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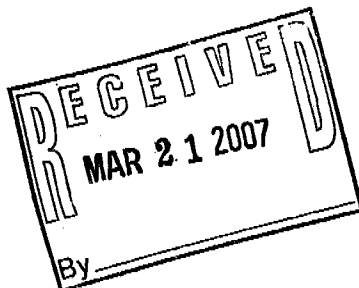
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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

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- STATUTORY CLAIMS

INTRODUCTION

This matter arises out of the Lake County Commissioners' (Commissioners) approval of the Kootenai Lodge Subdivision proposed by Milhous and Associates (Milhous) of Boca Raton, Florida. The development originally proposed 59 units on a 41- acre tract adjacent to Swan Lake and the Swan River, as it leaves the lake. The development poses serious environmental and public safety risks, which were not addressed during the planning process.

In Montana, subdivision of property is a privilege, not a right. That privilege is conferred by the governing body, if a developer meets the procedural requirements of the Montana Subdivision and Platting Act (MSPA) and local subdivision regulations, and if the governing body decides that the impacts of the development are acceptable in view of its constitutional obligations to protect the environment. As detailed below, the Commissioners May 10, 2005, approval of preliminary plat for Kootenai Lodge failed to comply with the MSPA and Lake County Subdivision Regulations (LCRS) and other aspects of Montana law. In addition to this brief, Swan Lakers file separate briefs on (1) the constitutional issues that pertain to both the original and revised plats, and (2) remaining issues pertaining to the revised preliminary plat issued in April, 2006.

BACKGROUND ON THE PROPOSED DEVELOPMENT

Petitioner Swan Lakers, Inc. has over 245 registered members. The organization was formed in part because of intense local opposition the Kootenai Lodge project, and the organization's membership has opposed the development as it has been presented since the outset. This Court previously ruled that Swan Lakers had standing to pursue this matter. The Milhous Group is a land development corporation based in Boca Raton, Florida. Neither Paul

Milhous nor the Milhous Group were record owners of the property proposed to be subdivided. Owners Mark and Debi Rolwing entered into a buy-sell with Paul Milhous and the Milhous Group, which had not been finalized at the time preliminary plat was approved.

The Historic Kootenai Lodge lies adjacent to Swan Lake/Swan River. The area is renowned for its scenic beauty, critical wildlife habitat and outstanding recreational opportunities. Four species listed under the federal Endangered Species Act, 16 U.S.C § 1531 *et seq.*, grizzly bear, bald eagle, bull trout and lynx, inhabit the general area. The property is one of only three sites registered on the National Register of Historic Places in Lake County. Kirkland Cutter, architect of Lake McDonald Lodge in Glacier National Park, designed the Kootenai Lodge as a retreat for businessmen and their families.

The proposed subdivision calls for demolishing several significant elements of the site, and adding fifty-three, new free-standing structures. The Milhous Group recognizes the historic value of the Kootenai Lodge, but asserts that the only way to fund its restoration is to substantially develop the remainder of the property. Milhous proposes twenty-four boat slips along the lower reaches of the Swan River. Currently, only one boat slip is in active use on the property. Boat traffic would be exponentially increase in the narrow, shallow outlet of Swan Lake. Over 50 jet skis could be housed at the boat slip. Petitioners allege that the addition of this much boat traffic will have significant effect on Swan Lake, poses a safety risk to users of the Lake, and will cause unacceptable increases in noise pollution.

The subdivision review process was flawed from the outset. The subdivision application was not submitted by the owner of the property. The application was signed by David

DeGrandpre allegedly on behalf of Milhous. AR 20.¹ The application form states that “the statement must be signed by the owner of the land proposed for subdivision . . .” *Id.* The application did not contain detailed information on wildlife or public safety impacts. *See AR 38-41.* On February 18, 2005, Lake County’s Planning Department disapproved the application on a variety of grounds, including the requirement that the record owners sign the Joint Application. AR 223. The letter of February 18 also required “in order to proceed the covenants [in the Ridge Subdivision] will need to be amended to allow for the proposed treatment facility on lot 4 and included as part of the scope of the project.” *Id.*, Ltr. ¶ 9 (February 18, 2005). However, on February 23, 2005, after a private meeting with Dave DeGrandpre, former head of the Lake County Planning Department, and now the chief agent for the Milhous Group, the County reversed its position and began to review the application. AR 213-217. The basis upon which the County determined the application was complete is not clear in the County’s letter, and the County insisted that Milhous provide additional information though the application was considered “complete.” AR 216 (“We urge you to submit the information requested in this letter to allow a comprehensive review and evaluation of your condominium subdivision application.”).

On April 14, 2005, a divided Planning Board recommended conditional approval for the creation of 57 condominium units to be developed with 49 single-family structures and 4 multi-family structures. Over 90 percent of the public testimony was in opposition to the project. The Commissioners held a four-hour public hearing on April 18, 2005, with the same level of public

¹Swan Lakers cite to the Commissioners’ bate-stamped record, and presume the Court has a copy. However to facilitate the Court’s review, Swan Lakers will file an appendix with their final brief of all documents cited in their briefs.

opposition. The transcript of that hearing reveals a striking depth of opposition to the project. *AR* 749-817 (Transcript of public hearing). Dozens testified against the project and practically no one, except Milhous, supported it. The written record contains *over six hundred and fifty pages* of written comments, expressing near unanimous opposition to the project as it had been proposed by Milhous. Only four letters were received in support of the project, including one from Milhous. Those opposing the project understood that Milhous would eventually develop the property. However, the condominium-style project is out of character with the rural flavor of the lower Swan Lake valley and would pose serious adverse environmental impacts. Public opposition by locals focused on three concerns relevant to this petition:

1. The density of the development was inconsistent with the surrounding area and Lake County's Growth Policy;
2. The development posed safety threats for recreationists and residents because of the increased boating and vehicular traffic;
3. The development created unacceptable environmental impacts, including water quality degradation, flood plain encroachment and loss of wildlife habitat.

The Administrative Record is replete with the comments of concerned citizens, government agencies, and industry experts urging the Lake County Commissioners to halt the development of the "Historic Kootenai Lodge Condominium Development Project." The juxtaposition between the chorus of voices opposing this development and the whispers in favor is staggering. Over 300 people submitted over 650 pages of written testimony in opposition to this project. This number stands in glaring contrast to the four people and four pages submitted by proponents of the project (one of which was submitted by the developer himself). *AR*, 524-

1525.

Some of the most compelling scientific data concerning potential adverse affects came from the State and National government agencies charged to act as stewards of the lands and waters directly affected by this development. A representative of U.S. Fish and Wildlife noted:

The Swan River watershed provides important habitat for several fish and wildlife species that are currently listed as threatened under the Endangered Species Act, including the bull trout, grizzly bear, Canada lynx, and bald eagle. The condominium project proposed by the Milhous Group has the potential to impact these species as well as other unless measures are taken to minimize the project impacts.”

AR 524, Ltr. from Mark Wilson, Field Supervisor: U.S. Fish and Wildlife Service, to David DeGrandpre, Land Solutions, LLC (April 4, 2005). Mr. Wilson also noted that it “is crucial that protection measures be taken to reduce impacts to riparian habitat along the Swan River and Swan Lake to prevent the degradation of water quality.” *Id.* Montana Fish Wildlife and Parks submitted two letters expressing concerns for the critical terrestrial and aquatic animal habitats affected by the construction. Area Wildlife Biologist, Thomas Litchfield noted:

“The development would occur in an ungulate winter range area (not to the exclusion of a lower density yearlong ungulate residents) on the northeast portion of Swan Lake. It also lies in prime lion and bear habitat.”

AR 550, Ltr. from Thomas R. Litchfield, Area Wildlife Biologist: Montana Fish Wildlife and Parks, to Dave DeGrandpre, Land Solutions, LLC (Feb. 24, 2005). In a second letter from Fish Wildlife and Parks, Fisheries Biologist Scott Rumsey notes that “[t]he Department of Environmental Quality (DEQ) identified Swan Lake as a threatened waterbody on the 303(d) list in 2002 and this designation still exists.” *AR 552*, Ltr. from Scott Rumsey, Regional Fisheries Biologist: Montana Fish, Wildlife and Parks, to Dave DeGrandpre, Land Solutions, LLC (Feb.

24, 2005). Mr. Rumsey also notes pollutant sources from private development include “road, riparian disturbances, stream encroachment, septic systems, and livestock.” *Id.* In a description of Johnson Creek, which flows through the middle of the proposed development site, Mr. Rumsey calls the water “unique” and a “significant tributary.” This water is a habitat for rainbow trout, brook trout, mountain whitefish, and westslope cutthroat trout, and the ESA listed bull trout. *Id.*

This subdivision also has the potential to adversely impact tribal cultural and historic interests. In their comments, the Confederated Salish and Kootenai Tribes of the Flathead Nation stated they were “deeply concerned about this development and its potential for both direct and indirect impacts to the cultural and natural environments of Swan Lake and surrounding areas.” *AR 528, Mem. from Tony Incashola, Confederated Salish and Kootenai Tribes, to Janet Camel, et al., March 21, 2005.* Mr. Incashola notes, [t]he site of this development lies directly along one of the major trails used by Pend d’Oreille and other native peoples from time immemorial.” *Id.* The tribe views this major development as “a profound threat to the protection and maintenance of the cultural environment.” *Id.*

Citizens and groups concerned with the Preservation of Historic places also spoke out against the project and the resulting impacts to the Kootenai Lodge. The Director of the Mountain/ Plains Office of the National Trust for Historic Preservation notes that Kootenai Lodge is “one of only two National Register listed sites in Lake County” and is “one of the most significant historic places in Northwest Montana.” *AR 531, Ltr. from Barbara Pahl, Director: Mountain/ Plains Office of the National Trust for Historic Preservation (March 9, 2005).* Mrs. Pahl adds that the density of the plan will “significantly diminish the historic and architectural

character of the historic lodge, cabins, and landscape.” *Id.* Additionally, public utilities, designed to service the predominantly rural Swan Valley, are not equipped to accommodate such a large development. A representative of the Lake County Solid Waste District expresses that the proposed subdivision would adversely affect the Waste District by “increasing the pressure on the already limited resource of the Ferndale container site.” *AR 574*, Ltr. from Mark E. Nelson, Program Manager: Lake County Solid Waste District, to Dave DeGrandpre (Feb. 8, 2005).

Significant concerns regarding safety issues from the increased traffic on highway 83, and increased boat traffic in the shallow, narrow outlet of Swan Lake were repeatedly noted by residents as well. The 24 new boat slips could house nearly 50 jet skis, with impacts on the lake’s water quality, shoreline, wildlife, not to mention the tranquility of the area valued by many. As discussed below, these impacts remain unmitigated, and mostly unaddressed by the Commissioners.

After another public hearing, in which dozens of persons again spoke against the development, on May 3, 2005, the Board granted preliminary plat approval to the Kootenai Lodge subdivision, subject to minimal mitigation requirements, mostly agreed to in advance by the developer, as conditions of final plat approval. Citizens repeatedly pressed the Commissioners for answers to questions about the development that remain unanswered to this day.

ARGUMENT

A. Standard of Review

The standard of review for the claims addressed in this brief is governed by *Madison River RV, Ltd. v. Town of Ennis*, 298 Mont. 91, 994 P.2d 1098 (2000). Actions under § 76-3-625

M.C.A. are governed by a two-part standard to determine whether the decision was “arbitrary, capricious or unlawful.” *Id.*, 298 Mont. at 96, 994 P.2d at 1102, citing *North Fork Preservation Ass’n v. Department of State Lands*, 238 Mont. 451, 778 P.2d 862 (1989). This court must first determine whether the governing body acted “lawfully.” A decision by a governmental body is unlawful if it does not conform to the proper rules and regulations governing the activity. *Id.*, 778 P.2d at 867, cited in *Ravalli County Fish and Game Ass’n, Inc. v. Mont. Dept. of State Lands* 273 Mont. 371, 903 P.2d 1362 (1995) (“To evaluate the lawfulness of the DSL’s actions, we look to the laws and regulations governing the [agency’s] review process.”). Second, even if the decision followed all relevant regulations, the court can set aside the merits of the decision if it was “arbitrary and capricious.” Here the court examines whether the governing body considered all the relevant factors, and articulated a rational decision between the facts found and the decision made. *Id.* As the Montana Supreme Court stated, in the factual inquiry concerning whether an agency decision was “arbitrary or capricious,” the reviewing court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *North Fork, supra*, 238 Mont. at 465.

The Montana Subdivision and Platting Act was enacted to promote the “public health, safety, and general welfare by regulating the subdivision of land.” M.C.A. § 76-3-102(1). Legislation passed for the general welfare is to be liberally construed to protect the public. See *State ex. rel. Florence Carlton School Dist. v. Board of County Commissioners of Ravalli County* (1978), 180 Mont. 285, 291, 590 P.2d 602, 605, citing *Hall v. Union Light, Heat & Power* (E.D.Ky.1944), 53 F.Supp. 817, 818-19. (“No rule of statutory construction is more readily applied by the courts than that public statutes dealing with the welfare of the whole people are to

have a liberal construction.”). Legislation such as the Montana Subdivision Act, “enacted for the promotion of public health, safety, and general welfare, is entitled to ‘liberal construction with a view towards the accomplishment of its highly beneficent objectives.’” *Id. citing* 3 Sutherland, Statutory Construction, § 71.01 (4th Ed., 1974). The standard of review under the MSPA must be applied in light of the profound public purposes effectuated by the statute.

B. Relevant Components of the MSPA.

In Montana, subdivision is a privilege, not a right. That privilege is conferred by the governing body, if the developer meets the procedural requirements of the MSPA and local subdivision regulations, and if the governing body decides that the impacts of the development are acceptable. One of the procedural requirements is the preparation of an Environmental Assessment. The Subdivision Act contains clear standards for an EA which include:

(1) for a major subdivision:

- (a) a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available ground water information, and a description of the topography, vegetation, and wildlife use within the area of the proposed subdivision;
- (b) a summary of the probable impacts of the proposed subdivision based on the criteria described in 76-3-608; and
- (c) a community impact report containing a statement of anticipated needs of the proposed subdivision for local services, including education and busing; roads and maintenance; water, sewage, and solid waste facilities; and fire and police protection.

M.C.A. § 76-3-603 (1) (a). The preparation of an EA with all of the required components is mandatory. Judge Curtis recently explained that “the laws and regulations pertaining to EAs require strict adherence. *Neighbors Over the Aquifer v. Board of County Commissioners of Flathead County*, Montana Eleventh Judicial District, DV -05-179 B, Order dated July 28, 2006 (hereafter cited as *NOTA*).