



DATE: July 6, 2016

SUBJECT: Treasure Hill Properties' Compliance with Square Footage Limitations and Requirements

1. Introduction.

The following memorandum demonstrates how the Conditional Use Permit Application ("CUP Application") for the Treasure Hill Properties, which is currently pending before the Park City Planning Commission, complies with the provisions of the applicable Land Management Code ("LMC") relating to unit equivalents ("UE") and additional allowed square footage. The memorandum also addresses how the current CUP Application is consistent not only with the express terms of the 1985 Master Planned Development ("MPD") approval ("MPD Approval"), but also with the expectations of the parties to the 1985 MPD.

This memorandum does not address in detail all of the numerous issues raised in the draft staff report of the Planning Department,¹ which covers a variety of issues beyond those identified by the Planning Commission at the hearing on June 8, 2016. MPE, Inc.,² objects to the staff's attempt to preemptively address issues beyond those that the Planning Commission directed MPE to address at the July 13, 2016, CUP hearing. In footnotes throughout the memorandum, MPE has identified some of the issues addressed by the draft staff report that are beyond the scope of the hearing scheduled for July 13, 2016, and provided a brief response. MPE intends to address each of these issues in a more substantive fashion when the Planning Commission directs MPE to do so, consistent with the applicant's due process rights.

2. The Fiftieth Edition of Park City's Land Management Code Applies to the CUP Application.

Utah law provides that MPE is entitled to substantive review of its CUP Application under the LMC in effect at the time the Application was submitted, which is the Fiftieth Edition of the LMC revised on July 10, 2003 ("2003 LMC"). *See* Utah Code Ann. § 10-9a-509(1)(a)(i)

¹ The Planning Department shared a draft of its staff report with MPE on July 1, 2016. This memorandum references certain statements contained in the draft report. Since the final staff report may be different from the draft report, it is possible the final report may not contain the referenced passages.

² The draft staff report continues to erroneously refer to the applicant as "Sweeney Land Company and Park City II, LLC." MPE, Inc., is the applicant. Additionally, the CUP Application was submitted January 26, 2004, not January 13.

“An applicant who has filed a complete land use application . . . is entitled to substantive land use review of the land use application under the land use laws in effect on the date that the application is complete”). Indeed, the MPD Approval recognized that “[a]t the time of conditional use . . . review, the staff and Planning Commission shall review projects for compliance with the adopted codes and ordinances in effect at the time.” (MPD Revised Staff Report at 3.) The LMC in effect at the time of the MPD Approval (the “1985 LMC”) also provided that MPE was permitted to “take advantage of changes in zoning that would permit greater density or more intense use of the land,” further providing that the later CUP Application would be evaluated under the LMC in effect when MPE submitted its CUP Application in 2004. 1985 LMC § 1.22.

Before MPE initiated preparation of its current CUP Application, it sought confirmation from the Park City Attorney that the LMC in effect when MPE submitted the CUP Application would govern the City’s review of the Application, including its calculations of allowable square footage and floor areas. In a letter dated August 25, 1999, Mark Harrington, the City Attorney, confirmed to MPE that “[s]quare footage and floor areas for the Unit Equivalents (UEs) are calculated as provided in the Land Management Code and Uniform Building Code adopted by Park City, *at the time of application.*” (emphasis added).

Over the course of the next several years, MPE expended millions of dollars preparing its current CUP Application in reliance on Park City’s confirmation that square footage and floor area calculations would be governed by the LMC in effect at the time of the CUP Application—the 2003 LMC.³ MPE has invested enormous amounts of time and money since the CUP Application was first submitted to revise the plans and submission, all in reliance on Park City’s confirmation that square footage and floor area calculations are governed by the 2003 LMC.⁴

³ The Planning Department’s draft staff report suggests that the square footage and floor area calculations are governed by something other than the 2003 LMC, such as the LMC in effect when the original MPD was approved—the 1985 LMC. Even though the draft staff report’s interpretation of the 1985 LMC is erroneous in several respects, it is not applicable in any event. Notably, the Planning Department staff acknowledged that square footage and floor area calculations were governed by the 2003 LMC in numerous reports submitted to the Planning Commission in 2004. (*See, e.g.*, Staff Reports, dated April 14, 2004, May 26, 2004, July 14, 2004, August 11, 2004, and August 25, 2004.) Staff provides no explanation for its change in position.

⁴ MPE and its representatives, including its principals, architects, land planners, engineers, and attorneys, have spent tens of thousands of hours, and MPE and its principals have incurred well in excess of \$2 million in fees and expenses, in connection with their design efforts, preparation of the Application, and pursuit of MPE’s development rights as granted in the MPD Approval.

MPE has relied on the City’s representations that the 2003 LMC would apply to the CUP Application, including with respect to its calculations of the square footage and floor area permitted by the vested UEs. Had MPE used the square footage and floor area calculations permitted by the 1985 LMC, it could have potentially requested significantly more square footage and floor area. For example, under § 10.12 of the 1985 LMC, a 15,000 square foot

3. The Square Footage and Floor Area Requested in the CUP Application Is Permitted under the 2003 LMC.

Density for the MPD known as the Treasure Hill Project (the “Project”) was approved by the Park City Planning Commission on December 19, 1985, and then approved by the Park City Council on October 16, 1986. The MPD vested the applicant with certain densities for residential and commercial space. The Project is entitled to 197 residential UEs and 19 commercial UEs between the two development areas under the MPD.

Under the provisions of the 2003 LMC, these UEs establish the baseline for allowable square footage and floor area calculations for the Project. *The 2003 LMC contains a number of important provisions relating to additional allowable square footage and floor areas over and above this baseline.*⁵ As noted below, this additional square footage and floor area is vested space.

The draft staff report includes a number of incorrect statements regarding the 1985 MPD.⁶

3.1 The CUP Application’s Square Footage for Residential and Allotted Commercial Uses Complies with the 2003 LMC.

First, the 2003 LMC provides the square footage permitted for each UE. One residential UE equates to 2,000 net square feet, and one commercial UE equates to 1,000 net square feet. 2003 LMC § 15-6-8(A), (E). As such, the Project is entitled to 394,000 net square feet in residential space and 19,000 net square feet in allotted commercial space.

As set forth on [Sheet P.16 – Area, Unit Equivalent & Parking Calculations](#) of MPE’s submittals, MPE’s Application seeks 393,911 in net residential square footage, which is less than vested residential square footage permitted under the MPD. Likewise, MPE’s Application

condominium only counted as 1.5 UEs; under the 2003 LMC, that same condominium counts as 7.5 UEs.

⁵ The draft staff report discusses at length differences between the 2004 submission and the current version of the submission. The 2004 submission has been superseded by the current revision, and any differences are legally immaterial to the question of whether the current submission under consideration complies with the 2003 LMC and is therefore entitled to approval. Per the letter from Geoffrey Mangum, one of MPE’s attorneys, to Park City Attorney, Mark Harrington, dated July 6, 2016, MPE will address these issues, among others, in subsequent written submissions and at future CUP hearings, as directed by the Planning Commission and consistent with MPE’s due process rights.

⁶ For example, the report concludes that “[t]he total square footage of the project is larger than originally anticipated within the master plan approval.” That is incorrect.

requests 18,863 in allotted net commercial square footage, which is less than the allotted commercial square footage allowed under the MPD.⁷

3.2 The CUP Application’s Square Footage for Support Commercial and Meeting Space Complies with the 2003 LMC.

Next, the 2003 LMC provides additional square footage—over and above square footage for UEs—for Support Commercial and Meeting Space uses.⁸ This too is vested space under applicable legal doctrines.⁹

Section 15-6-8(C)–(Support Commercial) provides that “within a Hotel or Nightly rental Condominium project, up to five percent (5%) of the total floor Area may be dedicated to support Commercial Uses . . . *without the Use of a Unit Equivalent for commercial space.*”¹⁰ (emphasis added).

Similarly, section 15-6-8(D) (Meeting Space) provides that “[w]ithin a Hotel or Condominium Project, up to five percent (5%) of the total floor Area may be dedicated for meeting room space without the use of Unit Equivalents. . . . Accessory meeting Uses, such as back of house, administrative Uses, and banquet offices, are Uses normally associated and necessary to serve meeting and banquet spaces. *These accessory meeting Uses do not require the use of Unit Equivalents.*” (emphasis added).

In order to calculate the additional square footage allowed for Support Commercial and Meeting Space uses, the total floor area of the Project must be determined. Section 15-15-1.91 defines “Gross Floor Area” to include the “Area of a building, including all enclosed Areas designed for human occupation. Unenclosed porches, Balconies, patios and decks, vent shafts

⁷ As explained further below, in 2009, MPE informed the Planning Department that it was eliminating the mine exhibit from its proposal, which accounted for 1,393 square feet of allotted commercial space, in addition to the support commercial space described below. As a result, MPE’s Application only seeks 17,470 net square feet in allotted commercial space.

⁸ The draft staff report claims that “[t]he applicant utilized the 2008/2009 LMC to calculate the support commercial area and meeting space within the development.” That too is incorrect.

⁹ See, e.g., *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah 1980).

¹⁰ Without explanation or justification, the Planning Department’s draft staff report takes the position that the Project is not entitled to any square footage for Support Commercial uses and that the Project is limited to the commercial UEs set forth in the MPD. Not only is this position contrary to (1) the law, (2) the MPD Approval, (3) the prior representations of the Park City Attorney, and (4) the positions taken in numerous previous staff reports, it is also contrary to the LMC in effect when the MPD was approved in 1985. Staff’s claim that “[a]ny additional support commercial and meeting space areas above the 19 UEs must be in compliance with the LMC at the time of the MPD vesting” is a manifestly incorrect statement of the law on several accounts. The staff errs when it suggests that the Project is not entitled to any square footage for Support Commercial uses in addition to the square footage for allotted commercial UEs.

and courts are not calculated in Gross Floor Area. . . . Basement Areas below Final Grade are not considered Floor Area.”

Applying this definition of Gross Floor Area to the CUP Application, [Sheet P.16 – Area, Unit Equivalent & Parking Calculations](#) calculates the Application’s Gross Floor Area as 682,001 square feet.

As the Planning Department previously pointed out (and as draft staff report repeats), in order to calculate the additional square footage allowed for Support Commercial and Meeting Space under the 2003 LMC, those spaces must be removed from the Gross Floor Area before the calculation is made.¹¹ Removing that square footage from the Gross Floor Area calculation—33,412 for Support Commercial and 16,127 for Meeting Space—yields a total of 632,462 square feet of Gross Floor Area ($682,001 - 49,539 = 632,462$).

Thus, under the 2003 LMC, the Project is entitled to 31,623.1 square feet in Support Commercial uses and 31,623.1 square feet in Meeting Space uses.

Although [Sheet P.16 – Area, Unit Equivalent & Parking Calculations](#) indicates that the CUP Application seeks 33,412 square feet in Support Commercial space, in 2009, MPE informed the Planning Department that it intended to eliminate the mine exhibit from the proposal (Building 5.C), which accounts for 6,686 square feet of Support Commercial space. The elimination of this space from the proposal puts the Support Commercial uses requested under the Application at 26,726 square feet, which represents 4.2% of the Gross Floor Area—less than the 5% allowed under the 2003 LMC.

Similarly, the CUP Application seeks 16,127 square feet in Meeting Space uses, which represents approximately 2.5% of the Gross Floor Area—again, well under the 5% allowed by the 2003 LMC.

Furthermore, all of the floor area requested in the CUP Application qualifies as Support Commercial and Meeting Space uses, respectively. For example, MPE has identified the possible Support Commercial uses as a restaurant, bar, clothing store, coffee shop, sporting goods store, convenience store, lounge, and deli. Likewise, the Meeting Space uses identified in the Application, both the meeting space itself and associated back-of-house and administrative uses (e.g., “banquet prep”), qualify under the 2003 LMC. See [P.1-P.5 – Level Use Plans](#).

¹¹ [Sheet P.16 – Area, Unit Equivalent & Parking Calculations](#) contains a minor error on this point—it fails to deduct the square footage for Support Commercial and Meeting Space uses from the Gross Floor Area total before calculating the additional 5% square footage allowed for Support Commercial and Meeting Space uses. However, as set forth herein, MPE is aware of the error and has already proposed revisions to the Application to correct for it.

3.3 The CUP Application’s Square Footage for Residential Accessory and Resort Accessory Uses Complies with the 2003 LMC.

The 2003 LMC also provides for square footage and floor area for Residential Accessory and Resort Accessory uses over and above the area allowed for UEs. Again, the Project is legally entitled to this vested space.

Section 15-6-8(F) states that “Residential Accessory Uses” include uses that are for the benefit of the residents of a commercial residential use and *do not require the use of UEs*. Such residential accessory uses include, but are not limited to, ski/equipment lockers, lobbies, concierge, mechanical rooms, laundry facilities, back-of-house uses, elevators and stairs, and employee facilities.

Similarly, section 15-6-8(G) provides that “Resort Accessory Uses,” which also “*do not require the use of a Unit Equivalent*,” are “incidental to and customarily found in connection with . . . the principal resort Use,” and include uses such as administration, maintenance and storage, public restrooms, ski school/day care facilities, ticket sales, equipment check, and circulation and hallways.

The CUP Application includes 216,027 square feet of Residential Accessory and Resort Accessory uses above grade, as well as 93,484 square feet below grade.¹² All of these uses qualify under the 2003 LMC as accessory uses that do not require UEs. For example, the CUP Application includes the following uses under these categories: circulation (e.g., pedestrian tunnels and hallways); back-of-house uses (e.g., service tunnels, receiving); maintenance and storage (e.g., service tunnels, storage space); lobbies; ticket sales (e.g., lift ticket area); employee facilities (e.g., lockers); public restrooms; elevators and stairways; ski storage; laundry facilities; and hotel offices. See [P.1-P.5 – Level Use Plans](#).¹³

3.4 The CUP Application’s Square Footage for Parking Complies with the 2003 LMC and MPD Approval.

Although this issue will be addressed more fully in subsequent written submissions and at future CUP hearings, MPE notes at this time that (1) its Application seeks far less parking space than allowed under the 2003 LMC, (2) its Application requests less parking space than what was contemplated in the MPD Approval, and (3) the vast majority of the square footage devoted to parking is below grade.

¹² The square footage for Residential Accessory and Resort Accessory uses are identified on [Sheet P.16 – Area, Unit Equivalent & Parking Calculations](#) under the headings “Common Space & Circulation” and “Accessory Space.”

As explained above, square footage and floor areas below final grade are not counted as part of the Gross Floor Area. 2003 LMC § 15-15-1.91.

¹³ Accessory space in [Sheet P.16 – Area, Unit Equivalent & Parking Calculations](#) includes square footage for employee housing (6,669 square feet).

4. The CUP Application Complies with the Applicable Open Space Requirements.

MPE agrees with the draft staff report that the CUP Application “complies with the open space requirements identified in the” MPD Approval. Indeed, the CUP Application fully complies with the open space requirements of the MPD Approval and 2003 LMC.

5. Conclusion.

The CUP Application complies with the provisions of the 2003 LMC, under which it is vested, with respect to allowed square footage, floor area, and open space.

BJM: