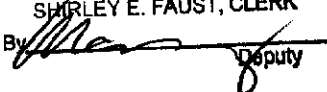


1 Robert L. Deschamps, III  
2 Department No. 2  
3 Missoula County Courthouse  
4 Missoula, Montana 59802  
5 (406) 258-4772

FILED FEB 24 2010

SHIRLEY E. FAUST, CLERK  
By  Deputy

6 <MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY>

7 KATHY HEFFERNAN, ROBIN  
8 CAREY, DAVID HARMON and  
9 NORTH DUNCAN ASSOCIATION,  
10 INC.,

11 Plaintiffs,

12 -vs-

13 THE MISSOULA CITY COUNCIL,  
14 CITY OF MISSOULA and JOHN  
15 ENGEN, MAYOR,

16 Defendants,

17 MUTH-HILLBERRY, LLC,

18 Intervenor-Defendant.

DEPT NO. 2

CAUSE NO. DV-08-84

OPINION AND ORDER

19 Before the Court are the parties' Cross-Motions for Summary  
20 Judgment.

21 ORDER

22 The Plaintiffs' Motion for Summary Judgment is **GRANTED**. The  
23 Defendants' and Intervenor's Cross-Motions for Summary Judgment are  
24 **DENIED**.

25 //



1 **BACKGROUND**

2 In 2006, developer Muth-Hillberry, LLC (hereinafter "M-H") proposed the  
3 Sonata Park subdivision in the west Rattlesnake neighborhood of Missoula.  
4 M-H proposed to subdivide 34 acres into 38 lots in an area that is currently  
5 open hillside with widely-dispersed houses. The adjacent property  
6 immediately to the north is also proposed for development and beyond that  
7 lies the southern boundary of the Rattlesnake National Recreation Area. The  
8 western portion of the proposed subdivision borders a large public open  
9 space area called "Waterworks Hill."  
10  
11  
12

13 On December 4, 2007, the Planning Board met to discuss the proposed  
14 development and heard testimony from members of the public, including  
15 Plaintiffs, who opposed the project. Their objections included, in part,  
16 Defendants' alleged failure to comply with the Rattlesnake Plan,<sup>1</sup> the  
17 landslide potential given the alleged instability of the land and soils, and the  
18 high density of the development relative to the neighboring developments.  
19  
20  
21

22  
23 

---

<sup>1</sup> In 1975, Missoula City and County first adopted two components of a comprehensive plan, the Missoula  
24 County Comprehensive Plan for rural areas and "Missoula – A Policy Guide for Urban Growth" for urban  
25 areas. Both have been updated through the years and, in 2006, the City and the County adopted the  
26 "Missoula County Growth Policy 2005 Update." The 2005 Update incorporated several existing  
27 neighborhood plans, including the 1995 Rattlesnake Valley Comprehensive Plan. The Resolution to adopt  
the 1995 Rattlesnake Plan states the Plan is a "policy document intended to provide the City and other  
agencies and districts with a coordinated guide for change over a long period of time." It also states, "All  
subdivision, zoning and rezoning requests should substantially comply with the land use recommendations of  
this Plan."



1 The Planning Board, however, recommended approval of the subdivision and  
2 related rezoning and Planned Unit Development (hereinafter "PUD").

3  
4 The City of Missoula adopted the Missoula County Growth Policy 2005  
5 Update on December 4, 2006. The 2005 Update incorporated, without  
6 amendment, the 1995 Rattlesnake Plan. In addition to the mandates of Little v.  
7 Board of County Comm'rs (1981), 193 Mont. 334, 631 P.2d 1282 and other  
8 case law, the Rattlesnake Plan *itself* requires that "all subdivision, zoning and  
9 rezoning requests should substantially comply with the land use  
10 recommendations of this Plan." Plan, p. 25.

11  
12  
13 The 1995 Rattlesnake Plan addressed a number of questions, including  
14 "which areas are best suited for future development", "which areas are best  
15 suited to remain relatively unchanged", and "as the Missoula urban area  
16 continues to grow and change, what role and responsibilities does the  
17 Rattlesnake Valley share as a part of this larger community?" Plan, p. 1.

18  
19  
20 The Plan "attempts to reduce the problems associated with unplanned  
21 and uncoordinated growth." Plan, p. 17. As such, it lists several "Goals and  
22 Guiding Principles" that summarize the objectives of the 1988 Comprehensive  
23 Plan Amendment, Missoula community goals as stated in the Missoula Urban  
24 Comprehensive Plan, the 9/9/94 City-County growth management working  
25 document titled *Planning for Growth in Missoula County* and finally some  
26  
27



1 "guiding principles" identified by the citizens of the Rattlesnake.

2 On December 5, 2007, the Plat, Annexation and Zoning Committee  
3 (hereinafter "PAZ") met. Members of the public, including Plaintiffs, attended  
4 and raised their concerns about the subdivision, including bicycle and  
5 pedestrian safety issues, potentially doubling neighborhood size, fire  
6 concerns given the amount of fuels in the surrounding grasslands, soil  
7 stability issues and the potential for faulting in the area. Plaintiffs were  
8 concerned that that the proposed rezoning of the area did not substantially  
9 comply with the Rattlesnake Valley Comprehensive Plan. City Council  
10 Minutes, 12-5-07, page 6.  
11  
12  
13

14 On December 10, 2007, the City Council held a public hearing on the  
15 proposed development. Members of the public, including Plaintiffs, appeared  
16 and testified in opposition to the proposal reiterating, in part, their concerns  
17 regarding Defendants' lack of compliance with the Rattlesnake Plan and  
18 Growth Policy. On December 12, 2007, the PAZ Committee met again and  
19 heard more testimony, including additional public comment concerning the  
20 proposal's alleged non-compliance with the Rattlesnake Plan.  
21  
22  
23

24 On December 17, 2007, the City Council met. Again, members of the  
25 public, including some of the Plaintiffs, commented extensively. However, the  
26 City Council voted 10-2 to grant the rezoning/PUD and to approve the  
27



1 preliminary plat. The following day, the City sent a letter to M-H informing  
2 them that the subdivision had been approved. The letter included a list of  
3 "conditions of subdivision approval" adopted by the Council on December 17,  
4 2007. The City Council did not adopt any separate findings of fact and  
5 conclusions of law as required by § 76-3-608(2), MCA.  
6

7  
8 On January 16, 2008, Plaintiffs filed a Petition for Judicial Review of the  
9 City's decision. By November 2008, all parties had filed motions for summary  
10 judgment based on their various interpretations of the record. All of the  
11 motions were denied in an Order issued January 14, 2009 in which the Court  
12 held,  
13

14 In conclusion, the Court finds there are disputed material factual  
15 issues regarding whether the City was, in the very least, "guided  
16 by" the Growth Plan, much less whether it "substantially complied"  
17 with it when it approved 37 lots for development. Based on the  
18 foregoing, summary judgment is **DENIED** to all parties.

19 The parties then reached an agreement regarding the record and, on  
20 June 11, 2009, Plaintiffs filed a "Stipulation Regarding Administrative Record  
21 and Supplemental Summary Judgment Briefing." On June 19, 2009, the City  
22 filed several affidavits of individuals involved in the subdivision review  
23 process. This was the second time the City had filed supplemental affidavits,  
24 presumably to "clarify" the record in the underlying proceedings. On June 19,  
25  
26  
27



1 2009, Plaintiffs filed a second motion to strike the affidavits, which was  
2 granted. In its July 31, 2009 Order, the Court held, "it shall rely on the  
3 stipulated record directly rather than on Defendants' summaries, particularly  
4 as applied to 'the process' [of subdivision review] that was used."

5  
6 On August 10, 2009, the Court remanded the case to the City Council  
7 for issuance of Findings of Fact and Conclusions of Law as mandated by  
8 § 76-3-608(2), MCA. The Order specified that, "The findings and discussion  
9 weighing the criteria shall include citations to the Stipulated Record submitted  
10 to this Court June 11, 2009." (emphasis included). On October 20, 2009, the  
11 City submitted its Findings of Fact and Conclusions of Law. In spite of the  
12 Court's Order, the City's Findings and Conclusions make minimal references  
13 to the Stipulated Record. Further, there are at least three references in the  
14 Findings and Conclusions to documents not contained in the record. The City  
15 attorney produced these documents to the Court and to Plaintiffs' counsel on  
16 February 2, 2010.<sup>2</sup>

17  
18 The Court's August 10, 2009 Order allowed Plaintiffs to submit a final  
19 response to the City's Findings of Fact and Conclusions of Law, which  
20 Plaintiffs filed on November 16, 2009. The matter is now ready for ruling.

21  
22  
23  
24  
25  
26 <sup>2</sup> The documents, delivered to the Court by Deputy City Attorney Susan Firth, were the City Council Minutes  
27 from 12/3/07, the Parks and Recreation Department agency comment letter referred to in the FOF-COL as  
dated 8/23/07, but actually dated 1/23/07, and Montana Fish, Wildlife and Parks agency comment letter  
dated 1/26/07.





1 208 P.3d 876 (citing Madison River R.V. Ltd. v. Town of Ennis, 2000 MT 15, ¶  
2 30, 298 Mont. 91, 994 P.2d 1098; Kiely Constr., LLC v. City of Red Lodge,  
3 2002 MT 241, ¶ 69, 312 Mont. 52, 57 P.3d 836). The duty of the Court is to  
4 review the entire record to determine whether the Missoula City Council's  
5 decision to approve Sonata Park subdivision "was arbitrary, capricious, or  
6 unlawful." Id. While the standard of review adopted by the Montana Supreme  
7 Court utilizes three terms, "it breaks down into two basic parts." Id. "One part  
8 concerns whether the agency action could be held unlawful, and the other  
9 concerns whether it could be held arbitrary or capricious." Id. (citing North Fork  
10 Preservation Assn. v. Dept. of State Lands (1989), 238 Mont. 451, 459, 778  
11 P.2d 862, 867).

12  
13  
14  
15  
16 Local governments like the Missoula City Council must "substantially  
17 comply" with their growth policy. North 93 Neighbors, Inc. v. Board of County  
18 Commissioners, 2006 MT 132. ¶ 23, 332 Mont. 327, 137 P.3d 557. To require  
19 no compliance "would defeat the whole idea of planning." Little v. Board of  
20 County Comm'rs (1981), 193 Mont. 334, 353, 631 P.2d 1282, 1293. "Why have  
21 a plan if the local governmental units are free to ignore it at any time?" Id.  
22

23  
24 The "substantial compliance" standard is "flexible enough so that the  
25 master plan would not have to be undergoing constant change." Little, 193  
26 Mont. at 353, 631 P.2d at 1293. "Yet, this standard is sufficiently definite so  
27



1 that those charged with adhering to it will know when there is an acceptable  
2 deviation, and when there is an unacceptable deviation from the master plan.”

3  
4 Id.

5 The Court finds the City's approval of the Sonata Park subdivision is a  
6 significant deviation from the Rattlesnake Plan and therefore arbitrary and  
7 capricious. The Court finds the City essentially ignored the central component  
8 of the Rattlesnake Plan, the land use recommendations, when it approved a  
9 subdivision with over four-times the recommended density. The Rattlesnake  
10 Plan dictated certain densities in each section of the Rattlesnake valley and  
11 contains a map delineating desired land uses and densities in the  
12 Rattlesnake area. For the area containing Sonata Park, the map designates  
13 a density of 1 dwelling unit per 5-10 acres in one area, and 1 dwelling unit per  
14 2 acres in the remaining area. These density recommendations would allow  
15 7-8 dwelling units in the proposed area as opposed to the City's approval of  
16 37 dwelling units.

17 The City ignored or failed to substantiate its findings on a number of other  
18 components of the Plan as well. The Goals and Guiding Principles of the  
19 Missoula County Growth Policy 2005 Update, which incorporated the 1995  
20 Rattlesnake Plan, are listed, in part, below. Where a particular goal or principle  
21 is inapplicable to Sonata Park, such as “preserving an open space corridor  
22  
23  
24  
25  
26  
27



1 along Rattlesnake Creek," it is omitted. Also, where the citizens' goals  
2 duplicate the Missoula Urban Comprehensive Plan, etc., the goal is stated just  
3 once.<sup>3</sup>  
4

5 *1. Air and Water Quality*

- 6 a) *Minimize air pollution emissions: by encouraging increased*  
7 *pedestrian, bicycle, and transit use...*  
8

9 The City's October 20, 2009 Findings of Fact and Conclusions of Law  
10 (hereinafter "FOF-COL") state, on page 8, ¶ 45, "The property is located within  
11 the Air Stagnation Zone." This is defined as,  
12

13 "The portion of the valley where air is most likely to stagnate, so air  
14 pollution (dust, smoke, factory and automobile emissions, etc.)  
15 tends to stick around for longer because the air isn't being  
16 mixed/replaced as often. The zone generally corresponds to areas  
17 that experience a lot of inversion. What this means from a  
18 regulatory standpoint is that air quality is more closely regulated in  
19 this area. For example, all roads are required to be paved because  
20 gravel roads kick up more dust. (This is only a distinction in the  
21 County because all roads are required to be paved in the City  
22 anyway.) There are also more restrictions on wood stoves and  
23 other burning in the Air Stagnation Zone."<sup>4</sup>

---

24 <sup>3</sup> The 1995 Rattlesnake Plan lists several Goals and Guiding Principles that summarize the objectives of the  
25 1988 Comprehensive Plan Amendment, Missoula community goals as stated in the Missoula Urban  
26 Comprehensive Plan, the September 9, 1994 City-County growth management working document titled  
27 *Planning for Growth in Missoula County* and finally some "guiding principles" identified by the citizens of the  
Rattlesnake.

<sup>4</sup> Email from Susan Firth, Missoula Deputy City Attorney, January 22, 2010, referencing definition found in  
2000 Missoula City-County Air Pollution Control Program Regulations,  
<http://www.co.missoula.mt.us/airquality/AbouttheAirProgram/regulations.htm>.



1           The FOF-COL address the goal of minimizing air pollution by stating that,  
2 "the Missoula City-County Air Pollution Control Program regulations prohibit  
3 wood-burning stoves and fireplaces in Sonata Park. Pellet stoves that meet  
4 emission requirements or natural gas or propane fireplaces may be installed..."  
5 FOF-COL, p. 33, ¶ 18. More importantly, the FOF-COL contain no provisions  
6 regarding the development of bike paths, public transportation, etc., and,  
7 instead state, on page 7, ¶ 42, "Mountain Line does not have a bus route  
8 serving this portion of the Rattlesnake Valley..." On page 25, ¶ 7, the FOF-  
9 COL provide, with no reference to the record, "This subdivision is not within the  
10 Missoula Urban Transportation district, and Mountain Line recommended that  
11 the subdivider petition this property into the district. City Council required this in  
12 a condition of approval." There is no Finding that the subdivider actually  
13 petitioned Mountain Line and received approval for the property to enter the  
14 Mountain Line service district.

15  
16  
17  
18  
19  
20           There are no Findings or Conclusions regarding the impact on air quality  
21 as it relates to the addition of exhaust emissions generated by 314<sup>5</sup> more trips  
22 to and from town daily within the Air Stagnation Zone.  
23  
24

25  
26  
27  

---

<sup>5</sup> Email from Deputy City Attorney Susan Firth, 2/2/10. "Average Daily Trips (ADT) are generally calculated as 7-10 trips per day per dwelling unit." Ms. Firth states, "As I understand it, this is a pretty common estimate used amongst transportation engineers. This is referenced on page 17 of the Application in the submittal packet (Section 3), and Nick Kaufman (the developer's representative) discusses this formula on pages 33 & 34 of the 12-04-07 Planning Board Minutes. It is also referenced on page 2 of the 12-12-07 PAZ Minutes."

