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**MONTANA TWENTY-SECOND JUDICIAL DISTRICT,
STILLWATER COUNTY**

BEARTOOTH FRONT COALITION, *et al* Plaintiffs, v. BOARD OF COUNTY COMMISSIONERS, STILLWATER COUNTY, and HEIDI STADEL, in her capacity as Clerk and Recorder of Stillwater County Defendants.	Cause No. DV 18-12 **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR MANDAMUS**

I. INTRODUCTION

Plaintiffs Beartooth Front Coalition, Lazy Diamond Bar, LP, Lana and Charles Sangmeister, William and Carolyn Hand, and Margaret and Doxie Hatch filed this lawsuit challenging the decision by the Stillwater Board of County Commissioners, based on a determination by the Clerk and Recorder, that a petition to create the Stillwater County Beartooth Front Zoning District did not satisfy statutory requirements. Petitioners had submitted their petition to create a "Part 1" citizen initiated zoning district as allowed under § 76-2-101, MCA. The aim of the zoning was to regulate, to the extent allowed, surface impacts from oil and gas development. Section 76-2-101, MCA allows such a

petition to be considered for adoption by the Commissioners "upon petition of 60% of affected real property owners." While the Clerk and Recorder determined in the summer of 2017 that the petition had met the 60% requirements when taking into account surface ownership, she later determined that it did not meet the requirement when mineral estate interests were taken into account. The Commissioners accepted this decision.

The Defendants' actions, in denying a citizen initiated zoning petition because the petitioners did not take into account mineral estate ownership in calculating "affected real property owners," is unprecedented. To Plaintiffs' knowledge, no other County in Montana has previously taken that position to deny a petition. Over 100 such petition-created zones exist in Montana. The practical impact of the County's interpretation, if adopted by the Courts, would be to emasculate not only the creation of citizen-initiated zoning, but it could also throw into confusion the protest provisions of Part 1 zoning, 76-2-101 (5), MCA.

Unlike surface property ownership, which can be easily determined and catalogued through title and tax records, as the attached affidavits of Charles Heringer and Jonathan Ries demonstrate, there is no central data base for mineral estate or royalty ownership. Moreover, the Part 1 zoning statute has no mechanism in place to determine how a "split estate", with multiple property interests, would be "counted" towards the statutory 60% threshold. As Plaintiffs set forth in this Brief, the Legislature intended that "affected real property owners", in the context of surface zoning, means surface real property owners, not subsurface mineral estate owners. The contrary construction urged on the Court by Defendants renders ineffective a statutory scheme intended to help landowners implement zoning on their own land.

Plaintiffs seek declaratory relief and mandamus, requiring the Defendants to certify that the 60% threshold has been met, and ordering the Commissioners to consider adoption of the zone. Plaintiffs also sought injunctive relief, to prevent the Commissioners from acting on proposed regulations which sought to formalize the Commissioners' flawed interpretation of "real property owners". However, following commencement of this litigation, the Commissioners decided to suspend their rulemaking efforts pending the outcome of this case.

II. STATEMENT OF UNDISPUTED FACTS

1. The Beartooth Front is a vast and beautiful landscape where the plains meet the Rocky Mountains. It contains world-class wildlife habitat as well as stunning scenery. Most of the private land is open space in larger acreage ranches, or smaller parcels with individual homes. The area enjoys a unique quality of life marked by a rural lifestyle; ranching traditions; pristine air, rivers, and streams; and stunning day and night views of the Beartooth Mountains in their natural state. According to the 2010 census, the population of the entire Stillwater County is 9,117 people, spread over 1,795 square miles (1,148,000-acres).

2. Petitioners, including Plaintiffs, are landowners within an approximately 83,000-acre portion of the Beartooth Front who want to protect the surface amenities within the proposed district from impacts associated with oil and gas development through the development of regulations that would reasonably regulate surface use. The petitioners do not seek to ban oil and gas development; rather they merely seek to regulate it to lessen impacts on local ranchers, farmers and other landowners. (Ex. 1, Affidavit of Lana Sangmeister, ¶ 2.)

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3. The Stillwater County Commissioners adopted the first (and only) "Part 1" (i.e. citizen initiated) zoning in Stillwater County November 11, 1979. That zone was intended to regulate surface uses and impacts associated with the Stillwater Platinum Mine along the Stillwater River in the southern end of the County. According to the planning and zoning document, "[t]he purpose of the following zoning regulations is not to prevent particular activities, but rather to regulate and promote the orderly development of the area. The development of this area shall consider the health, safety, and general welfare of the people of Stillwater County." (Ex. 21, West Stillwater Planning and Zoning Ordinance.)

4. Beginning in 2014, in response to the prospect of large-scale oil and gas development along the Beartooth Front, members of the Beartooth Front Coalition organized to seek a citizen-initiated zone through the Part 1 zoning process pursuant to § 76-2-101, MCA. They drafted a petition to create a zoning district along the Beartooth Front. (Ex. 1, Affidavit of Lana Sangmeister, ¶2.)

5. The petition sought adoption of regulations requiring that oil and gas activity be conducted in a responsible manner within the District to (1) preserve public health, (2) protect private property, (3) protect and improve public infrastructure and public services, (4) protect surface and ground water, (5) protect air quality, (6) protect soil quality, and (7) maintain the quality of life by preserving the rural residential and agricultural character of the area. (Ex. 3, Petition; Ex. 1, Affidavit of Lana Sangmeister, ¶ 3.) The purpose of the Petition

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[1] Exhibits 2-8 and 13 are attached to the Affidavit of David Katz, Ex. 12.

of Bureau of Land Management (BLM), and State of Montana lands, the proposed district is approximately 79,500 acres. (Ex. 4, November 10, 2015 Submission to the County Commissioners of Stillwater County, Montana)

7. Commencing in 2014 and on numerous occasions that followed, up to spring of 2017, the petitioners sought to get clear and specific guidelines from the Commissioners and the Clerk for how the County intended to count the petition signatures and to determine its process for determining whether the 60% threshold had been met. However, the Commissioners and Clerk never provided consistent guidance on how property ownership would be taken into account to meet the petition threshold. At no time during this multi-year process of gathering signatures, through the final submittal of the petitions in 2017, did the Clerk or the Commissioners inform the petitioners that they needed to take mineral interests into account in determining the 60% threshold. (Ex. 1, Affidavit of Lana Sangmeister, ¶ 5.)

8. The petitioners began collecting signatures in 2014, and first submitted what they believed were a sufficient number of signatures to the County Clerk and Recorder in November 2015. In March, 2016, the Clerk for the first time provided the County's newly developed signature verification procedure to the petitioners. (Ex. A to Lana Sangmeister Affidavit, "Zoning Petitions – Submittal Requirements for Stillwater County Clerk & Recorder's Office") These new requirements did not mention mineral estate interests in the 11-paragraph list of procedures by the Clerk's office following submittal of a petition for the Clerk to determine whether sufficient signatures had been submitted. The procedures also required the Clerk to submit to the Commissioners an affidavit "stating the number of affected freeholders within the boundaries of the proposed district, the number of valid

signatures and verification of the percentage of freeholders within the proposed district that signed the petition after it was reviewed by the county attorney." Based on these new requirements, the Clerk informed the petitioners that some petitions signed in a representative capacity did not meet the County's standards. These new standards, which had not been provided previously, affected approximately 110 petitioner signature sheets. As required by the Clerk and Recorder, the petitioners obtained and submitted an affidavit in support of the previously submitted signature sheet or sheets for persons who signed in a representative capacity (and a new signature sheet and affidavit for a limited number of original petition signers.) Petitioners re-submitted their petition in February, 2017, again working under the assumption that they needed to obtain 60% of surface property owners' signatures. (Ex. 1, Affidavit of Lana Sangmeister, ¶ 6.)

9. By letter to counsel, in August, 2017, the Stillwater County Attorney informed the petitioners that they had secured over 60% of the signatures of "surface holders". "However, it has come to our attention that there is a question as to whether the owners of mineral rights in the affected zones should have been included as real property owners, 60% of whose consent is also required. . . ." (Ex. 5, August 21, 2017 letter from County Attorney Nancy Rohde to Plaintiffs' counsel David K. W. Wilson, Jr.) This was the first time, and only after the petitioners had achieved the 60% threshold they had been working toward for nearly three years, that a County official had mentioned that mineral rights holder signatures could be required.

10. On January 23, 2018, the Stillwater County Attorney advised the Stillwater County Clerk and Recorder to notify the County Commissioners that "the petition submitted by the Beartooth Front District does not meet the threshold requirements of 60% signatures, to

include sub-surface mineral interest holders as an affected real property owner and will be deemed invalid." (Ex. 6, January 23, 2018 letter from County Attorney Nancy Rohde to Clerk and Recorder Heidi Stadel)

11. On January 24, 2018, the Clerk and Recorder informed the County Commissioners, based on the County Attorney's advice, that mineral interests must be considered under § 76-2-101, MCA, and accordingly, "the petition submitted by the Beartooth Front District does not meet the threshold amount of 60% of the affected real property owners." (Ex. 7, January 24, 2018 letter from Clerk and Recorder to County Commissioners)

12. On January 30, 2018, the Commissioners met and voted to accept the decision of the Clerk and the County Attorney and deny the petition, by a vote of 3-0. (Ex. 8, Stillwater Commissioner Meeting Minutes, January 30, 2018.)

13. The Clerk and Recorder has admitted she did not prepare an affidavit for the Commissioners concerning her determination that the petition did not meet the signature requirement, as required by the Commissioners' own procedures. (Ex. 9, Defendants' Responses to Plaintiffs' First Discovery Request, Response to Request for Admission no. 1).

14. Both Defendants have admitted that they did not calculate how many mineral estate owners needed to be counted to address the 60% threshold in § 76-2-101, MCA, stating that "calculating the amount of the mineral estate owners is the responsibility of the party submitting the petition." (Id.) The County, thus, made no effort to determine the extent of (1) the mineral interests represented by the petition signers, and (2) the total universe of mineral interests in the proposed district.

15. Determining surface estate real property ownership involves searches of readily available public records in the Clerk and Recorder's office and tax records. (Ex. 10, Affidavit

of Jonathan Ries, ¶¶ 3 & 4.)

16. Finding the "real property owners" with mineral or royalty interests for a parcel of land is "difficult, time consuming and complicated." (Ex. 11, Affidavit of Charles Heringer, ¶ 4.) (See also Exhibit 12, Affidavit of David Katz, ¶¶ 4 & 5.) Mr. Heringer's affidavit in ¶ 4 goes on to describe in detail the process for tracking down mineral estate owners, concluding "mineral owners are not required to keep the county records updated with their current address. A great deal of time and cost will be spent to make sure that the record title mineral owner or heirs of the record title owner should be located." Id.

17. Mineral title research to determine record owners is expensive. Mr. Heringer estimates that the cost to determine mineral estate ownership for the approximately 80,000 surface acres in the proposed district would range from $288,000 to $340,000. (Id., ¶ 5. "In the event that the royalty ownership is to be included along with the mineral ownership as 'real property', the cost will increase.")

18. Mr. Heringer points out that often a surface estate that has one owner will have several mineral or royalty owners. "It is not uncommon for the mineral estate to be divided numerous ways, even for one small surface parcel." (Id., ¶ 6.) Attached to Mr, Heringer's Affidavit as Exhibit 1 is a "Mineral and Surface Ownership Report" for one 320-acre parcel in Stillwater County which shows 12 mineral estate owners in addition to the one surface owner. (Id.)

19. Given the potential that one surface parcel may have multiple subsurface mineral owners as shown in the 320-acre example above, it is not clear how these multiple interests would be counted for the purpose of determining "real property owners" in determining the 60% threshold under the zoning statute.

20. At roughly the same time as it rejected the Petition in late January, 2018, the County put forth proposed policy for "Formation of a Citizen Initiated Zoning District (Part 1 Zoning) Stillwater County."

III. STANDARD OF REVIEW

Rule 56(c), M.R.Civ.P., provides that summary judgment shall be rendered when there are no genuine issues of any material fact and that the moving party is entitled to judgment as a matter of law. *Elk Park Ranch, Inc. v. Park County*, 282 Mont. 154, 162, 935 P.2d 1131, 1136 (1997). Once the moving party has met its burden, the opposing party must present material and substantial evidence essential to one or more elements of its case rather than presenting mere conclusory or speculative statements. *Gonzales v. Walchuk,* 2002 MT 262, ¶ 9, 312 Mont. 240, 59 P.3d 377. If no genuine issues of material fact exist, the district court then determines whether the moving party is entitled to judgment as a matter of law. *Roe v. City of Missoula,* 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200.

The standard of review for the Commissioners' refusal to consider the petition to create the Stillwater County Beartooth Front Zoning District is the "abuse of discretion" standard. To constitute an abuse of discretion, the zoning authority's decision must be based on information that is "so lacking in fact and foundation that it is clearly unreasonable." *Flathead Citizens for Quality Growth v. Flathead County Board of Adjustment,* 2008 MT 1, ¶ 32, 341 Mont. 1, 175 P.3d 282. While the standard is deferential, it is far from baseless. Montana courts do not defer to ill-informed, random decisions that do not effectuate the laws and regulations that County Commissioners are duly bound to administer. *Flathead Citizens for Quality Growth, supra ¶* 32; *North 93 Neighbors, Inc. v. Bd.*

of Co. Commissioners of Flathead County, 2006 MT 132, ¶ 44, 332 Mont. 327, 137 P.3d 557 (internal quotation omitted). While zoning decisions as legislative acts carry a presumption of validity, they may be overturned if the governing body acted arbitrarily. *See Missoula v. Missoula County*, 139 Mont. 256, 362 P.2d 539 (1961).

IV. ARGUMENT

A. The Part One "Citizen Initiated Zoning" Statutory Scheme

Zoning is an effective way for citizens to protect their properties and for communities to safeguard important local values. Nearly a century ago the U.S. Supreme Court recognized zoning as a legitimate means to protect neighborhoods and property values, even if some uses were excluded in the process. *Village of Euclid, Ohio v. Ambler Realty*, 272 U.S. 365 (1926). As U.S. Supreme Court Justice William O. Douglas later noted, zoning "is not confined to elimination of filth, stench, and unhealthy places; it is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

In 1953, the Montana Legislature provided citizens the legal authority to initiate a process to create their own zoning districts, to create their own "sanctuaries." Known as "Part 1" zoning, the law permits citizens to self-zone by creating zoning districts as small as 40 acres. *See generally* 76-2-101 *et seq*, MCA. A decade later, the Legislature implemented "Part 2" zoning, §§ 76-2-201, *et seq.*, MCA, which gives local government's authority to create county-wide zoning districts. Part 1 zoning, thus, complements the authority the Legislature has granted to local governments to perform county-wide zoning. The Montana Legislature's enactment of this two-part statutory zoning scheme was intentional. "[T]he

legislative intent is that Part 1 is to have its own meaning and effect." *Montana Wildlife Federation v. Sager*, 190 Mont. 247, 260, 620 P.2d 1189, 1197 (1980). Montana local governments consistently approve Part 1 zoning petitions[2]. This case presents the unusual and unfortunate decision of the Stillwater County Commissioners to not even consider a Part 1 zoning petition that met all statutory requirements.

Citizens initiate the Part 1 zoning process by submitting petitions signed by at least 60% of the "affected real property owners in the proposed district." § 76-2-101 (1), MCA. In the case at bar, per the County Attorney's August 21, 2017 letter to Counsel, petitioners exceeded 60% of *surface* owners' signatures. (Ex. 5)

As the Court has noted in the recent decision denying the County's Motion for Summary Judgment, once a petition with more than 60% of the affected real property owners' signatures is submitted, County Commission *may* adopt the zone, and "create a planning and zoning district and appoint a planning and zoning commission." § 76-2-101 (1), MCA. "When the county commissioners adopt a Planning and Zoning District under section 76-2-101, MCA, so as to establish the boundaries of the District, they take but the first step.... The establishment of the boundaries is but preliminary to the adoption of the development pattern under section 76-2-104, MCA." *Sager,* 190 Mont. at 259, 620 P.2d at 1196. After notice and a public hearing, the county commissioners then *may* adopt zoning regulations for the purpose of carrying out the development district. §§ 76-2-106 and 76-2-107, MCA; *See generally Ash Grove Cement v. Jefferson County,* 283 Mont. 486, 493, 943 P. 2d

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[2] *E.g.* Missoula County has 31 Part 1 zones: https://www.missoulacounty.us/government/community-development/community-planning-services/planning-information/citizen-zoning-districts; Gallatin County has 23 Part 1 zones: http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/zd?textPage=1; Ravalli County has 41 Part 1 zones: http://ravalli.us/179/Zoning

85 (1997).

The public interest or convenience standard under § 76-2-101 (1), MCA ("whenever the public interest or convenience may require, and upon petition of 60% of affected real property owners. . . ."), is the touchstone inquiry defining the Commissioners' discretion. In this case, the Commissioners did not yet take the "first step" of determining whether to adopt the zone. Their failure to do so prompted the lawsuit. (*See* this Court's Order Denying Motion for Summary Judgment, p. 5.)

Section 76-2-101 (5), MCA also contains a protest provision: "If real property owners representing 50% of the titled ownership in the district protest the establishment of the district within 30 days of its creation, the board of county commissioners may not create the district." This provision is important because both § 76-2-101(1) and (5) refer to the same population of affected property owners, although they are labeled differently in the statute. As such, determination of who constitutions "affected real property owners" for purposes of (1) will affect the statute's protest provisions as well.

As discussed below, if Stillwater County's position prevails, then this statutory scheme becomes unworkable.

B. The Legislature Intended that Part 1 Zoning be Initiated by 60% of Surface Real Property Owners and Did Not Intend That Mineral Interests be Counted.

Defendants ask this Court to interpret "real property owners" to include all mineral interest holders. Such an interpretation would render § 76-2-101 effectively meaningless. "The Court should seek to avoid any statutory interpretation that would render meaningless any statute, or section thereof . . ." *State v. Heath*, 2004 MT 126, ¶ 31, 321 Mont. 280, 90 P.3d 426, citing *State v. Berger*, 259 Mont. 364, 367, 856 P.2d 552, 554 (1993). Furthermore, the goal of the Court when interpreting a statute is to implement the

objective the Legislature sought to achieve. *Montana Wildlife Fed'n v. Sager*, 190 Mont. at 264, 620 P.2d at 1199. Interpreting "real property owners" to include all mineral interests, as Defendants contend, does not implement the objective the Legislature sought to achieve and actually runs counter to it, as explained below.

To begin statutory interpretation, the Court should examine the language of the statute itself. Initially, the legislative intent should be ascertained from the plain meaning of the words used. *Boegli v. Glacier Mountain Cheese Co.*, 238 Mont. 426, 429, 777 P.2d 1303, 1305 (1989). If the intent of the Legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls and the Court need go no further nor apply any other means of interpretation. *Phelps v. Hillhaven Corp.*, 231 Mont. 245, 251, 752 P.2d 737, 741 (1988).

Conversely, if the statute is ambiguous the Court must look deeper to determine legislative intent. *State v. Allport*, 2015 MT 349, ¶ 13, 382 Mont. 29, 363 P.3d 441 (quoting *Montanans For Justice: Vote No On CI-98 v. State*, 2006 MT 277, ¶ 60, 334 Mont. 237, 146 P.3d 759; "When the legislative intent cannot be readily derived from the plain language, we review the legislative history and abide by the intentions reflected therein.").

"Real property owners" as used in § 76-2-101(1) is ambiguous. While "real property" has been found to include mineral interests in other contexts[3], such an interpretation is not clear in this instance. "Words and phrases used in a statute are to be construed according to the context in which they are found, and according to their normal usage, unless they have acquired some peculiar or technical meaning." § 1-2-106, MCA. In

[3] *Libby Placer Mining v. Noranda Minerals Corp.*, 346 Mont.436, 197 P.3d 924 (2008).

context, use of the term "real property owners" in § 76-2-101(1) refers to surface property owners only. There are several provisions of the statute which support this interpretation.

First, all of the activities mentioned in this part relate to surface uses. The "district" that may be zoned must be 40 acres or more. § 76-2-101(3), MCA. Only surface rights are measured in acres. Furthermore, the statutes authorize the County to create a development plan, which

> [S]hall show the planning and zoning commission's recommendations for the development of the districts, within some of which it shall be lawful and within others of which it shall be unlawful to erect, construct, alter, or maintain certain **buildings** or to carry on certain trades, industries, or callings or within **which the height and bulk of future buildings and the area of the yards, courts, and other open spaces** and the future **uses of the land** or buildings shall be limited and future building setback lines shall be established.

§ 76-2-104(2) (emphasis added). These categories all refer to surface activities.

Second, all of the actions which may *not* be regulated under Part 1 zoning also relate to *surface* activities. "No planning district or recommendations adopted under this part shall regulate **lands used for grazing, horticulture, agriculture, or the growing of timber**." § 76-2-109, MCA (emphasis added). Notably, the list does not exclude any regulation of surface uses related to oil and gas exploration and development. In determining the statutory mandate given to a statute by the Legislature, it is important to remember that the Court's role "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA. Here, the County is clearly attempting to read into the statute something that is not there – that "no planning district or recommendations adopted under this part shall regulate lands for .... *oil and gas development.*" Obviously, since the italicized language is not in the statute, the Court should not read it into the statute.

Lastly, in the context of the County's assertion that the 60% must include mineral estate and/or royalty owners, it is notable what the statute does *not* say. It does not in any way spell out how "60% of affected real property owners" would be counted if a parcel had one owner of the surface interest, and one or multiple owners of the subsurface mineral interest. (See Ex. 11, Affidavit of Charles Heringer, ¶ 6.) There is a reason for that: the Legislature did not intend the 60% to include mineral estate holders because the method for counting multiple ownership interests in one parcel towards the 60% threshold would have to be spelled out in detail in the statute. It was not[4].

A simple example serves to illustrate the difficulty one runs into if mineral interests must be counted. On one hand you could have a 5th generation homesteaded 1,500-acre ranch where a single owner has 100% ownership of land *and* minerals; on the other hand, you could have a vacation cabin on ½ acre where there is a single surface owners and 32 minerals owners. Does the vacation cabin get 33 signatures and the homesteading rancher get 1 signature, therefore enabling the absentee vacation cabin owner to have 33 times the voice of the 5th generation rancher? Indeed, the County's proposed policy suggests that is the case. (*See* Ex. 13, ¶ 4 "Guidance for Signatures", second bullet: "Each individual real property owner within a proposed district can sign a petition and if found to be a proper signature, each will be counted toward the total number of real property owners within the proposed zoning district boundary.")

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[4] County Attorney Rohde's August 21, 2017 letter (Ex. 5) refers to the case of *Libby Placer Mining v. Noranda Minerals Corp.*, 346 Mont.436, 197 P.3d 924 (2008) for the proposition that fractional mineral interests are interests in real property and thus should be counted under § 76-2-101, MCA. *Libby Placer*, however, is distinguishable in that it concerned reversionary rights under the eminent domain statute, § 70-30-321 (3), MCA, not zoning of surface land as set forth in § 76-2-101, MCA.

Given that the statute's use of the term "real property owners" is ambiguous, the Court must look to legislative intent. What is now § 76-2-101 *et. seq.*, MCA, was originally codified in 1953, however a predecessor to the statute existed at Sec. 16-4101, R.C.M. (1947). Instead of "real property owners", the original statute used the term "freeholders". Plaintiffs could not find any legislative committee notes from 1953 or older that discussed the meaning of "freeholders" in the context of the original statute.

In 2009, the Legislature amended the statute to replace the term "freeholders" with "real property owners". According to supporters of the amendment, "Section 4 [of the bill] clarifies the issue of free holders versus real property owners. 'Free Holders' is a term which has crept into the Planning and Zoning Commission sections and does not generally exist otherwise. . . 'Real property owners' is a defined and generally understood term which does simplify matters quite a bit." *House Bill 486—Generally Revise Land Use and Planning Laws*: Hearing on HB 486 Before the H. Subcomm. on Local Government, 61st Leg., Reg. Sess. at 1 (Mont. 2009). In sum, changing the word "freeholder" to "real property owner" was not meant to be a substantive change.

Since the proponents of the amendment seemed confident there was already an established definition of "real property owner" from which to work, it is worth looking at how the phrase is otherwise defined in the Code. The only definition of "real property owner" in the Montana Code currently (and in 2009) is at § 7-2-4704(3), which states:

> ... 'Real property owner' means a person who holds an estate of life or inheritance in real property or who is the purchaser of an estate of life or inheritance in real property under a contract for deed, **some memorandum of which has been filed in the office of the county clerk**. (emphasis added)

This provision of the code is in Title 7: Local Government, Chapter 2: Creation, Alteration, and Abandonment of Local Governments, and Part 47: Annexation with the Provision of Services.[5]

This definition makes sense because it is harder to prove someone is a property **owner** if he or she isn't recorded with the County. Owners of mineral interests don't file their interests in a central database, as discussed in the attached Affidavit of Charles Heringer, Ex. 11, ¶ 4. According to § 1-2-107, otherwise known as the "whole code rule," "whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears." Since there is no plain contrary intention to use a different definition of "real property owner" in the Part 1 zoning statutes, the definition in Title 7 should govern.

In addition to statutory support, Plaintiff's interpretation is also supported by the clear purpose and Legislative intent of the statute. The purpose of Part 1 Zoning is to enable citizens to mobilize to initiate a process by which to control of their surface land to promote the public health and welfare by regulating surface uses of a specific area of a county. Including mineral rights in the definition of "real property owners" contravenes this purpose because locating and including all mineral rights would make the process nearly impossible and impractically expensive, as discussed in the attached affidavits.

The statute has apparently never before been interpreted to require accounting for owners of mineral interests. As far as Plaintiffs have been able to determine, of the over

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[5] "Real property owners" are also mentioned in § 7-33-2103(2), but the property owner must also be a resident.

100 citizen zoning initiatives in Montana, no county has previously required that mineral interests to be counted towards the 60% threshold. Since 2008, following the *Libby Placer Mining Company* decision, *supra,* relied upon by the County, at least 8 citizen-initiated zones have been created in four counties[6], and to Plaintiff's knowledge none of such zones counted mineral interests. This history speaks for itself: the statute has been interpreted a certain way since its inception because it made the most sense given the purpose of zoning. Discerning all mineral interests without a central database would be exceedingly and unreasonably difficult and time-consuming. (*See generally* Affidavits of Charles Heringer and Jonathan Ries.) Changing the interpretation now would run afoul of the purpose of the statute and potentially put the legality of over 100 citizen-initiated zones in jeopardy.

Defendants themselves have, ironically, acknowledged the difficulty of counting property owners using their own interpretation. In Defendant's Response to Plaintiff's Request for Admission No. 2, the Defendants admitted that neither Defendant had calculated how many mineral estate owners needed to be counted to address the 60% threshold in § 76-2-101, MCA. According to the Defendants, "calculating the amount of mineral estate owners is the responsibility of the party submitting a petition." (Ex. 9, Def's First Disc. Resp. at 8.)

Plaintiffs submitted the signatures of 60% of the real property owners that could be identified using sources that were available to them. The *County,* not the petitioners, then validated those signatures of surface ownership using the same sources. In contrast, if it is the responsibility of *petitioners* to identify the *minerals* owners, and the petitioners

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[6] Yellowstone, Missoula, Gallatin, Ravalli, Park, Stillwater, Dawson, and Flathead Counties, which list their data online.

presents the signatures of 60% of those they have identified, as Defendants contend, how will the County validate those signatures? Will the County use the petitioners' sources? Or will they have to develop their own? The double standard the County now posits – of the County verifying the number of surface owners needed to meet the threshold, but the petitioners having to verify mineral owners – makes no sense and is clearly unworkable.

Quite simply, it is the County's responsibility to validate the signatures per § 76-2-101, MCA, and it would make logical sense that the County would have to do so using an objective source for the universe of real property owners. Such a source does not exist, and as explained below and in the affidavits, petitioners' task in developing this source would be exceedingly costly and unreasonably burdensome. Defendants, in their admission that they did not determine mineral ownership, thus fail to explain how the County *would* validate the signatures. If the County did not know itself how many signatures were needed overall, including both surface and mineral, then it was truly speculating when it denied the petition for not having considered mineral estate signatures.

The County's failure to even determine how many mineral estate signatures may be needed to qualify the petition is clearly an abuse of discretion. To determine whether an abuse of discretion has occurred, courts examine "whether the information upon which the [Commission] based its decision is so lacking in fact and foundation that it is clearly unreasonable and constitutes an abuse of discretion." *North 93 Neighbors, Inc. v. Bd. of Co. Commissioners of Flathead County,* 2006 MT 132, ¶ 44, 332 Mont. 327, 137 P.3d 557 (internal citations omitted.); *See also Flathead Citizens v. Flathead County Bd.*, 2008 MT 1, ¶ 32, 341 Mont. 1, 175 P.3d 282. Here, the County's admission that it did not know how many

mineral interest holders were at stake renders its decision lacking in fact and foundation and therefore unreasonable.

In addition to the issue of validation, Defendants' construction presents several other serious concerns:

(1) Stillwater County's proposed new rules requires a list of real property owners from the title company. (Ex. 13, "Required Steps", ¶ 2.) Stillwater Abstract & Title Company, however, does not provide lists of mineral interest owners. (*See* Ex. 12, Affidavit of David Katz, ¶ 4.)

(2) The only way to obtain a list of mineral interest owners is to hire a certified minerals abstractor. This is not a government record. It costs approximately $3/per acre, or in this case between $288,000 and $340,000 for the Plaintiffs' proposed 83,000-acre zone. (See Ex. 11, Affidavit of Charles Heringer, ¶ 5.) Such costs are prohibitive and present an unreasonable barrier to creating a citizen-initiated zone.

(3) Defendants' proposed rules[7] (Ex. 13) are ambiguous. Mineral interest signatures would only be required "when subsurface rights may be at risk". (Ex. 13, p. 1.) How is "at risk" defined? Who makes the determination?

(4) Stillwater County records are not complete. It is unclear how Plaintiffs are expected to account for mineral holders who are not in the Stillwater County records. The County expects Plaintiffs to do something the County itself cannot or will not do. (See Ex. 9, Answer to Request for Admission No. 2.)

(5) There can be multiple mineral owners for a single parcel of surface land. (See, e.g.

[7] As noted in previous briefing, the County has agreed to hold implementation of these rules pending this Court's decision.

Ex. 11, Affidavit of Charles Heringer, ¶ 6.) The County does not explain how mineral interests are to be counted versus surface interests.

(6) It is not known how petitioners are expected to locate mineral interest owners to obtain their signatures. The addresses of surface owners, even those who reside outside the county, are current as identified in the country property tax tolls. Mineral interests, on the other hand, may have been purchased and recorded in county records decades ago, and extensive searches may be required to contact the owners. It is unclear how this is supposed to be accomplished, and by whom. (See generally Ex. 5, Affidavit of Charles Heringer.)

In *Swaim v. Redeen*, the Montana Supreme Court considered the sufficiency of petition signatures needed for the consolidation of school districts and the appropriateness of the burden to verify those signatures. The statute at issue in the case was R.C.M. Section 1034 (1921):

> Whenever the county superintendent of schools receives a petition **signed and acknowledged by a majority of the resident freeholders of each district affected**, . . . he shall within ten days cause a ten days' posted notice . . . of an election in such district at a time and place specified in each notice to vote on the question of consolidation.

Swaim v. Redeen, 101 Mont. 521, 55 P.2d 1 (1936) (emphasis added).

The argument being considered in *Swaim* was whether a list of registered freeholders provided by the County was sufficient to determine "the majority of the resident freeholders" in a district required by the statute. Regarding the Superintendent's obligations under the statute and his reliance on the County records to determine resident freeholders, the Court stated:

> We do not think it may be reasonably assumed that the superintendent shall personally contact each of the residents of the district and by direct inquiry

> determine whether such resident is a freeholder or not. . . .That the freeholders of the district **are the freeholders shown to be such by the county records is the only reasonable construction**, we think, that can be placed on this requirement of the statute in the action at bar.
>
> To hold that a superintendent must **hunt out every resident** of the district and discover whether any such freeholder has a deed to real property in the district or not . . . would appear to be too absurd on which to found any assumption that the legislature intended any such freeholder should be taken into account in numbering the signers of a petition in such matters as are involved here.
>
> . . . We think the proper and reasonable construction to be placed upon proceedings relative to school matters, **where the requirements are not made clear by the statutes**, is well set forth and soundly expounded in *State ex rel. Hall* v. *Peterson*, 55 Mont. 355, 359, 177 P. 245, 247. The court said in that case:
>
> '....**Statutes such as the one here involved have been fashioned broadly and without regard to technical nicety, the purpose being to serve the vital interests of the public.** It was not contemplated or purposed that such a statute should be taken into the closet and there subjected to critical scrutiny in the hope or expectation of revealing occult meanings different from those fairly apparent from the language used and contrary to the general design of the lawmaking power. **If the attacks here made upon the petition be sufficient to destroy its life, few, if any, petitions for the creation of a school district out of an existing district will ever serve any purpose** unless competent lawyers be employed to draft them.'

101 Mont. 521, 530-532, 55 P.2d 1, 5-6 (1936), emphasis added; *cited by State ex rel. Wilson v. Musburger*, 114 Mont. 175, 177, 133 P.2d 586, 587 (1943).

In sum, the Court in *Swaim* found the only reasonable construction of the statue was that the statute contemplated only "the freeholders shown to be such by the county records." Additionally, the Court took care to note that the statute should be construed to effect its public purpose over straining to achieve "technical nicety." Just like the superintendent in *Swaim*, citizens should not be made to do more than the law plainly requires. The purpose of the statute is not served by forcing citizens to "hunt out" all

mineral rights holders at great personal expense, and the resulting near impossibility of accomplishing 60% does not serve the vital interests of public zoning.

To follow the County's argument to its logical conclusion "would render the exemption a nullity, contrary to our rules of statutory construction which presume that our Legislature does not pass useless or meaningless legislation, and that the literal application of a statute that leads to absurd results should be avoided" *Hampton v. Lewis and Clark County,* 2001 MT 81, ¶ 29, 305 Mont. 103, *citing Hart-Anderson v. Hauck* (1988), 230 Mont. 63, 70, 748 P.2d 937, 941; *State v. Trimmer* (1985), 214 Mont. 427, 432-33, 694 P.2d 490, 493.

In short, Defendants are requiring petitioners to do something the County itself cannot do. This Court should not disregard the Montana Supreme Court's long-held tenets that it will not interpret statutes to defeat their obvious purposes, and that the courts must be cognizant of what the legislature intended. *Murphy for L.C. v. State*, 229 Mont. 342, 346, 748 P.2d 907, 909 (1987) (citing *Mont. Wildlife Fedn. v. Sager*, 190 Mont. at 264, 620 P.2d at 1199.) When dealing with protections for the public safety and welfare, it is for the legislature to decide what regulations are needed. *Id.*, 190 Mont. at 261, 620 P.2d at 1198. Affirming the Defendants' construction effectively eviscerates the purposes served by the statute by creating a precedent under which the barrier to citizen participation in zoning would trump the promotion of public safety and welfare.

3. The Court Should Issue a Writ of Mandate Requiring the Commissioners to Consider Adoption of the Zone, Pursuant to § 76-2-101, MCA.

Count One of Plaintiffs' Complaint seeks alternative and peremptory writs of mandate, requiring the Clerk to certify that the signature requirement of § 76-2-101, MCA, has been satisfied, and in turn requiring the Commissioners to act on the petition, i.e.

decide whether or not to adopt it.

Mandamus may be issued to any governmental unit to compel the performance of an act that the law specifically enjoins as a duty resulting from an office, trust or station. § 27-26-102, MCA. As the Supreme Court stated in *Smith v. County of Missoula,* 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834:

> Whether to grant or deny a writ of mandate is a legal conclusion that we will review to determine if it is correct. *Becky v. Butte-Silver Bow Sch. Dist. No. 1* (1995), 274 Mont. 131, 135, 906 P.2d 193, 195. A two-part standard must be satisfied for the issuance of a writ of mandate. *Becky*, 274 Mont. at 135, 906 P.2d at 195. The writ is available where the party who applies for it is entitled to the performance of a clear legal duty by the party against whom the writ is sought. If there is a clear legal duty, the district court must grant a writ of mandate if there is no speedy and adequate remedy available in the ordinary course of law. Section 27-26-102, MCA. For a court to grant a writ of mandate, the clear legal duty must involve a ministerial act, not a discretionary act. *Withers v. County of Beaverhead* (1985), 218 Mont. 447, 450, 710 P.2d 1339, 1341. "Where the person has a specific right and the public officer is acting ministerially and has no discretion in the matter, mandamus will lie." *State v. Cooney* (1936), 102 Mont. 521, 529, 59 P.2d 48, 53.

A "ministerial" act has, in turn, been defined as "where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial." *State v. Cooney,* 102 Mont. at 529, 59 P.2d at 53.

Section 76-2-101, MCA states that "whenever the public interest or convenience may require and upon petition of 60% of the affected real property owners. . . , the board of county commissioners may create a planning and zoning district." Clearly, the ultimate decision whether or not to create a district upon petition of 60% is discretionary, although the discretion is constrained by whether the zone is in the public interest or convenience. However, the statute does not give the Commission discretion in whether or not to make *a*

determination, yea or nay. In other words, once a petition of 60% of the affected real property owners has been received, the County cannot simply do nothing. They have to act on the petition, and in so acting, they may, or may not, adopt the zone.

The Court recognized this in its Order denying the County's Motion for Summary Judgment: "the County failed to follow the statutory procedure in **creating or rejecting** a proposed planning and zoning district. . . ." (Order on Denying Motion for Summary Judgment, p. 5, emphasis added). Here, should the Court determine that as a matter of law, the County may not require that mineral interests be "counted" towards the 60%, then Plaintiffs request that the Court issue a writ of mandate compelling the Commission to act on the petition.

V. CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment. The County Defendants have taken a position, and ask the Court to take a position, that would render the citizen imitated zoning statute meaningless. That is not what the Legislature intended when it created citizen-initiated zoning.

DATED this 28th day of August, 2018.

MORRISON SHERWOOD WILSON & DEOLA

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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28 day of August, 2018, a true and correct copy of the foregoing document was duly served by first-class mail upon the following:

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