

FILED

02/04/2025

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 23-0728

DA 23-0728

IN THE SUPREME COURT OF THE STATE OF MONTANA

2025 MT 22

GBSB HOLDING, LLC,

Plaintiff and Appellant,

v.

FLATHEAD COUNTY BOARD OF
COUNTY COMMISSIONERS AND
FLATHEAD COUNTY, MONTANA;
WHITEFISH VILLAGE, LLC; WILLIAM F.
OSWALD AND JULIANA M. OSWALD,
Co-Trustees of the Oswald Family Trust dated
May 23, 2016; SHAWN PATRICK JAMES
AND KRISTIN PATRICIA BELL; WHITEFISH
HILLS VILLAGE HOMEOWNERS
ASSOCIATION, INC.; and JOHN DOES 1 AND 2,

Defendants and Appellees.

WHITEFISH HILLS VILLAGE HOMEOWNERS
ASSOCIATION, INC.,

Plaintiff,

v.

FLATHEAD COUNTY,

Defendant,

GBSB HOLDING, LLC,

Intervenor.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause Nos. DV-20-995(A) and
DV-21-206 (D)
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Richard P. DeJana, Richard DeJana and Associates, PLLC, Kalispell, Montana

For Appellee Flathead County:

Susan B. Swimley, Attorney and Counselor at Law, Bozeman, Montana

Tara DePuy, Attorney at Law, PLLC, Livingston, Montana

For Appellee Whitefish Village, LLC:

Donald R. Murray, Hash, Rudbach, Hutchison & Murray, PLLP, Kalispell, Montana

For Appellee Whitefish Hills Village Homeowners' Association, Inc.:

Colleen M. Dowdall, Dowdall Law, Missoula, Montana

For Appellees William F. Oswald, Juliana M. Oswald, Sean Patrick James, Kristin Patricia Bell, Scott C. Martin, and Rikki Ann Martin:

Dana L. Hupp, Chris A. Johnson, Worden Thane, P.C., Missoula, Montana

Submitted on Briefs: November 6, 2024

Decided: February 4, 2025

Filed:



Bon Granf

Clerk

Justice Beth Baker delivered the Opinion of the Court.

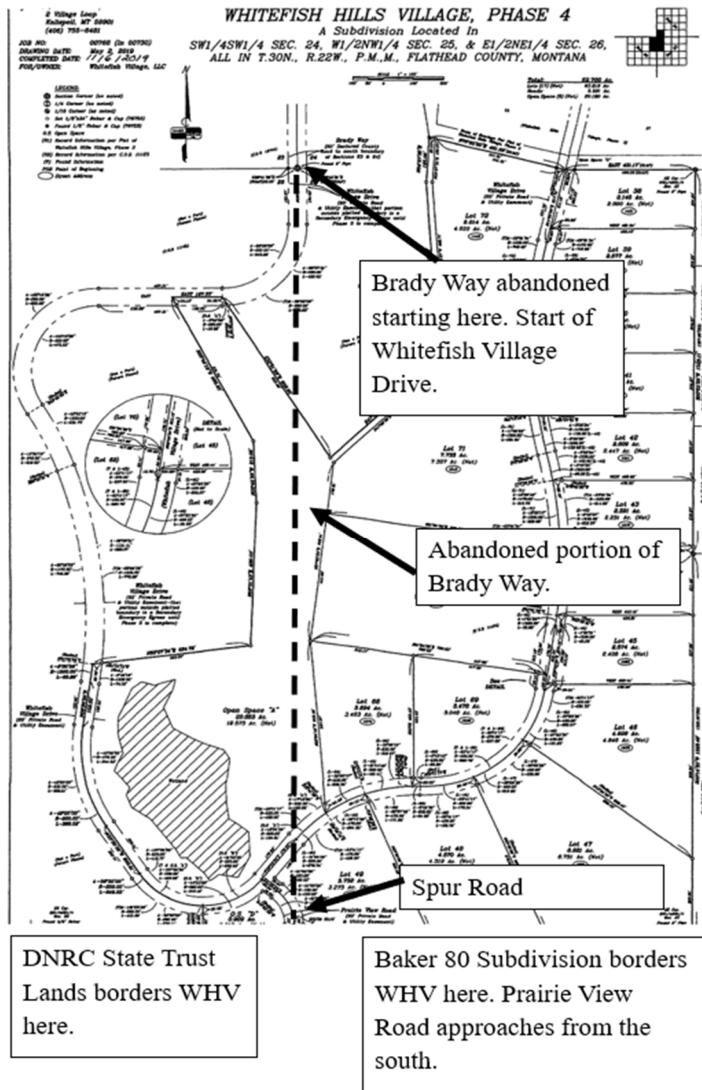
¶1 This case concerns a road use dispute between two neighboring subdivisions in Flathead County. GBSB Holding, LLC (GBSB) appeals a series of orders from the Montana Eleventh Judicial District Court. The District Court prohibited GBSB from using Whitefish Hills Village (WHV) subdivision roads as the primary access to GBSB's subdivision. On GBSB's petition for a writ of review, the court also concluded that Flathead County did not exceed its jurisdiction in abandoning a portion of a county road within WHV. We consider two issues on appeal:

- 1. Did the District Court err when it held that the scope of the public access easements encumbering WHV roads did not include primary access to Baker 80 residents?*
- 2. Did Flathead County exceed its jurisdiction to abandon a portion of Brady Way?*

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 GBSB is the developer for Baker 80, a proposed subdivision directly south of and adjacent to WHV. Baker 80 sought access to its property through WHV, which Flathead County, Whitefish Village, LLC, and the WHV Homeowners Association opposed. Whitefish Village, LLC is the developer for WHV. GBSB asserts that Baker 80—the southern subdivision—has a legal right to use both Whitefish Village Drive (a road passing through WHV) and a “spur road” connecting Whitefish Village Drive to Baker 80. Piecing together maps from the stipulated record, the following map illustrates the relevant lands and roads in dispute.



¶3 WHV is a five-phased subdivision that submitted its first application in 2011 and received conditional approval that year. Phase 1 received final plat approval beginning in 2016, with Phase 5 receiving final plat approval in 2020. Whitefish Village Drive is a constructed, internal subdivision road that loops through WHV. Each of the recorded final plats for the five phases included language substantially similar to the following paragraph shown on the Phase 5 plat:

Certificate of Private Roadway: The roadway shown as Whitefish Village Drive on this plat is intended to be *private in all respects*. It is hereby dedicated forever to be for the use of the owners (and their successors in interests) of the lots described on this plat It is understood and agreed that the value of each lot described on this plat is enhanced by the private, exclusive nature of said Whitefish Village Drive. Excepting and reserving the right to use all roadways within the plat of WHITEFISH HILLS VILLAGE . . . by the owners of the lots in this phase, the developer, his heirs and assigns, and any and all past and future phases or subdivisions submitted by the developer. (Emphasis added).

¶4 The final plats also contained the conditions of subdivision approval, including that “[a]ll subdivision roads are designated public access easements” pursuant to Flathead County, Mont., Subdivision Regulations § 4.7.15(e) (Apr. 1, 2011), <https://perma.cc/G3X9-TDAJ>.¹ The current dispute finds its genesis in these two designations.

¶5 Brady Way was a road that ran north to south straight through WHV. It was declared a county road in 1905 but was not fully constructed. A 2011 report by the Flathead County Planning and Zoning Office noted that about a half-mile from where Brady Way began in the north (not shown in the above diagram), it made a 90-degree turn and transitioned to Brady Way West to serve adjacent properties. There was a road easement alignment for Brady Way that continued south. This was problematic because it would split two proposed WHV lots and impact one of the smaller wetland areas. WHV thus proposed to abandon a portion of Brady Way. The environmental assessment (EA) conducted for WHV also

¹ All references are to Version IV of the Flathead County Subdivision Regulations. These were the subdivision regulations in effect at the time WHV received conditional approval. The relevant substance of the regulations discussed in this Opinion remains the same today. Flathead County includes all versions of its subdivision regulations online. Available at: <https://perma.cc/S6QLUMKT>.

included plans to abandon a segment of Brady Way. The EA described Brady Way as a dedicated county road providing access to several tracts west of WHV, but stated that a significant portion was never developed, including the southern end, which accessed DNRC School Trust Land. The EA explained that a sixty-foot easement still would provide access to the DNRC School Trust Lands south of WHV, but the private roads within the subdivision would be maintained by the WHV HOA. Flathead County received a formal petition to abandon a portion of Brady Way in September 2019. At a public hearing on November 4, 2019, the Board of Commissioners of Flathead County (hereinafter, “the Board”) approved the road abandonment.

¶6 Baker 80 had various owners during WHV’s development and the abandonment of Brady Way. In 2011, when WHV submitted its subdivision application (with the proposal to abandon a segment of Brady Way), Bauer Trust owned the property. Bauer Trust conveyed the property to Kaltschmidt Holdings, LLC, which owned Baker 80 when Brady Way was abandoned. Afterwards, Kaltschmidt Holdings, LLC conveyed the property to GBSB, the current party in this lawsuit.²

¶7 When the Board granted conditional approval to the WHV subdivision, it included the abandonment of the unconstructed portion of Brady Way as a condition, realigned as shown on the plat and, citing the Flathead County Subdivision Regulations § 4.7.15(e), stated that all subdivision roads, including the realignment of Brady Way, shall be designated

² After filing this lawsuit, GBSB transferred its interest in Baker 80 to Octex Company A. As stated in a notice of ratification filed with the District Court, GBSB continues to maintain the action pursuant to M. R. Civ. P. 25(c). In briefing on appeal, both parties refer to the appellant as GBSB.

public access easements. When Brady Way was abandoned, the “spur road” was not constructed. The WHV Phasing Plan states that the “right-of-way from Whitefish Village Drive to the southern property boundary shall be dedicated as a public ROW but not constructed.”

¶8 In May 2020, GBSB submitted a major subdivision preliminary plat application with Flathead County for Baker 80. GBSB asserts that it understood Whitefish Hills Village Drive and the spur road to be public roads and thus available as the primary access point for Baker 80.

¶9 In November 2020, GBSB filed a petition in the District Court seeking a declaratory judgment that WHV subdivision roads were public easements, including both Whitefish Hills Village Drive and the spur road. In the alternative, the petition requested the District Court to declare the abandonment of the portion of Brady Way defective, thus rendering it invalid.

¶10 On February 2, 2021, the Board granted conditional approval of the Baker 80 preliminary plat. This conditional approval listed various findings of fact and conditions, citing the County’s subdivision regulations.³ The Board required Baker 80 to pave 69.6% of Prairie View Road or provide “proof of legal access and a road maintenance mechanism for Whitefish Village Drive.”

³ In March 2021, the Whitefish Hills Homeowners Association separately filed a request for judicial review appealing the Board’s decision to approve the Baker 80 Subdivision preliminary plat. The District Court consolidated the two cases. This petition was later dismissed by the District Court, apparently after stipulation by the HOA. This issue is not on appeal.

¶11 GBSB then filed an amended complaint. Both GBSB and Whitefish Village, LLC moved for summary judgment. The District Court granted Whitefish Village, LLC's motion. It concluded that WHV roads were private roads encumbered by public access easements. These public access easements were easements in gross that did not include primary access for Baker 80 residents. The court determined that, without an agreement, Baker 80 residents must use Prairie View Road and KM Ranch Road to the south as primary access.

¶12 District court proceedings continued because GBSB's second issue—the road abandonment challenge—remained. The parties stipulated to a record, submitted briefing, and presented arguments during a contested hearing before the District Court. On a writ of review, the court concluded that the Board did not exceed its jurisdiction in abandoning the disputed portion of Brady Way.

¶13 In an October 2023 order on subsequent motions, the District Court reiterated that Whitefish Village Drive and the spur road are private roads burdened by a public access easement, this easement is an easement in gross, and its scope does not extend to Baker 80 residents using these roads as their primary access.

¶14 The District Court certified its judgment as final pursuant to Mont. R. Civ. P. 54(b).⁴ Pursuant to M. R. App. P. 4(4)(b), we accepted the certification and allowed the appeal to proceed.

⁴ According to the District Court's order granting certification, the remaining issues for the District Court are the following: damage claims between Whitefish Hills Village Homeowners Association, Inc. and Whitefish Village LLC; claims between GBSB and the Whitefish Hills Village Homeowners Association, Inc. for remediation of the spur road; and claims by the individually-named homeowners.

STANDARDS OF REVIEW

¶15 “We review district court grants or denials of summary judgment de novo for conformance to M. R. Civ. P. 56.” *Speer v. Mont. Dep’t of Corrections*, 2020 MT 45, ¶ 17, 399 Mont. 67, 458 P.3d 1016 (citing *Alexander v. Mont. Dev. Ctr.*, 2018 MT 271, ¶ 10, 393 Mont. 272, 430 P.3d 90). Summary judgment is proper if “there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.” M. R. Civ. P. 56(c)(3). Here, the parties stipulated to a record and there is no issue of fact. “We review district court conclusions and applications of law de novo for correctness.” *Speer*, ¶ 17 (citing *Alexander*, ¶ 10).

¶16 “A district court’s decision to deny a writ of review is discretionary.” *Williams v. Stillwater Bd. of Cnty. Comm’rs*, 2021 MT 159, ¶ 11, 404 Mont. 424, 490 P.3d 1234. When a court reviews an inferior board’s decision through a writ of review, it asks only whether the board exceeded its jurisdiction or regularly pursued its authority. *Williams*, ¶ 11 (citing §§ 27-25-102,(2), -303, MCA).

DISCUSSION

¶17 *1. Did the District Court err when it held that the scope of the public access easements encumbering WHV roads did not include primary access to Baker 80 residents?*

¶18 An interest in real property “may not be created, granted, assigned, surrendered, or declared otherwise than by operation of law or a conveyance or other instrument in writing, subscribed by the party” creating or granting said interest. Section 70-20-101, MCA. “An easement is a nonpossessory interest in land that gives a person the right to use the land of another for a specific purpose.” *Broadwater Dev., L.L.C. v. Nelson*, 2009 MT 317, ¶ 31,

352 Mont. 401, 219 P.3d 492 (citing *Taylor v. Mont. Power Co.*, 2002 MT 247, ¶ 11, 312 Mont. 134, 58 P.3d 162). Under Flathead County's Subdivision Regulations, the Board may not approve a subdivision application unless it “[a]ssures [that] easements for the location and installation of any planned utilities, roadways . . . , or other easements required by the [Board] shall be shown on the final plat[.]” Flathead County, Mont., Subdivision Regulations § 4.1.7(a). When it approved the WHV subdivision, the Board imposed the condition that all subdivision roads shall be designated as public access easements. This condition is shown and described on the face of the final plat. Flathead County, Mont., Subdivision Regulations § 4.7.15(e).

¶19 There are two common types of easements—appurtenant and in gross. An easement appurtenant benefits a particular parcel of land, and the benefited parcel is the dominant estate. *Broadwater Dev., L.L.C.*, ¶ 33 (citing *Blazer v. Wall*, 2008 MT 145, ¶ 24, 343 Mont. 173, 183 P.3d 84). An easement in gross benefits the holder of the easement personally, not in connection with their ownership or use of a particular parcel of land. *Broadwater Dev., L.L.C.*, ¶ 33 (citing *Blazer*, ¶ 24). Whether dealing with an easement in gross or easement appurtenant, the burdened parcel of land is the servient estate. *Broadwater Dev., L.L.C.*, ¶ 33. A “right-of-way” is a type of easement that can be an easement in gross or an easement appurtenant. *Broadwater Dev., L.L.C.*, ¶ 34 (citing §§ 70-17-101(4), -102(5), MCA).

¶20 In *Broadwater Development, L.L.C.*, a subsequent owner objected after a proposed subdivision developer agreed with neighboring properties to create an “emergency public access [and] utility easement.” *Broadwater Dev., L.L.C.*, ¶¶ 4-5. Noting a general

presumption that an easement is appurtenant, this Court reasoned that the terms “public” and “utility” in the easement created an easement in gross because the public and the utility providers personally held the easement. *Broadwater Dev., L.L.C.*, ¶ 37. The scope of the public access and utility easement was for “members of the public to travel between Broadwater Estates Major Subdivision and Highway 12 in emergency situations and by utility providers to provide utilities to the subdivision.” *Broadwater Dev., L.L.C.*, ¶ 44.

¶21 The District Court reasoned that like in *Broadwater Development, L.L.C.*, the final WHV approval and plats created no ascertainable dominant tenement other than the public at large. Thus, the public easement encumbering WHV private roads was an easement in gross. GBSB does not appeal this conclusion.

¶22 The parties do not dispute that a public access easement encumbers the WHV roads, but they dispute the scope of that easement and whether it extends to the use that Baker 80 proposes. When an easement is established, the “documents of conveyance must give the owner of the property being burdened by the servitude ‘knowledge of its use or its necessity.’” *Davis v. Hall*, 2012 MT 125, ¶ 20, 365 Mont. 216, 280 P.3d 261 (citing *Blazer*, ¶¶ 36, 51, 56-57). Recording the documents imparts “constructive notice of [their] contents to all interested parties.” *Davis*, ¶ 22 (quoting *Blazer*, ¶ 73). “[I]f a referenced plat or certificate of survey is used to confirm or amplify the description of a purported easement provided in another document . . . then the documents should be read together.” *Davis*, ¶ 25 (citing *Blazer*, ¶ 51). Critically, the documents must “adequately describe” the easement’s use or necessity and identify “with reasonable certainty the dominant and servient

tenements.” *Davis*, ¶ 25 (citing *Blazer*, ¶¶ 51, 54). Here, because it is an easement in gross, the documents identify no dominant tenement, only the servient tenement. The subdivision regulations, conditions of approval, and plats comprise the “transaction documents” creating the public access easement on WHV roads; accordingly, we read them together. *See Davis*, ¶ 25. We address only whether the scope of the public access easement entitles Baker 80 residents to use WHV roads as their primary access.

¶23 An easement’s scope “is determined by the terms of the grant or the nature of the enjoyment by which it was acquired.” Section 70-17-106(1), MCA.

Permissible uses of an express easement include only those which do not substantially exceed the nature, scope, and extent or intensity of use intended by the grantor at the time of the express grant as determined by:

- (1) the express language of the source instruments of conveyance, including any subdivision plat, certificate of survey, or map referenced therein; *or as necessary*
- (2) resort to extrinsic evidence and implication from the totality of the prevailing circumstances under which the express grant or restriction was made or imposed.

Baugh v. H2S2, LLC, 2024 MT 314, ¶ 17, 419 Mont. 472, 560 P.3d 1279 (citations omitted).

¶24 We may resort to extrinsic evidence “only to the extent that the use, scope, and extent or intensity of use intended by the grantor of an express easement is not” clear and unambiguous from the pertinent instruments of conveyance. *Baugh*, ¶ 18; *accord Quarter Circle JP Ranch, LLC v. Jerde*, 2018 MT 68, ¶ 10, 391 Mont. 104, 414 P.3d 1277 (quoting *Mason v. Garrison*, 2000 MT 78, ¶ 21, 299 Mont. 142, 998 P.2d 531) (If the terms on the face of the document are sufficiently specific to define the breadth and scope of the easement, we must abide by the “actual terms of the grant.”). The extrinsic evidence a court may

consider includes “the situation of the property, surrounding circumstances, and historical use[,]” *Quarter Circle JP Ranch, LLC*, ¶ 11 (quoting *Ganoung v. Stiles*, 2017 MT 176, ¶ 15, 388 Mont. 152, 398 P.3d 282), as well as “the intent behind the easement’s creation,” *Quarter Circle JP Ranch, LLC*, ¶ 13. A court also may consider the “nature and character of the dominant and servient estates, the prior and subsequent use of the properties, the character of the surrounding area, the nature and character of any common plan of development for the area, and the consideration, if any, paid for the easement.” *Baugh*, ¶ 19 (citations omitted).

¶25 The breadth and scope of the easement are as “reasonably necessary and convenient” as the purpose for which the easement was created. *Quarter Circle JP Ranch, LLC*, ¶ 11 (quoting *Mattson v. Mont. Power Co.*, 2009 MT 286, ¶ 17, 352 Mont. 212, 215 P.3d 675). The easement’s use cannot differ so substantially that it burdens “the servient estate to a greater extent than was contemplated at the time the easement was created.” *Quarter Circle JP Ranch, LLC*, ¶ 11 (quoting *Guthrie v. Hardy*, 2001 MT 122, ¶ 48, 305 Mont. 367, 28 P.3d 467); *accord Ganoung*, ¶ 17. There is a rebuttable presumption that reasonable anticipated changes in use may exist by gradual and evolutionary developments, but the subsequent use cannot be “revolutionary” in scale, type, extent, or intensity from the original intent, and cannot unreasonably interfere with the servient estate’s lawful use and enjoyment. *Baugh*, ¶ 20.

¶26 Relying on *Quarter Circle JP Ranch, LLC*, the District Court reasoned that the terms of the grant were not sufficiently clear, so it consulted evidence of historical use and intent.

In its order, the court stated that in 2011, when WHV sought preliminary approval, both the County Attorney and DNRC advised that they were amenable to abandoning Brady Way, but only if the private roads in WHV retained an easement to “ensure access to state trust lands as well as promote future connectivity and emergency ingress/egress should lands to the south be developed.” The court reasoned that the County envisioned the easement to allow a “narrow set of users: mainly, those accessing the public land to the south and persons in emergency situations.” The District Court also reasoned that the Board, according to local regulations, could have required WHV to provide access to Baker 80 but did not. Instead, it granted conditional approval to Baker 80 if the developer could show physical and legal access by either paving the southern entrance road (Prairie View Road) or providing proof of legal access and a road maintenance agreement for Whitefish Village Drive.

¶27 GBSB asserts the record shows an intent to designate “public access easements” in WHV to allow future access to residents of other potential subdivisions. It maintains that the scope of the public access easement inherently includes Baker 80 residents. GBSB contends the District Court misconstrued findings of fact with the subdivision conditions of approval. GBSB further argues that when Brady Way was abandoned, the Board intended that it would become a public right-of-way, thus allowing access to Baker 80 via Whitefish Village Drive. It asserts that the District Court overlooked Finding of Fact 18 in the Baker 80 approval, which states that “[i]nformation provided appears to demonstrate that the Whitefish Village Drive was intended to replace/realign a portion of an existing public right-of-way known as Brady Way.”

¶28 Flathead County and WHV contend the District Court was correct in its scope analysis. They argue that the subdivision regulations and conditions of approval show that the Board could have, but did not, condition its approval of WHV on granting Baker 80 access. The absence of these conditions shows that Baker 80 cannot show “legal access” through the public access easements. WHV argues that it takes a formal action by the County to abandon a county road, and a formal action to establish one. Section 7-14-2101, MCA. There was a formal abandonment, but no steps were taken to establish a new county road, and the County asserts no such claim.

¶29 Flathead County’s Subdivision Regulations do not contain a definition of either “public access” or “public access easement.” *See* Flathead County, Mont., Subdivision Regulations § 4.9. Because the approved final plats designate the WHV roadways as “private in all respects,” but the conditions of approval designate the subdivision roads as “public access easements,” the intended use and scope of the “public access easements” is not “clearly and unambiguously discernible on the face of the pertinent instruments of conveyance . . .” *Baugh*, ¶ 19. Like the District Court, we consider extrinsic evidence. *Baugh*, ¶ 17.

¶30 In *Broadwater Development, L.L.C.*, we analyzed the scope of a public easement in gross on an adjacent landowner’s roads. *Broadwater Dev., L.L.C.*, ¶ 37. Unlike the present case, the easement in *Broadwater Development, L.L.C.* was expressly titled a “60’ emergency public access and utility easement,” thus aiding a determination of its scope. *Broadwater Dev., L.L.C.*, ¶ 5. The term “public access,” however, does not necessarily mean a permitted

thoroughfare between two private subdivisions. The cumulative record shows a salient concern that when WHV was granted conditional approval, the Board wanted to ensure public lands to the south would not become landlocked and access would be available for emergencies. Less than a year before GBSB acquired Baker 80, the previous owner—Kaltschmidt Holding—applied for zoning changes on Baker 80. In Kaltschmidt’s proposal and related findings of fact by the Flathead County Planning Office, there are various references that if future development or residential construction were to occur, access to Baker 80 would be from the southern Prairie View Road.

¶31 GBSB does not seek access for members of the general public but instead to use the WHV subdivision roads as the *primary access* to private lots within Baker 80. The record does not show a “common plan of development for the area” to include such a thoroughfare on WHV roads for Baker 80 residents. *See Baugh*, ¶ 19. As Whitefish Village, LLC points out, to define public access here to allow primary access to Baker 80 would—in essence—make the land of Baker 80 a dominant tenement. A key feature of an easement in gross is that there is no dominant tenement. *Blazer*, ¶ 24. The record also shows that using WHV roads as the primary route of travel to Baker 80 would increase the traffic on Whitefish Village Drive by 160 average daily trips, making it more “revolutionary” in type and intensity of use. *See Baugh*, ¶ 20.

¶32 The Regulations further aid our construction of the transaction documents. Section 4.7.15(e) requires that “[s]ubdivision roads shall be designated as public access easements” and that property owners provide proof of an agreement to “bear their pro-rata share for road

maintenance within the subdivision and for any integral access roads lying outside the subdivision.” This section refers to an agreement for road maintenance costs but says nothing about interior subdivision roads automatically including “legal access” to other, future private subdivisions. Immediately preceding this subsection, the Regulations state that “[w]hen a new subdivision adjoins un-subdivided land (lands or parcels not created by a filed subdivision plat) the subdivider *may* be required to provide rights-of-way or easements from proposed subdivision road easement to the adjacent un-subdivided property.” Flathead County, Mont., Subdivision Regulations § 4.7.15(d) (emphasis added). Under common rules of construction, the word “may” is permissive or discretionary, while the word “shall” is compelling or mandatory. *Gaustad v. City of Columbus*, 265 Mont. 379, 381, 877 P.2d 470, 471 (1994); *see also Kacego Orchards, LLC v. Mont. Dep’t of Transp.*, 2023 MT 71, ¶ 23, 412 Mont. 45, 528 P.3d 1097 (reasoning that the “use of the word ‘may’ means that the decision to be made is discretionary”). In other words, the Board requires that all subdivision roads have public access but has discretion to require that a new subdivision grant an easement to adjacent, unsubdivided land.

¶33 When WHV received final approval in 2020, the land to the south was bordered partially by DNRC state trust land and partially by Baker 80 property. The 2011 conditions of approval contain no reference to § 4.7.15(d) or any requirement for future provision of specific rights-of-way or easements to the adjacent un-subdivided private property. The final WHV plat references that all roads shall be public access easements pursuant to § 4.7.15(e) but likewise does not cite to § 4.7.15(d). At the time the County approved the WHV

subdivision, it could have required WHV to provide a right-of-way or easement to what is now Baker 80, but it did not.

¶34 When there are several provisions in an instrument, the role of the judge is to adopt a construction that will give effect to all. Section 1-4-101, MCA. If we adopted GBSB's argument that the public access easement mandated by § 4.7.15(e) automatically mandated primary access to Baker 80, it would render meaningless the provision of § 4.7.15(d) that reserves discretionary authority to the Board to require a new subdivision to provide access to adjacent, un-subdivided property.

¶35 A comparison of both WHV and Baker 80 subdivision approvals also supports our analysis. Section 76-3-620, MCA, requires that when the Board conditionally approves a proposed subdivision, it must identify the regulations and statutes used to reach the decision, provide the facts and conclusions relied upon in making the decision, and identify the conditions that apply to the preliminary plat approval before the final plat may be approved. Section 76-3-620(1)(d), (e), (f), MCA. The Regulations require all subdivisions to have “legal and physical access via a primary access road, and all subdivision lots shall have legal and physical access.” Flathead County, Mont., Subdivision Regulations § 4.7.15. This provision specifically prohibits secondary emergency access roads to be used to provide primary access to a subdivision or lot. Flathead County, Mont., Subdivision Regulations § 4.7.15. The Regulations define “legal access” as access to the subdivision, or any lot within it, through a “dedicated or deeded public road right-of-way or by a private road easement.” Flathead County, Mont., Subdivision Regulations § 4.9.

¶36 In Baker 80’s approval, the Board’s Finding of Fact 3 states that “the road system appears to be acceptable” because Baker 80 “would be required to pave” almost 70% of Prairie View Road “unless proof of legal access and a road maintenance mechanism for Whitefish Village Drive is provided.” Finding of Fact 16 states that there are “adequate provisions for legal and physical access to the subdivision and all lots within it, with the imposition of conditions, because Whitefish Village Drive and Prairie View Road *may* provide access to the subdivision and the internal subdivision road would provide access to each lot.” (Emphasis added). Both findings cite to Conditions 5, 6, 20, and 21, which cumulatively discuss the road requirements for the subdivision and state that Baker 80 must provide a compliant road user’s agreement unless the developers pave Prairie View Road. Condition 21 for Baker 80 (citing to Finding of Fact 3 and 16) states that Baker 80 must provide a compliant road user’s agreement for the roads *within Baker 80*, and any integral access roads.⁵

¶37 When WHV received conditional approval, the Board’s Finding of Fact 23 stated that each lot would have legal and physical access “because they *will* be served by Whitefish Village Drive, Hills Lookout Court, Meadow View Court and Brady Way which are all proposed internal subdivision roads and utility easements made open and available to public use pursuant to the applicable subdivision regulations.” (Emphasis added). Contrast this

⁵ GBSB argues the District Court misconstrued findings of fact as conditions but cites no authority why this would warrant overturning the District Court’s determination. The subdivision approval conditions are based on the findings of fact. Both the findings and conditions in the Baker 80 approval evidenced the Board’s determination that, absent an agreement, GBSB was not entitled to compel primary access to the subdivision through WHV roadways.

finding with Baker 80’s Finding of Fact 16—that legal access to Baker 80 “may” include Whitefish Village Drive and Prairie View Road. Considering the respective language and the Regulations’ definition of “legal access,” if the public access easement automatically included legal access to Baker 80, there would be no need for the Board to require that Baker 80 show legal access by *permissively* reaching an agreement with WHV or by building its own road from the south. We must interpret the Board’s approval and conditions for Baker 80 and WHV “as a whole, giving meaning and effect to all provisions as possible.” *See Peeler v. Rocky Mountain Log Homes Can., Inc.*, 2018 MT 297, ¶ 18, 393 Mont. 396, 431 P.3d 911. The Board’s conditions aligned with the contemplated scope in 2011 of “promoting future connectivity,” but the Board did not guarantee that WHV would be required to provide the legal or primary access to Baker 80’s private subdivision.

¶38 Finding of Fact 18 in Baker 80’s approval states that “[i]nformation provided appears to demonstrate that the Whitefish Village Drive was intended to replace/realign a portion of an existing public right-of-way known as Brady Way.” GBSB argues that the District Court overlooked this finding. The Board did not impose conditions based on this finding. When Brady Way was abandoned, the public easement encumbering WHV private roads remained. The realignment does not establish a county road. “[A] public easement is not the equivalent of a county road.” *Pedersen v. Dawson Cnty.*, 2000 MT 339, ¶ 23, 303 Mont. 158, 17 P.3d 393. The District Court did, in fact, take into consideration Finding of Fact 18 from the Baker 80 approval. It reasoned that “all governmental parties appeared amenable to the abandonment proposal so long as the realigned right of way within WHV would be subject

to a public access easement.” In other words, Brady Way was abandoned as a county road and, although the road was not used at the time to access the southern public lands, the Board required that a public access easement remain to ensure public lands to the south would not become landlocked in the future.

¶39 The adoption, enforcement, and administration of subdivision regulations—including the coordination of roads within subdivided land with other roads, both existing and planned—are within the authority of the local governing body, here the Board of County Commissioners. Section 76-3-501(1)(b), MCA. “[L]ocal governing bodies should be able to develop their own local subdivision regulations” if they do not conflict with the Montana Subdivision and Platting Act and thus undermine the legality of the local regulation. *See Burnt Fork Citizens Coal. v. Bd. of Cnty. Comm’rs of Ravalli Cnty.*, 287 Mont. 43, 49, 951 P.2d 1020, 1024 (1997). We also acknowledge the broad authority vested in county commissioners to oversee county roads. *Ingram-Clevenger, Inc. v. Lewis & Clark Cnty.*, 194 Mont. 43, 49-50, 636 P.2d 132, 1376 (1981). By this same logic, we agree with the District Court’s reasoning that the Board understood its own requirements when it said GBSB must either come to an agreement with WHV to use the WHV road or pave Prairie View Road for alternative southern access.

¶40 Finally, WHV’s Phase 5 Plat contains the phrase under a separate notes section: “Future developments of lands which will access Whitefish Village Drive, Prairie View Road, and Brady Way will be required to join in a road maintenance agreement with the Whitefish Hills Village HOA for the yearly maintenance and upkeep of said Whitefish

Village Drive, Prairie View Road, and Brady Way.” This note is not listed under a condition of approval, nor does it cite to § 4.17.15(d) of the Subdivision Regulations. The note preserves the standard county requirement that subdivisions that share roads also must pay their share of road maintenance; it does not create a private easement to a future subdivision or impose a mandate on WHV to allow Baker 80 to use WHV roads. When the Board granted conditional approval to Baker 80, it did not require that WHV enter into a road user’s agreement with Baker 80. Given the broad authority the Legislature vested in the Board to oversee subdivision roads and our reasoning that the “public access easement” reference standing alone does not extend primary access to Baker 80, the District Court correctly refused to impose such a requirement. *See* § 76-3-501(1)(b), (c), MCA.

¶41 We agree with the District Court’s reasoning that considering all relevant records in the context of the County’s Subdivision Regulations, the scope of “public access easements” does not include primary access by Baker 80 residents to their own private subdivision. The Board gave Baker 80 the option either to enter a road use agreement with WHV or to pave the road that provides a different route of access. The conditions of approval for both subdivisions, read in conjunction with the relevant regulations, show that WHV is not obligated to provide primary access to Baker 80.

¶42 *2. Did Flathead County exceed its jurisdiction to abandon a portion of Brady Way?*

¶43 In the alternative, GBSB argues that the Board failed to follow the statutory procedure when it abandoned a portion of Brady Way, thus exceeding its jurisdiction and invalidating the abandonment.

¶44 When WHV petitioned to abandon a portion of Brady Way in 2011, the adjoining landowner list it attached to the petition identified only Whitefish Village, LLC. GBSB asserts the Board erred because there were two affected landowners (Kaltschmidt Holding and the State of Montana) who had legal access but were not identified in the report and petition, and the commissioners did not notify them or obtain their consent. GBSB argues that the District Court further erred because the commissioners did not find substantially similar access would be provided by the abandonment, and thus there was no jurisdiction to abandon the portion of Brady Way.

¶45 Both Flathead County and Whitefish Village, LLC assert that all statutory requirements to abandon a county road were met. They emphasize the deferential standard of review to which courts must adhere when reviewing a county decision to abandon a road.

¶46 The Legislature has not provided for a direct appeal or other method of judicial review from a Board decision on road abandonment. *Williams*, ¶ 15 (citations omitted). The only avenue for judicial review of a road abandonment decision is through a writ of review, which is an extraordinary remedy. *Williams*, ¶ 15 (citations omitted). Judicial review is not the functional equivalent of an appeal, and the court's inquiry is limited to whether the Board exceeded its jurisdiction and exercised its jurisdiction with regularity. *Williams*, ¶ 15 (citations omitted). To determine if the Board kept within its jurisdiction, the court "inspects the record to determine if the decision is 'unsupported by evidence, or the findings are contrary to all the substantial evidence, or the decision below has no evidence to support it.'" *Williams*, ¶ 16 (quoting *State ex rel. Griffiths v. Mayor of City of Butte*, 57 Mont., 368,

373, 188 P. 367, 369 (1920)). The court’s limited “review of the evidence is ‘not for the purpose of weighing it, but to ascertain whether it furnishes any legal and substantial basis’ for the decision.” *Williams*, ¶ 16 (quoting *State ex rel. Griffiths*, 57 Mont. at 373, 188 P. at 369). A court may not reweigh conflicting evidence. *Williams*, ¶ 17 (citing *State ex rel. Griffiths*, 57 Mont. at 373, 188 P. at 369).

¶47 Title 7, Chapter 14, Part 26, MCA, sets out the requirements and procedures to abandon a county road. Under § 7-14-2615(3), MCA, a board “may not abandon a county road or right-of-way used to provide existing legal access to public land . . . unless another public road or right-of-way provides substantially the same access.” Under § 7-14-2615(4), MCA, a “board may not abandon a county road or right-of-way used to access private land if the access benefits two or more landowners unless all of the landowners agree to the abandonment.”

¶48 Section 7-14-2602, MCA, sets out the requirements for a petition to abandon a road. It requires that the petition list the land and owners affected and whether the affected owners consent. Section 7-14-2602(3), (4), MCA. A handwritten statement in the WHV petition requiring that it comply with § 7-14-2615(4), MCA, states that the road currently is not built on the dedicated easement, and “landowners currently access from the south from KM Road.” The District Court carefully walked through each section of the statutory requirements and reasoned that while not perfect, the petition substantially complied with the requirements of § 7-14-2602, MCA.

¶49 A Flathead Deputy County Attorney viewed Brady Way with the director of the County Road and Bridge Department. She submitted an attorney report in support of abandonment and testified at the public hearing to abandon the road. Both the testimony and report discussed that the road was undeveloped, and they could not drive on it. The Deputy County Attorney also wrote that § 7-14-2615(3) and (4), MCA, did not apply because the right-of-way does not provide access to public land and the private landowners whose land borders the right-of-way support the petition. A surveyor report also found the portion of Brady Way undeveloped and stated that it did not at the time provide access to public land or water.

¶50 At the time Brady Way was abandoned, a public easement was realigned to Whitefish Village Drive to ensure there would be connectivity to DNRC State Trust Lands (Baker 80 was undeveloped at the time). Because evidence indicated that Brady Way was not used to access the state public lands, but the realignment would ensure public access to DNRC State Trust Land, the Board complied with § 7-14-2615(3), MCA. The Board, by ensuring a public access easement remained on the WHV roads, ensured “substantially the same access” as required by § 7-14-2615(3), MCA.

¶51 GBSB argues that because the public right-of-way reached the land bordering Baker 80, the Commissioners needed consent from the owner under § 7-14-2615(4), MCA. The record at the time established that the current owners did not use Brady Way to access Baker 80 because the road was unbuilt. Thus, there is evidence to support the Board’s decision,

and it did not exceed its jurisdiction by not requiring Baker 80's consent under § 7-14-2615(4), MCA.

¶52 GBSB argues that the road in fact was developed farther south and was used to access Baker 80. The District Court rejected the affidavits GBSB used to support this assertion because they were outside the stipulated record. We do not disturb this determination. *See Covey v. Brishka*, 2019 MT 164, ¶ 19, 396 Mont. 362, 445 P.3d 785 (noting that a District Court's determination to admit or exclude evidence is a discretionary decision). To reweigh this evidence would be going outside the record before the Board at the time it abandoned the county road and incorrectly reweighing conflicting evidence. *See Williams*, ¶ 17. The record furnished a legal and substantial basis for the Board's determination. *See Williams*, ¶ 16.

¶53 GBSB protests that it had no notice of the abandonment. Bauer Trust owned Baker 80 in 2011. The Board provided Bauer Trust notice of WHV's application for the subdivision, which included the proposed abandonment of the portion of Brady Way. The Board's conditional approval of WHV required the abandonment. The District Court observed that Bauer Trust did not object. The Board approved the abandonment in November 2019, and GBSB closed on its purchase of Baker 80 in December 2019.

¶54 In *Williams v. Stillwater Board of County Commissioners*, the plaintiffs asserted many similar arguments to GBSB. The *Williams* plaintiffs argued that the District Court misconstrued factual evidence in the record and misinterpreted § 7-14-2615(4), MCA, and that substantial evidence showed an abandoned road ran to the plaintiff's property, thus

requiring their agreement under § 7-14-2615(4), MCA. *Williams*, ¶ 13. This Court reasoned that the Stillwater County Board’s decision to abandon a portion of the disputed road “necessarily required it to determine” that the road did not abut the disputed border, and thus the District Court did not err in limiting its review to “whether or not there is sufficient evidence that the Board overstepped its jurisdiction to justify intruding on the Board’s inherent discretion regarding road abandonment decisions.” *Williams*, ¶ 17. The facts here are similar.

¶55 The petition’s statements, the attorney report, the surveyor report, and testimony at the Board hearing all reveal substantial record evidence that the portion of Brady Way to be abandoned was not constructed or developed. The District Court did not err in concluding that—on these facts—the petition complied with the statutory requirements. Substantial evidence—including the petition, the Deputy County Attorney’s report, the Deputy County Attorney’s testimony, and a surveyor report—all established the evidence that the Board used to come to its decision. We affirm the District Court’s denial of the writ of review and determination that substantial evidence supported the Board’s decision.

CONCLUSION

¶56 The District Court is affirmed.

/S/ BETH BAKER

We Concur:

/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ JIM RICE