

1 from three to five acres with one remaining lot of about 150 acres. The lakefront
2 property currently is alleged to be very rocky consisting of old dredge piles from
3 mining in the area. The Boyers claim that putting homes on the lots would enable the
4 family to use the property year round to maximize its potential. They seek to avoid the
5 subdivision regulations under the family gift or sale exemption set forth in Section
6 76-3-207(1)(b), MCA. The Boyers claim that one lot (B1F) is currently ready to be
7 built upon, and the family wishes to build a home on that lot as soon as possible. No
8 plausible explanation is provided in the record as to why the family requires five
9 separate homes to enjoy the Hauser lakefront.

10 The Court must note that between 1981 and 2008, Petitioners'
11 predecessor, Richard Shaver, divided the property, which includes the subject property,
12 on seven different occasions. Most of those divisions were not subdivisions being
13 either in excess of 20 acres (prior to 1993) or in excess of 160 acres (post-1993). See
14 Section 76-30-104, MCA. One of the divisions by Shaver occurred in 1993 and was
15 exempt from subdivision review because it was an occasional sale. In addition, the
16 Boyers completed a boundary line relocation, reducing their parcel from 174 to 170
17 total acres. In addition to these various divisions of land, when the Boyers purchased
18 this property, it was split off from the larger tract owned by their immediate
19 predecessor-in-interest.

20 On April 22, 2010, the County's Survey Review Committee (Review
21 Committee) denied the Boyers' application to use the family exception to avoid the
22 subdivision laws. That decision was appealed to the Commissioners. A hearing was
23 held on May 20, 2010. On June 1, 2010, during the regularly scheduled biweekly
24 meeting, the Commissioners discussed a motion made by Commissioner Derek Brown
25 to approve the application, which would have overturned the Review Committee's

1 decision. Following extended examination, the motion failed on a 2-1 vote, and thus
2 the administrative decision was upheld. The Boyers' timely appealed that decision to
3 this Court.

4 The Commissioners' hearing was conducted pursuant to Appendix I of
5 the Lewis and Clark County Subdivision Regulations. Under Appendix I, the applicant
6 has the burden of proving by a preponderance of the evidence that it should be exempt
7 from the subdivision regulation. (Verified Pet. Appealing Decision of Resp'ts & Writ
8 of Mandamus, Ex. F, at 2, section B2.) There is a rebuttable presumption that a
9 proposed division of land as an exempt family transfer is inappropriate if one of ten
10 criteria are present. (Id., at 5.) The Review Committee denied the requested family
11 transfer based on five of the ten criteria which they felt were implicated, stating:

- 12 2.b.(1) The original or any subsequent tract, from which the parcel
13 created for transfer is to be segregated, was exempt from
14 subdivision review pursuant to the exemptions listed in Section
15 C.1., or (*Staff Note: 14 tracts [have been] created from the original
16 since 1973. Most recently, applicant has used a boundary line
17 relocation exemption.*)
- 18 (2) The parcel to be transferred is not intended for a home site for the
19 transferee; or (*Staff Note: Recreation homes; non-permanent
20 residences.*)
- 21 (4) It will become one of three or more parcels that were subdivided
22 from the original tract; or (*Staff Note: 14 tracts [created] from the
23 original since 1973.*)
- 24 (6) The proposed subdivision of land fits a pattern of land divisions
25 and land transfers; or (*Staff Note: Jeff Boyer had requested a
"ranch hand" apartment in the Quonset building on the property.
That was originally allowed until it was discovered he was renting
the ranch house to a third party.*)
- (7) The applicant has used exemptions to create parcels from the
original tract or other tracts; or (*Staff Note: Boundary line
relocation*)

(Id., Ex. E, at 1-2, quoting Ex. F at Appendix I - 5, 6.) The Review Committee also

1 considered additional relevant factors including the prior history of the tract in
2 question. Specifically, the Review Committee considered the fact that this parcel was
3 previously reviewed and approved for a minor subdivision.

4 On June 8, 2010, Commissioner Michael Murray sent the Boyers a letter
5 explaining that the decision to deny the request was based on the five exemption
6 criteria upon which the Committee had decided the matter. The Boyers appeal that
7 decision as arbitrary and capricious and an abuse of discretion.

8 STANDARD OF REVIEW/SUMMARY JUDGMENT

9 A writ of mandamus is only available to compel the performance of a
10 clear legal duty that does not involve discretion. *Withers v. County of Beaverhead*, 218
11 Mont. 447, 450, 710 P.2d 1339, 1341 (1985) (citation omitted). Here, the
12 Commissioners' decision involved a great deal of discretion. Thus, mandamus is not
13 appropriate. In addition, the Court finds no abuse of discretion and concludes that the
14 Commissioners' adoption of the Review Committee's recommendation was not
15 arbitrary and capricious.

16 Summary judgment is appropriate when "the pleadings, depositions,
17 answers to interrogatories, and admissions on file, together with the affidavits, if any,
18 show that there is no genuine issue as to any material fact and that the moving party is
19 entitled to judgment as a matter of law." Rule 56(c), M.R.Civ.P. The party moving for
20 summary judgment must establish the absence of any genuine issue of material fact,
21 and entitlement to judgment as a matter of law. *Tin Cup County Water and/or Sewer*
22 *Dist. v. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60.
23 Once the moving party has met its burden, the party opposing summary judgment must
24 present affidavits or other testimony containing material facts that raise a genuine issue
25 as to one or more elements of its case. *Id.*, ¶ 54 (citing *Klock v. Town of Cascade*, 284

1 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)). Conclusory statements and assertions
2 will not prevent summary judgment. *Id.* The mere denial of a fact does not satisfy the
3 non-moving party's burden of establishing a genuine issue of material fact, and is not a
4 proper basis for denial of a motion for summary judgment. *Vettel-Becker v. Deaconess*
5 *Med. Ctr. of Billings, Inc.*, 2008 MT 51, ¶ 27, 341 Mont. 435, 177 P.2d 1034.

6 DISCUSSION

7 The facts relevant to summary judgment are not in dispute. The issue is
8 whether the Commissioners' decision to affirm the Review Committee's denial is
9 arbitrary and capricious or an abuse of discretion. *Withers*, 218 Mont. at 450, 710 P.2d
10 at 1341.

11 The Montana Subdivision and Planning Act (MSPA), Section 76-3-101
12 et seq., MCA, seeks, among other things, to ensure the protection of the public health,
13 safety and general welfare, by regulating the division of land. Section 76-3-102(a),
14 MCA; *Mills v. Alta Vista Ranch*, 2008 MT 214, ¶ 18, 344 Mont. 212, 187 P.3d 627
15 (citing *State ex rel. Florence-Charlton Sch. Dist. v. Board of County Comm'rs*, 180
16 Mont. 285, 291, 590 P.2d 602, 605 (1978)). A subdivision must be in the public
17 interest before a governing body may approve it to ensure that the public health, safety
18 and welfare is protected. *Id.* The MSPA allows certain exceptions to its requirements.
19 Those exemptions permit the division of land, so long as the exemption is not used in
20 an attempt to evade the orderly subdivision of land through the MSPA. Section
21 76-3-201, MCA. The Montana Supreme Court has ruled that the exemptions to the
22 MSPA are to be narrowly construed. *Id.*; *Shults v. Liberty Cove, Inc.*, 2006 MT 70, ¶
23 17, 334 Mont. 70, 146 P.3d 710. In this regard, local governments are granted
24 authority to establish procedures to evaluate proposed requests for exemptions.
25 *Withers*, 218 Mont. at 450, 710 P.2d at 1341 (citation omitted).

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The Montana Attorney General has stated:

[t]he party claiming the exemption should bear the burden of establishing his entitlement to it. . . . The exemptions in section 76-3-207(1), MCA, were not provided to allow a developer to create a division of land which is for all intents and purposes nothing less than an unreviewed subdivision. Rather, they were provided to deal with exceptional circumstances under which, in the Legislature's judgment, full plenary subdivision review is unnecessary.

40 Op. Atty Gen. Mont. No. 16 (1983). As noted by the Attorney General, the subdivision and platting act must be liberally construed to effectuate its objects. In addition, its exemptions should be narrowly applied. *Id.*, at 3. In addition, the parties claiming an exemption, here the Boyers, bear the burden of establishing their entitlement to it. The local governing body, here the Commissioners, should evaluate all relevant circumstances in assessing the claimant's intent. *Id.*

The exemptions in Section 76-3-207(1), MCA (including the family transfer exemption), were not provided to allow a developer to create a division of land which is for all intents and purposes nothing less than an unreviewed subdivision. Rather, they were provided to deal with exceptional circumstances under which, in the legislature's judgment, full plenary subdivision review is unnecessary. *Id.*

The Lewis and Clark County 2009 Subdivision Regulations set forth rebuttable presumptions for each proposed subdivision exemption that require the applicant to prove by a preponderance of the evidence that its proposed exemption is not an attempt to avoid the subdivision laws of Montana.

In light of the burden of proof requirements contained in the County's subdivision regulations, this Court feels the exemption is inappropriate. The Boyers have the burden of proving that they should be exempt from subdivision regulation. In light of the fact that there is a rebuttable presumption that a family transfer is an inappropriate use of land, the Court cannot rule that the Commissioners' position is

1 incorrect. The Court sees no reason why this proposed division of land should be
2 exempted from subdivision review. Here, the Boyers have shown no “exceptional
3 circumstances” to mandate approval of their proposed action. Especially suspicious in
4 this case is the fact that proposed exemption bears a striking resemblance to a
5 subdivision that was proposed by the applicants’ predecessor-in-interest.

6 The Commissioners are not only to consider the specific exemption
7 criteria set forth in state law and in the Lewis and Clark County subdivision
8 regulations, but they are also to consider other evidence including, but not limited to,
9 the prior history of the tract. See L&C County Subdivision Regulations, App. I,
10 section C(2)(a). Further, and probably most important for our consideration, the
11 exemption criteria set forth in subdivision regulation, appendix I, section D(2), are
12 disjunctive. In other words, a finding on any one of those criteria could doom the
13 proposed exemption.

14 In reviewing what the Commissioners have done, this Court, although it
15 may agree with some of the points made by the Boyers, cannot say, as a whole, that the
16 Commissioners’ decision was arbitrary and capricious and/or a result of an abuse of
17 discretion. When considering the history of the property, it is clear that what was
18 before the Commissioners was a “division of land which is for all intents and purposes
19 nothing less than an unreviewed subdivision.”

20 The six additional lakefront lots will obviously raise environmental
21 issues under the Montana Constitution. See e.g. *Roe v. City of Missoula*, 2009 MT
22 417, ¶ 26, 345 Mont. 1, 221 P.3d 1200. The Court believes subdivision regulation is
23 necessary to protect the Montana constitutional mandate of a clean and healthful
24 environment. A number of provisions within MSPA set forth the importance of
25 preventing environmental impacts through subdivision regulation. See, e.g., Section

1 76-3-501(9), MCA (providing that subdivision regulation shall reasonably provide for
2 “the avoidance of subdivisions that would involve unnecessary environmental
3 degradation. . . .”); Section 76-3-601, MCA (requiring submission of water and
4 sanitation information); Section 76-3-608(3), MCA (listing impact on the natural
5 environment as one of the primary criteria for reviewing a proposed subdivision.)
6 Here, the Court believes six new lots on the Hauser lakefront clearly implicate
7 environmental concerns requiring subdivision review. *Id.*; *Citizens for Responsible*
8 *Dev. v. Bd. of County Comm’rs*, 2009 MT 182, ¶ 12, 351 Mont. 40, 208 P.2d 876.

9 The Court does not feel it necessary to address each of the various points
10 made by the Commissioners in their June 8, 2010 denial letter. Item 2, for example,
11 refers to one of the exemption criteria set forth in appendix I of the subdivision
12 regulations. In that item, the Commissioners held that the parcel was not intended for
13 a home site. The staff noted that recreational homes were contemplated and not
14 permanent residences. Although the Boyers complain that this criteria is not in the
15 subdivision statutes, the Court sees nothing wrong with the Commissioners
16 considering this as a criteria when looking at whether this proposal is an appropriate
17 family transfer. The Commissioners are authorized to make regulations and, in so
18 doing, they can flush out the empty areas of the statute. In this regard, the Court again
19 notes that the burden is on the Boyers as to the various exemption criteria.

20 At the May 20, 1010 hearing before the Commissioners, Jeffrey Boyer
21 indicated that the property was to be used as a “compound during the summer.” (Pet’rs
22 Final Br. Resp. County’s Answer, Ex. D, at 5.) Boyer also indicated that family
23 members would like to put residences on the property — whether they were
24 recreational or permanent. (*Id.*)

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1 Certainly there is evidence in the record that the proposed residences
2 might be permanent, but there is also the evidence just quoted that indicates that any
3 residences placed on the property might be seasonal in nature. The Commissioners are
4 tasked with the job of determining the factual issues as to whether the purpose of a
5 claimed exemption is to evade subdivision review. See 41 Op. Atty Gen. Mont. No. 21
6 (1985). The Court cannot hold that the Commissioners' determination in this regard is
7 arbitrary, capricious, or evidenced by an abuse of discretion. This is especially so
8 since it could be reasonably argued that it is unlikely that each of the family members
9 who are beneficiaries of this transfer, who presumably have permanent residences
10 elsewhere, are all going to build a permanent residence on the subject property. The
11 Boyers failed to show why each of five relatives needs a separate home on a separate
12 parcel of land to enjoy family time on Hauser Lake.

13 Item 6 in the June 8, 2010 rejection letter states: "The proposed
14 subdivision of land fits a pattern of land divisions and land transfers" Here, the
15 Commissioners noted that the Boyers had requested a ranch hand apartment in the
16 Quonset building on the property, which was originally allowed until it was discovered
17 that the Boyers were renting the ranch house to a third party. The factual
18 underpinnings of this statement are contained in the minutes of the family exemption
19 meeting before the Commissioners on May 20, 2010, where Jeffrey Boyer indicated
20 that there was a renter in the farmhouse and he intended to put a ranch hand apartment
21 in the Quonset hut. Since the septic system for that proposal had not been approved,
22 he did not go forward with that plan. (Pet'rs Final Br. Resp. County's Answer, Ex. D,
23 at 17.)

24 While it can be argued that the rental is not a subdivision, it can certainly
25 be argued that the renting of the farm house and the creation of an apartment in a

1 Quonset hut (whether proposed or actual) fits a pattern of land transfers. The Court
2 here notes the further implication of the 2009 County Subdivision Regulations at
3 section VI(B) wherein the County established limits of one development right per
4 parcel. Thus, the proposal to put in the septic system for the ranch hand apartment in
5 the Quonset hut implicates the subdivision regulations and also reasonably raises the
6 flag as to the possibility of a “transfer” between the Boyers and whoever would be
7 renting the ranch hand apartment.

8 Finally, and probably most important, is the Commissioners’
9 consideration of the prior history of the particular tract in question. The
10 Commissioners, in their subdivision regulations, have given themselves various tools
11 to determine whether an exemption is claimed to evade subdivision review. The
12 Commissioners are to consider the specific exemption criteria found in appendix D of
13 the regulations and as set forth in the Commissioner’s June 8, 2010 rejection letter.
14 However, they may also consider other evidence including, but not limited to, the prior
15 history of the tract. See L&C County Subdivision Regulations, App. I, section C(2)(a).
16 Here, the prior history of the tract was clearly considered by the Commissioners.
17 Further, the review of the prior history does not limit itself to the prior history with this
18 applicant. Here we have a situation where fourteen tracts of land have been created
19 from the original since 1973. In addition, and maybe most important, was the fact that
20 this particular parcel was reviewed and approved for a minor subdivision on behalf of
21 the Boyers’ predecessor-in-interest. However, the predecessor-in-interest did not go
22 forward with the subdivision. The proposal here to create the various family member
23 lots appears to the casual observer to be identical to the subdivision that was previously
24 reviewed and approved by the Commissioners. Given the prior history of the tract just
25 mentioned, it was reasonable for the Commissioners to conclude that what they were

