VIA ELECTRONIC MAIL:

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Re: Appeal of Approval of Conditional Use Permit For an Accessory Building Greater than 10,000 Square Feet in the Rural Residential Zone ("Woodward Project")

Dear Summit County Council:

I am writing to provide supplemental information and legal authority in support of the appeal filed regarding the Woodward Project. The appeal of this matter is scheduled for February 14, 2018.

I. Background.

Based upon the record before the Planning Commission, several key facts are not in dispute. First, the land in question is subject to the Hillside Stewardship Zone. The development being sought through the Woodward Project, which involves the development of a new ski resort operation and a massive commercial building, are not permitted in the Hillside Stewardship Zone. The underlying basis for the assertion that the proposed development is allowed, despite being prohibited in the Hillside Stewardship Zone, is that development rights are vested under a 1999 Development Agreement. It is not disputed that the Development Agreement expired and terminated by its own terms on July 26, 2009.

The Development Agreement sets forth the details of parties' agreement to grant to the developer certain rights to develop the mountainside and engage in certain outdoor activities, despite the underlying zoning, in exchange for developer obligations to provide benefits to the County. Section H of the Developer Agreement states, "The County also desires to receive certain public benefits and amenities, and Developer is willing to provide these public benefits and amenities in **consideration** of the agreement of the County for increased densities and intensity of uses in the Project pursuant to the terms of this Development Agreement"

The obligations included:

- Protecting the Visual Corridor and Near View Buffer with Project Layout;
- No Build (17 acres) around Rock Outcropping (Quarry);
- Protecting the 40' wide buffer surrounding existing wetlands and stream;
- Provide an easement for publically developed trails;
- Noise level protection;
- Explore public transportation to the development;
- Plan to mitigate noise, traffic control, and hours of operation during construction on adjacent residential uses;
- Protection for Lorin and Debra Redden's water well;
- Temporary yurts;
- Sale Tax Revenue Targets.

Ultimately, the developer elected to not pursue the development contemplated in the Development Agreement, with the exception of a narrow band of property on one side of the mountain for a tubing hill that is limited to operation between November and March. Because the Developer elected to not pursue any other development, the developer did not have to fulfill its contractual duties and obligations in the Development Agreement. To date, those developer obligations have not been fulfilled and current CUP does not include or enforce those obligations.

II. Standard of Review.

The Summit County Council is to consider the application for a conditional use permit *de novo*. This means that there is no deference whatsoever given to any aspect of the Planning Commission's actions or decisions, and that decision is to be disregarded. The applicant is submitting its application to the Council as if for the first time, and the Council is to consider the application as if it had never been submitted to the Planning Commission.

The Planning Commission decision, and the decision of this County Council are also subject to the substantial evidence test. This substantial evidence test applies to any "final decision of a land use authority or an appeal authority" acting in a quasi-judicial capacity. *See* UTAH CODE ANN. §17-27a-801(3). A county acts in a quasi-judicial capacity when it interprets and applies law. *See Carter v. Lehi City*, 269 P.3d 14, ¶34, (Utah 2012); *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207, 210 n.5 (Utah Ct. app. 1998). 'Substantial evidence' is that "quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *See Bradley v. Payson City Corp.*, 70 P.3d 47, 52. The County's interpretation of the vested rights in question will be illegal if not supported by substantial evidence. *Id.; see also* UTAH CODE ANN. §17-27a-802(3)(d).

III. The Only Possible Vested Use on the Property is the Existing Tubing Hill.

The only record evidence before the Planning Commission was that the only consistent use of the land in question was for the existing tubing hill operation. On December 1, 2016, the County legal department issued a memorandum that explained:

> When development agreements expire, the property reverts back to the underlying zone, but the existing uses, densities and configurations vest. Those become legal nonconforming uses within the underlying zone. The permanent buildings contemplated in the Development Agreement, including the lodge, learning center, and maintenance buildings, were not constructed and did not vest prior to the expiration of the Development Agreement. However, recreational uses, ***to the extent that those uses have occurred within Gorgoza Park***, have vested. (Emphasis added).

See, Legal Memorandum from David L. Thomas, December 1, 2016, Page 4, Paragraph 10.

Accordingly, in order to determine what legal nonconforming uses may have vested, given the County's own framework for analysis, it is necessary to determine what uses actually occurred within Gorgoza Park. As noted by the County Attorney, the lodge, learning center, and maintenance buildings were not constructed and did not vest. There are multiple other uses that are described in the Development Agreement that never occurred on the property, including: ski lifts, snowboarding terrain park, ice rink, toboggan and luge rides, climbing wall, BMX and mountain bike trails and an alpine slide. Like the lodge and learning center, these uses were not constructed and did not vest.

The only record evidence before the Planning Commission when it issued its decision was the limited use of the property for the existing tubing hill. As such, the only possible vested use is the location and configuration of the existing tubing hill.

It appears that the developer has realized the fatal flaw in the submission to the Planning Commission and is now attempting to insert facts into the record that suggest that other uses may have taken place on the property. However, despite the eleventh hour attempt to load the record, there is still no evidence of when the alleged uses took place and the actual extent of those uses. Moreover, any vested rights, in addition to the tubing hill, must be narrowly confined to actual uses. For example, if there was a modest rope tow for a small ski hill on a portion of the

property, only that use could be potentially vested. That use would not support the notion that a four person, fixed grip chairlift can now be installed on the property.

Another problem with the developer's argument is that any prior uses – other than the tubing hill – have not taken place for more than ten years. According to the developer's own website, the only uses that were in existence in 2009, when the Development Agreement terminated, were the tubing hill and an illegal mini-snowmobile track. Screenshots of the developer's web page from March 27, 2009 and May 2, 2010 are attached to this letter. The staff reports, submitted to both the Planning Commission and the County Council, have confirmed that the uses have remained unchanged since 2009.

To the extent that certain uses may have existed at some point, more than 10 years ago, (such as a skateboard ramp in a parking lot), those non-conforming uses have been abandoned and cannot now be resurrected. The Utah Code provides that, "Abandonment may be *presumed* to have occurred if…(ii) the use has been discontinued for a minimum of one year; or (iii) the primary structure associated with the non-conforming use remains vacant for a period of one year." *See* Utah Code Ann. §17-27a-510(4)(c)(ii)-(iii)(emphasis supplied). The facts establish that the nonconforming use rights, if any, for any use other than the existing tubing hill, are legally *presumed* to have been abandoned in 2009, when the Development Agreement expired. In *Vial v. Provo City*, a nonconforming basement apartment used as a rental was deemed abandoned after a previous owner discontinued renting the basement for a period longer than a year. 2009 UT App 122, 210 P.3d 947. In *Rogers v. W. Valley City*, a landowner's nonconforming use of a parcel as horse property was abandoned because the landowner removed the horses from the parcel for a period longer than one year. 2006 UT App 302, 142 P.3d 554.

Accordingly, even if there was historic evidence that a portion of the property was used for a non-conforming use during the term of the Development Agreement, those uses have been abandoned and extinguished due to non-use for the last decade. The record evidence before the County Council establishes that the only vested use on the property is the existing tubing hill.

IV. The Developer is Prohibited from Expanding Non-Conforming Use of the Property.

The only allowed non-conforming use of the property is the existing tubing hill and related operations. It is evident that the developer seeks to expand these non-conforming uses. The following statements are taken directly from the CUP application[1]:

[1] Staff Report and Legal Memorandum, February 14, 2018, Page 2-3

- Expanded Snowmaking;
- Expanded mountain biking trail system, dirt jump / freestyle-mountain terrain;
- Expansion of the existing parking lot;

Additionally, the applicant will be expanding the following:

- Adding snow guns expands the use of outdoor recreation;
- Adding lights expands the use of outdoor recreation;
- Adding a skate park expands the use of outdoor recreation;
- Adding a half-pipe expands the use of outdoor recreation;
- And adding a 52,107 sq. ft. building, no matter what it's called, expands that use.

It is axiomatic in land use law and under the County's own code that legal non-conforming uses cannot be expanded. Under code provision 10-8-1-(C) "A non-conforming structure or non-conforming use shall not be enlarged in any way, unless it conforms to the provisions contained in this Title." Obviously, the word shall is mandatory, not permissive. On June 25, 2014, County Planner Tiffanie Northrup-Robinson explained that when the Development Code was adopted in 1998, expansion of non-conforming uses was allowed through a Conditional Use Permit (CUP) process. In 2004 the Code was amended to allow for limited expansion through a Low Impact Permit (LIP). At the direction of the County Council due to some controversial projects, in 2009 that language was removed and expansion of non-conforming uses was not allowed at all.

As explained above, the only possible vested use is the existing tubing hill and that non-conforming use, cannot be expanded.

V. The Tubing Hill "Accessory Structures" Already Exist and Cannot be Expanded.

Insofar as the only vested use is the existing tubing hill, any structure that is built on the property in question must be an accessory to that use. It is obvious that a 52,107 square foot training facility to be used for, among other things, BMX biking, gymnastics, cheerleading and digital media is not a necessary accessory for a tubing hill. Indeed, the only accessory buildings necessary for a tubing hill – a ticket office, storage shed and warming yurts – already exist.

To the extent that the tubing hill is the only legal non-conforming use on the property, any accessory structure should be limited to what is already in place. The attempt to shoe-horn a massive entertainment complex into an exception for an "accessory structure" is not permitted by code and would impermissibly result in a massive expansion of a non-conforming use.

Even if it were true that other limited uses have also been "grandfathered in" as vested uses under the Development Agreement, those limited uses cannot be used to justify the 52,107 square foot "accessory" building. Under the County Code "Accessory" is defined as a minor use, or structure, or on premises sign, which is clearly subordinate to a principal use or structure which has been issued a permit under this Title." It is evident that the 52,107 square foot commercial building is not subordinate to the uses vested on the property. Indeed, many of the uses proposed for the commercial building have nothing to do with tubing. This is a case of the tail wagging the dog. The reality is that any vested uses on the mountain would be accessory to the massive commercial building complex. The proposed building simply does not meet the definition or intent of an accessory structure.

If the developer wants to build a massive commercial building in this area, it should follow the rules. It should ask for the property to be rezoned to a zone that allows this type of development and and the public should be allowed to weigh in on that request. But, this type of commercial development should not be shoehorned into a zone that was not intended for commercial development of this size and nature by calling the building something that it is not.

VI. The County Should not Write the Developer a Blank Check to Develop Whatever it Wants.

The Developer and County staff have taken the position that all possible rights set forth in the Development Agreement have vested and run with the property in perpetuity. This expansive position is grounded in the language in the Development Agreement's use of the phrase, "other uses consistent with the outdoor recreation setting." Following this line of reasoning the following uses would be permitted by the applicant:

- Horseback Riding
- Zip Lines
- Ropes Courses
- Alpine Slides
- Alpine Coasters
- Climbing Walls
- Pools
- Any and all winter and summer sports
- Any and all uses "consistent with" outdoor recreation setting, including Cabins/Condos, restaurants, shops, etc.

On February 28, 1017 during the Snyderville Basin Planning Commission, Commissioner Klingenstein highlighted the practical concern of resurrecting this undefined and virtually limitless phrase from the expired Development Agreement. He explained his struggle with the "the part of the language that says '…and other uses that are consistent with the mountain outdoor recreation setting.' The Park City ski area is an outdoor mountain recreation setting with hotels and condominiums."[2]

The reality is that there is the no activity that would not fit within the concept of a being "consistent with" outdoor recreation. In sum, the conclusion that the developer has a vested right to develop the property under the expired Development Agreement is tantamount to a blank check to engage in unlimited development on the property. This result is inconsistent with the County Attorney's conclusion that the only rights that have vested are those related to actual prior uses on the property and is plainly contrary to the best interests of the County and its citizens.

VII. Allowing Uses to Vest Under an Expired and Terminated Development Agreement Creates a Very Dangerous and Untenable Precedent.

It is not disputed that the Development Agreement terminated in 2009 and that no further development is now allowed under that agreement. However, now the developer is attempting to resurrect the benefits allowed under the development agreement, namely development of the mountain in the Hillside Stewardship zone and certain outdoor uses. But, the developer is not agreeing to fulfill any of the obligations set forth in the Development Agreement. This is the worst possible outcome for the County and the surrounding residents. The developer is – in essence - being granted all of the rights of the Development Agreement, while at the same time stripping away all of the developer's obligations. This is an untenable and unsupportable position. Either the Development Agreement is expired, and all rights and obligations are extinguished or the Development Agreement is revived and all rights and obligations remain enforceable.

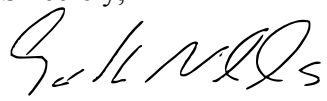
The policy being embraced by the developer and the County staff sets a dangerous precedent. Developers will argue that all rights in a development agreement vest the minute the agreement is signed and that those rights run with the land forever. The developer then would have the incentive to not meet its obligations under the development agreement, allow the agreement to expire (thus wiping away all obligations for the developer) and then pursue the development of the "vested uses" without the need to comply with any of the developer's obligations.

[2] SBPCMM 2/28/17, Page 12

If the County Council approves this application, it can expect every developer that has ever entered into an agreement with Summit County to scour all expired and terminated development agreements and then attempt to enforce all rights discussed in those agreements – because those rights have purported vested in perpetuity – regardless of whether the developer performed the corresponding obligations in those agreements. That result will prove to be a disaster for the County and it should be avoided. Instead, the County should carefully define the actual rights that have been vested and not abandoned. Here, that use is a tubing hill. That is the only use that has existed consistently since 2009. And that use should define and control the scope and size of legitimate accessory structures. Respectfully, those structures already exist.

For the foregoing reasons, the CUP for the Woodward Project should be vacated and reversed.

Sincerely,



Scott K. Nichols

GORGOZA PARK

Winter fun for everyone.

Skiing and riding aren't the only ways to have fun in the snow. Experience the thrills of Gorgoza Park, featuring a lift-served, lighted tubing hill. There are also plenty of adventures for little tubers such as a miniature snowmobile track and the Fort Frosty play area. And when you're ready to come in from the cold, there's a cozy yurt to warm-up in.

Let the convenience of one of three lifts take you to the top of the hill. Then, enjoy the unpredictable thrills of sliding down the mountain on an inner tube. And the fun doesn't stop when the sun goes down, because Gorgoza Park offers the fun of night tubing, too.

For more information on Gorgoza Park, call 435-658-2648, no reservations accepted.

Gorgoza Hours 2008-2009 Winter Season

Regular Season

☐ Dec 13* - ~~Mar 29~~ Extended through April 5th!	Sat/Sun 12:00pm - 8:00pm Mon - Fri 1:00pm - 8:00pm

Special Hours

☐ Dec 20 - Jan 4	10:00am - 8:00pm
☐ Jan 17 - Jan 19	10:00am - 8:00pm
☐ Feb 14 - Feb 16	10:00am - 8:00pm
☐ Feb 17 - Feb 20	12:00pm - 8:00pm

* conditions permitting

GORGOZA TUBING

Give your weary legs a needed break on the Gorgoza Park tubing hill. Featuring three beginner and four advanced lanes, Gorgoza Park is an adventure that's sure to thrill the entire family.

Tubing Rates 2008-2009 Winter Season

Ages	1 Ride	2 Hours	4 Hours
☐ **3-6 years old**	$3	$10	$15
☐ **7 year old & up**	$8	$20	$29

RULES AND REGULATIONS

All tubers must sign a waiver. Ticket includes the use of tubes and tows. One person per tube. Minimum age is three years old and kids under 18 years must have a parent or legal guardian's signature. For their safety, children 3-6 are not allowed on upper tow or lanes. Conditions may determine restrictions and operating hours. No ski boots.

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Tubing at Gorgoza
Sleigh Rides
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Fort Frosty

Tubers ages 6 and under will love this popular kids play area with a unique tubing carousel, as well as other fun snow features.

Fort Frosty Rates 2008-2009 Winter Season

☐ **6 years old and under**	$6	FREE with purchase of 2 or 4 hour 3-6 year old tubing ticket

RULES AND REGULATION

For kids 6 and under. Parent or guardian must accompany child while participating in Fort Frosty activities. All participants must have a parent or legal guardian sign waiver.

Print the Gorgoza Park Waiver: CLICK HERE.

GORGOZA MINI-SNOWMOBILE RIDES

Kids ages 5-12 will enjoy the thrill of revving miniature snowmobiles while zipping around the oval course.

Gorgoza Mini-Snowmobiles Rates 2008-2009 Winter Season

☐ **5-12 years old (Max 110lbs)**	$9/ride

RULES AND REGULATION

For kids ages 5-12 or a weight limit of 110 lbs. Helmets must be worn and are included in the cost of the ride. All participants must have a parent or legal guardian's signature on waiver. All kids must be able to demonstrate they can safely handle snowmobiles prior to riding. Click HERE for additional safety information.

Print the Gorgoza Park Waiver: CLICK HERE.

2008-2009 Group Rates

Download our 2008-2009 Gorgoza Park Group Rates sheet for great rates on groups as small as 20. Or, get details on how your group can rent the entire park.

How to Get to Gorgoza

Take the Jeremy Ranch exit (#141) off I-80 and proceed to 3863 West Kilby Road (frontage road on south side of the freeway). There's also the All Resort Express shuttle service that can take you directly to Gorgoza Park. Call 435-649-8999 to make arrangements.

Low Temperature: 41°F
Last 24 Hours: 0"
complete report

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Gorgoza Hours 2009-2010 Winter Season

Regular Season	
☐ Dec 5 - April 11 (extended from April 4!)	Sat/Sun 12:00pm - 8:00pm Mon - Fri 1:00pm - 8:00pm
Special Holiday Hours	
☐ Dec 19 - Jan 3	10:00am - 8:00pm
☐ Jan 16 - Jan 18	10:00am - 8:00pm
☐ Feb 13 - Feb 15	10:00am - 8:00pm
☐ Feb 16 - Feb 19	12:00pm - 8:00pm
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Sign up for email updates
Get Snow Reports and Resort information customized for you.

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Park City Mountain [illegible] 1310 [illegible] | Park City, [illegible] 435-649-81[illegible] PCMinfo@pcmr.[illegible] Park City Mountain Resort.