

April 7, 2020

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VIA ELECTRONIC MAIL AND REGULAR MAIL

City Council, City of Fort Collins
Wade Troxell, Mayor
300 LaPorte Avenue
Fort Collins, CO 80521

RE: April 7, 2020 City Council Second Reading, Harmony Corridor Plan Amendment for the Gateway Area (the "Amendment") – Opposition to the 40% open space requirement (the "Open Space Requirement" or "Requirement")

Dear Mayor Troxell and City Council Members:

This letter is sent on behalf of our client, Harmony-McMurray, LLC ("Harmony"), the owner or contract purchaser of substantially all of the privately-held property (the "Property") within the proposed Harmony Corridor Gateway area (the "Area"). First, as we have commented previously, we note that Harmony fundamentally agrees with the City's underlying purpose in considering the Amendment; the requirement for 75% employment uses in the current Plan and zoning are obsolete and not in keeping with market demands.

However, Harmony must oppose the Open Space and Landscape Setback Requirements (the "Requirements") in the form approved by the Council at its March 3, 2020 meeting ("First Reading"), given that the Requirements would render valueless Harmony's investment in the Property and preclude economic development of the Property. Harmony believe that more reasonable requirements would achieve the Council's goal of highlighting a natural appearance for the Area, while also allowing an economic use of the Property. If the City adopts the Amendment without modifying the Requirements, the City will have left Harmony no choice but to pursue its legal options to protect its property rights.

As you know, the City has considered acquiring the Property for many years. This fact is not disputed and is acknowledged in multiple City-prepared summaries, presentations, and memos. Notably, page 3 of the Staff memo to City Council for First Reading reiterates that City Staff considered the opportunity to purchase the Property but declined due to the "costs and liabilities of mining permit closeout, water augmentation and site restoration." Within the past 90 days, Harmony again proposed to the City that the City consider purchasing or accepting a donation of all or a portion of the Property to be slated as natural area, which the City again declined. But the City, having determined not to purchase the Property, now seeks to accomplish the same ends through the Requirements, appropriating the Property for community open space, landscaping and separators without paying any compensation to the landowner. Harmony respectfully submits that this is an abuse of governmental power that the Council should resist.

We also ask the Council to consider the significant investment and risk that Harmony will undertake to make the Property capable of sustaining a development that will contribute to the City's tax and employment base. The Property is not pristine. As discussed in our February 28, 2020 letter to City

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Council and at First Reading, existing constraints already make the Property very difficult and expensive to develop. The Property was previously used to mine gravel, and several former gravel pits, now full of water, remain on the Property. The water presently filling these gravel pits cannot be maintained, and these gravel pits must be filled, at significant cost to Harmony, before the Property can be developed. Also, because the Property is located within a flood zone, Harmony must design and construct a floodway channel before developing the Property, a lengthy and costly process that will require coordination with the City, FEMA, and CDOT. Finally, the Property overlies a high water table, which will further increase the costs of development. These existing constraints prevented the Property's previous owner from developing the Property, despite considerable efforts. Recognizing the impact of these constraints on development, Harmony has spent significant time and resources in evaluating and designing thoughtful solutions to safely accommodate development on the Property. Imposition of the Requirements would render that work valueless.

When added to the existing constraints on development of the Property, the imposition of the Requirements would be unfair and amount to an unconstitutional taking. This legal issue was properly recognized by several Council members during First Reading, who expressed concern that the Requirements would unfairly confiscate the Property to benefit the public, without compensation to the owner.

These concerns are well founded. The Requirements would deprive Harmony of the use of approximately 55 acres to benefit the residents of the City, while at the same time imposing upon Harmony the obligation to pay to landscape and maintain this acreage. By forcing Harmony to devote approximately 55 acres to open space and "placing the entire burden of preserving the land as open space upon [Harmony]," the City is unlawfully taking Harmony's Property. See *Burrows v. City of Keene*, 121 N.H. 590, 600-01 (N.H. 1981). In *Burrows*, the court found that an amendment to a local zoning ordinance that placed a substantial portion of the plaintiff's property into a conservation district resulted in a taking of the plaintiff's property. Similarly, the Minnesota Supreme Court explained in *Wensmann Realty, Inc. v. City of Eagan* that the city's refusal to amend its comprehensive plan to permit residential development of a golf course was an "extreme burden on one property owner while benefitting the public as a whole with open space for which the city did not pay." 734 N.W.2d 623, 640 (Minn. 2007). Because the residents of the City will share the benefits provided by the Open Space Requirement while Harmony alone will bear the costs, the Requirements constitute an unconstitutional taking Harmony's property rights.

The Planning Board also recognized this issue, recommending that the City add a requirement that the City purchase the property or an easement, and contribute financially to the installation and maintenance of the required landscaping, if the Requirements were otherwise included unchanged. Harmony agrees with the Planning Board that if the City were to pay for its taking of private property, then the Requirements would not be unconstitutional.

Even the City's actions acknowledge the validity of Harmony's objections. As initially proposed, the Amendment applied solely to the property south of Harmony Road – e.g., Harmony's Property. When Harmony voiced concern about this apparent special legislation applying only to its property, the City recognized that it would be unlawful to burden only Harmony's property with the Requirements. But rather than making the requirement less onerous, the City expanded the scope of the Amendment to apply to the entire Area, both north and south of Harmony Road. However, because all of the property within the Area north of Harmony Road is already in public ownership, this attempt to validate the Amendment is unavailing. Harmony remains the only private property owner unfairly burdened by the Requirements.

As the Supreme Court has held, the takings clause of the United States Constitution prevents a government from requiring a single property owner alone to shoulder a public burden "which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40 (1960).

Governments may not thrust the expense of improving the public condition upon an individual. *Burrows*, 432 A.2d at 20. If the City wants the Property to be open space for the benefit of the public, then the City should purchase it and operate and maintain it as open space.

We also maintain that the Requirements are an unlawful exaction. Although couched as a legislative action, in the form of a comprehensive plan amendment, the Requirements have all the hallmarks of an exaction whereby the City is conditioning development on Harmony's dedication of land to a public purpose. The Requirements prevent Harmony from developing the Property without dedicating 40% of the Property to open space uses, a requirement not borne by any other private property owners under the Amendment, or elsewhere in the City.

Section 2.13.11 of the City's Land Use Code prevents the City from imposing an exaction upon Harmony without a reasonable nexus and rough proportionality. These requirements originate from two Supreme Court cases, commonly referred to as *Nollan* and *Dolan*, which so held. Here, the Requirements bear no nexus and are not proportional to any reasonably contemplated development of the Property allowed pursuant to the Code and the Amendment. The City's is attempting to undertake a quasi-judicial, site-specific exaction, in the guise of a legislative action to amend a comprehensive plan.

Not only would the Requirements unconstitutionally deprive Harmony of the Property, it ultimately would not advance the City's objectives in adopting the Amendment because it would render development of the Property economically and commercially infeasible. This would result in exactly what the City is trying to avoid by adopting the Amendment – underdeveloped land that would not serve the public and the inability of the Property or developer to improve the Harmony Gateway in accordance with the Harmony Corridor Plan. Harmony's representatives are longtime residents of the City who hope to develop the Property and the Harmony Gateway to be an aesthetically pleasing addition both to the Area and to the City. Instead of enabling Harmony to overcome the Property's considerable constraints to develop a mixed use center that attracts desirable industries and businesses to the City, the Requirements would render the property valueless and incapable of development.

Thank you for the opportunity to comment on the Amendment. We request that the City Council either adopt the Amendment with the Planning Board's recommendation that compensation be provided, modify the Requirements to a reasonable percentage, or decline to adopt the Amendment as initially approved at First Reading.

Sincerely,



Carolynne C. White
cc:

Brad Yatabe, Deputy City Attorney
Carrie Daggett, City Attorney