

APPLICATION FOR
DISTRICT COURT JUDGESHIP
Eighteenth Judicial District

A. PERSONAL INFORMATION

1. Full Name: **Christopher B. Gray**

a. What name do you commonly go by? : **Chris**

2. Birthdate: [REDACTED] Are you a U.S. citizen? **Yes**

3. Home Address: [REDACTED] Phone: [REDACTED]

4. Office Address: **P.O. Box 1065, Bozeman, MT 59771**

Phone: **406-551-4511**

5. Length of residence in Montana: **21 years in Bozeman, Montana**

6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
1995-present	Bozeman	MT

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Douglas County High	Castle Rock, CO	June, 1982	HS Diploma
University of Montana	Missoula, MT	Sept., 82 - June, 84	
University of California Santa Cruz	Santa Cruz, CA	June 1986	BA Biology
Gonzaga University	Spokane, WA	May 1991	JD

8. List any scholarships, awards, honors and citations that you have received:

During law school I received an American Jurisprudence Award for Legal Research and Writing and the Gonzaga Public Interest Law Project Grant Award.

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

No.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
Washington State Bar Association	1991 (Voluntary Withdrawal)
State Bar of Montana	1996
United States District Court (E.D. WA)	1991
United States District Court (MT)	1996
United States Court of Appeals (Ninth Circuit)	1992

11. Indicate your present employment. (List professional partners or associates, if any).

Private practice, Sole Practitioner.

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Gray Law Office	Sole Practitioner	7/2016-present
Gallatin County Attorney	Chief Civil Deputy	7/2007-7/2016
Gray Law Office	Sole Practitioner	5/2004-7/2007
Barnard Companies	General Counsel	2/2003-5/2004
Gallatin County Attorney	Deputy County Attorney	7/1996-2/2003
Gray Law Office	Sole Practitioner	6/1993-7/1996
Dellwo, Roberts, & Scanlon Spokane, WA	Associate Attorney	9/1991-6/1993

13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

I have been employed continuously.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

Currently I represent individuals and political subdivisions in litigation and transactions regarding construction, real estate, probate and general business matters. In addition, I act as consulting general counsel regarding multi-party litigation.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

Misdemeanor and felony crimes in Justice and District Courts, including extensive trial work, personnel, contracting, bidding, grants, counsel for numerous boards and political subdivisions, general legal counsel to governments and private business.

16. If you specialize in any field of law, what is your specialty?

I consider myself as a general practitioner.

17. Do you regularly appear in court?

Not at this point in my practice. In the past my appearances in court were daily and varied from motion practice to jury trials.

What percentage of your appearance in the last five years was in:

Federal court	<u>0</u>	%
State or local courts of record	<u>100</u>	%
Administrative bodies	<u>0</u>	%
Other	<u>0</u>	%

18. During the last five years, what percentage of your practice has been trial practice? **0%**

19. How frequently have you appeared in court? **Less than 1 time per month on average.**

20. How frequently have you appeared at administrative hearings?
0 times per month on average.

21. What percentage of your practice involving litigation has been:
Over the extent of my legal career my litigation practice has been:

Civil	50 %
Criminal	50 %
Other	0 %

22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

None.

23. State the number of jury trials that you have tried to conclusion in the last ten years. 0

24. State the number of non-jury trials that you have tried in the last ten years. 0

I transitioned out of regular trial work in about 2000.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

Gallatin County, MT. v. State of Montana, 18th Jud. Dist., DV-12-707AX,
Hon. Mike Salvagni, 406-582-2140

Tommy Butler
2000 Fifth Avenue
Helena, Montana
59601-4814

Dennison Butler
P.O. Box 201601
Helena, Montana
59601-1601
406 444-1451

Gallatin County, Montana v. United States of America, Fed. Dist. Court, Montana, 13-43-BU-DLC.
Hon. Dana Christiansen, 406-829-7140

Victoria Francis
U.S. Attorney's Office
2601 2nd Avenue North, Suite 3200
Billings, Montana
59101
406 247-4633

Bridger Canyon Property Owner v. Gallatin County Commission, et.al., 18th Judicial District, DV-13- 310A.
Hon. Mike Salvagni, 406-582-2140

**Brian Gallik
777 E. Main Street, Suite
203
Bozeman, Montana
59771-0070
406 404-1728**

**Susan Swimley
1807 W. Dickerson, Suite B
Bozeman, Montana
59715
406 586-5544**

**Rebecca Pape
P.O. Box 1601
Bozeman, Montana
59771-1601
406 522-0014**

Gallatin City-County Board of Health v. Jerald E. Swenson, 18th Judicial District, DV-11-920C

Hon. John Brown, 406 449-2150

**Jason Delmue
602 Ferguson Ave., Suite 5
Bozeman, Montana
59718
406 600-2896**

Baxter Meadows Development, L.P. v. Gallatin County, 18th Judicial District, DV-08-272A

Hon. John Brown, 406 582-2150

**John Crist
Securities Bldg.
2708 1st Ave. N., Suite 300
Billings, MT 59101
406 255-0400**

Gallatin County, Montana v. Joseph J. Smith et. al., 18th Judicial District, DV-15-831B

Hon. Mike Salvagni, 406 582-2140

**Brian Gallik
777 E. Main Street, Suite 203
Bozeman, Montana
59771-0070
406 404-1728**

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

None in the last five years.

27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.
Montana Lawyer, *Need to Catch Up on Technology Ethical Obligations? Start Here, May 2015.* In 2012 I provided a presentation to the Montana District Court Judges pertaining to technology and the courts as a member of the State Bar Technology Committee. In addition, I have performed numerous interactive trainings for board of political subdivisions regarding the duties of the board and public meeting laws.

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

State Bar of Montana Board of Trustees: elected 2016

Gallatin County Bar Association, Board: early 2000's

State Bar Technology Committee: 2014-present

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

Holy Rosary Parish Council: 2012-present

Gallatin Empire Lions Club: 2014-present

Reach Incorporated, Board of Directors: 2002-2011

USA Hockey Official: 2005-2011

Montana Amateur Hockey Association: 2009

Gallatin Ice Foundation: 2006-2007

Bozeman Amateur Hockey Association: 2005-2006

**Montana High School Association
Football Official: 2000-2004**

30. Have you ever run for or held public office? If so, provide the details.

No.

31. Explain your philosophy of public involvement and practice of giving your time to community service.

I am responsible to take care of my community. This simple phrase is what every Montanan should live by. If one does not have responsibility as a public servant he or she can serve through civic groups, professional organizations or merely helping a neighbor. In my 21 years in Bozeman I have always stayed involved in all of these endeavors. I have worked in the public sector for a majority of my life here. In addition, I have volunteered for groups that I believe best utilize my time and talent for the betterment of Bozeman, Gallatin County and the State of Montana. A district court judge is at the height of service to the community. He or she is the face of the first and most important step in citizens' contact with the judicial branch of government which protects the rights of the individual and safeguards the community. Any candidate for appointment to the office of district court judge should be primarily motivated by service to community. I certainly am.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No.

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No.

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No.

36. Is there any circumstance or event in your personal or professional life that would, if brought to the attention of the Commission, Governor or Montana Supreme Court, affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

No, other than a Registered Agent for LLC's and corporations.

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

If appointed I would transition my law practice and Registered Agent duties to other local attorneys.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

None.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.

None.

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes.

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? Yes No

If not, please explain.

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?
 Yes No

If yes, please explain.

44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No

G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

I have never had the benefit of utilizing an associate or assistant other than acting as a “team-member” in writing briefs and legal pleadings. I have responsibility for all of the legal research and any document I write. Actually doing the research is the best way to be a proper advocate for your clients’ positions.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

Contracts, agreements, government resolutions (including bond resolutions), business formation documents, wills, memoranda of advice, and letters of advice.

My practice since 2000 is weighted to transactions and advice to government entities and business. Often that includes giving complex verbal legal advice in a public setting, somewhat similar to a court room, to elected officials in an efficient manner.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

48. What percentage of your practice for the last five years has involved research and legal writing?
90 %

49. Are you competent in the use of Westlaw and/or Lexis?

Yes

H. MISCELLANEOUS

50. Briefly describe your hobbies and other interests and activities.

Oddly enough, as a Montanan observing the current political climate, I do not hunt or fish.

However, I enjoy the outdoors in other ways such as hiking, mountain biking, and cross-country skiing. As you can see from my volunteer activities, much of my non-work life has been involved developing the sport of ice hockey in Montana, playing as an adult, coaching, and as my daughters' biggest fan as they play at the collegiate level. I have always been involved with youth sports and attempting to foster a climate of fun through hard work and discipline that being on a team can provide our young citizens. I am interested in technology and keep myself knowledgeable on how it can improve my profession, our personal lives and where it can be a burden.

51. Describe the jobs that you have held during your lifetime.

Starting in high school I have been a bus-boy, delivered newspapers, database manager, car wash attendant, retail salesperson, umpired baseball and was a biology research assistant.

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

Holy Rosary Parish

Story Mill Rural Fire District

Gallatin Ice Foundation

In 2007 I was awarded the Gallatin County Bar Association Pro-Bono Award for work in the community and participation in child abuse and neglect cases representing guardians-ad-litem.

53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

The attorneys and judges who I encounter every day influence my view and attitude of the judicial system. The organized, hardworking, zealous advocates who ethically and professionally represent clients, no matter adversary or not, create a positive image for the profession and a similar perception by me. The attorneys who lose sight that the law is still a profession and see it exclusively as a business proposition frustrate the legal system and me personally. Recently judges who sort through the two types of attorneys and get to an efficient and just resolution of an issue or case have influenced my view of my chosen profession for the better.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

As a participant and observer in the work of the 18th Judicial District over the last 21 years I have a sound understanding of what the job entails. I am not in any way attracted to the power or prestige that the job may offer some. What I do understand is the hard work and preparation necessary to be a good judge in this jurisdiction which serves the fastest growing population and is an integral economic engine driving the state. Colleagues who work with and against me on matters will vouch for my ability to see all sides of an issue before making up my mind on the best resolution or strategy. A factor that is sometimes overlooked is the ability to be and stay organized. I am able to set up systems and work flow in order to timely complete work at a quality level. I have a strong respect for the necessity for rules, procedures and process. The strength of the judicial system relies on the organization, attention to detail and facilitation of the same in the interest of justice. Over the years I have become a generalist in the practice of law. The breadth of my experience in doing so, from being a prosecutor, criminal defense attorney, advocate for abused and neglected children and the people of Gallatin County I have a unique insight in almost, if not all, areas of the law a Montana District Court judge encounters.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

The law allows flexibility in every case. Each matter has its own unique facts. The essential duty of any court of general jurisdiction is to apply the law and precedent to those facts and reach efficient decisions. A fair and complete evaluation of the case based on the law as it stands at the time is the role of a district court judge. If precedent needs to change, the role belongs to the Montana Supreme Court. It is incumbent upon a district court judge to utilize the law as it has been given to her or him and critically apply the facts of the case or matter. This task is encountered constantly by the court. Bail hearings, divorce proceedings, criminal sentencings, involuntary commitment hearings cannot be placed in a black box with the same result at the end. The judge must take the time and thoughtfully apply the circumstances in the record to obtain the just result.

56. In the space provided, state the reasons why you are seeking office as a district court judge.

As stated earlier, I have dedicated my efforts to better the community which I live. Through my years as a deputy county attorney, helping obtain multi-million dollar settlements for my clients which allowed the building of community infrastructure, working with community groups and my work with the local and state bar associations I can now take the next logical step and carry forward my deep-rooted calling to serve. To this point I have garnered the necessary experience and will have the prime years of my legal career to make the sacrifices necessary to be an excellent district court judge.

57. What items or events in your career have distinguished you or of which you are most proud?

Most importantly, although I am paid for legal services and advice I give to people and entities, when I receive a “thank you” for what I do I couldn’t be happier or honored. In the long run, win-lose-or draw, the appreciation of your efforts in this nature gives me the most satisfaction and pride.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

During the past twenty-one years of my professional and personal life in Montana I have raised three successful daughters with my wife of 28 years and wake up every day to go into the world, build respectful relationships and humbly protect the rights of my clients.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

Not to belabor the point but my application offers a well-rounded and diverse background in the law which is grounded in the willingness to serve my community. I look forward to continuing to serve the State of Montana and Gallatin County citizens in another new capacity and I thank you for your time and consideration.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 18th Judicial District, if tendered by the Governor, and further, my willingness to abide by Judicial Conduct, if appointed.

September 21, 2016
(Date)


(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by **5:00 p.m. on Wednesday, September 21, 2016.**

Mail the signed original to:

**Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005**

Send the electronic copy to: mtsupremecourt@mt.gov

1 Christopher B. Gray
2 GALLATIN COUNTY ATTORNEY'S OFFICE
3 1709 W. College St., Suite 200
4 Bozeman, Montana 59715
5 406-582-3745

6 ATTORNEY FOR
7 COUNTY DEFENDANTS

8 EIGHTEENTH JUDICIAL DISTRICT, GALLATIN COUNTY MONTANA

9 MURRAY RANCH, INC., WALTER S.)
10 BROWN, SUSAN and BILL FOREMAN,)
11 TIMOTHY and MELISSA GRIFFITHS,)
12 XLNT PROPERTIES, LLC, TABLE)
13 MOUNTAIN RANCH CO., DOUBLE)
14 F CORPORATION, MONICA LANE)
15 GUENTHER and TERRY ANDERSON,)
16 ESTATE OF FLORENCE LANE (a/k/a)
17 AA RANCH) WILLIAM W. OLIVER VI)
18 and HEIDI M. OLIVER, DON and GUY)
19 ZEIGER, EVERTSON FAMILY LTD.)
20 PARTNERSHIP, ELMOSE RANCH, LLC,)
21 and DEAN and DARLENE JOHNSTON,)

22 Plaintiffs,)

23 vs.)

24 CITY OF THREE FORKS, POGREBA)
25 FIELD JOINT AIRPORT AFFECTED)
26 AREA ADVISORY REGULATION BOARD,)
27 and GALLATIN COUNTY,)

28 Defendants.)

No. DV-10-478C

**MEMORANDUM IN
SUPPORT OF
COUNTY
DEFENDANTS'
MOTION TO DISMISS**

I. Introduction and Summary

On November 30, 2005 the Board of Gallatin County Commissioners passed its Resolution 2005-162 ("Resolution"). Exhibit A. The Resolution reestablished the advisory zoning board charged with the duty to assist in creating a zoning area and promulgating zoning

1 regulations for an airport owned by Gallatin County.¹ The Resolution was needed after
2 amendments were made to Montana law in the 2005 Airport Compatibility Act. 2005 Laws of
3 Montana, Sec. 3, Ch. 300, codified in Title 67, Chapter 7, Parts 1 through 3. The body created
4 by the Resolution was the Pogreba Field Joint Airport Affected Area Regulation Board
5 (“PFJAAARB”). In the Resolution the County Commissioners outlined the administration and
6 duties of the PFJAAARB which are exclusively advisory in nature. The Resolution specifically
7 reserved the adoption of an airport affected area and regulations to the County Commissioners.

8 Since the establishment of the PFJAAARB many meetings and hearings have taken place
9 to allow the review different iterations of the airport affected area zoning map and regulations
10 pertaining to the Pogreba Field Airport. Finally, on April 13, 2010 the PFJAAARB formally
11 made its recommendation to the County Commissioners for the airport affected area and
12 regulation. Exhibit B (true and correct copy of relevant excerpts of the text of the regulation
13 recommended by the PFJAAARB). That document specifically repeals and supersedes any
14 recommendations for previous versions and states that “the effective date that this regulation
15 shall be 30-days after the regulation has been adopted by resolutions of ... the County
16 Commissioners.” The Board of Gallatin County Commissioners has taken no action after the
17 PFJAAARB’s recommendation. Therefore, based on the Commissioners reservation in the
18 Resolution, no regulation or airport affected area is currently in place.

19 A few weeks later, on April 29, 2010 Plaintiff’s filed the instant action and subsequently
20 filed their First Amended Complaint on May 24, 2010. The First Amended Complaint in large
21 part seeks declaratory relief and judgment based on the County Defendants’ actions pertaining to
22 the regulation and zoning map.

23 The First Amended Complaint fails to state a cause of action upon which this Court can
24 grant relief. No justiciable case or controversy has been brought to the bar because no regulation
25 or area has been adopted by the Board of Gallatin County Commissioners. Specifically, Counts
26 One, Two, Three, Four and Six of the First Amended Complaint should be dismissed as they are
27 not ripe nor pled with any sufficiency to sustain a claim upon which relief can be granted.

28 _____
¹ The Three Forks Airport is classified under the National Plan of Integrated Airport Systems (NPIAS). See Exhibit C.

1 II. Argument

2 A. Standard to grant motion to dismiss.

3 In deciding a motion brought pursuant to Rule 12(b)(6), Mont.R.Civ.P., the Court
4 assumes all well pleaded factual allegations in the Complaint to be true. *Stokes v. State ex rel.*
5 *Mont. Dept. of Transp.*, 2005 MT 42, ¶ 6, 326 Mont. 138, 107 P.3d 494. The Court must
6 construe the complaint in the light most favorable to the plaintiffs and may dismiss the complaint
7 only if "plaintiff is not entitled to relief under any set of facts which could be proven in support
8 of the claim." *Williams v. Zortman Mining* (1996), 275 Mont. 510, 512, 914 P.2d 971. Even
9 liberally construing the pleadings, the Court will not create a cause of action in a complaint
10 where none exists. *Sikorski v. Johnson*, 2006 MT 228, ¶ 23, 333 Mont. 434, 143 P.3d 161. A
11 Court cannot create a cause of action either explicitly or implicitly. *Sikorski*, ¶23.

12 The law is evolving in determining how a complaint can survive a motion to dismiss. A
13 pleader may not use conclusory statements in the absence of a factual basis. *Cowan v. Cowan*,
14 2004 MT 97, 321 Mont. 13, 89 P.3d 6, *see also, McKinnon v. Western Sugar Cooperative Corp.*,
15 2010 MT 24, ¶40, 355 Mont. 120, 225 P.3d 1221 (J. Rice, dissenting). The *Cowan* line of
16 reasoning has been further articulated recently in pronouncements of the United States Supreme
17 Court. Legal conclusions "couched as factual allegations" do not have to be accepted as true by
18 a court. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937 (2009), *see also, McKinnon, supra*. A
19 complaint must allege something more than just a mere suspicion of a cause of action. *Bell*
20 *Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) *see also, McKinnon, supra*.

21 "In addition to the complaint, it is proper for the district court to take judicial notice of
22 matters of public record outside the pleadings and consider them for purposes of the motion to
23 dismiss." *Mir v. Little Company of Mary Hospital*, 844 F.2d 646, 649 (9th Cir. 1988); *see also*
24 *O'Fallon v. Farmers Ins. Exchange*, 260 Mont. 233, 237, 859 P.2d 1008, 1011 (1993).

25 B. The Counts of the First Amended Complaint based on the adoption of an airport
26 affected area or regulation are not ripe for adjudication and should be dismissed.

27 Any claim in this case based on the adoption of any regulation or zoning map is
28 premature and should be dismissed. The power of Montana courts is limited to justiciable
controversies. *Plan Helena v. Helena Regional Airport Authority*, 2010 MT 26, ¶6, 355 Mont
142, 226 P.3d 567. A justiciable controversy is one in which the "court's judgment will

1 effectively operate” and not one which is based on a “purely political ... conclusion.” *Plan*
2 *Helena*, ¶8. The concept of justiciability is analyzed via many sub-categories including that of
3 ripeness. *Plan Helena*, ¶8. In order for a case to be ripe it must be an “actual present
4 controversy.” *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶19, 333 Mont. 331, 142
5 P.3d 864. The case cannot be based on hypothetical legal issues or a controversy that is merely
6 speculative. *Havre Daily News, LLC*, ¶19.

7 This case, as plead by Plaintiff, presents questions that are not ripe for adjudication. The
8 body that is ultimately responsible for adopting a regulation and zoning map has yet to do so. It
9 is undisputable that the Board of Gallatin County Commissioners must take final action to
10 designate an airport affected area and to adopt regulations thereto pursuant to their own
11 authorizing resolution. The PFJAAARB’s action is subject to final approval of the map and
12 regulations by the County Commissioners. The Airport Compatibility Act allows such a
13 reservation by a government owner of an airport:

14 (1) Subject to the provisions of subsection (5), a governing body of a political
15 subdivision that owns or controls an NPIAS airport ... or a joint board established
16 pursuant to 67-7-202 shall, by ordinance or resolution, exercising its police power:

17 (a) designate an airport affected area within 1 year of April 19, 2005;

18 (b) concurrently adopt regulations for the airport affected area that comply with 67-
19 7-203...

20 (5) (a) Before a governing body designates an airport affected area and adopts or
21 amends regulations governing the airport affected area, the governing body shall hold at
22 least one public hearing. (b) The notice of the public hearing must be published as
23 provided in 7-1-2121 if the governing body is a county commission ...

24 §67-7-201, MCA (emphasis added).

25 Back in November of 2005 the Board of Gallatin County Commissioners had a choice to
26 make pursuant to §67-7-201(1), MCA as cited above. They could have given exclusive authority
27 to the PFJAAARB or elect to designate an airport affected area and adopt regulations themselves
28 as the governing body that owns the airport. They opted for the later by reserving the final
authority to designate and adopt in the Commission. The Resolution is consistent with the
Airport Compatibility Act where it states:

*Prior to the designation of an airport affected area and adoption of regulations, the
Board of Gallatin County Commissioners shall hold a public hearing to consider both.*

Exhibit A. Based on the Resolution adopted pursuant to the Airport Compatibility Act, the
Board of Gallatin County Commissioners has the exclusive authority to designate the airport

1 affected area and adopt regulations and the PFJAAARB actions since 2005 have only been
2 advisory in nature.

3 The Plaintiffs have not alleged County adoption or an affected area or a regulation in
4 their First Amended Complaint. Unfortunately, such action by the Commissioners is necessary
5 before the action as pled may proceed. The Commissioners are required to adopt the airport
6 affected area and regulations after public hearing and provide notice at least two times in the
7 County's official publication source. §§67-7-201, MCA and 7-1-2121, MCA. Most of the
8 Plaintiff's Counts in the First Amended complaint stand on the assumption that the County
9 Commissioners have held such a hearing and taken such action. They have not. No actual and
10 present controversy exists. *Havre Daily News, LLC*, ¶19.

11 The Plaintiff's cannot attack a regulation and zoning map that has not been adopted. The
12 *Havre Daily News* court states the primary rationale behind the ripeness requirement is to avoid
13 "premature adjudication" and preventing courts from "enabling themselves in abstract
14 disagreements." *Havre Daily News, LLC*, ¶19. Here, the Plaintiffs' tempt the Court to exercise
15 is jurisdiction but the Board of Gallatin County Commissioners need to designate the airport
16 affected area and adopt the regulations as a matter of law. Plaintiffs beg a question that cannot
17 be answered. Any discussion or evaluation of the zoning map and regulation is both premature
18 and abstract as both could be amended or not adopted at all by the Commissioners.

19 In *Montana-Dakota Utilities Co. v. City of Billings*, 2003 MT 332, ¶9, 318 Mont. 407, 80
20 P.3d 1247 the Montana Supreme Court set forth another test to determine if a justiciable
21 controversy exists. The court boiled the analysis down to three elements:

22 (1) the parties have existing and genuine, as distinguished from theoretical, rights or
23 interests; (2) the controversy must be one upon which the judgment of the court may
24 effectively operate, as distinguished from a debate or argument invoking a purely
25 political, administrative, philosophical or academic conclusion; and (3) there must be a
26 controversy the judicial determination of which will have the effect of a final judgment in
27 law or decree in equity upon the rights, status or legal relationships of one or more of the
28 real parties in interest, or lacking these qualities be of such overriding public moment as
to constitute the legal equivalent of all of them.

29 The court decided the justiciability issue based on the last prong of the test. It stated appellate
30 review of a franchise fee controversy in the City of Billings would have an effect on the rights of
31 local governments and utilities throughout the state even though the fee referendum was defeated

1 by Billings voters (the District Court had also ruled the franchise fee provisions illegal). The
2 basis of the court's decision was that in the absence of appellate review and an interpretation of §
3 7-1-112(1), MCA the issue would arise again because of undeveloped franchise law in Montana.

4 The last prong of the test and thus that portion of *Montana-Dakota Utilities* is not
5 applicable here. This matter stems from the Plaintiffs prematurely filing their broadly drafted
6 and conclusory complaint before any regulation or map was considered or adopted by the Board
7 of Gallatin County Commissioners. There are no issues of state wide import needing detailed
8 statutory analysis like in *Montana-Dakota Utilities*. The Airport Compatibility Act is clear that
9 before the final consideration of the map and regulation, the governing body must notify the
10 public and hold a hearing. The County Commissioners could very easily take the public's views
11 into consideration and either refrain from designating an airport affected area and adopting
12 regulations or make further modifications to the proposed map and regulations. Any count in the
13 First Amended Complaint which is based upon the passage of a regulation, adoption of an airport
14 affected area or the exercise of power thereunder is only speculative and advisory. Therefore, no
15 count of the First Amended Complaint which relies on the adoption of the regulation is ripe for
16 adjudication and should be dismissed.

17 C. The First Amended Complaint contains speculative and conclusory allegations that
18 should be dismissed.

19 A court has the obligation to take all of the "well-pleaded allegations" in the complaint as
20 true and admitted when it reviews a motion to dismiss under Rule 12(b)(6), M.R.Civ.P. *Cowan*,
21 ¶9. As pointed out briefly above, the First Amended Complaint has no allegation that any
22 airport affected area or regulation has ever been adopted pursuant to the Airport Compatibility
23 Act. That is because the Plaintiffs cannot make such an allegation because it never happened.
24 Any Count of the First Amended Complaint which in any way relies on the adoption of an area
25 or regulation should be dismissed.

26 Counts One, Two, Three, Four and Six of the First Amended Complaint are speculative
27 and are based on the assumption that Gallatin County has exercised some sort of legislative or
28 regulatory authority. Such speculation and assumption cannot be contained in a viable complaint
and is subject to dismissal under Rule 12(b)(6), M.R.Civ.P. *See, Cowan, supra.*

1 The United States Supreme Court's analysis in *Iqbal* is particularly helpful here. The
2 Court bases its decision on the obligation of the pleader to "state a claim to relief that is plausible
3 on its face." *Iqbal at 1949*. It reasons that Rule 8 of the Federal Rules of Civil Procedure
4 requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal at*
5 *1949*. The Plaintiffs in the instant action have plead their case in the manner that the high court
6 specifically prohibits, leaving out salient and mandatory acts of the County Defendants and
7 concocting fallacious causes of action.

8 For example, Count Two of the First Amended Complaint alleges "Unreasonable
9 Exercise of Government Powers." However, the complaint does not set forth with any
10 reasonable particularity what government powers have been unreasonably exercised. How could
11 any of the actions of the County Defendants be unreasonable when in fact no power to legislate
12 under the Airport Compatibility Act has been exercised by the County? This Count is exactly
13 what the *Iqbal* court was addressing when it stated, "threadbare recitals ... supported by mere
14 conclusory statement, do not suffice." *Iqbal at 1949*.

15 Moreover, how could have the County Defendants violated the substantive and
16 procedural due process rights of the Plaintiffs when no airport affected area or regulations have
17 been promulgated? A valid claim for violation of substantive due process can only be made to
18 review "the purpose of a government body in enacting a statute, ordinance or regulation." *Town*
19 *and Country Foods, Inc. v. City of Bozeman*, 2009 MT 72, ¶17, 349 Mont. 453, 203 P.3d 1283.
20 Notions of procedural due process require "fairness of procedure which includes notice." *In re*
21 *Best*, 2010 MT 59, ¶25, 355 Mont. 365, 229 P.3d 1201. The Airport Compatibility Act requires
22 procedural due process be afforded to all of the Plaintiffs through notice and public hearing
23 before any affected area or regulation is adopted. §§67-7-201, MCA and 7-1-2121, MCA. No
24 hearing has ever been set by the Commissioners and thus no area or regulation was ever created
25 by the County and therefore any claims of violation of due process rights are invalid.

26 A similar question can be asked for Count One. How can a court grant relief in the form
27 of declaratory judgment under the Airport Compatibility Act when the Board of County
28 Commissioners has not taken any action pursuant to the Act? Finally, Count Six alleges the
"regulatory actions" of the Defendants have resulted in a taking of Plaintiffs' property in
violation of the state and federal constitutions. Mysteriously Plaintiffs have created county
regulatory action that does not exist. The Court should dismiss the Counts in light of *Iqbal*

1 which instructs that “a reviewing court to draw on its judicial experience and common sense” to
2 take into consideration where the “well-pleaded facts do not permit [a] court to infer more than
3 the mere possibility of misconduct.” *Iqbal at 1950.*

4 III. Conclusion

5 Plaintiffs have sued the County Defendants prematurely for any and all claims based on
6 the determination of an airport affected area and adoption of regulations under the Airport
7 Compatibility Act. Plaintiffs have additionally pushed the concept of notice pleading beyond
8 reason through the method in which they have pled their case. To the extent Counts One, Two,
9 Three, Four and Six of the First Amended Complaint rely on any action of Gallatin County and
10 its advisory agents such as the PFJAAARB it fails to state a claim upon which relief can be
11 granted and should be dismissed.

12 DATED this 10th day of September, 2010.

13 GALLATIN COUNTY ATTORNEY’S OFFICE

14
15 _____
16 Christopher B. Gray
17 Chief Deputy, Civil Division

18 * * *

19 This is to certify that the above and foregoing was duly served upon the counsel of record at
20 his or her address, by mail, postage prepaid, on the 10th day of September, 2010 as follows:

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