



MISSOULA CONSOLIDATED PLANNING BOARD

Meeting Minutes



Missoula County
Planning, Development & Sustainability
(406) 258-4657

City of Missoula
Community Planning, Development & Innovation
(406) 552-6630

Date: November 12, 2024, 6:00 p.m.

Location: Missoula County Courthouse, Sophie Moiese Room (in person) or TEAMS (virtually)

Members in Attendance: Danny Tenenbaum (City Alternate), Danny Oberweiser (County Appt), Peter Bensen (County Appt), Derek Kanwischer (City Appt), Lynn Davis (City Appt), Rick Hall (County Appt), Tung Pham (Mayor), James Fountain (County Alternate), Josh Schroeder (Conservation District), and Shane Morrissey (City Appt)

Members Absent: Sean McCoy (County Appt)

I. CALL TO ORDER [Time stamp – 0:19]

Shane Morrissey called the meeting to order at 6:02 p.m.

II. ROLL CALL [Time stamp – 0:25]

Analeshia Rodriguez called the roll. Seven members were in attendance. James Fountain and Danny Tenenbaum were promoted to voting members for the evening.

III. APPROVAL OF MINUTES [Time stamp – 1:41]

Tung Pham moved, and Derek Kanwischer seconded approval of the October 15, 2024, minutes as written. The motion passed by unanimous voice vote.

IV. PUBLIC COMMENT ON NON-AGENDA ITEMS [Time stamp – 2:32]

There were no public comments on non-agenda items.

V. STAFF ANNOUNCEMENTS [Time stamp – 4:45]

Karen Hughes announced an update on an upcoming memo that will be outlining a summary of the Planning Board actions.

VI. PUBLIC HEARINGS [Time stamp – 5:22]

There were no Public Hearings.

COMMUNICATIONS & SPECIAL PRESENTATIONS [Time stamp – 5:27]

A. Karen Alley, MACo Associate General Counsel, - Missoula County Planning Board Training

SPEAKER PRESENTATION

Karen Alley introduced the fundamentals of Planning Boards and effective governance practices. She highlighted the comparison between the Planning Board and the Planning Commission under the Montana Land Use Planning Act (MLUPA), noting the City's current efforts to comply with MLUPA. Alley provided the concepts of quasi-legislative and quasi-judicial decisions. In the discussion, ethical considerations for Planning Board members were explored, focusing on conflicts of interest, gifts/favors, and ex parte communication. An update on the Broadwater County Case was addressed as well.

BOARD DISCUSSION

Board members raised a question about the best practices regarding the disclosure of any prior relationships with applicants that come before the Board. Alley confirmed that it's always a best practice to disclose any previous or prior relationships to maintain transparency and trust in the decision-making process.

The speaker shared what constitutes a "gift of substantial value" under Montana law. She emphasized the potential for bias or conflict of interest. The potential issues with site visits and tours provided by developers or exclusive communities were mentioned. It was referenced practices like these can compromise the integrity of the planning process.

The ethical concern of ex parte communication in board decision making processes, particularly in quasi-judicial decisions was addressed.

A Board member clarified whether forming subgroups within the Planning Board to address specific issues and then reporting back to the full board is appropriate. Alley stated with legal guidance from an attorney, creating subgroups for research or policy development is acceptable. These subgroups can hold public meetings, take public comments, and contribute to the board's work without violating ethical standards, as long as their activities are transparent and reported back to the full board.

Concern about individual site visits and independent research by Board members were discussed. They asked whether conducting individual research outside of what's presented to the Board is not advisable. Alley responded that if the research involves specific issues related to a particular application under review, it is problematic because it introduces information not shared with all Board members. However, researching broader issues to understand policy development is acceptable – so long that it's not site specific.

The discussion revolved around the rules governing ex parte communications for Planning Board members, specifically the difference between quasi-legislative vs quasi-judicial actions. In quasi-legislative actions, such as creating subdivision regulations that affect the entire community, ex parte communications are less restricted, and Board members can engage with the public. However, in quasi-judicial actions, where rules are applied to a specific manner, ex parte communications are more restricted.

A Board member raised a question about the Board's role in decision-making versus advising the governing body, such as the City Council or County Commissioners. This led to a question about whether or not the Board should align its recommendations with the governing body as well as with representing the public's views. Alley emphasized that although the Planning Board is an advisory board, it plays an important role in providing the governing body with collecting public information. It's common for the governing body's decisions to differ from the Planning Board's recommendations due to new information that may have been received. They have some latitude to be creative and represent public concerns, as long as their recommendations don't make proposals infeasible.

The discussion centered on the ethical responsibilities of Board members, specifically regarding conflicts of interest and the consequences of unethical behavior. It was stated when a Board member

acts with an undisclosed conflict of interest, it can lead to litigation from affected parties. If you suspect another Board member has a conflict, it was recommended to consult a legal advisor on how to proceed without biasing other Board members.

Concern was expressed about whether Planning Board members are allowed to individually visit specific sites to better understand their context, outside of what is presented on maps or shared information. Alley responded by clarifying that if the subdivision regulations permit such visits and if it's a common practice among Planning Board members, there should be no issue with individually driving by the site.

Best practices for public comment and participation were summarized. Board members asked for more clarification on how to address the handling of press in meetings. Alley stated the best approach was to follow the established meeting agenda and protocols. She explained the public comment periods are designed for individuals to express their thoughts or concerns, not to engage in a question-and-answer session with the Board. It's noted that the ability of a Planning Board to put items on the agenda or update regulations varies by County and jurisdiction. When it comes to growth policies, typically a resolution of intent from the governing body is required to adopt or amend them.

A Planning Board member raised a question regarding the current status of the Planning Board and the implementation of the Planning Commission. Laval Means, Community Planning Manager, with the City of Missoula clarified that they plan to continue working with the Planning Board through the Planning Act's land use planning phase and when they reach the code reform phase, they anticipate the need to transition to a municipal-only commission.

Board members questioned whether all subdivisions would undergo administrative review or if certain applications meeting specific criteria will require an expedited review. Alley explained with the adoption of new regulations and the splitting of the commission, County members will continue as a County Planning Board handling site-specific reviews. The City's Planning Commission will manage the administrative process for subdivisions within the City.

A summary of the Broadwater County Decision and its broader implications for subdivision development were addressed.

Please see attached slides.

VII. COMMITTEE REPORTS

There were no committee reports.

VIII. OLD BUSINESS

No old business was reported.

IX. NEW BUSINESS

No new business was reported.

X. COMMENTS FROM BOARD MEMBERS

No comments from Board members were reported.

XI. ADJOURNMENT [Time stamp – 2:07:58]

The meeting was adjourned at 8:11 p.m.

Missoula Consolidated Planning Board November 12, 2024 – Transcription

This transcription was produced by transcription software. There may be discrepancies between this transcription and meeting dialogue. You can view the recording of the meeting at this link: <https://missoulacomt.portal.civicclerk.com/event/9072/media>

Missoula Consolidated Planning Board- November 12, 2024-Meeting Recording

AR **Analeshia Rodriguez**

Great. Thanks.

We'll go ahead and call the November 12th, 2024 Planning Board meeting to order.

Can we have roll call please?

Annalisea roll call.

Ben Davis. Ben Davis.

Can we share?

Inform here.

Danny Tenenbaum here.

Danny oberweiser here. Peter Benson here.

Rick call.

Can't hear you there, Rick.

You said.

James Fountain.

Here.

Shane Morrissey.

Mr. Chair, we have seven regular members present.

Would you like to appoint alternates? James Fountain and Danny Tunenbone as voting members for the evening?

Yes, please.

And we do have quorum. Thank you.

You wanna try that again?

See if we can hear you.

RH **Rick Hall** 19:46

Can you hear me? No. OK.

AR **Analeshia Rodriguez** 19:47

Oh yeah, we got you. Thanks.

We'll move on to approval of the Minutes from October 15th, 2024, almost a month ago.

And hopefully everybody's gotten a chance to review those and if somebody wants to make a motion, I would take one.

I move to approve the Minutes.

Wait, thanks tongue 2nd.

2nd.

Get it by Derek.

And we'll just do an up and down vote, although any discussion.

All those in favor, please say aye, aye.

RH **Rick Hall** 20:31

Hey Cortana.

AR **Analeshia Rodriguez** 20:32

Any opposed?

Any opposed?

The abstentions.

LD **Lynn Davis** 20:37

Thanks.

AR **Analeshia Rodriguez** 20:41

Passes unanimously.

We'll move on to public comment on non agenda items.

We don't have any public hearings tonight, but if anybody has anything that they'd like to say from the public, we'll give you a couple of minutes and maybe annalisia could put in, put up the call in information possible up on screen.

If you're on teams, you can just simply raise or lower your hand to be acknowledged.

And if you are calling in on your phone, the number to call is 406-272-4824.

The phone conference ID is 127489322 pound and you will press *6 to mute and unmute yourself and star five to raise your hand.

And be acknowledged.

Do you have a couple of minutes?

Not seeing any hands raised.

Right. OK.

With that, we will close public comment on non agenda items.

We'll move on to staff announcements.

Do we have any staff announcements?

Go ahead, Karen.

During years of Missoula County planning development sustainability, we don't really have much in the way of announcements.

I do have a memo coming that outlines all the planning board actions and both county Commission and City Council.

Actions on the items that have been before you in recent months, so that should be coming in the next week.

Great. Thanks Karen.

Anybody else?

No other staff announcements.

We'll move along to public hearings. We have no public hearings tonight, and that brings us to communications and special presentations we have.

A planning board training with Karen Alley.

Mr. Chair, I do have both a PowerPoint and a handout, so I will hand this to Tim.

To get copies out to folks.

We'll join the meeting.

Then it looks like I don't have ability to share my screen. OK.

Thank you.

All right. Are we ready?

Excellent. Well.

At the outset, my name is Karen Alley.

I'm associate general counsel for the Montana Association of Counties, and I was asked to come.

Karen Lanning planning department.

Karen invited me to do a board training.

This is something that I commonly do with planning boards.

I've actually not been to Missoula in the three years that I've held this position.

But.

I go around travel quite a bit around the state of Montana, meeting with different

planning boards, talking about issues that are current, that are relevant to planning boards.

And kind of just do general board trainings.

So that is what I've been invited to do here tonight.

And I will say I have done hybrid meetings before. Often times I don't see if people have questions online.

So if someone could help manage that, that would be very beneficial.

So I will put forth a disclaimer right off the bat.

I am an attorney.

I am not your attorney.

Nothing in this presentation should be construed as legal advice. Should you have questions that.

Of nature that you feel like you would need legal advice.

I recommend you do consult your County Attorney or city attorney as applicable.

What I do is come.

Forth is come to boards and talk about best practices.

What I've seen in the field because the Montana Association of Counties represents all 56 counties in the state of Montana.

So we I work with a very diverse set of issues from urban issues.

Around zoning, city annexation to more rural issues, which my rural issue of late has been wind farm zoning.

So really I kind of touch a broad spectrum of land use issues for the state of Montana.

So that's my one disclaimer. I always I have to say it so.

So where we are headed tonight is in talking with Karen this Karen, about what I could offer you all.

I have some basics on things like board governance and best practices for planning for planning boards.

The role of planning board and local planning processes, and with that kind of a comparison of.

The Planning Board and the and the Planning Commission under the Montana Land Use Planning Act.

Because I know if I know this is a consolidated board and I know within the City of Missoula you all are getting amped up to begin your planning process as the

Planning Commission to come into compliance with Lupa and Lupa and the Planning board for the county.

Does not at this point in time have to.

Comply with the Montana Land Use Planning Act, but can always opt in.

And I will say at the outset, I.

In the 2021 interim, I was on the working group that actually drafted part of the Montana Land Use Planning Act.

So I can kind of also give some background and ideas some insight into what some of those recommendations were and what some of that work was.

And then I have an update on the broad water county case.

This is the Broadwater County case, has been what I have talked about the most since February 14th 24/20/24 and that's the decision that really impacts water use in subdivisions and especially the exempt well and what the response has been from the DNRC and D.

As well as how counties have responded to that decision.

And then I have a time reserved at the end for questions, comments and discussion. I find with these trainings it's always really beneficial if you ask your questions as we go along.

So I really like these sort of interactive.

It's sometimes a challenge with hybrid, but I find that.

That if we have the discussion where I'm talking about something, we can actually get into issues and get your questions answered rather than you trying to remember what I was talking about two hours ago and what I'm trying to remember, what I'm talking about for two hours.

Ago, my goal is to not hold you hostage too late.

I know that 8:00 is about the sweet spot, so it's my hope that we're out there by then.

So that's where we're headed today.

I start all of my presentations with this statute, which is the holding of public office or employment, is a public trust created by the confidence that the electorate reposes in the integrity of public officers, legislators and public employees, a public officer, legislator or public employee, including board members.

Shall carry out their individual's duties for the benefit of the people of the state. Has anybody ever read the statute before?

I'm assuming representative Tenenbaum. You should have.

You should be familiar with that, right? OK. OK.

That's a test.

That straight straight out of the code of ethics and I always start at this point because.

You are here as representatives.

You are appointed by a governing body, whether it be your City Council or your board of County Commissioners, to fulfill a public role, and so to an extent when you're in this planning. Yeah, planning board space, Consolidated planning, board space. You're a public officer.

You, to an extent, shed your individual identity and become part of a larger body with that larger bodies being.

To look out for the best interests of your community, whether it be the city or the county you have, you do have some individual interests. You have some individual expertise, but at the end of the day, when you're in here, when you're acting as a planning board, you.

Acting as a board not for your own benefits, right?

This is kind of the core of.

Where we start and where I start, especially when we start framing the different kinds of board actions and the different kinds of activities that boards undertake, does that make sense?

Perfect. Has anybody else read this statute?

I didn't mean to pick on your representative, however.

Anyone, anyone else familiar with this one?

Oh alright.

Why do I start there?

So the other place I I always start is there are two kinds of decisions that boards make that come before you.

There's what we call quasi legislative.

That's where you're establishing policies, rules, regulations that are going to govern the entire community again, whether it be your city or your county.

These are typically things that are based off of public information off of public comment, and what I'm looking for, what I'm referencing when we talk about quasi legislative or things like growth Policies, Subdivision regulations, zoning.

Any other?

Plans that you adopt by which you intend the entire Community to be governed by. Where this becomes important and we'll touch on this really briefly is when we're talking about ex parte communication. So in a quasi legislative role, when you're in the process of adopting regulations or a growth policy or a land use plan, you can be lobbied much like members of.

The legislature can be lobbied, right?

So I as and I should say at the outset, I'm not also a lobbyist for the Montana Association of County, so.

With the legislature, I can go and talk to any legislator about any piece of law that I think would be important for them to have information from the Mako perspective. On the other side of things is the quasi judicial decisions that you make and that's where you are.

Applying your regulations, whether it be as subdivision regulations, zoning, regulations, any other.

Regulatory documents you have, like floodplain or anything like that in a site specific manner.

So that's when we're talking about subdivision review, and we're talking about variances.

Zoning map amendments the county has zoning, right? OK.

So it's kind of a silly question.

I'm in a lot of counties or zoning is a very bad word, so that you all have zoning is, is, is, is good because we can now talk about it.

But where this comes in, where it becomes important is that when we're talking about quasi judicial decisions, when you're in a quasi judicial process, you can't be lobbied.

So as an attorney in my background, I was a prosecutor up on the highline and the example, I like to say is I could never go into the judges chambers by myself and tell the judge exactly why a defendant needed \$1,000,000 bond. That's not cool, right?

Because I'm telling the judge site specific information, mainly about how somebody's been very naughty and deserves to be in jail for a lot longer than necessary, I could do those sorts of arguments if I took their defense attorney, we could have those sorts of conversations in Ch.

With the judge, but.

They can never do it one sided.

So when we're talking about quasi judicial decisions, when I'm talking about quasi judicial, what I'm trying to keep away from and steer away from is one side of conversations. If everybody is in the room or if there's, you know, a way to get information onto the record that.

Different than going and having one sided conversations, right?

Makes sense so far.

OK, you're a quiet group.

Are they gonna stay quiet? OK.

Just wait. Just wait.

I I'm gonna need some rabble rousing in a little bit.

Are you?

Are you here?

OK. OK, excellent.

So what?

That all brings me to is.

And so I will say just to back up a little bit with a lot of boards that I come to the heart of what we spend our time on is ethics.

I was told I didn't have to do that with you and that really excited me that that I didn't have to start and spend all of my time on ethics. Not that I don't love it.

I do, but it was really exciting to have a board want to know more than just basic board how to be a good board member. And I've heard that you all attend those trainings. So I appreciate that.

I do like to touch on it though, so when we're talking about ethic, ethical considerations and decision making, there's really 3 sorts of things that we consider.

So #1, we talk about conflicts of interest.

And that's where.

I I shouldn't have put this on the slide and I shouldn't have given you any slides ahead of time because I would never generally ask you to define conflict of interest.

Right. It's for a private benefit is derived from public action, right?

We'll work through my favorite example of whether or not there's a conflict of interest. Is there?

Are there any Realtors on the board?

Am I going to offend anyone if I talk about Realtors?

A lot of planning boards actually have Realtors on sitting on the boards.

So a lot of one of my favorite questions to ask is does a realtor sitting on a planning board have a conflict of interest?

Is this very community based?

What does anyone think?

I'll add some facts in and to to see if you can decide, but outright Realtors sitting on the planning board, would that be a conflict of interest?

Yes, I think so. OK, why?

Because they would benefit often from decisions that we make about.

Rezoning.

Allowing.

Implementing new developments.

That they indirectly or indirectly will sell.

So it provides them with opportunities to make money.

I.

Broadly painted.

Sure can, right.

Anybody have a differing opinion?

Take a differing opinion.

I I I don't think inherently that there is a necessarily a conflict of interest.

I think one could you know, I don't know.

We're on the realtor train here, but I'm an architect, like I could also benefit, but try to recuse myself if I am directly involved with the case. Just.

My opinion, yeah.

And I think the the accuser part is I think it's part of it also could be in NDA as well. I think you know if there's there's any issues that you have to be there if you could sign an NDA and then you can get some.

Sorry, I said.

Yes, the recusal is part of it. I think is one of it. But but I think also signing an NDA in any other potential meeting agendas that could be potential conflict of interest, maybe signing an NDA could be a way around that as well potentially any other you. Looked like you really wanted to say something.

I was just gonna.

Also say that just being a realtor itself is not a conflict of interest.

But if they had a connection to a proposal that we were hearing, then that potentially

could be a conflict of interest. Yeah. So let's say that they were going to be the exclusive realtor for the subdivider.

That's a problem, right?

Because very clearly, there's a financial benefit that's going to trickle down.

Missoula has what 500 Realtors.

1000 Realtors a lot of Realtors, right?

How about a town of 500?

And there's two Realtors in town. One of them sits on the planning board.

Potential for a conflict of interest, right?

Because there's a much more close connection to perhaps hearing, how about another twist?

Everything you do is public.

You have no secrets, right?

So does it matter that everything you do is subject to public scrutiny and is on the public record and anyone would have access to that information, not just a planning board member?

Does that make a difference?

In the realtor example.

You have no secret displaying board members. I should be clear on that.

I'm not sure I understand the implications of that.

So everyone would have access to that information.

Does that make a difference? Every realtor in town could watch the planning board meetings and get the same information that your planning board member had. Does that make a difference?

And again, I don't have the answers.

And there's no writer on answers because we're in ethics world and everything is a shade of Gray.

You can argue either side of the issue, right?

And both of us can walk away and say.

The attorney has to decide at the end of the day.

I mean, I think that adds a transparency, but but not every realtor, not all 500

Realtors are in the room that can ask the questions they want to ask, right?

Only the realtor that is in the room can ask the questions they want to ask.

So there is transparency, but I think that there is also a bent and a direction that can

be taken by by a member of the paying board, who is a realtor.

Sure, because as a planning board member, you hold a certain amount of power in that as a board member, you get to ask questions, whereas a member of the public coming to public comment or even just observe the the process doesn't have that power, right, I hope.

So you're right.

There is a there's transparency, but there is another nuance to it.

So I bring this up just because.

It it becomes sort of Shades of Grey area and when we start thinking about conflicts of interest, it really is really is a matter of.

How closely connected am I as an individual to the proposed project to the issue before me?

Can I?

You know, hear the project or the proposal or whatever before me in a in a fair and unbiased manner.

Or do I need to recuse myself because at the end of the day, what we really want to ensure is #1 transparency in the process, we want to ensure that everybody has a fair shot.

And that our decisions are made in a way that again just allows for.

And to be fair, unbiased, kind of this due process analysis, right?

Again, that's my criminal background coming in. When I started talking about two process, but we just want to make sure that everyone walks away from the process having been treated fairly and not having somebody you know on the board with a clear bent that or a clear you.

Know.

Power something that made the process unfair, right. Makes sense.

That's my high level conflict of interest.

Is there something?

Oh, OK.

Yeah, sorry, I.

 **Rick Hall** 42:04

No.

So I've always heard that.

You should disclose any kind of relationship you've had with any of the applicants that come before you, even if you don't have a private benefit, just so it's out in the open is that.

A best practice or?

AR **Analeshia Rodriguez** 42:27

That's a best practice.

Again, so that it's just clear that if you've had a previous relationship and a lot of this really comes out in particularly very small towns. But honestly, Montana has one big small town.

But yeah, I think it's a best practice to disclose a previous relationship or a prior relationship that you've had with an applicant before the board. And if you feel that it, you know that relationship in some way might bias you.

That's a discussion you would have.

Either with planning staff off the record before a meeting or with a with a County Attorney again off the record prior to the meeting to determine whether or not that relationship is going to bias you in such a way it would give rise to a conflict of int.

Does that make sense?

So the next ethical consideration is gifts and favors.

And I didn't put this in the PowerPoint.

So who can define what?

A substantial gift. A gift of substantial value, is under Montana law.

Guess that it's \$10 or more.

\$10 or more.

Wow, alright.

Anyone else have a guess?

RH **Rick Hall** 43:47

\$75.00 but I don't know if that's.

AR **Analeshia Rodriguez** 43:48

75 well, we've got a range now.

Any other guesses?

I vaguely remember it being \$50.

It's \$50, OK.

It's actually defined a statute.

It hasn't been changed for a while, so I think inflationary factors should be taken into consideration.

I'm just kidding.

It's in statute as \$50.

Aren't we headed in that direction?

But here's here's here's where I always come up to and and in the years that I've been doing this job and meeting with planning boards, I've had some really interesting discussions on what constitutes a gift.

And my rule is always.

Who? Who's giving it to me? And what are they up to? Again, as a lawyer, I trust no one.

I think everybody has a private, you know, vendetta or is out to get me or at some reason that they're trying to give me something.

That's just my bent as a lawyer.

But I had a a a discussion one time in a meeting where somebody said that fund size Snickers are a gift of substantial value.

What do you think about that?

Just one. And they were like the tiny, fun size Snickers, like the mini ones.

He was suspicious.

I felt like I thought that maybe take it a little bit too far, but what about?

Someone buying you dinner?

What about somebody bringing dinner to a planning board member? That's not planning staff? Could that be a gift?

Potentially it could given how the cost of food these days.

What's their motivation, though?

Is it a developer?

Is their project coming before you? And it's gonna be a long meeting. So they're bringing you dinner so that you are well fed and make good decisions.

That's probably suspicious, right?

Is it Tim Bacon cookies and bringing them into the meeting?

Because he's nice.

He's pretty innocent, right?

Again, it's what. What's the motivation?

Why is this person?

Why is somebody bringing a gift to the meeting the other?

Big thing and this happens again.

A lot in rural Montana is developers taking especially county commissioners out to lunch or out to coffee.

Little iffy, right?

Especially if they have something pending before the board of County Commissioners now.

Sometimes it's just an innocent conversation about the weather, but sometimes in that conversation about the weather they're bringing in the oh, by the way, I have something coming up soon.

Let me buy you lunch.

That's a problem.

Right. And that's a problem because that becomes a risk of ex parte communication, which is the next thing I'm going to talk about.

Do you all do site visits?

No.

You do Dr. Bys just to see the sites, yeah.

So I have a couple of counties.

I have a couple of counties that encompass Big Sky and once a year Big Sky rents a bus and takes the planning board on a tour of the gated communities of Big Sky.

That's part of a planning board perk.

There's a lot of development, of course. As you all know, there's a lot of development in Big Sky.

And it's a public meeting so anybody can attend.

Would that be a gift? If it's the I don't even I think it's the Yellowstone Club that does it.

But don't don't quote me on that.

Would that potentially be a gift?

Kind of depends on what's pending before the planning board, right?

But at the same time, it's public meeting. Everybody has access to it.

It's also been going on since 197475.

Questionable, right?

I have another county where there's a exclusive ranch and one of the big perks of being the planning board is that a couple members of the Planning Board every year would go and tour the ranch.

Learn about the ranches upcoming like exemptions, minor subdivision applications, and be treated to a fancy schmancy dinner.

Is problematic.

Yeah, because this branch is bringing in is, you know, bringing in members of the planning board with the intent of part of it's educational.

It wasn't the whole board.

It wasn't a public meeting.

A part of it was to kind of sweeten up those board members, right?

This is problematic. I will tell you I was not very popular the day I said they could no longer do that.

Was not popular at all.

But at the same time, integrity of process is what's really important so.

Which brings me to my next one.

So ex parte communication is my third consideration ethical consideration, and that's one sided. Conversations between a decision maker and an individual concerning issues before the entire board.

So last slide, I had quasi judicial decisions that you make saying that those are decisions that you can't be lobbied.

And I said we would come back to that really quickly when we talked about ex parte communication.

So ex parte communication is when somebody wants to talk to you off record about something that really that is occurring on record.

So again, this happens a lot with the public.

Wants to make that maybe knows you personally as and knows about your role as a board member and they wanna tell you about a subdivision or about a zoning map amendment or additional use permit.

But they just wanna talk to you because you're their friend and they're familiar with you and coming and standing in front of the entire board is a little bit intimidating maybe.

But that can't really occur, right?

Because everything you do, every decision you do should be made from a level

playing field. So.

Public comment is part of that level playing field.

So if you have information from your friend and it's not on the public record, you have additional information that you're potentially using right to assess an application, whereas your colleague next, you doesn't have that information. But that means the playing field isn't level, right? You're not acting from.

The same information, so the goal.

Of avoiding ex parte communication is just making sure that everybody has the same information. See while they're acting again as as a unit, not necessarily with unanimity, but as one unit, right?

Does that make sense?

In the past.

With the city attorney's permission, we have we created.

Subgroups of the planning board to address particular issues and then came back and reported to the full board what it was that we.

Thought of and discussed.

Is that kosher?

Yeah. So you were acting on legal advice of your attorney, and it's not. It's not completely out of the realm of things to have sub working groups of boards.

And have those sub working groups be have public meetings. Take public comment report back to the full board on activities that's not outside the realm of possibility.

Or I wouldn't even say that's inappropriate.

That's that's how boards function, especially when you're, you know, either have was this for applications or for like development of?

This was the the one I'm thinking about was a group of us who wanted to discuss.

Low income housing or affordable housing in Missoula.

And ways to approach that and how other communities did it.

What did Albuquerque do?

Sure. So more of a research function.

Not necessarily. Looking at a site specific but more trying to develop policy or come up with ideas on how to address a big issue within your community.

Yeah. So, no, that sort of sub working group that comes back and reports.

Appropriate a lot of boards do that in the development of regulations. There's a small group of people that for whatever reason really have a drive to write

regulations.

I don't know why, but they do and they meet. They make recommendations. They come back to the full body, report out what their progress is and what their recommendations are. At the end of the day, as far as regulations go completely appropriate.

Oh, go ahead. I was just gonna say that Rick had a question too, but we'll get to him after you. Thank you.

I'm not doing a very good job of yes, Rick.

RH **Rick Hall** 53:02

Was in another area.

I was in planning in Idaho for about 8 years and one of the things we were told is that site visits individually were absolutely a no no because as a board we all had to be based.

We had to make our decisions based on the same amount of information as other board members have, so they stopped that.

They were doing it at one time.

So is.

His research, individually outside of what's presented to us.

Not advisable.

AR **Analeshia Rodriguez** 53:42

So I think it depends. That's that's gonna be your typical attorney answer is it depends. And I think it depends on what exactly you're researching.

So if you're researching, say.

Specific issues that come up within an application.

That's problematic if you're researching issues to.

Say understand greater issues for the development of policy or something like that. I think that's OK.

I but I.

RH **Rick Hall** 54:15

Mean site site specific.

AR **Analeshia Rodriguez** 54:19

So long as it's not site specific, so like there are boards right now and I'll touch, I'll we'll get into this in a little bit, but with the Broadwater County decision.

RH **Rick Hall** 54:22

OK.

AR **Analeshia Rodriguez** 54:30

And having a a significant impact on water law, there are a lot of boards that are getting, you know, links to information with like the Montana Bureau of Mines, Dnrc, USGS for water resources. And they're being given that information. So that board members can just sort of get.

Their hands on what sort of water information is out there.

It's not site specific, it's it's specific to the county, but it's not site specific to an application.

But it's just a these are the resources that you know the planning staff are using to educate themselves, and that's trickling down to boards, having that sort of information provided to them so that they can even just get familiar with the lay of the land, so to speak.

Does that make sense?

RH **Rick Hall** 55:18

Yes, absolutely.

Thank you.

AR **Analeshia Rodriguez** 55:20

Yeah, I have a question that sort of similar to what Rick brought up.

With ex parte communication in the rule prohibiting it, does it apply differently with quasi legislative actions versus quasi judicial sort of seem like you are getting there?

Yep, Yep. Because with quasi legislative, you can be lobbied by any member of the public that wants to talk to you about your subdivision regulations because you're creating rules and standards by which the entire Community is going to be governed.

You're not applying those rules in a site specific matter. It's when you're.

Applying them in a site.

Site specific manner that you need to be a little bit cognizant of what's before you and what a person is actually talking about.

Thanks. You're welcome. And of course it happens.

I mean, like I said, Montana's A1. Big, small town people are going to talk.

They might recognize you as a planning board member and want to talk to you in the grocery store at the gas station. What have you?

It happens happens all the time and the best practices if you.

Accidentally get ex parte communication disclose it.

You know what planning staff know?

Reduce it to writing as quickly as you can so that you recall the details of the conversation.

Get it on the record.

It's not that it's necessarily it's it's going to happen simply because that's how our Montana way of life is.

The bigger issue is having that information and not sharing it with everyone.

Two hands.

So speaking, I guess of the subgroup, but probably more informally like imagine a few people from planning board or any board for that matter. You know, grab a beer afterwards and have a conversation about.

Very related to some of the issues about a development. For example, there's no ex parte communications happening in these conversations. But how is? How is there a line?

That should be followed in terms of like when we're beneath quorum versus having a group in quorum in terms of like what needs to be revealed back to the group.

Yeah. So I mean it's hard because you want to be colleagues with your fellow board members.

You want to be able to have conversations about issues that are coming before you in more of sort of a broad perspective, right?

You know, sort of looking at the bigger issues, not necessarily the issues that are.

Pending right before you. But I I don't have a bright line.

But I mean, if it's an informal gathering after the meeting, not gathering because you want to keep it below a quorum.

But if a couple of you go and grab a beer and talk about, you know, how do we solve the low income housing issue in Missoula?

How do we solve affordable housing in Missoula?

Or kind of a debrief. I think that's different than an intentional group going out and researching. You know, I think when it's an informal group, I think it's a little bit different than when there's been.

At a chair, like if the chair has appointed a subgroup.

Versus we're all going to now.

I can't remember bars in Missoula, and I should because I went to law school here.

I should remember.

You know, we're all going down the street.

I think that's different.

Don't all go together and don't all talk, because that's a quorum. But I think a debrief in that sort of informal space is different because you're going to wander into other topics anyway. You're going, you know.

So that.

Provide some clarity.

Do you have?

Used the term decision a lot tonight already and I feel like in a way we don't make a decision. We recommend to a decisioning body.

And it seems to allow our board to talk in hypotheticals and opinions much more than the actual governing body can you know? And we've seen it play out where this board would recommend denial unanimously. And then that gets approved at the governing body because of.

Maybe what the law says they need to vote towards and I read ahead.

So I see their slide about litigation here.

So maybe it's better addressed at that point in the presentation, but does that is that like a dialogue in other boards across the counties of like how do we formulate our vote to align with the governing body versus just?

How we feel we're representing the public.

So that's a great question.

So you're an advisory body?

And I completely recognize your advisory.

What you you make recommendations to a governing body in the governing body

makes the ultimate decision.

That being said, you play a critical role in providing the governing body with information. So.

You hold public hearings on behalf of applications and make recommendations, so you take into consideration public comment information that planning staff doesn't have when they're putting together their staff report.

Information that goes forward to the governing body as part of their review. The governing body then gets additional information because at a public meeting, they still have to take public comment.

So in addition to the public comment you received, they receive additional information which is sometimes where those recommendations differ.

It is not uncommon that the planning board make a recommendation that differs from what the governing body ultimately decides.

That's not actually all that uncommon it makes for.

Makes planning boards real mad.

I will say that it makes it not real mad. It makes folks really frustrated because you know, you thought that you made a thorough, fair decision and then the governing body completely didn't.

And I understand that that's a very frustrating position, but at the end of the day, you do have a little bit more latitude, but at the same time.

In the realm of land use law and in the realm of what Supreme Court has said about the role planning boards make, you're still bound by.

The regulations are still bound by Montana law, and so your your recommendation should still align.

It's just a matter of does the governing body interpret it differently in the time you had your hearing and they had their meeting, did something change?

Was there new information that they should have?

Do they remember that back down for new for a subsequent hearings? Now it got complicated after 2023.

The new information.

The sub subsequent hearing statutes but.

I mean.

Did something change?

But I get the frustration I I heard that as frustration anyway.

Maybe a little, yeah, but it was more like a concern. More than a frustration of how do we need to think, do we need to think more like City Council or the county commissioners do and be more strict with our recommendation as it aligns with the law or?

Can we?

Flirt the lines a little bit and be more hypothetical and opinionated because we feel it better represents what the public who we represent feel. It's about set. Yeah. No, that makes sense. And I think, you know, I think it comes down to is it has that been a. Consistent practice.

Do is that information you're getting from the public within the public hearing?

In order to make those recommendations, you can be a little bit creative.

I think and a lot of times your creativity is what?

Results in a developer's response to an application on how to mitigate concerns to the primary review criteria for in subdivision.

Concerns regarding variances, if we're in either subdivision or zoning.

I think you have a little bit of latitude to be creative so long as.

Your creativity doesn't make it impossible, right?

Yes. So I didn't read ahead, sorry.

So you might you might address this already.

But getting back to the ethics questions, what are the recourses if you will or consequences of of potential unethical?

Situations and then a quick follow up to that is what is our responsibility or mechanisms if we think that there might be a conflict, if it is, for example, from another board member or something of that nature.

So.

The consequence, I think, is that.

Again, because I live in the litigation world.

The consequences litigation. So if it was very clear that a board member had a conflict of interest and was acting anyway and didn't disclose it, acted in a way that was clearly biased on an applicant, then I think that applicant could potentially sue if, depending on the out.

As far as as board members having conflicts of interest of interest.

You may not, but a fellow board member might.

That's that's a discussion where I would pull in a legal adviser to say, how do I

handle this?

I will say from experience I've had.

A county have to remove a board member from a decision because the board member represented an interest group that, prior to the Planning board, having a public hearing on a subdivision application.

This specific planning board member signed a letter in opposition and the Planning Board member didn't think they had a conflict of interest.

But their conflict of interest was they'd already made-up their mind, you know, and they had publicly signed a letter, submitted it to the planning board.

How could that not be a conflict of interest, right?

That subdivision will end up in litigation, not over the conflict of interest issue, because we had that planning board member.

We just, we had the County Attorney flat out say you planning board member can't sit on this decision because you clearly have made-up your mind.

And we couldn't.

They could not articulate that they were going to listen in a fair and unbiased manner.

They just said no. This subdivision needs to be denied.

Hadn't even looked at the application, right? So that's a problem.

But I think really if you have a concern about a fellow board member.

It would probably turn to an attorney and say, what is my next step?

How this is what I perceive and let all of this occur again.

It should occur off the record because you don't want to bias other board members.

But that's where I would definitely be asking.

Next person up on how best to proceed with that perception.

And it happens.

I mean that question comes up quite a bit.

How do I handle this and it always comes down to and I'm very sorry to attorneys.

Hey, John isn't running away yet.

LD **Lynn Davis** 1:06:36

I had a question if we could.

AR **Analeshia Rodriguez** 1:06:36
OK. Yeah.

LD **Lynn Davis** 1:06:39
Going back to viewing sites and everyone having the same information on the board. That one's a tough one for me. 'cause. I feel like representing the people. Seeing the location of the site specific location is very important and. So I don't know if I was clear on it. It sounded like we couldn't go individually to just drive by the location and see what what we're seeing on the map. In real life, is that true?

AR **Analeshia Rodriguez** 1:07:16
You know that I I would say if if your subdivision regulations allow for it and if it's been a common practice for a planning board members to individually drive by a location, I don't see an issue with that some counties.

LD **Lynn Davis** 1:07:17
OK, good.

AR **Analeshia Rodriguez** 1:07:29
And I I apologize for city folks. I I since I work for the association of Counties, I really only talk about counties. But some counties actually organize site visits with their planning boards. And it's a publicly noticed meeting and they go and look at the site together.

LD **Lynn Davis** 1:07:42
OK.
Thank you.

AR **Analeshia Rodriguez** 1:07:48
But I don't see an issue with planning board members again, as long as it's a

common practice and it's been done, I don't see an issue with it because I agree sometimes seeing the lay of the land is just beneficial in and of itself.

LD **Lynn Davis** 1:08:00

Thank you.

AR **Analeshia Rodriguez** 1:08:01

Hmm.

So why so moving along? We'll get off of ethics.

And move on to why it's important to ensure that you know we are conducting our meetings in a way that's transparent and forthright, and that's to do with public participation.

So public participation in Montana law is a constitutional right.

It is the public has the right to know and the right to participate in the meetings of its government, including.

Political subdivisions.

And advisory committees.

All of those are subject to the open meeting laws.

There are very, very, very limited circumstances where a meeting can be closed to the public and I'm going to go out on a limb and say you will never have a closed meeting.

Because closed meetings are for litigation strategy and for usually HR type complaints.

Human resources complaints.

That's typically not what a planning board is going to deal with. Now. That being said, sometimes planning boards are named as defendants in litigation.

But typically, when a planning board is named, it's actually the county that picks up the lawsuit.

And so it's the governing body that is the actual defendant, not the planning board.

But again, in order to have a closed meeting for litigation, strategy actually have to have active litigation.

Public participation under the Montana so.

This is where we're gonna split a little bit under the Montana subdivision and Planning Act is critical.

And we have a big body of case law that interprets public participation. What meaningful public participation looks like? What adequate public participation looks like? This even comes into play in the broader county case. And failure to allow for adequate public participation will result in litigation. I say could, but honestly it will because failure to provide for adequate public participation is really low hanging fruit in land use litigation. It's almost always pled that not only did the governing body act unlawfully arbitrary and capriciously, they also violated the public right to participate. I mean. It's just how lawsuits go. And it was probably unconstitutional on top of everything. So that's that's just how a complaint looks like in the land use arena, so. It's critical, and in the Montana subdivision and Planning Act, public participation comes in and I'll talk about this a little bit more. Yes, we'll just go to the next slide. Comes in really specifically under growth policies. And again, I'm under the mspa. The development of growth policies rely heavily on public participation. Anticipate a great amount of public input when you're talking about how to plan growth for a Community subdivision review, and we're talking about site specific applications. Again, there always has to be an analysis of public comment received in the public hearing or in advance of the public hearing. Because a lot of times that results too in. Can result in new information coming in which could result in subsequent public hearings needing to be held. There was a change in what constitutes new information in the 2023 legislation. I think it was House Bill 211 that addressed that. And what the need is for subsequent hearings. This had a this new information in the subsequent hearings had a bit impact again on the Broadwater County case. But as I'll talk about in a little bit under the Montana land Use Planning Act and Lupa. Public participation. It looks a little bit different under that act in that. Under site specific reviews, when you're talking about subdivision review. Subdivision review quite literally becomes the division of land. Does not at this point in time, necessarily mean a robust public process? It becomes an administrative decision, whereas right now.

Into the Montana subdivision and plotting act.

An application comes in.

I don't know what your experience is with subdivision applications.

My experiences is once they come before the planning board, sometimes the gloves come off and it's hours and hours and hours of public testimony, right?

You all experience that 30 hours? Maybe testimony.

Trying to do that but it happens.

Because the public comes in and wants to be heard on an application, usually.

Usually they're trying to stop an application from going through.

Very rarely is it we support the application.

Usually it's this is rife with issues.

Anywhere from there's not enough water to it's going to disturb birds.

To whatever you want to come up with, right?

Like I said, under the Montana Land Use Planning Act, public participation is going to look different.

And and again, why does it matter?

Because again, litigation, it's very low hanging fruit because public participation is a constitutional right.

Failure to provide for it can be a constitutional violation, and when you have constitutional violation, that means attorney's fees.

And guess what? Attorneys aren't cheap.

The other caveat is that when there's been a violation of public participation, a lot of times courts just say go try again, vacating all of the work you did as the planning board vacating the work your governing body did in, you know, going through all of your recom.

And making their own recommendation and going through all of the work the applicants did in order to bring forth an application.

So that's why you know, we talked about it as being so critical and so important.

You don't want your work undone necessarily, right?

Think of the hundreds of hours that you spent listening to subdivision applications, or the thousands of hours an applicant has put in putting forth an application. Not not.

Not the least of which was not cheap.

So that's a lot of, you know what I talk about with counties is ensuring that we are

engaging with our public in a way that's appropriate, that provides for meaningful public participation and doesn't truncate that constitutional right.

And I'll get into that a little bit.

What the courts have said specifically, when I talk about that, the Broadwater County case.

Because again, that was an issue that the Court talked about.

The court didn't find that the county acted.

In a way that was unconstitutional.

But the court did find that the county acted unlawfully and was arbitrary or capricious. So anyway.

All right.

Any other questions before we move on to the next topic?

And I don't see any online. OK, so now best practices.

Again. So this is just.

From my experience, what I have talked about with other planning boards, what I've seen from other planning boards.

Number one first best practice is be cognizant of open meeting laws.

And.

Part of that is understanding the risk of electronic communications and what that can mean.

An accidental public meetings via e-mail.

I was included on an accidental public meeting via e-mail over the weekend.

In a planning board in eastern Montana.

The chair sent out an e-mail to all the board members, copied me on it because they consulted with me on an issue and luckily copied their County Attorney on it.

County Attorney caught it, said by the way, this is an open meeting and it's not noticed, and this is a public meeting.

So you need to disclose it the next time you meet.

Luckily, they meet tomorrow.

But that's a risk, right?

So it's always a dangerous question.

Do you all communicate about board activities via e-mail?

It's really good, I mean.

Were you going to say something?

You looked like you were going to say something. OK. All right. OK.

There, there's a time and place for a meal.

I mean, administratively we have a meeting on November 12th at 6:00 PM.

That's a completely appropriate e-mail to send out.

I would say be aware of who you're sending it to.

And.

In some counties, the county attorneys have recommended that if a member of the planning board emails the entirety of the board that they blind copy everybody. So you can't hit reply all.

That's a potential best practice.

I think it's county by county whether who does that.

But the risk is is that when there is communications coming to the full board and it's electronic, the reply all you start talking about content of what's on an agenda, what you need to talk about or hey, I learned the school land use thing.

It risks becoming a public meeting.

The other thing is is do you all use your e-mail for land land?

Planning board activities, do you receive emails relevant to planning board activities?

E-mail reminders application.

That's really about it.

Yeah. OK.

How do you get copies of applications for review?

It's all LinkedIn the so there is.

It's linked to an agenda, OK?

So all the information regarding a meeting is in the agenda that's posted online.

Perfect. So most of your communications go through a website.

Yeah, I mean we do.

We do the attendance polling and Alicia will, you know, say, you know, here's the, you know, upcoming agenda.

You click on the link and it'll take you to the publicly available information.

That's my understanding.

Perfect. That is, that is excellent.

I would say that is advanced.

From some of some of the counties that I work with because in a lot of counties, it's just everything's through e-mail and that's how it's communicated. And there's a risk

with that, so.

In one county that I worked with, they communicated enough by e-mail that planning board members were recommended.

They set up a separate e-mail account, so that should their e-mail ever need to be subpoenaed.

Have a specific planning board e-mail, not their personal e-mail, so I always like to tell people that if you ever subpoena my personal e-mail account, you're going to get an e-mail from my mom every morning at 6:00 AM.

Probably 3 pictures of my cat and all of my runners world subscriptions like it's a riveting e-mail account, right?

But some people have more riveting e-mail accounts than that.

And that's always the risk.

Same thing with text messages. Do you ever receive text messages related to your planning board activities?

Again, that's fantastic because cell phone dumps are a real thing.

So if there's ever an idea that you've communicated via text message regarding your, your your.

Role within your official capacity on the planning board that might be subject to subpoena.

Do you want your cell phone records subpoenaed? Again, my cell phone records are text to my mom and my siblings and pictures of my cat so they can have at it. I don't care.

What other people?

Again, they use their phones for much.

Not going to say nefarious purposes, but there's some interesting things that could be found on cell phones.

Same thing with social media messaging.

Again, if you're not using it, that's great because that's a best practice I would say.

But if you are, or if you receive public comments from social media or somebody reaches out to you on your social media accounts, get that to the planning staff so that it's part.

Of a public record. You know, if it's concerning to you, tell your planning staff that this is happening and it's concerning.

And the caveat I always put is and again, this is just the lawyer black-owned is that if

you do have emails regarding.

Board activities outside of attendance polls preserve those because you never know.

I mean, attorneys are.

I don't know if they need new hobbies or what, but they're subpoenaing cell phone records.

I you know, they're trying to get all kinds of information because somebody found something in one set of discovery in one case, that was a gold nugget.

And now they think every case has that gold nugget.

And it's just not true.

I will say that there's a great story out of the city of Bozeman and we can pick them, Bozeman, because nobody likes Bozeman, right?

We're a bunch of Grizz fans here.

I hope.

About deleting emails.

So back in, I don't in the last 10 or 15 years, there was a developer in Bozeman that wanted to buy a parcel of land and he told City Council that he wanted to buy this parcel of land and do commercial development on it.

Told told the city that was his plan.

And then he went on vacation prior to completing the buy sell.

The city then bought the parcel of land this developer wanted and put something else on it. He sued.

And this was never done.

The city never made the decision to buy the parcel of land in a public meeting.

This was all done over e-mail.

Fact of the matter is, none of those emails could ever be recovered.

So he sued on conspiracy that the that the City Council conspired to buy this parcel of land.

And so that he couldn't develop it.

And it was.

It was going to be a multi \$1,000,000, development was going to be you know quite a bit of money and.

He could never prove that these emails existed, that the City Council actually conducted this.

Decision to buy this personal land over e-mail. But the city couldn't ever prove that

they did it on the record.

So it was a conspiracy.

So the absence, this is where the law gets really funky.

The absence of these emails was enough to prove the conspiracy, and the developer got something like \$3,000,000 because the city couldn't produce those emails.

That's always the risk that I say don't communicate by e-mail.

And if you do, don't delete it because it might cost your county several \$1,000,000.

That's my.

That's my one hazard.

My one story about hazards.

So secondly, act as a board, not as individuals.

Second best practice.

And that's because that goes back to that very first code of ethics, right, that when you come into this room, you're acting as a public official. You have a public identity, having been appointed as a Member of this planning board by your governing body, whether it be the.

City or the county and you represent the best interests of your community.

It's not your best interest.

It's not the best interest of the sector.

That you work in.

So it's not the architect's best interest, but it's the best interest of the body that appointed you.

Isn't to say that you shouldn't bring your own expertise in.

But at the end of the day, you leave that expertise on the table when you're making a decision, so your background informs how you look at an application and it's good to have diverse backgrounds on a planning board because everybody has a slightly different perspective and sees things.

In a different light, but at the end of the day, you act as a board and not as individuals.

And that's not to say that acting as a board means unanimity.

You can have dissent.

It just means that in your dissent, you're looking out for the best interests of your community, not your individual identity.

There was a up in northwest Montana.

There was a push for some Part 2 county zoning and three of the planning board members didn't like it, and they wrote letters to the county commissioners as planning Board members, saying that they represented the planning Board and they didn't.

They want they what they wanted to tell the Commissioners was as individuals. They didn't like it, but they used their planning board Insignia.

Was problematic, right?

Because the board itself had made a different recommendation entirely.

And these folks decided to act as individuals under the color of board authority problem, right?

They weren't acting as the board.

They were then taking their individual interests and superimposing those on the board itself.

Became wildly problematic and a big mess.

Yeah.

That's where I said you can have dissent.

You don't have to agree, but at the end of the day, even among your agreements, you should be able to walk away and say I felt like I represented my community in what I believed was in the best interest of my community.

Next, frequently review your governing documents.

When was the last time you read your subdivision regulations?

You're seeing a lot of blank stares.

Oh, congratulations.

Is that how you fall asleep at night?

What I mean is that you should be familiar with what's in your growth policy, what's in your subdivision regulations, what your applicable zoning regulations, what other adopted land use documents you have?

You may not need to read your subdivision regulations cover to cover on a regular basis, but maybe you know be familiar with your design improvement standards are what your definitions are.

How are you know?

And maybe with frequent review of those, you might see areas where you need to improve or where it's caused confusion in board meetings before.

But just be aware of what your rules and regulations are.

How many of you have read Montana code annotated lately?

Title 76 specifically.

Very good.

I should hope that you have, but it's riveting, right?

I personally think so, but I understand if others are not as excited by Title 76. Did great work though.

I really like it.

It is a good book I mean I have a copy of it in my in my backpack.

I mean, I read it probably once a year. I go through because every time you read something, you've heard more applications, you've had more experiences, something else stands out for you, right?

Again, it's just a way of.

Knowing what your playing field is, what your rules, what your regulations are, it's just a good practice to maybe not read it, read them, cover to cover, but give them a power scheme every once in a while.

Maybe you've got an application you maybe want to try something creative with mitigation.

Check your regulations.

Is that, you know, clear within your regulations or do you have to have some creative thinking with that?

I know who speaks for the board.

Do you all ever make statements to the press?

No.

Yeah.

And if you did, who would speak for the board?

There was one instance where we drafted a memo together and voted on it.

Not in this, not so distant past about Highway 93.

And.

It was reviewed, drafted publicly, noticed, and then we voted on it, and I that's the only instance that I remember us actually having something.

Formal or formal?

Yeah, I don't know if anybody else remembers anything recently.

Yeah, I mean that's good because.

I when I was the County Attorney in Hill County, I my rule was always I talked to the

press and my rule was I never talked to the press.
So my my deputies were never allowed to make a statement.
It was always my statement and my statement was no comment.
Just because.
Prosecutor had different rules and special rules, but that was always my rule.
But the other thing is is that you want to make sure that if anyone ever decides they should make a statement to the press.
That they're not representing the board. I like that. When you decided to make an official statement, you drafted it as a group. That way the group had buy in.
No one person chair wasn't saying.
This is what the board thinks the chair wasn't saying.
This is our position. The board was saying this is what we think and this is our position.
So I think that's a great practice.
The danger is this. When folks think that they can speak on behalf of the board and they don't have that authority, it's not clearly laid out in the bylaws.
Or they go rogue, yes.
We had an incident I don't remember which couple of.
Sessions ago, where we had a member of the press.
On in the meeting with us and he asked for clarification at one point and.
We did not give him an opportunity to speak because it was not an appointment meeting that was public.
How should we have dealt with that?
Yeah. So your agenda has a very clear way that it goes.
There was the call for public comment on non agenda items.
There's usually a call for public comment on agenda items, I always say.
In in Sessions with planning boards, is that public comment is just that it's not question and answer. It is a time to come forth and.
Make a comment.
You may have a question. It may not get answered.
So that's how it goes. And I I mean, I've had members of the press come to my trainings and report back out and actually write newspaper articles about them. And I still wouldn't speak with the press and they were at my training and wanted further clarification on what.

Told the board.

Because mostly I'm, I'm here at your invitation. I'm not here for.

Public to question me, I'm not here for members of the press to question me.

I'm here. Your invitation.

You may not have known you invited me because it came from your planning staff, but you know I'm here to provide information to you, not to not to members of the press. So.

With that, the next best practice is be prepared to capture and analyze public comments.

The court has been very clear and consistent on this on this point.

The comment needs to be analyzed and considered in land use processes and decisions.

So when you get applications your packets, as I understand and as I've seen, contain public comment that you all read because it's part of your public record.

It's part of the record.

How do you handle when the public comes and speaks at a meeting?

Do you have somebody capturing that?

Is it just the subject to recordation or?

Recorded. And then that's recorded. And then the meeting notes reflect that.

And yeah, we do ask for people's full names and everything like that.

But Karen can probably speak about that if she wants.

Yeah, it's recorded.

And then the transcript. There's a meeting set of meeting notes.

And then a transcript that goes with it as supplemental. And then is it is that are the public comment analyzed by the board members in their discussion?

Typically they.

They go through them and pick up the ones that they want to follow up on and ask questions about and reflect on.

Yeah. Yep. Yeah, both.

Both the written comments that they've received, as well as the oral comments.

Yeah. So that's again, that's the best practice is that.

It's not enough that the public just comes and gives you their thoughts in order for it to be meaningful public participation.

It has to be analyzed on whether or not it was relevant, whether it was not relevant,

whether it was.

I don't like it or whether it was. I don't like it.

And here's why.

Because this is, you know, going to have an impact on my water.

Well, here's.

The testimony about my water well or it's there's a specific bird that nests in the ground of the subdivision.

Here's my pictures of the bird, you know, so you're sort of taking into consideration is what this person saying relevant? If it's not, you move on.

If it is, you get pause and say does that change anything for me, right?

Makes sense?

And always understand that land use decisions are frequently litigated, land use for whatever reason, is highly contentious.

So any decisions, any recommendations that you make are subject to intense scrutiny.

With that, I always recommend follow proper protocols and processes.

So if you have, you know your meeting has a specific agenda, you follow that agenda.

And you follow it consistently because if you're able to show you're doing something with consistency, then you're able to show we've had a fair and impartial process to our best of our abilities.

And a lot of times planning boards have those sorts of standard operating procedures reduced to writing.

So that whoever is taking over as chair or is running a meeting has a standard operating procedure from which to work off of.

Like I said, planning boards have been named as defendants.

Typically, they're not the ones that ultimately defend. By and large, that's because your role is advisory and it's the governing body who ult, who makes the ultimate decision for denial or approval.

Who ultimately has to defend?

That being said, you know, like I said, part of what I'm going to do tonight is talk about a couple of land use cases that have come up.

Because it's good to know about what the body of land use land use law is.

A lot of these best practices that I pulled out or pulled out from land use decisions.

So engage in the best practices.

You've likely created a defensible record, and at the end of the day, it's not when you it's not if you get sued, it's when you get sued, and when you get sued, you want to ensure that your governing body has the ability to defend, and so that your.

Record is defensible, so as long as you've been consistent with your processes and protocols.

And somebody can look at what I like to call the pieces of the puzzle of a land use decision.

And be able to put together the pieces of the puzzle.

More often than not, your decisions and recommendations are upheld.

It's one that can't put together the pieces of the puzzle, or the puzzle is convoluted or Byzantine, as a judge has described a subdivision, the broad Water County Subdivision review, that we have problems.

So.

That any questions on best practices?

Yes.

On occasion when we are discussing internally the.

Measure in front of us.

Will say, well, did the planning office consider moving?

Oh.

In this particular case, I'm thinking it was a dock on a lake.

Did the dock 10 feet to the right?

Is that opening us up in the when we start suggesting solutions, does that open us up and for?

Litigation, or even less seriously.

Inappropriate practice.

Sure. And I think that depends because.

It could be that you're making that recommendation based off of your analysis of public comment.

So I think it just depends on.

Planning staff when they make their recommendation, has some public comment in front of them, but they don't. The luxury of having all the public comment, you get more, so you add to the record when you get an application.

So you might have more information.

That planning staff didn't when they were writing their initial reports, right?
Yeah. So it's not necessarily outside the realm of possibility.
They may not thought of it because one it didn't come up in the application materials they had.
Because they didn't have all of the comment that you had after a public hearing.
OK.
So we are.
Rick has a question I believe.
Yeah, I'm sorry.
I I looked and he didn't have his hand up.
And now he does, yes.

RH Rick Hall 1:37:48

Hi we sort of have an unwritten protocol. I think a lot of boards do.
Where when we have public testimony and.
Often times people have questions for the developer or questions for the county. We don't have to answer those questions, but generally.
We we listen to their comment and then we try to address it when we ask for comments and additional information.
From either the county or the developer.
Should that be a written protocol or is it?
You know, it's kind of an unwritten protocol.

AR Analeshia Rodriguez 1:38:26

No, I think.
I think that is a as a practice.
I think it's fine and and again a lot of times the public comes in and they have questions.
Unfortunately, there's not a question and answer session, but when you hear their questions, you know, sometimes you turn those into questions.
So the developer to the county. So you as planning boards identify that as an important piece of information that's needed potentially. I don't know that it necessarily has to be in writing just as long as that's a consistent practice.
I don't know that you would necessarily want to put that into writing because you

wouldn't want the public to come in and say, well, I have 27 questions and I expect 27 answers, right?

RH Rick Hall 1:39:01

I agree.

And sometimes they do. So thank you.

AR Analeshia Rodriguez 1:39:06

Sometimes they do.

OK.

So moving on to the role of the planning board and this is going to launch into what the Planning Commission is going to look like underneath.

So I went into the statutes and I pulled out the language of what the role of planning boards is from 1957.

We haven't updated it since 1957.

And at that time, so this predates the Montana subdivision and Planning Act, the Montana Subdivision and Planning Act was the 1973 session went into implementation in 1974.

So I would say this language might be outdated.

But I mean, really what it was to improve health, safety, convenience, welfare of citizens, planned future development for communities to the end of that highway systems are carefully planned.

Community centers grow only with adequate Hwy. Utility health, educational, recreational facilities, needs of agriculture and industry are recognized.

And that residential areas provide healthy surroundings for family life. I mean, this sounds kind of like old language, right?

Kinda old goals.

Although still relevant today.

But I just thought it was kinda funny.

So moving on, currently this is more recent than 1957 language.

The role of the Planning board is to ensure the promotion of public health, safety, morals, convenience and order of general welfare.

So you do things like propose policies for subdivision plots.

That's your subdivision regulations you develop.

Make proposed policies for the development of public ways, public places, public structures. Again, I think that's for subdivision regulations and zoning regulations. I don't think you're doing improvement location permits.

That's old language and I don't know that you're necessarily laying out the development of public ways and services on on platforms. I think that's the Department of Transportation that does that.

But these are the statutory this is what statute says the role of the planning board is. In reality.

You have a couple of critical roles.

One is in the development of guiding and regulatory documents, so developing holding the public hearing for growth policies, assisting in the development of subdivision regulations and recommending the boundaries and regulations for Part 2 zoning.

That's straight out of statute.

So.

That's developing.

That's that quasi legislative role that you play your ranking recommendations on policy.

You're making recommendations on the regulations by which the the Community should be governed and passing those recommendations up to the governing body to adopt or amend those recommendations.

Then you have roles within site specific review and again this comes out of statute where you have public hearings for subdivision review.

Capture and analyze public comment made at the planning board level and then make a recommendation even though that recommendation is views is viewed as advisory.

There are some counties where the public hearing is actually not at the planning board level.

The public hearing is at the board of.

The governing body level and the Planning board has a public meeting.

And honestly, what that comes down to the big difference between a public hearing and a public meeting is notice. Public hearings have specific notice provisions within statute.

Public meetings have a different notice provision. Yes, just going back to the

previous maybe two slides.

So it says the planning board may propose policies for subdivision, Platts, and then the second one about involving development of public ways, public places and so on. I think with the planning board here, we traditionally you know, our agenda is comprised of things that the city or the.

County puts on the agenda whether it sites a specific review or our next meeting is going to be over the new draft land use plan from the City of Missoula.

This makes it seem like we have the authority to put things on the agenda.

Recommendation.

For.

For say, like subdivision regulations, is that the case?

So I think it's county by county in jurisdiction by jurisdiction.

So in some counties.

The Planning Board is taking it upon themselves to update their subdivision regulations. The county commissioners haven't asked them to, but their regulations were last adopted in 2012.

Seems a little outdated to me.

And the Planning Board has decided that that's important because their regulations are outdated.

Specific to growth policies, I think.

Have to check the statute, but a lot of times I think with the growth policy, it's a resolution of intent from the governing body.

To adopt or amend the growth policy that's specific with this statute, but I don't think the subdivision regulations are Part 2 zoning regulations are because it's again. When they're being recommended, the regulations come at the request of the board of County Commissioners, but I don't know that amendments necessarily follow that, because sometimes it's a zoning map amendment. Sometimes it's a text amendment. So I think it.

You know it.

You all kind of are the first ones to see where there's issues?

Does that make sense?

So moving on to the Planning Commission, so who hears from the city?

City you all are coming. OK. And online. Oh, OK. Online. And then, Rick, are you city or county?

Me, Rick is with the county. OK, perfect.

Alright, so you all with the city as the consolidated planning board. Are you all engaging as the Planning Commission for the future or for the land use plan or is that going to be separated out?

It's gonna be joint, right?

It's the consolidated board is serving as the Planning Commission. Cool.

OK.

So the Planning Commission, so the Montana land use planning actor is what we call M Lupa.

Umm.

To an extent, the goal of M Lupa was to flip the planning process on its head. So. You get virtually all public participation in land use processes happens at the site specific level, right?

It happens when you have a subdivision application.

You get some at the growth policy state, you know.

When you're doing outreach and trying to get public engagement, the goal of the land use plan and the future land use map within the Montana Land Use Planning Act just kind of call it amalupa because I'm going to trip over those words eventually and we're going to not.

Sure. What's going to come out of my mouth at some point?

What I'm going to call it.

The goal is to front load public participation.

And so the idea within the land use Planning Act is that all public participation.

To the greatest extent possible occurs in the development of the land use map.

That's why.

One of the big reasons why cities were given three years to implement.

Lupa.

So it went into effect in May of 2023.

You have until May of 2026 to come into compliance.

No county has to comply with that at this point in time.

Counties were specifically removed from.

Lupa, during the legislative process, some counties have talked about opting in, but there's a lot of.

A lot additional issues that counties have been looking at on whether or not to opt in

one of the big ones being cost of of undertaking that process at the county level.

So the Planning Commission.

Which at this point in time I understand will be this body again, will make recommendations to the local governing body regarding.

Development adoption, amendment and review of a land use plan and a future land use map.

So the plan is akin to a growth policy.

But it is far more robust, so it takes into consideration things like like natural resources, local services, but also has a has a significant housing portion that has to be undertaken.

There's like something like 14 housing criteria, of which five have to be chosen as as strategies for the jurisdiction to adopt.

In order to address housing issues.

And accompanying the land use plan has to be a future land use map that shows the areas of the jurisdiction designated for growth and what kind of growth. So just like a zoning map would show, this is where industrial goes. This is where commercial goes. This is where.

We anticipate, you know, multifamily housing, single residence, all of those, all of those qualifications still go into the future land use map.

And then areas where the city could annex or intends to annex in the future.

In implementation of the land use plan is through zoning and the option of zoning regulations, and then following the adoption of zoning regulations or the Subdivision regulations, and then any other document designated necessary by the governing body.

There is an appeal process of site specific decisions. Like I said, by and large site specific decisions of the Planning Commission or of the under Lupa become administrative and so, so long as a developer says I'm in compliance with the land use plan and the future land use.

Map and you have designated this area of the jurisdiction as appropriate for this kind of development that I'm putting in.

It's an administrative process, it's just approved.

Goes before the Planning Commission for approval.

It never goes before the governing body unless it's appealed.

Completely different process than what we're used to.

Right. Subdivision literally becomes the division of land, creating lots and compliance with the land use plan.

In order to build housing, commercial, mixed-use, whatever the designation is of that zoning area.

Does that make sense?

So the land use plan provides for public notice and public participation in its development.

The Planning Commission accepts, considers and responds to public comment all of that public comment is made part of an administrative record. So as you've been capturing public comment within your planning board activities, I would recommend that you continue that practice as you are thinking about being a plan.

Commission and developing your land use plan all of that public.

Comment is transmitted, transmitted.

Just like it is now to the governing body, and then every five years, this land use plan is supposed to be evaluated to determine if there's been changes to impact impacts and allow for public impact public input on new increased or changed impacts.

So right now it's recommended that every five years your growth policy be looked at. I went looking for a growth policy for a county last week and their most recent growth policy is 2016.

So I asked the chair of the county commissioners if they've updated it and he's and he said yeah in 2021.

Well, in 2021 they adopted new Subdivision regulations.

Didn't touch their growth policy. So I said, well, you have an 8 year old growth policy and you want to zone this problem.

Mostly because the county has significantly changed so.

Whereas it's recommended every five years you take a look at your growth policy under the growth policy statutes every five years.

The land use plan.

The idea is that there's a record made that there's an analysis of. Have there been changed impacts?

Has there been an increased impact and you know a lot changes in five years if you if you think about it, even things related to basic like water availability?

That changes substantially year over year as more and more people are using the aquifer. Perhaps your aquifer changes.

Impacts within that impacts of surface water and pollution, whether or not bodies of water become impaired, a lot of that happens really in the blink of an eye.

So five years is not that unreasonable of a time. And again the the idea was make it consistent with how often growth policy should be reviewed, but make this required to be reviewed.

Because communities change.

The Planning Commission makes recommendations regarding zoning regulations.

Again, that's how the land use plan is implemented.

The Planning Commission is the one that provides public notice and public participation.

I'm hoping that you're seeing a theme here that you all are going to be engaged in a very robust public process.

You accept consider respond to public comment.

That public comment becomes part of an administrative record that's again transmitted to the governing body.

To make the to make the final adoption.

And then the same thing with subdivision regulations. Again, the Planning Commission is the one that provides public notice and public participation again playing it.

Into that robust public process, capturing those comments and putting them and transmitting them as part of the administrative records planning to the governing body. So really.

Planning Commission plays the critical role in the robust public participation of the development of the land use plan.

And provides all of those opportunities for the public to come and comment. And I think what's going to be really difficult and I hope that.

In.

Taking on this role as being a Planning Commission that you do provide quite a bit of education to your public such that this it does flip the planning process on its head. There will not be site specific reviews before a Planning Commission anymore as a as a matter.

As a course of habit, there might be appeals that the Planning Commission cures.

I think I have a slide on the appeals.

Yeah, you might hear appeals of challenged administrative land use decisions.

But by and large, subdivisions are not going to be reviewed by the Planning Commission.

They're going to be administratively reviewed by planning staff and if they meet the requirements of the land use plan of that for that specific kind of development in that location, it never comes before the Planning Commission unless challenged. It never comes before the governing body unless challenged, and I think that's going to be a bit of a that's going to be a a.

I want to say a shock, but it's going to be shocking to the members of your public because.

It's not how it's been for the last 50 years. For the last 50 years, members of the public have been able to come to you as the planning board and say I don't like this subdivision.

And here's why they don't get to do that anymore.

Under the land Use Planning Act. So the goal was that the public be engaged up front to share their goals, their hopes, their what they want to see from their community up front, and then you adopt those regulations based on their goals based on that public input and.

Then it just becomes administrative for your planning staff behind you.

Find me.

I will say this, SB382, which is what the land use Planning Act was as a bill in the legislature. This last session is being litigated.

Right now it's pending in Gallatin County.

I don't know the state of that litigation other than its pending.

There had been a temporary injunction of SB382.

The Supreme Court lifted that injunction.

So it the implementation can go forward.

I think they asked for a jury trial.

I don't think it's been set.

I.

Remains to be seen. One of the big issues that is raised in the litigation.

Is there is a question of the constitutionality of it because of public participation?

And I think.

Why don't you don't want to opine on how a court is going to handle that challenge? Because for so long.

The public being able to come in and tell you about their feelings about a site specific application has been kind of the foundation.

Of the planning board.

And so there that is a question of whether or not that is constitutional.

I don't know.

You know, as one of the one of the architects of SB382, I hope it upholds because I think it's an exciting way to think about planning because it's truly what planning is meant to be.

Planning was never meant to be people coming in and talking about site specific applications, and that being public comment planning was always meant to be this sort of robust public participation up front.

Buy in from the community in the development of the plans and then having the rest of it be an administrative process. That was always the intent for the hope it just became convoluted in the last 50 years so.

I'm gonna remain hopeful.

Going to wish you best of luck as you engage in this process because I will be watching your Missoula is one of 10 communities that had to comply.

Lewistown opted in to comply, so it'll be interesting to see how it plays out and how the development world also responds to it and also how your public response.

But I would.

I would, you know, say take the opportunity to educate your public that this is what planning is or what.

Development is going to look like and planning is going to look like moving forward once we fully implement and begin compliance.

So maybe this may be a question for Karen.

Like we're literally in the middle of this, like next week on the agenda is our review of the land use policy.

And so can you clarify where we are?

Like, are we officially the Commission now and then?

What is the relationship between the city and the county? And then?

To swap.

Yeah.

In July, the Council City Council approved a resolution establishing the Planning Board. This consolidated planning board as a Planning Commission for the functions

we had. While we've been working on this process, and of course we started it before the Planning Act was passed, we had included coming.

To you all with updates on the project and talking to you about where we're at with it and including.

A planning board member on our advisory group. So we've had some really good continuity and I would also say that.

A lot of the ways that we have done growth policy.

Documents the way we establish the city's growth policy was with that fundamental public engagement early and often in thousands of comments.

So there's some similarity in the startup of the policy framework for all of this. And then while we've been out working.

In the community and talking to community members.

You know, representing this large effort we've been carrying that message of change, the message that.

With the Planning Act we are it is even more critical and very significant that people participate early, learn a lot about what the project is and that it is going to change outcomes later on when it comes to site specific project reviews that we've been kind of.

Consistently making that message.

Heard across the website and in our public events that we've been having. So that's more than what you asked, but I think that even in the October update that we provided, there was more information that was shared about, yes, this is who we want to work with as.

The Planning Commission.

To get us through the implementation pieces of the Act and later down the road when we are at the code reform process.

Piece of it, we find we are going to need to shift towards a municipal only Commission because that's like the best way to handle the changing function and the appellant portion of it at the later stage.

So we need to when we want to work with you through the Planning Act part, the land use planning piece and go from there.

So thanks for that.

So just looking ahead, like in a year or two, if there are no more site specific subdivision hearings like what does the board do?

So under as a plan, so but at that point there will we will split apart by the time the the city has a Planning Commission only function and no longer functions as a planning board until until they have everything adopted. There's still a need for a planning board.

For the city.

It's not until you get to that last bit and then then you kind of then that board will then function as almost kind of like a quasi board of adjustment Slash planning board.

That's that's essentially.

So you have this kind of dual role, you might not need to meet as often.

It's probably gonna change and we don't.

We don't know until it's all kind of adopted. How frequent you're gonna end up with having things come before the board.

So, to some extent, there'll be a little bit of a learning process. I think for the city.

Here I am speaking for the city.

Spot on. This is Lavelle again.

The.

You're still gonna be looking at the legislative elements of it, the quasi legislative. So if there's an amendment, if there's amendments to any of the regulations.

And then that need to review the plan.

Every five years, you know that means more like 4 1/2 years or four years.

We're back in front of you with with more of that too, so I think some of the functions you've been used to will continue, just not the site specific projects. The appeals might be replacing that and hopefully less.

Is it going to be every single subdivision or is it specific applications that meet certain criteria? Like I know in like the 21 session, there's like the expedited review if you met certain criteria is there. So once you have implementation and you have all of The Reg.

Adopted and the Commission is split then.

Us County members would continue on as a county planning board.

You would still go through the site specific reviews you've been going through it. The Planning Commission is the city.

That would be the administrative process in every subdivision would go through that administrative process.

There's a provision in there if it's demonstrated that the impacts were not considered, if it, if it, if there's a development where the impacts weren't adequately considered in the original planning, there is the potential for a higher level of review, which I think then does it.

Go to the planning board. Or is it?

Yeah, then goes to the Planning Commission.

So there is the possibility that you might have specific development proposals where. Impacts are raised that were never considered during the planning process.

Those get elevated and go through more of a hearing process, so it should be in the unique circumstance that that those developments would come through that site specific review.

For the Planning Commission with subdivision applications that comply with the land use plan but maybe don't comply with the zoning, would that be administrative review or would that go before the Planning Commission?

I think variances would go through through the Planning Commission.

I think that's the process because if you need a variance that means you're not in compliance with the land use plan of the regulations, OK.

So I think that's how that's laid out. But our like land use like the draft land use plan that we're gonna hear next week, it has like place types on the future land use map and those place types encompass sometimes like four or five different types of pot. Zoning.

Designations and it's possible that we could get a subdivision application that.

Fits within one of those, but that's not the one that's currently in place with the new zoning map. I don't.

I was just wondering.

What's handled?

Yeah. So I think as as applications come in, if there are those sorts of questions, that's for the Planning Commission may come in and need to hold, especially if there's the need to grant a variance.

The variance process is very similar to what it is now and is built into the land use Planning Act.

Yeah.

The land use plan.

Yeah, Steve, if if you rezone, it just has to as long as it complies with the land use

plan as long as it's one of those place types, it's allowed for under the OR the zoning complies with the place type.

In this case it can be done administratively. If you need a plan amendment, different story.

Got it.

Thank you.

It's not confusing at all and I would just want to caveat all of that, that that this is all new and we are diving into the details.

Well, we're also trying to get through the Planning Act.

So I appreciate your questions, but I just think we're we're gonna be coming back quite a bit with more information as it is all just weaved together again.

There's other aspects or substantial compliance.

There's, there's just a lot of different pieces to it that will be covering as we come forward in that piece.

Got a couple of questions online.

Is that? Yeah. OK to ask. Now, Josh, you wanna go?

JS **Josh Schroeder** 2:06:55

Thank you so.

Where will the representative of the conservation district go?

Will they go with the city or the county? Or please don't say both.

AR **Analeshia Rodriguez** 2:07:06

I think they stay with the county.

Yeah, I the.

So typically on accounting planning board, there's a representative of conservation district.

And it depends.

You may remember that I sent an e-mail out to everyone a while ago.

Because we were contemplating how, in response to the what the city's doing, how we were going to deal with this at the county. And we're looking at two different options.

One is to create a county planning board and keep the Board of Adjustment and the Planning Board separate the others to others to create.

Consolidated land use board. In either case, I think the county's interested in looking at the Conservation District representative being on that board.

Yeah. And and I just.

I just pulled out the statute and it it doesn't specifically call out the conservation district being on the Planning Commission. I think they stay with the planning board at this point in time.

Win.

And yeah.

LD **Lynn Davis** 2:08:09

Sorry, my question is I I'm just not clear what we're what we're doing next week as far as the whole.

Are we reviewing the entire plan?

Next week in our meeting.

It's is that kind of it 'cause it's.

I've been reading it and it's kind of like taking awhile. I'm just saying.

There's a lot.

So.

AR **Analeshia Rodriguez** 2:08:38

Thank you.

This is Lavelle means that the planning office again. And yeah, we'll be bringing the the proposed adoption draft to you all to consider with a staff report and walk through the material again and be able to highlight where there's been some changes.

Based on what we've been hearing from the public as well.

And and.

Hopefully work with the chair and Vice chair on this structure, but the idea would be to see.

If, like any like other public hearings that you have get the information, here's public comment.

Consider all of that and field questions determine.

Any considerations that you have if there are changes or motions you need to make, if it's possible, can see whether it may we make it through in one night or if you need

to extend it, continue it to another meeting.

It needs to be at a level that you are comfortable with.

Other questions on Planning, Commission planning boards and you all are right in the thick of it.

So it's an interesting time for sure.

I'm very cognizant of time, so we are going to fly through the Broadwater County case.

In far faster than I've ever done it before.

One caveat, this is a District Court order, the one that I'm talking about may not be applicable to all counties. If you have questions about applicability, ask your legal advisor.

But the principles that are in the case are a good guide. Caveat #2.

Was doing this prior to November 12th, which means the time for appeal has passed. And there is a single issue on appeal, and it's the denial of the plaintiff's motion for attorney's fees.

So there'd been a discussion on whether or not anyone was going to appeal the exempt well decision and or and or the counties.

Decision on granting preliminary plat and nobody did so attorney's fees is the only thing on appeal.

Super quick Broadwater County decision, are you all familiar with this case?

Have you heard about this case? You read the case.

Anybody read the case?

Excellent. A nice riveting 85 page decision where the judge was very angry.

It was a subdivision 442 acre parcel on the West side of Canning Ferry.

It was a phase subdivision. The issue that talked about most of statewide significance was that the developer plan to use.

Use one exempt well per phase SO4 exempt wells were going to be used.

The DNRC issued 4 separate predetermination letter saying each phase is a separate project and I will say Dnrc had not been consistent on its phasing statewide.

So my understanding is that in this part of the state, the DNRC handled phasing a little bit differently than it did in other parts of the state, I think.

That's fair. But in in Broadwater County?

The Dnrc had interpreted 4 phases as four separate projects.

County granted preliminary plat this application. This process was convoluted at best.

It was something like five public hearings at the Planning board stage.
All of them filled with public comment. Hundreds upon hundreds of pages of public comment.

Went up to the board of County Commissioners.

New information analysis went back down to the planning board back up for new information analysis, back down, up and down and up and down.

So the court.

Described this process as Kafkaesque and Byzantine, and I don't blame the court at this point in time. Having gone back and look at the application again.

So what?

The court really took issue with, though was sufficiency of environmental assessments as it relates to water and both legal availability of water and the physical properties of water, which looks at water quantity and water quality.

And what the what the court took issue with was that the environmental assessment lacked.

Descriptions of bodies of water.

So a complete and sufficient application according to the court, contains basic hydrological information, basic hydrological information coming from a different case called Citizens for responsible development versus Sanders County, which is a 2009 Supreme Court case, includes information about the nature of the aquifer, how surface and.

Groundwater's interact, aquifer recharge health of nearby waters at issue within Broadwater County was that.

This subdivision bordered.

Not quite bordered, but was along Canyon very.

Canyon Very is an impaired body of water for nitrogenous levels within it.

Declared federally under the Clean Water Act.

And there was another Creek nearby that had been.

Annual but turned perennial and was like had very decreased stream flow that former fisheries biologist had testified to. The court also took issue with the DNR CS interpretation of combined appropriation and unequivocally said in bold letters and underlined, which I've never seen in a decision before in my.

Career that a subdivision, regardless of size or phasing.

Is 1 project for the purposes of combined appropriation. The court was not at all

amused with the DNR CS interpretation that each.

Phase got its own.

Exempt well and was not all amused that the dnrc seemed to be sort of working around the clock for coalition case from 2014.

Which is really where a lot of the issues. I wouldn't say a lot of the issues rose, but where a lot of the current practice at the time of the Broadwater County decision went into place, so.

Dnrc and DEQ after the Clark Fork coalition.

Case in 2014 came out, entered into an MOU and DEQ was the one that was determining water availability, water quality and water quality. At no point has dnrc ever been at the table for subdivision review. Beyond issuing these predetermination letters.

And these predetermination letters were actually a creature of administrative rule under the DEQ. Administrative regulations, not even the DNRC zone regulations. So. There had been sort of 10 years of this kind of inconsistent practices statewide, especially as it relates to the use of the exempt well. The exempt well is kind of what we call it colloquially.

It's actually the exception to the permitting process under E 52306. If you ever want to look up that statute.

And.

DEQ was the one undertaking that review Dnrc was issuing these letters saying they're going to use the combined appropriation.

Here's what they say they're going to use.

Not ever actually really analyzing the combined appropriation, the court said.

You can't really do that, dnrc is.

Tasked with implementation of the Water Use Act, DEQ with the water quality.

So it really was just a kind of a perfect storm that just absolutely blew apart in Broadwater County.

Since that time, as of February 15th, 2024, DNRC ceased issuing predetermination letters.

Actually rescinded some of their pre determination letters. Not all of them, but some of them.

Then August, DEQ amended its regulations so that that predetermination letter was no longer required for the issuance of a Cosa for the certificate of subdivision

approval, which is required for the review of water and sanitation informations subsequent to.

To a subdivision.

So like I said, the Broadwater County decision, it was a decision on summary judgment, it was specific.

It was a District Court order and I would say what has statewide implication has been the DNRC and the Deq's response to it since that time.

I had filled out that.

How did we get here?

It's, you know, this case didn't happen in a vacuum.

There had been 15 years of case law of the court of the Supreme Court saying hey counties environmental assessments or governing bodies.

We're gonna pick on counties, though, because that's what the court picked on.

Counties, you know, letting insufficient applications go through subdivision review, and the court said, really, really tired of this.

We've told you once.

We've told you twice now, a third time. Really. Knock it off.

And so the citizen for responsible United citizens for responsible development, not Citizens United. That's a different case altogether. We're not gonna talk about that.

I did that the same thing at the yeah.

Citizens for responsible development out of Sanders County.

Again, this is where the case in court in broader county pulled out what basic hydrological information is needed for a subdivision application is, you know, what's the nature of the aquifer?

How does everything interact?

And in that case, the court found that the county acted unlawfully because it approved.

An A preliminary plat application where it was actually statutorily insufficient because it didn't contain.

Information about the water bodies neighboring the subdivision and it well, it wasn't a constitutional violation. The court also found that when there's an insufficient application that truncates meaningful public participation, and then the other case that we I pull out is is Aspen trails, which is again A20.

10 Montana Supreme Court case.

Then it's out of city of Helena because there was an annexation in this case, and again it was an insufficient a A.

Environmental assessment, where the developer hadn't provided.

Available groundwater information that's part of the statute of what needs to be provided within a complete and sufficient application and had failed to address impacts to one of the primary review criteria. With that impact being how the surface water pollution was entering groundwater.

That environmental assessment didn't did not.

Contain an analysis of either of those.

In that case, the planning Board had recommended denial and the local governing body approved. And if the governing body had just listened to the planning board, they wouldn't have been sued, right?

But the, you know, the court again found that the application was unlawful because it was insufficient governing body acted in a way that was arbitrary or capricious, when it hadn't taken into into consideration impacts the groundwater.

And So what?

The Broadwater County decision really in the last nine months has been and what I've talked with counties about at length has been looking at these environmental assessments, insight specific applications with a more with more scrutiny that these applications simply need to be more robust.

They need to provide all of the statutory information.

And that failure to have that information.

Can call can call into question constitutional issues, so.

There's a county that I'm working with where the information related to the aquifer is the wrong aquifer and the planner knows it and has kept on, but is getting, you know, a lot of pressure to say to find this application sufficient.

And I keep on saying it can't be because you will be deliberately misleading the public on the nature of the aquifer. If you send forth information about the wrong aquifer, right?

This is problematic.

And so it's these sorts of questions now that county planning offices really been dealing with more so than cities.

Cities are lucky because they typically have water rights and municipal facilities, but counties have been put into a really difficult position because at no point in time has

the county ever been, you know, tasked with the implementation of the Water Use Act. And the court really. Sort of.

Put that responsibility on the shoulders of counties.

Specifically, Broadwater County.

Has really kind of blown up in several other areas.

There are some legislative fixes going through the DNRC has a what's called the Stakeholder working group and they have an exempt well bill that's going to that proposes to create zones that puts within the state that puts parameters on the use of exempt wells for.

Development within those zones, I have no opinion on that though.

And then there is what's called the Agency Coordination bill, which I've been working on with the dnrc.

The DEQ and the League of Cities and Towns, which is an attempt to clarify rules of each reviewing agency to sort of silo those roles within subdivision review for the site specific review and to bring that dnrc into the mix when we're talking about subdivision review.

Hopeful that that Bill will gain some traction.

We're continuing to work and tweak on it, but.

Honestly, when it comes to talking about water legal water availability, I don't know of any county Commissioner that wants to make that decision.

When I don't have any planner that really wants to make that recommendation.

And like I said I you know the perception is and and I don't think that this is that far off is that since February of 2024, we've really sort of had a not really a complete stop on subdivision applications but certainly it slowed down significantly.

While we're getting our arms around what information is available for counties as it relates to hydrology, who is available to help counties interpret hydrological information?

Counties don't have hydrologists on staff.

Even the most sophisticated counties don't have hydrologists on staff, and that information is really technical.

And where can we get some assistance on on understanding that technical information?

And then the real stop has been with DEQS rules requiring that predetermination letter for six months after this decision.

No Cosa could be issued because if they were relying on the exempt well if they had a water right, that was a different, that's different entirely. But upon with reliance upon exempt wells in development, especially in development enclosed basins, which is quite a few in the state of.

Montana.

When Dnrc quit issuing those letters that really sort of halted daq for a period of time.

So now DEQ no longer requires that.

And now it's sort of that tension of.

What sufficient for counties?

And you know what can the development community provide? What's available resources out there for county?

So that is probably the fastest I've ever talked about the broad water county case.

But does anybody have any questions?

I was.

I was very involved in that case, so I know quite a bit about it, but if anyone has any questions, like I said, that was the fly by night overview.

OK.

You know, I'm watching very carefully.

Any other thing that I didn't cover that you're just dying to know?

It's my graphic, all right.

Thank you for your time tonight.

Thank you for the invitation.

I really appreciated it.

I appreciated your comments, questions and your insight. If you have questions, finding staff knows how to get a hold of me. But I did throw my e-mail up there.

Feel free to ask me.

Feel free to reach out if you have questions. Like I said, most of what you're going to say, what you're going to get is this.

I think this is a best practice but.

I'm always happy to dialogue with planning boards and planning board members, so thank you very much.

Thank you very much, Karen. Yeah.

Just have a few more things to get through and I let my computer go to sleep here. I

think we're onto committee report.

Anybody have an agenda in front of them?

Run the committee reports.

Do we have anything? No committee reports?

Old business, we don't have any old business.

New business, we don't have any new business.

Comments from planning board members.

Does anybody have anything?

Being none, I guess that brings us to adjournment. Thanks, everybody.

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Missoula County Planning Board Training

NOVEMBER 12, 2024

PRESENTED BY KAREN ALLEY, ASSOCIATE GENERAL COUNSEL

MONTANA ASSOCIATION OF COUNTIES

Disclaimer

- ▶ Karen Alley is a licensed attorney in the State of Montana. Nothing in the presentation should be construed as legal advice but should be interpreted as best practices. Should you need legal advice based off information contained within this presentation, you should consult your county attorney or city attorney as applicable.

Agenda

The Basics: Board Governance and Best Practices

Role of Planning Board in Local Planning Process

MLUPA: Planning Board vs. Planning Commission

Update on Broadwater County Case

Questions/Comments/Discussion

Board Governance

- ▶ “The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, legislators, and public employees. A public officer, legislator, or public employee (including board members) shall carry out the individual's duties for the benefit of the people of the state” Mont. Code Ann. 2-2-103.

Board Governance

Quasi-legislative

- ▶ Establish rules, policies or standards generally applicable to the entire community
- ▶ Well-informed decisions based upon public hearings and information gathered by staff
- ▶ Examples: growth policy, subdivision regulations, and zoning regulations
- ▶ Members can be “lobbied” by individuals or groups who have an interest in the adoption of regulations

Quasi-judicial

- ▶ Decisions made under circumstances similar to that of a court of law
- ▶ Applying legislative rule, policy, or standard in a site-specific manner
- ▶ Examples: Subdivision Review, Variances, Zoning Map Amendments
- ▶ Consider information from subdivider and public but cannot be lobbied when making a decision

Board governance

Ethical considerations in decision-making

- Conflict of Interest
 - Private benefit derived from public action
- Gifts and Favors
 - A person holding a position of public responsibility cannot accept a gift of substantial value
- Ex Parte Communication
 - Private conversations between a decision maker and an individual concerning issues before the full board

Board Governance

Public Participation

- Montana has broad open meeting laws
 - Public right to know and participate is a constitutional right
 - Very limited circumstances for closing a meeting from public participation
- Public participation is critical in land use
 - Failure to allow for adequate public participation could (probably will) result in litigation.

Board governance

- Public Participation specific to land use
 - Growth Policy rely heavily on public participation in the development of the plan
 - Subdivision review requires an analysis of public comment received either in the public hearing or in advance of the public hearing
 - Public comment could result in new information, resulting in subsequent hearings (we will get to that a little later)
- Why does it matter?
 - Again, litigation. A party can challenge a land use decision for violating public's right to participate.
 - Courts have been vacating the decisions and counties (and developers) have to start all over again.

Best practices

- ▶ Be cognizant of open meeting laws
 - ▶ Understand the risk of electronic communication and accidental public meetings via email
 - ▶ Preserve emails regarding board activities
- ▶ Act as a board, not as individuals
 - ▶ Members act in the best interests of the jurisdictions they represent, not in the best interests of certain sectors

Best practices

- ▶ Frequently review governing documents
 - ▶ Know or be familiar with growth policy, subdivision regulations, applicable zoning regulations, and any other adopted land use documents
- ▶ Know who speaks for the board
 - ▶ Understand who can make “official statements” on behalf of the planning board when speaking to the press
- ▶ Be prepared to capture and analyze public comments
 - ▶ The courts have been clear and consistent: public comment needs to be analyzed and considered in land use processes and decisions

Best practices

- ▶ Land Use Decisions are frequently litigated
 - ▶ Land use is contentious, and any decisions made are subject to intense scrutiny
 - ▶ Remember to follow proper protocols and processes
 - ▶ Planning boards HAVE been named as Defendants; however, typically, it is the governing body who ultimately defends

Role of Planning Board

► Mont. Code Ann. 76-1-102: Purpose

- It is the object of this chapter to encourage local units of government to improve the present health, safety, convenience, and welfare of their citizens and to plan for the future development of their communities to the end that highway systems be carefully planned; that new community centers grow only with adequate highway, utility, health, educational, and recreational facilities; that the needs of agriculture, industry, and business be recognized in future growth; that residential areas provide healthy surroundings for family life; and that the growth of the community be commensurate with and promotive of the efficient and economical use of public funds.

(This language is from 1957!)

Role of Planning Board

- ▶ Mont. Code Ann. 76-1-106
 - ▶ To ensure the promotion of public health, safety, morals, convenience, or order or the general welfare and for the sake of efficiency and economy in the process of community development, if requested by the governing body, the planning board shall prepare a growth policy and shall serve in an advisory capacity to the local governing bodies establishing the planning board.
 - ▶ The planning board may propose policies for:
 - ▶ subdivision plats;
 - ▶ the development of public ways, public places, public structures, and public and private utilities;
 - ▶ the issuance of improvement location permits on platted and unplatted lands; or
 - ▶ the laying out and development of public ways and services to platted and unplatted lands.

Role of planning board

- ▶ Critical role in development of guiding and regulatory documents
 - ▶ Holding public hearing for Growth Policy
 - ▶ Assist with development of Subdivision Regulations
 - ▶ Recommend boundaries and regulations for Part 2 Zoning

Role of planning board

- ▶ Role within site-specific reviews
 - ▶ Public hearing for subdivision applications
 - ▶ Includes capturing and analyzing public comment made at the planning board level
 - ▶ Makes a recommendation to the governing body; however, recommendation is viewed as advisory.

Planning Commission (MLUPA)

- Makes recommendations to local governing body regarding development, adoption, amendment, review, approval or denial of:
 - Land Use Plan and Future Land Use Map
 - Zoning Regulations and Map, which implement the Land Use Plan
 - Subdivision Regulations
 - Any other document as designated necessary by governing body
- Also hears appeals of site-specific decisions of planning administrator

Planning Commission (MLUPA)

- Land Use Plan
 - Provides for public notice and participation in development
 - Accepts, considers, and responds to public comment
 - All public comment becomes part of administrative record transmitted to local governing body
- Every 5 years, review Land Use Plan and make determination of changed impacts and allow for public input on new, increased, or changed impacts

Planning Commission (MLUPA)

- Zoning (Implementation of Land Use Plan)
 - Makes a recommendation to the governing body on zoning regulations
 - Provides public notice and public participation
 - Accepts, considers, and responds to public comment on the proposed regulations.
 - All public comment becomes part of administrative record transmitted to local governing body.

Planning Commission (MLUPA)

- Subdivision Regulations
 - Makes recommendation to governing body on subdivision regulations
 - Provides for public notice and public participation on proposed subdivision regulations
 - Accepts, considers, responds to public comment
 - All public comments become part of administrative record transmitted to local governing body

Planning Commission (MLUPA)

- Appeals
 - Hears appeals of any challenged administrative land use decision
 - Appeals are de novo, meaning the decision is made without regard to any decision made by the land use administrator
- Any final land use decision made by the Planning Commission can be appealed to governing body, which is also a de novo appeal

Broadwater County decision

- ▶ Two caveats
 - ▶ Caveat 1: Order may not be applicable to all counties (ask your legal advisor) but the principles that can be pulled from the case are a good guide for subdivision review
 - ▶ Caveat 2: Time for notice to appeal expired on November 12. At the time this presentation was put together, only Denial of Plaintiff's Motion for Attorney's Fees was pending issue on appeal.

Broadwater County Decision

- ▶ Relevant facts
 - ▶ Subdivision of a 442-acre parcel to be developed over 4 phases
 - ▶ Developer proposed use of exempt wells for water and DNRC had issued 4 Pre-Determination Letters, one for each phase.
 - ▶ DNRC had not been consistent statewide with its one exempt well/phase in subdivisions
 - ▶ Broadwater County issued preliminary plat approval, relying on the DNRC Pre-Determination Letters

Broadwater County Decision

- ▶ Court took issue with:
 - ▶ County's determination that application was complete and sufficient because it failed to provide "descriptions of bodies of water" pursuant to statute
 - ▶ Complete and sufficient applications need basic hydrological information such as
 - ▶ Nature of aquifer, how surface and ground water interact, aquifer recharge, health of the bodies of nearby waters
 - ▶ DNRC's interpretation of "combined appropriation"
 - ▶ Court stated, unequivocally, that a subdivision, regardless of size or phasing, was one project for the purposes of "combined appropriation."

Broadwater County Decision

- ▶ Implications for counties
 - ▶ Similar lawsuits are pending in other counties
 - ▶ DNRC ceased issuing Pre Determination Letters; DEQ amended its ARMs so that letter was no longer required for issuance of a COSA
 - ▶ Not the first time the Court has come down hard on Environmental Assessments, so understanding the trends in litigation, even if not directly applicable, is beneficial for a county to have a legally defensible subdivision

Broadwater County Decision

- ▶ How did we get there?
 - ▶ Citizens for Responsible Development v. Sanders County (2009 MT Supreme Court)
 - ▶ Court analyzed EA and found it lacking on basic hydrological information such as:
 - ▶ Nature of aquifer, how nearby surface waters interact with aquifer, current health of aquifer, impact wells and wastewater systems will have on aquifer, location of aquifer
 - ▶ Court found the county acted unlawfully in approving preliminary plat when the EA was statutorily insufficient
 - ▶ While no constitutional violation was found, the Court did say that an insufficient EA does not allow for meaningful public participation

Broadwater County Decision

- ▶ How did we get there?
 - ▶ Aspen Trails Ranch, LLC v. Simmons (2010 MT Supreme Court Case)
 - ▶ Court again took issue with an insufficient EA, this time finding that the governing body failed to address impacts of surface water pollution entering groundwater and that the EA did not contain “available groundwater information”
 - ▶ This time the Court found the application was unlawful for the insufficient EA and that the governing body acted in a way that was arbitrary or capricious for failing to address impacts to groundwater

Broadwater County Decision

- ▶ Impacts to subdivision review
 - ▶ Environmental Assessments need to be more robust
 - ▶ Also need to be reviewed with more scrutiny for required information
 - ▶ When the required information is not in an EA, it calls into question constitutional muster
 - ▶ Inability of the public to engage meaningfully when they do not have sufficient information upon which to comment

Broadwater County Decision

- ▶ Where do we go from here?
 - ▶ Legislative fixes
 - ▶ Potential proposed legislation: Agency Coordination Bill
 - ▶ An attempt to clarify roles of each reviewing agency and to draw DNRC into the mix within subdivision review
 - ▶ Potential proposed legislation: DNRC Stakeholder Working Group Bill
 - ▶ Exempt well bill that creates zones within the state and puts parameters on the use of exempt well for development purposes within those zones



Questions?

Thank you!

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