INSTITUTE FOR JUSTICE

November 2, 2018

Via Certified Mail and Email
Millcreek Community Reinvestment Agency
3310 South 1300 East
Millcreek, UT 84106

To Whom It May Concern:

We write on behalf of the Institute for Justice in connection with the Millcreek Community Reinvestment Agency's (the "Agency's") Millcreek Center Community Reinvestment Project Area ("Project Area") blight study and the corresponding blight designation hearing scheduled for November 13, 2018 or "soon after." The Institute for Justice is a nonprofit organization dedicated to protecting the right of every American to own and use his or her property freely. In particular, we have helped property owners oppose eminent domain abuse and the exploitative redevelopment plans and blight designations that frequently precede eminent domain abuse. We have met with several property owners in the proposed Project Area (the "property owners") and have grave concerns about your intention to declare that area blighted and to authorize eminent domain to take private property therein.

Request For Adjournment And Continuance

First and foremost, we urge the Agency to: (1) adjourn the blight designation hearing scheduled for as early as November 13, 2018; and (2) if the Agency chooses to reschedule the hearing, not do so for at least 120 days.

Based on our meetings with property owners and our own research, we do not believe property owners have received adequate notice of the blight designation hearing or its importance. They need more notice, more information, and more time to protect their rights because, as the Utah Supreme Court has repeatedly recognized, "'redevelopment is a serious action that may be in derogation of individual property rights.'" *Johnson v. Redevelopment Agency of Salt Lake County*, 913 P.2d 723, 725 (Utah 1995) (quoting *Salt Lake County v. Murray City Redevelopment*, 598 P.2d 1339, 1344 (Utah 1979)).

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The Agency failed to meet its notice obligations in several ways. First, we have been informed by some property owners within the Project Area that they never received mailed notice of the blight designation hearing, much less 30 days prior to that hearing, in violation of Utah Code Annotated § 17C-1-806(b).

Second, the notice that was issued is woefully inadequate. It does not adequately inform the property owners of either the importance of the blight hearing in the redevelopment and eminent domain process or of the rights property owners have and could lose. The notice also contains no explanation of the basis for the proposed blight designation. And, although the notice directs property owners to the existence of a blight survey and states that the study is available for inspection, that survey does not provide adequate information for property owners to exercise their rights at the blight hearing under Utah Code Annotated § 17C-5-404(1).

Third, and compounding these errors, the Agency has failed to make critical parcel-by-parcel survey data available to property owners and the public. Utah Code Annotated § 17C-5-403(1)(a) requires each blight survey to be done on a parcel-by-parcel basis. And Utah Code Annotated § 17C-5-404(2) requires the Agency to allow property owners a period of at least 30 days to review the evidence of blight compiled by the Agency or any consultants. But nothing in the Agency's notice mentions the existence of parcel-by-parcel data.

Further, as of last week, this data was not available for public inspection. When we reviewed the blight study available at Millcreek City Hall on October 24, the underlying parcel-by-parcel data was missing. We had to acquire the critical material by submitting a Government Records Access and Management Act (GRAMA) request for it. Yet, the Agency's aforementioned notice neither makes mention of the parcel-by-parcel data nor states where it can be found.

This situation is unacceptable given the fundamental property rights at stake here. Utah law purports to limit the ability of citizens wishing to challenge a finding of blight even where—as here—it would authorize eminent domain. *See* Utah Code Annotated § 17C-5-406. If, in a challenge to a blight determination, property owners are limited to evidence presented at the blight hearing, *see* Utah Code Annotated § 10-9a-801(8), they are entitled to sufficient notice, information, and time to prepare that evidence and to meaningfully object to the Agency's evidence about hundreds of properties.

In addition to violating Utah law, these deficiencies in notice violate the United States Constitution and (if not corrected) may render the entire blight designation a nullity. Courts have routinely found that blight determinations trigger the protections of the Due Process Clause of the Fourteenth Amendment and have repeatedly held that insufficient notice—like the notice issued here—is unconstitutional. *See, e.g., Brody v. Village of Port Chester*, 434 F.3d 121, 129-132 (2d Cir. 2005) (finding notice of hearing inadequate where it failed to fully apprise owners of the nature of the hearing and how to challenge eminent domain); *Harrison Redevelopment Agency v. DeRose*, 942 A.2d 59, 85-87 (N.J. App. Div. 2008) (refusing to honor a conclusive presumption of blight where property owners were not provided with sufficient notice of blight hearing).

So as to comply with its statutory and constitutional obligations, especially given the Agency's warning that it "may . . . use eminent domain" in the proposed Project Area, the Agency should cancel the blight hearing scheduled for November 13 or "soon after." If the Agency chooses to reschedule the hearing, it should not do so for at least 120 days and provide mailed notice to all the property owners at least 120 days in advance of that hearing.

Declaration Of Intent To Examine And Cross-Examine Witnesses Providing Evidence Of The Existence Or Nonexistence Of Blight, And To Present Evidence And Testimony, Including Expert Testimony, Concerning The Existence Or Nonexistence Of Blight

If the Agency and Millcreek City Council choose to go forward with the hearing scheduled for on or soon after November 13, 2018, numerous property owners have indicated they will oppose a finding of blight at the hearing. If the Agency fails to postpone this hearing and allow property owners, the Institute for Justice, and other members of the public more time to review what evidence there is relating to blight, we intend to assist property owners at the blight hearing with the examination and cross-examination of witnesses, including the Agency's representatives and consultants. We also intend to assist in the presentation of evidence and testimony, including expert evidence, to demonstrate that the proposed Project Area is not blighted.

Comments In Opposition To A Finding Of Blight

The desire for redevelopment is not enough to permit eminent domain; only curing actual blight can allow redevelopment. *Johnson*, 913 P.2d at 725. But even

a cursory review of the Agency's blight survey demonstrates that it does not satisfy Utah's standards for "blight" (to the extent those standards are not also unconstitutionally vague). Indeed, we suspect that the Agency's proposed blight determination is a foregone conclusion and that the blight study's objective is to supply the Agency with a blight pretext for otherwise prohibited use of eminent domain for private economic redevelopment.

In fact, even the Agency's blight study concedes that the proposed Project Area does not satisfy Utah's standards for "blight." Under Utah Code Annotated § 17C-5-405, the Agency cannot make a blight finding for the Project Area unless 66% of the privately owned acreage in the area is "affected by at least one" statutory blight factor. According to the blight study, less than 66% of the privately owned acreage in the Project Area is "affected" by a blight factor.

Yet, despite this finding, the Agency is considering a blight designation on the grounds that a portion of the Project Area is purportedly blighted. After failing to establish that the Project Area as a whole is blighted, the Agency has gerrymandered the (already non-contiguous) Project Area into a smaller blight study area.

For several reasons, this gambit was improper. First, the Agency's May 14, 2018 survey area resolution, required under Utah Code Annotated § 17C-5-103, authorized a survey area that was identical to the Project Area. After that survey area did not support a blight designation, the blight study's author surveyed a smaller area not authorized by any resolution.

Second, Utah's applicable statute suggests that blight study areas must be *bigger* than (or coterminous with) proposed community reinvestment project areas—like the Project Area here—rather than smaller. Under the statute, a survey area resolution must have "a statement that the survey area requires study to determine whether project area development is feasible within one or more proposed community reinvestment project areas *within* the survey area." Utah Code Annotated § 17C-5-103(1)(c) (emphasis added). By instead creating a survey area within a proposed project area, the Agency is flouting Utah law.

Third, the Agency cannot use a blight designation for a portion of the Project Area to threaten the entire Project Area with eminent domain. Even the most pristine, non-blighted areas may have portions with blight conditions. If redevelopment agencies throughout Utah had the authority to cherry pick portions

of non-blighted areas for a blight designation, seemingly no neighborhood in Utah would be safe from a blight designation. And yet, the Agency's notice mailed for the upcoming blight designation hearing alludes to potential eminent domain throughout the Project Area as a whole. *See also* Utah Code Annotated § 17C-1-902(2)(c) (authorizing eminent domain "within a community reinvestment project area" after a blight designation).

Even if the Agency could gerrymander a new blight study area, it should not designate this area as blighted. The new gerrymandered blight study area is—like the broader Project Area—not blighted under any common sense understanding. It contains beautiful, well-maintained, and beloved homes. It also contains several viable businesses that provide valuable goods and services to Millcreek residents, while allowing working men and women to support themselves and their families. The owners of these homes, businesses, and properties love and value them. Millcreek has no right to cast aspersions on these properties by calling them "blighted" and certainly no right to threaten them with eminent domain.

The blight survey which the Agency commissioned to make its blight determination suffers from so many flaws that neither the Agency nor the Millcreek City Council can reasonably rely on it to make a blight determination. *Cf.* George Lefcoe, *Redevelopment Takings After Kelo: What's Blight Got to Do with It?*, 17 S. Cal. Rev. L. & Soc. Just. 803, 821 (2008) ("Redevelopment agencies choose consultants who 'know their job is not to determine if there is blight' but to find blight where the agency wants it to be found."). Setting out every flaw that we have uncovered in that survey would take too much space here. And more flaws would likely be found with an appropriate amount of time to study that survey. In sum, however, the study:

- Creates and purports to consider numerous "subfactors" outside the blight factors enumerated in Utah Code Annotated § 17C-5-405(1)(a)(iv) to pad its findings;

- Uses subfactors that are irrelevant to Utah's enumerated blight factors—including temporary or trivial conditions—to support finding those enumerated blight factors;

- Counts failures of the Millcreek City Government (which is controlled by the Agency's alter ego, the Millcreek City Council)—along with failures of participants involved in proposed Project Area

development—as excuses to find blight and engage in eminent domain of private property for redevelopment;

- Never demonstrates substantial physical dilapidation, deterioration, or defective construction of buildings or infrastructure; or significant noncompliance with current building code, safety code, health code, or fire code requirements or local ordinances;

- Does not address, or provide evidence of, how the properties identified are unsanitary or unsafe and threaten public health, safety, or welfare;

- Never demonstrates there are environmental hazards that require remediation as a condition for current or future use and development;

- Fails to demonstrate excessive vacancy, abandoned buildings, or vacant lots;

- Admits that there are no abandoned or outdated facilities that pose a threat to public health, safety, or welfare;

- Fails to address, or provide evidence of, actual "criminal activity";

- Admits there are no defective or unusual conditions of title rendering the title nonmarketable;

- Fails to satisfy the requirements of Utah Code Annotated § 17C-5-405(1)(a)(iv)-(v).

The use of eminent domain in such nonblighted conditions is eminent domain for economic development or other non-public use, which is prohibited by Utah statutes and unconstitutional under both the Utah and United States Constitutions.

If the Agency does not adjourn its upcoming blight hearing, we look forward to examining and cross-examining witnesses and presenting evidence and testimony, including expert evidence and testimony, to illuminate the numerous faults with the blight study and to demonstrate that the proposed Project Area—

and any blight study area therein—is not blighted. We will also investigate an appeal from any pretextual blight finding the Agency makes.

Sincerely,

Milad Emam
Institute for Justice

Kevin Anderson
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