



Planning Board Agenda

**Thursday - June 16, 2022 1:30 PM
Community Room
City/County Courthouse**

CALL TO ORDER AND INTRODUCTIONS

PUBLIC COMMENT ON ITEMS NOT INCLUDED ON AGENDA

PLANNING BOARD MEMBER TRAINING WORKSHOP

Park County Board Training Handout June 2022

[Park County Board Training Handout June 2022 Final.pdf](#)

ADDITIONAL PUBLIC COMMENTS

ADJOURNMENT

PARK COUNTY PLANNING BOARD TRAINING

June 16, 2022

Presented by:

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MACo/PCT Land Use Attorney

And

Karen Alley, MACo Associate General
Counsel



AGENDA



Park County Planning Board Training

Livingston, Montana

June 16, 2022

- | | |
|-----------|---|
| 1:30 p.m. | Introductions and Overview of Materials |
| 1:45 p.m. | The Basics: Ethics and Ex Parte Communication |
| 2:00 p.m. | The Basics: Open Meeting Act |
| 2:15 p.m. | Board Governance and Public Participation |
| 2:45 p.m. | Planning Board Jurisdiction |
| 3:15 p.m. | Planning Board Member Liability |
| 3:30 p.m. | Best Practices for Planning Board Members |
| 4:00 p.m. | Questions from Planning Board |
| 4:15 p.m. | Questions or Comment from Public |
| 4:30 p.m. | Adjourn |

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Ethics and Ex Parte Communication

THE APPEARANCE OF IMPROPRIETY BY A GOVERNMENTAL ENTITY OR MEMBER MAY RESULT IN LITIGATION.

A. Ethical Considerations:

1. Conflicts of Interest
2. Gifts and Favors
3. "Ex Parte" communication

B. Conflicts of Interests

- "Conflict of interests" is when a private benefit is derived from your actions.
- Usually the benefit is a financial benefit.
- Just because you are a member in a group or organization is not considered a conflict of interest.
- If a conflict of interest exists, the person should recuse themselves and not participate in the discussion on the action.
- Discuss the matter with planning staff and attorney's office prior to meeting.
- Don't taint the other members and discuss your conflict with them.

C. Gifts and Favors

- A person holding a position of public responsibility should not accept gifts or favors.
- Even minor gifts, i.e., lunches, are not acceptable.

D. Kinds of Board Decisions

- Quasi-Legislative: Establish rules, policies, or standards generally applicable to the entire community. These are well-informed decisions based upon public hearings and information gathered by planning staff. E.g. Subdivision regulations, zoning regulations, growth policies.
- Quasi-Judicial: Decisions made under circumstances similar to that of a court of law. These decisions apply a legislative rule, policy, or standard in

a site-specific matter. E.g. subdivision review, variances, zoning map amendments.

E. Ex Parte Communication

- ❖ “Ex Parte” communication can be verbal, written, electronic or visual and is received outside of the public record.
- ❖ “Ex Parte” communication cannot be received in a quasi-judicial activity, i.e., subdivision application review, zoning conditional use permit. Quasi-judicial means that the decision is made under circumstances similar to a court of law.
- ❖ “Ex Parte” communication can be received in a legislative activity, i.e., adoption of growth policy, subdivision regulations or zoning regulations. Legislative activities are similar to those of the legislature where lobbying is allowed.
- ❖ “Ex Parte” communication should not occur with the subdivider or their consultants at any time, including before the subdivision application is submitted.
- ❖ “Ex Parte” communication should not occur during a site visit. The site visit should be noticed as a public meeting. Any information received from the subdivider or consultants during a site visit must be factual only and limited to the physical features of the site.
- ❖ If you have inadvertent “ex parte” communication with the subdivider or the public, this should be disclosed immediately to planning staff and attorney.
- ❖ “Ex Parte” communications may result in the board or commission member being recused from reviewing and participating in the subdivision application review.
- ❖ “Ex Parte” communication may result in litigation.

OPEN MEETING ACT

The Open Meeting Act and Montana law requires counties to properly notice meetings. Violation of the Open Meeting Act can result in the decision being voided and the county paying attorney's fees to the party challenging the county's compliance with the Act.

A. RELEVANT MONTANA LAWS

1. Montana Constitution

a. Section 8. Right of participation. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

b. Section 9. Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

2. Montana Code Annotated, Title 2 Government Structure and Administration, Chapter 3, Public Participation in Governmental Operations, Part 1 NOTICE AND OPPORTUNITY TO BE HEARD

a. 2-3-101. Legislative intent. The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency.

b. 2-3-102. Definitions. As used in this part, the following definitions apply:

(1) "Agency" means any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts except:

(a) the legislature and any branch, committee, or officer thereof;

(b) the judicial branches and any committee or officer thereof;

(c) the governor, except that an agency is not exempt because the governor has been designated as a member thereof; or

(d) the state military establishment and agencies concerned with civil defense and recovery from hostile attack.

(2) "Agency action" means the whole or a part of the adoption of an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial

thereof.

(3) "Rule" means any agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public; or

(b) declaratory rulings as to the applicability of any statutory provision or of any rule.

c. 2-3-103. Public participation -- governor to ensure guidelines adopted. (1)

(a) Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public. The agenda for a meeting, as defined in [2-3-202](#), must include an item allowing public comment on any public matter that is not on the agenda of the meeting and that is within the jurisdiction of the agency conducting the meeting. However, the agency may not take action on any matter discussed unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. Public comment received at a meeting must be incorporated into the official minutes of the meeting, as provided in [2-3-212](#).

(b) For purposes of this section, "public matter" does not include contested case and other adjudicative proceedings.

(2) The governor shall ensure that each board, bureau, commission, department, authority, agency, or officer of the executive branch of the state adopts coordinated rules for its programs. The guidelines must provide policies and procedures to facilitate public participation in those programs, consistent with subsection (1). These guidelines must be adopted as rules and published in a manner so that the rules may be provided to a member of the public upon request.

d. 2-3-104. Requirements for compliance with notice provisions. An agency shall be considered to have complied with the notice provisions of [2-3-103](#) if:

(1) an environmental impact statement is prepared and distributed as required by the Montana Environmental Policy Act, Title 75, chapter 1;

(2) a proceeding is held as required by the Montana Administrative Procedure Act;

(3) a public hearing, after appropriate notice is given, is held pursuant to any other provision of state law or a local ordinance or resolution; or

(4) a newspaper of general circulation within the area to be affected by a decision of significant interest to the public has carried a news story or advertisement concerning the decision sufficiently prior to a final decision to permit public comment on the matter.

e. 2-3-111. Opportunity to submit views -- public hearings. (1) Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public.

(2) When a state agency other than the board of regents proposes to take an action that directly impacts a specific community or area and a public hearing is held, the hearing must be held in an accessible facility in the impacted community or area or in the nearest community or area with an accessible facility.

f. 2-3-112. Exceptions. The provisions of [2-3-103](#) and [2-3-111](#) do not apply to:

(1) an agency decision that must be made to deal with an emergency situation affecting the public health, welfare, or safety;

(2) an agency decision that must be made to maintain or protect the interests of the agency, including but not limited to the filing of a lawsuit in a court of law or becoming a party to an administrative proceeding; or

(3) a decision involving no more than a ministerial act.

2-3-114. Enforcement — attorney fees. (1) The district courts of the state have jurisdiction to set aside an agency decision under this part upon petition of any person whose rights have been prejudiced. A petition pursuant to this section must be filed within 30 days of the date on which the person learns, or reasonably should have learned, of the agency's decision.

(2) A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 8, of the Montana constitution may be awarded costs and reasonable attorney fees.

3. Montana Code Annotated, Title 2 Government Structure and Administration, Chapter 3, Public Participation in Governmental Operations, Part 2 OPEN MEETINGS

a. 2-3-201. Legislative intent -- liberal construction. The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.

b. 2-3-202. Meeting defined. As used in this part, "meeting" means the convening of a quorum of the constituent membership of a public agency or association described in [2-3-203](#), whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power.

c. 2-3-203. Meetings of public agencies and certain associations of public agencies to be open to public -- exceptions. (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds, including the supreme court, must be open to the public.

(2) All meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual must be open to the public.

(3) The presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.

(4) (a) Except as provided in subsection (4)(b), a meeting may be closed to discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency.

(b) A meeting may not be closed to discuss strategy to be followed in litigation in which the only parties are public bodies or associations described in subsections (1) and (2).

(5) The supreme court may close a meeting that involves judicial deliberations in an adversarial proceeding.

(6) Any committee or subcommittee appointed by a public body or an association described in subsection (2) for the purpose of conducting business that is within the jurisdiction of that agency is subject to the requirements of this section.

d. 2-3-211. Recording. Accredited press representatives may not be excluded from any open meeting under this part and may not be prohibited from taking photographs, televising, or recording such meetings. The presiding officer may assure that such activities do not interfere with the conduct of the meeting.

e. 2-3-212. Minutes of meetings -- public inspection. (1) Appropriate minutes of all meetings required by [2-3-203](#) to be open shall be kept and shall be available for inspection by the public.

(2) Such minutes shall include without limitation:

(a) date, time, and place of meeting;

(b) a list of the individual members of the public body, agency, or organization in attendance;

(c) the substance of all matters proposed, discussed, or decided; and

(d) at the request of any member, a record by individual members of any votes taken.

(3) If the minutes are recorded and designated as the official record, a log or time stamp for each main agenda item is required for the purpose of providing assistance to the public in accessing that portion of the meeting.

(4) Any time a presiding officer closes a public meeting pursuant to 2-3-203, the presiding officer shall ensure that minutes taken in compliance with subsection (2) are kept of the closed portion of the meeting. The minutes from the closed portion of the meeting may not be made available for inspection except pursuant to a court order. (2015 – HB 123).

f. 2-3-213. Voidability. Any decision made in violation of [2-3-203](#) may be declared void by a district court having jurisdiction. A suit to void a decision must be commenced within 30 days of the date on which the plaintiff or petitioner learns, or reasonably should have learned, of the agency's decision.

g. 2-3-221. Costs to plaintiff prevailing party in certain actions to enforce constitutional right to know. A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 9, of the Montana constitution may be awarded costs and reasonable attorney fees.

BOARD GOVERNANCE: STRATEGIES TO DEAL WITH THE PUBLIC

Transparent, efficiently run meetings set the tone for public comment. If the public understands the process and their role in providing public comment, the process is more efficient. Also, the public needs to know that their comments have been received and reviewed.

Below are some methods of making public comment more efficient and transparent. Processes for dealing with public comment should also be addressed in the Growth Policy, Subdivision Regulations and/or Board By-laws.

A. GROUND RULES FOR MEETINGS

Ground rules for meetings are the rules of conduct that participants are expected to follow. An effective set of ground rules can help minimize conflict, keep the meeting on schedule and efficient, and ensure fair participation. Both participants and leaders can become frustrated when opinions are not respected, personal criticism flies, and voicing of beliefs is prevented. Meetings with these issues are often divisive and unproductive.

The addition of ground rules as part of the meeting process can help alleviate or circumvent incivility in a meeting. Ground rules provide a tool to handle difficult situations while protecting both the rights of public participants and the integrity of the meeting. Opposition groups sometimes view public meetings as an opening to derail a project, commonly by hijacking the process so that it can be called into question. Ground rules make commandeering a meeting more difficult by giving everyone the same opportunity to participate and providing a clear set of parameters delimiting when a facilitator can intervene in the discussion. Without these parameters, the chair of the meeting can be accused of being bias by favoring one side over another.

The ground rules should be in writing and part of the agenda for each meeting and posted at the podium where the public will speak from.

Examples of common ground rules can include the following:

- The speakers will only address the board through the Chair; not other audience members or staff.

- Everyone agrees not to interrupt the speaking opportunity of others.
- Shouting and personal attacks will not be allowed.
- Everyone will listen actively and sincerely. Listening does not imply agreement.
- Cell phones should be turned off or silenced.
- No single party will be allowed to dominate the meeting.
- No person will be allowed to speak twice until all others have had the opportunity to speak.
- Discussion should not deviate from the established agenda.
- The speaker should not repeat other speaker's testimony; the speaker can state they agree with the former speaker(s) and then add new information to their testimony.

B. SAMPLE PUBLIC COMMENT GUIDELINES:

These guidelines may be read at the beginning of each public meeting and may be posted on meeting doors and at the podium where the public will speak from.

If you wish to speak, please line up at the podium. Before you begin your comment, state your name and address. If you are speaking on behalf of other people, groups, or entities, please state the nature of that representation.

All comments should be directed to the Chair of the Planning Board, not to other audience members or the developer. You may have questions. Understand that this public hearing is not a question and answer session. It is an opportunity for you to provide public comment to the Planning Board on the matter before the Planning Board.

Speakers are encouraged to support a previous speaker's comments but not repeat the same point. If you agree with what a previous speaker has said, simply state you agree with the comment and move on to the next issue you wish to address. The Planning Board wishes to hear from as many people as possible. To that end, no person will be permitted to speak a second time until everyone in the room, who wishes to make a public comment, has been provided the opportunity to do so.

Do not interrupt others as they are speaking. Additionally, there should be no applause, whistling, cheering, or booing during or after any particular comment. Such conduct is unduly disruptive and will not be tolerated.

The purpose of this public hearing is to receive comment on these issues:

- [List specific issues for hearing]

Your comments must be limited to these topics. The Planning Board is not collecting public comments on any other issues.

Once the Chair of the Planning Board has closed public comment, no further comments will be received. At that point in time, the public is asked to quietly observe the deliberations of the board. The board may have questions to confirm what a particular member of the public said and may ask that member to clarify; however, that does not mean more comments will be received. If members of the public continuously disrupt the Board's discussions, the disruptive individuals may be asked to leave the meeting.

Park County Planning Board By-Laws Code of Civility

The Park County Planning Board By-Laws include a Code of Civility which is to be included with the Agenda and/or made available to the public at every board meeting. Included within the Code of Civility are prohibited behaviors, including:

- Yelling at, threatening, or continued disruption of participants (verbally or physically).
- Any behavior that creates an environment where people feel harassed or unsafe.
- Harassment or intimidation based on race, religion, language, sexual orientation, gender identity, gender expression, ethnicity, disability, physical appearance, body size, or other group status.

What the public can expect of the Board Members:

- The audience will be treated with respect before, during, and after the meeting. The Board Chair will rule out of order any person making derogatory or disrespectful comments about participants, staff or Board members. If necessary to ensure the civility of public comment, the Chair may take recesses to diffuse tension in the room or adjourn public comment to a later date and certain time.

- Board members will give their undivided attention to speakers but may also be taking notes by hand or on electronic devices.
- Speakers will be recognized by the Chair and speakers will address the questions to the Chair – not to individual Board members, staff or members of the audience.
- Board members will be neutral in their respect to speaker’s opinions through their questions, comments, and body language; they will not express an opinion on the agenda items before all public testimony has occurred and been reviewed on the record.
- Board members will identify the findings that support a vote on an agenda item.
- The Chair will strive to provide an equitable amount of time to all speakers on an item.
- Board members will be prepared on each agenda item.

C. What About Public Comment?

- Public comment in writing to the Board/Commission or presented at a public hearing or meeting must be considered by the Board/Commission.
- Public comment outside this formal process if it is a quasi-judicial process (review of an application) is considered ex-parte contact as the Board/Commission is acting in a quasi-judicial role.
- All public comments must be analyzed on the record by the Board/Commission and incorporated into findings as appropriate.
- While all public comment must be analyzed not all public comment must be incorporated into findings if the public comment is not relevant or other credible information outweighs the public comment.

D. ANALYZING PUBLIC COMMENT

Taking public comment at a meeting is the first step in the public comment process. Public comment is not meaningful unless it is reviewed by the Board/Commission and analyzed to determine if the comments require amendments to proposed regulations, processes or findings. Almost every lawsuit filed against a county in the last five years has contained an allegation that public comment was not reviewed and analyzed properly. Properly reviewing and analyzing public comment in the same manner for all land use processes ensures transparency and the public understands their comments were reviewed and analyzed on the record.

Park County has adopted a process for analyzing public comment to ensure that all public comments are reviewed in their entirety, whether oral or written, and that the Board/Commission reviews each comment and determines whether it is relevant or not and whether the comment warrants changes to findings/regulations.

If there are few oral public comments, the public comment is typed verbatim on a laptop which projects on to a screen as the commenter makes the comments. The commenter is then asked if what is on the screen accurately represents the public comment. When the Board/Commission then closes public comment, each comment is reviewed in the following format:

ORAL PUBLIC COMMENT				
Name	Comment	Applicable Yes/No	Analysis and Response to Comment	Determined Amendments/Findings

If a lot of written and oral comments are expected, the public comment period/hearing is scheduled for one day and the meeting to take action by the Board/Commission is scheduled for a different date. Staff then listens to the recorded oral comments and transcribes those into the comment sections and also inserts all written comments in the table, defining which comments were oral or written by having them in separate worksheet pages in Excel. Staff then makes the first determination as to the “Analysis and Response to Comment” and whether any amendments to the document or new findings need to be made.

Then at the Board meeting the Board goes through each comment to determine whether it agrees with the Staff analysis and recommendations. If the document/application is then reviewed by the Commission, the changes to the public comment tables are noted so it is easy for the Commission to determine how public comment has been reviewed/analyzed to-date and what changes were made by the Board to the Determined Amendments/Findings.

These public comment analyses are posted on the County website and are available to the public for their review.

E. AGENDAS: ESTABLISHING THE RECORD AND GUIDING THE PUBLIC

Detailed agendas for each meeting are another method to ensure transparency in land use processes and guide the public as to the process of the meeting and their role in providing public comment. While the below sample is for a subdivision application review, a similar type of agenda could be adopted for other land use processes. The small notes could be removed from the public's agenda and just left for the Board; however, leaving the notes guides the public on why the process is the process.

Sample Agenda for Subdivision Review

_____ SUBDIVISION
_____ (DATE – TIME)
_____ County Commission (Planning Board) Meeting/Decision
AGENDA

1. Call Meeting to Order

I, _____, call the meeting to order. This is a public meeting (for minors) or hearing (for majors) to review the _____ Subdivision

2. Public Comment on Matters Not on the Agenda

3. Disclosure of Conflicts of Interest by Commission (Planning Board)

4. Establishment of Record before County Commission (Planning Board)

The Board has received the following documents:

1. Subdivision Application
2. Staff report
3. Staff and/or PB Reports

4. Maps – (state what maps)
5. Attachments – (state what they are, i.e. letters, covenants, etc.)
6. Written Public Comment
7. Other: _____

The Board will consider the following documents in determining findings and conditions:

- A. Growth Policy/Neighborhood Plans
- B. Subdivision Regulations
- C. Floodplain Regulations
- D. Trail Plans, Park Plans, etc.

This is a public meeting (minor subdivision)/public hearing (major subdivision). Public comment will be taken. If there are questions regarding mitigation of the subdivision proposal, the County Commission (Planning Board) may ask questions of the subdivider or the subdivider's representative. A decision on this subdivision may or may not be made today. A decision will be made no later than _____ (the date in the board report), after due notice.

5. Planner/Planning Board Report

The Board now requests a report from _____, County Planner regarding the application (and recommendations of the County Planning Board).

6. Subdivider/Representative Presentation

7. Public Comment on Subdivision (comment only; no questions asked/answered) (if a public hearing (for a major subdivision) - ask for proponents/opponents)

a. Public Comment

- i. General Public Comment
- ii. Specific Public Comment on Water and Sanitation

8. Subdivider Response

9. Close Public Comment

10. Commission (Planning Board) Discussion (Commission/Planning Board may ask questions planner/public/subdivider)

- a. Review of Planning Board/Staff report (variances/findings/conditions)
- b. Review of Public Comments
- c. New Information Analysis (if applicable)
- d. Consideration of Subdivider Preferred Mitigations (if any)

11. Commission (Planning Board) Decision/Motions

a. Variances (Should be dealt with first)

1. The Commission (Planning Board) grants variances when "strict compliance would result in undue hardship and when it is not essential to the public welfare". A variance shall not have the effect of nullifying the intent and purpose of the subdivision regulations. The Commission (Planning Board) may

not grant a variance for building purposes in areas located within the floodway of a flood of 100-year frequency.

2. The Commission (Planning Board) shall not approve a variance unless it makes findings (findings are facts) based upon the evidence in each specific case that:

- a. The granting of the variance will not be detrimental to the public health, safety, or general welfare, or injurious to other adjoining properties;
- b. Because of the particular physical surroundings, shape, or topographical conditions of the specific property involved, an undue hardship to the owner would result if the strict letter of the subdivision regulations are enforced;
- c. The variance will not cause an increase in public costs; and
- d. The variance will not in any manner place the subdivisions in nonconformance with any adopted zoning regulations or growth policy plan.

3. The Commission (Planning Board) may impose such conditions (conditions mitigate impacts of the findings) as will, in its judgment, secure substantially the objectives of the subdivision regulations and the growth policy plan.

b. Findings and Conditions (Review of Staff/Planning Board Findings and Conditions)

1. The Commission (Planning Board) should go through each group of findings (findings are facts) by the Staff/Planning Board, i.e., effects on agricultural, etc., and the conditions imposed to mitigate those findings. Either the Commission (Planning Board) should state that it is in agreement with the findings and the conditions recommended by the Staff/Planning Board as set forth in the Staff/Board Report and adopt those as the findings and conditions of the Commission (Planning Board); and/or

2. The Commission (Planning Board) should make specific findings on those findings where the Commission (Planning Board) differs from the Staff/Planning Board findings and alter conditions appropriately. The Commission (Planning Board) should go through each finding/condition on which they differ from the Staff/Planning Board finding/condition in the format where the Chair states that “in my opinion . . . ” and then asks each Commissioner (Planning Board Member) to state their opinion. A finding must be made in which two out of the three Commissioners (three out of five of Planning Board) agree on the finding to support the condition and a condition must be made in which two out of the three Commissioners (three out of five of Planning Board) agree on the condition.

NOTE: FOR EACH CONDITION, THERE MUST BE A FACTUAL FINDING TO SUPPORT THE CONDITION, i.e., in the interests of public health and safety, etc. BUT YOU MAY HAVE A FACT THAT DOESN'T REQUIRE A MITIGATION CONDITION. You should NEVER have a condition which is not supported by a finding which made the condition necessary.

3. After arriving at a finding, and if the finding has an effect on one of the primary criteria for the subdivision, the Chair MUST ask the subdivider/representative if they have any suggestions for mitigation to add to or in lieu of the suggested condition. The Commission (Planning Board) does not have to accept the subdivider's suggested mitigation.

c. Motion to Approve with Conditions/Deny (state why)

Motion to Approve:

The motion to approve can only be made after the findings on variances and conditions are done. The motion to approve the subdivision shall contain a statement describing the variances and the facts and conditions upon which the issuances of the variances are based.

The motion to approve the subdivision shall also contain a statement describing the findings/conditions adopted as set forth in the Staff/Planning Board recommendation and the

findings or conditions numbers _____ as just amended or added by the Commission (Planning Board), based upon a short statement of the facts supporting those changes/additions to the conditions.

Example motion:

I move to approve the _____ Subdivision, including the granting of a variance for _____ based upon these facts: _____, and conditions numbers _____ as recommended by the Staff/Planning Board, adopting their findings on said conditions, and with the changes/additions to conditions numbers _____ based upon these facts:_____.

d. Discussion on Motion Before Vote

Each Commissioner (Planning Board member) should state why they are or are not supporting the motion.

e. Vote on Motion

12. Adjourn Meeting

F. PARLIMENTARY PROCEDURE

A Board must determine whether it is using Roberts Rules of Order for a Regular Board or a Small Board in its By-laws. The Park County Planning Board By-Laws do not state whether or not this board uses the Regular Board Rules or Small Board Rules. At every meeting the Board members should have access to their By-laws and Roberts Rules to ensure an orderly meeting. The Chair may want to appoint one Board member to be the “parliamentarian” for the meetings; that person would be responsible for resolving questions regarding process for motions and would be familiar with the Board’s by-laws as well.

ROBERTS RULES CHEAT SHEET

To:	You say:	Interrupt Speaker	Second Needed [Small Boards – No for all motions]	Debatable	Amendable	Vote Needed
Adjourn	"I move that we adjourn"	No	Yes	No	No	Majority
Recess	"I move that we recess until..."	No	Yes	No	Yes	Majority
Complain about noise, room temp., etc.	"Point of privilege"	Yes	No	No	No	Chair Decides
Suspend further consideration of something	"I move that we table it"	No	Yes	No	No	Majority
End debate [Small Boards – No]	"I move the previous question"	No	Yes	No	No	2/3
Postpone consideration of something	"I move we postpone this matter until..."	No	Yes	Yes	Yes	Majority
Amend a motion	"I move that this motion be amended by..."	No	Yes	Yes	Yes	Majority
Introduce business (a primary motion)	"I move that..."	No	Yes	Yes	Yes	Majority

The above listed motions and points are listed in established order of precedence. When any one of them is pending, you may not introduce another that is listed below it, but you may introduce another that is listed above it.

To:	You say:	Interrupt Speaker	Second Needed	Debatable	Amendable	Vote Needed
Object to procedure or personal affront	"Point of order"	Yes	No	No	No	Chair decides
Request information	"Point of information"	Yes	No	No	No	None
Ask for vote by actual count to verify voice vote	"I call for a division of the house"	Must be done before new motion	No	No	No	None unless someone objects
Object to considering some undiplomatic or improper matter	"I object to consideration of this question"	Yes	No	No	No	2/3
Take up matter previously tabled	"I move we take from the table..."	Yes	Yes	No	No	Majority
Reconsider something already disposed of	"I move we now (or later) reconsider our action relative to..."	Yes	Yes	Only if original motion was debatable	No	Majority
Consider something out of its scheduled order	"I move we suspend the rules and consider..."	No	Yes	No	No	2/3
Vote on a ruling by the Chair	"I appeal the Chair's decision"	Yes	Yes	Yes	No	Majority

The motions, points and proposals listed above have no established order of preference; any of them may be introduced at any time except when meeting is considering one of the top three matters listed from the first chart (Motion to Adjourn, Recess or Point of Privilege).

G. MAKING CLEAR FINDINGS OF FACT AND CONDITIONS/CONCLUSIONS

While the public may not agree with a Board's findings and imposed conditions/conclusions, if they understand the Board's analysis and reasoning they will be less likely to challenge a decision. Further, if a decision is challenged, the Court needs to be able to understand, based on the record before the Board, how the Board analyzed the record and came to its conclusions. The process of making findings, imposing conditions and coming to conclusions should be a well laid out on-the-record road map for the public and the Court.

PLANNING BOARD MEMBER LIABILITY

Board members acting within the course and scope of their authority, acting within the confines of the law, and acting within established rules, cannot be held personally liable. That is to say, so long as board members make a good faith effort to carry out the law, rule, or policy created by a legislative body, they have immunity from personal liability.

2-9-103. Actions under invalid law or rule -- same as if valid -- when. (1) If an officer, agent, or employee of a governmental entity acts in good faith, without malice or corruption, and under the authority of law and that law is subsequently declared invalid as in conflict with the constitution of Montana or the constitution of the United States, that officer, agent, or employee, any other officer, agent, or employee of the represented governmental entity, or the governmental entity is not civilly liable in any action in which the individuals or governmental entity would not have been liable if the law had been valid.

(2) If an officer, agent, or employee of a governmental entity acts in good faith, without malice or corruption, and under the authority of a duly promulgated rule or ordinance and that rule or ordinance is subsequently declared invalid, that officer, agent, or employee, any other officer, agent, or employee of the represented governmental entity, or the governmental entity is not civilly liable in any action in which liability would not attach if the rule or ordinance had been valid.

2-9-105. State or other governmental entity immune from exemplary and punitive damages. The state and other governmental entities are immune from exemplary and punitive damages.

Additionally, Montana Code Annotated has specific language of indemnification for public officers and employees.

2-9-305. Immunization, defense, and indemnification of employees. (1) It is the purpose of this section to provide for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment.

(2) In any noncriminal action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission, including alleged violations of civil rights pursuant to 42 U.S.C. 1983, or other actionable conduct of the employee committed while acting within the course and

scope of the employee's office or employment, the governmental entity employer, except as provided in subsection (6), shall defend the action on behalf of the employee and indemnify the employee.

(3) Upon receiving service of a summons and complaint in a noncriminal action against an employee, the employee shall give written notice to the employee's supervisor requesting that a defense to the action be provided by the governmental entity employer. If the employee is an elected state official or other employee who does not have a supervisor, the employee shall give notice of the action to the legal officer or agency of the governmental entity defending the entity in legal actions of that type. Except as provided in subsection (6), the employer shall offer a defense to the action on behalf of the employee. The defense may consist of a defense provided directly by the employer. The employer shall notify the employee, within 15 days after receipt of notice, whether a direct defense will be provided. If the employer refuses or is unable to provide a direct defense, the defendant employee may retain other counsel. Except as provided in subsection (6), the employer shall pay all expenses relating to the retained defense and pay any judgment for damages entered in the action that may be otherwise payable under this section.

(4) In any noncriminal action in which a governmental entity employee is a party defendant, the employee must be indemnified by the employer for any money judgments or legal expenses, including attorney fees either incurred by the employee or awarded to the claimant, or both, to which the employee may be subject as a result of the suit unless the employee's conduct falls within the exclusions provided in subsection (6).

(5) Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter constitutes a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, omission, or other actionable conduct gave rise to the claim. In an action against a governmental entity, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment, unless the claim constitutes an exclusion provided in subsections (6)(b) through (6)(d).

(6) In a noncriminal action in which a governmental entity employee is a party defendant, the employee may not be defended or indemnified by the employer for any money judgments or legal expenses, including attorney fees, to which the

employee may be subject as a result of the suit if a judicial determination is made that:

(a) the conduct upon which the claim is based constitutes oppression, fraud, or malice or for any other reason does not arise out of the course and scope of the employee's employment;

(b) the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through 7;

(c) the employee compromised or settled the claim without the consent of the government entity employer; or

(d) the employee failed or refused to cooperate reasonably in the defense of the case.

(7) If a judicial determination has not been made applying the exclusions provided in subsection (6), the governmental entity employer may determine whether those exclusions apply. However, if there is a dispute as to whether the exclusions of subsection (6) apply and the governmental entity employer concludes that it should clarify its obligation to the employee arising under this section by commencing a declaratory judgment action or other legal action, the employer is obligated to provide a defense or assume the cost of the defense of the employee until a final judgment is rendered in that action holding that the employer did not have an obligation to defend the employee. The governmental entity employer does not have an obligation to provide a defense to the employee in a declaratory judgment action or other legal action brought against the employee by the employer under this subsection.

****It is important to remember that, in order to be indemnified, board members must be acting within the course and scope of their position and not out of personal interest.****

BEST PRACTICES FOR PLANNING BOARD MEMBERS

*****Note, these best practices are adopted and included in the Park County Planning Board By-Laws*****

1. Planning Board Members Should be Cognizant of Open Meeting Statutes

- a. Electronic meetings by e-mail are a violation of the Open Meeting Act.
- b. All subcommittee meetings must be noticed, public comment must be taken and minutes must be kept.
- c. E-mails regarding Planning Board activities should not be deleted and should be kept in a separate folder. In *Delaney & Co. v. City of Bozeman*, Delaney was awarded \$3,000,000 in damages for abuse of discovery; the abuse was that the City of Bozeman failed to retain e-mails that Delaney alleged would have shown that the City of Bozeman intentionally undermined his purchase of the Mandeville property after he disclosed to the City of Bozeman his intention to purchase and develop this property.
- d. Limit the number of e-mails you use for Planning Board activities. Park County By-Laws recommend board members shall limit email to questions regarding notice and attendance of meetings, dialogue with planning staff, and educational materials. (Article IV, Section 7)
- e. Copying parties outside of the Planning Board or County on Planning Board Activities may appear to be a conflict of interest and subject that party to e-mail discovery if there is litigation.

2. The Planning Board Should Act as a Board; Not as Individual Members

- a. All information regarding Planning Board activities should be shared with the entire Board so that all Board members have the same information when taking action on issues.
- b. Inviting speakers to present to the Planning Board is Board action; not an individual member action.
- c. If a matter is under the jurisdiction of the Planning Board, stating that you are representing yourself and not the Planning Board in regards to that matter may create a conflict of interest for you to act on that matter as a Planning Board

member. The majority of the Zoning Board of Adjustments in Three Forks was recently removed for cause after they signed a petition against a development. The development application included a variance which is heard by the Zoning Board of Adjustments.

d. The Planning Board acting as a Board should determine Planning Board work plans, agenda items and best use of staff time.

e. Park County Planning Board By-laws allow for subcommittees but those committees may not commit the Board to the endorsement of any plan or program. Members of these subcommittees are appointed by the Chair and are for a specific objective or task.

3. Planning Board Members Should Not Hire Outside Consultants to Advise the Planning Board.

a. State statutes states that all “staff” must be approved by resolution. 7-1-201(2)(d), MCA.

b. County employees and county hired contractors have a duty to represent the best interests of the county. Outside consultants hired by private individuals have no duty to represent the best interests of the county.

c. The County has disciplinary control and contract provisions to address county employee and county hired contractor actions. 2-2-121, MCA is a Code of Ethics for Public Employees.

d. County employees and county hired contractors are not allowed to have conflicts of interest in regards to County activities upon which they provide advice to the County.

4. Planning Board Members Should Frequently Review Planning Board Policies and County Regulations.

a. Planning Board By-laws should be consulted in regards to proper protocols for Board actions and activities. By-laws can be amended to include protocols the Board wishes to put in place, subject to County Commission approval.

b. The Growth Policy is a living document that by statute should be updated every 5 years and it should be read frequently so the Planning Board knows what action items it is supposed to address in what time frame and to be familiar with the Growth Policy when reviewing subdivision applications.

c. Outdated regulations are a liability to the County as they do not accurately reflect state law and may misinform the public. Subdivision regulations

should be updated to conform to the goals and objectives of the Growth Policy and state statutes.

d. County imposed zoning must be consistent with the goals and objectives of the Growth Policy and cannot be enacted without a Growth Policy.

5. Planning Board Members Should Be Cognizant of when Ex Parte Contact is prohibited.

a. Planning Board members should understand whether they are taking action on a legislative matter or a quasi-judicial matter.

b. Planning Board members do not take action on zoning permits, variances, or enforcement so where zoning is concerned, the Planning Board is only involved in legislative activities.

c. Subdivision review is strictly a quasi-judicial matter:

i. Planning Board members should not meet with a subdivider, neighbors or other agency outside of public meetings on the subdivision that have been noticed correctly.

ii. Site visits must be conducted in such a manner as limit ex parte contact with the subdivider or his representatives. If present, contact with the subdivider or his representatives should be limited to answering specific questions about location of subdivision features on the ground, i.e. where the fire fill site is located.

6. Planning Board Members Should Determine How the Board Interacts with the Press

a. Planning Board members should determine who has the authority to speak to the press on behalf of the entire Board.

b. Planning Board members should make sure that any representations to the press by comments in articles in the newspaper or letters to the editor represent the positions of the entire Board or those comments should be made as an individual and not as a member of the Planning Board.

c. Care should be taken to make sure that information repeated to the press is accurate so as to not misinform the public.

7. Planning Board Members Should Make Sure that Public Comments are Captured and Analyzed

a. While Planning Staff captures all oral public comments at public

meetings and written public comments, comments made to Planning Board members on legislative activities should be conveyed to the entire Board and made a part of the record.

b. In *Citizens for a Better Flathead v. Flathead County* the allegations were that both the County Commission and the Planning Board failed to consider and analyze public comment. The MSCt found that all public comments had been captured, made a part of the record, and analyzed.

8. Planning Board Members Should be Cognizant that Land Use Decisions are Frequently Litigated

a. Land use issues are contentious across the State of Montana and Planning Board members should be aware that their activities and decisions will be under intense public scrutiny.

b. Planning Board members should remember that even if they follow proper protocols and processes they still may be involved in litigation. While this litigant was not successful, the *Touris II* complaint against Flathead County asserted 11 counts:

- I violation of due process by the Bigfork Land Use Advisory Committee;
- II negligence/negligence per se by the Bigfork Land Use Advisory Committee;
- III violation of equal protection by the Bigfork Land Use Advisory Committee;
- IV a negligence by the Planning Board;
- V violation of equal protection by the Board of Commissioners;
- VI negligence by the Board of Commissioners;
- VII violation of substantive due process by the Board of Commissioners;
- VIII negligent misrepresentation by the Flathead County Planning and Zoning Office;
- IX violation of equal protection by the Flathead County Planning and Zoning Office;
- X violation of procedural due process by Jeff Harris; and
- XI failure by Flathead County to adequately train and supervise employees and board members.