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Ravalli County Planning Dept.

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Dear County Commissioners,

No one has really had enough time to resolve all the problems that come with the changes proposed in our flood plain regulations. FWP and the Bitterroot Conservation District and the public should have been included earlier in the process. FWP stated as much at the first meeting. Commissioner Burrows noted that he had not had enough time. Now with time about to run out we have still not finished hashing things out.

Your Planning Staff sent out a letter to all affected property owners in the flood plain on December 2, but did not bother to notify the general public, or other affected agencies such as FWP and the Bitterroot Conservation District. Why? Even your planning staff was not ready to proceed. (see the state's review of the proposed new rules made on December 11). Obviously someone underestimated the amount of public interest in the issue and failed to allow sufficient time for reasonable public involvement. It is noteworthy that even the notice sent to landowners did not mention the fact that the Planning Staff was considering lifting the prohibition on residential construction in the flood plain.

I'm not going to ply you with any more evidence about the unusually unstable river we have here in the Bitterroot. I think you have heard enough. We've heard enough. We get it. The river moves around too much in the Flood Plain and can suddenly barge through the Flood Fringe on any given year. Your draft flood plain regulations don't change that fact and don't adequately address the hazards that this phenomena presents to us. There is no question that the twenty year old restrictions on residential construction in the flood plain were aimed at protecting the public health and safety in this regard.

So the question that I have now, after your vote at the last meeting to lift these longstanding restrictions is, why? What has changed? All those reasons for having stricter regulations than most places in the state for the last twenty years haven't changed.

After reviewing the recordings of the meetings it is still not clear to me why this commission voted to lift those restrictions. In part this is due to the confusion generated by misrepresentations made by the Planning Staff.

Based on the public record so far, we see that the county Planning Department manager actually made the decision to remove the restrictions on residential construction in the flood plain prior to any public meeting. Rather than present the public with a copy of the existing regulations for consideration of any changes, a draft was presented in which the restrictions had already been removed. The draft was displayed to the public and the Flood Plain Administrator said, "These are our current regulations..." but that was not true. In the staff report which followed, not a word was said about the restrictions having been removed. Intentionally or not this misrepresentation of the document and the failure to mention that a significant omission had already been made lead to considerable confusion on the part of the public and public officials in the subsequent discussions. Even up to the end of the last meeting a few commissioners were still confused about whether something was being added to the regulations or being taken out.

It was not until some members of the public commented on the omission that the Planning Manager clarified that the restrictions had been removed from the draft that was under scrutiny. He said if regulations stricter than state law are inserted that scientific, peer reviewed studies would have to be done as well as an economic impact study. This comment was very misleading. It presumes that the restrictions are not already in the regulations, compounding the first misrepresentation.

It might be argued that what the Planning staff did was not an actual decision and that only the Board of Commissioners could actually make the decision to change the regulations. But it is hard to take something out of a document when it is not in the document. As a result the prohibition was added to the draft so that the commission could then make the decision to remove it.

Despite all the misrepresentation and resultant confusion the Commissioners did make the final decision to lift restrictions on residential construction in the Flood Fringe, but that decision also deserves scrutiny. While a governing body does have a lot of discretion in its review and decision making authority, that discretion is not unlimited. It's got to be based on a consideration of relevant factors. If it fails to consider an important aspect of the problem, or offers an explanation that runs counter to the evidence in front of it, or is so implausible that it could not be ascribed to a different point of view or the product of agency expertise, then it is what we call an arbitrary decision.

In this case we seem to have a classic example of arbitrary decision making. The Commission heard plenty of evidence and testimony concerning the need for the twenty year old restrictions on residential building in the flood plain. I won't try to go over it. But it was credible and it was based on scientific data. The Commission neither presented nor considered any evidence to the contrary. No reasons other than the frustration of a private landowner at not being able to build in flood hazard zone where they believe it is safe was ever produced. But lifting restrictions put in place to protect public health and safety simply to accommodate the wishes of a private developer is not a good reason. The desire to develop of a private parcel of land does not trump public health and safety concerns.

The Commission claims that the new criteria that it produced at the last meeting for permitting activity in the flood plain addresses the public health and safety issues. But they do not. In fact some of the proposed permit criteria are obviously not criteria at all, but simply judgments that themselves call out for some criteria.

For instance, how is it determined that there is a risk that materials may be swept onto other lands or downstream to the injury of others?

How is it determined that there is “susceptibility of the proposed activity to flood damage”?

How is the “importance or value of the proposed activity to the community determined? What does this even mean?

How is it determined that “the building or structure will be threatened due to its proximity to the stream or potential lateral movement of the stream”?

It has been well documented that the Bitterroot River may move laterally in the flood plain crossing into what was considered flood fringe? How is this predicted at any particular site?

Your attorney has told you that decision criteria should be rational, that is based on facts and evidence, and be objective in nature. Your proposed criteria do not meet this standard.

It is our hope that you will reconsider your decision to lift the prohibition on residential building in the flood fringe. We believe that the decision was arbitrary and contrary to the overwhelming evidence before the Board. We hope that you will retain the prohibition on residential construction in the flood fringe until the areas in the flood fringe that can potentially be developed in a safe fashion are identified by on-the-ground examination through acceptable scientific and objective methods.

Michael Howell, Program Director

Bitterroot River Protection Association