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IN THE ELEVENTH JUDICIAL DISTRICT
FLATHEAD COUNTY, MONTANA

LYLE PHILLIPS, ANNE DEE RENO,)
TURNER ASKEW, and BEN WHITTEN,)
Plaintiffs,)

Cause No. DV-11-1535D

v.)

CITY OF WHITEFISH,)
Defendant/Third-Party Plaintiff,)

v.)

THE BOARD OF COMMISSIONERS OF)
FLATHEAD COUNTY,)
Third-Party Defendant,)

ORDER ON MOTION TO INTERVENE
and APPLICATION FOR
PRELIMINARY INJUNCTION

and)

DAN WEINBERG and ED McGREW,)
individually and on behalf of LET)
WHITEFISH VOTE, a ballot committee)
lawfully organized under the laws of)
Montana; MARY PERSON and MARILYN)
R. NELSON,)
Intervenors.)

This matter came before the Court on February 6, 2012 for a hearing on the application of the City of Whitefish (the City) for a Preliminary Injunction and on the Motion of the Intervenors for leave to intervene. The parties were represented by legal counsel whose appearance was noted on the record. Prior to the hearing the City and the Board of Commissioners of Flathead County (the County) entered into a Stipulation in which they agreed to entry of a preliminary injunction ostensibly eliminating the need for a hearing.

1 Plaintiffs were not a party to the stipulation and filed their written objection to entry of a
2 stipulated preliminary injunction.

3 Prior to considering the preliminary injunction the Court elicited from the parties their
4 respective position with regard to the motion to intervene. While none of the parties opposed
5 the motion, the City candidly acknowledged that the decisions of its council do not always
6 reflect the will of some of the city residents. Noting that the interests of the intervenors was not
7 entirely the same as that of the City the Court ruled that the motion to intervene would be
8 granted and that counsel for the intervenors would be allowed to participate in consideration of
9 the application for a preliminary injunction. The Court then heard testimony and received
10 documentary evidence from Plaintiffs in opposition to issuance of an injunction. After hearing
11 the argument of counsel the matter was taken under advisement.

12 Having heard the testimony and having considered all of the filings along with the motions, the
13 stipulation, the legal memoranda, and the argument of counsel the Court enters the following
14 findings and order:

15 **Findings**

16
17 1. The City and County have been parties to a Cooperative Interlocal Agreement (2005 IA)
18 which governs zoning within a two mile “doughnut” or extra territorial area (ETA) adjacent to
19 the Whitefish City limits since 2005. Differences between the City and the County resulted in
20 litigation over efforts to terminate the agreement.¹

21
22 2. In 2010 the City and County entered into negotiations which resulted in the execution of
23 a restated Interlocal Agreement (2010 IA), the mutual dismissal of the related lawsuit, and
24 continued City zoning authority within the ETA.² Pursuant to the agreements the City
25 expended significant amounts of money, time, and tangible resources implementing and
26 administering zoning regulations within the ETA. During the same period the County deferred

27 ¹ Since the Court and the party litigants are well versed in the contentious background of this dispute, facts and
28 legal positions will be referred to only when necessary. It is unnecessary at this point to set out the entire
background of this and related litigation in Cause No. DV-2008-367(A).

² The Court makes no findings or determination with regard to the issue of whether the 2005 IA was replaced by or
integrated into the 2010 IA.

1 zoning responsibility to the City and therefore was not required to expend its resources or
2 develop and implement its own regulations for the same affected property.

3 3. Real property owners who are not residents of the City of Whitefish but whose property
4 is situated within the ETA have been required to comply with those zoning regulations
5 applicable to the ETA. Those property owners have been required to take affirmative action to
6 ensure compliance and have likewise been prohibited from making certain improvements. There
7 are differences in the County's zoning regulations which apply to real property immediately
8 adjacent to the ETA.

9
10 4. After announcing its intent to terminate the 2010 IA effective June, 2012, the County
11 undertook the process of developing zoning regulations which would govern the ETA upon
12 termination of the IA.

13 5. In the fall of 2011 the voters of the City of Whitefish passed a referendum which had the
14 effect of overriding the decision of the Whitefish City Council to settle its lawsuit with the
15 County and enter into the 2010 IA. A dispute now exists regarding whether the legal
16 relationship between the City and County is governed by either the 2010 IA or 2005 IA.³
17

18 6. The residents of both the City and the County, and in particular the residents of the ETA,
19 are now subject to substantial uncertainty regarding the zoning of the effected property.
20 Similarly, the County and City are unable to proceed with any degree of certainty as to the
21 future of zoning within the ETA.

22 7. Because of uncertainty surrounding the legal efficacy of the referendum, and the effect it
23 may have on the enforceability of both the 2005 and 2010 IAs, the City and County, and their
24 respective residents, stand to suffer irreparable harm as a result of the waste of financial
25 resources, the expenditure of human resources in the preparation of new zoning regulations, and
26

27
28 ³ The Court makes no finding as the legal effect of the referendum as that issue must be determined on its merits during the course of this lawsuit.

1 the risk of inconsistent or nonconforming zoning practices under the 2005 and 2010 IAs and
2 any new regulations adopted by the County.

3 8. Implementation of new zoning regulations by the County under its statutory authority
4 during the pendency of this action, if later determined to be in violation of the City's rights,
5 would render a judgment in favor of the City ineffectual.

6 **Order**

7
8 1. **The Motion to Intervene is GRANTED.** Intervenors' Answer and Application for
9 Writ of Mandate, Writ of Review and for Declaratory Relief is deemed filed February 6, 2012.
10 Absent further order of the Court, the caption of the case will be as set forth above. The parties
11 shall respond accordingly to the relief requested according to the Rules of Civil Procedure.

12 2. **The Application for a Preliminary Injunction is GRANTED,** and the terms thereof
13 are as follows:

14 A. The Board of County Commissioners is enjoined from taking any
15 further action pursuant to County Resolution No. 2297 to adopt amendments to
16 the County Growth Policy, County Zoning Regulations or County Subdivision
17 Regulations for the extraterritorial area identified in the 2005 and 2010 Interlocal
18 Agreements between the parties pending further order of the Court.

19 B. Pending further order of the court, resolution of this matter on the
20 merits, or other final disposition, the City of Whitefish shall retain jurisdiction
21 with the extraterritorial jurisdictional area consistent with the authority granted
22 by the parties' previous agreements and Montana Code Annotated §§ 76-2-310,
23 76-2-311, and 75-7-214.

24 C. Each of the parties retains their respective right to argue the
25 merits of the pending claims. The stipulation to entry of a preliminary injunction
26 by the City and County shall not give rise to any claims for mootness, estoppel or
27 other legal theory that a party has failed to preserve its right to seek such relief.
28

1 D. This preliminary injunction shall be binding upon the
2 parties, their officers, agents, employees, attorneys, and any other person
3 or entity in active concert or participation with them. The parties shall
4 take all steps necessary to ensure notice is given to those whose conduct
5 may be subject to this order.

6 Rationale

7 Intervention

8
9 Intervenors represent that they were instrumental in drafting and carrying a petition to the City
10 of Whitefish ballot a referendum to repeal City Resolution No. 10-46, which approved the
11 settlement of the existing lawsuit and adopted the 2010 IA. The referendum passed by a
12 majority of the City of Whitefish registered voters. Because the referendum only appeared on
13 the City ballot, the residents of the ETA had no vote. Plaintiffs and the County first contend
14 that the referendum is invalid, and in the alternative, if determined to be a valid citizen
15 initiative, the relationship between the City and the County regarding zoning and land use
16 decisions within the ETA is governed by the 2010 IA, not the 2005 IA. The City and the
17 Intervenors contend that the referendum, which had as its goal, to void or rescind the City's
18 agreement to the 2010 IA, also breathed life back into the 2005 IA. That the intervenors'
19 interests may not be adequately represented by an existing party and or that their interest may be
20 impaired upon the issue being determined on its merits is readily apparent.

21 Intervenors rely on Rule 24(a), M.R.Civ.P., and *Sportsmen for I-143 v. Montana 15th Judicial*
22 *District Court*, 2002 MT 18, 308 Mont. 189, 40 P.3d 400, for their argument that as the drafters
23 of the referendum which recanted the City's settlement of the dispute between the City and the
24 County over zoning and land use authority in the ETA, they are entitled as a matter of right to
25 intervene. Without discussing at length the statutory requirements for intervention, as well as
26 the criteria set forth in *Sportsmen, supra*, the Court finds that the specific and unique interests of
27 the Intervenors are not adequately represented by the City or any other party. Protection of
28 those interests may be impaired by disposition of the action without participation by the
intervenors. Finally, the motion to intervene was filed in a timely manner.

1 **Preliminary Injunction**

2 The purpose of preliminary injunctive relief is to maintain the status quo between the affected
3 parties during the pendency of the litigation. In this regard, the trial court has a duty to
4 minimize injury and continuing damage to all of the parties to the action. *Cole v. St. James*
5 *Healthcare*, 2008 MT 453, 348 Mont. 68, 19 P.3d 810, citing, *Benefis Healthcare v. Great Falls*
6 *Clinic, LLP*, 2006 MT 254, 334 Mont. 86, 146 P.3d 714. In deciding whether to issue a
7 preliminary injunction the court is not to decide or make a final determination of the various
8 issues which may arise at trial or make a final determination of the parties' respective rights. In
9 applying the subsections of § 27-19-201, MCA, the court must simply determine whether, based
10 upon the circumstances before the court, the status quo ought to be maintained for any one or
11 more of the reasons set forth in the statute. *Sweet Grass Farms v. Board of County*
12 *Commissioners*, 2000 MT 147, 300 Mont. 66, 2 P.3d 825, *Benefis, supra*, *Pinnacle Gas*
13 *Resources, Inc. v. Diamond Cross properties, LLC*, 2009 MT 12, 349 Mont. 17, 201 P.3d 160.

14 The City and the County disagree whether the referendum which purported to withdraw the
15 City's consent to the 2010 IA is valid and, if the referendum is valid, whether the 2005 or 2010
16 Agreements are extant. Notwithstanding, both the City and the County have agreed that during
17 the pendency of the matter, the County will not proceed with growth plans, zoning regulations
18 or public hearings to impose County zoning regulations within the ETA. In acknowledgement
19 of the existing uncertainty, and a mutual desire to reach the merits of this matter in the most
20 efficient and economical way, the City and the County have agreed to maintain the status quo
21 which they interpret according to the 2010 IA. Plaintiffs, on the other hand, argue that the
22 status quo is represented by the 2005 IA because of the successful referendum. Plaintiffs also
23 object to the terms of the stipulation crafted by the City and the County because they do not
24 believe that the City will suffer irreparable harm if the injunction is denied.

25 As set forth by the City in its brief in support of its application for an injunction, regardless of
26 the ultimate determination of the merits of the case, and regardless of which interlocal
27 agreement is enforced, irreparable harm would result if the County proceeds with its stated
28 intent to establish new zoning regulations for the ETA, and then implement those regulations in

1 June of 2012. The chaos and potential for harm which would follow cannot reasonably be
2 denied.

3 The City relies on §27-19-201, MCA, as well as arguing *res judicata*, collateral estoppel and the
4 law of the case, the latter theories arising from the settlement which the City and the County
5 entered to resolve *City of Whitefish v. Board of County Commissioners of Flathead County*,
6 2008 MT 436, 347 Mont. 490, 199 P.3d 201.⁴

7
8 The subsections of §27-19-201, MCA, are disjunctive and an applicant need satisfy only one of
9 the provisions in order to obtain an injunction. Here, the City relies on subsection (2), that it
10 would suffer great or irreparable harm if the County were not enjoined from proceeding with
11 zoning the extraterritorial properties. The Court finds that subsection (2) is also applicable. As
12 argued by the City, if the County proceeds with establishing a Growth Policy and implements
13 zoning for the ETA, and if it is later determined that the City prevails in the instant litigation
14 over the 2010 IA, then the potential conflict between the zoning and regulatory provisions of the
15 City and the County would bring irreparable injury to the landowners with no meaningful way
16 to lessen that harm. Clearly, the City and the landowners in the ETA would suffer irreparable
17 harm if County planning and zoning is implemented and later the City prevails in its position.
18 While the City argues that it has expended funds to create a planning and zoning office and staff
19 based on the expectation that it will have continuing jurisdiction over the ETA, the Court is
20 more inclined to focus on the impact conflicting planning and zoning will have upon the
21 affected landowners-both inside the ETA and immediately adjacent to it.

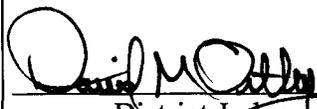
22 The City argues that upon entry of this injunction the 2005 IA governs the relationship between
23 it and the County and zoning in the ETA. The County, on the other hand, contends that the 'last
24 peaceable, non-contested' relationship between the parties was the 2010 IA, which had been
25 executed as a settlement between the parties to resolve *City of Whitefish v. Board of County
26 Commissioners of Flathead County, supra*. Any determination of which interlocal agreement is

27 ⁴ The Court is not persuaded that an injunction based solely on *City of Whitefish, supra*, is proper. A ruling based
28 on that case, as interpreted by the City, would open the door to premature determination of the merits of this
litigation. The stipulation obviates the need to determine that issue.

1 in place pending trial would be a determination of the merits of the dispute. It should be
2 remembered that under either agreement, the City had planning and zoning jurisdiction over the
3 extraterritorial area, pending further action by either governmental entity.

4 In the final analysis, it is patently obvious that the stakes are high and that the City and County,
5 along with those property owners within the ETA who may be subject to conflicting
6 regulations, have much to gain, and lose, in the resolution of this matter. As obvious, but
7 perhaps lost or forgotten in the legal wrangling, are the rest of the citizens of Flathead County
8 who, while not directly affected by zoning within the ETA, nonetheless have an interest in
9 seeing this matter resolved on its merits and without unnecessary uncertainty and the expense of
10 protracted litigation.

11 February 10, 2012.

12
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14 _____
15 District Judge

16 pc: Duncan Scott, Attorney at Law
17 Mary VanBuskirk, Attorney at Law/ Terry Trieweiler, Attorney at Law
18 Alan McCormick, Attorney at Law/ Peter Steele, Attorney at Law
19 John Lacey, Attorney at Law