



# Sanders County Land Service Department

## Subdivision Administration

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### MEMO

Date: March 4, 2024

To: Board of Sanders County Commissioners

Copy: Kathleen & Mark French

From: Chris McComas, Land Services Director, and Joel Nelson, Contract Planner

Re: McMillan Post RV Park Subdivision; continued hearing on March 5<sup>th</sup>; summary of public comments; potential additional conditions of approval; and MACo guidance following a Broadwater County District Court Order

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This memo is prepared in advance of the continued Commissioners' hearing on March 5<sup>th</sup> regarding the McMillan Post RV Park Subdivision. This can be considered an addendum to the staff report.

At the February 20 public hearing, the Commissioners continued the hearing to March 5<sup>th</sup> at 2:30pm so that clarification could be obtained regarding the Montana Department of Transportation (MDT) comments. We received clarification from MDT, which is further discussed below.

Leading up to and at the February 20 public hearing, Sanders County received a substantial amount of public comments on the proposed subdivision; the County has continued to receive public comments since then, and we expect more public comments leading up to and at the March 5 continued hearing. The allowance of additional verbal comments at the continued hearing will be at the discretion of the Commissioners.

Regarding public comments, this memo includes a summary of relevant comments, how they seem to apply to this subdivision, and how they have been or could be addressed. Additional conditions of preliminary approval could be considered by the Commissioners; this memo includes potential additional conditions if the Commissioners choose to move toward granting preliminary, conditional approval.

Also since February 20<sup>th</sup>, we have received additional guidance from the Montana Association of Counties (MACo). This guidance is the result of a District Court case in Broadwater County concerning the county's preliminary approval of a subdivision. The case is referred to as "Upper

*Missouri Waterkeepers v. Broadwater County*”. The District Court Order found Broadwater County’s decision to approve a subdivision was arbitrary, capricious, and/or unlawful based in part on the subdivision’s Environmental Assessment being insufficient despite the county having determined it sufficient. As a result of the court decision, MACo has advised counties that complete and sufficient applications now need to include more information, particularly regarding surface and groundwater. Specifically, basic hydrological characteristics of the aquifer and how surface waters interact with the aquifer need to be provided and reviewed by counties. There are other implications to county subdivision reviews, but this memo discusses how the Court’s decision impacts the review of the McMillan Post RV Park Subdivision, which we have also discussed with MACo Associate General Counsel, Karen Alley; that will also be further discussed below.

**MDT Clarification:**

During review of the preliminary plat application, we corresponded with MDT Maintenance Chief Steve Felix regarding MDT’s approval of the approach permits to MT Highway 135 and MT Highway 200. Those correspondences were included with the staff report for the subdivision. At the February 20 hearing, highway traffic safety and access to the proposed development were discussed at length, and it was noted that MDT’s comments indicated motorists must enter the development on Highway 135 only and exit on Highway 200, which appeared problematic; this was based on the following statement from Steve Felix in a February 8 email: “*Yes, once the park is operational it will be enter on 135 and exit on 200 only as shown on the developers plans, Signage will be required to guide travelers.*”

Because the MDT statement appeared problematic and would impact access by existing users of the approach to Highway 135, we sought clarification from Mr. Felix. On February 23, Mr. Felix responded as follows: “*The 135 approach can be used as a full movement, in and out approach for any vehicle. The approach on 200 is to be used only for RV’s leaving the development and other vehicles turning right only.*”

The above clarification from Mr. Felix seems to resolve the concerns related to existing users of the Highway 135 approach and logistics of motor vehicles visiting other uses in the development, such as the store, being able to only exit through the one-way RV Park roads and Highway 200. However, we noted the restriction for right turns only onto Highway 200 is concerning and may cause safety concerns because RV travelers that may seek to travel west-bound on Highway 200 would need to enter the highway east-bound and travel several miles in the opposite direction to safely turn around. Due to this potential safety concern, we sought further clarification from Mr. Felix. Mr. Felix responded on March 4<sup>th</sup> as follows: “*In my previous email I stated that the approach on MT-200 is right in, right out only. That is incorrect. The approach can be used as a full movement and vehicles leaving the development via 200 can turn right or left. I still believe that the RV park owners intend to restrict RV’s from entering on 200 so that their internal operations work properly for them. Sorry for the confusion.*”.

It appears our concerns as reviewers with the highway accesses have been addressed and there are no longer questions with the approaches and their uses from our perspective.

Traffic control on the highway and approaches is under the jurisdiction of MDT, so Sanders County's ability to address any remaining highway safety concerns with a condition or otherwise is limited. If there are remaining safety concerns regarding highway access or safety, additional findings regarding the subdivision's impact on public safety may be warranted.

**Public Comments:**

As stated previously, the County has received considerable public comment. Many comments and portions of comments do not appear to be relevant as they do not pertain to or address the primary review criteria for subdivision review. However, several comments are related to the primary review criteria and are relevant; therefore, they should be addressed with this review. The following is our analysis of relevant public comments received so far:

Variance request/road width:

Several comments either oppose or express concern with the variance requested for road widths. The reviewer recommendations in the staff report regarding the variance request include the recommendation to deny the variance request, with findings in support of denial. Therefore, no changes are currently recommended regarding the variance request.

Highway/traffic safety:

Many comments express concerns with traffic safety, the highways, intersection, and approaches. Highway approaches and traffic control on the highways are under MDT's jurisdiction. Conditions of approval have been recommended regarding Sanders County requirements for highway access, as well as internal access and traffic control within the subdivision. We have sought clarification with MDT regarding safety concerns, as described above. Because the County is required to consider a subdivision's impacts on public safety, and although the highways, approaches, and traffic control on the highways are under MDT's jurisdiction, the Commissioners should consider the subdivision's impacts on public safety, even with respect to MDT's jurisdiction. Additional findings regarding the subdivision's impact on public safety may be warranted if highway-related safety concerns remain.

As discussed at the February 20 hearing, there have been comments that the Highway 135 approach requirements could result in a one-way only road/approach that will impact access to the users of Wild Rose Lane. It appears the MDT clarification received since the hearing resolve this matter.

Water and sanitation information:

Several comments pertain to the water and sanitation plans. Recommended conditions would require DEQ review and approval, and that comments be provided to DEQ as required by law. These conditions will address some of the comments pertaining to water and sanitation information; however, the County must also consider the water and sanitation information, comments, and compliance with water and sanitation related requirements. The following are discussions of water and sanitation comments received.

Phil Cook's comments noted a misidentified well proposed for the Public Water Supply that would serve the development. The comments state the well to be used for the PWS serving this project has been misidentified as GWIC #154141, and the actual well ID is GWIC # 315461. Mr. Cook stated this error has carried over into the water rights issued by DNRC, which must also be corrected, as the property on which well 154141 sits (across Hwy 200) is under development by the owner, and he will be filing the required paperwork for his water rights this calendar year. If this issue is not corrected prior to that time, his ability to secure his rights will be severely compromised. Mr. Cook suggests that Sanders County withhold any approvals for this project until the above is settled, for the County's own protection.

Mr. Cook's comments also expressed concerns that in 2019, modifications to GWIC well # 315461 were made as part of pump installation required to provide water to the future RV Park; he stated that unapproved components were installed that would have the potential to contaminate groundwater for all 3 wells on these 4 parcels, and the developers may have corrected this issue, demanded by DEQ, with proper parts and inspection by a P.E. Mr. Cook feels this should be confirmed.

Regarding Mr. Cook's comments regarding the misidentified wells, the information submitted for the well to be used for the public water supply has a GWIC number as represented in the application materials, and this all seems consistent with the water rights files. However, we have found that GWIC indeed maps that GWIC well number across the highway, but the GWIC mapping is not completely reliable. During investigation of the comments from Phil Cook regarding potential misidentified well GWIC #154141 potentially being GWIC #315461, information was found that possibly corroborates Phil Cook's comments. It was discovered that in a previous subdivision (Amended Lot 8 of COS 769, across Highway 200) that was granted preliminary plat approval on July 27, 2023 that a well located on the property cross the highway owned by Clifford Stephens was identified by Ron Warren, P.L.S., as GWIC #154141. This information indicates that the GWIC well #154141 is not located on Parcel B of COS 1507 as described in the application for preliminary plat approval for McMillan Post RV Park that is intended to be used for the PWS. In summary, we have been unable to resolve these apparent discrepancies, which could result in issues with water rights and changes to what is being reviewed by Sanders County now, what DEQ reviews, and DNRC water rights. We have therefore drafted a condition of approval for consideration by the Commissioners to attempt to address these matters; please see below.

Brian Meaden submitted written comments, some of which are addressed elsewhere in this memo. He also suggested that rules be required for the RV Park to address a number of issues. RV Park rules are further discussed below.

Brian Meaden provided verbal comments at the February 20 hearing stating the development's replacement drain fields are on his property based on a DEQ study map received from the previous Land Services Director. He was told that there needs to be a 100-foot buffer zone around the drain fields and that the drain fields could not be located in the floodplain. He stated he will not allow his property to be filled to accommodate the floodplain. His well is approximately 150' outside the proposed drain field. The reviewers have reviewed information regarding the drain

field mixing zones for the developments' wastewater treatment system, which as proposed would not serve the RV spaces, but would serve the bathhouse RV Park occupants will use (and the store and other uses in the development). It does appear that Mr. Meaden's comments regarding the mixing zone overlapping his well are valid. However, the reviewers are not Sanitation in Subdivisions Act reviewers, nor are we engineers or qualified to determine full compliance with DEQ requirements; the mixing zones relative to existing well location(s) may be compliant due to the 2005 subdivision approval by DEQ and the approved mixing zones being previously approved may be acceptable to DEQ. The recommended conditions would require comments regarding water and sanitation information to be submitted to DEQ, and DEQ approval of the subdivision consistent with the preliminary plat application.

Comments at the February 20 public hearing question why DEQ approval was not complete, and whether the sewer is going to contaminate the water table. A commenter noted the hydrologist report cited in application is from 2004, and there are 9 additional houses drawing from this area.

We also note that the report cited in the subdivision's EA is from 2004 (nearly 20 years old) and was not included in the application; nor is it readily available. This impacts the sufficiency of the application, particularly in light of the Broadwater County decision. See further discussion below on this matter. Regarding why DEQ approval is not complete, the normal subdivision review process requires preliminary approval by the local government to be obtained prior to DEQ approval; however, it is also typical for the water and sanitation information to be submitted to and reviewed by DEQ to be submitted to the local government with a preliminary plat application to meet the requirements of 76-3-622, MCA; this is also further discussed below.

#### Natural environment:

Many comments express concerns with issues such as noise, trash, aesthetics, and visual impacts, which relate to impacts on the natural environment. Some of these comments are speculative and not specific, documentable, and clearly defined impacts as required by 76-3-608(3)(a), MCA, which require that a subdivision proposal must undergo review for specific, documentable, and clearly defined impact on the natural environment. Pages 4 & 5 of the staff report present draft findings on impacts on the natural environment; these are subject to modifications by the Commissioners.

Potential impacts from noise are addressed by recommended Condition 23, which requires quiet hours.

Impacts from trash and visual impacts are not addressed by the recommended conditions, other than Condition 23, which requires the Subdividers to provide and use bear resistant dumpsters and garbage cans. No landscaped or other visual buffer has been formally proposed by the Subdividers, but they have indicated plans to plant trees.

The Commissioners could consider conditions to address these natural environment-related concerns if appropriate findings can be made regarding specific, documentable, and clearly

defined impact on the natural environment. The Subdividers could also propose mitigation measures.

Development on two tracts:

There have been comments, including those by Alfred J. Aschenbrener, which raise concerns about the RV Park including improvements (primarily the road network) on two tracts of record. We would like to note that the subdivision regulations and Montana law do not preclude this; the RV Park subdivision itself is located on one tract, and portions of the road network are located on the Subdividers' adjacent tract. This arrangement will require easements to be created for the subdivision's road network, which is already addressed by the recommended conditions of approval.

Phases:

Some commenters have expressed concern that this subdivision is part of a phased development, which should require plans for the phasing. We would like to note the subdivision is not proposed as a phased subdivision; therefore, it cannot be treated as a phased subdivision at this time. Any future phases would require additional review as subdivision(s) when proposed.

RV Park design is not for large vehicles:

Comments have expressed concerns that the one-way access roads are insufficient for large vehicles to maneuver. We believe these concerns are addressed through adoption and implementation of the subdivision regulations' requirements for RV Parks, including the road standards specific to RV Parks and mobile home parks. Recommended conditions will require compliance with RV Park standards in SCSR, which are intended to ensure the RV Park roads and RV spaces will be sufficient for access by RVs and emergency service vehicles.

RV parks bring fires to the area:

A comment at the February 20 hearing by Denise Moreth was that RV parks bring fires to the area. We believe this concern is related to potential RV Park patrons generally increasing fire risks in the greater area; not just at the RV Park itself. While we agree that activities by RVers and other campers present inherent elevated fire risks (campfires, fireworks, gas tanks and appliances, dragging tow chains, smoking, etc.), this comment is somewhat speculative and not based on specific, documentable, and clearly defined impacts. If the Commissioners find this concern relevant, it could be addressed by adding a condition requiring the RV Park rules to outline fire-related rules, fire risk awareness, and fire prevention techniques. The condition could also require the RV Park rules provide information to occupants regarding the subdivision's Fire Prevention Plan and Fire Response Plan.

Rules for RV Park and management:

The application did not include proposed rules for the RV Park. As drafted, recommended Condition 22, which addresses wildlife attractants, contemplates RV Park rules with the following statement: *“..These requirements shall be incorporated into the RV Park rules.”* RV Park rules are also contemplated by Condition 23, which addresses quiet hours, which are also to be incorporated into the RV Park rules. We have drafted an additional condition for consideration

by the Commissioners to specifically require RV Park rules to address relevant public comments and mitigation measures.

**Other comments and concerns:**

Other comments have been received regarding concerns with changing the status of neighborhood, trespass, theft, property values, past experiences with the Subdividers, potential long-term use by RV Park occupants, etc.

The status of the neighborhood, property values, past experiences with the Subdividers, and the quality of RVs that will be used in the RV Park do not seem to be related to the subdivision review criteria.

Trespass and theft do relate to public safety, but these concerns appear to be somewhat speculative and not documented or documentable at this time, so these concerns could be considered beyond the scope of this review, as future problems with trespass and theft resulting from occupants of the RV Park would be issues that can be addressed through posting signs on private property and contacting law enforcement. However, we are suggesting a potential condition requiring RV Park rules be submitted with the final plat application, and implemented and posted on site – the rules could address trespass concerns to mitigate concerns related to public safety and trespass.

There have been several letters of support of the application citing support for property rights, economic and business development, the Subdividers' ownership buffer around the development, and good design. These too generally do not pertain to the subdivision review criteria. Support of the subdivision design is reasonable to consider in light of the requirements for the RV Park to comply with the subdivision regulations' design criteria, but this type of support does not require additional findings.

**Potential Additional Conditions to Consider:**

As a result of public comments, the following conditions have been drafted by the reviewers for consideration by the Commissioners:

Recommended new condition to address the water well discrepancy discussed above:

- DEQ is advised of public comment that the well depicted on the preliminary site plan and lot layouts reviewed by Sanders County during preliminary plat review is identified with a GWIC (Montana Ground Water Information Center) number that is in error, which Sanders County has been unable to independently resolve. This may impact the validity of the well information included with the preliminary plat application, which this review and preliminary, conditional approval is based on. The Subdivider shall provide with the final plat application documentation from DNRC regarding water rights sufficient to demonstrate the DEQ-approved plans match the DNRC water rights, which shall be consistent with the preliminary site plan and lot layouts reviewed by Sanders County during preliminary plat review. The final plat application shall include DEQ approval of plans substantially consistent with the plans submitted for preliminary plat approval,

which are what the preliminary, conditional approval are based on. Deviation from the water supply plans reviewed by Sanders County during preliminary plat review will require additional review by Sanders County. *(this condition addresses an apparent discrepancy between the information included in the preliminary plat application as it relates to DEQ review and DNRC water rights)*

Recommended condition requiring RV Park rules:

- RV Park rules shall be submitted with the final plat application, implemented, and posted on site. The approved RV Park rules shall be recorded or filed with the final plat so that the rules approved by Sanders County are part of the public record. The RV Park rules shall address the following:
  - Fire safety, such as limitations on campfires, fireworks, use of gas tanks and appliances, dragging tow chains, smoking, and other fire-related impacts. The rules shall outline fire-related rules, fire risk awareness, and fire prevention techniques. The RV Park rules shall also provide information regarding the subdivision's Fire Prevention Plan and Fire Response Plan as approved by the Fire District.
  - Onsite disposal of wastewater from RVs may only occur via the dump station as approved by DEQ. No wastewater from the RVs may be disposed of in the on-site wastewater treatment system or in other locations on site.
  - Quiet hours as required by Condition 23.
  - Food storage and other wildlife attractants as required by Condition 22.
  - Compliance with traffic control requirements.
  - Garbage control.
  - Language informing RV Park users of private properties in the area, and that trespass on other properties is not allowed by RV Park occupants.

*(as authorized by 76-3-608(3)(a) & (4), impacts on the review criteria and mitigation of potential adverse impacts)*

#### **MACo Guidance:**

Having discussed the *Upper Missouri Waterkeepers v. Broadwater County* Court decision and this subdivision application with Karen Alley at MACo, we have been advised the County needs to analyze the factual existence and legal appropriability of water. This raises concern when considering the apparent discrepancy in the well identifications discussed previously.

Additionally, MACo has advised us that the County needs to look at the location of the aquifer, the current health of the water bodies, whether the aquifer and the nearby surface waters interact, and the impact the wells and wastewater systems will have on the aquifer and nearby surface water. The advice is that the County must analyze how the waters (both surface and groundwater) will be affected, i.e. dewatered, flooded, impacts from sewage, pesticides, sediment, wastewater discharge, all beyond the 1,000 feet that DEQ looks at under their requirements. The subdivision application includes no real analysis of the impact of the wells and wastewater on the aquifer and nearby surface water, no analysis of how waters will be affected by sewage, sediment, etc. Because the water and sanitation information submitted is lacking

relative to the information required by 76-3-622, MCA, the information submitted with the application is not current and not what DEQ is reviewing, and the EA does not sufficiently provide information required for County review in light of the *Upper Missouri Waterkeepers v. Broadwater County* Court decision, based on our discussion with Karen Alley, the application should return to sufficiency review so the above can be further addressed by the Subdividers. However, because the application was determined sufficient for review by the former County Planner, the Commissioners must act on the submitted application and supplemental materials by the review deadline unless the Subdividers agree to an extension to allow for further sufficiency review.

**Reviewer Recommendations:**

As reviewers, we have had concerns about the actual sufficiency of the application, which was determined sufficient for review by the former County Planner. We have discussed several of our concerns with the Subdivider and suggested the application return to pre-sufficiency review so that the application could be made sufficient while the review period is suspended with agreement from the Subdividers. The Subdividers have chosen not to agree to an extension of the review period, which gives a deadline of March 7, 2024 for the Commissioners to act.

With MACo guidance being that in light of the Broadwater County decision and noted concerns with the sufficiency of this application, the application should be remanded to sufficiency review, we now must recommend the same if the Subdividers agree to that; however, that would require agreement from the Subdividers per 76-3-604(4), MCA, as follows:

- (4) After the reviewing agent or agency has notified the subdivider or the subdivider's agent that an application contains sufficient information as provided in subsection (2), the governing body shall approve, conditionally approve, or deny the proposed subdivision within 60 working days or 80 working days if the proposed subdivision contains 50 or more lots, based on its determination of whether the application conforms to the provisions of this chapter and to the local regulations adopted pursuant to this chapter, unless:
  - (a) the subdivider and the reviewing agent or agency agree to an extension or suspension of the review period, not to exceed 1 year; or
  - (b) a subsequent public hearing is scheduled and held as provided in 76-3-615.

**Options:**

As reviewers, we see the following options for this review:

- If after further consideration by the Commissioners, the Commissioners find the application is approvable subject to findings and conditions, the Commissioners could adopt the findings and recommendations in the staff report, potentially modify the findings and conditions, and grant preliminary, conditional approval of the preliminary plat application.
- If after further consideration by the Commissioners, the Commissioners find the application is deficient, the impacts are unmitigable, and/or does not comply with applicable requirements, the Commissioners could deny the application based on specific findings that support denial.

- If the Subdividers agree to return the application to sufficiency review and the Subdividers and Sanders County (Land Services Department) agree to an extension or suspension of the review period, not to exceed 1 year, the current deadline of March 7<sup>th</sup> for Commissioners' action/decision on the application would be postponed as determined by agreement between Sanders County and the Subdividers. The agreement would need to extend the review deadline to provide an adequate amount of time after a determination of sufficiency to allow for proper notices of the public hearing and County review. The review deadline could be set to March 7, 2025, another date valid only if the application is determined by a set date, such as 60 working days after the sufficiency determination.

**Mitigation:**

When requiring mitigation as recommended by the conditions of approval and other mitigation measures that may be considered by the Commissioners', it is important to be aware of the following requirements:

76-3-608. Criteria for local government review.

(5) (a) In reviewing a proposed subdivision under subsection (3) and when requiring mitigation under subsection (4), a governing body may not unreasonably restrict a landowner's ability to develop land, but it is recognized that in some instances the impacts of a proposed development may be deemed unmitigable and will preclude approval of the subdivision.

(b) When requiring mitigation under subsection (4) and consistent with 76-3-620, a governing body shall consult with the subdivider and shall give due weight and consideration to the expressed preference of the subdivider.