FOSTER GRAHAM MILSTEIN & CALISHER, LLP
ATTORNEYS AT LAW

360 South Garfield Street
6th Floor Denver, CO 80209
T 303-333-9810 F 303-333-9786

fostergraham.com

October 13, 2021

Via Electronic Mail: RSheesley@c3gov.com

Robert Sheesley
City Attorney
Commerce City
7887 E. 60th Ave.,
Commerce City, CO 80022

Re: City Council Changes to the Administrative Residential Final Plat Subdivision Process

Dear Mr. Sheesley:

As you know, Foster Graham Milstein & Calisher, LLP ("FGMC") represents a number of applicants to the Commerce City Planning Department for currently proposed developments within Commerce City (the "City"). Prior to Commerce City Council's ("City Council") public hearing on October 4, 2021 (the "Hearing"), applicants were subject to an administrative subdivision process contained within Article III, Division 2 of the City's Land Development Code ("Code"). Generally, this process provided that the Planning Director administratively approve final plats, except in certain instances. However, during the Hearing, City Council passed a motion to require all residential final plat subdivision applications to go through the public hearing process contained within the Code. Further, the motion requested that Commerce City Staff ("City Staff") draft an ordinance to codify the motion for review at the upcoming October 18, 2021, City Council meeting.

This letter expresses the position that (1) City Council is barred from effectively changing the Code without going through proper procedures; (2) under Article 2, Section 11 of Colorado's Constitution, the Motion (defined below) and potential ordinance may not have retrospective effect such that current applicants are required to automatically go through the public hearing process; and (3) City Council is barred from adopting a public hearing review mandate that will delay or impair development subject to statutory vested rights without paying just compensation.

I. Background

On October 4, 2021, during a regularly scheduled City Council meeting, City Council's agenda noticed council business 21-148 (the "Notice"), "Suspension of Administrative

Subdivision Process Temporarily." Introduced by Council Member Susan Noble, and supported by Mayor Benjamin Huseman, 21-148's intent was to motion for a suspension of administrative subdivision approvals for 365 days and request action of the City Council to draft an ordinance or resolution to achieve this intent through April 4, 2022. After discussion on the Notice among City Council members, City Council member Noble amended her proposed motion to generally provide that from October 4, 2021 through April 4, 2022, all residential final plats would be processed via the public hearing process under Section 21-3241(2)(b) of the Code as opposed to the administrative process (the "Motion"). After a vote of five to one in favor of the Motion, City Council passed the Motion to be effective immediately.

On October 5, 2021, City Staff published a memo, "Subdivision Application Changes," (the "Memo") providing that effective October 5, 2021, all residential subdivisions would now be processed via the public hearing process as opposed to the administrative process through April 4, 2022. The Memo further explained that affected subdivision actions include all final plats, consolidation plats, or any plat contained within a zone district that allows residential development. Further, no matter where applicants of these subdivision applications are in the process, they would be required to go through this public hearing process.

II. City Council Cannot Amend the Land Development Code through a Motion

As discussed above, City Council's Motion, as you described in your conversations with City Council, effectively "institutionalizes" City Council's right to call up final plat decisions for review by the Planning Commission and City Council. In essence, City Council's Motion was an attempt to amend the Code. This is improper.

Specifically, Code Section 21-3241(2)(a) states the following:

> (2) *Review*.
> (a) Except where public hearings are required pursuant to paragraph 4, the director and DRT review applications for final plats and the director is authorized to approve, approve with conditions, or deny such applications based upon the approval criteria outlined below (for purposes of this section, this process shall be referred to as an administrative approval). In the event the director denies the application, the applicant may request that the plat be reviewed through the public hearing process.

Accordingly, as shown above, the general rule is that final plats are approved administratively, unless an exception in Code Section 21-3241(4) applies.

Code Section 21-3241(4) provides the following exceptions to administrative final plat approvals (emphasis added):

> (4) *Public Hearings Required.* Public hearings before the planning commission and the city council shall be required if:

> (a) The applicant or any property owner within 300 feet of the property submits a written request to the director by the date scheduled for department approval. This written objection request must be directly related to the proposed subdivision. General objections regarding existing land use, zoning, or issues unrelated to the subdivision will not be considered valid objections for purposes of this provision;
> (b) If any public entity or utility affected by the proposed subdivision claims it is negatively impacted by the proposed subdivision and submits written request to the director by the date scheduled for department approval;
> (c) The director determines that the final plat should be reviewed through a public hearing process; or
> ***(d) The city council requests that the final plat be reviewed through a public hearing process if such request is made before the date scheduled for department approval.***

As shown by the emphasized portion above, under the Code, City Council has the authority to request that a final plat be reviewed through a public hearing process. However, such a request would have to be for a specific final plat and would only be called up to the City Council if City Council voted, by a majority vote of City Council members, at a duly noticed meeting. The Motion proports to amend the requirements of Code Sections 21-3241(2) & (4) by making the public hearing review a mandatory element of the final plat review process, rather than requiring City Council to hold a duly noticed meeting and vote on whether to call up each individual final plat.

However, Code amendments are only proper through the ordinance process. Commerce City Charter ("Charter") Section 5.2 states, "[a]ll ordinances shall be introduced in written form and ***no ordinance or section thereof shall be amended or repealed except by an ordinance regularly adopted***" (emphasis added). The Motion was not an ordinance and therefore, does not have the legal authority to amend the Code. Accordingly, City Council's passage of the Motion cannot, and does not, effectively amend the Code. Therefore, current applications are still subject to the Code as currently in effect, allowing for the administrative approval process unless one of the instances above applies.

III. Neither the Motion nor the Potential Ordinance May Have Retrospective Effect

During the October 18, 2021 City Council meeting, even if City Council were to properly amend the Code by passing an ordinance requiring the public hearing process for all residential subdivisions, this ordinance cannot be applied retrospectively to applications already under review by the City Staff for administrative subdivision approval prior to the official passing and adoption of the October 18, 2021 ordinance.

Colorado Constitution Article 2, Section 11 provides a prohibition against ex post facto and retrospective laws. Specifically, the constitution provides that "[n]o ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation or making any irrevocable

grant of special privileges, franchises or immunities, shall be passed by the General Assembly."[1] As explained by the Colorado Supreme Court, when this constitutional provision is applied to the effectiveness of land use ordinances passed by municipalities, applicants under review for a land use decision are entitled to have their application considered only under the zoning law in force at the time of the application.[2] The Colorado Supreme Court has developed a two-part inquiry to determine whether an ordinance is retrospective in operation. First, for a law to have retrospective effect, there must be a determination that the legislative intent of the municipality is to have the ordinance operate retroactively.[3] Second, there must be a determination of whether the ordinance "(1) impairs a vested right, or (2) creates a new obligation, imposes a new duty, or attaches a new disability."[4]

Under the first inquiry of the two-part test above, City Council clearly intends for the Motion and upcoming ordinance to have retrospective effect. City Staff's Memo specifically provides that all residential subdivision applications will be subject to the public hearing process.

What if I have a residential subdivision case already under review?	All residential final plats, or property zoned with a residential entitlement, regardless of where they are at in the application review process, will now be required to be heard through the public hearing process. This public hearing process will include one meeting at Planning Commission (PC) and one meeting at City Council.

The City's language above clearly indicates that no matter if a residential subdivision application was under review prior to the passing of the Motion or the upcoming ordinance it will be required to go through the public hearing process. Accordingly, the first prong of the Colorado's Supreme Court's two-part inquiry is met.

Under the second inquiry, the Motion, which is to be potentially solidified by an upcoming ordinance, imposes a new duty on residential subdivision applicants. Under the Code, prior to the passage of the Motion, applicants for residential final plat subdivision applications were only required to have hearings at the Planning Commission and City Council under limited circumstances, as stated above. However, the Motion and upcoming ordinance purports to remove these limited circumstances, imposing additional fees and expenses upon current applicants to prepare for such hearings. Further, the addition of this new duty will subject current applicants to a longer review process that will inevitably lead to an additional unforeseen financial impact. Under the second inquiry, the new mandated public hearing process is the imposition of a new duty and therefore both inquiries of the two-part test are met. Accordingly, the Motion and any upcoming ordinance will have retrospective effect. Under Article 2, Section 11 of the Colorado Constitution, this is prohibited.

City Council certainly has the authority to amend the Code such that all residential final plat subdivision applications must go through the public hearing process. However, as explained above, any such amendment may not have retrospective effect on current applications. Current applicants are entitled to the procedural process currently in effect within the Code. As discussed

[1] Colo. Const. art. II, § 11 (emphasis added).
[2] *City & Cty. of Denver v. Denver Buick, Inc.*, 141 Colo. 121, 140, 347 P.2d 919, 930 (1959).
[3] *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006)
[4] *Parker*, 138 P.3d at 290 (emphasis added).

above, if City Council wants current applicants to go through the public hearing process, it must solely rely on Code Sections 21-3241(2) & (4), as currently in effect, to do so.

IV. Vested Rights Bar City Council Action that Delays or Impairs Development Without Just Compensation

City Council has previously entered into several annexation agreements with FGMC's clients that establish statutory vested rights. Colorado Revised Statutes § 24-68-101(1)(a) states, "[i]t is necessary and desirable, as a matter of public policy, to provide for the establishment of vested property rights in order to ensure reasonable certainty, stability, and fairness in the land use planning process and in order to stimulate economic growth, secure reasonable investment-backed expectations of landowners, and foster cooperation between the public and private sectors in the area of land use planning." "A vested property right shall be deemed established with respect to any property upon approval, or conditional approval, of a site specific development plan, following notice and public hearing, by the local government in which the property is situated."[5] Furthermore, "local governments are hereby authorized to enter into development agreements with landowners providing that property rights shall be vested for a period exceeding three years."[6]

Of particular relevance to the Motion and any upcoming ordinance, "[a] vested property right, once established as provided in this article, precludes any zoning or land use action by a local government 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 a site specific development plan."[7][8]

Many of FGMC's clients are subject to annexation agreements that created statutory vested rights for a period that has not yet expired. Therefore, City Council cannot take any land use action, including the Motion or any upcoming ordinance, which would "alter, impair . . . or otherwise delay" the development or use of the properties subject to such annexation agreements. The Motion and an ordinance establishing the same, would significantly delay and impair many developments because the public review process adds several months and added expense to the development process, which was not contemplated when the City Council agreed to such annexation agreements. Therefore, any such action would violate C.R.S. 24-68-105(1) unless the City provides just compensation for the same, including all development costs and fees incurred to-date for the development of such properties. The amount of money expended to date by

[5] C.R.S. § 24-68-103(b).
[6] C.R.S. § 24-68-104(2).
[7] C.R.S. § 24-68-105(1).
[8] There are three exceptions to such preclusion: (1) consent of the landowner; (2) discovery of natural or man-made hazards; and (3) to the extent that the landowner receive just compensation for all costs, expenses, and liability incurred by the landowner after approval by the government entity, including, but not limited to, 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.

FGMC's clients on several development projects subject to vested rights within the City would pose a significant financial burden to the City.

V. Conclusion

For the foregoing reasons, as a representative of current residential subdivision applicants, we respectfully request confirmation that: (1) the Motion has no effect on currently pending residential subdivision applications; (2) any upcoming ordinance will apply only to new applications submitted after the time of the ordinance's effective date; and (3) any upcoming ordinance will not apply to projects with statutory vested rights.

Thank you for your attention to this matter. Please do not hesitate to contact us with questions or requests for additional information.

Sincerely,

FOSTER, GRAHAM, MILSTEIN & CALISHER LLP

David Wm. Foster

cc: City Council: Citycouncil@c3gov.com

Roger Tinklenberg, City Manager: rtinklenberg@c3gov.com

Dylan Gibson, City Clerk: dgibson@c3gov.com

Brownstein

Brownstein Hyatt Farber Schreck, LLP
303.223.1100
410 Seventeenth Street, Suite 2200
Denver, Colorado 80202

October 18, 2021

City Council
Commerce City
7887 E. 60th Ave.
Commerce City, CO 80022
Via Email: CityCouncil@c3gov.com

Re: Recent and Proposed Changes to the Approval Process for Residential Final Plats

Dear Councilmembers:

This firm represents numerous clients who have developed, or are in the process of entitling and developing, many residential, commercial retail, commercial office, and industrial projects in Commerce City (the "**City**"). Some of these clients are currently processing final plats and related entitlements, permits, and approvals for residential projects, and a few are on the doorstep of final approval. However, as you know, City Council ("**Council**") recently purported to change the process by which it reviews final plats for residential projects. Rather than being approved through the default administrative process provided in the City's Land Development Code ("**Code**"), on October 4, 2021, Council passed a motion designated as noticed agenda item 21-148 (the "**Motion**") to require that all pending and future final plats for residential projects be reviewed and approved through a public hearing process, including a public hearing before the Planning Commission and a second hearing before Council. Council further directed City staff to prepare an ordinance to codify the changes made in the Motion. On October 18, 2021, Council will consider whether to rescind the Motion and whether to adopt Ordinance 2354 (the "**Ordinance**"), the ordinance prepared by staff in response to Council's request. We respectfully request that Council rescind the Motion and disapprove of the Ordinance. Put simply, neither the Motion nor the Ordinance are proper, and neither is an effective means of accomplishing Council's objectives, as explained below.

Illegality of the Motion and Ordinance

Our friend and colleague, David Foster, submitted a letter to the City, dated October 13, 2021, that summarized the illegal effect of the Motion and, if adopted, the Ordinance. We join with and agree with Mr. Foster's analysis. The Motion was an end-around of the intent of Code Section 21-3241(4)(d), under which Council has the power to request that "*the* final plat" under review be called up for a public hearing process. The clear implication, and the City's historical practice, is that individual final plats be called up after notice and consideration of the specific plat. The Motion called up *all* pending and future residential final plats, thereby subverting the administrative process set forth in the Code and, in effect,

amending the default review process for residential final plats. The Code requires that amendments to the Code be approved after notice and two readings of an ordinance. The Motion was not properly noticed, was not an ordinance, and was not approved after two readings. Therefore, the Motion was an ineffective and improper attempt to amend the Code.

Further, as Mr. Foster noted, the Ordinance would have an illegal retrospective effect because the City intends to apply the public hearing process to final plats applications that are currently pending. In addition to the authority cited by Mr. Foster, Colorado state statute requires that "an application for approval of a site specific development plan as well as the approval, conditional approval, or denial of approval of the plan shall be governed only by the duly adopted laws and regulations in effect *at the time the application is submitted* to a local government." C.R.S. § 24-68-102.5(1). [emphasis added] In the City, final plats often qualify as "site specific development plans." Code § 21-11200(429). Therefore, any such final plats must be approved under the laws in effect at the time the application for the final plat was made, and it would violate state statute (in addition to the state constitution) to apply the Ordinance to pending final plat applications.

Finally, Mr. Foster notes that adoption of the Ordinance may subject the City to claims for damages resulting from the violation of vested rights granted by the City to many existing residential projects. We would add that pending applicants will have strong claims that the City did not follow its own Code when adopting the Motion, that their applications are being reviewed under an illegal process as a result of the Motion and Ordinance, and their constitutional due process rights are being violated. These claims will require the City to defend such actions with both internal and outside counsel, at great expense, and may result in substantial liability for damages to the claimants.

Accomplishing Council's Objectives

Our understanding is the Council passed the Motion in response to some recent projects that were approved administratively and that Council felt were contrary to the City's Comprehensive Plan (the "**Comp Plan**"). Council felt that the administrative process was advancing certain residential development at the expense of commercial development and believed that it needed to better understand how and why the administrative subdivision process was approving these projects.

It is understandable that Council wants to guide the right mix of uses in its community, and that it wants to understand how the City's current approval processes may not be resulting in that desired mix of uses. However, neither the Motion nor the Ordinance will accomplish Council's goal of promoting an appropriate mix of residential and commercial development. Nor will subjecting every final plat application to a public hearing process be an effective or efficient means to better understanding the subdivision process.

First, the subdivision process is largely technical in nature. Subdivision criteria are intended to ensure that lots created through the process have proper access, easements for public infrastructure, and meet minimum lot size requirements. The criteria also include requirements for dedication of right of way, public spaces, and landscaping.

By the time a subdivision is submitted, the question of the proper ***land use*** for a particular project has already been decided, through comprehensive planning, zoning, and site plan approval. The subdivision stage is not the proper time to make a determination as to what land uses are desired for a particular location.

Second and perhaps more importantly, this maneuver is not only unlikely to produce the desired result, it is likely to produce the opposite result. As our many commercial developer clients will confirm, commercial development follows residential development. Commercial developers, especially retail and office developers, and their prospective tenants, look for “rooftops,” or the density of residential development, as a primary factor in determining when and where to develop commercial projects. No successful commercial retail developer will take the unnecessary risk of building “spec” retail where no one lives. This makes sense if you think of your own shopping habits. Consumers shop where they live and along their typical routes commuting to and from work. They rarely travel far outside of those areas to seek far-flung commercial projects, no matter how attractive they might be. These precepts of consumer psychology are well-established. Therefore, commercial retail developers look to maximize their chances of success by developing projects that are located near mature residential or growing developments, especially in an environment where brick-and-mortar retail is under more intense scrutiny from lenders and capital partners. Similarly, office developers typically look for a minimum established residential population before they will develop new office buildings because their potential tenants evaluate whether their employees will have ample housing and related amenities as part of their site-selection process. Put simply, residential development attracts commercial development, not the other way around.

In light of this, hindering residential development by requiring that all residential projects be subjected to a public hearing process actually harms the prospects that the City will see more commercial retail or office development. Public hearing processes are the most intense type of review, are naturally discretionary in nature, and inherently take months longer to complete, cost substantially more for the developer and City, and bring heightened risk to the project. Developers and their lenders and capital partners evaluate the expected length of the entitlement process, costs, and risks before they make the decision to commence, finance, or invest in a new project. The associated delays, costs, and risks associated with a public hearing process will be enough for some developers, lenders, and capital partners to pull out and place their limited resources elsewhere – in cities that continue to employ the standard administrative approval process. Even projects that are currently underway may now die because the process has changed as impatient lender and capitals partners reassess their previous investments. Unfortunately, that means not only will fewer residential projects start and finish in the

City, but fewer commercial retail and office projects as well. In addition, the significant delays and higher costs will ultimately result in higher overall project costs, which will be passed along to homebuyers. This will only exacerbate an already dire affordable housing crisis in the City and along the Front Range.

Finally, subjecting all final plats to a public hearing process in front of Planning Commission and Council is neither an efficient use of staff, Planning Commission, and Council time, nor an effective mechanism for controlling where specific uses are allowed in the City.

The City controls which uses are allowed on specific properties through its comprehensive planning and zoning processes. After those policies have been established, property owners can get approval to develop those allowed uses by processing applications for concept plans, final plats, and development plans. These approvals are processed administratively because the City has already established its policies regarding what uses are allowed, permitted heights and densities, and similar design standards. Therefore, City staff is entrusted to use their technical expertise to evaluate concept plans, final plats, and development plans to ensure that they comply with the City's adopted policies and standards. Final plats are technical documents that merely create lots, tracts, and public rights of way. They are not zoning approvals that prescribe allowed uses or even development plans that depict the proposed specific uses and improvements.

The Code provides the criteria for approval of final plats. Code § 21-3241(3). None of the criteria allow for the City to disapprove of specific uses described on the final plat if those uses are allowed per the underlying zoning for the property, or to require that other uses be included within any proposed project. These criteria apply whether the final plat is approved administratively or through public hearings. Code § 21-3241(2)(b)(iii). Therefore, subjecting final plats to a public hearing process does not provide Council with an opportunity to change the uses that are allowed on a specific property, or to encourage one type of use over another. Council would be reviewing the same technical criteria for approval of final plats as staff would under an administrative review – in a situation where staff likely has more relevant professional expertise.

Further, staff, Planning Commission, and Council would spend a tremendous amount of time to prepare for and hold hearings for all of the final plat applications that are pending or will be submitted prior to April 2022. For Council to properly evaluate each plat, it would have to become familiar not just with the criteria for approval, but also with the standards and methodologies employed when evaluating compliance with those criteria. Then, Council would be required to spend adequate time to become intimately familiar with every final plat to apply those criteria, standards, and methodologies to the plat. Of course, staff already goes through these processes when evaluating final plats, and it would continue to do so as it evaluates final plats prior to scheduling the public hearings. But now, Planning Commission and Council would both also have to spend the time to prepare for those hearings and clear time on their agendas to actually hold the required hearings. This is a tremendous amount of work and time at all levels of the City's government.

There are better tools at Council's disposal to guide the mix of uses within the City and to learn about, and if necessary fix, the administrative final plat approval process.

Namely, if Council would prefer to see different uses on certain properties within the City, the appropriate means for controlling the allowed uses would be through a rezoning. The City is also currently in the process of updating the Comp Plan to set a new vision for future land use in the City. These are the right tools and processes for Council to set policy in the City regarding its preferred mix of uses. If Council believes that the administrative review process for final plats is not functioning correctly, it should call one or more study sessions to review the current process and the criteria for approval of final plats, and have staff present on how those criteria were applied to certain projects. Council could study the administrative processes used in other cities to compile best practices. Council will then have the information it needs to decide whether and how to amend the Code to revise the administrative review process or criteria for approval.

Even if legal, calling every final plat up for public hearings does not give Council the ability to approve or deny specific uses that are allowed under zoning, and it is not an efficient means of becoming further acquainted with the City's final plat approval process and criteria. But it will add months of delay and substantial cost to each project, and will bog staff, Planning Commission, and Council down in final plat reviews for months. Contrary to Council's objectives, fewer residential projects will result in fewer commercial retail and office projects and further increases in project costs will contribute to accelerating inflation in home prices.

For all of the above reasons, we request the Council rescind the Motion and disapprove of the Ordinance.

Sincerely,

Carolynne White

Charlie Smith

Cc:

Robert Sheesley (rsheesley@csgov.com)
Matt Hader (mhader@c3gov.com)
Roger Tinklenberg (rtinklenberg@c3gov.com)
Dylan Gibson (dgibson@c3gov.com)

October 18, 2021

City of Commerce City - City Council
7887 E 60th Ave
Commerce City, CO 80022

RE: October 18, 2021 - City Council Agenda
Proposed Ordinance Number 2354

To whom it may concern,

I am writing this letter in concern of the proposed Ordinance 2354 which would temporarily amend the Commerce City Land Development Code to require a public hearing process for all final plats and consolidation plats zoned for any residential use.

The City's current plat approval process employs the expertise of the City's planning and engineering staff to ensure that final plats and associated documents are in compliance with the City of Commerce City Land Development Code (City Code) prior to approval. The introduction of a public hearing process, as proposed in Ord 2354, would add an unnecessary step that would rely on the public to review and verify the expert determination of the City's planning and engineering staff. This will make the development process more cumbersome and cause significant delays in the development process. The retroactive effect on current/pending applications will create an undue burden on developers, consultants, and City staff who have been proceeding under the process currently outlined with the City Code.

For the reasons stated above, passage of Ord 2354 will have a negative impact on the development process in the City of Commerce City.

Sincerely,

HARRIS KOCHER SMITH

John O'Rourke, P.E.
Vice President

1120 Lincoln Street, Suite 1000, Denver, Colorado 80203 | P:303.623.6300 | F:303.623.6311 | www.harriskochersmith.com