



FOSTER GRAHAM MILSTEIN & CALISHER LLP  
ATTORNEYS AT LAW

EXHIBIT B  
June 2, 2020  
Town Council Meeting  
Item #10  
Resolution 2020-052

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November 27, 2019

*Sent via electronic mail to: [bslentz@crgov.com](mailto:bslentz@crgov.com)*

Bob Slentz  
Town Attorney  
Town of Castle Rock  
100 N. Wilcox Street  
Castle Rock, CO 80104

**Re: Caliber at Terrain Site Development Plan #SDP19-0029 – Reversionary Rezoning Analysis**

Dear Mr. Slentz:

As you know, Foster, Graham, Milstein & Calisher LLP (“FGMC”) represents The Garrett Companies, LLC (“Garrett”) regarding its application for a site development plan for an apartment building complex known as Caliber at Terrain in the Town of Castle Rock, Colorado (the “Town”) and identified by the Town as project number #SDP19-0029 (the “SDP Application”). The SDP Application proposes to construct an apartment complex (the “Project”) on property in the Town located in the northeast quadrant of Founders Parkway and State Highway 86 (the “Property”). The Property is located within the Villages at Castle Rock Planned Unit Development (the “Villages PUD”).

This letter explains why Garrett is entitled to build the Project in accordance with the Villages PUD regardless of any certain provisions of the Villages PUD ordinance related to the completion of development within twenty-five years of approval.

## **I. Background**

On August 4, 1981 the Town created the Villages PUD via the adoption of Town Ordinance 3.71 (the “Villages PUD Ordinance”). Section VIII(A) of the Villages PUD Ordinance states, “Each final site plan shall contain a phasing plan, provided, however, that the entire Planned Unit Development shall be completed within twenty-five (25) years of the date hereof, except as such may be enlarged by the Board of Trustees or its successors.” The Villages PUD Ordinance does not provide any additional provisions regarding the process, procedure or result in the event of the

expiration of the twenty-five year completion period, nor does the Villages PUD Ordinance define “completed.”

The Town accepted the SDP Application in early 2019 and has been processing and working with Garrett on the same since the submittal. Specifically, Garrett has held two neighborhood meetings regarding the SDP Application, the first on April 24, 2019 and the second on September 19, 2019. The next step for the SDP Application is to present the SDP Application to the Town’s Planning Commission for review at a public hearing and recommendation of approval, approval with conditions or denial of the Application to the Town Council. Additionally, the owners of the property submitted a June 23, 2019 memorandum to the Town entitled, “Flamingo, Linden and Poplar Parcels – Villages at Castle Rock – Unified Development History” explaining the development history of the Property and the Town’s processing of the same, and also submitted a letter on July 9, 2019 detailing potential economic impacts to the property.

It has come to Garrett’s attention that there is some question as to the impact of the twenty-five year completion period to the SDP Application. For the reasons explained below, Garrett has the right to continue to process the SDP Application pursuant to the Villages PUD Ordinance regardless of the twenty-five year completion provision.

## **II. Applicable Law**

The Colorado Supreme Court finds that automatic reversionary zoning is prohibited because it would amount to a second rezoning which, “would violate the procedural directions of state law, which demands that rezoning be accomplished through notice, hearings and planning commission inquiry.”<sup>1</sup> Accordingly, the Colorado Court of Appeals have held that while automatic zoning clauses are inoperative, when a planned unit development ordinance contains a time period expiration and the municipality provides notice of such expiration, the governing body of the municipality is entitled to initiate formal rezoning proceedings, complete with notice and a public hearing.<sup>2</sup> Specifically, in *Applebaugh*, the county’s zoning regulations required a developer-applicant to submit documents for final approval within a certain timeframe or else the rezoning would revert to the pre-planned unit development zoning.<sup>3</sup> When the developer-applicant took no action prior to the deadline, the county sent him notice that his planned unit development zoning had lapsed and the developer-applicant again took no action.<sup>4</sup> Four years later, the Board of County Commissioners initiated formal rezoning proceedings and ultimately voted to approve a rezoning to its pre-planned unit development zone district.<sup>5</sup> The *Applebaugh* court upheld the Board of County Commissioners’ rezoning approval.

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<sup>1</sup> *Spiker v. City of Lakewood*, 603 P.2d 130, 132 (Colo. 1979).

<sup>2</sup> *Applebaugh v. Bd. of Cty. Com'rs of San Miguel Cty.*, 837 P.2d 304, 307 (Colo. App. 1992).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*



### III. Analysis

In this instance, the Property is still located in the Villages PUD Zone District. As an initial matter, the twenty-five year completion period contained in the Villages PUD Ordinance only speaks to development of the Property, not the Property's underlying zone district. Specifically, neither the Villages PUD Ordinance nor any other municipal code provision in the Town provide that the Property shall be rezoned if the twenty-five year completion period expires or, worse yet, an automatic reversion to a previous zone district. The Villages PUD Ordinance does not even define "completed." Thus, there is no clear direction to rezone the Property as there was in *Applebaugh* and therefore, this twenty-five year completion period speaks only to development of the Property, not the Property's zoning designation.

Even if the twenty-five year completion period provision of the Villages PUD Ordinance did contain a provision addressing an expiration of the underlying zoning of the Property, automatic reversionary rezoning, as explained in *Spiker*, is prohibited and thus, the Villages PUD zoning designation remains valid and in effect for the Property.

The twenty-five year completion period provision contained in the Villages PUD Ordinance does not provide any direction in the event of the expiration of this time period. Presumably, the Town and the owners of the Property at the time of the adoption of the Villages PUD Ordinance thought it was feasible for development of the Property to be completed within twenty-five years. Accordingly, this provision is tantamount to a vested rights provision that provided the owner of the Property with the right to develop the Property for at least the twenty-five years, and prohibited the Town from interfering during that time with a process such as rezoning the Property.<sup>6</sup> However, the Property was not developed within the twenty-five years contemplated in the Villages PUD Ordinance, but, as explained above, there is no legal "automatic action" that results from such expiration. Thus, the Town must continue to process the SDP Application because the Property is still located in the Villages PUD Zone District.

Even if the expiration of the twenty-five year completion period granted the Town the authority to make a change to the Property's zoning designation, the Town has not initiated any proceedings to do so. Moreover, the Town has not provided Garrett or the Property owners with any notice that the twenty-five year completion period has expired and that the Town intends to initiate rezoning proceedings, like the county did in *Applebaugh*. Furthermore, the Town may not, while the SDP Application is pending, initiate a rezoning of the Property because a rezoning that would nullify the SDP Application would constitute retroactive application of an ordinance, which

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<sup>6</sup> *Taylor Morrison of Colorado, Inc. v. Bemas Construction, Inc.*, 411 P.3d 72, 77 (Colo. App. 2014) (holding that "a vested right must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another.")

is prohibited under Colorado law.<sup>7</sup> Therefore, the Town must continue to process the SDP Application because it did not take any action on the underlying zoning of the Property between the expiration of the twenty-five year completion period and the submittal of the SDP Application.

#### IV. Conclusion

For the foregoing reasons, the Property retains its zoning designation of Villages PUD. Accordingly, Garrett respectfully requests that the Town continue to process the SDP Application and issue a formal finding that, regardless of the twenty-five year completion provision contained in the Villages PUD Ordinance, the Property has a zoning designation of Villages PUD and thus, the Project contains uses permitted under the Property's zoning.

Thank you for your attention to this matter. Please do not hesitate to contact me with questions or to further discuss.

Sincerely,

FOSTER, GRAHAM, MILSTEIN & CALISHER LLP

A handwritten signature in black ink, appearing to read 'David Wm. Foster', with a stylized flourish at the end.

David Wm. Foster

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<sup>7</sup> *Saur v. Cty. Com'rs of Larimer Cty.*, 525 P.2d 1175, 1176 (Colo. App. 1974).