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**IN THE SUPREME COURT OF THE STATE OF MONTANA**Cause No. DA 18-0366

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**COMMUNITY ASSOCIATION FOR NORTH SHORE  
CONSERVATION, INC., a Montana Nonprofit Mutual Benefit  
Corporation,**

Plaintiffs and Appellee,

vs.

**FLATHEAD COUNTY and its BOARD OF COUNTY  
COMMISSIONERS, a Political Subdivision of the State of Montana**  
Defendant and Appellee**JOLENE DUGAN,**

Intervenor and Appellant.

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On Appeal from the District Court for the Eleventh Judicial District, Flathead  
County, Montana  
Cause No. DV-15-121B  
Hon. Robert B. Allison

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**APPELLEE FLATHEAD COUNTY'S BRIEF IN RESPONSE TO  
APPELLANT JOLENE DUGAN'S OPENING BRIEF**

\* \* \* \* \*

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**STATEMENT OF THE CASE**

Defendant and Appellee Flathead County files this brief in response to Intervenor’s Opening Appellant’s brief (in this brief, Appellant Intervenor shall be referred to as “Dugan.”) The center of this controversy is a bridge connecting the main shore of Flathead Lake to a nearby island, close to the community of Bigfork, Montana. *Dugan’s Appendix #1*, page 3. Flathead County issued a permit for the bridge through a summary review procedure, after the Board of Flathead County Commissioners (“Board”) determined the bridge would have “minimal or insignificant impact” upon such recommendation from the Flathead County Planning and Zoning Office (“FCPZO”). *Dugan’s Appendix #1*.

At the District Court, Plaintiff CANSC (“CANSC”) prevailed in its request the lakeshore permit issued by Flathead County be voided and the lakeshore be restored to its natural condition. *Dugan’s Appendix #1*, p. 9. The District Court concluded the review of the regulatory and statutory criteria and the determination by the Board the bridge would have a minimal or insignificant impact was arbitrary and capricious. *Dugan’s Appendix #1*, p. 9. Rather than remanding to the Board for further consideration and to be sent to the Planning Board for review, the District Court voided the permit. *Dugan’s Appendix #1*, p. 11.

In a subsequent clarifying ruling, the District Court determined the statute requires Dugan, the party who undertook the work, to restore the lakeshore. *Dugan’s Appendix #2*, p. 4. The District Court deemed the future role of Flathead County would be to ensure compliance with the regulations and issue a permit to Dugan for the work of removing the bridge, since the removal of the bridge and restoration of the site also constitute work within the area subject to County regulations. *Dugan’s Appendix #2*, p. 4. The District Court ruled (or declined to rule), on numerous other motions raised by the parties. *Dugan’s Appendix #1*, p. 5. In a subsequent order, the District Court denied Plaintiffs’ request for attorneys’ fees. *Dugan’s Appendix #3*. Appellee Flathead County will respond to the Cross-Appellant’s appeal on the attorneys’ fees issues in a separate brief.

At this stage, Flathead County does not appeal the final decision of the District Court pertaining to the issuance of the permit. Although Flathead County aligned with Dugan on many issues at the District Court level, it disagrees with some of the arguments Dugan raises and addresses those here. Primarily, since this case is apparently one of first impression before this Honorable Court, Flathead County responds in an attempt for clarification in processing future lakeshore permits.

### **STATEMENT OF FACTS**

The Flathead County Planning and Zoning Office (FCPZO) received an application from Dugan on January 17, 2011 for a Lakeshore Construction Permit for an “access bridge” across the open water of Flathead Lake. The application was numbered FLP-11-02. *Dugan’s Separate Appendix #8*, p. 41 of 89. Former FCPZO Planning Director BJ Grieve prepared a “Memo to File” regarding the application. *Dugan’s Separate Appendix #8*, p. 41 of 89. In the memo, Mr. Grieve describes the application would undergo the summary review procedure per Section 3.2(C)(a) of the Flathead County Lake and Lakeshore Protection Regulations (FCLLPR). *Dugan’s Separate Appendix #8*, p. 42 of 89. Grieve articulated in the memo “[I]t is important to note here that the Planning Director’s initial considerations are ONLY to determine appropriate procedure and do not preclude the governing body from ultimately determining that the impact of the

proposed structure may be significant.” *Dugan’s Separate Appendix #8*, p. 43 of 89.

On March 16, 2011, the Board convened to consider the permit application. The hearing was included on the Board’s agenda and was open to the public. Present at the meeting were County Commissioners Jim Dupont and Pam Holmquist, FCPZO staff Bailey Minnich and BJ Grieve, and the technical representative for the applicant Olaf Ervin. *Dugan’s Separate Appendix #8*, p. 56 of 89. No other members of the public were present. *Dugan’s Separate Appendix #8*, p. 56 of 89. At the March 16, 2011 meeting, the Commissioners posed questions to Minnich about the review procedure and to Ervin about the application. *Dugan’s Separate Appendix #8*, p. 58-59 of 89. Thereafter the Board granted approval of Dugan’s application subject to standard conditions stemming from the regulations. *Dugan’s Separate Appendix #8*, p. 60 of 89.

The Board granted Dugan extensions on permit FLP-11-02 on December 8, 2011; February 6, 2013; January 6, 2014; January 26, 2015; and March 16, 2015. *DKT 68*. Such extensions are typical. On March 16, 2015, the Board approved an amended permit submitted by Dugan, which proposed to add length to the bridge and remove some of the pilings. *Dugan’s Separate Appendix #8*, p. 80-81 of 89. The amendment approval included an additional condition which required Dugan to assume all risk associated with removal and restoration of the lakebed,



recognizing the bridge was subject to pending litigation. *Dugan's Separate Appendix #8*, p. 81 of 89.

### **SUMMARY OF ARGUMENT**

Although it did not prevail at the District Court level, Flathead County is not appealing the District Court's final order. In this response, Flathead County seeks to correct or argue against erroneous positions advanced by Dugan which misconstrue the Lakeshore Protection Act and the Flathead County regulations. Moreover, Flathead County argues Dugan did not obtain a vested right in the bridge and the completed construction of the bridge does not moot the issue.

### **ARGUMENT**

#### **II. STANDARD OF REVIEW**

The standard of review in appeals from a District Court's grant of summary judgment is *de novo*. *Kullick v. Skyline Homeowners Assoc.*, 2003 MT 137, ¶ 13, 316 Mont. 146, 69 P.3d 225. This Court reviews a District Court's conclusions of law to determine whether they are correct. *Kullick*, ¶ 13.

Since the Lakeshore Protection Act does not contain a standard of review, the District Court relied upon the Montana Administrative Procedure Act (MAPA) and review of agency decisions as providing a comparable analogy. In so doing, the District Court concluded the "arbitrary and capricious" standard was most appropriate. *Dugan's Appendix #1*, p. 6. The standard for determining whether

a decision was arbitrary or capricious is whether the decision appears “random, unreasonable or seemingly unmotivated, based on the existing record.” *Hobble Diamond Ranch, LLC v. State*, 2012 MT 10, ¶ 24, 363 Mont. 310, 268 P.3d 31.

**III. The Lakeshore Protection Act and Flathead County regulations provide the procedure for Flathead County’s actions in granting the permit.**

The Lakeshore Protection Act (the “Act”) is contained in Montana Code Annotated Title 75, Chapter 7, Part 2. The policy of the Act provides: “local governments should play the primary public roles in establishing policies to conserve and protect lakes.” Sec. 75-7-201, M.C.A. The Act requires local governing bodies to adopt regulations in the form of criteria for denying or granting permits for work in lakes. Sec. 75-7-207, M.C.A. Moreover, the Act states “the local governing body may provide a summary procedure to permit work which it finds has a minimal or insignificant impact on the lakeshore.” Sec. 75-7-207(3), M.C.A.

Flathead County adopted its own Lake and Lakeshore Protection Regulations (the “regulations”) in April 1982, with various amendments. The pertinent regulations are included in part as an appendix to this brief. The regulations include the summary review procedure authorized by the Act:

### 3.2 APPLICATION PROCEDURE

- A. An applicant shall file an application with the County Planning Office or other agent as designated by the Flathead County Commissioners.
- B. An application is deemed as accepted when the complete application and fee are presented.
- C. The planning staff shall review the application and other information for compliance with the requirements of these regulations and, based on this review, shall process the application as follows:
  - a. Projects will receive *summary review* (Section 3.3) if the project is in compliance with the construction requirements and design standards of these regulations or if proper design modifications and necessary conditions can be incorporated into the project to bring it into compliance.
  - b. *If the planning staff or governing body determines* that a project will create a *significant impact* to the lake or lakeshore protection zone, the application will be forwarded to the Planning Board for review and recommendation (Section 3.4) *prior to forwarding the application to the governing body for final action* (Section 3.3).

The review procedure is described in section 3.3:

### 3.3 REVIEW PROCEDURE

- A. The governing body shall review the application, other information and the planning staff findings and recommendations *in order to determine whether the proposed project will have a minimal or a significant impact on the lake, lakebed or its lakeshore.*
- B. *If the governing body determines that the proposed project may have a significant impact on the lake, lakebed or lakeshore, or; the project will require a major variance pursuant to Section 5.1, B.2 of these regulations, it shall first seek a recommendation from the planning board for review in accordance to Section 3.4 of these regulations.*

C. The governing body, based on its findings, shall approve, conditionally approve or deny the application.

Simply, a summary review procedure is triggered if the design and construction standards are met. Thereafter, planning staff and the governing body make a determination as to whether the project would cause a significant impact requiring review by the Planning Board before final action by the governing body.

In addition, the regulations also include an “Administrative Permit” for specific projects:

### 3.5 ADMINISTRATIVE PERMIT PROCEDURE

- A. Certain activities and projects, by their very nature, when constructed within the approved design guidelines as found in Section 4.2-4.3 of these regulations are found to have an insignificant impact on the lake and lakeshore, the planning director may issue an administrative lakeshore construction permit for the following activities when (a) the Director finds in each specific case that the proposed activity or activities will have an insignificant impact on the lake or lakeshore and (b) said activities comply with Section 4.2 and 4.3 of these regulations:

Single residential docks,  
Waterlines,  
Rip rap,  
Free-standing pilings adjacent to dock,  
Ground mounted decks,  
Walkways, and  
Shorestations.

The bridge at issue did not qualify for an administrative permit, but was forwarded to the Board as the governing body for a determination of minimal or significant impact.

**IV. Flathead County is not appealing the District Court's ruling overturning the Board's decision the construction of the bridge would have a minimal or insignificant impact.**

**a. Dugan errs in arguing the Board was "required" to grant summary approval pursuant to the regulations.**

Dugan makes several erroneous statements in her opening brief regarding the summary review and approval process. Specifically, Dugan states:

The procedure allowed by 75-7-207(3) MCA required that the commissioners find minimal or insignificant impact to provide summary approval. The regulations required summary approval if the project complied or could be modified to comply with the construction requirements and design standards. If the project met those requirements, it had a minimal or insignificant impact. This project met those requirements.

*Dugan's Opening Brief, pp. 8-9. Emphasis in original.*

Flathead is empowered to establish criteria for the issuance of permits for work within the lake or lakeshore (LPZ) and is required to have a summary procedure for work it finds to be of minimal or insignificant impact.

*Dugan's Opening Brief, pp. 12-13.*

Dugan misstates the process. Rather, the regulations require construction requirements and design standards be met as a prerequisite to sending the

application to the governing body for a determination of minimal or insignificant impact through a summary review. A finding of minimal or insignificant impact (and therefore summary approval) is not guaranteed simply by an applicant showing the project meets the design standards. Moreover, *any application* for a Lakeshore permit must satisfy the criteria listed in Section 4.1, Policy Criteria for Issuance of Permit:

#### 4.1 POLICY CRITERIA FOR ISSUANCE OF A PERMIT

The proposed action shall not, during either its construction or its utilization:

- A. Materially diminish water quality;
- B. Materially diminish habitat for fish or wildlife;
- C. Interfere with navigation or other lawful recreation;
- D. Create a public nuisance;
- E. Create a visual impact discordant with natural scenic values, as determined by the governing body, where such values form the predominant landscape elements; and,
- F. Alter the characteristics of the shoreline.

In addition, Flathead County is not required to have a summary review procedure although it has adopted one. Rather, the statute is permissive: “the local governing body *may* provide a summary procedure to permit work...” Sec. 75-7-207(3), M.C.A.

Dugan’s erroneous assertions about the requirements of the statute and regulations should not be ratified by this Court. Although the District Court determined the Board’s review of criteria was insufficient and the granting of the permit arbitrary and capricious, Flathead County followed the appropriate

procedural steps in processing the application. The summary review process implemented by Flathead County should be upheld for future applications pursuant to the statute.

**b. The District Court viewed the “completeness” of the application as related to the overall impact, not a technical definition of completeness.**

Dugan argues the District Court erred in finding the application was incomplete due to not considering connecting roads. Dugan is correct in stating there is not a specific criteria mandating review of connecting roads in the regulations. However, the regulations do state that “any additional information deemed necessary for adequate review may also be required.” Flathead County Lake and Lakeshore Regulations 3.1(E)(2). Read in context, the District Court’s analysis on this point relates to the Board’s overall consideration of “impact.” The District Court indicated the Board could not have fully considered impact without information about roads.

While Flathead County does not support the District Court adding specific criteria to the regulations, the District Court’s misplaced statement the application was procedurally incomplete is harmless error. Flathead County would request this Court not consider the District Court’s dicta as adding specific criteria to the County’s regulations for all permits, but merely acknowledge that in this instance

only, the District Court concluded such consideration was necessary for a determination of the extent of impact as being either minimal or significant.

**c. Flathead County does not appeal the District Court's ruling insofar of its view of the facts.**

While Flathead County argued to the contrary at the District Court level, it is not appealing the final determination. The District Court's ruling stands for itself.

**d. While the Board does not appeal the District Court's determination regarding the status of the bridge as a "road," the Board requests this Court not add criteria to the statute or regulations.**

Dugan argues the District Court erred in disagreeing with Flathead County's conclusion pertaining to the bridge being classified as a road or not. Flathead County is not appealing this issue. However, Flathead County would note several points in Dugan's brief on this issue with which it agrees.

The role of the Court in interpreting statutes is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Sec. 1-2-101, M.C.A. In this scenario, Flathead County was required to apply the "not specifically listed" standard for review set forth in Flathead County Lakeshore Regulation § 4.3 since a bridge/road was not contemplated by the regulations. Moreover, as pointed out by Dugan, the regulations also do not specifically require a showing of internal



roads or future roads as a criteria for review. While Flathead County is not appealing the District Court's ruling, it requests this Court not add on additional criteria to that which was already imposed in the statutes and regulations. On this discrete issue, Flathead County agrees with Dugan. Instead Flathead County argues the Court should view the District Court's ruling on the status of the bridge as a road as part of its determination of minimal or significant impact, not as adding criteria to the regulatory scheme.

**V. Flathead County is not appealing the District Court's rulings on procedural issues.**

**a. Standing and discovery**

The Act provides any "interested person" may petition for review of an action by the governing body. Sec. 75-7-215, M.C.A. The Act does not further define what is meant by "interested person." At the District Court level, Flathead County did not join Dugan's argument the Plaintiff CANSC lacked standing. The District Court determined the case was one for judicial review under the Act.

*Dugan's Appendix # 1, p. 3.* The District Court's order noted:

The parties initially treated the matter as a lawsuit rather than a judicial review. The Court has vacated the non-jury scheduling order governing this case in order to proceed in a proper procedural manner. In a judicial review the district court acts in an appellate capacity. That being said, motions for summary judgment are an appropriate mechanism for deciding the legal questions

in a judicial review as there are not issue of fact to be determined.

*Dugan's Appendix # 1, p. 3.*

Dugan's arguments regarding standing assumes the District Court was treating the lawsuit as standard civil litigation and that standard discovery rules were in effect. However, the District Court noted "with the sole exception of the discovery responses of individual members of the Plaintiff organization for the purpose of establishing standing, the Court has not considered anything outside the stipulated record..." *Dugan's Appendix # 1, ¶ 5.*

"A district court's rulings regarding discovery and control of pretrial and trial proceedings are reviewed for an abuse of discretion." *City of Missoula v. Mt Water Co.*, 2016 MT 183, ¶ 18, 384 Mont. 193, 378 P.3d 1113. Such discretion is considered "broad," and "the appellant must demonstrate that the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason." *City of Missoula*, ¶ 18. Even assuming the appellant has demonstrated an abuse of discretion, the Court will only find "reversible error," if a "substantial right of the appellant is affected." *City of Missoula*, ¶ 18.

Here, the District Court was required to make an interpretation of "interested person" because the Act lacks such a definition. The District Court made a broad interpretation, noting the Plaintiffs' members are residents of "the state who use and enjoy the lake, live in close proximity and recreate on it." *Dugan's Appendix #*

1, ¶ 5. This certainly aligns with the Act's policy statement which observes the importance of "the continued value of lakeshore property as well as to the state's residents and visitors who use and enjoy the lakes." Sec. 75-7-201, M.C.A.

The District Court's determinations regarding discovery and pre-trial matters were at times unclear but not an abuse of discretion amounting to reversible error. The District Court's reliance on unverified interrogatory responses might have been technically incorrect, but does not amount to impacting a substantial right of the appellant. The District Court determined the citizens who comprised CANSC were "interested persons" under the statute. Dugan has not demonstrated such a ruling amounts reversible error.

**b. Statute of Limitations and the Record**

Flathead County did join Dugan in the lower court in arguing the statute of limitations had passed. However, Flathead County has determined not to appeal on this issue. Flathead County does request this Honorable Court make a determination which gives guidance on whether permit extensions toll the statute of limitations in permit applications.

**c. The District Court properly denied Dugan's argument as to mootness and Dugan did not obtain a vested right in the bridge.**

**i. The issue is not moot because Dugan confuses mootness with vested rights and equitable estoppel**

Dugan confusingly conflates "mootness," with vested rights, with

equitable estoppel. Something would be moot if it could not possibly be undone. Here, the bridge can be removed and the statute specifically contemplates restoration. Dugan seems to essentially argue it would be unfair for removal based on the circumstances, which is an equitable estoppel argument. Moreover, Dugan has not obtained a vested right in the bridge.

Dugan's argument a "valid permit" was not required, only a permit, is borderline absurd. *Dugan's Opening Brief*, p. 34. This would mean any time a governing body acted unlawfully in issuing a permit, a permit-holder could claim it was justified in proceeding simply by way of having a permit.

This Court considered a similar equitable estoppel argument in *City of Whitefish v. Troy Town Pump*, 2001 MT 58, 304 Mont. 346, 21 P.3d 1026. In *Troy Town Pump*, the District Court ordered Town Pump to permanently remove neon and fluorescent lighting in an awning pursuant to a permit issued by the City of Whitefish. *Troy Town Pump*, ¶ 3. The City had initially granted approval for the sign as proposed by Town Pump, but, after the sign was installed, the City determined the awning violated the city sign ordinance. *Troy Town Pump*, ¶¶ 7-8. When Town Pump refused to remove the sign at the request of the City, the City filed for injunctive relief. *Troy Town Pump*, ¶ 9.

This Court summed up the argument from *Troy Town Pump*: "Town Pump argues Whitefish should have been precluded from invoking its sign ordinance

after its earlier approval of the Town Pump building plans.” *Troy Town Pump*, ¶ 14. The Court also noted the elements of equitable estoppel, including “(1) conduct, act, language or silence amounting to a representation or a concealment of a material fact....5) the representation must be relied upon by the other party, leading that party to act upon it; and (6) the other party must in fact rely on the representation so as to change its position for the worse,” *Troy Town Pump*, ¶ 15. The Court, in citing another case, noted equitable estoppel is inapplicable when the conduct complained of consists of legal determinations that are later deemed to be mistakes of law. *Troy Town Pump*, ¶ 17.

Although it was the Court’s legal ruling, not a later retroactive determination by Flathead County that invalidated the permit, the same principle applies. The District Court found it was a mistake of law to grant the permit, not a mistake of fact, and therefore equitable estoppel arguments do not apply. Per the District Court, the Board erred by finding no significant impact, which is a legal determination based on facts presented. Equitable estoppel does not apply here.

In addition, Dugan did not obtain a vested right. The Act specifically describes the nature of property rights as viewed by the legislature:

Work or development authorized or approved under this part shall not create a vested property right in the permitted development other than in the physical structure, if any, so developed.

§ 75-7-206, M.C.A.<sup>1</sup>

Dugan was aware of the pending litigation at the time of the extension and at the time it secured a permit through the amended application. *Dugan's Separate Appendix # 8*, p. 78 of 89. Specifically, Flathead County conditioned approval of the amended permit thusly:

14. The bridge project is the subject of pending litigation which may result in court ordered removal. Thus, as a condition of approval of this permit amendment applicant assumes all risk associated with removal and restoration of the lakebed should the Court order such relief as a result of this pending litigation or any other future litigation.

*Dugan's Separate Appendix # 8*, p. 78 of 89.

Dugan was on notice from March 16, 2015, that Flathead County viewed the status of the Dugan's project as potentially tenuous in the eyes the Court. Given the limited case law and interpretation of the Act, with this condition of approval, Flathead County intended to provide Dugan with ample notice of the possibility the action may be voided by the Court.

The Montana Supreme Court has wrestled with the concept of vested rights in previous cases concerning land use. In *Town Pump, Inc. v. Board of Adjustment*, the Court noted "[t]his Court has not previously defined 'vested

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<sup>1</sup> This language is closely mirrored in the Flathead County Lake and Lakeshore Protection Regulations: "Work or development by permit under these regulations shall not create a vested property right in the permitted development, other than in the physical structure, if any, so developed." Chapter 2.3.

interest.’ We have determined, however when a party does not have a vested interest.” 1998 MT 294, ¶ 21, 292 Mont. 6, 971 P.2d 349. In *Town Pump*, this Court considered a lawsuit brought by Town Pump against the Red Lodge Board of Adjustment for denial of a beer and wine application. ¶¶ 9-10. At issue in part, was the retroactive application to changes in the Development Code which impacted the property *Town Pump* had previously entered into an agreement to purchase. ¶¶ 7-11.

As part of its analysis this Court considered whether Town Pump had acquired a vested right, concluding it did not. *Town Pump*, ¶ 23 (“Town Pump did not gain a vested interest merely because it submitted the beer and wine application before the adoption of the Development Code.”) The *Town Pump* Court noted a general rule:

In most jurisdictions it is clear that, as a general rule, the denial of an application for a building permit may be based on a zoning regulation enacted or becoming effective after the application was made, or to state the rule conversely, *a zoning regulation may be retroactively applied to deny an application for a building permit, even though the permit could have been lawfully issued at the time of application.*

*Town Pump*, ¶ 25 (emphasis added).

This Court has also considered the retroactive application of a statutory change to a ranch owner’s application to expand its game farm. *Wallace v. Mont. Dep’t of Fish, Wildlife & Parks*, 269 Mont. 364, 366-67, 889 P.2d 817, 819 (1995). There,

the Wallaces submitted an application for expansion of their game farm while new legislation was being considered. Before the Department was required to act on the application, the new legislation was approved and the Department concluded the Wallaces' application would be processed under the new law. *Wallace*, 269 Mont. at 366, 889 P.2d at 819. The Wallaces applied to the District Court for a writ of mandamus directing the Department to issue the license under the prior law or show cause why it had not done so. *Wallace*, 269 Mont. at 367, 889 P.2d at 819.

This Court analyzed whether the Wallaces had acquired a vested right to receive a game farm license. This Court noted "the conferment of a license...is merely a privilege." *Wallace*, 269 Mont. at 367-68, 889 P.2d at 820 (internal citations omitted). This Court concluded the Wallaces had not acquired a vested right by mere submission of an application. *Wallace*, 269 Mont. at 368, 889 P.2d at 820.

The circumstances in the current case lead to the conclusion Dugan had not gained a vested right in the bridge. Simply because the permit was issued by Flathead County does not preclude a later District Court ruling which invalidates the permit. The statutes specifically allow judicial review of a permit with work completed and contemplates *restoration* of the lakeshore. Sec. 75-7-215, M.C.A.



The concept of restoration implies that work occurred in furtherance of a permit and need be undone.

The case law cited by Dugan does not support her position. Dugan relies on *Seven Up Pete Venture v. Montana* for the argument completion of the permit requirements creates the property right (wherein the Court considered a lawsuit against the State for due process grounds, specifically an unconstitutional regulatory taking) 2005 MT 146, 327 Mont. 306, 114 P.3d 1009. However, in *Seven Up Pete Venture*, the Court only concluded that the “opportunity” to seek a permit did not constitute a property right. *Seven Up Pete Venture*, ¶¶ 32-33.

Contrary to Dugan’s assertions, the Court did not definitively say that once an applicant finishes the permit requirements, he obtains the vested right. Dugan also cites *Germann v. Stephens* for the proposition once the permit requirements are complete the right is vested. 2006 MT 130, 332 Mont. 303, 137 P.3d 545.

However, this Court said nothing so definitive. Instead, the *Germann Court* reiterated since the applicant had yet to obtain a state liquor license at the time the City of Whitefish passed an ordinance prohibiting new establishments that serve liquor without a conditional use permit, she did not have a property interest in operating her business as a bar. *Germann*, ¶ 31. The Court reiterated the receipt of a liquor license is a privilege, not a right, and therefore the applicant was entitled to nothing as a property right. *Germann*, ¶ 31.

In both *Seven Up Pete* and *Germann*, the Court concluded the party had not demonstrated a protected property interest. Dugan's citations to these cases as authority for the proposition that once it is built, it is a vested right, is not supported by the case law.

In *Kiely*, this Court considered whether the plaintiff had a protected property interest as a matter of law, in order to pursue a federal § 1983 claim. *Kiely L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶¶ 23-26, 312 Mont. 52, 57 P.3d 836. The Court emphasized a plaintiff had to demonstrate a protected right before claiming to have lost something, and those rights could be found in state statute: "When a plaintiff looks to state law to provide a basis for a property interest, '[a] reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms.'" *Kiely*, ¶ 27. The *Kiely* Court then analyzed the amount of discretion the governing body had in considering applications under the subdivision regulations. *Kiely*, ¶¶ 30-43. The Court concluded *Kiely* did not have a protected property interest, though it did state, in dicta, that *Kiely* "arguably" could have established a property interest had certain conditions been met. *Kiely*, ¶ 45. However, that issue was not actually before the Court, so arguing the Court made a definitive legal ruling in dicta is inappropriate.

*Kiely* is further distinguishable from the current case because the Court there was interpreting the amount of discretion the governing body had in subdivision regulations. Here, the governing body was considering an entirely different statute, the Lakeshore Protection Act. Moreover, as noted previously, the Act specifically contemplates “restoration” after judicial review.

Dugan further argues the focus in determining vested rights is whether the landowner relied in good faith upon an act of the government and in reliance made a substantial change. *Dugan’s Opening Brief*, p. 32. Dugan’s argument oversimplifies the determination of a vested right. Moreover, the argument completely ignores Dugan’s knowledge of the pending litigation and the condition placed upon the amended permit when arguing “good faith.” Dugan knew the risk of proceeding with building the bridge in spite of the pending litigation and cannot argue she acquired a vested right in good faith reliance on representations from Flathead County.

**ii. The fact the Lakeshore regulations were amended during the pendency of the action does not moot the issue.**

Flathead County also objects to Dugan’s assertion: “The regulations were changed to recognize the exiting (sic) bridge before the court set aside the first permit.” *Dugan’s Opening Brief*, p. 34. The District Court also made reference to the change in the regulations, implying Flathead County changed the rules in an

effort to maintain the permit.<sup>2</sup> To the contrary, while Flathead County did conduct a major revision to its Lake and Lakeshore Protection Regulations, the changes were more a result of the contentious “donut” litigation with the City of Whitefish, wherein jurisdiction of Whitefish Lake and other lakeshores was in dispute for years. A review of the Commissioners’ Minutes on June 29, 2016; July 18, 2016; and July 25, 2016, pertaining to the regulatory changes demonstrates the Board’s primary concern lay with resolving longstanding issues with the City of Whitefish. *Appellee’s Appendix, Board of County Commissioners Minutes June 29, 2016, July 18, 2016, and July 25, 2016.* The Board did discuss the non-conforming use definition change, but primarily in the context of the historic use of structures, and the ability of a property owner to maintain or rebuild something that was destroyed. *Minutes July 18, 2016.* Flathead County recognizes these minutes were not part of the initial administrative record and includes them only for purposes of rebutting the assertion from Dugan that Flathead County changed the regulations to accommodate the bridge.

Dugan made numerous arguments as to the “mootness” of the issue based on the completion of the bridge. None of these arguments are supported in law.

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<sup>2</sup> “The ultimate effect of the Notice of Making Moot and the amended Lakeshore Protection Regulations is to deprive the Court of the option of remanding the permit decision to the Flathead County Commissioners to conduct a property permit review. The commissioners have shown the Court their hand and any remand would be meaningless.” *Intervenor’s Appendix Item 1*, p. 11.

Dugan cannot lay claim to an equitable estoppel argument, nor were vested rights acquired. The issues are not mooted by the passing of new regulations.

**RELIEF REQUESTED**

Appellee Flathead County does not appeal the final determination of the District Court, but by this response requests this honorable Court clarify (and correct) rulings of the District Court.

Respectfully submitted,

/s/ Caitlin Overland

Caitlin Overland

## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing APPELLEES' BRIEF is double spaced, has proportionately spaced typeface of 14 points, and does not exceed 10,000 words as the word count (per the Microsoft Word software used to produce the brief), including this Certificate of Compliance.

/s/ Caitlin Overland

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## **CERTIFICATE OF SERVICE**

I, CAITLIN Ann OVERLAND, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-15-2018:

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