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SHIRLEY E. FAUST, CLERK
By *[Signature]*
Deputy

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

6 <MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY>

7 PRESERVE HISTORIC MISSOULA,
8 INC., a Montana Non-profit
9 Corporation; WESTERN CULTURAL,
10 INC., a Montana Corporation; DAVID
11 and NANCY TYRELL; VIRGINIA
12 BRAUN; MIDNITE DEVELOPMENT,
13 LLC, a Montana Limited Liability
14 Company; and JOHN DOES I-XXX.

15 Plaintiffs,

16 v.

17 THE MISSOULA CITY COUNCIL,
18 the governing body of the City of
19 Missoula; MERCANTILE, LLC, a
20 Montana Limited Liability Company;
21 HOMEBASE MONTANA, LLC, a
22 Montana Limited Liability Company;
23 110 NORTH HIGGINS MISSOULA
24 OWNER, LLC, a Montana Limited
25 Liability Company; and JOHN DOES
26 I-XXX.

27 Defendants.

Cause No. DV-16-749

Dept. No. 2

OPINION AND ORDER

Before the Court are assorted Motions for Summary Judgment filed by the Plaintiffs and most of the Defendants. Also before the Court are Defendant's Motions to Strike certain portions of the Plaintiff's Response



1 briefs or in the alternative, requesting leave to file additional briefs. The last of
2 the Defendants' briefs was filed on December 21, 2016 at which time the
3 Court determined that all of the matters were submitted and ready for ruling.

4 The above matters, together with briefs regarding an application for an
5 *Amicus Curiae* appearance which were also filed and considered during the
6 same time period, comprised nearly 2000 pages. The Court is aware that
7 certain Defendants have been complaining to the press that this matter is
8 taking too long to be decided, yet as of the date of this Opinion and Order,
9 only 16 business days have elapsed since the matter was fully submitted.
10 Most litigants would be pleased to obtain such a speedy decision.

11 ORDER

12 Defendants' Motions for Summary Judgment on Plaintiff's Second
13 Amended Complaint are **GRANTED**. All other pending motions, including
14 Plaintiff's Motion for Summary Judgment, Defendant's Motions for Summary
15 Judgment regarding Plaintiff's Lack of Standing and Damages, and Motions
16 to Strike, are therefore deemed **MOOT**.

17 STATEMENT OF UNDISPUTED FACTS

18 While many facts surrounding these motions are disputed, from the
19 pleadings, briefs and exhibits submitted, the Court determines that the
20 following facts are undisputed: This dispute involves a building, referred to
21 herein as "the Merc," located at the corner of Higgins and Front Streets in the
22 original town site of downtown Missoula. Commencing in the 1870s the Merc
23 was built in stages over the following decade or so when the Merc (as well as
24 nearby property and buildings) was owned by a now-defunct company called
25 "The Missoula Mercantile Company." The property was used for retail
26 business owned by the Missoula Mercantile Company and its immediate
27 successors in ownership, culminating with Macy's which is a national



1 department store retail chain. During this time the façade of the building
2 remained largely intact. Macy's ceased operations in Missoula approximately
3 seven years ago and eventually the property came into the ownership of
4 Defendant 110 North Higgins Missoula Owner, LLC, also called "Octagon."
5 Several unsuccessful attempts were made to lease or sell the property to
6 continue its use for ground floor retail business as well as possible office
7 space in the upper level.

8 In September 2015, Defendant Mercantile, LLC entered into a contract
9 to purchase the Merc. After considering options, Mercantile LLC and an
10 affiliated Defendant, HomeBase Montana, LLC ("HomeBase") determined
11 that the only viable option for the property was to deconstruct the Merc
12 building and erect a hotel with retail space. Accordingly, in March 2016,
13 Octagon, Mercantile and HomeBase filed an application with the City of
14 Missoula to obtain a Demolition Historic Preservation Permit
15 ("demolition permit") to deconstruct the Merc.

16 Per the provisions of the Missoula City Code, the application was
17 referred to the Missoula Historic Preservation Commission ("HPC") for
18 processing and decision. Over the next several months, the HPC reviewed
19 the project and, during its June 2, 2016 meeting, voted to deny the permit
20 application based on the review criteria in Missoula Municipal Code ("MMC")
21 § 20.85.085(J)(1).

22 The applicants immediately appealed the HPC's decision to the
23 Defendant Missoula City Council in accordance with the procedures outlined
24 in MMC §§ 20.85.085(P) & 20.85.100. They cited the HPC's failure to take
25 timely action on the permit application, the HPC's denial of a fair hearing
26 process, and its insufficient factual findings as grounds for the appeal.

27



1 The City Council considered the appeal over the course of two months.
2 After nineteen hours of committee meetings, weighing evidence and
3 considering public comments, on July 13, 2016, the City Council's Land Use
4 and Planning ("LUP") Committee voted to sustain the appeal and authorize a
5 partial demolition permit contingent upon a signed development agreement
6 between the City and applicants. The LUP Committee forwarded its decision
7 for a full City Council vote and, at its regular meeting on August 1, 2016, the
8 City Council voted 10-1 to sustain the appeal and issue the partial demolition
9 permit. The City issued its record of decision on August 30, 2016.

10 Plaintiffs filed this action on August 30, 2016, and subsequently filed
11 two amended petitions on September 26th and October 18th.

12 SUMMARY JUDGMENT STANDARD

13 The party seeking summary judgment has the initial burden to
14 demonstrate an absence of genuine issues of material fact and entitlement to
15 judgment as a matter of law. Mont. R. Civ. P. 56(c); Bridgman v. Union Pac.
16 R. Co., 372 Mont. 124, ¶ 20, 311 P.3d 416. "The burden then shifts to the
17 non-moving party to prove by more than mere denial or speculation, and by
18 competent evidence, that a genuine issue of material fact exists." Bridgman,
19 Id. Summary judgment is particularly appropriate in cases involving review of
20 a record of decision, because the facts taken into account by the deciding
21 body are undisputed. Montco v. Simonich, 285 Mont. 280, 285, 947 P.2d
22 1047, 1050 (1997); Pennaco Energy, Inc. v. Mont. Bd. of Env'tl. Review, 2008
23 MT 425, ¶ 8 199 P.3d 191.

24 ANALYSIS

25 The Missoula Mercantile Company was a powerful component in the
26 development of Western Montana and Missoula. The building at issue here
27 was the seat of this power and an example of a frontier era shopping center



1 where people from all over the region came to obtain every imaginable item
2 needed to comfortably survive in what was pretty much a wilderness. As a
3 life-long Missoula native, the Court fondly remembers the Missoula Mercantile
4 Company continuing as *the* regional shopping center for everything for farm
5 implements, guns, tools, groceries, furniture, clothing, and almost everything
6 else well into the 1960s.

7 Because it was largely constructed in stages before the arrival of the
8 railroad, the building is an example of a frontier era brick and mortar structure
9 manually constructed by a variety of builders who used locally produced
10 materials hauled to the site by wagon. This rustic origin is at once a source of
11 its historic significance as well as the root of its current fate because it is not a
12 particularly well-built or attractive building, making it difficult and expensive to
13 utilize.

14 For the foregoing reasons, like several members of the City Council, the
15 Court has a personal sense of sadness and loss about the destruction of the
16 building that is such an important piece of Western Montana and Missoula
17 history. But the issue before the Court is not an emotional or a political one. It
18 is not even a factual dispute -- It is a purely legal issue.

19 It is well established that governments may exercise police power by
20 regulating the use of real property within their jurisdiction. Typically, this is
21 done through zoning and other land use regulations. However, the prevention
22 of destruction of privately owned buildings could potentially be a regulatory
23 taking in violation of the US and Montana Constitutions. See Lucas v. S.C.
24 Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, (1992).
25 Montana cities have authority to regulate the use and destruction of historic
26 structures. The City of Missoula has exercised this power in its zoning code
27 by the enactment of Missoula's Historic Preservation Ordinance (Ordinance),



1 §20.85.085 Missoula Municipal Code (MMC). The Ordinance provides a
2 definition of historic resource; defines a process and review criteria for historic
3 resources; and provides review criteria for demolition. The process by which
4 the City Council implemented the Ordinance is the issue before the Court for
5 review.

6 When reviewing a local government's discretionary zoning decision, a
7 district court may not "substitute its discretion for that of the [local
8 government]." Lowe v. City of Missoula, 165 Mont. 38, 44, 525 P.2d 551,
9 554 (1974) (overruled on other grounds). As such, the Court's review does
10 not include an evidentiary hearing on the merits of the decision, but is, rather,
11 limited to a review of the administrative record. See, Englin v. Bd. of Co.
12 Commrs., 2002 MT 115, ¶ 16, 310 Mont. 1, 48 P.3d 39 (a district court does
13 "not sit as a super-legislature or super-zoning board") (citations omitted);
14 Skyline Sportsmen's Assn. v. Bd. of Land Commrs., 286 Mont. 108, 113, 951
15 P.2d 29, 32 ("consideration of [extra-record] evidence to determine the
16 correctness or wisdom of [a governing body's] decision is not permitted");
17 Heffernan v. City of Missoula, 2011 MT 91, 360 Mont. 207, 255 P.3d 80
18 ("Review of the governing body's action is generally limited to the record
19 before the governing body at the time of its decision.").

20 Thus, "[a] district court . . . reviews a zoning authority's decision for an
21 abuse of discretion." Botz v. Bridger Canyon Plan. & Zoning Commn., 2012
22 MT 262, ¶ 17, 367 Mont. 472, 289 P.3d 180. This standard requires a great
23 deal more than general disagreement. An abuse of discretion only occurs
24 "when the information upon which the municipal entity based its decision is so
25 *lacking in fact and foundation that it is clearly unreasonable.*" Id. (emphasis
26 added).

27



1 Moreover, when a party challenges a governing body's "substantive
2 decision," not just "the procedure used and the sufficiency of evidence," the
3 decision is entitled to "to the presumptions of validity and reasonableness."
4 Lake Co. First v. Polson City Council, 2009 MT 322, ¶ 37, 352 Mont. 489, 218
5 P.3d 816. This is because "[t]he authority to make such determinations is
6 within the [governing body's] legislative powers, and courts are ill-equipped to
7 make them" *Id.* (citations omitted).

8 Here, Plaintiffs begin by challenging the procedure used by the City
9 Council, primarily that the City Council did not grant the HPC's decision the
10 required presumption of correctness. The Court finds that the presumption of
11 correctness is rebuttable and that the proper procedures were used by the
12 City Council. Section 20.85.085(P) MMC provides that appeals from
13 decisions of the HPC are made to the City Council in accordance with the
14 process described in §20.85.100 MMC. Section 20.85.100 MMC provides
15 that there must be a public hearing on the appeal, the decision must be
16 supported by written findings of fact, and that the City Council has all the
17 powers of the official from whom the appeal is taken and may reverse or
18 affirm the appeal in whole or in part or modify the decision being appealed;
19 basically a de novo review. When reviewing the appeal the City Council is
20 required to grant the official's decision a presumption of correctness, placing
21 the burden of persuasion of error on the appellant. Defendant City Council
22 went through each of the HPC's findings to determine if the HPC erred. (See
23 the July 13, 2016 Land Use and Planning minutes). The July 13, 2016 City
24 Council Land Use Committee did initially provide a presumption of
25 correctness review. Defendant City Council was persuaded that the HPC had
26 erred. A July 13, 2016 motion to uphold the HPC decision failed. After
27 reviewing the record, Defendant City Council determined that HPC erred, for



1 example, by not requiring the recusal of persons with conflicts of interest and
2 by making errors in over one half of its findings.

3 Of course, these determinations by the City Council required the
4 Council to make its own determinations of fact, but as noted above, in the
5 absence of evidence of arbitrary and capricious determinations courts are not
6 permitted to substitute their factual determinations for those of the trier of fact.
7 The Plaintiffs have wholly failed to produce such evidence, instead simply
8 relying on the (rebuttable) presumption of correctness and a contention that
9 one City Council member authored an e-mail saying *de novo* review was not
10 required. In fact, after determining HPC erred the City Council had all the
11 powers of the HPC and the City Council was permitted *de novo* review
12 pursuant to the provisions in Table 20.85-1 and §20.85100(G)(3) MMC.

13 Plaintiffs next argue the City Council's review "exceeded the scope of
14 Mercantile, LLC's appeal" contending the HPC's factual findings were not
15 properly before the City Council on appeal because the notice of appeal that
16 the HPC issued inaccurate findings of fact was "far too broad to give any
17 indication of those alleged inaccuracies." This argument fails because
18 Plaintiffs cite no authority for the notion that an appellant under MCC §
19 20.85.100 must specifically list, in detail, every alleged inaccurate finding of
20 fact in the notice of appeal. Indeed, the MCC is silent on what the notice of
21 appeal must contain, other than to state it should be "complete." MCC
22 § 2.85.100(C).

23 Here, there is no question the notice of appeal was complete. The
24 appellant specifically alleged three grounds for its appeal, one of which was
25 inaccurate findings of fact by the HPC, and further stated "[w]e will
26 supplement this notice of appeal as appropriate, particularly upon receiving
27 the written findings of fact." Because the notice of appeal specifically alleged



1 inaccurate findings of fact by the HPC, the City Council did not exceed its
2 authority by reviewing those findings of fact on appeal.

3 The Plaintiffs next take issue with some of the facts found by the City
4 Council when it did conduct its *de novo* review, but the record shows that the
5 factual questions involved were disputed.

6 Pursuant to §20.85.085(J)(1) MMC there are 5 criteria to be reviewed
7 when considering a historic preservation permit for demolition:

- 8 a. The applicant has consulted with the Historic Preservation
9 Commission and the State Historic Preservation Office, and made a
10 good faith effort to find an alternative that would result in the
11 preservation, renovation, or reuse of the historic resource;
- 12 b. The applicant has advertised the Historic resource for sale in a local
13 newspaper of general circulation for a period of 30 days;
- 14 c. The applicant's good faith efforts to find a purchaser interested in
15 acquiring and preserving, renovating, or reusing the historic resource
16 have failed;
- 17 d. Denying the application would prevent all reasonable economic use
18 of the property; and
- 19 e. The applicant shall provide the historical preservation officer
20 supporting documentation demonstrating that the above criteria are
21 met.

22 The Plaintiffs' main attacks focus on subsections c and d. There was
23 disagreement between the parties about the number and genuine interest of
24 potential purchasers and/or investors in the property. The City Council
25 examined the events of the six-year effort to find parties interested and able
26 to acquire, preserve, renovate and reuse the Merc. In its finding of fact, the
27 City Council found:



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2 110 N. Higgins has been listed for sale since 2013. More than 20
3 prospective buyers looked at acquiring and renovating the building
4 however it proved too costly for those prospective buyers to acquire the
5 land, renovate, abate, and incur architectural and engineering fees and
6 other related costs.¹

7 There was significant credible evidence to support this finding, and the
8 Plaintiffs have failed to show that it was made without evidence or was
9 arbitrary and capricious. The Court is required to honor the factual decision of
10 the City Council.

11 The remaining §20.85.085(J)(1) MMC fact issue before the City Council
12 concerned the economic feasibility of preserving the Merc building which,
13 according to the Plaintiffs, included the City Council ignoring the availability of
14 funds to assist the developer. In fact, there was testimony submitted to the
15 City Council that the purported other funds were not available.² Once again,
16 this Court cannot substitute its judgment for that of the trier of fact regarding
17 disputed facts.

18 Finally, the Plaintiffs contend that the City Council's decision violates
19 the Missoula Downtown Master Plan ("DMP").

20 Plaintiffs claim the "DMP provides for historic preservation as one of its
21 central goals," and that the "City Council erred by not giving deference to the
22 goals of historic preservation in the [DMP]." (Second Amend. Pet., ¶¶ 23–
24.)

23 Montana Code Annotated § 76-1-601(4)(a) provides that "[a] growth
24 policy may . . . include one or more neighborhood plans," which "must be
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27 ¹ See minutes from July 13, 2016, Exhibit # 4 to City Council's Brief in Support of Summary Judgment, ("City Brief"), July 27, 2016, Exhibit # 5 City Brief, and August 1, 2016, Exhibit # 6, City Brief, as well as the City Council's Findings of Fact and Conclusions of Law for a Demolition Historic Preservation Permit application for 110 North Higgins Avenue, Exhibit # 7, City Brief



1 consistent with the growth policy.” A “‘growth policy’ means a comprehensive
2 development plan, master plan, or comprehensive plan.” Mont. Code Ann.
3 § 76-1-103(4). A “‘neighborhood plan’ means a plan for a geographic area
4 within the boundaries of the jurisdictional area that addresses one or more of
5 the elements of the growth policy in more detail.” Montana Code Ann. § 76-1-
6 103(8). Neighborhood plans are part of a jurisdiction’s growth policy.

7 Local governments are required to “substantially comply” with growth
8 policies and associated neighborhood plans when making planning and
9 zoning decisions. See Heffernan v. City of Missoula, ¶¶ 77–78 (“All facets of
10 the proposed land use must be considered to determine whether, taken
11 together, they comply not strictly, but substantially with the goals, objectives,
12 and recommendations in the growth policy.”); Helena Sand & Gravel, Inc. v.
13 Lewis & Clark Co. Plan. & Zoning Commn., 2012 MT 272, ¶ 17, 367 Mont.
14 130, 290 P.3d 691; Mont. Code Ann. § 76-2-304(1)(a) (“Zoning regulations
15 must be . . . made in accordance with a growth policy.”). At the same time,
16 local governments are prohibited from ignoring portions of a growth policy
17 applicable to a planning or zoning decision. See Heffernan, ¶ 90; see also
18 North 93 Neighbors, Inc. v. Bd. of Co. Commrs., 2006 MT 132, ¶ 29–30, 332
19 Mont. 327, 290 P.3d 691 (the governing body must set forth its reasoning with
20 respect to all facets of a decision in order to avoid “judicial intrusion into
21 matters committed to administrative discretion by the legislature,” and to
22 prevent a court from “having to substitute its own judgment for the [governing
23 body’s] judgment”).

24 The DMP was adopted in 2009 as a plan for a comprehensive,
25 balanced-center strategy for strengthening and expanding downtown
26

27 ² See City Council’s Findings of Facts and Conclusions of Law, attached as Exhibit #7 City Brief, at pages 20
– 22, items 1.d.26 – 1.d.36.



1 Missoula's role as the economic and cultural heart of the community." The
2 DMP is a 120-page document attached as Exhibit 7 to the Plaintiff's Brief in
3 Support of Summary Judgment. The DMP recognizes preservation as a
4 general goal:

5 "[p]reservation of buildings and development patterns
6 characteristic of Missoula's downtown neighborhoods
7 is critical to maintaining the local community identity."

8 When the DPM was adopted Macy's occupied the Merc building and
9 the DPM specifically calls for a:

10 "... retail hot spot focused along Higgins Street
11 between Front and Broadway, expanding the
12 downtown's 'Main Street' shopping pattern to foster a
13 vibrant, 18-hour downtown." [The retail hot spot]
14 "preserves and strengthens Macy's, or any other
15 future anchor use on this site, as a fundamental
16 component of the framework."

17 The Plaintiff's specific objection is that the City Council violated these
18 provisions calling for a "retail hot spot" and "preservation of buildings" by
19 approving a demolition permit for the Merc and the construction of a hotel in
20 its place.

21 While it is true that the DMP envisions a "retail hot spot" at the Merc
22 location and does have a general goal to preserve historic buildings, these
23 provisions are only two of numerous aspirational objectives listed in the DMP.
24 These include a purpose to have a "comprehensive, balanced-center strategy
25 for strengthening and expanding downtown Missoula's role as the economic
26 and cultural heart of the community." The plan states that it "reflects and
27 strengthens Missoula's historic character; respects the city's Rocky Mountain
setting; is consistent with the community's economic, sustainability, and



1 cultural values and builds on past successful investments.” The stated
2 objective of the plan is “support[ing] development in downtown that has a
3 positive fiscal impact for the community and encourages compatible reuse
4 and redevelopment of vacant sites, vacant buildings, and historic buildings as
5 a priority over outward expansion.”

6 The City Council was tasked with proportionately balancing these
7 objectives, and by not singling out two objectives to the exclusion of others,
8 appears to have done so. Moreover, once more in the absence of proof of
9 arbitrary and capricious action, the Court is prohibited from entering its own
10 assessment over that of the legislative body empowered to make the
11 balancing decisions.

12 The City Council exercised reasonable discretion in this matter. In the
13 preamble to its findings of fact and conclusions of law, the City Council
14 specifically stated its “priority [was] neither historic preservation nor economic
15 development but rather the overall wellbeing of the Missoula community,
16 which includes a fair and transparent government that follows its own
17 ordinances and policies, and which in this case results in both preservation of
18 its historic character and economic vitality.” The City Council noted the
19 growth policy’s call for maintaining the downtown “through the perspective of
20 livability, economic development, community design and housing,” and “does
21 not rank the various perspectives by priority, but rather sees them as mutually
22 supportive.” The City Council concluded:

23 It is clear from the [DMP], the City’s zoning ordinance,
24 and public sentiment that preserving Missoula’s
25 historic character as well as encouraging and allowing
26 for economic development are priorities for the
27 community. The final outcome of the Demolition
Historic Preservation Permit application process seeks
to honor both these primacies. Council authorized a



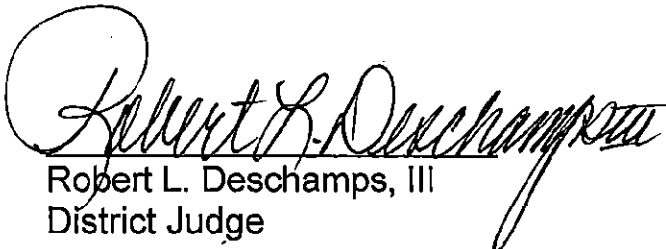
1 partial Demolition Historic Preservation Permit to the
2 new developer that preserves a portion of the façade
3 called The Pharmacy through a negotiated design that
4 reflects the downtown historic character.³

5 The above excerpts evince a weighing of the relevant factors and a
6 conclusion that issuing the partial demolition permit, subject to an agreement
7 preserving the Pharmacy portion of the Mercantile building, best served the
8 multiple goals and objectives outlined in City planning documents. The City
9 Council recognized the importance of historic preservation, both in the
10 abstract and as articulated in the growth policy and DMP, and balanced it with
11 the need to maintain a robust and active downtown economy.

12 Based on the foregoing, Defendant's Motion for Summary Judgment is
13 **GRANTED**. Because of the Court's findings on the above matters, the
14 remaining issues before the Court are deemed moot.

15 Dated this 17th day of January, 2017.

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Robert L. Deschamps, III
District Judge

cc: Michael Doggett
City Attorney Nugent/Firth
Allan McCormick
Natasha Prinzig
James Bowditch

³ (page 4, City Council Findings of Fact, Conclusions of Law, (Ex. 7, City Brief) (emphasis added)).

