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MEMORANDUM

TO: Mayor and City Council, City of Golden

FROM: Dave Williamson and Keith Martin, Office of the City Attorney

DATE: January 25, 2019

RE: **Land Use Moratoria**

This memorandum briefly discusses land use moratoria in general, and examines the criteria for drafting a valid land use moratorium.

What is a moratorium?

Put simply, a moratorium is a temporary “time out” on a particular practice. In the land use context, moratoria have focused on the issuance of building permits, new sewer/waste facility hookups as well as the use of property for certain things, such as cellular towers, adult bookstores, mobile home parks, nursing homes, video arcades, livestock operations, oil and gas operations, billboard signs, apartments, recycling businesses, time-share units, and fast food restaurants.

Just as there are diverse types of moratoria, there are also different purposes behind land use moratoria. For instance, one purpose is to preserve the status quo during periods of creation and adoption of, or revision to, a comprehensive plan. Another viable purpose behind the issuance of a moratorium is a city’s desire to prevent a public facilities crisis from spiraling out of control, because of a lack of existing capacity. One final purpose behind land use moratoria is a city’s desire to control development during the comprehensive planning process, or while making significant changes to its land use development regulations, to eliminate hasty planning.

In sum, land use moratoria are a recognized tool for local governments to bring about effective land use planning and governmental decision-making.

What are the criteria for crafting a valid land use moratorium?

While there is no bright-line rule that explicitly addresses the elements of a valid land use moratorium ordinance, several helpful “guideposts” can be distilled from decisions that have analyzed land use moratoria in the regulatory takings context:

First, the moratorium must be adopted in good faith. If no genuine need or emergency exists that would justify imposing the moratorium, then it would be evidence of the moratorium's invalidity.

Second, the moratorium must be non-discriminatory. Put another way, the moratorium cannot be used to stop a particular project, simply because it is distasteful or faces opposition from the local community. Another question before the court in determining whether the moratorium is non-discriminatory is whether the effect of the moratorium has such a harsh and unjust consequence as to constitute "substantial prejudice" on a landowner. Thus, a moratorium ordinance that provides a procedure for applicants to seek a special exception from city council to prevent undue, substantial hardship may support a finding that it is not discriminatory. If exceptions are authorized, they should be governed by clear standards, which should be set forth in the ordinance.

Third, the moratorium must advance the same interest that the government asserted for enacting the moratorium. For instance, a moratorium on the issuance of new building permits might not be an appropriate response to address a risk to public safety posed by systemic problems within an existing sewer system, if there are no facts demonstrating that new construction (and, by extension, new connections) would actually worsen the condition of the sewer line in the affected area. It cannot just be assumed that new construction would make matters worse. Rather, there must be demonstrable facts showing that new connections could not be made without adverse effects to the sewer line. Otherwise, a court will likely find that the moratorium is not tied to the asserted public interest that the proposed development is said to endanger.

Finally, the length of the moratorium must be no longer than necessary to accomplish the stated interest. No court decision has offered any bright-line rule for determining when exactly a moratorium is too long in duration. However, the United States Supreme Court has cautioned that "any moratorium that lasts more than one year should be viewed with special skepticism." Consequently, the limited in duration factor will be analyzed with the other factors to determine whether or not the moratorium was enacted properly. For example, suppose a city enacts a twelve-month land use moratorium pending adoption of new zoning and development regulations. If, upon enactment, the study of what appropriate regulations should be imposed proceeds promptly and appropriate zoning ordinances are expeditiously adopted when it is completed, a court will likely view the duration of the moratorium as reasonable, even if that decision-making process ends up taking longer than a year due to the complexity of the task. If, on the other hand, the same moratorium is specified as lasting five years, and no study proceeds after its enactment, a court will likely conclude the moratorium is, in effect, a regulatory ban rather than a truly temporary time out.