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From: Charles Stormont <cstormont@fabianvancott.com>
Sent: Friday, July 22, 2016 6:29 PM
To: Treasure Comments
Cc: Brian Van Hecke
Subject: Treasure Hill Condition Use Application
Attachments: 2016.07.22 THINC Comments to Planning Commission.pdf

Attached please find correspondence that THINC requests be included with the public comments relating to PL-08-00370, Treasure Hill Conditional Use Application, Creole Gulch and Town Lift Mid-station Sites. Please let me know if you have any difficulty opening the attached file. Thank you.

Regard, Charles

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July 22, 2016

Via Electronic Mail: treasure.comments@parkcity.org

Park City Planning Commission
PO Box 1480
Park City UT, 84060

Re: Treasure Hill Conditional Use Permit Application

Dear Members of the Park City Planning Commission:

I write on behalf of THINC, Inc., a non-profit organization comprised of hundreds of Park City residents, business owners, and home owners. This letter is intended to supplement my public comments at the July 13, 2016 meeting of the Planning Commission with respect to Project Number PL-08-00370, Treasure Hill Conditional Use Permit Application, Creole Gulch and Town Lift Mid-station Sites.

First, as mentioned during my public comments, THINC has concerns that treatment of the 1986 Sweeney Properties Master Plan ("SPMP") as a valid, continuing approved Master Planned Development is error. Although Jody K. Burnett has provided an advisory opinion letter with respect to this subject, we note that this opinion was provided on April 22, 2009, which was more than seven years ago. While Mr. Burnett concludes that "[i]n light of the extensive materials that have been submitted in support of the application for this final phase of the Project, together with the numerous meetings with the Planning Commission and continuing dialog with staff since that time, one would be hard pressed to argue they have not proceeded with reasonable diligence under these particular facts and circumstances," THINC respectfully suggests that the facts and circumstances support a different conclusion.

For example, the SPMP notes that "[t]he build-out of the entire Master Plan is expected to take somewhere between 15-20 years." It goes on to note that "a detailed time line has been developed as an attachment to the MPD approval documents." Further, it states that "[w]hile some flexibility is built-into the approved Master Plan, any period of inactivity in excess of two years would be cause for Planning Commission to consider terminating the approval." It goes without saying that the originally contemplated phasing of the project has been exceeded by at least a decade, and the detailed timeline that was part of the MPD approval documents has not been followed. Any claim of reasonable diligence must be evaluated in that context. While Mr. Burnett evaluated the issue in 2009, the additional seven years that have passed raise serious questions about whether a valid claim of reasonable diligence can still be made today.

By way of further example, the Park City Planning Commission's website (http://www.parkcity.org/how-do-i/treasure-conditional-use-application) states the following:

> During the April 26, 2006 Planning Commission meeting, staff outlined additional application requirements which were required to be submitted by the applicant as part of the revised plans in order to continue the full analysis of the proposed development. A complete set of revised plans were received by staff by October 1, 2008.

Thus, more than two years passed from the Planning Commission's request of the applicant and the applicant's submission of revised plans. According to the SPMP, this period of inactivity provides "cause for Planning Commission to consider terminating the approval."

Similarly, the Planning Commission website notes that from 2010 to 2014 "the City Council decided to proactively engage the applicant to explore additional alternatives and negotiate as a buyer" but that these discussions concluded "without a solution." During that time, it appears no efforts were made with respect to the SPMP or the conditional use application, again demonstrating a period of significant inactivity. While THINC understands that the applicant may claim it's efforts during that period can somehow demonstrate that they were still acting in a diligent manner, the nature and extent of discussions during that period have largely been treated confidentially by the City and the applicant. As such, any claim of diligence rings hollow based on the information that is publicly available at this time, and creates serious doubts about the applicant's ability to demonstrate reasonable diligence during that period. If there is additional information that might lead to a different conclusion, it should be made available to the public for evaluation. Without such information, any grant of the current conditional use application based on the premise that the SPMP is still valid will not be supported by substantial evidence. As such, and based on the information currently available, THINC believes that the conditional use application should be denied because there is not a valid MPD. Of course, this issue becomes somewhat moot should the Planning Commission deny the application for any of the many additional reasons that exist for denial, but we note our concerns because any density approved should be based upon a valid MPD, not one granted 30 years ago that has lapsed according to its own terms.[1]

However, to the extent the Planning Commission may treat the SPMP as a continuing, valid MPD, there are numerous reasons why the current application should be denied. The applicant's presentation at the July, 13, 2013 meeting and their July 6, 2013 letter submitted in

[1] THINC understands that Mr. Burnett has suggested that the applicant may have a quasi-contractual claim relating to the SPMP. THINC would respectfully suggest that the applicant's lack of diligence in the face of the terms of the SPMP would make any claims of reliance unreasonable. As the Utah Supreme Court has stated, "[a] development approval does not create independent free-floating vested property rights – the rights obtained by the submission and later approval of a development plan ***are necessarily conditioned upon compliance with the approved plan***." *Keith v. Mountain Resorts Development*, LLC, 2014 UT 32, ¶ 31, 337 P.3d 213 (emphasis added). As set forth below, THINC believes the applicant has failed to meet the conditions of approval in numerous respects, and thus, to the extent they have any valid, continuing rights, their attempts to exceed those rights should not be permitted.

response to a draft Planning Commission Staff Report rely heavily on the proposition that the applicant is entitled to review of its application under the 2003 Land Management Code. On that basis, the applicant claims it is entitled to considerable amounts of additional density.[2] If the conditional use application filed in 2004 is deemed to still be valid despite the inactivity described above, the applicant would be correct that the process set forth in the 2003 LMC controls, but that process is not an appropriate mechanism by which to expand upon and increase any rights claimed through the SPMP. Rather, such a vast expansion of the density and concept involved requires that the MDP Modification process set forth in both the 2003 and current LMC § 15-6-4(I) be followed.

Indeed, the applicant's efforts to expand upon the density provided for in the SPMP is directly contrary to the express limitations set forth in the SPMP. As the December 18, 1985 Revised Staff Report states on page 3, the SPMP was expressly "predicated upon the following terms and conditions" and the applicant was "bound by and obligated for the performance of the following:"

- "At the time of conditional use or subdivision review, the staff and Planning Commission shall review projects for compliance with the adopted codes and ordinances in effect at the time, ***in addition to ensuring conformance with the approved Master Plan***." (emphasis added)

- "The approved densities are those attached as an Exhibit, ***and shall be limited to the maximums identified thereon.***" (emphasis added)

The applicant has claimed that the review "for compliance with the adopted codes and ordinances in effect at the time" of their application permits their efforts to expand the SPMP by hundreds of thousands of square feet. Yet the applicant ignores the latter part of the sentence on which it relies, which requires that it shall also "conform[] with the approved Master Plan." That limitation requires compliance with ***both*** the 2003 LMC and the approved Master Plan, not one or the other. As such, the applicant's efforts to expand density violate the limited maximum densities "attached as an Exhibit" to the SPMP.

The applicant's July 6, 2016 letter goes on to claim that the 2003 LMC somehow establishes a "baseline for allowable square footage and floor area" and that "this additional square footage and floor area is vested space." THINC struggles with the idea that a 1986 MPD approval could somehow result in vested rights based upon uncertain future events. THINC would argue that the vested rights doctrine is about protecting a landowner's existing rights, not

[2] Indeed, the applicant's July 6, 2016 letter argues that "MPE was permitted to 'take advantage of changes in zoning that would permit greater density or more intense use of land,'" citing § 1.22 of the 1985 LMC. In short, the applicant concedes that it is seeking greater density and more intense use of land than the SPMP provides, which is a significant concession as discussed herein. But to the extent the applicant attempts to rely on § 1.22 of the 1985 LMC, that provision relates to changes in zoning that occur while the MPD application is pending, not changes that occur after it has been granted. Once granted, compliance with the terms of the MPD is required as noted in the *Keith* decision, and any efforts at expansion must follow the MPD Modification process.

about expanding and creating rights that have never actually been approved. *See Keith*, 2014 UT 32, ¶¶ 30-31. It was suggested by the applicant at the July 13, 2016 Planning Commission meeting that if the City Council had not intended the expansion of square footage and floor area it claims the 2003 LMC provides to apply to the SPMP, the City Council should have said so, but did not. This, of course, ignores that the SPMP states that "[t]he approved densities are those attached as an Exhibit, ***and shall be limited to the maximums identified thereon***." There was no need for the City Council to again state that the SPMP was limited; it had already clearly said so when it approved the SPMP in 1986.

The applicant's erroneous claims with respect to rights to additional square footage and floor space are highlighted in several portions of its July 6, 2016 letter. For example, the applicant claims that "the 2003 LMC provides additional square footage—over and above square footage for UEs—for Support Commercial and Meeting Space uses." It goes on to claim that it is entitled to up to 5% of additional floor area without the use of UEs for commercial space for each of Support Commercial and Meeting Space. However, the limits of the SPMP are ignored. As Mr. Burnett's opinion states:

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

Thus, the applicant's efforts to claim 5% for each of "Support Commercial" and "Meeting Space" without the use of unit equivalents results in a doubling of that which the 1985 LMC permitted in violation of the maximum density limitations set forth in the SPMP. The problem is potentially exacerbated by the fact that the 1985 LMC only permitted 5% of total floor area without use of UEs for hotels, unlike Section 15-6-8(C) of the 2003 LMC, which permits them for "Hotel or Nightly Rental Condominium project[s]." It is unclear if the additional space sought by the applicant is for a hotel project or a nightly rental condominium project; to the extent it is the latter, it would be an additional violation of the density limitations set forth in the SPMP.

By way of additional example, the applicant's effort to obtain 216,027 above-grade and 96,484 below-grade square feet for Residential Accessory Uses and Resort Accessory Uses based upon the 2003 LMC once again fails to take into account the limits set forth in the SPMP. These concepts did not exist in the 1985 LMC, and thus the applicant's efforts are contrary to Mr. Burnett's opinion that "historical vested rights ha[ve] to be viewed in the context of the land

use regulations which were in place at the time the vesting occurred as a result of the original MPD approval." Section 10.12 of the 1985 LMC is much more restrictive than the 2003 LMC, providing that only "circulation spaces including lobbies ***outside of units***, including lobby areas, do not count as floor area of the unit, or as commercial unit equivalents" (emphasis added). The applicant would have space that the 1985 LMC said must be outside of units expanded to include "ski/equipment lockers, lobbies, concierge, mechanical rooms, laundry facilities, back-of-house uses, elevators and stairs, and employee facilities" as well as "administration, maintenance and storage, public restrooms, ski school/day care facilities, ticket sales, equipment check, and circulation and hallways." The fact that the 1985 and 2003 LMCs both use "circulation" in their identification of spaces highlights what a vast expansion the applicant's seeks over the limits of the 1985 LMC and the SPMP.

Each of these admitted efforts to expand square footage and density by the applicant results in larger buildings, additional massing, the need for significant excavation, grading, and retaining walls that were never considered as part of the SPMP approval, more traffic, limitations on open space, impacts on environmentally sensitive land, and so on. Given that none of the requested density is vested in light of the limitations with respect to density clearly set forth in the SPMP, each of these impacts must be fully mitigated. THINC would suggest that the applicant's failure to address how it will mitigate such impacts, and instead claiming that such additional density is vested, highlights that the applicant cannot mitigate these additional impacts. It also reinforces that the changes to the SPMP that the applicant seeks are improper for a conditional use application, and should instead be evaluated as an MPD Modification.

THINC appreciates the thorough work that the Planning Commission and its staff have already dedicated to the review of this conditional use application. THINC believes that a careful review of the law and the facts that apply to the pending application make it clear that the application fails to meet applicable standards in numerous regards. The applicant concedes that it seeks to exceed the maximum density provided for in the SPMP, but ignores that it must conform with the SPMP according to its terms. As such, the application should be denied. We look forward to a continuing dialogue on each of the items that must be reviewed as part of a conditional use application. THINC has numerous additional concerns relating to the application's consistency with the General Plan, conformance with Historic District Design Guidelines, impacts of the proposed commercial uses on surrounding commercial uses, height limitations, traffic, and soil contamination and its effects on Park City's water supply. Additional concerns are likely to come to light as we continue through this process, and we are grateful for the opportunity to voice our concerns.

Very truly yours,
FABIAN VANCOTT

Charles A. Stormont

cc: Brian Van Hecke