

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2011-027

TO: Mayor John Engen, City Council, Bruce Bender, Mike Barton, Mary McCrea, Todd Klietz, Tim Worley, Steve King, Kevin Slovarp, Gregg Wood, Marty Rehbein, Donna Gaukler, Jackie Corday

CC: Dept. Atty.

FROM: Jim Nugent, City Attorney

DATE December 15, 2011

RE: Land uses permitted in flood plains and flood ways pursuant to Montana state law

FACTS:

A time-extension for final plat filing of Stonybrook Subdivision expires Monday, December 19, 2011. Stonybrook subdivision proposes 43 platted lots on 17.6 acres on the south side of the Clark Fork River, west of Reserve Street, on the northwest corner of South Third Street West and Tower Street. Since the City Council's November 10, 2008 approval of the original preliminary plat approval for Stonybrook subdivision, the Missoula community experienced the approximate equivalent of a ten-year flood floodwater level in some areas on the south side of the Clark Fork River west of Reserve Street during the spring season of 2011. The proposed Stonybrook subdivision is in the general area where Clark River flooding occurred. Some properties located in the floodplain sandbagged their residential properties to protect their residences.

These sandbagging efforts may have caused some of the diverted flood waters to flow onto other lands, including lands potentially outside of the Federal Emergency Management Agency (FEMA) designated flood plain. During the peak of the spring season flooding in 2011, waters were evident on several proposed lots within the proposed Stonybrook Subdivision, some of which lots are reportedly not located within the FEMA designated flood plain. There also is some citizen testimony that a channel or drainway of the Clark Fork River may have currently altered its course during the 2011 flooding.

Both citizen and City elected official concern has arisen regarding the water that was present on the surface of several proposed lots in Stonybrook Subdivision. Therefore, instead of another time extension for filing the final plat for Stonybrook Subdivision, a phasing plan is being proposed by the developer and OPG staff so that some aspects of the Stonybrook subdivision conditions-of-approval may be revisited and addressed further pursuant to a phasing in plan that could take up to thirteen years to implement.

ISSUE:

Does Montana state floodplain and floodway management law authorize some land uses to occur within flood plains and floodways?

CONCLUSION:

Yes, 76-5-401 and 76-5-402 MCA identify land uses that may occur in open spaces or flood plains outside of floodways.

LEGAL DISCUSSION:

Title 76, chapter 5, MCA is entitled “Floodplain and Floodway Management.” Pertaining to Montana State Legislative findings, 76-5-101(2) MCA finds that:

“(2) [T]he public interest necessitates management and regulation of flood-prone lands and waters in a manner consistent with sound land and water use management practices which will prevent and alleviate flooding threats to life and health and reduce private and public economic losses.”

76-5-103 MCA sets forth definitions for use in parts 1 through 4 of title 76, chapter 5. 76-5-103(9), (10), and (11) MCA define the phrase “flood of 100 year frequency,” and the words “floodplain” and “floodway” as follows.

“(9) ‘Flood of 100 year frequency’ means a flood magnitude expected to recur on the average of once every 100 years or a flood magnitude that has a 1% chance of occurring in any given year.”

(10) ‘Flood plain’ means the area adjoining the watercourse or drainway that would be covered by the floodwater of a flood of 100-year frequency, except for sheetflood areas that receive less than 1 foot of water per occurrence and are considered ‘zone B’ or a shaded ‘X zone’ by the federal emergency management agency.

(11) ‘Floodway’ means the channel of a watercourse or drainway and those portions of the flood plain adjoining the channel that are reasonably required to carry and discharge the floodwater of any watercourse or drainway.”

As previously noted, title 76, chapter 5, MCA is entitled “Floodplain and Floodway Management.” Part 4 of title 76, chapter 2 MCA is entitled “Use of Floodplains and Floodways.” 76-5-401 MCA is entitled “Permissible Open-Space Uses.” This section identifies open-space uses that are permitted within the designated floodway to the extent that they are not prohibited by any other ordinance. 76-5-401 MCA provides as follows.

76-5-401. Permissible open-space uses. The following open-space uses are permitted within the designated floodway to the extent that they are not prohibited by any other ordinance or statute and provided they do not require structures other than portable

structures, fill, or permanent storage of materials or equipment:

- (1) agricultural uses;
- (2) industrial-commercial uses such as loading areas, parking areas, or emergency landing strips;
- (3) private and public recreational uses such as golf courses, tennis courts, driving ranges, archery ranges, picnic grounds, boat launching ramps, swimming areas, parks, wildlife management and natural areas, alternative livestock ranches, fish hatcheries, shooting preserves, target ranges, trap and skeet ranges, hunting and fishing areas, or hiking and horseback riding trails;
- (4) forestry, including processing of forest products with portable equipment;
- (5) residential uses such as lawns, gardens, parking areas, and play areas;
- (6) excavations subject to the issuance of a permit under 76-5-405 and 76-5-406.

76-5-402 MCA is entitled “Permissible Uses within Floodplain but Outside Floodway.” 76-5-402 MCA identifies land uses within portions of the flood plain not contained within the designated floodway for which permits must be granted. 76-5-402 MCA provides as follows.

76-5-402. Permissible uses within flood plain but outside floodway. Permits must be granted for the following uses within that portion of the flood plain not contained within the designated floodway to the extent that they are not prohibited by any other ordinance, regulation, or statute:

- (1) any use permitted in the designated floodway;
- (2) structures, including but not limited to residential, commercial, and industrial structures, provided that:
 - (a) the structures meet the minimum standards adopted by the department;
 - (b) residential structures are constructed so that the lowest floor elevation, including basements, is 2 feet above the 100-year flood elevation;
 - (c) commercial and industrial structures are either constructed as specified in subsection (2)(b) or are adequately floodproofed up to an elevation no lower than 2 feet above the 100-year flood elevation. The floodproofing must be in accordance with the minimum standards adopted by the department.

76-5-403 MCA is entitled “Prohibited Uses within Floodway,” and identifies nonconforming uses that shall be prohibited within the designated floodway. 76-5-403 MCA provides the following.

76-5-403. Prohibited uses within floodway. The following nonconforming uses shall be prohibited within the designated floodway:

- (1) a building for living purposes or place of assembly or permanent use by human beings;
- (2) a structure or excavation that will cause water to be diverted from the established floodway, cause erosion, obstruct the natural flow of water, or reduce the carrying capacity of the floodway;
- (3) the construction or permanent storage of an object subject to flotation or movement during flood level periods.

76-5-404 MCA is entitled “Artificial Obstructions and Nonconforming Uses.” 76-5-404 MCA declares an artificial obstruction or nonconforming use in a designated flood plain or designated floodway to be a nuisance “unless a permit has been obtained for the artificial obstruction or nonconforming use from the department or the responsible political subdivision,” pursuant to the definitions set forth in 76-5-103 MCA, the department referenced is the Montana Department of Natural Resources and Conservation. See 76-5-103(3) MCA. Section 76-5-404 MCA provides:

76-5-404. Artificial obstructions and nonconforming uses. (1) An artificial obstruction or nonconforming use in a designated flood plain or designated floodway enforced under 76-5-301(1) and (2) and not exempt under 76-5-401 through 76-5-403 or subsection (2) or (3) of this section is a public nuisance unless a permit has been obtained for the artificial obstruction or nonconforming use from the department or the responsible political subdivision.

(2) It is unlawful for a person to establish an artificial obstruction or nonconforming use within a designated flood plain or a designated floodway without a permit from the department or the responsible political subdivision.

(3) (a) Parts 1 through 4 of this chapter do not affect any existing artificial obstruction or nonconforming use established in the designated flood plain or designated floodway before the land use regulations adopted by the political subdivision are effective or before the department has enforced a designated flood plain or a designated floodway under 76-5-301(1) and (2).

(b) However, a person may not make nor may an owner allow alterations of an artificial obstruction or nonconforming use within a designated flood plain or a designated floodway whether the obstruction proposed for alteration was located in the flood plain or floodway before or after July 1, 1971, except upon express written approval of the department or the responsible political subdivision. Maintenance of an obstruction is not an alteration.

Sections 76-5-405 and 76-5-406 MCA set forth a process and procedure for obtaining a variance permit for establishing or altering artificial obstructions and nonconforming uses that would otherwise violate sections 76-5-401 through 76-5-404 MCA as well as the criteria to be considered with a variance request.

CONCLUSION:

Yes, 76-5-401 and 76-5-402 MCA identify land uses that may occur in open spaces or flood plains outside of floodways.

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/s/

Jim Nugent, City Attorney

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