David K. W. Wilson, Jr.
Anne E. Sherwood
MORRISION SHERWOOD WILSON & DEOLA
401 North Last Chance Gulch
P.O. Box 557
Helena, MT 59624
Phone: 406-442-3261
kwilson@mswdlaw.com
anne@mswdlaw.com
Attorneys for Plaintiffs

**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 **PLAINTIFFS COMBINED BRIEF IN RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT, AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiffs file this Combined Brief as their Reply in support of their Motion for Summary Judgment; and their Response to Stillwater County's Motion for Summary Judgment. Attached in response is the (second) Affidavit of David Katz, and the Affidavit of Missoula County Clerk and Treasurer Tyler Gernant. For the following reasons, the Court should deny the County's Cross-Motion for Summary Judgment, and grant Summary Judgment to the Plaintiffs.

II. STATEMENT OF FACTS

In replying to Defendants' Statement of Facts contained in the combined brief, Plaintiffs respond as follows:

1. In response to Paragraph 1 of Defendants' Statement of Facts ("SOF"), Plaintiffs

do not dispute that the information contained therein is found on the Stillwater County government website, www.stillwatercountymt.gov.

2. In Paragraph 2 of Defendants' SOF, they cite a web log or "blog" to support their assertion that Plaintiffs seek to ban oil and gas development within the proposed district. That blog can be found at https://preservethebeartoothfront.com. As the attached responsive Affidavit of David Katz demonstrates, the cited blog is his personal blog that discusses his personal views and opinions. It is not an official blog of the Plaintiffs. Mr. Katz is the sole author of the blog and does not submit entries to anyone for review or editorial revision. (See Aff. David Katz attached hereto as Ex. A.) Rather, the Plaintiffs' official website is https://beartoothfrontcoalition.org, which does not advocate banning oil and gas development within the proposed district.

3. In Paragraph 3, the Defendants dispute Plaintiffs' assertion that the "purpose of the Petition was very similar to the purpose of the previous Part 1 zone adopted by Stillwater County in 1979." (Pls' Notice of Errata, Statement of Undisputed Facts, ¶ 5.) The purpose of the West Fork Stillwater Planning and Zoning District was "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. 2 Pls' Opening Br.) While the petition for the current district does not contain a "purpose" statement, *per se*, it asks that "coal bed methane activity and oil and gas activity. . . be conducted in a responsible manner within the proposed 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 Pls' Opening Br.) In other words, petitioners want to protect the health, safety and general welfare of the people, which was the purpose of the West Fork Stillwater zone. Indeed, the

"Attachment A Guidelines" contained in the West Fork Stillwater regulations (Ex. 2 Pls' Opening Br.) contains language that almost mirrors the language in the current petition outlined above. Thus, the *purposes* of the two zones are very similar, as asserted by Plaintiffs. That the proposed zone "only regulates oil and gas development", as asserted by Defendants is irrelevant in that the Part 1 zoning statute does not prohibit a zone from being created for such a purpose. §76-2-101, *et seq.*, MCA. Finally, Defendants' assertion that the West Fork Stillwater zone permitted oil and gas development implies that this proposed district does not. That, of course, is belied by the statement in the current petition that that "coal bed methane activity and oil and gas activity. . . **be conducted in a responsible manner** within the proposed district." (Emphasis added) (Ex. 3 Pls' Opening Br.)

4. In Paragraphs 4 and 5 of Defendants' SOF, they assert, as they did in their initial Motion to Dismiss/Motion for Summary Judgment, that the "proposed regulations" would impose unlawful conditions on oil and gas development. However, this Court has already disposed of this argument in denying Defendants' Motion to Dismiss that was converted to a Motion for Summary Judgment. In that Order, the Court recognized that notwithstanding what the petitioners' desired regulations may look like, the actual adoption of regulations would not take place until the zoning petition was approved by the County under § 76-2-101(1), MCA, and regulations adopted by the Commissioners under § 76-2-106, MCA. "Stated simply, because the County failed to follow the statutory procedure in creating or rejecting a proposed planning and zoning district as outlined in § 76-2-101, MCA, it is premature to consider whether hypothetical regulations adopted subsequent to the creation of a planning and zoning district are preempted by state law." (August 6, 2018 Order at 5.)

5. *See* discussion in Paragraph 4 above.

6. In Paragraphs 6 and 7 of Defendants' SOF, they take issue with Plaintiffs'

characterization that the Commissioners voted to accept the Clerk and Recorder's decision that the petition did not meet the 60% threshold. "Defendant Clerk and Recorder had deemed the petition as invalid based upon the advice of the County Attorney and therefore never forwarded the petition to the Commissioners for consideration on the merits of the petition." (Defs' Br. at 6.) It appears that the Commission is trying to distance itself from the Clerk's "decision" to decline the petition. However, clearly the Commissioners were deeply involved in the decision. The County Attorney's January 23, 2018 letter to the Clerk and Recorder concerning the matter states: "I am advising you that the petition should not be verified as sufficient to meet the statutory requirements of §76-2-101(1), MCA, and to further notify the Commission of the same information. The Commission can then place the correspondence on the weekly agenda as a file item to inform the public of the results and the reasons why." (Ex. 6 Pls' Opening Br., emphasis added.) Defendant Clerk and Recorder Stadel did just that, sending a letter to the Commission on January 24, 2018. (Ex. 7 to Pls' Opening Br.) During the January 30, 2018 meeting, Commissioner Crago moved to "place the file item (i.e. the Clerk and Recorder's letter to the Commission as advised by Ms. Rohde) to file." As the Complaint makes clear, prior to the Commissioners' January 30th vote, the Commissioners released a draft set of proposed regulations for Part 1 zoning that incorporated the very requirements that mineral interests be accounted for that was used to deny the petition. (Verified Compl., ¶ 25.) (The proposed rules were attached as Ex. 13 to Plaintiffs' Opening Brief.) Whether the Commission voted to "accept" the Clerk's advice, or to simply "file" it, the issue is, as the Court recognized in denying Defendants' first Motion for Summary Judgment, the County's failure "to follow the statutory procedure in creating or rejecting a proposed planning and zoning district as outlined in § 76-2-101, MCA." (August 6, 2018 Order at 5.)

7. *See* discussion in Paragraph 6 above.

8. In Paragraph 8, the Defendants dispute Plaintiffs' assertion that the County's own procedures required the Clerk and Recorder to submit an affidavit to the Commissioners once the petition was submitted. (Verified Compl., ¶ 17.) This zeroes in on one of the central issues of this case: how can the Clerk and Recorder and Commission know if the petitioners met the signature requirement if the Clerk and Recorder did not assess how many signatures, including mineral interest signatures, would be required? The County's current procedure "after submission" of a petition is clear: "The Clerk and Recorder will submit an affidavit to the Board of County Commissioners 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 has been reviewed by the county attorney." (Ex. 1/Ex. A, "Submittal Requirements for Stillwater County Clerk and Recorder's Office", Pls' Opening Br., emphasis added.) There is nothing in this language that is equivocal about when an affidavit is needed. Defendants argue that this does not require the Clerk and Recorder to prepare an affidavit for the Commission, but that is precisely what it does require. And the Clerk and Recorder admitted she did not prepare one. (See Ex. 9 Pls' Opening Br., Answer to Request for Admission No. 1: "Admit [that Defendant Stadel] did not prepare an affidavit. It is the Defendants' position that an affidavit was not required because the 'Petition' failed to meet the 60% threshold amount, lacking the proper number of 'affected real property owners' as mineral estate owners were not included as signatories.") The purpose of the affidavit requirement is clearly to ensure that the Clerk determines whether the petition meets the criteria or not; it is not required only if the Clerk determines that the petition does meet the requirement. The Defendants' argument and factual assertion here is circular and demonstrates that the County did not follow any procedure, its own or otherwise, in determining that the Petition did not have enough signatures. Finally, in response to the Defendants' closing statement in this paragraph

that the Clerk did "send Defendant Commissioners a letter", it can be presumed that the Defendants, and their counsel, know the difference between a letter and an affidavit. Moreover, it is clear that Ms. Stadel's January 24, 2018 letter does not, in any event, address the matters required of an affidavit in the County's own procedures.

9. In Paragraphs 9 and 10, the Defendants attempt to rebut Plaintiffs' assertion, in the Affidavit of Charles Heringer, that "finding the 'real property owners' of mineral . . . interest for a parcel of land is difficult, time consuming and complicated." (Aff. Charles Heringer, Ex. 11 Pls' Opening Br.) Defendants assert that "anyone has the ability to determine who mineral owners are." (Defs' Br. at 7, citing Patrick Padon Aff, attached to Defs' Br. as Ex. D.) Then, in an effort to show what "anyone" can do, the Defendants cite Mr. Padon who claims that it took him approximately "ninety-five days to conduct a mineral title review covering approximately 13,000 acres" (Padon Aff., ¶ 7), and that "the total cost of this work was $47,500." (Padon Aff., ¶ 8.) If you apply Mr. Padon's math, the cost to undertake a mineral title review is $47,500/13,000 acres, or about $3.65 per acre. Similarly, the amount of time required is 13,000 acres/95 days, or about 137 acres per day. At this rate, according to Mr. Padon, the cost to do a mineral title review on the roughly 83,000 acres in the proposed Beartooth Front Zone would be 83,000 acres x $3.65 = $302,950, and the amount of time it would take is 83,000/137 = 606 days, or 121-weeks, considering a five-day work week. This is precisely in the range of what Plaintiffs' expert, Mr. Heringer, stated: "(T)he cost to run mineral title (for the proposed zoning district) would be between $288,000. . . and $340,000." (Heringer Aff., ¶ 5, Ex. 11 Pls' Opening Br.) Given the presumed need for the County to do an independent confirmation of the ownership, to establish a valid count, this mineral title review would have to be done twice. Thus, it would cost over $600,000 and take over 1,200 days – over three years – to properly establish the relevant minerals owners. As will be discussed below, that is clearly not what the

Legislature intended. Finally, Defendants' suggestion that Plaintiffs "could have posted public notices in public places and/or newspapers requesting to hear from mineral owners" (Defs' Br. at 8) underscores the imprecision of confirming mineral ownership for this purpose: does this mean that only those who respond to the advertisement or notice get counted? Notably, this "method" is not recommended by the County in either its current submittal requirements (Ex. A Lana Sangmeister's Aff.), or the proposed new procedures (Ex. 13 to Pls' Opening Br.)

10. See discussion in Paragraph 9 above.

11. Defendants assert in Paragraph 11 of their SOF that the proposed Beartooth Front zoning district involved in this case is "substantially larger than any Part 1 zoning district in Montana." (Defs' Br. at 8.) In addressing the legal issue, while the statute contains a minimum requirement of 40-acres for Part 1 zoning, there is no maximum: "'District' means any area that consists of not less than 40 acres." § 76-2-101(3), MCA, emphasis added. Additionally, in looking at just the Gallatin County Part 1 zoning referenced by Defendants in this paragraph, three Part 1 zones – Bozeman Pass, Bridger Canyon and Gallatin Canyon/Big Sky – together total over 100,000 acres. Notably, each of those three Part 1 zones contains strict requirements for conditional use permits for oil and gas development:

a. Bozeman Pass = ~21,760 acres. http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/BP_Regulation.pdf. (Natural resource conditional uses § 2.01.6, including oil and gas exploration and development. Section 4.05 provides detailed application requirements for conditional use permits (CUP), including an environmental impact statement (EIS) requirement.)

b. Bridger Canyon = ~51,500 acres. http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zo

ning/districts/Bridger%20Canyon%20Regs. (Natural resource conditional use permits, Appendix A, same or similar detailed requirements as Bozeman Pass.)

c. Gallatin Canyon/Big Sky = ~72,960 acres of which 44,160 are public land. http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/BS_Zoning_Regs_03.2018.pdf. (Section 41 contains same requirements for CUP for natural resource development, including EIS.)

12. In Paragraph 12, the Defendants assert that since § 76-2-101, MCA, does not provide a method for counting signatures, each county will have to set up procedures to count "affected real property owners", citing as an example Stillwater's "submittal requirements." But this assertion, which amounts to saying that each county may interpret the statute to include or not include mineral interests, makes no sense, since the statute does not expressly state that each county gets to make its own rules. Even so, the other Montana counties that have Part 1 zones have regulations in place that do not account for mineral estate interests being counted towards the total. (See ¶ 14 below.) It is true that there may be multiple surface owners just as there may be multiple subsurface owners. The issue however, when you add subsurface ownership to the mix, is how to deal with the multiple ownerships involving different mineral and title interests for the same parcel.

13. In Paragraph 13, Defendants attempt to address Plaintiffs' assertion that the County did not confirm, one way or another, how many mineral interests were at play in the proposed district. Plaintiffs asserted in their Opening Brief "[i]f the County did not know itself how many signatures were needed overall, including both surface and mineral, then it is truly speculating when it denied the petition for not having considered mineral estate interests." (Pls' Opening Br. at 19.) Defendants' reliance on Plaintiffs' expert's general observation that "not every surface owner is a mineral owner and several mineral owners do not own any surface"

(Defs' Br. at 10) to reinforce the County's decision to deny the petition simply confirms the County's own failure to follow its own procedures in requiring an affidavit from the Clerk and Recorder calculating the number of affected real property owners. (See also discussion in Paragraph 8 above.) Moreover, it appears that of the individuals who submitted affidavits in support of the County's motion, at the most one "additional" signature – Keith Martin's – would be added to the total required, according to the County's own proposed rules. (Ex. A Sangmeister Aff. ¶ (D)(3)1.)

14. Montana has 111 Part 1 zones in place in eight counties, including Stillwater. (Ex. A David Katz Aff.)

15. In response to Defendants' argument in their cross-motion that mineral interests must be counted, Missoula County has 31 Part 1 zones. Its regulations do not require the collection of mineral estate holders, nor has it ever required their collection. (Ex. B, Aff. Tyler Gernant, Missoula County Clerk and Treasurer.) Additionally, none of the other counties with Part 1 zoning regulations on their websites explicitly require mineral estate holders' signatures.

a. Ravalli County: https://ravalli.us/DocumentCenter/View/3334/Citizen-Initiated-Zoning-Disctrict-CIZD-Procedure?bidId=

b. Carbon County: http://co.carbon.mt.us/wp-content/uploads/2016/03/Type-1-Zoning-Petitions-RES-2009-16.pdf:

c. Missoula County: https://www.missoulacounty.us/home/showdocument?id=25293

III. ARGUMENT

A. Introduction

[1] The affidavits of Ekworzel (Defs'. Ex. F), Kirch (Defs'. Ex. G), and Braly (Defs.' Ex. H) show that those individuals own both surface and mineral rights for their parcels within the proposed district, and therefore would not be entitled to any more than one vote.

"Citizen-initiated" or Part 1" zoning was created by the Legislature in 1953. §§ 76-2-101, *et seq.*, MCA. Montana has 111 Part 1 zoning districts. (*See* Ex. A, Aff. David Katz, ¶ 4.) Section 76-2-101(1), MCA, the provision of law that spells out the requirements for initiating Part 1 zoning, reads as follows:

> (1) 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.

At issue in these cross-motions for summary judgment is a single question: does the phrase "60% of the affected real property owners in the proposed district" contemplate that only surface owners would be counted (as Plaintiffs argue), or that subsurface mineral interests would also have to be counted (as asserted by Defendants). To Plaintiffs' knowledge, this is a case of first impression in Montana[2]. Moreover, to Plaintiffs knowledge, prior to this instance no Montana County has ever asserted that a Part 1 zoning petition required the signatures of mineral interest holders. Indeed, in Stillwater County's previous and only other existing Part 1 zone, mineral interest holders' signatures were not required. (*See* Ex. 2 Pls' Opening Br., West Fork Stillwater Planning and Zoning Ordinance, Attachment B, showing the six surface landowners whose property comprised the district only, with no reference to mineral interests. *See also* Ex. B, Aff. Tyler Gernant, Missoula County Clerk and Treasurer.)

In their Opening Brief, Plaintiffs outlined a number of reasons why "affected real property owners", as used in this statutory scheme, was not intended by the Legislature to include mineral estate interest holders:

---

[2] *Martinell v. Bd. of County Comm'rs,* 2016 MT 136 involved the protest provision of § 76-2-101 (5), MCA, but was dismissed for other reasons without addressing that issue. This Court's decision regarding the meaning of "real property owners" in § 76-2-101(1), MCA, in this case, will affect this protest provision as well.

1. The citizen zoning statute by definition and practice is meant to regulate and delineate surface activities. The statute permits the regulation of surface oil and gas development activity but regulation of other surface activities such as agriculture and timber cultivation are expressly prohibited. § 76-2-109, MCA.

2. The statute does not address potential differences in how "votes" are counted between surface and subsurface owners who may vote differently relative to the same parcel towards the 60% threshold in the statute. If the Legislature intended that mineral interests would be included for the purpose of the 60% threshold, it would have provided a statutory mechanism for how mineral and surface estates would be weighted and counted.

Additionally, the Plaintiffs pointed out that during their years-long efforts to obtain the requisite number of signatures, neither the Stillwater Count Clerk and Recorder nor its Commissioners informed them that they had to obtain mineral interest signatures – in fact, the County led them to believe the opposite.

By and large, the County does not address the practical problems of interpreting the statute as they propose, and they ignore their own, and other Counties', past actions in interpreting the law. Instead, they focus on their view that "real property owners" generally include, by definition, mineral estate interest holders. As this Brief will demonstrate, the County's view of the law in this case is incorrect and impractical.

B. "Affected Real Property Owners" in § 76-2-101, MCA, Refers to Surface Parcel Owners Only.

While no definition of "real property owners" exists in the citizen-initiated zoning statute, a definition exists in the city annexation statutes that can reasonably be applied here. Additionally, Plaintiffs have argued that "affected real property owners" is ambiguous, and the Court should look to legislative intent, the statute as a whole, and past interpretation to determine

its meaning. Lastly, a finding that "real property owners" includes mineral interest holders in the context of citizen zoning would render the statute meaningless.

i. A definition of "real property owners" already exists and makes sense to use in the context of the zoning statute.

Citing to various definitions of "real property", "lands", and "real estate" in dictionaries and the Montana Code, Defendants argue that "defining 'real property' as including mineral interests is generally accepted and unambiguous." (Defs' Br. at 15). In doing so, they ignore the one definition of the phrase "real property owner" in the Montana Code, found at § 7-2-4704(3), MCA:

> ... '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)

When a word is defined in any part of the MCA, the same definition applies wherever the word appears unless "a contrary intention plainly appears." § 1-2-107, MCA.

No contrary intention appears in this case, and the use of this definition makes sense in the context of citizen-initiated zoning. The definition comes from Title 7, Local Governments, Chapter 2, Creation, Alteration, and Abandonment of Local Governments (otherwise known as the Planned Community Development Act or PCDA). The two code sections contemplate similar acts of creation involving local government: one for city annexation and one for county zoning districts.

Similar to the citizen-initiated zoning statutes, the PCDA outlines steps that a city must take to extend services to a non-annexed area. The resident freeholders in the area to be annexed may vote on any proposed capital improvements for the area. If a negative vote is cast by more than 50% of the resident freeholders, the area may not be annexed. § 7-2-4733, MCA. Mineral interest owners do not vote in this context and may not be "residents."

The requirement that there be a "memorandum of ownership" filed with the Clerk and Recorder ensures consistency in determining real property ownership. While the Defendants claim, without attribution and in a footnote, that "severed mineral owners have title to their mineral interests which is recorded in the county records" (Defs' Br. at 13), that is not necessarily so in all situations. As Plaintiffs' expert, Charles Heringer, stated in his affidavit:

> Finding the "real property owners" with mineral . . . interests for a parcel of land is **difficult, time consuming and complicated.** It requires researching the entire title history of the land from the time the patent was issued until the last deed of record has been filed. The researcher must determine if, when and how the mineral rights were split off from the surface rights, and track the chain of title to determine the current mineral ownership. It requires **looking up several types of records**, including deeds, miscellaneous, liens, judgments, probates, civil actions, Clerk of the Court, Treasurer, Assessor and mortgages.
>
> All of the deeds from the time the patent was issued until the present must be examined to determine what mineral rights run with the surface ownership or have been severed and who presently owns those rights. **You may come across a gap in the record title** where the buyer(s) on a deed do not match up with the seller(s) on a subsequent deed. That means the land changed hands in-between those two documents, **however no record of that exchange exists in the county records.** The change in ownership could be due to foreclosure, marriage, divorce or death. **If the title itself does not explain the discrepancy, you may have to look through other records, such as: probates, marriage licenses, divorce decrees, foreclosures, mortgage releases, judgments, liens or tax sales.** When you have a clear picture of the chain of the mineral ownership for the land, you should be able to determine the last address of record for each severed mineral rights owner. The next step is to track down the current address of each mineral owner which usually differs from the address that is placed of record. **Mineral owners are not required to keep the county records updated with their current addresses.**

Ex. 11 Pls' Opening Br., ¶ 4, emphasis added.

Plaintiffs' other expert, Jonathan Ries, elaborated on this point: "In contrast (with identifying surface owners), identifying mineral . . . 'real property owners' in a proposed zoning district is far more difficult and complicated. It generally involves the above-mentioned researching and the following searching of records in the Department of Natural Resources, Historical Society, BLM records, and miscellaneous documents in the Clerk and recorders' office." (Ex. 10 Pls' Opening Br., Aff. Jonathan Ries, ¶ 5.) In other words, the records that may

be required to verify all the mineral estate owners are not all found in "county records" or with the "county clerk." Defendants do not address this obvious problem.

Further, the affidavit of Defendants' expert, Mr. Padon, does not refute Mr. Herringer's affidavit testimony about how difficult and expensive it is to determine mineral estate interests. While Mr. Padon claims that "anyone has the ability to determine who mineral interest owners are", (Padon Aff., ¶ 4, Ex. D Defs' Br.), the ease of that task is completely belied by Mr. Padon's description that follows of what it took him to find the mineral interests for a fraction (1/6) of the area of the proposed zone: ninety-five days of work at a cost of $47,500. As stated in Paragraph 8 of the Statement of Facts, *supra,* applying Mr. Padon's calculations to the proposed zone, the cost to do a mineral title review on the roughly 83,000 acres in the proposed Beartooth Front Zone would be 83,000 acres x $3.65 = $302,950, and the amount of time it would take is 83,000/137 = 606 days. It is apparent from the factual agreement between the parties' experts that the real reason the Clerk did not produce an affidavit here is that she was *unable to do so:* it would have been prohibitively expensive and time-consuming.

Similar to both the PCDA and Part 1 Zoning, yet another Montana Code provision contemplates the collection of signatures of "real property owners" before an action can take place. In § 7-12-2128, MCA, a board of county commissioners may transfer the ownership of the improvements in a district to the owners of property in a district "upon 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." § 7-12-2128(2). Again, mineral interest holders are not considered in determining the threshold 66% because doing so would be prohibitively costly and the timeframe would be unduly burdensome and require additional staffing. (*See, e.g.* Aff. Missoula County Clerk and Treasurer Tyler Gernant, Ex. B, ¶ 5.)

In establishing a legislative scheme to allow citizens to initiate a process to create their own zoning district, the Legislature did not intend a system that could be prohibitively time consuming and expensive for most citizens. To find otherwise would defeat the ability of citizens to initiate their own zones, which is the purpose of the statute. "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). In summary, Plaintiffs are requesting an interpretation of the citizen-initiated zoning statute that is consistent with other interpretations of "real property owners" throughout the code and with the purposes for which the citizen-initiated zoning provisions were enacted.

ii. Use of the term "real property owners" in the context of citizen-initiated zoning indicates the Legislature contemplated surface owners only, but at best is ambiguous as to the inclusion of mineral owners.

Plaintiffs' interpretation of the statute is consistent with rules of statutory construction. Under rules of statutory construction, Courts will look to the following analysis:

(1) Is the interpretation consistent with the statute as a whole?
(2) Does the interpretation reflect the intent of the legislature considering the plain language of the statute?
(3) Is the interpretation reasonable so as to avoid absurd results? And
(4) Has an agency charged with the administration of the statute placed a construction on the statute?

Dunphy v. Anaconda Co., 151 Mont. 76, 80, 438P.2d 660, 662 (1978).

Here, Plaintiffs' position that "affected real property owners" has to be read to exclude mineral interest holders is consistent with the statute as a whole. Part 1 zoning is intended to affect surface uses, only, and the statute as drafted contains no mechanism for how the 60% threshold would be determined where multiple mineral interests exist for one surface parcel of land.

Second, there is no indication that the Legislature, in implementing the Part 1 zoning scheme, contemplated that mineral interest holders would need to be counted towards the 60% threshold. That is clear both from the lack of a mechanism for counting as noted above; and from the Legislative History of the amendment from "freeholders" to "real property interests" as discussed in Plaintiffs' Opening Brief, pp. 16-17.

Third, "(W)hen construing statutes, the interpretation should be reasonable to avoid . . . absurd results." *State Department of Highways v. Midland Materials Co.,* 204 Mont. 65, 71, 662 P.2d 1322 (1983). The fact that the statute does not contain a mechanism for "counting" or weighing conflicting votes when one parcel contains multiple mineral owners is telling. If the statute were nonetheless interpreted to mean that mineral interest holders had to be counted, without such a mechanism in place, "absurd results", i.e. confusion, would follow.

Here, as an example, one need look no further than the County's assertion here that the Clerk is not required to calculate the number of mineral interests at stake; that this task is on the petitioners. (Ex. 9 Pls' Opening Br., County's Response to Request for Admission 2: "Calculating the amount of mineral estate owners is the responsibility of the party submitting the petition.") Even though the opposite is true in the County's dealing with verifying surface ownership, which the County *did* calculate. (Ex. 5 Pls' Opening Br.: "The Stillwater County Clerk and Recorder has completed her tally and validation of signatures, and the Stillwater Protective Association was able to secure 60% of the surface owners' consent in the affected zone.") Having two different methods and responsibilities for calculating the number of signatures necessary is an absurd result.

Finally, the "agency charged with administration", i.e. Stillwater County, as well as other counties which have regulations in the books, have historically not required mineral interest holders' signatures to be gathered. When a statute is ambiguous, Courts will look to the whether

the agency charged with the administration of the statute placed a certain construction on the statute. *Montana Contractors' Association v. Department of Highways,* 220 Mont. 392, 395, 715 P.2d 1056 (1986). *See also Dunphy,* 151 Mont. at 80, 438 P.2d at 662.

Here, Stillwater County's interpretation of the statute and its guidance to Plaintiffs on what was needed in terms of signature, prior to August 2017, made clear that mineral interests' signatures were not required. First, the only other Part 1 zone in the County, the West Fork Stillwater zone, did not require mineral interest holders' signatures for its creation in 1979, even though it, like this zone, addressed mineral activity. (*See* Ex. 2 (Attachment 2) Pls' Opening Br. (Map showing only surface ownership.)).

More importantly, during the three years that Plaintiffs were attempting to gather signatures, and attempting to obtain guidance from the County, the County never once informed them that they needed to take into account mineral interest holders. As Plaintiff Lana Sangmeister said in her Affidavit, Ex. 1 to Plaintiffs' Opening Brief, ¶ 5, "(A)t no time during this multi-year process of gathering signatures, through the final submittal of the petitions in 2017, did either the Clerk or the Commissioners ever inform us that we needed to take mineral interests into account in determining the 60% threshold."

In 2016, the Clerk and Recorder provided the petitioners with a document called "Zoning Petitions – Submittal requirements for Stillwater County Clerk & Recorder's Office." (Ex. A Sangmeister Aff.) Nowhere in an 11-paragraph "Guidance for Signatures" did it mention that mineral estate interest holders' signatures were needed, although that is certainly the document that would and should have made that fact known to petitioners and other members of the public interested in such zoning. In fact, quite the opposite. Paragraph 3, for instance, states "(F)reeholders **who own multiple parcels** within the boundaries of the proposed district will count as one freeholder and their signatures will only be counted once." (Emphasis added.)

Mineral estate interest holders do not own "parcels." Finally, it is apparent that none of the other Counties in Montana with Part 1 zones have required mineral estate interest holders to approve creation of Part 1 zones. (*See* Statement of Facts, ¶¶ 14 and 15 *supra;* Ex. B, Aff. Missoula County Clerk and Treasurer Tyler Gernant.)

Moreover, while there is no definition of "affected real property owners" in the citizen-initiated zoning provisions, there is every indication that zoning in general, including Part 1 zoning, is intended to regulate surface activity. The Defendants, in response, argue that the statutory requirement to create a development plan is not restricted to surface activity. While the Defendants assert that the reference in § 76-2-104, MCA, to "trades", "industries" and "callings" could refer to subsurface oil and gas, a close examination of the statute makes clear that it is only addressing surface uses:

> **76-2-104. Development pattern.** (1) For the purpose of furthering the health, safety, and general welfare of the people of the county, the county planning and zoning commission hereby is empowered, and it shall be its duty to make and adopt a development pattern for the physical and economic development of the planning and zoning district.
>
> (2) Such development pattern, with the accompanying maps, plats, charts, and descriptive matter, shall 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.

(emphasis added).

"In ascertaining plain meaning, we have 'long adhered to ordinary rules of grammar.'" *Bates v. Neva*, 2014 MT 336, ¶ 15, 377 Mont. 350, 339 P.3d 1265 (internal citation omitted). The first part of the highlighted clause speaks to the future *size and shape* of the buildings and the corresponding surface land around them. The next part addresses the future

uses of the same buildings and the surface land around them. In both parts, the land around the buildings is described in surface terms only ("yards, courts, and other open spaces"). As such, the statute should be read as follows: ". . . which the height and bulk of future buildings and the area of the yards, courts, and other open spaces [of the future buildings] and the future uses of the [yards, courts, and other open spaces] or buildings shall be limited, and future building setback lines shall be . . . established." If surface use is not clearly indicated, the sentence is at best ambiguous as to the inclusion of subsurface uses by the mere use of the word "land" when more specific language describes surface use only.

Defendants' argument on pages 16 and 17 of their Brief that Plaintiffs' interpretation of the statute could somehow allow prohibition of oil and gas development is again, belied by the plain language of the statute. And Plaintiffs have pointed out, the proposed zone does not seek to prohibit oil and gas development, but rather that such development be conducted in a "responsible manner." (Ex. 3 Pls' Opening Br.) That is made clear by the language of § 76-2-109, MCA: "No planning district or recommendations adopted under this part shall regulate lands used for grazing, horticulture, agriculture, or the growing of timber." That means a planning district *may regulate* oil and gas or mining activity, as Stillwater already has done in the West Fork Stillwater zone. (*See, e.g.* Ex. 2 Pls' Opening Br., Attachment A.) Regulation of an activity is not a prohibition of an activity, and as previously noted, Gallatin County's Part 1 regulations specifically regulate oil and gas activity. (*See* Statement of Facts, *supra,* ¶ 11).

C. *Libby Placer Mining Company v. Noranda Minerals Corp.* is distinguishable and does not provide authority on the definition of "real property owners" in the context of Part 1 zoning.

In Plaintiffs' Opening Brief, Exhibit 5, the August 21, 2017 letter from the Stillwater County Attorney to counsel, the County Attorney cited the case of *Libby Placer Mining Company v. Noranda Minerals Corp.*, 2008 MT 367, 346 Mont. 436, 197 P.3d 924, in support of

the County's position that mineral estate holders must be taken into account when calculating the 60% under § 76-2-101, MCA. In their Brief, the Defendants discuss *Libby Placer Mining* at length at pages 18-20.

Libby Placer concerned an interpretation of § 70-30-321(3), MCA, in the eminent domain statute, which states:

> When an interest, other than a fee simple interest, in property that has been acquired for a public purpose by right of eminent domain, or otherwise, is abandoned or when the purpose for which it is acquired is terminated, the property reverts to the original owner or the original owner's successor in interest.

Libby Placer owned 75% of the mineral interests of certain real property while Noranda owned 25%. *Libby Placer*, ¶ 7. In 1989, Noranda filed an action seeking to condemn Libby Placer's interests, alleging it had the right by means of eminent domain to acquire Libby Placer's interests in fee simple. *Id.*, ¶ 10. In 1991, pursuant to agreement between Libby Placer and Noranda, the Court entered a judgment, including condemnation of all of Libby Placer's rights to the land, and assessing $20,000 against Noranda in favor of Libby Placer for the condemnation. *Id.*, ¶ 12.

In 1996, Libby Placer filed a "Notice of Reversionary Interest", alleging that the interest previously condemned by the Court was "an interest other than a fee simple interest" because it was fractional. Accordingly, Libby Placer was registering its intent to exercise its reversionary rights under §§ 70-30-321(3) and 70-30-322(3), MCA. *Id.*, ¶ 14. Subsequently, in 2002, Noranda announced its abandonment of its interest in the mineral properties in the Cabinet Mountains. *Id.*, ¶ 15. Consequently, Libby Placer filed suit seeking a declaratory judgment that the fractional mineral interest that Noranda acquired from it in the 1991 judgment of eminent domain should revert to Libby Placer pursuant to § 70-30-321(3), MCA because of Noranda's abandonment of mining operations. *Id.*, ¶ 16. Noranda argued that the 1991 judgment gave it a fee simple interest and therefore the reversionary statute did not apply. *Id.*, ¶ 22.

In evaluating the statute, the Court noted that the interest at issue is "the interest in property 'that has been acquired by eminent domain'. . . . The interest relevant to this dispute is the fractional mineral interest Libby Placer held that Noranda acquired by condemnation." *Id.*, ¶ 31. If that interest was fee simple, then Libby Placer could not re-acquire the interest by reversion. It is in this context that the Court evaluated in detail the definition of "real property interests." In ruling in Noranda's favor, the Court said:

> Contrary to Libby Placer's argument that fee simple refers to a particular quantity (i.e. the whole) of real property, fee simple describes the infinite or perpetual duration of the ownership of the interest, be it an interest in the whole, the surface, a fraction of the surface, the minerals, or a fraction of the minerals. . . . Libby Placer and Noranda's interests were each absolute and unqualified, the highest forms of ownership that can be held in real property.

Id., ¶ 47.

Because the Court found that Libby Placer's interest in the mineral estate was fee simple when it was condemned, it ruled that Libby Placer had no right to reversion under § 70-30-321(3), MCA. Therefore, *Libby Placer* stands for the proposition that fractional interest can be a fee simple interest. By itself, *Libby Placer* does not stand for the proposition that mineral interests must always be counted as "real property interests" for the purposes of the citizen-initiated zoning provisions.

Section 70-30-321(3), MCA, the eminent domain statute at issue in *Libby Placer*, and § 76-2-101, MCA, the statute at issue, address completely different things: the former concerns how rights revert under eminent domain; the latter concerns how a district to zone surface uses of land may be created. Since *Libby Placer* addressed eminent domain, the Court's purpose and context in construing the statute was different than the case at hand. "Because eminent domain interferes with the fundamental right of private ownership of real property, any statute which allows a contemnor to take a person's property must be strictly construed, giving the statute its plain interpretation, but favoring the person's fundamental rights. *McCabe Petroleum Corp. v.*

Easement & Right-of-Way Across Twp., 12 N., 2004 MT 73, ¶ 28, 320 Mont. 384, 87 P.3d 479 (internal citation omitted). No such considerations are present here.

Additionally, in *McCabe,* the Court found "definitions from other sources are not readily imported into the eminent domain arena" given the unique provisions of eminent domain law. *McCabe*, 2004 MT at ¶ 20 citing *Richter v. Rose,* 1998 MT 165, ¶¶ 18-20, 289 Mont. 379, 962 P.2d 583. The converse should also be true, especially when a definition from a more related area of the Montana Code readily applies.

The authority Defendants cite from other states is not binding on this Court. Furthermore, the cases apply law that differs from Montana law in material ways and none consider real property interests in the context of citizen-initiated zoning. Defendants have provided no argument or analysis as to why the implications and considerations of real property ownership in the context of eminent domain (*Libby Placer)*, adverse possession (*Clay v. Mountain Valley Mineral Ltd. Partnership*, 2015 WY 84), constructive notice (*Schulz v. Hauck*, 312 N.W.2d 360, 361 (N.D. 1981)), the categorization of raw ore (*Smith v. El Paso Gold Mines, Inc.*, 720 P.2d 608, 609 (Colo. App. 1985)), or easements in a non-ownership in place state (*Gerhard v. Stephens*, 68 Cal. 2d 864 (Cal. 1968)), most of it from out-of-state authority, should be imported into a Montana statute about citizen-initiated zoning.

Nor do the Montana cases Defendants cite (*McDonald v. Unirex, Inc.,* 221 Mont. 156, 718 P.2d 316 (1986) and *Stokes v. Tutvet,* 134 Mont. 250, 328 P.2d 1096 (1958)) provide useful or binding authority regarding the definition of "real property owners" for citizen-initiated zoning. In both cases, the Court decided issues relating to conveyance of mineral interests. In *McDonald*, the Court found that Montana is an ownership in place state and "title to the mineral interest in land may be separated from the rest of the fee simple title." 221 Mont. 156, 158, 718 P.2d 316, 317, citing *Stokes v. Tutvet,* 134 Mont. 250, 255, 328 P.2d 1096, 1099 (1958). That is

not the issue in this case.

On page 18 of their brief, Defendants argue that Plaintiffs have "provide[d] no meaningful distinction on why mineral interests should be treated as real property in certain context but not others." On the contrary, Plaintiffs have provided multiple meaningful distinctions, including the purpose and the context of the citizen-initiated zoning statute, as well as the unworkable ramifications of a contrary interpretation. The Montana Supreme Court found such arguments to be persuasive in *McCabe*, 2004 MT 73, ¶ 20, where the Court found the definition of "mines" did *not* include oil wells under § 70-30-102(33), MCA, which addresses the way roads may be obtained via eminent domain as rights-of-way to exploit "mines." In so holding, the Court gave "mines" a narrower and more technical meaning that differed from the meaning of "mines" in other contexts. Plaintiffs are requesting the Court do the same here. Such an interpretation would not be unusual, given the multiple examples from other statutory provisions where Plaintiffs have provided where "real property owners" has not been interpreted to include mineral owners in other statutory provisions.

Libby Placer, however, does shed some light on why the County's interpretation of the statute would lead to a meaningless statute. In evaluating mineral interests, the Court said:

> ¶ 42 We have long recognized that title to mineral interests in land may be segregated in whole or in part from the rest of the fee simple title. . . . A division of the mineral interest from the surface interest is a horizontal division.
>
> ¶ 43 We have also recognized that mineral interests, like surface interests, may be divided vertically into fractional interests.

Here, of course, § 76-2-101, MCA, makes no mention of these horizontal and vertical splits involving mineral interests, nor how such estates, split with multiple mineral interests, would be "counted" in respect to surface interests *on a given parcel* towards the "60% of affected real property owners."

D. Plaintiffs' Interpretation of the Statute Does not Render the Word "Affected" Meaningless.

Section 76-2-101(1), MCA requires the petition of "60% of the *affected* real property owners in the proposed district. . . ." (emphasis added). Defendants argue that Plaintiffs' interpretation of "real property owners" as excluding mineral estate holders would essentially read the word "affected" out of the statute. That is not the case. It is clear that in the context of the statute, "affected" means real property owners *in the proposed district*. Plaintiffs' proposed interpretation does not read the word "affected" out of the statute; Plaintiff's interpretation properly construes the sixty percent requirement.

It should also be noted that Defendants' argument highlights more confusion and potential ambiguity within the statute. The term "mineral" itself is ambiguous. *See Farley v. Booth Bros. Land & Livestock Co.*, 270 Mont. 1, 8, 890 P.2d 377, 379 (1995) (noting "the term 'mineral,' has varying definitions in different contexts."). "Mineral" is not defined anywhere in the Part 1 zoning statutes and Defendants have not provided a working definition. If the Court accepts Defendants' interpretation, the Court will also need to clarify which "minerals" are being considered in Defendants' interpretation of "affected real property owners", and in so doing it would read something in to the statute that is not there.

Defendants' interpretation creates more work for the citizens, counties, and ultimately the Courts. First, the counties would need to determine which interests are "mineral interests" for the purposes of citizen-initiated zoning. Then, the counties would need to determine who owned the mineral interests (due to potential ambiguities in the conveyance documents). Third, counties would need to determine which of those mineral interests would be "affected" by the proposed regulations. Lastly, counties would need to determine how fractional interests would be counted. Such undefined discretion, and eventual judicial oversight, was not contemplated by the

Legislature when it drafted the statute, which is designed for citizens to mobilize themselves without the help of the judiciary or the Legislature.

E. Mandamus is Appropriate

In Plaintiffs Opening Brief, they succinctly addressed their request for mandamus found in Count One of the Complaint, and asked that the Court, if it determines as a matter of law that the Petitioners did not need to obtain mineral interest signatures, issue a writ of mandate compelling the Commission to act on the petition. Defendants did not address this issue directly in their Brief, so Plaintiffs merely incorporate by reference their prior argument.

IV. CONCLUSION

As the facts before the Court, and Plaintiffs' arguments, demonstrate, the interpretation of "affected real property owners" that Stillwater County urges the Court to adopt is untenable and unworkable in the context of zoning, is at odds with other statutory definitions and uses of "real property owners", and is contrary to Stillwater County's past interpretation of the phrase, as well as the interpretation of the phrase by other counties which have implemented Part 1 zoning. The Defendants have failed to present material and substantial evidence in opposition to Plaintiffs' motion (*Gonzales v. Walchuk,* 2002 MT 262, ¶ 9, 312 Mont. 240). Defendants have also failed to show that there are no genuine issues of material fact in support of their motion. Accordingly, Plaintiffs respectfully request that the Court deny the Defendants' motion, and grant summary judgment to the Plaintiffs.

DATED the 29th day of November, 2018.

MORRISON SHERWOOD WILSON & DEOLA

David K. W. Wilson, Jr.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of November, 2018, a true and correct copy of the foregoing document was duly served by first-class mail upon the following:

Nancy Rohde
Stillwater County Attorney
P.O. Box 179
Columbus, MT 59019

Bethany A. Gross
Brad L. Jensen
BUDD-FALEN LAW OFFICES
P.O. Box 346
Cheyenne, WY 82003

By _____

David K. W. Wilson, Jr.
MORRISION SHERWOOD WILSON & DEOLA
401 North Last Chance Gulch
P.O. Box 557
Helena, MT 59624
Phone: 406-442-3261
kwilson@mswdlaw.com
Attorneys for Plaintiffs

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 **AFFIDAVIT OF DAVID KATZ**

David Katz, being first duly sworn, states as follows:

1. I am a landowner in Stillwater County, Montana, and am active in Plaintiff Beartooth Front Coalition. My family has owned property in Stillwater County since 1974, when my parents-in-law retired there. When they died in 2006, ownership passed to my family. My sons have grown up here, and bring their families here as often as they can. I previously submitted an affidavit in support of Plaintiffs' Motion for Summary Judgment (Exhibit 12).
2. Since 2013, I have been actively working on efforts to create a citizen-initiated zone in Stillwater County, to address surface impacts from oil and gas development.

3. In Paragraph 2 of Defendants Statement of Facts in their Brief in Support of Cross Motion for Summary Judgment, they cite to a weblog, or blog, for support of their argument that Plaintiffs seek to ban oil and gas development within the proposed district. They attach selective entries from the blog as Exhibit A to their Brief. That blog is my personal blog, and discusses my personal views and opinions. I am the only author, and I do not submit my entries to anyone for review or editorial revision. The link to the blog is https://preservethebeartoothfront.com. The opinions expressed in that blog are not those of the Plaintiff Beartooth Front Coalition. Further, I have made over 425 posts to the blog on a variety of subjects related to oil and gas drilling since 2013, and these posts reflect my developing opinions. To select a few random posts, some over five years old, and suggest that I want to ban oil and gas drilling in Stillwater County, is simply a mischaracterization.

4. The Beartooth Front Coalition's website is https://beartoothfrontcoalition.org. That website contains Plaintiffs' official positions.

5. I have researched and determined through a search of online public records in Montana that there are a total of at least 111 Part 1 zones in Montana.

   - Ravalli County has 41: https://ravalli.us/179/Zoning
   - Missoula County has 31: https://www.missoulacounty.us/government/community-development/community-planning-services/planning-information/citizen-zoning-districts
   - Gallatin County has 22: http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/zd?textPage=1

Yellowstone County has 7:
https://ci.billings.mt.us/DocumentCenter/View/1265/Special-Zoning-Districts?bidId=
Park County has 6: http://www.parkcounty.org/Government/Departments/Planning/Zoning-Applications/
Dawson County has 2
http://www.dawsoncountymontana.org/departments/planning/zoning.php
Stillwater County has 1
https://beartoothfrontcoalitionorg.files.wordpress.com/2018/03/west-fork-stillwater-planning-and-zoning-ordinance.pdf
Flathead County has 1
https://flathead.mt.gov/planning_zoning/documents/Res1594A_12302002.pdf

Further Affiant sayeth not.

DATED this 29th day of November, 2018.

David Katz

On this 29th day of November, 2018 before me, a notary public, personally appeared David Katz, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

JUDY K PROUTY
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20034040288
MY COMMISSION EXPIRES 11/26/2019

Notary Public for the
State of ~~Montana~~ Colorado
Residing at:
My commission expires: 11/26/2019

David K. W. Wilson, Jr.
MORRISION SHERWOOD WILSON & DEOLA
401 North Last Chance Gulch
P.O. Box 557
Helena, MT 59624
Phone: 406-442-3261
kwilson@mswdlaw.com
Attorneys for Plaintiffs

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 **AFFIDAVIT OF TYLER GERNANT**

Tyler Gernant, being first duly sworn, states as follows:

1. I am the Clerk and Treasurer of Missoula County, Montana. I was sworn into the position on November 19, 2014. I am also an attorney licensed to practice law in Montana and on inactive status since 2014.
2. Since being elected to the position, my office has not yet processed a citizen-initiated zoning request under Mont. Code Ann. § 76-2-101.
3. We recently processed a petition to transfer ownership of an improvement funded by the creation of a rural special improvement district ("RSID") to the real property owners in that RSID. Mont. Code Ann. § 7-12-2128(2)(a) allows a public hearing on such a transfer "upon receipt of a petition signed by at least 66% of the owners of real property in a district". RSIDs may initially be created "whenever the public interest or convenience may require" (Mont. Code Ann. § 7-12-2102), just as is required for the creation of a Part 1 zone under Mont. Code Ann. § 76-2-101.
4. For the purposes of determining the "66% of owners of real property in a district", our office counted the number of people who had ownership interests in any of the parcels in the district (i.e. a husband and wife jointly owning a parcel would have the equivalent of two votes).

5. Our office did not count or attempt to count mineral estate interest owners, and we would not have contemplated doing so. As the office responsible for verifying the sufficiency of the petition, researching and verifying mineral estate interest owners would have been unduly and extremely burdensome, requiring additional expertise and staffing.
6. Missoula County has 31 Part 1 zones, including subzones, all created before I came into office. To my knowledge, my predecessors never sought nor required that mineral estate interests be found or counted in creating the Missoula County Part 1 zones and subzones. Additionally, our written procedures do not require collection of mineral estate signatures for Part 1 zoning (*see* "Formation and Amendment of a Part One ("Citizen "Initiated") Planning and Zoning District in Missoula County" available at https://www.missoulacounty.us/home/showdocument?id=25293).

Further Affiant sayeth not.

DATED this 26th day of November, 2018.

Tyler Gernant

STATE OF MONTANA)
:ss
County of Missoula)

On this 26th day of November, 2018 before me, a notary public, personally appeared Tyler Gernant, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

SHYRA SCOTT
NOTARY PUBLIC for the
State of Montana
Residing at Missoula Montana
My Commission Expires
August 13, 2020

Notary Public for the
State of Montana
Residing at:
My commission expires: