

MINUTES OF THE CITY COUNCIL MEETING HELD OCTOBER 23, 2007, AT 7:00 P.M., IN THE COTTONWOOD HEIGHTS CITY COUNCIL CHAMBER

MEMBERS PRESENT: Mayor Pro Tem Bruce Jones, Councilman Don Antczak, Councilman Scott Bracken, Councilman Gordon Thomas

EXCUSED: Mayor Kelvyn Cullimore

STAFF PRESENT: City Manager Liane Stillman, City Attorney Shane Topham, Deputy City Manager Kevin Smith, Public Relations Specialist Bob Warnick, Finance Director David Muir, Mike Dolan

OTHERS PRESENT: Larry and Beverly Jensen, Thomas Thorup, Gary Thorup, Tristan Webb, Heidi and David Stapel, Todd Barfuss

- 1.0 **Consideration of Resolution No. 2007-40 Approving and Ratifying Entry Into a Settlement Agreement with (a) David and Heidi Stapel Concerning Denial of a Conditional Use Permit for Short-Term Rental at 3388 East Creek Road; and (b) Tom Taylor Concerning Approval of a Conditional Use Permit for Short-Term Rental of 8956 South Wasatch Blvd.**
- 1.1 City Attorney Shane Topham explained the issues affecting the properties on Creek Road and Wasatch Blvd. He said that some months ago the Planning Commission approved a conditional use permit for short-term rental purposes for the property at 8956 South Wasatch Blvd., even though the application for that conditional use permit showed that the unit would have more than four bedrooms. The Planning Commission imposed conditions limiting the number of useable bedrooms to four. Two weeks later the Planning Commission denied a conditional use permit for short-term rental purposes for property located at 3388 East Creek Road. The application showed more than four bedrooms and in this event the Planning Commission determined to deny the application outright because of a provision in the Supplemental and Qualifying Regulations of the City's zoning code that states that a short-term rental shall not contain more than four bedrooms. In view of the opposing decisions, residents appealed the approval of the short-term rental permit granted for the Wasatch Blvd. project and the owners, appealed the denial of the short-term rental permit for the property located at 3388 East Creek Road. The Board of Adjustment heard the appeals on August 30, 2007, and took the matters under advisement.
- 1.2 Attempting to act as a mediator between the opposing factions, Mr. Topham entered into discussions with the Stapels and their Counsel and a settlement agreement was signed by the Stapels on September 26, 2007, and submitted to the City that day. Based on that agreement Mr. Topham entered into negotiations with Thomas Taylor, the appellant for the Wasatch Blvd. appeal. He had issues with the agreement the Stapels signed, and sent proposed redrafts to the Stapels' Counsel. Mr. Topham said he was relying on a provision in the contract which states that "to allow adequate time for this agreement to be presented to, approved, executed and delivered by all other parties, the parties execution delivery of this agreement shall be deemed irrevocable for 30 days after such

parties' execution and delivery of this agreement to the City". The agreement that the Stapels signed last Friday was eventually signed by Mr. Taylor.

Mr. Topham received that agreement from Mr. Taylor on Friday at approximately 3:00 p.m. and a meeting of the Board of Adjustment to approve the withdrawal of the appeals was noticed at approximately 4:00 p.m. Just before 5:00 p.m. Mr. Topham received an email from Todd Barfuss, representing the Stapels, stating that the Stapels were asserting a right to withdraw their approval of the settlement agreement asserting that the presentation of the proposed amended agreements containing the changes proposed by Tom Taylor was a counter offer which voided the offer contemplated by the agreement.

Mr. Topham said that there is the provision that parties execution and delivery is deemed irrevocable for 30 days after delivery of the agreement to the City which occurred on September 26, 2007, which gives until October 26, 2007 for all parties to approve the agreement. There may be litigation on this matter, but the Council may want to consider approving the agreement and find out if the settlement agreement is enforceable.

- 1.3 Mr. Todd Barfuss, counsel for the Stapels, said that it is their position that the agreement initially signed on September 26th was their offer to settle. He said that it is his understanding that the City had not met with Mr. Taylor at the time to present a settlement offer, that the written offer that was signed by his clients was their offer. At a later time it was presented to Mr. Taylor and categorically rejected, and Mr. Taylor worked with Mr. Topham to redraft a substantially different or materially altered agreement that had many different provisions. That was never accepted by the Stapels. The rejection of the agreement signed by his clients and the submission of a counter offer he believes nullifies the irrevocable language, or binding effect stated in the first draft which was signed by his clients. He believes that there is an argument for the fact that there was not sufficient consideration given for an irrevocable clause, for which his client should be bound by. Secondly, his oral revocation of his clients offer to settle was conveyed to Mr. Taylor, a party of this agreement, prior to his agreement to or signing of the first draft. At the time the oral revocation was conveyed, he was still trying to negotiate with Mr. Barfuss alternate terms that the parties could agree to under the modified agreement, or second draft they presented. He stated that his clients are prepared to move forward on disputing the validity of the first agreement and wish not to be bound by that.

Mr. Barfuss said that the more they negotiated, the more it seemed clear that Mr. Taylor did not speak for all parties involved in this situation. The Stapels feel very strongly that if they go forward with this agreement as signed, they would be giving up rights to the Creek Road property and in turn not getting full rights to the Wasatch Blvd. property. The Stapels have no guarantee that the Wasatch neighbors will not bring litigation or attempt to bring an action that would effect their rights to use the Wasatch Blvd property for short-term rentals, therefore losing on both fronts rather than gaining something and

giving up something else which is there position for disputing the validity of the contract they originally signed.

- 1.4 City Attorney Shane Topham read the following provision from the agreement: "Upon any actual or asserted revival or pursuit of the Wasatch Blvd. appeal by Mr. Taylor or anyone else, then the Creek Road appeal shall be deemed correspondingly revived and available for pursuit by the Stapels, but only for the purpose of ultimately achieving final withdrawal and termination of the Wasatch Blvd. appeal and all related claims, actions and proceedings as provided in this agreement." He stated that there is a reciprocal provision concerning the Creek Road appeal and would submit the agreement deals with the second issue raised by Mr. Barfuss.
- 1.5 Mayor Pro Tem Jones said that he assumes the City's position is that the contract being made irrevocable, and that it was accepted within that period of time, even though prior to that it may have been rejected or disputed, but because it was ultimately accepted within the time period which the contract provided for, then the contract would be enforceable.

Mr. Topham concurred that was the City's position.

- 1.6 Gary Thorup, 3148 Creek Road, stated that he is not officially representing Mr. Taylor, but is his law partner. He disagreed with Mr. Barfuss' interpretation of contract law and suggested that if a binding agreement that states that the agreement shall remain open for 30 days irrevocably upon the signature of any party, that is a willing open contract that a person entered into voluntarily. This is an irrevocable agreement signed by one party and was open and fair and available for anyone to accept the agreement. Within that same 30 days Mr. Taylor did sign the contract and it was completed. The subsidiary negotiations that may have transpired trying to change the offer, but the offer did not change and both parties are bound by the agreement at this time.
- 1.7 Mayor Pro Tem Jones closed the public comment period.
- 1.8 Mayor Pro Tem Jones said that he believes that Mr. Thorup's analysis of the legal matter is correct, which supports the City Attorney's advice. He said that negotiations prior to the 30 day period do not terminate the offer. The provision in the agreement is that in the event it isn't enforceable on one side or the other, the agreement provides for what would happen. The agreement settles the dispute and one rental property would be approved and one would not be approved.

Mayor Pro Tem Jones asked the City Attorney what would happen if the Council were to deny the resolution approving the agreement, and what would happen if the resolution were signed.

- 1.9 Mr. Topham said that if the resolution is denied and the agreement is not validated within the 30 days, the Stapels would have the ability to withdraw their approval at any time after the 30th day. At that point, the appeals would be ready for decision by the Board of Adjustment and they would convene and make their decision. That decision would probably attempt to reconcile the two competing decisions in some way and one side would have a complete win and one side a complete loss. Following the Board of Adjustment decision, anyone aggrieved by the decision would have a right to appeal to Third District Court within the statutory time period.

Mr. Jones asked if the city could be subject to a lawsuit by Mr. Taylor by refusing to approve the agreement.

Mr. Topham said that the city's entry into a settlement agreement is within the City's discretion and he does not know that it would be a fruitful cause of action.

- 1.10 Mr. Topham said that if the resolution is signed, all of the neighbors are in favor of the agreement with the exception of one or two and he does not know if they will want to appeal the decision. The Stapels will have to decide how strongly they feel and would have a right to pursue litigation on the settlement agreement.

- 1.11 Councilman Bracken asked if the homes can be used if the contract is not signed, goes back to the Board of Adjustment, and it is appealed to the Third District Court

Mr. Topham said that the Creek Road property has never been granted any right to be used as a short-term rental property. The Wasatch Blvd. property has been granted a right, but it has been appealed in a timely fashion and the right has never matured.

- 1.12 **MOTION:** Councilman Bracken moved to approve Resolution No. 2007-40. The motion was seconded by Councilman Thomas and passed unanimously on a roll call vote.

Councilman Antczak moved to adjourn. The motion was seconded by Councilman Bracken and passed unanimously on a voice vote. The business meeting adjourned at 6:30 p.m.

Approved: November 27, 2007

Kelvyn Cullimore, Jr., Mayor

Don Antczak, Councilman

Scott Bracken, Councilman

Bruce Jones, Councilman

Gordon Thomas, Councilman