IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; PLAINS GRAINS, INC., a Montana corporation; ROBERT E. LASSILA and EARLYNE A. LASSILA; KEVIN D. LASSILA and STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA and LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISTLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA and MYRNA R. KANTOLA; KENT HOLTZ; HOLTZ FARMS; INC., a Montana corporation; MEADOWLARK FARMS, a Montana partnership; JON C. KANTOROWICZ and CHARLOTTE KANTOROWICZ; JAMES FELDMAN and COURTNEY FELDMAN; DAVID P. ROEHM and CLAIRE M. ROEHM; DENNIS N. WARD and LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER and KARLA BUMGARNER; CARL W. MEHMKE and MARTHA MEHMKE; WALTER MEHMKE and ROBIN MEHMKE; LOUISIANA LAND & LIVESTOCK, LLC., a limited liability corporation; GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER and DOROTHY FORDER; CONN FORDER and JEANINE FORDER; ROBERT E. VIHINEN and PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN and HELEN A. COLEMAN; GARY OWEN and KAY OWEN; RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; JEROME R. THILL; and MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Appellees,

and

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L. URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Appellees/Cross-Appellants.

From the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

APPELLANTS' BRIEF

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I. ISSUES

Whether the District Court erred in granting summary judgment to SME and the Commissioners and denying Plains Grains summary judgment:

(1) by ruling that the Commissioners' rezoning of 668 acres of land from Agricultural to Heavy Industrial was not spot zoning;

(2) by ruling that the conditional zoning was legal; and

(3) by ruling that the public's right to participate in the decision-making process was not violated.

II. INTRODUCTION AND PRIOR PROCEEDINGS

Generations of farm and ranch families have made their living working the productive soil and rangeland in the Salem/Highwood area east of Great Falls. The entire area was zoned "Agricultural" by Cascade County. Long before the area became home to farmers and ranchers, the Lewis and Clark Expedition hauled their gear across the then prairie in their famous Portage around the Great Falls of the Missouri, rendering it a designated "National Historic Landmark."

The Appellants, Plaintiffs below (collectively Plains Grains), include farmers and ranchers who own land contiguous to 668 acres of land which has been rezoned from Agricultural to Heavy Industrial for the stated purpose of Southern Montana Electric (SME) constructing an electrical generating station as the Highwood

Generating Station (HGS). Land in every direction around the HGS is both zoned Agricultural and used for agricultural production. As proposed to be built during the rezoning proceeding, the HGS industrial complex would require the construction of railroad lines, electric transmission lines, wastewater disposal and water lines, which would require condemnation of lands owned by Appellants, disrupting their agricultural operations and diminishing their quality of life. It would also cause the delisting of the Lewis and Clark Portage National Historic Landmark.

The Cascade County Commissioners (Commissioners) approved the zone change from Agricultural to Heavy Industrial on a 2-1 vote, subject to eleven conditions proposed by SME, and which apply only to SME. Cascade County has no zoning regulations which provide standards or procedures for conditional zoning.

Thereafter Plains Grains filed a Complaint and Application for Writ of Mandate and Writ of Review requesting the Court to declare void the zone change on multiple grounds, including that the action constituted illegal spot zoning, that the conditional zoning was illegal, and that the Commissioners violated the public's right to participate in the decision-making process.

On November 28, 2008, the District Court issued its Order on Motions for Summary Judgment and Writ of Mandamus/Writ of Review denying Plains Grains' motion for summary judgment and their application for writs. (Order attached at Tab

A.) In concluding that the rezoning was not spot zoning, the District Court mistakenly assumed that the power plant was "already permissible" in the Agricultural District. (Order at pp. 24-26; Tab A.) The District Court's conclusion constitutes a mistake of law and is based upon the manifest misapplication of the appropriate standards, including Montana Supreme Court precedent and Cascade County Zoning Regulations.

However, not all claims were resolved and judgment was not entered. Thus, on January 29, 2009, Plains Grains filed a Petition for Writ of Supervisory Control with the Supreme Court. On February 2, 2009, the Supreme Court directed the District Court, or its designee, to file a response. The District Court designated SME to respond, and SME filed a response. On April 29, 2009, the Supreme Court filed its Order, noting that:

> Plains Grains contends that the impending construction of the HGS constitutes an urgency or emergency factor that renders the normal appeal process inadequate. We agree. . . . We also determine that a mistake of law by the District Court on Plains Grains' spot zoning claim would cause a gross injustice in light of the inadequacy of the normal appeal process. As a result, we deem it appropriate to exercise supervisory control over the District Court to a limited degree.
>
> The District Court should resolve any remaining claims in Plains Grains' complaint and issue a final judgment.

(Order of April 29, 2009, pp. 4-5.)

On May 27, 2009, the District Court issued an Order denying summary judgment to Plains Grains on all claims and granting summary judgment to the Commissioners and SME on all claims. (Attached, Tab B.) Final judgment was entered and this appeal follows. Pursuant to the provisions of Rule 29, M.R.App.P., application has been made for the expedited determination of this appeal.

III. STATEMENT OF FACTS

On October 30, 2007, Duane and Mary E. Urquhart and Scott and Linda Urquhart (Urquharts) submitted a Rezoning Application to the Cascade County Planning Department requesting that 668.394 acres of their agricultural land, located approximately eight miles east of the City of Great Falls and just south of the Missouri River, be rezoned "from Agricultural (A-2) to Heavy Industrial (I-2)." (Tab C of Appendix, at p. 1.) The Urquharts submitted their Rezoning Application for the stated purpose of allowing for the construction and operation of SME's coal-fired electric power generating complex, known as the Highwood Generating Station (HGS). (*Id.*)

The majority of the materials submitted with the Rezoning Application consisted of materials describing HGS. (Tab C.) As stated in the Rezoning Application (Tab C, p 1.):

> The requested zoning to heavy industrial use is a prerequisite to the planned construction and operation of an electric generating station, known as the Highwood Generating Station (hereafter, "HGS"). Applicants intend to sell the rezoned property to Southern Montana Electric Generation and Transmission Cooperative, Inc. (hereafter, "SME"), which plans to permit, construct and operate HGS, a 215-250 mW electrical generating facility.

The Rezoning Application describes the ongoing fuels and materials needed to operate the HGS, including coal consumption estimated to be 1,314,000 tons per year. Coal will be delivered by train, and fly ash from the coal combustion process will be disposed of onsite. (*Id.*, p. 12.) Construction of the HGS will also necessitate construction of a number of utility facilities and infrastructure on land owned by Appellants, described in the Rezoning Application:

> In addition to construction of the HGS on the Real Property, construction of the following utility facilities and infrastructure on and in the vicinity of the Real Property are planned: a rail spur; raw water intake at the Morony Reservoir on the Missouri River; raw water pipeline; two 230 kV transmission lines; a new switchyard; potable and wastewater lines; and access roads.

(*Id.*, pp. 11-12.)[1]

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[1]Throughout the Rezoning Application, references were made to the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) (both part of Tab C) prepared for SME's proposed coal-fired power plant. Likewise, the Staff Report relies throughout on the FEIS and ROD. (See *passim* 11/19/07 Staff Report, Tab D; and 01/10/08 Agenda Action Report, Tab E.) The FEIS and ROD considered locating SME's proposed coal-fired power plant in Cascade County's Industrial Park, which was already zoned Industrial. However, the FEIS and ROD, and later the Rezoning Application and Staff Report, all favored the Salem site as the preferred

The Rezoning Application admits that all of the property which is sought to be rezoned from Agricultural (A-2) to Heavy Industrial (I-2) is used for agricultural purposes. (*Id.*, p. 3.)

Likewise, the Cascade County Planning Department's Staff Report describes the existing land use as agricultural, and the existing zoning as "A-2" Agricultural. (Tab D, p. 2; Tab E, p. 5.) As to the "Surrounding Zoning and Land Uses" the Staff Report (Id., p. 2) states:

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alternative on the basis that operation of the coal-fired power plant at the Industrial Park would require coal trains to travel through the City of Great Falls disrupting traffic, and that disposal of coal ash could not take place onsite at the Industrial Park because of the smaller area. (See, *e.g.*, Tab D, p. 13; and Tab E, p. 13.)

Ironically, on August 3, 2009, the Montana Department of Environmental Quality received from SME a request that its Air Quality Permit to operate HGS as a coal-fired power plant be revoked, on the basis that SME was now planning to build a natural gas-powered facility at HGS. (Tab O(1).) However, SME's General Manager Tim Gregori, described SME's move as a realignment of "our order of build-out" of generation and not the death of a coal-fired facility. (Tab P.) Although no construction is presently occurring on the site, SME continues to pursue permits required to construct an electrical generating facility on the Salem site. Thus, both the threats to adjacent landowners and a justiciable controversy remain.

Direction	Legal Description	Zoning Classification	Existing Land Use
North	Parcel #5356400	A-2 Agricultural>20 acres	Agricultural Production
Northeast	Parcel #5118800	A-2 Agricultural>20 acres	Agricultural Production
East	Parcel #5120100, #5364000	A-2 Agricultural>20 acres	Agricultural Production
Southeast	Parcel #5365100	A-2 Agricultural>20 acres	Agricultural Production
South	Parcel #5365100, #5365400	A-2 Agricultural>20 acres	Agricultural Production
Southwest	Parcel #5366900	A-2 Agricultural> 20 acres	Agricultural Production
West	Parcel #5366900, #5362700	A-2 Agricultural>20 acres	Agricultural Production
Northwest	Parcel #5357500	A-2 Agricultural>20 acres	Agricultural Production

Approximately 200 acres of the rezoned land is within the boundaries of the Lewis and Clark Great Falls Portage National Historic Landmark. (Affidavit of Kathleen McMahon, Tab F, p. 33.) National Historic Landmarks are designated by the Secretary of Interior because they possess exceptional value in preserving the national heritage of the United States. According to the National Park Service, "despite the claim 'significant mitigation measures are planned to offset the impacts of the HGS' . . . it is our belief that HGS cannot be mitigated at the Salem site and such construction would result in delisting of most, if not all the NHL." (Tab H, p.

2.) Section 7.4.2.1 of the Cascade County Zoning Regulations (CCZR) states that permitted uses in the Heavy Industrial (I-2) District are, "All uses not otherwise prohibited by laws." (Tab I.) The types of uses that are defined as Heavy Industrial under the Regulations, CCZR § 2.99.28, include:

> Place and/or building, or portion thereof, that is used or is intended for the following or similar uses: processing or manufacturer of materials or products predominantly from extracted or raw materials; storage of or manufacturing processes using flammable or explosive materials; or storage or manufacturing processes that potentially involve hazardous or commonly recognized offensive conditions; the term includes motor vehicle assembly, oil refineries, textile production, sawmills, post and pole plants, log yards, asphalt and concrete operations, primary metal processing, and the like.

The Staff Reports (Tabs D & E) focus exclusively on use of the land for the construction of the HGS facility, and throughout the Staff Reports it is noted that the proposed rezoning does not comply with applicable review criteria unless a number of conditions are imposed. The Staff Reports failed to discuss or analyze whether the other uses allowed by the Heavy Industrial zoning (the so-called "litany of uses") would comply with the criteria required by applicable statutes and regulations. As discussed below, this limited analysis is emblematic of "special legislation," a hallmark of spot zoning. Moreover, "conditional zoning" is not recognized by, nor standards provided for, in the Cascade County Zoning Regulations.

The complete "Recommendation" set forth in the Staff Report provided as follows:

> RECOMMENDATION
>
> It is recommended that the Planning Board recommend to the County Commission **approval** of the request to rezone Parcels #5364100, #5364200, and #5364300 in Section 24, and Parcel #5365200 in Section 25, Township 21 North Range 5 East, P.M.M., Cascade County, Montana from "A-2" Agricultural to "I-2" Heavy Industrial.

(Tab D at p. 3; underlining added, bolding in original.)[2] The recommendation included no mention of conditional zoning.

In the motions approving the Resolution of Intention to rezone and the Final Resolution to Rezone, the Commissioners made the rezoning "subject to the 11 conditions offered by Tim Gregori of Southern Montana Electric, representing the Applicants, dated January 9th, 2008, and attached hereto." (Tab J; Disk 1, Binder 11, p. 110445.) Included among the eleven conditions was that, "SME agrees, as a condition of rezoning to heavy industrial use, that such use shall be solely for purposes of an electrical power plant." The letter dated January 9, 2008, and received by the Planning Office on January 11 just two business days prior to the hearing before the Commissioners, further represented that, "SME will present testimony and documentation on each of these areas at the rezoning hearing on January 15."

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[2]Unless otherwise indicated all emphasis herein is added.

SME's letter dated January 9, 2008 (Tab G(7)), setting forth the eleven conditions that were incorporated into the motions to rezone adopted by the County Commissioners was not available to the public, the Planning Department, or the Planning Board at the time of the Planning Board hearing on December 4, 2007, or at the time that required public notices of the Planning Board hearing were published. Nor was the "testimony and documentation of each of these areas" that was submitted by SME at the time of the January 15, 2008, public hearing before the County Commissioners available to the public, the Planning Department or the Planning Board at the time of the public hearing before the Planning Board on December 4, 2007. (Second Affidavit of Anne Hedges, ¶ 11; Tab G.)

Consistent with the Staff Report, whose "Recommendation" included no reference to conditional zoning, neither the public nor the Planning Board discussed "conditional zoning" at the hearing before the Planning Board. In accord with the Recommendation in the Staff Report, the Planning Board approved on a 5-4 vote the following motion:

> MR. KESSEL: Let me make this more technical. I recommend the planning board recommend the county commission approval of a request to rezone Parcel Numbers 5364100 and 5364200 and 5364300 in Section 24, and Parcel Number 5365200 in Section 25, Township 21 north, Range 5 east, P.M.M., Cascade County, Montana, from A-2 agriculture to I-2 heavy industrial.

(Transcript of December 4, 2007, Planning Board hearing at p. 270; Disk 1, Binder 11, p. 110279; Tab G(4).)

The first time the Plaintiffs learned of the SME letter and its eleven proposed conditions of rezoning was during the course of the January 15, 2008, public hearing before the County Commissioners on the proposed rezoning. (Second Affidavit of Anne Hedges at ¶ 11; Tab G.) The first time that Appellants became aware of the voluminous documentation submitted by SME in support of the conditions of rezoning was also at the January 15, 2008, public hearing. (*Id.* at ¶ 13.) The documentation submitted at that time included a traffic impact study, a baseline noise study, a review of scientific studies concerning coal-fired power plants and children's health, a report on whether organic farming will be harmed by HGS emissions, material on the effects of the Colstrip power plant on range resources and stack emissions, a property appraisal report, and a landscape plan. The documentation contained technical information that would require a significant amount of time to review and prepare informed responses. (*Id.*) However, the public hearing was closed at the end of the January 15, 2008, public hearing. (Transcript of January 15, 2008 public hearing at p.360; Tab G(10).)

On January 31, 2008, the County Commissioners met to consider a motion to approve passage of a Resolution of Intent to rezone the Urquharts' property from

"A-2" Agricultural to "I-2" Heavy Industrial. The motion stated:

> COMMISSIONER BRIGGS: Mr. Chairman, I move the Cascade County Commission approve the Resolution of Intention to rezone . . . from A-2 agricultural to I-2 heavy industrial, subject to the 11 conditions offered by Tim Gregori of Southern Montana Electric, representing the applicants, dated January 9th, 2008, and attached hereto.

(Transcript of January 31, 2008 Commission Meeting at p. 2; Disk 1, Binder 11, p. 110445; Tab J.) The motion to approve passed 2 to 1.

On March 11, 2008, the County Commissioners met to consider Final Resolution 08-22, to rezone the Urquharts' parcels from "A-2" Agricultural to "I-2" Heavy Industrial, subject to the eleven conditions proposed by SME, which passed on a 2 to 1 vote, with Commissioner Beltrone opposing on the basis that the rezoning "is the definition of spot zoning." (See Transcript of March 11, 2008, meeting at pp. 4, 6; Tab K.)

Over 1,900 concerned citizens commented or protested in one form or another on the proposed rezoning. (See Cascade County's Disk 1, Binder 12, pp. 228-91; Disk 1, Binder 11, pp. 13-14; and Disk 1, Binder 9, p. 1018.) As further indicated by the extensive media coverage on the requested zone change, this matter was of significant interest to the public. (Affidavit of Anne Hedges at ¶ 6, Tab L.)

IV. STANDARD OF REVIEW

The Supreme Court reviews the District Court's grant of summary judgment *de novo*, applying the same Rule 56(c) criteria used by the District Court. *Citizens for Responsible Development v. Board of County Comm'rs of Sanders County*, 2009 MT 182, ¶ 7, 351 Mont. 40, 208 P.3d 876; *Matter of Estate of Lien* (1995), 270 Mont. 295, 298, 892 P.2d 530, 532. The Supreme Court will review the District Court's conclusions of law to determine whether its interpretation of the law is correct. *Carbon County v. Union Reserve Coal Co., Inc.* (1995), 271 Mont. 459, 469, 898 P.2d 680, 686.

V. ARGUMENT

A. The Rezoning From Agricultural to Heavy Industrial Constituted Spot Zoning.

1. The District Court erred in its analysis of spot zoning.

This Court has developed a three-part test for analyzing spot zoning. *See Little v. Board of County Comm'rs of Flathead County* (1981), 193 Mont. 334, 631 P.2d 1282. Here, the District Court engaged that three-part analysis and found "compelling" bases in favor of Plains Grains' argument under the *Little* standard. In spite of its analysis, however, the District Court retreated altogether and erroneously held that "spot zoning is not implicated in this case." (Order at p. 25; Tab A.) The

Court's conclusion was predicated upon the Agenda Action Report prepared by the Planning Department, which states:

> When the County adopted its county-wide zoning the County determined that electrical generation facilities are appropriate land uses within the agricultural zoning district upon satisfying the special use permit process. Converting the subject property to I-2, so long as it is limited to the HGS facility, would not be significantly different than allowing such a facility in the existing A-2 district with a special use permit.

(Agenda Action Report, p. 12, Tab E; cited in Order at pp. 24-26, Tab A.).

Several fundamental flaws undermine the Staff's conclusions, which are carried over into the Court's conclusions regarding spot zoning. The following arguments demonstrate that the District Court's conclusion that spot zoning is not implicated in this case constitutes an error of law and is based upon a manifest misapplication of the Cascade County Zoning Regulations.

a. The District Court conflated the distinction between a special use permit proceeding and a zone change proceeding.

There is a fundamental distinction between a proceeding for a special use permit before the Board of Adjustment and a rezoning proceeding before the County Commissioners. Here, Urquharts and SME determined that the rezoning of the 668 acres was a required prerequisite to the construction and operation of HGS. (Tab C, p. 1.) Hence, a Rezoning Application was submitted and the matter went before the

Commissioners for decision as a request for rezoning. SME did not attempt to proceed with HGS as an "already permissible" use in the Agricultural District, and the County never followed the process for considering HGS pursuant to a special use permit within the Agricultural District.[3] The District Court erred in unilaterally construing HGS and the rezoning application as an already permissible special use after the fact. This case needed to have been treated below (and now here in this Court) as the rezoning issue that it is.

b. The District Court erred in applying regulations applicable to commercial wind farms to HGS.

Both the Planning Staff and the District Court concluded that HGS would be allowed within the existing A-2 zoning district because it was an electrical generation

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[3]The Cascade County Zoning Regulations state in relevant part that, "Special exception uses may be permitted in a zoning classification district if special provision for such special exception is explicitly listed in the Zoning District Regulations as a special exception and a special permit is issued." (CCZR § 2.99.180; Tab I.) Consideration of a "special permit" must adhere to CCZR § 8, wherein "each specific use shall be considered as an individual case" and such permit "may be issued only upon meeting all requirements in these regulations for a specific use which is explicitly mentioned as one of the 'Uses Permitted Upon Issuance of a Special Use Permit as Provided in § 8 . . ." (CCZR § 8.1; Tab I.) The CCZR require the Board of Adjustment, not the County Commissioners, to review a special use permit application, (see CCZR § 8.8; Tab I), and then, the Board of Adjustment can only approve a special use permit request upon first reaching a number of conclusions, including, "The proposed development will be in harmony with the area in which it is located." (CCZR § 8.5.4; Tab I.)

facility. The source of this error is CCZR § 7.2.3.16 (Tab I), which contemplates a special use exception in the A-2 District for electrical generation facilities that are attendant to commercial wind farms, not massive coal-fired power plants:

> Commercial Wind Farms/Electrical Generation Facilities providing that the use is in compliance with all other Federal, State and County regulations.

Beyond the District Court's above-described error in retro-fitting the requested zone change into the special use exception which was never requested here, the commercial wind farm regulation being relied upon cannot support a stand-alone special use for the coal-fired HGS.

As used in CCZR § 7.2.3.16, the term "Electrical Generation Facilities" depends upon such facility being attendant to a "Commercial Wind Farm." The District Court erroneously interpreted the slash ("/") between "Commercial Wind Farm" and "Electrical Generation Facilities" as an "and" or an "or." Other parts of the CCZR highlight the District Court's error. For example, the special use which immediately precedes "Commercial Wind Farms/Electrical Generation Facilities" allows for:

> Mobile Home Park **or** Recreational Vehicle Park providing that the use is in compliance with all other Federal, State and County regulations.

(CCZR § 7.2.3.15; Tab I.) In contrast, the drafters of the special use regulation for

Commercial Wind Farms/Electrical Generation Facilities did not use the conjunction "or", but instead relied upon a slash to communicate the need for such electrical generation facilities to be attendant, rather than alternative to the preceding "commercial wind farm" phrase.

As such, any special exception that might exist within A-2 zoning for "Electrical Generation Facilities" is tethered to "Commercial Wind Farms." The coal-fired power plant described in SME's Application for Rezoning is simply inapposite to a commercial wind farm. This construction is bolstered by recalling that the provision for "Commercial Wind Farms/Electrical Generation Facilities" exists as a "special exception" requiring a special use permit. (CCZR § 7.2.3; Tab I.) The CCZR instruct that such a special exception must be "explicitly listed in the Zoning District Regulations." (CCZR § 2.99.180; Tab I.) Likewise, this construction is further supported by the Montana Supreme Court's determination that legislation which promotes the public health, safety and welfare[4] (and hence implementing regulations) must be liberally construed to achieve these objectives, and any exception should be given a narrow interpretation. *State ex rel. Florence-Carlton School Dist. v. Board of County Comm'rs of Ravalli County* (1978), 180 Mont. 285,

[4]The explicit purpose of county zoning is "promoting the public health, safety, morals and general welfare." § 76-2-201(1), MCA.

291, 590 P.2d 602, 605. *Accord* CCZR § 15.1 (Interpretation, Conflict with Other Laws; Tab I.)

In sum, it was error for the District Court to consider this rezoning case in the context of a non-applicable special use regulation, CCZR § 7.2.3.16. This conclusion is corroborated by and consistent with other relevant provisions of the CCZR, which clearly limit the HGS industrial complex to an Industrial District.

c. The District Court erred in concluding that the Heavy Industrial HGS use would be allowable in the Agricultural zoning district.

The Cascade County Zoning Regulations only allow "Industrial Uses" within an I-1 (Light Industrial) or I-2 (Heavy Industrial) zoning district. *See* CCZR § 2.99.31 at Tab I (defining "Industrial Uses" as "Uses of land which are allowed by right or through the special permit process only in the I-1 or I-2 zoning classifications, as listed in these regulations."). Thus, even under a special use permit process, an "Industrial Use" can only occur in an I-1 or I-2 zoning classification.

Here, SME succinctly describes the HGS coal-fired power complex as follows:

> The plant will combust approximately 1,200,000 tons of coal annually. The combustion of coal will result in the generation of approximately 225 tons of ash per day or approximately 77,000 tons per year. The proposed project includes construction or installation of the CFB boiler, electric turbine, generator, coal storage and handling facilities and substation, 400 foot chimney, ash monofill, four wind turbine electric generators, water and wastewater treatment, cooling tower, railroad

> access, electric transmission lines, water supply from the Missouri River, wastewater disposal and potable water supply lines to the City of Great Falls, and access road improvements.

(Tab M, p.1.) This description of the massive HGS complex clearly matches the uses defined by the CCZR as "Heavy Industrial:"

> Place and/or building, or portion thereof, that is used or is intended for the following or similar uses: processing or manufacture of materials or products predominantly from extracted or raw materials; storage of or manufacturing processes using flammable or explosive materials; or storage or manufacturing processes that potentially involve hazardous or commonly recognized offensive conditions; the term includes motor vehicle assembly, oil refineries, textile production, sawmills, post and pole plants, log yards, asphalt and concrete operations, primary metal processing, and the like.

(CCZR § 2.99.28, Tab I.)

In short, the Cascade County Zoning Regulations simply do not support the District Court's error of interpreting the HGS "Industrial Use" as "already permissible" in the existing A-2 Agricultural District by virtue of the special exception provision for "Commercial Wind Farms/Electrical Generation Facilities." Electric generation facilities are <u>always</u> a component part of a specific means of production; *i.e.* a commercial wind farm, a hydroelectric dam, a nuclear reactor, or a coal-fired power plant. Where, as here, the electric generation facilities are attendant to the HGS coal-fired industrial power complex proposed by SME, then it is clearly a "Heavy Industrial" use as defined by CCZR § 2.99.28, and clearly limited to an

Industrial zoning classification by CCZR § 2.99.31. Hence the zone change from Agricultural to Industrial was applied for.

Thus, the District Court's conclusion that the industrial coal-fired power complex was "already permissible" in the A-2 Agricultural Zoning District is clearly a mistake of law.

2. The Zone Change constitutes illegal spot zoning.

Had the District Court not erroneously undermined its application of the spot zoning test articulated by this Court in *Little* through its conclusion that the HGS was "already permissible" in the Agricultural District, Plains Grains' motion for summary judgment on the spot zoning claim would have been, and should be, granted.

As this Court explained in the seminal case of *Little v. Board of County Comm'rs of Flathead County*:

> There is no single, comprehensive definition of spot zoning applicable to all fact situations. Generally, however, three factors enter into determining whether spot zoning exists in any given instance. First, in spot zoning, the requested use is significantly different from the prevailing use in the area. Second, the area in which the requested use is to apply is rather small. This test, however, is concerned more with the number of separate landowners benefited by the requested change than it is with the actual size of the area benefited. Third, the requested change is more in the nature of special legislation. In other words, it is designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public.

Little, 193 Mont. at 346, 631 P.2d at 1289. Accord, *Greater Yellowstone Coalition,*

Inc. v. Board of County Comm'rs of Gallatin County, 2001 MT 99, ¶ 21, 305 Mont. 232, 25 P.3d 168.

Subsequent to the articulation of the three-prong test in *Little*, the Court has made clear that, "since we held in *Little* that 'usually' all three elements are required to establish illegal spot zoning, it is possible that illegal spot zoning can occur in the absence of an element." *Boland v. City of Great Falls* (1996), 275 Mont. 128, 134, 910 P.2d 890, 894. In addition, *Boland* clarified that the "primary focus" of the second and third *Little* factors must be on "not the benefit resulting from the development of the Property, but rather the benefit to landowners as a result of the rezoning." *Id.*

Here, the rezoning from Agricultural to Heavy Industrial meets each factor in the spot zoning analysis articulated by the Supreme Court.

a. Adjoining land use.

The first factor considers whether the requested use is significantly different from the prevailing use in the area, which here is clearly agricultural. According to the Application for Rezoning, "The predominant land use is grain farming and cattle ranching, on a large-scale, commercial basis as opposed to hobby use." (Tab C, p. 3.) Likewise, the Staff Report confirms that the "Existing Land Use" is "Agricultural Production" in virtually every direction. (Tab D, p. 2.)

The District Court's Order acknowledges that the rezoning to Heavy Industrial to allow for construction of HGS is unquestionably a change of use from that prevailing in the area. However, the District Court erroneously concludes that the coal-fired power plant was already a permissible use in the agricultural area prior to the rezoning request and, therefore, spot zoning is not implicated:

> Thus, while the coal fired plant will be a different use than agricultural, it certainly was already permissible in that agricultural area prior to the rezoning request. Thus, spot zoning is not implicated in this case.

(Order at p. 25; Tab A).

First, as set forth above, the District Court erroneously concluded that the coal-fired power plant "was already permissible" in the Agricultural District. Second, the test established by the Supreme Court is, "whether the requested use is significantly different from the prevailing use in the area." *Little*, 631 P.2d at 1289; *Greater Yellowstone Coalition*, ¶ 21. Here, the prevailing use is unarguably agriculture. When properly considered, the first prong of the spot zoning test is clearly met.

b. Size of the area.

In upholding the District Court's finding of spot zoning, the *Greater Yellowstone Coalition (GYC)* Court explained:

> The second prong of the *Little* test for spot zoning focuses on the size of the area in which the requested use is to apply, but is not limited to the physical size of the parcel. It also includes analysis of how many

> separate landowners stand to benefit from the proposed zoning change. The District Court found that the Duck Creek parcel was small in relation to the Hebgen Lake Zoning District - the 323 acres at issue comprise a mere 2% of the District's 13,280 acres. * * * More importantly, the *Little* test focuses on the number of owners who stand to benefit from the zoning change.

GYC, ¶¶ 26-28.

An analysis of the A-2 zoning district indicates that there are some 1,560,000 acres in Cascade County that are zoned A-2. The subject property (consisting of 668 acres) constitutes only .05% of the total A-2 zoning district's acreage. (Tab F, p. 56.)

As regards this prong of the spot zoning test, the District Court determined:

> On the surface, Plaintiffs appear to have a compelling argument. The proposed rezone area would comprise 'less than .05% of the total Zoning District area, Writ, p. 31, ¶ 75, and it looks to benefit only one landowner which is now SME. *See Greater Yellowstone Coalition v. Bd. of Commiss. of Gallatin Co.*, 2001 MT 99, 305 Mont. 232, 25 P.3d 168. However, this zoning 'change' was not required for the intended uses. Agenda Action Report, p. 11. Consequently, no spot zoning occurred where such use was already allowed by existing zoning regulations. *Id.*

(Order at p. 25; Tab A.)

Once again, the District Court clearly proceeded under a mistake of law when it concluded that the second prong was not met because "no spot zoning occurred where such use was already allowed by existing zoning regulations." When properly considered, the Plains Grains indeed "have a compelling argument" and the second

prong of the spot zoning test is clearly met. That is, the requested zone change is unarguably small in relation to the zoning district, constituting only .05% of the A-2 zoning district. *Cf., GYC*, at ¶ 27 ("the 323 acres at issue comprise a mere 2% of the District's 13,280 acres").

c. Special legislation.

As explained by this Court in *Greater Yellowstone Coalition* at ¶ 29:

> The issue presented by the third prong is whether the zoning request is in the nature of special legislation designed to benefit one or a few landowners at the expense of surrounding landowners or the general public. *Little*, 193 Mont. at 346, 631 P.2d at 1289.

The Urquharts are the immediate sole beneficiaries of this dramatic zone change, which is intended for the sole purpose of allowing SME to construct and operate its coal-fired power plant in the middle of this agricultural area. As if to add emphasis to the rezoning as special legislation, the rezoning approved by the Commissioners is subject to eleven special conditions which apply **only** to SME (Tab K, p. 3), including the following:

> SME agrees, as a condition of rezoning to Heavy Industrial use, that such use shall be solely for the purposes of an electric power plant.

(Tab G(7), p. 1.)

Unarguably the rezoning will come at the expense of surrounding landowners. Construction of the electric power plant, the only contemplated use of the rezoned

property, will necessitate constructing, on the surrounding landowners' land, railroad tracks, transmission lines, sewer lines, and water lines. (Tab C, pp. 11, 12.) No Plaintiffs (Appellants herein) will willingly part with their agricultural lands to allow for the 100 foot wide swaths of utility corridors crossing their lands to serve the industrial complex. Their farmland will need to be taken from them through condemnation proceedings. (Tab G, ¶ 10; see also Tab G(10).) One can hardly think of a more compelling example of rezoning coming at the expense of surrounding landowners. But the impacts do not end with the taking of land from the surrounding landowners. As explained in the Final Environmental Impact Statement (Tab N at Page 4-109):

- "Impacts associated with air quality, noise, visual resources, and traffic would all potentially decrease the quality of life for area residents downwind of the facility or adjacent to transportation routes," which impacts could be "perceived as adverse enough to residents that they would choose to relocate."

- "Land put up for sale in the area may be attractive to an industrial developer," and the "addition of any industry would perpetuate the impacts of decreasing the quality of life for residents of this rural agricultural area, and over time this cycle could continue and the predominant land use in the area could change from being primarily farmland to being primarily industrial land."

The *GYC* case is further instructive as to the third prong of the spot zoning test. In that case, the area rezoned by the Gallatin County Commissioners was important

to wildlife and was adjacent to public land that "includes some of the most significant wildlife habitat in the country." *Id.*, ¶ 32. Officials from a number of public agencies opposed the rezoning because of the negative impacts on this nationally important habitat. This was an additional factor relied on by the District Court in finding that the rezoning was in the nature of special legislation. *Id.*, ¶¶ 32-34.

Here, approximately 200 acres of land rezoned to Heavy Industrial are within the boundaries of the Lewis and Clark Great Falls Portage National Historic Landmark. National Historic Landmarks are nationally significant places designated by the Secretary of Interior because they possess exceptional value in preserving the heritage of the United States. According to comments from the National Park Service in regards to construction of HGS, "such construction would result in delisting of most, if not all the NHL." (Tab H, p. 2.) Thus, as in *GYC*, the significant negative impact to an important public resource is one more indicia that the proposed rezoning is "special legislation."

Finally, although the Staff Report acknowledges that the proposed rezoning does not comply with a number of goals and objectives of the Growth Policy (Tab D, pp. 9-12), the Staff Report concludes that "the level of compliance is acceptable" again on the basis of its previously stated conclusion that:

> When the County adopted its county-wide zoning the County determined that electrical generation facilities are appropriate land uses within the agricultural zoning district upon satisfying the special use permit process.

(Tab D, pp. 12.) Likewise, the District Court again relied on this provision of the Staff Report in determining that the third prong of the spot zoning test was not met, thereby repeating the same error with prong three as it made with prongs one and two above. (See Order at pp. 25-26; Tab A.) The explication of this error is set forth above and incorporated here by reference.

In sum, the "special legislation" test is clearly met. It is unarguable that the Urquharts were the immediate sole beneficiaries of this dramatic zone change, which was intended for the sole purpose of allowing SME to construct and operate its power plant in the middle of this agricultural area. Meanwhile, numerous other landowners will have to watch as their agricultural operations are disrupted, their property is condemned, and their quality of life is destroyed. In addition, an irreplaceable National Historic Landmark will be scarred and suffer delisting, which "would be an irreplaceable loss to the national heritage of our country for the construction of a facility with an expected life span of 40 years."

All three prongs of the spot zoning test are met. The District Court's conclusion to the contrary is predicated upon a mistake of law.

B. The Conditional Rezoning Is Illegal.

1. No ordinance or regulation provides standards or procedures for conditional zoning, which violates the "uniformity requirement."

Section 14 of the Cascade County Zoning Regulations (Tab I), sets forth the standards and procedures for amending the zoning regulations or maps. Nowhere in those regulations, or anywhere else in the Cascade County Zoning Regulations, are there procedures or standards for "conditional zoning." Nevertheless, by letter dated January 9, 2008 (Tab G(7)), SME requested that the rezoning contain eleven conditions which applied only to SME. Those eleven conditions were then included in the motion to approve the rezoning (Tab K), and passed on a 2-1 vote.

A review of the zoning statutes reveals that there is no explicit statutory authority for conditional zoning. There is, however, the so-called "uniformity requirement" that, "all regulations must be uniform for each class or kind of buildings throughout a district, but the regulations in one district may differ from those in other districts." § 76-2-202(5), MCA. Thus, when allowed, conditional zoning must be based on specific regulations and apply uniform standards. As explained by the Connecticut Supreme Court:

> [Z]one changes may be conditionally granted only when regulations authorize conditions to be imposed in specific circumstances, and when the regulations are uniformly applied. A general rule requiring uniform

regulations serves the interests of providing fair notice to applicants and of ensuring their equal treatment.

Kaufman v. Zoning Comm'n of City of Danbury (Conn. 1995), 653 A.2d 798, 812 (citations omitted); see also *Andres v. Village of Flossmoor* (Ill. Ct. App. 1973), 304 N.E.2d 700, 703 ("the making of individualized zoning deals by local municipalities, apart from the provisions they are willing to adopt as general zoning regulations, is an invalid abuse of the zoning power").

The McMahon Report (Tab F (27)) discusses conditional zoning and points out that at least one town in Montana, the City of Whitefish, allows conditional zoning. Significantly, however, Whitefish passed a zoning ordinance which includes procedures and standards for imposing conditions; *i.e.* there is "uniformity." (See McMahon Report, Tab F(27) at pp. 52-54.)

2. Basic legal standards that apply to conditional zoning.

This brings us to a consideration of the basic legal standards that apply to a local governing body's exercise of its police power to zone or rezone. First, enacting or amending a zoning designation constitutes a legislative act. *Schanz v. City of Billings* (1979), 182 Mont. 328, 335, 597 P.2d 67, 71. Second, when exercising this legislative power to enact zoning ordinances and regulations, the local governing body must comply with the constitutional requirements of equal protection, and

substantive and procedural due process, including giving fair notice of what the zoning ordinance or regulation purports to accomplish (the void for vagueness doctrine). *Yurczyk v. Yellowstone County*, 2004 MT 3, 319 Mont. 169, 83 P.3d 266. The "uniformity doctrine" is a reflection of these limitations:

> Zoning ordinances must not only be nondiscriminatory and reasonable, but also applied in a uniform and reasonable manner in order to be enforceable. . . . An ordinance may be held lacking in uniformity if it is so vague as to be capable of being applied in a discriminatory manner.

83 Am. Jur. 2d *Zoning and Planning* (1992), § 128 "Uniformity," citing *Taylor v. Moore* (1931), 303 Pa. 469, 479, 154 A. 799, 802, which held:

> While the exercise of discretion and judgment is to a certain extent necessary for the proper administration of zoning ordinances, this is so only where some standard or basis is fixed by which such discretion and judgment may be exercised by the board. Where a zoning ordinance is vague and indefinite, it cannot be sustained as valid under the authorizing act.

Assuming *arguendo* that Montana's zoning statutes authorize local governing bodies to engage in conditional zoning, then there is still the need to meet the basic standards required of local governing bodies in exercising their legislative power in adopting zoning ordinances and regulations. Thus, in accord with the above-referenced principles, the Montana Supreme Court has not hesitated to strike down under the "void for vagueness" doctrine a zoning regulation which failed to give a person of ordinary intelligence fair notice of the substance of the regulation.

In *Yurczyk*, landowners brought an action against Yellowstone County alleging that zoning regulations requiring "onsite construction" of dwelling units was (among other deficiencies) " void for vagueness," with which the Supreme Court agreed. *Yurczyk*, ¶¶ 32-33. In *Yurczyk*, at least there was a written zoning regulation that Yellowstone County was relying on. Here, the "vague regulation" is even more amorphous. There are no written zoning regulations which set forth procedures, standards, and definitions governing the review, enactment, and enforcement of conditional zoning in Cascade County. Nor does the Resolution enacting the conditional rezoning contain any such procedures and standards.

Thus, the conditional rezoning at issue not only suffers from impermissible vagueness, but violates the requirements of the enabling legislation. In that regard, it should be noted that § 76-2-202(5), MCA ("all regulations must be uniform . . .") and § 76-2-203(1)(2), MCA ("zoning regulations must be . . ."), clearly contemplate that a county will and must enact zoning regulations when exercising its statutorily delegated zoning authority. While neither statute explicitly authorizes conditional zoning, it is instructive that where local governing bodies have implemented conditional zoning (*i.e.* the City of Whitefish, see Tab F(27)), it has been accompanied by zoning regulations which: 1) define conditional zoning; 2) require that the proposed statement of conditions are in a form recordable with the County

Clerk and Recorder; 3) contain a statement acknowledging that the statement of conditions runs with the land; 4) require that if the statement of conditions references other documents (as here), then the other documents must either be recorded with the statement of conditions, or specify where the documents may be examined; 5) upon the conditional zoning taking affect, the zoning map is required to be amended to reflect the new zoning classification along with the designation that the land was zoned with a statement of conditions; 6) provide that the failure to comply with all of the conditions is a violation of the zoning ordinance, with all remedies thereunder available to the local governing body; 7) specify time limitations within which the conditions must be implemented; and 8) provide for an orderly process for reversion of the conditionally rezoned property to its prior zoning classification, including public notice, public hearing before the Planning Board, and a public hearing before the local governing body. Here, there are neither zoning regulations nor provisions in the Resolution which put these safeguards in place.

Emblematic of this failure is the email of February 25, 2008 (Tab G (13)), from Brian Hopkins, the Deputy County Attorney assigned to this proceeding, who attempted to explain his understanding and the Commissioners' intention regarding what happens if SME is unable or unwilling to meet the conditions:

> Ms. Ward, The notice of intent to rezone was approved subject to the eleven conditions offered by Tim Gregori of SME, representing the applicants, dated January 9, 2008. I believe that the property reverts to A2 if SME is unable or unwilling to meet those conditions; at least that was the Commissioners' intention in adding the conditions to the rezoning motion rather than simply making them part of a location conformance permit.

Although this may have been the Commissioners' intention, there is simply no provision in either the motion, the Resolution, or the Cascade County Zoning Regulations specifying what happens if SME is unable or unwilling to meet the conditions.

While SME and the Commissioners argued below that the Supreme Court has expressly approved the process of conditional zoning, neither case put forth as authority for Montana's adoption of conditional zoning actually addressed the issue of conditional zoning. First, *Boland v. City of Great Falls* (1996), 275 Mont. 128, 910 P.2d 890, dealt with spot zoning. The Montana Supreme Court in *Boland* never analyzed, much less approved the appropriateness of conditions within the zoning action. Likewise, the Montana Supreme Court's decision in *Citizen Advocates for a Livable Missoula, Inc. v. City Council*, 2006 MT 47, 331 Mont. 269, 130 P.3d 1259, never addressed the issue of conditional zoning.

In sum, as explained by the Connecticut Supreme Court, "zone changes may be conditionally granted only when regulations authorize conditions to be imposed

in specific circumstances, and when the regulations are uniformly applied." *Kaufman, supra.* Here, the conditional rezoning at issue not only suffers from impermissible vagueness, but the conditional rezoning is arbitrary and capricious, constitutes an abuse of discretion, and violates the requirements of § 76-2-205(5), MCA, and § 76-2-203(1)(2), MCA. The conditional rezoning is illegal and void.

C. The Commissioners Violated the Public's Right to Participate.

Article II, § 8 of the Montana Constitution gives the public the right to participate in the decision-making process before governing bodies make final decisions. The Montana Public Participation Act, § 2-3-101, *et seq.*, MCA, implements this constitutional right. Montana law requires public bodies (including the Board of County Commissioners) to develop procedures for permitting and encouraging the public to participate in decisions that are of significant interest to the public. The required procedures must assure adequate notice and assist public participation before a final decision is made, and allow the public to submit data, views or argument before a final decision is made. § 2-3-103, MCA. Montana law further requires that:

> Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public.

§ 2-3-111(1), MCA.

The "reasonable opportunity" to participate requires that the public be fairly apprised concerning the proposal on which the governing body is to make a decision. In *Bryan v. Yellowstone County Elem. School Dist.*, 2002 MT 264, 312 Mont. 257, 60 P.3d 381, the Montana Supreme Court held that, although members of the public were allowed to speak at a public hearing before the School Board and submit comments, they were not afforded the statutorily required "reasonable opportunity" to participate in the decision-making process because they did not have available to them all of the documents to which they were entitled. In *Bryan*, the plaintiff and other interested members of the public had tried to keep apprised of a proposal to close certain elementary schools in the district because of budget shortfalls. At the time of a public hearing before the School Board, a comparative analysis prepared by the Facilities Committee was distributed to the School Board. Neither the plaintiff nor other interested members of the public had had an opportunity to review this document.

Likewise, in the instant case the public was not afforded a reasonable opportunity to participate in the decision-making process. First, included among the mandatory requirements for notices in the zoning statutes and Cascade County Zoning Regulations is the requirement that the notice "must state" that "the proposed

zoning regulations are on file for public inspection at the office of the county clerk and recorder." See § 76-2-205(1)(d), -5(c), MCA; see also CCZR §§ 14.2.1.4 and 14.3.1.4.[5]

The conditions set forth in SME's letter dated January 9, 2008, are clearly "proposed zoning regulations" related to the rezoning of the 668 acres from A-2 to I-2. In the motion to approve the Resolution of Intention to rezone, the Commissioners explicitly incorporated the letter and its eleven conditions into the legislative enactment:

> COMMISSIONER BRIGGS: Mr. Chairman, I move the Cascade County Commission approve the Resolution of Intention to rezone . . . from A-2 agricultural to I-2 heavy industrial, subject to the 11 conditions offered by Tim Gregori of Southern Montana Electric, representing the applicants, dated January 9th, 2008, and attached hereto.

(Transcript of January 31, 2008 Commission Meeting at p. 2; Disk 1, Binder 11, p. 110445; Tab J.)

Thus, these proposed zoning regulations were required to be on file for public inspection at the office of the County Clerk and Recorder and the Cascade County

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[5]"Must" and "shall" are mandatory rather than permissive." *Harris v. Smartt*, 2002 MT 239, ¶ 101, 311 Mont. 507, 57 P.2d 58, 72 (Nelson, J., concurring), citing *Montco v. Simonich* (1997), 285 Mont. 280, 287, 947 P.2d 1047, 1051 (citation omitted).

Planning Department at the time the public notices were published, as required by CCZR § 14.2.1.4 (Tab I) and § 76-2-205(1)(d), MCA. They were not. Instead, SME's letter requesting the conditional rezoning approved by the Commissioners was hand-delivered to the Planning Department on January 11, 2008, two business days prior to the January 15 public hearing. Moreover, the following undisputed facts are set forth in the Second Affidavit of Anne Hedges:

> MEIC and the other plaintiffs first learned of the existence of this letter requesting rezoning subject to the eleven conditions at the time of the public hearing before the Cascade County Commissioners on January 15, 2008. MEIC, as well as other interested members of the public, regularly checked on filings by SME with the Cascade County Planning Department. The Planning Department was aware of our keen interest in this rezoning proceeding. Yet neither MEIC nor other members of the interested public were notified of SME's letter dated January 9, 2008, prior to the January 15, 2008 public hearing. Neither MEIC, nor other plaintiffs, had the opportunity to conduct research on the proposal to "conditionally zone" the property, nor to offer reasonable comment on it during the January 15, 2008 public hearing. Had we been given a reasonable opportunity to do so, we would have been able to point out the numerous problems and deficiencies with the proposed conditional zoning, which we have complained of in this lawsuit.

(Second Affidavit of Anne Hedges at ¶ 11; Tab G.)

Second, in its letter requesting conditional rezoning SME stated, "SME will present testimony and documentation on each of these areas at the rezoning hearing on January 15." (Tab G(7) at p. 2.) During the Applicant's presentation to the County Commissioners at the time of the January 15, 2008, public hearing, SME

submitted to each of the Commissioners a three-inch binder containing hundreds of pages of technical information in support of its proposed conditional rezoning that had not previously been submitted and made available to the interested public in the rezoning proceeding. Once again, the Second Affidavit of Anne Hedges establishes the following undisputed facts:

> During the "Applicant's Presentation," SME submitted to each of the County Commissioners a three-inch binder containing hundreds of pages of technical information that had not previously been submitted in support of the conditional rezoning that it proposed, and which was not previously available in the rezoning proceeding to MEIC, the other plaintiffs, or other members of the public. This extensive technical documentation included a traffic impact study, a baseline noise study, a review of scientific studies concerning coal-fired power plants and childrens' health, a report on whether organic farming will be harmed by HGS emissions, information on the effects of the Colstrip Power Plant on range resources and stack emissions, a property appraisal report, and a landscape plan. (See Exhibit 9.) Even during the course of the January 15, 2008, public hearing MEIC and the other plaintiffs were not provided copies of these technical reports. Moreover, these reports contain technical information that would require a substantial amount of time to review and prepare an informed response. Yet, the public hearing was closed the same night the materials were submitted (Transcript of January 15, 2008 hearing at p. 360; Exhibit 10), and the opponents had no opportunity to review the additional submissions and make informed comments on them during the public hearing. Had the plaintiffs been given the opportunity, they would have rebutted and corrected representations made in these submissions, as is demonstrated by the extensive report submitted in this proceeding by land use consultant Kathleen McMahon (Exhibit 27).

(Second Affidavit of Anne Hedges at ¶ 13; Tab G.)

This case is analogous to *Bryan*. In that regard, it is instructive to note the *Bryan* Court's rational as to why it was compelled to reject the government entity's argument that simply providing citizens with the opportunity to speak fulfilled the constitutional and statutory mandate of public participation:

> Such a superficial interpretation of the right to participate to simply require an uninformed opportunity to speak would essentially relegate the right of participation to paper tiger status in the face of stifled disclosure and incognizance. Given the tenor of the delegates' insistence upon open government and citizen participation, we find it improbable that they envisioned and subsequently memorialized such a hollow right.
>
> Certainly, as the District suggests, Bryan was given the opportunity to voice her concern regarding the school closure recommendation. However, she participated under a distorted perspective in light of the District's partial disclosure of information . . .

Bryan, ¶¶ 43, 44.

In the instant case, not only did SME submit the three-inch binder of technical material in support of its request for conditional rezoning at the time of the January 15, 2008 public hearing, but the public hearing was closed at the conclusion of the hearing. ("Are there other opponents?...Hearing none, I'll close this public hearing."; Transcript of January 15, 2008 public hearing at p. 360; Tab G(10).) Thus, as in *Bryan*, Plaintiffs never had the opportunity to review, rebut or respond to either SME's proposed conditional rezoning, or the extensive technical materials submitted

in support of the conditional rezoning.

In its recent decision in *Citizens for Responsible Development v. Bd. of County Commr's of Sanders County,* 2009 MT 182, 12, 351 Mont. 40, 208 P.3d 876, the Montana Supreme Court made eminently clear the interconnection between the right of "reasonable opportunity for citizen participation" contained in the Montana Constitution and the disclosure requirements of the Montana Subdivision and Platting Act:

> The Montana Constitution provides that government agencies are to afford "such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." Mont. Const. Art. II, § 8. The procedural requirements under subsection 604 [§ 76-3-604, MCA] facilitate public participation by informing the public at what stage the application is in the process—whether the governing body is assessing the completeness of the application or whether the process has moved ahead to the governing body's consideration of the substantive merits of the application.
>
> Similarly, the EA enhances public participation by summarizing the above-mentioned impacts upon the local community which the public can then consider and respond to, whether in agreement or disagreement. Failure to provide this information, or failure to provide it in a reasonably cohesive fashion, makes it difficult for the public to use the information. The Board argues that the crucial point is whether the Board had sufficient information before it. However, focusing on that point alone ignores the public participation purposes served by compliance with the statutory process.

Citizens for Responsible Development, ¶¶ 23-24 (footnote omitted).

Here, the procedures used by the Commissioners in adopting the conditional rezoning proposed by SME at the eleventh hour undermined the right of public participation. SME's submission of proposed conditions two working days before the public hearing before the Commissioners (and long after the public hearing before the Planning Board) came as a surprise to the public and did not afford them an opportunity to reasonably respond to the proposed conditional rezoning, including pointing out that there were neither procedures nor standards governing conditional zoning in the Cascade County Zoning Regulations. Moreover, SME submitted hundreds of pages of technical information in support of the proposed conditions at the time of the January 15, 2008 public hearing before the Commissioners, which the public had no opportunity to review, analyze, or prepare comments on at the time of the January 15, 2008 public hearing - - which was closed at its conclusion, thereby foreclosing any further comment by the interested public, including Appellants.

In sum, the "reasonable opportunity" to participate requires that the public be fairly apprised concerning the proposal on which the governing body is to make a decision, and has available to it prior to the public hearing all documents that are material to the governing body's decision. *Bryan; Citizens; supra.* Here, that clearly was not the case. The public, including Appellants, did not have a reasonable opportunity to participate in the decision-making process as required by Article II, §

8 of the Montana Constitution, and §§ 2-3-103, -111, MCA. Accordingly, the Commissioners' rezoning decision should have been set aside by the District Court pursuant to the provisions of § 2-3-114, MCA.

VI. CONCLUSION

Based on the foregoing, Plains Grains requests that the Court reverse the District Court and declare the conditional rezoning from Agricultural to Heavy Industrial to be unlawful, and to further declare that the rezoning is therefore void and of no effect.

Respectfully submitted this 14th day of August, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that the foregoing brief is produced in proportional font (Times New Roman) of not less than 14 point type, utilizes double line spacing, except in footnotes, headings and extended quotations, which are single spaced, and the word count calculated by WordPerfect 12 for Windows does not exceed 10,000 words, excluding certificate of service and certificate of compliance.

Dated this 14th day of August, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2009, a true and correct copy of the foregoing document has been served via U.S. First Class Mail upon the following:

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Linda M. Ranes

Linda M. Ranes

TAB A

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

BDV-08-480

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; **PLAINS GRAINS, INC.**, a Montana corporation; **ROBERT E. LASSILA** and **EARLYNE A. LASSILA; KEVIN D. LASSILA** and **STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA** and **LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISTLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA** and **MYRNA R. KANTOLA; KENT HOLTZ; HOLTZ FARMS, INC.**, a Montana corporation; **MEADOWLARK FARMS**, a Montana partnership; **JON C. KANTOROWICZ** and **CHARLOTTE KANTOROWICZ; JAMES FELDMAN** and **COURTNEY FELDMAN; DAVID P. ROEHM** and **CLAIRE M. ROEHM; DENNIS N. WARD** and **LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER** and **KARLA BUMGARNER; CARL W. MEHMKE** and **MARTHA MEHMKE; WALTER MEHMKE** and **ROBIN MEHMKE; LOUISIANA LAND & LIVESTOCK, LLC**, a limited liability corporation; **GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER** and **DOROTHY FORDER; CONN FORDER** and **JEANINE FORDER; ROBERT E. VIHINEN** and **PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD** and **MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN** and **HELEN A. COLEMAN; GARY OWEN** and **KAY OWEN; RICHARD W. DOHRMAN** and **ADELE B.DOHRMAN; CHARLES CHRISTENSEN;** and **YULIYA CHRISTENSEN; WALKER S. SMITH, JR.** and **TAMMIE LYNNE SMITH; MICHAEL E. HOY; JEREOME R. THILL:** and **MONTANA ENVIRONMENTAL INFORMATION CENTER**, a Montana nonprofit public benefit corporation,

Plaintiffs,

Judge E. Wayne Phillips

ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND WRIT OF MANDAMUS/ WRIT OF REVIEW

vs.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Defendants.

and

SOUTHERN MONTANA ELECTRIC GENERATION and **TRANSMISSION COOPERATIVE, INC.;** the **ESTATE OF DUANE L. URQUHART; MARY URQUHART; SCOTT URQUHART;** and **LINDA URQUHART,**

Defendants and Intervenors.

FINDINGS OF FACT

1. On October 30, 2007, Duane and Mary E. Urquhart and Scott and Linda Urquhart (hereinafter "Urquharts") submitted an Application for Rezoning to the Cascade County Planning Department requesting that 668.394 acres of their agricultural land, located approximately eight miles east of the City of Great Falls and just south of the Missouri River, be rezoned "from Agricultural (A-2) to Heavy Industrial (I-2)." (Exhibit 1 at p. 1.)[1] The Urquharts submitted their Application for Rezoning for the stated purpose of allowing for the construction and operation of SME's coal-fired electric power generating complex, known as the Highwood Generating Station

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[1] Referenced Exhibits are attached to the Second Affidavit of Anne Hedges, filed by Plaintiffs, which affies that the copies of documents that are a part of the rezoning proceeding before Cascade County are true and accurate copies of public documents. The Court also notes that the Defendant Board of County Commissioners has filed with the Court two CDs containing PDF files of all documents which it believes are part of the public record of this proceeding. Where possible, the Court refers to the hard copy of the exhibits as numbered by the Plaintiffs; otherwise, the Court refers to the PDF files submitted by the Commissioners with reference to the CD, volume, and page.

(hereinafter "HGS"). (*Id.*)

2. Throughout the course of the rezoning proceedings, which culminated in the Commissioners' rezoning the 668.395 acres of farmland from Agricultural (A-2) to Heavy Industrial (I-2), both SME and the Urquharts jointly participated in pursuing approval of the Application to rezone the land. In fact, the Application for Rezoning was prepared by Bison Engineering, SME's engineering firm, and Ugrin, Alexander, Zadick & Higgins, P.C., the law firm which jointly represents SME and the Urquharts. (*Id.*) The majority of the materials submitted with the Application for Rezoning consisted of materials describing the Highwood Generating Station, the coal fired power plant which SME plans to construct on the rezoned land. (*Id.*) As stated in the "Application for Rezoning" (Exhibit 1):

> The requested zoning to heavy industrial use is a prerequisite to the planned construction and operation of an electric generating station, known as the Highwood Generating Station (hereafter, "HGS"). Applicants intend to sell the rezoned property to Southern Montana Electric Generation and Transmission Cooperative, Inc. (hereafter, "SME"), which plans to permit, construct and operate HGS, a 215-250 mW electrical generating facility.

As will be noted later in this Order, the Application was in error with regard to the rezoning being "a prerequisite", except for purposes of Tax Increment Financing.

3. Prior to the Commissioners' approval of Urquharts' request to rezone the land from agricultural to heavy industrial, the Urquharts had already agreed to sell the property to SME. The "Option to Purchase" agreements entered into between SME and the Urquharts in 2004 recite: "The Seller and Buyer acknowledge that Buyer is engaged in acquisition of the property upon which it intends to construct electric generating facilities." (Exhibit 21) The purpose of SME entering into these agreements was so that

it could demonstrate to finance and regulatory agencies that it had a property interest in the subject property. (See Exhibit 21, ¶ 2.)

4. The Application for Rezoning states that all of the property which is sought to be rezoned from Agricultural to Heavy Industrial is used for agricultural purposes. (Exhibit 1 at p. 3.)

5. The Cascade County Planning Department adopted and made available its initial Staff Report on November 19, 2007. Testimony, Mr. Clifton, Planning Director at November 26, 2008 hearing. That Staff Report was placed on file for public review with the Cascade County Clerk and Recorder. *Id.*

6. The Staff Report explains that the purpose of the rezoning from Agricultural (A-2) to Heavy Industrial (I-2) is to allow for the construction and operation of HGS. (Exhibit 2 at p. 4.) It also explains that such rezoning was not necessary for replacement of an electrical generating plant. Staff Report, p. 17, ¶ 9.

7. The complete Recommendation set forth in the Staff Report provided as follows:

> RECOMMENDATION
>
> It is recommended that the Planning Board recommend to the County Commission **approval** of the request to rezone Parcels #5364100, #5364200, and #5364300 in Section 24, and Parcel #5365200 in Section 25, Township 21 North Range 5 East, P.M.M., Cascade County, Montana from "A-2" Agricultural to "I-2" Heavy Industrial.

(Exhibit 2 at p. 3; underlining added, bolding in original.)

8. The Cascade County Zoning Regulations (hereinafter "CCZR") include their requirements for publication of the notice of public hearing before both the Planning Board and the Commissioners the requirement that the notice must state "the

boundaries of the proposed district," and that the proposed zoning regulations or maps "are on file for public inspection" at the office of the County Clerk and Recorder and the Planning Board Office. (CCZR § 14.2, *et seq.*, and § 14.3, *et seq.*) (emphasis added) The maps, the County's overall zoning regulations, the Staff Report, and the Planning Board recommendation to the Cascade County Commissioners entitled "Agenda Action Report" were on file. Testimony, Mr. Clifton, Cascade County Planning Director and Ms. Sickels, Deputy Cascade County Clerk and Recorder, November 26, 2008 hearing.

9. As the property description is a contested issue in this matter, the Notice of Public Hearing that was published for the Planning Board hearing (Exhibit 3) is attached as Exhibit "A" to these Findings of Fact. The publication for the Cascade County Commissioners' public hearing contained an identical property description (Exhibit 5).

10. In the motions approving the Resolution of Intention to rezone and the Final Resolution to Rezone, the County Commissioners made the rezoning "subject to the eleven conditions offered by Tim Gregori of Southern Montana Electric, representing the Applicants, dated January 9, 2008, and attached hereto." (Exhibit 15; Disk 1, Binder 11, p. 110445.) Included among the eleven conditions was that, "SME agrees, as a condition of rezoning to heavy industrial use, that such use shall be solely for purposes of an electrical power plant."

11. SME's letter dated January 9, 2008 (Exhibit 7), sets forth the eleven conditions. These were iterations reflecting existing Planning Board staff analysis of the twelve-step rezoning analysis process set forth in both the Staff Report and the Agenda Action Report to which, this Court specifically finds, SME was responding.

12. According to § 76-2-204(1), MCA, the Planning Board "shall make written reports of their recommendations to the board of county commissioners. . . ." The Planning Board's written report to the Cascade County Commissioners was titled "Agenda Action Report." Testimony, November 26, 2008 hearing, Mr. Clifton, Planning Director.

13. The first time the Plaintiffs learned of the SME letter (Exhibit 7) and its eleven proposed conditions of rezoning was during the course of the January 15, 2008, public hearing before the County Commissioners on the proposed rezoning. (Second Affidavit of Anne Hedges at ¶ 11.) However, Plaintiffs had access to both the Staff Report and the Action Agenda Report because they were on file with the Clerk and Recorder. As noted, the SME "conditions" were required iterations of matters raised by the Planning Board staff throughout the planning process (both the Staff Report and the Agenda Action Report). The documentation submitted by SME at the Cascade County Commissioners' public hearing included a traffic impact study, a baseline noise study, a review of scientific studies concerning coal-fired power plants and children's health, a report on whether organic farming will be harmed by HGS emissions, material on the effects of the Colstrip power plant on range resources and stack emissions, a property appraisal report, and a landscape plan.

14. On January 31, 2008, the County Commissioners met to consider a motion to approve passage of a Resolution of Intent to rezone the Urquharts' property from "A-2" Agricultural to "I-2" Heavy Industrial. The motion stated:

> COMMISSIONER BRIGGS: Mr. Chairman, I move the Cascade County Commission approve the Resolution of Intention to rezone Parcels Number 5364100, 5364200 and 5364300 in Section 24 and Parcel

Number 5365200 in Section 25 all located in Township 21 North, Range 5 East, from A-2 agricultural to I-2 heavy industrial, subject to the 11 conditions offered by Tim Gregori of Southern Montana Electric, representing the applicants, dated January 9th, 2008, and attached hereto.

(Transcript of January 31, 2008 Commission Meeting at p. 2; Disk 1, Binder 11, p. 110445; emphasis added.)

15. The motion to approve passed 2 to 1, with Commissioners Lance Olson and Joe Briggs voting in favor, and Commissioner Peggy Beltrone opposing.

16. This Court specifically finds that the Agenda Action Report establishes a record of the facts relied upon by the Cascade County Commissioners in making its decision to pass the Resolution of Intention and the later Final Resolution, to rezone the Urquharts' land.

17. Following passage of the above-described Resolution of Intention, a "public notice of passage of Resolution of Intention to Amend County Zoning District Map" was published on February 2, 3, 9, and 10, 2008. (Exhibit 12.)

18. The Resolution of Intention (Exhibit 11) identified in the notice does not reference either the eleven conditions or SME's letter dated January 9, 2008 (Exhibit 7). However, that Resolution (and the Final Resolution) contains whereas clauses which clearly demonstrate review of the "conditions" as contained in the Staff Report and Agenda Action Report. According to the motion passed by the Commissioners, the rezoning was "subject to the 11 conditions offered by Tim Gregori of Southern Montana Electric, representing the applicants, dated January 9th, 2008, and attached hereto." This Court specifically finds that these eleven conditions were reflections of and responses to precise Planning Board staff analysis of the twelve factor requirements of

CCZR and statute and which directly required response that took the form of these eleven conditions.

19. On March 11, 2008, the County Commissioners met to consider Final Resolution 08-22, to rezone the Urquharts' parcels from "A-2" Agricultural to "I-2" Heavy Industrial, which passed on a 2 to 1 vote. (See Transcript of March 11, 2008, meeting at pp. 2-3; Exhibit 15.) The County Commissioners adopted the Agenda Action Report as its findings in regards to the proposed rezoning. Testimony, November 26, 2008 hearing, Mr. Clifton, Planning Director.

20. According to the Transcript of the March 11, 2008, meeting (Exhibit 15 at pp. 2-3), the motion that was approved stated as follows:

> COMMISSIONER BRIGGS: Mr. Chairman, I move the Cascade County Commission approve the final resolution to rezone Parcels Number 5364100, 5364200, and 5364300 in Section 24, and Parcel Number 5365200 in Section 25, all located in Township 21 north, Range 5 east, from A-2 agricultural to I-2 heavy industrial subject to the 11 conditions offered by Tim Gregoire (*sic*) of Southern Montana Electric representing the applicants dated January 9th, 2008, attached hereto. (Emphasis added.)

21. Over 1,900 concerned citizens commented or protested in one form or another on the proposed rezoning. (See Cascade County's Disk 1, Binder 12, pp. 228-91; Disk 1, Binder 11, pp. 13-14; and Disk 1, Binder 9, p. 1018.) Citizen concerns, fire suppression as an example, were considered by the Cascade County Commissioners and the conditions necessary for a Location Conformance Permit (see discussion below) and the rezoning were adjusted by the staff accordingly. Testimony, Mr. Clifton, Planning Director, November 26, 2008 hearing.

PROCEDURAL STANCE

Outstanding issues before this Court are:

1. Plaintiffs' Writ of Mandate, April 10, 2008.
2. Plaintiffs' Writ of Review, April 10, 2008.
3. Defendants' Motion to Dismiss or Alternative Motion for Summary Judgment, August 28, 2008, translated to Motion for Summary Judgment September 10, 2008.
4. Plaintiffs' Motion for Summary Judgment, September 26, 2008.
5. Plaintiffs' Request for Immediate Preemptory Writ or Writ of Review, October 20, 2008.
6. Defendants' Request for Protective Order, November 5, 2008.
7. Plaintiffs' Rule 37 and Rule 56 Motions, November 7, 2008.
8. Defendants' Motion to Strike, November 17, 2008.

This Court has taken every possible measure to expedite consideration and ruling on this matter despite an exceptionally foreshortened calendar. To a large extent, that calendar has been driven by the imminent November 30, 2008 expiration of one or more of Defendants' permits and circumscribed by briefs which amounted in one case to 75 pages plus affidavits. Credible representations led this Court to believe that significant hardship would inure to Defendants if this Court's decisions on outstanding issues were filed beyond that date. Given the right to and likely exercise of appellate review, that deadline appears a bit amorphous. Nevertheless, this Court believes that the trial courts have a responsibility to render decisions in a timely manner so as not to prejudice either party's rights to resolution by the courts. Given those constraints, this Order addresses only the Motions for Summary Judgment and the Applications for

Writs.

While the Plaintiffs in their request for Preemptory Writ "incorporated by reference" the arguments set forth in their Motion for Summary Judgment, that is procedurally unacceptable. The Motion for Summary Judgment as been denied (see below). Therefore, the only arguments properly before this Court are those presented in the Application for Writ of Mandamus/Review and the Request for Preemptory Writ of Mandamus/Review.

ANALYSIS AND ORDER

Defendants' Motion to Dismiss/Motion for Summary Judgment. Essentially, Defendants contend that the appeal by Plaintiffs of the county's zoning decision is moot because Defendant Urquharts' sold the zoned property to Defendant Southern Montana Electric ("SME") and/or the Plaintiffs' failure to seek a stay. Mootness is a threshold issue which must be addressed prior to determination of the substantive merits of a dispute. *Grabow v. MT High School Ass'n*, 2000 MT 159, ¶ 14, 300 Mont. 227, 3 P.3d 650.

Within the quite narrow confines of Defendants' precise Motion for Summary Judgment, there are no issues of fact outstanding, only the legal issue of mootness. Given that stance, this Court has authority to either grant or deny summary judgment. Rule 56 (c), M.R.Civ.P., *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 37-38, 345 Mont. 12, ____ P.3d ____ (Citations omitted).

The substance of Defendants' argument relies on *Turner v. MT Engr. & Constr., Inc.* (1996), 276 Mont. 55, 915 P.2d 799, *Mills v. Alta Vista Ranch, LLC*, 2008 MT 214, 344 Mont. 212, 187 P.3d 627, and *Henesh v. Bd. Of Commr's of Gallatin Co.*, 2007 MT

335, 340 Mont. 239, 173 P.3d 1188. What is interesting about each of those cases is that the transfer/sale of property which precipitated a mootness ruling occurred after a determinative procedural action (Sheriff's sale in Turner, failure to act after a District Court Order, which act could be either an injunction, a stay or an appeal, in *Henesh*). While Defendants are correct that the procedural failure in *Mills* was obtaining a stay, that stay could have prevented a transfer of property. *Mills* at ¶ 22.

These holdings were founded on the impossibility of the Court granting effective relief or returning the parties to the status quo. *Id.*, *Henesh* at ¶ 5-6. Defendants construe this to mean that Plaintiffs' failure to obtain a stay precludes a return to status quo due to the sale of the property to SME. Defendants' Memo in Support, August 27, 2008, p. 11. However, the question is to which status quo are the Defendants referring? The underlying status quo is not property ownership but the re-zoning determination by the Cascade County Commissioners. That is not moot for either Defendant SME or any of the Plaintiffs. Now that the Urquharts no longer own the property, it is arguable that the re-zoning decision is moot for them, e.g., what interests remain that require return to status quo? The Court certainly has not been presented with any legal argument that the land sale should be overturned.

Furthermore, Defendants' constant references to and reliance upon Plaintiffs' failure to seek a stay is based on reasoning familiar to both parties. A stay would require a bond that would cover the prospective damages to Defendants due to delayed construction. Both parties acknowledge such a bond could be astronomical, depending on this Court's assessment. Plaintiffs plainly and simply argue that as citizens, they have a right to access the courts for remedies and not have to assume such astronomical costs

as a prerequisite to that right. This assumes, of course, that the other remedies sought (the Writs here) are appropriate. This Court agrees primarily because the rights afforded under Article II, Section 16 are worthless if they become dependent upon large expenditures of money.

Therefore, with regard to Defendants SME and the Board of County Commissioners, the Motion for Summary Judgment is **Denied.** With regard to the various Defendants Urquhart, the Motion for Summary Judgment is **Granted.**

Plaintiffs' Motion for Summary Judgment. Plaintiffs have adopted a "kitchen sink" approach to their arguments for summary judgment and/or the Writs. Consequently, this Court has spent very valuable time considering those that are substantive and those that may be fairly described as less so.

Two key contentions of the Plaintiffs are first, that a number of critical zoning related conditions (eleven in total) proposed by SME were not available during critical decision making by the Planning Board. Plaintiffs' Brief for Summary Judgment, September 26, 2008, p. 9, *passim*. Second, Plaintiffs contend the County Commissioners "did not adopt the [Planning Board] staff report as its findings in regards to the proposed re-zoning." *Id.*, p. 10, *passim*.

Both of these are factual contentions in dispute. Summary Judgment is, consequently in apropos. Therefore, Plaintiffs' Motion for Summary Judgment is **Denied.**

Plaintiffs' Petition for Writ of Mandate, Writ of Review, Immediate Preemptory Writs of Mandate or Review. This Court holds that it has jurisdiction to proceed to consideration of the Writs requested based on the following rationale. All

procedural requirements necessary have been satisfied. Complaint and Application, Affidavit of Anne Hedges. The re-zoning decision on appeal and at issue here was made pursuant to § 76-2-201, MCA, and has no attendant right of appeal under statute. That establishes a preliminary basis to determine that no speedy and adequate remedy at law exists. Section 27-26-102, MCA. As noted in the Court's introduction, a serious and consequential deadline looms. As noted in the Plaintiffs' Application for Preemptory Writs, groundbreaking has occurred with construction preliminaries imminent because of that deadline. Given these considerations, no alternative, speedy and adequate remedy is available. *Id.*

Another threshold consideration is the application of the Writs requested. This is made more poignant because the Plaintiffs have not sought an injunction or stay (see discussion above). Are these Writs appropriate remedies for the cause at bar?

The gravamen of Plaintiffs' Application for either Writ is the contention that the Cascade County Commissioners and their agency arm the Cascade County Planning Board failed to follow proper procedure in granting the request for re-zoning. Plaintiffs rightfully note that the Montana Supreme Court has considered either Writ appropriate in such circumstances. *See State ex rel. Christian v. Miller* (1976), 169 Mont. 242, 545 P.2d 660, *Bryant Developm. Assoc. v. Dagel* (1975), 166 Mont. 252, 531 P.2d 1320. Defendants disagree, of course, countering that the re-zoning decision was either a discretionary or legislative act not subject to mandamus or that the decision, being a *fait accompli*, cannot be undone by mandamus. *See State ex rel. Diehl Co. v. City of Helena* (1979), 181 Mont. 306, 593 P.2d 458, *Greens at Ft. Missoula, UC v. City of Missoula* (1995), 271 Mont. 398, 897 P.2d 1078, *State ex rel. Galloway v. City of Great Falls*

(1984), 211 Mont. 354, 684 P.2d 495, *State ex rel. Popham v. Hamilton City Counsel* 1979), 185 Mont. 26, 604 P.2d 312.

There are distinct strengths and weaknesses to applying the two lines of precedent. Considering those substantive allegations of procedural error promulgated by the Plaintiffs, in particular the Public's Right to Know, Article II, Section 9 of the Montana Constitution, and the Public's Right to Participate, Article II, Section 8 of the Montana Constitution, the balance is tipped heavily by those Constitutional Rights and, therefore, this Court holds that the Writs are properly before the Court. In reaching that holding, this Court relies upon *Kadillak v. Anaconda Co.* (1979), 184 Mont. 127, 602 P.2d 147, *Christian v. Miller, supra.* Now, the question becomes whether they should issue?

A detailed analysis of that question is contained in the paragraphs which follow. Each attempts to address counts and arguments raised by Plaintiffs in their Writ Applications. The Court notes candidly that it has not addressed each and every argument or sub-argument. Some of those might be considered substantive by an objective eye possessed with either infinite time or a more comprehensive factual record. Having neither of those blessings, all exclusions were consciously made. Given the four corners of the Writ Applications and the facts available, a global perspective emerged from the record, which this Court believes and holds answers the considerations at issue.

1. First and foremost is the necessity to review the interplay of a Location Conformance Permit (hereinafter "LCP") and the zoning change at issue here. The Court notes that the SME letter indicates that only item #1 relates to the rezoning while the remainder relate to the LCP. The LCP and the rezoning consideration are at one and

the same time independent, yet tandem processes. Testimony, Mr. Clifton, November 26, 2008 hearing (hereinafter "Clifton"). Independent because the LCP is designed to respond to public concerns raised during both the Planning Board process (the Staff Report) and the Cascade County Commissioners' review of its Planning Board recommendations (the Agenda Action Report) and holding of public hearings regarding the Planning Board recommendation. Clifton.

They are independent in that the rezoning is made with these separate LCP considerations in mind, thus the Cascade County Commissioners' constant reference to the eleven SME conditions, but that rezoning decision is made and final before the LCP is actually issued. As noted, "it (the LCP) is a final step we use to ensure that there is compliance with all concerns raised in the public process." Clifton.

As will be discussed below in more detail, the Plaintiffs repeatedly characterize the Cascade County Commissioners' decision as an act of "conditional zoning." In doing so, they reference these eleven SME conditions. In fact, there is only one condition related to rezoning and the rest relate to the LCP. The one outstanding has to do with limitation of the rezoning to the HGP facility. (See SME letter reproduced below) Staff Report, p. 17, ¶ 9. As indicated by the staff, zoning is not required for such a plant because "electrical generation facilities are appropriate land uses within the agricultural zoning district." *Id.* The key for rezoning was the "character" of the current land uses. *Id.* Only the HGP would be within that character. *Id.* Consequently, SME addressed one condition to that land character issue and the rest to the LCP.

2. Probably the most oft repeated and relied upon argument of the Plaintiffs is that "material elements of the proposed zoning regulations . . . were not on file for

public inspection." App., p. 15, *passim*. This allegation implicates the Article II, Sections 8 and 9 rights mentioned above, as the Montana Supreme Court has ruled that the right to participate is dependent on the fulfillment of the right to know. *Bryan v. Yellowstone Co. Elem. Schl. Dist.*, 2002 MT 264, ¶¶ 43-46, 312 Mont. 257, 60 P.3d 381. In other words, if there is a violation of the right to know, the right to participate becomes a paper tiger, a mere formality. *Id.*

The material element referred to by Plaintiffs is a letter written by Defendant SME to Brian Clifton, Cascade County Planning Department Director, dated January 9, 2008. As the contents of this letter are crucial to all considerations, it is reproduced here:

> Dear Mr. Clifton:
>
> This letter responds to issues which have arisen in connection with the rezoning application referenced above. All of these issues concern the location conformance permit, with the exception of one, which regards the rezoning.
>
> In response to these issues, SME provides the following representations.
>
> 1. SME agrees, as a condition of rezoning to heavy industrial use, that such use shall be solely for purposes of an electrical power plant.
>
> 2. SME agrees, as a condition to issuance of the location conformance permit, to enter into a mutual aid agreement for fire protection with the City of Great Falls.
>
> 3. SME agrees, as a condition to issuance of the location conformance permit, to install a state of the art internal emergency fire suppression system.
>
> 4. SME agrees, as a condition to issuance of the location conformance permit, to train and staff its own internal fire response team.

5. SME agrees, as a condition to issuance of the location conformance permit, to develop and work with the County in finalizing a traffic mitigation plan for Salem Road.

6. SME agrees, as a condition to issuance of the location conformance permit, to maintain Salem Road during construction in accordance with and as required by County standards.

7. SME agrees, as a condition to issuance of the location conformance permit, to pave Salem Road to County standards, within one year of substantial completion of the construction of Highwood Generating System. SME further agrees that it will execute an irrevocable letter of credit, or other similar financial instrument, as security for the agreement to pave the road.

8. SME agrees, as a condition to issuance of the location conformance permit, to comply with all local, state and federal laws, rules and regulations which relate to the location conformance permit.

9. SME agrees, as a condition to issuance of the location conformance permit, to develop and work with the County in finalizing a landscaping plan which complies with the County's landscaping regulations and which may, as directed by the County, consider issues of visual impact.

10. SME agrees, as a condition to issuance of the location conformance permit, to develop and work with the County in finalizing a mitigation plan to reduce glare.

11. SME agrees, as a condition to issuance of the location conformance permit, to develop and work with the County in finalizing a mitigation plan to reduce noise.

SME will present testimony and documentation on each of these areas as the rezoning hearing on January 15. In particular, City of Great Falls Fire Chief Randy McCamley will speak about fire safety and his department's plan for fire protection services to SME. He will also be submitting a letter to the same effect. Construction-related issues will be addressed by Stanley Consultants. SME's landscape architect will present the landscaping plan

Sincerely,

Tim Gregori
SME General Manager

The Plaintiffs repeatedly characterize the information in this letter as a "proposal to add eleven conditions to the proposed rezoning", Plaintiffs' Brief in Support of Summary Judgment, p. 26, *passim*. Consequently, the "conditions" set forth must be traced to determine their existence or lack thereof in the entirety of the planning process and the Cascade County Commissioners' decision making.

The Planning Board Staff Report (to the Planning Board) and the Agenda Action Report (from the Planning Board to the Cascade County Commissioners) both contain identical language relevant to Plaintiffs' contentions. Each and every matter raised in the letter was a direct response to matters articulated in the Staff Report and the Agenda Action Report and relevant to the LCP, but #1 (about which, see discussion above). As the language of the Planning Board staff specifically and forthrightly indicates, SME had to respond to the conditions outlined.

1. Sole Purpose. See p. 17, ¶ 9, p 10; p. 18, p 12.

2 - 4. Fire Protection, Response, & Suppression. See p. 14, ¶ 3.

5 – 7. Road Mitigation, Construction, and Paving. See p. 13, ¶ 2, p. 16, ¶ 8, p. 14, ¶4.

8. Laws, Rules, & Regulations. See p. 15, ¶ 4.

9. Landscaping. See p. 15, ¶ 4.

10. Glare. See p. 15, ¶ 5.

11. Noise. See p. 15, ¶ 4.

Thus, to say that the eleven "conditions" were "not available to the public, the Planning Department or the Planning Board", Writ. P. 16, ¶ 30, is incorrect, unless, of

course, they were not "on file with the Clerk and Recorder", CCZR, § 14.2.1.4.

Testimony by Ms. Sickels, Deputy Clerk and Recorder, at hearing on November 26, 2008 clearly and convincingly demonstrates that the Staff Report and the Agenda Action Report, hence the staff articulated conditions deemed necessary in the LCP process, were on file with the Cascade County Clerk and Recorder. Ms. Sickels' Testimony (hereinafter "Sickels"). This was affirmed by Mr. Clifton. Clifton.

Plaintiffs make much of whether such documents were "on file" because they were not stamped "filed." As noted in testimony, the Clerk and Recorder policy was that reports of this nature (as opposed to deeds, etc.) were not stamped "filed." Sickels. They were "filed" however for purposes of public viewing. Sickels. Testimony revealed that Ms. Sickels was well aware of the public interest, specifically notified the staff of the receipt of the documents, where they were located (her desk), and was prepared to make them available on request. *Id.*

3. Plaintiffs' next contention is that "the Planning Board did not make a written report of its recommendation to the County Commissioners, nor did the Planning Board adopt the Staff Report as its report or findings in regard to the zone change." Writ, p. 16, ¶ 31, p. 22, ¶ 48. This is a most curious argument. The Planning board did produce and promulgate to the public a "Staff Report", as Plaintiffs acknowledge elsewhere. Anne Hedges Second Affidavit, p. 2, ¶ 9. Plaintiffs certainly rely on that Staff Report themselves, Writ, ¶¶ 22-24, ¶¶ 26-27, *passim*, to raise substantive issues in direct reference to the Cascade County Commissioners' decision to rezone, in particular their contention that the staff imposed "conditions" which created, in Plaintiffs' eyes, "conditional rezoning." In the Second Affidavit of Anne Hedges, she

states: "... Cascade County Planning staff prepared Agenda Action Reports for the County Commission meetings which contained identical language to the Staff Report ..." Anne Hedges Second Affidavit, p. 3. Plaintiffs clearly understood this report to be the product of and therefore the recommendation of the Planning Board. As Mr. Clifton testified, this was a volunteer board that may not have dotted every "I" or crossed every "t", but they clearly adopted the Staff Report and recommended its content and conditions to the Cascade County Commissioners. Clifton.

Plaintiffs next contend that testimony and documentation regarding each of these areas, which SME stated would be presented to the Cascade County Commissioners at hearing, were not available to the public, the Planning Department or the Board. This misconstrues the nature of a public hearing and, particularly, the LCP process. Such evidence and testimony is exactly the purpose of hearings. The Staff Report/Agenda Action Report language makes clear the issues which must be addressed with regard to noise, fire prevention, glare, etc. They were not a surprise to Plaintiffs. They make clear the old saying that the "devil is in the detail." It is important to note again, with regard to that detail, that every "condition" but one related to the location conformance permit. As stated by the staff, this required review and approval prior to the LCP's final issuance, Staff Report, p. 14, ¶ 3, yet the rezoning would be completed prior to that issuance. Clifton..

A further aspect of this contention is that the final Cascade County Commissioners' motion made no reference to either the eleven "conditions" or standards and procedures for adoption and enforcement of the "conditions." Writ, p. 28, ¶ 65. However, that contention relies solely on one paragraph of the motion. Their

resolution contains much more than the paragraph presented, Writ, p. 28, ¶ 64. It also contained numerous "Whereas" clauses which laid out the specific grounds relied upon for final adoption. Those grounds included a "written report" to the Commissioners (the Agenda Action Report). That written report, as outlined above, articulated fully and completely the "conditions" and, particularly, the procedures for adoption and enforcement of them, the LCP. Review of the staff language and its relation to the LCP is critical here. This Court specifically holds that such language and its relationship to the LCP, address the conditions, procedure, and enforcement, e.g. the LCP was the procedure and the hammer of enforcement! The Motion to Approve the Resolution of Intent to rezone articulated the eleven conditions in SME's letter. This Court's fundamental holding is that the SME letter/conditions were mere reiterations of the Planning Board's LCP requirements as outlined above.

4. Next, Plaintiffs argue that this action by the Cascade County Commissioners was "conditional" zoning. Writ, p. 28, ¶ 66. Such a claim has required this Court to use that term in this Order with quotation marks, advisedly as it were. While Plaintiffs do not hesitate to cite cases or argument in support of other arguments, here there is only the bold assertion. What zoning worth its salt would proceed without consideration of fire, glare, noise, traffic, etc.? These "conditions" were in fact responses to considerations specifically required by the CCZR through the LCP process. While those CCZR may not allow for "conditional zoning" in the Plaintiffs' words, they certainly require consideration of each and every factor addressed through the LCP process. See CCZR.

5. Plaintiffs contend that the required public notices of the boundaries of the

proposed district were "erroneous and misleading", citing CCZR, § 14 and § 76-2-205, MCA. Writ App., p. 15, ¶ 21. Specifically, the published notices do not "include" a half section of land that is part of the application project.

Plaintiffs are correct to an extent. The official Notice of Public Hearing (see Exhibit "A", attached hereto and incorporated by reference) published by the Planning Board and the Cascade County Commissioners does erroneously leave out Section 24, W ½ in one part of the announced property descriptors. However, the published descriptions contain two additional descriptors which include the allegedly missing ½ section. This Court holds that this is not "a major discrepancy", Writ, p. 15, ¶ 29.

It is important to note here that this Court has conducted several hearings in this matter. This Court specifically and repeatedly provided the Plaintiffs with opportunities to present any factual evidence necessary for their contentions. Plaintiffs did not offer any evidence that they protested during either the Planning Board process or the Cascade County Commissioners' decision process that the published "boundary" notices made it impossible for them to be aware of the property at issue in the rezoning. Using a fine tooth comb after the process does not create a legally sufficient basis for objecting in a timely manner. Consequently, this Court holds that the language of the Public Notice and the legal descriptions are sufficient for purposes of satisfying the CCZR and for informing the public of what land was at issue. They are not perfect but they comprise substantial compliance. *See Dover Ranch v. County of Yellowstone* (1980), 187 Mont. 276, 280, 609 P.2d 711, 714.

6. No letter signed by a landowner in the rezone area. Writ, p. 24, ¶ 52. Here Plaintiffs mix the "Application" requirement with the SME letter of January 9, 2008 and

its "conditions." The Application does have the letter required. Application 1), Urquhart letter.

7. Without explication or facts, Plaintiffs state that some people were not allowed to protest during the rezoning process and this implicates and corrupts the change in zoning. Writ, p. 20, ¶ 42, p. 23, ¶ 51. However precisely which additional landowners were thus disenfranchised is not argued.

This Court has previously ruled and holds in this case that the following ruling by the Montana Supreme Court is applicable to filings in the District Court. As the Montana Supreme Court has stated, "it is fundamentally unfair to fault a trial court for failing to rule correctly on an issue that it was never given the opportunity to consider." *Matter of T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38. If this Court has never had an opportunity to consider facts, authority or analysis for the position advanced, it follows logically that it has never been given the opportunity to craft a considered ruling on the merits. Again, given the opportunity to present facts, the Plaintiffs did not substantiate this claim. Thus, this contention is rejected for lack of support, foundation, and argument.

8. The Planning Board did not "adopt the Staff Report as its report or findings." Writ, p. 22, ¶ 48. Given the analysis presented above that the Staff Report was identical, for all intents and purposes on the issues to be addressed by this Court, as the Agenda Action Report and was presented to the Cascade County Commissioners by the Planning Director, this argument is without merit. See Agenda Action Report, p. 1, p. 2, ¶ 8. Additionally, Mr. Clifton unequivocally testified that the Board adopted the report. Clifton.

9. The rezoning decision was not made in accordance with the mandatory criteria for amending a zoning district. Writ, pp. 24-27, ¶ 59. As noted by the Plaintiffs in their Application, the Montana Supreme Court has required consideration of a twelve-step analysis. *Little v. Flathead Co.*, (1981), 193 Mont. 334, 352, 631 P.2d 1282, 1292. Even the most cursory review of the Planning Staff Report and the subsequent Agenda Action Report shows that Plaintiffs are in error where they claim "the zone change will not secure safety from fire, panic and other dangers", Writ, p. 26, ¶ 59. See analysis above, ¶ 2. The same with provision of adequate light and air, over crowding, undue concentration of population, etc. *Id.* Giving the Plaintiffs' argument the most possible credence, the legal question from *Little* and other precedent is whether the twelve-step test and the CCZR were considered. The Staff Report clearly and convincingly establishes they were considered, *Id.*, and this Court so holds.

10. Plaintiffs next argue that the zoning decision was "Spot Zoning." Writ, p. 29, ¶ 68, f.f. There is a three-part test established by the Montana Supreme Court to determine if, in fact, spot zoning occurred. *Little, supra.* The first part is change of use. Unquestionably, there is a change of use but the Plaintiffs failed to draw to the Court's attention or to distinguish the Staff Report and the Agenda Action Report conclusions that "the construction of the HGS is permitted within the existing A-2 zoning district with the approval of a special use permit and the conversion to I-2 is not necessarily incongruous with the allowable land uses." Agenda Action Report, p. 11. (emphasis added) Further, the Report states: "When the county adopted its countywide zoning, the county determined that electrical generation facilities are appropriate land uses within the Agricultural zoning district . . . converting the subject property to I-2, so long

as it is limited to the HGS facility, would not be significantly different than allowing such a facility in the existing A-2 district with a special use permit." *Id.*, pp. 12-13.

Thus, while the coal fired plant will be a different use than agricultural, it certainly was already permissible in that agricultural area prior to the rezoning request. Thus, spot zoning is not implicated in this case.

11. Size of Area is the second criteria. Writ, p. 30 f.f., ¶¶ 73 f.f. On the surface, Plaintiffs appear to have a compelling argument. The proposed rezone area would comprise "less than .05% of the total Zoning District area, Writ, p. 31, ¶ 75, and it looks to benefit only one landowner which is now SME. *See Greater Yellowstone Coalition v. Bd. Of Co. Commiss. Of Gallatin Co.*, 2001 MT 99, 305 Mont. 232, 25 P.3d 168. However, this zoning "change" was not required for the intended uses. Agenda Action Report, p. 11. Consequently, no spot zoning occurred where such use was already allowed by existing zoning regulations. *Id.*

12. Special Legislation. As noted by the Court in *Little*, if the zoning request benefits one or a few landowners at the expense of others and if the requested use is inconsistent with the comprehensive land use plan, then it is spot zoning. *Little* at 347, 631 P.2d at 1290. Taking the latter issue first, the use was totally consistent with the existing land use plan. Agenda Action Report, p. 11, *passim*.

A truly substantive argument of the Plaintiffs is that one landowner (be it viewed as either SME, the current deed holder, or the Urquharts, the applicants) will benefit at the expense of others. That expense is not merely the location of a power plant in the "Back 40" but the power lines, rail spurs, and other industrial detritus of a large, power generating facility. As noted at hearing, these accessory impacts will be imposed on

some landowners by way of eminent domain. Writ, p. 12, ¶ 21. To that extent, this aspect of the *Little* test distinctly favors Plaintiffs' position.

As noted, the Court concludes this last aspect of the *Little* test indicates special legislation, thus spot zoning. The others distinctly do not. The Court resists the temptation to take the global view of Plaintiffs or of the Defendants regarding the benefits or detriments of a coal fired power plant but looks to the very persuasive conclusions that this zoning change was in name only and did not change the uses allowed under existing Cascade County Master Planning, this was not spot zoning and this Court so holds.

13. Findings of Fact. Plaintiffs reiterate several times that the Cascade County Commissioners failed to make findings of fact and that the two reports did not contain such findings. Both reports contain extensive analysis and facts. While not labeled as such, they clearly and convincingly have provided more than sufficient basis to facilitate this judicial review, and this Court so holds.

14. Cascade County Commissioners' failure to consider public comments and to evaluate within the framework of the CCZR. The Cascade County Commissioners clearly and convincingly adopted the Agenda Action Report which incorporated issues within the requirements of the CCZR. As indicated by testimony of the Cascade County Planning Director, Mr. Clifton, at hearing on November 26, 2008, public comments were incorporated into the final requirements for a Location Conformance Permit and the zone change. The LCP was the framework and it was integral to the Cascade County Commissioners' decision.

15. Documentation submitted at Cascade County Commissioners' hearing was

required to be submitted ahead of time. Writ, p. 37-38, ¶ 93. Plaintiffs have made no showing to this Court that they requested a delay in consideration by the Cascade County Commissioners due to such submissions. Failure to object at the time is a tough hurdle for Plaintiffs. More importantly, the LCP process was the focus of the documentation submitted as they referenced the "conditions." Plaintiffs have made no showing that they were excluded from that process.

16. As noted, a zoning change was not even required. The zone change was requested pursuant to Montana statute allowing for tax increment financing. Staff Report, p. 17, ¶¶ 9-10. See § 7-15-4282, et seq., MCA.

Given the Findings of Fact and Conclusions of Law reached above, the Application for Writ of Mandamus is **Denied**. The Application for Writ of Review is **Denied**. The Applications for Preemptory Writs are **Denied**.

The Clerk of Court is directed to file this Order On Motions For Summary Judgment And Writ of Mandamus/Writ of Review and provide copies to counsel of record.

DATED this 28th day of November 2008.

E Wayne Phillips

DISTRICT COURT JUDGE
Hon. E. Wayne Phillips
P. O. Box 1124
Lewistown, Montana 59457
Telephone: (406) 535-8028
Facsimile: (406) 535-6076

c: Robert M. Sullivan, Esq. and John F. Lacey, Esq.
c: Elizabeth A. Best, Esq.
c: Alan F. McCormick, Esq.
c: Brian Hopkins, Esq.
c: Gary M. Zadick, Esq. and Mary K. Jaraczeski, Esq.

ADV-08-480.b

AFFIDAVIT OF PUBLICATION
THE GREAT FALLS TRIBUNE
205 RIVER DR S
GREAT FALLS, MT 59405
Phone: (406) 791-1444
Toll Free (800) 438-6600

Terri VanLieshout, being first duly sworn deposes and says that GREAT FALLS TRIBUNE COMPANY is a corporation duly incorporated under the laws of the State of Delaware, that the said GREAT FALLS TRIBUNE COMPANY is the printer and publisher of the GREAT FALLS TRIBUNE, a daily newspaper of general circulation of the County of Cascade, State of Montana, and that the deponent is the principal clerk of said GREAT FALLS TRIBINE COMPANY, printer of the GREAT FALLS TRIBUNE, and that the advertisement here to annexed.....

NOTICE OF PUBLIC HEARING – URQUHART ZONE AMENDMENT

Has been correctly published THREE times in the regular and entire issue of said paper on the following dates:

DECEMBER 30TH , JANUARY 6TH , 13TH 2008

Terri VanLieshout

STATE OF MONTANA
County of Cascade

On this 14TH of JANUARY 2008, before me the undersigned, a Notary Public of the State of Montana, personally appeared Terri VanLieshout, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

In witness whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

Vivian A Hunter
Print Name

Vivian A Hunter
Signature
NOTARY PUBLIC for the State of Montana
Residing in Cascade County
My commission expires: 11/12/09

VIVIAN A. HUNTER NOTARIAL SEAL STATE OF MONTANA

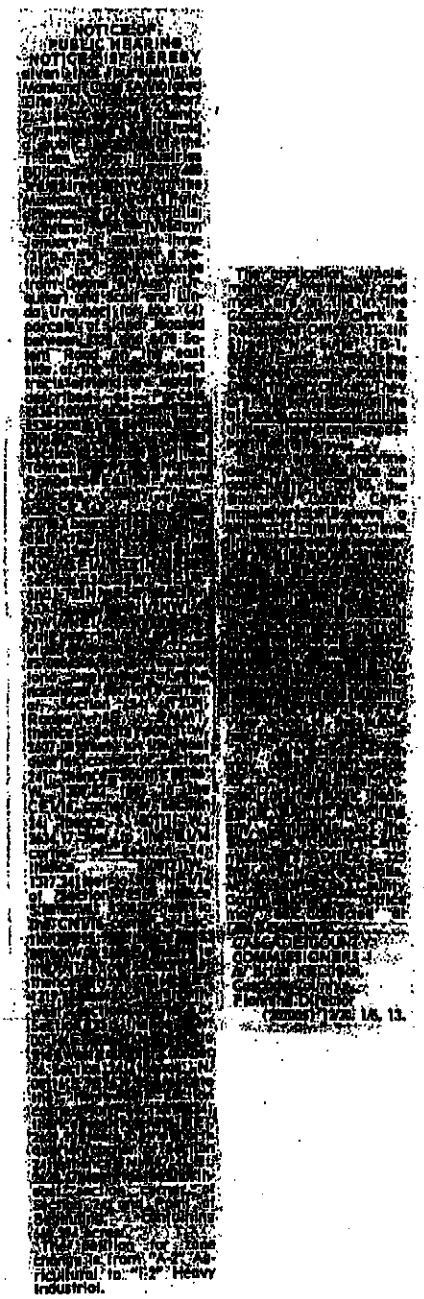

Exhibit "A"

TAB B

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 09-0054

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership, et al.,

Petitioners,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY, HONORABLE E. WAYNE PHILLIPS, District Judge,

Respondents.

ORDER

Plains Grains Limited Partnership, a Montana limited partnership, various Montana corporations, organizations, and individuals (collectively Plains Grains) have filed a petition pursuant to M. R. App. P. 14(3), for a writ of supervisory control over District Judge E. Wayne Phillips of the Eighth Judicial District, Cascade County. Plains Grains seeks review of the court's order on motions for summary judgment and a writ of mandamus, a writ of review denying Plains Grains' motion for summary judgment and its application for writs. We issued an order on February 2, 2009, in which we directed Judge Phillips, or his designee, to file a response to Plains Grains' Petition for Writ of Supervisory Control. Judge Phillips directed counsel for defendants and intervenors, Southern Montana Electric Generation and Transmission Cooperative, Inc. (SME), the Estate of Dwayne L. Urquhart, Mary Urquhart, Scott Urquhart, and Linda Urquhart (Urquharts). SME filed a response on behalf of Judge Phillips on February 20, 2009.

At this Court's direction, Plains Grains filed a reply brief on March 23, 2009. SME lastly filed a motion to file the transcript for the February 19, 2009, telephonic status conference. We grant SME's motion to file the transcript of the telephonic conference.

The Urquharts submitted an application for re-zoning to the Cascade County Planning

Department on October 30, 2007. The Urquharts requested that the County re-zone approximately 668 acres of their agricultural land, located approximately eight miles east of the City of Great Falls just south of the Missouri River, from agricultural (A-2) to heavy industrial (I-2). The Urquharts submitted their application for re-zoning for the stated purpose of allowing for the construction and operation of SME's coal fired electric power generating complex, known as the Highwood Generating Station (HGS). The Urquharts had agreed to sell the property to SME before the Cascade County Board of Commissioners (Commissioners) had approved the request to re-zone the land from agricultural to heavy industrial.

The Commissioners approved the re-zoning application, by a two to one vote, subject to 11 conditions offered by SME. Plains Grains filed a complaint and application for a writ of mandate and writ of review against the Commissioners, SME, and the Urquharts. Plains Grains' complaint requested the court to declare void the zone change on multiple grounds, including the fact that the commissioners' action constituted illegal spot zoning. The District Court issued its order on motions for summary judgment and writ of mandamus/writ of review on November 28, 2008.

The District Court first addressed a motion for summary judgment filed by the Urquharts, SME, and the commissioners. The Urquharts contended that the consummation of their sale of the land to SME effectively mooted any spot zoning claim. The court granted summary judgment with respect to Urquharts on this issue, but denied summary judgment with respect to SME, the purchasers of the property, and the commissioners.

The court denied a motion for summary judgment filed by Plains Grains relating to the 11 conditions attached to the approval of the zoning change request and questions of whether the Commissioners adequately considered the planning board's staff report. The court then addressed the writ of mandate and the writ of review filed by Plains Grains despite objections by SME that Plains Grains needed to obtain a stay. The court rejected SME's contention that Plains Grains needed to post a bond before it addressed the writ claims on the grounds that

the requirement of posting a large bond would deprive Plains Grains of its right of access to the courts protected by Article 11, Sec. 16 of the Montana Constitution.

The court deemed the gravamen of Plains Grains' writs request to focus on whether the Commissioners had followed the proper procedure in granting the request for re-zoning. The court also addressed Plains Grains' claim that the Commissioners' approval of the zoning request had constituted illegal spot zoning. The court denied all of these writ requests.

SME and Urquharts filed a motion for entry of judgment on January 7, 2009. SME contended that the court, in its order of November 28, 2008, had denied the relief sought by Plains Grains in its complaint and "thereby disposed of the case in its entirety." SME conceded that the District Court's denial of Plains Grains' motions for summary judgment did not constitute a final judgment on the merits. SME argued, however, that the court nonetheless had disposed of the case in its entirety by denying the relief requested by Plains Grains in its complaint and application for writ of mandate and writ of review. In particular, SME noted that the court had denied Plains Grains' application for writ of mandamus, Plains Grains' application for writ of review, and Plains Grains' applications for peremptory writs. SME argued therefore that the court's ruling on Plains Grains' writ applications had rendered moot the outstanding issues not resolved by the denial of summary judgment. As a result, SME argued that the entry of judgment would be proper.

Plains Grains filed its petition shortly thereafter. SME opposed Plains Grains' Petition for Writ of Supervisory Control on the grounds that the case effectively had ended and that the District Court could enter a judgment from which Plains Grains could appeal. As evidenced by the transcript of the February 19, 2009, telephonic conference, however, it appears that the court is reluctant to act in the face of Plains Grains' pending petition for supervisory control before this Court. The court noted that it is "very reluctant to get into the middle" of the pending petition for a writ of supervisory control.

Counsel for SME, at the same conference, argued that implicit in the court's denial of

Plains Grains' motion for summary judgment on the procedural deficiencies was the notion that the court had "ruled on the voluminous record on the merit." Counsel for SME thus argued that the court's order of November 28, 2008, constituted a final judgment on the merits.

The case now sits in the anomalous position of the District Court unwilling to take further action on the unresolved issues arising from Plains Grains' complaint out of a concern of complicating the potential review by this Court; and this Court hesitant to act due to the matter of the very same unresolved issues before the District Court potentially necessitating a second appeal. Inaction by this Court likely will result in a continuing stand-off that postpones final resolution of the case.

Article VII, Section 2(2) of the Montana Constitution gives this Court general supervisory control over all other courts. This Court may, on a case-by-case basis, supervise another court by way of a writ of supervisory control. Supervisory control constitutes an extraordinary remedy that should be exercised only in "extraordinary circumstances." *Miller v. Eighteenth Judicial Dist. Court*, 2007 MT 149, ¶ 16, 337 Mont. 488, 162 P.3d 121. Extraordinary circumstances include urgency or emergency factors that make the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist: (1) the other court is proceeding under a mistake of law and is causing a gross injustice; or (2) constitutional issues of state-wide importance are involved; or (3) the other court has granted or denied a motion for substitution of a judge in a criminal case. M.R.App.P. 14(3).

Plains Grains contends that the impending construction of the HGS constitutes an urgency or emergency factor that renders the normal appeal process inadequate. We agree. The combination of the impending construction of HGS and the District Court's professed unwillingness to act render the appeal process inadequate. We also determine that a mistake of law by the District Court on Plains Grains' spot zoning claim would cause a gross injustice in light of the inadequacy of the normal appeal process. As a result, we deem it appropriate

to exercise supervisory control over the District Court to a limited degree.

The District Court should resolve any remaining claims in Plains Grains' complaint and issue a final judgment. At that point, Plains Grains can decide whether to appeal and whether to seek a stay of the District Court's final judgment or an injunction pending appeal. Plains Grains first must file with the District Court any request for a stay or an injunction pending appeal. M.R.App.P. 22(1)(a)(i) and (iii). A district court retains jurisdiction to rule on any motion for stay even after the appellant has filed a notice of appeal. M.R.App.P. 22(1)(c). The district court promptly must enter a written order on a motion filed M.R.App.P. 22 and include findings of fact and conclusions of law, or a supporting rationale, that contains the relevant facts and legal authority on which the district court's based its order. M.R.App.P. 22(1)(d). This Court retains the authority to review any decision by the district court regarding the stay of execution of a judgment or the denial or granting of an injunction pending appeal. M.R.App.P. 22(2). Accordingly,

IT IS HEREBY ORDERED that the District Court shall resolve forthwith any remaining claims presented in Plains Grains' complaint;

IT IS FURTHER ORDERED that the District Court promptly shall enter a final judgment upon resolution of any remaining claims presented in Plains Grains' complaint.

The Clerk of Court shall mail a copy of this Order to all counsel of record.

DATED this 22 day of April 2009.

Chief Justice

Justices

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership, et al., Plaintiffs, vs. BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, et al., Defendants.	Cause No. BDV-08-480 Judge: E. Wayne Phillips **ORDER**

Pursuant to the parties' Stipulation, dated May 21 and 22, 2009, and in order to finally and fully resolve any and all claims pled by Plaintiffs in their Complaint and Application for Writ of Mandate and Writ of Review,

IT IS HEREBY ORDERED that summary judgment is DENIED to Plaintiffs on all claims and that summary judgment is GRANTED to Defendants on all claims based on the rationale adopted in this Court's Order on Motions for Summary Judgment and Writ of Mandamus/Writ of Review, dated November 28, 2008.

IT IS FURTHER ORDERED that the present Order, in conjunction with the Court's previous November 28, 2008 Order, comprise the Court's final decision on all claims pled by Plaintiffs, and accordingly, this case is ripe for appeal, following entry of judgment.

DONE this 27 day of May, 2009.

DISTRICT COURT JUDGE
Hon. E. Wayne Phillips
P. O. Box 1124
Lewistown, MT 59457
Telephone: 406.535.8028
Facsimile: 406.535.6076

cc: Roger Sullivan
Elizabeth Best
Alan McCormick
Brian Hopkins
Gary Zadick, Mary Jaraczeski

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership, et al., Plaintiffs, vs. BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, et al., Defendants.	Cause No. BDV-08-480 Judge: E. Wayne Phillips **JUDGMENT**

In accordance with the "Order on Motions for Summary Judgment and Writ of Mandamus/Writ of Review," dated November 28, 2008, and the subsequent "Order," dated May 27, 2009, Judgment is GRANTED to Defendants and against Plaintiffs on all Counts set forth in Plaintiffs' Complaint and Application for Writ of Mandate and Writ of Review.

DONE this 27 day of May, 2009.

E W Phillips

DISTRICT COURT JUDGE
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