46 Op. Att'y Gen. No. 22

COUNTIES - Scope of protest rights afforded freeholders subject to proposed zoning districts and amendments of zoning regulations;
FREEHOLDERS - Protest rights to zoning districts and amendment of zoning regulations proposed by county governments;
LAND USE - Scope of protest rights afforded freeholders subject to proposed zoning districts and amendments of zoning regulations;
MONTANA CODE ANNOTATED - Sections 76-2-205(6), -305;
MONTANA LAWS OF 1995 - Chapter 591;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 47 (1977).

HELD:

1. Mont. Code Ann. § 76-2-205(6) enlarges "protest rights" for freeholders whose property is classified for real property tax purposes as agricultural or forest land, where their combined title ownership represents 50 percent of the total property ownership within the proposed or revised zoning district. These enlarged protest rights supplement the protest rights provided to 40 percent of freeholders within the district whose names appear on the last-completed assessment roll.

2. The phrase "freeholders representing 50 percent of the titled property ownership" within Mont. Code Ann. § 76-2-205(6) requires that all owners of property held in joint or common ownership join in the protest for the area of the parcel to be included in the calculation of the protest area. Condominium owners or purchasers are entitled to have their proportionate share of the freehold interest in the land area of the particular development included in the calculation of the protest area.

July 22, 1996

Mr. Thomas J. Esch
Flathead County Attorney
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Dear Mr. Esch:

You have requested my opinion upon the following questions:

1. Does Mont. Code Ann. § 76-2-205(6) provide an enlarged right of protest to: (a) both the freeholders owning 50 percent of the land taxed for agricultural purposes in the proposed district and the freeholders owning 50 percent of the land taxed for forest purposes in the proposed district; or (b) freeholders taxed for agricultural or forest purposes who own 50 percent of all property in the proposed zoning district?

2. Does the phrase "freeholders representing 50 percent of the titled property ownership" within Mont. Code Ann. § 76-2-205(6) require that all owners of property held in joint or common ownership join in the protest for the area of the parcel to be included in the protest?

These questions arise from a proposed 3761.67-acre Southeast Rural Whitefish Zoning District within Flathead County (hereinafter "zoning district"). The proposed zoning district includes 262 freeholders and is a mixture of land in residential and agricultural use. Classified for taxation purposes as agricultural or timber land are 2993.49 acres. Twenty-eight freeholders of land taxed for agricultural or forest use have submitted protests to the creation of the zoning district. These 28 landowners represent 1708.58 acres or 45 percent of the titled land ownership in the zoning district. The protesting agricultural and timber landowners represent 57 percent of the total acreage within the district classified as either agricultural or timber.

Your opinion request requires construction of Mont. Code Ann. § 76-2-205(6). The statute provides:

Within 30 days after the expiration of the protest period, the board of county commissioners may in its discretion adopt the resolution creating the zoning district or establishing the zoning regulations for the district. However, if 40% of the freeholders within the district whose names appear on the last-completed assessment roll or if freeholders 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.

The constitutionality of the "protest provision" in question has not been challenged. The zoning statute is presumed to be constitutionally valid, and this opinion does not address the constitutionality of the statute.

There is no controlling decisional law in Montana pertaining to the questions you have presented and the law of other jurisdictions has limited application given the unusual nature of the Montana statute. Opinions of other jurisdictions are premised on the recognition that the protest provisions of those jurisdictions pertain to the amendment of an existing zoning regulation. The courts recognize that those protest provisions are a form of protection afforded property owners in the stability and continuity of preexisting zoning regulations. Such reasoning is not applicable to the Montana statute, which operates as a form of extraordinary protection afforded property owners to prevent the legislative body from adopting zoning regulations in the first instance. As such, the statute operates more like a "consent provision" than a protest provision. Consistent with these observations, the statute's "protest" rights discussed within this opinion are so identified only for purposes of consistency with the actual language of the statute.

I. The 50 Percent Requirement

Prior to 1995, Montana law provided a statutory right of protest to "40% of the freeholders within the district whose names appear on the last-completed assessment roll." Mont. Code Ann. § 76-2-205(6) (1993). In 37 Op. Att'y Gen. No. 47 (1977) Attorney General Greely found that this language allowed each freeholder in the district one protest vote without regard to the number of parcels the freeholder owned within the district. The proposed Whitefish zoning district, comprised of approximately 262 freeholders, thus could be defeated if 40 percent or approximately 105 freeholders submitted timely protests.

Mont. Code Ann. § 76-2-205(6) was amended by HB 358 of the 1995 legislature to enlarge the statutory protest provision described above. 1995 Mont. Laws ch. 591, § 2. The statute, set forth above, was amended by the addition of the language emphasized below:

However, if 40% of the freeholders within the district whose names appear on the last-completed assessment roll ***or if freeholders 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.

In construing and interpreting statutes, my function is to effectuate the legislature's intent; the plain meaning of the words used in the statute should be first considered. Gulbrandson v. Carey, 272 Mont. 494, 500, 901 P.2d 573, 577 (1995). The intent of the 1995 amendments is difficult to ascertain by reference to the plain meaning of the words used because the language is subject to at least two interpretations, depending on the effect given the modifying phrase "whose property is taxed." The language may be construed as follows:

If freeholders who represent 50 percent of the titled property ownership within the district protest, and if the property counted as meeting the 50 percent limit consists exclusively of property taxed for either agricultural or forest purposes, the establishment of the zoning district fails.

On the other hand, the amendment may be construed to mean:

If freeholders who represent 50 percent of the titled property ownership of land taxed for agricultural purposes within the district protest, or if freeholders who represent 50 percent of the titled property ownership of land taxed for forest purposes within the district protest, the district fails.

A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more different senses. 2A Sutherland Statutory Construction § 45.02, at 6 (5th ed. 1992). Without question, the 1995 amendment of Mont. Code Ann. § 76-2-205(6) is ambiguous on its face.

If the plain words of a statute are ambiguous, the next step in statutory interpretation is to determine the intent of the legislature by examining the legislative history of the statute. Eisenmenger v. Ethicon, Inc., 264 Mont. 393, 398, 871 P.2d 1313, 1316 (1994). House Bill 358 was introduced in order to grant large landowners relief from zoning district proposals that included their property. The bill was entitled: "An Act Changing the Protest Requirement for Zoning Adoption; and Amending Section 76-2-205, MCA." The sponsor of the bill stated that the legislation would add a method by which a zoning district could be protested. Representatives of agricultural and forestry interests supporting the bill noted that the bill would grant protest rights to large landowners not recognized by the current law; large landowners would be treated on an equitable basis with small landowners. See Mins., House Local Gov't Comm., Feb. 9, 1995. In its original form, HB 358 proposed the following amendment to Mont. Code Ann. § 76-2-205(6):

However, if 40% of the freeholders within the district whose names appear on the last-completed assessment roll ***or if freeholders representing 50% of the titled property ownership*** 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.

The House passed HB 358 in this form.

On March 29, 1995, after the bill had passed the Senate Local Government Committee, an amendment was offered and adopted on the Senate floor. This amendment added language, emphasized below, which created the ambiguity at issue:

However, if 40% of the freeholders within the district whose names appear on the last-completed assessment roll or if freeholders representing 50% of the titled property ownership ***whose property is taxed for agricultural purposes under 15-7-202(2)(a) 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.

The legislative intent behind this amendment is determinative of the first question you have presented regarding interpretation of Mont. Code Ann. § 76-2-205(6). The amendment was discussed by the Conference Committee that considered HB 358 on April 7, 1995. Minutes of the meeting reflect the following exchange between conference committee members concerning the amendment's intent:

REP. SHIELL ANDERSON asked why it was inserted "who's [sic] property is taxed for agricultural purposes"?

CHAIRMAN BECK said that SEN. LYNCH was concerned about major companies saying if they had a big parcel of land and they could control zoning regulations with that purpose. SEN. LYNCH wanted to specify that it could not be a major company.

SEN. HARGROVE asked if they had seen the concerns about Ashgrove and that was what SEN. LYNCH was concerned about.

REP. BILL RYAN said that SEN. LYNCH [was] referring to the Anaconda Company, they would have controlled everything and no zoning would have taken place.

SEN. DOROTHY ECK said the amendment was looking at company towns.

CHAIRMAN BECK said if the land was classified for agriculture purposes there would not be a problem.

The dialogue suggests an intent to limit the type of large freeholders who would be entitled to invoke the protest right: Freeholders taxed for agricultural and forest use would be given a new protest right; freeholders engaged in industrial or commercial use would not be entitled to a new protest right under the proposed statute. The amendment was thus intended to limit application of the bill's expansion of protest rights.

Returning to the two possible interpretations of Mont. Code Ann. § 76-2-205(6) set forth above, the first interpretation achieves a result that is consistent with the legislative intent established by the Senate floor amendment of March 29, 1995. This interpretation limits the expansion of protest rights of large landowners by simply clarifying what types of freeholders may receive the expanded rights--those whose property is taxed for agricultural or forest purposes.

The second interpretation effects a reading of HB 358 that also clarifies that only agricultural and forestry freeholders may receive the enlarged protest rights. However, this interpretation greatly expands the protest rights of these types of freeholders. Under the second interpretation, agricultural and forestry freeholders may effectively block implementation of zoning districts when they represent less than 50 percent of the titled land ownership within a district, a result that substantively changes the plain meaning of the bill as introduced, considered by the House Local Government Committee, passed by the House, and considered by the Senate Local Government Committee.

If such an interpretation were adopted, one agricultural or forestry freeholder representing a small percentage of the total titled ownership of a proposed zoning district composed of one or two isolated agricultural or forested tracts could effectively block zoning implementation due to that freeholder's ownership of 50 percent of the few such tracts included within the proposed district. This result undermines the basic intent of HB 358 (to create additional protest rights for large landowners controlling 50 percent of the titled property ownership within the district), the legislative intent of the Senate floor amendment (to limit application of the bill's expansion of protest rights), and the ability of county governments to implement zoning districts that include a small number of agricultural or forestry freeholders.

In summary, HB 358 enlarged the protest rights of agricultural and forestry freeholders by amending Mont. Code Ann. § 76-2-205(6). The plain language of the statute is ambiguous because it is capable of two interpretations. Legislative history supports the conclusion that the enlarged protest rights are available to freeholders taxed for agricultural or forest purposes, where their combined title ownership represents at least 50 percent of the total property ownership within the proposed zoning district.

II. Representation of Property Held in Joint and Common Ownership

Your second question frequently has been litigated in other jurisdictions: In the absence of a controlling statute, who may properly sign a protest and represent property held in joint and common ownership? The question arises during judicial scrutiny of zoning protest petitions and petitions concerning improvement districts that contain the signature of one spouse who holds property in some form of cotenancy. The question has also arisen in the context of condominium and partnership ownerships. Resolution of this question is relevant because the burden is upon government "to affirmatively prove that the requisite percentage of the protesting landowners fit within the class of landowners outlined in the statute." See 7 Patrick J. Rohan, Zoning and Land Use Controls § 50.04[4][b], at 140-41 (1995), and cases cited therein; 1 Anderson's American Law of Zoning § 4.34 (4th ed. 1996), and cases cited therein.

These questions have not been resolved by Montana decisional law and the courts of other jurisdictions are split in their conclusions. Several jurisdictions have reasoned that a joint tenant has the duty to protect the common title; protest provisions typically allow landowners to protect their property from poorly conceived zoning amendments or petitions for improvement. These courts have concluded that the policy of allowing one joint tenant to lodge a valid protest to a proposed change facilitates the duty to protect the common title; finding otherwise would allow a joint tenant to reduce the existing protection of zoning regulation to the commonly-held land by inaction on his or her part. See, e.g., Disco v. Board of Selectmen of Amherst, 347 A.2d 451 (N.H. 1975); Chapman v. County of Will, 304 N.E.2d 287 (Ill. 1973);

Bonner v. City of Imperial, 32 N.W.2d 267 (Neb. 1948) (where one joint tenant files objection and another does not a presumption arises that the objecting tenant did so as the representative of the joint tenancy; this presumption prevails unless the contrary is made to appear).

The other line of cases holds that all owners must sign a protest to allow property held jointly or in common to be included as part of a calculated protest area. The reasoning of these cases varies; several courts have recognized that one cotenant is not the "owner" of the property for purposes of these statutes. See Woldan v. City of Stamford, 164 A.2d 306 (Conn. C.P. 1960); Warren v. Borawski, 37 A.2d 364 (Conn. 1944); Marks v. Bettendorf's, Inc., 337 S.W.2d 585, 595 (Mo. Ct. App. 1960); Newton v. Borough of Emporium, 73 A. 984, 985 (Pa. 1909).

Mont. Code Ann. § 76-2-205(6) refers specifically to the "freeholders representing 50% of the titled property ownership." The general rule is that one freeholder holding a joint or common interest in property may not bind or represent the other joint or common owner without proof of consent or authority. 20 Am. Jur. 2d Cotenancy and Joint Ownership §§ 2, 103 (1995). In the absence of such proof, I conclude that the single signature of a husband or wife or other joint property owner on a protest filed under Mont. Code Ann. § 76-2-205(6) is insufficient to include commonly or jointly held property in the area of the calculated protest. Where both husband and wife, or several partners, are listed on the assessment rolls for a particular tract of land, all owners must be present on the protest before the land may be included within the area of the calculated protest. To find otherwise presumes that one protesting co-owner or partner represents the interests and better judgment of the silent co-owner or partner; such an undocumented presumption may be misleading and erroneous.

With regard to condominium ownership, courts agree that a condominium owner or purchaser has the right to have the proportionate share of the freehold interest in the land within the particular development included in the protest calculation. See Gentry v. City of Norwalk, 494 A.2d 1206 (Conn. 1985); Upper Keys Citizens Ass'n, Inc. v. Schloesser, 407 So. 2d 1051 (Fla. Dist. Ct. App. 1981). I find this reasoning persuasive. To require all condominium owners to file protests in order to allow inclusion of their undivided interest in the freehold estate would essentially disenfranchise these property owners from operation of Mont. Code Ann. § 76-2-205(6).

THEREFORE, IT IS MY OPINION:

1. Mont. Code Ann. § 76-2-205(6) enlarges "protest rights" for freeholders whose property is classified for real property tax purposes as agricultural or forest land, where their combined title ownership represents 50 percent of the total property ownership within the proposed or revised zoning district. These enlarged protest rights supplement the protest rights provided to 40 percent of freeholders within the district whose names appear on the last-completed assessment roll.

2. The phrase "freeholders representing 50 percent of the titled property ownership" within Mont. Code Ann. § 76-2-205(6) requires that all owners of property held in joint or common ownership join in the protest for the area of the parcel to be included in the calculation of the protest area. Condominium owners or purchasers are entitled to have their proportionate share of the freehold interest in the land area of the particular development included in the calculation of the protest area.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/gs/dm