
MONDAY, FEBRUARY 12, 2007

The Board of County Commissioners met in continued session at 8:00 o'clock A.M. Chairman Brenneman, Commissioners Hall and Lauman, and Clerk Robinson were present.

Commissioner Brenneman & Hall to MACo Midwinter Conference in Helena

At 5:00 o'clock P.M., the Board continued the session until 8:00 o'clock February 13, 2007

TUESDAY, FEBRUARY 13, 2007

The Board of County Commissioners met in continued session at 8:00 o'clock A.M. Chairman Brenneman, Commissioners Hall and Lauman, and Clerk Robinson were present.

**9:30 a.m. Commissioner Brenneman and Hall to MACo Midwinter Conference in Helena
Commissioner Lauman to North Fork Interlocal Agreement meeting @ Fish, Wildlife & Parks**

At 5:00 o'clock P.M., the Board continued the session until 8:00 o'clock February 14, 2007.

WEDNESDAY, FEBRUARY 14, 2007

The Board of County Commissioners met in continued session at 8:00 o'clock A.M. Chairman Brenneman, Commissioners Hall and Lauman, and Clerk Robinson were present.

**3:30 p.m. Commissioner Brenneman and Hall to MACo Midwinter Conference in Helena
FCCHD/ EMS Committee meeting @ Earl Bennett Bldg**

At 5:00 o'clock P.M., the Board continued the session until 8:00 o'clock February 15, 2007.

THURSDAY, FEBRUARY 15, 2007

The Board of County Commissioners met in continued session at 8:00 o'clock A.M. Chairman Brenneman, Commissioners Hall and Lauman, and Clerk Robinson were present.

**2:00 p.m. Commissioner Hall to MACo Midwinter Conference in Helena
Commissioner Brenneman to Health Board meeting @ Earl Bennett Bldg**

At 5:00 o'clock P.M., the Board continued the session until 8:00 o'clock February 16, 2007.

FRIDAY, FEBRUARY 16, 2007

The Board of County Commissioners met in continued session at 8:00 o'clock A.M. Chairman Brenneman, Commissioners Hall and Lauman, and Clerk Robinson were present.

Chairman Brenneman opened the public comment on matters within the Commissions' Jurisdiction.

9:19:41 AM

Members present:

Chairman Joseph D. Brenneman
Commissioner Gary D. Hall

Commissioner Dale W. Lauman

Others present:

Assistant Michael Pence, Planner Kirsten Holland, Weed & Parks Director Jed Fisher, County Attorney Jonathan Smith, Jerry Nix, Richard Kuhl, Bob Fraser, Diane Conradi, Warren Eli, Bob Cole, Chuck Snyder, Jon Bailey, Dennis Carver, Tom Sands, Chuck Hunt, Clerk Ashley Bradford

Jerry Nix spoke in regards to the proposed changes in the legislative session regarding gravel pit extraction regulations. He stated that the main change is giving counties jurisdiction over zoning for residential purposes for gravel pit legislation. One of the items being proposed is to change local jurisdiction back to state jurisdiction and his hope is that local zoning would continue to be supported for all purposes including gravel pit legislation. Another piece of the legislation is requiring that the county do an extensive study of gravel resources, which could cost over \$100,000 and then would basically not allow you to prohibit extraction of resources where ever they are found. From the Long Range Planning Task Force discussions the only way the resources can be found is to take well logs through out the county and map them into a 3-D cross section, which is very expensive and would be a huge burden on the county. He is asking for support of denial and to join with MACo in opposing the legislation.

Richard Kuhl spoke in regards to the procedure that was followed in abandoning the present right of way on Wagner Lane. It was stated that during the planning process for the Growth Policy the one item that sticks out is that it seems to him that people want to maintain public access to public lands. He then quoted several parts of the new Growth Policy that state that Flathead County should preserve recreational access to public lands, waterways and scenic resources. Given all that he fails to understand why the road on Wagner Lane is being de-commissioned and moved further away from the slough bank that is highly valued for both recreation and viewpoint from the road. He stated that it seems to him that the Commissioners are elected to represent the public interest and he feels they have failed to do so. He then stated that he feels they have to re-consider the whole process when a right of way is being abandoned that is next to a waterway and is asking that the road abandonment be reconsidered.

Diane Conradi an attorney spoke on behalf of Flathead Wildlife Inc. regarding the abandonment of Wagner Lane. She spoke of the legal obligation under Montana statues regarding abandonment of road ways that provide access to public lands and waters. Conradi stated in 1999 and 2005 the legislature adopted a statue precisely to protect a property right; that being the public's right to access Montana's lands and waters. The risk then as it is now is that people get locked out when ordinary Montanans can not afford to buy their own piece of private paradise. Statue 7-14-2615 provides that the county may not abandon a right of way that provides existing legal access to public lands and waters, including stream access, unless another right of way provides substantially the same access. Conradi then stated that if the road is abandoned you don't have any access; you have a promise and a proposal but nothing else. The statue says provide; it doesn't say promise to provide, will provide, might provide, it says provide and you don't have anything in hand for that. Also in terms of providing substantially the same access you don't really know what you have on the ground right now; that the public does have an existing legal right of access, but the extent of the access is unknown. The high water mark was discussed and it was stated that the state defines an ordinary high water mark as the stage regularly reached by a body of water at the peak of fluctuation in its water level. The ordinary high water mark is generally observable, but may also be indicated by characteristics such as terracing, changes of soil character, destruction of vegetation and presence and absence of litter or debris or other similar characteristics. It was then stated that until you actually know where the public right of access is, it is going to be difficult, if not impossible for you to determine whether what you are getting is substantially the same.

Warren Elli spoke in regards to the River Vista Subdivision that the developer has proposed and stated that the new Wagner Lane Road services the back lots to the proposed subdivision, so this road that is replacing Wagner Lane would have had to be built to service the lots for the subdivision. The existing Wagner Lane that is to be abandoned is about 3,400 feet long and his proposal to give the public the same access is to give 100 feet of frontage, which some dispute, as to where the high water mark is and whether you can go from the county road to the high water mark and have legal access to the water. He then spoke about the existing 30 foot county right of way and stated that every spring for the last 20 years Flathead Audubon goes on a bird tour and park along Wagner Lane and look out at the duck, geese and swan. Under the abandonment proposal the public would have to give up 97 percent of the frontage. The developer would get 3,300 feet and the public would have 100 feet. In terms of acreage if all 3,400 feet is given up at 30 feet wide the developer will receive high value water front property of 2.34 acres in which he is proposing the public access be 100 feet by 125 feet, which is less than three tenths of an acre. The developer would end up with 85 percent of the acreage and the public ends up with 12 percent of the acreage. He then questioned how 3 percent of the frontage and 12 percent of the acreage could be substantially the same. In addition the developer promises to build a new dirt road from the new Wagner Lane down to the slough frontage, which will be made a gravel road if the county provides the gravel. The existing access is now on a paved road so the public will go from a paved road to a gravel road if the county provides the gravel. He then also questioned how that is substantially the same. He spoke about a walk way in Missoula where a bond issue was passed to preserve public access and open space and in Flathead County we are contemplating giving away 3,400 feet of access to Church Slough and stated that he feels that is not in the public's interest. He then spoke about a letter they received from Diane Conradi that indicates they would be willing to compromise in saying that we can accept giving up Wagner Lane if part of it is reserved for public access along Church Slough, which would enhance the developers property with it being better to have a trail in front of your house instead of a county road.

Bob Cole stated that he has been using the road along Church Slough 8-10 times per year in the spring and fall and knows several guys that do the same, just to watch birds. He spoke about not being able to see from the new road and feels that it is a valuable asset to be able to park along the road and watch birds. He also spoke about putting his boat in for fishing and questioned the proposed access in regards to it being small for turning a pick-up and trailer around in.

Chuck Hunt spoke of his concerns with the abandonment of Wagner Lane and stated that people have been using the road for years to access the slough. With the abandonment of the road he does not feel it is actually giving the general public the ability to have substantially the same amount of space to get to the slough and that is his biggest concern. With the abandonment of the road proposed by the developer is another 22 foot right of way as well, and with that being abandoned as part of the developers agreement to put in a boat launch, he feels that is not enough based on what was originally there. He then stated that all they are asking for is 150 feet by 300 feet to provide a boat launch for access to the slough and if something is not done now then people will loose more and more ability to access water and lands. It was then stated that he would like to see that the road not be abandoned or to increase the amount of space.

Bob Fraser spoke about fishing and hunting Wagner Lane property 50 to 60 years ago, and stated that in his generation when he wanted to cross private property he would go up and knock on the land owner's door and ask for permission. After speaking with the landowner he would determine whether he would let them cross his property to hunt and fish, and whether it was a yes or no they always abided by his decision. He then stated that now it appears that people seem to think that private property belongs to the masses, not to the owner or the tax payer. The road has been there for years, but it is private property between

the road and the slough and that is why he always asked permission to hunt and fish. He feels like the opposition is off base and if they were just to go ask the owner who ever he is if they can watch duck, geese or swan and cross the private property to the slough, then that is the way it should be done.

Allen McCormick representing Dennis Carver spoke about the commission already making a determination to abandon Wagner Lane, subject to Mr. Carver demonstrating that it is substantially the same access. With the statute that states that you can not abandon the road, unless a substantially same access is provided. He then questioned what was the public access to begin with, and in this case the evidence is a survey that Mr. Carver had done by Sands Surveying that shows there is a gap for the most part between the right of way and Church Slough. He then spoke about discussion that was heard earlier about protecting property rights and the property right here is the public's right to access. He then read a statute that pertains to property rights that state; we are not going to allow the public to acquire a prescriptive easement right by crossing private land to get to public waters. The location of the historic access has crossed private land and the only place with arguable dispute is at the northern end of the property, and you can tell from where the stakes are that is not where the public has ever accessed Church Slough. It was then stated that what that demonstrates is that there has never been public legal access to Church Slough, so the obligation to provide substantially the same access is an obligation to provide no access at all. Mr. Carver wanted to provide public access that doesn't exist there now and that is the proposal to provide the turn around area and access to Church Slough, as well as some parking spaces in which, he feels that is more than enough compromise when there is actually no obligation to provide any access at all.

No one else rising to speak, Chairman Brenneman closed the public comment period.

CONTINUATION OF ROAD ABANDONMENT #455 (WAGNER LANE)

[9:42:41 AM](#)

Members present:

Chairman Joseph D. Brenneman
Commissioner Gary D. Hall
Commissioner Dale W. Lauman

Others present:

Assistant Michael Pence, Planner Holland, Planner Sears-Tull, Weed & Parks Director Jed Fisher, County Attorney Jonathan Smith, Jerry Nix, Richard Kuhl, Bob Fraser, Diane Conradi, Warren Eli, Bob Cole, Chuck Snyder, Jon Bailey, Dennis Carver, Tom Sands, Chuck Hunt, Clerk Ashley Bradford

Sears-Tull pointed out to the commission that the new road that is proposed for Dennis Carvers subdivision breaches the flood plain in 4 areas. It was stated that Mr. Carver is aware of this and it would be addressed in the Preliminary Plat as a condition; the problem being the road abandonment might be premature in light of the fact that they do have a flood plain issue that has not been resolved at this time. A flood plain permit will have to be obtained in order to cross the flood plain and Mr. Carver has indicated that he is willing to work at putting culverts in to mitigate the flood plain concern.

Jonathan Smith spoke about obtaining a deed to the property on the survey that goes down from the new road to the slough that would be substantially the same access. He then spoke in regards to the right of public access and feels that there probably was a prescriptive right developed before the law was passed, saying that you can't develop a prescriptive easement for recreational use. As it is understood the easement has been used by the public for years, so the easement existed before the law.

Commissioner Brenneman stated that it was his understanding that prescriptive rights can go back as far as forever.

Jonathan Smith then spoke in regards to however it is used or developed is what is the continued prescriptive right and if they had a deed they would be satisfied.

Jed Fisher then stated that his board has reviewed the access and the board believes that this is substantially the same and is an improvement over what they had before. He then stated that he certainly understands Flathead Wildlife's concern, but that they can access the slough by a raft or canoe and can still have the same viewing opportunities. It was stated that maybe they could work with the developer in getting an observation platform to have a better view of the slough. Fisher then spoke about his board's main mission being water access and that it was weighed out and they completely believe this is a safer and better access for the public.

Commissioner Hall then spoke about the current road being un-safe with the situation not being attended to for years; with the county now having an opportunity to have a better access and ability to enjoy the area. He then questioned if the letter that was received from Mr. Carver that offers to deed the property to the Flathead County Weed & Parks Board would be sufficient to approve the abandonment today.

Commissioner Brenneman then read a letter from Mr. Carver that states I have offered to dedicate an unquestionable 100 foot of frontage to Flathead County which is far beyond any possibility of public access. Today we offer answers to complaints brought to you about handicapped access and access for boats is as follows: 100 foot of frontage on Church Slough, 125 feet deep from ordinary high water, 40 foot access right of way from the newly constructed Wagner Lane, which is to be used for loading and unloading only, unless it is a valid handicap marked vehicle. My purpose is to render historical use of the access and not to prevent meaningful access. The 12 foot wide by 8 inch deep gravel access road in place of the existing grade is level with the existing ground with gravel furnished by the county. A parking area adjacent to the new Wagner Lane adequate for 5 vehicles and trailers, 3 handicapped parking spaces as close to Church Slough as possible.

Commissioner Hall then stated that it is his understanding that Mr. Carver is not interested in conditioning the access, but to deeding it to the county to let them work with Flathead County Weed & Parks Board to develop the site the way they would see fit in cooperation with interested parties with no conditions.

Commissioner Brenneman then stated that they can only consider what is before them with the letter he is reading being the latest offer, dated 1-26-2007. He then said the last thing in the letter is no ramp shall be built as this intrusion would be unfair to all the neighbors. In return he asks that the northerly legal access road be abandoned as well as part of Wagner Lane.

Brenneman then stated that obviously we can't consider a further abandonment today that has not gone through the procedure of road abandonment.

Jed Fisher then pointed out that 2 of his board members live in Lower Valley and use the site. He then spoke about the parking issue and stated that when people park along the road right of way they can be ticketed for parking along the county road side.

Commissioner Brenneman stated that an offer gives them nothing except an offer and we now have a clear precedence for public access to the water from historic use of the area.

Commissioner Hall then stated that he feels this can be dealt with at Preliminary Plat.

Commissioner Brenneman then stated that until we have a Preliminary Plat and a deeded piece of property and the county has legal access he feels we have a promise. As long as Mr. Carver owns the property that might be okay, but until we have the legal access then we could have a legal challenge on our hands that we could not defend.

Commissioner Lauman stated that he has known this area all of his life and fished it as a child and in more recent years the properties to the south were posted as private property. He then spoke about the road way dipping to an access point between lots 5 and 6 and stated otherwise it is on private property; the muddy access that you go down is actually on private property. He then spoke about liability issues and questioned who would be liable if someone was to get hurt.

Commissioner Hall then stated that it is not a maintained access and that Mr. Carver has stepped up to the plate and offered to enhance the road and donate it to the Weed & Parks Board the way they deemed fit. He then spoke about a conference call between Fish Wildlife & Parks, Jed Fisher and the attorney and at that time FWP was very interested in partnering with the county in developing a quality and safe site for citizens. Hall then stated that he feels we have the right to abandon the road at this time with the developer still going through Preliminary Plat where it can be conditioned at that time.

Tom Sands the surveyor for Dennis Carver stated that the survey was prepared and given to the county attorney for the access that Mr. Carver is prepared to donate to the county.

Commissioner Brenneman stated that we have 3 options before us; to deny, to approve or to continue. Staff has advised the commission that this abandonment may be premature possibly because of the concern with the road that has been installed and also that we don't have an actual deed to any property in replacement for what is being abandoned.

Commissioner Hall then questioned if the road could be abandoned today with the letter offering the deed for the property.

Jonathan then stated that they would like the deed first; with conditional abandonment being risky.

Commissioner Hall made a **motion** to abandon Wagner Lane contingent on the county receiving the deed to the access.

Commissioner Brenneman stated that he is strenuously opposed to this and feels it is a huge mistake and thinks we are abandoning our public responsibility and then advised the developer to seriously consider if this is the direction in which he wants to go, because the potential for litigation is in the high percentile of potentially holding up his development. It was then stated that this has the potential of being the kind of case that people refer to as the example of how developers step in and take things away from the public and the perception of that is monumental. He then strongly urged Hall and Lauman to not vote in support of the motion and then asked the developer to consider if this is the direction in which he wishes to go.

Commissioner Hall then disagreed with the concept that this would be litigateable in the fact that this is a Weed & Parks Board acceptance of a letter of deed to the property and stated that he would not have made the motion if he felt it was not in the best interest in the health, safety and welfare of the people that use the area.

Commissioner Brenneman stated that the motion was granted upon the contingency that the substantially same access was provided, and then said we don't have any access right now. He then said the whole thing could go through Preliminary Plat and be conditioned there with the possibility still existing to put a walk way in.

Commissioner Lauman then questioned, if you had a lot there would you want a walk way in front of your home. He then stated that if they are providing an access to the water that will be maintained with the county that is a great movement.

Commissioner Brenneman then stated that the developer bought the land knowing that a county right of way existed when the property was purchased.

Commissioner Hall then spoke about the new road that has been built being safer and questioned how they could not be in favor of the improvement.

Commissioner Brenneman stated that his concern lies with the abandonment of the prescriptive use of the county road and the public's rights.

Tom Sands then questioned if the 22 foot right of way would be abandoned also.

Commissioner Brenneman stated that it would require a separate public notice and hearing than what is being considered today.

Warren Elli then spoke about the legal notice in the paper including the 22 feet.

Commissioner Brenneman stated that what they are considering today is the notice before him with the map.

Tom Sands then discussed the Certificate of Survey that was prepared to dedicate the new road to the county included the dedication of the 22 feet.

Commissioner Lauman **seconded** the motion. **Aye** - Hall and Lauman **Opposed** -Brenneman. Motion carried by quorum.

PERSONNEL MATTER

[10:14:00 AM](#)

Members present:

Chairman Joseph D. Brenneman
Commissioner Gary D. Hall
Commissioner Dale W. Lauman

Others present:

Assistant Michael Pence, Weed & Parks Director Jed Fisher, Solid Waste Director Dave Prunty, Fairgrounds Director Jay Scott, Clerk Ashley Bradford

Discussion was held relative to Jed Fisher, Jay Scott and Dave Prunty's contract.

LEGISLATIVE SESSION

[11:08:04 AM](#)

Members present:

Chairman Joseph D. Brenneman
Commissioner Gary D. Hall
Commissioner Dale W. Lauman

Others present:

Assistant Michael Pence, OES Director Mark Peck, Animal Control Director Richard Stockdale, Health Department Joe Russell, Planner Kirsten Holland, Clerk Ashley Bradford

- Joe Russell spoke about SB 142 in regards to a combined effort between DES & DPHHS that was passed out of senate with amendments and is looking good now.
- Joe Russell spoke on HB 92 which is a public health bill that needs to be modernized.
- Joe Russell spoke on HB 590.
- Richard Stockdale spoke on HB 503.
- Kirsten Holland spoke on HB 557 and SB 398 in regards to gravel issues.

1:00 p.m. Commissioner Lauman to CDC meeting @ CDC Office, Kalispell

At 5:00 o'clock P.M., the Board continued the session until 8:00 o'clock February 19, 2007.
