JENNIFER L. FARVE, ESQ.
MOORE, O'CONNELL & REFLING, P.C.
P.O. BOX 1288
BOZEMAN, MT 59771-1288
Ph: 406-587-5511
Fax: 406-587-9079
e-mail: morlaw@qwestoffice.net
Attorneys for Respondent

BKG ✓
JDG
Client ✓
2/3/12

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

KEVIN BOTZ, RANDY THEKEN, and FPR PROPERTIES, LLC, Petitioners, vs. BRIDGER CANYON PLANNING AND ZONING COMMISSION, Respondent, and BRIDGER CANYON PROPERTY OWNERS' ASSOCIATION, INC., Intervenor-Respondent.	Cause No. DV-10-1076B Cause No. DV-10-1174C (consolidated) Hon. Mike Salvagni **NOTICE OF ENTRY OF JUDGMENT**

Pursuant to Rule 58 of the Montana Rules of Civil Procedure, please take notice that judgment was entered by the Court on January 31, 2012 for the Defendants and against the Plaintiffs by affirming the Zoning Commission's decision to affirm the Gallatin County Code Compliance Specialist's January 28, 2010 determination and removal order; by affirming the Zoning Commission's decision to deny Petitions' August 20, 2010 application to modify the Brass Lantern PUD CUP; by vacating the Order Granting Preliminary Injunction issued on February 4, 2011; by dismissing with prejudice Petitioners' Second Amended Petition and Complaint Re: Zoning Violation and Removal Order in Cause No. DV-10-1076B; by dismissing with prejudice Petitioners' Amended Petition and Complaint Re: Denial of Application for Conditional Use Permit in Cause No. DV-10-

H-Work\38000\044\BSH7098.WPD//BSH

development to achieve greater density while preserving open space by limiting the location of all building sites on the recorded plan and as referenced in the covenants.

Petitioners' arguments also ignore the role of the General Plan. That document advises that cluster development may occur at higher densities, but subject to strict land use controls, including the use of topography and vegetation to screen structures. Non-clustered, single family development was not intended to receive a density bonus: "Non-clustered development of 40 acres or larger homesites will occur as a 'mater of right' pursuant to locations set out in the Zoning Regulation for this use." Bridger Canyon General Plan & Development Guide, 27.

In this regard, it is important to note that the Zoning Commission's decision, with respect to the barn, is consistent with the General Plan, and thus is further evidence that the Zoning Commission's decision was not arbitrary, capricious or illegal. Petitioners' argument ignores the terms and conditions of the PUD that was approved by the Zoning Commission as well as the General Plan. As COS 1154-A and other documents make clear, the PUD restricted the location of buildings within the development. This fact was a critical consideration for the Zoning Commission to grant increased density on the real property involved in this case.

Section 76-1-113(1), MCA, provides as follows:

> Except as provided in subsection (2), nothing in this chapter may be considered to authorize an ordinance, resolution, or rule that would prevent the complete use, development, or recovery of any mineral, forest, or agricultural resources by the owner thereof.

When the original PUD was created, the applicants freely surrendered control over the placement of structures and other land use aspects for return of additional residential density. As discussed above, that is the PUD process. Section 76-1-113, MCA references regulation of lands. The primary use of the real property in this case is residential. The restriction on location of improvements to real property to a building site, as set forth in the PUD approval, is not

contrary to either § 76-1-113, MCA or § 6.1 of the Regulations. The Zoning Commission's decision does not regulate the use of the land. It simply regulates the location of improvements to the property. No restriction has been imposed upon the raising, feeding, and management of livestock, poultry, or other animals, as set forth in § 6.1 or § 6.2 of the Regulations. Moreover, § 6.2 of the Regulations discusses the agricultural intent of a 40-acre parcel. In this case, there are 20-acre parcels. The restriction on location of buildings within the 20 acres was the consideration for additional dwelling units, as opposed to one per 40 acres.

Section 76-2-109, MCA, provides as follows:

> No planning district or recommendations adopted under this part shall regulate lands used for grazing, horticulture, agriculture, or the growing of timber.

Statutes and ordinances will not be read so narrowly as to restrict the plain meaning of the whole law. *Schendel* , 237 Mont. at 284-285, 774 P.2d at 383. A statute derives its meaning from the entire body of words taken together. *Id.*

Assuming arguendo that the construction of a barn constitutes "agriculture" within the plain meaning of § 76-2-109, MCA, the Zoning Commission's decision still does not amount to the regulation of agriculture. To "regulate" means "to adjust; to govern by rule; to direct or manage according to certain standards or laws; to subject to rules, restrictions or governing principles." *State ex rel. State Bd. of Equalization v. Glacier Park Co.*, 118 Mont. 205, 214, 164 P.2d 366, 371 (1945) (quoting *City of Butte v. Paltrovich*, 30 Mont. 18, 75 P. 521 (1904)).

In this case, the Zoning Commission's decision does not impose any new rules, standards or restrictions upon Petitioners' land. The decision merely enforces the conditions of CUP approval established for the Brass Lantern PUD in 1984. As discussed above, one of the conditions of PUD approval was that Turner record restrictive covenants that limited construction of buildings to the areas designated on the map submitted with the CUP application.

The Zoning Commission's decision in no way limits Petitioners' construction of a horse barn so long as that construction complies with the conditions of approval of the 1984 Brass Lantern PUD.

Furthermore, § 76-2-109, MCA, must not be read so narrowly so as to restrict the plain meaning of the law. As discussed above, one of the expressed purposes of a planned unit development is to enhance and preserve open space. If the Zoning Commission is not permitted to regulate the location of structures simply because they are labeled "agricultural," their ability to achieve the purposes of the planned unit development will be compromised. The plain meaning of § 76-2-109, MCA, does not prohibit a planning and zoning commission from requiring a barn to be located within a building site established at the time of PUD approval. Requiring structures to be constructed within a designated building area protects open space and ensures the scenic values of the neighborhood. Petitioners should not be permitted to ignore these well-established principles simply by tagging an "agricultural" label to the structure.

Section 76-2-109, MCA does not preclude regulation of the barn in this case. In *Doull v. Wohlschlager*, 141 Mont. 354, 377 P.2d 758 (1963), the Montana Supreme Court addressed a situation where a party used a building on his property within the zoning district for automobile repair. The party argued § 76-2-109, MCA[3] allowed him to use the property for auto repair because, at the time the zoning was enacted, the land at issue was used for agriculture and thus exempt from any regulation. *Doull*, 141 Mont. at 364, 377 P.2d at 763. The Montana Supreme Court rejected this argument stating:

> If this interpretation is correct, then the act is meaningless. Most of Montana is agrarian in nature, and the lands outside of but contiguous to the towns and cities of Montana, are still largely used for such purpose. The future expansion of Montana towns and cities would be left to whim if such lands were thereafter

[3] In *Doull* the statute in existence at the time was former § 16-4102, R.C.M. 1947. The last sentence of that statute is now § 76-2-109, MCA.

> exempt from regulation. Yet one of the most important purposes of the act is to provide for the orderly and planned expansion of such towns and cities. The interpretation of the district court would make much of the act a nullity. A statute will not be interpreted to defeat its evident object or purpose. *State ex rel. Boone v. Tullock*, 72 Mont. 482, 234 P. 277; *Wilkinson v. La Combe*, 59 Mont. 518, 197 P. 836. The objects sought to be achieved by legislation are of prime consideration in interpretation of such legislation. *Corwin v. Bieswanger*, 126 Mont. 337, 251 P.2d 252.
>
> Moreover, the word "used" in the last sentence of section 16-4102, supra, is a verb used in a noun phrase as a participial adjective rather than in the past tense of the verb form. When a verb is so used it indicates a present rather than a past meaning. "Used" is defined in its adjective form, in Webster's New International Dictionary (2d ed.), to mean "Employed in accomplishing something, especially customarily or repeatedly so employed * * *." This connotes a continuing or repeated use. In other words, the lands must be so used repeatedly or continuously in order to retain the exemption. In construing a statute, courts must first resort to the ordinary rules of grammar, and in the absence of a clear contradictory intention disclosed by the text, must give effect to the legislative intent according to those rules, and according to the natural and most obvious import of the language, without resorting to subtle and forced construction to limit or extend their operation. *State ex rel. Palagi v. Regan*, 113 Mont. 343, 126 P.2d 818.
>
> Clearly the Legislature intended to preserve the identity of farm lands from the encroachment of expanding towns and cities, but only so long as they are so employed. Any other interpretation would result in defeating the object of the legislation.

Doull, 141 Mont. at 364-365, 377 P.2d at 763-764.

In this case, Petitioners' land is not utilized as a farm or ranch. It is not taxed as agricultural or forest land. The land is a 20 acre parcel, which is part of a PUD, with a building site for a residential dwelling and outbuildings, designed to protect "open space" from development.

The application for a CUP characterizes the barn at issue as an "agricultural accessory structure." Whether the structure is considered agriculture or recreational, it is not entitled to any special status. It is an accessory to a residence under the Regulations. This does not constitute an illegal regulation of agricultural land under § 76-2-109, MCA, because the lands are not

agricultural. The barn will not sustain an agricultural livelihood, as contemplated by the General Plan. The conditions, covenants, and Regulations clearly designate that "open space" is to be free of all structures. The property at issue is not used for agriculture as intended by the legislature. Section 76-2-109, MCA, does not preclude the regulation of Petitioners' barn.

CONCLUSION

The record shows the Zoning Commission considered the relevant Regulations and stated its reasons for affirming the Code Compliance Specialist's January 28, 2010 decision and May 11, 2010 removal order. Each Commissioner commented on the issues on appeal and stated the reasons for the Commissioner's decision. Based on the record, which is not disputed, the Zoning Commission's decision was not lacking in fact or foundation so as to be unreasonable. The Zoning Commission did not abuse its discretion.

Furthermore, the Zoning Commission's decision was correct as a matter of law because Petitioners were on actual, constructive and inquiry notice of material facts which, when reviewed, demonstrate that all buildings, not just dwelling units, are required to be constructed within the building site depicted on COS 1154-A. Pursuant to *Conway*, the building site restriction noted on COS 1154-A and in the covenants created a negative easement in favor of the other landowners in the PUD. Construction of the barn outside the designated building site is unlawful. Therefore, the Zoning Commission was correct, as a matter of law, to affirm the Code Compliance Specialist's decisions concerning the zoning violation and order requiring removal of the structure.

Finally, the Commission's decision does not constitute the unlawful regulation of agriculture in violation of § 76-2-109, MCA. The Zoning Commission's August 12, 2010