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March 9, 2022

Town Council
Town of Vail
75 S. Frontage Road West
Vail, CO 81657

Via email: towncouncil@vailgov.com

Matt Mire, Esq.
Attorney, Town of Vail

Via email: jmm@hpwclaw.com

Re: 3070 Booth Creek Drive ("Property")

Dear Vail Town Council and Mr. Mire:

Our firm represents the Reggie D. Delponte Trust No. 1 and the Reggie D. Delponte Trust No. 2 (collectively, "Delponte"), owners of the referenced Property. Delponte applied with the Town of Vail Design Review Board ("DRB") on February 7, 2022, for approval of the addition of a second level above certain portions of the existing footprint of the residence located at the Property.

Delponte's architect attended a pre-planning meeting on September 16, 2021, to discuss the proposed project. On September 17, 2021, the DRB advised that it could not accept applications for the Property "due to pending legal issues." That decision was reversed after consulting the Town's legal counsel and the DRB advised that there were no impediments that would prevent Delponte from applying for approval of the project. Thereafter, the DRB unanimously approved the application on March 2, 2022, however, the day of the approval, a condition was placed upon obtaining a building permit for the project:

Prior to submitting for a building permit, the applicant shall cause to be removed all existing private improvements, including sod, located on Vail Village Filing No. 11, Tract C.

This condition was never discussed in any prior meeting or discussions with Delponte's architect and, more importantly, is not a condition of approval of a building permit under the Town's code. When we first learned of the condition imposed on the morning of March 2, 2022,

Wendell Porterfield, on behalf of Delponte, wrote a letter to Mr. Mire asking for the basis upon which the condition was imposed and requested a response prior to the DRB meeting that day. Mr. Mire did not respond, and still has not responded, to that letter.

Colorado law prohibits this type of discretionary condition on the approval of a proposed project:

No local government shall impose any discretionary condition upon a land-use approval unless the condition is based upon duly adopted standards that are sufficiently specific to ensure that the condition is imposed in a rational and consistent manner.

C.R.S. § 29-20-203(2).¹

As noted above, the DRB's condition of removing landscaping, including sod, from a 37-acre tract of land owned by the Town is not an adopted standard and is not at all related to the Delponte project. The proposed work does not increase the footprint of the building in any way, nor does it impact any portion of Tract C.

Furthermore, the condition requires Delponte to remove landscaping, including sod, from property owned by the Town of Vail and utilized by other owners of property adjacent to Tract C. Requiring Delponte to guess what improvements in Tract C are private, then remove those improvements – including removal of sod, thereby leaving 37-acres of exposed dirt – subjects Delponte to violations of a host of other laws, including trespass, nuisance, vandalism, theft, and many more. Furthermore, even if removal of all existing improvements was permissible, it is impossible to remove landscaping and sod given the several feet of snow covering Tract C and the frozen ground. That factor physically prohibits Delponte from complying with the condition.

It is our belief that the discretionary condition was imposed in retaliation for Delponte's position taken in the case captioned *Town of Vail v. Town of Vail*, District Court, Eagle County, Colorado, Case No. 2021CV30084, which was dismissed by the Court one week prior to the DRB decision. In that case, just as in previous cases between the Town and Delponte of which you are likely aware, the Town sought to extinguish Delponte's recorded interest in a portion of Tract C adjacent to the Property. The DRB's discretionary condition in this instance is an arbitrary attempt to circumvent the Town's failed efforts to force Delponte's removal of private improvements in Tract C.

¹ The DRB's actions may also constitute a requirement to provide services to the Town in the form of landscape removal on Tract C in violation of C.R.S. § 29-20-203(1).

On behalf of Delponte, we have initiated a formal appeal of the DRB decision, which is scheduled for consideration at the April 5, 2022, Town Council meeting. Should the DRB decision be upheld, we will pursue all legal remedies pursuant to C.R.S. § 29-20-204. Specifically, we believe the DRB's actions constitute an unlawful exaction of property in contradiction of state and federal property laws, including violation of the 5th Amendment takings clause. *See* 42 U.S.C. § 1983. The discretionary condition in this instance is wholly unrelated in nature or extent to the Delponte project and, therefore, is a compensable taking. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994); and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2594-95 (2013) (*Nollan* and *Dolan* prevent the government from engaging in extortion by leveraging "its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts."). Such claims can now be brought directly in federal court. *See Knick v. Twp. of Scott, Penn.*, 139 S.Ct. 2162 (2019). It also is apparent to us that the DRB's actions have exceeded its jurisdiction and abused its discretion and, therefore, are actionable under Colorado law. C.R.C.P. 106. In connection with these claims, we will pursue all damages available by law, including recovery of attorney fees. 42 U.S.C. § 1988.

The building permit is scheduled to be obtained in early April and work is scheduled to begin shortly thereafter. The DRB's imposed conditions threaten the construction timeline and the resulting delays will be extremely costly to Delponte. The Town's intentional interference with Delponte's project raises additional legal claims. It is our preference to avoid these delays and possible litigation concerning the DRB condition. That said, we ask that you advise the DRB to immediately remove the illegal condition upon obtaining a building permit and allow the approved project to proceed as approved.

We request that you include this letter in the Town Council packet for the April 5, 2022, Town Council meeting as an attachment to the formal appeal of the DRB's decision. If you would like to schedule a call to discuss this matter, let us know. Otherwise, we look forward to your response.

Sincerely,

ALDERMAN BERNSTEIN LLC

A handwritten signature in blue ink, appearing to read "Amanda A. Bradley", with a stylized flourish at the end.

Amanda A. Bradley

cc: Mr. Reg D. Delponte
Wendell Porterfield, Esq.
Carrie Bernstein, Esq.