



Montana Department of
ENVIRONMENTAL QUALITY

MEMO

TO: Katherine Orr, Hearing Examiner
Board of Environmental Review

FROM: Joyce Wittenberg, Board Secretary
Board of Environmental Review
P.O. Box 200901
Helena, MT 59620-0901

DATE: November 4, 2009

SUBJECT: Board of Environmental Review case, Case No. BER 2009-22 SUB

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:
THE REQUEST FOR HEARING BY JOHN
MCINERNEY, BOB HANEY, AND MARWIN HOFER
REGARDING THE REVOCATION OF
CERTIFICATE OF APPROVAL ES#34-93-C1-4
FOR THE FORT YELLOWSTONE SUBDIVISION,
PARK COUNTY.

Case No. BER 2009-22 SUB

BER has received the attached request for hearing. Also attached is DEQ's administrative document(s) relating to this request.

Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Jim Madden
Legal Counsel
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Steve Kilbreath
Public Water Supply & Subdivisions Bureau
Permitting and Compliance Division
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Nicole Olmstead
Enforcement Division
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Attachments

Swandal, Douglass & Gilbert, P.C.

A Professional Corporation
119 South Third Street
Livingston, Montana 59047
E-mail: sdgattorneys@qwestoffice.net

BRENDA R. GILBERT
Telephone 406-222-3301

KENDRA K. ANDERSON
Facsimile 406-222-3308

November 2, 2009

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Joyce Wittenberg
Secretary
Board of Environmental Review
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

FILED this 3rd day of
November AD 2009
at 12:36 o'clock P. M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by: M. Gable

RE: NOTICE OF APPEAL AND REQUEST FOR HEARING
DEQ Notice of Revocation, Fort Yellowstone Subdivision, Park County, Sanitation in
Subdivisions Act Complaint (CVID #11671)

TO: BOARD OF ENVIRONMENTAL REVIEW

Please take notice that John J. McInerney, Bob G. Haney & Marwin E. Hofer of 119 N. 7th Street, Livingston, Montana 59047 (hereinafter referred to as the "Parties") hereby appeal the notification from the Department of Environmental Quality (DEQ), dated October 2, 2009. The Parties hereby request an administrative hearing before the Board of Environmental Review, or any other relevant board who may have jurisdiction over this matter, pursuant to Section 76-4-108(5), MCA 2007.

The notice from the DEQ states that it is revoking Certificate of Approval ES #34-93-C1-4 for the Fort Yellowstone Subdivision (Fort Yellowstone). The notice states that the revocation is effective as to all lots and condominium units in the subdivision except for condominium Unit #12.

The Parties purchased their property located in the Fort Yellowstone Subdivision in reliance upon representations made to them that the necessary Certificates of Approval had been issued by the DEQ, and that the property was suitable for condominium and retail development.

November 2, 2009

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If the property loses its Certificate of Approval it will have an adverse effect on the use, purpose and value of the property as it was represented when the Parties purchased it. Therefore, the Parties will suffer irreparable damages as a result of DEQ's revocation of the Certificate of Approval for this subdivision.

For purposes of this notice of appeal and request for hearing, the parties have employed Brenda R. Gilbert as their attorney and legal representative to initiate this action and any other action, notice or appeal that may be necessary in order to protect the rights of the Parties. In that regard, please direct all correspondence to Brenda R. Gilbert regarding this matter.

Very Truly Yours,

A handwritten signature in cursive script that reads "Brenda R. Gilbert".

Brenda R. Gilbert
Attorney at Law

BRG/gt

cc: John J. McInerney



Montana Department of
ENVIRONMENTAL QUALITY

Brian Schweitzer, Governor

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • www.deq.mt.gov

October 2, 2009

Sue Berg
Fort Yellowstone PUD, LLC
59 Pool Creek Road
Livingston, MT 59047

CERTIFIED MAIL #7008 0500 0000 2880 2873
Return Receipt Requested

John J. Mcinerny
Bob G. Haney
Marwin E. Hofer
119 N 7th Street
Livingston, MT 59047

CERTIFIED MAIL #7008 0500 0000 2880 2866
Return Receipt Requested

RE: Notice of Revocation, Fort Yellowstone Subdivision, Park County, Sanitation in Subdivisions Act Complaint (CVID #11671)

Dear Ms. Berg, Mr. Mcinerny, Mr. Haney and Mr. Hofer:

This letter is to notify you that the Department of Environmental Quality (Department) is revoking Certificate of Approval ES #34-93-C1-4, for the Fort Yellowstone Subdivision (Fort Yellowstone). This revocation is effective as to all lots and condominium units in the subdivision except for condominium unit # 12. Unit # 12 has been approved for hookup to the Gardiner public water supply system under Certificate of Approval EQ #09-1275, and that approval is not affected by this revocation. Under the Sanitation in Subdivisions Act, Title 76, Chapter 4, MCA, this revocation will require that the owners of lots and condominium units apply to the Department for approval before any lots or units may be sold and before water, sewer, solid waste, or storm drainage facilities may be constructed or used.

Pursuant to the authority in Section 76-4-108(5), MCA, the Department may revoke a Certificate of Approval when a violation of the requirements of the Sanitation in Subdivisions Act has occurred. In this case, there is a violation of Section 76-4-130, MCA, which states that a person may not construct or use a facility that deviates from the certificate of subdivision approval until the reviewing authority has approved the deviation. The water system serving the subdivision was not constructed in accordance with the plans and specifications approved by the Department. The approved plans called for a retaining wall to be constructed adjacent to the water main to prevent erosion and to maintain the depth of cover for the main. The retaining wall was not installed. This is a violation of § 76-4-130, MCA, which prohibits construction or use of a facility that deviates from a Certificate of Approval.

Based on the above violation, the Department is revoking Certificate of Approval #34-93-C1-4. The revocation will be final in 30 days from the date of your receipt of this Notice if a hearing is not requested as set out in the next paragraph. After the revocation is final, no lots or units may be sold and no water,

Sue Berg
John Mcinerny
Bob Haney
Marwin Hofer
Fort Yellowstone PUD, LLC
September 18, 2009
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sewer, solid waste, or storm drainage facilities may be constructed or used until after Department approval of those facilities is obtained. Section 76-4-121, MCA.

As stated in Section 76-4-108(5), MCA, when the Department revokes a Certificate of Approval, the person aggrieved by revocation may request a hearing before the Board of Environmental Review. A hearing request must be filed in writing within 30 days after receipt of this Notice of Revocation, and must state the reason for the request. The contested case provisions of Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, apply to a hearing held under Section 76-4-108, MCA.

If you wish to request a hearing you must send written notice, postmarked no later than 30 days after receipt of this notice, to:

Joyce Wittenberg
Secretary
Board of Environmental Review
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

If you have questions about this Notice of Revocation, you may contact me at 406-444-3638.

Sincerely,



Steve Kilbreath
Supervisor
Subdivision Section
Department of Environmental Quality

cc: Nicole Olmstead, Case Manager, DEQ ENFD
Karl Knuchel, P.O. Box 953, Livingston, MT 59047