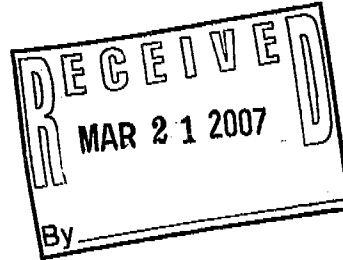


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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

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-06-105/consolidated with Cause No DV 05 143

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT- REVISED PRELIMINARY PLAT REMAINING CLAIMS

INTRODUCTION

This matter arises from the Lake County Board of County Commissioners' (Commissioners) April 10, 2006, decision to amend a preliminary plat that was previously approved in May 2005. This matter was consolidated with the original suit filed over the May, 2005 preliminary plat approval for the Kootenai Lodge project. Plaintiff Swan Lakers Inc., a Montana public benefit non-profit organization, and Bradley Wirth (hereafter Swan Lakers) previously moved for partial summary judgment on one claim in their Petition filed in May, 2006, that the approval of a revised or amended preliminary plat was unlawful and beyond the authority of the Commissioners. This brief addresses the remaining claims regarding the revised preliminary plat approval.

BACKGROUND AND STATEMENT OF FACTS

It is important for this Court to distinguish at the outset that there are two pending lawsuits over the same subdivision. On May 10, 2005, the Lake County Commissioners conditionally approved preliminary plat for the Historic Kootenai Lodge Subdivision (Kootenai Lodge or Subdivision) on Swan Lake. The Swan Lakers properly filed an appeal of the approval under M.C.A. § 76-3-625, alleging the approval violated the MSPA, the Montana Constitution, and Lake County Subdivision Regulations. *Swan Lakers, et al. v. The Board of Lake County Commissioners*, DV-05-143. While suit was pending, on April 4, 2006, the Commissioners approved an amended plat for the Kootenai Lodge Subdivision, with a new design and layout, and revisions to three of the conditions placed on approval in May 2005. The Swan Lakers again filed an appeal of the new approval under M.C.A. § 76-3-625. *Swan Lakers, et al. v. The Board of Lake County Commissioners*, DV-06 105. The Swan Lakers, with the consent of the other parties moved to consolidate the two cases.

Paul Milhous first approached Lake County with ideas to develop the Historic Kootenai Lodge property in January of 2005, before he or his business entity the Milhous Group became record owner of the property. The application was rejected by the Planning Department in February 2005 because it was missing "a number of items" that "must be submitted" before review could commence. *Exhibit A*, Letter from Sean Conrad, Planner Lake County Planning Department, to Dave DeGrandpre, Land Solutions, LLC, February 18, 2005, p. 1. These deficiencies included the lack of the signature of the record owner of the land and failure to

provide documentation for a proposed wastewater treatment facility. *Exhibit A*, p. 2-3.¹ Neither of these deficiencies were corrected by the time the Commissioners approved the preliminary plat in May 2005.

The application was deficient in many other respects. It lacked plans or specifications for a workable wastewater treatment plan, treatment layout, percolation tests, or an environmental assessment providing any analysis of treating sewage from the 57 homes proposed to ring a prized lake already threatened by failing water quality. Milhous' application presented a rough location for a wastewater treatment facility on a tract of land that was not owned by Milhous and which had covenants that prohibited its use for wastewater treatment. Issues pertaining to loss of wildlife habitat, and the impacts from an overly dense development on the surrounding neighborhood and on Swan Lake were also glossed over. At the time the preliminary plat was approved, all of the sewer information in the Environmental Assessment was for a lot in The Ridge subdivision where the proposed treatment facility was to be located. However, at that time The Ridge homeowners amended their covenants to prohibit Milhous' sewer facility.

Furthermore, Milhous did not own the property at the time the application was filed and still did not own it 4 months later when preliminary plat was approved. Both the Lake County Subdivision Regulations and the Montana Department of Environmental Quality regulations *require* the owner's signature before preliminary plat can be approved. Yet the County approved the regulations despite the lack of a signature.

Without a signature, complete Environmental Assessment, or even the barest information on proposed wastewater treatment, the Lake County Commissioners approved the application for 57 units on the 40.9 acre parcel. The inadequacy of the original application and accompanying Environmental Assessment are at issue in the first lawsuit. The original subdivision application was so deficient that it was nothing more than a placeholder, designed to circumvent the impending density regulations discussed below.

To avoid repetition, Swan Lakers incorporate the facts from the brief filed in support of summary judgment on statutory claims in the first lawsuit. The factual predicate regarding the

¹References here are to the Exhibits filed with Swan Lakers first motion for partial summary judgment, which is still pending before the Court.

process used to approve the subdivision, as well as the impacts to the project discussed by the public and other government agencies, applies to this suit as well. The process is all part of the same subdivision of land.

One month after preliminary plat for Kootenai Lodge was approved, Lake County adopted a Density Map and accompanying regulations. The Density Map was a matter of significant public controversy for a long time prior to its adoption on June 21, 2005. The Map and Regulations became effective on October 1, 2005. The regulations are aimed at controlling the density of development in various parts of Lake County:

“The Density Map and Regulations are only intended to influence the density of new parcels created under Lake County’s jurisdiction and are not intended to prescribe land use.”

Exhibit I, Density Map and Regulations I. The “creation of parcels” includes those created as part of the subdivision process. *Density Map and Regulations V.* But they apply only to new subdivisions - i.e those created **after** the approval of the Density Map:

These regulations and the attached map apply to the creation of parcels of land that did not exist at the time of the adoption of the Lake County Density Map and Regulations that fall under the jurisdiction of Lake County, Montana. These rules in no way prohibit the use of existing parcels of land, whether conforming or not conforming to the terms contained herein.

Density Map and Regulations III. The Density Map applies to proposed subdivisions after October 1, 2005. “All parcel creation in Lake County’s jurisdictional area must comply with the development densities and regulations established in this document, on the attached Lake County Density Map, [...and] other regulations. Where the Density Map shows an area of Lake County with a prescribed density, **parcels may not be created with an average density greater than the number shown except as provided herein.**” *Density Map and Regulations VI.* (Emphasis added).

The Kootenai Lodge Subdivision is subject to the Density Map. The Map provides for density of 1 dwelling per 1.5 acres in that part of Lake County. Under the Density Map, Milhous is permitted approximately 27 new residences. Thus the application of the Density Map is of critical importance to Milhous because both his original preliminary plat (57 dwellings) and the amended plat (42 dwellings) exceed densities permitted by the Density Map. If Milhous’ proposal for an amended preliminary plat was processed under the Density Map, only twenty-

seven lots would be allowed to meet the new requirement of 1 dwelling per 1.5 acres. Rather than submit a new application, Milhous and the County developed a new process that resulted in an "amended" or "revised" preliminary plat, and therefore not subject to the Density Map.

In June, 2005, one month after preliminary plat approval, at the request of the Planning Department, Milhous submitted a Pre-Application Questionnaire - the document that the County uses to initiate review of a new subdivision. *Exhibit C*. For the next year, Milhous and his representatives maintained an active dialogue with the Planning Department to work out the deficiencies on several components of their new plans for sewage disposal. Thereafter, the developers approached Lake County with three different iterations of a wastewater treatment facility, all of which were later withdrawn due to legal or practical impossibilities.

In January 2006, Milhous approached the Planning Department with a new preliminary plat, showing new lot design and layout, wastewater treatment facility, road placement, and a request to change the conditions originally placed at preliminary plat approval. *Exhibit D*. The application presented a new sewage plan located off-site at the corner of Broken Leg and Halverson Road. Because density and layout changed with the amended application, the new application revised the design of Johnson Creek Trail, Trout Trail and Cooper Lane, and a portion of the southern section of River Run Loop. The new proposal divided the tract into 42, rather than 57 lots. *Exhibit E*, Letter from Susan Shannon, Lake County Planning Department, to Nick Fucci, Billmeyer Engineering, January 20, 2006, p. 2.

The Planning Department responded with suggestions and a request for more information, including missing elements on the new "proposed" preliminary plat and other application components. Among other requests, the Planning Department asked for a revised preliminary plat map, a revised EA, and information detailing: "the route the sewer line would take to the property in relation to the edge of pavement and road right-of-way; which sides of Sunburst Drive and Kelley Drive will the line be located and the length of each if the sides vary; a letter addressing the impacts of the sewer line including any stormwater drainage or private approach issues and/or requirements from the Lake County Road Supervisor; comment from MDOT regarding design criteria requirements to cross the highway and the proposed use of their right-of-way; size and location of all proposed sewer and water lines within the subdivision and in relation to the right-of-way for the public roads and the edge of pavement; state's non-

degradation requirement for surface waters; necessary information to address any concern relating to whether the sewer treatment system proposed will impact neighboring wells.” *Exhibit E*, p. 3-4. The point of reciting these facts is to explain why the application for the revised preliminary plat was really a new subdivision, and should have been processed under the density map.

The Planning Staff issued a staff report (just as it does for every subdivision proposal) for the new “proposal” on February 24; the report is devoid of reference to any statutory or regulatory authority to alter the preliminary plat after approval. *Exhibit G*, Planning Department’s Report, p. 1. Indeed there is none. After a hearing, the Lake County Planning Board recommended that Lake County deny two of the three proposed amendments. While they approved the road design and layout, they did not approve the new density because it was still too dense for the rural neighborhood and surrounding area, nor did they recommend approval of the sewage treatment facility for lack of information.

On April 4, 2006, Milhous’ “revised” preliminary plat application came before the Commissioners. It was addressed by the County in the same fashion as any new subdivision proposal: the developer made a presentation, a public hearing followed during which proponents and opponents were allowed to speak, and the Commissioners deliberated the matter. During the hearing the issues raised before this Court were presented to the Commissioners. After deliberations, the Commissioners voted to approve the amended application for the Kootenai Lodge Subdivision by a vote of 2-1.

The Commissioners then issued a written decision granting Milhous an “amended” preliminary plat, subject to a revised set of conditions. *Exhibit H*. The new preliminary plat contains a revised subdivision of the parcel into 42, instead of 57, lots. It also contains a new road configuration and a new wastewater treatment system. The amended preliminary plat was not subject to the 1.5 dwelling per acre limitation on the Density Map; had it been subject to those restrictions, only 27 dwellings would be permitted.

As with any new decision for a preliminary plat, the Commissioners informed the public that the decision was subject to appeal under M.C.A. § 76-3-625. *Exhibit H*. The Swan Lakers timely filed an appeal. Swan Lakers previously moved for partial summary judgment on Count I of their appeal, addressing the issue of whether the County’s approval of the amended or revised

preliminary plat was unlawful because the Commissioners lacked any statutory basis for their actions. Swan Lakers have now also moved for summary judgment on their constitutional and statutory claims in their challenge to the May, 2005 original preliminary plat. With this brief they address the remaining issues in their second petition.

STANDARD OF REVIEW

Count II-V are appropriate for resolution on summary judgment. The facts all come from the government's own documents. None of the material facts are in dispute. The issue presented is purely legal: whether the MSPA permits the Commissioners to review, process and ultimately approve a "revised" preliminary plat that is substantially different from the original preliminary plat, and whether approval, if lawful, was violative of the MSPA, the constitution, or was otherwise arbitrary and capricious.

A decision to approve, conditionally approve or deny preliminary plat is reviewed under the "arbitrary, capricious or unlawful" standard. *Madison River RV v. Town of Ennis*, 298 Mont 91 ¶ 30, 2000 MT 15, 994 P.2d 108, *quoting with approval, North Fork Preservation Ass'n v. Department of State Lands* (1989), 238 Mont. 451, 458-59, 778 P.2d 862, 867 ("the standard of review to be applied by the trial court and this Court is whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully"). Under this standard, the analysis begins with the understanding that the County's authority is "both empowered and constrained by a set of statutes and regulations relevant to its actions challenged in this case." *North Fork, supra*, 238 Mont at 459. The reviewing court analyzes the challenged actions under the pertinent statutes and regulations to see if the government carried out its actions in accordance with the mandates of those statutes and regulations.

ARGUMENT

A. Swan Lakers Incorporate the Arguments Raised in their Brief in Support of Summary Judgment on Constitutional Issues.

In Count V herein Swan Lakers raise a challenge to the subdivision's approval as violative of Swan Lakers' fundamental right to a clean and healthful environment. That claim is similar to constitutional claims raised in the first petition, which are also incorporated into the challenge to the revised preliminary plat. To avoid duplicitous briefing, Swan Lakers adopt and incorporate all arguments made in the Brief in Support of Summary Judgment on Constitutional

Issues into this brief as well.

B. The Commissioners Based their Approval on Incomplete Information and Failed to Properly Weigh the Primary Review Criteria.

Again, to avoid duplicitous briefing, Swan Lakers incorporate all of their arguments in Sections E, F, and G of their Brief in Support of Summary Judgment on Statutory Issues for their original petition into this brief. The same issues were raised in this Petition and the same facts and arguments apply.

In addition, a new issue arose during the spring, 2006. At hearings for the revised preliminary plat, testimony was provided about the Kootenai Lodge property flooding. Swan Laker Denny Kellogg introduced photographs of Johnson Creek flooding that spring, that flood plains had not been properly delineated, and there was additional evidence that the Swan River flooded on to the property in 1997. The Commissioners' failure to require that this information be addressed in the Environmental Assessment before approving the project is another example of the Commissioners' failure to consider the relevant factors, rendering plat approval arbitrary.

C. The Creation of New Zoning District is an Illegal Spot Zone.

As part of the revised preliminary plat, the Commissioners approved the creation of a zoning district. However the district has yet to take effect, and hence is not yet subject to challenge under zoning laws. Swan Lakers protested the zone as a spot zone, and urged the Commissioners to deny it. The incorporation of a spot zone into the revised preliminary plat is unlawful.

The Montana Supreme Court has defined the following three part test to review a claim of spot zoning:

Generally, however, three factors enter into determining whether spot zoning exists in any given instance. First, in spot zoning, the requested use is significantly different from the prevailing use in the area. Second, the area in which the requested use is to apply is rather small. This test, however, is concerned more with the number of separate landowners benefited by the requested change than it is with the actual size of the area benefited. Third, the requested change is more in the nature of special legislation. In other words, it is designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public.

Little v. Board of County Commissioners of Flathead County, 193 Mont. 334, 346, 631 P.2d 1282, 1289, citing Williams, 1 American Land Planning Law, at 563; Hagman, Urban Planning and Land Development Control Law (1971), at 169; Rhyne, The Law of Local Government

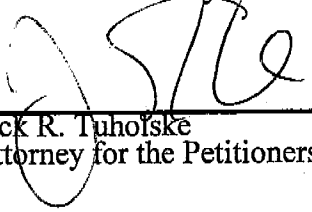
Operations (1980), at 760-761.

The three-part test in *Little* is met by the zoning district that was created just for Milhous as a result of the 2006 revised preliminary plat. As detailed in Swan Lakers' brief on statutory issues, the density of 42 residences is much greater than surrounding areas, and much greater than the 27 homes permitted under the Density Map. The zoning district, when it takes effect, is for the benefit of one landowner. It is accomplished for the benefit of only one landowner, not the surrounding neighborhood. All of these facts are evident from the approval of the district, which encompasses Milhous' 40 acre property and none other.

CONCLUSION

Based on the foregoing, Swan Lakers and Bradley Wirth respectfully request that they be granted partial summary judgment on Count II-V in this matter.

Dated this 19th day of March, 2007.



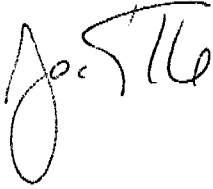
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent via First Class US Mail on this 4 day of March 2007 to:

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A handwritten signature in black ink, appearing to read "Scott D. Hagel". The signature is written in a cursive style with a large initial "S" and "H".