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DATE: April 12, 2024
TO: Planning & Zoning Commission
FROM: Karp Neu Hanlon, P.C.
RE: Bolts Lake Development and Vested Property Rights Agreement

For Council's consideration is a proposed Development and Vested Property Rights Agreement ("Development Agreement") to implement the Bolts Lake development concept and the Settlement Agreement with Battle Mountain. Council will recall that as part of the ski/resort development concept from 2008, the Town and Battle Mountain entered into a lengthy Battle Mountain Annexation Agreement and Vested Property Rights Development Agreement approved by Ordinance No. 10 – Series 2008 ("2008 Annexation Agreement"). Pursuant to Section 1.4, the Development Agreement would supersede the 2008 Annexation Agreement, together with the Wastewater Agreement, Water Service Agreement, various Escrow Agreements, and the 2012 Agreement Regarding Escrows and Funding. Adoption of the Battle Mountain Code Changes (Ordinance No. 1 – Series 2024) replaced the prior Battle Mountain Preliminary PUD Plan (Resolution 18 – Series 2008). Between the adoption of the Battle Mountain code changes and the Development Agreement, all prior agreements and approvals for the 2008 Battle Mountain ski/resort development for the Bolts Lake property will be superseded by new approvals and agreements.

As provided for in the Settlement Agreement and outlined in Section 1.2 of the Development Agreement, the Development Agreement and associated approvals do not become effective until the Settlement Agreement closing happens and a stipulation for dismissal of the pending lawsuit is approved. At that time, the Development Agreement and other approvals will be recorded in the public records.

Conceptually, Council should think about the Development Agreement as accomplishing the following matters: (a) memorialize various promises and commitments made by Battle Mountain as part of the approval process, and (b) create a system of vested property rights allowing Battle Mountain (and its successors) to pursue the development in accordance with the approved zoning for a period of 30 years.

Section 2.1 implements certain guidelines for the zoning approved by the Council earlier this year. Section 2.1 b. identifies the presumptive methodology for implementing a river setback for purposes of the Town's watershed protection plan. With the implementation of best management practices, a 30 foot setback from the ordinary high watermark would be used to protect the Town's

water supply. Section 2.1 c. identifies the need to allocate the costs of infrastructure improvements that Battle Mountain may develop with other beneficiaries of that infrastructure. This is particularly relevant for Maloit Park Road which will be upgraded as part of the Bolts Lake development but will also serve the school district property. While the Town agrees to work on such allocations, it does not guarantee that allocation of infrastructure improvement costs will ultimately be achieved.

Section 2.2 largely restates provisions contained in the zoning approved for the Bolts Lake area. Section 2.3 identifies that with the exception of Maloit Park Road and associated pedestrian paths, ownership of roads within the Bolts Lake development will be private or dedicated to one of the metropolitan districts. This will relieve the Town of maintenance obligations for these internal roadways.

Section 2.4 requires a restrictive covenant to be recorded against the Maloit wetlands area property preserving it in an undeveloped state. Battle Mountain will reserve the right to install, operate and maintain infrastructure within the wetlands area as well as to undertake various passive winter recreation activities consistent with EPA and or CDPHE guidelines. The Town similarly would have the right to approve recreational uses. Section 2.5 requires that Battle Mountain record a fishing easement along Cross Creek at the time that a final plat is recorded in that area. Access to Cross Creek will be at defined locations identified in the easement. Section 2.6 provides that no open space dedications will be made as part of future plats. As Council will remember, a large part of the Battle retained parcels is zoned as open space. Neighborhood parks can be required as part of future residential land use decisions.

Section 2.7 deals with water service to the Bolts Lake development area. As identified in the previously adopted code changes, water service to Town parcels and certain of the restricted parcels would need to be accomplished with Town water resources. Water service to the Battle retained parcels (the development property) will be undertaken by a separate water treatment facility constructed in accordance with the reservoir agreement with ERWSD (where ERWSD will operate the plant). The Development Agreement contains an express waiver of the right to receive Town water for the Battle retained parcels and a waiver of the right to disconnect any portion of the Battle retained parcels due to the Town's failure to provide municipal water service. Plat notes to this effect will be included on all plats for the Bolts Lake area. The Development Agreement acknowledges that a separate water system will be constructed to serve the Bolts Lake development. As previously adopted in the code changes, the construction of the Bolts water treatment system will not be subject to the Town's 1041 regulatory powers. The Town further agrees that it will not review and approve the technical aspects of the Bolts water treatment plant as those will be reviewed and approved by both ERWSD and CDPHE. The Town may review and approve the location, character and extent of the Bolts water treatment plant as provided by state statute. In the event that a dispute arises as to the Town's authority to review and approve a portion of the Bolts water treatment system, the Town consents in section 4.10 to an alternative dispute resolution where 3 water law technical experts would be appointed to decide the question. It is important to note that this alternative dispute resolution only applies to the limited situation of a dispute involving the Town's ability to review and approve an element of the Bolts water treatment system.

Article 3 deals with vested property rights for the Bolts Lake development. The easiest way to think of vested property rights is that it provides a guarantee that the government will not issue new land use regulations that diminish or conflict with the approvals granted for a property for a specific period of time. In other words, the government cannot change the rules surrounding the development of the property for a period of time in which the developer has the ability to implement the development plan. In the case of the vested property rights for Bolts Lake, section 3.3 establishes that the vesting period is for 30 years. This lengthy period of time reflects the complexity of implementing the Bolts Lake development together with the number of units that will be developed. A copy of ordinance No. 1 - Series 2024 adopting the Bolts Lake zoning is attached to the Development Agreement establishing the land use rights granted to Battle Mountain.

There are a limited number of Town code amendments contemplated to be addressed in the next few years without violating the vested property rights. Section 2.1 b. provides that the Town may amend the Community Housing guidelines to lower the top cap for affordable housing to no lower than 140% AMI. Further, the Town has the right to amend procedural elements of the code so long as they do not diminish or conflict with the rights granted under the Bolts Lake zoning. As the Council is aware, Town staff intends to undertake a revision to the Town land use code as part of implementing provisions in the community plan adopted last year. Finally, section 3.5 acknowledges the Town's ability to adopt updates to technical codes, implementation of federal or state mandates, the adoption of impact fees of general applicability, and modifications to processing requirements and appeal procedures.

Article 4 deals with events of default under the Development Agreement and remedies of the parties. I would point out that it is unlikely that Battle Mountain will default under this agreement. They have a limited number of commitments that will largely be fulfilled at or shortly after closing on the settlement agreement. Therefore, the remedies section is largely based around a future Town action that could impact the vested property rights. The Town will not be deemed in default under the Development Agreement under a scenario where a natural hazard is discovered that would limit development or if the action impairing the vested rights is due to an act of a third person. Barring those scenarios, section 4.4 provides Battle Mountain with the remedy of specific performance. This means that Battle Mountain (or successor property owners) could go to court and seek an order compelling the Town to abide by the land use approvals and vested rights. If the Town failed to comply with the order, an injunction could issue against the Town. Under section 4.4 c, if a court were to determine that specific performance was not an available remedy, damages could be awarded against the Town. The Town, however, would have the right to remove the offending regulation and avoid the payment of monetary damages in such a situation. A goal of the Development Agreement is to prevent the Town from being liable for monetary damages. Section 4.5 creates a series of waivers intended to avoid monetary damages as a remedy and to bolster specific performances as the sole remedy. Battle Mountain specifically waives the right to receive monetary damages from the Town and the Town waives its right to pay monetary damages for a violation of the vested rights. Only if Battle Mountain is denied the remedy of specific performance would monetary damages against the Town be awarded. In any dispute involving the Development Agreement, the prevailing party will

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receive its attorneys fees and costs from the other party. Both parties waive their right to a jury trial in any action involving the Development Agreement.

The Development Agreement will be approved by ordinance. This means that there will be 2 opportunities for Council review and public comment. I look forward to discussing your questions and comments on this document at the upcoming meetings.