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MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

BITTERROOTERS FOR PLANNING, INC. Plaintiff and Petitioner, vs. THE BOARD OF COUNTY COMMISSIONERS OF RAVALLI COUNTY, a body politic and a political subdivision of the State of Montana, and SUNNYSIDE ORCHARDS, LLC, Defendants and Respondents.	Cause No. DV 2013-372 173 Department No. 2 **OPINION AND ORDER - ATTORNEY FEES**

This Court entered final judgment on the *Opinion and Order* filed July 31, 2015 (Doc. #59) ("Order"). Later, the Court bifurcated the motion filed on August 17, 2015 which petitioned for an award of attorney fees and costs (Doc. #58). If the Court determines an award of attorney fees and costs is merited, it will next determine the reasonableness of the fees to be awarded. The Court then set a briefing schedule (Doc. #62) for the parties to respond and reply to the *Motion for Attorney Fees and Brief in Support* (Doc. #56) filed by Plaintiff and Petitioner Bitterrooters for Planning, Inc. ("BFP"). The Court held a further hearing on November 23, 2015 regarding certain matters related to an award of attorney fees and costs (Doc. #67) and set a supplemental briefing schedule (Doc. #70). The matter is now fully briefed.

DISCUSSION

1. Sunnyside as "Passive Observer"

Initially, the Court addresses the position of Defendant and Respondent Sunnyside Orchards, LC ("Sunnyside") that it should be considered a "passive observer" in any determination of an attorney fees award (Docs. #64, #72). Neither the Defendant and Respondent Board of County Commissioners of Ravalli County ("BCC" or "Commissioners") nor BFP genuinely oppose this position.[1] Sunnyside is the developer who proposed the Legacy Ranch Subdivision ("Legacy" or "Legacy Ranch"). Sunnyside was omitted as a party from the original complaint and later involuntarily joined this action. Sunnyside served no written discovery or deposition requests, and filed no motions. Sunnyside deferred to the Commissioners' active participation in this cause and never voluntarily came to the Commissioners' aid to promote any of Sunnyside's own interests. Instead, while Sunnyside may have prevailed on the Commissioners to accept and adopt Sunnyside's development proposal of a 659 unit subdivision built on 368 acres over a 30 year, 15 phase period with full build out projected in January 2049, it was solely the Commissioners' approval of the Legacy Ranch proposal and preliminary plat which aggrieved the BFP. §76-3-625(4), MCA.

The unlawful "decision of a governing body" was the sole basis of this appeal by BFP to the district court. This unlawful decision was solely made by the Commissioners. The Court, therefore, agrees with the position of Sunnyside that it was a passive observer in this

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[1] BFP's Reply Brief (Doc. #66, p.9) concedes "it may well be that the Developer was indeed a passive observer" yet suggests the Court defer a final determination. In the Court's view, under the facts presented, it was the Commissioners' entire responsibility to ensure compliance with Montana's laws.

challenge brought by BFP to the Commissioners' preliminary plat decision. Therefore, Sunnyside falls outside further consideration by the Court in BFP's request for an award of attorney fees and costs.

2. **Fees - Private Attorney General Doctrine**

BFP petitions for an award of attorney fees and costs against the Commissioners primarily under the Private Attorney General Doctrine ("PAGD").[2]

> The PAGD applies when "the government, for some reason, fails to properly enforce interests which are significant to its citizens." *In re Dearborn Drainage Area*, 240 Mont 39, 43, 782 P.2d 898, 900 (1989); *Gateway Village, LLC v. MT DEQ*, 2015 MT 258, ¶12, 381 Mont. 206, 357 P.3d 917. Courts evaluate three factors when considering a request for attorneys' 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; and (3) the number of people standing to benefit from the decision. *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶¶66-67, 296 Mont. 402, 989 P.2d 800.

BFP argues that this Court's July 31, 2015 *Order and Opinion* (Doc. #53) ["Order"] serves the interest of all Ravalli County citizens, sends a strong message to all Montana County governments "to take a hard look at subdivision impacts, and fosters public participation in all aspects of plat approval." (Doc. #56, p.2). BFP also asserts it undertook the expense of this litigation "solely to serve the public interest after years of frustrated efforts to have their voices heard. . . ." "They hired experts and gathered data studies. Even a cursory review of the record demonstrates the great effort and burden undertaken by BFP." (Doc. #56, p.3).

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[2] BFP reserves an alternate argument under the Uniform Declaratory Judgment Act, citing *Trustees of Indiana University v. Buxbaum*, 2003 MT 97, ¶46, 315 Mont. 210, 69 P.3d 663. BFP also addresses, in its supplemental briefing, the applicability of §2-3-221, MCA.

Defendant and Respondent Commissioners counter that an award of attorney fees (and costs) under the PAGD "would result in a significant and unwarranted expansion of the American Rule for awarding attorney fees." (Doc. #63, pp. 5-6). The Commissioners also point out a fourth consideration when evaluating the application of the PAGD, namely, (4) "whether an award of fees would be unjust under the circumstances," citing *W. Tradition P'ship v. Att'y Gen. Of Mont.*, 2012 MT 271, ¶14, 367 Mont. 112, 291 P.3d 454. The Commissioners further contend that no issue(s) of statewide importance were involved in the Court's Order, that the Court engaged in mere statutory interpretation to resolve a "garden variety" dispute, and that no extraordinary or compelling circumstances were or are involved. (Doc. #63, p.6).

BFP's reply brief (Doc. #66) agrees the Montana Supreme Court has now established four requirements for an award of fees under the PAGD, and that an award of fees under the PAGD is not automatic simply because BFP prevailed in this litigation. BFP asserts the fact specific record establishes that BFP has acted in the public interest to vindicate important public policy interests under state law and Montana's Constitution. BFP elaborates that the Commissioners "brought this suit on themselves, by "clinging to the developer's wishes" and refusing to give meaningful consideration to hundreds of public comments outlining in detail the reasons why Legacy Ranch was unlawful as proposed. Moreover, BFP states its membership volunteered thousands of hours and invested significant portions of the non-profits' limited funds in commenting, attending hearings, and ultimately filing this lawsuit. BFP concludes that the equities here lie with an award of fees, and that an award would be just under the circumstances.

The Court discusses and assess the four PAGD factors below.

a. **Social Importance**

Plaintiff BFP argues that it "vindicated the public's important constitutional right to participate in government decisions" when it prevailed in its case. Defendant Commissioners, however, assert that BFP's victory did not depend on any statutory interpretation that required this Court to analyze the constitutional underpinnings of Montana Code Annotated §76-3-625. The Commissioners maintain this case lies in stark contrast to *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.* ("BRPA"), 2011 MT 51, ¶49, 359 Mont. 393, 251 P.3d 131. In BRPA the Montana Supreme Court relied heavily on the Montana Constitution as it interpreted the 310 Law and the stream access law. The Commissioners do concede that members of the BFP may have "exercised" their constitutional right to participate in government decisions. Yet, the Commissioners maintain the Court's Order does not redefine that right or expand that right.

The Commissioners further assert this case has no precedential value, and without precedential value, this case has no broad societal importance across the state of Montana. The Commissioners further contend the Court's Order depended upon applying existing law to act specific considerations based on the administrative record, in a garden variety manner, *e.g.*, that the Commissioners violated the Montana Subdivision and Platting Act ("MSPA") by granting a preliminary plat decision ("PPD") that would be in force for longer than three calendar years, and that this violation was a straightforward determination based on statutory construction. Moreover, the Commissioners assert when this Court determined the Commissioners failed to take a "hard look" at the Legacy subdivision application, the Court

neither created any new law, nor did the Court engage in any statutory analysis in which it looked to the Montana Constitution. Instead, the Court merely determined that the Commissioners had unlawfully relied on an outdated 2006 Traffic Impact Study, failed to consider the impacts to public health and safety, and ignored public comments related to wildlife, especially wildlife migration corridors.

The Commissioners concede that the Court determined that the preliminary plat decision ("PPD") violated the public's constitutional right to participate by denying the public an opportunity to review and comment on the full Legacy Ranch proposal. Yet the Commissioners maintain that the Court – rather than recognize a new right or expand an existing right – merely cited *Citizens for Responsible Development v. Board of County Commissioners of Sanders County*, 2009 MT 182, ¶¶ 23-24, 351 Mont. 40, 208 P.3d 876, for the proposition that a citizen's right to participate extends to the subdivision review process. The Commissioners therefore concludes that this Court's Opinion is not precedent setting with relation to the constitutional right to participate.

Alternatively, the Commissioners argue that even if BFP's right to participate claim does address important constitutional issues of statewide importance, attorney's fees should not be granted under the private attorney general doctrine. The Commissioners assert the Montana Supreme Court faced a similar issue in *Baxter v. State*, 2009 MT 449, 354 Mont. 234, 224 P.3d 1211 where the parties argued that the Montana Constitution recognized a right-to-die in the dignity clause. The Court decided the issue on the basis of statutes and declined to address the constitutional question. *Baxter*, ¶47. The Court therefore declined to award attorney's fees pursuant to the private attorney general doctrine. *Baxter*, ¶47.

Finally, the Commissioners contend this Court's Order that the preliminary plat decision ("PPD") was unlawful was exclusively premised upon the Commissioners' failure to take a "hard look" and upon the Commissioners' unlawful grant of the PPD for a period of longer than three years. These statute based reasons – the BCC urges – supercede any need to reach the constitutional question under Article II, §8 (Right of Participation) of the Montana Constitution. Therefore, the Commissioners conclude, that under the rationale in *Baxter*, this Court should not grant attorney's fees when it was unnecessary to reach a constitutional question. *Baxter*, ¶47.

This Court agrees with BFP that the inherently constitutional policy of sound governmental decision making is significant, the express constitutional policy of public participation in government is significant, and the policy of environmental protection as set forth in the MSPA is significant. Thus, when private citizens step forward as members of a non-profit organization to ensure that existing laws are enforced, this effort plays a significant and critical role in vindicating public benefit rights. It is pointless for the Commissioners to gainsay the significant purposes of the MSPA.

> **76-3-102. Statement of purpose.** It is the purpose of this chapter to:
> (1) promote the public health, safety, and general welfare by regulating the subdivision of land;
> (2) prevent overcrowding of land;
> (3) lessen congestion in the streets and highways;
> (4) provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements;
> (5) require development in harmony with the natural environment;
> (6) promote preservation of open space;
> (7) promote cluster development approaches that minimize costs to local citizens and that promote effective and efficient provision of public services;
> (8) protect the rights of property owners; and
> (9) require uniform monumentation of land subdivisions and transferring interests in real property by reference to a plat or certificate of survey.

As the Commissioners note, fees may be awarded under the PAGD in litigation vindicating constitutional interests. Issues of primarily statutory interpretation, however, can qualify for fees under the private attorney general doctrine if constitutional concerns are "integrated into the rationale underlying the decision." BRPA, ¶25. Since 1980 it has been the announced formal position of the executive branch of Montana's government that the purposes stated in §76-3-102, MCA are in accord with the constitutional right of all Montanans to a clean and healthful environment as stated in Art. II, §3 of the Montana Constitution. *38 A.G. Op. 106 (1980).*

Moreover, this Court based a significant part of its analysis directly on the Montana Constitution. *Order* at 40-43. This Court found the Commissioners' violation of §8, Art. II of Montana's Constitution an "independent grounds" for voiding the Preliminary Plat Decision.[3] In addition, the MSPA's requirement of an environment assessment under §76-3-504(1)(b) and §76-3-603 and §76-3-608 and its primary review criteria further the constitutional requirement in Article IX, §1 (protection and improvement) that the "state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Further, the provisions in Art. IX, §§ 2 and 3 require the legislature to provide "adequate remedies" for the enforcement of this provision.

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[3] Defendant Commissioners downplay the constitutional significance of this Court's decision, arguing that it does not create "new rights." (Doc. #63, p.8) Whether a "new right" is created is not the test – the test is whether important constitutional rights are "vindicated." It is elementary that voiding a government decision for violating the fundamental constitutional right under Article 2, Sec. 8 (Right of Participation) vindicates that right. Accordingly – and alternatively – the Court awards costs and reasonable attorney fees to BFP pursuant to §2-3-114, MCA for enforcing this right.

The Commissioners reliance on *Baxter* is inapposite. *Baxter* is readily distinguished. *Baxter* concerned a challenge to the constitutionality of Montana's right-to-die statutes. The Supreme Court resolved the case purely on statutory grounds. ¶47. ["Our holding today is statute-based."] Without the vindication of constitutional interests, the Court determined an award of fees under the private attorney general doctrine was not warranted. *Baxter*, ¶47. Contrary to this district court's Order which invalidated the Legacy Ranch PPD, the *Baxter* Court expressly declined to address the constitutional implications raised by the parties. The *Baxter* decision does not apply here.

Moreover, this Court's Order pp. 10-13 and 30-39 determined the Commissioners failed to take a "hard look" at the Legacy Ranch subdivision application. The Commissioners argue that the "hard look" requirement merely embodies a long recognized Montana legal standard created by case law, which is independent of Montana's Constitution. The Commissioners are partially correct. The "hard look" standard has long been recognized in Montana. *Ravalli County Fish & Game v. DSL*, 273 Mont. 371, 377, 903 P.2d 1362 (1995). This standard required the Commissioners to closely examine the environmental impacts of the Legacy Ranch subdivision proposal. This standard imposes a high bar with respect to the preliminary plat criteria in §76-3-603 and §76-3-608. *Aspen Trails v. Simmons*, 2010 MT 79, ¶54-55, 356 Mont. 41, 48, 230, P.3d 808.

As discussed above, a proper examination of environmental impacts enforces the purposes of the MSPA which are set forth in §76-3-102. Enforcement of these purposes accords with the constitutional right to a clean and healthful environment. Moreover, ensuring proper adherence by the Commissioners to the purposes set forth in 76-3-102 inherently

includes proper consideration by the Commissioners of all relevant factors related to the environmental assessment for Legacy Ranch. Ensuring that the Commissioners apply and follow long recognized Montana law was a significant effort in this case in and of itself.

The Commissioners assert the Court's Order has no precedential value. This Court disagrees. The Commissioner strenuously promoted a "phasing" concept for he Legacy preliminary plat approval and pointed to the Missoula County Subdivision Regulations as proof that other local governments within the State agree with and also similarly implement the Commissioners "phasing" concept.

This Court has no doubt, had it approved the Commissioners "phasing" concept, a Court decision favorable to the Commissioners "phasing" concept would have been used as precedential justification for implementation of phasing in future subdivision review applications. Moreover, to the extent the Commissioners coordinate(d) with their local governmental counterparts in Missoula County regarding "phasing" of subdivision build-outs, both county governments have benefitted from the clarifications set forth in the Court's Order. Finally, this Court's Order at pp. 21-26 sets forth a clear precedential guidance for the proper use of phasing – under the current requirements set forth in §76-3-610, MCA, (2011) – which guidance has statewide utility.

Lastly, the Commissioners appear to minimize the need for this Court to apply any real judicial effort in issuing its July 31, 2015 Order. The Commissioner's style this Order as a mere "straightforward" statutory interpretation of the wording set forth in §76-3-610; a "garden variety" effort. The Court's Order disagreed with the Commissioners' nebulous interpretation that the language in 76-3-610 was "anything but clear." *Order* @ 18. The Court found the Commissioners' "anything but clear" position to be perplexing. *Id.* Nevertheless, in order to

erase any doubt and to attempt to dispel the Commissioners from their perplexing interpretation of §76-3-610, the Court engaged in a detailed 4-page "plain meaning" analysis. *Order*, pp. 17-21. For the Commissioners to now switch horses from their "anything but clear" starting point to their "garden variety" end point borders on disingenuous.

Ultimately, the Court concludes it was and is of great social importance to require the Commissioners to correctly interpret and apply Montana's Subdivision and Platting Act ("MSPA"). It is at least equally as important that the Commissioners ensure and protect the constitutional right of Montana citizens to full public participation in the machinations of government agencies, including by assembling the requisite information to take a hard look at the environmental, health, safety, and traffic congestion impacts of Legacy's subdivision application.

b. Private Enforcement and Policy Vindicated

The Commissioners assert that BFP has conceded "the immediate benefit of their favorable court decision will be limited to the litigants and the people of Ravalli County. (Doc. #63, p.10). This partial statement is incomplete. BFP made this statement in the context of all Ravalli County citizens ". . . who now have greater assurance that the subdivision review process will be maintained [in a legal fashion]." (Doc. #56, p.10). BFP's complete statement continues by pointing out that the Commissioners have publicly agreed the Court's Opinion is ". . . going to change not only how Ravalli County, but counties statewide use subdivision approvals." (Doc. #56, p. 11).

The volume of the record in this case attests to BFP's years long commitment to the public process in an effort to have their concerns addressed. BFP is a small, local non-profit

member organization. It's members had no private property interest at stake. BFP brought this suit to vindicate public participation rights and public policy interests applicable to all of Montana's citizens. No other entity, public or private, showed a willingness to hold the Commissioners accountable under the law.

Private enforcement was necessary. The burden of this enforcement action fell squarely and solely on the shoulders of BFP. The case record encompasses thousands of pages over a 10-year period. BFP engaged material expert witnesses. BFP successfully addressed complex issues that required extensive research and analysis, from the tenants of Montana's constitution to an underlying federal court settlement; *e.g.*, the "*Lords* Settlement Agreement." *Lords et al. V. Ravalli County*, Cause No. CV 07-002-M-DWM (U.S. Dist. Ct. - Mont.) (Jan. 5, 2007).[4] *Order* @5-6.

c. Number of People Benefitting

As explained above, the Court's view is that BFP's efforts in the case vindicated important constitutional and MSPA policy interests which are of direct and immediate benefit to the citizens of Ravalli County, as well as of long term benefit to the citizens across Montana. Even the Commissioners concede that "subdivision related litigation is unfortunately common and is frequently brought by interested citizen groups." (Doc. #63, p.10). This concession highlights the need for statewide vigilance in order to protect

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[4] The Court noted that Terry Nelson, the current Planning Administrator for Ravalli County, as well as Mr. Nelson's business interest, Man Enterprises, LLC, are a named party-plaintiff in this federal lawsuit. The record is unclear as to whether Mr. Nelson filed any conflict of interest disclosure(s).

important public interests. BFP successfully and ably undertook the vindication of these substantial interest.

Finally, under the facts of this case, the Court fully agrees with BFP's argument (Doc. #66, p.3):

> Financial compensation in the form of attorney's fees lowers the cost barrier to bringing suit thereby encouraging citizens to participate. This results in a robust culture of public interest environmental litigation in which citizens, such as BFP here, actively bring meritorious claims to enforce public benefit laws without fear of financial burden. The Montana Supreme Court adopted the PAGD for precisely these reasons. Forcing a non-profit organization to incur substantial litigation costs when the government fails to enforce public benefit laws creates a "substantial injustice" that the PAGD remedies by fee-shifting. *Montanans for Responsible Use of School Trust v. State*, 1999 MT 263 ¶69, 209 Mont. 403, 423 (1999).

d. Equities in Awarding Fees

The Commissioners point out that the legislature did not see fit to include an attorney's fee provision when it created a right to challenge the subdivision review process. Montana Code Annotated §76-3-625 allows a party to bring an adversarial action in Montana's district court, but contains no statutory provision for awarding attorney fees. Citing *In Re Dearborn Drainage*, 240 Mont. 39, 42,782, P.2d 898, 900 (1989), the Commissioners contend that this case is "really no more than an ordinary" subdivision review dispute. The Commissioners continue with: "The fact that the legislature chose not to include an attorney's fee provision should caution this Court against granting attorney's fees under the private attorney general doctrine." (Doc. #63, p.11).

BFP counters that the exact purpose of the private attorney general doctrine is to evaluate and award fee-shifting in this type of appropriate case. The Court notes that both

parties appear to have overlooked an applicable fee-shifting statute: §2-3-114, MCA, which reads in pertinent part:

. . . . . .

> (2) A person alleging a deprivation of rights who prevails in an action brought in district court to enforce the person's rights under Article II, section 8, of the Montana constitution may be awarded costs and reasonable attorney fees.

Even the Co-Defendant and "passive observer" Sunnyside concedes

> "the Court conducted its analysis under Article II, §8, and found that the County violated the right of public participation under *Citizens* when it deferred the compilation of an adequate record upon which the public could comment until after the approval of the PPD." (Doc. #72, pp.5-6)

On this equitable consideration alone, coupled with the above statutory authority, BFP should be awarded attorney fees and costs. Further, the Court agrees with BFP that the Commissioners should pay for their own failure to prepare an adequate EA, the Commissioners' failure to allow public comment on the yet-completed traffic study, by approving a near four decade build-out in direct violation of Montana law. BFP points out that in *Clark Fork Coalition v. Tubbs, BDV 2010-874 (Slip. Op. Issued June 12, 2015)*, the Hon. Jeffrey Sherlock recently noted, "a government agency cannot be expected to bring suit against itself. In such situations private citizens must 'guard the guardians.'" *Slip Op.* @9, *quoting Comm. To Defend Reproductive Rights v. A Free Pregnancy Center,* 229 Cal. App. 3d 633, 639 (1991). Here BFP had to "guard the guardians." The MSPA is first and foremost a statute to benefit the public welfare. *Order* at 8. Without BFP's legal action, the MSPA's public purposes – and the constitutional concerns integrated into those public purposes – would have been cast aside.

Moreover, the unrelenting efforts of BFP to participate in the public process to try to convince the Commissioners that the Legacy Ranch 30 year "phasing" build-out proposal constituted illegal public policy was thoroughly meritorious. *Grandstaff Affidavit* ¶6-7. The record of public participation and comments is uncontroverted.[5] Yet the County Commissioners repeatedly ignored or brushed aside these earnest efforts to make the Commissioners reconsider. *Grandstaff Aff.* ¶8. For example, wildlife impacts were raised by the lay public, the expert USFWS, and BFP's expert Skip Kowalski. Yet as this Court found, the County Commissioners neither responded to the comments on the wildlife corridor issue, nor did they update the inadequate EA. *Opinion and Order* at 37-38. The Commissioners' behavior undermines its arguments on the fourth factor. These circumstances make the award unjust. An award here is just when the Court balances the public's virtuous efforts with the Commissioners' recalcitrance.

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[5] The Court's *Order* @3 simply refers to the "record, contained in two compact discs." Even a cursory review of this Public Record establishes it consists of thousands of pages of testimony, expert reports, and citizen comments.

ORDER

NOW THEREFORE IT IS ORDERED:

1. Pursuant to the private attorney general doctrine ("PADG"), Plaintiff BFP is awarded its reasonable attorney fees and costs against the Defendant Commissioners alone.

2. Pursuant to §2-3-114, MCA, Plaintiff BFP is awarded its reasonable attorney fees and costs against the Defendant Commissioners alone.

3. This Court previously bifurcated the issue of the reasonableness of the fees and allowable costs to be awarded. (Doc. #58). These matters should now be addressed. Plaintiff BFP, however, had submitted its initial affidavit of fees and had addressed the *Plath* factors. (Docs. #56, #57). BFP does not appear to have addressed it's allowable costs.

4. Plaintiff BFP shall have ten (10) days from the date of this Order to supplement it's statement of reasonable fees and allowable costs.

5. Defendant Commissioners shall have fourteen (14) days thereafter to file a written objection to Plaintiff BFP's claims of reasonable attorney fees and allowable costs. If an objection is filed, the Commissioners shall indicate if an evidentiary hearing is requested. If no timely objection is filed, Plaintiff BFD shall be awarded the fees and costs requested, and shall prepare and submit to the Court a proposed Judgment.

DATED this 9th day of February, 2016.

HON. JAMES A. HAYNES, District Judge

I certify that I forwarded copies of this instrument to counsel of record 2-9-16 email cm·cb

Paige Trautwein, Clerk

Deputy