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17 MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

18 PLAINS GRAINS LIMITED PARTNERSHIP, a  
19 Montana limited partnership; PLAINS GRAINS,  
20 INC., a Montana corporation; ROBERT E. LASSILA  
21 and EARLYNE A. LASSILA; KEVIN D. LASSILA  
22 and STEFFANI J. LASSILA; KERRY ANN  
23 (LASSILA) FRASER; DARYL E. LASSILA and  
24 LINDA K. LASSILA; DOROTHY LASSILA; DAN  
25 LASSILA; NANCY LASSILA BIRTWISTLE;  
26 CHRISTOPHER LASSILA; JOSEPH W.  
27 KANTOLA and MYRNA R. KANTOLA; KENT  
28 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

CLERK OF DISTRICT COURT  
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Cause No. **BDV 08- 480**

Judge: **JULIE MACEK**

**COMPLAINT AND  
APPLICATION FOR WRIT  
OF MANDATE AND WRIT  
OF REVIEW**

1  
2 W. MEHMKE and MARTHA MEHMKE; WALTER  
3 MEHMKE and ROBIN MEHMKE; LOUISIANA  
4 LAND & LIVESTOCK, LLC., a limited liability  
5 corporation; GWIN FAMILY TRUST, U/A DATED  
6 SEPTEMBER 20, 1991; FORDER LAND &  
7 CATTLE CO.; WAYNE W. FORDER and  
8 DOROTHY FORDER; CONN FORDER and  
9 JEANINE FORDER; ROBERT E. VIHINEN and  
10 PENNIE VIHINEN; VIOLET VIHINEN; ROBERT  
11 E. VIHINEN, TRUSTEE OF ELMER VIHINEN  
12 TRUST; JAYBE D. FLOYD and MICHAEL E.  
13 LUCKETT, TRUSTEES OF THE JAYBE D.  
14 FLOYD LIVING TRUST; ROBERT M. COLEMAN  
15 and HELEN A. COLEMAN; GARY OWEN and  
16 KAY OWEN; RICHARD W. DOHRMAN and  
17 ADELE B. DOHRMAN; CHARLES  
18 CHRISTENSEN and YULIYA CHRISTENSEN;  
19 WALKER S. SMITH, JR. and TAMMIE LYNNE  
20 SMITH; MICHAEL E. HOY; JEROME R. THILL;  
21 and MONTANA ENVIRONMENTAL  
22 INFORMATION CENTER, a Montana nonprofit  
23 public benefit corporation,

24 Plaintiffs,

25 vs.

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

Defendants.

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**Introduction**

With this lawsuit plaintiffs challenge the action taken by the Board of County Commissioners of Cascade County approving the final resolution to rezone approximately

1 668 acres of farmland from Agricultural (A-2) to Heavy Industrial (I-2). Plaintiffs bring this  
2 action to ensure that the Board of County Commissioners complies with Montana statutes,  
3 the Montana Constitution, and Cascade County Regulations governing zoning and public  
4 participation.  
5

6 **Parties**

7 1. Plains Grains Limited Partnership is a Montana limited partnership which owns  
8 agricultural land west of and contiguous to the above-described land that has been rezoned  
9 from A-2 to I-2 for the stated purpose of facilitating construction of the Highwood  
10 Generating Station, a coal-fired power plant. Plains Grains, Inc. is a Montana corporation  
11 which participates in the operation of Plains Grains Limited Partnership. Robert E. and  
12 Earlyne A. Lassila, husband and wife, have three adult children: Kerry Ann Fraser; Daryl  
13 E. Lassila, who is married to Linda K. Lassila; and Kevin D. Lassila, who is married to  
14 Steffani J. Lassila (Lassila Family). Robert E. Lassila, Earlyne A. Lassila, Kerry Ann Fraser,  
15 Daryl E. Lassila and Kevin D. Lassila are partners in Plains Grains Limited Partnership.  
16 Robert, Earlyne and their son Daryl are stockholders in Plains Grains, Inc. The Lassila  
17 Family make their living growing small grains and specialty organic crops on approximately  
18 2,750 acres, some of which is rangeland. A lengthy process has been followed by Plains  
19 Grains to certify about half of their fields as organic. Other fields are expected to be certified  
20 organic in coming years. Approximately one-half mile of these fields that have been certified  
21 organic share an immediate border with the land which has been rezoned from A-2 to I-2.  
22 Robert E. Lassila and Earlyne A. Lassila live on a 160 acre tract of land which they own,  
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1 which is approximately two miles southwest of the rezoned property, which is leased to  
2 Plains Grains Limited Partnership for purposes of growing crops. According to information  
3 submitted with the rezoning petition, the proposed coal-fired power plant would require  
4 construction of an additional power line crossing Plains Grains Limited Partnership land,  
5 bisecting this agricultural land from east to west for about two miles. Dorothy Lassila,  
6 widow of Robert's uncle, has her two children living with her, Dan Lassila and his sister  
7 Nancy Lassila Birtwistle. Dan Lassila's son, Christopher Lassila, also lives on the property.  
8  
9 The Dorothy Lassila Family own 30 acres of agricultural land which is leased to Plains  
10 Grains Limited Partnership for purposes of growing crops and another 80 acres of property  
11 on which they reside. The Dorothy Lassila Family are not shareholders of Plains Grains  
12 Limited Partnership or Plains Grains, Inc. but they all live and/or work in the quiet rural  
13 agricultural area. Plains Grains Limited Partnership, Plains Grains, Inc., and all of the  
14 individuals identified above will be harmed if the actions complained of are not remedied.  
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18 2. Joseph W. Kantola and Myrna R. Kantola, husband and wife, own 320 acres  
19 of agricultural land south of and contiguous to the land that has been rezoned from A-2 to  
20 I-2 for the stated purpose of facilitating construction of the coal-fired power plant. The  
21 Kantolas run a small family grain and fertilizer business. According to information  
22 submitted with the rezoning petition, the proposed coal-fired power plant would require  
23 construction of rail and water/sewer lines crossing the Kantolas' agricultural land. The  
24 Kantolas will be harmed if the actions complained of are not remedied.  
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1           3.     Holtz Farms, Inc. (Holtz Farm) is a Montana corporation, which owns 2,200  
2 acres of agricultural land approximately four miles west of the land which has been rezoned  
3 from A-2 to I-2 for the stated purpose of facilitating construction of the coal-fired power  
4 plant. According to information submitted with the rezoning petition, the proposed coal-fired  
5 power plant would require construction of an additional power line crossing Holtz Farms'  
6 agricultural land. Kent Holtz is a shareholder in Holtz Farms and raises dryland wheat and  
7 barley. Holtz Farms, Inc. and Kent Holtz will be harmed if the actions complained of are not  
8 remedied.  
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11           4.     Jon C. Kantorowicz and Charlotte Kantorowicz, husband and wife, are  
12 shareholders in Meadowlark Farms, a Montana partnership. Courtney Feldman is their  
13 daughter and she is married to James Feldman. The Kantorowicz' own 6,300 acres of land  
14 approximately 3-4 miles south of the land that has been rezoned from A-2 to I-2 for the stated  
15 purpose of facilitating construction of the coal-fired power plant. The Kantorowicz' cultivate  
16 6,000 acres of their 6,300 total acreage, primarily with winter wheat. Their operation is  
17 100% no till and summer fallow rotation. According to the Rezoning Petition, the rail line  
18 to the power plant will cut off approximately 45 acres on the west end of a 965 acre field,  
19 occupying productive agricultural lands, creating a triangular shaped field which will be  
20 more difficult to cultivate. Jon C. Kantorowicz and Charlotte Kantorowicz, Meadowlark  
21 Farms, James Feldman and Courtney Feldman will be harmed if the actions complained of  
22 are not remedied.  
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1           5.     David P. Roehm and Claire M. Roehm, husband and wife, own 5,000 acres of  
2 agricultural land approximately two miles south to five miles west of the land that has been  
3 rezoned from A-2 to I-2 for the stated purpose of facilitating construction of the coal-fired  
4 power plant. The Roehms raise wheat and occasionally barley on their land. According to  
5 information submitted with the rezoning petition, the proposed coal-fired power plant would  
6 require construction of rail and water/sewer lines crossing the Roehms' agricultural land.  
7  
8 The Roehms will be harmed if the actions complained of are not remedied.

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10           6.     Dennis N. Ward and LaLonnie Ward, husband and wife, and Janny Kinion-  
11 May, sister of LaLonnie Ward, own approximately 940 acres approximately three and one-  
12 half to four miles southeast of the land that has been rezoned from A-2 to I-2 for the stated  
13 purpose of facilitating construction of the coal-fired power plant. The Wards lease  
14 approximately 800 acres of their land for growing wheat and barley. The Wards and Janny  
15 Kinion-May will be harmed if the actions complained of are not remedied.

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17           7.     Charles Bumgarner and Karla Bumgarner, husband and wife, are shareholders  
18 in C Lazy J Ranch, a Montana corporation. The Bumgarners own and work a 4,000-acre farm  
19 and ranch approximately three to four miles southeast of the land that has been rezoned from  
20 A-2 to I-2 for the stated purpose of facilitating construction of the coal-fired power plant.  
21 According to information submitted with the rezoning petition, the proposed coal-fired power  
22 plant would require construction of rail lines crossing the Bumgarner's agricultural land.  
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24 Bumgarners and C Lazy J Ranch will be harmed if the actions complained of are not  
25 remedied.  
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1           8.     Carl W. Mehmke and Martha Mehmke, husband and wife, along with their son  
2 Walter Mehmke, and his wife, Robin Mehmke, own and work a 2,000 acre small grain and  
3 cow-calf operation approximately four miles south of the land that has been rezoned from  
4 A-2 to I-2 for the stated purpose of facilitating construction of the coal-fired power plant.  
5 According to information submitted with the rezoning petition, the proposed coal-fired power  
6 plant would require construction of rail lines crossing the Mehmkes' agricultural land. The  
7 Mehmkes will be harmed if the actions complained of are not remedied.  
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10           9.     Louisiana Land & Livestock, LLC., is a Montana limited liability company,  
11 which raises grain and which owns approximately 5,000 acres of land which share an  
12 immediate border on the north, south and east of the land which has been rezoned from A-2  
13 to I-2 for the stated purpose of facilitating construction of the coal-fired power plant.  
14 Louisiana Land & Livestock, LLC., will be harmed if the actions complained of are not  
15 remedied.  
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18           10.    The Gwin Family Trust, U/A dated September 20, 1991, owns approximately  
19 130 acres of land which is located along the Missouri River approximately one to two miles  
20 north and slightly west of the land that has been rezoned from A-2 to I-2 for the stated  
21 purpose of facilitating construction of the coal-fired power plant. The Gwin Family Trust  
22 will be harmed if the actions complained of are not remedied.  
23

24           11.    Wayne W. Forder, who is married to Dorothy Forder, and their son Conn  
25 Forder, who is married to Jeanine Forder, are shareholders of Forder Land & Cattle Co., a  
26 Montana corporation. The Forders operate a 7,000-acre farm and ranch, owning 4,000 acres  
27

1 and leasing an additional 3,000 acres for agricultural production, which is located  
2 approximately one and one-half mile northeast of the land that has been rezoned from A-2  
3 to I-2 for the stated purpose of facilitating construction of the coal-fired power plant. Conn  
4 Forder also leases an additional 900 acres of agricultural and ranch land for the purpose of  
5 raising wheat and cattle. This land is located approximately six miles east of the  
6 aforementioned rezoned land. Forder Land & Cattle Co., Wayne W. Forder and Dorothy  
7 Forder and Conn Forder and Jeanine Forder will be harmed if the actions complained of are  
8 not remedied.  
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11 12. Ronald E. Vihinen resides with his wife, Pennie Vihinen, on property located  
12 approximately six miles south of the land that has been rezoned from A-2 to I-2 for the stated  
13 purpose of facilitating construction of the coal-fired power plant. Robert E. Vihinen and his  
14 mother, Violet Vihinen, as Trustees of the Elmer Vihinen Trust, own and lease approximately  
15 four acres of agricultural land for the production of wheat. One small field is located  
16 approximately three miles south of the aforementioned rezoned land. Ronald. E. Vihinen,  
17 Pennie Vihinen and Violet Vihinen will be harmed if the actions complained of are not  
18 remedied.  
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21 13. Jaybe D. Floyd and Michael E. Lockett, as Trustee of the Jaybe D. Foyd Living  
22 Trust; Robert M. Coleman and Helen A. Coleman, husband and wife, Gary Owen and Kay  
23 Owen, husband and wife; Richard W. Dohrman and Adele B. Dohrman, husband and wife;  
24 Charles Christensen and Yuliya Christensen, husband and wife, all live on and own  
25 residential property in the Homestake Subdivision, less than four miles south of the land that  
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1 has been rezoned from A-2 to I-2 for the stated purpose of facilitating construction of the  
2 coal-fired power plant. Walker S. Smith, Jr. and Tammie Lynne Smith, husband and wife,  
3 own land and a home near the Homestake Subdivision. Michael E. Hoy owns residential  
4 land and a home approximately three miles south of the aforementioned rezoned land.  
5 Jerome R. Thill resides in a home situated on a one-half acre tract which is located  
6 approximately six miles south of the aforementioned rezoned land. All of these individuals  
7 will be harmed if the actions complained of are not remedied.  
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10 14. The Montana Environmental Information Center (MEIC) is a Montana  
11 nonprofit public benefit corporation dedicated to the preservation and enhancement of the  
12 natural resources and natural environment of the State of Montana and to the gathering and  
13 disseminating of information concerning the protection and preservation of the human  
14 environment and the education of its members and the general public concerning their rights  
15 and obligations under the state constitution and state laws. MEIC has members who live in  
16 the Great Falls area, who recreate on the Missouri River which is adjacent to the area which  
17 has been rezoned from A-2 to I-2, and whose members will be harmed if the actions  
18 complained of are not remedied.  
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21 15. Peggy S. Beltrone, Lance Olson and Joe Briggs are residents of Cascade  
22 County and are the duly elected Commissioners, who serve as the Board of County  
23 Commissioners of Cascade County. The Board of County Commissioners forms the  
24 governing body of Cascade County, with the jurisdiction and power, under such limitations  
25 and restrictions as are prescribed by law, to represent the County, and is entrusted with the  
26  
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1 care of Cascade County property and the management of the business and concerns of the  
2 County in all cases where no other provision is made by law, as provided in Title 7 of the  
3 Montana Code. All claims herein are asserted against the Board of County Commissioners,  
4 and its individual members, in their official capacities acting for and on behalf of Cascade  
5 County.  
6

7 **Jurisdiction and Venue**

8  
9 16. This Court has jurisdiction over this case pursuant to § 27-26-101, MCA; § 27-  
10 25-102, MCA; § 27-8-201, MCA; § 2-3-114, MCA; and the Montana Constitution.

11 17. Venue is proper in this judicial district as the land alleged to have been illegally  
12 rezoned is located within Cascade County, Montana, as is the land which plaintiffs allege  
13 will suffer harm. The vast majority of plaintiffs reside or are located within Cascade County,  
14 Montana, and defendants reside or are located within Cascade County, Montana.  
15

16 **Background Facts and Procedure**

17 **Urquharts' Petition to Rezone**

18  
19 18. On October 30, 2007, Duane and Mary E. Urquhart and Scott and Linda  
20 Urquhart (Urquharts) submitted an Application for Rezoning to the Cascade County Planning  
21 Department requesting that 668.394 acres of their agricultural land, located approximately  
22 eight miles east of the City of Great Falls and just south of the Missouri River, be rezoned  
23 from Agricultural (A-2) to Heavy Industrial (I-2). (Application for Rezoning, at p. 1.) The  
24 Urquharts submitted their Application for Rezoning for the stated purpose of allowing for  
25 the construction and operation of a coal-fired electric power generating complex, known as  
26  
27

1 the Highwood Generating Station (HGS). (*Id.*)

2 19. The Urquharts previously described the intended HGS plant as follows:

3  
4 The plant will combust approximately 1,200,000 tons of coal annually. The  
5 combustion of coal will result in the generation of approximately 225 tons of  
6 ash per day or approximately 77,000 tons per year. The proposed project  
7 includes construction or installation of the CFB boiler, electric turbine,  
8 generator, coal storage and handling facilities and substation, 400 foot  
9 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.

10 (Rezoning Petition dated October 10, 2006, at p. 1, submitted by Urquharts to the Cascade  
11 County Planning Department.)

12 20. The Application for Rezoning describes the ongoing fuels and materials needed  
13  
14 to operate the Highwood Generating Station as follows:

15 Coal consumption is estimated to be 300,000 lb/hr or 1,314,000 tons/yr. Coal  
16 will be delivered approximately twice a week in 110-car bottom-dump unit  
17 trains. Fly ash from the coal combustion process will be disposed of onsite in  
an engineered monofill, lined with clay. . . .

18 Limestone and ammonia will be purchased and utilized to reduce air  
19 pollutants. Limestone will be consumed at a rate of approximately 5,780 lb/hr  
20 or 25,000 tons/yr. Limestone will be delivered to the plant by truck or train  
21 from the Graymont Lime Plant and limestone quarry near Townsend, Montana.  
22 Ammonia will be consumed at a rate of 239 lb/hr (1,047 tons/yr). Anhydrous  
23 ammonia will be purchased and delivered to the plant by rail or by truck.

24 (Application for Rezoning at p. 12.)

25 21. Construction of the Highwood Generating Station will also necessitate  
26 construction of a number of utility facilities on land owned by plaintiffs herein, including  
27 utility facilities and infrastructure described in the Application for Rezoning as follows:

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

5 (*Id.* at p. 11-12.) The Application for Rezoning states that all of the property which is sought  
6 to be rezoned from Agricultural to Heavy Industrial is presently used for agricultural  
7 purposes. (*Id.* at p. 3.)

### 8 **Staff Report**

9  
10 22. The Cascade County Planning Department made its initial Staff Report  
11 available on November 19, 2007. According to the Staff Report:

12 Duane and Mary Urquhart and Scott and Linda Urquhart, owners of the real  
13 property, request a change in zoning from Agricultural (A-2) to Heavy  
14 Industrial (I-2) to allow for the construction and operation of a 215-250 mW  
15 electrical generating facility, known as the Highwood Generating Station  
16 (“HGS”). If rezoned, The Urquhart’s plan to sell the property to Southern  
17 Montana Electric Generation & Transmission Cooperative, Inc. (“SME”),  
18 which will construct and operate the HGS. In addition to the coal facility, the  
SME also proposes to install four wind turbines which would generate 6 mW  
of electricity.

19 23. According to that Staff Report, the existing land use is agricultural, and the  
20 existing zoning is “A-2” Agricultural. As to the “Surrounding Zoning and Land Uses” the  
21 Staff Report (at p.5) states:

22 //

23 //

24 //

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26 //

1 Surrounding Zoning and Land Uses:

2

<u>Direction</u>	<u>Legal Description</u>	<u>Zoning Classification</u>	<u>Existing Land Use</u>
3 North	Parcel #5356400	A-2 Agricultural>20 acres	Agricultural Production
4 Northeast	Parcel #5118800	A-2 Agricultural>20 acres	Agricultural Production
5 East	Parcel #5120100, #5364000	A-2 Agricultural>20 acres	Agricultural Production
6 Southeast	Parcel #5365100	A-2 Agricultural>20 acres	Agricultural Production
7 South	Parcel #5365100, #5365400	A-2 Agricultural>20 acres	Agricultural Production
8 Southwest	Parcel #5366900	A-2 Agricultural> 20 acres	Agricultural Production
9 West	Parcel #5366900, #5362700	A-2 Agricultural>20 acres	Agricultural Production
10 Northwest	Parcel #5357500	A-2 Agricultural>20 acres	Agricultural Production

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15 24. According to the Staff Report the “purpose” of the rezoning is as follows: “The  
16 applicant desires the rezoning to permit heavy industrial type uses on the subject property.”  
17 (Staff Report at p. 2.)

18 25. Section 7.4.2.1 of the Cascade County Zoning Regulations (CCZR) states that  
19 permitted uses in the Heavy Industrial I-2 District are, “All uses not otherwise prohibited by  
20 laws.” The types of uses that are defined as Heavy Industrial under the Regulations (CCZR  
21 § 2.99.28) include:  
22

23  
24 Place and/or building, or portion thereof, that is used or is intended for the  
25 following or similar uses: processing or manufacturer of materials or products  
26 predominantly from extracted or raw materials; storage of or manufacturing  
27 processes using flammable or explosive materials; or storage or manufacturing  
28 processes that potentially involve hazardous or commonly recognized

1 offensive conditions; the term includes motor vehicle assembly, oil refineries,  
2 textile production, sawmills, post and pole plants, log yards, asphalt and  
3 concrete operations, primary metal processing, and the like

4 26. Throughout the Staff Report, it is noted that the proposed rezoning does not  
5 comply with applicable review criteria unless a number of conditions are imposed, and unless  
6 the rezoning is used solely to facilitate the construction of the HGS facility and no other  
7 industrial use occurs on the rezoned land. The Staff Report failed to discuss or analyze  
8 whether the other uses allowed by Heavy Industrial zoning would comply with the criteria  
9 required by applicable statutes and regulations. As set forth at further length below,  
10 "conditional zoning" is not recognized by, nor standards provided for, in the Cascade County  
11 Zoning Regulations or the zoning statutes. The proposed rezoning does not comply with the  
12 criteria and guidelines required by applicable statutes and regulations.  
13  
14

#### 15 **Notice of Planning Board hearing**

16 27. The Staff Report (at p. 2) stated in regard to the Planning Board hearing:

17  
18 Legal notices for the Planning Board hearing were sent to the Great Falls  
19 Tribune on November 7, 2007 and are scheduled to run on November 18,  
2007, November 25, 2007, and December 2, 2007.

20 28. The Cascade County Zoning Regulations include among the requirements for  
21 publication of the notice of public hearing before the Planning Board the requirement that  
22 the notice state "the boundaries of the proposed district," the general character of the  
23 proposed zoning regulations, and that the proposed zoning regulations or maps are on file for  
24 public inspection at the office of the County Clerk and Recorder and the Planning Board  
25 Office. (CCZR § 14.2, *et seq.*)  
26  
27

1           29.    The Notice of Public Hearing that was published for the Planning Board  
2 hearing included identification of tracts of land “legally described” by reference to parcel  
3 numbers in the County Real Estate File Maintenance Database. A “further legal description”  
4 included a metes and bounds description from a referenced certificate of survey. However,  
5 the only description of “the boundaries of the district” in the legal notice was erroneous and  
6 misleading. There is a major discrepancy between the description of the boundaries of the  
7 district as published in the notice and the description contained in the Application for  
8 Rezoning. According to the Application for Rezoning, included in the proposed rezoning  
9 was “Section 24, W1/2.” (Application for Rezoning at p. 1.) However, the “boundaries of  
10 the district” set forth in the published notice does not include Section 24, W1/2, which  
11 includes some 320 acres of land.  
12  
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14

15           30.    The Cascade County Zoning Regulations also require that the notice must state  
16 that the proposed zoning regulations or maps are on file for public inspection at the office  
17 of the County Clerk and Recorder and the Planning Board Office. (CCZR § 14.2.1.4.)  
18 However, material elements of the proposed zoning regulations or maps were not on file for  
19 public inspection as required. This included a letter from Southern Montana Electric  
20 Generation & Transmission Cooperative, Inc. (SME), dated January 9, 2008 (dated as  
21 received on January 11, 2008), to the Cascade County Planning Department setting forth  
22 eleven conditions. In the motions approving the Resolution of Intention to rezone and the  
23 Final Resolution to rezone, the County Commissioners made the rezoning “subject to the  
24 eleven conditions offered by Tim Gregori of Southern Montana Electric, representing the  
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1 applicants, dated January 9, 2008, and attached hereto.” Included among the eleven  
2 conditions was that, “SME agrees, as a condition of rezoning to heavy industrial use, that  
3 such use shall be solely for purposes of an electrical power plant.” The letter dated January  
4 9, 2008, further represented that, “SME will present testimony and documentation on each  
5 of these areas at the rezoning hearing on January 15.” SME’s letter dated January 9, 2008,  
6 setting forth the eleven conditions that were incorporated in the motions adopted by the  
7 Cascade County Commissioners was not available to the public, the Planning Department,  
8 or the Planning Board at either the time of the Planning Board hearing on December 4, 2007,  
9 or at the time that notices of the Planning Board hearing were published. Nor was the  
10 “testimony and documentation of each of these areas” submitted by SME at the time of the  
11 January 15, 2008 public hearing before the County Commissioners available to the public,  
12 the Planning Department or the Planning Board at the time of the public hearing before the  
13 Planning Board on December 4, 2007.

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16  
17 31. According to § 76-2-204(1), MCA, the Planning Board “shall make written  
18 reports of their recommendations to the board of county commissioners. . . .” The Planning  
19 Board failed to make a written report as required, nor did the Planning Board adopt the Staff  
20 Report as its report or findings in regards to the proposed rezoning.  
21

### 22 **Approval by Cascade County Commissioners**

23  
24 32. The Cascade County Zoning Regulations require that prior to the hearing  
25 before the County Commissioners notice of the public hearing be published, which notice  
26 must state “the boundaries of the proposed district,” the general character of the proposed  
27



1 zoning regulations, and that the proposed zoning regulations or maps are on file for public  
2 inspection at the office of the County Clerk and Recorder and the Planning Board Office.  
3 (CCZR § 14.3, *et seq.*)  
4

5 33. On December 30, 2007, January 6, 2008 and January 13, 20078 notice was  
6 published of the public hearing on the proposed rezoning to be held before the County  
7 Commissioners on January 15, 2008.  
8

9 34. The notice of the public hearing to be held before the County Commissioners  
10 contained the same statement of the "boundaries of the proposed district" set forth above in  
11 regards to the notice of the hearing to be held before the Planning Board. Once again the  
12 required statement of the boundaries of the proposed district did not include "Section 24,  
13 W1/2," which according to the Application for Rezoning was proposed to be rezoned. Thus,  
14 the required notice failed to include within the boundaries of the proposed district  
15 approximately 320 acres of land for which rezoning was sought.  
16

17 35. The letter from SME to the Cascade County Planning Department dated  
18 January 9, 2008, and received by the Planning Department on January 11, 2008, contained  
19 conditions material to the proposed rezoning, which were not previously available to the  
20 public, the Planning Department, the Planning Board, or the County Commissioners. The  
21 first time that plaintiffs learned of the SME letter and its eleven proposed conditions of  
22 rezoning was during the course of the January 15, 2008 public hearing before the County  
23 Commissioners on the proposed rezoning. The first time that plaintiffs heard the testimony  
24 and documentation submitted by SME in support of the conditions of rezoning was also at  
25  
26  
27  
28

1 the time of the January 15, 2008 public hearing. The documentation submitted at that time  
2 included a traffic impact study, a baseline noise study, a review of scientific studies  
3 concerning coal-fired power plants and children's health, a report on whether organic  
4 farming will be harmed by HGS emissions, material on the effects of the Colstrip power  
5 plant on range resources and stack emissions, a property appraisal report, and a landscape  
6 plan. The documentation contained technical information that would require a significant  
7 amount of time to review and prepare informed responses. The public hearing was closed  
8 at the end of the January 15, 2008 public hearing. (Transcript of January 15, 2008 public  
9 hearing at p. 360.) Thereafter, SME continued to submit material to the County  
10 Commissioners.

11  
12  
13  
14 36. On January 31, 2008, the County Commissioners met to consider a motion to  
15 approve passage of a Resolution of Intent to rezone the Urquharts' property from "A-2"  
16 Agricultural to "I-2" Heavy Industrial. The motion stated:

17  
18 I move the Cascade County Commission approve the Resolution of Intention  
19 to rezone Parcels #5364100, 5364200, and 5364300 in Section 24, and Parcel  
20 #5365200 in Section 25, all located in Township 21 N, Range 5 East, from "A-  
21 2" Agricultural to "I-2" Heavy Industrial, subject to the 11 conditions offered  
22 by Tim Gregori of Southern Montana Electric, representing the applicants,  
23 dated January 9, 2008, and attached hereto.

24  
25 37. The motion to approve passed 2 to 1, with Commissioners Lance Olson and  
26 Joe Briggs voting in favor, and Commissioner Peggy Beltrone opposing. The County  
27 Commissioners did not adopt the Staff Report as its findings in regards to the proposed  
28 rezoning, nor did it otherwise establish a record of the facts relied upon in making its  
decision to pass the Resolution of Intention to rezone the Urquharts' land.

1           38. If the County Commissioners pass a resolution of intention to revise the  
2 boundaries of a zoning district or amend the zoning regulations, then the County  
3 Commissioners are required to publish a notice of passage of the resolution of intention  
4 which is required to state “the boundaries of the proposed district”; the general character of  
5 the proposed zoning regulations; that the proposed zoning regulations or maps are on file for  
6 public inspection at the office of the County Clerk and Recorder and the Cascade County  
7 Planning Department; and that for thirty (30) days after first publication of the notice, the  
8 County Commissioners will receive written protests to the creation of the zoning district, or  
9 to the creation of or amendment to the zoning regulations, from persons owning real property  
10 within the district whose names appear on the last completed assessment roll of the county.  
11  
12 (CCZR § 14.4, *et seq.*)  
13  
14

15           39. Following passage of the above-described Resolution of Intention, a “public  
16 notice of passage of Resolution of Intention to Amend County Zoning District Map” was  
17 published on February 2, 3, 9, and 10, 2008.  
18

19           40. Once again, the notice included identification of tracts of land “legally  
20 described” by reference to parcel numbers in the County Real Estate File Maintenance  
21 Database. A “further legal description” included a metes and bounds description from a  
22 referenced certificate of survey. However, the only description of “the boundaries of the  
23 district” in the legal notice was once again erroneous and misleading. According to the  
24 Application for Rezoning, the Applicants were seeking rezoning of “Section 24, W1/2.”  
25 (Application for Rezoning at p. 1.) However, the “boundaries of the district” set forth in the  
26  
27

1 published notice does not include Section 24, W1/2, which includes some 320 acres of land.

2 41. The Resolution of Intention, referenced in the notice and required to be on file  
3 for public inspection, does not reference the conditions that were referenced in the motion  
4 to approve the Resolution of Intention.  
5

6 42. As to the right of protest described in the notice, Cascade County maintained  
7 and communicated its position that only real property owners within the boundaries of the  
8 area proposed for rezoning could exercise a legally enforceable right to protest. However,  
9 by purportedly passing the "Resolution of Intention to Amend County Zoning District Map"  
10 (and later the "Final Resolution Amending Cascade County Zoning District Map"), two  
11 zoning districts were being amended. The "A-2" Agricultural District was being diminished  
12 by up to 668 acres. The "I-2" Heavy Industrial District was being increased by up to 668  
13 acres.  
14  
15

16 43. On March 11, 2008, the County Commissioners met to consider a final  
17 resolution of approval to rezone the Urquharts' land from "A-2" Agricultural to "I-2" Heavy  
18 Industrial. The motion to approve Final Resolution 08-22, to rezone the Urquharts' parcels  
19 from "A-2" Agricultural to "I-2" Heavy Industrial passed on a 2 to 1 vote, with  
20 Commissioner Briggs and Commissioner Olson voting in favor of the resolution and  
21 Commissioner Beltrone voting against. The County Commissioners did not adopt the Staff  
22 Report as its findings in regards to the proposed rezoning, nor did it otherwise establish a  
23 record of the facts relied upon in making its decision to pass the Final Resolution to rezone  
24 the Urquharts' land.  
25  
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1 44. According to the Minutes of the March 11, 2008 meeting, Commissioner  
2 Briggs made a motion:

3  
4 ... to approve the Final Resolution to rezone Parcels #5364100, 5364200, and  
5 5364300 in Section 24, and Parcel #5365200 in Section 25, all located in  
6 Township 21 N, Range 5 East, from "A-2" Agricultural to "I-2" Heavy  
7 Industrial, subject to the 11 conditions offered by Tim Gregori of Southern  
8 Montana Electric, representing the applicants, dated January 9, 2008, attached  
9 hereto.

10 Final Resolution 08-22 does not, however, reference the conditions referred to in the motion.

11 45. Over 1,000 concerned citizens commented or protested in one form or another  
12 on the proposed rezoning. As further indicated by the extensive media coverage on the  
13 requested zone change, this matter was of significant interest to the public.

14 **Counts**

15 **I. The rezoning violates mandatory procedures for amending a zoning  
16 district.**

17 46. All paragraphs above are incorporated by this reference.

18 47. CCZR § 14 and § 76-2-205, MCA, mandate procedures for amendment of a  
19 zoning district or zoning regulations, including the requirements that notices for the public  
20 hearings before the Planning Board and before the County Commissioners, as well as notice  
21 of passage of a resolution of intention, shall state the boundaries of the proposed district, the  
22 general character of the proposed zoning regulations, that the proposed zoning regulations  
23 or maps are on file for public inspection at the office of the County Clerk and Recorder and  
24 the Planning Board Office, and that for thirty (30) days after publication of notice of passage  
25 of the resolution of intention the Commissioners will receive written protests to the  
26  
27

1 amendment to the zoning district or zoning regulations from persons owning real property  
2 within the district whose names appear on the last completed assessment role of the county.

3  
4 48. The Commissioners failed to follow the mandatory procedures for amendment  
5 of a zoning district as set forth in CCZR § 14 and §§ 76-2-204, -205, MCA. In violation of  
6 § 76-2-204, MCA, the Planning Board did not make a written report of its recommendation  
7 to the County Commissioners, nor did the Planning Board adopt the Staff Report as its report  
8 or findings in regard to the zone change. The “boundaries of the proposed district” set forth  
9 in the published notices was erroneous and misleading. According to the Application for  
10 Rezoning, the Applicants were seeking rezoning of “Section 24, W1/2.” However, the  
11 “boundaries of the district” set forth in the published notices do not include Section 24,  
12 W1/2, which includes some 320 acres of land.  
13  
14

15 49. The Cascade County Zoning Regulations also require that the notices must  
16 state that the proposed zoning regulations or maps are on file for public inspection at the  
17 office of the County Clerk and Recorder and the Planning Board Office. However, material  
18 elements of the proposed zoning regulations or maps were not on file for public inspection  
19 as required. This included the letter from SME dated January 9, 2008 (dated as received on  
20 January 11, 2008), to the Cascade County Planning Department setting forth the eleven  
21 conditions. In its motions approving the Resolution of Intention to Rezone and the Final  
22 Resolution to Rezone, the County Commissioners made the rezoning subject to the eleven  
23 conditions offered by SME.  
24  
25  
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1           50.     SME's letter dated January 9, 2008, setting forth the eleven conditions that  
2 were included by the County Commissioners in its motions was not available to the public,  
3 the Planning Department, or the Planning Board at the time that the mandatory notices of  
4 public hearings were published. Nor was the extensive documentation related to the  
5 conditions and submitted by SME at the January 15, 2008 public hearing before the County  
6 Commissioners available to the public, including the plaintiffs herein, the Planning  
7 Department, the Planning Board or the County Commissioners at the time of the public  
8 hearing before the Planning Board on December 4, 2007, or prior to the January 15, 2008  
9 public hearing before the County Commissioners. Nor were copies of the documents  
10 provided to the public and plaintiffs herein at the January 15 public hearing. At the public  
11 hearings, the public and plaintiffs herein were not given a fair opportunity to be heard  
12 regarding the proposed amendment to the zoning districts and zoning regulations, including  
13 the proposed conditions described above and the materials submitted by SME in support of  
14 the proposed conditions.  
15

16           51.     The position taken by Cascade County that only real property owners within  
17 the boundaries of the area proposed for rezoning had a right of protest under § 76-20-205,  
18 MCA, and CCZR § 14, deprived the public and plaintiffs herein of the informed exercise of  
19 their right of protest as provided for in the referenced statute and regulations. The  
20 Commissioners' failure to follow the mandatory procedures deprived persons owning real  
21 property within the zoning district, including plaintiffs herein, from an informed exercise of  
22 their right of protest.  
23  
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1           52. According to the Cascade County Zoning Regulations, the Application for  
2 Rezoning must include, “a letter signed by at least one landowner within the area to be  
3 rezoned explaining the requested rezoning.” (CCZR § 14.1.1.) SME’s letter dated January  
4 9, 2008, setting forth the eleven conditions that were included by the County Commissioners  
5 in its motions to rezone the Urquharts’ property was not signed by the Urquharts, who owned  
6 the property.  
7

8           53. The Commissioners’ failure to follow the mandatory procedures for  
9 amendment of a zoning district thereby renders void the Commissioners’ purported approval  
10 of the rezoning request. *Dover Ranch v. County of Yellowstone* (1980), 187 Mont. 276, 609  
11 P.2d 711; *State ex rel. Diehl Co. v. City of Helena* (1979), 181 Mont. 306, 593 P.2d 458;  
12 *State ex rel. Christian, et al. v. Miller* (1976), 169 Mont. 242, 545 P.2d 660  
13  
14

15           **II. The Commissioners’ rezoning decision was not made in accordance with**  
16           **the mandatory criteria for amending a zoning district.**

17           54. All paragraphs above are incorporated by this reference.

18           55. Montana law authorizes counties to adopt zoning regulations:

19           For the purpose of promoting the public health, safety, morals, and general  
20           welfare, a board of county commissioners that has adopted a growth policy  
21           pursuant to chapter 1 is authorized to adopt zoning regulations for all or parts  
22           of the jurisdictional area in accordance with the provisions of this part.

23           § 76-2-201(1), MCA (emphasis added).

24           56. Montana law also sets forth the mandatory criteria and guidelines for county  
25 zoning regulations:

26           (1) Zoning regulations must be:

27           (a) made in accordance with the growth policy or a master plan, as



- 1 provided for in 76-2-201(2); and  
2 (b) designed to:  
3 (i) lessen congestion in the streets;  
4 (ii) secure safety from fire, panic, and other dangers;  
5 (iii) promote public health and general welfare;  
6 (iv) provide adequate light and air;  
7 (v) prevent the overcrowding of land;  
8 (vi) avoid undue concentration of populations; and  
9 (vii) facilitate the adequate provision of transportation, water, sewerage,  
10 schools, parks, and other public requirements.  
11 (2) Zoning regulations must be made with reasonable consideration, among  
12 other things, to the character of the district and its peculiar suitability for  
13 particular uses and with a view to conserving the value of buildings and  
14 encouraging the most appropriate use of land throughout the jurisdictional  
15 area. . . .

16 § 76-2-203, MCA (emphasis added).

17 57. In *Lowe v. City of Missoula* (1974), 165 Mont. 38, 525 P.2d 555, the Montana  
18 Supreme Court recognized that, pursuant to statutory criteria, a governing body must  
19 consider a twelve-step test in making zoning and rezoning decisions. See also *Schanz v. City*  
20 *of Billings* (1979), 182 Mont. 328, 335, 597 P.2d 67, 71 (recognizing twelve-step test set  
21 forth in *Lowe*, and clarifying that there is no elemental distinction between the act of  
22 “zoning” and the act of “rezoning”). While *Lowe* and *Schanz* addressed the municipal zoning  
23 statute, the Montana Supreme Court has made clear that the twelve-step test is equally  
24 applicable to the statute which sets forth the criteria and guidelines that apply to county  
25 zoning and rezoning, § 76-2-203, MCA. *Little v. Flathead County* (1981), 193 Mont. 334,  
26 352, 631 P.2d 1282, 1292; *North 93 Neighbors, Inc. v. Board of County Commissioners of*  
27 *Flathead County*, 2006 MT 132, ¶¶ 42-45, 332 Mont. 327, 137 P.2d 557.

1 58. The twelve-step criteria are as follows:

- 2 1. Whether the new zoning was made in accordance with the Growth
- 3 Policy.
- 4 2. Whether the new zoning was designed to lessen congestion in the
- 5 streets.
- 6 3. Whether the new zoning was designed to secure safety from fire, panic,
- 7 and other dangers.
- 8 4. Whether the new zoning will promote public health and general
- 9 welfare.
- 10 5. Whether the new zoning will provide adequate light and air.
- 11 6. Whether the new zoning will prevent the overcrowding of land.
- 12 7. Whether the new zoning will avoid undue concentration of population.
- 13 8. Whether the new zoning is designed to facilitate the adequate provision
- 14 of transportation, water, sewerage, schools, parks, and other public
- 15 requirements.
- 16 9. Whether the new zoning gives reasonable consideration to the character
- 17 of the district.
- 18 10. Whether the new zoning gives consideration to the peculiar suitability
- 19 of the district for particular uses.
- 20 11. Whether the new zoning was adopted with a view to conserving the
- 21 value of buildings.
- 22 12. Whether the new zoning will encourage the most appropriate use of
- 23 land throughout the jurisdictional area.

24 § 76-2-203, MCA; *Lowe, supra*.

25 59. The proposed rezoning does not comply with the mandatory twelve-step  
26 criteria set forth above. The zone change was not made in accordance with Cascade  
27 County's Growth Policy; the zone change will not lessen congestion with streets; the zone  
28 change will not secure safety from fire, panic and other dangers; the rezoning will not  
promote public health and general welfare; there is no evidence to suggest that the industrial  
complex will provide adequate light and air of that the proposed zone change will prevent  
the overcrowding of land; there is no evidence to suggest that the zone change will not result  
in the undue concentration of population; traffic will substantially increase due to the

1 industrial facility, and there is insufficient evidence in the record for how the proposed zone  
2 change could impact water; reasonable consideration was not given to the character of the  
3 district, which will be dramatically changed if the heavy industrial zone is permitted;  
4 reasonable consideration was not given to the peculiar suitability of property in the district;  
5 reasonable consideration was not given to conserving the value of agricultural land and  
6 homes; and the proposed zone change does not encourage the most appropriate use of land  
7 throughout the jurisdictional area.  
8  
9

10 60. Throughout the Staff Report, it is noted that the proposed rezoning does not  
11 comply with applicable review criteria unless a number of conditions are imposed, and unless  
12 the rezoning is used solely to facilitate the construction of the HGS facility and no other  
13 industrial use occurs on the rezoned land. There are no procedures or standards for  
14 conditional zoning in the Cascade County Zoning Regulations. There were no findings of  
15 fact nor analysis in the Staff Report determining whether the conditions were adequate to  
16 comply with applicable review criteria. And the Staff Report failed to discuss or analyze  
17 whether the other uses allowed by Heavy Industrial zoning would comply with the criteria  
18 required by applicable statutes and regulations.  
19  
20

21 61. The County Commissioners did not adopt the Staff Report as its findings in  
22 regards to the proposed rezoning, nor did the County Commissioners otherwise flesh out the  
23 pertinent facts upon which its decision was based. *Lowe; Schanz; North 93 Neighbors;*  
24 *supra.*  
25  
26  
27

1           62.    The County Commissioners illegally approved the requested zone change and  
2 it should be declared void.

3           **III.    The “conditional rezoning” is not recognized by, nor standards provided**  
4           **for, in the Cascade County Zoning Regulations or the zoning statutes.**

5           63.    All paragraphs above are incorporated by this reference.

6           64.    The Motion to Approve the Resolution of Intention to Rezone, and the Motion  
7 to Approve the Final Resolution to Rezone, were both made upon substantially similar  
8 motions:  
9

10           I move the Cascade County Commission approve the Resolution of Intention  
11 [the Final Resolution] to rezone Parcels #5364100, 5364200, and 5364300 in  
12 Section 24, and Parcel #5365200 in Section 25, all located in Township 21 N,  
13 Range 5 East, from “A-2” Agricultural to “I-2” Heavy Industrial, subject to the  
14 11 conditions offered by Tim Gregori of Southern Montana Electric,  
representing the Applicants, dated January 9, 2008 and attached hereto.

15           65.    Despite the above-referenced motions, there is no reference to the eleven  
16 conditions in either the Resolution of Intention to Rezone or the Motion to Approve the Final  
17 Resolution to Rezone. Moreover, the Resolutions contain neither standards nor procedures  
18 for the adoption or enforcement of the conditions.

19           66.    The County Zoning Act, § 76-2-201, *et seq.*, MCA, does not provide for  
20 conditional zoning. The Cascade County Zoning Regulations neither recognize, nor provide  
21 standards or procedures for conditional zoning or rezoning. As such, the purported  
22 conditional rezoning of the Urquharts’ property is without legal basis, violates fundamental  
23 principles of due process, is arbitrary and capricious, and violates the Montana Constitution,  
24 thereby rendering void the Commissioners’ purported approval of the Urquharts’ rezoning  
25  
26  
27

1 request.

2 **IV. The proposed zone change constitutes illegal spot zoning.**

3 67. All paragraphs above are incorporated by this reference.

4 68. The Montana Supreme Court has established a three-part test to determine  
5 whether a zone change constitutes illegal spot zoning. See *Little v. Board of County*  
6 *Commissioners of Flathead County* (1981), 193 Mont. 334, 631 P.2d 1282; *Greater*  
7 *Yellowstone Coalition, Inc. v. Board of County Commissioners of Gallatin County*, 2001 MT  
8 99, 305 Mont. 232, 25 P.3d 168.

9 69. The Cascade County Zoning Regulations purport to define "spot zoning" in a  
10 manner which is inconsistent with the three-part test mandated by *Little* and *GYC, supra*.  
11 (See CCZR § 2.99.184.) The County cannot avoid the Supreme Court mandate by adoption  
12 of an inconsistent regulation.

13 70. Rezoning the Urquharts' 668.394 acres of land from "A-2" Agricultural to "I-2"  
14 Heavy Industrial fails each prong of the test articulated by the Montana Supreme Court. It  
15 constitutes illegal spot zoning.

16 **(1) Adjoining land use**

17 71. The first prong of the test examines whether the requested use is significantly  
18 different from the prevailing use in the area. According to the Application for Rezoning all  
19 of the property which is sought to be rezoned from Agricultural to Heavy Industrial is  
20 presently used for agricultural purposes. (Application for Rezoning at p. 3.) Likewise,  
21 according to the Staff Report, the existing land use is agricultural, and the existing zoning  
22  
23  
24  
25  
26  
27

1 is "A-2" Agricultural. As to adjoining land uses, the Staff Report (at p. 5) states:

2 Surrounding Zoning and Land Uses:

3

<u>Direction</u>	<u>Legal Description</u>	<u>Zoning Classification</u>	<u>Existing Land Use</u>
4 North	Parcel #5356400	A-2 Agricultural>20 acres	Agricultural Production
5 Northeast	Parcel #5118800	A-2 Agricultural>20 acres	Agricultural Production
6 East	Parcel #5120100, #5364000	A-2 Agricultural>20 acres	Agricultural Production
7 Southeast	Parcel #5365100	A-2 Agricultural>20 acres	Agricultural Production
8 South	Parcel #5365100, #5365400	A-2 Agricultural>20 acres	Agricultural Production
9 Southwest	Parcel #5366900	A-2 Agricultural> 20 acres	Agricultural Production
10 West	Parcel #5366900, #5362700	A-2 Agricultural>20 acres	Agricultural Production
11 Northwest	Parcel #5357500	A-2 Agricultural>20 acres	Agricultural Production

12

13

14

15

16 72. According to the Staff Report, the "purpose" of the rezoning is as follows:

17 "The Applicant desires the rezoning to permit heavy industrial type uses on the subject  
18 property." (Staff Report at p. 2.) Specifically, the construction and operation of the  
19 Highwood Generating Station, a coal-fired power plant complex. The requested use is  
20 significantly different from the prevailing use in the area.  
21

22 **(2) Size of the area**

23

24 73. In upholding the District Court's finding of spot zoning, the Montana Supreme  
25 Court in *Greater Yellowstone Coalition* explained:

26 The second prong of the *Little* test for spot zoning focuses on the size of the  
27 area in which the requested use is to apply, but is not limited to the physical

1 size of the parcel. It also includes analysis of how many separate landowners  
2 stand to benefit from the proposed zoning change. The District Court found  
3 that the Duck Creek parcel was small in relation to the Hebgen Lake Zoning  
4 District - the 323 acres at issue comprise a mere 2% of the District's 13,280  
5 acres. \* \* \* More importantly, the *Little* test focuses on the number of owners  
6 who stand to benefit from the zoning change.

7 *Greater Yellowstone Coalition*, ¶¶ 26-28.

8 74: Here, the Application for Rezoning seeks to rezone 668.394 acres of  
9 agricultural land presently zoned A-2 to I-2 Heavy Industrial. As stated in the Cascade  
10 County Zoning Regulations:

11 All areas of the county that were formally located outside the former  
12 City-County Jurisdictional Planning Area shall, by this action and Resolution,  
13 be designated as "A-1" or "A-2" Agricultural District, and shall be subject to  
14 the conditions of this Cascade County Zoning District, and shall also be  
15 subject to the specific regulations pertaining to "A" Agricultural Districts.

16 (Accord CCZR § 4 "Zoning Map," and CCZR § 15.2 "Exhibits".)

17 75. The A-2 Zoning District consists of approximately 1,560,000 acres. The  
18 668.394 acres at issue comprise less than .05% of the District's acreage. In addition, , the  
19 Urquhart family stands as the only immediate beneficiary of the proposed zone change, while  
20 the Southern Montana Electric Generation and Transmission Cooperative, Inc., is intended  
21 to become the sole owner who will stand to benefit from the proposed zoning change, which  
22 would allow for the construction of its proposed coal-fired electric power generation  
23 complex. Accordingly, the second prong of the spot zoning test is met.

### 24 (3) Special legislation

25 76. As explained by the Montana Supreme Court in *Greater Yellowstone Coalition*:

1 The issue presented by the third prong is whether the zoning request is in the  
2 nature of special legislation designed to benefit one or a few landowners at the  
3 expense of surrounding landowners or the general public. *Little*, 193 Mont. at  
4 346, 631 P.2d at 1289. This inquiry should include an evaluation of whether  
5 the requested use is consistent with the comprehensive land use plan for the  
6 area. *Little*, 193 Mont. at 347, 631 P.2d at 1290.

7 *Greater Yellowstone Coalition*, ¶ 29.

8 77. There are numerous provisions of Cascade County's Growth Policy with which  
9 the proposed zone change fails to comply. The Growth Policy emphasizes the protection and  
10 maintenance of Cascade County's rural character. Growth Policy objectives call for  
11 industrial development to be located in close proximity to existing development in cities and  
12 towns. A stated goal of the Growth Policy is to maintain the agricultural economy. The  
13 Growth Policy promotes sustainable and environmentally sensitive development, and the  
14 Growth Policy emphasizes alternate methods of energy production. The Growth Policy  
15 discusses the importance of protecting the agricultural heritage and rural character of the  
16 county. The Growth Policy states that this proposed energy supply is not needed in Cascade  
17 County because there is a "virtually unlimited supply of electricity" to the area.

18  
19 78. The proposed rezoning to Heavy Industrial ignores the existing agricultural use  
20 and is totally at odds with the description of the area in the Growth Policy under "BENCHES  
21 AND DISSECTED BENCHES":

22  
23 This landscape covers most of the northern half of the county and comprises  
24 the majority of the important wheat producing areas of the county. Benches  
25 flank a major portion of the lower Smith River drainage. The benches divide  
26 the Missouri and lower Sun River watersheds and include most of the area to  
27 the north of Great Falls and east to the foothills of the Highwood Mountains.  
28 To the south of Great Falls the benches are dissected by many drainages  
forming many coulees and extending to the foothills of the Little Belt



1 Mountains.

2 (Growth Policy at p. 52.) A stated policy for this area is as follows: "Since the existing land  
3 use of the benches and dissected benches landscape unit is predominantly agriculture, special  
4 consideration should be given to protect this use." (*Id.* at p. 54; emphasis added.)  
5

6 79. The Urquharts will be the immediate sole beneficiaries of this dramatic zone  
7 change, which will come at the expense of the nearby property owners. This zone change  
8 is designed for one purpose - - to allow a coal-fired power plant to operate in the middle of  
9 this agricultural area, which is proposed to be constructed and run by SME. In fact,  
10 according to Condition No. 1 in SME's letter dated January 9, 2008, which was included in  
11 the motions of the County Commissioners approving the rezoning, "SME agrees, as a  
12 condition of rezoning to heavy industrial use, that such use shall be solely for purposes of an  
13 electrical power plant." This rezoning clearly constitutes special legislation designed to  
14 benefit first the Urquharts and then SME.  
15  
16

17 80. On the other hand, those who live and farm nearby and downwind from this  
18 plant will suffer from the air pollution it generates. They will be forced to tolerate not only  
19 the pollution, but the nuisance of noise, light, odor and increased traffic. The construction  
20 of the coal-fired power plant complex will require the condemnation and taking of the land  
21 of surrounding landowners, including plaintiffs herein, in order to facilitate the construction  
22 of the required electric transmission lines, railroad tracks, water and sewer lines. The  
23 surrounding landowners will not reap any benefits from the stark visual impacts of this  
24 industrial complex. Their property values will decrease as the pollution, visual and nuisance  
25  
26  
27

1 impacts are realized.

2           81. The rezoned area includes approximately 240 acres within the boundaries of  
3 the Lewis and Clark Great Falls Portage National Historic Landmark. National Historic  
4 Landmarks are nationally significant places designated by the Secretary of Interior because  
5 they possess exceptional value in preserving the heritage of the United States. According to  
6 the National Park Service, "While there are many historic places across the nation, only a  
7 small number have meaning to all Americans - - these we call National Historic Landmarks."  
8 (Kathleen McMahon's "Analysis of Urquhart Rezoning," at p. 29.) As the FEIS (p. 4-85)  
9 notes, "The Proposed Action would adversely affect cultural resources from site preparation,  
10 staging, construction, maintenance, operations, and connected actions associated with power  
11 plant, water lines, transmission lines, rail supply lines." Also according to the FEIS (*Id.*), the  
12 "impact significance" on this cultural resource would be "of major magnitude" and  
13 "significantly adverse." Numerous public agencies submitted comments during the rezoning  
14 process, noting the significant adverse impacts that the proposal would have on the National  
15 Historic Landmark. According to the National Park Service, the major disruption of the  
16 landscape would threaten the eligibility for national landmark status by destroying the  
17 integrity of the site, which would be an irreplaceable loss to the national heritage of our  
18 country for the construction of a facility with an expected life span of 40 years. The  
19 significant negative impact to an important public resource (our cultural heritage) is another  
20 indicia that the proposed rezoning is "special legislation." *Greater Yellowstone Coalition*,  
21 ¶¶ 32-34.  
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1           82.    In sum, the rezoning will enure to the financial benefit of a single family, as  
2 the sole immediate beneficiaries of this zone change, with the utility company soon to follow.  
3  
4    Meanwhile, surrounding landowners, including plaintiffs herein, will have to watch as their  
5 lands are condemned, their agricultural operations are disrupted, their quality of life  
6 diminishes, and their property values decrease. In addition, an irreplaceable National  
7 Historic Landmark will suffer impacts “of major magnitude,” which would be an  
8 irreplaceable loss to the natural heritage of our country. The third prong of the spot zoning  
9 test is met.  
10

11           83.    The zone change approved by the Cascade County Commissioners in Final  
12 Resolution No. 08-22 constitutes illegal spot zoning, is in violation of Montana public policy  
13 and law, and should be declared void.  
14

15           **IV.    The Commissioners failed to consider relevant public comments and make**  
16           **findings of fact.**

17           84.    All paragraphs above are incorporated by this reference.

18           85.    Basic principles of administrative and zoning law require findings of fact in  
19 order to develop an adequate record which flushes out the pertinent facts upon which the  
20 County Commissioners’ decision is based in order to facilitate judicial review. *North 93*  
21 *Neighbors, Inc. v. Board of County Commissioners of Flathead County*, 2006 MT 132, 332  
22 *Mont. 327, 137 P.3d 557; Flathead Citizens for Quality Growth, Inc. v. Flathead County*  
23 *Board of Adjustment*, 2008 MT 1, 341 *Mont. 1, 175 P.3d 282.*  
24  
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26           86.    Neither the Staff Report prepared for the Planning Board nor the Agenda  
27 Action Reports prepared for the County Commissioners contained findings of fact.

1 Moreover, neither the Planning Board nor the County Commissioners adopted either the Staff  
2 Report, the Agenda Action Reports, or any findings of fact. The failure to adopt findings of  
3 fact is especially important when there is new evidence submitted at the public hearing that  
4 was not part of the Staff's analysis, and when there is conflicting testimony and conflicting  
5 reports. The Applicants themselves submitted new evidence at the January 15, 2008 public  
6 hearing. In addition, there were a number of significant issues raised by the opponents,  
7 including plaintiffs herein, during the public hearing before the County Commissioners that  
8 either conflicted with the reports prepared by Planning Staff or were not addressed in the  
9 Staff Reports. For instance, there is conflicting evidence on the mitigation of impacts on the  
10 Lewis and Clark National Historic Landmark District; there are conflicting statements  
11 regarding the construction of an overpass on Highwood Road; there is conflicting evidence  
12 regarding traffic impacts; there are conflicting statements regarding whether the land at issue  
13 is classified as prime farmland. Without findings of fact having been made, it is unknown  
14 what facts were relied on by the County Commissioners in making their decision to approve  
15 the proposed rezoning and to attach conditions thereto.  
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20 87. Under the zoning statutes (§§ 76-2-201, -205, MCA), zoning regulations  
21 (CCZR §§ 1, 14), the Montana Public Participation Act, case law, and general principles of  
22 administrative law applicable herein, the County Commissioners had an obligation to  
23 consider the public comments, and the issues raised through the public comments, and to  
24 evaluate such issues with the requirements of the zoning statutes, the Cascade County Zoning  
25 Regulations, and the Growth Policy, and to incorporate those comments into its decision-  
26  
27

1 making process. *North 93 Neighbors, Inc., supra.* The County Commissioners failed to  
2 fulfill this legal obligation in this proceeding.

3  
4 88. The Commissioners' decision to approve the rezoning is clearly unreasonable,  
5 an abuse of discretion, arbitrary and capricious, and should be reversed. *North 93 Neighbors;*  
6 *and Flathead Citizens for Quality Growth, Inc., supra.*

7 **V. The Commissioners Violated the Public's Right to Participate.**

8 89. All paragraphs above are incorporated by this reference.

9  
10 90. The Montana Public Participation Act states:

11 The legislature finds and declares pursuant to the mandate of Article II, section  
12 8, of the 1972 Montana constitution that legislative guidelines should be  
13 established to secure to the people of Montana their constitutional right to be  
14 afforded reasonable opportunity to participate in the operation of governmental  
agencies prior to the final decision of the agency.

15 § 2-3-101, MCA (emphasis added).

16 91. The Montana Public Participation Act further requires that:

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

21 § 2-3-111(1), MCA (emphasis added).

22 92. The "reasonable opportunity" to participate requires that the public be fairly  
23 apprised concerning the proposal on which the public agency is to make a decision.  
24 Sufficient factual detail must be provided to the public in order that the public have a  
25 reasonable opportunity to participate in the decision-making process in accordance with Art.  
26 II, § 8, of the Montana Constitution and §§ 2-3-101, 111. *Bryant v. Yellowstone County*

1 *Elem. School Dist.*, 2002 MT 264, 312 Mont. 257, 60 P.3d 381.

2 93. The letter from SME to the Cascade County Planning Department dated  
3  
4 January 9, 2008, and received by the Planning Department on January 11, 2008, contained  
5 conditions material to the rezoning application, which were not previously available to the  
6 public, the Planning Department, the Planning Board, or the County Commissioners. The  
7 first time that plaintiffs learned of the SME letter and the proposed conditions of rezoning  
8 was during the course of the January 15, 2008 public hearing before the County  
9 Commissioners on the proposed rezoning. The first time that plaintiffs heard the testimony  
10 and documentation submitted by SME in support of the conditions of rezoning was also at  
11 the time of the January 15, 2008 public hearing. Copies of the documents were not provided  
12 to the public or plaintiffs herein at the time of the January 15 public hearing. The  
13 documentation submitted by SME at that time included a traffic impact study, a baseline  
14 noise study, a review of scientific studies concerning coal-fired power plants and children's  
15 health, a report on whether organic farming will be harmed by HGS emissions, material on  
16 the effects of the Colstrip power plant on range resources and stack emissions, a property  
17 appraisal report, and a landscape plan. All of these reports contained technical information  
18 that would require a significant amount of time to review and prepare informed responses.  
19  
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22 94. The public hearing was closed at the end of the January 15, 2008 public  
23 hearing. (Transcript of January 15, 2008 public hearing at p. 360.) The reports submitted  
24 by SME at the January 15, 2008 public hearing contained serious flaws and errors in analysis  
25 which would have been discovered and rebutted if the reports had been made available to the  
26  
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1 plaintiffs prior to the January 15, 2008, public hearing. As a result of being denied prior  
2 access to these documents, the plaintiffs were denied the opportunity to analyze and rebut the  
3 reports, and were forced to operate under a distorted perspective at the public hearing,  
4 thereby depriving the plaintiffs herein of their right to meaningfully participate in the  
5 decision-making process in violation of §§ 2-3-111, MCA, and Art. II, § 8, Mont. Const.  
6

7 95. In addition, the failure of the Cascade County Planning staff, Planning Board,  
8 and Board of County Commissioners, to analyze and review the application for the zone  
9 change, and the last minute conditions set forth in SME's January 9, 2008 letter, in  
10 accordance with criteria and procedures required by Montana law deprived the plaintiffs  
11 herein of their right to meaningfully participate in the decision-making process in violation  
12 of §§ 2-3-111, MCA, and Art. II, § 8, Mont. Const.  
13  
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15 96. The Cascade County Commissioners' March 11, 2008, decision to approve the  
16 zone change, as reflected in Final Resolution 08-22 should be set aside by the Court pursuant  
17 to § 2-3-114, MCA.  
18

### 19 **Writ of Mandamus**

20 97. All paragraphs above are incorporated by this reference.

21 98. The County Commissioners violated clear legal duties under Montana's zoning  
22 statutes and Cascade County Zoning Regulations, and the Montana Public Participation Act,  
23 §§ 2-3-101, *et seq.*, MCA, and Art. II, § 8 of the Montana Constitution. Plaintiffs have no  
24 plain, speedy and adequate remedy in the ordinary course of law in that the proposed coal-  
25 fired power plant is presently moving forward based on the Commissioners' March 11, 2008,  
26  
27

1 decision. Pursuant to the provisions of §§ 27-26-101, *et seq.*, MCA, a peremptory writ of  
2 mandamus should issue directing the Board of County Commissioners to consider the  
3 application of the proposed rezoning of the Urquharts' land in accordance with Montana law.  
4

### 5 **Writ of Review**

6 99. All paragraphs above are incorporated by this reference.

7  
8 100. The Board of County Commissioners has failed to regularly pursue its authority  
9 under Montana's zoning laws and Cascade County Zoning Regulations and Montana's public  
10 participation laws. Plaintiffs have no appeal and there is no plain, speedy and adequate  
11 remedy in that the proposed coal-fired power plant development is presently moving forward  
12 based on the Commissioners' March 11, 2008, decision. A writ of review should issue  
13 directing the Board of County Commissioners to certify to the Court the record of the  
14 proceedings complained of so that the legality of same may be reviewed by the Court,  
15 pursuant to the provisions of §§ 27-25-101, *et seq.*, MCA.  
16

### 17 **Declaratory Judgment**

18  
19 101. All paragraphs above are incorporated by this reference.

20 102. A controversy has arisen between plaintiffs and the Board of County  
21 Commissioners regarding the rights under and construction of the statutes, regulations, and  
22 resolutions referenced herein and implicated by passage of Final Resolution 08-22 on March  
23 11, 2008. Declaratory judgment is appropriate, as is all other relief requested.  
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1 **PRAYER FOR RELIEF**

2 WHEREFORE, the plaintiffs pray for relief against the defendants as follows:

3 1. For an Order declaring void *ab initio* the Board of County Commissioners'  
4 March 11, 2008, approval of Final Resolution 08-22 approving the Urquharts' rezoning  
5 request.  
6

7 2. For peremptory writ of mandamus directing the Board of County  
8 Commissioners to withdraw Final Resolution 08-22 approving the Urquharts' rezoning  
9 request, granted on March 11, 2008, and directing the Board of County Commissioners to  
10 conduct any further proceedings in regards to the proposed rezoning request in accord with  
11 the provisions of the Montana zoning statutes and Cascade County Zoning Regulations; and  
12 directing the Board of County Commissioners to afford the plaintiffs and the public  
13 reasonable opportunity to participate in the deliberations of the Board of County  
14 Commissioners prior to the Board of County Commissioners making a final decision on the  
15 Urquharts' rezoning application.  
16  
17

18 3. For a writ of review directing the Board of County Commissioners to certify  
19 to the Court, at a specified time and place, the record of the proceedings complained of so  
20 that the legality of same may be reviewed by the Court.  
21

22 4. For a determination and declaration that: (1) the Commissioners' decision to  
23 approve the Urquharts' rezoning request required that the decision be based upon the twelve  
24 factors set forth in the referenced statute, regulation, and case law, and having failed to do  
25 so in reviewing and approving the Urquharts' rezoning request, the Commissioners' action  
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1 is null and void; (2) pursuant to § 76-2-205, MCA, and CCZR § 14, the Commissioners were  
2 required to follow procedures in reviewing and approving the Urquharts' rezoning request,  
3 and the Commissioners' failure to follow the mandatory procedures renders void the  
4 Commissioners' purported approval of the rezoning request; (3) that "conditional zoning"  
5 is not recognized by, nor standards provided for in the Cascade County Zoning Regulations  
6 or the zoning statutes, thereby rendering void the Commissioners' adoption of Final  
7 Resolution 08-22; (4) the Commissioners' approval of the Urquharts' rezoning request  
8 constitutes illegal spot zoning, thereby rendering void the Commissioners' adoption of Final  
9 Resolution 08-22; (5) the Board of County Commissioners deprived the plaintiffs herein of  
10 their right to meaningfully participate in the decision-making process in violation of the  
11 Montana Public Participation Act, §§ 2-3-101, *et seq.*, MCA, and Art. II, § 8 of the Montana  
12 Constitution; and (6) pursuant to §§ 76-2-201, -205, MCA, CCZR §§ 1, 14, and the Montana  
13 Public Participation Act, and applicable case law, the Commissioners had an obligation to  
14 consider public comments and the issues raised therein and to incorporate and address those  
15 issues in its decision-making process, and to make appropriate findings of fact, and having  
16 failed to do so the Commissioners' decision is clearly unreasonable, an abuse of discretion,  
17 arbitrary and capricious, and void.  
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22           5.     For reasonable attorney fees and litigation expenses as damages under  
23 mandamus, § 27-6-402, MCA; under the Declaratory Judgment Act, § 27-9-313, MCA;  
24 under the Private Attorney theory; and as otherwise provided by law.  
25

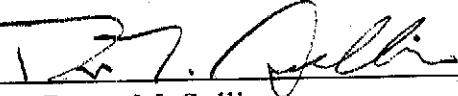
26           6.     For costs of suit.  
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7. For such further relief as the Court deems equitable and just.

Dated this 9<sup>th</sup> day of April, 2008.

McGARVEY, HEBERLING, SULLIVAN  
& McGARVEY, P.C.  
BEST LAW OFFICES, P.C.

By:   
Roger M. Sullivan