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April 10, 2020

Via Email (jthorn@GARDENCITYIDAHO.ORG)

Jenah Thornborrow
Director
Garden City Development Services
6015 N. Glenwood Street,
Garden City, ID 83714

Re: Garden City's Proposed Flood Insurance Ordinance
CW File No. 23780.1

Dear Ms. Thornborrow,

As you know represent Shawn D. McFadden, the owner of certain real property located at 606 and 608 E. 52nd Street, in Garden City, Idaho. We recognize that Garden City has a looming deadline with respect to adoption of certain ordinances. We also recognize that our client's property remains within the seclusion area and that future action regarding the impact of mapping and study will be required. We recognize that much of the proposed ordinance reflects the existing model ordinance and is relatively consistent with other jurisdictions in the vicinity.

While we generally understand and are comfortable with this proposed ordinance and process, we have several concerns that we will continue to advocate on behalf of our client in all proceedings relating to regulation of properties adjacent to the Boise River.

First, while we recognize that ongoing compliance with the National Flood Insurance Program requires adherence to specific requirements, Federal regulations provide a degree of flexibility that needs to be recognized. We are specifically concerned with the proposed definitions of "Substantial Damage" and "Substantial Improvement" which recognize the flexibility that jurisdictions have in adopting flood insurance and flood plain ordinances. There has been inadequate consideration of the impact that the proposed optional language, and we request its exclusion from the ordinance.

Second, as we have previously articulated in other correspondence, we believe that Garden City has inadequately considered the extent to which its ordinances comply with the constitutional protections afforded property owners of existing non-conforming uses and structures under state and federal constitutional law. O'Connor v. City of Moscow, 69 Idaho 37, 42, 202 P.2d 401, 404 (1949).

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We appreciate the Garden City attorney's prior acknowledgment that any ordinance adopted by Garden City must recognize and protect those rights. We expect that Garden City will acknowledge its counsel's evaluation and will actually recognize and fulfill its constitutional obligations to all existing nonconforming uses and structures in adopting ordinances.

The importance of preserving our client's rights associated with the historic use and configuration of her property cannot be understated. It has been long recognized in Idaho that "The owner of a lawful nonconforming use has a right to continue that use despite the conflicting provisions of the subsequently enacted zoning ordinance." Glengary-Gamlin Protective Association Inc. v. Bird, 106 Idaho 84, 89 (Ct.App. 1984). That is because ordinances which prohibit the continuation of an existing lawful use are "unconstitutional as taking property without due process of law and being an unreasonable exercise of the police power." O'Connor, 69 Idaho at 41.

Third, we caution Garden City that we will be observing its actions to ensure that legislative actions are not used as a subterfuge to limit or damage the rights our client possesses as a result of the 1997 settlement agreement between our client, Garden City, and ACHD that resolved various disputes and resulted in every party thereto surrendering certain rights and claims in order to satisfy and settle their competing claims. Pursuant to that 1997 settlement agreement, certain rights and interests were granted to Ms. McFadden as just compensation for the taking of her property by those governmental entities, including Garden City. We would hope that the adoption of the proposed ordinance is not the first step of Garden City in an attempt to circumvent the 1997 settlement agreement, and to take our client's property in contravention of the constitutions of the United States and the State of Idaho.

Finally, we recognize that many issues are in flux with the current condition Stay at Home Order issued by Governor Little. Please advise as to the impact such has on the proposed hearing schedule for this ordinance as well as what alternative accommodations that Garden City is providing to ensure public participation in the required hearings on this ordinance.

We appreciate your assistance in this matter.

Sincerely,


Geoffrey M. Wardle

GMW:lc

cc: Charles Wadams, Garden City Attorney (Email: cwadams@GARDENCITYIDAHO.ORG)
Shawn McFadden