MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

KYSO CORPORATION, Plaintiff, vs CITY OF GREAT FALLS, Defendant.	Cause No. CDV-19-215 **ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

KYSO Corporation alleges the City's *refusal* to annex KYSO's property actually amounted to a constitutional *taking* of that same property. The property was and continues to be outside the City limits, meaning it was and continues to be beyond the reach of City zoning regulations. KYSO concedes that the City had no affirmative legal obligation to annex KYSO's property. But KYSO says the City's conceded discretion to deny annexation is immaterial because that denial, even if perfectly legal, nonetheless impermissibly burdened KYSO's property rights by interfering with KYSO's desire to change the historical use of its property, and therefore constituted a compensable taking.

After reviewing the undisputed material facts in light of the controlling law, the Court concludes that KYSO's evidence is distinguishable from what it views as its best legal authority and further fails two of the three factors of the applicable balancing test. The Court accordingly GRANTS the City's summary judgment motion and DENIES KYSO's motion for the reasons that follow.

I. Summary Judgment Standard

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The Court determines this by examining the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. M.R.Civ.P. 56(c).

The moving party must show a complete absence of any genuine issues of fact deemed material in light of the relevant substantive legal principles. *Bruner v. Yellowstone Co.*, 272 Mont. 261, 265, 900 P.2d 901, 904 (1995). If the moving party meets this burden, the nonmoving party must show there is a genuine issue of material fact or that the moving party is not entitled to judgment as a matter of law. *Id.* at 264, 900 P.2d at 903. The Court reviews the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor and without finding facts, weighing the evidence, choosing one disputed fact over another, or assessing the credibility of witnesses. *Fasch v. M.K. Weeden Const.*, Inc., 2011 MT 258, ¶¶ 16-17, 362 Mont. 256, 262 P.3d 1117.

II. Identification of Legally Material Facts

"Material issues of fact are identified by looking to the substantive law which governs the claim." *Glacier Tennis Club at the Summit v. Treweek Const. Co.*, 2004 MT 70, ¶ 21, 320 Mont. 351, 87 P.3d 431. *See also Bruner, supra, and Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1996). The Court accordingly begins with a short summary of the claims and applicable law.

KYSO originally asserted four claims, but in its response to the City's *Motion* it conceded its claims for spot zoning and condemnation blight. CR36, p.21. This leaves Count I: Inverse Condemnation and Count II: Regulatory Taking.

A. Terminology

The City says KYSO is using the phrase "inverse condemnation" merely as shorthand for a compensable taking. CR27, pp. 28-29. Whether KYSO agrees or disagrees with this is not entirely clear. KYSO's insistence that it is entitled to summary judgment on Count I but the City is not entitled to summary judgment on Count II suggests it does see this as more than a mere semantic difference. *See* CR36, p.12. But in its reply brief KYSO says "a claim for inverse condemnation is simply one in which the landowner seeks just compensation for the taking of private property when no condemnation proceedings have been instituted." CR44, p.2.

> 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, Inc. v. Lewis & Clark County, 2012 MT 272, ¶ 35, 367 Mont. 30, 290 P.3d 691. KYSO owns the land at issue in fee. Clearly this is a constitutionally protected property interest. *Id.*, ¶ 46. The real dispute is about whether the City "deprived" KYSO of that interest within the very technical and precise meaning of takings law.

Allegedly unconstitutional takings are either "categorical" or "regulatory."

A categorical taking occurs when the government forces the property owner to endure a "permanent physical invasion" of the property or when government action completely deprives the owner of "all economically beneficial use" of the property. *Kafka v. Dept. of Fish, Wildlife, & Parks*, 2008 MT 460, ¶¶ 67-68, 348 Mont. 80, 201 P.3d 8.

A regulatory taking occurs when government action has not completely destroyed the economic value of the property but the "justice and fairness" of the particular situation "require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Kafka*, ¶ 69.

B. The *Penn Central* Factors

Courts analyzing whether a particular situation requires compensation consider

> (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.

Id. (c*iting Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). Weighing and balancing these *Penn Central* factors is an "'ad hoc, factual inquiry' based on the circumstances of each case." *Id.*

The "character of the governmental action" factor requires courts to

> inquire concerning the magnitude or character of the burden imposed by the regulation, and determine whether it is functionally comparable to government appropriation or invasion of private property.

Id., ¶ 71.

The "reasonable investment-backed expectations" factor requires "more than a unilateral expectation or an abstract need." *Id.*, ¶ 72. It limits compensable takings to plaintiffs who can "demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Id.* (*quoting Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1190 (Fed. Cir. 2004)).

The "economic impact" factor considers "the change in the fair market value of the subject property caused by the regulatory imposition." *Id.*

C. Knight v. Billings

KYSO particularly relies on *Knight v. City of Billings*, 197 Mont. 165, 642 P.2d 141 (1982). The plaintiffs in *Knight* bought homes on the west side of 24th Street West when it was still a quiet two-lane street with on-street parking and no traffic lights, before the construction of Rimrock Mall. *Id.* at 166, 642 P.2d at 141-142. As that area became increasingly commercialized, the city widened the street and installed traffic lights and streetlights. *Id.* at 166-168, 642 P.2d at 142-144. Traffic, noise, and light pollution increased to the point that the plaintiffs' homes were essentially no longer tenable as residences. *Id.* at 169, 642 P.2d at 143. In the process the city condemned and paid for homes on the *east* side of the street *but not the west side*. *Id.* at 167, 642 P.2d at 142. The plaintiffs ultimately sued when the city denied their request to rezone their side of the street to residential professional. *Id.* at 168, 642 P.2d at 143.

The Supreme Court rejected the city's argument that it was merely adapting to business growth:

> In that area of law where inverse condemnation has most notably expanded -- where *airports have been constructed in populated areas* and the resultant low-flying landing and takeoff of jets has *disturbed residential properties* -- it is certainly true that the airport authorities have merely adapted to changing transportation patterns from land traffic to air traffic in providing airports. Yet the cases recognize that inverse condemnation has occurred, and recovery is allowed on the principle that an "air easement" has been taken, *Griggs v. County of Allegheny, Pennsylvania* (1962), 369 U.S. 84, 82 S.Ct.531, 7 L.Ed.2d 585; *United States v. Causby* (1946), 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206.

Knight, 197 Mont. at 171, 642 P.2d at 144 (emphasis added).

The Supreme Court continued:

> [T]he City Council validly refused to amend the zoning ordinance for plaintiffs' properties to reclassify to residential professional, which would have substantially mitigated the plaintiffs' losses. *The valid refusal of a zoning amendment, which nailed down the servitude imposed on plaintiffs' properties, stands on no higher ground, insofar as inverse condemnation is concerned, than a valid exercise of police power*. What remains, above all, after the City has acted, validly or invalidly, is that plaintiffs' properties, through the actions of the City, *have become unsuitable for residential use, and the plaintiffs' right to use their properties as contemplated by the deed restrictions* is limited to a degree of constitutional magnitude.

Knight, 197 Mont. at 174-175, 642 P.2d at 146 (emphasis added). This concept of the city having "nailed down" an "air easement" or "air servitude" is the centerpiece of KYSO's argument in the present case.

The Supreme Court warned that its holding in *Knight* was "limited to the situation here, where a physical taking across the street occurred." *Id.* at 174, 642 P.2d at 146.

The Supreme Court endorsed the following explanation by former Tenth Circuit Judge Murrah:

> "As I reason, the constitutional test in each case is first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone."

Knight, 197 Mont. at 173, 642 P.2d at 145 (*quoting Batten v. U.S.*, 306 F.2d 580 (10th Cir. 1962) (Murrah, J., dissenting)).

KYSO apparently prefers this formulation of the regulatory taking factors. But *Knight* sheds little light on what it actually means for the challenged government action to be "sufficiently direct" or "sufficiently peculiar." KYSO has not identified any more recent Montana Supreme Court decision that applies these factors or interprets or explains them. Consequently the *Knight* formulation of the analysis appears to this Court to have been supplanted by the *Penn Central* regulatory factors as applied in more recent Montana decisions like *Kafka*.

D. Annexation

Where, as here, a city receives an annexation petition signed by the owners of half of the property sought to be annexed, the city's "governing body may approve or disapprove [the] petition . . . (3)(a) on its merits." Mont. Code Ann. § 7-2-4601(3). The governing body documents annexation approval by passing an appropriate resolution. *Id.*

Annexation is ordinarily "a political matter exclusively for legislative control." *O'Donnell Fire Service & Equipment Co. v. City of Billings*, 219 Mont 317, 320, 711 P.2d 822, 824 (1985) (*quoting Harrison v. City of Missoula*, 146 Mont. 420, 424, 407 P.2d 703, 705-706 (1965)). In *St. John v. City of Lewistown*, 2017 MT 126, ¶ 21, 387 Mont. 444, 395 P.3d 486, the Supreme Court held that the District Court had correctly refused to substitute its own judgment for the city's determination in a Mont. Code Ann. § 7-2-4312 proceeding that annexation would be in the best interests of the city.

The foregoing generally identifies the applicable legal rules. Further citations appear as necessary below. With these issues and legal authorities in mind, the undisputed material facts are as follows.

III. Undisputed Material Facts

1. No one has ever used the subject property as anything other than farmland.

2. Cascade County has zoned the subject property as "Agricultural." County zoning regulations preclude developing it into high-density residential lots.

3. Portions of the subject property lie beneath the glide path at the southwest end of the Malmstrom Air Force Base runway.

4. In 1958, the Air Force paid for a perpetual easement over portions of the subject property.

5. Dana Huestis is KYSO's sole officer and shareholder.

6. In 1979 Mr. Huestis paid $1 to buy the property from a corporation owned by himself and his brother. He does not recall whether there was any additional consideration.

7. The Malmstrom runway was active when Mr. Huestis bought the property in 1979.

8. In the mid-1990s the Air Force reassigned the last remaining fixed-wing aircraft at Malmstrom to other bases.

9. The Malmstrom runway has been dormant since January 1, 1997.

10. Mr. Huestis incorporated KYSO in 1999.

11. KYSO presently owns the subject property.

12. In 2012 the City, the County, several surrounding counties, the Air Force, and the Department of Defense cooperated in the preparation of a Joint Land Use Study (JLUS) to guide land use and planning decisions that might impact Malmstrom Air Force Base. KYSO's Exhibit I.

13. The JLUS noted that Department of Defense policy identified "Clear Zones" and two "Accident Potential Zones" at each end of the Malmstrom runway. *Id.*, p. 3-28.

14. The Clear Zone is closest to the runway, followed next by Accident Potential Zone I and then by Accident Prevention Zone II. *Id.*

15. The Clear Zones begin at each end of the runway, extend 3000 feet beyond the end of the runway, and are 3000 feet wide measured from the runway centerline. *Id.*

16. Accident Potential Zone I begins at the outer end of the Clear Zone, extends 5000 feet, and is 3000 feet wide. *Id.*

17. Accident Potential Zone II begins at the outer end of Accident Potential Zone I, extends 7000 feet, and is 3000 feet wide. *Id.*

18. Department of Defense policy classifies as "incompatible use" any structure in the Clear Zones and any residence in Accident Potential Zone I. *Id.,* pp. 3-28 to 3-33.

19. On May 1, 2012, the City Commission adopted a resolution accepting the JLUS "as a resource for guidance in development future land use decisions." City's Exhibit RR.

20. Since 2015 the subject property has been contiguous to but outside the city limits.

21. In March of 2016 KYSO filed a petition with the City to annex the subject property and zone it for high-density development.

22. City planning staff expressed several concerns with the proposal.

23. The City Commission first considered the annexation petition on September 18, 2018. City's Ex. JJ, App. 1. Several commissioners expressed concerns about last-minute changes to the proposal. *Id.* The Commission voted to table it pending further discussion. *Id.* p.25 of 30.

24. On March 5, 2019, the Commissioners again took up KYSO's annexation petition. City's Exhibit JJ, App. 2. This time they unanimously voted to deny it. *Id.*, pp. 13-14 of 17.

25. On March 12, 2019, the City filed a *Notice of Decision* regarding the March 5 denial of the annexation petition. City's Ex. PP.

26. The first page of the *Notice of Decision* said

> This denial does not limit the applicant's ability to resubmit a revised application for consideration. The decision to deny the annexation request may be appealed to a court of competent jurisdiction within thirty days of the final decision.

City's Exhibit PP, p.1.

27. The *Notice of Decision* included 12 numbered Findings of Fact that tracked the 12 numbered factors in Great Falls City Code § 17.16.7.070. *Id.*

28. Finding 2 stated, in pertinent part:

> While staff notes that the property is contiguous and is adjacent to a stubbed street containing water, sewer, and stormwater mains, the property's location context creates significant challenges for the provision of storm water and public safety services. With regards to the Plan's guidance on supporting the current and future military mission of Malmstrom Air Force Base and the Montana Air National Guard, page 154 of the Plan document has been included as an attachment. Staff notes the following policy guidance as being most applicable to the Planning Board's consideration of this finding:
>
> Eco3.1.2 – Support the Malmstrom Air Force Base Joint Land Use Study (2012), also referred to as the JLUS study, and participate in the joint coordinating committee so as to implement the report's recommendations.
>
> . . .

Id., Finding 2.

29. Finding 5 stated, in pertinent part:

> The 21.10 acre parcel's location . . . presents challenges for local services such as street maintenance, snow removal, and public safety response. . . 1) the property is only contiguous to the City limits in one direction . . . 2) the developer hasn't shown or committed to constructing a paved secondary access for either emergency services or general connectivity, and 3) the nearest public street to the west is located approximately ½ acre to the west of the parcel being considered for annexation. As a result, staff cannot make a positive finding that the City has the capacity to provide public services.

Id., Finding 5.

30. Finding 6 stated, in pertinent part:

> The subject property is not being improved to the standards acceptable to the Engineering Department or Fire Department. For Engineering, the property's location upstream from the Gibson Flats area requires a preliminary plan to re-route or retainage of all stormwater . . . For the Fire Department, their standards for a second fire apparatus route and response times have not been addressed.

Id., Finding 6.

31. Finding 7 stated, in pertinent part:

> The owner has not committed to installing a complying secondary ingress and egress route for fire protection and improved connectivity. Additionally, no agreement has been reached regarding the Engineering Department's stormwater recommendations.

Id., Finding 7.

IV. Analysis

KYSO insists its case is about the JLUS. Every time the Court pressed KYSO's counsel during the summary judgment hearing about whether KYSO's case depended on having a legally enforceable right to be annexed into the City, counsel replied that KYSO would have no viable claim if the City had simply denied annexation *without mentioning or referring to the JLUS*.

But the City did refer to it, and in counsel's view this transforms an otherwise non-actionable annexation denial into a constitutional taking that "nailed down" an "air servitude" onto the subject property within the meaning of *Knight, supra*. Throughout her summary judgment argument counsel repeatedly returned to *Knight* and repeatedly characterized it as the template that controlled here and required KYSO to prevail.

A. Reasonable Investment-Backed Expectations

Knight, however, is distinguishable in a way that goes directly to the heart of the investment-backed expectations factor of the *Penn Central* analysis. That factor looks not at the plaintiff's *current* expectations but rather to the *historical* situation when the plaintiff invested in (i.e., bought) the property. *Kafka*, ¶ 72. It requires the plaintiff to "demonstrate that [he] bought [the] property in reliance on a state of affairs that did not include the challenged regulatory regime." *Id.*

A 2010 en banc Ninth Circuit decision sheds more light on what this means:

> To "expect" can mean to anticipate or look forward to, but it can also mean "to consider probable or certain," and "distinct" means capable of being easily perceived, or characterized by individualizing qualities. **"**Distinct investment-backed expectations" implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes. . . . Speculative possibilities of windfalls do not amount to "distinct investment-backed expectations," unless they are shown to be probable enough materially to affect the price. The idea, after all, of the constitutional protection we enjoy in the security of our property against confiscation is to *protect the property we have, not the property we dream of getting*.

Guggenheim v. City of Goleta, 638 F.3d 1111, 1120-21 (9th Cir. 2010) (en banc), *cert. denied,* 563 U.S. 98 (2011) (emphasis added). The facts in *Knight* meet this criterion. The following discussion shows why KYSO's facts do not.

The plaintiffs in *Knight* bought their properties *for residential purposes* when the fundamental character of the neighborhood was *still residential*. The city's ensuing actions *changed* the neighborhood; the former city engineer had to admit that their homes were *no longer tenable as residences*. *Knight*, 197 Mont. at 169, 642 P.2d at 143. The two U.S. Supreme Court decisions the Montana Supreme Court found compelling in *Knight* had to do with airports that had been "constructed in populated areas" – i.e., "constructed" *after* the areas were already "populated" - which then "disturbed residential properties." *Id*, 197 Mont. at 171, 642 P.2d at 144.

The situation here is different. Here, Mr. Huestis bought *farmland* in 1979. No one had ever used it for any other purpose. Malmstrom still had a flight mission. Outbound KC-135s were flying over the property several times each day. The record contains no evidence establishing that he bought the property in 1979 because he foresaw that the flight mission at Malmstrom would end. KYSO has not shown that in 1979 Mr. Huestis was in any way relying on one day being free to subdivide this historically agricultural property into residential lots. KYSO does not even hint at this in its briefing.

Here, unlike *Knight*, the City has done nothing to keep the owner from continuing to use the property the way it had been used it when he bought it. JLUS or no JLUS, nothing about the City's refusal to annex the property has deprived KYSO of the right to continue to use it as farmland. The summary judgment record simply does not support Mr. Huestis having had *reasonable* investment expectations *in 1979* about future uses of the property that have now been impeded by the City's unwillingness to annex it.

Here, unlike *U.S. v. Causby*, 328 U.S. 256, 262 (1946), the City has not used a purported overhead air easement to "*reduce . . .* a residential section to a wheatfield." Here, the property *has always been a wheatfield* and the City has done nothing to change this. Here, unlike *Griggs v. Allegheny County*, 369 U.S. 83 (1962), the City has not constructed an airport or anything else next to the subject property that now renders previous residential use of it untenable.

KYSO says the City's discretion to deny annexation is immaterial, because KYSO claims a refusal to annex property *outside* the current city limits is exactly like the City of Billings' refusal to re-zone the west side of 24th Street West which was *inside* the city limits. The *Knight* court, however, expressly warned that its *holding was limited to zoning only one side of a city street*. *Knight*, 197 Mont. at 174, 642 P.2d at 146.

B. Character of the Governmental Action

The "character of the governmental action" factor requires the Court to analyze "the magnitude or character of the burden imposed by the regulation" and determine whether it is "functionally comparable to government appropriation or invasion of private property." *Kafka*, ¶ 71 (*citing Lingle v. Chevron*, 544 U.S 528 (2005)). It is conceptually difficult to apply this factor to these facts, because by declining to annex the City actually decided *not to regulate* KYSO's property.

When it applied this factor in *Kafka*, the Supreme Court said "[i]t is well-established that regulations which impair or significantly decrease the profitable use of property do not amount to a taking." *Id.*, ¶ 87. The Court emphasized there that the plaintiffs could still sell their game-farm animals out of state and could still permit no-fee shooting of them. *Id.*

Here, the record refutes KYSO's contention that by choosing not to annex the property the City has actually imposed a "servitude" on it, thereby prohibiting KYSO from developing it. No one has ever used it as anything other than farmland and KYSO retains the ability to keep using it that way. The property was outside the city limits before the annexation vote and it remains outside the city limits after the vote. Therefore the City cannot zone it, cannot regulate it, and cannot reach it to impose the alleged "servitude" that lies at the heart of KYSO's claims.

KYSO remains free to subdivide and sell the property without city services (though this would apparently run afoul of *County* zoning regulations). Not having city services will likely make the intended subdivided lots less attractive and harder to sell, but KYSO has provided nothing to quantify this.

Moreover, KYSO cites no legal authority *requiring* the City to provide services via annexation. KYSO *wanted* City services but concedes the City was not *legally obligated* to provide them via annexation. At no point in the briefing or during the May 19 summary judgment argument has KYSO ever been able to bridge the legal gap between its *right* to develop the property and the City services it wants but cannot get without an affirmative annexation vote.

The government "burden" here is ultimately the City's *withholding* of City services KYSO wants to enhance the profitability of the proposed development. KYSO remains free to farm the land or to develop it without these services. Nothing about this is "functionally comparable" to appropriating KYSO's property or physically invading it. *Kafka, supra*, ¶ 71.

C. The *Lucas* Case

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), a decision with which KYSO's counsel has an unusual connection,[1] is not directly apposite here because it was clearly a categorical taking case. But KYSO invoked it at oral argument in support of KYSO's right to develop its property. The record in *Lucas* showed that the plaintiff "bought two residential lots . . . on which he intended to build single-family homes." *Id.* at 1006-1007 (emphasis added). Two years later the state legislature prohibited the construction of any permanent habitable structures on the plaintiff's lots. *Id.* at 1007.

The trial judge in *Lucas* found that this rendered the lots "valueless." *Id.* Justice Scalia's majority opinion repeatedly referred to the statute at issue as having deprived the plaintiff's property of "all economically beneficial use." *Id.* at 1016, 1017, 1019, 1020, 1027, & 1030. KYSO's property is not "valueless."

This Court does not doubt that Mr. Huestis and/or KYSO has a right to develop the property. What the Court does doubt is whether that right trumps the City's conceded discretion to decline annexation, and further whether the right to develop circumvents the way the reasonable investment-backed expectations factor looks back at the historical situation that existed when the takings plaintiff acquired the property. KYSO remains free to develop the property outside the city limits. While this will likely be more difficult without city services, KYSO has articulated no legal entitlement to these.

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[1]Ms. Lund was in the Supreme Court courtroom to observe the oral argument in *Lucas* in connection with her previous life as a journalist. She subsequently interviewed Mr. Lucas about the case.

D. Economic Impact on the Claimant

This *Penn Central* factor considers "the change in the fair market value of the subject property caused by the regulatory imposition" as it impacts the "parcel as a whole." *Kafka*, ¶ 72.

The City says any market-value change would not be the *kind* of economic impact this factor considers because *County* regulations prohibited this development before the annexation decision and continue to do so. To a large extent this appears to overlap the City's argument on the other two factors.

KYSO supplies little information about this because it insists the *Penn Central* factors are essentially immune to summary judgment. The Court has combed through both sides' statements of disputed and undisputed facts and finds no before-and-after market value information that would keep this factor from overcoming the other two *Penn Central* factors.

E. *Penn Central* Summary

The *Penn Central* factors are obviously a balancing test, not a conjunctive set of elements. "In some cases, one or more are dispositive." *Kafka*, ¶ 69. Here, the evidence on the reasonable investment-backed expectations and character of the government action factors outweighs the relative lack of concrete information on the economic impact factor. The fact is, nothing the City did or failed to do here has inflicted anything like the crippling evisceration of historical use the City of Billings inflicted in *Knight*. Nothing the City did or failed to do here has rendered KYSO's property valueless. And KYSO has offered no logically coherent explanation of how the City's unwillingness to bring the property within the City's regulatory jurisdiction is the same as somehow imposing a "servitude" on it.

F. Immaterial Background Facts

KYSO points to previous historical discussion by the City and the County about potentially buying undeveloped property in the glide path of the Malmstrom runway to compensate owners for not developing. There was an unsuccessful bond issue to fund this. KYSO argues these entities were doing this because they knew they were legally obligated to pay if they wanted to slow or halt development in the glide path, and concludes this is significant because it is inconsistent with the City's current legal position. The Court disagrees. The City's previous "admissions" affect the facts but do not change the controlling law.

To refute KYSO's insistence that the JLUS was the sole or most important reason the Commissioners declined to annex, the City supplies significant background about concerns and reservations its planning staff and each individual Commissioner expressed about the annexation proposal. The City says this shows the JLUS was not the only reason or even the primary reason the Commissioners declined to annex KYSO's property. At oral argument KYSO declined to explain whether it had to show the JLUS was the but-for cause or only a substantial factor in the City's decision. Upon further consideration the Court concludes that whether the JLUS was the Commissioners' sole or primary motivation for declining annexation is immaterial because *Knight* is distinguishable and the investment-backed expectations and character of the government action factors show this was not a true regulatory taking.

V. Conclusion and Order

Accordingly, IT IS HEREBY ORDERED that:

1. The Court **GRANTS** the City's motion for summary judgment.

2. The Court **DENIES** KYSO's cross-motion for summary judgment.

3. The Court **VACATES** the *Status Hearing* set for November 15, 2021.

4. The Court **VACATES** the jury trial previously set for November 29, 2021.

Digitally signed by Judge John Kutzman
DN: cn=Judge John Kutzman, o=Montana Judicial Branch, ou=Eighth Judicial District, email=jkutzman@mt.gov, c=US
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John A. Kutzman
District Court Judge

cc: Hertha Lund, Attorney for Plaintiff
Natasha Prinzing Jones and Zachary Franz, Attorneys for Defendant