

Friends of Park County

P.O. Box 23, Pray, Montana 59065

Promoting thoughtfully planned growth in order to protect and enhance Park County's vibrant communities, sustainable working lands, and healthy natural resources.

Testimony on Mountain View Subdivision Preliminary Plat Application Livingston Planning Board September 21, 2022

Summary

The Planning Board is required by law to consider the Growth Policy.

The Planning Board must consider the Growth Policy in making its recommendation to the City Commission, under the clear wording of Montana statutes and your subdivision ordinance.

The Planning Board should recommend denial based on incomplete application, failure to satisfy the subdivision ordinance criteria and for contradictions with the Growth Policy.

The Planning Board should recommend denial of the application based on: (a) the failure of the applicant to provide a complete application as required by the subdivision ordinance; (b) evidence which shows the application does not satisfy the criteria in the subdivision statute and ordinance; and (c) substantial conflicts with your Growth Policy.

As a safeguard, the Planning Board should propose conditions of approval should the City Commission decide to approve the subdivision.

As a safeguard in the event the City Commission decides to approve the application, the Planning Board should propose conditions of approval to mitigate adverse impacts on agriculture, wildlife, public services and to address conflicts with the Growth Policy, including:

1. Limit the authorized future uses of the lots to the “light manufacturing” “transportation terminals” and “warehouse“ uses authorized in the Highway Commercial zone.
2. Pro-actively prevent the extension of the new internal road to the east, outside the city limits, to prevent it from being used to help justify and facilitate additional annexations and commercial development and include a continuous open space designation and buffer to the east.
3. Require landscaping and design standards.

This proceeding should prompt the Planning Board to commit to upgrading staff reports and an immediate revision of land use designations, zoning, annexation and infrastructure plans that are inconsistent with the core principles of the Growth Policy.

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Montana's subdivision statutes clearly require the Planning Board to consider the proposed subdivision's consistency with the 2021 Growth Policy.

Montana Code Annotated 76-1-605 describes the use of an adopted growth policy.

*(1) Subject to subsection (2), after adoption of a growth policy, the governing body within the area covered by the growth policy pursuant to 76-1-601 **must be guided by and give consideration to the general policy and pattern of development set out in the growth policy** in the:*

(a) authorization, construction, alteration, or abandonment of public ways, public places, public structures, or public utilities;

(b) authorization, acceptance, or construction of water mains, sewers, connections, facilities, or utilities;

(Emphasis added.)

The Mountain View Subdivision application describes the new roads, sidewalks, water and sewer lines and stormwater facilities that will be built, so these subsections of the Montana subdivision require the Planning Board to consider and be guided by its 2021 Growth Policy.

It is correct that the growth policy is not a "regulatory document":

*MCA 76-1-605 (2)(a) A growth policy is not a regulatory document and does not confer any authority to regulate **that is not otherwise specifically authorized by law or regulations** adopted pursuant to the law.*

However, as noted in the next section, the City's subdivision ordinance, does give you the authority to consider the Growth Policy.

In addition, the statute makes it clear that noncompliance with the Growth Policy can be a part of the grounds for denying or conditioning a subdivision application, as long as there are other grounds based on the city's regulations:

*MCA 76-1-605 (2)(b) A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based **solely** on compliance with a growth policy adopted pursuant to this chapter.*

In other words, as long as there are other grounds for withholding, denying or imposing conditions, then the Growth Policy can provide additional grounds for your action. Friends of Park County will present those alternative grounds for denial below.

The City's Subdivision Ordinance allows you consider the Growth Policy, "without limitation" in making recommendations to the City Commission on whether to deny, approve with conditions or approve the subdivision.

The City's subdivision ordinance provides:

III-B-4 Planning Board Hearing, Consideration and Evidence

c Consideration-Evidence

*In making its decision to approve, conditionally approve, or deny a proposed subdivision, the governing body may consider, **without limitation**, the following, as applicable:*

- (i) an officially adopted growth policy;*

Under the previously cited Montana statutes, the Growth Policy is not only "applicable" it is directly relevant and essential to making a sound decision.

The "Highway Commercial Zone" allows virtually anything - gas stations, Starbucks, convenience stores, offices, banks, apartments, motels, big box stores, even mortuaries. The future development of the subdivision with those uses contradicts the goals, objectives and strategies of the Growth Policy that call for focusing development downtown and against sprawling at the edge of the city. There is no future opportunity for the Planning Board or the public to review subsequent development applications.

Authorized uses in the "Highway Commercial" zone are classified either as "acceptable" or as requiring a "special exception permit."

The following uses are listed in [Table 30.40](#) as "acceptable."

- Single family dwellings
- Two family dwellings
- Multifamily dwellings
- Town Houses
- Accessory Buildings
- Modular Homes
- Churches
- Trade Schools
- Clinics
- Personal Care Center
- Child Care Center
- Veterinarian [sic] Clinics
- Kennels and Catterys
- Self Service Laundry

Bed and Breakfasts
Motels/Hotels
Travel Trailer Parks
Business and Professional Offices
Retail (Large scale Retail requires a Special Exception Permit)
Barber Shop and Beauty Parlors
Restaurants
Bars
Drive-in Restaurants
Banks
Mortuary
Wholesale Businesses
Commercial Greenhouses
Gasoline Service Stations
Auto Repair Garage
Automobile Dealerships
Warehouse and Enclosed Storage
Machine Shop
Light Manufacturing
Lumberyards
Transportation Terminals
Radio Stations
Government Offices
Health and Exercise Establishment

Additional uses that are authorized but require a “special exception permit” include “Large-scale Retail” “where the total area utilized by a single tenant occupies twenty thousand (20,000) square feet or more of gross floor area or outdoor space, exclusive of parking.”

In other words, despite its name and stated purpose the “Highway Commercial” zone allows virtually everything allowed downtown.

The City’s code allows the planning staff to approve any those uses on the subdivision lots without any oversight by the Planning Board or Zoning Commission or a public hearing. In other words, this proceeding is the only chance to consider the implications of allowing any or all of those uses at the western edge of the city.

The Growth Policy describes what residents believe is important to them about Livingston’s community character (page 14):

Through the community’s definition of community character, three overarching themes rose to the top, a friendly, laidback welcoming atmosphere, our surrounding natural environment, and the look and feel of our downtown Between 60 and 70 percent of respondents stated that unique businesses, the charming downtown, and the small-town atmosphere were very important to their definition of community character. The Growth Policy reflects and translates these definitions of community character into land use recommendations, with the understanding that the

community desires to maintain this character as the City grows and changes through time.

Here are some of the goals, objectives and strategies in the Growth Policy that development of the Mountain View Subdivision will contradict:

Objective 2.2.3: Support traditional neighborhood design and active transportation.

Goal 3.1: Prioritize infill over expansion by taking advantage of existing and planned infrastructure, such as transportation, energy, water, and sewer facilities.

Strategy 3.1.1.4: Promote any growth that maintains the compact, historic development patterns found in the historic city center.

Goal 3.4: Encourage the responsible growth of Livingston by evaluating proposed developments against the ten principles of Smart Growth.

Strategy 3.4.3.2: Encourage development near transit routes and active transportation infrastructure to promote development that produces minimal strain on the environment and existing transportation infrastructure.

Strategy 4.1.3.3: Reduce climate disruption through compact growth and increased transportation choices that reduce the need for driving.

Objective 4.3.2: Protect the riparian corridors to preserve unique wildlife, promote water quality, and provide for public trails and open space.

Objective 4.3.3: Preserve the night skies as well as the natural scenic vistas.

Objective 6.1.1: Support existing local businesses.

Objective 6.1.5: Plan for and attract new investment into the downtown district to support local businesses.

Objective 6.2.3: Make a good first impression to [sic] visitors.

Objective 8.2.7: Prioritize existing roadways and utility infrastructure to ensure connectivity and avoid leapfrog development.

Strategy 8.2.7.1: Prioritize roadway construction or improvements in areas that have been dedicated as mixed use or higher density in the Growth Policy.

As explained previously, as long as there are other grounds in the statute or subdivision ordinance for denying or conditioning the application, the Planning Board and City Commission can rely on conflicts with the Growth Policy as additional reasons to deny or condition the application.

The evidence in the record does not demonstrate compliance with the state subdivision criteria and therefore the Planning Board must recommend that the City Commission deny the application.

Montana state law and the City's subdivision regulations require the staff to prepare and the reviewing bodies to make "findings of fact" in support of their decisions to approve or deny an application.

A finding of fact requires the consideration and evaluation of relevant evidence and information. For many critical criteria the August staff report does not reference any facts but just offers an unsupported assertion.

Here are some examples from the August staff report:

1. Effect on Agriculture [Questions from Subdivision Ordinance III-B-6 (b)(iv)(A)].

*1) Would the subdivision remove agricultural or timberlands with significant existing or potential production capacity? **No.***

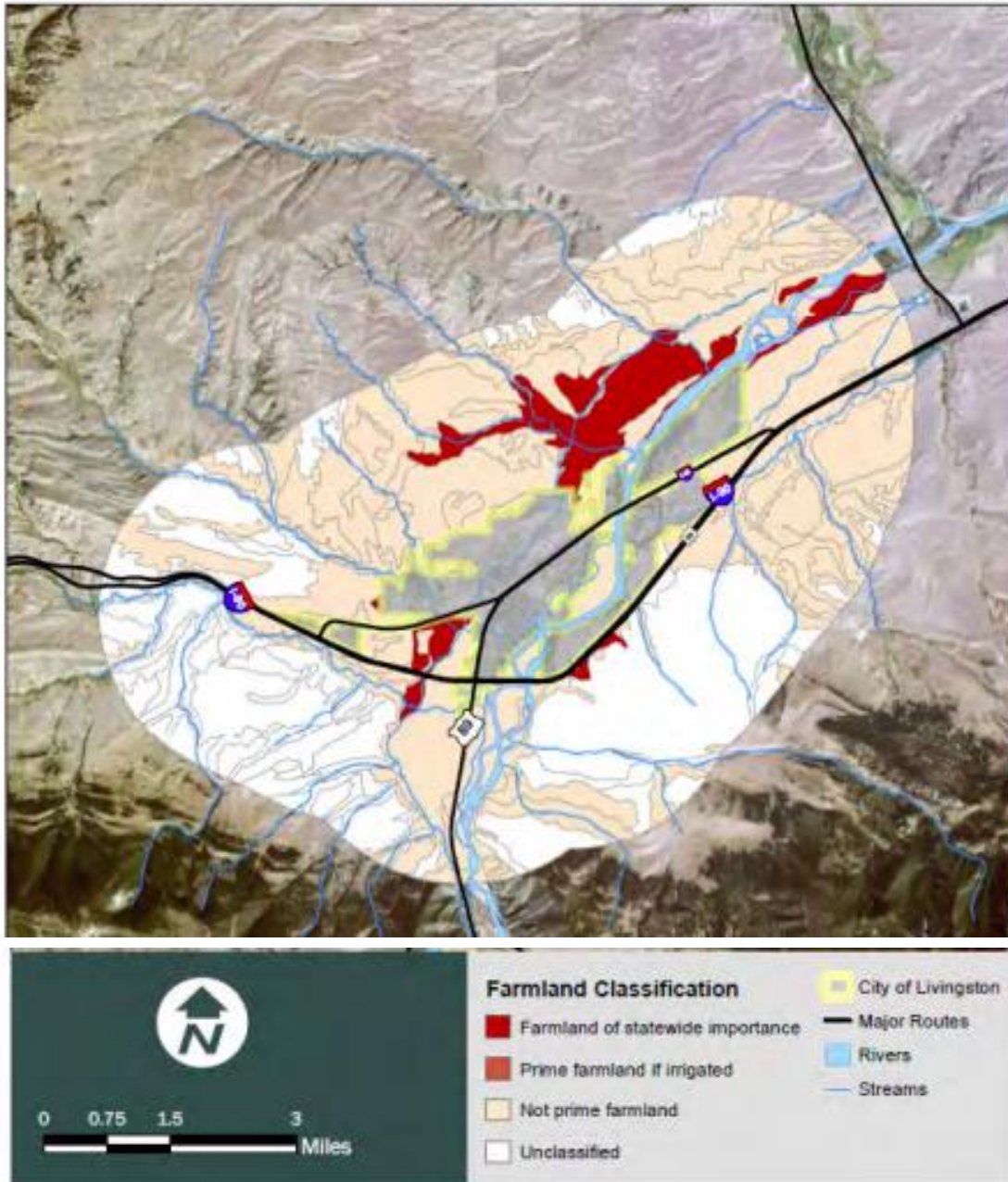
*2) Would the subdivision remove from production agricultural lands that are critical to the area's agricultural operations? **No.***

*4) How would the subdivision affect the value of nearby agricultural lands? **Not applicable.***

An unsupported statement of the conclusion without reference to any facts is not a finding of fact at all.

Readily available information does not support these conclusions. For example, Exhibit 2.7 "Farmland in the Extraterritorial Jurisdiction" in the 2021 Growth Policy shows there are agricultural lands on, and near, the subject property:

Exhibit 2.7: Farmland in the Extra-Territorial Jurisdiction



This is just one source of information on this subject.

The following findings in the August staff report are also unsupported conclusions (possibly in reliance on assertions made by the applicant) that are not based on any facts in the staff report and therefore cannot be a basis for a decision by the Planning Board:

3. Impact on Local Services [Subdivision Ordinance III-B-6 (b)(iv)(C)].

- 1) (a) No information about additional costs imposed by the development is provided.
(b) Answer does not respond to the question about “who will bear the costs.”
(c) No facts related to capacity to fund additional costs provided.
- 2) Unsupported conclusion about additional efficiency of service provision.
- 4) No evidence provided for the estimate of \$300,000 in additional revenues; what are the assumptions about the types of future development and their assessed value?

4. Effect on Natural Environment [Subdivision Ordinance III-B-6 (b)(iv)(D)].

The questions about possible effects on the natural environment in subsections 1) a), b), c), and f) are answered with conclusions without any supporting evidence, without any analysis of those facts that support the conclusion. It is also interesting that the staff report found that there was no known hazard in the form of “high winds.”

5. Effect on Wildlife and Wildlife Habitat [Subdivision Ordinance III-B-6 (b)(iv)(E)].

The responses in the August Staff Report to the questions in 1) and 2) are conclusions unsupported by evidence. Also see discussion about wildlife in the next section of this testimony.

6. Effect on Public Health on Safety [Subdivision Ordinance III-B-6 (b)(iv)(F)].

The responses in the August Staff Report to the first question about hazards resulting from highways and other conditions is a conclusion unsupported by evidence. The response to the third question relating to possible hazards from fire or traffic is “None have been identified.”

It is the responsibility of the staff and the Planning Board to affirmatively review available information and analyze it rather than treat the absence of information from third parties as grounds for a conclusion about facts.

The Planning Board’s recommendations and the City Commission’s decision must address the standards in the regulations as they are written, not the modifications or re-interpretations of them proposed by your staff.

In at least three cases, the August staff report modifies or reinterprets the question posed by the subdivision ordinance and responds to that modified or reinterpreted version that is not in the city code (while also neglecting to provide any factual support.)

Here are the problematic reinterpretations:

1. Effect on Agriculture

3) *Would the subdivision create significant conflict with nearby agricultural operations (e.g. creating problems for moving livestock, operating farm machinery, maintaining water supplies, controlling weeds, applying pesticides or would the subdivision generate nuisance complaints due to nearby agricultural operations)?* **No. There are no intensive agricultural activities in the immediate area.**

The actual words in the subdivision ordinance refer to “agricultural operations, not “intensive agricultural activities.” The area to be considered is “nearby” not “in the immediate area.” O

Here is how the August staff report addresses the criteria related to agricultural water facilities.

2. Effect on Agricultural Water User Facilities

1) *Would the subdivision create a significant conflict with “ water user facilities (e.g. creating problems for operating and maintaining irrigation systems or creating nuisance complaints due to safety concerns, noise, etc.)?”* **No ag water user facilities exist on the subject property.**

The actual question in the ordinance is about the potential for significant conflict with agricultural water user facilities that could be nearby; it does not limit the consideration to water facilities on the subject property.

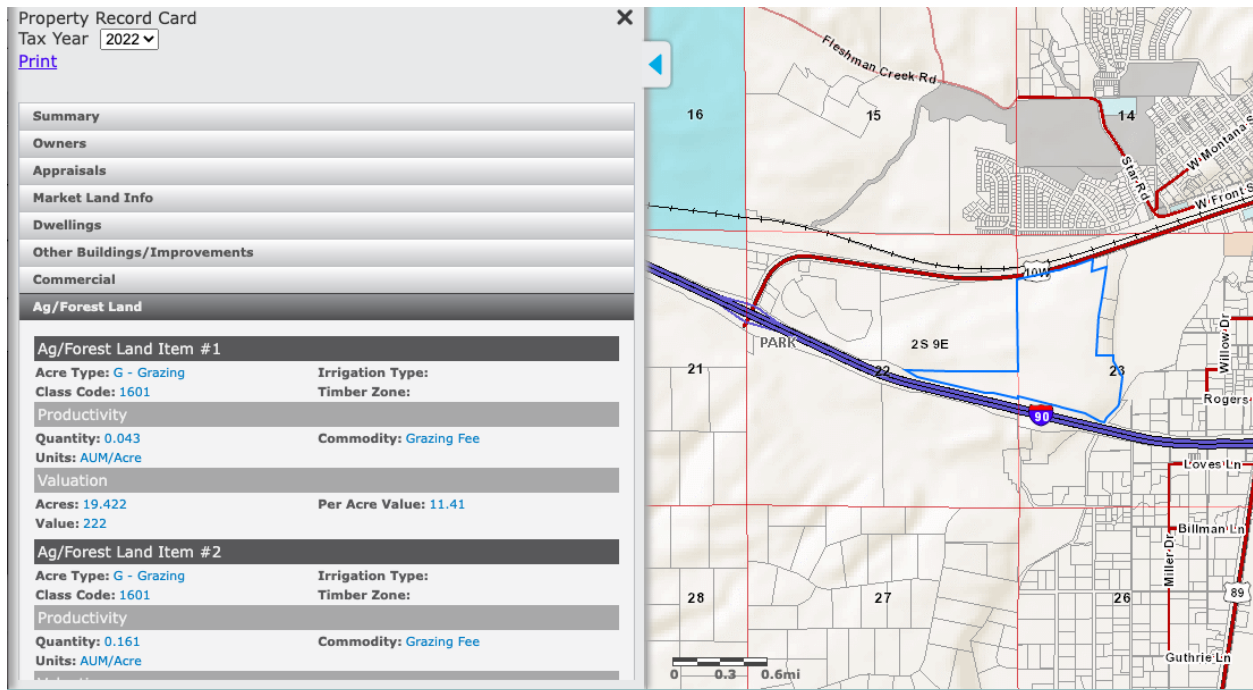
The Cadastral Survey indicates there are agricultural operations nearby, grazing and alfalfa production and the latter relies on irrigation:

Property Record Card
Tax Year 2022
[Print](#)

- Summary
- Owners
- Appraisals
- Market Land Info
- Dwellings
- Other Buildings/Improvements
- Commercial
- Ag/Forest Land**

Ag/Forest Land Item #1	
Acre Type: I - Irrigated	Irrigation Type:
Class Code: 1101	Timber Zone:
Productivity	
Quantity: 1.193	Commodity: Alfalfa
Units: Tons/Acre	
Valuation	
Acres: 6.399	Per Acre Value: 552.99
Value: 3539	

Ag/Forest Land Item #2	
Acre Type: I - Irrigated	Irrigation Type:
Class Code: 1101	Timber Zone:
Productivity	
Quantity: 3.74	Commodity: Alfalfa
Units: Tons/Acre	



There is also agricultural land south of I-90 and elsewhere nearby.

The August staff report addresses wildlife and wildlife habitat impacts this way:

5. Effect on Wildlife and Wildlife Habitat

1) How would the subdivision affect critical wildlife areas such as big game wintering range, migration routes, nesting areas, wetlands or other important habitat? This subdivision is not located within critical wildlife habitat.

The response substitutes what seems to be a technical term “critical wildlife habitat” for “critical wildlife areas” “such as big game wintering range, migration routes, nesting areas, wetland or other important habitat.”

The letter from Montana Fish and Wildlife states: “The area is used by big game, especially pronghorn, along with a variety nongame species. Black bears or mountain lions are known to use the area occasionally.” The letter also references design approaches that would provide “safe passage wildlife corridors.”

The staff report must address the actual standards in the city’s ordinance not the revised, weaker and narrower revisions to those standards as reinterpreted by the staff.

The application may not be exempt from the environmental assessment required by Montana subdivision statutes and the City's subdivision ordinance. If it is not exempt, then the application is incomplete and must be denied.

- 76-3-603. Contents of environmental assessment. (1) When required, the environmental assessment must accompany the subdivision application and must include:
- (a) for a major subdivision:
 - (i) 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;
 - (ii) a summary of the probable impacts of the proposed subdivision based on the criteria described in [76-3-608](#);
 - (iii) 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
 - (iv) additional relevant and reasonable information related to the applicable regulatory criteria adopted under [76-3-501](#) as may be required by the governing body;

Environmental assessments are not required if an application qualifies for the following statutory exemption in MCA 76-3-616 (2) [emphasis added]:

- (2) To qualify for the exemptions in subsection (1), a subdivision must meet the following criteria:
- (a) the proposed subdivision is entirely within an area inside or adjacent to an incorporated city or town where the governing body has adopted a growth policy that includes the provisions of [76-1-601](#)(4)(c);
 - (b) the proposed subdivision is entirely within an area subject to zoning adopted pursuant to [76-2-203](#) or [76-2-304](#) that avoids, significantly reduces, or mitigates adverse impacts identified in a growth policy that includes the provisions of [76-1-601](#)(4)(c); and
 - (c) the subdivision proposal includes a description of future public facilities and services, using maps and text, that are necessary to efficiently serve the projected development.

In this case, the application fails to satisfy subsection (b) because the zoning does not “significantly reduce or mitigate adverse impacts identified” in the new Growth Policy but in fact aggravates them.

The staff contends that the 2021 Growth Policy does not apply to this property because it was annexed and zoned before the Growth Policy.

Friends of Park County does not agree with this analysis but assuming, for the sake of argument that it is true, then the Growth Policy in effect at the time of the annexation, if any, is applicable. If no Growth Policy was in effect, then the exemption does not apply at all.

If an environmental assessment is required, then this application is incomplete and the Planning Board must recommend denial of the application by the City Commission.

As a safeguard, the Planning Board should propose conditions of approval to mitigate adverse impacts and to reduce conflicts with the Growth Policy should the City Commission decide to approve the subdivision.

In the event the City Commission decides to approve the application, the Planning Board should propose conditions of approval to mitigate adverse impacts related to the criteria in the Montana subdivision statute (MCA 76-3-608(3)(a)), the parallel criteria in the subdivision ordinance and conflicts with the Growth Policy.

Conditions of approval relating to the criteria in the subdivision ordinance and the Montana subdivision statute would mitigate the:

- Impacts on agriculture activities on the Voyich and other properties
- Impacts on nearby agricultural water user facilities on the Voyich property.
- Potential impacts on local services, including impacts on taxpayers who will bear part of the burden of building and maintain the new roads, water and sewer lines and other infrastructure.
- Impacts on the natural environment, including to the wetlands caused by runoff from streets and roads,
- Impacts on wildlife and wildlife habitat, including interruption of migration paths and loss of habitat needed for food or refuge and night illumination impacts on nocturnal wildlife.
- Impacts on public health and safety including impacts resulting from increased highway oriented traffic and increased greenhouse gasses accelerating climate change.

Because these conditions are appropriate then additional conditions that would help achieve greater consistency with the Growth Policy could also recommended to the City Commission, including:

1. Limit the authorized future uses of the lots to the “light manufacturing,” “transportation terminals” and “warehouse“ uses which are permitted in the Highway Commercial zone.

This limitation would be consistent with the current uses on the property – a printing facility and the FedEx shipping facility. These uses are not the kinds of uses that would be located downtown.

2. Pro-actively prevent the extension of the new internal road to the east, beyond the city limits, to prevent it from being used to help justify and facilitate additional annexations and commercial development and require a continuous open space designation and buffer to the east. Friends of Park County will provide an illustration of how this condition could be met.
3. Specify landscaping and design standards, which are not required because this property is not just to the Gateway Overlay District.

This application should spur the Planning Board to formally commit to improving staff reports, to identifying and removing the various contradictions to the Growth Policy in current zoning, infrastructure plans and annexation policy and to address the internal contradictions in the Growth Policy.

The application raises three fundamental issues we hope the Planning Board will formally commit to addressing:

1. Requiring adequate factual information and legal analyses from your staff to enable the Planning Board and the City Commission to discuss the merits of a proposal objectively and make the required findings of fact and conclusions of law, not just in this case, but in all cases.
2. The urgent need to translate the Growth Policy into internally consistent, effective zoning, annexation policy and infrastructure plans. Until and unless this is done, all of your, your staff's and the community's work on the Growth Policy will be rendered meaningless as development proceeds without regard to the Growth Policy's admirable goals and objectives.
3. Addressing the contradictions and unaddressed issues within the Growth Policy that create confusion about what it means and how it should be implemented. These include the extensive amount of commercial development assumed by land use designations both within the city limits and the extraterritorial jurisdiction. These are detailed in our May 2021 testimony to the City Commission.