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M E M O R A N D U M

To: Members of the Park City Planning Commission

From: Jody K Burnett 

Date: April 22, 2009

Re: Advisory Opinion regarding vested rights with respect to Sweeney Master Plan Development

Pursuant to your request, I have been asked to render an independent public advisory opinion to you regarding whether, and to what extent, the Sweeney Master Plan Development ("Sweeney MPD") has vested rights with continuing validity for the purpose of assisting you in your review of the pending application for the final phase of development of the Treasure Hill Conditional Use Permit under the Sweeney MPD.

In the process of preparing this opinion, I have reviewed the extensive City files regarding both the original approval of the Sweeney MPD as well as the more recent events focusing on the application for approval of the final phases consisting of the Creole Gulch and Mid-Station components of the Project, for which I understand an application for a conditional use permit has been pending and in various stages of review and discussion since January 13, 2004.

Based on my independent review of the City's records and relevant legal authorities, for the reasons more fully set forth below, I conclude that the Sweeney MPD has continuing vested rights which are valid and therefore advise you to continue processing the pending application for a conditional use permit under the development parameters and conditions established as part of the original Sweeney MPD approval and the conditional use permit review criteria set forth in the Park City Municipal Code.

While I understand and appreciate the community concerns that naturally arise in the context of a historical master plan approval such as the one presented here, it is important to recognize and understand that Utah law establishes earlier and more favorable vesting conditions for applicants and property owners than may be true in a number of other jurisdictions. See generally Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980). In addition, while those principles were originally established as a matter of common law by the Utah courts, they have since been codified as part of the Land Use Development and Management Act, Utah Code Ann. § 10-9a-509.

In this specific instance, the Sweeney MPD was granted historical vested rights as part of the original approval effective as of the date of final City Council action on October 16, 1986. As a result, the question presented here is whether the applicant has proceeded with reasonable diligence. In light of the extensive materials that have been submitted in support of the application for this final phase of the Project, together with the numerous meetings with the Planning Commission and continuing dialog with staff by the applicant since that time, one would be hard pressed to argue that they have not proceeded with reasonable diligence under these particular facts and circumstances. That same analysis also applies to the concerns that have been raised as to whether those historical vested rights the Project possessed by virtue of the original MPD approval have expired or lapsed through inaction on the part of the owner/developer.

In articulating the vested rights rule in Utah, our Supreme Court specifically recognized the challenge presented by large, long term multi-phase projects, but specifically observed that, "...the tests employed by most other jurisdictions tend to subject landowners to undue and even calamitous expense because of changing city councils or zoning boards... Tests currently followed by the majority of states are particularly unsatisfactory in dealing with the large multistage projects. The threat of denial of a permit at a late stage of development makes a developer vulnerable to shifting governmental policies..." Western Land Equities, 617 P.2d at 395.

Although I view this as primarily a vested rights issue, my conclusion is further supported by the partial performance on the part of the Sweeneys of what might be characterized as the quasi-contractual elements of the original MPD approval in the form of the rezoning of a substantial portion of the hillside area to recreation open space, the imposition of deed restrictions for the purpose of the long term preservation of open space, the granting of easements, dedication and construction of trails, etc. Such activities might be also be characterized as establishing the elements of an equitable estoppel theory based

on the notion that the applicant has substantially changed their position in good faith reliance on affirmative action by the City in the form of the original MPD approval.

I also note from my review of the extensive files and records in this matter a common misunderstanding about the nature and degree of discretion afforded to the City under the conditional use process which merits further discussion. The issue has been appropriately framed by City staff in advising you that under both state law and local ordinance, an application for a conditional use permit shall be approved if reasonable conditions are proposed or can be imposed to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards. See, Utah Code Ann. § 10-9a-507(2)(a). In this particular instance, while I recognize that the Planning Commission must make a finding that the pending application will be compatible with surrounding structures in use, scale, mass and circulation, that determination must be understood and approached in the context of the findings adopted as part of the original approval of the Sweeney MPD, with particular emphasis on items 1, 2 and 3, which specifically determined that the proposed cluster development concept and associated projects are consistent with the Park City Master Plan, the underlying zoning, is or will be compatible with the character development in the surrounding area, and that the preservation of open space and other site planning attributes resulting from the cluster approach to the development of this hillside area is sufficient justification for the height and other review criteria approved at that time.

Finally, I also want to address a question that has been raised as to what standard should apply, in the vesting context, to the calculation of the amount of any additional support commercial and/or meeting space for the Sweeney MPD. From my vantage point, the evaluation of historical vested rights has to be viewed in the context of the land use regulations which were in place at the time the vesting occurred as a result of the original MPD approval. In this case, that means the provisions of the Land Management Code in effect as of the date of that original approval in 1986 should also be applied to the calculation of any additional meeting space and support commercial areas without requiring the use of unit equivalents of density. As you move forward with the conditional use permit approval process, the provisions of Section 10.12 of the 1985 LMC should be used for that purpose, which I understand provide that up to five percent (5%) of the total floor area within a hotel may be dedicated to meeting rooms, and support commercial areas without requiring the use of a unit equivalent of commercial space.

In conclusion, the Sweeney MPD has vested rights of continuing validity in the Creole Gulch and Mid-Station components of the project at the maximum densities as calculated by staff subject to compliance with the development parameters and conditions adopted as part of the original MPD approval and the conditional use permit review criteria under the Park City Municipal Code.

I am and will continue to be available to answer any questions you may have in order to assist you in proceeding with the further review and processing of this pending application.

cc: Mayor Williams and Members of the City Council
Mark Harrington, City Attorney