

Via E-Mail

City of Cle Elum
119 West First Street
Cle Elum, WA 98922

May 6, 2023

Re: Untimely Notice of May 8th Regular Council Agenda City Heights Phase II Final Plat Review and Violation of Development Agreement

Dear City Councilmembers and Mayor:

We are writing to express our deep concern and disappointment upon receiving, on May 5th, notice of the City Council's agenda for the regular meeting on Monday, May 8th, which includes a staff recommendation and proposed resolution to deny the City Heights Phase 2 final plat. The City's proposed action comes at great cost and risk to the City. The City should instead faithfully adhere to the Development Agreement (DA), particularly here its process for Implementing Approvals in Appendix Q, which prohibits this action.

The City's late notice comes as an unwelcome surprise, given that City Heights just met with City staff earlier this week to discuss the substantial progress made on the same two items (water main and secondary access) that are now being improperly used as a political excuse to recommend denial of the Phase 2 final plat. At that meeting, City staff gave absolutely no indication of such an impending recommendation. Given that this was never disclosed by staff despite this regular project meeting, which have otherwise was productive, we can only suspect that the Mayor is hastily asking the City Council to deny the final plat because he is well aware these very items are nearly complete.

Staff's abrupt recommendation that the City Council deny the final plat would force the Council to violate the well-established process for Implementing Approvals, which expressly include final plats. *See* Appendix Q. The Planning Director is required to issue a decision on each Implementing Approval, including this final plat, which then is subject to a 15-day appeal period to this City Council. Appendix Q, Steps 4 and 5. Because this Council serves as the appeal authority, it would obviously be improper for the Council to make the very decision for which they must hear any appeal.

None of this DA process is new, yet if Council proceeds with its agenda on Monday, the City would (again) be in undisputed violation of the DA, ignoring Judge Kallas' decision, and subjecting it again to an arbitration award and costs. The City's failure to comply with this DA process is clear error: staff's recommendation of denial with one day notice to City Heights, with no Planning Direct decision and no appeal process to this Council, fundamentally violates

Appendix Q. Council should reject this invitation to violate the DA and instead adhere to the process set forth in the DA and Judge Kallas' decision.

The proper steps for the City to continue to comply with the DA and the Special Master recommendation are as follows:

- Complete work with the applicant on the recommendation points made by the Special Master (assigned by Kallas).
- When the applicant believes they are 'complete,' they will notify the City.
- Proceed with Step 4 and 5 of Appendix Q.

As the City is well aware, the City's own consultants and staff meet weekly with City Heights. Prior to this notice we were acting on the good faith belief that both parties were collaborating on the content necessary to complete Step 4, as prescribed by the Special Master. On May 2nd, City Heights representatives (Barbara Rodgers) and engineer (Brett Pudists) met with City staff (Ben Annen and Christina Wollman) and discussed the Phase 2 final plat considerations, specifically, including Zone 3 water. Staff never mentioned that Mayor McGowan intended to put this matter on the Council's agenda, let alone that it anticipated recommending denial of the final plat. This alone should shock the Council.

Before you convene the May 8th meeting, we urge you to reflect upon the broader implications of the Mayor's decision to 'recommend denial' including the possible connection to the City's exploration of bankruptcy. It is critical to bear in mind that the City has already spent over \$50,000 on bankruptcy attorneys, alone. City Heights is deeply concerned about this situation and urges this Council not to put the City at unnecessary, greater financial risk.

The financial health of the City is of paramount importance to City Heights. We are deeply concerned that this underhanded approach undermines negotiations in mediation, which City Heights is participating in to help the City mitigate its own financial damage resulting from its prior conduct. Recall that Judge Kallas most recent Arbitration Order has already once found the City in violation of the Development Agreement.

- To resolve the damages litigation, City Heights has clearly and repeatedly offered multiple options to the city to settle the matter for a cash amount less than the City's insurance coverage.
- Our client has offered over \$10mm in concessions, yet the City faces a \$35mm claim and the City has not substantially addressed a response that reflects our flexibility or the reality of this situation.

Actions such as this unnecessary Council agenda item are an inappropriate invitation that the Council must decline to safeguard the City's fiscal health and avoid sabotage of any potential for settlement.

In April, attorneys for the City indicated that the City was considering "placing the issue of final plat approval" before City Council. No one from the City ever communicated further on this ambiguous statement or what the Council might be asked to review or approve. Instead, City staff continued to actively work with City Heights on final plat considerations with no further discussion of Council review. With the Special Master recommendation as a guide, City Heights has

honorably worked to deliver the outstanding items in collaboration with your staff, engineers and legal counsel. City Heights has continued these permitting activities, again, in good faith, with no reason to believe anything other than that staff was working cooperatively to continue processing the necessary project plans and permits.

City Heights has had its final plat application in review with the City since the fall of 2022. For months, staff reviewed this application, asked for more information while failing to complete the City's own obligations regarding water utility rights of way. After months of attempting to complete steps for final plat, City Heights proposed conditions of approval that would allow the final plat to be approved without risk to the City. When it did not receive substantive response to those suggested conditions, City Heights engaged the agreed upon Special Master for review.

The Special Master recommended that City Heights complete review from BPA and PSE before the final plat is approved, and also provide legal authority for constructing the secondary access.

- City Heights long ago provided the legal authority to the City for the secondary access.
- As staff is aware, City Heights has now obtain approvals from both PSE and BPA for the water main.
- Because the City failed to obtain the correct right of way over Cle Elum Pines for its existing water main, City Heights has wasted immense legal and planning cost because of the city's desire to relocate the water main.

In sum, Council review of the final plat under these circumstances is procedurally and substantively in error. We strongly encourage the City Council to thoroughly evaluate these potential outcomes and explore all viable avenues for resolution before committing to such a drastic course of action during the May 8th meeting. The long-term well-being of the City and its residents must remain the primary concern in your decision-making process.

If the City chooses to leave the matter on the agenda, the City will again have defaulted on the Development Agreement which is the core of the matter that has caused great financial harm to the City. The Development Agreement and the Arbitrator's order outline a specific process in Appendix Q. The Arbitrator has already ruled that the City violated the DA and that the DA process must be followed. The Arbitrator further ruled that the City has harmed City Heights financially due to this violation. A City Council hearing on this matter, skipping steps 4 and 5 of Appendix Q, will result in another Arbitration Order reprimanding the City. In the absence of cancelling this hearing and confirmation of your intent to respect Judge Kallas' Order and the DA, we have no choice but to conclude this Council does not value the legal environment this City agreed to and now is binding.

City Heights will continue to operate in good faith under the DA and honor its commitments. We simply ask you to do the same in order to avoid harm to the City. We respectfully request that the City Council reject the staff's recommendation to deny the final plat and instead allow City Heights to continue working collaboratively with the City towards a mutually beneficial resolution. By doing so, the Council will demonstrate a commitment to upholding the best interests of the City and its residents while avoiding any unnecessary legal and financial repercussions.

City of Cle Elum

May 6, 2023

P a g e | 4

Sincerely,



Duana T. Koloušková

Direct Tel: (425) 467-9966

Email: kolouskova@jmmklaw.com

cc: Alex Kenyon
City staff

2023-05-06 Ltr to City re Phase II Final Plat.docx