NEILSON SWANSON DIETRICH
NORTHWEST LAW FIRM

June 23, 2022

Sent by email to:
Mayor John Engen & Missoula's City Council

RE: KJA Development LLC's Rezone Request for 2920 Expo Parkway

Dear Mayor and Council:

I represent Rocky Mountain Elk Foundation, Inc. ("RMEF") and I submit this letter to address the Development Agreement.

Montana statutes applicable to municipal zoning codes dictate that "All regulations must be uniform for each class or kind of buildings throughout each district …" § 76-2-302(2), MCA. As such, the Council cannot legally consider the Development Agreement ("DA") when deciding whether KJA has satisfied its burden of proving all the review criteria are satisfied. And as the legal authority in Friends of Grant Creek's ("FOGC") legal memorandum to the Council explains, the DA is illegal and unenforceable because the DA violates the uniform application requirement in § 76-2-302(2) and is illegal "contract zoning," illegal "conditional zoning," and illegal "spot zoning."

The logic for prohibiting the City of Missoula ("City") from entering into a DA when there is no statute authorizing it in the context of a rezone, and when the City will not guarantee that it will enter into the same DA every subsequent time an owner of land zoned RM1-45 applies to rezone that land (in violation of the uniform application requirement in § 76-2-302(2)), is sound:

- "They [the various court decisions analyzing similar statutes to § 76-2-302(2), MCA)] 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 an in the same district be treated alike." *Kaufman v. City of Danbury Zoning Comm'n*, 1999 Conn. Super. Lexis 2019.

- "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. Both the benefits of and reasons for a well-ordered comprehensive zoning scheme would be eliminated. … The adoption of an ordinance is the exercise of municipal legislative power. In the exercise of this governmental function a city cannot legislate by contract. If it could, then each citizen would be governed by an individual rule based upon the best deal he could make with the governing body. Such is certainly not consonant with our notion of government by rule of law that affects alike all similarly conditioned." *Harnett v. Austin*, 93 So.2d 86 (Supreme Court of Florida, 1956).

- Montana has adopted a three-part test for spot zoning: (1) whether the requested use is significantly different from the prevailing use in the area; (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 zoning classification; and (3) whether the requested change is more in the nature of special legislation designated to benefit one or a few landowners at the expense of the surrounding landowners or general public. *Boland v. City of Great Falls*, 275 Mont. 128 (1996). Applying this test to the KJA's rezone request:

    - Part 1: KJA is proposing a high-density development, mostly in the form of 4-story apartments that it will lease (not sell), not single-family homes (as in the Prospect neighborhood), low-rise condo units {as in the Cottonwood Condominiums), low-density development (as in RMEF's parcels), or commercial use (as in the parcels to the south).

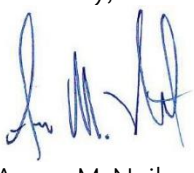
    - Part 2: KJA is the sole owner and sole beneficiary.

    - Part 3: The rezone, especially in conjunction with the DA, is special legislation (considering the DA is not authorized by statute or applicable law) designed to benefit KJA, the sole owner.

Considering this legal authority, if the City enters into the DA and approves KJA's rezone it opens itself up to potential lawsuits from interested members of the general public, KJA, future owners of the subject parcels, future owners of land zoned RM1-45 seeking a rezone, and others. And if the plaintiffs in those lawsuits prevail and a Court declares the DA in this matter is unenforceable, then KJA and future owners of the subject property can—if the rezone is approved—construct many more dwelling units on the subject property than the 700 described in the DA.

On behalf of RMEF, thank you all for your time, efforts, and service to our wonderful community.

Sincerely,



Aaron M. Neilson