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,

vs.

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.

CANSC'S RESPONSE TO DUGAN'S PETITION FOR REHEARING

An appeal from the decision of the Honorable Robert B. Allison 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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CANSC'S RESPONSE TO DUGAN'S PETITION

FOR REHEARING

CANSC offers this response to Appellant Dugan's *Petition for Rehearing*.

INTRODUCTION

Dugan provides no basis for rehearing under Rule 20, M.R.App.P. Moreover, none of Dugan's arguments has merit. Dugan's arguments are addressed in the order she presented them.

1. THIS COURT DID NOT "MISSTATE" THE DISTRICT COURT'S RULINGS

Contrary to Dugan's assertions, there is nothing inaccurate in this Court's characterizations of the District Court's rulings.[1] Dugan claims the Court's *Opinion* ¶40 supports her assertion. Dugan's *Petition for Rehearing* ("*Petition*"), p. 1. As shown in the breakdown below, each ruling this Court attributed to the District Court is supported by the District Court's *Order and Rationale*, Dkt.#145, Apdx.1, and its *Order Amending Summary Judgment*, Dkt.#178, Apdx.2. ("Apdx." denotes *Appendix to Combined Brief of Appellee and Cross-Appellant CANSC*.)

> **This Court:** "In this case, the District Court thoughtfully deliberated but ultimately rejected remanding the case to the Board . . ."

[1] The District Court noted it is Dugan who "twists and misstates several of the Court's holdings." *Order Amending Summary Judgment*, p. 2, ln. 24.

District Court: This is an accurate characterization of the District Court's analysis. *Order and Rationale*, p. 9, ln. 14 through p. 11, ln. 8; *Order Amending Summary Judgment*, p. 3, ln. 26-28.

This Court: ". . . recognizing that remand would be futile."

District Court: While the District Court used the term "meaningless" rather than "futile," it recognized remand would be futile: ". . . any ***remand would be meaningless***." *Order and Rationale*, p. 11, ln. 6 [emphasis added].

This Court: "After finding the bridge was a road or roadway not serving a boat ramp . . ."

District Court: "The bridge is a vehicular bridge 481 feet long and 16 feet wide. It is in essence an elevated ***roadway***." *Order and Rationale*, p. 9, ln. 3.

This Court: ". . . the District Court recognized that the Regulations explicitly preclude the bridge from being built in the lakeshore protection zone. See Regulations §2.7(N)."

District Court: "The Lakeshore Protection Regulations prohibit roads and driveways in the Lakeshore Protection Zone except to serve boat ramps." *Order and Rationale*, p. 8, ln. 26.[2] "Given that the regulations preclude roads . . . the Act would seem to not even contemplate the construction of bridges in the Lakeshore Protection Zone. *Order and Rationale*, p. 9, ln. 4.

This Court: "Therefore, the Board could not possibly approve the project on remand. Because remand would be futile, the court ordered Dugan to restore the lakeshore to its natural state pursuant to §§ 75-7-205 and -215(1), MCA."

[2] The District Court cited "Section 2.8M" of the *Regulations* for this prohibition. This is the correct citation in the 2016 version of the *Regulations*; the prohibition is in §2.7N of the 2002 version applicable here.

> **District Court:** ". . . the Act would seem to not even contemplate the construction of bridges in the Lakeshore Protection Zone." *Order and Rationale*, p. 9, ln. 5. "Thus, the Court has no option but to declare the permit invalid and void *ab initio* and because the bridge was built without a permit, the remaining remedy is removal of the bridge and restoration of the lakeshore pursuant to Section 75-7-205 and 75-7-215(1), MCA." *Order and Rationale*, p. 11, ln. 6.

The obvious futility of remanding to the County was but one of the District Court's grounds for ordering restoration. Another was the District Court's finding the permit was void *ab initio* and that as a result, the work was done without a permit. *Id*. The futility of remand was further demonstrated by the County's 2016 denial of Dugan's request to add safety railings, structural steel bracing and illumination. By that time, this litigation was a year in and the bridge had come under intense public scrutiny. No longer able to gloss over its *Regulations*, the County determined these additions would be too impactful to allow and denied the amendment. PZO File, p. 451, Apdx.13. As the District Court recognized, if because of their impact these additions could not be allowed, the bridge itself could never be approved. *Order and Rationale*, p. 9, ln. 14-18. Thus, the Commissioners' denial of Dugan's amendment request also rendered remand "meaningless." *Order and Rationale*, p. 11, ln. 6.[3]

This Court reached the same conclusions for largely the same reasons,

[3] This may be to what the District Court was referring when it stated: "The commissioners have shown the Court their hand . . ." *Order and Rationale*, p. 11, ln. 5.

recognizing that the chosen remedy was the product of thoughtful deliberation, supported by the *Act*, and within the District Court's discretion. *Opinion*, ¶¶39, 41.

Now for the first time Dugan makes vague references to other bridges and roads in the LPZ (she does not specify the County – much of Flathead Lake is in Lake County), and that a variance could have allowed her prohibited project. She claims the "variance question" was "introduced by this Court." Dugan's *Petition*, p. 3. These arguments have no merit.

a) Dugan's "Variance" Argument.

Dugan could have sought a variance at any time; she had five-plus years to do so. She chose to proceed under a clearly flawed and invalid permit and is now facing the consequences of that decision. The unequivocal prohibition against roads in the LPZ was prominent from the outset and the "reasoning" the County used to get around it and give Sortino (Dugan's father) the permit he wanted was so clearly flawed the District Court labeled it "nonsensical."

Notwithstanding the untimeliness of the issue, a variance is not available to evade a prohibition. One can vary a limitation (*e.g.,* dock length, *Regs*., §4.3A(2)); or a requirement (*e.g.*, setbacks, *Regs*., §4.2H(2)), or a standard (*e.g.*, retaining walls, *Regs*., §4.3E(2)). An absolute

prohibition, however, such as §2.7N's prohibition against roads and driveways in the LPZ, cannot be varied. With a blanket prohibition, there is nothing to "vary." The language in the *Regulations* confirms this, speaking to variances from two things only, "construction requirements" and "design standards." *Regs*., p. 39, §5.1A(2).

b) The *Act's* Cross-Reference to MAPA.

Dugan asserts the District Court was "incorrect" when it noted the *Act* contains a cross-reference to MAPA. Dugan's *Petition*, p. 2, footnote 1.

Again, it is Dugan who is mistaken. In the official print version of the *Montana Code Annotated*, compiled by the Montana Legislative Services Division, among the cross-references to the *Act's* §75-7-215, entitled "Judicial enforcement and review," is a reference to MAPA that provides: "Montana Administrative Procedure Act - judicial review, Title 2, ch. 4, part 7." That is the part of MAPA the District Court consulted. And as the District Court noted, part 7 of MAPA's chapter 4 includes references to permitting decisions under Title 75 (which contains the *Act*). *Order and Rationale*, p. 6, ln. 8; *Order Amending Summary Judgment*, p. 3, ln. 27.

In ordering restoration the District Court relied primarily on the *Act*. In MAPA's §2-4-704, it found support for its ruling. There was no error.

2. DUGAN'S "MOOTNESS" ARGUMENT IS WITHOUT MERIT

Again, Dugan offers no grounds for rehearing under Rule 20, and her arguments lack merit.

Dugan claimed the 2016 amendments to the *Regulations* made the bridge "legal" and therefore the case was "moot." She also argued she completed the bridge and that also made the case moot. These "mootness" claims were thoroughly addressed and debunked in the District Court in CANSC's *Plaintiff's Response To Intervenor's Assertion Of Mootness*, Dkt.#137 (included herewith as Attchmt.#2). That brief shows clearly that the amendments did not "grandfather" or "legalize" the bridge. The County had no intention of so doing, as shown by the County in its opening brief in this appeal. *Appellee Flathead County's Brief in Response to Dugan's Opening Brief*, pp. 18-28.

The District Court rejected Dugan's "mootness" arguments referring to them as "circular reasoning" and a "logical fallacy." *Order and Rationale*, p. 10, ln. 11.

The only 2016 amendment with relevance here is the elimination of the provision that listed "the development of roads, roadways, and driveways" among the examples of work in the LPZ for which a permit was required. *Regs*., p. 4, §2.5Q It was felt this could be seen as inconsistent with §2.7N's prohibition against roads and driveways so the planning staff

recommended to the Commissioners it be eliminated. It was, thereby enhancing the clarity of the prohibition. *Regs*., p. 6, §2.7N (§2.8M in the 2016 amended version).

a) A valid permit was required, and it was Dugan's responsibility to ensure she had a valid permit.

Dugan asserts: "The statutes and regulations require only a permit and not a 'valid permit' to conduct work." Dugan's *Petition*, p. 4. Again, Dugan is wrong. As this Court noted, §2.1 of the *Regulations* provides: "No person shall proceed with any work . . . until she has obtained . . . a ***valid*** 'Lakeshore Construction Permit' . . ." *Regs*., p. 3, §2.1; *Opinion*, ¶9. The *Regulations* further provide: "The person who performs such work is responsible for assuring that a ***valid*** permit has been obtained from the governing body." *Regs*., p. 3, §2.1.

The District Court correctly found Dugan's permit was invalid from the moment of issuance. *Order and Rationale*, p. 2, ln. 20. Dugan is far from blameless in her failure to obtain a valid permit. She chose to ignore the fact her permit was fraught with obviously serious problems, despite being confronted with those problems early in the construction process by CANSC's detailed *Complaint and Petition for Judicial Review.* Dkt.#1. She continued to ignore them even after the County, as a condition of granting her requested permit amendment, required that she assume the risk

of being ordered to remove the bridge and restore the lake. *Amended Permit*, PZO File, p. 385, Apdx.12. See Dkt.#137, pp. 10-12, Attchmt.#2.

b) The project was not completed.

Dugan's assertion that she completed the project is also flawed. The bridge has never seen a vehicle; there is no way to reach either end. This was among the reasons the District Court ruled the County had accepted an incomplete application. *Order and Rationale*, p. 8, ln. 4; *Opinion*, ¶31. The bridge also needs structural steel bracing, safety railings (described by Sortino as "imperative") and illumination, project components Dugan sought to add through the permit amendment denied by the County. See, *Order and Rationale*, p. 9, ln. 14. Building a road to reach the bridge is also impermissible, as "[F]illing of wetlands adjacent to a lake is prohibited." *Regs*., p. 30, §4.3F(2)(g). All documented in the PZO File, these facts are discussed more fully in CANSC's brief addressing Dugan's "mootness" arguments. Attchmt.#2, Dkt.#137. These facts show the bridge has not been and cannot be completed; the structure is unsound structurally and perhaps unsafe; and remanding the matter to the County would be meaningless.

3. DUGAN'S ARGUMENTS ON STANDING HAVE NO MERIT

There is no basis under Rule 20 for reconsideration of the standing issue. Dugan makes the same argument she made to the District Court and to this Court, claiming there was no admissible evidence to support the District Court's factual findings. Again, Dugan is wrong. In support of CANSC's motion for summary judgment, CANSC's directors submitted an affidavit describing the members' interest in the litigation. That affidavit is included with this *Response*. *Affidavit in Support of Motion for Summary Judgment*, Dkt.#93, Attchmt.#1. The *Affidavit* was unopposed and unchallenged, just as the same statements in CANSC's pleadings and detailed interrogatory answers were unopposed and unchallenged. *Complaint*, Dkt.#1; *Amended Complaint*, Dkt.#41.[4]

The District Court found: "The individual members are residents of the state who use and enjoy the lake, live in close proximity and recreate on it." *Order and Rationale*, p. 4, ln. 2. In their *Affidavit*, five members of CANSC's board stated [emphasis added]:

> 5. CANSC currently has one hundred thirty (130) individual members, all of whom have paid dues and are either full or part time ***residents of Montana***, and most of whom ***reside in the Flathead Valley in close proximity to Flathead Lake***. The Association's members share a concern for Flathead Lake and a commitment to the

[4] The District Court was well within the bounds of its broad discretion in discovery matters by choosing to consider CANSC's interrogatory answers despite any technical shortcoming.

> Association's mission, which is to protect Flathead Lake's scenic North Shore, and ***many of them use and enjoy the*** area of the ***lake*** where the bridge that is the subject of this action is proposed to be built.

Affidavit in Support of Motion for Summary Judgment, p. 2, Dkt.#93, Attchmt.#1. That *Affidavit* recites almost verbatim the facts upon which the District Court based its determination that CANSC's members had standing under the *Act*. There was no error.

Dugan's argument that CANSC somehow lacked associational standing because it was incorporated after the permit was issued is more nonsense. As the District Court noted: "Organizations have standing if the members have standing." *Order and Rationale*, p. 3, ln. 24 [citation to *Heffernan* omitted]. That CANSC was formed after issuance of the permit is of no legal consequence.

4. DUGAN'S ARGUMENTS ON THE STATUTE OF LIMITATIONS HAVE NO MERIT

The District Court thoughtfully considered this issue. Among the reasons the District Court found CANSC's claims were not time-barred was because the permit was valid only for one year, and Dugan had requested and received five extensions. "The fourth renewal was granted three weeks before this lawsuit was filed." *Order and Rationale*, p. 4, ln. 11. The fifth extension and the amendment came ***after*** the litigation was commenced.

As this Court noted, Dugan offers no substantive argument on this issue. *Opinion*, ¶24. Rather, she asserts the extensions should not have been considered because they occurred after the permit was issued and the District Court should not have considered any events occurring after that date (March 16, 2011). Dugan's *Petition*, p. 10. Dugan's position is overbroad and illogical. The District Court was correct to confine its consideration of the record to events as of March 16, 2011 (permit date) to decide the issue of permit validity (and whether the permit was void *ab initio*). *Order Amending Summary Judgment*, p. 3, ln. 14-18. However, that constraint does not pertain to other issues in the case. For example, how could the court evaluate whether a period of limitation had expired without looking beyond the date on which the period began to run?

The District Court's handling of the record was appropriate and its analysis of the statute of limitations was sound.

CONCLUSION

Dugan has shown no grounds for rehearing under Rule 20. Even had she met that burden, none of her arguments have merit. CANSC's standing is clear. That the permit was void *ab initio* is also clear. The remedy of restoration is appropriate and the District Court was well within the bounds of its discretion (and very much in harmony with the spirit of the *Act*) to

order it. The futility of remand is obvious. Dugan's petition should be denied.

RESPECTFULLY SUBMITTED, this 14th day of August, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.P., I hereby certify that this *Response to Petition for Rehearing* is printed with proportionately spaced Times New Roman typeface of 14 points (footnotes and indented material are 12 points), is double spaced (except for footnotes and quoted and indented material, which are single spaced), and the word count calculated by Microsoft Word for Mac is not more that 2,500 words, excluding the case caption, signature block and this *Certificate of Compliance*.

Electronically signed by
/s/ Donald R. Murray
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CERTIFICATE OF SERVICE

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