BEFORE THE CITY COUNCIL

CITY OF MISSOULA, MONTANA

In the Matter of the Application of
KJA Development LLC for Rezoning
Of Two Parcels of Land on Expo Parkway:
South Parcel: Section 5, Township 13 North, Range 19 West Portion A of Commerce Center, Phase II
North Parcel: Section 5, Township 13 North, Range 19 West Government Lot 4

Legal Memorandum Submitted by Friends of Grant Creek (FOGC)

Regarding The KJA Development Agreement

As a preface to the discussion: FOGC participated in a meeting with the Mayor and Mr. Ault's team in early 2021 after the rezoning application had been overwhelmingly rejected in December, 2020. At that time Mr. Ault was proposing to prepare a PUD (Planned Unit Development) to include 75 units for sale to individuals or families. That process would require subdivision review, dedication of streets and utilities, a detailed plat, etc. This proposal was abandoned and now KJA is proposing a fairly vague Development Agreement ("the Agreement") as an incentive to induce the Council to change its mind about rezoning.

Several questions arise:

1. Is the Agreement, and any zoning decision made in reliance thereon, simply an effort to create "spot zoning" favorable to the developer?

2. Is the Agreement an attempt to create conditional zoning, in violation of Title 20, the Missoula Zoning Ordinance?

3. Is there statutory authority in Montana (as compared with other states) which authorizes a zoning authority to accept a development agreement as an incentive to make a zoning decision favorable to the developer?

4. Would imposing unique conditions on a RM1-45 district, different from those applicable in other RM1-45 districts in Missoula, violate MCA 76-2-302(2)?

The answers to these related questions, in sequence, are: Yes, Yes, No, and Yes. The Agreement is not properly to be considered by Council as it violates zoning statutes. Further, as noted below, the Agreement is not enforceable.

Basic Legal Authorities:

MCA 76-2-302 (2) "All regulations must be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts." (That is, all regulations must be uniform in all RM1-45 districts within the city, but they may be different between RM1-45 districts and RM1-35 districts, for example.)

City Staff's notes on the *Engage Missoula* website explain the commonly understood meaning of this statute:

" Can City Council condition approval of a rezoning request?

"Montana State Law prohibits conditioning the approval of a request to rezone from one standard zoning district in the City to another standard zoning district. City adopted standard zoning districts in the Title 20 Zoning Ordinance must have the same standards for all locations where that zoning occurs. All properties within the same zoning district must be treated equally and abide by the same regulations. Conditioning a rezoning would place more stringent requirements on one property owner than other property owners with land of the same zoning designation. Per State Law, City standard zoning districts must apply equally to all property with the same zoning designation.

" A rezoning request from a city standard zoning district to a Planned Unit Development (PUD) Zoning may be conditioned by City Council as the PUD Zoning is for a specific site and does not exist elsewhere in the city. "

Some Legislatures Have Authorized Zoning Authorities to Consider Private Agreements, but Montana is Not Among Them

The topic of whether development agreements are a proper or legal method to modify a zoning decision has been widely discussed. A thorough treatise by Shelby D. Green [https://law.bepress.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1683&context=expresso] (Professor, Pace Law School) notes that several states have adopted specific legislation which sets forth details about the contents of such agreements and the procedures by which they must be approved.

For example: ARIZ. REV. STAT. ANN. § 9-500.05 (West Supp. 2001-02); CAL. GOV'T CODE § 65864 (West 1997); COLO. REV. STAT. § 24-68-102 (2001); FLA. STAT. ANN. § 163.3220 (West 2000); HAW. REV. STAT. § 46-121 (1993); IDAHO Code § 67-6511A (Michie 2001); LA. REV. STAT. ANN. § 33:4780.21 (West 2002); MD. ANN. CODE art. 66B § 13.01 (Lexis 1998); OR. REV. STAT. § 94.504 (2001); NEV. REV.STAT. ANN. § 278.0201; N.J. STAT. ANN § 40:55D-45 (West 1991); S.C. CODE ANN.§ 6-31-10 (West Supp. 2001); VA. CODE ANN. §15.2-2303.1(Michie 1997).

Professor Green describes the purposes of such statutes:

> Goals. Most statutes identify the purposes and goals of such agreements, e.g.,:
> a) to bring increased "certainty" and "assurance" to the development process, which in turn will strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic costs of development,
> b) to achieve "predictability," and "public benefits," including **affordable housing, design standards, and off-site infrastructure**,
> c) for the "vesting of development rights" as solutions to the problems caused by the "lack of certainty" in the development process."
>
> Minimum Provisions. The statutes typically require that a development agreement specify certain substantive terms, including:
> a) a description of the land subject to the agreement;
> b) a statement of the permitted uses, including density, intensity, maximum height and size of the proposed buildings;
> c) **provisions for reservations or dedications of land for public purposes**;
> d) conditions, terms, restrictions and **requirements for public infrastructure**;
> e) **the phasing or time of construction**. (emphasis added)

In the absence of a statute specifically authorizing a City to trade some of its regulatory power for the certainty of an agreement, such an agreement is invalid. Again, Professor Green:

> "Contract zoning" involves a deal that creates an impermissible reciprocity of obligation between a private interest and a government entity. It is defined as the required exercise of the zoning power pursuant to an express bilateral contract between the property owner and the zoning authority and an agreement to rezone that lacks a valid basis independent of the contract on which to justify the zoning amendment. Thus, the problem with a deal arising under contract zoning is that it would bind the government to specific terms of the contract that may ultimately prevent it from carrying out its public duties, while conferring on private parties the special rights different from other landowners within the same zone. This practice has long been disapproved in most jurisdictions where the issue has come up.

Some courts have tried to make a distinction between "contract zoning" and "conditional zoning". A large part of Professor Green's 91 page treatise discusses whether there is a valid distinction between them (see pages 50-54, citing courts which generally rule conditional zoning invalid in the absence of statutory authority). (Some courts have upheld validity of an agreement in the absence of statutory authority, but these holdings are in the minority.)

Doubtless KJA's attorneys will argue that the draft Agreement they have proposed is more like conditional zoning than contract zoning. However, conditional zoning is explicitly barred by the Montana statute requiring uniformity of regulations among all lands subject to the same zoning district, e.g., RM1-45. Imposing or accepting conditions upon a zoning decision is simply not permissible in Montana, no matter how good the idea may seem.

There are two statutory inquiries presented here. First, is there a statute authorizing a Montana city to accept an agreement as a condition of approving rezoning? (There is not.) Second, is there a statute which prohibits such a practice? (There is.)

The Connecticut Superior Court discussed both of these issues in the course of interpreting a statute similar to Montana's requirement of uniformity, see Professor Green's treatise at p. 57:

> In *Kaufman v. City of Danbury Zoning Comm'n* (1999 Conn. Super. Lexis 2039) the court addressed both contract zoning and conditional zoning, holding that Connecticut did not recognize either. The court explained that there was no statutory provision that allows zoning commissions to condition a zoning change either in its formal resolution of approval or on the form of amendments to the zoning regulation. According to the court, neither may the zoning authority enter into a binding contract with a developer to assure the completion of the conditions of approval. **This is based on the statutory requirement that all such regulations be uniform for each class or kind of building, structure, or use of land throughout each district.** (emphasis added) The cases conclude that to permit a zoning authority to enact or contract for special conditions to assure fulfillment of its goals with respect to a particular piece of property would promote the very type of mischief which the statute was enacted to prevent, namely that there would be no improper discrimination employed by the commission but rather that all owners of the same class and in the same district be treated alike. The court concluded "...[A] zoning commission cannot be allowed to create binding agreements on the use of land thereby limiting its successors' ability to make changes in the future."

See also discussion of *Andres v. Village of Flossmor*, 15 Ill. App.3d 655 (1973) and *Treadway v. City of Rockford*, 28 Ill. 2d 370 (1962), by Professor Green at pp.59-60:

> That is, even where a zoning ordinance is reasonable and not arbitrary and bears a reasonable relationship to the public health, safety and welfare, they are yet invalid if subject to bargaining or contract. In *Andres*, the court explained that "in accepting … donations and entering into or approving the agreements the trustees of the village undoubtedly did what they believed was best for the whole

community, but it placed them in the questionable position of bartering their legislative discretion for emoluments that had no bearing on the merits of the requested amendment."

The court also expressed the concerns articulated in a Florida Supreme Court decision, *Hartnett v. Austin*, **that if each parcel of property were zoned on the basis of variables that could enter into private contracts, then the whole scheme and objective of community planning and zoning would collapse**. The zoning classification of each parcel would then be bottomed on individual agreements and private arrangements that would totally destroy uniformity. If the city could legislate by contract, **each citizen would be governed by an individual rule based upon the best deal he could make with the governing body.** (emphasis added.)

Spot Zoning Issues

Some courts have held that imposing special conditions in a rezoning decision is equivalent to "spot zoning"; see Professor Green's discussion at pp. 52-53:

Other courts view **the rezoning of a particular parcel of land upon conditions not imposed by the zoning ordinance** generally in the particular district into which the land has been rezoned as "prima facie evidence of 'spot zoning' in its most maleficent aspect, as not in accordance with a comprehensive plan and as beyond the power of the municipality." This view is premised on the notion that legislative bodies must rezone in accordance with a comprehensive plan, and Euclidean[1] zoning requires that in amending the ordinance so as to confer upon a particular parcel a particular district designation, **it may not curtail or limit the uses and structures placed or to be placed upon the lands so rezoned differently from those permitted upon other lands in the same district**. (emphasis added.)

Montana has adopted a three-part test for spot zoning known as the "Little Test." *Little v. Board of Cty. Comm'rs.*, 193 Mont. 334, 346, 631 P.2d 1282, 1289 (1981). This test is:

(1) whether the requested use is significantly different from the prevailing use in the area;

[1] The term "Euclidean" refers to the Supreme Court decision in *Village of Euclid v. Ambler Realty Co*., 272 U.S. 365 [1926], generally upholding the town's zoning powers as not constituting a taking of property. This case formed the foundation for dividing municipalities into districts and establishing rules for each district.

(2) whether the area in which the requested use is to apply is small, although not solely in physical size. An important inquiry under this factor is how many separate landowners will benefit from the zone classification, and

(3) whether the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or general public. (emphasis added)

These elements are considered together. *Boland v. City of Great Falls*, 275 Mont. 128, 134, 910 P.2d 890, 894 (1996). Montana courts have found illegal spot zoning when the zoning is not in accordance with a comprehensive plan. The test places a "great weight" on a comprehensive growth plan as a guide in zoning. *Id*. at 347, 631 P.2d at 1289.

Here, the rezone proposal is significantly different from the prevailing use in the area (Prospect single-family homes, Cottonwoods low-rise condos, RMEF low-density development, and commercial development to the south). This analysis weighs in favor of finding spot zoning.

The rezoning proposal is aimed to only benefit KJA Development, LLC, the sole owner, thus *Little* element two weighs in favor of spot-zoning.

Further, the proposal does not honor the 1980 Grant Creek Area Plan and, as explained in FOGC's April 11 statement of reasons why the rezoning should be again denied, it does NOT comply with the 2015 Growth Policy and other City planning documents. The proposal does not provide for home ownership; it benefits only one owner. It is special legislation. Public policy does not favor this proposal. Accordingly, it fails the third *Little* element.

The Agreement is Not Enforceable

A further problem: is the Agreement enforceable? There is no Montana case law determining that such an Agreement, without statutory authority, is enforceable. This issue came up in Mississippi, as discussed in a treatise by a Mississippi real estate law firm in 2016: https://www.danksmillercory.com/2016/01/25/is-contract-zoning-permissible/

"However, the Mississippi Supreme Court has drawn a distinction between "contract zoning" and "conditional zoning." As explained by the Mississippi Supreme Court, "conditional zoning" describes the situation where a municipality goes ahead and rezones the property on the condition that the landowner perform certain acts simultaneously with or after the rezoning. see *Old Canton Hills Homeowners Ass'n v. Mayor & City Council of City of Jackson*, 749 So. 2d 54, 60 (Miss. 1999)(holding that contingent zoning was both legal and beneficial in certain situations). The difference between conditional zoning and contract zoning is that **with conditional zoning there is not an enforceable promise.**

Instead, performance by both sides is simply a matter of trust. (emphasis added)

"In response to a similar question submitted to the Mississippi Attorney General's Office involving a conditional subdivision approval, the Attorney General concluded that "while this question has not been addressed by the Supreme Court, it is our opinion that if conditions may be attached to zoning applications, then they can be attached to subdivision approvals." **However, when asked if the governing authority could enforce the covenant if the developer subsequently violates one of the conditions, the Attorney General concluded that there was no authority to enforce the covenant.** 2008 WL 2687406, at *2 (Miss. A.G. June 13, 2008).

"**So at this point it does not appear that a municipality or county can make an enforceable promise that if a developer makes certain changes then the rezoning application will be passed**. The reasoning behind this is that doing so preempts the power of the zoning authority to zone the property according to the prescribed procedures." (emphasis added)

See also N. Carolina Law Rev. Vol 65:957 (1986), footnote 203, for a list of treatises regarding statutes which authorize development agreements and enforceability of such agreements.

The developer will argue that paragraph 13 of the draft Agreement provides that it will "run with the land" rather than be merely personal to KJA. Conceding this fact does not answer the questions raised in the Mississippi discussion, nor does it overcome the fact that Montana statutes requiring uniformity do not permit agreements which vary the uniformity of zoning regulations among districts of the same type.[2]

Standard of Review

Attempts to accept development agreements or similar types of conditions in zoning decisions have been reviewed by many courts. A leading case is *Fasano v. Bd. of County Commissioners*, 507 P.2d 23 (Or. 1973). The Oregon Supreme Court held that site-specific rezoning decisions are quasi-judicial in nature and that judicial deference is not appropriate; in other words, the courts are free to render a decision in each case. In *Fasano*, the courts reversed the Commissioners' decision because the rezoning classification was contrary to local comprehensive plans:

[2] In contrast to Montana, the California and Illinois legislatures enacted laws in the 1980s which specifically authorize annexation agreements and development agreements which may be accepted as part of zoning decisions. See, e.g., N. Carolina Law Rev. Vol 65, (1986) pp. 994-996.

> Because the action of the commission in this instance is an exercise of judicial authority, the burden of proof should be placed, as is usual in judicial proceedings, upon the one seeking change. The more drastic the change, the greater will be the burden of showing that it is in conformance with the comprehensive plan as implemented by the ordinance, that there is a public need for the kind of change in question, and that the need is best met by the proposal under consideration. **As the degree of change increases, the burden of showing that the potential impact upon the area in question was carefully considered and weighed will also increase**. If other areas have previously been designated for the particular type of development, it must be shown why it is necessary to introduce it into an area not previously contemplated and why the property owners there should bear the burden of the departure. (emphasis added)

As noted in Fordham Law Review, Vol. 81 (2013) Contract and Conditional Zoning Without Romance: A Public Choice Analysis:

> The American Law Institute (ALI) was quick to adopt *Fasano* review in its Model Development Code. The ALI agreed with the *Fasano* court that local legislatures are not equal in all respects to state and national legislatures and that rezoning is an administrative, not a legislative, function.

Conclusion

The City of Missoula has well-established procedures for approval of subdivision plats and planned unit developments (PUDs). Instead of attempting to comply with these procedures, KJA has proposed a Development Agreement as an incentive for the Council to reverse its prior decision regarding rezoning to RM1-45 status. Although such agreements are accepted in other states with enabling legislation, they are not authorized by Montana law and, in this instance, the Agreement would violate the uniformity requirement of Montana statutes. MCA 76-2-302 (2). This alone should render the Agreement to be invalid; it cannot be considered by the Council.

Further, the Agreement is unenforceable. Once the land is zoned to RM1-45, it can be used for all purposes authorized in that zoning district, including construction of as many 45-feet tall apartment buildings as can be crammed into the site. (In order to avoid split zoning of the north parcel, the hillside would have to be included in the RM1-45 district.)

Respectfully submitted this 13th day of April, 2022.

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R. T. Cox, President, FOGC

c: Alan McCormick, Esq.; Aaron Neilsen, Esq.; Grant Parker, Esq.; Jim Nugent, Esq.