THE WORTHY LAW GROUP, PLLC

February 2, 2023

Fionnuala B. Kofoed
Administrative Services Director/City Recorder
City of Eagle Mountain
1650 E Stagecoach Run
Eagle Mountain, UT 84043

VIA EMAIL ONLY (fkofoed@emcity.org)

Re: Notice of Claims relating to Residence at 3505 E. Bay Court, Eagle Mountain, UT 84005

Dear Ms. Kofoed:

I have been engaged by Thomas and Blasa Fox (collectively, the "Foxes") to represent them in a conflict with the City of Eagle Mountain ("Eagle Mountain" or the "City") which involves the lateral sewer line that services their residence at 3505 E. Bay Court, Eagle Mountain, UT 84005 (the "Residence").

As you may know, on or about November 15, 2022, the Residence suffered significant damage because of a sewer backup. This backup caused the Residence in its entirety to be completely uninhabitable for two days, during which time the Foxes stayed at a nearby hotel. The backup also ruined the Foxes' basement apartment and, rendering it uninhabitable, forced the renters that were in the apartment to move out permanently. A ServiceMaster crew was able to clean out and sanitize the basement apartment between November 15 and 28, but to date the apartment cannot be rented because there is a substantial amount of restoration work that has yet to be completed.

In attempting to assess the cause of the backup, the Foxes have engaged a number of plumbing and other experts, and two companies, Beehive Plumbing and Rocket Rooter, using video camera probes have identified the source of the backup as a problem with a vertical cleanout that connects to the lateral sewer service line running from a nearby city sewer main line to the Residence (the "Fox Lateral"). This cleanout (the "Cleanout" or the "City Property Cleanout") is located on Eagle Mountain city property directly across the street from the Residence and is composed of T-joint which sits between two sections of the Fox Lateral and a vertical pipe which runs from the T-joint to near the surface of the Eagle Mountain city park above.

According to these experts, the specific problem with the Cleanout is that the T-joint has been broken because the vertical pipe has been improperly forced downward from its original, correct location, and the Fox Lateral has therefore been reduced to about half of its normal capacity at

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the Cleanout and is thus no longer capable of properly conveying waste water away from the Residence. From available evidence, it appears that this has occurred (1) because of settling in the ground nearby and (2) because the top of the vertical pipe has been physically run over any number of times by Eagle Mountain landscape maintenance crews and/or private vehicles that have driven up over the curb which is just a few inches from the top of the Cleanout.

With respect to the settling specifically, one significant contributing factor is that the ground around the Cleanout slopes towards the Cleanout and causes water runoff to build up around it. In addition, at this time the curb, gutter and road areas around the Cleanout are visibly broken or cracked and water often accumulates near the Cleanout as a result of rain or snow or the running of City water sprinklers.

As to damage from being run over, prior to the Foxes' sewer backup the City Property Cleanout had been improperly buried and covered by several inches of dirt.[1] As a result, it was impossible for the City's landscape maintenance crews to see the top of the cleanout and recognize that they should drive lawnmower tractors or other motorized vehicles around it. In addition, the bus stop which the City has put on Ranches Parkway Blvd. has significantly increased the traffic on Bay Court, yet the City has removed the one-way signs that formerly designated Bay Court as a one-way street. This is significant because tire marks on the nearby curb and other available evidence suggests that any number of vehicles traveling on Bay Court have driven up over the curb and over the City Property Cleanout which, as explained above, had been improperly buried by the City and covered by several inches of dirt such that these vehicles would not even know that there was a cleanout in that area that they should be careful to avoid. But regardless of whether it was from the City's landscape maintenance or from private traffic, it appears very likely from the Foxes' investigation that the top of the vertical pipe has recently been broken by a motorized vehicle.

Turning to the legal questions raised by these facts, perhaps foremost is the general issue of who is responsible for the proper maintenance of the Eagle Mountain City sewer system,[2] and the City Code addresses this issue expressly in various places. For instance, the City Code states that the "director of the water and wastewater division shall be responsible for the proper care and efficient operation of the … wastewater (sewer) system." *Id.*, § 13.20.020 (Duties of Director). To this end, the director has charge of the "water mains … and all equipment and appurtenances of the water system." *Id*. The director is also responsible for "the laying of water

[1] Relevant International Plumbing Code provisions explain that cleanouts of this nature should always be accessible and not buried or otherwise covered over in any way. *E.g.*, International Plumbing Code § 708.1.10 ("Required cleanouts shall not be installed in concealed locations.… Cleanouts located below grade shall be extended to grade level so that the top of the cleanout plug is at or above grade.").

[2] This is not only because the Residence is connected to the City sewer but also because the Eagle Mountain City Code (the "City Code") mandates such a connection. City Code, § 13.35.030.

mains, the installation of all services lines, and the regulation of the supply of water." *Id*. In addition, the director is required to "inspect all plumbing installations, or provide for such inspection by other city personnel under the Utah Plumbing Code." *Id*. The director also has the authority to "condemn and order removed any plumbing installation or fixture which violates any provision of state law or city ordinance." *Id*. In other words, the person generally responsible for maintaining the City sewer system is the director of the wastewater system, not the individual homeowners that the system serves.

The City Code also provides, however, for an exception to the director's general responsibility in that residents are required to maintain their own lateral sewer service lines "from building to the right-of-way." City Code, § 13.20.620. And the City Code defines a right-of-way as "the surface of and the space above and below any public street, sidewalk, alley, or other public way of any type whatsoever, now or hereafter existing as such within the city." *Id*., § 13.10.20.

In short, the City Code as it was originally promulgated and as it is currently published in various places (including the city's own public utilities webpage https://eaglemountaincity.com/public-utilities/#:~:text=The%20city%20shall%20maintain%20and,the%20right%2Dof%2Dway) puts the responsibility for maintenance of the City's sewer system where it should be (with the City itself) but also states that responsibility for later sewer service lines belongs to individual residents insofar as those lateral lines are actually situated within the bounds of the residents' own private property.

That said, some years after the first publication of the City Code, the City Council adopted a resolution which stated that the "City is responsible for sewer collection mains, but not for individual service lines connected to collection mains and extending from collection mains to individual building points of service." City Resolution R-06-2007. In addition, despite what is posted on the City's public utilities webpage, the City has also recently published a notice at https://sway.office.com/CtcGCt37iJKunwXO?ref=Link which implies that it does not consider §13.20.620 of the City Code to be valid insofar as it obligates the City to maintain a resident's lateral sewer line from the point where it leaves the resident's property and enters the public right-of-way (whether that be a public street, sidewalk, alley, or other public way). This online notice stated specifically as follows:

> While the main sewer line is publicly owned and operated, the sewer lateral that connects a home to the main sewer line is owned by the homeowner. This means that sewer lateral maintenance and repair fall under the property owner's responsibility – even if that section may run under public right of way, such as asphalt and street landscaping.

In other words, by resolution of the City Council in 2007 and by its recent notice published online, the City looks like it is trying to transfer all ownership of and responsibility for maintaining lateral sewer service lines to individual homeowners, even in cases where, as here, the lateral runs exclusively underneath City property for nearly 150 feet from the point where it meets the main City sewer line to where it hits the homeowner's land and, during that stretch,

travels under multiple city streets and attaches to a vertical cleanout that comes up inside a public city park.

Moreover, in this case not only is the City attempting to force the homeowner to pay for repairs to a section of the lateral service line which sits squarely on City property and has lately been damaged and malfunctioned through no fault of the homeowner, but the City also claims that, despite being responsible for the cost and burden of repairing the lateral service line as needed, the homeowner has no right to take measures to protect this the line against future vehicular or other similar damage.

In addition to being grossly unreasonable, the City's declarations appear to constitute a violation of, among other things, the Utah State Constitution, which provides expressly that all persons in Utah "have the inherent and inalienable right … to acquire, possess and protect property." Utah Const., Art. 1, Sec. 1. In other words, even if it were legal for the City to force the Foxes to maintain and repair the lateral sewer line (and, as explained in detail below, it is not), it would be grossly improper for the City to simultaneously impose the burden of doing so while at the same time prohibiting the Foxes from taking measures to protect the line from damage in the future.

More generally, the City's conduct in this case may also constitute violations of the due process clauses of the Utah State and United States Constitutions, both of which provide that no person in Utah shall be deprived of property without due process of law. Utah Constitution, Art. I., § 7; United States Constitution, Amend. 14. And the City's conduct may amount to an unconstitutional taking of the Foxes' property in violation of Article I, § 22 of the Utah Constitution and/or the Fifth Amendment of the United States Constitution.

In this context, I also note that the City has elected (for reasons that are not clear) to treat lateral sewer lines in a way that is unique among its utility systems. That is, with the other utilities system that the City maintains, the City expressly acknowledges its responsibility to maintain every aspect of the system until it meets a physical junction point that connects it to a particular residence. For instance, as to culinary water the City has expressly affirmed its "ownership and responsibility" for "water service lines up to the water meter" and has explained that the water meter is the point where the City's responsibility for water facilities ends and the homeowner's responsibility begins. City Resolution R-06-2007, at 1. Likewise, as to electricity the City has expressly affirmed its responsibility for "all power distribution devices and cable to the power meter installed at the place of use" and has explained that responsibility for power distribution and cabling shifts to the homeowner at the power meter. *Id*. And again, as to natural gas the City has expressly affirmed its responsibility for the gas meter and the lines leading up to it and has explained that all lines and appliances on the other side of the gas meter are the homeowner's responsibility. *Id*., at 1-2. Only wastewater is treated differently. Yet, there is no apparent reason for this different treatment because wastewater also has a physical junction point that connects the larger wastewater system to a particular residence: the cleanout where the residential building drain meets the residential building sewer.

Perhaps more to the point, the City's unique approach towards the maintenance of its wastewater system also looks like ultra vires rulemaking (or, in other words, an invalid exercise of the City's delegated powers). This is because in Utah "cities are creatures of statute and limited in powers to those delegated by the legislature." *Ritholz v. City of Salt Lake*, 284 P.2d 702, 703 (Utah 1955). In other words, cities in Utah are not permitted to make whatever rules or ordinances might happen to be considered or discussed by the city council or other city employees. Rather, city ordinances in Utah must be traceable to a specific grant of power by the Utah state legislature. In addition, Utah courts have characterized the limited powers of cities in Utah as "first, those granted [by the legislature] in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted [by the legislature]; [and] third, those essential to the accomplishment of the declared objects and purposes of the [city]." *Id.*, at 704. Utah courts have also consistently held that "any fair, reasonable, substantial doubt concerning the existence of [a power claimed by a city] is resolved by the courts against the [city], and the power denied." *Salt Lake City v. Revene*, 124 P.2d 537, 540 (Utah 1942).

As to wastewater maintenance in particular, the Utah legislature has granted municipalities in Utah the authority to "construct, reconstruct, maintain, and operate, sewer systems, sewage treatment plants, … sewers, … and all systems, equipment, and facilities necessary to the proper … sanitary sewage disposal requirements of the city." Utah Code § 10-8-38(1)(a). The legislature has further provided that municipalities may "defray the cost of constructing, reconstructing, maintaining, or operating a sewer system" by requiring city residents to connect to the system "if the sewer is available and within 300 feet of [their] property line." Utah Code § 10-8-38(2)(a). Municipalities may also require residents to pay "a reasonable charge for the use of the sewer system." *Id*. As interpreted by the Utah courts, however, the "scope of power granted by the Legislature under this statute is clear. **Municipalities may make a reasonable charge for the use of a sewer system in order that it be self-sustaining. No greater charge is authorized**." *Patterson v. Alpine City*, 663 P.2d 95 (Utah 1983) (emphasis added and citations omitted). **In addition**, Utah courts have expressly declared that **a connection of fee of $1,500 is not reasonable**. *Harding v. Alpine City*, 656 P.2d 985 (Utah 1982). And nowhere have the courts implied that the Utah Code either expressly or implicitly authorizes municipalities to delegate their responsibility for maintenance and repair of their sewer systems (and all associated costs thereof) to city residents.

Turning to this case in particular, the City of Eagle Mountain has availed itself both of its authority to construct a municipal sewer system and of its authority to require that City residents connect to that system if their properties are within 300 feet of it. Thus, the Foxes are required by city ordinance to be connected to the City sewer. Were that the only requirement, the Foxes would not take issue. However, in addition to requiring the Foxes to connect to the City sewer, Eagle Mountain has also improperly attempted to delegate its responsibility to maintain and repair the sewer system to the Foxes insofar as the Fox Lateral is concerned. By so doing, the City is shirking a number of its responsibilities to the Foxes, including at least: (1) the responsibility to protect the Fox Residence from damage that could result from a poorly constructed or poorly maintained sewer system, (2) the responsibility to maintain and, as needed,

repair the Fox Lateral, and (3) the responsibility to pay for damages to the Fox Residence that will or have already resulted from the improper functioning of the Fox Lateral.

In addition, it is precisely because the City has neglected its responsibilities as to protecting the Fox Residence and properly maintaining the Fox Lateral that the Residence has recently been damaged by the above-described sewer backup. Alternatively, the City may be liable for the damage caused by the sewer backup under theories of trespass or nuisance. *Purkey v. Roberts*, 2012 UT App 241, ¶ 18, 285 P.3d 1242 ("[E]ntry upon the soil of another, in the absence of lawful authority, without the owner's license, is a trespass."); Utah Code § 76-10-801 (defining nuisance); *Whaley v. Park City Mun. Corp*., 190 P.3d 1, 2008 UT App 234 (Utah App. 2008) ("Because unlawful conduct is not an element of a private nuisance claim, specific authorization from a municipality does not defeat such a claim.")

At all events, at present the Foxes estimate the total damage that they have suffered to date to be no less than $62,875, calculated (using approximate figures) as follows:

- $6,000 for the initial cleanup of the Residence by ServiceMaster
- $300 for a hotel room for the Foxes during the period when the entire Residence was uninhabitable immediately after the sewer backup
- $35,000 to restore the basement of the Residence to its condition prior to the backup
- $6,075 in lost rent from the middle of November 2022 through the end of March 2023 because the basement has been and remains unrentable as a result of the sewer backup
- $500 paid to plumbing companies to investigate the cause of the sewer backup
- $15,000 to repair the City Property Cleanout in order to mitigate the risk of another sewer backup in the near term

As a result, the Foxes are now requesting that the City take the following measures:

(1) Acknowledge expressly in writing that that City is now and shall at all future times be wholly responsible for maintenance of the entire Fox Lateral until it meets the cleanout which is at the junction of the building drain and the building sewer of the Fox Residence;

(2) Pay the entire estimated damages to the Fox Residence as set forth above ($62,875); and

(3) Pay all attorney fees incurred by the Foxes in connection with this matter.

If within sixty (60) days of the date of this letter, the City has not taken these measures, the Foxes may, without further notice, commence legal action. Should the Foxes be required to do so, they anticipate naming not only the City itself as a defendant, but also any number of City employees, including the current managers of the City's wastewater system (whom they understand to be Mack Straw, Matt Mortensen and Brody Kinder) and possibly the city engineer (Chris Trusty) and/or any number of other city employees whose identities have not yet been

ascertained but who may nevertheless have been involved in one way or another in the incidents which have resulted in the above-described damages.

Sincerely,

Kevin R. Worthy
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cc:

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