



Promoting thoughtfully planned development 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 City Commission

Transmitted September 18, 2023

Summary

With respect to the applicable subdivision criteria, this application is substantively the same as the 2022 application. To approve the application, the Commission would have to repudiate its own findings of fact and conclusions of law set out in the City's November 2022 decision which would be arbitrary and capricious. Instead, the application should be denied for these reasons:

1. Montana Code Annotated 76-1-605: Consistency with Growth Policy provisions.

The proposed subdivision would be inconsistent with:

- Objective 2.1.1. Community gateways that celebrate its character.
- Objective 6.2.3. Making a good first impression on visitors.
- Objective 3.1 Prioritize infill over expansion.
- Goal 3.4 Evaluate proposed developments against Smart Growth principles.
- Objective 4.3.3 Preserve the night skies and natural scenic views.
- Objective 6.1.1 Support existing local business.

2. Montana Code Annotated 76-3-608(3)(a): Primary subdivision review criteria:

- Adverse impact on local services.
- Wildfire and high wind hazards.
- Adverse impacts on wildlife.
- Potential surface water contamination.

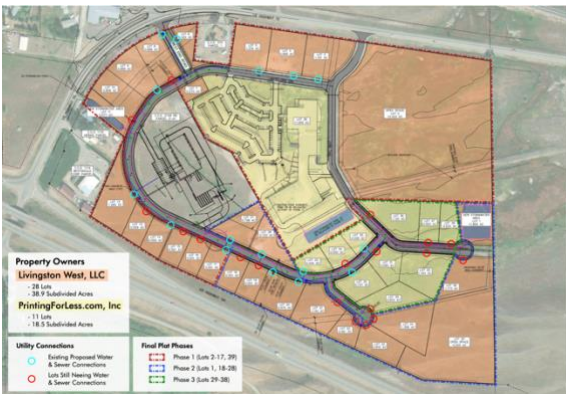
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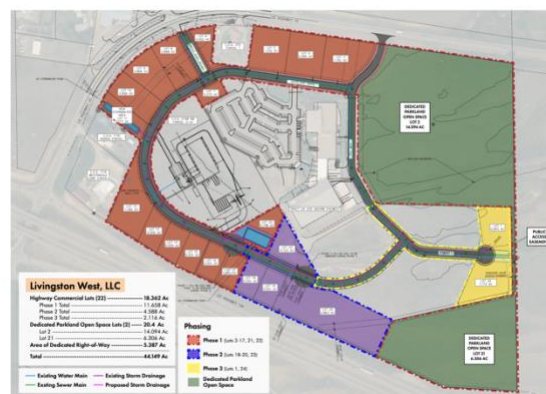
With respect to the relevant statutory criteria this application is substantively virtually identical to the application denied by the City Commission in 2022.

Despite a few minor changes in the number and arrangement of lots, the addition of a hypothetical set of covenants and restrictions the 2023 subdivision preliminary plat application is almost identical to the 2023 application, as is evident from this comparison of the development plans:

2022 Subdivision Development Plan



2023 Subdivision Development Plan



The City’s subdivision ordinance and Montana’s subdivision statutes require the City Commission and Planning Board to consider the proposed subdivision’s consistency with the 2021 Growth Policy as it did in 2022.

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;*

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 cited Montana statutes and the City's subdivision ordinance the Growth Policy is not only "applicable" it is directly relevant and essential to making a sound decision.

The City's November 3, 2022, findings of fact and conclusions of law found that the previously proposed subdivision plat did not comport with six objectives, two goals and one strategy in the Growth Policy, reproduced and discussed below.

The Planning Board recommendation, the staff report and draft findings of fact and conclusions of law failed to address the City's determinations of inconsistency with the City's Growth Policy.

The September 19, 2023 Staff Report and the draft Findings of Fact (there are no conclusions of law) do not address the Growth Policy other than a reference to the Future Land Use Map.

The City's 2022 findings regarding the Growth Policy were:

A governing body may not withhold, deny, or impose conditions on any land use approval or other ority to act based *solely* on compliance with a growth policy adopted pursuant to this chapter.

- While the adopted growth policy cannot be used to solely approve or deny any land use it can be used to provide additional grounds for a decision.
- Per City of Livingston Subdivision Regulations
 - Consideration-Evidence
"In making its decision to approve, conditionally approve, or deny a proposed subdivision, the governing body may consider the following, as applicable
(iv) an officially adopted growth policy

Livingston Growth Policy:

Goals, objectives and strategies of the growth policy that the Mountain View Subdivision does not comport with:

- Objective 2.1.1: Establish community gateways to indicate entrances into Livingston and celebrate its character.
- Objective 6.2.3: Make a good first impression to visitors.
- 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 of Livingston by evaluating proposed developments against the ten principles of Smart Growth.
- Objective 4.3.3: Preserve the night skies as well as the natural scenic views.
- Objective 6.1.1: Support existing local business.

There is no explanation of why provisions in the Growth Policy that were part of the basis for denial in the 2022 application are not considered legally relevant in 2023.

It seems arbitrary and capricious for the City to change the governing law that applies to the same applicant, the same kind of application on the same property in the course of one year.

With one exception (discussed in the next section), the applicant does not even attempt to demonstrate the consistency of the subdivision with provisions the City identified as conflicting with the preliminary plat.

Objective 2.1.1 Establish community gateways to indicate entrances to Livingston and celebrate its community character.

The application does not address this objective, (nor does the Staff Report.) This alone is grounds for denial.)

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



This is the property as of today (Google Earth imagery October 2021.) Imagine how it will look if developed with any of the wide range of allowed uses in the Highway Commercial zoning – gas stations, convenience stores, fast food franchise restaurants, etc.

The re-application does not address this objective, nor does the Staff Report or the proposed findings of fact.

This omission is grounds for denial.

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

The re-application does not address this objective, nor does the Staff Report or the proposed findings of fact.

This omission is grounds for denial.

Objective 3.4: Encourage the responsible [growth] of Livingston by evaluating proposed developments against the ten principles of Smart Growth (listed on next page.)

The re-application does not address this objective, nor does the Staff Report or the proposed findings of fact.

This omission is grounds for denial.

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

The re-application proposes a covenant that will require “shielded downlight exterior lighting only in conformance with the City of Livingston’s Night Sky Protection Act.” (Exhibit H) but does not address the preservation of “natural scenic views,” nor does the Staff Report or the proposed findings of fact. This omission is grounds for denial.

Objective 6.1.1: Support existing local business.

The re-application does not address this Objective, nor does the Staff Report or proposed finding of fact. This alone is grounds for denial.

The application does not comply Growth Policy Goal 3.1: “Prioritize infill over expansion by taking advantage of existing and planned infrastructure, such as transportation, energy, water, and sewer facilities.”

In 2022, the City found that the subdivision did not comport with this Goal 3.1: “Prioritize infill over expansion by taking advantage of existing and planned infrastructure, such as transportation, energy, water, and sewer facilities”

In the 2023 application, the applicant responds that the proposed subdivision “represents the continuation of infill of this property....” Application Narrative page 6 (scrolling page 19.)

However, the City’s policy clearly refers to prioritize infill across the City not on a single property separated by more than a mile from the rest of the City’s developed area and infrastructure. The applicant’s statement misinterprets the Goal and is thus not relevant.

Because there has been no change in state law, no major and responsive revision to the subdivision proposal (with one minor exception) and no new relevant facts submitted, ignoring and thereby repudiating the City’s prior application of the Growth Policy would be arbitrary and capricious. Instead the failure to address there provisions of the Growth Policy require denial of the application.

MCA 76-3-608(3)(a) states:

- (3) *A subdivision proposal must undergo review for the following primary criteria:*

(a) except when the governing body has established an exemption pursuant to subsection (6) 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, excluding any consideration of whether the proposed subdivision will result in a loss of agricultural soils;

Next, we review the City's findings of noncompliance under this statute and address whether and how the applicant has addressed those deficiencies.

Impact on local services:

In 2022 the City found that the proposal for a commercial subdivision plat on the same property:

will create an increase in infrastructure a significant distance from the majority of the land developed in the city limits which significantly increases the costs to maintain it," referencing specific details about water, sewer and transportation infrastructure enhancements.

The subdivision improvements proposed in the 2023 application are in the same location, no closer to the city than they were when first proposed, and there is no indication that the City's financial situation is much improved and no new facts are provided about those costs or an explanation of why the prior factual assertion is now in error.

In 2022, the City found:

We know that new development pays for itself when it comes to long-term maintenance and upkeep of new services. The City of Livingston is currently not able to maintain our historic and current infrastructure. Our sewer lines are being infiltrated by groundwater and we have water lines to residences that are failing. By adding additional water and sewer lines so far outside the city center we will be adding additional burden to current city residents.

This is why our Growth Policy prioritizes infill as a way to mitigate those costs to the City and its current residents."

November 2022 Decision page 2.

In 2023 the applicant asserts (and the staff agrees) that the new taxes will indeed cover project costs but there are no facts just speculative assertions. However there is no factual basis for that conclusion.

This is the question posed in MCA Section 76-3-608(C)(1)(a):

What additional costs would result for services such as streets, law enforcement, parks and recreation, fire protection, water, sewer and solid waste, schools and busing (including additional personnel, equipment, construction and maintenance costs)?

Staff Report page 4.

But the question is not answered. Instead of giving the cost, the staff report describes funding methods and responsibilities:

The cost of fire and police services will increase proportionally to population growth in the City; however, the amount attributed to this development is integrated into the City's current Impact Fee Schedule, which was updated in 2021. New and expanded public infrastructure associated with the proposed subdivision will be constructed and paid for by private parties. Ownership and maintenance of public infrastructure dedicated to the City will be the responsibility of the City. As stated in the Public Works referral dated 61 5 July 19, 2023 (attached), the developer covenants must be updated to indicate developer responsibility for sidewalk construction costs. Until the proposed subdivision lots are developed, it is unknown whether the proposed subdivision will have residential development. Similarly, it is unknown whether future housing would include residents with school age children requiring busing for school.

Id.

This means that another finding about whether costs would be covered by revenues from the development cannot be answered with an actual estimate only an assumption:

5) Would new taxes generated from the subdivision cover additional public costs?

Because the subject property is zoned Highway Commercial, with the potential for both higher density residential development as well as commercial uses, staff anticipates it is likely that the property tax revenue generated by new development will cover additional public costs. Impact fees will apply to new development in the subdivision and the developed lots must also pay into the City's street and light maintenance districts.

A conclusion, not connected to any determination of actual likely costs, that revenues are “likely” to cover additional costs, does not satisfy the statutory requirement.

Natural Environment:

The City's November 2022 Decision (page 2) found that once the subdivision lots were built out it could contaminate surface waters with runoff:

There are wetlands in the subdivision so it's likely surface water contamination from run-off at maximum build out could contaminate surface waters especially given that

highway commercial zoning is very permissive with a variety of potential contamination vectors at full build out,

2022 City Decision page 2.

The June 2023 revised subdivision application's incorporates the 2022 wetland delineation (scrolling pages 249 and 265) and site drainage report for the original application, which confirms rather than contradicts the City's conclusion about surface water contamination:

Proposed Watershed A is hydrologically split into two sections, Proposed Watershed A1 and A2. Runoff from Proposed Watershed A2 will match existing drainage patterns. Runoff from Proposed Watershed A1 will flow into Antelope Drive east towards the intersection with PFL Way. Runoff will flow in the gutter of PFL Way until the end of the curb where runoff is diverted into the existing wetland to the east. No new inlets and pipes are proposed for Proposed Watershed A.

Runoff from Proposed Watershed B is split into three separate basins as Shown on Exhibit B in Appendix A. Proposed Watershed B1 is the area west of the new Street B, Proposed Watershed B2 is the area east of the new Street B and Proposed Watershed B3 is the area that drains into the proposed retention area to matching the existing retention area.

Mountainview Subdivision Preliminary Plat Application June 23, 2023 scrolling page 58. See also reference to surface waters in Sundog Ecological Inc. hydrology report page 5, scroll page 244.

Effect on Wildlife & Habitat:

In finding that the subdivision does not address effects on wildlife, the City decision states: "There is a recommendation to connect open spaces for safe wildlife corridors. The subdivision doesn't connect the open spaces."

The revised application design still shows the two dedicated open spaces as two separated lots, shown bat right:



Figure 2. Site Layout
Mountain View Subdivision TIS

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The decision notes (page 2) “Montana Wildlife & Parks has stated that the area is used by big game especially pronghorn as well as black bear, mountain lions and non-game species. Other than a proposed covenant requiring bear-proof garbage containers (Exhibit H) neither the applicant nor the staff report and proposed findings of fact address these issues fully or offered any mitigation strategies.

Public Health & Safety:

The City’s November 2022 Decision (page 2) found that the steep grassy slopes near I-90 were a “known fire hazard” during the dry seasons and that the proposed subdivision is in “a very high wind area.”

Friends of Park County did not find documentation in the re-application of how the applicant addressed and mitigated these public health and safety risks.

In her statement explaining her opposition to recommending approval fo the subdivision application Planning Board member Jessie Wilcox explained that when the rezoning of the property from Light Industrial to Highway Commercial was approved in 2018, it may have been done under the assumption that City voters were about to approve funding for additional emergency services and an overpass over the rail line to safely connect the north side of town. These steps would have provided additional protections and an evacuation route in the event I-90 was closed due to a fire or a derailment.



Above: Fire after derailment of a Union Pacific train carrying oil, next to Interstate 84 and the Columbia River in the small city of Mosier, Oregon, June 3, 2016. (Photo KGW TV.)

Wilcox also mentioned that range fires in Montana were occurring even in the winter now. She also referenced potential harm to the wetland and wildlife habitat as other grounds for her opposition.

A new traffic analysis was submitted with the re-application. It is not clear whether or how this considered additional traffic volumes when I-90 is re-routed through the city, and what analysis or mitigation addressed the City's concerns about the hazards presented by the proximity to I-90 and the main line railroad.

Friends of Park County submits its September 21, 2022 testimony on the original application as part of the record of this proceeding.

As part of its testimony on the re-application, Friends of Park County have previously submitted its September 21, 2022, testimony to the Planning Board on the original application.

Conclusion: The City Commission should deny the application for failure to satisfy all the requirements of MCA 76-3-608, its subdivision ordinance and for failure to demonstrate consistency with multiple provisions of the Growth Policy.

For the reasons presents the Planning Board should recommend that the City Commission deny the re-application.

Respectfully submitted,

A handwritten signature in blue ink, consisting of several overlapping loops and a long tail extending downwards and to the right.

Ken Cochrane, President
Friends of Park County