



STAFF REPORT

To: City Council
From: City Manager
Date: 01102006

Subject: Resolution denying transfer of Cable TV franchise

Recommendation: The City Attorney's office recommends that the Council deny the request for transfer of the Cable TV franchise Adelphia to Time Warner Comcast utilizing the attached resolution.

Discussion: As the Council is aware Time Warner/Comcast are acquiring the Adelphia Cable TV franchises and our City Attorney's Office (Rutan and Tucker) are representing the franchise agreements of more than a dozen California cities including Twentynine Palms. The Attorney has been negotiating the transfer of the franchises but indicates that requested and needed information has not been provided to assess the transfer. The matter is not ready for the Council to grant a transfer. There are specific action timelines that must be met to effect the transfer. To facilitate the negotiations for transfer and recommend the periods of time provided for by law, the Attorney recommends that the Council deny the transfer 'without prejudice' so that if and when the documents are complete and the negotiation is concluded satisfactorily the Council may take up the matter without prejudice and consider granting the transfer.

The attorney has prepared extensive determinations and findings for the Council to make. These are included within the resolution for denial their office has prepared.

RESOLUTION NO 05-27

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TWENTYNINE PALMS, CALIFORNIA REJECTING AND DENYING WITHOUT PREJUDICE ONE OR MORE FCC FORMS 394 RELATING TO THE TRANSFER OF THE CABLE TELEVISION FRANCHISE, AND/OR CONTROL THEREOF, TO AN ENTITY CONTROLLED BY TIME WARNER INC. OR COMCAST CABLE COMMUNICATIONS, INC.

WHEREAS, the City of Twentynine Palms (the "City") has received one or more FCC Forms 394 (collectively, the "Application") requesting consent of the City Council to the assignment of the cable television franchise, or control thereof, (the "Franchise") granted to an entity currently controlled by Adelphia Communications Corporation ("Adelphia") (the "Franchisee"), to an entity (the "Proposed Transferee") ultimately controlled by Time Warner Inc. ("TWI") or Comcast Cable Communications, Inc. ("Comcast") (the "Transfer");

WHEREAS, City has tendered numerous information requests to the parties submitting the Application (the "Applicants") relating to, among other things, the legal, technical, and financial qualifications of the Proposed Transferee, and the potential impact on rates and services; and

WHEREAS, the Applicants have failed or refused to timely provide requested information in relation to, among other things, the following issues:

- (1) Complete and accurate copies of the relevant transactional documents, including all exhibits and schedules thereto, which are necessary for the City to exercise its legislative authority in reviewing the Transfer.¹
- (2) The provision of financial disclosure relating specifically to that entity or entities which will possess a legally enforceable obligation to comply with franchise obligations.²
- (3) The provision of requested information relating to how the Transfer will potentially impact cable services including, without limitation, how will the operational changes be implemented in Southern California, how call

¹ The exhibits and schedules to the transactional documents were ultimately provided, subject to a Non-Disclosure Agreement, on November 11, 2005. In order to obtain these documents, representatives of the City had to spend literally months attempting to negotiate an appropriate Non-Disclosure Agreement which complied with relevant state law and provided for the disclosure of the requested documents upon terms and conditions such that they could be utilized by the legislative body in terms of making a final decision. For months, the Applicants proposed to provide disclosure upon terms and conditions which either failed to comply with relevant state law, provided the documents upon a basis which rendered them unusable in the deliberate process, or hinged their provision upon contortions of the attorney-client privilege which exceeded its legitimate scope and potentially conflicted with public policy. As a result, some of the requested documents, but certainly not all of them, were provided 140 days into the process and without sufficient time to have them fully integrated into the due diligence analysis.

² Relatively late into the due diligence process, the Applicants did offer to provide a written guaranty of Time Warner Cable Inc. ("TWIC"). The vast majority of the financial disclosure was not provided at the TWIC level but rather at the Time Warner Inc. ("TWI") level, the ultimate parent. At this point in time, no audited financial data has been provided specifically relating to TWIC, although revenue and cost allocations are contained in the filings of TWI. The financial condition of TWIC is rendered more problematic by the public announcements as to the intended reorganization of TWIC through the spin off of the interests held by Comcast therein and the intended IPO relating to that entity. Given the fact that the vast majority of the financial disclosure has been provided at the TWI level and further given the fact that the corporate and financial structure of TWIC appears to be a moving target at this point in time, it cannot be safely concluded without additional analysis that TWIC constitutes a legally and financially sufficient guarantor within the meaning of the applicable franchise ordinance and franchise agreement.

center operations will be handled, if and how local offices will be merged or reorganized, how and when will local construction and equipment needs be financed and prioritized, what will be the rollout schedule for new services, and other issues which relate directly to the day-to-day operations of the Proposed Transferee.

- (4) The potential impact of the Settlement Agreement between the Securities and Exchange Commission ("SEC") and TWI and the Deferred Prosecution Agreement between TWI and the Department of Justice ("DOJ") upon Proposed Transferee's legal technical, and financial qualifications and the continued viability of TWI and/or TWC and their affiliates and subsidiaries; and

WHEREAS, the Applicants unreasonably delayed or refused or failed to provide a material portion of the requested information; and

WHEREAS, the City has reviewed the FCC Form 394, all supplemental information submitted in relation thereto, as well as information compiled in any compliance audit, and the various Staff reports and related documents; and

WHEREAS, the following documents, without limitation, are deemed to be incorporated into the Administrative Record relating hereto:

- (1) Letter of William M. Marticorena to Sheila R. Willard and Gary Matz dated June 29, 2005;
- (2) Letter of Sheila R. Willard to William M. Marticorena dated July 12, 2005;
- (3) Letter of Gary Matz to William M. Marticorena dated July 12, 2005;
- (4) Letter of William M. Marticorena to Sheila R. Willard and Gary Matz dated July 29, 2005;
- (5) Letter of Gary Matz to William M. Marticorena dated August 12, 2005;
- (6) Letter of Gary Matz to William M. Marticorena dated August 19, 2005;
- (7) Letter of Gary Matz to William M. Marticorena dated August 19, 2005;
- (8) Letter of William M. Marticorena to Sheila R. Willard and Gary Matz dated August 22, 2005;
- (9) Letter of William M. Marticorena to Sheila R. Willard and Gary Matz dated August 25, 2005;
- (10) Letter of Gary Matz to William M. Marticorena dated September 27, 2005;
- (11) Letter of William M. Marticorena to Gary Matz dated September 27, 2005;
- (12) Letter of Sheila R. Willard to William M. Marticorena dated September 30, 2005;
- (13) Letter of Gary R. Matz to William M. Marticorena dated October 7, 2005;

- (14) Letter of William M. Marticorena to Gary Matz dated October 12, 2005;
- (15) Letter of Gary R. Matz to William M. Marticorena dated October 28, 2005;
- (16) Letter of Gary Matz to William M. Marticorena dated November 14, 2005; and
- (17) Letter of Kristy Hennessey to Mary Morales dated November 15, 2005 (PCTA);

WHEREAS, all of the information provided by the Applicants including, without limitation, the Applications, the transactional documents, numerous SEC disclosure documents, and other information provided to the City and retained in the files of the City, its attorneys and/or consultants, is hereby incorporated by reference into the Administrative Record and is available upon request;

WHEREAS, the Franchise Agreement has expired as of this date without renewal, extension, or otherwise;

WHEREAS, the expiration of the Franchise Agreement was not a result of the City stalling, frustrating, or otherwise interfering with the orderly process for renewal under Section 546 of the Cable Communications Policy Act of 1984, as amended (the "Cable Act") to the detriment and prejudice of the Cable Operator;

WHEREAS, the Cable Operator possesses no statutory rights pursuant to Section 537 of the Cable Act, or otherwise, given the expired and extinguished nature of the Franchise Agreement (*Comcast of California I, Inc., et al. v. City of Walnut Creek, California*, Order Denying Plaintiffs' Motion for Preliminary Injunction, p.p.s. 10-13 (N.D.Cal., Case No. C05-00824 (WHA) (2005)); and

WHEREAS, the City has determined that it would not be in the public interest in the exercise of its legislative discretion to approve the Transfer at this point in time and has determined that it would be in the public interest to disapprove the Transfer without prejudice subject to potential future and further consideration;

NOW, THEREFORE, the City Council of the City of Twentynine Palms, does hereby resolve as follows:

Section 1: The Application for approval of the Transfer is hereby rejected and denied without prejudice for one, or more, or all of the following reasons:

- A. Failure to timely provide "additional information required by the terms of the Franchise Agreement or applicable state or local law";
- B. Failure to timely provide other requested additional information;
- C. Failure on the part of the Applicant to timely cooperate with Staff, its attorneys and consultants, in performing due diligence relating to the Application, the legal, technical, and financial qualifications of the Proposed Transferee and/or the impact of the transaction upon cable television rates and/or services;
- D. Failure to demonstrate the legal, technical and financial qualifications of the Transferee;

E. Failure to provide a written financial guarantee, acceptable as to form and substance by the City Manager, of the legal entity(s) for which financial disclosure was provided in the Application of and/or additional filings; and

F. Filing FCC Forms 394 providing for potentially different Transferees.

G. The facial invalidity of the FCC Form 394 relating to the “Exchange Transaction” based upon the lack of legal authority for Comcast to execute said form.

H. Due to the specific circumstances that exist in this matter, the unconditional grant of a franchise transfer during the “renewal window”, or subsequent to the expiration of the franchise, destroys or significantly impedes the proper operation of the renewal provisions of Section 626 of the Cable Act and results in the inability of the City to consider, for the purposes of renewal, the operating history of the existing franchisee. The unconditional grant of a franchise transfer at this point in time during the “renewal window”, as established by Section 626 of the Cable Act, circumvents its legislative intent, terminates the ability of the City to consider, as envisioned by the statute, the operating history of the existing franchisee, the existing franchisee’s compliance or lack thereof, with applicable law, and the legal, technical and financial qualifications of the existing franchisee, which is the entity which filed the application for renewal pursuant to Section 626 and thus invoked the protections and burdens of Section 626 of the Cable Act.

I. The approval of the Transfer would not be in the public interest.

J. The expired and extinguished nature of the Franchise Agreement eliminates any right on the part of the Applicants to require the approval of the Transfer pursuant to Section 537 of the Cable Act, or otherwise, and the approval of a transfer of an expired and extinguished franchise at this point in time based upon the facts set forth in the record, without any commitment as to renewal, extension, or otherwise on the part of the Applicants, will create a significant risk to the City based upon the uncertain nature of the Cable Operator’s continued occupancy of the public rights-of-way and operation of the cable system. (*See, Comcast of California I, Inc. v. City of Walnut Creek, California, Id.* at p. 14).

Section 2. The Recitals above are hereby declared to be true, accurate, and correct.

Section 3. The Proposed Transferee has failed to demonstrate that it is a legally, technically and financially qualified applicant for the following reasons:

- (A) The burden of proof is upon the Proposed Transferee to demonstrate its legal, technical, and financial qualifications to assume control of the Franchise and the Franchisee.
- (B) The Proposed Transferee has failed to present any business plan or other documents indicating its short-term and long-term intent as to how it will operate the cable television system and how it intends to achieve an acceptable and reasonable return of and on its investment.
- (C) The City has attempted to carefully review the financial qualifications of the Proposed Transferee. In order to determine the qualifications of a buyer for a cable television system, or a series of cable television systems, it is necessary to not only review the personal wealth, or lack

thereof, of the individual or entity assuming control of the franchise operations, but it is also necessary to evaluate the economic reasonableness of the transaction to determine whether the transaction will impose unreasonable financial burdens upon the purchaser which could result in material rate increases beyond that associated with normal operation of a cable system, reduction in service quality based upon cost cutting and expense minimalization, a combination thereof, a premature sale of the system, or financial insolvency. The lack of financial qualifications on the part of the Proposed Transferee can impose significant and serious financial consequences upon the City and its subscribers. The Proposed Transferee has failed to provide the necessary information to perform this critical analysis.

- (D) The individual wealth of a Proposed Transferee, corporate or personal, is only the starting point for the financial qualification analysis. Obviously, if the Proposed Transferee does not possess sufficient cash or borrowing capacity to acquire necessary proceeds to close the transaction, financial unsuitability is established. In addition, if the Proposed Transferee does not possess sufficient financial resources, by way of cash or reasonable and customary borrowing capacity, to operate the system, meet current and long-term liabilities when due including, but not limited to, capital expenditure requirements, financial unsuitability is the logical conclusion. However, even in the case of a Proposed Transferee which possesses sufficient cash to close the transaction and operate the system consistent with franchise requirements, there are circumstances under which a buyer or Proposed Transferee may assume such financial obligations that render it financially impossible for that buyer, absent massive influxes of additional capital, to operate that cable television system in a manner which pays current and long-term liabilities, covers debt service, and provides a reasonable and adequate return of and on equity investment.
- (E) In this particular case, all, or substantially all, of the independently-audited financial information provided by the Applicants in relation to the Transfer has been provided at the TWI level. Information relating to TWIC has, in whole or at least material part, constituted allocations of parent-level information without independent verification. In addition, the Applicants have informed the City, as well as the financial community as a whole, that they intend to implement a material restructuring of TWIC which will involve, based upon information provided by the Applicants, the redemption of an eighteen percent (18%) interest held by Comcast, through an FCC-mandated trust and the creation of a new publicly-traded company in which TWI will retain an approximate 84% ownership interest and 90% of the voting interest. Little if any information has been provided regarding the financial and legal structure of TWC subsequent to its restructuring and thus significant uncertainty exists as to whether or not any disclosure provided in relation to TWIC, independently audited or otherwise, will survive the restructuring. In addition, and without limitation, the Applicants have refused to guaranty post-closing, certain indices of financial health, or lack thereof, including the amount of debt, debt-to-equity ratios, and other important financial indicators and predictors of financial health. Thus, without said guarantees, information

provided “as of closing,” although relevant, is not necessarily indicative of long-range financial structuring, especially in light of announced changes in the ownership and financial structure of TWIC. The Applicants have further failed to provide meaningful assurance to the City that the financial commitments made “as of closing” will carry forward in the future.³ As a practical matter, it is relatively commonplace over the past several years for major cable operators to significantly increase their debt load or otherwise modify “at closing conditions,” as times moves on. For example, and without limitation, the amount of debt ultimately incurred by Adelphia, for both legitimate and allegedly illegitimate purposes, significantly exceeded the debt as of the day of closing of the transfer of the cable system to Adelphia.

- (F) The existence of the SEC Settlement and the Deferred Prosecution Agreement, and the circumstances surrounding its entry, create serious doubts and concerns regarding the legal, financial, and technical qualifications of the Proposed Transferee, and/or TWI/TWIC. First, it must be noted that the alleged commission of illegal acts, including without limitation security fraud by Adelphia cause, or materially contributed to, the Adelphia Bankruptcy and all of the negative impacts upon subscribers and local franchising authorities that flowed therefrom. Based upon the evidence presented to the City, it does appear that a reasonable basis exists to believe that TWI may have engaged in certain unlawful or prohibited acts or omissions.⁴ The existence of the Deferred Prosecution Agreement, and the circumstances surrounding its entry, provides a strong and independent basis for rejection of the Transfer absent the provision, which provision has not been provided as of this date, of assurances that the type of acts and omissions which allegedly occurred in relation to the SEC Litigation and the Deferred Prosecution will not repeat on a going forward basis and that the SEC Settlement Agreement and the Deferred Prosecution Agreement themselves, and their implementation, will not materially hinder the operational and financial status of TWI and its subsidiaries. Any allegation that these settlements are irrelevant to this Transfer based upon the fact that entry is between TWI, the parent entity, and the SEC/DOJ is simply wrong for several reasons. First, TWI possesses a controlling interest in both TWIC and the Proposed Transferee and thus its operating history, its management philosophy, its compliance, or lack thereof, with applicable

³ In fact, the Applicants have even refused to guaranty that the Franchise will end up in the hands of a TWI affiliate.

⁴ The SEC Settlement Agreement and the Deferred Prosecution Agreement, as well as ancillary agreements, do not contain any special admission of liability on the part of TWI or any related entity. Thus, any conclusions must be based upon information inferred from the existence of the SEC Settlement Agreement and the Deferred Prosecution Agreement, and its ancillary documents, as well as the allegations and other information set forth in those documents. Although guilt or innocence cannot be conclusively established by the legislative body based upon the information contained in those documents, as well as other information disclosed by TWI in its public filings, as well as extrinsic information contained in the trade and popular press, it does appear reasonable to conclude that reasonable grounds existed to believe that violations may have occurred. As a practical matter, rational business entities, such as TWI, do not enter into settlement agreements involving the payment of over half a billion dollars unless those entities believe that reasonable grounds exist in relation to a finding of culpability. In addition, the City has recently learned that TWI has recently agreed to a \$2.65 Billion settlement of certain private civil claims (*In Re AOL Time Warner, Inc. Securities and ERISA Litigation* (MDL Docket 1500, 02-Civ-5575 (SWK)).

law, directly speaks to its going forward control of the Proposed Transferee and this cable franchise and system. Second, the Deferred Prosecution Agreement does directly involve the operation of TWI's cable subsidiary since several of the agreements which have been earmarked for review by the Independent Monitor appointed by the DOJ involve programming agreements relating to the cable division. The fact that these programming agreements have been earmarked for further scrutiny casts doubt upon the operating history of the cable division and directly brings into analytical focus its prior compliance with applicable law and its legal, financial and technical qualifications. At a minimum, it is reasonable to defer approval of the Transfer until the Independent Monitor has concluded its examination as to whether or not TWI's cable division had committed prohibited and/or unlawful acts in relation to programming and other contracts directly related to the operation of its cable systems.

- (G) The Applicants have failed to provide evidence denying the existence of the various risks described above or demonstrating the potential benefits to the City and subscribers which might justify the incurrence of the risks described above.
- (H) Given the risks associated with the Transfer, as identified above, it will not be in the public interest for the City to unconditionally approve the Transfer at this time. This disapproval of the Transfer contained herein is without prejudice and may be reconsidered by the City Council when and if the Applicants are able to present evidence demonstrating the Proposed Transferee's technical and financial suitability and the lack of a negative impact on rates and/or services.
- (I) The Applicants have asked the City to determine the legal, technical, and financial qualifications for the Transfer based primarily upon the legal, technical, and financial qualifications of the proposed parent entity. The Applicants have failed to present sufficient information to the City sustaining, if otherwise sustainable, a finding of legal, technical, and financial qualifications other than in relation to TWI and/or TWIC. More specifically, and without limitation, absent the financial qualifications of TWI as set forth in the FCC Form 394, the Applicants could make no reasonable argument whatsoever for a finding of financial qualification. Notwithstanding the Applicants' reliance upon the financial disclosure of the parent entity, the City has been informed by authorized attorneys for the Applicants that no transfer agreement can include TWI as an obligated party thereto.⁵ It is reasonable to conclude that the proposed parent entity is not willing to commit the assets set forth in the FCC Form 394 to franchise obligations and thus the use of the financial qualifications of the proposed parent entity is inappropriate since those assets are not pledged or otherwise made legally available for the performance of franchise obligations. Thus, based upon the express refusal of the proposed parent entity to commit the financial resources identified in the

⁵ A Guaranty from TWIC is certainly more substantial but not without its own problems as explained above.

FCC Form 394, or any specific portion thereof, to performance of franchise obligations, the Proposed Transferee is hereby found not to possess the financial qualifications to control the Franchise.

Section 4. The Franchisee, which is currently controlled by Adelphia, has filed an application for renewal pursuant to Section 626 of the Cable Act. By invoking the benefits and burdens of the renewal provisions of the Cable Act, the Franchisee has initiated a statutorily-created process whereby its operating history throughout the franchise term constitutes the relevant operating history for the purposes of consideration in the renewal process. Both the express language and legislative intent of Section 626 of the Cable Act rewards those cable operators who have, throughout their franchise term, complied with franchise requirements, complied with applicable law, and possess the legal, technical, and financial qualifications for renewal. On the other hand, the same statutory scheme potentially penalizes those franchisees who fail to meet one or more of these statutory criteria. The unconditional grant of a transfer potentially eliminates the ability of the City to consider the relevant operating history of Adelphia and thus destroys or materially impedes the proper operation of the renewal provisions of the Cable Act. The unconditional approval of the Transfer at this point in time would, in essence, make a mockery of the renewal provisions of Section 626 and encourage the going forward “laundering” of franchises and franchisees which have failed to comply with the renewal criteria set forth in the Cable Act through late-term sales. Although the Franchisee was not required to invoke the benefits and burdens of Section 626 in seeking renewal of its franchise, having made that election, the statutory scheme can only be properly implemented through a completion of that process with the existing Franchisee.

Section 5. A transfer of the Franchise, transfer of actual or managerial control of the Franchise, and/or transfer of control of the Franchisee, shall be deemed a material breach of the Franchise.

Section 6. The decision pursuant to this Resolution shall, without further action of the City Council, constitute an act of the Franchising Authority within the meaning of 47 C.F.R. § 76.502 and a “final decision” of the City Council within the meaning of §§ 617(e) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L.No. 103-385, 106 Stat. 1477 (1992).

Section 7. This denial, disapproval, and rejection issued pursuant to the authority of this Resolution shall be deemed “without prejudice” to the ability of the Applicant to file another FCC Form 394 relating to the same or a different transaction. However, nothing herein shall limit the authority of the City Council, or their written designee, to reject any subsequent FCC Form 394 based upon the same grounds set forth in the written notice of denial or such other grounds as might exist in relation to said future FCC Form 394.

PASSED and ADOPTED by the City Council of the City of Twentynine Palms at a regular meeting held on the 13th day of January, 2006.

Mayor

ATTEST:

Charlene L. Sherwood, CMC City Clerk

STATE OF CALIFORNIA)
COUNTY OF SAN BERNARDINO) SS
CITY OF TWENTYNINE PALMS)

I, Charlene L. Sherwood CMC City Clerk of the City of Twentynine Palms, California hereby certify that the foregoing Resolution No. 05-27 was duly adopted at a regular meeting of the City Council of the City of Twentynine Palms, held at the 10th day of January, 2006, by the following vote:

AYES: COUNCIL MEMBERS:
NOES: COUNCIL MEMBERS:
ABSENT: COUNCIL MEMBERS:

Charlene L. Sherwood, CMC City Clerk



**CITY OF TWENTYNINE PALMS
STAFF REPORT**
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To: City Council

From: Community Development Director via City Manager

Date: January 10, 2006

RE: PC 04-58 – An application by Geraldine Hagman, on behalf of Sky's the Limit, for approval of a General Plan Amendment and a Change of Zone from RS-E (Single Family Residential) to P (Public), on 10 acres, at 9701 Utah Trail, east of Utah Trail, north of the Joshua Tree National Park, Section 15, APN # 591-081-13 and –14.

RECOMMENDATION: Conduct the Public Hearing, adopt the Mitigated Negative Declaration, introduce Ordinance 198, amend the General Plan and change the Zone from RS-E (Single Family Residential) to P(Public).

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| <p>Attachments</p> <ol style="list-style-type: none"> 1. Application 2. Planning Commission staff report 3. Mitigated Negative Declaration 4. Ordinance |
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BACKGROUND:

The City received an application for a General Plan Amendment, Change of Zone and Site plan review on June 8, 2005. The Planning Commission reviewed this project on November 15, 2005 and voted to recommend that the City Council approve the project on December 20, 2005.

The table summarizes Land Use, General Plan and Zoning in the project area.

Land Use, General Plan and Zoning			
Parcel	Land Use	General Plan	Zone
Site	Unimproved	RS-E	RS-E
North	Unimproved	RS-E	RS-E
East	Unimproved	RS-E	RS-E
South	National Park	NP National Park	NP National Park
West	National Park	NP National Park	NP National Park

PROJECT DESCRIPTION

Geraldine Hagman, on behalf of Sky's the Limit, a non-profit organization, has filed an application with the City for a General Plan Amendment, Change of Zone and site plan approval to construct an observatory, amphitheater, classroom facility, meditation center, nature trails, desert observation area, caretakers unit, public restrooms and related parking facilities on 10 acres. The Planning Commission previously approved the site plan.

General Plan

The site is designated by the General Plan as RS-E. The Single Family Residential (RS) General Plan designation allows Institutional uses that are designed to be integrated into the neighborhood in which they are located, so as to maintain the integrity of the neighborhood. The applicant requests a General Plan amendment to Public (P). The "P" designation allows City facilities, parks, golf courses, schools and other public uses. Staff recommends approval of this amendment.

Zoning

The project site is zoned RS-E (Residential Single Family-Estate), which allows residential development with a maximum density of one dwelling unit per 2.5 acres. The zone also allows Institutional uses that are accessible from Expressways, Arterials and Collectors, such as churches, conference centers, camps, government facilities, hospitals and schools. The application includes a request for a Change of Zone from RS-E to P (Public). The P (Public) land use district is intended for public uses, such as City and county facilities and offices, parks, golf courses and schools. Staff recommends approval of the change of zone.

Visitor Services

The proposed project represents a potentially dynamic educational resource for the community. The project could allow for advanced scientific field study of astronomy, expand educational resources and opportunities, and could generate additional tourism.

Environmental Clearance

A copy of the draft Mitigated Negative Declaration and Initial Study are included. As of the writing of this report, the City has not received correspondence on this project.

A Desert Tortoise and General Biological Survey was prepared for this project. No desert tortoises were found on site during the survey. Furthermore, no special status species, including any plant or animal species considered to be rare, threatened or endangered, were observed or are expected to be impacted by the project. Mitigation measures will ensure that the project's biological impacts are less than significant.

A traffic study was not prepared for this project. The project will be required to widen Utah Trail to General Plan standards, with a 52' wide half-street. When complete, the citywide traffic survey currently underway will allow further refinement of the street classification system.

The potential for uncovering paleontological, archaeological, and/or cultural resources could occur during grading activities. In order to mitigate the potential for the loss of such resources, archeological monitoring during grading activities shall be required.

Approval Authority

The City Council, as legislature, is the final Approval Authority for the General Plan Amendment and Change of Zone.



CITY OF TWENTYNINE PALMS
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To: City Council
From: Community Development Director via City Manager
Date: January 10, 2006
RE: PC 05-29 - An appeal by Sean Pulliam of the Conditions of Approval, specifically conditions # E3, E4, E5, E12 and E19, of Tentative Parcel Map 17060, which approved the subdivision of 10 acres into four parcels, located at the northwest corner of Indian Trail and Utah Trail, on APN #0621-281-20, Zone RL 2.5, Section 9.

RECOMMENDATION: The Planning Commission recommends that the City Council open the Public Hearing, take testimony, uphold the Conditions of Approval and deny the appeal.

BACKGROUND: Pursuant to Section 19.46 of the Development Code, the applicant is appealing the Conditions of Approval. The applicant seeks relief from conditions requiring street improvements on Utah Trail and Indian Trail, installation of street lights and construction of a Class I bike path on Utah Trail adjacent to the development. The applicant contends that these conditions are “economic discrimination.”

Attachments

- Planning Commission report
- Vicinity Map
- USGS Map
- Appeal application
- Appeal letter
- Conditions of Approval

The parcel map would subdivide ten acres into four (4)-lots. The project is located west of Utah Trail, north of Indian Trail on APN # 0621-281-20. The zoning for the property is Rural Living 2.5 minimum parcel size (RL 2.5). The proposed use, low-density single family residential uses, are allowed in the RL 2.5 Land Use District.

On August 15, 2005, Tentative Parcel Map 17060 was approved by the City Manager acting as the Community Development Director, pursuant to Section 19.94.110 of the Development Code (Review and Approval Authority).

On September 6, 2005, the applicant appealed the following conditions:

- E3. All streets shall be improved to City standards with curb, gutter, sidewalk and street pavement.
- E4. All streets abutting the development shall be improved a minimum half-street width of 40 feet with curb, gutter and sidewalk on the development side.
- E5. Streets adjacent to the property shall be improved as follows:
 - Utah Trail adjacent to the property shall be improved to the City’s half-width Arterial street standards.
 - Indian Trail adjacent to the property shall be improved to the City’s half-width Arterial street standards.

- E12. Streetlights shall be required and shall conform to City's standards for such.
- E19 Class I bike path shall be constructed along Utah Trail adjacent to the development. Additional easements shall be required for construction of bike path.

On 2005, the Planning Commission held a public hearing, upheld the conditions of approval and denied this appeal. The applicant then appealed this action.

SUMMARY

The project is located at the intersection of Indian Trail and Utah Trail, both of which are General Plan designated Arterial roadways. Arterials transport large volumes of intra-city traffic. An Arterial provides circulation within a defined geographic area, providing access and connections between other Arterials and is also designed to route local traffic from Expressways to their destination and vice versa. Arterials feature 104' wide right of ways, with 52' wide half streets.

Recently, an applicant appealed conditions requiring street improvements on "Local" streets. Streets not designated by the General Plan are deemed to be "Local" streets. Local streets require 60' of right of way and have a paving width of 36' feet. The City Council has found that, in one instance where lots of very low density, were located on Local streets, street improvements may be deferred without damage to the City's General Plan Circulation Element. This did not establish precedent, as the subject property was not located on an Arterial roadway.

The legal basis for requiring conditions of approval was established by the courts in the case entitled City of Buena Park V Boyar. In the case, the courts ruled that a City may impose conditions of approval when granting discretionary approval, in order to assure that a project is consistent with the General Plan. In this case, conditions were imposed to assure that the Pulliam Tentative Parcel Map would be consistent with the General Plan. Without these conditions, the project would not be consistent with the General Plan

In the case of Dolan v City of Tigard, the United States Supreme Court found that there must be a connection between the project and the condition. In the case of this project, the four proposed residential lots created by the project, will result in additional traffic, therefore, street improvements to the General Plan standard are required.

The applicant contends that these conditions are "economic discrimination". However, the applicant has provided no evidence to this effect. Furthermore, the conditions are consistent with the policies of the General Plan and Development Code and with other map approvals in the vicinity and throughout the community under similar conditions.

GENERAL PLAN REQUIREMENTS

The purpose of the Circulation Plan is to establish a standard for the development and improvement of the transportation network and a long-range plan, which ensures the community vision. Goals, policies, and programs established in the Plan are to be implemented to ensure the orderly development of effective circulation systems in the twenty-year period from adoption through the year 2020.

The City of Twentynine Palms General Plan Circulation Element requires the orderly development of required infrastructure, including the construction of underground utilities (water, 05-29 Appeal CC SR1

gas, electricity, sewage treatment), curb, gutter, sidewalks and roads, by the private sector. This requirement is generally implemented as a condition of approval placed upon new development as a means of minimizing the environmental impacts of new development, in exchange for the right to develop property in a manner consistent with the Land Use Element.

The General Plan designates Indian Trail and Utah Trail as Arterials adjacent to the project site.

Arterials are intended to transport large volumes of intra-city traffic. An Arterial provides circulation within a defined geographic area, providing access and connections between other Arterials and/or Expressways. These streets distribute traffic to Collectors within the City and provide efficient access to nearby destinations. Some vehicles may use Arterials as through routes, but the primary function of an Arterial is to route local traffic from Expressways to their destination and vice versa. Arterials are designed with a 104-foot wide right-of-way consisting of a minimum of four traffic lanes, two parking lanes and 12-foot wide continuous left turn lane and/or median strip.

Eliminating these conditions would result in a project that is inconsistent with the General Plan. Government Code Section 66474 states that a City must deny a map that is inconsistent with the General Plan.

DEVELOPMENT CODE REQUIREMENTS

Pursuant to Section 19.96 of the Development Code, the project was approved with conditions, according to the following General Subdivision Standards:

19.96.010 Circulation. The street pattern of the proposed subdivision shall conform to the Circulation Element of the City's General Plan; and

19.96.040 Street Layout - Street layout and design shall be consistent with the Circulation Element of the General Plan and surrounding developments.

The appeal, which requests the elimination of these conditions of approval, would result in a project inconsistent with these Development Code requirements.

APPEALS

Appeals must be filed in a timely basis. The code provision below addresses this topic:

19.46.030 Filing Appeals. - Appeals shall only be considered if filed within ten (10) consecutive calendar days following the date of action for which the Appeal is made. If the last day to act falls on a non-business day, the following business day shall be deemed to be the last day to act.

The appeal was not filed within ten days of the approval. The appeal was filed on September 6, 2005, 21 days after the project was approved. Therefore, the appeal was not filed in a timely basis and should not be considered by the City Council.

FINDINGS:

Based on the aforementioned facts, the Planning Commission adopted the following findings in denying this appeal:

1. The project is located at the intersection of Indian Trail and Utah Trail, both of which are General Plan Circulation Element designated Arterial roadways.

2. Arterial roadways require dedication of 104' wide right of ways, with 52' wide half streets.
3. A tentative parcel map that is inconsistent with the General Plan must be denied (Government Code Section 66474).
4. The project was approved with conditions requiring completion of the General Plan circulation element street improvement requirements (Government Code Section 66474).
5. The street pattern of the proposed subdivision shall conform to the Circulation Element of the City's General Plan (Development Code 19.96.010 Circulation).
6. Street layout and design shall be consistent with the Circulation Element of the General Plan and surrounding developments (Development Code 19.96.040 Street Layout).
7. The conditions of approval are consistent with the General Plan.
8. The conditions of approval are consistent with the Development Code.
9. The project, a tentative parcel map, will generate additional traffic in the area.
10. The conditions are related and directly proportional to the project impacts.
11. Infrastructure improvements have previously required on other projects, and under similar conditions.
12. A nexus exists between the project's circulation impacts and the conditions of approval.
13. The conditions of approval are appropriate and proportionate for the size and scale of the project.
14. On August 15, 2005, Tentative Parcel Map 17060 was approved by the City Manager acting as the Community Development Director, pursuant to Section 19.94.110 of the Development Code (Review and Approval Authority).
15. On September 6, 2005, the applicant filed an appeal.
16. The appeal was not filed within ten days of approval.
17. The appeal was not initially filed within the required timeframe.
18. The appeal is without merit.
19. The appeal has no basis in fact.
20. The action of the approval of Tentative Parcel Map # 17060 with conditions is final, as the appeal was not filed on a timely basis.
21. No relevant precedent on the topic of this appeal exists.
22. The applicant has provided no evidence of economic discrimination.
23. The approval and application of conditions does not constitute economic discrimination.