



PUBLIC MEETING
November 21, 2017
MINUTES

The Lewis and Clark County Commissioners Public Meeting was held on Tuesday, November 21, 2017, at 9:00 AM in Commission Chambers Room 330.

Roll Call

Chairman Susan Good Geise called the meeting to order at 9 a.m.

Commissioner Andy Hunthausen and Commissioner Jim McCormick were present. Others attending all or a portion of the meeting included Roger Baltz, Marni Bentley, Nancy Everson, Pat Ford, Nicho Hash, Charles Lane, Michelle McNamee, Eric Merchant, Lindsay Morgan, Thomas Plank, Traci Sears, Paul Spengler, and Nadine McCarty, Recording Secretary.

Pledge of Allegiance

Everyone recited the pledge.

Consent Action Items

- a. Resolution 2017-152 Declaring County Property Surplus Property. (Amy Reeves)

Roger Baltz reported on the consent action item 2 a and recommended approval.

No public comment was received.

A motion to Approve was made by Commissioner Hunthausen and seconded by Commissioner McCormick. The motion Passed on a 3-0 vote.

Amendment to the Immunization Services Grant Award to Lewis and Clark Public Health from Department of Health and Human Services. (Eric Merchant)

Eric Merchant, Disease Control and Prevention Division Administrator, presented the amendment to the Immunization Services grant award from the Montana Department of Public Health and Human Services. The purpose of the grant is to provide support to reduce the burden of vaccine preventable diseases within the county. Under this amendment the contract term will be revised from a Calendar Year to a State/County Fiscal Year and the grant award will be increased from \$27,355 to \$41,032 to provide an additional 6 months of funding. All other terms in the grant award and the agreement remain the same. Staff recommends approval.

Commissioner Good Geise addressed the controversial Human Papillomavirus (HPV) vaccine and stated she would expect that Public Health is keeping close tabs over the debate that surrounds the vaccination. Mr. Merchant gave an explanation of the Human Papillomavirus (HPV), the safety

of the vaccine, and stated the Community Health Improvement Plan for the year was modified to include HPV as a priority and provide education on the vaccine due to the direct tie to this virus and certain types of cancer. No public comment was received.

A motion to Approve was made by Commissioner McCormick and seconded by Commissioner Hunthausen. The motion Passed on a 3-0 vote.

Lewis and Clark County Indigent Burial Policy. (Marni Bentley)

Marni Bentley, Budget Coordinator, presented the Indigent Burial policy to establish criteria for financial assistance for indigent burials in Lewis and Clark County. There has not been a formal process in the past. There is now a need to have something in place as the number of indigent burial requests has increased. The policy will ensure the deceased is actually indigent with no resources or money to pay for burial, as well as, establish there is no one else who should be responsible for the burial costs. The deceased must be a resident of Lewis and Clark County in order for the burial to be paid for by the county. The funeral home will work with any family and with county finance to determine if the deceased meets the indigent requirements. The final decision will be made by the Chief Administrative Officer based on recommendation from County finance staff. Staff recommends approval.

Ms. Bentley stated the county is not required by the State to have an indigent burial policy in place. Other counties in the state have existing policies such as this.

No public comment was received.

A motion to Approve was made by Commissioner Hunthausen and seconded by Commissioner McCormick. The motion Passed on a 3-0 vote.

Appeal. Floodplain Development Permit Application Denial for Red Fox Meadows Subdivision (Appellant: Hamlin Construction and Development Co., Inc.) (Floodplain Administrator: Paul Spengler)

Charles Lane requested a 10 minute recess to print some documents from emails that were received this morning from Mr. Hamlin's attorney.

Paul Spengler, Disaster and Emergency Services Coordinator and Flood Plain Administrator, presented the appeal of the Flood Plain Development Permit Application denial for the preliminarily approved Red Fox Meadows Subdivision located south of and adjacent to Canyon Ferry Road, and east of and adjacent to Lake Helena Drive.

Mr. Spengler stated the second flood plain permit application was denied for the following reasons: 1) Hamlin's flood plain development permit application, submitted on July 25, 2017, proposed a 100-year peak flow of 448 cubic feet per second (cfs). The Montana Department of Natural Resources (DNRC) and Michael Baker International (Baker) reviewed this application, focusing on the hydrology peak flow calculation; 2) Hamlin's July 2017 application, while procedurally distinct from their previous flood plain development permit application, is a continuation of engineering reports submitted to the County for the drainage that runs through the proposed Red Fox Meadows Subdivision. Hamlin's purport that this application is responsive to recommendation made by DNRC and Baker during the review of Hamlin's first application, specifically recommendations made by Baker in their June 2017 review; 3) DNRC reviewed the hydrology study submitted with the application and submitted their comments to the County in a letter dated September 25, 2017. Steve Story, the Water Operations Bureau Chief for DNRC, stated that a reasonable range of flows for that area is 840 to 1330 cubic feet per second (cfs), or even higher. Mr. Story recommends denying the application based upon the unreasonable low flows Hamlin's application relies on; 4) the county flood plain ordinance states that the first purpose of the regulations is to "promote public health, safety and general welfare of the residents and minimize public and private losses due to

flood conditions in Regulated Flood Hazard Areas." Accepting Hamlin's proposed flows could put houses at risk that are built within the proposed subdivision; 5) Baker reviewed the latest hydrology report from WWC Engineering and submitted their comments to the County in a letter dated September 25, 2017. Baker determined that WWC's hydrology calculations were not responsive to Baker's comments in their June 2017 review. Baker's September 2017 review stated that WWC's report "did not obtain reasonable 100-year discharge that is consistent with gaging station data similar to the ephemeral stream as recommended by Baker in their June 2017 review comments." Baker concluded that "a reasonable 100-year discharge for the Red Fox Meadows Subdivision at 11.89 square miles is on the order of 1300 cfs." This number, while consistent with the USGS regression equations, is derived by Baker using various methods; 6) for at least these reasons, the flood plain permit application dated July 21, 2017 was denied.

Traci Sears, National Flood Insurance Program Coordinator (NFIP) for the State of Montana, stressed the fundamental purpose of the NFIP is public health, safety, and welfare by the reduction of flood risk. Permit applications are reviewed to ensure the proposed project is safe from risk and the project will not cause harm or risk to others that surround them. There are 136 participating communities in Montana. Most of the flood plain administrators are not engineers and rely heavily on the technical assistance provided by DNRC. Typically DNRC sees about 50-70 hard technical reviews such as what was asked to be performed for this application from the regional or state engineers. Once a community approves that particular application they assume the liability. She referenced a subdivision in Missoula and the discrepancy with a FEMA map that did not show area being vulnerable, of which homeowners had seen the area under water. The subdivision was approved with conditions, one of which no basements or crawl spaces. About five to six years after the development completion a major flood occurred, flooding 150 homes resulting in lawsuits. At the time of training or advising flood plain administrators they tell them if a number of community members state there is an issue it is recommended that more information is provided before moving forward due to the concern. It could place future property owners at higher risk to, not only flood, but also increased flood insurance standards. The questionable engineering that is going on now will make it difficult for the homeowners to make a case to FEMA that the lots are outside of the 100 year flood plain and will be burdened with insurance costs that keep increasing. The costs in the special flood hazard area are currently from \$700 to \$5,000 annually.

Mr. Spengler stated this was denied on September 25, 2017.

Commissioner Good Geise stated the information given this morning was emailed last night at 11:25 pm. There is a letter here the reason this is late the appellant is in California without his regular business equipment. The Commission was prepared to make a decision today, but now it has to be delayed due to the additional information received by Charles Lane on November 20, 2017 at 11:25 pm. Time is needed to review this documentation.

Charles Lane, Deputy County Attorney, stated he has reviewed the 69-page packet received on October 25, 2017. He referenced certain points in the packet starting with the clarification that the flood plain that runs through the proposed Red Fox Meadows Subdivision is an approximate Type A subdivision meaning there has been no study or delineation of that flood plain so the statement at the end of the first paragraph "All subdivision property that lies within that flood plain, however, is designated exclusively for use as open space" is misleading at best; as well as open space is exempt from the permitting requirements and the reason a permit is required is due to the five roads that run through the flood plain. He pointed out that Mr. Spengler is available to clarify any statements he made during his deposition; at the bottom of page 2 the statement "submission of the July 25th application does not affect the legal position or contentions of the applicant with respect to the first application", the County disagrees with this statement and reserves the right to start all arguments related to the legal implication of Mr. Hamlin's submittal of the second application, these arguments include, but not limited to, that the continued participation in the administrative process is an acknowledgment that the first application was properly denied and that

Hamlin's have waived the right to appeal the Board of County Commissioners denial of the first application.

Commissioner Good Geise stated it seemed that the appellant's position was that the initial denial should not be looked at, only concentrate on this denial. Mr. Lane stated there are internal inconsistent statements throughout the applicant's memo that attempt to exclude the process or the application submittals that were submitted during the first application and the relation to the second application. The memo relies on statements made in the first application in an attempt to argue that the second application complies with recommendations made during the first application.

Commissioner Good Geise confirmed with everyone that Commissioner McCormick having to leave by 11:00 am is okay with everyone involved. She does not want to rush this and a decision will not be made today.

Mr. Lane referenced the statement "that the application was prepared and complies with the recommendations by the Michael Baker firm in their June 23, 2017 report", he clarified that Michael Baker made a recommendation that Hamlin could use a specific methodology to calculate the hydrology, this is methodology that Baker had previously calculated but had not relied on and had resulted in a flow of 1,000 cfs. Baker did not recommend against using any other methodologies, but just made a recommendation that they could use this methodology.

Commissioner Good Geise referenced the last paragraph of page 2 and the statement that addressed that the application was submitted out of practical and compelling economic necessity for the applicant, given the denial of the first application and uncertainty of a final court decision, as well as approval of a permit by late summer was essential to avoid losing another construction season for the subdivision. It sounds like a lot of pressure was applied to hurry this up. Mr. Lane confirmed and will address later the timeline and how Mr. Hamlin rushed the application without an opportunity for a realistic meeting.

Mr. Lane stated that WWC has clearly not convinced Michael Baker or the DNRC, acting as the technical advisors; they are attempting to convince the Commissioners, who are not engineers, of their hydrology and their engineering. This should be directed towards the DNRC and Michael Baker. He referenced the statement "USGS regression equations were advocated by DNRC; clarification is neither DNRC, nor Baker has required the use of the USGS regression equations. There have been USGS regression equations that applied to this region prior to their update in 2016 and neither the County nor the DNRC required the use of these equations. They are a baseline equation to see if the calculated hydrology is in the right ballpark. The updated equations result in a lower flow than the previous USGS regression equations. The implication of the sentence that the county required equations that were published eight to nine months after submittal of the application was to the benefit of Hamlin.

There is reference to the MDT application throughout this application in an argument that because a permit was granted to MDT in 2009 it should also be granted to Hamlin. There is a statement that site specific conditions and structural characteristics of the Hamlin property were evaluated in the MDT application; they were not, the MDT's application relied on what is called a local regression equation analysis. This uses other site gauged streams within the area to calculate new regression equations rather than the more generic USGS regression equations those do not take into account soil conditions or other site specific characteristics.

The bottom of page 4 and top of page 5 are threats to the County of litigation and is improper when reviewing whether or not the hydrology calculation is incorrect. The threat of litigation is an attempt to force the County to accept hydrology calculations that both DNRC and Michael Baker view as inadequate.

Mr. Lane stated no evidence has been seen that a directive to make major improvements to existing public infrastructure at its sole expense in order to develop the property was given to Mr. Hamlin or his engineers. There is reference during Mr. Spengler's deposition that Mr. Spengler made a statement that perhaps that would be required. This is long after the applicant has submitted many variations of the report. Mr. Spengler confirmed he never told the applicant that he would need to rebuild a road or anything like that.

Mr. Lane stated the County disagrees with the implication that the MDT permit was improperly granted. It was properly granted under the regulations at that time.

Mr. Lane referenced the bottom of page 5 and the top of page 6 regarding the timing of the meeting; after the denial of the first application emails were received from Mr. Hamlin's attorney on Wednesday, July 12, 2017. No further emails were received from his attorney discussing if they wanted to have a meeting. Mr. Lane personally contacted Steve Story and Mr. Spengler to setup a meeting; Mr. Story was not available to meet until July 27th and Mr. Hamlin submitted his application on Friday, July 21st. He understands on the 21st Mr. Spengler called Sean Higley or a representative at WWC to persuade them to not submit the application on that date, but wait until the meeting could be conducted. He also understands that Mr. Hamlin insisted the submittal of the application.

Mr. Lane referenced the last paragraph at the bottom of page 6 that discusses the procedural requirements and how the first application was submitted, which is irrelevant for reviewing whether or not the hydrology is correct for the second application.

The County disagrees with the statement that the entire findings of fact cannot be relied upon for the denial of the second application. The second application is a continuation of the first six iterations of the application submitted during the first application. It is the position of Mr. Hamlin that the last application is in response to comments made during the first application; the history and the application documents submitted during the first application are relevant to the second application and to the denial of the second application.

The second application is another iteration; practically speaking the report relies on as a continuation of the iterations submitted during the first application. Procedurally it is a separate application, however the applicant has argued that it is responsive to comments made during the first application cycle, therefore relies on the first application procedure, submitted reports, and reviews that were conducted.

Commissioner Good Geise referenced page 7 and the assertion that findings number 1 through 31 are taken verbatim and seems to be problematic for the appellant. Mr. Lane stated the appellant is making every argument to try to reduce what is in front of the commission; is odd, considering he has been allowed to submit documents at 11:30 the night before the hearing. He sees no reason that the commission cannot review the findings of fact 5 through 31. It is Mr. Hamlin's position and he is not present to argue. The county's position is that they are relevant.

Commissioner McCormick commented to the relativity with the applications crossing over. There are two applications with information going to both; allegations that some applies and some does not making it very difficult to sort out.

Mr. Lane stated the issue is whether or not Paul Spengler properly denied this application.

He referenced page 8 and the dispute that apparently the factual findings included as reasons for denial the first application were insufficient or that the implication that the county thought they were insufficient. The findings of fact for the second application as he stated earlier is a second application distinct from the first application and the findings of fact for that application are distinct from the findings of fact for the first application. The county disagrees that the first findings of fact

were insufficient. At the bottom of the page is a quote from Michael Baker in their letter this is a quote that has been relied on by Mr. Hamlin extensively trying to characterize the disagreement over the hydrology calculations as merely a difference in opinion. This statement was made by Michael Baker in their introduction to the report to introduce the issue before starting on the technical evaluation of WWC's submittal. The county disagrees that it is merely a difference of opinion.

He referenced the recommendations made by Michael Baker that says as an acceptable hydrologic procedure for estimating flood discharges. They did make recommendation on a procedure; however the application of this procedure by WWC in their second submittal was rejected by Michael Baker as not being consistent with what the recommendation was; while they used the same procedure the ending result was not what was recommended by Michael Baker.

Commissioner Good Geise referenced page 9 and the sentence that stated the DNRC and the county could easily have made a site visit to verify the WWC information but neither bothered to visit. She stated the experts are there for the commission to rely on.

Mr. Lane confirmed the technical expertise is done by the DNRC and Michael Baker; it is their discretion whether or not to visit the site if that is an important step in the evaluation of the drainage basin and they do not believe that it is. The County has not advocated the use of USGS equations. The county will take the position that the statements made by DNRC and their recommendation to deny the second application are consistent with the recommendations made by Michael Baker to deny the application.

On the bottom of page 10 he referenced the sentence that begins with equally disconcerting are Mr. Story's instructions; they are not requirements, they are recommendations on a procedure that the county could follow given DNRC's frustration with the application. They are recommendations that the county is not obliged to follow. He understands discussions are in process with a third application where the county is considering not requiring a Conditional Letter of Map Revision (CLMR) be submitted.

He referenced page 12, the county has a position that the MDT permit was properly applied and he understands the MDT permit did not rely on site specific conditions such as soil analysis or the irrigation canal, but used a local regression equation methodology based on five gaging stations. It was the methodology that WWC relied on in the first application and was rejected by DNRC for that reason and other deficiencies.

On page 13 the county disagrees that Mr. Higley demonstrated in a graphic and compelling way that the 2016 USGS regression equations advocated by DNRC and the County were substantially unreliable and inaccurate for estimating flows. The memorandum states that the Baker report did not recommend using USGS regression equations; this is a mischaracterization, they recommended that Hamlin could use a methodology that was previously experimented with, but did not rely on. When WWC had used that method it got to a 1,080 cfs, but they chose not to use it. It was recommended that they could go back to that methodology. WWC did go back to the methodology and at that time derived at 480 cfs. The last paragraph neither the County nor the DNRC are adamant that they relied on the 2016 USGS regression equations.

On pages 14 and 15, Section IV is additional threats by Mr. Hamlin of litigation in an attempt to force the county to adopt the lower flow numbers if he does not get what he wants.

Commissioner McCormick referenced the statement on page 14; the applicant recently learned that Canyon Ferry is owned by the county and not by the state with reference later in the documentation referencing Montana statute and MDT taking over the maintenance of the roads in the late 1990s. There are dates, ownership, and responsibility for the roads that do not line up.

The question before the Commission today is whether or not Mr. Spengler properly denied the second flood plain application.

Commissioner Good Geise stated ultimately the decision is the Commission's, but when there is conflicting advice they have to rely on the experts with no involved interest.

PUBLIC COMMENT -

Shawn Higley, WWC Engineering, stated he is here to answer questions. He knows Mr. Hamlin is frustrated by the process and he submitted a lot of information of which he has not been privy to all of the information. They did respond to Michael Baker's comments and revised their modeling. They could not get the numbers to where Baker wanted to see. He doesn't think they are trying to convince the Commission to a certain number. They have been working with DNRC and Michael Baker to address the concerns. The biggest change from the last submittal was Michael Baker came forward with about an 840 cfs proposal; that went away with the last round of comments. The arguments as to why they took that away were not very good. He does not believe anyone has said they have to use a certain method; it comes down to the 1,300 cfs is the number they want to be used. There are many ways to get there. He thinks the comments about going out on the ground were more directed towards the reviewers. In many cases, that does tell a lot of information about what is going on and can influence the view and decisions made.

Mr. Higley knows no one said rebuild Canyon Ferry Road. The reality is the infrastructure in that area cannot handle more than about 500 cfs. To pass 1,300 cfs major improvements would have to occur. The road was built to 512 cfs because that was what the permit was for. The number they came up with is in the ballpark. There is a difference in opinion between the technical experts. Their information has been reviewed several times by different people and they feel it is a reasonable approach of which DNRC and Michael Baker have not agreed.

Commissioner Hunthausen stated when Canyon Ferry Road was built and the permit was for 500 cfs it was a farm field. It was not built with future consideration of homes to be built and a number of crossings of the road.

Mr. Higley, stated at the time that was there the application was in play. It should not matter the flood plain is what it is and whether it is residential or non residential the flow should be the same.

Commissioner Hunthausen stated the consideration today is not the same. It does matter and is a completely different consideration when people's lives and homes are at threat compared to farmland.

Mr. Lane agreed this is a difference of engineering opinion and further asked if the MDT permit relied on site specific conditions and structural characteristics for their hydrology calculation. He understood they relied on a local regression equation where five local sites were used which gave them their number; having nothing to do with soil conditions or an irrigation canal. Mr. Higley confirmed that to be correct. He also confirmed with Mr. Higley to be correct that the meeting that was to take place prior to the second application submittal Mr. Spengler had called Mr. Higley and asked him to delay submitting the application.

Mr. Higley stated they were under pressure by Mr. Hamlin as he was concerned about losing the construction season. He thinks Mr. Hamlin thought they still had time to have the meeting; the 60 day window did complicate things as far as getting together with time to review.

Commissioner Hunthausen understands the position Mr. Higley is in with his client. He wanted Mr. Higley to understand with build out ten twenty years down the road the county could still be in a liable situation by this decision.

Commissioner Good Geise stated it is unreasonable to suggest the packet submitted late the night before the meeting could be reviewed thoroughly. Would like time to properly review the information, close the public hearing today.

Nicho Hash, Deputy County Attorney, stated it is correct; in that the public hearing can be closed and consider the information, argument and discussions before the Commission today. Those individuals, including the applicant that was not present provided the comments as well.

Commissioner Good Geise stated the information that was received this morning and submitted on November 20, 2017 at 11:25:06 pm will be the final word from the appellants and the public hearing is now closed.

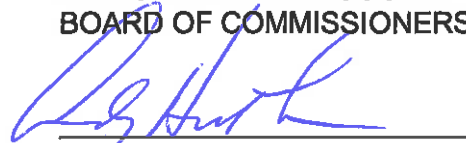
A motion was made by Commissioner Hunthausen to take the public comment, testimony and information received today and prior to today under consideration and to make the final decision on November 30, 2017 at the regularly scheduled public meeting. The motion was seconded by Commissioner McCormick. The motion Passed on a 3-0 vote.

Public comment on any public matter within the jurisdiction of the Commission that is not on the agenda above.

Adjourn

There being no further business, the meeting adjourned at 10:46 am.

LEWIS AND CLARK COUNTY
BOARD OF COMMISSIONERS



Andy Hunthausen, Chair



Jim McCormick, Vice Chair

Susan Good Geise, Member

ATTEST:



Paulette DeHart, Clerk of the Board