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Title: CPC PUD 05-00301-2MJ12. Public hearing on a reconsideration of City Council's previous action denying an appeal of City Planning Commission's denial of an appeal of an Administrative denial of an amendment to a previously approved development for the Dublin Terrace Townhome project. The amendment to the development and this hearing specifically pertains to the existing townhomes located at 6552, 6553, 6560, 6568, 6572, 6576, 6580, 6588, 6592, and 6596 Emerald Isle Heights. (Quasi-Judicial Matter)

Sponsors:

Indexes:

Code sections:

Attachments: 1. Attachment 1 - Dublin Terrace Townhomes previous CC and CPC packets, 2. Attachment 2 - Dublin Terrace Townhomes MLP report, 3. Attachment 3 - MLP Memo and Supporting Documents, 4. Attachment 4 - Citizen Communication

Date	Ver.	Action By	Action	Result
3/10/2015	1	City Council	approved	Pass

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From:

Peter Wysocki, Planning and Development Director, Planning and Development Department

Summary:

This is a court-ordered rehearing of a previous City Council decision made on March 26, 2013, which effectively denied an amendment to the Dublin Terrace Planned Unit Development Plan. The amendment sought approval of three, as built, non-compliant buildings containing 10 townhome units. Subsequent to the City Council's March 26, 2013 decision, MLP Receivership, LLC (MLP) filed a lawsuit against the City. MLP seeks a judgment permitting the non-compliant townhomes to remain as built and seeks an undisclosed amount of damages.

A Trial Court found a due process violation and ordered the City Council to rehear the case. The Trial Court also instructed the City Council to consider equity and fairness impacts to multiple parties that have vested interests including MLP, the contractors (who have not been paid and/or have liens against the properties), and residents of the Dublin Terrace development (who are impacted by the unfinished, aging vacant townhomes). Essentially, the Court ruling stipulates that impacts and

mitigation must be reviewed in totality, not solely based on the development plan review criteria.

As reference, amendments to approved development plans must meet the development review criteria set forth in City Code Section 7.5.502.

1. Will the project design be harmonious with the surrounding land uses and neighborhood?
2. Will the proposed land uses be compatible with the surrounding neighborhood? Will the proposed development overburden the capacities of existing streets, utilities, parks, schools and other public facilities?
3. Will the structures be located to minimize the impact of their use and bulk on adjacent properties?
4. Will landscaping, berms, fences and/or walls be provided to buffer the site from undesirable views, noise, lighting or other off site negative influences and to buffer adjacent properties from negative influences that may be created by the proposed development?
5. Will vehicular access from the project to streets outside the project be combined, limited, located, designed and controlled to channel traffic to and from such areas conveniently and safely and in such a manner which minimizes traffic friction, noise and pollution and promotes free traffic flow without excessive interruption?
6. Will all the streets and drives provide logical, safe and convenient vehicular access to the facilities within the project?
7. Will streets and drives within the project area be connected to streets outside the project area in such a way that discourages their use by through traffic?
8. Will adequately sized parking areas be located throughout the project to provide safe and convenient access to specific facilities?
9. Will safe and convenient provision for the access and movement of handicapped persons and parking of vehicles for the handicapped be accommodated in the project design?
10. Will the design of streets, drives and parking areas within the project result in a minimum of area devoted to asphalt?
11. Will pedestrian walkways be functionally separated from vehicular traffic and landscaped to accomplish this? Will pedestrian walkways be designed and located in combination with other easements that are not used by motor vehicles?
12. Does the design encourage the preservation of significant natural features such as healthy vegetation, drainage channels, steep slopes and rock outcroppings? Are these significant natural features incorporated into the project design? (Ord. 94-107; Ord. 95-125; Ord. 01-42; Ord. 02-64; Ord. 03-74; Ord. 03-157; Ord. 09-50; Ord. 09-78; Ord. 12-72)

Given that the development was comprehensively vetted for compliance with all of the Criteria, it is staff's position that only Criteria 1, 3 and 4 (above) apply to this amendment and the resolution of the lawsuit. Building types, building heights and grading of the three subject sites do not relate to the other nine Criteria. t

As stated above, the Court ruling also mandates that the Council consider fair and equitable solutions and impacts of the non-compliant buildings not only to the adjoining 5 or 6 single-family residents who objected the development, but also to the investors, contractors, and 60 townhome owners within the development.

Staff believes, that as conditioned, the proposed amendment meets the development plan review criteria (including Criteria 1, 3 and 4) and court-mandated fairness and equity standard. Below are staff responses emphasizing Criteria 1, 3 and 4:

Criterion #1: Will the project design be harmonious with the surrounding land uses and neighborhood?

Staff response: The amendment does not change the overall character, land use or density of the Dublin Terrace Townhome project and does not necessitate modifications to utilities, parking, access or other improvements. The approved development plan already allows two-story townhomes, with entrances and windows facing the existing single-family residences. The as built homes are consistent with other models built within the development, and have been approved on other lots within the development. MLP has agreed to demolish one building containing 3 townhome units - Lots 71, 72 and 73. Future construction on that site is conditioned to comply with the originally approved development plan.

Criterion #3: Will the structures be located to minimize the impact of their use and bulk on adjacent properties?

Staff response: As conditioned, the amendment requires one non-conforming building to be demolished and any future development of the site must comply with the originally approved development plan. Post demolition, the site is required to be rough-graded and seeded to control erosion and dust. Considering the Dublin Townhome project in its totality, the amendment has negligible impacts to the adjoining properties.

Criterion #4: Will landscaping, berms, fences and/or walls be provided to buffer the site from undesirable views, noise, lighting or other off site negative influences and to buffer adjacent properties from negative influences that may be created by the proposed development?

Staff response: In order to mitigate the higher than originally approved first floor grade elevation and to provide additional buffering, the amendment has been conditioned to install a solid vinyl fence along the top of the building pads along 17 townhome units, screening first floor windows and front doors from the adjoining single-family residences. Additional trees are also required to screen the walkways to the front doors of the townhome units.

In conclusion, approval of the amendment, subject to the recommended conditions, is in the best interest of the City, the residents within the townhome development, the residents of the adjoining single-family homes, and all other parties with vested interests. The approval results in a fair and equitable solution to this issue.

Previous Council Action:

The City Council heard the appeal on March 26, 2013. On a 5 to 1 vote (3 absent), the Council denied the appeal with modifications to Planning Commission's denial. The Council bifurcated the non-compliant townhome buildings from the rest of the undeveloped parts of the development. This action allows the remainder of the development to be completed without being "tied" to the non-conforming buildings.

Background:

The Dublin Terrace Townhome project was approved by the City Council in 2006. The project includes 142 townhome units on 11.2 acres. Approximately 60 units have been constructed to date. The original developer (Today's Homes, aka Heritage Homes) closed its operations in Colorado Springs by 2012 and the parent company filed for credit protection in Canada. PNC Bank (the lender

that funded the construction loan) requested that the properties encumbered by the loan be placed in a receivership to protect the bank's assets. MLP was appointed to represent PNC Bank. MLP is not the developer of the project or the general contractor that built the non-compliant buildings.

From the beginning, this project caused contention between the developer and the residents of the adjacent single-family home development. The single-family homeowners felt that the project was not harmonious or compatible because it affected their privacy and views, and allegedly would diminish their property values. The City Council ultimately approved the PUD development plan by adding restrictions on the style of buildings permitted along the southern boundary of the Project. The goal was to create less bulky looking and lower profile buildings. The developer, however, failed to comply with the approved development plan by (1) improperly grading the land along the southern boundary (arguably increasing the building height); (2) building different townhome models than permitted by the development plans (the model with "hipped" roofs were not constructed); and (3) building taller model elevations than permitted along the southern boundary (the as-built models are approximately 2 feet taller than the required "Elevation B" model). It should be reiterated that the approved models were also two-story with first and second floor windows facing the single-family residences. The lower heights of the approved building models result from different architectural designs.

In 2012, City planning staff became aware that the buildings failed to comply with the approved development plan. Planning staff worked with the Pikes Peak Regional Building Department to deny Certificates of Occupancy for the offending townhomes. At that time Today's Homes had already filed for bankruptcy in Canada. This halted further development of the project, leaving about 70% of the total project undeveloped. Currently, two of the non-compliant townhome buildings are more than 90% complete and the building located at the far western corner along the southern boundary is about 40% complete.

Upon appointment as a receiver, MLP submitted a proposed amendment to the development plan requesting for the non-compliant townhomes to remain in place, as built. Planning staff denied the proposed amendment and MLP appealed staff's decision to the Planning Commission, which also denied the proposed amendment. The matter was then appealed to City Council. The Council denied the appeal based on the City's evidence demonstrating the townhomes were constructed with different models, model elevations, and grading than permitted in the approved plans.

For a more detailed background, please see the attached staff report from the March 26, 2013 City Council meeting, which also includes the staff report and supporting materials from the February 21, 2013 Planning Commission meeting.

Financial Implications:

If the amendment to the development plan is approved by the City Council subject to the staff's recommended conditions, there should be no financial implications to the City from this case.

Board/Commission Recommendation:

The Court remanded the rehearing directly to the City Council with specific instructions; therefore, Planning Commission rehearing and recommendation is not required.

Stakeholder Process:

In light of this hearing being a directive of Trial Court as part of legal suit against the City, a

neighborhood meeting was not held. However, a notice of public hearing poster was posted on each of the subject buildings and notice of public hearing postcards were sent to property owners within 500 feet of the three subject buildings.

Alternatives:

1. Overturn the original denial of the appeal and approve the Amendment to the PUD Development Plan, subject to conditions recommended by staff. This alternative would resolve this case.
2. Uphold the original denial of the appeal. This alternative would like result in further legal action against the City.
3. Overturn the original denial of the appeal and approve the Amendment to the PUD Development Plan with modifications to staff's recommended conditions. Since staff's recommended conditions have been agreed to by MLP, depending on the nature of the modifications, MLP may not agree to the resolution.

Proposed Motion:

APPROVE the Dublin Terrace Townhome development plan amendment CPC PUD 05-00301-2MJ12, based upon the finding that as amended, the development plan meets the development plan review criteria set forth in City Code Section 7.5.502.E, and the fairness and equitable standard established by the District Court, subject to the following conditions:

1. Conditions pertaining to properties located at 6588 (Lot 71), 6592 (Lot 72) and 6596 (Lot 73) Emerald Isle Heights:
 - a. The building consisting of the three townhomes ("Properties") shall be demolished by no later than December 31, 2015. All debris, including the foundation, shall be removed from the site and utility connections shall be appropriately capped.
 - b. Within 30 days of the demolition and removal of the debris, the site shall be rough graded and seeded to stabilize the soils. The deadline for seeding, however, may be extended based on weather conditions and the time of year that the building is demolished.
 - c. The Properties may be developed pursuant to the Dublin Townhome Development Plan approved by the City of Colorado Springs on November 13, 2006. To the extent possible, the grade of the Properties shall be lowered to be compliant with the approved 2006 Development Plan.
2. Conditions pertaining to properties located at 6520 (Lot 57), 6524 (Lot 58), 6528 (Lot 59), 6552 (Lot 64), 6556 (Lot 66), 6560 (Lot 66), 6568 (Lot 67), 6572 (Lot 68), 6576 (Lot 69), and 6580 (Lot 70) Emerald Isle Heights (collectively, the "Receiver's Townhomes"):
 - a. A 6-foot high white vinyl fence shall be constructed along the south side (the side with the front doors) of each of the three townhome buildings comprising the Receiver's Townhomes. The width of the fence shall be the same width as the adjacent building. There will be a gap in the fence between the townhome buildings. The fence shall be located between the sidewalk and the top of the retaining wall. The fence materials shall be consistent with the existing white vinyl perimeter fence around the Dublin Terrace Townhome neighborhood.
3. Landscaping and irrigation along the south property line shall be installed in compliance with the landscape plan approved by City of Colorado Springs on November 12, 2006 adjacent to the Receiver's Townhomes. Two low level shrubs shall be installed on top of the slope along the fence, facing each individual townhome unit between the fence the sidewalk. Two evergreen trees shall be

planted between the fences constructed adjacent to the townhome buildings (between Lots 63 and 64; 66 and 67; and 70 and 71-59 and 60). The evergreen trees shall be approximately 8 feet in height and not subject to any particular stem caliper. The final landscape plan shall be approved by the City prior to installation.

4. Certificates of Occupancy for the residences located 6552 (Lot 64), 6556 (Lot 65), 6560 (Lot 66), 6568 (lot 67), 6572 (Lot 68), 6576 (Lot 69), and 6580 (Lot 70) Emerald Isle Heights will not be issued until conditions I, II, and III above are met, including the fencing described in condition II. The fence described in condition II for residences located at 6536 (Lot 60), 6540 (Lot 61), 6544 (Lot 62), 6548 (Lot 63), 6588 (Lot 71), 6592 (Lot 72), and 6596 (Lot 73) shall be constructed when the lots are developed. The Parties understand that re-Inspection of the residences located at 6552 (Lot 64), 6556 (Lot 65), 6560 (Lot 66), 6568 (Lot 67), 6572 (Lot 68), 6576 (Lot 69), and 6580 (Lot 70) Emerald Isle Heights may be necessary. The City shall work with Pikes Peak Regional Building Department to facilitate inspections of the Receiver's Townhomes and issuance of Certificates of Occupancy. Only issuance of Certificates of Occupancy for the residences located at 6552, 6556, 6560, 6568, 6572, 6576, and 6580 Emerald Isle Heights shall be contingent upon the fulfillment of the conditions I, II, and III above. Conditions in Sections I and II that relate to a specific building or unit shall not be a condition precedent to the issuance of a Certificate of Occupancy on other units or buildings. Certificates of Occupancy will be issued for the remaining residences if they comply with the 2006 Development Plan and all amendments thereto.

Not Applicable