



**PARK CITY APPEAL PANEL MEETING
SUMMIT COUNTY, UTAH
March 4, 2024**

The Appeal Panel of Park City, Utah, will hold its regular meeting in person at the Marsac Municipal Building, City Council Chambers, at 445 Marsac Avenue, Park City, Utah 84060. Meetings will also be available online and may have options to listen, watch, or participate virtually.

- 1. MEETING CALLED TO ORDER AT 5:00PM**
- 2. ROLL CALL**
- 3. STAFF AND BOARD COMMUNICATIONS AND DISCLOSURES**
 - 3.A. Appeal Panel Chair Election** - The Appeal Panel Will Elect One of Its Members to Serve as Chair for a Term of One Year.
 - 3.B. Open and Public Meetings Act Training**
- 4. PUBLIC COMMUNICATIONS**
- 5. CONSENT AGENDA**
 - 5.A. Consideration to Adopt Resolution 01-2024**, a Resolution Authorizing Participation in Meetings by Electronic Communication
- 6. REGULAR AGENDA**
 - 6.A. 1115 Aerie Drive - Conditional Use Permit for a Private Recreation Facility** - The Applicant Appeals the Planning Commission's July 13, 2022, Denial of a Conditional Use Permit (PL-21-05101) for a Private Recreation Facility (Sports Court) Located Outside the Building Pad.
(A) Public Hearing; (B) Action
- 7. ADJOURNMENT**

Pursuant to the Americans with Disabilities Act, individuals needing special accommodations during the meeting should notify the Planning Department at 435-615-5060 or planning@parkcity.org at least 24 hours prior to the meeting.

***Parking is available at no charge for meeting attendees who park in the China Bridge parking structure.**

Open and Public Meetings Act

2022 Training Handout



The Open and Public Meetings Act (OPMA) requires that members of public bodies be provided with annual training on the requirements of OPMA. This document facilitates compliance with that requirement and helps members of public bodies better understand OPMA.

OPMA's Goal: Ensure that public bodies deliberate and take action openly.

OPMA's General Rule: Meetings of a public body are open to the public, unless an exception is available under the Act that allows the meeting to be closed.

Public Notice

- A public body is required to provide public notice of a meeting at least 24 hours before the meeting. The public notice must:
 - include the date, time, and place of the meeting,
 - include an agenda that specifies topics the public body will consider, and
 - be posted on the Utah Public Notice Website and at the location of the meeting.

Minutes and Recordings

- A public body is required to keep written minutes and a recording of all meetings unless the meeting is a site visit or traveling tour where no vote or action is taken.
- A recording of the open portions of the meeting should be made available to the public within three business days after the public meeting.
- Draft minutes are required to be made available to the public within a reasonable time after the meeting.
- The approved minutes and any public materials distributed at the meeting should, within three business days after their approval, be:
 - posted on the Utah Public Notice Website; and
 - made available at the public body's website and office.

Closed Meetings

- A public body may hold a closed meeting only to discuss specific topics, including:
 - An individual's character, competence, or health,
 - pending or reasonably imminent litigation,
 - certain matters regarding acquisition or sale of real property, including water rights or shares,
 - the deployment of security personnel, devices, or systems, and
 - an investigation of alleged criminal conduct.
- A public body may close a meeting only by a two-thirds vote with a quorum present.
- A public body that closes a meeting is required to announce and record in the minutes the reasons for closing the meeting.
- An ordinance, resolution, rule, regulation, contract, or appointment may not be approved during the closed portion of a meeting.
- A public body must keep a recording of a closed meeting, unless the meeting is closed to discuss a person's character, competence, or health or the deployment of security personnel, devices, or systems. A public body may keep written minutes. Recorded and written minutes are protected records under GRAMA.

Definitions

“Meeting” means a convening of a public body with a quorum present to discuss, receive public comment about, or act upon a matter over which the public body has jurisdiction or advisory power. Meeting does not mean a chance or social gathering or the convening of members of a public body without a quorum present.

“Public Body” means an administrative, advisory, executive, or legislative body of a political subdivision that:

- is created by the Utah constitution, state statute, rule, ordinance, or resolution;
- Spends, distributes, or is supported by tax money; and
- is vested with the authority to make decisions regarding the public's business (this includes advisory boards or groups).

“Quorum” means a simple majority of the membership of a public body.

Electronic Meetings

- Each public body must adopt a rule or resolution governing the use of electronic meetings before they can have electronic meetings.
- Electronic Meetings with Anchor Location
 - Provide anchor location for the public to join.
 - No determination or justification needed.
 - Public body members may appear remotely.
- Electronic Meetings without Anchor Location
 - Chair must make determination that meeting in-person presents a substantial risk to the health or safety of those who would be present at an anchor location.
 - Public notice must detail the Chair's determination, facts supporting Chair's determination, and include information on how to connect to the meeting.
 - Determination must be renewed every 30 days (and can be renewed with each public notice).
- **By 2023, all public bodies must adopt a rule or resolution that establishes the conditions under which a remote member is included in calculating a quorum.**

Public Participation

- Public must be allowed to come and watch, but there is generally no requirement that members of the public are allowed to comment.
 - If the agenda item requires a public hearing (usually for land use regulations), an opportunity for public comment must be provided.
- Public has a right to record meetings if they can do so without disrupting the meeting.
- A public body may discuss an item raised by the public that is not listed on the agenda but may not take final action on the item at the meeting.
- Public bodies may require public comments be on topic.
- Disruptions at meetings do not have to be tolerated. Individuals may be removed from a meeting if they willfully disrupt the meeting and the orderly conduct of the meeting is seriously compromised.

Penalties

- Open Meetings – When final action taken during a meeting violates certain open-meeting provisions of OPMA, the action is voidable by a court.
- Closed Meetings – It is a class B misdemeanor to knowingly or intentionally violate the closed-meeting provisions of OPMA.

Definitions

"**Anchor location**" means the physical location where a meeting originates or where the participants are connected from.

"**Electronic meeting**" means a public meeting convened or conducted by means of a conference using electronic communications.

Questions

If you have any questions, please reach out to:

Luke Henry
Assistant City Attorney
luke.henry@parkcity.org
435-615-5023

Open and Public Meetings Act 2023 – Training Video

<https://www.youtube.com/watch?v=QNVBuXB7vkM>

Appeal Panel Staff Report

Subject: **Electronic Meetings Resolution**
Author: **Levi Jensen**
Date: **March 4, 2024**
Type of Item: **Resolution**



Recommendation

Adopt a resolution adopting meeting procedures and authorizing participation in meetings by electronic communication.

Summary

The Open and Public Meetings Act (OPMA) added a provision in 2023 that all public bodies must adopt an ordinance, resolution, or rule that establishes the condition under which a remote member is included in calculating a quorum (see [Utah Code § 54-2-207\(2\)\(b\)](#)).

Analysis

The proposed resolution adopts the same meeting rules as the City Council and other boards and commissions, qualified by the requirements of the appeal section of the Land Management Code and Utah Code. The resolution meets the OPMA requirements by permitting members of the Appeal Panel to participate via electronic communication and be counted toward the quorum requirement if a member uses a means of communication that permits simultaneous communication during the meeting between:

- The public body member,
- All other members of the public body participating in the meeting, and
- All members of the public participating electronically or physically

These meetings can also be held without an anchor location as long as they are noticed properly, per state code.

Exhibits

Exhibit A: Electronic Meetings Resolution

**A RESOLUTION APPROVING APPEAL PANEL RULES OF ORDER AND
PROCEDURE, AND ADOPTING A POLICY AUTHORIZING PARTICIPATION IN
MEETINGS BY ELECTRONIC COMMUNICATION**

WHEREAS, the Park City Appeal Panel is permitted to meet via electronic communication or meet in person with some members attending electronically; and

WHEREAS, the Park City Appeal Panel desires to specifically authorize members to participate in electronic meetings and be counted toward the quorum requirement;

NOW, THEREFORE, BE IT RESOLVED THAT:

Section 1. The Appeal Panel may hold electronic meetings in accordance with section 52-4-207 of the Utah Code, as amended.

Section 2. It shall be the policy of the Appeal Panel to authorize and permit members of the Appeal Panel to participate by electronic communication in any meeting of the Appeal Panel and be counted toward the quorum requirement as provided in Section 3.

Section 3. A member of the Appeal Panel may participate by electronic communication and be counted toward the quorum requirement only if the member uses a means of communication that permits simultaneous communication during the meeting between: (i) the member of the Appeal Panel (ii) all other members of the Appeal Panel participating in the meeting; and (iii) all members of the public participating electronically or physically present at the place where the meeting is conducted.

Section 4. Pursuant to Utah Code section 10-3-606, the Appeal Panel hereby adopts the Rules of Order and Procedure to govern its meetings as attached as Exhibit A.

Section 5. Effective Date. This resolution shall be effective upon adoption.

Passed this 4th day of March 2024.

PARK CITY MUNICIPAL CORPORATION

Appeal Panel Chair

Attest:

Rebecca Ward, Planning Director

Approve as to form:

City Attorney's Office

EXHIBIT A

APPEAL PANEL RULES OF ORDER AND PROCEDURE

Pursuant to Utah Code Section 10-3-606, the Appeal Panel hereby adopts the following rules of order and procedure to govern the meetings of the Appeal Panel.

RULE NO. 1. UTAH AND MUNICIPAL CODE REQUIREMENTS The Appeal Panel must comply with the required procedures in Title 15, Chapter 1, Section 18 of the Municipal Code of Park City and Title 10, Chapter 9a of the Utah Code, as amended. The Appeal Panel is also required to comply with Utah Code Title 52, Chapter 4, Open and Public Meetings Act. In the event of a conflict, the Utah Code controls.

RULE NO. 2. AGENDA The agenda for the meeting will be the guide to the meeting. While matters not on the agenda may at times come up for discussion, final action cannot be taken on any matter not on the agenda. The agenda will be published in advance. Agenda items ordinarily are considered in the order listed but may be considered in a different order.

RULE NO. 3. PARLIAMENTARY ORDER AND PROCEDURE Appeal Panel meetings are chaired by the designated Chairperson or by the Chair Pro Tem, as needed. The Panel follows a simplified Roberts Rules of Order. Panel members may speak after being recognized by the Chairperson and may make motions that propose action. For example, a Panel member may move to approve or deny an appeal, to remand to the land use authority, consider a substitute motion, close a public hearing, ask for more information, continue discussion to a later time, or adjourn a meeting. A motion may be discussed and voted upon only if it is seconded by another member. When the Chairperson confirms there is no further discussion, the Chairperson calls for the vote on the matter. Unless otherwise specified by applicable law or ordinance, a motion passes if a majority of Panel members present vote in favor. The Chairperson votes on all matters.

RULE NO. 4. ETHICAL REQUIREMENTS. Appeal Panel members must comply with the Municipal Officer's and Employees' Ethics Act, Utah Code Title 10, Chapter 3, Part 13 and Title 3 of the Park City Municipal Code. These laws establish ethical standards of conduct for City officers, employees, and volunteers.

RULE NO. 5. RULES OF DECORUM

1. Public comments should be directed to the agenda item under consideration. The Chairperson determines the germaneness of the comments.
2. Remarks must be addressed to the Panel as a whole and not to any single member, unless in response to a question from a member.
3. To afford all persons an opportunity to speak on an agenda item, the Chairperson may impose a time limit, typically three-minutes, on comments made by members of the public. Individuals will generally be limited to one comment per agenda item.
4. Hearing comments must be respectful. Personal, impertinent, unduly repetitive, slanderous or profane remarks to the Panel, any member of the Panel, staff or general

public are prohibited. Jeering, cheering, clapping, stamping, finger snapping, sign waiving, whistling or similar behavior is prohibited because it may intimidate other speakers, cause a disruption, or impede the orderly conduct of a Panel meeting.

5. Persons addressing the Panel may not interrupt the Chairperson or Panel members while they are asking questions or otherwise addressing the speaker.

6. Members of the public must be courteous to others participating and to the proceedings by avoiding conversations within Panel Chambers and immediately outside the Chambers.

7. Unless addressing the Panel or entering or leaving the Panel Chamber, audience members should be seated. Those who need to stand should do so in the rear without blocking exits.

8. A time for public comments on any item not on the agenda may be included on the agenda. A time limit on comments may be imposed and speakers must provide their names for the record. If a prepared statement is available, a copy should be given to the City Recorder. Generally, members of the Panel will not comment upon the comments made by a member of the public. Administrative issues will typically be referred to the City Manager's Office for a response.

9. The Appeal Panel on a two-thirds vote may expel any person who is disorderly during the meeting of the governing body. Removal may be executed by peace officer upon Panel direction.

10. Any person removed may be prohibited from attending or addressing the Panel for no more than ten Panel meetings. The number of meetings and the prohibition will be determined by the Chairperson and the Panel upon a vote, taking into consideration the number and severity of prior incidents of being disorderly.

11. If a person is removed from a meeting for being disorderly, the Panel may elect to postpone voting on the issue being discussed at the time of removal in order to avoid the appearance of retaliatory action.

Appeal Panel Staff Report



Subject: 1115 Aerie Drive
Application: Conditional Use Permit – PL-21-05101
Appeal – PL-22-05329
Author: Spencer Cawley, Planner II
Date: March 4, 2024
Type of Item: Appeal of Conditional Use Permit Denial

Recommendation

(I) Review the Appeal of the Planning Commission's denial of a Private Recreation Facility Conditional Use Permit, (II) conduct a public hearing, and (III) consider affirming, reversing, or affirming in part and reversing in part the Planning Commission's decision.

Description

Appellant: Wade Budge representing Gary Sutton/1115 Aerie, LLC

Location: 1115 Aerie Drive

Zoning District: Estate
Sensitive Land Overlay

Adjacent Land Uses: Single-Family Residential
Open Space

Reason for Review: The Appeal Panel hears appeals of Planning Commission decisions on Conditional Use Permits¹

CUP Conditional Use Permit
E Estate
LMC Land Management Code
MPD Master Planned Development
SLO Sensitive Land Overlay

Terms that are capitalized as proper nouns throughout this staff report are defined in LMC [§ 15-15-1](#).

¹ LMC [§ 15-1-18\(C\)](#)

Summary

On December 20, 2021, the Applicant submitted a Conditional Use Permit (CUP) application for a sports court (a Private Recreation Facility) that was constructed without proper approvals or permits and was built outside of the existing Building Pad indicated on the Hearthstone Subdivision Plat (Exhibit B), crossing property lines. The Applicant proposed to modify the constructed sports court by reducing its size from 4,795 square feet to 2,085 square feet and completing the review and permitting process for the construction of the sports court.

Also, on December 20, 2021, the Applicant submitted an Administrative CUP application for retaining walls constructed greater than six feet in height without proper approvals or permits. Administrative CUPs require staff-level review and Final Action. On June 17, 2022, the Applicant requested Final Action on the Administrative CUP pursuant to Utah Code [§ 10-9a-509.5\(2\)\(b\)](#), requiring staff to complete the review within 45 days. Because the relocation of the retaining wall was adjacent to the proposed modified sports court, Planning Staff recommended that the Planning Commission review the Private Recreation Facility CUP and provide input prior to the public hearing on the Administrative CUP for retaining walls.

On July 13, 2022, the Planning Commission reviewed the Private Recreation Facility CUP, held a public hearing, and denied the CUP as outlined in the Final Action Letter, attached as Exhibit C, finding that:

- The Development is not compatible with prior land use approvals, including the approved Master Planned Development (MPD) and Final Plat;
- The application lacked information regarding the CUP requirements for screening and landscaping, compatibility with surrounding Structures, noise, lighting, sensitive lands, and steep slopes; and,
- The proposal is inconsistent with the General Plan.

The July 2022 Planning Commission Staff Report is attached as Exhibit D ([Meeting Minutes](#)).

Background

1115 Aerie Drive is Lot 8 of the Overlook at Old Town Subdivision. The Subdivision is located on Aerie Drive within the two switchbacks of the Right-of-Way. The following image, taken from the Summit County Parcel Viewer, identifies 1115 Aerie Drive in the context of neighboring properties:



Figure 1: Vicinity Map – 1115 Aerie Drive

The Subdivision was approved in 1993 with 90-foot by 90-foot Building Pads on each Lot designated for the construction of a Single-Family Dwelling. Some variety was established within the Front Setback of each Building Pad. Driveway locations were fixed at the time of the subdivision's original approval. The following image is taken from the Applicant's existing conditions survey, emphasis added by Planning Staff:

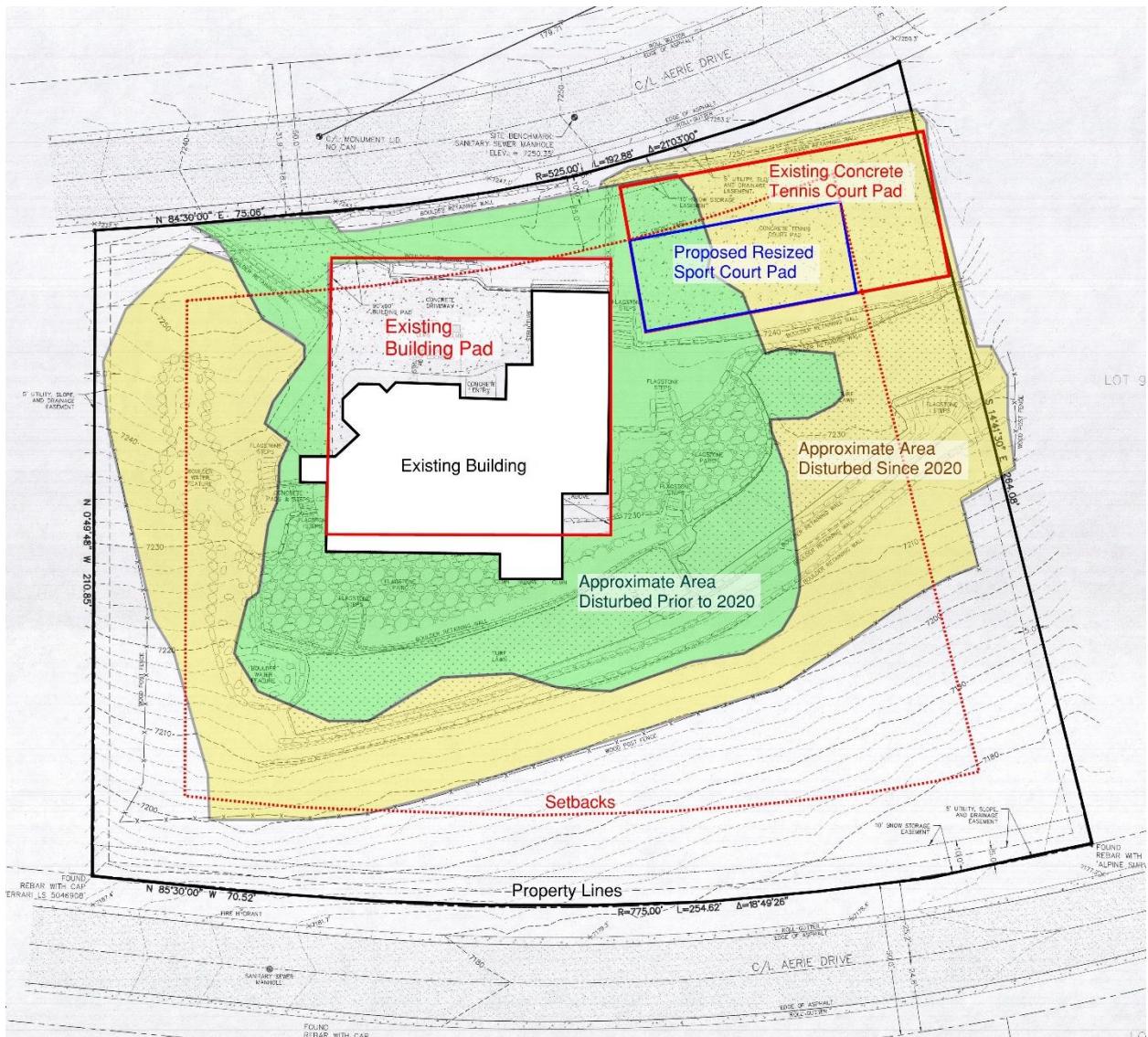


Figure 2: Existing Conditions Survey

The Overlook at Old Town Subdivision has a long history. Originally, as part of the settlement agreement between Park City and Nielson/Korthoff, the Property was subject to a small-scale MPD. The following is an outline of important dates associated with the development of the Subdivision:

- June 17, 1993 – The City Council overturned the Planning Commission's denial of the MPD and approved a 12 Lot MPD.
- September 8, 1993 – The Planning Commission approved a Sketch and Preliminary Plat.
- October 7, 1993 – The City Council approved the Final Plat for The Overlook at Old Town.
- April 13, 1994 – The Planning Commission reviewed and forwarded a positive recommendation to the City Council for a Plat Amendment to reduce the Subdivision to ten Lots.

- April 21, 1994 – The City Council approved the Plat Amendment.

Before becoming The Overlook at Old Town, the subdivision was first known as the Nielson/Korthoff Subdivision and then the Hearthstone Subdivision.

On November 10, 1998, the City issued Building Permit B98-04301 for the construction of a Single-Family Dwelling on Lot 8 (1115 Aerie Drive). On May 20, 1999, the City issued Building Permit B99-04788 for the construction of a retaining wall on the Property with a maximum height of four feet.

On April 14, 1999, the Planning Commission held a Work Session and heard a proposed MPD amendment to replat the Hearthstone Subdivision to eliminate fixed Building Pads. The Planning Commission did not take action, but the Commission reached consensus that there was no reason to change the Building Pad limitations as platted. Consequently, the application to amend the plat to remove the platted Building Pads never moved forward.

On October 17, 2016, the City issued Grading Permit GR-16-13414 to allow work on the existing retaining wall in the Front Setback immediately adjacent to the driveway at 1115 Aerie Drive.

On January 21, 2021, a landscaping company, on behalf of the Applicant and Property Owner, applied for a Grading/Landscaping Permit (#21-122) to replace three retaining walls, not to exceed four feet in height, at the northeast corner of the property. In the notes approving the permit, the Building Department Staff noted that walls greater than four feet require engineered plans, that the scope of the permit is limited to the construction of the walls as proposed, and that the addition of any patios requires a separate Building Permit. Planning Department Staff noted that retaining walls must be set back ten feet from the curb to avoid encroaching into the platted ten-foot Public Snow Storage Easement adjacent to Aerie Drive. Planning Staff also noted that all disturbed areas must be re-vegetated, and no Significant Vegetation² was approved to be removed. The approved Site Plan is attached as Exhibit E.

The Applicant was able to move forward with completing some portions of the landscaping in connection with Building Permit #21-122 to complete work on the playground, outdoor kitchen, putting green, fire pit, and hot tub. This permit received a partial pass on January 27, 2023 (Exhibit K).

On September 8, 2021, Code Enforcement (now known as Community Code Compliance) issued two stop-work orders (CE-21-01142 and CE-21-01143) for working outside of the approved scope of the issued Building Permit and for commencing work on a Private Recreation Facility without a permit. At that time, Staff identified that the non-permitted construction activity crossed Property lines into the neighboring Lot at

² LMC [§ 15-15-1](#) defines Significant Vegetation as, “Includes all large trees six inches (6") in diameter or greater measured four and one-half feet (4.5') above the ground, all groves of small trees, and all clumps of oak or maple covering an Area fifty square feet (50 sq. ft.) or more measured at the drip line.”

1039 Aerie Drive. On October 1, 2021, and February 25, 2022, City Staff issued letters to the Property Owner outlining the code compliance issues with the Property and options to become compliant (Exhibits F & G).

On December 20, 2021, the Applicant's representative submitted two land use applications to the Planning Department:

- An Administrative CUP for retaining walls greater than six feet in height from Final Grade
- A CUP for the sports court (a Private Recreation Facility)

The Applicant and Property Owner submitted written explanations describing that they were unaware of their landscaper's actions and that the work was out of compliance with the LMC and the permit requirements. The proposal was to reduce the size of the Private Recreation Facility to be compliant with code standards.

On March 15, 2022, the Applicant submitted a land use application to amend the Plat to adjust Lot Lines and to expand the platted Limits of Disturbance.

On June 6, 2022, the Applicant requested to move forward with the Administrative CUP for the six-foot-tall retaining walls and the CUP for a Private Recreation facility. Consequently, the Applicant deferred the Plat Amendment application until action was taken on the Administrative CUP and CUP applications.

On July 13, 2022, the Planning Commission reviewed the CUP application for a Private Recreation Facility and denied the application.

On August 1, 2022, the Applicant filed an appeal of the Planning Commission's denial of the CUP.

On August 11, 2022, the Planning Director, with the Applicant's approval, continued the Administrative CUP review of the proposed retaining walls to a date to be determined due to the appeal of the denial of the CUP for a Private Recreation Facility. Final action is still pending on the Administrative CUP for the retaining walls.

On October 18, 2022, a Perpetual Improvements Easement Agreement was recorded with Summit County. This agreement allows the Applicant access to the improvements that cross the property line onto neighboring Lot 9. The purpose of this easement is to allow the Applicant to use equipment, recreational equipment, and related surface improvements and for maintenance, repair, and replacement of these improvements (Exhibit L).

The Applicant requested the appeal be placed on hold and asked the Utah Property Rights Ombudsman to issue an advisory opinion on the Planning Commission's denial of the CUP. On November 16, 2023, the Utah Property Rights Ombudsman issued an Advisory Opinion concluding that:

“Final action on conditional use applications must include findings according to conditional use standards and must be supported by substantial evidence. It is incumbent on the city to use the substantive review process to obtain all information necessary before considering a matter for final decision. Unless the applicant demands final action, “insufficient information” is not a valid basis for denial where the application could be continued to obtain information necessary for required findings. Conditional uses, like any land use application, must also comply with the objective requirements of land use regulations, development standards, and applicable land use decisions, including plat restrictions. Plats are interpreted to discern the meaning of the parties at the time the plat is created, and ambiguity is appropriately resolved by the extrinsic evidence of subdivision approval documents and the land use ordinances in effect at the time of approval.”

“The city wrongfully interpreted platted building pad lines as proscribing any development activity beyond the existing home’s footprint, which was not the intent of the plat according to the master planned development approval and ordinances in effect at that time. The city also concluded that it had insufficient information about the lot’s pre-development condition in order to determine compliance with standards for steep slopes and vegetation protection. Despite the applicant’s preference to continue the matter to provide the necessary information, the city wrongfully denied the application for “lack of information” and for noncompliance with original plat restrictions, which was erroneous.”

“The city should reconsider the application without regard to any plat restrictions, and only after it has received whatever information it feels is necessary to determine compliance with steep slope regulations and to make required findings under its conditional use standards of reasonably anticipated detrimental effects, and the potential mitigation of those effects by condition. It must then approve the conditional use permit if it determines the application, as conditioned, achieves compliance with its standards, or else deny the permit if it determines objective requirements are not met or that reasonable conditions cannot substantially mitigate identified detrimental effects” (Exhibit I).

See Analysis Section III for more details.

Standard of Review

Pursuant to Land Management Code (LMC) [§ 15-1-18\(C\)](#), Final Action by the Planning Commission concerning Conditional Use Permits may be appealed to the Appeal Panel. The Appeal Panel shall act in a quasi-judicial manner and review factual matters de novo, without deference to Staff determination of factual matters. The Appeal Panel shall determine the correctness of the Planning Commission’s interpretation and application of the plain meaning of the land use regulations and interpret and apply a land use regulation to favor a land use application unless the land use regulation plainly restricts the land use application.³

³ LMC [§ 15-1-18\(G\)](#)

Burden of Proof

The Applicant has the burden of proving that the Planning Commission erred in denying the Conditional Use Permit (LMC [§ 15-1-18\(G\)](#)).

There are certain Uses that, because of unique characteristics or potential impacts on the municipality, surrounding neighbors, or adjacent land Uses, may not be Compatible in some Areas or may be Compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.

The Planning Commission shall approve a Conditional Use if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed Use in accordance with applicable standards. The Planning Commission may deny the Conditional Use if the proposed Use cannot be substantially mitigated by the proposal or imposition of reasonable conditions to achieve compliance with the applicable standards, outlined below (LMC [§ 15-1-10\(E\)](#)).

Analysis

(I) The Planning Commission found the proposal does not mitigate the reasonably anticipated detrimental effects of the proposed Use and does not comply with the Conditional Use Permit criteria outlined in LMC § 15-1-10(E).

Steep Slopes and Significant Vegetation

LMC [§ 15-2.21-4](#) states, “No Development is allowed on or within fifty feet (50’), map distance, of Very Steep Slopes, Areas subject to land slide activity, and other high-hazard geologic Areas. As used herein, an Area of Very Steep Slopes must cover a topographic Area at least twenty-five feet (25’) vertically, upslope or downslope, and fifty feet (50’) horizontally in any direction to be subject to this prohibition.”

LMC [§ 15-15-1](#) defines Steep Slope as greater than 15 percent and Very Steep Slope as greater than 40%. The Applicant has provided Steep Slope maps as part of this appeal (Exhibit J).

LMC [§ 15-2.10-10](#) requires Property Owners in the Estate Zoning District to “[...] protect Significant Vegetation during any Development activity. Significant Vegetation includes large trees six inches in diameter or greater measured four and one-half feet above the ground, groves of small trees, or clumps of oak and maple covering an Area 50 square feet or more measured at the drip line.”

“Development plans must show all Significant Vegetation within 20 feet of a proposed Development. The Property Owner must demonstrate the health and viability of all large trees through a certified arborist.”

The Planning Commission denied the CUP and determined, in part, the following:

Finding of Fact 11: The request for a Private Recreation Facility at 1115 Aerie Drive was not compatible with the surrounding Structures in Use, scale, and circulation, and that reasonable conditions cannot be proposed to mitigate the anticipated detrimental effects because:

- a. The subject Property contains Steep Slopes and Very Steep Slopes, which have been disturbed and terraced to accommodate the Recreation Facility.
- b. The submitted slope map and the vegetative cover map are reflective of post-development conditions, and do not interpolate the prior conditions before the work done in 2021. Because of this, staff is unable to verify to what extent Significant Vegetation may have been removed, or in what areas of development was placed within 50 feet of Very Steep Slopes. Based on the post-conditions slope map, it appears that much of the new development is currently within 50 feet of Very Steep Slopes. Based on satellite imagery from September 2020, prior to the recent development, it appears that some amount of vegetation was removed, but exact counts cannot be determined.
- c. The proposed resized sports court adds approximately 2,085 square feet of impervious surfaces to the site. This is not adequately mitigated in the Applicant's proposal, as they have only shown new proposed vegetation uphill of the [sports] court and proposed to retain a hardscape flagstone patio and artificial turf lawn downhill of the [sports] court.
- d. The amount of disturbed and landscaped areas outside of the Building Pad is not consistent with other properties in the Overlook at Old Town Subdivision.

Finding of Fact 12: The as-built conditions, including the placement of Structures like the sports court outside of the Building Pad, do not appear to comply with the original plat restrictions. In the Notice of City Council Action letter dated August 19, 1993, the City Council approved the Nielsen/Korthoff Properties MPD with 12 Conditions of Approval. Condition of Approval 3 states:

- a. The Plat shall contain notes regarding stormwater requirements and considerations, wintertime travel restrictions (one-way road), and limits of disturbance as specified at the time of final plat approval.

The Planning Commission determined that the retaining walls and sports court fall under the definition of "Structure" and, therefore, are limited within the platted Building Pad. The LMC at the time of Subdivision approval contains the following definitions:

- Building Pad Line – The Building Pad Line denotes the area in which the entire new Structure must lie. The area of construction disturbance attributable to the Structure (as opposed to utilities installation) may not extend beyond ten feet from the Building Pad Line.
- Limits of Disturbance – The Limits of Disturbance line indicates the area in which

construction activity must be contained. Construction disturbance must not extend beyond the Limits of Disturbance line as indicated on the Plat of Master Plan unless the Community Development Director has amended the limit as per sections 10.9(k)3 or 15.4.2(d)3.

- Structure – Anything constructed, the use of which requires fixed location on or in the ground, or attached to something having a fixed location upon the ground and which imposes an impervious material on or above the ground; definition includes “building”. All Structures must maintain the minimum setbacks for the district in which they are located, both above and below the ground.

Additionally, the Planning Commission also based their determination that the proposed development cannot extend beyond the platted Building Pad because the current LMC definition of Limits of Disturbance is, “the designated Area in which all Construction Activity must be contained.”⁴

Details Outlining Landscaping, Noise, Lighting, Steep Slopes, and Sensitive Land Overlay Evaluation Needed

Finding of Fact 15: The Planning Commission determined that the application does not meet Land Management Code [§ 15-1-10 Conditional Use Review](#) Process due to a lack of information submitted regarding screening and landscaping, compatibility with surrounding Structures, potential noise, lighting, environmentally sensitive lands, Steep Slopes, and appropriateness of the proposed Structure to the existing topography of the Site.

Finding of Fact 16: The proposal is not consistent with the General Plan, as it allows for disturbance of Sensitive Lands without adequate mitigation.

- a. The Property is located in the Masoni Hill Neighborhood of the General Plan. The Property is noted as having slopes that exceed 30 degrees. The General Plan identifies Masonic Hill as a “natural conservation neighborhood”, [which] it also denoted as [a] “Critical Area for Protection and Conservation.” The General Plan stresses that, “the aesthetic of the Masonic Hill Neighborhood should be preserved.”
- b. These elements are described in Goal 4 of the General Plan, Open Space, and Objective 4D emphasizes to minimize further land disturbance and conservation or remaining undisturbed land areas to development to minimize the effect on neighborhoods.

The Planning Commission determined that the proposal did not show compliance with revegetation of the site and indicated that the commission supports the Applicant restoring the Property to what was approved with the Landscape Permit (#21-122).

(II) The Applicant’s Appeal outlines the following points as the bases for the appeal.

⁴ LMC [§ 15-15-1](#)

On August 1, 2022, Staff received the Applicant's Notice of Appeal (Exhibit A). The following is a summary of that Notice:

1. The Planning Commission's conclusions regarding the detrimental effects of the sports court lacked evidential support, as assumptions based solely on public comments are deemed insufficient for denial of the application. The Commission failed to provide substantive findings or evidence to justify their decision.
2. Under Utah Code, Conditional Use Permits should be approved if reasonable conditions can mitigate anticipated detrimental effects of the proposed use. While mitigation does not necessitate complete elimination of effects, the Planning Commission did not adequately explain why proposed conditions by the Applicant regarding lighting, noise, and screening, were deemed insufficient.
3. The Planning Commission's determination that reasonable conditions could not mitigate detrimental effects must be backed by substantial evidence. Denying a Conditional Use Permit is only justified if such conditions cannot substantially mitigate effects. However, the Commission's failure to provide evidence for findings regarding the inability to mitigate effects renders their decision unsupported.
4. The Property, situated in the Hearthstone Subdivision, was subject to a Master Planned Development approval by Park City in 1993, which included conditions on landscaping and disturbance limits. However, when the Final Subdivision Plat was approved, it lacked these mandated restrictions and only included Building Pads for each lot. Despite the distinction between Building Pads and Areas of Disturbance in Park City's Land Management Code, the Planning Commission erroneously mandated all improvements, including a sports court, be confined to the Building Pad. This misinterpretation effectively nullifies certain provisions of the land use code and imposes impractical limitations on construction activities within the Subdivision.
5. Despite Park City's Land Management Code prohibiting development within 50 feet of Very Steep Slopes, the Planning Commission erroneously denied the application based on speculative reasoning regarding the sports court's proximity to these slopes. This decision was unsupported by adequate evidence and relied on insufficient post-development maps.
6. While municipalities may adopt land use ordinances with Conditional Use provisions tied to objective standards, the Planning Commission's reliance on subjective statements from the General Plan lacked objective basis. Aspirational statements within the General Plan cannot be enforced as conditions without accompanying objective standards, which the Commission failed to provide.

(III) The Ombudsman Advisory Opinion outlines four points in their analysis of

the Planning Commission's action.

On November 16, 2023, the Office of the Property Rights Ombudsman issued an Advisory Opinion regarding the Planning Commission's decision to deny the Conditional Use Permit for 1115 Aerie Drive (Exhibit H). The following is a summary of the opinion:

1. The proposed Development at 1115 Aerie Drive does not violate internal Lot restrictions.
 - The absence of separate Limits of Disturbance on the final Plat lead to differing interpretations between the City and Applicant regarding the purpose of the Building Pad.
 - The 1994 LMC emphasizes minimizing disturbance to existing vegetation and provides for designated building envelopes.
 - Plat restrictions could include easements, covenants, or definitions to restrict development beyond the building pad.
 - Without specific definitions or explanations of reservations on the Plat, the intention of the Building Pad designation was likely to designate the location of the primary residential Structure.
 - The Building Pad note does not prohibit development of a sports court outside of its area.
2. The Commission's Findings that the as-built conditions violated the City's Steep Slope Regulations is not supported by the record.
 - Non-compliance with the Steep Slope provision is a basis for denial.
 - The Planning Commission's findings of violation of this provision is not supported and conflicts with other findings.
 - The Planning Commission cited disturbed Steep and Very Steep Slopes as a reason for denial but could not verify the placement of development relative to these slopes due to lack of pre-development information.
 - The Planning Commission acknowledges that pre-development conditions determine compliance with slope regulations and their findings are undermined by the lack of this information.
3. Final Action on Conditional Use applications must be supported by substantial evidence; the substantive review process allows for obtaining additional necessary information before decision-making, and the City's code suggests that the Planning Commission should have continued the matter per the Applicant's request.
 - The Applicant alleges that the City wrongly denied their conditional use permit due to insufficient information on compliance with various requirements such as screening, landscaping, lighting, noise, Sensitive Lands, and Steep Slopes.
 - According to state law, the City must base their denial of a Conditional Use application on findings of anticipated detrimental effects that cannot be mitigated, but the Applicant argues that the City failed to fulfill this requirement.

- The City's denial was criticized for not making sufficient findings to support either approval or denial of the permit, which the Applicant argues violates the law.
- Utah law mandates that the approval or denial of a Conditional Use application must be supported by substantial evidence, including findings of fact.
- Despite the City providing a written Final Action Letter with 17 Findings of Fact, the Applicant contends that the denial lacked adequate information and violated LMC standards.
- The Planning Commission cited insufficient information regarding several required review criteria, indicating that they did not have enough information to make the necessary findings.
- The Land Use, Development, and Management Act (LUDMA) requires municipalities to follow specific application processes and to ensure they have all necessary information before making a decision.
- The Applicant argues that the City's denial should have been based on a lack of sufficient information, which should have prompted a continuance rather than a final decision.
- The City's decision to move forward with the denial despite the lack of information was deemed contrary to state law and local ordinance.
- Despite other potential bases for denial, such as plat restrictions, the decision to deny based solely on insufficient information was criticized as arbitrary and capricious.
- The Applicant requested a continuance to provide additional information, but the Planning Commission proceeded with the denial.
- The Code requires a public hearing for a Conditional Use application and provides for continuances if requested in advance or if the Planning Commission deems it necessary.
- Insufficient information to evaluate the listed items under the Conditional Use standards is considered more than sufficient reason to continue the application process.
- Despite other reasons for denial, the decision based solely on insufficient information was deemed contrary to both state law and local ordinance, which directed that the matter should have been continued.

4. The remaining findings according to the City's Conditional Use review must be revisited to consider proper Plat interpretation and additional necessary information.

- The Planning Commission made other affirmative findings to support denial of the conditional use permit.
- The proposal was criticized for adding impervious surfaces without adequate mitigation and disturbing landscaped areas outside the Building Pad, which was deemed inconsistent with neighboring properties.
- The proposal was also found to be inconsistent with the General Plan, particularly regarding sensitive lands and conservation goals in the Masonic Hill neighborhood.

- The Code requires review for consistency with the goals and objectives of the Park City General Plan but states that this review alone is not binding.
- The Commission's reliance on the General Plan for denial was contested, but it was found relevant in framing detrimental effects and guiding compliance with the Code.
- However, the Commission's findings were undermined by errors in determining compliance and insufficient information.
- Findings regarding impervious surfaces, landscaping, and consistency with neighboring properties were deemed lacking due to insufficient information on compliance with Conditional Use standards.
- The Commission was advised that even with additional information, a denial might still be recommended based on concerns about vegetation loss and drainage issues.
- Despite potential concerns, the Commission must base its findings on proper information and consider whether reasonable conditions can mitigate detrimental effects to achieve compliance.

Alternatives

- If the Appeal Panel determines the Planning Commission had substantial evidence to support their Findings to deny the Conditional Use Permit, the Appeal Panel may deny the appeal, uphold the Planning Commission's denial, and direct staff to prepare Findings and Conclusions upholding the Planning Commission's decision.
- If the Appeal Panel determines the application complied with the plat, Sensitive Lands regulations, and contained substantial evidence to mitigate any proposed Use or reasonable additional conditions could be proposed to mitigate the reasonably anticipated detrimental effects of the proposed Use in accordance with applicable standards, the Panel may vote to grant the appeal and grant the CUP, and direct staff to prepare Findings, Conclusions and Conditions of Approval consistent with the Panel's determination.
- If the Appeal Panel agrees with the Ombudsman's Advisory Opinion that the Planning Commission erred in the application of the building pad plat restriction beyond the primary residential Structure; the plat note does not prohibit development of a sports court outside of its area; the Planning Commission did not have substantial evidence to support their Findings; and/or the Planning Commission erred by taking final action to deny the application rather than granting a continuance, the Appeal Panel may grant the appeal in part and remand the matter to the Planning Commission with direction to re-evaluate the proposal consistent with the Appeal Panel's determination.

If the Appeal Panel remands the application to the Planning Commission, staff recommends the Appeal Panel require the Applicant to submit sufficient information for a final determination by the Planning Commission, including:

- i. Sensitive Lands Analysis, including Steep Slopes
- ii. Updated Landscape Plan
- iii. Updated project statement addressing the 16 CUP criteria in LMC § 15-1-10(E)
- iv. Geotechnical Report

- The Appeal Panel may continue the appeal to a date certain and request additional information.

Department Review

The Planning Department, Executive Department, and City Attorney's Office reviewed this report.

Notice

Staff published notice on the City's website and the Utah Public Notice website and posted notice to the property on February 14, 2024. Staff mailed courtesy notice to property owners within 300 feet on February 15, 2024. The *Park Record* published courtesy notice on February 17, 2024.⁵

Public Input

See Exhibit I for a compilation of public input.

Exhibits

- Exhibit A: Notice of Appeal dated July 29, 2022
- Exhibit B: Hearthstone Subdivision Plat
- Exhibit C: Final Action Letter dated July 13, 2022
- Exhibit D: July 13, 2022, Planning Commission Staff Report
- Exhibit E: Building Permit #21-122 Approved Site Plan
- Exhibit F: October 1, 2021, Code Compliance Letter
- Exhibit G: February 2, 2022, Code Compliance Letter & February 25, 2022, Addendum Letter
- Exhibit H: Property Rights Ombudsman Advisory Opinion dated November 16, 2023
- Exhibit I: Public Comments
- Exhibit J: Steep Slope Maps
- Exhibit K: Building Permit Inspection Report

⁵ LMC [§ 15-1-21](#)

RECEIVED

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AUG 01 2022
PARK CITY
PLANNING DEPT.



Wade R. Budge
wbudge@swlaw.com

July 29, 2022

VIA US MAIL AND EMAIL MICHELLE.KELLOGG@PARKCITY.ORG

Michelle Kellogg
City Recorder
Park City
445 Marsac Avenue
Park City, Utah 84060

**Re: Notice of Appeal of Planning Commission's Final Action pursuant to Utah
Code § 10-9a-703(1) and LMC § 15-1-18C for Application PL-21-05101**

Dear Ms. Kellogg:

This firm represents 1115 Aerie, LLC ("1115 Aerie"), the owner of the real property located at 1115 Aerie Drive Park City, Utah (the "Property"). 1115 Aerie previously filed a Conditional Use Permit application (No. PL-21-05101) on December 20, 2021, to construct a sports court on the Property (the "Application").

On July 13, 2022, the Park City Planning Commission ("Planning Commission") held a public hearing and ultimately denied the Application. On July 20, 2022, the Planning Commission took final action by issuing its written denial of the Application (the "Denial Letter"), a copy of which is attached hereto as Exhibit A.

Pursuant to Utah Code § 10-9a-703(1) and Park City Land Management Code § 15-1-18C, 1115 Aerie hereby submits this Notice of Appeal of the Planning Commission's decision.

There are at least six independent bases for this appeal.

1. A land use authority's detrimental effect findings must be supported by substantial evidence in the record. *See Ralph L. Wadsworth Const. v. West Jordan City*, 2000 UT App 49, ¶ 17, 999 P.2d 1240. Findings "based solely on adverse public comment" are insufficient to support a conditional use permit denial. *Id.* Here, the Planning Commission simply assumed the Sports Court would have detrimental effects but provided no evidence and made no findings to support its conclusion. For example, the Denial Letter states that 1115 Aerie failed to provide adequate information regarding lighting, screening, noise, compatibility with surrounding structures, environmentally sensitive lands, steep slopes, and the mismatch between

Michelle Kellogg

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the Sports Court and the Property's topography, but the Planning Commission made no real findings underlying these concerns. Indeed, the only evidence in the record raising concerns with lighting, screening, and noise came from the public clamor—which cannot be the only evidence of a detrimental effect.

2. Pursuant to Utah Code § 10-9a-507(2)(a)(i), “a land use authority shall approve a conditional use if reasonable conditions are proposed, or can be imposed, to mitigate the reasonable anticipated detrimental effects of the proposed use” Importantly, mitigation of reasonably anticipated mitigation does not require elimination of the detrimental effects. *Id.* § 10-9a-507(2)(a)(ii). Here, the Planning Commission failed to explain why 1115 Aerie’s proposed conditions would not mitigate the supposed detrimental effects. For example, the public clamor raised concerns that the Sports Court’s lighting would create light pollution on adjoining properties. 1115 Aerie proposed a simple solution—the Sports Court would have no lighting. Similarly, the public expressed concerns about noise associated with pickleball. Again, 1115 Aerie proposed a reasonable, mitigating condition—the Sports Court would not be used for pickleball. Finally, the public clamor asserted that the Sports Court would not be properly screened from view, 1115 Aerie proposed a detailed plan outlining how the Sports Court would be screened from the road and adjoining properties

3. If a land use authority determines that reasonable conditions cannot mitigate the detrimental effects caused by a proposed use, it must support such determination by substantial evidence in the record. *See McElhaney v. City of Moab*, 2017 UT 65, ¶ 27, 423 P.3d 1284. The land use authority can deny a conditional use only if reasonable conditions cannot substantially mitigate the detrimental effects. *See* Utah Code 10-9a-507(2)(c). Because the Planning Commission failed to make any findings as to why the Sports Court would cause detrimental effects, it also failed to make findings as to why any detrimental effects were unmitigable.

4. The Property is located within the Hearthstone Subdivision. On June 14, 1993, Park City approved the Hearthstone MPD subject to various conditions, including, that the final subdivision plat would contain notes governing “limits of disturbance” and “[l]imitations on landscaping and irrigation.” On October 4, 1993, Park City approved the final subdivision plat for the Hearthstone Subdivision (the “**Plat**”). The Plat contained no limits of disturbance or limitations on landscaping and irrigation as was required by the prior MPD approval. The Plat did, however, include a building pad for each lot. Park City’s prior and current land use code distinguish between a building pad line and an area of disturbance. Despite this, the Planning Commission wrongly asserted that all improvements—including the Sports Court—must be constructed within the building pad line designated on the Plat. To reach this conclusion, the Planning Commission conflated the building pad—which was intended to provide restrictions on house size—with a limit of disturbance. This conflation renders provisions of the land use code inoperative and leads to the absurd result that no lot in the subdivision may lawfully construct a driveway or disturb any land outside the building pad. *See Monarrez v. Utah Dept. of Transp.*,

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2016 UT 10, ¶ 11, 368 P.3d 846 (Courts avoid interpretations “which render[] parts or words in a statute inoperative or superfluous . . .”); *Olsen v. Park City Mun. Corp.*, 2013 UT App 262, ¶ 8, 315 P.3d 1055 (Courts avoid interpretations “that lead[] to absurd results.”).

5. Park City’s Land Management Code prohibits development within fifty feet (50’) of Very Steep Slopes. *See* LMC § 15-2.21-4(A). Very Steep Slopes are defined as “a Topographic Area at least twenty-five feet (25’) vertically, upslope or downslope, and fifty feet (50’) horizontally in all directions . . .” *Id.* The Sports Court was not constructed within 50’ of a Very Steep Slope. 1115 Aerie provided evidence at the public hearing that the Sports Court was constructed far away from the only Very Steep Slope on the Property and offered to supplement its Application to provide additional evidence. Despite this, the Planning Commission denied the Application because it speculated, based on a post-development slope map, that the Sports Court was located within 50’ of Very Steep Slopes. The map the Planning Commission relied on does not identify the length and width of various slopes, and such dimensions are essential for determining whether a slope constitutes a Very Steep Slope.

6. “A municipality may adopt a land use ordinance that includes conditional uses and provisions for conditional uses that require compliance with objective standards set forth in an applicable ordinance.” Utah Code § 10-9a-507(1)(a). Park City’s General Plan notes that the Property is located in an area that has slopes that exceed 30 degrees and is a natural conservation neighborhood which is a critical area for protection and conservation (*See* Denial Letter, ¶ 16.a.) As such, the aesthetic of the area should be preserved. (*Id.*) These aspirational statements were relied upon by Planning Commission to deny the Application. However, these General Plan statements are purely subjective, and 1115 Aerie is not required to comply with subjective, aspirational statements as conditions imposed on its Application.

For the foregoing reasons, 1115 Aerie submits this Notice of Appeal to the City Council of Park City in its capacity as the appeal authority for land use decisions of the Planning Commission.

As always, thank you for your professionalism and attention to this matter.

Sincerely,

SNELL & WILMER



Wade R. Budge, P.C.

WRB

Snell & Wilmer

— L.L.P. —

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Exhibit A

Denial Letter

[Attached]

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July 13, 2022

Wade Budge Representing 1115 Aerie LLC
6706 Norway Rd
Dallas, TX 75230

NOTICE OF [PLANNING COMMISSION OR PLANNING DIRECTOR] ACTION

Description

Address: 1115 Aerie Drive
Zoning District: Estate (E)
Application: Private Recreation Facility Conditional Use Permit
Project Number: PL-21-05101
Action: DENIED
Date of Final Action: July 13, 2022
Project Summary: The applicant proposes to modify an existing sports court (a Private Recreation Facility) located outside of the existing Building Pad. The existing sports court was not built with appropriate permits, and crosses property lines.

Action Taken

On July 13, 2022, the Planning Commission conducted a public hearing and denied the Private Recreation Facility Conditional Use Permit according to the following findings of fact, conclusions of law, and conditions of approval.

Findings of Fact

1. The property is located at 1115 Aerie Drive.
2. On December 20, 2021, the applicant representing the property owner of 1115 Aerie Drive submitted two land use applications to the Park City Planning Department:
 - a. An Administrative Conditional Use Permit for retaining walls greater than six feet (6') in height from Final Grade
 - b. A Conditional Use Permit for Private Recreation Facilities

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3. The Applicant proposed to modify an existing sports court (a Private Recreation Facility) located outside of the existing Building Pad. The existing sports court was not built with appropriate permits, and crosses property lines.
4. The property is in the Estate (E) Zoning District. The property includes Lot 8 of the Overlook at Oldtown subdivision.
5. The property fronts Aerie Drive in the front and rear of the Lot.
6. The primary access to the property is from Aerie Drive, a public street.
7. The neighborhood is characterized by large single-family homes on lots with steep slopes.
8. The property is subject to the Nielsen Korthoff Properties MPD, as recorded in the Notice of City Council Action letter dated August 19, 1993.
9. LMC § 15-2.10-2(B) establishes a Private Recreation Facility as a Conditional Use in the Estate Zoning District.
 - a. Because the CUP Application was submitted on December 20, 2021, the project is not subject to LMC § 15-4-22, *Outdoor Pickleball Courts In Residential Areas*, which was adopted on April 28, 2022.
 - b. Private Recreation Facility was designated a Conditional Use in the Estate Zoning District prior to the April 28, 2022 LMC Amendments specific to Pickleball Courts.
10. Prior to the April 28, 2022 LMC Amendments, Private Recreation Facilities were defined by LMC § 15-15-1 as, "Recreation facilities operated on private Property and not open to the general public. Including Recreation Facilities typically associated with a homeowner or Condominium association, such as pools, tennis courts, playgrounds, spas, picnic Areas, similar facilities for the Use by Owners and guests".
11. The Planning Commission determined the Applicant's request for a Private Recreation Facility at 1115 Aerie Drive was not compatible with the surrounding Structures in Use, scale, and circulation, and that reasonable conditions cannot be proposed to mitigate the anticipated determinantal effects because:
 - a. The subject property contains Steep Slopes and Very Steep Slopes, which have been disturbed and terraced to accommodate the Recreation Facility.
 - b. The submitted slope map and the vegetative cover map are reflective of post-development conditions, and do not interpolate the prior conditions before the work done in 2021. Because of this, staff is unable to verify to what extent Significant Vegetation may have been removed, or in what

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areas development was placed within 50' of Very Steep Slopes. Based on the post-conditions slope map, it appears that much of the new development is currently within 50' of Very Steep Slopes. Based on satellite imagery from September 2020, prior to the recent development, it appears that some amount of significant vegetation was removed, but exact counts cannot be determined.

- c. The proposed resized sports court adds approximately 2,085 square feet of impervious surfaces to the site. This is not adequately mitigated in the applicant's proposal, as they have only shown new proposed vegetation uphill of the court and proposed to retain a hardscape flagstone patio and artificial turf lawn downhill of the court.
- d. The amount of disturbed and landscaped areas outside of the Building Pad is not consistent with other properties in the Overlook at Old Town subdivision.

12. The as-built conditions, including the placement of Structures like the sports court outside of the Building Pad, do not appear to comply with the original plat restrictions. In the Notice of City Council Action letter dated August 19, 1993, the City Council approved the Nielsen Korthoff Properties MPD with twelve conditions of approval. Condition of approval 3 states:

- a. The plat shall contain notes regarding storm water requirements and considerations, wintertime travel restrictions (one-way road), and limits of disturbance as specified at the time of final plat approval.

13. The Land Management Code at the time of subdivision contained the following definitions:

- a. Building Pad Line. The building pad line denotes that area in which the entire new structure must lie. The area of construction disturbance attributable to the structure (as opposed to utilities installation) may not extend beyond ten (10) feet from the building pad line.
- b. Limits of Disturbance. The limits of disturbance line indicates the area in which construction activity must be contained. Construction disturbance must not extend beyond the limits of disturbance line as indicated on the plat of Master Plan unless the Community Development Director has amended the limit as per sections 10.9(k)3 or 15.4.2(d)3.
- c. Structure. Anything constructed, the use of which requires fixed location on or in the ground, or attached to something having a fixed location upon the ground and which imposes an impervious material on or above the

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ground; definition includes "building". All structures must maintain the minimum set-backs for the district in which they are located, both above and below the ground.

14. The current proposal is to allow for 1115 Aerie Drive (Lot 8) to retain development located outside of the existing 90-foot by 90-foot Building Pads, which accommodates extensive landscaping, regrading, and a concrete sports court that were constructed outside of the scope of the Grading/Landscaping Permit #21-122.
 - a. The current LMC definition of Limits of Disturbance is, "the designated Area in which all Construction Activity must be contained."
 - b. The development that occurred on the site in 2021 was inconsistent with the prior approvals, including the approved MPD and final plat, the latter of which did not include separate Limits of Disturbance for landscaping.
15. The Planning Commission determined that the application does not meet Land Management Code, Section 15-1-10, *Conditional Use Review Process*, due to a lack of information submitted regarding screening and landscaping, compatibility with surrounding structures, potential noise, lighting, environmentally sensitive lands, steep slopes, and appropriateness of the proposed Structure to the existing topography of the Site. The following Conditional Use Permit review criteria have not been sufficiently addressed:
 - a. LMC § 15-1-10(E)(7), *Fencing, Screening, and landscaping to separate the Use from adjoining Uses*,
 - b. LMC § 15-1-10(E)(8), *Building mass, bulk, and orientation, and the location of Buildings on the Site; including orientation to Buildings on adjoining Lots*,
 - c. LMC § 15-1-10(E)(11), *physical design and Compatibility with surrounding Structures in mass, scale, style, design, and architectural detailing*,
 - d. LMC § 15-1-10(E)(12), *noise, vibration, odors, steam, or other mechanical factors that might affect people and Property Off-Site*; and
 - e. LMC § 15-1-10(E)(15), *within and adjoining the Site, Environmentally Sensitive Lands, Physical Mine Hazards, Historic Mine Waste and Park City Soils Ordinance, Steep Slopes, and appropriateness of the proposed Structure to the existing topography of the Site*.
16. The proposal is not consistent with the General Plan, as it allows for disturbance of Sensitive Lands without adequate mitigation.

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L.L.P.

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July 29, 2022

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- a. The property is located in the Masonic Hill neighborhood of the General Plan. The property is noted as having slopes that exceed 30 degrees. The General Plan identifies Masonic Hill as a "natural conservation neighborhood", with it also denoted as "Critical Area for Protection and Conservation". The General Plan stresses that, "the aesthetic of the Masonic Hill Neighborhood should be preserved".
- b. These elements are described in Goal 4 of the General Plan, Open Space, and Objective 4D emphasizes to minimize further land disturbance and conservation or remaining undisturbed land areas to development to minimize the effects on neighborhoods.

17. Staff posted notice to the property and mailed notice to property owners within 300 feet on June 28, 2022. On July 13, 2022, the Planning Commission conducted a public hearing and denied the application.

Conclusions of Law

1. The Conditional Use Permit is not consistent with the Land Management Code, Section 15-1-10, *Conditional Use Review Process*, and reasonable conditions cannot be proposed to mitigate the anticipated detrimental effects of the proposed Use.
2. The Conditional Use Permit is not compatible with surrounding Structures in Use, scale, mass, and circulation, as required by LMC Section 15-1-10(D), *Standards for Review*.

If you have questions or concerns regarding this Final Action Letter, please call Alexandra Ananth or email Alexandra.ananth@parkcity.org

Sincerely,

A handwritten signature in black ink, appearing to read "John Phillips".

John Phillips, Planning Commission Chair



July 13, 2022

Wade Budge Representing 1115 Aerie LLC
6706 Norway Rd
Dallas, TX 75230

NOTICE OF [PLANNING COMMISSION OR PLANNING DIRECTOR] ACTION

Description

Address: 1115 Aerie Drive
Zoning District: Estate (E)
Application: Private Recreation Facility Conditional Use Permit
Project Number: PL-21-05101
Action: DENIED
Date of Final Action: July 13, 2022

Project Summary: The applicant proposes to modify an existing sports court (a Private Recreation Facility) located outside of the existing Building Pad. The existing sports court was not built with appropriate permits, and crosses property lines.

Action Taken

On July 13, 2022, the Planning Commission conducted a public hearing and denied the Private Recreation Facility Conditional Use Permit according to the following findings of fact, conclusions of law, and conditions of approval.

Findings of Fact

1. The property is located at 1115 Aerie Drive.
2. On December 20, 2021, the applicant representing the property owner of 1115 Aerie Drive submitted two land use applications to the Park City Planning Department:
 - a. An Administrative Conditional Use Permit for retaining walls greater than six feet (6') in height from Final Grade
 - b. A Conditional Use Permit for Private Recreation Facilities



Planning Department

3. The Applicant proposed to modify an existing sports court (a Private Recreation Facility) located outside of the existing Building Pad. The existing sports court was not built with appropriate permits, and crosses property lines.
4. The property is in the Estate (E) Zoning District. The property includes Lot 8 of the Overlook at Oldtown subdivision.
5. The property fronts Aerie Drive in the front and rear of the Lot.
6. The primary access to the property is from Aerie Drive, a public street.
7. The neighborhood is characterized by large single-family homes on lots with steep slopes.
8. The property is subject to the Nielsen Korthoff Properties MPD, as recorded in the Notice of City Council Action letter dated August 19, 1993.
9. LMC § 15-2.10-2(B) establishes a Private Recreation Facility as a Conditional Use in the Estate Zoning District.
 - a. Because the CUP Application was submitted on December 20, 2021, the project is not subject to LMC § 15-4-22, *Outdoor Pickleball Courts In Residential Areas*, which was adopted on April 28, 2022.
 - b. Private Recreation Facility was designated a Conditional Use in the Estate Zoning District prior to the April 28, 2022 LMC Amendments specific to Pickleball Courts.
10. Prior to the April 28, 2022 LMC Amendments, Private Recreation Facilities were defined by LMC § 15-15-1 as, "Recreation facilities operated on private Property and not open to the general public. Including Recreation Facilities typically associated with a homeowner or Condominium association, such as pools, tennis courts, playgrounds, spas, picnic Areas, similar facilities for the Use by Owners and guests".
11. The Planning Commission determined the Applicant's request for a Private Recreation Facility at 1115 Aerie Drive was not compatible with the surrounding Structures in Use, scale, and circulation, and that reasonable conditions cannot be proposed to mitigate the anticipated determinantal effects because:
 - a. The subject property contains Steep Slopes and Very Steep Slopes, which have been disturbed and terraced to accommodate the Recreation Facility.
 - b. The submitted slope map and the vegetative cover map are reflective of post-development conditions, and do not interpolate the prior conditions before the work done in 2021. Because of this, staff is unable to verify to what extent Significant Vegetation may have been removed, or in what



Planning Department

areas development was placed within 50' of Very Steep Slopes. Based on the post-conditions slope map, it appears that much of the new development is currently within 50' of Very Steep Slopes. Based on satellite imagery from September 2020, prior to the recent development, it appears that some amount of significant vegetation was removed, but exact counts cannot be determined.

- c. The proposed resized sports court adds approximately 2,085 square feet of impervious surfaces to the site. This is not adequately mitigated in the applicant's proposal, as they have only shown new proposed vegetation uphill of the court and proposed to retain a hardscape flagstone patio and artificial turf lawn downhill of the court.
- d. The amount of disturbed and landscaped areas outside of the Building Pad is not consistent with other properties in the Overlook at Old Town subdivision.

12. The as-built conditions, including the placement of Structures like the sports court outside of the Building Pad, do not appear to comply with the original plat restrictions. In the Notice of City Council Action letter dated August 19, 1993, the City Council approved the Nielsen Korthoff Properties MPD with twelve conditions of approval. Condition of approval 3 states:

- a. The plat shall contain notes regarding storm water requirements and considerations, wintertime travel restrictions (one-way road), and limits of disturbance as specified at the time of final plat approval.

13. The Land Management Code at the time of subdivision contained the following definitions:

- a. Building Pad Line. The building pad line denotes that area in which the entire new structure must lie. The area of construction disturbance attributable to the structure (as opposed to utilities installation) may not extend beyond ten (10) feet from the building pad line.
- b. Limits of Disturbance. The limits of disturbance line indicates the area in which construction activity must be contained. Construction disturbance must not extend beyond the limits of disturbance line as indicated on the plat of Master Plan unless the Community Development Director has amended the limit as per sections 10.9(k)3 or 15.4.2(d)3.
- c. Structure. Anything constructed, the use of which requires fixed location on or in the ground, or attached to something having a fixed location upon the ground and which imposes an impervious material on or above the



Planning Department

ground; definition includes "building". All structures must maintain the minimum set-backs for the district in which they are located, both above and below the ground.

14. The current proposal is to allow for 1115 Aerie Drive (Lot 8) to retain development located outside of the existing 90-foot by 90-foot Building Pads, which accommodates extensive landscaping, regrading, and a concrete sports court that were constructed outside of the scope of the Grading/Landscaping Permit #21-122.
 - a. The current LMC definition of Limits of Disturbance is, "the designated Area in which all Construction Activity must be contained."
 - b. The development that occurred on the site in 2021 was inconsistent with the prior approvals, including the approved MPD and final plat, the latter of which did not include separate Limits of Disturbance for landscaping.
15. The Planning Commission determined that the application does not meet Land Management Code, Section 15-1-10, *Conditional Use Review Process*, due to a lack of information submitted regarding screening and landscaping, compatibility with surrounding structures, potential noise, lighting, environmentally sensitive lands, steep slopes, and appropriateness of the proposed Structure to the existing topography of the Site. The following Conditional Use Permit review criteria have not been sufficiently addressed:
 - a. LMC § 15-1-10(E)(7), *Fencing, Screening, and landscaping to separate the Use from adjoining Uses*,
 - b. LMC § 15-1-10(E)(8), *Building mass, bulk, and orientation, and the location of Buildings on the Site; including orientation to Buildings on adjoining Lots*,
 - c. LMC § 15-1-10(E)(11), *physical design and Compatibility with surrounding Structures in mass, scale, style, design, and architectural detailing*,
 - d. LMC § 15-1-10(E)(12), *noise, vibration, odors, steam, or other mechanical factors that might affect people and Property Off-Site*; and
 - e. LMC § 15-1-10(E)(15), *within and adjoining the Site, Environmentally Sensitive Lands, Physical Mine Hazards, Historic Mine Waste and Park City Soils Ordinance, Steep Slopes, and appropriateness of the proposed Structure to the existing topography of the Site*.
16. The proposal is not consistent with the General Plan, as it allows for disturbance of Sensitive Lands without adequate mitigation.



Planning Department

- a. The property is located in the Masonic Hill neighborhood of the General Plan. The property is noted as having slopes that exceed 30 degrees. The General Plan identifies Masonic Hill as a "natural conservation neighborhood", with it also denoted as "Critical Area for Protection and Conservation". The General Plan stresses that, "the aesthetic of the Masonic Hill Neighborhood should be preserved".
- b. These elements are described in Goal 4 of the General Plan, Open Space, and Objective 4D emphasizes to minimize further land disturbance and conservation of remaining undisturbed land areas to development to minimize the effects on neighborhoods.

17. Staff posted notice to the property and mailed notice to property owners within 300 feet on June 28, 2022. On July 13, 2022, the Planning Commission conducted a public hearing and denied the application.

Conclusions of Law

1. The Conditional Use Permit is not consistent with the Land Management Code, Section 15-1-10, *Conditional Use Review Process*, and reasonable conditions cannot be proposed to mitigate the anticipated detrimental effects of the proposed Use.
2. The Conditional Use Permit is not compatible with surrounding Structures in Use, scale, mass, and circulation, as required by LMC Section 15-1-10(D), *Standards for Review*.

If you have questions or concerns regarding this Final Action Letter, please call Alexandra Ananth or email Alexandra.ananth@parkcity.org

Sincerely,

A blue ink signature of John Phillips.

John Phillips, Planning Commission Chair

Planning Commission Staff Report



Subject: 1115 Aerie Drive
Applications: PL-21-05101
Authors: Browne Sebright, Alex Ananth
Date: July 13, 2022
Type of Item: **Administrative -Private Recreation Facility Conditional Use Permit**

Recommendation

Review the proposed 1115 Aerie Drive Private Recreation Facility Conditional Use Permit; (II) conduct a public hearing, and (III) consider denying the Private Recreation Facility Conditional Use Permit subject to the Findings of Fact, Conclusions of Law, and Conditions of Approval outlined in the Draft Final Action Letter (Exhibit A).

Description

Applicant: Wade Budge, Snell & Wilmer (Applicant Representative)
Location: 1115 Aerie Drive
Zoning District: Estate
Adjacent Land Uses: Residential, Open Space
Reason for Review: The Planning Commission reviews and takes final action on Conditional Use Permits¹

CUP Conditional Use Permit

ACUP Administrative Conditional Use Permit

LMC Land Management Code

MPD Master Planned Development

SLO Sensitive Land Overlay

Terms that are capitalized as proper nouns throughout this staff report are defined in LMC § [15-15-1](#).

Summary

The applicant proposes to modify an existing sports court (a Private Recreation Facility) that was constructed outside of the existing Building Pad indicated on the Overlook at Old Town Subdivision Plat. The applicant is proposing to modify the as-built sports court by reducing the size. The sports court was built without a building permit and crosses property lines. The applicant also seeks to accommodate already constructed retaining walls, benching, and terracing to mitigate the construction across property lines. Concurrently, the applicant has submitted an Administrative Conditional Use Permit for retaining walls greater than six feet in height which will be heard on July 29, 2022. The Applicant plans to either record an easement or submit a Lot Line Adjustment/Plat

¹ LMC § [15-1-8\(G\)](#).

Amendment to address construction across property lines, dependent on the outcome of the CUP and Administrative CUP.

On June 17, 2022, the applicant filed a Request for Final Action, under Utah Code § 10-9a-509.5(2)(b), for Park City's land use authority to take final action on the Administrative CUP for retaining walls greater than six feet in height. Because the proposed relocated retaining wall is located directly adjacent to the resized sports court pad, staff recommends that the Planning Commission review the Private Recreation Facility CUP and provide input prior to the Administrative public hearing on the ACUP for retaining walls.

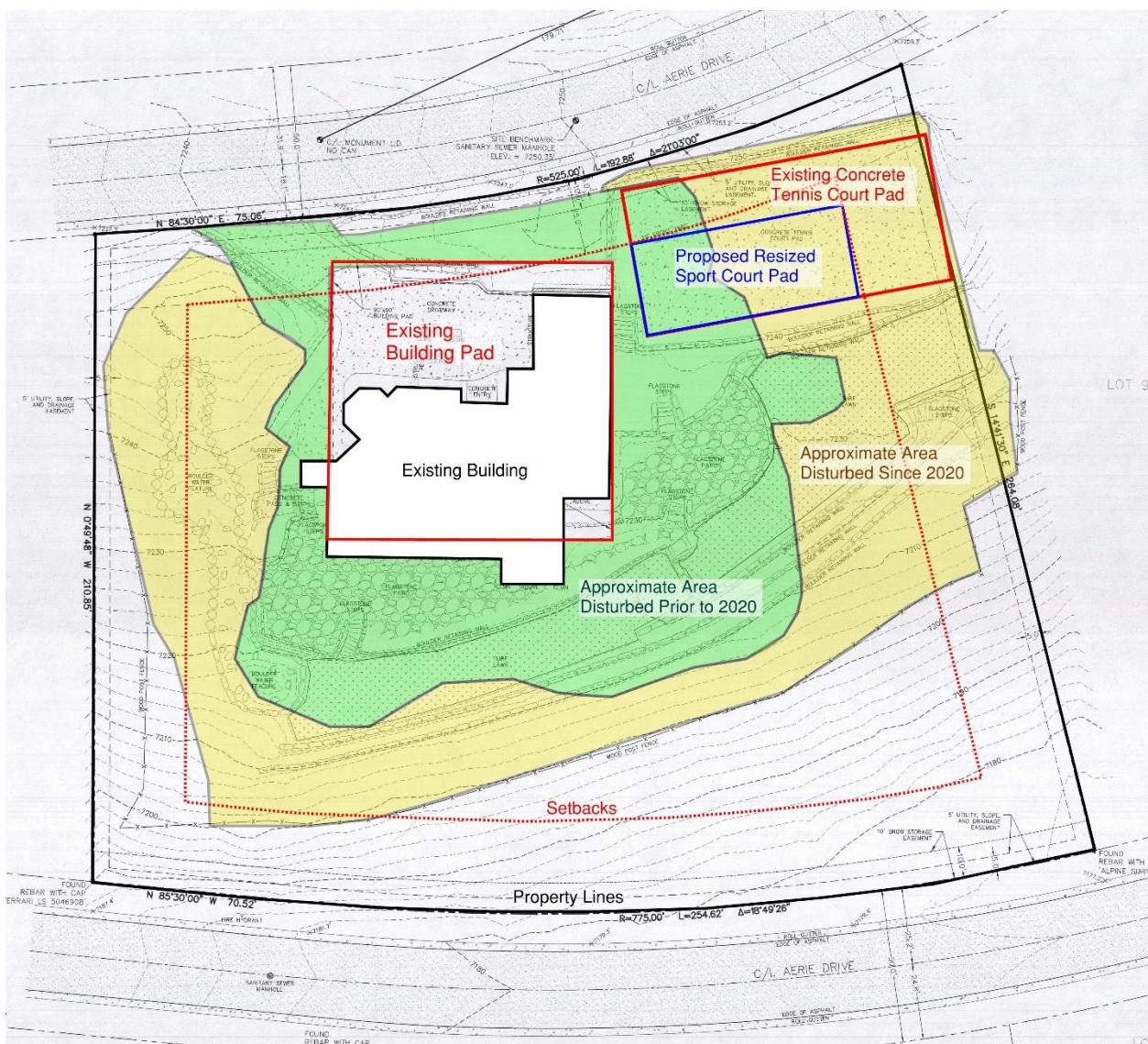


Figure 1. Development Conditions for 1115 Aerie Drive.
Source: Applicant's Existing Condition Survey, Emphasis Added by Staff

Background

1115 Aerie Drive is Lot 8 of the Overlook at Old Town subdivision. The area included in the Overlook at Old Town subdivision has been in Park City Municipal boundaries since 1970.² The subdivision is located on Aerie Drive within the two switchbacks of the road. The subdivision was approved in 1993 with 90-foot by 90-foot Building Pads on each lot designated for the construction of a single-family home. There was some variety in the front setback of each Building Pad. Driveway locations were fixed at the time of the original approval.

The Overlook at Old Town subdivision has a long history. Originally part of the settlement agreement between the City and Nielson/Korthoff, the property was subject to a small-scale MPD. The City Council overturned the Planning Commission's denial of the MPD on June 17, 1993 and approved a 12-lot MPD. A Sketch and Preliminary plat were approved by the Planning Commission on September 8, 1993, with a final plat recommended by the Commission on September 23, 1993. The City Council approved the final plat on October 7, 1993. The plat was amended to a ten-lot subdivision (splitting off the two Korthoff lots) and recommended by the Planning Commission on April 13, 1994 and approved by the City Council on April 21, 1994. The two Korthoff lots were added back by plat amendment in December of 1998. The subdivision has been known by several names: first the Neilson/Korthoff subdivision, then the Hearthstone subdivision, and finally the Overlook at Old Town subdivision.

On November 10, 1998, the City issued Building Permit B98-04301 for the construction of a detached single-family house on the lot (Exhibit M). On May 20, 1999, the City issued Building Permit B99-04788 for the construction of a retaining wall on the property. The permit included a cross-section of the wall showing the maximum height of 4 feet.

On April 14, 1999, the Planning Commission heard a proposed MPD amendment to replat the Hearthstone subdivision to eliminate fixed building pads during a work session. The Planning Commission did not take action, but all Commissioners either could not see a reason to change the Building Pad limitation or would have supported reconfiguring the Building Pad to a different location rather than expanding the pads. The application was not heard again and was either withdrawn or expired due to lack of action.

On October 7, 2016, the City issued Grading Permit GR-16-13414 for work on the existing retaining wall in the front setback immediately adjacent to the driveway.

On January 21, 2021, a landscaping company applied for a Grading/Landscaping permit (Permit #21-122) to replace three retaining walls not to exceed 4' in height on the northeast corner of the property. In the notes approving the permit, Building staff noted that engineering would be required for walls 4' or higher, that no other scope was covered by the permit, and that patios would need a separate permit. Planning staff

² [Park City General Plan, p. 23.](#)

noted that retaining walls would need to be set back 10' from the curb so that they would not encroach into the 10' snow storage easement along Aerie Drive. Planning staff also noted that all disturbed areas must be re-vegetated and that no Significant Vegetation was proposed to be approved or removed.

On September 8, 2021, the Code Enforcement division issued two stop-work orders (CE-21-01142 and CE-01143) for working outside of scope and without a permit for a sports court. At that time, staff identified that construction activity that was done without a permit crossed property lines into the neighboring Lot at 1039 Aerie Drive. On October 1, 2021 (Exhibit O), and February 25, 2022 (Exhibits P and Q), City staff issued letters to the property owner outlining code compliance issues with the property and options for compliance.

On December 20, 2021, the applicant representing the property owner of 1115 Aerie Drive submitted two land use applications to the Park City Planning Department:

- An Administrative Conditional Use Permit for retaining walls greater than six feet (6') in height from Final Grade
- A Conditional Use Permit for Private Recreation Facilities

The owner has submitted explanations describing that he was not aware that his landscaper's actions were so out of compliance with existing restrictions and permit requirements. He is now trying to achieve compliance with both his adjacent neighbor and the City.

On March 15, 2022, the applicant submitted a land use application to amend the Plat for the property:

- A Plat Amendment to adjust lot lines and to expand the platted Limits of Disturbance

On June 6, 2022, the applicant indicated that they wished to move forward with the Administrative CUP for retaining walls and CUP for the Private Recreation Facility as soon as possible, without moving forward on the Plat Amendment application at this time.



Figure 1. Pre-Development Conditions for 1115 Aerie Drive.
Source: Summit County Parcel Viewer, Emphasis Added by Staff



Figure 2. Post-Development Conditions for 1115 Aerie Drive.
Source: Summit County Parcel Viewer, Emphasis Added by Staff

Analysis

(I) The proposed Private Recreation Facility Conditional Use Permit does not comply with the Previous MPD Conditions of Approval.

During the MPD process and subsequent sketch, preliminary, and final plat reviews, restrictions were placed on the Hearthstone subdivision regarding visibility of houses built on the lots, maximum house size, driveway locations, turnarounds, and front setbacks. Restrictions were noted on the original plat as typical 90' x 90' building pads, and as a Condition of Approval for the MPD.

In the Notice of City Council Action letter dated August 19, 1993 (Exhibit G), City Council approved the Nielsen Korthoff Properties MPD with twelve conditions of approval. Condition of approval 3 states:

3. *The plat shall contain notes regarding storm water requirements and considerations, wintertime travel restrictions (one-way road), and limits of disturbance as specified at the time of final plat approval.¹¹*

The as-built conditions, including the placement of Structures like the sports court outside of the Building Pad, do not appear to comply with the original plat restrictions. The Land Management Code at the time of subdivision contained the following definitions:

Building Pad Line. *The building pad line denotes that area in which the entire new structure must lie. The area of construction disturbance attributable to the structure (as opposed to utilities installation) may not extend beyond ten (10) feet from the building pad line.*

Limits of Disturbance. *The limits of disturbance line indicates the area in which construction activity must be contained. Construction disturbance must not extend beyond the limits of disturbance line as indicated on the plat of Master Plan unless the Community Development Director has amended the limit as per sections 10.9(k)3 or 15.4.2(d)3.*

Structure. *Anything constructed, the use of which requires fixed location on or in the ground, or attached to something having a fixed location upon the ground and which imposes an impervious material on or above the ground; definition includes “building”. All structures must maintain the minimum set-backs for the district in which they are located, both above and below the ground.*

The current definition of Limits of Disturbance is, “the designated Area in which all Construction Activity must be contained”.³ Staff’s interpretation is that the original plat restrictions intended for there to be limitations placed on each lot to minimize the impact of Construction Activity on lots containing steep slopes and significant vegetation. The current proposal is to allow for 1115 Aerie Drive (Lot 8) to retain development located outside of the existing 90-foot by 90-foot Building Pads, which accommodates extensive landscaping, regrading, and a concrete sports court that was constructed outside of the scope of the Grading/Landscaping Permit #21-122. Also, limits of disturbance were not addressed in the final plat approval for the whole subdivision.

³ LMC § [15-15-1](#)

The development that occurred on the site in 2021 was inconsistent with the prior approvals, including the approved MPD and final plat, the latter of which did not include separate Limits of Disturbance for landscaping. On April 1, 2022, Planning staff communicated that it would be appropriate for the Applicant to proceed with the Private Recreation Facility CUP application should the applicant also proceed with a Plat Amendment application that establishes separate Limits of Disturbance for landscaping, as outlined in the 1993 MPD Conditions of Approval. The applicant has submitted a Plat Amendment application with proposed limits of disturbance but has chosen not to move forward with that application at this time.

Staff indicated that we would support the Applicant's proposal for adding landscaping Limits of Disturbance (LOD) on the plat, as it would address several existing issues on the property, such as the existing building partially located outside of the Building Pad. However, due to the significant impacts to sensitive lands, as outlined in Analysis III, Planning staff found that enlarging the size and scope of the landscaping LOD inclusive of areas that were formerly Steep Slopes and Very Steep Slopes would not encourage the preservation of environmentally sensitive lands or be a good precedent for sustainable development in the subdivision. Therefore, the owner chose to move forward seeking a decision on the sports court CUP only at this time.

(II) The proposal complies with the Estate Zoning District Requirements outlined in LMC Section [15-2.10-3](#).

1115 Aerie Drive is in the Estate Zoning District. LMC Section [15-2.10-2\(B\)](#) requires a Conditional Use Permit for Private Recreation Facilities in the Estate Zoning District and LMC Section [15-4-2\(A\)\(1\)](#) requires an Administrative Conditional Use Permit for retaining walls that exceed four feet in height in the Front Setback and six feet in height in the Side and Rear Setbacks.

The owner has submitted two additional applications in conjunction with the Plat Amendment. First, is a Conditional Use Permit for a Private Recreation Facility, and second is an Administrative Conditional Use Permit for retaining walls that exceed four feet in height within a Front Setback, pursuant to LMC Section [15-4-2\(A\)\(1\)](#), *Fences and Retaining Walls*.

In the Private Recreation Facility Conditional Use Permit, the applicant has proposed to reduce the size of the already-constructed sports court, and to change the location of the retaining walls to be outside of the required setbacks:

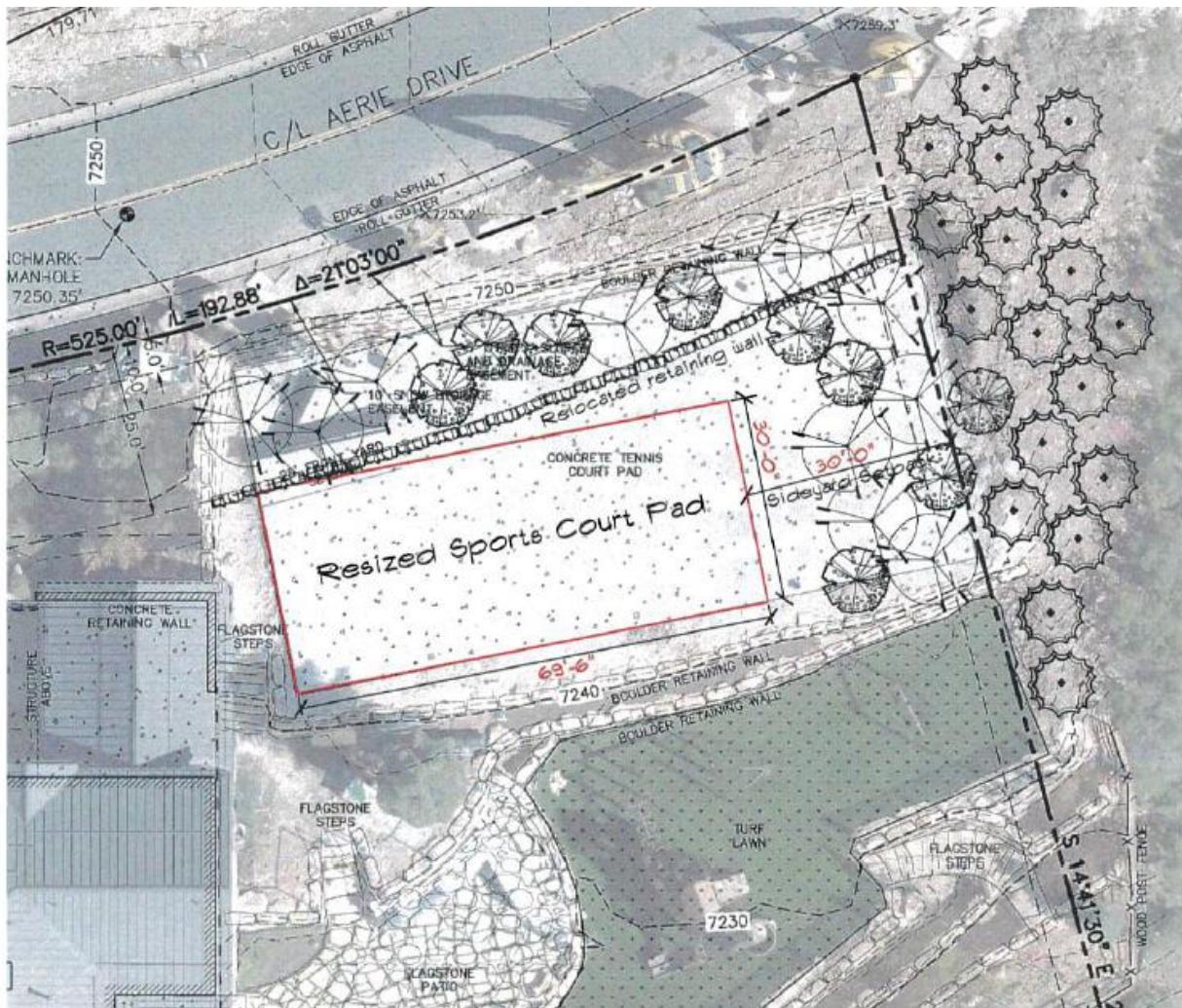


Figure 5. Proposed Resized Sports Court Pad
Source: Applicant's Submittal (Exhibit C)

LMC Section [15-2.10-3](#) requires the following Lot and Site Requirements in the Estate Zoning District:

Zoning Requirement	Analysis of Proposal
Lot Size and Density <p>The minimum Lot size for all Uses is three (3) acres, except that a duplex requires a minimum Lot size of six (6) acres. The Planning Commission may reduce the minimum Lot size during review of a Master Planned Development or Subdivision Plat to encourage clustering of Density. The maximum Density is one (1) unit per three (3) acres.</p>	Complies Lot 8 Current Size: 70,131 SF (1.61 Acres) <p>Lot sizes are compliant due to previous MPD approval, where the owner donated 16.18 acres to Park City Municipal Corporation and allowed the acreage to be credited to Lots 1-11 to satisfy the Estate Zoning Lot Size requirement. The subdivision density remains unchanged.</p>

Lot Width - 100 feet	Complies Lot 8 Current: 271 Feet
Setbacks – All setbacks are 30 feet, per the Estate Zoning District ⁴ Per the Plat Notes, the Front Setback for Lots 8 and 9 are 25 feet. Front and Rear Setbacks must be open and free on any Structure except fences, walls, and retaining walls not more than four feet in height, sidewalks, patios, and pathways, and driveways leading to a garage or Parking Area. Side Setbacks contain the same exceptions, but with fences, walls, and retaining walls not more than six feet in height. ⁵	Lot 8 Front (N): 25 Feet Rear (S): 50 Feet Side (E): 30 Feet Side (W): 66 Feet Although the house complies, the applicant must apply for an ACUP for retaining walls in the front and side setbacks.

(III) The proposal does not comply with the Conditional Use Permit criteria outlined in LMC [§ 15-1-10\(E\)](#).

The Applicant proposes Conditional Use Permit approval for a 2,085-square-foot Private Recreation Facility. The Applicant has not yet identified the proposed use for the already-constructed 2,085-square-foot concrete pad but has inquired about using it as a pickleball court or a basketball court.

LMC § [15-2.10-2\(B\)](#) establishes a Private Recreation Facility as a Conditional Use in the Estate Zoning District. Because the CUP Application was submitted on December 20, 2021, the project is not subject to LMC § [15-4-22](#), Outdoor Pickleball Courts In Residential Areas, which was adopted on April 28, 2022. Private Recreation Facility was designated a Conditional Use in the Estate Zoning District prior to the 2022 LMC Amendments specific to Pickleball Courts. Prior to these amendments, Private Recreation Facilities were defined by LMC § [15-15-1](#) as, “Recreation facilities operated on private Property and not open to the general public. Including Recreation Facilities typically associated with a homeowner or Condominium association, such as pools, tennis courts, playgrounds, spas, picnic Areas, and similar facilities for the Use by

⁴ LMC Section [15-2.10-3](#)

⁵ LMC Section [15-2.10-3\(D, E & F\)](#)

Owners and guests."

There are certain Uses that, because of unique characteristics or potential impacts on the municipality, surrounding neighbors, or adjacent land Uses, may not be Compatible in some Areas or may be Compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.

The Planning Commission shall approve a Conditional Use if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed Use in accordance with applicable standards. The Planning Commission may deny the Conditional Use if the proposed Use cannot be substantially mitigated by the proposal or imposition of reasonable conditions to achieve compliance with applicable standards. LMC [§ 15-1-10.](#)

CUP Review Criteria	Analysis of Proposal
Size and location of the Site	The area that has been disturbed on the lot constitutes approximately 55% of the total lot area, or 39,766 square feet. This significantly exceeds the original intent of the MPD which limited construction activity to an 8,100 square foot Building Pad.
Traffic considerations including capacity of the existing Streets in the Area	No change.
Utility capacity, including Storm Water run-off	The proposed resized sports court adds approximately 2,085 square feet of impervious surfaces to the site. This is not adequately mitigated in the applicant's current proposal, as they have only shown new proposed vegetation uphill of the court and proposed to retain a hardscape flagstone patio and artificial turf lawn downhill of the court. No drainage analysis has been provided by the applicant.
Emergency vehicle Access	No change.
Location and amount of off-Street parking	A Private Recreation Facility generates a parking demand of 1 space per 4 persons maximum rated capacity. ⁶ This in addition to the 2 spaces required for a Single-Family Dwelling generates a parking requirement of 3 spaces. The capacity of the existing garage is 3 vehicles, with additional parking space in the driveway, outside of the setbacks of 7 vehicles (Exhibit N).
Internal vehicular and pedestrian circulation system	The project introduces extensive external circulation in the newly terraced rear and side yards, which are

⁶ LMC Section [15-3-6](#)

	visible from the south and west outside of the established Building Pad.
Fencing, Screening, and landscaping to separate the Use from adjoining Uses	<p>The applicant proposes 11 quaking aspen trees, 9 Austrian pine trees, and 19 gamble oak trees to provide screening to the sports court from the northeast. The rest of the development on the site will remain visible from the south and west, which is not in keeping with other lots in the subdivision. The Applicant's submitted vegetative cover map (Exhibit K) is a black-and-white aerial photo that does not identify specific vegetation.</p> <p>LMC § 15-5-5 (N) establishes the Maximum Turf or Lawn Area as a percentage of the allowed Limits of Disturbance Area of the Lot that is not covered by Buildings, Structures, or other Impervious paving. For lots greater than one (1) acre, a maximum of 25% of the allowed Limits of Disturbance Area not covered with Buildings, Structures, or other Impervious may be turf or lawn area</p> <p>1115 Aerie Drive contains 70,131 SF (1.61 Acres). Because landscaping Limits of Disturbance have not been established for this Lot, staff are unable to calculate the Maximum Turf or Lawn Area pursuant to the Land Management Code. Based on the submitted Record of Survey (Exhibit B), approximately 5,773 SF of the Lot is Turf or Lawn Area.</p>
Building mass, bulk, and orientation, and the location of Buildings on the Site; including orientation to Buildings on adjoining Lots	No change to building mass.
Usable Open Space	See Analysis II above.
Signs and lighting	No new signs or lighting are proposed or approved. The applicant has not submitted a lighting plan.
Physical design and Compatibility with surrounding Structures in mass, scale, style, design, and architectural detailing	Staff has noted that at least three other properties in the Overlook at Old Town subdivision have landscaped portions of their property outside of the designated Building Pads. Staff estimates that the area disturbed on those properties ranges from approximately 15,000 SF to 25,000 SF. The proposed disturbance to be retained at 1115 Aerie Drive is approximately 39,766 SF.

Noise, vibration, odors, steam, or other mechanical factors that might affect people and Property Off-Site	The applicant has not identified the intended use of the sports court. Depending on the use, there may be additional noise considerations that would need to be studied and mitigation measures proposed.
Control of delivery and service vehicles, loading and unloading zones, and Screening of trash and recycling pickup Areas	No changes proposed.
Expected Ownership and management of the project as primary residences, Condominiums, time interval Ownership, Nightly Rental, or commercial tenancies, how the form of Ownership affects taxing entities	No changes in ownership for Lot 8 proposed. The Applicant has stated that there is an agreement between the property owners that either an easement or a "sale" of the property will happen, in accordance with the approval from the city. The Applicant states that this would be finalized in conjunction with approvals from the city.
Within and adjoining the Site, Environmentally Sensitive Lands, Physical Mine Hazards, Historic Mine Waste and Park City Soils Ordinance, Steep Slopes, and appropriateness of the proposed Structure to the existing topography of the Site	The project is not located in the Soil Ordinance area. The applicant has provided the slope map, below, that depicts the slope of post-development conditions for Lot 8. Steep Slopes are shown in green and yellow, and Very Steep Slopes are shown in red.

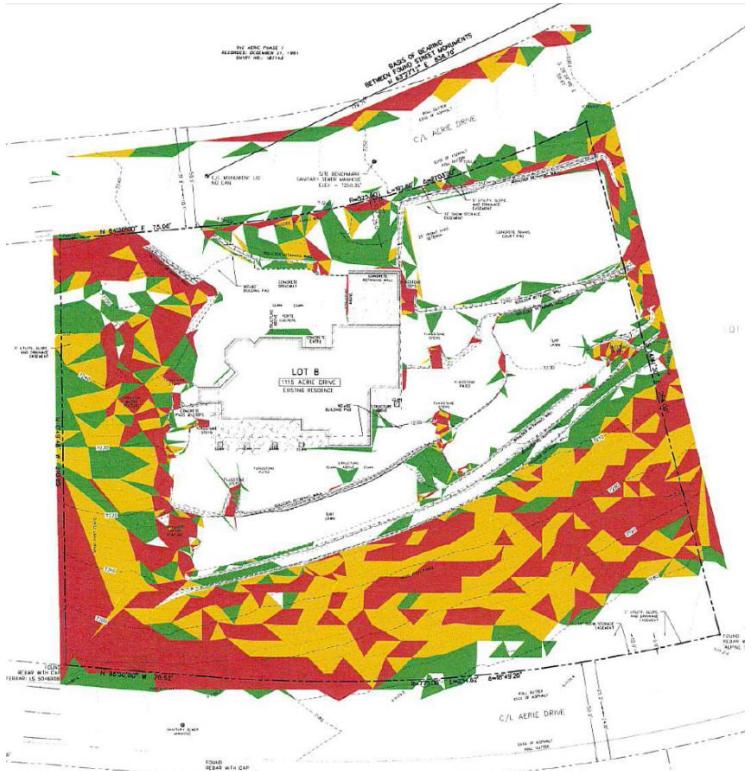


Figure 6. Slope Map Post Recent Development

Source: Applicant's Submittal (Exhibit J)

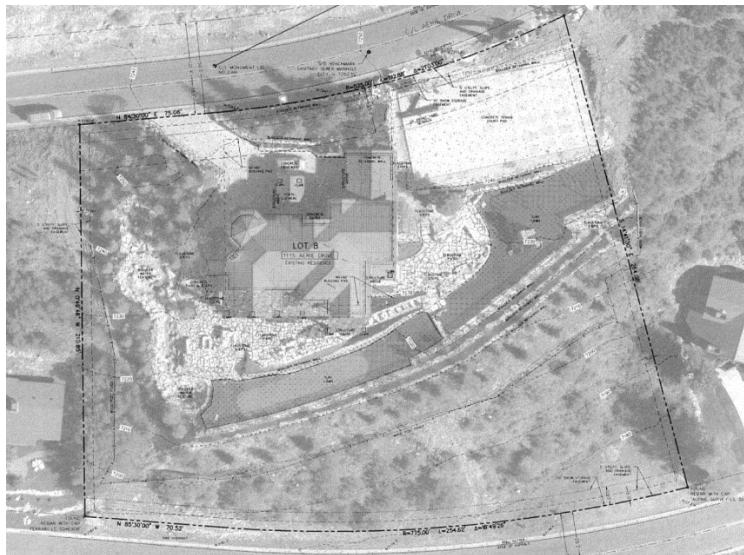


Figure 7. Vegetative Cover Map Post Recent Development
Source: Applicant's Submittal (Exhibit K)

Both the slope map and the vegetative cover map are reflective of post-development conditions, and do not interpolate the prior conditions before the work done in 2021. Because of this, staff is unable to verify to what extent Significant Vegetative may have been removed, or in what areas development was placed within 50' of Very Steep Slopes. Based on the post-conditions slope map, it appears that most of the new development is currently within 50' of Very Steep Slopes. Based on satellite imagery from September 2020, prior to the recent development, it appears that some amount of significant vegetation was removed, but exact counts cannot be determined (see Figure 1).

The proposed Recreation Facility is not located within any protected Ridge Line Areas. The property is also not visible from any designated Vantage Points. The closest Vantage Points are the intersection of Main Street and Heber Avenue, and the Park City Ski Area Base. From both locations, the property is located behind intermediate hills. The lot contains protected wetlands, stream corridors, irrigation ditches, or Waters of the United States.

Reviewed for consistency with

The property is located in the Masonic Hill

the goals and objectives of the Park City General Plan	<p>neighborhood of the General Plan.⁷ The property is noted as having slopes that exceed 30 degrees. The General Plan identifies Masonic Hill as a, “natural conservation neighborhood”, with it also denoted as “Critical Area for Protection and Conservation”. The General Plan stresses that, “the aesthetic of the Masonic Hill Neighborhood should be preserved”.</p> <p>These elements are described in Goal 4⁸ of the General Plan, <i>Open Space</i>, and Objective 4D emphasizes to minimize further land disturbance and conservation of remaining undisturbed land areas to development to minimize the effects on neighborhoods.</p>
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(IV) The Development Review Committee identified Engineering issues that may require Conditions of Approval.

On January 11, 2022, the Development Review Committee reviewed the Conditional Use Permit application for a Private Recreation Facility and the Administrative CUP application for retaining walls exceeding 4' within the Front Setback. The Engineering Division noted that the applicant needed to identify any encroachments into Snow Storage Easement and how they would be resolved, and that the applicant would need to provide a series of engineering reports. These reports include a geotechnical report, structural calculations, and slope stability analysis. The Applicant provided these documents, included in Exhibit H and Exhibit I.

These documents have been reviewed by the Engineering Division and have been determined to be sufficient for review. Engineering staff communicated that approval of the Administrative CUP for retaining walls is appropriate because it provides additional stabilization for Aerie Drive, which was a concern at the time of the stop-work orders. The applicant has not provided additional drainage or stormwater runoff calculations for Engineering review. Therefore, it is undetermined if the addition of impervious surfaces has been adequately mitigated in the applicant's proposal.

Department Review

The Development Review Committee and Planning, Engineering, and Legal Departments reviewed this application.

Staff recommends denial of the CUP for a Private Recreation Facility due to a lack of submitted information to date.

⁷ [General Plan](#), p. 223-231

⁸ [General Plan](#), p. 52-53

If the applicant wishes to withdraw and resubmit, the following information should be provided:

- Additional analysis of pre-development conditions, including identifying areas of Steep Slopes, Very Steep Slopes, and Significant Vegetation
- An explanation and proposed management for the use of the sports court
- A lighting and noise mitigation plan for the court and site

Public Input

Staff has received three public comments from neighbors of the project, included in Exhibit R. The comments raised concerns with how close the sports court is to Aerie Drive, and that the construction appears to extend into setbacks. The comments also raised concerns regarding whether the lighting of the court and landscaping at night is compliant with the Land Management Code. The applicant has not provided a lighting plan as part of this application. The comments also addressed the impact of the construction activity on the neighborhood.

Exhibits

Attachment 1: Draft Final Action Letter

Exhibit A: Letter of Intent

Exhibit B: Record of Survey

Exhibit C: Sport Court Plans

Exhibit D: Approved Site Plan (Permit #21-122)

Exhibit E: Hearthstone Subdivision Plat

Exhibit F: Nielsen Korthoff Properties Small Scale MPD Final Action Letter

Exhibit G: Construction Photos

Exhibit H: Focus Engineering Boulder Wall Technical Report

Exhibit I: Alliance Engineering Rock Wall Inspection

Exhibit J: Slope Map

Exhibit K: Vegetative Cover Map

Exhibit L: Visual Analysis

Exhibit M: 1998 Building Plan Set

Exhibit N: Parking Plan

Exhibit O: 10.01.2021 Letter Outlining Code Compliance Issues

Exhibit P: 2.22.22 Letter Outlining Land Management Code Compliance Issues

Exhibit Q: 2.25.22 Addendum Letter

Exhibit R: Public Comments

FROM THE DIMENSIONS AND CONDITIONS SHOWN BY THESE DRAWINGS, THE ABOVE DRAWINGS AND SPECIFICATIONS AND THE IDEAS, DESIGN AND ARRANGEMENTS REPRESENTED THEREBY ARE AND SHALL REMAIN THE PROPERTY OF STUDIO MOXIE. NO PART THEREOF SHALL BE COPIED, DISCLOSED TO OTHERS OR USED IN CONNECTION WITH ANY WORK OR PROJECT OR BY ANY OTHER PERSON FOR ANY PURPOSE OTHER THAN FOR THE SPECIFIC PROJECT FOR WHICH THEY HAVE BEEN PREPARED AND DEVELOPED WITHOUT THE WRITTEN CONSENT OF STUDIO MOXIE. DESIGNS CAN NOT BE COPIED, DUPLICATED, OR COMMERCIALIZED EXPRESSED IN WHOLE OR IN PART WITHOUT THE SOLE AND EXPRESS WRITTEN PERMISSION OF STUDIO MOXIE. VISUAL CONTACT WITH THESE DRAWINGS OR SPECIFICATIONS SHALL CONSTITUTE CONCLUSIVE EVIDENCE OF ACCEPTANCE OF THESE RESTRICTIONS. WRITTEN DIMENSIONS ON THESE DRAWINGS SHALL HAVE PREFERENCE OVER SCALED DIMENSIONS.

SUTTON RESIDENCE

1115 AERIE DRIVE
PARK CITY, UT 84060

Curtiss@StudioMoxieArchitects.com



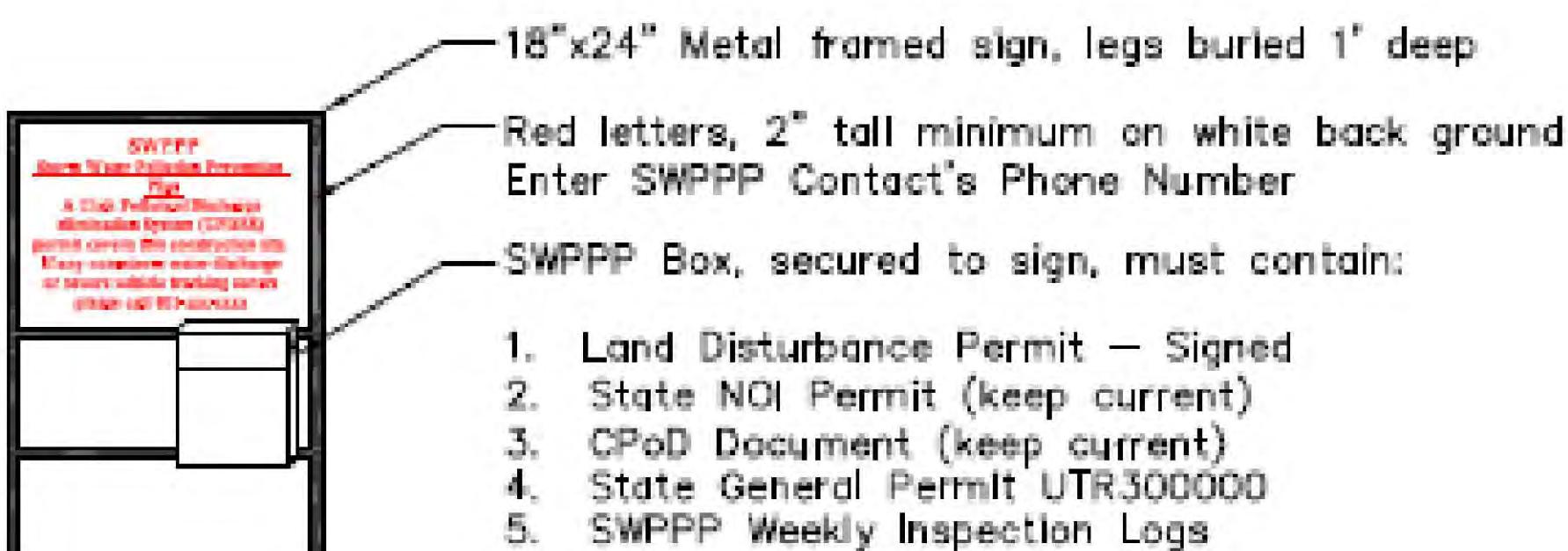
SITE DETAILS

Feb 05,2021 **SHEET#**

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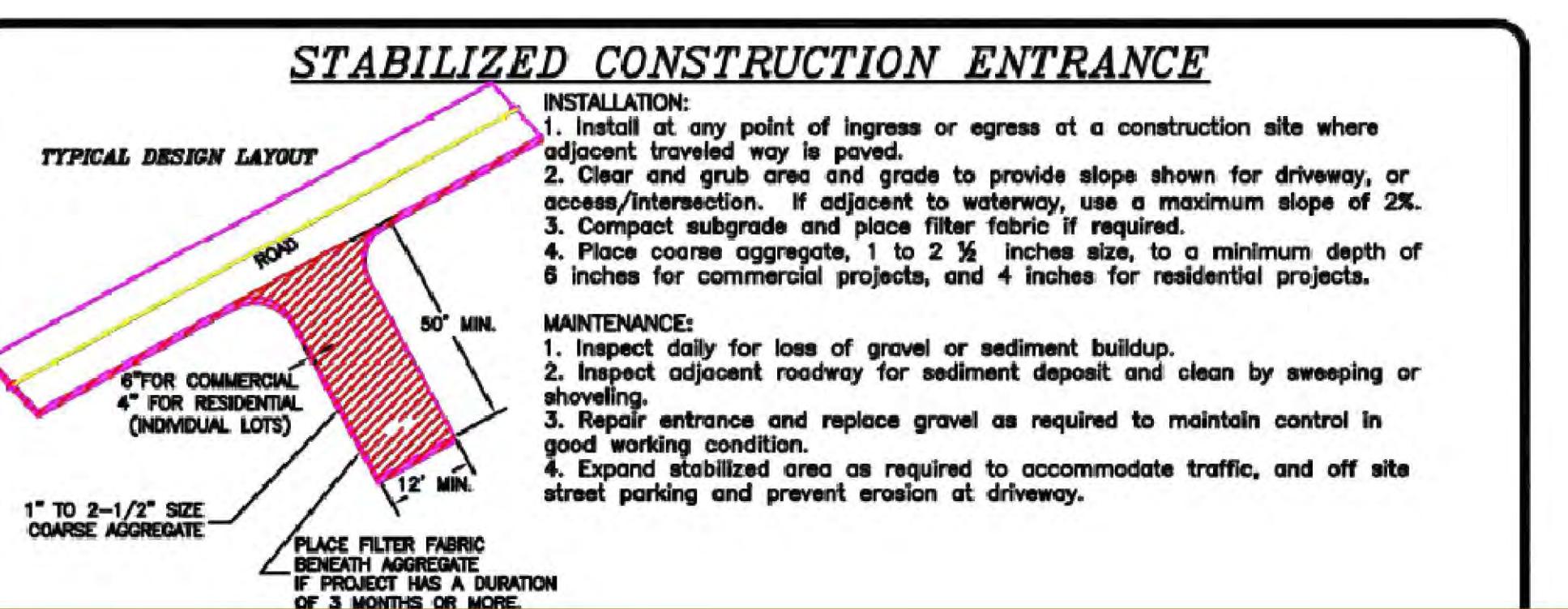
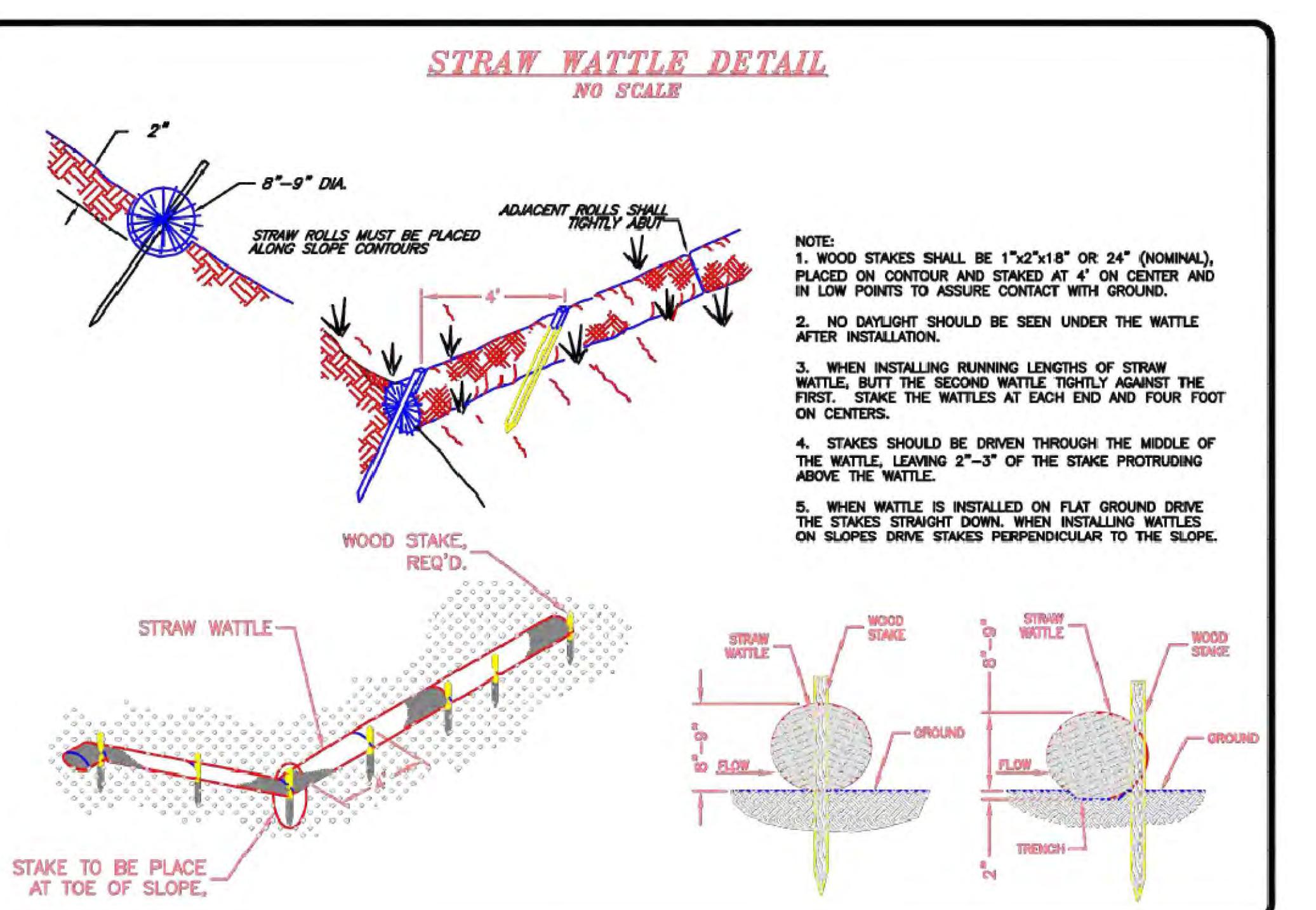
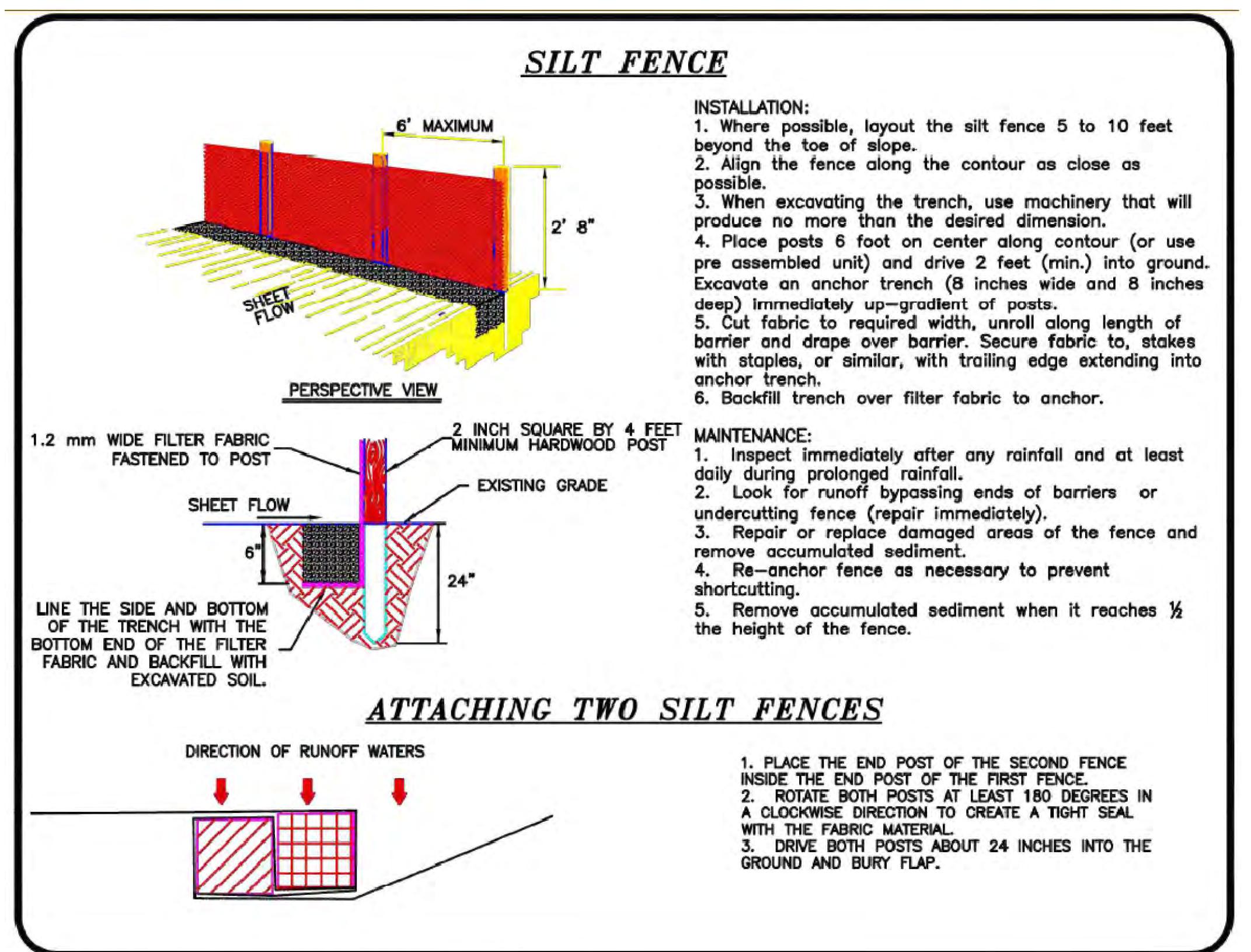
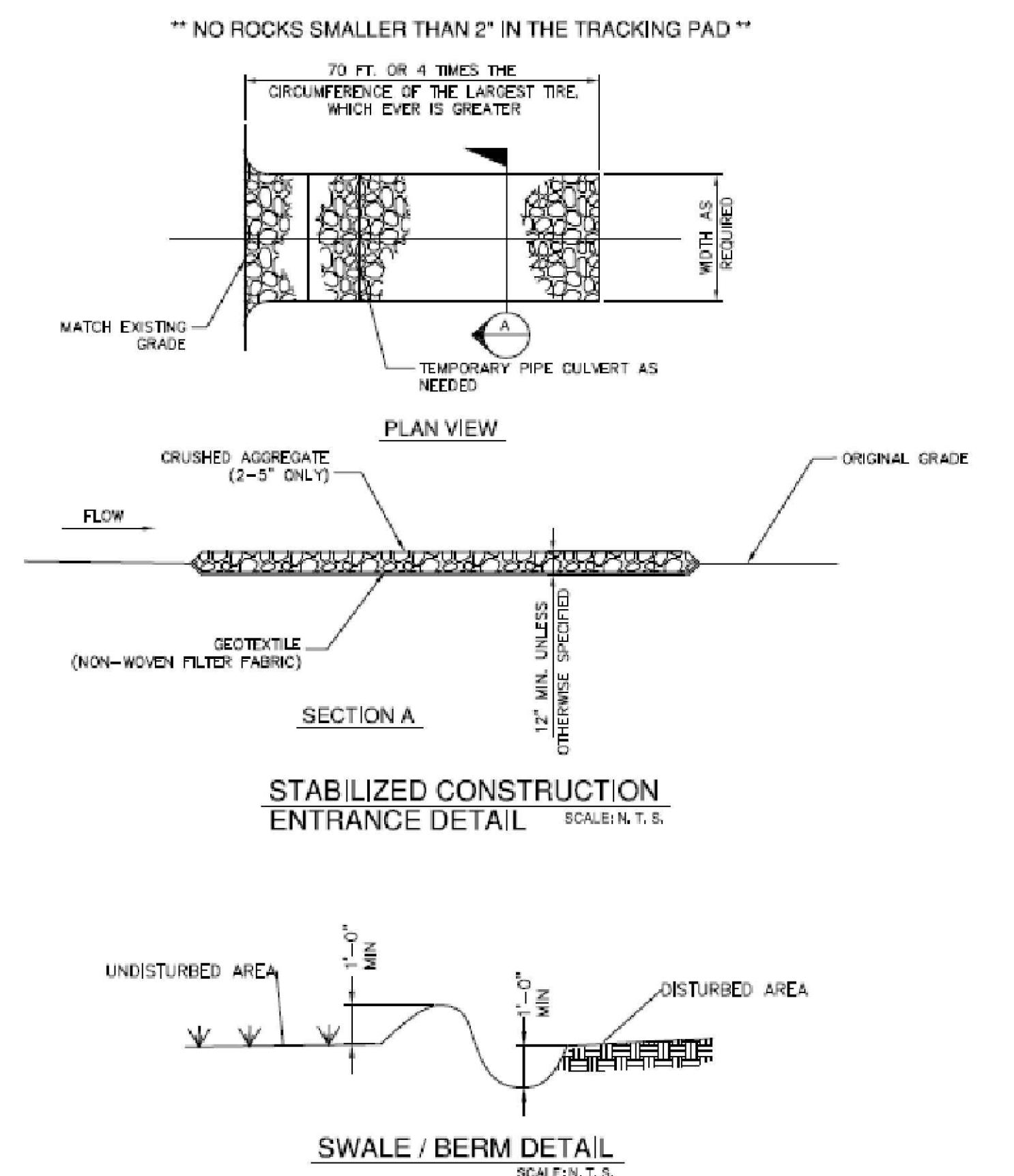
Construction Mitigation Plan Notes

- Show location for dumpster, portable toilets, materials storage, parking
- Construction parking/traffic may not block the street without a permit (available from the Engineering Division)
- Mud tracked out onto the street must be cleaned prior to the end of the work day
- The construction site must be maintained in a neat manner. Trash and other debris may not accumulate outside the dumpster.
- Roadside parking is not allowed from November 1st to April 1st



SWPPP SIGN - Under 1 Acre Projects

Project Type B Signage



NOT

CONTRACTOR AND ALL SUBCONTRACTORS WORKING ON THIS PROJECT SHALL THOROUGHLY REVIEW AND VERIFY ALL DIMENSIONS, LOCATIONS, NOTES, ETC. AND ADDRESS ANY DISCREPANCIES OR CONCERN WITH OWNER, GENERAL CONTRACTOR, & SUB CONTRACTOR, BEFORE CONSTRUCTION COMMENCES. DIMENSIONS ON PLAN TAKE PREFERENCE OVER SCALE



October 1, 2021

1115 Aerie LLC
Attn: Gary Sutton
1115 Aerie Drive
Park City, UT 84060
gdsutton@me.com

LAND MANAGEMENT CODE COMPLIANCE COMMENTS

Stop Work Orders: CE-21-01142 and CE-21-01143
Subject: LMC Compliance Comments
Address: 1115 Aerie Drive, Lot 8 of the Overlook at Old Town Subdivision, formerly known as the Hearthstone Subdivision
Description: Land Management Code Compliance Issues

The property is currently subject to two Stop Work orders issued by Park City Code Enforcement:

- CE-21-01142 – Working outside of scope and without a permit for sport court
- CE-21-01143 – Working without a Permit

Staff have identified that construction activity that was done without a permit has crossed property lines into the neighboring Lot at 1039 Aerie Drive. As part of Building Permits for that construction activity, the Applicant may need various access and encroachment agreements and/or approvals from utility easement owners and the adjacent property owners, or a plat amendment. The Applicant will also need to secure a Right-of-Way Permit from the Park City Engineering Department for work in Public Right-of-Way.

Staff from the Planning Department reviewed an as-built site plan of 1115 Aerie Drive. Staff have found the following Land Management Code compliance issues regarding for the property:

Plat Regulations

- LMC [§ 15-7.3-2\(J\)](#) states that Limits of Disturbance or Building Pad lines shall be shown on the final plat.
 - The Plat establishes a Building Pad of 90' by 90', in which the entire Building Footprint may be located and in which all Construction Activity must be contained.

Estate Zoning District Regulations

- Per LMC [§ 15-2.10-3](#), retaining walls in front setbacks greater than four feet (4') in height from Final Grade and retaining walls in side and rear setbacks that are greater than six feet (6') in height from Final Grade require an Administrative Conditional Use approval.
- Per LMC [§ 15-2.10-2\(B\)\(19\)](#), Private Recreation Facilities are a Conditional Use and require Planning Commission review and approval prior to construction.
 - Recreation Facilities, Private are defined as: recreation facilities operated on private Property and not open to the general public. Including Recreation Facilities typically associated with a homeowner or Condominium association, such as pools, tennis courts, playgrounds, spas, picnic Areas, similar facilities for the Use by Owners and guests.

- Per LMC [§ 15-2.10-3](#), the minimum Front, Side, and Rear Setback for all Structures is thirty feet (30'). The Planning Commission may vary required Setbacks in Subdivisions.
 - The Subdivision Plat allows for a reduced Front Setback of 25 feet for Lot 8.
 - The submitted existing conditions survey shows that the concrete tennis court pad and boulder retailing walls are within the required Front Setback.
- Per LMC [§ 15-2.10-3](#) (D, E, F), Recreation Facilities are not permitted in any required Front Setback.
 - Structure is defined as: anything constructed, the Use of which requires a fixed location on or in the ground, or attached to something having a fixed location on the ground and which imposes an impervious material on or above the ground; definition includes "Building".

Per LMC [§ 15-2.10-3\(D\)](#), the required Front Setback must be open and free of any Structure except fences, walls, and retaining walls not more than four feet (4') in height, or as permitted in Section [15-4-2](#) Fences and Walls.

Sensitive Land Overlay Regulations

- Per LMC [§ 15-2.21-2\(A\)](#), any Applicant for Development must produce a Sensitive Lands Analysis performed by a Qualified Professional that identifies and delineates all the following features and conditions:
 - SLOPE/TOPOGRAPHIC MAP. A Slope and topographic map based on a certified boundary survey depicting contours at an interval of five feet (5') or less. The map must highlight Areas of high geologic hazard, Areas subject to land sliding, and all significant Steep Slopes¹ in the following categories:
 - Greater than fifteen percent (15%), but less than or equal to thirty percent (30%);
 - Greater than thirty percent (30%) but less than or equal to forty percent (40%); and
 - Very Steep Slopes, greater than forty percent (40%).
 - VEGETATIVE COVER. A detailed map of vegetative cover, depicting the following:
 - Deciduous trees;
 - Coniferous trees;
 - Gamble oak or high shrub; and
 - Sage, grassland, and agricultural crops.
- Per LMC [§ 15-2.21-2\(B\)](#), the Planning Department may require the Applicant to submit the following information, as applicable:
 - VISUAL ASSESSMENT. A visual assessment of the Property from Vantage Points designated by the Planning Department, depicting conditions before and after the proposed Development, including the proposed location, size, design, landscaping, and other visual features of the project.

Based on these Land Management Code compliance issues, this property may need the following Land Use Applications:

1. A [Building Permit](#) to remediate the construction activity that was done without a permit that has crossed property lines.
2. A [Building Permit](#) for the interior remodel work.
3. A [Plat Amendment](#) to modify the 90' by 90' Building Pad.
 - Requires Planning Commission and City Council approval

4. A [Conditional Use Permit](#) for Private Recreation Facilities
 - Requires Planning Commission approval
5. An [Administrative Conditional Use Permit](#) for retaining walls greater than six feet (6') in height from Final Grade.
 - Requires Planning Director approval
6. A [Building Permit](#) for all exterior work, pending review and approval of the applications listed above.



February 22, 2022

1115 Aerie LLC
Attn: Gary Sutton
1115 Aerie Drive
Park City, UT 84060
gdsutton@me.com

RE: LAND MANAGEMENT CODE COMPLIANCE ISSUES

Mr. Sutton,

The property located at 1115 Aerie Dr. is currently subject to two Stop Work orders issued by Park City Code Enforcement:

- CE-21-01142 – Working outside of scope and without a permit for sport court
- CE-21-01143 – Working without a Permit

Staff have identified that construction activity that was done without a permit has crossed property lines into the neighboring Lot at 1039 Aerie Drive. A Building Permit to remediate this issue must be completed prior to future Land Use Applications. As part of that Building Permit, the Applicant may need various access agreements and/or approvals from utility easement owners and the adjacent property owners. The Applicant will also need to secure a Right-of-Way Permit from the Park City Engineering Department.

On September 22, 2021, Staff from the Planning Department reviewed an as-built site plan of 1115 Aerie Drive. Staff have found the following Land Management Code compliance issues regarding for the property:

- Per LMC § 15-1-3, The LMC shall not supersede any private land Use regulations in deeds or covenants, which are more restrictive than the LMC. Whenever a conflict exists, the more restrictive provision shall apply to the extent allowed by law.
 - The Plat establishes a Building Pad of 90' by 90', in which the entire Building Footprint may be located and in which all Construction Activity must be contained.
- Per LMC § 15-2.10-2 (B), retaining walls greater than six feet (6') in height from Final Grade are an Administrative Conditional Use in the Estate Zoning District.
- Per LMC § 15-2.10-2, Private Recreation Facilities are a Conditional Use in the Estate Zoning District.

- Recreation Facilities, Private are defined as: recreation facilities operated on private Property and not open to the general public. Including Recreation Facilities typically associated with a homeowner or Condominium association, such as pools, tennis courts, playgrounds, spas, picnic Areas, similar facilities for the Use by Owners and guests.
- Per LMC § 15-2.10-3 (C), The minimum Front, Side and Rear Setback for all Structures is thirty feet (30'). The Planning Commission may vary required Setbacks in Subdivisions and Master Planned Developments.
 - The Subdivision Plat requires a Front Setback of 25 feet.
- Per LMC § 15-2.10-3 (D, E, F), Recreation Facilities are not permitted in any required Front or Side Setback must be open and free of any Structure except for those described in the LMC.
 - Structure is defined as: anything constructed, the Use of which requires a fixed location on or in the ground, or attached to something having a fixed location on the ground and which imposes an impervious material on or above the ground; definition includes "Building".
- Per LMC § 15-2.10-3 (D), the required Front Setback must be open and free of any Structure except fences, walls, and retaining walls not more than four feet (4') in height, or as permitted in Section 15-4-2 Fences and Walls. On Corner Lots, Fences more than three feet (3') in height are prohibited within twenty-five feet (25') of the intersection at back of curb.
- Per § LMC 15-4-2 (A), fences and retaining walls shall not exceed six feet (6') in height measured from Final Grade within any required Rear Setback or Side Setback. Within any required Front Setback or Street Side Setback, Fences and retaining walls shall not exceed four feet (4') in height, measured from Final Grade.
 - The height of retaining walls in the Front Setback may exceed four feet (4'), measured from Final Grade, subject to approval by the Planning Director and City Engineer, and may exceed six feet (6') in height subject to approval of an Administrative Conditional Use permit or as approved as part of a Master Planned Development (MPD) or Conditional Use permit.
- Per § LMC 15-2.21-2 (A), any Applicant for Development must produce a Sensitive Lands Analysis performed by a Qualified Professional(s) that identifies and delineates all the following features and conditions:
 - SLOPE/TOPOGRAPHIC MAP. A Slope and topographic map based on a certified boundary survey depicting contours at an interval of five feet (5') or less. The map must highlight Areas of high geologic hazard, Areas subject to land sliding, and all significant Steep Slopes¹ in the following categories:
 - Greater than fifteen percent (15%), but less than or equal to thirty percent (30%);
 - Greater than thirty percent (30%) but less than or equal to forty percent (40%); and
 - Very Steep Slopes, greater than forty percent (40%).
 - VEGETATIVE COVER. A detailed map of vegetative cover, depicting the following:

- Deciduous trees;
- Coniferous trees;
- Gamble oak or high shrub; and
- Sage, grassland, and agricultural crops.

- Per § LMC 15-2.21-2 (B), the Planning Department may require the Applicant to submit the following information, as applicable:
 - VISUAL ASSESSMENT. A visual assessment of the Property from Vantage Points designated by the Planning Department, depicting conditions before and after the proposed Development, including the proposed location, size, design, landscaping, and other visual features of the project.

Based on these Land Management Code compliance issues, this property WILL need the following Land Use Applications:

1. A Plat Amendment to modify the 90' by 90' Building Pad.
 - Requires Planning Commission and City Council approval
2. A Building Permit to remediate the construction activity that was done without a permit that has crossed property lines.
3. A Building Permit for the interior remodel work
4. A Building Permit for all exterior work. This will need to include all work that is approved by the Land Use Permits.

And based on these Land Management Code compliance issues, this property MAY need the following Land Use Applications:

1. An Administrative Conditional Use Permit for retaining walls greater than six feet (6') in height from Final Grade.
 - Requires Planning Department Administrative approval
2. A Conditional Use Permit for Private Recreation Facilities
 - Requires Planning Commission approval
3. A Variance for Structures in the required Front and Side Setbacks.
 - Requires Board of Adjustments approval

As of the date of this letter City Staff has not received any additional information regarding the direction of the proposed construction. This letter shall be a final notice of the application and approval requirement. Failure to apply for and obtain all required permits will result in enforcement action against the property and property owner. Application shall be received no later than February 18, 2022.

Please forward any questions or concerns to the City Code Compliance team (435) 615-5101.

Thank you for your attention to this matter.



Dave Thacker
Chief Building Official/Fire Code Official
Park City Municipal Corporation
dave.thacker@parkcity.org
(435) 615-5115



Gretchen Milliken
Planning Director
Park City Municipal Corporation
Gretchen.milliken@parkcity.org
o: 435.615.5008 | c: 435.659.4591



Planning Department

February 25, 2022

ADDENDUM

In a letter dated October 1, 2021, staff communicated to the applicant that the proposed development at 1115 Aerie Drive requires a Plat Amendment to modify the 90' by 90' Building Pad to accommodate new Structures that are located outside of the approved limits of disturbance as noted on the Hearthstone Subdivision Plat (Exhibit A).

On December 3, 2021, December 9, 2021, and December 15, 2021, Staff provided the applicant with copies of the original Master Planned Development Approval, the 1993 Land Management Code, and the 1993 Land Management Code and the definitions therein.

On December 20, 2021, the applicant representing the property owner of 1115 Aerie Drive submitted two land use applications to the Park City Planning Department:

- An Administrative Conditional Use Permit for retaining walls greater than six feet (6') in height from Final Grade. ([LMC 15-4-2 \(A\)](#)).
- A Conditional Use Permit for Private Recreation Facilities ([LMC 15-2.10-2 9\(B\)](#)).

In the Applications submitted on December 20, 2021, the applicant stated:

In the letter dated October 1, 2021, there was a comment regarding the need for a plat amendment application. This was based on the belief that all site improvements, including landscaping and accessory buildings needed to happen within identified "building pad". However, as we have reviewed the approval of the MPD (8/19/1993), approval of the preliminary plat (9/08/1993), approval of the final plat (10/4/1993), approval of the plat amendment (4/13/1994) and approval of the revised plat (4/21/1994), there was a clear indication that the "building pad was intended to show the general location of the new homes and not be used as a boundary for all improvements on the site. One example, in the staff report related to the Final Plat approval, dated October 4, 1993, it states – "Each lot reflects a building pad of approximately 8000 square feet, which designates the general location of the home." The minutes and approvals continuously use this language and intent. As we process these applications, we are willing to discuss the plat item, should the staff desire. It is with this understanding, that we are seeking review and approval of the building permit and conditional use permits.



Planning Department

Under the Land Management Code, Private Recreation Facilities and the associated ground infrastructure that support them, are considered Structures (LMC [15-15-1](#)), and are subject to the restrictions and provisions of a property's Subdivision Plat (including plat notes), and the Conditions of Approval outlined in the Subdivision Ordinance and Master Planned Development approval.

In the Notice of City Council Action letter dated August 19, 1993 (Exhibit B), City Council approved the Nielsen Korthoff Properties MPD with twelve conditions of approval. Condition of approval 3 states:

3. The plat shall contain notes regarding storm water requirements and considerations, wintertime travel restrictions (one-way road), and limits of disturbance as specified at the time of final plat approval.

As noted in an email sent from staff to the applicant's representative on December 9, 2021, the Land Management Code at the time of subdivision contained the following definitions:

Building Pad Line. *The building pad line denotes that area in which the entire new structure must lie. The area of construction disturbance attributable to the structure (as opposed to utilities installation) may not extend beyond ten (10) feet from the building pad line.*

Structure. *Anything constructed, the use of which requires fixed location on or in the ground, or attached to something having a fixed location upon the ground and which imposes an impervious material on or above the ground; definition includes "building". All structures must maintain the minimum set-backs for the district in which they are located, both above and below the ground.*

As stated, staff are required to review submitted applications under the standards of the Land Management Code, the Subdivision Plat (including plat notes), and the Conditions of Approval outlined in the Subdivision Ordinance and Master Planned Development approval.

On January 11, 2022, staff took the applications to the Development Review Committee for an inter-departmental review of the proposals. At that time, and during subsequent discussions, staff found that the proposal was not compliant with the provisions of the Plat and the Conditions of Approval in the Master Planned Development approval. On that date, staff communicated to the applicant's representative that we had received feedback from the Development Review Committee, and that the Engineering and Building departments would need additional information related to structural calculations, slope stability analyses, and a geotechnical report.

The letter sent on February 25, 2022 was intended to communicate that if the applicant wishes to proceed with bringing into compliance structures that were built without a building permit outside of



Planning Department

the building pad, that they would need to apply for a Plat Amendment prior to us being able to process the Administrative Conditional Use Permit and the Conditional Use Permit.

We apologize for the delay and confusion in communication, and are available if you have further questions. Based on the information presented above, the property owner will need to file a Plat Amendment application in order to consider Conditional Use Permit applications for structures that do not comply with the Plat. The application shall be received no later than March 31, 2022.

Please forward any questions or concerns to the City Code Compliance team (435) 615-5101.

Thank you for your patience and attention to the matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Gretchen Milliken".

Gretchen Milliken
Planning Director
Park City Municipal

Exhibit A: Hearthstone Subdivision Plat

Exhibit B: Notice of City Council Action letter (MPD Approval)



UTAH DEPARTMENT OF COMMERCE

Office of the Property Rights Ombudsman

SPENCER J. COX
Governor

DEIDRE M. HENDERSON
Lieutenant Governor

MARGARET W. BUSSE
Executive Director

JORDAN S. CULLIMORE
Division Director, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested By:	Wade Budge, Attorney for 1115 Aerie, LLC
Local Government Entity:	Park City
Applicant for Land Use Approval:	1115 Aerie LLC
Type of Property:	Residential
Date of this Advisory Opinion:	November 16, 2023
Opinion Authored By:	Richard Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

Was 1115 Aerie entitled to approval of the Conditional Use Permit Application it submitted to the Park City Planning Commission for a sports court as a “Private Recreation Facility”?

SUMMARY OF ADVISORY OPINION

The applicant’s residential property is a lot in a master planned development subdivision located in the city’s Estate district and subject to the sensitive lands overlay. The applicant is seeking to legalize certain prior land disturbance and development activity that had initially commenced without proper permits, and applied for conditional use approval of a sports court.

Final action on conditional use applications must include findings according to conditional use standards and must be supported by substantial evidence. It is incumbent on the city to use the substantive review process to obtain all information necessary before considering a matter for final decision. Unless the applicant demands final action, “insufficient information” is not a valid basis for denial where the application could be continued to obtain information necessary for required findings. Conditional uses, like any land use application, must also comply with the objective requirements of land use regulations, development standards, and applicable land use decisions, including plat restrictions. Plats are interpreted to discern the meaning of the parties at the time the

plat is created, and ambiguity is appropriately resolved by the extrinsic evidence of subdivision approval documents and the land use ordinances in effect at the time of approval.

The city wrongfully interpreted platted building pad lines as proscribing any development activity beyond the existing home's footprint, which was not the intent of the plat according to the master planned development approval and ordinances in effect at that time. The city also concluded that it had insufficient information about the lot's pre-development condition in order to determine compliance with standards for steep slopes and vegetation protection. Despite the applicant's preference to continue the matter to provide the necessary information, the city wrongfully denied the application for "lack of information" and for noncompliance with original plat restrictions, which was erroneous.

The city should reconsider the application without regard to any plat restrictions, and only after it has received whatever information it feels is necessary to determine compliance with steep slope regulations and to make required findings under its conditional use standards of reasonably anticipated detrimental effects, and the potential mitigation of those effects by condition. It must then approve the conditional use permit if it determines the application, as conditioned, achieves compliance with its standards, or else deny the permit if it determines objective requirements are not met or that reasonable conditions cannot substantially mitigate identified detrimental effects.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for Advisory Opinion submitted by Wade Budge, Attorney for 1115 Aerie, LLC, received on August 2, 2022.
2. Response Letter from Park City, received on February 13, 2023.
3. Reply letter from Wade Budge, received on March 8, 2023.
4. Park City's Response to March 8, 2023 reply, received March 13, 2023.
5. Wade Budge reply to City's March 13, 2023 response, received on March 17, 2023.
6. Letter from Wade Budge re: Supplemental Information, dated July 20, 2023.

BACKGROUND

1115 Aerie Drive, in Park City, is owned by an LLC of the same name, 1115 Aerie, LLC (Aerie). The property is a residential lot within a subdivision originally approved as a 12-lot Master Planned Development in 1993. The subdivision plat depicts on each lot a 90' x 90' area noted as "building pad." A home was later built in 1998 which utilized the lot area noted as building pad.

Aerie hired a landscaping contractor to landscape, retain, and build improvements on the Property, including a large sports court. The contractor represented to Aerie that it had obtained all necessary permits for the work. Unfortunately, the contractor had not, in fact, done so. While the contractor

did apply for a grading/landscaping permit in January of 2021 to replace three retaining walls, the remainder of the work, including the sports court, had not been permitted by Park City (City).

In September 2021, after much work had been performed, the City notified Aerie that the work had exceeded the scope of the issued permit and violated provisions of Park City's Land Management Code (Code). Once Aerie learned that its contractor had failed to obtain the correct permits, it began working with the City to obtain necessary approvals and attempt to modify the contractor's work to bring it in compliance with Code requirements.

On December 20, 2021, Aerie submitted a Conditional Use Permit Application (CUP) proposing to legalize the already constructed sports court by modifying the facility and seeking approval of the facility as a "Private Recreation Facility," which is a conditionally permitted use in the applicable Estate Zoning District under the Code. The application proposed to significantly modify the sports court to accommodate setback requirements, reduce the overall size of the court to minimize disturbance, and increase the amount of vegetative screening to minimize the court's impacts on neighbors and the community. Aerie also submitted a separate Administrative CUP application for retaining walls greater than six feet in height. On June 17, 2022, Aerie formally requested final action pursuant to Utah Code Section 10-9a-509.5(2)(b) on the Administrative CUP. Planning staff recommended that because the proposed relocated retaining wall is located directly adjacent to the sports court pad, the Planning Commission should review the Private Facility CUP for the sports court use and provide input before the administrative hearing on the retaining wall CUP.

When the private recreation facility CUP was scheduled to come before the planning commission, the staff report that accompanied the application concluded that the building pad lines depicted on the plat were intended as the limit on disturbance for the lot, and that developing outside of the building pad area violated restrictions in the plat. The report noted that the information submitted regarding lot conditions were all post-development, and that information regarding the pre-development conditions were necessary. The report referenced several pieces of information that staff felt was missing in order to determine compliance with the City's conditional use standards, and ultimately recommended denial of the CUP "due to a lack of submitted information to date." The report continued:

If the applicant wishes to withdraw and resubmit, the following information should be provided:

- *Additional analysis of pre-development conditions, including identifying areas of Steep Slopes, Very Steep Slopes, and Significant Vegetation*
- *An explanation and proposed management for the use of the sports court*
- *A lighting and noise mitigation plan for the court and site*

On July 13, 2022, the Planning Commission reviewed the CUP application in a public hearing. Before and during the hearing, neighbors to the Property expressed concerns that lighting and noise associated with the sports court would negatively impact them. City staff raised issues related to steeps slopes and noncompliance with prior approvals and the applicable subdivision plat.

The applicant provided an explanation of the proposed use of the sports court as well as lighting, and stated that the owner would accept certain conditions regarding use and lighting that he felt would mitigate anticipated detrimental impacts and address comments made by neighbors.

In regards to the pre-development conditions for steep slope and vegetation issues, the applicant repeatedly offered to provide more information as needed. When one commissioner expressed support for denying the permit until the applicant worked more with staff and provided more information, the applicant responded that “the applicant would be happy to provide the additional information and rather than going through the process of handling a denial, they would like to provide that information to the Commission. [Applicant] suggested a continuance would be preferable.”

Despite the request for more time to provide information that the Commission felt it was lacking, Planning Staff expressed its opinion that while more information could be helpful, even with additional information, Staff would likely still recommend denial. This appears to be, in part, due to the conclusion that the plat restricted any development outside of the building pad area, but also due to questions of whether the applicant could adequately mitigate the loss of vegetation and issues of drainage due to the amount of impervious surface and other landscaping added.

The Planning Commission therefore moved forward with denying the application. A July 20, 2022 denial letter issued by the Planning Commission listed 17 findings of fact to support its conclusions that the conditional use permit was not consistent with the conditional use standards in the Code.

These findings are distilled into two primary reasons for denial: (1) that the as-built conditions, including placement of structures like the sports court outside of the building pad area depicted on the plat violated original plat restrictions, and could not therefore be brought into compliance, and (2) the application does not meet the Code’s conditional use review process “due to a lack of information submitted regarding screening and landscaping, compatibility with surrounding structures, potential noise, lighting, environmentally sensitive lands, steep slopes, and appropriateness of the proposed Structure to the existing topography of the Site.”

Aerie contends that the City’s provided reasons for denial are legally insufficient, and that the Planning Commission therefore unlawfully denied Aerie’s conditional use permit application. Accordingly, Aerie has submitted a Request for Advisory Opinion to this Office asking us to determine whether the denial was lawful.

ANALYSIS

Utah’s Land Use, Development, and Management Act (LUDMA), as applied to municipalities, provides that a court “shall presume that a final land use decision of a land use authority or an appeal authority is valid unless the land use decision is . . . arbitrary and capricious; or . . . illegal.” UTAH CODE § 10-9a-801(3)(b).

In its Request for Advisory Opinion, Aerie asserts the City’s land use authority—the Planning Commission—erred in denying Aerie’s conditional use permit application for four primary

reasons. Namely, Aerie alleges, first, that the Commission improperly denied the application “for a lack of information,” instead of identifying detrimental effects and determining whether the effects could be mitigated. Second, Aerie alleges that the Commission was legally wrong in concluding that subdivision plat prohibits development of the proposed sports court outside of the platted building pad lines. Third, Aerie argues that the Commission incorrectly determined the sports court was constructed within fifty feet of a Very Steep Slope. Fourth, and finally, Aerie argues that the Commission improperly relied on aspirational or subjective provisions of the City’s general plan to deny the application.

We will address each concern, but as discussed below, we conclude that the Planning Commission erred in its interpretation that the plat restricted the proposed development, and that the development activity violated steep slope standards. Without these two reasons as independent bases for denial, the Commission likewise erred in taking final action to deny the conditional use application without the information it felt it needed to make required findings under its conditional use standards. We conclude that the reasons stated as the basis for denial in the City’s final action letter were affected by unknowns that the City acknowledges could be cleared up by additional information by the application. The Commission therefore should have continued the matter, as was preferred by the applicant, before attempting to conclude that the application did not conform to applicable standards.

I. Aerie’s Proposed Development Activity Does Not Violate Internal Lot Restrictions

A land use application is entitled to substantive review under the land use regulations in effect at the time of application. UTAH CODE § 10-9a-509(1)(a). However, an application must also comply with applicable land use decisions and development standards, *see id.*, which may include “internal lot restrictions,” defined as a “platted note, platted demarcation, or platted designation that . . . runs with the land; and creates a restriction . . . [or] designates a development condition that is enclosed within the perimeter of a lot described on the plat.” *Id.* § 10-9a-103(27).

Here, the 1993 Hearthstone Subdivision plat that created the Aerie lot depicts, on each lot of the subdivision, a designated area labeled “90’ x 90’ BUILDING PAD”.

Relevant for our purposes, the City’s current version of the Code defines the following terms:

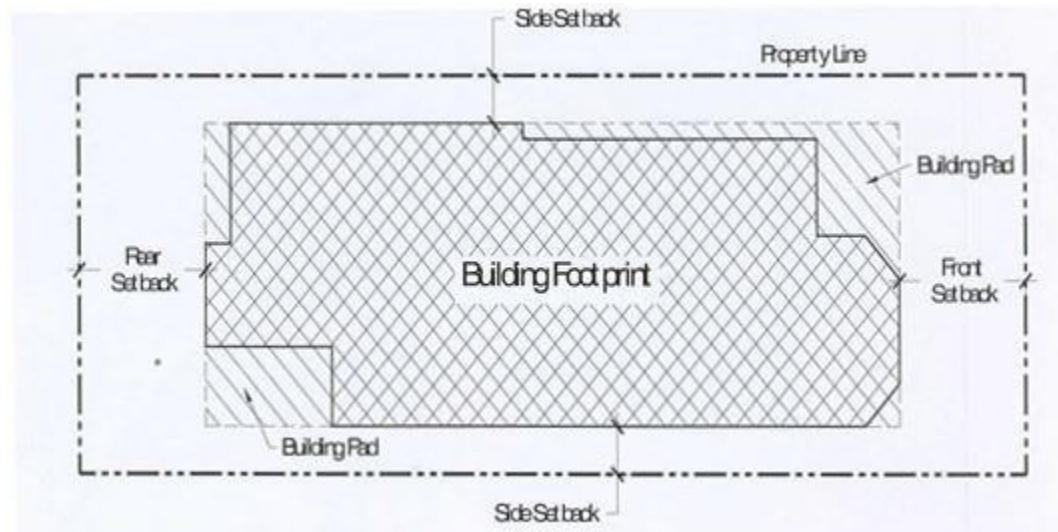
STRUCTURE. Anything constructed, the Use of which requires a fixed location on or in the ground, or attached to something having a fixed location on the ground and which imposes an impervious material on or above the ground; definition includes “Building”.

BUILDING ENVELOPE. The Building Pad, Building Footprint, and Height restrictions that defines the maximum Building Envelope in which all Development must occur.

BUILDING FOOTPRINT. The total Area of the foundation of the Structure, or the furthest exterior wall of the Structure projected to Natural Grade, not including exterior stairs, patios, decks and Accessory Buildings listed on the Park

City Historic Structures Inventory that are not expanded, enlarged or incorporated into the Main Building.

BUILDING PAD. The exclusive Area, as defined by the Setbacks, in which the entire Building Footprint may be located. See the following example; also see Limits of Disturbance.



LIMITS OF DISTURBANCE. The designated Area in which all Construction Activity must be contained.

CONSTRUCTION ACTIVITY. All Grading, excavation, construction, Grubbing, mining, or other Development Activity which disturbs or changes the natural vegetation, Grade, or any existing Structure, or the act of adding an addition to an existing Structure, or the erection of a new principal or Accessory Structure on a Lot or Property.

LAND MANAGEMENT CODE (LMC) § 15-15-1.

The City concludes that the proposed sports court is a “structure” under the Code, and that demarcation of “building pad” on the subdivision plat, consistent with that term’s meaning and other related terms as currently defined in the Code, is intended to effectively act as the lot’s definitive building envelope, meaning that the plat restricts any type of development activity outside of the depicted building pad area, and since the Aerie lot has been improved with a primary structure that effectively utilized the entirety of this building pad area, the City concludes that the plat prospectively prohibits any further development of a structure on the Aerie lot, including the proposed sports court. Aerie concludes, to the contrary, that the building pad plat restriction applies only to the primary structure, and does not proscribe other development activity on the lot.

Our Office is not aware of any Utah appellate decision that directly addresses the proper interpretation of plat notes, specifically. However, Utah recognizes the basic legal concept that when “lands are granted according to an official plat of a survey, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are

conveyed, and controls so far as limits are concerned, as if such descriptive features were written out on the face of the deed or grant itself.” *Barbizon of Utah v. Gen. Oil Co.*, 24 Utah 2d 321, 323, 471 P.2d 148 (Utah 1970).

As such, Utah Courts construe deeds “like other written instruments, and . . . employ all appropriate tools of construction to arrive at the best interpretation of its language . . . [to] determine the parties’ intent from the plain language of the four corners of the deed.” *Keith v. Mt. Resorts Dev., L.L.C.*, 2014 UT 32, ¶ 21. However, a deed is ambiguous “if the parties have both advanced a tenable interpretation of the language,” in which case extrinsic evidence may be used “to illuminate the intent of the parties.” *RHN Corp. v. Veibell*, 2004 UT 60, ¶ 40. Beyond this, any remaining doubts regarding “uncertain or ambiguous restrictions” are to be resolved “in favor of the free and unrestricted use of property.” *Freeman v. Gee*, 18 Utah 2d 339, 345, 423 P.2d 155 (Utah 1967).

Here, other than the depicted building pad areas, the plat does not otherwise contain any notes defining building pad and/or limits of disturbance. Therefore, both parties advance tenable interpretations of the subdivision plat’s depiction of “building pad” on the Aerie lot, in that it either means a limitation on all development activity for the lot, or else reflects a limitation on the primary structure only. To resolve this ambiguity, then, both parties urge us to look at the legislative history of the master planned development approval. We agree with this approach that the “legislative history” of the plat—meaning the stated conditions of the master planned development approval itself as well as the applicable land use ordinances in effect at the time—would be appropriate extrinsic evidence to illuminate the intent of the parties to the plat.

The City approved the master planned development on June 17, 1993. A Sketch and Preliminary plat were approved on September 8, 1993, and the final subdivision plat for the Hearthstone Subdivision was later approved on October 7, 1993. A revised plat was later approved on April 21, 1994, which reduced the 12-lot subdivision to ten lots. The revised plat was approved and recorded in June of 1994, and the parties have proffered that the 1994 version of the Land Management Code reflects the relevant version of land use ordinances applicable to the approved subdivision plat that we should consider.

The master planned development conditions of approval stated that the “plat shall contain notes regarding . . . limits of disturbance as specified at the time of final plat approval.” It also stated that “Limitations on landscaping and irrigation shall be defined at the time of final plat,” and further provided that “Structures built in the [subdivision] shall be limited by a maximum house size of up to 6,000 square feet.”

Both parties acknowledge that the final plat approval and subsequently recorded plat did not address any separate limits of disturbance or limits on landscaping. The City concludes that this absence establishes that the “building pad” plat designation is intended as a restriction to limit construction activity on each lot to minimize impact to steep slopes and significant vegetation. Aerie alleges, however, that the master planned development approval contemplated a limit of disturbance to ensure each lot contained open space, but that by the time of final plat approval, the “plan had changed so that the developer was going to dedicate an entire lot to open space thereby negating the need for open space on each individual lot,” which is alleged to be why the limitation of disturbance was not included on the plat.

We conclude that the building pad depiction on the plat was intended to regulate the construction activity of the primary structure, only, and not to serve as a prospective restriction on further development activity on the rest of the lot for other kinds of lot improvements such as the sports court in question. The applicable regulations at the time did provide a way to clearly impose the kind of prospective development restrictions the City has in mind, but would have employed platted definitions, easements, covenants to more clearly and effectively restrict the proscribed activity. Since these tools were not used, we decline to conclude any such prohibitions now exist.

The 1994 Code provided that “Building sites or envelopes shall be designed which minimize disturbance of existing vegetation. In designating building envelopes, consideration should be given to minimum separations between structures.” *Id.* § 15.4.2(b) (1994). While the 1994 Code does not have an enacted definition for “building sites” or “building envelope,” it is clear that the code nevertheless adheres to the traditional concept of building envelope and buildable area, in that required yard setbacks establish the total outer limits of where a building “site” or “area” may be built in relation to the lot’s respective property lines. *See*, “Setback,” *id.* (“The distance between a building and the street line or road right-of-way, or nearest property line thereto.”); *See also*, “Yard,” *id.* (“A required space on a lot other than a court, unoccupied and *unobstructed by buildings* from the ground upward . . .”) (emphasis added).

The City’s subdivision ordinances at the time provide, for all subdivisions, and not just master planned developments,¹ that “a separate plan which addresses limits of disturbance and vegetation protection *during construction* and revegetation of disturbed areas will be required.” *Id.* § 15.4.1(m) (1994) (emphasis added). However, this required disturbance plan does not appear to equate to requiring designations on the plat itself, unless “staff determines that there is significant vegetation on the site or if it is important to *clearly designate future building locations*,” in which case “Limits of disturbance or building pad lines shall be shown on the preliminary and final plats.” *Id.* § 15.4.2(d) (1994) (emphasis added). However, the code requires that “Limits of disturbance or building pad lines *with definitions as approved by the staff* must be reflected on the final plat.” *Id.* (1994) (emphasis added). Without any accompanying definitions that would have clearly acted as a prospective restriction on any development activity, according to the provisions cited above, we are left to conclude that the intention would have been nothing more than to designate the location of the “Main Building,” *See*, LMC § 2.1 (1994), in order to protect existing vegetation *during construction*. Should the intention have been to limit any future development activity beyond the building pad, including for landscaping and other lot improvements, the final subdivision plat requirements direct that any such self-imposed restrictions, reservations, easements, or covenants, should be clearly restricted on the plat. *See, id.* §§ 15.5.2, 15.5.3, 15.5.4 (1994).

In other words, the 1994 ordinances allowed the City to impose building pad lines as a plat restriction to define a specific building envelope within the total buildable area of the lot as defined by setbacks, if there was a specific need to protect significant vegetation or designate future building locations. Those plat restrictions could have included easements, reservations, covenants, or specific definitions had the intention been for the building pad to include permanent landscaping

¹ The code’s master plan development provisions simply repeat these same standards—applicable to all subdivisions—to master planned developments, without any significant alteration. *See*, LMC § 10.9(k) (1994).

or improvement restrictions. However, in absence of any specific definition on the plat or explanation of any reservation or easement, the ordinances at the time evidence that the parties' intention in depicting "building pad" on the 1993 subdivision lots was merely to designate where the principal residential structure should go, and would not have prohibited future development of other lot improvements. *See, id.* §§ 8.14, 8.15 (1994).

We therefore conclude that whereas no defined development restrictions are reflected on the plat, and in resolving doubts in favor of the free and unrestricted use of property, the "building pad" plat note does not restrict the development of a sports court on the lot areas outside of the building pad area.

II. The Commission's Finding that the as-built conditions Violated the City's Steep Slope Regulations is Not Supported by the Record.

The City's staff report identifies that the Aerie property is subject to the "Sensitive Land Overlay," or "SLO." The Code's "Sensitive Lands Regulations – Slope Protection" provisions state the following prohibition: "No Development is allowed on or within fifty feet (50'), map distance, of Very Steep Slopes." LMC § 15-2.21-4 (2007).²

This is an objective development standard for which noncompliance would be an independent basis for denial. However, we conclude that the Commission's finding that this provision is violated by the development activity is not supported by the record, as it actively conflicts with the Commission's other findings that slopes could not be determined without more information on the site's pre-development condition.

In the City's final action letter, the very first reason provided as basis for the Commission's denial is that "The subject property contains Steep Slopes and Very Steep Slopes, which have been disturbed and terraced to accommodate the Recreation Facility." However, the Commission also found that the submitted slope map and vegetative cover map were reflective of post-development conditions, and that because of this, "staff is unable to verify . . . in what areas development was placed within 50' of Very Steep Slopes." The Commission went on to conclude that, according to the post-development conditions slope map, much of the new development is currently within 50' of Very Steep Slopes.

The Commission's findings acknowledge that it is the *pre-development* conditions that would determine compliance with the Code's regulations on Very Steep Slopes. Indeed, the staff report suggested that the applicant could resubmit by providing additional analysis of pre-development conditions, including identifying areas of Steep Slopes, Very Steep Slopes, and Significant Vegetation. Therefore, the Commission's finding that Very Steep Slopes have been disturbed is undermined by its other finding that slopes could not be determined, and is therefore not supported by the record.

III. Final Action on Conditional Use Applications Must Be Supported by Substantial Evidence; The Substantive Review Process Allows for Obtaining Additional

² We note that since the time of Aerie's application, this section has more recently been amended. We therefore cite to the last version of this section of the LMC that was in effect at the time of application.

Necessary Information before Decision-making, and the City’s Code Suggests that the Planning Commission Should Have Continued the Matter per Aerie’s Request

Aerie alleges that the City erred in denying the conditional use permit by finding that it “lacked information to determine compliance with screening and landscaping, lighting, noise, sensitive lands, and steep slope requirements.” Aerie argues that state law requires that in order to deny a conditional use application, the City must (1) make findings of detrimental effects anticipated by the proposed use, and (2) find that the reasonably anticipated detrimental effects “cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards.” *See*, UTAH CODE § 10-9a-507(2)(c).

Aerie argues that in denying the application for insufficient information, the City effectively “dodged its duties” to make findings to support either an approval or denial of the conditional use application by substantial evidence.

We note, briefly, that had there been an independent objective basis for denial—such as the violation of plat restrictions on development or noncompliance with some other development standard such as the steep slope regulations—a decision denying the application would not have been in error even without required conditional use findings, because such development restrictions or code compliance issues are not something that can be “mitigated” by condition. However, because we have concluded that the plat imposed no development restriction, and the City’s finding regarding steep slope violations was not supported by the record, the City’s denial must otherwise stand on the basis of its review of the proposed conditional use according to its enacted standards.

Utah law has made clear that the approval or denial of a conditional use application is an administrative decision that must be supported by substantial evidence. *McElhaney v. City of Moab*, 2017 UT 65, ¶ 27. Substantial evidence requires findings of fact, and the failure to produce findings, generally, is a “fatal flaw” that renders a decision arbitrary and capricious. *N. Monticello All. LLC v. San Juan Cty.*, 2023 UT App 18, ¶ 17. The reason for requiring findings to support an administrative decision is “to permit meaningful appellate review” by “inform[ing] the parties of the basis of the administrative agency’s decision such that the parties knew why the agency ruled the way it did.” *Staker v. Town of Springdale*, 2020 UT App 174, ¶ 40 (cleaned up).

Here, the City’s denial was, in fact, memorialized in a written final action letter that listed a total of 17 findings of fact. The City’s enacted conditional use standards require the City to conclude that the “Application complies with all requirements of this LMC,” and that the “Use will be Compatible with surrounding Structures in Use, scale, mass, and circulation,” and that “the effects of any differences in Use or scale have been mitigated through careful planning.” LMC § 15-1-10(D). To reach this conclusion, the Code provides a list of 16 items which the City “must review . . . when considering whether or not the proposed Conditional Use mitigates impacts of and addresses the [listed] items.” *Id.* § 15-1-10(E).

In the final action letter, the Planning Commission found that the application “does not meet Land Management Code, Section 15-1-10, *Conditional Use Review Process*, due to a lack of information submitted regarding screening and landscaping, compatibility with surrounding structures,

potential noise, lighting, environmentally sensitive lands, steep slopes, and appropriateness of the proposed Structure to existing topography of the Site.” (emphasis in original). The City cited to five of the 16 required review criteria it found as having “not been sufficiently addressed”—namely, Subsections (E)(7), (E)(8), (E)(11), (E)(12), and (E)(15). In substance, the Planning Commission is effectively saying: *we didn’t have enough information to make the findings we were required to*. This is an outcome that should not occur if LUDMA is followed correctly.

LUDMA anticipates that a municipality’s application process for land use approvals will entail “specific, objective, ordinance-based application requirement[s].” *See*, UTAH CODE § 10-9a-509.5(1). In which case, the applicant bears the initial burden to present a complete land use application according to the ordinance-based application requirements. However, once an application is submitted, as it is ultimately the land use authority that must support its administrative decision with substantial evidence in the record, the burden effectively shifts to the municipality to ensure it has all of the information needed before it moves that matter forward for decision. Namely, LUDMA explicitly requires a city, upon receiving an application to (1) “in a timely manner,” determine the application is complete, and then (2) substantively review a complete application and approve or deny “with reasonable diligence.” *Id.* § 10-9a-509.5(1)-(2).

This initial review as to form, and subsequent substantive review, is the process by which a city is able to ensure that there is enough evidence in the record from which to make findings to avoid arbitrary and capricious decisions. It is often the case that an application may be “red-lined” and returned to the applicant with requests for additional or clarifying information, before the application proceeds further. In the separate context of subdivision approval, this back-and-forth process was recently defined in LUDMA as a “review cycle,”³ in which case there may be several rounds.

Throughout the application process, after the application is submitted, it is generally the city who is at the helm as to whether the application is moving forward; in deeming it complete or sending back to the applicant, and then forwarding it on to the designated land use authority, and scheduling the application as an item on the public agenda for formal consideration and action. In that regard, we generally agree with Aerie’s proposition that a land use authority has not “work[ed] within the statutorily required framework” to the extent that *the land use authority has decided* to take final action on an application without sufficient information to make required findings.

However, LUDMA does provide a circumstance under which *the applicant* may take control of whether to move the application forward for final action. After a reasonable period of time to allow the land use authority to consider an application, the applicant may in writing request final action on the application within 45 days from the request. *See*, UTAH CODE § 10-9a-509.5(2)(b). If the effect of the request is to cut short any routine review cycle that would otherwise have produced more information for the record, the request under Section 509.5(2)(b) might be appropriately

³ Section 10-9a-604.2 provides that, as used in that section: “‘Review cycle’ means the occurrence of:

- (i) the applicant’s submittal of a complete subdivision land use application;
- (ii) the municipality’s review of that subdivision land use application;
- (iii) the municipality’s response to that subdivision land use application, in accordance with this section; and
- (iv) the applicant’s reply to the municipality’s response that addresses each of the municipality’s required modifications or requests for additional information.”

characterized as “proceed at your own risk” when it comes to compelling the land use authority to take final action on an application with only the information submitted to that point. Under those circumstances, we agree that a “lack of information” necessary to support findings required by conditional use standards would be a valid basis for denial. However, we do not feel those circumstances are present here, as although the applicant made an initial demand for final decision, that demand was on a separate land use application and it was ultimately the City who moved forward with final action on this CUP despite the applicant’s request for a continuance.

The staff report for the Aerie application reflects that the applicant did, in fact, make a demand for final action under Section 509.5(2)(b), albeit for the specific Administrative CUP for proposed retaining walls, and not for the Private Recreation Facility CUP. Staff suggested, however, that a decision on the conditional use application for the sports court use was necessary before proceeding further with the other Administrative CUP. At the hearing, in response to a commissioner’s question as to why the retaining wall Administrative CUP would not be heard first, the applicant responded that they wanted it first, but were deferential.

Over the course of the hearing, the general lack of necessary information was discussed, and the applicant expressed its preference for a continuance to provide the information requested. However, the Planning Commission moved forward with its decision to deny.

The Code provides that a public hearing is required for a conditional use application. LMC § 15-1-10(C). The Code also addresses an applicant’s request for continuance for an item scheduled for public hearings, which gives staff the authority to continue if requested five days in advance, or, otherwise, the Planning Commission “will determine if there is a sufficient reason to continue the item on the scheduled date.” *Id.* § 15-1-12.5.

LUDMA requires a land use authority to make findings of detrimental effects according to its conditional use standards, as well as the potential mitigation of those identified effects by condition. The land use authority must “approve or deny” the application, *See UTAH CODE § 10-9a-509.5(2)(a)*, and support the decision with substantial evidence in the record. A lack of sufficient information to evaluate the listed items the City “must review” under its conditional use standards, *see, LMC § 15-1-10(E)*, is more than a “sufficient reason to continue” a conditional use matter to avoid arbitrary and capricious decision-making.

We recognize that, apart from insufficient information, the Planning Commission felt it had other independent bases for denial, which may have contributed to its decision not to continue the application for more information. But since we find the Commission’s conclusion regarding plat restrictions to have been in error, then taking final action on the basis of insufficient information, alone, was contrary to both state law and local ordinance that directed that the matter should have been continued.

IV. Remaining Findings According to the City’s Conditional Use Review Must be Revisited to Consider Proper Plat Interpretation and Additional Necessary Information.

Other than the Commission's findings regarding plat note restrictions, steep slope noncompliance, and insufficient information for five of the 16 required conditional use review criteria, the Commission did make other affirmative findings under its conditional use review criteria to support its denial. For example, the Commission found as follows:

[11]c. The proposed resized sports court adds approximately 2,085 square feet of impervious surfaces to the site. This is not adequately mitigated in the applicant's proposal, as they have only shown new proposed vegetation uphill of the court and proposed to retain a hardscape flagstone patio and artificial turf lawn downhill of the court.

[11]d. The amount of disturbed and landscaped areas outside of the Building Pad is not consistent with other properties in the Overlook at Old Town subdivision.

...
16. The proposal is not consistent with the General Plan, as it allows for disturbance of Sensitive Lands without adequate mitigation.

- a. The property is located in the Masonic Hill neighborhood of the General Plan. The property is noted as having slopes that exceed 30 degrees. The General Plan identifies Masonic Hill as a "natural conservation neighborhood", with it also denoted as "Critical Area for Protection and Conservation". The General Plan stresses that, "the aesthetic of the Masonic Hill Neighborhood should be preserved".*
- b. These elements are described in Goal 4 of the General Plan, Open Space, and Objective 4D emphasizes to minimize further land disturbance and conservation of remaining undisturbed land areas to development to minimize the effects on neighborhoods.*

As to finding 16, we note that Aerie's final contention had been that the Commission improperly relied on aspirational or subjective provisions of the City's general plan to deny the application. While we ultimately conclude that the Commission's findings must be revisited, we fundamentally disagree that the Commission's finding number 16 regarding the general plan, above, is somehow irrelevant or that the Commission "relied" on this finding to support its denial.

The final item on the Code's listed required review items for conditional use review states "reviewed for consistency with the goals and objectives of the Park City General Plan," however, the Code itself qualifies this item by further stating that "such review for consistency shall not alone be binding." LMC § 15-1-10(E)(16). It is clear, then, that this final required review item cannot be used as a sole item of noncompliance to support the denial of a conditional use permit under the Code. We find this to be consistent with state law in that the general plan, as typically expressing a statement of policy, may "provide guidance to the reader as to how the [zoning ordinance] should be enforced and interpreted, but [is not] not a substantive part of the statute." *See, Price Development Co. v. Orem City, 2000 UT 26, ¶ 6.* We nevertheless find the review item relevant as framing the nature of the detrimental effects to be found under the Code's other required review items, as well as providing guidance as to what conditions may or may not be considered reasonable to achieve compliance with the Code's stated goals and requirements.

The problem here, however, is the relation of the Code's required review items to the Commission's findings that it had insufficient information to determine compliance. We find that each of these remaining findings, 11(c), 11(d), 16(a), and 16(b), all suffer, to some extent, on the erroneous findings discussed herein, or to the Commission's other findings that it had insufficient information to determine compliance, and should be revisited on the premise that plat does not restrict development activity of a sports court outside of the building pad, and only after receiving additional information regarding the pre-development condition of the property in order to determine the actual impacts of the previous land disturbance and development activity, as proposed.

For example, 11(c) and 11(d)'s findings that the proposal adds additional impervious surface without adequate mitigation and that the amount of disturbed and landscaped areas outside of the Building Pad is inconsistent with other properties in the subdivision, both appear to relate to required review items that the Commission already found were lacking in information to determine compliance, such items (E)(8), "Building mass, bulk, and orientation, and the location of Buildings on the Site; including orientation to Buildings on adjoining Lots," item (E)(11), "physical design and Compatibility with surrounding Structures in mass, scale, style, design, and architectural detailing," and item (E)(15), "within and adjoining the Site, Environmental Sensitive Lands, Physical Mine Hazards, Historic Mine Waste and Park City Soils Ordinance, Steep Slopes, and appropriateness of the proposed Structure to the existing topography of the Site." LMC § 15-1-10(E). The same can also be said for the findings under 16(a) and 16(b).

In other words, these remaining findings—similar to the findings on steep slopes—are undermined by the Commission's other findings that it had insufficient information to determine compliance. The Commission must make findings that are definitive and based upon adequate information. Therefore, the Commission should revisit its findings with the proper legal analysis and upon the additional information identified as necessary for determining compliance.

We note, finally, that the Staff had signaled to the Commission that, even with additional information, a denial might still be recommended due to questions of whether the applicant could adequately mitigate the loss of vegetation and issues of drainage due to the amount of impervious surface and other landscaping added. That may very well continue to be the case once the Commission reviews the application upon proper supporting information, however, the Commission must nevertheless make the attempt, and definitively support its findings upon proper information, which includes not only findings of detrimental effects according to its standards, but also specific findings as to whether "reasonable conditions are proposed, *or can be imposed*, to mitigate" those effects to achieve compliance. UTAH CODE § 10-9a-507(2)(a) (emphasis added).

CONCLUSION

The Planning Commission's basis for denying Aerie's conditional use application because it determined that the plat prohibited further development on the lot was in error. The Commission further erred by taking final action to deny the application due to lack of sufficient information when the applicant had requested a continuance to provide additional information requested by Staff and the Commission. The Planning Commission should reconsider the application in light of

a proper interpretation of the plat, and upon receiving the additional information identified as necessary in order to make required findings according to the City's conditional use review process. This must not only include findings of reasonably anticipated detrimental effects, but also findings as to whether those effects can be substantially mitigated by reasonable conditions to achieve compliance with the City's enacted standards.

A handwritten signature in blue ink that reads "Jordan S. Cullimore".

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Section 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees and civil penalty provisions, found in Section 13-43-206 of the Utah Code, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

Browne Sebright

From: Robin Felton [REDACTED]
Sent: Monday, July 4, 2022 5:24 AM
To: Browne Sebright
Subject: [External] 1115 Aerie Drive Sport Court

Follow Up Flag: Follow up
Flag Status: Flagged

Categories: 1115 Aerie Drive Public Comment

[CAUTION] This is an external email.

Hello, we own the house across the street from this sport court. The owner of this house has been working on this massive landscape project which also includes a commercial quality play structure, for over a year. Not only have they been shut down for lack of proper permits, this "sport court" is practically on the road. We were never offered an opportunity to review any lighting or related before or during this project. If and when the lights are used they will shine right into the main area of our house. We assume the noise level will be challenging as well.

I am frustrated with how this project has been handled by the home owner. We were told it is a rental investment property. I am against this sport court and all activities related to it. Do we have any rights here?

Thank you, Robin Felton

--

The PC Feltons

Jeff, Robin, Coleman, Graham, Hoyt & Wyette

cell [REDACTED]

Browne Sebright

From: Craig Kipp [REDACTED]
Sent: Tuesday, July 5, 2022 7:33 AM
To: Browne Sebright
Subject: [External] 1115 Aerie Dr....Application Proposal for a Private Recreation Facility

Follow Up Flag: Follow up
Flag Status: Flagged

Categories: 1115 Aerie Drive Public Comment

[CAUTION] This is an external email.

Browne,

I am a resident of the Aerie. The bottom of my property is directly across Aerie Dr from this proposed recreation facility. We have two concerns...noise and night lighting.

1) Do you have drawings of the completed facility? 2) What is the intended use? 3) What is the lighting plan? 4) Is this a pickle ball court?

It also appears that one corner of the recently poured concrete pad extends into the easement setback along Aerie Dr. I tried to inform the landscape contractor of this issue last summer, but to no avail.

This will be the 3rd summer that this landscaping project has been under construction. The noise from excavators, dump trucks, cement trucks, backhoes has irritated everyone in the "Aerie". Many nights the construction continued late into the evening....even after talking to the contractor. Finally, the various construction trucks used my property as a turn-around area and ruined my lawn.

What is the plan, what is the use, when will it be finished?

Craig Kipp

[REDACTED] (m)

Park City, UT 84060

Browne Sebright

From: [REDACTED]
Sent: Tuesday, July 5, 2022 2:08 PM
To: Browne Sebright
Subject: Upcoming hearing 1115 Aerie Drive PL-21-05101

Follow Up Flag: Follow up
Flag Status: Completed

Categories: 1115 Aerie Drive Public Comment

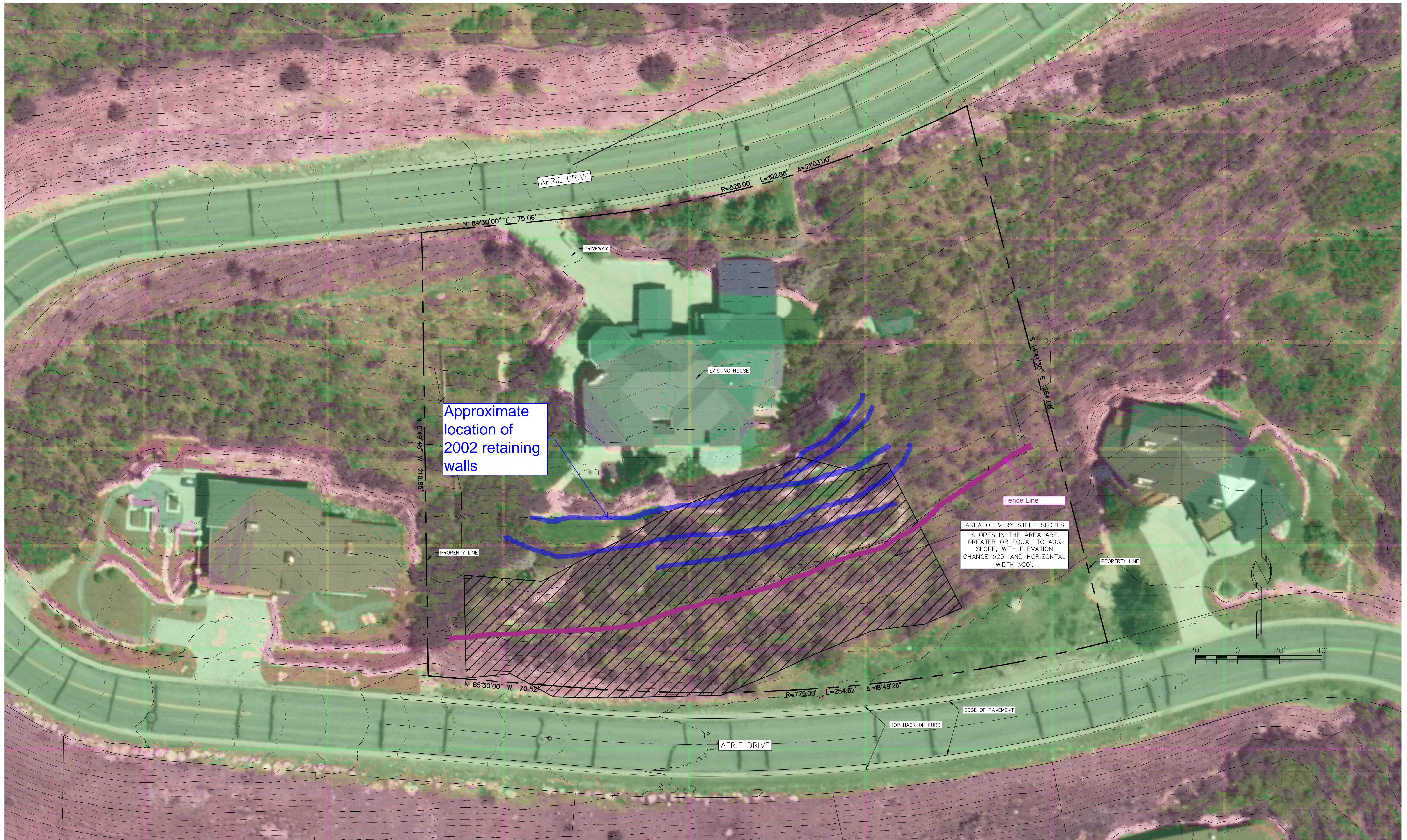
Hi Browne – Thanks for returning my call last week. We live at [REDACTED] just above the property at 1115 Aerie Drive.

We have concerns about the noise and night lighting with respect to the proposed private recreational facility PL-21-05101. We would like to know whether this recreational facility would include a lighted sport court that can be used for Pickle Ball? If so, will it meet the recently adopted amendments to the Land Management code for both noise and lighting for Pickle Ball courts?

Recently the landscape lighting at 1115 Aerie was turned on and it's significantly brighter than anything else in the area even without additional lights for an outdoor recreation facility. In fact, we wonder if the current lighting meets the Park City night sky ordinance?

Is there a plan that can be shared with nearby residents showing the completed facility and all of its intended uses?

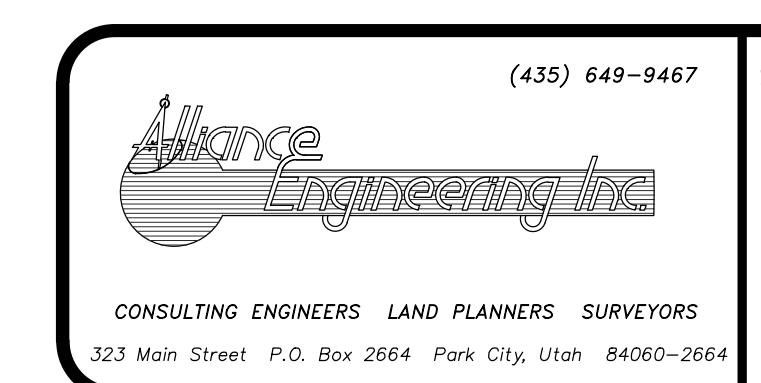
Thanks for addressing our concerns at the upcoming hearing.



NOTES:

1. SURFACE CONTOURS SHOWN WERE IMPORTED FROM A 0.5-METER RESOLUTION AERIAL LIDAR SCAN, GATHERED FROM USGS DATA DATED 2018. ANY DISCREPANCY BETWEEN GROUND SURVEYED TOPOGRAPHY AND THE AERIAL LIDAR SCAN ARE DUE TO POSSIBLE INACCURACIES IN LIDAR SCAN DATA.
2. LOT LINES SHOWN ARE APPROXIMATE ONLY.

2015 Aerial Image



STAFF:
BRAYLON ROSE
COLLIN MILLER

DATE: 10/17/22

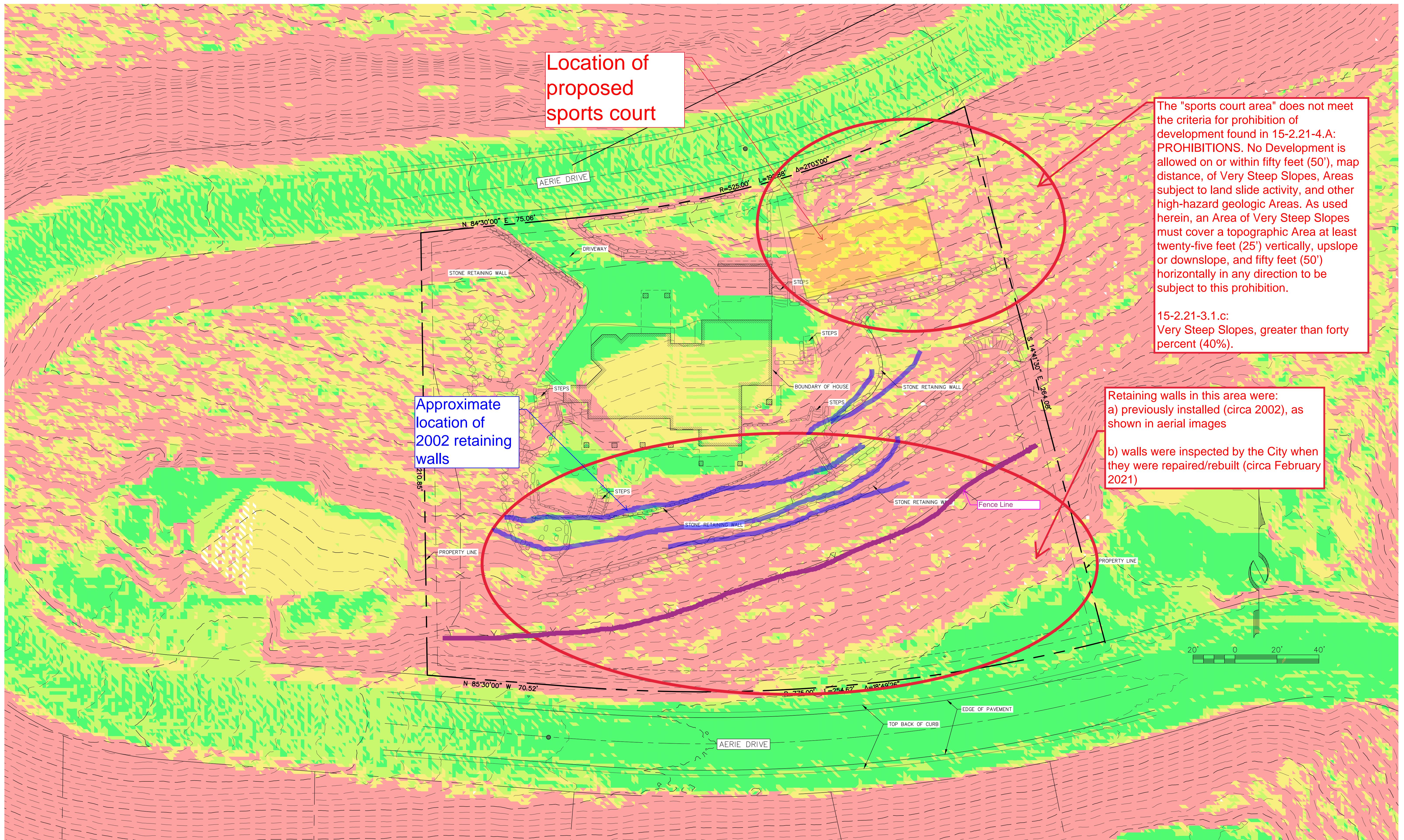
SLOPE MAP EXHIBIT
1115 AERIE DRIVE

FOR: JASON BOAL

JOB NO.: 3-9-21

FILE: X:\Aerie\dwg\srv\svy2021\030921-Aerie Lot 8\Aerie Lot 8 TIN from DEM_2022.10.13.dwg

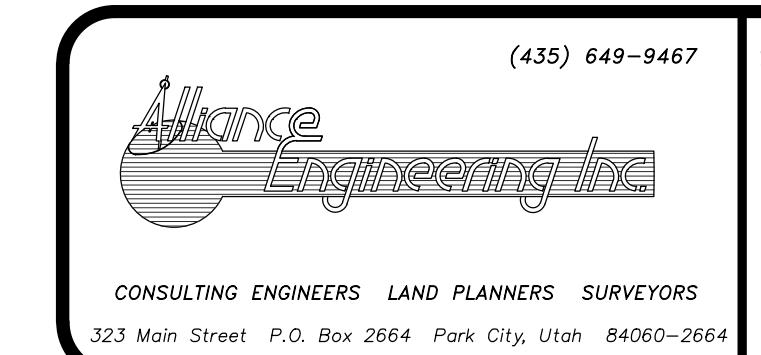
SHEET
1
OF
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NOTES:

1. SURFACE CONTOURS SHOWN WERE IMPORTED FROM A 0.5-METER RESOLUTION AERIAL LIDAR SCAN, GATHERED FROM USGS DATA DATED 2018. ANY DISCREPANCY BETWEEN GROUND SURVEYED TOPOGRAPHY AND THE AERIAL LIDAR SCAN ARE DUE TO POSSIBLE INACCURACIES IN LIDAR SCAN DATA.
2. LOT LINES SHOWN ARE APPROXIMATE ONLY.

Slopes Table			
Number	Minimum Slope	Maximum Slope	Color
1	0.00%	10.00%	
2	10.00%	20.00%	
3	20.00%	30.00%	
4	30.00%	1000.00%	



STAFF:
BRAYLON ROSE
COLLIN MILLER

DATE: 10/17/22

SLOPE MAP EXHIBIT
1115 AERIE DRIVE

SHEET
1
OF
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