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## Williams v. Board of County Commissioners of Missoula County

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***Williams v. Board of County Commissioners of Missoula County*, 2013 MT 243, 371 Mont.**

**356, 308 P.3d 88.**<sup>1</sup>

**Ross Keogh**

**I. ABSTRACT**

The Montana Supreme Court affirmed the Fourth Judicial District Court’s holding that Montana Code Annotated § 76-2-205(6) was an unconstitutional delegation of legislative power. The statute contains a “protest provision” which enabled landowners owning 50% of the property taxed as forest or agriculture to stop zoning decisions. The case resulted from efforts by Missoula County to zone land north of Lolo to address public health and safety concerns posed by gravel mining, and asphalt production operations, proposed by Liberty Cove, Inc. The Court also found the protest provision of the statute severable from the general zoning power.<sup>2</sup>

**II. INTRODUCTION**

The Court affirmed that the “protest provision” was an unconstitutional delegation of legislative power because it failed to provide “standards or guidelines to inform the exercise of the delegated power” and contained no legislative bypass.<sup>3</sup> Since there was no mechanism whereby a County Commission could override the protest, the Court found that it could give “a small number of agricultural or forest landowners, or even a single landowner . . . absolute discretion to make the ultimate determination concerning the public's best interests with no opportunity for review.”<sup>4</sup> The Court indicated that a protest provision could be permissible, if it contained a legislative bypass, such as that found in Montana Code Annotated § 76-2-305 where

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<sup>1</sup> The University of Montana School of Law’s Land Use Clinic participated as Amicus: Michelle Bryan Mudd, Benjamin S. Sudduth (argued).

<sup>2</sup> *Williams*, ¶¶ 70-71.

<sup>3</sup> *Williams*, ¶ 51. The holding was not specific to the Montana Constitution.

<sup>4</sup> *Williams*, ¶ 53.

a city or town council can override a citizen protest of their zoning decisions through a two-thirds vote.<sup>5</sup>

### **III. FACTUAL BACKGROUND**

The County's efforts to address public health and safety issues associated with proposed gravel mining in the area north of Lolo began with interim zoning regulations enacted in May of 2008.<sup>6</sup> The interim regulations were challenged, found lawful, and extended.<sup>7</sup> Concurrently, the County began to develop a permanent zoning proposal for 422 acres north of Lolo and west of Highway 93, which culminated in the preliminary adoption of the North Lolo Special Zoning District through an Amendment to the Missoula County Growth Policy 2005 Update by the County. That Amendment was subsequently protested pursuant to Montana Code Annotated § 76-2-205(6) by five landowners who owned more than 50% of the agricultural and forest land within the district ("Landowners").<sup>8</sup> After the district court action, described below, the Commission adopted final zoning in May of 2010.<sup>9</sup>

### **IV. PROCEDURAL BACKGROUND**

L. Reed Williams filed a complaint in district court against Missoula County on May 14, 2010 arguing that the protest provision was unconstitutional, and requesting a temporary restraining order to effectively preserve the zoning. The Commission agreed with Williams and refused to defend the protest provision, and the district court issued the requested injunctive relief on May 21.<sup>10</sup> The protesting Landowners did not move to intervene until May 28.<sup>11</sup> They subsequently requested dismissal for Williams' failure to join all required parties pursuant to

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<sup>5</sup> *Id.*

<sup>6</sup> *Williams*, ¶ 6.

<sup>7</sup> *Liberty Cove, Inc. v. Missoula County*, 2009 MT 377, 353 Mont. 286, 220 P.3d 617; *Williams* ¶ 8.

<sup>8</sup> *Williams*, ¶¶ 7-11.

<sup>9</sup> *Williams*, ¶ 14.

<sup>10</sup> *Williams*, ¶ 14.

<sup>11</sup> *Williams*, ¶ 15.

Montana Rule Civil Procedure 19 and the Montana Uniform Declaratory Judgments Act.<sup>12,13</sup>

The district court granted summary judgment, and denied the Landowners’ motion to dismiss, for Williams—and the County—on April 5th, of 2012. The district court concluded that the statute was unconstitutional on three grounds: 1) it violated the fundamental right to vote; 2) it violated equal protection; and 3) it was an unconstitutional delegation of legislative power.<sup>14</sup>

## V. ANALYSIS

The Court identified *Bacus v. Lake County*,<sup>15</sup> as providing the standard for a delegation of legislative power: “the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion.”<sup>16</sup> As applied to the context of zoning, the Court said such delegation must contain “standards or guidelines,” and the “existence of an appellate body ... is essential to the proper exercise of a police power.”<sup>17</sup> Because the zoning protest provision did not contain “standards or guidelines to inform the exercise of the delegated power ... and contains no legislative bypass,” the Court agreed that it was unconstitutional.<sup>18</sup>

The Court further grounded its holding on precedent from the United States Supreme Court and the Supreme Court of South Dakota. First, under longstanding precedent in *Eubank v. Richmond*,<sup>19</sup> the U.S. Supreme Court said a zoning ordinance could not “confer the power on

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<sup>12</sup> The Montana Supreme Court, in a partial overruling, did find that the protesting landowners were a necessary party under Mont. Code Ann. § 27-8-301, but that—under the harmless error doctrine—that their lack of participation prior to the issuance of the preliminary injunction did not harm the Landowner’s substantial rights. *Williams*, ¶¶ 33-35.

<sup>13</sup> Mont. Code Ann. § 27-8-301

<sup>14</sup> *Williams*, ¶ 19.

<sup>15</sup> 138 Mont. 69, 354 P.2d 1056 (1960).

<sup>16</sup> *Williams*, ¶ 44 (quoting *Bacus*, 138 Mont. at 78, 354 P.2d 1061 (1960)).

<sup>17</sup> *Williams*, ¶ 45 (quoting *Shannon v. City of Forsyth*, 205 Mont. 111, 666 P.2d 750, 752 (1983)).

<sup>18</sup> *Williams*, ¶ 51.

<sup>19</sup> 226 U.S. 137 (1912).

some property holders to virtually control and dispose of the property rights of others.”<sup>20</sup> Second, South Dakota’s analogous precedent in *Cary v. City of Rapid City*<sup>21</sup> was similarly persuasive. There, South Dakota statute authorized 40% of landowners within or around a zoning district to protest.<sup>22</sup> The South Dakota Court found that the absence of guidelines or standards made the statute an unconstitutional delegation because it authorized unequal treatment under the law—a violation of due process, while observing that the lack of a legislative bypass did create an impermissible delegation.<sup>23</sup> This precedent, the Court observed, created “constitutional infirmities” when a protest provision lacks “standards or guidelines.”<sup>24</sup>

A secondary consideration to the Court was the lack of a legislative bypass in the protest provision. The Court looked specifically to the conduct of municipal zoning in Montana, and found that the protest provision there contained a “proper legislative bypass”—allowing for the governing body to override by a two-thirds vote.<sup>25</sup> This “reten[tion] of authority” the Court determined, places a protest provision “within constitutional bounds.”<sup>26</sup>

## **VI. CONCLUSION**

As the Montana Legislature looks to remedy the statute in 2015, the Court may have left open the critical question of whether the requirement for “guidelines and standards” is a necessary element in any protest provision. The Court’s comparison to the municipal zoning ordinance in Montana sounds like an instruction to the Legislature to simply add a bypass provision. However, the Court’s primary authorities: *Shannon*, *Cary*, and *Eubank*, are all characterized as producing constitutional infirmities, because of the lack of “standards or

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<sup>20</sup> *Williams*, ¶ 48 (quoting *Eubank v. Richmond*, 226 U.S. at 143 (1912)).

<sup>21</sup> 559 N.W.2d 891 (S.D. 1997).

<sup>22</sup> *Williams*, ¶ 49.

<sup>23</sup> *Williams*, ¶ 50 (quoting *Cary* 559 N.W.2d at 895).

<sup>24</sup> *Williams*, ¶ 52.

<sup>25</sup> *Williams*, ¶ 53.

<sup>26</sup> *Williams*, ¶ 53.

guidelines.”<sup>27</sup> This seems to suggest that Montana’s municipal zoning protest provision, even with a legislative bypass, could still be susceptible to a constitutional challenge, due to its lack of “standards or guidelines to inform the propriety of the exercise of that power.”<sup>28</sup>

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<sup>27</sup> *Williams*, ¶ 52 (“Without any standards or guidelines for the exercise of the delegated power, the protest provision of [Mont..Code Ann.] §76-2-205(6) contains the same constitutional infirmities as discussed in *Shannon, Eubank, and Cary*.”).

<sup>28</sup> *Williams*, ¶ 45.