

1 HON. JAMES A. MANLEY
2 20th Judicial District Court
3 Lake County Courthouse
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5 Polson, MT 59860
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BY

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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

7 MONTANANS FOR RESPONSIBLE LAND
8 USE, a Montana non-profit corporation,
9 JAYBE FLOYD, SHANNON ELIZABETH
10 GUILFOYLE, BRIAN JAMES NIELSEN,
11 CAROL K. CRAVEN, DEBORAH JENKINS,
12 ERIN M. TINGEY, WILLIAM A ROGERS,
13 LALONNIE R. WARD, DENNIS N. WARD,
14 MICHAEL JENKINS, LOGAN TINSEN, and
15 TAMMIE LYNNE SMITH,

Plaintiffs,

-vs-

16 BOARD OF COUNTY COMMISSIONERS OF
17 CASCADE COUNTY, the governing body of
18 the County of Cascade, acting by and through
19 Joe Biggs, James Larson, and Jane Weber,

Defendants.

Cause No. BDV-19-0813

**ORDERING GRANTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

20 This matter comes before the Court on *Plaintiffs' Motion for Summary Judgment*. The
21 motion is fully briefed, and oral argument was held on October 16, 2020.

BACKGROUND

22 On April 25, 2019, Big Sky Cheese, LLC ("Applicant") submitted a Special Use Permit
23 Application ("SUP Application") to Cascade County for a value-added agricultural commodity
24 processing facility on property owned by Madison Food Park, LLC. The Planning Department
25 issued a Staff Report on the SUP Application to the Cascade County Zoning Board of
26 Adjustments ("BOA") on June 27, 2019. The Applicant submitted supplemental materials on
July 11, 2019. Public comments on the SUP Application were received from May 1, 2019

1 through July 26, 2019. The BOA conducted public hearings on the SUP Application on June 27,
2 2019 and August 28, 2019. On August 28, 2019, the BOA deliberated and based upon the
3 information supplied by the Applicant, the Staff Report, the extensive public comments received,
4 and its review of applicable standards, made its decision unanimously approving the SUP
5 Application subject to 17 conditions.

6 On September 26, 2019, the Applicant submitted a letter to the Board of County
7 Commissioners ("Commissioners") appealing 9 of the 17 conditions imposed by the BOA. On
8 November 13, 2019, Montanans for Responsible Land Use ("MRLU") sent a letter to the
9 Commissioners in support of upholding the BOA's decision. On November 21, 2019, the
10 Commissioners held a meeting to discuss the Applicant's appeal. No public comment was taken
11 on the Applicant's appeal. The Commissioners issued a written Decision on November 25,
12 2019, which included varying reversals, modifications, and remands of 9 of the BOA's
13 conditions.
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16 Plaintiffs challenge the action taken by the Commissioners in reversing, modifying, or
17 remanding the conditional approval of the SUP Application made by the BOA. Plaintiffs' allege
18 the Commissioners failed to comply with the applicable standard governing the review of
19 decisions by the BOA. Plaintiffs' assert the BOA did not abuse its discretion in approving and
20 conditioning the SUP Application because it relied on "fact and foundation" that was reasonable.
21 Plaintiffs' further assert the Commissioners' review of the BOA's conditions were not based on
22 'grounds of illegality' as directed by the statute, but instead the Commissioners conducted their
23 own *de novo* review of the SUP Application and made their own findings of fact in amending
24 contested conditions.
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1 Defendants argue the Commissioners review of the BOA decision was a review on the
2 record and the Commissioners were within their statutory discretion to remand, reverse, affirm or
3 modify the conditions the BOA imposed on the SUP Application. The Defendants further
4 asserted in oral argument that there is no standard of review for the Commissioners to apply and,
5 therefore, even if Commissioners did a *de novo* review, it was not outside their authority.

6 DISCUSSION

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8 Summary Judgment is appropriate and should be granted only if the pleadings, discovery
9 and disclosure of materials on file, and any affidavits show there is no genuine issue as to any
10 material fact and that the moving party is entitled to judgment as a matter of law. Mont. R. Civ.
11 P. 56(c)(3); *Wrzesien v. State*, 2016 MT 242, ¶ 7, 385 Mont. 61, 380 P.3d 805. Material issues of
12 fact are identified by looking to the substantive law which governs the claim. *Rosenthal v. Cnty*
13 *of Madison*, 2007 MT 277, ¶ 22, 339 Mont. 419, 170 P.3d 493.

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15 The parties agree that summary judgment is proper to resolve the issues before the Court
16 and there are no material facts in dispute. Both sides have stipulated to the record. The question
17 before the Court is whether the Commissioners properly exercised their authority in reversing,
18 modifying, or remanding contested conditions applied to the SUP Applicant. The inquiry,
19 therefore, is whether the Commissioners, in their review of the BOA decision, showed the BOA
20 acted “illegally” by imposing the disputed conditions on the SUP Application. The Court
21 reviews the Commissioner’s decision for an abuse of discretion.

22 **I. Applicable Law**

23 **General Authority**

24 Montana statutes and Cascade County Zoning Regulations (“CCZR”) delineate the
25 discretionary powers of the BOA and the Commissioners. The statutes and regulations set
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standards that the BOA and Commissioners must follow in considering a proposed SUP. Under § 76-2-221(1), MCA, the “county commissioners must provide for the appointment of a board of adjustment” and the BOA is given authority to “make special exceptions to the terms of the zoning resolution in harmony with its general purposes and intent”. The BOA exercises “considerable discretion” in determining whether to grant a special use permit. Mont. Code Ann. § 76-2-223; *Plains Grains Ltd. P’ship v. Bd. of Cnty. Comm’rs of Cascade Cnty.*, 2010 MT 155, ¶ 54, 357 Mont. 61, 238 P.3d 332; *Beasley v. Flathead Cnty Bd. of Adjustments*, 2009 MT 120, ¶ 18, 350 Mont. 171, 205 P.3d 812.

Pursuant to the authorizing statutes of the MCA, the CCZR assigns to the BOA the power to “hear and decide Special Use Permits.” CCZR § 12.3.3.2. The CCZR explicitly states that these regulations are “not intended to restrict or limit the power of the Zoning Board of Adjustment provided by Title 76, Chapter 2, Parts 221 through 228, Montana Code Annotated.” *Id.* The CCZR additionally sets forth standards which govern the BOA’s review and approval of a proposed SUP. *See* CCZR § 10.6.

Appealing BOA Decisions

In 2015, the Montana State Legislature passed HB 193 which added to Mont. Code Ann. § 227 a new appeal process from the BOA to the Board of County Commissioners. Cascade County chose to add to its zoning regulations a mandatory appeal from the BOA to the Board of County Commissioners. The Plaintiffs’ argue this new provision holds the Commissioners to the same review standard as a district court. The Defendant argues the 2015 Legislature granted the Commissioners discretion to remand, reverse, or modify the decision of the BOA, and no review standard applies to the Commissioners’ review of the BOA.

1 The MCA and CCZR contain nearly identical language on the process for appealing BOA
2 decisions. Under § 76-2-227, MCA, and CCZR § 12.3.5.1, the BOA makes a determination
3 based on the required considerations, and then a review of its decision may be brought before
4 either the County Commissioners or the District Court.

5 Any person . . . aggrieved by a decision of the Zoning Board of Adjustment, may
6 present to the Board of the County Commissioners [or to a court of record] a petition . . .
7 setting forth that the decision is illegal, in whole or in part, and specifying the grounds of
8 the illegality.

9 Mont. Code Ann. § 76-2-227 and CCZR § 12.3.5.1.

10 The MCA and CCZR do not define “illegality”. However, the parties agree this can be
11 shown through an “abuse of discretion”. Generally, a district court reviews a zoning decision for
12 “an abuse of discretion.” *Flathead Citizens for Quality Growth, Inc. v. Flathead Cnty Bd. of*
13 *Adjustment*, 2008 MT 1, ¶ 32, 342 Mont. 1, 175 P.3d 282. A court determines whether an abuse
14 of discretion has occurred by looking to the record and determining if the governing body’s
15 decision is “so lacking in fact and foundation that it is clearly unreasonable and constitutes an
16 abuse of discretion.” *Id.* (quoting *North 93 Neighbors v. Flathead Cnty Commr’s*, 2006 MT 132,
17 ¶ 44). The court review is limited to the record before the local governing body. The court then
18 determines whether the record contains sufficient evidence to establish the decision is reasonable
19 and not arbitrary or capricious. *Town & Country Foods v. City of Bozeman*, 2009 MT 72, ¶ 27,
20 349 Mont. 453, 203 P.3d 1283; *Richards v. County of Missoula*, 2012 MT 236, ¶¶ 17-18, 366
21 Mont. 416, 288 P.3d 175.

22 The Court agrees the 2015 Legislature granted the Commissioners discretion in reviewing
23 the BOA determination. However, accepting Defendant’s argument that no review standard
24 applies to the Commissioners would grant complete discretion to the Commissioners and
25 essentially strip all authority from the BOA determinations. Based on the plain language of the
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1 statutes and regulations and the case law cited above, this Court finds that the abuse of discretion
2 standard applies whether the appeal is to the local reviewing board or the district court.

3 II. Legal Analysis

4 The Commissioners review must demonstrate an illegality in the BOA's determination.
5 Mont. Code Ann. § 76-2-227(2). An illegality is shown by demonstrating an abuse of discretion
6 by the BOA. see generally *Flathead Citizens*, ¶ 32; *Town & Country Foods*, ¶ 27. An abuse of
7 discretion is shown by demonstrating there was no factual foundation for the conditions imposed
8 by the BOA on the SUP Applicant. *Id.* Absent a showing of illegality, the Commissioners may
9 not exercise their powers to remand, reverse or affirm, or modify the decision of the BOA.
10 Mont. Code Ann. § 76-2-227(2); CCZR § 12.3.5.1.

11 Under the nearly identical language of § 76-2-227, MCA, and CCZR § 12.3.5.1, "any
12 person . . . aggrieved by a decision of the Zoning Board of Adjustment, may present to the Board
13 of the County Commissioners [or to a court of record] a petition . . . setting forth that the
14 decision is illegal, in whole or in part, and *specifying the grounds of the illegality.*" Here, the
15 BOA followed the standards set forth in CCZR § 10.6 in reviewing, approving, and placing
16 conditions on the SUP Application. Based on the record, the conditions were solidly based on
17 fact and foundation. The Applicant appealed 9 of the 17 conditions imposed. The
18 Commissioners then modified, reversed, or remanded the 9 contested conditions. The
19 Commissioners did not review for an abuse of discretion, but instead essentially conducted their
20 own *de novo* review, making their own findings and exercising their own discretion to reach an
21 alternative decision. The Commissioners did not cite to any of the conditions imposed by the
22 BOA as being "clearly unreasonable" and constituting an abuse of discretion.
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1 The Court finds that the record demonstrates a factual foundation for the BOA's imposed
2 conditions and, therefore, the Commissioners abused their discretion in re-weighting the evidence
3 before the BOA and modifying, reversing, or remanding BOA's conditions.

4 **Right to Public Participation**

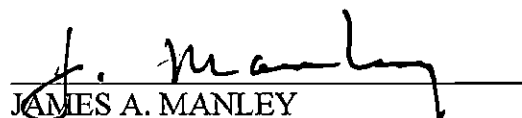
5 The Court finds it is not necessary to reach a conclusion on the public participation issue.
6 However, the Court notes that because the Commissioners are held to the same standard of
7 review as the district court, there is likely no public participation violation. The public had
8 several opportunities to submit public comment before and during the BOA proceedings.
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10 Alternatively, if the Court had determined the Commissioners were within their rights to
11 conduct a *de novo* review, then public participation would likely have been violated.

12 **ORDER**

13 Based on the foregoing, the Court hereby GRANTS *Plaintiffs' Motion for Summary*
14 *Judgment*, affirming the BOA determination and reversing the Commissioners.
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18 DATED this 6th day of November, 2020.

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21 
22 JAMES A. MANLEY
23 District Court Judge

24
25 cc: Roger Sullivan / Dustin Leftridge, Attorneys for Plaintiffs
26 Susan B. Swimley, Co-Counsel for Defendants
Tara DePuy, Co-Counsel for Defendants
~~Sheena Jandre Cobb, 8 JUD Dept. 2 JA to Hon. Elizabeth A. Best~~

11/9/20 CWMc