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June 20, 2023

Boulder of County Commissioners
Boulder County Courthouse
3rd Floor Hearing Room
1325 Pearl Street
Boulder, CO 80302

*Delivery via email (hhippely@bouldercounty.org; planner@bouldercounty.org;
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**RE: Public Hearing, July 6, 2023, 1pm
Kanemoto Estates Conservation Easement Termination**

Dear Boulder County Commissioners,

Our office represents Keep Airport Road Environmental & Safe (“KARES”), a coalition of Longmont citizens residing in the vicinity of Kanemoto Estates and opposing this proposed termination.

Since we submitted comments to the Planning Commission (dated March 8, 2023, included in Planning Commission’s Kanemoto Estates Outlot A CE Termination 3.15.23 PC Packet), this letter addresses only new subjects. It addresses (1) comments by Ron Stewart and staff in support of this proposed termination, and (2) a procedural infirmity that should legally prevent you from approving the matter at this time.

1. Ron Stewart and County staff miss the point on what you are being asked to do.

First, Ron Stewart casts an admittedly, and deserved, long shadow in this County on open space matters and he supports the extinguishment of the Kanemoto Estates conservation easement. Mr. Stewart bases his support on the idea that Kanemoto Estates is “within Longmont’s [urban growth] planning area” and that development should be allowed to occur however Longmont chooses. Staff (Hannah Hippely) echoed his approach before the Planning Commission, pointing to two provisions in the Boulder County Comprehensive Plan (“BCCP”) that support the concept of “cluster development” and an “appropriate rate of growth” to argue that the BCCP is not “no growth” but rather a “growth in an appropriate location” plan.

However, both Mr. Stewart and Ms. Hippely miss the point of what you are being asked to do. You are being asked to evaluate an extraordinary request to terminate open space in Boulder County whereupon it will be replaced with what most uninterested parties would agree is a densely packed, uninspired, box development where currently hawks soar, elk migrate, and citizens, who have for forty years relied on open space to enhance their lives, have had the

reasonable expectation that the land they walk on with their families was protected in perpetuity by a conservation easement. (Indeed, for forty years, and as recently as last month, real estate brokers led buyers of homes directly abutting the conservation easement to believe that this land was “protected” by a conservation easement.) After all, Boulder County has devoted a great deal of effort and prestige on creating open space, and it is precisely when the development pressures are great that the County Commissioners should fulfill their fiduciary obligations to maintain the conservation easements already in place.

Even worse, from a credibility standpoint, is the fact that the developer is paying into the County Parks & Open Space Department’s revolving open space fund the amount of \$2.3 million for the right to terminate this easement.¹ Such a large payment for the right to develop on open space may be just the tip of this revolving fund’s iceberg. It is anathema to the notion that Mr. Stewart’s old department is protecting the public’s open space; it makes it even more imperative that the County Commissioners create a fiduciary bulwark for protecting open space.

Mr. Stewart’s and staff’s arguments is also unsupportable legally. Once granted to the public in perpetuity,² the 1982 Kanemoto Estates conservation easement became subject to the charitable trust doctrine, supervised by the Colorado Attorney General for the benefit of the people of Colorado.³ It should not be terminated at the behest of any local government, including the City of Longmont or even the CE’s holder, Boulder County, unless its continued purpose is “impossible” to fulfill, which is certainly not the case here.

Ms. Hippely, in trying to show the Planning Commission that extinguishment is consistent with the BCCP, pointed to two provisions in the BCCP encouraging “cluster development” and discussing an appropriate growth rate. These two provisions do not counter the four BCCP goals encouraging the maintenance of existing open space referenced in our earlier comments (3/8/23, included in Planning Commission’s Kanemoto Estates Outlot A CE Termination 3.15.23 PC Packet), nor those of neighborhood resident Norm Gee, OD, who provides 35 BCCP references in his comments showing that extinguishment is inconsistent with the BCCP (included in Planning Commission’s 3.13.23 Comments Received). Moreover, while Longmont and Boulder

¹ This amount of the developer’s contribution was made public on May 2, 2023 after this firm appealed the decision by the County’s CORA Team to keep it from being disclosed.

<https://www.longmontleader.com/local-news/developer-would-pay-23-million-to-end-conservation-easement-6970424>.

² Land use document executed around the same time as the easement show that this CE was intended to be perpetual. Subdivision Plat, Film 1207, Rec. No. 494790 (dedication of improvements “to the use of the public forever”); Subdivision Agmt., 4/21/82 (“preservation of Outlot A, for agricultural purposes”).

³ McLaughlin, Nancy and Weeks, W. William, *In Defense of Conservation Easements: A Response to the End of Perpetuity*. Wyoming Law Review, Vol. 9, p. 34, 38-40 (2009); *Hicks v. Dowd*, 157 P.3d 914, 921 (Wyo. 2007); Restatement (Third) of Trusts § 28; and IVA William F. Fratcher, Scott on Trusts, § 364 (4th ed. 1989) (“A charitable trust is enforceable at the suit of the Attorney General”); *Mitchellville Comty. Ctr., Inc. v. Vos (In re Clement Trust)*, 679 N.W.2d 31, 37 (Iowa 2004) (same).

County *used to* operate under the Longmont Area TDR Intergovernmental Agreement (1996 TDR IGA), which identified certain receiving sites, including Kanemoto Estates, for development, the 1996 TDR IGA has since expired and cannot serve as a basis for unconditionally extinguishing a County CE.

It is also inappropriate to apply the 1996 TDR IGA since the Kanemoto Estates' CE was created in 1982.⁴ Because it predates any agreement for Longmont development, the CE was never intended to be used as a vehicle for Longmont growth and should, like all open space, be used as pocket where growth is limited and wildlife and open vistas are maintained. If communities could relinquish open space by after-the-fact IGAs that anticipated future growth, no open space in the County would be safe.

This raises the question of why the County has so far failed to impose any conditions on the extinguishment of open space in order to protect the nearby neighborhoods. Indeed, in those rare circumstances when groups like the Nature Conservancy or Trust for Public Land lose one of their conservation easements, they demand concessions from the developer. Boulder County should demand concessions here too, and these might include:

- A wildlife corridor;
- Less density in Outlot A, where the CE exists;
- Putting a park where the proposed development abuts neighboring subdivisions;
- Transit improvements at Airport Road and the Diagonal to counter one of the County's worst traffic fatality flash points even before this development;
- More trees; and/or
- Greenhouse gas reductions.

Finally, why do County staff get to decide which open space parcels should be extinguished, or which County land should be bought with revolving fund dollars? Shouldn't this be within the purview of a public board, with public oversight, to make these critical decisions?

In short, the decision to extinguish open space where a developer has paid the County Parks & Open Space Department \$2.3 million to do so is untenable. It would create a slippery slope, leaving all of the County's open space ripe for a future developer's "contributions."

2. Staff failed to find that terminating the Kanemoto Estates CE is consistent with the County's land use regulations, an express condition in the easement that must be met before this body acts.

The CE's termination clause requires that the Planning Commission and Boulder County County Commissioners "determine[] that the proposed and/or allowed development and/or land use resulting from such termination or transfer is consistent with the *current* Boulder County Comprehensive Plan *and Boulder County Land Use Regulations...*". Kanemoto Estates NUPUD (Outlot A) CE 00494792 (1982) (emphasis added).

⁴ It should never have been included as a "receiving site" in the first place. Boulder's Land Use Code states that "a subdivided lot ... recorded prior to 1994" should not be considered for a TDR/PUD receiving site. Code, § 6-700(J)(3).

County staff acknowledged that they failed to do this. Hannah Hippely, Staff Planner, Boulder County Community Planning and Permitting, testified to the Planning Commission on March 15, 2023 as follows:

“Staff does find this application to be consistent with the Boulder County Comprehensive Plan. I just want to note again that the other portion of the conservation easement terms are that we would find a project consistent with the Boulder County Land Use Regulations. In an instance where development were to occur in the unincorporated county, say if the project wasn’t proposing to annex, we would in this instance probably have done a lot more detailed analysis of our NUPUD regulations, that sort of thing, and presented that to you.

However, because this property is proposing to annex into the City of Longmont, and will be administered by their development code, through the various processes I have listed here, analysis of the County Land Use Code is not necessary. So we are also able to find number two – the second term of the conservation easement – to be met.”

Public video recording of Planning Commission meeting, March 15, 2023, addressing Kanemoto Estates Conservation Easement Termination, at 3:51:30 – 3:52:30 (emphasis added).

County staff had no right to refuse to comply with an express term of the CE’s termination – which required an analysis of whether extinguishing the CE is consistent with Boulder County’s land use regulations. It is perfectly reasonable for a termination clause to require such an analysis of the government codes currently in effect, as the CE requires, regardless of whether a planned development may in the future be subject to another government’s regulations. The plain language of the CE’s termination provision requires an analysis of consistency with *Boulder County’s* land use regulations, not Longmont’s, and this was not done.

Even if Boulder County staff had performed a consistency analysis involving the Boulder County land use regulations, such analysis would have shown that extinguishing the CE is inconsistent therewith. For instance, the County’s land use code requires the “[p]romotion of the...safety...of present or future inhabitants of the County through such means as lessening traffic congestion, reducing waste caused by road constructions, *fostering agricultural* and other industries, *ensuring that unincorporated lands outside of the community service areas remain rural in nature, open and rural land preservation, and environmental protection.*” Boulder County Land Use Code (the “Code”), § 1-300(B) (2022) (emphasis added). Thus, the purpose of the Code is fulfilled by preserving the easement which reduces traffic and construction, promotes environmental protection, fosters agricultural activities, and preserves open land. Extinguishing the CE for commercial development is inconsistent with the land use regulations.

In short, the Commission should instruct staff to analyze the issue of whether terminating the CE is consistent with the Boulder County land use regulations, as the CE requires. Once this is done, the Planning Commission will need to make a new determination in light of Staff’s analysis.

3. Conclusion.

It is premature for the Boulder County Commission to extinguish the Kanemoto Estates agricultural conservation easement. The Commissioners should vote NO on this proposal in order to adhere to the express requirements in the easement, preserve the character of this critical area, promote conservation values and act fairly to the current residents.

Thank you for your consideration.

Respectfully,

A handwritten signature in black ink, appearing to read "Randall M. Weiner", written in a cursive style.

Randall M. Weiner
Weiner & Cording
Attorneys for KARES