

Park County Subdivision Regulations: Broad Expansion of Government Control and Taking of Private Property

PUBLIC MEETING NOTICE

Date: Tuesday, June 19, 2007
Time: 7:00 – 8:00 p.m.
Place: Emigrant Hall

The purpose of this public meeting is to provide information with regards to the legal problems and property right implications of the Park County Subdivision Regulations. It will also be a strategy session for those individuals who want to use the public process to keep Park County from taking private property.

Hertha L. Lund, an attorney from Bozeman with the Wittich Law Firm, P.C., will share her *analysis* and *insights* on how to provide public comment and on potential litigation in response to the Park County's regulations that go "too far."

Be advised that Park County is holding a public hearing on these overreaching regulations at 1:30 p.m. on Thursday, June 21, 2007 in the Community Room of the City-County Building (Courthouse), 414 E Callender Street in Livingston.

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Admitted MT & CO

Frederick P. Landers, Jr.

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Park County Subdivision Regulations Go "Too Far:"
Taking of Private Property Without Compensation
By: Hertha L. Lund
June 19, 2007

Introduction:

On June 21, 2007 at 1:30 p.m. the Park County Planning Department will be holding a public hearing on the County's Subdivision Regulations. These regulations go "too far," in violation of the Montana and United States Constitutions. Now is the time for Park County residents to let the County know that the regulations are unconstitutional and to work with the County to develop legal and workable subdivision regulations.

The Public and Appeal Process:

Mont. Code Ann. § 76-2-205 requires the County to provide notice of a public hearing and then provide the public with the opportunity to be heard prior to adoption or amendment of subdivision regulations. Following this public process, if the County does not make all the necessary changes in the subdivision regulations, then those who have commented and/or participated in the public hearing can file an appeal in District Court within 30 days of the County Commissioner's Final Determination. Mont. Code Ann. § 76-2-110.

The County Cannot Take Private Property Without Compensation:

United States Constitution – The United States Constitution provides that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend V. In 2005, the United States Supreme Court discussed the principles of fairness that underpin takings jurisprudence. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005). In her opinion for the Lingle majority, Justice O'Connor explained that the most important takings inquiry was the impact of the government's action on the property owner. Id. As the Court stated in Dolan, "In general, no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for physical invasions]." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

Montana Constitution – The Montana Constitution's language protecting private property rights is even stronger than the United States Constitution: "Private property shall not be taken **or damaged** for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." Mont. Const. Art. II, § 29 (emphasis added). Montana's addition of the "or damage" language entitles the owner to compensation when the government action has reduced the market value by twenty to thirty percent. Knight v. Billings, 642 P.2d 141, 145-46 (1982). In later cases the Court has

not interpreted the “or damaged” language and has indicated that the Court would find a categorical takings when all economical value has been taken.

The County’s Subdivision Regulations Go “Too Far” and Take Private Property:

The County’s regulations provide that legal access is a public road or private road that has an easement dedicated for public use. Park County Subdivision Regulations at Definitions 1.a. The County has explained that “[r]equiring subdivisions to provide roads that are dedicated to public use, even if they are private, is primarily to provide for the public health and safety of the residents.” Letter from Park County Planning Office, December 15, 2006. The County also stated, “Park County chose to allow for private roads, if developers or Home Owners Associations document they are dedicating the roads to public use.” *Id.*

There is a provision in Montana law that allows the County to use the State’s eminent domain process to condemn right-of-ways. Mont. Code Ann. § 70-30-107. However, this provision provides that the damages and expenses incurred in opening the private road to public access must be paid by whomever benefits from the public easement. *Id.* Instead, of paying for the public easement, the County is attempting to take it without paying just compensation.

The County seems to have positioned itself to argue that it needs the public roads to provide for the public health and safety. However, even if the County wants to provide for the public health and safety, it does not circumvent the County’s duty to pay for the property. In fact on that issue, the United States Supreme Court stated, “[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

The only way the County can get around paying for the roads, is if citizens give them the roads through dedication. In fact, the County told the Glastonbury Landowners Association, “[o]ne option would be to look at the maps . . . to determine which roads **you wish to dedicate** to public use.” Letter from Park County Planning Office, December 15, 2006 (emphasis added). This “wish to dedicate” is not really a free will transaction because the County is not going to allow further subdivisions unless current owners of private roads dedicate these roads to the County for public use. The County is attempting to avoid the Constitutional requirement to pay for public easements.

Other Problems With Subdivision Regulations:

- ***Fire Protection Requirements*** – The County is requiring that even small subdivisions provide a large quantity of stored water for fire fighting purposes. The County has placed an unacceptable burden on small systems and should either delete the requirement or require it only for public water supply systems that serve more than 25 residential lots. Also, fire protection water can more effectively be provided in underground tanks, as is provided for the in the current County regulations, rather than above-ground storage that the County is considering in the amended regulations.

- **County Requirement to Review and Approve Covenants** – The regulations provide that the County must approve any change to restrictive covenants governing the use of the land. Park County Subdivision Regulations, II-B-3.A. Usually a covenant is an agreement between certain individuals and the County governs land use by regulations. However, in this case, the County is attempting to circumvent the duties it has as a governmental body regulating land use by inserting itself into the covenants. The County should not be allowed to insert itself into covenants that run with the land.
- **County Should Not Provide Stormwater Review** – The Department of Environmental Quality (“DEQ”) has responsibility for issuing stormwater permits. The County should allow the DEQ to fulfill its duties rather than inserting itself into this process.
- **County Should Review Applications to Ensure Appropriate Sewer Disposal Systems** – The DEQ does not provide adequate review of solid waste systems and it is the County’s responsibility to oversee the transportation and disposal of solid waste. Therefore, the County should revise the regulations so that it performs these duties.
- **County Cannot Mandate Waiver of Future Rights** – The regulations provide that a property owners’ association must provide that each property owner has mandatory membership in the homeowners association and may be “required to sign a waiver of [their] right to protest the formation of a maintenance district to maintain improvements.” Park County Subdivision Regulations, II-B-3.C.2. This is illegal and citizens cannot be required to give up their future rights as a concession to own property.

County Has A Duty to Not Act in an Arbitrary, Capricious or Unlawful Manner:

Pursuant to Montana law, the County has a duty to not act in a manner that is arbitrary, capricious or unlawful. North Fork Preservation Ass’n v. Department of State Lands, 778 P.2d 862, 867 (1989). The Montana Supreme Court has explained arbitrary and capricious as “random, unreasonable or seemingly unmotivated, based on the existing record.” Silva v. City of Columbia Falls, 258 Mont. 329, 335, 852 P.2d 671, 675 (1993). The federal Courts have also addressed the meaning of arbitrary and capricious. In determining whether an agency acted in an arbitrary and capricious manner, a court must ensure that the agency’s decision was based on a consideration of the relevant factors and examine whether there has been a clear error of judgment. See Friends of the Bow v. Thompson, 124 F.3d 1210, 1215 (10th Cir. 1997) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).