

LIVINGSTON CITY COMMISSION ADDENDUM #1

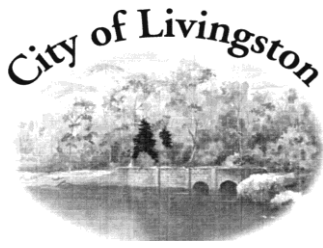
REGULAR MEETING 10.04.2022

ATTACHMENT TO ADDENDUM D.

DISCUSS/APPROVE/DENY: MOUNTAIN VIEW SUBDIVISION

PRELIMINARY PLAT APPROVAL

- **Memo from Interim City Manager, Lisa Lowy**
- **Insurance Policy section concerning Land Use Decision Coverage from MMIA**
- **Additional Memo to Planning Board Decision from Staff**
- **Legal Opinion Memo from the City Attorney on issues raised during the Planning Board Meeting.**
- **MCA Portion of Requirements for Decision Summary**



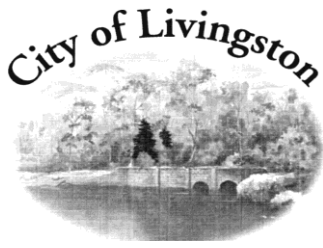
Lisa L. Lowy
Interim City Manager
citymanager@livingstonmontana.org
(406) 823-6000

Chairperson
Melissa Nootz
Vice Chairperson
Karrie Kahle
Commissioners
Mel Friedman
Quentin Schwarz
Torrey Lyons

TO: Livingston City Commission
FROM: Lisa L. Lowy, Interim City Manager
DATE: September 30, 2022
RE: Mountain View Subdivision

As the Interim City Manager, it is an obligation of the role to provide additional information and reminders about decisions to the commission which may present added liability to the City, as an organization, or to each of you personally. That is the intent of this memo concerning the Mountain View Subdivision which is on our agenda for 10/4/22, as well as to provide guidance about concerns raised during the Public Hearing at the Planning Board meeting last week.

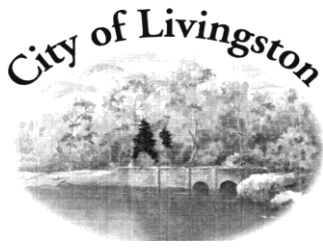
1. The deadline for a decision on this application is 10/19/2022, which is the 60th day from the date of application.
2. This subdivision request must be decided in the 10/4/2022 meeting, because of cancelling and/or closing the Commission meeting on 10/18/2022, due to the City Manager hiring process.
3. Land Use Decision liability coverage is limited to \$500,000 from MMIA. There is no coverage if it is determined that the decision is not in keeping with statute and policy guidance. (MMIA Policy guidance attached)



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4. Land Use Decisions are considered quasi-judicial and must follow the law as written in both MCA and City Ordinances. This includes the disclosure of ex parte communications with any stakeholder, especially if those communications are not part of the public record. Any departure from either, creates liability for you as commissioners individually because you would be considered to be acting outside the scope of your authority. Any Commissioners who met with the developer or a representative of concerning this project should simply disclose that at the beginning of the Action Item.
5. Private Property Rights take precedence in case law throughout Montana.
6. If you as the Commission deny, or provide a conditional approval of, a subdivision you are required to provide written findings of fact and conclusions for the denial, or for each condition, consistent with the MCA and Ordinance. (MCA Section Attached)
7. From a process and procedure standpoint, the Planning Board as the entity charged with the public hearing portion of the process, is expected to provide findings of fact and conclusions for a recommendation to deny or condition an approval. They did not fulfill that obligation with their denial.
 - a. We can address that moving forward with them as you are the decision makers for the approval or denial of subdivision requests. However, as a Commission with that duty, in order to be true to process, you should hereafter require written determinations directly from the Planning Board.



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8. The property was annexed into the City Limits and Zoned Highway Commercial previously.
9. You do not have the authority to limit permitted uses under the property's zoning designation as a condition of approval.
10. There is no requirement to consider the Growth Policy in subdivision review. It is assumed that our subdivision regulations were written to reflect the growth policy. Even if this assumption is wrong, the current regulations control.

The following attachments are provided as documentation of the above and for your reference.

- a. Insurance Policy section concerning Land Use Decision Coverage from MMIA
- b. Additional Memo to Planning Board Decision from Staff
- c. Legal Opinion Memo from the City Attorney on issues raised during the Planning Board Meeting.
- d. MCA Portion of Requirements for Decision Summary

If any other questions come up between now and the meeting, please feel free to reach out and we will get research and answers to you which can be presented to the public during the meeting.

MONTANA MUNICIPAL INTERLOCAL
AUTHORITY

MEMORANDUM OF LIABILITY
COVERAGE

EFFECTIVE JULY 1, 2022

SECTION 14. LAND USE PRACTICES

14.1. Land Use Practices Coverage.

The MMIA agrees to pay on behalf of a COVERED PARTY those sums as part of the Ultimate Net Loss up to the LIMITS OF LIABILITY which the COVERED PARTY shall become obligated to pay by reason of liability imposed by law because of a covered Claim for Land Use Practices, under Coverage E, to which this Coverage Section applies, caused by an Occurrence during the COVERAGE PERIOD.

Coverage E for Land Use Practices is subject to the per Occurrence LIMITS OF LIABILITY for the COVERAGE PERIOD as set forth in the DECLARATIONS.

14.2. Land Use Practices Definitions.

“Land Use Practices Liability” under Coverage E means legal liability which a COVERED PARTY shall become obligated to pay by reason of liability imposed by law because of a covered Claim, including Property Damage or diminution of property value, arising out of, or based upon, land use regulation, interim takings, takings, down-zoning, zoning, general planning regulations, easements, nuisance, or annexation, including deprivation of constitutional or civil rights related thereto, caused by an Occurrence during the COVERAGE PERIOD.

14.3. Land Use Practices EXCLUSIONS.

In addition to the EXCLUSIONS stated in Section 9 of this Memorandum, the following are not covered under Coverage E, Land Use Practices:

14.3.1. Any liability for Bodily Injury, Personal Injury, Property Damage, Automobile Liability, Public Officials Errors or Omissions, Employment Practices, or Employment Benefit Liability.

14.3.2. Any liability for a Claim arising out of or in connection with the principles of eminent domain, mandamus to compel eminent domain, pre-condemnation activities, condemnation proceedings, or inverse condemnation by whatever name regardless of whether such Claims are made directly against a COVERED PARTY or by virtue of any agreement entered into, by or on behalf of the COVERED PARTY.

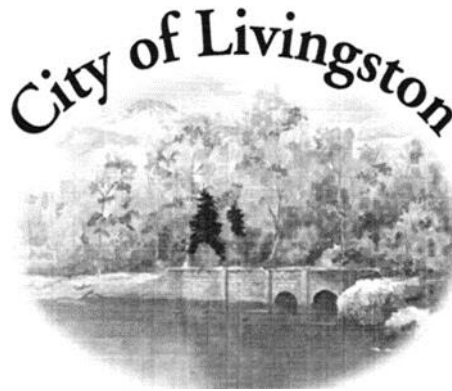
14.3.3. Any liability for a Claim as a result of subsidence. "Subsidence", with respect to Coverage E hereunder means any earth movement, including but not limited to settling, expansion, earth sinking, earth rising or shifting, slipping, falling away, tilting, caving in, eroding, mud flows and any other movement of land or earth. This EXCLUSION does not apply to Property Damage arising out of subsidence proximately caused by the negligent act or omission of a COVERED PARTY.

14.3.4. Any liability, including all Damages, directly or indirectly arising out of or related to the liability of a COVERED PARTY involved in or acting as Contractors for Residential Construction.

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Michael Kardoes

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Incorporated 1889

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September 9, 2022

MEMORANDUM

TO: City Planning Board

CC: City Manager, City Attorney

FROM: Director of Building/Planning

SUBJECT: Mountain View Subdivision

All of the submitted documentation for this application is now available on the City website with the agenda. Keep in mind that the engineering reports and utility design are all preliminary and are subject to further review and refinement by the Public Works Department, in accordance with their standards, after, and if, preliminary plat approval occurs.

With regard to the presumption that this application requires two variance requests:

1. Alleys – Livingston Subdivision Regulations Sec. VI-A-8-b(vii) states “Alleys, designed in accordance with Table 1, shall be provided in all residential subdivisions. Alleys will also be the preferred method for providing utility and garbage pick-up access in non-residential subdivisions.”

This is a non-residential subdivision based on its zoning. “preferred method” is not a requirement. No variance is required.

2. Livingston Subdivision Regulations Sec. VI-A-7c states “Blocks must be wide enough to allow for two tiers of lots unless a narrower configuration is essential to provide separation of residential development from traffic arteries, or to overcome specific disadvantages of topography and orientation, or unless the governing body approves a design consisting of irregularly shaped blocks indented by cul-de-sacs.”

Because alleys are not required (alleys would generally separate the two tiers of lots) and the development is oriented on a single street with the lots either bordering the project boundary or accessed by cul-de-sacs, the applicant has the right, under our regulations, to present the current design to the governing body.

The Planning Board, at the August 17th meeting, expressed a desire to see an analysis of how this subdivision complies with or furthers the Growth Policy. They also expressed the desire to see both the final requirements from MDOT as well as information about what this development would do in terms of affordable housing. I will explain why these items did not appear in the Staff Report.

Under State law, when a property is annexed into a city's jurisdiction, the city commits to providing municipal services to the annexed parcel. If the City has zoning, it must designate a zone for the parcel. Both of these processes, annexation and zoning, provide vested property rights to the parcel and the owner. Since completed using the guidance of the growth policy at that time, the fact that a newer, or updated, growth policy exists today has a limited affect. An updated growth policy only affects the property rights vested by annexation and zoning to the extent that the zoning regulations or other regulatory documents have been altered to comply with the updated growth policy. There is no point in analyzing the proposal under the current growth policy, because the process to which it applies, annexation and zoning, has already occurred. The growth policy cannot undo what was done lawfully under a prior document.

The Montana Department of Transportation has jurisdiction over Hwy 10. They will decide what, if any, improvements will be required to their roadway as a result of this development. Their final determination has not yet been made and may take several months to be finalized. As these decisions are made, any influence that DOT offers the City, will be overseen by engineering staff or city consultants. This is why the staff report proposes to condition this subdivision based on DOT's requirements.

Effect on affordable housing. The City does not regulate the provision of "affordable housing". With this development, because of the zoning, we don't know with any certainty that housing will be built. All that can be said is that the project is zoned for and could provide additional housing. Affordability, under any definition, remains an unknown.

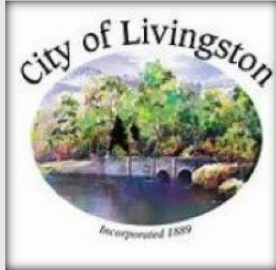
September 30, 2022

Legal Memo

From: City Attorney, Courtney Lawellin

Re: *Mountain View Subdivision*

Background and considerations for the review of the Mountain View Subdivision by the Livingston City Commission on October 4, 2022.



OFFICE OF THE CITY ATTORNEY

Courtney Jo Lawellin

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- ❖ The Property was Annexed in 2004, and zoned thereafter, then rezoned in 2018 to highway commercial. Livingston has had a growth plan since 2004, updated most recently in 2017 and 2021. A planning board and two zoning commissions recommended the annexation, zoning, and rezoning. Only subdivision remains to be reviewed.
- ❖ Limitations on authorized uses are zoning considerations and cannot be conditions of subdivision approval. Conditioning subdivision on excluding permitted uses is illegal, violates state law and COL regulations. 76-2-302 If suggested, a rezoning would require a 4/5^{ths} vote of the Commission.76-2-305 GP pg 11/6
- ❖ Subdivision review is limited to the review of a complete subdivision application 76-3-604. Completeness is determined by the statute, subdivision regulations, overseen by the planning department and is complied with by the developer applying. Id. & 76-3-504(subdivision reg contents) and COL subdivision regs.
- ❖ The planning board failed to make any findings related to their recommendation to deny the proposed subdivision. Regardless of any action the commission makes in relation to a planning board's recommendation, the commission must, as required by law, make findings of fact and have conclusions that identify the regulations and statutes used and how they apply to the basis of the decisions.620 & 608(4)(5) Conditions for 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.76-3-620
- ❖ The criteria for commission review, and denial, approval, or conditional approval, are 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.

- ❖ The “full discretion” of the governing body, related to the growth policy, is the discretion employed to detail how the essential elements required under 76-1-601(3), are defined during its creation. The Growth Policy is non-regulatory in nature which includes being non-regulatory in land use planning, including subdivision approval.
- ❖ In conditioning approval, a governing body may not unreasonably restrict a landowner's ability to develop land. If requiring mitigation (conditions of approval in 608(3)), and consistent with 76-3-620, a governing body shall consult with the subdivider and shall give due weight and consideration to the expressed preference of the subdivider if mitigation can be accomplished. The proposed conditions for Mountain View Subdivision are found in the staff report. Conditions of approval were not determined by the planning board.
- ❖ A growth policy's influence on subdivision is limited to subdivision regulations, which are drafted and amended to conform to a growth policy. This is how a growth policy influences subdivision. A new growth policy does not amend subdivision regulations, but amendment to subdivision regulation must be guided by the general policy and pattern of development laid out in the new growth policy. A developer is required to conform a subdivision to current subdivision regulations. 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. 76-1-605

Courtney Jo Lawellin
Livingston City Attorney

Montana Code Annotated 2021

TITLE 76. LAND RESOURCES AND USE

CHAPTER 3. LOCAL REGULATION OF SUBDIVISIONS

Part 6. Local Review Procedure

Review Requirements -- Written Statement

76-3-620. Review requirements -- written statement. (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; and
- (f) identifies the conditions that apply to the preliminary plat approval and that must be 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.

History: En. Sec. 2, Ch. 224, L. 1995; amd. Sec. 13, Ch. 298, L. 2005; amd. Sec. 20, Ch. 446, L. 2009; amd. Sec. 5, Ch. 319, L. 2021.