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September 13, 2021

Mayor Ben Huseman and City Council Members
City of Commerce City
7887 E. 60th Avenue
Commerce City, CO 80022

Re: Reunion Ridge – Filing 1, Amendment 4 – Final Plat Approval

Dear Mr. Mayor and City Council Members,

On September 20, 2021, the City Council (“Council”) will hold a public hearing to consider the Reunion Ridge – Filing 1, Amendment 4 Final Plat Application (the “Application”). Spencer Fane LLP represents Clayton Properties II, Inc. dba Oakwood Homes (“Oakwood Homes”) regarding the Application. After a recommendation of approval of the Application by City Staff, and a presentation by Oakwood Homes, on August 24, 2021, the Commerce City Planning Commission, by a vote of 5-0, recommended Council approve the Application. As discussed below¹, it is Oakwood Homes’ position the Application meets all final plat approval criteria contained in the Commerce City (“City”) Land Development Code (“LDC”) and should approved by Council.

Reunion Ridge Land Use Entitlement Background

In late 2017, Oakwood Homes became the master developer of the Reunion development (“Reunion”). At that time, approximately 1700 acres of land in Reunion, including Village 9 (“Reunion Ridge”), remained undeveloped. The development of Reunion Ridge was subject to the requirements of the original PUD Zone Document, created in 2001 (the “Reunion PUD”)², and the 2001 development agreement (the “Development Agreement”)³.

Prior to Oakwood Homes becoming the master developer, the Reunion PUD had been amended to add additional annexed property, adjust the sizes of various planning areas and school

¹ Much of the information presented in this letter was contained in Oakwood Homes’ letter to the Planning Commission. For ease of reference by City Council, Oakwood is providing this information again in this letter.

² See, Buffalo Hills Ranch PUD Zone Document, recorded October 27, 2000 at Reception No. C0725646; Reunion PUD Zone Document Amendment #1, recorded December 9, 2002 at Reception No. C1064716, and December 17, 2002 at Reception No. C1068494.

³ See, Consolidated Development Agreement for Buffalo Hills Ranch PUD, recorded January 23, 2002 at Reception No. C0917475.

site locations, and revise allowed uses in Planning Areas 3, 8, and 10.⁴ Shortly after becoming the master developer, Oakwood Homes began working with the City to amend to the Reunion PUD to acknowledge the changed economic conditions since approval⁵, and to implement Oakwood Homes’ desire to refresh and reinvigorate the vision for Reunion, while celebrating the site’s history of farming and ranching⁶ (the “Amended Reunion PUD Application”).

The primary changes to Reunion Ridge in the Amended Reunion PUD Application consisted of the realignment of Potomac Street and relocation of a school site to a more centralized location, to provide greater connectivity to trails and the Bison Ridge Recreation Center.⁷ A change to the bulk standards to reduce minimum floor area requirements for cluster home lots from 1,100 sf to 900 sf, was also proposed to allow more attainable housing.^{8,9}

In the Amended Reunion PUD Application, Oakwood Homes addressed the compliance of the proposed changes in Reunion Ridge with the Comprehensive Plan stating “Comprehensive Plan compliance has been discussed with staff and determined that overall the revisions put forth in this amendment meet the intent of the comprehensive plan.”¹⁰ Directly addressing the proposed changes in Reunion Ridge, Oakwood Homes stated, “Medium Density residential is proposed for the majority of Village 9. High density residential is shown on the comp plan along 96th; however due to the Wildlife Refuge directly to the south the intent would be to have higher density focused closer to 104th and transition to lower densities toward the wildlife refuge.”¹¹

Compatibility of the revised school site location with the intent of the comprehensive plan was also addressed in the Amended Reunion PUD application.¹² As an outside review agency, Public School District 27J (“District 27J”) reviewed the Amended Reunion PUD Application and stated District 27J, “supports the needs for various school sites within the development.”, and “representatives from 27J have been meeting with members from Oakwood Homes during the last year to discuss issues related to school siting and contribution to the Capital Facilities Fee Foundation program¹³.

In its report, City Staff found the Amended Reunion PUD Application (1) would not have any adverse impacts on the existing infrastructure or taxing authorities; (2) included development that continues to comply with the various land use designations shown on the Future Land Use Plan; and (3) met Goals LU1 and LU2 of the comprehensive plan.¹⁴ City Staff made specific findings the Amended Reunion PUD Application satisfied all approval criteria under LDC §21-3251 and recommended approval, with one condition as to outdoor storage, to the City’s Planning

⁴ See, Exhibit A – Staff Report – Planning Commission, pages 2-3.

⁵ See, Exhibit B – Reunion PUD Narrative, page 1.

⁶ See, Planning Commission Draft Meeting Minutes, January 9, 2019.

⁷ See, Exhibit A – Staff Report – Planning Commission, pages 6-7.

⁸ See, Exhibit A – Staff Report – Planning Commission, page 8.

⁹ See, Planning Commission Draft Meeting Minutes, January 9, 2019, page 2.

¹⁰ See, Exhibit B – Reunion PUD Narrative, page 2.

¹¹ See, Exhibit B – Reunion PUD Narrative, pages 2-3.

¹² See, Exhibit B – Reunion PUD Narrative, page 3.

¹³ See, Exhibit A – Staff Report – Planning Commission, page 9.

¹⁴ See, Exhibit A – Staff Report – Planning Commission, page 9.

Commission.¹⁵ On January 9, 2019, Planning Commission held a public hearing on the Amended Reunion PUD Application, and unanimously recommended approval to the City Council, with no conditions.

On February 4, 2019, City Council held a public hearing on the Amended Reunion PUD Application. During the public hearing Oakwood Homes provided testimony regarding the driving force behind the Amended Reunion PUD Application, which was the need for increasing housing stock diversity in Reunion. Oakwood Homes further testified that the northern part of Reunion Ridge was the planned location for Oakwood Homes' American Dream product line, which necessitated the requested change to the cluster home bulk standards. Oakwood Homes reiterated that while the mixed use land use designation allowed for commercial uses for portions of Reunion Ridge along 104th, the intent was for this area to be primarily residential. Public testimony supported the need to provide more "attainable housing" and to move "affordable homes" away from the Rocky Mountain Arsenal Wildlife Refuge. The City Council voted 8-1 in favor of approving the Amended Reunion PUD Application.¹⁶ On March 4, 2019, City Council passed, on second and final reading, an ordinance approving the Amended Reunion PUD.¹⁷

Reunion Ridge Filing 1, Amendment 4 Final Plat Background

On August 18, 2020, Oakwood Homes submitted its application for administrative approval of a final plat for a portion of Village 9-A designated as Reunion Ridge, Filing 1, Parcel 1, Tract B (the "Application"). City Staff provided comments from various City departments and referral agencies addressing the Application's compliance with the criteria for final plat approval contained in LDC §21-3241(3) (the "Approval Criteria") to which Oakwood Homes responded and provided revised and additional information on March 22, 2021. In this initial set of review comments, only two (2) comments addressed the zoning and land use criteria, and none addressed adequacy of schools.¹⁸

On May 20, 2021, in response to the City's second round review comments, Oakwood Homes provided additional information addressing the Approval Criteria. There were no City comments addressing zoning and land use criteria or adequacy of schools.¹⁹ On June 22, 2021, Oakwood Homes was informed by City Staff the Application was scheduled for public comment, the last step prior to administrative approval of a final plat, with a comment deadline of July 12, 2021 for final administrative approval on July 13, 2021.

On July 10, 2021, comments from Mayor Huseman were posted on the Reunion Facebook Group page,²⁰ as part of a discussion of school funding in Reunion and specifically Oakwood

¹⁵ See, Exhibit A – Staff Report – Planning Commission, page 11.

¹⁶ See, Exhibit C - City Council Meeting Minutes, page 5.

¹⁷ Ordinance No. Z-781-02-04-05-06-10-17-19, dated March 4, 2019 filed at Reception No. 2019000016880

¹⁸ See, Exhibit D - Oakwood First Round Comment Responses, page 2.

¹⁹ See, Exhibit E – Oakwood Second Round Comment Responses.

²⁰ Reunion Colorado, Facebook Group,

<https://www.facebook.com/groups/ReunionCommunity/permalink/10159308457953320/>.

Homes' contributions to the 27J Capital Facilities Fee Foundation (the "27J CFFF").²¹ The Reunion Facebook group, despite having "4700+ members" is a private Facebook group for which individuals must request permission from the group moderator to participate.²²

In the posts, Mayor Huseman stated "[e]very builder is required to pay a school impact fee, which usually translates to land being dedicated to the district, but that doesn't help with the construction of the school."²³ Mayor Huseman went on to address Oakwood Homes' history of contributions to the 27J CFFF, specifically as related to a new proposed elementary school in Reunion's Southlawn area, stating "[t]he plat for these new Oakwood homes was set to be approved administratively. I have requested that the case be referred to the planning commission and the city council for public hearings."²⁴ In response to a question by another member of the Reunion Facebook page as to "[how] Oakwood is allowed to continue to build if they aren't paying", Mayor Huseman stated "the CFFF contributions are 'voluntary' "²⁵.

On July 12, 2021, at a special meeting of the City Council called by Mayor Huseman, the Application was considered for call up for public hearings by the Planning Commission and City Council. Despite the advisement of the City Attorney that the merits of the Application should not be discussed, Mayor Huseman stated on the record his reasons for moving to call-up the Application for public hearings, including "there's about \$1 million, \$965,565 roughly, that has not been paid into the Capital Facility Fee Foundation [by Oakwood] that could have gone towards construction of that school" and "we have proposed development that could have gone commercial that is going to be residential"²⁶. The Mayor's motion was seconded and approved 7-1 with one Councilmember absent.

On August 24, 2021, after a recommendation of approval of the Application by City Staff, and a presentation by Oakwood Homes, , the Commerce City Planning Commission, by a vote of 5-0, recommended Council approve the Application.

Final Plat Approval Process

Section 21-3241(2)(a) of the LDC provides that "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." LDC §21-3241(4) addresses required public hearings for final plat approval. Subsection (4)(a) provides that a property owner within 300 feet of the property

²¹ See, Exhibit I - Facebook Private Messages between Benjamin Huseman and Kerstin Helsel (July 10, 2021, 21:03 MDT).

²² See, "private." Merriam-Webster.com. 2021. <https://www.merriam-webster.com/dictionary/private>. (September 13, 2021) (1.a.: intended for or restricted to the use of a particular person, group, or class).

²³ See, Exhibit I - Facebook Private Messages between Benjamin Huseman and Kerstin Helsel (July 10, 2021, 21:03 MDT).

²⁴ See, Exhibit I - Facebook Private Messages between Benjamin Huseman and Kerstin Helsel (July 10, 2021, 21:03 MDT).

²⁵ See, Exhibit I - Facebook Private Messages between Benjamin Huseman and Kerstin Helsel (July 10, 2021, 21:03 MDT).

²⁶ See, Exhibit F - City Council Special Hearing Transcript, page 5, line 14 through page 7, line 9.

may submit a written objection that forms the basis for review of a final plat pursuant to the public hearing process, only if the objection is “directly related to the proposed subdivision”. Subsection (4)(a) goes on to state that “issues unrelated to the subdivision will not be considered valid objections”.

Contrary to subsection (4)(a), subsection (4)(d) allows City Council to request a final plat be reviewed through a public hearing process without providing any basis for the request, as long as the request is made before the date scheduled for department approval. When a final plat is called up for public hearings, the director provides a report to the Planning Commission, which makes a recommendation to City Council to approve, approve with conditions or deny an application based on the Approval Criteria, and the City Council becomes the final quasi-judicial decisionmaker as to whether an application meets the Approval Criteria.²⁷

In this case, the DRT had reviewed the Application and determined it met the Approval Criteria so the public notice period began. The public notice period was scheduled to end two days after Mayor Huseman’s Facebook exchanges and on the very day Mayor Huseman requested a special City Council meeting for the purposes of calling up the Application for the public hearing process.

It’s unknown whether the other Reunion Facebook page member lives within 300’ of the Reunion Ridge Filing 1, Amendment 4 parcel and could have objected. Further, LDC §21-3241(4)(d) does not require City Council to provide a reason for calling up a final plat for a public hearing process. However, while the timing of the call-up met the requirements of LDC §21-3241(4)(d), as discussed below, the reasons stated by Mayor Huseman for calling up the Application, are issues which are unrelated to the subdivision and are either not part of the Approval Criteria or a misapplication of the Approval Criteria.

Final Plat Approval Criteria

LDC §21-324(3) provides nine (9) criteria that must be met for final plat approval, including consistency with any approved rezoning, concept plan or PUD Zone Document and the intent of the specific zoning district in which the plat is located. To be approved a final plat cannot violate any state, federal, or local laws, regulations or requirements, and must comply with all applicable City standards regarding the creation of lots or patterns of lots.

A final plat must also provide a general layout of lots, roads, driveways, utilities, drainage facilities and other services in a way that minimizes the amount of land disturbance, maximizes the amount of open space, preserves existing trees, vegetation, and riparian areas; and must not result in a substantial or undue adverse effect on adjacent properties, traffic conditions, parking, or public improvements. To the extent there is an adverse effect, the applicant must show that any such effect has been or will be mitigated to the maximum extent feasible.

Finally, there must be adequate and sufficient public safety, transportation, utility facilities and services, recreation facilities, parks, and schools available to serve the final plat area,

²⁷ LDC §21-3241(2)(b).

while maintaining sufficient levels of service to existing development. Prior to approval, a development agreement must be entered into between the City and the applicant which addresses the construction of all required public improvements, and any proposed phasing plan for development of the subdivision must be rational in terms of available infrastructure capacity.

The Application is consistent with the approved PUD Zone Document and the intent of the Specific Zone District.

The Amended Reunion PUD designated the plat area in the Application as a mixed use (“MU”) zone district and provided a land use table containing the allowed uses in MU zone districts.²⁸ The Amended Reunion PUD also contains a Land Use Schedule providing the allowable densities of residential and non-residential development in each Reunion Village.²⁹ Finally, the Amended Reunion PUD contains residential and non-residential development standards matrixes.³⁰

The land use table contained in the Amended Reunion PUD contains a variety of residential and non-residential uses that are “allowed by right” in an MU zone district. The proposed Cluster Homes in the Application are such an “allowed by right” use in this MU zone district. The residential densities for the subject plat are also in compliance with the Amended Reunion PUD. Further, as part of the Application, Oakwood Homes provided a detailed Residential Land Use Development Standards Matrix showing a comparison of the Application with each of the bulk and performance standards set forth in the Amended Reunion PUD.³¹ The Application meets or exceeds each one of these standards, showing the Application is clearly consistent with the approved Amended Reunion PUD.

It is important to note, the Amended Reunion PUD does not contain any requirements as to minimum or maximum *amounts* of residential or non-residential uses, only minimum and maximum densities of any proposed residential or non-residential uses. The Planning Commission Staff Report specifically supports this finding of compliance with the Amended Reunion PUD, stating, “the Reunion PUD zoning is very flexible in what it allows ... the zoning has consistently been identified this area (sic) for Mixed-Use that allows for both residential and non-residential uses ... Although it allows for a variety of uses, it does not mandate a variety of uses.”³²

As discussed above, the Amended Reunion PUD was approved to allow exactly the type of attainable housing use Oakwood Homes is proposing in the Application. In its Amended Reunion PUD Application narrative, Oakwood Homes stated the high density residential shown on the comprehensive plan along 96th would be refocused closer to 104th due to the Wildlife Refuge directly to the south.³³ Further, in the testimony provided at the Amended Reunion PUD City Council hearing, which became part of the basis for City Council’s approval, Oakwood specifically

²⁸ See, Exhibit G - Reunion PUD Zone Document, pages 10, and 16-17.

²⁹ See, Exhibit G - Reunion PUD Zone Document, page 13.

³⁰ See, Exhibit G - Reunion PUD Zone Document, page 13.

³¹ See, Exhibit H – Development Standards Matrix.

³² See, Staff Report – Planning Commission, dated August 24, 2021, page 7.

³³ See, Exhibit B – Reunion PUD Narrative, pages 2-3.

stated Village 9 [Reunion Ridge] would be primarily residential despite the fact the MU zone district *allows* for commercial uses.

Since Cluster Homes are a “use by right” allowed in an MU zone district in the Amended Reunion PUD with no minimum amount of non-residential uses, and since the Application meets the required residential densities and bulk and performance standards, the Application is consistent with and meets the Amended Reunion PUD and the intent of the MU zone district.

The Application does not violate any state, federal, or local laws, regulations or requirements, and complies with all applicable City standards regarding the creation of lots or patterns of lots.

There is no evidence to suggest the subdivision violates any state, federal, or local laws, regulations or requirements as evidenced by City Staff’s approval of the subdivision for public comment and subsequent recommendation of approval to the Planning Commission. In addition, since call-up of the Application, the City’s Public Works department approved the Grading, Erosion and Sediment Control plans, which contain drainage facilities that have been designed in accordance with City standards.

Construction documents for these drainage facilities and road construction were also approved by the City. The wet utility design for the subject plat area is under final review and approval by the South Adams Water and Sanitation District, and no referral agencies have provided objections to the Application that remain unresolved. Finally, the design of the lots and the associated PUD Permit comply with City standards and do not create patterns of lots that make compliance with the standards difficult or infeasible.

The Application provides a general layout that minimizes land disturbance, maximizes open space, preserves existing trees, vegetation and riparian areas, and does not result in substantial or undue adverse effects.

The site contains no existing trees, shrubs, or riparian areas, and grading plans were approved by the City minimizing the amount of earthwork required to adequately drain the site. Also, a buffer along E. 104th Avenue has been created which exceeds the arterial setback requirements contained in the Amended Reunion PUD. Furthermore, Oakwood has improved the Reunion regional drainage system by agreeing to release stormwater at rates and volumes lower than the historical rates and volumes to help improve regional stormwater management efforts. The final design and engineering for these revisions is based on years of discussions and negotiations between Oakwood Homes, the City and the Mile High Flood District to alleviate historical downstream stormwater conditions northwest of the site.

Specifically, Ragweed Draw, which is south of the parcel was constructed from the ground up to redefine the drainage area, including a geomorphic channel with landscaping and new riparian habitat areas. Planning Area 3, which is to the east of the subject parcel was also improved with additional regional drainage facilities to reduce the rate and volume of water leaving the site to further resolve historic downstream drainage concerns.

This parcel was originally platted as part of the Reunion Ridge Filing #1 subdivision. Traffic studies and reports were provided to, and approved by, the City at that time. As part of the Reunion Ridge Filing #1 approval, traffic signals were added to the intersection of Vaughn Way and E. 104th Avenue and a turn lane on E. 104th Avenue was added for Tucson Street to accommodate this development. A letter of compliance for this parcel was provided as part of that process.

As noted above, the Amended Reunion PUD identified any potential negative impacts from the proposed residential land uses allowed by right for this parcel. Additionally, Oakwood Homes has worked to rectify historical negative drainage issues that were not due to development of Reunion Ridge. Therefore, residential development at the proposed densities will not result in any substantial or undue adverse effect on adjacent properties that has not already been mitigated. In addition, the new traffic signal, road improvements, and regional drainage facilities discussed above will create a positive impact on the adjacent properties and a value to the public.

There are adequate and sufficient public safety, transportation, utility facilities and services, recreation facilities, parks, and schools available to serve the final plat area, while maintaining sufficient levels of service to existing development.

During the Amended Reunion PUD Application process, all appropriate referral agencies were notified of the proposed amendments to the Reunion PUD and provided input on that application, including District 27J. District 27J specifically stated it “supports the needs for *various school sites* within the development.” (*emphasis, added*). Further, the comprehensive plan provides for park and school dedications within walking distance of surrounding neighborhoods. To that end, the Amended Reunion PUD contains a future elementary school site in Reunion Ridge south of this parcel, and a 48.6 acre site in Planning Area 10 designated for a high school land use. Also, Section 10.2 of the Development Agreement provides for payment of fees in lieu of land dedication for schools if the quantity of lands required by City ordinance are not dedicated.

During the City Staff review and referral process for this Application these same agencies were notified of, and provided comment on, the Application regarding the adequacy of infrastructure and schools. At the time of the public comment period there were no unresolved referral agency comments regarding infrastructure and during the review process City Staff provided no comments to Oakwood Homes regarding a lack of adequate schools. The Planning Commission City Staff Report, specifically stated “[b]ased on the latest information from 27J, the proposed schools could handle this development.”³⁴ Therefore, City Staff found this criteria was met when the Application was scheduled for public comment. Mayor Huseman, however, apparently questions whether Oakwood Homes’ designation of land for school use or payment of fess-in-lieu of land dedication, without participation in the 27J CFFF, is sufficient to ensure the Application meets the criteria requiring adequacy of schools. As discussed below, it does.

LDC §21-9200(1) requires payment of a school fee for all new residential development located within the City. LDC §21-9200(2) provides the calculations for determining the land, in

³⁴ See, Staff Report – Planning Commission, dated August 24, 2021, page 9.

acreage, required for dedication based on the student population per dwelling, and LDC §21-9200(3) provides the method for satisfaction of the school fee. Specifically, LDC §21-9200(3) provides that the school district affected by the proposed development plan should, at the earlier of a PUD Concept plan, PUD sketch plan or PUD zone document application, indicate its preference for a land dedication for fee-in-lieu payment. If a land dedication is desired by the school district and City Staff determines a land dedication is appropriate, subsection (3)(a) requires the developer to designate on the final plat the land that will be dedicated for future school use. If fees in-lieu of dedication are determined to be the appropriate means of satisfying the school fee, such fees are paid to the City at the time of final plat approval.

In the case of the Amended Reunion PUD, land dedication for schools was determined to be the appropriate means of satisfying the school fee. The Application, however, contains no parcel designated for school use, therefore, no dedication of land or payment of a fee in-lieu to 27J is necessary for approval of the Application.

Public School Financing and the 27J CFFF

In his Facebook posts, Mayor Huseman attempts to link the adequacy of schools criterion to participation in the 27J CFFF. Such a linkage, however, is not permissible under the statutory funding scheme for public schools in Colorado or Colorado Supreme Court holdings on school impact fees.

The Public School Finance Act

In Colorado, financing of public schools is regulated by statute. Specifically, the Public School Finance Act of 1994 (the “Act”) provides a formula for the State to determine the amount of funding each school district receives. The Act, held constitutional by the Colorado Supreme Court in the Lobato case, which addressed what constitutes a constitutionally adequate public education,³⁵ is funded by both local and state taxes. Generally, the local share is calculated first by combining property taxes and specific ownership taxes³⁶ and the State share is used to complete the remaining funding.³⁷

Additionally, the Act allows local districts the discretion to raise additional revenue at the local level to meet maintenance and capital construction needs in five different ways:³⁸ (1) Bonded Indebtedness³⁹, (2) Special Building & Technology Funds⁴⁰, (3) the Building Excellent Schools Today Program⁴¹, (4) Loan Programs for Capital Improvements in “Growth Districts”⁴² and (5) a

³⁵ Lobato v. State, 304 P.3d 1132 (2013).

³⁶ C.R.S. 22-54-106.

³⁷ *id.*

³⁸ *Understanding Colorado School Finance*, *supra* note 16, at 8.

³⁹ C.R.S. 22-42-102.

⁴⁰ C.R.S. 22-45-103(1)(d).

⁴¹ C.R.S. 22-43.7.

⁴² C.R.S. 22-2-125.

Supplemental Capital Construction, Technology and Maintenance Fund.⁴³ It is important to note that Bond dollars cannot be used for general operations within a district.⁴⁴

Any attempt by District 27J to require mandatory contributions to the 27J CFFF for purposes of its determination of the adequacy of schools is unsupportable as it would run afoul of the Act's limitations on authorized forms of school funding.⁴⁵

School Impact Fees

Not only does the Act not allow District 27J to require mandatory contributions to the 27J CFFF, if the City attempted to require a contribution, such a requirement would likely be deemed an improper school impact fee.

In analyzing a county's authority to exact a school impact fee in addition to requiring a land dedication or payment of a fee in-lieu, the Colorado Supreme Court in *Bd. of Cty Comm'rs of Douglas Cty., Colo. v. Bainbridge, Inc.*, held that a school impact fee imposed by a county at the time of building permitting or certificate of occupancy went above and beyond the fee allowed in C.R.S. §30-28-133(4)(a)(I) and (II), and was improper.⁴⁶ These sections allow for land dedication or payment of fees in-lieu of dedication for the fair market value of the land, or a combination of both not to exceed the fair market value of the land.

In the *Bainbridge* case, developers were paying a statutorily authorized school fee in the form of land dedication or payment of a fee in-lieu at the time a subdivision was approved. Douglas and Boulder Counties, however, were imposing a second fee when building permits or certificates of occupancy for homes were applied for due to the lack of funding by the affected school districts to construct school buildings on the dedicated lands with the available fees in-lieu.⁴⁷

The Court ruled that this second fee was improper, holding “our prior cases do not support expanding upon the stated statutory exaction. *The legislature has selected subdivision approval as the trigger for payments made for the benefit of school districts.*”⁴⁸ (*emphasis, added*). The Court further held that while “[w]e have upheld fees and assessments based on explicit statutory fee authority ... No such fee provision is applicable here outside of the subdivision provisions of the Planning Code. Rather, the school district [at the time of subdivision] is empowered to make recommendations as to both ‘school sites’ and ‘school structures’.” (*emphasis, added*).⁴⁹

⁴³ C.R.S. 22-54-108.7.

⁴⁴ Colorado School Finance Project, *Colorado K-12 School Finance Information Packet*, 14 (Jan. 2021) <https://cosfp.org/wp-content/uploads/CSFP-K12-School-Finance-Packet.pdf> (last accessed Aug. 9, 2021).

⁴⁵ As discussed below, contributions to the 27J CFFF are purely voluntary.

⁴⁶ *Bd. of Cty. Comm'rs of Douglas Cty., Colo. v. Bainbridge, Inc.*, 929 P.2d 691, 695 (Colo. 1996), as modified on denial of reh'g (Jan. 13, 1997).

⁴⁷ *Id.*, at 706. “In the present case the ‘problem’ that the Counties seek to resolve is a shortfall in school district revenue. They have determined that the school dedication or in-lieu fee requirement for approved subdivisions, or combination thereof, authorized to be exacted under the Planning Code is not sufficient for their purposes.”

⁴⁸ *Id.*, at 703.

⁴⁹ *Id.*, at 706.

In this case, City Staff stated “[a]lthough no portion of this proposed plat includes a planned future public school site, the PUD and City’s Master Plan does call (sic) for an elementary school site within the Village 9 [Reunion Ridge] area to the south.”⁵⁰ City Staff went on to state that “based on maps that the School District has approved, the students would attend Second Creek Elementary, Stuart Middle, and Prairie View High School. . . . Based on the latest information from 27J, the proposed schools could handle this additional development.”⁵¹

Both District 27J and the City Staff had an opportunity to review and comment on the adequacy of “school sites” and “school structures” and found both to be adequate. Therefore, the Application meets this Approval Criteria.

While indicating that mandated fees, also known as exactions, were improper if they exceeded the statutory limit of fair market value through a land dedication or cash in-lieu payment at the time of subdivision or a combination thereof, the court made it clear that donations were not subject to such prohibition.⁵² Further, each school district in Colorado is required to operate pursuant to the Financial Policies and Procedures Handbook (the “Handbook”) that has been developed by the State Board of Education, which allows donations as another revenue source.⁵³

The 27J CFFF

The 27J School District Capital Facility Fee Foundation (“27J CFFF”) “was established in 2001 to collect contributions from developers and builders to help fund school expansion or new school construction”⁵⁴ and to “address the shortfall between the cost of school capital construction needs and the impact of the negative factor to the District’s state funding.”^{55,56} These contributions are voluntary.⁵⁷, and “Funding is provided by homebuilders and developers who have agreed to contribute per dwelling unit based on the current fee structure.”⁵⁸ That structure for 2021-22 is \$865 per single family unit and \$494 per multifamily unit. Donated funds must be used only for acquisition or construction of facilities for student capacity approved by the Board of Education.

⁵⁰ See, Staff Report – Planning Commission, dated August 24, 2021, page 9

⁵¹ See, Staff Report – Planning Commission, dated August 24, 2021, page 9

⁵² *Id.*, at 713. “Our holding in this case prohibiting county enlargement of the statutorily prescribed school exaction in connection with approved subdivisions does not prevent the making of school construction or other school-related contributions at any time.”

⁵³ *Id.*, at 712 (emphasis added), citing Colorado Dep’t of Edu., *Financial Polies and Procedures Handbook*, D-7 to D-9), eff. July 1, 2020, <https://www.cde.state.co.us/cdefinance/fpphandbookfy20-21> (last accessed Aug. 8, 2021).

⁵⁴ School District 27J Capital Facility Fee Foundation, <https://www.sd27j.org/Page/131> (last accessed Aug. 9, 2021).

⁵⁵ *Informational Brochure*, School District 27J Capital Facility Fee Foundation, June 2021, https://www.sd27j.org/site/handlers/filedownload.ashx?moduleinstanceid=15373&dataid=24606&FileName=CFFF%20Trifold%20Brochure_Jun2021.pdf (last accessed Aug. 9, 2021).

⁵⁶ It is important to note that the 27J CFFF was created due to state budgetary shortfalls adversely impacting District 27J funding, not a lack of dedication of school sites or payment of fees in-lieu by developers.

⁵⁷ *Id.* (emphasis added).

⁵⁸ *Informational Brochure*, *supra* note 41.

Oakwood Homes initially participated in the 27J CFFF. However, after becoming the master developer in 2018, Oakwood Homes made the decision to create the Reunion Community Foundation (“RCF”), a Federally-approved 501(c)(3) organization, as a means of more directly advancing school planning and development efforts within the Reunion Community. Oakwood Homes and its homebuilder-partners have been making contributions to the RCF in lieu of making contributions to the 27J CFFF since that time.

Like the 27J CFFF, the RCF is a permitted means of gathering *donations* for school capital expenditures. However, while the 27J CFFF accepts donations from builders in various communities and disburses funds based on district-wide needs, creation of the RCF has allowed Oakwood Homes to keep RCF donations by Oakwood Homes and its homebuilder-partners in Commerce City and the Reunion Community. Some examples of the outsized positive impact of the RCF and its partnerships on the Reunion community include the dedication of ten (10) additional acres of land to Reunion school needs, valued at \$6 million; additional direct contributions by Oakwood Homes of \$243,000 to the early concept planning and land use entitlements for the STEAD School; and collaboration with BuildStrong to secure campaign pledges of \$224,375 towards a \$1 million fundraising effort for the STEAD School.

Based on the language found throughout both the District 27J website as well as the informational pages linked therein, it is clear that the 27J CFFF is an allowed *voluntary* source of local revenue, as provided for in the Handbook. Despite Mayor Huseman’s statements to the contrary and pursuant to the Act, District 27J cannot make contributions to the 27J CFFF mandatory for purposes of its determination of adequacy of school sites or structures. Further, based on the holding in *Bd. of Cty Comm’rs of Douglas Cty., Colo. v. Bainbridge, Inc.*, it is unlikely the City could require a contribution to the 27J CFFF as this would amount to the exactment of an improper school impact fee. Despite these limitations on the 27J CFFF, Oakwood Homes through the establishment, funding and partnerships generated by the RCF continues to evidence its commitment to Commerce City, and to Reunion and its residents regarding school funding.

A development agreement has been entered into between the City and Oakwood Homes’ predecessors, which addresses the construction of all required public improvements for the F1 Am 4 Final Plat, which will be constructed in one phase.

On December 17, 2001, a development agreement was entered into between the City and the predecessors of Oakwood Homes.⁵⁹ The development agreement addresses construction of all required public improvements as well as school lands dedication. The phasing for the development will occur in one phase and as noted above, sufficient transportation, drainage, and utility infrastructure capacity exists to serve the subdivision.

Conclusion

As discussed above, the Application clearly meets the Approval Criteria. Further, the concerns expressed by Mayor Huseman at the special City Council hearing where the plat call-up

⁵⁹ See, Consolidated Development Agreement for Buffalo Hills Ranch PUD, recorded January 23, 2002 at Reception No. C0917475.

was approved are either not part of the Approval Criteria or a misapplication of the Approval Criteria.

For the reasons discussed above, Oakwood Homes respectfully requests the City Council approve the Application. Oakwood Homes and I look forward to the public hearing on September 20th and answering any questions you may have at that time.

Very truly yours,

SPENCER FANE LLP

/s/ Michelle L. Berger

Michelle L. Berger

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