

Ordinance 2108, Amending Well Irrigation Requirements of the Bozeman Municipal Code



ORDINANCE 2108

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF BOZEMAN, MONTANA AMENDING BOZEMAN MUNICIPAL CODE SECTION 38.550.070 – LANDSCAPING OF PUBLIC LANDS AND SECTION 38.420.080 – PARK DEVELOPMENT AND PROVIDING AN EFFECTIVE DATE

WHEREAS, the City of Bozeman (the “City”) has adopted land development and use standards to protect public health, safety and welfare and otherwise execute the purposes of Montana Code Annotated §§ 76-1-102, 76-2-304, 76-3-102, and 76-3-501; and

WHEREAS, after proper notice, the Community Development Board in their capacity as Bozeman Zoning Commission and Planning Board held a public hearing on May 16, 2022 to receive and review all written and oral testimony on the proposed amendments; and

WHEREAS, the Community Development Board acting in their capacity as the Bozeman Zoning Commission and Planning Board recommended to the Bozeman City Commission that Ordinance 2108, be approved as proposed; and

WHEREAS, after proper notice, the City Commission held its public hearing on June 7, 2022, to receive and review all written and oral testimony on the proposed amendment to the subdivision regulations; and

WHEREAS, the City Commission has reviewed and considered the applicable amendment criteria established in Montana Code Annotated § 76-2-304, and found that the proposed amendments are in compliance with the criteria; and

NOW, THEREFORE, BE IT ORDAINED by the City Commission of the City of Bozeman, Montana that:

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SECTION 1

Legislative Findings

The City Commission hereby makes the following findings in support of adoption of this Ordinance:

1. The City has adopted land development and use standards to protect public health, safety and welfare and otherwise execute the purposes of Montana Code Annotated §§ 76-1-102, 76-2-304, 76-3-102, and 76-3-501.
2. The City adopted a growth policy, the Bozeman Community Plan 2020 (BCP 2020), by Resolution 5133 to establish policies for development of the community.
3. The existing municipal water supply of the City of Bozeman is an essential resource that sustains public health, safety and welfare and is highly susceptible to the impacts of drought therefore necessitating wise use and conservation of the limited water resource.
4. The City of Bozeman has enacted development regulations within its unified development code to conserve the existing municipal water supply by requiring the use of groundwater wells for irrigation of parks, open spaces and certain rights-of-way areas in new developments.
5. That landscapes in parks, open spaces and rights-of-way demand irrigation water supplies that are physically and legally adequate to maintain healthy and viable landscape areas for the public's use and enjoyment.
6. All waters within the State of Montana are owned by the state and the legal use of water requires a water right.
7. The Montana Department of Natural Resources and Conservation (MT DNRC) is the agency of the State of Montana that is authorized under the laws of the state to issue new water rights or changes to existing water rights and water right permits.
8. On March 23, 2022 the MT DNRC revised its 'Combined Appropriation Guidance' (attached to this Ordinance 2108 as Exhibit A) to clarify that any subdivision of land, as defined under Montana Code Annotated §76-4-102, created after October 17, 2014 that uses groundwater, must receive a pre-determination from MT DNRC that all exempt wells proposed for the subdivision will stay at or under a combined appropriation of 10 acre-feet per year regardless of the distance between proposed wells.
9. A combined appropriation of groundwater for a project or development exceeding 35 gallons per minute and 10 acre-feet per year requires a water right permit ("permitted wells") and a combined appropriation under 10 acre-feet per year using wells pumping no more than 35 gallons per minute is exempt from permitting ("exempt wells").
10. With limited exception, exempt wells serve as the physical and legal irrigation water source for existing parks, open spaces and certain rights-of-way areas in the City of Bozeman.
11. The current MT DNRC process to obtain a permitted irrigation well in a closed basin is protracted, cumbersome, technically complex and, unlike an exempt irrigation well, is without a reasonably certain or guaranteed outcome that a water right will be obtained.

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12. It is unlikely that all new development applicants will be able to comply with the existing City of Bozeman requirement that, without exception, all parks, open spaces, and certain rights-of-way areas use a well for irrigation considering the March 23, 2022 Combined Appropriation Guidance because, unlike an exempt irrigation well, there is no guaranteed outcome that an applicant can obtain a permit for an irrigation permitted well from MT DNRC.
13. Amendments of certain municipal code sections enacted by this Ordinance 2108 are necessary to remove the mandatory requirement that wells be used for irrigation of parks, open space and certain rights-of-way areas in new developments in order to avoid undue hardship created by the March 23, 2022 Combined Appropriation Guidance and to provide necessary flexibility to allow for other sources of irrigation water supply for these landscaped areas.
14. A staff report analyzing the required criteria for an amendment to the City's regulations for zoning review, including the amendment's accordance with the BCP 2020, and has found that the required criteria of Montana Code Annotated § 76-1-304 are satisfied.
15. The necessary public hearings were advertised as required in state law and municipal code and all persons have had opportunity to review the applicable materials and provide comment.
16. The City Commission considered the application materials, staff analysis and report, recommendation of the Community Development Board acting in their capacity as the municipal Zoning Commission and Planning Board, all submitted public comment, and all other relevant information.
17. The Community Development Board acting in its capacity as the municipal Zoning Commission and Planning Board considered the application materials, staff analysis and report, all submitted public comment, and all other relevant information.
18. The City Commission determines that, as set forth in the staff report and incorporating the staff findings as part of the decision, the required criteria for approval of this ordinance are satisfied.
19. The City Commission determines that the ordinance provides a proper balance of interests, rights, and responsibilities of all parties affected by the ordinance.

SECTION 2

Section 38.550.070. - Landscaping of public lands of the Bozeman Municipal Code be amended as follows:

Sec. 38.550.070. - Landscaping of public lands.

A. City rights-of-way, open space and parks.

1. General.

- a. Tree planting permits must be obtained from the forestry department prior to installation of trees in city rights-of-way or parks.

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- b. Drought tolerant landscaping ~~grass seed~~ must be planted in ~~these areas~~ open space, parks and city rights-of-way, unless otherwise approved by the City.
 - 2. ~~External~~ Streets, open space, and parks. The developer must at the time of initial development ~~for installing vegetative ground cover~~ drought tolerant landscaping, boulevard trees and an irrigation system when required in the public city rights-of-way boulevard strips and medians along all external perimeter development collector or arterial streets and all streets adjacent to public parks or other open space areas.
 - a. Prior to installing landscaping in these areas, city rights-of-way or parks, the developer must submit a landscaping plan to the ~~facilities manager~~ city for review and approval. The landscaping plan must be prepared by a qualified landscaping professional meeting the requirements of this division 38.550. ~~Tree planting permits must be obtained before any tree is placed on public land.~~
 - b. The developer must specify its irrigation water supply source(s).
 - ~~bc.~~ Wells must may be used to irrigate landscaping in these areas subject to applicable state law governing the appropriation of groundwater.
 - i. The appropriation and use of groundwater for irrigation of parks and city rights-of-way takes priority over irrigation of open space and individual lots.
 - d. The developer must transfer to the city legal ownership of any water rights used for the irrigation these areas.
 - 3. *Adjacent to individual lots.* When individual parcels are developed, the individual property owners' must install landscaping and street trees within the ~~public city rights-of-way~~ boulevard strips adjacent to their property; and ~~providing for~~ provide irrigation; in compliance with section 38.550.050.E.1.
- B. *Maintenance.*
- 1. Maintenance of landscaping installed within the boulevard portion of the public right-of-way, with the exception of tree trimming and tree removal, is the responsibility of adjacent property owners'.
 - ~~2. A developer must irrigate and maintain landscaping along external streets and landscaping adjacent to parks or other open space areas until 50 percent of the lots are sold. Thereafter, the property owners' association is responsible for maintaining and irrigating these landscaped areas. The property owners' association may, with the city's approval, establish an improvement district to collect assessments to pay for the irrigation and maintenance.~~
 - ~~3. The City is responsible for the maintenance of all other required landscaping installed in accordance with approved site plans within the public right-of-way or on public lands.~~
 - 2. The developer must maintain landscaping and irrigation systems for open space until the open space is transferred to a property owners' association. After a property owners' association assumes responsibility for the maintenance of landscaping and irrigation systems for open space areas, it may establish an improvement district to collect assessments to pay for the irrigation and maintenance with the city's approval.

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3. The developer must maintain landscaping and irrigation systems for parklands until the parkland is accepted by the City. After the City accepts parkland, the City is responsible for maintaining the landscaping and irrigation systems for the parkland.
- C. *State rights-of-way.* Landscaping must be installed along state rights-of-way, in the same manner described in this section, provided that the state department of transportation has reviewed and approved the proposed landscaping plan. Maintenance of landscaping installed within the boulevard portion of the ~~public-state~~ right-of-way is the responsibility of adjacent property owners' unless a different responsibility is established by the encroachment permit.

SECTION 3

Section 38.420.080. – Park development of the Bozeman Municipal Code be amended as follows:

Sec. 38.420.080. Park development.

- A. *General.* Developers must consult any adopted citywide park plan, and with the parks department which implements the plan, ~~to~~ determine the types of parks needed for the proposed development and surrounding area. Parks must be developed in accordance with the citywide park plan and any approved park master plan. At a minimum, all parks must be improved to the following standards by the developer, prior to final plat or final occupancy approval as appropriate:
1. *Minimum required improvements to land dedications.* ~~The subdivider~~ developer must level any park area, amend the soil, seed disturbed areas to allow mowing with turf type mowers, and install an underground irrigation system in compliance with city standards and specifications, unless otherwise provided in an approved Park Master Plan.
 - a. Parks must ~~contain be seeded with~~ drought tolerant landscaping grass seed ~~unless approved otherwise provided in an approved park master plan. writing by the park superintendent.~~
 2. *Irrigation.* ~~The developer must irrigate the park area until 50 percent of the subdivision lots or condominium units are sold. Thereafter, the property owners' association must be responsible for park irrigation. The property owners' association may establish an improvement district to collect assessments to pay for irrigation. Parks must have an improvement district to collect assessments to pay for irrigation. Parks must have an~~ irrigation water supply that is legally and physically adequate to meet the irrigation water demands of the park landscape. The developer must ensure the city obtains legal ownership of any irrigation water rights used to irrigate parks.
 - a. Wells ~~may must~~ be used to irrigate parkland subject to Sec. 38.550.070 BMC.
 - b. Existing irrigation water rights appurtenant to parkland may be used for irrigation subject to city review and approval.

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- c. The city's municipal water supply may be used for irrigation of parkland, but only if wells and existing irrigation water rights are inadequate to meet the water demands of the parkland.
- B. *Boundaries.* The park boundary bordering all private lots must be delineated at the common private/public corner pins, with flat, flexible fiberglass posts, a minimum of six feet in length with no less than two feet driven into the ground. Each post must be labeled with a permanent glued on sign stating "Park Boundary" or "Property Boundary." Other forms of boundary marking may be approved by the planning or other appropriate department.
- C. *Sidewalks.* Sidewalks, when required within the development, must be installed by the developer at points where the park borders or crosses public or private streets.
- D. *Stormwater detention/retention ponds.* Stormwater retention or detention ponds may be located within public parkland, but such areas do not count towards the parkland dedication requirement. Any stormwater ponds located on parkland must be designed, constructed and/or added to so as to be conducive to the normal use and maintenance of the park. Stormwater ponds may not be located on private lots. Stormwater retention or detention ponds must be maintained by the property owners' association.
- E. *Clean up required.* All fencing material, construction debris and other trash must be removed from the park area.

SECTION 4

Repealer.

All provisions of the ordinances of the City of Bozeman in conflict with the provisions of this ordinance are, and the same are hereby, repealed and all other provisions of the ordinances of the City of Bozeman not in conflict with the provisions of this ordinance shall remain in full force and effect.

SECTION 5

Savings Provision.

This ordinance does not affect the rights and duties that matured, penalties that were incurred or proceedings that were begun before the effective date of this ordinance. All other provision of the Bozeman Municipal Code not amended by this Ordinance shall remain in full force and effect.

SECTION 6

Severability.

That should any sentence, paragraph, subdivision, clause, phrase or section of this ordinance be adjudged or held to be unconstitutional, illegal, or invalid, the same shall not affect the validity of this ordinance as a whole, or any part or provision thereof, other than the part so

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decided to be invalid, illegal or unconstitutional, and shall not affect the validity of the Bozeman Municipal Code as a whole.

SECTION 7

Codification.

The provisions of Section 2 and Section 3 shall be codified as appropriate in the Bozeman Municipal Code. All references within the Bozeman Municipal Code shall be revised to reflect the changes in this ordinance.

SECTION 8

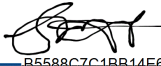
Effective Date.

This ordinance shall be in full force and effect on July 14, 2022.

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PROVISIONALLY ADOPTED by the City Commission of the City of Bozeman, Montana, on first reading at a regular session held on the 24th day of May, 2022.

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Cynthia L. Andrus
Mayor

ATTEST:

DocuSigned by:



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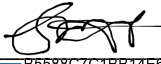
Mike Maas
City Clerk

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FINALLY PASSED, ADOPTED, AND APPROVED by the City Commission of the City of Bozeman, Montana on second reading at a regular session thereof held on the 147th day of June, 2022.

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Cynthia L. Andrus
Mayor

ATTEST:

DocuSigned by:



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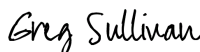
Mike Maas
City Clerk

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APPROVED AS TO FORM:

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Greg Sullivan
City Attorney

EXHIBIT A

Combined Appropriation Guidance



[Updated 03/23/22]

Overview:

The following document is intended to provide *general guidance* in applying the Montana First Judicial Court's recent Order on Petition for Judicial Review in *Clark Fork Coalition, et al. v. Tubbs et al.*, Cause No. BDV-2010-874 (issued October 17, 2014) (**CFC decision**). The CFC decision concluded that the Department's rule defining "combined appropriation" of "exempt" wells as "an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system," was inconsistent with applicable law and therefore invalid. Admin. Rule Mont. (ARM) 36.12.101(13). Neither the Department's underlying Declaratory Ruling nor the Court action challenged the validity of the permit exception provided for in § 85-2-306(3), MCA, for wells not to exceed 35 gallons per minute (GPM) and 10 acre-feet (AF) per year.

Important Point:

One can still seek a water right for one or more "exempt" wells pursuant to § 85-2-306(3), MCA, and other statutory provisions including a beneficial water use permit under § 85-2-311, MCA.

Moving Forward:

The CFC decision ordered that the DNRC's 1987 Rule defining a "combined appropriation" of two or more "exempt" wells be reinstated. This order took effect on October 21, 2014. This 1987 rule states:

An appropriation of water from the same source aquifer by means of two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. Groundwater developments need not be physically connected nor have a common distribution system to be considered a "combined appropriation." They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined appropriation."

HB 168:

HB 168 was passed during the 2015 Legislature in order to create an applicability date for the CFC decision. HB 168 stated that if a project, development, or subdivision existed before October 17, 2014 (the date of the Order) or an application for a project, development, or subdivision was submitted to DEQ or a local government with the required review fee by that date then 1993 rule definition of combined appropriation would apply so that only wells that are physically manifold together would be considered a combined appropriation that cannot exceed 10-acre feet per year. If a project, development, or subdivision was submitted after that date then 1987 rule definition of combined

EXHIBIT A

appropriation above would apply. The Department is using the DEQ definition of a subdivision under MCA 76-4-102 so that it is only considering lots that are less than 20 acres to be part of a subdivision either in existence prior to October 17, 2014 or created after that date.

"Subdivision" means a division of land or land so divided that creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and includes any resubdivision and any condominium or area, regardless of size, that provides permanent multiple space for recreational camping vehicles or mobile homes.

This definition includes parcels created by a family transfer or via a District Court order. These types of property subdivision will likely not come in front of DNRC until sanitary restrictions are being lifted from a parcel. Boundary line adjustments (BLA) are not considered a subdivision of property because they do not create any new parcel; review of BLAs will be based on when the parcels going through the BLA were originally created.

As a result of both the Order and the passage of HB 168, the Department in its judgement has determined the following four scenarios are combined appropriations of two or more wells from a same source aquifer that may not exceed 10 AF:

- 1) Any two or more exempt wells that are physically manifold together are considered a combined appropriation in all cases, regardless of ownership. Physically manifold includes any storage shared between multiple groundwater developments.
- 2) Any lots less than 20 acres in size in existence or part of a subdivision application submitted on or prior to October 17, 2014, are grandfathered in under HB 168 so only exempt wells that are physically manifold together are considered a combined appropriation.
- 3) For lots that are greater than or equal to 20 acres, either in existence prior to October 17, 2014 or created after that date, any wells within 1,320 feet of one another on a lot are considered to be a combined appropriation. *If there are any lots that are 20+ acres in the new arrangement, those lots will not be considered part of the subdivision, will not be reviewed by DNRC, and will not be required to share the 10 AF limit for the subdivision.*
- 4) Any subdivision of land as defined under 76-4-102 (see definition above) created after October 17, 2014, or for which a subdivision application was submitted to DEQ after that date, is considered a combined appropriation that must receive a pre-determination from DNRC determining that all exempt wells proposed for the subdivision will stay at/under a combined appropriation of 10 AF.

All subdivisions using exempt wells will be required to allocate the full 10 AF of volume across the subdivision for planning purposes (though lot owners will not be required to perfect the full volume allocated as part of the review). If there is unallocated water, DNRC will split the unallocated portion evenly amongst the lots. DNRC will outline volumes requested by the applicant for each purpose in the pre-determination letter. **All future Notices of Completion filed within the subdivision will be limited to the total volume per lot identified in the pre-determination notice.

Water use standards:

The Department typically uses the water use standards found in ARM 36.12.115 or on Department Form

EXHIBIT A

615 when quantifying water use standards related to exempt wells. The Department will accept variations from these standards on a case-by-case basis as well. For the Department to accept a variation from the standard, calculations must be provided which justify the variance from standards. The DEQ minimum domestic standard is 250 GPD/household, which equals 0.28 AF/household/year. The Department will not accept an applicant proposal for less than this amount unless they have requested and received prior approval from DEQ.

Reducing existing Groundwater Certificates:

The Department has a Request to Reduce a Groundwater Certificate form that may be used to reduce the flow rate, volume, place of use, period of use, and/or purposes of use for a Groundwater Certificate. Once processed, a new Certificate will be issued for the reduced amount. Once a new Certificate with the reduced elements is issued, the elements listed on the original Certificate may not be reinstated.

Any right to use of water under the original Certificate will be permanently relinquished and/or abandoned in an amount equal to the reduction.

Questions:

The Department encourages and welcomes anyone with questions about this guidance or the water right permitting process to contact their local Regional Water Resources Office so they can discuss your situation and answer questions. You can find your Regional Office at the following link:

<http://dnrc.mt.gov/divisions/water/water-rights/water-resources-regional-offices>

You may also contact our New Appropriations program staff—contact information can be found at:

<http://dnrc.mt.gov/divisions/water/water-rights/new-appropriations-program>