

LEGAL MEMORANDUM:

TO: Park County Environmental Council, Michelle Uberuaga
Friends of Park County, Ken Cochran

FROM: Jecyn Bremer, Gallik, Bremer & Molloy, P.C.
Stephen E. Woodruff, Huppert, Swindlehurst & Woodruff, P.C.

DATE: June 14, 2021

RE: City of Livingston/Heart K Land & Cattle Co.

This Memorandum applies to Resolution No. 3896, A Resolution of the City Commission of the City of Livingston, Approving of Agreement with Yellowstone Community Partners, Inc., passed and adopted October 1, 2007 (the "Agreement"), and the issue before the City of Livingston as to whether or not to approve an assignment of the Agreement with Yellowstone Community Partners, Inc. to a third party.

Issue 1: Is the Agreement Between Yellowstone Community Partners, LLC, Headwaters Walking Horse Ranch, LLC and the City of Livingston legally valid?

The Agreement purports to clarify the scope of the approval of the preliminary plat for the Yellowstone Preserve Subdivision and provides a fifteen (15) year time period for subdivision completion from the date of the preliminary plat approval.¹ The City Commission voted to grant conditional, preliminary approval for the Yellowstone Preserve subdivision on September 4, 2007. See September 17, 2007 letter from City Planner Jim Woodhull to Mr. Randy Schrauder, Summit Consulting Group, LLC.

At the time of preliminary plat approval, the Montana Subdivision and Platting Act provided a specific term for preliminary plat approval and the extension thereof pursuant to Section 76-3-610, Montana Code Annotated ("MCA"), set forth as follows:

¹ See Agreement at page 2.

- (1) Upon approving or conditionally approving an application and preliminary plat, the governing body shall provide the subdivider with a dated and signed statement of approval. This **approval must be in force for not more than 3 calendar years or less than 1 calendar year. At the end of this period the governing body may, at the request of the subdivider, extend its approval** for no more than 1 calendar year, except that the governing body may extend its approval for a period of more than 1 year if that approval period is included as a specific condition of a written agreement between the governing body and the subdivider, according to 76-3-507.
- (2) After the application and preliminary plat are approved, the governing body and its subdivisions may not impose any additional conditions as a prerequisite to final plat approval if the approval is obtained within the original or extended approval period as provided in subsection (1).²

(Emphasis added.)

Based on the plain language of the Agreement and Section 76-3-610, MCA, a preliminary plat approval may be in force for no more than three years nor less than one year, after which an applicant must seek an extension of preliminary plat approval to extend the approval beyond the original term. The City and the applicant cannot by agreement disregard the plain language of the statute and provide another term for approval, beyond what is allowed by statute. No extension of preliminary plat approval was sought or approved, the Agreement is unlawful, and the preliminary plat approval has now lapsed.

CASE LAW:

Montana case law supports a plain language reading of Section 76-3-610, MCA and the limited term of preliminary plat approval provided by statute, absent extension thereof.

² This is the 2007 version of Section 76-3-610, MCA. Review and decisions regarding subdivisions under the Montana Subdivision and Platting Act must occur under the regulations in effect at the time the application is submitted. *Burnt Fork Citizens Coalition v. Board of County Comm'rs*, 287 Mont. 43, 951 P.2d 1020, 54 Mont. St. Rep. 1490, 1997 Mont. LEXIS 280 (Mont. 1997).

In *Bitterrooters for Planning v. Bd. of Ravalli County Comm'r.*³, the District Court specifically found that the Board of County Commissioners' authority in approving or conditionally approving a subdivision application and preliminary plat is "plainly limited to providing the subdivider with a dated and signed [preliminary plat approval] that will be in force for no more than 3 calendar years or no less than 1 calendar year." The District Court determined that the statute is unambiguous, and that "the plain construction of the phrases ... no more than 3 calendar years ...and [a]t the end of ... in Section 76-3-610, MCA are clear."⁴ (Internal citations omitted.)

In *Gateway Opencut Mining Action Group v. Bd. of County Comm'rs*, the Montana Supreme Court noted that "where timing requirements of statutes or rules are mandatory and not discretionary or permissive, asserted lack of prejudice cannot supplant an express time requirement" and that "[u]nder such circumstances, the court must construe the statute as written, and not insert what has been omitted."⁵ The Court thus determined that when applicable statutes unequivocally set forth mandatory deadlines for Commissions' actions, a District Court has no authority to extend those statutory deadlines by stipulation or order.⁶ It stands to reason if a District Court has no authority to extend statutory deadlines by stipulation or order, a municipality has no authority to do so by resolution or agreement.

Issue 2: Would the assignment violate the Montana Subdivision and Platting Act?

In addition to violating Section 76-3-610, MCA, the assignment is contrary to the public interest and the purposes and intent of the Montana Subdivision and Platting Act ("Act"). The expressed purposes of the Act are to promote the public health, safety, and general welfare by regulating the subdivision of land, among others. § 76-3-610, MCA. The Montana Supreme Court has routinely held that "[n]o rule of statutory construction is more readily applied by the courts than [the rule] that public statutes dealing with

³ *Bitterrooters for Planning v. Bd. of Ravalli County Comm'r.*, Montana Twenty-First Judicial District Court, Ravalli County, Cause No. DV-2013-372, at page 19.

⁴ *Id.* at page 20.

⁵ *Gateway Opencut Mining Action Group v. Bd. of County Comm'rs*, 2011 MT 198, ¶19, 361 Mont. 398, 260 P.3d 133, 2011 Mont. LEXIS 236 citing to Section 1-2-101, MCA; *Miller v. Eighteenth Jud. Dist. Ct.*, 2007 MT 149, ¶¶ 39-40, 337 Mont. 488, 162 P.3d 121.

⁶ *Gateway Opencut Mining Action Group v. Bd. of County Comm'rs*, 2011 MT 198, ¶ 23, 361 Mont. 398, 260 P.3d 133, 2011 Mont. LEXIS 236

the welfare of the whole people are to have a liberal construction.”⁷ A liberal construction of Section 76-3-610, MCA necessitates construction in favor of the public interest which can only be promoted by enforcing the statutory limitation on preliminary plat approval for no more than three years.

Issue 3. Can the City Commission of the City of Livingston reasonably withhold consent to the assignment of the Agreement?

Section 18 of the Agreement provides that “[t]he benefits of this Agreement to Developer may not be assigned without the express written approval of the City” and that “[s]uch approval may not be unreasonably withheld.”⁸

Montana law enforces provisions limiting the assignment of a contract. *Bos Terra, LP v. Beers*, 354 P.3d 572 ¶17 (Mont. 2015). The reasonableness of a refusal to consent to an assignment is to be measured objectively by the action which a reasonably prudent person would take in like circumstances. *224 Westlake, LLC v. Engstrom Properties, LLC*, 281 P.3d 693, 721 (Wash. App. 2012). When considering the reasonableness of a refusal to consent to an assignment, reason, fairness, and good faith must be the guide; whim, caprice, or opportunism, however expedient to the ends, will not suffice. *Id.*

In *Bos Terra, supra*, the Montana Supreme Court was faced with the reasonableness of a property owner's refusal to consent to an easement assignment where the easement document stated that consent to the assignment could not be unreasonably withheld. The assignment provision in the easement allowed for assignment to "Grantees, their heirs and successors," but did not contemplate assignment to a third party who was not an heir or successor. When an unrelated third-party purchaser sought assignment of the easement rights and the benefited owner withheld consent to the assignment, litigation ensued. Reviewing the scope of the language of the assignment provision limiting it to "heirs" or "successors," the Supreme Court held that the benefited property owner was within its rights to withhold consent to the assignment insofar as a reasoned analysis of the language

⁷ *State ex rel. Florence-Carlton Sch. Dist. No. 15-16 v. Bd. of Cty. Comm'rs of Ravalli Cty.*, 180 Mont. 285, ¶29, 291, 590 P.2d 602, 605 (1978) (internal citation omitted).

⁸ Agreement, Section 18, page 11.

and purposes of the easement indicated that assignment to an unrelated third party would not be permitted.

Similarly, in this case there is no reasonable or rational basis by which the City could or should consent to the proposed assignment. Not only is it reasonable for the City to withhold consent to the assignment, but it is the City's legal obligation to do so as the Agreement was and is unlawful and contrary to the plain language of the statute.⁹ With respect to unlawful contracts, state law provides the following:

When contract wholly void. Where a contract has but a single object and such object is unlawful, whether in whole or in part, or wholly impossible of performance or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

See § 28-2-603, MCA.

Based on *Bos Terra*, the City has a duty to consider the intent and legality of the proposed assignment. In light of the underlying illegality of the Agreement which is proposed for assignment, withholding consent to the assignment is not only reasonable, but is in fact a legal necessity based on applicable law.

GALLIK, BREMER & MOLLOY, PC

/s/ *Jecyn Bremer, Esq.*

**HUPPERT, SWINDLEHURST &
WOODRUFF, PC**

/s/ *Stephen Woodruff, Esq.*

⁹ See § 28-2-603, MCA: When contract wholly void. Where a contract has but a single object and such object is unlawful, whether in whole or in part, or wholly impossible of performance or so vaguely expressed as to be wholly unascertainable, the entire contract is void.