



DATE: October 7, 2016

SUBJECT: Treasure Hill Properties' Square Footage and Volume Are Allowed and Appropriate under the Applicable Standards and Criteria

1. Background.

The Planning Commission Staff Report dated July 13, 2016, recites the applicable background of the Sweeney Properties Master Plan ("SPMP") and current Conditional Use Permit ("CUP") Application. (*See* p. 1-2.)

In April 2016, the Applicant, MPE, Inc., requested that the Planning Commission place its CUP Application for the development of the Hillside Properties back on the Commission's agenda and to review the Application for compliance with the applicable Land Management Code ("LMC") and SPMP Approval. The Planning Commission held public hearings on the CUP Application on June 8, July 13, August 10, and September 14, 2016.

The topics that the Planning Commission directed Staff and MPE to address at these past hearings and at the hearing scheduled for October 12 address portions of several criteria under the Conditional Use Review Process set forth in the applicable 2003 LMC,¹ and in particular address the following criteria:

8. Building mass, bulk, and orientation, and the location of Buildings on the Site; including orientation to Buildings on adjoining Lots;
11. Physical design and Compatibility with surrounding Structures in mass, scale, style, design, and architectural detailing; and
15. Within and adjoining the Site, impacts on Environmentally Sensitive Lands, Slope retention, and appropriateness of the proposed Structure to the topography of the Site.

The topics also touch upon several of the CUP Standards for Review, including, in particular:

¹ Staff and MPE agree that the Fiftieth Edition of the LMC revised on July 10, 2003 ("2003 LMC") applies to the CUP Application.

2. the Use will be Compatible with surrounding Structures in Use, scale, mass and circulation; and
4. the effects of any differences in Use or scale have been mitigated through careful planning.

The topics that MPE has discussed with the Planning Commission during the previous hearings in 2016 have also included several of the conditions of the SPMP Approval, including the building height and building envelope limits established by the SPMP Approval.

The CUP Application satisfies the CUP Standards for Review, each of the criteria set forth in the 2003 LMC, and the associated conditions of the SPMP Approval, including the criteria, standards, and conditions covered by the issues addressed during the prior hearings.

Because “[a] conditional use shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use,” and because the CUP Application conforms to the conditions of the SPMP Approval and proposes additional mitigating factors to address the impacts of square footage and volume, the Planning Commission should conclude that the CUP Application meets the criteria, standards, and conditions relating to these issues. Utah Code § 10-9a-507(2)(a).

2. The CUP Application Complies with the SPMP and the CUP Criteria and Standards for Review Relating to Square Footage, Mass, and Volume.

As the Applicant has demonstrated during the prior hearings and in prior submissions, the CUP Application complies with all SPMP conditions and all CUP Criteria and Standards for Review touching upon square footage, mass, and volume issues. The Applicant has likewise demonstrated, and will emphasize again at the October 12, 2016 hearing, how it has reasonably mitigated any effects of the square footage, mass, and volume of the proposed project. The Applicant developed these mitigation measures in collaboration with and at the direction of the Planning Commission and Staff during earlier phases of the application process.

2.1 The Planning Commission Should Honor the Directions It Has Given to the Applicant in the Past.

The Applicant is deeply troubled by statements from current Commissioners that they do not care what the Planning Commission or former Commissioners may have said or done with respect to the current Application in prior phases and that the current Commissioners do not feel constrained by any direction the Planning Commission has given in the past. The Applicant reminds the Planning Commission that it is a continuously existing public board and that while the individuals appointed to the Commission may change, the Planning Commission itself is the same entity. The Applicant is entitled to rely upon directives from the Planning Commission regardless of who comprises it.

Statements to the effect that the Planning Commission is free to contradict any direction and instructions that it gave to the Applicant during earlier phases not only raises serious due process concerns, it erodes the public’s confidence in the process. The public and those who come before the Planning Commission should be assured that they will not be subject to the whim and

caprice of each individual Commissioner who comes and goes. If the Applicant cannot rely in good faith upon any directions or instructions it is given by the Planning Commission in the past, then the Applicant cannot be sure that responding to any current directions from the Planning Commission will be honored by the Commission in the future. That the mere change in personnel would result in a complete about-face by the Commission on a number of issues is the epitome of arbitrary and capricious action.

2.2 Planning Staff Previously Concluded that the CUP Application, Including the Application's Proposed Support Commercial, Complied with Density Conditions and Criteria.

Notably, Staff concluded that the CUP Application fully complied with the applicable CUP criteria during earlier review periods, before the Applicant refined the design at the behest of and under guidance of the Staff and Planning Commission. But after expending enormous amounts of money and time to refine the project's design as requested by Staff and the Planning Commission, Staff—albeit lead now by a new, less experienced City Planner—suddenly and without explanation ignored Staff's prior findings and conclusions on criteria relating to square footage, mass, and volume.

For example, in 2005, Staff found and concluded that the "Treasure Hill CUP plans comply with the approved density." (*See, e.g.*, March 9, 2005 Staff Report p. 2.) Staff likewise concluded that "Meeting space and support commercial (10% of the total approved floor area) per Land Management Code (15-6-8.) is allowed per the MPD, in addition to the 19 UE of commercial uses. Additional square footage is allowed for back of house and other ancillary uses, such as storage, mechanical, common space, etc." (p. 7.) Thus, contrary to statements by Commissioner Joyce and others suggesting that any commercial space beyond on the 19 commercial UEs designated in the SPMP exceeds what is allowed, Staff determined more than a decade ago that the Applicant was allowed 5% of additional Support Commercial space "in addition to the 19 UEs of commercial uses" set forth in the SPMP and that such space "compl[ied] with the approved density."

2.3 Planning Staff Previously Concluded that the CUP Application Complied with the Other Mass and Volume Criteria.

Planning Staff also made a number of other important findings about conditions and criteria relating to mass and volume, including:

- "[T]he revised plans for the Treasure Hill CUP comply with the height and elevation standards approved with the Sweeney MPD";
- "The current Treasure Hill CUP plans comply with the Park City General Plan regarding location of medium density resort related development";
- "The revised Treasure Hill CUP plans are consistent with the[] heights and volumetrics" set forth in the SPMP;
- "Staff has reviewed the Treasure Hill CUP site plan for site suitability from the perspective of both the location of buildings on the site, grading, slope retention,

cliff-scape designs and the visual analysis from a variety of vantage points, . . . and finds that the project complies with the site design and site suitability criteria of the LMC Section 15-1-10.”

(*See, e.g.*, March 9, 2005 Staff Report p. 4, 5, 7, 8.)

Although Staff now takes a different position on certain of these issues, it has failed to provide any reasons for departing from its prior findings and conclusions. It is well-established that administrative determinations that contradict prior conclusions on the same issue without a rational basis are, by definition, arbitrary and capricious. Moreover, if the criteria and standards used to evaluate the project allow Staff to reach directly conflicting conclusions based on essentially the same record, those criteria are constitutionally suspect and fail to provide proper guidance in the exercise of the Planning Commission’s limited authority.

3. Specific Issues Raised During Past Hearings.

In order to provide a complete record, the Applicant believes it is prudent to respond to various statements made by specific Commissioners and members of the public during prior hearings that related to issues of square footage, mass, and volume.

3.1 The 2003 LMC Does Not Require an Amendment to the SPMP to Approve the CUP Application.

Although neither Staff nor special counsel to the Planning Commission has taken the position that the CUP Application presently requires an amendment to the SPMP, a lawyer engaged by a group opposed to the CUP Application suggested that the provisions of the 2003 LMC require an amendment to the SPMP. That statement is incorrect.

The relevant provision states that “[c]hanges in a Master Planned Development which constitute a change in concept, Density, unit type or configuration of any portion or phase of the MPD will justify review of the entire master plan and Development Agreement by the Planning Commission, unless otherwise specified in the Development Agreement.” (2003 LMC 15-6-4(I).) Only “substantive” changes require the Applicant to submit to a new MPD review process.

There is no basis for concluding that the CUP Application represents a change in concept, Density, or unit type or configuration.

First, Staff has already concluded that “[t]he current Treasure Hill CUP plans comply with the clustered development concept approved with the Sweeney MPD.” (*See, e.g.*, March 9, 2005 Staff Report p. 2.) Staff’s conclusion is squarely grounded in the SPMP, which clearly contemplated a development concept like that proposed in the CUP Application.

Second, “Density” is a defined term in the 2003 LMC and refers only to UEs. Specifically, the 2003 LMC defines “Density” as “[t]he intensity or number of non-residential and residential Uses *expressed in terms of Unit Equivalent*s per acre or Lot or units per acre.” (2003 LMC 15-15-1.67 (emphasis added).) Aside from the minor issue of certain residential UEs having been shifted between the development sites at the City’s prior request (September 14, 2016 Staff Report p. 86), which is addressed below, Staff has never deviated from its prior conclusion that with respect to

the question of Unit Equivalents, the “Treasure Hill CUP plans comply with the approved density” of the SPMP (*see, e.g.*, March 9, 2005 Staff Report p. 2).

Finally, the CUP Application has not changed any “unit types or configurations” from the original SPMP because those issues were expressly reserved in the SPMP for the CUP Process. As the SPMP Staff Report provides, “[f]inal unit configuration and mix may be adjusted by future developers at the time of conditional use review.” (p. 7.)

Because the Applicant has not made any substantive changes to the development approved in the SPMP, there is no basis for requiring the Applicant to submit to a new MPD process.

3.2 The Site Grading and Excavation Contemplated by the CUP Application Were Contemplated by the SPMP and Are Necessary to Mitigate Other Aspects of the Project.

The excavation proposed by the CUP Application is a function of the density allotted to the project, the site requirements imposed by the fire protection plan, and efforts to mitigate the perceived mass and volume of the proposed project. The SPMP and the attachments incorporated into the SPMP Staff Report contemplated that a significant amount of excavation would be necessary in order to cluster the density at the site selected by the City during the MPD process. Indeed, the SPMP Staff Report established building heights relative to “mean sea level” precisely because it was understood that excavation would necessarily change the existing grading at the site and that a reference point for maximum building heights that would not be affected by excavation was required. (SPMP Staff Report p.4; *id.* at 6 (“[C]ut and fill shall be balanced and distributed on-site whenever practicable”).)

The SPMP Staff Report also established that the parties to the MPD agreement understood the proposed site grading and excavation was the price of mitigating other, more important concerns, particularly the perceived size and volume of the project. As the SPMP Staff Report explains, “[a] balance between site disturbance and scale/visibility has been attained through the course of reviewing alternate concepts.” (p. 14.) The City understood in the course of the MPD process that there was a basic trade-off between excavation and grading and the perceived mass, scale, and volume of the development.

The City also recognized that basic concept during earlier phases of the CUP Application review process. Staff and the Planning Commission directed the Applicant to reduce the perceived mass and volume of the project by pushing the project back into the hillside. Of course, such revisions to the project design do not come without consequences, one of the most obvious of which is the need to excavate and re-grade to a much greater degree than otherwise.

The City also understood that the alternative development concepts considered during the MPD review process would actually result in more total excavation, re-grading, and site disturbance due to the roadways and other improvements that would be necessary to service a diffused development. As the SPMP Staff Report explains, “[t]he current concept results in considerably less site clearing and grading than any of the others presented.” (p. 14.) Additionally, each individual development parcel in a non-clustered development would require its own grading, excavation, and site disturbance. Although the cluster approach certainly results in the need to

excavate and re-grade a portion of the properties, the aggregate total of such excavation and re-grading is far less than any of the alternatives.

Indeed, the proposed development plan, because it is part of the broader strategy outlined in the SPMP Staff Report, honors the Hillside Properties far better than any of the other proposed alternatives. Rather than excavate roadways and building sites for hundreds of single-family residences, the clustered development approach concentrates the entirety of the impact from excavation and re-grading on a small portion of the hillside. But the excavation and re-grading of the development sites, upon which all of the density is clustered, is the only way that the conservation of more than 100 acres of open space is made possible.

Additionally, the Woodruff Drawings also reflected a significant amount of excavation at the site. In fact, the City's representations in its September 14, 2016 Staff Report about the existing grade in the Woodruff Drawings are erroneous. The Applicant informed the City years ago that such representations were inaccurate and misleading, yet Staff continues to perpetuate these misrepresentations in the face of clear evidence to the contrary.

While Staff and certain Planning Commissioners have questioned the Applicant's integrity concerning representations about the effect of the fire protection plan on the project design and need for excavation and re-grading of the site, Staff members who were actually involved during these phases of the CUP Application have confirmed the Applicant's claims to be correct:

The applicant worked with a consultant who specializes in fire protection plans to revise the originally submitted plans significantly to come up with a site plan, circulation system, general building and plaza layout, and other technical additions that address the Fire Department and Building Department concerns regarding these issues. **The fire protection plan and technical documents are complete to the extent that the Fire Marshall and Chief Building Official are in agreement that the site plan, circulation, building locations, access, etc. are acceptable and defensible. The technical documents spell out a wide range of conditions that have to be met and maintained throughout the life of the project in order for the project to continue to be in compliance.**

(*See, e.g.*, March 9, 2005 Staff Report p. 2 (emphasis in original).) Thus, the proposed site plan, which necessitates the contemplated excavation and re-grading, is in fact a function of the requirements of the fire protection plan, which includes detailed and specific requirements for the project.

3.3 Staff Has Already Identified and Approved Conditions for Mitigating the Effects of Excavation and Re-Grading.

During earlier phases of the review of the CUP Application, Staff praised the Applicant for its extensive and detailed proposals for mitigating the effects of the excavation and re-grading. For example, Staff explained that

[t]he applicants have fairly extensive plans for the grading, retaining, and revegetation of the cut-slopes, in what is termed “cliff-scapes”. The design booklet explains this concept in detail indicating that these cliff-scapes will be a combination of natural rock, block retaining walls, exposed rock "cliffs" with varying degrees of stepping and landscaping.

(*See, e.g.*, March 9, 2005 Staff Report p. 9.) Although Staff understood that “[s]pecific conditions will be required to address this issue,” Staff certainly did not suggest that the CUP Application could not be approved due to the necessary excavation. Instead, Staff recognized that certain mitigation measures would be necessary at the time of approval. Of course, the Applicant remains open to discussing such mitigation conditions.

Indeed, certain mitigation measures are already built into the plans. For example, the vast majority of the areas of excavation will not be visible from the City since the project’s buildings will visually buffer those areas from the rest of the City. In the few areas of excavation that will be visible from the City, as the March 9, 2005 Staff Report explains, the Applicant will diligently remediate those areas with a variety of tested and proven techniques, including landscaping.

3.4 The “Limits of Disturbance” May Extend Beyond the Building Sites.

It has also been suggested that because certain areas of excavation extend beyond the building sites, the CUP Application violates the SPMP or other applicable standards. That, however, is also incorrect.

Staff previously concluded that according to the submitted plans for the Hillside Properties, which include areas of disturbance and excavation outside of the specific building sites, “**all development is contained within the identified development parcels.**” (*See, e.g.*, March 9, 2005 Staff Report p. 2 (emphasis added).) Although a new, less experienced planner later concluded that the areas of excavation were outside the limits of disturbance, that conclusion is both contrary to the SPMP Staff Report and earlier staff reports which concluded the opposite. The less experienced planner never even attempted to explain how the more experienced planner’s prior conclusion was erroneous.

In fact, the less experienced planner’s conclusion is contrary to the SPMP Staff Report, which states that “**the detailed definition of ‘limits of disturbance’ [would be] deferred until conditional use review.**” (SPMP Staff Report p. 14.) Thus, the limits of disturbance are to be established as part of the CUP Application review process. This language from the SPMP Staff Report highlights that the building site area is not coextensive with the allowed limits of disturbance. **If the limits of disturbance were the same as the building site area, there would have been no need to defer defining the limits of disturbance to a subsequent process.**

Moreover, it is well-established practice at the City to permit disturbance outside of the building area limits. Numerous other development phases of the very same SPMP included disturbance outside the defined building area sites. Likewise, the City has allowed other similar developments, such as the Montage, to disturb and excavate areas outside the building area limits. It would be patently arbitrary for the City to suddenly impose a strict requirement on the Applicant

when it has routinely allowed others who are similarly situated to excavate outside the building area limits.

3.5 The Applicant Will Amend the CUP Application to Address the 2.2 Residential UEs at the Creole Site.

The September 14, 2016 Staff Report concludes that “[t]he current proposal exceeds the maximum residential UEs at the Creole-Gulch site by 2.20 residential UEs” but notes that “[t]he CUP can be amended by reducing the number of proposed residential UEs at the Creole-Gulch site.” (p. 86.) The Staff Report fails to note that the additional UEs at the Creole Gulch site were a result of the Applicant shifting some density from the Midstation site to Creole Gulch site after Staff directed the Applicant to treat the two building sites as a single, unitary development. (*See, e.g.*, March 9, 2005 Staff Report p. 9 (“Staff recommends that all building/parking development associated with the proposed Treasure Mountain CUP be located on a single lot, rather than 2 parcels.”).) Nevertheless, because this is a minor point, the Applicant will amend the CUP Application as recommended by current Staff.

BJM: