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April 4, 2012

Boise City Council
Boise Planning and Development Services
150 N. Capitol Boulevard
Boise, Idaho 83701

Re: River Edge Apartments, CUP 11-00090
Applicant's Response to Appeal by 917 Lusk LLC

Dear Boise City Council Members,

This law firm represents the Michaels Organization ("Michaels"), the developer of the River Edge Apartments ("River Edge") proposed to be built on Royal Boulevard along the Boise River near Ann Morrison Park. River Edge is the kind of project the City of Boise has been looking for: a quality residential product near downtown, serving a critical need for close-in housing for Boise State students.

On March 5, 2012, the Planning and Zoning Commission ("P&Z") approved a conditional use permit ("CUP") and variance for a height exception for River Edge. A single neighboring property owner, 917 Lusk LLC ("Appellant"), has appealed the approval of the project, complaining it will obscure the view from Appellant's office building to the west toward Ann Morrison Park. In its appeal, Appellant fails to meet its burden to show that the P&Z's decision is erroneous. Therefore, the P&Z decision must be upheld.¹

I. The standard of review is deferential to the P&Z decision.

The Boise City Council has adopted an appellate (i.e. on the record), rather than a *de novo* (i.e. new proceeding with new evidence), standard of review for appeals of P&Z decisions to City Council. The City Council may not consider any new facts or evidence on appeal.²

¹ The P&Z also approved a Boise River System Permit, but Appellant did not appeal that permit.

² Boise City Code § 11-03-07.05(F)(5)(a).

Further, so long as the P&Z's decision is supported by substantial evidence, the City Council shall accept those findings.³

The City Council may only find error with a P&Z decision if it: (a) violates the constitution, a state statute or City ordinance; (b) exceeds statutory authority; (c) is made upon unlawful procedure; (d) is arbitrary, capricious or an abuse of discretion; or (e) is not supported by substantial evidence.⁴

II. The 2012 Legislature amended LLUPA to clarify that height exceptions are and have been allowed by CUP.

Appellant's primary assertion—that the Boise City ordinance allowing height exceptions by CUP is void based on the Local Land Use Planning Act ("LLUPA")⁵ and a recent Idaho Supreme Court decision—has no merit because new legislation retroactively amends LLUPA to expressly state that height exceptions are allowed by CUP.

In *Burns Holdings, LLC v. Teton County Board of Commissioners*, 12.3 ISCR 45 (Jan. 25, 2012), the Court interpreted LLUPA to find that a variance rather than a CUP must be used to obtain a waiver of a zoning ordinance provision limiting the height of buildings. Based on this interpretation of LLUPA, Appellant argues that Boise City Code § 11-06-06.12, which allows height exceptions by CUP, is void and that the River Edge CUP application filed pursuant to this code section is invalid.⁶

Although we do not agree with Appellant's interpretation of LLUPA or the effect of *Burns Holdings* on the River Edge application (which preceded the decision), these issues are no longer material as the 2012 Idaho Legislature passed legislation to amend LLUPA to expressly state that height exceptions are allowed by CUP.⁷ The new legislation provides:

In addition to other processes permitted by this chapter, exceptions or waivers of standards, other than use, inclusive of the subject matter addressed in Section 67-6516, Idaho Code [i.e. variances], in a zoning ordinance may be permitted through issuance of a special use permit or by administrative process specified by ordinance, subject to such conditions as may be imposed pursuant

³ Boise City Code § 11-03-07.05(G)(1).

⁴ Boise City Code § 11-03-07.05(G)(8).

⁵ Idaho Code §§ 67-6501 *et seq.*

⁶ This position is directly contrary to Appellant's own interests since Appellant received a height exception for their office building pursuant to the same code provision.

⁷ As of this writing, the Legislation (H0691) has passed both houses of the Legislature by wide margins and has been delivered to the Governor. Absent prior action by the Governor, the bill will be enacted by operation of law on April 9, 2012 (10 days following adjournment of the Legislature).

to a local ordinance drafted to implement subsection (d) of this section.⁸

The Legislature explained that its intent was to reject the *Burns Holdings* interpretation of LLUPA, to amend the language to clarify that height exceptions are allowed by CUP, and to make the amendment retroactive to confirm that LLUPA has always allowed height exceptions by CUP.⁹ Thus, Boise City Code § 11-06-06.12 is not void and the River Edge CUP application filed pursuant to that section is not invalid. Further, although we disagree with Appellant's arguments challenging the P&Z decision to approve a variance,¹⁰ those issues need not be addressed since the project does not require a variance in light of H0691.

III. The P&Z decision granting the CUP is proper.

Appellant has not shown that the P&Z decision is erroneous based on applicable law and the administrative record. Therefore, it must be upheld.

A. The P&Z decision, and P&Z's exercise of authority in making the decision, comply with state statutes and city ordinances.

Both LLUPA and Boise City Code allow a height exception to be granted by CUP.¹¹ As discussed above, any uncertainty created by *Burns Holdings* about whether LLUPA allows height exceptions by CUP has been resolved by amendments to LLUPA.

B. The P&Z decision was made in accordance with lawful procedure.

Appellant does not specifically allege, or cite evidence of, any procedural errors.

C. The P&Z decision is not arbitrary, capricious or an abuse of discretion.

Appellant has not demonstrated that the P&Z's actions "were without rational basis; or in disregard of the facts and circumstances presented. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration."¹² Rather,

⁸ H0691, to be codified as Idaho Code § 67-6512(f).

⁹ "The [Burns Holdings] court decision interpreted the law contrary to legislative intent and to practices that have been followed for over 30 years, and places in question prior permits issued through an otherwise valid hearing process. ... [The bill] clarifies that the Legislature intended the conditional use permit to be a process through which waivers of or exceptions to zoning standards could be permitted. ... Finally, it makes the application of the clarified conditional use permit language retroactive to demonstrate that this was the Legislature's original intent." Statement of Purpose RS21549 (H0691).

¹⁰ The P&Z properly found that a variance was warranted in light of the hardship and exceptional circumstances created by the site's location within the floodplain (requiring the base elevation to be raised) and its relatively small size and frontage on the Boise River greenbelt and the Ann Morrison Park entryway (requiring podium parking to accommodate pedestrian access).

¹¹ Idaho Code § 67-6512; Boise City Code § 11-06-06.12.

¹² Boise City Code § 11-03-07.05(G)(8)(d).

as detailed below, the P&Z's decision was made reasonably based on the applicable standards for a CUP and the facts presented. Thus, even if an alternate decision could have been made, the P&Z decision cannot be deemed arbitrary and capricious.

D. The P&Z decision is supported by substantial evidence.

1. The P&Z properly determined River Edge is compatible to other uses in the general neighborhood (Boise City Code § 11-06-04.13(A)).

Appellant claims the P&Z's "sole rationale" for compatibility is that there are buildings of similar height in the immediate vicinity. It is true that the surrounding buildings are similar in height, but it is not the only factor the P&Z considered for compatibility. The P&Z's determination of compatibility to other uses in the general neighborhood is based on numerous considerations and supported by substantial evidence in the record including:

- There are buildings of similar height in the immediate vicinity.¹³ River Edge is proposed to be 59' at the greenbelt and 63' along Royal Boulevard.¹⁴ Appellant's Keynetics building was approved for 56' and constructed at 53'.¹⁵ Cottonwood Grill was approved for a height exception of its parapet at around 61' and additional elements at 64' to 65', stairwells, elevators and things of that nature.¹⁶ The Morrison Center is 63', and the student dormitories on Capitol Boulevard are 74'.¹⁷ Along the river corridor, multiple buildings have received height exceptions, including the Cottonwood Grill, the Mallard Building, Blue Heron and the Arid Club.¹⁸
- River Edge provides ample separation from shorter structures.¹⁹ There are some three-story apartment buildings to the southwest; the impact to these structures will be reduced due to the distance created by Royal Boulevard and setbacks.²⁰ Neither the complex owner nor its residents have objected to the project.
- The additional height does not increase the density to the point it exceeds parking standards.²¹
- The proposed building height does not obstruct pedestrian views of the river any more than a 35-foot building would, and the pedestrian pathway mitigates this impact.²²

¹³ P&Z Action Letter (3-6-12) ("Decision Letter"), p. 3.

¹⁴ Staff Report (3-5-12), p. 2, in Staff Packet (3-5-12), p. 2.

¹⁵ Staff Report (2-6-12), p. 6, in Staff Packet (3-5-12), p. 66; Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 5.

¹⁶ Staff testimony, P&Z Hearing Minutes (3-5-12), p. 1.

¹⁷ Staff Report (3-5-12), p. 3, in Staff Packet (3-5-12), p. 3.

¹⁸ Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 5.

¹⁹ Decision Letter, p. 3.

²⁰ Staff Report (2-6-12), p. 6, in Staff Packet (3-5-12), p. 66.

²¹ Decision Letter, p. 3; Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68.

- The additional height will not create privacy concerns given that adjacent uses consist of offices and park land.²³ Adjacent uses are mostly office and industrial in nature.²⁴
- The additional height allows podium parking which creates a desirable aesthetic for the neighborhood.²⁵ The podium parking minimizes surface parking, creates a better streetscape, and creates a more pedestrian friendly environment.²⁶

Although Appellant is upset that River Edge will obstruct the view from its office of the park to the west, the P&Z properly considered the impact to the neighborhood as a whole and determined the proposed building height is compatible based on substantial evidence in the record. Compatibility does not equate to a promise to existing uses that they will experience no impact from new uses. It is the nature of infill and redevelopment that existing uses will experience minor impacts from new uses. A reduced viewshed is a common example. Existing uses in the neighborhood experienced a similar impact when Appellant constructed its new office building (with added height per a CUP height exception).

2. *The P&Z properly determined River Edge will not place an undue burden on transportation and public facilities in the vicinity (Boise City Code § 11-06-04.13(B)).*

Appellant claims River Edge will create parking problems for the City-owned Ann Morrison Park. However, no City department shared this concern. Moreover, River Edge meets all parking requirements and has not requested any reduction of parking.²⁷ Further, as discussed in section 4 below, the parking provided should match actual parking needs based on the applicant's experience and that of Boise State housing projects.

The P&Z's determination of no undue burden on transportation and public facilities is supported by substantial evidence in the record including:

- Most roads within the general vicinity operate at acceptable levels.²⁸
- ACHD issued a letter December 22, 2011 concurring with the traffic study.²⁹
- The traffic generated by this development is mitigated by its intended use as student housing and the fact that the site is served by many modes of transportation. Boise State University provides bus service only one block away, which runs every 20

²² Decision Letter, p. 3; Staff Report (2-6-12), pp. 6, 8, in Staff Packet (3-5-12), pp. 66, 68.

²³ Decision Letter, p. 3.

²⁴ Staff Report (2-6-12), p. 6, in Staff Packet (3-5-12), p. 66.

²⁵ Decision Letter, p. 3.

²⁶ Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 7.

²⁷ Staff Report (2-6-12), p. 3, in Staff Packet (3-5-12), p. 63.

²⁸ Decision Letter, p. 3; Staff Report (2-6-12), pp. 4, 6-7, in Staff Packet (3-5-12), pp. 64, 66-67.

²⁹ Staff Report (2-6-12), p. 7, in Staff Packet (3-5-12), p. 67.

minutes on weekdays. The project is next to the greenbelt, which allows a direct walking/biking path to Boise State University, which is only ¼ mile away.³⁰

- The Boise Parks and Recreation Commission voted to support River Edge.³¹

3. *The P&Z properly determined the site is large enough to accommodate the use (Boise City Code § 11-06-04.13(C)).*

Appellant does not allege any deficiencies with this finding.

4. *The P&Z properly determined River Edge will not adversely affect other property in the vicinity (Boise City Code § 11-06-04.13(D)).*

Appellant claims River Edge will create parking problems for other properties. This is not the case. River Edge meets all parking requirements and has not sought any reduction of parking.³² Further, Appellant's arguments are based on a misunderstanding of the different parking needs of student housing as compared to market-rate apartments.³³ Student housing projects simply need less parking. This should be good news to the City of Boise as it works to develop a less auto-dependent culture and increase the vibrancy of its downtown.

Michaels is acutely aware of the needs of its tenants, as it develops student housing projects all over the country. Michaels has every incentive to provide adequate parking or students will not rent in its projects. The simple fact is a student housing project does not need a sea of surface parking when it is located immediately adjacent to a college campus.

The P&Z understood this difference. The P&Z's determination of no adverse affect on other properties is supported by substantial evidence in the record including:

- River Edge will provide 280 parking spaces for 175 units to satisfy the Boise Zoning Ordinance parking requirement of 1.5 spaces per dwelling unit and 1 guest space per 10 units.³⁴ Appellant's attempts to transform the project from an apartment project into a fraternity or sorority are simply inconsistent with the plain language of the Boise City Code.
- The additional height does not increase the density to the point it exceeds parking standards.³⁵ This should prevent overflow parking from spilling into the neighborhood.³⁶

³⁰ Decision Letter, p. 3; Staff Report (2-6-12), p. 7, in Staff Packet (3-5-12), p. 67.

³¹ Parks Commission letter (2-17-12) and minutes (2-16-12), in Staff Packet (3-5-12), pp. 11, 23-24.

³² Staff Report (2-6-12), p. 3, in Staff Packet (3-5-12), p. 63.

³³ In addition, the parking arguments in Appellant's memorandum do not cite to the record and rely on numerous facts that are not in the record.

³⁴ Staff Report (2-6-12), p. 3, in Staff Packet (3-5-12), p. 63.

³⁵ Decision Letter, p. 3; Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68.

- River Edge parking is consistent with parking ratios provided by Boise State University housing developments.³⁷ Selected on-campus projects show parking to bedroom ratios of 0.34, 0.46 and 0.54.³⁸ These are not all freshman and sophomore projects as Appellant contends and we believe they are entirely representative of the campus and of the needs of Boise State students. River Edge provides a parking to bedroom ratio of 0.45, based on 39 two-bedroom units and 136 four-bedroom units.³⁹
- River Edge will promote the use of zip-cars and provide 5-6 stalls within the parking garage for zip-car use, which may be rented by the hour or by the day.⁴⁰
- River Edge will promote bicycle use, U-bikes and rental bikes and will provide secured bicycle parking on site.⁴¹
- The proposed building height does not obstruct pedestrian views of the river any more than a 35-foot building would, and the pedestrian pathway mitigates this impact.⁴²
- The operating characteristics of the multi-family development do not conflict with the surrounding uses. The area is comprised of other multi-family developments, office and industrial uses that are of similar or greater intensity to River Edge.⁴³
- The increase in traffic generated by the development is offset by the potential for existing businesses to capitalize on the increase in customers to the surrounding neighborhood as well as by access to bus stops and the greenbelt.⁴⁴
- The traffic generated by this development is mitigated by its intended use as student housing and the fact that the site is served by many modes of transportation. Boise State University provides bus service only one block away, which runs every 20 minutes on weekdays. The project is next to the greenbelt, which allows a direct walking/biking path to Boise State University, which is only ¼ mile away.⁴⁵

³⁶ Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68.

³⁷ Staff testimony, P&Z Hearing Minutes (3-5-12), p. 1.

³⁸ Boise State University Parking Ratios for Select On-Campus Housing Properties (3-2-12).

³⁹ Applicant letter (2-27-12), in Staff Packet (3-5-12), p. 43.

⁴⁰ Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 4.

⁴¹ Applicant testimony, P&Z Hearing Minutes (3-5-12), p. 4.

⁴² Decision Letter, p. 3; Staff Report (2-6-12), pp. 6, 8, in Staff Packet (3-5-12), pp. 66, 68.

⁴³ Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68.

⁴⁴ Staff Report (2-6-12), p. 8, in Staff Packet (3-5-12), p. 68.

⁴⁵ Decision Letter, p. 3; Staff Report (2-6-12), p. 7, in Staff Packet (3-5-12), p. 67.

5. ***The P&Z properly determined River Edge will comply with and support the goals of the Comprehensive Plan (Boise City Code § 11-06-04.13(E)).***

Appellant claims River Edge will not comply with the Comprehensive Plan because it is not compatible with other properties, creates parking problems, and has a design that is not aesthetically pleasing. The substance of the compatibility and parking issues has already been addressed. Appellant's opinion regarding design aesthetics is not well-founded and in any case does not dictate whether a project complies with the Comprehensive Plan. The current design has been considered and approved by the City's Design Review Committee, the Parks and Recreation Commission, and the P&Z.

The P&Z's determination of compliance with the Comprehensive Plan is supported by substantial evidence in the record including:

- Objective 7.1.2 calls for opportunities for residents of Boise to find housing in the neighborhood of their choice. River Edge will allow for prospective students to find housing near the university.⁴⁶
- The lack of BSU dormitories has also created a situation where there are many single-family residential homes in historic neighborhoods being rented out to students. This has produced problems with compatibility in older sections of town. River Edge reduces the demand for conversion of existing housing stock into rentals in conformance with Objective 7.2.1.⁴⁷
- Although the project is single-use in nature, the height exception creates a large supply of housing in a mixed-use part of town where there are many commercial businesses that can take advantage of the increase in customers within the area in conformance with Objective 8.1.3.⁴⁸
- The use of structured parking allows the project to better address Royal Boulevard and create a more pedestrian friendly streetscape.⁴⁹ New urbanism design values are discussed throughout the Comprehensive Plan, specifically Policy 7.2.2.2C, which speaks to dovetailing parking with the architectural character of the structure so as not to dominate the streetscape.⁵⁰

⁴⁶ Decision Letter, p. 3; Staff Report (2-6-12), pp. 8-9, in Staff Packet (3-5-12), pp. 68-69.

⁴⁷ Decision Letter, p. 3; Staff Report (2-6-12), pp. 8-9, in Staff Packet (3-5-12), pp. 68-69.

⁴⁸ Staff Report (2-6-12), pp. 8-9, in Staff Packet (3-5-12), pp. 68-69.

⁴⁹ Decision Letter, p. 3; Staff testimony, P&Z Hearing Minutes (3-5-12), p. 1.

⁵⁰ Staff testimony, P&Z Hearing Minutes (3-5-12), p. 1.

- River Edge complies with Comprehensive Plan Objectives 6.1.2 and 6.1.4 and Policies 6.1.2.1, 6.1.4.4 (Transportation); Goal 7.2, Objectives 7.2.1 and 7.2.6, and Policy 7.2.6.2 (Community Quality); and Policies 8.1.17.3 and 8.1.17.6 (Land Use).⁵¹

6. *The P&Z properly determined River Edge includes features that add to the aesthetic appearance of the structure, avoid box-like appearance and includes design features to enhance the physical appearance (Boise City Code § 11-06-04.13(F)).*

Appellant argues the design of River Edge is not aesthetically pleasing. As noted above, the design includes numerous features to enhance its aesthetic appeal. The design has been considered and approved by the City's Design Review Committee, the Parks Commission, and the P&Z.

Further, Appellant argues the P&Z erred because it "failed to make any findings that specific design features were added to enhance the physical appearance of the Project."⁵² To the contrary, the P&Z specifically made the requisite multi-family finding⁵³ by express reference to the Staff Report findings.⁵⁴

Likewise, the Boise City Design Review Committee previously approved the River Edge design based on numerous findings of fact that describe design features that have been added to enhance the physical appearance of the project.⁵⁵

The P&Z Decision Letter is not required to specifically state the multi-family finding or any other finding of fact. The City Code does not require this finding to be included in the P&Z decision document or even to be in writing.⁵⁶ And the Idaho Code has not required a P&Z decision document to be in the form of findings of fact and conclusions of law since the Legislature amended LLUPA in 1999 to remove this requirement. Instead, LLUPA requires a decision to "be in writing and accompanied by a reasoned statement" that explains the rationale for the decision based on the relevant law and facts.⁵⁷

⁵¹ Staff Report (2-6-12), p. 4, in Staff Packet (3-5-12), p. 64.

⁵² Appellant's letter (3-29-12), p. 9.

⁵³ "The Commission or committee must make a finding that specific design features have been added to enhance the physical appearance of such multiple-family residential structures." Boise City Code 11-06-04.13(F).

⁵⁴ P&Z Motion to Approve, P&Z Hearing Minutes (3-5-12), p. 16; Staff Report (2-6-12), p. 9, in Staff Packet (3-5-12), p. 69.

⁵⁵ Boise City Design Review Committee Action Letter (DRH12-00013), p.6.

⁵⁶ Boise City Code 11-06-04.13(F). In fact, the Code language suggests that either the P&Z or the Design Review Committee could make this finding.

⁵⁷ Idaho Code § 67-6535(b); *Evans v. Teton County*, 139 Idaho 71, 80-81 (2003).

IV. Conclusion

River Edge is a great example of quality, compact, urban housing that will serve Boise State University students and add housing options for the downtown area. The project will serve to redevelop an older industrial site and will help to revitalize the area.

The development has been carefully considered by the P&Z, the Design Review Committee, and the Parks and Recreation Commission, as well as all of the commenting agencies and City departments.

For all of the reasons described herein, Appellant has failed to meet its burden to show that the P&Z's decision is erroneous. Therefore, under the applicable standard of review, the City Council must uphold the P&Z decision.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary G. Allen", with a stylized, flowing script.

Gary G. Allen

1434378_3

cc: Josh Johnson
(via e-mail)