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MONTANA EIGHTH JUDICIAL DISTRICT, CASCADE COUNTY

MONTANANS FOR RESPONSIBLE
LAND USE, a Montana Non-Profit
Corporation; and JAYBE FLOYD,
SHANNON ELIZABETH GUILFOYLE,
BRIAN JAMES NIELSEN, CAROLYN
K. CRAVEN, DEBORAH JENKINS,
ERIN M. TINGEY, WILLIAM A.
ROGERS, LALONNIE R. WARD,
DENNIS N. WARD, MICHAEL
JENKINS, LOGAN TINSEN and
TAMMIE LYNNE SMITH,

Plaintiffs,

vs.

BOARD OF COUNTY
COMMISSIONERS OF CASCADE
COUNTY, the governing body of the
County of Cascade, acting by and through
Joe Briggs, James Larson and Jane Weber,

Defendants.

CAUSE NO. BDV-19-0813

**PLAINTIFFS' BRIEF IN
SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

(Oral argument requested)

INTRODUCTION

Plaintiffs have challenged the action taken by the Board of County Commissioners of Cascade County (Commissioners) in reversing and modifying the conditional approval of Special Use Permit #006-2019 (SUP) made by the Cascade County Zoning Board of Adjustments (BOA). Plaintiffs allege the Commissioners failed to comply with the

applicable standard governing the review of decisions by the BOA. The BOA did not abuse its discretion in approving and conditioning the SUP; it relied on “fact and foundation” that was reasonable. On appeal, the Commissioners did not review the BOA’s conditions based on ‘grounds of illegality’ as directed by statute but instead erred by conducting their own *de novo* review of the SUP and exercising their own discretion, making their own findings of fact, and variously reversing, modifying or remanding contested conditions. Accordingly, the Court should grant summary judgment to Plaintiffs, affirming the BOA, and reversing the Commissioners. Pursuant to Local Rule 8.D(1), Plaintiffs have submitted herewith their Statement of Uncontested Facts (SUF).

PRIOR PROCEEDINGS AND FACTS

A. Special Use Permit Application

On April 25, 2019, Big Sky Cheese, LLC (Applicant) submitted a Special Use Permit Application (Application) to Cascade County for value-added agricultural commodity processing facility on property owned by Madison Food Park, LLC (MFP). (Stipulated Record (SR) Ex.1.) The Planning Department issued a Staff Report on the SUP Application to the BOA on June 27, 2019. (SR Ex.4.) The Applicant submitted supplemental materials on July 11, 2019. (SR Ex.5.)

B. BOA Proceedings

Public comments on the Application were received from May 1, 2019, through July 26, 2019. (SR Ex.7.) Extensive comments were submitted on behalf of Plaintiffs on June 24 and 25, 2019 (Id. 0018-0031, 0037-0065) and July 26, 2019 (Id., unnumbered).

The BOA conducted public hearings on the Application on June 27, 2019 (SR Ex.9),

and August 28, 2019 (SR Exs.9,11). On August 28, 2019, the BOA deliberated and based upon the information supplied by the Applicant, the Staff Report, the extensive public comment received, and its review of applicable standards, made its decision unanimously approving Special Use Permit #006-2019 subject to 17 conditions. (SR Ex.11, 01:28:48-01:31:51; SR Ex.12.)

C. Appeal to County Commissioners

On September 26, 2019, the attorney for the Applicant submitted a letter to the Commissioners, captioned “Re: Appeal of Zoning Board of Adjustment Decision” and stating, “Section 12.3.5.1 of the Zoning Regulations requires us to file this petition and to specify the ‘grounds of illegality’ to any portion appealed.” (SR 13, p.1.) The Applicant appealed 9 of the 17 conditions imposed by the BOA. (SR 13, pp.1-5.)

On November 13, 2019, attorneys for Montanans for Responsible Land Use (MRLU) sent a letter together with documents of record to the Commissioners which responded to the Applicant’s September 26, 2019 appeal. MRLU’s letter set forth the applicable standard of review, and demonstrated that the conditions that the Applicant appealed were supported by the record and that the contentions of illegality made by the Applicant were misplaced. (SR 14).

On November 21, 2019, the Commissioners held a meeting to discuss the Applicant’s appeal. (SR 18, p.5.) No public comment was allowed on the Applicant’s Appeal. MRLU’s letter of November 13, 2019 was not considered by the Commissioners. (Id.) The Commissioners issued a written Decision on the Appeal of SUP #006-2019 (Commissioners’ Decision) on November 25, 2019, which included reversals of the BOA’s

Conditions #'s 12, 14, 15, 16; modifications of Conditions #'s 2, 3, 8, 17; and remand of Condition #7. (SR 20.) On December 24, 2019, Plaintiffs filed this action challenging the Commissioners' Decision.

DISCUSSION

I. Montana statutes and Cascade County Zoning Regulations delineate the discretionary powers of the BOA and the standards the BOA must follow in considering a proposed SUP.

MCA §76-2-221(1) provides:

The board of county commissioners shall provide for the appointment of a board of adjustment and ... the board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the zoning resolution in harmony with its general purposes and intent and in accordance with the general or specific rules of this part.¹

MCA §76-2-223(1) delineates the powers of the BOA, including the power “to hear and decide special exceptions to the terms of the zoning resolution upon which the said board is required to pass under such resolution...” The Montana Supreme court recognizes that pursuant to these statutes, “The board of adjustment exercises considerable discretion...with respect to whether to grant a special use permit.” *Plains Grains Ltd. P'ship v. Bd. of Cty. Comm'rs of Cascade Cty.*, 2010 MT 155, ¶ 54.

Pursuant to the authorizing provisions of these statutes, the Cascade County Zoning Regulations (CCZR) assign to the BOA the power to,

Hear and decide Special Use Permits ... to the terms of the zoning regulations as provided in Section 10 of these regulations. The language herein is not intended to restrict or limit the power of the

¹ All emphasis and brackets added unless otherwise noted.

Zoning Board of Adjustment provided by Title 76, Chapter 2, Parts 221 through 228, Montana Code Annotated.

CCZR §12.3.3.2.

The Zoning Regulations explicitly recognize that the exercise of this power requires that the BOA impose appropriate conditions and safeguards: “A special use is a use for which conformance with additional standards will be required...” CCZR §10.9; *see also* CCZR §12.1.

The Cascade County Zoning Regulations, at CCZR §10.6, set forth the standards which govern the BOA’s review and approval of a proposed SUP:

Before the Board of Adjustment can approve any Special Use Permit, it must first reach each of the following conclusions:

- (1) Conditions may be required that the Zoning Board of Adjustment determines if implemented, will mitigate potential conflicts in order to reach these conclusions.
- (2) The proposed development will not materially endanger the public health or safety.

Considerations:

- (a) Traffic conditions in the vicinity, including the effect of additional traffic on streets and street intersections, and sight lines at street intersection and approaches.
 - (b) Provision of services and utilities, including sewer, water, electrical, telecommunications, garbage collections, and fire protection.
 - (c) Soil erosion, sedimentation, and stormwater runoff.
 - (d) Protection of public, community, or private water supplies, including possible adverse effects on surface waters or groundwater.
- (3) The proposed development will not substantially injure the value of adjoining property or is a public necessity.

Considerations:

- (a) The relationship of the proposed use and the character of development to surrounding uses and development, including possible conflicts between them and how these conflicts will be resolved.

...

- (4) The proposed development will be in harmony with the area in which it is located.

Considerations:

- (a) The relationship of the proposed use and the character of development to surrounding uses and development, including possible conflicts between them and how these conflicts will be resolved.

...

CCZR §10.6.

II. An appellant of a BOA decision must demonstrate “the decision is illegal, in whole or in part, and specifying the grounds of the illegality.”

After the BOA renders its decision based on the required considerations, a review of its decision may be brought before either the County Commissioners or the District Court, under the provisions of MCA §76-2-227 and CCZR §12.3.5.1, with mirroring language. “Any person ... aggrieved by a decision of the Zoning Board of Adjustment, may present to the Board of County Commissioners [or to a court of record] a petition ... setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality.” *Id*

A. Case law instructs that the “abuse of discretion” standard of review applies.

While neither the Code nor the Regulations define “illegality”, caselaw instructs the reviewing body should determine whether the BOA abused its discretion in denying or

approving the variance. *Flathead Citizens for Quality Growth v. Flathead County BOA*, 2008 MT 1, ¶ 32. “To determine whether an abuse of discretion has occurred, we examine ‘whether the information upon which the Board based its decision is so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion.’” *Id.*, quoting *North 93 Neighbors v. Flathead County Commr’s*, 2006 MT 132, ¶ 44. In explicating this standard of review, the Montana Supreme Court has made clear that the reviewing entity does not itself re-weigh the evidence and resolve facts that were in dispute in the proceeding before the BOA. Rather, the reviewing entity determines whether the record contains sufficient evidence to establish that the decision is reasonably based in fact:

Essentially, T & C is arguing the District Court erred because it failed to re-weigh the evidence, sit as a fact finder, and determine if T & C's plan comported with the Zoning Ordinance. However, pursuant to Bozeman's Zoning Ordinance, the city commission is the appropriate fact-finder, and it decided T & C's site plan did not comply with requirements of the B-1 zoning district. The District Court's job is not to re-try the facts, but to review the city commission's decision for an abuse of discretion. *Flathead Citizens*, ¶ 32. In turn, this Court reviews whether the District Court erred in concluding the city commission did not abuse its discretion. See *Flathead Citizens*, ¶ 55. If the record contains sufficient evidence showing the city commission's decision to deny T & C's application was reasonable and based in fact, we will not disturb the District Court's conclusion.

Town & Country Foods v. City of Bozeman, 2009 MT 72, ¶ 27.

Here, the Commissioners make no reference to the applicable standard of review in their Decision on the Applicant's appeal of 9 of the 17 conditions attached to the SUP by the BOA. (SR Ex.20.) Instead, the Commissioners erred by conducting their own de novo review, making their own findings of fact, and exercising their own discretion in variously reversing, modifying or remanding the contested conditions.

III. Count I: The BOA approved the SUP petition subject to conditions reasonably necessary to carry out the purposes of the CCZR and supported by the record.

The Applicant appealed 9 of the 17 conditions imposed by the BOA. (SR 13, pp.1-5.) The Commissioners modified Conditions 2,3,8,17; reversed Conditions 12,14,15,16; and remanded Condition 7. (SR 20.) The 9 conditions at issue are addressed seriatim below as follows: first, the numbered BOA condition is outlined in bold; second, the Appellant's contention of illegality is bulleted; and third, is a discussion demonstrating that there was no abuse of discretion: the BOA was acting within its authority and pursuant to the Record—. Thus the challenged conditions should have been affirmed.

SUP Condition #2: The Applicant obtains the necessary water rights from the Montana Department of Natural Resources and Conservation (“DNRC”). The Applicant shall be required to place meters on wells and submit quarterly reports to the Planning Department, and obtain water rights if usage exceeds the exempt well levels provided by DNRC.

- The Petition on appeal to the Commissioners states, “First, exempt wells do not obtain “water rights” but are subject to a notice of completion. Therefore, the first sentence of the condition is impossible to meet.”

The Record: First, the Applicant represented in its Application that, “Water Rights and permitting will be completed by MFP’s contracted hydrogeologist.” (SR Ex.1, Response to Question 6.) Second, and more to the point, extensive public comments were submitted on the issue of BOA’s mandated consideration of “water supplies, including possible adverse effects on surface waters or groundwater”. (See CCZR §10.6.2.d; see also SR Ex.7 *passim*.) Although MFP’s hydrogeologist issued a supplemental report that represented the combined appropriation from the proposed wells would be just under the statutory exemption of 10 acre-feet as provided by MCA §85-2-306(3)(A)(iii), rebuttal calculations

demonstrated that under MFP's proposed plan of operation the proposed wells would exceed the statutory exemption, triggering DNRC's analysis of adverse effects on surface waters or groundwater. *See, e.g.*, Carolyn Craven's comments of 7/25/19 and 7/26/19, including discussion of *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 24, (holding that the "combined appropriation" exemption of 10 acre-feet per year in MCA §85-2-306(3)(a)(iii) relied on by the Applicant refers to the total amount of water that may be appropriated without a permit). *See also* Montana FWP 6/24/16 comments (describing water quality and quantity concerns and noting, "Big Sky Cheese proposes to tap the Madison aquifer for an annual volume of 10.3 acre-feet.") (SR Ex.7.) Thus, at both the 6/27/19 and 8/28/19 meetings, there was extensive BOA discussion that although the Application stated that the well is exempt, there is the possibility that future operations may have water demands that exceed the standards for exempt wells. At that time, the Applicant would be required to obtain water rights. (6/28/19 transcript beginning at 43:10, SR Ex.9; and 8-28-19 transcript beginning at 46:51, SR Ex.11). BOA Member Michelle Levine noted that according to Application materials, there will be two wells with a combined appropriation that exceeds 10-acre feet per year. To wit: The SUP Application asks at Q. 18, "Estimated volume of water to be used (gallons per day) and the source of water." The Applicant Responded: "Estimated Water Usage: 12,960 gpd (10.3ac-ft/yr)" (SR Ex.1, p.7.) Although the Applicant represented that the proposed wells are exempt, Ms. Levine noted that, according to MCA §85-2-306(3)(a)(iii), "that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit." Thus, on the basis of the record before the BOA, Ms. Levine

noted that since there is a potential that a permit may be required, it is appropriate to add a condition regarding water rights. (Id., SR Ex.11.) Indeed, in its Decision, the Commissioners likewise noted in their Findings of Fact that, “The combined appropriation of the two proposed exempt wells exceed the ten acre-feet to be considered exempt under MCA §85-2-306(3)(A)(iii) and require a permit by DNRC.”²

In any event, the operant language in Condition #2 makes clear that the Applicant is simply required to obtain “the necessary water rights from the Montana Department of Natural Resources and Conservation”—which is obviously a determination made by DNRC.

- The Petition states, “...whether meters are required on wells, and any associated monitoring obligations is solely within the purview of the DNRC. The Board of Adjustment does not have the authority to supplement or deviate from DNRC rules and regulations.”

The Record: The authority for the BOA to grant conditions is found in MCA §76-2-221 which states, “... the board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms in the zoning resolutions in harmony with its general purposes and intent and in accordance with the general or specific rules of this part.” As noted by the BOA during deliberations, the BOA has an obligation under the regulations governing the issuance of SUPs to provide for the “Protection of public, community, or private water supplies, including possible adverse effects on surface waters or groundwater.” (CCZR §10.6(2)(d)). Pursuant to these requirements, the BOA recognized that one way to mitigate “possible adverse impacts” is

² Citing to the Aug. 28, 2019 BOA meeting audio recording (SR Ex.11) at timestamp 00:46:51-00:49:17.

through monitoring. (See 8-28-19 discussion starting at 46:51; SR Ex.11.) While there is no documentation in the public record or Petition to support the Applicant's assertion that the BOA lacks authority to issue the challenged condition, the condition itself is premised on recognition of DNRC as the permitting entity, from whom any necessary permits are to be obtained: "The Applicant obtains the necessary water rights from the Montana Department of Natural Resources and Conservation ("DNRC")." (SR 12.) Further, review of the Record indicate that the BOA did not impose any requirement that the Planning Department would be responsible for monitoring or enforcing DNRC regulations. Rather, per condition #2, the Applicant is responsible for monitoring activities and must submit such monitoring reports to the Planning Department. The Planning Department only has the responsibility of keeping such reports on file and making them available for public review. (8-28-19 discussion starting at 57:50; SR Ex.11.)

In its Decision on appeal the Commissioners acknowledged the following: "Based on the foregoing facts contained in the record, there may be possible adverse effects on nearby water sources based on the estimated water draw from the Madison Formation aquifer caused by the proposed development justifying the imposition of reasonably necessary condition(s) to mitigate the risk." (SR Ex.20, p.6.) However, the Commissioners also determined that since DNRC is the State agency charged with administering the development and use of water resources, including determining whether a water permit or exemption is applicable, "DNRC will determine if, when, and how water usage for the proposed development will be monitored and tracked making quarterly reporting to the Planning Department unnecessary." (SR Ex.20, p.7.)

The Commissioners' Decision ignores that the BOA is also obligated under the requirements governing the issuance of SUPs to provide for the "Protection of public, community, or private water supplies, including possible adverse effects on surface waters or groundwater." (CCZR §10.6(2)(d)). As such, the challenged condition requiring placement of meters on the wells and submitting quarterly reports to the Planning Department neither interferes with DNRC's exercise of permitting authority nor was it "clearly unreasonable and constitutes an abuse of discretion." *Flathead Citizens*, ¶ 32. It is entirely possible—and indeed reasonable—to harmonize the statutes governing DNRC's jurisdiction over the permitting and use of water resources with the BOA's mandate, formulated pursuant to MCA §76-2-221(1), to provide for the "Protection of public, community, or private water supplies, including possible adverse effects on surface waters or groundwater." (CCZR §10.6(2)(d)). To that end the Montana Supreme Court instructs that, "When several statutes may apply to a given situation, such a construction, if possible, is to be adopted as will give effect to all." *Skinner Enterprises v. Lewis & Clark Cty. Bd. of Health*, 286 Mont. 256, 272, 950 P.2d 733, 742 (1997), quoting *Schuman v. Bestrom*, 214 Mont. 410, 415, 693 P.2d 536, 538 (1985). For purposes of judicial review, zoning ordinances are treated like statutes.³

In sum, the Court in this proceeding must apply the "abuse of discretion" standard of review—which is the same standard that the Commissioners should have applied. Compare MCA §76-2-227(1) (appeal to Commissioners) and §76-2-227(2) (appeal to

³ *Schanz v. City of Billings*, 182 Mont. 328, 332, 597 P.2d 67, 69 (1979), quoting *State ex rel. Bennett v. Stow*, 144 Mont. 599, 399 P.2d 221 (1965).

Court). “To determine whether an abuse of discretion has occurred, we examine ‘whether the information upon which the Board based its decision is so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion.’” *Flathead Citizens*,

¶ 32. Here, although the BOA could possibly have exercised its discretion in other ways to fulfill its mandatory duty to protect against “possible adverse effects on surface waters or groundwater,” requiring the Applicant to monitor its water use and then make that information available to the public through submission of the monitoring reports to the Planning Department is solidly based on “fact and foundation” in the record before the BOA.⁴ Accordingly, there having been no abuse of discretion by the BOA, it was error for the Commissioners to modify the BOA’s Condition #2 by removing the requirement that the Applicant monitor its water use and make that information available to the public through submission of the monitoring reports to the Planning Department.

SUP Condition #3: The Applicant obtains approval from the City-County Health Department and Montana Department of Environmental Quality (“MDEQ”) for a new public water supply/wastewater system. The Board requests the DEQ consider requirements for the wastewater ponds to be lined. The Board requires the applicant to provide quarterly reports on the wastewater monitoring wells to the Planning Department.

- The Petition on appeal to the Commissioners states, “Our concern is with the final sentence. Wastewater monitoring wells are not typically required by MDEQ.”

The Record: This statement contradicts the public record that was relied upon by the BOA to make their decision, including this condition. Representations made by the

⁴ As made clear in the Commissioners’ Decision, the record on appeal was limited to record before the BOA. (SR Ex.20, pp.1-2.)

Applicant's own engineer, Kevin May, at the 8/28/19 BOA hearing, in response to a question from the BOA as to whether the Applicant could install groundwater monitoring wells to address concerns with potential wastewater leakage included:

... a standard requirement from the Department of Environmental Quality for a lagoon system where our wastewater will be stored will be for ground water monitoring wells surrounding that uh. It allows us to track it for liners leaking or how that lagoon is performing. Um, so that is something that is standard in our permit for a wastewater system already.

(8/28/19 transcript discussion starting at 1:02:04; SR Ex.11).

- The Petition further states, "... the Board of Adjustment lacks all authority to require such wells, any associated monitoring, and any resulting reporting requirements."

The Record: As detailed in the previous section, the BOA has authority to impose such a condition. Here, notwithstanding the Applicant's representations to the BOA that the requirement of groundwater monitoring wells is standard procedure for MDEQ, the Applicant argued to the Commissioners that BOA could not require the Applicant to periodically provide those reports to the Planning Department for ease of access to the citizens of Cascade County. As with the monitoring of Applicant's proposed water wells, the BOA received numerous comments regarding the Applicant's proposed wastewater disposal and the concomitant potential for groundwater contamination. (SR Ex.7, *passim*.) The BOA issued its SUP with this condition attached on the basis of these expressed concerns and the Applicant's representation that ground water monitoring wells "is something that is standard" for the type of treatment system proposed by the Applicant. Since, as represented by the Applicant's engineer, the requirement for the monitoring wells is standard operating procedure for DEQ, the BOA simply required that the monitoring

reports be provided to the Planning Department for ease of public review in tracking the Applicant's compliance with the conditions attached to SUP #006-2019.

Thus, this most certainly was **not** a “decision...so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion.” *Flathead Citizens*, ¶32. Nevertheless, on appeal, the Commissioners modified the condition to provide that, “In the event, MDEQ requires periodic monitoring reports of either the public water supply or wastewater system, the Applicant is required to provide a copy of any such report(s) to the CCHD [City-County Health Department] Environmental Health Division within 10 days of submitting to MDEQ.” (SR Ex.20, p.12.)

The BOA could possibly have exercised its discretion in *other ways* to fulfill its mandatory duty to protect against “possible adverse effects on surface waters or groundwater” (CCZR §10.6.2.d), including the mechanism proposed in the Commissioners Decision. However, under the “abuse of discretion” standard, that is not the issue. Rather, the issue is whether the BOA's decision was so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion. The BOA reasonably required that the monitoring reports be provided to the Planning Department for ease of public review in tracking the Applicant's compliance the conditions attached to the SUP. This condition is solidly based on “fact and foundation” in the record before the BOA, including the expressed concerns of the local citizenry and the representations of the Applicant's own engineer. Accordingly, the Commissioners committed reversable error by modifying BOA's Condition #3 and removing the requirement that the Applicant provide reports on the wastewater monitoring wells to the Planning Department.

SUP Condition #7. Operation hours shall be limited to 7:00 AM to 7:00 PM.

- The Petition on appeal states, “Because of the nature of the proposed facility as a cheese processing plant, some activities such as routine maintenance, cleaning and disinfection of equipment, wastewater treatment plant operations and similar tasks will be occurring at the facility as much as 24 hours a day.”

The Record: Once again, this statement contradicts the Applicant’s own representations in the record that the BOA relied upon to make their decision. The Application (SR Ex.1, p.18) stated:

Pursuant to the Proposed Plan of Operation adopted for Madison Food Park (MFP) as drafted by the project development team, the business enterprise is expected to operate 260 days per year; i.e., 5 days/week. Plant operations during a typical processing day will be 7 a.m. to 4 p.m. Facility cleaning, disinfecting, maintenance and repairs will be completed throughout the day (between batches), from 4 p.m. to 7 p.m. each evening, and on Saturdays from 8 a.m. to 2 p.m.

The Application form was signed by Mr. Ed Friesen, as the owner of both Big Sky Cheese and Madison Food Park, and it contained the following statement confirming that the Applicant understood that the operating hours stated in the Application could be binding upon issuance of the approved SUP with conditions:

Attest: I hereby certify that the information given herein is true and correct to the best of my knowledge and acknowledge that the information provided herein may be binding upon issuance of an approved Special Use Permit with conditions.

(SR Ex.1, p.4.)

Moreover, establishing the hours of operation was critical to evaluating the request because the Application specifically refers to this Proposed Plan of Operation as a basis for calculating traffic, water use, and wastewater use. See the Application (SR Ex.1) and attendant responses to the following questions:

Question 10 – Service and Delivery Vehicles

Question 17 – Solid and Liquid Waste

Question 18 – Estimated Volume of Water

Question 19 – Utilization of Buildings

The Applicant's responses to each of these questions relies on the Proposed Plan of Operation—which is based on a 12-hour day. If, as later stated in the Applicant's appeal, the plant will instead be operating 24-hours a day, the estimates that were provided by the Applicant to the BOA were misleading. Likewise, it is important to note that the analysis in the Staff Report (SR Ex.4) also relied upon the representations in the Application which were based on the Proposed Plan of Operation with a 12-hour time period for conducting operations.⁵ Not only did the Planning Staff rely on this information in their analysis, but supplemental information provided by the Applicant's engineer also relied on estimates for wastewater volume based on information in the "plan of operation". (See letter dated 7-10-19 from HRGreen; SR Ex.5.) Likewise, the July 8, 2019 "Assessment of Adverse Effects from Pumping Proposed Water Supply Wells" submitted to the BOA by the Applicant's contractors was based on estimates from the original application that assumed a 12-hour daily operation. (Id.) Of further note, that same 12-hour/day operation was the basis for the Applicant's hydrogeologist representing that the water wells are exempt from

⁵ This changing of position, once relied upon, is the genesis of the "mend the hold" doctrine (named after a nineteenth century wrestling term, meaning to get a better grip (hold) on your opponent) which binds contacting parties, during litigation, to pre-litigation statements. See Bishop, Randall, *The "Mend the Hold Doctrine"*, Trial Trends (Summer 2020). The basic premise of not changing your position once others have relied upon it applies here.

permitting.

Nevertheless, despite this compelling record, on appeal the Commissioners remanded Condition #7 back to the BOA to “develop the record” concerning what makes a limitation from 7 a.m. to 7 p.m. reasonable. (SR Ex.20, p.17.) Under the applicable standard of review, this is reversible error. The possibility that the Big Sky Cheese plant would operate in excess of 12-hours a day was not part of the public record that was presented to the BOA. Instead, the BOA in conformance with the representations of the Applicant and in consideration of concerns expressed by the public, appropriately included Condition #7. In doing so, the BOA adopted the findings in the Staff Report, which relied upon the “Proposed Plan of Operation” set forth in the Application.⁶

In sum, the BOA’s decision to impose condition #7 most certainly was **not** a “decision...so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion.” *Flathead Citizens*, ¶ 32. Thus, on appeal the Commissioners should properly have affirmed the BOA’s imposition of the condition.

SUP Condition #8: All cheese manufacturing process activities must occur inside a fully enclosed building and not be visible to the general public, with air from the internal cheese manufacturing process being treated or filtered to address odor concerns. The applicant is to design and adopt odor control measures.

- The Petition on appeal states, “However, the condition is worded in such a way in which it could be interpreted as preventing deliveries of milk or other supplies used in the manufacturing process because they occur outside the building.”

The Record: The BOA motion that was amended and approved, indicates that the

⁶ Additionally, the BOA adopted findings to include material from the Applicant and the public testimony. (See SR Ex.14, Att.3 – Excerpts from BOA meeting 8/28/19).

conditions are based on information provided by the Applicant in their Permit Application, public comment, staff analysis and other documentation in the public record. (See SR 14, Attachment 4.) Condition #8 is consistent with the information presented by the Applicant in the Permit Application. The representations in the Permit Application cited below clearly describe that the indoor operations include manufacturing and was not intended to exclude storage of bulk materials:⁷

Response to Question 15:

- “It should be noted that the entire cheese-manufacturing process will occur inside a fully enclosed building and will not be visible to the general public.”
 - “All bulk materials will be placed within a covered, fully enclosed structure so as to eliminate potential of creating an unsightly appearance.”
 - “Manufacturing operations will occur indoors, minimizing noise impacts.”
- The Petition on appeal further states, “Plus, there are no specifications to determine what “odor control measures” are acceptable.”

The Record: Per the following excerpts from the minutes of the 6/27/19 BOA meeting (SR Ex. 4), specifics for determining appropriate measures were discussed. These minutes were adopted as findings by the BOA. Testimony from the Applicant’s engineer regarding installing a "filtered exhaust" system to control for odors was relied upon in adopting

Condition #8:

Jerry Phipps from Cedar Rapids Iowa (01:25:17). He says everything will be

⁷ As noted above, in the signature page, the Applicant attested that these statements are true and acknowledged that the information could result in binding conditions on the special use.

inside of a building and there will be filtered exhausts. So, they are anticipating low odor levels.

[BOA member] Michelle Levine (03:32:19) asks if there is control of air and water quality at the sister dairy facility. If so, is it possible that they can obtain information on the sister facility takes in order to better understand the water and air quality impacts?

Jerry Phipps (03:32:44) replies yes.

Moreover, although this condition was a recommendation of the Staff Report dated 6-27-19, the Applicant did not present testimony or written materials to the BOA regarding objection to this condition. Nevertheless, on appeal the Commissioners modified Condition #8 as follows:

The Applicant shall install a filtered exhaust system inside the cheese processing facility for the purpose of reducing odors released into the outside air. Additionally, any outdoor activities must be compliant with activities allowed in the Agricultural District without the issuance of a special use permit.

(SR Ex.20, p.21.)

The touchstone here is not whether the BOA could have fulfilled its duties in addressing concerns raised in the SUP proceeding through a differently worded condition. Rather, the issue is whether the BOA's decision to impose Condition #8 was a "decision...so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion." *Flathead Citizens*, ¶ 32. As demonstrated above, clearly it is not.

SUP Condition #12: The Applicant is to execute or obtain and record a road easement from US Highway 89 to the parcel the Cheese Processing Plant is located on.

- The Petition on appeal states, "First, there are no findings of fact and conclusions of law adopted by the Board of Adjustment to explain the basis for requiring an easement – i.e., no finding that there is some intervening private land that might prevent access to the cheese processing facility."

The Record: As noted previously, the findings adopted by the BOA included the findings in the Staff Report, materials from the Applicant, and the public comments. (See SR Ex.14, Att.3 – Excerpts from BOA meeting 8/28/19). In the package of the public comments that were compiled and distributed to the BOA on June 27, 2019, was a 6/24/19 memo from MRLU's consultant noting, and documenting, that the Application specified that the SUP was located in Section 34 on the parcel with Geocode 534830. "This section and specific parcel are landlocked and do not have any direct access to U.S. Highway 89." (Id.) A map was attached to the memo demonstrating the intervening private land that could prevent access to the facility. (See SR Ex.14, Att.5; *also*, SR Ex.7.) As the land use consultant pointed out to the BOA:

In such situations, it is standard planning practice that a condition of approval requires either a permanent access easement be recorded on the parcel in Section 27 or that the two parcels be combined as a single parcel. Permanent access to Highway 89 is critical for the landlocked subject parcel in the SUP application.

Id. On this basis of this record the BOA imposed Condition 12, which is entirely consistent with its exercise of discretion under the CCZR's recognition that, "Conditions may be required that the Zoning Board of Adjustment determines if implemented, will mitigate potential conflicts..." CCZR §10.6(1).

- The Petition on appeal further states, "Second, we anticipate all the land will be owned by Madison Food Park, LLC. Under Montana law, a landowner cannot grant an easement to itself. Thus, upon recording of such an easement, the easement automatically terminates by operation of law and we would never be able to comply with this condition."

On appeal, the Commissioners reversed the BOA's imposition of Condition #12 on the

basis that, “It is impossible to grant an easement to one’s self as a matter of law.” (SR Ex.20, p.23, citing MCA §70-17-105.)

The Record: However, as unarguably demonstrated by the record, the land is presently owned by Madison Food Park, LLC. The Applicant for the SUP is a different legal entity: Big Sky Cheese, LLC. Thus, the right to the “servitude” (the easement) would be held by Big Sky Cheese, LLC and the “servient tenement” (the owner of the burdened property) would be Madison Food Park, LLC.

Thus, in accordance with the substantial facts of record and the applicable law, the BOA properly exercised its discretion. The Court should affirm the BOA and reverse the Commissioners.

SUP Condition #14: Livestock and dairy cows are prohibited on site.

- The Petition on appeal states, “While Big Sky Cheese and Madison Food Park do not have plans for livestock use on the property, the property contains thousands of acres and some leasing for grazing could be a useful option.”

The Record: According to the Application for the SUP submitted by the Applicant Big Sky Cheese, and as stated in the BOA motion to approve the Special Use Permit, approval was limited to Parcel 0053483000, Geocode 02-3017-34-47-02-01-000. As set forth in the record, according to information publicly available from the Montana Cadastral, the total size of the property is 220 acres. This condition does not apply to the “thousands of acres” surrounding the property that are owned by Madison Food Park. Therefore, the Applicant’s statement in its appeal above is neither an accurate representation of “the property” subject to the challenged condition, nor is it a proper basis to attacking the exercise of discretion by the BOA.

- The Petition on appeal also states, “There are no findings of fact and conclusions of law adopted by the Board of Adjustment to explain the basis for prohibiting livestock and dairy cows on the Madison Food Park site.”

The Record: As noted previously, the BOA did adopt as findings the SUP Application, the Staff Report, and the public comments. And as also noted, the Applicant acknowledged that the information in the Application was correct and could be binding as a condition with approval of the SUP. Of significance here, the Application for the Big Sky Cheese SUP contained the following statement regarding livestock:

Question 16: “The proposed use will rely upon fresh milk which is provided by area producer’s livestock and will be delivered to the site via milk delivery trucks; however, no livestock or dairy cows will exist onsite.”

In addition to the Applicant’s verified representations in the Application, there was testimony at the 6/27/19 hearing voicing concerns from the public regarding odors. In addition, the public comments compiled for the 8/28/19 BOA meeting also address the concern for odors, including a memo from MRLU’s consultant regarding prohibiting livestock on site as a means of odor control. These compelling public comments, together with the representations by the Applicant in the SUP Application regarding livestock,⁸ provide the basis in the facts of record for this condition.

Nevertheless, the Commissioners reversed the BOA’s Condition #14 on the grounds that it is an unreasonable condition to impose when having livestock and dairy cows on property located in the Agricultural District is an allowed use of the land. (SR Ex.20, p.26.) This undermines the very premise underlying the granting of SUP’s: The

⁸ The “mend the hold” doctrine is once again apt here. See footnote 6, *supra*.

Zoning Regulations explicitly recognize that the BOA's exercise of this power requires that the BOA impose appropriate conditions and safeguards: "A special use is a use for which conformance with additional standards will be required..." CCZR §10.9; *see also* CCZR §12.1. Here, a quid pro quo for granting the SUP for the Applicant's operation of an industrial-scale dairy processing facility with the attendant concern for odors was the Applicant's own representation that "no livestock or dairy cows will exist onsite." Further, the Applicant acknowledged that this representation could be used as a condition to the grant of the SUP—which the BOA in its discretion elected to do, based on the substantial record before it.

In sum, the issue here is whether the BOA's decision to impose condition #14 was a "decision...so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion." *Flathead Citizens*, ¶ 32. As demonstrated, clearly it is not. The Court should affirm the BOA and reverse the Commissioners.

SUP Condition #15: Design standard regarding width, pavement and subsurface for access road to accommodate emergency vehicles and provide for dust control shall be implemented.

- The Applicant's Petition on appeal states, "Our concern with this condition is the requirement for paving the road. There are no findings of fact and conclusions of law adopted by the Board of Adjustment to explain the basis for requiring paving, particularly where many of the roads in the area are constructed to a gravel standard."

The Record: As noted previously, the BOA did adopt as findings the Permit Application, Staff Report and public comments. As also noted, the Applicant attested that information in the Application was correct and may be binding with approval of the special use. The Application for the Big Sky Cheese SUP contained the following statement regarding

paving the road:

“Q.15 – “Proper surfacing of roads and parking areas will minimize dust.” (SR Ex.1, Use Statement, p.5.)

In addition to this statement, MRLU’s land use consultant submitted public comment on 7/26/19 that specifically talked about paving the road for purposes of dust control and accommodating emergency vehicles. (See SR 14, Att.6, pp.1,7.) Thus, the public record and representations in the Application provide the basis for this condition. Although the Applicant’s appeal to the Commissioners later noted that while MFP intended to “eventually” pave the road, it also noted that there are other methods of dust control which could be implemented. (SR Ex.13, p.4.) However, this information was not presented to the BOA and was not part of the public record that the BOA considered as part of its deliberations. Nevertheless, the Commissioners eliminated Condition #15 in its entirety. (SR Ex.20, p.29.)

Based on the record before it, the BOA’s decision to impose condition #15 was clearly not a “decision...so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion.” *Flathead Citizens*, ¶ 32. Accordingly, the Court should affirm the BOA and reverse the Commissioners.

SUP Condition #16: Applicant shall provide emergency secondary access.

- The Applicant’s Petition on appeal states, "There are no findings of fact and conclusions of law adopted by the Board of Adjustment to explain the basis for requiring a secondary access. Further, there are no specifications in the condition of approval to allow our client to know how to meet the condition, or to allow the Planning Department to know whether the condition has been met."

The Commissioners in turn reversed the BOA's imposition of Condition #16, stating that it was not "reasonably necessary" to prevent endangering the public safety. (SR 20, p. 30.)

The Record: As noted previously, the BOA did adopt as findings the public comment. Included in the public comments that were compiled for the BOA's 8/28/19 meeting was a detailed memo prepared by MRLU's land use consultant that specifically addressed emergency access. (See SR Ex.14, Att.6). Furthermore, the following sections in the county zoning ordinance and the MCA provide the legal basis for establishing conditions in regard to fire protection and other dangers:

Cascade County Zoning Regulation - §10.6 Standards Applicable to All Special Uses

(2)(b) Provision of services and utilities, including sewer, water, electrical, telecommunications, garbage collections, and fire protection.

MCA §76-2-203. Criteria and guidelines for zoning regulations.

(1)(a)(i) secure safety from fire and other dangers...

As to the assertion that there is a lack of specificity for meeting this condition, the Cascade County Zoning Regulations provide an orderly process for issuing the required Location Conformance Permit (§9.2) and for preparing a Site Plan to be submitted with the Location Conformance Permit (§8.5) prior to construction of improvements at the site. As with other conditions related to public health and safety, this is a broadly stated condition which leaves details of implementation to the discretion of the Zoning Administrator upon review of the Site Plan and Location Conformance Permit. Thus, while a plan for emergency access in the event of fire or other danger is called for, the Applicant could propose meeting this

condition from a range of reasonable possibilities. Such flexibility does not render the condition “so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion.” *Flathead Citizens*, ¶ 32.

SUP Condition #17: Applicant obtains fire suppression cistern approval from the Rural Volunteer Fire Department for the fire suppression system.

- The Applicant’s Petition on appeal states, “This condition, as worded, lacks any specificity for our client to know how to meet the condition, or to allow the Planning Department to know whether this condition has been met.”

The Record: As noted previously, the Applicant attested and acknowledged that the information in the Application was correct and may be used to impose binding conditions on the SUP. The Application for the SUP includes the following representations regarding fire suppression:

Question 22. (2) Fire protection will be provided via onsite storage tanks and booster pumps.

The project will incorporate onsite storage and pumps to provide onsite fire prevention measures to the structures. Additionally, the onsite fire storage may be available for adjacent properties in the event of emergencies, if necessary, as a hydrant can be placed onsite for local fire department use.

(SR Ex.1, SUP Criteria Responses, p.11.)

As also noted previously, the BOA adopted as findings the public comment. In the public comments that were compiled for both the 6/27/19 public hearing and the 8/28/19 BOA meeting, were memos prepared by MRLU’s land use consultant that specifically addressed the advisability of and standards for fire suppression which provide guidance on how the Applicant may meet the condition. (*See* SR 14, Att. 5-6). Finally, this condition does not require the Planning Staff to review and approve a particular fire suppression system. It

only requires that the Applicant submit documentation to the Planning Department that the Rural Volunteer Fire Department has approved such a system.

In their Decision on appeal, the Commissioners affirmed in principle that the BOA's "decision that an adequate fire suppression system is needed to ensure the public health and safety is not materially damaged." (SR Ex.20, p.34.) However, the Commissioners modified the BOA's Condition #17 contending that it was "unreasonable" because "it implies that only a fire cistern can be installed to provide adequate fire protection." (Id.) In doing so the Commissioners make no reference to the applicable standard of review, which is whether the BOA committed an abuse of discretion. "To determine whether an abuse of discretion has occurred, we examine 'whether the information upon which the Board based its decision is so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion.'" *Flathead Citizens*, ¶ 32. Clearly, the BOA based its decision on facts in the record: specifically, the representations of the Applicant that, "Fire protection will be provided via onsite storage tanks." In modifying Condition #17, the Commissioners erred by conducting their own de novo review and exercising their own discretion as if they were in the shoes of the BOA.

In sum, each of the BOA's conditions were solidly based on facts of record; there was no abuse of discretion. The Commissioners made no reference to the applicable standard of review in their Decision on the Applicant's appeal of 9 of the 17 conditions attached to the SUP by the BOA. (SR Ex.20.) Instead, in variously reversing, modifying or remanding the contested conditions, the Commissioners erred by conducting their own *de novo* review, making their own findings of fact and exercising their own discretion in

reaching their Decision. Accordingly, Plaintiffs are entitled to summary judgment on Count I.

IV. Disposition of Counts II-IV.

A. Count II.

Count II of Plaintiffs' Complaint requested that the District Court issue a writ of review, pursuant to the provisions of MCA §76-2-227 and CCZR §12.3.5.1, directing the Commissioners to certify to the Court the Record of the proceedings before the BOA so that the Court could conduct the judicial review requested by Plaintiffs. The Commissioners, through counsel, have stipulated to the record and filed same with the Court. Accordingly, Count II is now moot.

B. Count III.

Count III alleges that the Commissioners violated Plaintiffs' rights of public participation and Count IV alleges the Commissioners violated Plaintiffs' due process rights on the basis of the following undisputed facts. Following the Applicant's submission of the BOA appeal, the Commissioners did not accept any public comment prior to reaching their final "Written Decision on the Appeal of SUP #006-2019." Indeed, the Commissioners' press release on November 18, 2019, stated, "The public is invited to watch the deliberations of the Board of County Commissioners in reviewing the final decision made by the ZBOA on August 28, 2019 and will render its final decision on the appeal on Thursday, November 21st, 2019 at 5:30 p.m. at the Family Living Center at Expo Park, 400 3rd Street NW, Great Falls, Montana. There will be no public comment taken on this matter." (SR Ex.22.) Following the Applicant's attorney's submission of the appeal

of the BOA's conditions to the Commissioners (SR Ex.13), Plaintiffs attorneys submitted to the Commissioners a responsive letter explaining:

Please note that it is not the purpose of this letter to supplement the public record; rather, we direct the Commissioners to the existing public record to demonstrate that: 1) the SUP's conditions are supported by the record; and 2) the contentions of illegality made by the Applicant are misplaced.

(SR Ex.14) The submission by Plaintiffs' counsel then explicated the applicable abuse of discretion standard of review and demonstrated that each of the BOA's conditions were solidly based on facts of record. Nevertheless, the Commissioners refused to consider the Plaintiffs submission and instead considered only the submission by the Applicant.

Article II, Section 8 of the Montana Constitution 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 the agencies prior to the final decision as may be provided by law.

See Bryan v. Yellowstone Cty. Elementary Sch. Dist. No. 2, 2002 MT 264, ¶ 24. The Montana Public Participation Act in turn requires that:

Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public.

MCA §2-3-111(1). *See also* 47 Mont. Op. Atty. Gen. No. 13, 1998WL219761. While there are limited exceptions to public participation, none apply. *See* MCA §2-3-112. The decision at issue was demonstrably of significant interest to the public; the Commissioners had to use the Expo Park facility to accommodate substantial

attendance by the interested public. Thus, the Commissioners' decision to exclude the Plaintiffs from participation violated Plaintiffs' constitutional and statutory rights of public participation. Plaintiffs are entitled to summary judgment on Count III.

C. Count IV.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Connell v. State*, 280 Mont. 491, 496 (1997). If the Court grants summary judgment on Count III, then Count IV alleging violation of Plaintiffs due process rights is rendered moot. It is based on the same operant facts set forth above, and points to the obvious defect in the Commissioners process of considering the Applicant's appeal of the BOA decision: the Commissioners refused to allow Plaintiffs to participate in the process, notwithstanding that Plaintiffs had extensively participated in the SUP proceeding before the BOA, and then Plaintiffs' counsel attempted to submit for the Commissioners' consideration an extensive letter demonstrating that: 1) the SUP's conditions are supported by the record; and 2) the contentions of illegality made by the Applicant are misplaced. (SR Ex.14.)

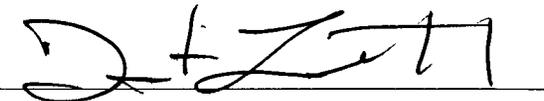
CONCLUSION

A review of the record demonstrates that the BOA did not abuse its discretion in approving and conditioning the SUP; it relied on "fact and foundation" that was clearly reasonable. The Commissioners make no reference to the applicable standard of review in their Decision on the Applicant's appeal of 9 of the 17 conditions attached to the SUP

by the BOA. (SR Ex.20.) Instead, the Commissioners erred by conducting their own *de novo* review and exercising their own discretion, making their own findings of fact, and variously reversing, modifying or remanding the contested conditions. Accordingly, the Court should grant summary judgment as requested, affirming the BOA and reversing the Commissioners.

Respectfully submitted this 2nd day of July, 2020

McGARVEY LAW

By: 

ROGER SULLIVAN
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Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned, Roger Sullivan, certifies as follows:

The total word count is 8,500 words excluding caption and certificates of compliance and service. The undersigned relies on the word count of the word processing system used to prepare this document.

By: 
For Roger Sullivan