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Planning & Development Services

RECEIVED

MAY 4 - 2006

HOLLAND & HART

May 2, 2006
Mr. J. Frederick Mack
Holland & Hart, LLP
P. O. Box 2527
Boise, Idaho 83702-2527

Re: Takings Analysis of CAR05-00050

On March 27, 2006 Boise City Planning and Development Services received a request for a regulatory taking analysis regarding Council decisions made on February 22, 2006 on case CAR05-00050. The request was from Holland & Hart representing Signet Investments, LLC, an Idaho limited liability company, Adelaid Investments, LLC, an Idaho limited liability company, and Skyline Development Company, an Idaho limited partnership (collectively "Skyline").

As set forth in detail below, the City has analyzed each factor as set forth by the Idaho State Attorney General and finds that City Councils actions do not, in any way, constitute a taking.

Evaluation of Proposed Regulatory or Administrative Actions to Identify Potential Takings of Private Property

- A) The State of Idaho Attorney General issued a white paper "Idaho Regulatory Takings Act Guidelines" December 2003, providing the basis for this taking analysis. Within that document there is an "Advisory Memorandum: State of Idaho Attorney General's Advisory Memorandum for Evaluation of Proposed Regulatory or Administrative Actions to Identify Potential Takings of Private Property" (the Memorandum) which lists the specific process and criteria for a taking analysis. This format will be used to outline the requested analysis, and quotes are from that document.
- B) Sequence of events for a request for taking analysis and fulfillment of the request.

State agencies and local governments are required to use this procedure to evaluate the impact of proposed administrative or regulatory actions on private property. I.C. § 67-8003(1). Upon the written request of an owner of real property that is the subject of such action, a state agency or local governmental entity shall

prepare a written taking analysis concerning the action. ... The written request must be filed *not more than* twenty-eight (28) days after the final decision concerning the matter at issue and the completed takings analysis shall be provided to the property owner *no longer than* forty-two (42) days after the date of filing the request with the clerk or secretary of the agency whose action is questioned. Idaho law also provides that “a regulatory taking analysis shall be considered public information.” See I.C. § 67-8003(2).

The City Council’s action was on February 22, 2006. The ordinance and resolution required by Council was prepared and are pending scheduling for final readings and approval. Because the ordinance and resolution had not been read and published as of the date of the request, the request for a regulatory taking analysis is timely.

C) The memorandum provides a checklist to aid in the analysis. According to the memorandum this should have been part of the request for taking analysis, but it was not included. The answers to the following questions one through six are all “No”. A detailed response to these issues is set forth below the checklist.

Idaho Regulatory Takings Act Guidelines
APPENDIX C: REGULATORY TAKINGS CHECKLIST

State of Idaho Office of the Attorney General Regulatory Takings Checklist			
		Yes	No
1	Does the Regulation or Action Result in Either a Permanent or Temporary Physical Occupation of Private Property?	_____	_____ <u> x </u>
2	Does the Regulation or Action Require a Property Owner to Either Dedicate a Portion of Property or to Grant an Easement?	_____	_____ <u> x </u>
3	Does the Regulation Deprive the Owner of All Economically Viable Uses of the Property?	_____	_____ <u> x </u>

4	Does the Regulation Have a Significant Impact on the Landowner's Economic Interest?	_____	<u> X </u>
5	Does the Regulation Deny a Fundamental Attribute of Ownership?	_____	<u> X </u>
6	(a) Does the Regulation Serve the Same Purpose that Would be Served by Directly Prohibiting the Use or Action;	_____	<u> X </u>
	(b) does the Condition Imposed Substantially Advance that Purpose?	_____	<u> X </u>

Remember: Although a question may be answered affirmatively, it does not mean that there has been a "taking." Rather, it means there could be a constitutional issue and that proposed action should be carefully reviewed with legal counsel.

This checklist should be included with a requested analysis pursuant to Idaho Code § 67-8003(2).

D) Detailed analysis of the six points on the checklist

1 Does the Regulation or Action Result in Either a Permanent or Temporary Physical Occupation of Private Property?

At the February 22, 2006 public hearing, the City Council voted to continue negotiations with Ada County regarding expansion of the area of impact. This negotiation process actually began July 7, 2006. That same night, City Council voted that part of the negotiation process would include comprehensive plan policy amendments that Ada County would be requested to adopt should the area be successfully negotiated into the area of impact. Finally, should the negotiations be successful, the Council voted that the land use map should be modified to include the lands under negotiation.

Nothing about any of these actions would result in the City imposing regulations that would result in a permanent or physical occupation of private property. The City currently has no jurisdiction over the land. Even if the area of impact was re-negotiated, Ada County would simply be requested to implement comprehensive plan policies. The comprehensive plan is merely a guide. The City's request that the County implement guiding policies cannot be considered a permanent or temporary physical occupation of private property. Finally, even if the negotiations were successful, Ada County would retain jurisdiction over the land subject to this review.

2 Does the Regulation or Action Require a Property Owner to Either Dedicate a Portion of Property or to Grant an Easement?

The possible action of including the subject area into the Boise Area of Impact does not require the dedication of a portion of a property or the granting of an easement. Further, requesting that Ada County implement specific comprehensive plan policies does not require a property owner to dedicate a portion of his property. Nor does it require the property owner to dedicate an easement.

3 Does the Regulation Deprive the Owner of All Economically Viable Uses of the Property?

First of all, there is no regulation involved with the City's actions to re-negotiate the area of impact or to create policies that Ada County may want to implement. Assuming that Ada County agreed to re-negotiate the area of impact and implement the applicable comprehensive plan policies, the following analysis would apply.

The current condition of the property is that it is zoned RP (Rural Preservation) in the County and has an allowable density of only one unit per forty acres. The Boise *Foothills Policy Plan* assumes a similar base density for all Foothills property, so bringing the property into the Foothills designation does not take away that base right.

The fundamental concept of the *Foothills Policy Plan* and the Foothills Planned Development Ordinance is that Foothills properties can qualify for additional density beyond 1 unit per 40 acres by clustering units and setting aside permanent open space on the remainder of the property. In fact, urban densities can be obtained on the developed portion of Foothill properties with a large increase of overall density beyond the starting base density. In addition, there is no requirement that the open space be made public. All open space can remain private and fenced and can be used for pasturage and similar private rural uses, although additional density bonus incentives are available in return for public access to the required open space.

The *Foothills Plan* and implementing ordinance were carefully crafted by the City to ensure that they did not take away base land use rights or deprive owners of all economically viable uses; did not require public occupation of private property; did not improperly require dedication of property or easements and did not deny fundamental attributes of ownership. In fact, the *Foothills Plan* was intended to provide a process to increase the development rights associated with Foothills property.

4 Does the Regulation Have a Significant Impact on the Landowner's Economic Interest?

As stated above, there is nothing inherent in the City's actions that would regulate anything. Further, Signet Investments, LLC submitted its application to Ada County on February 21, 2006. Ada County accepted Signet Investments, LLC, application on April 18, 2006. The law in Idaho is clear, that the law in affect when an application is submitted governs. At the time the

application was submitted, the land subject to the application was outside the area of impact. Therefore, the City had no jurisdiction and its actions have no impact on the landowner's economic interest.

It is important to remember that Boise City Council was not reviewing an application for development and made no decisions that could have a significant impact on the landowner's economic interest.

5 Does the Regulation Deny a Fundamental Attribute of Ownership?

The proposed inclusion of the subject land in the Area of Impact would not deny any fundamental attributes of ownership that are available under Ada County's jurisdiction. Even if the area was included in the area of impact, Ada County would merely consider the comprehensive plan policies as a general guide in processing the development application. There is nothing in the proposed policies that would deny the landowner the right to possess, exclude others and dispose of all or a portion of the property owned by Signet Investments, LLC.

6 (a) Does the Regulation Serve the Same Purpose that Would be Served by Directly Prohibiting the Use or Action;

The City has done nothing to regulate this land. The proposed policies allow higher density cluster development than the base zone allows in exchange for open space. Therefore, if the policies were implemented to serve as a guide to development, they would not serve the same purpose as directly prohibiting the use or action.

(b) Does the Condition Imposed Substantially Advance that Purpose?

The City has not imposed any conditions on this development. However, this is a critical area for wildlife management. Therefore, the suggested comprehensive plan policies, if implemented by the County upon successful renegotiation of the area of impact, would allow development while protecting wildlife reserves.

As stated above, Boise City's analysis reveals that pursuant to the Attorney General's checklist, no taking on any category occurred.

Sincerely,



Bruce Eggleston, AICP
Boise City Planning and Development Services Department