Lakeshore Protection Regulations 2009
Minority Report

The Lakeshore Protection Committee has undertaken review and revision of the Whitefish Lake and Lakeshore Protection Regulations ("WLLPR"). The process was completed when the WLLPR were approved by a majority of committee members on March 12, 2009. Because that meeting was previously unscheduled, not all committee members were able to attend. This Minority Report represents the opinions of those who dissent from the March 12, 2009 decision.

At the outset, it should be made clear that the signatories to this report do not oppose regulation of the lakeshores. Rather they urge further review and revision because they believe that lakeshore regulation *is* necessary. It is the position of the minority report that the WLLPR, as approved by the committee, are not legally sustainable, and, if challenged will almost certainly be stricken. The primary focus of this report will be to discuss the flaws that create the vulnerability and suggest how those flaws could be corrected.

It is further the purpose of this report to suggest how most of the legitimate objectives sought to be accomplished by the current WLLPR can be effectuated by WLLPR that are conformed to statutory authority. This report will discuss how the WLLPR are structurally defective and why certain of the individual provisions violate statutory or constitutional provisions. A brief outline of an alternative format will be offered.

A. The WLLPR as approved are structurally defective because they exceed the grant of authority by the Montana Legislature to the local governing bodies.

1. Background: Legal authority for the Lakeshore Protection regulations is found in Title 75 of the Montana Code Annotated, known as the Environmental Policy Act. Section 75-1-102 of the Act identifies the competing objectives of the legislation: "…it is the policy of the State of Montana to encourage productive and enjoyable harmony between humans and their environment *and* to protect the right to use and enjoy private property free of undue government regulation. Title 75-7-401, et. seq, delegates to local governing bodies authority (1) to promulgate regulations "in the form of criteria" for permits for certain work done on lakeshores, and (2) to grant or deny permit applications. Because the area of water management is an express state function, local governing bodies possess only the authority granted to them by the legislature. MCA §7-1-113 The rule takes on added weight where the lakeshore protection permit function arguably must assign equal import to preservation of water quality and the right of private property owners to be free of undue government regulation.

Part A2 of this report addresses the lake and lakeshore authority granted to the governing bodies and the different authority claimed by the WLLPR.

2. Permit authority granted by the Legislature:

a. "Work:"

i. **Section 75-7-204** defines the kind of work that is subject to the permit process as "any work that will alter or diminish the course, current, or cross-sectional area of a lake or its lakeshore."

ii. WLLPR, by contrast, attempt to expand their authority to require a permit for "any work *on or alteration or disturbance of* a lake, lakebed or lakeshore."

Clearly, the WLLPR encompass a far greater range of activity than the statutory grant of authority. Therein is one of the structural deficits.

iii. **Examples**:

Montana Code Annotated: In order to explain the nature of the permit process, in Section 75-7-204, the legislature gives examples of the type of work contemplated to be covered by the permit process as follows:

> "2) [T]he following activities, when conducted *below mean annual high-water elevation*, are examples of work for which a permit is required: construction of channels and ditches; dredging of lake bottom areas to remove muck, silt, or weeds; lagooning, meaning the placement of a narrow strip of land across a portion of a lake to create a lagoon; filling; constructing breakwaters of pilings; constructing wharves and docks."

WLLPR: Under the language of the WLLPR, the mere "disturbance" of the lakeshore triggers the need for a permit, as does "any work" or "disturbance" -- whether or not it alters the course or current of the lake or a cross-section of the lake or lakeshore. Thus, the mere moving of a pebble triggers the permit requirement under the language of the WLLPR.

b. Limitation of geographic area in which a permit is required:

i. Montana Code Annotated: Section 75-7-202 defines the "*lakeshore*" as the perimeter of a lake when the lake is at mean

annual high-water elevation, including the land within 20 horizontal feet from that high-water elevation. The statute defines "*mean annual high-water elevation"* as "the average of the highest elevation of a lake in each of at least 5 consecutive years, excluding any high levels caused by erratic or unusual weather or hydrological conditions."

ii. WLLPR: Regulation 1.4 of the WLLPR defines the mean high water mark by reference to two sources[1], but NOT by reference to the five year average exclusive of extraordinarily high water years. Thus, the WLLPR regulation designation of mean high water is not consistent with the statutory grant.[2]

iii. The WLLPR provides that "lake frontage" may be measured "as a straight line between two lot lines at the point where mean annual high water intersects each lot line." Thus, if a lakeshore lot includes a peninsula, the owner's lake frontage for purposes of the regulations could be substantially reduced. To the extent that the lakeshore protection zone is determined pursuant to that provision, it could result in a significant reduction in the amount of useable property on a lot with a meander line. There is no authorization in the statute for such a definition.

iv. Because the local governing body has only that authority granted to it by the legislature, it has no power to act beyond the subject matter delegation or outside of the geographic boundaries set by the state. Any attempt to expand that jurisdiction or to legislate outside the authority is ultra vires and likely would be stricken.

c. Lakeshore regulations are to be promulgated "in the form of criteria."

i. Montana Code Annotated: Section 75-7-207 requires that regulations promulgated by the local governing authority to assist in the grant or denial of permits be "in the form of criteria." "Criteria" is not defined in the statute, but the dictionary definition is, "a basis for comparison; a reference point against which other things can be evaluated."

Section 75-7-208, sets forth the type of criteria intended in the previous section and advises that lakeshore regulations "*shall*

[1] NAVD 1988 AND NGVD 1929.

[2] The sources cited by Whitefish may be based on the average of five consecutive years, exclusive of extraordinarily high water years, but the regulations don't state that fact.

favor issuance [of an applied for permit] if the proposed work will not during either its construction or its utilization:"

(1) Materially diminish water quality;

(2) Materially diminish habitat for fish or wildlife;[3]

(3) Interfere with navigation or other lawful recreation;

(4) Create a public nuisance; or

(5) Create a visual impact discordant with natural scenic values, as determined by the local governing body, where such values form the predominant landscape elements.

While Section 75-7-207 provides that the above criteria are minimum criteria that do not restrict a local governing body from adopting stricter or additional regulations, any expansion beyond the basic five criteria must be as "authorized by other statutes". *Id.* Thus, any criteria added by the WLLPR other than the basic five must be under the authority of a specific state statute.

ii. WLLPR: The Whitefish regulations are comprised of not five criteria, but 47 pages of rules containing more than 41 "prohibitions"[4] of conduct or activity; construction standards; building material requirements; definitions of property rights; directives as to lawns, upland areas, streamside areas, and "non-conforming" structures. None of these rules cites to a statute that authorizes it, as required by 75-7-207.

d. Consequence of deviation: The local governing body does not have authority to redefine the parameters of its jurisdiction. The expansion of "work" and of the lakeshore protection zone and the promulgation of prohibitive and mandatory standards not authorized by any statute are inconsistent with state law and the authority granted by the legislature. The definition of mean high water mark may or may not be consistent with state law, but that fact can't be determined by the language of the regulations. Where a local regulation is inconsistent with state law, it must fall.

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[3] "Materially" is not defined in the Act, requiring the assignment of ordinary meaning. §MCA §1-2-106. The dictionary defines its use as an adverb as "to a significant degree."

[4] Nothing in the lakeshore statutes authorizes or provides for prohibitions by the local governing body. Their charge by the statute is simply to promulgate rules and grant or deny permits.

Thus, there is a high likelihood that, if challenged, the regulations would be stricken as structurally fatally defective.

B. Numerous WLLPR violate constitutional or property protections or are internally inconsistent:

1. Background: Beyond the structural defects in the regulatory scheme, many of the WLLPR would fall if challenged constitutionally or with reference to the statutes. These challenges would be less problematic if the structure of the regulations were sound, because the severability clause likely would save the regulation scheme. The minority proposes correcting the defective regulations as well and herein lists examples in summary fashion in order of their appearance in the regulations:

2. Examples of voidable provisions:

a. Regulations 2.1 F. through Q are listed as projects that require a permit. In Regulation 2.3, six of those permittable projects are prohibited from applying for a permit.

b. As to the prohibitions in Regulation 2.3, nothing in the statute provides authority to foreclose the projects without due consideration of a permit application. In view of the fact that the legislature sought to protect the right to use and enjoy private property free of undue government regulation and because 75-2-208 provides that a permit "should" be granted unless the project would *materially* diminish water quality or wildlife habitat, interfere with navigation, or create a nuisance or visual impact discordant with natural scenic values, a court likely would find WLLPR 2.3 to be an ultra vires enactment.

c. Regulation 2.6 would very likely be stricken as invading residents' Montana Constitutional right of privacy and the 4th Amendment to the US Constitution in that, in order to apply for a permit to do work on one's own lakeshore property, the person making application must "grant" to the "governing body, the Lakeshore Protection Committee, planning board departments, their staff and/or their consultants permission to enter upon his/her land or upon the waters of the lake to evaluate the site and verify compliance with any Lakeshore Construction Permit issued *both during the application process and upon completion of the construction.*" Thus, without notice or permission, all of the above groups of people, in any number and at any time would be authorized to enter on the property of the applicant to inspect and

investigate. Under the regulation, a property owner, who is to be protected by the state statute from "undue government regulation," must, if seeking a permit under WLLPR, forebear exercise of his or her right to privacy and to be secure in his or her home.

d. Regulation 2.7 summarily excludes from permit eligibility persons who have deeded easement rights within the lakeshore protection zone. An easement is a vested property interest. The governing body has no authority to diminish such an interest. Certainly the rules can require that an easement holder demonstrate his/her/its authority to apply for a permit during the permit process. But a court likely would void a provision that strips from easement holders property rights extended to other owners—that is the right to apply for a lakeshore permit.

e. Regulation 4.2.A. provides that, except for work specifically allowed by lakeshore permit or work that is exempt from permit requirements, the lakeshore protection zone "shall be maintained in its pre-existing condition." A court likely would find the provision unenforceable as being vague. "Pre-existing condition" is not defined. This is particularly important since every wave can change the condition of the lakeshore from its immediately preceding condition. The person or entity to be held responsible for any "change in condition" is not set forth in the regulation. Further, the scope of authority of the lakeshore protection regulations is the granting or denying of permits—not the governance of the lakefront property.

f. Regulation 4.2.D provides expansively that, "areas where vegetation has been destroyed in the lakeshore protection zone shall be restored in accordance with Section 5.1.D". The provision almost certainly would be found unconstitutionally vague in that it is entirely open-ended. The provision fails to advise who may be charged with restoration. It arguably allows persons to be charged with restoration whether or not those persons had anything to do with the destruction. Since the restoration requirement is in the nature of punishment for "violation" of the lakeshore regulations, there must be some nexus between the person sought to be punished and the act of violation. But the regulation recites no requirement of such a nexus. The regulation also would likely fall for the structural reason: that no such authority was granted to the local governing body.

g. Chapter 5 sets forth "Construction Standards." Nothing in the legislative grant of authority authorizes the governing body to

promulgate construction standards for the lakeshore. As such, the entire chapter is ultra vires.

h. Regulation 5.1.D provides for requirements as to the type of plants permitted in the lakeshore zone and prohibits flower gardens. It further attempts to set out extensive directives as to trees in the lakeshore zone, which directives are inconsistent with one another. It provides as a punishment for pruning trees a ten year "sentence" to plant and maintain new trees, whether or not the pruning activity implicates the requirements for a permit. There is no statutory authority for such regulations.

i. Regulation 5.1.E deals extensively with lawns and grasses in the lakeshore protection zone. In addition to other defects of the provision, regulation of lawns is not authorized by the statute. Further, the regulations are vague and therefore unenforceable. Regulation 5.1.E.5, provides that "the existence of lawns or dense native grasses maintained as lawns, which did not exist prior to the establishment of lakeshore regulations, may be prosecuted as a lakeshore violation." The permissive language invites equal protection litigation. The regulation impermissibly purports to authorize the governing body to prosecute an owner who had nothing to do with the installation of a lawn on his property. Further, unless prior regulations prohibited the establishment of a lawn, the provision is an ex post facto law even as to a person who installed the lawn. It would most likely be stricken for all of the above reasons.

j. Regulation 5.1.I.3 impermissibly attempts to govern streams, a function occupied entirely by the state of Montana in 75-7-101, et seq.

k. Regulation 5.1.I.5 purports to establish side setbacks from property lines—a zoning function not available to the lakeshore protection regulations.

l. Regulation 5.1.K.1 provides that only one dock will be permitted per "common property ownership." It then defines common property ownership as "multiple contiguous lots under one family or related ownership." Thus, two contiguous lots could each have one dock. But, if they happened to be owned by distant cousins or other relatives, they can only have one dock between them. The term "related ownership" in the provision is vague and allows for arbitrary enforcement. It further violates equal protection and Article II of the Montana Constitution. A court almost certainly would strike this provision.

m. All of Regulation 5.1.K.5, et seq, articulates “laws” as to docks. While those considerations can form criteria for granting or denying a permit, there is no authority in the statute for them to be free standing requirements outside the permit process.

n. Regulation 5.1.K.13 provides that, “after a permitted dock is installed, a licensed survey of the property riparian boundaries may be required if the governing body receives a complaint about possible setback encroachments.” The statute limits the governing body to granting or denying permits. Disputes among neighbors are dealt with in the court system. There is no authority for this for the governing body to usurp that function.

o. Regulation 5.1.U.2 provides that existing grandfathered boathouses and boat shelters shall be maintained “subject to 5.1.Z.” That provision contains numerous directives relating to “nonconforming structures, ” which are structures that pre-existed the lakeshore regulations or resulted from earlier permits. The statute provides that the owners of such properties have “vested property rights” in the physical structures. 75-7-206. Regulation 5.1.Z.1, et. seq provides that such buildings “may be continued provided there is no physical change other than necessary maintenance and repair” and no change in the use of the structure or improvement which *might* result in a change of use. A court likely would hold that the governing body does not have authority to condition continued existence of a structure in which the owner has a vested property right on “no” change being made to it. The lakeshore statutory scheme deals with granting or denying permits for work that will alter the course or current of the lake or a cross section of the lakeshore or lake. If change to such a structure can be effectuated without work that requires a permit, the governing body has no authority to address the change. The provision likely would fall for all of the above reasons.

p. Regulation 5.1.Z.6 provides that, if a nonconforming structure has been “partially destroyed by fire, or other calamity to an extent *not exceeding 50%* of its real value, exclusive of foundations, at any time may be restored to its immediately previous use existing at the time of the partial destruction.” But, if the structure is damaged *in excess of 50%* and doesn’t qualify for a variance, it can’t be rebuilt at all. A court would likely strike this provision as violative of equal protection and substantive due process.

q. Regulation 5.1.Z.8 provides that any nonconforming use or structure which is "eliminated or reduced in size by means other than natural disaster or calamity may only be replaced, re-established or enlarged" according to the regulations (which means that it *can't* be replaced or reestablished since the regulations purport to prohibit it), except if the nonconforming use or structure is a dock. In that case, it can be completely replaced in its nonconforming dimensions without a variance. Regulation 5.1.Z.10. A court likely would strike the earlier provision as violative of equal protection as well as for other defects.

r. Regulation 5.1.V.1 and Z.9.a impermissibly prohibit overhangs, balconies, bay windows, chimneys, or decks cantilevered from a structure outside the lakeshore protection zone from entering the air space above the lakeshore zone. The statute does not authorize prohibition of projects. Nor does it authorize requirement of a permit for a structure that does not alter the course or current of the lake or the cross section of the lakeshore or lake. A court likely would say such regulations are ultra vires, especially in light of the private property right policy articulated in the Environmental Policy Act.

3. The foregoing recitation of likely defective provisions is not intended to be complete. It is presumed that, in a re-writing of the regulations, each provision would be challenged and re-written to conform to the law. The provisions cited were selected for purposes of example.

C. Suggested organization of Lakeshore Protection Regulations.

Discussions regarding the history of the WLLPR reveal that they have developed on an ad hoc basis as the committees assigned responsibility for them have tried to address situations that have arisen. When a seeming "loophole" has been exposed, the committee has undertaken to plug it and to address suggested other possible loopholes. This explains the inconsistencies and excesses. The minority suggests that a more effective organization would be as follows:

1. After the permit process regulations are amended to conform to the statutory grant of authority, a brief application procedure would form the "Whitefish Lake and Lakeshore Regulations. It would include from the current regulations:

Chapter 1: "General Provisions"
Chapter 2: "Permits" with 2.3, 2.6, 2.7 deleted
Chapter 3: "Application Review Procedure"
Regulation 4.1

Definitions
Procedure for Violations

2. All other regulations, after having been “scrubbed” to dispose of inconsistencies, excesses and constitutional violations, would form an Appendix of guidelines to which Applicants would be directed to formulate their Permit Applications. For example, the present Chapter 5, “Construction Standards” re-named “Construction Guidelines,” would become the criteria for examination of construction plans submitted with the permit application. The granting or denial of the permit would depend on conformance with the Construction Guidelines, but the committee considering applications would have the flexibility to select those that would most effectively protect water quality while not unduly burdening the property rights.

Similarly, all regulations that are not repugnant to constitutional rights or inconsistent with the statutory procedure would be included within the appendix for use by applicants for permits and by the committee evaluating the applications.

Such an organization would protect the permit process itself from legal challenge, because, even if a guideline were voided by a court, the basic structure of the regulations would remain in tact.

D. Conclusion: The minority appreciates your attention to this dissenting opinion. It is submitted in the spirit of freeing the committee and property owners to focus on protection of our lakes rather than on divisive disagreement and litigation as to the regulations themselves. It is further offered with the hope and belief that a comprehensive revision of the lakeshore regulations will result in a stronger, fairer, and more effective process.

Dated this _____day of April, 2009

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Ken Stein, Lakeshore Protection Committee member

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Scott Ringer, Lakeshore Protection Committee member

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Sharon Morrison, Lakeshore Protection Committee member