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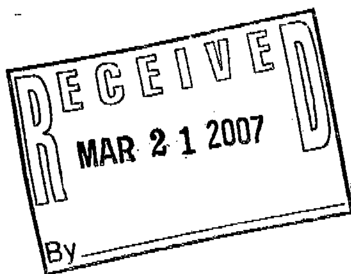

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

SWAN LAKERS, a Montana non-profit corporation and BRADLEY WIRTH, an individual, Plaintiffs and Petitioners, vs. THE BOARD OF COUNTY COMMISSIONERS OF LAKE COUNTY, a body politic and a political subdivision of the State of Montana, THE MILHOUS GROUP, a corporation, Respondents.	Cause No. DV -05-143 **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT: CONSTITUTIONAL ISSUES**

I. INTRODUCTION

This suit challenges the defendant Lake County's approval of defendant Milhous Group's subdivision. Background details are set forth in Plaintiff's Brief in Support of Summary Judgment previously filed with the Court. This motion addresses the Plaintiff Swan Lakers' contention that the Montana Subdivision and Platting Act (MSPA), §76-3-101, M.C.A. *et seq*. and Lake County's regulations, based thereon, violate the constitutional protections to a clean and healthful environment afforded to Montanans.

"The right to a clean and healthful environment is a fundamental right." *Montana Environmental Information Center v. Dept. of Environmental Quality*, 296 Mont. 207, 988 P.2d 1236, 1246 (1999); *Cape-France Enterprises v. Estate of Peed*, 2001 MT 139, ¶ 31, 305 Mont. 513, 519, 29 P.3d 1011. "Any statute or rule which implicates [this] right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling State interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *MEIC, supra*; *accord*; *Peed, supra*. Both individuals and the government have an affirmative duty to maintain and improve the environment.

The Subdivision and Platting Act is the only regulatory mechanism at the local level for determining whether or not a proposed subdivision harms the environment. The statutory review criteria allow governing bodies to approve subdivisions, even though they are not in the public interest and even in the face of overwhelming community opinion that the subdivision will significantly harm the community's environment. The Act also places the burden on the governing body to prove that the subdivision needs modifications to comply with environmental concerns-- rather than putting that burden on the developer. Finally, the Act chills the governing body's ability to make an unbiased decision based on the need to protect a clean and healthful

environment, by granting the developer a right to sue the local government, conceivably for millions of dollars in damages if the subdivision is disapproved.

There is no compelling state interest justifying these restrictions. A statutory act that allows a governing body to make decisions about the environment which are not in the public interest, and which requires governing bodies to worry about damage suits instead of the public interest, cannot protect the fundamental right to a clean and healthful environment, and abrogates the governing body's constitutional duty to "maintain and improve a clean and healthful environment." Art. IX, §1, MONT. CONST.

II. SCOPE OF THE RIGHT

The scope of this Constitutional right is defined in *MEIC, supra* and *Estate of Peed, supra*. It is derived from three portions of the Constitution, as well as the discussions of the delegates at the 1972 Constitutional Convention. *MEIC*, 988 P.2d at 1247-1250. It is identified as being "inalienable" by Art. II, § 3. It is designed to further the Constitution's preamble by protecting the environment and "improv[ing] the quality of life . . . for this and future generations."[1] Under Art. IX, §1, the "state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations" and the legislature "shall provide for the administration and enforcement of this duty, " including providing "adequate remedies for the protection of the environmental life support system."

These three portions of the Constitution must be consulted and "read together" with "consideration given to all of the provisions." *MEIC, supra* at 1249. Thus, the mere fact that the legislature is allowed to create statutes for administering and enforcing the right to a clean and

[1] "We the people of Montana grateful to God for the quiet beauty of our State, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this Constitution."

healthful environment does not give it authority to curtail the right without a showing of a "compelling state interest." The right remains "inalienable" and therefore, entitled to the protection of a strict scrutiny review. *See MEIC, supra*; *Estate of Peed, supra.*

Taking this Constitutional language and the discussions at the 1972 Constitutional Convention into consideration, the Montana Supreme Court concluded:

> We conclude that the delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our Constitution does not require that dead fish float on the surface of our State's rivers and streams before its farsighted environmental protections can be invoked. The delegates repeatedly emphasized that the rights provided for in subdivision (1) of Art. IX, §1 was linked to the legislature's obligation in subparagraph (3) to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources.

MEIC, supra. at 1249. Applying this language to the present situation, the plaintiff has both the right and duty to challenge the provisions of the Subdivision and Platting Act and the approval of the Milhous subdivision thereunder. Constitutional protection of the environment is "anticipatory and preventative." It can be "invoked" immediately before the subdivision is built, before the damage is done.

As set forth below, the Subdivision and Platting Act as applied by Lake County in the case at bar fails to protect the right to a clean and healthful environment as required by the Constitution.

III. THE CURRENT PROVISIONS OF THE SUBDIVISION and PLATTING ACT VIOLATE THE CONSTITUTION

Previously, the Subdivision and Platting Act provided considerable protection for the constitutional right to a clean and healthful environment, but that protection was abrogated, and the Act rendered unconstitutional by changes made to the Act during the 1990's. This is

explained below.

A. THE ORIGINAL ACT.

The Subdivision and Platting Act was enacted in 1973. Neither at that time nor at any time since has the Act or its legislative glosses as much as referred to the citizen's constitutional right to a clean and healthful environment. Nevertheless, for most of the first two decades of its existence, the Act contained provisions which provided considerable protection for this fundamental constitutional interest. Its purpose statement provided that "approval of subdivisions [must] be contingent upon a ***written finding of public interest*** by the governing body." § 76-3-102, M.C.A. (emphasis added). Its statutory review process mandated:

> "The ***basis*** for the governing body's decision to approve, conditionally approve, or disapprove a subdivision shall be whether the preliminary plat, environmental assessment, public hearing, planning board recommendations, and additional information demonstrate that the development of the subdivision would be in the ***public interest. The governing body shall disapprove any subdivision which it finds not to be in the public interest.***

Section 76-3-608, M.C.A. (emphasis added). To prove the "public interest" was being served, the governing body was required to address eight separate criteria in its written findings and conclusions:

(a) The basis of the need for the subdivision;

(b) ***Express public opinion***;

(c) Affect on agricultural;

(d) Affect on local services;

(e) Affect on taxation;

(f) Affect on natural environment;

(g) Affect on wildlife and wildlife habitat; and

(h) Affect on public health and safety."

Id. (emphasis added).[2]

Thus, the Act, by its plain terms, previously provided considerable protection to criteria in the public interest. If a decision had to be made in the "public interest," a governing body would be hard put not to give considerable weight to environmental concerns, which are a paramount "public interest" under the Constitution. It would be just as hard to ignore overwhelming "express public opinion" that the proposed subdivision would substantial harm the community's clean and healthful environment. Moreover, unlike later versions of the Act, the governing body was not given the conflicting burden of proving that the subdivision needed to be modified to prevent environmental degradation. Rather, that burden fell on the developer. Finally, the governing body was free to make a principled decision without fear that a disgruntled developer would be able to bring a lawsuit against local taxpayers for alleged damages including millions of dollars in anticipated profits.

If these provisions were still in effect today, it is doubtful that Plaintiffs would have been required to file this suit. Over 300 people submitted over 650 pages in opposition to this project. This number stands in glaring contrast to the 4 people and 4 pages submitted by proponents of the project (one of which was submitted by the developer himself). *See A.R.*, 524-1525. The basis for the opposition is the adverse environmental effects of a subdivision far out of character from the existing neighborhood. The Milhous subdivision could not have been justified as being in the "public interest" given the substantial evidence and community opposition that it will substantially harm the clean and healthful environment which currently

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[2]The "public interest" and "express public opinion" criteria were added to the MSPA in 1975. *R.C.M. Section 11-3866 (Supp. 1975).*

exists at the north end of Swan Lake. *See Discussion, infra.*

B. THE POST-1993 ACT.

In the 1990's, the legislature made drastic changes which not only eliminated the requirement that decisions be made in the "public interest," but also passed other amendments which tipped the scales in favor of subdivision development over constitutionally protected environmental concerns. These changes were not supported by any compelling state interest and therefore, are unconstitutional under strict scrutiny review.

In 1993, the requirement that subdivision approval was "contingent upon a written finding of public interest" was completely eliminated from the Act. In its place, the governing bodies were instructed they had to approve subdivisions that met the minimum requirements of the Act. (Compare, § 76-3-102, M.C.A. (1977) and § 76-3-608, M.C.A. (1977) with the same sections as amended in 1993). The requirement that the governing body had to consider the "express" community's opinion, which would include concerns related to a clean and healthful environment, was also eliminated. *See* § 76-3-608, *supra*. Thus, after 1993, governing bodies were free to ignore the "public interest" and "express public opinion" concerning environmental damage. They could give the developer's interest as much weight as they wanted and the environment as little as they wanted.

In 1995, additional provisions were added which favored development over constitutional environmental protection. Two years after it eliminated the "public interest" as the basis for making subdivision decisions, the legislature substituted "protect[ing] the rights of property owners" as a purpose of the Act. § 76-3-102, M.C.A. The legislature also added new provisions at § 76-3-608(4)-(5), M.C.A., which switched the burden of proving that the proposed development needed modification in the interest of the environment. Where before, the

developer had to prove the subdivision could be built without major environment degradation, the governing body was now charged with "justify[ing]" in writing that modifications were needed to "minimize potentially significant adverse impacts." *Id.*

In 1995, the MSPA was amended with a provision that created a conflict of interest for the decision-makers, and further reduced a county's ability to decline a subdivision based on environmental concerns. If the governing body was inclined to disapprove a subdivision due to environmental concerns, it would have to run the risk that a disgruntled developer would sue the taxpayers for damages. Section 76-3-625 (1), M.C.A. gave developers a statutory right to "sue the governing body to recover actual damages caused by a final action, decision or order of the governing body or a regulation adopted pursuant to this chapter that is arbitrary or capricious." This provision was designed to create a chilling effect on the ability of county governments. Therefore, were the governing body to couch its written findings by denying a subdivision because of environmental impacts, a developer could sue for damages on the ground the decision was arbitrary because it was not authorized by the Act (as shown later in this brief, this threat of a lawsuit was considered by Lake County in approving the Milhous subdivision in the face of overwhelming public opinion that the development will do grave harm to the surrounding environment).

IV. THE AMENDMENTS CANNOT BE JUSTIFIED BY A COMPELLING STATE INTEREST

This Court must begin with the premise that subdivision of land for commercial gain is a privilege, not a fundamental right in Montana. On the other hand, the right of all citizens to a clean and healthful environment is a fundamental right, and the County has a duty to protect that right. The Subdivision and Platting Act cannot provide full and consistent protection for the

fundamental constitutional right to a clean and healthful environment, if it does not even require decision-makers to make their decision in the "public interest;" allows them to ignore the community's "express" opinion on whether or not their environment will be significantly degraded and gives them unbridled discretion concerning how to weigh and balance the remaining statutory review criteria. The protection is further watered down by switching the burden of proof to the government to show the proposed subdivision will harm the environment. There is no compelling state interest that can justify these drastic reductions in the protection to a clean and healthful environment. Indeed neither the Act nor its legislative glosses discuss the citizen's right to a clean environment let alone consider a compelling basis for reducing its protection. As such, under the strict scrutiny standard, the 1993 and 1995 statutory changes that significantly abrogated protection for our constitutional right are void as they were applied to the Milhous subdivision.

Furthermore, there is no compelling state interest for the 1995 changes that grant developers a statutory right to sue government entities for damages. Statutory acts which chill the exercise of a fundamental constitutional right are void. *United States v. Jackson*, 390 U.S. 570, 581 (1968); *State v. Bush*, 195 Mont. 475, 478, 636 P.2d 849, 851 (1981); *City of Sumner v. Walsh*, 148 Wash.2d 490, 513, 61 P.3d 1111, 1122 (Wash. 2003). Here, governing bodies have a fundamental obligation under Art. IX, §1 to "protect and improve a clean and healthful environment in Montana for present and future generations." *See Estate of Peed, supra*. They cannot freely exercise that right in their decision making process if they are faced with a conflict between their constitutional duty and protecting the taxpayers' coffers from million dollar damage suits. Although a developer does have a right to court review, it cannot include a chilling damage suit for a good faith denial based upon the right to a clean and healthful

environment. The portion of §76-3-625(1) that grants developers the right to damages, therefore, must be declared void.

In addition, the truncated time frames required by Act infringe upon Plaintiffs' due process rights to gather information to provide to the decision-makers about how their rights are affected. The determination of the whether or not a particular statutory scheme comports with due process, "requires consideration of three distinct factors." *Dorwart v. Caraway*, 290 Mont. 196, 966 P.2d 1121, 1143 (1998). These are:

1. The nature of the interest involved;
2. The risk of an erroneous deprivation of such interest probable you of additional or supplemental procedures safeguards and
3. The government's interest.

Id. When these three factors are considered in the context of the Subdivision and Platting Act, it is clear that additional procedures and safeguards are necessary. As discussed above, the nature of the interest at stake is a fundamental right. But under §76–3–604 (2), M.C.A. the governing body has only 60 working days to review this information before it is <u>required</u> to make a decision. The affected community is given even less notice; Citizens have a right only to 15 days notice prior to the date of the hearing that will determine if a development will be approved which implicates the right to a clean and healthful environment. §76-3-605 (3), M.C.A. These limitations provide an inadequate opportunity for either the governing body or the affected community to analyze the developer's proposed subdivision and gather evidence which may well show the developer's evidence lacks weight and the development will significantly harm the surrounding clean and healthful environment. The governing body has the burden of "justifying" any changes to the proposed subdivision and if that evidence is not fully developed within 60