

Case No: DA 09-0183

IN THE SUPREME COURT
OF THE STATE OF MONTANA

LIBERTY COVE, INC.,

Plaintiff and Appellant

-vs-

MISSOULA COUNTY,

Defendant and Respondent

APPELLANT'S BRIEF

On Appeal from the Fourth Judicial District Court, Missoula County

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I. ISSUES PRESENTED FOR REVIEW.

- A. Whether the District Court erred in concluding that Missoula County gave proper notice prior before adopting interim zoning.
- B. Whether the District Court erred in concluding there was an “emergency” to justify interim zoning.
- C. Whether the District Court erred in concluding that the interim zoning adopted by Missoula County did not constitute illegal reverse spot zoning.

II. APPELLANT’S STATEMENT OF THE CASE.

Appellant Liberty Cove, Inc., (“Liberty Cove”) owns real property in Missoula County, Montana. This is the second time this property has been the subject of review by the Supreme Court. The first time involved interpretation of Montana’s Subdivision and Platting Act as it related to condominiums. Now, the issue revolves around Liberty Cove’s attempts to construct a lake on an unzoned portion of its property and in doing so, extract sand and gravel from this property.

On May 30, 2008, Missoula County, with less than 48-hrs notice, conducted a public hearing wherein it found that an emergency existed

which required interim zoning, and then the County adopted interim zoning to preclude Liberty Cove from removing materials from its property pursuant to a written contract between Liberty Cove and JTL Group, Inc., now known as “Knife River, Inc.”

Missoula County’s interim zoning resolution was appealed to the Montana Fourth Judicial District Court on grounds that there was not proper notice for the zoning hearing, the County’s actions were arbitrary and capricious, and the zoning constituted illegal spot zoning. The Montana Fourth Judicial District Court upheld the interim zoning, ruling that notice was proper, that there was an emergency to justify the zoning, that Missoula County did not act arbitrarily and capriciously in its determination, and that the zoning was not spot zoning. Liberty Cove contends that the District Court erred in its ruling.

III. STATEMENT OF FACTS.

A. General factual background.

Liberty Cove owns an 80-acre tract of agricultural land in Missoula County, along Highway 93, between Missoula and Lolo. CR 6, Page 1. Historically, this property has been used primarily for agricultural purposes. Less than 300 yards from the property, across Highway 93 to the east, there

is a gravel pit and mining operation currently in operation. This gravel pit is depicted on Exhibit A to CR6. A close-up photograph of the gravel pit is depicted on Exhibit B to CR 6.

Liberty Cove's property is bordered by three public roads (Highway 93 to the east; Bird Lane to the north, and Valley Grove on the south. There is also a private driveway providing direct access to Highway 93 – this driveway is centrally located between Valley Grove and Bird Lane. *See*, Exhibit A to CR 6.

On April 28, 2006, Liberty Cove entered into a "Purchase Agreement" with JTL Group, Inc., (now "Knife River") for construction of a lake on Liberty Cove's property. CR 6; Page 2. In the course of constructing the lake, gravel and other minerals would have to be removed. JTL Group contracted for "the right and privilege to explore for, remove, extract, store, prepare, ship and dispose of excavated materials" *See* Exhibit C to CR 6.

In order to dig the lake and remove gravel and other minerals, an open-cut mining permit from the Montana Department of Environmental Quality ("DEQ") was necessary. CR 6; Page 2.

In preparing to apply for a permit from the DEQ, Liberty Cove,

through JTL Group, requested a zoning compliance permit from Missoula County. This permit was granted by Missoula County on March 8, 2006. *See Exhibit D to CR 6.* The issuance of a zoning compliance permit signifies that the proposed use is compliant with any applicable zoning regulations, or if zoning regulations are not in place, that the proposed use is not precluded. The portion of Liberty Cove's property which was going to be mined was unzoned.

JTL Group applied for a mining permit from the DEQ. The application was deemed completed by the DEQ in January of 2007, and approved. *See Exhibit E, ¶¶ 4-6, to CR 6.* Pursuant to statutes then in effect, once the application for a permit was deemed completed and approved, DEQ had 30 days to issue an open-cut mining permit. Unfortunately, this did not happen. CR 6.

Liberty Cove's proposed lake and gravel mining operation was met with hostility by members of the public. Based on public concern, and based on the fact that DEQ had not issued a permit when it was supposed to, Missoula County Commissioners held a meeting on December 19, 2007, to discuss imposing interim zoning against this property, which would preclude the mining operations. CR 6. At that public meeting, the County

Commissioners did not find there was an “emergency” to justify interim zoning, contending that DEQ’s violation of the law was not adequate to justify interim zoning. CR 6, Exhibit F, Page 39.

On May 23, 2008, JTL Group initiated a lawsuit against the DEQ in the Montana First Judicial District Court, Lewis and Clark County, Cause No. BDV-2008-474, seeking a writ of mandamus. JTL Group requested that the District Court order DEQ to issue a permit to JTL Group, since the mining permit application had been reviewed, deemed completed, and approved. There had been other cases in Montana where this type of action had been successful.

In the Lewis and Clark County case, a hearing was scheduled for Monday, June 2, 2008. However, before the hearing on the Writ of Mandamus action was held, Missoula County held another “emergency” Commissioner’s meeting/hearing on Friday, May 30, 2008. There was less than 48-hours notice before the meeting was held. *See* Exhibit G to CR 6. The purpose of the meeting was to discuss interim zoning *again*.

This time, the Missoula County Commissioners reversed their December 19, 2007, decision, and voted to find that there was an emergency:

The application of a permit from the JTL Group, also known as Knife River, constitutes an emergency related to issues of public health, welfare, and safety, because the Board of County Commissioners find a deficiency, or failure, of the regulatory process regarding these issues as promulgated by the State of Montana Department of Environmental Quality and the State of Montana Department of Transportation.

CR 6, Exhibit H, Page 16. The motion was seconded and passed. Once there was a motion to find the emergency, which carried and passed, there was a second motion to adopt interim zoning. This motion passed unanimously, and became effective immediately. A copy of Zoning Resolution No. 2008-066 (with attachments) is attached as Exhibit I to CR 6.

The property included in the interim zoning plan (Exhibit I) included property that was not owned by Liberty Cove. A major subdivision known as "Ponderosa Heights" was included in the interim zoning even though the development had already been approved by Missoula County. CR 6. The interim zoning effectively precluded Ponderosa Heights from developing previously approved commercial lots and multi-family lots. *Id.*

After the zoning was implemented, Paul Rossignol, the main developer of Ponderosa Heights, approached Missoula County to question why his property was included when there was no "emergency" associated

with his property. *See* CR6, Exhibit J, ¶ 12. Mr. Rossignol was assured that the interim zoning did not affect his ability to develop Ponderosa Heights since the subdivision had already been approved by Missoula County. *Id.* at ¶ 13. Missoula County told Mr. Rossignol that it could not lift the interim zoning against his property because they needed it to justify the interim zoning on Liberty Cove's property. *Id.* at ¶ 14. These facts have never been refuted by Missoula County. Therefore, the interim zoning would have to be amended.

On July 30, 2008, Missoula County held another Commissioner's meeting, this time with no notice, and modified Zoning Resolution 2008-066 to re-designate Ponderosa Heights and subject it only to its own restrictive covenants. *See* CR 6, Exhibit J, ¶ 16. The amended interim zoning resolution is Resolution No. 2008-089, and is attached as Exhibit K to CR 6.

B. Procedural background.

On June 26, 2008, Liberty Cove appealed Missoula County's adoption of Zoning Resolution No. 2008-066. On March 3, 2009, the Montana Fourth Judicial District Court entered an Opinion and Order affirming the Missoula County Commissioner's decision. CR 9. The

District Court concluded that the interim zoning statute did not require a local government to adhere to *all* of the procedural requirements set forth in Mont. Code Ann. § 76-3-205, including, but not limited to, the notice requirements.

The District Court affirmed Missoula County's finding of an emergency, ruling that Missoula County validly exercised its discretion in enacting interim zoning because there was an "exigent circumstance" impacting the public health, safety, and general welfare. The District Court disregarded Liberty Cove's claim that the zoning constituted illegal reverse spot zoning, holding that because there was an emergency which justified the interim zoning, then it could not be considered spot zoning.

IV. STANDARD OF REVIEW

A district court reviews administrative decisions by local governments to determine whether their findings of fact were clearly erroneous and whether their interpretation of the law as correct. *Clouse v. Lewis and Clark County*, 2008 MT 271, ¶ 23, 345 Mont. 208, 190 P.2d 1052 (citations omitted). The Montana Supreme Court employs the same standard of review when considering a district court's order affirming the administrative decision. *Id.* (citations omitted). The district court's legal

interpretations are reviewed *de novo*. *Id.* (citations omitted).

V. ARGUMENT

A. Summary of Argument.

Liberty Cove contends that Missoula County's decision to enact interim zoning was arbitrary and capricious, and in violation of existing Montana law. Specifically, Liberty Cove contends that Missoula County was required to follow the notice requirements of Mont. Code Ann. § 76-2-205 before they could implement interim zoning under Mont. Code Ann. § 76-2-206. Since they did not, the zoning is invalid.

Liberty Cove also argues that before interim zoning can be enacted, the governing body must find a justifiable emergency. Here, the mere fact that JTL Group filed a lawsuit hoping to secure an order forcing DEQ to issue an open-cut mining permit is not suitable grounds for declaring an emergency. Finally, when unwrapping the whole package, Missoula County's decision to initiate interim zoning against Liberty Cove's property constitutes illegal reverse spot zoning.

B. **The Missoula County Commissioners did not give proper notice of the hearing for interim zoning -- therefore the zoning is invalid.**

In May of 2008, notice for interim zoning under Mont. Code Ann. §

76-2-206 was governed by § 76-3-205. Mont. Code Ann. § 76-2-206 was governed by § 76-3-205 states that notice of the public hearing regarding the proposed zoning must be published at least once a week for 2 weeks in a newspaper of general circulation within the county. The notice must define the boundaries of the proposed district, the general character of the proposed zoning regulations, the time and place of the hearing, and that the proposed zoning regulations are on file for public inspection with the clerk and recorder's office. *Id.* at § 76-2-205(1)(a) - (d).

In this case, there was nothing “published” that would constitute a “notice” by Missoula County of the interim zoning. Missoula County claims that the Press Release (CR 6, Exhibit G) was the proper notice, but they also admitted that it was only published on their website, and only two days before the hearing. *See* CR 6, Exhibit L. Missoula County also claimed they gave notice because there was a newspaper article written by reporter Chelsi Moy on the morning the hearing was scheduled. CR 6, Exhibit M. Chelsi Moy is not employee of Missoula County, and this article does not comply with the notice statutes.

Missoula County violated the notice requirements on at least 4 counts:

- (1) Missoula County did not publish notice of the hearing once a week for two weeks in a local newspaper, in clear violation of the notice requirements set forth in § 76-2-205(1).
- (2) The press release did not set forth the “boundaries” of the proposed district. In fact, documents depicting boundaries for the proposed zoning were not available for review until the day of the hearing. This is in violation of § 76-2-205(1)(a).
- (3) The press release did not describe the general character of the proposed zoning regulations. This is in violation of § 76-2-205(1)(b).
- (4) The press release did indicate the time and place of the hearing, but it did not state that the proposed zoning regulations were on file for public inspection with the Missoula County clerk and recorder’s office. This is in violation of § 76-2-205(1)(d).

Missoula County does not argue against these points, but instead claims they are not required to follow all of the requirements of § 76-2-205, including the notice requirements. Unfortunately, the District Court agreed.

However, the law says differently. Both the statutes and existing case law require a governing body to follow the notice requirements of

Mont. Code Ann. § 76-2-205 before enacting interim zoning under § 76-2-206. *Bryant Development Association v. Dagele*, 166 Mont. 252, 258, 531 P.2d 1320, 1324 (1975); *Christian, Spring, Sielbach & Associates v. Miller*, 169 Mont. 242, 244, 545 P.2d 660, 661 (1976); Mont. Code Ann. § 76-2-206 (case notes). It has previously been held that failure to comply with the proper notice requirements for interim zoning actually renders the adopted emergency zoning resolution void. *Bryant Development Association v. Dagele*, 166 Mont. at 258, 531 P.2d at 1324.

Missoula County's position was addressed in *Christian, Spring, Sielbach & Associates v. Miller*. In that case a developer brought suit against Powell County to set aside an interim zoning resolution which effectively prevented further work on the developer's subdivision. 169 Mont. 242, 244, 545 P.2d 660, 661 (1976). The developer challenged the County's interim zoning for failure to comply with the notice requirements under statute, based on *Bryant Development Association v. Dagele*. In response, the County argued that due process requirements should not be applied when circumstances are urgent enough for an emergency resolution. *Id.* at 245, 545 P.2d at 662. On appeal, the Supreme Court disagreed and upheld *Bryant*, stating it was the "rule supported by the majority of

authorities.” *Id.*, 545 P.2d at 662. The Court declared the interim zoning regulation “null and void for the failure to observe the proper procedures upon its enactment.” *Id.*, 545 P.2d at 662.

The District Court’s failure to render Missoula County’s interim zoning of Liberty Cove’s property void was erroneous and its interpretation of the law was incorrect. The well established precedent requires a governing body to follow the appropriate notice requirements. Failure to follow the notice requirements renders the zoning void. Liberty Cove is also entitled to its attorney fees in appealing this issue. *Christian, Spring, Sielbach & Associates v. Miller*, 169 Mont. 242 at 246, 545 P.2d at 661.

B. There is no “emergency” to justify interim zoning.

In order to enact interim zoning, there must be an “emergency.” Mont. Code Ann. § 76-2-206. Zoning Resolution 2008-066 states “recent legal decisions in the State of Montana may compel DEQ to issue a permit without the review that is normally carried out by DEQ.” (CR 6, Exhibit I). The sole basis for the “emergency” was the fact that DEQ had failed to timely issue a permit:

[T]he application of a permit from the JTL Group, also known as Knife River, constitutes an emergency related to issues of public health, welfare and safety, because the Board of County

Commissioners find a deficiency, or failure, of the regulatory process regarding these issues as promulgated by the State of Montana Department of Environmental Quality and the State of Montana Department of Transportation.

(CR 6, Exhibit H, P. 16). The District Court found this argument persuasive, and affirmed the finding of an emergency.

The District Court's order, and the interim zoning, have the affect of punishing Liberty Cove for DEQ's failures to follow statutes, and MDT's alleged failures in regard to traffic impacts. The District Court ignored two salient facts:

- (1) DEQ had already reviewed the open-cut mining permit application, it had been deemed completed, and it had been approved;
- (2) Once DEQ was forced to actually issue a permit, then they would still have regulatory responsibilities, as would MDT; and
- (3) Missoula County had already discussed this issue in December 2007, and found that there was *not* an emergency.

The statutes applicable to interim zoning do not define what constitutes an "emergency" to justify interim zoning. In 2002, the Montana

Attorney General opined that an emergency exists if “some exigent circumstance impacting the public health, safety and zoning is required to address the exigency pursuant to Mont. Code Ann. 76-2-203(1). . . .” What constitutes an exigent circumstance warranting interim zoning is fact-bound, and to the discretion of the local governing body. 49 A. G. Op. 23 (2002).

In this case, the fact that the Montana First Judicial District Court *may have* entered an order requiring DEQ to comply with the statutes and issue a permit is not an exigent circumstance sufficient to constitute an “emergency” for purposes of interim zoning. There are no facts to support an emergency. There was no expert testimony suggesting the presence of an emergency. There was no inherent or present danger. There were no facts in the record to suggest that the mining operations themselves would adversely and unreasonably impact public health, safety and welfare. The District Court’s conclusion that there was an emergency sufficient to justify Missoula County’s interim zoning is clearly erroneous and constitutes a misinterpretation of Montana law. Because there is no emergency, the zoning should be considered void.

C. The interim zoning Liberty Cove’s property constitutes illegal spot zoning.

Spot zoning is defined as “the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners.” *Mont. Wildlife Fed. v. Sager*, 190 Mont. 247, 620 P.2d 1189, 1198 (1980), citing *Gutkowski v. Langhor*, 160 Mont. 351, 502 P.2d 1144 (1972). Spot zoning in Montana is illegal.

In this case, Liberty Cove alleges its land was improperly singled out and as a result, it received detrimental and less favorable treatment. This is called “reverse spot zoning.” *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 132, 98 S. Ct. 2646, 2663, 57 L. Ed.2d 631 (1978). Regulations that impose more restrictive treatment on given parcels than is imposed on other parcels in the same zoning district are often characterized as “reverse spot zoning.” *W.R. Grace & Co. v. Cambridge City Council*, 56 Mass App. Ct., 559, 569 (Mass. 2002).

Although Montana has not used the term “reverse spot zoning,” other courts have used the term “spot zoning” as an umbrella to protect against granting special privileges to a particular piece of property, or against imposing restrictions against that property, if such restrictions are not otherwise granted or imposed on surrounding properties in the larger area.

Tolman v. Logan City, 2007 UT App. 260, ¶ 15, 167 P.3d 489, ¶ 15 (Utah 2007). The Utah Court stated spot zoning results in the “creation of these two types of islands.” *Id.*

This particular case is a classic example of spot zoning. There are two components to this argument: (1) Liberty Cove must prove that its property was singled out; and (2) Liberty Cove must show that the restrictions against its property were more severe than other similar properties and operations in the area.

1. Liberty Cove’s property was singled out.

The first issue is whether Liberty Cove’s property was singled out by the interim zoning. The purpose of interim zoning is to “classify and regulate those uses and related matters that constitute the emergency.” Mont. Code Ann. § 76-2-206(2). Therefore, the alleged emergency must apply to all of the property included in the interim zoning. In this case, the only property to which the alleged emergency applies is Liberty Cove’s property. However, more than just Liberty Cove’s property was included in the interim zoning.

Since interim zoning only applies to operations on property that create an “emergency,” it is necessary to separate out those properties

included in Zoning Resolution 2008-066 or 2008-089 which are not subject to the emergency claimed by Missoula County. When we do this, we are left with only one piece of property – Liberty Cove’s. It is therefore clear that Liberty Cove’s property is being singled out.

The District Court did not address this issue and instead ruled that because there was an emergency to justify the interim zoning, then it could not be spot zoning. CR 9, 6:15-19. However, the test for spot zoning is not the presence or absence of an emergency – the test is whether the property is being singled out in the zoning. In this case Liberty Cove’s property was singled out, and therefore the first prong to establish spot zoning has been met.

2. The restrictions on Liberty Cove’s property are more restrictive than on other properties in the “larger area.”

The second prong of spot zoning requires analysis of whether the zoning is more restrictive than other uses within the larger area. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 132, 98 S. Ct. 2646, 2663, 57 L. Ed.2d 631 (U.S. 1978); *W.R. Grace & Co. v. Cambridge City Council*, 56 Mass App. Ct., 559, 569 (Mass. 2002); *Tolman v. Logan City*, 2007 UT App. 260, ¶ 15, 167 P.3d 489, ¶ 15 (Utah 2007).

Prior to the interim zoning adopted by Missoula County, Liberty Cove's property was unzoned. Because there were no restrictions, Liberty Cove, through JTL Group, was granted a zoning compliance permit. Therefore, Missoula County's interim zoning imposed restrictions on Liberty Cove's property that previously did not exist and are more restrictive than adjacent or nearby properties.

To the immediate south of Liberty Cove's property, still on the west side of Highway 93, there is a veterinarian clinic. South of the clinic there is a church. South of the church there is a Exxon gas station, convenience store, and casino. Liberty Cove cannot use its property for any of these types of pre-existing activities.

The coup de grâce example of spot zoning in this case is the fact that directly across the highway from Liberty Cove's property there is a gravel pit already in existence and in operation. This pit is between the highway and the Bitterroot River. Yet, Liberty Cove is not allowed to mine gravel from *its* property. This is unreasonable, and is more restrictive than other uses in the area. This fact went virtually ignored by the District Court.

3. Missoula County had already approved Liberty Cove's proposed gravel mining.

Before development can occur in Missoula County, the developer must apply for a zoning compliance permit. This fact was not refuted by Missoula County in the District Court proceedings. The application process requires County officials to review the proposed development through the lens of any applicable zoning regulations against the property begin developed. If the development is authorized under the zoning regulations, or if there are no regulations precluding the proposed development, a zoning compliance permit is issued.

In this case, before Missoula County adopted interim zoning to prohibit Liberty Cove's development of its property, it had already issued a zoning compliance permit. Liberty Cove contends that enacting interim zoning against property which had previously been granted a zoning compliance permit constitutes a double-standard, and is further evidence of spot zoning. Because Liberty Cove was granted a zoning compliance permit by Missoula County, any subsequent interim zoning is *ex post facto*, and should not apply to Liberty Cove's property.

4. Missoula County previously denied a residential use of the property.

In 2003, Missoula County denied Liberty Cove the ability to

construct residences on this property because they believed it would increase traffic and cause problems with access. In this case, Missoula County conceded that traffic concerns were a “very real part of the rejection of the residential subdivision.” CR 6, Exhibit H, Page 16.

In May 2008, however, Missoula County restricted Liberty Cove’s property to single-family residences, in an effort to stop Liberty Cove’s proposed mining operations. Representatives of the Missoula County Attorney’s office cautioned the Commissioners against enacting something that would not be legal, but the interim zoning was enacted anyway. *See* CR 6, Exhibit F, Page 35. These comments were made at the December 2007 public meeting.

Missoula County cannot have it both ways. They cannot deny a “residential subdivision” based on their concerns over traffic, and then a few years later, when it suits their purposes, actually zone the property residential to preclude other development, still claiming the same traffic concerns. This is further indicative of spot zoning.

VI. CONCLUSION.

Appellant contends that Appellee engaged in unlawful, arbitrary, and capricious conduct in enacting Zoning Resolution 2008-066, and its

amendment, 2008-089. Missoula County failed to follow the statutory guidelines for notice. The District Court's approval of this failure was in error, and the District Court's Opinion and Order should be reversed.

Further, the District Court's conclusion that there was an emergency to justify the interim zoning is unsupported by the facts and by the law. The potential for a government entity to be forced by a District Court to issue an open-cut mining permit for an application which was already approved is not sufficient to justify an emergency.

Finally, the District Court's conclusion that there was no illegal spot zoning is in error. The unrefuted evidence shows Liberty Cove's property was singled out specifically to stop the gravel mining, and this restriction is harsher and more restrictive than other property surrounding it. Missoula County's actions depict a bias towards factually unsupported public opinion over the development of this real property. For these reasons, the District Court's Opinion and Order dated March 3, 2009, should be reversed and Zoning Resolution 2008-066, and its amendment, 2008-089 should be rendered void as a matter of law. Liberty Cove should be entitled to its attorneys fees in appealing Missoula County's decision to the District Court and in filing the current appeal to the Supreme Court.

VIII. JUDGMENT/ORDER APPEALED FROM. (See attached).

DATED this 25 day of June, 2009.

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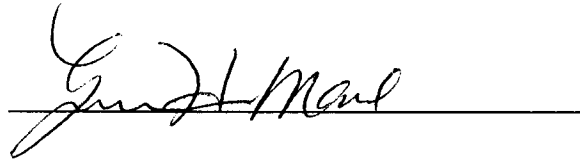
By: 

Cory R. Gangle

CERTIFICATE OF SERVICE

The undersigned does hereby certify, under penalty of perjury, that on the 25th day of June, 2009, a true copy of the foregoing document was served by mail to the following individual(s) by depositing a copy of the same in the U.S. Mail, postage prepaid thereon, addressed as follows, unless otherwise indicated below:

D. James McCubbin
Deputy County Attorney
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Missoula County Attorney
200 West Broadway
Missoula, MT 59802



CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that pursuant to Montana Rules of Appellate Procedure, Rule 27(d)(iv), the Appellant's Brief is:

- Proportionally spaced, 14 pt and contains 4380 words.
- Does not exceed 10,000 words (opening and answering briefs) or 5,000 words (reply briefs).

Dated this 25th day of June, 2009.



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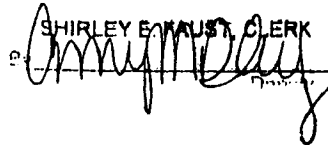
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JUDGMENT/ORDER APPEALED FROM

1 John W. Larson, District Judge
2 Fourth Judicial District Dept. 3
3 Missoula County Courthouse
4 Missoula, MT 59802
5 (406) 258-4773

FILED MAR 03 2009

SHIRLEY E. KAUST, CLERK



6 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

8 LIBERTY COVE, INC.,

Dept. 3
Cause No. DV-08-805

9 Appellant,

10 vs.

**OPINION AND ORDER
AFFIRMING MISSOULA COUNTY
COMMISSIONERS' DECISION**

11 MISSOULA COUNTY,

12 Appellee.

13
14 Before the Court is Liberty Cove's Appeal of Missoula County
15 Commissioners' Resolutions No. 2008-066 and 2008-089. Briefs have been
16 filed and the matter is now ready for decision.
17

18 **Background**

19 Liberty Cove owns eighty acres of property that is located south of
20 Missoula along Highway 93 north of Lolo, Montana. Appellant requests that
21 this Court set aside Missoula County Board of Commissioners' Zoning
22 Resolution No. 2008-066, and its amendment, 2008-089, which placed
23 single-family residential restrictions upon Liberty Cove's property and, in
24
25
26

1 turn, banned gravel pits for one year. Prior to the interim zoning adopted by
2 Missoula County, Liberty Cove's property was unzoned.

3 Standard

4 Pursuant to Mont. Code Ann. 76-2-110 "any person aggrieved by any
5 decision of the commission or the board of county commissions may, within
6 30 days after such decision or order, appeal to the district court in the county
7 in which the property involved is located." A county's decision is generally
8 an administrative decision, and therefore such decisions are reviewed by the
9 District Court to determine whether the findings of fact are clearly erroneous
10 and whether the agency correctly interpreted the law. *Clouse v. Lewis and*
11 *Clark County*, 2008 MT 271, ¶ 23, 345 Mont. 208, ¶ 23, 190 P.2d 1052, ¶
12 23. Courts review challenges to a governing body's decision for an abuse of
13 discretion. *North 93 Neighbors, Inc. v. Bd. Of County Comm'rs*, 2006 MT
14 132, ¶ 18, 332 Mont. 327, ¶ 18, 137 P.3d 557, ¶ 18 (citations omitted). The
15 Court must examine an agency's decision to see whether it could be
16 characterized as arbitrary or capricious based on the agency's consideration
17 of relevant factors and whether there has been a clear error of judgment.
18 *North Fork Preservation Ass'n v. Department of State Lands*, 1989 Mont.
19 Lexis 215, 238 Mont. 451, 465, 778 P.2d 862, 871.

Discussion

1 Appellant argues that Missoula County Board of Commissioners did
2 not give proper statutory notice for adopting the interim zoning regulations
3 per Montana Code Ann. § 76-2-205. Appellant also argues that the Board's
4 adoption of the interim zoning regulation was improper because it was
5 inconsistent with the prior zoning compliance permit already issued by the
6 County. Appellant argues that the County acted arbitrarily to convert
7 Appellant's unzoned property to residential to prevent alleged traffic
8 concerns when it previously denied a residential use of the property in 2003
9 for the same reasons. Appellant argues that there was no emergency as
10 contemplated by the Legislature when they enacted Mont. Code Ann. § 76-
11 2-206 to justify the interim zoning in this case. Finally, Appellant argues that
12 the County engaged in illegal reverse spot zoning since the only emergency
13 alleged in this case applied to Appellant's property and not the other
14 properties surrounding it.
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20 Missoula County argues that the Board validly exercised discretion in
21 its finding that an emergency existed due to a lack of substantive
22 environmental review for the proposed mining operation and regulatory
23 oversight with respect to traffic safety. The County argues that the interim
24 zoning resolution also conformed to the requirements of Mont. Code. Ann.
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1 § 76-2-206. The County argues the Board is not estopped by the Board's
2 prior zoning compliance form because the Montana Department of
3 Environmental Quality (DEQ) has the authority to approve proposed mining
4 operation. The County argues that a prior denial of a subdivision based
5 upon traffic safety concerns is consistent with its continuing traffic safety
6 concerns regarding the proposed gravel pit. Finally, Missoula County
7 argues that the doctrine of reverse spot zoning has not been adopted in
8 Montana, and Appellant has not cited any cases where emergency zoning
9 has been found to be prohibited by the doctrine of reverse spot zoning.
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12 Pursuant to M.C.A. § 76-2-206,

- 13
- 14 (1) The board of commissioners may adopt an interim zoning map or
15 regulation as an emergency measure in order to promote the public
16 health, safety, morals, and general welfare if:
17 (a) the purpose of the interim zoning map or regulation is to
18 classify and regulate those uses and related matters that
19 constitute the emergency; and
20 (b) the county:
21 i. is conducting or in good faith intends to conduct studies
22 within a reasonable time; or
23 ii. has held or is holding a hearing for the purpose of
24 considering any of the following:
25 (A) a growth policy;
26 (B) zoning regulations; or
(C) a revision to a growth policy, to a master plan, as
provided for in 76-1-604(6) and 76-2-201(2), or to
zoning regulations pursuant to this part.
- (2) An interim resolution must be limited to 1 year from the date it
becomes effective. The board of commissions may extend the
interim resolution for 1 year, but not more than one extension may
be made.

1 Here, On May 28, 2008, the Missoula Board of County Commissioners
2 issued a press release regarding the proposed interim zoning meeting. See
3 Appellant's Brief Exh. G. On May 30, 2008, the Missoulian published a story
4 entitled "County weighs zoning north of Lolo: Commissioners want to
5 ensure proper studies, improvements required for controversial gravel pit"
6 and a public meeting also was held on the same day. See Appellant's Brief
7 Exh. M. Other Montana District Courts have reasoned that procedures
8 required for permanent zoning are not applicable, in their entirety, to interim
9 zoning. *Farley v. Big Horn County*, 2003 MT ML 2582, ¶ 20. As such, this
10 Court has determined that the County did meet applicable procedural due
11 process requirements and gave affected landowners effective notice and an
12 opportunity to be heard regarding the proposed interim zoning resolution.
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17 The interim zoning statute, M.C.A. § 76-2-206, does not require local
18 government to follow all the procedural requirements set forth in adopting
19 land use regulations per M.C.A. § 76-2-205. *Fasbender v. Lewis*, 2007
20 Mont. Dist. LEXIS 509, ¶ 13, 15. Interim zoning to address an emergency is
21 expressly authorized by M.C.A. § 76-2-206. Specifically, the interim zoning
22 regulation states "recent legal decisions in the State of Montana may compel
23 DEQ to issue a permit without the review that is normally carried out by
24 DEQ" and that "MDT will not be able to require traffic control measures
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1 during the operation of the pit that will adequately protect public health and
2 safety." See Exh. I to Appellant's Brief. This Court has determined the
3 Board validly exercised its discretion in enacting interim zoning as they
4 determined based on the facts before them that an interim measure was
5 needed to resolve an exigent circumstance impacting the public health,
6 safety, and general welfare.
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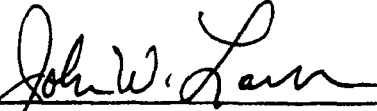
8 The Court also has determined that the zoning compliance form dated
9 March 8, 2006 does not interfere with the County's decision to enact an
10 emergency interim zoning regulation. See Exh. D to Appellant's Brief.
11 Additionally, this Court is not persuaded that a prior decision denying
12 residential use of the property is relevant to whether there was a current
13 need for interim zoning regulation. Finally, this Court does not find the
14 County's interim zoning to be an instance of illegal spot zoning as this Court
15 has already determined that a reasonable emergency existed to enact the
16 interim zoning.
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20 This Court has determined that the Board's findings were not clearly
21 erroneous, nor was the law misapplied. Thus, this Court has determined
22 that the Commissioners Resolution Number 2008-066 and the amendment
23 Resolution Number 2008-089 were neither arbitrary nor capricious.
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For the foregoing reasons,

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2 IT IS HEREBY ORDERED that the Appeal is denied and the County
3 Commissioners' decision is affirmed.

4 DATED this 3rd day of March 2009.

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7 _____
8 JOHN W. LARSON, District Judge

9 Copies of the foregoing were sent to:

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