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June 16, 2021

TO: MINTURN TOWN COUNCIL

FROM: TOWN ATTORNEY

RE: INFORMATION ABOUT INTERPRETATION OF 2012 AGREEMENT

In the packet is a staff memo related to the proposed Future Funding Agreement. This document was drafted by Michelle and myself. The memo discusses in various places when the developer is required to replenish the “Developer’s Funds” into escrow with the Town and in what amount. The memo addresses the provision of paragraph 10.c. of the 2012 Agreement which provides:

If the parties abandon their efforts to execute an amendment to the Annexation Agreement, Developer shall replenish Developer’s Funds, less those for which Developer shall receive a credit for spending consistent with the terms of this Agreement, to escrow within one year thereafter or at the time that Developer files a revised development plan with the Town consistent with the provisions of the Municipal Code, whichever is earlier.

Based upon this language in the 2012 Agreement, the staff memo states that Battle Mountain’s use of the Developer’s Funds on its own Project as provided for in paragraph 5 of the 2012 Agreement would constitute a “credit for spending consistent with the terms of this Agreement.” This, as the memo notes, could mean that Battle Mountain’s spending on the Project, which is purported to be in excess of \$7,210,000, would mean that there are no funds that Battle Mountain would be required to replace into escrow even if one of the triggers identified by paragraph 10 occurred.

Former Councilperson Shelly Bellm and Councilperson Earle Bidez have questioned this interpretation. Councilperson Bidez directed Staff to a PowerPoint presentation which was used as part of the public meeting at the time that the 2012 Agreement was approved by Council. Staff was also able to locate the video of the Council meeting when the 2012 Agreement was approved. The PowerPoint presentation is attached to this supplemental memorandum. Slides 9 and 18 each indicate that Battle Mountain is required to restore “all” funds to escrow that were released to the Developer under the 2012 Agreement. Comments made during the Council meeting discussed how the developer credits that could come out of a replenishment of escrow funds was limited to moneys the Town spent from the “Town’s Funds” that fulfilled obligations identified in the Battle Mountain annexation agreement (e.g. Scholarship Fund, Little Beach Park, Recreation Center). Based upon this information created contemporaneously with the approval of the 2012 Agreement,

the Developer's spending on its Project from the \$7,210,000 is irrelevant to the funds that are contemplated to be replenished back into escrow.

Under the 2012 Agreement, replenishment of escrow funds can occur at one of three junctures. First, under 10.b. "If the parties execute an amendment to the Annexation Agreement, Developer shall replenish the escrow if and when required therewith." This is not a perfect solution, because Annexation Agreements are usually drafted based upon the content of a contemporaneously approved PUD so that all of the development impacts are included as obligations in the agreement. That said, the Town and the Developer could move forward with negotiating an amendment to the Annexation Agreement independent of the Developer moving forward with processing the revised PUD. This would require the Developer to either: (a) comply with the funding provisions in paragraph 14.d. or (b) enter into a Future Funding Agreement with the Town.

The other two junctures for the replenishment of escrow funds are in 10.c. Under this provision at the earlier of one of two events the escrow (minus developer credits discussed above) must be replenished when (1) the "parties abandon their efforts to execute an amendment to the Annexation Agreement", or (2) "at the time that Developer files a revised development plan with the Town."

At this juncture, Council can consider the following options:

- A. Require the replenishment of the escrow as a pre-condition to submitting an application for a revised PUD as contemplated by 10.c.
- B. Work with Battle Mountain on an amendment to the Annexation Agreement without concurrently reviewing a PUD proposal as contemplated by paragraph 10.b.
- C. Approve the funding agreement as drafted (which does not contemplate replenishment of the escrow at this time), which would allow Battle Mountain to submit an application for a revised PUD which could be processed concurrently with negotiations to amend the Annexation Agreement. Escrow funds would then be replenished in such amount as ultimately approved by the amended Annexation Agreement.