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STATE OF MONTANA
Case Number: DA 21-0032

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 21-0032

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

Plaintiffs/Appellants,

v.

FLATHEAD COUNTY BOARD OF COUNTY COMMISSIONERS, a body politic of Flathead County, FLATHEAD COUNTY PLANNING AND ZONING DEPARTMENT, and FLATHAD CITY/COUNTY HEALTH DEPARTMENT,

Defendants/Appellees,

and

MONTANA ARTESIAN WATER COMPANY,

Defendant/Appellee and Cross-Appellant.

FLATHEAD COUNTY'S ANSWER BRIEF TO MONTANA ARTESIAN WATER COMPANY'S CROSS-APPEAL

On Appeal from the Eleventh Judicial District Court,
Flathead County, Montana
Cause No. DV-18-952C
Honorable Robert B. Allison

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TABLE OF CONTENTS

Page

I. STATEMENT OF ISSUES 1

A. Whether the District Court correctly concluded the Egan Slough Zoning District Regulations do not Constitute a Taking of Montana Artesian Water Company's Protected Property Interest 1

II. STATEMENT OF FACTS 1

III. STATEMENT OF STANDARD OF REVIEW 5

IV. SUMMARY OF ARGUMENT 6

V. ARGUMENT 7

A. The Jurisprudence of Takings Claims 8

B. The *Penn Central* Factors Show the Zoning Regulations Do Not Take MAWC's Property without Just Compensation 12

C. The District Court Did Not Err in Concluding the Zoning Regulations Do Not Result in a Taking of MAWC's Property 16

1. The District Court did not determine MAWC lacks a protected property interest; instead, it analyzed the *Penn Central* factors based on the assumption MAWC possessed such an interest 16

2. The Zoning Regulations do not take MAWC's Water Right 18

3. The District Court correctly considered MAWC's takings claims 20

VI. CONCLUSION 21

CERTIFICATE OF COMPLIANCE 23

TABLE OF AUTHORITIES

Page(s)

Cases

Elk Grove Dev. Co. v. Four Corners Cty. Water & Sewer Dist.,
2020 MT 195, 400 Mont. 515, 469 P.3d 153 10

Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 7, 12

Hadford v. Credit Bureau, Inc.,
1998 MT 179, 289 Mont. 529, 962 P.2d 1198 19-20

Helena Sand & Gravel, Inc. v. Lewis & Clark Cty. Planning & Zoning Comm'n,
2012 MT 272, 367 Mont. 130, 290 P.3d 691 ....6, 8-12, 16-17

In re the Existing Rights ex rel. All the Water,
253 Mont. 167, 832 P.2d 1210 (1992) 9-10

Kafka v. Mont. Dep't of Fish, Wildlife & Parks,
2008 MT 460, 348 Mont. 80, 201 P.3d 8 .... 7, 9, 12-13

Kensmoe v. City of Missoula,
156 Mont. 401, 480 P.2d 835 (1971) 12

Laurel Park Cmty., LLC v. City of Tumwater,
698 F.3d 1180 (9th Cir. 2012)..13

Pa. Coal Co. v. Mahon,
260 U.S. 393 (1922) 7-8

Penn Cent. Transp. Co. v. New York City,
438 U.S. 104 (1978) 11-13, 16-17

Russell v. Flathead Cty.,
2003 MT 8, 314 Mont. 26, 67 P.3d 182 12

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases

Thornton v. Flathead Cty.,
2009 MT 367, 353 Mont. 252, 220 P.3d 395 6

Statutes

Mont. Code Ann. § 85-2-312(2) 5

Rules

Mont. R. Civ. P. 56 6

I. STATEMENT OF ISSUES

A. Whether the District Court correctly concluded the Egan Slough Zoning District Regulations do not Constitute a Taking of Montana Artesian Water Company's Protected Property Interest.

II. STATEMENT OF FACTS

Defendants/Appellees Flathead County Board of County Commissioners, Flathead County Planning and Zoning Department, and Flathead City/County Health Department (collectively, "Flathead County") adopt the Statement of Facts set forth in their Answer Brief and provide the following additional facts relevant to the issues discussed herein.

In its Second Cause of Action presented in its crossclaims and counterclaims, Montana Artesian Water Company ("MAWC") alleged Initiative 17-01 amounts to a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. *See* Dist. Ct. Case Reg. ("CR") 26 at 17. Specifically, MAWC alleged "Montana Artesian's use of the land for a water bottling facility (with a water right of 710.53 acre-feet per year) prior to Initiative 17-01 is a vested right." CR 26 at 17. MAWC further alleged "Montana Artesian's water right of 710.53 acre-feet per year is a property right," and "[e]nactment and enforcement of the unlawful Initiative 17-01 in a manner that limits or precludes the operation of Montana Artesian in any way deprives

Montana Artesian of its water right, business rights, and other property rights without due process or just compensation." CR 26 at 17.

MAWC claims "Initiative 17-01 is therefore illegal and unconstitutional." MAWC did not allege the purported taking resulted in monetary damages and did not ask the District Court to award monetary damages in its Request for Relief. CR 26 at 17, 22. On motions for summary judgment, the District Court resolved this claim in the County's favor.

Flathead County did not take part in arguments pertaining to MAWC's other counterclaims and crossclaims, deferring to the District Court's judgment in that regard. Therefore, the facts and associated arguments presented herein are limited to those relevant to MAWC's allegations that the Egan Slough Zoning District Regulations ("Zoning Regulations") amount to a taking of its property without just compensation.

Flathead County issued its Flathead County Planning and Zoning Office's Enforcement Decision on January 3, 2019 (the "Enforcement Decision"). CR 44. The Enforcement Decision determined MAWC's facility is a legal, nonconforming use and states: "Montana Artesian may operate the water bottling facility to an extent consistent with the State of Montana Building Permit, Flathead City-County Health Department Septic Permit, DEQ Public Water Supply Permit, State of

Montana Permit to Appropriate Water, Wholesale Manufacturing License, and other associated permits as stated above." CR 44. The District Court upheld this determination.

The Enforcement Decision notes "[c]hanges to Montana Artesian's water bottling facility are permitted only in accordance with Section 14.4 of the Egan Slough Zoning District Regulations," and "[a]ny change to the water bottling facility which requires a material amendment to the permits set forth above may result in a reevaluation of Montana Artesian's nonconforming status." CR 44.

Section 14 permits various changes to the current use, including expansion of its facility by up to 50%. CR 44. While MAWC may be limited to a 50% increase in the size of its building, the Enforcement Decision and Zoning Regulations place no restrictions on the amount of water MAWC can utilize out of its existing water permit and existing facility or expanded facility.

MAWC obtained numerous permits during the process of constructing, opening, and operating its water bottling facility, including its "water right." MAWC's water right is actually a Permit to Appropriate Water (the "Permit"), allowing MAWC to use up to 710.53 acre-feet ("AF") of water annually as part of its operation. CR 19, Ex. C: State Mont. DNRC Final Order, Jan. 18, 2018;

CR 19, Ex. D: State Mont. DNRC Permit Appropriate Water, June 25,2018.[1] Not all of this water is slated for bottling. Actual annual water use is permitted to be 588.08 AF for bottled water, 120.57 AF for bottle rinsing, 1.12 AF for facilities wash water, and 0.76 AF for on-site employee use. CR 19, Ex. C at 25 ¶ 71. To maximize production at these volumes, MAWC represented it would be bottling water at full build-out 24 hours a day, 365 days per year. CR 19, Ex. C at 25 ¶ 72.

MAWC acknowledges it did not build a facility capable of meeting these numbers as its facility is currently configured. CR 19, Ex. C at 26 ¶ 77; CR 164, Aff. Lew Weaver ¶ 7, Aug. 13, 2020. Of particular note, MAWC's septic system is designed to accommodate one-quarter of the anticipated wastewater of what would be needed should MAWC obtain full build-out. CR 19, Ex. C at ¶¶ 77, 81. Expanding its current operations will require MAWC to obtain a new wastewater discharge permit and other new or revised permits. CR 19, Ex. C at ¶¶ 77, 81.

Indeed, MAWC never intended to utilize all 710.53 AF of water when it began operations. MAWC's plan has always been to gradually expand operations over the course of 20 years. CR 19, Ex. C at ¶ 77. It is expressly because of this

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[1] Flathead County is aware the validity of this Permit is the subject of various other litigation, the status of which appears to change frequently. For purposes of this appeal, the County treats the permit as remaining valid and in effect.

anticipated gradual expansion the Montana Department of Natural Resources and Conservation ("DNRC") granted MAWC until 2039 to file its notice of project completion. CR 19, Ex. C at ¶ 82; Mont. Code Ann. § 85-2-312(2).

MAWC has also acknowledged it may not be entitled to utilize all of the 710.53 AF of water in any given year. As noted in the Final Order for MAWC's application for a beneficial water use permit:

> "[t]he Applicant has the ability to regulate the volume of water diverted during times of water shortage so that the water rights of prior appropriators may be satisfied. During times of water shortage, they will initially reduce production by 50%. If the reduction in production is not enough, the Applicant has the ability to cease diversion altogether until senior water users are satisfied."

CR 19, Ex. C at ¶ 60. Thus, MAWC has long admitted it may never be able to fully utilize all of the water associated with its Permit. MAWC constructed a facility which, in its present configuration and with its present equipment, is not designed to utilize the entire water right. MAWC has always known its expansion plans require new or revised permits which are never guaranteed. CR 19, Ex. C at ¶¶ 77, 81.

III. STATEMENT OF STANDARD OF REVIEW

Flathead County incorporates herein its Statement of Standard of Review in its Answer Brief. Specific to takings claims, courts engage in a two-step inquiry to determine whether a government action amounts to a taking of private property:

first, whether the plaintiff has a constitutionally protected property interest; and second, whether the property owner has been deprived of that interest. *Helena Sand & Gravel, Inc. v. Lewis & Clark Cty. Planning & Zoning Comm'n*, 2012 MT 272, ¶ 35, 367 Mont. 130, 290 P.3d 691. Because the District Court resolved MAWC's Second Cause of Action (takings) via summary judgment, this Court reviews summary judgment rulings de novo, applying the same criteria as the District Court based on Montana Rule of Civil Procedure 56. *Thornton v. Flathead Cty.*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395.

IV. SUMMARY OF ARGUMENT

The District Court correctly concluded the Zoning Regulations do not give rise to a taking of MAWC's property without just compensation. MAWC's facility is a legal, nonconforming use which may continue to operate in accordance with its existing permits. It can even expand. While MAWC complains the Zoning District regulations prevent it from expanding enough, MAWC fails to satisfy its obligation to present substantial evidence in support of its claim for takings, and not mere denial, speculation, or conclusory statements.

Here, MAWC does not presently "own" a 710.53 AF water right. MAWC sought a Permit via application to Montana DNRC to use <u>up to</u> 710.53 AF annually and was granted at least 20 years to work toward that goal – or not work toward

that goal. There are many reasons, some of them voluntary, why MAWC may never use all of that water. We simply will not know how much water MAWC actually can or does use until December 31, 2039, at the earliest. Speculative harm is insufficient to support a takings claim and the District Court's Order should be affirmed.

V. ARGUMENT

The Takings Clause of the United States Constitution as embodied in the Fifth Amendment to the United States Constitution prohibits private property from being taken for public use without just compensation. *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 30, 348 Mont. 80, 201 P.3d 8. The enactment of zoning regulations in and of itself is not a taking. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

In its Second Cause of Action MAWC alleges the "[e]nactment and enforcement of the unlawful Initiative 17-01 in a manner that limits or precludes the operation of Montana Artesian ***in any way*** deprives Montana Artesian of its water right, business rights, and other property rights without due process or just

compensation." CR 26 at 17 (emphasis added). It is simply not a valid legal principle to claim "any" limitation on private property to be a depravation of property rights without due process or just compensation.

Specific to its appeal, MAWC alleges the District Court erred in its analysis of MAWC's takings claim in three ways: 1) the District Court's determination that a water right is not property is wrong; 2) Initiative-17 takes MAWC's water right without compensation; and 3) the District Court failed to consider MAWC's compensable commercial property. MAWC's Comb'd Answer & Cross-Appeal Br. at 40-43, Aug. 26, 2021 ("MAWC's Br."). This Argument Section discusses the applicable law regarding takings claims, applies the law to MAWC's takings claims, and then discusses MAWC's allegations of error.

A. The Jurisprudence of Takings Claims.

Our property rights jurisprudence is governed by the principle "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co.*, 260 U.S. at 415. Courts engage "in a two-step inquiry to determine whether government action amounts to a taking of private property—first, whether the plaintiff has a constitutionally protected property interest and second, whether the property owner has been deprived of that interest." *Helena Sand & Gravel*, ¶ 35 (citing *Seven Up Pete Venture v. State*,

2005 MT 146, ¶ 26, 327 Mont. 306, 114 P.3d 1009 (quoting *Kiely Constr., L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 23, 312 Mont. 52, 57 P.3d 836) ("[T]he guarantees of the Fifth and Fourteenth Amendments apply only when a constitutionally protected liberty interest or property interest is at stake.")).

Determining whether a constitutionally protected property right exists for purposes of a takings analysis requires an examination of the discretion given to a decisionmaker in approving a permit sought by the applicant, and not on the "probability of the decision's favorable outcome." *Helena Sand & Gravel*, ¶ 36 (citing *Kiely*, ¶ 29). This analysis shifts somewhat once a landowner has acquired certain "property," but the analysis still looks to the nature of the underlying interest held by the landowner. *See Kafka*, ¶ 32 (analyzing whether a license already held by a landowner could be the subject of a cognizable property interest for an alleged taking where subsequently enacted regulations impacted the utility of the license).

This Court has held that water rights, like other property rights, are protected against unreasonable state action, but have not been granted indefeasible status. *In re the Existing Rights ex rel. All the Water*, 253 Mont. 167, 174, 832 P.2d 1210, 1214 (1992). For example, enacting regulations requiring water right holders to take affirmative actions to maintain their water rights, lest they be abandoned, is a

constitutionally sound regulatory action. *In re the Existing Rights ex rel. All the Water*, 832 P.2d. at 174. Further, a water right "is not absolute because it is always subject to DNRC approval and oversight[.]" *Elk Grove Dev. Co. v. Four Corners Cty. Water & Sewer Dist.*, 2020 MT 195, ¶ 17, 400 Mont. 515, 469 P.3d 153 (internal quotations and citation omitted). This discretion afforded to the DNRC raises significant questions whether a MAWC's Permit is a sufficient property right for purposes of a takings claim. Nevertheless, because MAWC had obtained the permit, Flathead County's briefing in the District Court presumed it serves as a protected property interest, without deciding the issue.

This Court also acknowledges "when faced with a claim that regulations have gone 'too far,' courts should consider 'whether the interference with [a party's] property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].''" *Helena Sand & Gravel*, ¶ 42 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978)). In *Helena Sand & Gravel*, the Supreme Court summarized the means of analysis, and the associated limits of its reach as follows:

> '[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.' *Palazzolo v. Rhode*

> *Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 2457, 150 L. Ed. 2d 592 (2001) (citing *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659); see also *Laurel Park Community, L.L.C. v. City of Tumwater*, 698 F.3d 1180, 2012 U.S. App. LEXIS 22330 (9th Cir. Oct. 29, 2012) (No. 11-35466). Zoning regulations rarely amount to a taking of property on the ground that they affect some property owners more severely than others, 'because a landowner is not entitled to the highest and best use of [its] property.' *Animas Valley Sand and Gravel, Inc. v. Bd. of Co. Comm'rs of the Co. of La Plata*, 38 P.3d 59, 65 (Colo. 2001) (citing *Penn Central*, 438 U.S. at 125, 98 S. Ct. at 2659-60) (other citations omitted); *Laurel Park Community*, 698 F.3d at 1188 ('As a general rule, zoning laws do not constitute a taking, even though they affect real property interests . . .') (citing *Penn Central*, 438 U.S. at 125, 98 S. Ct. at 2659-60). *Palazzolo* makes clear that *Penn Central* requires an 'ad hoc,' fact-specific inquiry where the property retains economic value but, 'when its diminished economic value is considered in connection with other factors, the property effectively has been taken from its owner.' *Animas Valley Sand and Gravel*, 38 P.3d at 66. This ad hoc inquiry provides a safety valve 'to protect the landowner in the truly unusual case.' *Animus Valley Sand and Gravel*, 38 P.3d at 66.

Helena Sand & Gravel, ¶ 43.

To evaluate an "ad hoc, factual inquiry," based on the circumstances of each case, we examine the three *Penn Central* factors:

> (1) the character of the governmental action; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation on the claimant.

Helena Sand & Gravel, ¶ 47 (citing *Kafka*, ¶ 69); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). These factors are used to determine whether a particular regulatory action is functionally equivalent to a classic taking "in

which government directly appropriates private property or ousts the owner from [its] domain." *Helena Sand & Gravel*, ¶ 47 (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005)).

B. The *Penn Central* Factors Show the Zoning Regulations Do Not Take MAWC's Property without Just Compensation.

Analyzing each of the *Penn Central* factors demonstrates the Zoning Regulations do not result in a taking of MAWC's property without just compensation. For the first *Penn Central* factor, courts have long held zoning regulations and associated non-conforming use provisions are valid exercises of governmental police power. *See, e.g., Euclid*, 272 U.S. at 365, 397; *Kensmoe v. City of Missoula*, 156 Mont. 401, 480 P.2d 835 (1971); *Russell v. Flathead Cty.*, 2003 MT 8, 314 Mont. 26, 67 P.3d 182. When the exercise of police power is valid such "actions may injure investment-backed expectations with respect to commerce in the goods at issue without having to pay compensation." *Kafka*, ¶ 75 (internal quotations omitted).

The second *Penn Central* factor examines a regulation's impact on a landowners' investment backed expectations. However, "[z]oning regulations rarely amount to a taking of property on the ground that they affect some property owners more severely than others, 'because a landowner is not entitled to the highest and best use of [its] property.'" *Helena Sand & Gravel*, ¶ 43 (quoting

Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs of the Cty. of La Plata, 38 P.3d 59, 65 (Colo. 2001) (other citations omitted)). Just having an effect on real property interests generally does not constitute a taking when enacting zoning regulations. *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1188 (9th Cir. 2012) (citing *Penn Cent.*, 438 U.S. at 125). Here, MAWC is entitled to continue to operate the very facility it built to carry out its investment-backed expectations and can even expand operations.

The third *Penn Central* factor examines the economic impact of the regulation on the claimant. *Kafka*, ¶ 69. MAWC argued in the district court that the economic impact of the Zoning Regulations is significant because MAWC risks losing its entire water right if it fails to operate during any 180-day period or fails to use all of its 710.53 AF of water annually. This argument misconstrued the nature of MAWC's "water right."

In its cross-claims and district court briefing, MAWC makes passing references to several "compensable property interests" including its "water right, business right, property lease interest, and ownership of its personal property[.]" CR 176 at 24. However, all of MAWC's argument are inseparable from its central tenant, that MAWC will suffer a complete loss of its water right because it cannot expand its building enough to use all of the water. MAWC incorrectly argues its

failure to use all the 710.53 AF annual will void its entire water right. CR 182 at 22.

MAWC has been given 20 years by the Montana DNRC to file a "project completion notice" or request an extension of time to do so by December 31, 2039. CR 19, Ex. C at ¶ 82, Ex. D at 1. But it is entirely incorrect for MAWC to argue its failure or inability to demonstrate it has utilized every drop of its 710.53 AF would render its <u>entire</u> water right void. Only MAWC's failure to file the required notice or request an extension will void MAWC's water right.

MAWC alleges the Zoning Regulations do not allow sufficient capacity to utilize all 710.53 AF as the facility is currently configured, but MAWC did not obtain septic permits or wastewater discharge permits sufficient to support the use of that amount of water. CR 19, Ex. C at ¶¶ 77, 81. In other words, while MAWC may indeed intend to utilize all 710.52 AF of water at some point, its intent is riddled with speculation. MAWC might change its business plans. Commercial demand for its product may never get that high. The water right adjudication process may reduce the amount to account for other senior water rights. Changes in technology may reduce the amount of water MAWC needs for rinsing bottles (currently anticipated to be 120.57 AF annually). Water shortages may prevent MAWC from using any of its water right in any given year. *See* CR 19, Ex. C at

¶ 60. Montana DNRC's Final Order even acknowledges the 710.53 AF is a maximum number, not a requirement: "Pursuant to Application for Beneficial Water Use Permit No. 76LJ 30102978 by Montana Artesian Water Company, MAWC proposes to pump 1 CFS (450 GPM) up to 710.53 Acre-Feet (AF) annually from a well for commercial and geothermal use in a water bottling plant." *See* CR 19, Ex. C at ¶ 1 (emphasis added).

Contrary to MAWC's assertion, the DNRC's Final Order granting MAWC's Permit proves MAWC's Permit will not be entirely void if MAWC fails to use all of the 710.53 AF: "If MAWC is unable to obtain additional discharge permits, or the project does not develop to full buildout within 20 years, the permit will only be perfected for that amount of water actually put to beneficial use, or MAWC will be required to demonstrate it has proceeded with reasonable diligence in development of the project to obtain additional time to complete the project. § 85-2-312, MCA." CR 19, Ex. C at ¶ 82 (emphasis added).

Thus, whether MAWC uses less that the full amount or requests an extension of time, the Permit will not be voided. The fundamental premise of MAWC's takings claim is simply wrong. There is nothing inherent in the Zoning Regulations which directly limit, void, or take MAWC's property. This is not one

of the truly unusual cases which amounts to the functional equivalent of a condemnation of MAWC's property interests. *Helena Sand & Gravel*, ¶ 43.

C. The District Court Did Not Err in Concluding the Zoning Regulations Do Not Result in a Taking of MAWC's Property.

In its cross-appeal, MAWC alleges the District Court made three errors in its takings analysis. For the following reasons, the District Court's decision should be affirmed.

1. The District Court did not determine MAWC lacks a protected property interest; instead, it analyzed the *Penn Central* factors based on the assumption MAWC possessed such an interest.

MAWC first alleges the District Court erred in concluding a water right is "not property" and argues the court's takings analysis was entirely premised upon this erroneous conclusion. MAWC Br. at 40. MAWC's argument is based solely on the final sentence of the District Court's discussion of the takings claim, wherein the Court states "[b]asically, there is no taking because MAWC has no water right, only the opportunity to attain such a right through 'annual use.'" CR 187 at 19. In the context of the entire discussion, the Court's statement is accurate.

For takings claims, courts engage in a two-step inquiry to determine whether a government action amounts to a taking of private property: first, whether the plaintiff has a constitutionally protected property interest; and second, whether the

property owner has been deprived of that interest. *Helena Sand & Gravel*, ¶ 35. If there is no protected property interest, there is no need to determine whether the governmental action has deprived the owner of such an interest.

MAWC complains the District Court determined its water right was "not property," but this is not the correct inquiry. For the first prong of the inquiry, the court must determine whether the plaintiff has a constitutionally protected property interest in the thing which the plaintiff complains it is being deprived of. If it does, the court proceeds to the second prong. Here, the District Court did not explicitly analyze whether MAWC's "water right" is a constitutionally protected property interest. Instead, the District Court skipped straight to the analysis of the *Penn Central* factors on the assumption the "thing" MAWC possesses at least arguably presents a constitutionally protected property interest. There is no reason to analyze the *Penn Central* factors if no such interest exists.

Indeed, MAWC does not possess a "water right." MAWC's Permit is provisional in nature because MAWC must take steps to complete it. MAWC has been given 20 years to do so and, at the end of the 20-year period, MAWC can file a notice of completion for the amount of water it is actually using at that time or request an extension of time. We simply will not know what MAWC has that might be "taken" until it completes the process. MAWC has not constructed a

facility or obtained all the permits to even allow it to attempt to utilize all 710.52 AF. MAWC has already acknowledged the future adjudication process or calls from senior water right holders may even limit its ability to do so.

Thus, the District Court is correct in noting, in a colloquial fashion, that MAWC does not have a water right, but an opportunity to attain such a right through annual use of the water. There is nothing inherent in the Zoning Regulations which automatically prohibits MAWC from exercising such an opportunity. As the District Court noted, speculative allegations of future harm do not lead to a taking without compensation. CR 187 at 18.

2. The Zoning Regulations do not take MAWC's Water Right.

MAWC next alleges the District Court erred by not concluding the Zoning Regulations result in a taking of MAWC's water right without just compensation. MAWC Br. at 42. MAWC argues the Zoning Regulations prohibit it from expanding its building enough to conduct operations of sufficient size to utilize all 710.53 AF of water. MAWC Br. at 42. MAWC alleges justice and fairness require compensation for the limitations which exist now and "for the eventual expiration and loss of that portion of its Water Right tant cannot be developed sue to the Regulations' limitations." MAWC Br. at 43.

As an initial note, mentioned above, MAWC does not allege monetary damages in its Second Cause of Action, nor does it ask the District Court to award monetary damages as part of its prayer for relief. CR 176 at 24. MAWC merely alleges the negative effect Initiative-17 has on its property results in the Initiative being illegal and unconstitutional. CR 53.

Next, the District Court resolved this issue on motions for summary judgment. Pursuant to the standard of review for motions for summary judgment, all parties must present material and substantial evidence. "The evidence must be substantial, 'not mere denial, speculation, or conclusory statements.'" *Hadford v. Credit Bureau, Inc.*, 1998 MT 179, ¶ 14, 289 Mont. 529, 962 P.2d 1198 (quoting *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)).

MAWC's evidence for its takings claim comes from a single statement in an affidavit from MAWC's owner, Lew Weaver, in which Mr. Weaver opines that "[u]sing the current equipment configurations, peak operation of Montana Artesian would require additional building space, much more than just an additional 5,705 square-feet." CR 164 at ¶ 7. Yet, this conclusory statement begs many questions. What about other equipment configurations? What about different technology? Will this statement still be true 20 years from now when the project completion notice is actually due?

MAWC has an obligation to present substantial evidence in support of its claim, and not mere denial, speculation, or conclusory statements. *Hadford*, ¶ 14. As explained, MAWC does not have a water right for 710.53 AF of water. It has an opportunity to use up to that amount. To suggest the Zoning Regulations automatically render it impossible for MAWC to ever fully utilize its Permit is a matter of pure speculation. In the absence of substantial evidence to the contrary, the District Court correctly concluded the Zoning Regulations do not result in a taking of MAWC's Permit.

3. The District Court correctly considered MAWC's takings claims.

Finally, MAWC argues the District Court failed to analyze its takings claims pertaining to its "'vested right' to a commercial water bottling facility, its business rights, property lease, commercially developed well, commercial septic system, bottling equipment and vehicles." MAWC Br. at 43. MAWC claims these items are distinct from its "water right" claim, yet proceeds to point out these vested rights are impacted because the Zoning Regulations prohibit MAWC from "enlarging its building for bottling equipment sufficient to develop its full Water Right." MAWC Br. at 44. MAWC claims this limitation has "already caused Montana Artesian to lose contracts, customers and projects" and the District Court

failed to complete a takings analysis to determine what just compensation was due for its losses. MAWC Br. at 44.

Regardless how MAWC characterizes it, the claim remains rooted in its alleged inability to use all of the 710.53 AF of its Permit. Further, MAWC has presented no actual evidence the building size limitations in the Zoning Regulations has caused MAWC to lose contracts, customers, and projects. Its references to the record point to App. 3 and App. 4, which are District Court Orders. MAWC makes passing references to other property interests, such as its business interests, but has never submitted any substantive evidence in support of such claims.

Regardless, all such claims are predicated on MAWC's incorrect argument that the Zoning Regulations amount to a taking of its "water right" because its water right will be voided if it cannot utilize all of it.

VI. CONCLUSION

The District Court correctly upheld the County's Enforcement Decision which allows MAWC to continue to operate its facility in accordance with the permits it obtained as of the date the Zoning Regulations took effect. MAWC has the opportunity, over the course of 20 years, to determine whether and how to utilize *up to* 710.53 AF of water in accordance with its Permit. There is nothing

inherent in the Zoning Regulations which automatically prevent MAWC from doing so, particularly where MAWC has not obtained sufficient permits to allow full utilization of the 710.53 AF. The District Court's Order on MAWC's Second Cause of Action should be affirmed.

DATED this 22nd day of October, 2021.

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Attorneys for Appellee Flathead County

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2016 is 4,962 words, excluding Certificate of Service and Certificate of Compliance.

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CERTIFICATE OF SERVICE

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