



DATE: January 6, 2016

SUBJECT: Treasure Hill Properties' Responses to Issues Raised in Prior Staff Reports and at Previous Hearings

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.) MPE further incorporates the Background section set forth in its December 9, 2016, position statement.

2. Staff's New Contentions about the Limits of Disturbance Are Contrary to the SPMP, the Applicable Code, and Staff's Own Prior Conclusions.

The SPMP Staff Report specifically states that "[g]eneral development parameters have been proposed for Master Plan approval *with the detailed definition of 'limits of disturbance' deferred until conditional use review.*" (SPMP Staff Report, p. 14 (emphasis added).) Astonishingly, however, Staff now takes the position that SPMP implicitly defined the limits of disturbance for the project, despite its plain language to the contrary. (December 14, 2016, Staff Report p. 67.)

Staff claims that the SPMP Staff Report impliedly defined the limits of disturbance when it stated that "land not included within the development area boundary will be rezoned to Recreational Open Space (ROS)." (December 14, 2016, Staff Report, p. 67 (quoting SPMP Staff Report, p. 8).) Staff then latches onto an exhibit submitted with MPD Application titled "Town Lift Midstation & Creole *Height Zones*" (subtitled "Development Requirements and Restrictions"), to suggest that an exhibit expressly designating height zones also defines the limits of disturbance, despite that Sheet 22 says nothing about limits of disturbance. (SPMP Exhibits, [Sheet 22](#) (emphasis added).)

The SPMP Staff Report specifically explains the purpose of Sheet 22:

Building heights shall be limited to the maximum envelope described on the Restrictions and Requirements Exhibit. At the time of conditional use approval, projects shall be reviewed for conformance with the heights prescribed thereon

(SPMP Staff Report, p. 3.) The SPMP Staff Report likewise describes Sheet 22 this way: "An exhibit defining building 'envelopes' has been developed to define areas where increased

building heights can be accommodated with the least amount of impact.” (*Id.* at 12.) Thus, according to the SPMP Staff Report itself, the purpose of Sheet 22 is to define the areas where taller buildings may be placed. Nothing in the SPMP Staff Report’s description of the Restrictions and Requirements exhibit suggests that it was intended by any party to define the limits of disturbance, which, as noted above, the SPMP Staff Report expressly stated would be defined at the CUP stage.

Indeed, the purpose of Sheet 22 was to define the areas where the Applicant could construct buildings in excess of the height restrictions under the existing zoning ordinances, which was part of the consideration that MPE received for agreeing to forego a substantial amount of density and cluster the remainder in the two development parcels designated for development. The “lines” on Sheet 22 that Staff references in its December 14, 2016, report define the boundary of MPE’s rights to construct buildings in excess of the height restrictions in the existing zoning, not the limits of disturbance. That is the how the SPMP Staff Report describes Sheet 22, and the context of the deal struck by the City and MPE shows that such description is accurate.

While Staff acknowledges that Sheet 22 does not reference “limits of disturbance,” it relies on the building height envelopes established on Sheet 22 and, anachronistically, definitions in the 2004 Land Management Code (that did not exist in the 1985 Land Management Code) to suggest that the building height envelopes also define the limits of disturbance. Even if Staff’s interpretation were plausible, it runs headlong into the explicit language of the SPMP Staff Report that the “definition of ‘limits of disturbance’ [will be] deferred until conditional use review.” Staff never attempts to reconcile the plain language of the SPMP Staff Report with its current interpretation of Sheet 22 or explain why the Planning Commission should ignore the clear directive of the SPMP Staff Report.

Moreover, Staff’s current position about the purpose and effect of Sheet 22 are contrary to Staff’s earlier positions. For example, the then-director of the Planning Department, Patrick Putt, explained that the purpose of Sheet 22 was to “identify maximum building heights.” (April 12, 2006, Staff Report, p. 10; *see also, e.g.*, March 9, 2005 Staff Report, p. 7 (“The building heights shall conform to the height zones and maximum elevations as shown on Sheet 22 of the approved MPD.”).)

Indeed, Staff previously explained that the purpose of Sheet 22 was to define areas where additional building height could be accommodated with the least amount of impact:

In order to minimize site disturbance and coverage, the clustering of density necessitated consideration of building heights in excess of that which was permitted in the underlying zoning. The various concept plans were reviewed in detail for the trade-offs between height and site coverage and open space. The MPD approval includes an exhibit defining building envelopes *to define areas where increased building heights can be accommodated with the least amount of impact.*

(March 9, 2005 Staff Report, p. 4 (emphasis added).)

Staff has been issuing reports about this application since 2004. Staff has written approximately thirty-three (33) reports about this application since that time. Staff has discussed Sheet 22 on numerous occasions in those thirty-three reports, and never once has Staff—until December 2016—suggested, hinted, or intimated that Sheet 22 defines the limits of disturbance or addresses any issue other than the building height envelopes. Staff’s sudden change in position raises due process, equitable, and breach-of-contract concerns with respect to the Staff’s apparent desire that the City essentially repudiate its prior agreement with Applicant as embodied in the SPMP approval.

2.1 Staff’s Current Position that No Development Activity Is Permitted Outside the Lines on Sheet 22 Contradicts Staff’s Previous Interpretations of the SPMP.

Furthermore, current Staff’s attempts to graft definitions from the 2004 Land Management Code onto the 1985 SPMP Staff Report are contradicted by Sheet 22 itself. According to Staff’s interpretation, no “Development Activity which disturbs or changes the natural vegetation [or] Grade” or that “erect[s] a new . . . Structure” is permitted outside of the building height boundaries on Sheet 22. (December 14, 2016, Staff Report, p. 67 (quoting 2004 LMC § 15-15-1.56).) Staff claims that the “cliffscapes/retaining walls outside the line identified on Sheet 22” are impermissible. (*Id.*)

However, Staff’s current position fails to account for the fact that Staff and the City previously allowed MPE to undertake “Development Activity” outside the building area boundaries in connection with *this very Master Planned Development*. The homes built on the single-family lots included in the SPMP involved significant “Development Activity” outside the building area boundaries specified in the SPMP. On a proportional basis, the amount of “Development Activity” outside the building area boundaries on these single-family lots far exceeds what is proposed for the Midstation and Creole sites. Nonetheless, the City allowed the “Development Activity” outside the building area boundaries on those lots without raising any objection or concern. Staff fails to explain why the City is taking one position on certain portions of the SPMP and the opposite position on the hillside portion.

Staff’s conflation of the building height envelopes with the limits of disturbance, in addition to the problems noted above, is also contrary to common sense. Under Staff’s interpretation of the 1985 SPMP Staff Report through the lens of the 2004 Land Management Code’s definitions, MPE would not be allowed to “disturb” a single speck of dirt outside the building height zone envelope. According to Staff’s interpretation, *any* disturbance outside of those lines, including for utility tie-ins, ski improvements, or even landscaping would be a violation of the limits of disturbance. Basic logic dictates that Staff’s contrived interpretation is erroneous.

2.2 Staff’s Current Position that the Proposed Development is Outside the Development Area Established by the SPMP Is Contrary to Prior Representations by Staff.

While Staff now claims that certain cliffscapes and retaining walls are outside the limits of disturbance supposedly established by Sheet 22, when Staff reviewed the same basic site

design in 2005 and 2006—including in view of the requirements of Sheet 22—Staff not only never raised concerns about development outside of the limits of disturbance, it concluded that the proposed design complied with such requirements.

For example, in its March 9, 2005, report (p. 2), Staff concluded that “[t]he revised Treasure Hill CUP plans comply with the approved density and *all development is contained within the identified development parcels*” (emphasis added).

3. Staff’s Reliance on the SPMP in Asserting that the Current Design Includes Unanticipated and/or Excessive Excavation Is Unsupported by the Facts.

Staff rather incredibly suggests that the Woodruff drawings “returned final (finished) grade back to existing (natural) grade.” (December 14, 2016 Staff Report, p. 66.) In reality, the Woodruff drawings did not address excavation in any meaningful way, as MPE’s design professional, Steve Perkins, explained during the hearing on October 12, 2016. Staff’s claim is based on drawings showing some of the buildings in profile that depict land mass in front of the building facades. Staff reads those drawings to show finished grade against the buildings, but if that were really the case, there would literally be dirt covering building windows and the ski runs under the Woodruff buildings would be as short as eight or nine feet in height.¹ Obviously, no reasonable interpretation of the Woodruff drawings could conclude that the finished grade would result in half-covered windows and unusable ski runs. Thus, for Staff to rely on these preliminary drawings and unreasonable assumptions to conclude that the Woodruff drawings “returned final (finished) grade back to existing (natural) grade” is untenable.

Moreover, despite MPE informing the City years ago that its claims about the Woodruff drawings depicting no excavation were based on a misinterpretation of the drawings, *which actually show final grade well below existing grade*, Staff repeated those exact same claims as recently as September 14, 2016. After MPE *again* pointed out Staff’s error during the October 12, 2016 hearing, Staff has yet to correct the record or inform the Planning Commission that the Woodruff drawings do in fact show significant excavation. On the contrary, Staff basically repeated those erroneous claims in its December 14, 2016, report.

In reality, the grading required to construct buildings like those depicted in the Woodruff drawings would have been significant. Even though the current design requires more excavation, Staff’s position that the Woodruff drawings contemplated virtually none is unsupported. Moreover, to suggest that the incremental increase in excavation required by the current design, which mitigates a number of other concerns with the basic Woodruff design (as discussed in previous submissions), is inconsistent with the CUP standard.

Moreover, the Woodruff design would have required significant additional excavation and grading to make it safe from a fire-protection standpoint. For example, because the Woodruff buildings are built into the hillside, a fire-protection barrier would have been

¹ The exhibits to the SPMP Staff Report expressly specify that “[w]here ski trail passes through a building, opening to be a minimum of . . . 20’-0” vertical.” (SPMP Exhibits, [Sheet 22.](#)) Thus, Staff’s interpretation of the Woodruff drawings showing openings for the ski trails as little as eight or nine feet in height is erroneous.

necessary, as described by Ron Ivie at the December 13, 2016, CUP hearing. Additionally, access for fire-fighting equipment would have been necessary for the points of the Woodruff buildings farthest from public rights-of-way. The need for a barrier and emergency vehicle access would have necessitated the construction of a roadway on the uphill side of the Woodruff buildings, requiring further excavation and grading, all outside the lines on Sheet 22.

Based on the fact that Woodruff did not specifically address excavation (and there was no requirement that it did), Staff concludes that SPMP did not approve and does not allow significant excavation. Leaving aside that any reasonable person looking at the Woodruff buildings would have understood that they would have required significant excavation, as MPE has addressed in prior submissions, the SPMP, by its own terms, contemplated that excavation would be significant. As MPE has already explained, the SPMP Staff Report repeatedly addressed the issue of excavation and did so in a way that shows the City knew significant excavation would be necessary. (SPMP Staff Report, p. 4 (establishing building heights relative to “mean sea level” and not from existing grade because existing grade would be excavated); *id.* at 6 (“[C]ut and fill shall be balanced and distributed on-site whenever practicable”); *id.* at 14 (noting that “[a] balance between site disturbance and scale/visibility has been attained through the course of reviewing alternate concepts.”).) Staff has completely ignored these parts of the SPMP approval.

Moreover, in its December 14, 2016, Staff Report, Staff effectively concedes that the SPMP specifically addresses the issue:

Grading - The proposed cluster concept will result in less grading than the alternatives considered. The MPD review enabled the staff, Planning Commission, and developer the opportunity to consider this kind of concern early in the project design process. The concept plans developed have examined the level of site work required and how potential impacts can be mitigated. Various *conditions* supported by staff *have been suggested* in order to verify the efforts to be taken to minimize the amount of grading necessary and correlated issues identified.

(December 14, 2016, Staff Report, p. 66 (quoting SPMP Staff Report, p. 14 (emphasis added)).) Despite the clear language of this passage, which is written in the past tense, explaining that Staff *already* set forth conditions in the SPMP to address grading concerns, current Staff reads the passage to allow Staff to impose additional conditions on the CUP Application regarding grading and excavation.

However, as this passage states in plain language, the SPMP Staff Report already sets forth a number of “Development Parameters and Conditions” in Part III of the report, including conditions that address grading issues. As explained above, those conditions include specifying building-height limits relative to mean sea level rather than site grade² and requiring that cut and

² This is actually a significant change in practice, since the 1985 Land Management Code specified that building height was measured from “natural undisturbed grade.” 1985 LMC § 2.1. Because the City understood that there would be no meaningful “natural undisturbed grade” left

fill be balanced “whenever practicable.” (SPMP Staff Report, p. 4, 6.) The conditions set forth in the SPMP Staff Report do not support Staff’s current contentions, and Staff does not suggest that they do. The SPMP specifically addressed grading issues and imposed conditions relating to those issues. Imposing new, different, and additional conditions on the CUP Application is contrary to the agreement reflected in the SPMP and raises additional due process, equitable, and breach-of-contract issues.

Staff has also failed to provide any explanation for its complete change in position regarding the contemplated excavation and the ability of MPE to mitigate its effects. For example, in its March 9, 2005, Staff Report, Staff recognized that the proposed plans contemplated significant excavation but also noted that MPE had submitted “fairly extensive plans for the grading, retaining, and revegetation of the cut-slopes.” (*See, e.g.*, March 9, 2005 Staff Report, p. 9.) While Staff certainly contemplated mitigation conditions for the excavation, Staff never suggested that excavation would prevent approval of the CUP Application.

While current Staff has claimed that changes to the design since 2005–06b explain Staff’s complete change in position, the plans evaluated by Staff in 2005–06 generally depicted about the same amount of excavation as the current plans. Because the differences between the 2005–06 plans and the current refinements are immaterial from an excavation standpoint—and current Staff has not shown otherwise—Staff’s unexplained change in position raises due process, equitable, breach-of-contract, and other legal concerns.

BJM:

in the project after development, the City specified building heights from a fixed reference point—mean sea level—in the SPMP.