

MEMORANDUM

TO: University Heights City Councilors

DATE: September 6, 2011

FROM: Pat Bauer

Re: Failures to Insist on Development Agreement Provisions Essential to Adequate Protection of the Interests of the Citizens of University Heights

INTRODUCTION

No episode in the City Council's consideration of Jeff Maxwell's project perhaps has been as distressing as the August 23rd work session's marathon march through the thirty-four items Steve Ballard identified as important policy questions involved in determining the contents of a development agreement. If a number of tentative determinations are carried forward to final action, University Heights will have surrendered much of the bargaining power previously reserved to it by relevant portions of Ordinance No. 180 and the Conditional Zoning Agreement (see Attachment Pages A1-A2).

As a procedural matter, pushing through a series of tentative determinations in a three hour segment that began at 9:15 p.m. and ended at 12:15 a.m. is a striking measure of the desperate commitment the current three-person council majority seemingly has to getting something locked up before the citizens of University Heights are able to express their views about this project in the upcoming November city election. As a substantive matter, the tentative resolution of many items occurred by means of a disheartening chorus of "I'm comfortable with that" by three councilors who consistently rejected Steve Ballard's identification of matters that would protect the City of University Heights in favor of positions that would protect Jeff Maxwell.

The cumulative effect of the points at which the current three-person council majority "caved" and gave Jeff Maxwell what he was after may not come through the sanitized recounting of the official minutes, but the few residents able to endure to the end saw things that can in no way be squared with repeated claims that the process to date has involved "negotiations" with Jeff Maxwell. The balance of this memorandum describes more than a half dozen items on which Jeff Maxwell clearly prevailed at the expense of interests of the City of University Heights, but residents should view for themselves the videorecording of the work session to confirm what and how things happened.

To be sure, on a few points where the City's interests were sufficiently clear that an acceptance of Jeff Maxwell's position would have been widely recognized as utterly indefensible, "compromise" outcomes imposing some usually relaxed constraint did occur. Fully in keeping with the basic orientation demonstrated last fall in pushing Ordinance No. 180 through in advance of the January special election and again this spring by an unyielding insistence on taking action on the PUD Application, Developer's Agreement, and/or TIF Payments before the November city election, whenever a choice between the interests of the City of University Heights and Jeff Maxwell has involved anything approaching a close question, the current three-person council majority has almost always come down on Jeff Maxwell's side.

ITEMS WHERE JEFF MAXWELL IS RECEIVING MUCH MORE LENIENT TREATMENT
THAN OTHER SIMILARLY SITUATED DEVELOPERS

Item 15. Timing of Construction

In response to Steve Ballard's suggestion that "[t]he Council may wish to provide that construction of the proposed development must be commenced by a certain date and be completed by a certain date," Tom Gelman asserted that "it seems unnecessary to place a time constraint, but if the City Council feels compelled to do so, then it is suggested that perhaps ten years would be a reasonable time frame in which to require commencement of the project ... No time limit should be imposed that would result in the expiration of an approved PUD after such a project has been commenced." Because a related provision makes clear that the project is likely to be built in two separate phases (one for each building) with only a "soft" limit for the completion of each phase ("all reasonable efforts to complete construction of [each] phase as efficiently and in as timely a manner as the parameters of the project permit") and no limit whatsoever on the length of the interval between phases, the current three-person council majority's unqualified embrace of the developer's position results in no requirement other than commencement of the first phase within a decade with essentially open-ended ability to hold off on commencement of the second phase for some unlimited number of years to come.

No provision probably speaks louder about the speculative quality of both Jeff Maxwell's project and the equally speculative quality of the current three-person council majority's effort to lock in their approval of it. The City's failure to include a completion deadline allowed three buildings in the Grandview Condominiums to sit "boarded up" for a substantial length of time, and allowing something similar to occur with the Maxwell project reflects an indifference to the interest of anyone other than Jeff Maxwell. With Tom Gelman repeatedly invoking on other items the normative force of his experience elsewhere, it is notable that with both Plaza Towers and Hieronymus Square the City of Iowa City required commencement of construction within a year of the approval of a development agreement and completion of all construction within two years thereafter.

Item 32. Restrictions on Transfer to Entities Not Owned or Controlled by Jeff Maxwell

Jeff Maxwell repeatedly has invoked various personal qualities as important reasons for approval of successive requests and just as frequently the current three-person council majority has cited some of those qualities in support of their actions in approving those requests. In such circumstances, Steve Ballard understandably suggested that an appropriate transfer restriction would protect the City's interest in continuing to deal with the same person going forward, a requirement especially important where hasty "front-loading" of particular matters will necessitate further development of various details some years down the line.

Although at other points Tom Gelman expressed discomfort with absolutes, no such reservations are apparent in his unqualified response to this item: "Any restriction on the transfer of the Development Agreement is objectionable." Apart from its rather telling reflection of possible speculative purposes, Tom Gelman's blanket rejection of this requirement again is directly contrary to comparable provisions the City of Iowa City has included in the development agreements for both Plaza Towers and Hieronymus Square.

Item 7. Rental/Leasing of Residential Units

In another instance of an absolute stance inconsistent with his position on other items, Tom Gelman initially rejected any limitations on the developer's ability to lease all units for as long as it might wish to do so: "The developer does not wish to otherwise have restrictions on leasing residential units that are not applicable generally in University Heights, and believes that any such restrictions would be discriminatory." In a rather impressive example of how a little backbone could go a long ways given Jeff Maxwell's precarious need to get as much as he possibly can before the current three-person council majority potentially disappears, Tom Gelman quickly acceded to a 25% limitation on the number of residential units the developer will be allowed to use as rental properties.

Once again, treatment of other developers has been more demanding than what the current three-person council majority is inclined to require from Jeff Maxwell. With Birkdale Court, the development agreement with Jeff Hendrickson incorporated the following restriction on the rental of residential units:

No unit shall be purchased for rental purposes. No unit may be rented under any circumstances except in the sole instance when the owner's profession demands the removal of the owner from Iowa City for a period of nine consecutive months or longer. In these circumstances, only, the unit may be rented, and under said circumstances, the unit may be rented only to a responsible person or family approved by the Board of Directors. It is clearly the policy of the Association not to permit the rental of any unit except under extraordinary circumstances as set forth herein.

Despite all the rhetoric about how OUP might somehow counteract the growth of rental properties in University Heights, the current three-person council majority only partially resisted Jeff Maxwell's inclination to place his own financial interests ahead of those of the citizens of University Heights.

ITEMS WHERE NOT ADDRESSING SOMETHING HERE AND NOW INVOLVES CONSIDERABLE RISK THE MATTER WILL NOT BE ADDRESSED BEFORE THE DIFFICULTY OF DOING SO HAS INCREASED CONSIDERABLY

In other instances the current three-member council majority refused to get into the details of significant regulatory concerns with repeated statements that the matter "should be handled by ordinance." Although entirely consistent with a "kick the can down the road" mentality that in hindsight has allowed unsound elements to surface at later points where various difficulties could have been avoided if something had been more timely addressed at an earlier phase of the proceedings, this stance involves three substantial difficulties.

First, in the absence of a professional staff, University Heights rather notoriously has often gotten around to things only after problems have materialized. Although some belated relief may remain possible, "closing the barn door after the horse has left" is not a regulatory strategy reasonably embraced by councilors inclined towards placing protection of the public interests of city residents ahead of Jeff Maxwell's private interest in getting things locked up before the November election.

Second, the challenge of crafting appropriate regulations in the context of a single specific situation that in significant ways may be unlike any other circumstances in our community may be considerably greater than coming up with regulations that may operate much differently in those other circumstances. Treating things like liquor licenses, excessive noise, or signage as “something to be handled by ordinance” flagrantly ignores the fact that such things either are unlikely to present much of a problem anywhere else in University Heights (in which case the appropriateness of regulating them now seems rather compelling) or will present problems of a decidedly different nature in other settings (e.g., ability of city police to monitor and enforce loud parties in the backyard of residence v. the effects of a loud party on the proposed rear building’s sixth floor rooftop reception area, permanent flashing signage for retail businesses at OUP v. real estate agents temporarily placing signs in parking areas between sidewalk and street).

Third and most seriously, although the “out” of handling significant concerns through ordinances may now be convenient to the current three-member council majority’s apparent purpose of getting something through in advance of the November election, that short term political advantage will have been secured at the expense of the abdication of a presently available power considerably greater than that excisable at a later point in time through the enactment of an ordinance. Relevant portions of Ordinance No. 180 and the Conditional Zoning Agreement (see Attachment Pages A1-A2) provide a fully defensible basis for addressing various things at this time (e.g., restrictions on leasing) that in all likelihood could never subsequently be secured through the enactment of an ordinance. It approaches a dereliction of duty for the current three-person council majority to forgo the opportunity to address such things now in the absence of some formal assurance by Steve Ballard that things can be accomplished as readily and as fully by the enactment of an ordinance as some later point in time.

Item 13. Restrictions on Commercial Uses/Hours of Operation

Although both Ordinance No. 180 and the Conditional Zoning Agreement clearly authorize the imposition of further restrictions on permissible commercial uses, the current-three person council majority saw no need to add anything to what the zoning ordinance presently specifies as permissible outer limits. This failure to impose any additional limitations is especially egregious because the uses presently permitted by the zoning ordinance were specified at a point in time when the project included 107 spaces of surface parking and such uses have never been reviewed and revisited in light of a subsequent halving of allowed surface parking spaces to 53.

The idea that there presently is no need to adjust the sorts of commercial uses that previously may have been sensible in a context involving twice as many parking spaces is hardly out of character with the shortsighted nature of other determinations by the current three-person council majority, but the developer’s position clearly is that once “the horse is out the barn” in terms of uses outstripping the reduced amount of available surface parking, the City will be unable to rectify the spill-over of vehicles onto the streets of adjacent neighborhoods: “In the event [permitted commercial] uses are modified by zoning amendment, previously existing uses will be grandfathered until such time as such use ceases to be operated by one year.”

Item 9. Law Enforcement on Property

Item 14. Outdoor Game Day Sales

Item 18. Limit Liquor Licenses

Item 29. Restrictions on Signs

Although they may involve effects of varying severity, each of these items stands as a lost opportunity to address things now that could easily prove troublesome down the line. The smaller amount of effort and greater effectiveness of resolving these issues now, however, seemingly is overcome by the developer's need to get things done before the November election. Once again, the current three-person council majority is advancing Jeff Maxwell's private interests at the expense of the interests of the residents of our community.

To provide but one example, in Item 9 Steve Ballard suggested that "the Council ... consider requesting that the developer and those coming after the developer (owners of condominium units) agree that the University Heights Police Department may come upon the property in perpetuity to enforce all ... regulations upon the property." It takes little thought to realize that enforcement of excessive noise emanating from a fourth-floor balcony or a sixth-floor rooftop reception area presents a very different circumstance from that presented by an overly-loud backyard barbecue, but once again Tom Gelman obstinately insists that the developer cannot be subjected to any requirement that does not extend to all other parts of University Heights: "The property should be subject to the same rules, regulations, and laws as other properties in University Heights with regard to any official acts, whether of the police department or any other division of the City."

The character of this recurring stance also speaks volumes about the likelihood that any semblance of reasonableness Jeff Maxwell may adopt while pursuing a requested approval will outlast his receipt of such approval. Consider the consistency of this "don't tread on me" position with the terms of the Conditional Zoning Agreement Jeff Maxwell signed in order to secure approval of Ordinance No. 180:

... Developer shall not challenge the authority of the City Council to further regulate the development of the subject property under a Multiple-Family Commercial Planned Unit Development (PUD) Agreement, ... including but not limited to regulation regarding ... restrictions on types of commercial uses and hours of operation for such uses [and] restrictions on leasing of residential dwellings Developer ... acknowledge[s] that the conditions contained herein are reasonable conditions to impose on the land under Iowa Code §414.5, and that said conditions satisfy public needs that are caused by the requested zoning change.

CONCLUSION

In both form and substance, the August 23 work session seems hard to square with Mike Haverkamp's previous assertion that "I'm deliberate. I will take as much time as we need. The [election] in November means nothing to me." Instead, it seems that the November election means everything to the current three-person council majority and that their haste to get something locked in by then outweighs the need for careful action to protect the interests of University Heights and its citizens.

Residents attending the August 23 work session saw (and those able to view a videorecording of it will see) the way in which an unyielding commitment to moving forward prevailed over the need for thoughtful consideration of significant difficulties. Bad results more commonly are caused by bad process than bad persons, and the need to fully evaluate each and every thoughtful concern raised by both city staff and interested citizens must not be subordinated to a perceived imperative to act in advance of citizens weighing in at the ballot box. Going forward, the current three-person council majority must demonstrate much greater commitment to “taking as much time as we need” to get things right.

ORDINANCE NO. 180

AN ORDINANCE AMENDING ORDINANCE NO. 79 (ZONING) TO REQUIRE
THAT A DEVELOPER OWN THE REAL PROPERTY IDENTIFIED IN A
MULTIPLE-FAMILY COMMERCIAL PUD APPLICATION

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF UNIVERSITY HEIGHTS,
JOHNSON COUNTY, IOWA:

* * *

- F. Property in a Multiple-Family Commercial zone shall be used for the following purposes only:
1. All uses which are allowed in an R-1 Single-Family Residential Zone, subject to the height restrictions, yard regulations, lot regulations, and off-street parking regulations specified for the R-1 Single-Family Residential Zone in Sections 7, 8, 9, and 10 of this Ordinance.
 2. **As provided in or limited by the Development Agreement** between the City of University Heights and the Developer **pursuant to the Multiple-Family Commercial Planned Unit Development (PUD) regulations and requirements set forth in Section 13 of this Ordinance.**

* * *

Section 13. Multiple-Family Commercial PUD.

- B. Development Regulations and Restrictions. Property may be developed as a Multiple-Family Commercial PUD Zone pursuant to the following regulations and restrictions:

* * *

8. **The University Heights City Council may impose additional reasonable conditions as it deems necessary** to ensure that the development is compatible with adjacent land uses, will not overburden public services and facilities, and will not be detrimental to public health, safety, and welfare.

- C. Procedure.

3. **The University Heights City Council in its sole discretion may approve, deny, or approve on condition any such Plan Application or any part thereof.**

CONDITIONAL ZONING AGREEMENT

This agreement is made between the City of University Heights, Iowa, a municipal corporation (hereinafter referred to as "City"), St. Andrew Presbyterian Church and MidWestOne Bank (hereinafter together referred to as "Owners"), and Jeffrey L. Maxwell (hereinafter referred to as "Developer").

* * *

6. In consideration of the City's rezoning Owners' property, Developer agrees to, and Owners accept, the following conditions:

* * *

- b. that **Owners and Developer shall not challenge the authority of the City Council to further regulate the development of the subject property under a Multiple-Family Commercial Planned Unit Development (PUD) Agreement, as provided in the City's Zoning Ordinance, as amended, including but not limited to regulation regarding site design and building elevations, vehicular access, landscaping and common open space, restrictions on types of commercial uses and hours of operation for such uses, restrictions on leasing of residential dwellings, and amenities to serve the residents and businesses of the development,** provided the City Council's exercise of such regulatory authority is in accordance with the City Council's zoning authority under such Zoning Ordinance, as amended, and is not arbitrary, capricious, discriminatory or otherwise an abuse of its discretionary zoning authority relative to Planned Unit Developments or otherwise a violation of applicable laws.

* * *

7. Owners, Developer, and the City acknowledge that the conditions contained herein are reasonable conditions to impose on the land under Iowa Code §414.5, and that said conditions satisfy public needs that are caused by the requested zoning change.

MEMORANDUM

TO: University Heights City Councilors

DATE: August 26, 2011

FROM: Pat Bauer

RE: Discrepancies in Financial Information Provided to Councilors at Tuesday's Work Session

Introduction

The financial information provided to councilors at Tuesday's work session contained almost a half dozen material discrepancies. This circumstance is especially distressing because it occurs in the face of concerns about similar inadequacies previously raised in a number of earlier submissions. While it is troubling enough that Jeff Maxwell feels free to continue to submit incomplete or misleading financial information in an untimely manner, with first impressions potentially becoming lasting impressions it is even more disturbing that three councilors have now twice expressed support "at this point in time" on the basis of such deficient submissions.

1. "Discounting" of Amount of Annualized Rate of Return Attributable to TIF Payments

The "private profit" of \$2,500,000 resulting from total projected non-TIF revenue of \$47,400,000 and total projected costs of \$44,900,000 produces a projected developer annualized rate of return of 5.01%. The addition of net projected economic value of TIF payments to the developer in the amount of \$3,625,000 (a figure that is 145% of the developer's \$2.5M private profit), however, only produces a 5.43% increase in the developer's annualized rate of return (a figure that is only 108% of the annualized rate of return produced by the developer's private profit).

Mr. Craven's undisclosed financial model seemingly discounts taxpayer money paid to the developer so that it produces a smaller proportionate annualized rate of return than the money Jeff Maxwell earns from marketing his units to private buyers. If they are treated equally, however, the proposed TIF payments to the developer would raise his annualized rate of return to 12.27%. Conversely, if the developer's annualized rate of return is kept at 10.44%, such equal treatment would allow the necessary net projected economic value to the developer to be reduced to \$2,709,581, an amount that would allow (i) a 75/25 split of incremental tax revenues (i.e., ten annual developer payments of \$520,000, ten annual LMI payments of \$80,000, and ten annual payments of \$200,000 to local governments) with a resulting "break-even" point of eighteen years (see attached Scenario 4).

2. "Double-Billing" for Value of City Space

Attributing \$65,000 to the "projected annual value of City space" seems indefensible because local governments have in effect already bought and paid for that same space through the deduction of \$675,000 factored into the calculation of the net projected value of TIF payments to the developer. A possible explanation that a benefit specific to the City is being realized at an offsetting expense to other local governments is rather troubling, but such explanation might point towards the appropriateness of a complete elimination of the City space.

Under the approach used in the prior segment, elimination of the City space would further decrease the necessary net projected economic value to the developer to \$2,034,581, an amount that would allow a 65/35 split of incremental tax revenues (i.e., ten annual developer payments of \$440,000, ten annual LMI payments of \$80,000, and ten annual payments of \$280,000 to local governments) with a resulting “break-even” point of fifteen years (see attached Scenario 5)..

3. No Mention of Required LMI Housing Assistance

While the required amount of low and moderate income housing assistance is not paid to the developer, it obviously involves an additional diversion of incremental tax revenues away from those public purposes towards which such revenues might otherwise be put. Failing to mention that figure results in a significant understatement of the total overall public cost of giving Jeff Maxwell the TIF assistance he is requesting. With the reinstatement of Sunset intersection, however, the required amount presumably may be the total amount of \$800,000 specified in the original request and assumed for purposes of calculations stated in the prior segment and presented in attached Scenarios 4 & 5.

4. Difference in Valuations of City Space

Separate and apart from the “double-billing” for the value of city space noted above, statements of both cost and value use amounts that are higher than those produced by the proportionate reduction in size (i.e., 2,500 sf / 4,000 sf = .625) between the original and revised TIF requests. The drop in “purchase price” from \$920,000 in the original request to \$675,000 in the revised request is \$100,000 greater than the \$575,000 figure that would be proportionate to the reduction in size. Similarly, the drop in “annual value” from \$65,000 in the original request to \$48,000 in the revised request is \$7,375 greater than the proportionate-to-reduction-in-size figure of \$40,625 figure. These differences conceivably reflect the cost or value of space “buil[t] out [to] a commercially acceptable level of finish” over the cost or value of “white envelope” space, but if so such increased cost or value should be explained and substantiated rather than simply being asserted.

5. Questionable Selection of Values Used in Calculations of TIF Ratios

The revised request avoids a previously noted “apples/oranges” confusion of assessed and taxable value that distorted the original request’s comparison of TIF ratios with Plaza Towers. In view of the possibility of lingering misperceptions caused by that earlier confusion, a more forthright presentation usefully could have noted that continuing forward the prior use of taxable values in the comparison made with Plaza Towers would essentially double the ratio figures for OUP to something in the vicinity of 15% for the original request and something in the vicinity of 17% for the revised request.

Conclusion

As initially noted, the foregoing discrepancies are entirely in keeping with a persistent pattern of misstatements and omissions that have occurred previously and presumably will continue going forward unless and until councilors insist that considerably more accurate and complete

information must be provided on a more timely basis by someone who is seeking to obtain a very substantial sum of incremental tax revenues. A continuing failure to first secure and then rigorously assess such information falls far short of the demanding standards of financial stewardship elected officials must adhere to considering a very large and longstanding commitment of public funds to a still-to-be-determined group of private investors.

Kent Ralston

From: City Clerk <uhclerk@yahoo.com>
Sent: Thursday, August 25, 2011 8:33 PM
To: John Yapp; Kent Ralston
Subject: Fw: Financial Information Distributed to Councilors at Tuesday's Work Session

----- Forwarded Message -----

From: "pbb338koser@aol.com" <pbb338koser@aol.com>
To: mike-haverkamp@university-heights.org; rosanne-hopson@university-heights.org; stan-laverman@university-heights.org; brennan-mcgrath@university-heights.org; pat-yeggy@university-heights.org
Cc: louise-from@university-heights.org; ballard@lefflaw.com; uhclerk@yahoo.com
Sent: Thursday, August 25, 2011 9:35 AM
Subject: Financial Information Distributed to Councilors at Tuesday's Work Session

Dear Councilors,

It was most disappointing that the two-page financial information sheet distributed to councilors at Tuesday's work session hadn't previously been made to councilors, wasn't shared that evening with members of the public in attendance, and as of this morning apparently still hasn't been made available to citizens in a posting to the OUP page on the city's web site.

In earlier submission I identified various discrepancies in financial information previously provided by Jeff Maxwell, and as indicated in the memo I submitted on Monday, Mr. Craven never has responded to a rather critical concern raised two weeks ago in the last segment of an e-mail thread attached to my memo.

Councilors formulating tentative positions on the OUP TIF request based on cursory information being presented "on the fly" without any prior opportunity for considered reflection by councilors or any prior or contemporaneous opportunity for review and comment by citizens is an extremely poor way of proceeding forward on a complicated financial matter of this magnitude.

Pat Bauer
338 Koser Avenue

Kent Ralston

From: Alice Haugen <alice.haugen@gmail.com>
Sent: Wednesday, August 24, 2011 12:31 PM
To: Louise From; louise-from@university-heights.org; Rosanne Hopson; Rosanne Hopson; Brennan McGrath; Brennan McGrath - Council; Mike Haverkamp - Council; mike-haverkamp@university-heights.org; Stan Laverman - Council & Mayor Pro Tem; Stan Laverman; Patricia Yeggy - Council; pat-yeggy@university-heights.org
Cc: Chrs Anderson - City Clerk; Steven E. Ballard; Jeff Maxwell; jbilskemper@shive-hattery.com; John Yapp; Kent Ralston; Kevin Monson
Subject: Including the limited five-way intersection in projections
Attachments: ProposalforaFive-WayIntersectionwithLimitedAccessontheFifthLeg.pdf

Dear mayor and city council,

It appears from the work session last night that Mr. Maxwell and Mr. Monson will be presenting some details on the revised PUD at the September city council meeting. I am writing to urge you to request them to include in their projections as an alternative the limited five way intersection that I was going to present in August.

This proposal (keep the existing northern leg of Sunset for bus and emergency access, extend Sunset onto the development site to provide the main access to the project) has many benefits: it corrects the intersection of Sunset and Melrose, it only needs one stop light, and it preserves the east ravine. As the buildings are going to be narrower than before this proposal should be straightforward to implement.

I am attaching the proposal that was presented in August. I am asking you to request its inclusion in projections because otherwise it may be left out of discussions as too late to the table, and I believe it has considerable value. Please let me know if you have any other questions.

--

Warm regards,

Alice Haugen

Ring the bells that still can ring
Forget your perfect offering
There is a crack in everything
That's how the light gets in.

MEMORANDUM

TO: University Heights City Councilors

DATE: August 22, 2011

FROM: Pat Bauer

RE: Questions and Comments About Revised OUP TIF Request

Introductory Observations

The revised TIF request that Jeff Maxwell submitted to the University Heights City Council on Friday, August 19 lacks the sort of financial detail appropriate to a matter of this magnitude at this point in the proceedings. Although the unlikelihood that Johnson County would be receptive to a joint TIF agreement was explicitly raised more than two months ago,¹ at the regular August 9 council meeting Jeff Maxwell was unprepared to do anything more than (i) characterize the original TIF request as “null and void” and (ii) request special scheduling of a work session to consider a revised TIF request. In the context of a course of conduct in which complex financial issues have been presented “on the fly” and in ways that have significantly misstated critical factual matters, Jeff Maxwell expressly affirmed that he would have his revised TIF request fully completed the Friday before this Tuesday’s work session.

Unless its numbers have been totally concocted, the revised TIF request is based on financial calculations that Jeff Maxwell deliberately withheld from last Friday’s submission. If Tuesday’s work session is to be confined to the contents of Jeff Maxwell’s abbreviated letter, the effort involved in having this meeting would seem rather wasteful. If the meeting instead is going to extend to additional details not presented until then, Jeff Maxwell will have flouted the council’s direction for advanced submission of his revised proposal to permit deliberate review by both councilors and citizens.

As the balance of this memorandum details, the revised OUP TIF request fails to address a number of important financial questions and continues to be fiscally unsound. In detailing these concerns, however, various assumptions have to be made to compensate for the absence of the sorts of details that properly should have been included in last Friday’s submission.

It is distressing enough to think that Jeff Maxwell may in fact be as woefully under-prepared as his TIF submissions to date have suggested he is, or alternatively to think that it may only be an appearance of under-preparedness cynically adopted in an effort to obtain some sort of tactical upper hand by depriving both councilors and citizens of financial information needed to permit effective “double-checking” of his very sketchy math. In either event, however, it is even more distressing to realize that such conduct has occurred and may continue because three councilors seem unwilling to raise any objection to it. That pattern of acquiescence may indicate that those same councilors lack the inclination and capacity to “negotiate” with Jeff Maxwell about much of any consequence,

1. Bauer, “Questions & Concerns About Maxwell TIF Proposal” (June 15, 2011) at p. 6.

and one apt way of countering that unsettling possibility would be for Mr. Maxwell to be told on Tuesday evening in no uncertain terms that future financial submissions must be more fully detailed and more accurate than has been the case to date.

The Revised OUP TIF Request Fails to Address A Number of Important Financial Questions

Because they have been set forth in greater detail in a number of earlier submissions and do not seem to be materially altered by the cursory terms of Jeff Maxwell's revised TIF request, an initial set of financial questions can be presented in essentially "punch list" form:

1. Although it is a circumstance which follows from the range of speculative effects attributable to the perverse sequencing of the present proceedings in advance of any decision by Saint Andrew Church to sell, at the point of a potentially enforceable commitment of \$6,500,000 of incremental tax revenues there certainly would seem to be a need for some more significant specification of when both buildings will be completed (versus nothing more than an undertaking to commence construction of the first building within ten years and to complete it within another two years and no commitment about the second building other than its completion within two years of whenever construction of it might begin.²)
2. If an "initial commitment by the City of an amount equal to 80% of its allowable debt ceiling"³ is made at the present time, will this limitation of the city's borrowing authority take effect right now⁴ even though the project may not be completed for as long as a dozen years?⁵
3. What effect will "initial commitment by the City of an amount equal to 80% of its allowable debt ceiling" have upon the availability and/or cost of any other borrowing the City may need to incur?

2. Draft PUD Development Agreement (August 1, 2011) at para. 7 ("The Project is likely to be built in phases: Phase One being the south commercial /residential building, and Phase Two being the north residential building. Once construction commences on each Phase, Developer shall use all reasonable efforts to complete construction of such phase as efficiently and in as timely a manner as the parameters of the project permit and to be substantially completed within two years after the commencement date for such phase."); Maxwell, Response to Memorandum (August 1, 2011) at p. 7("In reference to time frame, it seems unnecessary to place a time constraint, but if the City Council feels compelled to do so, then it is suggested that perhaps ten years would be a reasonable time frame in which to require commencement of the project or expiration of the PUD Plan approval. No time limit should be imposed that would result in the expiration of an approved PUD after such a project has been commenced.").

3. Maxwell, City of University Heights-One University Place Project (August 19, 2011) at p. 2.

4. Bauer, "Questions & Concerns About Maxwell TIF Proposal" (June 15, 2011) at pp. 4 & 7.

5. Upon completion of each building, it appears that the City's allowable debt ceiling may be increased in an amount equal to five percent of the completed building's assessed value. Bauer, "Questions & Concerns About Maxwell TIF Proposal" (June 15, 2011) at p. 6.

In contrast, some new financial question are framed by seriously underdeveloped indications of material alterations in the dimensions of the underlying project or the composition or overall level of TIF support sought to be provided to it:

4. What is the reduction in (a) overall size and (b) projected assessed valuation resulting from the changes in the two buildings the revised TIF request is suggesting?⁶
5. What is the projected cost of “build[ing] out the community center to a commercial acceptable level of finish”?⁷
6. What amount of low and moderate income housing assistance will the revised TIF request require?

One core set of questions common to both the initial and revised TIF requests involves the critical elements of projected costs and revenues. Perhaps in response to others having identified various difficulties with the skimpy numbers contained in his initial request, Jeff Maxwell’s revised request seems to have eliminated such numbers altogether. Given the frequency with which “trust me” has been proven to be an inappropriate stance towards various aspects of the original submission, additional financial details must be required to see whether Mr. Maxwell is pursuing what he really needs or just what he thinks he can get University Heights to give him.

A striking example of calculated evasion in the process to date is provided by an extended e-mail thread in which Dennis Craven repeatedly avoided an identified circumstance where money provided by University Heights appeared somehow to be only half as valuable as money Jeff Maxwell might earn through private means. See Attachment Pages A6-A12. Since the same issue presumably may infect his revised TIF request, a response to the prior request should be required and additional information obtained to assure that this disturbing circumstance has been adequately corrected.

The Revised OUP TIF Request Remains Fiscally Unsound

The terms of Jeff Maxwell’s original TIF request previously were analyzed in various ways that never were the subject of any response. The financial coyness of the revised TIF request unfortunately requires various assumptions, but quibbles about the exact accuracy of those assumptions hardly will effect the essential thrust of analyses that have been altered to reflect what seem to be the likely circumstances of such request.

6. Maxwell, City of University Heights-One University Place Project (August 19, 2011) at p. 1 (“... I am willing to reduce the scale of the project by reducing the footprint of each of the two buildings. This will result in a reduction in the maximum number of residential units from 79 to 69, and reduce the amount of commercial space on the first floor of the mixed use building by approximately 1470 square feet.”)

7. Maxwell, City of University Heights-One University Place Project (August 19, 2011) at p. 2.

Scenario 3 (Attachment Page A1) is a table detailing the allocation of incremental taxes on a “flat” basis (i.e., unadjusted for any effects of increased taxable values or reduced rates of taxation) at the proposed 90/10 division with both revenue and present value effects based on the supposed completion of construction of both buildings four years from now.⁸ The table underscores the questionably logic of repeated assertions of “win-win” effects by demonstrating that it will take an additional fifteen years for local governments to recover property tax revenues having a present value equal to that of the tax revenues that will be diverted from them in the ten years it will take to pay Mr. Maxwell the TIF support of \$6,500,000 he claims is needed for his OUP project to proceed. In deciding to allocate resources towards a particular purpose, few private citizens or business enterprises would pursue “investments” with a “break-even” point of twenty-five years.

Indeed, Scenario 3 indicates the revised TIF request actually may provide Jeff Maxwell with a present value that may be up to \$225,000 greater than what his original TIF request was projected to produce. Under the original request, a total proposed TIF payment of \$8,000,000 was reduced to a present value of \$5,500,00 followed by offsets of \$920,000 and \$850,00 (for the value of the community center and public improvements respectively) to produce a “net projected economic value to developer” of \$3,730,000.⁹ Under the revised request, a total proposed TIF payment of \$6,500,000 with a net present value of a little over \$4,780,000 would be followed by offsets of only \$825,000 (reflecting the reduced value of the community center ($\$920,000 \times (2500\text{sf} / 4000\text{sf} = .625) = \$575,000$) and original offsite costs of \$850,000 minus \$600,000 assigned to Sunset intersection) leaving a “net projected economic value to developer” of \$3,955,000. Unless the added cost of “build[ing] out the community center to a commercial acceptable level of finish” is equal to or greater than \$225,000, Jeff Maxwell will accordingly receive more TIF support under his revised request than he would have received under his original request.

Illustrations 13, 14, 15, and 16 (Appendix Pages A2-A5) are four charts reflecting some of the same assumptions previously explained in connection with Scenario 3. Constraints of sheet size, however, resulted in limiting the demonstrated effects to a period of twenty years, and the combination of using current taxable values as a defensible point of departure and the convenience of laying out calendar years in parallel to annual periods prompted a simplifying assumption that both buildings presently are completely constructed and fully taxable. In an effort to illustrate the cumulative effects of relaxing different assumptions, the charts proceed from one where taxable values and property tax rates are entirely fixed (Illustration 13) to one where taxable values increase at assumed amount equal to five percent of initial values and property tax rates are reduced to reflect the increased revenues attributable to OUP’s assumed expansion of taxable values (Illustration 16).

8. Because the revised TIF request provides no such figures, Scenario 3 assumes that the suggested changes in the buildings will reduce their assessed value in an amount causing the previously estimated annual incremental tax revenues of \$900,000 to decrease by 11% to \$800,000. This decrease is somewhat greater than the factor suggested by the stated reduction in the size of the commercial space on the first floor of the front building ($1,470\text{sf} / 18,637\text{sf} = 7.9\%$) but less than that suggested by the stated reduction in the number of residential units ($10/69 = 12.7\%$).

A somewhat similar approach underlies Scenario 3’s assumption that the required total amount of low and moderate income housing assistance will be reduced by 12.5% from \$800,000 to \$700,00.

9. Summary of OUP TIF Request (June 28, 2011) at p. 1.

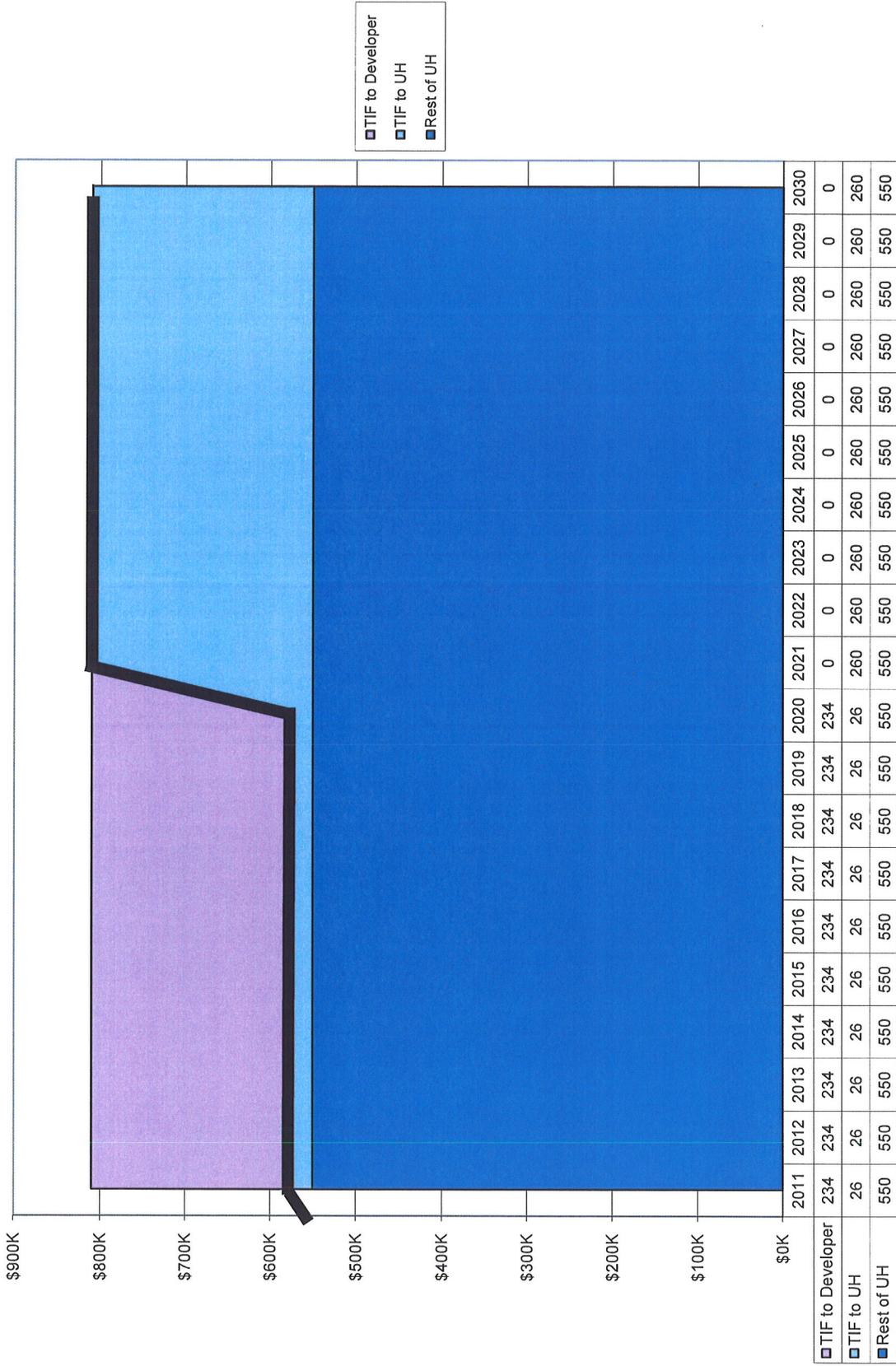
Although it involves the necessary limitations of the assumptions it carries forward, Illustration 16 (Appendix Page A5) seems the most realistic (or probably more accurately, the least unrealistic) and accordingly may be the best vehicle for graphically viewing the fiscal effects of Jeff Maxwell's revised OUP TIF request. For the first ten years, the modest amount of the portion of additional tax revenues University Heights would receive from the ten percent of incremental taxes allocated to all local governments probably wouldn't be enough to cover the cost of a half-time police officer and would only reduce the amount of property taxes that otherwise would have to be paid by the rest of University Heights by about five percent.

When TIF payments end after ten years, the amount of incremental taxes potentially available to University Heights will increase tenfold, but absent a corresponding increase in municipal expenditures based on nothing more than this sudden increase in potentially available additional tax revenues, the resulting proportionate decrease in tax rates ultimately reduces the effect of a fifty percent increase in taxable values to a reduction of less than a third in the property taxes otherwise payable by both the residents of OUP and the rest of University Heights. Once again, the misleading elements of asserted "win-win" effects are demonstrated by an illustration in which the shift in taxes payable by all residents upon the conclusion of the TIF period clearly demonstrates that during the TIF period almost a third of municipal expenses that would otherwise be paid by the residents of OUP will instead be paid by other residents in the rest of University Heights.

Conclusion

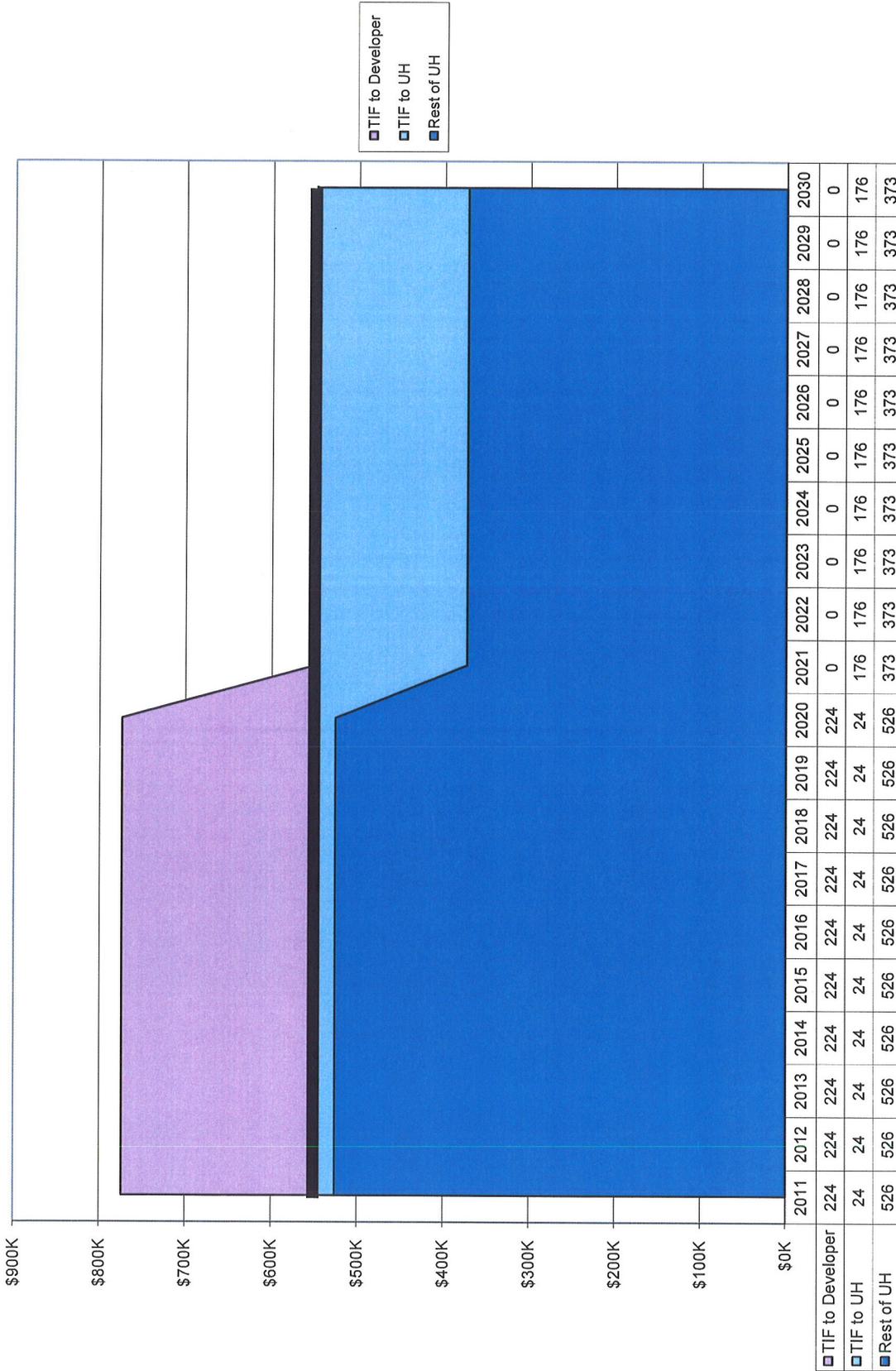
Both procedurally and on the merits, Jeff Maxwell's revised TIF request is no better (and in some instances is worse) than his original TIF request. If Jeff Maxwell can in fact get whatever he wants from three councilors, the substantial shortcomings detailed above will be swept aside in the same manner as other shortcomings that have been fully demonstrated in a series of prior submissions. If at long last, however, at least one of those three councilors is willing to stand up for University Heights instead of rolling over for Jeff Maxwell, vigorous pursuit of some of the points set forth in this memorandum could be an appropriate place to begin.

ILLUSTRATION 13
90/10 - Flat



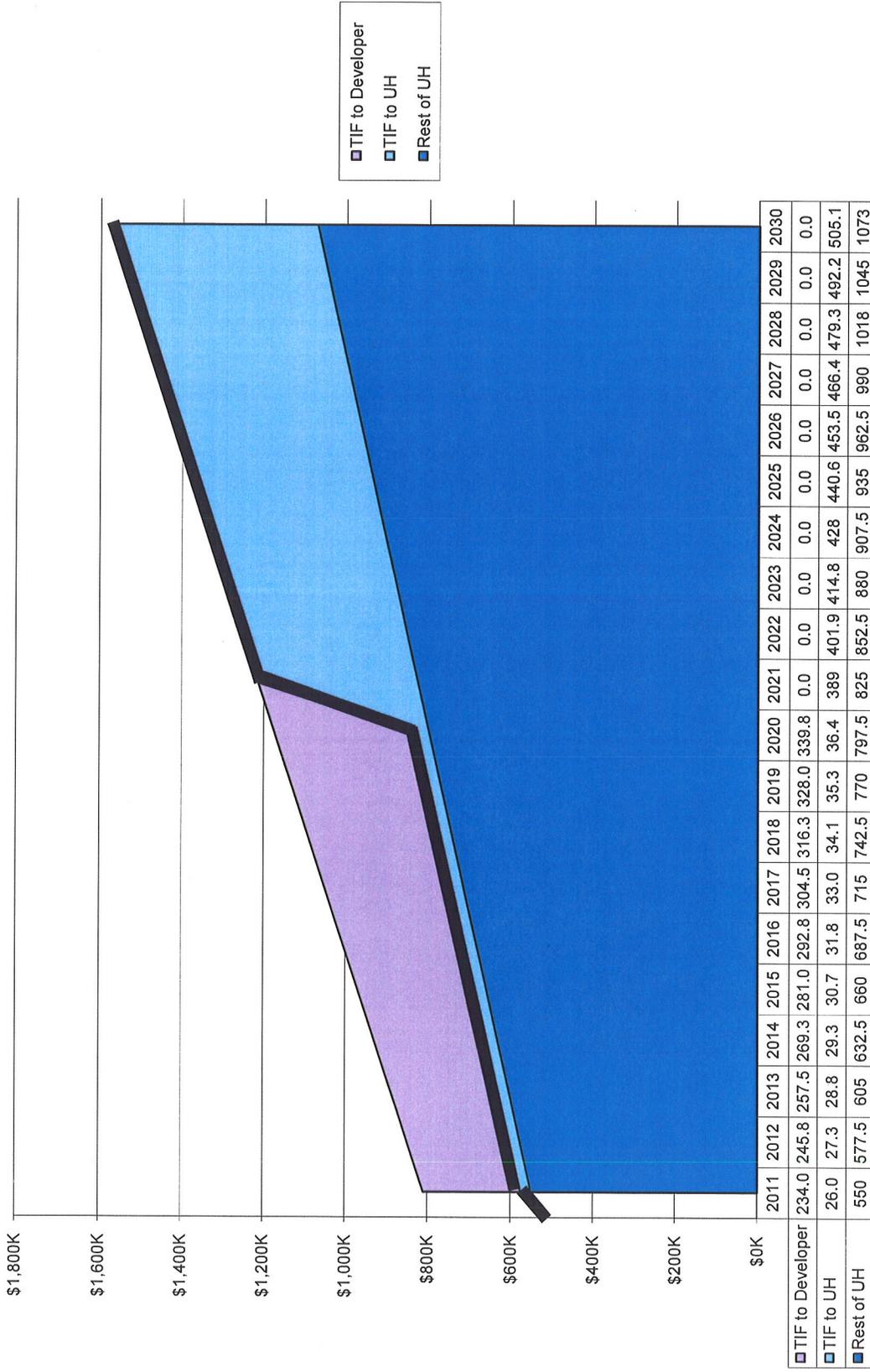
BOLD LINE = City Expenses Covered by Property Taxes

ILLUSTRATION 14
90/10 - Flat - Incorporated



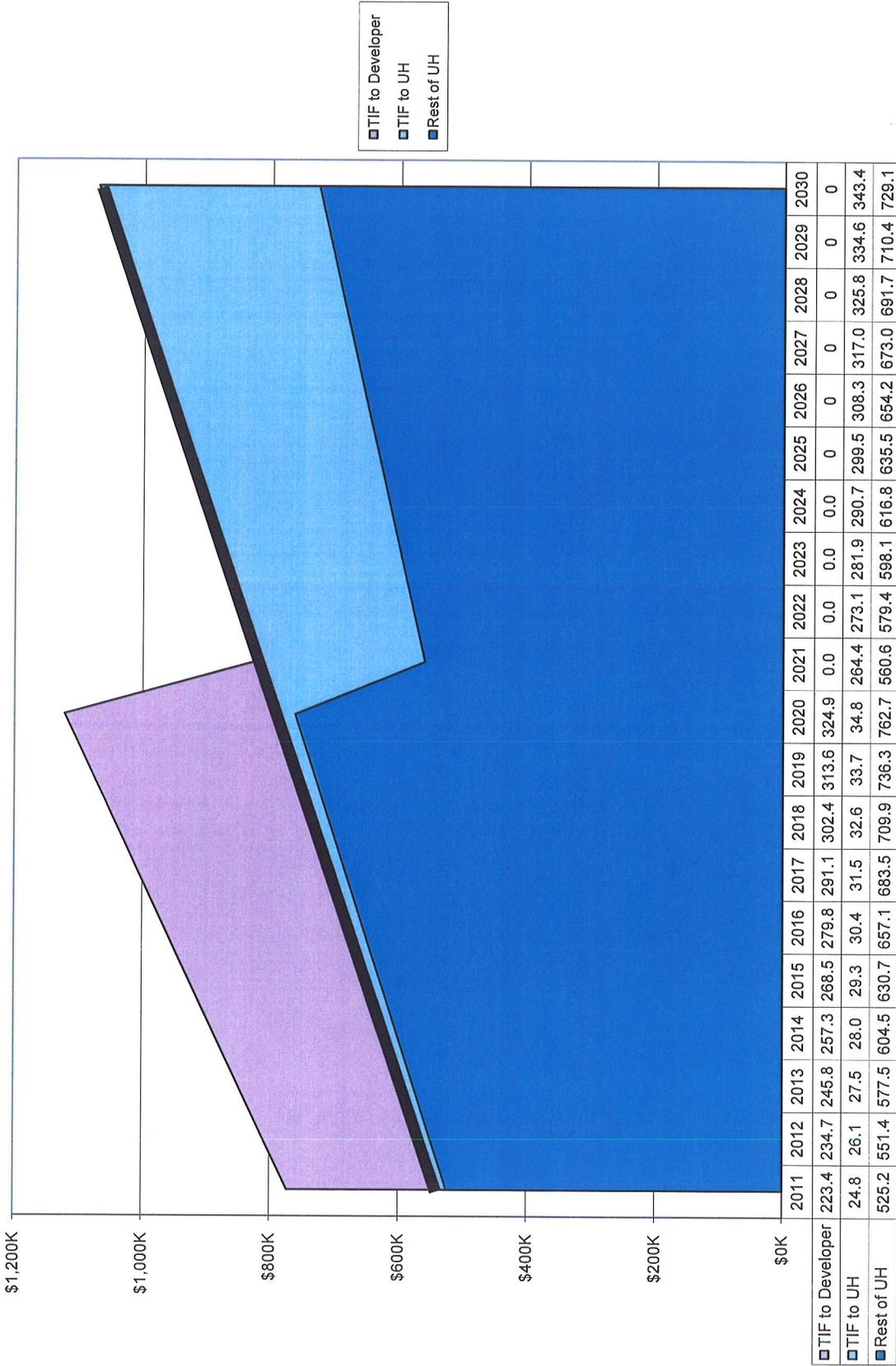
BOLD LINE = City Expenses Covered by Property Taxes

ILLUSTRATION 15
90/10 - Dynamic



BOLD LINE = City Expenses Covered by Property Taxes

ILLUSTRATION 16
90/10 - Dynamic - Incorporated



BOLD LINE = City Expenses Covered by Property Taxes

From: pbb338koser <pbb338koser@aol.com>

To: dcraven <dcraven@berganpaulsen.com>; mike-haverkamp <mike-haverkamp@university-heights.org>

Subject: Re: Request for Additional Explanations (Financial Information Provided at June 28 Work Session)

Date: Thu, Aug 4, 2011 1:41 pm

Dear Mr. Craven,

Thank you for confirming my intuition that "Total project cost" overstates the amount of the developer's investment. I know that debt financing is commonly used in real estate development, but would note that it was an identified element of the financial figures that have been provided to the City Council.

I'm left with the question posed in my third paragraph: If debt financing transforms "Total projected profit" of \$1,750,000 into a "Projected annualized rate of return (w/o TIF)" of 5.12%, how is it that net present value assistance of \$2.73M circa 2014 only raises such rate to 10.16%?

That specific anomaly was at the heart of both my originally asked and restated questions, and I'd respectfully suggest that my pursuit of a response that addresses it is hardly inappropriate.

Best regards,

Pat Bauer

-----Original Message-----

From: Dennis Craven <dcraven@berganpaulsen.com>

To: pbb338koser <pbb338koser@aol.com>; mike-haverkamp <mike-haverkamp@university-heights.org>

Sent: Thu, Aug 4, 2011 8:25 am

Subject: RE: Request for Additional Explanations (Financial Information Provided at June 28 Work Session)

Mike:

The statement "it would seem that the amount of the investment used to calculate the annualized rate of return must be (notwithstanding Explanation 2) some number that is smaller than Total projected costs" is correct. It would be very rare for any real estate project to be capitalized with 100% equity and One University Place is no different. Debt financing will be used to reduce the investment required for this project.

The amount and cost of debt financing is a very material component of the annualized return calculation.

Dennis

From: pbb338koser@aol.com [mailto:pbb338koser@aol.com]

Sent: Wednesday, August 03, 2011 5:39 PM

To: mike-haverkamp@university-heights.org

Cc: Dennis Craven

Subject: Re: Request for Additional Explanations (Financial Information Provided at June 28 Work Session)

Dear Mike,

Thank you very much for following up on this with Mr. Craven.

The additional explanations were very helpful, but there's still some things in explanations 2 and 6 that may be the source of my difficulty.

Explanation 2 states that "projected revenues and costs ... are the amounts used in the annualized rate of return" and Explanation 6 states that the "[a]nnualized rate of return ... is a calculation of the return to an investor based on the amount of the investment and the period of time it is invested ." Since Total projected profit (w/o TIF) of \$1,750,000 (Explanation 5) is only 3.4% of Total projected costs of \$51,450,000, it would seem that the "amount of the investment" used to calculate the annualized rate of return must be (notwithstanding Explanation 2) some number that is smaller than Total projected costs.

ATTACHMENT PAGE A6

I'll attach a spreadsheet that's a variation of one previously provided to Councilors illustrating the "break-even" points on a net present value basis of the two proposed TIF scenarios. Even after the offsets for the community center, public improvements, and LMI and an additional \$1M present value reduction from taking things back to 2014 (Explanation 1), I'm unable to see how \$2.73M of NPV TIF assistance circa 2014 can have an impact on annualized rate of return (whatever the "amount of investment" might be) that's only slightly less than that produced by Total projected profit of \$1,750,000 (which Explanation 2 states has no net present value dimension).

My apologies in advance if the foregoing gets into the details of the financial model that contractually non-disclosable, but I'd very much appreciate any further explanation that Mr. Craven may be able to provide consistent with those constraints.

Best regards,

Pat Bauer

-----Original Message-----

From: mike-haverkamp <mike-haverkamp@university-heights.org>
To: pbb338koser <pbb338koser@aol.com>
Cc: dcraven <dcraven@berganpaulsen.com>
Sent: Wed, Aug 3, 2011 3:32 pm
Subject: [Fwd: FW: Request for Additional Explanations (Financial Information Provided at June 28 Work Session)]

Pat,

I forwarded your email to Dennis Craven yesterday after you had said he never replied. I also talked to him today about it. He went through his inbox, as well as junk mail folder. He then went through the firm's spam folder and couldn't find it there either. Below are his replies to your questions.

-Mike

----- Original Message -----
Subject: FW: Request for Additional Explanations (Financial Information Provided at June 28 Work Session)
From: "Dennis Craven" <dcraven@berganpaulsen.com>
Date: Wed, August 3, 2011 3:23 pm
To: "Louise From" <louisebob@mchsi.com>
mike-haverkamp@university-heights.org
Cc: jmaxwell@maxwellconstructioninc.com
"Kevin Monson" <KMonson@neumannmonson.com>

Louise and Mike:

The email below from Pat Bauer did not get to me until Mike Forwarded it yesterday.

My response is as follows. I would appreciate it if one of you would forward to Pat:

1. The present value calculation discounts the future cash flow stream back to the first tax TIF payment year, which is projected to be 2018 (based on 2016 assessment). The value of the space is the value of the space, there is no discount, and is based on an estimate of the current market value for white envelope commercial space in an upscale development.

The \$850,000 of offsite costs is the estimate of those costs, which is in current dollars.

Since I only took the PV calculation back to the first payment year (2018)

ATTACHMENT PAGE A7

the amounts are not all as of the same point in time. The discount increases by approximately \$1,000,000, from \$2,500,000 to \$3,500,000, when I take the PV back to 2014.

2. Not sure I understand the question. There is no present value calculation in the green highlighted section. The projected revenues and costs are those projected for the development. They are the amounts used in the calculation of the annualized rate of return.

3. The \$720,000 variance is partially due to rounding. The balance of it is inflation. "Completion" is assumed to be the year after building #2 goes on line. I incorporated a 1% inflation factor into the annual assessments. This results in some increase in value of the units from the point they are projected to be sold to the year the entire project is complete.

4. For TIF projection purposes I assumed all of the parking will be subject to residential roll back. Will not be the case but makes the projection more conservative.

5. Yes.

6. Yes it does. Annualized rate of return (also referred to as internal rate of return or IRR) is a calculation of the return to an investor based on the amount of the investment and the period of time it is invested, quoted on an annualized basis. It is the equivalent of the stated interest rate on a CD or savings account.

7. No. Hence, \$8,000,000 of TIF only increases the IRR from 5% to 10%.

8. Not exactly, but it is a more accurate relationship of the impact of TIF on the investor return calculation than the one referenced in question #7.

9. ARR is a complex calculation. Profit is only one component of the calculation. Your attempt to compute the impact of the TIF on the return in comment #7 ignores the factor of time. An analogy would be a bank advertising a return on a five year CD as being 5% but failing to mention that it is 5% over the entire life of the CD. The annualized rate of return in that example would be more like 1.2% not 5%. If the bank agreed to raise the interest rate by 1% from 5% to 6%, the customer's return on an annualized basis only increases from 1.2% to 1.4% not from 1.2% to 2.2%.

Dennis Craven

-----Original Message-----

From: mike-haverkamp@university-heights.org
[<mailto:mike-haverkamp@university-heights.org>]

Sent: Tuesday, August 02, 2011 8:14 AM

To: KMonson@neumannmonson.com; jmaxwell@maxwellconstructioninc.com; Dennis Craven

Subject: Fwd: Request for Additional Explanations (Financial Information Provided at June 28 Work Session)

ATTACHMENT PAGE A8

I'm forwarding this to you all as well as the other email I just found in my inbox.

-Mike

----- Original Message -----
Subject: Fwd: Request for Additional Explanations (Financial Information Provided at June 28 Work Session)
From: pbb338koser@aol.com
Date: Mon, August 1, 2011 11:20 pm
To: mike-haverkamp@university-heights.org
rosanne-hopson@university-heights.org
stan-laverman@university-heights.org
brennan-mcgrath@university-heights.org
pat-yeggy@university-heights.org
Cc: louise-from@university-heights.org
uhclerk@yahoo.com
ballard@lefflaw.com

As noted in the memo just submitted to City Councilors, I've not received any response to the following request for additional explanations from Mr. Craven.

If any Councilor feels that the explanations I requested would be of help to you in considering the OUP TIF request, I urge you to let Mr. Craven know of your interest in having such explanations furnished to you in advance of next Tuesday's council meeting.

-----Original Message-----
From: pbb338koser <pbb338koser@aol.com>
To: dcraven <dcraven@berganpaulsen.com>
Sent: Mon, Jul 25, 2011 9:30 am
Subject: Request for Additional Explanations (Financial Information Provided at June 28 Work Session)

Dear Mr. Craven,

Following my exchange of e-mails with Mayor From is a request for additional explanations of financial information contained in segments of the first page of the sheets presented at the June 28th University Heights City Council's work session.

If there's any need for this request to come directly from a councilor, please let me know and I'll pursue that route. Also as noted in my initial message to Mayor From, please don't hesitate to get back to me by phone if that would be a more efficient/effective way of addressing the questions I have.

Best regards,

Pat Bauer

ATTACHMENT PAGE A9

-----Original Message-----

From: Louise From <louisebob@mchsi.com>
To: pbb338koser <pbb338koser@aol.com>
Sent: Mon, Jul 25, 2011 9:17 am
Subject: RE: Request for Additional Explanations (For Possible Forwarding to Dennis Craven)

Pat,

Here is Dennis Craven's email: dcraven@berganpaulsen.com I just think it would be easier if you contact him directly.

Louise

From: pbb338koser@aol.com [<mailto:pbb338koser@aol.com>]
Sent: Sunday, July 24, 2011 8:50 PM
To: louisebob@mchsi.com
Subject: Request for Additional Explanations (For Possible Forwarding to Dennis Craven)

Dear Louise,

In attempting some further financial analyses of different elements of the OUP TIF request, I've encountered a few difficulties (stated below) with specific parts of provided information not "lining up" with other parts.

Dennis Craven offered at the last council meeting to respond to questions about provided financial information, but because I wasn't clear if his offer was limited to city officials, I'm routing this request for additional explanations to you in the hope that you will deem it appropriate to forward to him as a way of asking him to respond to questions raised by me (versus you endorsing in any way the questions I'm asking).

If you think this is something I should instead be doing directly, I certainly will do so if you can direct me towards Mr. Craven's e-mail address (I haven't been able to find in on e-mails I've received). I also would be happy to instead route my request through a councilor if you have any concerns about forwarding it as mayor on the understanding indicated above.

If you forward my request to Dennis Craven and it would be helpful for him to talk over with me anything below, he certainly can call me either during the day at 335-9014 or in the evening at 337-7446.

To complete the additional financial analyses I'm preparing in time to meet the August 3 "deadline" for public input incorporated into MPOJC's summary for next month's council meeting, it would be most helpful for me to receive the requested additional explanations from Mr. Craven by the

ATTACHMENT PAGE A10

end of the coming week (Friday, July 29).

As always, thanks in advance for any help you're able to provide me on this.

Best regards,

Pat

REQUEST FOR ADDITIONAL EXPLANATIONS

NOTE: Referenced figures appear in three highlighted sections of attached PDF (first page of financial information presented at June 28 work session).

NET VALUE OF TIF TO DEVELOPER (YELLOW HIGHLIGHTING)

1. Are all numbers in this section determined as of the same point in time (e.g., "present value"), and if so, is the point in time the same as those used in the other two highlighted sections?

FINANCIAL ANALYSIS (GREEN HIGHLIGHTING)

2. Once again, are all numbers in this section determined as of the same point in time (e.g., "present value"), and if so, is the point in time the same as those used in the other two highlighted sections?

3. "Total projected revenue (w/o TIF)" is \$53,200,000 and "[a]ssessed value of One University Place is assumed to be 90% of retail value." Although 90% of \$53,200,000 is \$47,880,000, "Assessed value at completion" stated in the preceding section (Comparison to Plaza Towers) is \$48,600,000. The difference is only \$720,000, but does it reflect some other variable not included in my "90% of total projected revenue" calculation.

4. How is the revenue from Parking (\$3,300,000) allocated between Commercial (\$3,000,000) and Residential (\$46,900,000)?

ATTACHMENT PAGE A11

5. Does "Total projected revenue (w/o TIF)" of \$53,200,000 minus "Total projected costs" of \$51,450,000 result in a "Total projected profit (w/o TIF)" (my own term for what seems to be a missing derived figure) of \$1,750,000?

PROJECTED DEVELOPER ANNUALIZED RATE OF RETURN (PINK HIGHLIGHTING)

6. Does the "Projected Developer Annualized Rate of Return - Without TIF" of 5.12% reflect something besides the "Total projected profit (w/o TIF)" of \$1,750,000 derived in Item 5, and if so, what are those other factors?

7. If "Projected Developer Annualized Rate of Return - Without TIF" of 5.12% is produced by "Total projected profit (w/o TIF)" of \$1,750,000, can each per percent of return appropriately be viewed as "encompassing" \$341,797 (i.e., \$1,750,00/5.12)?

8. If "Projected Developer Annualized Rate of Return - With TIF" of 10.16% is produced by "Net projected economic value to developer" of \$3,730,000 (from yellow highlighted section), can each per percent of the additional 5.04% return attributable to TIF (i.e., 10.16%-5.14%) appropriately be viewed as "encompassing" \$740,079 (i.e., \$3,730,000/5.04)?

9. What justifies the differences in the "relative" rates of return computed in Items 7 and 8? (Using the factor derived in Item 8 (\$740,079), the combination of non-TIF profit and TIF assistance (\$5,480,000) would seem to produce a "with TIF" return of 7.4%; in contrast, using the factor derived in Item 7 (\$341,797), the combination of non-TIF profit and TIF assistance (\$5,480,000) would seem to produce a "with TIF" return of 16.0%).

Ãfâ -â -

To ensure compliance with requirements imposed by the Internal Revenue Service, we must inform you that, unless specifically indicated otherwise, any tax advice contained in our written or electronic communications with you is not intended or written to be used, and cannot be used, to either 1) avoid tax-related penalties under the Internal Revenue Code; or 2) promote, market or recommend to another party any transaction or matter addressed in such communication.

To ensure compliance with requirements imposed by the Internal Revenue Service, we must inform you that, unless specifically indicated otherwise, any tax advice contained in our written or electronic communications with you is not intended or written to be used, and cannot be used, to either 1) avoid tax-related penalties under the Internal Revenue Code; or 2) promote, market or recommend to another party any transaction or matter addressed in such communication.

ATTACHMENT PAGE A12

MEMORANDUM

TO: University Heights City Councilors

DATE: August 9, 2011

FROM: Pat Bauer

RE: Comments on Jeff Maxwell's Responses to Steve Ballard's Memorandum Concerning Provisions Needing Consideration in Connection with OUP Development Agreement

INITIAL OBSERVATIONS

Back when Jeff Maxwell was seeking to have the zoning ordinance changed, he and others placed great emphasis on the ability to subsequently formulate more focused controls during the PUD application process. The capacity to do so was clearly reserved in both Ordinance No. 180 and the Conditional Zoning Agreement (see emphasized passages in attachment pages A1-A2). With the zoning change in hand, Mr. Maxwell has now done a striking "about face" with various responses amounting to claims that the project shouldn't be subject to restrictions unless they apply across the board to everyone else in University Heights.

This blatant example of "having your cake and eating it too" behavior conveniently ignores the fact that OUP involves a range of uses that presently do not exist elsewhere in our community. Restrictions tailored to the specific circumstances of OUP were promised along the way and should be imposed without the necessity of having to go through the efforts involved in determining how restrictions should be framed to function appropriately throughout the rest of University Heights. Our relatively small number of fairly basic ordinances may be entirely appropriate to the scale of our existing community, but with OUP "ramping things up" rather considerably, OUP-only regulations clearly are both in order and entirely legitimate.

A final initial observation is that Steve Ballard's memorandum outlines things the City should consider in order to protect the City's interests and Tom Gelman's responses presumably only involve things that would best serve the developer's interests. To more clearly present the nature of Steve Ballard's concerns and the character of Tom Gelman's responses, comments on approximately half of Tom's responses to Steve's numbered items are grouped below based on commonality of subject matter.

A. PERMISSIBLE COMMERCIAL USES (Items 9, 13, & 18)

Comments

Steve Ballard's memorandum consistently identifies provisions necessary to "careful control" of commercial uses, and Tom Gelman just as consistently disclaims the appropriateness of such provisions.

Item 9 is especially critical to the effectiveness of noise restrictions formulated with an eye towards the special circumstances OUP will present relative to other properties in town (see attachment page A3 (e-mail from Chris Luzzie describing need for specific addressing noise emanating from upper balconies and top floor of rear building)).

9. Law Enforcement on Property. The Council should consider requesting that the developer and those coming after the developer (owners of condominium units) agree that the University Heights Police Department may come upon the property in perpetuity to enforce all traffic signage and regulations on the property.

RESPONSE: The property should be subject to the same rules, regulations and laws as other properties in University Heights with regard to any official acts, whether of the police department or any other division of the City.

13. Restrictions on Commercial Uses/Hours of Operation. The Council should consider the types of businesses that are or are not permitted in the commercial portion of the development. Ordinance 79(6)(f)(2)(b) provides a broad list of permitted uses. The Council may wish to further refine or define those uses and further address hours of operation.

RESPONSE: The uses provided in the referenced ordinance are acceptable and have already been restricted by the Council adopting the ordinance. The matter has been addressed at Section 3.i of the Development Agreement.

Referenced Provision: "Commercial uses shall be limited to those uses specifically permitted by City ordinance, now or in the future, in a multi-family commercial zone. In the event such uses are modified by zoning amendment, previously existing permitted uses shall be grandfathered until such time as such use ceases to be operated for one year."

18. Limit Liquor Licenses. The Council may wish to consider limiting the number of liquor licenses or beer permits that may be issued for businesses located at the development. Doing so may be another measure useful to restricting permitted uses. The point may be that one restaurant would be great but 3 is too many.

RESPONSE: The Zoning Ordinance already sufficiently limits liquor licenses by precluding bars, saloons, taverns or drinking establishments in the multi-family commercial PUD zone.

B. REQUIRED COMMERCIAL USES (Item 16)

Comment

“[B]est commercially reasonable efforts” probably falls quite short of the expectations of residents initially impressed by suggestions of retail amenities of an implied quality and an assumed duration..

16. Grocery Store/Market. The Council should consider whether it desires to require that a portion of the commercial space be used for a grocery store/market.

RESPONSE: This matter is generally addressed at Section 8 of the Development Agreement and has been more specifically addressed in the developer's TIF proposal.

*Referenced Provision: "Developer will use Developer's **best commercially reasonable efforts** to secure a tenant or owner agreeing to operate a neighborhood grocery market/deli within one of the commercial units within the Project." (emphasis added)*

C. SUFFICIENCY OF PARKING (Items 6, 17, & 19)

Comments

“Having your cake and eating it too” seems an apt description of the developer’s position that a halving of surface parking spaces from 107 to 53 shouldn’t result in any constriction of permissible commercial uses.

The response to Item 17 substantially overstates the implications of the MPOJC report in at least three respects. First, the report assumed a limited mix of specific commercial uses (unlike the developer’s assertion of entitlement to freedom from any restrictions on uses beyond the outer limits established by the zoning ordinance). Second, even within that limited mix of specific uses, the report identified a likely parking deficit in the early evening. Third (and perhaps most significantly), based on the absence of an available objective foundational measure, the report included no assessment of the parking requirements attributable to a neighborhood grocery store.

Some “nose of the camel in the tent” effects are evident in Item 6 (expansion of parking not be restricted by condominium documents) and also from the absence of a clear recognition in Item 19 that expanding the number of parking spaces beyond 55 will necessitate a change in the City’s zoning ordinance (see Ord. 79, sec. 13.B.6. (“A minimum of one hundred eighty-five (185) off-street parking spaces, of which no more than fifty-five (55) may be above ground, shall be provided for commercial and residential uses.”)).

6. Changes to Condominium Documents. The Council should consider whether to require that any substantive changes to the condominium documents that will be drafted must be approved by the Council to be effective. The Council particularly may wish to have such a requirement concerning changes to the rules and regulations governing the development.

RESPONSE: Section 3 of the Development Agreement addresses condominium documents. Items a through n represent covenants required to be incorporated into the Condominium Declaration that “shall be enforceable by the City (in addition to the Association and/or unit owners) and shall not be permitted to be amended, deleted or otherwise modified without approval of the City by appropriate resolution of the City Council”.

Unreferenced Provision: Development Agreement sec. 3.o. provides that “[t]he Developer and/or the owners’ association shall have the right to convert green space within the Project into additional surface parking if approved by the City Council and consistent with the applicable zoning ordinances.” Both response and development agreement thus exclude an expansion of parking space from the set of covenants enforceable by unit owners (removes.

17. Parking. The Council should consider whether the proposed parking is sufficient for the development and the types of commercial uses contemplated.

RESPONSE: The PUD plan contains 53 proposed service parking spaces out of the 55 maximum permitted by the Zoning Ordinance. The MPO-JC report indicated that this was sufficient surface parking.

19. “Land Banking” Green Space. MPO-JC has raised the possibility of the Council requiring that certain green space be kept available for conversion into surface parking if some specified triggering event occurs in the future. The triggering event might be something like (i) a future finding and Resolution by the Council that parking is inadequate or (ii) the establishment of a certain number of a certain types of businesses at the proposed development (e.g., if there’s 3 restaurants, the green space becomes or may become parking).

RESPONSE: There has been added to the Development Agreement (Section 3.o) a provision that would allow the developer the ability to convert green space into additional surface parking if approved by resolution of the City Council.

D. LEASING OF RESIDENTIAL UNITS (Items 7 & 25)

Comments

Here again the developer asserts a right to be free from any restrictions specific to OUP even though such restrictions (i) clearly are allowed by both Ord. No. 180 and the Conditional Zoning Agreement (see attachment pages A1-A2) and (ii) clearly are necessary by virtue of OUP involving uses unlike those permitted anywhere else in University Heights.

7. Rental/Leasing of Residential Units. The Council should decide whether it is agreeable to permitting some or all of the residential units in the development to be rented or leased. The Council may propose that no units be leased; or that only units in one building may be leased; or that no more than a specified number of units may be leased; or some other description of limits on leasing.

RESPONSE: Section 3.j of the Development Agreement incorporates the City's zoning definition of "family" to control appropriate residential use. The developer does not wish to otherwise have restrictions on leasing residential units that are not applicable generally in University Heights, and believes that any such restrictions would be discriminatory.

25. Number of Residential Rentals. If residential units will be permitted to be leased, does the Council desire to limit the number?

RESPONSE: See response to paragraph 7.

E. TIME LINE FOR CONSTRUCTION OF PROJECT (Items 15 & 21)

Comments

The responses to these two items exemplify the highly speculative effects involved in considering a PUD application and development agreement well in advance of any decision by the Church to move. The extent of the developer's "commitment" (if the word is capable of being stretched to such length) is to "use all reasonable efforts to complete construction of [a] phase ... within two years after the commencement [of] such phase" with commencement of the first phase occurring no later than ten(!) years from now.

The response to Item 21 mentions the possibility that the Church may not sell now but subsequently might decide at some later date to then sell either to Jeff Maxwell or some other totally unrelated developer. This explicit effort to accommodate such possibilities within the responses to these "time line" items underscores the importance of the elements of "identity and background of developer" and "persons bound and restrictions on transfer" subsequently discussed in Sections G and H of this memorandum.

15. Timing of Construction. The Council may wish to provide that construction on the proposed development must commence by a certain date and be completed by a certain date.

RESPONSE: Timing of construction is addressed at Section 7 of the Development Agreement.

Referenced Provision: “The Project is likely to be built in phases: Phase One being the south commercial /residential building, and Phase Two being the north residential building. Once construction commences on each Phase, Developer shall use all reasonable efforts to complete construction of such phase as efficiently and in as timely a manner as the parameters of the project permit and to be substantially completed within two years after the commencement date for such phase.

21. Conditioning PUD Approval on Land Sale Timely Construction. The Council may wish to consider provisions that the PUD Plan Application approval terminates if St. Andrew Presbyterian Church votes not to sell the property or if the project is not completed in a given time. This issue also may be addressed separately in a provision that requires commencement and completion by certain dates.

RESPONSE: It would seem inappropriate to condition PUD approval on the Church's decisions. The Church could decide in the near term not to sell the property, but after further consideration in the longer term might again decide to sell the property, at which time an approved PUD plan could still be viable to the same or a different developer. Any modification to the plan would in any event require Council approval. All of this is speculative and it would seem unnecessary from the City's standpoint to add conditions based on what the Church may or may not do. In reference to time frame, it seems unnecessary to place a time constraint, but if the City Council feels compelled to do so, then it is suggested that perhaps ten years would be a reasonable time frame in which to require commencement of the project or expiration of the PUD Plan approval. No time limit should be imposed that would result in the expiration of an approved PUD after such a project has been commenced.

F. RELATIONSHIP TO TIF (Item 20)

Comments

As reported in the minutes of the City Council’s June 29th TIF work session, “Gelman stated that the project cannot happen if the TIF financing is not approved” and “Monson stated that ... there is no ‘plan B’”. Unless those statements were false when made, it defies reason to contend that the Development Agreement can possibly be approved prior to effective resolution of the developer’s existing request for TIF assistance. The possibility those earlier statements might now be characterized as “inoperative” merely underscores the imperative need for great critical caution in assessing the accuracy and reliability of other developer representations made before or hereafter.

20. TIF. Does the Council desire to condition approval of the PUD Plan Application on establishing the requested TIF? Are there other TIF points the Council would like to address in the Development Agreement?

RESPONSE: TIF matters will be addressed in a separate TIF Agreement to be entered into between the City and the developer should TIF be approved. The Zoning Ordinance already requires an approved PUD plan before the property can be developed under any circumstances. The Development Agreement need not address the TIF issue.

G. IDENTITY AND BACKGROUND OF DEVELOPER (Items 33 & 34) [newly added items - no response yet by developer]

Comments

Although the developer has not yet responded to these newly added items, the rather predictable nature of such responses warrants the observation that (as reported in the minutes of the City Council’s June 29th TIF work session) “Craven stated the Maxwell development most closely

resembles the Plaza Towers project in Iowa City” and that both of these items were required in connection in connection with that project. Item 34 obviously is appropriate if the City Council is counting on Maxwell going forward to do the things he is saying he is going to do, and Item 33 is equally essential to protect University Heights from the problems that could arise if Maxwell wants to turn the project over to someone else as soon as the Church decides to sell or (as previously noted in Section E) if the church decides not to sell now but at some later point in time wishes to sell either to Maxwell or to some totally unrelated developer.

33. *Restriction on Transfer to Entities Not Owned or Controlled by Jeff Maxwell.* The Council may wish to restrict the transfer or assignment of the Development Agreement to persons other than Jeff Maxwell or to entities not owned or controlled by him. Similarly, the Council may wish to condition its approval of the PUD Application on continued ownership by Mr. Maxwell or an entity owned or controlled by him. The thought behind such restrictions and conditions is that the qualifications and identity of the person/group proposing redevelopment (here Mr. Maxwell) are important to the Council and were significant reasons for entering into the Development Agreement (if it is entered into) and for approving the PUD Application (if it is approved).

34. *Statement of Qualifications of Developer.* The Council may wish to require that Jeff Maxwell provide a statement as to his qualifications and background for undertaking and completing a project such as the one proposed. This information may be important to the Council in determining whether to enter into a Development Agreement or to approve the PUD Application. The information sought could include such things as the identity of all owners and directors of any corporate or other legal entity involved in ownership or the development; financial references and background; other projects that have been developed; D/B/As or other names or entities by or through which the developer has conducted business in the past and present; and financial resources available for developer to complete financing of the proposed development. I would be happy to prepare a list of such requirements at the Council's direction.

H. PERSONS BOUND AND RESTRICTIONS ON TRANSFER (Items 1 & 32)

Comments

In still further instances of wanting to “have his cake and eat it too,” the developer wants to bind the City without the Church being bound to the City in return. The suggestion in the response to Item 1 that the Development Agreement is somehow personal to Mr. Maxwell is quite at odds with the “it should be available to others” contentions previously discussed in Sections E and G.

The response to Item 32 is characteristic of the evasiveness apparent in some other communications with the developer. Obviously a sale to a tax-exempt entity before TIF payments are completed might reduce (in the case of a partial sale) or eliminate (in the case of a complete sale) the developer’s ability to receive such payments. Once TIF payments are completed, however, the developer seems totally oblivious to the circumstance that subsequent sales to tax-exempt entities would reduce or eliminate the “payback” that has been a central motivating factor of the support the project has received from some councilors and some residents.

As has been detailed previously (“Financial Issues Presented by OUP TIF Request” (July 10, 2011), Appendix Page A4), the net present value “break-even” points would not have occurred until the 26th year (under the 80/20 scenario that would have prevailed if Johnson County had been willing to provide TIF assistance) and will not occur until the 30th year under the presumably now operative 100/0 “city alone” scenario. Needless to say, any sales to tax-exempt entities before the

break-even points will result in tax receipt having been allocated to the developer in excess of those ultimately paid to local governments.

1. Parties to Agreement. The Council should consider whether St. Andrew Presbyterian Church should be a party to the Development Agreement. Mr. Maxwell, as owner of a portion of the property proposed for development and as the proposed developer presently is a party in the draft version. The Council may desire that the church also undertake the commitments set forth in the Agreement.

RESPONSE: St. Andrew Presbyterian Church need not be a party to the Agreement. St. Andrew Presbyterian Church is not the applicant nor would the Church at any time, under any circumstances, be likely to become the developer of the property. The ordinance specifically requires the developer to enter into an agreement with the City, not the property owner. Jeff Maxwell is the PUD Plan applicant/developer, and also either the owner or contract purchaser of the entire development parcel. Once a plan is approved, any party that develops the property according to the plan would be required to abide by the Development Agreement or enter into a separate new agreement with the City in connection with any modified plan.

32. Restriction on Transfer to Tax-Exempt Entity. The Council may wish to prohibit any sale or transfer of all or part of the proposed development to tax-exempt entities. Some such entities (like the church, for example) do not pay property taxes. To the extent portions of the proposed development are transferred to such an entity, the TIF component, if there is one, of the development may be affected.

RESPONSE: If TIF is provided as a means to support the project, there will be an incentive for the developer not to sell to tax exempt entities (other than a portion of the project slated for possible transfer to the City). Reduced tax revenue will slow down the tax rebate and increase the possibility that the full rebate amount may not be reached. On the other hand, the developer would not wish to be absolutely restricted from making a sale to a tax exempt entity.

I. MISCELLANEOUS MATTERS (Items 3, 12, & 26)

Comments

The response to Item 3 presumably meant to cite draft development agreement section 2.a.iv., but the response to Item 26 fails to recognize that that section is not responsive to the “fountain/sculpture/etc.” circumstance Item 26 is addressing.

By omission, the response to Item 12 confirms the developer’s unwillingness to accept responsibility for the snow removal difficulties caused the curb/sidewalk realignment possibilities described in section 2 of City Engineer Staff Report # 1 (August 4, 2011).

3. Exterior Amenities. The Council may desire that certain exterior amenities, perhaps including benches, book drop, and bicycle racks be shown and specified in site or building plans.

RESPONSE: Exterior amenities are addressed at Section 2.a.v of the Development Agreement.

12. Snow Removal. The Council should consider whether to require the developer to be responsible in perpetuity for the removal of snow and ice on certain City sidewalks, including those on the north and south sides of Melrose Avenue beginning at Sunset Street and proceeding west to a specified distance. The sidewalk on the south of Melrose Avenue will be closer to the street, from what I understand of the plans, which may lead to additional deposits of snow and ice from plows clearing the street.

RESPONSE: The developer will remove snow and ice on sidewalks along the north side of Melrose adjacent to the project as provided at Sections 3.k and 3.n of the Development Agreement.

26. OUP Entrance Design Elements. The Council may wish to require approval of specific plans for the entrance to the proposed development. Different ideas have been suggested - a fountain, a community common area, a sculpture. The Council may wish to have a say in how this area is presented.

RESPONSE: See response to paragraph 3.

Referenced Provision: "Landscaping Plan showing species and size of plantings as well as amenities including but not limited to walkways, benches, bicycle racks, and trash receptacles." (draft development agreement section 2.a.iv.)

ORDINANCE NO. 180

AN ORDINANCE AMENDING ORDINANCE NO. 79 (ZONING) TO REQUIRE THAT A DEVELOPER OWN THE REAL PROPERTY IDENTIFIED IN A MULTIPLE-FAMILY COMMERCIAL PUD APPLICATION

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF UNIVERSITY HEIGHTS, JOHNSON COUNTY, IOWA:

* * *

- F. Property in a Multiple-Family Commercial zone shall be used for the following purposes only:
1. All uses which are allowed in an R-1 Single-Family Residential Zone, subject to the height restrictions, yard regulations, lot regulations, and off-street parking regulations specified for the R-1 Single-Family Residential Zone in Sections 7, 8, 9, and 10 of this Ordinance.
 2. **As provided in or limited by the Development Agreement** between the City of University Heights and the Developer **pursuant to the Multiple-Family Commercial Planned Unit Development (PUD) regulations and requirements set forth in Section 13 of this Ordinance.**

* * *

Section 13. Multiple-Family Commercial PUD.

- B. Development Regulations and Restrictions. Property may be developed as a Multiple-Family Commercial PUD Zone pursuant to the following regulations and restrictions:

* * *

8. **The University Heights City Council may impose additional reasonable conditions as it deems necessary** to ensure that the development is compatible with adjacent land uses, will not overburden public services and facilities, and will not be detrimental to public health, safety, and welfare.
- C. Procedure.
3. **The University Heights City Council in its sole discretion may approve, deny, or approve on condition any such Plan Application or any part thereof.**

CONDITIONAL ZONING AGREEMENT

This agreement is made between the City of University Heights, Iowa, a municipal corporation (hereinafter referred to as "City"), St. Andrew Presbyterian Church and MidWestOne Bank (hereinafter together referred to as "Owners"), and Jeffrey L. Maxwell (hereinafter referred to as "Developer").

* * *

6. In consideration of the City's rezoning Owners' property, Developer agrees to, and Owners accept, the following conditions:

* * *

- b. that **Owners and Developer shall not challenge the authority of the City Council to further regulate the development of the subject property under a Multiple-Family Commercial Planned Unit Development (PUD) Agreement, as provided in the City's Zoning Ordinance, as amended, including but not limited to regulation regarding site design and building elevations, vehicular access, landscaping and common open space, restrictions on types of commercial uses and hours of operation for such uses, restrictions on leasing of residential dwellings, and amenities to serve the residents and businesses of the development,** provided the City Council's exercise of such regulatory authority is in accordance with the City Council's zoning authority under such Zoning Ordinance, as amended, and is not arbitrary, capricious, discriminatory or otherwise an abuse of its discretionary zoning authority relative to Planned Unit Developments or otherwise a violation of applicable laws.

* * *

7. Owners, Developer, and the City acknowledge that the conditions contained herein are reasonable conditions to impose on the land under Iowa Code §414.5, and that said conditions satisfy public needs that are caused by the requested zoning change.

From: CLuzzie@aol.com
To: ballard@lefflaw.com, brennan-mcgrath@university-heights.org, uhclerk@yahoo.com, louise-from@university-heights.org, mike-haverkamp@university-heights.org, pat-yeggy@university-heights.org, rosanne-hopson@university-heights.org, stan-laverman@university-heights.org
Sent: 7/24/2011 7:33:08 P.M. Central Daylight Time
Subj: PUD Development Agreement items

In looking over the draft development agreement included in the July 12 agenda attachments, I believe the subject of noise and music should be addressed in greater detail.

Currently, the draft agreement says that occupants, owners and guests must comply with the city's noise ordinance. Section 3(g). Such a general provision might be adequate for ordinary residential properties but the Maxwell development includes commercial uses, balconies, and patio areas on the top floor of the rear building. Music piped outside on commercial outdoor space or on a balcony or the top floor of the rear building can project noise more regularly and much farther than someone having a back yard party once a year.

Allowing commercial space to be open until midnight both Friday and Saturday nights may seriously impinge on the quiet enjoyment of neighboring homes (a concern residents near Stella have mentioned when, in nice weather, the patio areas are used and the windows on some nearby residences are open). Section 3(h). Music played on the top floor of the back building or on balconies of upper floors could easily reach residents living at considerable distances from the development.

This is an area where a bit of prevention would save all of us hassles with noise enforcement. I would suggest prohibiting any outside speakers (either permanent or temporary) on all balconies, the top floor of the back building, or any commercial areas.

I also would strongly suggest requiring that the outside space of commercial uses be closed much sooner than midnight. Many people go to bed long before midnight and would not appreciate loud noise that late at night.

Thank you for your consideration.

Chris Luzzie
338 Koser Avenue