IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0577

THE FRIENDS OF LAKE FIVE, INC.
and WARD E. "MICK" TALEFF,

Appellees/Petitioners,

v.

FLATHEAD COUNTY COMMISSION;
FLATHEAD COUNTY, MONTANA

Appellees/Respondents, and

SUSAN DIETZ, Individually and Trustee
of G&M TRUST,

Appellant/Respondent.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eleventh Judicial District Court, Flathead County
DV-20-306, The Honorable Amy Poehling Eddy, Presiding

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Intervenor/Petitioner

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As explained in Dr. Dietz's opening brief, the district court applied the wrong standard of review and provided insufficient deference to the County when reviewing the zoning permit. This reversible error permeated the court's consideration of the merits. The court's decision lacked deference to the County's interpretation of its own zoning code, the Canyon Area Land Use Regulatory System (CALURS). Among other errors, this led the district court to ignore the CALURS definition of short-term rentals as residential use when deciding whether Grizzly Spur Road provided sufficient access, to reweigh the evidence presented to the County concerning the grandfathered rental of the existing structures, and to apply subdivision standards despite its acknowledgment that this land use did not require subdivision review.

The Friends of Lake Five (Friends) and Intervenor Taleff (collectively Plaintiffs or Respondents), in response, urge this Court to provide discretion to the district court's determinations. Under the appropriate abuse of discretion standard, however, it is the district court that is required to provide discretion to the decision of the local zoning authority (here the County Commission). The district court's review here provided insufficient discretion to the zoning authority, both at the standard of review level and as applied to its analysis of particular zoning decisions made by the zoning authority. This legal error, along with the additional errors

explained in Dr. Dietz's opening brief, and the lack of citation and analysis in Respondents' briefs, supports reversal.

ARGUMENT

I. The many issues that Respondents' fail to address, or address without analysis, are conceded.

Due to the expansive nature of the district court's Order, *see* Doc. 154, Dr. Dietz's opening brief alleged 11 discreet errors (grouped into four issues). *See* Op. Br., Table of Contents. Respondents' briefs, however, fail to address some of these errors and fail to provide analysis in responding to others.

As this Court has "stated on numerous occasions," it will not "develop arguments on behalf of parties to an appeal, nor [will it] guess a party's precise position, or develop legal analysis that may lend support to his position." *Botz v. Bridger Canyon*, 2012 MT 262, ¶ 46, 367 Mont. 47, 289 P.3d 180 (citation omitted); *see also Hamlin Constr. v. Mont. DOT*, 2022 MT 190, ¶ 44, 410 Mont. 187, 521 P.3d 9 (citing M.R.App.P. 12(1), applicable to respondent via Rule 12(2)) (Court will not conduct legal analysis or legal research for a party). More specifically, this Court has held that where a party fails to respond to an appellant's argument "with [contrary] argument and citations to authority," the party "effectively concede(s)" the issue. *In re Estate of Snyder*, 2009 MT 291, ¶ 9, 352 Mont. 264, 217 P.3d 1027 (citation omitted).

Here, Respondents' briefs fail to address, at all, the "design critique issue" addressed in the opening brief at part I(E). Likewise, as explained in more detail below, Respondents' briefs fail to provide contrary argument or authority in response to Dr. Dietz's arguments that: (1) the County appropriately conditioned the permit on septic approval (Op. Br. part I(C)); (2) the wetland and natural resources determination is sufficiently supported by the Stipulated Record (Op. Br. part I(D)); (3) the County provided sufficient public participation (Op. Br. part I(F)); and (4) the court lacked authority to require full restoration of the entire property (Op. Brief part III). As such, Responds have conceded these issues.[1]

That leaves only Friends' bare-bones defense of the district court's incorrect standard of review and easement determinations in support of the judgment vacating the permit. These arguments are likewise insufficient as explained below.

II. The district court, though apprised of the correct abuse of discretion standard, applied of the wrong standard, and thus insufficient deference, when reviewing the County's zoning decision.

Plaintiffs now concede that a district court is required to apply an abuse of discretion standard when reviewing a county zoning decision, and that abuse of

[1] Intervenor's brief, while providing more robust argument and authority, fails to provide record citations to large swaths of its "Statement of Facts." *See* Int. Br. at 4-6. As but one example, Dr. Dietz' has never owned or developed property in "Canada," *see* Int. Br. at 5, and this statement from the district court's introduction is untethered to any evidence in the record. Lacking record citation, this Court should not consider this portion of Intervenor's fact section. *See* M.R.App.P. 12(1)(d).

discretion is the appropriate standard of review in this case. *See* Int. Br. at 6 (citing *Powell Co. v. Country Vill.*, 2009 MT 294, ¶ 8, 352 Mont. 291,217 P.3d 508); Friends' Br. at 9-10 (*citing Botz*, ¶¶ 17-19)[2]; *see also* County's Br. at 4-5. Under this forgiving standard, the "courts give deference to the decisions of the local board" and a zoning authority's "interpretation of its rule is afforded great weight." *Powell*, ¶ 8. Nevertheless, Friends suggests this Court should ignore the district court's error for two reasons: (1) that Dr. Dietz failed to raise the issue to the district court; and (2) that the zoning decision should be reversed anyway under abuse of discretion. Neither rationale has merit.

As a practical matter, even if the issue had not been preserved, this Court would still review the County's decision under the abuse of discretion standard. *See Helena Sand & Gravel v. Lewis & Clark County Planning & Zoning Comm'n*, 2012 MT 272, ¶ 15, 367 Mont. 130, 290 P.3d 691 ("Our review is limited to the question whether the zoning authority abused its discretion."). As such, the critical issue for this Court is whether the district court provided sufficient deference to the County's decision during its review. Still, the issue was preserved, and the district court made aware of the correct standard, as explained below.

[2] Friends also cite the arbitrary and capricious standard in reference to review of decisions under the Lakeshore Act. Friends' Br. at 5. As explained in Dr. Dietz's opening brief, the lakeshore violations are not at issue here.

1. The abuse of discretion standard was raised several times below.

The County raised the abuse of discretion issue to the district court prior to trial at least three times—in its Answer to the Amended Complaint, Doc. 72, in its Motion in Limine, Doc. 82[3], and in its proposed findings and conclusions, Doc. 107—and then again after trial and judgment in a Rule 59(e) motion, Doc. 179. Though the issue was raised numerous times before the district court, Friends argue Dr. Dietz was also required to object, separately and in addition to the County, to preserve the issue for appeal. Friends fail to cite any authority supporting this theory, however, and Dr. Dietz is aware of none. Instead, as quoted by Friends, this Court looks to whether the district court was "given the opportunity to consider the issue …." Friends' Br. at 9 (quoting *Hansen Trust v. Ward*, 2015 MT 131, ¶ 19, 379 Mont. 161, 349 P.3d 500). As noted, this issue was presented to the district court several times below, including briefing by the County explaining the correct abuse of discretion standard for zoning decisions. *See* Doc. 82.

Friends suggest, however, that Dr. Dietz had to actively argue for, and apply, the correct abuse of discretion standard. But counsel's application of the incorrect standard, *see* Doc. 150, ¶ 10, was understandable given the district court had not adopted the abuse of discretion standard despite the County's repeated requests,

[3] Granted by the Court without reference to the standard of review. Doc. 105.

and because the Lakeshore Act allegations were still at issue. Likewise, Dr. Dietz was not required to join the County's Rule 59(e) motion to preserve an issue when the County forcefully argued for the appropriate abuse of discretion standard. *See* Doc. 179. Again, there is no requirement that a party file a "me to" objection when another party has sufficiently preserved the issue and the district court has had the opportunity to consider the issue. The issue was preserved.

2. Under the appropriately deferential standard of review, the district court erred by reweighing or ignoring the record evidence and invalidating the permit.

"The District Court's job is not to re-try the facts, but to review the [zoning authority's] decision for an abuse of discretion." *Town & Country Foods v. City of Bozeman*, 2009 MT 72, ¶ 27, 349 Mont. 453, 203 P.3d 1283. As explained in detail in the opening brief, the County appropriately applied CALURS to a robust factual record, required conditions, and considered the relevant issues raised during the exhaustive public process. Friends' response critiquing the County's zoning decision, without a single cite to the Stipulated Record (except for CALURS sections), *see* Friends' Br. at 9-11, is indicative of the errors in the district court's decision and analysis. Simply suggesting the County erred or should have come to a different conclusion is insufficient to show the decision was "so lacking in fact and foundation that it is clearly unreasonable." Friends' Br. at 10 (citing *Botz*, ¶ 17). Analysis of these specific errors and issues is provided below.

III. The district court misapplied and misinterpreted the road easement under the applicable zoning regulations.

As to whether Grizzly Spur provided sufficient access to the property, the County appropriately applied CALURS in determining whether the proposed use of guest cabins for short-term rentals was a residential use, as opposed to a commercial use. *See* Op. Br. at 20-21 (citing CALURS §§ 7.27 and 7.31). As the district court itself explained, "CALURS clearly sets forth that short-term rental use is residential. Therefore, for purposes of zoning, *the short-term rental is a residential use*." Doc. 154, COL 52-53 (emphasis added); *see also* COL 23 ("[o]vernight vacation rental of a guest cabin is defined as a 'residential use.'"). Moreover, the County prohibited commercial use of the property other than for rentals. *See* Op. Br. at 21-22 (citing CC119/SR1124 (the "permit does not contemplate any additional activity, including commercial retail or events.")).

Despite clear direction in CALURS, and without giving deference to the County's interpretation of its rules, the district court went well beyond the record, and beyond the legal questions presented, and determined that in its opinion the proposed use "converted" the property "into a commercial development that eclipsed mere short-term rentals." Doc. 154, COL 54. Friends' sole argument in defense of this conclusion is that CALURS § 1.6 required application of the easement's residential restriction as "the greater restriction or higher standard."

Friends Br. at 10. The response does not address, however, the fact that CALURS considers short-term rentals as "residential," and that all other commercial activity was prohibited under the permit. *See* Op. Br. at 21-22. Considering these constraints, the easement does not impose a "greater restriction" than, and is not "at variance" with, CALURS. *See* CALURS § 1.6. The County thus appropriately interpreted CALURS and determined the easement provided access for the proposed residential use of the property.

Especially considering the lack of analysis or argument in Friends' brief, the response falls flat. Even assuming the easement issue was "fairly debatable … the legislative judgment of the zoning board controls." *Helena Sand & Gravel*, ¶ 15 (citing cases). The district court erred in misapplying and reinterpreting the County's reasoned decision concerning access, requiring reversal.

IV. The subdivision, septic permit, wetlands/natural resources, design, and public participation issues were waived and thus conceded.

After the two sentences (total) discussing the easement issue, the Friends' brief lists, in serial form, several CALURS requirements they allege the County failed to consider or apply in its zoning permit. Friends' Br. at 11 (including "simultaneous review" of water and sewer requirements; "maximum occupancy"; and "natural resource protections"). The brief, however, fails to include any analysis, argument, or citation to the Stipulated Record in support of these serial allegations of error (and Intervenor's brief does not address these issues). As

explained above, this Court will not conduct the analysis for Respondents, and they have therefore conceded these issues. *In re Estate of Snyder*, ¶ 9.

Even if considered, these allegations fail to show an abuse of discretion. As to "simultaneous" review of water and sewer requirements, the cited CALURS provision, §3.2, applies only to "subdivision of land," and this permit does not involve a subdivision of the property or subdivision review. Doc. 154, COL 7. Section 3.2 is simply not applicable, and thus the County could (and did) condition the permit on obtaining water and sewer approval by DEQ and the County Health Department, CC119/SR1124.[4] As to a determination of "maximum occupancy" related to sewer capacity, CALURS does not require a predetermination prior to zoning, but simply states that "maximum occupancy" is "the sewage capacity" as determined by the Health Department. §4.1.I.4. Again, the permit here is expressly conditioned on Dr. Dietz obtaining sewer permits and meets the major-use limit of one cabin per two acres. CC119/SR1124; CALURS §6.2(C)(2).

As to "natural resource protections," the only mention of "natural resource protection" in the district court's decision concerns constructing roads and bulb outs. Doc. 154, COL 38-39. As explained in Dr. Dietz's opening brief, however, the County and staff expressly considered these issues, SR1044-1046, and the site

[4] In any case, DEQ has since approved water and sewer permits for Tracts 1 and 2. Doc. 153.

plan (CC107, CC115) shows that neither the abandoned road nor the bulb outs are near the wetlands in the southwest corner of the property (*see* PB69/SR0500) or Lake Five. The County's reliance on these record facts was not "clearly unreasonable." *See Town & Country Foods*, ¶ 29 (zoning decision upheld as "reasonable" where, as here, city commission considered relevant criteria (including traffic, setbacks, and wetlands), staff recommendations, and public comment).

Finally, as to the public participation issue, the Friends brief does not discuss this issue at all. Intervenor's brief likewise does not address the issue in its argument section. Intervenor does state in the fact section, in conclusory fashion and without citation to the record, that the County "restrict[ed] public input into their decision by allowing only G&M's representatives to address newly raised issues about the proposed project." Int. Br. at 5. Because it lacks any citation to the record, this assertion should not be considered by this Court. *See* M.R.App.P. 12(1)(d).

In any case, it's inaccurate. The County Commission's consideration was public, and included public comment, but it was not the public hearing; that four-hour marathon occurred before the Planning Board. *See* PB 62; CALURS §3.3(B)(3)(d). The Commission, per CALURS, "review[ed] the evaluation record" and changes made in response to public comment, and made its approval decision.

See §3.3(B)(4). As explained in detail in Dr. Dietz's opening brief, the public participation here was robust, and the public, and public comment, was included at every stage of the process, fully meeting the requirements of both CALURS and Montana law. *See* Op. Br. at 27-29.

V. The evidence of grandfathering in the Stipulated Record is legally sufficient.

As explained in Dr. Dietz's opening brief, the Stipulated Record shows that she provided documentary proof to Joe Bauer, the County's Compliance Officer, that she had rented the entire property in 2018 (prior to the CALURS revisions adopted April 2019), including the main house and existing cabins. V18/SR0044; App. 3[5]; V23/SR0049; Tr. at 59, 78-79. *See* Op. Br. at 29-31. These existing cabins are therefore grandfathered and can be rented by Dr. Dietz without a major land use permit. CALURS, §2.8. This evidence of prior rental is, in fact, "uncontroverted," meaning there is no evidence in the Stipulated Record, or the trial record for that matter, to controvert this established fact.

Instead, Intervenor suggests that a phone record and email, both in the Stipulated Record and both stating that Dr. Dietz provided "proof of rental" of the existing structures, is insufficient evidence of prior rental. Int. Br. at 7-11. According to Intervenor, and the district court, paper copies of "the receipts"

[5] As noted by Intervenor in footnote 3, one citation in the Opening Brief referenced "Ex. 1." The correct cite is App. 3 (the full document).

themselves must be in the record. Int. Br. at 9-10. This "paper" requirement, however, does not exist in CALURS or in Montana law. Intervenor, for its part, fails to cite to authority for this proposition, and this Court should not "develop [the] legal analysis that may lend support to [this] position." *See Botz*, ¶ 46.

While Intervenor appropriately acknowledges that the district court's review was limited to the Stipulated Record (or should have been anyway), Intervenor then suggests that this Court should defer to the district court's judgment as to witness credibility and competing evidence in lieu of the facts in that very record. Int. Br. at 8-10 (citing *Kurtzenacker v. Davis*, 2012 MT 105, 365 Mont. 71, 278 P.3d 1002) (not a zoning-decision review case and not applying the abuse of discretion standard)). Intervenor has is backwards; this Court has made clear that it is courts that must "give deference to the decisions of the local board," not the other way around. *Powell*, ¶ 8; *Town & Country Foods*, ¶ 27, ("The District Court's job is not to re-try the facts, but to review [the] decision for an abuse of discretion.").

Moreover, the evidence in the Stipulated Record was not "competing," but determinative: Dr. Dietz provided proof of rental to the County. Even assuming the issue was "fairly debatable," the district court should not have sat as a "fact finder" and "re-weighed the evidence"; instead, "the legislative judgment of the zoning board controls." *See*, *Town & Country Foods*, ¶ 27, *Helena Sand & Gravel*, ¶ 13.

The district court discredited the County's reliance on testimony and record evidence from its own staff, thereby acting as a "super-zoning board." *See Botz*, ¶ 18. Considering the evidence in the Stipulated Record, the County's grandfathering decision was *not* "based on information that is so lacking in fact and foundation that it is clearly unreasonable," and should have been upheld. *See id.*, ¶ 17. This Court should reverse.[6]

VI. If considered, the district court's full-restoration requirement was unauthorized and unsupported outside the lakeshore zone.

Even if the district court properly voided some portion of the permit (it did not), Dr. Dietz explained that the district court's order requiring restoration of the entire property "to its previous unaltered" condition was unauthorized (other than the portion in the lakeshore zone).[7] Op. Br. at 32-33. Specifically, neither CALURS nor general zoning law provides for restoration.

Friends suggest that the district court did have authority, however, because they sought declaratory and equitable relief in addition to judicial review of the zoning permit. Friends' Br. at 11-12. This argument, however, is devoid of analysis or citation to case law, and thus asks this Court to "develop arguments …. guess

[6] At most, if we were to put form over substance as suggested by Intervenor, this Court should remand to the County and require documentation be entered into the administrative record (Dr. Dietz still has receipts).

[7] Again, the lakeshore zone violations were not appealed and are not at issue here, and the brief does not address (and thus concedes) the "Artist Studio" issue. *See* Op. Br. at 32-33.

[their] precise position" and "develop legal analysis that may lend support to [their] position." *Botz*, ¶ 46. The Court should decline the invitation. In any case, the district court does not provide authority for its restoration order. The conclusion of law cited by Friends (Doc. 154, COL 76) speaks to attorney fees and a permanent injunction, not restoration. Moreover, Friends fail to address, at all, Dr. Dietz's secondary argument that the record lacks evidence of the property's "unaltered condition." *See* Op. Br. at 33-35. The issue was conceded, and this Court should reverse.

VII. Likewise, the district court failed to justify, with the required specificity, an award of attorney fees against Dr. Dietz.

Attorney fees should not have been awarded here in the first place, but if addressed, the attorney-fee award should be reversed. This is so because the district court did not "articulate its reasons" for awarding fees against Dr. Dietz, *see* analysis at Op. Br. at 36-37, despite Intervenor's assertion to the contrary, *see* Int. Br. at 12-13. The attorney-fee Order does not explain the reasons the court awarded fees against Dr. Dietz, instead referring to the findings, conclusions and order (Doc. 154) and asserting that "the claims against the Defendants" are "intertwined." *See* Doc. 176. Likewise, the district court, in COL 76, merely explains that it found zoning violations and was awarding injunctive relief and fees. Doc. 154. The reason fees were awarded against Dr. Dietz is not explained.

The only specific rational provided by the district court, as referenced by Respondents, is the right to participate violations. *See* Int. Br. at 13 (citing § 2-3-114(2), MCA); Friends' Br. at 7; Doc. 154, COL 67, 69. But the right to participate violations do not justify attorney fees against Dr. Dietz, as the public participation duties, and responsibility, is exclusive to governmental agencies such as the County, not private citizens. *See generally* Mont. Const. Art. 2, § 8 ("governmental agencies to afford" public participation); Mont. Code Ann., Title 2, Chapter 3 (Public Participation in *Governmental* Operations) (emphasis added).

Finally, Intervenor suggests that Dr. Dietz affirmatively requested to participate as a full party, as opposed to being required to do so by the district court. Int. Br. at 14-17. This assertion is not born out by the record. Instead, despite Dr. Dietz's limited motion to intervene, Doc. 35, the district court required full intervention, Doc. 64. As later explained by the district court, it "ordered [that] G&M Trust[8] was a necessary party …." Doc. 106 at 4. That Dr. Dietz's counsel "inquired" whether the district court was "allow[ing] a limited or complete intervention," Doc. 52, is irrelevant; an inquiry is not a request. Likewise, that Dietz's counsel was more engaged in the litigation after full intervention was "ordered" by the court, *see* Int. Br. at 15-16, in unsurprising, especially after Dr. Dietz was named as a defendant in Plaintiffs' amended complaint. *See* Doc. 70.

[8] Dr. Dietz is now the sole owner of the property.

In sum, where the district court's rationale in assessing attorney fees was expressly based on alleged public participation violations, inapplicable against Dr. Dietz, and where Dr. Dietz sought only one-time, limited participation, it was inequitable for the district court to award any fees against Dr. Dietz, much less half the fees. Even if this Court upholds some portion of the judgment, it should strike the attorney-fee award.

CONCLUSION

The district court, at Plaintiffs' urging, applied an insufficiently deferential standard of review, thereby reweighing the County's decision and acting as a "super-zoning board." Its subsequent decision invalidating the zoning permit, despite the County's careful consideration of the issues in response to robust public participation, constituted error. Especially considering the many conceded issues not addressed in the response briefs, this Court should reverse.

DATED this 26th day of June, 2023.

/s/ J. Stuart Segrest
J. STUART SEGREST
Counsel for Appellant/Respondent

Certificate of Compliance

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 3,809 words, excluding certificate of service and certificate of compliance.

Dated this 26th day of June, 2023.

/s/ J. Stuart Segrest
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CERTIFICATE OF SERVICE

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