

**IN THE SUPREME COURT  
OF THE STATE OF MONTANA**

Case No. DA 23-0728

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**GBSB HOLDINGS, LLC,**

Plaintiff and Appellant,

vs.

**FLATHEAD COUNTY BOARD of COUNTY COMMISSIONERS  
and FLATHEAD COUNTY, MONTANA; WHITEFISH VILLAGE,  
LLC; WILLIAM F. OSWALD and JULIANA M. OSWALD, co-trustees  
of the Oswald Family Trust dated May 23, 2016; SHAWN PATRICK  
JAMES and KRISTIN PATRICIA BELL; WHITEFISH HILLS  
VILLAGE HOMEOWNERS ASSOCIATION, INC.; and JOHN DOES  
1 AND 2,**

Defendants and Appellees.

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**ANSWER BRIEF OF APPELLEE,  
WHITEFISH VILLAGE, LLC**

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On Appeal from the Montana Eleventh Judicial District Court  
Flathead County Cause Nos. DV-20-995 and DV-21-206  
Consolidated under DV-20-995  
Honorable Amy Eddy, Presiding District Judge

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## **NOTE ON NAMES and PARTIES**

The petitioner/Appellant, GBSB Holdings, LLC, is a Texas limited liability company. Since filing this lawsuit, it has been succeeded by Octex Company A, a Texas corporation. *Notice of Ratification*, Doc. 67. Octex Company A is comprised of the same two principals, Gardner Baldwin (GB) and Scott Baker (SB). The parties continue to refer to the Appellant as GBSB.

The defendant/Appellee, Whitefish Village, LLC, is a single member (Tibor Toth) Montana limited liability company and the developer of the Whitefish Hills Village PUD/subdivision. Tibor also developed the original Whitefish Hills (to the north of Whitefish Hills Village, the subdivision involved here) and Whitefish Hills Forest (to the west). The developer is referred to herein as Whitefish Village (with no “Hills”). The Whitefish Hills Village PUD/subdivision is referred to herein either by its full name, Whitefish Hills Village, or for ease of reading sometimes just Whitefish Hills.

The defendant/Appellee, Whitefish Hills Village Homeowners Association, Inc., is, as the name suggests, the association of Whitefish Hills Village lot owners. It is a Montana nonprofit mutual benefit corporation.

## ISSUES PRESENTED FOR REVIEW

This appeal presents two primary issues. One of those issues has real significance for the parties and that is whether GBSB has the right to utilize the private roads in the adjacent Whitefish Hills Village subdivision to access its new “Baker 80” subdivision.<sup>1</sup>

The other issue is the validity of the County’s abandonment of a segment of “Brady Way,” a county right-of-way. While the abandonment issue is interesting academically, its practical significance is limited. Whether that segment of undeveloped right-of-way was abandoned by the County or not, it will never be used as a road. In 2011, eight years before the formal abandonment of the right-of-way, Flathead County approved the Whitefish Hills Village planned unit development, *conditioned on the abandonment*. The County’s approval of the PUD included this condition [emphasis added]:

The existing County road easement for Brady Way *shall be abandoned* along the boundary between Tract 4 in Section 25 and Tract 4 in Section 26 . . . as proposed by the applicant.

Thus, while the formal act of abandonment would not occur until some eight years later, by approving the Whitefish Hills Village subdivision

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<sup>1</sup> GBSB’s proposed subdivision was originally known as “Baker 80” but has been renamed by GBSB, or its successor company, Octex Company A, as “Whitefish Estates.” The parties continue to refer to it as Baker 80.

subject to that condition, the fate of that segment of county right-of-way was sealed. Whitefish Village was given approval to create subdivision lots and Open Space Area A on those portions of its property through which the County's right-of-way passed. Those features of the subdivision are now "on top of" the right-of-way. GBSB's pursuit of this issue was never about using the right-of-way. It was about leverage – putting pressure on Whitefish Village, the HOA and the County to capitulate to GBSB's demands for access through Whitefish Hills to protect the individual defendants from having a county road through their properties.

There is in the County's brief a succinct statement of these two issues framed in terms of how the District Court ruled on each. *Flathead County's Answer Brief*, p. 1. Whitefish Village endorses that statement.

## **STATEMENT OF THE CASE**

The Appellant (the petitioner/plaintiff below), GBSB Holdings, LLC, initiated the action with its *Petition for Writ of Review or Declaratory Relief*. Doc. 1. GBSB raised two issues; a declaration of its right to use the internal subdivision roads in Whitefish Hills for access to its proposed Baker 80 subdivision, and its challenge to the validity of the County's abandonment of an unbuilt segment of county right-of-way. *Id.* GBSB is pursuing this litigation to avoid having to build its own access to its Baker 80 subdivision.

GBSB's objective is to secure the right, through a ruling of this Court, to use the roads in the adjacent Whitefish Hills Village subdivision as the primary access for its development, without the consent – and over the strident objection – of Whitefish Hills.

In the County's brief there is a statement of the case and it is adopted by Whitefish Village. *Flathead County's Answer Brief*, pp. 1-3.

### **STATEMENT OF FACTS**

There is a detailed statement of facts in the County's brief. *Flathead County's Answer Brief*, pp. 3-9. There are statements of the facts in both of the District Court's major rulings; its summary judgment order and its ruling on the abandonment issue. *Order* (on summary judgment), Doc. 41, pp. 2-4; *Order Re: Writ of Review*, Doc. 92, pp. 2-6. Both of those District Court rulings are included in the internal appendix to GBSB's brief. *Appellant's Opening Brief*, Internal Appendix Items 1 and 2. A *Supplemental Statement of Facts* was filed in the District Court by Whitefish Village for the hearing on the Writ of Review. *Supplemental Statement of Facts*, Doc. 80. That document is attached to this brief as Appendix 1.

### **STANDARDS OF REVIEW**

The two issues raised by Appellant call for different standards of review, as follows:

**1. Summary Judgment – de novo.**

The applicable standard for this Court’s review of the District Court’s summary judgment ruling on the first issue is the well-known standard of *de novo* review under Rule 56, M.R.Civ.P. The cases are legion that discuss this standard; one is *Broadwater Development, LLC v. Nelson*, 2009 MT 317, 352 Mont. 401, 219 P.3d 492, ¶ 15, a case considering an easement in gross with applicability to the substantive issues here, in which the Court described the standard with particular attention to that which constitutes a genuine material factual dispute (of which there are none here).

**2. Writ of Review – highly deferential.**

The applicable standard for review of a district court’s denial of a writ of review is limited and deferential. Sections 27-25-102 and 303, MCA, give us the standard. Section 27-25-102 provides in relevant part:

**When and by whom granted.** A writ of review may be granted by:

(2) the supreme court or the district court or any judge of those courts, when a lower tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of the tribunal, board, or officer and there is no appeal or, in the judgment of the court, any plain, speedy, and adequate remedy.

Section 27-25-303 provides:

**Scope of review upon writ.** The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.

The standard was analyzed recently in *Williams v. Stillwater Bd. of County Comm'rs*, 2021 MT 159, 490 P.3d 1234. That decision is of particular interest since, as here, the issue in *Williams* was the decision of a county commission to abandon a county road. The Court noted the limited scope of the review and that it was the same for the district court and this Court [emphasis added]:

A district court's decision to grant or deny a petition for a writ of review is discretionary. See § 27-25-102, MCA. The district court's review of the decision of the inferior tribunal, board, or officer on a writ of review is limited to determining whether an inferior tribunal, board, or officer ***exceeded its jurisdiction or whether the inferior tribunal, board, or officer regularly pursued its authority***. Sections 27-25-102(2), -303, MCA. On appeal, our review is limited to the same questions.

*Williams v. Stillwater Bd. of Cnty. Comm'rs, supra*, ¶11.

Emphasizing the limited review of the record, the Court noted:

A court reviews the record of the lower tribunal, board, or officer on a writ of review to determine whether the body had jurisdiction and kept within it. As part of this review, we have explained the court inspects the record to determine if the decision is “unsupported by evidence, or the findings are contrary to all the substantial evidence, or the decision below has no evidence to support it.” The court's review of the evidence is “not for the purpose of weighing it, but to ascertain whether it furnishes any legal and substantial basis” for the decision. [Citations omitted.]

*Id.*, ¶16.

Accordingly, this Court's review of the County's abandonment of Brady Way is limited in scope and quite deferential.

## SUMMARY OF ARGUMENT

The internal subdivision roads in Whitefish Hills Village are private roads. This includes the Prairie View “spur” and the entirety of Whitefish Village Drive. The recorded plats for each of the five phases of the Whitefish Hills Village PUD state unequivocally that the roads are “private in all respects.” The plats are approved by the county attorney and endorsed by the county commission as shown prominently on the face of each final plat and each was accepted for recording by the Flathead County Clerk & Recorder.

The Whitefish Hills roads are also burdened by a “public access easement” by virtue of Section 4.7.15(e) of the *Flathead County Subdivision Regulations* (FCSR). That regulation, “across the board,” imposes the burden of a public access easement on all subdivision roads in Flathead County. As determined by the District Court, and as now acknowledged by GBSB, these public access easements are easements in gross; they are not easements appurtenant.

The County’s subdivision regulations, as well as the *Montana Subdivision and Platting Act*, require that all subdivisions and the lots within them have both physical and “legal” access. GBSB’s proposed Baker 80 subdivision had two options for its external access; one utilizing county

roads to the south and one using private subdivision roads to the north in the adjacent Whitefish Hills. As to the former, “legal access” is present since the access is exclusively on county roads. GBSB would be required to bring that county road, Prairie View Road, up to county standards and pave a portion of it, just as Tibor (Whitefish Village) did with the external county roads leading to the Whitefish Hills subdivisions. Rather than incur that expense, GBSB brought this lawsuit to force Whitefish Hills to allow GBSB’s use of its private roads, without its consent and without contributing to the cost of building those roads. Through litigation GBSB believed it could bend the Whitefish Hills entities to its will and thereby avoid the cost of improving the county road to the south. Interestingly, before it closed on the Baker 80 property, on the advice of its Montana legal counsel, GBSB attempted to negotiate a road users’ agreement with Whitefish Hills. That effort was unsuccessful. GBSB closed on the purchase nonetheless and then brought this lawsuit to gain access through Whitefish Hills.

To satisfy the requirement for legal access on the private roads in Whitefish Hills, GBSB must have an easement. The easement must be appurtenant to the Baker 80 property and to each lot in the subdivision and it must run with the title to each subdivision lot. As an easement in gross, the public access easement imposed on private subdivision roads does not

satisfy that requirement. GBSB argues that by simply including in the covenants (CC&R's) for its Baker 80 subdivision a provision obligating future lot owners to share in the cost of maintaining the Whitefish Hills roads gives GBSB the right to use those roads. However, simply committing future lot owners to share in the cost of road maintenance does not bestow on GBSB or those future lot owners legal access or the legal right to use the roads. GBSB must demonstrate legal access – an easement appurtenant to its Baker 80 property – to utilize the private subdivision roads in Whitefish Hills. If unable to do that, its alternative is the readily available county road to the south, Prairie View Road.

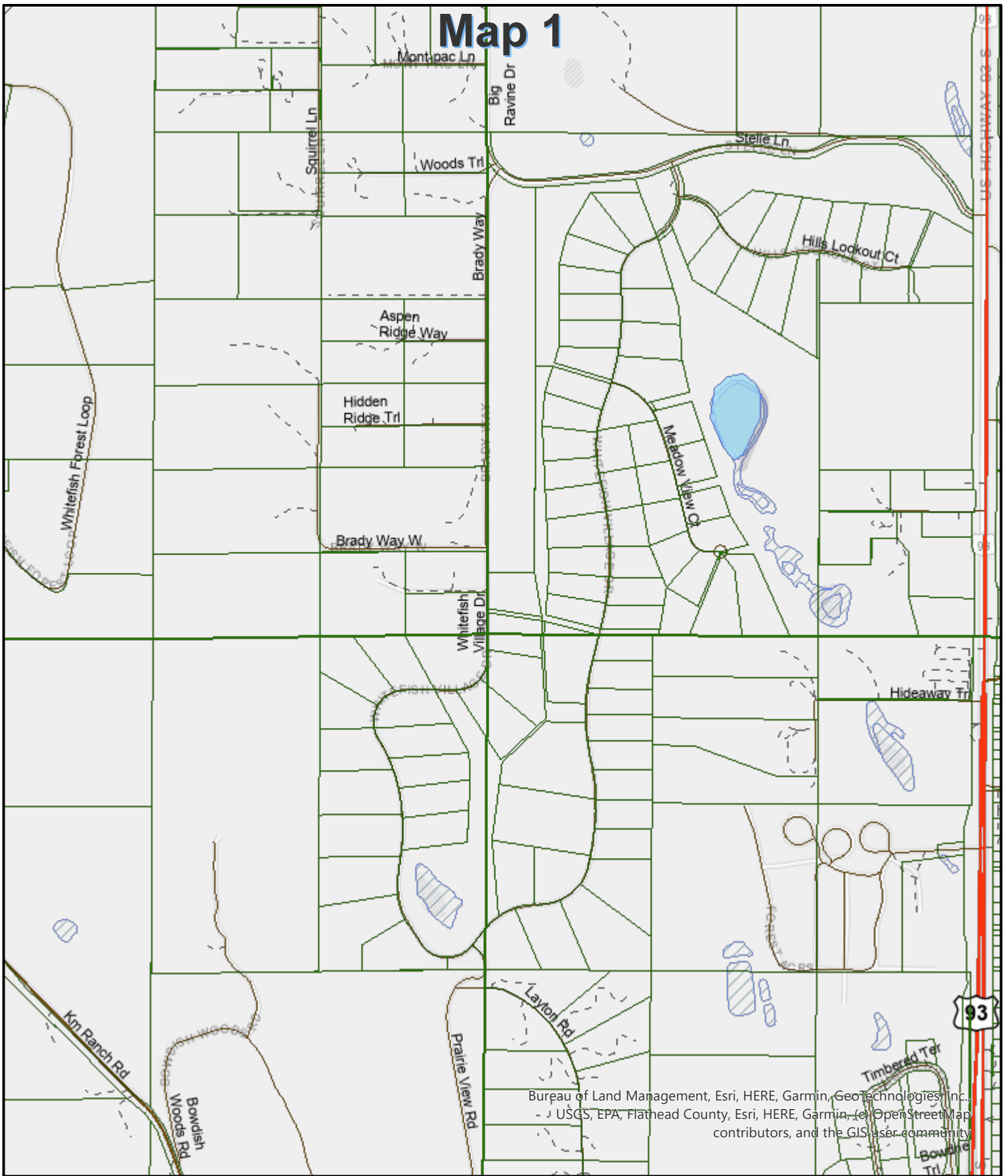
Montana's counties have broad discretion to manage the roads within their jurisdictions. In its exercise of that discretion, Flathead County committed to the abandonment of the Brady Way right-of-way in 2011 as part of its approval of the 450-plus acre Whitefish Hills Village PUD. The County conditioned that approval on the abandonment, mandating, “. . . Brady Way shall be abandoned . . .” Whitefish Village developed its PUD subject to and in reliance on that condition. In Phase 4 of the subdivision, in which the abandoned segment of county right-of-way is located, Whitefish Village developed the three subdivision lots owned by the individual defendants in this action and dedicated Open Space Area A. Whitefish

Village sold those lots, and the individual defendants purchased those lots, in reliance on the County-mandated abandonment of the Brady Way right-of-way through Whitefish Hills.

The County's formal abandonment of Brady Way some eight years later, in November 2019, was in all respects valid and the District Court so ruled. Upon receiving a petition for abandonment submitted by Whitefish Village as part of the final approval of its Phase 4, the County followed the statutory procedures and voted unanimously to abandon the right-of-way. As the District Court concluded, the abandonment complied with the statutory requirements and was a valid act of the county commission.

In its several rulings, the District Court made extensive findings and after careful and sound legal analysis correctly ruled that the roads in Whitefish Hills were private roads subject to easements in gross in favor of the public, and that they are not available for use by GBSB without Whitefish Hills' consent, and that the County's abandonment action was valid. The District Court's rulings are factually and legally sound, are well reasoned, and should be affirmed in all respects.

# Map 1



Bureau of Land Management, Esri, HERE, Garmin, Geotechnologies, Inc.,  
USGS, EPA, Flathead County, Esri, HERE, Garmin, (c) OpenStreetMap  
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## Flathead County GIS Department



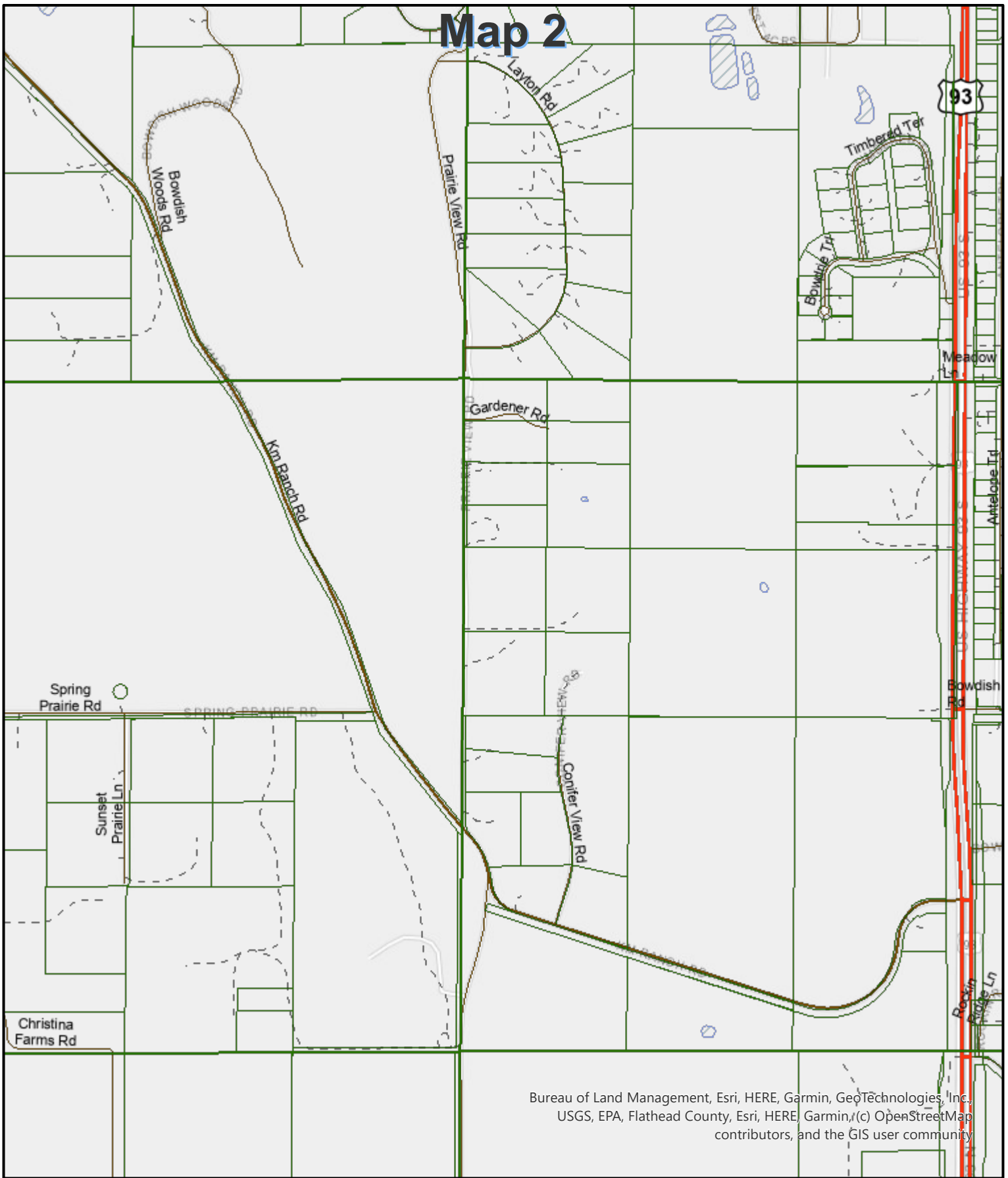
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# Map 2

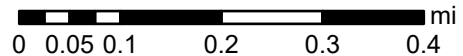


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USGS, EPA, Flathead County, Esri, HERE, Garmin, (c) OpenStreetMap  
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*The areas depicted on these maps are for illustrative purposes only and do not necessarily meet mapping, surveying, or engineering standards. Deriving conclusions from this map is done at the user's assumed risk.*

## ARGUMENT

### A. GBSB HAS NO RIGHT TO USE THE PRIVATE INTERNAL SUBDIVISION ROADS IN WHITEFISH HILLS WITHOUT WHITEFISH HILLS' CONSENT

The District Court correctly held that GBSB cannot help itself to an easement through Whitefish Hills by simply agreeing to share in the cost of road maintenance. GBSB must have legal access to its subdivision, and to demonstrate “legal access” over the private roads in Whitefish Hills, GBSB must have the consent of Whitefish Hills – an easement. The County advised GBSB of this requirement – a requirement imposed by statute and regulation – from the outset. In its preliminary approval of GBSB’s proposal for its Baker 80 subdivision, the County stated [emphasis and bracketed notations added]:

. . . the applicant would be required to pave approximately 69.9% of Prairie View Road [the county road to the south] . . . unless ***proof of legal access*** and a road maintenance mechanism for Whitefish Village Drive [the private road to the north in Whitefish Hills] is provided . . .”

Ex. 12 to GBSB’s *Motion for Summary Judgment*, Doc. 7, Ex. B (Findings),

¶ 12.

- 1. The County has broad discretion in making decisions relative to roads and rights-of-way within its jurisdiction and its decisions are entitled to considerable deference; Section 7-14-2102, MCA.***

This basic premise applies to all the County’s road-related decisions in this case – those pertaining to the access issue as well as those related to

the abandonment of Brady Way. For obvious (and practical) reasons, the legislature has invested counties with broad latitude in dealing with the roads within their jurisdictions. Section 7-14-2102, MCA. The Court acknowledged this broad authority in *Ingram-Clevenger, Inc. v. Lewis & Clark County*, 194 Mont. 43, 636 P.2d 1372, 1376 (1981), stating:

Clearly, the legislature intended to vest broad authority and discretion in county officials.

\* \* \*

We must keep in mind that the board of county commissioners is given the discretion to do whatever is necessary for the best interests of county roads. This discretion is contained in section 7-14-2102, MCA, which states: “Each board of county commissioners may in its discretion do whatever may be necessary for the best interest of the county roads and the road districts.”

This is the starting point for evaluating both issues raised by GBSB – its subdivision access claim and its challenge to the validity of the abandonment of Brady Way.

***2. GBSB wants free access through Whitefish Hills for its Baker 80 subdivision.***

GBSB’s objective is free access from the north on the existing private roads in Whitefish Hills Village, sparing GBSB the expense of improving the low-standard county road that leads to its property from the south. The access GBSB seeks is on Whitefish Village Drive north to Brady Way and Stelle Lane (all roads built by Tibor) connecting with Highway 93 south of Whitefish. GBSB is unwilling to contribute a penny toward the cost of

building any of those roads. It offers only to commit its future lot buyers to share in the cost of maintenance. GBSB is not entitled to a free ride. Rather, as the County concluded and the District Court found, it has two options for access – improve Prairie View Road, the county road to the south as required by the subdivision regulations, or reach an agreement with Whitefish Hills.

As GBSB acknowledged to the Planning Board in January 2021, it sought an access it did not have to develop itself. In the *Planning Board Addendum* for GBSB’s Baker 80 project, the following exchange is reported between Planning Board member, Sandra Nogal, and GBSB’s counsel:

Nogal – Asked why the developer does not want the subdivision to be accessed from Prairie View Road. De Jana replied it is because of the additional expense. Nogal stated she is trying to understand why they are trying to put WHV through this when they have their own access and added it does not appear to be a well thought out process. ***De Jana replied the purchase price for this property included the fact it had access from the north and the developer paid for it. That was the seller’s representation and the County’s representation.*** Nogal asked why this was not the presentation when the subdivision wanted approval from the board. Her understanding was the original idea was to access the development from Prairie View Road. De Jana stated it was the developers understanding when he purchased the property that there was access from the north.

Nogal – Asked De Jana what he has to say to those who purchased lots in WHV. De Jana replied they should talk to the developer.

*Planning Board Addendum, Baker 80 (FPP-20-09), January 21, 2021, p. 4.*

GBSB's objective is access through Whitefish Hills; why pay to improve your own access if you can use someone else's for free.

**3. *The Subdivision Act and the County's subdivision regulations require that Baker 80 have "legal access."***

All subdivisions must have both physical access and *legal access*. Section 76-3-608(3)(d), MCA. Section 4.7.15, FCSR, imposes the requirement in these terms: "Each subdivision shall have legal and physical access via a primary access road, and all subdivision lots shall have legal and physical access." For legal access to its Baker 80 subdivision, GBSB had two options – county roads to the south or the private roads in Whitefish Hills to the north. To use the latter – the roads in Whitefish Hills – the consent of Whitefish Hills is required; a legally enforceable easement that is *appurtenant to the Baker 80 property* and that runs with the title to each lot in the subdivision. *Id.* Using the serviceable county road to the south dispenses with the easement requirements arising from reliance on private roads. It would also eliminate the acrimony and potential for further litigation between subdivisions. That county road, Prairie View Road, not only reaches the southern end of the Baker 80 property, the right-of-way continues north along the full length of its western boundary, providing excellent access.

***4. The internal subdivision roads in Whitefish Hills are private roads and their status as such is not altered by the public access easement imposed by the County.***

The main road through Whitefish Hills Village, Whitefish Village Drive, like all internal subdivision roads in the PUD, is a private road subject to a public access easement. That public access easement is standard fare, imposed on all Flathead County subdivision roads by the mandate of § 4.7.15(e), FCSR, which provides [emphasis added]:

Subdivision roads ***shall be designated as public access easements*** and shall be shown and described as such on the face of the final plat.

This encumbrance does not make Whitefish Village Drive a county or “public” road. GBSB’s arguments in this regard are unsound; the public access easement designation does not alter the status of Whitefish Hills’ internal subdivision roads. A private road subject to a public access easement is no less a private road because the public may use it. Were the case otherwise, every subdivision road in Flathead County would have been transformed by § 4.7.15(e) into a “public” road or the equivalent of a county road, giving every neighboring property the right to use the subdivision’s roads for access. It would render § 4.7.15(d), that allows the County to require new subdivisions to grant access to adjacent property, superfluous.

While common sense and the formal procedure of § 7-14-2101

required for the establishment of a county road compel this conclusion, the legislature has addressed it specifically in § 7-14-2101(2)(d), MCA:

(d) A road on a final subdivision plat that is dedicated to public use is not considered a county road until the board of county commissioners approves by resolution the adoption of the road as a county road as provided in subsection (4)(b)(ii).

To imbue a “road on a final subdivision plat” – even one “dedicated to public use” (as is the case with the roads in Whitefish Hills) – with county (or “public”) road status requires official action by the county. *Id.* The county commissioners took no such action; not with respect to either the Prairie View spur or Whitefish Village Drive.

The mandate of § 4.7.15(e), FCSR, is the sole reason Whitefish Village Drive is burdened by a public access easement. It is not because it “replaced” or “realigned” the abandoned county right-of-way. And it was not the result of some “agreement” with the County or “*quid pro quo*” as asserted by GBSB. Rather, the public access easement is a burden imposed on *all* new subdivision roads in Flathead County.

***5. The “public access easement” is an easement in gross; Baker 80 must have an easement appurtenant.***

While GBSB argued the public access easements were easements appurtenant in the District Court, it now acknowledges they are easements in gross. In its brief, GBSB states:

The court in App.1 found the roads within WHV were subject to a public access easement. These are easements in gross with the only ascertainable dominant tenement being the public [at Pg.6]. That determination has not been appealed.

*Appellant's Opening Brief*, p. 19.

With an easement in gross, there is no dominant tenement, a key feature of an easement in gross. *Blazer v. Wall*, 2008 MT 145, 343 Mont. 173, 183 P.3d 84; *Broadwater Development, LLC v. Nelson*, 2009 MT 317, 352 Mont. 401, 219 P.3d 492. Easements are either easements in gross or they are appurtenant to some identifiable property. As the Court noted in *Blazer*:

An easement may be “appurtenant” or “in gross.” An easement appurtenant is one that benefits a particular parcel of land, i.e., it serves the owner of that land and passes with the title to that land. The benefited parcel is known as the “dominant” tenement or estate, and the burdened parcel is termed the “servient” tenement or estate. See § 70-17-103, MCA; *Burleson*, ¶ 16; *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 6 n. 1, 329 Mont. 129, ¶ 6 n. 1, 122 P.3d 1220, ¶ 6 n. 1; *Jon W. Bruce & James W. Ely, Jr.*, *The Law of Easements and Licenses in Land* § 1:1, at 1-5 to 1-6 (2008). An easement appurtenant must have both a dominant tenement and a servient tenement. See *Thompson on Real Property* vol. 7, § 60.02(f)(1), at 469 (David A. Thomas ed., 2d Thomas ed., 2006). An easement in gross, by contrast, benefits the holder of the easement personally, i.e., not in connection with his or her ownership or use of a specific parcel of land. Thus, with an easement in gross, no dominant tenement exists and the easement right cannot pass with the title to any land. See *Leichtfuss*, ¶ 6 n. 1; *Bruce & Ely*, *The Law of Easements and Licenses in Land* § 1:1, at 1-6; *Thompson on Real Property* § 60.02(f)(2), at 469.

*Blazer v. Wall*, *supra*, ¶ 24.

Since the “public access easements” that burden the roads in Whitefish Hills Village are easements in gross, they lack the appurtenance to allow the otherwise private roads to serve as access for GBSB’s Baker 80 subdivision. To satisfy the requirement for “legal” access imposed by the *Subdivision Act* and the County’s regulations, a subdivision must have an easement that is appurtenant and that runs with the land; one that will attach to and run with the title to each individual lot, ensuring they will have merchantable title. Section 76-3-608(3)(d), MCA; Section 4.7.15, FCSR.

***6. The status of the internal subdivision roads in Whitefish Hills Village was not altered by the abandonment of Brady Way.***

The abandonment of Brady Way facilitated implementation of Whitefish Village’s chosen road design. It did not, however, result in any of those internal subdivision roads taking on the status of “public” or county roads. That Whitefish Village Drive, or some segment of it, conceptually “replaced” or “realigned” the abandoned county right-of-way does not mean the public status of that right-of-way was transferred to, or superimposed on, some segment of the Whitefish Hills’ internal subdivision roads. Abandonment is abandonment and means what it infers. Section 7-14-2601(3)(a), MCA (“ ‘abandonment’ or ‘vacation’ means cessation of the use of a right-of-way or easement or of activity on a right-of-way or easement with no intention to reclaim or use it again”). The county right-of-way was

eliminated and nothing having the same legal status replaced it. It takes a formal action by the County to abandon a county road, and it takes a similarly formal action to establish one. Section 7-14-2101, MCA. Here, there was a formal abandonment, but no steps taken to establish a new county road or right-of-way. Notably, the County asserts no such claim. See for example, *Flathead County's Opposition to Plaintiff's Motion and Arguments*, Doc. 104, p. 4.

As noted above, for a “road on a final subdivision plat” (even one “dedicated to public use”) to take on county road status requires specific, official action by the county. Section 7-14-2101(2)(d), MCA (“A road on a final subdivision plat that is dedicated to public use is not considered a county road until the board of county commissioners *approves by resolution* the adoption of the road as a county road . . . .”)

***7. The recorded plats for each phase of Whitefish Hills Village define the status of the internal subdivision roads.***

That all the roads in Whitefish Hills Village are private roads is beyond legitimate dispute. The final plats for each of the five phases – plats endorsed by the County and entered in the public record – are unequivocal that the roads are private. Printed on the face of each recorded plat is the “Certificate of Private Roadways” that provides [emphasis added]:

***CERTIFICATE OF PRIVATE ROADWAYS:***

*The roadways shown as Whitefish Village Drive and Hills Lookout Court on this plat are intended to be **private in all respects**. They are hereby dedicated forever to be for the sole use of the owners (and their successors in interest) of the lots described on this plat. The owners (and their successors in interest) of the lots described on this plat, will provide for the all-season maintenance of Whitefish Village Drive and Hills Lookout Court by the creation of a corporation or homeowners association to administer and fund the maintenance. It is understood and agreed that the value of each lot described on this plat is enhanced by the private, exclusive nature of said Whitefish Village Drive and Hills Lookout Court.*

All five plats for the Whitefish Hills Village PUD provide that all the internal subdivision roads, including Whitefish Village Drive and the Prairie View spur, are private roads for the exclusive use of the Whitefish Hills residents. The County approved each of those plats. On the face of each is the signature of the county attorney and the endorsement of the county commission. Each was accepted for recording by the county Clerk & Recorder. As subdivision plats, they are among the public documents upon which purchasers are entitled to rely. Specifically referencing recorded plats, the Court noted in *Broadwater Development, LLC v. Nelson, supra*, ¶ 21:

As we have said, good-faith purchasers of real property are entitled to rely on publicly recorded deeds, plats, and certificates of survey pertaining to the subject property to disclose accurately all encumbrances, easements, and impediments thereon . . .

The Court said the same thing in *Blazer v. Wall, supra*, ¶ 74.

Eighty-eight lot owners purchased their lots in Whitefish Hills Village in reliance on these recorded plats.<sup>2</sup> The buyers of lots in Whitefish Hills also justifiably relied on the condition the County imposed on its approval of the Whitefish Hills Village PUD in 2011, that “. . . Brady Way shall be abandoned . . .”

Applying the applicable law to the undisputed facts led the District Court to the same conclusions. The Court stated:

GBSB is mistaken. Brady Way, a former county road, was abandoned. Whitefish Hills Drive is a private road. This Court found that the public access easement burdening Whitefish Hills Village is an easement in gross and that the scope of Whitefish Hills Village’s public access easement did not include providing access to adjacent subdivisions. (Doc. 41). Whitefish Village Drive is not a public right-of-way nor public road.

\* \* \* \*

Again, GBSB is mistaken. There are no public rights-of-way involved here. There are private roads encumbered by public access easements.

*Order Re: Plaintiff’s Motions*, Doc. 130, p. 3.

**8. *The County chose not to use Section 4.7.15(d), FCSR, when it approved the Whitefish Hills Village PUD.***

Subpart (e) of § 4.7.15 is mandatory; all subdivision roads are subject to public access easements. Subpart (d), however – the provision that allows the County to require as a condition of approval that a new subdivision allow

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<sup>2</sup> The number of purchasers is significantly higher since many of the lots have changed hands from the original purchasers. The lots are conveyed with specific reference to the plats.

access by adjacent lands – is discretionary, providing: “When a new subdivision adjoins un-subdivided land . . . the subdivider *may be required* to provide . . . easements . . . to the adjacent un-subdivided property.” Section 4.7.15(d), FCSR.

The County did not impose such a requirement in 2011 when it approved the Whitefish Hills Village PUD. The County cannot now “after the fact” subject the roads in Whitefish Hills Village to an easement appurtenant to the Baker 80 property. The County of course recognizes this limitation and has from the outset.

Consideration of access for adjacent lands is a basic step in the review process for new subdivisions, rural subdivisions in particular. However, once the review process is completed and a requirement to provide access is not included as a condition of approval, that window closes and the obligation can no longer be imposed. GBSB argued in the District Court this provision was mandatory. It is not. On appeal, GBSB asserts without elaboration: “This use by an adjacent future subdivision was required by the regulations . . . .” *Appellant’s Opening Brief*, p. 27. Section 4.7.15(d), however, is clearly discretionary, both by its use of the words “may require” and the application of a little common sense. If 4.7.15(d) was mandatory, what lands would be entitled to access? All adjacent lands? Lands adjacent

to adjacent lands?<sup>3</sup> Section 4.7.15(d) allows the County to identify adjacent lands that are likely to require access in the future and make appropriate provision for access, including the establishment of “latecomer” contributions for potential future road users.

***9. Accessing the Baker 80 property from the south on Prairie View was part of the County’s overall plan for its road network as evidenced by the 2019 Kaltschmidt zone change process.***

GBSB was aware of the Kaltschmidt zone change process that was considered by the County just months before GBSB acquired the Baker 80 property. GBSB’s *Motion for Summary Judgment*, Doc. 7, p. 21. Throughout that process that changed the minimum lot size for the Baker 80 property from 20-acres to 5-acres, paving the way for its subdivision, it was noted repeatedly that in the event of future subdivision access would be from the south on Prairie View Road. In its cross motion for summary judgment, Whitefish Village highlighted some ten references in record of the County’s proceedings on the Kaltschmidt application recognizing that in the event of future subdivision, access to the property would be from the south on Prairie View Road. *Brief in Response to GBSB’s Motion for Summary Judgment*,

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<sup>3</sup> An example can be seen here with the 20-acre parcel immediately south of Baker 80 that has now become an addition to the Baker 80 property. Would it also be entitled to access through Whitefish Hills?

Doc. 12, pp. 19-21. There are other such references as well. FC KHZC0001, *et seq.*

Examples of those ten-plus references to the property's future access noted by the County's planning staff are these [emphasis added]:

Primary access to the property is currently via Prairie View Road via KM Ranch Road.

According to the application, 'the property has access to the Prairie View Road right-of-way but ***any future development or residential construction will require the road to be developed.***' "

Comments received by the Flathead County Road and Bridge Department indicate no concern at this time. Because ***Prairie View Road would require improvement to Flathead County Road and Bridge standards if subdivided . . .***

*Zoning Map Amendment Report (FZC-18-23) Kaltschmidt Holdings, LLC, January 29, 2019, pp. 13-14; FC KHZC0001, et seq.*

The access for this property was not considered in isolation, or only with respect to the zone change; it was considered in anticipation of future subdivision and how the County's road network would accommodate that development. Notably, the County's long-time road superintendent Dave Prunty, was again involved as he was in the approval of Whitefish Hills Village in 2011 and Baker 80 in 2020-21.

It was always intended by the County (and understood by the owner) the Baker 80 property would be accessed from the south *via* Prairie View Road.

***10. Whitefish Village did everything it proposed to do, and everything it was required by the County to do.***

In the District Court, GBSB accused Whitefish Village of not doing what it “promised.” *GBSB’s Motion for Summary Judgment*, Doc. 7, pp. 2-3. However, GBSB never identified anything Whitefish Village represented it would do that it did not do, apart from not “dedicating” its internal subdivision roads as county roads to give GBSB its desired free access. *Id.* In the District Court, GBSB asserted Whitefish Village did not “dedicate” the roads in the subdivision as public access easements. *GBSB’s Motion for Summary Judgment*, Doc. 7, pp. 9, 14 (fn. 4), 19, 20. On appeal, however, GBSB acknowledges the dedication as “public access easements,” but suggests the dedication should have been something more, asserting: “There was no dedication unless the plat references to “public access easements” could be construed to have been a dedication.” *Appellant’s Opening Brief*, p. 35. GBSB further asserted: “Other than the ‘public access easement’ there is no dedication on either plat.” *Appellant’s Opening Brief*, p. 37. GBSB also claims that “County staff noted that WVLLC had not complied with its representations regarding public access . . .” *Id.*, p. 36. In support of that baseless assertion GBSB quotes a statement made by deputy county attorney Caitlin Overland at the 2019 abandonment hearing. *Id.*, p. 36. The Overland statement does not support GBSB’s accusation in the least.

What Whitefish Hills proposed, or “represented,” was that it would dedicate its internal subdivision roads, including Whitefish Village Drive and the spur, for use by the public as “public access easements.” That is precisely what it did, and that is precisely what was required of it by the County. As GBSB acknowledges, that dedication is clearly stated on the plats for all five phases of the subdivision.

Section 4.9 of the *Flathead County Subdivision Regulations* and § 76-3-103, MCA, define “dedication” as the “deliberate appropriation of land by an owner for any general and public use, reserving to the landowner no rights that are incompatible with the full exercise and enjoyment of the public use to which the property has been devoted.” Whitefish Village did just that.

## **B. THE COUNTY’S ABANDONMENT OF THE BRADY WAY RIGHT-OF-WAY WAS VALID**

Even under a less deferential standard than the one applicable here, the County’s abandonment of Brady Way was compliant with statutory requirements and was clearly intended by the County.

### ***1. GBSB was not “affected” by the abandonment, nor was any other landowner.***

The significance of being “affected” – a concept having an element of subjectivity – in the abandonment context is limited. The only private

landowners whose consent is required are those who meet the criterion of subpart 4 of § 7-14-2615, MCA. Those are private landowners (when there are two or more of them) by which the right of way is actually being used. Since Flathead County made an absolute, irrevocable commitment to abandon the unbuilt right-of-way in 2011 when it approved the Whitefish Hills PUD, the County necessarily made the decision then that the right-of-way would never be used, and in essence was “discontinued.” *See*, § 7-14-2102, MCA. As a result of that action, no landowner was affected by the “formal” abandonment eight years later in 2019, initiated by Whitefish Hills in conjunction with its request for final plat approval of its Phase 4 in which the abandoned section of Brady Way is located. As a practical matter, the right-of-way was abandoned when the Whitefish Hills Village PUD was approved in 2011. Once Whitefish Village developed its project in reliance on that commitment, the County’s action became irrevocable.

The parties are all familiar with Condition No. 24 that made the abandonment a condition of approval of the Whitefish Hills Village PUD. GBSB quotes its full text in its brief, as does the District Court in its summary judgment ruling. *Appellant’s Opening Brief*, p. 6; *Order*, Doc. 41, p. 8. Implicit in that action was that there would never be a county road on that section of right-of-way. Once the Whitefish Hills Village subdivision

was approved subject to that requirement, the right-of-way was “off the books” and could never be used to access the Baker 80 property. As a result, the then owner of the Baker 80 property (Kaltschmidt) was not “affected” by the County’s subsequent 2019 “formal” abandonment action.

***2. The Baker 80 property was never accessed by the right-of-way; no owner of the Baker 80 property ever used Brady Way. Section 7-14-2615, MCA.***

GBSB recognizes its consent to the abandonment is an issue only if it can bring itself within § 7-14-2615(4), MCA. *Appellant’s Opening Brief*, pp. 30-32. That statute requires a private landowner’s consent to a road abandonment if – but only if – the road is ***being used*** to provide access to the landowner’s property. An un-built right-of-way cannot meet that statutory criterion.

Subpart 3 of 7-14-2615 is addressed to abandonments affecting public land such as the DNRC state land involved here. Subpart 4 is addressed to abandonments affecting privately owned property. The verbiage in the two subparts is similar, but there is an important difference. For public land covered by subpart 3, the “use” is described in these terms [emphasis added]: “. . . a county road or right of way ***used to provide existing legal***

*access* to public land . . . .”<sup>4</sup> However, the “use” language of subpart 4 addressing private land is more limited. With private land the test is [emphasis added]: “. . . *used to access* . . . .” Clearly, “*used to access*” is not the same as “*used to provide existing legal access.*” The language in subpart 4 relating to private land contemplates actual use already taking place; an active, on-going use of an existing road that would be curtailed by the abandonment. We do not have that here.

Since a road on the abandoned segment was never built, it was not “used to access” the Baker 80 property (or any property). Section 7-14-2615(4), MCA, is inapplicable and no landowners’ consent was required. A subjective determination that GBSB was “affected” (since the right of way reached the Baker 80 property) does not change the fact that its consent was not required. *Id.*

Having come to the realization it needs to show actual use to argue its consent was required, GBSB is now asserting the right-of-way was used to access the Baker 80 property. However, GBSB previously acknowledged,

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<sup>4</sup> In the process of reviewing the Whitefish Hills Village PUD in 2011, with its proposed abandonment of Brady Way, much attention was given to the state land located south of Whitefish Hills and west of Baker 80. The DNRC was involved in that review. That tract of state land has abundant access with KM Ranch Road running right through it and other roads entering it as well. The District Court found the state land had substantially equivalent access without Brady Way. *Order*, Doc. 130, p. 2. Notably, the Prairie View right-of-way leads to the exact same point at the northeast corner of the state land as the Brady Way right-of-way. In contrast, no consideration was given to the Baker 80 property as it was always understood its access was from the south on Prairie View Road.

as all the evidence shows (and as the County and the District Court recognized), the abandoned segment of right-of-way was “unbuilt.” GBSB now finds itself contradicting the allegations in its own *Petition* (as well as all the other evidence in the record) to assert that the right-of-way was in fact used to access the Baker 80 property. Contrary to all the evidence, and with no credible factual support, GBSB now asserts, “it is undisputed that the ROW was used to physically access the GBSB’s property.” *Appellant’s Opening Brief*, p. 35.

This assertion is easily debunked by satellite imagery, and it is also flatly contradicted by GBSB’s own representations. In its *Petition* (repeated in its *Amended Petition*) GBSB alleged that, “. . . the road on the right of way had not been built” and “the actual road had not been completely built . . .” *Petition*, Doc. 1, ¶¶ 22, 7; *Amended Petition*, Doc 3, ¶¶ 23, 8.

What is “undisputed” is that the right-of-way through Whitefish Hills (the abandoned segment) was not built (and thus never used to access any property). GBSB itself represented when it filed this action that a road on the Brady Way right-of-way had not been built, alleging as follows [the allegations are made in GBSB’s *Petition* and repeated in each case, one paragraph “later” in its *Amended Petition*]:

7. The rights-of-way for what would be known as Prairieview Drive and Brady Way are located in sections 23 through 25 and 35 and 36 in

Township 30 North, Range 22 West, PMM, Flathead County Montana although the actual road had not been completely built through the Northwest Quarter of section 25 and the Northeast Quarter of section 26 . . .

19. The right of way provided an unbuilt access to the private land owned by the Plaintiff's predecessor . . .

22. . . . all of whom had access though the right of way even though the road on the right of way had not been built.

*Petition*, Doc. 1; *Amended Petition*, Doc. 3.

The “graveled its entire length” quote relied on by GBSB as the basis of its claim the right-of-way was built and thus used to access its Baker 80 property is from the planning staff’s report for the Whitefish Hills Village PUD. It is clear when read in context the staff was reporting that the right-of-way was graveled its “entire length” from its northern terminus at Stelle Lane south to Brady Way West. That was the “entire length” of the right-of-way on which a road had been built, and none of it was paved.<sup>5</sup> GBSB submitted that staff report to the District Court with its *Amended Petition*. Doc. 3, Ex. 1, p. 27.

In its motion for summary judgment, GBSB repeated its representations that Brady Way was not built through what is the Whitefish

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<sup>5</sup> Brady Way may have been built several hundred feet further south, but that is not material. What is material – and not seriously disputed – is that Brady Way was unbuilt from the section corner south; the abandoned segment.

Hills property from the section corner south. This is the segment that was abandoned. GBSB represented [emphasis added]:

The rights-of-way for what would be known as Prairieview Drive and Brady Way are located in sections 23 through 26 and 34, 35 and 36 in Township 30 North, Range 22 West, PMM, Flathead County Montana. ***The actual road had not been completely built*** through the Northwest Quarter of section 25 and the Northeast Quarter of section 26.

GBSB's *Motion for Summary Judgment*, Doc. 7, p. 3.

As part of the subdivision application, the developer sought to abandon a prior right of way held by the county ***but not developed***.

*Id.*, p. 5 [emphasis added].

On September 5, 2019, at the behest of Whitefish Village, LLC, a petition to abandon Brady Way and ***the unbuilt right of way to the south*** was filed with Flathead County.

*Id.*, p. 8 [emphasis added].

The developer of Whitefish Village Hills [*sic*] sought to use property over which there existed a ***partially unbuilt*** county road right of way that extended to the Plaintiff's property.

*Id.*, p. 10 [emphasis added].

GBSB now asserts the road it initially claimed was never built was used to access its property, trying to bring itself within the class of owners whose consent is required for abandonment under § 7-14-2615(4), MCA. The Brady Way right-of-way was never "used to access" the Baker 80 property; a road was never built on the right-of-way south of Brady Way West. GBSB's reconstituted assertions to the contrary are baseless.

The two affidavits GBSB offered – one of a realtor and the other of Scott Baker, GBSB’s president, both of whom claimed to have driven down the right-of-way in 2019 and 2020, respectively, to reach the Baker 80 property, were rejected by the District Court since they were not part of the record to which the parties had stipulated. It is obvious they are not credible and are contradicted by satellite images, including ones GBSB attached to its *Petition*. Two of those images are appended to this brief, one of which is a 2019 satellite image of the area in question taken after the internal subdivision road, Whitefish Village Drive was built. Appendix 2. The new road is clearly visible in the photograph. Also clearly visible is the absence of any road down the section line on the Brady Way right-of-way. There is nothing there but forest. It is clear the two affiants did not drive through the woods on the county right-of-way to reach the Baker 80 property.

The District Court made numerous findings on this point, an example of which is this:

Brady Way was declared a county road in 1905, but it was not built. (FC BW000002) The portion of Brady Way running south through the proposed WHV subdivision was not developed or constructed at the time of the application in 2011.

*Order Re Writ of Review*, Doc. 92, p. 2, Finding 2.

The District Court’s findings are supported by *all* the evidence in the record, as well as by GBSB’s own allegations (made before it realized the

need to argue Brady Way was “used to access” the Baker 80 property as contemplated by § 7-14-2615(4), MCA).

Numerous Google Earth satellite images in the record (including those submitted at the abandonment hearing) debunk GBSB’s assertion the right-of-way was “used to access” Baker 80 and show clearly there has never been access to the Baker 80 property from the north on the Brady Way right-of-way. *Declaration of Murray*; Doc. 79, Exhibits 1-9 (seven satellite images and the two-sheet Preliminary Plat of Whitefish Hills Village). See also the images attached to this brief as Appendix 2 (each of which GBSB attached to its *Petition*). All show clearly Brady Way built from Stelle Lane south to the area around Brady Way West, and nothing on the abandoned segment from the section corner south.

There was no road on the right-of-way south of Brady Way West, and the District Court so found. *Order*, Doc. 41, pp. 2-3; *Order on Writ of Review*, Doc. 92, p. 2. The District Court further found:

There is no evidence in the record to support GBSB’s assertion that the abandoned portion of Brady Way was actually used to access the Baker 80 property. The evidence in the record indicates that the abandoned portion of Brady Way was never developed and was not used by any landowners to the south, including GBSB and their predecessors.

*Order on Writ of Review*, Doc. 92, p. 6, Finding 27. In a footnote the District Court stated:

GBSB attached affidavits to its brief of a realtor and Scott Baker who claim that there was a dirt road to the north that provided access to Baker 80. However, these affidavits are not part of the record and there is no indication that there was any dirt road or trail located on the Brady Way right of way that provided access to Baker 80. The evidence in the record indicates that there was no access along this portion of Brady way. See FCBW000059-62, FCBW000019.

*Id.*, fn. 3, p. 6.

***3. The County's investigation was "by the book" and met all the statutory requirements.***

The County's investigation exceeded the requirements of § 7-14-2603, MCA. Not only did the county surveyor (accompanied by a commissioner) investigate by physically inspecting the area, the County's road superintendent, Dave Prunty, accompanied by deputy county attorney, Caitlin Overland, also inspected the area. As noted above, Dave Prunty was also the County's road superintendent in 2011 when the proposed abandonment was scrutinized as part of the approval of the Whitefish Hills Village PUD.

Section 7-14-2603 calls for an investigation that is, "sufficient to properly determine the merits or demerits of the petition." Section 7-14-2603(1), MCA. Undertaken by two teams that included the county surveyor, county road superintendent, a county commissioner and a lawyer from the county attorney's office, the County's investigation satisfied that

requirement. Each of those four participants expressed their support for the abandonment. The Commissioners voted unanimously in favor of abandonment.

The primary elements of the County's investigation are touched on below.

***a) The Plat Room memo.***

GBSB has criticized the report produced by the Plat Room for having identified two abutting landowners but listing only one. GBSB's *Summary Judgment Brief*, Doc. 7, p. 7; FC BW0009-16. The reason for this, however, is obvious. The right-of-way has abutting landowners on both sides. Here, there is one abutting owner on the east side of the right-of-way and there is one abutting owner on the west side of the right-of-way. Those abutting owners happen to be the same entity since the entirety of the abandoned section of right-of-way is within Whitefish Hills Village. The Plat Room report is accurate and reflects the information disclosed by the County's records.

The GBSB property does not abut the abandoned segment of right-of-way. The GBSB property abuts the Prairie View right-of-way; part of the same county right-of-way that runs along the full length of the western

boundary of the Baker 80 property (affording GBSB excellent access and numerous options for connecting to it).

***b) The County surveyor's report.***

The County surveyor inspected the area accompanied by a county commissioner. They confirmed the right-of-way was not used to access the Baker 80 property, and in her report to the Commission, the surveyor so noted. Both supported the abandonment. FC BW00059.

***c) The county attorney's report.***

The County also conducted a second field investigation. Dave Prunty, the longtime head of the County's road department, inspected the area with deputy county attorney Caitlin Overland. It is reasonable to assume that Prunty took into consideration not only what he observed "on the ground," but that he also assessed the abandonment in the context of the County's larger road network. Prunty and Overland concluded that Brady Way was not used to provide access to any property south of Whitefish Hills, and they too supported the abandonment, stating (correctly), "the ROW does not provide access to public land and the private landowners whose land borders the ROW support the petition for abandonment . . . currently the public derives no benefit from the ROW as it is undeveloped . . ." FC BW00019.

Those determinations are all well supported by the record and the District Court so found. *Order on Writ of Review*, Doc. 92, pp. 5-8.

***d) The Commission duly considered the “merits and demerits” of the abandonment.***

The County found no downside – no demerits – with the abandonment. While it may not have formally cataloged them, the benefits to the County are obvious. The northerly section of Brady Way from Stelle Lane to the section corner was improved and paved by Whitefish Village. That section of Brady Way remains a county road, and the County was able to transfer the maintenance obligation for the entire length of Brady Way to Whitefish Hills. Now Whitefish Hills maintains the entire road network from Highway 93 west on Stelle Lane then north on Big Ravine Drive to the original Whitefish Hills and south on Brady Way to Whitefish Hills Village. The County no longer has that short “isolated” segment of Brady Way to maintain. Even though it remains a county road between Stelle Lane and the section corner, its maintenance is provided by Whitefish Hills. The County also received the benefit derived from the Whitefish Hills Village PUD with its 150-plus acres of dedicated open space and excellent internal road network open to the public. The Prairie View spur preserved the potential for public access to the state land to the south and an emergency egress for Whitefish Hills.

**4. GBSB knew of the Brady Way abandonment when it closed on the Baker 80 property in December 2019.**

GBSB was in the process of buying its Baker 80 property from Kaltschmidt Holdings, LLC, when the County formally abandoned Brady Way at its public meeting on November 4, 2019. And GBSB was obviously aware of the status of Brady Way and that it was being abandoned. As GBSB represented in its *Amended Petition* [emphasis added]:

26. The Plaintiff had entered into an earnest money and purchase agreement to acquire the property owned by the Plaintiff as described in Paragraph 1, above, which was contingent upon the existence of *the right of way replacing the Brady Way right of way*.

27. Based upon and in reliance upon the above described actions and statements, the Plaintiff acquired its property as described in Paragraph 1, above.

GBSB's *Amended Petition for a Writ of Review*, Doc. 3, p. 9, ¶¶ 26, 27.

GBSB closed on its purchase of the Baker 80 property on December 10, 2019, five weeks after the abandonment. The above allegations in GBSB's *Amended Petition* leave little doubt that GBSB bought the Baker 80 property knowing the County had abandoned the right-of-way. This response to a request for admission from Whitefish Village erases any doubt:

**REQUEST FOR ADMISSION NO. 4:** Admit that when GBSB took title to the Baker 80 property, it was aware that the Flathead County Commission had already acted on the Brady Way abandonment.

**RESPONSE:** Objection . . . this party hereby admits but qualified the response in that that GBSB understood that the abandonment of the

county right of way was part of the realignment of the county road. See: Condition 24 of approval Whitefish Hills Village . . .

When GBSB closed on the Baker 80 property on December 10, 2019, it had actual knowledge that the abandonment had been formally approved. Armed with that knowledge GBSB finalized its purchase of the Baker 80 property. As a result, it has no basis to object to the action of the County relative to the abandonment.

**5. GBSB's predecessor in title, Bauer Trust, waived any objections to the Whitefish Hills PUD that called for the abandonment of Brady Way.**

GBSB acknowledged in briefing in the District Court [emphasis added]: “At the time of WHV’s initial applications in 2011, the Ervin & Marie Bauer Trust owned the property that GBSB would later come to own . . . ***The County provided notice of WHV’s application for the subdivision*** to the Bauer Trust because the Bauer Trust land, which is now the GBSB land, is directly adjacent to WHV’s proposed subdivision.” GBSB’s *Motion for Summary Judgment*, Doc. 7, pp. 10-11 [citations to the *Record* omitted]. Notice was sent to the Bauer Trust by certified mail, return receipt requested. Notice of the subdivision application was also published in the Daily Interlake and posted on the property. The developer’s application proposed the abandonment (and the County’s approval of the PUD ***required*** the abandonment). Condition No. 24; FC WHVS000507, ¶ 24. The District

Court noted the Bauer Trust had notice and an opportunity to be heard and did not object. *Order on Writ of Review*, Doc. 92, p. 3, Finding 5.

The abandonment was discussed at the Planning Board meeting at which the Whitefish Hills PUD was considered, and the process culminated with the approval of the proposed subdivision at a public meeting of the County Commission. The approval included Condition No. 24, that recited, “. . . the existing County Road easement for Brady Way *shall be abandoned* . . .” *Id.* The Bauer Trust did not object.

Since the Bauer Trust, the then owner of the Baker 80 property, had notice and an opportunity to be heard and did not object to the proposed PUD (that included abandonment of Brady Way), the Bauer Trust waived the right to object. That waiver is binding on GBSB. The waiver is not vitiated by Bauer Trust having conveyed the property to a third party (Kaltschmidt, GBSB’s transferor). These facts, which are not in dispute, and which GBSB acknowledged in its briefing in the District Court, should foreclose consideration of GBSB’s challenge of the abandonment on principles of waiver and estoppel.

## **CONCLUSION and RELIEF REQUESTED**

The Flathead County Commission “may in its discretion do *whatever may be necessary* for the best interest of the county roads . . .” Section 7-

14-2102, MCA. The County’s decision to abandon Brady Way was thoroughly vetted and carefully considered, both in 2011 with the approval of the Whitefish Hills Village PUD and again in 2019 when the Commission formally abandoned the right-of-way. The record reflects a thorough assessment of the implications – the “merits” – of the action. There were substantial benefits to the County and no downside. Clearly this right-of-way was never built and never used to access the Baker 80 property (or any property). The record abundantly supports the County’s decision, and the District Court correctly so found. The County did everything by the book and most certainly was acting within its jurisdiction, prudently discharging its broad statutory authority over its roads.

The roads in Whitefish Hills Village are all private roads encumbered by the obligatory easements in gross in favor of the public. They are not “public” or county roads. The “public access easement” cannot satisfy the requirement for “legal” access to GBSB’s Baker 80 subdivision. To establish “legal access” using a private road requires an easement appurtenant; an easement that will run with the titles to each subdivision lot. These are attributes an easement in gross does not afford. Moreover, practical and policy considerations militate strongly in favor of exactly what the County required of GBSB, which was: “Either show us your easement

that reflects the consent of Whitefish Hills to the use of their private roads (giving you “legal access”) or improve the existing county road access to the south.”

GBSB has but one path to its goal of using the roads in Whitefish Hills and that is to reach an agreement with Whitefish Hills that is acceptable to both parties. If unable to do that, then GBSB must improve its own readily available county road access to the south on Prairie View Road. Precisely the options GBSB was given by the County.

GBSB’s petition was properly denied on both issues, and the District Court’s rulings should be affirmed in all respects

**DATED** the 29<sup>th</sup> day of July, 2024.

Respectfully Submitted,

**HASH, RUDBACH, HUTCHISON & MURRAY PLLP**

*[Electronically signed by]*

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.P., I hereby certify that this *Response Brief* of the Appellee is printed with proportionately spaced Times New Roman typeface of 14 points (footnotes are 12 points; indented, quoted material is 13 points), is double spaced except for footnotes and for quoted and indented material (which is single spaced), and the word count calculated by Microsoft Word for Mac is not more than 10,000 words, excluding the cover page, tables of contents and authorities, signature block, this *Certificate of Compliance* and the *Certificate of Service*.

**HASH, RUDBACH, HUTCHISON & MURRAY** PLLP

*[Electronically signed by]*

/s/ Donald R. Murray

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