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March 29, 2012

*Via E-Mail and Hand-Delivery*

Attn: Hal Simmons  
Attn: Josh Johnson  
City of Boise  
Planning & Development Services  
150 N. Capitol Boulevard  
Boise, ID 83701

**RE: CUP11-00090 and CFH11-00036 (1004 W. Royal Boulevard)**  
**SB File No. 22868.1**

Dear Mr. Simmons and Mr. Johnson:

Our client, 917 Lusk LLC ("**Keynetics**"), owns the Keynetics Inc. building situated immediately east and south of the proposed River Edge Apartment student housing project at 1004 W. Royal Boulevard ("**Project**"). The proposed Project is located in the R-OD zone (Residential – Office with Design Review). The developer, the Michaels Organization ("**Applicant**" or "**Michaels Organization**"), applied for a conditional use permit for a height exception to construct the Project nearly 30 feet taller than the 35-foot height allowed in the R-OD zone. The consequences of this massive increase in height over what Boise City Code and State law allow are far-reaching, prejudicial, and detrimental to our client's substantial rights specifically, and to the surrounding mixed-use neighborhood, which the City would – we hope – like to see re-develop in a manner that benefits all.

In *Burns Holdings, LLC v. Teton County Board of Commissioners*, the Idaho Supreme Court ruled that height limits legislatively-adopted by a local government can only be changed through a variance process – not a conditional use process. After the Boise City Attorney and City Staff were made aware of the *Burns Holdings* decision, Staff responded that they would "convert" the conditional use application to a variance application—despite the fact the Michaels

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Organization did not submit a variance application form or pay a variance application fee<sup>1</sup> and despite that the matter had not been noticed as a variance application. Still, the Planning & Zoning Commission (the "**Commission**") proceeded to hear the application as both a conditional use permit as well as a variance. On March 6, 2012, the Commission's action letter was issued containing both Reasons for the Decision and Conditions of Approval (collectively, the "**Decision Letter**").

On March 15, 2012, Keynetics appealed the Commission's decision to the Boise City Council (the "**Council**"). This letter constitutes Keynetics' memorandum in support of the appeal.

### **ANALYSIS**

The Commission's decision approving the conditional use permit application and the variance violates Idaho Code and Boise City Code, exceeds the Commission's statutory authority, is arbitrary, capricious and an abuse of discretion, and is not supported by substantial evidence.<sup>2</sup>

#### **A. The Proposed Height Exception Fails to Meet the Requirements for a Conditional Use Permit.**

Conditional uses "by definition possess characteristics such as to require review and appraisal by the Commission to determine whether or not the use would cause any damage, hazard, nuisance or other detriment to person or property in the vicinity."<sup>3</sup> In other words, the "use," in this case a height standard, is deemed a risk to persons or property to be proven otherwise or mitigated with appropriate conditions.<sup>4</sup> The proposed Project does not satisfy the criteria for conditional use permits under the Boise City Code.<sup>5</sup> Further, the Commission did not attach conditions of approval that would mitigate the adverse impacts caused by the Project.

#### **1. The Proposed Project is Not Compatible to Other Uses in the General Neighborhood. – Boise City Code § 11-06-04.13.A.**

The Commission's sole rationale that the Project is compatible with other uses in the general neighborhood is that "there are buildings of similar height in the immediate vicinity and ample

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<sup>1</sup> The Boise City Code requires an "application with the appropriate form and fee." Boise City Code § 11-06-11.02. For variances, the City requires payment of a separate \$366 fee and utilizes a separate Variance Application Form (Department Application form #122).

<sup>2</sup> Boise City Code § 11-03-07.05.G.8.

<sup>3</sup> Boise City Code § 11-06-04.01.

<sup>4</sup> See *Burns Holdings, LLC v. Teton County Board of Commissioners*, 2012 WL 206010 \*4 for a discussion on why it is problematic to call height a "use."

<sup>5</sup> Boise City Code 11-06-04.13.

separation is provided to shorter structures.”<sup>6</sup> This is not true and was not supported by the substantial evidence before the Commission. The proposed Project’s five stories and 63-foot height is not compatible with the other buildings in the neighborhood. Most of the office buildings within the Forest River development on the north bank of the Boise River are either two or three stories tall.<sup>7</sup> It is important to bear in mind that although those buildings are now located in the R-OD zone, they were not at the time they were constructed. According to the architects that designed the buildings, the land was zoned L-OD when the buildings were developed, and the L-OD zone allows a building height of 45 feet. Moreover, all of those buildings, with the exception of the Cornerstone (Cottonwood Grille) building, are 15 to 20 feet shorter than the proposed Project. The proposed Project would tower over the surrounding area—including the Greenbelt—at five stories.

The Keynetics office building is three stories; the proposed Project would be 10 to 15 feet higher than the Keynetics building.<sup>8</sup> The Keynetics building is located in a zone (C-2D) that permits buildings 10 feet higher than the zone in which the proposed Project is located.<sup>9</sup> The proposed structure would harm the Keynetics building by completely obscuring views from the Keynetics building to the west toward Ann Morrison Park.

The Commission claims compatibility with surrounding buildings that are not in the immediate vicinity – the Morrison Center (at 63 feet) and the Barnes Towers (at 74 feet), which are both located on the Boise State campus, nearly a third of a mile from the proposed Project.<sup>10</sup> Moreover, the Morrison Center and Barnes Towers are also across two major roadways (9<sup>th</sup> Street and Capitol Boulevard) from the neighborhood surrounding the Project. More importantly, the Morrison Center and the Barnes Towers are in completely different zones (U and UC), which allow buildings as tall as 75 feet.<sup>11</sup> Merely comparing buildings “along the Greenbelt” without accounting for the differing zoning classifications in which they are located ignores what it means to be compatible with surrounding buildings.

Not only is the unusual height of the proposed Project not harmonious with the surrounding uses, but its design is also not compatible. BRS architects designed the buildings in the Forest

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<sup>6</sup> *Decision Letter* p. 3.

<sup>7</sup> *Barber Letter* p. 1. The Cornerstone (Cottonwood Grille) building is the lone exception with four stories.

<sup>8</sup> The Keynetics building is located in the C-2D zone. The majority of the Keynetics building’s height is below the zone’s 45-foot height limit; the tallest habitable floor height of the Keynetics building is 41 feet. A design parapet is 46 feet high, and a stairwell structure used to access utility structures on the roof extends to 53 feet. Keynetics obtained a height exception for aesthetic and design characteristics, and not to increase the density or to add floors as is requested in the present application.

<sup>9</sup> Boise City Code § 11-04-06.10, Table 4A.

<sup>10</sup> *Decision Letter* p. 3.

<sup>11</sup> Boise City Code § 11-04-11.04.

River Development as well as the Keynetics building. Those buildings are not carbon copies of each other, but they do include unifying and complimentary themes. The proposed Project contains none of the unifying or complementary themes. In fact, Design Review changes require contemporary colors that, while possibly compatible with downtown, are not compatible with the existing buildings or the natural setting along the Greenbelt.

**2. The Proposed Project will Place an Undue Burden on Transportation and Other Public Facilities in the Vicinity. – *Boise City Code § 11-06-04.13.B.***

Parking problems created by the higher density associated with the height of the proposed Project will strain public facilities in the area. Ann Morrison Park, a City owned park, will be clogged with overflow parking. Visitors to the park will not be able to locate parking, and the City will be forced to expend valuable resources policing parking areas within the park and along the Greenbelt. As was noted by the City of Boise in its new comprehensive plan, Blueprint Boise, “while many places are tempted to relax standards during uncertain economic times, our high expectations will hold value many decades later.”<sup>12</sup> The City should resist pressure to make decisions now that will hinder the redevelopment of the area due to impacts of this Project on the attractiveness of the immediate vicinity and the Greenbelt.

**3. The Proposed Project Will Adversely Affect Other Property in the Vicinity. – *Boise City Code § 11-06-04.13.D.***

Parking issues created by the Project – with no mitigation – will severely and adversely affect the properties in this re-developing neighborhood.

Staff and the Commission claimed the adverse parking situation created by the Project cannot be considered when determining whether to grant the conditional use permit or the variance for a height exception.<sup>13</sup> This conclusion ignores Boise City Code requirements that a conditional use permit for a proposed Project will not adversely affect other property within the vicinity.<sup>14</sup> Inadequate parking provided by the proposed Project will severely affect nearby properties. Further, the request for a height exception that is nearly twice that allowed in the R-OD zone cannot be separated from parking concerns. Each added story increases occupant density and the need for additional parking. Because the housing Project would include 175 dwelling units (of which 139 are four-bedroom units), it will contain 622 bedrooms and house at least 622 student tenants, yet only 280 parking spaces are planned.

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<sup>12</sup> Blueprint Boise, Foreword.

<sup>13</sup> March 5<sup>th</sup> Minutes pp. 1 and 15.

<sup>14</sup> Boise City Code § 11-06-04.13.D. A similar standard exists for variances. Boise City Code § 11-06-11.04.C (requiring that a variance “will not be detrimental to the public health, safety or welfare, or injurious to other property, or the quiet enjoyment thereof.”).



The application was improperly processed as "multi-family" for purposes of calculating off-street parking requirements. This is a significant error because "multi-family" projects under the City's off-street parking requirements must include only 1.5 parking spaces per dwelling unit and one guest space per 10 units.<sup>15</sup> Presumably, the "multi-family" parking requirements were drafted with the notion that one or two car driving adults would live in each unit. That presumption does not logically apply to the proposed student housing Project.

The Applicant and the City have been clear that the Project is aimed at student housing for Boise State students.<sup>16</sup> The student-centered nature of the Project is borne out by the number of bedrooms in each unit and the proposed leasing arrangement. Most multi-family apartment complexes in downtown and the downtown periphery include one-bedroom, two-bedroom, or a combination of one and two bedroom units. The proposed structure would consist almost entirely of four-bedroom units (175 total dwelling units of which 139 are four-bedroom units) and will include 622 bedrooms for at least 622 student tenants.

The leasing arrangement further demonstrates that the proposed Project is not typical multi-family housing, where the lease covers the entire apartment and not, as in this case, a lease for each individual bedroom.<sup>17</sup> Each lease on a bedroom-by-bedroom basis will be guaranteed by a parent guarantor. Thus, each "unit" is a bedroom under the leasing arrangement.

The table below provides the ratio of parking spaces to bedrooms in multi-family apartments and college fraternity/sorority housing projects under Boise City Code:<sup>18</sup>

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<sup>15</sup> Boise City Code § 11-10-01.01, Table 1.

<sup>16</sup> Compare *Planning Division Staff Report prepared for Commission Hearing on February 6, 2012 and Letter from Engineering Solutions LLP dated November 28, 2012* (the "First Applicant Letter") with *Planning Division Staff Report prepared for Commission Hearing on March 5, 2012 and Letter from Engineering Solutions LLP dated February 27, 2012* (the "Second Applicant Letter").

<sup>17</sup> The foregoing information was obtained by Eileen Barber in conversations with the Applicant's representatives.

<sup>18</sup> The ratios were calculated by using the Boise City Code § 11-10-01.01, Table 1. The Fraternity/Sorority classification best describes the proposed project: groups of young (driving-age) adults living together. Under the Fraternity/Sorority classification the proposed project must (and should) provide at least 622 parking spaces. Staff provided the Commission with parking figures from a few select on-campus housing projects at Boise State. Those on-campus projects provide no guidance for an off-campus project. On campus housing traditionally caters to freshman and sophomores and foreign students without cars, and students that have purposely chosen to live on campus because they do not have cars. Keynetics provided the Commission with parking ratios from off-campus multi-family apartments, which have much higher parking ratios (.78 to 1.19). Those ratios demonstrate the project is severely under-parked.

<b>Bedrooms Per Unit</b>	<b>Ratio Parking Spaces to Bedroom</b>
All one-bedroom Units	1.6
All two-bedroom Units	0.8
Combination of one- and two-bedroom Units	0.9 to 1.5
Fraternity/Sorority	1.0
<b>Proposed Project</b>	<b>0.45</b>

With only 280 proposed parking spaces (including spaces for visitors and complex staff) for 622 bedroom units, the Project creates a parking ratio far below that of typical multi-family apartments.

Even slight changes in the number of student tenants with cars creates a monumental problem. The table below illustrates how the shortage of parking spaces doubles as the percentage of students with cars increases to 75%, which, according to the Applicant, is a realistic expectation:<sup>19</sup>

<b>% of Students with Cars</b>	<b>Parking Spaces Needed Based on 622 Occupants</b>	<b>Shortage of Parking Spaces</b>
<b>60%</b>	373	93
<b>65%</b>	404	124
<b>70%</b>	435	155
<b>75%</b>	467	187

The shortage of parking spaces and the excess of cars will be detrimental to the public health, safety, welfare, and injurious to nearby properties and the City of Boise. Parking in this neighborhood has been a problem, remains a problem, and will become an even more serious problem with the severe shortage of parking for the building tenants. Although students will be able to walk or bike to their classes, many will still own cars to drive to grocery stores, retail stores, jobs, recreation, parents' homes, etc. Many students opt for off-campus housing, so they can have a car.

The reduced reliance on auto travel that this particular location may provide for tenants does not reduce the need for parking. The City has recognized that the reduction in travel demand does not equate to a reduction in parking demand for other off-campus student housing projects, which have been required to provide more car and bike parking facilities.

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<sup>19</sup> According to the Applicant's representative, at least 60% to 65% of college students own cars. See, *Letter from Eileen Barber to the Commission, dated February 13, 2012* (the "*Barber Letter*") p. 3.

Last fall, the Commission approved CUP11-00051, which involved a plan to repurpose the Doubletree Hotel at 475 W. Parkcenter Boulevard into 158 residential dwelling units aimed at student tenants. The conditions of approval are instructive. The Project was limited to 142 units with a total occupancy of 200 tenants. However, the Project was required to provide 200 bicycle parking spaces and 180 car parking spaces. That is a one-to-one ratio for bikes, and nearly a one-to-one ratio for cars. Yet, the proposed Project provides only 48 bicycle parking spaces and 280 car parking spaces for at least 622 tenants. The disparate treatment of the two off-campus student housing projects is not justified, and it is not fair to either the ultimate tenants of the proposed Project or its neighbors.

Procedurally there remains the nagging problem that the Planning Director has not, as a preliminary matter, made an administrative decision on the number of parking spaces required, thus depriving our client and others to be involved with that decision very early in the process. If a project, such as this, does not fit within either the "multi-family" designation or the "Fraternity/Sorority" classification, the Planning Director is required to determine the appropriate number of required parking spaces.<sup>20</sup> The Planning Director has not done so. The Council should, at the very least, remand this application so the Planning Director can properly determine the appropriate number of parking spaces for an off-campus student housing project. The Commission's decision was not based on substantial evidence that included this information.

Ultimately, if not addressed, inadequate parking will make the proposed Project an undesirable place to live, adversely affect the businesses in the area, and harm the ability to enjoy Ann Morrison Park and the Boise River Greenbelt. Students that cannot find parking within the housing Project will park at adjacent properties and within Ann Morrison Park. This situation is against the public interest, will be detrimental to the public health, safety, and welfare, and will injure neighboring properties.

The proposed height of the Project will also adversely affect Keynetics building occupants by obscuring views to the west toward Ann Morrison Park. Individuals walking along the Greenbelt and in Ann Morrison Park will be confronted with the sight of a structure nearly double what is allowed in the R-OD zone, which zone is intended to be a transition zone.<sup>21</sup> Instead of a transition, the proposed Project will be the tallest building in the neighborhood between the Boise River, Ann Morrison Park, and 9th Street.

Because the Commission stated that it would not even consider the parking situation when assessing the conditional use permit and the variance,<sup>22</sup> the Commission failed to consider all necessary evidence and make the required determination under Boise City Code Section 11-06-

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<sup>20</sup> Boise City Code § 11-10-01.01.C.

<sup>21</sup> Boise City Code § 11-04-05.03.

<sup>22</sup> March 5<sup>th</sup> Minutes pp. 1 and 15.

04.13.D. Regardless, substantial evidence provided to the Commission demonstrates the proposed Project would adversely affect other property in the vicinity due to not only the parking, but also the design and height of the building.

**4. The Proposed Project Does not Comply with or Support the Goals of the Comprehensive Plan. – *Boise City Code § 11-06-04.13.E.***

As set forth above, the proposed Project does not maintain compatibility with surrounding buildings or uses. Thus, contrary to the Commission's findings, the Project does not comply with Objective 7.2.1 of the Comprehensive Plan.<sup>23</sup> In fact, the proposed Project actually contradicts other provisions of the Comprehensive Plan.

Parking issues created by the proposed Project violate the City's Comprehensive Plan. The Comprehensive Plan provides that on-street parking by Boise State students and staff in neighborhoods near campus is discouraged and the City shall explore "[m]ethods for reducing on-street, off-campus parking."<sup>24</sup> Further, on-street parking is generally discouraged.<sup>25</sup> The proposed Project will only intensify and congest on-street parking in the area around the development and, more generally, the Boise State campus, demonstrating further non-compliance with the Comprehensive Plan.

The proposed Project also fails to provide a "new residential structure that [is] functional and aesthetically pleasing" as required by the Comprehensive Plan.<sup>26</sup> The large mass of the structure and the continuous roof line, which is only broken by the parapets required by Design Review, creates an overpowering structure on this portion of the Greenbelt.

The proposed design is not the only design option available for higher density housing at the location. A more appropriately designed project with adequate parking and a height that conforms to the zoning ordinance would support the objective in the Comprehensive Plan for residents to "seek housing in a neighborhood of their choice."<sup>27</sup>

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<sup>23</sup> *Comprehensive Plan Objective 7.2.1* does not expressly provide for "compatibility with surrounding buildings" as stated in the *Decision Letter*. Rather, it provides the City shall "[p]romote and establish a physical framework of development in the City which encourages the development of form and character of its districts, the preservation of its neighborhoods and the conservation of its historical identity." The proposed project does not comply with the express language of *Objective 7.2.1*.

<sup>24</sup> *Comprehensive Plan Policies 2.16.1.8 and .9.*

<sup>25</sup> *Comprehensive Plan Policies 6.4.3.1 and .2.*

<sup>26</sup> *Comprehensive Plan Objective 7.2.2.*

<sup>27</sup> *Comprehensive Plan Objective 7.1.2.*



**5. The Proposed Project Does Not Include Features That Add to the Visual and Aesthetic Appearance of the Structure and Help Prevent a Sterile, Box-Like Appearance, and the Commission Failed to make the Required Findings that specific Design Features have been added to enhance the physical appearance of the Project. – Boise City Code § 11-06-04.13.F.**

Although the Project went through the design review process, the proposed design does not include features that add to the visual and aesthetic appearance and help prevent a sterile, box-like appearance. Even if opinions may differ about whether the design of the proposed Project is attractive, the Commission clearly failed to make any findings that specific design features were added to enhance the physical appearance of the Project.<sup>28</sup> This failure to comply with Section 11-06-04.13.F demonstrates error and the application accordingly should be denied.

**B. Under LLUPA, the Applicant Did Not Submit a Valid Application for a Conditional Use Permit for a Height Exception.**

In *Burns Holdings, LLC v. Teton County Board of Commissioners*,<sup>29</sup> the Idaho Supreme Court merely affirmed what the Local Land Use Planning Act ("LLUPA")<sup>30</sup> stated long before the present Applicant submitted its request for a height exception: conditional (or special) use permits apply to uses, and variances apply to modification of bulk or placement standards.<sup>31</sup> As the Idaho Supreme Court explained:

A CUP is used for classifications of uses that the zoning authority has determined will be permitted only if it is allowed to require specified types of conditions that are typically developed on a case-by-case basis in order to mitigate the adverse effects that the development and/or operation of the proposed use may have upon other properties or upon the ability of political subdivisions to provide services for the proposed use.<sup>32</sup>

This makes sense. A conditional use permit includes conditions to mitigate the impacts of the particular use, which use has been defined by the City to possess characteristics requiring a determination about whether the use would cause any damage, hazard, nuisance, or other detriment to person or property in the vicinity.<sup>33</sup> Bulk and placement standards (i.e., height and mass and where the building sits on a parcel) are distinguishable from the use of the building.

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<sup>28</sup> See *Decision Letter*.

<sup>29</sup> *Burns Holdings, LLC v. Teton County Board of Commissioners*, 2012 WL 206010.

<sup>30</sup> Idaho Code §§ 67-6501 to 67-6538.

<sup>31</sup> Idaho Code §§ 67-6512 (special or conditional use permits) 67-6516 (variances).

<sup>32</sup> *Burns Holdings, LLC v. Teton County Board of Commissioners*, 2012 WL 206010 \*4 (emphasis added).

<sup>33</sup> Boise City Code § 11-06-04.01.

Bulk and placement standards adopted by the City, by their very nature as uniform standards within a particular zone, do not allow for site specific manipulation of the standards, lest the uniformity requirements of LLUPA be violated.<sup>34</sup> This is why variances only apply "upon a showing of undue hardship because of characteristics of the site. . ."<sup>35</sup> In other words, the physical characteristics of the site make it difficult or impossible to comply with the normal bulk and placement standards (which standards apply to all other property located within the same zone). Otherwise, bulk and placement standards within a zone become at best mere "suggestions," and at worst, arbitrary and subject to the whim of the reviewing body or individual.

Regardless of the logic or policy considerations behind the rules established in LLUPA pertaining to conditional use permits and variances, at the time the Applicant submitted its conditional use permit application for a height exception, the Boise City Code provision<sup>36</sup> that allowed conditional use permits for height exceptions violated LLUPA and was void.<sup>37</sup> The City simply does not possess authority to waive the requirements of LLUPA.<sup>38</sup> Thus, the Applicant never submitted a valid conditional use permit application.

Because the application is not a valid conditional use permit application, the variance cannot be heard without a separate variance application. Boise City Code provides that an "application with the appropriate form and fee is required" for a variance.<sup>39</sup> The Michaels Organization did not submit a variance application form or pay a variance application fee,<sup>40</sup> and the notices did not describe the application as a variance application.

Boise City Code Section 11-06-11.05 does provide that the "Commission or Hearing Examiner may grant a variance as part of a conditional use permit without separate application and hearing as long as the notice requirements of Section 11-6-11.3 are met and the findings in Section 11-6-11.4 are made."<sup>41</sup> However, because no valid conditional use permit application

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<sup>34</sup> See, Idaho Code §67-6511: "...All standards shall be uniform for each class or kind of buildings throughout each district, but the standards in one (1) district may differ from those in another district."

<sup>35</sup> Idaho Code §67-6516.

<sup>36</sup> Boise City Code § 11-06-06.12.

<sup>37</sup> *Burns Holdings, LLC v. Teton County Board of Commissioners*, \* 3 - \*4.

<sup>38</sup> *Burns Holdings, LLC v. Teton County Board of Commissioners*, \* 3 - \*4.

<sup>39</sup> Boise City Code Section 11-06-11.02.

<sup>40</sup> The Boise City Code requires an "application with the appropriate form and fee." Boise City Code § 11-06-11.02. For variances, the City requires payment of a separate \$366 fee and utilizes a separate Variance Application Form (Department Application form #122).

<sup>41</sup> Boise City Code Section 11-06-11.05 (emphasis added).

was submitted to the City, no variance can be made part of a conditional use permit. In other words, a variance cannot be converted from a conditional use permit application that was never authorized under LLUPA that was in effect at the time the application was submitted. The variance can only be heard as part of an authorized conditional use permit application.

**C. The Proposed Height Exception Fails to Meet the Requirements for a Variance.**

The proposed student housing Project does not comply with the Boise City Code or Idaho Code requirements for a variance. The Boise City Code provides that a "variance shall not be considered a right or special privilege but may be granted upon a showing of undue hardship because of characteristics of the site or unique circumstances relating to the intended use and that the variance is not in conflict with the public interest."<sup>42</sup> Further, a variance request may only be approved with the findings:

- A. That the granting of the variance will not be in conflict with the Comprehensive Plan for the City and will not affect a change in zoning;
- B. That there is either a hardship associated with the property itself or an exceptional circumstance relating to the intended use of the property that is not generally applicable in the district; and
- C. That the granting of the variance will not be detrimental to the public health, safety or welfare, or injurious to other property, or the quiet enjoyment thereof.<sup>43</sup>

The parameters of variance under the Boise City Code, however, must conform to the limits set forth in LLUPA for variances.

Idaho recognizes Dillon's Rule that a "municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature and the legislature has absolute power to change, modify or destroy those powers at its discretion."<sup>44</sup> If Boise City Code violates or provides a lower/looser standard than set forth in the Idaho Code for variances, the provision of the Boise City Code is void. Idaho Code provides a more succinct standard for a variance than the Boise City Code: "A variance shall not be considered a right or special privilege, but may be granted to an applicant only upon a showing of undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest."<sup>45</sup> To the extent the Boise City Code attempts to impose a lesser standard for variances than those

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<sup>42</sup> Boise City Code § 11-6-11.01.

<sup>43</sup> Boise City Code § 11-6-11.04.

<sup>44</sup> *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (citing *State v. Steunenberg*, 5 Idaho 1, 4, 45 P. 462, 463 (1896)).

<sup>45</sup> Idaho Code § 67-6516 (emphasis added).

set forth in the Idaho Code, the Boise City Code is void. Regardless, the proposed Project meets neither the City requirements nor the Idaho Code requirements.

**1. The Applicant has Not Demonstrated an Undue Hardship Due to the Characteristics of the Particular Site.**

The hardship must be unique to the particular property and not shared by other properties within the zone and/or self-created by the proposed use. There is simply nothing unique about this particular property in this R-OD zone.

The Commission claims a hardship is present because "the project is located within the floodplain and the site must artificially be raised above base flood elevation."<sup>46</sup> The Commission's decision cites no other "hardship" unique to the particular property.

The Applicant admits the Boise River Ordinance merely requires the "finished floor of the proposed structure" to be one foot above the Base Flood Elevation."<sup>47</sup> The current elevation of the property is 2686 feet.<sup>48</sup> At the Commission hearing on March 5<sup>th</sup>, the Applicant's representative stated that "with our grading plan I think we're at a 2688.7, which is our highest finish floor elevation."<sup>49</sup> Thus, using the Applicant's own numbers, the location within the floodplain only adds 2.7 feet to the height of the building from what would be allowed outside the floodplain.<sup>50</sup> This hardly accounts for the other proposed 26 feet above what the R-OD zone designation allows. The additional 26 feet requested by the Applicant cannot be justified by the floodplain. At most, the Applicant can claim a hardship for 2.7 feet of height.

The fact that the Project will be raised one foot (or even 2.7 feet) above base flood elevation does not support the Commission's decision for a height variance of nearly 30 feet. Even assuming the floodplain is somehow unique only to the proposed site—which it is not—there is no explanation by the Commission as to why the floodplain would require the building to exceed—by nearly 30 feet—the adopted R-OD height of 35 feet. The floodplain alone does not necessitate a 63-foot tall structure.

In fact, the entire floodplain argument is incorrect under Boise Code and misleading. The Boise City Code defines "building height" as the "vertical distance from the grade to the highest point of the coping of a flat roof or to the deck line of a mansard roof or the average height of the

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<sup>46</sup> *Decision Letter* p. 3.

<sup>47</sup> *Second Applicant Letter* p. 4.

<sup>48</sup> *Andrus Letter* Exhibit A.

<sup>49</sup> *March 5<sup>th</sup> Minutes* p. 5.

<sup>50</sup> *See Second Applicant Letter* p. 4 and *First Applicant Letter* p. 3.



highest gable of a pitch or hip roof.”<sup>51</sup> The “grade” is defined as the “elevation of the finished surface of the ground adjacent to the exterior wall of a building or structure.”<sup>52</sup> In other words, fill brought onsite to raise the finished floor of the proposed structure one foot above the Base Flood Elevation has no effect on the building height because the building height is determined from the elevation of the fill.<sup>53</sup>

The Applicant also claims it must build an apartment complex of a particular size in order to make the Project feasible; the Idaho Supreme Court rejected this argument 25 years ago. Economic viability is not an adequate hardship for purposes of obtaining a variance.

In *City of Burley v. McCaslin Lumber Co.*, a property owner began converting a duplex into a triplex, despite the fact that triplexes were not allowed in the zone where the property was located. Upon learning of the issue, the property owner applied for a variance to complete the triplex, which was granted. The Supreme Court invalidated the variance and aptly held as follows:

The variance was granted because increasing the density of the land use, from a duplex to a triplex, would make the remodeling economically feasible. However, the same could be said of any investment in rental property. When the density of land use is increased, the potential income flow also increases. An otherwise unprofitable investment, such as remodeling, may become feasible. This correlation between density of land use and the scope of feasible investments is not “peculiar” to the property at issue in this case. It could apply to rental properties anywhere.<sup>54</sup>

Simply stated, if the Project cannot be built within the height limits adopted by the City and set forth in the R-OD zone, the Project is not suitable for the R-OD zone. A claim for “economic feasibility” will not cure this problem.

During the March 5<sup>th</sup> hearing, Applicant’s representatives listed items that it believes are unique to its property and demonstrate a hardship, including: the zoning ordinance required setbacks,

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<sup>51</sup> Boise City Code § 11-01-03.01 (emphasis added).

<sup>52</sup> Boise City Code § 11-01-03.01.

<sup>53</sup> Mathew Bartner, architect on the project for the applicant, testified at the Commission hearing on February 13, 2012 that the fill brought on the site to account for the location within the floodplain could possibly add “four feet in the overall height of the buildings, but on the north side, the Greenbelt side, grade comes up basically to the floor level so that four feet is mitigated on that side.” *Boise City Planning & Zoning Commission Minutes for February 13, 2012* (the “February 13<sup>th</sup> Minutes”) p. 2. Mr. Bartner’s statement ignores the fact that not all of the four feet is attributable to the floodplain. Nevertheless, even under the most generous interpretation proposed by Mr. Bartner of grade and building height under the Boise City Code, the floodplain location would only add four feet to the building height, far below the nearly 30 feet extra requested by the Applicant.

<sup>54</sup> *City of Burley v. McCaslin Lumber Co.*, 107 Idaho 906, 693 P.2d 1108 (1984).

“special requirements as to the treatment on Royal,” an ACHD storm drain located on the property, small lot size, the desire for higher density housing near Boise State, and the inclusion of podium parking in the Project design.<sup>55</sup> These items are either not unique to this property or are self-imposed by the Applicant; the existing standards of the R-OD zone do not “mandate” that the Project be designed as it has in order to make the Project economically feasible.<sup>56</sup> The Applicant did not provide, and the Commission did not find or describe, any connection between those items to justify a variance to exceed the R-OD height limit by nearly double.<sup>57</sup> Height, setback, parking, and other bulk standards within the R-OD zone are legally required to apply uniformly for all parcels within the R-OD zone. If the City determines it would like higher density student housing projects than what is allowed under the current bulk standards of the R-OD zone—which the City may very well want to consider—the proper course of action is to amend the zoning ordinance. To do otherwise, would violate Idaho Code Section 67-6511 that requires “[a]ll standards shall be uniform for each class or kind of buildings throughout each district.”<sup>58</sup>

## **2. The Variance Would Constitute a Special Privilege.**

All other property within the R-OD zone must comply with the height, setback, and other bulk standards applicable in the R-OD zone. A variance for the proposed Project would constitute a special privilege that other properties within the R-OD zone do not enjoy. If the City determines it would like higher density student housing projects in the R-OD zone, the proper course of action is to amend the zoning ordinance so the changes apply across the board and fairly to all similarly situated property owners.<sup>59</sup>

## **3. The Variance Would Constitute a Zoning Change.**

The maximum building height in the R-OD zone is 35 feet.<sup>60</sup> If the Council allows the Commission’s decision to stand and the proposed Project is built, it would effectively allow spot zoning within this portion of the R-OD zone. Staff argued that the R-OD zone height limit of 35

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<sup>55</sup> This list appears to be a duplicate of a list included in the *Second Applicant Letter* p. 4:

- The 3.21-acre lot size.
- The parking requirements.
- Eight-foot wide detached sidewalk and eight-foot wide landscape along Royal Boulevard.
- 70-foot setback from the Boise River 6,500 C.F.S. watermark.
- An existing ACHD 15-inch drainage pipe along the property’s west boundary.

<sup>56</sup> The list includes the items listed in footnote 56 above. *See Second Applicant Letter* p. 4.

<sup>57</sup> *See Decision Letter.*

<sup>58</sup> Idaho Code § 67-6511.

<sup>59</sup> This would also help assure compliance with Idaho Code Section 67-6511.

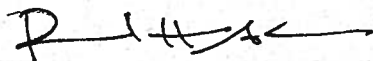
<sup>60</sup> Boise City Code § 11-04-05.05.

feet and the "desire of this zone . . . for multi-story high density residential projects" "presents an unusual circumstance."<sup>61</sup> The unusual circumstance appears to be manufactured for this particular Project. A variance for one property is not the solution for a zone wide problem. If 35 feet is insufficient for high density apartment buildings within the zone and the City desires to have higher density projects within the zone, the appropriate method of changing the bulk standards would be to amend the zoning classification ordinance.

### CONCLUSION

Keynetics understands the desire of the City in promoting economic development. As a business that located to Boise from out of state, and as a local employer, Keynetics has a long-term investment in the City of Boise and the quality of life of its employees that live and work here. Keynetics is not opposed to a student housing project per se; in fact, it invites redevelopment of this underutilized property. However, redevelopment should not only comply with the City's ordinances and the Idaho Code, and it should not injure its neighbors. The present design meets none of these criteria. The Applicant appears to have the resources available to design the building suitable for City of Boise and the neighborhood surrounding the property. Keynetics respectfully requests that the Council take the actions suggested above and deny the approval.

Very truly yours,



Richard A. Andrus

RHA:g

c: Eileen Barber (*via e-mail*)  
Brad Wiskirchen (*via e-mail*)  
JoAnn C. Butler (*via e-mail*)

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<sup>61</sup> Planning Division Staff Report prepared for Commission Hearing on March 5, 2012 p. 2.