

**City Planning & Zoning Meeting – Minutes – October 05, 2010**

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## **City Planning & Zoning Meeting – Minutes – October 05, 2010**

Stan Gibbs called the regular meeting Tuesday, October 05, 2010 to order at 4:30pm. Commissioners present were Bert Myrin, Cliff Weiss, Mike Wampler, LJ Erspamer, Jim DeFrancia and Stan Gibbs. Jasmine Tygre was excused. Staff in attendance were Jim True, Special Counsel; Jennifer Phelan, Deputy Community Development Director; Jackie Lothian, Deputy City Clerk.

### **Comments**

LJ Erspamer noted there was no financing for fractional ownership units. Jennifer Phelan stated that it might be easier for the applicant's representative, Alan Richman, to do his presentation first since there was a lot of history.

### **Minutes**

*MOTION: Bert Myrin moved to approve the minutes from September 21<sup>st</sup> seconded by Mike Wampler. All in favor.*

### **Conflicts of Interest**

None stated.

### **CONTINUED PUBLIC HEARING:**

#### **700 Ute Ave – PUD Amendment**

Stan Gibbs opened the continued public hearing. Alan Richman said that there were two other folks with him tonight, John Corcoran, Aspen Alps General Manager, and Lennie Oates, representing the Bornefeld family that posse an easement to unit A or 711 from the association for the right to use space A.

Richman said the 700 building was an element of Aspen Alps South, which includes the 300, 400 and 500. The 700 building is its own land area and association. Space A was also 711; they have documents from the owner that built the space, which was built as a dwelling unit when it was first built and has always been occupied by the Borenfeld family with a perpetual easement to the Borenfeld family to use it as a dwelling unit. Space A doesn't have to be a member of the condominium association or pay dues, the original developers of the Aspen Alps were Mr. Mitchell and Mr. Borenfeld and both secured spaces for themselves in the original Alps. Mr. Borenfeld passed on and his heirs do not use space A and have reached a contract to sell Space A to Mr. Seidman. 701 sits right on top of Space A and adjacent to Space A on the lower level; he kind of the most logical person to have use of this space; Mr. Seidman is trying to make an internal connection between Space A and 701. Richman utilized drawings of building 700 to show the relationship of these units, the entry to Space A is on the lower level and the entry to 701 is on the upper level. Richman said they were proposing to

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keep the separate entries; staff was concerned about the size of the unit we were proposing here. Unit 701 is about 2250 square feet in size and Space A is about 600 square feet in size so when you combine the 2 units it is about 2850 square feet.

Richman said that up until about 2005 this kind of minor activity would have been processed at the staff level; it would have been considered a minor amendment. In 2004 the unit owner of 702 processed a minor amendment to a plat; the space was a linen closet and he purchased it from the association and applied for a minor amendment. Richman said the reason that we are here before you tonight is because in 2005 the city adopted amendments to the Lodge/Tourist Residential District, as it was known at the time and it basically did a couple of things. First it changed the name from the LTR to the Lodge District and more importantly it changed some of the dimensional standards; the most significant one was the maximum unit size to 1500 square feet in the Lodge Zone District. Unit 701 exceeds the 1500 square feet standard today. Richman said that he has an inventory of the units in the 700 and 7 of the 11 units in the building are over 1500 square feet. So you have a non-conforming situation with many of the units in this building. Richman showed that the Borenfeld only occupied Space A about 31 days a year and during the same time period the owners of unit 701, their guests and the other persons to whom the unit was rented occupied the unit approximately 103 days per year; so the larger unit was occupied more than 3 times more frequently as Space A over that 15 year period. Richman suggested that minimum Space A is going to get occupied as much as unit 701; the Borenfeld family really has not occupied it as a hot bed.

Richman said the Alps back in the 80s and 90s the Aspen Alps was subject to multiple zoning designations; parts of the complex were different zones. Some portions were designated Lodge/Tourist Residential and were conforming but there were buildings 400 and 500 buildings were designated R-6; there was a large area by the tennis courts were R-15 and the 700 building was designated Conservation. In 2001 the Alps came in with an application to develop a parking structure, tennis courts and build some affordable housing in conjunction with that parking structure. There was a time when the city was trying to zone one property with one zone; the rezoning Ordinance that was adopted also had a PUD Overlay.

Richman said tonight was a proposed PUD Amendment. A PUD was put on the Alps property for the future of an overall plan for at least portions of the Alps i not fthe entire Alps, it didn't just want to review it as a subdivision but a PUD because it brings in architecture, landscaping, it brings in all of those aspects. This was an example of standards that do not comply with the code because some of the units

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already exceed the unit size limitation. Richman reiterated that the unit size limitation came in 2005. Richman said there benefits that this application brings to the community and the Alps complex, approval of this application will allow space A to be modernized and be brought up to today's code, the homeowners association benefit because it will receive payment from Mr. Seidman to purchase the space and condominium assessments, a way for greater occupancy for the space and they don't think that they are setting a precedent because they are using the PUD process. Richman asked the commission to support the application and grant the proposed PUD Amendment.

Cliff Weiss how many spaces are there like this one; you showed us the one under 702. Weiss thought he saw a couple of others in this building and more throughout the complex. Richman said there were some storage spaces and all of those are necessary for the function of the building. Weiss asked how 702 got the linen closed added to their unit. Richman replied that it was superfluous to the building.

John Coracorn said there were other spaces in other buildings but there were no other perpetual easements in any of the Aspen Alps buildings.

Weiss said that 7 out of the 11 units were over the size limit in building 700; what about the rest of the complex. Richman replied that most of the other units were built as one and two bedroom units; all in units in the 100 and 200 buildings were less than 1500 square feet; the 300, 400 and 500 building each had one unit over 1500 square feet. The two buildings where the predominant unit size is 3 bedrooms are in the 700 and the 800 buildings. Corcoran said that in the 777 building all are. Weiss said that he didn't understand who owned this unit. Richman replied that the association owns the space because it's a general common element; the Bornefeld family has an easement that gives them the exclusive right to use the space. Richman said all they have to give to convey is the right to use; for Mr. Seidman to gain fee simple ownership on the space needs to also have the association convey the general common element.

The Planning Department didn't begin until 1971 and there were no Co's at that time.

Bert Myrin said this sort of gets to what Cliff was asking; the perpetual exclusive easement and how should that bear on our decision as a common element. Richman replied that he didn't think so, the physical action is really what you are all about, we have to worry about how many conveyances and it seems to me from a planning commission standpoint it's a question of how do you feel about

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combining these two spaces. Is that a problem or not. Myrin said at the end of your presentation you said that you were not setting precedent. Richman replied that was certainly the thought of what a PUD can do for you. Richman said the merits of this application were its own merits, I am not proposing to establish this as the law of the land, we proposed it as an amendment specific to unit 701 and Space A. Myrin asked if someone else wanted to combine two units, how would P&Z say no to them. Richman asked if it were someone else in the Aspen Alps or somewhere else. Myrin replied another PUD. Richman said that you would have the opportunity to make that decision. Myrin said isn't this about two things combining. Richman said yes.

Mike Wampler said that he was confused about if we allow you to combine these two units are you still planning on renting the lower unit separately. Richman replied that you could and we thought that was a more attractive option from a community standpoint. Richman said their proposal was to leave the two separate entries. Wampler asked if 701 was in the rental pool. Richman answered it is rented from time to time. Corcoran said it was prior to Seidman's ownership. Wampler said that makes him skeptical whether he would put this one in the rental pool.

Jennifer Phelan noted for the record there was a site visit today; they have public notice as required. Phelan said that the request is to merge two units together. Phelan said this was zoned Lodge PUD and these units are considered multi-family residential but since they are in the lodge zone district they are permitted but not required to be short term rentals. Phelan stated that codes change over time; there is a provision in the code for non-conforming structures or uses; they are allowed to be maintained but not expanded. Phelan said the Aspen Alps was developed over time with varying unit sizes; as it happens City Council had a moratorium in place and as a result was caps on unit sizes. That cap is 1500 square feet and can go up to 2000 square feet with the landing of a Transferable Development Right. Phelan said as a PUD you can vary the dimensional requirements, which is the cap size and that's how this is before you. Staff does not recommend approval of this request because it does not fit the underlying zoning.

Jim DeFrancia said on that issue of occupancy, two units versus one if it maintains separate entrances it effectively becomes a lock-off, then you could have two units. Phelan replied that if P&Z approves the ability of these units to merge there is nothing to prohibit the developer to maintain a lock off.

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Cliff Weiss asked why should this PUD amendment apply to the whole 700 building instead of just this unit. Phelan said it seemed to make sense if there were other non-conforming units and one unit would be very site specific; there are other units in that building that are bigger than the 1500 square feet. DeFrancia asked if they had done that would that have changed staff's position. Phelan responded no, staff did not feel it should be merged because it exceeds the square footage cap for a unit.

Stan Gibbs asked if the PUD was applied to this building or the whole Aspen Alps. Phelan responded the whole Aspen Alps. Gibbs said so modifying the PUD modifies the PUD for the whole Aspen Alps. Richman answered not necessarily; the way that the Aspen Alps is it has an unusual ownership configuration in that there are a series of associations that own the land under their buildings so there are 4 or 5. Corcoran said that they were bound together by the By-Laws. Richman said you can have an applicant like the 700 building because the land area is distinct from the rest. Richman said they have processed applications for portions of the Aspen Alps without having the entire Aspen Alps because there are separate associations. Phelan said the way that this was written was for that specific building, any unit in that building could go to that size. Phelan said that it could be pulled back and say it is only units 701 and 711 are permitted to be merged. Weiss asked the down side to that just 701 and 711. Phelan said that it's very site specific. Gibbs said with a PUD you have certain parameters and that all applies to all properties in that PUD, is that what the code says, we can have one PUD but we can have 5 different decisions about different properties in that PUD. Phelan said it would make more sense to have something that is applied throughout the PUD as a whole. Phelan said in looking at this since it is separate ownership in the 700 building we could apply it just to this interest; the site specific application to the Aspen Alps. Richman said you could have a PUD where Phase I is single family, Phase II is multi-family and Phase III is Commercial and each one of those phases would have different regulations. Richman said the dimensional standards would be very different for the single family than the multi-family. Richman said that Jennifer was right that you would like to have it more universally than to have one specific unit that you picked out and you get this and everybody else gets that; it is hard to administer. Gibbs said if we were to do something along these lines we can be specific as we want. Phelan said if we were going to say it was the whole PUD we would need more consent from other ownership interests.

Gibbs asked if there was a PUD Amendment for the 702 closet. Phelan replied there wasn't a rule on unit size on that point in time. Richman said this was 2004 and the change was 2005 on size standards.

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DeFrancia said the staff opposition was because combining the units causes the new unit to be larger than what is permitted. Phelan replied correct. DeFrancia asked the public benefit for this application. Richman replied they were benefits to the association and because the association was made up of a multiplicity he thought that was the public benefit. Richman said the association was gaining no assessments from the presence of Space A; combining the unit with 701 not only provides the purchase price but also the ongoing assessments that will occur.

Myrin asked if staff would be supportive of this just turning into a one bedroom apartment rather than the merger. Phelan replied the ownership interest could turn into a live in common element, that's just an ownership issue; they have provided enough information that was a legally established unit. Phelan said the biggest issue was merging the two units and that would be larger than one now. Myrin said from staff's perspective you could do that without P&Z. Phelan replied they could change the ownership. Myrin said they can start as if they are 2 legal units and make the decision based upon that and what's the public benefit. Phelan said that staff doesn't recommend merging the units, however we suggested that if you were going to approve you could recommend TDRs to increase the size. Myrin asked Jennifer how strongly she felt about that TDR solution. Phelan replied that would be a more equitable solution as other people want to increase their unit size look at purchasing a Transferable Development Right to do that. Myrin said that you mentioned Council's direction was to not allow this to happen; what does P&Z do in those circumstances. Phelan answered that was for P&Z to decide; there was concern for larger units being developed that raised concern for the vitality of the community that people were looking for. Richman said that moratorium was for the whole downtown.

LJ Erspamer asked if that 1500 square feet was for new construction. Phelan said that was for new construction and you could go up to 2000 square feet with the landing of TDRs. Phelan said if you had a 1700 square foot unit and wanted to go to 2000 square feet you could purchase a TDR for the extra 300 square feet. Erspamer asked if P&Z was final review. Phelan replied yes. Erspamer asked if they had to change the code to approve this. Phelan answered no, you would be amending the dimensional standard for unit size associated with the 700 building only. Erspamer said that you said that larger units are occupied more. Richman replied that was for this case; he said that he wasn't trying to make that for the community; he doesn't have the data for that. Erspamer said this would be a lock-off. Richman replied if you find that attractive, if you find it unattractive you don't have to do that.

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Gibbs asked if they can require that this space be rented. Phelan replied no because the zone district doesn't require that.

Myrin asked the applicant for something that achieves City Council's goals to have these units rented and could be a public benefit. Richman responded that he didn't have any authority from his clients to be put into the rental pool; the planning & zoning commission could certainly oppose whatever condition it believes are appropriate. Richman said if you want to pursue the TDR idea I would ask P&Z to table this and then he would go back to his client and see if this will work for him; if those are the kinds of conditions for P&Z to approve it; he will go back to his client with those conditions. Phelan said to consider the enforceability of what you might be considering; landing a TDR is enforceable, to make sure something is rented out is a lot harder.

No Public Comments.

### Commissioner Discussion:

Cliff Weiss said his real concern was precedent and the whole thing is non-conforming and was all developed before code was in place. Weiss said to worry about the Aspen Area Community Plan is over the top and the egress out of that window concerns him and suggest keeping that entry door as another egress. Weiss said he thought it should be all one unit. Weiss said he was concerned with precedent and the amendment should apply to this unit only so that we don't have this spreading throughout that complex. Weiss said he didn't want to see more of this even in the 700 building.

Jim DeFrancia shared a lot of Cliff's sentiments, which is not trying to make a mountain out of a mole hill here. DeFrancia said if landing a TDR would be appropriate then there would be a certain consistency in applying that policy and clearly a more demonstrable public benefit to that. DeFrancia said that he would be inclined to support it if there was a TDR.

Bert Myrin said the concern Cliff raised about egress and the concern that others have raised about it being from the 60s to him it has no bearing on merging the units; if it were put on the free market the unit would be updated to code.

Weiss said that unit should never have been a unit; it would concern him if there were a fire in the building. Weiss said that window had to have been put in in the last 10 years. Weiss said to gain one hot bed he didn't see any public benefit other than the TDR.

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Richman said there was no question that his client was going to come up the quality of the rest of his ownership on that unit. Richman said when you do that the building department is going to apply today's codes because you will be beyond the minimum standard for the code but if the egress is not up to code a window well would be an excellent solution but it's got to have 2 forms of egress. John Corcoran said that as it is it can never be a hot bed, it's a general common element with a perpetual easement; there's 40 years of history that show that it's been used by the family. Phelan said if the HOA of South Aspen Alps decided to agree to return it to a common element because therefore then they would not be paying to maintain this unit, they could do that. Corcoran said they were not paying to maintain that unit now. Gibbs said that Jennifer's point was that you could agree with some other third party buyer that comes down the road that the family wants to sell it to other than the applicant; just somebody that wants to buy 600 square foot little apartment right on the ski slope and the HOA could strike the same kind of agreement with those folks. Gibbs said theoretically there's nothing different about this applicant than any other applicant. Corcoran replied that wasn't true, this applicant was a known owner to the Aspen Alps and is different than someone walking in off the street. Erspamer said that we have to approve this because we want a legal egress; you can do that right now without our approval.

Mike Wampler said the unit hasn't been modernized.

Lennie Oates responded to Cliff's comment about the window; the window was in there from the get go the windowpane was replaced because it was broken. Corcoran said the window was replaced because it was broken. Oates said that the unit was perfectly livable. Corcoran said that it wasn't in the rental pool now and being in the hospitality business it has one door and one window and their market is different than that unit. Wampler said if this is approved he would go with the TDR.

Gibbs said that he didn't like the TDR idea and didn't think it was appropriate and did disservice to the TDR program. Gibbs said he didn't see enough benefit; if we could find a way to have that unit rented 100 days a year. Gibbs said that he didn't want to put a number on it and didn't know if the HOA would be the enforcer; those are details that would have to be worked out. Gibbs said if it were to become a hot bed that would be the one thing that would probably cause him to agree to; if it was a lock off that could be sometimes used fully or as an individual unit.

Weiss said the impression that he has is the potential buyer is not going to make this a hot bed, so the reason I was intrigued with the TDR was that he doesn't buy

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much of the public benefit beyond the homeowners association, which was not his interpretation of the public. Jim DeFrancia agreed. Weiss said again we are trying to apply the 2010 Aspen Area Community Plan to something that was built in the 60s. Gibbs said the even the 2000 AACP didn't apply to things built in the 60s, 70s, 80s and he didn't think that we wanted to go down the road. Gibbs said that's what you are saying. Weiss asked how can you have x number of units, 7 of 11, that are not conforming; you can apply what you want, it's already non-conforming and any plan leaves room for non-conforming. Phelan said that pretty much any land use code that you have has pretty standard language in which allows non-conformities to continue to maintain, to invest in them but not to increase the amount of whatever that non-conformity is.

Corcoran asked the commission what has weight as a public benefit, leave out the Alps, and somebody comes and says I've outgrown and I want to get bigger. Gibbs said he didn't know if they wanted to get into that now. Myrin said he thinks he asked that question earlier. Gibbs said in the case of a re-development there would be other benefits that would accrue; if it were multi-family housing there would be work force housing; there might be other issues that come in and it would completely depend on the application. Gibbs said we have to ask what is the benefit. Corcoran replied I am not the applicant I'm here more of an association guide, there is a lot of non-conformity in that building. Gibbs said that's what we don't want to keep expanding. Weiss said that he was in the hospitality industry and the only public benefit would have been if it were a locked off short term rentable unit. Weiss said that's what the Aspen Area Community Plan seeks to do is increase the 27% loss of inventory that we had; that was the real public benefit that we could refer to and when we have the impression that the present or potential owner doesn't plan to use it that way.

Erspamer said he tries to look at this objectively and with criteria. Erspamer said that he was a little hesitant to approve it because there are other avenues to do the same thing we are doing now but he wanted to be consistent on his judgment on all of these applications. Erspamer said that he was still thinking about what could be done for the benefit, work force housing or extinguishing TDRs could be a benefit. Erspamer said staff recommends against it and he needs profound evidence to convince him otherwise.

Lennie Oates stated that he represents the Bornefeld family. Oates said LJ mentioned a concept and Jennifer noted that it could be about the notion of converting the general common element to a limited common element; if you did that could that be used as living space even though the limited common element

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caused the living area to exceed the maximum that you have provided in the zone district. Phelan said the unit 711 which is just over 600 square feet is now a general common element with the use easement on it and that general common element that 600 square feet if the HOA agreed to it could become a limited common element. Phelan said that is just an ownership issue, it would still be its own separate dwelling unit. Oates asked about the ability to create an access between the limited common element unit 711 and the 701 unit. Phelan said that again is merging two units together so we would be the same. Oates stated he thought it would be a limited common element and you don't count limited common elements. Phelan responded unit 711 can be established as a legal dwelling unit so she said she doesn't care about the ownership issue; there is a requirement in the code that any dwelling units, she consider there were two dwelling units here, legally established can only be a maximum certain size. Phelan said that one was 620 square feet and there is approximately 2200 square feet, if you merge the two you go over your limit.

Richman said a majority of you are asking for his applicant /client to agree to some public benefit beyond what we have proposed in this point in time; TDR or some proposal that this Space A would be in the rental pool for some proportion of the year. Richman said it seemed that if he could bring either of those to the table some of you would support this proposal. Wampler, Erspamer, DeFrancia and Weiss supported the TDR.

Gibbs asked if they could approve the resolution with TDRs. Phelan replied that they can but she wanted to check with the attorney to make sure. Phelan suggested continuing to the next meeting.

*MOTION: Jim DeFrancia moved to continue the 700 Ute Ave PUD Amendment with the requirement that the applicant extinguish TDRs to exceed the unit cap size to October 19<sup>th</sup>; seconded by Mike Wampler. All in favor, APPROVED.*

Richman said that he would rather go back to his client to say that the planning commission would be willing to support but there needs to be a more demonstrative for community benefit and come up with a date and if he was prepared to do that and if he's not then we will come back on the 19<sup>th</sup> and say thank you. Richman said that they can review the resolution between now and then.

Weiss asked the other commissioners about consensus about limiting the resolution to the unit in order to prevent precedent. DeFrancia, Erspamer, Gibbs. Gibbs said

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that would be included in the resolution and some type of public benefit could be determined. The commissioners agreed.

Erspamer said that he missed the meeting that was discussed for the Art Museum; letters in the newspapers say that P&Z did not want to discuss it. Erspamer asked what happened there and what action was going to be taken. Gibbs said that Bert actually brought it up and asked if we should send a resolution to city council. Gibbs said the consensus was that it was not a land use application that we didn't have any authority; it was a legal agreement between council and this other party. Gibbs said the commission wasn't in any position to craft a resolution of any authority. Phelan said that Jim True was there and talked about the legal process of the lawsuit and Jim talked about the process in more detail. Weiss said that the impression that he got was that council had already made up his mind when they settled the suit so anything that this commission had to say was pretty irrelevant. Erspamer asked if the commission could follow it up with the newspapers from the chair. DeFrancia said that a letter from the chair would be entirely appropriate. Myrin said he raised this at the July 20<sup>th</sup> meeting and he hasn't talked to LJ since. Myrin said that he felt very strongly that P&Z has been misrepresented and there was some agreement about Chris getting in touch with the reporter. Phelan said that was a number of emails that went back and forth; if we wait until the 19<sup>th</sup> we can have Chris and Jim attend.

Gibbs asked if it was okay with his fellow commissioners to meet with Chris and Jim and they craft something to go to the paper. Weiss said he saw an email from Chris to that new reporter and he said he was done with it. DeFrancia said that he was done with it too and favors what Stan just said. Erspamer said it was fine with him. Gibbs said that he would set up a meeting with Chris and Jim. The commissioners all agreed with Stan.

Adjourned.

  
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Jackie Lothian, Deputy City Clerk