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Bitterroot Star
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Star wins public notice lawsuit against county commissioners

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County violated the law in its $675,000 settlement decision

By Michael Howell

District Court Judge Jeffrey Langton ruled in favor of the Bitterroot Star last week in the newspaper's lawsuit against the Ravalli County Commissioners over their decision to settle a lawsuit against Big Sky Development Inc. for $675,000. Langton found that the commissioners violated the Montana constitution, statutory law and their contractual obligations in the settlement agreement itself when they approved the payment without proper public notice and without affording the public the right to participate.

The settlement agreement with Big Sky Development was the culmination of a lawsuit filed in 2008 in which Big Sky Development and Morado Mountain Estates sued the county after having a variance request arbitrarily denied. District Judge James Haynes ruled against the commissioners in that case, finding their denial of the requested variance arbitrary and capricious. On the first count of making an arbitrary and capricious decision over the variance and by summarily refusing to hear the subdivision proposal, he found the county had denied the applicants due process. The decision was remanded back for a proper decision. The variance and the subdivision were then approved a few months later. But the developers continued seeking damages on their other claims in the case totaling $10,000,000.

Deputy County Attorney Howard Recht, representing the county in case brought by the Bitterroot Star, countered the newspaper's allegations of misconduct by noting that the commissioners had provided three days prior notice by placing it on the commissioner's agenda and then posting it on the official bulletin boards at the county administration building, on the county's web site and emailing it to representatives of the media. He argued that KECI reporter Kevin Maki, who attended the meeting, and the lawyers present at the meeting "are members of the public and thus members of the public did attend the meeting." Recht also noted that the Commission "relies on its own public notice protocol" in support of its argument that it fully complied with constitutional and statutory notice and participation requirements.

Recht also argued that the Star's claim was moot because the Court is unable to grant effective relief.

"The Commission asserts the settlement agreement has already been executed and $500,000 of the $675,000 has already been paid out," states Recht. The remainder is being paid off gradually by a special levy imposed later by the commissioners.

In his opinion and order, Langton quotes the constitution about the right to participate, "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." He underlined a couple of the words.

He quotes the constitution again about the public's right to know: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." He notes how case law has shown how intimately they are connected and notes that open meetings violations remain of utmost concern to the Montana Supreme Court.

"The Montana Supreme Court will not hesitate to affirm a district court's determination to void decisions made in violation of the open meeting law or to reverse a court's refusal to do so," he writes.

Judge Langton notes that the county was successfully sued in 2011 by the Star over similar constitutional and statutory violations of the public's right to know and participate. As part of the ruling in that case, the Commission was "ordered to create, adopt, and publish guidelines for determining whether an issue is 'of significant interest to the public,' pursuant to § 2-3-103(1), MCA, and for how it will notify the public of issues of significant interest . . . and to adhere to such guidelines in the future as it conducts the business of Ravalli County." The protocol referred to by Recht was a product of that order.

Langton is critical of the new protocol, however. Following an often referenced Attorney General's Opinion, the county set a protocol of providing notice at least 48 hours before the meeting and in this case met that criteria. They also stated plainly on the agenda "Review, Discussion and possible Decision on Big Sky Litigation and Settlement." But they didn't meet the spirit of the law or the intention of the law, according to Langton.

He notes that the county received a copy of the signed settlement agreement on Tuesday, May 6 and that Commissioner Greg Chilcott had it placed on the agenda for Monday, May 12. But the agenda was not posted on the county website until around 4:30 p.m. Friday and it was not sent out to the media until after the closing of business hours on Friday. The meeting was scheduled for 8:30 a.m. Monday morning.

In regards to the late Friday posting on the web site, Langton notes, "It is common knowledge that a large number of Montana's senior citizens live on fixed incomes and do not use the internet, and that the potential for property tax increases due to the Commission's approval of the settlement would hold high interest to these citizens."

He notes that statutory law allows the postponement of a deadline if the last day falls on a holiday or a Saturday and that Sundays are legal holidays. "There is no evidence that anything prevented the Commission from providing notice of the May 12 meeting to the public earlier in the previous week. Nor is there any evidence that anything prevented the Commission from scheduling the meeting later in the week of May 12," he concludes.

"Although the Commission's 48-hour plus notice of the May 12 meeting technically complied with Resolution 2979's requirement of 48 hours advance notice," writes Langton, "it did not comply with the spirit and intent of constitutional and statutory notice and participation provisions. More importantly: There is no statutory requirement that county commissioners post notice of a regularly scheduled meeting 48 hours in advance. The standard is simply that county commissioners must provide notice that is adequate to ensure the public has the opportunity to participate in the decision-making process."

In response to the argument that the Star's claims are "moot" because there is no remedy, Langton states, "Just like in the Star's 2012 lawsuit against the Commission, the Commission contends that because the decision has already been made and the bulk of the monies already paid out, no relief is available. (The monies at issue at the inadequately noticed meeting in 2012 were a mere $46,780.) Like it did before, the Court disagrees. As the Commission has aptly shown, this issue falls within the 'capable of repetition, yet evading review' exception to the mootness doctrine. This exception is applied to situations where the challenged conduct invariably ceases before courts can fully adjudicate the matter."

Langton also awarded attorney fees in the case and quotes case history about the award of attorney fees in civil rights cases in which constitutional rights are at issue and states that the instant case fits the bill and supports the idea of awarding the Star attorney fees.

"The fact that the Star seeks no damages or other form of relief personal to it makes an even stronger argument for a full fee award... The Star has performed a service for the citizens of Ravalli County by prevailing on its claim that the Commission violated constitutional and statutory notice provisions to ensure public participation on a matter of significant public interest prior to making its decision. Due to the public benefits gained by its efforts, the Court concludes the cost of the litigation should be spread among its beneficiaries," he wrote. Adding, "In the absence of a fee award, the Commission will have no more incentive to ensure its obligation to implement the public's constitutional right to participate in government and observe governmental deliberations than it did in May 2014."

Asked if he had a comment on the judge's ruling, Commissioner Chair Jeff Burrows said, "I was disappointed with it. It seems like he had his mind made up and then figured out how to get there."

Burrows said the judge got some things wrong in his opinion. He said the judge "misunderstood" things when he found a discrepancy between Commissioner Chilcott's and Administrative Assistant Glenda Whiles' affidavits. "And his emphasis on the bulletin boards is not right," said Burrows. "To make it the emphasis isn't an accurate portrayal of how we do business."

He said he didn't think the opinion showed a good understanding of the internet or the county's web page.

"It would have been nice if he better understood our process and Granicus [the live web streaming of the commissioners' meetings] has brought us a long way as well," said Burrows.

"Judge Langton's ruling will be of enormous benefit to the citizens of Ravalli County," said Victoria Howell, co-publisher of the Bitterroot Star. "The County has taken the position in the past that it need only provide a minimum notice of proposed decisions, regardless of the significance of the action. The judge makes it clear that the law sets no minimum. The law requires them to provide 'reasonable opportunity' for the public to participate and they failed miserably in this regard. Hopefully, the Commissioners will respond to the ruling by changing the notice policy so that people can have sufficiently advanced notice to attend and participate in decisions of significant public interest."

"I'm also pleased about the awarding of attorney fees," said Howell, "and the judge's recognition that the Star was acting on behalf of the public."

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