PARK CITY MUNICIPAL CORPORATION
PLANNING COMMISSION MEETING MINUTES
COUNCIL CHAMBERS
MARSAC MUNICIPAL BUILDING
APRIL 11, 2018

COMMISSIONERS IN ATTENDANCE:

Vice-Chair John Phillips, Sarah Hall, John Kenworthy, Mark Sletten, Laura Suesser, Doug Thimm

EX OFFICIO: Planning Director, Bruce Erickson; Anya Grahn, Planner; Polly Samuels McLean, Assistant City Attorney

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REGULAR MEETING

ROLL CALL

Vice-Chair Phillips called the meeting to order at 5:35 p.m. and noted that all Commissioners were except Commissioner Band, who was excused.

ADOPTION OF MINUTES

March 28, 2018

Commissioner Sletten referred to page 23 of the Minutes and corrected night pollution to correctly read **light pollution.**

MOTION: Commissioner Suesser moved to APPROVE the Minutes of March 28, 2018 as corrected. Commissioner Sletten seconded the motion.

VOTE: The motion passed unanimously.

PUBLIC COMMUNICATIONS
There were no comments.

STAFF/COMMISSIONER COMMUNICATIONS AND DISCLOSURES

Planning Director Erickson reported that the new iPads had been passed out.

Director Erickson stated that Graham, Liz, and Laura would check to make sure all the Commissioners had signed a new or updated disclosure form.

Commissioner Thimm disclosed that he would be out of town on April 25th and would not be able to attend the Planning Commission meeting that night. Commissioner

Suesser disclosed that she would also be out of town on April 25th and would not be able to attend the meeting. Assistant City Attorney McLean suggested that the remaining Commissioners check the agenda for the April 25th meeting ahead of time and let the Planning Department know if they need to recuse on a specific item to make sure there will be a quorum for that item.

CONTINUATIONS – Public hearing and continue to date specified.

1. Twisted Branch Road Subdivision Plat – A Subdivision Plat for 3 lots of record for an on-mountain private restaurant, a City water tank, and a recreational warming shelter/yurt; platted ROW for existing Twisted Branch Road; and platted parcels for Deer Valley Resort ski trails and bridges, open space, and existing Guardsman Pass Road, subject to the Flagstaff Annexation and Development Agreement, located within the Empire Pass Development Area. (Application PL-17-03664)

Director Erickson noted that the applicant was out of town and requested that the item be continued this evening. The Staff recommended a continuance.

Vice-Chair Phillips opened the public hearing. There were no comments. Vice-Chair Phillips closed the public hearing.

MOTION: Commissioner Kenworthy moved to CONTINUE the Twisted Branch Road subdivision plat to May 9, 2018. Commissioner Thimm seconded the motion.

VOTE: The motion passed unanimously.

2. Stag Lodge Phase II Unit 49, Fourth Amended Plat – A plat amendment proposing to convert 578 SF of unexcavated common area to private area belonging to Unit 49 of the Stag Lodge Condominiums.
(Application PL-18-03802)

Director Erickson recommended that the Planning Commission continue this item to April 25, 2018 to give the Planning Department the opportunity to make sure the public notices are accurate.

Vice-Chair Phillips opened the public hearing. There were no comments. Vice-Chair Phillips closed the public hearing.

MOTION: Commissioner Suesser moved to CONTINUE the Stag Lodge Phase II, Unit 49, Fourth Amended Plat to April 25, 2018. Commissioner Sletten seconded the motion.

VOTE: The motion passed unanimously.

The Planning Commission moved into Work Session for training with the State Ombudsman and Assistant City Attorney McLean.

WORK SESSION

Land Use Training by State of Utah Ombudsman and Assistant City Attorney McLean

Director Erickson stated that the Ombudsman has an important role at the State level to make sure Land Use Regulation is handled correctly. He reported that there have been incidences in Park City where cases have been reviewed by the Ombudsman and by Summit County. Director Erickson encouraged the Commissioners to take the opportunity to ask questions this evening regarding conditional use permits, review procedures and other land use issues. He noted that Commissioner Band keeps asking about Planned Unit Developments in the State, and they would address that question in her absence.

Assistant City Attorney McLean introduced the State Ombudsman, Brent Bateman, and noted that Mr. Bateman has been practicing Land Use Law for 20 years. He is a great asset to the State and to Park City. His office does advisory opinions, mediations, and they answer questions.

Mr. Bateman appreciated being invited to speak to the Planning Commission this evening. He noted that the decisions made by the Planning Commission affects the lives of all the citizens in town on a daily basis. Mr. Bateman put up a slide with general bullet points related to land use as a reminder for those who have heard his presentation in the past and as a guide for asking questions.

Mr. Bateman stated that it was important to understand what is the rule and what is exception about Land Use Law. He noted that most people reverse the rule and the exception in their thinking. He explained that the rule of Land Use Law, is that if he owns land he can do whatever he wants with his property. His neighbors and other people, including the government, have no power to control what happens on his land. That is the constitutional rule. For example, if he lives in the middle of a residential area and he wants to build a movie theater or a bar right next to an elementary school,

he can do it because it is his land. However, the exception to the rule are zoning laws. Zoning is fairly new in the Country and it came about around the turn of the Century. When zoning first came about people started filing lawsuits because they owned the land and could do whatever they wanted. He commented on one case in Euclid that went all the way to the Supreme Court. The Court agreed that it was the rule and the owner has rights; but the Court also allowed zoning as an exception to the rule so people can live in an ordered society. The Supreme Court allowed zoning, and zoning became a way for people to tell their neighbors what they could and could not do on their property. Mr. Bateman emphasized that zoning is only an exception and it is important to understand the difference. There is a process for telling people what they can or cannot do on their property, and that process applies to the neighbors and the government. The process must be followed before exceptions can be imposed on a property owner. Without the process, property owners can do whatever they want.

Mr. Bateman remarked that the process is adopting ordinances. The City of Park City has the power to make laws for what people can and cannot do; but the rules have to be spelled out in an ordinance and made into law. There are implications in the process, which is why it is important to understand the rule versus the exception. He noted that the Planning Commission has a significant role in writing the rules and a role in applying the rules when they review applications. If they follow the process correctly, there are no issues. If they do not follow the process, it creates problems that can lead to lawsuits.

Director Erickson noted that the Planning Commission deals with a lot of sophisticated real estate transactions. A lot of money is at stake and a lot of risk is at stake. Sometimes the City buys out rights and other times they try to buy out rights. The Code is always changing.

Director Erickson stated that the first question was an issue the Planning Commission faces of what rule applies. If an applicant was approved in a certain year and the rules were changed before the project was started, which rules apply. Mr. Bateman stated that Utah has the earliest vesting rule in the United States. Vesting means at what point is an applicant subject to the current rules. Mr. Bateman created a scenario where a person paid millions of dollars for a piece of land and did their due diligence to make sure their plans for the property were legal. Suddenly, the City changes all the rules and the land is not worth what the property owner paid or they cannot build what they planned to build. There is nothing to prevent that from happening because the City has the legislative power to make law and change law. Downzoning is also legal as long as it is done right and it does not go too far. Property can be upzoned, and road locations can be changed. All of these changes can affect what someone can do with their land. Mr. Bateman stated that the question is at what point the City no longer

has that ability if a property owner has done his due diligence. The answer is vesting. He noted that in the majority of states the vesting rule is that if an applicant is approved for a project, starts the work, and spends a significant amount of money, the City can no longer change the rules and stop his plans for the project. Mr. Bateman explained that Utah is different. Utah has the earliest vesting and it vests when the application is submitted. The property owner can proceed with their development until the project is completed with the rules that were in place when the full application was submitted. He pointed out that the City can change the rules after the property has been purchased but before the application because the property owner is not yet vested. If the rules are changed it applies to future applicants, but not the ones who were already vested.

Mr. Bateman stated that one exception is a compelling countervailing public interest exception. If an application comes in and there is a compelling countervailing public interest against allowing that person to vest, then the vesting can be prevented. However, the reason must be extremely compelling.

Commissioner Thimm wanted to know who would be the judge of a compelling countervailing public interest. Commissioner Suesser asked Mr. Bateman to provide an example. Mr. Bateman stated that one example would be if there are engineering drawings showing that the ground is in imminent danger of sliding. It has to be an issue that is injurious to health, safety and welfare. Commissioner Thimm reiterated his question about who makes that decision. Mr. Bateman replied that the City's Land Use Authority makes the finding, and it is always subject to challenge. If it ends up going to Court, the judge will make the final decision.

Commissioner Kenworthy asked if the City can put a time limit on the vesting of a piece of property. Mr. Bateman answered yes, as long as it is in the ordinance. He thought it was reasonable to give a time limit to reach a certain point in the building process. Director Erickson clarified that the time limits need to be a legislative act and not an administrative act. Mr. Bateman answered yes. He explained the difference between an administrative act and a legislative act in terms of placing a time limit. He thought a building permit was one example of placing a reasonable time limit. Assistant City Attorney McLean stated that Park City believes that Building permits are controlled by the IBC, which has the 180-day time limit. The City has been asked to shorten the time frame or find that 180-days is too lenient because it only requires an inspection every six months. She asked Mr. Bateman if they could tighten the time frame if they put it in the Code. Mr. Bateman was hesitant to change the IBC requirements. However, he would back up the IBC in the Code by saying what happens to the application if the deadline is not met.

Commissioner Suesser noted that when the Planning Commission approves MPDs, there is a time limit. Director Erickson pointed out that conditional use permits also have time limits. Assistant City Attorney McLean noted that an MPD is two years and a CUP is one year. It is a condition of approval on the actual application, and it is also codified in the LMC. Commissioner Suesser understood that because it is in the LMC, it is considered legislative rather than administrative. Mr. Bateman stated that it applies to administrative applications, but it is done legislatively. Commissioner Thimm asked, if it is not in an ordinance, whether a schedule could be tied to a condition of approval in a particular conditional use approval. He provided an example of a CUP to build 100 house, and 20 of those houses need to be affordable. Before the 51st permit, those 20 affordable houses must be available. Commissioner Thimm asked if that condition would be allowed. Mr. Bateman stated that it would depend because the conditions imposed on a CUP must relate to standards in the ordinance. If it is not in the Code, it cannot be a condition.

Vice-Chair Phillips asked if there was language in the Code to support affordable housing. Director Erickson stated that there is an affordable housing requirement. Most of the projects that have an affordable housing requirement are MPD approvals or annexations. Development agreements are primarily a legislative act and there can be time constraints. The difficulty is trying to regulate to make sure the time constraints are completed. Mr. Bateman suggested that if there are requirements in an ordinance for specific things that are constant, a condition is not necessary because it is already in the Code. An ordinance rather than conditions can avoid lawsuits.

Director Erickson noted that the Planning Commission is out in the public and they are approached wherever they go. On the issue of being vested at the time of application, Assistant City Attorney McLean is rigorous about the Commissioners not responding in detail unless an application has been submitted. Commissioner Thimm stated that typically in the Staff report there is a point in the report that says an application was made on a specific date and it was deemed complete on a specific date. He wanted to know which date is the vesting date. Mr. Bateman replied that vesting is the date when the application is made. Commissioner Thimm wanted to know what would happen if the applicant is deemed incomplete at a later date. Mr. Bateman stated that in that case it was never vested. The application must be complete and compliant to vest.

Assistant City Attorney McLean clarified that if someone applies on April 14th and the Staff finds that the applicant is complete upon their review on April 30th, they would revert back to the date the application was complete. However, what frequently happens is that an application is submitted but it is not complete. She suggested the possibility of removing the date that the application is first submitted and just use the date when the application is deemed complete and the Staff receives the site plan. Ms.

McLean noted that the Planning Department typically uses the “deemed complete” date as the vesting date. Mr. Bateman remarked that there is no case law on the matter, but he was comfortable saying that the application is vested on the date it is complete. Per the language in the State Statute, Mr. Bateman preferred to use “compliant” rather than “complete”. Assistant City Attorney McLean explained why they use the word “complete”. An application may be compliant but if it is missing information it is not complete until all the required documents are provided.

Commissioner Hall asked for the second exception. Mr. Bateman replied that the first exception was compelling countervailing public interest. The second exception was the pending ordinance doctrine. If someone makes an application that complies with Code but the City has already started the process of working on an ordinance that would make the application non-compliant, that would prevent vesting. Vice-Chair Phillips asked if work on a pending ordinance needed to be publicly announced. Mr. Bateman replied that there was no case law to support a decision, but in his opinion, if it appears on an agenda it is pending. Director Erickson understood that if the City has a pending ordinance, the Planning Department could not approve an application under the pending ordinance, but they also cannot deny an application. Mr. Bateman stated that they could approve under the pending ordinance, but if they are waiting for the ordinance to be adopted, the application is put on hold for vesting. Mr. Bateman noted that the pending ordinance doctrine prevents vesting, but it is only good for six months. If the ordinance is not adopted after six months, the applicant can be approved and vested.

Mr. Bateman commented on exactions related to affordable, employee, inclusionary housing in a development. He explained that any kind of exaction that requires someone to give something to the public in exchange for a development approval has to be proportionate to the impact. He emphasized that it is the impact not the cost. If someone is not creating an impact, the City cannot exact. If there is one house with an impact, they can impact one house worth of impact exaction. Mr. Bateman used roads as an example of the easiest way to look at exactions. The houses in the development will use the road, but so will other people. Therefore, the exaction should only be based on the number of houses in the development that impact the road. Mr. Bateman stated that affordable housing usually works as an exaction. However, one of the rules of exaction is that the exaction has to solve a problem that the development creates. If the City intends to exact affordable housing, they need to be prepared to show that the development is creating a problem and affordable housing is the solution. Mr. Bateman stated that some cities require a fee-in-lieu of affordable housing, but he was not in favor of fee-in-lieu. Assistant City Attorney noted that Park City allows fee-in-lieu but it is not automatic. At this point, affordable housing is only required in MPDs or through an annexation, but the City Council would consider looking more broadly at requiring

affordable housing where there are impacts. If the developer did not want to provide the affordable housing itself, a second option would be a fee-in-lieu. Mr. Bateman stated that a fee-in-lieu of affordable housing, particularly if it is not used for affordable housing, is still up in the air from an exaction standpoint and that causes him concern. However, it was appropriate as an option for affordable housing.

Commissioner Suesser understood that when a developer pays a fee-in-lieu instead of building the affordable housing, that the City dedicates that fee-in-lieu towards building affordable housing. Ms. McLean replied that it is earmarked for affordable housing. Mr. Bateman stated that he was more comfortable with the fee-in-lieu if it is earmarked and does not go into a general fund.

Planner Kirsten Whetstone stated that Park City has a housing resolution that is based on the housing element of the General Plan which calls for mitigation. Housing studies are done and there are formulas for based on commercial development and housing development. Planner Whetstone pointed out that it is a Resolution and not an Ordinance but it is referred to in the MPD section of the zoning ordinance. Planner Whetstone asked if the tiers of the General Plan, the studies, and the Housing Resolution that is referenced in the ordinance makes it stronger and more protective. Mr. Bateman stated that being in the ordinance with justification is the strongest factor. The fact of being in a Resolution depends on how the resolution is created and the effects of the resolution. Mr. Bateman stated that his opinion is that things can always be stronger. It is also his opinion that how to solve this problem has never been settled.

Planner Whetstone remarked on the question regarding the timing of needing so many units completed before moving forward and thought it could tie back to the Housing Resolution, which requires 15% to meet the standards of the Housing Resolution for a specific housing and population. Mr. Bateman could see the virtue of doing it in a resolution form because it is an unsettled area. However, the downside is that a resolution does not have the power of an ordinance.

Commissioner Kenworthy used the example of a mega hotel with 40 affordable units, and the units disappear five years later due to fire or some other reason. He wanted to know what would happen in that case. Mr. Bateman stated that if the ordinance has not changed in the interim, the affordable units are still permitted and the units can be re-established. If the units are not re-established and the ordinance does not change, the units are still permitted. Mr. Bateman commented on situations where affordable housing is established, but the first owner sells it at market rate and it is no longer affordable. Ms. McLean noted that Park City puts deed restrictions on affordable housing to keep that situation from occurring.

In the scenario Commissioner Kenworthy used, Planner Whetstone asked how they could get the hotel to rebuild the affordable units if it was a requirement of the hotel. She asked if the hotel could be closed down because it was no longer compliant with the conditions. Mr. Bateman did not have an answer because that situation has never happened. If he was faced with that question, he would look at the requirements of the ordinance and the permits that were issued. If they are no longer in compliance, the use could be revoked, but it would be a difficult because there is so much that still needs to be dealt with in terms of affordable housing.

Assistant City Attorney McLean asked Mr. Bateman to comment on Planned Unit Developments. Park City has an interesting situation where some PUDs are older, but it is not addressed in the LMC and they are not explicitly required to occur in the State Code. Currently, Park City does not allow PUDs and that form of ownership has to be a condominium. However, they get pushback because condos are harder to finance and people want PUDs. Mr. Bateman stated that he gets the most questions about PUDs, and when that happens it is usually a problem. He explained that the point of a PUD is to allow mixed uses and provides flexibility in development. Mr. Bateman remarked that people have different interpretations of flexibility and that is the primary cause of the questions he gets regarding PUDs. He used a question regarding density that he was asked earlier that day as an example. He had not yet researched the information to answer the question, but the problem is that the PUD itself does not address density and provide guidance. Mr. Bateman stated that in his mind, PUDs require tremendous planning to do them in a way that works. He noted that people and developers love PUDs, but they should expect to have problems. Mr. Bateman noted that the planning responsibility ultimately falls on the Planning Commission because it is their job to plan. If the Planning Commission decides that PUDs are best for Park City, they should put together a PUD ordinance and propose it to the City Council. If they do that, he advised them to plan it carefully to head off controversies about flexibility.

Mr. Bateman stated that the Planning Commission has two roles; the legislative role and the administrative role. City Council are the only legislators that can make law; but the Planning Commission has the important legislative role to plan and create ordinances, to propose changes to ordinances and zoning, and to recommend them to the City Council. Their administrative role is applying applications. Mr. Bateman mentioned an earlier comment about the Commissioners being approached by people in public. If they are talking about a legislative decision, they can talk to the public without issue to hear their opinions and what they want or think about a legislative decision. If it is an administrative decision, they should never discuss it with the public because they do not have all the information or know the answers. Mr. Bateman emphasized that in an administrative decision, the Planning Commission only decides whether or not the application complies with the ordinance.

Mr. Bateman stated that in his experience, the cities that are the best run spend at least half their time on the legislative aspect of their Planning Commission.

Vice-Chair Phillips recalled from the last training that Mr. Bateman had talked about the weight of the General Plan as they apply applications. Mr. Bateman stated that the General Plan is advisory. It has no legal weight. It is important, but the Planning Commission needs flexibility to plan the City without having to change the General Plan every time they make a decision. Mr. Bateman remarked that the Planning Commission should consider the General Plan but they do not have an obligation to follow it. However, they do have an obligation to follow the Ordinances. Ms. McLean clarified that when ordinances are adopted they should refer to the General Plan because the ordinances should reflect the values that were adopted in the General Plan. Mr. Bateman concurred. He recommended that they amend the General Plan when something different is accomplished in an ordinance, because the two documents should match as closely as possible.

Mr. Bateman concluded his training and offered to come back any time.

The Planning Commission adjourned the work session and returned to the Regular Agenda.

DISCUSSION/PUBLIC HEARINGS/ POSSIBLE ACTION

1. Land Management Code (LMC) Amendment – Removing 819 Park Avenue the Park City Historic Sites Inventory (HSI) as codified by LMC Section 15-11-10(D)(2)(dt). (Application PL-18-03777)

Planner Anya Grahn stated that last May changes were made to the LMC to codify the Historic Sites Inventory list, which is a list of all the properties designated as historic in the City. The change to the LMC was that the Historic Preservation Board would review the requests for determinations of significance on whether or not to designate or keep a building designated on the Historic Sites Inventory, and forward their recommendation to the City Council. However, because the HSI has been codified, the Planning Commission also forwards a recommendation to the City Council when the LMC is redlined. Planner Grahn stated that it was primarily a technical review.

Planner Grahn pointed out that this procedure avoids having a repetitive process. The HPB makes their recommendation, the Planning Commission makes their

recommendation, and both recommendations are forwarded to the City Council together. Director Erickson clarified that the Planning Commission was only being asked to change the list to remove 819 Park Avenue. The HPB has the authority to determine whether or not the building is historic and the City Council considers the recommendations.

Vice-Chair Phillips opened the public hearing.

Melissa Barbanell, an attorney representing Ron Whaley, offered one suggestion if the Planning Commission decided to move forward. She was comfortable with the language in the ordinance; but there was language in the HPB Staff report that Mr. Whaley thought would be beneficial and supportive of the conclusion. She thought it might be added as another Whereas in the ordinance. Ms. Barbanell suggested that the language from the original Staff report stating, "The Historic Sites Inventory is weakened by maintaining buildings that no longer meet the criteria for Significant as outlined in LMC 15-11-10(A)(2). She thought it would fit under the third Whereas clause that talks about the City reviews the Land Management Code on a regular basis. Ms. Barbanell believed that the added language would support the decision to remove the site if the Planning Commission chooses that direction.

Planner Grahn was not opposed to adding the Whereas as suggested by Ms. Barbanell. Assistant City Attorney McLean thought it was a fair statement.

Vice-Chair Phillips closed the public hearing.

MOTION: Commissioner Sletten moved to forward a POSITIVE recommendation to the City Council to remove 819 Park Avenue as a Significant Structure from the Park City Historic Sites Inventory as codified in LMC 15-11-10(B)(124) in accordance with the Findings of Fact and Conclusions of Law contained in the draft ordinance and as amended by including the language from the HPB Staff report as read by the applicant's representative. Commissioner Thimm seconded the motion.

VOTE: The motion passed unanimously.

The Park City Planning Commission Meeting adjourned at 6:50 p.m.

Approved by Planning Commission: _____