

May 20, 2020

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VIA E-MAIL – TRAPAR@LAKEWOOD.ORG

Travis Parker
City of Lakewood
Planning Department
480 South Allison Parkway
Lakewood, CO 80226-3127

Re: Request for Amendment of Development Agreement

Dear Travis:

As you are aware, our firm represents CDN Red Rocks, L.P. (“**CDN**”), owner of certain real property (the “**Property**”) located along South McIntyre Street and within the plat of Red Rocks Business Park in the City of Lakewood (the “**City**”). The Property is the subject of that certain Development Agreement for Solterra Centre Official Development Plan Regarding Vested Rights, recorded December 11, 2009 in the real property records of Jefferson County at Reception No. 2009124458 (the “**Development Agreement**,” a copy of which is attached here), which confers vested property rights upon the CDN Property for the development of a mix of commercial and residential uses. We are submitting this letter, along with the attached draft First Amendment to Development Agreement for Solterra Centre Official Development Plan Regarding Vested Rights (the “**Proposed Amendment**”), and respectfully request that you forward the same to the City Council for review and approval. Below, I offer some general, relevant background on vested property rights, the Development Agreement, and these concepts’ relationship to the City’s recently-enacted, voter-approved “**Residential Growth Limitation**” ordinance, codified as Chapter 14.27 of the Lakewood Municipal Code. I also explain our request for the Proposed Amendment.

Background

Vested Property Rights. In the absence of vested property rights, a local government is generally free to unilaterally amend or modify zoning and other land use entitlements applicable to a given parcel of land. In such a circumstance, the only limitations on the government’s ability to do so include constitutional limitations such as the Takings Clause of the Fifth Amendment and the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Vested property rights generally provide heightened protection against government interference with land use entitlements. The vested rights doctrine establishes if and when a landowner will be subject to new regulations

applicable to the landowner's property and the extent to which a landowner might be entitled to a remedy in the event the government interferes with the vested rights. In 1988, the Colorado legislature adopted a vested rights statute, C.R.S. § 24-68-101 *et seq.* (the "**Vested Rights Act**"). The Vested Rights Act confers vested property rights for up to three years upon a local government-approved "site specific development plan." A site specific development plan can be any land use approval identified in a local code or as designated pursuant to a development agreement. With a development agreement, a local government can confer extended vesting beyond the statutory three-year period. There are many reasons that a local government may choose to confer vested rights, including: (1) the desire to induce development on a long-vacant parcel or in response to an economic recession; and (2) as a "fair trade" with a developer that constructs or provides public utilities or services over and above those which might otherwise be required by law

The vested rights conferred by the Vested Rights Act are not a blanket ban on government action that limits the underlying site specific development plan. Section 105 of the Vested Rights Act identifies three conditions under which regulations may be modified in a manner that would "alter, impair, prevent, diminish, impose a moratorium on development, or otherwise delay the development or use of . . . property as set forth in a site specific development": (1) if the affected landowner consents to the government action; (2) if hazards are discovered on or in the vicinity of the property posing a serious threat to the public health, safety, and general welfare; or (3) if the landowner receives "just compensation for all costs, expenses, and liabilities incurred by the landowner after approval by the governmental entity." Such costs, expenses, and liabilities may include "costs incurred in preparing the site for development consistent with the site specific development plan, all fees paid in consideration of financing, and all architectural, planning, marketing, legal, and other consultants' fees, together with interest thereon at the legal rate until paid."

The Development Agreement. In 2009, the City Council approved the Solterra Centre Official Development Plan (the "**ODP**"), encumbering the CDN Property. The ODP contemplates the development of the CDN Property with a mix of land uses, including retail, office, and residential. With respect to residential development, the ODP permits the development of up to 1,630 dwelling units. The City Council subsequently approved the Development Agreement pursuant to the Vested Rights Act and designated the ODP as a "Site Specific Development Plan," thus conferring upon CDN the right to develop and use the CDN Property in the manner described in the ODP.

Section 3 of the Development Agreement contains language substantially identical to the language of Section 105(1) of the Vested Rights Act, providing that "[a]ny zoning or land use action by the City or pursuant to an initiated measure which would alter, impair, prevent, diminish, impose a moratorium on development or otherwise delay the development or use of the Property as set forth in the Site Specific Development" is prohibited except in certain, limited circumstances. The Development Agreement goes on to provide CDN with a remedy of specific performance or, in the alternative, money damages for all costs incurred in furtherance of development after the approval of the Development Agreement.

Relationship to Residential Growth Limitation. In 2019, City voters approved the Residential Growth Limitation, now codified at Chapter 14.27 of the City's Municipal Code. In order for a residential project to receive building permits under that provision, the project must obtain a number of allocations from the City equal to the number of proposed residential units. These allocations are made from a pool of allocations set

by the City Council each year, which is generally equal to one percent of the total number of housing units in the City in the prior year. Furthermore, any project containing more than 40 units is required to obtain special City Council approval in order to receive allocations.

Application of the allocation process and other provisions of Chapter 14.27 would, at the very least, “delay” if not “impair, prevent, diminish, [or] impose a moratorium” on the development of the Property. To date, the mere existence of the Residential Growth Limitation ordinance has put CDN’s development plans at risk, as potential homebuilders are unwilling to move forward with their plans, given the uncertainty surrounding the project’s ability to actually receive allocations. Since obtaining approval of the ODP, CDN has spent in excess of \$6,000,000 preparing the Property for residential development. The passage of Chapter 14.27 puts this investment at risk. In the event that CDN were placed in the unenviable position of filing an action to enforce the terms of the Development Agreement, it would very clearly be entitled to either: (1) a court order requiring the City to adhere to the terms of the Development Agreement notwithstanding Chapter 14.27; or (2) recovery of some or all of its \$6,000,000 investment in preparing the Property for residential development. CDN—and we suspect the City as well—views this type of litigation as a suboptimal approach to resolving the inconsistencies between CDN’s vested rights secured under the Development Agreement and the City’s Residential Growth Limitation.

Request

To resolve the foregoing inconsistencies between CDN’s previously-conferred vested rights and the Residential Growth Limitation, CDN has worked at the request of City staff to prepare the attached Proposed Amendment. As drafted, the Proposed Amendment would do the following:

- Amend the Development Agreement to acknowledge the existence of the Residential Growth Limitation.
- Require the owner(s) of the Property to submit, on or before November 1 of each year, a written notice setting forth the number of building permits that the owner(s) expect to seek in the following year.
- Obligate the City to determine, at the time of the Property owner’s submittal of the foregoing notice, whether to provide allocations to the Property owner from the subsequent year’s allocation pool, “borrow” allocations from other years’ worth of allocations, or otherwise determine how to issue the building permits identified in the notice.
- Ensure that the approval of more than 40 building permits per year for the Property would occur on a nondiscretionary basis.

The Proposed Amendment carries several mutual benefits for CDN and the City. Most significantly, the Proposed Amendment balances the Residential Growth Limitation with CDN’s vested rights, allowing the City a means to adhere to the citizen-adopted Residential Growth Limitation while ensuring that CDN retains the benefit of its vested rights. Additionally, the Proposed Amendment provides certainty to both CDN and the City regarding the process through which allocations will be conferred upon future residential development of the Property, avoiding needless argument regarding the relationship between vested rights and the Residential

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Growth Limitation. Finally, because the Proposed Amendment is specific to the Property, it does not change or modify the Residential Growth Limitation as it applies to any other parcels in the City. Any owner of other property subject to vested rights will not benefit from the Proposed Amendment, and would be required to separately seek an amendment or other approval to address any conflict between that owner's vested rights and the Residential Growth Limitation.

We look forward to working with you on the foregoing request. We respectfully request that the Proposed Amendment be expeditiously processed for review by the City Council in accordance with Section 104(2) of the Vested Rights Act, and that the City approve the Proposed Amendment. Please note that in the event the City Council does not approve the Proposed Amendment, nothing in this letter is intended to constitute a waiver or limitation of any claim that CDN may have, now or in the future, for any breach of the rights conferred pursuant to the Development Agreement, in the event the City Council does not approve the Proposed Amendment.

Very truly yours,



Brian J. Connolly
For the Firm

BJC/abm
Attachments

cc: Tim Cox, City Attorney