

Donald R. Murray
HASH, O'BRIEN, BIBY & MURRAY PLLP
Attorneys at Law
136 First Avenue West
P. O. Box 1178
Kalispell, MT 59903-1178
(406) 755-6919
dmurray@hashlaw.com

Attorneys for the Plaintiff, Appellee and Cross-Appellant, CANSC

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

COMMUNITY ASSOCIATION FOR NORTH
SHORE CONSERVATION, INC., a Montana
Nonprofit Mutual Benefit Corporation,
Plaintiff, Appellee and Cross-Appellant,

v.

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

and

JOLENE DUGAN,
Intervenor and Appellant.

RESPONSE TO APPELLANT'S MOTION TO STRIKE
(Of Appellee and Cross-appellant, CANSC)

I. INTRODUCTION

The most significant of the materials Appellant seeks to have stricken from CANSC's appendix are those that pertain to the North Shore wetlands on the bridge property. Those will be addressed first. Addressed last will be

CANSC's appendix item 30. As to this item, Appellant's motion is legitimately arguable. As to the other appendix items to which Appellant objects, the Appellant's motion should be denied.

II. DISCUSSION

A. Wetlands and the "LPZ"

The presence of wetlands on the bridge property occupies an important place in the case. The County's *Lakeshore Regulations* provide that wetlands adjacent to lakes are part of the County's jurisdictional "lakeshore protection zone" (LPZ). *Regs.*, p. 45, Chapt. 6, Definition "Lakeshore Protection Zone."¹ The full text of the *Regulations* is included in CANSC's Appendix.² Apdx.15. Since the *Lakeshore Protection Act* charges counties with identifying and protecting their "lake areas" (§75-7-201, MCA), it is important they correctly identify the LPZ. In processing Appellant's permit application for the bridge, the County presumed the LPZ included just the "usual" twenty-foot strip of shoreline above the high water mark, failing to recognize that by definition, the LPZ *included the wetlands*

¹ The definition of the LPZ reads [emphasis added]: "The land area which is within twenty (20) horizontal feet of the perimeter of the lake *and adjacent wetlands* when the lake is at the mean annual high water elevation. . ." *Regs.*, p. 45, Chapt. 6, Definition "Lakeshore Protection Zone."

² Both the Appellant and County include selected provisions from the *Regulations* in their appendices, but neither includes the definition of the "Lakeshore Protection Zone."

adjacent to the Lake. *Permit*, PZO File, p. 68; *Amended Permit*, PZO File, p. 382. While the District Court did not rely on this failure to invalidate the permit (although CANSC raised it; *Amended Complaint*, ¶¶42-49, Dkt.41), it is nonetheless relevant for four reasons.

First, Appellant argues her amended permit allowing her to lengthen the bridge by roughly twenty feet on each end extended the bridge beyond the LPZ. This argument is not only inane, it is based on a flawed assumption. Because the LPZ includes adjacent wetlands, it is not twenty feet but hundreds of feet as shown by the National Wetlands Inventory (Apx.19), the wetlands delineation map of Appellant's own consultant (Apx.17), and other wetlands material Appellant moves to strike.

Second, Appellant argues (endorsing the County's "reasoning" in the planning director's *Memo to File*, PZO File, p. 44, Apx.5) that the bridge is not a road because it does not connect to any public way. This position likewise is not only illogical; it too is based on a flawed assumption. Since Appellant proposes to build a connector road from Holt Drive (a county road) to the mainland terminus of the bridge, the bridge will be connected to a public way. Appendix 21 is a diagram of Dugan's proposed road prepared by Dugan's consultants and submitted by Dugan to the County.

Third, it underscores the fact (as the District Court found but that

Appellant asserts was error) that Dugan’s permit application was incomplete because, among other shortcomings, it did not include connector roads.

Fourth, the material shows that remanding the matter to the County as urged by Appellant (but rejected by the District Court) would be futile – not only for all the reasons relied on by the District Court and cited by CANSC in its brief, but also because according to Appellant’s consulting engineer, the construction of this connector road would require placement of 1,462 cubic yards of fill in the floodplain. PZO File FDP-16-01 (Dugan), Engineer’s (D. Leatzow) March 7, 2016 Ltr., p.1. While the wetlands may not correlate precisely with the floodplain they largely overlap and the *Regulations*, just as they prohibit roads and driveways in the LPZ, prohibit filling in wetlands adjacent to lakes. *Regs.*, p. 30, §4.2F(2)(g) (“Filling of wetlands adjacent to a lake is prohibited.”).³

B. Foundation

Foundation for the wetlands information consists of, among other things, the affidavit of Jack Stanford in support of CANSC’s motion for summary judgment. *Affidavit* (Stanford), Dkt.92. Dr. Stanford is the renowned, recently retired, long-time director of the University of Montana’s Flathead Lake Biological Station at Yellow Bay. As Dr. Stanford

³ Section 4.2F(1)(c) provides the reason for the prohibition.

states, he and his colleagues have studied the Lake and its North Shore extensively. He testifies to the presence of wetlands on Appellant's property, and he testifies to the reliability and wide acceptance of the NWI (National Wetlands Inventory) maintained by the U.S. Fish & Wildlife Service (Apdx.18) and the Montana Natural Heritage Program's wetland mapping (Apdx.19). These are Internet accessible maps that inventory our wetlands as directed by Congress and the Montana Legislature. While not as precise as a field delineation, they are reasonably accurate and relied on by experts in the field of wetlands science. *Affidavit* (Stanford), Dkt.92.

CANSC's Appendix 17 is a map from a wetlands delineation prepared by ***Appellant's own consultant*** that she submitted to the Army Corps of Engineers in connection with her ongoing disputes with the Corps over wetlands on the Eagle Cove subdivision of which her property is the westernmost parcel adjacent to the FW&P North Shore Fisheries Conservation property.⁴ Apdx.26.

C. The "Connector Road" – Appendix 21

CANSC's Appendix 21 is a diagram submitted to the County ***by the Appellant*** as part of a permit application to build a road through the

⁴ Dugan is in litigation with the Corps challenging the Corps' assertion of jurisdiction over the wetlands on Sortino's Eagle Cove subdivision. *Jolene Dugan and Flathead Properties, LLC v. United States Army Corps of Engineers*, Case No. CV 16-80-M-DLC, United States District Court for the District of Montana, Missoula Division.

wetlands on her property to the mainland terminus of the bridge. PZO File FDP-16-01. In her permit application, Appellant's consultant wrote: ". . . Figure 2 shows the layout of the roadway. The immediate purpose of the roadway is to provide access between Holt Drive over the bridge to the island . . ." "Figure 2" is CANSC's Appendix 21, which is available in the County's planning office (PZO File FDP-16-01). It was prepared and submitted to the County by the Appellant.

D. Edited Transcript – Appendix 9

Appendix 9 is the verbatim transcript of the Commissioners' meeting at which they approved the permit with only the comments of the Commissioners. Redacted are the comments of the planning office staffer and Appellant's consultant, the only others present at the meeting besides the two commissioners and planning director (who said nothing). The complete transcript of this seventeen-minute meeting is also included in CANSC's Appendix. Apdx.8. The edited version, the length of which is slightly more than a single page, is meant to assist the Court as contemplated by Rule 12(5), M.R.App.P. It highlights the dearth of consideration given the application by the Commissioners and rebuts Appellant's assertion that the Commissioners did – contrary to the finding of the District Court –

consider the visual impacts of the bridge. *Order and Rationale*, p. 8, ln. 23, Dkt.145, Apdx.1.

E. Media Items – Appendix 27, 28 and 29

These are photographs (Apdx.27) of the bridge from several different sources, exchanged by the parties in discovery. There has been no suggestion they do not accurately depict the bridge and that which they purport to show. Appendix 28 and 29 are print media articles in which the County’s planning director is quoted and to which reference is made in CANSC’s brief. The *Daily Interlake* article (Apdx.29) appears in the PZO file, which is part of the record in the District Court. PZO File, p. 120, Dkt.100.

F. “The List” – Appendix Item 30

Appendix 30 is a condensed list of the positions taken by the County that CANSC asserts were outside the bounds of legitimate argument, supporting CANSC’s claim for attorney’s fees under §25-10-711, MCA. These “positions” can be found in various forms in various places throughout the record and in CANSC’s brief, but CANSC felt that to assist the Court (as contemplated by Rule 12(5), M.R.App.P.) in evaluating its claim under §25-10-711, MCA, it would be beneficial to have assembled in one place a concise list of the alleged offending positions. Space constraints

precluded CANSC from including this list in Section II of its *Cross-appeal Brief*.

RESPECTFULLY SUBMITTED, this 11th day of January, 2019.

HASH, O'BRIEN, BIBY & MURRAY PLLP

Electronically signed by

/s/ Donald R. Murray

By: Donald R. Murray

136 First Avenue West

P.O. Box 1178

Kalispell, MT 59903-1178

Attorney for the Appellee and Cross-Appellant, CANSC

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16, M.R.App.P., I hereby certify that this *Response* is printed with proportionately spaced Times New Roman typeface of 14 points (footnotes are 12 points), is double spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Mac is not more that 1,250 words, excluding the caption, signature block, this *Certificate of Compliance* and the *Certificate of Service*.

Electronically signed by

/s/ Donald R. Murray

By: Donald R. Murray

CERTIFICATE OF SERVICE

I, Donald R. Murray, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 01-11-2019:

Richard P. DeJana (Attorney)
120 4th Street West
P.O. Box 1757
Kalispell MT 59903
Representing: Jolene Dugan
Service Method: eService

CAITLIN Ann OVERLAND (Attorney)
820 S Main Street
Kalispell MT 59901
Representing: Flathead County Board of County Commissioners, Flathead, County of
Service Method: eService

David William Randall (Attorney)
820 South Main Street
Kalispell MT 59901
Representing: Flathead County Board of County Commissioners, Flathead, County of
Service Method: eService

Shiloh Silvan Hernandez (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Montana Environmental Information Center
Service Method: eService

John F. Lacey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Montana Trial Lawyers Association
Service Method: eService

Tara Renee Fugina (Attorney)
820 South Main Street
Kalispell MT 59901
Representing: Flathead County Board of County Commissioners, Flathead, County of
Service Method: Conventional

Electronically signed by Lacie L. Hill on behalf of Donald R. Murray
Dated: 01-11-2019