No. DA 21-0032

IN THE

SUPREME COURT OF THE STATE OF MONTANA

EGAN SLOUGH COMMUNITY, YES! FOR FLATHEAD FARMS AND WATER, AND AMY WALLER,

Plaintiffs/Appellants,

VS.

FLATHEAD COUNTY BOARD OF COUNTY COMMISSIONERS, A BODY POLITIC OF FLATHEAD COUNTY, FLATHEAD COUNTY PLANNING AND ZONING DEPARTMENT, AND FLATHEAD CITY-COUNTY HEALTH DEPARTMENT,

Defendants/Appellees,

AND

MONTANA ARTESIAN WATER COMPANY,

Defendant/Appellee and Cross-Appellant.

ON APPEAL FROM THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY, HON. ROBERT B. ALLISON, PRESIDING
CASE NO. DV-15-2018-0000952-DK

MONTANA ARTESIAN WATER COMPANY'S COMBINED ANSWER AND CROSS-APPEAL BRIEF

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I. STATEMENT OF THE ISSUES

Appellants appeal the District Court's November 25, 2019 Order re Summary Judgment II ("2d Order")[1] granting summary judgment to Montana Artesian Water Company ("Montana Artesian") and the Flathead County Appellees ("County"). The issue on appeal is:

> Did the District Court properly conclude that the County did not abuse its discretion by finding Montana Artesian is a legal, nonconforming use that may continue to prepare for operation and operate consistent with its various permits?

Montana Artesian cross-appeals the District Court's June 6, 2019 Order on Summary Judgment ("1st Order"); its August 26, 2019 Order denying the Motion to Compel ("Discovery Order"); its December 15, 2020 Order on Summary Judgment ("3d Order"), and its Order Denying attorney Fees and Costs ("Fees Order"). The issues on cross-appeal are:

1. Did the District Court err in concluding that Initiative I-17 is not illegal?
2. Did the District Court err in denying discovery?
3. Did the District Court err in concluding that I-17 is not unconstitutional?
4. Did the District Court err in denying attorney fees and costs?

[1] The appealed and cross-appealed orders are provided in Montana Artesian's Rule 12(1)(i) Appendix.

II. STATEMENT OF THE CASE

After the County Commissioners ("Commissioners") considered and disapproved Appellants' zoning petition aimed at shuttering Montana Artesian, Appellants submitted their proposal as a ballot initiative – Initiative 17 ("I-17") – for a county-wide election. I-17 passed and the vote was certified on June 21, 2018. On September 7, 2018, Appellants filed a mandamus and declaratory judgment action seeking enforcement of I-17 against Montana Artesian and its immediate shutdown. Montana Artesian moved for summary judgment, pointing to several statutory violations that render I-17 unlawful. The District Court denied the motion. Montana Artesian cross-appeals.

Discovery included depositions of Appellants that revealed no evidence of harm caused by Montana Artesian and facts contrary to two reports relied upon by Appellants and the District Court.[2] The District Court agreed that I-17 was proposed to eliminate Montana Artesian, but nonetheless denied discovery into campaign materials and communications with third-parties and voters regarding I-17 and Montana Artesian. Montana Artesian cross-appeals.

[2] The reports are not credible or useful. They have never been produced as expert reports in accordance with evidentiary rules, their authors have not been qualified as experts, they are contrary to the expert analysis completed by the state agencies statutorily required to conduct environmental review (to whom deference is due, *see MEIC*,¶20), and they are inconsistent with Appellants' sworn testimony. App.3,Exs.A,B; Doc.131,pp.5-7,Exs.T-V.

The County filed a Notice of Enforcement Decision determining that Montana Artesian was a legal non-conforming use under the regulations imposed by I-17. As such, Montana Artesian could continue operation, subject to the Regulations. Appellants amended their complaint to challenge the County's decision. Appellants moved for summary judgment on their claims and the District Court denied the motion. Appellants appeal.

All parties filed for summary judgment on Montana Artesian's remaining cross and counterclaims concerning I-17's illegality as reverse spot zoning and its unconstitutionality. The District Court granted Appellants' and the County's motions and denied Montana Artesian's. Montana Artesian cross-appeals. Montana Artesian's motion for attorney fees and costs, limited to the mandamus claim, was denied. Montana Artesian cross-appeals.

III. STATEMENT OF FACTS

More than 25 years ago, Lew and Larel Weaver began investigating operation of a water bottling plant to make use of an artesian well on their private property. Realizing that "farming 300-and-some plus acres does not sustain the property for future generations of [their] family," the Weavers incorporated Montana Artesian in 2014 as "another alternative on the property to supplement

retirement incomes and make sure the property could be maintained by the family." App.1,77:12-23.[3]

The Weavers steadily developed Montana Artesian, obtaining permits and approvals between 2014 and 2018. 3dOrder,pp.2-5. The public water supply well was completed on February 18, 2015, and a water right application was filed for the well, establishing a priority date of June 24, 2015. 3dOrder,p.3; App.2,Ex.D; §85-2-401(2), MCA. The well was used thereafter by Montana Artesian. The building permit was received on May 5, 2016. 3dOrder,p.3; App.2,Ex.B. Montana Artesian, its permits and activities, were aimed at commercial development and the sale of bottled water. App.2,Ex.D,p.3; App.12,55:8-20.

The Weavers began encountering opposition and started receiving threats for operating the water plant on their private property. App.3. Local businesses to whom Montana Artesian sold water were boycotted and the Weavers' family business suffered. App.4. Appellants ultimately would spend nearly $100,000 on a public disinformation campaign aimed at putting the Weavers out of business. App.5. The campaign included a host of negatively-charged "not-in-my-backyard" rallies; relentless social media hounding; newspaper op-ed attacks; and signs and

[3] Rule 12(5) Appendix references include the tab number followed by the relevant pinpoint citation.

flyers posted throughout the Flathead Valley attacking Montana Artesian. App.3; App.4.

In January 2016, Montana Artesian received a preliminary determination proposing approval of its water right application. 3dOrder,p.3. Appellants quickly added litigation to their attack portfolio and filed objections to the water right application. After a lengthy contested case, DNRC issued a final order granting Montana Artesian water right number 76LJ-30102978 (the "Water Right"). App.10,Ex.B. Appellants appealed to district court. That litigation came before this Court; the district court was reversed, the case was remanded and remains pending at district court. *Flathead Lakers*, 2020 MT 132.

In 2016, at about the same time Appellants were appealing the DNRC's final order on the Water Right, Appellants submitted a citizen-initiated zoning petition to the Commissioners, seeking to add unzoned private property, including property where Montana Artesian is located, (the "Expansion") to the Egan Slough Zoning District ("ESZD"). App.6.[4]

The ESZD was created in 2002 as citizen-initiated zoning pursuant to Part 1 of the county zoning statutes, §§76-2-101-76-2-117, MCA ("Part 1 Zoning"). The

[4] The petition includes a legal description of land, the ballot language does not. App.6; App.11,Ex.1. Neither provides the acreage of the Expansion, which is nearly 550 acres. App.10,Ex.E.

purpose was to "restrict uses to certain agricultural activities and restrict lot size to an 80-acre minimum." App.7,Res.1594A. The ESZD's regulations ("Regulations") describe its boundaries and its intent "to control the scattered intrusion of uses not compatible with an agricultural environment, including but not limited to, residential development." App.7,§5. They prohibit the expansion of non-conforming uses, specifically by limiting building expansion to just 50% of the existing structure. App.7,§14.4.D.

The Commissioners denied the petition. App.10,Ex.D. Appellants challenged that decision in district court. The case was eventually remanded by the district court for additional consideration of public comments and compliance with the Growth Policy. *Egan Slough Community v. Flathead County Board of County Commissioners*, Cause No. DV-1502016-1059-RP (Montana Eleventh Judicial District Court) ("*Egan Slough I*"). App.8. Before reconsideration could be completed on remand, Appellants converted the petition to I-17, seeking to repeal the Commissioners' decision and enact a resolution adding the Expansion to the ESZD. I-17 passed. App.11,Ex.1; 3dOrder,pp.4-5.

Within the Expansion, there are no lots that meet the minimum 80-acre requirement and there are no commercial businesses other than Montana Artesian. App.9; App.10,¶7; Doc.174,p.11,¶17. Property in the Expansion is owned by fewer than 25 individuals. App.10,¶7. The Regulations restrict expansion of non-

conforming uses such that Montana Artesian is unable to expand as planned to use its entire Water Right. App.11; App.10,Ex.B,p.25; App.1,65:15-19.

IV. STANDARD OF REVIEW

For review of the District Court's 2d Order upholding the County Appellees' determination that Montana Artesian is a legal, nonconforming use that may continue to prepare for operation and operate consistent with its various permits, "this Court reviews whether the District Court erred" in reaching its conclusion. *Town & Country*, ¶27. "If the record contains sufficient evidence showing the city commission's decision . . . was reasonable and based in fact, [this Court] will not disturb the District Court's conclusion." *Id*.

For cross-appeal issues regarding the 1st and 3d Orders, which were decided on summary judgment, this Court's review is *de novo*, using the same standards used by the District Court: "first, whether issues of material fact exist and, if not, whether the moving party is entitled to judgment as a matter of law." *Cole*, ¶16. When a District Court denies attorney fees or denies discovery into "information relevant to the 'claim or defense of the party seeking discovery'" it abuses its discretion. *AgAmerica, FCB v. Robson*, 272 Mont. at 421.

V. SUMMARY OF THE ARGUMENT

Appellants fail to identify any error made by the District Court or show how the County was unreasonable in their application of the laws and rules. As is undisputed, "[i]n Montana, a district court reviews the zoning authority's decision for an abuse of discretion." 2dOrder,p.8 (*citing Town & Country*, ¶13); App.12, 5:25-6:2;57:24-58:1 (Appellants' counsel agreeing the standard of review is "abuse of discretion," which is a "high standard"). Having presented no reason to find an abuse of discretion, Appellants ask this Court, without legal basis, to adopt their reasoning. Appellants' arguments fail.

The 1st Order wrongly allows voters who are not physically or financially affected by I-17 to approve I-17; assumes facts not in the record; ignores statutory language; and allows voters to govern beyond their authority. The 1st Order should be overturned. A correct analysis, based on the facts, shows I-17 is illegal.

The District Court's 3d Order wrongly decided the constitutional flaws in I-17 because it presumed legality where none is indicated and the evidence proves otherwise. Based on an erroneous conclusion that Montana Artesian's Water Right is not a water right and not protectable, the 3d Order truncates the takings analysis. A proper takings analysis reveals that, pursuant to the Regulations, Montana Artesian cannot expand its operation as planned to use its full Water Right; therefore, a taking has occurred and just compensation is required.

The 3d Order also reached the wrong conclusion on the spot zoning test. I-17 singles out Montana Artesian for detrimental treatment. Its sole purpose was to stop Montana Artesian and to do that, it created a fictional zoning district – where every parcel is "non-conforming." I-17 is "spot zoning of the worst kind."

VI. ARGUMENT

A. Appeal Issue 1: The District Court Properly Concluded That the County Did Not Abuse Its Discretion by Finding Montana Artesian Is A Legal, Nonconforming Use That May Continue to Prepare for Operation and Operate Consistent with Its Various Permits.

Appellants disagree with the County's interpretations of its own regulations but raise no lack of "fact or foundation," nothing "incorrect or unlawful," and provide no reason for this Court to "substitute its judgment for that of any agency carrying out a statutory duty assigned to it." *MEIC*,¶¶20,22,23; *Town & Country*, ¶¶13,14. Appellants cannot overcome the deference due the County or prove the decision of the County or District Court wrong. *Id.*

The District Court properly dismissed Appellant's "truncated theory" in favor of the County's reasonable analysis of Montana Artesian's lawful operation pre-existing I-17, including:

- Incorporation, establishing the land use in 2014. App.2,Ex.A.
- Commercial permits, including a 2016 commercial building permit that conclusively establishes a nonconforming use. App.7,§14.3.

- Construction and use of commercial facilities, including an obviously large public water supply well with a water right priority date of June 24, 2015. App.2,Ex.D; App.3,¶5 (the well was drilled with a special, larger than normal drill rig); App.2,Ex.D,p.2 (Appellant Waller describing when she noticed the "really big well").

There is nothing unreasonable in the County's recognition of more than three-years' of business development and operation or of Montana Artesian's permits, which were not nullified upon passage of I-17. 2dOrder,pp.10,11.

Russell is inapposite because it involved a change in land use from agricultural to industrial that occurred nearly six years after a zoning district was created. *Russell*,¶¶6-7,9-10. Here, even pursuant to Appellant's preferred "*Russell* before and after test," Montana Artesian remains a legal commercial use of land that pre-existed I-17.

More on point is the *Kensmoe* case:

> It is undisputed that [Montana Artesian was] using the land as a site for a [commercial water bottling facility] prior to enactment of [I-17]. They had a vested right to use the land for this purpose, which nonconforming use was preserved by subsection [14 of the Regulations]. As use of the land for this purpose has been continuous ever since, this **vested right** has not been abandoned nor lapsed to date. Thus [Montana Artesian] has a present existing right to use the land in question as a site for a [commercial water bottling facility].

Kensmoe v. City of Missoula, 156 Mont. at 405 (emphasis added). There, the land use in question was for a "residential trailer." *Id*. Here, the land use in question is commercial use. Just as the homeowner in *Kensmoe* did not have her lawful

"residential trailer" use limited to the same number of bedrooms occupied prior to the regulation; here too, Montana Artesian's lawful commercial use is not limited to any specific production level that pre-existed I-17. Such an absurd result is not reasonable under zoning regulations, which aim not to regulate minute details of activity, but instead regulate "use" of the land. *Kensmoe*, at 403; App.7, §19 (defining Principal Use as the "primary or predominant use to which the property is or may be devoted"). Just like *Kensmoe*, Montana Aretesian has a "vested right" to commercial use. The Regulations cannot be applied to the Expansion (*Supra* VI.B,D), but if they do apply, Montana Artesian is a legal nonconforming use. The District Court properly upheld the County's decision.

Montana Artesian incorporates herein the County's arguments in defense of its decision and the 2d Order.

B. <u>Cross-Appeal Issue 1</u>: The District Court Erred in Concluding That I-17 Is Not Illegal.

Opening the gates to a tyranny of the majority, the District Court held that "if the people want land use planning in the face of elected officials congenitally opposed to it (*op. cit. Egan Slough I*), they may have it through the initiative." 1stOrder,p.7. That holding fails to ensure that *anyone* is following the law or upholding constitutional rights – bedrock requirements that the U.S. Supreme Court recognizes outweigh a popular vote:

> One's right to life, liberty, and property and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose it to be.

Lucas, 377 U.S. at 736.

> If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters . . . wish it so would not save the restriction.

City of Eastlake, 426 U.S. at 676.

In the face of clear discrepancies with the laws, the District Court was wrong to uphold I-17 based on a majority vote of people "congenitally opposed" to Montana Artesian.

1. The District Court Ignored Prevailing Case Law And Assumed Facts Not In The Record.

a. Sandholm Governs And Requires Reversal Of The 1st Order.

In *Sandholm*, this Court went out of its way to find that "[c]learly, the property owners who will be benefited by the improvement, as well as assessed for the costs of the project, should control whether the project succeeds or fails." *Sandholm,* 208 Mont. at 80. There, a Special Improvement District ("SID") was at issue, which would impact "property within the boundaries" and would be paid for only by those landowners within the boundaries. *Id*., at 78-80. Because that special benefit and the financial burden would have affected "approximately two-thirds of the real property within the City," but would be voted on by the entire

City electorate, the Court held that "[r]eferendum is not the proper tool" by which to regulate the SID. *Id*., at 79. Noting that "[t]he Montana Constitution places limits on the use of referendum," this Court held:

> The intent of [the Constitutional Right of Referendum] is to give all interested and qualified voters of a municipality a right to vote on a referendum. But here the special improvement district encompasses **less than all of the real property** in the City, and there are qualified voters in the City who could vote on the referendum but **who are not physically or financially affected** by the special improvement district.

Id., at 80 (emphasis added).

Likewise, I-17 impacts, by increased regulation and physical constraints, not all 25,158 county voters, but only less than 25 landowners within the Expansion. App.7,§14. I-17 also imposes financial obligations, not on the 25,158 voters, but only on the less than 25 landowners in the Expansion. *See* §76-2-102(3),MCA (imposing "a levy on the taxable value of all taxable property within the district" to pay "the expenses" of the planning and zoning commission). The Regulations make clear that their purpose "is to protect and preserve agricultural land in the Egan Slough area" and nowhere else. App.7,§5. Therefore, I-17 is just like the referendum at issue in *Sandholm*. It cannot stand because it both physically and financially impacts less than 25 landowners and only one corporation, but it was voted on by the entire county. *Sandholm*, at 81; *see also* 45 Mont. A.G. Op.5

(reaching the same conclusion on a county-wide resolution that would have financial impacts on just two-thirds of the county).

The *Sandholm* Court went further and held that when protestors failed to garner support through the appropriate statutory challenge provisions, they could not then "avail themselves of a city-wide referendum" as a means of challenge. *Sandholm,* at 81. Likewise, here, the protestors were unable to garner support of the Commissioners through the statutory provisions of Part 1 Zoning.[5] §76-2-101(1),MCA. Just like the failed protest that was instructive in *Sandholm*, here too, the failed zoning petition instructs that Appellants may not afterward "avail themselves of a [county-wide initiative] as a means of challenging the [denial] of a special [zoning] district affecting less than all of the area in the [County], and less than all of the property owners in the [County]." *Sandholm*, at 81.

b. The Greens Case Does Not Apply Here.

The *Greens* case presented "unique facts" making it distinguishable from the *Sandholm* case, as well as from this case. *Greens*, 271 Mont. at 404-06. The *Greens* Court found "historical and social significance" in the fate of Fort Missoula because the land had been "publicly accessible open space" and had been used "for

[5] It remains uncertain whether the Commissioners would have reached any different conclusion on remand from *Egan Slough I*. What is certain is that the Commissioners already unanimously rejected the petition finding that it "may not be required by public interest or convenience." App.10,Ex.D.

many years for various community-wide functions." *Greens*, at 404. The impact of the zoning was described as:

> The proposed construction of housing for several hundred people in what has historically been publicly accessible open space on the edge of the City affects prospective development residents, public services and schools, the city housing market, nearby residents and facilities, city traffic and development patterns.

Id. Thus, it was the change from *public* space to *private* homes and the resulting impact on *public* features (services, schools, housing market, traffic patterns) that created a "potential effect upon the City that distinguishes the [*Greens*] case from *Sandholm*" and supported the City-wide to vote. *Id*.

The land at issue here has never been public. There is no record of public use or evidence of "community-wide functions," let alone any record of public use for "many years" as was the case in *Greens*. Here, the land at issue has always been and will remain private land – the public has been and will remain excluded from the land. Here, there has been no "public use" let alone any "historical" or "social significance" for the entire County, thus *Greens* is inapposite.

Without citing facts, the District Court found that the entire county would be affected by Montana Artesian and that the zoning would "preserve the rural nature of the property." 1stOrder,p.7. But the ESZD and Regulations were designed specifically "to protect and preserve agricultural land" not "rural" land. App.7,Res.1594A,§5. Even equating "rural" with "agricultural," I-17 does not

protect agricultural land because none of the parcels in the Expansion meets the 80-acre minimum lot size for agricultural status. App.10,¶7. Therefore, **all the parcels** in the Expansion are non-conforming uses. App.7,§14. Likewise, the District Court's preference for "restrictions on the subdivision of property" is not realized by I-17 because most parcels already have homes on them and all of the parcels have been subdivided such that they are too small to comply with the ESZD and its Regulations. App.9.

Further, Montana Artesian is not incompatible with the "rural nature of the property" such that any protection is warranted. 1stOrder,p.7. In fact, Appellant Waller herself was not surprised when the Montana Artesian building went up, thinking it was just a "shed" for "equipment" (App.3,Ex.D,p.3), similar to agricultural buildings. The evidence before the Court proved that Montana Artesian would cause no significant impact to the human environment that would warrant special protection. App.3,Exs.A,B.[6]

Furthermore, protection of natural resources and principles of self-governance (1stOrder,p.7) are general public interests promoted by enforcement of

[6] The agency environmental reviews have since been held unlawful in yet a third piece of litigation (the MEPA Case) targeting Montana Artesian, but that holding did not find any environmental threat or harm. The decision did not take issue with the impact analysis of the Water Right and found no error in the impact analysis of the discharge permit at the authorized operational level. But that decision has no bearing here. At the time of the 1st Order, no errors had been found in the agencies' environmental reviews; the court should have deferred to them. *MEIC*,¶20.

existing laws and rules. There is nothing unique about those public interests that rises to the level of the "unique facts" supporting the *Greens* holding.

Also fatal to the District Court's *Greens* analysis is the assumption that I-17 is "Part 1 zoning [which] implicates county-wide interests." 1stOrder,p.8. The District Court refers to *Egan Slough I*, but I-17 was **not** enacted pursuant to Part 1 Zoning and does **not** follow the statutory process provided in Part 1 Zoning. In Part 1 Zoning, the Commissioners must analyze the "public interest or convenience" and then use their discretion to determine the appropriateness of creating the petitioned zoning district. §76-2-101(1),MCA. The Commissioners "must be guided by and give consideration" to the Growth Policy. §76-1-605(1),MCA.

In stark contrast, nothing in I-17 indicates that *anyone* analyzed the "public interest or convenience" or considered the Growth Policy. I-17 is **not** Part 1 Zoning; therefore, the "public interests" analysis required by its statutory scheme is not implicated in I-17.[7] The District Court was wrong to assume that I-17 could

[7] The District Court acknowledged that "the zoning in the instant case was created by ballot initiative, not by Pure Part 1 Zoning." Discovery Order,p.5. Without explanation, the District Court changed position and, in its 3d Order, concluded that "[t]he Initiative here was the county electorate legislating under Part 1 zoning law." 3dOrder,p.11. It cannot be both ways. Because the initiative process is not included in and does not follow Part 1 Zoning, I-17 is not Part 1 Zoning.

ride on the coat-tails of Part 1 Zoning, claiming it protects public interests while failing to follow the Part 1 Zoning statutes.

The tyranny of the majority cannot stand. There is no public use element here that supports reliance on *Greens*. Instead, *Sandholm* governs and prohibits a county-wide electorate of 25,158 voters from burdening less than 25 landowners with physical and financial requirements not borne by the entire electorate.

2. I-17 Violates the Statutes Governing the Right of Initiative.

a. I-17 Illegally Enacts A Resolution and Repeals A Different Resolution, Without Setting Out Fully the Resolution to Be Repealed.

The District Court did not give effect to the statutory language limiting the power of initiative such that "the electors of a local government may, by petition, request an election on whether to enact, repeal, **or** amend an ordinance." §7-5-132(1), MCA (emphasis added). I-17 both repeals Resolution 1594B and enacts Resolution 1594C. This situation would only be compliant with the statute if the word "and" is added and the singular "resolution" is changed to plural, allowing an election on whether to "enact *and* repeal … resolution*s*." The law dictates reversal. §1-2-101,MCA.

The statutes also require the initiative to "set out fully … the ordinance to be repealed." §7-5-132(4)(b),MCA. The District Court never explains why it is permissible for I-17 to leave out language informing the public that their elected

officials considered this same proposed resolution and found compelling reasons to deny it. *Compare* Resolution 1594B (App.10,Ex.D) *with* Resolution 1594C (App.6,Ex.A) (which leaves out Resolution 1594B's statement that "the Board of Commissioners determined that the Egan Slough Planning and Zoning District expansion may not be required by public interest or convenience.") Even worse, the ballot language presented to voters fails to include the entirety of either resolution. App.11,Ex.1. Allowing the initiative to go forward without such transparency misleads the public (reason enough to void I-17, *see Waltermire*, 227 Mont. at 90), does a disservice to the Commissioners' time and efforts, and violates §7-5-132(4)(b),MCA.

The District Court reasoned that, as between the two resolutions, "one arrived and the other became history." 1stOrder,p.9. But that does not negate the need to comply with the law. Relying on county review of the petition, the District Court ends "further inquiry into [Montana Artesian's] contention of noncompliance." 1stOrder,p.9. But the county only reviews the "form of the petition," not its legality – which is the court's job. §7-5-132(1),MCA. I-17 does not comply with the plain language of the statute.

b. I-17 Is Illegal Because It Legislates on Multiple Subjects.

A petition "must embrace only a single comprehensive subject." §7-5-132(4)(a),MCA. I-17 claims to expand a zoning district enacted pursuant to

Part 1 Zoning by applying that district's Regulations to a new area. But Part 1 Zoning is intended to follow a sequential and precise process that includes multiple steps before zoning regulations may be applied.

First, a new geographic zoning district is created. Then a development pattern, with "accompanying maps, plats, charts, and descriptive matter" is drafted and considered. §76-2-104(2),MCA. After adoption of the development district, zoning regulations are drafted and approved. Those distinct steps are vital to the existence of a zoning district. §76-2-107(1),MCA (commissions may "void a planning and zoning district" if a development pattern is not adopted by the planning and zoning commission; *see also Montana Wildlife Federation v. Sager*, 190 Mont. 247, 258-260 (sustaining Part 1 Zoning's validity based on the "definite outlines and limitations" and the "procedural matters . . . contained in the [Part 1 Zoning] act itself"). Because I-17 summarily skips those vital steps and presumes the outcome, it unlawfully legislates on multiple subjects.

c. I-17 Is Illegal Because It Legislates on Subjects Beyond the County Commission's Authority.

Only the planning and zoning commission ("PZ Commission"), which is distinct from the county commission, is empowered to draft and adopt the development pattern for a zoning district. §§76-2-101(1), 76-2-102,MCA (requiring the PZ Commission to include "two citizen members" who reside in the

zoning district); §76-2-104,MCA ("For purposes of furthering the health, safety, and general welfare of the people of the county, the [PZ Commission] hereby is **empowered** and it **shall be its duty** to make and adopt a development pattern for the physical and economic development of the planning and zoning district") (emphasis added); §§76-2-106; 76-2-107(1),MCA.

The important role of the PZ Commission is illustrated in *Helena Sand & Gravel*, where the Court noted that after the Commissioners created the boundaries of the zoning district, the matter proceeded to the PZ Commission "which is statutorily required to adopt a development pattern for the new district and authorized to recommend regulations to the Board to implement the development pattern." *Helena Sand & Gravel*, ¶10.

The PZ Commission held a public hearing on the proposed development pattern and regulations, during which important legal questions were raised. *Id*. Those questions were forwarded to the county attorneys' office, which requested "additional evidence." *Id.,*¶11. To satisfy that need, the PZ Commission "directed planning staff to create a report." *Id*.,¶10. The PZ Commission then held another public hearing to receive comments on the staff report. *Id*.,¶12. Only after considering all public comments, input from the County Attorney, and the staff report, did the PZ Commission adopt the development pattern and refer draft

regulations to the Commissioners for approval. *Id*. The Commissioners then held another public hearing and approved the regulations. *Id*.

It was the PZ Commission's statutorily-imposed process, followed by the Board's, that created "the record demonstrat[ing] that the County heard and considered public comments from both sides at all stages of its decision-making process" such that the zoning regulations were upheld. *Id*.,¶24. Specifically, the PZ Commission's staff report "provided information upon which the County reasonably relied," and supported the Court's decision to "defer to the legislative judgment of the zoning board." *Id*.,¶26.

Here, the PZ Commission was bypassed. I-17 never had the opportunity to go through a similar process prior to decision. Instead, I-17 when straight to the voters accompanied by an onslaught of anti-Montana Artesian propaganda in all media forums. There was no public hearing, no opportunity to consider important legal questions (including those raised in this litigation), no opportunity to identify and fill evidentiary gaps, and no development pattern or draft regulations. The entire process was skipped. The PZ Commission was impermissibly bypassed.

The county electorate has no authority to legislate in areas reserved by statute to PZ Commission. §7-5-131,MCA. By establishing, by default, the development pattern for the Expansion and by foisting Regulations upon the voters without the benefit of the PZ Commission's public process and recommendations,

I-17 allows the voters to legislate beyond their power in areas not governed by the county commission.

I-17 also goes beyond the power of the local government by ignoring important constitutional mandates. The Commissioners have no power to enact zoning ordinances and resolutions absent consideration of "the public interest or convenience" and the "promot[ion] of public health, safety, morals, and general welfare;" therefore, neither does the county electorate. §§76-2-101(1); 76-2-201(1) and (2),MCA.

The District Court recognized and relied upon this in *Egan Slough I*, adamantly requiring the County Commissioners to "weigh the public interest or convenience of the entire county." App.8,p.5. In a stark reversal, the District Court concludes there is no "requirement that the electorate be informed on the petition, much less the ballot, that the initiative serves the public interest and the reasons why it does so." 3dOrder,p.9. The contradiction is fatal – the county electorate may not do by initiative what their county commission cannot do by resolution. Without the foundational prerequisites for zoning (consideration of public interest, convenience, public health, safe, moral and general welfare), neither the commissions nor the electorate may zone an area. I-17 bears no marker of those foundational prerequisites. Order,p.9 ("The words 'public health, safety, and general welfare' are not found on the petition"). Therefore, I-17 legislates

beyond its authority and is illegal. "The electorate cannot circumvent their constitution by indirectly doing that which cannot be done directly." *Harper*, 213 Mont. at 429.

3. I-17 Is Illegal Because It Creates Illegal Reverse Spot Zoning.

A three-prong test, established in *Little*, determines whether spot zoning is illegal:

> (1) whether the requested use is significantly different from the prevailing use in the area;
> (2) whether the area in which the requested use is to apply is rather small; and
> (3) whether the requested change is more in the nature of special legislation.

Hartshorne, ¶16.

a. *The Expansion's Prevailing Use Differs Significantly from I-17's Requested Use*.

When determining the prevailing use, courts consider the legal status of the land at issue and the surrounding land. When the zoning change matches the pre-existing surrounding area, the change is not illegal. *North 93 Neighbors*, ¶67 (where the surrounding land was zoned commercial, changing the land at issue to a similar commercial zone was allowed); *Gutkoski*, 160 Mont. at 353 (where the surrounding land was already zoned motor business, changing the land at issue to the same motor business zone was allowed). When the zoning change does not match the preexisting, surrounding zone, the change is illegal. *Plains Grains*, ¶60

(when the surrounding land is zoned agricultural, changing the land at issue to an industrial zone is illegal); *Little*, 193 Mont. at 345, 347 (when the land surrounding on three sides is zoned residential, changing the land at issue to a commercial zone was "spot zoning of the worst kind").

The District Court did not consider the legal zoning status of the land surrounding the Expansion on three sides. The Expansion is a peninsula of previously "unzoned property" (App.6,Ex.A) "located in a sea of unzoned property." 3dOrder,p.21. "Unzoned" areas are areas where the County "has no regulatory reviewing authority over the types of uses." App.13,p.148; *see generally* Mont. Code Ann., Title 76, Chapters 1,2. Therefore, the land use is limited only by compliance with other non-zoning laws and regulations, none of which specifically prohibits water-bottling or other commercial uses.

In-line with that reasoning, and in part because "[c]ommercial land uses are unique for their ability to adopt and blend with other land uses" and "can have a positive impact," the Growth Policy "[p]rovide[s] ample commercial land designation to promote affordability." App.13,pp.9,21. When describing current commercial land use, the Growth Policy includes the "approximately 368,023 acres of private property in the County which are unzoned." App.13,p.22. The Growth Policy places commercial use within unzoned areas, including unzoned rural areas. Here, the land surrounding the Expansion was and remains unzoned

rural, which includes commercial use pursuant to the Growth Policy. Because I-17 prohibits commercial use, it is "spot zoning of the worst kind." *Little*, at 347.

None of the parcels in the Expansion meets the threshold requirement "restrict[ing] lot size to an 80-acre minimum" and most have homes on them, a known risk to agricultural areas. App.7,Res.1594A,§9; App.13,p.20 (describing agriculture's competition from "residential developers"). This contradiction satisfies the second prong of the spot zoning test. The District Court waives off this threshold requirement, stating "it should come as no surprise if the lots are smaller in the Expansion with homes on them." 3dOrder,p.23. Instead of recognizing the significant difference between the prevailing and requested uses, the District Court characterizes the Regulations as establishing a "worthy goal, not fully met, but still a reasonable goal." 3dOrder,p.23. The only way the "goal" could be met in the Expansion is if, *on every single parcel*, residences are removed and/or parcels rejoined into larger parcels. That is not worthy, reasonable or possible. I-17 creates a nullity – a zoning district completely made up of non-conforming uses, evidence that the first prong is met.

Appellants and the District Court wrongly relied on a map based on Department of Revenue tax data.[8] The map is included in the Growth Policy, but

[8] The District Court also cites two reports that are not credible. *Supra* n. 4.

with a specific admonition that it is "not to be used to legally classify a particular piece of real property." 3d Order, p.21;[9] App.13,p.158. The map is not useful in determining the legal uses of land because it uses a classification system not connected to the Growth Policy or zoning requirements.

However, the map is useful to confirm two important characteristics of the land. First, the map confirms that the Expansion and the land surrounding it are all *rural land*. Because the Growth Policy includes commercial use in unzoned rural areas, the map confirms that commercial use is an existing land use in the Expansion and the area surrounding it. App.13,pp.21-22.

Second, the map confirms the area includes and is surrounded by scattered residential land (yellow parcels are residential, including areas immediately south and east of the Expansion). Scattered residential use contradicts the requested use, which is to "control the scattered intrusion of uses not compatible with an agricultural environment, including, but not limited to, *residential* development."[10] App.7,§5; App.13,p.20 (noting that "agriculture in Flathead County is at risk," in part from "compet[ion] with *residential* developers" and mineral extraction, but

[9] The map was presented by Appellants in briefing. Doc.158, p.11 and is available as Map 2.3(B) at https://flathead.mt.gov/planning_zoning/documents/GrowthPolicyMaps.pdf.

[10] Any contention by Appellants that Montana Artesian is a use "not compatible with an agricultural environment" is blatantly false, as proven by the fact that Mr. and Mrs. Weaver maintain agricultural use of their property surrounding and adjoining Montana Artesian. App.A,76:25-77:9.

not from commercial use). These contradictions between the prevailing and requested uses satisfy the first prong.

b. The Expansion Is Small.

The size element to be considered for this prong is in terms of affected landowners, not necessarily acreage. *Helena Sand & Gravel*, ¶30 ("even though – at over 400 acres – its parcel of land is not physically small, HSG has shown that it was the only landowner to be adversely affected by the zone change."); *Plains Grains,* ¶66 (finding illegal spot zoning where the affected area was "relatively small – both in absolute size and in terms of landowners affected"); *Greater Yellowstone*, ¶28 (this Court "focuses on the number of owners who stand to benefit from [or be adversely affected by, in the case of reverse spot zoning] the zoning change"). The 3d Order does not analyze the second prong in terms of landowners at all, even though it is undisputed from county records that Montana Artesian is the only affected commercial enterprise and that the entire Expansion is owned by fewer than 25 people. 3dOrder,pp.21-22; App.10,¶7.

Should the Court perform the analysis based on geographic size, the proper comparison is the size of the impacted area to the size of the area *from which it was removed*, not to the area to which it will be added. *Greater Yellowstone*, ¶26 (comparing the size of the impacted parcel (323 acres) to the size of the area from which the parcel was *removed* (13,280 acres)); *Plains Grains* ¶63 (also comparing

the size of the impacted parcel to the size of the agriculturally zoned area from which it was *removed*). Contrarily, the 3d Order compares the size of the impacted area to the size of the zone to which it was *added*. 3dOrder,p.21. When analyzed correctly, the 550-acre Expansion, taken from the 368,023 unzoned acres open for commercial development in Flathead County, is not just sufficiently small, it is significantly small and easily satisfies the second prong. App.10,¶7; App.13,p.22.

c. *I-17 Resembles Special Legislation Because It Was Designed to Eliminate Montana Artesian and It Violates the Growth Policy*.

Preservation and protection of private property rights were "important in the creation of this Growth Policy" and a "major concern" raised by the public. App.13,pp.xxxiv,3. Hence, the Growth Policy sets out requirements that "shall control" over any other provision of the Growth Policy:

> Property rights are protected individual rights that guarantee a property owner's right to use his or her property as he or she wishes, limited only by a reasonable, lawful and compelling public need.
> ***
> [A]ny regulatory requirements that apply to the use of private property using this Growth Policy or its' amendments as its' lawful basis must meet the following requirements:
> 1. Must be carefully drafted to ensure the highest probability of meeting the constitutional tests of; a) ensuring substantive due process, b) providing procedural due process, c) ensuring equal protection, and d) avoid a "taking".
> ***
> 3. Must be reasonably related to and must actually further the public health, safety or general welfare.

App.13,p.xxxv.

When considering the third prong of the spot zoning analysis, "[c]ompliance with such growth plans is especially relevant." *Hartshorne*, ¶19. As noted below (*Supra* §VI.D.), I-17 violates every one of the "constitutional tests" and is not reasonably related to anything other than eliminating Montana Artesian. I-17 is not only unconstitutional, it also violates the Growth Policy.

Even absent consideration of the Growth Policy, I-17 meets the test of special legislation. The hallmark of special legislation in the context of reverse spot zoning is whether the regulation was designed to adversely affect "only one or a few landowners." *Little*, at 346. Nobody here disputes that I-17 was enacted to eliminate Montana Artesian. The assertion remained undisputed in summary judgment briefing and Appellants' counsel admitted that the "ultimate goal of [I-17] was to prevent [Montana Artesian] from establishing a plastic water bottling facility in the expanded district." App.12,55:8-20; App.3,Ex.D,p.2 (Plaintiff Waller describing I-17 as "reacting" to Montana Artesian's Water Right and advocating that "as people are trying to figure out whether or not to vote for [I-17] . . . just keep in mind it's the size of the [Water Right]"). The District Court acknowledges that the goal of I-17 was to eliminate Montana Artesian. Discovery Order,p.7:5-9; 3dOrder,p.22.

Despite those admissions and undisputed facts, the District Court wrongly found such intentions "irrelevant." 3dOrder,p.22. Instead, the District Court

"assumes" that the voters "heard and considered public comments from both sides." 3dOrder,p.22. But the only public opposition to I-17 that voters might have considered was one advertisement, placed by Mr. Lew Weaver, in one newspaper. Doc.123,Ex.10,p.2 of 16. In contrast, voters were exposed to anti-Montana Artesian rhetoric and propaganda for I-17 through numerous telephone calls, texts, social media advertisements, radio, television, and newspaper interviews and articles, as well as personal contact through rallies and distributed flyers – all presenting false information and all focused on eliminating Montana Artesian. App.3. Thus, the District Court's assumption that voters heard from both sides is contradicted by the undisputed facts.

Because voters were flooded with anti-Montana Artesian propaganda, the I-17 vote became not about zoning at all, but about the existence and future of Montana Artesian. Voter intent, the purposes of the initiative, and whether the initiative advances a legitimate governmental interest are all issues that may be proven with evidence of proponents' communications with the voters, the public and the media. *Perry v. Schwarzenegger*, 591 F.3d at 1153 (finding discovery requests seeking such information relevant); *Washington*, 458 U.S. 457. Here, although discovery into the proponents' communications was improperly denied, the communications available and presented by Affidavit confirm that the purpose of I-17 was to eliminate Montana Artesian. That singular purpose, adverse to just

one corporation and two individuals, is the hallmark of special legislation. The District Court acknowledges this hallmark (Discovery Order, p.7; 3dOrder,p.22) yet fails to call I-17 what it is - special legislation.

All three prongs of the spot zoning test are satisfied. I-17 is illegal reverse spot zoning.

C. Cross-Appeal Issue 2: The District Court Erred In Denying Discovery.

1. The District Court Acknowledged Fraud Was Relevant But Prevented Discovery Of Evidence Of Fraud.

The District Court denied the Motion to Compel because it would:

> not assume the motives and pre-election promotional activities of the petitioners, *short of fraud*, promoting the ballot issue are any less laudatory than the motive of the Board of County Commissioners in *Egan Slough I*, which abdicated its duty to address the petition.

Discovery Order, p.6. Setting aside the mistaken reference to *Egan Slough I*, which does not govern, and the mischaracterization of the Commissioners' actions,[11] the Court indicates that evidence of fraud would make the campaign activities relevant, yet wrongly prevented Montana Artesian from discovering such evidence.

[11] By the time of the remand, I-17 had already been placed on the ballot. Doc.54,¶¶15-17. The County did not "abdicate" its duty; Appellants attempted an end run around the Part 1 Zoning process.

Fraud includes "false representations" intended to be acted upon. *Franks*,¶17. The evidence proves that Appellants' communications about I-17 and Montana Artesian include and are linked temporally and thematically to false representations. App.3. But Montana Artesian was prevented from discovering whether those false representations constituted fraud linked to I-17 – the exact situation that the District Court acknowledged would indicate an improper motive. Failing to allow a party to discover the exact evidence that would prove its claims is an abuse of discretion requiring reversal. *AgAmerica, FCB v. Robson*, 272 Mont. at 421.

2. Evidence of Intent Is Relevant to Montana Artesian's Claims.

Evidence of improper voter intent would indicate that I-17 resembles special legislation and was decided arbitrarily, capriciously, based on the whim, will or caprice of the voters, rather than on "public health, safety, morals and general welfare of the community." Therefore, evidence of voter intent is relevant to Montana Artesian's spot zoning and constitutional claims. *Hartshorne*, ¶16; *Freeman*, 97 Mont. at 355; *Cutone*, 187 Mont. at 523.

Evidence of improper voter intent can be found in communications between the voters and the initiative proponents, in this case. *Perry v. Schwarzenegger*, 591 F.3d at 1153 (finding discovery requests seeking such information relevant); *Washington*, 458 U.S. 457. In *Washington*, which concerned desegregative busing,

the U.S. Supreme Court noted that proponents' campaign activities and statements "demonstrate[d] that the initiative was directed solely at" and "focused almost exclusively on" desegregative busing; therefore, it was "beyond reasonable dispute, then, that the initiative was enacted" to stop desegregative busing despite the initiative's textual neutrality. *Washington*, 458 U.S. at 463, 471.

Appellants were the rule proponents and communicated with the voters about Montana Artesian and I-17. Doc.54,¶¶1-3. The District Court recognized that Appellants' "ultimate goal of the initiative process was to prevent [Montana Artesian] from establishing a plastic water bottling facility in the expanded district," admonishing Appellants to admit the same "under oath" and "end the cat-and-mouse game." Discovery Order,p.7. But then, relying a misinterpretation of *Helena Sand & Gravel*, the District Court wrongly concludes that voter intent does not matter. Doc.114,p.5.

In *Helena Sand & Gravel*, even though the commissioners were faced with a "blatant[ly] gerrymander[ed]" petition, the Court found evidence that the commissioners considered all sides and "were careful to make their decision based on compliance with the Growth Policy and existing uses within the district." *Helena Sand & Gravel*,¶24. Those proper motives negated whatever improper motive the petitioners had. *Id*.

Here, all indications are that the voters were not exercising legislative judgment, but were making a yes/no decision on the existence of Montana Artesian, which is an improper motive. Unlike *Helena Sand & Gravel*, here, there was no later decision-maker to negate that improper motive. It was an abuse of discretion to deny the motion to compel.

D. Cross-Appeal Issue 3: The District Court Erred in Concluding That I-17 Is Not Unconstitutional.

The power of initiative is not exempt from constitutional limitations as the District Court presumed. 3dOrder,pp.9,16. "[C]onstitutional limitations on the initiative process are important because '[t]he sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.'" *MACo v. State*,¶12 (finding "Marsy's Law" unconstitutional despite its approval by 66% of Montana voters).

The same applies to zoning initiatives. Whether exercised by the government or by the people, the "power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." *Roberge*, 278 U.S. at 121. Neither the government, nor the voters may, "under the guise of the police power impose restrictions that are unnecessary and

unreasonable upon the use of private property or the pursuit of useful activities." *Id*.; *see also Mohave Plant., Inc.*, 23 Mich. App. at 237 (referendum vote may not legitimize an unlawful zoning classification which is arbitrary, unreasonable and discriminatory).

1. <u>I-17 Violates Procedural Due Process</u>.

Due process requires "fair procedures" which are determined by "considering any relevant precedents and then by assessing the several interests that are at stake." *In re A.F.-C.*,¶50; *Lassiter v. Dept. of Social Services of Durham Co., N.C.*, 452 U.S. at 25. Here, the proper analysis considers procedures specific to initiatives and zoning, and protects property rights.

Without full discovery of the campaign activities and voter communications, the District Court inexplicably "finds [Montana Artesian] was treated fairly by the process" and discounts arguments related "to the Growth Policy, to public health, to welfare, to guidelines, to boundaries, to standards, to direction, to constitutional protections…" as "either inaccurate, not necessary to meet due process concerns, or subsumed by the reference to the ESZD Regulations of which the public was put on constructive notice." 3dOrder,p.11-12.

a. The Proper Due Process Analysis Reveals Constitutional Violation.

Instead of finding "relevant precedents" from which to derive due process requirements, the District Court relies on "notice and opportunity to be heard." 3dOrder,p.11. Those requirements are neither appropriate for a public initiative nor protective of the property, including business rights "that are at stake" in zoning decisions. *Montanans*,¶30; *Freeman*, 97 Mont. at 356. For initiatives, "[d]ue process is satisfied if the voters are informed by or with the ballot of the subject of the amendment, are given a fair opportunity by publication to consider its full text, and are not deceived by the ballot's words." Misleading proposals should be voided. *Waltermire*, 227 Mont. at 90.

I-17 does not inform the voters that the ESZD was enacted to protect agriculture and "restrict lot size to an 80-acre minimum," that the Expansion contains scattered residential developments, or that none of the parcels meet the 80-acre minimum size. I-17 creates a zoning district contrary to its express purpose and completely made up of non-conforming uses, but the voters were not put on notice of those facts. I-17 also fails to inform voters that their own elected officials concluded that I-17 did not meet the Part 1 Zoning statutory requirements. App.10, Ex.D (Commissioners finding the petition "may *not* be required by public interest or convenience" (emphasis added)); §76-2-101,MCA.

Zoning decisions require consideration of "public health, safety, or the general welfare." *Williams*, ¶52; *Shannon*, 205 Mont. at 114-115 (zoning decisions violate constitutional protections when they are void of "any sensible fixed guidelines or standards, calculated to protect the interests of all the inhabitants"); *see also Freeman*, 97 Mont. at 355; *Euclid v. Ambler*, 272 U.S. at 387.

I-17 does not refer to the "public health, safety, and general welfare." 3dOrder,p.9; App.11,Ex.1. Mere mention of the Regulations does not cure that fatal flaw because the Regulations were written in 2002 and designed for the ESZD, not the Expansion. The fact that not a single parcel in the Expansion meets the minimum lot size prescribed for the ESZD confirms that the Regulations are not suited to protect the Expansion. Additionally, if the Regulations are legitimate police power applied to the ESZD pursuant to Part 1 Zoning, that cannot save I-17 because I-17 did not comply with Part 1 Zoning.

Worse still, the intention of I-17 was the demise of Montana Artesian. Discovery Order,p.7; App.12,55:8-20; App.3,¶¶7-8; *Washington*, 458 U.S. at 485-86. The I-17 campaign was little more than an attack on Montana Artesian and does not legitimize dumping the Expansion into the ESZD and applying the Regulations. I-17 is just like the zoning regulations found unconstitutional because they provided no "standards or guidelines for the application of the police power" (*Cary*, 1997 SD at 19; *Williams*, ¶52; *Shannon*, 205 Mont. at 114); subjected

property to being "held hostage by the will and whims of neighboring landowners" (*Cary*, at 22) and subjected landowners to the "will and caprice" of others. *Roberge*, 278 U.S. at 122; *see also Williams*, ¶2; *Shannon*, 205 Mont. at 114.

2. I-17 Is Unconstitutional Because It Violates the Right To Equal Protection.

"[A]ll persons [are] treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Montana Land Title*, 167 Mont. at 475; Mont. Const. Art. 2,§4; U.S. Const. Am. 14,§1. I-17 only affects one business – Montana Artesian. App.9; App.10,¶7. No other voter in Flathead County is impacted in the manner that Montana Artesian and its owners are because no other commercial enterprise in Flathead County that began on unzoned private property now finds itself within the Expansion. *Id*. Therefore, I-17 does not apply equally throughout Flathead County and violates equal protection rights.

When those who helped draft and create the regulation are "unable to identify any health and only minimal safety concerns" addressed by the regulation and fail to "determine what kind of general welfare interests the provision protected other than a possible preservation of property values," the regulation violates equal protection rights. *Yurczyk*, ¶29 (finding violation even "assuming that [claimants] were not treated differently than similarly situated groups").

The District Court assumes, without support, that I-17 is valid despite acknowledging that I-17 fails entirely to address "public health, safety, and general welfare." 3dOrder,p.9,19. Just as in *Shannon*, here the effect of Initiative 17-01 is to make Montana Artesian's vested rights[12] "dependent wholly on the will and whim" of other county residents "without the application of any sensible fixed guidelines or standards, calculated to protect the interests of all the inhabitants. The result is unequal treatment under the law." *Shannon*, 205 Mont. at 115.

a. The District Court's Determination That A Water Right Is Not Property Is Wrong.

The District Court's takings analysis was entirely premised upon its conclusion "there is no taking" because Montana Artesian "has no water right." 3d Order,p.19. That conclusion is plainly wrong and warrants reversal.

It has long been held in Montana that a water right is a property right. *See Connolly*, 102 Mont. 295; *City of Helena v. Cmty. of Rimini*, ¶51 (Rice, McKinnon, Baker, JJ., dissenting) (["A] water right is a property right."); §2-10-103(2),MCA (when assessing action that may implicate a takings, the state defines private property as "all real property, including but not limited to water rights.").

Under Montana law, a "water right" is defined as "the right to appropriate water pursuant to an existing right, *a permit*, a certificate of water right, a state

[12] Confirmed by application of *Kensmoe*, *Supra* §VI.A.

water reservation, or a compact." §85-2-102(32),MCA (emphasis added). In turn, a "permit" is defined as a "the permit to appropriate issued by the department [of natural resources and conservation] under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314." §85-2-102(20),MCA. Montana Artesian holds a "Permit to Appropriate Water," specifically Permit No. 76LJ 30102978 for commercial water bottling, issued by DNRC under §85-2-311,MCA. App.2,Exs.C,D. Thus, Montana Artesian has a "water right" as defined in Montana law.

The District Court wrongly characterizes the Water Right as "only the opportunity to attain such a right through 'annual use.'" 3dOrder,p.19. Annual use is *not* an "opportunity" to attain a water right; annual use *is* the water right. A water right is not a right to own the water, it is a right to *use* the water. Mont. Const. Art. IX,§3 (all waters are the property of the state but may be appropriated for beneficial *use*). That right to use water is a "distinct property right," which is "a species of property in and of itself" that is "considered property of the highest order." *Harrer*, 147 Mont. at 134. Montana Artesian's annual use of water in accordance with its permit is a water right subject to constitutional protections. The erroneous holding that Montana Artesian had "no water right" tainted analysis of the first and third *Penn Central* factors; causing reversible error.

b. I-17 Takes Montana Artesian's Water Right Without Compensation.

Montana Artesian intends to use the full 710.53 acre-feet per year of water by operating 20 machines that will fill 140,000 20-oz. bottles per hour. App.10,Ex.B,p.25. But the machines to bottle that much water would require additional building space, well beyond the current 11,410 square-foot building in which Montana Artesian now operates, and even beyond the limited expansion of an additional 5,705 square-feet, as constrained by the 50% building expansion limit in the Regulations. App.11,¶7.

Right now, Montana Artesian has a property right to use 710.53 acre-feet per year of water. Right now, if the Regulations apply to Montana Artesian, even as a non-conforming use, those Regulations prohibit Montana Artesian from using its full Water Right because they prohibit adequate building expansion. Even worse, if Montana Artesian cannot use its full Water Right, the unused portion expires in 2039 and Montana Artesian will have lost that portion of its Water Right. The Regulations, as applied to Montana Artesian through I-17, have no expiration date; therefore, Montana Artesian will be constrained *ad infinitum* such that it cannot, not even by 2039, reach its planned operation that enables full use of its Water Right.

By limiting building expansion, the Regulations cause economic injury to Montana Artesian *now* because Montana Artesian cannot build sufficient facilities to use its entire Water Right. The Regulations cause further economic injury to Montana Artesian because that portion of its Water Right that cannot be used, due to the zoning constraints, will expire and be lost in 2039. Justice and fairness require compensation to Montana Artesian for the limitation that the Regulations place on its Water Right now, as well as for the eventual expiration and loss of that portion of its Water Right that cannot be developed due to the Regulations' limitations.

c. The District Court Failed to Consider Montana Artesian's Compensable Commercial Property.

The District Court failed entirely to analyze anything other than the Water Right even though Montana Artesian claimed and argued that I-17 was a taking of its "vested right" to a commercial water bottling facility, its business rights, property lease, commercially developed well, commercial septic system, bottling equipment and vehicles. *Kensmoe*, 156 Mont. at 405; *Kafka*,¶66.

In *Knight*, the City widened 24th Street West, causing residences to lose their on-street parking rights and privileges and leading to increased traffic. *Knight*, 197 Mont. at 167. Property owners sued, claiming a taking. This Court agreed, finding that the reduction in value of the residential properties was the

result of a "servitude" imposed by the City, "a limitation upon the use and marketability of plaintiffs' properties" such it warranted just compensation. *Id*., at 173. The landowners were "consciously singled out or selected to bear a burden" which the government consciously elected not to impose on others, presenting "a classic" takings. *Id*., at 174.

Here too, I-17 limits the use and marketability of Montana Artesian's commercial property because I-17 imposes Regulations that prohibit Montana Artesian from enlarging its building for bottling equipment sufficient to develop its full Water Right. That limitation has already caused Montana Artesian to lose contracts, customers and projects and it has negatively affected its customer base for future sales. App.3; App.4. Montana Artesian's lost business and lost profits are the loss in "use and marketability" presented in *Knight*. Just as in *Knight*, where homes on one side of the street were singled out and treated differently than homes on the other side, here too, Montana Artesian has been singled out and treated differently from other commercial businesses in unzoned areas of Flathead County. And, just as in *Knight*, I-17 decreases the commercial use and value of Montana Artesian and its property, including its Water Right and more. The District Court should have but failed to complete a takings analysis to determine what just compensation was due Montana Artesian for its losses beyond the Water Right.

E. Cross-Appeal Issue 4: The District Court Erred in Denying Attorney Fees and Costs.

The District Court found the "Mandamus Claim focused on the County" not on Montana Artesian and "the Court did not rule on the claim." Fees Order,p.3. The record is contrary. Doc.1,p.13,Ex.B ("**any** commercial production is unlawful."); 2dOrder,p.9.

Not only is zoning a legislative, not ministerial, act such that mandamus fails as a matter of law, the nature of Appellants' declaratory judgment action provides the "plain, speedy, and adequate remedy" that defeats the claim. 2dOrder,p.9. An award of fees and costs is appropriate when a defendant is forced "through no fault on her part to incur attorney fees and costs" and the losing party had no "reasonable basis to believe his cause might prevail." *Foy*, 176 Mont. at 511-512; *Goodover*, 255 Mont. at 447. Appellants' declaratory judgment claim prevented mandamus, but Montana Artesian was forced to litigate the claim anyway. Equity demands that Montana Artesian be made whole.

VII. CONCLUSION

Appellants' campaign of opposition crossed legal and constitutional boundaries. Montana Artesian lawfully established commercial use well before I-17 and I-17 cannot withstand legal scrutiny. The 3d and 1st Orders should be reversed, as should the Discovery and Fees Orders.

Dated this 25th day of August, 2021.

/s/ Victoria A. Marquis
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CERTIFICATE OF COMPLIANCE

The undersigned, Victoria A. Marquis, certifies that the foregoing complies with the requirements of Rule 11(4) of the Montana Rules of Appellate Procedure. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 9,995 words or fewer, excluding caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Victoria A. Marquis

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CERTIFICATE OF SERVICE

I, Victoria A. Marquis, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee and Cross to the following on 08-25-2021:

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