

Friends of Park County

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

2023 Montana Legislature Round-up

May 2023

The 2023 Montana legislature adjourned on May 3. It passed many bills relating to land use and the environment. Important bills are summarized here, grouped under three headings: Bills weakening laws regulating the protections of lands, waters and natural resources from the impacts of rural development, bills removing zoning barriers to higher density and infill housing in cities, and the Montana Land Use Planning Act.

Bills weakening laws regulating the protection of lands, waters and natural resources.

SB 152 Allowing more recently created lots to qualify for review as minor subdivisions.

Passed Senate 46-3 Passed House 97-0 Senate passed with House amendments 49-0

This bill allows many more subdivisions to be approved as minor subdivisions, instead of major subdivisions, and thus subject to weaker criteria. Prior to this bill, any subdivision of a tract created by a subdivision of five or more lots after July 1, 1973, had to be reviewed using the criteria applicable to a "major subdivision". This bill changes that date to October 1, 2003, which means thousands of future land divisions can be approved more easily.

SB 158 Expanding family member subdivision exemption.

Passed Senate 33-16 Passed House 66-27

Current law exempts from subdivision review, the creation of lots *outside* of platted subdivisions, if the lots are for gifts or sale to family members. This bill expands this exemption to include the creation of lots within an existing subdivision if the lots are of a size allowed in the subdivision.

Note: Despite language in the new and existing legislation designed to stop the use of family transfers to create lots for resale to nonfamily members, this is known to be happening.

SB 228 Eliminating local government authority to regulate petroleum fuels

Passed Senate 33-17 Passed House 68-32

This bill adds petroleum fuels to the list of activities or land uses local governments are prohibited from regulating. The following broad phrase could be interpreted by an applicant or landowner

to prevent Livingston from regulating gasoline pumps, oil storage and processing, or methane gas compressor stations: [A local government cannot regulate] *the installation or use of any vehicles, vessels, tools, or commercial and residential appliances that burn or transport petroleum fuels.*

SB 240 Exemption of subdivisions of 14 lots or less and 2 miles or more from “high-quality waters” from review by the Department of Environmental Quality.

Passed Senate 34-14 Passed House 64-29

Senate Bill 240 exempts subdivisions from review by the Montana Department of Environmental Quality if they:

- (a) *are located 2 or more miles from high-quality waters, as defined in Montana Code Annotated 75-5-103;*
- (b) *include 14 or fewer single-family residential subdivision lots;*
- (c) *include wastewater systems that meet nonsignificance criteria established in rule; and*
- (d) *demonstrate full compliance with the acquisition of necessary water rights and water availability.*

“High quality waters” do not include intermittent streams that are dry for 9 months of the year and certain ground waters.

Senate Bill 285 Directing Montana DEQ to revise rules to reduce or eliminate review of septic systems that more than 500 feet away and lower than from surface waters; other provisions.

Passed Senate 27-23 Passed House 61-32 Senate approved House amendments 33-16

The bill directs the Montana Department of Environmental Quality to draft new rules that specify when new septic systems will be found not to have a significant impact on surface water quality including, specifically septic systems lower than and more than 500 feet away from surface waters. (This summary omits many details.)

SB 557 Making permits for mining and mineral exploration harder to challenge, reversing Supreme Court victory against Lucky Minerals gold exploration in Park County.

Passed Senate 30-20 Passed House 65-33 Senate passed with House amendments 34-16

As part of this summary, it is important to consider the state Constitutional context.

The Montana State Constitution includes the right to a clean and healthful environment as one of Montanans’ inalienable rights:

***Inalienable rights.** All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing*

and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

It is important to note that the state Constitution balances these rights with “corresponding responsibilities;” sensible land regulations, including zoning, reflects and balances property rights with responsibilities.

Article IX of the state Constitution, “Environment and Natural Resources” provides:

Section 1. Protection and improvement. (1) *The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.*

(2) *The legislature shall provide for the administration and enforcement of this duty.*

(3) *The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.*

The Montana Environmental Policy Act ([MEPA](#)) carried out by the state Department of Environmental Quality (DEQ,) are the means for protecting our rights to a clean and healthful environment. MEPA requires state agencies to analyze the effects of projects on things like fish, wildlife, water and agriculture, through Environmental Impact Statements (EIS.) MEPA also expanded the public’s opportunities to participate in these environmental reviews.

These Constitutional rights and MEPA were the reasons residents of Park County, working with a coalition of organizations including the Park County Environmental Council, were able to secure victories in the District Court and state Supreme Court (December 9, 2020) overturning a permit issued to Lucky Minerals for gold exploration in Emigrant Gulch in Paradise Valley. DEQ had authorized the company to proceed with preliminary road construction even before it had corrected its inadequate EIS.

The Montana Supreme Court found the EIS approved by the Montana Department of Environmental Quality was inadequate. It invalidated an amendment to MEPA that was the basis for DEQ’s action, because that amendment violated Article IX of the Constitution.

Senate Bill 557 amends two sections of MEPA to create new and serious barriers to securing an injunction against mining permits while the validity of a permit is being litigated and increases the risk of liability for damages by opponents filing litigation challenging mining permits under MEPA.

HB 971 Prohibits consideration of greenhouse gas emissions and climate impacts in state environmental impact statements.

Passed House 70-28 Passed Senate 34-15

SB 971 modifies the statute prescribing the subjects and contents of environmental impact statements under the Montana Environmental Policy Act to exclude the consideration of greenhouse gas emissions and potential related impacts on the climate, except in two circumstances: 1. These impacts may be considered as part of Federal environmental impact review, or 2. If the US Environmental Protection Agency classifies carbon dioxide as a regulated pollutant.

Bills passed that remove zoning barriers to higher density and infill housing in cities.

SB 323 Duplex authorization.

Passed Senate 47-3 Passed House 72-26 Senate approved House amendments 35-14

The key sentence in SB 323 is: “In a city with a population of at least 5,000 residents, duplex housing must be allowed as a permitted use on a lot where a single-family residence is a permitted use, and zoning regulations that apply to the development or use of duplex housing may not be more restrictive than zoning regulations that are applicable to single-family residences.”

SB 331 Broadening condo and townhouse exemptions from subdivision review.

Passed Senate 49-1 Passed House 85-14 Senate approved House amendments 35-14

This bill clarified the exemption of condos and townhomes from subdivision review under Montana Code Annotated Chapter 76-3 and reduced the discretion allowed in making a determination of the exemption. It prohibits local governments from making the conversion to townhomes or condos subject to a conditional use permit review or other quasi-judicial (discretionary) procedures.

SB 407 Prohibits discretionary residential design review.

Passed Senate 34-16 Passed House 93-5 Senate rejected House amendments 49-1 Conference Committee version Passed House 91-5 Passed Senate 44-6

SB 407 requires cities to use only clear and objective design standards and requires review by city staff and prohibits third party advisory board review of designs except in historic districts.

SB 528 Allows Accessory Dwelling Units by right and prohibits regulatory barriers to them.

Passed Senate 32-18 Passed House 85-14 Senate approved House amendments 48-1

Accessory dwelling units (ADUs) are smaller, additional housing units on single family lots, created by remodeling existing homes, adding on to them or built as detached cottages in the backyard or a side yard. They are used to house extended family members, friends or rented out. This bill mandates authorization of one attached or detached ADU on every lot on which a single-family residence is allowed. Cities cannot:

- Require a public hearing, variance or any discretionary review for an ADU.
- Require construction of additional on-site (off street) parking.
- Require design consistency with the main home.
- Require occupancy of the main house or the ADU by the property owner or a family relationship between the residents of the ADU and the main house.
- Impose limits on the minimum lot size, lot coverage, setback requirements or height of the ADU that are more restrictive than are imposed for homes generally.
- Charge impact fees for ADUs.
- Require infrastructure improvements as a condition of approving an ADU.
- Require covenants governing the use of the ADU.

Senate Bill 382 The Montana Land Use Planning Act.

Passed Senate 44-6. Passed House 95-5 Senate approved with House amendments 50-0

The Montana Land Use Planning Act is 52 pages in length, most of it is new provisions rather than amendments. It is mandatory for cities with populations of 5,000 or more in counties with populations of 70,000 or more (including neighboring Gallatin County.) It is optional for all counties and other cities, including Livingston and Park County.

The Act includes a legislative finding about the benefits of planning, including a list of desirable outcomes (more housing, protecting natural resources and farm and forest lands) that the Legislature believes – but does not mandate- planning will achieve.

Its legislative purposes specify an integrated planning framework in which plans are the required basis for mandatory implementing regulations, for internal consistency of those regulations with the plans and expedited review of decisions based on the implementing regulations.

In addition, the *Montana Land Use Planning Act*:

- Requires cities subject to the Act to prepare a housing needs analysis as part of a land use plan.
- Requires cities to choose five actions from a menu of 14 residential densification options including authorization of ADUs and duplexes on single family lots as permitted uses, eliminating or reducing parking requirements, reducing minimum lot sizes and changing zoning to allow higher density residential development near transit, universities and employment centers. (ADUs and duplexes are mandated by SB 323 and 528, described previously.)
- Requires the adoption of implementing regulations in “substantial compliance” with the land use plan and Future Land Use Map.

- Requires permitting decisions to be in “substantial compliance” with the implementing regulations. It is unclear whether the effect of this phrase will be to strengthen consistency of the decisions or interpreted to weaken the effect of those regulations.
- Confirms broad public participation in the planning phases but narrows it significantly in the execution phase, that is, applying regulations to site-specific permit applications.
- Requires anticipatory zoning for all areas that may be annexed to the City in the next 20 years, but the zoning is effective only upon annexation.
- Significantly revises the subdivision process.

The Montana Land Use Planning Act contains several good provisions, but its major failing is that it does not require counties to address the multiple challenges of rural residential and commercial development.