PARK CITY PLANNING COMMISSION
WORK SESSION NOTES
August 24, 2011

PRESENT: Brooke Hontz, Julia Pettit, Mick Savage, Adam Strachan, Jack Thomas, Nann Worel, Thomas Eddington, Mark Harrington, Polly Samuels McLean

WORK SESSION ITEMS

Training with Utah League of Cities and Towns

City Attorney, Mark Harrington, reported that the Planning Commission would hear a two-hour training this evening from the League of Cities and Town. The Planning Commission was involved in the General Plan rewrite and potential Code legislation, and the training would be beneficial to those endeavors. Mr. Harrington felt it was important for the Planning Commission to hear the League and the Private Property Ombudsman's perspectives, since they are the ones on the front line who deal with the issues of the State Legislature and also have the opportunity to see what goes on in other jurisdictions. Mr. Harrington pointed out that the training this evening would come from a real world perspective and not just legal advice. He remarked that the best defense is a good offense. The more training that can be provided reduces the amount of time spent collectively defending the land use code and the inaccurate perceptions from the legislature that not everyone follows the same rules.

City Attorney Harrington referred to four main basic principles that should be followed for a fair and procedural due process in planning communities proactively. Mr. Harrington noted that the General Plan is incorporated as a mandatory element for conditional use permits and master planned developments. However, the language is guidance rather than mandatory. The Planning Commission has struggled with balancing the degree of clarity to use the General Plan as a defense to say no, versus an enabling guide to describe to people what they want for best planning practices. He believed that after hearing the presentation this evening, the importance of understanding that framework and balance would be important as they re-write the General Plan and its ramifications for implementing the LMC.

City Attorney Harrington commented on the perennial problem of compatibility. In a community that tries to do good proactive planning, yet relies on the definition of compatibility in an environment that is anything but uniform, they have struggled with compatibility. As they hear some of the requirements from the State to be objective and to have standards in advance, Mr. Harrington asked the Planning Commission to think about how they could better define compatibility as they move forward with the Code revisions. He thought that would remain the most difficult challenge in terms of balancing flexible design standards that do not result in cookie-cutter structures, and at the same time provide predictability to the applicant through the Code.

Brent Bateman, the State Private Property Rights Ombudsman, stated that his job is to help people understand property rights and act within the framework of the existing law to honor and respect property rights. He has been directed by the legislature to help citizens, cities and counties understand what the law is and to help guide them in following the law in ways that resolve disputes. Mr. Bateman stated that he does a lot of mediating in his office and he is the type of attorney who prevents lawsuits as opposed to causing them.

Mr. Batement stated that a large part of his job was to provide information and training. He believes it is difficult to follow the law and respect people's property rights without understanding what property rights are and the law itself. He remarked that the presentation given this evening was a shortened version of a longer presentation. It would be a big picture land use law presentation.

Mr. Bateman outlined the framework or big picture of land use law, which would help focus on the smaller details of the General Plan or revised ordinances. He noted that there is an inherent conflict in real estate law. On one hand are property rights. People have property and they want to do things with their property and put it to good use. However, on the other hand is the public good. No man is an island and no property sits by itself. Therefore, they need to work together as a community. Laws are created that restrict what can be done in the interest of the greater good, but that sometimes conflicts with what property owners wants to do with their property. Mr. Bateman stated that the property land use law in the State of Utah could be carefully crafted to create a balance. As a community, they can pretty much do whatever they want in terms of zoning, density, uses, etc., and the City can put restrictions on property. He remarked that if the community does not have specific and explicit laws, people have the right to do what they want with their property. Mr. Bateman stated that the Planning Commission has the responsibility to be carefully specific and explicit when they craft ordinances.

Jodi Hoffman stated that she chairs a 67 member task force for the League of Cities and Towns; 30 are from cities and towns, 20 consider themselves the Property Rights Coalition who represent large lot developers and utility companies. The remaining members are various stakeholders.

Ms. Hoffman stated that the task force started out by completely revising the Land Use Development Act in 2004 and 2005. In 2006 the legislature proposed a piece of legislature that would have eliminated land and zoning all together. It would have criminalized certain aspects of land use enforcement, and would have literally held Planners criminally liable if they did not do certain things. The League of Cities and Towns, as well as the Utah Association of Counties took action and the bill was defeated. Ms. Hoffman stated that the lesson learned was that land use work was ongoing and it would never be completed. Pressure builds up and there needs to be a mechanism to understand what is bothering the development community and the local communities and find ways to reach common ground. Ms. Hoffman stated that since the 2006 legislative session until now, the task force has been meeting every two weeks to discuss land use. As a result of those meetings, 25 bills were originated by the task force and all 25 were passed unanimously at the legislature. The bills that the task force opposed all failed with the exception of one.

Ms. Hoffman pointed out that the task force has been a successful group, and they are always changing land use laws. She noted that municipalities, planners, and planning commissions want to know why the laws are always changing and how they are supposed to keep up with it. The response from the developers has been that if they have to follow the rules and regulations, the cities and towns should also have to follow the law. Mr. Hoffman stated that the League of Cities and Towns is a group of people trying to do their job. They are not trying to wreak havoc or destroy people who own property. To address the problem, they decided to provide training to help people understand the intent.

Ms. Hoffman stated that the Planning Commission and the Staff are the guardians of private property rights in the community, both in adding value to the community and in insuring fairness for

the individual applicant. It is important that the developers, Staff, and the Planning Commission speak the same language, because often times the problems result from a lack of communication. Ms. Hoffman noted that the Staff and Planning Commission could acquire personal liability for failing to do their job correctly.

Ms. Hoffman stated that once you understand the big picture the little things make sense and fall into two or three categories. She presented photos of historic events in America to show that public interest originally began in Boston in 1773 with the resistance of taxation and regulation without representation. The idea was to protest against King George and the power of oppression over an individual that was supposed to be feared. In contrast was the revolution in France, where the fear was not concentration of power, but rather concentration of power in an uneducated, uninformed population. Ms. Hoffman pointed out that democracy was a huge experiment at that time. She quoted Madison, who tied property rights to freedom in 1792. Ms. Hoffman stated that all private property rights comes down to two clauses in the Constitution; the takings clause and the due process clause. She remarked that the founding fathers believed that separation of powers would protect the people from an omnipresent and all-powerful government. Ms. Hoffman stated that after the Civil War the power went to the States, which applies to the issues municipalities face today.

Ms. Hoffman remarked that in local government the legislative, executive and judicial powers are concentrated with the City Council. That concentration of power explains why the State Land Use law tries to pull those powers apart to protect individual rights.

Ms. Hoffman stated that in the legislative process public clamor is allowed and expected. The legislative process requires a land use authority, which is the Planning Commission, and an appeal authority that is separate and independent from the land use authority. Ms. Hoffman remarked that all land use authorities are administrative agents of local government. She noted that old vestiges of bad concepts die slowly in local government. Part of the Land Use Development and Management Visions in 2005 was about encouraging local governments to make salutatory changes in a process to get to a better outcome. Ms. Hoffman stated that subdivisions are administrative acts that belong with an administrative authority. When subdivisions are sent to the City Council for a decision, it sounds political and legislative. The City Council does not have the discretion to respond to an angry person in the audience; and therefore the system sets them up for verbal assault by the public, followed by public disappointment. Ms. Hoffman stated that she advises every city and county in the State to make sure that their law is clear enough to avoid any worry that a Staff person or the Planning Commission could be harmed.

Commissioner Thomas wanted to know who would correct that if it was evident in the current organization. Ms. Hoffman replied that the Planning Commission would recommend to the City Council that the Council excuse themselves from subdivisions.

Commissioner Strachan stated that if Ms. Hoffman advised making subdivision and conditional use permits administrative, how would anyone know if the Staff errs in favor of the applicant. Ms. Hoffman clarified that the Planning Commission could still be part of the subdivision and CUP approval process. She was only suggesting that the decision end with them and not move to the City Council.

Mr. Bateman stated that the City Council in their legislative function has control to make the law as

explicit as possible. Therefore, when it comes to the administrative body, the administrative body knows exactly what to do. They can take the law and apply it. He pointed out that the City Council is not giving up control, but they should not be doing administrative functions.

Commissioner Strachan wanted to know why the Staff would not make the decision if it was an administrative function. Ms. Hoffman stated that the question was how much they trust the Staff. Commissioner Strachan replied that he trusts the Staff, but they do make mistakes. Ms. Hoffman stated that she has lived in Park City for nearly 20 years and she understands the Park City culture. If the City Council has been the land use authority for specific things, they should make changes in small steps rather than a giant leap.

City Attorney Mark Harrington explained why the City Council elected to retain the final authority in the subdivision process. He noted that the subdivision process is intertwined with the master planned development process, which has some flexible performance zoning parameters, such as height exchanges, affordable housing, density bonuses, etc. The City Council felt they were appropriately the final say because those changes have a great impact on the community, and there were times when they disagreed with the Planning Commission. Mr. Harrington suggested that the current City Council may be more receptive to making changes, and it may be time to revisit the question.

Ms. Hoffman noted that prior to 2005, State law said that the Planning Commission could allow, deny, or allow with conditions, a conditional use. That gave everyone the impression that the Planning Commission could automatically say no. It became let's make a deal and the City bargained for community benefits. The Land Use Development and Management Act of 2005 made clear what common law had already made clear, that conditional uses were assumed allowed uses in the zone with mitigating conditions.

City Attorney Harrington pointed out that a unique situation that puts Park City at a disadvantage is that many of the older MPDs were written under the belief that the future conditional use permit gave the upper hand to the City and not the developer. The City always explains at the beginning of the process that the options in the CUP are different than what may have been originally envisioned when the format was established.

Ms. Hoffman pointed out that site plan, non-conforming uses, non-compliant structures, enforcement, sign code, subdivision improvements are all administrative decisions. There is no discretion, they either comply or not. She remarked that the question was whether the conditional use ordinances were strong enough with enough conditions and performance related criteria to be enforceable.

Commissioner Savage felt a significant part of the process to rewrite the General Plan in a way that it can meaningfully inform the LMC, has to do with trying to come up with a sense of the boundary conditions around the attributes associated with conditional use permits. When there are differences among the Planning Commission, it often comes from ambiguity. He believed the Planning Commission has an obligation related to modifying the General Plan and the subsequent Land Management Code changes to reflect what they want to do, and to do it in a rigorous fashion.

Ms. Hoffman stated that substance was the problem and no one was suggesting what zoning should

look like. Each community has the ability to decide how their own community should look.

Vice-Chair Pettit stated that if Park City has already identified things that cannot be done. Putting a checklist of conditional uses within a zone creates the opportunity for all of those uses to be implemented provided that the applicant can demonstrate that any impacts related to the uses can be mitigated. Mr. Hoffman clarified that they must be identified impacts in the Code. Vice-Chair Pettit stated that in terms of the LMC, and as they get into the neighborhood analysis and look at which uses they think are appropriate and which ones are not, they should think about being more restrictive if a use is not appropriate. Ms. Hoffman stated that if a use only works in one special case, it should be taken off the list of conditional uses in that zone. The Planning Commission has the discretion to remove the use and use a floating overlay zone to place it where it would be appropriate. She noted that the floating overlay zone is legislative rezone, and no one has the right to a floating overlay zone.

Commissioner Strachan asked if it was the State Code's view that every possible impact can be mitigated. Mr. Bateman replied that the Statute states that if it can be mitigated, there must be conditions to mitigate it. Commissioner Strachan believed the language presumes that some impacts cannot be mitigated. Ms. Hoffman pointed out that traffic is usually the unmitigated impact. There are mitigating solutions but they are too expensive.

Using traffic as an example, Assistant City Attorney McLean asked if Ms. Hoffman was suggesting that the use be approved with that mitigation, but then the mitigation is too expensive. Ms. Hoffman answered yes. Ms. McLean pointed out that in that case it would not be a denial. She asked Mr. Hoffman to give another example of when it would be lawful to deny based on unmitigated impacts. Ms. Hoffman read from State law, "Conditional use shall be approved if reasonable conditions are imposed or can be imposed to mitigate the reasonably anticipated detrimental effects of the proposed use, in accordance with applicable standards". She reiterated that the standards must be in the Code. She noted that absolute denials are difficult and very rare.

Commissioner Strachan commented on instances where the required mitigation has its own impacts. Ms. Hoffman replied that those impacts would also need to be mitigated as far as the Code allows.

Commissioner Thomas asked about life, safety and traffic. Ms. Hoffman stated that the problem with any life safety issue is that there is always an expert that says it is safe. The City should always have a better expert to dispute that opinion because it is considered an objective decision.

Commissioner Strachan remarked that the Planning Commission is always presented with traffic studies and the reports always say the impacts are mitigated. He wanted to know what they could do in circumstanced when it is evident that the impacts are not mitigated. Ms. Hoffman replied that the City should do their own traffic study or hire an objective third party.

Commissioner Hontz remarked that the traffic studies show that traffic works because the assumptions are based on the wrong time of year. Most of the studies are conducted on summer traffic and the City is interested in winter traffic. She agreed that they either need someone with the expertise to challenge the study and request that the study be done again on specific assumptions, or they should to hire their own study and provide specific assumptions.

Ms. Hoffman stated that ordinances are mandatory and must be complied with. Ordinances can be revised and changes can be made, but it must be done legislatively. She noted that Utah has a Vested Rights Doctrine. Utah had the earliest vesting of property rights in the nation. The Vested Rights Doctrine means that once you have submitted an application, the rules cannot change for your application. Utah law also requires that applications must be acted on within a reasonable time frame and with reasonable diligence. Ms. Hoffman remarked that Utah Law has a rip cord provision which allows the applicant to require the City to make a decision if the process has dragged on. A forced decision could be a denial, however, if the application is denied, the reasons for denial must be in stated writing and those reasons hold if the matter comes up on appeal.

Vice-Chair Pettit commented on submittal requirements and the requirement for a complete application for vesting purposes. There is a checklist of items an applicant must submit, but for certain types of administrative actions the burden of proof falls on the applicant to show the impacts have been mitigated. She asked, if an applicant pulls the rip cord but the Planning Commission does not feel that all the identified impacts were mitigated based on the information provided, if that would be an objective and reasonable basis for denial. Ms. Hoffman answered yes.

City Attorney Harrington stated that the City has two things in their favor regarding the rip cord. One is the economy and the people who tolerated the process. He could only recall one time that the rip cord was used since the law was adopted. The second is that the Park City Code is very direct. Mr. Harrington stated that the City is seeing more inquires because of the economy, not only because of the vesting issue but also the expiration issue. He believed it was only a matter of time before they would see more questions regarding the rip cord because of the economic downturn.

Ms. Hoffman stated that the judicial authority was another level of governing. The Planning Commission wears an administrative hat and a quasi-judicial hat. Assistant City Attorney McLean clarified that the Planning Commission wears three hats because they also recommend legislation. Ms. Hoffman pointed out that they recommend legislation but they do not vote. Therefore, it is an advisory legislative role and not decision making. Ms. Hoffman stated that in the quasi-judicial context is it entirely inappropriate to take ex parte input when a Commissioner or Council member is approached outside of a regular meeting. It is difficult to explain and almost impossible to enforce, but the Commissioners need to be mindful of it when someone wants to talk to them. Ms. Hoffman stated that she is on a mission to convince Councils to get out of the judicial business because it is impossible to tell someone they are not allowed to talk to them when the usual process is to solicit input.

Ms. Hoffman noted that in 2005 the Board of Adjustment was taken out of the State Code because that Board does not work. She was disappointed to learn that Park City still had a Board of Adjustment, but recognized that it might work for Park City because they have unique situations. City Attorney Harrington remarked that most other jurisdictions utilize Board of Adjustments for exceptions rather than variances. The Legislature reacted to the exceptions because it was used as a relief valve for the public exception process. Commissioner Savage clarified that it was an exception based on public outcry rather than a legitimate basis.

Ms. Hoffman noted that the judicial authority must respect the due process rights of participants. Both parties have to exchange information ahead of time so they are not ambushed at a hearing.

There cannot be internal conflicts of interest. Adequate notice must be given and the applicant has the right to sit before an impartial decision maker. There can be no expression of pre-judgment, and findings of fact and conclusions of law must be written. Ms. Hoffman stated that there needs to be a process in the quasi-judicial process that is fair in both fact and appearance. The quasi-judicial body cannot be the same entity that made the original decision.

Ms. Hoffman outlined the standards of review for the legislative, administrative, and judicial levels. She noted that nearly all the land use law comes from the 5th Amendment provision of the Constitution, specifically the due process clause and the takings clause. Commissioner Thomas used the example of a power company that wants to expand a substation, and asked if the utility company could condemn the adjacent property. Ms. Hoffman answered yes, because State law says that private utility companies have the power of imminent domain. Mr. Bateman stated that in Utah it is not a question of who gets imminent domain but rather a question of why. They can do it, but they have to pay for it and provide due process.

Mr. Hoffman remarked that another provision related to land use law is the 14th amendment, which provides people with equal protection of the laws. Ms. Hoffman stated that from 1868 to four years ago, the first eight of the Bill of Rights were applied to the States through the 14th Amendment. Any time the Planning Commission acts, their actions need to be in concert with the Bill of Rights protections.

Ms. Hoffman stated that the Land Use Development Act, or LUDMA, enables legislation by giving the Planning Commission the authority to do things in a certain way. It authorizes limitless land use regulation if it is done right, with very few restrictions. Ms. Hoffman remarked that the State did not believe in any type of regional planning until recently. She noted that there were very few examples of State-wide planning. Ms. Hoffman reviewed the provisions of LUDMA.

Vice-Chair Pettit commented on other legislative actions that could be taken, recognizing that in some respect they may impose on someone's first amendment rights. However, there is a legitimate public purpose and the rule imposed has a rationale relationship to that purpose. Ms. Hoffman stated that the reasonable standard and the rationale relationship standard works on all things except constitution rights. First amendment rights, such as sign codes, are held to a much higher standard. Ms. Hoffman noted that the most difficult part of sign codes is that the first amendment says that government cannot regulate context. Distinguishing between realtor signs and billboard signs is context based regulation. A sign is considered regulating speech and all you can have is reasonable time, place and manner.

City Attorney Harrington stated that this was similar to the struggle they encountered with temporary sales. The City Council would like more and more vibrancy on the sidewalks, but doing that would make it harder to say no to Westgate because you cannot pick and choose. The same principles apply to the signage issues. The City tried to articulate content neutral classifications of types of signs as objectively as possible, to push the absolute limit of their authority. Mr. Harrington was curious to watch the progress of new legislation regarding sign codes because it may inspire widespread changes.

Vice-Chair Pettit asked if there was a similar standard that would be applicable when trying to legislate land use. Ms. Hoffman replied that it is the reasonably debatable standard. It is much lower

than the constitutional standard, until you run up against a protected right.

Ms. Hoffman cited examples where people used their concentrated power of government authority for personal privilege, which is prohibited by law. City Attorney Harrington noted that concentration of power can also occur with Staff individuals. He stated that the City has experimented with streamlining some of the processes and they have struggled to find the right balance. Ms. Hoffman stated that there is a higher standard of review for administrative decisions in the courts. There is a higher level of scrutiny with the Legislature.

Ms. Hoffman commented on the ability for exactions in a development proposal land use application, as long as there is an essential link between a legitimate government interest and each exaction. It must be something that offsets the impact of that particular development. The exaction must be roughly proportionate in both the nature and scale of the impact fee. Ms. Hoffman noted that problems can occur with the Exactions Doctrine in cases where cities are exacting for other entities such as school districts or UDOT. Mr. Harrington stated that one complaint regarding impact fees is when a subsequent developer objects to what the first developer agreed to on a project that was already approved, and they want to revisit the matter. Ms. Hoffman stated that the task force is looking at whether or not the law needs to be changed to more clearly define the exaction standards.

Commissioner Thomas asked Ms. Hoffman to list the building types that are exempt from the process. He understood that schools were exempt. Ms. Hoffman stated that the City is entitled to enforce the land use laws with public schools. She gave the former Chief Building Official, Ron Ivie, credit for the fact that the State law had changed dramatically in the last six or seven years. School Districts must pay impact fees and they must comply with the reasonable objective land use standards, except for things such as putting in sidewalks. The standards for setbacks, height, bulk and mass all apply. Ms. Hoffman noted that charter schools were more difficult because unlike traditional public schools, they are an allowed use in each zone. If there were more regulations for allowed uses, they would apply to charter schools.

Commissioner Savage stated that he has been asked several times about the Sweeney project and the idea of a bond issuance. Most of the inquiries have come from second homeowners regarding the idea of taxation without representation. He wanted to know how he should respond to people who could end up paying twice what a local resident would pay, but would not have a say in the bond issue. City Attorney Harrington stated that everyone is taxed at the full amount, but single families are given an exemption. Different people are not taxed differently, however, the State decided to promote and subsidize the single family home. Commissioner Savage clarified that his question was how they have the authority to impose a tax increase on people who do not have the opportunity to be represented. Ms. Hoffman stated that the second home owner has the ability to make their Park City home the primary home, which would give them the right to vote on matters in Park City. Commissioner Savage understood that you could only have one primary residence anywhere in the United States. If you have a second home anywhere in the United States you do not have the right to vote in a local election. Mr. Harrington pointed out that some states allow second homeowners to vote.

Commissioner Strachan asked if Ms. Hoffman thought it was appropriate to take public comment when the Planning Commission is reviewing a CUP and acting in their administrative role. Ms.

Hoffman answered no because public input cannot be considered.

Assistant City Attorney McLean stated that sometimes the public can put forth evidence that has not yet been considered. Mr. Bateman stated that considering substantial evidence on the record is the standard, but clamor is not evidence. Ms. Hoffman remarked that public comment is not evidence and she advised against it. She pointed out that State law does not require any type of public comment.

City Attorney Harrington stated that a pragmatic reason for holding a public hearing is that it limits the amount of ex parte contacts. The City Council recently changed the process to allow public comment during an appeal for that reason.

The Work Session was adjourned.