

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

Case No. DA 23-0728

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.

**OBJECTIONS OF APPELLEE, WHITEFISH VILLAGE,
LLC, TO GBSB'S PETITION FOR REHEARING**

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

APPEARANCES OF COUNSEL

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OVERVIEW

There is no “material fact” or “decisive question” that was “overlooked” by the Court. Rule 20(1)(a), M.R.App.P. The “material fact” GBSB asserts the Court overlooked is that Whitefish Village Drive does not reach the state land. While this is a “fact” (and an obvious one overlooked by no one), it is not material. *Id.*

Whitefish Village Drive does not exist in isolation. It is the primary component of the internal road network of Whitefish Hills, a network that includes the Prairie View “spur,” the short connecting link between Whitefish Village Drive and the state land. All roads in Whitefish Hills share the same legal status; they are private roads subject to public access easements as mandated by Flathead County’s subdivision regulations. Section 4.7.15(e), FCSR. In pressing its argument that Whitefish Village Drive does not reach the state land (and inferring the Court mistakenly believed it did), GBSB variously denies the spur’s existence or discounts its purpose (since it has not been built). While the spur may exist only “on paper” (as did the abandoned Brady Way right-of-way before it), the spur still serves the important function of maintaining the potential for future connectivity and public access to the state land south of Whitefish Hills. This was intended (and understood) by all concerned; overlooked by no one. Dedicated as a public access easement on the recorded plat for Phase 4 of the Whitefish Hills Village PUD, the spur provides “legal” access to the state land from the north by connecting Whitefish Village Drive

to the Prairie View right-of-way. This was the status of the state land access prior to Brady Way's abandonment, and it remains the status post-abandonment. *GBSB v. Flathead County*, 2025 MT 22 (“*Opinion*”), ¶ 50.

The status of these roads and access to the state land is by design. The internal subdivision roads are public access easements because of the mandate of Flathead County's subdivision regulations; the spur exists as an unbuilt connector in furtherance of the objectives of the DNRC.¹ The DNRC did not want to lose the potential for access from the north as was provided by the Brady Way right-of-way, but it also did not want the connection completed without its prior approval. All these facts were recognized by the Court. *Id.*, ¶¶ 7, 26, 30, 37 and 50.

The facts surrounding the spur and the state land access are well documented in the record. Collectively they manifest 1) the objectives of the DNRC, 2) the requirements of the County, 3) the plans of the developer, and 4) the rights of the public. None of those facts were overlooked by the District Court and none were overlooked by this Court.

GBSB's objective in seeking rehearing has nothing to do with preserving public land access. GBSB's only interest is in gaining free access to its Baker 80

¹ See the comments of county attorney Peter Steele and DNRC community planner, Steve Lorch, in the June 29, 2011 *Flathead County Planning and Zoning Office Report* for the Whitefish Hills Village Subdivision and PUD, p. 13. FC WHVS000552; *Appellant's Separate Appendix*, Exhibit 10, p. 32.

subdivision through Whitefish Hills.² *Petition for Rehearing*, p. 11. The tortured argument it has contrived in its pursuit of that interest satisfies none of Rule 20's requirements for rehearing.

ARGUMENT

1. The location and legal status of Whitefish Village Drive and the spur are by design; there are no "overlooked facts"

GBSB asserts that Whitefish Village Drive, the constructed primary subdivision road in Whitefish Hills, does not reach the state land. While true (and obvious), it is not material and was not overlooked. This is the *raison d'être* for the Prairie View spur – to make that connection to the state land should it at some point be desired (a decision that resides primarily with the DNRC). The premise of GBSB's *Petition* seems to be that for the County's abandonment of the unbuilt Brady Way right-of-way to have been valid, § 7-14-2615(3), MCA, required that substituted in its place would be a completed, presently available connection linking Whitefish Village Drive to the Prairie View right-of-way and the state land south of Whitefish Hills.

However, the spur is not built for a reason; the DNRC did not want it built. The DNRC wanted two things; to preserve the potential connection, and that the

² GBSB has now improved Prairie View Road to serve as the primary access to its Baker 80 subdivision and has received final subdivision approval and the return of its subdivision improvements bond related to Prairie View Road.

spur, by which that connection was provided, not be completed without DNRC's approval.³

In its 2011 review of the Whitefish Hills subdivision/PUD with its proposal for the abandonment of Brady Way, the County's planning staff sought agency comment from, among others, the DNRC. In its staff report, the County's Planning Office documented the below comments from the DNRC's community planner, Steve Lorch, and deputy county attorney, Peter Steele. June 29, 2011 *Flathead County Planning and Zoning Office Report* for Whitefish Hills, p. 13. FC WHVS000552; *Appellant's Separate Appendix*, Exhibit 10, p. 32.⁴

- **Peter Steele, Deputy County Attorney**
(verbal comment received June 23rd, 2011)
 - Abandonment of County road easement for Brady Way would be acceptable, but new road alignment should remain designated for public use, at minimum to the spur easement leading to the DNRC School Trust Land to the south.
 - All internal subdivision roads should be shown as public access easements as required under Section 4.7.15(e) of the subdivision regulations.
- **Steve Lorch, Community Planner, DNRC Northwestern Land Office**
(verbal comment received June 28th, 2011)
 - The developer is required to obtain approval from the DNRC prior to utilizing the spur easement to DNRC School Trust Lands as emergency ingress/egress to the development.
 - The DNRC would prefer the subdivision roads be maintained as public easements to ensure access to state trust land as well as promote future connectivity and emergency ingress/egress should lands to the south be developed.

Those DNRC objectives communicated to the County are the reason Whitefish Village proposed that the spur would be dedicated on the plats for the

³ See fn. 1, *supra*.

⁴ See, also, the phone log entry of the comments from DNRC's Steve Lorch. *Record on Writ of Review*, Doc. 69, FC WHVS000070 [phone log entry].

subdivision but **not constructed**. Whitefish Hills *Phasing Plan* (which, contrary to GBSB's assertion, *is* in the record), *Appellant's Separate Appendix*, Exhibit 8, pp. 25-27; FC WHVS000611-13; *Opinion*, p. 7, ¶ 7. The County in turn approved the Whitefish Hills Village PUD conditioned on the developer dedicating **but not constructing** the Prairie View spur. July 15, 2011 *Flathead County Planning and Zoning Office Report* for Whitefish Hills, Conditions 20 and 24, *Appellant's Separate Appendix*, Exhibit 12, pp. 45-46, FC WHVS000596-97.

Notably, before the abandonment of Brady Way, there was no way to physically access the state land *via* that county right-of-way from the north. Now, post-abandonment, the same is true; there is still not a developed connection to the state land. However, as was the case prior to the abandonment, the **potential** for that connection remains because of the spur. Before the abandonment, there was legal but not physical access. Post-abandonment the same is true; there is legal public access but no physical access. *Opinion*, p. 25, ¶ 50. In both cases – before and after abandonment – there is “**existing legal access** to public land.” Section 7-14-2615(3), MCA.

2. The current status of access to the state land through Whitefish Hills is also by design

Neither the District Court nor this Court was under any illusion that Whitefish Village Drive reached the state land. It is the obvious function of the spur to provide the link between Whitefish Village Drive and the Prairie View right-of-way.

GBSB's argument that a material fact was overlooked by the Court is baseless. The Court recognized that: "When Brady Way was abandoned, the 'spur road' was not constructed. The WHV phasing plan states that the 'right-of-way from Whitefish Village Drive to the southern property boundary shall be dedicated as a public ROW, but *not constructed*.'" *Opinion*, p. 7, ¶ 7 [emphasis added]. The Court's own map clearly identifies the spur and illustrates its purpose as the connector between Whitefish Village Drive and the state land. *Opinion*, p. 4, ¶ 2.

Both the District Court and this Court were well aware of the location of Whitefish Village Drive in relation to the state land. Both courts were equally aware of the spur's role as a connecting link to the state land. GBSB's convoluted argument of an "overlooked fact" is nonsense.

3. The state land enjoys abundant access

Similarly baseless is GBSB's assertion that the presence of other nearby county roads cannot be considered since they are "not in the record." The "record" here is a compendium of documents (and it is voluminous) to which counsel stipulated (long after the County's abandonment decision) to aid the District Court in its consideration of GBSB's petition for a writ of review. Doc. 69. That stipulated record was not intended as a reflection of what the county commissioners actually did or did not consider, nor as a limitation on their reliance on matters of public record such as the County's roads. Section 7-14-2110, MCA. Obviously, the County

can take note of its own roads and was not tethered to the post-abandonment stipulated record. The commissioners' knowledge of the County's roads (especially those in close proximity) is to be presumed. *See*, §§ 7-14-2101, *et seq.*, MCA. It is also information of which a court can take judicial notice (whether requested to do so or not). Rule 201(a), (b), (c) and (f), M.R.Evid. To put a document in the record is a straightforward task. Putting a road in the record is a little trickier.

Using the "layers" function of Flathead County's Interactive Mapping Application (IMA) to highlight the state land, its access is readily seen.⁵ Prairie View Road runs for more than a mile along its eastern boundary reaching at its northern terminus the point at which it connects to the spur.⁶ KM Ranch Road angles through the heart of the state land providing more than a mile of access. Spring Prairie Road runs east and west along its southern boundary for more than 3,000 feet. Bowdish Woods Road is also shown, providing additional access from

⁵ The County's Interactive Mapping Application (IMA) is maintained by its GIS Department in furtherance of the objectives of the *Montana Geospatial Information Act*, §§ 90-1-401, *et seq.*, MCA, the purpose of which is to "prioritize[s] consistent collection, accurate maintenance, and common availability of geospatial information to provide needed, standardized, and uniform geospatial information in digital formats." Section 90-1-402, MCA.

Interactive Mapping Application (IMA)



Flathead County

Flathead County GIS Department

⁶ As can be seen on the County's IMA and other maps in the record, a substantial portion of Prairie View Road has been built outside the right-of-way.

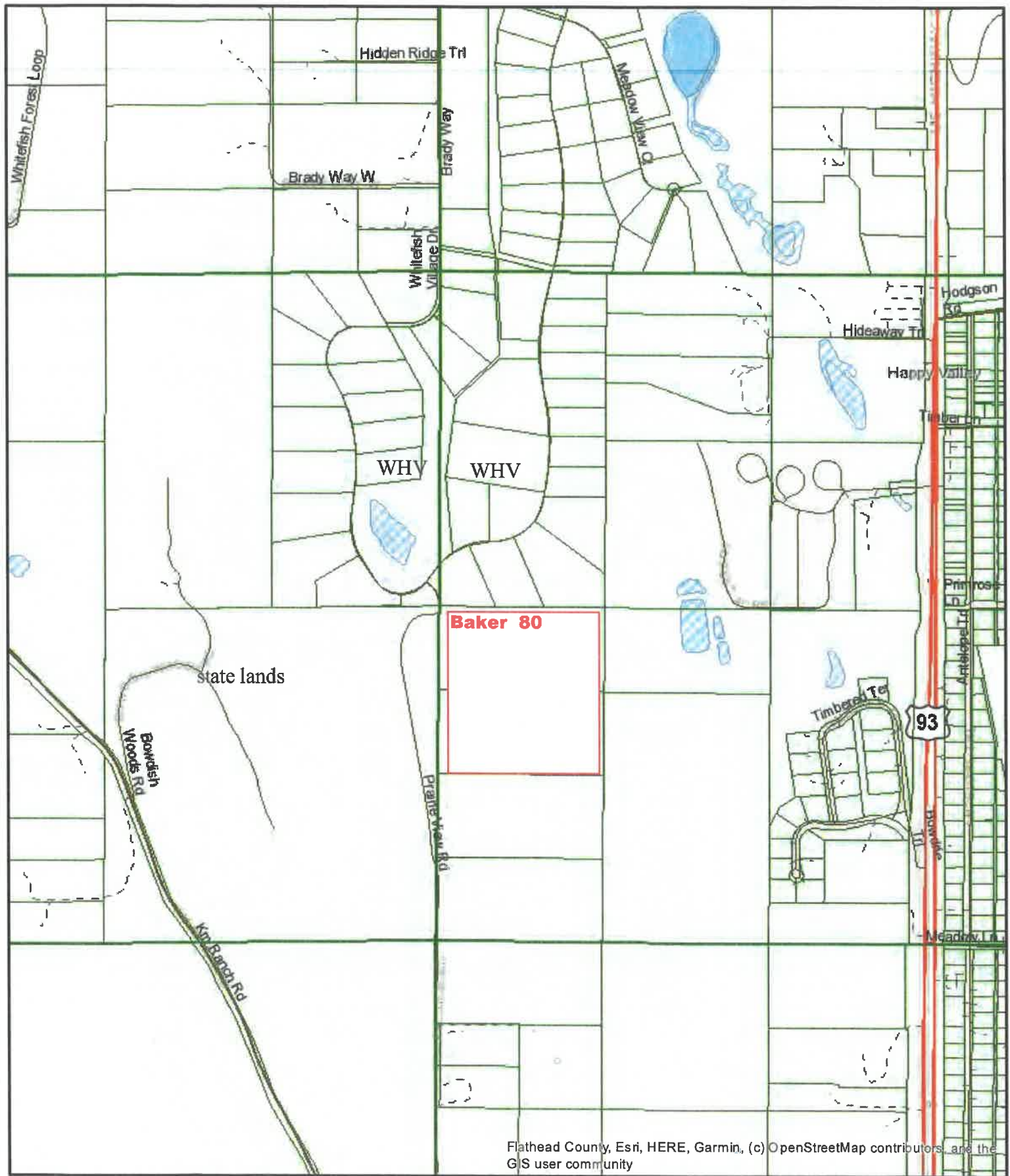
KM Ranch Road. These county roads provide infinitely more access to the state land than the unbuilt Brady Way, which only touched its far northeast corner (a point that can still be reached from the south on the Prairie View Road/right-of-way).

Thus, even if the Brady Way access had been eliminated, there is still “substantially the same access” on several other county roads, and arguably the *exact same access* on the same right-of-way from the south. GBSB’s suggestion that the County or the DNRC was unaware of these roads, or that the District Court and this Court should not take judicial notice of their presence (with respect to which there is no dispute) defies common sense.

4. The roads are “in the record”

While GBSB would have the Court don blindfolds in service of confining its review to “the record,” the presence of the County’s road network is an uncontroverted and judicially noticeable fact. Rule 201, M.R.Evid. And contrary to GBSB’s assertions that these roads are not “in the record,” they are shown on numerous maps that are in the stipulated record. As but one example, maps attached to Whitefish Village’s abandonment petition show Prairie View, KM Ranch and Bowdish Woods Roads. Doc. 69, FC BW000009-018.

Ironically, among the “better” maps in the record is one GBSB prepared and submitted to the District Court in support of its motion for summary judgment. Doc. 7, Exhibit 12. [Included on following page]. GBSB used the IMA from the County’s



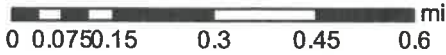
Flathead County, Esri, HERE, Garmin, (c) OpenStreetMap contributors, and the GIS user community

Flathead County GIS Department



800 South Main Street
Kalispell, Montana 59901

EXHIBIT 12



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.

GIS Department and on it labeled the “state land,” “WHV” and “Baker 80” (erroneously depicted as a 40-acre tract; it is an 80-acre tract and includes the two 20-acre parcels south of what is outlined in red). This map is “in the record,” submitted by GBSB for the District Court’s edification. While it does not show the Spring Prairie Road access at the southern end of the state land, it shows KM Ranch Road, Bowdish Woods Road, Prairie View Road, the spur, Whitefish Village Drive and Brady Way.

The District Court noted the presence of these access roads in its consideration of § 7-14-2615(3).⁷ The maps mentioned above appear in numerous places in the record and there are numerous other maps in the record that show these and other county roads. Doc. 69.

5. The abandonment complies with § 7-14-2615(3), MCA

The state land involved here was never at risk of being landlocked by the abandonment of Brady Way. The concern was future connectivity, which in some cases is desirable and others not, a question within the broad discretion of the County in the management of its roads. *Ingram-Clevenger, Inc. v. Lewis & Clark Cnty.*, 194 Mont. 43, 49-50, 636 P.2d 132, 137 (1981).

⁷ The District Court noted this extensive access to the state land. Doc. 130, p. 2. (“ . . . the requirement of a substantially equivalent access to state land as Brady Way is in existence on KM Ranch Road as well as Bowdish Woods Road”).

Throughout this entire process, now spanning some fourteen years, Flathead County's long-tenured road superintendent, Dave Prunty, has been involved. Prunty occupies the role provided for in § 7-14-2102, MCA ("The board may assign responsibility for the supervision of county roads to a . . . county road superintendent . . ."). The below email from Prunty to Allison Mouch, AICP, the County's lead planner on the Whitefish Hills PUD review (copied to county attorney, Peter Steele), illustrates the attention Prunty accorded the abandonment from its initial proposal in 2011.

From: David Prunty
Sent: Thursday, June 09, 2011 2:35 PM
To: Allison Mouch
Cc: Peter Steele
Subject: WF Hills Subdivison-PUD

Hi Allison:

I started the review of the PUD you sent to me. Would you please forward a copy of the packet to Peter at the Co Atty office. The issue with the abandonment of Brady Way is of a concern to me. Peter is very much involved in any ROW abandonment we do and I will need to have his collaboration on our response for your staff report.

Thanks.....dave

Doc. 69, FC WHVS000063. Eight years later in September 2019, when the petition for abandonment was submitted, Prunty viewed the right-of-way with county attorney, Caitlin Overland. Prunty and Overland reported that Brady Way was not used to provide access to any property south of Whitefish Hills, and they endorsed the abandonment, stating: "On September 26, 2019, Dave Prunty and I made a visit to the road site . . . the ROW *does not provide access to public land* . . . currently the public derives no benefit from the ROW as it is undeveloped . . ." FC

BW000019 [emphasis added]; *Appellant's External Appendix*, pp. 82-83, Exhibit 18.

In the report submitted by the county surveyor and commissioner Mitchell, by whom the “official” investigation was conducted, the commissioners were advised:

We found upon viewing:

- 1.) The right of way is undeveloped
- 2.) The right of way does not provide access to any public land or water.
- 3.) All of the property owners that would be directly affected by the abandonment of the right of way have signed the petition.

We recommend approval of the petition for the abandonment of the above described right of way.

FC BW000059; *Appellant's External Appendix*, p. 252, Exhibit 40.

Those determinations are well supported by the record and the District Court so found. *Order on Writ of Review*, Doc. 92, pp. 5-8. GBSB’s assertion of an “overlooked material fact” in regard to Whitefish Village Drive or the spur (or § 7-14-2615(3)), is baseless.

Section 7-14-2615(3) prohibits a county from abandoning a 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.” Contrary to GBSB’s assertions, the statute does not stand for the proposition that it must be Whitefish Village Drive and the spur that provide that alternate access (although they do). The danger proscribed by the statute is abandoning a road or right-of-way without an alternate access of comparable utility – “unless *another road* provides substantially the same access.”

Id. [emphasis added]. The location of that other road is not mandated; only that “another road” must provide comparable access.

Since Brady Way was never *used* to provide access to the state land, the statute’s applicability is questionable. But that is an issue this Court need not resolve; the statute’s requirement of “another public road or right-of-way” providing “substantially the same access” is abundantly satisfied. Section 7-14-2615(3), MCA. There has been no loss of public access.

CONCLUSION

In the fourteen years since the County’s approval of the Whitefish Hills subdivision/PUD conditioned on the abandonment of Brady Way, there has been no suggestion from any quadrant (other than GBSB) that the County’s decision was ill-advised or that it impaired public access to the state land. If there was an access issue here, it would be given voice not by GBSB, but by the DNRC, or the County, or a public lands access advocacy group. Not by GBSB, the Texas subdivider.

GBSB’s arguments do not satisfy the requirements for a petition for rehearing under Rule 20, M.R.App.P. Moreover, they are unsound and lacking in merit.

The petition should be denied.

HASH, RUDBACH, HUTCHISON & MURRAY PLLP

Electronically signed by

/s/ Donald R. Murray

By: Donald R. Murray

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.P., I hereby certify that this brief, entitled *Objections of Appellee Whitefish Village, LLC to Petition for Rehearing* is printed with proportionately spaced Times New Roman typeface of 14 points for primary text (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 2,500 words, excluding the cover pages, signature block, three pasted items, this *Certificate of Compliance* and the *Certificate of Service*.

HASH, RUDBACH, HUTCHISON & MURRAY PLLP

[Electronically signed by]

/s/ Donald R. Murray

By: Donald R. Murray
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CERTIFICATE OF SERVICE

I, Donald R. Murray, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Other to the following on 03-03-2025:

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Dated: 03-03-2025