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MEMORANDUM IN SUPPORT OF APPEAL

TO: Boise City Council
FROM: Deborah E. Nelson, Jeffrey W. Bower
RE: Applicant's Memorandum In Support of Appeal
CAR16-00002, PUD16-0005, & SUB16-00006/ Ben's Crow Inn Subdivision
DATE: May 23, 2016

We submit this Memorandum on behalf of our client, Devco, LLC ("Devco" or "Applicant") in support of Devco's appeal of the City of Boise Planning and Zoning Commission's ("Commission") denial of Devco's application for a Planned Unit Development ("PUD"). The Commission's decision should be reversed because it is in violation of applicable laws, was made on unlawful procedure and is not supported by substantial evidence.

I. Procedural History

On February 22, 2016, Devco submitted applications for annexation, a PUD and a subdivision along with all requisite reference materials, studies and reports to comply with the Boise City Code ("BCC"). The City's planning team prepared a Planning Division Project Report (the "Project Report"), which recommended approval of all three applications with conditions.

Devco's three applications were placed on the Commission's agenda for public hearing on April 11, 2016. As to the annexation application, a motion was made to recommend approval, and the Commission voted 2-2.¹ The result of the tie vote was a recommendation from the Commission that the City Council deny annexation.²

Following the annexation vote, a motion was made to approve the PUD with additional conditions.³ However, after some debate on the motion, the Commission deferred both the PUD and subdivision applications to May 2, 2016. The Commission deferred the application because

¹ Draft Minutes of April 11, 2016 Hearing, p. 32.

² *Id.*

³ *Id.* at 40.

it was unsure how to proceed on the PUD and subdivision applications following the recommended denial of annexation.⁴

On April 15, 2016, the Commission issued a written decision recommending denial of the annexation application (“Annexation Decision”). The Annexation Decision stated that denial was recommended because “the Commission felt that the commercial designation was important to maintain.”⁵

On May 2, 2016, the Commission took up the deferred PUD and subdivision applications. As to the PUD, the Commission recognized that a motion for approval was pending.⁶ That motion was withdrawn.⁷ The Commission then concluded that the PUD and subdivision applications were “automatically denied” because it lacked jurisdiction based on the recommended denial of the annexation application.⁸ No motion to deny Devco’s PUD application was ever made or voted on. Similarly, no motion to recommend denial of Devco’s subdivision application was ever made or voted on.

On May 4, 2016, the Commission issued a letter outlining its actions at the May 2, 2016 hearing, which states that the Commission “withdrew a motion to approve PUD16-00005. Based on the April 11, 2016 recommendation to deny CAR16-00002, a request for annexation, the ... Commission does not have jurisdiction to approve PUD16-00005 or make adequate findings that are not inconsistent with the recommendation to deny CAR16-00002.”⁹

Devco submits this memorandum in support of its appeal of the Commission’s denial of the PUD application in accordance with BCC § 11-03-03.9(C)(1)(e). Devco’s PUD application only seeks minor deviations from the applicable dimensional standards; it seeks no deviations from or adjustments to the allowed density.

Devco also asks the City Council to reject the Commission’s recommended denial of the annexation and subdivision applications and to approve the applications in accordance with the Project Report’s proposed conditions. Annexation and subdivision in this case is proper under the City Code and the Comprehensive Plan, and approval of the applications is supported by the record.¹⁰

⁴ *Id.* at pp. 39–46 (Chairman Gillespie: “So here’s where we are at. So I’ll reverse my disqualification of the earlier motion by Commissioner Bradbury so we have a live motion on the table, seconded by Commissioner Gibson, to approve PUD16-00005. Is there anybody who would like to make a motion to defer this matter, which can be done as a minor [sic], you can defer it to the next meeting.”).

⁵ April 15, 2016, Annexation Decision, p. 3.

⁶ May 2, 2016, Hearing Video, at 9:15.

⁷ May 2, 2016, Hearing Video, at 9:30 (Commissioner Bradbury stated: “based on advice from uh... counsel and staff I’ll withdraw my motion for approval of PUD16-00005”).

⁸ May 2, 2016, Hearing Video, at 10:00.

⁹ May 4, 2016, Written Decision on PUD, p. 1.

¹⁰ The Commission’s Annexation Decision states: “The site is within the Area of Impact and Sewer Planning Area and is contiguous to Boise City on its easterly boundary. The annexation will facilitate orderly expansion of the City

II. Existing Zoning and Description of the Project

The Project Site consists of 4.2 acres in Ada County and is the current location of the restaurant Ben's Crow Inn.¹¹ The land is currently zoned RP, Rural Preservation under the Ada County Code.¹² The Project proposes annexation of the Site into the City of Boise and the construction of 24 single-family dwellings.

The Comprehensive Plan Land Use Map designates the northern portion of the Site (2.43 acres) as "Commercial" and the southern portion (1.76 acres) "Large Lot."¹³ Land designated as "Commercial" on the City's Land Use Map supports a zoning designation of A-1, A-2, R-1M, R-2, R-3, L-O, N-O, C-1, C-2, C-3, C-4, C-5, or PC.¹⁴ Land designated as "Large Lot" supports a zoning designation of A-1, A-2, R-1A, R-1B, L-O, or N-O.¹⁵

Consistent with the compatible zoning designations recognized by the Comprehensive Plan, Devco's annexation application proposes that the northern commercial-designation portion of the site be zoned R-2D (medium density residential) and the southern large lot-designation portion be zoned R-1B (single family residential). R-2D zoning permits a density of 14.5 units per acre, and R-1B districts permit a density of 4.8 units per acre.¹⁶

With the proposed zoning designations, the Site could support 43.7 units with a density of 10.45 units per acre.¹⁷ The Project, however, proposes 24 units with a density of 5.74 units per acre. Within the Site, 66.81% will be built and 18.1% will be devoted to landscaping and common areas.¹⁸ Single-family dwellings are an allowed use in both R-2D and R-1B zones.¹⁹

The single-family detached homes proposed by the Project will add to the current mix of housing options available in the Barber Valley area. The Project's 24 homes will range from 2,245 to 3,100 square feet and will be one, two and three story residences.

The Site has single-family dwellings to the south and the east. Most significant is the Eastvalley subdivision across Warm Springs Avenue, which consists of 115 single-family dwellings and is zoned R-1C (single-family residential urban), allowing 8 units per acre.²⁰ To the west of the Site are the Greenbelt and the Boise River, including the Barber Pool Reserve.²¹

boundaries and conform to the Level of Service standards found in the Comprehensive Plan..." Annexation Decision, p. 3. *See also* Project Report Summary, p. 1; Project Report, p. 7.

¹¹ Project Report, p. 2.

¹² *Id.*

¹³ *Id.*

¹⁴ Comprehensive Plan, Commercial/Employment Areas, Commercial.

¹⁵ Comprehensive Plan, Neighborhoods, Large Lot.

¹⁶ BCC § 11.04.03.2.

¹⁷ Project Report, p. 8.

¹⁸ *Id.* at 3.

¹⁹ BCC § 11-06.1.

²⁰ Project Report, p. 13.

²¹ *Id.* at 2.

Commenting agencies have all issued positive comments on the Project and recommend standard conditions of approval. The Ada County Highway District (“ACHD”) comments concluded that the Project meets all of ACHD’s policies and will not alter the level of service on Warm Springs Avenue, which is currently operating at an acceptable level of service and will continue at an acceptable level of service with the proposed Project.²² The Idaho Department of Fish and Game concluded that the Project’s “design layout contains fencing heights and a secondary wildlife corridor that will provide permeability through the subdivision” and did not recommend any additional wildlife corridors for the Project.²³ The Boise Fire Department reviewed the Project and approved it with conditions, all of which Devco finds acceptable.²⁴ No other commenting agencies raised any concerns beyond standard conditions of approval.²⁵

III. Applicable Review Standard

The City Council is to give due consideration to the decision of the Commission.²⁶ The City Council may find error in the Commission’s decision when the decision: (1) is in violation of constitutional, state or city law; (2) exceeds the Commission’s statutory authority; (3) is made on unlawful procedure; (4) is arbitrary, capricious or an abuse of discretion; or (5) is not supported by substantial evidence.²⁷ If the City Council finds error, it may reverse or modify the Commission’s decision to cure the error.²⁸

IV. Argument in Support of Appeal

A. The Commission’s denial of the PUD application was made on unlawful procedure.

The City’s planning team analyzed all application materials and agency comments and issued its Project Report recommending approval. At the April 11, 2016 public hearing, the Commission made a motion to approve the PUD application with additional conditions. The motion, however, was deferred due to procedural confusion among the Commission’s members following the recommended denial of the annexation application.²⁹

At the Commission’s second public hearing on the PUD application, the previous motion to approve the PUD application was withdrawn.³⁰ The Commission’s chairman then denied the

²² See Project Report, pp. 4, 8, 15; see also March 15, ACHD Approval Letter, p. 2 (“The proposed single family use is estimated to generate fewer daily vehicle trips than the existing restaurant use.”).

²³ March 24, 2016 letter from Idaho Fish and Game re: Devco LLC, annexation & rezone application, Case # CAR16-0002 & PUD16-00005, p. 2.

²⁴ Project Report, p. 16.

²⁵ *Id.*

²⁶ BCC § 11-03-03.9(C)(2)(a).

²⁷ BCC § 11-03-03.9(C)(2)(a)(i)-(vi).

²⁸ BCC § 11-03-03.9(C)(2)(b).

²⁹ See Draft Minutes of April 11, 2016 Hearing, pp. 41–44.

³⁰ May 2, 2016, Hearing Video, at 9:15.

PUD application without a motion, debate, or vote.³¹ The denial violated the BCC and the Commission's procedural rules.

The BCC provides that the Commission as a "decision body shall approve, approve with modifications, or deny an application based upon the applicable standards and criteria in this Code and the Boise City Comprehensive Plan."³² The Commission's public hearing procedures are governed by Robert's Rules of Order for parliamentary procedure.³³

A fundamental rule of Robert's Rules of Order is that "[a]ll business should be brought before the assembly by a motion of a member, or by the presentation of a communication."³⁴ "All business" is very broad and encompasses the Commission's duty to approve, approve with modifications, or deny an application for a PUD. Therefore, any action by the Commission on a PUD application must be made by a proper motion made by a member and voted on. Under Robert's Rules, when a motion is withdrawn, the effect is the same as if it had never been made.³⁵

In this case, the Commission's PUD application denial violated its own procedures and should be reversed. The withdrawal of the motion to approve the PUD application with additional conditions had the effect of removing the PUD application from consideration as though it had never been made. Following the withdrawal, no member of the Commission brought a subsequent motion for denial. Instead, the Commission's chairman unilaterally and "automatically" denied the PUD application on his own initiative, without discussion or debate and without a vote.³⁶ This was procedurally improper and constitutes a deprivation of the Applicant's due process rights to a full and fair motion, discussion, and decision on its PUD application. Therefore, the Commission's denial should be reversed by the City Council.

B. The Commission's denial of the PUD application should be reversed because substantial evidence shows that the Project satisfies all approval criteria.

By "automatically" denying the PUD application the Commission failed to provide a well reasoned written statement supporting its denial of the PUD application. In this case, as stated by the Project Report, the PUD application should be approved because substantial evidence demonstrates that the Project satisfies each of the five approval criteria from BCC § 11-03-04.7(C)(7). The Project Report carefully analyzed the Project's compliance with the BCC's PUD approval criteria and determined that Devco's PUD application should be approved with conditions.³⁷ Each of the criteria is analyzed below.

³¹ *Id.* at 10:00.

³² BCC § 11-03-03.7.

³³ *See* Bylaws of the Commission.

³⁴ Robert's Rules, Article I, § 1.

³⁵ Robert's Rules, Article III, § 17.

³⁶ The same is true of the Applicant's subdivision application, which is not the subject of this appeal.

³⁷ Project Report, pp. 13-17.

1. The location of the Project is compatible with other nearby uses.

The Project is compatible with the surrounding neighborhood and land uses. The use proposed by the Project is single-family dwellings. This use is entirely compatible with the surrounding area, which consists of existing single-family neighborhoods on similarly-sized lots and densities greater than the Project. The Site has single-family homes to the north, east and south.³⁸ The Eastvalley subdivision, to the east of the Site, is a newer single-family housing project that is zoned R-1C (8 DU/acre) and has 115 lots. To the northeast is the River Heights Development, which is approved for 236 residential lots. Therefore, the proposed Project is compatible with the other surrounding predominate use: single-family residences.

The Project is also compatible with the surrounding recreational uses of the Greenbelt to the west of the Site. As currently planned, the Project has devoted Lot 16 as a pedestrian pathway to preserve and enhance public access to the Greenbelt. Although members of the public have previously used the Site to access the Greenbelt, this will be the first time public access has been lawfully established across the Site.

2. The proposed use will not place an undue burden on transportation and other public facilities in the vicinity.

The Project will not place an undue burden on transportation. The proposed Project will actually generate fewer daily trips than the current use of the Site as a public restaurant.³⁹ ACHD's letter approving the Project states:

The proposed single family use is estimated to generate fewer daily vehicle trips than the existing restaurant use. Based on the square footage of the restaurant, there are 260 existing vehicle trips per day to this site, with 20 in the PM peak hour. This development is estimated to generate 228 vehicle trips per day with 24 in the PM peak hour....⁴⁰

Warm Springs Avenue, classified as a minor arterial, will continue to operate at an acceptable level of service at full build out of the Project. Accordingly, the Project will not place an undue hardship on transportation.

3. The site is large enough to accommodate the proposed use.

The record shows the Site is capable of the type and volume of development proposed by the Project where the conditions of approval are adhered to. This conclusion is not disputed. The only evidence in the record is the Project Report's conclusion that with the approval of the PUD

³⁸ *Id.* at 2.

³⁹ *Id.* at 15.

⁴⁰ March 15, 2016 ACHD Approval Letter, p. 2.

application “the site is large enough to accommodate the proposed use and all required elements of a planned residential development.”⁴¹

4. The proposed use, as conditioned, will not adversely affect other property of the vicinity.

The record demonstrates that the Project, as conditioned, will not adversely affect property in the vicinity. The PUD application only proposes deviations from the BCC’s applicable standards for lot size, width and side yard width.⁴² No increase in allowed density is requested. In fact, the Project’s density is significantly lower than the density allowed by the proposed zoning designations.

The height of all proposed structures within the Project complies with the City’s 35-foot limitation in the Applicant’s proposed zones.⁴³ In response to concerns from Project opponents and the Commission regarding uniform height and homogeneity of the Project, Devco also agreed to limit the number of three story homes to 50% or less.⁴⁴ In conformity with the Commission’s recommended condition and the Applicant’s comments at the April 11, 2016 public hearing regarding home elevations, the Applicant has prepared a graphic depiction of the proposed home elevations for lots 1–22.⁴⁵ As the graphic demonstrates, the additional condition proposed by the Commission will create roof line variation and enhance the aesthetics of the Project, while still creating a variety of products for homebuyers seeking three story floor plans.

Substantial evidence shows that the Project will be a valuable addition to the neighboring properties and the City as a whole. The Project proposes to construct quality homes of varying sizes located on desirable smaller lots adjacent to natural open spaces and the Greenbelt—a housing product currently in high demand.

The Project, through the PUD application, will also endeavor to preserve and enhance public pedestrian access to the Greenbelt through the Applicant’s private property by constructing a pedestrian pathway through the Project to an existing easement that connects to the Greenbelt. The Project will provide positive aesthetics through thoughtful landscaping and open space areas as well. These features demonstrate a valuable addition to the surrounding property and do not support a conclusion that the Project will adversely affect other property in the area.

Opposition to the Project has been raised by residents of the Eastvalley subdivision across Warm Springs Avenue. The Eastvalley residents argue that the Project will adversely affect them because the Site is being built as residential as opposed to commercial and because

⁴¹ Project Report, p. 16.

⁴² *Id.* at 13.

⁴³ Draft Minutes of April 11, 2016 Hearing, p. 12.

⁴⁴ *Id.* at 13 (Commissioner Bradbury: “How would you react to the suggestion that a condition of approval be included that would limit the number of three story houses to your proposal, say in the 50% range?” Jim Conger: “Mr. Chairman, Commissioner Bradbury, we had discussed this earlier, that would be acceptable.”).

⁴⁵ See Exhibit A, attached hereto.

the Project may limit access to the Greenbelt over Applicant's private property. Neither of these neighbor complaints bears directly on the PUD application, which only proposes deviations from the BCC's applicable standards for lot size, width and side yard width. Further, the Eastvalley residents have not established any adverse impacts to their property based on these arguments.

As to the neighbors' first argument, residential development of the Site is expressly allowed by the City's Land Use Map and Comprehensive Plan. As noted above, the Applicant's proposed zoning constitutes proper zoning designations for land designated as "Large Lot" and "Commercial" by the City's Land Use Map.⁴⁶ Therefore, the use proposed by Devco complies with the City's planning documents. Despite the Project's compliance with planning documents, Eastvalley residents argue that the Site should be developed commercial for their benefit and convenience. Opponents ignore the extensive commercial development occurring minutes away at Harris Ranch and Barber Station, as well as the nearby Bown Crossing. And, additional commercial land still exists adjacent to the Eastvalley subdivision. The Project Report states: "the overwhelming majority of existing homes, and those anticipated to develop are located on the east side of Warms Springs Avenue. Approximately 3.2 acres of commercial zoning, with significant development/redevelopment potential exists adjacent to [the Eastvalley subdivision]."⁴⁷ Commercial development on the remaining commercial land adjacent to Eastvalley subdivision and on the same side of Warm Springs Avenue is preferable both for proximity and safety reasons. Lastly, the record establishes that the Site cannot currently support the commercial development advocated for by Eastvalley residents.⁴⁸ Should the City Council opt for different zoning than has been requested by Devco, then Devco withdraws its request and consent for annexation.

As to the neighbors' second argument, the developer has made every effort to maintain and improve pedestrian access to the Greenbelt.⁴⁹ The Site does not abut the Greenbelt and the Applicant alone cannot ensure access to the Greenbelt.⁵⁰ Pedestrian access to the Greenbelt requires crossing Applicant's property and another parcel of private property, Parcel No. S0933131220, the "Brant Property." Currently, there is a paved pathway across the Brant Property, which crosses the Penitentiary Canal and leads to the Greenbelt. As planned, the Project reserves lot 16 as a paved and improved pedestrian pathway to maintain access to the Brant Property and eventually the Greenbelt via the current existing route. Devco views access to the Greenbelt as a great amenity and is committed to doing all it can on the Site to allow public pedestrian access to the Greenbelt via the Brant Property.

⁴⁶ See *supra*, nn. 15–16.

⁴⁷ *Id.*

⁴⁸ Draft Minutes of April 11, 2016 Hearing, p. 34.

⁴⁹ *Id.* at 10 (Jim Conger: "We have always supported stubbing the sidewalk to the edge of our property" to allow Greenbelt access).

⁵⁰ Project Report, p. 10.

5. The proposed use is in compliance with the Comprehensive Plan.

The evidence in the record demonstrates that the Project complies with the goals and policies of the Comprehensive Plan, specifically the Barber Valley Planning Area.⁵¹ The planning team has found that the Project is consistent with the Comprehensive Plan.⁵² Furthermore, opponents of the Project have not pointed to a single specific provision of the Comprehensive Plan that the Project violates.

As established herein, the substantial evidence in the record demonstrates that the Project complies with each of the BCC's PUD approval criteria. Accordingly, automatic denial by the Commission was an error that should be reversed by the City Council.

V. Conclusion

Devco has presented a quality plan for residential development. The Project will maintain open space, provide connectivity to public lands, and provide quality single-family home sites to Boise residents. Devco respectfully requests the City Council to reverse the Commission's decision to deny its PUD application, which decision was made upon unlawful procedure and is not supported by substantial evidence. Devco further respectfully requests the City Council to approve the annexation and subdivision applications.

⁵¹ NAC 3.1; BV-C 2.3; and BV-PSF1.

⁵² Project Report, p. 17; April 11, 2016 Draft Minutes, p. 7.

EXHIBIT A

RIVER RIDGE



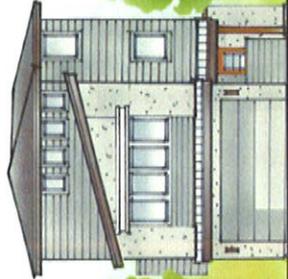
HUDSON A
LOT 1



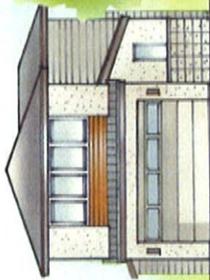
RIVERWALK A
LOT 2



SKYVIEW A
LOT 3



SKYVIEW B
LOT 4



RIDGEWAY A
LOT 5



HIGHLINE B
LOT 6



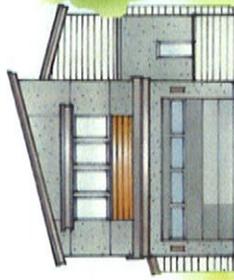
RIDGEWAY B
LOT 7



HIGHLINE A
LOT 8



RIVERWALK A
LOT 9



RIDGEWAY B
LOT 10



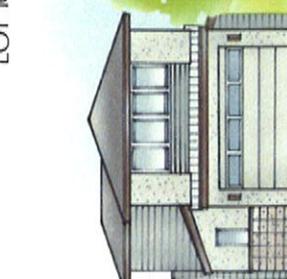
SKYVIEW A
LOT 11



HIGHLINE A
LOT 12



RIDGEWAY B
LOT 13



RIDGEWAY A
LOT 14



HIGHLINE B
LOT 15



SKYVIEW A
LOT 16



RIDGEWAY B
LOT 17



HIGHLINE A
LOT 18



RIVERWALK A
LOT 19

HIGHLINE B
LOT 18

SKYVIEW A
LOT 19

RIDGEWAY B
LOT 20

HIGHLINE A
LOT 21

RIVERWALK A
LOT 22

RIDGEWAY A
LOT 21

HIGHLINE B
LOT 22