MICHELLE L. BERGER, PARTNER
DIRECT DIAL: 303-839-3790
mberger@spencerfane.com

May 27, 2022

Sent via Email

Planning Commission
City of Commerce City
7887 E. 60th Avenue
Commerce City, CO 80022

Re: Reunion Ridge, Filing 1, PA-1 Application for Lot Line and Terminology Adjustments – Oakwood Homes Appeal of Community Development Director Decision

Dear Planning Commission Members:

On Tuesday, June 7, 2022, Planning Commission will hold a public hearing to consider the City of Commerce City's (the "City") decision regarding an application for Lot Line and Terminology Adjustments for Tracts C and X of Reunion Ridge Filing 1, PA-1 (the "Application") filed by Clayton Properties II, Inc. d/b/a Oakwood Homes ("Oakwood"). Spencer Fane LLP represents Oakwood with respect to the Application, the City's decision regarding the Application, and Oakwood's appeal of the City's decision.

As discussed herein, the City has interpreted and applied the LDC to Oakwood's Application in a discriminatory, arbitrary, and capricious manner because there is no component evidence in the record to support its interpretation. Further, the City has exceeded its authority by requiring Oakwood to file an application for and receive City approval of a final plat for PA-1 prior to development. The result is an unlawful taking of Oakwood's vested property rights. By this letter, Oakwood is appealing the Decision to the Planning Commission and City Council as provided for in LDC § 21-3245(3).

History of Reunion Ridge Filing 1 Plat

The Reunion Ridge Filing 1 Plat ("Reunion Ridge Filing 1 Plat") was administratively approved by City Staff on January 10, 2020 and recorded on January 17, 2020. A copy of the approved Reunion Ridge Filing 1 Plat is attached hereto as ***Exhibit A***. Reunion Ridge Filing 1 Plat was subdivided into several parcels.[1] Parcel 2 was further subdivided into single family lots, while Parcels 1 and 3 were divided into tracts.[2] Parcel 1 contained several tracts, including "Tract C," which was designated as "Future Development," and "Tract X," which was designated as "Open Space, Utilities, Drainage, Park"

[1] *See* Ex. A, *Reunion Ridge Filing 1 Plat*.
[2] *Id.*

in the Land Summary Chart.[3] Tract X is planned to be a detention pond.[4] Tracts C and X are considered PA-1.[5]

Background on Application and Decision

On August 9, 2021, Oakwood submitted the Application to the City. A copy of Oakwood's submitted Application is attached hereto as ***Exhibit B***. The Application consisted of a requested Lot Line and Terminology Adjustment to retitle Tract C as a lot and to adjust the lot line between Tracts C and X to reflect the final detention pond size.[6] Oakwood plans to develop Tract C as a single lot with a group of single family for-rent homes.[7] Therefore, no further subdivision of Tract C is necessary for Oakwood's planned future development, which is a use by right under the Reunion Planned Unit Development ("Reunion PUD"). A copy of the Reunion PUD is attached hereto as ***Exhibit C***.

On August 24, 2021, in email correspondence between Ms. Jennifer Jones (the City's Principal Planner), on behalf of the City, and Mr. Jeff Marck, on behalf of Oakwood ("August 24, 2021 Email Correspondence"), Ms. Jones instructed Oakwood that Tract C should be changed from a tract to a lot through a Terminology Adjustment. A copy of the August 24, 2021 Email Correspondence is attached hereto as ***Exhibit D***. Also, in the August 24, 2021 Email Correspondence, Mr. Marck informed Ms. Jones that Tract C was already platted in the Reunion PUD and that Tract C would not be further subdivided.[8]

On April 19, 2022, Oakwood received a letter ("Decision Letter") from Ms. Jennifer Jones, on behalf of the City's Community Development Director, Mr. James (Jim) Tolbert,, informing Oakwood of the City's decision the Application for a lot line adjustment for Tract X could be processed, but the requested Terminology Adjustment for Tract C could not be processed and was therefore denied ("Decision"). A copy of the Decision Letter is attached hereto as ***Exhibit E***. According to the City, the Terminology Adjustment process could not be used to retitle Tract C as a lot because, pursuant to LDC § 21-3244(3)(a), "the adjustment cannot increase the number of lots or parcels or create new lots or parcels."[9] Ms. Jones further informed Oakwood it could either resubmit the Application as a new application for a final plat of the entire PA-1 area, or appeal the Decision within ten (10) days, pursuant to LDC §21-3425(3).[10]

The Decision came as a surprise to Oakwood as City Staff had directed Oakwood to use this process[11] and accepted Oakwood's Application without issue.[12] Further, Oakwood and the City had been working on the Application for approximately one year without any indication from the City that the

[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *See* Ex. B, *Application*.
[7] *Id.*
[8] *See* Ex. D, *August 24, 2021 Email Correspondence*.
[9] *See* Ex. E, *Decision Letter*.
[10] *See id.*
[11] *See* Ex. D, *August 24, 2021 Email Correspondence*.
[12] *See* Ex. B, *Application*.

Terminology Adjustment process was not the correct development process under the LDC to accomplish Oakwood's requested adjustments to the previously recorded Reunion Ridge Filing 1 Plat. Finally, the City's "Facts to Know regarding Lot Line or Terminology Adjustments" ("Facts to Know") explicitly provide: "[t]erminology adjustments refer to the process for retitling lots from platted tracts to prepare for development. No additional *parcels* are created through a terminology change." (emphasis added). The City's Facts to Know are attached here to as ***Exhibit F***.

On April 29, 2022, Oakwood submitted an appeal of the City's Decision to the City ("Appeal"), which the City confirmed receipt of on May 5, 2022. A copy of the Appeal is attached hereto as ***Exhibit G***. Oakwood further requested copies of the record for the Appeal,[13] including copies of any and all correspondence between, or directions received by, "you, your staff and any other parties within or outside the City, other than your legal counsel, and including the Mayor and any City Council members."[14] Oakwood further requested a copy of any rules of procedure adopted by the Planning Commission or City Council for the administration of appellate matters, adopted pursuant to LDC §21-3445.[15] In response, the City Clerk provided only a copy of Oakwood's Application, and a set of rules adopted by City Council on May 16, 2022, seventeen days after Oakwood filed the Appeal. Separately, Ms. Jones provided email correspondence between herself and Mr. Tolbert, ("Jones-Tolbert Email Correspondence"). A copy of the Jones-Tolbert Email Correspondence is attached hereto as ***Exhibit H***.

Notably, in the Jones-Tolbert Email Correspondence, Ms. Jones requests that Mr. Tolbert provide specific language that planning staff can rely upon to explain to applicants, including Oakwood, that Terminology Adjustments were no longer permitted under the LDC.[16] Mr. Tolbert responds stating that:

> [I]f asked about the question of why is a lot to a tract no longer a terminology change simply say because the code states that creation of a lot is subdivision and that why we are doing this. **Do not say that Matt [Hader] made a new interpretation**.[17, 18]

Applicable LDC Provisions and Approval Process/Criteria

LDC § 21-11200 contains defined terms used in the LDC. A copy of LDC § 21-11200 text is enclosed as ***Exhibit I***.

Subsection (324) defines a "Parcel" as "a plot of land of any size that may or may not be subdivided or improved."[19]

---

[13] Per LDC § 21-3425, upon receipt of the Appeal, the City must forward the documents constituting the record of the action to the appropriate appellate body, in this case the Planning Commission and, subsequently, the City Council.
[14] *See* Ex. G, *Appeal*.
[15] *See id.*
[16] *See* Ex. H, *Jones-Tolbert Email Correspondence*, p. 4.
[17] Mr. Matt Hader is the Interim City Attorney. However, the Jones-Tolbert Email Correspondence was not between Mr. Hader and Ms. Jones or Mr. Tolbert. Mr. Hader also was not copied on the email correspondence, so there can be no claim that the Jones-Tolbert Email Correspondence is attorney-client privileged.
[18] *See id.*, p. 3 (emphasis added).
[19] LDC § 21-11200(324).

Subsection (468) defines a "Tract" as "a unit of subdivided land not occupied or designed to be occupied by a primary building, such as open space or drainage."[20]

Subsection (248) defines a "Lot" as "a unit of subdivided land occupied or designed to be occupied by a primary use or building or *a group of such buildings and accessory buildings*." (emphasis added).[21]

Subsection (429) defines a "Site Specific Development Plan" as "any of the following applications, if designated by the applicant as a site specific development plan for the establishment of vested property rights according to C.R.S. § 24-68-103, when approved by the city. The site-specific development plan shall describe with reasonable certainty the type and intensity of use proposed for a specific parcel or parcels of property. Site specific development plans include the following:

(a) Final plats;
(b) Development plans; or
(c) Final PUD development permits.[22]

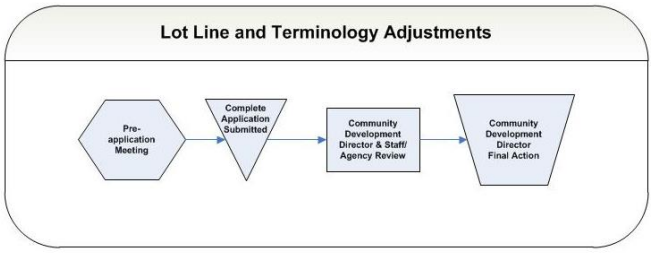
Subsection (445) defines "Subdivision" as "the division by plat of a lot, tract, or parcel of land."[23]

LDC § 21-3244 provides an administrative process for adjusting lot lines and adjusting terminology on a previously recorded plat. A copy of LDC § 21-3244 text is enclosed as ***Exhibit J***. The process is as follows:

(1) *Description*. The lot lines or terminology of previously recorded documents may only be adjusted in accordance with this section.

(2) *Review*. The director and the DRT, as deemed appropriate by the director, will review applications for lot line or terminology adjustments ("adjustments"). The director is authorized to approve, approve with conditions, or deny such applications based on the criteria below.

Figure III-20. Lot Line and Terminology Adjustments



[20] *Id.* § 21-11200(468).
[21] *Id.* § 21-11200(248).
[22] *Id.* § 21-11200(429).
[23] *Id.* § 21-11200(445).

(3) *Approval Criteria*. The director may approve a lot line adjustment if:

(a) The adjustment does not increase the number of lots or parcels or create new lots or parcels;

(b) The adjustment does not affect a recorded easement without the prior approval of the easement holder;

(c) Street locations will not be changed;

(d) The adjustment will not create any nonconformities, or increase the degree of nonconformity of any existing structure or use; and

(e) The adjustment complies with all other applicable city standards.

(4) *Acceptance of Dedications*. When an adjustment involves a street, easement, or other public use dedication, the director's approval of the application shall constitute the city's acceptance of any such dedication.

(5) *Recording*. The city will record each approved adjustment. The applicant may be required to pay all recording fees.

Lapse. If the approved plat is not executed by the applicant within 60 days of the date of approval, or within any longer period approved in advance in writing by the director due to unique circumstances, the plat shall automatically lapse and be null and void.[24]

LDC Article VI provides Subdivision Standards, Public Improvements, and Design Requirements ("LDC Subdivisions Standards"). A copy of LDC Article VI text is enclosed as ***Exhibit K***. Specifically, LDC § 21-6100 of the LDC Article VI text includes a general restriction on subdivisions:

> Unless exempted below, no land within the city shall be split or divided in any manner, regardless of whether into lots or parcels, except in compliance with the provisions of this land development code. It shall be unlawful for any person to sell or otherwise convey land for the purpose of laying out any subdivisions, suburban lots, building lots, tracts or parcels or any owner of any land to establish any street, alley, park or other property intended for public use or to offer for development purposes any land without reference to a legal, recorded plat.[25]

The City's **Facts to Know** provides the following regarding the applicability of Lot Line or Terminology Adjustments:

[24] LDC § 21-3244.
[25] LDC Article VI.

> A lot line or terminology adjustment is the process that is used to change property lines or reconfigure the shapes of existing parcels. In every instance, the lot line or terminology adjustment process will yield the *same number of parcels* that exist prior to the lot line or terminology adjustment. The traditional subdivision procedure is the process by which property is divided or consolidated to legally create more or fewer lots, tracts, or parcels than what existed prior to the subdivision. *Terminology adjustments refer to the process for retitling lots from platted tracts to prepare for development. No additional parcels are created through a terminology change.*[26]

Oakwood's Application Meets LDC § 21-3244 Criteria

Oakwood's Application simply seeks to amend the terminology on the previously-recorded Reunion Ridge Filing 1 Plat to retitle a Tract as a Lot, so that Tract C matches its designated use—as a Lot—in the Reunion Ridge Filing 1 Plat Land Summary Chart[27] and its permitted use in the Reunion Ridge PUD. Oakwood neither desires nor needs to further subdivide Tract C to accomplish the planned development; therefore, a plat application is unnecessary. According to the LDC and the City's Facts to Know, a Terminology Adjustment is the proper avenue for Oakwood to achieve its intended result.

Oakwood's Application satisfies the Terminology Adjustment process of LDC § 21-3244.[28] The Application does not increase the number of lots or parcels nor does it create new lots or parcels from the initial Reunion Ridge Filing 1 Plat—it simply changes the designation of an already platted single parcel from a Tract to a Lot.[29] Tract C could have been designated as a Lot during the initial Reunion Ridge Filing 1 Plat, since it was designated for future development, which meets the definition of a Lot. The fact Oakwood waited to determine how Tract C would be developed and whether further subdivision of Tract C was necessary to accomplish the desired development does not affect whether Oakwood's Application, currently, satisfies the criteria for a Terminology Adjustment.

Basis for Oakwood's Appeal

The basis for Oakwood's appeal of the Decision (denying Oakwood's Application for the requested Terminology Adjustment) is four-fold. First, the City cannot amend LDC § 21-3244, including its applicability, through the guise of a "new" interpretation. Second, applying ordinary statutory construction principles, a court would enforce the plain language of LDC § 21-3244, including its application to Terminology Adjustments. Third, LDC Subdivisions Standards do not apply to Oakwood's Application. Fourth and last, if the City's new interpretation of LDC § 21-3244 was a discretionary condition, placed on Oakwood's Application, the City is in violation of C.R.S. § 29-20-203(2).

1. The City cannot amend the LDC through the guise of a new interpretation.

[26] Ex. F, *Facts to Know*.
[27] *See* LDC §21-11200 (248) ("Lot shall mean a unit of subdivided land occupied or designed to be occupied by a primary use or building or a group of such buildings and accessory buildings.").
[28] *Compare* Ex. B, *Application*, *with* LDC § 21-3244.
[29] *See* Ex. B, *Application*.

Colorado law provides the City no legal basis to spontaneously change the interpretation of LDC § 21-3244. In fact, Colorado law is clear that a local government's amendment of local authorities through the guise of interpretation, absent a proper amendment, should be afforded no legal weight by a reviewing authority.[30] This is especially true when a new interpretation is issued without notice and an opportunity to be heard.[31] In order to properly amend the City's code, section 1-2001 of the City's own code requires there be a new ordinance setting forth the amended section in full. A copy of Commerce City Revised Municipal Code § 1-2001 is enclosed as ***Exhibit L***.

Notably, within the relevant timeframe (August 2021 through present), no amendments to the code regarding Terminology Adjustments or the applicability of LDC § 21-3244 were made. Moreover, no City council meetings or agenda reference any intended amendment to LDC § 21-3244 altering its applicability or changing the process for making Terminology Adjustments.

Instead of properly utilizing the appropriate LDC process to amend LDC § 21-3244, the City is attempting to improperly and surreptitiously amend LDC § 21-3244, including its applicability to the Application, through the guise of interpretation. To wit, Ms. Jennifer Jones, on behalf of the City, explicitly advised Oakwood that the proper process for changing Tract C from a Tract to a Lot was through a Terminology Adjustment (*i.e.*, LDC § 21-3244).[32] City Staff accepted Oakwood's Application without issue, and Oakwood was not advised at any time, within the nearly one year that the City and Oakwood worked together on the Application, that the Terminology Adjustment process of LDC § 21-3244 was not the correct process to accomplish Oakwood's requested adjustments to the previously-recorded Reunion Ridge Filing 1 Plat.

As indicated in the Jones-Tolbert Email Correspondence, at some point subsequent to the August 24, 2021 Email Correspondence, the Interim City Attorney, Mr. Hader, apparently created a new interpretation of LDC § 21-3244, either of his own accord or at the direction of City Council.[33] In creating this new interpretation of LDC § 21-3244, the City clearly intended that the new interpretation be kept confidential and did not put applicants, including Oakwood, on notice of such change in interpretation or provide an opportunity to be heard (*e.g.*, "Do not say that Matt [Hader] made a new interpretation").[34]

In sum, the City's new interpretation of LDC § 21-3244, amending its applicability, principally fails to observe the appropriate LDC amendment processes. As a result, the City's amendment of LDC § 21-3244 by way of a new posited interpretation—contrary to previous interpretations and undisclosed

[30] *Eason v. Bd. of Cnty. Comm'rs of Cnty. of Boulder*, 70 P.3d 600, 610 (Colo. App. 2003) ("[A] changed interpretation, issued without notice and an opportunity to be heard, is due no deference.") (emphasis added); *Anderson v. Bd. of Adjustment for Zoning Appeals*, 931 P.2d 517, 520 (Colo. App. 1996) ("Judicial deference to the decision of the zoning official and the Board cannot extend to allowing those officials to amend the ordinance in the guise of interpreting it."); *see also Adams v. Colorado Department of Social Services*, 824 P.2d 83 (Colo.App.1991) (although a contemporaneous administrative interpretation of a statute is entitled to great weight, this is not true of a subsequent contradictory interpretation).
[31] *Eason*, 70 P.3d at 610 ("[A] changed interpretation, issued without notice and an opportunity to be heard, is due no deference.")
[32] *See* Ex. D, *August 24, 2021 Email Correspondence*.
[33] *See* Ex. H, *Jones-Tolbert Email Correspondence*.
[34] *See id.*

to applicants, including Oakwood—is afforded no legal weight by a reviewing authority under Colorado law.

2. Applying ordinary statutory construction principles, a court would reject the City's new interpretation of LDC § 21-3244.

Colorado courts employ ordinary statutory construction principles when interpreting a local government's legal authorities.[35] In interpreting such authorities, Colorado courts must discern and give effect to the intent of the local governmental body that enacted such authority.[36]

In discerning intent, courts first look to the actual language of the legal authority and apply plain language construction.[37] If the language of the legal authority is unambiguous and intent is discernible, courts will construe the legal authority *as written* instead of turning to other rules of statutory interpretation.[38]

If the language of the legal authority is found to be ambiguous or its intent unclear, courts will use extrinsic sources to discern intent.[39] Such extrinsic sources may include the history of the legal authority, declarations of intent in the legal authority itself, and other legal authorities such as the city code or city charter.[40]

Further, courts will also consider the interpretation set forth by the local government itself. If that interpretation is reasonable, it will be given deference by the courts. However, if the local government's proffered interpretation is inconsistent with extrinsic authorities or would lead to an inconsistent or absurd result, a court will reject the city's interpretation.[41] Despite local governments having a certain amount of deference in interpreting their own legal authorities, there are still instances in which Colorado courts have rejected a local government's interpretation of their own legal authorities by finding that local governments have misinterpreted, misapplied, or overreached when applying or enforcing their own laws.[42]

---

[35] *See City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1248 (Colo. 2000) ("Courts interpret the ordinances of local governments, including zoning ordinances, as they would any other form of legislation."); *see also Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 790 P.2d 827, 830 (Colo.1990) (interpreting zoning ordinance under the general canons of statutory interpretation).

[36] *See Friends of Denver Parks, Inc. v. City & County of Denver*, 327 P.3d 311, 317 (Colo. App. 2013); *MDC Holdings v. Town of Parker*, 223 P.3d 710, 717 (Colo. 2010); *Bowman v. Eldher*, 369 P.2d 977, 978 (Colo. 1962).

[37] *See Friends of Denver Parks*, 327 P.3d at 317; *MDC Holdings*, 223 P.3d at 717; *Cook v. City & County of Denver*, 68 P.3d 586, 588 (Colo. App. 2003).

[38] *See Murr v. Civil Service Commission of City*, 459 P.3d 699, 704 (Colo. App. 2019); *Denver Police Protective Association v. City & County of Denver*, 488 P.3d 319, 321 (Colo. App. 2018).

[39] *See Burger Invs. Family Ltd. P'ship v. City of Littleton*, 463 P.3d 303, 306 (Colo. App. 2019); *Murr*, 459 P.3d at 704.

[40] *Id.*

[41] *See O'Connell v. City Council of Denver*, 488 P.3d 14, 15–17 (Colo. App. 2019); *Murr*, 459 P.3d at 704.

[42] *See, e.g., O'Connell*, 488 P.3d at 15–17 (rejecting Denver's interpretation of its charter that a historic district designation is not an exercise of city council zoning power because that interpretation was inconsistent with the plain language of the charter); *Murr*, 459 P.3d at 704 (Colo. App. 2019) (rejecting Denver's interpretation of its charter that it's quasi-judicial disciplinary body for police officers had implied authority to rescind a disciplinary order after it was entered because that interpretation would lead to inconsistent and absurd results); *Burger Invs. Family*, 463 P.3d at 307 (rejecting Littleton's interpretation of its charter regarding jurisdiction of its municipal courts because that interpretation was inconsistent with

Here, on its face, the language of LDC § 21-3244 is clear and intent is easily discernible.[43] LDC § 21-3244 exclusively applies to Lot Line or Terminology Adjustments.[44] The criteria set forth in LDC § 21-3244(3) apply only to Lot Line Adjustments, not Terminology Adjustments. Since the criteria in LDC § 21-3244(3) does not Terminology Adjustments, an application for a Terminology Adjustment, including Oakwood's, cannot be approved/disapproved based on such criteria grounds. Thus, the City's new interpretation of LDC § 21-3244 applying the Lot Line Adjustment criteria to Terminology Adjustments, and denying Oakwood's Terminology Adjustment Application on grounds that it fails to meet the criteria is a misapplication of the plain language LDC § 21-3244.

In the event a plain language interpretation of LDC § 21-3244 lends itself to an interpretation that LDC § 21-3244(3) criteria do, in fact, apply to Terminology Adjustments, the City's denial of Oakwood's Application, nonetheless, is a misapplication of this plain language interpretation of LDC § 21-3244. The City denied Oakwood's Application on grounds it failed to satisfy LDC § 21-3244(3)(a) because the retitling of Tract C from a Tract to a Lot would increase the number of lots or parcels or create new lots or parcels. According to the City, the appropriate process for retitling Tract C is by way of a Subdivision. However, as noted above, Oakwood is not creating more or fewer lots or parcels. Oakwood is simply changing the title of an already subdivided parcel from a tract to a lot. The City's conclusion that the simple retitling of a parcel creates a "new lot" is illogical. There would never be a situation in which the retitling of a parcel from a tract to a lot would not result in an increase in the total number of lots, however this is not equivalent to the addition or creation of new parcels or lots. The City's interpretation results in an absurd result and renders LDC § 21-3244 completely obsolete. As such, the City's interpretation that the retitling of Tract C requires a Subdivision, not a Terminology Adjustment under LDC § 21-3244, is a misapplication of the plain language and meaning of LDC § 21-3244.

Nonetheless, if a court somehow determined the language of LDC § 21-3244 was unclear or the City's intent not discernible as to its applicability, over LDC Subdivision Standards, to Oakwood's Application and the retitling of Tract C, a court may look to extrinsic sources such as the history of LDC § 21-3244, the declarations of intent in LDC § 21-3244, and the City's code or charter.[45] A court may also look at the declarations of intent by the City, itself.[46]

Upon examination of available extrinsic sources, they do not weigh in favor of deferring to the City's interpretation that LDC Subdivision Standards, not LDC § 21-3244, apply to the retitling of Tract C and Oakwood's Application. Primarily, despite the City's new declaration that the retitling of a parcel

---

city council minutes reflecting the intent of the at-issue charter provision); *North Avenue Center, L.L.C. v. City of Grand Junction*, 140 P.3d 308, 311 (Colo. App. 2006) (rejecting Grand Junction's interpretation of its charter relating to jurisdiction of its municipal courts over land-use variance requests because that interpretation was inconsistent with the charter's language); *City of Fort Collins v. Dooney*, 496 P.2d 316, 318–319 (Colo. 1972), (rejecting Fort Collins's interpretation of its charter regarding referral of zoning decisions to a vote of the people because that interpretation was inconsistent with the plain language of the charter); *City of Golden v. Sodexo America, LLC*, 441 P.3d 444, 449–450 (Colo. App. 2019) (rejecting Golden's interpretation of its tax code as being in conflict with the code's plain language).

[43] *See* LDC § 21-3244.

[44] *Id.* § 21-3244(1).

[45] *See Burger Invs. Family*, 463 P.3d at 306; *Murr*, 459 P.3d at 704.

[46] *See id.*

is a Subdivision, not a Terminology Adjustment, the City's historical application and enforcement of LDC § 21-3244 does not support such declaration.[47]

Moreover, the applicability of LDC § 21-3244 is stated in the first subsection—"lot lines or terminology of previously recorded documents may only be adjusted in accordance with this section."[48] LDC § 21-3244(1) sets forth the exclusivity of LDC § 21-3244 and no other city code sections or city authorities shall apply.[49] Other City resources, such as the Facts to Know, stress that LDC § 21-3244 and a Terminology Adjustment is the proper process for retitling Tract C as a Lot.[50] The Facts to Know explicitly state: "[t]erminology adjustments refer to the process for retitling lots from platted tracts to prepare for development."[51]

Last, highlighting the exclusivity of LDC § 21-3244(1), the city code and charter provide no other avenues for retitling Tract C as a Lot other than a Terminology Adjustment.

In short, a court will reject the City's current interpretation of LDC § 21-3244. On its face, the language of LDC § 21-3244 is clear, and a court will simply enforce it as written without deferring to the City's new interpretation that LDC Subdivision Standards apply to Oakwood's application to retitle Tract C. Even if LDC § 21-3244 is not clear on its face, extrinsic sources weigh against a finding of deference to the City's new interpretation of LDC § 21-3244. Ultimately, the City's present interpretation of LDC § 21-3244 is a misinterpretation and misapplication of the LDC, is a gross overreaching of the City's authority, and would result in absurd results. Colorado courts have rejected many a local government's interpretation in such circumstances. This case is no different.

3. By requiring Oakwood to comply with LDC Subdivisions Standards, the City exceeds its jurisdiction.

The City's new interpretation of LDC § 21-3244 under the Decision mandates that the LDC Subdivisions Standards, not LDC § 21-3244, apply to Oakwood's proposed retitling of Tract C and the Application. Notably, the only time an applicant must comply with LDC subdivision standards is when a parcel is to be *subdivided*.[52] As explicitly noted herein, and as Oakwood advised the City,[53] Oakwood does not intend to subdivide Tract C to create additional lots or parcels. Oakwood is simply changing the designation of Tract C from a Tract to a Lot. Adhering to the plain language of the LDC Subdivisions Standards, such standards clearly do not apply to Oakwood's Application.[54]

[47] *See* Ex. D, *August 24, 2021 Email Correspondence*; *see also* Ex. H, *Jones-Tolbert Email Correspondence*.
[48] LDC § 21-3244(1).
[49] *See id.*
[50] *See* Ex. F, *Facts to Know*.
[51] *Id.*
[52] *See* LDC Article VI; *see also* Ex. F, *Facts to Know* ("The traditional subdivision procedure is the process by which property is *divided or consolidated* to legally create more or fewer lots, tracts, or parcels than what existed prior to the subdivision.") (emphasis added).
[53] *See* Ex. B, *Application*; *see also* Ex. D, *August 24, 2021 Email Correspondence*.
[54] *See* LDC Article VI.

Oakwood has a vested right to develop in accordance with the Reunion Ridge Filing 1 Plat.[55] Therefore, under the present circumstances, requiring Oakwood to submit a subdivision plat for review and otherwise comply with the LDC Subdivisions Standards, exceeds the City's authority to regulate land uses within the City.[56] Simply put, the City cannot limit Oakwood's right to develop Tract C as provided for in the Reunion Ridge Filing 1 Plat, nor mandate that Oakwood subdivide Tract C and create new lots or parcels.[57] Such control is a deprivation of Oakwood's vested rights to develop and exceeds the City's jurisdiction.[58]

4. If the City's new interpretation of LDC § 21-3244 was a discretionary condition placed on Oakwood's Application, the City is in violation of C.R.S. § 29-20-203(2).

According to C.R.S. § 29-20-203(2): "No local government shall impose any discretionary condition upon a land-use approval unless the condition is based upon duly adopted standards that are sufficiently specific to ensure that the condition is imposed in a rational and consistent manner."[59]

In assessing whether a violation of C.R.S. § 29-20-203(2) has occurred, among other things, the court shall consider "[w]hether there are adequate legislative standards and criteria to ensure that the local law, regulation, policy, or requirement is rationally and consistently applied."[60]

If the court determines that a violation of C.R.S. § 29-20-203(2) has occurred, and such "enforcement or application is not based on a duly adopted law, regulation, policy, or requirement or that there are not adequate standards and criteria to ensure that such enforcement or application is rational and consistent, the court shall invalidate the enforcement or application of the law, regulation, policy, or requirement as applied to the subject property."[61] The Court may also award costs and reasonable attorney fees.[62]

In the event evidence[63] establishes the City's new interpretation of LDC § 21-3244 was a discretionary condition, placed on Oakwood's Application, that was not based upon duly adopted standards that are sufficiently specific to ensure that the condition is imposed in a rational and consistent

[55] *See* LDC § 21-11200 (429), C.R.S. § 24-68-103; *see also Wolf Creek Ski Corp. v. Bd. of Cnty. Comm'rs of Min. Cnty.*, 170 P.3d 821, 827 (Colo. App. 2007) ("A final approval creates vested development rights under which a reasonable developer could start construction."); *Jafay v. Bd. of County Comm'rs*, 848 P.2d 892, 902 (Colo. 1993).
[56] *See* C.R.S. § 24-68-105.
[57] *See id.*
[58] *See id.*
[59] This letter shall also serve as Oakwood's notice to the City of an alleged violation of C.R.S. § 29-20-203 pursuant to C.R.S. § 29-20-204(1)(a) ("owner of such property may notify the local government in writing of an alleged violation of section 29-20-203.").
[60] C.R.S. § 29-20-204(2)(d)(IV).
[61] C.R.S. § 29-20-204(2)(e)(II).
[62] C.R.S. § 29-20-204(2)(f).
[63] As of the date of this letter, the City has only produced one document in response to Oakwood's CORA request—Oakwood's Application. However, additional public records obtained by Oakwood through other means, including the Jones-Tolbert Email Correspondence, are responsive to Oakwood's CORA request but were not produced by the City in response thereto. As a result, Oakwood is currently communicating with the City regarding the City's failure to produce all public records responsive to Oakwood's CORA request in accordance with C.R.S. § 24-72-201, *et. seq.* and reserves the right to rely upon relevant documents subsequently produced.

manner, the City is also in violation of C.R.S. § 29-20-203(2). Moreover, if the City's requirement that Oakwood subdivide land in order to achieve a Terminology Adjustment is likewise a discretionary condition, the City, again, is in violation of C.R.S. § 29-20-203(2). As a result, Oakwood would be entitled to removal of the condition and the described damages permitted under statute.

Conclusion

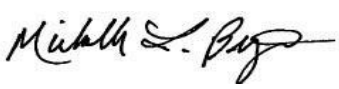
Ultimately, LDC § 21-3244 applies to Oakwood's Application, and the Application meets all criteria contained in the LDC for Terminology Adjustments. The City's Decision—denying Oakwood's Application—is a misinterpretation of the LDC. As discussed in detail herein, the City cannot retroactively amend LDC § 21-3244, including its applicability, through the guise of interpretation. Rather, the plain language of LDC § 21-3244—including its application to Oakwood's Application—will be enforced. Moreover, the City's mandate that LDC subdivision standards, instead, apply to Oakwood's Application and Oakwood's retitling of Tract C, exceed the City's jurisdiction to regulate land uses within the City.

For the reasons discussed above, the City has interpreted and applied the LDC to Oakwood's Application in a discriminatory, arbitrary, and capricious manner because there is no component evidence in the record to support its interpretation. Further, the City has exceeded its authority by requiring Oakwood to comply with LDC Subdivision Standards, and file an application for, and receive City approval of, a final plat for PA-1 prior to development. This results in an unlawful taking of Oakwood's vested rights to develop in accordance with Reunion Ridge Filing 1 Plat.

As a result, Oakwood respectfully requests the Planning Commission make a recommendation to City Council to reverse the City's Decision upon the Application and approve the use of a Terminology Change to retitle Tract C as a Lot. Oakwood and I look forward to the public hearing on Tuesday, June 7th, 2022 and answering any questions you may have at that time.

Very truly yours,

SPENCER FANE LLP



Michelle L. Berger

cc: Bruce Rau, Oakwood Homes, President, Land, BRau@OakwoodHomesCo.com
Scott Thorson, Oakwood Homes, Chief Operating Officer, SThorson@OakwoodHomesCO.com
Jim Hayes, Oakwood Homes, Vice President of Land Acquisition and Entitlements, JHayes@OakwoodHomesCO.com

Enclosures:

Exhibit A – Reunion Ridge Filing 1 Plat
Exhibit B – Application
Exhibit C – Reunion PUD
Exhibit D – August 24, 2021 Email Correspondence
Exhibit E – Decision Letter
Exhibit F – Facts to Know
Exhibit G – Appeal
Exhibit H – Jones-Tolbert Email Correspondence
Exhibit I – LDC § 21-11200
Exhibit J – LDC § 21-3244
Exhibit K – LDC Article VI
Exhibit L – Commerce City Revised Municipal Code § 1-2001