

Development Agreements – Use? Overuse?

Todd Godfrey

Wilf Sommerkorn

John Janson

Francis Lilly

Session Goals

- Pros and Cons of use - JJ
- Overview of relevant State Law and Case Law – Todd Godfrey
- When do they make the most sense? Wilf Sommerkorn
- A possible template – JJ
- An example – Francis Lilly



Pros and Cons – are we just worried about density and height (again)?

Pros

- Discretionary tool – best used during Legislative process – zoning/rezoning. We don't have the discretion we used too!
- Communities with less detailed ordinances
- Complicated projects
- Often accomplishes obtaining better community assets

Community Concerns

- Concern about rezoning and getting something you don't want
- Concern about rezoning and getting a lower quality project (zoning issue!)

Utah Code Ann. § 10-9a-532

Development agreements.

(1) Subject to Subsection (2), a municipality may enter into a development agreement containing any term that the municipality considers necessary or appropriate to accomplish the purposes of this chapter.

(2)(a) A development agreement may not:

(i) limit a municipality's authority in the future to:

(A) enact a land use regulation; or

(B) take any action allowed under Section 10-8-84;

(ii) require a municipality to change the zoning designation of an area of land within the municipality in the future; or

(iii) contain a term that conflicts with, or is different from, a standard set forth in an existing land use regulation that governs the area subject to the development agreement, unless the legislative body approves the development agreement in accordance with the same procedures for enacting a land use regulation under Section 10-9a-502, including a review and recommendation from the planning commission and a public hearing.

- (b) A development agreement that requires the implementation of an existing land use regulation as an administrative act does not require a legislative body's approval under Section 10-9a-502.**
- (c) A municipality may not require a development agreement as the only option for developing land within the municipality.**
- (d) To the extent that a development agreement does not specifically address a matter or concern related to land use or development, the matter or concern is governed by:**
- (i) this chapter; and**
 - (ii) any applicable land use regulations.**



Wallingford v. Moab City, 459 P.3d 1039 (2020)

“The Lionsback Project”

¶22 The practice of contracting around municipal zoning requirements is known as “contract zoning.”

¶23 Courts generally offer two related reasons why contract zoning is unlawful. First, because a municipality’s adoption of land use rules and restrictions is an exercise of its police power, it must exercise that police power for the general welfare of all its citizens and not by contract with any particular landowner.

¶24 Second, and relatedly, “the legislative power to enact and amend zoning regulations requires due process, notice, and hearings,” and “by binding itself to enact the requested ordinance ... the municipality bypasses the hearing phase of the legislative process.”

¶25 We find the reasoning of these cases persuasive, and conclude that the City, by adopting the ZSA without a public hearing, committed an unlawful act of contract zoning.

Using DAs: Things to Keep in Mind

- Discretionary Tool – gives flexibility
- Can add details beyond the ordinance
 - BUT, if always adding the same details, put it in your Code!
- Stay within the limits of your existing zone
 - Otherwise, becomes a legislative process, like a rezone! (creating new law!)
- Negotiating every development lessens predictability
 - Plus, overuse may cause retribution by the Legislature



Use in modifying standards? Use in TDR?

Other potential Standards that could be modified via a DA

- Parking - many communities have an “out” already in their ordinances to allow reduced parking, thru a bonified study
- Landscaping – maybe needs some flexibility
- Parks/open space – do you have codified standards?
- Building design/materials (FBC?)
- Affordable housing?
- Others

TDR

- Should not have to do a DA, if your receiving area zone is in good shape
- Receiving zone needs good standards (that is still an issue in most communities!)
- TDR Ordinance and associated deed restrictions and recordings, should be enough
- TDR already difficult enough without putting a developer thru a DA too.

Outline of a typical DA (Don't forget – I'm NOT a lawyer)

- Used in a few communities
- Legal agreement between city/county/town and a land owner/developer
- Runs with the land (recorded!)
- Some communities like the developer to provide the DA and simply review their work – might be easier if you have your own – fill in the blanks
- Whereas's
- Affected property – legal description
- Vested Rights
- Compliance with zoning and other codes
- **Design conditions** – usually appendices
- Agreement runs with the land
- Assignment – other partners or sale of land still requires the DA rules
- Entire Agreement - this covers everything - mention any additional processes
- How enforced, how challenged, court costs
- Severability

Design conditions list (starter list)

- A **written description** of how the subject property and the rezone application meet the intent of this zone, including the design theme proposed, as well as the means in which it furthers the City's goals. Include information about the intended market and, if applicable the mix of unit types and their interior amenities.
- A **conceptual development site plan**. This plan must be drawn to scale and show property boundaries, proposed uses, proposed buildings footprints, etc.
- **Conceptual building elevations**, materials, and commitments to architectural features.
- **Proposed typical street cross sections**, public and private, if applicable, addressing the width of street pavement, park strips and sidewalks, type of curb and gutter, park strip landscaping, street lighting, and street furniture.
- A written description of the **recreational amenities**.
- A **detailed description of any flexibility** being requested over traditional development standards in the current zone (*fine line here – new law or not?*).
- A **conceptual improvement plan** for all amenities and public improvements such as storm drainage.

DAs to get more of what a community seeks

Francis

- Unique areas like the Millcreek Common
- Standard open space requirement needs modification to acknowledge City investment in a community park
- Shared Parking

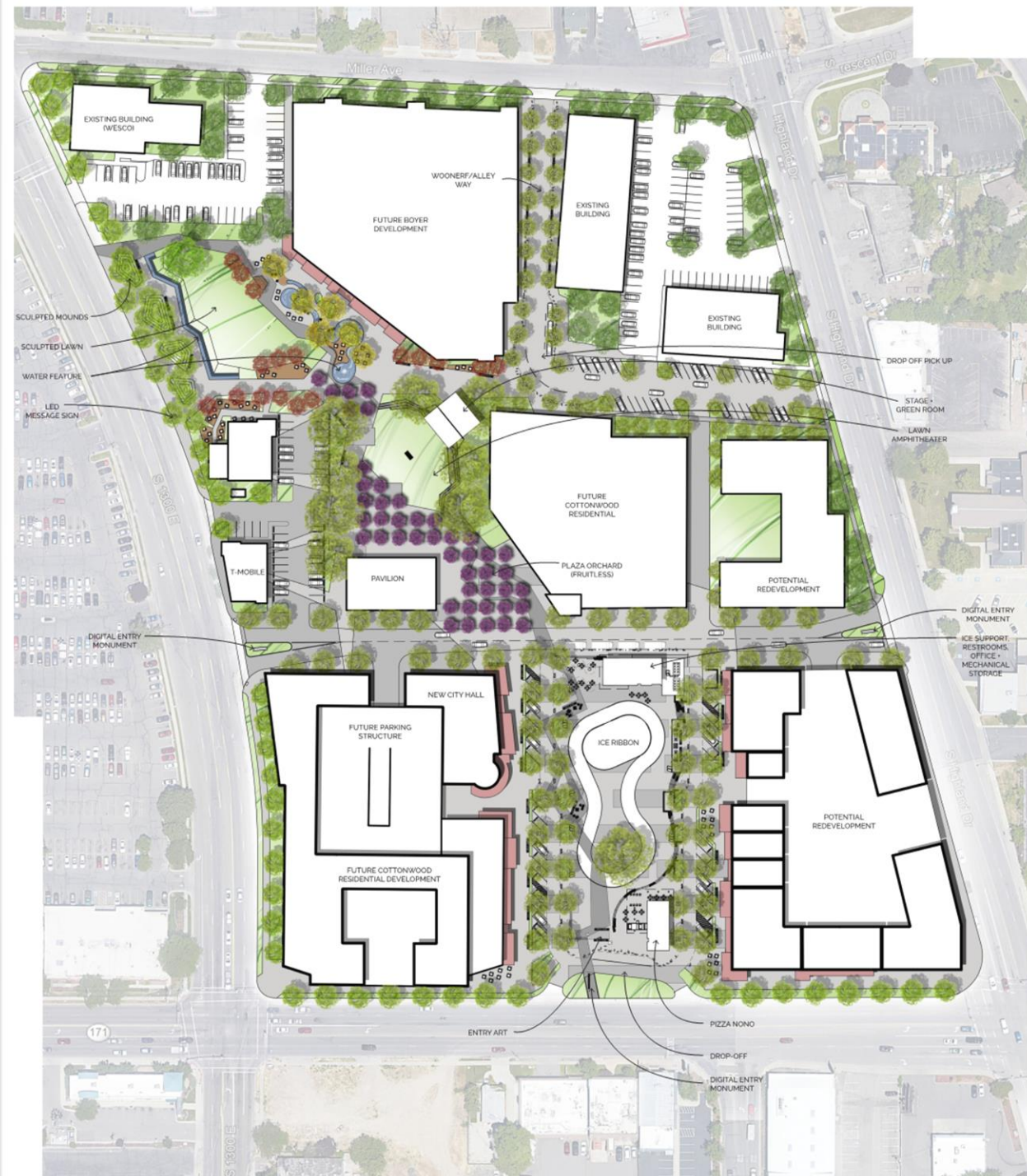
Need for DA

- Could modify ordinance but the development is here now
- DA can speed up a process in a unique area
- What if City is building a public parking lot that many businesses can take advantage of?

Development Agreements Can Implement Master Plans

Good for Catalytic Projects...
And Win-Win situations.

Millcreek City Center and Millcreek Common

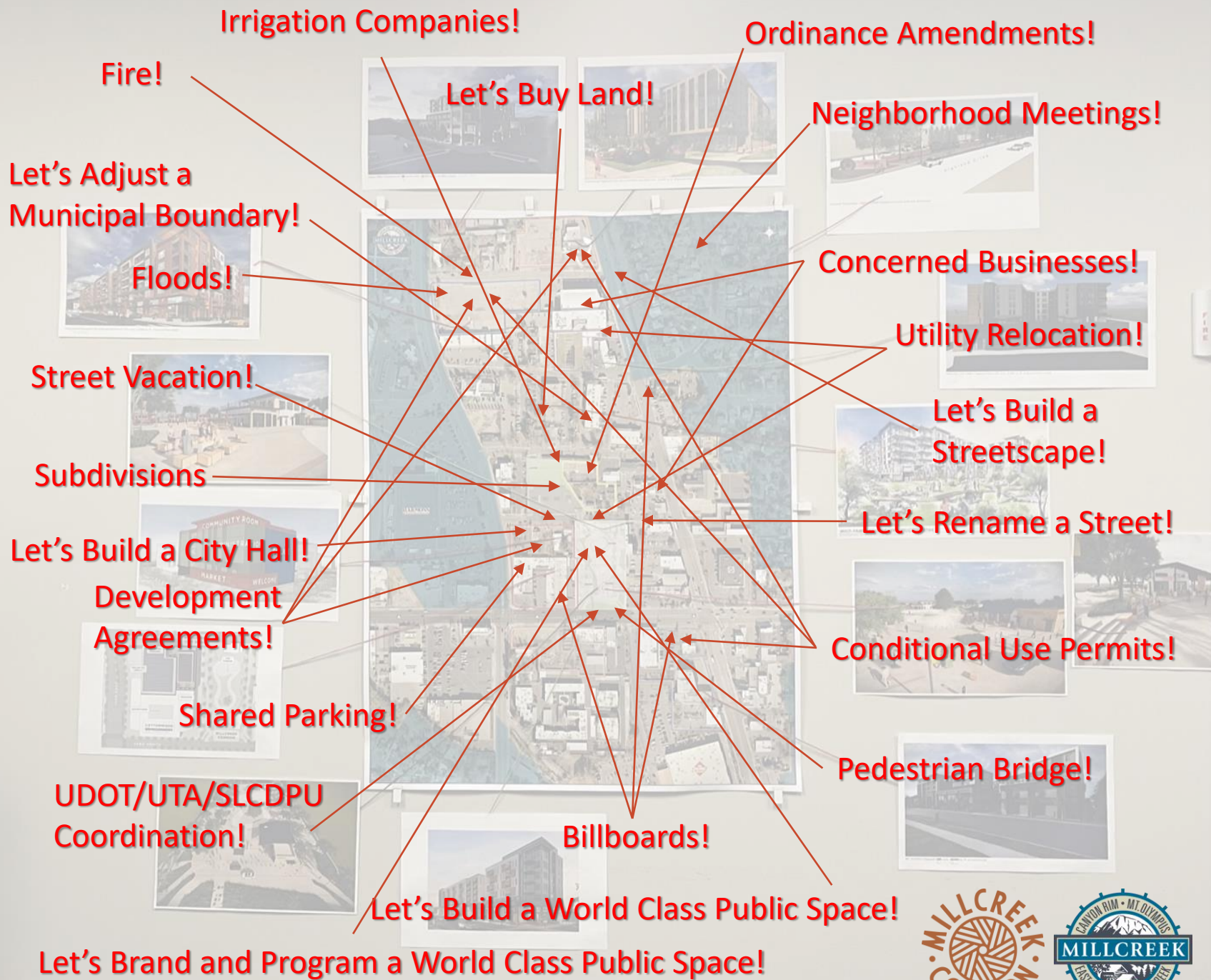


What the world sees



City Center Implementation

What the planners see



Catalytic Project: Richmond



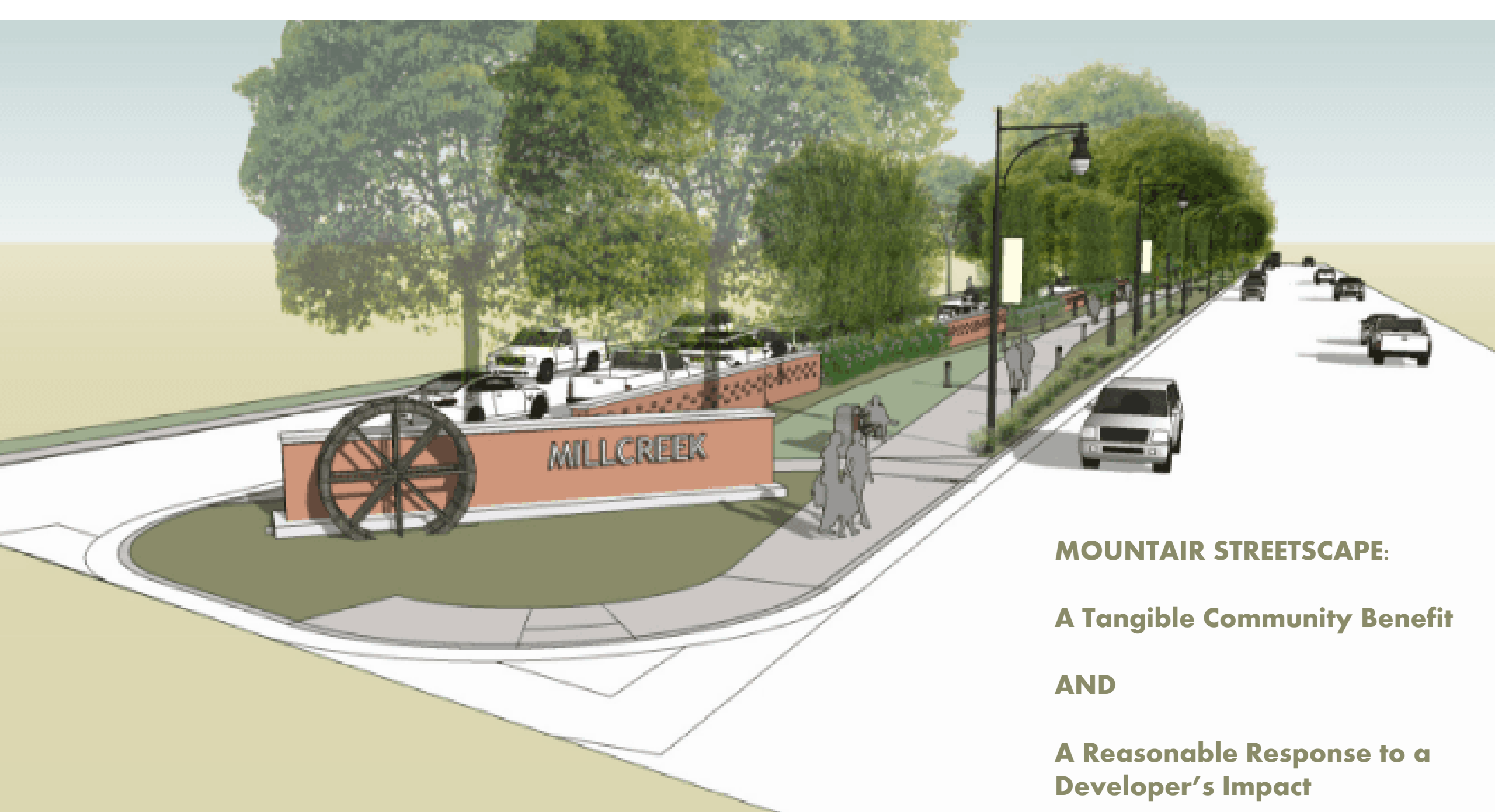
- Cottonwood Residential / Atlas Ventures
- 330 dwellings
- 22,000 square feet of retail and restaurant space.
- Incorporates a plaza and potential trail connection on the east side of the project.
- Under Construction. Completion: 2022



Catalytic Project: Cottonwood Highland

- Cottonwood Residential / Solstice
- 250 dwellings
- 18,000 square feet of retail and restaurant space.
- Under Construction. Completion: 2022





MOUNTAIN STREETScape:

A Tangible Community Benefit

AND

**A Reasonable Response to a
Developer's Impact**



IMPLEMENT YOUR VALUES

- **Millcreek did not want another outdoor shopping mall, or a reliance on national tenants.**
- **Millcreek is using the Common and the Ground floor of City Hall to incubate local business.**
- **This requires the city to be nimble and creative.**



BE WILLING TO TAKE A RISK

Millcreek City Hall blends public and private uses. It will anchor Millcreek Common. It's also expensive.



Building Materials

Brick
Concrete
Glass
Steel



Building Materials

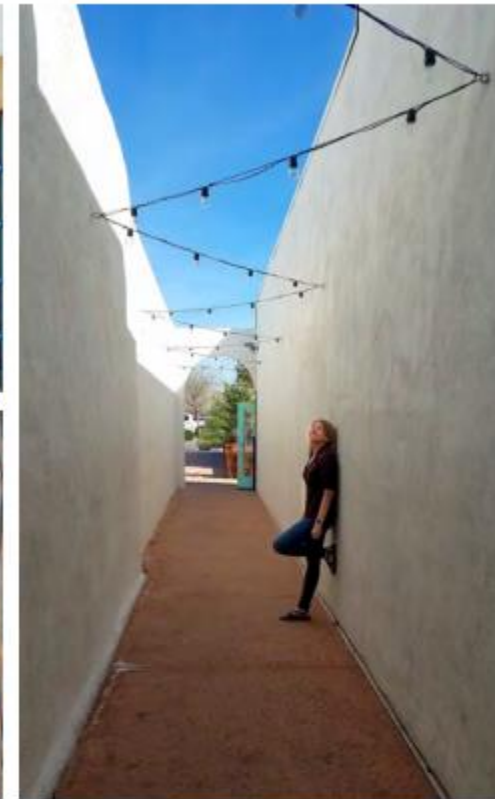
Steel
Concrete
Millcreek Stone



Building Materials

Stucco
Carbonized Wood

06/22/2020



Millcreek Common



CITY CENTER OVERLAY ZONE – DEVELOPMENT AGREEMENT APPLICATION PROCESS



A GOOD DA SHOULD:

- **Have an explicit basis in code.**
- **Advance an adopted master plan.**
- **Address improvements that are proportionate to impacts.**
- **Be Voluntary.**
- **Be Specific.**
- **Be Consistent.**
- **Be Transparent.**



Questions?

