MONTANA TWENTY-SECOND JUDICIAL DISTRICT COURT
STILLWATER COUNTY

BEARTOOTH FRONT COALITION, LAZY Y DIAMOND BAR LP, LANA and CHARLES J. SANGMEISTER, WILLIAM A. and CAROLYN F. HAND, and MARGARET BARRON and DOXEY RAY HATCH, Plaintiffs, vs. **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** Judge: **Matthew J. Wald** **ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

Before the Court are motions for summary judgment filed by both parties. The Plaintiffs Beartooth Front Coalition, Lazy Y Diamond Bar LP, Lana and Charles J. Sangmeister, William A. and Carolyn F. Hand, Margaret Barron and Doxey Ray Hatch (collectively "Beartooth Front") have filed a *Motion for Summary Judgment and Request for Mandamus*. Beartooth Front is represented by David K. W. Wilson, Jr. The Defendants Board of County Commissioners, Stillwater County and Heidi Stadel ("the County") oppose Beartooth Front's *Motion* and have filed a *Cross-Motion for Summary Judgment*. The County is represented by Brandon Jensen as well as by Nancy Rohde, Stillwater County Attorney. Having reviewed the parties' briefs, the applicable law, and the parties' arguments at hearing, the Court finds that Beartooth Front's *Motion* must be granted and the County's *Motion* must be denied.

BACKGROUND

Beartooth Front filed suit challenging the County's refusal to consider Beartooth Front's petition to create the Beartooth Front planning and zoning district in Stillwater County. The lawsuit sought mandamus and declaratory relief requiring the Stillwater County Clerk and Recorder to certify signatures gathered by Beartooth Front as satisfying the requirement of § 76-2-101(1), MCA, and the Stillwater County Commission to act on the petition under § 76-2-101, MCA. *(Pls.' Compl.*, ¶ 34). Beartooth Front alleges that the County refused to consider the petition, despite the fact that Beartooth Front had gathered over 60% of the signatures of the surface real property owners of record in the geographic area of the proposed zone as set forth in the petition. Beartooth Front claims that the County determined that the petition was not valid because Beartooth Front failed to gather the requisite signatures of the real property owners in the area when the owners of mineral estate interests are included as "real property owners." (*Pls.' Compl.*, ¶ 18).

According to Beartooth Front, members of the Beartooth Front Coalition organized to seek citizen-initiated zoning under the Part 1 zoning process pursuant to § 76-2-101, MCA. (*Pls.' Compl.*, ¶ 13). The petition requested adoption of regulations on oil and gas activity within the proposed district. (*Id.*). Beartooth Front began collecting signatures in 2014 and submitted its petition in February 2017. (*Id.*, ¶ 16). In August 2017, the Stillwater County Clerk and Recorder validated the signatures and determined that the petitioners had gathered more than 60% of the signatures of the real property owners. (*Id.*, ¶ 17). However, that same month, the Stillwater County Attorney informed the petitioners that, while they had gathered signatures from over 60% of the "surface holders" of the land, it was unclear whether the requisite number of signatures of the mineral rights owners would also be required. (*Id.*, ¶ 18). On January 24, 2018, the Stillwater County Clerk and Recorder informed the Stillwater County Commissioners that, due to the lack of mineral rights owners' signatures, the petition submitted by Beartooth Front did not meet the 60% requirement. (*Id.*, ¶ 23). The County Commissioners later met and accepted the determination of the Clerk and Recorder and denied the petition. (*Id.*, ¶ 24).

After Beartooth Front initiated the lawsuit, the County filed a *Motion to Dismiss*, arguing that the Court should not consider whether the County followed the correct procedure in

considering the petition because notwithstanding the creation of the zoning district, state law preempts the County or a zoning district from promulgating any regulations relative to oil and gas activity, which is the gravamen of Beartooth Front's petition. The Court converted this *Motion to Dismiss* to a *Motion for Summary Judgment* and, after a hearing, denied the *Motion* on the basis that the issue of preemption was not an actual case in controversy and thus it would have been premature to consider whether hypothetical regulations adopted subsequent to the creation of a planning and zoning district are preempted by state law. *Order Denying Motion for Summary Judgment*, Aug. 18, 2018.

On August 30, 2018, Beartooth Front filed its *Motion for Summary Judgment and Request for Mandamus*. On October 31, 2018, the County filed its *Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment*. On November 29, 2018, Beartooth Front filed its *Combined Brief in Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment*. On December 27, 2018, the County filed its *Reply Brief in Support of Cross-Motion for Summary Judgment*. The parties requested that the hearing and determination of the summary judgment motions be stayed while they engaged in settlement discussions with the goal of resolving the matter. Ultimately, they were unable to do so, and on May 14, 2020, the Court held a hearing on both Beartooth Front's *Motion* and the County's *Cross-Motion*. At the hearing on the instant *Motion* and *Cross-Motion*, Beartooth Front modified its request for relief as follows:

- Withdrawing its mandamus claim;
- Seeking a declaratory judgment that § 76-2-101 refers to surface owners and does not require subsurface mineral interests to be counted;
- Seeking a declaration invalidating the Clerk's January 24, 2018 letter asserting that Beartooth Front had not met the 60 percent signature threshold;
- Seeking a declaration that the County erred in denying Beartooth Front's petition based on subsurface mineral interests not being counted; and
- Seeking that the matter be remanded to the County Commissioners to consider the petition based on its August 2017 determination that Beartooth Front had exceeded the 60 percent threshold based on surface property owners.

STANDARD OF REVIEW

M. R. Civ. P. 56 controls the Court's review of a motion for summary judgment. "Under Rule 56(c), judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 221 P.3d 1200 (quoting *Corporate Air v. Edwards Jet Ctr.*, 2008 MT 283, ¶ 24, 190 P.3d 111). "A material fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact." *Schweitzer v. City of Whitefish*, 2016 MT 254, ¶ 9, 383 P.3d 735 (quoting *Roe*, 2009 MT at ¶ 14). 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*, 2009 MT at ¶ 14. The purpose of summary judgment is to dispose of claims for which there remain no genuine issues of material fact, thereby eliminating the expense and burden of a trial. *Cane v. Miller*, 258 Mont. 182, 852 P.2d 130 (1993). In this matter both parties agree that no issues of material fact exist and that the matter is appropriate for a decision as to which party is entitled to judgment as a matter of law.

DISCUSSION

The core issue underlying both Beartooth Front's *Motion* and the County's *Motion* concerns the meaning of the words "affected real property owners" as used in § 76-2-101(1), MCA. This appears to be a matter of first impression in Montana. § 76-2-101(1) provides that:

> Subject to the provisions of subsection (5), whenever the public interest or convenience may require and upon petition of 60% of the affected real property owners in the proposed district, the board of county commissioners may create a planning and zoning district and appoint a planning and zoning commission consisting of seven members.

§ 76-2-101(1), MCA. The County argues that the term "affected real property owners" as used in § 76-2-101(1) to make up the 60% threshold must include the owners of mineral interests where, such as here, the proposed zone could affect these interests. Beartooth Front disagrees, arguing that the term was meant to be limited to surface owners within the geographic boundary of the proposed district, that to allow mineral interest owners to vote on Part I zoning petitions would go

against the legislature's intent and the historical interpretation of the statute, and that it would make the entire Part I zoning scheme unworkable.

The Court must "construe a statute by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature." *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 4 (internal citations omitted). The Court "will not interpret the statute further if the language is clear and unambiguous." *Id.* (internal citations omitted). "In construing a statute, the intention of the Legislature is controlling." *Dunphy v. Anaconda Co.*, 151 Mont. 76, 79-81, 438 P.2d 660, 662 (1968)(internal citations omitted). This intention "must first be determined from the plain meaning of the words used, and if interpretation of the statute can be so determined, the courts may not go further and apply any other means of interpretation." *Id.* "Where the language of a statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe." *Id.* If the language is not clear and unambiguous, the Court must look to legislative intent "and give effect to the legislative will." *Id.* "Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 395 (quoting *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280). The Court has a duty to read and construe each statute as a whole in order to give effect to the purpose of the statute. *Id.* Further, "[s]tatutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Mont. Sports Shooting Ass'n*, ¶ 11 (internal citations omitted).

The County argues that the term "affected real property owners" as used in § 76-2-101(1), MCA is unambiguous, and by its plain language must include the owners of mineral rights. Beartooth Front disagrees, arguing that this language is ambiguous and the Court must apply the rules of statutory construction to determine what the legislature intended "affected real property owners" to mean in the context of Part I zoning petitions.

Unfortunately, the statutes governing the Part I zoning scheme, § 76-2-101, *et seq.*, do not contain a definition section wherein the term "real property owner" or "affected real property owner" is explicitly defined for the purpose of citizen initiated zoning. § 70-1-106 MCA defines real property: "Real or immovable property consists of: (1) land; (2) that which is affixed to land,

including a manufactured home declared an improvement to real property under 15-1-116; (3) that which is incidental or appurtenant to land; (4) that which is immovable by law." The only definition of "real property owner" in the Montana Code is found at § 7-2-4704(3), MCA, which defines it as "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." That definition is set forth in the statutes regarding annexation of land by municipalities, and it is interesting to note that despite the broad definition, in cases where annexation under Title 7 was at issue, the Court has not found a single instance where the real property owner definition included subsurface interests. See, e.g. *St. John v. City of Lewistown*, 2017 MT 126, 387 Mont. 444; *Houston Lakeshore Tract Owners Against Annexation Inc. v. City of Whitefish*, 2017 MT 62, 387 Mont. 83. While that specific issue was not raised in any of the cases reviewed, "real property owner" was assumed to be a surface owner within the geographical area of a proposed annexation. See, *City of Lewistown*, ¶ 5 (wherein notices were mailed "to all registered voters and property owners in the areas being annexed", but there is no mention of mailing such notices to mineral interest owners). Thus, even if the Court accepts the definition found at § 7-2-4704(3) as controlling, the application of this definition in the annexation context does not provide the Court with significant guidance.

Beartooth Front acknowledges that "real property" has been found to include mineral interests in other contexts. However, they claim that such an interpretation is not appropriate in this instance, and that in the context of § 76-2-101(1), "real property owners" refers to surface property owners only whose property is located within the proposed district. The County argues that "real property owners" necessarily includes mineral interests.

As was acknowledged by Stillwater Front, mineral interests are certainly real property interests. This is generally understood in property law. Moreover, the County cites Montana caselaw as controlling. "Mineral interests are treated as real property interests, and are subject to the rules related to real property." *Libby Placer Mining Co. v. Noranda Minerals Corp.*, 2008 MT 367, ¶ 39, 346 Mont. 436, 445-446, 197 P.3d 924, 931 (quoting 53A Am. Jur. 2d *Mines and Minerals* § 159). *Libby Placer* occurred in the eminent domain context, holding that a

"condemned 75% mineral interest was a fee simple interest." *Id.*, ¶ 50. The nature of the ownership interest held by the owners of fractional mineral rights was important in *Libby Placer* because of statutes "which provide for reversionary interests under limited circumstances for interests other than fee simple." *Id.*, ¶ 22. Thus, *Libby Placer* was a case about the actual ownership of property – whether mineral rights could be held in fee simple – and is instructive in that regard. It is not helpful, however, in determining what the term "affected real property interests" means as used in § 76-2-101, MCA, as the nuances of this term regarding eligibility to petition for a zoning district were not in any way at issue in *Libby Placer*. The Court does not find *Libby Placer* to be controlling precedent on the question at issue.

A cursory initial examination of the plain text of § 76-2-101(1) would indicate that, as the owners of mineral interests can be owners of "real property," they could be considered "real property owners" under the statute. However, this would be true only if such a definition is appropriate or dispositive in the § 76-2-101 MCA context. If the term "real property owner" or "affected real property owner" is unambiguous as used in § 76-2-101 as the County asserts, then mineral interest owners would need to be counted every time a Part 1 zoning petition is filed, regardless of the purported purpose of the zoning district, because the definition would always mean the same thing: the owners of every type of real property. However, even the County is not arguing that every single Part 1 zoning petition must take the votes of mineral interest owners into account. Rather, the County argues, such votes are only necessary when these mineral interests are "affected" by the proposed zone. Thus, the term that the Court must evaluate is not merely "real property owners" but rather "affected real property owners." It is this expanded term that suggests significant ambiguity; if a term does not mean the same thing depending upon the situation for which it is being applied, it is clearly ambiguous.

The County argues that the word "affected" is key in this case because it means that the votes of mineral rights owners are only necessary when their property rights are going to be "affected" by the proposed zone. However, the statutory scheme does not set out that requirement, or provide any guidance on when a property right should be considered "affected." Although mineral rights could be affected by a proposed zone that explicitly concerns activities intended to profit from those rights, this is, at least hypothetically, not always the case if a

particular petition to create a zone did not "affect" every property owner in the proposed zone. The interpretation of the word "affected" could range from so broad as to include every possible property interest within a proposed district or even property owners outside of the proposed district, to so narrow that only certain property rights owners within a district would be "affected real property owners" with a valid vote. A hypothetical zone that impacted, for example, fishing, boating or hunting activities could only require the votes of those property owners where such activities could reasonably take place, as only they would be considered "affected." Potential petitioners would have to guess as to what property owners were "affected" and the County would have to determine the answer to that question to certify a petition. If the legislature intended for such a determination to be made every time that a Part I zoning petition was submitted, the Court would expect it would have provided some guidance as to the basis for such a determination. It did not. The Court can at best guess at the meaning of the word "affected" as used in § 76-2-101(1), which by itself provides significant ambiguity.

If, as here, the plain meaning of the statute cannot be determined from its language alone, it is ambiguous. The term "affected real property owners" is ambiguous as used in § 76-2-101(1), and the Court must look to the legislative intent in order to give effect to the legislative will. *Mont. Sports Shooting Ass'n*, supra, ¶ 11 (internal citations omitted); see also § 1-2-102, MCA ("In the construction of a statute, the intention of the legislature is to be pursued if possible.). Courts "must harmonize statutes relating to the same subject, as much as possible, giving effect to each." *Mont. Sports Shooting Ass'n*, ¶ 11. "Statutory interpretation cannot divest the authority of other provisions, or render other provisions, superfluous." *City of Missoula*, supra, ¶ 22. The general structure of the Part 1 zoning program and the language used therein supports Beartooth Front's claim that "affected real property owners" was intended to refer to surface owners only whose property lies within the geographic area of the proposed zone. All of the activities mentioned in the Part 1 zoning statutes relate to surface uses. Such activities include rules regarding where it would be lawful "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), MCA (emphasis added). The statutes also expressly bar Part 1 zoning from regulating certain activities (all of which are surface activities): "[n]o 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. Regarding the enforcement of enacted zoning provisions, the statutes set forth what action can be taken "[i]f any building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained or if any building, structure, or land is used in violation of this part or of any resolution adopted under" the zone. § 76-2-113, MCA (emphasis added). Again, only surface activities are specifically set forth.

Unfortunately, the legislative history does little to clear up the dispute over the term "affected real property owners." In 2009, the legislature amended the statute to replace the term "freeholders" with "real property owners." The legislature did so because it apparently felt that "real property owners" was 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). Thus, the change from "freeholder" to "real property owners" was not meant to be a substantive change and, contrary to what the legislature may have thought, does not simplify whether this term was meant to include mineral interest owners as used in the Part 1 zoning context. However, the rules of statutory construction indicate that the purpose and context of the entire Part 1 zoning scheme must be considered in order to answer this question. "It is a ... fundamental role of statutory construction that the unreasonableness of the result produced by one interpretation is reason for rejecting it in favor of another that would produce a reasonable result." *Murphy v. State*, 229 Mont. 342, 346, 748 P.2d 907, 909 (1987)(internal citation omitted). "A legislative body is presumed to have inserted every provision for some useful purpose" and the Court should "not interpret a statute so as to defeat its obvious purpose." *Id.* (citing *Montana Wildlife Federation v. Sager*, 190 Mont. 247, 620 P.2d 1189 (1980)). The objects sought by the legislature to be achieved by a statute "are prime considerations" in its interpretation. *Id.* Further,

> "[W]hen interpreting a statute, we seek to implement the objectives the Legislature sought to achieve, and if the legislative intent can be determined from the plain language of the statute, the plain language controls." [...] "Furthermore, a statute 'must be read as a whole, and its terms should not be isolated from the context in which they were used by the Legislature.'" [...] Accordingly, we must interpret a statute "as a part of a whole

> statutory scheme and construe it so as to forward the purpose of that scheme" and "to avoid an absurd result."

Houston Lakeshore Tract Owners Against Annexation Inc. v. City of Whitefish, 2017 MT 62, ¶ 10 (internal citations omitted).

There are a range of practical problems that would result from the interpretation that the County advocates, which would ultimately create an "absurd" result that would inhibit the general purpose of the Part 1 zoning scheme. Conversely, if the legislature intended that the term "affected real property owner" simply refers to the surface owners within the geographic boundaries of the proposed district, the statutory scheme is workable. The object the legislature sought to be achieved by Part 1 zoning was to provide the availability of the establishment of local zoning districts by citizen petition to the board of county commissioners. *Motta v. Granite County Comm'rs*, 2013 MT 172, ¶ 13, 370 Mont. 469, 472. That being the case, the Court must interpret the statute keeping in mind that the legislature intended to give citizens the ability to request by petition that the County establish a certain zoning district. The Part 1 zoning petition process does not give citizens the ability to mandate that the County does so, but it was established to give them the ability to initiate consideration of such action. The subject areas upon which citizens may request certain zoning areas are broad, with only a few categories of activities and uses being explicitly barred from this process. See § 76-2-109, MCA. While the legislature's enactment of the Part 1 zoning scheme certainly does not mean that filing such a petition must be easy, it does mean that the legislature intended that it be reasonably practicable.

Beartooth Front cites as support for its' position *Swaim v. Redeen*, 101 Mont. 521, 531, 55 P.2d 1 (1936). *Swaim* involved a petition for an election regarding whether a school district should be annexed by another school district. *Id.*, 101 Mont. at 523. The superintendents of the two school districts posted notices of an election for this purpose, the election was held, and a majority of those who voted favored the consolidation. *Id.* A resident of one of the districts challenged the election, claiming that "the petition d[id] not contain a majority of the resident freeholders" of his district." *Id.* at 528. While "the petition did contain the signatures of a majority of the resident freeholders of record of the district when it was filed [...,] by reason of the recording on that date of [certain] deeds [...] the number signing was reduced below the number

required by statute." *Id.* at 528. The Court "[did] 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." *Id.* at 530. Thus, the Court found that "a freeholder not of record is not entitled to be taken into account in determining whether the petition is sufficient or not, and [held] that the petition [was] sufficient." *Id.* at 531. In doing so, the Court noted:

> The petition is not a pleading. Its sufficiency is not to be tested by subjecting its contents to analysis by the trained legal mind searching for, or bent on discovering, defects; nor are its averments to be construed against those who have signed it. 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.

Id. at 531-532. The Court observed that "[i]f 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." *Id.* *Swain* is not in any way controlling precedent on the specific issue before the Court, but the practical issues in this case are similar to *Swain* in that the County's interpretation would prevent Part 1 zoning petitions on a range of topics that were not explicitly barred by the legislature. In addition, the mechanics of how such a policy would be enacted are unclear and could be a severe impediment to the citizen zoning process that the legislature intended to be available.

A myriad of practical difficulties would arise if this Court adopted the County's interpretation of § 76-2-101(1). Determining the total number of record surface owners within a defined geographic area is not difficult and can be accomplished by a simple record search at the Clerk and Recorder's office, and so determining the total "affected real property owners" would be easily accomplished. Determining what mineral owners, including the owners of fractional interests, exist in a proposed zone in order to obtain their signatures would be difficult, if not impossible, and likely cost-prohibitive for the proponents of a Part 1 Zoning petition (and potentially extremely expensive for the County as well, in order for it to have the necessary information to certify or reject the petition). It is unclear what procedure the County would use to

verify whether petitioners have gathered sufficient signatures to meet the 60% threshold, because when the County rejected the Petition in this case, the County did not have any idea of who or what 100% of the "affected real property owners" was under the definition the County urges the Court to adopt, and so of course the County had no way of determining whether the Petitioners met the 60% threshold. The County has admitted that it did not calculate how many mineral estate owners need to be counted, claiming that "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). Again, if the petitioners did calculate this number and gather what they believed was the necessary number of signatures to reach this threshold, it is unclear how the County would proceed in verifying this information. Without the County performing such a calculation, it is pure speculation that the Beartooth Front petition failed to reach the 60% threshold for not having considered mineral estate signatures. Even if mineral interest signatures were necessary, the County did not do its requisite due diligence in determining whether the 60% threshold was met even including the votes of the owners of these interests. It is possible that enough mineral interests are owned by the respective surface owners in this case that the 60% threshold was still met even if such interests had to be included. Thus, regardless of this Court's determination of the meaning of the term "affected real property owners" in § 76-2-101(1), MCA, the County did not meet the requisite standard for considering the petition. This determination exemplifies the difficulties in the process under the analysis presented by the County.

Neither was there any reasonable way put forward to count the fractional interests. The County asserts that the Clerk is not required to calculate the number of mineral interests at stake, instead suggesting that this task is on the petitioners. This conflicts with how the County deals with verifying surface ownership, which the County did calculate. The County has apparently considered the need to verify at least surface owners in its proposed rules. For example, the County's proposed new rules require a list of real property owners from the title company. (Ex. 13, "Required Steps", ¶ 2.) Stillwater Abstract & Title Company does not provide lists of mineral interest owners. It is unclear what sort of document or verification would be sufficient for the County if such mineral interest owners were required to be considered. Without such guidance, potential petitioners would be going into the process blind and would possibly be in a position

where they would spend significant time and financial resources on collecting mineral interest owner's signatures only to have the county to inform them that, in fact, this documentation was insufficient. This cannot be the intent of the legislature.

As written above, it is unclear how the County legitimately could verify the ownership of mineral rights owners without such a process becoming time-consuming and cost prohibitive for the County in addition to the petitioners. It is undisputable that these costs would be significant. The only way to obtain a list of mineral interest owners is to hire a certified minerals abstractor. Beartooth Front has presented evidence that, for the zone that they are seeking to create, such a list would cost between $288,000 and $344,000. (See Ex. 11, Affidavit of Charles Heringer, ¶ 5). Presumably, if the legislature intended for such costs to be part of the Part 1 zoning process, it would have been addressed somewhere in the statutes, but it is not. In contrast, the legislature did address the source of financing in other areas of the statutory scheme where such costs would be significant. For example, the legislature explicitly set forth that "the finances necessary for the transaction of the planning and zoning commission's business and to pay the expenses of the employees and justified expenses of the commission's members must be paid from a levy on the taxable value of all taxable property within the district." § 76-2-102, MCA.

The County argues that the high cost is due, at least in part, to the large size of the proposed zone, and clearly that is true. However, the Part 1 zoning scheme contains a minimum requirement of 40 acres for a zone but no maximum size. § 76-2-101(3), MCA. Regardless, the issue is that the cost of petitioning for any zone becomes exponentially higher if the petitioners are forced to include mineral rights owners, perhaps to the point that such a petition becomes impracticable. This issue is present regardless of the size of the zone itself.

Another Montana Code provision, § 7-12-2128, MCA, involves the collection of signatures of "real property owners" before an action can take place. § 7-12-2128 allows "a board of county commissioners [to] transfer the ownership of the improvements in a district to the owners of property in a district [...] [u]pon receipt of a petition signed by at least 66% of the owners of real property in a district requesting that the ownership of the improvements be transferred." Mineral interests are not considered in determining whether the 66% threshold has been met because doing so would be prohibitively costly and the time and manpower required to

do so would be unduly burdensome. (see Pl. Ex. B to Combined Resp. and Reply). Requiring mineral interest owners to be considered would be similarly burdensome here.

The County's interpretation of the statute would entail such practical difficulties, including cost for both the petitioners and the County itself, that it would essentially prevent citizen-initiated zoning on topics that would "affect" the owners of mineral rights interests, despite such activities being absent from those which explicitly cannot be regulated under the Part 1 zoning scheme. See § 76-2-109, MCA (stating that Part 1 zoning cannot "regulate lands used for grazing, horticulture, agriculture, or the growing of timber," but not mentioning oil and gas development or other minerals exploitation). When a Court is construing a statute "the interpretation should be reasonable to avoid [...] absurd results." *State by Department of Highways v. Midland Materials Co.*, 204 Mont. 65, 71, 662 P.2d 1322, 1325 (1983). The Court considers the practical abolition of an entire group of activities from Part 1 zoning without the legislature having clearly intended for that outcome to be such an "absurd result" when the same statutory scheme set forth specific exclusions.

The past interpretation of § 76-2-101(1) by both the County and other counties around the State when dealing with Part 1 zoning petitions also suggests that mineral interests should not be considered in determining the 60% threshold. In interpreting a statute, "great deference and respect must be shown to the interpretations given the statute by the officers and agencies charged with its administration." *Montana Contractors' Ass'n v. Department of Highways*, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986). The specific agency involved here, i.e. the Stillwater County Board of County Commissioners, has previously dealt with a Part 1 zoning petition. The only other Part 1 zone in the County, referred to as the West Fork Stillwater zone, did not take the signatures of mineral interest holders into account. The County attempts to differentiate that zoning petition from the one underlying the instant case, arguing that in that case mineral rights owners could not be considered "affected," whereas here mineral rights owners would clearly be affected by the proposed zone. Beartooth Front disagrees with this assertion, claiming that, like the zone here, it addressed mineral activity and under the County's requested interpretation mineral rights owners could have been considered "affected." Regardless, it is undisputed that, prior to the petition underlying the instant case, the County did not require such signatures for

Part 1 zoning petitions. Stillwater County's previous interpretation of the statute and its guidance to Beartooth Front on what was needed in terms of signatures did not require mineral interests' signatures prior to August 2017. During the three years that Beartooth Front was attempting to gather signatures and obtain guidance from the County, the County never maintained that Beartooth Front needed to take mineral interest owners into account. In 2016, the Clerk and Recorder provided the petitioners with a document titled "Zoning Petitions – Submittal requirements for Stillwater County Clerk & Recorder's Office" which did not mention or even hint that mineral interest owners' signatures were needed for Part 1 zoning petitions.

Other "agencies" in Montana, i.e. other counties across the state, that have dealt with Part 1 zoning petitions have interpreted it to not require the votes of mineral interest owners, or at least have never interpreted it to so require. Montana has at least 111 Part 1 zones in 8 counties throughout the state, including Stillwater County. (See Pl. Ex. A. to *Combined Resp. and Reply*, ¶ 5). Beartooth Front notes that least 8 such zones have been created in four counties since 2008, the year of the *Libby Placer* decision, and none have counted mineral interests. Over 100 zones have been created across Montana under Part 1 zoning and neither party has been able to locate even one that required the votes of mineral interest owners. While this certainly does not require the Court to find that the County's interpretation of the statute as requiring mineral owners to be accounted for is incorrect, it is persuasive evidence that the interpretation urged by the County is contrary to how the statute has historically been interpreted. This is persuasive information that the Court must consider.

Therefore, after considering the language of the statutory scheme and the legislature's intent in passing it, and the historical interpretation of the statute at issue before the Court, it is clear that as used in § 76-2-101(1) MCA to determine the 60% threshold for citizen initiated zoning petitions, "affected real property owners" are limited to surface owners within the geographic boundary of the proposed district.

The Court's determination that the legislature's intent regarding the part 1 zoning petition process was to allow the process to be initiated by the surface owners of record within the proposed geographic area of the district is not made lightly or in disregard for other property interests that might be affected. The Court is cognizant of the fact that the owners of mineral

rights have a clear property interest at stake in the consideration and possible adoption of a zone that could impact these interests or their value. However, the Court's interpretation that the legislature did not intend to include mineral rights owners in the petitioning process rests in part in noting that the legislature has made provision for these mineral rights owners (and other property owners that may object) to be able to address their concerns during other procedures set forth in the statutory scheme. For that reason, it is appropriate to briefly address some of those protections. The collection of signatures and submission of a petition is just the first step in the creation of a zone under the Part 1 zoning procedures. If the 60% threshold is met, "the board of county commissioners *may* create a planning and zoning district and appoint a planning and zoning commission." § 76-2-101(1), MCA (emphasis added). That means that even when a petition meets the requirements to be considered, the County retains discretion in deciding whether to create the zone requested and determine whether "the public interest or convenience require" such a zone. *Id.* The County cannot adopt (or change) a development district under Part 1 except "by the affirmative vote of the majority of the whole commission" and only after a public hearing. § 76-2-106(1), MCA. The owners of mineral interests certainly have the right to be heard at such a hearing.

The statutory scheme includes other hurdles that must be overcome before a zone is created. If the County does issue an order creating the requested zoning district, and real property owners "representing 50% of the titled property 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." § 76-2-101(5). Also, property owners who disagree with that decision have six months to file an action challenging that decision. § 76-2-101(4). The County has "the power to authorize such variance from the recommendations of the planning commission [where] a literal enforcement of the decision of the planning and zoning commission will result in unnecessary hardship." § 76-2-106(2). If, after going through all these steps, the zone is ultimately adopted, affected mineral rights owners also retain their right to pursue a takings claim, if such a claim is warranted. See *Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n*, 2012 MT 272, ¶¶ 34-48, 367 Mont. 130, 147. Therefore, while the legislature's citizen initiated zoning framework excludes mineral rights owners from the process of filing a petition,

the process does not take away such owners' right to be heard nor their ability to seek recourse if such a zone impacts the value of their property.

For these reasons,

IT IS HEREBY ORDERED that Beartooth Front's *Motion for Summary Judgment* is **GRANTED**. Affected real property owners as used in § 76-2-101(1) MCA to make up the 60% threshold to initiate Part 1 zoning are limited to surface owners within the geographic boundary of the proposed district; and

IT IS FURTHER ORDERED that the Clerk's January 24, 2018 letter stating that Beartooth Front had not met the signature threshold is void and of no force and effect; and

IT IS FURTHER ORDERED that the County's *Cross-Motion for Summary Judgment* is **DENIED**, as the Court has determined the County erred in denying Beartooth Front's petition based on subsurface mineral interests not being included; and

IT IS FINALLY ORDERED that the matter is remanded to the County Commissioners to consider Beartooth Front's Petition based on its August 2017 determination that Beartooth Front had passed the 60 percent threshold necessary to initiate Part 1 zoning.

DATED this 1st day of September, 2020.

MATTHEW J. WALD, District Judge

cc: David K. W. Wilson, Jr., Counsel for Plaintiffs
Brandon Jensen, Counsel for Defendants
Nancy L. Rohde, Counsel for Defendants

CERTIFICATE OF SERVICE
This is to certify that the foregoing was duly served by mail, fax, or email upon the parties or their attorneys of record at their last known address/email.
Done this 1st day of September, 2020
By: Kathryn B. Stanley
COURT ADMINISTRATOR to the HON. MATTHEW J. WALD