# IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0438

HAMILTON SOUTHSIDE HISTORIC PRESERVATION ASSOCIATION,
Petitioner/Appellant,

vs.

ZONING BOARD of ADJUSTMENT of the CITY of HAMILTON,
Respondent/Respondent.

and,

ROMAN CATHOLIC BISHOP of HELENA, a religious corporation sole,
Respondent/Respondent.

## Brief of Appellant Hamilton Southside Historic Preservation Assoc.

On Appeal from the Montana 21st Judicial District Court,
Hon. Jennifer B. Lint, Presiding

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(1) Whether the District Court erred by failing to require the ZBA to make findings on material zoning issues it didn't address.

(2) Whether the District Court erred by failing to reject ZBA findings that were unsupported by "competent and substantial evidence."

(3) Whether the District Court erred by affirming ZBA approval of an illegal "Joint Use Parking Agreement."

## Statement of the Case

*To more easily navigate this administrative record, the "**Index to Key Documents in the Record**" may be useful ("Appellants Appendix A") .*

This zoning case reviews the Hamilton ZBA's quasi-judicial approval of:

- A Conditional Use Permit (CUP) to build a church in a residential zoning district.
- Two variances (for steeple height and setback deviations), and
- A "Joint Use Parking Agreement" (JUPA) to avoid off-street parking requirements.

In 2018, the ZBA first granted the Bishop a CUP and variances to demolish the historic St. Francis Church, and build a replacement almost double the size, at the same location. Several neighbors appealed, and pursuant to stipulation, the matter was remanded.

In 2019, the Bishop amended his application. ZBA rehearing commenced December 16, 2019, and was continued and reconvened many times, concluding June 14, 2021. The amended applications were again approved, 4 to 2.

Appellants filed certiorari to District Court. The City, followed by Appellant, both moved for summary judgment. Before briefing concluded, the District Court rendered its decision, solely based on pleadings, without referencing either motion.

## Statement of Facts

The currently existing St. Francis Church was built in 1897 on one city block of Hamilton gifted by Marcus Daly. It has been in continuous use for over 120 years, and is listed in the National Register of Historic Places as a "contributing" structure to the Hamilton Southside Historic District.[1] According to the undisputed testimony of historic preservation expert, Philip Maechling,

> .. [the proposed *replacement* church] is more than twice as large as St. Francis church, a bulkier, gable front box with a diminished "steeple." It has altered the neighborhood setting from a finely scaled "corner church" to over a half a block parking lot more fitting in materials and scale to Highway 93. It is neither historic nor contemporary, fully out of character with the neighborhood it proclaims to respect.[2]

In 2005, the ZBA granted a CUP to expand the use of the Bishop's property, adding a 15,675 sq.ft. Parish Center, subject to conditions, including more off-street

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[1]ZBA pp.371-374.

[2]ZBA p. 372, *see,* pp. 371-374. City staff confirms Maechling's expertise & conclusions p.487 ¶y,z,aa.

parking. But, as of 2019, the church was found by city staff in continuous violation of those conditions.[3]

In 2018, the Bishop applied for another CUP plus 3 variances, to demolish and replace St. Francis. The new church would more than "double" the seating capacity (from 205 to 442),[4] with a ground footprint 95% larger,[5] and a bigger facade in all dimensions.[6]

For "more than a year" previously, Land Hansen, the Zoning Administrator had "been working" with the church on "this project."[7] His report to the ZBA recommended approval.[8] He instructed,

> This Conditional Use application simply is an application to replace the existing church with a new church. The new church will have different parameters than the old church, but the use is the same. The parameters of the new church will be addressed in the variance request. In replacing the old church with a new church, the Zoning Board of Adjustment is *required to approve* the use by Hamilton Municipal Code (emphasis added).[9]

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[3]ZBA pp.79, 257-258.

[4]ZBA File p.30, p.49, *see*, ZBA p.532.

[5]Appellants Appx B, (Neighbor's Ex. 9, substantiated by city staff, ZBA p.484 ¶l, ZBA p.485k, ZBA p.488 ¶ee); *see,* ZBA p.532, "first floor= 4,024 SF".

[6]Appellants Appendix C, (Neighbors Ex. 8A, substantiated by staff, ZBA p.485, ¶¶ l, m. n).

[7]ZBA p. 22 (final paragraph).

[8]ZBA pp.14-23.

[9]ZBA p. 16 "General Staff Comments."

Later, Hansen again told the ZBA,

> This is having the current church be demolished and rebuilt, This is kind of a dot the "I's" cross the "T's" item for this board to approve the use of the new church in a residential single-family zoning district...[10]

Concerning arguments for historic preservation, notwithstanding major preservation emphasis in Hamilton's Growth Policy,[11] Hansen said,

> The City of Hamilton currently .. does not have a historic preservation ordinance. So, given that, ... the historical values don't necessarily apply ..in this particular variance and CUP.[12]

By 4 to 2, the ZBA voted approval of the requests (November 26, 2018).

Subsequently, church neighbors appealed, filing Ravalli Cause DV-19-30, *Roddy v. ZBA*. Because the ZBA had made no findings, the City stipulated to remand with a mandate to do so.

Subsequently, on July 23, 2019, the bishop submitted a modified application for another CUP and 3 variances.[13] The application slightly changed the proposal. *E.g.*, by removing seating, it decreased the church "capacity" to 389, while keeping the same footprint on the ground.[14]

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[10]Audio, 2019-11-26, time 8:50; transcribed, PC-6.5 "Staff."

[11]Hamilton's 2015 Growth Policy promotes "historic preservation" as a primary objective. Parish Ex. II, "Land Use," pp.14, 22; Implementation, p. 4-5; Parish Ex. HH, Cultural Resources, p.17, Proportionality, p50.

[12]Audio, 2019-11-26, time: 6:28; transcribed, PC-6.5 "Staff"

[13]ZBA pp.132-146.

[14]ZBA p.532, 120' x 82'; see, ZBA p.538 "Revised Parking Calculations."

On November 29, 2019, Hansen again submitted reports, again recommending approval, but *also* proposing "findings of fact."[15] At the time, the *only* evidence in the record was the 2018 audio hearing, the 2018-2019 applications, and some mostly irrelevant documents.[16] Hansen's proposed findings touted that "the existing *use* would continue."[17]

ZBA rehearing of the Bishop's modified application began December 16, 2019. Spread over 18 months, the hearing produced a massive record –20 hours of audio & 1000 document pages-- finally concluding June 14, 2021.

The same written ZBA "Agenda" was used throughout the 18 months.[18] Except once, no additional public notice was given. Never were upcoming issues in the "continued" hearings noticed.[19] And, contrary to statute, no "minutes" of any meetings were available until June, 2021.[20] Regarding the crucial ZBA meetings of November 4 and 9, 2020, no audio was timely posted by the ZBA for public review;

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[15]ZBA pp.230-237, pp.260-273.

[16]ZBA pp.1-229; City Exhibits B, D, & E, Audio recording, 2018-11-26, see, Hansen, ZBA p.236 ¶B5 ("..the public comment received to date is limited, ..it is difficult to delineate specific conditions to protect the rights of adjoining property and the health, safety, comfort and general welfare of the neighborhood..").

[17](Emphasis added) ZBA p.233, proposed finding, ¶10; see, ZBA p.262 C1; p.263 D1; p.267 C1.

[18]ZBA p.505.

[19]See, ZBA pp. 274-280, 507.

[20]ZBA pp.684-699; *compare* §76-2-325(2).

and it remained that way until after *Certiorari* was filed.[21]

So, unless individuals attended every ZBA meeting (or listened to every recording), they would have no way to know what was to happen next in the hearings. Nevertheless, Appellant "Neighbors" attended every meeting, and more than 260 people signed petitions opposing demolition of the historic church.[22]

On November 9, 2020, the ZBA voted to approve the CUP, plus two variances (steeple height and setback).[23] In doing so, the ZBA adopted *verbatim*, without *any* material changes, the entirety of Hansen's proposed findings, written *before* any of a full-year of evidence had been submitted.[24] The ZBA *did* make tiny modifications to Hansen's proposals: adding minor conditions, correcting grammar and numbering. Significantly, it deleted Hansen's concern that "the larger structure and increasing attendance could become too large (and therefore unsuitable) for this mixed use district."[25] In substance, the ZBA's findings treated the preceding year of submitted evidence as irrelevant.

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[21]See, Appellants Appendix D [the website posted the same October 14 recording at all three "Audio" links (hovering the cursor over the links shows they all link to the same October 14 recording).

[22]Audio, 12/16/19, time: 116:20 Alex Shaffer presents petitions with "over 200" signatures, mentions 60 parish members who signed a letter to the Ravalli Republic, ZBA pp. 378-406.

[23]Minutes, ZBA pp.691-694.

[24]Minutes, ZBA pp.692-694, *compare* ZBA pp.230-237, pp260-273 (2019-11-29), *with* ZBA p.692.

[25]ZBA p. 676, ref. pp233-234.

Still pending was the third variance (regarding parking), and with it, the potential alternative of a Joint Use Parking Agreement. Staff recommended making traffic studies, and the City obliged by hiring WGM engineers to perform them. However, the WGM studies failed to survey traffic as requested,[26] failed to consider much relevant evidence,[27] and made unsupported speculation about foundational facts.

After receipt of the studies and another JUPA revision, on June 14, 2021, the ZBA approved the JUPA, and reopened the CUP to impose three minor conditions on the applicant.[28] That rendered a parking variance unnecessary.

Thus, on June 14, 2021, despite six *more* months of application changes and evidence, the ZBA again, amended *no* findings, and made *no* new ones. So, *none* of the evidence submitted in the huge record from December, 2019 through July, 2021 provoked the ZBA to modify any substance in the staff's 18-month-old findings (except, without explanation, deleting the "unsuitability" statement, described above). Likewise, rarely, if at all, did any ZBA members' pose any questions to the applicant, opponents, or witnesses.

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[26] *Infra*, note 111.

[27] Neighbor's Exhibit 4 thru 4-7, ZBA p.71.

[28] ZBA p.698, referencing, ZBA p.643.

The hearing process as a whole was functionally chaotic.[29] Despite several requests from the public:[30]

- Much immaterial emails, notes, and document fragments appear in the record without discussion or rationale,
- Hearsay was always accepted.
- No process was available for compelling testimony.
- No issues of competency or expertise were considered.
- No procedure was available for objecting to incompetent evidence.
- No direct or cross-examination was allowed, even on a limited basis.
- No evidence was received under oath.
- No legal "instructions" were given to the ZBA
- No conclusions of law were entered or considered by the ZBA.

## Standards of Review

Regarding CUPs, variances,[31] and zoning amendments,[32] *quasi-judicial*

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[29] *See, e.g.*. Audio, Nov. 11, 2020, 01:21:39 (Schulund states "we did vote" to approve CUP, *prior* to vote being taken); Audio: March 8, 2021 (entire 19 min), June 14, 2021, times 4:00 to 8:17(re documents in record), 20:00 to 26:58 (re amendment of agenda),

[30] PC-14.7 thru 14.8; PC-41.1 thru 41.3; ZBA p.688-689; ZBA p.688, line 156, at in Audio 2020-01-30; Audio 2020-10-05.

[31] *Carlson v. Yellowstone Cnty. Bd. of Adjustment*, 2017 MT 186, 399 P.3d 322, 388 Mont. 232 (Mont. 2017); *Cutone v. Anaconda Deer Lodge*, 610 P.2d 691, 187 Mont. 515 (Mont., 1980); *Freeman v. Bd. of Adjustment of City of Great Falls*, 97 Mont.

(continued...)

decision-making by a zoning board is reviewed for abuse of discretion.

> To determine whether an abuse of discretion has occurred, we examine "whether the information upon which the Board based its decision is so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion." *Flathead Citizens v. Flathead County Bd* (2008).[33]

The Court explained,

> [A] board cannot ..disregard the provisions of, nor exceed the powers conferred by, a zoning ordinance and must act in accordance with the law.[34]

In addition, there must be "competent and substantial evidence" to support a zoning decision.[35]

The Supreme Court, in turn, applies the same standards in its review, except that questions of law are reviewed *de novo*.[36]

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[31](...continued)
342 (Mont., 1934).

[32]*Citizens for a Better Flathead v. Bd. of Cnty. Comm'rs of Flathead Cnty.,* 385 Mont. 505, 386 P.3d 567, 2016 MT 325 (Mont., 2016); *Heffernan v. Missoula City Council,* 2011 MT 91, 360 Mont. 207, 255 P.3d 80 (Mont., 2011); *North 93 Neighbors v. Bd. of County Com'rs,* 137 P.3d 557, 2006 MT 132, 332 Mont. 327 (Mont., 2006).

[33]¶32, 175 P.3d 282, 291, 2008 MT 1, 341 Mont. 1 (Mont., 2008); *Arkell v. Middle Cottonwood Bd. of Zoning Adjustment*, ¶ 24, 2007 MT 160, 338 Mont. 77, 162 P.3d 856; *North 93 Neighbors, supra,* ¶ 44, 137 P.3d, at 565.

[34]*Flathead Citizens*, ¶37, quoting 101A C.J.S. Zoning and Land Planning § 232.

[35]*Cutone, supra, 187 Mont., at 521, 610 P.2d, at 695 (1980), Lambros v. Bd. of Adjustment, 153 Mont. 20, 26, 452 P.2d 398, 401 (1969), Freeman, supra.*

[36]*Kevin Botz, Randy Theken, & FPR Props.v. Planning*, ¶¶17-18, 367 Mont. 47, 289 P.3d 180, 2012 MT 262 (Mont. 2012)

## Summary of Argument

1. Quasi-judicial zoning bodies abuse their discretion by, failing to follow law and ordinances, *Schanz v. City of Billings*, 597 P.2d 67, 82 Mont. 328 (Mont. 1979), or failing to require "competent and substantial evidence." *Cutone v. Anaconda Deer Lodge*, 610 P.2d 691, 187 Mont. 515 (Mont., 1980)
2. Zoning bodies must make findings to address the material requirements of Zoning laws. *Flathead Citizens v. Flathead County Bd*, 175 P.3d 282, 2008 MT 1, 341 Mont. 1 (Mont., 2008).
3. Findings must be rejected when unsupported by "competent and substantial evidence." *Cutone, supra*; *Urbanski v. Johnson*, 581 P.2d 948 (Or. 1978).

# ARGUMENT

A quasi-judicial zoning body abuses discretion if,

(a) it exceeds its powers,

(b) fails to follow the law, or

(c) the decision is unsupported by "competent and substantial evidence."[37]

The Hamilton ZBA violated both (b) & (c).

In *Schanz v. City of Billings*, as in the instant case,

> ..the city argues that under Montana's [statute], it cannot be charged with an abuse of discretion if the record indicates the City Council and the district court had before them reasonable evidence or testimony upon which they could find that one or more of the purposes of the enabling statute had been accomplished. [But] the judiciary does have the power to find whether or not there has been an abuse of discretion.... In such application the exercise of sound discretion is limited by the *provisions of the statute*, including such *standards as are set forth therein*.[38]

In this case, the District Court's opinion failed to discuss any "provisions of the statutes," or "standards..therein." Instead, after a lengthy, but bare, recital of case history, arguments, and statutes, the Court concluded, *without any analysis,*

> The record affirms that the ZBA regularly pursued its authority, did not exceed its jurisdiction, and did not abuse its discretion with regard to CUP #2019-06. Additionally, the information upon which the ZBA based its decision is not so lacking in fact and foundation that the decision is clearly unreasonable. *Opinninion [sic] and Order Re Writ of*

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[37] *Standards of Review, supra, p.8.*

[38] 597 P.2d 67, 70-71, 82 Mont. 328, 334-335 (Mont. 1979).

*Certiorari*, 6-14-22, Doc. 29, p.12 ["Opinion"].

The Opinion is similarly cavalier about the variances and JUPA, reflexively concluding, "..the ZBA did not abuse its discretion," (Opinion, pp.13, 14, 15).

But, the Court improperly failed to consider any *evidence* about the ZBA's abuses of discretion, whether in the ZBA record, or provided on appeal.[39] The Court's few factual references only superficially pass upon any material issues.[40] The Court never addresses any of the *specific* evidentiary, due process, and statutory issues argued in the *Certiorari* petition,[41] or in Appellants summary judgment motion.[42] Nowhere did the District Court discuss, or even cite, a single Hamilton zoning ordinance. Nowhere did the Court mention the contents of any of the "Findings" referentially adopted by the ZBA. [Compare, ZBA pp.230-237, 260-268].

In short, the District Court *failed to* consider whether the ZBA's findings were supported by "competent and substantial evidence" or whether they followed the law.

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[39]§76-2-327(3), MCA.; Discussion, *infra*, pp. 13-43. *Eg*, *see*, Appellants Appx. D, E, & F.

[40]Opinion, pp.12-15.

[41]*Verified Petition for Writ of Certiorari*, Doc. 1, pp.10-11, ¶¶ 41a-41f, 42b-42d.

[42]*HSHPA's Brief Supporting Consolidated Motions*, Doc. 25, *passim*.

## I. Required Findings of Fact, Never Made by the ZBA

This Court has declared, under applicable laws, certain findings *must* be made by a zoning board in quasi-judicial hearings. Those findings are required, with sufficient scope and clarity, to inform and guide judicial review. *Flathead Citizens*, *supra*.[43] In this case, the Hamilton ZBA nominally adopted sets of findings concerning the Bishop's CUP and variance requests.[44] The ZBA made no findings concerning the JUPA.[45]

The basic requirement for making "findings" is typically imposed by the zoning code,[46] in some instances by statute,[47] but also by principles of administrative law.[48] The Hamilton Zoning Code requires them, saying "[w]ithin thirty (30) days after the public hearing, the zoning board of adjustment shall submit ...its finding [*sic*] of fact." HMC §17.124.060(F).[49] Similarly, §76-2-325(2), M.C.A. demands,

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[43]¶37, 175 P.3d, at 294.

[44]ZBA pp.675-683 (July 12, 2021), incorporating by reference, ZBA pp.230-237, 260-263 & 264-268 (Nov. 29, 2019).

[45]*See*, ZBA minutes, ZBA pp. 684-699, *see*, ZBA p. 700-704.

[46]*Flathead Citizens, supra,* ¶46, 175 P.3d, at 294.

[47]§6–3–608(2), M.C.A.

[48]*Flathead Citizens, supra,* ¶47, 175 P.3d, at 294.

[49]See, HMC §17.04.040, "Definitions," "Conditional Use Structure," & "Conditional Use," "..not allowed in a district as a matter of right, but which is allowed upon findings of the zoning board of adjustment that such use is in harmony with the principal uses of the district."

> The board shall keep minutes of its proceedings, showing the vote of each member upon each question.. and shall keep records of its examinations and other official actions, all of which shall be *immediately* filed in the office of the board and shall be a public record.

In this case the ZBA's "minutes" were not prepared until months *after* its meetings and decisions.[50]

## A. Required Subjects for Findings.

The findings of fact required from an administrative decision maker vary based on the issues.

### 1. For a Conditional Use Permit

Under the Hamilton zoning code, conditional uses are *not* allowed "as a matter of right," but "may be granted" in the discretion of the ZBA, only *if* the criteria in the ordinances are satisfied.[51] (*The complete 2019 HMC Zoning Code is at Appellants Appendix G*). The word "may" signals that a CUP is discretionary.[52] "[T]he denial of a conditional use permit is a discretionary decision."[53]

In exercising discretion, the required subjects for "findings" are determined by

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[50]Compare record on Appellants Appendix D, June 14, 2021 link (containing pp. 1-658), to "Church File Complete", with ZBA documents pp.1-704.

[51]HMC §17.124.030B & §17.124.040B ("..conditional use permits may be granted..");

[52]*Tacke v. Energy West, Inc.*, ¶30, 227 P.3d 601, 355 Mont. 243 (Mont. 2010).

[53]*Boehm v. Park Cnty.*, ¶15, 421 P.3d 789, 793, (Mont. 2018).

the ordinances.[54] Hamilton's Zoning Code imposes four main requirements:

- HMC §17.04.040 "Conditional use structure" (must be "in harmony with the principal uses of the district"),
- HMC §17.08.050(B)(1) & §17.124.020(B)(1)- ("appropriate and in the best interests of the public"),
- HMC §17.124.030(A) & 040(B)(2)- ("health, safety, comfort and general welfare of persons residing or working within the community"),
- HMC §17.124.040(B)(1)- ("..consistent with the intent of this Title 17").

The "intent" of Title 17 is defined in HMC §17.04.030. That section contains twenty policies to be addressed, including, that Hamilton,

> ..adopt and enforce such regulations that: 1. Are designed in accordance with the growth policy. (A)(1).
>
> ..lessen congestion in the streets; (A)(2), *etc., etc.*

**2. For Variances**

Findings requirements for variances are imposed both by statute and ordinance. Section 76-2-323(1)(c), M.C.A. provides,

> The board of adjustment shall have the following powers: ... to authorize upon appeal in specific cases such variance from the terms of the ordinance as will [1] not be contrary to the public interest, where, [2] owing to special conditions, a literal enforcement of the provisions

[54] *Flathead Citizens, supra*, *passim*.

> of the ordinance will result in [3] unnecessary hardship and so that [4] the spirit of the ordinance shall be observed and [5] substantial justice done. (Bracketed numbers added).

City Code adds additional requirements, including again, §17.124.030(A) "health, safety, comfort and general welfare..."

The most extensive "findings" requirement for variances is in HMC §17.124.050. Please see Appellants Appendix G for the full text. This ordinance's requirement include, *inter alia*, public interest; and "hardship to the property."

**3. For a Joint Use Parking Agreement**

Although no statute explicitly requires findings when reviewing a JUPA, findings were needed. Hamilton ordinance §17.100.110 allows a JUPA *only* in certain circumstances. The material portions of the ordinance are quoted, *infra*, p.38. Those essential facts must be established. And, "general principles of administrative law" dictate that under §76-2-323(1)(a), M.C.A., the ZBA should prepare findings of fact to explain its reasoning.[55] To date, it has not done so.

## B. Required Scope of Findings

The topics requiring findings, described above, are broad and vague. With criteria so broad, almost any "finding" discussing things like "general welfare" will be relevant, and find some support in the record. *But*, is it *sufficient* to satisfactorily address the required subjects?

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[55] *Flathead Citizens, supra,* ¶47, 175 P.3d, at 294.

For zoning decisions, this Court says generally that affected landowners have a "'fundamental right to notice and the opportunity to be heard'..." *Fasbender v. Lewis and Clark County*.[56] Concerning that "right," to date, the Court has put its sharpest focus on the "findings of fact."

In the instant case, the ZBA's adopted "findings" give lip service to some of the legal criteria. That superficially suggests the ZBA weighed the evidence. But we know that they didn't, because the ZBA adopted its "findings" ***entirely*** from proposals written long ***before*** the vast majority of evidence was received. (The only substantive modification was the deletion of staff's concern about an oversized church, *supra,* p.*6*).

Such a cavalier practice by zoning officials –adopting "findings" drafted before hearing the evidence– has at least twice been criticized by the this Court. *Heffernan, supra,* ¶25, ¶87 (2011);[57] *North 93 Neighbors, supra,* ¶¶33-36 (2006).[58] Instead, the "abuse of discretion" standard of review, requires the development of explicit findings of fact, based on the *whole* record.

> ..a governing body is not entitled to rely on an "it's okay because we said it's okay" approach when developing the record underlying its decision. ..the governing body must develop a record that fleshes out all pertinent facts upon which its decision was based in order to facilitate judicial review. *Heffernan, supra,* ¶87.

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[56]¶17, 218 P.3d 69, 71, 2009 MT 323, 352 Mont. 505 (Mont. 2009).

[57]2011 MT 91, 360 Mont. 207, 255 P.3d 80 (Mont. 2011).

[58]137 P.3d 557, 2006 MT 132, 332 Mont. 327 (Mont., 2006).

Specifically,concerning the adoption of staff's proposed findings, in *93 Neighbors* the Court said,

> *The Board failed to address the public comments in its decision-making and thereby failed "to flesh out the pertinent facts upon which [its] decision [was] based in order to facilitate judicial review.*" Accordingly, we cannot know whether the public raised novel issues not addressed by the Planning Office's report and whether the Board appropriately responded to those issues. The public participation statutes contemplate more than merely eliciting public comment. Further, the Board must equip reviewing courts with a record of the facts it relied upon in making its decision to avoid judicial intrusion into matters committed to the Board's discretion. *93 Neighbors, supra.*, ¶35 (citations omitted).

The *Flathead Citizens* case, *supra*, further illustrates the scope of findings required. Ordinances mandated "the Board to evaluate the CUP under particular criteria," which like Hamilton's, were broad and ambiguous. ¶6, ¶11. Also similar, the Flathead planning staff had,

> ..prepared a Staff Report.. which *thoroughly* evaluated the application. ... The Report also considers and applies the relevant Regulations and state laws to the CUP application, makes specific findings of fact, and concludes with a series of recommendations to the Board. ¶7 (emphasis added).

At length, the Flathead Staff Report recommended approval of the CUP, subject to 27 conditions. ¶14.

Subsequently, the Flathead board had a hearing which considered the Report, then took public testimony. "Many issues and concerns were raised in the course of this hearing." ¶16. The ensuing board discussion included, "almost all of the issues raised by the Report and the public testimony.." ¶18. Among the issues raised were

conformity of the proposed CUP with parts of the "West Valley Neighborhood Plan."[59] ¶34.

The Flathead zoning board had argued,

> ..its decision was not arbitrary and capricious because it did consider all the impacts as required by the Regulations. The Board notes that it imposed 28 conditions on [the] CUP, and that, in its Report and in public testimony, it properly considered all the impacts from [applicant's] operation. ¶53.

But the Supreme Court determined, based both on local ordinance, and on "basic principles of administrative and zoning law," ¶47,

> ..when water quality and traffic impacts have been identified, the CUP application must show how those impacts are addressed, and the Board must make specific findings of fact showing that the criteria have been satisfied. ¶54.

The foregoing cases define what is needed from a zoning board to issue discretionary permits such as CUPs and variances. Its findings must show the Court what was decided, and how it was decided; what major evidence from the public process the board accepted, what it rejected, and why. It is insufficient for the board to simply list each criterion and cite, for each one, some evidence that, standing alone, would satisfy it. *North 93 Neighbors, supra.*, ¶35.

## C. The ZBA's Missing Findings

Following, we discuss the categories of findings the ZBA never made, though under the case law, above, it should have.

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[59] Adopted pursuant to Title 76, Chap. 1, M.C.A.

**1. In harmony with the principal uses of the district**

This criterion is imposed by HMC, §17.04.040, and also by HMC §17.124.050(D)(4). However, the administrative record for the CUP contains no findings concerning issues of "harmony."

The undersigned brought this criteria to the ZBA's attention in December, 2019.[60] Multiple exhibits addressed the "harmony" issue.[61] But the ZBA made no finding about it.

Notably, Administrator Hansen's November 29, 2019 reports on the steeple and setback variance tagged a bald "harmony" conclusion to another bald conclusion about "health, safety, comfort and general welfare..," without referencing any facts to justify either one.[62]

**2. Whether the ZBA "pre-decided" the CUP was required, or "grand-fathered?"**

As noted on page 3 above, at the beginning, city staff instructed the ZBA that church use of this property was, in substance, "grand-fathered," and the ZBA "..is *required* to approve [the CUP]."[63] Three ZBA members in 2018 concurred "there is already an existing use as a church." ZBA p. 11, ¶1. The ZBA chair, Darwin Ernst,

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[60]ZBA p. 293.

[61]ZBA pp. 85, 247, 318, & 372.

[62]ZBA p.263, ¶4; again at ZBA p.267, ¶4

[63]ZBA p. 16 "General Staff Comments;" *likewise, see,* Audio, 2019-11-26, time 8:50; transcribed: PC-6.5 "Staff."

at the 2018 hearing, made similar statements indicating bias in favor of demolition and replacement.[64] Although "pre-judgment" of a zoning decision requires reversal and remand, neither he nor the ZBA saw fit to recuse him from the renewed hearing beginning in 2019.[65]

Issues of bias and "pre-judgment" were front-and-center from the beginning of the December, 2019 hearing, when the undersigned moved to disqualify two ZBA members from participation.[66] The ZBA voted to recuse one of them, but not Chairman Ernst. Yet, in that 2019 discussion, Ernst reiterated, "Physical depreciation is the same for humans as it is for buildings-–we all are going to die."[67] The ZBA made no findings as to why one member was disqualified and the other not.

Eleven months later, *just* before the vote, Chairman Ernst again argued (contrary to city code), "..the church existed before the city, and now we're trying to

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[64]PC-5.1 thru 6.7; see, especially PC-6.2 ¶¶9-13, PC-6.5 at after: at 48:45, 54:01, 58:30, 1:01:33.

[65]ZBA p.695, lines 19-27; *compare, Marris v. City of Cedarburg,* 498 N.W.2d 842, 848-849 (Wis. 1993) (hearing remanded, disqualifying chair for referring to party as "a loophole" .."in need of closing"); *Barbara Realty Co. v. Zoning Bd. of Cranston*, 85 R.I. 152, 128 A.2d 342 (1957); *Lage v. Zoning Board of Appeals*, 148 Conn. 597, 172 A.2d 911 (1961); *McNamara v. Saddle River*, 60 N.J. Super. 367, 158 A.2d 722 (1960); Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D.L.Rev. 161 (1989).

[66]ZBA p. 685 (minutes); PC-5.1 to 5.7 (Motion for Disqualification or Recusal).

[67]Audio, 2019-12-16, time: 16:00

go back and say 'we wanna put restrictions on this church..?'"[68] ZBA member Tragmoe argued, "A decision's got to be made here pretty quick if we're gonna do anything for the church.."[69]

Planning staff notes of a meeting with the parish, on July 15, 2019, likewise reflected the notion that the church may be "grandfathered."[70] All this took place despite the *explicit* admonition of the Hamilton Zoning Code that a CUP *cannot* be "grand-fathered."[71]

Subsequently, the *sole* basis for the ZBA's finding #A10 involving HMC 17.04.030(A)(10) was the continuation of "existing use." And, the deletion of the staff's explicit concern (from #A10) that such use "could become to large..and therefore unsuitable" suggests the ZBA majority may believe that even an "unsuitable" preexisting use is grand-fathered (despite the HMC).[72]

Similar evidence the ZBA favorably "pre-judged" these zoning applications, and paid little, if any, attention to crafting appropriate "findings," is the inconsistency within them. Notwithstanding the board's deletion from proposed

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[68]Audio, 2020-11-09, time 01:22:20-01:22:36.

[69]Audio 2020-11-04, time 2:08:16 - 2:08:56.

[70]ZBA p.176.

[71]Neighbor's Exhibit 1, pp.4-5, citing, HMC, §17.124.040, §17.124.050-D6; §17.112.050B - Nonconformities.

[72]See, ROD, p.233 #10; HMC, §17.124.040, §17.124.050-D6; §17.112.050B - Restrictions on Nonconformities.

finding #A10 noted above, finding #A15 (ZBA p.234) nevertheless continued to say, "[a]t some point, expansion of the Church Campus will become too large for the area." The ZBA made no effort, at all, to reconcile Findings #A10 and #A15.

Clearly, issues and ZBA assumptions about pre-existing use were salient in this case, both with respect to the "pre-judgment" issue, and on the merits, itself. But it's impossible to tell from the ZBA's findings whether they regarded continuing church use of this property as legally "grand-fathered," illegally pre-judged, or something else. Those deficient findings require correction without the bias of individual ZBA members advocating plainly illegal notions of "pre-existing use."

**3. Uncontradicted evidence of traffic and parking problems**

The ZBA's CUP findings have a little discussion about traffic and parking for this proposed double-sized church.[73] But, as noted, all of those findings were written by the staff in 2019, *before* most of the evidence about parking and traffic was introduced. That evidence includes two City-funded WGM studies, as urged by staff. In short, the ZBA's findings reflected none of that evidence, pro or con.

At the end, a few modest conditions were added, but *zero* changes to findings resulted. See Minutes, pp.692, 698. Absent is any rationale in the findings as to why the conditions were imposed. For example, the findings do not reveal what items in WGM's studies may, or may not, have been deemed influential to the decisions.

[73]ZBA pp.230-237; pp.675-678.

Even more important, the ZBA's findings failed to take into consideration any of the considerable evidence supplied by neighbors about *currently existing* problems with parking and traffic. It showed routine church parking figures ranging from 90 to 140 vehicles.[74] While those observations were made by lay persons, *none* of the observations were contradicted by anyone, *ever*.

Additionally, the Neighbors exhibits included references from professional traffic literature.[75] These included recent traffic studies showing contemporary church-goers typically arrive 2 persons per car, rather than the 4-persons used to compute the minimum requirements in the Zoning Code.[76] That, of course, is powerful evidence that reflexive use of "minimum" traffic standards is *not* going to be probative of real impacts to public interests from traffic. Because this un-rebutted evidence came into the record *after* the findings were written, the findings did not reflect *any* of it. Again, this fails to meet the standards in *North 93 Neighbors*, and *Flathead Citizens, supra.*

**4. Implications of the "Religious Land Use & Institutionalized Persons Act"**

Early in 2020, the Bishop introduced arguments based on this federal act

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[74]12-16-2019, John Engleman statement, ZBA p. 71; Neighbor's Exhibits 4 thru 4-7, (in color) submitted at hearing, ZBA pp.328-358 (black & white).

[75]ZBA pp. 340-358.

[76]ZBA p.60, referencing: U.S. Dept. of Trans, ZBA pp.356-357, confirmed by observations, ZBA p.330.

("RLUIPA").[77] He argued, in substance, that the Catholic Church, as a religious institution, should get more favorable zoning treatment because of RLUIPA.

In response, City legal staff advised the ZBA that "the best course of action to comply with RLUIPA is for the ZBA to work with the applicant to try to find the *least restrictive way* to address ZBA concerns."[78] But, staff's advice sidestepped the factual predicates required to be proven under RLUIPA before the "least restrictive way" requirement even becomes applicable.[79] Staff's advice substantively amounted to a command to *grant* the CUP, and do so on the "least restrictive" terms.

Then, despite a motion for the ZBA to vote on the applicability of RLUIPA, it refused to do so.[80] As a consequence, the ZBA findings give no clue whether, or how its decision may, or may not, have followed staff's advice.

**5. No findings about what size of church is approved.**

The record presents a cornucopia of changing "capacities" for the proposed church.[81] Although the JUPA and most recent architecture drawings indicate a "capacity" of 292 people, that figure is computed from revised drawings of church *seating*–mostly derived by extracting movable chairs (referred to as the "COVID

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[77]PC 16.1 to16.14., citing, 42 U.S.C. §2000cc.

[78]ZBA p.482, ¶7 (emphasis added).

[79]42 USC § 2000cc(a)(1), (must prove a "substantial burden on religious exercise").

[80]ZBA p. 689, lines 202-212.

[81]Capacity: 420 (ZBA p.30), 442 (ZBA p.49), 390 (ZBA p.132-146), *etc*.

seating plan").[82] The perimeter of the designed building hasn't changed since it was proposed in 2018, being a constant 120 feet long x 82 feet wide.[83] In short, all that's required for the building to resume the originally desired capacity of 442 people would be rearrangement of seating. *Ibid*.

In the face of these peripatetic numbers, absent from the ZBA findings is any determination of what is the *approved* church capacity "in the best interests of the public" (under HMC §§17.08.050B1 &17.124.020B1); nor regarding the "health, safety, comfort and general welfare of persons residing or working within the community" (per HMC §§17.124.030 & 17.124.040.B.2).

Similarly, at the staff's urging, the ZBA arbitrarily eliminated all consideration of neighborhood impacts for so-called "special events.," like "weddings and funerals," despite the regularity of such events at this church.[84] No finding addresses that issue, either.

Given the house of cards that comprises these interdependent zoning permits, the absence of such findings is critical. The legitimacy of the CUP is dependent on

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[82]Staff testimony, Audio 2021-06-14, time 45:00-47:50.

[83]ZBA p. 532 (showing different seating configurations).

[84]ZBA, pp.540, 577, 588; *compare* JUPA vers pp.533-536 to 571-574, see "special events" discussion, *infra*, p.36.

the efficacy of a JUPA.[85] The JUPA, in turn, specifies a church "capacity" of 292,[86] but ***does not limit*** the church to that. Instead, it generously allows the applicant to increase capacity in the future, limited only by compliance with the parking provisions in HMC §17.100.070.[87] More will be said about that, *infra.* But the absence of any findings about "capacity" and "special events" *suggests* that "off-street parking" is the only CUP criterion impacted, and does so without any finding so-saying.

Equally unfathomable is why the ZBA struck the staff's concern about future church growth becoming "unsuitable" (staff's proposed Finding #A10), while retaining a similar concern in Finding #A15.[88] Such significant determinations require explanatory findings.

## II. ZBA Findings Unsupported by "Competent and Substantial Evidence"

"Competent and substantial evidence" in a zoning case,[89] comprises a "due process" issue. This case exemplifies the problem: How to sort wheat from chaff when the ZBA made no effort whatsoever to evaluate "evidence" on the basis of

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[85]ZBA p. 232, Finding No. 2, adopted by ZBA, p.692-693 (minutes).

[86]ZBA p.572.

[87]ZBA p. 573.

[88]ZBA p.692, ¶2, compare, ZBA p. 234, Finding #A15.

[89]*Freeman, supra, Cutone, supra.; Lambros, supra.*

relevance, hearsay, speculation, or foundation. How does a ZBA, comprising six laymen –*i.e.*, non-lawyers– determine what evidence it should, and should not, utilize in making zoning decisions?

Although this Court has never imposed formal rules of evidence or procedure in zoning hearings, it remains concerned about administrative due process.[90] Montana largely follows federal law, concluding, "Due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* ¶36.

> ..the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' " "Rather, ' "asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case.[91]

Regarding zoning, the "competent and substantial evidence" test derives from Montana's first zoning case. *Freeman v. Board of Adjustment* (1934) involved a variance granted under Montana's first zoning statute, 1929 Laws of Montana, Chap. 136. Zoning law was new, and cases emphasized constitutional issues.

*Freeman* applied, but barely discussed, the "competent and substantial evidence" test. The Court observed, "Witnesses were called and evidence was produced by both sides." It concluded, "..there is competent and substantial evidence to sustain ..the board..." *Ibid*. But *Freeman's* "called" witnesses may have been

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[90] *Bean v. Montana Bd. of Labor* Appeals, ¶¶32-39, 965 P.2d 256, 264-266 (Mont. 1998) (confronting and cross-of witnesses required in unemployment hearing). *Similarly, see, Wendlandt v. Johnson*, ¶¶14-15, 2012 MT 90, 277 P.3d 1208, 1211-1212 (Mont. 2012). (Confrontation and Cross-ex required in child custody).

[91] *Bates v. Neva,* ¶14, 371 Mont. 466, 308 P.3d 114, 119 (Mont. 2013).

subpoenaed, and were likely under "oath," because Montana's new zoning statute said, "[the board's] Chairman,.. may administer oaths and compel the attendance of witnesses." Sec. 7, Ch. 136, L. 1929. That "oaths" and "attendance" provision remains unchanged, today (like most of the 1929 Act),[92] but was never utilized by the Hamilton ZBA.

Later, *Lambros*, and *Cutone* also applied the "competent and substantial evidence" requirement, discussing in detail the supporting facts.[93] But, like *Freeman*, neither case further explained it.

However, on zoning issues, Montana courts often look to other states for guidance.[94] Generally, "competent evidence" refers to the admissibility of evidence and not necessarily the weight it should be given.[95] Conversely, "substantial evidence" is defined as "evidence that a reasonable mind could accept as adequate to support a conclusion."[96]

Compared to a courtroom, modern zoning hearings are casual events.

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[92]§76-2-321(3), M.C.A.; *see,* Ch. 136, Montana L. 1929; *compare generally,* Title 76, Chap 2, Part 3, M.C.A.

[93]*Cutone,* 187 Mont., at 521, 610 P.2d, at 695 (1980), *Lambros*, 153 Mont., at 26, 452 P.2d, at 401 (1969).

[94]*Freeman (passim)*; *Heffernan v. Missoula City Council*, ¶61, 360 Mont. 207, 255 P.3d 80 (Mont., 2011); *Helena Sand & Gravel, Inc. v. Lewis & Clark Cnty. Planning & Zoning Comm'n*, ¶¶ 29-30; 367 Mont. 130, 290 P.3d 691 (Mont., 2012); *Flathead Citizens, supra*, ¶45, ¶49 175 P.2d, at 294-295.

[95]See *Evidence - admissible evidence*, Black's Law Dictionary (11th ed. 2019).

[96]*Evidence - substantial evidence*, Black's Law Dictionary (11th ed. 2019)

> Because a zoning board is a body usually composed of persons without legal training, courts are reluctant to impose rigid technical requirements upon their procedures so long as they are orderly, impartial, judicious, and fundamentally fair.[97]

"A hearing in front of a zoning board is ' informal in nature and do[es] not necessarily have to be conducted as are hearings before a court..'"[98] "Such a board is not bound by the strict rules of evidence."[99]

> Nevertheless, [zoning hearings] cannot be so conducted as to violate the fundamental rules of natural justice. Due process of law requires ... a fair opportunity to cross-examine witnesses, to inspect documents presented and to offer evidence in explanation or rebuttal...[100]

Other authorities also supply some evidentiary guard rails.

> ..conclusions should not be based entirely upon the opinions of non-expert witnesses because such evidence is not substantial. It is an abuse of discretion to grant an exception where proof that essential standards are met is insufficient and lacks any expert testimony.[101]

"During a board of adjustment hearing, the parties are entitled to the right of cross examination because a zoning hearing is a trial-type proceeding."[102]

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[97]*Boffo v. Boone County Bd. of Zoning Appeals*, 421 N.E.2d 1119, 1129 (Ind. App. 1981); 83 Am.Jur.2d, Zoning and Planning § 296.

[98]*Woodbury v. Zoning Bd. of Review of Warwick*, 82 A.2d 164, 166 (R.I. 1951).

[99]*Parsons v. Board of Zoning Appeals of City of New Haven*, 99 A.2d 149, 150 (Conn. 1953).

[100]*Pizzola v. Planning and Zoning Commission of Town of Plainville*, 355 A.2d 21, 24 (Conn. 1974) (emphasis added).

[101]83 Am. Jur. 2d, Zoning & Planning, §642, p. 649.

[102]83 Am. Jur. 2d, Zoning & Planning, §668, p. 645.

The "substantial and competent evidence" requirement has been held to reject speculative testimony in a zoning hearing.[103] "[C]itizen testimony in a zoning matter is perfectly permissible and constitutes substantial competent evidence, *so long as it is fact-based*.'.."[104]

Similarly, speculation about prospective use of property was rejected when, "..not supported by competent and substantial evidence."[105] Expert opinions are rejected when based on speculation.[106]

Those authorities, while not exhaustive, hang some flesh on the concept of "competent and substantial evidence." Although zoning hearings are casual, they are still limited by "rules of natural justice," and should be "orderly, impartial, judicious, and fundamentally fair."[107] Following, we discuss how those principles were offended by the unbridled free-for-all of this ZBA hearing.

## A. CUP findings regarding "health, safety, & comfort"

As noted above, throughout its findings the ZBA considered parking and

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[103]*East Bay Cmty. v. Zon. Bd. of Barrington*, 901 A.2d 1136, 1158 (R.I. 2006).

[104]*Lake Sana Devs., LLC v. Miami-Dade Cnty*., 306 So.3d 169, 170 (Fla. App. 2020) (emphasis added).

[105]*Algonquin Golf Club v. State Tax Com'n,* 220 S.W.3d 415, 421 (Mo. App. 2007).

[106]*Urbanski v. Johnson*, 581 P.2d 948, 949 (Or. 1978).

[107]*Boffo, supra*; 83 Am.Jur.2d, Zoning and Planning § 296.

traffic issues solely based on the ordinances' minimum parking requirements.[108] But, minimum parking requirements may or may not be satisfactory to satisfy public "health, safety, and comfort" under HMC §17.124.030(A) and §17.124.040(8)(2). No competent evidence refuted traffic problems under those ordinances. Specifically, WGM Engineering ignored throughout, the undisputed observations and professional literature provided by Neighbors, *despite having been asked to review it by city staff*.[109]

In addition, WGM's reports have other foundational flaws. First, WGM conducted only *one single day* of traffic observation, on April 25, 2021, making the speculative assumption, "that mass attendance levels have returned to pre-Covid levels based on the adoption of social distancing measures and telecasting of services in the parish center."[110] To the contrary, City staff had recommended "not less than three months" of on-site observations, and the ZBA chair stated 4 to 6 months would be *insufficient*.[111] WGM never factually justified its *single-day* of observation.

Second, WGM's premise for its April 25 observations was wrong. The

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[108]See, Findings #A2, p.232; A6, p. 233; A14, p.234; B1, p.235; b5, p. 236.

[109]*See*, WGM, "documents reviewed" at ZBA pp.585-586, *compare* Neighbor's Exhibits 4 through 4-7, & ZBA p.71. City staff asked WGM, for "..a traffic impact study from WGM to analyze the applicant's proposed parking layout and joint use parking agreement, *as well as the concerns expressed by the residents of the neighborhood*.." ZBA p.649, emphasis added.

[110]ZBA p.642 #12 & p.588.

[111]ZBA p.496 final ¶, *see*, Audio, 2020-11-04, at 1:16 to 1:18 hrs..

church's official COVID conditions persisted in April, 2021. It wasn't until June 5 that the Bishop called worshipers back to attending mass.[112] He said,

> I issue the following update to our directives, effective June 5, 2021: The obligation to attend Sunday Mass and Holy Days of Obligation will resume starting June 5,...[113]

Furthermore, WGM's single-day automobile count was lower than ALL of the Neighbors pre-pandemic 9-am mass observations collected over a 2 month time span.[114] So, WGM's central conclusion "that the existing parking conditions reviewed are representative of a typical Sunday parking demand for the St Francis Church," is foundationally unsupported.[115]

Third, when WGM observed church traffic on April 25, 2021 it collected no data on the number of persons attending.[116] That's a glaring deficiency in light of WGM's heavy reliance on the 2010 *ITE Parking Generation Manual* ("ITE Parking Manual") as its primary reference.[117] The *current* ITE Parking Manual (2019) explicitly commands, "It is .. important to collect *attendance data* for the survey

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[112]Dave Bryan, Audio, June 14, 2021, time 1:20:40-1:21:40.

[113]https://diocesehelena.org/2021/10/diocesan-covid-19-update-may-13-2021/. Attached as Appellants Appendix F.

[114]*Compare* ZBA pp.330-331, to p.588.

[115]ZBA p.588.

[116]ZBA pp.587-588.

[117]See, generally ZBZ pp.585-639.

days."[118] [*partial copy attached as Appellants Appendix E*]. Because WGM never appeared at a hearing, we have no way of inquiring into this foundational issue for WGM's report.

A fourth foundational flaw was WGM's failure to explain why it used outdated professional literature as its primary reference. WGM's conclusions were premised mostly on the 2010 *ITE Parking Generation Manual (**4th edition**)*.[119] But, the 4th Edition had already been supplanted by the ***5th Edition*** in February, 2019, because it represented, "a significant improvement in the content and capabilities from previous editions with more than 60 percent new data, additional analysis capabilities [etc.]"[120]

The central conclusion framing all of WGM's analysis was that the HMC's minimal parking requirements are "more conservative" than the *ITE 4th Ed. Manual* (requiring 97 church parking spaces versus the *ITE Manual's* 86 spaces).[121] However, had WGM used the *5th Edition* of the *ITE Manual* (2019), it's conclusions would have been *much* different. The ITE 5th Edition shows new parking averages for "churches." ("31 spaces per 100 seats," Appellants Appendix E).

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[118]*Parking Generation Manual,* 5th Ed., 2019, "Land Use: (560) Church," p. 389.

[119]ZBA pp.586-592.

[120]https://ecommerce.ite.org/IMIS/ItemDetail?iProductCode=PG5-ALL.; see, *ITE Parking Generation Manual* (5th Ed.), "Changes Since the 4th Edition" p.5.

[121]ZBA, p.591.

The following table compares three of the church seating plans under each system. It shows, if WGM had used the 5th Edition of the *ITE Manual*, its parking requirements would have been much more "conservative" than the HMC minimums. But, since WGM never appeared before the ZBA, there is no explanation for why it used an outdated reference.

| **Church Parking Space Requirements (comparing WGM, HMC, JUPA, & ITE 5th Ed.)** | | | | | |
|---|---|---|---|---|---|
| **Church seats** | | ***WGM Study (4th Ed. ITE)*** | ***H.M.C.*** | ***JUPA*** | ***5th Ed. ITE*** |
| 2019 Seating Plan | 389 | 86 | 97 | | 121 |
| COVID seating | 292 | | 68 | | 91 |
| JUPA | 292 | | | 68 | 91 |

The fifth WGM flaw is illustrated by its conclusion, "The historical church usage and schedule indicates that for approximately 1.5 hours per week the off-street parking requirements for the COVID seating plan *may* exceed the proposed on-site parking supply."[122] Compare, however the *actual* numbers of cars from multiple days of *pre-pandemic* observations, taken well-beyond a mere "1.5 hours," ZBA pp. 330-331. Nine out of eleven of those observations exceed the "minimum" 68 parking

[122]ZBA, pp.591 & 593 (emphasis added).

spaces.[123] This evidence was ignored by WGM.

Sixth, WGM's minimalist conclusions about parking problems are predicated on the premise that "[r]equiring parking based on special events such as weddings and funerals would result in an oversupply of underutilized parking." ZBA p.588. That factual assumption, accredited to City Staff, has no foundation in the record. The exclusion of *all* "special events" from *all* CUP considerations by Staff, WGM, and the ZBA is arbitrary and capricious. Except for the Neighbor's observations, the record is devoid of evidence about the frequency and size of "special events."

Finally, WGM's studies were hearsay. Although the WGM memos were delivered to Neighbors a month before the June 14 hearing, the staff's report adopting and applying them wasn't available until June 7.[124] And, Neighbors were unaware *until the hearing,* itself, that no one from WGM would appear to testify.

As a lynch pin for issuance of the CUP and JUPA, the absence of this foundation evidence for crucial "health, safety, & comfort" findings voids the CUP.

## B. No Proof of "Hardship" for Variances

A variance may not be granted without proof of an "unnecessary hardship," §76-2-323(1)(c), M.C.A.; HMC §17.124.050. A hardship must be a "hardship that

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[123]JUPA, ZBA p.572 (church spaces=68).

[124]ZBA pp.640-658.

was peculiar to [this] land."[125] It may not be self-inflicted hardship. *Id.* The Board purported to adopt findings of "hardship" for the steeple and setback variances.[126] But *none* of the Board's variance findings are material to the hardship requirement, and there is *no evidence* in the record to sustain any *material* ones.

The steeple variance findings emphasize two facts: 1– that there is a pre-existing, non-conforming church on-site; 2– that other churches in Hamilton have steeples which exceed zoning limitations.[127]

A pre-existing, non-conforming building is not a "hardship." Hamilton's "variance" section, §17.124.050(D)(6), explicitly forbids granting a variance based on a "grand-fathered" condition.

The ZBA's second rationale– that other churches steeples non-conform– is likewise not a "hardship." In *Carlson v. Yellowstone*, *supra,* the Court held comparisons to other neighborhood uses were irrelevant to establish "hardship" *unless* those other uses resulted from *variances*. *IE.* Mere non-conforming conditions don't count.[128]

Concerning the setback variance, the ZBA's findings are similarly flawed.[129]

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[125]*Carlson v. Yellowstone*, ¶20, 2017 MT 186, 399 P.3d 322, 326, 388 Mont. 232, 237 (Mont. 2017)

[126]ZBA pp.260-263 (steeple), pp.264-268 (setback); adopted, ZBA p.694.

[127]ZBA pp.262-263, Findings C1, C2, & D. 1 thru 4.

[128]*Carlson v. Yellowstone,* 388 Mont. 232, 399 P.3d 322, ¶¶18-23, (Mont. 2017).

[129]ZBA p.266-267.

None of the rationales constitute *legal* "hardships." There is no evidence in the record showing anyone has variances like those described in findings C1, D2 & D3. Findings C2 and D4 are not present, existing conditions; they are contingencies.

Importantly, finding D1 describes a self-imposed condition. The parish wants to physically double its footprint, using its chosen design. But, it has confessed it could "rotate" this *very same plan* 90 degrees, and *entirely* fit *within* the setbacks.[130]

Likewise, the choice to build a *larger* church is a personal choice of the owner, not a condition of the property. (*If the Bishop elected to rebuild a new church in the same footprint with the same capacity as the historic church, he would not need ANY zoning permit, because, without a "change," he would automatically be grand-fathered*).[131]

Both variance grants must be rejected for lack of material hardship evidence.

## III. The JUPA Fails to Satisfy the Law

The CUP, and the withdrawal of the third variance request, are both predicated on adoption of a JUPA for all the buildings on the church campus.[132] A JUPA provides an alternative parking option if it satisfies HMC §17.100.110.

The ordinance provides, in part,

A. The owner(s) of a group of uses or buildings may jointly provide for

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[130]Kaney, Dec. 19, 2019; Kaney statement, p.464; staff reply p.483. Staff agrees, p.483¶a; *see,* PC-14.4..

[131]§HMC §17.04.040 "Grand-father Clause"

[132]ZBA p. 232, Finding No. 2, adopted by ZBA, p.692-693 (minutes).

> the collective use of off-street parking and loading spaces, subject to the zoning administrator's approval of the plans therefore. ... [requiring] an agreement signed by all owners of the subject property binding them to continued collective use of off-street parking..
>
> D. Up to one hundred (100) percent of the Sunday and/or nighttime parking facilities required by this section for a church or auditorium incidental to a public or parochial school may be supplied by parking area required for the school use, provided that the reciprocal parking area shall be subject to the conditions set forth in this chapter.
>
> E. It shall be the applicant's responsibility to establish that there is no substantial conflict in the principal operating hours of the buildings or uses for which the joint use of the parking facility is proposed.

The suggestion of a JUPA as a parking alternative came up early.[133] While hearings were underway, applicant and staff negotiated over multiple JUPA's. In the final draft, the parish simply reduced its reported "operating hours" to reach a deal with staff.[134]

But, the JUPA is legally insufficient.

## A. The JUPA "binds" no one.

The ordinance requires a JUPA to be "*an agreement* signed by all owners of the subject property *binding* them to continued collective use of off-street parking.." This JUPA, however, is so vague it may not be an "agreement" at all. This Court has observed,

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[133]Staff report/findings proposals, Nov. 29, 2019, ZBA p.232, ¶2.

[134]ZBA pp.571-575 (final JUPA); compare pp.533-536, 558-560.

> Where vagueness or imprecision exist in a contract, the contract as a whole must be considered. The language of the above alleged renewal clause is made totally nebulous [& unenforceable]..."[135]

The JUPA, as a "whole," is mostly a recital of alleged facts.[136] Those include the *revised* "principal operating hours" of the buildings in the block. It also includes "the seating capacity" of the church as "292." *Id.*,p.562. The nominal "agreement," says, "parish and Bishop agree..:

> In the course of the principal operating hours, the Parish of St Francis of Assisi affirms there shall be no substantial conflict between both SFC and the PLC although both buildings shall be used at the same time. This Agreement provides for joint use of off-street parking for all three buildings and uses.
>
> IF THE APPLICANT INCREASES SEATING CAPACITY AT THE PROPOSED SFC THEN ANY INCREASED CAPACITY SHALL BE IN COMPLIANCE WITH 17.100.070 OF THE HAMILTON MUNICIPAL CODE. *Id.*, p.563.

As a whole, these terms are insufficient to create the required "binding" set of promises.

First, because it nebulously provides no explanation of what is meant by "substantial conflict," no discernable conduct or condition is either required, or prohibited by its language. But, it nevertheless authorizes that "both buildings shall be used at the same time."

Secondly, the "affirmation" by the Parish only applies during "principal

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[135]*Willson v. Terry,* 874 P.2d 1234, 1237, 265 Mont. 119, 123 (Mont. 1994).

[136]ZBA pp.571-575 .

operating hours." No representation is made whatsoever about any *other* hours in which the buildings might be simultaneously used. No regulation of any special events, like weddings, funerals, festivals, etc. is even mentioned. So, use of multiple buildings for a large wedding, or a visit by a cardinal would be perfectly permissible.

Third, the JUPA contains no language binding any of its signatories to retain unchanged "principal operating hours" or "seating capacity." Nothing "binds" the church from doubling its number of masses, or adding 150 more chairs. The JUPA is a "feel good" document without discernable promises.

## B. The JUPA provides no enforcement mechanism.

In part because it has no rules of required, or prohibited, conduct, the JUPA is unenforceable. It's also unenforceable because the city has no enforcement tools, taking action only on the basis of complaints.[137] *The terms of the 2006 Parish Center CUP have never been enforced*.[138]

## C. The JUPA illegally allows a "change" to the CUP.

The sole real "promise" in the JUPA is the statement that "***IF*** the applicant increases seating capacity," it must comply with Hamilton parking requirements.

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[137]ZBA p.486, ¶r; See, Pleadings, ¶15 "complaint driven" enforcement; *see,* PC-69.1 to10 (comment by Judge Jim Haynes); PC-71.1 to 75.1 (uncontradicted evidence of non-compliance with new parking constraints).

[138]City Exhibit E (staff report on church CUP violations) see Neighbor's exhibit 4; ZBA Chair comments, Audio, Nov. 9, 2020, time 29:55-30:11.

But that provision just pre-authorizes an increase in the capacity of the church, subject only to parking compliance. It doesn't require a new JUPA, nor even *void* the CUP. By law it should do both.

The CUP has *presumably* approved (via the JUPA) building a new church with a capacity of 292 people.[139] (Albeit, *none* of the ZBA's findings define church "capacity" or "seating"). This JUPA, however, explicitly contemplates, and impliedly allows, the church to "increase" seating capacity beyond 292 people. This violates the plain language of HMC §17.124.040(B)(3) which says, "Any change shall void the conditional use permit ..and a new ..permit must be applied for." The language necessary to comply with that section was *explicitly* stricken from the JUPA.[140]

## D. The JUPA's efficacy is based on insufficient evidence and findings.

The ZBA's findings nowhere discuss what is in the JUPA or how it works. It's only mentioned in Finding #2 as being needed.[141] But whether it satisfies crucial CUP criteria such as "health, safety, and welfare," of "persons residing and working" in the areas, there are no findings.

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[139]ZBA p. 232, Finding No. 2, adopted by ZBA, p.692-693 (minutes).

[140]*Compare*, ZBA p.568, to p.563, quoted, supra.

[141]ZBA p. 232, Finding No. 2, adopted by ZBA, p.692-693 (minutes).

This is important because the key JUPA element of "principal operating hours" was controversial. City staff stated,

> Under section D of the proposed joint use parking agreement, it clearly states that there are conflicts in the principle operating hours of the St. Francis of Assisi Church and the Pastoral Life Center. City staff can not approve an agreement that on its face conflicts with the provisions of 17.100.110(E). The applicant would have to revise its principal operating hours to show that there is no substantial conflict.[142]

The church subsequently *revised* its "principal operating hours." But the JUPA does not anywhere prohibit it from revising those hours yet again. ("Principal operating hours" is not defined in the HMC or the JUPA).

Throughout this case there was controversy about parking computations. For example, the 15,600 square foot Parish Center with a 639-person capacity is required by the JUPA to have just 59 parking spaces (11 occupants per car?). Meanwhile the 292-seat church needs just 68.[143] Uncontradicted evidence shows routine traffic for masses pre-covid averages 90 to 100 cars.[144] Those disparate numbers demand explanatory findings for the JUPA and CUP to have any efficacy, and to be anything other than arbitrary and capricious.

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[142]ZBA, p.540.Jan. 2021, ref. p.533-534.

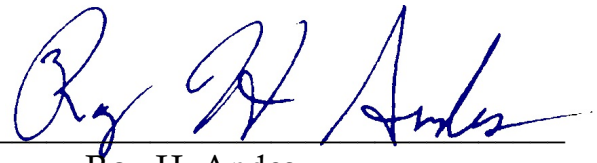
[143]ZBA pp.79, 572.

[144]ZBA p. 71, see, p.330.

# Conclusion

Appellant respectfully requests remand of this matter with instructions that it be further to remand to the ZBA to:

1. Reject the CUP and variances for insufficient evidence to support required elements,
2. Make findings on the material issues; and/or
3. Reject the JUPA as illegal and unsupported by material evidence.

by 

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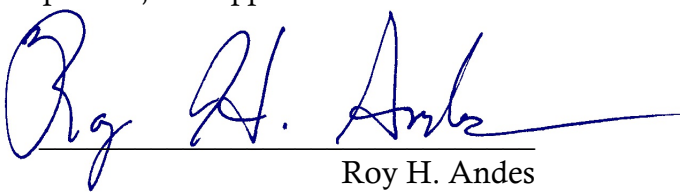
**Certificate of Compliance**

I hereby certify that the foregoing document complies with M.R.App.Proc. 27 in that it is prepared in a 14 point proportional spaced typeface, double-spaced, with left, right, top and bottom margins of 1 inch, and contains 9,867 words, excluding the table of contents, table of citations, certificate of service, certificate of compliance, and appendix.

Dated this 24th day of November, 2022.



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**Order Being Appealed:**
**Opinninion [sic] & Order Re: Writ of Certiorari**
**(D.C.Doc. 29, "Opinion")**

**June 14, 2022**

(following page)

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