

EXHIBIT K

**T**ESCH  
LAW OFFICES  
*A Professional Law Corporation*

PARK CITY

314 Main Street, Suite 200  
P.O. Box 3390  
Park City, Utah 84060-3390  
Telephone: (435) 649-0077  
Facsimile: (435) 649-2561

SALT LAKE CITY

Telephone: (801) 363-5111

HEBER CITY

2 South Main Street, Suite 2-D  
Heber City, Utah 84032  
Telephone: (435) 654-1550  
Facsimile: (435) 654-1554

October 2, 2008

VIA EMAIL and Hand Delivery to Park City Municipal Offices

Park City Council  
P.O. Box 1480  
Park City, Utah 84060  
[cerickson@parkcity.org](mailto:cerickson@parkcity.org)  
[jim@parkcity.org](mailto:jim@parkcity.org)  
[jkernan@parkcity.org](mailto:jkernan@parkcity.org)  
[rharlan@parkcity.org](mailto:rharlan@parkcity.org)  
[liza@parkcity.org](mailto:liza@parkcity.org)  
[mark@parkcity.org](mailto:mark@parkcity.org)  
[brooks@parkcity.org](mailto:brooks@parkcity.org)  
[dsmith@taliskermountain.com](mailto:dsmith@taliskermountain.com)  
[rivie@parkcity.org](mailto:rivie@parkcity.org)

Re: *Marsac Affordable Housing Development Proposed Use of  
Ontario Court Private Driveway*

Dear Park City Council Members,

This letter introduces us as legal counsel for Jamie Thomas representing the Ontario Court Driveway Association (“Driveway Association”). It is our understanding that the Marsac Affordable Housing Development (“Marsac Development”) has proposed to use the Ontario Court Driveway (“Private Driveway” hereinafter) for emergency vehicle access to platted Marsac Avenue. Specifically, in the Planning Commission’s review pursuant to the Land Management Code (15-1-10) standards of review, the Planning Commission concluded that the Marsac Development had “no unmitigated impacts” for emergency vehicle access since an additional “emergency vehicle access” was proposed and located at the north end of the site through Private Driveway, a private driveway. *See Planning Commission Staff Report dated July 9, 2008 at the Land Management Code (15-1-10) Standard of Review Section, p. 311*, attached hereto as Exhibit A. In addition, the Planning Commission concluded that the Marsac Development proposed “emergency access and trail to the north of its property would provide access to [the Private Driveway]” as evidence to support that the proposed development met the the “adequate internal vehicular and pedestrian/ bicycle circulation” requirements. *See id* at 308.

In its Staff Report, the Planning Commission mischaracterizes the Private Driveway as “a private street with an easement for emergency vehicles.” *See id.* at 311. Based upon our review of the relevant easements agreements, dedications, and plats and corresponding case law, we conclude that the Private Driveway is **not** “a private street with an easement for emergency vehicles” but is a private driveway that has not been dedicated or established for public use.

The Private Driveway is located within the Block 52 Replat. The Block 52 Replat (Lot Line Adjustment) was recorded on October 29, 2002. The Block 52 Replat was recorded simultaneously with the Declaration of Easements and Restrictive Covenants for the Ontario Driveway Association (the “Declaration”). This Declaration was approved by Park City. The Ontario Driveway Association was formed by lot owners within Block 52 and Block 60 (“Association” hereinafter) and established in order to maintain and improve the Private Driveway that was located on the Block 52 Replat. *See Block 52 Replat*, recorded on October 29, 2002 as Entry No. 636341 attached hereto as Exhibit B; *see Declaration of Easements and Restrictive Covenants Articles of Incorporation of Ontario Court Driveway Association (“Declaration of Easement”)*, recorded on October 29, 2002 as Entry No. 636342, attached hereto as Exhibit C.

These documents, the Block 52 Replat and Declaration of Easements for the Ontario Court Driveway, describe and provide the rights of access and use of the Private Driveway. The Private Driveway was established as a thirty foot wide private driveway, public trail, and utility easement. *See Declaration of Easements and Restrictive Covenants (“Declaration of Easement”)*, recorded on October 29, 2002 as Entry No. 636342. The Driveway was established as a “private driveway for the exclusive use” of the lot owners and their guests as specified in the Declaration of Easement. The Private Driveway was subject to “a non-exclusive utility easement on, over, across, under and through [the Driveway] **for the benefit of each of the [lot owners/ members of the Association] which non-exclusive utility easement shall entitle the owner of each to install, construct, maintain, repair and replace from time to time underground utility lines for the benefit of [Lots 3 and 4 of the IVERS’ REPLAT, Block 52-Parcel A, Block 52 Lot 1, Block 52-Lot2, Block 52-Lot 3].**” *See Declaration of Easements at 2*, attached hereto as Exhibit C. The Association has and continues to maintain the Private Driveway at the Association’s expense.

The “30’ Wide **Private** Utility and Driveway, Public Trail and **Non-Exclusive Public Utility Easement**” was intended to remain a private driveway, as noted in the Block 52 Replat, that was subject to a non-exclusive utility easement **for the benefit of the members of the Association**, as noted in the Declaration of Easements. *See id;* *see also Block 52 Replat*. Indeed, the Block 52 Replat even describes the thirty foot easement as a “**Private** Utility & Driveway, Public Trail, and Non-Exclusive Public Utility Easement.” *See Note 2 of the Block 52 Replat*. There is an easement, however, over the utility easement that is open for “public trail access to the existing rail spur that runs south of the existing Ontario Avenue via the Private Driveway.” However, the Private Driveway remains a “private utility and driveway” **as specified** on the plat. *Id.*

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No other access has been granted to the public.<sup>1</sup> See generally, *Kohler v. Martin*, 916 P.2d 910 (Ut. App. 1996)(discussing the elements required to establish a public thoroughfare). The Park City Council approved, acknowledged, and accepted the notes and descriptions of the Block 52 Replat on August 22, 2002, including the thirty foot wide Private Driveway.

Accordingly, the Park City Planning Commission Staff Report dated July 9, 2008 regarding the Marsac Avenue Affordable Housing development incorrectly states that the Driveway is “a private street with an easement for emergency vehicles.” The Driveway remains a private way for the exclusive use of the owners as specified in the Declaration of Easement and Block 52 Replat. Any landowners who are not members of the Driveway Association may not use the Private Driveway as an emergency access or otherwise without first obtaining access rights from the Association.<sup>2</sup>

Most importantly the Marsac Avenue Affordable Housing Project has no right to claim Fire Department access over this private driveway as a means of it establishing the required fire protection access; and, Park City, no matter how anxious it may be to promote affordable housing, has no right without first using its power of eminent domain, to legitimize Applicant’s attempt to use a private driveway belonging to adjacent land owners as its access for fire protection. Private property rights must be respected.

Let me be frank. This is a private driveway, no more. Like the driveway to your home. Do you think a neighboring proposed subdivision could claim fire protection access over your driveway?

To date, the Marsac Development has not obtained access rights from the Association to utilize the Private Driveway as an “emergency vehicle” access or otherwise and the Marsac Development is without authority to use the Private Driveway as an “emergency vehicle access” or any other type of access until such rights have been granted.

Lastly, my client objects to fatally defective failure of notice and violation of a timeline in the following respects: The morphing of this project was so drastic and the movement of the proposed residences to the north was so significant that new notices should have been given to my client; a two stage subdivision process, under these facts,

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<sup>1</sup> The “Owner’s Dedication” on the Block 52 Replat notes that the owners irrevocably offered dedication to Park City the streets, land for local government uses, easements, parks, etc.. We interpret this dedication to be limited to the public easements and public trails as shown on the plat and does not extend to the private driveway that was intended to remain a private way for the lot owners. See *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1099 (Utah 1995)(holding that the “law does not lightly allow the transfer of property from private to public use” and requires proof of dedication by clear and convincing evidence). In addition, the “Owner’s Dedication” notes that the dedication to the County, Snyderville Basin Water Reclamation District and Park City Fire Protection District has a “non-exclusive easement over the utility easements... for the **purpose of providing for utility installation, use, and eventual replacement.**” We can find no language which would expand this very limited utility only dedication.

<sup>2</sup> Any claim that fire protection access can be based upon Park City’s right to cross private property in an emergency must be summarily rejected. If this proposition had merit, then no development anywhere would be required to demonstrate that it provides adequate access for fire protection.

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should not have been combined into one stage; there should have been a 14 day period between the completed subdivision application and Planning Commission approval (but only 13 days lapsed here 8/28 to 9/10).

Thank you for your consideration of all of these issues.

Sincerely,  
TESCH LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read "Joseph E. Tesch", written over a faint, illegible stamp or background.

Joseph E. Tesch  
Stephanie K. Matsumura

# EXHIBIT A