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, Appellee and Cross-Appellee

JOLENE DUGAN,
Intervenor and Appellant.

APPELLANT'S REPLY BRIEF

An appeal from the decision of the Honorable Robert Allison sitting in the Eleventh Judicial District, in and for the County of Flathead, under the above caption and Cause No. DV-15-121B

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ISSUES PRESENTED

Dugan adopts the issues as stated in her principle brief with the following addition.

4. Is CANSC entitled to an attorney fees award against Dugan?

STATEMENT OF THE CASE/FACTS

Dugan adopts the Statements of the Case and Facts as stated in her principle brief.

STANDARD OF REVIEW

As Dugan previously stated, the proper standard of review to be applied by this Court and which should have been applied by the lower court is: "*Whether the commissioners' decision, after being given due deference, is so lacking in fact and foundation that it is clearly unreasonable (arbitrary and capricious) and were the commissioners' legal conclusions beyond the range of reasonable interpretation permitted by the wording.*

ARGUMENT SUMMARY

This Court must ignore CANSC's arguments made by incorporation rather than in its brief. It further should recognize that the "replacement permit" can place no obligation on Dugan if it is void.

The court failed to give proper deference to Flathead's interpretation of its own

regulations, misconstrued regulations and substituted its own "facts" for those of the commissioners. Here, the application did not miss some statutory requirement expanding the inquiry. The application disclosed a private use of the bridge. There was no need to inquire about any expanded use. The decision to seek more information baring a statutory mandate rests with the commissioners. The jurisdiction to inquire is limited to 20 feet above the median high water mark.

The court contrary to the law found it offensive that Commissioner Dupont used his own knowledge to supplement the record. The court itself became a rule of one man and not the law by doing so. The finding of insignificant impact was supported by evidence that the project met the design standards and had an insignificant impact. It was not for CANSC or the court to substitute their judgment.

The court lacked authority to change a reasonable consistent interpretation of the term "road." It also lacked authority to require a road be built over Dugan's property to the bridge.

The court did not follow the law in determining standing. It relied upon unverified interrogatory answers. There was no evidence offered or even an allegation made that any member of CANSC suffered an "an injury in fact."

Dugan argued either the statute of limitations ran or the court looked at each amendment to be a restart of the time. If the latter is the case, as CANSC argued, then

it is clear the court failed to abide by a consistent record. This expanding and shrinking record was itself a denial of a fair hearing.

Dugan acquired a vested right in the bridge based upon 75-7-206 MCA and Reg. §2.3. The regulation change reinforced the mootness of the case since Dugan acquired a vested right in the bridge arising before the regulation change.

The order of removal of the bridge was based on "the commissioners showing their hand." There was no basis for such a punitive ruling. This leads us to the realization the court in numerous ways acted in an arbitrary and captious manner.

Finally, Dugan will address the taking ramification of PAG if applied against the innocent land owner.

ARGUMENT

Introduction

This Court should strike and not consider those arguments made by CANSC where it incorporates lower court arguments or CANSC Apdx 30 by reference. These occur in CANSC's brief at pages: 17 (*Brief in Support*),18 (ibid), 23 (Response Brief), 24-25 (*Response to Intervenor's Motion*), pg 40 (*Brief in Support*; Reply Brief) and pg43 ("*shorthand list").*

CANSC is circumventing this Court's page limitations. Such arguments should be stricken and ignored by this Court and the parties. ***Murphy Homes, Inc.***

v. Muller, 2007 MT 140, ¶¶ 22-24, 162 P.3d 106. This behavior has been condemned. ***Farmers State Bank v. Iverson***, 162 Mont. 130, 133-34, 509 P.2d 839, 841 (1973).

Dugan responded to the incorporated arguments from below at DKT115, DKT57 & 71; DKT 59 & 83; and DKT174, but will not respond here.

The other issue, to which a comment need be made, is the replacement permit. APP8, pgs83-89. Both Flathead and CANSC discuss condition of approval 14, which makes Dugan responsible for any clean up order by the court. The condition is meaningless if the approval is void ab initio.

1. Did the Court's Determinations Demonstrate That it Failed to Give Deference to Flathead's Interpretation of its Regulations, Misconstrued the Regulations and Substituted its View of the "Facts" for the Commissioners'?

A. The complete application:

The planning staff found the application complete. A review of the application shows all questions were answered. The court required more information than the application.

Flathead asks this Court to clarify that the lower court was not requiring different regulations. CANSC argued under ***Kadillak v. Anaconda Co.***, 184 Mont. 127, 602 P.2d 147 (1979) for the application to be complete, it needed additional

information Flathead should have sought. Generally, a request for additional information is in the discretion of the governing body upon which the applicant can rely. See: ***State ex rel. Great N. Ry. v. State Bd. of Equalization***, 126 Mont. 187, 192-93, 246 P.2d 220, 222-23 (1952).

That discretion is not unbridled. If for example, one provides the required information for only a portion of property when a permit is for the whole, a court may require statutory compliance. See:***Kadillak v. Anaconda Co.***, suppra; ***Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality***, 2016 MT 9, ¶¶ 35-36, 365 P.3d 454; ***Clark Fork Coal. v. Mont. Dep't of Envtl. Quality***, 2008 MT 407, ¶¶ 42-44, 197 P.3d 482. Here, all work done within the jurisdictional Lake Shore Protection Area (LPA) was described and shown.

When Dugan discovered she suddenly was crossing two properties, her agent thought they erred, not having a place to start the bridge on her property. (PZO file, pg51). The problem was found to be a boundary line adjustment after the original permit was issued put the bridge over two properties instead of one. (Dugan App8, pg82). That was rectified with the replacement permit.

The legislature authorized the adoption of regulations and review for the LPA and no further. There was no basis for the court demanding information beyond what the commissioners were allowed to impose in their regulations and review.

B. The court substituted its interpretation of the facts for that of the commissioners:

§75-7-208(5) MCA requires Fathead to favor issuance of a permit if the work will not create a "visual impact discordant with the natural scenic values, **as determined by the local governing body, where such values form the predominant landscape elements."** Commissioner Dupont and Mr. Ervin offered evidence of the lack of impact. Contrary to the court's view, Dupont may draw upon his own knowledge. ***MM&I, Ltd. Liab. Co. v. Bd. of Cty. Comm'rs of Gallatin Cty.,*** 2010 MT 274, ¶ 35, 246 P.3d 1029/ contra: App1,pg11, lns2-3. Flathead noted the shore line change restored the historic access. (Dugan App8, pg48 ¶8).

Summary procedure is authorized by 75-7-207(3) MCA, if there is "minimal or insignificant impact on a lakeshore." Approval requires the same. The regulations at §3.2Ca allow summary review (procedure). It is that same finding which allows approval. Flathead seeks to separate approval and process. It really makes no difference. If meeting the design standards only invokes summary procedure, the evidence offered to and by the commissioners supported the permit issuance.

CANSC left out of its App9 Dupont's significant comments showing his familiarity with the property. It did this below. [DKT123, pgs1-4, DKT125, attached App10]. CANSC misleads concerning public participation. The planning

board would not hold a public hearing. It "review[s] the application, other information and the planning staff report" and submits its recommendations. [Regs.§3.4, CANSC's App15].

CANSC attempts to relitigate the design standards. Flathead found the project was in compliance with the construction and design standards and thus entitled to summary review (App8, pgs42-43; 61-63). Nothing with respect to the design standards was reversed by the lower court.

Summary review is brought by complying with Regulation §3.2Ca. The commissioners accepted the staff's finding and then, based on the evidence offered granted the permit. The court simply disagreed with the commissioners' view of the evidence. The court made no findings that the design standards were not met, it simply substituted its judgment at the hearing stage for that of the commissioners. The commissioners exercised a discretion specifically granted through legislative authority. That discretion is revoked only by the legislature. ***Core-Mark Int'l, Inc. v. Mont. Bd. of Livestock***, 2014 MT 197, ¶ 47, 329 P.3d 1278. The court cannot. ***Kiely Constr. LLC v. City of Red Lodge***, 2002 MT 241, ¶ 69, 57 P3d 839.

C. The bridge is not a road and a road is not needed to service the bridge

Flathead used the same definition of roads as used in its Flathead Development

Code, consistently requiring the bridge to be within the same parcel so as not to be a " road."(App8, pgs41-44; 82).

Flathead asks that the court's road discussion not change the regulations.

CANSC argues the development code was not used. That road definition, not the regulation, is the only one used by the planning office in the record. (App8, pgs41-44; 82). An interpretation in accord with Flathead's other codes was not "so lacking in fact and foundation that it is clearly unreasonable." ***Helena Sand & Gravel, Inc. v. Lewis & Clark Cnty. Planning & Zoning Comm'n***, 2012 MT 272, ¶ 15, 290 P.3d 691. It was a reasonable interpretation. ***Knowles v. State ex rel. Lindeen***, 2009 MT 415, ¶ 22, 222 P.3d 595.

CANSC like the court argued a road was required to access the bridge. No regulation requires that. Even the inadmissable exhibits offered by CANSC show no road exists.(CANSC App27, pgs4-6). Although the court was not aware, CANSC demonstrated that any access road would be subject to a different permit. (CANSC App 21).

By adding a regulation to build a road and by ignoring Flathead's reasonable interpretations, the court erred.

2. DID THE COURT FAIL TO PROPERLY FOLLOW THE LAW?

A. Standing and Discovery:

The court by basing its decision on standing upon unverified interrogatory answers committed error. Flathead simply assumes standing. CANSC claimed standing was "self proved." But standing must not only be alleged but also proven or at least shown. ***Gill v. Whitford***, 138 S. Ct. 1916, 1931 (2018); ***Mitchell v. Glacier Cty.***, 2017 MT 258, ¶ 11, 406 P.3d 427, ¶ 11.

This is not a constitutional challenge which would allow perhaps relaxed standing requirements. (App3, pg3, lns15-24; ***Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality***, 1999 MT 248, ¶ 43, 988 P.2d 1236). Standing here was based on the standing of CANSC's member(s). Is any member a statutorily required "interested party?" 75-7-215 MCA; ***Montana Wilderness Ass'n v. Board of Health & Envtl. Sciences***, 171 Mont. 477, 492-493, 559 P.2d 1157, 1165 (1976). To meet that standard CANSC had to show its member(s) suffered an injury in fact. ***Mitchell v. Glacier Cty.***, 2017 MT 258, ¶ 11, 406 P.3d 427.

Under the EPA "interested person" rule, for standing one must suffer adverse affects to her economic interests or "[a]esthetic and environmental well-being." ***NRDC v. United States EPA***, 526 F.3d 591, 601-602, (9th Cir. 2008). See: ***Sierra Club v. Morton***, 405 U.S. 727, 92 S. Ct. 1361 (1972); ***Trustees for Alaska v. EPA***, 749 F.2d 549, 554 (9th Cir. 1984) [applying "injury in fact."].

CANSC neither plead nor claimed an injury in fact. (See: DKT93). CANSC

denied any personal member injury when it sought fees. (DKT193 & 194). Its pleadings and affidavits simply claimed CANSC is an organization of members most of whom do not reside near the bridge; who love the lake; who don't like the bridge; and who think the bridge was illegally permitted. Not one allegation claiming an "injury in fact" was made. The court erred in finding standing based on inadmissible evidence. It erred in finding standing at all.

***B. Statute of Limitations and the Record*:**

The court inconsistently extended the record beyond March 16, 2011, to avoid the statute of limitations (§27-2-211 (1) (c) MCA) while limiting the record to deny considering affirmative defenses and the replacement permit. The court then extended its record and considered the completion of the bridge and change in the regulations as justification not to remand for consideration by the planning board.

Both Flathead and CANSC focused solely on the statute of limitations itself. CANSC argued without any authority: "The issue is not one of 'tolling;' any applicable statute would begin . . . to 'run anew upon each renewal of the permit.'" (CANSC pg24). Running a new means the court considered the amendments and replacement permit. The record was expanded. Dugan's argument! If each renewal matters rather than just the March 16, 2011 permit, the court should have considered

the entire record for all arguments. It did not do so. The lower court acted in an arbitrary and capricious and inconsistent manner towards the "record."

Flathead asks this Court for guidance. Does a lower court get to change the scope of the record to fit different decisions or are parties entitled to a consistent record? Fairness and due process demand a consistent application of the record and law.

C. Mootness was not considered:

The completion of the bridge and the adoption of the new regulations mooted CANSC 's claims. (DKT129, 142 &149). The completion of the structure rather than the acquisition of a permit creates the vested right. See: ***Seven Up Pete Venture v. Montana***, 2005 MT 146, ¶¶ 32-33, 114 P.3d 1009.

Flathead argues that equitable estoppel does not apply. Dugan did not argue equitable estoppel. The issue in a vested rights discussion are: "Has the landowner reached a point where his rights in real property can no longer be taken by regulation?" With equitable estoppel the question is whether it is inequitable to allow the government to act. ***THE ZONING AND LAND-USE HANDBOOK***, Cope, ABA Section of State and Local Government Law (2016) Chapter 20 B, pgs121-127. Even the test for vested rights has less elements: Did the landowner rely in good faith on

his permit? Did he make a substantial investment in that improvement?[1] Dugan never argued equitable estoppel's five part test.

Flathead notes vested rights were not found in Dugan's citations but ignores that each case stated the requirements for a vested right. Flathead based its arguments on cases dealing with vested rights **in permits.** Dugan never claimed a vested right in the permit[2].

Flathead argues finding a vested right in an invalid permit is absurd. The opposite is true. "[T]he owner's good faith reliance on the permit should afford him

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[1] C/f ***Richmond Corporation v. Board of County Commissioners for Prince George's County,*** 254 Md. 244, 255-256, 255 A.2d 398, 404 (1969);2 Rathkopf, The Law of Zoning and Planning (3rd ed.) Ch. 57, § 3, at 57-6 to 57-7

[2] Both 75-7-206 MCA and Flathead's § 2.3A provide: "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." "Other than" means: " with the exception of; except for, besides." https://www.merriam-webster.com/: C/f ***Hansen v. 75 Ranch Co.***, 1998 MT 77, ¶¶ 24- 26, 288 Mont. 310, 957 P.2d 32; ***Trifad Entm't, Inc.v. Anderson***, 2001 MT 227, ¶ 32, 36 P.3d 363 regarding § 35-1-823, MCA.

a vested right to complete the work, albeit the permit was issued in error." ***See: Pennsylvania, Department of Environmental Resources v. Flynn***, 21 Pa.Cmwlth. 264, 272, 344 A.2d 720, 724-725 (1975) citations omitted. Here, the clear language creates a vested right in " the physical structure, if any, so developed" – the bridge.

Flathead argues the regulations were not changed to allow the bridge. Dugan agrees. Dugan argued because of the change and the vested right in the structure, Dugan became at least a pre-existing non-conforming use. A court " 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." 1-2-101, MCA. A court looks "to the plain meaning" of the statute's or ordinance's language. ***Eldorado Coop Canal Co. v. Hoge***, 2016 MT 145, ¶ 18, 373 P.3d 836. That is all Dugan asks.

CANSC argues little law. It says the mootness argument was not made below. It was: DKT129,137,140, and 142. CANSC argues the bridge was not compete under the replacement permit. The planning office's finding of completion has not been set aside. DKT142.

Dugan:

1. Secured a permit (later replaced with one moving both ends of the bridge);
2. Dugan and Flathead acted in good faith. App3, pg3;
3. While Dugan was not being allowed to intervene, Flathead approved the

replacement permit mooting part of CANSC's claim. (App8, pgs85-89, permit; pgs65-69,73-74, application);

4. Dugan expended funds and completed the bridge without being enjoined; and

5. CANSC never made a claim against Dugan.

Dugan acquired a vested right in " the physical structure. . . so developed." That vested right coupled with the new regulations should have mooted the case.

***D. Order to Remove the Bridge Rather than Remand*:**

The court went beyond its claimed record and ordered the removal of the bridge because of the *Notice of Completion* and amendment to the regulations. The court also held these meant nothing because they occurred after March 16, 2011, while it said because of them, there could be no remand to the commissioners. (App1, pg9, ln 20 - pg11,ln 8). Dugan argued that under numerous cases remand is the proper relief after a finding that the lower decision was arbitrary and capricious. [See: Dugan pg36.]

CANSC argued restoration is allowed under the act and the court has the power to remove.

CANSC argued against remand because " the planning board cannot alter the

prohibition against introducing vehicles into the LPZ." No such prohibition exists. The regulations, CANSC App15, mention vehicles only four times. Three regulations limit construction activities within the lake bed and contacting the lake itself. One requires traction for vehicles on ramps and docks within the LPA. (pg13,§4.2b; pg16,§4D2; pg26, §4.3D2g; and pg34,§4.3Ge7). The bridge will keep vehicles off the lake bed. It provides a means of accessing the end of Dugan's continuous property during the whole year. (App8, pgs27-29, 34, 41). Dugan is actually removing vehicles from the lake bed while accessing all her property. Dugan has a right to use her property. ***Helena Sand & Gravel, Inc. v. Lewis & Clark Cty. Planning & Zoning Comm'n,*** 2012 MT 272, ¶¶ 45-48, 290 P.3d 691. The bridge protects that right while protecting the lake bed.

Although, CANSC expresses numerous reasons for not remanding, all of them could be resolved by a variance under the regulations. CANSC did not defend the court's error. "*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 th Flathead County Commissioners to conduct a proper permit review . The commissioners having shown the Court their hand and any remand would be meaningless.*" (App, pg11, lns4-8). We must assume CANSC had no defense of the court's arbitrary action. The error is indefensible.

E. If the Record Goes Beyond:

The court by limiting or expanding the record to assist CANSC, but not do the same when the limitation or expansion could assist Dugan or Flathead was clearly arbitrary and capricious.

CANSC disingenuously argued the court did not go beyond the initial approval date other than for one exception being the denial of an application in 2016 asking to insert cross bracing.[3] CANSC previously argued the court looked beyond in avoiding the statute of limitation. Here, even CANSC went well beyond the purported record to defend the court's decision (See: CANSC's appendix). The lower court decision cannot be defended based on a record as described by the court.

3. DID THE COURT ACT IN AN ARBITRARY AND CAPTIOUS MANNER SHOWING ITS BIAS AGAINST FLATHEAD AND DUGAN?

Dugan provided a number of issues as symptoms of how Flathead and Dugan were mistreated. The court determined Flathead was **granted jurisdiction over the area beyond what the legislature granted. It did so based upon only the disputed**

[3] See: DKT149, the planning director's affidavit noting the denial was a form and stating the recorded record reflected the reasons for the denial.

regulations themselves. (App1, pg4). That is arbitrary. CANSC filled its briefs with inadmissable "Facts," Dugan objected. (DKT59,82& 83). No ruling was made. CANSC was not required to abide by schedules or page limits. The court refused to clarify even what the real record was. Flathead planning at least twice in the record made its determination the bridge was not a road because it was all within Dugan's property. The court felt ruling the bridge was totally within Dugan's property was not pertinent.

Flathead asked this Court to " clarify (and correct) rulings of the District Court." Flathead, though not appealing, recognizes the court erred. CANSC tells this Court: "The court found that resolution of her lake bed ownership and jurisdictional LPZ motions was not necessary to resolve the issues before it and wisely declined to render advisory opinions." The extent of the commissioners' jurisdiction to inquire, when the court says they have to go beyond the Act's jurisdictional area and the existence of a bridge on one piece of property, would have a baring on this case. CANSC's argument only asks courts to be arbitrary and capricious.

Dugan's property ownership justified the "road/bridge" position of Flathead. The jurisdictional area within which Flathead could act determines in part the extent of review. The commissioners had no authority to and no reason to want to look

beyond this area[4].

There was no reason CANSC was allowed to ignore the rules. These are substantive problems when joined with the other issues about which the court simply did not care.

Most times "failure to rule" has been raised, the failure was significant but the issue was not preserved. ***PPL Mont., Ltd. Liab. Co. v. State***, 2010 MT 64, ¶ 111, 229 P.3d 421 (waited until mid trial); ***State v. Boese***, 2001 MT 175, ¶ 16, 30 P.3d 1092 (waited until after trial started); ***State v. Armstrong***, 172 Mont. 296, 300, 562 P.2d 1129, 1132 (1977) (failure to object). Dugan specifically called the problem to the court's attention. [DKT115, pgs1-3, "**PRELIMINARY MATTERS**."] The need for rulings was not waived. The rulings were pertinent to the arguments and significant.

This issue simply demonstrates the lower court acted in complete disregard of Dugan's rights.

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[4] Commissioners established the use would be private and not commercial. Thus, they could make an impact determination without asking what roads would lead to Dugan's property. (App8, pg29, #9). There was no reason for Flathead to look beyond the jurisdictional area as the court required, even if they could.

4. IS CANSC ENTITLED TO ATTORNEY FEES AGAINST DUGAN?

CANSC sought fees under two theories. Dugan will not respond to the §25-10-711 MCA claim wherein Flathead's "wrongful acts" are only listed in CANSC's appendix. It is not for Dugan to argue the propriety of PAG claims. Dugan is a land owner who intervened to protect a right. The court found she did nothing wrong, but rather Flathead erred. When CANSC withdrew its objection to Dugan intervening and amended its complaint, CANSC made no claim against Dugan.

Equity does not dictate an attorney fee award when a land owner in good faith defends her rights and belief the government acted correctly. ***Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist***., 2011 MT 51,¶¶ 35-37, 251 P.3d 131, appears to expand the PAG fee award to individuals. If interpreted to do this, PGA does away with the American rule while punishing the landowner for protecting her rights. This defeats the justification for PGA. ***Bitterroot*** may have turned on particular equitable principles which this Court did not articulate because it sent the case back to determine who was responsible for the fees.

To allow courts to extract fees from a person in good faith defending a property right is to go down the road of judicial takings. In ***Stop the Beach v. Fla. Dep't of Envtl. Prot***., 130 S. Ct. 2592, 2601-10 (2010), Justice Scalia found that judicial takings arose out of the text of the Fifth Amendment. In ***STB,*** six justices agreed that

state courts could be responsible for the judicial taking of property. Taking is **"forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole**." ***Armstrong v. United States***, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)." [bold and underling added for emphasis]; ***Palazzolo v. Rhode Island*** (2001) 533 U.S. 606, 617-618, 121 S.Ct. 2448,2457 - 2458. The PAG theory is built on that very same "public burden".

CANSC is not entitled to attorney fees from anyone. A simple lake shore permit fight does not justify an award. This as the court found is simply a dispute about Flathead following its own regulations. There was no attack on the regulations or the constitution. CANSC did not vindicate any constitutional interest. App3, pg3, lns18-24.

To grant fees in an ordinary action over whether a county properly granted a permit takes us too far down the road to destroying the American rule and taking property. Such a significant change is for the legislature not this Court.

CONCLUSION

Dugan sought a permit to connect her property so that it was accessible all year — accessible without driving on the lake bed. She followed the rules, filed the application, and was granted a permit. While construction was delayed, a boundary

line adjustment put the bridge within two properties. It would then be a road. But, having caught the change, a new application and a replacement permit were completed and issued. The new permit removed the ends of the bridge from the lakeshore protection jurisdictional area and reduced the impact on the lake bed.

CANSC and the lower court seek to expand the lake shore protection act and the regulation to force "***some people [Dugan] alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole***." ***Armstrong v. United States***, infra.[bold and underling added for emphasis]; ***Palazzolo v. Rhode Island***, infra. CANSC didn't exist when the permit was granted. It was not an interested person. It and its members say its members for the most part don't reside around the bridge, love the lake, don't like the bridge and think the bridge was permitted contrary to the law. They lack standing.

This brings to mind Delegate Wade Dahood speaking at Montana's constitutional convention:

> *[W]hen you restrict the right of an individual to use his private property, that is contrary to the tradition in this state . . . If a private individual can go to a private property owner and say, "I don't like the way you're using that property because, in my judgment, that is injuring the environment and in the years to come, because environment is the total concept-it's part of a total life-sustaining system, it's going to injure me", that is going to restrict the use of that*

> *property. . . If the Legislature says . . ., "We shall set up some administrative body" that requires that whenever I want to add to my property or improve it or do something to it, that I have to have some administrative license to do . . . then I am taking the right to use that property as a free citizen and I am destroying a basic right of citizenship in a free society.*

MT Const. trans., pages1267 - 68).

Here, the court simply had pre-decided the issue. Flathead determining a bridge is not a road was reasonable and in accord with its other regulations. Flathead not asking for more information on roads leading to the bridge was within its discretion and any road would and did require a different permit with specific review. The commissioners had evidence to support their decision and acted within the scope of their authority. The court should have recognized the commissioners applied a rule of law while it was applying a rule based on its one man's perceptions.

The court ignored important issues or decided them based on offhand remarks. The jurisdiction for determining the issuance of these permits end 20 feet above the median high water mark. The fact Dugan owns all of the property over which the bridge passes means she is not building a road under Flathead's land use standards articulated by the planning staff and found absurd by the court.

The court hardly had time to afford the bridge a fair hearing because it had decided it was a significant impact in its eyes and the eyes of the commissioners did

not matter. The eyes of the commissioners are all that mattered.

Dugan asks the Court to overturn the lower court and recognize that *commissioners' decision, after being given due deference, was not so lacking in fact and foundation that it is clearly unreasonable (arbitrary and capricious) and that the commissioners' legal conclusions were not beyond the range of reasonable interpretation permitted by the wording.* The lower court was arbitrary and capricious.

Baring a complete reversal, this Court should look at the issue before the lower court. Was Dugan entitled to summary approval? Dugan believes it is clear she was, but if not, she is entitled planning board review, possible variances, and then a commissioners' determination.

Finally, although it need not be said, this Court should take the opportunity to remind the lower courts that one must first determine a record and then apply it consistently so as not to favor one side over the other.

Respectfully submitted.

Richard De Jana & Associates, PLLC

by/s/ Richard DeJana
Richard De Jana, Esq.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that the Appellant's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Corel WordPerfect X5, is not more than 5,000 words, excluding the Table of Contents, Table of Authorities, Certificate of Service and this Certificate of Compliance.

Dated: January 24, 2019.

/s/Richard DeJana
Richard De Jana, Esq.

CERTIFICATE OF SERVICE

I, Richard P. DeJana, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant Reply and Answer to Cross Appeal to the following on 01-24-2019:

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Electronically Signed By: Richard P. DeJana
Dated: 01-24-2019