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MONTANA TWENTY-SECOND JUDICIAL DISTRICT
STILLWATER COUNTY

BEARTOOTH FRONT COALITION, *et al* Plaintiffs, v. BOARD OF COUNTY COMMISSIONERS, STILLWATER COUNTY, and HEIDI STADEL, in her capacity as Clerk and Recorder of Stillwater County Defendants.	Cause No. DV 18-12 **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS, and REQUEST FOR HEARING**

I. INTRODUCTION

Plaintiffs Beartooth Front Coalition, as well as Lazy Y Diamond Bar, LP, Lana and Charles Sangmeister, William and Carolyn Hand, and Margaret Barron and Doxey Ray Hatch (Plaintiffs) filed this lawsuit challenging the Stillwater County Commissioners' and Stillwater County Clerk and Recorder Heidi Stadel's refusal to consider, under § 76-2-101, MCA, a citizen-initiated petition to create the Beartooth Front zoning district in Stillwater County. The purpose of the proposed district is to give the County authority to implement zoning that addresses the surface impacts of oil and gas development within the proposed district. The Complaint sought mandamus and declaratory relief addressing the County Defendants' handling of and refusal to consider the petition. The Commissioners refused to consider the petition, despite the fact that over 60% of the surface land

owners signed the petition, because the signature gathering did not take into account mineral estate interests. Plaintiffs believe that this interpretation of the Part 1 zoning statute is incorrect as a matter of law. The Complaint also sought injunctive relief to prevent the County from formally implementing new rules memorializing its interpretation of the mineral estate issue *vis a vis* petition signature requirements.

Defendants have filed a Motion to Dismiss. In the motion, the Defendants raise a new issue that they never previously raised with the Plaintiffs or the public during the three-year petition gathering process leading up to this lawsuit: that Stillwater County may not, in any event, impose *any* land use regulations that address impacts from oil and gas development. Defendants' position is based on fear of an event that has not occurred yet. Their position is also contrary to law, and is based on a serious misapprehension of both the Plaintiffs' Complaint and the Part 1 zoning statutory scheme. In other words, this lawsuit is about the Defendants' interpretation of the signature requirements under § 76-2-101, MCA. It is not about any possible rules or regulations that would follow *if* the County adopted the zone under the statute; quite simply, until the Commissioners adopt the zone, any discussion of regulations (§§ 76-2-106 & 107, MCA) are premature. Defendants seek to dismiss a case that is not before the Court. Defendants' motion should be denied.

II. FACTS

A motion to dismiss under Rule 12 (b) (6) has the effect of admitting all well-pleaded allegations in the complaint, and the allegations of fact therein are taken as true. *Meagher v. Butte-Silver Bow City County*, 2007 MT 129, ¶ 13, 337 Mont. 339, 160 P.3d 552. Through that lens, for the purposes of this Motion, the pertinent facts are as follows:

Petitioners, including Plaintiffs, are landowners within an 83,000 acre, more or less, portion of the Beartooth Front who want to protect the surface amenities within the proposed district from

impacts associated with oil and gas development through the development of regulations that would reasonably regulate surface use. The petitioners do not seek to ban oil and gas development; rather they merely seek to regulate it to lessen impacts on local ranchers, farmers and other landowners. (Complaint, ¶ 11)

The Stillwater County Commissioners adopted the first (and only) "Part 1" (i.e. citizen initiated) zoning in Stillwater County November 11, 1979. That zone was intended to regulate surface uses and impacts associated with the Stillwater Platinum Mine along the Stillwater River in the southern end of the County. According to the planning and zoning document, "The purpose of the following zoning regulations is not to prevent particular activities, but rather to regulate and promote the orderly development of the area. The development of this area shall consider the health, safety, and general welfare of the people of Stillwater County." (Complaint, ¶ 12)

Beginning in 2014, in response to the prospect of large-scale oil and gas development along the Beartooth Front, members of the Beartooth Front Coalition organized to seek a citizen-initiated zoning through the Part 1 zoning process pursuant to § 76-2-101, MCA. They drafted a petition to create a roughly 83,000-acre zoning district along the Beartooth Front. The petition sought adoption of regulations requiring that oil and gas activity be conducted in a responsible manner within the District to: (1) preserve public health, (2) protect private property, (3) protect and improve public infrastructure and public services, (4) protect surface and ground water, (5) protect air quality, (6) protect soil quality, and (7) maintain the quality of life by preserving the rural residential and agricultural character of the area. The purpose of the Petition was very similar to the purpose of the previous Part 1 zone adopted by Stillwater County in 1979. (Complaint, ¶ 13)

The petitioners began collecting signatures in 2014, and first submitted what they believed were a sufficient number of signatures to the County Clerk and Recorder in November, 2015. In March, 2016, the Clerk for the first time provided the County's newly developed signature verification

procedure to the petitioners. Based on these new requirements, the Clerk informed the petitioners that some petitions signed in a representative capacity did not meet the County's standards. These new standards, which had not been provided previously, affected approximately 110 petitioner signature sheets. As required by the Clerk and Recorder, the petitioners obtained and submitted an affidavit in support of the previously submitted signature sheet or sheets for persons who signed in a representative capacity (and a new signature sheet and affidavit for a limited number of original petition signers). Petitioners re-submitted their petition in February, 2017. (Complaint, ¶ 16)

At some point in August, 2017, the Clerk validated the signatures and determined that the petitioners had gathered over 60% of real property owner's signatures. (Complaint, ¶ 17) By letter to counsel, in August, 2017, the Stillwater County Attorney informed the petitioners that they had secured over 60% of the signatures of "surface holders". "However, it has come to our attention that there is a question as to whether the owners of mineral rights in the affected zones should have been included as real property owners, 60% of whose consent is also required. . . ." (Complaint, ¶ 18)

Subsequently, the Stillwater County Attorney referred the question to the Montana Attorney General seeking an Attorney General's opinion. (Complaint, ¶ 19) However, in November, 2017, the Attorney General declined to issue an opinion in the matter. (Complaint, ¶ 20)

On January 24, 2018, the Clerk and Recorder informed the County Commissioners, based on the County Attorney's advice, that mineral interests must be considered under § 76-2-101, MCA, and accordingly, "the petition submitted by the Beartooth Front District does not meet the threshold amount of 60% of the affected real property owners." The Clerk and Recorder *did not* submit an affidavit, as required in her own guidelines provided to the Plaintiffs, discussed *supra,* ¶ 15, "stating the number of affected freeholders within the boundaries of the proposed district, the

number of valid signatures and verification of the percentage of freeholders within the proposed district that signed the petition." (Complaint, ¶ 23)

On January 30, 2018, the Commissioners met and voted to accept the decision of the Clerk and the County Attorney and deny the petition, by a vote of 3-0. (Complaint, ¶ 24) This lawsuit followed.

III. STANDARD OF REVIEW

In analyzing a motion to dismiss, the United States Supreme Court follows "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove **no set of facts in support** of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957), *overruled on other grounds, Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) (emphasis added). The same principle applies under Montana law. *Meagher v. Butte-Silver Bow City County*, 2007 MT 129, ¶ 15. "A motion to dismiss under Rule 12(b)(6) admits the allegations in the well-pled complaint. The court must consider the complaint in the light most favorable to the plaintiff in evaluating the motion. The court also must take as true all the allegations of fact contained in the Complaint." *Id.*, ¶ 13; s*ee also Lockwood v. W.R. Grace & Co.*, 272 Mont. 202, 207, 900 P.2d 314, 317 (1995). For these reasons, trial courts rarely grant motions to dismiss under M. R. Civ. P. 12(b). Viewed through this lens, the Defendants' Motion to Dismiss must fail.

IV. ARGUMENT

A. The Defendants Improperly ask the Court to Consider Matters Beyond the Complaint

Defendants attach to their Motion as Exhibit A, and use as the basis of much of their argument, a document that supporters of the petition at issue herein submitted to the Commissioners in November, 2015, "Proposed Stillwater County Beartooth Front District – Submission to the County Commissioners of Stillwater County Montana, November 10, 2015." Defendants assert that this

document is "incorporated by specific reference" into the Complaint, citing a quote in ¶ 13 of the Complaint with some of the same language found at p. 7 of the Exhibit. The Defendants rely on the case of *Cowan v. Cowan,* 2004 MT 97, ¶ 11 for the notion that documents "incorporated by reference" in a Complaint may be considered under Rule 12 (b) (6). *Cowan,* in turn, relies on *City of Cut Bank v. Tom Patrick Construction, Inc.,* 1998 MT 219, ¶ 20. Notably, in *Cut Bank*, the documents "incorporated by reference" were actually attached to the Complaint:

> Accordingly, we accept the court's order at face value; that it concluded based on the allegations in the complaint **and on the information in the attached documents**. . . . In ruling on a Rule 12 motion to dismiss, the only relevant document is the complaint and any **documents it incorporates by reference. Although the attached contract** required Tom Patrick to purchase insurance and bonds. . . .

Id., emphasis added.

Clearly, the "incorporation by reference" language in *Cowan* and *Cut Bank* is in the context of documents *attached* to the complaint, which is not the case here.

Defendants cite no authority for their additional argument that a document not attached is still "incorporated by reference", and therefore allowed to be considered, if Plaintiffs "are not surprised" by statements contained therein and therefore "there is no need for Plaintiffs to have further time to prepare for or consider the issues the petition presents." (Defendants' Brief, pp. 2-3) Obviously, such an exception to the general Rule 12 (b) (6) standard would swallow the rule. But Defendants have not cited any authority for this exception, because no such exception exists.

Moreover, the entire document attached as Defendants' Exhibit A is not even referenced in the Complaint. As noted above, Exhibit A is a submittal to the Commissioners in November of 2015. Page 2 of it lists 11 discrete documents attached to it, only one of which is the petition itself. Much of the rest is advocacy for the petition. Defendants argue that ¶ 13 of the Complaint "references" this document. It does not. It merely says that supporters of the petition drafted a petition; and that it sought regulation requiring oil and gas activity to be conducted in a responsible manner, listing 7

goals of the petition. Paragraph 13 does not reference this particular document. Nor does ¶ 15, which states that petitioners "first submitted what they believed were sufficient number of signatures to the County Clerk and Recorder in November, 2015." The paragraph does not discuss the document attached as Defendants' Exhibit A; it discusses how the Clerk, in any event, *rejected* this submittal.

Finally, the Court should note that Plaintiffs' Prayer for Relief does not request that any proposed regulations be adopted, nor mention the issue at all. It addresses the illegality of the Commissioners' and Clerk and Recorders' actions in denying the petition under § 76-2-101, MCA. The only mention of regulations is in challenging the new rules proposed *by the Commission* addressing the gathering of signatures for citizen-initiated zoning.[1] For these reasons, the Court should disregard Defendants' Exhibit A.

If the Court does choose to consider Exhibit A as "incorporated by reference", one thing should be clear from a quick perusal of it: It does not contain "proposed regulations", as asserted throughout Defendants' Brief. The cited pages in Exhibit A do not contain anything called "proposed regulations" or "proposed rules". Rather, page 7 delineates the reasons petitioners seek regulation, i.e. "preserve public health, protect private property" etc. Pages 10 and 11 are clearly advocacy material "for distribution to landowners within the proposed district" which includes what can best be described as a wish list of what petitioners would want any rules or regulations to cover. This wish list certainly does not rise to the level of "permitting term and conditions" as asserted by Defendants countless times on pages 13 through 16 of their Brief.

These are not proposed regulations; and even if they were proposed regulations, the operative word would be "proposed." As discussed below, under the Part 1 zoning scheme,

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[1] Subsequent to the filing of the lawsuit, the Commissioners agreed with Plaintiffs to defer action on these rules, pending the outcome of this lawsuit or further direction from the Court.

petitioners for a Part 1 district do not have the authority to adopt regulations – only the County Commission does (something the Defendant County Commission should be well aware of). Thus, a document submitted by the petitioners years before the Commission's final review of signatures and denial of the petition is simply not relevant as a matter of law to the issues before the Court.

B. <u>The Motion is Premature, and Therefore Not Ripe, Because no Regulations Have been Adopted Yet.</u>

The Defendants argue that the Complaint should be dismissed as a matter of law "because it requests the Court to mandate action that the Stillwater County Commissioners cannot legally take." Def's Br. at 6. The first response to this argument is that it is premature – the "event" that Defendants' fear – implementation of zoning regulations – has not occurred, nor is it known if it will occur as Defendants predict. In basing their argument on the potential impacts of what they term the "proposed regulations", the County Defendants completely misinterpret the nature and statutory scheme for Part 1 zoning. As discussed below, only after a commission has approved a zone under § 76-2-101, MCA does it then consider adopting regulations under § 76-2-107, MCA. Neither of those events has occurred, and Defendants' challenge is premature.

By way of background, zoning is an effective way for citizens to protect their properties and for communities to safeguard important local values. Nearly a century ago the U.S. Supreme Court recognized zoning as a legitimate means to protect neighborhoods and property values, even if some uses were excluded in the process. *Village of Euclid, Ohio v. Ambler Realty,* 272 U.S. 365 , 47 S. Ct. 114 (1926). As U.S. Supreme Court Justice William O. Douglas noted, zoning "is not confined to elimination of filth, stench, and unhealthy places; it is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9, 94 S. Ct. 1536, 1541 (1974).

In 1953 the Montana Legislature provided citizens the legal authority to create their own zoning districts, to create their own "sanctuaries", as it were. Known as "Part 1" zoning, the law

permits citizens to self-zone by creating zoning districts as small as 40-acres. *See generally* §§ 76-2-101 *et seq*, MCA. A decade later, the Legislature implemented "Part 2" zoning, §§ 76-2-201, *et seq.*, MCA, which gives local government's authority to create county-wide zoning districts. Part 1 zoning, thus, complements the authority the Legislature has granted to local governments to perform county-wide zoning. "[T]he legislative intent is that Part 1 is to have its own meaning and effect." *Montana Wildlife Federation v. Sager*, 190 Mont. 247, 260, 620 P.2d 1189, 1197 (1980). Montana local governments consistently approve Part 1 zoning petitions[2]. This case presents the unusual and unfortunate decision of the Stillwater County Commissioners to deny a Part 1 zoning petition that met all statutory requirements.

Property owners initiate the Part 1 zoning process by submitting petitions signed by at least 60% of the real property holders within the proposed district: "Whenever the public interest or convenience may require and upon petition of 60% of the affected real property owners in the proposed district, the board of county commissioners may create a planning and zoning district and appoint a planning and zoning commission consisting of seven members." § 76-2-101, MCA. In the case at bar, the Clerk determined in August of 2017 that over 60% of the *surface* landowners had signed the petition. (Complaint, ¶ 17)

In this case, of course, the Commission has not yet adopted the zone (which is why the lawsuit was filed), much less any regulations for the zone. Only after approving the zone, and after notice and a public hearing, the county commissioners may adopt land use regulations for the purpose of carrying out the development district. §§ 76-2-106 & 107, MCA.

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[2] *E.g.* Missoula County has 31: https://www.missoulacounty.us/government/community-development/community-planning-services/planning-information/citizen-zoning-districts; Gallatin County has 23: http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/zd?textPage=1; Ravalli County has 41: http://ravalli.us/179/Zoning

> The planning and zoning commission may, for the benefit and welfare of the county, prepare and submit to the board of county commissioners drafts of resolutions for the purpose of carrying out the development districts. . ., including zoning and land use regulations, the making of official maps, and the preservation of the integrity of the development districts. . . . The board of county commissioners is authorized to adopt these resolutions.

§ 76-2-107 (1), MCA. *See generally Ash Grove Cement v. Jefferson County,* 283 Mont. 486, 493, 943 P. 2d 85, 89 (1997)("After notice and a public hearing, the county commissioners may adopt the development district and, thereafter, may adopt zoning regulations for the purpose of carrying out the development district. Sections 76-2-106 and 76-2-107, MCA.")

In other words, the "regulations" that the County assails in its brief have not yet been adopted. . . by the Defendant Commission. As will be discussed below, since land use regulation of oil and gas exploration has *not* been preempted by legislation, the Commissioners have the ability to fashion any regulations so as to avoid the infirmities they claim exist in the proposed regulations, *if* they ultimately adopt the zone.

Accordingly, the issues that Defendants bring to the Court are not ripe because no regulations have been adopted. The judicial power of Montana's courts, like the federal courts, is limited to "justiciable controversies." *Greater Missoula Area Fedn. v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881. In *Plan Helena v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567, the Montana Supreme Court discussed justiciability as follows:

> Article III of the United States Constitution restricts the judicial power of the federal courts to "cases" and "controversies." *See* U.S. Const, art. III, § 2, cl. 1. Likewise, Article VII, Section 4 of the Montana Constitution, in relevant part, confers original jurisdiction on district courts in "all civil matters and cases at law and in equity." Mont. Const. art. VII, § 4(1). This Court has stated that the "cases at law and in equity" language of Article VII, Section 4(1) embodies the same limitations as are imposed on federal courts by the "case or controversy" language of Article III. *See Olson v. Dept, of Revenue*, 223 Mont. 464, 469-70, 726 P.2d 1162, 1166 (1986); *Seubert v. Seubert*, 2000 MT 241, P 17, 301 Mont. 382, 301 Mont. 399, 13 P.3d 365. Accordingly, federal precedents interpreting the Article III requirements for justiciability are persuasive authority for interpreting the justiciability requirements of Article VII, Section 4(1). *See e.g. Armstrong v. State*, 1999 MT 261, ¶¶ 6-13, 296 Mont. 361, 989 P.2d 364.

Among the categories subsumed in the "case or controversy" justiciability requirement are the doctrine of ripeness and the refusal to issue advisory opinions. *Greater Missoula* at ¶ 23.

"The doctrine of ripeness 'requires an actual, present controversy, and therefore a court will not act when the legal issue raised is only hypothetical or the existence of a controversy merely speculative.'" *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 19, 333 Mont. 331, 142 P.3d 864 (quoting *Mont. Power Co. v. Mont. Pub. Serv. Comm'n*, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91). Contrasting a "case and controversy" with an advisory opinion, the Montana Supreme Court in *Chovanak v. Matthews* defined a "controversy" as "a real and substantial controversy, admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising *what the law would be upon a hypothetical state of facts*, or upon an abstract proposition." 120 Mont. 520, 526, 188 P.2d 582, 585 (1948) (emphasis added). The Montana Supreme Court has consistently held that it will not render advisory opinions. *See Plan Helena, Inc.*, ¶ 9.

As of yet, no regulations have been adopted by the County under § 76-2-107, MCA, because the Commissioners have not approved the zone, meaning Defendants' arguments about preemption are not ripe. If the Court were to issue an opinion on the Defendants' purely speculative arguments, it would be issuing an advisory opinion, which the Court lacks jurisdiction to do.

In summary, the County's Motion to Dismiss should be denied as being premature. Moreover, it is clear that the Defendants cannot show that Plaintiffs can show "no set of facts in support of" their claim. *Conley v. Gibson,* 355 U.S. 41, 45-47, 78 S. Ct. 99, 102 (1957).

C. The Montana Oil and Gas Conservation Act Does not Effect an Express or Implied Preemption of Regulation of Oil and Gas Activity by Local Governments.

Plaintiffs believe the motion should be denied simply because it is premature as argued above: Defendants seek an advisory opinion on the scope of local government zoning control over oil and gas development. The Court should decline Defendants' invitation. Even assuming for the

sake of argument that the Court could reach the substantive issues raised by Defendants (which it should not), the Defendants' arguments are flawed, as discussed below.

The County argues that the Montana Board of Oil and Gas (MBOGC) has complete authority over oil and gas activity in the State of Montana, and that local governments may not regulate oil and gas activity in any form. "Stillwater County has **no** authority to regulate oil and gas activities. In Montana, the BOGC has **exclusive** jurisdiction to regulate oil and gas activities, and any attempt to undermine the BOGC's jurisdiction is preempted by state law." (Def's Br. at 7, emphasis added.) The County is mistaken in its belief that a County's—it's—authority to protect lands and citizens within its jurisdiction is so limited.

There are three primary ways that state preemption can arise: (1) express preemption through a statement of the legislature; (2) implied preemption when a statutory scheme reveals a legislative intent to "occupy the field" because of a dominant state interest; or (3) conflict preemption when a local provision directly conflicts with and frustrates the purposes of a state law provision. *Dukes v. Sirius Construction*, 2003 MT 152, ¶ 20; *see also Board of County Commr's of La Plata County v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045, 56-57 (Colo. 1992). This last category may be a *partial* preemption, which means that other, non-conflicting provisions of the local law may remain in effect. *Board of County Commr's of La Plata County*, 830 P.2d at 1059. Courts "must apply preemption analysis narrowly," both as to whether there is preemption, as well as the scope of any preemption. *Dukes*, 2003 MT 152 at ¶ 67.

Using zoning to regulate certain land uses is, of course, supported by the Constitution. Stillwater County is a general power government. As such, its power is limited to what is expressly or impliedly delegated to it by the State. County powers can be found either expressly in statute or implied within those express powers. In the case of Part 1 Zoning, the county has *express* authority statutory powers to regulate land use activities. *See generally* §§ 76-2-101, *et seq.*, MCA. Additionally,

the Constitution provides that county powers are liberally construed. Mont. Const. art. XI, § 4; *Associated Students of Univ. of Montana v. City of Missoula*, 261 Mont. 231, 235, 862 P.2d 380, 382 (1993). Finally, both the right to a clean and healthful environment and a landowner's right to protect their property are enshrined as inalienable rights in Mont. Const. art. II, § 3, and the state and its subdivisions have an affirmative duty to maintain and improve a clean and healthful environment. Mont. Const. art. IX, § 1.

Based on a review of the MBOGC statutes, the only area where the legislature has *expressly* preempted local jurisdiction is class II injection wells. In § 82-11-111, MCA, which enumerates the MBOGC's powers, the MBOGC has "exclusive jurisdiction over all class II injection wells and all pits and ponds in relation to those injection wells." Thus, local governments are specifically precluded from exercising powers reserved to the MBOGC in this narrow area. In establishing regulations under § 76-2-107 (1), MCA, the planning and zoning commission, and then the Commissioners, would arguably be precluded from regulation conflicting with § 82-1-111, MCA.

In contrast, all other MBOGC powers are listed without any limitation on concurrent authority. *See generally* § 82-11-111, MCA. If the legislature had intended to occupy the field of oil and gas regulation at the state level, it would have applied exclusive jurisdiction to all MBOGC powers, rather than selectively applying it to the limited area of class II injection wells. When this narrow area of exclusive jurisdiction is placed alongside a county's broadly construed powers to regulate "uses of land" under Part 1 zoning, it becomes clear that the legislature intended concurrent jurisdiction over oil and gas activity.

It is worth pointing out here that the Part 1 zoning scheme created by the Legislature *does* expressly prohibit zoning of certain *other* activities: "No planning district or recommendations adopted under this part shall regulate lands used for grazing, horticulture, agriculture, or the growing of timber." § 76-2-109, MCA. Notably, there is no express prohibition of regulating oil and gas

activity. Under rules for interpreting statutes, that means the Legislature did not intend to prohibit Counties from any regulation of oil and gas activity. "Under the canon *expressio unius est exclusio alterius*, [the court] interpret[s] the expression of one thing in a statute to imply the exclusion of another. *State v. Good*, 2004 MT 296, ¶ 17, 323 Mont. 378, 100 P.3d 644. "It is not [the court's] prerogative to read into a statute what is not there." *Hines v. Topher Realty, LLC*, 2018 MT 44, ¶ 15, 390 Mont. 352, 413 P.3d 813, citing *In re Marriage of Rudolf*, 2007 MT 178, ¶ 41, 338 Mont. 226, 164 P.3d 907.

Consistent with this interpretation, the MBOGC explicitly recognizes that local governments have concurrent jurisdiction over oil and gas activities. The agency's Form No. 22 "Permit to Drill" requires applicants to identify whether there are any local permits or authorizations required for the regulated activity. *See* MBOGC Forms at http://bogc.dnrc.mt.gov/testforms.asp.

Indeed, several counties in Montana have adopted several zoning districts which include comprehensive regulation of oil and gas development. In Gallatin County, four zoning districts, Bridger Canyon, South Cottonwood, Reese Creek, and Bozeman Pass to some degree, regulate oil and gas development.[3] For instance, the Bridger Canyon regulations contain comprehensive requirements for "Natural Resource Conditional Use Permits" in Appendix A, which include development of oil and gas. These regulations include a requirement for an environmental impact statement. The Bridger Canyon regulations were challenged in Court by an oil and gas developer, but the case was dismissed by

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[3] http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/Bridger%20Canyon%20Regs
http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/SCC_Regulation1.pdf
http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/RC_Regulations12.3.13.pdf
http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_plandept/1zoning/districts/BP_Regulation.pdf

the developer before any decision was issued. *J.M. Huber Corporation v. Gallatin County,* Eighteenth Judicial District Court, Cause No. DV 16-2002, dismissed with prejudice September 30, 2007. Therefore, the regulations still exist.

Other states addressing this topic in the oil and gas context have upheld local regulation of oil and gas development. In a case most on point, the Colorado Supreme Court upheld county authority to regulate oil and gas activity alongside the state Oil & Gas Conservation Commission. *Board of County Commr's. of La Plata County v. Bowen/Edwards Assoc., Inc.*, 830 P.2d 1045 (Colo. 1992). The county's oil and gas rules regulated such matters as setbacks, noise, wellhead spacing, wildlife protection, water quality protection, aesthetics, agricultural protection, and road maintenance. *Id.* at 1050-51. There, the court first addressed counties' authority to regulate land use:

> The expressly delegated authority conferred on counties by the Local Government Land Use Control Act and the County Planning Code leaves no doubt that land-use regulation is within the scope of a county's legislative power. **The development of oil and gas resources and the operation of oil and gas facilities directly involve the use of land and undoubtedly have some impact on a county's interests in land-use control.** While neither the Local Government Land Use Control Act nor the County Planning Code expressly prohibits county regulation of the land-use aspects of oil and gas developmental and operational activities within a county, the critical question nonetheless is whether the Oil and Gas Conservation Act renders La Plata County's Oil and Gas Regulations null and void under Colorado preemption doctrine.

Board of County Commr's of La Plata County, 830 P.2d at 1056, emphasis added. Here, both the Part 1 and the Part 2 zoning statutes give counties express authority to regulate land uses as is the case in Colorado. *See, e.g.* §§ 76-2-104, 106 & 107, MCA.

The Court then found that state law did not expressly preempt local land use powers and also rejected an implied preemption theory, holding that:

> A legislative intent to preempt local control over certain activities cannot be inferred merely from the enactment of a state statute addressing certain aspects of those activities. *City of Aurora v. Martin,* 181 Colo. 72, 76, 507 P.2d 868, 869 (1973). On the contrary, the determination of whether a legislative intent to completely occupy a field to the exclusion of all other regulation must be measured not only by "the

> language used but by the whole purpose and scope of the legislative scheme," including the particular circumstances upon which the statute was intended to operate. *City of Golden v. Ford*, 141 Colo. 472, 478, 348 P.2d 951 (Colo. 1960) . . . .
>
> The state's interest in oil and gas activities is not so patently dominant over a county's interest in land use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.

Id. at 58.

Turning to conflict preemption, the court observed that the county specifically stated in its zoning regulations that it intended to regulate "in a manner that does not hinder achievement of the state's interest." *Id.* Thus, the zoning on its face did not create conflict preemption because it was designed to harmonize state review of oil and gas activities with "the county's overall plan for land use." *Id.* at 1059-60. These specific facts, of course, highlight the fact that in this case, no regulations even exist yet.

The Courts have also addressed this issue in Pennsylvania (*Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901 (2013), construing Pennsylvania's constitutional environmental rights); and New York (*Anschutz Exploration Corp. v. Town of Dryden*, 940 N.Y.S.2d 458 (2012); *Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.2d 722 (2012)). In both states, the Court found that local governments had authority to regulate oil and gas activity.

Of course, in this case, to avoid conflict preemption, Stillwater County would simply have to take care to avoid imposing standards, if or when it establishes regulations, that conflict with class II injection wells or which otherwise frustrate the purpose of any MBOGC standard.

Which brings us to the remainder of Defendants' Brief and argument. On pp. 11-16, Defendants make numerous arguments based on their view of what the "proposed regulations" and "permitting terms and conditions" would entail. However, as noted above, no regulations have been adopted by the County, so the Defendants are essentially asking the Court to determine their motion to

dismiss based not only on documents that were not included in the pleadings, but on a hypothetical set of regulations that don't exist. This, of course, goes way beyond what a Court may consider under Rule 12 (b)(6).

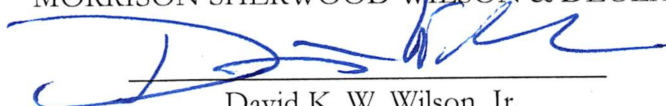
V. CONCLUSION

This lawsuit is about the signature requirements for citizen-initiated zoning petitions under § 76-2-101, MCA. It is not about any regulations that the Commissioners may or may not adopt under § 76-2-107, MCA, if the Commissioners ever do approve the zone under § 76-2-101, MCA. Because the Commissioners have not adopted any regulations yet, the Defendants cannot prove that Plaintiffs can show no set of facts entitling them to relief – given that the Commissioners *could* establish regulations consistent with the Act. But we're not there yet, and the Commissioners' attempts to get the Court to stop them – in advance – from doing something they clearly don't want to do does not rise to a justiciable controversy sufficient for the Court to dismiss the Complaint. Defendants' Motion to Dismiss should be denied.

Plaintiffs respectfully request that the Court hold a hearing on this motion.

DATED this 11th day of May, 2018.

MORRISON SHERWOOD WILSON & DEOLA



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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11 day of May, 2018, a true and correct copy of the foregoing document was duly served by first-class mail upon the following:

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