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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

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| JEFF BECK, individually; AMY WEINBERG, individually; ZAC WEINBERG, individually; ALTA VIEWS, LLC; RIVERVIEW COMPANY, LLC; and on behalf of a class of similarly situated persons and entities,<br><br>Plaintiffs,<br><br>vs.<br><br>CITY OF WHITEFISH, a Montana municipality, and DOES 1-10,<br><br>Defendants. | CV-2022-44-M-KLD<br><br>**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF CLASS CERTIFICATION MOTION** |

CITY OF WHITEFISH, a Montana municipality,

Third-Party Plaintiff,

vs.

FINANCIAL CONSULTING SOLUTIONS GROUP, INC.,

Third-Party Defendant.

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COME NOW Plaintiffs, and respectfully submit their Reply Brief in Support of Class Certification Motion.

## ARGUMENT

### I. The Class includes all persons who owned properties and bore the cost of the City's water or wastewater impact fees under rates effective January 1, 2019, to the present.

In their class certification motion, Plaintiffs asked the Court to define the Putative Class ("Class") as: "Any and all persons or entities who paid impact fees for water and wastewater services to Defendant City of Whitefish ('the City') from January 1, 2019, to the present." (Doc. 39 at 2.) The City and Third-Party Defendant Financial Consulting Solutions Group, Inc. ("FCS") (collectively the "Opposition") interpret this definition as encompassing anyone who transmitted impact fee payments to the City after January 1, 2019. This is incorrect.

While some impact fee payments may have been delivered to the City by third parties on behalf of property owners, the Class encompasses any property owner who actually bore the cost of improperly assessed impact fees. Put another way, the Class includes all persons or entities who owned properties for which they bore the cost of impact fees paid to the City for water or wastewater services under rates effective January 1, 2019, to the present. Aside from the City and a handful of others who paid fees under pre-2019 rates, this Class includes, but is not limited to, everyone identified in the list attached to Plaintiffs' opening brief. (Doc. 40-3). If the City's impact fee scheme violates the Constitution and Montana law, the Class members are entitled to the damages claimed in this case.

Regardless, the Court's grant or denial of Plaintiffs' motion does not turn solely on the Class definition offered in their opening brief. On the contrary, if the Court determines Plaintiffs' proposed definition needs tailoring, it may adopt one with different language. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (A "trial court has broad discretion to certify a class, [if] exercised within the framework of Rule 23"). With this in mind, class action procedure is specifically designed for class flexibility, even after an initial certification order. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 593 (1997) (Baked into Rule 23's procedure is "the [Court's] opportunity to adjust the class as litigation unfolds."); Fed. R. Civ. P. 23 (c)(1)(C) ("An order that grants or denies

class certification may be altered or amended before final judgment."). Plaintiffs seek certification of the class of persons actually harmed by the City's unlawful conduct. As such, the Court should adopt an appropriate definition of the individuals or entities comprising that group, even if it takes issue with Plaintiffs' proposed definition.

## II. All Class members have standing.

The Opposition contends some Class members lack standing. This is not true. To possess Article III standing, a person must have: (1) suffered a concrete and particularized injury in fact; (2) fairly traceable to the defendant's actions; (3) that can be "redressed by a favorable decision." *California Sea Urchin Comm'n v. Bean*, 883 F.3d 1173, 1180 (9th Cir. 2018). The Opposition does not specifically challenge application of any of these elements. Instead, the crux of the Opposition's standing argument is that some of the Class members lack standing because they are ineligible for impact fee refunds under Mont. Code Ann. § 7-6-1603(1)(c) (2021) ("§ 1603(1)(c)"). As explained below, not only is the Opposition's interpretation of § 1603(1)(c) improper, but that statute has no bearing on a standing analysis in this case.

### A. Standing must be determined without examining § 1603(1)(c).

The Class seeks to bring monetary damage claims for: (1) violation of 42 U.S.C. § 1983 ("§ 1983"); (2) negligence *per se*; (3) negligence; and (4) negligent

misrepresentation. (*See generally* Doc. 1.) The Class's entitlement to damages for these claims does not rise or fall on application of § 1603(1)(c).

Consider the Class's § 1983 claim, for example. The Fifth Amendment (rendered binding on the states through the Fourteenth Amendment) forbids the government from forcing private property owners "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960). In the monetary exactions context, a taking occurs when the government conditions land-use permits on monetary payments without "an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property." *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013).

The injury-in-fact necessary to confer standing occurs, of course, at the time an unconstitutional taking occurs. *Koontz* confirms this understanding, providing the type of constitutional injury complained of in this case is suffered by the property owner whose desired land use is extortionately conditioned on payment of arbitrary or disproportionate fees. 570 U.S. at 607. This Court has recognized as much, stating, "in this case, Plaintiffs allege that, in conditioning grants of building permits on the payment of excessive impact fees grossly disproportionate to the actual impact of proposed developments, the City has subjected Plaintiffs to deprivations

of their rights under the Fifth Amendment." *Beck v. City of Whitefish*, 2023 WL 1068239, at *5 (D. Mont. 2023).

This presents "a cognizable violation of the Takings Clause." *Beck*, 2023 WL 1068239, at *6. And, if successful, the remedy is monetary damages, without examination of § 1603(1)(c). *See Knick v. Township of Scott, Pa.*, ___ U.S. ___, ____, 139 S.Ct. 2162, 2177 (2019) (holding that a takings violation may be "remedied by monetary damages" obtained under "§ 1983" and "is complete at the time of the taking," regardless of any "subsequent state action"). In other words, the Class does not need to be eligible for a "refund" from the City pursuant to § 1603(1)(c) to receive damages for an unconstitutional taking. This analysis applies with equal force to the Class's remaining causes of action seeking monetary damages under state law tort theories which may be awarded irrespective of any refund provision found in § 1603(1)(c).

Oddly, it is exactly who the Opposition claims is eligible for refunds—people who currently own affected properties but who did not own such properties at the time the unlawful impact fee collections occurred—that would lack standing to prosecute the claims at issue in this case. *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1118–19 (9th Cir. 2015) (explaining general rule that a party "cannot rest his claim to relief on the rights or interests of third parties," but must instead "assert his own legal rights and interests"). If a current owner did not bear the cost of the

unlawful impact fee then they cannot advance the constitutional claim of the previous owner that did. *Id.* Regardless, as explained below, § 1603(1)(c) requires that refunds be paid to the Class members, whether they currently own the impacted properties or not.

**B. Section 1603(1)(c) requires payment of refunds to the person that owned the property at the time the impact fees were unlawfully collected.**

Montana law authorizes local governments to charge impact fees if they are established, calculated, imposed, and collected in accordance with enumerated criteria and limitations. *See* Mont. Code Ann. § 7-6-1602. In Montana, impact fee amounts must be reasonably related and proportionate to a development's share of the cost of the infrastructure improvements. Mont. Code Ann. § 7-6-1602(7)(a)-(b). Notably, Montana's impact fee statute provides a refund mechanism for improperly charged impact fees, stating:

> If the impact fees are not collected or spent in accordance with the impact fee ordinance or resolution or in accordance with 7-6-1602, any impact fees that were collected must be refunded to the person who owned the property at the time that the refund was due.

Mont. Code Ann. § 7-6-1603(1)(c). Because the refund becomes due at the time the impact fees are improperly assessed, § 1603(1)(c) requires that refunds be paid to the owners that were improperly charged. Montana's principles of statutory interpretation confirm this.

The most important step in statutory interpretation is to "ask whether the interpretation reflects the intent of the legislature considering the plain language of the statute." *Bostwick Props., Inc. v. Dept. of Nat Res. & Conserv.*, 296 P.3d 1154, 1159 (Mont. 2013). "In the search for plain meaning, the language used must be reasonably and logically interpreted, giving words their usual and ordinary meaning." *Houston Lakeshore Tract Owners Against Annexation v. City of Whitefish*, 391 P.3d 86, 89 (Mont. 2017).

To reach a logical plain language interpretation, it is necessary to determine exactly when § 1603(c) applies. By its plan language, this provision is triggered when "impact fees are not collected . . .in accordance with . . . [§] 7-6-1602." That statute sets forth the criteria that governmental entities "must comply with" when collecting impact fees in Montana. So, if a governmental entity unlawfully assesses and collects impact fees under § 7-6-1602, § 1603(1)(c)'s refund provision, by its own terms, is triggered. Once § 1603(1)(c) is triggered, its plain language requires "any impact fees that were collected . . . be refunded." Accordingly, when impact fees are unlawfully assessed and collected, a governmental entity has an obligation to refund the unlawfully collected fees, and the intended recipient of the refund is "the person who owned the property at the time that the refund was due." Put simply, "[t]he time a refund was due" is just another way to describe the moment an obligation to refund arose.

If the City has no legal right to the impact fees it collects, a refund is due the second it is collected. Ironically, the Opposition accuses Plaintiffs of inserting language into § 1603(1)(c) that is not there, yet that is exactly what their interpretation does. If, as the Opposition suggests, refunds are truly due when they are discovered or adjudicated as unlawful, the legislature would have simply written that refunds go to the "current property owner" or "the property owner at the time that the refund is paid" or even "the property owner at the time a court determines there was an overcharge." However, § 1603(1)(c) includes none of this language.

Contrary to the City's contentions, there is significant legal authority supporting Plaintiff's interpretation—the literal plain language of § 1603(1)(c). In contrast, the Opposition's authorities do not actually support its § 1603(1)(c) interpretation because none deal with the same statutory language or circumstances at issue here. *K.L.N Constr. Co. v. Town of Pelham*, 107 A.3d 658 (N.H. 2014) and *Town of Londonberry v. Mesiti Dev. Inc.*, 129 A.3d 1012 (N.H. 2015) both dealt with "entitlement to a refund of *legally assessed*, but unspent or unencumbered, impact fees." *Town of Londonberry*, 129 A.3d at 1016 (emphasis added). The Texas statute at issue in *Desoto Wildwood Dev., Inc. v. City of Lewisville*—which the Opposition describes as "similar" to § 1603(1)(c)—*specifically* required refunds "be made to the record owner of the property at the time the refund is *paid*." 184 S.W.3d 814, 821 (Tex. App. 2006) (emphasis added) (quoting Tex. Loc. Gov't Code Ann. §

395.025(e)). Finally, the Court in *Raintree Homes Inc. v. Vill. of Long Grove* did not interpret any statutory language but rather considered a builder's standing to seek refund of impact fees delivered to a local government for a particular lot when the builder specifically testified to transferring that cost to the lot owner, increasing the contract price by the exact amount of impact fees paid. 807 N.E.2d 439, 447-48 (Ill. 2004).

Here, Plaintiffs challenge the constitutional and legal deficiencies within the City's calculation, assessment, and ultimate collection of impact fees. (*See generally*, Doc. 1.) Even Plaintiffs' allegations concerning "phantom, ineligible, and improperly calculated" projects contend these projects could not "be lawfully included in calculating appropriate impact fee rates" in the first place. (Doc. 1 at ¶¶ 29, 32.) In short, these projects should have never been part of its impact fee charges. When the City's fee rates were determined, the projects were either ineligible for inclusion as unrelated to development impacts or far too preliminary to genuinely reflect "reasonable estimates of the cost to be incurred by the governmental entity as a result of new development." (*See* Doc. 1 ¶¶ 58-59 (citing Mont. Code Ann. §§ 7-6-1602(5), (7)).)

Impact fees collected to pay for such projects identified in Plaintiffs' allegations were not collected in accordance with § 7-6-1602 and should never have been collected in the first place. The City's decision to abandon a project has nothing

to do with when a refund is actually due. Instead, abandoned projects merely bolster Plaintiffs' argument that the City had no genuine, reasonable basis for believing such projects were "made necessary by . . . new development." Mont. Code Ann. § 7-6-1602(7)(a). The City could not abandon truly necessary projects without affecting its ability to allow future development. For example, the City has abandoned the Solar Array project, yet development within the City remains uninhibited by this decision. Accordingly, the Opposition's suggestion that the logical, plain meaning interpretation of § 1603(1)(c) does not square with Plaintiffs' allegations misconstrues Montana law, Plaintiffs' allegations, or both.

Another important step in the interpretative process is to "examine whether the interpretation comports with the statute as a whole." *Bostwick Props., Inc.*, 296 P.3d at 1159. "Indeed, statutes do not exist in a vacuum, [but] must be read in relationship to one another to effectuate the intent of the statutes as a whole." *Maier v. State*, 69 P.3d 1194, 1197 (Mont. 2003). Interpreting § 1603(1)(c) within the greater context of Montana's impact fee statutory scheme, it is clear the legislature intended for refunds to be returned to the property owners who were charged unlawful impact fees, consistent with the constitutional implications of monetary exactions.

For starters, the "reasonable relationship" and "proportionate share" language of § 7-6-1602 both track the essential nexus/rough proportionality constitutional

standard applicable to government exactions. *See Dolan v. City of Tigard*, 512 U.S. 374, 390-91 (1994) (discussing the "reasonable relationship test" adopted by a majority of state courts). "The Legislature is presumed to be aware of all of its enactments as well as all related constitutional duties and limitations." *Clark Fork Coal. v. Dep't of Nat. Res. & Conservation*, 481 P.3d 198, 222 (Mont. 2021). As already discussed, the constitutional concern of the Takings Clause is a property owner's rights *at the time* a government takings occurs. Montana's impact fee statutes, on the whole, clearly illustrate legislative intent for government entities to comply with their constitutional obligations in assessing and collecting impact fees.

When viewed in this context, § 1603(1)(c)'s place in Montana's impact fee framework is to provide an alternative remedial mechanism for rectifying injuries suffered by the public due to a local government's unlawful actions. The injury, of course, is inflicted on the person who bears the cost of the fee, not a subsequent owner. Because "it is paramount" a court interprets statutes to preserve constitutional rights, *In re A.R.R.*, 919 P.2d 388, 391 (Mont. 1996), § 1603(1)(c) must be read to establish refunds are due at the time the impact fees are lawfully charged. Consequently, presuming § 1603(1)(c) bears on the Class's standing, its plain meaning requires that refunds be paid to the owner of the property aggrieved by the unlawful action giving rise to the refund.

## III. The Class's claims are timely.

As a matter of law, Mont. Code Ann. § 27-2-209(5)'s six-month limitations period is inapplicable to the claims in this action. As such, the Class's claims are timely.

**A. Plaintiffs' § 1983 claims are timely.**

Under binding Supreme Court precedent, *any* claims brought under § 1983 must borrow the applicable state's tort statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 271-76 (1985). When a state has multiple statutes of limitations for certain enumerated torts and a residual statute for all other tort actions, the residual statute of limitations applies to *all* § 1983 claims. *Owens v. Okure*, 488 U.S. 235, 236 (1989). A short statute of limitations—like the six-month limitation found at § 27-2-209(5)—is inappropriate in federal civil rights litigation because it "ignores the dominant characteristic of civil rights actions: they belong in court." *Burnett v. Grattan*, 468 U.S. 42, 50 (1984).

The Opposition's suggestion that § 27-2-209 somehow applies to the Class's § 1983 claims is simply unfounded. Section 1983 "guarantees 'a federal forum for claims of unconstitutional treatment at the hands of state officials,'" and takings plaintiffs have no less of a right to the federal forum than any other § 1983 claimant. *Knick*, 139 S.Ct. at 2167 (quoting *Heck v. Humphrey*, 512 U.S. 477, 408 (1994). Accordingly, the only aspect of state law borrowed in adjudicating Plaintiffs' § 1983 claims is Montana's general tort statute of limitations.

Montana's general tort statute of limitations is three years. Mont. Code Ann. § 27-2-204(1). Additionally, "[a]lthough federal courts borrow state statutes of limitation in actions arising under 42 U.S.C. [§] 1983, the date on which the cause of action accrues is determined by federal standards. The time of accrual under federal law is when the plaintiff knows or has reason to know of the injury which is the basis for the action under 42 U.S.C. [§] 1983." *Harvey v. Pomroy*, 535 F.Supp. 78, 81 (D. Mont. 1982). Accordingly, Plaintiffs' § 1983 claims are not barred if brought within three years of when they knew or had reason to know of the constitutional deficiency of the City's impact fees.

Plaintiffs did not know or have reason to know the impact fees the City demanded of them were unrelated to or unattributable to their proportionate share of the cost of infrastructure improvements made necessary by development until a private Whitefish citizen, Paul Gillman, performed an extensive factual investigation into the evidence the City had for: (1) the impacts of development on public water and wastewater facilities in the City; (2) the capacity, cost, and other features of infrastructure improvements the City had "planned" for the future; and (3) the validity of certain processes, e.g., counting fixture units, the City used in administering impact fees.

During his investigation, Mr. Gillman requested information and documents from the City and discovered a plethora of potential issues with the City's impact

fee rates and fee administration. The results indicated the City's fees greatly exceed *any* development's actual proportionate share of costs for necessary infrastructure improvements. Mr. Gillman presented his findings to the City in the fall of 2021, and the City admitted to assigning the wrong fixture unit weighting factor to standalone showers but denied there was any validity to the rest of Mr. Gillman's findings. The first public mention of Mr. Gillman's investigation occurred at a September 20, 2021 public meeting of the Whitefish City Council where City Council members declined to address or further look into Mr. Gillman's findings outside of the standalone shower fixture unit issue. (*See* Sept. 20, 2021 Meeting Minutes of the Whitefish City Council attached hereto as Exhibit 1 at 6-7; Sept. 20, 2021 Excerpt from the City Council Meeting packet attached hereto as Exhibit 2; *see also* Doc. 75-11 at 1-2.)

Legally, "[t]here is a well[-]recognized presumption that a public officer has performed his legal duty and that his proceedings are regular and legal." *First Nat. Bank in Billings v. First Bank Stock Corp.*, 197 F. Supp. 417, 424-25 (D. Mont. 1961) (citing *U.S. v. Crusell*, 81 U.S. 1, 4 (1871)). In Montana, this presumption is codified. *See* Mont. Code Ann. § 26-1-602(15) (There is a disputable evidentiary presumption that "[o]fficial duty has been regularly performed."). Just like anyone else, Class members were entitled to presume City officials had legally performed their duties and determined impact fee rates reasonably related and proportional to

their developments' impacts on the City's public facilities, in accordance with the Constitution and Montana law.

Mr. Gillman's investigation into the City's impact fee rates went well beyond the reasonable exercise of diligence expected of members of the general public who paid fees the City required to develop property. Plaintiffs did not know or have reason to know of certain facts giving rise to their injuries until Mr. Gillman presented the public with evidence controverting their justified presumption that the City dealt with them legally, prompting Plaintiffs to undertake their own investigation, revealing their entitlement to redress for constitutional and legal harm. Accordingly, Plaintiffs did not know or have reason to know of their injuries at least September 20, 2021. Plaintiffs brought their § 1983 claim to this Court on February 24, 2022, well within the requisite three-year period from their actual or constructive knowledge of injury.

**B. Plaintiffs' state law claims are timely.**

Section 27-2-209(5)'s six-month statute of limitations applies when a property owner seeks to overturn a municipality's denial of a proposed land use. The Montana Supreme Court has applied much longer limitations periods in cases involving a municipality's duties to a property owner arising subsequent to a land use decision. *See Carl v. Chilcote*, 844 P.2d 79, 83 (Mont. 1992) (applying Mont. Code Ann. § 27-2-207's two-year statute of limitations to a plaintiff's claims against

the City of Missoula for negligence in supervising and inspecting a construction project it had permitted).

Here, Plaintiffs' state law claims sound in negligence and arise out of the City's breach of the duties it owed to Plaintiffs and the intended Class members in its assessment and collection of impact fees. *See generally* (Doc. 1 ¶¶ 51-79). When the City assessed impact fees on development within its jurisdiction, it assumed certain duties specific to that undertaking, including a continuing duty to refund any fees it unlawfully collects. Plaintiffs are not seeking to overturn the City's decisions to permit the development of their properties. Instead, Plaintiffs request relief in the form of "compensation for the unlawful, unconstitutional, and improper impact fees" they and the Class bore, consistent with the City's obligation to refund under § 1603(1)(c). (*See* Doc. 1 ¶ 4).

Here, the Opposition failed to cite any applicable authority to support its contention that Mont. Code Ann. § 27-2-209(5)'s six-month statute applies to the Class's claims. The imposition of an exaction is different from a traditional "land use decision." With the former, the government permits a land use upon its receipt of property (such as money) instead of simply deciding whether to permit or deny the use. With respect to the latter, the government has no continuing constitutional duties to a property owner once it decides to allow the proposed use.

With exactions, even after a permit is issued, the government may still have a constitutional duty to provide just compensation for what it received from the property owner if the exaction fails to meet the essential nexus/rough proportionality standard. Constitutionally, the government cannot just keep the property it collected without returning the unconstitutional excess. These constitutional considerations associated with exactions are exactly what the refund mechanism provided for in § 1603(1)(c) contemplates and what § 27-2-209(5)'s short statute of limitations does not.

After impact fees are paid and a permit is issued, § 27-2-209(5) no longer applies—there is no "written decision" on a "land use, construction, or development project" for a court to review, and the property owner is free to move forward with the project. Still, a municipality's duties to the property owner may persist, and, just as in *Carl*, when a property owner seeks redress for a municipality's failure to uphold its duties beyond merely saying "yes" or "no" to a proposed land use, the land use statute of limitations becomes inapplicable.

Montana's impact fee statutes provide no statute of limitations within which a plaintiff is to bring claims for refunds of unlawfully collected impact fees. Section 1603(1)(c) certainly puts "an obligation or liability, other than a contract, account, or promise, not founded upon an instrument writing" on a local government to refund such fees, to which § 27-2-202(3)/§ 27-2-204(1)'s three-year limitations period

applies. Consistent with § 1983 claims, constitutional torts in Montana "are subject to the three-year statute of limitations set forth in § 27-2-204(1)," Montana's general tort statute. *Belanus v. Potter*, 394 P.3d 906, 910 (Mont. 2017). At the very least, the applicable period might be two years from discovery of the facts constituting Plaintiffs' claims under Montana's statute of limitations for injury to real or personal property. Mont. Code Ann. §§ 27-2-207 (1), 27-2-102(3). As discussed, Plaintiffs brought their state claims to this Court on February 24, 2022, well within any potentially applicable limitations period from their actual or constructive knowledge of injury on September 20, 2021.

## IV. Due to the City's uniformity in assessing and administering impact fees, common questions heavily predominate in this action.

Because the City treated the entire Class the same in its assessment and collection of impact fees, the Class is "sufficiently cohesive to warrant adjudication by representation." *Wang v. Chinese Daily News*, 737 F.3d 538, 545 (9th Cir. 2013). As such, adjudication of the constitutionality and legality of the City's impact fee framework will achieve judicial efficiency and economy on a Class-wide basis.

### A. The entire Class suffered the same harm and have the same claims arising from the same set of operative facts.

"The City imposes impact fees as part of the development approval process for *all* developments, remodels, and renovations." (Doc. 27 at 2 (emphasis added).) The City's development approval process was applied uniformly across the Class

and is the source of every operative fact giving rise to the claims asserted in this matter. With respect to the negligent misrepresentation claim, for example, as part of the development approval process, the City provides every building permit applicant an invoice of impact fees that must be paid *before* the City will issue a permit. (*See, e.g.,* Water & Wastewater Impact Fee Invoice for 754 Cottonwood Court attached hereto as Exhibit 3.) Inherent in such representations is the City's authority to prevent the proposed development if the applicant does not pay the required fees. Again, citizens must presume the City acts within its legal authority, so the fact that an applicant actually paid the impact fees is prima facie evidence that the applicant justifiably relied on the City's representation. The entire Class bore the cost of the challenged impact fees and suffered the same injury based on the City's negligent misrepresentations.

Likewise, the entire Class suffered the same negligence, negligence *per se*, and takings injuries caused by the City's failure to charge impact fee rates in accordance with Montana law and the Constitution. Again, all of the operative facts for these claims arose out of the same development approval process applied to every property owner who paid impact fees. The City said it best:

> Here, the [City's] impact fees derive from legislative ordinances that broadly apply to the general public seeking to develop their property. *See* § 7-6-1601, MCA, et seq.; WCC § 10-2-1, et seq; Resolutions [18-44 and 19-15]. *They are uniformly calculated based on a preset framework specified in the ordinances and Resolutions, rather than discretionary decisions for individual landowners*.

(Doc. 27 at 9 (emphasis added).) The predominant issue common to the Class is whether that "preset framework" by which the City's water and wastewater impact fees "are uniformly calculated" complies with the constitutional and legal limitations placed on local governments assessing impact fees. It is disingenuous to now suggest, with class certification on the line, that issues within that preset framework are individualized to certain Plaintiffs or Class members.

**B. There are no difficulties in managing the claims at issue on a Class-wide basis.**

The City's own words explain why class certification in this matter is appropriate—in its impact fee rate determination and assessment, the City makes no "discretionary decisions for individual landowners." (*Id.*) Likewise, adjudication of this matter can occur on a class-wide basis because it requires no discretionary decisions for individual Class members.

When the government conditions land use permission on its receipt of property, it must provide analysis to justify that decision. *Dolan*, 512 U.S. at 394-95. The government carries the burden of demonstrating that the impacts of the proposed land use reasonably relate to what it exacts from the property owner. *Id.*, at 395 ("[T]he city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle

pathway easement."). Montana's impact fee statutes reflect this principle, requiring any local government charging impact fees to prepare a "service area report" in accordance with the criteria enumerated in § 7-6-1602. These reports serve as the findings supporting the amounts a government can reasonably charge new development for impacts to its facilities, and its officials are to administer the fees in accordance therewith. *Id.* Here, all Class claims arise out of the City's findings for water and wastewater rate amounts and its non-discretionary administration of the fee rates.

To illustrate, Resolutions 18-44 and 19-15 contain impact fee collection charts setting out the City's water and wastewater impact fee rates since January 1, 2019. (Doc. 40-1 at 3-4; Doc. 40-2 at 3-4.) The bases for these charts are two documents entitled: (1) the "Impact Fee Update" issued August 7, 2018; and (2) the "Addendum to 'Impact Fee Update'" issued November 6, 2018 ("Update Addendum").[1] (Doc. 76-1; Addendum to "Impact Fee Update" attached hereto as Exhibit 4.) The Impact Fee Update was authored by FCS and was intended by the City to function as its service area report for charging impact fees. The Update Addendum was authored by a City Staff member to addend the water fee section of FCS's original report.

[1] The Opposition misstates the facts, claiming that the Update Addendum prepared by a City Staff member was issued after January 1, 2019, and was not a basis for the City's impact fee rates until September 1, 2019. (Doc. 75 at 34). The Update Addendum was specifically referenced in Resolution 18-44, which was enacted on November 19, 2018. (*See* Doc. 40-1 at 1).

The overarching goal of these two documents was to analyze features of the City's water and wastewater systems and determine "maximum defensible" impact fee rates the City could theoretically charge while meeting its obligations under the law. *See* (Doc. 76-1 at 9-10; Ex. 4 at 3.) A number of critical flaws in these documents resulted in inflated "maximum defensible" rates that, in turn, permeated Resolution 18-44's and Resolution 19-15's collection charts, causing unconstitutionally excessive impact fee rates in Whitefish. Except for the shower fixture unit issue which was a flaw in the City's administration of fees, each "individualized issue" referenced by the Opposition is a flaw in the reports supporting the City's impact fee rates. As such, resolving Plaintiffs' claims would identify maximum water and wastewater impact fee rates reflecting amounts reconcilable with the Constitution and Montana law.

For example, if it was unlawful for the City to consider the Solar Array project in determining impact fees, the project cannot be included in calculating lawful maximum wastewater rates. Comparing new, lawfully-calculated maximum wastewater rates with those in the City's collection charts demonstrates overcharges due to errors, such as the Solar Array's unlawful inclusion in the original calculations. Notably, some issues inflated both water and wastewater impact fee rates simultaneously—for example, the City's vast overestimation of the impacts an "equivalent residence unit" (indicated by the City's reports and collection charts as

a building in Whitefish with a 3/4-inch meter) has on its water and wastewater systems. (Doc. 76-1 at 11-20.)

Upon determining rates reflecting development's reasonably proportionate share of the water and wastewater facility costs incurred by the City, lawful impact fees charges could be calculated for each Class member (utilizing proper fixture unit weighting). Each class member's damages would then be measurable as the difference between what they actually paid in impact fees and what the City could have lawfully charged. Through discovery, the City has provided information on: (1) what each intended Class member paid; (2) the date impact fees were paid; (3) the address of each property for which impact fees were paid; (4) the size of water meter on each affected property; and (5) the planned fixture counts used by the City to determine impact fee charges for each affected property. In counting planned fixtures to determine impact fee charges, the City would use the building plans submitted to it as part of the development approval process. The City is still in possession of these plans. Thus, showing Class-wide injury is far from the "involved inquiry for each person" as argued by the Opposition. Calculating overcharges in the same exact way the City originally decided to charge impact fees is actually quite straightforward.

Here, the City carries the burden of demonstrating that the impacts of a proposed land use reasonably relate to what it exacts from the property owner.

*Dolan*, 512 U.S. at 395. The factors within the City's impact fee calculations are "the findings on which the [C]ity relie[d]" for charges to a given development. *Id.*, at 394-95. Any suggestion by the Opposition that a more involved inquiry than the City's own method for calculating impact fees is required to prove Class-wide injury improperly seeks to shift the City's burden onto the Class. For example, to show Class-wide injury, Plaintiffs cannot be required to unquestionably prove the fixtures *currently existing* on every single property at issue when the *City* determined the building plans were sufficient to make its findings in the original calculations.

Class-wide injury can be proven through showing the City's methods, as-applied to every Class member, did not reflect an essential nexus/rough proportionality finding on which it could reasonably rely. Thus, there is sufficient cohesion to adjudicate liability and injury Class-wide, in furtherance of justice and judicial economy.

## V. The Opposition's arguments against superiority and numerosity are disingenuous and meritless.

The Opposition advances multiple arguments with respect to superiority and numerosity, none of which are prevailing.

### A. The City's "voluntary resolution" of the fixture count issue is an inadequate remedy.

Improper fixture unit weighting is a small, but not insignificant, issue challenged by Plaintiffs in this lawsuit. In the City's "ongoing, self-imposed refund

efforts" for fixture unit discrepancies, the City seeks to provide potential "refunds" to current property owners but only if the property owners agree to subject themselves to City inspections of their property. (Doc. 75-12.) Setting the legal issues regarding who should receive any payments aside, the City's "efforts" have been ongoing for over a year and to Plaintiffs' knowledge "refunds" have yet to be made. (*See* Whitefish Impact Fees Frequently Asked Questions attached hereto as Exhibit 5.)

If the City's inspection of the Weinbergs' property is any indication, the City's inspection and "refund" process is more retaliatory than remedial in nature. Somehow, after the City inspected the Weinbergs' property as part of this litigation, the City decided the Weinbergs actually owe it about $1,200 more in impact fees. There are many significant issues in the City's determination of undercharge to the Weinbergs, the most obvious of which is the City's identification of six extra fixture units it "did not know about" while failing to recognize such units would be offset by the three standalone showers (six extra fixture units) it overcharged them for. *See* (Doc. 75-10.) This highlights one of the many shortcomings with the City's "voluntary resolution" that is inadequate to even address the fixture unit issue alone.

**B. The City's administrative appeal process is inadequate for vindication of the Class's constitutional rights.**

Whitefish City Code ("WCC") § 10-2-6 does provide an exceptionally limited administrative appeal process for the City's impact fee charges which requires

payment of a fee before the payer is even "permitted" to appeal the amount. §10-2-6(A). However, almost every single Class member is now time-barred from availing themselves of the City's appeal process by not bringing a claim within WCC § 10-2-6(C)(2)'s 21-day "final bar to later seek review."

Further, there is nothing to suggest administrative appeal would do anything to change the City's position on the issues presented by this case. The City reached a conclusive position on its impact fee rates and obligations to refund overcharges in September 2021, when City Council members declined to address most of Mr. Gillman's investigative findings. "[A]dministrative 'exhaustion of state remedies' is not a prerequisite for a takings claim when the government has reached a conclusive position." *Pakdel v. City and Cty. of S.F., Cal.*, ___ U.S. ___, ____, 141 S.Ct. 2226, 2231 (2021) (quoting *Knick*, 139 S.Ct. at 2167). The City continues to maintain this position throughout this lawsuit. Plaintiffs are not "attempting to bypass" anything, and by suggesting that an administrative appeal is somehow a superior method of resolving Plaintiffs' and the Class's claims, the Opposition "ignores the dominant characteristic of civil rights actions: they belong in court." *Burnett*, 468 U.S. at 50.

**C. Joinder of all Class members is impractical.**

Even with eight extra individuals who paid fees under rates predating Resolution 18-44, Plaintiffs stated the correct Class size in their opening brief. In

November of 2022, there were still over 350 Class members. Since Plaintiffs' opening brief, the City identified at least thirty-five new properties for which water and/or wastewater fees were charged, up to January 25, 2023. The size of the Class grows—more persons suffer constitutional injuries—day after day while the City continues to charge unlawful and unconstitutional impact fee rates. It is impractical to join almost 400 individuals and entities, some of whom no longer reside in Whitefish or reside in Whitefish part-time. This impracticality is intensified by the need to join parties on a rolling basis as more are harmed by the City's conduct.

As addressed in-depth in Plaintiffs' opening brief, the prospect of obtaining a relatively small recovery does not provide adequate monetary incentive for many Class members to subject themselves to the costs and responsibilities of litigation. This does not mean each was not harmed, and escaping liability through avoiding class certification is exactly what the City is counting on.

## CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their class certification motion.

DATED this 7th day of April, 2023.

LAIRD COWLEY, PLLC

By: /s/ Cory R. Laird
Attorneys for Plaintiffs and Putative Class

KOVACICH SNIPES JOHNSON PC

By: /s/ Mark M. Kovacich
Attorneys for Plaintiffs and
Putative Class

**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this brief is printed in a proportionally spaced Times New Roman text typeface of 14 points; is double-spaced; and word count calculated by Word is 6344, excluding the Caption, Table of Contents, Table of Authorities, Exhibit Index, and this Certificate of Compliance.

DATED this 7th day of April, 2023.

LAIRD COWLEY, PLLC

By: /s/ Cory R. Laird
Attorneys for Plaintiffs and
Putative Class

KOVACICH SNIPES JOHNSON PC

By: /s/ Mark M. Kovacich
Attorneys for Plaintiffs and
Putative Class

**WHITEFISH CITY COUNCIL**
**September 20, 2021**
**7:10 P.M.**

1) CALL TO ORDER

Deputy Mayor Sweeney called the meeting to order. Councilors present were Feury, Hennen, Davis, Sweeney, and Norton. Mayor Muhlfeld and Councilor Qunell were absent. City Staff present were, City Clerk Howke, City Manager Smith, City Attorney Jacobs, Planning and Building Director Taylor, Public Works Director Workman, Parks and Recreation Director Butts, Interim Police Chief Kelch, Senior Planner Compton-Ring and Planner II Osendorf. Approximately 17 people were in the audience, and 2 participant via Webex.

2) PLEDGE OF ALLEGIANCE

Deputy Mayor Sweeney asked Eric Mulcahy to lead the audience in the Pledge of Allegiance.

3) COMMUNICATIONS FROM THE PUBLIC– (This time is set aside for the public to comment on items that are either on the agenda, but not a public hearing or on items not on the agenda. City officials do not respond during these comments but may respond or follow-up later on the agenda or at another time. The mayor has the option of limiting such communications to three minutes depending on the number of citizens who want to comment and the length of the meeting agenda)

Toby Scott, 1478 Barkley Lane, reminded the Council, staff and the community there is an Open House on Wednesday, September 22nd, between 3:30pm and 6:30pm at the O'Shaughnessy Center regarding the Montana Department of Transportation (MDT) Downtown Whitefish Highway Study. There are several plans within the study. He urges the community to attend the meeting to voice their opinion.

Shane Axhelm, 811 Railway Street, complained the recycling center on Railway Street has become dumping grounds for garbage. He also provided his displeasure along with the neighbors of the proposal to put a maximum density housing project on the Snow Lot. It will destroy their view, and traffic is already a nightmare with school twice a day. He doesn't think the neighborhood could bear it.

4) COMMUNICATIONS FROM VOLUNTEER BOARDS

Jan Metzmaker, 915 Dakota Avenue, addressed the letter she submitted that is in the packet. The letter addresses the problem with weeds in Whitefish. Landowners have inherited knapweed with reconstruction projects. The Contractors are bringing in weed contaminated soil that is used for the creation of new boulevards. Landowners are told it is their responsibility to maintain the boulevards. The City should be responsible as they also prune trees in the boulevard area. She has turned properties in for enforcement for 5 years and all that is done is mowing the weeds. Mowing does not kill knapweed. It needs to be taken care of because it is proliferating all over town and the boulevards. A lot of the properties she has turned in are city street projects. She also mentioned she has had a 10,000-volt fence that Fish Wildlife and Parks (FWP) installed in her yard this week. She is not happy about having it, but she is so besieged with bears in her yard, ruining her trees and raising havoc. She hopes the City will take garbage seriously and work on people with fruit trees and work with FWP knowing that there are 16-18 bears in town. That is a problem, and it is a safety issue. She also mentioned the City has not adopted a deer management plan. She hopes the Council and City will contact the Fish, Wildlife and Parks. Bear and deer are lovely but there is a lot of them, and they are causing problems.

5) CONSENT AGENDA (The consent agenda is a means of expediting routine matters that require the Council's action. Debate does not typically occur on consent agenda items. Any member of the Council may remove any item for debate. Such items will typically be debated and acted upon prior to proceeding to the rest of the agenda. Ordinances require 4 votes for passage – Section 1-6-2 (E)(3) WCC)
   a) Minutes from September 7, 2021, Regular Session (p.45)
   b) Ordinance No. 21-14; An Ordinance amending Ordinance Nos. 18-01 and No. 19-02, which approved and subsequently amended the 95 Karrow, LLC Preliminary Plat and Planned Unit Development, to develop a 22-lot mixed-use development at the north end of Karrow Avenue on

the former Idaho Timber property located at 95 Karrow Avenue, Whitefish (WPUD 21-02) (Second Reading) (p.51)

c) Ordinance No. 21-15; An Ordinance amending Title 12, Subdivision Regulations, of the Whitefish City Code (WSUB 21-01) (Second Reading) (p.53)

d) Consideration of a request from Brad and Dana Chelf for a Whitefish Lake and Lakeshore Protection Permit to remove non-compliant structures, gravel application and tree removal, located at 1500 West Lakeshore Drive (WLP 21-W46) (p.152)

e) Consideration of a request from Haley Barrile for a Whitefish Lake and Lakeshore Protection Permit to install a waterline and pump, gravel application and removal of trees, located at 1410 Wisconsin Avenue (WLP 21-W47) (p.169)

**Councilor Norton made a motion, seconded by Councilor Hennen to approve the Consent Agenda as presented. The motion carried.**

6) PUBLIC HEARINGS (Items will be considered for action after public hearings) (Resolution No. 07-33 establishes a 30-minute time limit for applicant's land use presentations. Ordinances require 4 votes for passage – Section 1-6-2 (E)(3) WCC))

a) Consideration of a request from Doug Vanee, Randy Vanee, Bruce Groenenboom, and Jim Groenenboom for a Preliminary Plat for a 2-lot subdivision located at 504 Dakota Avenue, zoned WRR-2 (Medium Density Resort Residential District) (WPP 21-03) (p.188)

Planner II, Tara Osendorf, presented her staff report that is provided in the packet on the website.

Deputy Mayor Sweeney opened the Public Hearing.

Eric Mulcahy, 2 Village Loop, Kalispell, Sands Surveying, a representative of the applicant. They are in complete agreement with the staff report and the Planning Board recommendation.

There being no further public comment, Deputy Mayor Sweeney closed the Public Hearing and turned the matters over to the Council for their consideration.

**Councilor Davis made a motion, seconded by Councilor Norton to approve WPP 21-03, and the Findings of Fact in the staff report. The motion carried.**

b) Consideration of a request from Paige McDonald for a Conditional Use Permit to construct an accessory apartment above a new garage, located at 950 Edgewood Place, zoned WLR (One-Family Limited Residential District) (WCUP 21-17) (p.216)

Planner II, Tara Osendorf, presented her staff report that is provided in the packet on the website.

Deputy Mayor Sweeney opened the Public Hearing. There being no public comment, Deputy Mayor closed the Public Hearing and turned the matters over to the Council for their consideration.

**Councilor Norton made a motion, seconded by Councilor Hennen to approve WCUP 21-17, the Findings of Fact in the staff report and the conditions of approval as recommended by the Planning Board. The motion carried.**

c) Consideration of a request from The 406 Standard LLC for a Conditional Use Permit to develop a six detached single family condominium project, located at 1625 Highway 93 West, zoned WR-1 (One-Family Residential District) (WCUP 21-16) (p.243)

Senior Planner Wendy Compton-Ring presented her staff report that is provided in the packet on the website.

Councilor Norton asked and Planner Compton-Ring stated the applicant can address her concerns pertaining to the wetlands.

Deputy Mayor Sweeney opened the Public Hearing.

Eric Mulcahy, 2 Village Loop, Kalispell, Sand Surveying, applicants representative, agree with the staff report and the conditions of approval. The applicant also agreed with the Planning Boards amendment to the conditions to add the architectural review element. He stated a drainage plan will have to be reviewed by the Public Works Department to ensure they are meeting their standards for the city. Engineers are working together to design the below grade parking areas, so they don't become inundated or impact the groundwater flow.

There being no further public comment, Deputy Mayor Sweeney closed the Public Hearing and turned the matters over to the Council for their consideration.

**Councilor Feury made a motion, seconded by Councilor Davis to approve WCUP 21-16, the Findings of Fact in the staff report and the conditions of approval. The motion carried.**

d) Resolution No. 21-__; A Resolution of Intention, indicating its intention to adopt amendments a map amendment to the 2007 Whitefish City-County Growth Policy, as requested by The 406 Standard, LLC and adopting findings with respect to such amendment (WGPA 21-01)(p.293)

Senior Planner Wendy Compton-Ring presented her staff report that is provided in the packet on the website.

Discussion followed between Deputy Mayor Sweeney and staff regarding the cash-in-lieu of Affordable Housing that is a condition of approval for the adjacent-conjoining project. Staff stated Council can look at this as one project with the conjoining project that is paying a sizable fee towards affordable housing. The developer could let the prior CUP lapse, come back for another CUP, and not pay the cash-in-lieu. Councilor Davis asked and Planner Compton-Ring stated they are sharing access, stormwater, open space, amenities. The project's is going to function as one project, so could be considered at one project.

Deputy Mayor Sweeney opened the Public Hearing.

Eric Mulcahy, 2 Village Loop, Kalispell, Sands Surveying, applicants representative. They agree with the staff's findings as well as the Planning Board recommendation. The proposed six units with the previous conditional use permit that was approved a year ago, essentially create a whole project with our access, amenities, open space, wetlands, drainage, everything works together really well. This property with the six units allows the project to move fifteen feet to provide a buffer between the Fox Hollow subdivision and the Eagle Crest Condos. There are a lot of benefits by bringing these two properties together. That is the goal with this growth policy amendment to have a zoning that lays on both; to allow short-term rentals in the six units.

Mayre Flowers, Citizens for a Better Flathead, Kalispell, stated this growth policy amendment does not provide extraordinary benefit. There is a shortage of housing in this community. Short-term rentals are not needed. She encourages the Council to deny this growth policy amendment.

Nathan Dugan, 937 Kalispell Avenue, stated we can't address our housing issues if we approve more short-term rentals. He asks the Council to deny it.

Rhonda Fitzgerald, 412 Lupfer Avenue, (via Webex), stated it is agreed community-wide that we have way too much resort residential, and it is being abused with way too many short-term rentals, and is gutting our community. She hopes the council will deny this.

There being no further public comment, Deputy Mayor Sweeney closed the Public Hearing and turned the matters over to the Council for their consideration.

**Councilor Norton made a motion, seconded by Councilor Feury to deny WGPA 21-01.** Councilor Norton stated our community is in dire straits. The community conditions have changed and there is a dire need for real housing for real people. She doesn't think the extraordinary community benefit is there to meet a growth policy amendment. Councilor Feury stated he can't support approval based on four of the six findings; 1)*How a specific error was made in the growth policy that necessitates an amendment to the map in order to preserve property right or preserve or achieve equal protection under the law*; he can't answer positively to that question in this case; 2) *How community conditions have changed to a degree that the amendments to the map will help facilitate achieving the community goals and overall vision for Whitefish*; he thinks it probably does the opposite for what people are currently feeling in this community; 3) *There is a clear and extraordinary community benefit in terms of achieving goals resolving problems or issues or furthering the realization of the community vision*; definitely not. This is a standalone project that will function with the other. Not allowing overnight rentals will not make that function any less. They are still going to use the same drainage, same access, they just can't rent them overnight. 4) *How the proposed change will promote the goals and objectives of the growth policy overall*, he can't really answer positively to that. On that basis he has to vote to deny. Deputy Mayor Sweeney stated the community benefit is that it could and should be long-term rental. He appreciates all that they have done and are willing to do for this community. The project will also serve the community as long-term housing. **The motion carried.**

e) Resolution No. 21-38; A Resolution of Intention, indicating its intent to adopt the Whitefish Highway 93 South Corridor Plan as an amendment to the 2007 Whitefish City-County Master Plan (2007 Growth Policy) (WPGA 21-02) (p.336)

Building and Planning Director Dave Taylor presented the Highway 93 South Corridor Plan that is provided in the packet on the website. Staff received one letter prior to the Planning Board meeting asking for fresh perspective on the plan and look at possible peer review for the plan. Eleven letters were received prior to the Council meeting, suggesting looking at areas for employee housing and higher density development. Director Taylor stated the map in the plan calls for urban density outside the general commercial. Within the urban density there is opportunity for higher density development with regard to urban. The WB-2 commercial zone allows a little bit higher density not as high density as WR-4.

Councilor Norton asked and Director Taylor stated Council has adopted several amendments to the growth policy since it was adopted along with several neighborhood plans. Montana Department of Transportation and Flathead County Planning Department have been involved throughout the process.

Councilor Davis asked and Director Taylor stated the future land use map dictates what zoning can go in there. A growth policy amendment would be required to change the zoning once properties are annexed into the city.

Deputy Mayor Sweeney opened the Public Hearing.

Toby Scott, 1478 Barkley Lane, agrees with the plan for the most part. The Committee didn't consider rezoning for the purpose of high-density residential housing. He encouraged the Council to amend the future land use map of the Highway 93 South Corridor Plan to require or allow any property annexed into the city be zoned high density residential if requested, regardless of the county zoning. Without this amendment any zoning requested by a developer or other person is going to be very difficult and require an amendment to the growth policy.

Phil Boland, 12 Green Place, requests amending the future land use map of the Highway 93 South Corridor so that the future land use shown for any parcel annexed as high density residential which would allow it to be zoned WR-3 or WR-4 for more density of workforce housing. It is imperative this amendment be made for the corridor plan. If the future land use plan of 93 Corridor is not amended, it

will require a growth policy amendment to be done prior to any future zone change that differs from future land use map designation. At this time any zone change must be consistent with the future land use map of the growth policy.

Mayre Flowers, Citizens for a Better Flathead (CBF), provided a letter that is appended to the packet on the website. The letter appended to the packet outlines points to consider to not adopt this plan currently. She reviewed those points. 1) Illegal process of amending the text and maps of the Whitefish Growth Policy; 2) The Growth Policy map and text amendments for segment C (and segment b) will endorse zoning inconsistent with the Growth Policy; 3) Council should table this corridor plan and follow proper procedures to amend the Growth Policy; 4) This annexation policy should make housing a clear priority for future annexations; 5) The Chamber Board voted for the City not to adopt the Extension of Services Plan prior to approving an annexation policy; 6) She compared maps that were provided in the letter, 20027 Growth Policy Map, proposed Hwy 93 Corridor Plan map, and Kalispell Future Land Use and Annexation Map; 7) The growth policy map amendments for segment C endorse the county's highway corridor development pattern and adopts it as city policy; 8) Two members of the Committee strongly opposed the adoption of this plan; 9) The city has no legal obligation to accept annexation request if they do not support the pattern of growth set forth in the Growth Policy; 10) Request the Council table this corridor plan and seek outside professional planner, peer review; 11) Whitefish has never share the vision of commercial strips along the highways connecting the three cities. CBF asks the council to table this corridor plan.

Tom Gilfillan, 240/242 Central Avenue, Whitefish Pottery, stated he can't find employees which has to do with affordable housing and workforce housing. Anything you do to this master plan growth period should include areas that will afford more housing for workers and affordable. He also thanked the city for changing the speed limit from 45 to 35 in front of the golf course.

Nate Dugan, 937 Kalispell Avenue, stated given the nature of the housing crisis, we should not be creating more exclusionary zoning. From a practical standpoint the area south of Hwy 40, although not incredibly walkable, it is bikeable, and is the most palatable area that is close enough to the city, that is limits the amount of sprawl and keeps people involved in the community.

Toby Scott, 1478 Barkley Lane, suggest if you can't come up with the text for an amendment to allow the annexation zoning changes, he suggest tabling this until the next meeting.

Michelle Weinberg, 116 Lupfer Avenue, (via Webex), representing the south whitefish neighborhood association, provided a letter that is appended to the packet on the website. The corridor plan should not be adopted as drafted. It purports the change the future land use designation of certain areas covered by the growth policy. The association is concerned the plan would open the door to higher density residential development on the west side of Highway 93 in Segment B. Despite the natural resource values and environmental constraints present in the area. The vacant land between JP Road and Park Knoll Lane, if the designation is changed to urban over 200 units could be built by right and hundreds more if the area is zone WR-2 with a residential PUD. The association respectfully request the council not adopt the resolution of intention and remove any changes to the land use designation from the plan.

Rhonda Fitzgerald, 412 Lupfer Avenue, (via Webex), participated in the process of developing the corridor plan from the beginning and stated it has not been a robust public process, but nevertheless throughout a lot of really good information was collected and the plan offers a lot of great ideas and insight and guidepost for the future. By the time the discussion got to Segment C, there wasn't very much information at all. A lot of the public comment points out that this is just not quite ready. The community needs a more solid plan to address all of the challenges we have currently. It is a good plan, but it is not done. She hopes the Council will take a step back and work on it a bit longer.

There being no further public comment, Deputy Mayor Sweeney closed the Public Hearing and turned the matters over to the Council for their consideration.

**Councilor Norton made motion, seconded by Councilor Davis to continue the Public Hearing to October 4, 2021.** Councilor Norton would like Attorney Jacobs to take a look at the legal arguments that were brought up and make sure we are compliant. She is not sure the Corridor Plan is the correct document to request property annexed to be zoned high density. Councilor Davis he would benefit from additional time to process some of the comments and take more time looking at maps. Councilor Feury supports the motion to continue a couple of weeks. We are hearing two different competing things about housing. That is something that is not universally agreed to amongst those that are talking about housing. He would like to see some greater density through housing and annexation policy. Other than that, he is not hearing too much from the public. We do need to be conscious of the fact that we have been at this for 40 months. **The motion carried.**

7) COMMUNICATIONS FROM PUBLIC WORKS DIRECTOR
   a) Consideration of appointing members to the Rating Panel and Selection Committee for the Spokane Avenue Watermain Replacement Project (p.467)

Public Works Director Craig Workman presented his staff report that is provided in the packet on the website.

**Councilor Hennen made a motion, seconded by Councilor Davis to appoint Neil DeZort, Craig Workman and Karin Hilding to the Rating Panel and appoint Neil DeZort, Craig Workman, Karin Hilding and Councilor Norton to the Selection Committee for the Spokane Avenue Watermain Replacement Project. The motion carried.**

8) COMMUNICATIONS FROM CITY MANAGER
   a) Written report enclosed with the packet. Questions from Mayor and Council? (p.474)

None

   b) Other items arising between September 15th through September 20th

Manager Smith reported she will bring forward an Interlocal Agreement with the County Commissioners to add the city to the Flathead County Health Board, at the next City Council meeting.

9) COMMUNICATIONS FROM MAYOR AND CITY COUNCILORS
   a) Letter from Jan Metzmaker requesting the City address weed compliance issues (p.477)

Councilor Norton asked and Director Workman stated staff has added language to the standard specifications addressing weed germination within boulevards. It is looked at during the two-year warranty walk. Staff goes through an educational campaign during the open houses and during the project with newsletters, but we don't see a whole lot of people out there watering. Manager Smith stated while the City does maintain the trees in the boulevard, it is the responsibility of the adjacent property owner to maintain both sidewalk maintenance and boulevard. If there is an issue within the two-year warranty period of reconstruction, the City will remediate it. Code enforcement is where we rely on making sure our property owners follow regulations.

   b) Letter from Paul Gillman and Bill Burg requesting an independent audit of Impact Fee overcharges (p.478)

Manager Smith reported City staff has been communicating with Mr. Gillman and Mr. Burg and providing a lot of documentation. She has done an internal review of the alleged issues and found an error in the program calculator. Staff is aware of that issue, will look at how that impacted the buildings

that had applied during that period and if any refunds are required. The other allegations that Mr. Gillman is making is that our impact fees are developed and being implemented incorrectly. She contacted FSC Group, who performed the 2018 Impact Fee update, and confirmed there was no change in methodology from our HDR initial study that created our impact fees in 2007. All that we have done, is we updated the capital improvements that were planned, based on the CIP that was available at the time and any planned projects Council was discussing. Those changes would not have created an issue in the way that we have collected or assessed our impact fees. There are numbers in the report that she cannot confirm if they are accurate or not. Mr. Gillman and Mr. Burg would like an independent audit of the Impact Fees, Manager Smith is not opposed, but she also questions the use of taxpayers' dollars to audit something that has gone through a significant public process.

Councilor Feury stated he is comfortable not having an outside audit. Staff caught the imperfections in the spreadsheet and have corrected it.

Council Comment

Councilor Davis asked and Manager Smith stated the Open House that is scheduled for Wednesday, September 22nd is part of the Downtown Highway Study Committee of MDT. The Committee is represented by City staff, Council, and other stakeholders of the Community. The Committee has been meeting for over a year. There were multiple alternatives that were looked at. Alternative G and Alternative C were the top choice through a rating criteria. She encourages the community to attend and provide comments. Deputy Mayor Sweeney also encourages the community to attend the Open House on Wednesday.

10) ADJOURNMENT (Resolution 08-10 establishes 11:00 p.m. as end of meeting unless extended to 11:30 by majority)

Deputy Mayor Sweeney adjourned the meeting at 10:01 p.m.

Deputy Mayor Sweeney

Attest:

Michelle Howke, Whitefish City Clerk

To: Mayor Muhlfeld and Whitefish City Council Members

# Whitefish Acknowledges Overcharging
## Residents and Developers

Whitefish residents who built or renovated a home since Jan 2019 may be entitled to refunds from the City. Developers will also have refunds coming. The Whitefish City Manager acknowledged in late July 2021 that the City has been overcharging permit applicants when assessing Impact Fees.

Impact Fees are a popular way for cities to finance infrastructure growth. They typically fund water, sewer, parks, etc. and allow the City to recoup the cost of expanding these services as the population increases. Impact fees are governed by Montana statute 7-6-16 that puts strict limits on what types of projects can be included, how fees are calculated and the max fees that can be collected. The City of Whitefish appears to violate all of these restrictions.

As a result, water and sewer impact fee collections more than **tripled** in Whitefish.

## Total Water and Sewer Impact Fees Collected By Year

- **FY 2018 - $488,000** (prior to fee increases)
- **FY 2019 - $820,000** (partial year with fee increases)
- **FY 2020 - $1,568,000** (first full year of fee increases)
- **FY 2021 - $1,662,000** (second full year of fee increases)

In 2018, a professional group was contracted to update Whitefish impact fees. This group determined that the City could increase its impact fees by **at most 31%.** This study included the new water and sewer treatment plant upgrades in its calculations. But using program errors, creative accounting, and outdated collection charts, Whitefish succeeded in raising these fees by **over 250%.**

## Computer Program Overcharges Permit Applicants

Whitefish Department of Public Works deliberately altered the program it uses to assess impact fees. The program overstated the size of residential and commercial projects and overcharged permit holders.

The City Manager admitted the program had errors and stated that the program was being fixed and prior permit applications were being audited. She also stated that other areas affected by this program would be reviewed by an outside consultant.

The program misclassifies stand-alone shower units in new dwellings as well as renovations. Overcharges amount to **$427** per shower unit. No timeframe was provided when refunds might be available.

**But the problems go much deeper.**

## Creative Accounting Raises Impact Fees

In 2018, Whitefish contracted The FCS Group to perform an impact fee update. The report concluded that Whitefish could increase water and sewer impact fees 31%, raising sewer fees by 80% but cutting its water fees by 50%. This was the maximum allowable increase according to Montana statutes.



EXHIBIT 2

Included in the original 2018 FCS study was a phantom project used to increase the sewer impact fee. Whitefish inserted a 2018 $4M Solar Array project in the study that added at least **$410** to every new building permit. This project did not meet impact fee criteria established by Montana law. Nor was the project studied, adopted by Council, budgeted, or implemented. The City has no plans to develop this project. Yet the City refuses to issue refunds and continues to charge new applicants for this project.

After the FCS study was published, Whitefish officials used some creative accounting and manipulated City planning reports to raise the water impact fees nearly 200%. Whitefish added $10M of new expenses to the water impact fee calculations for the sole purpose of increasing impact fees. Days later all fees were hiked again, nearly doubling the maximum allowable impact fees calculated by the FCS Group. City Council approved these measures and passed two fee hikes, one in Jan 2019 and another in Sep 2019.

## Whitefish Collection Chart Problems

Impact fees were first adopted by Whitefish in 2007. HDR Engineering did a study that year to calculate these fees and developed charts for fee collections.

The 2018 FCS Update calculated maximum allowable impact fees, but the City of Whitefish insisted on using an outdated collection chart copied from the 2007 HDR Update. This chart was not compatible with the FCS calculated fees. This faulty chart became a part of the Resolutions passed by the City in 2018 and 2019 that significantly overcharged impact fees on Whitefish residents.

Fees are based on the water meter size and the number of water fixtures in a dwelling. The larger the meter size, the greater the impact fees. When HDR conducted its study in 2007, the typical new home in Whitefish had a 5/8" water meter. Maximum fees were calculated based on a 5/8" meter and collection charts were developed for the average new home having a 5/8" water meter.

The 2018 FCS max impact fees were calculated for an average new home in Whitefish having a ¾" water meter. Whitefish assigned the max fees calculated by FCS for a ¾" meter to the 5/8" meter in the old HDR chart. Residents with ¾" meters are being charged up to 50% more than the legal max limit.

This overcharge averaged over **$2000** per new home building permit.

The total estimated overcharge for FY 2020 was well over **$650,000** for residential projects alone. City officials were notified of these problems, but so far have resisted requests that they conduct an independent audit to review and correct them.

We request that the Whitefish City Council approve an independent audit of these issues.

A full copy of the report Whitefish Impact Fee Problems is available online or cut and paste the following link to view this report.

www.callingcare.com/Whitefish-impact-fee-problems.pdf

For further information, contact:

Paul Gillman [redacted]

Bill Burg [redacted]

754 Cottonwood Drive — 3/4 Meter — 1-8-2019
New SFR — See Blue Prince Program

| | | | | | |
|---|---|---|---|---|---|
| WATER | SFU: 26 | Impact Fee: | $1,875.78 | Meter Fee | $388.84 |
| | | | | Inst./Insp. Fee | $20.00 |
| SEWER | DFU: 20 | Impact Fee: | $3,223.00 | | |
| | | | | **Utility Fees** | **$5,507.62** |
| | | | | **Impact Fee Administration 5%** | **$254.94** |
| | | | | TOTAL FEES | $5,762.56 |

| Accounting use only: | Water: | | Wastewater: | |
|---|---|---|---|---|
| | Impact Fee 7: *PIF* | $1,875.78 | Impact Fee 9: *PIF* | $3,223.00 |
| | Impact Fee 8: *Admin* | $93.79 | Impact Fee 10: *Admin* | $161.15 |
| | Water 6: *Latecomer* | | Wastewater 5: *Latecomer* | |
| | Water 3: *Meter/Inst.* | $398.84 | Wastewater 1: *Inspection* | $10.00 |
| | ***Inside 3/4"*** | **$2,368.41** | ***SC-1*** | **$3,394.15** |

REQUIRES: Minimum - 1" Service Line -- 1" Meter Pit and a 3/4" Meter - This will need a special E-1 Pump -- See Randy 253-8602

**CITY 014641**

# ADDENDUM TO "IMPACT FEE UPDATE"

PREPARED BY: Dana Smith, Assistant City Manager/Finance Director
DATE: November 6, 2018

## Water Impact Fee Update

After the final report was prepared by FCS Group for the Water Impact Fee, the City Council amended and adopted an updated Capital Improvements Program (CIP) on November 5, 2018. The update to the CIP significantly changed the Water Improvement Cost Basis when determining the Water Impact Fee, however, it did not affect the Reimbursement Fee Cost Basis. This addendum provides the updated calculations to support the maximum defensible Water Impact Fee.

## Improvement Fee Cost Basis

The calculation of the improvement fee divides the eligible cost of capacity-increasing capital projects by the estimated growth in ERUs. The improvement fee cost basis includes:

- **Current (Uninflated) Cost of Capital Projects:** The water utility CIP, adopted November 5, 2018, includes $21,280,000 in capital project costs.
- **Deduction – Outside Sources:** The cost basis excludes expected funding from resources external to the water utility, recognizing that this funding does not represent infrastructure investments made by current ratepayers. The City does not currently plan on funding any future capital project with outside sources.
- **Deduction – Projects Funding Existing Needs:** Consistent with Montana requirements, the improvement fee cost basis excludes projects that do not expand capacity to serve growth. The total value of growth eligible projects is $8,711,480.
- **Deduction – Impact Fee Fund Balance:** The improvement fee cost basis includes a deduction for the amount of cash that the City has in its Impact Fee Fund as of June 30, 2018, to offset the cost of growth-related projects.

The following table summarizes the improvement fee cost basis; which equates to $7,659,317 or 35.99% of the projected total future capital improvement cost.

# ADDENDUM TO "IMPACT FEE UPDATE"

PREPARED BY: Dana Smith, Assistant City Manager/Finance Director
DATE: November 6, 2018

| Capital Project | Year | Current Cost (Uninflated) | % Utility-Funded | % Allocable to Growth | Amount in Cost Basis |
|---|---|---|---|---|---|
| South Water Reservoir | 2019 | 8,400,000 | 100.0% | 42.9% | $3,603,600 |
| Water Treatment Plant Expansion | 2019 | 10,000,000 | 100.0% | 50.0% | $5,000,000 |
| Reinstate First Creek Supply | 2019 | 100,000 | 100.0% | 37.2% | $37,200 |
| Cast Iron Water Main Replacement | 2019 | 500,000 | 100.0% | 0.0% | |
| Karrow Avenue Loop - Design & Construction | 2020 | 1,000,000 | 100.0% | 0.0% | |
| Whitefish Urban Project - US 93 - Design & Construct | 2022 | 1,000,000 | 100.0% | 0.0% | |
| Armory Road Watermain Railroad Crossing | TBD | TBD | 100.0% | 0.0% | |
| Flathead Watermain Extension | 2019 | 190,000 | 100.0% | 37.2% | $70,680 |
| Suncrest Conversion Pumping Station | 2019 | 75,000 | 100.0% | 0.0% | |
| Whitefish Lake Pump Station | TBD | TBD | 100.0% | 0.0% | |
| Lower Grouse Pumps | 2019 | 15,000 | 100.0% | 0.0% | |
| Less: Existing Water Impact Fee Fund Balance | | | | | ($1,052,163) |
| Total | | $21,280,000 | | | $7,659,317 |

## Summary of Impact Fee Calculation

Below is the Water Impact Fee calculation including the reimbursement fee, the updated improvement fee, and the administrative fee.

| Water Impact Fee Calculation | Reimbursement Fee | Improvement Fee | Administrative Fee | Total |
|---|---|---|---|---|
| Total Costs | $235,699 | $7,659,317 | 5% | $7,859,016 |
| Growth in ERUs | 2747 | 2747 | | 2747 |
| Charge per ERU | $86 | $2,788 | $144 | $3,018 |
| | | | **Existing Impact Fee per ERU (+ %5 Administrative Fee)** | $1,641 |
| | | | **Difference** | $1,377 |

# ADDENDUM TO "IMPACT FEE UPDATE"

PREPARED BY: Dana Smith, Assistant City Manager/Finance Director
DATE: November 6, 2018

## Residential and Non-Residential Charges

Below are the maximum defensible charges for Water Impact Fees based on the updated improvement Fee Cost Basis, not including the 5% administrative fee.

| Meter Size (inches) | Weighting Factor | Base Impact Fee | Base # of Fixture Units | Additional Cost per Fixture Unit Above Base |
|---|---|---|---|---|
| 5/8 | 1.0 | $0.00 | | $143.70 |
| 3/4 | 1.0 | $2,874 | 20 | $95.80 |
| 1 | 1.5 | $4,311 | 35 | $95.80 |
| 1.5 | 2.5 | $7,185 | 65 | $62.48 |
| 2 | 5.0 | $14,370 | 180 | $47.90 |
| 3 | 8.0 | $22,992 | 360 | $45.72 |
| 4 | 15.0 | $43,110 | 800 | $28.74 |
| 6 | 25.0 | $71,850 | 1800 | $25.67 |

**WHITEFISH IMPACT FEES**
**FREQUENTLY ASKED QUESTIONS**

The City of Whitefish confirmed a discrepancy in the determination of fixture counts compared to the 2018 Uniform Plumbing Code. These fixture counts are used to calculate the City's water and wastewater impact fees charged on additions and new construction using the City's utility infrastructure.

The City is currently conducting an internal audit of all building permits issued from January 1, 2019, thru July 31, 2021, to determine the amount of any overcharges for water and/or wastewater impact fees that need to be refunded. Two separate City departments are involved in the audit and will submit their findings to the City Manager and Finance Director once the audit is complete. It is anticipated that this process will be completed within three (3) months, or by December 31, 2021.

Below are frequently asked questions and answers regarding this process:

1. **Is my construction project included in the audit?**
   If your project was issued a building permit between January 1, 2019, and July 31, 2021, your project will automatically be included in the internal audit to verify if the water and wastewater impact fees were correctly assessed.

2. **Do I need to contact the City for my building permit to be included in the audit?**
   No. All building permits issued between January 1, 2019, and July 31, 2021, will automatically be included in the internal audit.

3. **What impact fees are included in the audit?**
   The discrepancy identified only affects the water and wastewater impact fees. The City's other impact fees are unaffected by the fixture counts.

4. **What will happen if it is determined that my project was overcharged?**
   In accordance with § 7-6-1603(1)(c), MCA, the refund must be paid to "the person who owned the property at the time that the refund was due." In consultation with legal counsel and the City's external auditors, the refund is considered "due" once the overcharge is discovered and the refund amount is reasonably estimated. Therefore, the City will mail a notice and check to the current property owner of any project for which a refund is due.

5. **Will I be contacted if my project was affected?**
   The City will only contact a property owner should additional information be required, such as to confirming a current mailing address if one is not available.

6. **Will an external audit be completed?**
   The City's external auditors will test the accuracy of the internal audit process and related impact fee discrepancy calculations, meter sizing determinations and the Capital Improvement Projects (CIP) identified as eligible for impact fee recovery. The external auditors will have a specific focus on the City's impact fees as part of their annual financial audit which is anticipated to begin in January.

7. **What has the City done to address this issue moving forward?**
   The City has implemented new internal controls to prevent future discrepancies. For example, all building permit applications will now require applicants to report and confirm the number of plumbing fixtures included in a proposed project on a new Plumbing Fixture Count form. A City staff member will confirm the reported fixtures on the form to the building plans, which must clearly depict the fixtures included in the project. Staff will then calculate the impact fees owed. A second City staff member will review the plumbing fixture count and impact fee calculations for accuracy before submitting an invoice to the building permit applicant for impact fees due.

8. **Does the impact fee calculation affect my water and wastewater usage charges that are billed each month?**
   No, the impact fees do not affect the rates customers see on their monthly water and wastewater (sewer) utility bills. Impact fees are charged only when building permits are issued and impacts are identified in new additions and new construction that use the City's utility infrastructure.