

Raymond G. Kuntz
Attorney at Law
P.O. Box 2187
Red Lodge, MT, 59068
(406) 446-3725
Ray@RedLodgeLaw.com
Attorney for Defendants-Appellees
Aisenbreys, Herdens, Hergenriders,
Bakich Lechner and Thuesens

Alex Nixon
Carbon County Attorney
P.O. Box 810
Red Lodge MT, 59068
406-446-3300
anixon@carboncomt.com
Attorney for Defendants-Appellees
Board of Carbon County Commissioners

IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 15-0469

JACK AND BONNIE MARTINELL,
husband and wife; THOMAS AND
HAZEL MCDOWALL, husband and
wife; THOMAS SHAFFREY; and
BARRETT AND KARI KAISER,
husband and wife,

Plaintiffs and Appellants,
v.

BOARD OF COUNTY
COMMISSIONERS OF CARBON
COUNTY, the governing body of the
County of Carbon, acting by and through
JOHN GREWELL, JOHN PRINKKI,
AND DOUG TUCKER;

DOUG AND DENISE AISENBREY,
husband and wife; WILLIS AND
THERESE HERDEN, husband and wife;
DUANE AND DENA HERGENRIDER,
husband and wife; KAREN
HERGENRIDER; RUDOLPH
HERGENRIDER; SHELLEY BAKICH
LECHNER, as personal representative of
the Milovan Bakich estate; AND
STEVEN AND MONICA THUESEN,
husband and wife,

Defendants and Appellees.

**DEFENDANTS' AND
APPELLEES' JOINT MOTION
TO DISMISS**

The Defendants and Appellees jointly move this Court for an order dismissing the appeal because the district court dismissed the complaint without prejudice. Absent special circumstances, dismissal of a claim without prejudice is not appealable under M. R. App. P. 6. *Farmers Union Mut. Ins. Co. v. Bodell*, 2008 MT 363, ¶¶ 17-18, 346 Mont. 414, 197 P.3d 913.

Appellees file this motion pursuant to the obligation to promptly move to dismiss an appeal where it appears the Court is without jurisdiction. *State v. Diesen*, 1998 MT 163, ¶ 6, 290 Mont. 55, 964 P.2d 712.

Appellants oppose this Motion.

The Defendants and Appellees are referred to as “the Commissioners” and “the Neighbors” in the district court’s *Order*. The Plaintiffs and Appellants are referred to as “the Plaintiffs.”

A copy of the *Order* (Docket No. 35) dismissing the case without prejudice is attached hereto as Exhibit 1.

The legal context.

Montana citizens can petition for the creation of zoning districts pursuant to § 76-2-101, MCA, commonly known as “Part One zoning.” *Order*, p.2.

The “Part One” zoning statute contains a “protest provision,” whereby property owners representing at least 50% of the titled property ownership in the district may prevent the creation of the district if they protest the establishment of the district within 30 days of its creation. § 76-2-101(5), MCA. *Order*, p.2.

In 2009, the Carbon County Commissioners adopted Resolution 2009-16, which sets forth procedural and substantive requirements for “Part One” zoning petitions. *Order*, p.2.

Proceedings in the district court.

Plaintiffs submitted on November 20, 2014, a “Part One” petition to create the Silvertip Zoning District. *Order*, p.3.

The Commissioners considered the petition at their December 15, 2014, meeting. They heard statements both for and against the proposed district. Steve Thuesen, a landowner in the proposed district, informed the Commissioners that landowners holding more than fifty percent of the acreage in the district had signed or expressed their intention to sign a letter protesting the district's establishment. *Order*, pp.2-3.

At the close of discussion the Commissioners adopted a resolution of intent to grant the petition and establish the District, based on a finding that establishing the District would serve the public interest and convenience. They determined to reconvene on January 15, 2015, to address landowner protests and take further action on their resolution of intent. *Order*, p.4.

On January 15, 2015, the Commissioners met to discuss the protests received and to take final action on the petition. At the outset of the meeting, the Commissioners noted that all parties involved failed to adhere to Resolution 2009-16.

The Commissioners determined not to require compliance with the requirements of Resolution 2009-16, rescinded their earlier finding of public interest and convenience and voted against establishment of the zone. *Order*, pp.4-5.

The Plaintiffs filed a declaratory judgment action seeking to overturn the Commissioner's decision as arbitrary and capricious and seeking a declaration that the citizen protest provisions of § 76-2-101(5) are unconstitutional. *Complaint*, Docket No.1.

The Commissioners and the Neighbors moved to dismiss arguing that the Plaintiffs' failure to comply with Resolution 2009-16 rendered the petition legally insufficient. *Motions to Dismiss*, Docket No's. 23 & 27.

The Plaintiffs acknowledged that the petition was legally insufficient but argued that "[t]here is no reason why this Court cannot vacate the challenged decision as unlawful and remand the issue to the County Commission to make a new

determination, including a determination whether Plaintiffs must re-submit a petition that conforms to Resolution 2009-16.” *See Answer Brief*, p. 21, fn. 7, (Docket No. 31.) A copy of p. 21 is attached hereto as Exhibit 2.

The Plaintiffs did not argue that Resolution 2009-16 was itself illegal or unconstitutional.

The district court dismissed the complaint without prejudice because the petition was legally insufficient. The court determined that the Plaintiffs had failed to comply with the requirements of Resolution 2009-16 and that the Commissioners could not legally waive such compliance. The court declined to reach the constitutional and statutory issues raised by the parties. *Order*, pp.9-11.

The court explicitly provided that the plaintiffs could resubmit a petition that complied with Resolution 2009-16. The court ordered “that Plaintiffs’ *COMPLAINT FOR DECLARATORY RELIEF* is DISMISSED without prejudice. Plaintiffs retain the option to file another petition with the Carbon County Commissioners for consideration of the creation of the Silvertip Zoning District in compliance with Resolution 2009-16.” *See Order Ex. 1*, p. 11.

The opportunity to submit a legally sufficient petition is a resolution that the Plaintiffs themselves suggested to the district court as an appropriate remedy. *See Answer Brief Ex. 2*, fn. 7.

ARGUMENT.

It is well established that an order dismissing a case without prejudice is a non-appealable interlocutory order absent special circumstances. *Farmers Union Mut. Ins. Co. v. Bodell*, 2008 MT 363, ¶¶ 17-18, 346 Mont. 414, 197 P.3d 913.

There are no special circumstances in this case that would make the *Order* operate as a legal bar to the re-litigation of any claims at issue. In *Farmers Union* the Court explained that “[s]pecial circumstances may include the running of a statute of limitations, language in the order of dismissal indicating that the complainant will not

be permitted to re-plead, or where the practical effect of the order of dismissal terminates the litigation in the complainant's chosen forum.” *Id.* at ¶ 18.

No statute of limitations bars the plaintiffs’ claims.

The thirty day limitation period for appealing the commission’s decision on a Part One zoning petition provided by § 76-2-110 does not bar re-litigation of the Plaintiffs’ claims. The Plaintiffs’ time to re-file their complaint is extended for a period of one year by Montana’s “savings statute” § 27-2-407, MCA, which allows for a one-year extension of the statute of limitations when a timely-filed complaint is dismissed.

Moreover, the clock on the thirty day limitation period provided by § 76-2-110 begins to run anew when a new petition is submitted to the Commissioners. The first exception recognized in *Farmers Union* therefore does not apply.

The Plaintiffs are permitted to re-plead.

The court’s order specifically provides that the Plaintiffs retain the option to file another petition and re-plead. The court’s order is therefore not appealable pursuant to the second special circumstance..

The order does not terminate the litigation in the complainant's chosen forum.

The Plaintiffs chose the Montana Twenty-Second Judicial District Court as their forum for this case and nothing in the court’s order or the rules of civil procedure prevent them from further litigation in that forum.

No other special circumstances are present.

To the extent that the Plaintiffs are asking this Court to review the constitutional issues that the district court declined to reach, such issues are unripe and do not present a justiciable issue.

In *Gateway Opencut Mining Action Group v. Board of County Com'rs* 2011 MT 198 ¶ 24, 361 Mont. 398, 260 P.3d 133, the Supreme Court held that a challenge to the constitutionality of the citizen protest provisions applicable to “Part

Two” zoning pursuant to §76-2-205(6), MCA, was unripe because the Commission did not take the actions required of it before the statutory deadlines expired, and the zoning therefore failed for a reason independent of the citizen protest provision. *Gateway* at ¶ 24.

Because the zoning in this case likewise failed for reasons independent of the protest provisions, the Plaintiffs’ constitutional challenges do not present an appealable issue, and therefore do not constitute special circumstances weighing against dismissal of the appeal.

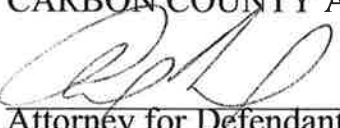
Moreover, by appealing the constitutionality of the protest provision in §76-2-101(5), an issue that was not reached by the district court, the Plaintiffs are seeking an advisory opinion. This Court has consistently held that this it does not render advisory opinions. *See Serena Vista, LLC v. Dept. of Nat. Resources and Conserv.*, 2008 MT 65, ¶14, 342 Mont. 73, 179 P.3d 510.

CONCLUSION.


Because the complaint was dismissed without prejudice this appeal should be dismissed for lack of appellate jurisdiction.

Dated this 20th day of August, 2015

ALEX NIXON
CARBON COUNTY ATTORNEY


Attorney for Defendants-Appellees
Board of Carbon County
Commissioners

RAYMOND G. KUNTZ
ATTORNEY AT LAW


Attorney for Defendants-Appellees
Aisenbreys, Herdens, Hergenriders,
Bakich Lechner and Thuesens

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on all parties or counsel of record via first class mail on August 20th, 2015


Alex Nixon

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word Perfect 12, is not more than 1,250 words, excluding caption, certificate of service and certificate of compliance.

DATED: 8/19/2015


Raymond G. Kuntz

COPY

MONTANA TWENTY-SECOND JUDICIAL DISTRICT COURT, CARBON COUNTY

JACK AND BONNIE MARTINELL,
husband and wife; THOMAS AND HAZEL
MCDOWALL, husband and wife; THOMAS
SHAFFREY; and BARRETT AND KARI
KAISER, husband and wife,

Plaintiffs,

vs.

BOARD OF COUNTY COMMISSIONERS
OF CARBON COUNTY, the governing body
of the County of Carbon, acting by and
through JOHN GREWELL, JOHN
PRINKKI, AND DOUG TUCKER; DOUG
AND DENISE AISENBREY, husband and
wife; WILLIS AND THERESE HERDEN,
husband and wife; DUANE AND DENA
HERGENRIDER, husband and wife;
KAREN HERGENRIDER; RUDOPH
HERGENRIDER; SHELLEY BAKICH
LECHNER, as personal representative of the
Milovan Bakich estate; and STEVEN AND
MONICA THUESEN, husband and wife,

Defendants.

Cause No. DV 15-14

Judge: Blair Jones

ORDER ON DEFENDANTS'
MOTIONS TO DISMISS

Before the Court is a *MOTION TO DISMISS* filed on April 3, 2015, by Defendants Carbon County Commissioners ("Commissioners") together with a *MOTION TO DISMISS* filed on April 3, 2015, by the individually named neighboring land owners opposing the creation of the Silvertip Zoning District (collectively referred to as "Neighbors"). Plaintiffs, members of a group of Carbon County residents who had petitioned the Commissioners to create the zoning district,

Exhibit 1.

RECEIVED

JUL 09 2015

CARBON COUNTY
ATTORNEY

1 oppose the motions. The Court held a hearing on the motions on June 4, 2015, at the Carbon
2 County Courthouse in Red Lodge, Montana. After due consideration of the briefs and arguments
3 of the parties, together with the applicable law, the Court concludes that the Neighbors' motion to
4 dismiss should be granted and the complaint for declaratory judgment dismissed.

5 BACKGROUND

6 Under Montana law, Montana citizens are afforded the right to petition for the creation of
7 planning and zoning districts in their community. Section 76-2-101, MCA, *et seq.* This citizen-
8 initiated zoning process, also known as "Part One" zoning, provides that "whenever the public
9 interest or convenience may require and upon petition of 60% of the affected real property owners
10 in the proposed district, the board of county commissioners may create a planning and zoning
11 district and appoint a planning and zoning commission consisting of seven members." Section 76-
12 2-101(1), MCA. The citizen petition process does not determine the content of zoning regulations
13 but rather initiates the county government's consideration of appropriate land use regulations for
14 the district.

15 The Part One zoning statute also contains what is commonly known as the "protest
16 provision," whereby real property owners representing at least 50% of the titled property
17 ownership in the district may prevent the creation of the district if they protest the establishment
18 of the district within 30 days of its creation. Section 76-2-101(5), MCA.

19 In 2009, the Carbon County Commissioners adopted Resolution 2009-16, which sets forth
20 more substantial requirements for the county's certification of "Part One" zoning petitions
21 submitted to the county. Pursuant to Resolution 2009-16, citizens submitting a "Part One" zoning
22 petition are required to include in the petition, *inter alia*, the following:

- 23 • "a map prepared by a certified land surveyor indicating the
24 boundaries of the area of land to be included in the district" and
marking the names of landowners, *Res. 2009-16*, ¶ A;
- 25 • signature pages that include a legal description of the signator's
26 affected real property, *Res. 2009-16*, ¶ B;
- 27 • an ownership report from a title company setting forth the
28 status of a title to a parcel of real property, *Res. 2009-16*, ¶
C(1), and;

- an affidavit by all persons circulating petition signature pages attesting that they collected those signatures, or each signature must be notarized, *Res. 2009-16*, ¶ C(2).

Also, after the Clerk and Recorder's Office receives the petition, "additional petitioner and signature pages or withdrawal statement will be accepted for 45 business days after petition is submitted." *Res. 2009-16*, ¶ D(2).

Plaintiffs in this case are members of the group of petitioners who submitted on November 20, 2014, a "Part One" petition to create the Silvertip Zoning District.¹ *Complaint*, ¶ 13. The proposed zoning district encompassed 2,741.34 acres of mostly agricultural private land near Belfry, Montana. *Id.*, ¶ 37. The petition's stated goal for the proposed zoning district was to "maintain the rural residential and agricultural character of the proposed district," primarily through the regulation of oil and gas activity conducted within the proposed zone. *Petition*, p. 1. The petition called for the protection of public health, private property, surface and ground water, and soil and air quality, as well as for the protection and improvement of public infrastructure and public services. *Id.* The petition focused exclusively on regulation of oil and gas activities and did not seek comprehensive land use regulation that would affect grazing, horticulture, agriculture, timber harvest, or other activities. *Id.*; *Complaint*, ¶ 31.

After certification of the petition from the Clerk and Recorder, the Commissioners brought up the petition for consideration at their December 15, 2014, meeting. *Id.*, ¶ 38. The Commissioners heard statements from many individuals, both for and against the proposed district. *Id.*, ¶ 39-43. Steve Thuesen, a landowner in the proposed district, informed the Commissioners that landowners holding more than fifty percent of the acreage in the district had signed or expressed their intention to sign a letter protesting the district's establishment. *Id.*, ¶ 42. The Commissioners heard comments from, and asked questions of, various members of the public audience concerning different aspects of the petition, including the proper procedure for the

¹ The petitioners originally submitted their petition on August 18, 2014. On September 17, 2014, the Commissioners convened a public meeting at the Belfry School concerning the proposed district, and the following day, the Commissioners notified the petitioners that they must revise their petition so that the district consists of a single contiguous parcel of land. The petitioners made the requested revisions and resubmitted their petition on November 20, 2014.

1 Commissioners' action on the petition. *Id.*, ¶ 43. At the close of discussion, Commissioner
2 Prinkki moved that the Commissioners adopt a resolution of intent to grant the petition and
3 establish the Silvertip Zoning District, based on a finding that establishing the District would
4 serve the public interest and convenience. *Id.*, ¶ 44. The Commissioners voted unanimously in
5 favor of Commissioner Prinkki's motion and determined to reconvene on January 15, 2015, to
6 address landowner protests and take further action on their resolution of intent. *Id.*, ¶ 44-45.

7 On January 15, 2015, the Commissioners met to discuss the protests received and to take
8 final action on the petition. *Id.*, ¶ 46. At the outset of the meeting, the Commissioners noted that
9 all parties involved failed to adhere to Resolution 2009-16. Commissioner Prinkki stated:

10 First, at this time, the Commissioners must acknowledge that the
11 petition provided does not comport with the County Resolution
12 2009-16 regarding citizen-driven or type one zoning. Simply put,
13 all parties failed to take notice of the resolution during the entire
14 process. The Commission takes the blame for the oversight, but
15 also makes the following findings: no parties have been prejudiced
16 by the oversight, and both parties, petitioners and protestors, were
17 held to the same standards and benefited from the easier standards
18 applied. The Commission has no reason to believe that either party
would have had any difficulty complying with the standards of
Resolution 2009-16 had parties been aware of it. At this time, the
Commission finds that it would be unduly burdensome and unfair
[not] to proceed with the petition process and there's no reason to
believe the outcome would have, would be in any way changed.

19 *Plaintiffs' Response Brief*, p. 19 (citing video of Jan. 15, 2015, Commissioners' meeting, at
20 01:16). Discussing the petition, Commissioner Prinkki reported that landowners holding
21 1,665.04 acres, or 60.7% of the total acres in the proposed District had submitted letters
22 indicating their intent to submit certified protests to the Commissioners. *Id.*, ¶ 47. Commissioner
23 Grewell made a motion to rescind the Commissioners' resolution of intent to create the Silvertip
24 Zoning District, which he stated was based on two reasons: (1) that it was in the Commissioners'
25 discretion to rescind their public interest finding in light of the "now certified protest acreage;"
26 and (2) that establishing the district would be contrary to law because the Commissioners had
27 received landowner protests satisfying the protest provision of the citizen-initiated zoning statute,
28 § 76-2-101(5), MCA. *Id.*, ¶ 48. After discussion regarding the motion, the Commissioners voted

1 unanimously in favor of the motion to rescind the resolution of intent to create the district. *Id.*, ¶
2 53. Commissioner Grewell then moved to deny the petition to establish the proposed Silvertip
3 Zoning District based on the previous motion. *Id.*, ¶ 54. Following limited further discussion, the
4 Commissioners voted unanimously in favor of the motion to deny the petition to establish the
5 Silvertip Zoning District. *Id.*, ¶55.

6 Following the January 15, 2015, meeting, Plaintiffs initiated the current declaratory
7 judgment action. Plaintiffs' *Complaint* sets forth three causes of action, all of which are based on
8 the Commissioners' alleged reliance on the § 76-2-101(5), MCA, protest provision in denying the
9 petition. Plaintiffs allege that the Commissioners' express reason for reversing the public interest
10 determination and denying the petition was premised on the protests received, and that the protest
11 provision relied on by the Commissioners is unconstitutional. *Id.*, ¶ 57-60. In addition, Plaintiffs
12 assert that relying solely on an unconstitutional protest provision to rescind the finding of public
13 interest was arbitrary and capricious and an abuse of discretion, (*id.*, ¶ 61-66), and that the
14 Commissioners' action deprived the Plaintiffs of their constitutional right to a clean and healthful
15 environment as articulated in Mont. Const. Art. II, § 3, Art. IX, § 1. *Id.*, ¶ 67-72.

16 The Commissioners and Neighbors have each filed a motion to dismiss this action, setting
17 forth several arguments to support dismissal of Plaintiffs' *Complaint*. For purposes of this order,
18 however, the Court needs to address only the effect of the petitioners' non-compliance with
19 County Resolution 2009-16, as it is dispositive of this declaratory judgment action.

20 STANDARD OF REVIEW

21 A motion to dismiss pursuant to M. R. Civ. P. 12(b)(6) requires a district court to
22 determine whether a claim has been adequately stated in the pleadings. *Woods v. Shannon*, 2015
23 MT 76, ¶ 9, 378 Mont. 365, 344 P.3d 413, citing *Meagher v. Butte-Silver Bow City-County*, 2007
24 MT 129, ¶ 15, 337 Mont. 339, 160 P.3d 552. The pleadings should not be dismissed unless it
25 appears certain that the petitioner will be unable to recover under any set of facts which could be
26 proven in support of his or her claim. *Id.* citing *Kleinhesselink v. Chevron, U.S.A.*, 277 Mont.
27 158, 161, 920 P.2d 109, 110 (1996). The pleadings must be construed in the light most favorable
28

1 to the petitioner, and all allegations of fact contained in the pleadings are taken as true. *Id.* citing
2 *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316.

3 In considering the motion to dismiss, the Court should only consider the complaint and
4 items the complaint incorporates by reference. M. R. Civ. P. 10(c); see *City of Cut Bank v. Tom*
5 *Patrick Construction, Inc.*, 290 Mont. 470, 963 P.2d 1283 (1998). In the present case, Plaintiffs'
6 *Complaint* incorporates and refers to several documents, videos, and letters regarding the
7 Commissioners' consideration of the proposed Silvertip Zoning District.

8 ISSUE

9 Given the petitioners' lack of compliance with Resolution 2009-16, did the
10 Commissioners err in taking action on the merits of the petition? If the Commissioners did err in
11 considering the petition, should the Court dismiss Plaintiffs' *COMPLAINT FOR DECLARATORY*
RELIEF?

12 DISCUSSION

13 The parties agree that the petition at issue did not meet the requirements of Resolution
14 2009-16. The petition in this case does not include a map prepared by a certified land surveyor
15 dictating the boundaries of the area of land to be included in the district, as required by Res.
16 2009-16, ¶ A. In addition, the map that is included in the petition was not attached to each
17 signature page, as required by Res. 2009-16, ¶ A. There is no ownership report included for any
18 of the property in the zone as required by Res. 2009-16, ¶ C(1). The petition does not include a
19 proper affidavit attesting to the petition signatures, nor are the petition signatures notarized as
20 required by Res. 2009-16 ¶ C(2). The only affidavit included with the petition is an affidavit
21 from Bonnie Martinell dated August 14, 2014, over two months prior to the October 29, 2014,
22 date of the signature pages and signatures therein. The Martinell affidavit fails to meet the
23 authentication requirements of Res. 2009-16, ¶ C(2). Finally, the Commissioners failed to wait
24 45 business days before taking any action on the petition, as required by Res. 2009-16, ¶ D(2).

25 The Neighbors assert that the insufficiencies of the petition are dispositive of the action,
26 because without a valid petition, the Commissioners lacked the authority to create the proposed
27 zoning district. Further, the Neighbors argue that because the petition was insufficient as a matter
28 of law, the Commissioners correctly denied the petition, and the Court need not entertain the

1 constitutional questions raised by Plaintiffs. According to the Neighbors, in light of the petition's
2 insufficiencies, deciding the constitutional issues raised by Plaintiffs would amount to an
3 academic exercise and an advisory opinion.

4 Plaintiffs counter that the Commissioners properly waived compliance with the resolution.
5 Plaintiffs contend that the Commissioners have the power to waive compliance with their own
6 resolutions, provided they reasonably explain their reason for doing so, and with respect to this
7 petition, Commissioner Prinkki sufficiently detailed the Commissioners' reasons for waiving
8 compliance with Resolution 2009-16 in their consideration of the petition.

9 A resolution is defined under Montana law as "a statement of policy by the governing
10 body or an order by the governing body that a specific action be taken." Section 7-1-4121(22),
11 MCA (defining "resolution" in the municipality context). The Montana Supreme Court has noted
12 that the same rules of construction apply to official enactments by County Commissioners as
13 apply to the construction of a statute. *Mesa Communications Group, LLC v. Yellowstone County*,
14 2002 MT 73, ¶ 14, 309 Mont. 233, 45 P.3d 37.

15 While the Court has not found authority analyzing whether a violation of a county
16 resolution voids a zoning decision, there is authority for voiding local government zoning
17 decisions for failing to follow the procedural requirements found in enabling statutes. *Bryant v.*
18 *Dagel*, 166 Mont. 252, 258, 531 P.2d 1320, 1324 (1975) (voiding a zoning resolution of the
19 Lewis and Clark County Commissioners for failing to follow the notice and hearing provisions of
20 the statute); *Dover Ranch v. Yellowstone County*, 187 Mont. 276, 284, 609 P.2d 711 (1980)
21 (affirming a district court decision invalidating the Yellowstone County Commissioner's grant of
22 an application for zoning change because of procedural errors). In those cases, the Montana
23 Supreme Court held that the local governing body does not have the authority to waive procedural
24 requirements set forth by the Montana Legislature in the enabling act.

25 Plaintiffs agree that a local government's compliance with the procedural requirements
26 found in the enabling act is mandatory. However, Plaintiffs contend that a local government
27 nevertheless has the authority to waive compliance with its own resolutions. While local
28 governments are granted only the power given to them by the Montana Legislature, and the local

1 governments cannot take actions that contravene the power delegated by the legislature through
2 an enabling act, Plaintiffs contend that a local resolution does not require the same mandatory
3 compliance. In contrast to the enabling act's requirements, the requirements of a resolution are
4 enacted directly by the local government.

5 Plaintiffs analogize the Commissioners' power in this sense to the power of a federal
6 administrative agency to disregard its own procedural rules when circumstances warrant such
7 action. Plaintiffs cite to several federal cases for the proposition that an administrative body has
8 discretion to waive its own procedural rules so long as it reasonably explains its reason for so
9 doing, and no party is prejudiced by the waiver. *Am. Farm Lines v. Black Ball Freight Serv.*, 397
10 U.S. 532, 539, 90 S. Ct. 1288, 1292 (1970); see also *Amcor, Inc. v. Brock*, 780 F.2d 897, 899
11 (11th Cir. 1986) ("An administrative agency may waive procedural requirements in the interest of
12 justice, provided such a waiver will not prejudice the other party.") (citations omitted).
13 Consistent with this rationale, the Plaintiffs contend that the Commissioners were permitted to
14 waive compliance with Resolution 2009-16 if they reasonably explained their decision to waive.
15 Furthermore, Plaintiffs argue that the Commissioners in fact waived compliance with Resolution
16 2009-16 in their consideration of the petition, explaining their reason for doing so at the outset of
17 the January 15, 2015, meeting.

18 The Court agrees with Plaintiffs that the Commissioners waived compliance with
19 Resolution 2009-16. The Commissioners argue that they did not waive compliance with
20 Resolution 2009-16, but simply determined that compliance with the resolution was moot because
21 the Commissioners had decided to reject the petition as not in the public interest. *Comm's*
22 *Reply*, p. 13. A valid petition, however, is a prerequisite to its consideration by the
23 Commissioners, and the directives of Resolution 2009-16 "constitute the approved process of
24 certification of 'Part One' zoning petitions." *Res. 2009-16*. The requirements under Resolution
25 2009-16 must be met before the Clerk and Recorder transmits the verified petition to the
26 Commissioners for consideration. *Res. 2009-16*, ¶ D(3). Here, the Court concludes that the
27 Commissioners waived compliance with Resolution 2009-16 when they determined to act on the
28 petition despite the petition's insufficiencies.

1 Contrary to Plaintiffs' position, the Court concludes that the Commissioners acted
2 arbitrarily in waiving compliance with Resolution 2009-16, insofar as the resolution is applicable
3 to this case. First, the Court does not agree that Plaintiffs' analogy to a federal administrative
4 agency's authority to waive its procedural requirements is particularly apropos to the
5 Commissioners' authority here. While the Court recognizes that a local government has the
6 power to rescind or modify its own resolutions, the Court cannot approve a practice that permits
7 county commissioners to simply abandon validly enacted and pertinent resolutions for the sake of
8 convenience. Moreover, as more fully discussed below, the Court does not agree that waiving
9 compliance with the procedural requirements of Resolution 2009-16 was without prejudice to all
10 parties.

11 A resolution is described as "an order by the governing body that a specific act be taken,"
12 § 7-1-4121(22), MCA. Such action will only have meaning if the governing body and others
13 affected by the resolution are required to follow the mandates described therein. To lessen this
14 mandate would invite arbitrary and capricious conduct by county commissioners and violate
15 sound public policy. Here, Resolution 2009-16 is specific to Part One zoning petitions, and it sets
16 forth requirements the Commissioners and all citizens must follow. The mandates of Resolution
17 2009-16 are important to more fully inform the Commissioners in the decision making process
18 relative to the petition by virtue of the required information and attachments referenced in the
19 resolution. Equally as important, the procedural requirements of the resolution also provide a
20 uniform set of rules upon which citizens can rely in petitioning for and protesting against a
21 proposed zoning district. In so doing, Resolution 2009-16 provides due process protections to
22 interested citizens by setting forth a timeframe in which the petition will be considered, as well as
23 describing the required items a petition must contain before it may be addressed by the
24 Commissioners. *See Resolution 2009-16, ¶ D(2)*. Waiver of such requirements is no small
25 matter, and waiver for the sake of convenience is fertile ground for prejudice.

26 As a consequence of the petitioners' failure to follow and the Commissioners' failure to
27 require compliance with the mandates of Resolution 2009-16 before consideration of the petition,
28 the Commissioners' acted in derogation of the very protections they sought to instill when

1 enacting Resolution 2009-16. By waiving the requirements of Resolution 2009-16 and by
2 considering the merits of the petition after recognizing the insufficiencies thereof as presented,
3 the Commissioners arbitrarily and for reasons of convenience disregarded the value to all parties
4 of a properly submitted petition.

5 The Commissioners stated that neither the petitioners nor the protestors were prejudiced
6 by disregarding the requirements of Resolution 2009-16, because not adhering to all requirements
7 of the resolution was easier on all parties. The Court will not assume a lack of prejudice,
8 particularly in light of the arguments raised by the Neighbors here. Moreover, it was erroneous
9 for the Commissioners to consider any damage done by waiving the requirements of the petition
10 inconsequential because they were going to deny the petition anyway. The Commissioners must
11 appreciate and all affected parties are entitled to expect that a properly submitted petition
12 complying with all requirements of Resolution 2009-16 might have affected a determination as to
13 whether the proposed zoning district was in the public interest.

14 It is sound public policy to require that the Commissioners as well as petitioners follow
15 duly enacted resolutions that enhance the decision making process while providing due process
16 protections to all interested parties. All petitioners coming before the county commission on a
17 Part One zoning petition should be held to the same consistent standard. The Commissioners'
18 decision to waive the requirements of Resolution 2009-16 in this instance was arbitrary because it
19 permitted the petitioners to avoid requirements pertaining to all similarly situated petitioners at
20 the expense of the Neighbors and other citizens protesting the petition, while unnecessarily
21 limiting information that would have assisted in an informed decision by the Commissioners.

22 Finally, despite the Plaintiffs' request that the Court declare § 76-2-101(5), MCA,
23 unconstitutional, courts should avoid constitutional issues whenever possible. *Merlin Myers*
24 *Revocable Trust v. Yellowstone County*, 2002 MT 201, ¶ 24, 311 Mont. 194, 53 P.3d 1268, citing
25 *State v. Still*, 273 Mont. 261, 263, 902 P.2d 546, 548 (1995). The Montana Supreme Court has
26 held that "certain constraints govern the Court's power to determine the constitutionality of
27 statutes. Among those constraints is the principle that we will not rule on the constitutionality of
28 a legislative act if we are able to decide the case without reaching constitutional considerations."

1. Still, 273 Mont. at 263. Here, the Court would be remiss in addressing the constitutional issues
2. raised by Plaintiffs in light of the insufficiency of the petition and the Commissioners'
3. unwarranted waiver of the requirements of Resolution 2009-16.

4. In conclusion, for the reasons stated above, the Court determines that the insufficiency of
5. the original petition in this cause and the Commissioners' action waiving such insufficiencies in
6. contravention of Carbon County Resolution 2009-16 render the petition and all action taken
7. thereunder void. Plaintiffs retain the option of filing a proper petition in compliance with
8. Resolution 2009-16 with the Carbon County Commissioners for consideration of the creation of
9. the Silvertip Zoning District.

10. Accordingly,

11. **IT IS ORDERED** that the Neighbors' *MOTION TO DISMISS* is **GRANTED**.

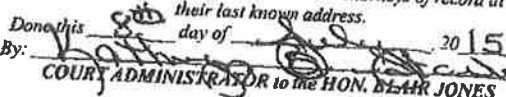
12. **IT IS FURTHER ORDERED** that the Commissioners' *MOTION TO DISMISS* is **MOOT**.

13. **IT IS FURTHER ORDERED** that Plaintiffs' *COMPLAINT FOR DECLARATORY RELIEF* is
14. **DISMISSED** without prejudice. Plaintiffs retain the option to file another petition with the
15. Carbon County Commissioners for consideration of the creation of the Silvertip Zoning District
16. in compliance with Resolution 2009-16.

17. DATED this 8th day of July, 2015.

18. 
19. BLAIR JONES, District Judge

20.
21. cc: Katherine K. O'Brien, Attorney for Plaintiffs
22. Alex Nixon, Carbon County Attorney
23. Raymond G. Kuntz, Attorney for Neighbors
24.

25. **CERTIFICATE OF SERVICE**
26. This is to certify that the foregoing was duly served by mail,
27. fax, or email upon the parties or their attorneys of record at
28. their last known address.
Done this 8th day of July, 2015
By: 
COURT ADMINISTRATOR to the HON. BLAIR JONES

The cases cited by Neighbors are not to the contrary. See Neighbors' Br. 6. Both Bryant Development Association v. Dagle, 166 Mont. 252, 531 P.2d 1320 (1975), and Dover Ranch v. Yellowstone County, 187 Mont. 276, 609 P.2d 711 (1980), concerned compliance of county zoning decisions with governing statutes, not a county resolution or ordinance. This distinction is significant. Because county commissions exercise delegated legislative authority in making zoning decisions, their actions are void when they fail to comply with the terms of that delegation, i.e., the governing statutory requirements. See Mont. Const., art. XI, § 4(1)(b) ("A county has legislative, administrative, and other powers provided or implied by law.") (emphasis added). The unremarkable requirement that county commissions must comply with state law in no way supports the proposition that the Commissioners here could not validly waive compliance with their own resolution where they determined on the record that doing so would prejudice neither party and there was no objection to that determination.⁷

C. The Commissioners' Disclaimer of Authority to Regulate "Oil and Gas Issues" is Erroneous and Irrelevant

The Commissioners' claim that they "are not statutorily empowered to act as a regulatory body overseeing oil and gas production," Commissioners Br. 15, is both inaccurate and irrelevant to this case. County governments have the authority and the responsibility to protect the health, safety, and welfare of their citizens, MCA §§ 76-2-201, 76-2-104, and zoning is the primary means by which they provide such protection from the harmful effects of incompatible land uses. Defendants do not assert that all local regulation of oil and gas activities is preempted, and the Commissioners' argument falls far short of proving that the county could adopt no lawful zoning

⁷ Furthermore, as discussed supra, Plaintiffs do not request an order from this Court creating a zoning district. There is no reason why this Court cannot vacate the challenged decision as unlawful and remand the issue to the County Commission to make a new determination, including a determination whether Plaintiffs must re-submit a petition that conforms to Resolution 2009-16.