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Ravalli County Commissioners

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FILED
DEBBIE HARMON, CLERK
JUN 14 2007
DEPUTY

MONTANA TWENTY FIRST JUDICIAL DISTRICT COURT,
RAVALLI COUNTY

BITTERROOTERS FOR PLANNING,
PHILLIP TAYLOR,

Plaintiffs;

v.

THE BOARD OF COUNTY COMMISSIONERS OF RAVALLI COUNTY, a body politic and political subdivision of the State of Montana,

Defendant.

CAUSE NO. DV 07- 285/5
Dept. 1

AFFIDAVIT OF STEWART BRANDBORG

AFFIANT BEING FIRST DULY SWORN, DEPOSES AND SAYS:

1. My name is Stewart Brandborg; I reside at 647 Foley Lane, Hamilton, Montana. I am the President of Bitterrooters for Planning.

2. The mission of Bitterrooters for Planning is to provide for the people of the Bitterroot Valley programs that will protect the quality of life and our economy through careful land planning, zoning and the continuing involvement of our members in governmental processes. Bitterrooters for Planning has had a long-standing interest in planning, government and in citizen participation in the government and has long been involved in both issues.

3. Bitterrooters for Planning is a grassroots public interest non-profit organization with limited assets. The organization owns no property, and its only income consists of contributions. If a party were to seek a bond that was anything other than a mere nominal bond, Bitterrooters would be unable to post that bond.

4. Bitterrooters for Planning has an interest in the County Commissioners June 5, 2007 approval of the settlement agreement in the *Lords v. Ravalli County* 07-CV-0002-DWM filed in U.S. District Court in Missoula that will affect the application of the interim zoning ordinance to any subdivisions or other developments in Ravalli County.

5. Phillip Taylor is a member of Bitterrooters for Planning who requested to examine the settlement agreement and any other relevant documents prior to the June 4, 2007 meeting and whose request was denied.

6. The denial of Phillip Taylor's request to examine documents prior to the June 4, 2007 meeting was a denial of the right to know and to participate and resulted in the Commissioners not receiving meaningful, informed public comment on a settlement agreement that seeks to exempt subdivisions constituting over 1,600 lots from application of the citizen-enacted interim zoning ordinance, a matter of great public interest as evidenced by the voters' enactment of that ordinance in November of 2006.

7. Bitterrooters for Planning does not seek any financial gain in filing this lawsuit, the basis for filing this lawsuit and requesting an injunction is to protect and enforce,, on its own behalf and on behalf of its members, the citizens' right to know and right of participation, both of which are fundamental rights contained in the Montana Constitution's Article II Declaration of Rights.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this __ day of June, 2007.

Stewart Brandborg

STATE OF MONTANA)
: ss.
COUNTY OF Ravalli)

On this 13 day of June, 2007, before me the undersigned Notary Public, personally appeared Stewart Brandborg, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

Notary Public for the State of Montana
Residing at Hamilton
My commission expires: 9-1-2007

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FILED
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JUN 14 2007
Kathy Daniels
DEPUTY

MONTANA TWENTY FIRST JUDICIAL DISTRICT COURT,
RAVALLI COUNTY

BITTERROOTERS FOR PLANNING, PHILLIP TAYLOR, Plaintiffs; v. THE BOARD OF COUNTY COMMISSIONERS OF RAVALLI COUNTY, a body politic and political subdivision of the State of Montana, Defendant.	CAUSE NO. DV 07- 285/4 Dept. 1 **AFFIDAVIT OF PHILLIP TAYLOR**

AFFIANT BEING FIRST DULY SWORN, DEPOSES AND SAYS:

1. My name is Phillip Taylor; I reside at 2343 Meridian Road, Victor, Montana. I am a member of Bitterrooters for Planning and I am the author of the "1 per 2" interim zoning initiative ordinance that the voters enacted in November of 2006. I have a long-standing interest in government and in citizen participation in the government.

2. Based on my membership in Bitterrooters for Planning and involvement in the drafting and advocating for the interim zoning ordinance, and based on my interest in citizen participation in government, I have an interest in the settlement agreement that the County Commissioners approved on June 5, 2007 in the *Lords v. Ravalli County* 07-CV-0002-DWM filed in U.S. District Court in Missoula that will affect the application of the interim zoning ordinance to any subdivisions or other developments in Ravalli County and in the decision the Commissioners made approving that settlement agreement that denied the citizen's rights to know and participate.

3. I learned of the *Lords* litigation shortly after it was filed in January 2007, but did not review the lengthy complaint.

4. Having learned on May 30, 2007, that the Board of County Commissioners intended to inform the public of, allow public comment on, and make a decision regarding approval of a proposed settlement agreement in the *Lords* litigation, I promptly contacted the County to obtain the proposed settlement agreement and any other relevant documents. At that time, I was informed documents were not available for the public to review. I was told by Commissioners Secretary Glenda Wiles that the attorneys were still working in closed sessions on the final agreement.

5. Although the meeting was originally scheduled for Friday, June 1, that public meeting was cancelled. I was informed the meeting would occur on Monday June 4, 2007. At that time, and on Friday June 1, 2007, I was told there were no documents available for the public to review.

6. On Monday, June 4, 2007, when I arrived at approximately 9:30 for the public meeting, a sign on the door and my conversation with Glenda Wiles informed me that the session was closed for discussion of litigation strategy. No documents were then available for the public to review.

7. At between 10:00 and 10:30 a.m., the door to the meeting room was opened and the public was invited in for the meeting. It was not until that meeting started that the public was provided with the proposed settlement agreement along with a few other documents, including "schedules" that were to be attached to the settlement agreement. Exhibit A, is the draft settlement agreement and various other documents that I received at the beginning of the June 4, 2007 meeting. The 97 page complaint, which the agreement intended to settle, was not provided to the public.

8. During the introduction and discussion of the agreement by the attorneys for both parties, we were informed this was an agreement that the parties had been working on for months. No explanation was given as to why the Board of County Commissioners needed to vote on the proposed settlement agreement, still in draft form, before the public had a reasonable opportunity to review it in order to submit meaningful comment.

9. I did not have an opportunity to review the proposed settlement agreement before the meeting was opened to public comment. The document was 7 pages of dense legal language that I was unable to digest and respond to during the June 4, 2007 meeting or the night of June 4, 2007, after the meeting was continued until the next morning, June 5, 2007. Moreover, I was busy on June 5, 2007, Election Day, working to get three new commissioners elected.

10. I was unable to fully comprehend the settlement agreement and what it purported to do in the limited time allowed for its review during the meeting and before the then-seated Board vote to approve the agreement.

11. I provided oral comments on June 4, 2007, to the Board of County Commissioners stating I felt the public had been shut out of the settlement process, that providing a draft of the settlement agreement, an agreement that was not finalized as insertions and deletions of data were exercised by attorney's from both sides during the meeting, was inadequate and did not provide sufficient time to review the document, schedules and accompanying letters in preparation to providing reasonable, meaningful public comment on the proposed settlement agreement. The Commissioners responded to citizens' comments during the June 4, 2007 meeting that insufficient time had been allowed to examine the documents, by asserting that the public had sufficient time to review the documents during recesses requested by the plaintiffs' attorneys in order for them to contact their clients regarding proposed changes in the proposed agreement.

12. Prior to the re-convening of the meeting the following day, June 5, 2007, and on the morning

of that day I again submitted comments regarding the inadequacy of time to examine documents and provide meaningful comment, an accurate copy of which is submitted as Exhibit B attached to this affidavit. My letter was sent to the commissioners' office by email with the instruction to disseminate copies of it to all parties involved. The commissioner staff, Beth Farwell, called me on June 5, 2007 to confirm that the email had been received and that she had distributed it to all parties before the meeting of April 5, 2007 was convened.

13. The agreement exempts 11 subdivisions with over 1,600 lots from application of the interim zoning ordinance that otherwise would have prohibited these proposed subdivisions, as they had been submitted.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 13th day of June, 2007.

Phillip R Taylor

Phillip Taylor

STATE OF MONTANA)
: ss.
COUNTY OF Ravalli)

On this 13th day of June, 2007, before me the undersigned Notary Public, personally appeared Phillip Taylor, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

Deborah S Shaffer

Notary Public for The State of Montana
Residing at Victor
My commission expires: 11/22/2009

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Kathy Daniels
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MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT,
RAVALLI COUNTY

BITTERROOTERS FOR PLANNING, PHILLIP TAYLOR, Plaintiffs v. THE BOARD OF COUNTY COMMISSIONERS OF RAVALLI COUNTY, a body politic and political subdivision of the State of Montana, Defendant	Cause No. DV-07-285/3 Dept. 1 **BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

COMES NOW, Plaintiffs Bitterrooters for Planning and Phil Taylor (hereafter referred to jointly as Bitterrooters) by and through their attorney, and submit this brief in support of their motion for temporary restraining order and preliminary injunction.

FACTUAL BACKGROUND

This matter has its genesis in the Commissioners' approval of a settlement agreement at a June 4, 2007 meeting that was continued to June 5, 2007. The Commissioners originally noticed this meeting on or about May 30, 2007 to be held June 1, 2007. Taylor Affidavit, ¶ 4. At the time the meeting was noticed, Phil Taylor asked to examine relevant documents, but was told none were available. Taylor Affidavit, ¶ 4.

The Friday June 1, 2007 meeting was cancelled and a new meeting noticed for Monday June 4, 2007, for the Commissioners to receive public comment and vote on whether to approve

the settlement agreement. Taylor Affidavit, ¶ 5. Again on June 1, 2007, when Phil Taylor requested to examine the relevant documents prior to the Monday June 4 meeting, he was informed no documents were available. Taylor Affidavit, ¶ 5. No privacy interests are at stake that might justify non-disclosure of the relevant documents. Indeed, the settlement agreement was the subject of the scheduled public meeting.

On June 4, 2007, when Mr. Taylor arrived for the scheduled meeting, again the relevant documents were not provided. Taylor Affidavit, ¶ 6. The meeting room was initially closed and when the Commissioners opened the meeting at between 10:00 and 10:30 a.m., for the first time they provided the draft settlement agreement, along with several other documents to the public. Taylor Affidavit, ¶ 6-7 Exhibit A attached thereto. The 97 page complaint that the agreement was to settle was not provided to the public. Taylor Affidavit, ¶ 7. The documents provided are documents of Commissioners, a public body subject to the constitutional right to know.

The settlement agreement provided to the public at the June 4, 2007 meeting was a draft document that was 7 pages long, was densely legalistic in form, and sought to settle with 11 of the 14 plaintiffs in a 97 page complaint filed in federal court. Taylor Affidavit, ¶ 9; Exhibit A. After a brief introduction regarding the settlement agreement by attorneys for both sides in the litigation, the Commissioners opened the meeting to public comment. Taylor Affidavit, ¶ 8-9.

At the June 4, 2007 meeting, various commenters informed the Commissioners that they believed the Commissioners had failed to allow citizens a reasonable opportunity to review relevant documents in order to meaningfully comment on the matter prior to the Commissioners' decision. Taylor Affidavit, ¶ 11. The Commissioners responded by asserting the public could review the documents on the two separate occasions that the plaintiffs attorneys asked for a recess to contact their clients regarding changes in the document. Id.

Commissioner Alan Thompson moved to continue the meeting on June 5, so that the final settlement agreement could be prepared, and then reviewed and voted on. That motion carried and the meeting was continued to June 5, 2007, election day for three seats on the Board of

Commissioners, among other things. The proposed settlement agreement, exempts 11 subdivisions, comprising over 1,600 lots, from needing to comply with the citizen-initiated and citizen-enacted interim zoning ordinance. Taylor Affidavit, ¶ 13. Citizen comments were submitted for the June 5 continued meeting reiterating concern that inadequate time had been provided for examination of the settlement agreement and related documents. Taylor Affidavit, ¶ 12, Exhibit B, attached thereto.

Bitterrooters allege that Defendant Commissioners violated the public's Article II Sections 8 and 9 right of participation and right to know and violated the statutory provisions §§ 2-3-111, 2-3-203(1) when it held its June 4-5, 2007 meeting at which it decided to approve a settlement agreement for the *Lords v. Ravalli County* federal litigation. The public was not provided an opportunity to review the relevant documents prior to the meeting for public comment and was not allowed a reasonable opportunity to participate in government.

ARGUMENT

I. STANDARDS FOR ISSUING A PRELIMINARY INJUNCTION.

Plaintiffs seek both a temporary restraining order and a preliminary injunction. Because the standards are similar, both are addressed here. Under §27-19-201 M.C.A., the Court should issue a preliminary injunction where one of the following three conditions appear:

> (1) When it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> (2) When it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
>
> (3) When it appears during the litigation that the adverse party is doing or threatens or is about to do, or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject matter of the action, and tending to render the judgment ineffectual.

These subsections are disjunctive; findings that satisfy a single subsection are sufficient to issue a preliminary injunction. *Sweet Grass Farms Limited v. Board of County Commissioners*, 2000

MT 147 ¶ 27; 300 MT 66, 2P. 3d 825; *see also Stark v. Borner*, 226 Mont. 356, 735 P.2d 314 (1987).

. The underlying purpose of a preliminary injunction is to preserve the status quo between the parties at the time suit is filed pending resolution on the merits. *Porter v. K & S Partnership*, 192 Mont. 175, 181, 627 P.2d 836 (1981) (" If either showing is made, then courts are inclined to issue the preliminary injunction to preserve the status quo pending trial.") "Status quo" has been defined as "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Porter*, 192 Mont. at 181, 627 P.2d at 839 (quotation and citations omitted); *Sweet Grass Farms, Ltd.* 2000 MT 147, *at* ¶ 28. Here the status quo means that the settlement agreement has not been filed with a court and has not become a court order of any sort, but is simply a contractual agreement the Commissioners' approval of which, Bitterrooters allege violated the public's right to know and right of participation. Preservation of the status quo is necessary to insure that if the Court sides with Bitterrooters, effective relief can be granted.

A temporary restraining order (TRO) precedes a hearing on a preliminary injunction, when the harm sought to be prevented is on-going at the time of the complaint. Montana law clearly supports the granting of a TRO under the circumstances here. "It is well settled that the purpose of a (TRO) is to preserve the status quo until a hearing can be held to determine whether an injunction *pendente lite* should be granted." *Boyer v. Karagacin*, 178 Mont. 26, 32, 582 P.2d 1173, 1177 (1978). The threshold that a party must meet to qualify for a TRO is minimal. In *Boyer*, the Court stated "to obtain a (TRO) the complaint must contain a statement of material facts establishing irreparable injury or plaintiff's right to the relief sought therein." *Boyer*, 178 Mont. at 31, 582 P.2d at 1176. That requirement can be satisfied through the submission of an affidavit asserting material facts. *In re Marriage of Morazan*, 237 Mont. 294,297, 772 P.2d 872, 874 (1989). Bitterrooters' submissions satisfy those requirements.

In addition to preserving the status quo as a general equitable basis, an injunction should

issue under M.C.A. § 27-19-201 subsections (1), (2), and (3).

A. BITTERROOTERS WILL LIKELY PREVAIL ON MERITS AND ARE ENTITLED TO RELIEF REQUESTED.

Bitterrooters are likely to prevail on the merits of this case and are entitled to have the decision approving the settlement agreement set aside. In the case at hand, the Commissioners refused to provide relevant documents, such as the proposed settlement agreement prior to the public meeting scheduled to allow the public to comment on and the Commissioners to make a decision on the settlement agreement. A draft of the agreement, that was seven pages long, used dense legal language and sought to settle the claims of 11 of 14 plaintiffs that were raised in a 97 page complaint, was provided at the start of the public meeting. At the same time the documents were provided to the public, the public was expected to provide comments, despite the fact that there had been no opportunity to even look through the documents, much less to carefully review the documents, digest the meaning of those documents and prepare comments. The Commissioners' actions "reduced what should have been a genuine interchange into a mere formality," as the Supreme Court has warned must not occur. *Bryan v. Yellowstone County Elementary School Dist.*, 2002 MT 264, ¶46, 312 Mont. 257, ¶ 46, 60 P.3d 381, ¶ 46.

Article II, section 8, provides:

> **Right of Participation.** The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of agencies prior to the final decision as may be provided by law.

The Bill of Rights Committee explained the importance of this right:

> The provision is in part a Constitutional sermon designed to serve notice to agencies of government that the citizens of the state will expect to participate in agency decisions prior to the time the agency makes up its mind. In part, it is also a commitment at the level of fundamental law to seek structures, rules and procedures that maximize the access of citizens to the decision-making institutions of state government. The committee believes that this is eminently proper and that it will have a salutary effect not only on the quality of the final decisions, but more important, on the deliberative and political capabilities of the citizenry.

Montana Constitutional Convention Transcript Vol. II at 630-1.

Article II, section 9, of the Montana Constitution provides:

> **Right to Know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The *Bryan* Court explained that when the delegates adopted Article II, Section 9, "they essentially declared a constitutional presumption that every document within the possession of public officials is subject to inspection." *Bryan*, 2002 MT 264, ¶ 39.

It need hardly be argued that both of these constitutional provisions apply to the Commissioners. See e.g. §2-3-102; *Associated Press v. State*, (1991) 250 Mont. 299 302, 820 P.2d 420, 421 (citing *Montana Const. Convention Transcript Vol. V, at 1670-1671.*).

1. Right to Know.

The Supreme Court has consistently held that "Montana's Constitution is to be broadly and liberally construed." See e.g. *Flesnor v. Darby School Dist.*, 2006 MT 31, ¶8, 331 Mont. 124, ¶ 8, 128 P.3d 1048, ¶ 8; M.C.A. §2-3-101 and §2-3-201. The Article II, Section 9 "right know" must be construed to mean that a citizen has the right to examine public documents sufficiently in advance of a public meeting that the citizen may fully review the documents and be able to make informed comments on the documents at issue in the public meeting.

Although the Commissioners may argue that settlement agreements, and related documents hold some special status and are not to be treated like regular public documents, the Montan Supreme Court has held "there is a *constitutional presumption* that all documents of every kind in the hands of public officials are amenable to inspection, regardless of legislation, special exceptions made to accommodate the exercise of constitutional police power, and other competing constitutional interests, such as due process." *Great Falls Tribune v. Montana Public Service Comm'n*, 2003 MT 359, ¶ 54, 319 Mont. 38, ¶ 54, 82 P.3d 876, ¶ 54.

In a case in the First Judicial District involving a challenge to the failure to provide information prior to a meeting on a proposed settlement agreement, the plaintiffs obtained a restraining order halting the approval of the settlement agreement, prevailed in obtaining the

documents sought and were awarded fees because: "This Court is aware that involving the public in litigation such as this can put government agencies in somewhat of a bind. However, the bottom line is that this is the public's business." *Hendricks v. City of Helena*, 2001 ML 1815, ¶ 21, 2001 Mont. Dist. LEXIS 1832. Similarly, in the case at hand, the proposed settlement agreement is the public's business, and the failure to timely provide relevant documents when requested by a citizen is a violation of the public's right to know about its business.

In a case in Ravalli County, involving one party's attempt to enforce a settlement agreement that had been signed by the Stevensville City Council, but had not been approved by that body following a public meeting, this Court, noting that the "Montana Constitution is the "cornerstone on which Montana law is founded," held that "negotiated settlements can only be accepted to the extent they do not violate the open meeting law which serves to protect constitutional guarantees." *Pollman v. Stevensville*, 2001 ML 4615, ¶ 27. The settlement agreement here was approved in violation of the open meeting laws enacted to effectuate the public's constitutional right to know and right of participation and should be set aside.

As *Pollman*, and *Hendricks* recognize, the Commissioners' hasty approval of a settlement agreement that fails to allow the public to examine the settlement agreement and to make informed comment on it, makes the citizens' right to know and to participate essentially hollow rights, something the Montana Supreme Court has warned against. Bitterrooters are likely to prevail on the merits of this case and the decision to approve the settlement agreement should be set aside. The citizens should then be allowed adequate time to review the relevant documents, so that they then are able to provide informed comments on a settlement agreement that seeks to exempt more than 1,600 proposed lots from application of the interim zoning ordinance.

2. Right of Participation.

Bitterrooters could not effectively exercise their Article II, Section 8, right to participate on June 4 and June 5, 2007, because the Commissioners violated their Article II, Section 9, right

to examine public documents by refusing to provide documents until the public meeting had begun. The Montana Supreme Court has recognized the "inextricable association" between these two fundamental rights, enshrined in the Declaration of Rights. *Bryan*, 2002 MT 264, ¶31. The *Bryan* Court also recognized the Framers of the Constitution intended that the right to know "is a companion to the preceding right of participation." *Id.* (citing *Montana Constitutional Convention, Vol. II at 631*). Courts and commenters alike have recognized that "to participate effectively and knowledgeably in the political process of a democracy . . . one must be fully apprised of what government is doing, has done, and is proposing to do." *Id.*, at ¶31 (citing Larry M. and Deborah E. Ellison, *Comments on Government Censorship and Secrecy*, 55 Mont. L. Rev. 175, 177 (1994).).

The *Bryan* Court explicitly held that the right of participation, "at a minimum, the 'reasonable opportunity' standard articulated in Article II, Section 8, and *§ 2-3-111, MCA*, demands compliance with the right to know contained in Article II, Section 9." *Id.* at ¶44. Here, as explained above, Bitterrooters' right to know was violated when the Commissioners refused to provide the proposed settlement agreement in advance of the meeting and when asked to allow adequate time to examine the documents, refused to do so.

The Commissioners' actions have resulted in precisely what the *Bryan* Court warned against when it cautioned attempts to employ restrictive interpretations to the right of participation: "Such a superficial interpretation of the right to participate to simply require an uninformed opportunity to speak would essentially relegate the right of participation to paper tiger status ...." *Id.*

B. THE CONTINUANCE OF ACTS BY THE DEFENDANT WILL PRODUCE GREAT OR IRREPARABLE INJURY.

Allowing the Commissioners to maintain their decision approving a settlement agreement, when that decision was made in violation of citizens' rights to know and of participation will result in irreparable injury to Bitterrooters. Specifically, if the County maintains its approval and allows the filing of the settlement agreement in court, the 11 subdivisions will be

exempted from a citizen-initiated zoning ordinance that was enacted to protect the county, pending completion of zoning regulations, against precisely the types of massive and dense developments the settlement agreement allows. If the Commissioners are allowed to maintain the approval of the settlement agreement, the interim zoning ordinance will have no effect on over 1,600 new lots. Bitterrooters have campaigned tirelessly in their efforts to have the county enact zoning and to plan and control the overwhelming growth and development occurring in Ravalli County. Bitterrooters' position is supported by affidavits of members, submitted herewith.

Once the settlement agreement is filed with the federal court, it is unlikely to be altered, and the Commissioners' decision will be essentially inviolate, allowing subdivision review of over 1,600 lots that will not be subject to the interim "1 per 2" zoning ordinance. It is because so many lots will be exempted from the "1 per 2" ordinance through this agreement that was approved without adequate opportunity for the public to participate, that preservation of the status quo now is required. Where injury to fundamental constitutional rights is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect those rights.

The Bitterrooters' main concern in this action is to protect and preserve the citizen's right of participation and to ensure that the citizens have had the opportunity to provide informed comment on the settlement agreement that will avoid application of the "1 per 2" zoning ordinance that the citizens enacted to over 1,600 lots.

C. A FAVORABLE FUTURE DECISION WOULD BE RENDERED INEFFECTIVE BY ALLOWING FINAL PLAT TO ISSUE.

A preliminary injunction is proper when Plaintiffs' rights have been violated and without an injunction, the relief demanded would be rendered ineffective. M.C.A. § 27-19-201 (3). This subsection underscores the equitable premise that the purpose of a preliminary injunction is to maintain the status quo. *Porter v. K & S Partnership, supra.* Here, the Bitterrooters are attempting to protect their right to participate in government and right to know. And they are

doing so in the context of a settlement agreement that will render meaningless the interim zoning ordinance that the citizens enacted when faced with the prospect of the very same massive subdivisions that, through the settlement agreement, will avoid the ordinance altogether.

Bitterrooters are exercising their right to seek judicial enforcement, granted by the Constitution, and reinforced by the Legislature, to challenge governmental decisions made in violation of the rights of participation and to know. M.C.A. § 2-3-114, and 2-3-213. This right of appeal is further protected by Montana Constitution Article II Section 16, which provides a fundamental right to petition the government for redress of grievances.

No party can seriously dispute that Bitterrooters have alleged that important rights, enshrined in the Montana Constitution's Declaration of Rights, have been violated by the Commissioners' decision to approve the settlement agreement. Bitterrooters are not required to prove those violations; that determination is reserved for the merits. But Bitterrooters' rights may indeed have been violated based on the allegation raised herein, satisfying that requirement of M.C.A. § 27-19-201 (3). The other requirement of M.C.A. § 27-19-201 (3), that a judgment will be rendered ineffective, is explained below.

In *Sweet Grass Farms, Ltd. v. Board of County Comm'rs of Sweet Grass County*, 2000 MT 147, 300 Mont. 66, 2 P.3d 825, plaintiffs sued over procedural violations of subdivision and planning regulations also under M.C.A. § 76-3-625. They sought a TRO preventing the Board of Commissioners from taking any further steps to issue final approval of the subdivision. The subdivider threatened to proceed during the litigation by filing his final subdivision plat and advertising the property for sale before the court could hear the merits of the case. *Sweet Grass Farms, Ltd*, 2000 MT 147, *at* ¶ 31. The district court denied injunctive relief, but Supreme Court reversed and remanded for a preliminary injunction under M.C.A. § 27-19-201 (3) to preserve the status quo and the effectiveness of any future judgment. In the words of the Montana Supreme Court:

> In anticipation of final approval of the subdivision, J & W was preparing to sell the lots in the subdivision during the litigation. The sale of any of these lots to

> third party purchasers would render an adverse decision regarding the Board's approval of the J & W Minor Subdivision ineffective and nullify Sweet Grass Farms' right to challenge the Board's approval. In addition, allowing the sale of these lots prior to a determination of whether the Board's approval of the J & W Minor Subdivision was proper would impact Sweet Grass Farms' property rights. The impacts associated with the introduction of a subdivision into a primarily agricultural area include increased property taxes, increased traffic, noise, and dust, a reduction in the quality of local services, and an irreparable loss of the agricultural character of the area. These impacts support the issuance of a preliminary injunction pursuant to *§ 27-19-201(3), MCA.*

Sweet Grass Farms, supra., 2000 MT 147 ¶ 31-32 (emphasis added). As in *Sweetgrass*, in the absence of a restraining order and injunction, the filing of the settlement agreement in federal court and te implementation of that settlement agreement would render ineffective a decision in Bitterrooters' favor on their claims of violation of rights to know and participate.

The Montana Supreme Court has denied relief under M.C.A. § 27-19-201 (3) only when acts of the parties will not render a judgment ineffective, for instance, when the plaintiff can obtain relief through a monetary damage judgment. *Dicken v. Shaw*, 255 Mont. 231; 841 P.2d 1126. Obviously, damage caused to Bitterrooters' rights to know and participate cannot be remedied by money damages or other such relief.

II. BITTERROOTERS SHOULD NOT BE REQUIRED TO POST BOND OR RESPOND IN DAMAGES FOR REQUESTING AN INJUNCTION.

If a party were to seek a bond that was anything other than a mere nominal bond, Bitterrooters would be unable to post that bond. Affidavit of Stewart Brandborg ¶ 3. Bitterrooters are a grassroots non-profit organization with limited assets. Id. The organization owns no property, and the only income consists of contributions. Id.

However, both Montana statutory law and well-developed federal case law establish that when non-profit citizen groups seek to enforce the law, large bonds are inappropriate. M.C.A. 27-19-306(b)(ii); *Four Rivers Seed Company v. Circle K Farms Inc.*, 2000 MT 360 P. 22; 303 Mont. 342; 16 P.3d 342; See, e.g., *People ex rel. Van de Kamp v. Tahoe Regional Plan*, 766 F.2d 1319 (9th Cir. 1985) (no bond); *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473 (E.D. Cal. 1988), rev'd on other grounds, 918 F.2d 813 (9th Cir. 1990) ($100); Scherr v. Volpe, 466 F.2d 1027 (7th Cir.

1972) (no bond); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) ($100); *Sierra Club v. Block*, 614 F. Supp. 488 (D.D.C. 1985) ($20); *Sierra Club v. Block*, 614 F. Supp. 134 (E.D. Tex. 1985) ($1).

Recently in Montana, federal magistrate Richard Anderson required a nominal $1,000 bond when issuing a broad injunction against coal bed methane development in Montana, wherein industry alleged tens of millions of dollars in damages. Citing the recent Ninth Circuit case *Save our Sonoran v. Flowers*, 408 F.3d 1113 (9th Cir. 2005), Magistrate Anderson concluded that "[T]hese cases are about the public interest. They deserve to be heard on the merits. A nominal bond facilitates this objective." *Northern Plains et al v. Bureau of Land Management*, CV 03-69-RWA-BLG.

Bitterrooters meet every public interest requirement for waiving a bond if it is requested, or in the alternative, for requiring a nominal bond. The organization is not a business competitor of any of the developers involved in the federal *Lords* litigation, nor does it seek any financial gain from this lawsuit. Bitterrooters' basis for filing this lawsuit and requesting an injunction is to protect and enforce the citizens' right to know and right of participation, both of which are fundamental rights contained in the Montana Constitution's Article II Declaration of Rights. Affidavit of Brandborg ¶ 7. In addition, the Bitterrooters are acting as private attorney generals in pursuing claims, based on evidence, that their county government has violated or ignored laws and constitutional rights and has otherwise acted arbitrarily and capriciously in approving the settlement agreement without providing reasonable opportunity to the public to examine documents and be informed so as to participate in their county government. They should not be penalized or threatened for carrying out this function, which if successful, will benefit the public at large. In Montana, the basis is even stronger because by statute the bond may be waived, by statute M.C.A. 27-19-306(b)(ii). The overwhelming weight of authority does not require a bond

for public interest groups such as Bitterrooters[1]

RELIEF REQUESTED.

The plaintiffs, therefore, request that the Court grant the following relief, pending resolution of this litigation on the merits:

(1) Issue a preliminary injunction prohibiting the county from implementing the settlement agreement and from filing or allowing the settlement agreement to be filed in federal court until the merits of this suit are resolved.

(2) Issue the injunction without the requirement of bond.

RESPECTFULLY SUBMITTED this 13th day of June, 2007.

Sarah K. McMillan

Attorney for Plaintiffs

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[1]In addition to the previous authority, and at the risk of adding a long string cite, Bitterrooters want this Court to understand the breadth of federal courts' prohibition against bonds. *See also Highland Co-op v. City of Lansing*, 492 F. Supp. 1372 (D. Mich. 1980) (no bond); *Citizens for Responsible Growth v. Adams*, 477 F. Supp. 994 (D.N.H. 1979) (no bond); *Wisconsin Heritages, Inc. v. Harris*, 476 F. Supp. 300 (E.D. Wis. 1979) (no bond); *Alabama v. Corps of Engineers*, 411 F. Supp. 1261 (N.D. Ala. 1976) ($1); *Sierra Club v. Froehlke*, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd on other grounds sub nom Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974) ($100); *Boston Waterfront Residents Ass'n v. Romney*, 343 F. Supp. 89 (D. Mass 1972) (no bond); *Silva v. Romney*, 342 F. Supp. 783 (D. Mass. 1972) (no bond); *Environmental Defense Fund v. Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971) ($1); *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970), *rev'd on other grounds sub nom Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) ($100); *Natural Resources Defense Council v. Morton*, 337 F. Supp. 167 (D.D.C. 1971) ($100).

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify on this 13th day of June, 2007, the foregoing was served by faxing and by depositing a true and correct copy in the United States Mail, postage prepaid and addressed as follows:

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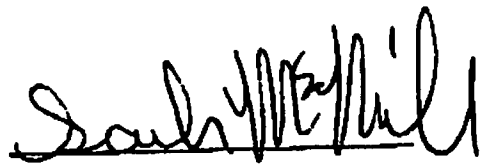

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FILED
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JUN 14 2007
Kathy Daniels DEPUTY

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT,
RAVALLI COUNTY

BITTERROOTERS FOR PLANNING, PHILLIP TAYLOR, Plaintiffs v. THE BOARD OF COUNTY COMMISSIONERS OF RAVALLI COUNTY, a body politic and political subdivision of the State of Montana, Defendant	Cause No. DV-07-285/2 Dept 1. **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

COMES NOW, Plaintiffs by and through their attorney, and pursuant to Montana Rules of Civil Procedure and M.C.A.§§ 27-19-101 et seq., and § 27-19-314 move the Court for a temporary restraining order and preliminary injunction. Plaintiffs' counsel has contacted George Corn, County Attorney for Ravalli County, and Allen Chronister who represented the Commissioners in the litigation for which the Settlement Agreement was drafted. These attorneys, at this point, oppose the motion and have requested that they be heard before the issuance of any restraining order. A copy of the Complaint, Motion for TRO/PI, and Brief in Support of Motion for TRO/PI were faxed and mailed to both George Corn and Allen Chronister on June 13, 2007. The basis for the injunction and restraining order is set forth in greater detail in the accompanying brief, exhibits, and affidavits. It is summarized below as follows:

1. The Defendant made a decision to approve a settlement agreement that exempted 11 subdivisions, with over 1,600 lots from the citizen-initiated and citizen-enacted interim zoning ordinance that would have prohibited those subdivisions as submitted . Despite being asked by

citizens to allow a reasonable time for the public to review the proposed settlement agreement along with the 97 page complaint it purports to settle, Defendant made the decision to approve the agreement on June, 5, 2007, election day.

2. Plaintiffs asked to see documents to be discussed, prior to the June 4 meeting, but were told none were available. It was only at the beginning of the June 4, 2007 meeting that the 7 page settlement agreement was provided, along with several other documents. The Complaint in the litigation that the settlement agreement was intended to resolve was not provided.

3. Plaintiffs and other citizens provided comment on June 4, 2007, that the Commissioners had not provided adequate time for the public to examine the documents before asking them to provide public comment.

4. The citizens right to know and right of participation were violated by the failure to allow reasonable opportunity to examine the documents before public comment was allowed. Especially where a citizen-enacted zoning ordinance is being avoided by more than 1,600 lots, the public should have the opportunity to meaningfully comment on a proposed settlement agreement. The Commissioners decision to approve the settlement agreement was in violation of the citizens' rights to know and of participation as the Commissioners did not allow reasonable opportunity to examine documents nor did it allow the public to make meaningful, educated comment on the settlement agreement it had only just seen.

5. Plaintiffs respectfully request that the Court issue a temporary restraining order and a preliminary injunction setting aside the Commissioners' decision approving the settlement agreement and that further prohibits the Commissioners from filing the settlement agreement in the federal court or agreeing to such filing, until the issues raised herein have been resolved, and to issue an order to show cause why such injunction should not continue to preserve the status quo until the complaint in the case at hand can be resolved on its merits.

RESPECTFULLY SUBMITTED this 13th day of June, 2007.

Sarah K. McMillan

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify on this 13th day of June, 2007, the foregoing was served by faxing and by depositing a true and correct copy in the United States Mail, postage prepaid and addressed as follows:

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FILED
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JUN 14 2007
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DEPUTY

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT,
RAVALLI COUNTY

BITTERROOTERS FOR PLANNING, PHILLIP TAYLOR, Plaintiffs v. THE BOARD OF COUNTY COMMISSIONERS OF RAVALLI COUNTY, a body politic and political subdivision of the State of Montana, Defendant	Cause No. DV-07-285/1 Dept. 1 **COMPLAINT**

COME NOW Plaintiffs, through their counsel of record, and file this action brought pursuant to the rights of participation and to know contained in Article II, Sections 8 and 9 of the Montana Constitution and the statutes governing the opportunity to be heard (2-3-101 et seq.) and open meetings (2-3-201 et seq.). This action arises out of the Defendant Ravalli County Board of County Commissioners' (hereafter "Commissioners") meeting on June 4, 2007, continued to June 5 for comment on and approval of a settlement agreement. Plaintiffs therefore request that the Court, pursuant to § 2-3-114, MCA, vacate and set aside the Commissioners' decision to approve the settlement agreement made at the June 4-5 meeting that violated Plaintiffs right of participation and right to know by failing to allow reasonable opportunity to review relevant documents before the meeting. Plaintiffs also seek a temporary restraining order and injunctive relief pursuant to M.C.A. § 27-19-101 et seq. Plaintiffs request that the Court enjoin the Commissioners from filing the settlement agreement in the federal court or agreeing to such filing, until the issues raised herein have been resolved. Plaintiffs here allege as follows

PARTIES

1. Plaintiffs, Bitterrooters for Planning and Phil Taylor, (hereafter jointly referred to as Bitterrooters) bring this action on behalf of themselves and the members of Bitterrooters for Planning. Bitterrooters and members thereof reside in Ravalli County and have been active citizen participants in the county government, particularly with regard to matters of planning relating to development in the county. They are threatened with injury as a result of the Commissioners' actions, including but not limited to injury to their right to participate in government prior to final decision and the right to examine documents. Moreover, the settlement agreement intends to exempt over 1,600 lots from application of an interim zoning ordinance that Bitterrooters drafted and campaigned for. Bitterrooters themselves and on behalf of their members have standing under the Montana constitution, and they are parties whose Article II, Sections 8 and 9 rights have been prejudiced, within the meaning of § 2-3-114 and § 2-3-213 by the Commissioners' decision to approve the settlement agreement.

2. Defendant is a body politic and political subdivision of the State of Montana. Defendant is the governing board authorized to make decisions, such as the one at issue, for the County. Defendant is a governmental entity to which the provisions of Article II, Sections 8 and 9 and the statutory provisions in Title 2, Chapter 3, entitled "Public Participation in Governmental Operations" apply.

VENUE AND JURISDICTION

3. Jurisdiction is vested pursuant to M.C.A. §§ 2-3-114, 2-3-213, 3-5-302, and the Montana Constitution, Article II, Section 16, which guarantees citizens the right to access the courts. The decision complained of was made June 5, 2007, and this action is filed within 30 days of that decision.

4. Venue is proper in the Twenty-First Judicial District, Ravalli County, as Defendant resides and works here, the conduct complained of occurred here, Plaintiffs reside here.

FACTS

5. This matter has its genesis in the Commissioners' approval of a settlement agreement at a June 4-5, 2007 meeting. The Commissioners originally noticed this meeting on or about May 30, 2007 to be held June 1, 2007.

6. At the time the meeting was noticed, Phil Taylor asked to examine relevant documents, but was told none were available.

7. The Friday June 1, 2007 meeting was cancelled and a new meeting noticed for Monday June 4, 2007, for the Commissioners to vote on whether to approve the settlement agreement. Again, when Phil Taylor requested to examine the relevant documents prior to the Monday June 4 meeting, he was informed no documents were available.

8. No privacy interests have been raised to justify non-disclosure of the relevant documents. Indeed, the settlement agreement was the subject of the scheduled public meeting.

9. On June 4, 2007, the Commissioners opened the meeting at between 10:00 and 10:30 a.m., and for the first time then provided the draft settlement agreement, along with several other documents. See Exhibit A attached to Taylor Affidavit. The 97 page complaint that the agreement was to settle was not provided to the public. The requested documents are documents of a public body subject to the constitutional right to know.

10. The settlement agreement provided to the public at the June 4, 2007 meeting was a draft document that was 7 pages long, was densely legalistic in form, and sought to settle with 11 of the 14 plaintiffs in a 97 page complaint filed in federal court.

11. After a brief introduction regarding the settlement agreement by the attorneys for both sides in the litigation, the Commissioners opened the meeting to public comment.

12. At the June 4, 2007 meeting, various commenters informed the Commissioners that they believed the Commissioners had failed to allow citizens a reasonable opportunity to review relevant documents in order to meaningfully comment on the matter prior to the Commissioners' decision.

13. The Commissioners responded by asserting the public could review the documents on the two separate occasions that the plaintiffs attorneys asked for a recess to contact their clients regarding changes in the document.

14. Commissioner Alan Thompson moved to continue the meeting on June 5, so that the final settlement agreement could be prepared, and then reviewed and voted on. That motion carried and the meeting was continued to June 5, 2007, election day for three seats on the Board of Commissioners, among other things.

15. The proposed settlement agreement, exempts 11 subdivisions, comprising over 1,600 lots, from needing to comply with the citizen-initiated and citizen-enacted interim zoning ordinance.

16. Defendant Commissioners violated the public's Article II Sections 8 and 9 right of participation and right to know and violated the statutory provisions §§ 2-3-111, 2-3-203(1) when it held its June 4-5, 2007 meeting at which it decided to approve a settlement agreement for the *Lords v. Ravalli County* federal litigation. The public was not provided a reasonable opportunity to review the relevant documents prior to opening the meeting for public comment and was not allowed a meaningful opportunity to participate in government.

COUNT 1

VIOLATION OF RIGHTS TO KNOW AND OF PARTICIPATION

17. Plaintiffs replead all allegations set forth above and incorporate them by reference.

18. Plaintiffs allege that the Commissioners' decision to approve the *Lords* settlement agreement was made in violation of Sections 8 and 9 of Article II of the Montana Constitution, which are inextricably intertwined.

19. *Montana Constitution. Article II, section 8*, provides:

Right of Participation. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of agencies

prior to the final decision as may be provided by law.

20. *Article II, section 9, of the Montana Constitution* provides:

Right to Know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

21. At a minimum, the "reasonable opportunity" for participation standard articulated in Article II, Section 8 and § 2-3-111, MCA demands compliance with the Article II, Section 9, right to know provision.

22. The Commissioners thwarted Plaintiffs and other interested citizens right to know when they did not allow the public to examine the documents relating to the settlement agreement prior to the June 4, 2007 meeting.

23. The Commissioners failure to provide the relevant documents in advance of the Commissioners' public meeting held on June 4-5, 2007, also violated the public's right of participation because that failure to provide documents precluded Plaintiffs and other citizens from meaningfully commenting on the proposed settlement agreement.

24. The same actions also violated the statutory codification of the right of participation and to know contained in provisions in §§ 2-3-101, 2-3-111, 2-3-201 et seq. These provisions are to be liberally interpreted to protect the citizen right to know and participate.

WHEREFORE, Plaintiffs pray for relief as follows:

A. That the Court find the Ravalli County Commissioners violated the governing statutes requiring them to provide citizens with a reasonable opportunity to participate in government after being provided an opportunity to examine relevant documents, and that their actions were arbitrary, capricious, or otherwise not in accordance with the law;

B. That the Court determine that the Ravalli County Commissioners violated Article II, sections 8 and 9 of the Montana Constitution in failing to allow a reasonable opportunity

to examine documents prior to the public meeting and thereby precluding meaningful comment regarding the proposed settlement agreement, and that their actions were therefore arbitrary, capricious, or otherwise not in accordance with the law;

C. That the Court set aside and void the decision approving the settlement agreement;

D. That the Court issue a permanent injunction enjoining the Ravalli County Commissioners from implementing the approval of the *Lords* settlement agreement, until such time as the public has had the opportunity to review the proposed agreement and comment on it;

E. That the Court issue an order restraining and enjoining the Commissioners from filing the settlement agreement in federal court, and enjoining and restraining the Commissioners from agreeing to its filing;

F. That the Court award Plaintiffs their reasonable attorney's fees and costs in bringing this action;

G. That the Court award such other and further relief as the Court may deem just, equitable, and appropriate under the circumstances of this proceeding.

RESPECTFULLY SUBMITTED this 13th day of June, 2007.

Sarah K. McMillan

Attorney for Plaintiffs