

To: Michelle Meteer, Town Manager  
From: Jeff Armistead – Midtown Village  
Date: February 29, 2024  
Re: Response to Feb. 15 Letter

Michelle, please review my responses (in red) to the Memorandum that was provided by the town attorneys.

## MEMORANDUM

To: Michelle Metteer, Town Manager  
From: Jester Gibson & Moore, LLP Robert R.  
Marsh, Esq.  
Date: February 15, 2024 cc: Michael J. Sawyer,  
Town Attorney  
Re: Water Moratorium – Midtown Lofts, LLC

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## INTRODUCTION

This memo summarizes our legal analysis and interpretation of Minturn’s moratorium on new connections to its water system and the Town Code, together with the moratorium’s impact on the number of single-family equivalent (“SFE”) water taps that may be issued to Midtown Lofts, LLC’s for its potential “Midtown Village” development. The Town’s February 2023 repeal and reenactment of the moratorium allows Midtown Village to receive taps equal to the number of SFEs historically used by the property(ies) being developed, plus three new taps. Based upon the facts as they have been provided to us, however, the developer did not make a request to the Town Council for an expansion of that limit before the February 2023 repeal and reenactment of the moratorium eliminated the possibility of such relief. Therefore, the developer cannot now receive taps in excess of the historic use plus three SFEs.

The Minturn Municipal Code provides that the PUD process is made up of 3 stages of review:

Conceptual PUD

Preliminary PUD

Final PUD

Although the initial submission of materials was under a Conditional Use application, the town accepted the developer’s materials for a Conceptual review, fees were collected, (*See email below dated March 12, 2021*) and a public hearing was held in March 2021 as a Conceptual review. Due to the fact that the application became a PUD, the Conceptual review hearing satisfied the provisions of the Minturn Municipal Code related to the first phase of the PUD process.

The Midtown Village PUD became an “active application” starting at the Conceptual phase of the review process and the Town should be obliged to apply the law as it existed in the spring of 2021.

The number of residential units that were originally proposed on the Conditional Use Permit Application were 42 Units. When Staff recommended that the applicant switch to a PUD rather than a Conditional Use, the number of proposed units remained the same.

The Conceptual PUD Application, which was accepted in June of 2021, included the same number of residential units (42).

Point of reference: the Town has been very consistent with regards to its position and rules that apply to “active” land use applications. The Town’s legal counsel have provided numerous training presentations during public Planning and Zoning meetings and Town Council meetings related to quasi-judicial land use applications and protocols related to conduct and public meetings. Review of the public records and meeting recordings of (2) of the most recent PUD’s (Belden Place and Minturn North) would demonstrate how long the process takes before 100% of the submission materials meet the “completeness” criteria. Yet, throughout the entire process, starting at the Conceptual PUD phase, both of those applications were considered “active”. The record is very clear on this fact and, as I have been advised as a Planning and Zoning Commissioner, the law is clear as it relates to quasi-judicial matters of active land use applications.

## BACKGROUND

As originally enacted on May 6, 2020, the moratorium limited applications for new connections to the Town’s water system to developments involving “no more than three SFE’s for new water use for an entire property or collection of adjoining properties...owned by the same or related owners.” The original moratorium also provided that “[t]his limitation may be modified on a case-by-case basis by the Town Council based upon a specific application.”<sup>1</sup>

In 2021, the developer of Midtown Village submitted but did not pay the fees associated with a Conditional Use Permit (“CUP”) application.<sup>2</sup> Town staff determined, however, that the proposed development could not proceed as a conditional use. Therefore, the Town never accepted or processed the CUP application.

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<sup>1</sup> Ordinance 5 – Series 2020, at Section 3.

<sup>2</sup> The CUP application that we received is incomplete and unsigned. An incomplete application confers no actual or potential rights upon the applicant. Even had the CUP application been completed and properly submitted with payment of the required fees, however, it makes no reference to the moratorium or any request for issuance of taps in excess of the limit fixed by the moratorium. Therefore, the potential CUP application does not constitute the request to the Town Council required for relief from the moratorium’s proscribed limit.

**SEE EMAIL dated March 12, 2021 below FROM MADISON**

Hi Jeff,

Scot and I have made the determination that you can come in conceptually for DRB (so would just pay the \$200 fee for that), however in further review and conference with the Attorneys, we do believe that you will need to bring this application in as a PUD past this initial conceptual hearing. This is mostly due to when you subdivide all of these single family lots, they will be smaller than the required minimum of 5000 square feet within this zone district which won’t be allowable by the code. However if you come in as a PUD, you can write your own zoning to an extent. Please let me know if you would like to go forward with the conceptual hearing in front of the DRB at the March 24<sup>th</sup> meeting and I will charge \$200 to the credit card you provided to me. If you would like to discuss this further, I can certainly set something up for early next week. Please let me know if you have any questions, and have a great and safe weekend!

Thanks, Madison

The fees were charged to the credit card that the applicant provided at that time and the March DRB Conceptual hearing was held, which satisfied step #1 of the PUD Process. (Conceptual PUD phase) The result of that meeting was that the Planning and Zoning Commission provided enough positive feedback for the applicant to move forward to the 2<sup>nd</sup> phase of the PUD process, Preliminary PUD Application.

Later in 2021, the Town Planning Commission considered the conceptual plan for Midtown Village. Unless they were the same as the materials accompanying the developer's incomplete CUP application, any materials the developer may have submitted to the Planning Commission have not been provided to us. The Official Minutes of the Planning Commission's consideration of the Midtown Village development, however, reference the pending moratorium, but make no mention of any request for relief from its limitations. **The materials, plans, etc. that were submitted, accepted by the Town Staff and presented to the Planning Commission at the Conceptual hearing in March 2021 were the same plans as the CUP application, 42 Residential units. Review of the video/audio recording of that meeting will confirm this. The need for 42 SFEs to support 42 residential units is inherently implied and at no time did the Town specify to the applicant that they needed to explicitly "request for relief" from the limitations of the pending moratorium.**

The Town received the developer's Preliminary Plan application on October 24, 2022, approximately a year after the Planning Commission's conceptual review. The developer did not complete its application, and the Town did not deem the application "complete," however, until approximately nine months later, in July 2023. **As a point of reference, the Minturn North PUD applications changed so drastically from the Conceptual PUD Application (October 2019) to the Final PUD approval (Fall 2023) that it was essentially a completely different project. The Conceptual PUD application materials showed a project that included 162 SFEs & Total Buildout of 184 Single Fam, Duplex, & Multi-Fam in MultiPhase Buildout with PHASE 1 = 70 Dwelling Units or SFE's. The Minturn North Preliminary PUD included relatively the same # of SFE's and units at Full Buildout and 70 SFE's for Phase 1. The Preliminary PUD application was deemed "not complete" at the May 5<sup>th</sup>, 2022 Special Town Council Meeting and remanded back to the Planning and Zoning Commission. The Final PUD application, which was approved in 2023, only included 39 residential units and only required between 50-60 SFE's. Yet, the Minturn North PUD was considered to be an "active application" throughout the entire process, which spanned 4 years. All PUD's go through a long process of back and forth with Staff, referral comments from County partners, consultants etc. and most are even approved with conditions that must be met before they are "complete". Minturn North was granted 70 SFE's prior to the moratorium and prior to a "complete" Preliminary PUD application.**

Statements made at APRIL 15, 2020 – First Reading of Ordinance NO.5-SERIES 2020

**"This ordinance allows the town to enter into an agreement with the Minturn Crossing development new Taylor St on Union Pacific Railroad property. The developer has agreed to prepay for the first phase of water taps allowing the town necessary funding to begin to address the Enterprise Fund Capital Improvements Plan (CIP)." - Mike Sawyer**

**Mayor Pro Tem Earle Bidez commented "the intent is to move forward with the CIP and to maintain the moratorium only as long as absolutely necessary."**

In the interim, on February 15, 2023, the Town repealed and replaced the moratorium. The 2023 moratorium allows projects that had "received a PUD Concept Development Plan approval" by the effective date of the reenactment to be allocated water taps "in the amount of the historic

number of SFEs used plus three additional SFE[s]...”<sup>1</sup> The 2023 moratorium does not identify any of these so-called “grandfathered” applications. A memo from the Town Attorney that accompanied the 2023 moratorium, however, identifies Midtown Village as among the grandfathered developments.

The 2023 moratorium also provides that “[t]he Town may accept no applications for connection to the Town’s water system or allocation of SFEs that differ from the content of this ordinance.”

The developer of Midtown Village has asked whether its actions summarized above enable it to apply to the Town Council for allocation of water taps in excess of the “historic use plus three” limit, as was allowed prior to the 2023 repeal and reenactment of the moratorium.

## ANALYSIS

The law that exists on the date of an action or omission generally controls the rights and/or obligations that flow from the events. The original moratorium would have allowed the Town Council to grant a request for relief from the moratorium “based upon a specific application.” We have not been provided, however, any indication that the developer of Midtown Village ever presented any such request to the Town Council. Neither the incomplete CUP application nor the Official Minutes of the Planning Commission’s consideration of Midtown Village make any reference to such a request, which would have been significant and, therefore, naturally included in the documentary record. **The Midtown project has been clear with the intentions to build 42 residential units and the obvious requirement for at least 42 SFE’s since 2021.**

The developer’s pending inquiry shows that its Preliminary Plan application does not include a specific request for relief from the moratorium. **At no time did the Town Staff make it clear that the applicant needed to make a “specific request for relief from the moratorium”. The plans have always shown the intention to build 42 units and therefore, the “request” for additional SFE’s other than the 22.5 (Historical +3) is inherently included within the application materials that were provided.** If it did, the developer would be asking about the Town’s intentions for resolution of its pending request, rather

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than for an opinion regarding whether a request for relief from the moratorium can be submitted in the future. **The developer is requesting resolution of the fact that 100% of the materials that have been provided to the town have demonstrated the need for 42 SFE’s since 2021. The statements made by the town Attorney during the October 2023 Town Council meeting only described a “new process” by which a developer may be allowed to make an “application” for the remaining taps that are leftover from the Minturn North PUD allocation.**

The Town is also obliged to apply the law as it exists on the date of an event. Therefore, were the developer of Midtown Village to ask in the future for relief from the moratorium, the Town would be required to process that application in accordance with the moratorium as reenacted in February 2023. The 2023 moratorium, however, prohibits acceptance of applications that differ from its

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<sup>1</sup> Ordinance No. 2 – Series 2023, at Section 7.

terms.<sup>2</sup> Therefore, based on the facts as we understand them and the existing language of the moratorium, Midtown Village may be allocated water taps equal to the historic use plus three new taps, but cannot apply for or be allocated taps in excess of that number.

Finally, the developer's Preliminary Plan application was not completed for processing until July 2023. Therefore, the Preliminary Plan application should be processed in accordance with the law as it existed in July 2023. As of that date, the February 2023 reenactment of the moratorium prohibited acceptance of an application by the developer of Midtown Village for taps in excess of the historic use plus three additional taps.

The facts that were provided to Jester Gibson & Moore, LLP Robert R. Marsh, Esq. and referenced in the memo above are not consistent with the records and materials that Midtown Village has provided to the Town. Further, the information that has been provided as a response to this memo should be considered by the Town prior to any hearings related to the distribution of any remaining SFE's / Taps.

The Midtown Village PUD application became an active application in the spring of 2021 and the Town should be obliged to apply law as it existed in the spring of 2021.

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<sup>2</sup> Ordinance No. 2 – Series 2023, at Section 8.

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