IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause DA 24-0108

PROTECT THE GALLATIN RIVER,

Plaintiff/Appellant,

v.

GALLATIN COUNTY, DEPARTMENT OF PLANNING AND COMMUNITY DEVELOPMENT, GALLATIN COUNTY COMMISSION, and JEFF and JIRINA PFEIL,

Defendants/Appellees

OPENING BRIEF OF PLAINTIFF / APPELLANT

From the Montana Eighteenth Judicial District Court, Gallatin County
District Court Case DV-16-2021-0001335-DK
Honorable Peter B. Ohman, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutions

Websites

Other

STATEMENT OF ISSUES

1. Did the District Court err in ruling that the Floodplain Administrator's decision did not violate Plaintiffs' right to participate?
2. Did the District Court err in upholding the Commission's decision to allow the Floodplain Administrator to take part in the appeal process and decision?
3. Did the District Court err in upholding the Commission's decision that the Floodplain Administrator's decision complied with the Floodplain Regulations?

STATEMENT OF THE CASE

In this case, Plaintiff Protect the Gallatin River (PTGR) appealed the November 15, 2021, decision by the Gallatin County Floodplain Administrator to approve a floodplain permit for a proposed "glampground" on an island in the Gallatin River west of Gallatin Gateway. As required by the 2017 Floodplain Regulations (Appendix Ex. 2), Plaintiff first appealed this decision to the Gallatin County Board of Commissioners. The Commissioners, after some motions practice and a hearing, largely upheld the Floodplain Administrator's decision. The only change they made was to impose a seasonal restriction on the operation of the glampground.

Plaintiff sought judicial review of the Commissioner's decision. At the same time, and in a separate action, the Defendant landowners, the Pfeils, appealed a

subsequent decision by the Floodplain Administrator to apply the amended 2021 Floodplain Regulations to the development. Subsequently, the two cases were combined (Doc. 22), and the Pfeils then amended their pleadings to also appeal the seasonal restriction.

All parties then moved for summary judgment, with Plaintiff filing two separate motions addressing the different counts of its Complaint. In its November 13, 2023, Order on Motions for Summary Judgment (App. Ex. 1), the District Court denied Plaintiff's motions for summary judgment; granted summary judgment to the County and Pfeils as to PTGR's claims; upheld the County's imposition of seasonal restrictions; but granted Pfeils' motion for summary judgment as to the application of the 2021 regulations.

After entering into a stipulation concerning the latter two rulings (Request for Entry of Judgment and Stipulation, Doc. 72), neither the County nor Pfeils appealed. Plaintiff timely appealed.

STATEMENT OF THE FACTS

On November 15, 2021, Gallatin County Floodplain Administrator Sean O'Callaghan, issued Floodplain Permit No. 2020-105 to Jeff and Jirina Pfeil. (The Permit). AR[1] 1-24. The Permit was for the Riverbend Glamping Getaway on an

[1] The County filed the Administrative Record with the District Court at Docket 25 on November 10, 2022, and those documents have been filed with this Court. Documents from that record will be referred to by their AR bate stamp number.

island in the Gallatin River immediately west of Gallatin Gateway. As proposed, the glampground would include 58 sites "with non-permanent structures" to serve as overnight accommodations, including a repurposed existing building, and related access roads, utilities, a wastewater lift station, a public water supply well and "minor" grading. AR 3. The Permit was issued pursuant to the 2017 Floodplain Regulations.[2]

The Application

The Pfeils originally submitted their application for a Floodplain Permit on January 3, 2020. AR 68-73. As shown on Figure 2 of the application, PTGR members Gordon and Margaret Lehmann's property abuts the Pfeils' property and the proposed glampground to the west and north. AR 74.

As described by the Pfeils,

> [a]ll campsites located within the floodplain/floodway will be self-contained camping units constructed on a wheeled trailer frame and can be attached to a vehicle and will be hauled off-site prior to imminent flood events occurring to avoid the potential for the units to be swept downstream.

AR 76. Each campsite will have gas, water and sewer service connections with a quick disconnect. AR 77.

The Pfeils acknowledged that "much of the property is located within the floodplain/floodway. As a result, the potential for flood damage exits." AR 88.

[2] App. Ex. 2.

"During flood events, much of the site may be inundated, limiting access to portions of the site." AR 89.

Federal Emergency Management Agency issued a Letter of Map Revision removing a portion of the property from the floodway, in 2019. AR 93-95.

Application Review

On February 7, 2020, Jeff Pfeil sent the County an email with illustrations of the "three accommodation types I would like to have permission. . . to utilize at Riverbend resort." Those three were Conestoga wagons, "tiny houses," and RVs. AR 319-321.

On February 11, 2020, the Floodplain Administrator wrote the Pfeils to inform them of the "issues that need to be clarified before the application is noticed for public comment." Among the requests, the Floodplain Administrator noted that the regulations required that any unit would have to be ready for highway use with quick disconnect to utilities and asking how the Pfeils intended to meet those requirements.

On November 19, 2020, Jeff Pfeil sent the Floodplain Administrator an email responding to various previous deficiency emails asking for more information. The attachments included a "flood response plan." The plan consisted of three pages, AR 348-350. It states that the property is in the floodway of the West Gallatin River, and "therefore it is anticipated that the property and Resort will flood. It is also anticipated that the flooding will occur while the resort is open and occupied." AR

348. The data used to create the Plan was derived from NOAA (National Oceanic and Atmospheric Administration) data and observations from previous owners and neighbors. *Id.* The Plan was based on "Flood Categories" developed by NOAA: action, minor flood, moderate flood, and major flood with flood depths 5, 6, 7 and 7.5 feet respectively. AR 349.

In the major flood stage, the Plan anticipates that the resort would have "actively flowing water in many areas within the floodplain" and facilities will "experience water damage." *Id.* In response to the flood risk, the Plan states that glampground staff will monitor the Advanced Hydrologic Prediction daily starting in April. "Once a flood warning has been issued or the action stage is reached, the owner is to be notified by phone immediately if he is not present. Attempts to reach the owner will continue on an hourly basis until he is reached." *Id.* The Plan then proceeds with general descriptions of various action scenarios, depending on which flood stage is reached. AR 350.

Public Comment

On December 6, 2020, Gallatin County issued a Notice of Floodplain Permit Application, with a comment deadline of December 28, 2020. AR 355, providing the public with 22-days to comment.

Gallatin County received 335 public comments prior to the expiration of the comment period. AR 363. All but one of the comments opposed the proposal. The

comments in opposition included detailed substantive concerns about the proposal, including potential impacts to the environment, the inappropriateness of floodplain development, traffic concerns, stormwater and safety hazards, and the inadequacy of the flood response plan, among other issues. AR 905-911.

Many commenters noted the difficulty of evacuating the site. For example, Pat Simmons commented:

> The staff residents (sic) have to call the owner every hour to reach him, and then seal connections, pump effluent, disconnect electricity and gas, disconnect and move mobiles out, 60+ units. Hard to believe the 6 employees could do all of this in a short amount of time in addition to getting all the campers safely removed ahead of a major flood.

AR 553-554.

PTGR member Kris Kruid commented expressing similar concerns. AR 624-626. She cited to § 5.02(B)(1) of the 2017 Floodplain regulations that restricts activities that increase the risk of flooding and noted a "large pile of rubble directly in the floodway" that was the result of digging a pond which was done without the proper § 310 permit.[3] She also questioned the viability of rapid removal of the camping units, in light of the requirements of § 5.02(B)(8). Additionally, she noted,

> there is no access for emergency vehicles for a two-mile stretch downstream of the proposed development. The burden on first responders and the burden of rescue costs to the community are more

[3] In *Pfeil Acquisitions LLC v. Gallatin County Conservation District,* 2022 MT 237, 411 Mont. 18, 521 P. 3d 47, the Montana Supreme Court affirmed that the Pfeils illegally built the pond without the proper permit from the Gallatin County Conservation District.

> examples of why this project has no community support and should be denied the floodplain permit.

AR 625.

PTGR members Gordon and Peggy Lehmann also submitted comments. AR 775-783. They are adjacent landowners with property to the immediate west and north of the Pfeils'. In their letter, they highlighted several concerns. In responding to the applicant's claim to be in complying with all local, state and federal permits, the Lehmanns also noted the Pfeil's noncompliance with the § 310 permit process, AR 778, now confirmed by the Montana Supreme Court. The Lehmanns stated that the Plan was not in compliance with the Growth Policy. AR 778. The Lehmanns also criticized the vague Plan for removal of the units, noting that it would potentially lead to year-round utilization of the floodway for portions of the development. AR 780.

Application Process Following Close of Public Comment

While the public comment period closed on December 28, 2020, the Permit was not issued until November 15, 2021, more than ten-months later.

After the December 28, 2020, close of public comment there was significant correspondence between the Floodplain Administrator and the Pfeils regarding deficiencies in the application; and significant new information, including changes or additions to the application, was added to the record following the close of public comment. (*See generally* AR 4, November 15, 2021 Floodplain Permit

Determination, in list of the record the Floodplain, items 17-30 are all items sent or received following the close of public comment.) Those post-comment period additions and corrections to the application are discussed, *infra,* pp. 28-30.

The Permit

On November 15, 2021, the Floodplain Administrator issued the Permit to the Pfeils. AR 1-25, Appendix Exhibit 3.

The Appeal

On December 15, 2021, PGR filed its Notice of Appeal. AR 1064-1066. PGR attached to its appeal several exhibits.

Preliminary Evidentiary Determinations

On February 4, 2022, the Pfeils filed an "Objection to Appellants' Extra-record Evidence and Motion to Strike," AR 1102-1114. In it the Pfeils objected to the attachments to the appeals, including the Osborne report attached to PTGR's appeal.

The parties fully briefed this preliminary procedural matter, and a hearing was held on March 8, 2022. At the hearing the Commission granted the Motion to Strike the extra record evidence and issued an Order which largely adopted the order proposed by the Pfeils. AR 1294-1305.

The Commission acknowledged that it "sits in an appellate capacity as set forth in the floodplain regulations." Conclusion of Law ("COL") ¶ 3, AR 1299.

"Consistent with these standards, it is fundamental, with narrow exceptions, that the scope of appeal is limited to the administrative record that was before the agency or administrative decision maker, at the time the decision was made." COL ¶ 8, AR 1300. "Whereas here, the scope of review is limited to the administrative record, evidence elicited outside such record is not proper for consideration." COL ¶ 9, AR 1301.

> In sum, this is not the 'rare case' where limited use of extra-record is necessary for background information, for ascertaining whether the Floodplain Administrator considered all relevant factors; or for ascertaining whether the Floodplain Administrator fully explicated the grounds of his decision.

COL ¶ 19, AR 1304.

Notwithstanding the Commission's detailed findings limiting the record to documents and matters that were before the Floodplain Administrator *before* his decision, the Floodplain Administrator himself, whose decision was under appeal, submitted to the Commissioners a substantial pre-hearing memo on March 30, 2022, prior to the April 8, 2022, hearing on the appeal. AR 1337-1357. The memo contained a detailed spreadsheet, labeled "Table 1: Floodplain Administrator Response to Appeals." AR 1342-1356.

The Hearing

At the hearing, PTGR presented its case, through argument, and testimony of member Peg Lehmann (Hearing recording at AR 1626, starting at approximately

55:00.) Other Appellants put on extensive testimony and argument as well. PTGR's argument focused on the following issues:

- The inadequacy of public participation in the floodplain review process, with the public comment period closing 11-months prior to a final decision (*Id.*, beginning approximately 35:00.)
- The "moving target" of the nature of the "glamping" units in the Pfeils' efforts to avoid building for lease or rent or subdivision review (*Id.,* beginning approximately 37:00.)
- The Floodplain Administrator's misinterpretation of his authority under the 2017 Floodplain Regulations, concerning his duty to protect public health, safety and welfare and the environment (*Id.,* beginning approximately 41:00.)
- The inadequacy of the "evacuation plan," and the implausibility of the Pfeils' plan to remove dozens of units from the floodplain in the event of an imminent or occurring flood, especially in light of the acknowledged fact that the access road may itself be flooded (*Id.,* beginning approximately 45:00.)
- The fact that the Floodplain Administrator ultimately approved the Permit even while the evacuation plan was "rather general," and his approval of a

"plan to make a plan," i.e., requiring the Pfeils to provide a plan in the future (*Id.,* beginning approximately 48:00.)

- The Floodplain Administrator ignoring the Pfeils' past violation of the Floodplain Regulations, despite those regulations' requirement that no permit be issued "without full compliance with" the regulations (*Id.*, beginning approximately 54:00.)

At the close of the hearing, the Commission decided to uphold the Floodplain Administrator's decision, with one exception discussed below.

Post Hearing Issues

The Floodplain Administrator drafted and circulated draft Findings of Fact, Conclusions of Law, and Order, following the hearing. AR 1520-1545. The Pfeils filed a Notice of Potential Error in the proposed Conclusion. AR 1548-1549.

Plaintiffs filed a response. AR 1565-1569. Citing *Kiely v. Red Lodge*, 2002 MT 241, 312 Mont. 52, 57 P.3d 836, Plaintiffs, again, noted for the Commissioners that it was entirely inappropriate, and unlawful, for them to allow the Floodplain Administrator, whose decision was under appeal, to draft the proposed findings for the Commissioners, and continue to be involved in determining the appeal following his decision to issue the Permit.

Commissioners' Decision

The Commissioners issued their Findings of Fact, Conclusions of Law, and Order, drafted by the Floodplain Administrator, on May 26, 2022. AR 1587-1612. They included nearly verbatim the Floodplain Administrator's response to the appeals, as set forth in his pre-hearing memo. AR 1591-1609.

However, the Commissioners did determine that the Floodplain Administrator "erroneously interpreted and applied the Floodplain Regulations, in part, by not requiring a seasonal closure of the facility from November 1st to July 1st each year." AR 1611, Conclusion of Law J. Therefore, the Commissioners modified the Floodplain Permit No. F2020-015

> by additional conditions of approval requiring Applicants to remove all temporary accommodations and to cap and seal the associated gas, water and sewer utilities from November 1st to July 1st of each year for those portions of the facility located within the Floodplain District.

Id., Conclusion of Law K.

> In all other respects, the County Commission otherwise adopts the Floodplain Administrator's responses to the alleged errors and concludes the Floodplain Administrator did not erroneously interpret or apply the Floodplain Regulations or relevant State and Federal laws.

Id., Conclusion of Law L.

STANDARD OF REVIEW

According to the 2017 Floodplain Regulations[4] § 4.04 C, an "aggrieved person" may appeal a decision by the Floodplain Administrator. Such an appeal "shall allege the Floodplain Administrator's Decision was an erroneous interpretation or application of these Regulations."

The review by this Court of the appeal to the Commissioners of the Floodplain Administrator's decision is under the abuse of discretion standard. *See, e.g., Arkell v. Middle Cottonwood,* 2007 MT 160, ¶ 24, 38 Mont. 77, 162 P.3d 856. Courts apply this standard to review informal agency decisions not subject to MAPA contested case provisions[5] and local land use decisions. *See MEIC v. DEQ,* 2019 MT 213, ¶ 21, 397 Mont. 161, 451 P. 3d 493; *Helena Sand and Gravel, Inc., v. Lewis and Clark County,* 2012 MT 272, 15, 367 Mont. 130, 290 P.3d 691. To determine whether an abuse of discretion has occurred, the Court examines "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." *North 93 Neighbors, Inc. v. Bd. of Co. Commissioners of Flathead County,* 2006 MT 132, ¶ 44, 332 Mont. 327, 137 P.3d 557, (quotation omitted).

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[4] Appendix Exbibit 2.

[5] As the Court pointed out in *MEIC v. DEQ*, "many of the bases listed in § 2-4-704, MCA are echoed in the common-law standard of review of non-MAPA cases", such as § 2-4-704 (2)(a)(vi): "arbitrary or capricious or characterized by abuse of discretion…."

Under Rule 56, the burden falls on the moving party, here the Plaintiff, to establish that the material facts necessary for resolution of the claims are not in dispute. The burden then falls "to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue [of fact] does exist." If the material facts are not in dispute, the court "must then determine whether the moving party is entitled to judgment as a matter of law." *Russell v. Flathead County*, 2003 MT 8, ¶ 16, 314 Mont. 26, 67 P.3d 182.

A district court's grant or denial of summary judgment, and related conclusions of law, are reviewed de novo for correctness. *Park County Environmental Council v. DEQ,* 2020 MT 303, ¶ 18, 402 Mont. 168, 477 P.3d 288.

SUMMARY OF ARGUMENT

The District Court erred in affirming the Commission's decision allowing the Floodplain Administrator, whose decision was under appeal, to participate in the appeal and draft the final decision denying the appeal. The Commission's actions were in direct contradiction to this Court's precedent set forth in *Kiely Construction, LLC v. City of Red Lodge,* 2002 MT 241, 312 Mont. 52, 57 P.3d 836, as well as Supreme Court precedent beginning with *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), *overruled on unrelated grounds, Califano v. Sanders,* 430 U.S. 99 (1977).

The Floodplain Administrator violated the PTGR's right to participate by failing to provide a "meaningful opportunity" to participate, as required by *Bryan v. Yellowstone County Elementary School District No. 2,* 2002 MT 264, 312 Mont. 257, 60 P.3d 381 and Art. II. Sec. 8, Mont. Const., in failing to re-open the matter for public comment upon receipt of significant new information and the passage of 11-months since the close of public comment. The District Court erred in affirming the Commissioners' decision upholding the Permit approval.

The District Court erred in upholding the Commission's decision affirming the Floodplain Administrator's issuance of the Permit. The Floodplain Administrator's issuance of the Permit was an erroneous interpretation of the 2017 Floodplain Regulations and his authority thereunder to broadly interpret the Regulations to protect public health, safety and welfare.

ARGUMENT

A. The District Court Erred in Upholding the Commission's Allowance of the Floodplain Administrator to Participate *Post Hoc* in the Appeal of his own Decision.

This case presents an unusual circumstance where the County Commissioners, purportedly acting in a judicial capacity hearing an appeal of a floodplain determination, first prevented the appellants, PTGR, from using as evidence for their appeal, an expert report (AR 1083-1086) that was attached to their appeal because the Commission was sitting in "an appellate capacity" (AR 1297). "(W)here, as here, the scope of review is limited to the administrative record,

evidence elicited outside such record is not proper for consideration upon appeal" (AR 1301).

But despite that early ruling in the case, the Commissioners then contradicted themselves, and allowed the Floodplain Administrator *whose decision was under appeal* to be involved throughout the appeal process, including (1) submitting written responses to the appeal; (2) testifying at the hearing; and (3) even drafting the decision for the Commissioners, in clear violation of the principles set forth in *Kiely Construction v. Red Lodge*, and *MM&I, LLC v. Gallatin County Commission,* 2010 MT 274, 358 Mont. 420, 246P.3d 1029, that such *post hoc* rationalizations are not allowed. The Commissioners' inconsistent and erroneous evidentiary and procedural rulings were arbitrary and an abuse of their discretion, and tainted the entire appeal process, preventing PTGR from a fair hearing.

The District Court first determined that the Commission's adoption of the Staff Report, drafted by the Floodplain Administrator, as its final decision, was not erroneous. App. A, pp. 26-29. The District Court then determined that the Floodplain Administrator's participation in the appeal proceedings was not unlawful. *Id.*, pp. 29-30. Both of these decisions were erroneous and an abuse of discretion as a matter of long-settled law in Montana.

First, the Floodplain Administrator provided the Commissioners with a "Staff Report" prior to the April 8, 2022, hearing on the appeals. AR 1337-1357. That

Report included a detailed "Floodplain Administrator Response to Appeals," including a table in which the Floodplain Administrator responded serially to each "alleged error" asserted by an Appellant, and then for each such error, provided a "Floodplain Administrator's Response." AR 1341-1356.

In reviewing these responses, it is clear that they are not limited to a neutral reference to the record as argued by the County and the Court, but in some instances, substantive responses to the concerns raised in the appeal. For instance, in response to Issue Number 4, PTGR's argument that the Floodplain Administrator did not comply with the overarching purpose of the Floodplain Regulations to minimize or eliminate harm to the environment and surrounding properties, and ignored the environmental requirements of the Montana Constitution, Mr. O'Callaghan responded:

a. The Floodplain Administrator **disagrees with Appellants' characterization** of the Flood plain Regulations as having an overarching purpose of eliminating harm to the environment.

b. Environmental considerations included in the Floodplain Regulations **are actually quite specific and narrow.** Such requirements are largely focused on regulating activities that would result in unsanitary conditions. . .

c. The scope of review appears to be broader for other permits that may be necessary for work in floodplains, such as 310 and 404 permits, **and the agencies that administer those permits may have broader authority to consider environmental and ecological impacts of projects.**

d. In terms of constitutional protections for a clean and healthful environment, the Floodplain Regulations are consistent with federal and state floodplain management requirements. **The Floodplain Regulations do not require or authorize the Floodplain Administrator to review a floodplain permit application for consistency with any environmental protections afforded by the Montana Constitution.**

AR 1343, emphasis added. Those are substantive *responses* (I "disagree"…) to issues raised in the appeal, and do not reflect the record before the decision.

In response to Issue Number 13, adequacy of the public comment period, the Floodplain Administrator opined at length on the adequacy of the Appellants' arguments, summarizing "there is little specificity or substance to those concerns," and the arguments "lack explanation of any specific flood hazard concerns dependent on change to accommodation types." AR 1351. As PTGR has documented throughout, beginning with their appeal, they have in fact been very specific in linking the flood hazard concerns to the accommodation types. AR 1351; *see, e.g.* PTGR Appeal, AR 1074-1076. Of course, the Floodplain Administrator's response minimizing those concerns raised by the Appellants amounts to a second bite of the apple defending his course of conduct, and no doubt carried great weight with the Commissioners.

In response to Issue Number 17, that the Applicant had unlawfully performed excavation work before the permit was issued, the Floodplain Administrator responded in part by acknowledging that,

> it would have been preferable to acknowledge the issue of unpermitted work completed by the Applicants in the Decision. The lack of such acknowledgement in the Decision was not intentional on the part of the Floodplain Administrator.

AR 1353. Again, such an after the fact apology no doubt carries great weight with the Commissioners and is clearly a substantive response to issues raised in the appeal.

These examples belie the District Court's statement that it had "identified no instances where the Administrator referred to extra-record evidence or offered after the fact positions regarding the permit." (App. Ex. 1, p. 30)

Additionally, the Floodplain Administrator was allowed to testify at the April 8 hearing. PTGR objected to both his written submittal and his testimony. AR 1626, recording of April 8 hearing, at 33:17-34:45. Those objections were rejected by the Commission. As the submitted transcript of the decisional part of the April 8th hearing shows, the Commissioners actively consulted with the Floodplain Administrator during their decision-making process. AR 1573-1586.

Next, after the hearing, the Floodplain Administrator submitted to the Commissioners proposed Findings of Fact, Conclusions of Law, and Order, as well as his further responses to post-hearing comments. These proposed findings included, *almost verbatim,* the Floodplain Administrator's response to the appeals. AR 1341-1356.

The Pfeils then filed a "Notice of Potential Error," AR 1348-1351, addressing what they claimed was an error in the Floodplain Administrator's proposed findings. PTGR responded, and in part renewed its objection to the Floodplain Administrator's continuing involvement, including his drafting of the proposed decision. AR 1565-1570. At a hearing on the matter on May 17, 2022, PTGR again objected in detail to the Commission's continued reliance on the Floodplain Administrator in reviewing his own decision. AR 1649, 24:40-19:38. The Commissioners ignored the objection and adopted modified findings.

In the approved Findings of Fact, Conclusions of Law, and Order (AR 1587-1612), the Commission adopted the Floodplain Administrator's responses to the appeals in the Staff Report for the April 8 hearing (AR 1337, *et seq*.): "The County Commission agrees with and **adopts the Floodplain Administrator's responses** as follows. . . ." AR 1591. (Emphasis added) The Findings of Fact, Conclusions of Law, and Order did not in any way respond to the presentations by the Appellants at the April 8 hearing, instead adopting the Floodplain Administrator's "responses" *that had been drafted before the hearing*. Nor did the Commissioners address in any way PTGR's objections to allowing the Floodplain Administrator to be involved in the decision-making on the appeal of his decision, as set forth above.

It was inappropriate for Sean O'Callaghan, the decision maker whose decision was appealed from, to have *any* involvement in the appeal hearing. The Commission

should not have considered his written responses to the appeal or his testimony at the hearing. Moreover, it was inappropriate for the Commission to, in turn, *adopt his response to the appeals, as its appellate decision*. This was clearly an abuse of the Commissioners' discretion.

The District Court, in discussing the issue of the final decision, focused on the Commissioners' independent involvement in the final decision separate and apart from the Floodplain Administrator's involvement. App. Ex. 1, pp. 26-28. However, the Court did not address whether the Floodplain Administrator, whose decision was under appeal, should have been involved in drafting the findings in the first place.

The overt involvement of the decision maker in responding to an appeal of his decision is an egregious violation of fundamental principles of administrative record review law. The law in Montana and nationally is crystal clear that in an administrative record review case, *the decision maker* does not get another bite at the apple to explain his or her decision. He or she is not allowed to submit *post hoc* rationalizations explaining or justifying a previously made decision.

Two cases control in this situation in Montana. The first is *Kiely Construction, LLC v. City of Red Lodge*. There, the City of Red Lodge, in a challenge to an appeal of a subdivision denial by the City, sought to include in the record minutes of the City Council meeting, and testimony from the City Council members explaining

their decision. The District Court excluded this evidence, and this Court upheld that ruling on appeal:

> Second, we conclude the District Court did not abuse its discretion when it excluded the minutes of the April 15, 1999 City Council meeting, **as well as testimony from individual council members,** as offered by Red Lodge **to explain the individual member's reasons for the denial.** The record is clear that Red Lodge violated § 76-3-620, MCA, by not issuing a written statement explaining the reasons for the denial and the evidence justifying the denial. The council meeting minutes are not the equivalent of the written statement the council was statutorily required to issue, and cannot be used as a substitute. Accordingly, the District Court did not abuse its discretion in excluding the minutes.
>
> **Nor were the after-the-fact opinions of individual council members as to the reasons for the denial relevant**. In an analogous situation, courts will not consider **post-enactment statements of legislators** because they are not part of the legislative history and **accordingly, not part of the record.** *See Slaven v. BP America, Inc.* , 973 F.2d 1468, 1475 (9th Cir. 1992); and *Hazardous Waste Treatment Council v. U.S. E.P.A.,* 280 U.S. App. D.C. 338, 886 F.2d 355, 365 (D.C. Cir. 1989). **Therefore, we conclude it was not error for the trial court to exclude testimony from the individual council members as to their reasons for denying Kiely's preliminary application, since such testimony would constitute 'post-decision' statements, which were not properly part of the record.**

Kieley v. City of Red Lodge., ¶¶ 96-97, emphasis added.

In *Kiely,* § 76-3-620, MCA required that the Commission issue a written statement of their decision. They did not do so, but tried to, after the fact, insert explanations for their decision. Here, the Floodplain Administrator *did* issue a "statement" as required by the rules – his November 15, 2021 decision. Therefore,

arguably, his *post hoc* involvement to explain his decision was even more inappropriate because he should have explained it in the first place in his decision.

The second Montana case is *MM&I, LLC v. Gallatin County Commission*, 2010 MT 274, ¶¶ 20-27, 358 Mont. 420, 246 P.3d 1029, where the Court relied on *Kiely* and rejected attempts by an appealing party to include deposition testimony of Gallatin County Commissioners *after the fact to explain a decision.*

The basic principle underlying these cases comes from the seminal environmental case of *Citizens to Preserve Overton Park v. Volpe*. There, plaintiffs challenged a decision by the Secretary of Transportation to construct a six-lane interstate through a public park. Specifically, they challenged the Secretary's decision to approve the highway without formal findings. At the District Court, the government introduced post-decision affidavits to explain the decision. *Id.*, 401 U.S. at 409. The District Court and Appeals Court upheld the use of the litigation affidavits. The Supreme Court reversed. Its discussion is germane, and worth reviewing at length:

> Here, unlike the situation in *Thorpe (Thorpe v. Housing Authority,* 393 U.S. 268 (1969)), there has been a change in circumstances -- additional right-of-way has been cleared and the 26-acre right-of-way inside Overton Park has been purchased by the State. **Moreover, there is an administrative record that allows the full, prompt review** of the Secretary's action that is sought without additional delay which would result from having a remand to the Secretary.
>
> That administrative record is not, however, before us. **The lower courts based their review on the litigation affidavits that were presented.**

> **These affidavits were merely '*post hoc*' rationalizations, *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169 (1962), which have traditionally been found to be an inadequate basis for review.** *Burlington Truck Lines* v. *United States, supra; SEC v. Chenery Corp., 318 U.S. 80, 87 (1943).* . . .
>
> Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. **That review is to be based on the full administrative record that was before the Secretary at the time he made his decision.** . . .
>
> The court may require the administrative officials who participated in the decision to give testimony explaining their action**. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided.** ***United States*** **v.** ***Morgan*****, 313 U.S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made.**

Citizens to Preserve Overton Park v. Volpe., 401 U.S. at 419-420, emphasis added.

Two lessons emerge from *Overton Park.* First, post-decision litigation affidavits constitute *post hoc* rationalizations that are not a proper basis for review. Obviously, the same would apply to post-decision testimony or other involvement in the appeal process, as was the case here. Second, while there are exceptions to the administrative record review rules that would allow a decision maker to submit additional testimony, where there *is* an administrative record, as there is here, that testimony can only occur upon a showing of bad faith, something that is not an issue here. Indeed, the County in its opening brief refers to the "voluminous record." Doc. 49, Brief in Support of MSJ, p. 20.

Accordingly, resort to testimony or post-decision documents prepared by the Floodplain Administrator is inappropriate.

In the Commission's March 22, 2022, Order removing from the record documents that Appellants, including PTGR, had attached to their appeals, the Commission stated, "[o]n appeal, this Commission sits in an appellate capacity as set forth in the Floodplain Regulations." AR 1275, Conclusion of Law 3. Based on the legal standard set forth above, *if* the Commission was acting in an appellate capacity, then taking any *post hoc* testimony, explanation or advice *from the decision maker* was and is improper.

The District Court's claim in responding to this argument that the Court should defer to the Administrator's and Commission's decision, based on the case of *Powell County v. Country Village,* 2009 MT 294, ¶ 8, 352 Mont. 291, 217 P.3d 508 is misplaced. There, the Court, in setting forth the standard of review, noted, first, that "district court's review a zoning authority's decision for abuse of discretion." *Id.* The Court then went on to state:

> A zoning authority abuses its discretion when the information upon which the authority based its decision is 'so lacking in fact and foundation that it is clearly unreasonable.' . . . courts give deference to the decisions of the local board… We review a district court's conclusions of law to determine if they were correct.

Id. (internal citations omitted).

Powell does not stand for, and there is no authority for, the proposition that giving deference to the decision maker for his decision equates with allowing that decision-maker to participate in the determination of the appeal of his decision.

Montana law makes clear that the Commissioners erred in allowing and encouraging the Floodplain Administrator to be integrally involved in the appellate review of his own decision. Counsel is aware of no similar situations in case law where a decision maker gets to take part in an appeal of his or her decision much less drafting the actual decision on the appeal. That would be akin to the District Judge joining this Court in its deliberations on the appeal of his decision – something clearly not allowed. Accordingly, the Commissioners' decision upholding the Floodplain Determination was a clear abuse of discretion and must be set aside.

B. The Floodplain Administrator Violated PTGR's Constitutional Right to Participate.

PTGR alleged in its Complaint that the Gallatin County Planning Department and the Floodplain Administrator violated its constitutional and statutory right to participate. The basis for that claim was two-fold: first, that Gallatin County should have extended the initial public comment period, because it fell during the holidays and the COVID pandemic; and second, that Gallatin County should have re-opened the public review process once the application was complete and before the final decision to approve the Permit.

Article II, Section 8, of the Montana Constitution states, "[T]he public has a right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." That constitutional right is, in turn, "provided by law" in the Public Participation Act, §§ 2-3-101, *et seq.*, MCA (the Act). The Act applies equally to state and "local government" agencies. § 2-3-102(1), MCA. Agencies are required to,

> develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures must ensure adequate notice and assist public participation before a final agency action that is of significant interest to the public.

§ 2-3-103(1), MCA; *see also* § 2-3-111(1), MCA. PGR timely filed this matter. § 2-3-114 (1), MCA. PGR limits the appeal of this issue to whether the County should have re-opened public comment.

The District Court determined that re-opening the comment period here was not a violation of the right to participate.[6] The question here is whether the public was given a "reasonable opportunity to participate." The public comment period closed almost eleven months prior to the final decision. After the December 28, 2020, close of public comment there was significant correspondence between the

[6] The Court clearly determined that the Defendants' actions *were* subject to the statutory and constitutional rights to participate, rejecting the County's argument that the Defendants were not even subject to the law.

Floodplain Administrator and the Pfeils regarding deficiencies in the application; and significant new information, including changes or additions to the application, was added to the record following the close of public comment. (*See generally* AR 4, November 15, 2021, Floodplain Permit Determination, list of the record the Floodplain, items 17-30 are all items sent or received following the close of public comment.)

Those post-public comment documents included several items that had significant bearing on the final decision. For instance, on January 14, 2021, the Floodplain Administrator sent the Pfeils a letter listing four deficiencies in the application that they needed to address, including a request they respond to public comment. On May 12, 2021, the County received a response from the Pfeils, which included a response to certain categories of public comment. AR 889-901. Within the Pfeils' response was an admission that they had performed work in the floodway before obtaining the permit:

> Installation of the fire hydrant to address future local fire department and Montana Department of Environmental Quality (DEQ) requirements did occur during the excavation of sediment from the existing pond which was a permitted project. At the time of that work, I did not understand the floodplain permits the way I do today.

AR 900. The public was not informed or able to comment on this admitted violation.

An August 18, 2021, Memo to the Floodplain Administrator (AR 929-949) from the Pfeils' engineer contained both a request that the Floodplain Administrator

waive the provision of the Floodplain Regulations requiring that the applicant obtain all Federal, State and County permits before approval (AR 929-930); and contained additional and substantial detail as an "addendum" to the information submitted with the original application (AR 930-949). The public was not informed or able to comment on this "addendum."

On September 1, 2020, DEQ approved a Certificate of Subdivision Plat Approval for the Applicants. AR 341-344. That Plat Approval shows much more extensive development within the floodway than was shown on the Applicant's "Overall Site Plan" submitted to the County on February 28, 2020. AR 337-338. Most of this additional proposed development would be prohibited under § 5.02 (E) of the 2017 Floodplain Regulations, which prohibits: (1) "new construction or alterations of any residential, commercial or industrial structure." Even though the Floodplain Administrator acknowledged the Conditions of the DEQ permits, and obviously had the copy of the previous, more expansive proposal, there is absolutely no discussion of, or plans to address, these additional proposed and clearly delineated developments in the floodway.

The public was never able to comment on or inquire about this significant inconsistency between plans approved by DEQ and permission sought by Pfeils in the floodplain process.

Finally, the public did not have a meaningful opportunity to comment on the "moving target" of types of glamping units that would be used and allowed. In one of the developer's first submittals to the County, the proposed units were described as Conestoga wagons, "tiny houses," and RVs. AR 319-321. The application for the floodplain permit initially described the units as follows:

> **All** campsites located within the floodplain/floodway will be self-contained camping units **constructed on a wheeled trailer frame and can be attached to a vehicle** and will be hauled off-site prior to imminent flood events occurring to avoid the potential for the units to be swept downstream.

AR 76, emphasis added. Then it apparently changed to Conestoga Wagons and teepees. (*See* AR 957)

By the time the Floodplain Permit was issued, the uncertainty about exactly what types of units were going to be used (and allowed) was reflected in the Permit itself. In that document, the accommodation units are variously described as: "non-permanent structures and overnight accommodations" (AR 3); "mobile units and teepees" (AR 7); "mobile self-contained camping units constructed on a wheeled trailer frame (and) can be attached to a vehicle and hauled off-site to avoid flooding" (*Id.,*); "Conestoga wagons and Tepees" (AR 11); "recreational vehicles or towable units" (AR 11); and "recreational vehicles, travel trailers and other accommodations" (AR 23).

The public should have been given the chance to comment as the project evolved because each type of unit proposed will come with its own unique challenges when it comes time for the units to be rapidly emptied of furniture, disassembled, taken down, and removed on short notice. For instance, the break down and removal of a teepee is a far different matter than hooking up a unit on a trailer and driving away. The public could have commented on those proposed changes, if given the opportunity. Instead, no public comment was received on the use of and breaking down of teepees, and the Floodplain Decision contains absolutely no analysis of how the tepees would be struck and how long it would take to remove them from the floodway.

Accordingly, the public was not provided with a "reasonable opportunity" to participate (Art. II, Sec. 8, Mont. Const.) The case of *Bryan v. Yellowstone County Elementary School District No. 2* contains a detailed discussion of the term "reasonable" found in Article II, Section 8, in the context of citizens' ability to view pertinent information prior to a final decision.

In *Bryan,* the School District claimed that it satisfied the right to participate when the plaintiff had an opportunity for "submit(ting) her views to the agency." *Bryan v, Yellowstone County.*, ¶ 41. This Court then evaluated dictionary definitions of "reasonable:"

> Black's Law Dictionary defines 'reasonable' as '1. Fair, proper, or moderate under the circumstances . . . .' Within the context of Rule

> 12(c), M.R.Civ.P., this Court has stated that a party has a 'reasonable opportunity' to act if he or she is '**fairly apprised**.' … Other jurisdictions have expanded upon these equitable notions to include a 'meaningful' component to the "reasonable" standard. See *Schwartz v. Town Plan & Zoning Commission* (Conn. 1975), 168 Conn. 20, 357 A.2d 495, 497 (conducting a just public hearing means that the public is given the opportunity to participate 'at a **meaningful time and in a meaningful manner . . . .**')

Id., ¶ 43, emphasis added, internal citations omitted.

Ultimately, this Court ruled that the District violated Bryan's right to participate.

Here, PTGR's ability to provide public comment prior to a final decision by the Floodplain Administrator is analogous to Bryan's efforts to speak at a hearing of the school district. In this instance, the public was not "fairly apprised" nor, importantly, provided a chance to comment at a "meaningful time and in a meaningful manner," given the moving target of the application process *following* the close of the public comment period. In light of the new additions to the record following the close of public comment, and the passage of almost eleven months, the County did not provide the public with a fully informed opportunity to speak. In doing so, it "reduced what should have been a genuine interchange into a mere formality." *Bryan,* ¶ 46.

The District Court ruled that the County did not violate the public's right to participate by not re-opening public comment before the final decision.

> The opening of public comment period does not mean the Administrator had completed the review of the application and had no further questions for the Applicant or would be requesting further documentation. Were that the case, the Administrator would not be able to address issues raised by the public (comment.)

App. Ex. 1, Order, p. 15.

However, the District Court here conflates the *application* process with the *review* process. After the application is fully submitted and the application is complete, the Floodplain Administrator must make a decision on whether it adequately meets the requirements of the regulations, and grant or deny the permit. App. Ex. 2 2017, § 4.01(C), AR 1004. It is possible that in some instances, the public comment period is followed, quickly and without much change to the application, with a final decision. But that was not the case here. Eleven months transpired, and the application as originally submitted had changed in the material ways highlighted above.

The Floodplain Administrator's review should have been informed by public comment on the final plan for those units, not some preliminary, and then discarded, plan.

Finally, echoing the County, the District Court "notes that the public had additional opportunity to participate while this matter was before the Commission and did so." App. Ex. 2, Order, p. 14.

Taking part in an *appeal* is a far different matter than having the meaningful opportunity to comment *before* the decision is made. After all, the County has been arguing all along that the record on the Permit was closed at the point when the permit was issued. Thus, no such public comment during the appeal, by PTGR or the public, would or could be considered by the Floodplain Administrator *concerning the decision he already made*. In other words, returning to *Bryan v. Yellowstone County*, comments are not meaningful when they are taken after the permit is issued and when the Floodplain Administrator cannot even consider them.

C. The District Court Erred in Finding that the Floodplain Administrator's Decision to Grant the Permit was not an Erroneous Application of the Floodplain Regulations.

Finally, PTGR alleged that the Floodplain Administrator's decision did not comply with the Floodplain Regulations, App. Ex. 3. Under Section 1.03, the Purpose of the regulations is to "promote the public health, safety and general welfare, to minimize flood losses in areas subject to flood hazards and to promote the wise use of floodplains." The Purposes provision goes on to specify that the regulations are intended to "restrict or prohibit uses which are dangerous to health, safety or property in times of Flood, or cause increased Flood heights or velocities" (§ 1.03(B)(1)); "identify lands unsuitable for certain development purposes because of flood hazards" (§ 1.03(B)(3)); and "minimize the need for rescue and relief efforts

associated with flooding and generally undertaken at the expense of the general public" (§ 1.03(B)(4)).

The overarching purpose of the Floodplain regulations, then, is to minimize or eliminate harm to the environment and surrounding properties. As such, the purpose of the Regulations is consistent with the environmental provisions of the Montana Constitution. Mont. Const. Art. II, § 3, and Mont. Const. Art. IX, § 1.

The "meat" of the Gallatin Floodplain Regulations is found under the "Additional Factors" requirements at § 4.01(B)(1); and "Specific Standards" for "Floodways" found at §§ 5.01 and 5.02. PTGR alleged that the approved development does not meet these regulatory requirements, and therefore, the Administrator erred in approving the permit.

As context for a discussion of the issues at play, it is important to remember some specific facts:

- Much of the proposed development is in the floodplain, and during floods much of it may be inundated, limiting access to the site. AR 88. It is anticipated that flooding will occur when the glampground is open and occupied. AR 89.

- The accommodation unit types were apparently narrowed down to "mobile units and teepees." AR 11 and 23.[7]
- The Floodplain Administrator acknowledged that access to the site may not be possible when flooding occurs. Therefore, the Applicant's adherence to a flood evacuation plan is especially important. AR 17.
- The Floodplain Administrator found that "units must be able to be quickly disassembled or removed from the floodplain when the risk of flooding is imminent to minimize the likelihood of them being swept downstream to the injury of others. . .. If the Applicants and their employees do not adhere to (the evacuation) plan and there is a flood, then there is a risk of units being mobilized by flood waters and causing damage." AR 14.
- Nevertheless, the evacuation plan proposed is "rather general (but) there are not specific standards or requirements for such plans." AR 20.
- The applicant did not provide any evaluation of how long it would take to strike each unit (teepees or mobile units), and what that would entail; nor did the Floodplain Administrator analyze this issue.

[7] Post-decision there was apparently a request for yet another type of accommodations. AR 1380-1393.

Given these facts, what is a floodplain administrator to do? What he should have done was to construe his powers under the Floodplain Regulations in the broadest possible manner to protect natural resources from damaging floods. He did not do so.

The District Court took issue with this position: "However, the regulations to not include language supporting such an interpretation." App. Ex. 1, Order, p. 19. This position ignores this Court's long held standard for statutes intended to protect the public health, safety, and welfare.

> Legislation enacted for the promotion of public health, safety, and general welfare, is entitled to 'liberal construction with a view towards the accomplishment of its highly beneficent objectives.' 3 Sutherland, Statutory Construction, § 71.01 (4th Ed., 1974). As one court has stated:
>
> 'No rule of statutory construction is more readily applied by the courts than that public statutes dealing with the welfare of the whole people are to have a liberal construction.' *Hall v. Union Light, Heat & Power,* 53 F.Supp. 817, 818-19 (E.D.Ky.1944).

State ex rel. Florence-Carlton Sch. Dist. v. Board of County Commissioners, 180 Mont 285, 291, 590 P.2d 602 (1978).

The County argued, and the District Court agreed, that a portion of the Regulations that PTGR relies on, in part, in its argument, the "Additional Factors" found at § 4.01 B.(1), are not mandatory and therefore not enforceable. Exhibit 1, p. 20.

And yet, these additional factors clearly contain much of the substance of the Regulations, requiring the Floodplain Manager to "consider," *and presumably act on*, several specific factors intended to quantify and minimize flood damage. Among those factors he must consider (a) the danger to life and property due to increased flood heights. . ., (b) the danger that materials may be swept onto other land or downstream. . ., (f) that the proposed development will be "reasonably safe from flooding"; and, importantly, (l) "the safety of access to property in times of flooding for ordinary and emergency services."

These are factors that "shall be considered for every Permit application." § 4.01 B.(1). And making decisions to approve or deny a permit based on these factors is consistent with the Floodplain Regulations overall. For instance, the Specific Standards set forth in Section 5 of the Floodplain Regulations, require that all development be "consistent with the need to minimize Flood damage" (§ 5.01 A (1)) and "use construction methods and practices that will minimize Flood damage." (§ 5.01 A. (2).) And the additional factors are consistent with the Purposes of the Floodplain Regulations discussed above—to "restrict or **prohibit uses which are dangerous to health, safety** or property **in times of Flood**, or cause increased Flood heights or velocities" (§ 1.03(B)(1) (emphasis added).

The District Court determined that the Floodplain Administrator "thoroughly considered" these criteria. Yet, when one reviews that discussion, it is clear that the

Floodplain Administrator's findings were not consistent with the information in, or missing from, the application. For instance, Additional Factor § 4.01.B.1.b. requires consideration of "the danger that materials may be swept onto other lands or downstream to the injury of others," and § 4.01.B.1.l. requires consideration of "the safety of access to the property in times of flooding for ordinary and emergency services." The Floodplain Administrator dismissed these impacts in his response to both criteria, relying on the purported portability of the units (AR 13), even while acknowledging "[D]ocuments in the record suggest that access to the property may not be possible, or at least very challenging, during periods of flooding." AR 17. This "suggestion" is reinforced in the application, which states: "During flood events, much of the site may be inundated, limiting access to portions of the site." AR 89.

An inaccessible road is useless, and therefore is "dangerous to health, safety or property in times of Flood." App. Ex. 2, § 1.03(B)(1). Approving a development that may be inaccessible during flooding certainly does not "minimize the need for rescue and relief efforts associated with flooding and generally undertaken at the expense of the general public." App. Ex. 2, § 1.03.B.4. On that basis alone, the Floodplain Administrator should have denied the application.

The Floodplain Administrator did not in any meaningful way evaluate the *actual ability* of the Pfeils to ensure that all the various units could be timely and completely removed from the Floodplain before an imminent flood.

The Floodplain Administrator noted that "while flooding is relatively common in this location, such events are rarely a complete surprise." AR 19. That statement is in stark contrast to the County's own description of flood dangers on their website.[8] Among the cautionary statements by the County are "the conditions which result in flooding **occur quickly** and are difficult to conduct long range forecasting for"; and "a key issue with flooding to keep in mind is **that it changes quickly**. Flooding can change from no issue to a big issue very quickly. . . . It is key to keep in mind that flooding often peaks in the middle of the night catching people off guard when they wake up." (*Id.,* emphasis added) Clearly, a flood can come as a "complete surprise."

The County argued, and the District Court agreed, that the "[r]egulations do not actually require a response plan, so the Administrator could not deny the Permit on that basis." App. Ex. 1, Order, p. 21. But if there is not a viable plan in place that will assure the "safety and access to the property in times of flooding for ordinary and emergency services" (§ 4.01. B.1.l), then how can there be compliance with the

[8] https://www.readygallatin.com/community-resources/preparedness-information/flooding-in-gallatin-county/

mandatory requirement that the floodplain district "be consistent with the need to minimize Flood damage," as required at § 5.01.A.1? Because if there is not an effective evacuation plan, then the requirements of the Regulations would be violated. *See* § 1.03 B.(1) and (4); § 4.01 B.(1)(a), (b), (f) and (l); § 5.01 A.(1) and (2), and B.(2); and § 5.02 A.(8). In other words, if there is not an effective evacuation plan, then these requirements cannot be met, and the permit could not be approved.

The District Court, in its discussion at pp. 21 and 22, highlights the factors that the Administrator required to be included in the evacuation plan, ¶ 11, AR 23. However, a plan compliant with these factors had not been developed or submitted to the Floodplain Administrator at the time of the approval, so the approval was essentially dependent on a future promise.

While the final decision by the Commissioners imposed a seasonal restriction on the glampground (AR 1608-1609), the requirement for a flood preparedness plan remains in place. (AR 1609). If flooding were to occur during the period that the glampground is occupied (July 1- November 1), the proposed evacuation plan as noted above, is wholly inadequate, and a future promise to "develop, maintain, implement and adhere to a flood response plan" that has not yet been established fails to ensure that the requirements of the Floodplain Regulations will be met.

Finally, the District Court, like the County, minimized the import of adherence to the Growth Policy. Among the "additional factors" the Floodplain Administrator

must consider is "the compatibility of the proposed use to any adopted growth policy or other plans covering the project area." § 4.01.B.1.k.

Here, the Gallatin Gateway Neighborhood Plan states plainly that 'new development should be designed to avoid the floodplain."[9] Under § 4.01 B. (1)(k), application of the Growth Policy is one of the additional factors that the Floodplain Administrator *must* consider. But instead of identifying and evaluating this obvious and very specific application of the applicable Neighborhood Plan[10] Growth Policy to the Floodplain, the Administrator instead determined, without analysis, that the applicant's assertion that this project was in substantial compliance with the Growth Policy was correct. AR. 17. The Floodplain Administrator then asserted, as did the Court in upholding the decision (Ex. 1, p. 24), that Growth Policies are not "regulatory" and therefore cannot provide the basis for denial of a permit.

However, in *Heffernan v. City of Missoula,* this Court addressed a similar situation, where an approved zone amendment was at odds with a specific provision of the neighborhood plan, as follows:

> The City reaffirmed the Rattlesnake Valley plan in 2006, and it thus continues 'to have full force and effect' as part of the City's growth policy. Yet, notwithstanding that growth policy, **the City approved a development which, as the District Court observed, exists on a scale**

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9 https://gallatincomt.virtualtownhall.net/sites/g/files/vyhlif606/f/pages/gatewaycommplan.pdf

10 Authorized and incorporated into the Growth Policy through § 76-1-601(4)(a), MCA.

> **that is incompatible with the development patterns of the neighborhoods** in the area and especially with the natural ecosystem that underlies the area. While it is not necessary for the Sonata Park zoning to be 'consistent with every goal and objective expressed' in the Rattlesnake Valley plan, *Citizen Advocates*, ¶30, **it is necessary for the zoning to substantially comply with the plan**. It does not, as established by the stipulated record and the City's findings of fact and conclusions of law.

Heffernan v. City of Missoula 2011 MT 91, ¶ 89, 360 Mont. 207, 255 P.3d 80, emphasis added.

Here, likewise, for the Floodplain Administrator to say that a development in the floodplain substantially complies with the Growth Policy when the applicable Neighborhood Plan says that development should be *avoided* in the floodplain is tantamount to ignoring the Growth Policy, something the Court in *Heffernan* says cannot be done.

The District Court's statement that the Growth Policy Act does not "require the County to consider the growth policy in . . . implementing the Regulations" (App. Ex. 1, Order, p. 24) is belied by the applicable regulations that *do* require consideration. § 4.01 B.(1)(k). In any event, as in *Heffernan,* here, the presence of a glampground in the floodplain of the Gallatin River does not "substantially comply" with the Neighborhood Plan because it is directly at odds with the applicable provision of that very plan.

The Floodplain Administrator erroneously interpreted and applied the regulations when he approved the application. The District Court's decision upholding that decision on summary judgment was not correct.

CONCLUSION

Based on the foregoing, this Court should determine the District Court committed error when it upheld the Floodplain Administrator's and Commission's decisions on summary judgment and reverse the District Court's decision and grant summary judgment to PTGR.

DATED this 8th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this 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 2008 for Mac is 9,900, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

DATED this 8th day of May 2024.

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