treasure
PARK CITY, UTAH

DATE: December 4, 2017

SUBJECT: Response to Recent Staff Reports Addressing (1) the May 1985 Fact Sheet, (2) Consistency with the SPMP, (3)) Recordation of the SPMP, (4) Setbacks, and (5) Other Issues.

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1. Staff Continues to Mislead the Commission about the May 1985 Fact Sheet.

Without addressing the Applicant's prior November 3, 2017, submission on this issue whatsoever, Staff continues to peddle the May 1985 Fact Sheet as a limitation on the proposed development, a position that neither the City nor Staff had ever taken until just a few months ago when Staff discovered the May 1985 Fact Sheet in response to the Applicant's request for a copy of it. (As you will recall, Staff, after locating the document in response to the Applicant's request, proceeded to write and submit an entire report about the May 1985 Fact Sheet ***before*** giving it to the Applicant.)

Staff has made all sorts of wild claims and baseless assumptions about the meaning of the May 1985 Fact Sheet and its purported effect on the SPMP without any understanding of the context or history of the relevant documents.

Without a complete production of documents from the City pursuant to the Applicant's long-ago served GRAMA request, the Applicant nevertheless provided a tremendous amount of historical context for the May 1985 Fact Sheet in its prior submission. (MPE Position Paper dated November 3, 2017.) In its subsequent submission, however, Staff completely ignored the context provided by the Applicant, pretending it does not exist. Indeed, Staff's subsequent report did not even bother with the courtesy of an acknowledgment that the Applicant had provided additional historical information about the May 1985 Fact Sheet and its successors. Staff's failure to engage in the merits of the discussion suggests that Staff has no response.

More incredible than Staff's failure to even acknowledge the Applicant's explanation of the May 1985 Fact Sheet—let alone respond to it—is Staff's treatment of the May 1985 Fact Sheet in its latest submission.

Moreover, despite that the City has now produced at least some of the historical documents relating to the May 1985 Fact Sheet in response to the Applicant's GRAMA request, it appears that Staff has failed to consult those documents, which continue to demonstrate that Staff's reliance on the May 1985 Fact Sheet to somehow limit the proposed development is sorely misplaced.

1.1 There Is No Basis for Singling Out the May 1985 Fact Sheet from All of the Other Documents in the "Project File" That Contradict It.

Staff poaches one document—or really, a few lines out of one document—from the entire project file and bestows it with talismanic power over the SPMP, suggesting it alone is the basis for interpreting the SPMP. (And even though the SPMP specifically indicated that there were subsequent revisions to the May 1985 Fact Sheet, Staff has bothered neither to locate those subsequent revisions nor consult them.)

Staff claims that the May 1985 Fact Sheet must be significant because it is specifically identified as an exhibit to the SPMP. But the sentence preceding the list of exhibits to the SPMP also says that the entire "project file" is incorporated into the SPMP and sits on exactly the same footing—and is as equally important—as the May 1985 Fact Sheet.

Staff provides absolutely no justification for giving the May 1985 Fact Sheet (but not its still missing successors) dispositive power over the SPMP and the questions left open in the SPMP for the CUP process. There is nothing in the SPMP that indicates that any of the floorspace designations in the May 1985 Fact Sheet have any significance or importance whatsoever to the final approval. Indeed, the May 1985 "Sweeney Properties Master Plan document," which is actually referenced in the SPMP *before* the Fact Sheet, is replete with various proposals for all sorts of aspects of the development (though all tied to the unique development concept proposed with those submissions) that Staff has chosen to ignore. The SPMP and its exhibits are not a salad bar—Staff is not permitted to pick the parts it prefers and forget the rest.

Indeed, Staff provides no basis for picking and choosing among the information contained in the Sweeney Properties Master Plan document and the Fact Sheet, arbitrarily giving some statements in the documents controlling weight, while wholly ignoring others.

Staff also provides no basis for picking and choosing among the statements contained in the thousands of other pages of documents that comprise the project file, which are also wholly incorporated into the SPMP on the same footing as the May 1985 Fact Sheet. In short, there is no justifiable basis for Staff to privilege some aspects of the exhibits to the SPMP while ignoring others.

1.2 The History of the Negotiations Between the Submission of the May 1985 Fact Sheet and Final Approval Demonstrate that the May 1985 Fact Sheet Was Never Intended to Limit the Proposed Development at the CUP Stage.

Staff and the public have made sweeping claims about the importance of the May 1985 Fact Sheet without a shred of support, including support from the SPMP itself. Staff poaches isolated statements out of context, fails to acknowledge that the statements are tied directly to specific development concepts that were rejected by the City, and refuses to admit that the City and the Applicant engaged in significant additional negotiations and discussions after May 1985.

The Applicant presented some of the relevant project file documents with its last submission, demonstrating that submissions after the May 1985 Fact Sheet contradict the portions the Fact Sheet that Staff finds so interesting. ***Staff did not respond to this information***.

The project file documents that the Applicant located have now been supplemented by the City's partial response to the Applicant's GRAMA request. Those documents amply demonstrate exactly what the Applicant has said about the May 1985 Fact Sheet: that it was an early and preliminary submission relating to a particular development concept that the City immediately rejected and that the Applicant, at the City's request, subsequently presented numerous additional—and very different—development concepts. Those alternative development concepts had nothing to do with the May 1985 Fact Sheet, were not connected to the Fact Sheet, and were inconsistent with the Fact Sheet.

Indeed, shortly after the Applicant submitted the May 1985 Sweeney Properties Master Plan document and Fact Sheet, the Planning Commission visited the site in July 1985. If there was any question about the extremely preliminary nature of the discussions at that point, the Staff report relating to that field trip resolves it. Prior to that field trip, Staff instructed the Planning Commission to begin considering "resolution of the key issues as they relate to the overall approach to development." (July 2, 1985 Staff report.) Thus, six weeks after the submission of the May 1985 Fact Sheet, which Staff now suggests unequivocally determines the amount of floorspace the Applicant may have for lobbies, the Planning Commission was just beginning to wrestle with "the overall approach to development." It strains credulity to suggest that anybody, including members of the Planning Commission, believed that the Applicant intended to limit the size of a lobby in a future development of unknown configuration, character, and concept.

Moreover, as the Applicant has already pointed out, the May 1985 Fact Sheet related to a very different development concept than what was ultimately approved. One of the most obvious differences between the development concept proposed in the May 1985 Sweeney Properties Master Plan document and Fact Sheet and the ultimate approval is the number of Unit Equivalents. As the Staff explained in a report dated August 14, 1985, the proposal then under consideration was for a "276 unit equivalent Large Scale MPD." (August 14, 1985 Staff report at 1.)

In August 1985, three months after the submission of the May 1985 Sweeney Properties Master Plan document and Fact Sheet, Staff again reiterated the preliminary nature of the discussions and highlighted the changes to the proposal that would eventually come. In particular, Staff instructed the Planning Commission that "[i]t is important at this stage of the review process to voice your concerns with the development concept. *This will help facilitate discussion between the city and the applicant and the master planning process*." (*Id*. (emphasis added).) The report continues, "[t]he staff has met several times with the developer of the proposed Large Scale MPD to discuss both the technical issues identified as well as the concerns raised by several of the Planning Commissioners." (*Id*.) The report explains that the Applicant would make a further presentation contrasting various development concepts at an upcoming work session. In short, by August 1985, the discussions between the Applicant, Staff, and the Planning Commission about the basic development concept had only just begun. Yet Staff now finds a document submitted three months earlier to be set in stone.

At a work session on September 11, 1985, the Applicant presented a number of new potential design concepts for the Coalition properties. Notably, during that work session, Ron Ivie was "opposed to requiring projects to step buildings" because "of difficulty with maintenance, with regard to water control and ***serious safety concerns."*** (September 11, 1985 Meeting Minutes at 2 (emphasis added).) As the meeting minutes reflect, Mr. Ivie told the Planning Commission to

"'look at design concepts that make sense but don't force people into design concepts that don't make sense.'" (*Id*.)

Throughout the fall of 1985, the Applicant continued to propose a variety of different development concepts to the Planning Commission, none of which had anything to do with the May 1985 Sweeney Properties Master Plan document and Fact Sheet. Indeed, in a Staff report dated September 20, 1985, staff explained that the Applicant would "present detailed slides of the Creole Gulch and Mid-station sites, ***depicting four different development scenarios***." (September 20, 1985 Staff report at 1 (emphasis added).) The Staff report sets forth in detail significant discrepancies between the "development scenarios" then under consideration—months after the May 1985 submissions—and the development concept eventually approved in the SPMP. For example, the September 1985 development concepts (1) included 208 residential UEs (vs. 197 approved), and (2) only requested a height exemption for the Creole site up to 50' (vs. the 95' approved by the Planning Commission or even the 75' eventually approved by the City Council).

During the Planning Commission meeting on September 25, 1985, the Applicant presented "some data on the possibility of a high-rise approach." (September 25, 1985 Meeting Minutes at 2.) During that meeting, Dr. Pat Sweeney "showed slides of his architect's rendition of the four different scenarios," only one of which appears to have been the development concept described in the May 1985 submissions. (*Id*.)

The final of the four alternatives presented on September 25, 1985 ("picture D"), included large buildings at the Creole site with "Norfolk Avenue extended with residential type development." (*Id*.) At that time, the Planning Commissioners "all seemed to like picture D with Norfolk Avenue extended." (*Id*. at 3.) Therefore, four months after the submission of the May 1985 Fact Sheet, the Planning Commission hadn't even determined that it wanted to pursue a clustered development approach, much less settled on specific issues like UEs. Nevertheless, Staff now claims that the May 1985 Fact Sheet somehow constrains and applies to all of the development concepts presented months after the May 1985 Fact Sheet.

If, as Staff now suggests, the Planning Commission, Staff, and the Applicant all understood that the May 1985 Fact Sheet had some bearing on their discussions about other development concepts, one would expect that there would have been a reference to the Fact Sheet during some meeting, in some work session, or in some contemporaneous report. But there never was.

Any questions about the place of the May 1985 Fact Sheet in the ongoing discussions in fall of 1985 are resolved by the meeting minutes from October 9, 1985. During that meeting, Staff urged the Planning Commission that it was "important to concentrate on the 'hard' issues at this point in the review." (October 9, 1985 Meeting Minutes at 1.) Thus, according to the people who were actually involved in the process during the relevant period of time, the Applicant and the Planning Commission hadn't even engaged in a discussion about the most difficult aspects of the application by October 1985. Yet staff suggests that a document submitted five months earlier somehow resolved the specific question of lobby floorspace—before even the basic development concept was settled upon.

At the October 9, 1985, hearing, the Planning Commission reversed course regarding the extension of Norfolk Avenue, deciding that approach was not feasible. For the first time, the

Planning Commission expressed a "consensus" about "clustering the density at the Mid-Station and Creole Gulch sites." (*Id*. at 3.) But even as late as October 1985, there was no consensus about whether the eventual master planned development approval should address "building pad(s), areas of disturbance," "building envelope(s), height definition," and "specific density assignment vs. ranges," just to name a few issues that remained undecided. (*Id*.)

Furthermore, the Applicant made it crystal clear during the discussions in fall of 1985 that "the Sweeney family is looking for realistic scenarios that are marketable to potential developers." (*Id*. at 5.) It is wholly inconsistent with that purpose to suggest that the Applicant expected to be limited to the lobby floorspace set forth in the May 1985 Fact Sheet, which related to an entirely different development concept previously rejected by the City. A large hotel/condominium project containing several hundred residential UEs would not be marketable or realistic with a lobby of only 17,500 square feet, especially since Staff believes the 17,500 square feet designated as "lobby" space in the May 1985 Fact Sheet must also cover a variety of other non-lobby uses (including administrative offices, storage, and guest meeting space).

The meeting minutes from October 9, 1985, do provide the first clue as to why the May 1985 Sweeney Properties Mater Plan document and Fact Sheet were included as an exhibit to the SPMP. In particular, the Staff and the Planning Commission began to discuss project phasing and how the eventual master planned development approval would address that issue. (*Id*.)

In late October 1985, the development concepts proposed changed and evolved further. The City had yet to settle on even the most basic development issues. During the October 23, 1985 meeting, "Staff [wa]s hoping to get a better direction as to what the Commission is looking for in the design concept of this master plan." (*Id*.)

The meeting minutes from a work session on October 23, 1985, described the Applicant presenting "additional graphics to demonstrate that other approaches to the development of their land were viable and could approach the requested density depicted in the cluster concept." (October 23, 1985 Meeting Minutes at 3.) "Each of the four new scenarios showed 207 units equivalents distributed throughout the two sites." (October 23, 1985 Work Session Notes at 3.)

The Applicant also presented a "preliminary plan with regard to establishing building envelopes and development parameters." (October 23, 1985 Meeting Minutes at 3.) Thus, more than five months after the submission of the May 1985 Fact Sheet, the Applicant was still proposing new development concepts and "preliminary" plans for initial consideration.

To suggest that the May 1985 Fact Sheet has some significance to the approved development concept is to ignore the history of the negotiations between the City and the Applicant throughout the fall of 1985. As late as October 1985, "[e]ven though many of the Commissioners liked the revised approach somewhat, and thought the direction being taken was good, they [we]re not comfortable with the overall concept." (*Id*.) Indeed, as late as October 23, 1985, there was no consensus among the Planning Commission to use a clustered approach, with some Commissioners still favoring a "conventional approach." (October 23, 1985 Work Session Notes at 3.) It is simply not credible to suggest that a document prepared six months earlier was intended to control the development of a concept that had not even been settled upon and that was still in flux.

Indeed, the search for a solution continued into November 1985, with "a few more development alternatives" considered by the Planning Commission. (November 9, 1985 Staff Report.) Later in November, a full six months after the submission of the May 1985 Fact Sheet, the Planning Commission first began to focus on the development concept ultimately approved. In a work session on November 27, 1985, the Commission first began "rankings of the alternative hillside development concepts." (November 22, 1985 Staff report.) Staff notes that based on the feedback from the Commission, "at least half of the scenarios submitted so far have not been well received." (November 27, 1985 Meeting Minutes at 1.)

In particular, Staff noted that "the ***most recent*** concepts seemed to be leading in the right direction." (*Id*. at 1 (emphasis added).) In other words, the development concepts proposed with the May 1985 Fact Sheet were not considered appropriate or favorable by the Planning Commission. Instead, the Planning Commission favored the development concepts proposed late in the negotiations, which were far different and far removed from the concepts proposed with the May 1985 submissions.

In sum, there is simply no historical or factual basis for current Staff's position that the May 1985 Fact Sheet somehow limits the scope of the development permitted under the SPMP. Incredibly, despite having had this information for decades, current Staff has done nothing to explain how the significant history of additional discussions and negotiations following the May 1985 Fact Sheet, which discussions involved development concepts fundamentally different than the concepts proposed with the Fact Sheet, do not undermine current Staff's conclusions.

1.3 The Purpose of Attaching the May 1985 Fact Sheet to the SPMP Was to Establish a Phasing Timeline for the Entire Master Plan.

Present Staff has suggested that the reference to the May 1985 Fact Sheet must have some significance to the SPMP. Staff then cherry picks a few isolated statements from the Fact Sheet, ignoring that the Fact Sheet was excerpted from a longer document also specifically referenced in the SPMP ("Sweeney Properties Master Plan document"), and suggests that these isolated statements from the Fact Sheet impose absolute limitations on the development.

Yet Staff offers no textual support for its assumption that these isolated statements that it has carefully selected from the May 1985 Fact Sheet have any relevance whatsoever. For example, the May 1985 Fact Sheet also seeks a much greater number of residential UEs. But Staff does not suggest that those portions of the Fact Sheet are controlling. Staff simply provides no support for the notion that certain portions of the Fact Sheet are relevant to the interpretation of the SPMP, while others are completely irrelevant. If that was intended by the SPMP, the drafters certainly knew how to make that clear.

In fact, the SPMP explains the purpose of referencing the Sweeney Properties Master Plan document and Fact Sheet—is was included merely to provide further information about the phasing of the project. Indeed, the SPMP expressly references the "Sweeney Properties Master Plan document and fact sheet" exactly two times: the first time in the list of exhibits to the SPMP, the second time is on the phasing exhibit included in the SPMP. Indeed, the phasing exhibit states, "For additional clarification, consult the Planning Department Staff Report and the Sweeney Properties Master Plan document and fact sheet dated May 15, 1985." (SPMP Staff Report at 18

n.1.) Thus, there is no need to guess, as Staff has done, about the reasons prior Staff referenced the May 1985 Fact Sheet in the SPMP. The sole and only reason that the document was included as an exhibit to the SPMP was to provide additional information about the proposed phasing of the entire master planned development, not just the hillside properties.

Indeed, the fact that the SPMP expressly references the May 1985 Fact Sheet for the purpose of providing additional information about phasing but references that document in no other portion of the SPMP forecloses the interpretation that current Staff has suggested. The express reference to the May 1985 Fact Sheet on the phasing exhibit demonstrates that past Staff knew how to reference exhibits for particular purposes. That there are no other references to the May 1985 Fact Sheet on any other substantive topics, including regarding floorspace for lobbies, demonstrates that the reference to the Fact Sheet was never intended for that purpose.

2. If the SPMP Is Ambiguous in Any Respect, that Ambiguity Is Always Resolved in Favor of the Applicant.

During some recent hearings, there have been questions raised about the proper interpretation of the Sweeney Properties Master Plan and how any ambiguities in that document should be treated. There have also been several misstatements about the law that applies to such issues during recent hearings, including by legal counsel for some members of the public.

First, while the SPMP has certain contractual aspects, it is not governed solely by principles of contract interpretation. Any interpretation of the SPMP must be done in the context of governing statutes, equitable principles, and other legal aspects unique to land-use applications. It is thus erroneous to suggest that contract law alone governs these issues.

Nonetheless, the City has conceded that the SPMP has contractual features. But though the SPMP may operate like a contract, it was not drafted like a typical contract, with all parties taking a part in the drafting of the contractual instrument. The SPMP is a Staff report drafted solely by City Staff, with minor subsequent modifications by the City Council (shown by interlineation).

The SPMP was drafted solely by the City—MPE had absolutely no control over the contents of the SPMP, the phrasing of the provisions of the SPMP, or any of the other linguistic details of the document. The City was the sole and only drafter of the SPMP.

This unassailable fact is important because "[i]t is bedrock Utah law that an ambiguous contract is interpreted against the drafter." *Jenco LC v. Perkins Coie LLP*, 2016 UT App 140, 378 P.3d 131, 137 n.10 (Utah Ct. App. 2016); *see also Sears v. Riemersma*, 655 P.2d 1105, 1107 (Utah 1982) ("[A]ny uncertainty with respect to construction of a contract should be resolved against the party who [drafted] the agreement."); *Parks Enters., Inc. v. New Century Realty, Inc*., 652 P.2d 918, 920 (Utah 1982) ("It is also settled law that a contract will be construed against its drafter.").

To be clear, the Applicant's position is that the SPMP is not ambiguous and that the Applicant's proposed development fully complies with the material provisions of the SPMP.

However, assuming for the sake of argument that the SPMP is capable of different meanings, along the lines suggested by present Staff and some members of the public, it does not change the outcome. If the Applicant's proposed development complies with any reasonable

interpretation of an ambiguous provision of the SPMP, the law requires that the application be deemed to comply with the SPMP.

An ambiguity exists in a contract if a provision "is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." *Watkins v. Ford*, 304 P.3d 841, 847 (Utah 2013). "When determining whether a contract is ambiguous, any relevant evidence must be considered." *Id.* Utah courts follow the "'better-reasoned approach'" and "'consider the writing in light of the surrounding circumstances'" to determine whether there is an ambiguity. *Id*. (quoting *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 268 (Utah 1995).

Of course, when it comes to the "surrounding circumstances" of the SPMP, there is really no witness with better historical knowledge and memory than Dr. Pat Sweeney. Through the Applicant's submissions, including its recent submissions, Dr. Sweeney has set forth the facts and circumstances establishing that the Applicant's interpretation of the SPMP is accurate and correct, including, for example, with regard to support commercial, excavation, and limits of disturbance.

No one has directly challenged the Applicant's recitation of the relevant historical facts and circumstances demonstrating that the SPMP means what the Applicant says it means. Instead, Staff and the public have simply offered competing views of the meaning of the SPMP on these issues, albeit without any firsthand knowledge of the history of the SPMP.

Both Staff and the public seem to be under the same misimpression: that if the meaning of a particular provision of the SPMP is debatable, then Staff or the public is free to choose whatever meaning results in the outcome that they prefer. That is incorrect.

Instead, to the extent there are any ambiguous provisions of the SPMP, ***every one must be read in favor of the Applicant***. If the SPMP admits of more than one interpretation, the interpretation that favors the Applicant and the approval of the application is the legally binding interpretation.

Moreover, as noted above, while the SPMP has contractual aspects, it is not governed solely by contract law. Rather, the body of law that has developed to address land-use applications is also relevant to the question.

Analogous to the rule requiring ambiguous contract provisions to be construed against the drafting party, long-standing Utah land-use law provides that ambiguities in municipal land-use records are also construed in favor of the applicant. "[T]o the extent there is ambiguity in the [City's land-use file document], ***it is well established that any ambiguity will be construed against the City***. *Vial v. Provo City*, 210 P.3d 947, 952, 2009 UT App 122 (Utah Ct. App. 2009) (emphasis added).

Both questions—(1) whether a contract is ambiguous, or (2) if not, what it means—present issues of law. *WebBank v. Am. Gen. Annuity Serv. Corp*., 2002 UT 88, ¶ 22, 54 P.3d 1139 (whether an ambiguity exists in a contract is a question of law); *Meadow Valley Contractors, Inc. v. State Dep't of Transp*., 2011 UT 35, ¶ 13, 266 P.3d 671 (the interpretation of an unambiguous contract is a question of law). Likewise, the City's application of the well-established canons of construction described above—which mandate that any ambiguities in the SPMP be construed

against the City—is also a legal determination. All of these legal matters—whether the SPMP is ambiguous and how it must be interpreted—are decisions reviewed for legal correctness. ***The City does not have any discretion on such issues—it must reach the legally correct conclusion***.

In sum, the fact that present Staff and some members of the public can creatively manufacture supposed ambiguities in the SPMP does not alter the appropriate result in this matter. If, in fact, the SPMP is capable of multiple meanings, several legal principles establish that those ambiguities must always be resolved in favor of the Applicant and the approval of the application. Stated differently, ***the only way the City can deny the application based on a supposed inconsistency with the SPMP is for the City to establish that the SPMP unambiguously supports its position.***

2.1 The SPMP Does Not Unambiguously Preclude the Applicant from Receiving the Additional Support Commercial Allowed under the Code.

Staff's position is that the SPMP limits the Applicant to 19 commercial UEs and does not permit the Applicant any additional support commercial under the applicable codes. Present staff has never really explained its rationale for this position. Instead, Staff has just repeated the conclusion again and again, apparently hoping everyone will forget that it has never actually offered a justification for it.

The Applicant has addressed why Staff's current position is erroneous in numerous submissions to this Commission. (*See, e.g.*, MPE Position Papers dated July 6, 2016; August 5, 2016; September 9, 2016; October 7, 2016; MPE Presentations dated July 13, 2016; August 10, 2016; September 14, 2016; October 12, 2016). Staff has never bothered to substantively engage any of the arguments set forth in the submissions. Rather, Staff has simply ignored them. These submissions establish definitively that the SPMP unambiguously allows the Applicant to have the additional support commercial floorspace allowed under the code.

There is no need to repeat those arguments here because there is one simple truth that the City will never be able to escape—its own Staff has taken three different positions on the proper interpretation of the SPMP with respect to support commercial. For several years, between 2004 and 2006, Staff agreed with the Applicant, finding that the Applicant was entitled to additional support commercial under the 2003 LMC. (*See, e.g.*, April 14, 2004, Staff report; May 26, 2004, Staff report; July 14, 2004, Staff report; August 11, 2004, Staff report; August 25, 2004, Staff report; April 12, 2006, Staff report.) All of these reports were carefully reviewed and approved by the Planning Director and all other applicable City departments, including the City's legal department.

Beginning in approximately 2009, Staff suddenly took a different approach to the issue, concluding that the SPMP allowed the Applicant additional support commercial as defined by the 1985 LMC, which Staff determined to be less than that permitted under the 2003 LMC. (*See* September 23, 2009 Staff report at 19.) Nevertheless, as of 2009, Staff believed that the Applicant was entitled to more than 11,000 square feet of additional support commercial space, over and above the 19 commercial UEs. (*Id.*)

Yet now Staff is certain that the SPMP does not permit the Applicant any additional support commercial space. Staff's language is telling: it now claims that the SPMP is "clear and specific *enough* that the 2004 LMC would not apply." (November 29, 2017 Staff report at 99 (emphasis added).) But the question is not whether the SPMP is "clear enough" for Staff to take a position that succumbs to public clamor; the question is whether the SPMP is objectively unambiguous. Staff's own language concedes it is not.

The very fact that the City has looked at the same SPMP and reached three very different interpretations of that document with regard to the support commercial issue amply demonstrates that, at a minimum, the SPMP is ambiguous with respect to whether the Applicant is entitled to additional support commercial space. As a result, the law mandates that that ambiguity be resolved against the City and in favor of the Applicant.

2.2 The SPMP Does Not Unambiguously Limit the Lobby Space to a Certain Size.

Elsewhere in this submission, the Applicant explains the history of the May 1985 Fact Sheet and establishes the true purpose of including the May 1985 submissions as exhibits to the SPMP. (The Applicant provided other historical context for the Fact Sheet in its last submission.)

For the City to prevail on the question of whether the Applicant is limited to the lobby floorspace supposedly set forth in the May 1985 Fact Sheet, the City must establish that the SPMP unambiguously intended to impose that limitation.

The Applicant has demonstrated, citing and quoting from specific historical materials, that the May 1985 Fact Sheet was never intended to be used in the way that Staff has attempted to use it. Certainly, Staff has come nowhere near demonstrating that the SPMP unambiguously intended to limit the future development to the lobby floorspace supposedly stated in the May 1985 Fact Sheet. A single, random reference to numerous multiple-page documents is not a basis for Staff to cherry pick one statement out of all of thousands of pages and give it dispositive weight.

The Applicant further notes that Staff's position regarding the meaning of those isolated, cherry-picked statements from the May 1985 Fact Sheet is different from the interpretation ascribed by legal counsel for members of the public. Thus, Staff and legal counsel for the public have offered two competing interpretations of the very same document. If there are multiple reasonable interpretations of the SPMP and its attached exhibits, it is ambiguous, and the interpretation that favors the Applicant must prevail.

2.3 The SPMP Does Not Unambiguously Place the Limits of Disturbance in the Building Height Envelopes.

Perhaps the simplest of the issues is the limits of disturbance. The Applicant has already demonstrated that the SPMP unambiguously does not limit the limits of disturbance to the building height envelope. (*See, e.g.*, MPE Position Papers dated October 7, 2016 and January 6, 2017.)

Staff's current position is that the SPMP sets the limits of disturbance within the building height envelopes. However, as the Applicant has repeatedly pointed out, the position that the SPMP establishes the limits of disturbance contradicts the express language of the SPMP, which states that the "definition of 'limits of disturbance' [will be] deferred until conditional use review."

(SPMP Staff report at 14.) It is illogical to suggest that the SPMP resolves an issue that the SPMP expressly states it is not resolving.

At best for Staff, the SPMP is arguably ambiguous on this point (though it is difficult to see how). If so, that ambiguity must be resolved in favor of the Applicant.

2.4 The SPMP Does Not Unambiguously Limit Excavation, Either Directly or Indirectly Through Building Height.

As with the other topics, the Applicant has already addressed at length why the SPMP unambiguously allows the Applicant to excavate as proposed. (*See, e.g.*, MPE Position Papers dated October 7, 2016 and January 6, 2017.) Staff has never bothered to substantively engage the arguments made by the Applicant in those submissions.

In fact, the SPMP makes multiple references to substantial excavation, demonstrating that the need to excavate the site was well understood by those who drafted and approved the SPMP.

Moreover, Staff's latest variation of the argument is that the proposed development violates the SPMP's height restrictions by excavating the site. But Staff ignores that the SPMP specifically set building heights on the hillside properties (though not the others) relative to mean sea level precisely because it was understood at the time that the existing grade of the site would be substantially altered and that a fixed reference point was necessary. (SPMP Staff report at 4.)

At a minimum, the SPMP is ambiguous on the question of excavation. Clearly some excavation was contemplated, and the SPMP certainly sets no limits on the excavation allowed. Even if Staff's latest position is credited, it certainly does not suggest that the SPMP unambiguously prohibited the proposed excavation. As a result, the resolution of that question must be in the Applicant's favor.

3. The Woodruff Drawings Do Not Limit the Designs Permitted under the SPMP.

For the first time in the more than a decade that this Application has been pending, a few weeks ago Staff suggested that the Woodruff concept drawings limited the final permissible design. In particular, Staff suggested that the Application could be denied because the proposed buildings do not look exactly like the bubble concept buildings shown on the Woodruff drawings. Staff has repeated that claim in recent reports.

However, the Applicant confronted Staff with its own prior statements directly contradicting that position. Specifically, during a hearing on January 7, 2009, Staff said:

> At the time of the MPD approval, a lot of the exhibits were just trying to figure out volumetrics and what would work in terms of height from existing grade. They put certain conditions on certain height and the Sweeney's worked with their architect to make sure they could make the volumetrics work in terms of units. ***It was always the understanding that the architecture was not final and it would change.*** One of the findings within the MPD is that the architecture must be compatible with the historic district. ***With all***

> ***the projects within this MPD, the architecture is changed at the time of CUP review. Planner Cattan clarified that the exhibits for buildings is not what has to be built for this MPD.***

Yet now Staff takes the exact opposite position, claiming that if the Applicant does not propose only the "buildings" set forth on the Woodruff drawings, it is grounds to deny this Application.

Staff claims that this position is supported by "[n]umerous Planning Commission and City Council meeting minutes." (November 29, 2017 Staff report at 103.) However, the Applicant has reviewed all of the historical Planning Commission and City Council meeting minutes provided by the City pursuant to the GRAMA request and can find nothing to indicate that either the Planning Commission or the City Council expected that the final design of the buildings would be limited to the Woodruff drawings. In fact, there is no support for Staff's current position in any prior meeting minutes. Of course, if Staff was so certain that meeting minutes contained the support it claims, a reasonable person would expect that Staff would actually provide a citation for those meeting minutes. No such references or citations have been provided. (While Staff makes sweeping claims about the supposed contents of prior meeting minutes, the Applicant has actually set forth the relevant portions of those meeting minutes above. Unlike Staff, the Applicant is not afraid to allow the Planning Commission to review the underlying materials.)

Apparently recognizing that its current position regarding the Woodruff concept drawings is indefensible, Staff has recently suggested that it is standard practice for volumetric drawings to later limit the final design.

Notably, despite more than a decade of review of this particular Application, ***Staff has never before taken that position.*** Additionally, a brief survey of the City's treatment of other development applications demonstrates that the City has never before taken the position that preliminary drawings used to arrive at volumetrics and UE density limit the final design in such a way.

Moreover, a brief review of prior statements by Staff demonstrates that the Staff's current position contradicts positions that Staff has previously taken on this very Application. For example, Staff previously concluded that the "Treasure Hill CUP plans are consistent with these heights and volumetrics" in the SPMP. (March 9, 2005 Staff Report at 7.) Staff continued to repeat those conclusions in subsequent reports. (*See, e.g*., April 27, 2005 Staff Report at 7.) In January 2006, Staff reported that "[a]fter reviewing the revised plans," Staff was "***confident that the plans are in compliance with the master plan in terms of height and massing***." (January 11, 2006 Meeting Minutes at 17 (emphasis added).)

Present Staff offers no explanation for its radical departure from its prior conclusions. More than a decade ago, Staff concluded that the proposed development fully complied with the previously approved volumetrics. Ten years later, Staff now takes the opposite position. But nowhere in the intervening period of time has Staff even attempted to explain its contradictory positions or why its current position is correct but its prior position was wrong.

Moreover, Staff all but admits that using the amorphous concept of "volumetrics" to deny the Application would run afoul of the Applicant's rights to due process and equitable treatment under the law. Indeed, Staff admits that "[v]olumetrics are not a specifically defined term in the Land Management Code." (November 29, 2017 Staff report at 103.) Because the concept of "volumetrics" is not defined in the code, it would be illegal, arbitrary, and capricious for the Planning Commission to use this undefined, vague, and wholly subjective standard to deny the Application.

Staff concedes, however, that volumetrics are really just a function of "height, setbacks, façade variations, open space requirements, etc." (*Id*.) Notably, the Application complies with all of these requirements in the SPMP.

4. Utility Issues.

The Applicant has repeatedly demonstrated compliance with the utility requirements of the SPMP and CUP criteria throughout the process, including in 2004, 2008, and in 2016–17. The Applicant's consulting engineer, Rob McMahon, has performed this type of engineering work in Park City for the past twenty-five years. He, or the firm he previously worked for, provided the same level (or less) of information for the CUP approvals of the Summit Watch Project, the Town Lift Base, Upper Norfolk Lots, and Empire Pass, to name just a few.

5. Recordation of the SPMP.

Condition No. 2 of Section III of the Revised Staff Report states in material part that "[u]pon final approval of the proposed Master Plan, a recordable document (in accordance with the Land Management Code) shall be prepared and submitted. The Official Zone Map will be amended to clearly identify those properties included in the Master Plan, and the hillside property, not included within either the Town Life (sic), Mid-Station or Creole Gulch sites . . . shall be rezoned to Recreation Open Space."

The so-called "recordable document" was never recorded. As noted in the attached Affidavit of Patrick Sweeney, President of MPE, Inc., the Applicant, Mr. Sweeney did, in fact, work collaboratively with Park City staff to prepare a recordable document in the latter part of the 1980s for the purpose of recordation. Subsequent to this effort, the City determined not to record a document because the rezoning of the property to Master Plan development status was sufficient. In fact, the property was so rezoned on August 3, 1990.

6. Staff's Position on the Application's Compliance with the Setback Requirements Is Misplaced.

The SPMP concludes that "[a]ll of the development sites provide sufficient setbacks." (SPMP Staff report at 15.) It is also clear from the SPMP that the setbacks of the hillside buildings would be evaluated solely from the distance to the road. In its description of the setbacks for the buildings on the hillside, the SPMP explains that "[t]he Hillside properties provide substantial 100'+ setbacks from the road." (*Id*.) That the project will provide adequate setbacks is a conclusion that has already been reached by the City, and it is not subject to revisiting. Otherwise, the promises and commitments made by the City in the SPMP would be illusory, allowing the City to arbitrarily impose additional requirements on the project. The SPMP speaks directly to the setbacks issue and

concludes that the project will have adequate setbacks. That conclusion is not subject to revisiting at the CUP stage.

Nevertheless, Staff believes that it is entitled to arbitrarily reinterpret the SPMP. Staff's supposed concern about the location of the retaining wall necessary to build the required fire access is superficial and wrong. Indeed, Staff's position is premised on a patently erroneous assumption.

In particular, Staff claims that even though the SPMP was crystal clear that the setbacks on the hillside properties would be measured solely from the road, "staff *interprets* that it acts the same way in the Mid-Station site" and "Staff finds that this entire area is considered the front yard area." (November 8, 2017 Staff report at 82.)

First, Staff is not authorized to "interpret" the SPMP to impose additional requirements that the SPMP specifically excludes. The SPMP addresses setbacks once and only once, which is described above. The SPMP does not suggest that the City may later impose additional setback requirements on the project or that there will be additional discussion of the setback requirements at the CUP stage. The SPMP says nothing about any setback requirements for the Mid-station site, nor does the SPMP say anything about considering portions of the development sites to be front yard, side yard, or backyard. Indeed, Staff's present position that the area surrounding the development should be treated as front yard or side yard space is facially absurd.

Second, for Staff to even consider "interpreting" the SPMP to address additional setback requirements, Staff ought to be able to point to some textual evidence in the SPMP that allows Staff to do so. Of course, Staff can point to nothing.

Third, Staff's late-breaking change in position also ignores historical context. The area where the retaining walls are proposed was zoned HR-1 prior to the SPMP. At the time, the front yard setback requirement was 10' and side yard setback 5'. Moreover, the 1985 Code waived the setback requirements in the Estate zone when property was included in a master plan. (1985 LMC §17.12.13(b) ("Set Backs. All structures shall be located more than 30 feet from the lot boundary line, except within master planned developments."). Staff provides no reason why the setbacks for the project should suddenly be more onerous than the previous zoning, especially since the SPMP specifically addressed that issue contrary to Staff's current position.

Moreover, Staff misinterprets the exhibit listing the areas of Maximum Building Height (MBH). The exhibit means what it says—it limits the height of buildings. Retaining walls, however, are not "buildings" under any definition of the term, including under the City's own definition of the term. (*See* 2003 LMC definition of "Building".) Thus, it is entirely consistent with the SPMP and its exhibits for the development to include retaining walls as proposed in order to build the necessary fire protection access.

Additionally, yet again, Staff's current position directly contradicts its prior conclusions on this exact same topic. In numerous prior Staff reports, Staff has concluded that the proposed development satisfies all of the necessary setbacks. For example, in a report dated August 11, 2004, Staff concluded that "[s]etbacks from the perimeter property line are generally greater than the required MPD setback of 25'." (August 11, 2004 Staff report at 5.) Although Staff had concerns about one particular building, Staff never suggested that any of the retaining walls proposed for

the development ran afoul of any setback requirements. (*Id*.) Later, Staff concluded that "staff believes the overall plan complies with the technical required setbacks, volumetrics, and height limitations as stated in the approved MPD." (September 22, 2004, Staff report at 4; *see also* October 13, 2004 Staff report at 4.)

For thirteen years, Staff indicated that the Application complied with the applicable setback requirements. Never before had Staff suggested that the retaining walls necessary for the required fire access were somehow in violation of the setback requirements. Now, just weeks before the completion of this process, Staff suddenly takes a completely different position in an effort to torpedo an Application that the hue and cry of the public has made Staff too afraid to treat fairly. Staff's last-minute change in position raises serious due process and equitable concerns.

Additionally, as explained above, to the extent the SPMP is ambiguous about setbacks for the Mid-Station site, that ambiguity is always resolved in the Applicant's favor.

7. Cliffscapes Are Not Structures.

There have been suggestions by members of the public and others that the proposed cliffscapes are considered "Structures" and therefore none of the cliffscapes can be outside the area permitted for buildings.

Cliffscapes are not "Structures." The applicable 2003 LMC defines "Structure" as "[a]nything *constructed*, the Use of which requires a fixed location on or in the ground, or attached to something having a fixed location on the ground *and which imposes an impervious material on or above the ground*; definition includes 'Building.'" (2003 LMC § 15-15-1.214.)

Cliffscapes, even though they may incorporate retaining systems and even walls in certain places, are not Structures for at least two simple reasons. First, regarding exposed natural rock, they are not "constructed." Just as no one would suggest that digging a hole is "constructing" a hole, it would be anomalous to suggest that exposed portions of the existing bedrock are "constructed."

Second, the cliffscapes, including walls, do not "impose an impervious material on or above the ground." The cliffscapes will be exposed bedrock, which is not an impervious material. Retaining walls of this type are specifically designed to release water to the substrate, i.e., the ground, as opposed to contain or dam it.

Thus, any suggestion that the proposed cliffscapes are Structures under the relevant code provisions is simply misplaced.

AFFIDAVIT OF PATRICK J. SWEENEY

The undersigned being first duly sworn deposes and states as follows:

1. I am the President of MPE, Inc., the Applicant, with respect to the Conditional Use Permit Application currently on file with Park City.

2. I am familiar with the circumstances surrounding the approval of the Sweeney Master Plan as reflected in the Park City Planning Department Revised Staff Report ("Revised Staff Report") dated December 18, 1985, and as subsequently modified and approved by the City Council on October 16, 1986.

3. Subsequent to the approval of the Sweeney Master Plan, I prepared what I believed to be an appropriate recordable summary with revised Master Plan exhibits reflecting such approval, which I shared with then City Planning Director, Nora Seltenrich. Subsequently, the City determined not to record the summary, but instead, to simply re-zone the property subject to the Sweeney Master Plan to the status of Master Plan Development, for purposes of meeting the recordation requirement set forth in paragraph 2 of Section III of the Revised Staff Report.

4. The property was, in fact, rezoned to HRI-MPD, ESTATE-MPD, HRC-MPD, HCB-MPD on August 3, 1990.

DATED this 21 day of November, 2017.

Patrick J. Sweeney

Patrick J. Sweeney

Subscribed and sworn to before me this 21 day of November, 2017.

Notary Public
MARILYN BURRELL
Commission #687550
My Commission Expires
February 18, 2020
State of Utah

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