PARK CITY COUNCIL WORK SESSION NOTES
SUMMIT COUNTY, UTAH
MAY 6, 2004

Present: **Mayor Dana Williams; Council members Kay Calvert, Marianne Cone, Candace Erickson; Jim Hier, and Joe Kernan**

Tom Bakaly, City Manager; Mark Harrington, City Attorney; Brooks Robinson, Planner; Jonathan Weidenhamer, Planner; and Gary Hill, Analyst

Jennifer Guetschow, Executive Director, Summit Land Conservancy (SLC); Rick Anderson and Monty Coates, HMBA

1. **Public Art Advisory Board interviews.** Council conducted fifteen-minute interviews with applicants Elizabeth Swank, Kim McGuire, and Teri Orr.

2. **Council questions/comments.** See regular meeting minutes.

3. **Conservation easements.** Brooks Robinson explained that staff met with Council in September regarding template language, as well as a process for granting easements to a non-profit organization. Currently, SLC does not have a special service contract with the City and Council may prefer to wait a year to coincide with the budget cycle. Staff is looking for direction on further refinements from Council on the language and any other discussion on a special service contract with SLC. City Manager Bakaly advised that by policy, special service contracts are handled in the first year of the budget cycle and applications would be accepted in March 2005. Jim Hier questioned if managing conservation easements falls under a special service contract or a professional services contract. Tom Bakaly responded that SLC could be treated as a vendor but typically non-profits enter special service contracts. Jim Hier estimated that the administrative work required for Empire Pass amounts to only about $2,750 per year and Round Valley is probably comparable. The City Manager continued that one of the benefits of the special service contract process is having all of the non-profits apply at one time. Another variation is having SLC hold the easements for a year, and then apply next year for a special service contract. Jim Hier stated that he has a problem with essentially putting the easement *out for bid.* Tom Bakaly explained that a distinction between vendor and special service contractor could be defined in the policy language in the budget. Mayor Williams felt there is already a commitment to SLC to hold the easements.

Council member Hier pointed out that SLC holds the conservation easement for Empire Pass where funding was established through the real estate transfer fee to preserve open space. He felt that inviting non-profits to manage the easement every two years isn't practical and Tom Bakaly again referred to possible wording in the budget policy. Mark Harrington stated that UPCM selected SLC to convey the easement. Joe Kernan felt that the provision for uses on reserved rights is not specific enough and the restrictions are very broad. He referred to the work session discussion in September where inviting public input on uses was discussed. For example, there is a prohibition on removing rocks and it might be helpful to have rocks for one reason or another. Brooks Robinson explained that the Parks and Recreation Board has been involved in determining appropriate uses in Round Valley and reserved rights are intentionally broad for the benefit of providing flexibility Mr. Kernan pointed out conflicts in the easement template.

Jim Hier countered that rather than focusing on allowed uses, which can be endless, to clearly outline what is disallowed. Marianne Cone suggested language that prohibiting excavation, mining and/or coring better describes the concern of removing rock. Mayor Williams pointed out that mechanized vehicles are prohibited and he is concerned about emergency police and fire response. There should be some allowance for public safety vehicles. Candace Erickson added that there may be a desire to reserve a right to dig a water well which isn't allowed in the draft. Brooks Robinson explained that under reserved rights, there is the right to install, maintain and replace utilities. . .including water lines, pump stations, etc.

Mark Harrington clarified that these are *redundant easements* as City restrictions exist. He cautioned Council in limiting itself in further defining reserved rights, as the strategy is to be general. However, he acknowledged that once these provisions are on paper, people will have certain expectations. Mr. Kernan discussed maintaining the baseline without compromising opportunities to make improvements. Jim Hier commented that the purpose of the baseline is to report changes and Mayor Williams added that the purpose of a baseline is not necessarily to keep the property the same. The Richards Property, for example, had stream erosion and was over-grazed, and a baseline provided a snap shot of the condition of the parcel.

The City Manager discussed including the contract amount in the final budget. Ms. Erickson noted that the life of the conservation easement is only 15 years; there was discussion about the ability to extend it. The City Attorney interjected that the language dealing with baseline documentation and finances in the template is crafted for the private sector for tax purposes. Additionally, this process is redundant; it is a second grant of an granted easement. Tom Bakaly suggested that Council members Erickson and Hier meet with staff and SLC to refine language that address expressed concerns. This matter can return to Council on May 27. He understood direction not to treat this as a special service contract, but to include the expense in a departmental budget. Jennifer Guetschow asked for clarification about reimbursing SLC with the proceeds from the real estate transfer fee for Flagstaff. The City Manager believed the intent was for acquisition of open space and transportation, not for monitoring easements, but more information will be available at the May 27 work session. Jim Hier excused himself from the meeting.

4. Sidewalk dining. Jonathan Weidenhamer explained that last year, the City Council allowed the use of City sidewalks for outdoor dining on a one-year trial basis. The process involved obtaining an administrative conditional use permit and lease for the use of City-owned property. There were two types of outdoor dining last year. Four of the five restaurants simply set up a table with chairs in front of their establishments. The Eating Establishment set up tables, chairs and ramping or a barrier system to move pedestrians around the dining area. He reported that there was only one complaint last year, but basically all of the input was good. There is a request to extend sidewalk dining from May 1 to October 31 and expand the ability to operate under a conditional use permit from a one-year term to five years. He acknowledged concerns expressed by Council about expanded terms and felt that other related issues could be addressed in the lease with the City. The complaint last year was from Alliance Engineering relating to the use of a public parking space for dining. In response to a question from Marianne Cone, Rick Anderson explained that the Eating Establishment requires three parking spaces, but they are in front of his business. There was discussion about the awkwardness of pedestrian circulation, preserving the look of the historic core, and complying with ADA requirements. Mayor Williams pointed out potential challenges if more restaurants applied. He felt that outdoor dining at the Eating Establishment did not look good and pedestrians were forced in the street. The two-top set-up allowed people to move around the dining area. Marianne Cone agreed with the Mayor's comments on aesthetics and preferred not to impede our narrow sidewalks. Kay Calvert stated that she witnessed people tripping on the curb and/or ramps and felt that scaling down sidewalk dining to two-tops may be more appropriate. She emphasized that losing parking spaces is a major consideration.

Rick Anderson argued that outdoor dining brings a festive atmosphere to the street and the two-top approach is not as appealing to patrons. Monty Coates explained that it was originally envisioned to have up to nine restaurants participate in the larger scale outdoor dining, but the Eating Establishment was the only business interested. Mayor Williams hypothetically stated that there may have been 100 or so patrons who enjoyed outdoor dining, while 2,000 pedestrians were inconvenienced by walking around the dining area in the street. There was discussion of limiting the large-scale operations to five participants. The Mayor pointed out that parking is at a premium in the most critical part of town. Joe Kernan expressed concern about promoting this program because of the sidewalk space limitations and Kay Calvert agreed that our sidewalks are too narrow. She added that if Main Street was one-way, the sidewalks could be widened, but one-way is not an option supported by a majority of merchants. Candace Erickson stated that she could support a two-top table concept. She encouraged the HMBA to develop a permanent plan for the summer, ensuring that the operation is aesthetically pleasing, and limiting the number of participants and forfeited parking spaces.

Jonathan Weidenhamer confirmed that Council is comfortable with extending the time frame for the season, but not the five-year lease.

Rick Anderson, Eating Establishment, stated that he would pursue the two-top approach this year, and look at a more permanent solution next summer. He emphasized that his sidewalk dining application will prompt noticing property owners within 300 feet.

5. **Delivery of budget and overview.** Gary Hill explained that 2005 constitutes the second year of the budget cycle. Rather than printing the entire document again, the Executive Summary illustrates the differences in the budget plan, approved by Council last year, and this year's numbers. He explained that the 2% increase in personnel represents the market adjustment to the pay plan, approved last year by Council. Materials, supplies and services increased 1.9% in 2004 and 2.3% in 2005. Debt service is projected to remain the same. The supplemental section includes departmental requests, which will be discussed on May 27. He stated that sales tax is up $200,000 over last year; revenues are distributed about two months after collection. Budget adjustments reflect an increase in planning, building and engineering fees of $330,000 and an increase in property tax revenues of approximately $310,000. Staff feels comfortable with revenue projections, which are relatively flat. He pointed out that bond proceeds reflected in the recommended budget is the issuance of $9.25 million in general obligation bonds, previously approved by voters for open space, parks and ice. He discussed the details of the upcoming budget calendar. On May 13, capital projects will be addressed. The town plaza, parking structure, police facility, recreation facility, ice, and seismic upgrade to the Marsac Building and funding approaches will be reviewed, including the expansion of the Main Street RDA. Also, the Water Fund and proposed rate increase will be scheduled, including a public hearing. He discussed the development of a sales tax model, which will provide data on a geographical basis and by industry. Staff does not expect any changes to the special services program. It is recommended to amend the resort cities sales tax and telecommunications tax ordinances.

The completion of the needs assessment for the police facility in June will identify a site. Mr. Hill stated that the timing, funding and phasing of the downtown capital projects depends upon the public safety facility. He discussed changes to the policies and objectives section. These specifically clarify practices like accepting and considering new requests for funding at one time and considering special service contracts and the pay plan in their respective years in conjunction with the budget cycle. Staff is recommending not funding one-time events or scholarships for special service contracts in the youth category. It is also suggested to remove minority affairs and combine it with youth services. He described the 2002 program and service analysis process, which involved citizens, committees and staff input. The document provides a great resource for future funding and policy decisions. Mr. Hill advised that the Wikstrom

Report projections have also been updated. Special event impacts will be addressed in the budget policies as well as capital requests from neighborhood groups, including traffic mitigation. In response to a question from Joe Kernan about amendments to the special service contract section, Mr. Hill explained that the categories outlined are deemed eligible for special service contracts.

Prepared by Janet M. Scott

PARK CITY COUNCIL MEETING
SUMMIT COUNTY, UTAH
MAY 6, 2004

I ROLL CALL

Mayor Dana Williams called the regular meeting of the City Council to order at approximately 6 p.m. at the Marsac Municipal Building on Thursday, May 6, 2004. Members in attendance were Dana Williams, Kay Calvert, Marianne Cone, Candace Erickson, Jim Hier, and Joe Kernan. Staff present was Tom Bakaly, City Manager; and Mark Harrington, City Attorney.

II COMMUNICATIONS FROM COUNCIL AND STAFF

Kay Calvert reported that the community meeting on downtown improvements was productive and well attended. Candace Erickson reported on collection activities planned by the Recycling Center. Marianne Cone discussed a meeting held on the art in the park program and a new web page designed by the Park City Arts Council. Jim Hier commented on a meeting with members of the lodging committee where programming requirements for the plaza and other special events was discussed, and will share this information with Council. Mayor Williams reported that Tim Henney has agreed to serve as interim chair of COSAC. He congratulated the Miners Soccer Team for its win over Waterford and announced that the Chief of Staff for the Secretary of the Interior will be in town tomorrow to participate in a state-wide Enviro-Thon.

III PUBLIC INPUT (any matter of City business not scheduled on agenda)

The Mayor invited the public to comment on any matter of City business, not scheduled on the agenda.

Guide dog, Triton Robinson – Planner Brooks Robinson explained that for the past year and a half years, he and his wife, Phyllis, have been involved with raising a puppy for the guide dog program for the blind. He thanked the community for its understanding during Triton's training process, who returns to California next week for further training as a service animal and companion to someone in need.

IV WORK SESSION NOTES AND MINUTES OF MEETING OF APRIL 22, 2004

Joe Kernan, "I move we approve the work session notes and minutes from the meeting of April 22". Kay Calvert seconded. Motion unanimously approved.

V PUBLIC HEARING

Ordinance adopting the Park City Mountain Resort child care record of survey, located at 1310 Lowell Avenue, Park City, Utah **(motion to continue to a date**

uncertain) – Jim Hier, "I so move". Kay Calvert seconded. Motion carried unanimously.

VI NEW BUSINESS

Appeal of determination of water credits for April Mountain – Bamberger Company – Mark Harrington explained that the appeal was originally filed in December 2002 and has been delayed for a number of reasons. Staff has been very appreciative of Bamberger's cooperative efforts with the City to reach a resolution on this issue, the April Mountain subdivision, and to secure continued access to the open space in Gambel Oak Park. Finally, because of the lack of agreement on the water credit matter, this is before Council as a formal appeal. He referred to the special appeal packet where de novo review is detailed and he added that Council has final discretion in interpreting contracts. In response to a question from Marianne Cone about the timing of Council's decision, the City Attorney explained that staff would like a decision tonight. It is likely that findings and conclusions of law and order will then be prepared for ratification by the City Council next week.

Tom Bakaly stated that his determination is that the alleged "credit" is actually a fee "waiver" for water connections for 70 units. There is no mention of fee credits in the agreement. The water fee calculations have changed over time, and staff applied the new rates to the 70 units, resulting in $169,000. Staff believes Bamberger has not complied with the terms of the agreement, and an argument could be made that if the letter of the law is applied to the agreement, not to pay anything. However, in light of the relationship with the appellant, staff focused on equity and felt that $169,000 was fairer than zero. Mr. Bakaly emphasized that staff recommends that Council deny any fee "credits" alleged by the appellant, and support staff's methodology of grating a fee "waiver" of $169,260.

Mark Harrington added that Bamberger requested information on payments made to the special service district by Nielson. He explained that the Nielson property went into bankruptcy in 1986. There were 190 estimated connections and Nielsen ultimately obtained 12 and paid approximately $40,000 to $50,000 to the fund. The subsequent zoning in the Aerie Subdivision was adopted during the bankruptcy, so there were additional vesting arguments during a bankruptcy stay that may have affected down-zoning the property and contributing to other ancillary complications. The City ultimately decided to reduce the Nielsen assessment in accepting $84,000 and two open space parcels in addition to the money already paid. All connection fees were required to be paid. Nielsen has paid the most money compared to others who were mainly delinquent and the City eventually foreclosed on the tank. Neilsen was still required to pay in excess of $130,000 for 12 units, donate two parcels of land and pay water fees.

The City Attorney stated that in the Bamberger case, payment is being offered to avoid going to court, and the City' still recognizes some sort of fee waiver.

Richard Hall, attorney for appellant and applicant, stated that he recognizes that Council has had the opportunity to review background information from the both parties, and will move directly into the issues in dispute and answer questions Council may have. The City entered into an agreement with the applicant in 1982, which the City initiated. Park City was involved in litigation with Elwood Nielsen and was seeking to settle the case, which required access across the applicant's property. The applicant entered into the agreement with the intent to help the City in resolving the matter with Mr. Nielsen. He continued that the agreement is still valid and the associated ordinance is valid. The applicant fulfilled his entire obligation under the agreement and his records indicate that he paid the City an assessment of $344,000 including the assessment and interest over a ten-year term. He never received a notice of deficiency from the City and through the term, continued to pay with the expectation that the City would fulfill its obligation under the agreement as well. In 1982, the applicant was not actively pursuing development of his property but entered into the agreement to help the City and at that time, the number of allowed units was undetermined. The number of units was not determined until 1984, when the ordinance was adopted. Mr. Hall stated that Section 13 of the agreement, Additional Documents, anticipates the ordinance and the assessment. It is important to note this because the City has suggested that the agreement is invalid because of failure to pay the assessments. In doing so, the City is basically relying on the ordinance to invalidate the agreement, where the specific assessments are not identified. These two documents, therefore, must be read together or the agreement cannot be understood.

Mr. Hall stated that the City suggests that the applicant received his entire benefit. The staff report indicates that water usage on the property has increased dramatically over the years. When the capacity of the tank was determined, a substandard 900 gallons was applied to the property. A later report identified 2,300 gallons per unit. He detailed General Engineering Standards and concluded that the 2,300 gallons per unit would support a household of nine people. Mr. Hall contended that there remains a fair amount of water in the Masonic Tank that the applicant paid for with no benefit. The fire capacity in the tank is shared throughout the system. He reiterated that the applicant entered into an agreement with the City that he feels is still valid. The applicant has fulfilled his obligation to the City and now expects the City to do the same. The basis of the City's argument to not fulfill its obligation is reflected in the unilateral actions in reducing the zoning in the Aerie. The City argues that it was an overlay zone, but for all practical purposes the result is the same as down-zoning by reducing density. By reducing the density, the City now feels it has the right to reduce the applicant's benefit under the agreement. The applicant paid assessments on time and in full and did not receive notice of the foreclosure on the tank. The City never indicated that the agreement was invalid, continued to accept payment through 1993, and never delivered a deficiency notice. Richard Hall stated that the applicant appreciates the City's efforts in trying to resolve this matter, but feels that the he has contributed a large sum of money to the tank and has not received the benefit of the bargain entered into and should be reasonably compensated.

He acknowledged the $170,000 offered by the City Manager which is simply for the 70 units, the result of the City's action to down-zone the area. This should not be the basis for the City to change the agreement. However, the applicant does not contest the legality of the overlay zone or the assessment as it was initially created. The density was reduced after the applicant paid his entire assessment.

In response to a question from Kay Calvert about the foreclosure of the tank, Mark Harrington explained that when other properties immediately defaulted, the City not only paid its own obligation but any deficiencies of property owners to obtain full ownership of the tank. Richard Hall interjected that the Bamberger Company was never in default, never received a deficiency notice, and paid its assessment in full. He read an excerpt from Section 5 of Ordinance 84-2, "*Upon any such default, the City shall give notice, in writing, of the default to the owner of the property in default, as shown by the last available equalized assessment rolls. The notice shall provide for a period of 30 days in which the owner shall pay the installments then due and owing, after which the City may accelerate the principal of the assessment, and immediately commence foreclosure proceedings under the procedure established by statute for the foreclosure of mortgages.*" This procedure was never undertaken with the applicant and there was no reason why the applicant would feel that his rights under the agreement *had been foreclosed on.* It has been suggested that the applicant lost his right or benefit from the agreement.

Mark Harrington referred to Section 23, Equitable Remedies, which allows the City to address overall breach. Unfortunately, this is not a two-party agreement. Had the City not exercised its equitable remedies and take possession of the tank, a number of things could have occurred. The tank could have come under private ownership or a bank, in which case there would be no obligation by a third party to pay Bamberger anything. He emphasized that the City intends to honor the agreement as applied to the party, which is fee waivers for units applied for. He pointed out that the zoning, market and product changed; condominiums were originally envisioned. The base density remained the same under the sensitive lands overlay, but with the potential of a much different configuration. Bamberger applied for primarily single-family units for profit.

In response to a question from the Mayor regarding payment records, the City Attorney clarified that some records could not be retrieved, and the appeal packet contains copies of the available records up until 1990. Bamberger asserts that a subsequent final payment was made of about $150,000 and the City acknowledges "*substantial compliance*" with the assessment.

Council member Hier stated that the legality of the original agreement isn't at issue. The City is taking the position that it is valid. Discussion ensued between Messrs. Hier and Hall about Section 13 of the agreement, contemplating additional documents, i.e., the number of units and assessment. Mr. Hall insisted that the City had the advantage of determining the number of units and the assessment and not a minimum number to the applicant. The Bambergers would not have entered into such a one-sided agreement. It was clarified that the property in question was sold by Bamberger and is being developed as the Seasons and part of April Mountain. Joe Kernan asked what Bamberger received for payment. Mr. Hall responded that none of the waivers have been provided because the Bamberger Company reserved that right once it sold the property to the current developer. The City's intent was to set that money aside to apply to those connections. Mr. Kernan clarified his interest in determining comparisons of what others paid and received to see if it was equitable. Mark Harrington explained that the Nielsen assessment is probably the closest comparison. The original assessment was probably about $220,000 and Nielsen paid approximately $150,000, plus dedicating two parcels. He still had to pay the connection fees; there was no fee waiver for the 12 units. Mr. Hall reiterated that the applicant paid the full assessment. Mr. Harrington pointed out that the property in the Aerie is a little different than the Bamberger property because the area was platted and density could be identified. He encouraged the Council to focus on the fee waiver. A fee waiver can only occur when there is an application for development. If this were a true fee credit or certificates for rights in the tank, it wouldn't be dependent on what is built there. Mark Harrington stated that the number of units was a forecast based on the then known circumstances. A different number doesn't invalidate the assessment; it is still valid based on rational, reasonable, and an equally applied principle. The City admits the number was off based on the final result, but the process was fair and Bamberger is still entitled to the waiver. He added that the City's water usage estimates are based on actual usage and Bamberger will receive the same benefit, especially in consideration of fire suppression and irrigation demands.

Jim Hier emphasized that the focus should be on the language in the agreement, regardless of subsequent events. The tank and a water delivery system in the area is a benefit to property to be developed, regardless of the number of units. He stated that he did not find provision for recovery of costs other than the fee waiver for application. Unit equivalencies and unit sizes are not described, and the normal rules weren't applied here. According to the agreement, nothing is owed, except the fee waivers of water connections. He explained that the methodology of the City Manager was to calculate the hook-up fee today and apply it to the 70 units. Mr. Hall argued that the applicant was unable to apply for the 190 units because of the approval of the overlay zone. Mr. Hier responded that Bamberger could have applied for the 190 units but in the location and in configurations complying with the sensitive lands overlay zone. Mr. Hall acknowledged that in theory, 190 may have been available, but as a practical matter would not have been approved. Mr. Hier explained the purpose of unit equivalencies, which are not referenced in the document and the significant time that elapsed without application for development. Mr. Hall indicated that the City approached the applicant and at that time, who felt he couldn't compete with the Nielsen development. Bamberger was not actively pursuing development, and the permit was the result of responding to the City. Mark Harrington understood that by coming to the table, Bamberger received the benefit of zoning it desired, as the area was not zoned. He stressed that the City stood by its zoning decision despite staunch public criticism.

Attorney Craig Smith stated that he joined the City in 1984 and was charged with overseeing the collections of the Masonic Hill Special Improvement District. Bonds were issued for the SID, which compelled the City to ultimately pay for the tank. He discussed the lawsuit with Elwood Nielsen and part of the settlement for him and other property owners resulted in densities that weren't realistic. Cities don't normally build infrastructure for developers, but because of the terms of the settlement agreement, the City proceeded with the formation of the SID. After making one payment, Mr. Nielsen defaulted and filed bankruptcy, but there were other owners who made full payment. Mr. Smith added that the bankruptcy trustee made some of the same arguments made by the appellant with regard to a credit for units not built. His response to the trustee was that the City didn't interfere with Mr. Nielsen's plan; there just wasn't a market for dense condominium projects.

Joe Kernan asked how the Masonic Hill Tank contributed to the City's water system. Mark Harrington explained that the City paid the incremental cost to expand the tank capacity by 50%, from 500,000 to one million gallons. The City always anticipated owning the rights to half of the capacity. He emphasized that it is uncommon that the City would be this involved; typically the City would require the developer to build the tank at his cost and dedicate it at the time of development. This effort was greatly subsidized by the City, which would not be done today or in other developments in the City at that time. Mr. Hall interjected that the City initially planned to cover 31% of the cost of the additional capacity and even though the City subsidized a number of other property owners, the Bamberger Company was not one of them.

Mayor Williams asked for clarification of the expiration of Bamberger's permit. Mark Harrington explained that the Code changed the expiration from two years to five years at some point. Bamberger received master planned development approval in 1984 for 184 units, which would have expired in 1989. There was discussion about the results of defaulting on bonds. Kay Calvert understood the amount in dispute is the calculation of the waiver amount for the difference between 70 and 184 units, but a waiver can't be given until there is an application. Mr. Hall explained that the applicant is seeking $350,000 in compensation but proposes as an alternative that $170,000 be applied as a credit to the Bambergers toward water fees for development in other parts of the City, which complies with the agreement. Mark Harrington explained that only the City had that right, based on buying surplus capacity, which could be sold to other developers throughout the City. Because of fire suppression requirements, no such surplus materialized in the tank and the City never contracted with anyone. The City Attorney added that the agreement provides entitlement to waivers for the 190 units, and the maximum benefit was calculated to be $114,000. There was never an expectation to receive $340,000 in value back. The credit argument doesn't equate. The City believes the offer is equitable by adjusting the water development fee upward to provide another $50,000.

Mr. Hall referred to the agreement and insisted that the SID had the authority to sell excess water and not the City and Mr. Harrington explained that the City obtained those rights when it took over the tank. The SID never operated as envisioned. Mr. Hall and Mr. Hier debated the interpretation of "other developers" in the agreement and Council member Hier emphasized that the $600 applies to a fee "waiver" not a "credit". Joe Kernan asked if the City received any benefit for its investment. Richard Hall responded that the developers were intending to build a 500,000 gallon tank and the City approached them to expand the size of the tank by 500,000. Mark Harrington added that the City received an oversized tank and oversized pipes in a subdivision that it didn't want. He acknowledged, however, that the tank is used in our water system, for which the City paid more than its fair share.

Jim Hier, "I move that we direct the staff to provide findings to uphold the staff's determination of water fees waivers in the amount of $169,260.70". Kay Calvert seconded. Motion carried unanimously. There was discussion about crafting findings that reflect the comments made by Council member Hier.

VII ADJOURNMENT

With no further business, the regular meeting of the City Council was adjourned.

MEMORANDUM OF CLOSED SESSION

The City Council met in closed session at approximately 2 p.m. Members in attendance were Mayor Dana Williams, Kay Calvert, Marianne Cone, Candace Erickson, Jim Hier, and Joe Kernan. Staff present was Tom Bakaly, City Manager; Myles Rademan, Public Affairs Director; and Mark Harrington, City Attorney. Kay Calvert, "I move to close the meeting to discuss property". Joe Kernan seconded. Motion carried unanimously.

The meeting opened at approximately 3 p.m.

The meeting for which these minutes were prepared was noticed by posting at least 24 hours in advance and by delivery to the news media two days prior to the meeting.

Prepared by Janet M. Scott

Janet M. Scott

Janet M. Scott, City Recorder

City Council Staff Report

PARK CITY 1884

Author:	Brooks T. Robinson
Subject:	Conservation Easements on Open Space Bond Purchased Lands
Date:	May 6, 2004
Type of Item:	Informational – Conservation Easements

Planning Department

Summary Recommendations:
This report is for informational purposes. City Council should provide Staff with any further direction on the language included in the conservation easement template and direction on who should oversee the conservation easements. Staff will return to Council for formal approval of conservation easements for the Round Valley Parcels and Richards Parcel by May 27, 2004.

Topic:
Conservation Easements templates and reserved and prohibited rights for both the Richards parcel and Round Valley parcels.

Background:
The City Council reviewed the prohibited and reserved rights for the Round Valley Parcels and Richards Parcel at both the August 31 and September 25, 2003 work sessions. Staff has attached the staff report and minutes from the September 25th meeting (Exhibits B and C). Staff has included the previous requests and language into the draft easements.

Analysis:
The Richards property easement template that has been used as an example is a similar template used by Utah Open Lands and other national non-profit land conservancy groups. The revised reserved rights and prohibited uses have also been amended in the draft.

The draft also discusses the baseline documentation. A baseline document outlining the vegetation, soils and habitat of the property, would be attached as Exhibit A to the easement. As the weather has improved and vegetation is starting to leaf out, Staff needs to conduct surveying and documentation for the Round Valley parcels and adopt the baseline for the Richards parcel. The baseline document would be updated annually by the City or a non-profit organization such as Summit Lands Conservancy (formerly COOL, Conserving Our Open Lands).

The City does not have a Special Services Contract with anyone for this service. Per adopted City Council policy, Special Service Contracts would not be approved until next

year. Rather than breaking or amending policy, one option might be to have the City hold the easements and then have a non-profit administer them starting in July of 2005. The non-profit would have to go through the Special Service Contract application process with all of the other non-profit organizations. This option allows the City time to complete the baseline documentation for the Round Valley parcels in 2004.

If the City Council does want to do a Special Service Contract this year, Staff suggests that the Special Service Contract sub-committee consisting of Councilmembers Calvert and Erickson review this issue and make recommendations to the City Council.

Department Review:

The Lease has been reviewed all applicable City departments.

Recommendation:

Provide Staff with direction on the language included in the conservation easement template, on the prohibited uses and reserved rights for both the Richards parcel and Round Valley parcels, and direction on who should oversee the conservation easements. Staff will finalize the easements and will return to Council for approval by May 27, 2004.

Exhibits:

Exhibit A – Draft Conservation Easement for the Richards and Round Valley Parcels
Exhibit B – September 25, 2003 Staff Report to Council
Exhibit C – September 25, 2003 City Council Minutes

EXHIBIT A
DEED OF CONSERVATION EASEMENT

THIS GRANT DEED OF CONSERVATION EASEMENT is made this _____ day of _______________, 2003, by and between PARK CITY MUNICIPAL CORPORATION, a Utah municipal corporation having an address of 445 Marsac Avenue, Post Office Box 1480, Park City, UT 84060-1480 ("Grantor"), in favor of the CONSERVING OUR OPEN LANDS, a Utah non-profit corporation having an address of Post Office Box 1775, Park City, UT 84060 ("Grantee").

WITNESSETH:

WHEREAS, Grantor is the sole owner in fee simple of approximately 20 acres of real property located west of SR 224 in Park City, Summit County, Utah, described more particularly at Exhibit A, attached hereto and incorporated herein by reference (the "Property"); and

WHEREAS, the Property possesses natural, scenic, recreational, and visual open space values (collectively, "Conservation Values") of great importance to Grantee, the people of Park City, and the people of the State of Utah which are worthy of protection and more fully described in the Baseline Documentation, attached hereto and incorporated herein as Exhibit B; and

WHEREAS, in particular, the Property could be developed for residential use, thereby destroying its natural, scenic and open space characteristics; and

WHEREAS, the Property is prominently visible from one of Park City's two entry corridors, namely SR 224; and

WHEREAS, the Property's proximity to Aspen Springs, the McPolin Farm, Willow Ranch, and the Huntsman Gateway open spaces is significant as it is part of a continuous corridor of open space on the sensitive SR 224 entry corridor; and

WHEREAS, at a November 3, 1998 special bond election, Park City voters authorized the issuance of general obligation bonds in an amount of ten million dollars for the express purpose of acquiring and forever preserving undeveloped park and recreational land; and

WHEREAS, the Property was purchased by Grantor using proceeds of the November 3, 1998 special bond election; and

WHEREAS, the specific conservation values of the Property are documented in an inventory of relevant features of the Property, dated ____________________, 2003, attached hereto and incorporated herein by reference at Exhibit B ("Baseline

Documentation") (original on file at the offices of Grantee) which consists of reports, maps, photographs, and other documentation that the parties agree provide, collectively, an accurate representation of the Property at the time of this grant and which is intended to serve as a objective information baseline for monitoring compliance with the terms of this grant; and

WHEREAS, Grantor intends that the conservation values of the Property be preserved and maintained by the continuation of land use patterns, including, without limitation, those relating to visual open space existing at the time of this grant, that do not significantly impair or interfere with those values; and

WHEREAS, Grantor further intends as owner of the Property, to convey to Grantee the right to preserve and protect the conservation values of the Property in perpetuity; and

WHEREAS, Grantee is a publicly supported, tax-exempt charitable organization qualified under Sections 170(h) and 501(c)(3) of the Internal Revenue Code, whose primary purpose is the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, and/or open space condition; and

WHEREAS, Grantee agrees by accepting this grant to honor the intentions of Grantor stated herein and to preserve and protect in perpetuity the conservation values of the Property for the benefit of this generation and the generations to come;

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms,
conditions, and restrictions contained herein, which the Parties agree constitute adequate consideration for this agreement, and pursuant to the laws of the State of Utah and in particular Utah Code Annotated, Title 57, Chapter 18, Grantor hereby voluntarily grants and conveys to Grantee a conservation easement in perpetuity over the Property of the nature and character and to the extent hereinafter set forth ("Easement").

1. **Purpose**. It is the purpose of this Easement to assure that the Property will be maintained forever (predominately) in open and recreational use, protecting in perpetuity its scenic, open and undisturbed character and recreational value, and preventing any use of the Property that may significantly impair or interfere with the conservation values of the Property. Grantor intends that this Easement will confine the use of the Property to those activities that are consistent with the purpose of this Easement.

1.1 **Baseline Documentation**. To establish the present condition of the Property's agricultural, natural, scenic, and/or other conservation resources and the Property's manmade features, so as to make possible the proper monitoring of future uses of the Property and to ensure compliance with the terms of this Easement, the Parties hereto have prepared an inventory of the Property's relevant resources, features and conditions, which inventory is attached hereto and incorporated herein as Exhibit B, Baseline Documentation. This Baseline Documentation in its entirety is on file at the office of Grantee. The Parties expressly agree that said inventory is an accurate representation of the Property at the time this Agreement is signed. It shall further constitute the minimum level at which the Property shall be maintained by Grantor. If a controversy arises with respect to the nature and/or extent of the historical and/or present use and/or physical condition of the Property at the time of signing of this instrument, the Parties shall not be foreclosed from utilizing all relevant or material documents, surveys, reports, and other evidence to assist in the resolution of the controversy.

2. **Rights of Grantee**. To accomplish the purpose of this Easement the following rights are conveyed to Grantee by this Easement:
   (a) To preserve and protect the conservation values of the Property;
   (b) To enter upon the Property at reasonable times in order to monitor Grantor's compliance with and otherwise enforce the terms of this Easement; provided that such entry shall be upon prior reasonable notice to Grantor, and Grantee shall not unreasonably interfere with Grantor's use and quiet enjoyment of the Property;
   (c) To enter upon the Property in the case of an emergency as determined by Grantee, in which event Grantee shall notify Grantor prior to entering onto the Property, if possible, or as soon thereafter as is reasonably practical;
   (d) To prevent any activity on or use of the Property that is inconsistent with the purpose of this Easement and to require the restoration of such areas or features of the Property that may be damaged by inconsistent activity or use, pursuant to Paragraph 6 herein; and
   (e) To enforce this Easement by appropriate legal proceedings, after providing Grantor with reasonable notice and reasonable opportunity to cure.

3. **Prohibited Uses**. Any activity on or use of the Property inconsistent with the purpose of this Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are prohibited in perpetuity on the Property:

   (a) Development, pre-sale, division, subdivision, or defacto subdivision (through long-term leasing or otherwise) of the Property for any type of human occupation or use;
   (b) Quarrying, mining, excavation, depositing, or removing of rocks, gravel, minerals, sand, or other similar materials from the Property;
   (c) Dumping, depositing, abandoning, discharging, storing, maintaining, or releasing any gaseous, liquid, solid or hazardous wastes, substances,

materials, pollutants, or debris of whatever nature on, in, or over the ground or into the surface or ground water of the Property;

(d) Placement, erection, or maintenance of signs, billboards, or outdoor advertising structures on the Property;
(e) Formal parks or playgrounds;
(f) Construction of buildings, residences, mobile homes, improved streets or roads, or other structures, or any other permanent improvements for use for human habitation, constructed or placed in, on, under, or upon the Property;
(g) Residential or industrial uses of the Property;
(h) Uses of the Property that would be detrimental to the water quality;
(i) Any use or activity that prevents or limits other activities that could occur in the same area; and
(j) Any unanticipated use or activity on or at the Property which would significantly impair the conservation values of the Property, unless such us or activity is necessary for the protection of the conservation values that are the subject of this Easement, in which case such use or activity shall be subject to the prior approval of Grantee, which approval shall not be unreasonably withheld.

4. **Reserved Rights**. Grantor reserves to himself, and to his personal representatives, heirs, successors, and assigns, all rights accruing from their ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not expressly prohibited herein and are not inconsistent with the purpose of this Easement. Without limiting the generality of the foregoing, Grantor expressly reserves the right to:

(a) Construct and use temporary structures on the Property;
(b) Use mechanized equipment to maintain and irrigate the Property;
(c) Construct and maintain ancillary structures on the Property, including but not limited to restrooms, storage, and equipment sheds;
(d) Construct and maintain trail head parking lots;
(e) Construct and maintain improved trails for use by the public;
(f) Place, erect, and maintain a reasonable number of signs on the Property for purposes consistent with the intent of this Easement, including but not limited to declaring the name of the Property and the purpose(s) for which it is preserved and trail wayfinding signs;
(g) Control noxious weeds either by tillage, digging or by use of chemicals and restoration of property. Restoration shall mean the deliberate attempt to speed recovery of damaged areas, including a wide range of possible interventions, from soil amendments, tillage, weed removal, seeding, planting, and aftercare. It ranges from practical and economic attempts to simply restore some productivity to grazing lands, to the attempt to return full ecosystem function and structure in a "natural" protected ecosystem";

(h) Permit grazing on the Property and/or the leasing thereof for grazing or otherwise use the Property for agriculture within in designated areas and accompanied with an approved animal management plan (excepting feedlots);

(i) Repair, restore, reconstruct, or replace existing fencing as necessary in a manner consistent with its condition established through the Baseline Documentation, and to construct and maintain additional fencing as necessary for agricultural or recreational purposes;

(j) Permit public access in accordance with the rules and regulations established by the Park City Parks Department and any subsequent regulations governing the safety and well-being of the pubic on City-owned property;

(k) any organized gathering, of over fifty (50) people, must be a City and Grantee sponsored event;

(l) Recreational services can be provided by a City contract to a vendor (e.g. cross country skiing or mountain biking lessons) but such service cannot limit public access or use or charge the public for the same activity.

(m)Construct and maintain any landscaping, art (not for sale), wayfinding and entryway identification, resident and visitor areas, and other public improvements at the sole discretion of the City Council consistent with the Open Space Bond Issues, to enhance the resident and tourist experience in Park City; anThe right to install, maintain, and eventually replace utilities including, but not limited to, power lines, water lines, sewer lines, telecommunications facilities, and natural gas pipelines, on, under or over the Property.

(o) Engage in all acts or uses that are not prohibited by governmental statutes, regulations, or expressly prohibited herein and consistent with the purposes of this Easement.

5. **<u>Continuous Conservation Reserve Program (CCRP)</u>**. Part of the property is presently encumbered by a CCRP contract; dated June 1, 2003. The CCRP is a 15- year USDA - Farm Service Agency contractual agreement for the stream corridor that is enrolled is 180' from the stream embankment and the designated land classification is riparian buffer zone. The conservation easement shall not apply to the area covered by the CCRP contract during the CCRP's effective period, but the conservation easement will apply to the CCRP area upon termination of the CCRP. Both parties recognize the contract and will honor its terms for its effective period.

6. **<u>Notice of Intent to Undertake Certain Permitted Actions</u>**. The purpose of requiring Grantor to notify Grantee prior to undertaking certain permitted activities, as provided in Paragraph 4, is to afford Grantee an opportunity to ensure that the activities in question are designed and carried out in a manner consistent with the purpose of this Easement. Whenever notice is required, Grantor shall notify Grantee in writing not less than sixty (60) days prior to the date Grantor intends to undertake the activity in question. The notice shall

describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purpose of this Easement.

6.1 **Grantee's Approval**. Where Grantee's approval is required, as set forth in Paragraph 5, Grantee shall grant or withhold its approval in writing within sixty (60) days of receipt of Grantor's written request therefore. Grantee's approval may be withheld only upon a reasonable determination by Grantee that the action as proposed would be inconsistent with the purpose of this Easement.

7. **Grantee's Remedies**. If Grantee determines that Grantor is in violation of the terms of this Easement or that a violation is threatened, Grantee shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Easement, to restore the portion of the Property so injured. If Grantor fails to cure the violation within thirty (30) days after receipt of notice thereof from Grantee, or under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fail to begin curing such violation within the thirty (30) day period, or fail to continue diligently to cure such violation until finally cured, Grantee may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement or injury to any conservation values protected by this Easement, including damages for the loss of scenic, aesthetic, or environmental values, and to require the restoration of the Property to the condition that existed prior to any such injury. Without limiting Grantor's liability therefor, Grantee, in its sole discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Property. If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the conservation values of the Property, Grantee may pursue its remedies under this Paragraph without prior notice to Grantor or without waiting for the period provided for cure to expire. Grantee's rights under this Paragraph apply equally in the event of either actual or threatened violations of the terms of this Easement, and Grantor agrees that Grantee's remedies at law for any violation of the terms of this Easement are inadequate and that Grantee shall be entitled to the injunctive relief described in this Paragraph, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this Paragraph shall be cumulative and shall be in addition to all remedies not or hereafter existing at law or in equity. If Grantor prevails in any action to enforce the terms of this Easement, Grantor's costs of suit, including, without limitation, attorneys' fees, shall be borne by Grantee. If Grantee prevails in any action to enforce the terms of this Easement, Grantee's costs of suit, including, without limitation, attorneys' fees, shall be borne by Grantor.

7.1 **Grantee's Discretion**. Enforcement of the terms of this Easement shall be at the discretion of Grantee, and any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any term of this Easement by Grantor shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any right or remedy upon an breach by Grantor shall impair such right or remedy or be construed as a waiver.

7.2 **Acts Beyond Grantor's Control**. Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Property resulting from causes beyond Grantor's control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes.

8. **Access**. No right of access by the general public to any portion of the Property is conveyed by this Easement.

9. **Costs and Liabilities**. Grantor retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property, including the maintenance of adequate comprehensive general liability insurance coverage. Grantor shall keep the Property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor.

9.1 **Taxes**. Grantor shall pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Property by competent authority (collectively "taxes"), including any taxes imposed upon, or incurred as a result of, this Easement, and shall furnish Grantee with satisfactory evidence of payment upon request. Grantee is authorized but in no event obligated to make or advance any payment of taxes, upon ten (10) days prior written notice to Grantor, in accordance with any bill, statement, or estimate procured from the appropriate authority, without inquiry into the validity of the taxes or the accuracy of the bill, statement, or estimate procured from the appropriate authority, without inquiry into the validity of the taxes or the accuracy of the bill, statement, or estimate, and the obligation created by such payment shall bear interest until paid by Grantor at the lesser of two (2) percentage points over the prime rate of interest from time to time charged by Zion's Bank or the maximum rate allowed by law.

9.2 **Hold Harmless**. Grantor shall hold harmless, indemnify, and defend Grantee and its members, directors, officers, employees, agents, and contractors (collectively "Indemnified Parties") from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands or judgments, including, without limitation, reasonable attorneys' fees arising from or in any connection with: (1) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, unless due solely to the negligence of any of the Indemnified Parties; (2) the obligations specified in Paragraphs 8 and 8.1; and (3) the existence or administration of this Easement.

10. **Extinguishment**. Grantee shall not voluntarily or willingly allow the extinguishment of any of the restrictions of this Easement, and if any or all of the restrictions of this Easement are nevertheless extinguished by a judicial or other governmental proceeding, any and all compensation received by Grantee as a result of the extinguishment shall be used by Grantee in a manner consistent with the conservation purposes of this Easement.

10.1 **Condemnation**. If the Easement is taken, in whole or in part, by exercise of the power of eminent domain, Grantee shall be entitled to compensation in accordance with applicable law.

10.2 **Amendment**. This Easement may be modified only by mutual written agreement of Grantor and Grantee. No amendment shall be made that will adversely affect the status of this Easement as a qualified conservation easement pursuant to Title 57, Chapter 18 of the Utah Code, nor Grantee's status as a publicly supported, tax-exempt charitable organization qualified under Sections 170(h) and 501(c)(3) of the Internal Revenue Code and applicable laws of the state of Utah. Any such amendment shall be consistent with the stated purposes of this Easement, shall not affect its perpetual duration, and shall not permit any impairment of the significant conservation values of the Property. Any such amendment shall be filed in the office of the Summit County Recorder.

11. **Transfer of Easement**. If Grantee determines that it no longer is able to perform its obligations or enforce its rights under this Easement, or that it no longer desires to enforce said rights, or if Grantee ceases to exist, or is otherwise prevented from enforcing its rights under this Easement, or if Grantee no longer qualifies as a qualified organization under Section 170(h) of the Internal Revenue Code of 1954, as amended (or any successor provision then applicable), Grantee may convey its rights and obligations under this Easement only to an organization that is a qualified organization at the time of transfer under Section

170(h) of the Internal Revenue Code of 1954, as amended (or any successor provision then applicable), and the applicable regulations promulgated thereunder, and authorized to acquire and hold conservation easements under State statute. Grantee shall require that the conservation purposes that this grant is intended to advance continue to be carried out. Grantee is hereby expressly prohibited from subsequently transferring the Easement, under any circumstances and whether or not for consideration, unless:

(a) Grantee, as a condition precedent of the transfer, requires that the conservation purposes which this Easement is intended to advance continue to be carried out;

(b) The transferee is an organization qualifying at the time of transfer as an eligible done under Paragraph 170(h) of the Internal Revenue Code of 1954, as amended (or any successor provision then applicable) and regulations promulgated thereunder; and

(c) Grantor and/or its successor in interest, at its sole discretion, either selected the transferee or consents in writing to the transfer.

12. **Grantor Transfer of Interest**. Grantor agrees to incorporate the terms of this Easement in any deed or other legal instrument by which he divests himself of any interest in all or a portion of the Property, including, without limitation, a leasehold interest. Grantor further agrees to give written notice to Grantee of the transfer of any interest at least twenty (20) days prior to the date of such transfer. The failure of Grantor to perform any act required by this Paragraph shall not impair the validity of this Easement or limit its enforceability in any way.

13. **Estoppel Certificates**. Upon request by Grantor, Grantee shall within twenty (20) days execute and deliver to Grantor any document, including an estoppel certificate, which certifies Grantor's compliance with any obligation of Grantor contained in this Easement and otherwise evidences the status of this Easement as may be requested by Grantor.

14. **Notices**. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by first class mail, postage prepaid, addressed as follows (or to such other address as either party from time to time shall designate by written notice to the other):

To Grantee: CONSERVING OUR OPEN LANDS
Attn: Executive Director
Post Office Box 1775

Park City, UT 84060

To Grantor: PARK CITY MUNICIPAL CORPORATION
Attn: City Recorder
445 Marsac Avenue
Post Office Box 1480
Park City UT 84060-1480

15. **Recordation**. Grantee shall record this instrument in timely fashion in the official records of Summit County, Utah, and may re-record it at any time as may be required to preserve its rights in this Easement.

16. **General Provisions**.

(a) Controlling Law. The laws of the state of Utah shall govern the interpretation and performance of this Easement.

(b) Liberal Construction. Any general rule of construction to the contrary notwithstanding this Easement shall be liberally construed in favor of the grant to effect the purpose of this Easement and the policy and purposes of Utah statute. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

(c) Severability. If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

(d) Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein.

(e) No Forfeiture. Nothing contained herein will result in the forfeiture or reversion of Grantor's title in any respect.

(f) Joint Obligation. If more than one person or entity is the successor or assign of Grantor, the obligations imposed by this Easement upon Grantor shall be jointly and severally binding on each such person or entity.

(g) Successors. The covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property.

(h) Termination of Rights and Obligations. A party's rights and obligations under this Easement terminate upon transfer of the party's interest in the Easement or Property, except that ability for acts or omissions occurring prior to transfer shall survive transfer.

(i) Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction of interpretation.

(j) Counterparts. The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

TO HAVE AND TO HOLD unto Grantee, its successors, and assigns forever.

IN WITNESS WHEREOF Grantor and Grantee have set their hands on the day and year first above written.

EXHIBIT A

Beginning at a point West 2403.70 feet, and North 655.95 feet from the Southeast Corner of Section 5, Township 2 South, Range 4 East, Salt Lake Base and Meridian: running thence East 187.26 feet; Thence South 577.14 feet to the North ling of Thaynes Creek Ranch Subdivision as Recorded; Thence Ease along said North line 831.89 feet to the West line of State Highway U-244; Thence North 21 deg. 12' West along said West line 1351.47 feet; Thence West 539.30 feet; Thence South 0° 44'37" East 682.93 feet to the point of beginning; containing 871,200 square feet or 20.000 acres, more or less;

Excepting all area within 180 feet of the stream embankment covered in the CCRP Agreement. Subject to all matters of record.

ROUND VALLEY
DEED OF CONSERVATION EASEMENT

THIS GRANT DEED OF CONSERVATION EASEMENT is made this _____ day of _______________, 2003, by and between PARK CITY MUNICIPAL CORPORATION, a Utah municipal corporation having an address of 445 Marsac Avenue, Post Office Box 1480, Park City, UT 84060-1480 ("Grantor"), in favor of the CONSERVING OUR OPEN LANDS, a Utah non-profit corporation having an address of Post Office Box 1775, Park City, UT 84060 ("Grantee").

WITNESSETH:

WHEREAS, Grantor is the sole owner in fee simple of approximately 655 acres of real property located north of SR 248 in Park City, Summit County, Utah, described more particularly at Exhibit A, attached hereto and incorporated herein by reference (the "Property"); and

WHEREAS, the Property possesses natural, scenic, recreational, and visual open space values (collectively, "Conservation Values") of great importance to Grantee, the people of Park City, and the people of the State of Utah which are worthy of protection and more fully described in the Baseline Documentation, attached hereto and incorporated herein as Exhibit B; and

WHEREAS, in particular, the Property could be developed for residential use, thereby destroying its natural, scenic and open space characteristics; and

WHEREAS, the Property is prominently visible from one of Park City's two entry corridors, namely SR 248; and

WHEREAS, the Property as it is part of a continuous corridor of open space on the sensitive SR 248 entry corridor; and

WHEREAS, at a November 3, 1998 special bond election and November 5, 2002 special bond election, Park City voters authorized the issuance of two general obligation bonds in an amount of twenty million dollars for the express purpose of acquiring and forever preserving undeveloped park and recreational land; and

WHEREAS, the Property was purchased by Grantor using proceeds of the November 3, 1998 and November 5, 2002 special bond election; and

WHEREAS, the specific conservation values of the Property are documented in an inventory of relevant features of the Property, dated ____________________, 2003, attached hereto and incorporated herein by reference at Exhibit B ("Baseline

Documentation") (original on file at the offices of Grantee) which consists of reports, maps, photographs, and other documentation that the parties agree provide, collectively, an accurate representation of the Property at the time of this grant and which is intended to serve as a objective information baseline for monitoring compliance with the terms of this grant; and

WHEREAS, Grantor intends that the conservation values of the Property be preserved and maintained by the continuation of land use patterns, including, without limitation, those relating to visual open space existing at the time of this grant, that do not significantly impair or interfere with those values; and

WHEREAS, Grantor further intends as owner of the Property, to convey to Grantee the right to preserve and protect the conservation values of the Property in perpetuity; and

WHEREAS, Grantee is a publicly supported, tax-exempt charitable organization qualified under Sections 170(h) and 501(c)(3) of the Internal Revenue Code, whose primary purpose is the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, and/or open space condition; and

WHEREAS, Grantee agrees by accepting this grant to honor the intentions of Grantor stated herein and to preserve and protect in perpetuity the conservation values of the Property for the benefit of this generation and the generations to come;

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions, and restrictions contained herein, which the Parties agree constitute adequate consideration for this agreement, and pursuant to the laws of the State of Utah and in particular Utah Code Annotated, Title 57, Chapter 18, Grantor hereby voluntarily grants and conveys to Grantee a conservation easement in perpetuity over the Property of the nature and character and to the extent hereinafter set forth ("Easement").

1. **Purpose**. It is the purpose of this Easement to assure that the Property will be maintained forever (predominately) in open and recreational use, protecting in perpetuity its scenic, open and undisturbed character and recreational value, and preventing any use of the Property that may significantly impair or interfere with the conservation values of the Property. Grantor intends that this Easement will confine the use of the Property to those activities that are consistent with the purpose of this Easement.

1.1 **Baseline Documentation**. To establish the present condition of the Property's agricultural, natural, scenic, and/or other conservation resources and the Property's manmade features, so as to make possible the proper monitoring of future uses of the Property and to ensure compliance with the terms of this Easement, the Parties hereto have prepared an inventory of the Property's relevant resources, features and conditions, which inventory is attached hereto and incorporated herein as Exhibit B, Baseline Documentation. This Baseline Documentation in its entirety is on file at the office of Grantee. The Parties expressly agree that said inventory is an accurate representation of the Property at the time this Agreement is signed. It shall further constitute the minimum level at which the Property shall be maintained by Grantor. If a controversy arises with respect to the nature and/or extent of the historical and/or present use and/or physical condition of the Property at the time of signing of this instrument, the Parties shall not be foreclosed from utilizing all relevant or material documents, surveys, reports, and other evidence to assist in the resolution of the controversy.

2. **Rights of Grantee**. To accomplish the purpose of this Easement the following rights are conveyed to Grantee by this Easement:

(f) To preserve and protect the conservation values of the Property;

(g) To enter upon the Property at reasonable times in order to monitor Grantor's compliance with and otherwise enforce the terms of this Easement; provided that such entry shall be upon prior reasonable notice to Grantor, and Grantee shall not unreasonably interfere with Grantor's use and quiet enjoyment of the Property;

(h) To enter upon the Property in the case of an emergency as determined by Grantee, in which event Grantee shall notify Grantor prior to entering onto the Property, if possible, or as soon thereafter as is reasonably practical;

(i) To prevent any activity on or use of the Property that is inconsistent with the purpose of this Easement and to require the restoration of such areas or features of the Property that may be damaged by inconsistent activity or use, pursuant to Paragraph 6 herein; and

(j) To enforce this Easement by appropriate legal proceedings, after providing Grantor with reasonable notice and reasonable opportunity to cure.

3. **<u>Prohibited Uses</u>**. Any activity on or use of the Property inconsistent with the purpose of this Easement is prohibited. Without limiting the generality of the foregoing, the following activities and uses are prohibited in perpetuity on the Property:

(k) Development, pre-sale, division, subdivision, or defacto subdivision (through long-term leasing or otherwise) of the Property for any type of human occupation or use;
(l) Quarrying, mining, excavation, depositing, or removing of rocks, gravel, minerals, sand, or other similar materials from the Property;
(m)Dumping, depositing, abandoning, discharging, storing, maintaining, or releasing any gaseous, liquid, solid or hazardous wastes, substances, materials, pollutants, or debris of whatever nature on, in, or over the ground or into the surface or ground water of the Property;
(n) Placement, erection, or maintenance of signs, billboards, or outdoor advertising structures on the Property;
(o) Construction of buildings, residences, mobile homes, improved streets or roads, or other structures, or any other permanent improvements for use for <u>human habitation</u>, constructed or placed in, on, under, or upon the Property;
(p) Residential or industrial uses of the Property;
(q) Uses of the Property that would be detrimental to the water quality; and
(r) Any unanticipated use or activity on or at the Property which would significantly impair the conservation values of the Property, unless such us or activity is necessary for the protection of the conservation values that are the subject of this Easement, in which case such use or activity shall be subject to the prior approval of Grantee, which approval shall not be unreasonably withheld.

4. **<u>Reserved Rights</u>**. Grantor reserves to himself, and to his personal representatives, heirs, successors, and assigns, all rights accruing from their ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not expressly prohibited herein and are not inconsistent with the purpose of this Easement. Without limiting the generality of the foregoing, Grantor expressly reserves the right to:

(n) Construct and use temporary structures on the Property;
(o) Use mechanized equipment to maintain the Property;
(p) Construct and maintain ancillary structures on the Property, including but not limited to restrooms, storage, and equipment sheds;
(q) Construct and maintain trail head parking lots;
(r) Construct and maintain improved trails for use by the public;

(s) Place, erect, and maintain a reasonable number of signs on the Property for purposes consistent with the intent of this Easement, including but not limited to declaring the name of the Property and the purpose(s) for which it is preserved and trail wayfinding signs;

(t) Control noxious weeds and restoration of property. Restoration shall mean the deliberate attempt to speed recovery of damaged areas, including a wide range of possible interventions, from soil amendments, tillage, weed removal, seeding, planting, and aftercare. It ranges from practical and economic attempts to simply restore some productivity to grazing lands, to the attempt to return full ecosystem function and structure in a "natural" protected ecosystem";

(u) Permit grazing on the Property and/or the leasing thereof for grazing or otherwise use the Property for agriculture within in designated areas and accompanied with an approved animal management plan (excepting feedlots);

(v) Repair, restore, reconstruct, or replace existing fencing as necessary in a manner consistent with its condition established through the Baseline Documentation, and to construct and maintain additional fencing as necessary for agricultural or recreational purposes;

(w) Permit public access in accordance with the rules and regulations established by the Park City Parks Department and any subsequent regulations governing the safety and well-being of the pubic on City-owned property;

(x) any organized gathering, of over fifty (50) people, must be a City sponsored event; and

(y) Engage in all acts or uses that are not prohibited by governmental statute or regulation, not expressly prohibited herein, and not inconsistent with the purpose of this Easement.

5. **<u>Notice of Intent to Undertake Certain Permitted Actions</u>**. The purpose of requiring Grantor to notify Grantee prior to undertaking certain permitted activities, as provided in Paragraph 4, is to afford Grantee an opportunity to ensure that the activities in question are designed and carried out in a manner consistent with the purpose of this Easement. Whenever notice is required, Grantor shall notify Grantee in writing not less than sixty (60) days prior to the date Grantor intends to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable, and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purpose of this Easement.

5.1 **<u>Grantee's Approval</u>**. Where Grantee's approval is required, as set forth in Paragraph 5, Grantee shall grant or withhold its approval in writing within sixty (60) days of receipt of Grantor's written request therefor. Grantee's approval may be withheld only upon a reasonable determination by Grantee that the action as proposed would be inconsistent with the purpose of this Easement.

6. **<u>Grantee's Remedies</u>**. If Grantee determines that Grantor is in violation of the terms of this Easement or that a violation is threatened, Grantee shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Easement, to restore the portion of the Property so injured. If Grantor fails to cure the violation within thirty (30) days after receipt of notice thereof from Grantee, or under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fail to begin curing such violation within the thirty (30) day period, or fail to continue diligently to cure such violation until finally cured, Grantee may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement or injury to any conservation values protected by this Easement, including damages for the loss of scenic, aesthetic, or environmental values, and to require the restoration of the Property to the condition that existed prior to any such injury. Without limiting Grantor's liability therefor, Grantee, in its sole discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Property. If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the conservation values of the Property, Grantee may pursue its remedies under this Paragraph without prior notice to Grantor or without waiting for the period provided for cure to expire. Grantee's rights under this Paragraph apply equally in the event of either actual or threatened violations of the terms of this Easement, and Grantor agrees that Grantee's remedies at law for any violation of the terms of this Easement are inadequate and that Grantee shall be entitled to the injunctive relief described in this Paragraph, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this Paragraph shall be cumulative and shall be in addition to all remedies not or hereafter existing at law or in equity. If Grantor prevails in any action to enforce the terms of this Easement, Grantor's costs of suit, including, without limitation, attorneys' fees, shall be borne by Grantee. If Grantee prevails in any action to enforce the terms of this Easement, Grantee's costs of suit, including, without limitation, attorneys' fees, shall be borne by Grantor.

6.1 **<u>Grantee's Discretion</u>**. Enforcement of the terms of this Easement shall be at the discretion of Grantee, and any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any term of this Easement by Grantor shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or any other term of this

Easement or of any right or remedy upon an breach by Grantor shall impair such right or remedy or be construed as a waiver.

6.2 **Acts Beyond Grantor's Control**. Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Property resulting from causes beyond Grantor's control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes.

7. **Access**. No right of access by the general public to any portion of the Property is conveyed by this Easement.

8. **Costs and Liabilities**. Grantor retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property, including the maintenance of adequate comprehensive general liability insurance coverage. Grantor shall keep the Property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor.

8.1 **Taxes**. Grantor shall pay before delinquency all taxes, assessments, fees, and charges of whatever description levied on or assessed against the Property by competent authority (collectively "taxes"), including any taxes imposed upon, or incurred as a result of, this Easement, and shall furnish Grantee with satisfactory evidence of payment upon request. Grantee is authorized but in no event obligated to make or advance any payment of taxes, upon ten (10) days prior written notice to Grantor, in accordance with any bill, statement, or estimate procured from the appropriate authority, without inquiry into the validity of the taxes or the accuracy of the bill, statement, or estimate procured from the appropriate authority, without inquiry into the validity of the taxes or the accuracy of the bill, statement, or estimate, and the obligation created by such payment shall bear interest until paid by Grantor at the lesser of two (2) percentage points over the prime rate of interest from time to time charged by Zion's Bank or the maximum rate allowed by law.

8.2 **Hold Harmless**. Grantor shall hold harmless, indemnify, and defend Grantee and its members, directors, officers, employees, agents, and contractors (collectively "Indemnified Parties") from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands or judgments, including, without limitation, reasonable attorneys' fees arising from or in any connection with: (1) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property, unless due solely to the negligence of any of the Indemnified Parties; (2) the obligations specified in Paragraphs 8 and

8.1; and (3) the existence or administration of this Easement.

9. **Extinguishment**. Grantee shall not voluntarily or willingly allow the extinguishment of any of the restrictions of this Easement, and if any or all of the restrictions of this Easement are nevertheless extinguished by a judicial or other governmental proceeding, any and all compensation received by Grantee as a result of the extinguishment shall be used by Grantee in a manner consistent with the conservation purposes of this Easement.

9.1 **Condemnation**. If the Easement is taken, in whole or in part, by exercise of the power of eminent domain, Grantee shall be entitled to compensation in accordance with applicable law.

9.2 **Amendment**. This Easement may be modified only by mutual written agreement of Grantor and Grantee. No amendment shall be made that will adversely affect the status of this Easement as a qualified conservation easement pursuant to Title 57, Chapter 18 of the Utah Code, nor Grantee's status as a publicly supported, tax-exempt charitable organization qualified under Sections 170(h) and 501(c)(3) of the Internal Revenue Code and applicable laws of the state of Utah. Any such amendment shall be consistent with the stated purposes of this Easement, shall not affect its perpetual duration, and shall not permit any impairment of the significant conservation values of the Property. Any such amendment shall be filed in the office of the Summit County Recorder.

10. **Transfer of Easement**. If Grantee determines that it no longer is able to perform its obligations or enforce its rights under this Easement, or that it no longer desires to enforce said rights, or if Grantee ceases to exist, or is otherwise prevented from enforcing its rights under this Easement, or if Grantee no longer qualifies as a qualified organization under Section 170(h) of the Internal Revenue Code of 1954, as amended (or any successor provision then applicable), Grantee may convey its rights and obligations under this Easement only to an organization that is a qualified organization at the time of transfer under Section 170(h) of the Internal Revenue Code of 1954, as amended (or any successor provision then applicable), and the applicable regulations promulgated thereunder, and authorized to acquire and hold conservation easements under State statute. Grantee shall require that the conservation purposes that this grant is intended to advance continue to be carried out. Grantee is hereby expressly prohibited from subsequently transferring the Easement, under any circumstances and whether or not for consideration, unless:

(a) Grantee, as a condition precedent of the transfer, requires that the conservation purposes which this Easement is intended to advance continue to be carried out;

(b) The transferee is an organization qualifying at the time of transfer as an eligible donee under Paragraph 170(h) of the Internal Revenue Code of 1954, as amended (or any successor provision then applicable) and regulations promulgated thereunder; and

(c) Grantor and/or its successor in interest, at its sole discretion, either selected the transferee or consents in writing to the transfer.

11. <u>Grantor Transfer of Interest</u>. Grantor agrees to incorporate the terms of this Easement in any deed or other legal instrument by which he divests himself of any interest in all or a portion of the Property, including, without limitation, a leasehold interest. Grantor further agrees to give written notice to Grantee of the transfer of any interest at least twenty (20) days prior to the date of such transfer. The failure of Grantor to perform any act required by this Paragraph shall not impair the validity of this Easement or limit its enforceability in any way.

12. <u>Estoppel Certificates</u>. Upon request by Grantor, Grantee shall within twenty (20) days execute and deliver to Grantor any document, including an estoppel certificate, which certifies Grantor's compliance with any obligation of Grantor contained in this Easement and otherwise evidences the status of this Easement as may be requested by Grantor.

13. <u>Notices</u>. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by first class mail, postage prepaid, addressed as follows (or to such other address as either party from time to time shall designate by written notice to the other):

To Grantee: CONSERVING OUR OPEN LANDS
Attn: Executive Director
Post Office Box 1775
Park City, UT 84060

To Grantor: PARK CITY MUNICIPAL CORPORATION
Attn: City Recorder
445 Marsac Avenue
Post Office Box 1480
Park City UT 84060-1480

14. <u>Recordation</u>. Grantee shall record this instrument in timely fashion in the official records of Summit County, Utah, and may re-record it at any time as may be required to preserve its rights in this Easement.

15. <u>General Provisions</u>.

(a) Controlling Law. The laws of the state of Utah shall govern the interpretation and performance of this Easement.

(b) Liberal Construction. Any general rule of construction to the contrary notwithstanding this Easement shall be liberally construed in favor of the grant to effect the purpose of this Easement and the policy and purposes of Utah statute. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

(c) Severability. If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

(d) Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Easement, all of which are merged herein.

(e) No Forfeiture. Nothing contained herein will result in the forfeiture or reversion of Grantor's title in any respect.

(f) Joint Obligation. If more than one person or entity is the successor or assign of Grantor, the obligations imposed by this Easement upon Grantor shall be jointly and severally binding on each such person or entity.

(g) Successors. The covenants, terms, conditions, and restrictions of this Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property.

(h) Termination of Rights and Obligations. A party's rights and obligations under this Easement terminate upon transfer of the party's interest in the Easement or Property, except that ability for acts or omissions occurring prior to transfer shall survive transfer.

(i) Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction of interpretation.

(j) Counterparts. The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

TO HAVE AND TO HOLD unto Grantee, its successors, and assigns forever.

IN WITNESS WHEREOF Grantor and Grantee have set their hands on the day and year first above written.

EXHIBIT A

LEGAL DESCRIPTION
GROVER
The Northwest quarter of the south east quarter of Section 34, Township 1, South Range 4 East, Salt Lake Base and Meridian.

LEGAL DESCRIPTION
RICHARDS
Beginning at a point West 2403.70 feet, and North 655.95 feet from the Southeast Corner of Section 5, Township 2 South, Range 4 East, Salt Lake Base and Meridian: running thence East 187.26 feet; Thence South 577.14 feet to the North ling of Thaynes Creek Ranch Subdivision as Recorded; Thence Ease along said North line 831.89 feet to the West line of State Highway U-244; Thence North 21 deg. 12' West along said West line 1351.47 feet; Thence West 539.30 feet; Thence South 0° 44'37" East 682.93 feet to the point of beginning; containing 871,200 square feet or 20.000 acres, more or less;

Subject to all matters of record.

LEGAL DECRIPTION
BILOGIO
A portion of the lands of Edward L. Gillmor, being a portion of Parcel 4 as described in Book 275 of Official Records of Summit County, Utah, at Page 380, being more particularly described as follows:

The South half of the Southwest quester, the South 1055.0 feet of the Northwest quarter of the Southwest quarter, and the North 995.17 feet of the Southwest quarter of the Southeast quarter of Section 34, Township 1 South, Range 4 East, Salt Lake Base and Meridian, more particularly described as follows:

Beginning at a found aluminum cap set on a rebar at the southwest corner of Section 34, Township 1 South, Range 4 East, Salt Lake Base Meridian; thence North 0°16'58" East 2388.60 feet along the West line of said Section 34, to a point South 0°16'58" West 278.60 feet from a found rebar set in a mound of rocks at the West quarter corner of said Section 34; thence South 89°52'47" East 1326.54 feet; thence South 0°16'58" West 338.43 feet to a found plastic cap set on a rebar marked "NE Cor Par 6-C" at the South quarter corner of said Section 34 and described in Parcel 6 (Park Meadows No. 6-C) as recorded in Book 510 of Official Records, at Page 180; thence North 89°52'47" West 2653.07 feet along the South line of said Section 34, said line being also the North line of said Park Meadows No. 6-C and the North line of the lands of Arnold Resorts, Inc., as described in the Trustee's Deed recorded in Book 510 of Official Records, at Page 79, to the point of beginning.

Excepting therefrom all oil, gas, mining and mineral rights of whatsoever kind and nature in subject property Excepted by Edward L. Gillmor in that certain Special Warranty Dee dated June 21, 1989 and recorded June 26, 1989 as Entry No. 309698 in Book 525 at Page 684 Official Records of Summit County.

LEGAL DECRIPTION
MCMILLIAN

Parcel 1:
Beginning at the Northeast corner of Section 33, Township 1 South, Range 4 East, Salt Lake Base and Meridian; and running thence North 89°51'08" West along the section line 2677.46 feet to the North quarter corner of said Section 33; Thence South 0°01'47" East along the center section line 733.935 feet; Thence North 2674.514 feet to the East line of said section 33; Thence North 0°12'01" East along said East line 733.932 Feet to the point of Beginning.

Parcel 2:
Beginning at a point South 0°12'01" West 733.932 feet from the Northeast corner of Section 33, Township 1 South, Range 4 East, Salt Lake Base and Meridian; And running thence North 89°51'08" West 2674.514 feet to the center section line of said Section 33; Thence South 0°01'47" East along said section line 651.80 feet; Thence South 89°51'08" East 2671.90 feet to the East line of said Section 33; Thence North 0°12'01" East along said East line 651.80 feet to the point of beginning.

Parcel 3:
Beginning at a point which is South 0°01'47" East 1395.735 feet from the North quarter corner of Section 33, Township 1 South, Range 4 East, Salt Lake Base and Meridian, said point of beginning is also located on the West line of the Northeast quarter of said Section 33; And running thence along said West line South 0°01'47" East 660 Feet' Thence South 89°51'08" East 1341.98 feet; Thence South 0°01'47" East 642.60 feet;

Thence South 89°51'08" East 657.65 feet; Thence north 0°01'47" West 1302.60 feet; Thence North 89°51'08" West 1999.63 feet, more or less, to the point of beginning.

Parcel 4: Beginning at a point which is Sough 00°01'47" East 2045.735 feet from the North quarter corner along the center line of Section 33, Township 1 South, Range 4 East, Salt Lake Base and Meridian and running thence South 00°01'47" East 1954.52 feet, more or less, to the South line of the North on-half of the Southeast quarter of said Section 33, thence North 45°42'36" East 1873.80 feet: Thence north 00°01'47" West 642.60 feet; Thence North 89°51'08" West 1341.98 feet, more or less, to the center line of said Section 33 to the point of beginning.

Parcel 5:
Beginning at a point North 89°51'08" West 2677.46 feet and South 0°01'47" East 4000.255 feet from the Northeast corner of Section 33, Township 1 South, Range 4 East, Salt Lake Base and Meridian, said point also being on the center section line of said Section 33; and running thence South 89°52'21' East 1999.624 feet along the South line of the North ½ of the Southeast quarter of said Section 33; Thence North 0°01'47" West 1311.212 feet; Thence North 89°51'08' West 657.65 feet; Thence South 45°42'36" West 1873.80 feet to the point of beginning.

Parcel 6:
Beginning at a point South 0°12'01" West 1385.732 feet from the Northeast corner of Section 33, Township 1 South, Range 4 East, Salt Lake Base and Meridian, said point also being on the East lone of Section 33 and running thence North 89°51'8" West 672.27 feet; Thence South 0°01'47" East 2613.812 feet; Thence South 89°52'21" East 660.276 feet to the East line of said Section 33, thence North 0°15'49" East along said East line 1333.095 feet to the East quarter corner of said Section 33, thence North 0°12'01" East 1280.468 feet along said East line of said Section 33 to the point of beginning.

Parcel B:
The Northeast Quarter of the Southwest Quarter of Section 34, Township 1 South, Range 4 East, Salt Lake Base and Meridian.

EXHIBIT B

City Council Staff Report

Special Events and Facilities Department

Author:	**Alison Butz**
Subject:	**Conservation Easements on Open Space**
Date:	**September 25, 2003**
Type of Item:	**Administrative - Easements**

Summary Recommendations:
Provide Staff with direction on the language included in the conservation easement template. Staff will return to Council for formal approval of conservation easements for the Round Valley Parcels and Richards Parcel in October 2003.

Description:
Topic:

Conservation Easements templates and reserved and prohibited rights for both the Richards parcel and Round Valley parcels.

Background:

The City Council reviewed the prohibited and reserved rights for the Round Valley Parcels and Richards Parcel. At that meeting Council requested the addition of the following items in the reserved rights section.

- **Trail way-finding Signs**
- **Trailhead Parking**
- **Restoration of land and vegetation**

Staff, per Council's direction, presented the uses to the Recreation Advisory Board to receive further input. Input received focused on the following topics.

<u>Events</u>. The reserved rights allows for events to take place on the property provided that the events are City sponsored. The Recreation Advisory Board requested a better definition of "significant" event be added.

<u>Water Conservation</u>. A suggestion was made to add language requiring drought tolerant grasses and plants be used on the property if developed for a use and along with minimizing the amount of grass that is planted. The Land Management Code addresses the use of drought tolerant vegetation and Staff is currently working to strengthen the language. Therefore, the suggested change was not added to the list of uses.

<u>Lighting of Trailhead Parking</u>. Council had added a reserved right to allow for

trailhead parking. The Recreation Advisory Board had requested that the lighting of those lots be carefully looked at and eliminated if possible.

Analysis:
As stated at the August 31st meeting the entire easement template, Richards property is used as an example, has been presented for Council comment. The template is a similar template used by Utah Open Lands and other national non-profit land conservancy groups. The revised reserved rights and prohibited uses have also been amended in the draft.

The draft also discusses the baseline documentation. A baseline document outlining the vegetation, soils and habitat of the property, would be attached as Exhibit A to the easement. At this time Staff is concluding the surveying and documentation for both the Richards parcel and Round Valley parcels. The baseline document would be updated annually by COOL (Conserving Our Open Lands), which is part of their duties as outlined within a Special Service Contract.

Department Review:
The Lease has been reviewed all applicable City departments.

Issues for Discussion:
- Are the revised prohibited and reserved rights consistent with what Council envisioned for the Conservation Easement?
- Does the easement language address the issues, and meet what Council envisioned with regards to a conservation easement?

Recommendation:
Provide Staff with direction on the language included in the conservation easement template and on the prohibited uses and reserved rights for both the Richards parcel and Round Valley parcels. Once received Staff will continue to draft the easements and will return to Council for approval of the easements in October 2003.

Exhibits:
Exhibit A – Draft Conservation Easement for the Richards Parcel

EXHIBIT C
EXCERPTS FROM
PARK CITY COUNCIL WORK SESSION NOTES
SUMMIT COUNTY, UTAH
SEPTEMBER 25, 2003

Present: Mayor Dana Williams; Council members Peg Bodell, Kay Calvert, Candace Erickson, Jim Hier, and Fred Jones

Tom Bakaly, City Manager; Alison Butz, Special Events and Facilities Manager; Kent Cashel, Transportation Director; Mark Harrington, City Attorney; Chief Lloyd Evans; and Gary Hill, Analyst

Jennifer Guetschow, COOL Executive Director; Teri Orr, Eccles Center Executive Director; Jeff Straw, LSC Transportation Consultants; and Roger Harlan, Chuck Klingenstein, Bob Swank and Dick Fontaine, Council Compensation Committee

2. **Conservation easements.** Alison Butz explained that Council reviewed the prohibited and reserved rights for conservation easements and Council directed some modifications including allowing way-finding signs, trailhead parking, and restoration of land and vegetation. This session is intended to receive Council direction on the draft easement and share comments from the Recreation Advisory Board. These related to defining special events and organized gatherings, limiting vegetation to native and drought tolerant specimens, and lighting trailhead parking. There were also concerns expressed about commercial uses, recognizing that conservation easements focus more on maintaining the land as open and recreation space rather than uses. In response to a question from Kay Calvert regarding cross-country skiing in Round Valley, Ms. Butz explained the lease with Jans and clarified that the activity requires minimal maintenance efforts. Council member Calvert asked if lack of trailhead lighting presents safety issues, and Alison Butz pointed out that trails are typically used during the day. The Land Management Code requires lighting when there are five or more parking spaces and Mr. Hier pointed out that if the lot is not stripped, there are technically no spaces. The Mayor stated that there should be assurances that an irrigation system would be allowed on the McPolin Farm property. Ms. Guetschow felt the easement language covers this type of installation and Ms. Butz relayed that she will check this with the Legal Department.

Fred Jones expressed the importance of identifying appropriate uses and testing them against the language of the conservation easement, which is in perpetuity. He suggested holding a meeting where public input on uses on each piece of land is solicited. Additionally, the conservation easement language should be very clear to minimize having it subject to interpretation. Jim Hier recommended testing the language against prohibitive uses rather than reserved rights and Fred Jones explained that it may be a good idea to test cross-country skiing, for example, against the easement criteria.

City Council Staff Report

Author: Jonathan Weidenhamer
Subject: Main Street Sidewalk Dining
Date: May 6, 2004
Type of Item: Administrative

PARK CITY 1884

Planning Department

Summary Recommendations:

Staff recommends continuing the sidewalk dining program, extending the seasonal leases to five-year terms, as well as expanding the seasonal limitations to allow sidewalk dining from May 1, to October 31. Individual leases will need to be formally approved by City Council.

Description:

Topic:

Sidewalk Dining on Main Street

Background:

Last spring the City Council approved, on a one-year trial basis, the use of City-owned sidewalks for sidewalk dining. In some cases they also allowed, on a limited basis, outdoor dining areas to expand into Main Street parking areas. Due to the success of the program, the Main Street Business Alliance (MSBA) and City staff propose the continuance of the program.

Analysis:

The permitting process required for an individual sidewalk dining permit included an Administrative Conditional Use Permit (for Outdoor Dining) as well as an individually approved seasonal lease by the City Council for the use of City-owned property. Because the program was implemented on a one-year trial basis, the permits and leases expired after one season. In an effort to make the process more user-friendly and less time consuming, staff requests that City Council consider: continuing of the Sidewalk Dining program with an expanded season of May 1 – September 30; and approving the seasonal leases on 5-year terms.

Any seasonal lease the City enters would: regulate the time and duration of the use, provide for consistency in look and materials, ensure the aesthetic value of the Historic District by preventing visual clutter, prevent conflicts with Special Events/MFL's, mitigate for conflicting uses in the public right-of-way, ensure for cleanly sidewalks, and provide an ongoing monitoring mechanism and revocation provision for failure to comply with regulation (see Exhibit B – Lease & Operational Restrictions).

Department Review:

This has been reviewed by the City Manager's Office, City Legal Department, and the Planning Department.

Alternatives:

This report is for informational purposes. Staff will return to City Council for approval of individual leases.

Recommendation:

Staff recommends extending the sidewalk dining program, with the expanded time frame, as well as extending the seasonal leases to 5 year terms.

EXHIBITS

Exhibit A – Submittal from MSBA
Exhibit B – Typical Lease & Operational Restrictions

Exhibit A

Main Street Business Alliance

April 5, 2004

Tom Bakaly
City Manager
Park City Municipal Corp,

Dear Tom,

The Historic Main Street Business Alliance is requesting that Park City again provide a program for sidewalk dining on Main Street this summer. The HMBA believes that the sidewalk dining program conducted over the past two summers has increased the summer vitality and ambiance on Main Street.

Last year restaurants were asked to seek a permit and lease with Park City Municipal before they were allowed to provide sidewalk dining. This process insures that standards for outside dining are maintained and we support continuation of the permitting process. With two years of successful experience with the program we think it is now time to establish the annual permitting process as a permanent program that should not require an annual review by the City Council. This would allow restaurants to seek permits earlier in the year and begin planning their dining programs in a timelier manner. For restaurants choosing to participate in the program the permitting process can take some time and cause delays which may discourage participation.

Last year's program was scheduled to run from May 1st through September 30th. October also provides some opportunities for sidewalk dining during a time that is typically slow for businesses on Main Street. We would also recommend extending the permits through the last weekend in October.

Thank you for your consideration of this matter. If needed I am able to attend any meetings or answer any questions you may have.

Sincerely,

Rick Anderson
President

Historic Main Street Business Alliance
•• P.O. Box 1348 •• Park City, Utah 84060 ••

435/649-6100 x: 105 Phone HMBA@parkcityinfo.com

Exhibit B – Typical Outdoor dining Lease & Operational Restrictions

MAIN STREET SIDEWALK
OUTDOOR DINING LEASE

This LEASE AGREEMENT is made and executed this day of , by and between Park City Municipal Corporation, a municipal corporation and political subdivision of the state of Utah ("Park City") and, a Utah LLC, located at Main Street, Park City, Utah ("Tenant").

The Parties agree as follows:

PROPERTY. The property affected by this lease is generally described as the sidewalk area directly fronting Tenant's restaurant located at Main Street, and more specifically described via site plan at Exhibit A, attached hereto and incorporated herein by reference (hereinafter referred to as the "Premises").

2. RENT. Tenant shall be solely responsible for payment of any and all costs associated with Tenant's performance under this lease, including but not limited to City additional business licensing fees, insurance, sales taxes and other expenses.

3. TERM. The term of this Agreement shall commence on ~~May 15, 2003~~ May 1 and shall terminate on ~~September 15, 2003~~, September 30 unless terminated earlier as provided herein.

4. USE OF PREMISES. Tenant may use the Premises only for the provision of outdoor dining services in a manner consistent with Section 15-2.6-12(B)(1) of the Park City Land Management Code and the terms of this Agreement. Additional operational restrictions are attached hereto at Exhibit B, if applicable.

5. IMPROVEMENTS TO THE PREMISES. Tenant shall not make any improvements to the Premises without first obtaining Park City's written consent. Any improvements approved by Park City shall be completed at Tenant's sole expense and removed at Tenant=s sole expense upon expiration of this Agreement.

6. SIGNS. No signs shall be permitted on the Premises except as specifically approved pursuant to the Park City Sign Code and/or Tenant's Master Sign Plan.

7. INSURANCE. Tenant shall, at Tenant's sole expense, carry a policy of general liability insurance in an amount of at least One Million Dollars ($1,000,000) per person and One Million Dollars ($1,000,000.00) per incident or occurrence. Park City shall be named as an additional insured on each policy. A certificate of insurance with a thirty (30) day cancellation notice provision shall be provided to Park City on or before the lease commencement date, and maintained continuously during the term of the lease. Tenant may carry whatever other insurance Tenant deems appropriate. The parties agree that Tenant's sole

remedy in the event of business interruptions, fire, windstorm, or other loss from hazard shall be its own insurance and Tenant will have no action against Park City. Park City is protected by the Utah Governmental Immunity Act, and nothing herein is intended to waive or limit the protection of the Act in behalf of either entity, but to the extent it is consistent with this intent, it is the purpose of this provision to protect Park City for liability or allegations arising out of the Tenant's use of the Premises.

8. HOLD HARMLESS. Tenant covenants and agrees to indemnify, hold Park City harmless from all claims, loss damage, injury or liability (hereafter "Liability") resulting from Tenant' use and occupancy of the Premises to the full extent provided in the Utah Governmental Immunity Act, including reasonable attorney's fees, but excluding any Liability resulting from acts or omissions of Park City, its officers, employees or agents. Nothing herein shall be construed as a waiver of any of the rights or defenses under the Utah Governmental Immunity Act (Utah Code Ann. Sections 63-30-1, et seq), as amended. The obligations hereunder shall be determined under principles of tort law including, but not limited to, the Governmental Immunity Act.

9. ASSIGNABILITY. Tenant shall not assign or transfer any interest in this Agreement without the prior written consent of Park City. Any assignment or transfer without written approval is void.

10. PROFESSIONAL PERFORMANCE. Tenant agrees to perform services under this contract at the highest professional standards, and to the satisfaction of Park City.

11. APPLICABLE LAW. This Agreement shall be governed by the laws of the state of Utah.

12. FORCE MAJEURE. Any delay or failure of either Party to perform its obligations under this Agreement shall be excused to the extent that it is caused by an event or occurrence beyond its reasonable control, including act of nature, terrorism or war.

13. ENTIRE AGREEMENT. This Agreement constitutes the entire and only agreement between parties and it cannot be altered or amended except by written instrument, signed by both parties.

SIDEWALK DINING
<u>OPERATIONAL RESTRICTIONS</u>

The following operational restrictions shall apply to all leases for outdoor dining on Main Street sidewalks:

1. Site Plan - This plan shall be to scale and indicate: the proprietors' building as it relates to the exact locations of chairs, tables, stanchions, heaters, curb (width of sidewalk), and any other existing public improvements (light fixtures, fire department connections, parking meters, utility covers, etc.).

2. Details/ Spec Sheets – Shall be submitted for each piece of equipment proposed with this application. This will include all tables, chairs, umbrellas, heaters, lighting sources, and crowd barricades, etc.

3. Parameters of Permit - Sidewalk Dining is allowed from May 1, 2003 until Sept 30, 2003, from 8:00 am until 10:00 pm.

4. Violations - Ongoing Monitoring will be provided to ensure compliance with lease parameters. A revocation provision will be included for lessee's failure to comply.

Design Standards

1. SIZE. Sidewalk dining area shall be limited to the linear frontage a building has on Main Street.
2. ADVERTISING. Additional signing or advertising is prohibited beyond what is allowed by the Sign Code. Umbrellas, table tents, or any other equipment must be free of branding or other promotion.
3. FURNITURE. All tables and chairs shall be metal and be either black or gray, and have a powder coated finish.
4. STANCHIONS. Any necessary crowd control barricades must be equivalent to the Crowd Controller TensaBarrier & Tape - Model 890 Standard, or T-Max, which has been approved by the Preservation Planner and chosen for its minimal visual intrusion, durability, and functionality. TensaBarrier poles shall be black and powder coated, and the tape shall be black also.
5. UMBRELLAS. Umbrellas are prohibited from having any advertising or signing and shall be in solid, primary colors. Umbrellas must be free standing and are prohibited from extending beyond the dining area.
6. HEATERS. Any proposed heaters shall be reviewed at the time of initial application. In most cases, additional heating elements may require additional building permits.
7. LIGHTING. No additional electric lighting is permitted, including exterior building lighting.
8. LANDSCAPING/ ATMOSPHERE. Any proposed landscaping or atmosphere pieces shall be reviewed at the time of initial application, and shall not create any public hazard nor unnecessary clutter.
8\. ADDITIONAL EQUIPMENT. To prevent unnecessary visual clutter, additional equipment beyond those outlined in this section is prohibited. This includes server or bus-stations, garbage receptacles, podiums, pedestals, etc.

9. LICENSING. The additional square footage of the dining area must be added to the existing licensed area for the restaurant. The Applicant shall also adhere to other applicable City and State licensing ordinances.
10. HEALTH & SAFETY. The Use shall not violate the Summit County Health Code, the Fire Code, or International Building Code.
11. MUSIC. The use of outdoor speakers and music is prohibited.
12. SPECIAL EVENTS. Operation of Sidewalk Dining during Special Events and Master Festival Licenses is prohibited when the boundary of that Special Event includes Main Street.
13. MAINTENANCE. The dining area shall be cleanly and maintained in a neat and orderly fashion.
14. STORAGE. All equipment and other associated materials must be removed from the sidewalk and stored on private property overnight and during prohibited times.

City Council Staff Report

Author: Tom Bakaly, Gary Hill
Subject: City Manager's Recommended Budget
Date: May 6, 2004
Type of Item: Informational

PARK CITY 1884

Budget, Debt, and Grants

Summary Recommendations: Presentation of the City Manager's Recommended Budget.

An overview of the Adjusted Budget for FY 2004 and City Manager Recommended Budget for FY 2005 will be formally presented to City Council and Mayor Williams during work session on May 6th.

The Executive Summary, which contains a preview of the major topics for discussion is included with the council packet under a separate cover.

Questions regarding the upcoming budget discussions or Executive Summary should be directed to Gary Hill at 615-5182.

APPEAL PACKET:

BAMBERGER CO. : APRIL MTN. FEE WAIVER

TAB 1:	ORIGINAL STAFF DETERMINATION TOM BAKALY 11/04/04 LETTER
TAB 2:	NOTICE OF APPEAL- BAMBERGER COMPANY
TAB 3:	STAFF RESPONSE: TOM BAKALY 5/06/04 STAFF REPORT
TAB 4:	BAMBERGER REPLY – TO BE DELIVERED

APPEAL PACKET:

BAMBERGER CO. : APRIL MTN. FEE WAIVER

TAB 1: ORIGINAL STAFF DETERMINATION
TOM BAKALY 11/04/04 LETTER

PARK CITY
1884

Office of City Manager

November 4, 2002

COPY

David Bernolfo
Bamberger Co.
163 South Main Street
Salt Lake City, Utah 84111

Re: Water Fees

Dear David:

This letter shall serve to confirm my recommendation for resolution of your claim for waiver of water fees under that certain Water Reservoir and Road Agreement dated August 31, 1982 ("the Agreement").

City records indicate that Parcel #SA-400-B originally was assessed $221, 488.70, plus interest, based on a maximum connection potential of 190 units at $1,165.73 per unit. City finance records show payment by Bamberger Co. of $205,120.24, with outstanding charges for principal, interest and late fees.

The Agreement provided for the waiver of City water connection fees ($600 at that time) for each property owner at the time units were actually permitted. The maximum benefit at the time the Agreement was entered was therefore $114,000. There was no minimum or other guarantee in the Agreement. However, the Surprise MPD approved in the 1980s was for substantially less units. That approval expired for non-activity after five years. The current April Mountain MPD and Subdivision project was approved for 70 units under more restrictive zoning adopted after the Agreement. A precise calculation of your waiver is impossible because the City no longer charges a water connection fee, but instead includes those costs as a component of the larger water development impact fee. Accordingly, after discussions with you failed to yield a mutually acceptable solution, the City now proposes an adjusted calculation based upon that portion of the current water development impact fee that tracts with what the past connection fee was composed of.

Based upon the City's 2002 water fee study, the City proposes a credit pursuant to the Agreement of $2,418.01 per unit for a total credit of $169,260.70. As the Agreement contemplates, this waiver would be given at the time of full building permit issuance for each unit so you would need to make arrangements with the current property owner for payment of the value of the credits. My understanding is that you reserved this right during your closing on the sale of the

Park City Municipal Corporation • 445 Marsac Avenue • P.O. Box 1480 • Park City, UT 84060-1480
Phone (435) 615-5007 • FAX (435) 615-4901

property. None of the credits are transferable to other property.

This is a compromise offer and if rejected, the City reserves all rights and defenses under the Agreement, and in law or equity, including but not limited to breach for non-payment, non-performance, estoppel, standing and statute of limitations. I apologize for this formality as I truly appreciate your efforts to resolve this matter and the original cooperation you displayed in the litigation back in the time of the Agreement. However, we must agree to disagree regarding your perception of entitlements and the measure of City benefit under the old Agreement.

City Manager decisions on contracts may be appealed to the City Council by filing a written appeal letter with the City Manager within five working days of receipt of this letter. You will be entitled to a hearing and written decision by the Council.

As an alternative, the City remains open to our original suggestion of mediation or analysis by a mutually agreed upon financial advisor as discussed with you by City Attorney Mark Harrington. Please contact me at 435.615.5180 (also within the five working days) if you would rather pursue the mediation option.

Sincerely,

Tom Bakaly
Acting City Manager

cc: Dana Williams, Mayor
Mark Harrington, City Attorney

APPEAL PACKET:

BAMBERGER CO. : APRIL MTN. FEE WAIVER

TAB 2: NOTICE OF APPEAL- BAMBERGER COMPANY

APPEAL PACKET:

<u>BAMBERGER CO. : APRIL MTN. FEE WAIVER</u>

TAB 2: NOTICE OF APPEAL- BAMBERGER COMPANY

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<u>BAMBERGER CO. : APRIL MTN. FEE WAIVER</u>

TAB 2: NOTICE OF APPEAL- BAMBERGER COMPANY

NOTICE OF APPEAL

The Bamberger Company

The Bamberger Company (the "Applicant") is the former owner of Parcel #SA-400-B located in Park City, referred to as the April Mountain property (the "Property"). The Applicant holds the rights to the waiver of certain water connection fees provided by Park City Ordinance 84-2. The rezoning of the Property has effectively resulted in the Applicant's property being significantly overassessed relative to the corresponding benefit that was bargained for pursuant to an agreement between the Applicant and Park City which provided for the waiver of certain water connection fees.

The Applicant now seeks to resolve this issue in a manner that will reasonably compensate the Applicant for its contribution to the construction of the water reservoir and accompanying water system. The Applicant proposes and requests a payment from Park City of $350,000 to compensate it for its loss. In the alternative, the Applicant proposes and requests Park City credit the Applicant $169,260.70 for those 70 water connections actually permitted on the Property, and in addition, provide the Applicant with the opportunity to apply the remaining water connection fee waivers, or an equivalent credit, to other properties served by the Park City water system.

In submitting this appeal, the Applicant expressly reserves the right to present corroborating evidence to the City Council in support of this appeal and to present other arguments and evidence in support of this appeal.

Facts

On August 31, 1982, the Park City Municipal Corporation ("Park City") entered into a Water Reservoir and Road Agreement (the "Agreement") with FMA Financial Corporation ("FMA").[1] Park City's purpose in entering into the Agreement was, in large part, to settle a lawsuit between the City and certain Masonic Hill landowners. By the terms of the Agreement, Park City "requested FMA to construct a reservoir with a 1,000,000 gallon capacity . . . to provide additional storage for the Park City Water system and to improve water distribution in Park City . . . "[2] In return for the construction of the reservoir, Park City agreed to form the Masonic Hill Improvement District (the "Improvement District") and "waive[] the water connection fee (which [was] $600), for all property owners within the Improvement District and Other Developers who use the Improvement District's capacity in the Water Reservoir."[3] Exhibit "C" of the Agreement sets forth those properties included in the Improvement District, including the Property owned by the Applicant.

On January 5, 1984, the City Council of Park City approved Ordinance No. 84-2 (the "Ordinance"), which levied the assessment anticipated by the Agreement on each property within the Improvement District in order to fund the construction of the reservoir and the

[1] Attached as Exhibit A
[2] See Exhibit A, pg. 2
[3] See Exhibit A, paragraph 7

accompany water system infrastructure.[4] The properties were assessed according to the estimated number of water connections to the water system within each property. The estimated number of water connections was based on the zoning in place at the time the Ordinance was enacted. Each property within the Improvement District was assessed $1,165.73 per possible water connection on the property. In reference to the assessment and the overall allocation of the cost of the reservoir, the Ordinance mandates "that each property within the [Improvement] District *will* be benefited in an amount not less than the assessments to be levied against said property; and that no piece of property listed in the assessment list *will bear more than its proportionate share of the cost of such improvements*."[5]

At the time the Ordinance was enacted, the Applicant anticipated constructing approximately 190 units on the Property, an amount permitted under the existing zoning. Pursuant to the Ordinance, the Applicant was assessed 190 units at $1,165.73 per unit, for a total assessment of $221,488.70 plus interest.[6] The Applicant was subsequently involved in a quiet title action which resulted in a reduction of the Applicant's interest in the Property by six units. The adverse party to this action became responsible for the assessment on these six units. By the terms of the Ordinance, the remaining assessment attributable to the Applicant was to be paid over a term of 10 years from the effective date of the Ordinance, at an interest rate of 13% per annum.[7] Over the course of the 10 year term, the Applicant paid to Park City the total amount of its assessment plus interest, an amount equaling approximately $344,000.00. On information and belief, the Applicant is the only member of the Improvement District that fulfilled its financial obligation to the Improvement District and paid in full the amount assessed to it.

Around the time the Ordinance was enacted, the Applicant's final development plans for 184 units on the Property were approved by Park City. However, due to changes in regional economic conditions and reduced residential housing demand, the Applicant did not develop the Property at that time. In February of 2002, the Applicant sold the Property to AMDC, LLC, reserving the right to receive the benefit of the water connection fee waiver that was provided in accordance with the Agreement and the Ordinance. AMDC, LLC has subsequently developed The Seasons residential development on the Property. However, as a result of more restrictive zoning adopted after the Agreement, the maximum number of units permitted within The Seasons development was reduced to 70 units. On information and belief, Park City has escrowed the amount attributed to the water connection fee waiver with the intent to credit this amount to the Applicant.

Since the approval of the Property for 70 units, the Applicant has been in discussions with Park City to resolve its claim based on the assessment and the waiver of the water connection fees. By letter dated November 4, 2002, City Manager Tom Bakaly proposed a credit of $169,260.70.[8] This credit offered by the City Manager consists of only the current water connection fee (estimated by Park City to be $2,418.01) for the 70 units approved on the Property, which Park City is clearly obligated to pay by the terms of the Ordinance. The offer fails to make any provision for the amount of the overassessment paid to Park City by the

[4] Attached as Exhibit B
[5] See Exhibit B, section 1 (emphasis added).
[6] See Exhibit B, assessment list – The April Land Company (the Bamberger Company)
[7] See Exhibit B, section 5
[8] Exhibit C

Applicant, and therefore falls far short of compensating the Applicant for the costs it has incurred for which it received little or no benefit in return.

Argument

I. The Overassessment Levied on the Applicant Violates State Law and the Ordinance's Mandate

As a result of Park City's actions in rezoning the Property, which decreased residential density, the assessment levied per unit on the Applicant's property substantially increased, in violation of State law and the Ordinance establishing the assessment. Pursuant to the Utah Municipal Code, all municipalities are under the obligation to ensure that all "taxes shall be uniform in respect to the class upon which they are imposed."[9] Additionally, the Utah Municipal Improvement District Act requires that "[a]ssessments shall be equal and uniform according to the benefits *received*."[10] Consistent with the State-mandated obligation, the Ordinance sets forth that "each piece of property within the [Improvement] District *will* be benefited in an amount not less than the assessment to be levied against said property; and that *no piece of property listed in the assessment list will bear more than its proportionate share of the cost of such improvements*." This directive clearly reinforces Park City's obligation under state law to assess any fees or charges in a fair and equitable manner which is uniform to all users or benefiting properties. Section 4 of the Ordinance verifies that the "tax is levied and assessed at *equal* and *uniform* rates on such property, which consists of a charge for an estimated potential number of water connections on each lot."[11] Any variation by Park City from the state-mandated obligation subsequent to this initial assessment, particularly if that variation results from the unilateral actions of Park City itself, would clearly argue that an adjustment or credit would be appropriate, if not required.

Pursuant to the Ordinance, an initial assessment of $1,165.73 per potential water connection was created, to be levied on the properties within the Improvement District. At the time the Ordinance was enacted, the existing zoning permitted 190 residential units to be constructed on the Property. Accordingly, by the terms of the Ordinance, the Applicant's property was assessed for 190 units. However, subsequent to the Agreement and the creation of the Ordinance, more restrictive zoning was implemented by Park City within the area where the Property is located. The revised zoning for the Property decreased residential density, substantially reducing the number of possible residential units on the Property from 190 to 70. As a result of this reduction, the assessment paid per unit by the Applicant has effectively increased from the $1,165.73 originally mandated by the Ordinance, to approximately $3,064.20, an increase of approximately 265% of the original approved assessment. In effect, the Applicant has been taxed approximately $1,900 more per unit than similarly situated property owners. As a result, the Applicant has paid approximately $133,000 plus interest more than would have been paid had the Applicant been originally assessed at 70 units.

As a result of the Park City's decision to reduce the allowed densities in the area, the Applicant has effectively been assessed twice the amount of similarly situated beneficiaries of

[9] UCA §10-1-203
[10] UCA §17A-3-316(4)
[11] Exhibit B, section 4

the Improvement District. This increase clearly violates the equal and uniform standard mandated by State law and the "proportionate share" cost allocation anticipated by the Ordinance.

II. Park City has been Unjustly Enriched as a Result of the Overassessment

To add to the inequity experienced by the Applicant, the assessment increase has provided no corresponding benefit to the Applicant. Rather, the benefit has flowed entirely to Park City in the form of additional capacity and water availability in the reservoir.

As originally envisioned, the purpose of the Masonic Hill water reservoir was primarily to service the water needs of the residences within the Improvement District. However, as a provision to the Agreement, the developers of the properties within the Improvement District, including the Applicant, agreed to increase the storage capacity of the reservoir "to provide additional storage for the Park City Water system and to improve water distribution in Park City and on Masonic Hill . . ."[12] This additional capacity was to be applied to units outside of the Improvement District. The total cost of the reservoir improvements, as set forth by the Ordinance, was $897,104.00. Of this amount, Park City contributed $278,102.24 to the system improvements. The Applicant contributed a principal amount of $214,494.32, almost a quarter of the total cost of the improvements. In return, the Applicant expected to have available to the Property approximately one quarter of the system capacity. However, as a result of Park City's decision to reduce the allowable density, less than half of the system capacity that the Applicant paid for has been made available to it. The benefit of the additional system capacity paid for by the Applicant now inures directly to Park City. Park City now has additional storage capacity available to integrate into its water system, additional storage capacity for which it did not pay for. On information and belief, Park City has sold this additional capacity to other developers within the City, thereby profiting from the capacity paid for by the Applicant.

III. Transfer of the Waiver to Other Properties Served by the Park City Water System

To resolve this dispute, the Applicant proposes that in addition to the $169,260.70 credit offered by City Manager, Tom Bakaly, the Applicant be allowed to apply the additional water connection fee waivers to other properties within the Park City water system. The Applicant believes that this is a fair resolution that would allow the Applicant to be reasonably compensated for its contribution to the water system.

In past attempts to resolve this matter, the Applicant has requested that the City allow the additional water connection fee waivers be applied to other developments within Park City. By letter dated April 20, 1999, Mr. Mark Harrington rejected this alternative (the "Waiver Letter").[13] In the Waiver Letter, Mr. Harrington concluded that "[t]he waiver is only for the benefit of property within the improvement district" and that "[t]here is no language authorizing the transfer of this waiver to property or development outside of the [Improvement] District."

The Applicant disagrees with Mr. Harrington's conclusion and believes that the Agreement allows for connection fee waivers to be applied outside of the Improvement District.

[12] See Exhibit A, pg. 2
[13] Attached as Exhibit D

The Applicant notes that the Waiver Letter quotes only a portion of Paragraph 7 of the Agreement which states that Park City "waives the water connection fee, (which is presently $600), for all property owners within the [Masonic Hill] Improvement District . . ." The Waiver Letter fails to quote the remainder of this sentence which reads "and Other Developers who use the Improvement District's capacity in the Water Reservoir." The latter portion of the sentence which is omitted from the Waiver Letter clearly anticipates and allows for water connection waivers to be applied to developers outside of the Improvement District.

The Waiver Letter also relies on a provision within the Road Development and Easement Agreement, executed May 23, 1983,[14] which reads:

> Consistent with the terms of the Agreement attached hereto as Exhibit "G" and the waiver of fees found in paragraph 7 thereof, Park City hereby waives the Water Connection Fee customarily charged by Park City for new water hookups for all property owners within Owners' Property, provided that the Owners Property is included within the Improvement District.

The Waiver Letter alleges that this provision prohibits allowing water connection waivers to be applied outside of the Improvement District. However, it is important to note that the provision is made in reference to and to be read consistent with paragraph 7 of the Agreement, which as noted, allows for the application of water connection fees outside of the Improvement District. Neither of the provisions reference in the Waiver Letter support the conclusion that the connection fee waivers can not be applied outside of the Improvement District.

In conclusion, Mr. Harrington states:

> The costs of the water system within the District were directly related to the owners' proposed density on the owners' property at that time. Those densities were never built but the water system was still built to serve that capacity. To allow those waivers, based upon a high cost attributed to density that was never built, to be transferred freely around the City defeats the original intent of the District, and quite simply does not make sense in that such transfer would allow the owners to take advantage of development plans that never materialized.

Once again, the Applicant disputes Mr. Harrington's conclusion. The original intent of *increasing the capacity* in the reservoir was "to provide additional storage for the Park City Water system and to improve water distribution in *Park City and on Masonic Hill*."[15] The reservoir was constructed not only to provide storage capacity for the Masonic Hill, but the entire Park City water system. Furthermore, the reservoir was constructed not only at Park City's expense, but also at the expense of the property owners within the Improvement District, including the Applicant. The suggestion that allowing water connection fees to be applied outside of the Improvement District thwarts the intent of the construction of the reservoir is not supported by the terms of the Agreement.

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[14] Attached as Exhibit E

[15] Exhibit A, pg. 2 (emphasis added)

It is true that the residential density anticipated at the time the water system was constructed was never built. It is equally true that the water system was constructed to serve a greater density that it currently serves within the Improvement District, and that as a result of the decreased density, the system now has greater available capacity than is necessary to serve the Improvement District. However, this does not provide a basis for disallowing the transfer of water connection waivers to other properties within the Park City system. The reason "those densities were never built" was because Park City reduced the allowable density within the Improvement District, and for that reason the owners' development plans "never materialized." Once again, the "high cost" of constructing the water system was shared by the property owners as well as Park City. Clearly the reduction in density that has resulted from Park City's actions can not be viewed as an equitable basis to foreclose the Applicant's right to the storage capacity it paid to construct, and anticipated receiving a benefit from.

Conclusion

The Applicant feels that the $350,000 requested is a fair and reasonable compromise. In the alternative, the Applicant proposes that it be credited the $169,720.70 offered by City Manager Tom Bakaly, and in addition be allowed to apply the additional connection credits to other properties within Park City.

The Applicant has long been involved in the development of Park City, and anticipates future involvement in the City's growth. To date, the Applicant has had a very good working relationship with the City, and recognizes the importance of maintaining a productive and professional working relationship with Park City. For this reason, the Bamberger Company is not pursuing every dime that might otherwise be available to it, and believes that resolving this matter outside of an adversarial proceeding is in the best interest of both parties. The Applicant is seeking only a mutually beneficial compromise that will compensate it for a reasonable portion of those funds that it contributed to the construction of the reservoir and accompany water system, the benefit of which now inures to Park City.

Based on the foregoing, the Applicant respectfully requests that the City Council objectively, and in good faith, evaluate the Applicant's request, and grant the requested reimbursement.

DATED this 26th day of April, 2004.

STOEL RIVES LLP

Richard R. Hall
D. Matthew Moscon
201 S. Main Street, Suite 1100
Salt Lake City, Utah 84111

Attorneys for the Bamberger Company

EXHIBIT A

Water Reservoir and Road Agreement
August 31, 1982

WATER RESERVOIR AND ROAD AGREEMENT

IS AGREEMENT is entered into this 31st day of August, 1982, by and between FMA Financial Corporation, a Utah Corporation (hereinafter referred to as "FMA"), and Park City Municipal Corporation, a body politic, (hereinafter referred to as "Park City").

RECITALS:

WHEREAS, FMA owns or is acquiring certain property on Masonic Hill, Park City, Summit County, Utah, more particularly described on Exhibit "A" attached hereto and incorporated herein by reference (hereinafter referred to as the "Aerie Property"), and

WHEREAS, the Aerie Property is subject to a Settlement Agreement relating to a suit between Park City, Plaintiff, and Elwood L. Nielsen, Great Eastern Mining Company, and Park West Village, Inc., Defendant, Summit County Civil No. 4613 which Agreement is dated April 24, 1981 (hereinafter referred to as the "Settlement Agreement"), and

WHEREAS, FMA has been assigned the interest of Elwood L. Nielsen, Great Eastern Mining Company, and Park West Village, Inc., under the Settlement Agreement as it relates to the Aerie Property, and

WHEREAS, the Settlement Agreement provides that the developer of the Aerie Property at its cost is required to construct and deed to Park City sufficient water reservoir capacity to serve the Aerie Property in accordance with reasonable design standards provided by the Park City Engineer at such location as agreed upon between the parties, and

WHEREAS, the Aerie Property requires a water resevoir with capacity of 132,300 gallons, and

WHEREAS, Park City has requested FMA to construct a reservoir with a 1,000,000 gallow capacity (hereinafter referred to as the "Water Reservoir") to provide additional storage for the Park City Water system and to improve water distribution in Park City and on Masonic Hill, and

WHEREAS, FMA is willing to construct such larger reservoir provided certain conditions are met, and

WHEREAS, both parties agree that the roads on Masonic Hill may be private pursuant to the terms and conditions hereof.

NOW THEREFORE, in consideration of their mutual promises and covenants and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Construction of Water Reservoir. FMA agrees to construct the Water Reservoir on the property described on Exhibit "B" attached hereto and incorporated herein by reference, at cost, as negotiated in good faith by FMA with a qualified, independent, contractor, plus six percent (6%)

of said amount to be paid to Aerie Development, a subsidiary of FMA for construction management, plus construction period interest actually incurred (hereinafter referred to as the "Cost of the Water Reservoir"). The Cost of the Water Reservoir shall not exceed $900,000.

2. Formation of Improvement District. Park City agrees to form the Masonic Hill Improvement District which shall include property described on Exhibit "C" attached hereto and incorporated herein by reference (hereinafter referred to as the "Improvement District"). Park City guarantees the Improvement District's performance of all its obligations hereunder.

3. Purchase of Water Tank. FMA agrees to sell and Park City agrees to purchase a 50% interest in the Water Reservoir pursuant to the following terms and conditions:

a. Price. The price for Park City's 50% interest shall be thirty one percent (31%) of the Cost of the Water Reservoir. Said percentage is based on cost estimated of $556,000 for a 500,000 gallon tank and $806,000 for a 1,000,000 gallon tank.

b. Payment Terms. Said sum shall be paid pursuant to the terms of a tax exempt obligation of Park City issued to FMA which shall be payable as follows:

Accrued interest on the first of each month and principal plus accrued interest in full eighteen (18) months from the date of closing.

Interest shall accrue on all unpaid balances at the rate quoted by Moore Financial Group for loans to municipalities with credit ratings similar to Park City on the date of closing not to exceed 11 1/4% per annum.

c. Closing. The closing shall be on or before the date the Water Reservoir is completed and given final inspection and approval by Park City and its engineer, and the State Board of Health if approval by that agency is required. Park City agrees to make and/or obtain such inspections and give and/or obtain such approvals or state in what particulars the water reservoir is incomplete according to the plans and specifications approved by Park City within ten (10) days from the date FMA notifies Park City that the Water Reservoir is completed according to the plans and specifications approved by Park City.

4. Purchase and Sale by Improvement District. FMA agrees to sell and Improvement District agrees to purchase a 50% interest in the Water Reservoir pursuant to the following terms and conditions:

a. Price. The price shall be 69% of the cost of the Water Reservoir plus accrued interest thereon at the rate of two percent (2%) per annum ~~over the~~

prime rate as quoted to FMA Financial Corporation by First Security Bank of Utah from the date of completion of the Water Reservoir until the date of closing.

b. Terms. The price shall be payable cash at closing.

c. Closing. The closing shall be on or before the date the Water Reservoir is completed and given final inspection and approval by Park City and its engineer, and the State Board of Health if approval by that agency is required. Park City agrees to make and/or obtain such inspections and give and/or obtain such approvals or state in what particulars the Water Reservoir is incomplete according to the plans and specifications approved by Park City within ten (10) days from the date FMA notifies Park City that the Water Reservoir is completed according to the plans and specifications approved by Park City.

5. Disposition of Excess Water Reservoir Capacity. The Improvement District is the owner of excess water reservoir capacity, (hereinafter referred to as "Excess Water Reservoir Capacity"). The amount of Excess Water Reservoir Capacity is 500,000 gallons less the capacity required to serve the connections for all approved units located on the property within the Improvement District whether connected

or not. The Improvement District may sell this Excess Water Reservoir Capacity to others developing property within Park City which may fulfill their obligation to construct water storage capacity for their projects by making use of the Water Reservoir (the purchasers of Excess Water Capacity are hereinafter referred to as "Other Developers"). Subject to sound engineering practice on water tank location Park City agrees not to allow Other Developers to build their own water storage tanks or to sell any of Park City's capacity in the Water Reservoir until the Improvement District has sold all of its Excess Water Reservoir Capacity. The price per gallon of Excess Water Reservoir Capacity shall be the price originally paid by the Improvement District for its interest in the Water Reservoir divided by 500,000 gallons plus accrued interest thereon from the date the Improvement District acquired its interest in the Water Reservoir. Interest shall be computed at the weighted average rate the Improvement District has paid to borrow funds during its existence. The price shall be paid in cash on or before the date the connection is made.

6. Improvement District Reimbursement. The Improvement District is forced to pay a nineteen percent (19%) premium to acquire its interest in the reservoir because economics of scale accrue to Park City for financing purposes. At such time as Park City allows and hookup using Park City's share of the Water Reservior capacity, it shall

reimburse Improvement District said premium for each gallon required by the hook-up. The per gallon reimbursement shall be 27.5% of the price of the Improvement District's Water Reservoir Capacity (paragraph 4a hereof) plus accrued interest thereon from the date the Improvement District acquires its interest in the Water Reservoir to the date of payment divided by 500,000 gallons. Interest shall be computed at the weighted average rate the Improvement District has paid to borrow funds during its existence. Park City's reimbursement obligation as set forth herein shall terminate when the Improvement District retires all of its debt.

7. Waiver of Fees. Park City hereby waives the water connection fee, (which is presently $600), for all property owners within the Improvement District and Other Developers who use the Improvement District's capacity in the Water Reservoir. In addition to the $600 fee, Park City ordinances require the property owner to pay the actual costs of physical connection, including meters, meter boxes, plumbing, and excavation. These actual costs of connection are not waived. The Water Development Fee, is not waived except for The Aerie, Phase II, where the Water Development is waived, and as set forth in the Nielsen Settlement Agreement.

8. Notice. All demands and notices to be given hereunder, if any, shall be personally delivered or

sent by registered mail addressed to the respective parties at their postal addresses as set forth below or to such other address as each may hereafter designate in writing, to wit:

FMA Financial Corporation
2060 East 2100 South
Salt Lake City, Utah 84109

Park City Municipal Corporation
526 Main Street, P.O. Box 1480
Salt Lake City, Utah 84060

the new address in the manner set forth above.

9. Successors. Except as otherwise provided herein, this Agreement shall be binding upon and inure to the benefit of the respective parties hereto, their legal representatives, successors and assigns.

10. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties hereto and supersedes all prior agreements or understandings.

11. Amendment. This Agreement may not be altered or amended except by a subsequent written agreement executed by all of the parties hereto.

12. Attorney's Fee. In the event any action is initiated by any person to enforce and/or defend the provisions of this Agreement or its enforceability, the prevailing party shall be entitled to recover their costs of suit, including a reasonable attorney's fee.

13. Additional Documents. The parties hereto

agree to execute such additional documents as may be necessary or desirable to carry out the intent of this Agreement.

14. Nonwaiver. The failure of any party to enforce the provisions of this Agreement shall not constitute a waiver unless specifically stated in writing, signed by the party whose rights are deemed waived, regardless of a party's knowledge of a breach hereunder.

15. Governing Law. The terms of this Agreement shall be governed by and construed in accordance with Utah law.

16. Saving Clause. The invalidity or unenforceability of any provision hereof shall not affect nor impair any other provision hereof.

17. Paragraph Headings. Paragraph headings in this Agreement are for convenience only and shall not be deemed to modify, interpret or limit the provisions hereof.

18. Place of Payment. The obligation to make payment as provided herein shall be made in Salt Lake County, State of Utah.

19. Interest. In the event any money obligation described herein is not paid when due, interest shall accrue thereon at the greater of the Annual Percentage Rate of twenty percent (21%) per annum or at the highest legal rate.

20. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall

be deemed an original, but all of which together shall be deemed to be one and the same instrument.

21. No Business Relationship. The parties agree that this Agreement is not intended to and does not create any agency, joint venture, partnership or other relationship or business association of any kind between them.

22. Authorization. The individuals who have signed this Agreement represent and warrant that they are duly authorized to execute this Agreement, in either their individual or representative capacity as indicated, and that this Agreement is enforceable according to its terms.

23. Equitable Remedies. It is further agreed that any breach or evasion of any of the terms of this Agreement by either party hereto will result in immediate and irreparable injury to the other party and will authorize recourse to injunction and/or specific performance as well as to any other legal or equitable remedies to which such injured party may be entitled hereunder.

24. Survival. The provisions, promises, warranties, representations, and covenants set forth herein shall survive any execution, settlement, delivery or recording of any instrument and shall not be merged therein.

25. Limitation of Warranties. It is expressly understood and agreed between the parties hereto that there are no warranties, representations, covenants, or

agreements between the parties hereto except as specifically set forth herein.

26. Third Parties. Except as set forth in paragraph 28 hereof, this Agreement is executed for the sole benefit of the parties specifically identified herein and is not intended to confer rights or benefits on any third party.

27. Exhibits. All exhibits referred to in this Agreement and any documents to be delivered at or prior to the execution of this Agreement are expressly made a part of this Agreeement as fully as though completely set forth herein.

28. Private Roads. The Settlement Agreement requires the dedication of the access roads and required rights of way to the Aerie Property on Masonic Hill (hereinafter referred to as the "Roads") upon completion of a second access route. Park City agrees to accept dedication of the Roads even though revegation of the Sunnyside access road to the Deer Valley Highway is limited to that necessary for erosion control and said Sunnyside access does not contain utilities and drainage lines other than sewer lines. Such lines will be installed by the owners of the adjacent property when they develop their property. Prior to dedication FMA is responsible for maintenance and snow removal services. Upon dedication, the City is responsible for maintenance and

snow removal services. The Masonic Hill Owners Association, (a non profit owners association to be formed by the owners of property within the Improvement District and others, (hereinafter refered to as the Owners Association) will be formed to control access and provide supplemental snow removal services for the Roads until Park City vacates the roads. After Park City vacates the Roads the Owners Association will provide all maintenance and snow removal services. The Owners Association shall hvae the right to build guard stations within the right of way for the Roads. The Owners Association may control access while the Roads remain dedicated. Park City agrees to vacate the Roads to the Owners Association upon the earliest of the happening of any of the following: (a) the request of the Owners Association, or (b) seven (7) years from the hereof; or (c) the date 250 units are occupied on Masonic Hill. Park City will adopt an ordinance now which vacates the roads to take affect at such time. Park City shall be obligated to provide maintenance and snow removal services in the same manner as any public road while the roads remain dedicated. Maintenance and snow removal services will be provided to the City standards, which provide maintenance and the snow removal service based on traffic volume, population served and need for emergency services.

Once vacated the Roads shall be considered private and the owners thereof may regulate access as they deem appropriate, provided that dedicated easements over the roads for utility service vehicles and emergency vehicles shall be granted to the proper public agencies or private utility companies. Once the Roads are vacated Park City will waive any requirement that property adjoining the Roads be served by a dedicated road prior to issuing a building permit.

IN WITNESS WHEREOF, the parties have set their hands on the day year first above written.

PARK CITY

John C. Green, Mayor

FMA FINANCIAL CORPORATION

Dan D. Farmer
by Authorized Officer

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the ____ day of ____________, 19__, personally appeared before me ________________, who being by me duly sworn, did say that he is the _________ of Park City, that the foregoing instrument was signed in behalf of said Corporation by authority of a Resolution of its Board of Directors; and said ________________ acknowledged to me that said Corporation executed the same.

My commission expires: ______________________
Notary Public
Residing in Salt Lake County,

____

Approved as to form by City Attorney T. Clyde

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the ____ day of ___________, 19__, personally appeared before me ___________________________, who being by me duly sworn, did say that he is the ____________________ of FMA Financial Corporation; that the foregoing instrument was signed in behalf of said Corporation by authority of a Resolution of its Board of Directors; and said ______________ ______________ acknowledged to me that said Corporation executed the same.

My commission expires:

____
Notary Public
Residing in Salt Lake County,

AUG #2 82
ks B1-14

EXHIBIT "A"

The Aerie Property

The Aerie, Phase I, and The Aerie, Phase II, according to the official plats thereof on file with the Summit County Recorder.

August #2, 82
ks B15

EXHIBIT B

Park City Municipal Ordinance 84-2
January 5, 1984

ORDINANCE NO. 84-2

AN ORDINANCE confirming the assessment rolls and levying a tax providing for the assessment of property in Park City, Utah, Greater Masonic Hill Improvement District, for the purpose of paying the costs of constructing improvements to the water storage facilities on Masonic Hill which include acquisition and/or construction of a water tank and associated pumping stations and water pipelines, and the completion of any other miscellaneous work, necessary to complete the improvements in a proper and workmanlike manner; reaffirming the establishment of a special improvement guaranty fund; and establishing the effective date of this ordinance.

BE IT ORDAINED BY THE CITY COUNCIL OF PARK CITY, SUMMIT COUNTY, UTAH:

Section 1. The City Council of Park City, Utah, hereby confirms the assessment roll as corrected and adjusted by the Board of Equalization and Review for Park City, Utah, Greater Masonic Hill Improvement District, (the "District"), and hereby confirms the findings of the Board of Equalization and Review that the proposed list of assessments as equalized by the Board of Equalization and Review for the District is just and equitable; that each piece of property within the District will be benefited in an amount not less than the assessment to be levied against said property; and that no piece of property listed in the assessment list will bear more than its proportionate share of the cost of such improvements.

Section 2. The City Council of Park City, Utah does hereby levy a tax to be assessed upon the real property described in the assessment list for the District. The assessments levied upon each block, lot, part of block or lot, tract or parcel of property therein described shall be in the amount set forth in the assessment list, which is hereby incorporated by reference and made a part of this ordinance. The property to be assessed in accordance with the assessment list for the District is described in Exhibit "A" to Resolution No. 33-83 dated November 17, 1983.

The assessments hereby levied are for the purpose of paying the cost of constructing improvements to the water storage facilities on Masonic Hill which include acquisition and/or construction of a water tank and associated pumping stations and water pipelines, and the completion of any other miscellaneous work necessary to complete the improvements in a proper and workmanlike manner. Said improvements are more particularly described in the assessment list for the District which list has been incorporated herein by reference and made a part of this ordinance.

Said assessments are hereby levied and assessed upon each of the blocks, lots, parts of block and lots, tracts or parcels of real property described in the assessment list according to the estimated number of connections to the water system possible within each of the properties identified as being within the District, and which are specially benefited by the improvements thereon. Said assessments are levied upon the land and lots in the District according to possible number of water connections per each parcel of property to be assessed.

The total cost of the improvements in the District is $897,104, of which total cost, the City's portion is $278,102.24. The City's portion for the District includes that part of the overhead costs for which an assessment cannot be levied, if any, and the cost of making improvements for the benefit of property against which an assessment may not be levied, if any. The balance to be assessed to the owners of property affected or benefited by the improvements in the District is $619,001.76, which is the total amount of the assessment hereby levied for the District and which does not exceed in the aggregate the sum of: (a) the total contract price for the improvements under contract duly let to the lowest and best responsible bidders therefor; (b) the reasonable cost of utility services, maintenance, labor, materials, or equipment, if any; (c) the property price, if any; (d) the interest on any interim warrants issued against the District; and (e) overhead costs not to exceed fifteen percent (15%) of the sum of (a), (b), and (c). The total assessment for the District is levied at the following rates:

IMPROVEMENTS	COST
acquisition and/or construction of a water tank and associated pumping stations and water lines	$1,165.73 per each ~~possible~~ water connection for each parcel to be assessed

Section 3. The assessment ~~list~~ made by the City for the property in the District as corrected, approved, equalized and completed by the Board of Equalization and Review, is hereby confirmed and the assessments made and returned in said completed list and the Findings, Recommendation and Decision of the Board of Equalization and Review to the City Council of Park City, Utah, are hereby ratified, approved, and confirmed.

Section 4. This tax is levied and assessed at equal and uniform rates on such property, which consists of a charge for an estimated potential number of water connections on each lot.

Section 5. The whole or any part of the assessments for the District may be paid without interest within fifteen (15) days from the effective date of this ordinance. Any part of the assessments not paid within such fifteen (15) days shall be payable in ten (10) substantially equal principal installments over a period not to exceed ten (10) years from the effective date of the ordinance, with interest on the unpaid balance of the assessment at a rate of thirteen percent (13%) per annum from the effective date of this ordinance until due; provided however, that the interest rate on the assessments shall be adjusted to the net effective rate of the assessment bonds to be issued as of the date of said bonds.

Interest shall be paid in addition to the amount of each such installment annually at the time each installment becomes due. After said fifteen (15) day period, all unpaid installments of an assessment levied against any piece of property (but only in their entirety) may be paid prior to the dates on which they become due, but any such prepayment must include an additional amount equal to the interest which would accrue on the assessment t the next succeeding date on which interest is payable on any special improvement bonds issued in anticipation of the collection of the assessments plus such additional amount as, in the opinion of the City Treasurer, is necessary to assure the availability of money to pay interest on the special improvement bonds as interest becomes due and any premiums which may become payable on redeemable bonds which may be called in order to utilize the assessments thus paid in advance.

Default in the payment of any installment of principal or interest when due, shall cause the whole of the unpaid principal and interest to become due and payable immediately, and the whole amount of any unpaid principal shall thereafter draw interest at the rate of fifteen percent (15%) per annum until fully paid. Upon any such default, the City shall give notice, in writing, of the default to the owner of the property in default, as shown by the last available equalized assessment rolls. The notice shall provide for a period of thirty (30) days in which the owner shall pay the installments then due and owing, after which the City may accelerate the principal of the assessment, and immediately commence foreclosure proceedings under the procedure established by statute for the foreclosure of mortgages. The Amounts of accrued interest, and all costs of collection shall be added to the amount of the assessment up to the date of foreclosure sale.

If the property owner pays the full amount of the installment past due within the thirty (30) day notice period, the assessment restored, and the default removed, and thereafter the owner shall have the right to make the payments in installments as if the default had not occurred.

Notice shall be effective upon deposit of the notice in the U. S. Mail, postage prepaid, and addressed to the owner as shown on the last equalized assessment rolls for the County, or on the official ownership records of the County.

Section 6. The City Recorder of Park City, Utah does hereby reaffirm the creation of a special improvement guaranty fund and shall at the time of each annual appropriation, so long as any special improvement district bonds of Park City remain outstanding, transfer to said fund each year such amount as a tax levy of one mill will produce on all taxable property located within Park City, Utah, either through a levy of a tax of not to exceed one mill in any one year or by the issuance of general obligation bonds or by appropriation from other available sources, for the purpose of guaranteeing to the extent of such fund the payment of special improvement bonds and interest thereon issued against local improvement districts for the payment of local improvements therein, all in the manner and to the extend provided by the laws of the State of Utah.

Section 7. The officials of Park City, Utah, are hereby authorized and directed to take all action necessary and appropriate to effectuate the provisions of this ordinance.

Section 8. All ordinances or parts thereof in conflict with this ordinance are hereby repealed.

Section 9. Immediately after its adoption, this ordinance shall be signed by the Mayor and City Recorder and shall be recorded in the ordinance book kept for that purpose. Said ordinance as adopted, shall be published once in <u>The Park Record</u>, a newspaper published and having gener circulation in Park City, Utah, and shall take effect immediately upon publication as required by law.

Section 10. The City Recorder is hereby authorized and directed to file a copy of the assessment ordinance within five (5) days from the date hereof in the Summit County Recorder's Office. If the assessment ordinance incorporates the assessment list by reference, the City Recorder is further directed to file a copy of the final assessment list with the Summit County Recorder.

PASSED AND APPROVED by the City Council of Park City, Utah this 5th day of January, 1984.

John C. Green

Mayor

ATTEST:

City Recorder

(S E A L)

PARK CITY SUMMIT COUNTY
CORPORATE
SEAL
1884

GREATER MASONIC HILL IMPROVEMENT DISTRICT

ASSESSMENT LIST

Lot #	Serial #	Owner - 1983 Assessment Rolls	Assessment
AERIE SUBDIVISION			
1	AER-1	Elwood L. and Lynn Nielsen	$ 1,165.73
2	AER-2	Firmage Financial Corp. dba The Aerie	1,165.73
3	AER-3	Firmage Financial Corp. dba The Aerie	1,165.73
4	AER-4	Firmage Financial Corp. dba The Aerie	1,165.73
5	AER-5	Firmage Financial Corp. dba The Aerie	1,165.73
6	AER-6	Firmage Financial Corp. dba The Aerie	1,165.73
7	AER-7	Firmage Financial Corp. dba The Aerie	1,165.73
8	AER-8	Firmage Financial Corp. dba The Aerie	1,165.73
9	AER-9	R.L.K. Enterprises	1,165.73
10	AER-10	Marcia Olch	1,165.73
11	AER-11	Christian Title	1,165.73
12	AER-12	Lot 12 Partners	1,165.73
13	AER-13	Elwood L. and Lynn Nielsen	1,165.73
14	AER-14	Firmage Financial Corp. dba The Aerie	1,165.73
15	AER-15	R.L.K. Enterprises	1,165.73
16	AER-16	Firmage Financial Corp. dba The Aerie	1,165.73
17	AER-17	Elwood L. and Lynn Nielsen	1,165.73
18	AER-18	Elwood L. and Lynn Nielsen	1,165.73
19	AER-19	Elwood L. and Lynn Nielsen	1,165.73
20	AER-20	Elwood L. and Lynn Nielsen	1,165.73
21	AER-21	Elwood L. and Lynn Nielsen	1,165.73
22	AER-22	R.L.K. Enterprises	1,165.73
23	AER-23	Firmage Financial Corp. dba The Aerie	1,165.73
24	AER-24	Golden Spike Enterprises	1,165.73
25	AER-25	Firmage Financial Corp. dba The Aerie	1,165.73
26	AER-26	Firmage Financial Corp. dba The Aerie	1,165.73
27	AER-27	Firmage Financial Corp. dba The Aerie	1,165.73
28	AER-28	Firmage Financial Corp. dba The Aerie	1,165.73
29	AER-29	Elwood L. and Lynn Nielsen	1,165.73
30	AER-30	Elwood L. and Lynn Nielsen	1,165.73

31	AER-31	Elwood L. and Lynn Nielsen	1,165.73
32	AER-32	Elwood L. and Lynn Nielsen	1,165.73
33	AER-33	Elwood L. and Lynn Nielsen	1,165.73
34	AER-34	Firmage Financial Corp. dba Park City Hylands #1	1,165.73
35	AER-35	Firmage Financial Corp. dba Park City Hylands #1	1,165.73
36	AER-36	Firmage Financial Corp. dba Park City Hylands #1	1,165.73
37	AER-37	Frank E. Dotson	1,165.73
38	AER-38	Frank E. Dotson	1,165.73
39	AER-39	Firmage Financial Corp. dba Park City Hylands #1	1,165.73
40	AER-40	Firmage Financial Corp. dba Park City Hylands #1	1,165.73
41	AER-41	Firmage Financial Corp. dba Park City Hylands #1	1,165.73
42	AER-42	R.L.K. Enterprises	1,165.73
43	AER-43	Elwood L. and Lynn Nielsen	1,165.73
44	AER-44	Elwood L. Nielsen c/o Wendell E. Bennett	1,165.73
45	AER-45	Elwood L. Nielsen c/o Wendell E. Bennett	1,165.73
46	AER-46	Elwood L. Nielsen c/o Wendell E. Bennett	1,165.73
47	AER-47	Elwood L. Nielsen c/o Wendell E. Bennett	1,165.73
48	AER-48	Elwood L. and Lynn Nielsen	1,165.73
49	AER-49	Elwood L. and Lynn Nielsen	1,165.73
50	AER-50	Elwood L. and Lynn Nielsen	1,165.73
51	AER-51	Rachael Enterprises	1,165.73
52	AER-52	Elwood L. and Lynn Nielsen	1,165.73
53	AER-53	Elwood L. and Lynn Nielsen	1,165.73
54	AER-54	Golden Spike State Bank	1,165.73
55	AER-55	Elwood L. and Lynn Nielsen	1,165.73
56	AER-56	Elwood L. and Lynn Nielsen	1,165.73
57	AER-57	R.L.K. Enterprises	1,165.73
58	AER-58	Golden Spike State Bank	1,165.73
59	AER-59	Elwood L. and Lynn Nielsen	1,165.73
60	AER-60	Elwood L. and Lynn Nielsen	1,165.73
61	AER-61	Elwood L. and Lynn Nielsen	1,165.73
62	AER-62	Elwood L. and Lynn Nielsen	1,165.73
63	AER-63	Elwood L. and Lynn Nielsen	1,165.73
64	AER-64	Elwood L. and Lynn Nielsen	1,165.73
65	AER-65	Elwood L. and Lynn Nielsen	1,165.73
66	AER-66	Elwood L. and Lynn Nielsen	1,165.73
67	AER-67	Firmage Financial Corp. dba The Aerie	1,165.73
68	AER-68	Firmage Financial Corp. dba The Aerie	1,165.73
69	AER-69	Firmage Financial Corp. dba The Aerie	1,165.73
70	AER-70	Firmage Financial Corp. dba The Aerie	1,165.73
71	AER-71	Firmage Financial Corp. dba The Aerie	1,165.73

72	AER-72	Firmage Financial Corp. dba The Aerie	1,165.73
73	AER-73	Craig Master	1,[illegible]65.73
74	AER-74	Firmage Financial Corp. dba The Aerie	1,165.73
75	AER-75	Firmage Financial Corp. dba The Aerie	1,165.73
76	AER-76	Firmage Financial Corp. dba The Aerie	1,165.73
77	AER-77	Firmage Financial Corp. dba The Aerie	1,165.73
78	AER-78	R.L.K. Enterprises	1,165.73
79	AER-79	Firmage Financial Corp. dba The Aerie	1,165.73
80	AER-80	Firmage Financial Corp. dba The Aerie	1,165.73
81	AER-81	Firmage Financial Corp. dba The Aerie	1,165.73
82	AER-82	Firmage Financial Corp. dba The Aerie	1,165.73
83	AER-83	Firmage Financial Corp. dba The Aerie	1,165.73
84	AER-84	Firmage Financial Corp. dba The Aerie	1,165.73
85	AER-85	Golden Spike State Bank	1,165.73
86	AER-86	Firmage Financial Corp. dba The Aerie	1,165.73
87	AER-87	R.L.K. Enterprises	1,165.73
88	AER-88	Firmage Financial Corp. dba The Aerie	1,165.73
89	AER-89	Firmage Financial Corp. dba The Aerie	1,165.73
90	AER-90	Al Nagy	1,165.73
91	AER-91	Firmage Financial Corp. dba The Aerie	1,165.73
92	AER-92	Michael and Judy Troup	1,165.73
93	AER-93	Firmage Financial Corp. dba The Aerie	1,165.73
94	AER-94	A.M.K. Company, a Utah General Partnership	1,165.73
95	AER-95	Firmage Financial Corp. dba The Aerie	1,165.73
96	AER-96	Firmage Financial Corp. dba The Aerie	1,165.73
97	AER-97	Firmage Financial Corp. dba The Aerie	1,165.73
98	AER-98	Firmage Financial Corp. dba The Aerie	1,165.73
99	AER-99	Firmage Financial Corp. dba The Aerie	1,165.73

AERIE CONDOMINIUM PARCEL

SA-254-2-D	Firmage Financial Corp. dba The Aerie	
SA-254-2	Firmage Financial Corp. dba The Aerie	
SA-254-2-A	Firmage Financial Corp. dba The Aerie	
SA-254-2-E	Firmage Financial Corp. dba The Aerie	
		55,955.04

HEARTHSTONE CONDO PARCEL

SA-254-9	Elwood L. and Lynn Nielsen	167,865.12

NIELSEN COMMERCIAL PARCEL

SA-404	Elwood L. and Lynn Nielsen	58,286.50
SA-400-B[1]	The Bamberger Company	221,488.70

[1]No serial number, State assessed property; part may be assessed as SA-400-B.

AERIE CONDOMINIUM PARCEL
FIRMAGE FINANCIAL CORP.dba THE AERIE

~~EXHIBIT C~~

Beginning at a point 888.57' ft. South and 1321.72 ft. West from the N.E. Corner of Section 16 T.2S., R.4E. S.L.B.&M.; thence N 0°06'31" E. 1193.30 ft.; thence N 82°20'31" E. 30.90 ft.; thence N 16°08'29" W. 240.00 ft.; thence N 80°49'31" E. 37.00 ft.; thence N 0°06'31" E. 555.10 ft.; thence N 80°49'31" E. 1500.00 ft. thence S 0°6'30" W. 256.80 ft.; thence N 82°20'31" E. 473.00 ft.; thence S 16°8'29" E. 806.40 ft.; thence S 12°38'31" W. 193.50 ft.; thence S 82°20'31" W. 447.32 ft.; thence S 12°36'38" W. 698.02 ft. thence S 19°30'0" E. 428.48 ft.; thence S 82°20'31" W. 445.00 ft.; thence N 17°0'0" W. 830.00 ft.; thence S 54°17'32" W. 740.79 f thence S 0°06'31" W. 175.00 ft.; thence S 82°20'31" W. 400.00 ft.; to the point of beginning, containing 81.329 acres.

Serial #

SA-254-2-D
SA-254-2
SA-254-2-A
SA-254-2-E

NIELSEN COMMERCIAL PARCEL

Beginning at the West line of the Southeast Quarter,
Northeast Quarter of Section 16, Township 2 South,
Range 4 East, Salt Lake Base & Meridian, at a point
176.25 feet North from the Southwest Corner of said
Southeast Quarter, Northeast Quarter; thence North
81°06'00" West 40.34 feet; thence North 24°11'00" West
28.29 feet; thence North 65°49'00" East 56.38 feet to a
point on said West line of the Southeast Quarter,
Northwest Quarter; thence North 204.77 feet; thence
South 37°06'03" East 139.22 feet; thence South 32°
21'39" East 351.01 feet; thence North 66°11'00" West
240.24 feet; thence North 42.45 feet; thence North
81°06'00" West 52.71 feet to the point of beginning.
Contains 0.945 acres, more or less.

TAX SERIAL #SA-404

APRIL LAND/SURPRISE P.U.D. PARCEL

Beginning at a point N 89° 25' 09" W 125.61 feet from the East Quarter Corner of Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian; and running thence N 0° 36' E 130.88 feet; thence N 82° 14' E 10.00 feet; thence S 77° 21' E 396.47 feet; thence S 11° 48' W 47.58 feet; thence N 89° 58' 38" E 521.44 feet; thence N 8° 30' E 112.03 feet; thence N 67° 33' E 1207.50 feet; thence North 644.50 feet; thence N 14° 10' E 4.80 feet; thence N 77° 36' W 1043.10 feet; thence S 67° 33' W 77.03 feet; thence N 14° 10' E 41.79 feet; thence N 77° 21' W 600.00 feet; thence N 14° 10' E 61.60 feet; thence S 82° 14' W 986.40 feet; thence S 0° 36' W 1507.04 feet; thence S 89° 25' 09" E 599.69 feet to the point of beginning.

Excluding therefrom the following parcel:

Beginning at a point North 237.22 feet and East 530.45 feet from the East Quarter Corner of Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian; and running thence S 14° 10' W 130.06 feet; thence East 31.83 feet; thence North 126.11 feet to the point of beginning. Parcel contains 79.12 acres.

~~[illegible]~~

State Assessed ~~as to balance~~

THE APRIL LAND COMPANY
~~The Bamberger Company — Serial # SA-[illegible]-B~~.
Surprise PUD parcels
(assessed at $1,165.73 per unit)

	Land Use	Units	Total Assessment
1.	Townhouses A	17	$19,817.41
2.	Garden Apts.	21	$24,480.33
3.	Townhouses A	12	$13,988.76
4.	Townhouses B	12	$13,988.76
5.	Townhouses C	10	$11,657.30
6.	Townhouses B	15	$17,485.95
7.	Garden Apts.	7	$ 8,160.11
8.	Townhouses B	7	$ 8,160.11
9.	Townhouses A	10	$11,657.30
10.	Garden Apts.	20	$23,314.60
11.	Garden Apts.	14	$16,320.22
12.	Townhouses B	8	$ 9,325.84
13.	Townhouses A	10	$11,657.30
14.	Townhouses B	6	$ 6,994.38
15.	Townhouses B	4	$ 4,662.92
16.	Townhouses B	5	$ 5,828.65
17.	Single Family	12	$13.988.76
18.	---	0	-0-
	TOTAL ASSESSMENT	190	$221,488.70

STATE OF UTAH)
:
COUNTY OF SUMMIT.)

I, William R. Gatherum, the duly qualified City Recorder of Park City, Utah, do hereby certify, according to the records of Park City in my official possession, that the above and foregoing constitutes a true and correct copy of: Ordinance 84-2 Confirming the assessment for Greater Masonic Hill Improvement District, including assessment list.

IN WITNESS WHEREOF, I have hereunto subscribed my official signature and impressed hereon the corporate seal of Park City this 9th day of January, 1984.

William R. Gatherum

William R. Gatherum
City Recorder

(Seal)

STATE OF UTAH)
: ss
COUNTY OF SUMMIT)

I, William R. Gatherum, City Recorder of Park City, Utah, do hereby certify, that on January 11, 1984, I mailed a true and correct Notice of Assessment to all property owners in the Greater Masonic Hill Improvement District. I also certify that on January 12, 1984, I published the complete Assessment List for all property included in the Greater Masonic Hill Improvement District in the Park Record Newspaper.

DATED this 11th day of January, 1984.

William R. Gatherum

William R. Gatherum
City Recorder

(Seal)

EXHIBIT C

Letter from Tom Bakaly, City Manager
November 4, 2002

PARK CITY
1884

Office of City Manager

November 4, 2002

COPY

David Bernolfo
Bamberger Co.
163 South Main Street
Salt Lake City, Utah 84111

Re: Water Fees

Dear David:

This letter shall serve to confirm my recommendation for resolution of your claim for waiver of water fees under that certain Water Reservoir and Road Agreement dated August 31, 1982 ("the Agreement").

City records indicate that Parcel #SA-400-B originally was assessed $221, 488.70, plus interest, based on a maximum connection potential of 190 units at $1,165.73 per unit. City finance records show payment by Bamberger Co. of $205.120.24. with outstanding charges for principal, interest and late fees.

The Agreement provided for the waiver of City water connection fees ($600 at that time) for each property owner at the time units were actually permitted. The maximum benefit at the time the Agreement was entered was therefore $114,000. There was no minimum or other guarantee in the Agreement. However, the Surprise MPD approved in the 1980s was for substantially less units. That approval expired for non-activity after five years The current April Mountain MPD and Subdivision project was approved for 70 units under more restrictive zoning adopted after the Agreement. A precise calculation of your waiver is impossible because the City no longer charges a water connection fee, but instead includes those costs as a component of the larger water development impact fee. Accordingly, after discussions with you failed to yield a mutually acceptable solution, the City now proposes an adjusted calculation based upon that portion of the current water development impact fee that tracts with what the past connection fee was composed of.

Based upon the City's 2002 water fee study, the City proposes a credit pursuant to the Agreement of $2,418.01 per unit for a total credit of $169.260.70. As the Agreement contemplates, this waiver would be given at the time of full building permit issuance for each unit so you would need to make arrangements with the current property owner for payment of the value of the credits. My understanding is that you reserved this right during your closing on the sale of the

Park City Municipal Corporation • 445 Marsac Avenue • P.O. Box 1480 • Park City, UT 84060-1480
Phone (435) 615-5007 • FAX (435) 615-4901

property. None of the credits are transferable to other prope:ty.

This is a compromise offer and if rejected, the City reserves a.l rights and defenses under the Agreement, and in law or equity, including but not limited to :reach for non-payment, non-performance, estoppel, standing and statute of limitations. I apologize for this formality as I truly appreciate your efforts to resolve this matter and the ori;inal cooperation you displayed in the litigation back in the time of the Agreement. However, we must agree to disagree regarding your perception of entitlements and the measure of City bene:it under the old Agreement.

City Manager decisions on contracts may be appealed to the City Council by filing a written appeal letter with the City Manager within five working days of receipt of this letter. You will be entitled to a hearing and written decision by the Council.

As an alternative, the City remains open to our original sugge stion of mediation or analysis by a mutually agreed upon financial advisor as discussed with you by City Attorney Mark Harrington. Please contact me at 435.615.5180 (also within the five work ng days) if you would rather pursue the mediation option.

Sincerely,

Tom B::kaly
Acting City Manager

cc: Dana Williams, Mayor
Mark Harrington, City Attorney

EXHIBIT D

Memorandum from Mark Harrington, City Attorney
April 20, 1999

MEMORANDUM

To: Toby Ross, City Manager

From: Mark Harrington, Deputy City Attorney MH

Date: 20 April 1999

Subject: Water Connection Fee Waiver for the Masonic Hill Improvement District

Issue: The issue is whether the water connection fee waiver granted by the City to developers through a 1982 contract may be transferred by the developer to developments outside the area specifically identified in the contract.

Short Answer: No. The waiver is only for the benefit of property within the improvement district.

Discussion: On August 31st, 1982, Park City entered into a Water Reservoir And Road Agreement (the "Agreement") with FMA Financial Corporation ("FMA") in which FMA agreed to construct a water reservoir on Masonic Hill. As part of the Agreement, the City agreed to form the Masonic Hill Improvement District (the "District") and to waive the water connection fee for all property owners in the Water District and for developers which draw on the district's capacity in the water reservoir.

Paragraph 7 ("Waiver of Fees") of the Agreement *"waives the water connection fee* (which is presently $600), *for all property owners within the [Masonic Hill] Improvement District..."*. The actual costs of physical connection, including meters, meter boxes, plumbing, and excavation were not waived. The water development fee was not waived except for The Aerie, Phase II, where the Water Development was waived as set forth in the Nielsen Settlement Agreement. The paragraph is very specific in stating that the benefit of the water connection fee waiver belongs to the property owners within the District, and not to the parties to the contract.

Additionally, in the Road Development and Easement Agreement, executed May 23rd, 1983 and which incorporated the Agreement above, Paragraph 8(b) states:

> Consistent with the terms of the Agreement attached hereto as Exhibit "G" and the waiver of fees found in paragraph 7 thereof, Park City hereby waives the Water Connection Fee customarily charged by Park City for new water hookups for all property owners within Owners' Property, **provided the Owners Property is included within the Improvement District."** (Emphasis added).

There is no language authorizing the transfer of this waiver to property or development outside the District. To the contrary, all references to the waiver specifically call for the property to be within the District. Discussions with former Asst. City Attorney J. Craig Smith confirm that the waiver was tied specifically to the costs associated with water reservoir. The costs of the water system within the District were directly related to the owners' proposed density on the owners' property at that time. Those densities were never built but the water system was still built to serve that capacity. To allow those waivers, based upon a high cost attributed to density that was never built, to be transferred freely around the City defeats the original intent of the District, and quite simply does not make sense in that such transfer would allow the owners to take advantage of development plans that never materialized.

The right to the waiver of the water donnection fee lies purely in the contract, and is limited for development within the District.

H:\LEGAL\MH\ADMIN\AERIEH2O.MEM

EXHIBIT E

Road Development and Easement Agreement
May 23, 1983

ROAD DEVELOPMENT AND EASEMENT AGREEMENT

THIS AGREEMENT, is made and entered into this 23rd day of May, 1983, by and between BAMBERGER COMPANY, a Utah corporation, (hereinafter referred to as "Bamberger"); MARGARET DOOLY OLWELL; JANE DOOLY GILE; WALKER BANK AND TRUST COMPANY, a/k/a FIRST INTERSTATE BANK OF UTAH, N.A. and WILLIAM H. OLWELL, Trustees under the Will of Eleanor F. Bamberger, (hereinafter referred to as "Eleanor F. Bamberger Estate"); BONNIE JEAN GILE PHILLIPS; ELEANOR OLWELL ROSER; CAROL JANE OLWELL; THE RUTH ELEANOR BAMBERGER AND JOHN ERNEST BAMBERGER MEMORIAL FOUNDATION, a Utah charitable corporation; CONTINENTAL BANK AND TRUST COMPANY, Trustee under the Will of John E. Dooly, deceased, (hereinafter referred to as "John E. Dooly Estate"); and APRIL LAND COMPANY, a Utah limited partnership.

All of the foregoing are referred to herein individually and collectively as "Owners"; and

FMA FINANCIAL CORPORATION, a Utah corporation, d/b/a The Aerie, (hereinafter referred to as "FMA"); and

PARK CITY, a municipal corporation of the State of Utah (hereinafter referred to as "Park City").

W I T N E S S E T H:

WHEREAS, Bamberger is the owner of certain real property known as the Surprise Claims and the Silver Queen Claims, (hereinafter referred to collectively as the "Surprise

Claims"), located in Summit County, State of Utah, and more particularly described as Parcel No. 1 on <u>Exhibit "A"</u> attached hereto and incorporated herein by reference; and

WHEREAS, Margaret Dooly Olwell owns a 14.5225% interest in certain real property described as Parcel 2 of said <u>Exhibit "A"</u> (hereinafter referred to as "April Lode and April Fraction"); and

WHEREAS, Jane Dooly Gile owns a 14.5225% interest in April Lode and April Fraction; and

WHEREAS, The Eleanor F. Bamberger Estate owns a 12.7071875% interest in April Lode and April Fraction, with a Trust being established for the benefit of Bonnie Jean Gile (Phillips), Eleanor Margaret Olwell (Roser) and Carol Jane Olwell (each in the original percentage of 7.26135 and in the following present percentages: Phillips 3.630625, Roser 3.630625 and Olwell 5.4459375); and

WHEREAS, Bonnie Jean Gile% Phillips owns an undivided 3.630625% interest in April Lode and April Fraction; and

WHEREAS, Eleanor Margaret Olwell Roser owns an undivided 3.630625% interest in April Lode and April Fraction; and

WHEREAS, Carol Jane Olwell owns an undivided 1.8153125% interest in April Lode and April Fraction; and

WHEREAS, The Ruth Eleanor Bamberger and John Ernest Bamberger Memorial Foundation owns a 41.91% interest in April Lode and April Fraction; and

WHEREAS, The John E. Dooly Estate owns an undivided 7.26125% interest in April Lode and April Fraction; and

WHEREAS, under that certain Real Estate Purchase Agreement dated October 15, 1982, April Land Company has the right to acquire April Lode and April Fraction; and

WHEREAS, Owners own or have the right to acquire certain real property known as a portion of Virginia No. 1 Lode Mining Claim located in Summit County, State of Utah, more particularly describe as Parcel 3 of said Exhibit "A"; and

WHEREAS, FMA owns or has the right to acquire certain real property, (hereinafter referred to as the "Aerie Property"), adjacent to the Surprise Claims, located in Summit County, State of Utah, more particularly described on Exhibit "B" attached hereto and incorporated herein by reference; and

WHEREAS, FMA desires to develop a secondary access road (hereinafter referred to as the "Road"), to provide access and utilities for the immediate development and occupancy of the Aerie Property over and across the Surprise Claims, April Lode, April Fraction and Virginia No. 1 (hereinafter referred to as the "Owners' Property"), and

WHEREAS, under the terms and conditions herein contained Owners desire to grant to FMA an in-common easement, as hereinafter defined, over portions of the Owners' Property to FMA for the development of the Road as hereinafter described, and

WHEREAS, under the terms and conditions herein contained FMA desires to grant an in-common easement, as hereinafter defined, to Owners for the use of a road over portions of the Aerie Property; and

WHEREAS, FMA and Park City, a body politic, entered into an agreement hereinafter referred to which will be affected by certain provisions of this Agreement and the parties hereto will cause Park City to execute and be bound by this Agreement as hereinafter provided,

NOW, THEREFORE, in consideration of the mutual promises herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Grant of Road Easement.

(a) Owners hereby convey and grant to FMA an in-common perpetual easement over a portion of the Owners' Property more particularly described and shown on Exhibit "C", attached hereto and incorporated herein by reference, to excavate, grade, level, fill, drain, build, construct, maintain, repair and rebuild to use an access road and underground utilities together with such bridges, culverts, ramps, and cuts as may be necessary for the development of and access to and from The Aerie Phase I, The Aerie Phase 2 and future phases of The Aerie. Owners, and their successors and assigns, hereby retain the right to use said easement for the development of and access to and from the Owners' Property, and for all uses incidental thereto.

(b) FMA hereby conveys and grants to Owners, their successors and assigns, an in-common perpetual easement over a portion of the Aerie Property, more particularly described and shown on Exhibit "D" attached hereto and incorporated herein by reference, for access, ingress and egress to and from the Aerie Property and to and from the Owners' Property. FMA and its successors and assigns hereby retain the right to use said easement for the development of and access to and from the Aerie Property, and for all uses incidental thereto. Insofar as roads within the Aerie Property have been platted and dedicated, it is understood and agreed that the easement referred to in this subparagraph is over, under and upon such existing platted and dedicated roads.

(c) For purposes of this Agreement the term "in-common perpetual easement" shall mean a perpetual easement binding upon and inuring solely to the benefit of the parties hereto and their respective successors and assigns permitted under paragraph 14 hereof.

(d) FMA covenants and represents that it has obtained certain rights to an easement over real property owned by Park City Mun. Corp. pursuant to and limited by that certain instrument entitled "Easement Relocation Agreement -- Aerie Drive," dated August 31, 1982 and recorded September 1, 1982 as Entry No. 195456 in Book M231 at Page 408, in the official records of the Summit County, Utah, Recorder. Said instrument is incorporated herein by this reference. FMA hereby assigns to Owners a non-exclusive right to use said easement as well as Hearthstone easements of record from Elwood Nielsen for purposes of this agreement.

2. Construction of Road. FMA shall construct the Road thirty (30) feet wide with four (4)inches of asphalt bituminous surface course over five (5) inches subbase gravel and three (3) inches surface gravel, at its own expense, in compliance with the requirements of Park City, a municipal corporation of the State of Utah (hereinafter referred to as "Park City") as set forth on Exhibit "E" attached hereto and incorporated herein by reference. FMA and Owners hereby approve the plans and specifications contained in said Exhibit "E" but reserve the right to review and approve any material changes to said the final plans and specifications, which approval shall not be unreasonably withheld. In addition, Owners and FMA retain the right to modify the exact location of the Road lying within the boundaries of the easement described or shown in Exhibits "C" and "D" hereof.

3. Gutters and Utilities. FMA, at its own expense, shall install 30" rolled concrete gutters on each side of the Road traversing the Surprise Claims, Virginia No. 1, April Lode and April Fraction, and shall install, or cause to be installed, under the Road (and before laying asphalt thereon) eight (8) inch PCV sanitary sewer main and man holes according to plans approved by Snyderville Basin Sewer Improvement District. FMA, at its own expense, shall install a sewer access stub within the existing, dedicated sewer easement

running through real property owned by Elwood L. Nielsen known as the Hearthstone project, which access stub is more particularly shown or described on Exhibit "F" attached hereto and incorporated herein by reference. Owners shall have the right to connect to said access stub at any time pursuant to the development of Owner's Property upon approval of such connection by the Snyderville Basin Sewer Improvement District. Owners shall pay the cost of the installation of culinary water lines and, if required, storm drainage lines under the Road. All such culinary and storm drainage lines shall be installed by FMA's contractor, Gibbons & Reed Co., within the time set forth in paragraph 11 hereof, and Owners agree to acquire any bonding required by Park City in connection with the installation of such culinary and storm drainage lines. Owners shall pay to Gibbons & Reed Co. its charges and expenses directly related to the installation of the culinary and storm drainage lines.

4. Revegetation. FMA, at its own expense, shall provide such revegetation as is required for erosion control at the time the Road is completed based upon the plans and specifications approved herein. In the event Owners modify such plans and specifications, thereby increasing the costs to FMA for revegetation, Owners shall pay all such additional costs.

5. Retention. FMA, at its own expense, shall provide such retention devises as may be necessary or advisable to protect the Road as designed in the plans and specifications

approved hereunder. Should Owners modify said plans and specifications such that the costs for retention devices of FMA provided herein are increased, Owners agree to reimburse FMA all amounts equal to such increased costs.

6. Water Hookup. FMA agrees to provide, at its own cost and expense, a six inch (6") water main to Owners' property line. The connection point shall be in the Road at said property line, and the connection apparatus shall be in place on or before the time FMA commences construction of the sewer line.

7. Easement. FMA hereby grants to Owners a non-exclusive easement over the property described as Parcel 1 on Exhibit "F" attached hereto and incorporated herein by reference for the installation of sewer lines to serve Owners' Property. In the event the sewer access stub does not join Owner's Property line, FMA will obtain for Owners a non-exclusive easement over the property described as Parcel 2 on said Exhibit "F" for the installation, operation and maintenance of the sewer lines and sewer outfall line serving Owners' Property and shall construct, at FMA's expense, the sewer outfall line through said Parcel 2 to Owners property line. Owners shall install at Owner's expense the sewer outfall line from Owner's propery line to the Road as development of Owner's property requires.

8. Improvement District. FMA is a party to an agreement with Park City Municipal Corporation dated August 31,

1982, a copy of which is attached hereto as Exhibit "G". Exhibit "G" requires Park City, among other things, to form an improvement district for the purpose of providing water services to the Masonic Hill properties. Inasmuch as Owners are or may be bound by certain of the provisions in Exhibit "G", Park City has executed this Agreement in the place provided therefor to evidence its agreement to the provisions of this Paragraph 8. The improvement district referred to in Exhibit "G" will purchase water tank capacity to serve Masonic Hill. Owners agree to be part of said improvement district provided that the following conditions precedent are complied with and agreed to by FMA and Park City:

(a) The improvement district, when formed, shall become a party to the Agreement attached hereto as Exhibit "G" insofar as the terms for purchase of the water tank and amortization of the costs outlined in said Agreement will affect and be binding upon the improvement district. At such time as permanent long-term financing, through tax free municipal bonding, for the payment of the improvements in the district is in place, Owners will become part of the improvement district and will become responsible for their share of costs and assessments arising thereunder.

(b) Consistent with the terms of the Agreement attached hereto as Exhibit "G" and the waiver of fees found in paragraph 7 thereof, Park City hereby waives the Water Connection Fee customarily charged by Park City for new water hookups for all property owners within Owners' Property, provided the Owners Property is included within the Improvement District.

(c) Nothing herein contained shall constitute a waiver of Owners' rights to contest or object to any water assessments levied by the improvement district at any time.

9. Status of Road. Paragraph 28 of the Agreement attached hereto as Exhibit "G" provides certain rights and obligations of FMA and Park City with respect to the maintenance, dedication and vacation of certain roads on Masonic Hill. Paragraph 9 of this Agreement will affect certain of the rights and obligations of FMA and Park City under paragraph 28 of the Agreement and as a result thereof, Park City has executed this Agreement in the space provided therefor to demonstrate its agreement to the provisions of this Paragraph 9 of this Agreement.

(a) The parties hereto, including Park City, agree that the Road on Owners' Property will be dedicated to Park City and that Park City shall accept such dedication, subject to the terms of this Paragraph 9, and be responsible for maintenance and snow removal services consistent with such dedication.

(b) Owners and FMA shall each form a "Homeowner's Association" consisting of property owners within their respective Properties which shall have the right and obligation to control access and provide supplemental snow removal services for the Road within Owners' and FMA's Property until vacation of the Road by Park City. After Park City vacates the Road as hereinafter provided, the Homeowner's Associations will provide all maintenance and snow removal services and will continue to control access. The Owners' Homeowner's Association shall have the right and the obligation to build, maintain and pay for the architectural design of an entrance way and guard station in the general locality of where the Road exits the Masonic Hill Area at the Deer Valley Road and the Pinnacle Subdivision. The access point and improvements are shown on Exhibit "H" and marked as "Entrance" and "Guard Station" thereon. FMA's Homeowner's Association shall have the right and the obligation to build, maintain and pay for the architectural design of an entrance way and guard station in the general locality of where Aerie Drive intersects with State Highway No. 248. The access point and improvements are shown on Exhibit "I" and marked "Entrance" and "Guard Station" thereon.

This Agreement does not constitute Park City's consent to the construction of the sales office shown on Exhibit "I", other business offices, or other uses permitted by the Recreation Commercial (RC) District. FMA, at FMA's expense, may petition to change the zoning on the parcel where the sales office is located to RC. The zoning of the parcel where the proposed office is located will not change until final approval is granted through the regular rezoning process. In addition, FMA's Homeowner's Association shall have the right and obligation to control access and provide supplemental snow removal services for the roads on property other than the Owners' Property all as provided in and limited by paragraph 28 of Exhibit "G".

Park City agrees to allow FMA's and Owners' Home-owner's Associations to construct the entry ways, traffic controls and property identification appuratus and a guard station adjacent to the Road and within the Road and the utility and curb and gutter easements relating thereto.

Nothing in this paragraph 9 or paragraph 28 of Exhibit "G" will affect the rights of FMA and the Owners to exercise their respective rights of ingress and egress granted by the easements referred to in paragraphs 1(a) and 1(b) herein.

(c) Park City agrees to vacate the Road on Owners' Property and as provided in Paragraph 28 of Exhibit "G" to each of the Homeowner's Associations upon the earliest happening of any of the following:

(1) The request of both of the Homeowner's Associations, or

(2) August 31, 1989;

(3) The date 250 units are occupied on Owners' and FMA's Property.

Park City will adopt an ordinance now which vacates the Road to take effect at such time. All maintenance and snow removal services on the Road shall be performed by Park City consistent with and to such standards as are set forth in paragraph 28 of

Exhibit "G". All other provisions of said paragraph 28 shall be incorporated herein and shall apply to the Road on the Owners' Property; provided, however, to the extent the terms of this paragraph 9 are inconsistent with paragraph 28 of Exhibit "G" the terms of this paragraph 9 shall govern.

10. Letter of Credit for Construction. Prior to the commencement of any construction of the Road, FMA, at FMA's expense, shall provide Owners and Park City with a letter of credit for the purpose of bonding the successful completion of the Road and other improvements to be made by FMA, which letter of credit shall be with an acredited Utah financial institution acceptable to Park City in an amount equal to 125% of the estimated cost of completing the Road and other improvements in accordance with the terms hereof, including the installation of the sewer as hereinbefore stated. Said estimate shall be made by Park City. Said bond shall comply strictly with the requirements of Utah law and Park City ordinances respecting Subdivision Improvement Bonds and shall remain in full force and effect for one full year following completion of the Road and improvements. Likewise, with respect to the improvements to be constructed by Owners as provided herein, Owners shall obtain the appropriate bonds necessary to comply with Utah law and Park City ordinances.

11. Time Period for Completion. FMA agrees to use its best efforts to complete construction of the Road and other

improvements by October 15, 1983. In the event such construction is not completed by that date due to causes beyond FMA's control, such construction shall be completed no later than July 15, 1984. In the event construction is not completed in 1983, Park City agrees to allow up to twelve (12) occupancy permits to Owners and twelve (12) occupancy permits to FMA along the Road, provided that all utilities within the Road have been installed.

12. Right to Inspect. Owners and their agents and/or Park City have the right at any time to inspect the construction of the Road.

13. Notice. All demands and notices to be given hereunder, if any, shall be personally delivered or sent by registered mail addressed to the respective parties at their postal addresses as set forth below or to such other address as each may hereafter designate in writing, to-wit:

IF TO OWNERS:	Bamberger Company 163 South Main Street Salt Lake City, Utah 84111
IF TO FMA:	FMA Financial Corporation 2060 East 2100 South Salt Lake City, Utah 84109 Attention: Dan D. Firmage

Any party may change its address for purposes of this paragraph by giving the other parties written notice of the new address in the manner set forth above.

14. Successors. No party hereto shall assign its interest herein without first obtaining the written consent of

all other parties hereto, which consent shall not be unreasonably denied. Except as otherwise provided herein, this Agreement shall be binding upon and inure to the benefit of the respective parties hereto, their legal representatives, successors and permitted assigns.

15. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties hereto and supersedes all prior agreements or understandings.

16. Amendment. This Agreement may not be altered or amended except by a subsequent written agreement executed by all of the parties hereto.

17. Attorneys' Fees. In the event any action is initiated by any person to enforce and/or defend the provisions of this Agreement or its enforceability, the prevailing party shall be entitled to recover their costs of suit, including a reasonable attorneys' fee.

18. Additional Documents. The parties hereto agree to execute such additional documents as may be necessary or desirable to carry out the intent of this Agreement.

19. Saving Clause. The invalidity or unenforceability of any provision hereof shall not affect or impair any other provision hereof.

20. Paragraph Headings. Paragraph headings in this Agreement are for convenience only and shall not be deemed to modify, interpret or limit the provisions hereof.

21. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same instrument.

22. No Business Relationship. The parties agree that this Agreement is not intended to and does not create any agency, joint venture, partnership or other relationship or business association of any kind between them.

23. Authorization. The individuals who have signed this Agreement represent and warrant that they are duly authorized to execute this Agreement, in either their individual or representative capacity as indicated, and that this Agreement is enforceable according to its terms.

24. Equitable Remedies. It is further agreed that any breach of any of the terms of this Agreement by either party hereto will result in immediate and irreparable injury to the other party and will authorize recourse to injunction and/or specific performance as well as to any other legal or equitable remedies to which such injured party may be entitled hereunder.

25. Limitation of Warranties. It is expressly understood and agreed between the parties hereto that there are no warranties, representations, covenants, or agreements between the parties hereto except as specifically set forth herein.

26. Third Parties. This Agreement is executed for the sole benefit of the parties specifically identified in this

Agreement and is not intended to confer rights or benefits on any third party.

27. Exhibits. All exhibits referred to in this Agreement and any documents to be delivered at or prior to the execution of this Agreement are expressly made a part of this Agreement as fully as though completely set forth herein.

28. Force Majeure. Any prevention, delay, or stoppage due to strikes, walkouts, labor disputes, acts of God, inability to obtain labor, materials or reasonable substitutes therefor, governmental restrictions, controls, or regulations, enemy or hostile governmental action, civil commotion, fire, or any other causes beyond the reasonable control of the parties shall not be deemed to be a breach of this Agreement and the time of performance shall be extended accordingly.

29. Situs of Agreement. This Agreement is made and entered into in the State of Utah and shall be interpreted and enforced in accordance with Utah law.

IN WITNESS WHEREOF, the parties hereto have signed or caused to be signed their respective names the day and year first above written.

OWNERS:

BAMBERGER COMPANY,
a Utah corporation

By [signature]
DAVID W. BERNOLFO, President

WILLIAM H. OLWELL, as Attorney-in-Fact for: MARGARET DOOLY OLWELL; JANE DOOLY GILE; BONNIE JANE GILE PHILLIPS; ELEANOR MARGARET OLWELL ROSER; CAROL JANE OLWELL;

THE ELEANOR F. BAMBERGER ESTATE (First Interstate Bank of Utah, N.A. and WIlliam H. Olwell, Trustees);

THE JOHN E. DOOLY ESTATE (Continental Bank & Trust Company, Trustee); and

THE RUTH ELEANOR BAMBERGER AND JOHN ERNEST BAMBERGER MEMORIAL FOUNDATION

APRIL LAND COMPANY

By ______________________
DAVID W. BERNOLFO,
General Partner

FMA:

FMA FINANCIAL CORPORATION

By ______________________
Its ______________________

PARK CITY:

Attest:

PARK CITY SUMMIT COUNTY UTAH
CORPORATE
Seal
MARCH

By ______________________
Its City Recorder

By ______________________
Its Mayor

Exhibit "B"

EASEMENT AGREEMENT

THIS AGREEMENT is made and entered into this 12th day of August, 1982, by and between FMA - Park City Hylands #1, (hereinafter referred to as "Aerie") and Kearns-Tribune Corporation, being the owner of an undivided one-half (1/2) interest and Dorothy J. Lynch, being the owner of an undivided one-half interest, (hereinafter referred to as "Kearns Tribune").

RECITALS:

WHEREAS, Aerie owns certain real property in Summit County, Utah which is described as:

> All of Lot 61, the Aerie, Phase I, according to the official plat thereof recorded with the Summit County, Utah Recorder,

(hereinafter referred to as the "Aerie Property"), and;

WHEREAS, Kearns Tribune owns certain real property in Summit County, Utah which is described as:

> Hope Lot No. 687, Emily Lot no. 686 and Alvina Lot No. 688 patented mining claims located in Section 10 and Section 15, township 2 South, Range 4 East, Salt Lake Base and Meridian,

(hereinafter referred to as the "Kearns Tribune Property"), and

WHEREAS, the parties agree to grant mutual easements to each other over their respective properties.

NOW THEREFORE, in consideration of Ten Dollars ($10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Temporary Easement. The Parties hereby grant, bargain, and convey to each other, their successors, assigns, lessees, licensees and agents, a nonexclusive temporary easement and right of way on and under certain real property located in Summit County, State of Utah and more particularly described on Exhibit "A" attached hereto and incorporated herein by reference, to excavate, grade, level, fill, drain, build, construct, maintain, repair and rebuild a water tank, an access road and underground utilities together with such bridges, culverts, ramps, and cuts as may be necessary for the development of and access to and from The Aerie, Phase I, any future phases of the Aerie, the Kearns Tribune Property, or other Masonic Hill Property.

2. Moving the Temporary Easement. The Parties agree to move the easement to accomodate development of the Kearns Tribune Property or the sale of the Aerie Property to a mutually agreeable temporary or permanent location.

3. South East Access Easement. At such time as either party acquires the property presently owned by Majorie Jean Taber and Bonnie Mae Avirett McSparron and at the request of either party, the parties will execute the Permanent Easement Form (Exhibit "B") after adding the legal description described below to be furnished by Gordon Casey, or such other engineer designated by the party who has acquired said property. The description will describe a fifty (50) foot easement to connect the shaded road shown on Exhibit "C" attached hereto and incorporated herein by reference (hereinafter referred to as the "South East Access") with Eagle Way between Lot 61 and Lot 62 The Aerie, Phase I, through the property presently owned by Marjorie Jean Taber and Bonnie Mae Avirett McSparron. Such Easement may meet the South East Access at any angle. The South East Access shall be dedicated by Kearns Tribune in accordance with applicable governmental regulations. Kearns Tribune shall have the option to move the location of the South East Access so long as the South East Access still ultimately provides access south to the Deer Valley Highway.

4. Dedication to Park City. The Parties agree to dedicate all or part of the water system easements to Park City if required by Park City. Such dedication shall include those elements of the system required to be dedicated by Park City. Easements relating to the water system not required to be dedicated by Park City shall expire at such time as Park City accepts dedication of the water system. The dedication shall include a provision that access easements may be moved to another location to accomodate development of the Kearns Tribune Property or the sale of the Aerie Property provided access acceptable to Park City is maintained at all times.

5. Successors. Except as otherwise provided herein, this Agreement shall run with the land, be binding upon and inure to the benefit of the respective parties hereto, their legal representatives, successors and assigns.

6. Attorney's Fee. In the event any action is initiated by any person to enforce and/or defend the provisions of this Agreement or its enforceability, the prevailing party shall be entitled to recover their costs of suit, including a reasonable attorney's fee.

7. Additional Documents. The parties hereto agree to execute such additional documents as may be necessary or desirable to carry out the intent of this Agreement.

8. Governing Law. The terms of this Agreement shall be governed by and construed in accordance with Utah law.

9. Saving Clause. The invalidity or unenforceability of any provision hereof shall not affect nor impair any other provision hereof.

10. Paragraph Headings. Paragraph headings in this Agreement are for convenience only and shall not be deemed to modify, interpret or limit the provisions hereof.

11. Authorization. The individuals who have signed this Agreement represent and warrant that they are duly authorized to execute this Agreement, in either their individual or representative capacity as indicated, and that this Agreement is enforceable according to its

12. Remedies. It is further agreed that any breach or evasion of any of the terms of this Agreement by either party hereto will result in immediate and irreparable injury to the other party and will authorize recourse to injunction and/or specific performance as well

The various rights and remedies herein contained and reserved to each of the parties shall not be considered as exclusive of any other right or remedy of such party, but shall be construed as cumulative and shall be in addition to every other remedy now or hereafter existing at law, in equity or by statute. No delay or omission of the right to exercise any power or remedy by either party shall impair any such right, power or remedy or be construed as a waiver of any default or nonperformance or as acquiescence therein.

13. Limitation of Warranties. It is expressly understood and agreed between the parties hereto that there are no warranties, representations, covenants, or agreements between the parties hereto except as specifically set forth herein.

IN WITNESS WHEREOF the parties have hereunto set their hands on the day and year first written above.

KEARNS TRIBUNE

by [signature]
its Pres

Attest:

[signature]
Secretary

[signature]
Dorothy J. Lynch

FMA FINANCIAL CORPORATION d/b/a
FMA - PARK CITY HYLANDS, #1

by [signature]
its Senior Vice President

Attest:

[signature]
Secretary

July #3, 82
ks B16-18

EXHIBIT A

An easement upon part of Hope Lot No. 687, Emily Lot No. 686 and Alvina Lot No. 688 patented mining claims located in Section 10 and Section 15, Township 2 South, Range 4 East, Salt Lake Base and Meridian.

A strip of land 25 feet wide 12.5 feet on each side of the following described centerline:

Beginning on the Westerly boundary line of Hope patented mining claim at a point which is 583.453 feet North and 814.907 feet East from the Southwest corner of said Section 10; thence South 77°35' East 283.59 feet; thence 149.37 feet along the arc of a curve to the right having a central angle of 131°40'03" and a radius of 65.00 feet (chord bears South 11°44'59" East 118.61 feet); thence 812.68 feet along the arc of a curve to the left having a central angle of 62°05'03" and a radius of 750.00 feet (chord bears South 23°02'31" West 773.50 feet); thence North 82°00' East 40.00 feet; thence 59.93 feet along the arc of a curve to the left having a central angle of 52°49'46" and a radius of 65.00 feet (chord bears North 55°35'07" East 57.83 feet); thence 340.18 feet along the arc of a curve to the right having a central angle of 30°00' and a radius of 649.69 feet (chord bears North 44°10'14" East 336.31 feet); thence North 59°10'14" East 497.07 feet.

ALSO, such additional area as is required for a five (5) foot shoulder on each side of the access road to be built on the easement described above and for required cuts and fills to accomodate said access road.

ALSO, Beginning at a point which is 124.25 feet North and 1434.35 feet East from the Northwest corner of said Section 15; thence North 45°00' East 250.00 feet; thence South 45°00' East 200.00 feet; thence South 45°00' West 250.00 feet; thence North 45°00' West 200.00 feet to the point of beginning.

An easement upon part of Lot 61, the Aerie, Phase I, according to the official plat thereof more particularly described as follows:

The southerly twenty five (25) feet of said lot 61.

July #3, 82
ks A-19

EXHIBIT B

PERMANENT EASEMENT FORM

GRANT OF EASEMENT

Those persons and entities whose signatures appear under the heading "First Party" below, being the owner of certain real property located in Summit County, State of Utah and more particularly described as follows:

Taber Parcel:

Beginning at Lode Claim Corner No. 4 of the Garey No. 1 Claim, Uintah Mining District, Summit County, Utah , said point (corner) being situated 557.06 feet South and 565.39 feet East of the Southwest closing corner of Section 10, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and running thence South 82°14' West 207.84 feet; thence North 19°30' West 430.19 feet; thence North 12°36'38" East 357.02 feet; thence North 82°20'31" East 448.55 feet; thence South 12°25' West 804.42 feet to the point of beginning, containing 7.0 acres more or less.

McSparron Parcel:

Beginning at a point North 12°25' East 804.42 feet from Corner No. 4, of the Garey No. 1 claim, said corner being 557.06 feet South and 565.39 feet East of the Southwest closing corner of Section 10, Township 2 South, Range 4 East, Salt Lake Base and Meridian; running thence South 82°20'31" West 448.55 feet; thence North 12°36'38" East 341.00 feet; thence North 82°20'31" East 447.32 feet; thence South 12°25' West 340.58 feet to the point of beginning, containing 3.5 acres more or less.

and those persons and entities whose signatures appear under the heading "Second Party" below, being the owners of certain real property located in Summit County, State of Utah and more particularly described as follows:

Hope Lot No. 687, Emily Lot No. 686 and Alvina Lot No. 688 patented mining claims located in Section 10 and Section 15, Township 2 South, Range 4 East, Salt Lake Base and Meridian, Summit County, Utah.

for the sum of Ten and no/100 Dollars, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, hereby grant, bargain, and convey unto each other, their successors, assigns, lessees, licensees and agents, a nonexclusive perpetual easement for roads and underground utilities to be constructed, maintained, repaired, and used to provide access and utilities to and from the building and improvements to be located on The Aerie, Phase I, and any future phases of the Aerie, the Kearns Tribune Property, and any other adjoining property acquired by FMA - Park City Hylands #1 or Kearns Tribune Company, their successors and assigns.

The location of said easement is as set forth on Exhibit "1" attached hereto and incorporated herein by reference.

This Grant of Easement shall run with the land described above and shall be binding on and inure to the benefit of the parties hereto, their heirs, successors, or assigns. This easement shall include the reasonable right to enter upon the above described land for the purpose of excavating, grading, filling, draining, repairing, building, or rebuilding roads or underground utility lines and pipes, together with such lines and pipes as may be necessary beneath the ground embraced within the easement.

IN WITNESS WHEREOF, we have executed this document on the 17th day of __________, 19__.

FIRST PARTY:

____

SECOND PARTY:

____

July #3, 82
ks B21

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the 12th day of August, 1982, personally appeared before me J. W. Gallivan, who being by me duly sworn, did say that he is the President of Kearns-Tribune Corporation; that the foregoing instrument was signed in behalf of said Corporation by authority of a Resolution of its Board of Directors; and said J. W. Gallivan acknowledged to me that said Corporation executed the same.

Marie L. Briggs
Notary Public
Residing in Salt Lake County,
State of Utah

My Commission expires:
August 25, 1985

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On the 12th day of August, 1982, personally appeared before me Dan D. Firmage, who being by me duly sworn, did say that he is the Senior Vice President of FMA Financial Corporation; that the foregoing instrument was signed in behalf of said Corporation by authority of a Resolution of its Board of Directors; and said Dan D. Firmage acknowledged to me that said Corporation executed the same.

Brenda Mannuck
Notary Public
Residing in Salt Lake County,
State of Utah

My Commission expires:
Feb 25, 1986

STATE OF UTAH)
: ss.
COUNTY OF ~~SALT LAKE~~ Weber)

On the 17th day of August, 1982, personally appeared before me Dorothy Heresh the signer(s) of the foregoing instrument, who duly acknowledged to me that he(they) executed the same.

Dan D. F[illegible]
Notary Public
Residing in ~~Salt Lake~~ Weber County,
State of Utah

2/8/83
Commission expires

EXHIBIT "C"

The property to be included in the Improvement District is that property being acquired by, or now owned by the Bamberger Group, FMA Financial Corporation dba The Aerie, Elwood L. Nielson and Lynne Nielson, in the Masonic Hill area. An exact description will be provided by FMA as a part of the formation of the District.

EXHIBIT 1

Legal Description of Easement

APPEAL PACKET:

BAMBERGER CO. : APRIL MTN. FEE WAIVER

TAB 3: STAFF RESPONSE: TOM BAKALY 5/06/04 STAFF REPORT

City Council Staff Report

PARK CITY 1884

CITY MANAGER

Author: Tom Bakaly, City Manager TBB
Subject: APPEAL OF WATER FEE CREDIT APRIL MTN.- BAMBERGER CO.
Date: May 6, 2004
Type of Item: Appeal: Quasi-Judicial

Summary Recommendations: Uphold the staff determination of water fee waivers due in the amount of $169,260.70 under the 1982 Water Reservoir and Road Agreement. Proof of assignment or reservation of rights to the fee waiver should be a condition to making final payment.

Description:

A. Topic:

This is an appeal of a contract determination. The City Council is the final authority for all City contracts and therefore the Council hears this matter utilizing the de novo standard of review. The Council should conduct a hearing during which the Council may take new evidence, and then uphold the decision, modify the decision, make a different determination, or any combination thereof. The appeal is not a public hearing, but the Council may, at its discretion, allow public comment if it determines it relevant to the matters at issue. Otherwise, the hearing should be limited to argument and evidence from the applicant and staff.

B. Background:

As a result of litigation between various parties and the City regarding zoning, roads and other matters in the early 1980s, the City entered into the 1982 Water Reservoir and Road Agreement (the "Agreement"). See Exhibit A to Applicant's Notice of Appeal. The Agreement provided for the construction of the one million gallon ("1 MG") Aerie Water Tank ("Tank") and the formation of the Greater Masonic Hill Improvement District (the "District") to pay for the costs of constructing the Tank. The area covered by the District included the Bamberger Co., FMA Financial Corp. dba the Aerie, and Nielson properties. It is important to note that only half of the tank capacity (.5 MG) was necessary for the District property. The City brought the increased capacity up to 1 MG by agreeing to be solely responsible for the increased cost. So .5 MG of the Tank was always to be used by the City however the City deemed it appropriate.

Paragraph 7 of the Agreements reads:

> 7. Waiver of Fees. Park City hereby waives the water connection fee, (which is presently $600), for all property owners within the Improvement District and Other Developers who use the Improvement District's capacity in the Water Reservoir. In addition to the $600 fee, Park City ordinances require the property owner to pay the actual costs of physical connection, including meters, meter boxes, plumbing, and excavation. These actual costs of connection are not waived. The Water Development Fee, is not waived except for the Aerie, Phase II, where the Water Development is waived, and as set forth in the Nielsen Settlement Agreement.

Staff met with Bamberger Co. representatives on and off over the last few years attempting to reach a solution as to how to apply the Agreement to the April Mountain property. The issue was forced to a head when permits were pulled for the property in late 2002. The City has elected to set aside in a holding account an amount of the impact fees which have been collected from the current owner to potentially be used as a refund due to any waiver of fees determined to be owed. These funds are not in escrow for the Applicant.

C. Analysis:

Staff's position is quite simply that the Applicant should receive the fee waiver as it is expressly and clearly provided for in the Agreement. No more, no less. The Agreement gives **property owners** in the District a waiver of water connection fees. The Agreement neither guarantees a minimum number of credits due to the owner, nor creates Fee Credit Certificates. The City has utilized Fee Credit Certificates with other properties in other parts of the City when a specific number of credits were contracted for. This was not the case in this instance. The owner applied for and received approval of 70 units. Therefore, the owner is entitled to fee waivers for 70 units. Staff used the most recent water study to determine the current value attributed to the "connection fee" since the City no longer utilizes a separate category for that fee; it is now combined with the development fee in the formulation of the overall water impact fee. See Exhibit C of the Notice of Appeal. There is no language in the Agreement requiring actual connections to match the estimated possible connections. There is no provision for a subsequent assessment adjustment based upon actual build out. Neither state law nor the Agreement requires such an adjustment. Paragraph 25 of the Agreement clearly states: "Limitation of Warranties. It is expressly understood and agreed between the parties hereto that there are no warranties, representations, covenants, or agreements between the parties hereto except as specifically set forth herein."

Also, note that Staff's position is one of equity, not entitlement. Neither the terms of the Agreement nor Ordinance 84-2 were fully complied with, so technically Staff asserts that neither is binding. However, in recognition of the Applicant's substantial performance, staff urges the Council to give the Applicant the benefit of the water fee waiver as originally contemplated. But, as shown below, a very valid argument may be made that the City has already exceeded any need to provide an equitable remedy to this individual property owner by bailing out this project when most property owners failed to make their required payments. As a result of the property owner's failure to make payments, the City owns the entire tank, not the District.

Staff offers the following responses to points raised in the Applicant's Notice of Appeal:

1. **The alleged right to a fee waiver arises from the Agreement, not the Ordinance.** There is no reference to the fee waiver in the Ordinance. The Applicant mistakenly asserts that it "holds rights to the waiver of certain water connection fees provided Park City Ordinance 84-2." In fact, the Ordinance makes no reference to the Agreement whatsoever, never mind the fee waiver.

2. **The assessment was legal, but regardless, any right to challenge the assessment has long since passed.** It is critical to understand that the original assessment on all the similarly situated properties was based upon the "**estimated**" number of possible connections. (Emphasis added) Those estimates were provided by the property owners as they requested the resulting zoning as part of the litigation settlement. Property owners then had two avenues to challenge the assessment- 1) go thru the Board of Equalization process; or 2) challenge the Ordinance/District formation. Neither was timely done by the Applicant. The Applicant now lacks standing and the Council lacks jurisdiction to hear a challenge to the assessment. Similarly, even if the Applicant could have raised the fee issue by challenging the Sensitive Lands Zoning Overlay in 1993 (the area was not rezoned, the property has the same base density and zoning it had in the early 1980s), or the final density approval for the April Mountain project in 2001, no such appeals were filed. All impact fees on the property were timely paid by the new owner without reservation, and were not appealed under the impact fee ordinance. Accordingly, none of the issues raised by the Applicant as they relate to the Assessments or density are properly before the Council.

3. **The property is not bearing more than its proportionate share and the City is not unjustly enriched by the Tank.** Even if the Council somehow agreed with the Applicant on the reduction of density issue, the real facts must lead the Council to conclude that the Applicant is still receiving its proportionate benefit. While the ultimate density being built on the property is less than originally estimated, actual water usage and demand is higher than calculated. The result is the property is estimated to receive a very similar if not greater (if you include the much higher fire storage requirements) capacity from the Tank than originally estimated when the District was formed. At the time the Tank was sized, the City was using sub-standard 900 gallons per residential unit for calculating culinary use. Even if you calculate the Applicant's share at the maximum 190 units, its expected usage would likely have been approximately 171,000 gallons, not including fire storage. Current

water studies put actual use in the Aerie area at approximately 2327 gallons per residential unit, which if you multiply by the actual April Mountain density of 70 units, you get approximately 163,000 gallons. Furthermore, fire capacity requirements dramatically increased and in fact 630,000 gallons of the Tank is currently dedicated to fire capacity for the area. This fire protection capacity does extend to other areas in Deer Valley but it has not been sold or provided to such developments as alleged by the Applicant.

The City is not even getting the .5 MG surplus initially contracted for, in spite of paying more construction costs than agreed. The 1994 Water Supply and Demand Study allocated only 40,000 gallons of this Tank capacity to "surplus" uses at projected build-out in the District area. This "surplus" is used to augment peak demand service in the lower-Deer Valley area, but the City although entitled to allocate its .5 MG capacity, has not sold a single gallon to "Other Developers" as alleged by the Applicant. Even if the "surplus" could be increased to 100,000 gallons, current plans still call for the City to reserve such "surplus" for emergencies. See the attached Memo from Jerry Gibbs (Attachment 1). There is no equitable principle compelling Park City to provide the Applicant with additional fee credits.

4. **<u>The fee waivers are limited to property owners within the District.</u>** The only users possibly contemplated to be outside the District were "Other Developers," defined by the Agreement as those the City contracted with to use the City's .5 MG capacity. That capacity was never deemed surplus to the area, and the City never contracted with Other Developers. The plain language of the Agreement otherwise limits the waiver to property owners within the District. The City has and continues to secure other water capacity and delivery systems to serve the Deer Valley area. While new PRV stations and connections do allow the City to move water from this Tank to other areas, the City does not do so due to demand and fire storage needs of this area, including the District.

5. **<u>These same arguments were raised and rejected during the Nielsen bankruptcy proceedings.</u>** Former City Attorney J. Craig Smith will attend the Council meeting to describe these proceedings and be available for cross-examination by the Applicant. The Nielsen properties were also ultimately approved for substantially less density than they were assessed for, and thus created precedent for how the City applied the terms of the Agreement. The court trustee in that matter accepted the application of fee waiver to only the units approved.

6. **<u>No harm or economic loss shown.</u>** The Applicant admits that even with nearly 190 of approved density and corresponding fee waivers, the project did not pencil in the 1980s. Yet, the current owner has proceeded with the project paying full fees. The Applicant has failed to submit a single piece of

evidence demonstrated that it did not receive the benefit of the bargain, or economic expectation equal to those contemplated at the time of the Agreement. The Applicant is simply trying to cash in on an ill-conceived "bank" of water credits that were never negotiated and simply do not exist.

7. **The City is under no legal obligation under the Agreement due to material breach.** As stated above, the City had to step in and save this project due to financial problems and bankruptcies of property owners. Therefore, the Building Department argued strongly that no credit or fee waiver is due because the Agreement and District were void at the time of complete application. Had the Applicant built his MPD project as approved, it would have received the benefit of $110,400 in waived fees. However, the Applicant never applied for any building permits and that approval expired in five years per the Land Management Code. In the meantime, the City closed on the Tank, the terms of the Agreement were materially breached, and payments per the District were never fully made. As a result, the Agreement was void and the District no longer existing at the time of complete application. Therefore, no payment obligation is enforceable against the City. If the Applicant had any property rights or entitlements in the Tank, those needed to be asserted at the time it discovered the City closed on the Tank. Although, this is a strong and compelling argument, it was rejected in favor of the more equitable reasoning outlined above which acknowledges that the Applicant has in fact paid approximately $205,120.24 towards its original District assessments for the Tank. While the staff recommendation is to recognize that contribution, the Council certainly has the authority to still consider the merits of this argument for not giving any fee waiver at all.

D. Department Review:
Building; Public Works; Engineering; Legal; Finance

Alternatives:

A. Deny the Appeal:
Uphold staff's determination of the fee waiver for 70 units. Direct staff to prepare specific finding for adoption on the May 13th meeting. **This is the recommended action.**

B. Grant the Appeal: Direct staff to prepare specific findings supporting the Council's decision. This action may include a partial grant and modification of the determination (Changing the amount to something different than put forth by either staff or the Applicant).

C. Deny the Appeal and Overturn the City Manager Decision: Determine that no fee waiver or credit is due, and direct staff to prepare appropriate findings.

D. Remand the matter to the City Manager: Direct the City Manager to reconsider specific elements of this matter.

E. **Continue the Item:** It may be appropriate to take time to consider the testimony presented and request additional clarifying information that may be necessary.

Significant Impacts:
Staff and the Applicant are almost $200,000 apart. The determination of this matter is also a matter of equal treatment with the other District property owners, some of which have paid their initial assessments as well, but have not receive the credits as claimed by the Applicant.

Consequences of not taking the recommended action:
The water and/or risk management fund will have to make up any difference in the fee credit calculation. There are ample reserves to cover this contingency.

Recommendation:
Uphold the staff determination of water connection fee waivers due in the amount of $169,260.70 under the 1982 Water Reservoir and Road Agreement. Proof of assignment or reservation of rights to the fee credit should be a condition to making final payment.

ATTACHMENT A

MEMORANDUM

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: JERRY GIBBS, PUBLIC WORKS DIRECTOR

DATE: 4/30/04

RE: AERIE WATER TANK

This memo serves to confirm that in the early 1980s the City received a waiver from the state to use 900 gallons capacity demand for culinary use for residential units. Actual demand in the Aerie has been estimated at approximately 2327 gallons per unit. The 1994 Water Supply vs Demand Study showed the Aerie Tank with 630,000 gallons of fire storage, and an active storage volume of 370,000 gallons. The Study further calculated surplus of the Tank at 40,000 gallons unless irrigation conservation measures were strictly utilized. The only outside project served with culinary water by the tank is most of the Pinnacle Condos, whose full original capacity is still in the Snow Park Tank, but due to more optimal pressure, peak demand and other water storage issues, was moved to the Aerie Tank in the mid-80s. See attached Study sheets 4-2 and Figure 4.3.

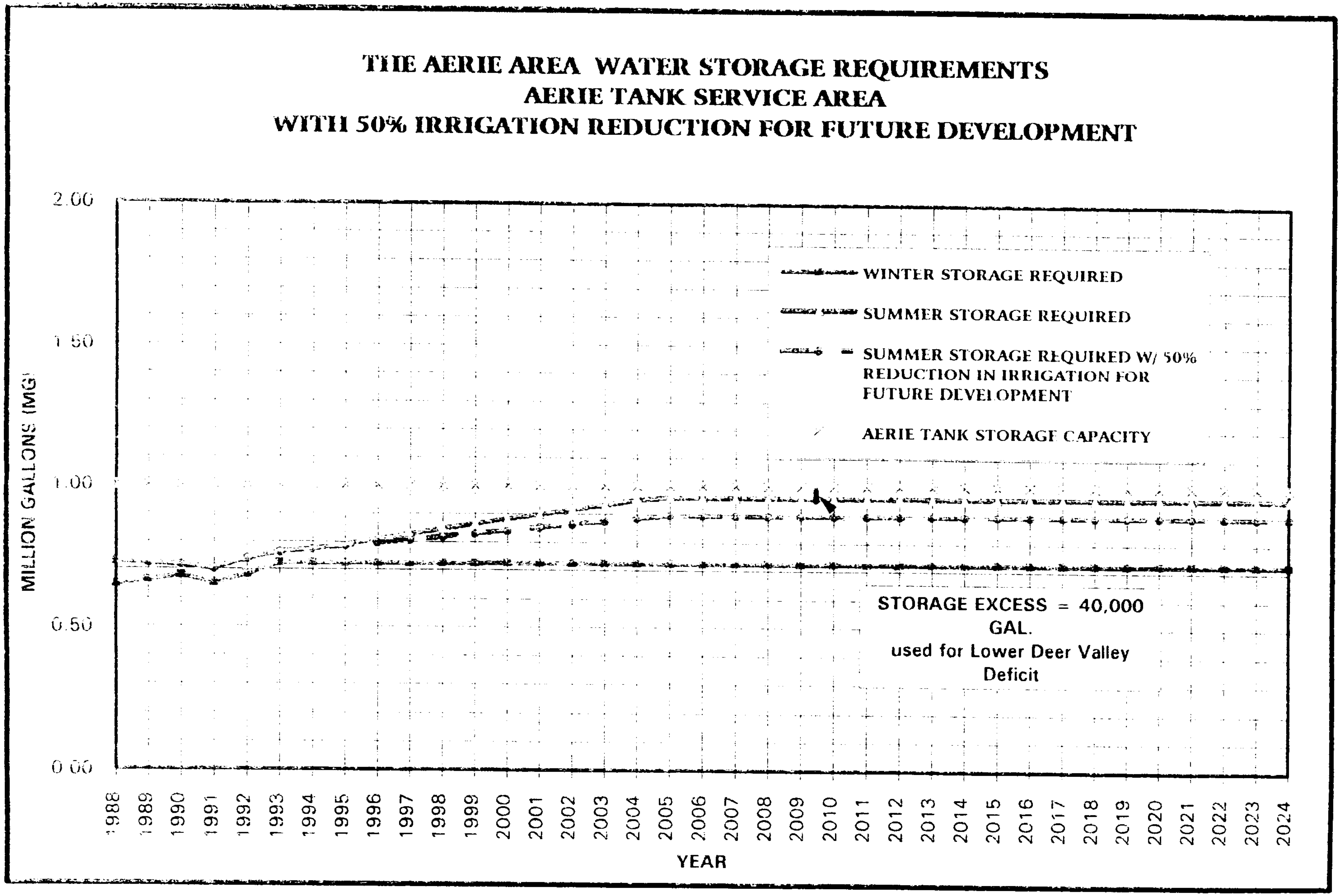
K:\MH\LITIGATI\APRIL.JERRY GIBBS.MEMO.DOC

4.2 LOWER DEER VALLEY/SOLAMERE AREA WATER STORAGE REQUIREMENTS

This area currently receives its primary storage from the Snow Park Tank. This area is also supplemented by fire flow from the Aerie Tank when necessary through release of water from the higher tank through a PRV. However, it appears that at least half the fire storage required for the area, or 315,000 gallons, must be dedicated in the Snow Park Tank. Therefore, the other 315,000 gallons can come from the Aerie and Solamere tanks, with the addition of a Solamere PRV, which can be added to the 800,000-gallon Neck tank, to provide a total available storage capacity for the zone of 1,115,000 gallons (the green line in Figure 4.2). Figure 4.2 shows that this capacity was exceeded by 1992 demands. However, the zone does have the ability to draw on nearly 300,000 gallons of excess capacity in the Aerie Tank. This can be supported by excess capacity in the Aerie booster pump, raising the active storage to nearly 1.4 million gallons (the purple line in Figure 4.2). This can also be supplemented by excess capacity in the Solamere Tank or an additional 400,000 gallons. But as growth in both the Aerie and Oaks areas takes place, the storage available from these upper tanks diminishes, as shown in Figure 4.2, such that by 1997, there will again be inadequate storage in the zone. Therefore, we are recommending that a new Solamere Tank of at least 800,000 gallons be constructed in the North Solamere area at the same elevation as the existing Snow Park Tank. This will require acquisition of a tank site above and east of the platted Solamere lots. This will provide a net excess of 5,000 gallons of storage at buildout for the Lower Deer Valley and Solamere areas. Note that this excess will be approximately 20,000 gallons if 50% irrigation reduction can be realized for future development.

4.3 THE AERIE SERVICE AREA WATER STORAGE REQUIREMENTS

The Aerie Area is serviced by the 1-MG Aerie water storage tank. This tank has a dedicated 630,000 gallons of fire storage, and an active storage volume of 370,000 gallons. Figure 4.3 shows that this Tank is adequate for the Service Area and will actually have an excess of 40,000 gallons storage at buildout of the Aerie Area. If irrigation reductions can be realized, this excess increases to almost 100,000 gallons which may best be used for water storage emergencies in the future.



THE AERIE AREA WATER STORAGE REQUIREMENTS
AERIE TANK SERVICE AREA
WITH 50% IRRIGATION REDUCTION FOR FUTURE DEVELOPMENT
MILLION GALLONS (MG)
0.00
0.50
1.00
1.50
2.00
WINTER STORAGE REQUIRED
SUMMER STORAGE REQUIRED
SUMMER STORAGE REQUIRED W/ 50% REDUCTION IN IRRIGATION FOR FUTURE DEVELOPMENT
AERIE TANK STORAGE CAPACITY
STORAGE EXCESS = 40,000 GAL.
used for Lower Deer Valley Deficit
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RESPONSE MEMORANDUM

The Bamberger Company

The Applicant provides the following responses to certain points raised in the City Council Staff Report by Tom Bakaly dated May 6, 2004 (hereinafter "The Response"). The Applicant reserves the right to further address these points and raise further arguments at the time of the City Council hearing.

1. **Validity of the 1982 Water Reservoir and Road Agreement**

There is no legal or factual basis for the position that no credit or fee waiver is available to the Applicant because the Agreement and District were void due to a material breach on the part of other property owners within the Improvement District. Referring to the Building Department's argument, the Response states that "If the Applicant had any property rights or entitlements in the Tank, those needed to be asserted at the time it discovered the City closed on the Tank." There is no evidence that the City followed the required procedure set forth under the Ordinance to foreclose on the interest of the Applicant in the Reservoir. Nor is there evidence that the Applicant breached the Agreement. Additionally, the City's own actions are inconsistent with its claim that the City had invalidated the Agreement as between the parties. There is no evidence to support the claim that the City viewed the Agreement between the Applicant and the City to be void during the assessment term. Rather, it appears that this argument was developed in recent years in an attempt by the City to invalidate the Applicant's interest, while at the same time retain the benefit provided to the City.

The procedure to be taken by the City to foreclose on a property owner's interest as a result of default in the payment is set forth in Section 5 of the Ordinance, which states:

> Upon any such default [of an assessment payment], the City shall give notice, in writing, of the default to the owner of the property in default, as shown by the last available equalized assessment rolls. The notice shall provide for a period of thirty (30) days in which the owner shall pay the installments then due and owing, after which the City may accelerate the principal of the assessment, and immediately commence foreclosure proceedings under the procedure established by statute for the foreclosure of the mortgages. . .

The Ordinance establishes a formal method of foreclosing on the interests of a property owner within the District. No such procedure was ever undertaken by the City with regards to the interests of the Applicant in the Reservoir. The Applicant never received any form of notice from the City of a foreclosure action against the Applicant's interests. Nor would the City have undertaken such action, as the Applicant was never in default on its assessment payments. According to the Applicant's records, in 1993, the Applicant fulfilled its financial obligation to the City, paying off the assessment in full. The City accepted the final assessment payment, and at no time before or after the final assessment, did the City provide a notice of deficiency to the Applicant. It is clear that in 1993, the City considered the Applicant's financial obligation to have been fulfilled and the Applicant's interest in the reservoir to be valid.

The manner in which Park City operated with regard to the Applicant's obligation provides further evidence that the City did not consider the Agreement void as to the interests and obligations of the Applicant. If indeed, Park City took the position in the mid 1980s that the Agreement had been breached as to all parties including the Applicant and the legal obligations between the parties dissolved, then the Applicant questions why the City continued to accept the subsequent assessments paid by the Applicant. If the City had in fact taken the position that the Agreement was void, then it should have refused the Applicant's further assessment payments. This did not occur. At no time was the Applicant notified that the Agreement was void, and throughout the assessment term, the Applicant continued to pay its assessment under the presumption that the Agreement was still valid as between the Applicant and the City. For the City's part, at no time were their actions consistent with the position that the Agreement was void as between the parties. The Applicant had no notice or reason to believe the Agreement was void, nor did the City's actions give to the Applicant any reason to believe otherwise.

The Applicant also adds that the Agreement is not the only legally binding document that provides for the waiver of the water connection fees to the Applicant. In addition to the Agreement, Park City confirmed and provided for the waiver of the water connection fees under paragraph 8(b) of the Road Development and Easement Agreement between Bamberger Company and Park City (attached as Exhibit E of Applicant Notice of Appeal). There appears to be little question that this agreement is still valid, and provides the Applicant a basis for the waiver of the connection fees independent of the Agreement.

The Agreement between the Applicant and the City remains in force, and there is no support in fact or law for the position that no credit or fee waiver is due to the Applicant. If the Building Department's argument were accepted, it would essentially allow the City to foreclose on the Applicant's interest without compliance with the established procedure, or even notice, based on the failure of other parties to the Agreement. The City Council would be allowing the City to extinguish the Applicant's interests under the Agreement, while at the same time allowing the City to retain the benefit provided to it by the Applicant. There is no support for such a position in the Agreement. Further, the Ordinance establishes a formal proceeding that the City was required to take in order to foreclose on a property owner's interest. No such action was taken against the Applicant. The position that no credit or fee is available to the Applicant is not supported by the facts or the law, and therefore should be rejected.

2. Transfer of the Waiver to Other Properties Served by the Park City Water System

To resolve this matter, the Applicant requests that it be credited $350,000. However, in the alternative, the Applicant has proposed that in addition to the $169,260.70 credit offered by City Manager, Tom Bakaly, the Applicant be allowed to apply the additional water connection fee waivers to other properties within the Park City water system.

The City has again rejected this alternative and alleges in paragraph 4 of the Response that the fee waivers are limited to the property owners within the Improvement District with exception of those "Other Developers" who contracted with the City. The Response states "[t]he only users possibly contemplated to be outside the District were 'Other Developers,' defined by

the Agreement as those the City contracted with to use the City's .5 MG capacity." Contrary to this allegation, paragraph 5 of the Agreement clearly states:

> The amount of Excess Water Reservoir Capacity [owned by the Improvement District] is 500,000 gallons less the capacity required to serve the connections for all approved units located on the property within the Improvement District, whether connected or not. The Improvement District may sell the Excess Water Reservoir Capacity *to others developing property within Park City* which may fulfill their obligation to construct water storage capacity for their projects by making use of the Water Reservoir (the purchasers of Excess Capacity are hereinafter referred to as *"Other Developers"*).

In conjunction with this provision, paragraph 7 of the Agreement states "Park City hereby waives the water connection fee (which is presently $600), for all property owners within the Improvement District and *Other Developers* who use the *Improvement District's Excess Capacity* in the Water Reservoir." As defined by the Agreement, "Other Developers" includes those developers outside of the District that contracted for the water allocated to the Improvement District. It is evident from these provisions that the connection fee waiver extends to "Other Developers" outside of the Improvement District, regardless of whether these "Other Developers" contracted for water from the Improvement District allocation or City's allocation.

The Response's position on this point in not supported by the terms of the Agreement. Accordingly, the Applicant once again offers this option to the City Council as a viable resolution to this matter.

3. Precedential Value of Nielsen Bankruptcy Proceedings

The Response suggests that the Nielsen bankruptcy proceedings provide a valid precedent for the City Council to follow in this matter. The Response states "The Nielsen properties were also ultimately approved for substantially less density than they were *assessed for . . .*" The crucial point to consider, and which the Response fails to take into account, is not what the properties were assessed for, but whether the property owner fulfilled its legal obligation to pay the assessment in full. On information and belief, the full assessment on the Nielsen properties was never paid by the property owner. If this is indeed the case, then the Nielsen bankruptcy proceedings are easily distinguishable, and fail to provide a precedent for the City Council to follow.

If the City intends to put forth the Nielsen Bankruptcy as a precedent for this proceeding, the Applicant requests that the City provide information on the percentage of the assessment paid by the property owner of the Nielsen properties, not just the amount of the initial assessment.

4. Applicant's Economic Loss

Paragraph 6 of the Response suggests that the Applicant has not provided any evidence of economic harm or loss. As stated in the Notice of Appeal, the Applicant paid approximately

$344,000 in principal and interest towards the construction of the reservoir. In return for the Applicant's contribution, the City agreed to provide certain water connection waivers. To date, the City has failed to provide a single water connection waiver, or adequately credit the Applicant for its contribution. These facts appear to be undisputed. There is no question that the Applicant has not received the "economic expectation" it contemplated when it entered into the Agreement. The undisputed facts and the City's own records should provide adequate evidence that the Applicant has not received the "benefit of the bargain."

5. Significant Impacts

The Response asserts that "[t]he determination on this matter is also a matter of equal treatment with the other District property owners, some of which have paid their *initial assessments* as well, but have not received the credits as claimed by the Applicant." Once again, the Response misses the point. The Applicant does not seek the credits for the water connection fee waivers based on the *initial assessment* paid to the City, but rather on the payment of the entire assessment. The Applicant is unaware of any other property owner within the District that fulfilled its entire financial obligation. Therefore, awarding the Applicant the requested credit would not result in unequal treatment of this property owner and would not have the significant impact alleged in the Response.

Summary

As stated in the Notice of Appeal, Applicant feels that the $350,000 requested is a fair and reasonable compromise. In the alternative, the Applicant proposes that it be credited the $169,720.70 offered by City Manager Tom Bakaly, and in addition be allowed to apply the additional connection credits to other properties within Park City.

Based on the foregoing, the Applicant respectfully requests that the City Council objectively, and in good faith, evaluate the Applicant's request, and grant the requested reimbursement.

DATED this 4rd day of May, 2004.

STOEL RIVES LLP

Richard R. Hall
D. Matthew Moscon
201 S. Main Street, Suite 1100
Salt Lake City, Utah 84111

Attorneys for the Bamberger Company

NIELSEN & SENIOR

Attorneys & Counselors
Since 1882

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June 29, 1994

Larry Criddle, CPA
Accounting Manager
Park City Municipal Corporation
P. O. Box 1480
Park City, Utah 84060

Re: Hearthstone Subdivision

Dear Larry:

Enclosed please find the documentation that you requested regarding the reduction of the Greater Masonic Hill Special Improvement District Lien on properties in the Elwood Nielsen Bankruptcy. This was accomplished through Stipulation and Order of the Bankruptcy Court.

As I mentioned on the telephone, in addition to the payment of $70,000.00 which I understand you have received, the Trustee of the Bankruptcy Estate transferred two parcels of property to the City. One parcel is 16 acres, the other 10 acres. Anita has those deeds if they would be helpful to you.

If you have any further questions, please do not hesitate to contact me.

Yours truly,

J. Craig Smith

cc: Jodi Hoffman, Esq., w/o Encl.

Kevin R. Anderson (4786)
KRUSE LANDA & MAYCOCK L.L.C.
50 West Broadway, Suite 800
Salt Lake City, Utah 84101
Telephone: (801) 531-7090
Attorneys for Trustee

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

--ooOoo--

In re	:	Bankruptcy No. 86A-00700
	:	Chapter 7
ELWOOD LESLIE NIELSEN and	:	
LYNN NIELSEN,	:	
	:	
Debtors.	:	

--ooOoo--

ORDER AUTHORIZING RECORDING OF HEARTHSTONE SUBDIVISION PLAT AND CONVEYANCE OF PROPERTY TO PARK CITY

The trustee's motion for authority to record the plat of the Hearthstone Subdivision came on for a hearing before this Court on Monday, May 2, 1994, at 3:00 p.m. The hearing was pursuant to a prior order of the Court shortening time and limiting notice. Kevin R. Anderson appeared for the trustee with other appearances being noted on the record. Based on the representations of counsel, the specific findings of the court being made on the record, and for other good cause appearing, it is hereby

ORDERED that the trustee may immediately record with the Summit County Recorder's Office the plat for the Hearthstone Subdivision in Park City, Utah, as more specifically described in Exhibit A attached hereto and incorporated herein by this reference.

IT IS FURTHER ORDERED, pursuant to the court-approved settlement with Park City Municipal Corporation, that the trustee may convey by quitclaim deed to Park City Municipal Corporation the real property identified on the plat map attached hereto as Exhibit B and incorporated herein by this reference.

DATED this 2 day of May, 1994.

BY THE COURT:

/S/
JOHN H. ALLEN
United States Bankruptcy Judge

THIS ORDER/JUDGMENT
WAS MAILED
ON:
MAY 3 1994
DEPUTY CLERK
U.S. BANKRUPTCY COURT

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing Order Authorizing Recording Of Hearthstone Subdivision Plat was mailed, postage fully prepaid, this ____ day of May, 1994, to the following:

Assistant United States Trustee
9 Exchange Place, Suite 100
Salt Lake City, Utah 84111

Kevin R. Anderson, Esq.
Kruse, Landa & Maycock
50 West Broadway, Suite 800
Salt Lake City, Utah 84101

Elwood & Lynn Nielsen
P.O. Box 1944
Sandy, Utah 84091

Diane Banks, Esq.
Fabian & Clendenen
Attorneys for RTC
215 South State Street, Suite 1200
Salt Lake City, Utah 84111

Stephen J. Covington
William C. Beck
P.O. Box 16132
Salt Lake City, Utah 84116

Duane Gillman, Esq.
McDowell & Gillman
Attorneys for Covington and Beck
50 West Broadway, Suite 1300
Salt Lake City, Utah 84101

Summit County Treasurer
Summit County Courthouse
Coalville, Utah 84107

Jerry Edgmon, Esq.
Attorney for Breckenridge
3835 E. 7th Street
Long Beach, Calif. 90804

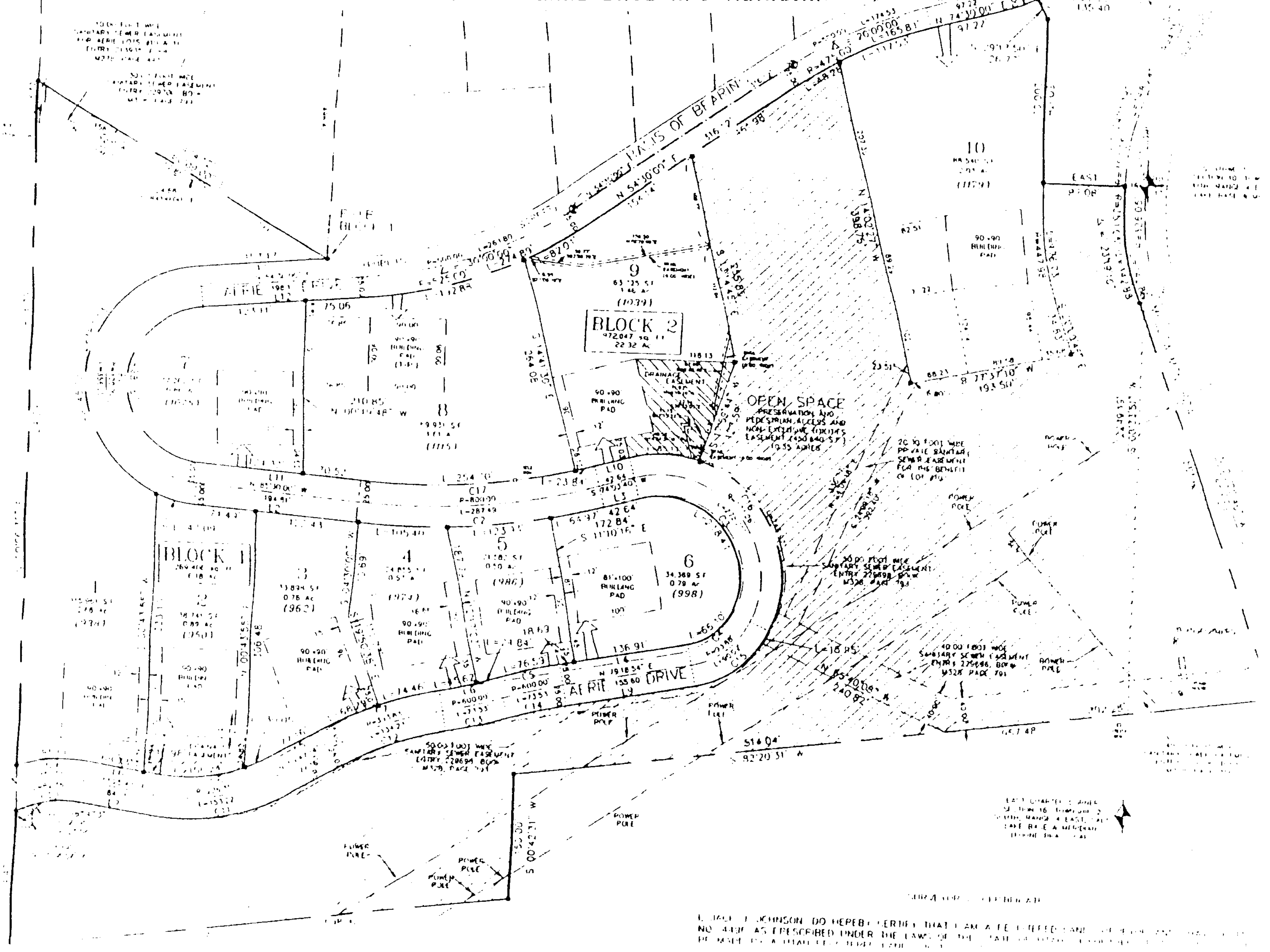
Clay Stringham
G.P. Castlecreek Ltd.
6925 Union Park Center, Suite 260
Salt Lake City, Utah 84047

Masonic Hill Special Improvement Dist.
Park City Attorney
P.O. Box 1480
Park City, Utah 84060

Craig Smith, Esq.
Attorney for Park City
Nielsen & Senior
60 E. South Temple #1100
Salt Lake City, Utah 84111

HEARTHSTONE SUBDIVISION

LOCATED WITHIN SECTIONS 10,16 & 17, TOWNSHIP 2 SOUTH,
RANGE 4 EAST, SALT LAKE BASE AND MERIDIAN



EXHIBIT

A

ALL-STATE LEGAL SUPPLY CO.

A parcel of land lying within Section 16, Township 2 South, Range 4 East, Salt Lake Base & Meridian, Summit County, Utah, more particularly described as follows

Commence at the Northeast Corner of said Section 16, (Basis of Bearing being North 00°35'42" West from the Southwest Corner of Section 10, Township 2 South, Range 4 East, Salt Lake Base & Meridian to the Northeast Corner of said Section 16); thence West, a distance of 970.09 feet, thence South, a distance of 496.42 feet to the Northerly right-of-way line of Aerie Drive and the POINT OF BEGINNING, thence continuing along said right-of-way South 84°30'00" West, a distance of 153.17 feet to the beginning of a curve, concave Easterly, having a radius of 145.00 feet and a central angle of 170°00'00", thence Westerly along the arc of said curve to the left, a distance of 430.22 feet, to the curve's end; thence South 85°30'00" East, a distance of 196.92 feet; to the beginning of a curve concave Northerly, having a radius of 825.00 feet and a central angle of 20°26'20", thence Easterly along the arc of said curve to the left, a distance of 294.30 feet, to the curve's end, thence North 74°03'40" East, a distance of 42.64 feet, to the beginning of a curve, concave Southwesterly, having a radius of 96.06 feet and a central angle of 130°16'12", thence Easterly along the arc of said curve to the right, a distance of 218.41 feet, to a point of compound curvature with a curve, concave Northwesterly, having a radius of 68.88 feet and a central angle of 54°59'02", thence Southwesterly along the arc of said curve to the right, a distance of 66.10 feet to the curve's end, thence South 79°18'54" West, a distance of 155.60 feet to the beginning of a curve, concave Southerly, having a radius of 625.00 feet and a central angle of 07°01'18", thence Westerly along the arc of said curve to the left, a distance of 76.59 feet, to a point of reverse curvature with a curve, concave Northerly, having a radius of 575.00 feet and a central angle of 07°01'18", thence Westerly along the arc of said curve to the right, a distance of 70.47 feet,, to a point of reverse curvature with a curve, concave Southerly, having a radius of 418.83 feet and a central angle of 19°31'40", thence Westerly along the arc of said curve to the left, a distance of 142.75 feet, to the curve's end, thence South 59°47'14" West, a distance of 77.16 feet, to the beginning of a curve, concave Northerly, having a radius of 201.35 feet and a central angle of 38°47'03", thence Southwesterly along the arc of said curve to the right, a distance of 136.29 feet, to the curve's end, thence North 81°25'43" West, a distance of 84.71 feet, to the beginning of a curve, concave Southerly, having a radius of 175.00 feet and a central angle of 28°01'38", thence Westerly along the arc of said curve to the left, a distance of 85.60 feet, to the point of intersection with a non tangent line, thence North 00°06'30" East, a distance of 824.39 feet, thence South 60°09'00" East, a distance of 404.12 feet to the POINT OF BEGINNING. Containing 6.18 acres of land, more or less

MAXIMUM HOUSE SIZES

LOT #	MAX. HOUSE SIZE
1	5000 SQ. FT.
2	5000 SQ. FT.
3	4000 SQ. FT.
4	3500 SQ FT
5	3500 SQ. FT.
6	4000 SQ. FT.
7	6000 SQ. FT.
8	6500 SQ. FT.
9	[illegible]000 SQ. FT.

FRONT YARD SETBACK

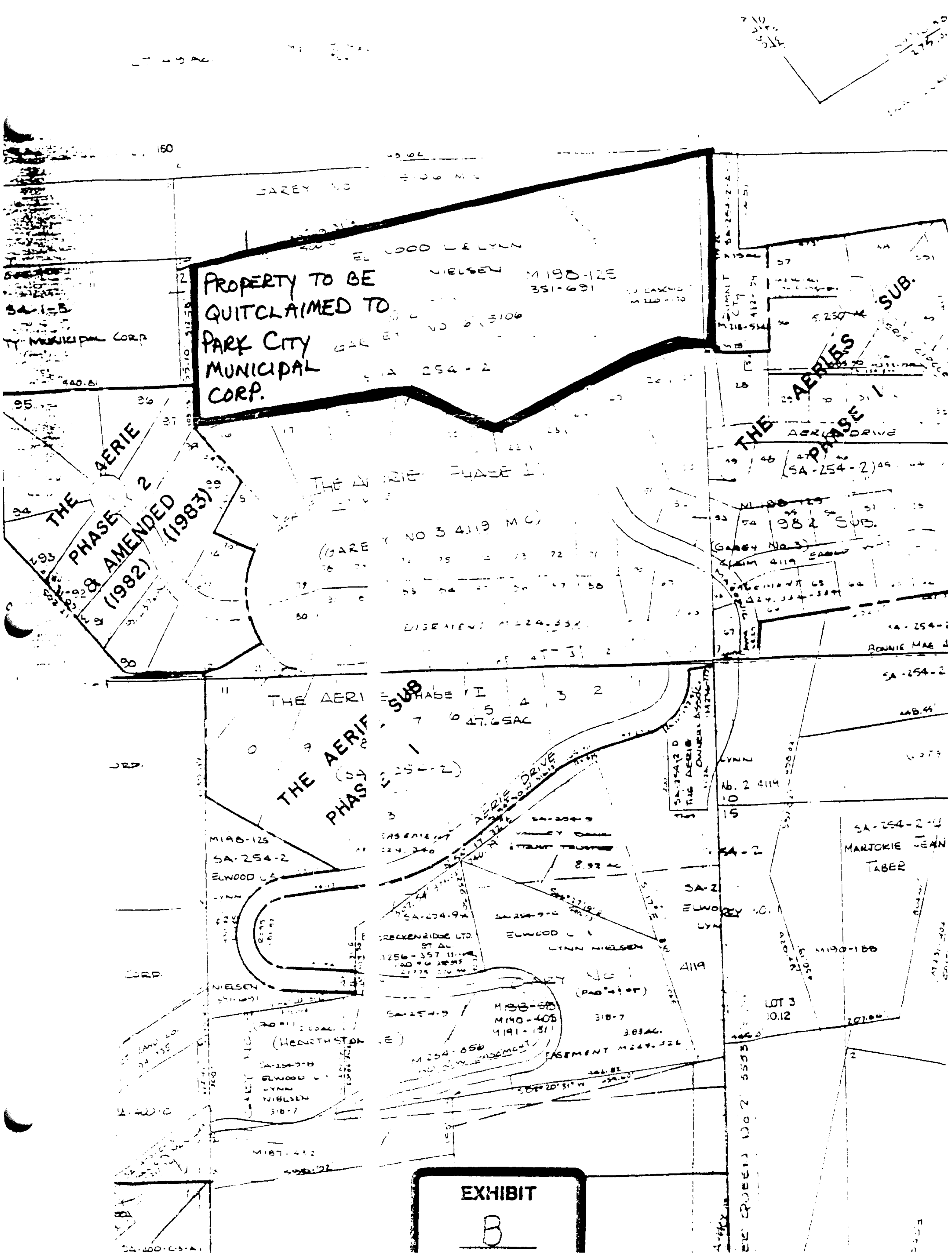
LOT #	SETBACK
1	25 FEET
2	50 FEET
3	25 FEET
4	35 FEET
5	25 FEET
6	45 FEET
7	25 FEET
8	25 FEET
9	25 FEET

A parcel of land lying within Sections 16 and 17, Township 2 South, Range 4 East, Salt Lake Base & Meridian, Summit County, Utah, more particularly described as follows

Commence at the Northeast Corner of said Section 16, (Basis of Bearing being North 00°35'42" West from the Southwest Corner of Section 10, Township 2 South, Range 4 East, Salt Lake Base & Meridian to the Northeast Corner of said Section 16), thence South 00°35'42" East along the Section line, a distance of 152.87 feet; thence West, a distance of 135.40 feet, to the POINT OF BEGINNING; thence South 29°17'50" East, a distance of 26.77 feet, thence South, a distance of 200.00 feet, thence East, a distance of 97.06 feet; to a point of intersection with a non-tangent curve, concave Easterly, having a radius of 351.05 feet and a central angle of 23°19'10", said point also being on the Westerly right-of-way line of Mellow Mountain Road, thence along said right-of-way the following two (2) calls.

(1) Southerly along the arc of said curve to the left, from which the radial point bears South 86°41'38" East, a distance of 142.88 feet, said arc subtended by a chord which bears South 08°21'13" East a distance of 141.89 feet thence (2) South 20°00'46" East a distance of 501.80 feet; thence South 82°20'31" West a distance of 906.29 feet; thence South 00°42'31" West, a distance of 150.00 feet, thence South 82°21'13" West, a distance of 598.92 feet, thence North 00°56'52" East, a distance of 164.42 feet, to a point of intersection with a non-tangent curve, concave Southerly, having a radius of 125.00 feet and a central angle of 36°25'04", thence Northeasterly along the arc of said curve to the right, from which the radial point bears South 27°50'47" East, a distance of 79.45 feet, said arc subtended by a chord which bears North 80°21'45" East, a distance of 78.12 feet to the curve's end, thence South 81°25'43" East, a distance of 84.71 feet, to the beginning of a curve, concave Northerly, having a radius of 251.35 feet and a central angle of 38°47'03", thence Easterly along the arc of said curve to the left, a distance of 170.14 feet, to the curve's end, thence North 59°47'14" East, a distance of 77.16 feet; to the beginning of a curve, concave Southerly, having a radius of 368.83 feet and a central angle of 19°31'40", thence Northeasterly along the arc of said curve to the right, a distance of 125.70 feet, ; to a point of reverse curvature with a curve, concave Northerly, having a radius of 625.00 feet and a central angle of 07°01'18", thence Easterly along the arc of said curve to the left, a distance of 76.59 feet, to a point of reverse curvature with a curve, concave Southerly, having a radius of 575.00 feet and a central angle of 07°01'18", thence Easterly along the arc of said curve to the right, a distance of 70.47 feet, to the curve's end, thence North 79°18'54" East, a distance of 155.60 feet; to the beginning of a curve, concave Northwesterly, having a radius of 118.88 feet and a central angle of 54°59'02", thence Easterly along the arc of said curve to the left, a distance of 114.08 feet, ; to a point of compound curvature with a curve, concave Southwesterly, having a radius of 146.06 feet and a central angle of 130°16'12", thence Northeasterly along the arc of said curve to the left, a distance of 332.09 feet, to the curve's end; thence South 74°03'40" West, a distance of 42.64 feet; to the beginning of a curve, concave Northerly, having a radius of 775.00 feet and a central angle of 20°35'32", thence Westerly along the arc of said curve to the right, a distance of 278.54 feet, to the curve's end, thence North 85°30'00" West, a distance of 194.84 feet, to the beginning of a curve, concave Easterly, having a radius of 95.00 feet and a central angle of 170°00'00", thence Westerly along the arc of said curve to the right a distance of 281.87 feet, to the curves end, thence North 84°30'00" East, a distance of 198.17 feet, to the beginning of a curve, concave Northerly, having a radius of 525.00 feet and a central angle of 30°00'00", thence Easterly along the arc of said curve to the left, a distance of 274.89 feet, to the curve's end, thence North 54°30'00" East, a distance of 316.12 feet; to the beginning of a curve, concave Southeasterly, having a radius of 475.00 feet and a central angle of 20°00'00", thence Northeasterly along the arc of said curve to the right, a distance of 165.81 feet, to the curve's end; thence North 74°30'00" East, a distance of 97.22 feet, to the beginning of a curve, concave Northerly, having a radius of 145.00 feet and a central angle of 13°47'50", thence Easterly along the arc of said curve to the left, a distance of 34.92 feet to the curve's end, and the POINT OF BEGINNING. Containing 16.31 acres of land, more or less

8.57'
N 53°00'00"


PROPERTY TO BE QUITCLAIMED TO PARK CITY MUNICIPAL CORP.
ELWOOD L & LYNN NIELSEN
M198-125
351-691
SA 254-2
THE AERIE PHASE 2 & AMENDED (1982) (1983)
THE AERIE PHASE 1
(GAREY NO 3 4119 M C)
EASEMENT M224-332
THE AERIE PHASE I
47.65AC
THE AERIE SUB PHASE 1
(SA-254-2)
AERIE DRIVE
THE AERIE PHASE 1 SUB.
(SA-254-2)
AERIE DRIVE
BONNIE MAE
SA-254-2
SA-254-2-4
MARJORIE JEAN TABER
LOT 3
10.12
M198-125
SA-254-2
ELWOOD L&
LYNN
NIELSEN
SA-254-9A
BRECKENRIDGE LTD. ET AL
ELWOOD L & LYNN NIELSEN
8.93 AC
4119
M188-585
M190-405
M191-1311
318-7
3.83AC.
(HEARTHSTONE)
EASEMENT M224-326
M187-432
M190-188

EXHIBIT

B

J. Craig Smith (4143)
Steven F. Allred (5437)
NIELSEN & SENIOR
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Attorneys for Park City Municipal Corporation

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re	:	Bankruptcy No. 86A-00700
	:	Chapter 7
ELWOOD LESLIE NIELSEN	:	
and LYNN NIELSEN,	:	
	:	
Debtors.	:	

SETTLEMENT AGREEMENT

Grant Thornton, the Chapter 7 trustee (the "Trustee") of the above-captioned bankruptcy estate (the "Estate"), by and through its counsel; and Park City Municipal Corporation ("Park City"), by and through its counsel, hereby stipulate and agree as follows:

RECITALS

1. The Estate holds title to certain real property located on the Masonic Hill in Park City, Utah (the "Estate Parcel").

2. Herbert W. and Barbara L. Korthoff (hereinafter "Korthoff") holds title to approximately 4.7 acres of real property that is contiguous to the Estate Parcel (the "Korthoff Parcel").

3. A legal description of both the Estate Parcel and the Korthoff Parcel (hereinafter collectively referred to as the "Property") and a copy of the plat map showing the Property and its division into six parcels for identification purposes only (hereinafter "Parcel Map") is attached hereto as Exhibit "A."

4. Pursuant to a certain stipulation (hereinafter the "Stipulation") resulting from a lawsuit filed by the Debtors against Park City in Park City Municipal Corporation v. Elwood Nielsen, Great Eastern Mining Corporation and Park West Village, Inc., Third Judicial District Court for Summit County No. 4613 (the "Lawsuit"), the Property was approved for construction of two condominium projects, Hearthstone and Eagles Nest with a total of 192 condominium units (hereinafter the "Stipulated Approval").

5. Park City asserts and Trustee admits that the Debtors committed various defaults under the terms of the Stipulation including the failure to convey clear title to certain property used in the construction of the Deer Valley Road. Pursuant to an order of the bankruptcy court, the Stipulation was deemed rejected as an executory contract and the Lawsuit was dismissed with prejudice.

6. As a result of the rejection, Park City asserts that the current zoning on the Property is "estate" zoning which allows only one lot per three acres which reduces the density on the Property from 192 condominium units to 12 residential lots.

7. After entering into the Stipulation, the debtors requested that a Special Improvement District be created to provide culinary water to property. The City thereafter formed the Greater Masonic Hill Special Improvement District. The Property was assessed for 192 water connections at $1,165.73 per connection for a total assessment of $223,820.16 (hereinafter the "Water Assessments"). The Water Assessments are a lien on the Property

(hereinafter the "Water Assessment Lien") on a parity with county property taxes. The debtors defaulted after the first annual installment and the current balance owing the Water Assessments is approximately $334,000.00 including penalties.

8. A dispute exists between Park City and the Trustee regarding the following issues:

a. Whether the stipulated approval was revoked as a matter of law when the stipulation was rejected.

b. Whether the Estate is obligated to pay the Water Assessments in light of the rejection of the stipulation;

c. Whether third persons could purchase the Property and reinstitute the Stipulated Approval under the Stipulation;

d. Whether the Estate has some property right in prepaid connection fees; and

e. Whether the automatic stay issued under 11 U.S.C. § 362(a) stays operation of Park City's sensitive land ordinance on the Property held by the Debtor.

9. To resolve these disputes, the Trustee and Park City hereby agree to the following.

10. The Trustee has submitted a master plan development and subdivision application seeking approval for twelve (12) residential lots on the Property with ten (10) lots being located on the Estate Parcel and two (2) lots being located on the Korthoff Parcel (hereinafter collectively the "Development"). A copy of the proposed Development plat is attached hereto as Exhibit "B."

11. As part of the Development, but only after the Development is approved by Park City and a final plat of the Development is recorded with the Summit County Recorder's office, the Estate will convey by quitclaim deed to Park City that portion of the Estate Parcel located north of the Aerie Subdivision, Phase I, which property is identified as Parcel No. 1A on Exhibit A. Such property shall be deemed by Park City to provide open space for the Development.

12. As part of the Development, but only after the Development is approved by Park City and a final plat of the Development is recorded with the Summit County Recorder's office, the Estate will convey by quitclaim deed to Korthoff approximately 1.45 acres of the Estate Parcel Running parallel to and directly west of Mellow Mountain Road as indicated on Exhibit B. The Estate shall pay any property tax liens associated with such parcel. Such parcel shall be conveyed to satisfy Park City's acreage requirements for the approval of two lots on the Korthoff Parcel.

13. The Trustee understands that the Development is subject to the ordinary approval process involving the City Planning Commission and the City Council, and that Park City staff do not have control over the decisions or actions of these bodies.

14. The Water Assessment Lien on the 10 lots on the Estate Parcel will be reduced to $7,000.00 per lot and shall be payable to Park City upon the sale of each lot by the Trustee. Upon payment of the $7,000.00 to Park City, the Water Assessment Lien shall be

deemed satisfied and shall be released from the lot for which payment is received.

15. The Trustee agrees that the purchaser of a lot on the Estate Parcel shall also be responsible for water connection fees, water development fees and all other city fees and charges in accordance with Park City's applicable ordinances as long as such fees are not in excess of those customarily charged for similar water service provided to similar property.

16. Upon recording with the Summit County Recorder's Office of the final plat for the Development, the Trustee will be deemed to have waived any causes of action the Estate may have against Park City or any claim of development rights inconsistent with the Development of 12 single family lots arising out of or relating to the Property, the Stipulation, the Water Assessments, the Lawsuit or that certain Water Reservoir and Road Agreement dated August 31, 1982.

17. Upon recording with the Summit County Recorder's Office of the final plat for the Development, the Trustee will be deemed to have waived all claims, known and unknown, it may have against Park City including, but not limited to, any claim, right, money or entitlement to prepaid water connection fees, water development fees, connects, hook-ups, or other such water rights pursuant to the Reservoir Agreement, the Stipulation, the Lawsuit or the Greater Masonic Hill Special Improvement District.

18. Upon Park City's approval of the Development, the 10 lots on the Estate Parcel may be used for residential single family home lots and for no other purpose and such property will be governed by

Park City ordinances in the same manner of other property within Park City.

19. This Agreement has previously been approved by the bankruptcy court and is effective upon execution by the parties, subject only to ratification by the City Council of Park City.

20. This agreement is a covenant running with the land and is binding on successors and assigns and purchasers of property from the Trustee or Korthoff.

DATED this 17TH day of August, 1993.

Kevin Anderson

KEVIN R. ANDERSON, ESQ.
KRUSE, LANDA & MAYCOCK
Attorneys for the Trustee

DATED this 16th day of August, 1993.

J. CRAIG SMITH, Esq.
NIELSEN & SENIOR
Attorneys for Park City