

1 Ed McLean, District Judge
2 Department No. 1
3 Fourth Judicial District
4 Missoula County Courthouse
5 Missoula, Montana 59802
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6 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

7 NEIGHBORHOODS BY DESIGN, LLC,) DEPT. 1
8)
9 Plaintiff/Petitioner,) CAUSE NO. DV-07-1721
10 -vs-)
11) OPINION AND ORDER and
12 CITY COUNCIL OF THE CITY OF) NOTICE OF HEARING
13 MISSOULA,)
14)
15 Defendant/Respondent.)
16)

14 Pending before the Court are: Plaintiff and Petitioner's Motion for
15 Partial Summary Judgment on Statutory Claims (Ct.Doc.28); Plaintiff and
16 Petitioner's Motion for Partial Summary Judgment on Takings Claims
17 (Ct.Doc.30); and, City of Missoula Motion for Summary Judgment
18 (Ct.Doc.32).

21 This is a subdivision application appeal from the Missoula City
22 Council's decision approving a subdivision application if the subdivider
23 meets 36 conditions. The subdivider, Neighborhoods by Design, takes
24 exception to four of those conditions, claiming those conditions are arbitrary
25 and capricious and are takings of private property without just compensation
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1 under the U.S. and Montana Constitutions. Neighborhoods By Design
2 alleges the Missoula City Council adopted two conditions (condition #'s 12
3 and 15) requiring Neighborhoods By Design to provide public easements for
4 future trails through Neighborhoods By Design's property that have no
5 relevance to any impact created by the subdivision or any other requirement
6 in the City Council's subdivision regulations. Neighborhoods By Design
7 further alleges the City Council imposed a third condition (#17) converting all
8 of the subdivision's privately-owned common areas into public access areas
9 without articulating sufficient factual or legal bases for these conditions. The
10 fourth condition (#19) challenged by Neighborhoods By Design relates to
11 the building of homes and out buildings in relationship to envelopes
12 designated on Neighborhoods By Design's proposed subdivision plat.
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16 Neighborhoods By Design's proposed 33-lot residential subdivision,
17 known as Clark Fork Terrace No. 2, is located on 47.38 acres in the East
18 Missoula area, along Deer Creek Road, with 34.25 acres proposed for
19 residential lots, 8.99 acres proposed for common areas, 4.10 acres
20 proposed for streets, and .04 acre proposed for utility lots.
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23 The factual and legal impacts of the City's condition #'s 12, 15, and 17
24 would give the City public easements in addition to those required by law, in
25 the forms of: (1) a public easement on a 20 foot strip of land along the
26 entire south side of the privately-owned property, (2) conversion of all of the

1 rest of the private property easements to public easements while requiring
2 the private property owner to maintain those easements, and (3) conversion
3 of all of the private easements to public utility easements, whether or not the
4 private easements require or contain public utility service equipment, all
5 without any just compensation to the current private property owner and
6 future private homeowners' association.
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8 The Court has diligently and carefully reviewed the legal arguments
9 and documentary evidence before it and determined that the private
10 property owner, Neighborhoods by Design, is correct that the City's findings
11 of fact do not support the City's attempt to gain more than it has a legal right
12 to gain in the form of public easements without just compensation.
13 Furthermore, the City's findings of fact and conclusions of law have failed to
14 show how its demand for a public easement in the south 20 foot wide strip
15 can co-exist with the home owner's desire to establish a conservation
16 easement on the said 20 foot strip.
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20 As to the City's condition #19, which relates to the placement of
21 residences and out buildings within and without building envelopes, neither
22 party has presented the Court with a copy of the subdivision plans, much
23 less the placement of building envelopes, or any photos or other evidence
24 which this Court could view to make an informed decision whether this
25 condition is factually and legally supportable.
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1 Neighborhoods by Design argue that, in the interests of judicial
2 economy, the absence of sufficiently expressed findings of fact to support
3 condition #'s 12, 15, 17, and 19, requires the Court to strike these four
4 conditions pursuant to the pending motions for summary judgment. The
5 Court seriously considered that option, but has concluded that the City's
6 insufficiently expressed findings of fact may be due to lack of understanding
7 of the factual detail required in written findings of fact to establish sufficient
8 supportable factual grounds to sustain those conditions. The Court reaches
9 that conclusion based on the City Council's mere reciting of statutory and/or
10 administrative guidelines and regulations giving the City the right and
11 responsibility to consider specific criteria when reviewing a subdivision
12 application, but containing little to no sufficient or site-specific factual
13 information to justify its conditions. Rather, the City repeatedly relies on a
14 generalized public policy statement that public easements are necessary to
15 the public's general health and welfare, based on the fact that the public is
16 by and large physically inactive and overweight, and therefore, needs to
17 exercise more.

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23 Consequently, the Court concludes that an evidentiary hearing would
24 best serve resolution of the parties' disputes as to the City's condition #'s
25 12, 15, 17, and 19. The Court believes this is the best alternative in this
26 case because the location of the property near the Clark Fork River make

1 the competing rights of the private property owner and the public interest
2 paramount in this case.

3 Therefore, evidentiary hearing will take place at the Missoula County
4 ✓ Courthouse on, **Thursday, the 13th day of August, 2009 at 8:30 a.m.**

5 The parties shall submit to the Court their Proposed Findings of Fact
6 and Conclusions of Law three days before the hearing, both in hard copy
7 and on a computer disk.
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9 SO ORDERED and DATED this 29th day of June, 2009.

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12 ED MCLEAN, District Judge

13 cc: Alan F. McCormick, Esq.
14 Jim Nugent, Esq.
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