

# VAIL HOMEOWNERS ASSOCIATION

## Town of Vail/Triumph Contract

### What Will the New Housing Project Look Like?

### Condemnation of Booth Heights Possible

### The Town's Relationship with Vail Resorts

### Overuse of Executive Sessions

### Open Lands Plan Contemplates DOS Designation for Donovan Park Middle Bench

February 27, 2021

**ALERT: Town Council to take up approval of the TOV/Triumph Contract at its March 2, 2021, meeting which begins at 6p.m.**

There is much to cover in this report. We begin with the proposed Town of Vail/Triumph Development Contract and why the VHA recommends that it **NOT BE APPROVED** as drafted. Next is the design of the new building that is contemplated at the former Children's Garden Center of Learning. That is followed by what is and is not included in the Open Lands Plan concerning Booth Heights and condemnation. There is also the question of the Town's relationship with Vail Resorts in light of recent events and threats. There is more about the overuse of Executive Sessions in the conduct of the Town's business. And we end with what the Open Lands Plan states about DOS designation for the Upper and Middle Benches of Donovan Park.

## Town of Vail/Triumph Contract

**The VHA recommends that the Town of Vail/Triumph Contract NOT BE APPROVED in its present form.** At the February 2<sup>nd</sup> Council Meeting, the community was promised that the final contract would be an ironclad agreement that would prevent, to the extent possible, development at Booth Heights under the previously approved application. This contract fails to meet that goal. Before getting to the reasons why it should not be approved as drafted, we first address an argument that will be raised in support of approval.

The argument will be that the timeline "crunch" requires that the agreement must be approved now. That is not so. The timeline is an artificial contrivance created by the Town. There is nothing in law that requires approval at the March 2<sup>nd</sup> meeting. Yes, sending the contract back for revisions will cause delays but that is already contemplated in the contract. Paragraph 4 (e) provides that if the current timeline cannot be met, then Triumph is to submit its application by March 15, 2022, and complete the building by August 31, 2022. There is no reason why the Council should be stampeded into approving a deficient contract just to comply with an artificial timeline, especially when doing so can leave the community at risk for an immediate development at Booth Heights. Haste makes waste and mistakes. It is much better that the Town get this right than that it complies with an arbitrary timeline.

Turning to the contract, at the February 2<sup>nd</sup> Council meeting, the community asked for specific changes in the Pre-Development agreement. The Council responded that the community's concerns could be put off until the final contract and that they would be incorporated in the final "ironclad" contract. Those concerns were that

the Pre-Development agreement did not include unambiguous commitments that (1) Triumph would not sell or transfer its plans or the Development rights to the Booth Heights project to any other party, (2) that upon execution of the Final Agreement, Triumph would release and forfeit all development approvals, (3) that those provisions should be made part of the essential consideration for the agreement so that any breach would void the entire agreement and (4) that paragraph 4(b), dealing with approval of a development at Booth Heights, be deleted. The draft of the contract does not, however, incorporate those changes; it retains the former paragraph 4 (b), and it is not an “ironclad” contract.

**First**, the contract does not contain any provision that Triumph will not sell or transfer the plans or the development rights to the Booth Heights project. All that is stated is that:

Triumph is the sole owner of the approved plans for the Booth Heights Project (but not the development rights for the Booth Heights Project). Paragraph 4 (l).

There are at least three things wrong with this provision. (1) All Triumph is warranting is that it owns the Booth Heights plans. There is nothing to prevent Triumph from selling or transferring its plans or the Booth Height development rights to any third party. (2) The Town is accepting Triumph’s assertion that it does not own the development rights to those plans. As stated in paragraph 4 (k):

based on representations made to the Town, it is the Town's understanding that Triumph does not hold any development rights with respect to the Booth Heights Project, which development rights, if any, would benefit the property on which the Booth Heights Project is located and the owner thereof.

Why the Town would accept Triumph’s assertions defies understanding, especially when it involves a legal conclusion that could have serious consequences in the future. The Town should retain a land use expert to advise it and not make its decisions on such a critical matter on the representations of a party who is looking out for its own interests and not necessarily the interests of the Town. (3) The conclusion that Triumph does not own the development rights seems to be based on confusion of development rights generally with the rights that were granted to build a particular project pursuant to a particular set of plans. Property zoning confers on the owner the right to develop the property in accordance with the zoning. Those rights are generally understood to “run with the land.” Since the Town (regrettably) rezoned Booth Heights for employee housing, Vail Resorts has the right to build some kind of employee housing on that parcel. But that zoning does not confer the right to build any particular project or any particular size of project. That is a matter that must be determined by the Town once an application is made. So, in that sense, Vail Resorts has the right to develop the property. However, the specific application for the Booth Heights project that was made and approved by the Town was an application by only Triumph Development. Vail Resorts was not a party to that application, and the approval was granted to Triumph, not Vail Resorts. The approved development plan was for only: “Applicant: Triumph Development West, LLC, and its representatives, heirs, successors and assigns.” Logic would seem to dictate that the particular approval for the Booth Heights project therefore belongs only to Triumph and the only way that Vail Resorts gets any rights to that particular development, as opposed to its general rights, is by assignment from Triumph. That is why the community demanded that, as part of this deal, Triumph abandon or releases that particular approval.

Proponents of this draft will be quick to point to paragraph 4 (k) which states that Triumph will waive its Booth Heights rights if it gets the right to develop Timber Ridge. However, the very next sentence states that the Town understands that based on Triumph’s representations, Triumph does not have anything to waive. How this makes any sense is beyond understanding. In effect, Triumph is agreeing to waive something that the Town is agreeing it does not have. So much for an ironclad contract. Waiver and release should be absolute, without any qualifications. The Town should not be agreeing that Triumph has nothing to waive or release. Nor should waiver and release be delayed until later. It should occur upon execution of this (hopefully revised) contract.

**Second**, as stated earlier, Triumph’s agreement to not sell or transfer the plans and rights under those plans to construct the Booth Heights project to any third party and Triumph’s waiver and release of those rights should

both be expressly made part of the essential consideration for the contract so that any breach will void the entire contract. That is not in the current draft.

**Third**, the contract contains the following provision from the Pre-Development agreement which presages the Booth Heights development taking place.

Triumph acknowledges that, if the Town is presented with applications to proceed with the Booth Heights Project, and such applications comply with all applicable Town regulations and the approved development plans for the Booth Heights Project, the Town will not be in a position to deny such applications, regardless of who asserts an ownership interest in such approved development plans, and must approve any such applications regardless of any assertion by Triumph that it is the sole owner of the approved plans for the Booth Heights Project. Paragraph 4 (n).

Why this is part of the agreement also defies understanding. It makes no sense for the Town to include a provision of this nature. This is an agreement to develop a particular project and to afford a right of first refusal to another particular project. It should not contain any language or provision that might be argued to bind the Town concerning a future application concerning Booth Heights.

**Fourth**, this contract still leaves the door open for the Booth Heights development to go forward and for Vail Resorts to roll construction equipment on to the site this coming spring, the very thing that Vail Resorts says it intends to do. But there is no reason why that should be the case.

It is for all these reasons that the VHA recommends that this contract **NOT BE APPROVED** until it has been corrected to remedy these defects. Specifically, the VHA recommends that:

1. Paragraph 4 (n) be deleted;
2. That the references in paragraphs 4(k) and 4(l) to Triumph not being the sole owner of the Booth Heights development rights be deleted;
3. That there be added a provision that Triumph will not sell or transfer either the plans or the Booth Heights development rights to any third parties; and
4. Triumph's agreement to not sell or transfer the Booth Heights plans and the related development rights should be made a part of the essential consideration for the contract.

These are simple matters to correct. It is not a matter of rocket science to draft a truly ironclad contract. None of the above changes would be unacceptable to Triumph. It is getting one of the biggest sweetheart deals that the Town has ever granted. Not only did it not have to face any competitive process to get the rights to two huge housing projects, but the projects are being structured so that they are tax-free deals, thereby, greatly increasing the profits that will flow to Triumph.

The VHA would also point out that the manner in which the Town proposes to approve the contract is improper under the Town Charter. The Town plans to proceed by resolution. However, the Town Charter, Section 4.8, requires that any act making an appropriation or creating indebtedness must be by ordinance. This contract will impose an obligation on the Town to pay Triumph up to \$390,000 for the preparation of the design documents and \$300,000 as a development fee. It would seem that this contract could only be approved by ordinance. This is an important distinction because under the Town Charter, Section 5.1 (b), ordinances are subject to referendum.

**MARK YOUR CALENDARS: This Contract will be Presented for Approval at the Town Council meeting on March 2, 2021, at 6 p.m.**

The VHA urges that all inform the Council of their views on this subject. You can send comments to the Council via email to: [towncouncil@vailgov.com](mailto:towncouncil@vailgov.com). You can also attend the meeting by registering on the [Town's website](#), so you can have the opportunity to speak directly to the council. Keep in mind, however, that the Council is enforcing its three-minute rule. That makes it very difficult, even impossible, to present a proper explanation of all the things that are wrong with the current draft.

## What Will the New Housing Project Look Like?

The VHA assumes that the contractual issues will be resolved and that Lot 3 project will go forward. Indeed, the VHA is not opposed to the project, just having it built under a deficient contract. With a project to be built the question arises, what it will look like, especially since it will sit at the very entrance to the Town. A year ago, the [Town prepared a “bulk and mass” schematic to demonstrate what could be built on the site](#). That schematic contained a rendering of a conceptual design for the new housing project at the former site of the Children’s Garden Center of Learning (Lot 3 of Middle Creek). Here is the rendering:



**Lot 3 Concept Design**

While the VHA supports this project, it believes that the plans for this building must have “architectural character” and that there needs to be more than the bare minimum of landscaping. Vail should not have a box-like, dormitory structure hovering over the entrance to Town nor should the building that is ultimately built be bereft of any meaningful landscaping. The TOV is a co-applicant on this project (and it is also the reviewer of the project), so the Town is in a unique position to see to it that the plans that are submitted are comparable with and enhancing of the Vail community. It would seem that with proper architectural details, such as exist at the next-door Middle Creek apartments and more than bare minimum landscaping, this could be a building that presents the best of Vail. The VHA urges that the Town Council make it clear that this building is to be something that the Town can be proud of, not something that the Town has to apologize for.

### **Condemnation of Booth Heights Possible**

At the February 2<sup>nd</sup> Council Meeting, Council Member Jenn Bruno stated that the TOV Open Lands Plan prohibited the use of condemnation to obtain title to the Booth Heights property. Specifically, she said:

In the Open Lands Plan that was most recently adopted there was a provision that the Town, in our Open Lands Plan that each and every one of us on this panel had some part in creating, would not condemn land to create open land if the land owner had plans to develop and that was approved by the Town....basically what we all agreed to in the Open Lands Plan was that we would not condemn land unless there were no plans to develop that land.

There is no such prohibition in the Open Lands Plan. In fact, the words “condemnation” and “condemn” do not even appear in the Open Lands Plan. And, even if they had, there would be nothing to prevent the current Town Council to decide differently since one Town Council cannot bind the hands of future Town Councils.

Since our last report, where the point was made that condemnation is how the Anholtz property was acquired by the Town for Ford Park, VHA has acquired the document authorizing that condemnation. It was adopted by the [Town as Ordinance No. 6, Series of 1973, on April 3, 1973](#). It is a literal roadmap for how the same process can be used to acquire title to the Booth Heights property. As a result, the VHA urges that if Vail Resorts does not immediately return to the bargaining table and move forward with the proposed land swap, the Town Council should retain an expert on condemnation and proceed ahead to acquire title to the Booth Heights property.

## **The Town’s Relationship with Vail Resorts**

Recent events have called into question the Town’s relationship with Vail Resorts. Up until December 2020, it was believed that the Town and Vail Resorts worked together in an informal partnership to achieve mutual goals. But now, with threats of litigation, Vail Resorts may be taking the stance of an adversary, rather than a partner. That is regrettable. How it has come to this is inexplicable since it would seem that Vail Resorts’ Code of Ethics and Business Conduct would align its actions with those of the Town.

If, as it might appear, Vail Resorts has now become adversarial, the Town should reexamine its relations with Vail Resorts. For example, Vail Resorts benefits from the Town providing free spill-over parking on Frontage Road. This has been a long-time public safety concern. The VHA believes that there is little, if any, economic benefit to the Town from this arrangement. Is it time to re-examine whether Frontage Road parking should continue? Vail Resorts also benefits from leasing Town owned housing. The VHA has been informed that the Town will not be extending Vail Resorts master lease at Timber Ridge. There are other arrangements with Vail Resorts that may no longer be in the Town’s best interests. If Vail Resorts is no longer going to be a reliable “partner”, it behooves the Town to make sure that it is acting in the Town’s best interests in all of its relationships with Vail Resorts.

## **Overuse of Executive Sessions**

At the February 2<sup>nd</sup> Council meeting after a number of citizens urged the Town to begin condemnation of the Booth Heights property, the Mayor announced that the Council had already decided in Executive Session that the Town would not condemn the property. Apparently, that was a 5 – 2 decision of the Council. The public had no notice that this subject would be taken up, no idea of what was said while it was being considered, and had it not been for the calls to condemn the property, the public would not have known that the vote was taken. When the Mayor was then called upon to explain why that was done in Executive Session, he responded that the “quick answer” was that “All real estate negotiations are done in Executive Session.” But the decision to condemn or not was not a matter of real estate negotiation. The Town was not bargaining with any third party. The Council simply made a policy decision for reasons that have yet to be publicly disclosed.

The VHA is very concerned that there seems to be an increasing reliance on executive sessions to conduct Town business and that this undermines transparency and confidence in government. Without notice and an opportunity to observe, ask questions and provide input, this becomes government by fiat. The decision to not condemn Booth Heights is a prime example. Did the Council act on a misunderstanding of the Open Lands Plan, or a belief that the community did not want the property condemned, or for some other misguided reason? No one knows because it was all done in secret.

There is a difference between receiving strategic or confidential advice and action by the Council. Action by the Council, i.e., motions and decisions, should be made in the “sunshine” with full opportunity for public observation and input. Even advice to the Council should, to the greatest extent possible, be provided in public so that the public can understand the advice, question the reasoning underlying the advice and point out any flaws in the advice.

## **Open Lands Plan Contemplates DOS Designation for Donovan Park Middle Bench**

In June 2020, the VHA requested that the Upper and Middle Benches of Donovan Park be designated as “Designated Open Lands,” a protected status under the Town Charter that would require a vote of the citizens to change. After much delay, a hearing on VHA’s request was scheduled for November 13, 2020. However, on the eve of the hearing, it was cancelled. In explaining why that was done, the Town Manager stated that there was no compelling need to have a meeting. “Compelling need” is not a criterion for DOS designation. As to the criteria that do exist, the Upper and Middle Benches fall precisely within those criteria.

In researching the [Open Lands Plan](#), it was discovered that it contemplated 26 parcels of Town-owned land for potential DOS designation. The Upper and Middle Benches of Donovan Park are included in that list. The Plan recommended that those parcels be studied:

in order to determine which, if any warrant being dedicated as Designated Open Space. Factors to be studied include site characteristics, zoning and potential opportunities for future Town use. This effort should be initiated by Town Staff and supported by a citizen’s task force to ensure there is broad community involvement in this process.

To VHA’s knowledge, no such study has been undertaken, and no citizen task force has been appointed. The VHA believes that there shouldn’t even need to be a study insofar as the Upper and Middle Benches are concerned since this property was acquired with RETT funds for the specific purpose of having open lands within the Town. Why the Town and, more specifically, the Open Space Trustees refuse to act on this matter is a mystery.

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If these matters are of concern to you [forward an email to the Vail Town Council](#)

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The VHA has been fighting to protect the bighorn sheep for years. If this is an issue that concerns you, we invite you to join as a member of VHA or become a subscriber to our reports. Our most valuable tool in influencing decision makers is through the proactive engagement of our informed readers. Your support will ensure that the VHA can continue to bring important matters to the community’s attention and, by doing so, make a difference for the good and the future of our community. It is you, our members and subscribers, who sustain our efforts with financial and vocal support.

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Post Office Box 238 Vail, Colorado 81658  
Telephone: (970) 827-5680 Email: [vha@vail.net](mailto:vha@vail.net) Website: [www.vailhomeowners.com](http://www.vailhomeowners.com)

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