on air quality.
- Impact of groundwater quality and quantity.
- Impact on surface water features.
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- Impact on historic and prehistoric sites.

(Source: Section _____ of _____ Growth Policy and Section _____ of _____ Subdivision Regulations)

A. Narrative Discussion of Impact on the Natural Environment

B. Findings on Impacts on the Natural Environment

1. Soil disturbance during the construction of this proposed subdivision will increase the potential for the spread of noxious weeds on the property and the surrounding area. (Source: *Reference Subdivision Regulations and State Statutes AND facts supporting finding in the record such as Application, Environmental Assessment, Comment Letter, Public Testimony*).
2. All vegetation disturbed during construction shall be reestablished with vegetation types that have been recommended by the NRCS or MSU Extension Office and approved by the Planning Office. (Source: *Reference Subdivision Regulations and State Statutes AND facts supporting finding in the record such as Application, Environmental Assessment, Comment Letter, Public Testimony*).

C. Condition to Mitigate Impacts on the Natural Environment

1. A **covenant** shall be filed with the final plat requiring control of County declared noxious weeds. (Mitigates Finding 1)
2. A **covenant** shall be filed with the final plat stating: “*Lot owner(s) shall comply with the required Noxious Weed Management Plan, approved by the County Weed Supervisor.*” (Mitigates Finding 1)
3. Any areas disturbed during construction shall be reseeded by the subdivider(s) for the purpose of establishing adequate ground cover prior to final plat approval. The choice of species to be used shall be approved by the MSU Extension Office which reviews the choice of species to ensure it is compatible with the climate and soil types of the subdivision. (Mitigates Finding 2)

CONCLUSION: The impacts to the Natural Environment set forth in the findings are mitigated with the imposed conditions based on the record.