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VIA E-MAIL ONLY

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Consolidated Yellowstone County Zoning Commission
316 N. 26th St.
Billings, MT 59101

RE: Comment on County Zone Change 735-1232 Johnson Ln from A to I2

Dear Commissioners:

Lund Law, PLLC represents PC Land Holdings, LLC (“PC Land”), the owner of 1347 Johnson Lane and 1355 Johnson Lane, and hereby respectfully submits the following comments for the Consolidated Yellowstone County Zoning Commission’s (“Zoning Commission”) consideration with regards to Par Montana, LLC’s application to change the zoning on its properties in the Lockwood area of Billings from Agricultural (A) to Heavy Industrial (I2) (County Zone Change 735-1232 Johnson Lane from A to I2).

PC Land’s properties on Johnson Lane are immediately adjacent to and surrounded by the property where Par Montana, LLC requests the zoning be changed. PC Land’s lots are also immediately adjacent to the railroad tracks that will provide access to Par Montana’s proposed railway siding/spur, rail car storage facility, and feedstock storage yard (“Rail Yard Facility”). Given Par Montana’s plans to expand the number of tracks providing access to its proposed Rail Yard Facility and the scope of the facility proposed in this location, it is undeniable that there will be an increase in rail traffic to and through the area, which, as proposed, will place a significant burden on the businesses operating in this area. Of particular concern for PC Land is the hinderance that will occur to vehicle traffic into and out of the area as trains cross Johnson Lane.

PC Land has recently invested in the construction of substantial improvements on both of its Johnson Lane properties and has two tenants operating out of this location. PC Land purchased and invested in the Johnson Lane properties because of the proximity and ease of access to Interstate 90, and both of PC Land’s tenants operate businesses that rely on uninterrupted access to Interstate 90. This access allows trucks carrying equipment to be dispatched quickly and efficiently to points across Montana and the

West. As the Zoning Commission is aware, Johnson Lane dead ends a short way from PC Land's lots, and currently provides only one point of access to Interstate 90 at the Johnson Lane interchange. Due to this configuration, vehicle access issues will undeniably be created by Par Montana's planned Rail Yard Facility, and if the Zoning Commission recommends approval of Zoning Change 735, as proposed, it will both violate the Yellowstone County Zoning Code and effect an unconstitutional taking of and damage to PC Land's property under the U.S. and Montana Constitutions.

I. Violations of the Yellowstone County Zoning Code

A. Violation of Section 27-601(B)

As Par Montana requests the Zoning Commission recommend a zoning change from A to I2, it is critical to begin a discussion of the Zoning Commission's analysis with the definition of I2 found in the Yellowstone County Zoning Code at 27-601(B), which defines Heavy Industrial zoning as:

This district accommodates larger or more intensive manufacturing and distribution facilities and related support services. Heavy industrial sites will have ready access to necessary utilities and *at least two or more major transportation routes*. Characteristics of the uses in this district may include outdoor storage areas, truck traffic, production of goods from raw materials, and multiple worker shifts. Some may involve large structures on large parcels.

With regards to PC Land's primary concern, hinderance of vehicle traffic into and out of the area of the proposed zoning change, the requirement that areas zoned I2 have "at least two or more major transportation routes" makes a recommendation to approve the zoning change to I2 facially invalid. Before the Zoning Commission can make any recommendation to change zoning from A to I2 on Par Montana's properties, at least one more access route to the area must be provided for during planning before the zoning change can be approved.

B. Violation of Section 27-1627(D)

Section 27-1627(D) of the Yellowstone County Zoning Code requires this Commission to evaluate several criteria when determining whether to recommend the County Commission grant or deny a zone change application. These factors include (a) "whether the new zoning will promote public health, public safety and general welfare" and (b) "whether the new zoning with effect motorized and nonmotorized transportation." If the requested zoning change is granted according to Par Montana current plans, the new zoning will harm public safety and negatively impact motorized and nonmotorized transportation.

Par Montana's current plans for the property include constructing a rail yard that will include a spur crossing Johnson Lane north of the current railroad track. Because Johnson Lane provides the only access to several properties, including those belonging to PC Land, north of the current railroad crossing, ensuring that consistent and safe

access to businesses and residences will continue to exist is paramount. Par Montana, however, has provided no information as to how it intends to prevent trains from blocking Johnson Lane while stopped on the proposed spur.

Adequate access to areas zoned I2 to allow for heavy industrial uses is especially important from a public safety perspective because the types of industries allowed under I2 zoning often involve work of a hazardous nature, involves handling of hazardous chemicals and substances, or both. Emergency vehicles of all types must, therefore, have easy access to the area by more than one route that only has a single access point that can be blocked by rail traffic. Given the scope of Par Montana's plans, it is not only possible but in fact probable that an incident will occur that will block vehicle from entering the area entirely, leaving emergency crews to scramble for alternate access through an area with no defined access and considerable environmental factors to be dealt with. The requested zoning change, by sanctioning a spur line and rail yard without any evidence that sufficient emergency services can be provided to protect public health and safety on both the Johnson Lane properties and the greater Lockwood area, violates the Yellowstone County Zoning Code.

Further, recommending approval of the Zoning Change will directly hamper transportation on Johnson Lane north of the proposed spur line. The businesses whose sole access is through Johnson Lane depend on the accessibility of Johnson Lane for motorized travel. As noted previously, both businesses operating out of PC Land's properties depend on unobstructed access to Johnson Lane to move equipment to projects throughout Montana. Other businesses on Johnson Lane receive hundreds of visits per day. Both their business and their customers' safety will be harmed by an additional spur line crossing Johnson Land and an increase in rail traffic, which will undeniably stop and delay vehicle traffic to and from the area. This violates the Zoning Code's requirement that this Commission consider whether the proposed change will harm motorized travel.

II. Taking of PC Land's Property Rights

The United States Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend V. In 2005, the United States Supreme Court discussed the principles of fairness that underpin takings jurisprudence. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). In her opinion for the *Lingle* majority, Justice O'Connor explained that the most important takings inquiry was the impact of the government's action on the property owner. *Id.* The fact that a regulation is in the public interest does not negate the City's duty to pay if it takes homeowners' property. As the United States Supreme Court has stated, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

In addition to property rights protections in the United States Constitution, the Montana Constitution protects property rights even more vigorously: "Private

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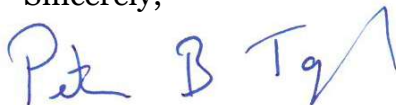
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property shall not be taken **or damaged** for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner.” Mont. Const. Art. II § 29 (emphasis added). Montana’s addition of the “or damaged” language entitles the owner to compensation when the government action has reduced the property’s market value. *Knight v. Billings*, 642 P.2d 141, 145-46 (1982). Further, regulations enacted under the state’s or a locality’s police power may not take property unless they are reasonable. *McElwain v. County of Flathead*, 248 Mont. 231, 235, 811 P.2d 1267, 1270 (1991).

Zone Change 735, if approved as proposed, will constitute a taking under the Montana Constitution in addition to being a violation of the United States Constitution. Access to property is a protected property right, and a county-sanctioned spur line frequently blocking vehicle access to the single means of ingress and egress will damage PC Land’s, as well as other landowners’, property rights, forcing them to bear a public burden at their own expense.

Because Par Montana’s requested zoning change from A to I2 violates the Yellowstone County Zoning Code and constitutes a taking under the United States and Montana Constitutions, and pursuant to Section 27-1627(E) of the Yellowstone County Zoning Code, the Zoning Commission should allow Par Montana to withdraw its current application to address the issues discussed herein. In the alternative, the Zoning Commission should deny Par Montana’s application for a zoning change, because it violates section 27-601(B) of the Yellowstone County Zoning Code by failing to provide adequate plans and appropriate assurances, including commitment of financial resources, to create additional vehicle access routes to the area of the proposed change, including routes with access points not impacted by rail traffic and rail crossings that address the substantial public safety and fire concerns with the requested zoning change.

Sincerely,



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PBT/gs

cc: Brenda Berns (via e-mail only bernsb@billingsmt.gov)