



Request for City Council Committee Action From the Planning Department

Date: August 19, 2002

To: Council Member Gary Schiff

Committee: Zoning and Planning Committee

Prepared or Submitted by: Jack Byers

Phone: (612) 673-2634

Approved by Chuck Ballentine, Director

Subject: Block E Appeal: Exception to the Decision of the City Planning Commission, dated August 15, 2002

Presenters in Committee: Jack Byers

Recommendation:

Deny appeal. Uphold approval and conditions of Minneapolis City Planning Commission from August 5, 2002

Financial Impact (Check those that apply)

No financial impact or Action is within current budget.

Action requires an appropriation increase to the Capital Budget

Action requires an appropriation increase to the Operating Budget

Action provides increased revenue for appropriation increase

Action requires use of contingency or reserves

Other financial impact (Explain):

Request provided to the Budget Office when provided to the Committee Coordinator

Previous Directives

Approvals by Minneapolis City Planning Commission: August 5, 2002:

- Planned Commercial Development: Conditional Use Permit Application C-#1000141/1000142
- Site Plan Review Application #SP1000138

Approvals by Minneapolis City Planning Commission, May 15, 2000:

- Planned Commercial Development: Conditional Use Permit Application C-#1000141/1000142
- Site Plan Review Application #SP1000138
- Alley Vacations Application # 1320/1321

See pages 2 and 3 of attached staff report (dated July 30, 2002) for list of other previous directives related this project.

Community Impact :

See Attachment D: Minneapolis City Planning Department Staff Report dated July 30, 2002 on proposed amendments to Conditional Use Permit Application C-#1000141/1000142 and Site Plan Review Application #SP1000138

ATTACHMENTS:

Attachment A: Notice of Exception to the Decision of the City Planning Commission, dated August 15, 2002 to David Dacquisto, Zoning Administrator from Rebecca Rom, Faegre and Benson, on behalf of Block E interests, LLC.

Attachment B: Excerpt from the Monday, August 5, 2002 City Planing Commission Minutes: Agenda items 45, 46, and 47.

Attachment C: Excerpt from the Monday, July 8, 2002 City Planing Commission Minutes: Agenda items 40, 41, and 42.

Attachment D: Minneapolis City Planning Department Staff Report dated July 30, 2002 on proposed amendments to Conditional Use Permit Application C-#1000141/1000142 and Site Plan Review Application #SP1000138

Attachment E: Excerpt from the Monday, May 15, 2002 City Planing Commission Minutes: Agenda items 20, 21, 22, 23, and 24.

Attachment F: Excerpt from the Minneapolis City Planning Department Staff Report dated May 4, 2000 on proposed amendments to Conditional Use Permit Application C-#1000141/1000142 and Site Plan Review Application #SP1000138, and Alley Vacations Application #1320/1321 (pages 16 and 26-27).

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REBECCA L. ROM
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August 15, 2002

David Dacquisto
Zoning Administration Office
250 South Fourth
Suite 300
Minneapolis, MN 55402

BY MESSENGER

Re: Block E - Notice of Exception to the Decision of the City Planning Commission

Dear Mr. Dacquisto:

Enclosed is the Notice of Exception to the Decision of the City Planning Commission appealing the City Planning Commission decision of August 5, 2002. This Notice of Exception is submitted on behalf of Block E Interests, LLC and relates to Block E. Thirteen (13) copies of a colored exhibit are also enclosed.

Please contact me immediately if you have any questions or concerns about this filing.

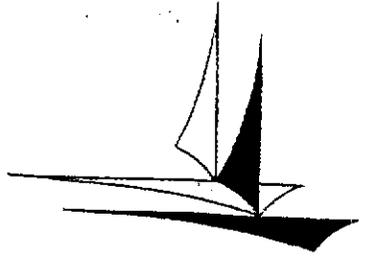
Very truly yours,

Rebecca L. Rom

RLR:mcdps
Enclosures
MI:906091.01

- cc: Dan McCaffery (w/enc.)
- Ed Woodbury (w/enc.)
- Mark Engebretson (w/enc.)
- Joe Antunovich (w/enc.)
- Chuck Kennedy (w/enc.)





City of Minneapolis
Inspections Division of Regulatory Services
Office of Zoning Administration
250 South 4th St. Room 300
Minneapolis MN 55415-1316
612-673-5836
Fax 612-673-3173

Notice of exception
To the Decision of the City Planning Commission

A complete application¹ shall be filed in the zoning office by 4:30 p.m. within ten (10) calendar days of the date of decision by the city planning commission.

MAILING/OFFICE ADDRESS:

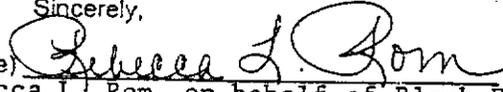
Zoning Administrator
Office of Zoning Administration
Public Service Center
250 S. 4th St. Room 300
Minneapolis MN 55415-1316
Office: 612-673-5867
Fax: 612-673-3173

Date: August 15, 2002
(Block bounded by Hennepin Ave.,
RE: Block E Sixth St. No., First Ave. No., and
(address) Seventh St. No.)
File No. BZZ-719

I, Rebecca L. Rom do hereby file an exception to the Decision of the City Planning Commission as provided for in Chapter 525.180;

525.180. Appeals of decisions of the city planning commission or board of adjustment. All decisions of the city planning commission, except zoning amendments, and all decisions of the board of adjustment shall be final subject to appeal to the city council and the right of subsequent judicial review. Appeals may be initiated by any affected person by filing the appeal with the zoning administrator on a form approved by the zoning administrator. All appeals shall be filed within ten (10) calendar days of the date of decision by the city planning commission or board of adjustment. No action shall be taken by any person to develop, grade or otherwise alter the property until expiration of the ten-day appeal period and, if an appeal is filed pursuant to this section, until after a final decision has been made by the city council. Not less than ten (10) days before the public hearing to be held by the zoning and planning committee of the city council to consider the appeal, the zoning administrator shall mail notice of the hearing to the property owners and the registered neighborhood group(s) who were sent notice of the public hearing held by the city planning commission or the board of adjustment. The failure to give mailed notice to individual property owners, or defects in the notice, shall not invalidate the proceedings provided a bona fide attempt to comply with this section has been made.
(2000-Or-034, § 2, 5-19-2000)

Further, I do hereby request that I be given an opportunity to express by case before the proper committee of the Honorable City Council.
The action being appealed and the reasons for appealing the decision are attached and made a part of this notice of exception.

Sincerely,

(Name) Rebecca L. Rom
Rebecca L. Rom, on behalf of Block E Interests, LLC
(Address) Faegre & Benson LLP
2200 Wells Fargo Center, 90 South Seventh Street
(Telephone) Minneapolis, MN 55402
(612) 766-7231

¹ Complete Application - includes a completed application form and attached statement explaining the basis for appeal, correct fee and mailing labels
BZZ-

CHECKLIST

1. Appeal Form (signed)
2. Written statement of reason for appeal
3. Waived Fee of \$150.00 (Waived if original applicant filing)
(Payable to the Minneapolis Finance Department)
4. List of property owners can be retyped on Avery 5160 Address labels by the person appealing (list can be faxed or copied) or labels reordered from:

Hennepin County Taxpayer Services Division
A-603 Gov't Center
4th Avenue South & 6th Street South
Telephone: 612-348-5910

**WRITTEN STATEMENT IN SUPPORT OF APPEAL
BY BLOCK E INTERESTS, LLC**

I. Introduction.

This written statement is submitted to the Minneapolis City Council by Block E Interests, LLC (the "Developer"), and is offered in support of the Developer's Notice of Exception filed on August 15, 2002. The Notice of Exception is an appeal from three separate decisions of the City Planning Commission, taken at its meeting of August 5, 2002, that imposed conditions on the Developer's request for (1) an amended CUP/PUD, (2) an amended CUP, and (3) amended Site Plan Review. In all three cases, the Planning Commission imposed a condition which would require the reconstruction of significant portions of the Block E Project for the installation of two exterior escalators.

The condition appealed by Developer reads as follows: *Condition 11a) (CUP/PUD and CUP) and 7) (Site Plan Review) The external escalators on the First Avenue side of the project, depicted in previously approved drawings dated May 4, 2000 will be constructed with the appropriate weather enclosures. Building plans for pedestrian links to and from these escalators will be modified as necessary to allow for full access by the general public to the Skyway System. Full public access to external escalators will conform to the Uniform Hours Program for the Skyway System.* This condition cannot be legally imposed by the Planning Commission and is wrong and unfair. Therefore the Developer respectfully requests that the Council reject it. The Developer requests that the following Condition be substituted for the Condition adopted by the Planning Commission (Condition 11a, CUP/PUD and CUP; Condition 7, Site Plan Review): *The fire stairs currently existing at First Avenue North will be modified and improved to provide access by the general public to and from the skyway system. Public access to the staircase will conform to the Uniform Hours Program for the skyway system.*

II. Facts and Background.

In May 2000, the Planning Commission and City Council approved concept plans for the Block E Project (the "Project"). Among other features, Developer's preliminary plans—and the original designs upon which they were based—proposed a pair of open-air escalators to convey pedestrians between the Project's plaza, on First Avenue North, and the Project's second-floor, skyway level.

Construction drawings consistent with the preliminary plans were prepared and submitted to the City for approval. However, the open-air escalators were not approved despite the Developer's earnest efforts. The drawings of the open-air escalators were rejected by the City of Minneapolis and the State in May 2001 because of an interpretation of the state building code. The Developer continued its appeal of this decision until the progress of construction forced the Developer to discontinue its efforts. During this process, the Developer requested that the City assist it in gaining approval for the Project's planned open-air escalators. These requests were systematically stymied and no approval of the proposed open-air escalators was granted.

In accordance with the direction of the City, the Developer reluctantly abandoned the open-air escalator design. Rejection of the escalator design by the City necessitated that the

Developer re-submit alternative plans for the entire plaza area at the corner of First Avenue North and Sixth Street North. These plans were subsequently submitted, reviewed, and approved by the City, permits were issued, and construction in accordance with the plans is now complete. No objection to the revised plans was ever issued or recorded in any form throughout the approval and construction period.

Nevertheless, now, more than a year later, after the expenditure of tens-of-millions of dollars and as the Project nears completion, the Planning Commission's directive has made approval of three important land use requests directly conditional upon the installation of external escalators. Moreover, the Planning Commission seeks to compel Developer to install "weather enclosed" escalators. This new design is not consistent with the May 2000 concept plans originally approved by the Planning Commission and thus falls outside of its authority.

To fulfill this unlawful directive and install exterior escalators at this late date, the Developer would be forced to demolish large portions of the Project's exterior wall along First Avenue North, raze the Project's plaza and fountain, and re-excavate portions of its subterranean parking garage. There is no Project funding available to pay for this large expense. A city-mandated change of this magnitude and under these circumstances will compel the Developer to seek legal recourse against the City to recoup the costs of such a major Project alteration.

For these reasons and the reasons that follow, the Council should reject these conditions.

III. *The conditions imposed by the Planning Commission should be rejected because the Developer relied, justifiably, on the City's permits when it constructed the Project in its present form, and its rights in the now-built Project have vested.*

The now-built Project was constructed, without exterior escalators, pursuant to valid building permits issued by the City. This fact—as detailed in the letter by Developer's attorney to Deputy City Attorney Michael Norton dated July 29, 2002 (a copy of which is attached hereto)—means that the Developer has powerful, vested, legal rights that cannot be taken away.

The Developer relied, in good faith, on the City's prior approvals, permits, and actions to build the Project. And although the City knew this, the City never indicated that the Developer's reliance was unjustified or misplaced. As a result, the Developer substantially changed its position and incurred enormous expenses to build the Project in its present form. It is therefore entirely unjust, highly inequitable, and unlawful for the City to undermine the Developer's settled expectations by now demanding the construction of something, at great cost, which the Developer originally sought to build but was told by the City that it could not.

Indeed, because of the type, location, and ultimate cost of the Project, it is difficult to imagine a scenario in which the Developer could be more severely prejudiced by the type of conditions proposed by the Planning Commission. After all, this Project is (1) a major, multi-story entertainment and retail facility (2) in the central business district of downtown Minneapolis (3) where tens-of-millions of dollars have already been expended on construction and related costs (4) where leases and other legal commitments were made based on the approvals and (5) where construction is substantially complete. All of these factors suggest that

the Developer would suffer extreme prejudice if the conditions imposed by the Planning Commission are supported by the Minneapolis City Council.

The Developer's rights in the existing Project have therefore vested and cannot be revoked in favor of the new conditions.

- IV. ***The conditions imposed by the Planning Commission should be rejected because the Project provides numerous avenues of travel between street-level and the skyway level. In addition, the Project design intentionally encourages pedestrian movement and activity at the street level and highly visible escalators from the plaza would diminish this desired street level pedestrian activity.***

Implicit in the conditions imposed by the Planning Commission is an objective. That objective is the encouragement and facilitation of pedestrian movement between street-level and the City's skyway system. However, this objective must be balanced against both the dynamics of the Warehouse District and the necessity – for the City and the Project – of encouraging pedestrian activity at the street level. Over-emphasizing or easing movement from the street level to the skyway level is not consistent with the existing Warehouse District. Too much flight to the skyways would damage the pedestrian orientation of the Project. Regardless, there is ample access to the skyway system within the Project through elevators, escalators, and stairs.

To summarize the existing alternatives for circulation between ground level and the skyway level in the Project as constructed, there are: elevators in the lobby off of First Avenue North; elevators and escalators in the lobby off of Hennepin Avenue; escalators in tenant space off the Hennepin Avenue lobby; an elevator and a major staircase in the Hard Rock Café; an elevator and a major staircase in Gameworks; an elevator and a major staircase in Border's Books. In addition, there is a possibility of several additional staircases passing through other tenant spaces. Taken together, these multiple means of accessing the street and the skyway level more than meets any requirement for circulation throughout the Project as a whole.

Although the opportunities for connection between the ground level and the skyway level are abundant, the Project is specifically designed to encourage people to utilize the sidewalks around Block E as they do so in the other blocks in the Warehouse District. No expense has been spared to make the sidewalks highly desirable to pedestrians, including an elaborate water fountain, 39 large diameter trees, ornate gardens (with a sound system), grillwork, period lampposts, colorful banners, and sidewalk cafes. A highly visible escalator providing direct connection to the skyway level will instead draw people away from the sidewalks and up to the "skyway highway," leaving the sidewalks empty and devoid of people.

- V. ***Even if an additional path of travel is required, the exterior escalator conditions should be rejected because access to a convenient staircase would be preferable.***

Finally, to indicate its willingness to compromise, the Developer will, if directed, modify an existing staircase to become an additional path of travel between First Avenue North and the skyway level. Discussions with the City fire marshal and representatives of the City's Regulatory Services, Inspections Division indicate approval of this approach. When this concept

was discussed with the City at the Committee of the Whole's meeting of June 27, 2002, and at the Planning Commission meeting on August 5, 2002, it was favorably received.

The existing fire stairs are located approximately mid-block on First Avenue North. This staircase will be highly visible to pedestrians on First Avenue North because of its prominent placement in the Project (directly on the plaza and not under the skyway) and a large, well designed and brightly lit blade sign. The staircase will be accessed directly from the outdoor plaza on First Avenue North through semi-transparent glass doors and will contain an significant upgrade in materials between the first and second floor levels. Improved lighting will be installed along with bright colors, security cameras, and duress alarms. The staircase will land on the skyway level adjacent to the space occupied by Coldstone Creamery and the escalators to the movie theaters on the third floor, adding activity in the entertainment lobby of the Project. This staircase location differs significantly from the staircase location presented to the Planning Commission on August 5, 2002. It is more prominent, more visible, more convenient, more transparent, and more user-friendly than the proposal put forward at the Planning Commission meeting of August 5, 2002. Depictions of the improvements to the First Avenue North staircase proposed by the Developer are attached.

VI. *Conclusion.*

For the reasons outlined above, the Developer urges the Council to reject the conditions imposed by the Planning Commission and eliminate any requirement that the Developer be compelled to install external escalators as part of the Project.

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FAEGRE & BENSON LLP

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July 29, 2002

Michael T. Norton, Esq.
Deputy City Attorney
300 Accenture Tower
333 South 7th Street
Minneapolis, MN 55402-2010

VIA FAX AND MAIL

Re: Block E

Dear Mike:

After years in the making, the redevelopment of Block E (the "Project") is nearly complete. Throughout the Project's long history, Block E Interests LLC (the "Developer") has worked closely and in good faith with the City to assure the Project's success. The Developer has consistently consulted with the MCDA and City Planning staff on modifications to the concept plan, has met every requirement of the Project, and has obtained all necessary City approvals.

You are aware of the confusion regarding the Redevelopment Contract, the site plan, and PUD. On the cusp of the Project's grand opening, the City has arbitrarily chosen to interpret conditions of the Redevelopment Contract in a manner that is detrimental to the financial success of the Project. To accept the interpretation of the City would require major design changes and an entirely new set of approvals which is also oddly at variance with the City's real economic interest.

The Planning Department's decision to place numerous issues before the Planning Commission (see Staff Report of 7/5/02) raise serious legal claims that are pertinent to your advice to the Planning Commission. All the matters now being raised by the Planning staff are literally set in concrete and were resolved in turn with the appropriate City departments and agencies as is evidenced by the issuance of building permits. I am available to review each in turn with you as any claim by my client could result in very large damages for the City.

For the reasons which follow, we believe that the Planning Department's assertions and implications are without merit, and are supported by neither the facts nor the law.

1. *The City cannot reopen its previously issued approvals for the Project because the Developer's rights in those approvals have vested.*

The Project has received, and operated under, a variety of municipal approvals granted by the City, including the PUD, CUP and various Building Permits. Under Minnesota law, a landowner's property right in such approvals will vest and cannot be revoked (even if improperly granted) when "nothing remains to be done" by the landowner prior to issuance of the approval, Stotts v. Wright County, 478 N.W.2d 802, 805 (Minn. App. 1991), and the landowner would suffer "substantial prejudice" by such revocation. Hawkinson v. County of Itasca, 231 N.W.2d 279, 284 (Minn. 1975).

With regard to the measure of substantial prejudice faced by a given landowner, although the courts have found that it is "impossible to fix a definite percentage of the total cost which [would establish] vested rights," *id.* (quoting Board of Supervisors v. Paaske, 98 N.W.2d 827, 831 (Iowa 1959)), it is clear that the time of vesting "depends on the type of the project, its location, ultimate cost, and *principally the amount accomplished under conformity* [with the granted municipal approvals]." *Id.* (emphasis added).

Here, given the factors listed by the court in Hawkinson, the Developer has every right to believe that the approvals previously granted by the City are now fully vested. The building permits and other approvals for the Project (including those relative to the disputed design changes) were properly issued, and the Project itself is now almost fully accomplished in conformity with those permits. In addition, if the type, location, and ultimate cost of the Project are important factors, it is difficult to imagine a scenario in which the amalgam of these factors would more clearly support the creation of vested rights because in this case we have (1) a major, multi-story entertainment and retail facility (2) in the central business district of downtown Minneapolis where (3) tens-of-millions of dollars have already been expended on construction hard-costs and (4) where leases and other legal commitments were made based on the approvals. Consequently, the Developer would suffer extreme prejudice if the City attempted to undermine the existing approvals, and the Project's existing approvals have therefore vested and cannot be revoked.

2. *Developer has detrimentally relied on the City's representations regarding the Project's approvals, and, because of those representations, the City would be estopped from enforcing any further requirements.*

As previously suggested in section 1, above, the Developer has relied on the City's repeated representations that the Project was on track and that the necessary approvals had been granted. These representations, together with the law of estoppel, prevent the City from taking any enforcement action to require new or different actions or approvals or prevent or delay the Project's opening. See, generally, State of Minnesota, City of Eden Prairie v. Liepke, 403 N.W.2d 252 (Minn. App. 1987). We understand the City has agreed the opening will not be delayed and partial Certificates of Occupancy will be duly issued as Project elements are completed and safe for occupancy.

The rule in Minnesota, as applied in Liepke, is that:

A local government exercising its zoning powers will be estopped when a property owner, (1) relying in good faith (2) upon some act or omission of the government, (3) has made such a substantial change in position or *incurred such extensive obligations and expenses* that it would be *highly inequitable* and unjust to destroy the rights which he ostensibly had acquired.

Id. at 254-55 (quoting Ridgewood Development Co. v. State, 294 N.W.2d 288, 292 (Minn. 1980) (emphasis in original)).

When this rule is applied to the Project, it is clear that all three elements have been satisfied. The Developer has relied, in good faith, on the City's prior approvals, permits, and verbal assents; and, as a result, the Developer has substantially changed its position and incurred extensive expenses. Consequently, in this case, because it would be highly inequitable for the City to undermine the Developer's settled rights and expectations, estoppel would apply.

3. *No further City approvals are required because, even if such approvals were necessary, the disputed design changes were "deemed approved" by operation of Minnesota Statute Section 15.99.*

Assuming that additional approvals by the Planning Commission were required, those approvals have now been granted by operation of law.

Minnesota Statute Section 15.99, Subdivision 2, states in pertinent part that,

[N]otwithstanding any other law to the contrary, an agency [including the City and its Planning Commission] must approve or deny within 60 days a written request related to zoning, septic systems, or expansion of the metropolitan urban service area for a permit, license, or other governmental approval of an action. Failure of an agency to deny a request within 60 days is approval of the request.

Additionally, if such an action requires the approval of more than one agency, the 60-day period begins to run for all agencies on the day the request is received by the first agency. See Minn. Stat. 15.99, Subd. 3(b). And "[t]he agency receiving the request must forward copies to other state agencies whose approval is required." Id.

In this case, all of the design changes now challenged by the Planning Department were formally submitted to the MCDA for that agency's approval. In each instance, the MCDA explicitly approved the submitted changes, the City Building Inspector issued building permits, and the Project has been constructed in accordance with the permits. If any of these changes required further approval by the Planning Department or Planning Commission, it was incumbent upon the MCDA to forward the Developer's submissions to its sister City agency and

for that agency to act within the period required by law. And absent formal action by the Planning Department or Planning Commission to deny the Developer's proposed changes within the period required by law, those changes have been "deemed" approved. See e.g., Demolition Landfill Services, LLC v. City of Duluth, 609 N.W.2d 278 (Minn. App. 2000).

Here, in fact, the Developer and MCDA did regularly advise the Planning Department staff of changes. Periodic joint Planning/MCDA/Developer meetings were held. To our client's knowledge, the Planning Department approved every change, either explicitly in such meetings, or by inaction.

Under both the PUD approval and the Site Plan ordinance, staff of the Planning Department held delegated authority to approve changes (or determine if they required Planning Commission review). In a very complex project such as Block E, numerous minor design changes, of course, will occur as leasing progresses. Such a staff delegation to the Planning Director is essential. Here, never once, within the 60 day Section 15.99 time frame, did the Planning Department reject a change. While the Planning Department requested a zoning application after the 60 days had run, in no way has the Developer agreed to or waived its rights under Section 15.99.

In this case, the 60-day period for the changes has expired, and during the applicable 60-day periods, the Planning Department or Planning Commission had taken no action to deny any of the Project's design changes. Consequently, all of the Project's design changes have, in fact, been approved by operation of law.

4. *If further approvals of changed designs are "required" in this instance pursuant to unwritten City policies, the City will be liable for damages under Snyder v. City of Minneapolis.*

No written provisions of the City Zoning Code or Redevelopment Contract make the Project's design changes subject to further review. Nevertheless, the fact that the staff suggests that the City may be operating pursuant to nebulous, unwritten policies. If so — and if the "required" additional approvals or changes arise from unknown policies — we submit that the Developer will be entitled to recover damages from the City under Snyder v. City of Minneapolis, 441 N.W.2d 781 (Minn. 1989).

In Snyder, the City was held liable for the Zoning Department's negligence when its staff misapplied unwritten City policies and a land use applicant was prejudiced thereby. See id. at 786-87 (puncturing discretionary immunity and awarding damages).

In this case, as in Snyder, the Developer has relied on the City's numerous representations concerning the status of proposed and implemented design changes, including the express condition of the CUP that provides that the Planning Department, not the Planning Commission, will approve the final site plan. Consistent with the City's representations and the CUP, as late as June 4, 2002, in a letter sent over the signature of Charles Ballentine, Director of

the City's Planning Department, the City indicated that no substantial issues or process remained unresolved or undone prior to the Project's completion. Moreover, in a meeting held with the Developer on June 18, 2002, the City's Planning staff gave its unanimous consent, subject to final review of plans, to all of the now-disputed design changes. Building Permits were issued by the City for all such changes. As it had in the past, the Developer then relied on the City's representations to make important decisions — such as authorizing final interior construction and substantial finishing work, for example.

But if the City's unwritten policies actually require new approval by the Planning Commission or can lead to new design obligations or revoke past approvals, as in Snyder, those policies flatly contradict the Planning Staff's prior representations and the issued Building Permits. And if the Staff's representations were erroneous, as in Snyder, the Developer has been damaged.

5. *Contrary to certain assertions, the Redevelopment Contract does not empower the Planning staff or Planning Commission to demand additional or "special" approvals.*

Although the motives underlying the Planning Department's eleventh-hour push are unclear, certain staff and Planning Commission members have intimated their belief that, because the Project has received public subsidy, the Planning Department or Planning Commission is somehow vested with additional approval authority or can impose "special" conditions on the Project. This belief is simply erroneous.

The City's Zoning Code details the standards and process which regulate all development projects in the City. Within its field, the Code establishes a uniform and comprehensive process, but nowhere does the Code state or suggest that development projects that receive public subsidy are subject to additional layers of review and approval or can have "special" obligations imposed by the Planning Commission. As a result, it is clear that the general approvals process defined by the Code is applicable to the Project, and the Developer has adhered to it. Many of the issues raised in the staff report are clearly well beyond normal zoning requirements and would not be within the City's land use powers.

The Amended and Restated Contract for Private Redevelopment between the MCDA and the Developer, dated August 31, 2000 (the "Redevelopment Contract"), requires that the Developer submit to the MCDA all proposed modifications to the design of the Project. The MCDA is the only entity with development control rights as specified in the Redevelopment Contract. However, the Redevelopment Contract does not confer the Planning Department or Planning Commission with any special authority beyond that which those agencies otherwise enjoy. Nor does the mere presence of a development contract trigger additional obligations under the Code. The Developer has the approval of MCDA for the Project as built.

Consequently, since the Developer has already secured all of the approvals mandated by the Code, the Planning Commission is simply not empowered to require additional approvals or impose new "special" conditions or obligations.

Mr. Michael T. Norton
July 29, 2002
Page 6

Mike, we needed to communicate these claims because we assert the Planning Commission has no jurisdiction here and the law, whether by 60 day rule, vesting or estoppel, precludes imposition of new, special design requirements at this late time. Of course, we want to cooperate with the City, MCDA and Planning staff and hopefully there will never be a need to raise these legal claims. The Developer will continue the process with the Planning Commission, but it does so under a reservation of all its claims and rights and under duress. As a result, your office needs to be aware of our claims and the major potential exposure of the City for the actions here.

Again, I suggest we meet to discuss this due to its extraordinary nature and importance. Hopefully we can change the climate here to be a more positive one that celebrates this fabulous Project.

Very truly yours,

/s/

Rebecca L. Rom

M1:897857.03

cc: Carol Lansing
Chuck Ballentine
Chuck Lutz
Dan McCaffery
Ed Woodbury
Mark Engebretson

08/19/2002

