



NEILSON SWANSON DIETRICH
NORTHWEST LAW FIRM

April 14, 2022

Sent by email and mail to:

Development Services & the Missoula City Zoning Officer

435 Ryman Street

Missoula, MT 59802

Email: degrandpred@ci.missoula.mt.us

RE: RMEF'S PROTEST PETITION TO REZONE REQUEST FOR 2920 EXPO PARKWAY

Dear Development Services Staff, Missoula City Zoning Officer, and Mr. Degrandpre:

I represent Rocky Mountain Elk Foundation, Inc. (RMEF). Enclosed please find RMEF's protest petition related to the above-referenced rezone request.

Sincerely,

Aaron M. Neilson

Aaron M. Neilson
Neilson, Swanson, Dietrich, PLLC
5705 Grant Creek Road, Suite A
Missoula, MT 59808
406-541-7820
aaron@nsdlawfirm.com
Attorneys for Rocky Mountain Elk Foundation, Inc.

BEFORE THE CITY OF MISSOULA’S PLANNING BOARD
AND CITY COUNCIL

IN RE THE MATTER OF)	PROTEST PETITION OF THE
THE SECOND CITY REZONE)	ROCKY MOUNTAIN ELK
APPLICATION OF KJA)	FOUNDATION, INC.
DEVELOPMENT, LLC)	
)	

I. PROTEST PETITION

Pursuant to Missoula Municipal Code 20.85.040.H, Rocky Mountain Elk Foundation, Inc. (“**RMEF**” or “**Petitioner**”) hereby: opposes the above-referenced second City Rezone Application submitted by KJA Development, LLC to rezone the 2920 Expo Parkway – Grant Creek Village Property from C1-4 Neighborhood Commercial, B2-2 Community Business, RM1-35 Residential and R5.4 Residential to RM1-45 (the “**Application**”).

RMEF presents this formal protest petition to the Missoula City zoning officer, and petitions the City Council for an order denying the current Application as it did with Applicant’s previous rezone attempt.

RMEF submits these comments and this petition so they are part of the public record that will be available for the Missoula Consolidated Planning Board’s consideration at the public hearing scheduled for April 19, 2022, and for further consideration by the Missoula City Council. Because the Staff Report on the City Rezone Application is not available, and considering there are numerous defects in the June 2021 Abelin Traffic Impact Study, some of which we understand the City of Missoula has requested to be updated, RMEF reserves the right to supplement its comments and this protest petition as information that should have been available prior to this point becomes available.

II. STANDARD FOR REVIEW

Pursuant to Missoula Code 20.85.030: (1) the Application must address **all** the review and decision-making criteria, and (2) applicant KJA Development LLC (“***Applicant***”) has the burden to prove the Application complies with all applicable review and approval criteria.

If these two requirements are met, and so long as protest petitions on behalf of twenty-five percent of the lots or units within 150 of the Subject Property (described below) are submitted, the Application must receive a two-thirds majority approval vote of the City Council members present and voting. *See* Missoula Code 20.85.040.H. RMEF understands that, including RMEF’s Protests for the two parcels it owns, the requisite number of protests have been, or will be, submitted, as was the case in the last rezoning effort.

III. BACKGROUND

1. RMEF ’s GRANT CREEK HEADQUARTERS PROPERTY

RMEF is a Montana public benefit corporation with a mission to ensure the future of elk, other wildlife and our hunting heritage. At the end of 2020 RMEF had over 230,000 members, more than 12,700 in Montana. RMEF has raised millions of dollars to secure access to public lands, protect wildlife habitat, support management and stewardship of public and private lands and wildlife research. RMEF has funded numerous projects in and near Missoula. Slightly less than 90 employees have been based out of RMEF’s Grant Creek headquarters (“Headquarters”). These employees support RMEF’s members, chapters and operations throughout the United States and North America. RMEF’s distribution center on the RMEF Property (defined below) is used to supply materials and merchandise to its chapters and members.

RMEF is also proud to have a Visitor Center at its Headquarters. While RMEF has curtailed public access to its Headquarters and Visitor Center during the Covid pandemic, RMEF will be updating and re-opening its Visitor Center. Before the pandemic, RMEF had over 40,000 visitors at its Visitor Center and Headquarters annually.

RMEF purchased the RMEF Property for its Headquarters building in 2002. The City of Missoula approved a request by RMEF to allow for its current use as an office building and distribution center. Prior to that time, zoning for the RMEF Property allowed for construction of about 75 residences. RMEF had support from Grant Creek neighbors to locate its Headquarters on the RMEF Property.

RMEF chose to build its Headquarters in lower Grant Creek due, in large part, to the character of the neighborhood. The 1980 Grant Creek Area Plan, among other publications, recommended providing two routes in and out of the Grant Creek valley, improving Grant Creek Road, providing an alternative emergency route, protecting existing wildlife populations, and preservation of the rural character of the Grant Creek Valley. The proposed rezone would take Missoula further from these planning elements and the reasons RMEF decided to move to this location.

In 2010 RMEF worked with the City of Missoula to improve the public access to the Grant Creek trail system by entering into a new Easement Agreement and Non-Motorized Pedestrian and Bicycle Path Easement. Since then RMEF has seen a significant increase in trespass, vandalism, unauthorized use of RMEF's parking lot, dogs not on leash, and traffic incidents. The City of Missoula has inadequately regulated use of the trail, does not provide garbage cans or pick up litter, nor provide bags for dog waste. The City Police Department has been helpful in dealing with trespass and vandalism. Unfortunately, because of the increased trespass and vandalism RMEF has had to spend significant resources on security—funds RMEF would rather spend directly on its mission. RMEF fears approval of the proposed rezone will greatly exacerbate these problems.

In 1992 Grant Creek Village, Inc. and the City of Missoula entered into a Levee Conveyance, Flood Protection and Waterway Easement Agreement. *See* Missoula County Clerk and Recorder Book 373, Page 1694. In that Agreement the City of Missoula assumed responsibility for the Flood Protection Levee that is between RMEF's Headquarters buildings and Grant Creek. The City is obligated to main the levee, "in a manner that inures to the health, safety, and welfare of the general public and in particular to the properties in the NW1/4, Section 5, T. 13 N., R. 19 W., PMM." RMEF was required to undertake significant expense in the construction of its buildings due to the potential for flooding from Grant Creek. RMEF continues to be concerned that the City of Missoula has not followed the Grant Creek Levee Operation and Maintenance Manual and has not adequately maintained the levee. RMEF is concerned that approval of the proposed rezone will exacerbate evacuation and safety issues in the event of a flood from Grant Creek.

RMEF is also concerned that the Application fails to adequately consider safety concerns associated with the proposal to significantly increase development on the Grant Creek Village property. The Application fails to show that the rezone, even considering the flawed Development Agreement, will not secure safety from fire, flood, traffic and other dangers. The increased number

of units will cause significant increased threats to the safety to RMEF, its employees, members and visitors, as well as other Grant Creek residents and visitors.

2. PROPERTY WITHIN 150 FEET OF THE SUBJECT PROPERTY

The parcels sought to be re-zoned are described in the Application and owned by KJA Development, LLC, and identified by Geocodes 04-2200-05-2-01-08-0000 (“***North Parcel***”) and 04-2200-05-2-01-07-0000 (“***South Parcel***”) (collectively, “***Subject Property***”).

Petitioner owns parcels or units located within 150 feet of the Subject Property. Specifically, RMEF owns two parcels located within 150 feet of the Subject Property that are commonly known as 5705 Grant Creek Rd., Missoula, Montana 59808 and identified by Geocodes 04-2200-05-2-01-02-0000 (“***RMEF South Parcel***”) and 04-2200-05-2-01-03-0000 (“***RMEF North Parcel***”) (collectively, “***RMEF Property***”). RMEF has submitted a protest petition on the form provided by the City of Missoula, but also submits these protests for both the RMEF South Parcel and the RMEF North Parcel. RMEF understands that, including RMEF’s two parcels, at least 25% of the property within 150 feet of the Subject Property has, or will have, submitted valid protests submitted, as was the case in the last rezone application.

IV. ISSUES

1. Whether the Application addresses all the review criteria required under Montana Code Annotated (“***MCA***”) [76-2-304](#) and Missoula Code [20.85.040.G](#), as mandated by Missoula Code [20.85.030](#)?

2. Has Applicant satisfied its burden to prove the Application complies with all applicable review criteria under MCA 76-2-304 and Missoula Code 20.85.040.G, as required by Missoula Code 20.85.030?

3. If the City Council determines the answer to issues 1 and 2 above is “yes,” should the City Council approve the Application?

V. ANALYSIS

1. APPLICANT MUST RECEIVE AT LEAST A TWO-THIRDS MAJORITY VOTE OF THE CITY COUNCIL FOR THE APPLICATION TO BE APPROVED.

Protest petitions are valid if signed by owners of 25% or more of the parcels or units, as defined in MCA 70-23-102¹, within 150 feet of the parcels that are the subject of the proposed change. 20.85.040.H.2.a. The area per unit to be included in the calculation of the protest shall be determined per MCA 76-2-305. 20.85.040.H.2. RMEF understands that a sufficient number of valid protests have been or will be submitted to constitute the 25% of parcels within the 150 feet threshold. As such, a two-thirds majority vote of the City Council members is required to approve the Application

2. THE APPLICATION SHOULD BE DENIED BECAUSE IT DOES NOT ADDRESS ALL THE REVIEW CRITERIA.

In the review and decision-making process for zoning amendments, the zoning staff, Planning Board and City Council must consider at least three elements as required in Missoula Code 20.85.040.G as well as the requirements of MCA 76-2-304. However, the Application and the Applicant's attached Primary Review Criteria Report and Development Agreement ("Applicant's Report"), failed to address some elements of the required review criteria established by subsection 1, and neglected to adequately address subsections 2 and 3. Under Municipal Code 20.85.040.G.2, the proposed rezoning must correct an error, clarify an inconsistency in the ordinance, or meet a challenge of a changing condition. Applicant failed to argue that the purpose of the Rezone Application is to correct an error or clarify an inconsistency in an ordinance, and the short paragraph on page 11 of the Applicant's Report did not show how the rezone would meet a challenge brought by changing conditions. Further, Section 20.85.040.G.3 of the Code requires the Application to address whether the proposed rezone is in the best interest of the City. The Application similarly failed to adequately address significant safety issues such as fire, flooding, trespass, traffic impacts to RMEF employees and visitors and other dangers required by MCA 76-

¹ MCA 70-23-102(19) defines "*Unit*" as "a part of the property including one or more rooms occupying one or more floors or a part or parts of the property intended for any type of independent use and with a direct exit to a public street or highway or to a common area or area leading to a public street or highway."

2-304(1). The impact of additional people and traffic when there is a wildfire in Grant Creek was still not adequately addressed. This is especially egregious in light of the Missoula Planning Office's recognition that there must be two routes into the Grant Creek valley, and an alternative emergency route out of the valley in light of wildlife, as set forth in the 1980 Grant Creek Area Plan. Because the requisite criteria are not included or addressed in the Application, it must be rejected.

In *Sunday Creek Land Co., LLC v. City of Billings*, a landowner was denied his residential rezoning application after a written protest was received and less than a two-thirds affirmative vote was cast. 2009 WL 10701665, ¶ 2. In the ensuing lawsuit, the District Court supported the exercise of the city council's legislative powers to make such decisions based on the MCA § 76-2-304 factors. *Id.* at ¶ 5. Similarly, the City Council should, like the City of Billings in *Sunday Creek Land Co.*, recognize that the Application has failed and exercise its duty to deny the Application.

3. THE APPLICATION SHOULD BE DENIED BECAUSE THE APPLICANT HAS NOT SATISFIED ITS BURDEN OF PROOF.

The burden is on the Applicant to show that an application complies with all applicable review or approval criteria. Missoula Code 20.85.030. In addition, the Application must address relevant review and decision-making criteria. *Id.* In KJA Development's Application, the review criteria laid out in Missoula Code 20.85.040 was summarily listed and reference was made to the Applicant's Report. However, all were not adequately addressed in the Applicant's Report. Some review criteria such as safety in the event of serious flooding of Grant Creek, were not addressed at all. Because this burden is placed on the Applicant, it should not be left open and unaddressed for the City Council to speculate potential outcomes or fill in these gaps. The Application should be denied on the grounds that the Applicant's burden has not been met. Existing landowners should not be faced with safety issues and impacts to their property because an inadequate Application failed to address those impacts.

4. THE CITY SHOULD DENY THE APPLICATION BASED ON THE REVIEW CRITERIA.

The Planning Board and City Council have an obligation to apply the review criteria established by State law and the City of Missoula's Municipal Code. Missoula Code 20.85.040,

MCA 76-2-304. Several elements of the review criteria indicate that the Application should be denied. Discussion of some of these elements is presented below.

Transportation: Neither the Application nor the June 2021 Abelin Traffic Impact Study adequately addresses transportation impacts to RMEF and its employees and visitors. The safety of RMEF visitors and staff coming to the building and leaving will be adversely impacted by the proposed rezone. RMEF staff that have attempted to bike to work have been injured, and the increased traffic will further threaten staff attempting to bike to work. The City of Missoula required RMEF to spend money for facilities to accommodate people who bike to work; approval of the proposed rezone will make RMEF's investment in such facilities a useless investment. As discussed, transportation needs for fire and flood evacuation have not been adequately addressed.

Securing Safety from Fire and Other Dangers: The safety of RMEF buildings, its employees and visitors has not been adequately addressed by Applicant. Under current zoning, the Applicant claims a "right" to 502 units. Applicant's Report at p. 4. The proposed rezone, if approved and if the Development Agreement's limitation of 700 Units were enforceable, would allow about 200 additional residential units in Grant Creek. Based on the Friend of Grant Creek's estimate that there are 635 occupied residences in Grant Creek this would be a significant impact on the Grant Creek Valley. <https://www.friendsofgrantcreek.org/>. RMEF has already had to spend considerable funds to deal with trespass, vandalism and threats to its employees and visitors, biking, driving and walking to and around the RMEF Property. The impacts of an additional 200 or so Units would have a significant adverse impact on RMEF's security and the safety of its employees and visitors.

Stormwater: RMEF is concerned that stormwater from the Subject Property would adversely impact the RMEF Property. Drainage from the existing ditch has not been addressed. There are no guarantees that stormwater will not be discharged onto the RMEF Property and into the Grant Creek floodplain.

Conserves the Value of Buildings: RMEF believes that approval of the proposed rezone would not conserve the value of its buildings, nor the use of those buildings as RMEF's Headquarters as recognized and approved by the City of Missoula under the current zoning of the RMEF Property. In fact, RMEF is concerned about significant reduction in the value of its buildings and investment of this site if the proposed rezoning is approved.

The Rezone must be in Accordance with Missoula's Growth Policy: The Application does not comply with Missoula's growth policy. The 1980 Grant Creek Area Plan, a fundamental part of Missoula's growth policy, provides protection for wildlife, the Grant Creek floodplain and watershed, traffic—including evacuation of the Grant Creek valley in the event of a flood or a wildfire. These goals behind the 1980 Grant Creek Area Plan are not consistent with the Application and the proposed Development Plan. The 1980 Grant Creek Area Plan identifies many factors, including transportation, floodplain, quality of the natural environment, character of the Grant Creek neighborhood, and wildlife that the Applicant fails to address in the Application. Moreover, the Application is antithetical to, and not in accordance with, many specific provisions in the Grant Creek Area Plan.

The City Council should deny the Application because the proposed rezone is not consistent with the required review criteria as set for the in Montana law and the Missoula Code.

5. THE NEW APPLICATION, WITH THE DEVELOPMENT AGREEMENT, DOES NOT COMPLY WITH LAW

The Application, coupled with the proposed Development Agreement, are flawed and the City of Missoula does not have authority to approve this Application. Missoula Municipal Code Title 20 governing zoning does not mention or provide for development agreements. The Montana Legislature only addressed development agreements in the context of an urban renewal area, which does not apply here. Compare, for example, the above-referenced MCA citations and Missoula Municipal Code citations to MCA 7-15-4258(2). Neither the City nor the Applicant have demonstrated that the development agreement, without any authority from the Montana Legislature of the City of Missoula, is even enforceable. Applicant is proposing a course of action that, if approved, will violate the requirements of MCA 76-2-302(2)—e.g., that all City adopted standard zoning districts must have the same standards. Approval of the Application conditioned on the Development Agreement appears to be an effort to create a de-facto PUD, which is allowed due to existing permits and development on site. Approval of the Application subject to the Development Agreement is likely illegal spot zoning. *Little v. Board of County Comm'rs*, 193 Mont. 334; 631 P.2d 1282 (Mont. 1981).

VI. CONCLUSIONS

As a wildlife conservation organization, RMEF supports efforts to provide infill housing development in Missoula. The current zoning on the Subject Property provides the opportunity for significant infill development while balancing the safety issues and adverse impacts to other properties in the area. If the proposed rezone is approved, RMEF is concerned that the value of its current buildings will be adversely impacted, the safety of its employees and visitors will be threatened and the character of the Grant Creek valley will be less desirable as RMEF's Headquarters location.

RMEF objects to Applicant's characterization at page 4 of Applicant's Report that existing zoning, "by right" would allow Applicant to construct 344 residential units on the southern parcel and 158 residential units on the northern parcel. Applicant goes on to acknowledge that site constraints reduce what could actually be built. Applicant does not have any right to build units where none could be built due to physical constraints such as the slope and hillside, or legal constraints such as construction being limited over an existing pipeline easement. It appears that these site constraints would likely have never allowed Applicant to build out to the levels claimed in Applicant's prior rezone attempt

RMEF believes that the proposed rezone, and the commensurate additional impacts, will not secure the safety of RMEF's employees and the RMEF Property, will decrease the value of RMEF's buildings and the RMEF Property, does not promote public safety and the general welfare and is not the most appropriate use of land. The City should take the same position it did in KJA Development's previous attempt to rezone the Subject Property, and the Application for Rezone of 2920 Expo Parkway should be denied.

DATE: April 14, 2022

NEILSON, SWANSON, DIETRICH, PLLC



By: Aaron M. Neilson
Attorneys for Rocky Mountain Elk Foundation, Inc.