

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 23-0728

GBSB HOLDING, LLC,
Plaintiff and Appellant,

v.

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, NC.; and JOHN
DOES 1 AND 2,
Defendants and Appellees.

APPELLANT'S PETITION FOR REHEARING

ON APPEAL FROM THE MONTANA ELEVENTH JUDICIAL DISTRICT
CAUSE NUMBER DV-20-995(A) and DV-21-206(D)
Filed in DV 20-995
The Honorable Amy Eddy

Attorneys for Plaintiff/Appellant

Richard DeJana, Esq.
Richard DeJana and Associates, PLLC
P.O. Box 1757
Kalispell, MT 59903-1757
Telephone: 406.752.4120
rdj [.dejanalaw@gmail.com](mailto:dejanalaw@gmail.com)

Attorneys for Defendants /Appellees

Tara DePuy, Esq.
P.O. Box 222
Livingston, MT 59047
Telephone: (406) 223-1803
attorney@riverworks.net
For Flathead County and its
Commissioners

Attorneys for Defendants /Appellees

Susan Brooks Swimley, Esq.
1807 W. Dickerson, Suite B
Bozeman, Montana 59715
Telephone: (406) 586-5544
swimley@swimleylaw.com
For Flathead County and its
Commissioners

Dana l. Hupp, Esq.
Chris A. Johnson, Esq.
Worden Thane P.C.
321 W. Broadway St. Ste 300
Missoula, MT 59802
TelephoneL (406)721-3400
Dhupp@wordenthane.com

cjohnson@worderthan.com

Attorneys for Bell, Oswald, James,
And Martin.

Donald R. Murray, Esq
Hash, O'Brian, Biby & Murray
P.O. Box 1178
Kalispell, MT 59903-1178
Telephone: (406) 755-6919
dmurray@hashlaw.com
Attorney for Whitefish Village, LLC

Colleen M. Dowdall, Esq
Dowdall Law
120 W. Broadway, Ste B
Missoula, MT 59802
Telephone: (406) 493-1817
Colleen@dowdall.law.com
Attorney for Whitefish Village HOA.

GBSB hereby petitions this Honorable Court to rehear the arguments on the jurisdiction to abandon Brady Way and reverse the same. Rule 20. (a) M. R. App.P. allows granting this petition when it is shown:

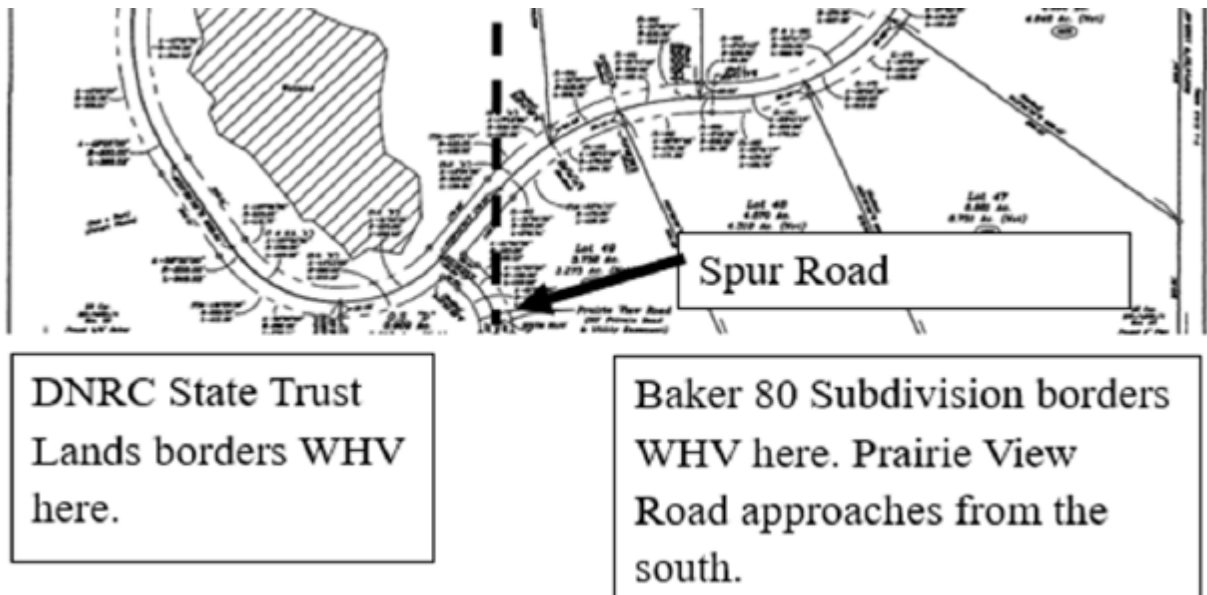
That the Court overlooked some fact material to the decision overlooked some question presented by counsel that would have proven decisive to the case; or its decision conflicts with a statute or controlling decision not addressed by the supreme court. We will address those issues.

References to “Opinion” are to 2025 MT 22 [DA 23-0728]. Reference to “App” are to the Internal Appendix filed with the Opening Brief (Items 1-4) and the External Appendix previously filed for Items numbered greater than 4.

1. The purported substantially the same access to State Land, Whitefish Village Drive, does not reach or connect to State Land and thus cannot provide the access. This is an overlooked material fact.

Under § 7-14-2615(3), MCA, a board “may not abandon a county road or right-of-way used to provide existing legal access to public land . . . unless another public road or right-of-way provides substantially the same access.” Opinion ¶47. This Court ruled that “Brady Way was abandoned, a public easement was realigned to Whitefish Village Drive . . .” concluding that the “realignment would ensure public access to DNRC State Trust Land, the Board complied with § 7-14-2615(3), MCA.” Opinion ¶50 . This Court’s

own diagram of the road [Opinion ¶2, pg., 4] establishes that Whitefish Village Drive [WVD] does not reach the State Trust Lands [state lands].



WVD connects to “Prairie View Road (A private road and utility easement.)” the spur. WVD does not reach the section line or Prairie View Road, the public right-of-way. This is in direct contradiction of this Court’s holding.

The district court initially held the abandoned portion of Brady Way “ provided legal access to public lands or waters to the South, the Board properly determined that the there is a public right of way that provides substantially the same access via Whitefish Hills (sic, “Village”) Drive.” [Underlining added, App.2, Finding 30].

Because WVD did not reach state lands and thus could not provide similar access, GBSB advised the lower court that its findings and the commissioners' record were not correct without the inclusion of Prairie View Road, the private easement (spur). (Doc. 102). Prairie View was needed to provide substantially the same access to state lands. The lower court recognizing that WVD did not provide access and while rejecting the inclusion of Prairie View Road (the private easement), found new access. The court no longer stated that the access was "same access was via Whitefish Hills (sic) Drive," but rather that "substantial equivalent access to state land as Brady Way is in existence on KM Ranch Road as well as Bowdish Woods Road." [App. 3,pg. 3]. There has been no appeal of that determination. This Court affirmed based on the wrong "substantial equivalent access."

The lower court correctly withdrew from the erroneous finding that WVD provided access to state lands. It erred by including roads which were never suggested in **the record** to provide such access. Bowdish Woods Road is not mentioned in **the record**. KM Ranch Road is only referenced in the application (App.16) as an access from the south to the private land, not state lands. The court was to review "**the record** of the . . . board . . . on a writ of review to determine whether the body had jurisdiction and kept within it. . . ." and inspect "**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 "to ascertain whether it furnishes any legal and substantial basis" for the decision. *Williams v. Stillwater Bd. of Cnty. Comm'rs*, 2021 MT 159, ¶16, 490 P.3d 1234. A court is not allowed to insert new “facts” previously not contained in **the record**.

This Court’s affirmation of the abandonment ignored the undisputed fact that WVD does not access state lands as the lower court determined in App. 3. This Court failed to protect lands set aside for the public.

Both courts have limited the evidence reviewed to that within the abandonment record. [Opinion ¶¶50 -51; App. 3, pg. 3]. The Phasing Plan used by this Court is **not in that record**. (Opinion, ¶40). There is no issue that under § 7-14-2615 MCA,¹ the commissioners lacked the jurisdiction to abandon Brady Way unless “another public road or right-of-way provide[d] substantially the same access.” This Court ignored the evidence **in the record** before it. WVD does not reach state lands. This Court’s own diagram demonstrates just that. Prairie View Drive, the private easement needs to connect to provide access. This Court when confronting this issue ignored the requirement of §

¹ 3)“the board may not abandon a county road or right-of-way used to provide existing legal access to public land or waters, including access for public recreational use as defined in 23-2-301 and as permitted in 23-2-302, unless another public road or right-of-way provides substantially the same access.”

7-14-2615 (3) MCA. The commissioners could not abandon the county right-of-way used to provide existing legal access to public lands without finding “another public road or right-of-way provide[ing] substantially the same access,” **as shown in the abandonment record.**

This Court and the lower court agreed Brady Way provided “legal access” to public land. [Opinion ¶ 50, App.2 Finding 30, App. 3. pg. 3]. The lower court’s revised determination of the commissioners’ jurisdiction was not supported by **the record**. There was no evidence “substitute access roads” actually did so. The commissioners had no jurisdiction without a substantially similar access.

The abandonment application [App. 16]² stated at point 4, the right of way to be abandoned reached public land. The applicant checked the statement reading:

“As required by M.C.A. Section 7-14-2615(3), the county road which this petition requests to be abandoned does provide access to public land or water in the *West Valley* area but the *Whitefish Village Drive, Road, which is a public road, provides substantially the same access to that public land or water, because as approved by the pre plat of Whitefish Hills Village, a new road has been built*³ to access previously non-accessible land to the South. *The road has been re-located & dedicated on PH 4 WFH Village.*” [Italics indicate the written inserts].

² Which this Court determined was evidence before the commissioners [Opinion, ¶48, ¶55]

³ The spur had not been constructed. [Opinion ¶7].

The substitute access identified in the application was a constructed road – WVD. The application's map was evidence that WVD did not connect to or even touch state lands. [App. 16, pgs. FCBW0001-13]. The spur was not constructed. [Opinion ¶7]. The application showed the WVD did not provide access, and the unconstructed spur could not be included. The viewer's report, FCBW0001-59, stated the Brady Way did not provide access to public land. The attorney report erroneously advised the requirement to provide access did not apply because the existing "ROW does not provide access to public land." [FCBW0001-19]. She stated she could not access from the south, precluding any assumption that the public Prairie View Drive could provide access to ~~that land~~. The commissioners never even discussed whether there was substantially the same access because they were erroneously told there was no legal access being taken. [See: App. 17, minutes, abandonment hearing].

The sole reference to the substantially similar access was provided by the applicant, who, despite saying already built WVD Drive was the new access, attached a map showing it was not and stated the spur was not constructed. [App. 16].

This Court cited *Williams v. Stillwater Bd. of Cnty. Comm'rs*, 2021 MT 159, 490 P.3d 1234. In *Williams*, the objection was that the road reached the opponents' private lands. ¶8. There was a dispute with conflicting evidence and arguments at the hearing. ¶17. There existed conflicting surveys and plats. The resolution adopting the road to be

abandoned was reviewed. It designated the roadway was as shown on Plat #171893. That plat showed the road was **“not abutting the eastern border of the”** contesting landowners’ property. Later surveys showed the road reaching the private property. ¶8. This Court recognized Plat #171893 and multiple surveys in the record showed the road did not abut the opponents’ property. ¶17. With conflicting evidence, the issue was decided by the commissioners based upon substantial evidence.

Here, the question posed after the abandonment was there “connectivity to DNRC State Trust Lands.” Opinion ¶50. There was no fight before the commissioners. The evidence they received was that the spur was not constructed, substantially similar access requirement did not apply, but even so, WVD provided access to state lands, even though the map portion of the application showed that WVD did not even reach the state lands. This Court said the similar access was satisfied with the realigned WVD. [Opinion, ¶50]. When confronted with that very issue, the lower court rejected finding the commissioners included the sixty foot Prairie View Drive easement as part of the new access. It could not. The “access” was constructed, not reaching state lands and the spur was not built. The court instead changed its finding from the “public right of way that provides substantially the same access via Whitefish Hills Drive,” to the “requirement of a substantial equivalent access to state land as Brady Way is in existence on KM Ranch Road as well as Bowdish Woods Road. . .” [Finding 30, App. 3]. Bowdish Woods Road is

not mentioned in the abandonment *record*. *The record* provides no evidence that KM Ranch reaches state lands. [F C BW000001-000062, App. 16, 17 and 18]. **Prairie View Drive (easement) is not discussed in the record.**

Like *Williams*, the surveys in the abandonment *record* show that WVD does not reach State Land or even the South boundary of subdivision. [See: Map with application, App. 16, FCBW0001-13; App. 23, phase 4]. Here, the record demonstrates Prairie View Drive was not considered as providing access. The district court determination in App. 3 essentially removed WVD as a substantially similar access to state lands. **The record** was that WVD does not provide access; the “access” was already “constructed”; the spur was unconstructed. No evidence **in the record** established that there was a substantially similar access to state land at the time of the abandonment.

2. This was presented by counsel.

GBSB made the above arguments in its prior briefs.

Opening brief at pages: 9 – 10, 30- 39 [Emphasis on pg. 38].

Reply brief at pages: 2, 14-16 (legal and physical access discussion), 16 -17 (Phase 4, creating Whitefish Village Drive was approved after the abandonment and did not provide access at the time of the abandonment.); 17-18.

3. The legal question is: “May the commissioners simply ignore the jurisdictional statute?”

Both courts agreed that abandonment of the previously existing right of way, even if not built, required substantially similar access. The commissioners’ jurisdiction is subject to strict statutory compliance requirements. See: *Silver Bow County v. Hafer*, 166 Mont. 330, 532 P.2d 691, 692 (1975). The board lacks jurisdiction to abandon a county road or right-of-way in violation of §70-14-2615(3) MCA.

“A reviewing court is limited to determining whether the evidence **in the record** 'furnishes any legal or substantial basis for the decision." *Williams*, ¶17; Opinion ¶46. **The record** offers no basis. The district court determined in App.3 that two other roads provided the substitute access and rejected finding the commissioners sought to connect through the spur. The commissioners did not make that determination. Neither the lower court nor this Court can now repair the commissioners’ jurisdictional determination. *Williams*, ¶17.

As part of its review, a 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.” *Williams*, ¶ 16 (citing *State ex rel. Griffiths*, 57 Mont. 368, 373, 188 P. 367, 369 (1920)). This Court’s map; the map attached to the application; and the plats filed with the application prove WVD does not

provide access. WVD does not even reach the edge of the subdivision, or section line and thus, not state lands. The scope of review is not solely limited to whether the tribunal acted within its subject matter and personal jurisdiction, but also more broadly to whether it acted within its authority under the governing procedural and substantive law based on the requisite facts based on the substantial evidence. *Fouts v. Montana Eighth Judicial Dist. Ct.*, 2022 MT 9, ¶ 11, 502 P.3d 689 (review for contempt sanctions) (citing *Bugli v . Ravalli Cty.*, 2019 MT 154, ¶ 19, 444 P.3d 499 (*Bugli II*)). A court reviews the record of the board, to determine whether the body had jurisdiction and kept within it. *Williams*, ¶16. The commissioners had no jurisdiction to abandon the right of way without finding *existing substantial similar access*. The evidence was that visibly the purported similar access never reached state lands, and was not in existence until Phase 4 was adopted after the abandonment hearing, even then the connecting spur was not constructed .

4. Conclusion

Here, the evidence was that the surveys showed the purported similar access never abutted state land [just as in *Williams*]. The private land owners were said to have used KM Ranch Road to reach their property. Prairie View Road -- the blocked public right-of-way --- was never in the record suggested as providing access. No other road providing access to state lands was even mentioned in the abandonment

record. GBSB is the only party to question the determinations in App. 3. Neither GBSB nor the other parties challenged the denial of GBSB's motion to include the spur as part of the access.

This Court should reverse and determine that there was no jurisdiction to abandon Brady Way in the record. That will allow the commissioners to start again; properly realign the right way; and provide the public access they originally sought and required.

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 and *realigned as shown on the preliminary plat* and proposed by the applicant ... [See :App.14,Condition #24].

The county commissioners have discretion to do whatever is necessary for the best interests of county roads. *Ingram-Clevenger, Inc. v. Lewis & Clark Cnty.*, 194 Mont. 43, 49-50, 636 P.2d 132, 1376 (1981). Upon following the statutory procedures, the commissioners could change the right way. §7-14-2601 MCA. Thus, they could allow GBSB to choose to use the Covenants, Conditions & Restrictions to be allowed to use the right of way. [App.37 Conditions 6 & 21]. They could avoid any cloud on homeowner properties.

Regardless, the abandonment was conducted without jurisdiction to complete it.

This Court should honor those facts and reverse the abandonment determination.

Dated this February 14, 2025.

/s/ Richard DeJana

Richard DeJana, Esq.

Attorney for GBSB

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) and Rule 20 of the Montana Rules of Appellate Procedure, I certify that the Petition for Rehearing is printed with a proportionately spaced Microsoft Word text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word, is not more than 2,500 words, not averaging more than 250 words per page, excluding the Certificate of Service and this Certificate of Compliance.

Dated: this February 14, 2025.

/s/Richard DeJana

Richard De Jana, Esq.

CERTIFICATE OF SERVICE

I, Richard DeJana, Esq, hereby certify that I have served true and accurate copies of the foregoing Petition to the following on 02- 14--2025:

Dana Lynn Hupp (Attorney)
Worden Thane P.C.
321 W. Broadway Ste., 300
Missoula MT 59802

Representing: Sean Patrick Bell, Rikki Ann Martin, Scott C. Martin, Julisns M. Oswald, William L. Oswald
Service Method: eService

Susan Brooks Swimley (Attorney)
1807 W. Dickerson, Suite B
Bozeman MT 59715

Representing: Flathead County, Flathead County Board of County Commissioners
Service Method: eService

Tara DePuy (Attorney)
PO Box 222
Livingston MT 59047

Representing: Flathead County, Flathead County Board of County Commissioners
Service Method: eService

Tara Renee Fugina (Govt Attorney)
820 South Main Street
Kalispell MT 59901

Representing: Flathead County, Flathead County Board of County Commissioners
Service Method: eService

Donald R. Murray (Attorney)
136 First Avenue W
Kalispell MT 59901

Representing: Whitefish Village, LLC
Service Method: eService

Chris A. Johnson (Attorney)
Worden Thane PC
321 West Broadway, Ste. 300
Missoula MT 59802

Representing: Sean Patrick Bell, Rikki Ann Martin, Scott C. Martin, Julisns M. Oswald, William L. Oswald

Colleen M. Dowdall (Attorney)
4900 Lower Miller Creek Road
Missoula MT 59803

Representing: Whitefish Hills Village Homeowners Association, Inc. Service Method: eService
Service Method: eService

Electronically Signed By /s/ Rchard DeJana
on 02/14/_2025

CERTIFICATE OF SERVICE

I, Richard P. DeJana, hereby certify that I have served true and accurate copies of the foregoing Petition - Rehearing to the following on 02-14-2025:

Susan Brooks Swimley (Attorney)
1807 W. Dickerson, Suite B
Bozeman MT 59715
Representing: Flathead County, Flathead County Board of County Commissioners
Service Method: eService

Tara DePuy (Attorney)
PO Box 222
Livingston MT 59047
Representing: Flathead County, Flathead County Board of County Commissioners
Service Method: eService

Tara Renee Fugina (Govt Attorney)
820 South Main Street
Kalispell MT 59901
Representing: Flathead County, Flathead County Board of County Commissioners
Service Method: eService

Donald R. Murray (Attorney)
136 First Avenue W
kalispell MT 59901
Representing: Whitefish Village, LLC
Service Method: eService

Colleen M. Dowdall (Attorney)
4900 Lower Miller Creek Road
Missoula MT 59803
Representing: Whitefish Hills Village Homeowners Association, Inc.
Service Method: eService

Chris A. Johnson (Attorney)
Worden Thane PC
321 West Broadway, Ste. 300
Missoula MT 59802
Representing: Sean Patrick Bell, Rikki Ann Martin, Scott C. Martin, Julisns M. Oswald, William L. Oswald

Service Method: eService

Electronically Signed By: Richard P. DeJana
Dated: 02-14-2025