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To: Board of County Commissioners

From: Kathy Parker, Assistant County Attorney

Date: September 26, 2016

Re: Legal Issues related to BVCP Map Change Requests

A number of legal issues were raised after public testimony at the joint hearing held by the Planning Commission and Board of County Commissioners on August 30, 2016 related to BVCP Land Use Map change requests, and discussed at the Planning Commission's continuation of the hearing held on September 21, 2016. A discussion of some of the relevant issues follows.

1. Why is the 3rd Street Property going through the map change process when staff's proposed change may be just correcting an error from several decades ago?

The 3rd Street parcel is currently designated as Area III in its entirety. The property owner has requested to change the entirety of the parcel to Area II. Staff's recommendation is to split the parcel into Area III west of the blue line and Area II east of the blue line.

Staff believes that the Area II/Area III split on the property previously was the same as staff's current recommendation. Research revealed that likely a mapping error changed the parcel to its current Area III designation, but that isn't entirely certain. The county administratively corrects very minor mistakes such as typos. The county corrects substantive errors only through an official, public process. In this case, the designation is more than a typo, and the map has been adopted and treated as correct since the early 1990s. Therefore, it is appropriate for this request to go through a fully-noticed and public process prior to changing the map.

2. What is "cash-in-lieu"?

Cities and counties may not impose rent control on private residential housing units in Colorado under C.R.S. § 38-12-301. Voluntary agreements between developers or property owners and a city or county to restrict rents or deed-restrict properties to have affordable rents is allowable. C.R.S. § 38-12-301(2). A state agency, county, or municipality may manage and control the rent for any property in which it has an interest through a housing authority or similar agency. C.R.S. § 38-12-301(5)

The Colorado Supreme Court has ruled that requiring a set-aside of affordable rental units as a requirement of a broader development is illegal rent control. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000), as modified on denial of rehearing (Feb. 26, 2000). For rental projects, many municipalities that are facing affordable housing issues allow developers to either limit rents voluntarily or pay for an exemption, which does not violate state law.

Aside from the legal issues, policy reasons often support a cash-in-lieu program. Funds paid as cash-in-lieu by developers go into a city's affordable housing fund. The city then provides grants from the fund to non-profit affordable housing developers. Often, these developers, which include entities like Boulder Housing Partners and Habitat for Humanity, may then apply for state and federal housing funds that will allow them to build more affordable housing units for cheaper than if private developers had volunteered to provide it as part of their development proposal.

3. What is the effect of subcommunity plans on annexation?

Subcommunities are distinct areas within the service area of the city (Area I and II). Subcommunity plans are jointly adopted by the City Council and Planning Board. The plans are meant to help implement the broad policies of the Boulder Valley Comprehensive Plan in a particular area. Subcommunity plans are not, however, required for every part of the planning area.

A subcommunity plan is not a contract with a subcommunity that grants rights. Rather, it is a guidance document that helps to bridge the planning gap between the BVCP policies and site-specific project review.

4. Members of the public testified that they wanted to talk to the Planning Commission and were denied access, but were allowed to talk to the other three deciding bodies. What was communicated and why?

The County Attorney's Office advised the Planning Commission that for reasons of fairness, equal access, and transparency, members of the Planning Commission should not tour the Twin Lakes parcels with groups, but that members could tour the parcels on their own. Correspondence from groups requesting pre-hearing tours received by county staff that was directed to the Planning Commission was included in the public record and made available to the commissioners.

The County Attorney's concern related to fairness and providing equal access was that if individual commissioners met with representatives of any one group, they would need to meet with representatives of all other interested groups. For example, members of Planning Commission meeting with Twin Lakes Action Group representatives would also need to meet with representatives of BVSD, or BCHA. Unlike county commissioners, the members

of the Planning Commission are volunteers and tours with multiple groups or individuals could take up a significant amount of volunteer time.

The other concern that informed the recommendation was in ensuring that all concerned citizens had access to any discussions that might take place about a given parcel, which would not be possible if the discussion took place on a tour. Therefore, the County Attorney recommended that all discussions related to a given request take place on the record and not in small groups outside a public hearing.

5. What is the relationship between the Boulder County Housing Authority (BCHA) and the Board of County Commissioners (BOCC)? Why is it okay for the BOCC to decide on a request from BCHA?

BCHA was created under Colorado's County Housing Authority Act, C.R.S. §§ 29-4-501 to -509, by Boulder County. The County Housing Authority Act specifically authorizes the BOCC to serve as the commissioners of the housing authority. C.R.S. § 29-4-504(2). Housing authorities are in the business of undertaking projects, and are subject to all planning, zoning, and other land use processes or regulations of the locality in which a project is situated. C.R.S. § 29-4-509. Still, the legislature approved this dual role.

Cities and counties typically render decisions that affect projects undertaken by entities similar to housing authorities, where the governing body also serves as the board. For example, a city or county may render decisions on projects by urban renewal authorities and public improvement districts for which the council members or commissioners also serve as the urban renewal board or the board of the public improvement district. Additionally, the departments of a city or county sometimes undergo processes involving review by the city or county. For example, Boulder County Parks and Open Space undertakes projects that trigger land use review. In such cases, the BOCC renders quasi-judicial decisions on the applications.

In the case of this BVCP change, review of BCHA's request is not limited to only the BOCC. The BOCC is only one of four bodies that reviews proposed changes. Moreover, further decisions related to annexation, zoning, and development will be made by the city bodies rather than the BOCC.

6. Are there restrictions on the use of the Boulder Valley School District (BVSD) parcel?

The Land Use Map change that BVSD requested affects how the property may be zoned post-annexation. While the property is under county jurisdiction, the dedicated parcel remains subject to C.R.S. 30-28-133, which governs county subdivisions. Upon annexation, however, the annexing city has land use authority over the property and controls subdivision and zoning. *See* C.R.S. 31-12-101 through -123 (the "Municipal Annexation Act").

Therefore, whether there are restrictions on the BVSD parcel post-annexation depends on whether the city places restrictions on the use of the parcel.

The Municipal Annexation Act requires a city to zone (or rezone) a property upon or within 90 days after annexation. C.R.S. § 31-12-115(1) & (2). It also specifically allows a city to subdivide (or resubdivide) a property upon annexation. C.R.S. 31-12-115(5). As an example, if a county approves a subdivision and records a subdivision plat, the county's plat and associated requirements will control *unless*, at or after annexation, the city exercises its own authority and records a new plat, as is contemplated in Colorado's Municipal Annexation Act. In that case, the city's subsequent action will govern.

The Colorado Supreme Court has also recognized that when a city annexes land, land use authority shifts from county to city. *Bird v. City of Colorado Springs*, 489 P.2d 324 (Colo. 1971). Specifically, a city has the power to classify land within its boundaries for specified uses to provide for the health, safety and welfare of its citizens and the general public. *Id.* at 325.

7. What site-specific issues related to the development of a parcel are appropriate to consider at this decision point?

Issues that are peripheral to comprehensive planning should be considered only to the extent that they are relevant to the land use designation change. As a general matter, there are three main phases of planning; the amount of information available to inform decisions becomes more complete as the phases progress.

The current process is comprehensive planning. The comprehensive plan is a long-range guiding document that allows a community to achieve its vision and goals, objectives, and policies. It provides a policy framework for regulatory tools like zoning, subdivision regulations, annexations, and other policies. It establishes a process for orderly growth and development, addresses both current and long-term needs, and provides for a balance between the natural and built environment. It is also a living document updated as needs of community change over time. This phase is the 30,000-foot overview.

In looking at a land use map change in particular, it is not expected that there will be a great deal of site-specific information available. Issues such as when the property might be annexed, what annexation option is most appropriate, or traffic, hydrology, and wildlife corridors typically would not be thoroughly studied and analyzed at this phase since site-specific development plans for the property typically come after a property owner understands how a land use designation for will affect future zoning.

The next phases after comprehensive planning are annexation and zoning. During annexation, the city looks specifically at whether the proposal meets state statutes as well as the policies for annexation in the BVCP. Annexation is a city-driven inquiry and analysis. The City of Boulder requires an annexation agreement to establish the terms and conditions

of the annexation. The terms and conditions include things such as right-of-way dedication requirements, affordable housing contributions, and fees. The city reviews and addresses issues related to transferring properties into the city's jurisdiction. At annexation, the city will also zone the property consistently with the comprehensive plan. More information is available to inform decisions at the annexation and zoning phases, but site-specific information may not be complete until after a property owner understands what zoning may allow for the property.

The most site-specific phase of planning is development review. It is during the development review processes that the city looks at the site-specific development plans and decides whether the development is appropriate for the city. At this phase, the applicant has studied and analyzed site-specific impacts, and the city would fully evaluate proposed mitigation strategies for impacts. Addressing site-specific impacts at the development review phase avoids any unintended consequences of trying to address issues before all relevant information is evaluated and understood.

8. What types of decisions could decision-makers render for a Land Use Map change request?

The decision-makers may impose only land use designations that currently exist within the BVCP. For example, a decision-making body may not impose a designation that has not been previously adopted as part of the BVCP. Additionally, if multiple designations are imposed on a property, the decision must be specific such that the dimensions and locations of designations are ascertainable on the map. Conditions may not be imposed upon designations, but the decision-making bodies may attach recommendations to an approval.

In order to change the Land Use Map in the BVCP, each of the four bodies must agree on the designation or designations. Multiple approvals that are not identical would ultimately be construed as a denial and the current designation would not change. Each of the four bodies may make differing recommendations or may omit recommendations, since these are non-binding.

9. What is the relevance of annexation?

Annexation is relevant insofar as it informs the decisions before the decision-makers. For properties already in Area II, the question is not if the areas are appropriate for annexation—an Area II designation means that a property is eligible for annexation. The Land Use Map designations govern with how the property may be zoned post-annexation.

In regard to the Twin Lakes parcels, there appear to be at least two legal and legitimate avenues to annexation, either across the trail corridor outlot parcel to the north or down Twin Lakes Road. Ultimately, at the time of annexation, the city would provide guidance to the property owners about how annexation may occur.

Annexation down Twin Lakes Road would not require annexation of other properties adjacent to the road. C.R.S. § 31-12-105(e)(II). If any property owners abutting the road also petitioned for annexation, however, they would be allowed to do so under the same or substantially similar terms and conditions as the initial annexation. C.R.S. § 31-12-105(e.1).

County-owned open space may not be annexed without the County's permission. The trail corridor outlot, however, is in Area II, so it is eligible for annexation. Annexing a County-owned open space parcel or the Twin Lakes trail corridor outlot parcel would change the jurisdiction in which the parcel lies, but would not change the ownership of the property or how it is managed.

The city currently owns and manages a large amount of open space within the county's jurisdiction; examples include Chautauqua and Joder Ranch. The city manages such properties in accordance with its own policies, but any projects proposed for the property would be reviewed under the Boulder County Land Use Code. Similarly, a county-owned parcel in the city would be managed by the county in accordance with county policies, but projects proposed for the property would be reviewed under the city's regulations.