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March 1, 2010 Hearing on Proposed Settlement Agreement

Good morning, my name is Sarah McMillan and I am a staff attorney in Missoula for Western Environmental Law center, here today representing Citizens for a Better Flathead as well as the interests of the public in preserving the statutorily mandated review process for subdivisions, and not evading it through settlement agreements.

I know there are many concerned citizens here today, and you will receive much comment on this settlement agreement with its proposed approval of a new subdivision, so I will tailor my comments to three specific areas: (1) Public policy issues raised where subdivisions are approved by litigation; (2) the absence of any inherent, vested right to subdivide property, and (3) the fact that the County has a duty to evaluate all proposed subdivisions to determine if they are appropriate in light of the impacts to the primary review criteria in 76-3-608.

PUBLIC POLICY-

The Commissioners' actions here, allowing public comment on a settlement agreement that the parties have already been signed, and, with what appears to be every intention of approving a subdivision "reduced what should have been a genuine interchange into a mere formality," as the Supreme Court has warned must not occur. *Bryan v. Yellowstone County Elementary School Dist.*, 2002 MT 264, ¶46, 312 Mont. 257, ¶ 46, 60 P.3d 381, ¶ 46.

Article II, section 8, provides:

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

The Bill of Rights Committee explained the importance of this right:



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The provision is in part a Constitutional sermon designed to serve notice to agencies of government that the citizens of the state will expect to participate in agency decisions prior to the time the agency makes up its mind. In part, it is also a commitment at the level of fundamental law to seek structures, rules and procedures that maximize the access of citizens to the decision-making institutions of state government. The committee believes that this is eminently proper and that it will have a salutary effect not only on the quality of the final decisions, but more important, on the deliberative and political capabilities of the citizenry. *Montana Constitutional Convention Transcript Vol. II at 630-1.*

Allowing public comment on a settlement agreement that the parties have already signed and signed and agreed to “essentially relegate(s) the right of participation to paper tiger status” *Bryan v. Yellowstone County Elementary School Dist.*, 2002 MT 264, ¶44.

There are two different exhibits - A and D- and they are substantially different- that are presented as proposed prelim plats. Section 2(a) of the settlement agreement and 12(a) of the consent decree note that the preliminary plat will be further modified. We do not know which plat - Exhibit A or D- the County has decided to approve, and do not know how it is going to be further modified, and therefore cannot provide meaningful comment to assist the Board’s decision-making. Courts and commenters alike have recognized that “to participate effectively and knowledgeably in the political process of a democracy . . . one must be fully apprised of what government is doing, has done, and is proposing to do.” *Id.*, at ¶31 (citing Larry M. and Deborah E. Elison, *Comments on Government Censorship and Secrecy*, 55 Mont. L. Rev. 175, 177 (1994).). Here, where the proposed subdivision is unclear, it is essentially impossible to participate effectively and meaningfully.

NO VESTED RIGHT TO SUBDIVIDE

It is essential to look at development proposals in the proper context - which is that subdivision development is a privilege. Contrary to the developers repeated assertions, there is no vested right to subdivide, indeed, the legislature has very clearly given the county the authority, in the subdivision and zoning statutes, to decide what kind of development will and will not be allowed and where it will be allowed. If that were so, the process would be complete upon the planning staff’s determination of sufficiency. Instead, the County has an obligation to review an application in light of the primary review criteria- 76-3-608(3) provides, “A subdivision proposal must undergo review for the following primary criteria.”



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While a complete and sufficient application that complies with the application requirements is a pre-requisite for the County's review, contrary to the allegations made in the developers' complaint, it does not guarantee a developer that the application will be approved.

AUTHORITY TO DENY SUBDIVISION:

As noted 76-3-608(3)(a), Mont. Code Ann. provides that "a subdivision proposal must undergo review" for impacts to, among other things, public health and safety, wildlife, the natural environment and wildlife habitat. Recently the Supreme Court affirmed a district court's decision affirming Missoula County's denial of a subdivision due to its impacts to wildlife and wildlife habitat. This decision clarifies that a County has the authority to deny a subdivision proposal based on wildlife and wildlife habitat concerns alone. Please review the John Richards opinion from Missoula District Court, recently affirmed by Supreme Court, both of which are submitted herewith. In the Richards case, the judge determined that where wildlife issues had been raised in the record by concerned citizens and agencies, including FISH, WILDLIFE, AND PARKS and Rural Initiatives, even if the developer's experts presented differing opinions, the County's denial of the development will be affirmed. The Board possesses the discretion to weigh conflicting evidence and reach a decision.

Christianson v. Gasvoda, 242 Mont. 212, 214-15, 789 P.2d 1234, 1235-36 (1990). Where substantial credible evidence outlined in the Board's findings of fact and conclusions of law, and included in the public record, supports the Board's decision to deny a subdivision application, a court cannot substitute its judgment for the Board's. *Richards v. Missoula County*, 2009 MT 453, ¶ 25; *North Fork Preservation*, 238 Mont. at 457, 778 P.2d at 866.

In this North Shore Subdivision, not only the FISH, WILDLIFE, AND PARKS, but also the US Fish and Wildlife Services, and even the developer's own experts agreed that there would be significant impacts on wildlife and wildlife habitat- see findings of fact #s 32, 57, 58. This criteria alone provides adequate basis for the county's denial of the proposal. But wildlife was not the only reason for denying the proposal here- there was additional concern that building on lands where the water table is as high as 2 feet is unsafe (finding of fact #43), that there is a potential for liquefaction in the event of seismic activity (finding of fact # 45). Finally, the County reasonably determined there were unacceptable impacts to public health and safety due to the fact that there is a flood easement covering the property that would allow PPL to flood this entire property (finding of fact #54).



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CONCLUSION

In conclusion, while I do not know what happened behind closed doors in negotiating this settlement, I have reviewed the record, both administrative and judicial, and find it astonishing that the county is settling this litigation without any substantive briefing. Only 8 months ago, in the only order from the Court presiding over this matter, that Court issued an order including the statement “even a casual review of the Commissioners’ Finding of Fact...establish that a significant basis for denying the development request was, *inter alia*, information regarding the unmitigated impact of the proposal on wildlife and wildlife habitat, the fact that the development as proposed bordered and impacted waterfowl protection area, the evidence of natural hazards and steep slopes, high water table, ability of soil types in the proposed area of development to provide ‘foundation bearing capacity’ ... the fact that PPL Montana owns a flood easement that includes lands within the proposed North Shore Ranch Subdivision...” How that court’s conclusion did not prompt briefing and a request for summary judgment in the county’s favor, but instead led to this settlement agreement which approves a new subdivision, makes a multi-million dollar payout to the developer, and waives the county’s right and duty to zone any of the area until after ALL lots are sold, is an unsettling mystery.

Thank you for your time, and I am sorry I could not attend in person on short notice.
Sarah McMillan