DA 18-0366

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 147

COMMUNITY ASSOCIATION FOR NORTH SHORE CONSERVATION, INC., a Montana Nonprofit Mutual Benefit Corporation,

Plaintiff, Appellee, and Cross-Appellant,

v.

FLATHEAD COUNTY and its BOARD OF COUNTY COMMISSIONERS, a Political Subdivision of the State of Montana,

Defendants and Appellees,

JOLENE DUGAN,

Intervenor and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-15-121B
Honorable Robert B. Allison, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Richard De Jana, Richard De Jana & Associates, PLLC, Kalispell, Montana

For Appellee and Cross-Appellant Community Association for North-Shore Conservation, Inc.:

Donald Murray, Hash, O'Brien, Biby & Murray, Kalispell, Montana

For Appellees Flathead County and its Board of County Commissioners:

Tara R. Fugina, Caitlin Overland, David W. Randall, Flathead County Deputy Attorneys, Kalispell, Montana

For Amicus Montana Environmental Information Center:

Shiloh Hernandez, Western Environmental Law Center, Helena, Montana

For Amicus Montana Trial Lawyers Association:

John F. Lacey, McGarvey, Heberling, Sullivan & Lacey PC, Kalispell, Montana

Submitted on Briefs: March 20, 2019

Decided: July 2, 2019

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Intervenor Jolene Dugan (Dugan) appeals from orders of the Eleventh Judicial District Court, Flathead County, entering judgment in favor of plaintiff Community Association for North Shore Conservation, Inc. (CANSC). CANSC cross-appeals from the court's order denying its request for attorney fees. Defendants Flathead County and its Board of County Commissioners (the Board) do not appeal but assert the District Court correctly denied CANSC's request for attorney fees. We affirm and address the following issues:

1. *Does CANSC have standing?*
2. *Was the Board's approval of the bridge permit arbitrary and capricious?*
3. *Did the District Court abuse its discretion when it ordered Dugan to restore the lake to its original state?*
4. *Did the District Court abuse its discretion by refusing CANSC's request for attorney fees under the private attorney general doctrine?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Dugan owns a peninsula-shaped parcel of land on the shore of Flathead Lake. When the lake's water is at its highest point for a few months each year, the end of the peninsula becomes an island. During the rest of the year, Dugan's property is a continuous strip of land. Dugan sought to build a bridge on her property to connect the intermittent island to the mainland. To do so, at the beginning of 2011, Dugan applied to the Flathead County Planning and Zoning Office for a Lakeshore Construction Permit. The Board approved Dugan's initial permit and subsequently approved an amended permit. Dugan built the bridge.

¶3 Meanwhile, CANSC filed a petition in District Court asking the court to overturn the Board's approval of Dugan's permit. It argued the Board should have never approved the permit and asked the court to require Dugan to restore the area to its natural state. The District Court ultimately agreed with CANSC and entered an order requiring Dugan to take down the bridge and restore the area. CANSC, as the prevailing party, asked the District Court for an award of fees. The District Court denied its request. Dugan now appeals the District Court's order requiring her to restore the area, raising various issues. CANSC cross appeals, arguing it is entitled to attorney fees.[1] We include additional facts throughout this Opinion as needed.

STANDARDS OF REVIEW

¶4 This Opinion addresses multiple and diverse issues and, therefore, we set forth each standard of review at the beginning of each issue's discussion.

DISCUSSION

¶5 In 1975, the Montana Legislature enacted the Lakeshore Protection Act (the Act), §§ 75-7-201 to -217, MCA. The Act begins with a policy statement: "The [L]egislature finds and declares that the natural lakes of Montana are high in scenic and resource values and that the conservation and protection of these lakes is important to the continued value of lakeshore property as well as to the state's residents and visitors who use and enjoy the

[1] After CANSC filed its initial brief on appeal, Dugan moved to strike eleven of CANSC's exhibits. In an order dated January 29, 2019, we granted Dugan's Motion to Strike Exhibits 9, 26, and 30, and took Dugan's Motion to Strike Exhibits 17-21 and 27-29 under advisement pending full consideration of Dugan's appeal and CANSC's cross-appeal. We did not rely on CANSC's Exhibits 17-21 or 27-29 to make our decision in this case and, therefore, Dugan's motion does not require further resolution.

lakes." Section 75-7-201, MCA. This policy is founded in the Montana Constitution. Mont. Const. art. II, § 3 (inalienable right to a clean and healthful environment); Mont. Const. art. IX, § 1(1) (duty to maintain and improve a clean and healthful environment).

¶6 The Act grants local governments the statutory power to adopt local lakeshore regulations to conserve and protect lake areas. Section 75-7-201, MCA. A person seeking to do any work "that will alter or diminish the course, current, or cross-sectional area of a lake or its lakeshore must first secure a permit" from the local governing body. Section 75-7-204(1), MCA. Each local governing body having jurisdiction over a lake adopts its own lakeshore regulations. Section 75-7-207(1), MCA. The regulations must, at a minimum, favor permit issuance if, during the proposed work's construction or utilization, it will not:

> (1) materially diminish water quality;
> (2) materially diminish habitat for fish or wildlife;
> (3) interfere with navigation or other lawful recreation;
> (4) create a public nuisance; or
> (5) create a visual impact discordant with natural scenic values, as determined by the local governing body, where such values form the predominant landscape elements.

Section 75-7-208(1)-(5), MCA. Those requirements "are minimum requirements and do not restrict a local governing body from adopting such stricter or additional regulations as may be authorized by other statutes." Section 75-7-207(5), MCA.

¶7 The Act also provides for judicial enforcement and review. Section 75-7-215, MCA. A district court may hear and decide various issues arising from the Act, including "a complaint and petition of a governing body or an interested person for an order to restore a lake to its previous condition" and "a petition of an interested

person for review of a final action of a governing body upon an application for a permit." Section 75-7-215(1)-(2), MCA. If a person performs work without a permit, the local governing body or the district court may require the person to "restore the lake to its condition before the person disturbed it." Section 75-7-205, MCA.

¶8 Pursuant to the Act, Flathead County's local governing board, the Board, adopted the Flathead County Lake and Lakeshore Protection Regulations (Regulations). Flathead County, Mont., *Lake and Lakeshore Protection Regulations* §§ 1.1 to 1.2 (enacted April 13, 1982, amended January 24, 2002), https://flathead.mt.gov/planning_zoning/documents/FCLakeshoreRegs-hyerlinked.pdf [https://perma.cc/K6QN-NVEJ] (hereinafter, "*Regulations*").[2] The Regulations' listed purposes reflect the Act's policies:

> A. Protect the fragile, pristine character of Flathead County's lakes and recognize that the ecosystem of these lakes [is] inseparably intertwined with the adjacent riparian corridor and uplands area;
> B. Conserve and protect natural lakes because of their high scenic and resource value;
> C. Conserve and protect the value of the lakeshore property;
> D. Conserve and protect the value of the lakes for the State's residents and visitors who use and enjoy them.

Regulations § 1.3(A)-(D); *accord* § 75-7-201, MCA.

¶9 The Regulations provide that a person must obtain a valid Lakeshore Construction Permit before he or she proceeds with "any work on, or alteration or disturbance of a lake, lakebed, or lakeshore . . . ." *Regulations* § 2.1. The lakeshore protection zone is defined

[2] We state and apply the 2002 version of the Regulations, as those were the Regulations in effect at the time of Dugan's application in 2011. The Regulations have since been amended three times, in 2015, 2016, and 2019.

as the "land area which is within twenty (20) horizontal feet of the perimeter of the lake and adjacent wetlands when the lake is at the mean annual high water elevation." *Regulations* § 6. Conforming with the Act's minimum requirements, § 75-7-208(1)-(5), MCA, and adding some additional requirements, the Regulations provide policy criteria for permit issuance that mirrors the language of § 75-7-208(1)-(5), MCA, and adds that a proposed action may not alter the characteristics of the shoreline. *Regulations* § 4.1(A)-(F). The Regulations list various examples of work requiring a permit, including the construction of buildings, docks, decks, ramps, stairways, and walkways (§ 2.5(F), (J), (P)); the development of roads, roadways, and driveways (§ 2.5(Q)); pilings (§ 2.5(R)); and "[a]ny other work, not herein mentioned, that may have an impact on a lake, lakebed or lakeshore" (§ 2.5(S)). Specific installations are not allowed in the lakeshore protection zone, including "[r]oads or driveways except to serve boat ramps" (§ 2.7(N)). The Regulations do not mention bridges.

¶10 A person seeking to do any work requiring a permit must submit an application to the Flathead County Planning and Zoning Office. *Regulations* § 3.1. Staff planners review the application for compliance with the Regulations and, based on their review, decide how to process the application. *Regulations* § 3.2(C). An application should generally go to the planning board for its review and recommendation, and the planning board will subsequently forward the application to the Board for its consideration. *Regulations* §§ 3.2(C)(b), 3.4(B). A project may receive summary review if the staff planners determine the project complies with the Regulations' construction requirements and design standards or if proper design modifications and necessary conditions can be incorporated

into the project to bring it into compliance. *Regulations* § 3.2(C)(a); *see also* § 75-7-207(3), MCA (permitting summary review). In those cases, the staff planners send the application directly to the Board. *Regulations* §§ 3.2(C)(a), 3.3(A). Based on its findings, the Board will approve, conditionally approve, or deny the application. *Regulations* § 3.3(C).

¶11 When Dugan applied for her Lakeshore Construction Permit in 2011, the Planning Director at the Flathead County Planning and Zoning Office considered how to process Dugan's application. The Planning Director noted his thought process in a memorandum, "[g]iven the unique purpose and visible location of the structure." The memorandum began by describing Dugan's application: she sought to build an "access bridge" on her property. The Regulations do not specifically contemplate an "access bridge" or a "bridge" as a structure requiring a work permit under § 2.5, but they also do not state that bridges are not allowed in the lakeshore protection zone in § 2.7. The Planning Director determined that the "access bridge" could not be classified as a "driveway," "road," or "roadway" under the Regulations because a driveway already provided access to the property; the bridge would not be surfaced as a road; and the bridge would exist entirely within one parcel of land, not providing access to any other property or to an existing public road. He also noted that, while not technically meeting the definition of "dock," the bridge's construction methods and materials were almost identical to those of a dock. The Planning Director decided that the "access bridge" fell under Regulation § 2.5's catch-all provision—"work . . . that may have an impact on a lake, lakebed[,] or lakeshore"—and that Dugan must have a permit in order to build the bridge.

¶12 The Planning Director further contemplated how to process the application, ultimately concluding that the application should proceed through the summary review procedure. He noted that the proposed project generally met the Regulations' policy criteria for the issuance of a permit. *See Regulations* § 4.1(A)-(F). It would not materially diminish water quality because of the materials and construction methods; it would not materially diminish habitat for fish and other aquatic wildlife because the bridge would allow for substantial "free water area"; it would not interfere with navigation or other lawful recreation because the water in that area was very shallow, even at high water, and the bridge would have a canoe "overpass" to permit canoes to utilize the public water space when the lake was full; and it would not create a public nuisance because the entire property was private and the canoe "overpass" would allow for public access when the property was underwater. The Planning Director questioned whether the bridge would alter the characteristics of the shoreline: on one hand, the bridge would create a structure between the shore and the island and, therefore, alter the shoreline; on the other hand, the land used to be one continuous parcel, even at high water, so the bridge could be considered a restoration of historic access.

¶13 The Board received the application with the Planning Director's report and held a public hearing, at which a commissioner discussed his familiarity with the area. He stated he did not see how the bridge would create a significant impact and noted that the water in the area was too shallow for a boat. Another commissioner accepted those statements, read the staff report, and heard a proponent's testimony. Ultimately, the Board granted

summary approval for a 481-foot long, 16-foot wide bridge. After the Board approved Dugan's original permit in 2011, it approved numerous extensions.

¶14 Meanwhile, Dave Hadden learned about Dugan's permit after the Board approved it in 2011. Hadden and others eventually formed CANSC, a nonprofit corporation dedicated to protecting Flathead Lake's north shore from improper development. In February 2015, CANSC filed a complaint and petition for judicial review in District Court, naming Flathead County and the Board as the defendants. CANSC criticized the Board's approval of Dugan's permit. Dugan sought to intervene as an interested party, and the court eventually permitted her to do so. An intense litigation battle followed, with all parties eventually filing some sort of motion for either partial or full summary judgment.

¶15 The District Court ultimately granted summary judgment in CANSC's favor. It found the Board's approval of Dugan's permit was arbitrary and capricious. The District Court addressed four specific errors in the processing and approval of the permit: (1) the Planning Director and Board considered an incomplete application; (2) the Planning Director inappropriately sent the permit through the summary review process; (3) the Board never properly evaluated the bridge's visual impacts; and (4) the Planning Director and Board wrongly determined the bridge was not a road or roadway. In making its decision, the court only considered and relied on facts leading up to Dugan's original permit approval in 2011. It did not substantively consider any post-permit-approval facts. In fashioning a remedy, the District Court determined it had "no option" but to declare the permit invalid, void from the outset. It further concluded that, because Dugan built the bridge without a permit, the remedy under the Act, §§ 75-7-205 and -215(1), MCA, was to

require Dugan to remove the bridge and restore the area to its natural state. Following the District Court's ruling, CANSC, as the prevailing party, sought an award of fees under various theories. The court denied CANSC's request.

¶16 Dugan now appeals numerous District Court decisions and CANSC cross-appeals the court's denial of fees. The Board does not appeal. We address each issue in turn.

¶17 *1. Does CANSC have standing?*

A. Standard of Review

¶18 Whether a party has standing is a question of law that we review de novo. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 28, 360 Mont. 207, 255 P.3d 80.

B. Discussion

¶19 A party must have standing—that is, a personal stake in the outcome—for a court to decide a case. *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶¶ 14-16, 340 Mont. 56, 172 P.3d 1232. Standing is a threshold, jurisdictional requirement that "limits Montana courts to deciding only cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing)." *Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187. To meet the case-or-controversy requirement, a plaintiff must clearly allege a past, present, or threatened injury to a property or civil right and the injury must be one that would be alleviated by successfully maintaining the action. *Bullock*, ¶ 31; *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430; *Heffernan*, ¶ 33. Prudential standing is a form of judicial self-governance that discretionarily limits the exercise of judicial authority consistent with the separation of powers. *Bullock*, ¶ 43. The Legislature "may enact

statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Heffernan*, ¶ 34 (internal quotations and citations omitted).

¶20 An association has standing to bring suit on behalf of its members, even without a showing of injury to the association itself, when: (1) at least one member would have standing to sue in his or her own right; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit. *Heffernan*, ¶ 43. Associational standing "recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *Heffernan*, ¶ 44.

¶21 The District Court determined CANSC had standing to request judicial review under the Act. On appeal, Dugan argues CANSC does not have standing. Because CANSC only has standing if at least one member would have standing, we consider whether a CANSC member could sue in his or her own right. CANSC describes its members as "individuals who care about Flathead Lake and its future and want to ensure it is protected from inappropriate development and other environmental degradation." Most of CANSC's members are people who live near the access bridge on Flathead Lake for some or all of the year. The Legislature approved the Act to protect Montana's lakes for the benefit of "the state's residents and visitors who use and enjoy the lakes." Section 75-7-201, MCA. The Act further explains who may bring suit under it: an "interested person" may file a complaint and petition seeking an order to restore the lake to its previous condition and

may also petition for judicial review of a governing body's final decision regarding a permit. Section 75-7-215(1)-(2), MCA. These statutes create legal rights, the invasion of which creates standing, even though no injury may exist absent the Act. *See Heffernan*, ¶ 34.

¶22 CANSC's members are "interested persons" under the Act. They are individuals who use and enjoy Flathead Lake and who the Legislature has explicitly provided may petition for judicial review and restoration. *See* § 75-7-215(1)-(2), MCA. CANSC's suit meets the case-or-controversy requirement because Dugan's access bridge threatens its members' rights under the Act and their injury will be alleviated if they successfully maintain the action and Dugan is required to restore the lake to its original state. Further, prudential considerations do not limit standing here, where the Legislature has specifically provided an avenue for interested persons to challenge a governing body's approval of a work permit in court.

¶23 Associational standing is further appropriate because the interests CANSC seeks to protect are germane to its purpose. It is seeking to protect Flathead Lake for the benefit of the state's residents and visitors who use and enjoy the lake. In its articles of incorporation, CANSC states its purpose is "to protect and preserve the north shore of Flathead Lake" and "to promote the interests of the members and the public generally." The interests CANSC seeks to protect in this lawsuit are directly related to its purpose. Additionally, neither the claim CANSC asserted nor the relief it requested require the individual participation of each allegedly injured party in the lawsuit. CANSC's claims represent its members' united interest in asserting their rights as interested persons under the Act, and each member does

not have to individually participate in the lawsuit. We conclude CANSC has standing to bring this lawsuit.

¶24 Dugan alleges a second threshold issue on appeal. She contends the District Court erred when it determined that CANSC filed its lawsuit within the applicable statute of limitations. Without citing any legal authority, Dugan argues the statute of limitations should have started running on March 16, 2011, when the Board approved her first application. Parties must cite legal authority to support the positions they advance. Statutes of limitations are set forth in statutes and further explained in this Court's case law. It is not this Court's job to conduct legal research on a party's behalf or to develop a legal analysis to support the party's position. *Johansen v. Dep't of Nat. Res. & Conservation*, 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653. We accordingly decline to address Dugan's statute of limitations argument.

¶25 *2. Was the Board's approval of the bridge permit arbitrary and capricious?*

A. Standard of Review

¶26 Because this is our first time addressing substantive arguments under the Act and because the Act does not contemplate a standard of review, we discuss the appropriate standard of review. The District Court performed its judicial review utilizing the Montana Administrative Procedure Act's (MAPA) arbitrary and capricious standard of review. *See* § 2-4-704(2)(a)(vi), MCA (stating that a court may reverse or modify an agency's decision if the decision prejudiced the appellant because the administrative findings, inferences, conclusions, or decisions were "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion").

¶27 We have previously applied MAPA's arbitrary and capricious standard of review to local government decisions. *See Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 31, 356 Mont. 41, 230 P.3d 808; *Kiely Constr. LLC v. City of Red Lodge*, 2002 MT 241, ¶ 69, 312 Mont. 52, 57 P.3d 836; *see also City of Livingston v. Park Conservation Dist.*, 2013 MT 234, ¶ 10, 371 Mont. 303, 307 P.3d 317 (analyzing an appeal from a district court's review of a conservation district's decision under the Natural Streambed and Land Preservation Act, §§ 75-7-101 to -125, MCA). We conclude the District Court utilized the correct standard of review.

¶28 When performing judicial review under the Act, § 75-7-215, MCA, district courts should review a local governing body's decisions to determine whether the local governing body acted arbitrarily, capriciously, or unlawfully. *See Aspen Trails Ranch*, ¶ 31. We review a district court's summary judgment ruling de novo, utilizing the same criteria. *Kiely Constr.*, ¶ 79. In reviewing a local governing body's decisions under the arbitrary and capricious standard, we may not reverse its decision "merely because the record contains inconsistent evidence or evidence which might support a different result." *Kiely Constr.*, ¶ 69 (quoting *Silva v. City of Columbia Falls*, 258 Mont. 329, 335, 852 P.2d 671, 675 (1993)). Rather, a local governing body's decision is arbitrary and capricious if it appears, based on the existing record, to be random, unreasonable, or seemingly unmotivated. *Kiely Constr.*, ¶ 69.

B. Discussion

¶29 On appeal, Dugan asks us to reverse the District Court and uphold the Board's approval of her permit, arguing the District Court made three specific errors. First, Dugan contends her 2011 application was complete and the District Court erroneously determined otherwise. The court took issue with the facts that Dugan's application contained no information regarding the bridge's use and that the application did not state where the connecting roads would be. It noted that a bridge logically requires connecting roads and that, if the bridge is in the lakeshore protection zone, any connecting roads are likely to also be in the lakeshore protection zone. The court determined that, without more information regarding connecting roads, the Board could not have considered the project's true impact. The District Court therefore concluded the Board should not have accepted the incomplete application.

¶30 Dugan argues her application was complete because it complied with the Regulations. She states the Regulations do not require her to show connecting roads or to state the bridge's use and argues the District Court added requirements to the Regulations by faulting her for not including that information in her application. Dugan is correct that the Regulations do not specifically require a showing of connecting roads or a statement of a bridge's use. However, the Regulations also do not contemplate bridges as structures that may be built in the lakeshore protection zone. Therefore, it was appropriate to classify the access bridge under § 2.5's catch-all provision, as "other work . . . that may have an impact on a lake, lakebed[,] or lakeshore." *Regulations* § 2.5(S). A permit is required for such work, and permit applications must contain enough information for the permitting

body to determine whether a proposed project complies with the policy criteria for issuance of a permit listed in § 4.1.

¶31 When considering a permit application for a bridge, it is unreasonable to not consider how the applicant plans to access the bridge and take that information into account when considering whether the project complies with the policy criteria for permit issuance, especially considering the fact that roads, roadways, and driveways are not allowed in the lakeshore protection zone unless they serve boat ramps. Without more information, the Board could not have adequately analyzed whether the bridge complied with all of the policy criteria for permit issuance. *See Regulations* § 4.1. Dugan's permit application was, therefore, incomplete, and the Board acted unreasonably when it approved the permit without requesting more information about matters such as connecting roads and use.

¶32 Second, Dugan argues the court erred when it found the Board failed to consider the bridge's visual impact. The Regulations require the Board to consider a project's visual impact: "The proposed action shall not . . . [c]reate a visual impact discordant with natural scenic values, as determined by the governing body, where such values form the predominant landscape elements." *Regulations* § 4.1(E); *accord* § 75-7-208(5), MCA (stating that a county's regulations shall favor permit issuance if the work will not "create a visual impact discordant with natural scenic values, as determined by the local governing body"). Dugan contends the Board sufficiently considered visual impact, as evidenced by: (1) a commissioner's comments regarding his familiarity with the property, the property's

natural shoreline, and historic access to the property[3]; and (2) a proponent's testimony discussing the property's landscape and explaining how the bridge would look similar to a dock. Dugan argues those statements amount to a finding that the bridge's visual impact would be minimal or insignificant.

¶33 We disagree. The Board failed to determine whether the bridge created a visual impact discordant with natural scenic values, where those values form the predominant landscape elements. *See Regulations* § 4.1(E). The District Court correctly determined the commissioner's and proponent's comments did not "constitute a consideration of the visual impact of the project" as the Act and Regulations require. The Board's decision was seemingly unmotivated—it did not actually consider the bridge's visual impact as the Regulations require—and its failure to do so was unreasonable, especially when it was considering Dugan's request to build a 481-foot long, 16-foot wide bridge connecting the mainland to an island.

¶34 Third, Dugan argues the District Court erroneously determined the bridge is a road or roadway. The Planning Director and Board processed and considered Dugan's application under the opinion that the bridge was not a road or roadway. Roads and roadways are not allowed in the lakeshore protection zone unless they serve boat ramps. *See Regulations* § 2.7(N). In the Planning Director's memo, he stated his impression that

[3] The commissioner also broadly stated his opinion that the bridge would have no significant "impacts," and Dugan contends that statement applies to the bridge's visual impacts. The District Court, on the other hand, determined the commissioner's impact comment was not specifically related to the bridge's visual impact. We do not have to resolve that factual dispute to analyze this issue.

bridge's purpose was to "allow vehicular access from one part of a piece of private property across open water of Flathead Lake to another piece of the same private property." The Planning Director determined the bridge was not a road, however, because it was entirely on private property. The District Court found that reasoning "nonsensical." It noted the bridge is a "vehicular bridge, 481 feet long and 16 feet wide. It is in essence an elevated roadway over water . . . ." The court further noted that a bridge supporting vehicular traffic "does not exist without a roadway." It therefore found the Board inappropriately approved the application, especially because the Act and Regulations explicitly prohibit roads in the lakeshore protection zone and do not contemplate the construction of bridges: "The [Board's] misinterpretation of the definition of road to not include a vehicular bridge is arbitrary and capricious."

¶35 We agree with the District Court's analysis and similarly find unreasonable the Planning Director and Board's conclusion that the bridge is not a road. The bridge is in the lakeshore protection zone and the record indicates that it is meant to carry vehicular traffic from the mainland to the island. It is unreasonable and arbitrary to exclude the bridge from the definition of a road or roadway, especially when the Regulations do not define those terms or contemplate bridges. We accordingly agree with the District Court and conclude the Board's approval of the permit was arbitrary and capricious.

¶36 In addition to those three specific issues, Dugan also argues that the District Court was generally biased against her and the Board and that the court erred when it made various ancillary rulings. She contends many of the District Court's small decisions, taken together, demonstrate its bias and constitute reversible error. She argues the court ignored

certain arguments and acted arbitrarily when it chose to rule on some motions and not others. We have reviewed the District Court's purportedly biased decisions and disagree with Dugan's classifications. The court objectively considered the issues it addressed and rationally justified its decisions to not address other issues. We conclude the District Court did not act with bias towards Dugan or the Board and that it did not err in any of its ancillary rulings.

¶37 *3. Did the District Court abuse its discretion when it ordered Dugan to restore the lake to its original state?*

A. Standard of Review

¶38 We review a district court's chosen remedy for an abuse of discretion. *See Kiely Constr.*, ¶ 75.

B. Discussion

¶39 Dugan argues the District Court erred when it required her to restore the area to its natural state. The Act provides that a district court may hear and decide "a complaint and petition of an . . . interested person for an order to restore a lake to its previous condition or to enjoin further work in a lake." Section 75-7-215 (judicial enforcement and review). It further provides that a district court may require a "person who performs work in a lake without a permit for that work" to "restore the lake to its condition before the person disturbed it." Section 75-7-205, MCA (unauthorized work). Thus, restoration appears to be a key component of the Act. The Legislature explicitly provided district courts with the power to require restoration, and we afford district courts deference in their decisions regarding the appropriate remedy.

¶40 In this case, the District Court thoughtfully deliberated but ultimately rejected remanding the case to the Board, recognizing that remand would be futile. After finding the bridge was a road or roadway not serving a boat ramp, the District Court recognized that the Regulations explicitly preclude the bridge from being built in the lakeshore protection zone. *See Regulations* § 2.7(N). Therefore, the Board could not possibly approve the project on remand. Because remand would be futile, the court ordered Dugan to restore the lakeshore to its natural state pursuant to §§ 75-7-205 and -215(1), MCA.

¶41 We conclude the District Court did not abuse its discretion in ordering Dugan to restore the lakeshore to its natural state. The Act grants district courts the authority to order restoration, §§ 75-7-205 and -215(1), MCA,[4] and the District Court thoughtfully considered the appropriate remedy in this case. We agree with the District Court's conclusion that the bridge is a road or roadway in the lakeshore protection zone—a structure that the Regulations explicitly prohibit. The Board arbitrarily and capriciously approved a project that clearly violates the Act and the Regulations. Because the Act and the Regulations clearly prohibit Dugan's bridge from existing in the lakeshore protection zone, remanding this case to the Board for its consideration would be futile. We conclude the District Court did not abuse its discretion when it ordered restoration.

[4] The Regulations do not similarly grant district courts with the authority to order restoration, instead only permitting the local governing body to require a person who performs work in the lake, lakebed, or lakeshore without a permit to restore the area to its original condition. *Regulations* § 2.2. The Act, however, as the statutory authority granting local governing bodies the right to implement their own regulations, takes precedent over the Regulations. Therefore, the District Court had the authority to order restoration based on §§ 75-7-205 and -215(1), MCA.

¶42 Dugan further contends she obtained a vested property right in the bridge's physical structure. She cites the controlling statute, § 75-7-206, MCA, which provides: "Work or development authorized or approved under this part shall not create a vested property right in the permitted development other than in the physical structure, if any, so developed." *Accord Regulations* § 2.3. Dugan argues she should not be required to restore the area because her vested right in the bridge's physical structure renders the entire issue moot. However, an argument pertaining to mootness does little to inform our interpretation of § 75-7-206, MCA. We have not previously interpreted § 75-7-206, MCA, and it was Dugan's responsibility to research, analyze, and provide us with a way to apply § 75-7-206, MCA, consistent with the Act's other relevant statutory sections, to the facts here.

¶43 The statute's plain language provides that work done pursuant to a permit does *not* create a vested property right, but makes an exception for "physical structure[s], if any, so developed." Section 75-7-206, MCA. Conversely, a district court may order a person to "restore a lake to its previous condition" pursuant to § 75-7-215, MCA, which sets forth judicial enforcement and review under the Act. Section 75-7-215, MCA, thus suggests that a district court could order a person to remove a physical structure in order to restore the lake to its prior condition. Further, as noted in some of the cases cited by the Dissent, the issue of good-faith reliance may be relevant to whether a vested property right exists, and it is unclear whether Dugan's reliance on the permit was in good faith. Because Dugan failed to properly argue or develop the issue, we decline to address whether she has a statutory vested property right in the bridge. Interpretation of such a weighty and important

statute should wait until the parties appropriately brief and argue the issue. We affirm the District Court's order requiring Dugan to restore the area to its natural state.[5]

¶44 *4. Did the District Court abuse its discretion by refusing CANSC's request for attorney fees under the private attorney general doctrine?*

A. Standard of Review

¶45 We review a district court's ruling granting or denying attorney fees under the private attorney general doctrine for an abuse of discretion. *Clark Fork Coal. v. Tubbs*, 2017 MT 184, ¶ 9, 388 Mont. 205, 399 P.3d 295. A district court abuses its discretion when it acts arbitrarily, without the employment of conscientious judgment, or when it exceeds the bounds of reason resulting in substantial injustice. *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2011 MT 51, ¶ 11, 359 Mont. 393, 251 P.3d 131.

B. Discussion

¶46 CANSC argues the District Court abused its discretion by not awarding it attorney fees under the private attorney general doctrine because it successfully challenged the Board's approval of Dugan's permit.[6] It argues the private attorney general doctrine applies, in part because the litigation vindicated constitutional interests. It reasons the litigation vindicated constitutional interests, such as enforcing the State's duty to maintain and improve a clean and healthful environment articulated in Article IX, Section 1, of the

[5] The restoration work may require permits of its own, as restoring the area will likely require construction in the lakeshore protection zone. The Board, as the local governing body, must consider any permitting necessary to effectuate the restoration herein ordered.

[6] The Montana Trial Lawyers Association and the Montana Environmental Information Center each filed an amicus brief in support of CANSC's request for attorney fees under the private attorney general doctrine.

Montana Constitution. Dugan and the Board argue the District Court correctly determined the private attorney general doctrine does not apply to CANSC's successful challenge to Dugan's bridge.

¶47 Montana courts follow the American Rule regarding payment of attorney fees. Generally, each party in a lawsuit pays its own fees and the prevailing party is not entitled to recover its fees from the other party. *Western Tradition P'ship v. Attorney Gen. of Mont.*, 2012 MT 271, ¶ 9, 367 Mont. 112, 291 P.3d 545. We recognize limited equitable exceptions to the general rule, but construe those exceptions narrowly "lest they swallow the rule." *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 23, 351 Mont. 464, 215 P.3d 649.

¶48 The private attorney general doctrine is one of those recognized exceptions. *Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 19, 315 Mont. 210, 69 P.3d 663. The doctrine may be sparingly "utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens." *Montanans for the Responsible Use of the Sch. Trust v. State ex. rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶ 64, 296 Mont. 402, 989 P.2d 800 (hereinafter *Montrust*) (internal citations and quotations omitted); *accord Clark Fork Coal.*, ¶ 15 (citing *Western Tradition P'ship*, ¶ 13). Courts should consider three factors in determining whether to award attorney fees under the private attorney general doctrine: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." *Western Tradition P'ship*, ¶ 14 (quoting *Montrust*, ¶ 66). We have declined to award attorney fees under the doctrine "when the litigation primarily served a party's own

pecuniary interests." *Western Tradition P'ship*, ¶ 14 (citing *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 91, 338 Mont. 259, 165 P.3d 1079). We also consider whether an award of fees would be unjust under the circumstances. *Western Tradition P'ship*, ¶ 14 (citing *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 33, 314 Mont. 314, 65 P.3d 576).

¶49 We further limit the award of attorney fees under the private attorney general doctrine to cases "vindicating constitutional interests." *Bitterroot River Protective Ass'n*, ¶ 22 (quoting *Am. Cancer Soc'y v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085). In *Clark Fork Coalition*, we reviewed our decisions discussing whether the litigation vindicated constitutional interests. *Clark Fork Coal.*, ¶¶ 16-21. We have awarded fees under the doctrine when the litigation vindicates constitutional interests. *Clark Fork Coal.*, ¶¶ 16-18 (discussing *Montrust*, ¶¶ 67, 69, where we awarded fees because the plaintiff litigated important public policies grounded in Montana's Constitution, the State did not dispute the necessity of private enforcement, and the litigation benefited a large class of people—all Montana citizens interested in Montana's public schools, and *Bitterroot River Protective Ass'n*, ¶¶ 23-26, where we held an award of fees was warranted because the litigation involved extensive constitutionally-based arguments and vindicated constitutional interests). We have denied fees under the doctrine when the litigation does not vindicate constitutional interests. *Clark Fork Coal.*, ¶¶ 19-21 (discussing *Baxter v. State*, 2009 MT 449, ¶¶ 3, 10, 47, 50, 354 Mont. 234, 224 P.3d 1211, where the case involved physician aid in dying and we reasoned our decision was statute-based, not rooted in the Constitution, and *American Cancer Society*, ¶¶ 3, 7, 18, 21, where the case involved

a constitutional challenge to a newly enacted statute exempting certain establishments from local government smoking ordinances and we reasoned our decision amounted "to a declaration that [the statute] is ineffectual rather than unconstitutional" and, accordingly, did not vindicate a constitutional interest).

¶50 In *Clark Fork Coalition*, we declined to award fees under the private attorney general doctrine, reasoning that the underlying decision was "statute-based" and, accordingly, did not vindicate constitutional interests. *Clark Fork Coal.*, ¶ 23 (quoting *Baxter*, ¶ 47, and citing *Am. Cancer Soc'y*, ¶ 21; *Western Tradition P'ship*, ¶ 14). In that case, we considered whether an agency's rule conflicted with a statute and determined that it did. *Clark Fork Coal.*, ¶ 22 (citing *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 35, 384 Mont. 503, 380 P.3d 771). The petitioners contended the "litigation vindicated constitutional interests articulated in Article IX, Section 3, of the Montana Constitution, which provides for the protection of existing water rights and water resources and requires the Legislature to regulate and administer water rights in the state." *Clark Fork Coal*., ¶ 12.

¶51 We concluded the litigation addressed an issue of pure statutory interpretation and did not vindicate any constitutional interests. We reasoned that there were no constitutional considerations "integrated into the rationale" and that the petitioners did not litigate "important public policies . . . grounded in Montana's Constitution." *Clark Fork Coal.*, ¶ 22 (quoting *Bitterroot River Protective Ass'n*, ¶ 25, and *Montrust*, ¶ 67). We further concluded the "failure to show that the litigation vindicated constitutional interests is dispositive" and, therefore, we did not address whether the remaining factors of the private attorney general doctrine were satisfied. *Clark Fork Coal.*, ¶ 23.

¶52 We similarly find that CANSC is not entitled to attorney fees under the private attorney general doctrine because the litigation did not vindicate a constitutional interest. Like in *Clark Fork Coalition*, where our decision was focused on an agency's rule and a statute, here, our decision was focused on the Act, the Regulations, and the Board's application of the Regulations to Dugan's bridge permit. The parties did not argue, and we did not address, whether the Act or the Regulations implicate or conflict with any constitutional provisions. Our rationale does not integrate any constitutional considerations. Further, CANSC did not litigate "important public policies . . . grounded in Montana's Constitution," because, while the Act's policies are grounded in Article II, Section 3, and Article IX, Section 1, of the Montana Constitution, the Regulations are one step removed. *See Clark Fork Coal.*, ¶ 22 (quoting *Montrust*, ¶ 67). The litigation did not directly implicate any constitutional provisions, but instead centered on the Act, the Regulations, and the Board's application of the Regulations to Dugan's bridge permit. *See Clark Fork Coal.*, ¶ 22 (citing *Bitterroot River Protective Ass'n*, ¶ 23).

¶53 CANSC's failure to show the litigation vindicated constitutional interests is dispositive and, therefore, we do not address whether the remaining factors of the private attorney general doctrine were satisfied. *See Clark Fork Coal.*, ¶ 23. The District Court did not abuse its discretion by denying CANSC attorney fees under the private attorney general doctrine.

¶54 CANSC also argues it is entitled to attorney fees under § 25-10-711, MCA. Section 25-10-711, MCA, provides that a person may recover costs and reasonable attorney fees in an action brought against a political subdivision or agency if (1) the person prevails and (2) the court finds that the political subdivision or agency defended the action frivolously or in bad faith. A defense is "frivolous or in bad faith when it is outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion." *Mont. Immigrant Justice Alliance*, ¶ 48 (quoting *Western Tradition P'ship*, ¶ 10). CANSC reasons that the Board took numerous positions outside the bounds of legitimate argument in its defenses of its permit approval.

¶55 This Court will not substitute its "judgment for that of a district court where the district court is acting as the trier of fact and there is substantial evidence to support its decision." *Ostergren v. Dep't of Revenue*, 2004 MT 30, ¶ 25, 319 Mont. 405, 85 P.3d 738. The District Court concluded the Board and Dugan "mounted a good faith defense to [CANSC's] claim . . . ." It reasoned, "Although the Court found that the permit should not have been issued," the Board's and Dugan's defenses were "well researched and presented" and were "not frivolous or made in bad faith." On appeal, CANSC has not pointed to specific facts that convince us the District Court's conclusion that the Board did not defend the action frivolously or in bad faith must be reversed. We affirm the District Court's order denying CANSC's request for attorney fees.

CONCLUSION

¶56 We affirm the District Court's order finding that Dugan's bridge violates the Act and the Regulations. The District Court did not abuse its discretion by ordering Dugan to restore the area to its natural state. The court also did not abuse its discretion by denying CANSC's request for attorney fees. Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR

Justice Jim Rice, concurring in part and dissenting in part.

¶57 I concur with the Court on all Issues except for a portion of Issue 3. I would hold that Dugan acquired a vested property right in the bridge structure pursuant to § 75-7-206, MCA.

¶58 Section 75-7-206, MCA, provides "[w]ork or development authorized or approved under this part shall not create a vested property right in the permitted development other than in the physical structure, if any, so developed." The Court declines to address whether Dugan has a statutory vested property right in the bridge, but I believe the statute compels resolution of the issue. Dugan in fact built or "developed" the bridge as authorized by a permit issued for that purpose by the Board. She thus obtained, under the statute, a vested property right in the bridge as a "physical structure." The Lakeshore Act was intended to protect one, like Dugan, who builds a "permitted" physical structure as "authorized or

approved" under the Act, from a later adverse ruling concerning the referenced permit. That the statute applies even when a permit is later revoked cannot be disputed: there would never be a need to protect a vested property right in a structure built pursuant to a permit that is *not* subsequently revoked—the structure remains authorized. Only if the permit that authorized the structure is later revoked or invalidated would the statutory protection be necessary to protect the owner's interest.

¶59 That this is the correct statutory reading is more evident in a review of the 1975 session law creating the Act, which codified the controlling provisions differently than they are currently codified within the Montana Code Annotated. It stated:

> Section 8. There is a new R.C.M. section numbered 89-3708 that reads as follows:
>
> **89-3708. Restoration – property rights.** (1) A person who performs work in a lake after the effective date of this act without a permit for that work shall, if required by the local governing body or the district court, restore the lake to its condition before he disturbed it.
>
> (2) Work or development authorized or approved under this act shall not create a vested property right in the permitted development, other than in the physical structure, if any, so developed.

Mont. Laws 1456-57. Reading the original text illustrates that the Act coordinated restoration with property rights, and provided that an owner acquired a vested property right only in a physical structure developed pursuant to a permit that authorized the work.

¶60 Consistent with the common law, the Act does not create a vested property right upon mere issuance of a permit, nor divest the right upon a later voiding of the permit. *See Commonwealth, Dep't of Envtl. Res. v. Flynn*, 344 A.2d 720, 724-25 (Pa. Commw. Ct. 1975) ("the owner's good faith reliance on the permit should afford him a vested right to

complete the work, albeit the permit was issued in error."); *Browning-Ferris Indus. v. Wake Cnty.*, 905 F. Supp. 312, 318 (E.D.N.C. 1995) ("[t]he inquiry as to whether a party has acquired a vested property right under the common law of North Carolina centers on the party's reliance on a permit, the exercise of good faith, and the incurring of substantial expenditures prior to the revocation of a permit or the amendment to an ordinance."); *Jordan-Arapahoe, Ltd. Liab. P'ship v. Bd. of Cnty. Comm'rs*, 633 F.3d 1022, 1024 (10th Cir. 2011) ("Under Colorado law a property owner does not obtain a vested property right absent (1) the approval of a site specific development plan, or (2) the landowner's substantial and detrimental reliance on representations and affirmative actions by the local government."); *c.f. Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 45, 312 Mont. 52, 57 P.3d 836 ("Arguably, Kiely could have established a property interest upon application for final approval . . ."); *Seven Up Pete Venture v. Montana*, 2005 MT 146, ¶ 32, 327 Mont. 306, 114 P.3d 1009 ("the . . . 'opportunity' to seek a permit . . . did not constitute a property right."). Rather, the vested right requires both the issuance of a permit and the building of a structure in reliance upon the permit.

¶61 The Court faults Dugan for proceeding with construction of the bridge while knowing that CANSC was challenging the permit, concluding that "it is unclear whether Dugan's reliance on the permit was in good faith." Opinion, ¶ 43. However, Dugan's knowledge of the pending legal challenge does not change the fact that the permit had been issued and the bridge was then a "permitted development" under the Act. Section 75-7-206, MCA. Nothing in the record indicates that the action Dugan took pursuant to the permit was somehow done in bad faith. The obligation to initiate legal action to enjoin the

permitted construction from proceeding while the challenges were pending fell to the opponents of the project. Their failure to obtain an injunction did not eliminate the vesting of Dugan's property right in the bridge under the Act.

¶62 I concur that the District Court correctly ordered removal of the bridge and restoration of the lakeshore property. However, I believe Dugan obtained a vested property right pursuant to the statute that was not lost, and for which she can pursue appropriate relief.

/S/ JIM RICE