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

IN RE THE MATTER OF)	PROTEST PETITION OF
THE CITY REZONE APPLICATION)	ROCKY MOUNTAIN ELK
OF KJA DEVELOPMENT LLC, AS)	FOUNDATION, INC.
APPLICANT, AND WESTERN)	
DEVELOPMENT, LLP, AS OWNER)	
)	

I. PROTEST PETITION

Pursuant to Missoula Code 20.85.040.H, Rocky Mountain Elk Foundation, Inc. (“*RMEF*” or “*Petitioner*”) hereby: opposes the above-referenced City Rezone Application (the “*Application*”), presents its formal protest petition to the Missoula City zoning officer, and petitions the City Council for an order denying the Application.

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 or approval criteria.

If these two requirements are met, and so long as protest petitions on behalf of twenty-five percent of property owners holding property within 150 of the Subject Property (described below) are submitted, the Application must receive a two-thirds majority 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.

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 2019, RMEF had over 234,000 members with over 13,500 from Montana. RMEF has raised millions of dollars to secure access to public lands, protect wildlife habitat, support stewardship of public and private lands and wildlife research. RMEF has funded numerous projects in and near Missoula. Around 90 employees are based out of RMEF's Grant Creek offices. These employees support RMEF's operations throughout the United States and North America.

RMEF purchased the property for its Headquarters building in 2002. The City of Missoula approved a rezoning request of RMEF's Property to allow for its current use. Prior to that time, zoning for RMEF's Property allowed for construction of about 75 residences. RMEF had support from Grant Creek neighbors to locate on this site.

RMEF chose to build its Headquarters in lower Grant Creek due in large part to the character of this neighborhood. The 1980 Grant Creek Area Plan, among other things, recommended providing two routes in the Grant Creek Valley, improving the 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 that 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 not done a good job regulating improper use of the trail, does not provide garbage cans or pick up litter, nor provide bags for dog waste. Because of the increased trespass and vandalism, RMEF has had to spend money on security – funds that it would rather be spending directly on RMEF's mission. RMEF fears that approval of the proposed rezone would exacerbate these problems.

In 1992 Grant Creek Village, Inc., and the City of Missoula entered into a Levee Conveyance, Flood Protection and Waterway Easement. *See* Missoula County Clerk and Recorder Book 373, Page 1694. In that agreement the City of Missoula assumed responsibility for the Flood Protection

Levee located 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 is 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 also concerned that both the Application and the Staff Report on the proposed Rezone fail to consider safety concerns associated with the proposal to significantly increase development on land located behind this Flood Control Levy in the event of flooding, the potential for levee failure, or the possibility of failure of the bridge that provides access over Grant Creek.

2. PROPERTY WITHIN 150 FEET OF THE SUBJECT PROPERTY

The parcels sought to be re-zoned are described in the Application and owned by Western Development LLP, 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 submits this Protest Petition for both the RMEF South Parcel and the RMEF North Parcel. It is RMEF understands that, including RMEF's two parcels that constitute the basis for this protest, at least 25% of the owners of property within 150 feet of the Subject Property have submitted, or soon will submit, valid protests.

IV. ISSUES

1. Does the Application address all the review criteria under Montana Code Annotated ("*MCA*") [76-2-304](#) and Missoula Code [20.85.040.G](#), as required 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 or should approval of the Application be subject to conditions?

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.a. RMEF understands that a sufficient number of valid protests have been, or soon will be, submitted to make the 25% of owners of parcels within 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 outlined in Missoula Code 20.85.040.G as well as the requirements of MCA 76-2-304. As provided in the Application and the 2920 Expo Parkway Rezoning Information slide show, the Application addresses, at some level, subsection 1 of the City’s review criteria in 20.85.040.G. However, the Application neglected to address subsections 2 and 3 even though Missoula Code 20.85.030 says “Applications must address relevant review and decision-making criteria” (emphasis added). 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 did not address these review criteria. Applicant failed to argue that the purpose of the Application is to correct an error, clarify

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.”

an inconsistency or meet a challenge brought by a changing condition. Further, G.3 of Missoula Code 20.85.040 requires the application to address whether the proposed amendment is in the best interest of the City, which the Application failed to include. The Application similarly failed to address significant safety issues such as fire, flooding, trespass, traffic impacts to RMEF employees and visitors and other dangers required by MCA 76-2-304(1). The impact of additional people and traffic when there is a wildfire in Grant Creek was not 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. The impact of stormwater runoff affecting the RMEF Property, the City's Levee and Grant Creek was not addressed. This is also a significant failing considering the City's responsibility to maintain the levee and the bridge across Grant Creek. 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 *Sunday Creek Land Co., LLC*, 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.

Like the city council in *Sunday Creek Land Co., LLC*, and for the reasons stated in this Petition, the City Council here should 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. In addition, the application must address relevant review and decision-making criteria. Missoula Code 20.85.030. In KJA Development's Application, the review criteria laid out in Missoula Code 20.85.040 was summarily listed. However, all, apart from certain traffic impacts that may have been addressed in the revised Traffic Impact Study, were either not address or not adequately addressed. For example, some review criteria such as safety in the event of flooding or fire were not addressed at all. Because this burden is placed on the applicant, it should not be left open and unaddressed in order for the 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 City 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 Updated Traffic Study adequately addresses transportation impacts to RMEF and its employees and visitors. The safety of RMEF visitors and staff coming to RMEF's building and leaving will be adversely impacted by the proposed rezone. RMEF staff who 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 place those same bikers in danger. As discussed, transportation needs for fire and flood evacuation have not been addressed.

Securing Safety from Fire and Other Dangers: The Staff Report incorrectly states that, "no unusual impacts" to emergency services are anticipated. RMEF respectfully suggests that Staff have not addressed emergency services when Grant Creek is flooding and bridges are compromised or when there is a significant wildfire in Grant Creek. Both the Application and the Staff Report fail to address these real safety issues. Also, increased safety threats to RMEF's buildings and employees are not addressed.

Stormwater: RMEF is concerned that stormwater from the Subject Property would adversely impact RMEF's Property. As acknowledged in the Staff Report, drainage from the existing ditch has not been addressed. While the Staff Report envisions a possible "Maintenance Agreement" and the fact that curb cuts may be considered, there are no assurances that stormwater will not be discharged onto RMEF's 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 RMEF's Property. In fact, RMEF is concerned about significant reduction in the value of its buildings and investment of this site if the proposed rezoning Application is approved.

Promoting Compatible Growth - Missoula's Growth Policy and Subdivision Review:

The Staff Report recognizes that the Application, "does not comply with all applicable statements, goals, and objectives of Missoula's Growth Policy." Instead, the Staff Report makes the unsupported claim that, "on balance [the rezone] complies to a large degree." RMEF contends that the Application does not comply with Missoula's growth policy. The Staff Report incorrectly states that the Missoula Growth Policy adopted in 2015 supersedes the Grant Creek Area Plan (1980). While it may supersede the Plan when specific conditions are in direct conflict, other provisions of the Grant Creek Area Plan remain in effect. The Protections the Grant Creek Area Plan provides wildlife, the Grant Creek floodplain and watershed, traffic – including evacuation of the Valley in the event of flood or wildfire - must be followed.

RMEF is also concerned that the Application is intended to avoid, and may actually result in avoiding, the laws governing subdivisions in Montana. MCA Title 76 Chapter 3. The purpose of the Montana Subdivision and Platting Act is to promote orderly development and promote public health and safety. Missoula must ensure that development of the 2920 Expo Parkway Subject Property fully complies with all subdivision requirements.

Thus, the City Council should reject 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. ALTERNATIVELY, IF THE APPLICATION IS GRANTED IT SHOULD BE GRANTED WITH CONDITIONS.

When decision-making bodies approve applications with conditions, the conditions must relate to a situation created or aggravated by the proposed use or development and must be roughly proportional to the impacts of the use or development. Missoula Code 20.85.020.F. If the City Council does not reject the zoning application it should, at the very least, include conditions to address traffic impacting RMEF's Property and the safety of its employees and visitors, risk to Grant Creek Valley property and people in the event of wild fire or flooding, trespass and vandalism to RMEF's and others' property, maintenance of the City's trail system, bridge and

levee, protection of area elk and other wildlife from off-leash pets and other threats, and compliance with the Montana Subdivision and Platting Act.

VI. CONCLUSION

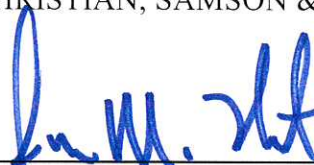
As a wildlife conservation organization, RMEF supports efforts to provide infill housing development in Missoula. The current zoning on the Subject Property provides the opportunity for significant infill development while balancing the safety issues and adverse impacts to other property in the area.

RMEF is concerned about existing and threatened adverse impacts to its employees and the RMEF Property in lower Grant Creek. RMEF has questioned whether staying in Missoula at its lower Grant Creek location is in its best interest, and whether the Application is granted or denied will weigh heavily on RMEF's decision. 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 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 building, does not promote public safety and the general welfare and is not the most appropriate use of land. KJA Development's Application should be denied.

DATED: August 3, 2020

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