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-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-Appellees.

BRIEF OF APPELLANTS

On Appeal from the Montana Twenty-Second Judicial District Court, Carbon County, Cause Number DV 15-14, Hon. Blair Jones

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

CONSTITUTIONAL PROVISIONS

STATE STATUTES AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Did the district court err in concluding that county commissioners are powerless to waive the procedural requirements of their own resolution governing certification of citizen-initiated zoning petitions where, as here, the commissioners find on the record that complying with the resolution would be unduly burdensome and unfair and that no party would be prejudiced by waiver, and no party objects to that determination?

2. Does the protest provision in the "Part 1" zoning statute, MCA § 76-2-101(5), violate the Montana Constitution's non-delegation principle by allowing private individuals to veto county commissioners' approval of citizen zoning proposals without any justification or opportunity for review by the commissioners?

3. Does the Carbon County Commissioners' reliance on the Part 1 protest provision, MCA § 76-2-101(5), to deny the citizen petition to establish the Silvertip Zoning District render their decision unlawful?

STATEMENT OF THE CASE

This appeal seeks to vindicate the rights of private property owners to pursue reasonable zoning regulations that will mitigate the threats that oil and gas development—particularly the practice of hydraulic fracturing—pose to their land and livelihoods.

Plaintiffs-appellants in this case—the "Silvertip Landowners"—have been working to secure zoning protections on their land by petitioning their county commissioners to establish a citizen-initiated or "Part 1" zoning district—the precise tool Montana law provides for citizens to protect their property from harm associated with incompatible land uses. See MCA § 76-2-101 (providing for zoning by citizen petition). But their efforts have been frustrated, first, by the unconstitutional "protest provision" in the Part 1 zoning statute, MCA § 76-2-101(5), which compelled defendant-appellee Board of Carbon County Commissioners (the "Commissioners") to deny the Silvertip Landowners' zoning petition; and second, by a district court order dismissing the Silvertip Landowners' appeal of that denial for reasons that lack support in controlling or persuasive authority. To secure a rational determination on their zoning petition and preserve their ability to protect their land as state law provides, the Silvertip Landowners seek relief from this Court.

This appeal concerns the Silvertip Landowners' petition under the Part 1 zoning statute, MCA § 76-2-101, to establish the Silvertip Zoning District. The Part 1 zoning statute authorizes county commissioners to establish zoning districts "whenever the public interest or convenience may require and upon petition of 60% of the affected real property owners in the proposed district." Id. For a citizen petition to be approvable, the proposed zoning district must consist of at least 40 acres and may not contain land that already has been zoned by an incorporated city. Id. § 76-2-101(2)-(3). Approving a Part 1 zoning petition does not establish specific land use regulations for the new district; instead, the county commissioners must appoint a planning and zoning commission for the district, which is responsible for developing and proposing zoning regulations for adoption by the county commissioners. See id. §§ 76-2-101(1), 76-2-104, 76-2-107(1).

The proposed Silvertip Zoning District would encompass approximately 2,700 acres of private property near the Clark's Fork of the Yellowstone River northeast of Belfry. The area retains the rural agricultural character that has been its hallmark for generations. It also overlies oil and gas deposits that have been the subject of recently renewed commercial interest and exploratory drilling. Accordingly, the Silvertip zoning petition is aimed at securing reasonable zoning regulations that will mitigate the adverse impacts threatened by oil and gas drilling in an agricultural and residential area. See Appx. G (amended petition).

The Commissioners considered the Silvertip zoning petition at their December 2014 public meeting. Based on the petition materials and public comment, the Commissioners determined that establishing the Silvertip District for purposes of mitigating oil and gas production impacts would serve the public interest and they unanimously adopted a resolution of intent to establish the district. But at their meeting one month later, the Commissioners reversed course and denied the petition. They noted at the outset that, in reviewing and certifying the petition, the Commissioners had overlooked and failed to comply with Carbon County Resolution 2009-16, which prescribes procedures for the county's certification of citizen-initiated zoning petitions.[1] However, they waived the resolution's requirements with regard to the Silvertip zoning petition based on their findings that it would be unduly burdensome and unfair to halt the petition process at that late stage and that no party would be prejudiced by the waiver. No party objected to the Commissioners' decision to waive compliance with Resolution 2009-16.

Having waived compliance with the resolution and determined it was appropriate to proceed, the Commissioners rescinded their finding that the Silvertip District would serve the public interest and denied the petition on the ground that landowners holding a majority of property within the proposed district (60.7%) had

[1] Resolution 2009-16 is attached as Appendix B.

formally protested its establishment. The Commissioners stated that, under the "protest provision" of the Part 1 zoning statute, MCA § 76-2-101(5), they lacked authority to establish the district because of these protests. That provision prohibits county commissioners from creating a citizen-initiated zoning district if landowners representing 50% of the titled property ownership within the district protest. Id. In denying the Silvertip zoning petition, the Commissioners made no factual findings contradicting their prior determination that establishing the Silvertip District would serve the public interest. Instead, the Commissioners stated that their decision was based on the protest provision, MCA § 76-2-101(5).

The Silvertip Landowners timely appealed the Commissioners' decision to the Twenty-Second Judicial District Court, Carbon County, as provided by MCA § 76-2-110 and the Declaratory Judgments Act, MCA §§ 27-8-201, 202. The central issue raised in their complaint is whether the Commissioners' decision to deny their zoning petition based on the Part 1 protest provision, MCA § 76-2-101(5), was unconstitutional under this Court's decision in Williams v. Board of County Commissioners, 2013 MT 243, 371 Mont. 356, 308 P.3d 88. See Compl. ¶¶ 57-60 (First Cause of Action). In Williams, this Court held that the substantively identical protest provision in the "Part 2," or county-initiated, zoning statute unlawfully delegates legislative power to protesting landowners by

empowering them to veto zoning proposals. Williams, ¶51.[2] The complaint alleges in the alternative that, even assuming the Commissioners denied the zoning petition for reasons separate from the protest provision, their decision still was arbitrary because the Commissioners failed to articulate any other reasoned basis for their decision. Compl. ¶¶ 61-66 (Second Cause of Action). Further, to the extent the Commissioners relied on the mere existence of opposition to the Silvertip District to deny the petition, the Silvertip Landowners claimed that the Commissioners violated the Landowners' fundamental constitutional right to a clean and healthful environment, Mont. Const. Art. II, § 3 and Art. IX, § 1. Compl. ¶¶ 67-72 (Third Cause of Action).

The Silvertip Landowners asked the district court for two primary forms of relief: (1) a ruling that the Part 1 protest provision is unconstitutional under Williams; and (2) an order setting aside the Commissioners' decisions to rescind their resolution of intent and deny the Silvertip zoning petition. Such a ruling would allow the parties to pursue a rational process in which the Commissioners could consider the merits of the petition without the obstacle of the unconstitutional protest provision.

[2] The Legislature has provided two separate tracks for zoning under Montana law: a citizen-initiated process pursuant to the "Part 1" zoning statute, MCA § 76-2-101, and a county-initiated process pursuant to the "Part 2" zoning statute," id. § 76-2-201 et seq. Ash Grove Cement v. Jefferson Cnty., 283 Mont. 486, 493, 943 P.2d 85, 89 (1997).

The Commissioners and individually-named defendants who protested the Silvertip District's creation pursuant to MCA § 76-2-101(5) (the "Neighbors") moved to dismiss the complaint.[3] They argued that the Silvertip Landowners' claims fail because, although the Commissioners found the parties' noncompliance with County Resolution 2009-16 "harmless and moot," Comm'rs Mot. to Dismiss 10 (April 3, 2015), that noncompliance rendered the Silvertip zoning petition invalid and deprived the Commissioners of authority to approve it regardless of the protests. See id. at 10-11; Neighbors Mot. to Dismiss 4-7 (April 3, 2015). The Commissioners and Neighbors argued in the alternative that (1) the Part 1 protest provision is constitutional and, in any event, the Commissioners did not rely on it; (2) the Commissioners' zoning decisions are unreviewable; (3) the Silvertip zoning petition is invalid because it seeks impermissible regulation of agriculture; and (4) the Silvertip Landowners' clean and healthful environment claim is not justiciable. The Commissioners advanced additional policy arguments concerning property rights, the Silvertip Landowners' prospects of achieving their goals under the Part 1 zoning statute, and the preferred forum for addressing concerns about oil and gas

[3] The Silvertip Landowners' complaint does not seek any relief against the Neighbors, but they are considered necessary parties because of their interest in the outcome of this litigation. See Williams, ¶¶ 31-33 (holding protesting landowners were necessary parties in challenge to Part 2 protest provision).

development. Commr's Mot. 13-15. All of these issues were fully briefed and argued by all parties.

On July 8, 2015, the district court issued an order dismissing the complaint ("Order") (attached as Appendix A). The district court agreed with the Silvertip Landowners that the Commissioners waived the requirements of Resolution 2009-16 as it applied to the Silvertip zoning petition. Order 8. However, the district court concluded—without citation to Montana authority and contrary to persuasive federal authority—that the Commissioners lacked the power to do so, rendering the petition and all action taken on it void. Id. at 9-11. The district court set aside the Commissioners' decision on that ground and invited the Silvertip Landowners to prepare a new zoning petition "in compliance with Resolution 2009-16," which would initiate a new administrative process and a new decision by the Commissioners. Id. at 11. The district court did not address the constitutionality of the Part 1 protest provision or the Commissioners' reliance on it. See id. at 10-11.

The district court's ruling leaves the Silvertip Landowners in an untenable predicament. The district court ruled against them based on a county procedural resolution whose application the Landowners could not have challenged because the Commissioners waived it, without objection from any party, upon finding its requirements to be inequitable and unnecessary in this case. Because the district

court rested its decision on the county resolution, it did not address the case-dispositive issue of the Part 1 protest provision's constitutionality and the Commissioners' exclusive reliance on that provision—which issue was properly raised and ripe for judicial review in this case. As a result, even assuming the Silvertip Landowners could create a new petition that satisfies the requirements of Resolution 2009-16,[4] they face the near-certain prospect that their new petition would be denied for the very same reason their first petition was denied: the Part 1 protest provision, MCA § 76-2-101(5). In sum, the district court's ruling would require the Silvertip Landowners to pursue an onerous and costly administrative process only to wind up precisely where they started, facing the obstacle of the unconstitutional protest provision and the prospect of relitigating the same challenge to that provision that they properly advanced in this case. To avoid such inequity and inefficiency, the Silvertip Landowners seek relief from the district court's erroneous dismissal order and respectfully request that, in the interests of justice and judicial economy, this Court address the issue of the Part 1 protest

[4] Some of the resolution's requirements, such as the requirement to obtain a professional survey of each parcel in the proposed zoning district, see Appx. B at 1, threaten substantial expense.

provision's constitutionality, which issue was raised in the complaint and dismissal motions and fully litigated in the district court. [5]

STATEMENT OF FACTS

The proposed Silvertip District lies in a region of southern Montana known as the "Beartooth Front," which encompasses the towns of Belfry, Bridger, and Red Lodge, surrounding areas of Carbon and Stillwater Counties, and adjacent public lands. Compl. ¶ 23. The region's communities have deep agricultural roots, hosting family farms that have sustained generations of residents and shaped the land and culture. Id. The pristine air, water, and soil, dramatic views of the rugged Beartooth Range, and adjacent wild lands occupying the northeast corner of the Yellowstone region make the Beartooth Front an especially beautiful, healthy, and productive place to farm and live. Id.

The Beartooth Front also contains substantial oil and gas resources. Id. ¶ 24. Though small-scale minerals development has been part of the landscape for decades, in recent years oil and gas companies have expressed interest in greatly expanding development with the availability of modern drilling techniques such as horizontal drilling and hydraulic fracturing. Id. Indeed, the Silvertip Landowners

[5] Because the Silvertip Landowners' clean and healthful environment claim was pled in the alternative to their primary claim challenging the Part 1 protest provision and was not addressed by the district court, see Compl. ¶¶ 68-72; Ord. on Defs.' Mots. to Dismiss (July 8, 2015) (Appx. A), this Court need not resolve the justiciability or merits of the clean and healthful environment claim in this appeal.

were spurred to action after Energy Corporation of America's CEO boasted that the company hopes "to bring something like the Bakken" to the area encompassing their land and the company drilled a test well immediately upstream from the proposed Silvertip District. Id. Though the company subsequently determined not to pursue development of that well in the near term,[6] the close proximity of the test well to the Silvertip Landowners' homes and farms added urgency to their efforts to establish appropriate zoning protections before further drilling occurs.

As documented in materials accompanying the Silvertip zoning petition, the practice of hydraulic fracturing or "fracking"—which commonly is used to access oil and gas in shale formations like that underlying the Silvertip area—can adversely affect air, water, and soil quality. Compl. ¶¶ 25-29. Fracking requires pumping millions of gallons of chemical-laced water and sand into the ground. Id. ¶ 25. After the well is completed, up to one-third of that contaminated water can remain underground, where it may pollute soil and groundwater; the remaining water that returns to the surface often is stored in open containment ponds that

[6] See Video recording of Carbon County Commissioners' Dec. 15, 2014, public meeting at 00:04:19 (Commissioner Grewell reading into record letter from Energy Corporation of America). This video recording is incorporated by reference in ¶ 38 of the complaint, is attached as Appendix D, and is available at http://vimeo.com/114639300 (last visited Nov. 5, 2015). See City of Cut Bank v. Tom Patrick Constr., 1998 MT 219, ¶ 20, 290 Mont. 470, 963 P.2d 1283 (in resolving motions to dismiss, court may consider items that the complaint incorporates by reference).

pose substantial risks of leakage or failure. Id. Many of the chemicals in fracking fluids, as well as those released as air pollutants throughout the drilling process, are toxic or carcinogenic and linked to serious human health problems. Id. ¶¶ 26, 28. In addition, oil and gas drilling brings with it substantial truck traffic, high noise levels from operation of drilling equipment and natural gas compressors, and industrial lighting, which can dramatically disrupt residents' work, domestic life, health, and well-being. Id. ¶ 29. The Silvertip Landowners' petition focuses solely on zoning regulations to mitigate these adverse impacts of oil and gas development and does not seek comprehensive land use regulation that would affect agriculture, grazing, horticulture, timber harvesting, or other activities. Id. ¶ 31.

The Silvertip Landowners submitted their zoning petition to the Commissioners on August 18, 2014. Id. ¶ 30. They submitted a revised petition on November 20, 2014, after the Commissioners reviewed the original petition and advised the Silvertip Landowners that they needed to redraw the boundaries of the proposed district so it would constitute a single contiguous parcel. Id. ¶¶ 36-37. The final petition was signed by twenty landowners, representing more than sixty percent of landowners in the proposed district. Id. ¶ 37. As revised, the proposed Silvertip District is a single contiguous area encompassing 2,741.34 acres. Id.

The Commissioners considered the Silvertip zoning petition at their December 15, 2014, public meeting. Id. ¶ 38. Commissioner Grewell noted for

the record that the County Clerk and Recorder had certified that at least sixty percent of landowners in the proposed Silvertip District signed the petition supporting its establishment, as required by MCA § 76-2-101(1). Id. ¶ 40. The Commissioners read into the record correspondence they had received regarding the district and heard statements for and against the district's establishment. Id. ¶¶ 39, 41, 43. Defendant-appellee Steve Thuesen, a landowner in the proposed Silvertip district, informed the Commissioners that he and other landowners collectively holding more than fifty percent of the acreage therein had signed or intended to sign letters protesting the district's establishment pursuant to the Part 1 protest provision, MCA § 76-2-101(5). Id. ¶ 42. Mr. Thuesen gave the Commissioners the protest letters in his possession and promised to deliver the others. Id.

Following further public comment and discussion of the zoning petition's merits, the Commissioners unanimously adopted a resolution of intent to grant the petition and establish the Silvertip Zoning District. Id. ¶ 44. The Commissioners specifically found that establishing the district for purposes of mitigating the impacts of oil and gas production therein would advance the protection of public health, safety, and welfare and the protection of public infrastructure. Id. They determined to reconvene in thirty days to address the landowner protests and take further action on their resolution of intent. Id. ¶ 45.

The Commissioners convened a public meeting to take final action on the Silvertip zoning petition on January 15, 2015. Id. ¶ 46. At the start of the meeting, the Commissioners for the first time raised Carbon County Resolution 2009-16, which provides "the approved process for the certification of 'Part One' zoning petitions in Carbon County." Appx. B at 1. Commissioner Prinkki stated that "all parties failed to take notice of the resolution during the entire process" of evaluating, revising, and certifying the Silvertip zoning petition, and "[t]he Commission takes the blame for the oversight." Video of Jan. 15, 2015, Commission meeting, at 00:01:36.[7] However, the Commissioners found that "no parties have been prejudiced by the oversight, and both parties, petitioners and protestors, were held to the same standards and benefited from the easier standards applied." Id. at 00:01:40. Accordingly, the Commissioners found "that it would be unduly burdensome and unfair" to re-start the petition process to conform to the resolution "and there is no reason to believe the outcome would … be in any way changed." Id. at 00:02:06. No one in attendance— including protestors and defendants-appellees Steve Thuesen, Willis and Therese Herden, and Duane Hergenrider—raised any objection to the Commissioners' decision to act on the

[7] The video recording of the Commissioners' January 15, 2015, meeting is incorporated by reference in ¶ 46 of the complaint. The recording is attached as Appendix E and is available at https://vimeo.com/116899053 (last visited November 5, 2015).

petition without complying with Resolution 2009-16. See Appx. F at 1 (Commissioners' minutes noting individuals at meeting); Jan. Mtg. Video, supra.

Commissioner Prinkki reported that landowners holding 60.7% of the total acreage in the proposed district had submitted "certified protests" opposing the district's creation. Compl. ¶ 47. Commissioner Grewell then moved to rescind the Commissioners' resolution of intent to establish the Silvertip District, which he said was based on "two reasons": first, the Commissioners' "discretion" to rescind their public interest finding in light of the "now certified protest acreage"; and second, because the Part 1 protest provision, MCA § 76-2-101(5), prohibited the Commissioners from establishing the district in light of the protests received. Compl. ¶ 48. In response to a clarifying question, Commissioner Grewell stated, "My motion is based on subsection 5 [of MCA § 76-2-101]. We're not allowed to create the district." Id. ¶ 50. Commissioner Prinkki reiterated that the petition failed "under section [76-2-101, subsection] 5, because of the protests. We couldn't move forward with this if we wanted to. It fails from that fact alone. And besides from the others." Compl. ¶ 54.[8] The Commissioners voted unanimously

[8] As explained infra, Point II, the Commissioners did not articulate any reasons for denying the petition independent of the protests, so, despite Commissioner Prinkki's statement, there were no "other[]" facts that caused the petition to fail. Compl. ¶ 54.

to rescind their resolution of intent and deny the Silvertip zoning petition. Id. ¶¶ 54-55.

STANDARD OF REVIEW

This Court conducts de novo review of the district court's decision on a motion to dismiss. Plouffe v. State, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316. To prevail on a motion to dismiss, a defendant must prove "that the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim." Id. (citation omitted). "'A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true.'" Id. (quoting Willson v. Taylor, 194 Mont. 123, 126-27, 634 P.2d 1180, 1182 (1981)).

SUMMARY OF ARGUMENT

The Silvertip Landowners seek to eliminate two barriers that have stalled their effort to pursue common-sense zoning protections for their land as provided by state law: (1) the unconstitutional protest provision in the Part 1 zoning statute, MCA § 76-2-101(5), and (2) the district court's decision to dismiss their complaint based on its abstract policy judgment regarding a county procedural resolution that had no bearing on the Commissioners' decision to deny the Silvertip zoning

petition. The record in this case and the Court's decision in Williams establish the Silvertip Landowners' right to this relief.

The district court erred in dismissing the complaint based on the court's unsupported conclusion that county commissioners are powerless to waive the requirements of their procedural resolutions as a matter of public policy. In reaching that conclusion, the district court overlooked persuasive authority affirming that county officials may waive their own procedural requirements where, as here, they articulate a reasoned basis for doing so and no party is prejudiced by the waiver. Further, the district court's ruling undermines the very equitable considerations on which it purported to rely by allowing the Commissioners to use their own disregard of their resolution as a shield to prevent judicial scrutiny of the merits of their decision on the Silvertip zoning petition. See infra, Point I.

It is undisputed that Resolution 2009-16 had no effect on the Commissioners' decision. Instead, the Commissioners' own statements on the record establish that they denied the Silvertip zoning petition based on the Part 1 protest provision, MCA § 76-2-101(5)—as they were compelled to do by the plain language of that statute. But under this Court's decision in Williams, the Part 1 protest provision unconstitutionally delegates legislative power to protesting landowners by empowering them to veto zoning proposals without justification or

review by the county commissioners. Accordingly, the Commissioners' reliance on that provision renders their denial of the Silvertip zoning petition invalid. See infra, Point II.

In the proceedings below, the Commissioners and Neighbors sought to evade the implications of the record and Williams by arguing that the Commissioners' zoning decisions are wholly immune from judicial review, that the petition is not approvable regardless of the protests because it allegedly seeks to regulate agriculture, and that the Silvertip Landowners' zoning objectives are misguided as a policy matter. These arguments cannot supply a basis for upholding the Commissioners' challenged decision because the Commissioners did not rely on them. More fundamentally, these arguments lack merit and cannot justify the extraordinary remedy of dismissal. See infra, Point III.

ARGUMENT

I. THE COMMISSIONERS VALIDLY WAIVED THE REQUIREMENTS OF RESOLUTION 2009-16

The district court erred in dismissing the Silvertip Landowners' complaint based on its judgment that "sound public policy" precludes the Commissioners from excusing procedural requirements in their own resolution regardless of their justification for doing so and the absence of prejudice to any party. Ord. 11. As the district court properly found, the Commissioners waived the requirements of Carbon County Resolution 2009-16 as it applied to the Silvertip zoning petition by

stating on the record that no party would be held to the resolution and proceeding to act on the petition. Id. at 8. However, contrary to the district court's conclusion, that waiver was valid and does not warrant dismissal of the Silvertip Landowners' complaint.

In holding that the Commissioners were powerless to waive the requirements of Resolution 2009-16, the district court disregarded persuasive authority affirming that county officials may waive their own procedural requirements where, as here, they articulate a reasoned basis for doing so and no party is prejudiced by the waiver. Resolution 2009-16 establishes procedural requirements for the County's certification of Part 1 zoning petitions that go beyond the requirements of state law.[9] It is well established in the analogous context of federal administrative law that a decision-making body has discretion "to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it," provided such action will not cause "substantial prejudice" to any party. Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970) (quotation omitted); see N. 93

[9] Compare MCA § 76-2-101 (requiring petition of 60% of landowners in proposed district, finding by commissioners that district would serve "public interest or convenience," and that proposed district is at least 40 acres and not already zoned by an incorporated city) with Resolution 2009-16, Appx. B at 1 (providing "the approved process for the certification of 'Part One' zoning petitions in Carbon County," and requiring, inter alia, a specific format for petition signature pages and a map of the proposed district prepared by a certified surveyor).

Neighbors, Inc. v. Bd. of Cnty. Comm'rs, 2006 MT 132, ¶ 30, 332 Mont. 327, 137 P.3d 557 (affirming that "general principle[s] of administrative law" apply to county zoning decisions). In the zoning context specifically, a county decision that complies with all applicable statutes may be upheld notwithstanding its inconsistency with county enactments. See Patricia E. Salkin, 1 Am. Law Zoning § 8:4 (5th ed. 2008) (attached as Appendix C) (explaining that, in contrast to statutory requirements, procedural requirements imposed by local ordinance may be interpreted as advisory, and zoning decision may be upheld so long as it complies with applicable statute).

Neither the Commissioners and Neighbors nor the district court cited any authority to the contrary. Instead, the Neighbors cited Bryant Development Association v. Dagel, 166 Mont. 252, 351 P.2d 1320 (1975), and Dover Ranch v. Yellowstone Cnty., 187 Mont. 276, 609 P.2d 711 (1980). See Neighbors Mot. 6. These cases are inapposite because they concern county officials' obligation to comply with governing statutes when making zoning decisions, not county resolutions. See Bryant Dev. Ass'n, 166 Mont. at 258, 351 P.2d at 1324 (voiding zoning resolution for failure to follow statutory requirements); Dover Ranch, 187 Mont. at 284, 609 P.2d at 716 (same). Because county governments 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

statute. See Mont. Const. Art. XI, § 4(1)(b) ("A county has legislative, administrative, and other powers provided or implied by law.") (emphasis added). But this unremarkable legal principle in no way conflicts with the sound rule of allowing county commissioners to modify or waive compliance with their own procedural rules in the interests of justice where they articulate a reasoned basis for doing so and there is no evidence of prejudice.

Here, the Commissioners rationally determined that it would be "unduly burdensome and unfair" to force the Silvertip Landowners to restart the petition process after the Commissioners' belated discovery of Resolution 2009-16 where the County already had certified the petition's legality, see Dec. Mtg. Video, supra, at 00:22:00 (Commissioner Grewell stating county clerk and recorder had certified petition), 01:26:58 (Commissioner Tucker stating that Silvertip zoning petition "is legal" as submitted), the petition satisfied all statutory requirements and clearly identified the lands at issue, see Appx. G (amended petition including map of proposed district and legal description of each parcel therein), and "both parties, petitioners and protestors, were held to the same standards and benefited from the easier standards applied," Jan. Mtg. Video, supra, at 00:01:44.

Further, the Commissioners rationally determined that excusing strict compliance with Resolution 2009-16 would "not prejudice the issue for the petitioners or protestors." Appx. F at 1 (minutes of Commissioners' meeting).

Although the district court relied heavily on the resolution's asserted role in ensuring a fair and transparent process, see Order 9-10, there is no indication in the record that any party was confused about the lands proposed for inclusion in the Silvertip District, doubted the accuracy of the map or signatures accompanying the petition, or lacked adequate opportunity to join or protest the petition—the nature of issues that the resolution's procedural requirements purport to address. The district court's abstract contention that the Commissioners' waiver created "fertile ground for prejudice," id. at 9, was unsupported by the record, which demonstrates that the Silvertip Landowners' petition included legal descriptions and tax identification numbers for each parcel in the proposed district as well as a map clearly identifying each parcel, see Appx. G at 4-28 (petition signature pages containing parcels' tax identification numbers and legal descriptions); id. at 29, 31 (list of parcel identification numbers and legal descriptions for all lands in proposed district); id. at 33 (map of proposed district identifying individual parcels and owners), and no party raised any objection to the Commissioners' excusing strict compliance with Resolution 2009-16—including the Neighbors who were in attendance, see Compl. Appx. F (Commissioners' minutes noting individuals at meeting); Jan. Mtg. Video, supra.[10] Under these circumstances, the

[10] Indeed, in the proceedings below the Neighbors failed to identify any concrete way in which the waiver prejudiced their interests. See Neighbors' Reply in Supp. of Mot. to Dismiss 3 (May 22, 2015) (asserting without explanation that "the

Commissioners' waiver of strict compliance with Resolution 2009-16 was valid. See Am. Farm Lines, 397 U.S. at 539; Salkin, supra, § 8:4.

Further, while the district court invoked public policy considerations as grounds for invalidating the Commissioners' waiver decision and dismissing the complaint, see Order 8-11, it overlooked the manifest injustice of its ruling: The Silvertip Landowners diligently worked for more than six months in consultation with the Commissioners to develop a petition that satisfies all legal requirements. After the Silvertip Landowners revised the petition in response to the Commissioners' feedback, the County Clerk certified the petition's validity and the Commissioners affirmed at a public meeting that the petition "is legal." Dec. Mtg. Video, supra, at 00:22:00, 01:26:58. Then, at their January 15, 2015, meeting, the Commissioners disclosed that they had overlooked Resolution 2009-16 until two days prior and "[took] the blame for the oversight." Jan. Mtg. Video, supra, at 00:01:35. But rather than halt the process and direct the Silvertip Landowners to revise their petition in conformity with the resolution, the Commissioners and County Attorney assured the Silvertip Landowners that they would not be "held to the resolution" and that, as a result, the Commissioners could appropriately take final action on the petition at that meeting. Appx. F at 1.

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purported waiver prejudices the neighbors whose property rights are affected by the proposed zoning").

Then, when faced with a legal challenge to their decision denying the petition, the Commissioners abandoned their representation that no party would be held to Resolution 2009-16 and asserted their own noncompliance with the resolution as a defense to shield the substance of their decision on the petition from scrutiny. This bait-and-switch deprived the Silvertip Landowners of a judicial determination addressing the validity of the actual reason the Commissioners gave for denying the Silvertip zoning petition—the Part 1 protest provision—a determination the Silvertip Landowners must obtain before they can secure a fair evaluation of their zoning proposal. In concluding that "sound public policy" dictated dismissal of the Silvertip Landowners' complaint, Order 11, the district court disregarded that its ruling rewarded the Commissioners' unfair conduct at the expense of their misled citizens.

In sum, neither the law nor the equities support the district court's dismissal order. Because the Commissioners validly waived the requirements of Carbon County Resolution 2009-16 as it applies to the Silvertip zoning petition, the district court's decision should be reversed.

II. THE PART 1 PROTEST PROVISION IS UNCONSTITUTIONAL

Because the Commissioners waived compliance with County Resolution 2009-16, the resolution had no effect on their decision to deny the Silvertip zoning petition. Instead, as the Commissioners' themselves explained, they denied the

Silvertip zoning petition "based on" and "because of" the Part 1 protest provision, MCA § 76-2-101(5). Compl. ¶¶ 50 (statement of Commissioner Grewell), 54 (statement of Commissioner Prinkki). In moving to rescind the Commissioners' resolution of intent to establish the Silvertip District, Commissioner Grewell stated, "My motion is based on subsection 5 [of MCA § 76-2-101(5)]. We're not allowed to create the district." Id. ¶ 50 (emphasis added). Commissioner Prinkki, in moving to deny the Silvertip zoning petition, likewise explained that the petition failed "under section 5, because of the protests. We couldn't move forward with this if we wanted to." Id. ¶ 54 (emphasis added). Indeed, while the Commissioners vaguely alluded to their "discretion" and "other[]" unidentified reasons to deny the petition, they did not articulate any other reason for their decision independent of the protest provision. Id. ¶¶ 48, 54; see N. 93 Neighbors, ¶ 30 (holding that county commissioners must articulate basis for zoning decisions on the record).

As explained below, this Court's precedent establishes that the Part 1 protest provision on which the Commissioners relied violates the Montana Constitution. In the interests of justice and judicial efficiency, the Silvertip Landowners respectfully urge this Court to resolve this issue in addition to reversing the district court's erroneous ruling regarding the county resolution. Because the issue of the protest provision's constitutionality and the Commissioners' reliance on it is purely

legal and was fully briefed and argued by all parties in the district court, this Court may and should reach it. See, e.g., Cook v. Hartman, 2003 MT 251, ¶¶ 27, 35, 317 Mont. 343, 77 P.3d 231 (addressing issue not reached by district court where appellant "asserts this point as a matter of law" and appellees "do not argue [appellant] failed to preserve this issue for appeal," and reversing district court based on resolution of that issue); City of Missoula v. Robertson, 2000 MT 52, ¶¶ 22-23, 298 Mont. 419, 998 P.2d 144 (deciding legal issues not reached by district court that were fully briefed in lower court); Langager v. Crazy Creek Prods., 1998 MT 44, ¶ 23, 287 Mont. 445, 954 P.2d 1169 (reversing district court's resolution of threshold issue and resolving dispositive merits issue district court did not reach).

The Part 1 protest provision, MCA § 76-2-101(5), violates the Montana Constitution by granting private individuals complete and unreviewable authority to veto county commissioners' decisions to establish zoning districts. This conclusion follows ineluctably from Williams, in which this Court held that the substantially identical protest provision in the Part 2, or county-initiated, zoning statute, MCA § 76-2-205(6), unconstitutionally delegates legislative power to private individuals. Williams, ¶ 51.

Like the Part 1 protest provision at issue here, the Part 2 provision struck down in Williams prohibited county commissioners from creating a zoning district

if a specified percentage of property owners within the proposed district protested its establishment. Id. ¶ 39. The Court found the Part 2 protest provision unconstitutional because (1) it contained no standards or guidelines to constrain landowners' exercise of the protest power; and (2) it lacked a "legislative bypass" by which county commissioners could override protests and make a final determination to approve a zoning district in the interests of the public. Id. ¶ 51.

The Part 1 protest provision suffers from identical constitutional infirmities. First, no party disputes that the Part 1 protest provision, like its Part 2 analogue, lacks any "standards or guidelines" by which county commissioners can judge the propriety of landowner protests. Id. ¶¶ 51-52. Instead, the Part 1 protest provision prohibits county commissioners from establishing a zoning district whenever protests are filed by landowners representing 50% of the titled property ownership in the district—no justification for the protests is required. See MCA § 76-2-101(5) (if protests from owners of 50% of acreage received, "the board of county commissioners may not create the district"). Thus, like the provision invalidated in Williams, the Part 1 protest provision unlawfully allows a subset of landowners

> to strike down proposed zoning regulations without any justification or for no reason at all. There is no requirement that the protesting landowners consider public health, safety, or the general welfare of the other residents in the district when preventing the board of county commissioners from implementing zoning regulations. As a result, [protesting] landowners can exercise their unfettered power in a proper manner, or in

> an arbitrary and capricious manner, making zoning decisions dependent wholly on their will and whim.

Williams, ¶ 52. This fact alone renders the Part 1 protest provision unconstitutional. "To be upheld as a lawful delegation of legislative authority," a statute "must contain standards or guidelines which can be used … to judge the propriety of a neighbor's" protest. Shannon v. City of Forsyth, 205 Mont. 111, 114, 666 P.2d 750, 752 (1983) (citations omitted) (invalidating ordinance requiring neighboring landowners' consent to petition for zoning variance); accord Williams, ¶ 45.

The Part 1 protest provision also is unconstitutional because it lacks a "legislative bypass." Williams, ¶ 53; see also Shannon, 205 Mont. at 115, 666 P.2d at 752-53 (indicating that inability of city council to grant zoning variance over neighbors' objection provided independent grounds for striking down ordinance). Like the Part 2 protest provision invalidated in Williams, the Part 1 provision does not allow the county commissioners to act as an "appellate body" capable of reviewing the legitimacy of landowner protests and exercising discretion to override protests in the interests of the public. Williams, ¶ 45. Instead, under both the Part 1 and Part 2 protest provisions, if landowners holding sufficient acreage protest a zoning district's creation, the protestors determine the fate of the proposal: "the board of county commissioners may not" create the district. MCA § 76-2-101(5) (emphasis added); see Williams, ¶ 39 (quoting

identical language in Part 2 protest provision). As the record in this case illustrates, the statute gives the protesting parties the last word on a zoning proposal, regardless of any finding by the county commissioners that the zoning district would serve the public interest or the capriciousness of the protests. See Compl. ¶¶ 50 (Commissioner Grewell explaining that Commissioners were "not allowed" to create district due to landowner protests under MCA § 76-2-101(5)), 54 (Commissioner Prinkki explaining that the Commissioners denied the petition "because of the protests. We couldn't move forward with this if we wanted to."). For this reason, too, the Part 1 protest provision is indistinguishable from the provision struck down in Williams and constitutes an unlawful delegation of legislative power. Williams, ¶¶ 53-54.

In sum, the Part 1 protest provision, MCA § 76-2-101(5), violates the Montana Constitution and cannot supply a valid basis for the Commissioners' decision to deny the Silvertip zoning petition. The Commissioners' and Neighbors' arguments to dismiss the Silvertip Landowners' complaint on the theory that the protest provision satisfies constitutional requirements, or that the Commissioners did not rely on the protest provision, are without merit.

III. THE COMMISSIONERS' AND NEIGHBORS' ALTERNATIVE DISMISSAL ARGUMENTS ARE MERITLESS

Attempting to avoid the necessary implications of the record and Williams, the Commissioners and Neighbors advanced a handful of alternative arguments for

dismissal in the district court. These arguments fail at the outset because the Commissioners themselves did not rely on them, so they cannot provide a basis for upholding the Commissioners' decision. See N. 93 Neighbors, ¶ 30 (to avoid judicial intrusion in matters committed to commissioners' discretion, judicial review of county zoning decisions must be based on the reasons the commissioners articulated on the record in making the challenged decision). Even if they could be considered, these arguments lack merit and cannot justify dismissing the Silvertip Landowners' complaint.

First, the Commissioners and Neighbors claimed that, regardless of whether the Commissioners' decision rested on the unconstitutional protest provision, the complaint must be dismissed because the Commissioners' zoning decisions are simply immune from judicial review. Comm'rs Mot. 4-7; Neighbors Mot. 9-12. However, it is well established that commissioners' zoning decisions—while "legislative" in nature—are reviewable by our state courts. See Plains Grains Ltd. P'Ship v. Bd. of Cnty. Comm'rs, 2010 MT 155, ¶ 21, 357 Mont. 61, 238 P.3d 332 ("Zoning designations are legislative acts that courts review for an abuse of discretion.") (citing N. 93 Neighbors, ¶ 18); see also, e.g., Williams, 2013 MT 243 (reviewing commissioners' decision not to establish zoning district because of landowner protests); Bridger Canyon Prop. Owners' Ass'n v. Planning & Zoning Comm'n, 270 Mont. 160, 166, 175, 890 P.2d 1268, 1272, 1277 (1995) (reviewing

county decision approving planned unit development pursuant to citizen-initiated zoning statute); Mont. Wildlife Fed'n v. Sager, 190 Mont. 247, 620 P.2d 1189 (1980) (reviewing county decisions granting citizen zoning petitions). While county commissioners are immune from tort liability arising from zoning decisions and other legislative acts, MCA § 2-9-111, that statutory grant of immunity does not insulate county zoning decisions from judicial review by depriving courts of jurisdiction to declare such decisions unlawful. See Hayworth v. School Dist. No. 19, 243 Mont. 503, 507, 795 P.2d 470, 473 (1990) (holding that a complaint "seeking declaratory judgment … is not precluded by § 2-9-111"); see also Cenex v. Bd. of Comm'rs, 283 Mont. 330, 337, 941 P.2d 964, 968 (1997) (holding that issue of legislative immunity and applicability of MCA § 2-9-111 is irrelevant in a declaratory judgment action).[11]

Second, the Commissioners and Neighbors argued that the Silvertip zoning petition could not be granted regardless of the protests because it allegedly seeks impermissible regulation of agriculture. Comm'rs Mot. 2-4; Neighbors Mot. 12-

[11] Further, the fact that the Part 1 zoning statute grants county commissioners discretion in evaluating citizen zoning petitions does not mean, as the Neighbors claimed below, that commissioners may deny such petitions "for any reason or no reason at all." Neighbors Mot. 3; see MCA § 76-2-101(1) (stating commissioners "may" establish zoning district where statutory requirements are met). At a minimum, substantive due process requires that county zoning decisions be "reasonably related to the legitimate governmental objective of promoting public health, safety and welfare." Englin v. Bd. of Cnty. Comm'rs, 2002 MT 115, ¶¶ 14, 32, 310 Mont. 1, 48 P.3d 39.

13. They invoked MCA § 76-2-109, which provides that zoning districts and regulations established under the Part 1 zoning statute shall not "regulate lands used for grazing, horticulture, agriculture, or the growing of timber." Their argument fails, however, because the Silvertip zoning petition does not seek to regulate agricultural activity. Quite the opposite; the petition seeks to protect agricultural land uses from the harmful effects of industrial oil and gas development. See Compl. ¶¶ 31, 33; Appx. D (petition).

The mere fact that the proposed Silvertip District includes agricultural lands does not trigger the prohibition in MCA § 76-2-109. That provision "prohibit[s] regulation of particular land uses," including agricultural uses, not the inclusion of "agricultural lands" in a zoning district. Missoula Cnty. v. Am. Asphalt, 216 Mont. 423, 426, 701 P.2d 990, 992 (1985) (emphasis added); see also City of Missoula v. Missoula Cnty., 139 Mont. 256, 258, 362 P.2d 539, 540 (1961) (interpreting precursor to § 76-2-109 to deny commissioners "the power to regulate the use of land for … agriculture," but not to prohibit inclusion of agricultural lands in zoning districts) (emphasis added). Indeed, the statute is clear that a Part 1 zoning district may include "any area that consists of not less than 40 acres" and is not already zoned by an incorporated city. Id. § 76-2-101(2)-(3) (emphasis

added).[12] A contrary interpretation would be inconsistent with manifest legislative intent because it would single out and deny agricultural landowners such as the Silvertip Landowners—one of the few groups afforded special protection in Montana's zoning statutes, see MCA § 76-2-901—the right to petition for zoning protections to safeguard their own property and livelihood from non-conforming land uses.

Third, the Commissioners' dismissal motion attacked the wisdom of Part 1 zoning generally and questioned whether the Silvertip Landowners can successfully secure the zoning regulations they desire even if their petition is granted. See Comm'rs Mot 13-15 (arguing that the Silvertip Landowners seek to regulate others' property, that approval of their petition might not result in adoption of the regulations they desire, and that the Board of Oil and Gas Conservation is a preferable venue for addressing oil and gas impacts). These policy arguments are irrelevant because the wisdom and validity of Part 1 zoning is not on trial in this proceeding. See Helena Sand & Gravel v. Lewis & Clark Cnty. Planning & Zoning Comm'n, 2012 MT 272, ¶ 26, 367 Mont. 130, 290 P.3d 691

[12] Thus, agricultural lands may be part of Part 1 zoning districts and subject to zoning regulations that, for example, limit the number of residences per parcel or the industrial activities allowed on the property. See Doull v. Wohlschlager, 141 Mont. 354, 367-68, 377 P.2d 758, 765 (1963) (upholding application of zoning regulations to auto repair operation on land defendant alleged was used for agriculture).

("[T]he Legislature expressly has authorized zoning by citizen petition and … [t]his Court does not sit as a super-legislature or super-zoning board.") (quotation omitted). Further, as stated above, these arguments are legally irrelevant to this Court's review because they were invented by counsel and not relied upon by the Commissioners in making the challenged decision. See N. 93 Neighbors, ¶ 30. It is the Commissioners, not a reviewing court, who must weigh these and other considerations on remand as part of a rational evaluation of the Silvertip zoning petition. See id.

CONCLUSION

For the foregoing reasons, the Silvertip Landowners respectfully request that this Court reverse the district court's order dismissing their complaint, hold that the Commissioners' decision denying the Silvertip zoning petition based on the Part 1 protest provision was unconstitutional, and remand this matter for further proceedings consistent with this Court's opinion.

Respectfully submitted this 17th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2015, I served true and accurate copies of the foregoing BRIEF OF APPELLANTS and the APPENDIX TO BRIEF OF APPELLANTS via first class mail upon each attorney of record in the above-numbered case, as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I hereby certify that the foregoing brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is not more than 10,000 words, excluding the certificate of service and certificate of compliance.

Dated this 17th day of November, 2015.

Katherine K. O'Brien, Counsel for Appellants