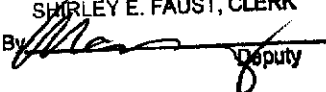


1 Robert L. Deschamps, III  
2 Department No. 2  
3 Missoula County Courthouse  
4 Missoula, Montana 59802  
5 (406) 258-4772

FILED FEB 24 2010

SHIRLEY E. FAUST, CLERK  
By  Deputy

6 <MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY>

7 KATHY HEFFERNAN, ROBIN  
8 CAREY, DAVID HARMON and  
9 NORTH DUNCAN ASSOCIATION,  
10 INC.,

11 Plaintiffs,

12 -vs-

13 THE MISSOULA CITY COUNCIL,  
14 CITY OF MISSOULA and JOHN  
15 ENGEN, MAYOR,

16 Defendants,

17 MUTH-HILLBERRY, LLC,

18 Intervenor-Defendant.

DEPT NO. 2

CAUSE NO. DV-08-84

OPINION AND ORDER

19 Before the Court are the parties' Cross-Motions for Summary  
20 Judgment.

21 ORDER

22 The Plaintiffs' Motion for Summary Judgment is **GRANTED**. The  
23 Defendants' and Intervenor's Cross-Motions for Summary Judgment are  
24 **DENIED**.

25 //



1 **BACKGROUND**

2 In 2006, developer Muth-Hillberry, LLC (hereinafter "M-H") proposed the  
3 Sonata Park subdivision in the west Rattlesnake neighborhood of Missoula.  
4 M-H proposed to subdivide 34 acres into 38 lots in an area that is currently  
5 open hillside with widely-dispersed houses. The adjacent property  
6 immediately to the north is also proposed for development and beyond that  
7 lies the southern boundary of the Rattlesnake National Recreation Area. The  
8 western portion of the proposed subdivision borders a large public open  
9 space area called "Waterworks Hill."  
10  
11  
12

13 On December 4, 2007, the Planning Board met to discuss the proposed  
14 development and heard testimony from members of the public, including  
15 Plaintiffs, who opposed the project. Their objections included, in part,  
16 Defendants' alleged failure to comply with the Rattlesnake Plan,<sup>1</sup> the  
17 landslide potential given the alleged instability of the land and soils, and the  
18 high density of the development relative to the neighboring developments.  
19  
20  
21

22  
23 

---

<sup>1</sup> In 1975, Missoula City and County first adopted two components of a comprehensive plan, the Missoula  
24 County Comprehensive Plan for rural areas and "Missoula – A Policy Guide for Urban Growth" for urban  
25 areas. Both have been updated through the years and, in 2006, the City and the County adopted the  
26 "Missoula County Growth Policy 2005 Update." The 2005 Update incorporated several existing  
27 neighborhood plans, including the 1995 Rattlesnake Valley Comprehensive Plan. The Resolution to adopt  
the 1995 Rattlesnake Plan states the Plan is a "policy document intended to provide the City and other  
agencies and districts with a coordinated guide for change over a long period of time." It also states, "All  
subdivision, zoning and rezoning requests should substantially comply with the land use recommendations of  
this Plan."



1 The Planning Board, however, recommended approval of the subdivision and  
2 related rezoning and Planned Unit Development (hereinafter "PUD").

3  
4 The City of Missoula adopted the Missoula County Growth Policy 2005  
5 Update on December 4, 2006. The 2005 Update incorporated, without  
6 amendment, the 1995 Rattlesnake Plan. In addition to the mandates of Little v.  
7 Board of County Comm'rs (1981), 193 Mont. 334, 631 P.2d 1282 and other  
8 case law, the Rattlesnake Plan *itself* requires that "all subdivision, zoning and  
9 rezoning requests should substantially comply with the land use  
10 recommendations of this Plan." Plan, p. 25.

11  
12  
13 The 1995 Rattlesnake Plan addressed a number of questions, including  
14 "which areas are best suited for future development", "which areas are best  
15 suited to remain relatively unchanged", and "as the Missoula urban area  
16 continues to grow and change, what role and responsibilities does the  
17 Rattlesnake Valley share as a part of this larger community?" Plan, p. 1.

18  
19  
20 The Plan "attempts to reduce the problems associated with unplanned  
21 and uncoordinated growth." Plan, p. 17. As such, it lists several "Goals and  
22 Guiding Principles" that summarize the objectives of the 1988 Comprehensive  
23 Plan Amendment, Missoula community goals as stated in the Missoula Urban  
24 Comprehensive Plan, the 9/9/94 City-County growth management working  
25 document titled *Planning for Growth in Missoula County* and finally some  
26  
27



1 "guiding principles" identified by the citizens of the Rattlesnake.

2 On December 5, 2007, the Plat, Annexation and Zoning Committee  
3 (hereinafter "PAZ") met. Members of the public, including Plaintiffs, attended  
4 and raised their concerns about the subdivision, including bicycle and  
5 pedestrian safety issues, potentially doubling neighborhood size, fire  
6 concerns given the amount of fuels in the surrounding grasslands, soil  
7 stability issues and the potential for faulting in the area. Plaintiffs were  
8 concerned that that the proposed rezoning of the area did not substantially  
9 comply with the Rattlesnake Valley Comprehensive Plan. City Council  
10 Minutes, 12-5-07, page 6.  
11  
12  
13

14 On December 10, 2007, the City Council held a public hearing on the  
15 proposed development. Members of the public, including Plaintiffs, appeared  
16 and testified in opposition to the proposal reiterating, in part, their concerns  
17 regarding Defendants' lack of compliance with the Rattlesnake Plan and  
18 Growth Policy. On December 12, 2007, the PAZ Committee met again and  
19 heard more testimony, including additional public comment concerning the  
20 proposal's alleged non-compliance with the Rattlesnake Plan.  
21  
22  
23

24 On December 17, 2007, the City Council met. Again, members of the  
25 public, including some of the Plaintiffs, commented extensively. However, the  
26 City Council voted 10-2 to grant the rezoning/PUD and to approve the  
27



1 preliminary plat. The following day, the City sent a letter to M-H informing  
2 them that the subdivision had been approved. The letter included a list of  
3 "conditions of subdivision approval" adopted by the Council on December 17,  
4 2007. The City Council did not adopt any separate findings of fact and  
5 conclusions of law as required by § 76-3-608(2), MCA.  
6

7  
8 On January 16, 2008, Plaintiffs filed a Petition for Judicial Review of the  
9 City's decision. By November 2008, all parties had filed motions for summary  
10 judgment based on their various interpretations of the record. All of the  
11 motions were denied in an Order issued January 14, 2009 in which the Court  
12 held,  
13

14 In conclusion, the Court finds there are disputed material factual  
15 issues regarding whether the City was, in the very least, "guided  
16 by" the Growth Plan, much less whether it "substantially complied"  
17 with it when it approved 37 lots for development. Based on the  
18 foregoing, summary judgment is **DENIED** to all parties.

19 The parties then reached an agreement regarding the record and, on  
20 June 11, 2009, Plaintiffs filed a "Stipulation Regarding Administrative Record  
21 and Supplemental Summary Judgment Briefing." On June 19, 2009, the City  
22 filed several affidavits of individuals involved in the subdivision review  
23 process. This was the second time the City had filed supplemental affidavits,  
24 presumably to "clarify" the record in the underlying proceedings. On June 19,  
25  
26  
27



1 2009, Plaintiffs filed a second motion to strike the affidavits, which was  
2 granted. In its July 31, 2009 Order, the Court held, "it shall rely on the  
3 stipulated record directly rather than on Defendants' summaries, particularly  
4 as applied to 'the process' [of subdivision review] that was used."

5  
6 On August 10, 2009, the Court remanded the case to the City Council  
7 for issuance of Findings of Fact and Conclusions of Law as mandated by  
8 § 76-3-608(2), MCA. The Order specified that, "The findings and discussion  
9 weighing the criteria shall include citations to the Stipulated Record submitted  
10 to this Court June 11, 2009." (emphasis included). On October 20, 2009, the  
11 City submitted its Findings of Fact and Conclusions of Law. In spite of the  
12 Court's Order, the City's Findings and Conclusions make minimal references  
13 to the Stipulated Record. Further, there are at least three references in the  
14 Findings and Conclusions to documents not contained in the record. The City  
15 attorney produced these documents to the Court and to Plaintiffs' counsel on  
16 February 2, 2010.<sup>2</sup>

17  
18 The Court's August 10, 2009 Order allowed Plaintiffs to submit a final  
19 response to the City's Findings of Fact and Conclusions of Law, which  
20 Plaintiffs filed on November 16, 2009. The matter is now ready for ruling.

21  
22  
23  
24  
25  
26 <sup>2</sup> The documents, delivered to the Court by Deputy City Attorney Susan Firth, were the City Council Minutes  
27 from 12/3/07, the Parks and Recreation Department agency comment letter referred to in the FOF-COL as  
dated 8/23/07, but actually dated 1/23/07, and Montana Fish, Wildlife and Parks agency comment letter  
dated 1/26/07.





1 208 P.3d 876 (citing Madison River R.V. Ltd. v. Town of Ennis, 2000 MT 15, ¶  
2 30, 298 Mont. 91, 994 P.2d 1098; Kiely Constr., LLC v. City of Red Lodge,  
3 2002 MT 241, ¶ 69, 312 Mont. 52, 57 P.3d 836). The duty of the Court is to  
4 review the entire record to determine whether the Missoula City Council's  
5 decision to approve Sonata Park subdivision "was arbitrary, capricious, or  
6 unlawful." Id. While the standard of review adopted by the Montana Supreme  
7 Court utilizes three terms, "it breaks down into two basic parts." Id. "One part  
8 concerns whether the agency action could be held unlawful, and the other  
9 concerns whether it could be held arbitrary or capricious." Id. (citing North Fork  
10 Preservation Assn. v. Dept. of State Lands (1989), 238 Mont. 451, 459, 778  
11 P.2d 862, 867).

12  
13  
14  
15  
16 Local governments like the Missoula City Council must "substantially  
17 comply" with their growth policy. North 93 Neighbors, Inc. v. Board of County  
18 Commissioners, 2006 MT 132. ¶ 23, 332 Mont. 327, 137 P.3d 557. To require  
19 no compliance "would defeat the whole idea of planning." Little v. Board of  
20 County Comm'rs (1981), 193 Mont. 334, 353, 631 P.2d 1282, 1293. "Why have  
21 a plan if the local governmental units are free to ignore it at any time?" Id.  
22

23  
24 The "substantial compliance" standard is "flexible enough so that the  
25 master plan would not have to be undergoing constant change." Little, 193  
26 Mont. at 353, 631 P.2d at 1293. "Yet, this standard is sufficiently definite so  
27



1 that those charged with adhering to it will know when there is an acceptable  
2 deviation, and when there is an unacceptable deviation from the master plan.”

3  
4 Id.

5 The Court finds the City's approval of the Sonata Park subdivision is a  
6 significant deviation from the Rattlesnake Plan and therefore arbitrary and  
7 capricious. The Court finds the City essentially ignored the central component  
8 of the Rattlesnake Plan, the land use recommendations, when it approved a  
9 subdivision with over four-times the recommended density. The Rattlesnake  
10 Plan dictated certain densities in each section of the Rattlesnake valley and  
11 contains a map delineating desired land uses and densities in the  
12 Rattlesnake area. For the area containing Sonata Park, the map designates  
13 a density of 1 dwelling unit per 5-10 acres in one area, and 1 dwelling unit per  
14 2 acres in the remaining area. These density recommendations would allow  
15 7-8 dwelling units in the proposed area as opposed to the City's approval of  
16 37 dwelling units.

17 The City ignored or failed to substantiate its findings on a number of other  
18 components of the Plan as well. The Goals and Guiding Principles of the  
19 Missoula County Growth Policy 2005 Update, which incorporated the 1995  
20 Rattlesnake Plan, are listed, in part, below. Where a particular goal or principle  
21 is inapplicable to Sonata Park, such as “preserving an open space corridor  
22  
23  
24  
25  
26  
27



1 along Rattlesnake Creek," it is omitted. Also, where the citizens' goals  
2 duplicate the Missoula Urban Comprehensive Plan, etc., the goal is stated just  
3 once.<sup>3</sup>  
4

5 *1. Air and Water Quality*

- 6 a) *Minimize air pollution emissions: by encouraging increased*  
7 *pedestrian, bicycle, and transit use...*  
8

9 The City's October 20, 2009 Findings of Fact and Conclusions of Law  
10 (hereinafter "FOF-COL") state, on page 8, ¶ 45, "The property is located within  
11 the Air Stagnation Zone." This is defined as,  
12

13 "The portion of the valley where air is most likely to stagnate, so air  
14 pollution (dust, smoke, factory and automobile emissions, etc.)  
15 tends to stick around for longer because the air isn't being  
16 mixed/replaced as often. The zone generally corresponds to areas  
17 that experience a lot of inversion. What this means from a  
18 regulatory standpoint is that air quality is more closely regulated in  
19 this area. For example, all roads are required to be paved because  
20 gravel roads kick up more dust. (This is only a distinction in the  
21 County because all roads are required to be paved in the City  
22 anyway.) There are also more restrictions on wood stoves and  
23 other burning in the Air Stagnation Zone."<sup>4</sup>

---

24 <sup>3</sup> The 1995 Rattlesnake Plan lists several Goals and Guiding Principles that summarize the objectives of the  
25 1988 Comprehensive Plan Amendment, Missoula community goals as stated in the Missoula Urban  
26 Comprehensive Plan, the September 9, 1994 City-County growth management working document titled  
27 *Planning for Growth in Missoula County* and finally some "guiding principles" identified by the citizens of the  
Rattlesnake.

<sup>4</sup> Email from Susan Firth, Missoula Deputy City Attorney, January 22, 2010, referencing definition found in  
2000 Missoula City-County Air Pollution Control Program Regulations,  
<http://www.co.missoula.mt.us/airquality/AbouttheAirProgram/regulations.htm>.



1           The FOF-COL address the goal of minimizing air pollution by stating that,  
2 "the Missoula City-County Air Pollution Control Program regulations prohibit  
3 wood-burning stoves and fireplaces in Sonata Park. Pellet stoves that meet  
4 emission requirements or natural gas or propane fireplaces may be installed..."  
5 FOF-COL, p. 33, ¶ 18. More importantly, the FOF-COL contain no provisions  
6 regarding the development of bike paths, public transportation, etc., and,  
7 instead state, on page 7, ¶ 42, "Mountain Line does not have a bus route  
8 serving this portion of the Rattlesnake Valley..." On page 25, ¶ 7, the FOF-  
9 COL provide, with no reference to the record, "This subdivision is not within the  
10 Missoula Urban Transportation district, and Mountain Line recommended that  
11 the subdivider petition this property into the district. City Council required this in  
12 a condition of approval." There is no Finding that the subdivider actually  
13 petitioned Mountain Line and received approval for the property to enter the  
14 Mountain Line service district.

15  
16  
17  
18  
19  
20           There are no Findings or Conclusions regarding the impact on air quality  
21 as it relates to the addition of exhaust emissions generated by 314<sup>5</sup> more trips  
22 to and from town daily within the Air Stagnation Zone.  
23  
24

25  
26  
27  

---

<sup>5</sup> Email from Deputy City Attorney Susan Firth, 2/2/10. "Average Daily Trips (ADT) are generally calculated as 7-10 trips per day per dwelling unit." Ms. Firth states, "As I understand it, this is a pretty common estimate used amongst transportation engineers. This is referenced on page 17 of the Application in the submittal packet (Section 3), and Nick Kaufman (the developer's representative) discusses this formula on pages 33 & 34 of the 12-04-07 Planning Board Minutes. It is also referenced on page 2 of the 12-12-07 PAZ Minutes."



1           Although the Plan's goals include, "Encourage and support new land  
2 development within or immediately adjacent to areas where public services are  
3 currently available both to maximize local government efficiency and to promote  
4 a logical growth pattern," the City erroneously states, on page 17, number 12, ¶  
5 3, "The property is served by urban infrastructure and services,  
6 including... Mountain Line Bus Service..."  
7

8  
9           The City's determination on this issue did not comply with the Plan.

10           b) ...[n/a]

11  
12           2. *Open Space and Natural Resources*

13           a) *Preserve the scenic views of Waterworks Hill, the hills along the*  
14           *northwest corner and along the northern boundaries of the planning*  
15           *area, Mount Jumbo...by encouraging clustered homesites,*  
16           *conservation easements and other land preservation techniques.*  
17

18           The area proposed for Sonata Park is currently semi-rural in character  
19 with widely dispersed houses amidst open grassy hillside. The adjacent  
20 property immediately to the north is also proposed for development and  
21 beyond that lies the southern boundary of the Rattlesnake National  
22 Recreation Area. The western portion of the proposed subdivision borders a  
23 large public open space area called "Waterworks Hill." "The property is in an  
24 area designated as an Existing and Potential Additional Open Space  
25  
26  
27



1 Cornerstone in the 1995 Urban Area Open Space Plan.” FOF-COL, p. 26, ¶  
2 13. “This plan explains that designated cornerstones ‘may be proposed and  
3 approved for development, but any development proposal must contain  
4 appropriate park and open space provisions which address the goal of an  
5 urban area open space system.” Id. There are few, if any, “appropriate park  
6 and open space provisions” for Sonata Park in the City’s Findings and  
7  
8 Conclusions.  
9

10           Regarding the issue of land preservation, the proposed subdivision  
11 contains “riparian resources areas within woody draws which are subject to  
12 the City’s Riparian Regulations,” FOF-COL, p. 29, ¶ 6, however, “The  
13 subdivider did not prepare a Riparian Resource Management Plan and Map  
14 as required by Section 3-13 of the Subdivision Regulations.” FOF-COL, p.  
15  
16 30, ¶ 11.  
17

18           According to various maps in the record, there is only one woody draw  
19 in the proposed subdivision; “the only undeveloped woody draw west of  
20 Duncan Drive between Mountain View to the south and beyond the power  
21 substation to the north.” Parks and Rec. agency comment letter, 1/23/07, p.1,  
22  
23 ¶ 2. “It connects wildlife from City Open Space in the North Hills to the west  
24 to Duncan Drive to the east.” Id. “From that point, it is a short distance  
25 across open fields to the Rattlesnake River.” Id. “This woody draw is a  
26  
27



1 "significant natural feature"<sup>6</sup> because, as stated above, it is the only one left  
2 undeveloped in the immediate area connecting to City Open Space with a  
3 relatively short distance to the Rattlesnake River." Id., p. 2. "As proposed,  
4 the corridor is too narrow and constricted between Lots 30-33 (where it is less  
5 than 100' wide) and between Lots 8-14 (about 130' wide)." Id., ¶ 3.  
6

7  
8 Without citing the record, the FOF-COL provide, "City Council imposed  
9 a condition of subdivision approval requiring deletion of four lots in the area of  
10 riparian resource with a provision to allow the subdivider to recoup three lots  
11 as shown on the plat dated December 14, 2007." FOF-COL, p. 29, ¶ 10.  
12

13 Further, without reference, the FOF-COL state, "To meet the parkland  
14 dedication requirement for this subdivision, City Council approved 16.26  
15 acres of common area." FOF-COL, p. 25, Parks and Rec. FOF, ¶ 3. It is not  
16 clear to the Court how approving 16.26 acres of common area satisfies the  
17 goal of land preservation and conservation easements. Further, without  
18 requiring a Riparian Resource Management Plan and Map, the City has failed  
19 to satisfy this goal.  
20  
21

22 Although Sonata Park may fulfill the goal of "clustered homesites" with  
23 37 sites on 34 acres, the current character of the property is mostly open  
24 space bordering Waterworks Hill/North Hills Open Space and is visible from  
25  
26

27 <sup>6</sup> Art. 3-1(9), City Subdivision Regulations.



1 the entire mid to upper Rattlesnake Valley as well as from the public Open  
2 Space. On page 6, ¶¶ 36(b)-(e), the FOF-COL provide:

- 3
- 4 (b) Cluster developments to protect environmentally sensitive  
lands;
- 5 (c) Protect natural resources such as wildlife corridors and  
6 habitat;
- 7 (d) Preserve the maximum amount of open space;
- 8 (e) Provide development incentives within the area served by  
sewer
- 9 (f) ...

10 Each of these Findings references the City Council Minutes, 12/10/07 at page  
11 36. However, upon review of that portion of the Minutes, the Court could only  
12 find one statement that marginally supports the Findings: "Encouraged [sic]  
13 clustering of subdivisions to maintain as much open space as possible and  
14 protect resources, and density was limited because of lack of access to  
15 sewer." Without more, the City falls short.

16  
17 To allow the density of development approved by the City would do little  
18 to, as dictated by the Plan, preserve "the scenic views of the hills along the  
19 northwest corner of the area." The disruption of the view caused by such a  
20 dense cluster of homes, in addition to the lack of a specific plan to protect  
21 riparian resources, and the failure to conform to the 1995 Urban Area Open  
22 Space Plan, fails to satisfy the goals of the Rattlesnake Plan.

23  
24  
25 b) ...[n/a]

26 c) *Preserve wildlife habitat, especially elk and deer winter and spring*  
27



1                    *range on Mount Jumbo and in the northwestern portion of the*  
2                    *planning range*

3  
4                    According to the Montana Natural Resource Information Service,  
5 turkey, mule deer, moose, black bear, pheasant, elk, Hungarian partridge,  
6 spruce grouse and white-tailed deer are known to frequent the area proposed  
7 for subdivision. FOF-COL, p. 30, ¶ 15. The site lies at the southern-most  
8 edge of elk winter range, however, per Montana Fish, Wildlife & Parks, "The  
9 subdivision is not expected to cause problems for elk, because most of the  
10 elk use is to the north and west, and upslope, of the proposed development."  
11 FOF-COL, p. 30, ¶ 16.

12  
13  
14                    As discussed above, the "central east/west draw [in Sonata Park] is an  
15 important wildlife corridor." FOF-COL, p. 31, ¶ 20. "This project will place a  
16 road across that corridor and potentially 49 homes to the north of the crossing  
17 (19 in Sonata Park, 30 in Duncan Meadows)." *Id.* "That will generate  
18 approximately 400 trips per day and it is likely that drivers will exceed the 25  
19 mph speed limit as they head downhill to the south." *Id.* "In order to prevent  
20 collisions with deer and other wildlife, City Council imposed a condition of  
21 approval requiring the subdivider to install road signs that state, 'Wildlife  
22 Crossing – Reduce speed to 15 mph' at the south and north ends of the draw  
23 crossing and also install the type of speed bumps that are acceptable to  
24  
25  
26  
27



1 Public Works and the Fire Department.” *Id.*, ¶ 21. There are no references to  
2 the record or agency letters implementing the City’s Findings on this issue.

3 This does not satisfy the Plan’s goal of “Preserving wildlife habitat,” and the  
4 Community Goal and Citizen-Identified Goal under this heading of the Plan to  
5 “Protect wildlife habitat and corridors.” Plan, p. 19.  
6

7  
8 *d) Continue the legacy of the “Garden City” by preserving existing*  
9 *trees, planting new trees, and maintaining those trees on both*  
10 *private and public land*

11  
12 The City fails to address this goal.

13 *3. Transportation*

14 *a) Improve traffic circulation by improving streets while minimizing*  
15 *adverse impacts on adjacent property owners*

16  
17 The City fails to address this goal.

18 *b) Improve pedestrian and bicycle safety...*

19  
20 The City fails to address this goal. As mentioned above, the addition of  
21 314.5<sup>7</sup> more trips over Duncan Drive, Greenough Drive, Lolo Street and  
22 Rattlesnake Drive, will undoubtedly have a negative impact on pedestrian and  
23 bicycle safety, especially without the addition of bike paths or additional  
24 sidewalks.  
25  
26  
27



1           c) *Encourage the highest density of residential development in the*  
2                   *southern portions of the Rattlesnake Valley and gradually lower*  
3                   *density of development to the northern portions of the Valley*

4  
5           The Lower, Middle and Upper Rattlesnake regions are described on  
6 pages 10 and 11 of the Rattlesnake Plan. Comparing these descriptions to the  
7 Rattlesnake Valley Planning Area Land Use Map # 13, it appears that Sonata  
8 Park would be considered in the Middle Rattlesnake by location but with a  
9 recommended density, per Map #13, more consistent with the Upper  
10 Rattlesnake. The map suggests densities from 1 dwelling unit per two acres to  
11 1 dwelling unit per 5-10 acres. Instead the City approved a density of 1.09  
12 dwelling units per acre. FOF-COL, p. 7, ¶ 40. This density of development is  
13 more appropriate for the lower Rattlesnake, per the Plan. Therefore, the City  
14 fails to comply with this goal.

15  
16  
17  
18           d) ...[n/a]

19           e) *Improve traffic safety – both motorized and non-motorized*

20           The City fails to address this goal

21           f) *Reduce traffic congestion – both motorized and non-motorized*

22           The City fails to address this goal.

23  
24           g) ...[n/a]

25  
26  
27 <sup>7</sup> (37 units x 7 trips per unit) + (37 units x 10 trips per unit) = 259 + 370 = 629. 629 divided by 2 = 314.5





1 The City fails to satisfy the goal as discussed on page 9, item 1a), page  
2 12, item 2a), page 15, item 2c), page 17, item 3a) and item 3b), page 18,  
3 item 3c) and item 3e), and page 19, item 3h).

4  
5 *b) Provide connections between neighborhoods to parks, open*  
6 *spaces, churches, commercial areas, and schools*

7  
8 Although there are currently two public access points to the North Hills  
9 Open Space in "fairly close proximity to the subject property," Jackie Corday<sup>8</sup>  
10 stated that there is no need to require the subdivider to construct a public trail  
11 through Sonata Park's east-west common area at this time." FOF-COL, p.  
12 26, ¶ 7. "To accommodate future connection from Duncan Drive to the City  
13 Open Space, City Council imposed a condition of approval requiring the  
14 dedication of an east – west 20-foot wide public pedestrian easement through  
15 the common area." FOF-COL, p. 24, ¶ 4. Those attempting to access the  
16 North Hills Open Space, including the residents of Sonata Park, will  
17 presumably use this easement which travels "midway up the draw along the  
18 northern half of the common area." Id.

19  
20  
21  
22 As mentioned above, this common area, the woody draw, is also  
23 serving as a "wildlife corridor from the North Hills open space to Rattlesnake  
24 Creek, within this subdivision." FOF-COL, p. 13, ¶ 88. Placing a public  
25

26  
27 <sup>8</sup> Open Space Program Manager, City of Missoula Parks & Recreation.



1 easement through this area conflicts with the Plan's goal, and the City's  
2 Findings that, "This area is proposed to remain undisturbed to facilitate  
3 wildlife movement through the area." FOF-COL, p. 13, ¶ 87. According to the  
4 Master Parks Plan & Recreation Plan, there are two relevant policies  
5 regarding riparian areas: 5.4 – "Preserve wildlife corridors and area of high  
6 quality, natural vegetation" and 5.5 – "Avoid environmentally-sensitive areas  
7 when locating trails and other developed areas." FOF-COL, p. 29, ¶ 5.  
8 Again, locating a public easement through what purports to be the common  
9 area, park and riparian-protection zone, conflicts with Parks & Recreation's  
10 master plan and the goals of the Rattlesnake Plan.  
11  
12  
13

14 Finally, there are no provisions in the FOF-COL for the installation of a  
15 bike path or sidewalk to connect Sonata Park residents and their children to  
16 "parks, open spaces, churches, commercial areas, and schools." This goal is  
17 not satisfied.  
18

19 *c) Protect the community's beauty (e.g., trees, views, historic*  
20 *buildings)*  
21

22 According to the City, "The requested rezoning request, as modified by  
23 City Council to restrict density to approximately 1.09 dwelling units per acre,  
24 and restrict height, building setbacks, and lot coverage, is suitable for the  
25 subject property and gives reasonable consideration to the character of the  
26  
27



1 district." FOF-COL, p. 17, ¶¶ 9-10. sub¶ 1. There is no reference to the record.  
2 This Finding does not sufficiently address the goal of "protecting the  
3 community's beauty" especially in terms of views.  
4

5 *d) Create a diversity of housing opportunities; in particular, address*  
6 *the current shortage of housing for lower and moderate income*  
7 *households*

8  
9 The City fails to address this goal.

10 *e) Value diversity of neighborhoods, and recognize the importance of*  
11 *protecting existing neighborhood character*

12  
13 The City fails to address this goal.

14 *f) ...[n/a]*

15 *g) ...[n/a]*

16 *h) Provide adequate parkland and developed playfields*

17  
18 Missoula Parks and Recreation Open Space Program Manager

19 Jackie Corday stated that "designation of the central draw as common  
20 area is acceptable and actually preferable to a public park." FOF-COL, p.  
21 26, ¶ 4. This is an insufficient explanation of how this goal is satisfied.  
22

23 *i) Have new development pay its own way on the one hand, and not*  
24 *expect new development to take care of current needs on the other*

25  
26 The City fails to address this goal.  
27



1           j) *Locate new development near existing public services or where*  
2                     *public services can be readily extended*

3  
4           There is currently no sewer or water connection to the proposed  
5 development, but "the subdivision will be served by City sewer and Mountain  
6 Water." FOF-COL, p. 25, Water System and Sewer System FOF, ¶ 1. There is  
7 no Finding or Conclusion that these services can be "readily extended," but  
8 rather, "A force main will be installed across Rattlesnake Creek to connect to  
9 the existing main at the intersection of Creek Crossing Road and Creekwood  
10 Road," which is some distance from the subdivision. This does not comply with  
11 the Plan.  
12  
13

14           k) *Protect property values*

15  
16           The City fails to address this goal, except to say, "Careful building design  
17 of any possible new construction may conserve the value of this and nearby  
18 properties." FOF-COL, p. 17. ¶ 11, sub¶1. This is insufficient.  
19

20           l) *Protect private property owner rights (develop their land on the one*  
21                     *hand and accept cultural and physical limits to development on the*  
22                     *other)*

23  
24           The City fails to address this goal.

25           m) *The overall vision of Missoula 2000 expressed at the beginning of*  
26                     *the Missoula Urban Comprehensive Plan:*  
27



1                    *"Missoula is the center of cultural and economic activity*  
2                    *in Western Montana; a community which provides an*  
3                    *urban environment that protects valuable natural*  
4                    *resources and complements its scenic setting, insures*  
5                    *a high quality living environment for all of its residents;*  
6                    *where people work together to plan and build a livable*  
7                    *community."*

8                    The City fails to address this goal.

9                    n) *Limit overall development to the Rattlesnake Valley's carrying*  
10                    *capacity*

11                    There are two main roads into the Rattlesnake Valley, Greenough  
12                    Drive, which becomes upper Duncan Drive on the west side, and  
13                    Rattlesnake Drive on the east side. According to the 2008 Transportation  
14                    Plan Update data, "Greenough/Duncan Drive is classified as a 2-lane  
15                    collector street from its origination point near the interstate up to  
16                    approximately Mountain View south of this subdivision." FOF-COL, p. 7,  
17                    ¶ 43. "A 2-lane collector street is designed to accommodate  
18                    approximately 6,000 vehicles a day at a Level of Service D." *Id.*

19                    The FOF-COL do not explain what Level of Service "D" means.  
20                    Six-thousand vehicles a day seems somewhat high for a 2-lane "collector  
21                    street" in the Middle Rattlesnake, such as Duncan Drive. In any event,  
22                    the City found, "Recent traffic counts put Duncan Drive for its entire length  
23                    below capacity." *Id.* "The 2006 traffic count at Station No. 241, located  
24                    below capacity." *Id.* "The 2006 traffic count at Station No. 241, located  
25                    below capacity." *Id.* "The 2006 traffic count at Station No. 241, located  
26                    below capacity." *Id.* "The 2006 traffic count at Station No. 241, located  
27                    below capacity." *Id.*



1 200' north of Lolo Street was 1,750 AADT (Average Annual Daily Trips)  
2 and the 2006 traffic count at Station No. 234, located on Greenough Drive  
3 just north of Peggio Drive in Rattlesnake Hills Estates was 1,570 AADT."  
4 Id. From this data, it appears that approximately 180 vehicles choose to  
5 take Lolo Street or other minor connector streets, over to Rattlesnake  
6 Drive which serves the University of Montana and east Broadway areas  
7 of Missoula. There is no traffic count data for Rattlesnake Drive in the  
8 FOF-COL.  
9  
10

11  
12 As stated above, Sonata Park, as proposed, would generate at  
13 least 300 more trips a day over Duncan Drive and its connectors.  
14 Although the City refers to the 2008 Transportation Plan Update data,  
15 and finds that Greenough/Duncan Drive "can accommodate  
16 approximately 6,000 vehicles a day," there is no reference in the record  
17 where this data was discussed and/or adopted during the Sonata Park  
18 subdivision review process. The City did not substantially comply on this  
19 issue.  
20  
21

22 o) *Develop community park lands for recreation*

23 Missoula Parks and Recreation Open Space Program Manager

24 Jackie Corday stated that "designation of the central draw as common area is  
25 acceptable and actually preferable to a public park." FOF-COL, p. 26, ¶ 4. This  
26  
27



1 is not a real explanation of how the goal is satisfied. Further, the City's findings  
2 that the Sonata Park common area satisfies the goal of riparian resource  
3 protection as well as the goal of developing community park lands or  
4 maintaining access to open space, are in conflict. The common area cannot be  
5 all things.  
6

7  
8 Although "the central east/west draw is an important wildlife corridor,"  
9 FOF-COL, p. 31, ¶ 20, and "This area is proposed to remain undisturbed to  
10 facilitate wildlife movement through the area," FOF-COL, p. 13, ¶ 87, the City  
11 also approved "an east – west 20-foot wide public pedestrian easement  
12 through the common area." FOF-COL, p. 24, ¶ 4. Further, although the  
13 property contains "riparian resources areas within woody draws which are  
14 subject to the City's Riparian Regulations," FOF-COL, p. 29, ¶ 6, and  
15 although one goal of the Rattlesnake Plan is to "Reduce the number of  
16 wildlife and human conflicts, Plan, p. 23, "This project will place a road across  
17 that corridor and potentially 49 homes to the north of the crossing (19 in  
18 Sonata Park, 30 in Duncan Meadows)." FOF-COL, p. 31, ¶ 20. "That will  
19 generate approximately 400 trips per day and it is likely that drivers will  
20 exceed the 25 mph speed limit as they head downhill to the south." Id.  
21  
22  
23  
24

25 The City has failed to balance several competing goals of the Plan and  
26 has expanded the idea of the common area to satisfy numerous, competing  
27



1 goals. In doing so, it has not complied with the Rattlesnake Plan.

2 p) ...[n/a]

3 q) ...[n/a]

4 r) ...[n/a]

5  
6 A set of "Recommended Policies and Actions" follows the goals and  
7  
8 guiding principles discussed above. In addition to stating that, "All  
9  
10 subdivision, zoning and rezoning requests should *substantially comply*  
11  
12 with the land use recommendations of this Plan," (emphasis added), the  
13  
14 policies and actions include expanding public transportation and sewer  
15  
16 service, and improving roads with "new development paying its full share  
17  
18 of the cost of transportation improvements." The City fails to address  
19  
20 these recommendations. Also, rather than assigning a development  
21  
22 density threshold, the Recommended Policies and Actions provide,

23 "Establish and apply residential zoning districts which recognize the  
24  
25 urban, suburban, semirural, and, in some cases, rural character of  
26  
27 the lands which have recently been annexed into the City of  
Missoula. With sound site planning and municipal services  
planning, the Rattlesnake Valley can support additional incremental  
development. This development should be at a scale which is  
compatible with the development patterns of existing Rattlesnake  
neighborhoods and the natural ecosystem which underlies and  
surrounds the entire study area."

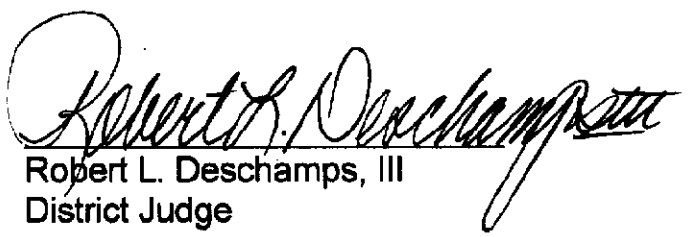
The Court agrees that the Rattlesnake Valley can support additional  
incremental development. However, the current proposal for Sonata Park fails



1 to recognize, in large part, the semirural character of the area. As proposed,  
2 Sonata Park exists on a scale that is incompatible with the development  
3 patterns of the neighborhoods in the area and especially with the natural  
4 ecosystem that underlies the area.  
5

6 The 1995 Rattlesnake Plan, reaffirmed in 2006, requires that zoning  
7 and subdivision substantially comply with the land use recommendations of  
8 the Rattlesnake Plan. The Sonata Park subdivision is four times as dense as  
9 the land use recommendations in the Rattlesnake Plan. The Court finds the  
10 City has failed to substantially comply with the density recommendations, and  
11 with many other recommendations, of the Rattlesnake Plan. The City was  
12 arbitrary and capricious in reaching its decision on Sonata Park. For that  
13 reason, the zoning and subdivision decisions are hereby **SET ASIDE** and  
14 summary judgment is **GRANTED** to Plaintiffs.  
15  
16  
17  
18

19 Dated this 24th day of February, 2010.

20  
21   
22 Robert L. Deschamps, III  
23 District Judge  
24  
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cc: David K. W. Wilson, Jr.  
Jim Nugent, Missoula City Attorney  
Donald V. Snavely

