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August 18, 2021

VIA EMAIL
Planning Commission
City of Elk Ridge, Utah
80 E. Park Drive
Elk Ridge, Utah 84651
Attn: Royce Swensen, City Recorder
Email: royce@elkridgecity.org

Re: Comments in Anticipation of the City Planning Commission's August 18, 2022 Meeting Re: Proposed Amendments Through Ordinance 22-07 (Re: CE-3 Zone)

To the Members of the Elk Ridge City Planning Commission:

I have been retained to represent Karl Shuler, Lee Pope, and several of their joint tenants (collectively the "Shuler Family") who (together) own over 120 acres in the Critical Environment ("CE-3") Zone at issue in proposed amendments to Elk Ridge City Code through Ordinance 22-07 (hereinafter "Ord. 22-07"). The Shuler Family's property located in Elk Ridge City (the "City") includes Parcel 30:078:0279 (the "Shuler Property") and is directly adjacent to the HR-1 Zone.

I have had an opportunity to review the extensive proposed amendments outlined in Ord. 22-07 that are posted to the City's website for consideration in the Planning Commission meeting to be held tonight, August 18, 2022. I respectfully request that this letter be included in the packet provided to the City's Planning Commission for tonight's meeting.

Based upon my review, the approval of the current amendments outlined in Ord. 22-07 would amount to an unconstitutional regulatory taking of the Shuler Property (and the land of many other property owners falling within the CE-3 zone(s)) through illegal exactions and excessively restricting ordinances.

Controlling Law Re: Regulatory Takings

Both the U.S. Constitution and the Utah Constitution protect private property against uncompensated governmental takings. U.S. CONST. AMEND. V ("[P]rivate property [shall not] be taken for public use, without just compensation."); UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation."). The Utah Constitution extends protection above that of the U.S. Constitution for *damage* to private property. See UTAH CONST. art. I, § 22 ; *Utah Dep't of Transp. v. Admiral Beverage Corp.* , 2011 UT 62, ¶ 20, 275 P.3d 208.

The City would surely not dispute the fact that, if the City ran a road directly through the path of a property owner (i.e. requiring the demolition of their home and physical taking of their

property), the City would owe that property owner compensation for the taking of their property. However, a government's physical taking of property is not the only occasion on which a government can perpetrate a taking requiring compensation to a property owner (or opening the City up to lawsuits and legal liability).

"[A] regulatory taking transpires when some significant restriction is placed upon an owner's use of his property for which "justice and fairness" require that compensation be given.'" *View Condo. Owners Ass'n v. MSICO L.L.C.*, 2005 UT 91, ¶ 31, 127 P.3d 697 (*quoting Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 (1st Cir.2002)). Stated more simply, a regulatory taking occurs when a zoning regulation goes "`too far.'" *Tolman v. Logan City*, 167 P.3d 489, 2007 UT App 260 (Utah App. 2007). Utah law prohibits the City from being arbitrary and capricious in its exercise of its zoning authority. *See Harmon City, Inc. v. Draper City*, 997 P.2d 321, 323-24 (Utah App. 2000).

A party can challenge a land use decision as a taking through either a facial challenge or an "as applied" challenge. *Id*. at ¶ 18 n. 9. A facial challenge to a land use regulation becomes ripe upon enactment of the regulation itself. *See Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 251 (Utah Ct. App.1998) (noting that the only question involved in a facial challenge to a land use regulation is "`whether the mere enactment of the [ordinance] constitutes [a substantive due process violation or] a taking'" (alterations in original) (*quoting Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987))).

A per se regulatory taking occurs where a "government requires an owner to suffer a permanent physical invasion of her property" or a regulation "completely deprive[s] an owner of 'all economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538. Otherwise, a regulation may create a taking under standards the United States Supreme Court set forth in *Penn Central*.[1] The major factors under the *Penn Central* inquiry are (1) '[t]he economic impact of the regulation on the claimant,' (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations,' and (3) 'the character of the governmental action." *Penn Cent*., 438 U.S. at 124; *see also B.A.M. Dev., L.L.C. v. Salt Lake* Cty (B.A.M. I) 2006 UT 2, ¶ 33, 128 P.3d 1161 (*quoting MacDonald, Sommer & Frates v. Yolo Cty*., 477 U.S. 340, 349, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986)).

In evaluating a landowner's claim of an uncompensated regulatory taking, Utah Courts look to the *Nollan - Dolan* line of cases which address the "unconstitutional conditions doctrine." Id. at 2594. This doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[2] It permits challenges under the takings clause even where the government has not seized private property, ***but instead has conditioned a government benefit upon acquiescence to an uncompensated taking of private property***. *Alpine Homes, Inc. v. City of W. Jordan*, 424 P.3d 95 (Utah 2017). (Emphasis added.)

[1] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).
[2] *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

The Proposed Amendments in Ord. 22-07 are Unlawful

When viewed through the lens of the controlling case law and constitutional provisions referenced above, together with Utah's limitations on exactions and regulatory constraints (as outlined in provisions including but not limited to Utah Code § 10-9a-505 and § 17-27a-507) the amendments outlined in Ord. 22-07 go ***too far*** (emphasis added).

First, and most glaringly, the proposed amendments to § 10-9B-6-1 contain no reference to include residential zoning and fails to classify the CE-3 area as permitting the construction of single-family dwellings, etc. This failure exceeds the limitations and regulatory purposes for which Ord. 22-07 attempts to serve.

Moreover, the complete and total prohibition on building along ridgelines without an articulable basis (as a ridgeline cannot be considered a per se geologic hazard area under Utah Code § 10-9a-505) amounts to a unconstitutional regulatory taking by the City. Many similarly situated municipalities have successfully and safely permitted development along their ridgelines.

The verbiage within the amendments that relate to cuts, fills, and grading (§ 10-9B-10) appear, in conjunction with the prohibition on benching or terracing) to prevent the building of any structure unless it can be accomplished without specified filling, etc. (however, considering the slope restrictions – it is not reasonable or feasible to determine that there would be mush (if any) buildable area left). We ask that, if the City considers moving forward with Ord. 22-07, the City first have an audit/analysis done to determine what percentage of the property falling within CE-3 would remain developable if these extensive, convoluted, excessive, and unnecessary amendments are adopted.

It is noteworthy that, if open space property is deeded to the City (§ 10-9B-11-2) the City itself appears to be exempt from its own highly restrictive building, grading, cuts, fills, restrictions, and requirements. This highlights the reality that the restrictions are not drafted in a manner to be narrowly tailored the City's regulatory power but, instead, appear to be intended to prevent development all together based upon emotional sentiments.

The City's proposed imposition of 4-acre lot minimums (§ 10-9B-13-3) goes too far and is exceedingly more restrictive than any nearby rural community with ridgelines that counsel has audited (i.e. Woodland Hills, Midway, Draper, etc.). Furthermore, the limited allowance of 1 acre lots in a development being subject to a requirement that 40% of the development must be dedicated to open space and required to include public access to trails (together with public parking lots) amounts to the City conditioning its' approval of a development with 1 acre lots upon a property owners' acquiescence to an uncompensated taking of private property. Utah courts have made clear that city benefits being conditioned upon such takings is patently unlawful. *See Alpine Homes, Inc. v. City of W. Jordan*, 424 P.3d 95 (Utah 2017).

If the goal of these amendments was to "preserve open spaces," there is no need for a taking of private property in a manner that requires public use. Rather, the proposed amendments could merely limit the percentage of the 1-acre parcel that could be developed and require that the remainder be undeveloped (but remain strictly private in nature).

Shuler Family History

Anyone residing in Elk Ridge knows the Shuler family name (with the Shuler family having donated parks to the City and remaining committed to the City maintaining a small town/rural feel). My clients remain committed to their love for the City and desire to maintain its small town feel. However, my clients have faced push-back from the City for over a decade when attempting to engage in limited development of their property (desiring for the property owners and their family to make meaningful use of the Shuler Property for their own family homes). Members of the Planning Commission and City Council have been on boards when the Shuler Family has applied for such developments and will likely recall the difficulty that the Shuler Family experienced in gaining approvals. In fact, at one point (following an application in approximately 2008) the City attempted to amend zoning to prevent my clients from completing their desired development.

Shockingly, despite the aversion to development, the City has allowed huge developments, packing in homes in high density in the lower areas of Elk Ridge and utilizing a large portion of the City's infrastructure resources through approving these large scale developments. However, the City now points to remaining infrastructure as a justification for continuing to prevent development along the ridge line and within the CE-3 Zone. My clients want nothing more than to continue to maintain positive and conflict free relationships with the City, members of the Planning Commission, and Members of the City Council. However, the Shuler Family cannot and will not stand by and allow their familial land (in the community they love and intend to remain in) to be taken from them through unlawful, excessive, and unnecessary restrictions and regulatory takings.

It is the Shuler Family's sincere hope that the Planning Commission will take pause, recognize the excessive and unlawful provisions of Ord. 22-07, and amend the ordinance to implement more reasonable development provisions (taking more reasoning positions on what slopes of property can be developed, allowing 1 acre lots (without unlawful exactions against properties), permit clustering of communities to be reduces to ½ acre lots so that the impact on the ridgeline is less extensive and cul-de-sacs can be more feasible in implementation, and respect that property rights of its long time citizens. We remain committed to working together to accomplish a workable and lawful solution to the amendments to Elk Ridge City's Code. However, if the City fails to implement reasonable amendments necessary to bring the proposed amendments in line with the laws of the United States and the State of Utah, my clients will be forced to take swift legal action.

Sincerely,
MACARTHUR HEDER & METLER, PLLC

/s/ Stephanie L. O'Brien
Stephanie L. O'Brien
Attorney for The Shuler Family