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; SHELLY BAKICH LECHNER, as personal representative of the Milovan Bakich estate; and STEVEN AND MONICA THUESEN, husband and wife,

Defendants and Appellees.

LAND USE & NATURAL RESOURCES CLINIC
BRIEF of *AMICUS CURIAE*

Appeal from the Montana Twenty-Second Judicial District Court, Carbon County,
Honorable Judge Blair Jones Presiding, Cause Number DV 15-14

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STATEMENT OF THE CASE

This case presents a facial challenge to MCA § 76-2-101(5) – a landowner protest provision that impermissibly delegates county zoning authority to self-interested landowners and that can prevent counties from zoning to protect people and property. This challenged statute suffers the same deficiencies as a protest provision recently invalidated in *Williams v. Bd. of Cnty. Comm'rs of Missoula Cnty.*, 2013 MT 243, 371 Mont. 356, 308 P.3d 88 (ruling Mont. Code Ann. § 76-2-205(6) unconstitutional).

While the parties dispute the degree to which § 76-2-101(5) ultimately influenced Carbon County's zoning decision below, it is undisputed that the County's understanding of the statute played a central role. It is also undisputed that the affected landowners and government officials cannot proceed on this zoning proposal (or future variations) without clarification on the validity of § 76-2-101(5). This clarification ultimately affects Montana's remaining fifty-five counties as well, and thus the case presents a question of statewide concern in which the Land Use & Natural Resources Clinic holds an interest. Because § 76-2-101(5) contains the identical constitutional infirmities as those identified in *Williams*, the Clinic urges a similar holding here.

Before proceeding to its arguments, the Clinic provides key background on Montana zoning law that illustrates why § 76-2-101(5) suffers from fatal defects

and why counties cannot simply resort to other forms of zoning to cure those defects.

BACKGROUND ZONING LAW

Three Distinct Forms of Montana Zoning

Montana enabled local governments to zone in three stages. In 1929, municipalities received express authority to zone. Mont. Code Ann. §§ 76-2-301 to -340 (2015). County zoning authority followed in 1953, authorizing county commissioners to zone when landowners specifically petition[1] for zoning in a particular area. MCA §§ 76-2-101 to -117 (2015). This form of zoning is often called "Part 1 zoning" or "citizen-initiated zoning." A decade later, in 1963, counties received authority to zone lands without landowner request and to zone on a county-wide basis. MCA §§ 76-2-201 to -240 (2015). This final form of zoning is often called "Part 2 zoning" or "county-initiated zoning." A special feature of Part 1 zoning, then, is that a county can protect a discrete planning area in direct

[1] Mont. Code Ann. § 76-2-101(1). The statute used to state "60% of the freeholders affected" until it was replaced by "60% of the affected real property owners" under H.B. 486 (2009). This change was not intended to alter the statute's original meaning. Hearing on H.R. 486 Before the H. Local Government Comm., 61st Leg., Reg. Sess. (Mont. 2009) 6:47, 7:33 (Feb. 19, 2009) (Tim Davis, Smart Growth Coalition: "[This is] simply a bill that modernizes and cleans up subdivision and zoning statutes. It does nothing radical, nothing terribly grand . . . These sections modernize the zoning statutes including changing the term 'freeholder' to 'real property owner' … "), *available at* http://montanalegislature.granicus.com/MediaPlayer.php?view_id=23&clip_id=7524.

response to landowner concerns about impacts to the use and enjoyment of their property, safety, health, and welfare.

Important Differences Between Part 1 and Part 2 Zoning

Because the Montana Legislature chose to provide counties with two separate forms of zoning authority, one can infer that each form is intended as distinct from the other. Indeed, the processes for zoning adoption, the required contents of the zoning regulations, and the decisionmaking bodies involved in Part 1 and Part 2 zoning vary significantly. *Ash Grove Cement Co. v. Jefferson Cnty.*, 283 Mont. 486, 493, 943 P.2d 85, 89 (1997) ("Each statutorily-authorized method for creating zoning districts and enacting zoning regulations is separate and distinct from the other."); *Mont. Wildlife Fed'n v. Sager*, 190 Mont. 247, 260, 620 P.2d 1189, 1197 (1980) ("We must therefore deem that the legislative intent is that Part 1 is to have its own meaning and effect."). Thus, a county effectively blocked by a landowner protest under Part 1 zoning cannot simply substitute Part 2 zoning.

Among the many distinctions between Part 1 and Part 2 zoning, a critical one is the role of the growth policy. Growth policies are optional planning documents that a local government may adopt to guide land use in its jurisdiction. MCA §§ 76-1-601 to 607 (2015). Under Part 2 zoning, a county cannot zone unless it has first adopted a growth policy. MCA § 76-2-201 ("[A] board of county commissioners that has adopted a growth policy . . . is authorized to adopt zoning

regulations . . ."); MCA § 76-2-203 ("Zoning regulations must be . . . made in accordance with the growth policy.").

Part 1 zoning, on the other hand, does not require a growth policy. *Petty v. Flathead Cnty. Bd. of Cnty. Comm'rs*, 231 Mont. 428, 432, 754 P.2d 496, 499 (1988) (holding that the procedural requirements of a comprehensive plan (now called a growth policy) under Part 2 zoning "have no application to the requirements for the creation of zoning districts under the rural zoning laws in [Part 1 zoning]."); *Mont. Wildlife Fed'n*, 190 Mont. at 260, 620 P.2d at 1197 (holding the same).

A county may be precluded from adopting Part 2 zoning because it has chosen not to adopt a growth policy. MCA § 76-1-106(1) ("[I]f requested by the governing body, the planning board shall prepare a growth policy . . ."); MCA §§ 76-1-601(5) and -604 (2015) (providing that a governing body can choose to adopt or reject the planning board's recommended growth policy).

The public can also repeal a growth policy by referendum. MCA § 76-1-604 (2015). *See, e.g.*, John Cramer, *Ravalli Voters Repeal County's Growth Policy*, THE MISSOULIAN (Nov. 5, 2008) ("Property rights advocates on Wednesday celebrated the repeal of Ravalli County's growth policy at the ballot box, saying it was

evidence that Bitterrooters don't want oppressive zoning.").[2] Under these scenarios, Part 1 zoning is thus the only available mechanism for counties to protect property and people from the negative impacts of land use.

A second important distinction involves the types of land uses receiving special protection under Part 1 and Part 2 zoning. In Part 2 zoning, for example, the Montana Legislature restricted counties from "prevent[ing] the complete use, development, or recovery of any mineral, forest, or agricultural resources" and limits the ways in which counties regulate operations that mine sand or gravel, mix concrete, or batch asphalt in non-residential areas. MCA § 76-2-209 (2015). In Part 1 zoning, the Legislature prevented the regulation of "grazing, horticulture, agriculture, or growing of timber." MCA § 76-2-109 (2015). Notably, Part 1 zoning, unlike Part 2 zoning, does not limit counties from regulating mining or asphalt activities. Thus, a county may by necessity require either Part 1 or Part 2 zoning because of the land use activities it seeks to regulate.

Another notable distinction involves the differing governance structures under Part 1 and Part 2 zoning. While the county commission is the ultimate decisionmaking body under both forms of zoning, Part 1 zoning creates a special advisory body (called a "planning and zoning commission") that includes the

[2] *Available at* http://missoulian.com/news/local/ravalli-voters-repeal-county-s-growth-policy/article_d03a6248-dd05-5adb-b64f-0d8f6703df49.html.

county commissioners, the county surveyor or clerk and recorder, and two citizen members. MCA § 76-2-102(1). Part 2 zoning, on the other hand, uses a planning board as its advisory body, comprised entirely of county commission appointees, including mandatory representation by a conservation district or grazing district. MCA §§ 76-1-211(1) and 76-2-204. The bodies granting variances to the zoning regulations also differ: Part 1 variance decisions reside with the county commission, and Part 2 variance decisions reside with a board of adjustment. *Cf.* MCA § 76-2-106 *with* MCA §§ 76-2-222 and -223. Again, counties may have important reasons for deeming that one set of governance structures is most suitable to a zoned area.

While additional distinctions exist, the above examples serve to highlight that Part 1 and Part 2 zoning stand as two separate zoning tools that counties may use to protect property and people from the negative impacts of land use. If a small set of landowners can block Part 1 zoning under § 76-2-101(5), counties are not only precluded from using the zoning tool most suitable to the regulated area, but may be effectively precluded from zoning at all if their Part 2 zoning powers cannot be exercised due to either a lack of growth policy or the special protections afforded a particular land use.

Legitimate Versus Defective Protest Provisions

The zoning enabling legislation of many states, including Montana, was influenced by the Standard State Zoning Enabling Act (SSZEA), which the U.S. Department of Commerce promulgated in the 1920s.[3] This model act contains a landowner protest provision that, in various iterations, has been adopted nationwide:

> **Sec. 5.** Such regulations, restrictions, and boundaries may from time to time be *amended, supplemented, changed, modified, or repealed*. In case, however, of a *protest against such change*, signed by the owners of 20 per cent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending feet therefrom, or of those directly opposite thereto extending feet from the street frontage of such opposite lots, *such amendment shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality*.[4]

Two notable features of the SSZEA provision are: (1) that the right to protest arises when a governing body amends an existing zoning regulation; and (2) that a protest

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[3] An annotated copy of this Act is available on the American Planning Association's website: www.planning.org/growingsmart/enablingacts.htm.

[4] (Emphasis added). This provision is similar to Montana's municipal zoning protest provision at Mont. Code Ann. § 76-2-305(2) (2015). For additional examples from other states, *see, e.g.* Conn. Gen. Stat. Ann. § 8–3(a) (West 2015) ("If a protest against a proposed change is . . . signed by the owners of twenty per cent or more of the area of the lots included in such proposed change or of the lots within five hundred feet in all directions of the property included in the proposed change, such change shall not be adopted except by a vote of two-thirds of all the members of the commission."); Tex. Loc. Gov't Code Ann. § 211.006(d) (Vernon 2015) (same); Wis. Stat. Ann. § 59.69(5)(e)(5g) (West 2015) ("If a protest against a proposed amendment is . . . duly signed and acknowledged by the owners of 50% or more of the area proposed to be altered, or by abutting owners of over 50% of the total perimeter of the area proposed to be altered included within 300 feet of the parcel or parcels proposed to be rezoned . . . the ordinance may not be enacted except by the affirmative vote of three-fourths of the members of the board present and voting.").

triggers a legislative bypass, returning the amendment to the governing body as part of a public process. The governing body must then adopt the amendment by a supermajority.

SSZEA-inspired protest provisions, including their requirement of a supermajority vote by the governing body, are generally recognized as a valid means of protecting the "interest of property owners in the stability and continuity of zoning regulations." 1 *Am. Law of Zoning* § 8:30 (5th ed. 2012); *see also* 3 *Rathkopf's The Law of Zoning and Planning* §§ 43:1, 43:2 (4th ed. 2012); *Zoning: Validity and Construction of Zoning Statute or Ordinance Provisions Regarding Protest by Neighboring Property Owners*, 7 A.L.R.4th 732 (updated online 2015).

In contrast to the general approach taken by the SSZEA and other state protest provisions, § 76-2-101(5) takes a highly irregular approach to landowner protests. Section 76-2-101(5) blocks even the initial creation of zoning and leaves the ultimate decision in the hands of self-interested landowners, rather than a governing body that is bound by public process and rational basis review:

> If real property *owners representing 50% of the titled property ownership* in the district protest the establishment of the district within 30 days of its creation, *the board of county commissioners may not create the district*. An area included in a district protested under this subsection may not be included in a zoning district petition under this section for a period of 1 year.

MCA § 76-2-101(5) (emphasis added). Under this provision, as few as one protesting landowner owning the requisite percentage of acreage can effectively

prevent a county from zoning. That landowner can do so for any reason, and can continue blocking similar zoning attempts in the future.

Section 76-2-101(5) was added to Part 1 zoning in 1995. H.R. 358, 54th Leg., Reg. Sess. (Mont. 1995). At the same time, and in the same bill, the Montana Legislature amended the Part 2 zoning protest provision to allow protest by owners representing 50% of titled agriculture and forest property in a Part 2 zoning district. *Id.* The Part 2 zoning protest provision is structurally similar to § 76-2-101(5):

> . . . [I]f 40% of the real property owners within the district whose names appear on the last-completed assessment roll or if real property *owners representing 50% of the titled property ownership* whose property is taxed for agricultural purposes under 15-7-202 or whose property is taxed as forest land under Title 15, chapter 44, part 1, have protested the establishment of the district or adoption of the regulations, *the board of county commissioners may not adopt the resolution* and a further zoning resolution may not be proposed for the district for a period of 1 year.

MCA § 76-2-205(6) (emphasis added).

This Court recently struck the Part 2 zoning protest provision. *Williams*, ¶ 51 (ruling § 76-2-205(6) "provides no standards or guidelines to inform the exercise of the delegated power" and "contains no legislative bypass."). On similar grounds, the South Dakota Supreme Court in 1997 struck a zoning protest provision as an unlawful delegation of zoning authority because it also did not "provide guidelines or standards for protesting an adopted ordinance" and did not

provide a legislative bypass for the protest to be formally reviewed by the legislative body. *Cary v. City of Rapid City*, 559 N.W.2d 891, 895 (S.D. 1997). Scholars have characterized these protest provisions as "unusual" because they deviate from the SSZEA-derived protest provisions used nationwide. 3 *Rathkopf's The Law of Zoning and Planning* § 43:2, n. 1 (noting that the South Dakota statute was outside the norm because it "does not provide for subsequent legislative action"). Section 76-2-101(5) thus shares the same fatal defects as the invalidated zoning protest provisions in Montana and South Dakota.

SUMMARY OF THE ARGUMENT

Section § 76-2-101(5), the Part 1 zoning protest provision, is an unlawful delegation of legislative authority that allows landowner whim and caprice to prevent county zoning of property for the public health, safety, and welfare. This unfettered landowner discretion directly violates the constitutional principles recognized in *Williams*, in which this Court recently invalidated a similarly structured Part 2 zoning protest provision (MCA § 76-2-205(6)). The 1995 Montana Legislature adopted the same defective language in both protest provisions as part of the same legislation. Just like the Part 2 protest provision invalidated in *Williams*, § 76-2-101(5) provides no guidelines or standards to inform the exercise of the delegated power and contains no legislative bypass to return the original zoning resolution back to the governing body.

Additionally, contrary to Appellee's arguments below, Part 1 zoning is not prohibited on agricultural lands. Indeed, the very purposes of Part 1 zoning would be defeated without the ability to protect agricultural lands within a planned zoning area. Further, such a holding would undermine the common practice that counties throughout Montana have adopted for the past several decades, of creating Part 1 zoning districts that include agricultural lands.

ARGUMENT

The Clinic will now address two issues raised below that are critical to the proper functioning of Part 1 zoning law in Montana. First, the Clinic argues that the Part 1 zoning protest provision falls squarely within a body of case law that has invalidated unlawful delegations of legislative authority. Section 76-2-101(5) lacks both decisionmaking standards and a legislative bypass, thus rendering the provision unconstitutional. Second, the Clinic argues that Part 1 zoning districts are designed to encompass a variety of lands, including agricultural lands, in order to effectively govern the planned zoning area.

I. SECTION 76-2-101(5) PLAINLY VIOLATES THE RULES AGAINST UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

A. Section 76-2-101(5) leaves Part 1 zoning to the unfettered discretion of self-interested landowners.

This Court recently held that the Part 2 zoning protest provision is unconstitutional because it "allows a minority of landowners, or even one landowner, to strike down proposed zoning regulations without any justification." *Williams*, ¶ 52. The Court reasoned: "There is no requirement that the protesting landowners consider public health, safety, or the general welfare of other residents of the district when preventing the board of county commissioners from implementing zoning regulations." *Id.* This would result in "unfettered power" for agricultural and forest landowners, where zoning decisions depend "wholly on their will and whim." *Id.*

Williams is the logical extension of well-settled case law holding that a lawful delegation of legislative authority "must contain standards or guidelines" for the decisionmaking body. *Shannon v. City of Forsyth*, 205 Mont. 111, 114, 666 P.2d 750, 753 (1983). *Id*. at 114, 666 P.2d at 753. In *Shannon*, the invalidated "neighbor consent" provision contained "no standard whatsoever," was arbitrary and capricious, and was based upon the "will and whim" of the neighbors. *Id*. at 114, 666 P.2d at 752; *see also Petition to Transfer Territory from High Sch. Dist. No. 6 v. Lame Deer High Sch. Dist.*, 2000 MT 342, ¶¶ 18-19, 303 Mont. 204, 15 P.3d 447 (striking a school statute that was "unchecked by any standard, policy or rule of decision," and left the decision to the superintendent's "unguided judgment"); *Ingraham v. Champion Int'l.*, 243 Mont. 42, 48, 793 P.2d 769, 772

(1990) (invalidating a workers' compensation statute that "delegated an absolute discretion to the insurer").

The U.S. Supreme Court has similarly held that laws with "no standard by which the power thus given is to be exercised" are unconstitutional. *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912) (holding that a zoning ordinance unlawfully "confer[red] the power on some property holders to virtually control and dispose of the property rights of others," thus allowing "one set of owners [to determine] not only the extent of use, but the kind of use another set of owners may make of their property.)" *Id*. at 143; *see also Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-122 (1928) (striking an ordinance that gave landowners "building authority-uncontrolled by any standard or rule").

The reasoning in *Williams* applies with equal force here. As noted above, both the Part 1 and Part 2 zoning protest provisions have nearly identically wording that arose from the same bill in the 1995 Legislature – language providing protest powers to "real property owners representing 50% of the titled property ownership . . . " *See supra* p. 9 (citing MCA §§ 76-2-101(5) and 76-2-205(6)). Both provisions lack guidelines or a legislative bypass. And both provisions allow landowner whim and caprice to prevent the initial zoning of property, leaving county lands at risk of remaining unzoned in perpetuity. This unfettered discretion

plainly violates the constitutional principles governing the delegation of legislative authority.

B. Section 76-2-101(5) lacks a legislative bypass.

Legislative bypass provisions are generally embedded within the protest statute itself, providing that the original zoning resolution return to the governing body for a final decision. The above Background of Zoning Law provides several examples, including the SSZEA's supermajority provision that a protested zoning amendment "shall not become effective except by the favorable vote of three-fourths of all the members of the legislative body of such municipality." *See supra* p. 7. Without this bypass, a zoning decision can be rendered without public process and without any legitimate, articulated rationale that a reviewing court can examine on appeal.

Yet in the briefing below, the Appellees argued that Part 2 zoning is a "work around" legislative bypass that counties could use to implement zoning in the face of a successful Part 1 zoning protest. *See* Comm'rs Mot. to Dismiss, 10:7-12 (Apr. 3, 2015), Cause No. DV 15-14. This argument fails because Part 1 and Part 2 zoning are not interchangeable. As noted above, there are instances when Part 2 zoning is unavailable to a county (e.g., lack of a growth policy or Part 2 restrictions on regulating certain land uses). *See supra* pp. 3-6. Allowing Part 1 protests to

stand would thus eliminate a county's ability to choose the most appropriate form of zoning, or, even worse, leave it with no zoning option whatsoever.

Further, starting an entirely separate zoning process under Part 2 cannot remedy the fact that an earlier, Part 1 zoning decision may have been illegitimately reached by a group of landowners. It also bears noting that this Court in *Williams* did not view Part 1 zoning as providing a workaround that would save the defects in the Part 2 zoning protest provision. Instead, the Court concluded that the provision on its face lacked a legislative bypass. Section 76-2-101(5) shares this same facial defect.

II. PART 1 ZONING IS SUITABLE AND IMPORTANT IN AGRICULTURAL AREAS.

Montana counties are by their very nature comprised of rural areas where agricultural lands and land use activities are prevalent. By logical inference, one can conclude that the Montana Legislature envisioned county zoning that would potentially overlay lands containing agricultural soils and lands used for agricultural activities. Indeed, there is strong evidence that the Legislature intended county zoning to encompass agricultural lands so that they could be protected.

Part 2 zoning, for example, may occur county-wide, and Part 1 zoning must comprise at least forty acres. MCA §§ 76-2-201(1) and 76-2-101(3). Despite the inexorable possibility that a planning area might need to include agricultural lands, Appellees assert that Part 1 zoning is prohibited on all agricultural lands based on

MCA § 76-1-109, which states: "No [Part 1] planning district or recommendations adopted under this part shall regulate lands used for grazing, horticulture, agriculture, or the growing of timber." *See* Comm'rs Mot. to Dismiss, 2:20-24 (Apr. 3, 2015), Cause No. DV 15-14.

Appellee's analysis must yield to the common sense rules of statutory construction. This Court will "construe a statute to ascertain the legislative intent and give effect to the legislative will." *State v. Letasky*, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288; *see also Mont. Power Co. v. Cremer*, 182 Mont. 277, 280, 596 P.2d 483, 485 (1979) (the Court's interpretation should be consistent the purposes of the statute as a whole). Importantly, "statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Letasky*, ¶ 11. This Court also "must endeavor to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used." *Mont. Trout Unlimited v. Mont. DNRC*, 2006 MT 72, ¶ 23, 331 Mont. 483, 133 P.3d 224. In particular, this Court has held that land use statutes "enacted for the promotion of public health, safety, and general welfare, [are] entitled to 'liberal construction with a view towards the accomplishment of its highly beneficent objectives.'" *State ex rel. Florence-Carlton Sch. Dist. No. 15-6 v. Bd. of Cnty. Comm'rs of Ravalli Cnty.*, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978) (quoting 3 Sutherland, *Statutory Construction* § 71.01 (4th Ed., 1974)).

The very concept of county zoning would fail if counties could not create zoning districts that embraced agricultural lands. To carve out agricultural lands from zoning entirely could create isolated parcels, scattered "spots" of zoned land, or gerrymandered zoning districts that fail to represent a meaningful planning area. This Court has decried the concept of "spot zoning" of isolated parcels as the very opposite of the planned zoning envisioned by the Montana Legislature. *Little v. Bd. of Cnty. Comm'rs of Flathead Cnty.*, 193 Mont. 334, 347, 631 P.2d 1282, 1290 (1981); *see also* 42 Mont. A.G. Opinion No. 43 (Dec. 7, 1987) (requiring the acreage in a Part 1 zoning district to be contiguous: "The suggestion that the district can be cobbled together from separate and detached blocks of property directly contradicts the intention of a zoning scheme, which is to provide for an area's organized development.").

Moreover, if zoning districts can only be placed on non-agricultural lands, counties would have to operate in a reactionary mode where they wait to zone until after agricultural land is converted to a non-agricultural use. At this point the purpose of zoning as a planning tool, and the option of protecting agricultural land, is defeated. In fact, once the non-agricultural land use arises, it becomes exempt from any future zoning regulation as a nonconforming use. MCA § 76-2-105 (2015). Thus, the only way county zoning works is to plan an area in its entirety so

that the conversion of agricultural land uses to non-agricultural land uses occurs under an existing regulatory scheme that guides development.

Rather than preclude the zoning of agricultural lands outright, the Legislature instead, as noted above, created special protections for agricultural land uses that fall within a zoning district. In Part 2 zoning, for example, counties may adopt zoning districts, but those districts cannot prevent the complete use of agricultural resources. MCA § 76-2-209 (2015). And Montana's "right to farm" law, contained within the zoning enabling statutes, states that counties "may not adopt an ordinance or resolution that prohibits any existing agricultural activities or forces the termination of any existing agricultural activities outside the boundaries of an incorporated city or town." MCA § 76-2-903 (2015). Again, this provision does not prevent counties from adopting zoning districts, but rather limits how those zoning districts impact agriculture.

Likewise, the only feasible interpretation of § 76-1-109 is that it also serves to protect agriculture lands that fall within a zoning district. In other words, a district can encompass agricultural lands, but cannot restrict the agricultural uses on those lands. But if those agricultural uses cease, and the landowner converts the use to industrial, residential, or mining purposes, the Part 1 zoning district rules would be in place to address those other uses.

Importantly, the absurd result suggested by Appellee's argument would also threaten the existing Part 1 zoning district's throughout Montana, many of which contain agricultural lands. Indeed, many have as their express purposes the protection of agricultural lands from anticipated changes to neighboring land uses. While there is no searchable database containing all such districts, a few examples illustrate the point.

In the Bridger Canyon Zoning District – a Part 1 zoning district recognized in *Bridger Canyon Prop. Owners' Ass'n, Inc. v. Planning & Zoning Comm'n*, 270 Mont. 160, 890 P.2d 1268 (1995) – a stated purpose is "to protect agriculture lands from the effects of urban encroachment." Gallatin County, Montana, Bridger Canyon Zoning Regulation § 2.1(h) (July 12, 1971).[5] The district contains areas planned for resort and residential development, as well as areas mapped as "Agricultural Exclusive" (AE). *Id.* § 4.1 In these areas, the county's intent is "to preserve agriculture as one of the primary occupational pursuits and an economic endeavor in Bridger Canyon [and] . . . to protect and preserve the existing rural character of Bridger Canyon and to preserve existing developed and undeveloped farm lands from unplanned residential, commercial and industrial development." *Id.* § 6.1.

[5] *Available at* http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/Bridger%20Canyon%20Regs.

Ravalli County, which relies exclusively on Part 1 zoning due to the lack of a growth policy, has over forty Part 1 zoning districts.[6] The Fruitland Farm Zoning District is an example of the counties' many districts containing agricultural lands. Fruitland Farms Zoning District, Document # 6311 (January 10, 1977).[7] The purpose of the district is to allow for both "agricultural and residential" uses, while providing for minimum lot sizes and stream channel protection, as well as the exclusion of industrial uses. *Id.*

Yellowstone County similarly has several Part 1 zoning districts that encompass agricultural lands and protect agricultural uses. Special Zoning District 14, for example, encompasses 31 square miles and states as its purpose: "to create, protect, and maintain a desirable living environment, to stabilize and protect residential harmony, and to conduct agricultural activities." Resolution Creating Yellowstone County Zoning District No. 14, Article III, Section 1 (Aug. 2, 1977).[8] Much like the Bridger Canyon example, this district has both agricultural only areas (A-O) and other areas where residential development is planned. *Id*. The A-O zone is "designed to preserve land for agriculture and related uses . . . [and] to

[6] Department of Zoning, Ravalli County, Montana, *Zoning*, http://ravalli.us/179/Zoning (last visited Dec. 2, 2015) (list); Ravalli County Citizen-Initiated Zoning Districts, *available at* http://ravalli.us/DocumentCenter/View/294 (last visited Dec. 2, 2015) (map).
[7] *Available at* http://ravalli.us/DocumentCenter/View/299.
[8] *Available at* http://www.co.yellowstone.mt.gov/planning/zoningdist/SZD14.pdf.

discourage the scattered intrusion of uses not compatible with an agricultural rural environment." *Id.*

Thus, the long-established county use of Part 1 zoning districts in agricultural areas throughout the state, along with the overall legislative purposes of county zoning, support the logical conclusion that agricultural lands (while exempt from Part 1 limitations) are appropriately included in Part 1 zoning.

CONCLUSION

The Clinic urges the Court to hold that the Part 1 zoning protest provision, MCA § 76-2-101(5), is an unconstitutional delegation of legislative authority. This holding is a natural extension of the Court's decision in *Williams* invalidating the Part 2 zoning protest provision, MCA § 76-2-205(6). Both provisions, passed by the 1995 Montana Legislature, suffer from identical infirmities. Specifically, neither provides standards or guidelines for the application of the delegated power, nor a legislative bypass to return the original zoning resolution back to the governing body. Further, consistent with the decades-old practice of Montana counties, and the overall statutory scheme of Montana zoning, we ask the Court to find that Part 1 zoning is suitable and important for protecting the agricultural areas of our state.

DATED December __, 2015.

LAND USE &
NATURAL RESOURCES CLINIC
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), M.R. App. P., I hereby certify that this 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 5,000 words, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this __ day of December, 2015.

_____

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CERTIFICATE OF SERVICE

I, the undersigned, a student of the Land Use & Natural Resources Clinic at Alexander Blewett III School of Law at the University of Montana, certify that a true and correct copy of the foregoing was mailed, postage prepaid, on December ___, 2015 to the following:

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