

1 HON. Wm. NELS SWANDAL  
2 District Judge  
3 Sixth Judicial District  
4 414 East Callender St.  
5 Livingston, Montana 59047  
6 (406) 222-4132

GALLATIN COUNTY CLERK  
OF DISTRICT COURT  
JENNIFER BRANDON

2009 AUG 5 AM 11 02

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

BIG BLUE RIVER, LLC, )

Plaintiff, )

vs. )

GALLATIN COUNTY COMMISSION, )

Defendant. )

FILED  
BY \_\_\_\_\_  
DEPUTY

Cause No. DV- 08-731C

**ORDER DENYING  
DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT  
AND DISMISSING CAUSE**

11 Oral Arguments on the Defendant's Motion for Summary Judgment were heard on August  
12 5, 2009. Arthur Wittich and Hertha Lund appeared for the Plaintiff and Allan Baris and Jennifer  
13 Farve appeared for the Defendant. Upon review of the arguments made, the briefs filed, the file and  
14 the law, the Court hereby makes the following orders:

15 1. The Defendant's Motion for Summary Judgment is DENIED. This cause is DISMISSED  
16 WITHOUT PREJUDICE.

17 2. Section 14.1.3.b. of the Gallatin County Subdivision Regulations is VOID. Gallatin  
18 County shall enact a substitute section to replace the void section which complies with the guidelines  
19 set forth in the cases and opinions cited by this Court herein within sixty (60) days from the date of  
20 this order.

21 3. The plaintiff herein may re-apply and the Commission will re-examine the application as  
22 soon as the substitute subdivision regulation is enacted.

23 DATED this 5<sup>th</sup> day of August, 2009.

24   
25 \_\_\_\_\_  
26 DISTRICT JUDGE

1 **EXPLANATORY COMMENT**

2 **Standard for Summary Judgment**

3 The party moving for summary judgment has the initial burden of showing that no genuine  
4 issues of material fact exist. Once the moving party meets that burden, in order to raise a genuine  
5 issue of material fact the non-moving party must provide substantial credible evidence that one  
6 exists. *Von Petersdorff v. Kenyon Noble Lumber Co.*, 2004 MT 382, ¶ 8, 325 Mont. 94, ¶8, 103 P.2d  
7 1082, ¶8.

8 For summary judgment to issue, the movant must demonstrate that no genuine issues of  
9 material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party  
10 to prove by more than mere denial and speculation that a genuine issue does exist. Having  
11 determined that genuine issues of material fact do not exist, the court must then determine whether  
12 the moving party is entitled to judgment as a matter of law. *Stutzman v. Safeco Ins. Co.*, (1997), 284  
13 Mont. 372, 376, 945 P.2d 32, 34, (citing *Treichel v. State Farm Mut. Auto Ins. Co.*, (1997), 280  
14 Mont. 443, 446, 930 P.2d 661, 663).

15 Under Rule 56(c) M.R.Civ.P. summary judgment is proper when there is no genuine issue  
16 of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c),  
17 M.R.Civ.P. It is never a substitute for a trial on the merits. *Morton v. M-W-M, Inc.*, (1994), 263  
18 Mont. 245, 249, 868 P.2d 576, 578, and *Mills v. Mather* (1995), 270 Mt 188, 890 P.2d 1277.

19 All inferences which may be reasonably drawn from the record are to be drawn in favor of the non-  
20 moving party. *Vincelette v. Metropolitan Life Ins. Co.* (1995) 903 P.2d 1374, 1376 citing *Simmons*  
21 *v. Jenkins* (1988) 230 Mont. 429, 432, 750 P.2d 1067, 1069.

22  
23 **Analysis**

24 This Court heard oral arguments on the plaintiff's motion for partial summary judgment at  
25 the same time as it heard oral arguments on the instant motion. The Court granted the plaintiff's  
26 motion for partial summary judgment, which renders the instant motion moot. Because the Court  
27 found that Section 14.I.3.b. of the Gallatin County Subdivision Regulations is void, the Court must  
28 remand the plaintiff's application for exemption from subdivision review to the Gallatin County

1 Commission. Further, the review shall not and must not occur until the Gallatin County Commission  
2 enacts a Subdivision Regulation to replace the void section so that it complies with §76-3-207,  
3 M.C.A., the *Veach* opinion cited by this Court in the order granting plaintiff's motion for partial  
4 summary judgment, and the criteria expressed in 40 Mont. Op. Atty. Gen. No. 16 and *State ex rel.*  
5 *Florence-Carlton School District v. Board of County Commissioners*, (1978), 180 Mont. 285, 291,  
6 590 P.2d 602, 605. The Commission shall enact an appropriate substitute section within the next  
7 sixty days, after which the plaintiff herein may re-submit their application for review.

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9 cc: Arthur V. Wittich ✓ 8-5-09  
10 Allan H. Baris } Emailed  
11 Judge Swandal } 08/06/09  
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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

BIG BLUE RIVER, LLC, )

Plaintiff, )

vs. )

GALLATIN COUNTY COMMISSION, )

Defendant. )


Cause No. DV- 08-731C

**ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

11 The Court heard oral arguments on the Plaintiff's Motion for Partial Summary Judgment on  
12 August 5, 2009. The plaintiff was represented by Arthur V. Wittich and Hertha L. Lund. The  
13 defendant was represented by Allan H. Baris and Jennifer L. Farve. The Court, having reviewed the  
14 arguments made, the briefs filed, the file and the law, hereby makes the following order:

15 1. The Plaintiff's Motion for Partial Summary Judgment is GRANTED.

16 DATED this <sup>5<sup>th</sup></sup> day of August, 2009.

  
Wm. Nels Swandal, District Judge

19  
20 **Issue: May the Court grant partial summary judgment on the issue of whether a Gallatin  
21 County's rule is void when the rule frustrates the purpose of the statute.**

22 **EXPLANATORY COMMENT**

23 **Standard for Summary Judgment**

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25 issues of material fact exist. Once the moving party meets that burden, in order to raise a genuine  
26 issue of material fact the non-moving party must provide substantial credible evidence that one  
27 exists. *Von Petersdorff v. Kenyon Noble Lumber Co.*, 2004 MT 382, ¶ 8, 325 Mont. 94, ¶8, 103 P.2d  
28 1082, ¶8.

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2 material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party  
3 to prove by more than mere denial and speculation that a genuine issue does exist. Having  
4 determined that genuine issues of material fact do not exist, the court must then determine whether  
5 the moving party is entitled to judgment as a matter of law. *Stutzman v. Safeco Ins. Co.*, (1997), 284  
6 Mont. 372, 376, 945 P.2d 32, 34, (citing *Treichel v. State Farm Mut. Auto Ins. Co.*, (1997), 280  
7 Mont. 443, 446, 930 P.2d 661, 663).

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9 of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c),  
10 M.R.Civ.P. It is never a substitute for a trial on the merits. *Morton v. M-W-M, Inc.*, (1994), 263  
11 Mont. 245, 249, 868 P.2d 576, 578, and *Mills v. Mather* (1995), 270 Mt 188, 890 P.2d 1277.

12 All inferences which may be reasonably drawn from the record are to be drawn in favor of the non-  
13 moving party. *Vincelette v. Metropolitan Life Ins. Co.* (1995) 903 P.2d 1374, 1376 citing *Simmons*  
14 *v. Jenkins* (1988) 230 Mont. 429, 432, 750 P.2d 1067, 1069.

### 16 **Relevant Statute**

17 §76-3-207, M.C.A. states, in part:

18 (1) Except as provided in subsection (2), unless the method of disposition is adopted for the  
19 purpose of evading this chapter, the following divisions of land are not subdivisions under this  
chapter...:

20 (a) divisions made outside of platted subdivisions for the purpose of relocating common  
boundary lines between adjoining properties[.]

### 21 **Relevant Regulation**

22 Gallatin County's regulation which was enacted to affect the purpose of §76-3-207, M.C.A.  
23 states:

[A] rebuttable presumption exists when a proposed relocation of common boundary lines is  
adopted for the purpose of evading the Act, if:

24 b. The Certificate of Survey for the relocation of common boundary lines  
25 significantly rearranges multiple parcels with little or no resemblance to the original  
configuration of the parcels.

26 County Reg. Section 14.I.3(b): Divisions of Land Except from Subdivision Review (amended  
27 September 19, 2006 at pg. 163-164 (Resolution No. 2006-097).

1     Analysis

2             The plaintiff argues that the county regulation above defeats the purpose of the statute above,  
3     rather than enhancing or maintaining the statute. The plaintiff further argues that, under *State of*  
4     *Montana and Leach v. Vissor* (The Gallatin County Board of Commissioners) (1989), 234 Mont.  
5     438, 442, 767 P.2d 858, 861, and *State of Montana ex rel. Swart v. Casne, et al.* (1977), 172 Mont.  
6     302, 564 P.2d 983, the language of the county regulation eradicates the purpose of the statute.  
7     Because the regulation uses the words "rebuttable presumption" rather than narrowly applying the  
8     exemptions in the statute and liberally construing the Subdivision and Platting Act, the regulation  
9     actually does the opposite.

10            The defendant counters that the regulation above is nothing like the regulation discussed in  
11    *Veach* and that the County Commission has the discretion to formulate pertinent regulations as  
12    needed to perpetuate the purpose of the statute. The defendant argues that a local government may  
13    legitimately require one claiming an exemption from the Act's requirements to make some  
14    evidentiary showing that the exemption is justified as stated by the Attorney General in 40 Mont. Op.  
15    Atty. Gen. 58. Thus, states the defendant, the rebuttable presumption of intent to evade is not  
16    contrary to statute.

17            Although *Leach* was interpreting a regulation which pertained to another part of §76-3-207,  
18    M.C.A., the analysis is startlingly similar. The County regulation quoted above sets out what is in  
19    essence a *per se* or automatic rule. It goes well beyond maintaining the county's discretion to  
20    determine whether the applicants' purpose is to evade §76-3-207, M.C.A. As the County state, they  
21    may certainly require that one claiming an exemption from the Subdivision and Platting Act's  
22    requirements make some evidentiary showing that the exemption is justified. The County may even  
23    require persons claiming an exemption to provide an affidavit to the effect that the exemption was  
24    claimed in good faith and not for purposes of evading the Act. See 40 Mont. Op. Atty Gen. 58. The  
25    County cannot, however, place the bar at an unattainable level, which is what the current regulation  
26    does. The County has the authority and duty to evaluate and determine, from all the circumstances,  
27    whether a proposed division of land may evade the subdivision requirements. This is a far, far  
28    different thing than stating a "rebuttable" presumption to evade the subdivision requirements exists

1 whenever an application proposes to change boundary lines to a certain extent. The rebuttable  
2 presumption requires the opposing party to prove a negative- a difficult and daunting task, which  
3 does not comport with the purpose of the statute.

4 The plaintiff's cross-motion for partial summary judgment is granted.

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6 cc: Arthur V. Wittich ✓ 8509 RH-  
7 Allan H. Baris } Emailed  
8 Judge Swandal } 08/05/09  
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