

November 21, 2021

Dear Broadwater County Commissioners and Planning Board and Attorney (County Officials):

Re: Horse Creek Hills Major Subdivision (HCHMS)-Existing Violations due to Noncompliance

Montana Codes Annotated MCA (the law) must be followed by the County officials when reviewing subdivision applications for decision. Specific requirements must adequately be met under that law. Failure of County officials to adequately address the requirements under the law could be a violation of the law. Comments identifying application deficiencies required under the law, by Broadwater County citizens (taxpayers) and other concerned parties, were provided to the County officials via written comments and via in person testimony during 2 Planning Board public hearings, 3 Planning Board meetings, and 2 Commissioner meetings. Below is a partial list of requirements and the deficiencies in the application, that are presently in violation of the law

**1. Lower Confederate, Lower Duck Creek, BOR Roads (Roads)-Transportation, Access, Safety** criteria in the application are presently violations under the law due to non-compliance with 76-3-608(3)(a) MCA and 76-3-501(1)(i) MCA.

The present application is utilizing a road study in which low road count distribution data was obtained between February 18-23, 2021, a known time the roads receive minimal travel, to make determinations to required criteria pursuant to 76-3-608(3)(a) MCA. The low distribution count was further used in calculating the applicant's contribution to the county towards county road improvements specifically to service this proposed residential and commercial subdivision. Photographs document heavy snowfall in February 2020.

On 11/1/2021, the County Public Works Director was skeptical of this low distribution count due to timing of study and knowledge of the roads' use. The increase in traffic due to both residential and commercial developments as proposed is certain to increase traffic thus triggering paving requirements to meet safety standards. He reported the road is low priority for plowing, often drifts in and becomes closed off. Residents provided comment they often must plow themselves out. Also identified was BOR ownership for portions of the road and no MOU exists between the BOR or the county and BOR maintenance is often delayed. The applicant failed to identify BOR ownership or potential financial costs obligations.

Using the low road distribution count, the applicant calculated his contribution to be \$286,840 to the county for 3" thickness of crush top surfacing 24 wide for 49,070 linear feet of (9.29 miles). Language in the application appears to place all future road maintenance or construction liability onto the county which is placed on to the existing taxpayers.

On 11/1/2021, the County Public Works Director further informed the commissioners that paving one mile of Goose Bay Road, required due to increased recreation traffic, cost around \$1 million dollars. That mile of Goose Bay Road is straight, flat, and in good condition requiring minimal work as opposed to the roads which have blind hills and curves that would likely require preparatory work to meet safety compliance prior to paving.

The application fails to adequately address impacts to other required criteria pursuant to the law associated with roads such as transportation, access, safety, effects on agriculture, wildlife, etc. **Page 11, item (c) of Appendix D identifies high traffic volume to be a manmade hazard, therefore, traffic increase should be included in impacts to agriculture and other natural resources.** In comparison to existing traffic volume, the addition of 39 residential and 2 commercial lots to include a gas station and convenience store has potential for high traffic volume over existing and the VPD count in the application appears to fail to take into account traffic volume from transitory vehicles being drawn to a gas station/convenience store business.

The Public Works Director stated the county has the tools to take a road count and it should be conducted at a time as to provide an accurate count. Gallatin and Lewis and Clark counties require developers to pay the costs of infrastructure and improvements upfront, prior to any development, to prevent the taxpayer from being saddled with these costs.

A low distribution road count skews data and fails to depict a factual count and reduces contribution cost calculations in favor of the applicant. The realistic costs of improvements to the roads are not currently written in the application, and because someone has to pay this price, the cost of millions of dollars are excessive and will likely be required of the taxpayers in order to improve this road specifically for this development as depicted in Pages 13-16 in Appendix D. This is a violation due to noncompliance with 76-3-501(1)(i) MCA. This low road distribution count is not an accurate depiction, if accepted, skews data and costs in applicants favor and results in excessive expenditures of funds and resultant tax increases to cover the excessive costs in violation with 76-3-501(1)(i) MCA. This deficiency causes the application to be incomplete, impacts are not adequately identified or addressed, costs to the county appear excessive, and \$286,840 should not be construed as mitigation.

**Of Importance, Contents Of Environmental Assessment, pursuant to 76-3-603 (iv) additional relevant and reasonable information related to the applicable regulatory criteria adopted under 76-3-501 as may be required by the governing body.**

**Water Availability**-adverse impacts to the existing aquifer and adjacent surface waters have not been clearly identified, defined, or mitigated. While it is understood the applicant took advantage of an existing loophole with DNRC thus circumventing water rights requirements and a more stringent aquifer evaluation under DNRC requirements, the county is however required to review the application as a whole of 41 individual wells on one submitted plat (irrelevant of when the applicant chooses to start phases 1-4) and criteria under county review includes water availability. Therefore, the county should obtain a qualified 3<sup>rd</sup> party independent study of the aquifer to determine the number of wells the aquifer can sustain without adversely impacting nearby existing domestic and irrigation wells as well as the wells of each resident in that subdivision. **Per the county attorney, the applicant can be required to pay the county for this independent study.** Without sufficient detailed information, a clear identification of potential impacts and mitigation measures, this component is seriously lacking and has potential for harm to existing landowners water availability, Confederate Creek, and for far reaching areas off site. The submitted Appendix D fails to adequately address this under the law.

**Cultural Resources**-Broadwater County is the government action agency tied to this application. Government action agencies are required to ensure applicants conduct cultural

resource surveys prior to approval, on undisturbed ground, which defines the land of this proposed subdivision. Because this proposed project is a high bench located in a known migratory corridor along the Missouri River, cultural resources are likely.

At present, known cultural resources exist on adjacent areas and the applicant evaded addressing cultural resources on the applicant's property by stating in Appendix D, page 18 item 6(a) "We understand there are no existing structures on the site and therefore no historic or culturally significant structures." This statement solely looks at structures and fails to identify the need for an on-site survey for historic, paleontological, archaeological, or cultural sites. The applicant was notified by SHPO of the specific need for a survey since no survey has been completed to date on this presently undisturbed proposed project site, per the November 5, 2019 letter, and despite having 2 years' time, the applicant has yet to have a cultural resource survey conducted on the proposed project site, nor does it appear to date the county has requested them to complete one.

The "disclaimer" construction will stop if something is found is unacceptable, is not mitigation, and destroys the very historic, paleontological, archaeological, or cultural sites required under the review criteria and as identified in Appendix D page 18, item 6(a). Per Appendix D page 18, 6(a) the SHPO letter dated 11/5/2019 was misinterpreted per communication with SHPO. The applicant's representative has further taken the step to publicly state incorrect information that SHPO can look at an aerial photo with special equipment and determine no resources exist and claimed this was done and concluded no survey is needed. This also is incorrect information per SHPO the following day the inaccurate statement was made.

**Agriculture**-the application fails to clearly identify the potential for adverse impacts to existing agriculture producers both on or near prime farmland or farmland of statewide importance. These soil types exist on the project property at 32.9% and 12.8% = 45.7% which questions how the applicant states 88% of the proposed project is not prime farmland or farmland of statewide importance. Simply because the applicant chose not to utilize the property for agriculture purposes, this should not diminish its agriculture value. The law requires clearly defined identifiable documentation of effects to agriculture **both on site and off site per page 8, 1(b) of Appendix D**. The applicant fails to adequately address impacts to agriculture located off the project area.

The answers to page 8, item 1(b) of Appendix D demonstrates blatant deficiencies of the required criteria to effects on agriculture in that the existing agriculture producers adjacent to and close to the proposed development consist of several hundred acres of irrigated land that consists of both prime farmland if irrigated and Farmland of Statewide importance per NRCS definition. Access to this proposed residential and commercial development bisects existing agriculture operations where livestock are required to cross the road for grazing and watering purposes and on which farm equipment traverses.

The applicant consistently fails to accurately answer, and address criteria as demonstrated in Appendix D page 9 item (g) and makes such statements as the majority of land appears vacant in nature based solely on aerial imagery, thus excluding potential grazing impacts.

The applicant fails to identify potential impacts to irrigation since no study to define the effects 41 individual wells will have on the area aquifer have not been conducted and the distance of the cone of depression from 41 wells.

On page 9 item (i) of Appendix D, per question “What measures will be taken to ensure no conflict to nearby agriculture operations, et.al.” is answered with “there are no anticipated negative impacts to any adjacent farm or ranch operations, nor any diminishing availability or quality of water for irrigation, nor interference with movement of livestock or farm machinery”.

The nearby agriculture operations repeatedly testified there will be adverse impacts to include manmade hazards due to heavy traffic volume above existing and due to heavy industrial activity resulting from build out and transient travelers, to the point they are concerned they could be run out of operation.

**Wildlife**-the area is a known wildlife corridor for large game animals to include dangerous bear and mountain lions. Despite letters from FWP addressing known impacts to wildlife, wildlife management and hunting, the applicant fails to clearly identify and document the impacts that are obvious at best and misconstrued information provided in those letters. Fencing gardens and refuse containers fails to adequately address impacts to the wildlife and wildlife habitat that exists on and adjacent to the subject property.

Per page 10 of Appendix D, item 3(b), the applicant fails to adequately address the question “Is the proposed subdivision likely to displace wildlife in a way that will create problems for adjacent landowners?” The proposed 39 residential and 2 commercial lots and increased traffic it causes has the potential for adverse impacts and to displaced wildlife in higher concentrations onto the adjacent lands, which may now be cut off from public hunting for wildlife management due specifically to the density of the proposed development. It appears the restrictive covenants fail to address the impacts.

**Safety**-this criteria is inadequately addressed, and the applicant fails to clearly define, or document impacts. Per page 11(c) of Appendix D the proposed project will result in manmade hazards due to heavy traffic volume that will result in impacts to agricultural operations near the site, heavy industrial traffic during build out, and from public hunting grounds adjacent to and nearly bounded on 3 sides to the proposed development; and per Page 12 (e) of Appendix D will include commercial fuel storage tank(s) located in the subdivision; is located on low priority public roads that are impacted by snow and ice that are minimally maintained in the winter sometimes with seasonal access; has dangerous wildlife such as mountain lions and bear; located on soils that require a geotechnical report on each individual site to determine home placement, etc.

Existing draws on the project site may be stable now, however runoff concentrated from roads and lots that could enter these draws could produce significant erosion gullies as currently evidenced on the south side of the road, a short distance south of the proposed project. Additionally, DEQ identified some stormwater detention ponds appeared to be located uphill from the direction of runoff and flows.

Per criteria (e) on page 12 of Appendix D, specifically asks if the proposed subdivision itself will include any activity or facility which could potentially endanger the public to include the example of **commercial fuel storage tank**. The applicant fails to adequately address this in lieu of the intentions to install a gas station and convenience store. The response is “not expected to include i.e. any commercial fuel storage” Based on public meetings, the applicant intends to place a gas station convenience store located on the commercial lot in the proposed subdivision,

directly adjacent to active agricultural producers and public land used for hunting and agriculture.

Page 17 of Appendix D, the applicant fails to identify and address the questions asked under 5(a)(1) and further totally fails to identify the number of personnel and number of vehicles for fire protection and law enforcement. The provided write up appears to misrepresent a letter provided by Sheriff Wynn Meehan. Safety factors also touch sheriff, fire and Ems departments and the applicant fails to adequately identify potential impacts, misconstrues letters provided by those officials, and fails to address any additional needs or funding necessary to include potential tax increases to existing residents to address an increase in population in an existing very rural predominantly agriculture area. The applicant fails to address safety of the residents, commercial businesses, gas stations and convenience stores located adjacent to public hunting grounds and the impacts this will have on hunting rights.

What about the safety of school children of all age groups standing in isolated areas along Highway 284 waiting for school bus pick up and drop off? Since the busses won't leave the pavement, is this another way the applicant can pressure the county to pave the existing roads at taxpayers' expense?

County officials reported they must comply with the law to make the determination on HCHMS. To comply with the law, 76-3-603 MCA, 76-3-608(3)(a) MCA and 76-3-501(1)(i) MCA must also be complied with. At present, as demonstrated above, the application is fraught with deficiencies and errors and therefore is in violation due to noncompliance with the above referenced laws and County officials would appear to be in violation of 76-3-608 (1) MCA and 76-3-501(1)(i) MCA if they elect to proceed forward using this application in its present state. Under the law, County officials would fail to be in compliance with the law since they could not accurately evaluate or make determinations forward on a deficient and error filled application.

The law states, pursuant to 76-3-608(3)(a) MCA, Criteria for local government review. (1) The basis for the governing body's decision to approve, conditionally approve, or deny a proposed subdivision is whether the **subdivision application...or additional information demonstrates that development of the proposed subdivision meets the requirements of this chapter.**

(2) The governing body shall issue written findings of fact that weigh the criteria in subsection (3), as applicable.

(3) A subdivision proposal must undergo review for the following primary criteria:

(a) except when the governing body has established an exemption pursuant to subsection (6) or except as provided in 76-3-509, 76-3-609(2) or (4), or 76-3-616, **the specific, documentable, and clearly defined impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety, excluding any consideration of whether the proposed subdivision will result in a loss of agricultural soils;** (*Note-This proposed subdivision does not meet the above listed exemption criteria pursuant "to except when the governing body has established an exemption pursuant to subsection (6) or except as provided in 76-3-509, 76-3-609(2) or (4), or 76-3-616,"*)

This application to date fails to meet the above requirements and pursuant to 76-3-608(3)(a) MCA”, the law includes obtaining **additional information** in this statute. County officials cannot lawfully or accurately evaluate or make determination forward on a deficient and error filled application.

Pursuant to 76-3-604. (2)(a) Within 15 working days after the reviewing agent or agency notifies the subdivider or the subdivider's agent that the application contains all of the required elements as provided in subsection (1), the reviewing agent or agency shall determine whether the application and required elements contain detailed, supporting information that is sufficient to allow for the review of the proposed subdivision under the provisions of this chapter and the local regulations adopted pursuant to this chapter and shall notify the subdivider or, with the subdivider's written permission, the subdivider's agent of the reviewing agent's or agency's determination.

**(c) A determination that an application contains sufficient information for review as provided in this subsection (2) does not ensure that the proposed subdivision will be approved or conditionally approved by the governing body and does not limit the ability of the reviewing agent or agency or the governing body to request additional information during the review process.**

Pursuant to 76-3-603 MCA, 76-3-608(3)(a) MCA and 76-3-501(1)(i) MCA, this application should be determined incomplete, either stopping the clock on any forward movement until studies are completed at a time to ensure data accuracy or grant a 1-year extension to the applicant as DEQ did in October 2021. The application and criteria to be reviewed under Appendix D pursuant to 76-3-608(3)(a) MCA appears grossly lacking substance as required under the law which in turn fails to provide sufficient information necessary to make an informed decision. The applicant’s representative appears to clearly continue to provide information of questionable accuracy and as demonstrated in the lack of sufficient data and information in Appendix D. An Environmental Assessment is required pursuant to 76-3-603 MCA (Appendix D).

*At present, this application should be deemed incomplete to comply with the above laws and the request for additional information is both required and applicable to this application to meet compliance.*

The delay in the processing of this application rests on the applicant as the submitted application fails to meet the requirements under the laws.

Respectfully submitted,