

Parkside Proposal Violations & Solutions

Asheville City Council should reject the Parkside proposal by Black Dog Realty et al. for the reasons summarized and detailed below:

A: The County's authority to sell the land the proposed building would occupy and the land's ownership are legally questionable.

B: The Parkside proposal violates three of the seven findings required for conditional uses in Asheville's Unified Development Ordinance, Section 7-16-2(c).

C: The proposal's height and apparent massing also violate two of the Pack Square Design Guidelines previously agreed upon by the City and the Conservancy. In addition to UDO conditions, Council is legally obligated to consider these Guidelines.

D: The proposal entails the controversial destruction of both the historic Hayes & Hopson building and a treasured magnolia tree.

Thankfully, "win/win" solutions exist which would both enable the developer to build condominiums beside the park and preserve the City's natural and architectural attractions.

A: Land Ownership Legally Questionable

Philanthropist George Willis Pack deeded the eastern portion of the proposed Parkside property to Buncombe County on the condition that if it were ever sold, ownership would revert to his descendants. On those grounds, three Pack descendants have filed a lawsuit contesting Black Dog Realty's ownership.

County Commissioner David Gantt publicly admitted, "We screwed up when that land was sold" to developer Stewart Coleman. "I had no idea that the land mentioned was in the park when the [Board of Commissioners] voted to sell it," he wrote in an e-mail to the press ("Pack Square Park land sale: 'We screwed up.' Conservancy out of loop for six months," by Cecil Bothwell, Mountain Xpress, July 25, 2007.) "It was billed as the old jail site when presented to us. ... I have unsuccessfully worked hard behind the scenes since this ill-advised sale took place to correct the situation."

Additionally, county staff has never publicly disclosed whether they knew the disputed land was part of the park at the time of the sale. It would appear to be a tacit acknowledgement of the Commissioners' mistake that Black Dog Realty has been refused purchase of a remaining triangle of land essential to its first design for the Parkside proposal. (The developer then submitted a second plan omitting the corner of the building that would have sat on that land.)

Over 500 signatures were gathered in one month last year on a petition requesting that County Commissioners rescind the sale of parkland to the developer. But Commissioners appear to be counting on City Council to rectify their error. As Commissioner

Gantt put it in the abovementioned article, “Fortunately, the City Council will have final say on the appropriateness of any development near the park.”

The Public Trust Doctrine: Under this longstanding legal principle, the public has deeply rooted rights in access to and use of resources important to the public welfare, and the state has limited rights to alienate those resources. (Cases modern legal scholars often cite include *Arnold v. Mundy*, *Martin v. Waddell* and *Illinois Central Railroad v. Illinois*.)

In recent years, the Public Trust Doctrine has been the basis of lawsuits around the nation against municipal governments that have improperly sold public parkland. The Public Trust Doctrine may supply grounds for a further lawsuit contesting the sale and the developer’s ownership of this land.

B: 3 of 7 UDO Conditions Violated

Condition: Sect. 7-16-2(c)(2) – *That the proposed use or development of the land is reasonably compatible with significant natural and topographic features on the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant.*

Violation #1: This proposal would destroy a significant magnolia tree. Listed by Quality Forward as a “Treasured Tree,” the unusual twinned magnolia tree in front of City Hall has for decades been popular with residents who have celebrated weddings, performed music at Shindig on the Green, and grown up playing under its spreading branches. Arborists have determined that the tree will probably not survive transplanting. The Pack Square Conservancy’s intent is to preserve this tree: Its “Green-Planting Plan” for the renovation of the area in front of City Hall and the Courthouse (as submitted to the Asheville Tree Commission Feb. 18, 2008) clearly marks the magnolia as “EX. [Existing] TREE TO REMAIN.” (See Exhibit #1.)

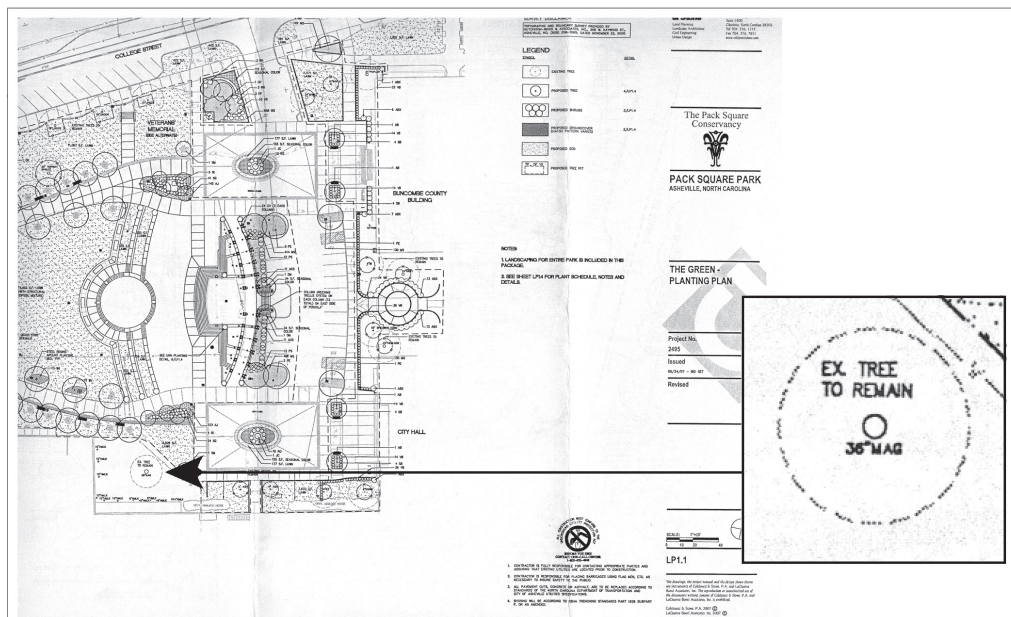


Exhibit #1: Pack Square Conservancy Green-Planting Plan

Violation #2: Shadow studies presented by the proposal’s architect, Mark Fishero, to the Downtown Commission show that the building, at its planned height, would significantly block sunlight and interfere with mountain views during events in City/County Plaza. It would cast a chilly shadow during much of the day throughout much of the year on the planned new stage in front of City Hall and the County Courthouse, as well as on the main spectator-seating lawn in front of the stage, ultimately discouraging many residents and tourists from attending outdoor events at the new Pack Square Park. (See also the discussion of the shadow it would cast on City Hall, below.)

Condition: Sect. 7-16-2(c)(4) — *That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located.*

Violation #1: The proposal is out of harmony with the scale, bulk, and character of the important public area in which it would be built, which is the symbolic center and civic seat of Asheville and Buncombe County.

The proposal’s height and apparent mass, which violate Pack Square Guidelines (see C, below), significantly detract from the visual primacy of the County Courthouse and City Hall.

As Downtown Commission Chairman Pat Whalen pointed out during the Commission’s review of shadow studies presented by the proposal’s architect, the proposed building would literally overshadow City Hall every afternoon throughout the year.

It should be noted that the artist rendering of the proposal included by its architect in his presentations is highly misleading. (See Exhibit #2.) It makes the Parkside building seem as if it were much smaller than City Hall, when in fact it would be at least as tall and wider. When questioned about the mix of perspectives in his drawing, the architect acknowledged that he drew the Parkside building from the viewpoint of an observer on the roof of the Biltmore Building. City Hall, on the other hand, is drawn from the considerably closer-up viewpoint of an observer on the lawn in front of it, as the photograph here makes clear.



Exhibit #2: Architect’s rendering; City Hall photo

It is very important that City Council, as elected representatives of the people of Asheville, consider the symbolic message it would send to members of the public about the influence vested special interests appear to have over the public's government if this proposal is built. Every time residents assemble in City/County Plaza or approach these government buildings to attend public meetings, they would see a massive, intimidating private condominium tower — off-limits to all but the very wealthy, and erected by a powerful developer who received widespread publicity last fall as one of the largest campaign contributors in the recent council election — dominating and casting a dark shadow over City Hall.

In sum, the scale and bulk of the proposed condominium building would visually overwhelm City Hall and rival the nearby Courthouse. Our City Hall and County Courthouse are not only famous, much-photographed landmarks that represent Asheville and Buncombe County to the rest of the world — they are also the centers of public governance for our city and county. Much like the Capitol Building and the White House in Washington, D.C., our City Hall and Courthouse serve as important symbols of our democratic/republican form of government — City Hall's unique cupola even serves as Asheville's official seal.

Condition: Sect. 7-16-2(c)(5) — *That the proposed use or development of the land will generally conform with the comprehensive plan, smart growth policies, sustainable economic development strategic plan and other official plans adopted by the city.*

Violation #1: In its Smart Growth Policy, the City of Asheville defines smart growth as “a development pattern that ... promotes a wide variety of transportation and housing options, absorbs and effectively serves a significant portion of the future population growth of Buncombe County and Western North Carolina, protects the architectural and environmental character of the City through compatible, high quality, and environmentally sensitive development practices”

Housing options: These luxury condos would be affordable only to a very small segment of the population. Given their location — in a city center far from grocery stores and gas stations, but next door to police and fire stations where ear-splitting emergency sirens go off throughout the day and night — they would likely be used mainly as vacation condos and corporate-owned retreats by people whose primary homes are elsewhere, and whose spending on basic goods and services would therefore mostly be non-local.

Architectural character: While the Italianate design of the condo building pays homage to heritage buildings elsewhere in downtown Asheville, it does so at the expense of an actual historic building which it would destroy: the historic Hayes & Hopson building, which the City and County had intended to acquire and maintain as part of the Pack Square renovation until its owner unexpectedly sold it to Black Dog Realty owner Stewart Coleman.

According to Asheville-Buncombe Historic Resources Commission Director Stacy Merten, no independent evaluation has apparently ever been done to determine the Hayes & Hopson Building's structural integrity. Thus, any claims by the developer that the Hayes & Hopson building is too far gone to restore and re-develop must be viewed skeptically.

Smart growth: “Encouraging community and stakeholder collaboration” is an established smart-growth principle (see www.smartgrowth.org). Other Asheville devel-

opers of potentially controversial projects have followed this principle by inviting extensive public input through charettes or design meetings before submitting their proposals to the City — for example, the developer of the Horizons proposal on the former Deal Buick site, and the developer of the former St. Joan of Arc site in West Asheville.

But despite the intense controversy the Parkside proposal has generated from the moment the county's sale of park land became public knowledge, Black Dog Realty has shunned community and stakeholder input throughout. The developer has invited no public input whatsoever into the design of his building, much less its extremely controversial location — indeed, his architect (who is not local, but based in Charlotte) and his attorney have complained at every design-review hearing about having to meet even the City's mandatory requirements. Reportedly, the attorney initially attempted to argue to the Downtown Commission that it had no jurisdiction over this proposal.

Violation #2: Sustainable development: Heritage conservation — the preservation and revitalization of historic buildings such as the Hayes & Hopson — is well known to be the key element in Asheville's downtown renaissance.

State and national historic-preservation experts point out the extremely high environmental and economic cost of destroying heritage buildings — ranging from the large quantity of solid waste dumped in a landfill (the equivalent, in the case of a typical small downtown building, of wiping out the environmental benefits of recycling over 1,300,000 aluminum cans), to the waste of “embodied energy” in its construction and materials (a large new building's metal, plastic, concrete, glass, etc. demand a high environmental and economic cost in extracting the resources, manufacturing, and assembling the materials), to the loss of space for incubating small businesses, and much more. (See, e.g., “Historic Preservation as Sustainable Development,” by Donovan D. Rypkema, in *North Carolina Preservation*, the 2005 Annual Report of Preservation North Carolina, Spring 2006.)

C: 2 Pack Square Guidelines Violated

Exhibit #3, compiled by the Downtown Commission, details the two principal violations of the Pack Square Guidelines, described as:

Guideline: *Building frontages shall be articulated [to] reduce the apparent massing of the structure and to be compatible with neighboring buildings.*

Violation: “The design as proposed does not include step-backs or massing alternatives to the extent suggested by the guidelines.”

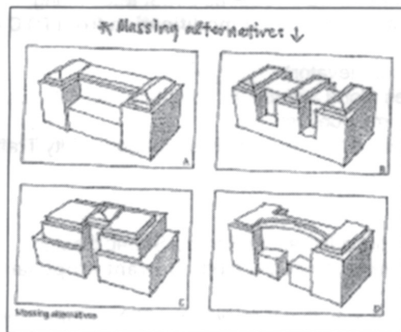
Guideline: *Height should not exceed the height of the first vertical setback on the County Courthouse.*

Violation: “The intended height appears to be approximately 8 stories [according to the Guidelines] This current proposal exceeds the intended height by 2 [to] 2-1/2 stories.”

City's obligation to consider Pack Square Design Guidelines: At the Downtown Commission's public hearing on this proposal, the City Attorney told the Commission that his interpretation of the agreement between the City and the Pack Square Conservancy during negotiations for the Park that the City is legally obligated to consider the Pack Square Guidelines.

Plan does not comply with the following Pack Square design guidelines :

- *Building frontages shall be articulated [to] reduce the apparent massing of the structure and to be compatible with neighboring buildings – The design as proposed does not include step-backs or massing alternatives to the extent suggested by the guidelines.*



- *Height should not exceed the height of the first vertical setback on the County Courthouse – The intended height appears to be approximately 8 stories as illustrated by these images below. This current proposal exceeds the intended height by 2-2 ½ stories.*

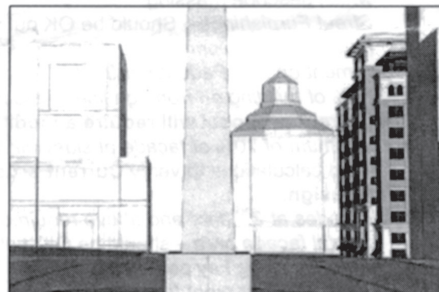
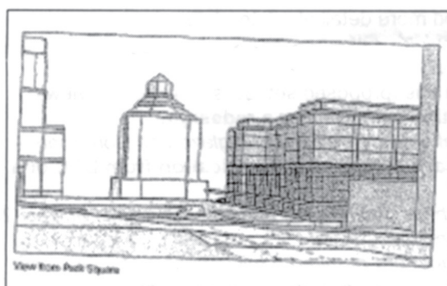


Exhibit #3: Downtown Commission formal review (excerpt)

It was on the basis of those guidelines that the Pack Square Conservancy rejected this proposal. If City Council were to follow the example of the majority of the Downtown Commission and disregard those guidelines, the possibility could be left open of a lawsuit against the City.

“Site B” diagram: In defending the Parkside proposal, the architect and developer refer repeatedly to a Pack Square Conservancy diagram from 2003 that shows a hypothetical building next to City Hall on property designated “Site B,” claiming this diagram proves the Conservancy has already planned for a large building to be on the proposed condo site.

But the Conservancy has made it clear that any building on “Site B” was intended to be not only well within the Pack Square height and sight-line guidelines, but set well back from the park boundaries — leaving the magnolia tree intact.

“Asked about the matter, [Pack Square Conservancy Communications Director Donna] Clark explained: ‘We always knew there would probably be a building on the site where Hayes & Hopson now sits (which is not parkland), because we knew the presence of the park and the quality of the park would increase the value of the surrounding land and make development very likely.’ But the building shown on those early drawings, she noted, is ‘pushed back so that the front façade is on the same plane as the façade of the fire/police station. So City Hall is very visible, and the magnolia tree stands

tall. Aside from the pavilion, we have never envisioned any structure that would have breached the original park outline.” (From “Pack Square Park land sale: ‘We screwed up,’” *ibid.*)

D: “Win-Win” Solutions

Based on the numerous grounds cited, City Council should deny the Parkside proposal and instead, encourage Mr. Coleman to build condos in the Hayes & Hopson building he already owns. He should preserve the historic building’s front façade, and put “eyes on the park” by adding windows in the wall facing the park, as shown in the Pack Square Park rendering on the Conservancy’s Web page at packsquarepark.org. (See Exhibit #4.)

Additionally, City Council should settle the ownership issue by paying Mr. Coleman for the property on which the magnolia tree stands. Since the county tax office lowered the appraised value of this parkland after Mr. Coleman bought it from \$600,000 to \$306,000, Council can presumably return the land to the people for a reasonable sum.

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Exhibit #4: Pack Square Park rendering — Hayes & Hopson Bldg. at right, behind Jackson Bldg.