

Lawsuit Against L & C County for Regulatory Taking of Only Rural Property: On 11/19/2020 L C County Board of County Commissioners voted 3-0 to formally adopt Zoning Regulations Helena Valley.

DATE: November 30, 2020, by John W. Herrin (406-202-0528)

General statements of fact:

- 1) The Zoning Regulations Helena Valley targeted roughly 150,000 acres of private property in the Helena Valley Planning Area (HVPA) with unfair regulatory controls.
- 2) The Commissioners (BoCC)/planning staff discriminated against rural property owners by ignoring higher-growth sub districts (suburban and urban) in Helena and East Helena. Illegal Constitutional taking claims, and violations of state regulations equal protection and administrative fairness.
- 3) The planning staff and BoCC refused to provide current growth trends, social-economic impact analyses, or scientific proof that all 150,000 acres of rural property had to be regulated. They determined a density of ten acres or greater must be imposed to protect regional groundwater, reduce impact to deficient rural roads, and protect citizens from wildland fire.
- 4) The County's only written document repeatedly cited as justification for the harsh rural property restrictions is the severely biased and unprofessional 2015 Updated Growth Policy (HVPA). But State MCA regulations, require the County to outdate a GP every 5 years if the district undergoes major changes or implements major new Zoning regulations. In Court, the County will not be able to defend their ignoring Citizens repeated request to do a Social/economic and regulatory impact assessment that proves they have the regulatory authority to implement these Zoning Regulations.
- 5) State and County subdivision regulations already reduced the supply of buildable rural land and increased the pace of development in higher density subdivision closer to Helena and East Helena (Note: > 1000 new building lots approved in 2018-2019).
- 6) The County made no effort to justify added regulatory control through Zoning given the 3 key health safety issues are already adequately addressed under State and County Subdivision Regulations:
 - Since 2014 District Court lawsuit ruling limits new subdivision to less than 13 lots or purchase existing water rights. Also DNRC/DEQ/County Sub Regs require detailed site-specific aquifer analysis proving adequate water supply and no-adverse impacts to existing landowners.
 - L & C Sub Regs force subdivisions to pay engineering designs and pro-rated share cost to upgrade off-site access- roads to county standards. Given the fact that that County Sub Regs target only new developments to make these costly payments vacates the county's right to target rural property for zoning restrictions. County has >\$23Million road maintenance deficit.
 - County Sub Regs require only new subdivisions to pay the cost to install high-flow water supply systems for fire suppression and local fire district must approve the fire mitigation plans.
- 6) Although there are localized issues for all three concerns, the fact remains – it is illegal for Lewis and Clark County or State permit agencies (MDEQ & DNRC) to approve new subdivisions that cause major unmitigated health and safety impacts. If regulators did violate the law they could be sued.
- 7) SO the County's justifications do not make technical, administrative or legal sense. The County's legally required to prove their claims of unacceptable cumulative health and safety impacts and

justification for taking of private property rights across the entire and every blade of grass on 150,000 acres of private property.

- 8) We will also demonstrate on court, the county ignore the well- reasoned 1800 plus pages of written testimony and hundreds of oral testimony wherein over 90% of these citizen opinions were in strong opposition to these targeted Zoning Regulations.
- 9) State Regs & Mt litigation Case Law, require the County document S/E Impacts:
 - At August 4 Planning Board hearing, Chairman Gregory Thomas presented a four page motion to recommend the BoCC table the Zoning Regulations until County completed a peer-reviewed Social Economic Impact assessment – or the county would be sued.
 - This Zoning proposal will have a significant impact on real estate sales in the community, slowing rural property sales and increase the desirability of underdeveloped property within Suburban and urban areas. RESULT: Depressed rural property values and increased value of the Suburban and Urban areas. This is classic **DISCRIMINATION** and illegal “Regulatory Taking”.
 - Zoning will reduce supply of lower cost building lots & up costs for all land and future housing.
 - Average home sales are greater than \$300,000. Zone Regs will harm affordable housing.
 - Skyrocketing RE values unfairly harm younger & lower income households, forcing them out of state or into un-zoned areas (e.g. Jefferson & Boardwater Co. or Silver City/Canyon Creek).
 - Starting Dec. 2019, the County Zoning plan has damaged many Rural RE transactions. Harming surveyors, realtors, builders, trades workers/businesses, and landowners etc. etc. DAMAGES.
- 12) The county has not proven “legal standing” to take property rights for the “Greater Good” as stated in Montana Constitutional and Administrative law.
- 13) The commissioners have violated the right to free speech, the right to testify, and the right to know and participate under Article II, Section 8 and 9 of the Montana Constitution.
- 14) The county’s Zoning Regulations limits the following property rights:
 - 10-acre average lot-size limit (6/1/2022, unless BRibbon Advisory Panel and the BoCC changed).
 - 1 primary use (e.g. residential or agricultural) & 1 subordinate accessory building (smaller). Illegal taking of State Regs Rent/Lease income (>5 buildings)/parcel. State DEQ reviews.
 - Maximum building height is 35 feet, which limits footprint expansion.
 - Parcels > 10 acres = 25’ property-line setback. Lots < 10 acres = 10-foot setbacks (State Sub Std).
 - Impose County Public Works Street and parking lot standards to property. (2 parking spots/home; daycare 1 space/2 employee + 2 parking+1/8 clients; business 4 spaces/1000 sq. ft. floor space; B and B 1 space/rent room+2 for on-site residents; etc.
 - Lighting standards: exterior light cutoffs; commercial 35 feet max downward full cutout.
- 16) County defined boundary lines, but Rural to Suburban illogically cuts land parcels into two Subzones. The county changed Rural Boundary on the Northern limits to exclude cutting lands, but did not do the same for southern boundary. Illegal arbitrary and capricious taking of property → Borders lack factual design, location, and placement (e.g., platted land split in two sub districts)
- 17) 2018 US Supreme Court 9-0 endangered frog case → was administrative “Regulatory Taking”!!

November 19, 2020 Lewis & Clark County Adopted

“Zoning Regulations Helena Valley”

- I. Geographic Scope and County Major Property Rights and Land-use Restriction Components of the Helena Valley Planning Area (HVPA):
 - a. Helena Valley PA covers the South Part of L & C Co within the Lake Helena Watershed, including
 - i. Ten Mile Drainage (e.g. Remini to Fletcher Pass to Helena City limits and Lake Helena).
 - ii. Lower Portion Silver Creek, Starting just short of Silver City on the NW to Lake Helena.
 - iii. Scratch Gravel Hills and over the top of the North Hills again to Lake Helena.
 - iv. E portion starts at North Hills -Hauser Lake & goes to the to Broadwater & J CO Lines.
 - b. Zoning Regs illegally only target Rural Property & exclude Valley Bottom Suburban & Urban land.
 - c. Only Real Authors of Map & Regulations Was County Community Development & Planning (Staff) with direction from the 3 Board of County Commissioners (BoCC).
 - d. Planning Staff sponsored 4 public listening Sessions (12/18/19, 12/19/19, 1/23/20, 1/28/20)
 - e. BoCC Held two Preliminary hearings on Helena Valley Zoning Regs (2/18/20 & 2/25/20).
 - f. Consolidated Plan Board held 5 hearings (June 16 & 25, July 17 & 21 with final 5-2 vote August 4. CPB did remove Stream Setback restrictions from Zoning for Remini, but remain in Sub. Regs.
 - g. BoCC held three public hearing (9/23/20, 9/30/20 & 10/6/20) & Final 3-0 Approval on 11/19/20.
 - h. Single Major Change at final 10/6/20 BoCC was to defer implementing 10-acre Average lot Size Density controls until further study completed June 1, 2022.
 - i. Also at 11/19/20 BoCC hearing they voted 3-0 to create a handpicked 12 person B-Ribbon Advisory Panel to revisit 10-acre average lot-size restrictions plus develop Zone Plans for Suburban and Urban Residential Mix-use Districts.
- ii. Summary of Property Rights, Business use and Building Code aspects of 11/19/20 Zoning Regulations.
 - a. Violations (pg. 1-6) 30-day notice to correct, then **Penalties** MCA 76-2-211 \$500/day or 6 M Jail.
 - b. Section 7 RURAL RESIDENTIAL M-U DISTRICT (RR) Pg. 7-2 Intent.

To provide for lower density residential development, along with the opportunity for continued agricultural activities ...Also, on a limited basis, to provide areas for non-residential uses in balance with residential development and ag – as an integral part of the community providing essential services & employment opportunities. Non-residential development ... should be permitted in compact centers rather than extended strips of development along roadways to provide orderly development (Orderly?), minimize traffic congestion (Real Traffic Congestion is only in Helena), and to provide for safe pedestrian traffic (Rural Road --No real Peds).
 - c. 701 (pg .7-2) **Urban development within this district is strongly discouraged**. Expansion of urban development into rural areas is a matter of public concern because of the challenges in satisfactorily addressing the impacts associated with the five key issues identified in the Growth Policy. The key issues (fire, water, wastewater, roads, & flooding) along with the potential for conflicts between ag., and urban activities support the lower densities levels of the RR district. Development or use of land in this district is permitted only in accordance with the provisions herein.
 - d. 702 (pg. 7-2) **Principal Uses**. Only one (1) principal use is allowed on each **parcel**. The following principal uses are allowed in the RR district (14 uses mostly forestry, ag, residential, churches). (Legal Note: Intent to restrict landowners future uses – forcing each parcel to have only one primary use and then only the 14 designated uses the county likes –

otherwise Conditional Uses kick in. County Plan is to supersede State Law – Rent or Lease passed because of L & C County had these types of restrictions)

- e. 703 (pg. 7-3) **Accessory Uses.** Each permitted accessory use shall be customarily incidental to the principal use established on the same parcel; be subordinate to and serve such principal use (e.g. residential or church or ag); be subordinate in area, extent, and purpose to such principal use; and contribute to the comfort, convenience, or necessity of users of such principal use (Legal Issues here – the leaves the County in control without needed rational for taking of property rights and is arbitrary & dictatorially capricious undue regulation)
- f. 704 (pg. 7-3) **Conditional Uses.** The following uses are permitted, upon approval of the Consolidated Use Permit (CUP) by the BoCC, in accordance with section 14... Listing 49 business designations plus 704.39.01 multiple -Dwelling Unit Residential per parcel.
- g. 705 (pg. 7-5) **Special Exception Uses.** The following uses are allowed to an established principal use, an accessory use, or conditional uses – (e.g. Ag, Comm Residential Facility, Day-care, forestry, Horticulture, Silviculture, Telecon Facility).
- h. 706 **Minimum Lot Area** (pg. 7-6) – Shall become effective and in full force and effect June 1, 2022.
 - i. Minimum parcel size shall be ten (10) Acres. However, in order to permit creative and environmentally sensitive site design, smaller parcel sizes maybe permitted through the use of Cluster Design as detailed below.
 - ii. Cluster Lot Design (see 706.01 pg. 7-6). {{{JH Note: very bad idea and great legal challenge given arbitrary, capricious takings classic arguments – if can allow tighter density in one portion of a landholding, then why can't the rest of the land be developed a similar densities. The County has no logical way around the fact that they just want to promote and place great value of open space. But highest and best use would counter this as a massive waste of valuable resources. It should not be dictated, but could be allowed as a developers/landowner design choice ??

Arbitrary Regulation – why allow higher density housing with effective minimum size parcels allowed under the Administrative Codes of Montana (ARM) adopted by Mt. Dept. Environmental Quality under Title 76, Chapter 4, MCA, -- but then the County written claim is the purpose of this sections is to encourage alternative design techniques that efficiently [JH Note Reality Check –wasting valuable land bad planning principals] , make use of land and water resources; protect environmentally sensitive areas, natural features and soils of agricultural importance [JH Note: the most productive agricultural land is the irrigated valley bottom lands largely located out-side the County Targeted Rural lands and lie mostly in the unregulated and ignored Suburban district] }}}}

iii.

- i. Pg 119 – App. B Citizen Initiated (Part 1) Zones are not covered by 2020 Part II Zone Plan. {{{ JH WHY only target Rural Property? Discrimination, targeting, taking & Arbitrary legal claims.}}}

MCA 76-1-605 (2) (a) reads A governing body may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.

{{{ Jh Comment; WOW. I think I just found a big problem for the L & C County's 2020 Zoning Regulations Helena Valley. The only document they have really cited repeatedly as the true basis for targeting the rural property only in this Zoning proposal is the 2025 Updated Growth policy. So legal challenge # 1. The current BoCC and Planning Staff repeatedly repeat false claims from the 2015 GP that uncontrolled rural growth for decades has cause widespread cumulative impacts to key resources like groundwater supply water quality, unmitigated wildland fire risks, and severe impacts to rural roads resulting in unacceptable health and safety failures. However the county claims are not supported by true facts and is not surprisingly that same fabricated house of cards game that the county played and lost in the 2006-2007 Zoning filed District Court hearings and subsequent political fallout

But the Most critical failing of the County using the fatally flawed, unprofessional, and outdated 2015 growth policy – is the County claims of a widespread critical problems with Subdivision and County approved property creation actions is the fact that it is against state law for the county to approve subdivision is the all major negative impacts are not adequately address and measures implemented to mitigate impacts to low and legally permissible standards.

The County is really pointing their fingers at themselves and State Agencies (DEQ and DNRC) for illegally approving land development administrative approvals not properly mitigating impacts. This statement applies to all three key concern issues. Regarding unmitigated impacts of continued rural development, the county has not proven they are widespread areas the require lot size densities anywhere near the County Zoning regulations require of average density of >10-acres.

State and county Subdivision regulations require all subdivision proposals to develop wildland fire mitigation plans that must be approved by the County Rural Fire Districts and ultimately the BoCC So how can the county now justify the 2020 Zoning Regulations 10-acre average lot size density and other land-use controls based on unmitigated wildland fire hazards. The Zoning regulations also only target the new landowner, while ignoring the wildland hazard of existing homes and development across the entire community. It is should be noted one of the worst cumulative wildland fire hazard prone areas are areas not covered under the 2020 Zoning plans which willfully, maliciously and purposefully left the urban, Suburban and Part I Zoned areas that all have considerable amount of heavily timbered areas that present and must higher risk to human life, health and property than most of the prime development rural grassland areas.

As such, the 2020 Zoning Regulations for the Helena Valley is discriminatory against rural property and not addressing the overall picture like wildland fire planning in a modern and professional planning regulatory framework.

As far as rural roads being inadequate, the county targeting only the new guy with severe lot-size and other landuse restrictions is illegal targeting especially given the fact that the only segment of the community that is paying way above the minimum for improving rural roads is the

in groundwater – a report Judge Sherlock could not overrule the County Staff despite Mr. Herrin’s factual scientific testimony clearly showing the county conclusions could not be supported based on the actual raw water quality sampling data and trend analysis.

However, 9 months later Mr. Herrin court testimony was proven to be the correct version of conditions when L & C County PhD Hydrogeologist James Sweirc produced a more detailed and accurate Water Quality assessment report. Professor Sweirc’s factual report destroyed the county’s fabricated report justifying the need for Level II wastewater treatment systems. As a result of this clear unethical behavior of L & C County Administrators trying to introduce their own will, bias and unethical moral compass, resulted in several very embarrassing newspaper and TV reporting clearly revealing the County got caught lying to hurt real people just to advance their anti-rural growth agenda. In addition, Commissioner Ed Tinsley lost reelection to political new-comer and well respect engineering & construction business owner Derek Brown.}}

2.7 Freedom of speech. No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible ..

{{{ Note: John Herrin right to address the Planning Board and the BoCC has repeatedly been denied and he has been unnecessarily harassed, intimidated, bullied and embarrassed plus totally blocked from giving crucial public testimony – specifically by PB Chairman Gregory Thomas (June 17 interrupted for over 3 minutes and July 21 JH was totally blocked from giving any testimony) and by BoCC chairperson Susan Good Geise at multiple public hearings where important factual information on the pending Zoning proposal was being presented by Mr. Herrin (e.g. February 25, September 3, September 8, September 23, October 6, and November 19, 2020). Other people giving public testimony have also been interrupted by both Mr. Thomas and Mrs. Good-Geise.

2.8 Right to Participate. To public has the right to expect government agencies to afford such reasonable opportunity for citizens participation in the operation of the agencies prior to the final decision as may be provide by law. {{{See JH comment bottom 2.7}}}

2.9 Right to know. No person shall be deprived of the right to examine documents or to observe the deliberation of all public bodies and agencies of state government and its subdivisions ...

2.18 Due process of law. No person shall be deprived of life, liberty, or property without due process of law.

2.29 Eminent domain. Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss... In the event of litigation, just compensation shall include necessary expense of litigation to be awarded by the court when private property owner prevails.

Your Turn IR

County Zoning Plan Will Ruin Tri-county Economy Without Justification

Tuesday June 16 from 6-8 PM the Consolidated Planning Board will review the 2020 Zoning proposal and you are encouraged to attend in person at the Civic Center or via Zoom.

L & C County planning staff & Commissioners are once again attempting to slow rural property development via costly regulatory requirements. The County's 2020 Zoning plan would force all rural property owners in the Helena Valley Planning Area (HVPA) to give up future development rights, including minor divisions or family transfers unless all parcels exceed the 10-acre minimum lot sizes (See L & C-CommD&P-Zoning website). Roughly 90% of buildable land in the HVPA would be impacted totally over 100,000 acres.

Rural property Zoning reinstates L & C's 1-development right per parcel, State legislation overturned for being too heavy-handed and restrictive. Only Rural Zoning restrictions preclude building a guesthouses, rental home or small business with a home. Just stupid and regressive – precluding home-based business and income forcing more travel.

This is especially bad timing given hard economic times that will persist for years. Such restrictions will drive people wanting smaller tracts of land to Broadwater, Jefferson and to Silver City etc. – increasing long-distance commutes not reducing it.

The 2020 Zoning also would supersede the 20-plus citizen initiated zoning districts that lie within the HVPA.

If the projected 850 new homes over the next 15 years are built as projected, then none of the 5 Key concerns issues will exceed any meaningful natural environment or human safety threshold. That is a fact and not wishful thinking and I will go toe to toe with any challenger.

For the past 15 years I and many others have been forced to sue the county for illegal county actions resulting in the County taxpayers having to pay damage claims and legal costs of \$8-10M. Starting in 2005 L & C County manager implemented multiple subdivision and zoning actions designed to dramatically increase cost of rural property development, resulting in over 20 lawsuits documenting repeated illegal, biased and unethical administrative targeting of rural property development.

This Rural Zoning takings is not based on Science or a vote of the citizens, but merely based on the bias and opinions of a select few top County managers and elected County Commissioners.

The County most likely will be sued by many different trade organizations, large rural landowner and normal citizen for illegally taking property rights without compensation – in essence a conservation easement without any compensation.

Zoning will depress rural property values and unduly enrich urban/fringe property plus it will drive more residents into rentals and away from home ownership. This will negatively impact already stressed small businesses; builders, realtor, skilled trades, landowners, ranchers and farmers etc. This will lower county tax income & depress economic growth.

Unfortunately, the only written justification for the 2020 Zoning proposal is the biased and unscientific County's 2015 Growth Policy documents. The 2015 GP largely based on citizen survey opinion poll

responses with a heavy dose of County manipulated and biased conclusions that ignore decades of groundwater research, County 2004 & 2014 Transportation plans, and other science-based facts.

One clear fact: existing State of Montana and L & C Subdivision regulations already require applicants to fully address and mitigate negative impacts to groundwater quality & supply, wildland fire, flooding and roads. In fact, L & C County subdivision regulations are already the most-costly, overly anti-rural growth County regulations in the State.

How have cities like -- Kalispell, Butte, Missoula, Billings and Bozeman-Belgrade etc. and all other cities across the US -- managing growth without targeting rural growth? If this Zoning proposal is challenged in Court, County managers will have to justify why they have a proven 15-plus year record of targeting only rural development for costly subdivision regulations, and zoning restrictions and not analyzing alternatives.

I submitted 3 documents to the county; overview & legal challenge summary, social-economic impacts, and 15-page scientific analysis of 5 Key County's claimed concerns -- proving the County has no real legal basis to limit rural growth using density restrictions and severe landuse restrictions, instead of fixing grossly deficient county roads and upgrading transportation networks etc. Many public commenters have stated – this is bad management top down driven with no regard for the landowners rights that will be challenged.

To date, the County refuses to send out mailer to all impacted rural landowners – violating their Mt. constitutional rights to know and comment. The County also refuses to allow impacted landowners to vote as they would be afforded under Type II Citizen initiated Zoning. They have purposefully avoided adequately informing the public at every turn since announcing the plan in December 2019.

The real truth is –The County has not produced any current and factually based written justification proving Density restriction trump private property ownership rights and justify the taking of \$100 millions of dollars in property value at the stroke of a pen.

Somehow the County Commissioner believe rural property owners will willingly give up their life investments for the “Greater Good”. The Greater Good the county is not counting on is lawsuits that could quickly and easily top the \$10 million paid out due to past county transgressions.

In fact, the US specifically states “Amendment 5 ... nor shall private property be taken for public use, without just compensation” and Amendment XIV Section 1 “.. Nor shall any state deprive any person of life liberty or property without due process of law.” And the Mt Constitution Article 2. Sec 18 “...State, Counties.... shall have no immunity from suit for injury to a person or property.”

The County staff has refused to recognize the rural property rights takings actions would damage anyone, and the staff uses terms like “Zoning generally increase predictability and stabilizes or increase property values “ but these feel good terms are hollow and are inadequate to justify the means to an end.

Respectfully submitted,

John W. Herrin
2855 Sundown Road
Helena, Mt 59602

COUNTY'S TOP DOWN ZONING IS NOT GOOD FOR LANDOWNERS

Comments by Jerry Hamlin 1//23/2020

First of all, let me state that zoning can sometimes be helpful and we are not against zoning per se. Zoning is merely a tool. It has not always lived up to its promise and is often times misused. Conventional zoning, by itself, will almost never create a memorable community.

In this case, the county's new zoning proposal is not being used as a constructive force for community good and it does not foster good design or enhance a sense of place.

This new County Zoning Proposal is supposed to be addressing the five cornerstones of development:

- 1) Are there adequate roads in the area to service heavier density
- 2) Is there adequate water in the area to supply the needs of development
- 3) Can wastewater be treated and approved by the Dept. of Environmental Quality and other regulatory bodies
- 4) Is the property in a Floodplain and can it be mitigated effectively
- 5) Does the property have adequate Fire Protection and can it be efficiently serviced with police and other safety personnel.

Please notice that all of the items above **are already addressed** and subject to review in the County Subdivision Regulations; they must be reviewed and approved by the County Government, they must be reviewed and approved by the:

- Department of Natural Resources,
- Mt Dept. of Environmental Quality;
- Montana Department of Transportation, and
- In some cases, must be reviewed by several different Federal agencies.
- Fire District operating in the area and local governments.

Simply put, there are already existing, heavily enforced regulations already in effect to determine what you can and can't do with your land. Is zoning a curse to a landowner or is it a positive force for community good. We believe it is a curse for the following reasons and urge you to protest the creation of a county wide zoning district because of the following:



- 1) **A landowner loses control** of his God given right to own and use his property when zoning is implemented. In this case, the county has drawn arbitrary lines and designated different colors for each parcel of land in the county. The land next to the incorporated city limits can be developed and those outside that area will be designated as low-density development areas (160 ac minimum size tract -4 units per 160 ac.)
- 2) **A landowner's property values will be decreased significantly** when the county arbitrarily draws a line around his parcel and declares there can be only 4 units of housing on 160 ac. regardless of the fact that he meets all of the requirements for more density. This is not right and it is a "takings" of an individual's property.
- 3) **Zoning creates artificial scarcity of lots and the price of land skyrockets as a result.** It is a well known fact that land cost is higher in places where laws governing land use and zoning are stricter.
- 4) **Zoning is proscriptive in nature and it is not good** for shaping the future or for improving the quality of new development. Zoning **tries** to prevent bad things from happening but forgets to lay out a vision of how things should be.
- 5) **Zoning requires individual landowners to yield their private property right to the public.** Once again, this loss of control is tantamount to a "takings" of an individual's private property right.
- 6) **Zoning is detrimental to Builders and others who had the foresight to buy land for future development and, as a result of zoning, now can not develop their as originally intended.** Is it fair to penalize a Builder who had a vision and purchased land for development in the future to have that right taken away from him because the government has decided he shouldn't be able to develop it?
- 7) **County initiated Zoning forces all newly created lots to be 10, 20 or 160** ac in size and forces all new development into a "donut" around the city of Helena, restricts a person's right to choose where he lives and it drive up the lot cost.
- 8) **County initiated zoning is a massive overage by county government with no real benefit to the landowner.** There are already rules in place governing the development in the county and state. This zoning is not needed and is a **duplication of the regulations** already in force.

9) Top Down zoning (that which is initiated by the county government) is almost always bad. If citizens want zoning in an area, they should request it. Zoning should come from the people to the government-not the other way around!

In summary, is this “one size fits all” government initiated zoning for all of the county, good for the landowners in Lewis and Clark County? I say the answer is a resounding NO! It should not be initiated by the government, and it is detrimental to landowners. As found in an article on the front page of the 1-1220 Independent Record, “people are moving to Helena because they realize they can’t afford to live in Bozeman. Land availability is the largest single issue facing the Helena housing market”. (Moore appraisal Services)

At a time when builders have been struggling for years to find available land to build on, This is the absolute worst time to have the county come along with such a restrictive, costly, time consuming zoning proposal that no one wants, it does not foster good design or enhance a sense of place. It penalizes landowners who try to provide land for their children and takes their right to develop the land that might have been in the family for years. I urge you to oppose this new “top down” zoning proposal put forth by your government to your detriment.

Date: June 8, 2021

To: Peter Italiano/Greg McNally/ZAP

From John W. Herrin

RE: November 19, 2020 L & C County BoCC Formal Approve of Resolution to Create Zoning Regulations for the Helena Valley Planning Area – Enclosed Please find a Copy of December 18, 2020 First Judicial Court Lawsuit filed by impacted landowners and business owners challenging entire Zoning Regulations or Portions Deemed Illegal in Court Hearings.

Attached please find a copy of the Court filed legal challenge to the L & C County Board of County Commissioners (BoCC) approved November 19, 2020 approved resolution to formally adopt the Zoning Regulations for the Helena Valley Planning Area.

Copies of this Complaint will be submitted to the BoCC and Andy Hunthausen and Jim McCormick on this same day. Former Commissioner Susan Good Geise will be served via County Sheriff's officers as soon as the officers are able to make contact with Ms. Good Geise.

Please make copies available to all members of the County Zoning Advisory Panel member and other involved county officials as well as the hired facilitator.

I have been working on revising the filed copy to remove the spelling errors and reorganize the format, but other life issue have delayed the final revisions too long, so I have decided that the original version was good enough to start the formal legal challenge process and therefore it is what it is.

Again, I feel the entire ZAP committee format and the way each subject matter has been presented (e.g. wildland fire, Transportation, groundwater supply etc.) sessions have presented the ZAP committee with a lot of background information, but produced very little concrete progress towards defining real problems and how these problems will be solved by the ZAP committee work plans.

All topics should have been focused on problems present in each of the three HVPA subzones (e.g. Rural, Transitional and Urban) with the key objective is to have discussions with presenting experts for ways the ZAP committee could outline solutions for past, current and future problems that zoning regulations could solve or move the focus towards legally valid administrative and scientific regulations that are not addressed in current County and State Subdivision regulations.

Traditional zoning regulations focus on defining commercial, mixed use and residential development design and engineering requirements based in past, present and future growth trends. But the County has not updated the 2014-2015 Growth Policy as is required when major growth patterns change as they have in the HVPA over these past 6-7 years and in fact much of the growth data was based in the 2010 census which is over 10 years old now.

Plus as indicated, many trained professional and real estate specialist have repeatedly commented that the 2014-2015 Growth Policy is severely biased against rural property wherein

the authors only solution for rural property was to advocate density controls only on rural property as a means to control growth and force more new development into or near East Helena and Helena. As the legal challenge documents detail, the targeting of only rural property for harsh landuse controls that are not forced onto the Transitional and Urban lands is discriminatory and violated both Montana Administrative regulations, and the US and Montana constitutions.

The County has also steadfastly refused to address the changing growth patterns from 2014 to present in large part driven by the County's anti-rural property Zoning Regulations plus the changing legal requirements limiting groundwater exemption to about 13-lots -- based on legal ruling against DNRC -- that have markedly changed the subdivision development patterns across the entire state.

The County was repeatedly asked to provide growth pattern development information in order to prove that there have been major changes from the pre-2014 growth patterns when the HVPA saw rather even distribution of growth between the three HVPA subzones. The most recent trends appear to show extreme growth in the Transitional areas, with many medium to large scale urban density development occurring with connections to city water and sewer the dominate development pattern.

Which is exactly what the 2015 Growth Policy and the County Planning Staff and BoCC have been attempting to force to happen with the regressive subdivision and zoning regulations. How much a factor the County's subdivision regulations (e.g. fire suppression and off-site road costly regulations) and the new 2020 HVPA Zoning Regulations have factored into this trend has never been addressed, but I and other are convinced the County's regulations have had a major influence on growth patterns in the HVPA.

Case in point -- no major subdivisions will occur that feed into the deficient and underfunded county roads -- such as Remini Road, Priest Pass, Lake Helena Drive, Floweree Lane and Birdseye road -- because of the costs to any development for cost sharing to upgrade these underfunded county roads.

Many citizen commenting on the County's 2020 Zoning Proposal requested that the county produce not only growth trend information, but also address that severe underfunding of county roads and EMS/fire etc. and the need for taxpayer funding solutions as is being done in other major cities across the US and in Montana.

The County is in essence blaming rural development as the source of all problems, when in fact the problem is the lack of creative and forward thinking county planning and funding solutions. The County needs to educate and inform the public about the increasing problems of overtaxing and lower volunteer recruitments for EMS and fire services, and County road improvement funding. The County is barred from lobbying citizens for mill-levy funding, but educational and organization outreach with the able and concerted effort of development and real estate business and people would go a long way towards solving these problems instead of playing the blame

game and illegally targeting and restricting rural development that is unnecessarily driving up all real estate costs across the Tri-county area.

These issues have been repeatedly been presented in written and verbal comments, but largely ignored by L & C County at all levels and spanning at least 16 years.

I have attempted to open all the L & C County BoCC agenda's for the past 1.5 years since the first December 2019 Zoning listening session. And I have only seen one new major subdivision go through the process and that was the Utick's family NE valley development.

Please provide the ZAP and the community growth trend data for all three HVPA zoning subzones, and show how the transportation, water supply and fire hazards concerns championed in the 2014-2015 Growth policy and 2020 Zoning Regulation Hearing are being impacted by this growth trends and where there are real fair and equitable solutions to solving these issues.

This information should have been produced prior to proposing and certainly before adoption of the 2020 HVPA Zoning Regulations that target only rural property for harsh regulatory controls—most of which will not be applied to the transitional or urban areas.

With the relative good network state maintained highways, the transportation congestion is generally concentrated in the urbans centers of East Helena and Helena and is especially bad wherever there are larger sized schools. As I indicated in my presentation to BoCC, the fact that new subdivisions along Spokane Creek would not really stress groundwater, transportation, or fire/ems services any more than new highly congested homes packed around east Helena (not actually higher fire spread risk with tighter developments) all lead to more traffic congestion near schools and major feeder roads into Helena.

So the ZAP panelists and County Planning Staff have no real valid platforms of information upon which to factor in growth going forward given the old GP information is not adequate and no effort is underway to provide such information to be used as a basis for real growth planning.

One final point – Mark Runkle stated that it is his view that all new development should have paved streets and curb/gutter. Then Tyler Emmert stated that he has four children and he feels that all new subdivisions should have sidewalks. Both ideas maybe appropriate for development that is within of near the incorporated cities, but is totally inappropriate for all transitional or rural areas. According to Mr. Runkle curb and gutter can add \$15,000 to the cost of each lot and that is from a developer that has ample on-site gravel to make his own road materials.

For rural areas in lower elevation (e.g. grasslands) with relatively low topographic relief, minimizing the use of deep runoff ditches is a better environmentally and living community design standard that should be widely adopted across the medium to lower density Transitional and Rural development landscape. This allows landowners to mow the grass right up to the road profile and allows children to walk or ride bicycles off the roadway when traffic is present.

I would like to see the ZAP panelist work progress posted on-line so the citizens can see what progress is being made in planning the future for the HVPA.

Unfortunately, I did not listen to the most recent ZAP hearing nor the next June 9 hearings, but maybe I will be able to catch up.

It is harsh to say, but the past 6 months of ZAP hearing I have yet to see real progress with developing good well-reasoned and foundational progress towards the revisions to the 2020 Zoning Regulations or the new Zoning Regulation for the transitional or urban areas.

The ZAP panel should get ahold of the 2005 -06(?) Development Standards Working Group documents, because we at that time had made a lot of progress towards consensus on building requirements and defining growth trend planning that made sense back then. Most of the work followed more traditional zoning regulations defining limits on businesses and traffic within more residential areas and landscaping and building façade issues for commercial development along major transportation roads etc. etc.

Also please send me any information possible on the CD&PD progress on hiring a consulting firm and working with that firm on reviewing and updating the County's subdivision regulations.

Respectfully submitted,

John W. Herrin

2855 Sundown Road

Helena, Mt. 59602

2freedomrings@gmail.com

406-202-0528

September 28, 2020 John Herrin's Testimony to BoCC – 2020 Zoning Plan violates Montana and US constitutions.

1. MCA 2-3-201 Part 2 Open Meetings , Chapter 3 Public Participation in Governmental Operations. Legislative Intent – Liberal Construction. “Legislature finds and declares that public boards, commissionsin this state exist to aid in the conduct of the peoples’ business. It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Towards these ends, the provisions of the part shall be liberally construed.”

2. MCA 1-1-204 Title 1 Part 2 General Laws and Definitions. TERMS DENOTING STATE OF MIND. (1) “Corruptly” , (2) “Knowingly” , (3) “Malice” and “maliciously” , (4) “Neglect” of Negligent” , (5) “Willfully” --- Read the definitions.

Political Setting of October 6, 2020 Final BoCC Hearing & Apparent Discriminatory & Targeted Anti-rural Growth Bias Displayed by BoCC, Planning Staff, L & C County Administrators & Legal Departments.

1. Commissioner Hunthausen statements to BoCC Candidate Mike Fasbender after 9/23/2020 2020 Zoning Hearings – paraphrased as “I am willing to work with you on the zoning proposal, but I still believe we should pass this plan and then work to fix it once a new commissioner is seated.”
2. Commissioner Good Geise –
 - Made the Statement “The fix is in” regarding the 2020 Zoning Proposed Regulations.
 - Repeatedly championed the cause of existing home owners being adversely impacted by new growth (views being impacted for which there are no regulatory laws or standards) and holding existing homeowners in higher regard than new landowners or developers.
 - Plus Statements like “ all three commissioners are against the rent or lease approval process” because it circumvents the normal subdivision process and an area landowners view is being adversely impacted (September BoCC hearing regarding the Lake Helena Storage Facility already constructed to state permitting standards).
 - Overriding bias against any rural growth proposals (e.g. Utick family subdivision, the Myles minor subdivisions etc.etc.).
 - See previous statements made by Commissioner GG regarding being fair, open, following the law when she took office, and then her track record of voting and statements made justifying her voting decisions on many subdivision and other land-use type hearings since taking office.

- I don't have to prove this interpreted bias of Commissioner Good Geise, because the video records are proof enough.
3. Commissioner McCormick. At February 2020 BoCC hearings on the proposed Zoning Proposal conveyed the following opinions:
- a. The when he was a young man driving with his parents into the Helena Valley for the first time to live, he noticed that the valley had very few lights except for occasional farmsteads. He indicated that now the valley is full of lights – implying that he longed for the 1950s and does not favor the growth in the valley and valley hillslopes.
 - b. He held up the 2015 Updated Growth Policy as the basis for approving the Zoning proposal and went further to say that is was well written, factual and provided a basis for the current Zoning Proposal -- (John Herrin comment here – the 2015 Updated GP is extremely biased against rural property. The 2015 GP is not in the least adequate in scope, depth, fairness, accuracy etc. etc. to characterize existing conditions nor adequately defines the unsubstantiated claims of unmitigated cumulative impacts to the 5 key resources that existing County and State administered regulations do not cover.

Administrative Failures of public testimony process and failures of entire county staff to fairly review all relevant facts, the social and economic damages and provide detailed analysis proving the 2020 Zoning proposal – specifically the need for all 150,000-500,000-acres of private property needs average 10-acre lot sire restrictions to avoid What?? No real documentation of the need for 10-acres even for the few spot problem areas that cover an extremely small areas (like North Star or Emerald Ridge), but in no way has the county proven the need for blanket density controls should be even a topic of discussion let alone a taking of property value and rights from thousands of existing landowners and thousands of future landowners.

Legal failings.

Discrimination, Taking of property rights, targeting, fabricating justifications, manipulating hearings, etc etc. are illegal actions this County has done in the past and is now again attempting to force onto the HVPA citizens under the guise of “The Greater Good”. But the This 2020 Zoning plan is absolutely not for the Greater Good of the HVPA – but pits one segment (Only Rural Property) of the population for severe financial damages while rewarding other segments (Urban and Transitional) property.

Discrimination (targeting) is illegal under the US and Montana constitutions and the county will lose in court for targeting only rural property for harsh regulatory controls with no real proof of the need for them to forgive the county for restricting the use of their land from passage forward.

A conservation easement damage claims easily could exceed \$10 Million, but future development right lost for all future rural landowners could easily top \$1 Billion.



Ms. Susan Giese, Chair
Lewis & Clark County Commissioner:
Helena, MT

Feb 17, 2020

RE: Proposed Helena Valley Zoning

Dear Commissioner Giese:

This letter is to inform you that the Lewis & Clark County Farm Bureau, with a vast membership of individuals directly involved in agriculture, is opposed to your proposed zoning effort in the Helena Valley. Your zoning effort appears to originate from a poorly worded "survey" and we are not aware of anyone has seen a written version of. The only fact finding (or survey) was your staff attending a Helena Valley Irrigation District meeting where your staff apparently asked the question "Do you want to protect Agriculture in the Valley?". This is certainly a poorly worded question upon which to base any zoning decision, as well all want to protect agriculture.

Our concerns are:

- Your proposed effort is coming from the top down versus the bottom up. This zoning action was not requested by the landowners who would be directly affected.
- The results, if adopted as proposed, would be simply an unconstitutional taking of property rights for a large portion of landowners in the valley and surrounding area.
- This Zoning will have a major negative impact on the value of much of the land within the proposed "Ag Conservation Zone District". For example, a landowner recently bought irrigated hay land. This land has development potential, and the price reflected that. If your zoning were to happen, the development potential would be eliminated, and the value of this land would revert back to agriculture values, which are much lower than development values.
- No commissioners attended the meetings. This is not acceptable.
- The assumed goals of your zoning, which will minimize development in the valley, can be achieved by existing statute. Subdivision, water rights, septic systems, etc.
- The meetings were not noted on the county calendar. It also appeared no notes or comments were recorded during the meetings.
- During each meeting held, there was no agenda developed, no explanation of why, nor any other information provided regarding the process, future development restrictions, or timeline of the commissioners' approval/denial process. Your staff were not able to answer questions directed to them regarding the purpose of the zoning. These meetings were non-informative and that is not acceptable. Meetings are to provide information and obtain feedback, which again in this case, was not recorded.

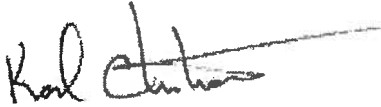
Other things you need to consider:

- This zoning effort would result in essentially a conservation easement without compensation, or again, a taking of property rights.
- This zoning will eliminate future development of small parcels which afford families the opportunity to have their children engage in programs such as 4-H. 4-H is a program that builds leaders and engages them in agriculture and animal husbandry.
- Landowners have stated they will 'lock the gates' to any future hunting and fishing if this zoning is approved.
- Many landowners are depending on future potential development as financial security. This zoning would eliminate that potential.
- The devaluation of land, due to the zoning, will have financial impacts to landowners with their lending institutions.

In conclusion, we are opposed to your proposed "Ag Conservation Zone District" zoning in the Helena Valley and surrounding area.

If you have questions, fell free to contact me.

Respectfully

A handwritten signature in black ink, appearing to read "Karl Christians", with a long horizontal stroke extending to the right.

Karl Christians
LCCFB President

CC: Mike Murphy, LCCFB Vice President
LCCFB Board

DATE: November 30, 2020 By John W. Herrin 406-202-0528

Case: L & C County BoCC voted 3-0 on 11/19/20 to formally adopted Zoning Regulations Helena Valley.
These ZR unethically & illegally target only rural property within the Helena Valley Planning Area.

Litigation Ideas -- General Statements of facts of the case:

- 1) The Zoning Regulations Helena Valley only target the roughly 150,000 acres of private property within the Helena Valley Planning Area (HVPA).
- 2) The Commissioners (BoCC)/Planning Staff purposefully ignored zoning the higher growth subdistricts (Suburban and Urban ((Helena & EH)), while the entire 2020 Zoning regulation only target and discriminated against only rural property for harsh regulatory controls.
- 3) The Planning Staff and BoCC refused to provide any current growth trend, social-economic impact analysis or real sound scientific current proof that all 150,000 acres of rural property need to be limited to an average density of 10-acre or greater to protect regional groundwater supplies, reduce impacts to deficient rural roads, and protect citizens from wildland fire.
- 4) The County justification document is the severely biased, unprofessional and over 5 year old 2015 Growth Policy with absolutely no homework done since proving adverse impacts to these 3 Key concerns because the existing County/State subdivision and DNRC Water Rights regulations somehow are not addressing cumulative impacts of all new development – a lie.
- 5) The unwritten purpose of these property rights restrictive regulations is to future slow rural growth beyond the already harmful and targeted anti-rural growth County Subdivision regs.
- 6) By adopting these harsh takings regulation only for the Rural Residential Mixed-Use District (RR), the County Commissioners and Planning Staff willfully, negligently, crafted a wide array of property land-use restrictions in order to slow rural growth, but they failed to assess the impacts of these regulation:
 - a. On the social/economic health of the area. Zoning will reduce rural property values and raise the value of the unregulated Suburban and Urban zoning areas. →Discrimination.
 - b. Zoning will future reduce the supply of lower cost building lots and therefore will drive up costs for all sold land and future housing. Average home sale just >\$300,000.
 - c. Skyrocketing RE values disproportionately harm younger and lower income households, forcing many to move out of the area in order to own real est. & gain wealth.
- 7) The 3 Commissioners Claimed the reason they approved the Zoning Regulations was because Unrestricted Rural Growth has harmed the health, safety and general welfare of the area.
- 8) However, these false claims will be easily challenged in court given the fact that isolated problem areas does not allow the county to adopt such punitive taking of property rights across the entire 150,000 acres of private property.
- 9) Also the County is out on a limb by claiming the Zoning Regulation actually solve any of the spot problems, and in fact in the case of roads, County Regulations require only new subdivision to pay for engineering design and actual percentage share contributions to up-grade off-site roads to meet strict County Road Design Standards when no one else has to contribute, including the county. SO the only party fixing deficient rural roads is the new development and therefore the county cannot target new growth for lot-size restrictions base on road impacts.
- 10) Plus the County's claims of unmitigated impacts causing severe Groundwater drawdowns should never happen going forward as DNRC, DEQ and the County regulators are all keenly aware and educated when reviewing subdivision specific GW Aquifer Supply Analysis reports.

- 11) And no subdivision can be approved without the developing a site-specific wildland fire mitigation plan signed off by the local fire chief and ultimately approved by the BoCC. In addition, current County Subdivision regulations require all major subdivisions to build or have close access to approved high-flow water supply/storage systems to fill fire trucks.
- 12) The 2015 Growth Policy document is full of lies and inferred aspersion claiming the health and safety of our community is being threatened by continued unbridled Rural property development. This 5 year old and biased Growth Policy cannot be used by the county to justify their punitive and aggressive actions against only rural property.
- 13) We will use the fact that the County refused to update this GP as required by law.
- 14) The County is out on a limb cutting it off behind them by claiming New Subdivision are and will illegally impact existing groundwater users or the new homes will substantially increase the wildland fire risk or that new rural homes will further degrade substandard roads – all lies.
- 15) It is illegal for the county to discriminate against only rural property owners with this zoning regulations while leaving the Suburban higher growth areas unscathed.
- 16) The County has not proven in the least they have the legal right to taking private property rights from all rural property for the “Greater Good” without real facts or legal basis in Montana Constitutional and Administrative law backing them.
- 17) They also violated several opposition leaders rights of free speech, rights to testify, and rights of the citizen to know, and citizen should have been allowed to vote for or against the proposal.
- 18) The county’s ZRHV will severely limit the US & Mt Constitutional guaranteed use of their private property for business income, happiness, and prosperity. Limits on property rights include:
 - a. Proposed 10-acre minimum lot size restrictions that will go into affect June 1, 2022 unless other wise modified by the Blue-Ribbon Advisory Panel and ultimately BoCC.
 - b. Limits all property to 1 primary use (e.g. residential or agricultural) & 1 one subordinate accessory building. This Zoning stops anyone from having up to 5 buildings the rent or lease on a property, that State law allows if meets WW treatment & GW supply regs.
 - c. Although I don’t see it in the actual ZR, oral discussions indicated property could have a residence and a business building as long as the busines building is smaller in size than the house and the county said (?) only 6 employees & < 20 (?) vehicle trips per day .
 - d. 35’ max building height. Limits building footprint expansion.
 - e. Parcel > 10-acres = 25’ property line setbacks, lots < 10-acre have 10’ setbacks.
 - f. Imposes L & C County Public works manual Street Standards and parking lot standards (2 parking spots/home; daycare 1 space/2 employee + 2 parking+1/8 clients; business 4 spaces/1000 sq.ft. floor space; B & B 1 space/rent room+2 for on-site residents; etc.
 - g. Lighting Standards: exterior lights cutoffs; commercial 35’ max downward full cutout.
- 19) The Boundary lines of the RR district were solely defined by L & C County Staff under the direction of the BoCC, and portions of these borders can be proven to be arbitrary and capricious in design, location, and lacking reasonable underlying scientific and factual rational for placement (e.g. splitting platted land into to two subdistricts – RR and Suburban Residential). Since December 2019, the pending Zoning regulations started adversely impacting actual real estate listings and sales within the ZRHV RR district. This has cause untold economic damages to listing property owners, realtors on both sides of the deal and perspective property buyers
- 20) These ZR Illegal violate Mt Constitutional Protected Property Owners future income, wealth, retirement, happiness, property. Also Impacting many other businesses and workers. DAMAGES

76-1-106. Role of planning board. (1) To ensure the promotion of public health, safety, morals, convenience, or order or the general welfare and for the sake of efficiency and economy in the process of community development, if requested by the governing body, the planning board shall prepare a growth policy and shall serve in an advisory capacity to the local governing bodies establishing the planning board.

NOTE: L & C County did not adequately understand that imposing 10-acre lot size restrictions and severely limiting the rent or lease income options that they were voting to approve an illegal taking of private property rights without real solid and valid justifications

76-2-211. Violations and penalties. A violation of this part or any resolution adopted pursuant thereto is a misdemeanor and shall be punishable by a fine not exceeding \$500 or imprisonment in the county jail not exceeding 6 months or both.

Note Standard state law language but these penalties could quickly stress or bankrupt many small business owners if enacted.

Adoption Of Growth Policy By Planning Board

76-1-603. Adoption of growth policy by planning board. After consideration of the recommendations and suggestions elicited at the public hearing, the planning board shall by resolution:

- (1) recommend the proposed growth policy and any proposed ordinances and resolutions for its implementation to the governing bodies of the governmental units represented on the planning board;
- (2) recommend that a growth policy not be adopted; or
- (3) recommend that the governing body take some other action related to preparation of a growth policy.

Note: At final August 4, 2020 Chairman Gregory Thomas offered in a proposed recommendation to the BoCC that they table the proposed Zoning Regulations Helena Valley proposal and the county pay for an Independent contractor to complete a Social Economic cost benefit analysis of the proposed regulations – or the county would like be sued. This is very power argument that the Planning Board voted 5-2 to ignore and voted 5-2 to pass the slightly modified County Staff drafted Zoning Regulations on to the BoCC.

76-2-203. Criteria and guidelines for zoning regulations

Zoning regulations must be:

- (a) made in accordance with the growth policy; and Note: L & C Co 2015 Updated Growth Policy Volume 1 was printed June 2015 & Volume 2 was printed November 2015, so both documents were more than 5 years since last reviewed and therefore Legal Challenge possible on procedural grounds that Zoning plan had to be updated prior to passage of the 2020 ZRHA proposal and the Blue Ribbon Advisory Panel associated BoCC resolutions.
- (b) designed to:
 - (i) secure safety from fire and other dangers; Note: This is one area where L & C County may have some validity in constricting growth and implementing lot size densities, but no factual data or information was provided by County even after repeated requests for them to do so. The totally avoided presently any current facts on any real

issues, but merely repeatedly and repeatedly citing the 2015 GP and a few spot problems areas without any real analysis, facts or logical arguments for Zoning.

The County is reportedly close to having the more up-to-date Wildland Fire Assessment and Mitigation Report and one PB member recommended the PB and BoCC wait on this ZRHV plan to allow this updated assessment reports and discussion as part of the meat on the bone basis for the zoning plan.

The worst human health Risk and danger area for massive building destruction due wildland fire is the high density urban areas of Helena southeast, mid and SW neighborhoods.

Yet the county is focused on how bad the forested areas of the RURAL district, but truth is very little of that area that could be developed -- either will be developed because of very costly and likely prohibitive road Pro-rata share contribution required under current L & C County Subdivision regulations or could be developed because so many of the more accessible forested areas lands are already developed or are federal or state owned lands.

(ii) promote public health, public safety, and general welfare; and Note: Zoning regulations were not based on any recent growth trends (most extend out 20 years into the future) or factual data proving the proposed Zoning regulations promote public health, safety or general welfare.

(iii) facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Note: County provide absolutely Zero information about current and future growth trends (must extend out 20-years into future) impacts on transportation system or these other categories. Total failure to even write up any real justifications for ZRHV proposal.

(2) In the adoption of zoning regulations, the board of county commissioners shall consider:

(a) reasonable provision of adequate light and air;

(b) the effect on motorized and nonmotorized transportation systems; Note: Nothing Written by county addressing transportation issue, and only verbal justification given by BoCC SGG that 2018 North Hills fire caused thousands dollars damage to County fire trucks is not a real justification for 10-acre lot size restrictions given the fact that the County made huge amounts of money fighting the fires on USFS and State lands.

(c) compatible urban growth in the vicinity of cities and towns that at a minimum must include the areas around municipalities;

(d) the character of the district and its peculiar suitability for particular uses; and Note: County made no effort to write any justification of the character of the RURAL district other than cite the 2015 Growth Policy as their bible. A lot has changed since the citizen survey questionnaire were mailed out in 2014 and since then so has the growth trends and district characteristics and uses.

(e) conserving the value and use of buildings and land and encouraging the most appropriate use of land throughout the jurisdictional area. THIS is big Achilles heal problem for the county right here. They failed to make any 2020 accounting of the growth trends, and a true and factual accounting documenting the need for additional regulatory controls to protect health, safety and general welfare of the community as a whole (BS).

Note. L & C County made no effort to look into the social and economic damage caused by this zoning proposal as required under this section. Conserving value of targeted undeveloped property with restrictive zoning regulations severely damages the value of and future uses of these lands such that landowners and all county residents are adversely impacted by limited reasonably priced rural land for future development and/or rent or lease.

The State of Montana Passed the Rent or lease provisions which has almost no County planning department and BoCC approvals beyond simple right to occupy facility sign-off by BoCC. This provision is particularly bothersome the L & C County Three Commissioners and the Community Development and Planning Department Staff.

MCA 7-3 Local Government – Alternative Forms Local Government – Part 3 Commission-Manager Gov

MCA 7-5 General Operation & Conduct of Business. Part 1 Ordinances, Resolutions & initiatives & Referendums. Part 21 Conduct of County Government.

Arbitrary arguments against 2020 ZRHV – regulations have no real basis in reality given the 5 key concerns listed in the outdated and biased 2015 Updated Growth Policy are not valid reasons for condemning and taking of private property rights across the entire approximately 150,000-acres of RR district private property.

The 5 key concerns (note Only really 3 concerns the county now is citing as justification for ZRHV) – being;

1. Flooding – really a non- issue for the RR district lands and the county admits it is not relevant.
2. Water Quality –the county staff & BoCC are not using WQ concerns relative to this ZRHV.
3. Groundwater Supply concerns. County can not prove that large segments of the Rural District has such limited groundwater supply to justify 10-acre average lot size restrictions. John Herrin’s written assessments submitted to L & C County carefully evaluated the 5 Montana Bureau Mines and Geology North Hills and Scratchgravel Hills controlled groundwater district professional reports and concluded that the vast majority of the RR area could easily support housing densities to at least 1-2 acres average and not adversely impact existing or future landowner groundwater supplies. Densities even smaller than 1-2 acres would be possible where solid sight data by Subdivision applicant is presented and approved by local and state government.

Each new subdivision must pay for detailed site specific groundwater supply reports that are carefully reviewed by the MDEQ, DNRC and Local County’s before they can be approved. After

the District Court Ruling of 2014, any subdivision developments of more than 13 lots, must prove they have the necessary water rights for additional development – a court ruling that significantly has slowed the pace of non-municipal development. SO in the Helena Valley, since 2014 the pace of rural development has significantly slowed across the state and conversely more real estate is being built that connections into the city water and sewer systems.

Within the HVPOA, there are several high-profile examples where decades old Subdivision approved developments have resulted in over-use of limited groundwater aquifers, causing dramatic drops in groundwater levels and in some cases adversely impacted neighboring or internal water supplies. One area of over-withdrawal is the North Star subdivision development area north of Bob's Valley Market. The Montana Dept Environmental Quality Subdivision Review and DNRC Water Rights Bureau are embroiled in lawsuits and resolution discussions to find long-term solutions for the landscape watering of too many houses supplied by stacked groundwater wells.

L & C County's 2020 Zoning regulations by targeting only rural property is discriminatory, targeted and willfully biased with no real scientific or factual basis and therefore they will lose in court if challenged.

Social-Economic Impact Analysis

2020 L & C County Zoning Proposal 2/29/2020 by John Herrin.

1. Economic Costs - Simple Math Calculation Damage to Rural Property - Takings.

Note: Source of Basic Land Sale Values came from Tim Moore of Moore Appraisal 12/28/2019.

Dry Land Agricultural Sale Price = \$300/acre. Confirmed by 2/18/2020 Verbal Testimony by Mark Dehl at L & C County Board of County Commissioners Hearing on Zoning Proposal.

A low end average land price for 10-20-acre size lots in HVPA = \$5,000/acre. Added value if 1-2-acre lots sold for home sites would likely be \$37,500 to \$85,000/acre.

- Given the fact that most land or builders buy land based on the number of homes that can be built on a property - with Zoning future land buyers will primarily looking at one home per lot and only pay a little more money for additional acreage. So whereas a buyer might pay \$75,000 for a one-acre lot, they might only pay a little more if any for the added acreage in a 20-acre tract - especially if there suddenly are a lot of 20-acre tracts on the market. Under zoning the additional acreage really does not add much if any added value to the property.
- And most rural property buyers do not want a 10-20 acre size lot as it is too much land for them to maintain or keep weeds under control. As a general rule, most rural land buyers want land sizes from ¼ to 2 acres in size and any lot size greater is not what most landowner want or need.

Rough calculation of the amount of rural land in the HVPA = about 150,000-acres and assume 40,000-acres already divided into 10-acres lots on average. Leaves about 110,000-acres that could be future divided.

A. Potential Total Land Value 2020 Takings Claim Scenario #1.

Low end calculation damage in lost value if large agricultural tracts were zoned 160-acres or larger. $\$5,000 - \$300 = \$4,700$. $\$4,700 \times 110,000 \text{ acres} = \$517,000,000 \text{ dollars lost in value.}$

B. Potential Total Land Value 2020 Takings Claim Scenario #2.

Another way to calculate lost value was given by John Navotney (2/18/2020 BoCC Zoning Hearing) backed up by another ranch/farmer -- stating the fact that their Loans with Banks could be cut in half their land value if the land was zoning by the county (equal to creating a conservation easement on the property). Under zoning, area banks would likely cut agricultural credit-lines in half (Note: which seems overly generous). Mr. Navotney also indicated that he paid more than the value of two adjacent tracts of land to add to his business, because it had more value than agricultural production would justify and if the bank cut his loan ability in half he would have to come up with \$200,000 in operating capital that he does not have,

Assuming an average per-acre undeveloped lot at $\$5,000 \times 50\% = \$2,500$ in lost value.

Damage calculation using this alternative calculation would result in $\$2,500 \times 110,000\text{-acres} = \$275,000,000$. Based on 50% lost value for conservation easement.

C. Potential Total Land Value 2020 Takings Claim Scenario #3 - higher density rural land development.

And if the land were developed into higher density lots for resale to future home buyers, the damage to the landowner/developer would be significantly greater than $\$2,500\text{-}\$4,700/\text{acre}$.

Using the lower end value of medium density development enhanced property lost value could be $\$50,000/\text{acre} \times 110,000\text{-acres} = \5.5 Billion dollars.

If the total end value of an acre of land were more (e.g. in higher density development) the total could be even higher.

Now all these simplistic calculations assume that every acre of land in the County's Rural designed HVPA area would be developed to a higher value -- and would not happen.

Each and every person in the rural areas would have to go to court to prove real damages and hire experts to determine the actual damages. Which would be a huge burden on the citizens, and the county creating a lot of wasted negative energy and expense for everyone, However, we should note, that if county lost in court (a high probability), then the court award plaintiff's additional damages including legal and court costs.

But what these simplistic calculations do underscore is the general scope land that is being impacted and the scope of real-life damage this Zoning plan could have on business owners and property owners. It also underscores the potential cumulative impacts lot size restriction could have by withdrawing land value and the future opportunity for normal growth patterns in the community.

Basic economic theory states for every dollar spent in the community compounds 5 fold as it travels through the community. So any money taken out of rural property owners, builders and trade associated trades people is money taken out of the community, with compounding negative impacts to everyone living and working here.

The county estimates that roughly 22,000 people currently live in the estimated 150,000 acres of rural land which equates to about 8,800 homes

(Note: John Herrin asked for but has not been given housing or population estimates for any of the three major rural property classifications).

Beyond just agricultural business landowners impacts, the Zoning proposal would likely significantly reduced the overall value of all current or future rural property and the negative property loss more than likely would in large part correlate with the size of the land underlying it. Larger land tracts would be more impacted than smaller ones, and lands closer to the county "Sweet Zone likely impacted the most.

Also the larger the tract size the county Zoning dictates (e.g. 10, 20, 160 -acres) the more negative the impacts would be on the underlying land value,

In a large extent, more recent land purchases would be the most vulnerable to adverse damages given their respective mortgages would likely be higher and the price of the purchased land higher.

Most recent larger tract Non-agricultural landowners purchased land with inflated property values based on the potential future value of the land were to be subdivided. Under the County large tract size Zoning proposal, the inflated prices of more recent purchases likely would not be recoverable in the short or long -term. In some cases this could put new land purchaser's in a financial bind with their lenders or in real terms especially if the market value of rural land greatly depreciates as is expected under this Zoning proposal, Future financial gains when the large tract lands are resold may not even recover the purchasers original investment when profits were almost assured without Zoning.

How many existing landowners would lose value would generally depends on the size of the property they own and the physical characteristics of the property. Many of these existing landowners with larger tracts of land, would like see the most significant drop total value.

These basic **damage calculations also help put into perspective County maybe subjecting the taxpayers and citizens to the risk of protracted legal actions and possible costly damage claims if the 2020 Zoning plan is adopted with large tract size restrictions on rural property.** The County and tax payer do not have large sums of money sitting around to defend legal actions and possibly of having to pay the legal bills of plaintiff's plus settle damage claims if the courts rule against the county on the 2020 Zoning plan to severely restrict lot sizes only on rural property in the HVPA.

2. Secondary Economic Impact of Large Tract-Size Rural Zoning on Overall HVPA Economy.

With the large -tract size restriction only on rural property, the overall growth in the Helena Valley Planning Area will be greatly surprised going forward and significantly lower future economic growth of the HVPA.

Additional damage would occur to future generations of landowner as land values climbed significantly in the Sweet Zone (driving up future home purchase prices) and land values in rural areas remained severely depressed.

And additional Economic damage would occur to overall HVPA economy as almost no rural building would be occurring on 90% pf the available undeveloped land of the HVPA. The economic impacts include a wide range of small to medium size local business such as home builders, realtors, construction trade contractors, and all Helena area business large and small.

There is no easy way to calculate the secondary impacts of this county proposal and it is beyond my limited knowledge to even venture an estimate other than to say this plan would have a very significant reduction in the future growth of the HVPA and as such a significant reduction in economic growth of the community for as long as the Zoning Lot Size restriction stand in place.

3. Other Social and Economic Impacts.

- **Schools and County Taxes.**

Recent Independent Record news articles state that the Helena school district is about \$1,000,000 (Helena IR 1/29/2020) in the red and must layoff a large number of teachers, and support staff plus find other ways to trim the school district budgets to make up for budgetary shortfalls, The primary reason is that construction of a new elementary and high school in East Helena.

But the Zoning proposal will remove a large portion of future tax income to the county and both East Helena and Helena school districts.

Taking 90% of the available land out of the future growth of the HVPA, will have significant the impacts on all future county tax revenue income into the county. The county staff are the correct party to do such an economic impact analysis, but to date the County Planning Staff and BoCC has refused citizens request to consider completing an economic impact assessment even on very basic level so it is not possible to quantify the impacts beyond a simple statement that they will be significant.

- **Cost of Land Will Increase in HVPA with Proposed Rural Zoning.**

- The cost of land in rural areas will be severely depressed as noted above.
- Land value within the L & C County targeted "Sweet Zone" (L & C County's Urban, Mixed Urban and Mixed transition) will have to go way up.
- Current undeveloped landowners will have an immediate and significant increased land value as soon as the L & C County Zoning proposal is passed.
- Prices in County Targeted "Sweet Zone" would like go up at least 10% or more that over time the increased value would greatly increase the rate the same property would have increased without Zoning.
- Fact is there is not that undeveloped land left in the county's Targeted "Sweet Zone" -- rough calculation <10,000 acres), over time this very limited land supply will begin to compound land and ultimately home priced forcing more and more people to live in Condos or apartments.
- As indicated, as land prices march upward the average size of lots will have to greatly decrease - so much for living the dream of owning land in the Big Sky State.
- Currently, the average price of Helena homes the past two years was close to \$300,000 and not that many years ago the average price was around \$250,000. With the Zoning Proposal, the average price is bound to go way up and therefore more county residents will be forced to live in condos, apartments or public subsidized housing.

- Affordable housing is now called homes costing less than \$250,000 however most of these priced homes are smaller, many need remodeling and generally have hidden costly repair problems down the line. And less and less young people and people on fixed income can afford a mortgage on a \$250,000 home and one that needs work.

- **Lack of and Need For Affordable Housing**

- More apartments and public housing would have to be built to accommodate those citizens that could not afford to buy homes.
- 11/23/2018 IR article entitled "Employees need affordable housing" and further states "People come from Billings and Butte to work for me but can't find anywhere reasonable to live" says Terry Gauthier owner of 2 McDonald's restaurants. "Lack of people to hire impacts subcontractors, such as plumbers and electricians, more than anything else. He said waiting for subcontractors to have time for a job often adds one to two months to a house project. He could build three more homes per urea with more readily available staff." says Chuck Casteel, owner of Casteel Construction.
- The lack of employees and affordable housing is costing home buyers more money for completed housing which in turn hurts the community with higher housing costs --were additional quotes in the IR article attributed to Donna Durkel (Helena Building Industry Association).
- In Missoula housing prices jumped 30% from 2010 to 2018, but wages have not kept pace for most wage earners (IR May 6, 2018). And the percentage of income dedicated to housing increases dramatically opposite the amount people earn, making housing the largest cost to most lower income earners. Discretionary funds evaporate which leads to household instability, plus social and emotional household stress and costs to society.

- **Growth is Limited by County Regulations.**

- Overly Restrictive Subdivision and Zoning Regulations do have a large impact on land and home prices, but with a huge influx into Montana from out-of-state buyers with large equity positions, the real estate markets are not currently severely limited by price.

The lack of supply of affordable land in Helena is future documented in other reports cited below and the County's Zoning Plan will only severely compound the supply restriction and upward spiral of housing costs in Helena.

As a factual backdrop lets look at the basic real estate market of western Montana and in particular the Helena RE market. In western Montana real estate has seen a impressive rise at over 4% -- rising at a rate of 30% since 2013. Bozeman tops the charts at 55% growth rate (11% a year). Helena by contrast Helena real estate price increases lagged behind the average at 16% from 2013-2018, an average annual growth rate of 3%.

"Helena's economy continues slow grow" (IR 1/30/202) article states wages in L & C County remained flat from 2016-2018, and then spiked to 5% in 2019 largely due to

legislative cuts that impacted the 53% of the local job pool of state workers from 2017-2018. Predicted economic growth in for Helena in 2020 is 2% and 1.6% thereafter. In 2019 the work force in the County topped 34,596 people , a gain of 494 (1.4%) workers in 2019 (Source Cathy Burwell CEO of Helena Chamber of Commerce).

The main factor driving up real estate costs faster than wages, is the influx of cash-rich out-of-state buyers driving up the demand for more land and more single family housing. In recent years more out-of-state buyers are now looking at Helena are real estate market after they visit the higher priced markets of Bozeman and Missoula, looking for the rural smaller city lifestyle but still being able to afford a home with the desired ammenities.

Unfortunately, as stated above, too many long-term residents and those living on fixed incomes (elderly and lower wage earners) are being squeezed out of the home market and into rentals and public housing by the steady increase in land and home prices.

And even so, the UoM Bureau of Business Economic Research (2018) did note that the average home sales price from 2013-2018 for L & C County was less than the average for the major cities of Montana at 16% (3% a year), large attributed to "Part of the difficulty in building more in Helena is the lack of available lots and high costs of lots that could be available for builders" .

Since 2005 L & C County administrative and revised subdivision regulations have limited the availability of reasonably priced lots as the UoM researchers recognized in their report.

It is easy to document costly subdivision regulations L & C County adopted in 2005-2008 that remain in effect to this day. Starting back in 1994 with a proposed zoning plan restricting rural growth -- that solidly opposed by the citizen and finally culminating in this large tract restriction Zoning plan of 2020.

It has long been my contention, that the L & C County Community Development and Planning Department and a long series of elected Board of County Commissioners have viewed rural growth as a problem that warrants limitations. To those means it would appear that these county managers decided the best way to slow rural growth is to incorporate costly regulations or take administrative actions (e.g. \$8,000,000 off-site road lawsuits) to increase the cost and limit the spread of rural subdivisions.

And collectively these regulations have slowed and limited where rural growth occurs in this county resulting in limited supply of affordable and available building lots in the HVPA. The county mandated health and safety requirements intended to limit the extent of and amount of rural growth included the following costly subdivision application requirements and now pending Zoning lot size restrictions:

- On-site fire water supply storage/wells.
- Two access/egress roads into all subdivisions.
- 2007-2009 Interim and Emergency Zoning forcing all new rural individual septic systems to meet the highest Level II treatment level costing \$20,000

- Forcing all new subdivision to pay 100% cost to upgrade off-site roads.
- 2020 Zoning Regulations Rural property lot size restrictions;

These added costs are somewhat unique to L & C County subdivision regulations and as stated were incorporated to driving up rural property and overall real estate costs/prices. Specifically;

- L & C County requires all new subdivision developments to install on-site fire suppression storage whereas existing rural homes and community don't have to have any such fire water storage/supply (a takings legal argument that no one yet has challenged). Although the access to and maintenance hundreds of on-site storage/well fire suppression systems rests with the rural fire districts, they are not maintaining most of them nor will they allow their equipment use these unmaintained sources in the event of a wildland fire. The added the cost to each new lot created HVPA is generally ranges from \$5,000-\$10,000. With no real benefit and long-term liability to the county.
- L & C County also requires two roads into all subdivisions (A unique requirement to L & C County) and both roads must be constructed to current county road design standards. A prime example of a huge block of very expensive real estate with only one road in is the Big Sky Ski and Recreational resort. This major and Billions of dollar in real estate area only has one road and it is very steep-sided so if blocked no one goes in or out.

So why does L & C County require two entrances? Their rational is for safety of landowners and EMS during a fire and if one road is blocked, then the secondary route is needed to protect life and property. However, using that rational Big Sky Resort should not exist. Older subdivision in Helena and Montana should be condemned or redesigned if this is a real safety threat. Nor should millions of acres of developed land in Montana, all across the US or the world where only 1 road enters a group of homes.

Locally the Great Divide Ski area cannot be developed for a subdivision development despite the fact that the US Forest Service granted federal land for a community drainfield to Kevin and Nilla Taylor (35-year owners of the GDSR), but because of this county's unique two entrance requirement prevented them from developing the property.

This situation is not unique to the Marysville road area, for there are many rural roads all across the county were only one main road reaching huge swaths of rural land.

It would appear to anyone objectively looking at this two egress/ingress requirements of L & C County managers, the county main purpose for the two entrance requirement it to meet their unwritten objectives ----

- slow or severely impede all growth in rural areas of L & C County,

- driving up rural property costs and thereby force more people to live near Helena and East Helena
 - encourage growth in under-utilized city Helena & EH wastewater and water systems.
- Zoning if adopted would as discussed above have major, far-reaching and long lived impacts to the entire community. So in summary, regulations absolutely do negatively impact growth, negatively impact affordable and all housing prices thereby impacting households at all income levels.

'It was extreme fire behavior': Evacuations lifted for residents on Birdseye fire near Helena

- Tom Kuglin
- September 2, 2020 4PM

- 2

1 of 3



Smoke fills the sky near homes in Birdseye off of Head Lane as a wildfire burns northwest of Helena on Wednesday, Sept. 2.

- THOM BRIDGE, Independent Record



A view of the Birdseye wildfire near Head Lane on Wednesday, September 2.

A fast-moving wildfire burned about 800 acres northwest of Helena Wednesday afternoon and caused the evacuation of part of the West Helena Valley.

The Birdseye fire sparked near where Birdseye Road crosses the railroad tracks north of Fort Harrison at about 4 p.m. Wednesday. The blaze quickly grew under red flag conditions including high winds and low relative humidity, sending a large column of smoke over Helena.

“It was extreme fire behavior,” said Chris Spliethof, incident commander with the Montana Department of Natural Resources and Conservation. “In some areas we were getting 10- to 20-foot flames.”

The fire threatened several houses and damaged fences in the area. It burned mostly in grass and sagebrush but did hit a creek bottom with willows as well.

“It burned right up to a few houses – a half dozen structures had fires close to them but they were able to get engines in there in the nick of time,” Spliethof said.

One historic building in the area was damaged, although authorities did not immediately have the name of the building.

Firefighters were mopping up the fire as of 7:30 p.m. but Spliethof expected crews to remain on scene the next three or four days.

About 100 rural volunteer firefighters responded to the fire, as well as the DNRC, city of Helena and helicopters from the Montana Army National Guard, said Paige Cohen with DNRC. The fire was being managed under a unified command among the departments and the state.

The cause of the fire remained under investigation Wednesday evening

The fire triggered evacuations north of Custer Avenue, south of Lincoln Road and west of Green Meadow Drive. Road closures included Green Meadow, Franklin Mine, Head Lane and Alfalfa Road.

“We’re trying to press people to stay out of the area and if people do feel unsafe at all, even if they have not been evacuated they should evacuate themselves if they feel unsafe at all,” Cohen said.

Evacuations for residents was lifted at 8:30 p.m. Authorities asked that others remain away from the area.

The Red Cross has established an evacuation point at the Helena First Church between National and Elm Streets for residents affected by the fire. The public may also call 447-1605 to get a recorded update from the Lewis and Clark County Disaster and Emergency Services Coordinator.

Large animals may be brought to the fairgrounds.

Reporter Tom Kuglin can be reached at 447-4076

@IR_TomKuglin [_2_comments](#)

Commission has taken county down dangerous path

Published
Independent
Record

October 04, 2012 12:00 am • By Anita L. Varone

(9) Comments

Recent articles discussing county government prompted me to write. I was honored to represent Lewis & Clark County as a commissioner from 2001-2006. The last four years of my tenure I witnessed commissioners enacting many illegal requirements; a water quality emergency declaration using fabricated data, forced emergency zoning attempts, public road building regulations.

I questioned the validity of the valley water quality data. The Environmental Health director privately told me there was no emergency; there were three small areas requiring immediate attention. She said she would publically share the information but, when the time came, she reported the opposite. Prior to the meeting, the commissioners discovered she was going to provide truthful information. She was directed to falsify the figures. A subsequent lawsuit revealed the deputy county attorney told her he could make her department go away if she did not falsify the facts.

By John Harris
Mike Fosbena
Bill Gallagher

Commissioner Hunthausen supported Commissioners Tinsley and Murray as they threw the law to the wind and supported using fictitious water quality information. All three passed emergency zoning and were almost successful in conning the public. The IR exposed their dishonesty in 2008, reporting there never was an emergency. The commissioners never offered a truthful explanation.

Attempts to provide statutory information to the commission repeatedly fell on deaf ears and several lawsuits were filed. For example, the Christisons' subdivision was one of many illegal decisions. Having lost the lawsuit, at least seven similar lawsuits are on hold until the Christison case is completed. Other past litigants are now asking for reconsideration of their suits.

The county attorney's office is also to blame for what is still happening. The deputy county attorney told me the commission could make any decision it wants, and unless the county is sued, it is law. He said all the commission had to do was say their decision was based on public "health, safety and welfare" and he could defend it. He said that even if the county lost in court, it would win in the end because he would bankrupt the plaintiff with their attorney fees.

The county now must pay the Christisons' attorney fees. When the cost of private attorneys, county staff and county attorney fees is added to the current \$673,000, it's not a stretch to assume we'll be paying at least \$1 million. Misleading legal advice will cost us millions in future lawsuit decisions.

This year's budget has roughly \$440,000 to settle lawsuits or prepare for court. That's not enough. If a recent estimate of \$16 million in lost lawsuits is accurate, one of two things must happen: our taxes will dramatically increase or services will be drastically reduced, meaning massive layoffs. Both could happen. Don't forget, there's no plan for road improvements.

We all should be offended when Commissioner Hunthausen said, "It's our responsibility to follow the law"; he's frustrated that some are portraying the commission as anti-development. Commissioners Hunthausen and Murray have always been anti-development. The resulting

lawsuits are proving it. They break the law to serve their purpose, and you and I are paying for it. It's not about subdivisions, it's about anything they want to do. Words are meaningless; it's their voting record that's important.

Commissioner Hunthausen took credit for being the instrumental supporter on a cornucopia of county projects. His claims are inaccurate. In at least one instance he takes credit for a project that he resigned from before completion.

When I was a commissioner, I told folks they should become involved and run for office so they could change laws they disagreed with. My fellow commissioners said if they didn't like what the commission did, they could sue; the county had staff attorneys and the public had to pay theirs by the hour.

Mike Fasbender took both suggestions seriously. He filed several lawsuits and won because the other commissioners illegally manipulated the law. He also filed for county commissioner. Mike's a brave man: bright, honorable, honest and more than anything else, he'll follow the law. I think our county deserves it.

Anita L. Varone is a former Lewis & Clark County Commissioner.

[View \(9\) Comments](#)

1. **Builder** - October 06, 2012 8:10 am

Prattler says there are overcrowded schools in the Valley, a traffic nightmare, failing water systems, flooded developments, and wildfire-prone communities. Well, the taxpayers need to step up and fund some solutions. The community WILL be growing, and it's not up to the developers to fund infrastructure improvements or slow down our legal right to build.

Mike Fasbender is on our side, and as he has stated so many times, if there is a legal way to do it, "No" and "I can't" will be unacceptable responses.

As Verone rightly pointed out, the water quality emergency declaration used fabricated data. The ground has been a great filter for our toilets for the last hundred years, and nothing has changed. We don't need the costs associated with higher standards for septic drain fields.

The people are coming, and we need to BUILD. The valley water is fine, there is ample drinking water, and plenty of room for more septic drain fields that meet existing standards, and not the more costly ones the current commission wanted.

Our LEGAL right to develop must be protected! Fasbender is our man, and we need to get him elected.

2. **Bean12** - October 04, 2012 9:03 pm

I think Prattler has lost his mind! Obviously he has never seen the county regulations nor has he ever tried to do anything in this county. His bias and ignorance of the regulations is very apparent even to a casual observer. Contrary to what he preaches

no doubt lives in a subdivision created by former bad word developers! Why is it that everyone who has theirs doesn't want anyone new to come here and get theirs? I believe this is called "not in my backyard" syndrome.

Take a deep breath Prattler and realize how lucky you are that these kind of abuses are by our local County attorney office and current and past commissioners have been exposed!

I, for one County resident, am tired of paying for these unnecessary needless lawsuits and I will vote for Mike Fasbender to try to get things changed

3. **poncho** - October 04, 2012 6:11 pm

Sounds familiar. In Park County, Montana, in a zoning dispute with the county over not following the correct procedures, the county attorney responded "we don't care what state law is, this is the way we do it in Park County. If you don't like it, sue us.

4. **forthekids** - October 04, 2012 5:12 pm

I just heard that Mike Fasbender presented a letter this morning at Hometown Helena that he had written to L&C County 6 or 7 years ago ... before all of the lawsuits started. In the letter he cautioned the County that their road requirements were violating the law and exposing the taxpayers to needless liability. How prophetic. I sure wish he had been on the Commission 8 years ago ... think of how many millions of dollars the taxpayers would have saved. Former Commissioner Varone is spot on ... we need to get Mike Fasbender on the Commission and stop hemorrhaging taxpayer money ASAP.

5. **redstar10** - October 04, 2012 11:22 am

The news is finally getting out! Lewis & Clark residents need to pay attention to this former County Commissioner. She was a great Commissioner, she had "common sense", and she had the residents of Lewis & Clark County foremost in mind when she was a Commissioner. However, she got absolutely no help from Commissioners Murray and Tinsley who constantly voted her down 2-1 during her tenure. Her admonitions to them to follow the law fell on "deaf ears" and that is why we see all of the lawsuits! Thank God we have people like Anita Verone who aren't afraid to stand up and tell the truth! We need more people like her who understand that good, well planned growth can occur in this County without negatively affecting the health, safety and welfare of County residents. These needless lawsuits must end and that is why I am voting for Mike Fasbender!

6. **steeline** - October 04, 2012 9:29 am

For those of you who believe that if there are no more subdivisions in the Valley there will be no more costs to the tax payers, I have news for you. I ask you, what is your

Repeal interim zoning regulations

By Independent Record helenair.com Wednesday,

February 25, 2009

A large portion of the Helena community surely feels vindicated by last week's findings by the new county hydrogeologist that a 2006 water quality assessment used to usher in interim zoning was flawed.

The latest draft report, released Friday by new Lewis and Clark County hydrogeologist James Swierc, says the data in his predecessor's white paper does not support a water quality emergency in the Helena Valley. Swierc told county commissioners the 2006 report shows an increase in groundwater nitrates, but there was not enough information to draw a conclusion that there is a water quality emergency.

"I don't think it's appropriate to say the groundwater quality has changed in the Helena Valley," Swierc said. "It's too big an area."

For years a vocal group of residents, mostly made up of Realtors, developers and builders, has strongly opposed the notion that the Helena Valley contains elevated, unhealthy levels of nitrates and other pharmaceuticals in the groundwater.

The interim zoning regulations were first approved in December 2006 and were subsequently overturned by a district judge who said commissioners hadn't followed the public process on the original summary report, prepared by county Environmental Health Director Kathy Moore.

The rules were approved again in May 2007 and have twice been amended. The first revision removed a controversial requirement that all valley residents installing or replacing a septic system must purchase a Level II system, which can cost two to four times as much as a standard system.

All this conflict has been promulgated on the notion there is a water quality emergency in the Helena Valley. Now a county official's report — not just an outside study provided by the group of critics says the old data used to justify that is inconclusive.

Just before the November general election, Moore admitted she made a mistake in her analysis, and that the nitrate levels had not increased as much as she originally proclaimed. She and county commissioners at the time stood by their water emergency assessment, as well as the impetus for approving interim zoning.

The news County Fabricated Groundwater Emergency could have contributed to incumbent Commissioner Ed Tinsley being defeated in the election by Derek Brown.

County settles another subdivision suit for \$650K

\$150K left in coffers for sole remaining case

AL KNAUBER
Independent Record

Lewis and Clark County has settled one of two remaining lawsuits that originated from previous regulations requiring

improvements to roads outside of subdivisions.

The \$650,000 settlement with Rubicon Development Corp., Russel Reed and John Herrin, which involved their plans for Green Meadow Vista major subdivision, came with no admission of liability by the county, according to the release and settlement agreement.

This settlement brings the previous total of \$4,813,000 paid

through seven other lawsuits to \$5,463,000, according to figures provided by county officials.

County officials have been budgeting money for legal settlements, and this year's budget contains \$1 million that was carried forward from last year's budget as well as an additional \$800,000.

With the settlement of the Rubicon Development Corp. lawsuit, the county has

\$150,000 remaining in this year's budget to use toward the sole remaining case that will go to trial because settlement talks were unsuccessful, said Eric Bryson, the county's chief administrative officer.

The lawsuits all involved off-site road improvements that at that time were required by county subdivision regulations, Bryson said previously, when he also noted that there has not

been a road lawsuit filed since the regulations were changed.

County officials have previously explained they opposed adding more traffic from new subdivisions onto county roads that were inadequate for existing traffic levels because of liability concerns. The choice they saw was to risk liability from traffic accidents as a result

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of new subdivision traffic or risk lawsuits from developers.

A district court ruling against the county in one of the previous lawsuits, said it was not appropriate for the county to require a developer to pay not only for the impacts of a subdivision but to also address pre-existing deficient road conditions, which is the county's responsibility.

The county's subdivision regulations were revised nearly six years ago to allow developers to pay only a proportionate share of the cost to improve roads outside of subdivisions.

Herrin, who is an equal partner with Reed in Rubicon Development, said Tuesday he's "glad to move on to a new chapter.

I'm probably not going to invest in Lewis and Clark County anymore."

"We finally got justice, which we should have had in the first place," Herrin said.

The subdivision proposed by Rubicon was initially 33 lots, then reconfigured in 2007 to 22 lots, Herrin said.

Requirements for off-site roads, fire protection and providing for two entrances into the subdivision became issues that Herrin said were taken to court.

The \$650,000 settlement, he added, pays for some \$550,000 in land, development costs and legal fees.

The remaining \$100,000 represents the "profit" on an investment that began in 2005, Herrin said, adding "that's a bad investment."

Land for the subdivision is being sold for development as a solar-electric facility, he said.

Yet to be resolved among the lawsuits that originated from off-site road improvements is one involving Chris Goodman and Jerry Lap-pier for Lookout Lodge, Bryson said.

The 2007 staff report that recommended denial of approval for the subdivision said the proposal was to create two lots, each for a tourist home or a single-family dwelling. The existing 2.95 acre tract would be divided into two lots ranging in size from 1.29 acres to 1.66 acres.

Access to the lots would be from the Craig River Road.

Both sides aren't allowed to discuss the failed settlement negotiations to avoid prejudicing potential jurors and the judge who will hear the case, Bryson said.

Al Knauer can be reached at al.knauer@helenair.com

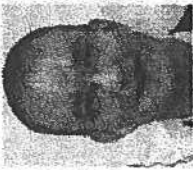
Subdivision suits have cost county nearly \$5M

AL KNAUBER
Independent Record

Subdivision lawsuit settlements from nearly a decade ago have cost Lewis and Clark County \$4,780,000, although two from those days have yet to be resolved.

The lawsuits, said Eric Bryson, the county's chief administrative officer, all involved off-site road improvements that at that time were required by county subdivision regulations.

Those regulations were revised nearly six years ago to allow developers to pay only a proportionate share of the cost



Bryson

to improve roads outside of subdivisions.

The most recent of those settlements came in November, when the county commission approved a \$2.5 million settlement with Hamlin Construction and Development Co. and Jerry and Barbara Hamlin individually



Hunthausen

and as trustees of the family's revocable living trust, whose proposed subdivision was denied.

Terms of that settlement called for a payment of \$1.5 million by Dec. 5, 2014, and two subsequent \$500,000 payments, one of which will be made in



Geise



Murray

each of the next two fiscal years. These two subsequent payments, Bryson explained, are structured so the county can budget for them.

The settlement also provided that Hamlin's 165-acre subdivision with 127 lots and about 235 living units, Red Fox Meadows, be approved.

While the district court noted in the Hamlin decision that the county was within its rights to require a developer to pay a reasonable fee to address impacts caused by a subdivision, "What is not appropriate, however, is for the county to require the developer to pay not only for

the impacts of his subdivision, but also to address a preexisting deficient road which is the County's responsibility."

To prepare for lawsuit settlements or judgments, the county set aside \$2 million in this fiscal year's budget. The county had budgeted about \$1 million in the previous fiscal year's budget toward potential legal liabilities from ongoing lawsuits that date back to before the subdivision regulations were revised in 2009.

Of the two lawsuits from before the change in subdivision

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FRIDAY, JANUARY 16, 2015

Independent Record

[helena.com](http://www.helena.com)

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regulations, one may be resolved by a state law passed by the Legislature two years ago, Bryson said. The Montana Association of Counties provided the county's legal defense, he noted.

Hamlin said on Thursday that emails related to his subdivision, which he obtained through the discovery process of his lawsuit, led him to believe he wasn't treated fairly.

"All of that is beginning to make me feel I was set up and I was dead before I started.

"I'm making statements based on the record," he added.

He pointed to his support for Republican candidates for the county commission, one of whom successfully won election, and his opposition with others to a proposed county regulation for home construction, to explain his belief.

However, the district court disagreed, as does Commission Chairman Andy Hunthausen, who said he had not met Hamlin before Hamlin's subdivision came before the commission.

"I try to treat everybody the same," Hunthausen said.

"There was nobody out to get anybody," he added.

The money paid to settle these lawsuits — some date from eight years ago — is troubling for Commissioner Susan Good Geise.

"Everything we do in subdivisions, we have to be exceptionally careful to follow the language and not be arbitrary and capricious," she said.

"As a commissioner, I believe it's our job to look forward, learn from the past ... to make sure that those mistakes, whether it be interpretation or application of statutes, or errors in process, are never repeated," she said.

Engaging the Helena Building Industry Association in dialogue as a public works manual was being assembled, she said, shows

the county's commitment to moving forward.

The county has also been seeking to engage builders, those involved in real estate sales and others as it works to update its growth policy, which examines development against the need to provide for fire and flood protection as well as wastewater disposal, roads and the availability of water.

There will always be a tension between the county, which represents all of the people who live here, and developers who are in the business of building homes for those people, Geise said.

"The challenge is making welcome the new people while making sure

people who have lived here a long time have their property rights respected," she said.

The challenge, she added, is making sure development is done right. When running for the commission in 2006 as a Democrat, Hunthausen said his priorities for office included "common-sense zoning for predictable and sustainable growth."

Changing the subdivision language to include a developer paying only a proportional share of the cost for impacts — county subdivision regulations included this in 2009 — was important to him, he said.

"We have not had a

filed road lawsuit since that time," Bryson, the county's chief administrative officer, said.

"I'm confident that it won't happen again," Commissioner Mike Murray said of the issue behind these lawsuits.

"I'm certainly disappointed that we were in a position to settle, but we were," he added.

The fiscal impact on the county from settling the lawsuits meant a tight budget this fiscal year and likely next year, too, he noted.

"And hopefully it will be over," Murray said.

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December 2, 2018

Justices jump to unanimity on frog case

CHRONICLE'S S.C. EDITOR

WASHINGTON — Unanimity is elusive in today's America but the Supreme Court achieved it last week. Although the dusky gopher frog is endangered, so are property rights and accountable governance. Both would have been further jeopardized if the frog's partisans in the U.S. Fish and Wildlife Service had gotten away with designating 1,544 privately owned Louisiana acres as a "critical habitat" for the 3-inch amphibian, which currently lives only in Mississippi and could not live in the Louisiana acres as they are now. The eight justices (the case was argued before Brett Kavanaugh joined the court) rejected both the government's justification for its designation, and the government's argument that its action should have received judicial deference, not judicial review.



GEORGE WILL

In his opinion for the court, Chief Justice John Roberts explained that back in the day you could not sling a brick without conking a dusky gopher frog in the longleaf pine forests of coastal Alabama, Mississippi and Louisiana. But 98 percent of those forests have been sup-

pressed in the manner of a schoolmarm whose patience has been sorely tried by a slow pupil, Roberts said. "According to the ordinary understanding

ceived judicial deference, not judicial review.

In his opinion for the court, Chief Justice John Roberts explained that back in the day you could not sling a brick without conking a dusky gopher frog in the longleaf pine forests of coastal Alabama, Mississippi and Louisiana. But 98 percent of those forests have been supplanted by urban development, agriculture and timber harvesting. The frog speaks, one of which was last seen in Louisiana in 1965, was designated endangered in 2001, when about 100 were found at a single pond in southern Mississippi, where the FWS decided the frogs were at risk of extinction from hurricanes or other natural events.

The frog is, like a well-born Victorian maiden, a frail flower, requiring everything to be just so. The frog needs an "open-canopy" forest with suitable ground vegetation and food supplied if the area experiences frequent fires, and the frog only breeds in "ephemeral" ponds that are dry part of the year, thereby protecting the tadpoles from hungry fish. The FWS designated the 1,544 acres a "critical habitat" even though (1) no such frog has inhabited them for half a century and (2) none could live long there unless the land were substantially modified (e.g., trimming the canopy, producing suitable undergrowth, and experiencing fires that the acres' loblolly pines cannot withstand) and (3) the loss of the acres could cost the owners \$34 million in lost timber farming and development opportunities.

Writing in the manner of a schoolmarm whose patience has been sorely tried by a slow pupil, Roberts said: "According to the ordinary understanding

agency is administering.

This idea is the crux of progressivism's case for allowing the administrative state to boss us around without judicial review of its bossiness. This state's agencies say that they possess detailed expertise beyond Congress' ken, and courts should bow before the agencies' disinterested wisdom when constraining Congress' legislative instructions, however much the instructions' ambiguities leave the agencies with vast discretion. Roberts reminded the dusky gopher frog's friends that courts are commanded by law to "set aside any agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"

Roberts cannot hope to replicate the achievement of his greatest predecessor, John Marshall, who as chief justice from 1801 to 1835 presided over a court in which approximately 95 percent of opinions were unanimous. However, in the aftermath of the Kavanaugh confirmation circus, and recent presidential nominations about judicial partisanship, Roberts must be eager to minimize the number of 5-4 decisions, and to achieve unanimity when possible. So it was serendipitous that the frog case involved government overreaching so rudently egregious to unite Roberts' colleagues behind an opinion that he must have relished writing.

The 8-0 ruling was doubly beneficial. It was a repurative moment for the court. And it was a chastisement of the administrative state, the government's fourth branch, which is one too many.

George F. Will is a columnist for The Washington Post.

June 2? 2019

Let flawed court precedent fall

Supreme Court Takings Clause

WASHINGTON — The doctrine that court precedents should have momentum for respect — the predictability of settled law gives citizens due notice of



GEORGE WILL

what is required or proscribed — is called stare decisis. This Latin translates as: “To stand by things decided.” The translation is not: “If a precedent was produced by bad reasoning and has produced irrational and unjust results, do not correct the error, just shrug, say, ‘well, to err is human,’ and continue adhering to the mistake.”

Last week, the Supreme Court was roiled by an unusually pointed disagreement about stare decisis. It occurred in a case that demonstrated how, when judicial review works well, Americans’ rights can be buttressed and American liberty enlarged by a process that begins when the denial of a right is challenged by someone who thinks that precedents, although important, are not graven in granite by the finger of God. Someone like Rose Mary Knick.

This 70-year-old got her dander up and challenged a 34-year-old Supreme Court precedent that substantially impeded her ability to contest a township ordinance that significantly burdened her property rights over her 90 rural acres in eastern Pennsylvania. In the past, that state had many burials on private land, and in 2012 Knick’s township decreed that all cemeteries (defined as any land ever used for burials) must be open to the public during daylight, and that township personnel could enter such properties to look for violations.

There is some evidence that long ago there might have been

a small burial plot on Knick’s property.

The Fifth Amendment’s Takings Clause says that “private property [shall not] be taken for public use, without just compensation.” Knick, who was exposed to cascading fines for resisting the township’s ordinance, wished to challenge the ordinance as a taking. But because of a 1985 court ruling, she was confronted with what Chief Justice John Roberts last week called a “Catch-22.”

That ruling held that before having access to federal courts, a plaintiff must first achieve a state court decision on the takings claims.

But, wrote Roberts, if after the time and expense of the state process the plaintiff receives an adverse ruling there concerning just compensation, that ruling generally precludes a subsequent federal suit. So the court ruled 5-4 (Roberts with Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh in the majority) that the 1985 ruling should not stand as a burden on plaintiffs seeking a federal remedy for state infringements of their constitutional rights.

Writing for the minority (joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor), Elena Kagan, making what Roberts rightly termed “extreme assertions,” said the court’s decision “smashes a hundred-plus years of legal rulings to smithereens.” It does not, but suppose it did. What if those supposedly pertinent prior rulings — prior to 1985 — also were wrong?

A brief filed with the court on Knick’s behalf by Washington’s Cato Institute and others argued that the 1985 decision was an anomaly that effectively consigned “Takings Clause claims to second-class status.

No other individual constitutional rights claim is systematically excluded from federal

court in the same way.” The post-Civil War 14th Amendment was enacted to secure federal rights for all citizens, which requires access to federal courts “to vindicate their federal rights.” Congress wrote that amendment and other laws because, according to the brief, it worried that “state courts could not be trusted to adequately enforce the federal Constitution against the coordinate branches of state government.”

In the court’s long and often luminous history, there is no nobler episode than the protracted, piecemeal erosion — most dramatically, with the 1954 Brown decision concerning school desegregation — of the now completely overturned 1896 Plessy v. Ferguson precedent upholding the constitutionality of (supposedly) “separate but equal” segregated public facilities.

Also, in 1943, in a 6-3 ruling, the court reversed an 8-1 ruling from just three years earlier that had upheld the constitutionality of laws requiring school pupils to salute the U.S. flag, regardless of deeply held religious objections to the practice.

More recently, the court has held (in 2003, when overturning a 1986 precedent upholding the constitutionality of anti-sodomy laws) that stare decisis is not an “inexorable command.” Quite right. The inexorable command is to reason correctly so that justice is done, especially when constitutional rights are at stake.

“Fiat justitia ruat caelum” is Latin for “Let justice be done though the heavens fall.” Perhaps that would not be prudent. However, when a flawed precedent falls, this is hardly equivalent to the heavens falling.

George F. Will is a columnist for The Washington Post.

February 28 2020 *Listening Session*

Comments on L & C County's proposed Zoning of the Helena Valley Planning Area

*19 people
Files out
of about 80 people
All voted same*

Print Name and Sign Signature:

Address Residence & Mailing:

Phone Number:

- 1. Do you favor the L & C County Zoning Map and General Plan as outlined? Yes No
Comments:
- 2. Do you believe the County Planning Staff is adequately advertising meetings? Yes No
Comments:
- 3. Has the Staff & info adequately justified the need for large tract rural property? Yes No
Comments:
- 4. Do you feel rural property values will drastically go down with County Zoning? Yes No
Comments:
- 5. Should The county Video Record all public Zoning Meetings? Yes No
Comments:
- 6. Should L & C Co mail Maps & economic impacts details to all HVPA landowners? Yes No
Comments:
- 7. Could the County be held liable for damages to rural property owner's lands? Yes No
Comments:
- 8. Must County Hire a Consultant to do an Zoning Economic Impact Assessment? Yes No
Comments:
- 9. Will you actively support efforts to counter the Counties proposal? Yes No

Brown also opposes the proposed requirement for paving all internal roads in new subdivisions, regardless of the development's size.

Nitrate mistake

Michael J. Fasbender, Comments posted HelenaIR.com Sunday, November 2, 2008

"Nitrate study numbers inaccurate. " This was the headline in the IR concerning county Environmental Health Chief Kathy Moore's admission that a report she submitted to the county commissioners contained erroneous nitrate numbers. Quoting from the article regarding the now proven to be false claim that nitrate levels had increased eightfold "In that instance of that report. I made an error." Moore said later in an interview.

"It was unfortunate." So to all our folks who needlessly spend \$20,000 on our level II septic systems. It was unfortunate.

John Herrin, former employee of the Montana Department of Environmental Quality, is an expert with experience in design, installation, and regulation of sewage treatment systems all over Montana. After Ms. Moore's report was first released, Mr. Herrin pointed out a number of discrepancies in her calculations and data. Following is her response taken from an IR article dated January 11, 2007:

"Mr. Herrin's demonstrated lack of knowledge about the county process, his hostility toward county officials and his scientifically unsupported statements are negative and erroneous," Moore wrote.

It has been proven that someone was making scientifically unsupported statements that were negative and erroneous but it wasn't Mr. Herrin.

County commission settles zoning lawsuit

LARRY KLINE - Independent Record - Friday,

April 25, 2008

Lewis and Clark County commissioners on Thursday signed off on an agreement to settle a lawsuit over county interim zoning regulations, though other litigation is still pending.

The county will cut a \$56,000 check for attorney Bill Gallagher, who represents plaintiffs Mike Fasbender and John Herrin.

The men won a preliminary injunction last year, voiding the county's first passage of interim zoning regulations, but lost on other counts. They may appeal the case to the state Supreme Court.

District Judge Jeffrey Sherlock had said officials violated public-participation laws in the run-up to the interim rules' approval.

Shortly after the decision, county commissioners went through the process again and approved a second iteration of the interim zoning rules, which have proven more controversial than the first document.

The new regulations, the subject of a separate lawsuit filed by Fasbender, required landowners installing new and replacement septic systems in the Helena Valley to use Level II treatment systems, which are about four times the cost of a standard system and run in excess of \$15,000.

Sherlock had already issued an order saying most of the original case's claims are now moot, but the lawsuit would still have proceeded to trial to address any financial damages Fasbender and Herrin could have requested. Thursday's settlement saves the county money it would have spent on staff time and hired experts at the trial, county attorneys said.

"Those costs add up quickly," Deputy County Attorney Jeff Sealey said.

Gallagher declined to say how the settlement will be divided between him and his clients.

Fasbender and Herrin released a statement through Gallagher on Thursday.

"Their position remains that Interim Zoning is being inappropriately used by Lewis and Clark County and counties around the state to circumvent the protest rights and protections of landowners provided by the Legislature and the Constitution," Gallagher wrote in an e-mail.

"It is our hope that this and the other zoning lawsuits ... will motivate the 2009 Legislature to more clearly define these issues and to reinforce a process that must be fair to all concerned," he wrote.

The lawsuit covered an array of issues related to the county's zoning regulations, but the item that has garnered the most attention across Montana and may be at the heart of any appeal the plaintiffs file in the state Supreme Court, Gallagher said, is a matter of interpreting state law.

The focus is on two sections of Montana law that govern the procedures for establishing county zoning regulations. The section related to permanent zoning specifically requires counties to hold

a planning board hearing, publish additional legal notices and allow a 30-day protest period for landowners.

The section governing interim zoning does not specify the same requirements. Interim zoning rules are created to serve as short-term solutions and may only stay on the books for up to two years.

Gallagher and his clients believe the two sections are related and that any interim zoning rules must go through the entire process and are subject to a protest.

Sherlock agreed with the county's assessment that the two sections are completely separate.

"To require the (commissioners) to create a protest period would create a ridiculous situation where there would be absolutely no reason to have a specific statutory requirement on emergency interim zoning," Sherlock wrote last year.

Reporter LarryKline. 447-4075 or larry.kline@helenair.com

After the court's zoning decision

By JOHN HERRIN - Your Turn Editorial Friday, April 6, 2007

We were heartened to read Judge Sherlock's legal opinion that a few county managers, by implementing zoning, violated county landowner's constitutional rights in limiting public written and oral testimony.

This injunction halts the December 12, 2006 adopted Helena Area zoning proposal, and thereby removes the severe lot size and wastewater design restrictions. The counties ill-conceived plan would result in massive administrative headaches for county staff and volunteer boards. The counties plan would also increase the average cost of a septic system by an additional \$10,000 to \$20,000 per lot.

And worst of all Kathy Moore admitted in court that she did not see a Helena Valley water quality crisis until she really looked at the data a week before the December 12 the Interim

"Emergency" hearing even though she was Lewis and Clark County Water Protection District manager for years. She further admitted on the stand that Paul Stahl had threatened to eliminate her section and job

Judge moves to nullify county's interim zoning regs

By LARRY KLINE IR Staff Writer Tuesday,

March 20, 2007

A district judge on Monday issued a preliminary injunction nullifying Lewis and

Clark County's interim zoning regulations. The decision by Judge Jeffrey Sherlock doesn't prevent county commissioners from implementing a new set of interim zoning rules — as long as they give opponents ample opportunity to counter county officials' claim that a groundwater emergency exists in the Helena Valley.

County Commissioner Ed Tinsley on Tuesday said the zoning regulations will be back before the commission within a month.

Two developers, John Herrin and Mike Fasbender, are suing the county over its zoning rules, which were approved in December. The regulations set building height and setback regulations, require all new lots to have only one use, such as residential or commercial, and set a controversial five-acre minimum lot size for newly subdivided parcels with on-site, individual septic systems.

In a court document, Sherlock said the preliminary injunction is not a decision on whether a water-quality emergency exists — a claim by county officials, which the developers have rejected.

Sherlock wrote he was troubled by several aspects of a Dec. 12 public hearing, where commissioners heard a water-quality report and took testimony from opponents and proponents before approving the regulations on the same day.

The judge wrote that county actions likely violated zoning opponents' constitutional right to participate.

County officials didn't respond to several requests by Fasbender and others seeking the details of the water-quality report in the days leading up to the hearing, Sherlock noted. The report was given at 9 a.m. and the decision made by noon that day — giving residents little time to analyze the information and respond.

"The problem remains in the fact that participants at a public hearing should not have to guess what the government's justifications are for its actions," Sherlock wrote.

Fasbender and Herrin were entitled to know why the county considered the situation an emergency and be allowed to present rebuttal evidence, he added.

The developers' attorney, Bill Gallagher, could not be reached for comment Tuesday morning.

Read more of this story in Wednesday's IR.

Zoned out

By LARRY KLINE -IR Staff Writer Helena IR Sunday, December 31, 2006

It was Day 3 of my new job here at the Independent Record, and I already knew what my big assignment was that week.

Little did I know it Emergency Zoning would become my big story for the rest of 2006.

During that week in August, I read the county's proposed zoning regulations. I met with Lewis and Clark County officials. I took note of the full-page ads already prompted by the issue. I learned of the controversies inherent with any mention of the "z-word."

And now it was time for a good old-fashioned public hearing.

I was excited about it - I love public forums - but thought I was coming into the game late in the fourth quarter. County commissioners, planning board members and the public had debated the rules for months.

I figured what turned out to be a three-hour-long hearing would be among the final stories I'd write about the regulations, which then were proposed for the Helena Valley, Canyon Creek Marysville and Canyon Ferry areas. I assumed the issue would wrap up quickly and neatly. Silly me.

I did a search this week. I've written more than 20 stories about the regulations in the last four months.

The public forum was a doozey, with more than two dozen folks taking time to opine on the rules, which regulate building heights and setbacks, lot uses, and set a controversial five-acre minimum lot size for new parcels with septic systems.

It felt darn good to return that night and try to condense the complex hearing into a readable story while on deadline. I loved it.

The issue since has gone through so many permutations. First Canyon Ferry was dropped from consideration. Then a citizens' protest nixed the rules in Canyon Creek-Marysville.

Then the county failed to twice publish a notice in the IR, negating the rules in the Helena Valley. A citizens' protest there had narrowly failed, but a dispute over the county's analysis of the protest still simmered.

Officials held another hearing and approved the same regulations, though under a different state statute that allows for interim zoning rules.

As promised by developers and attorneys, a lawsuit over the new regulations and the Helena Valley protest results showed up in District Court.

The story isn't my favorite because it involves controversy, debate and lawsuits. It's my favorite because of how important it is to the people involved and to the IR's readership.

Everyone, on all sides of the issue (and there are more than two: some want zoning, some don't, and others want zoning but not these rules), has said they believe they're sticking up for those who live in the valley.

It's intriguing because the issue has so many angles. And it's a cornerstone sort of matter - any discussion of zoning eventually leads you back to growth in the valley, concerns over groundwater and private property rights.

Lucky for me, the issue's not dead. The rules' fate will be decided by a judge.

And I love a good court hearing.