



**PARK CITY MUNICIPAL CORPORATION
BOARD OF ADJUSTMENT
MINUTES OF FEBRUARY 8, 2022**

BOARD MEMBERS IN ATTENDANCE: Ruthie Gezelius-Chair, Jennifer Franklin, Stefanie Wilson, Mary Wintzer

STAFF: Browne Sebright, City Planner; Gretchen Milliken, Planning Director; Rebecca Ward, Assistant Planning Director; Mark Harrington, City Attorney; Margaret Plane, City Special Counsel

1. ROLL CALL

Chair Ruthie Gezelius called the meeting to order at 5:00 p.m. and noted that all Board Members were present.

2. MINUTES APPROVAL

- A. Consideration to Approve the Board of Adjustment Meeting Minutes from August 17, 2021. Consideration to Approve the Board of Adjustment Meeting Minutes from August 24, 2021. Consideration to Approve the Board of Adjustment Meeting Minutes from December 7, 2021.**

With respect to the August 17, 2021, revised minutes, Board Member Stefanie Wilson indicated that her name was spelled incorrectly.

MOTION: Board Member Wintzer moved to APPROVE the revised minutes from August 17, 2021, as corrected. Board Member Franklin seconded the motion. The motion passed with the unanimous consent of the Board.

It was noted that a vote could not be taken on the August 24, 2021, revised minutes since there were not enough Board Members present who were also present at that meeting.

MOTION: Board Member Franklin moved to CONTINUE approval of the revised minutes from August 24, 2021, until a quorum could be present to vote. Board Member Wilson seconded the motion. The motion passed with the unanimous consent of the Board.

MOTION: Board Member Wintzer moved to APPROVE the minutes from December 7, 2021, as presented. Board Member Franklin seconded the motion. The motion passed with the unanimous consent of the Board.

3. PUBLIC COMMUNICATIONS

No ecomments were submitted and no hands were raised on Zoom.

4. STAFF AND BOARD COMMUNICATIONS AND DISCLOSURES

There were no Staff communications or disclosures.

Chair Gezelius noted for the record that she was seated on the Park City City Council at the time of the City Council's action on the approval of the plat for the Willow Creek Subdivision. Therefore, she would recuse herself from the discussion and action item pertaining to that matter on the Regular Agenda.

In addition, Chair Gezelius disclosed that she had an email communication from one of the appellants, Bob Theobald; however, there was no direct verbal conversation. City Attorney, Mark Harrington printed out the email. She added that since she was recusing herself from the discussion and action on the Regular Agenda item, the Board would need to vote in a temporary Chair Pro Tem.

Board Member Wintzer volunteered to serve as Chair Pro Tem for the Regular Agenda item. She was approved with the unanimous consent of the Board. It was clarified that Chair Gezelius would vote on the Consent Agenda.

5. CONSENT AGENDA

A. Adoption of 2022 Meeting Dates.

Chair Gezelius introduced the 2022 Annual Notice of Board of Adjustment Meetings and invited comment from the Board. It was confirmed that the meetings would be held as listed in the packet. Chair Gezelius added that if there were any special meetings required, they would have to be noticed.

MOTION: Board Member Franklin moved to APPROVE the Consent Agenda. Board Member Wilson seconded the motion. The motion passed with the unanimous consent of the Board.

Chair Pro Tem Wintzer assumed the Chair.

6. **REGULAR AGENDA**

- A. **2704 Meadow Creek Drive – Appeal of a Code Enforcement Complaint Disposition- Third Party (non-owner/applicant) Appeal of a Building Department Code Enforcement outcome declining to take any action on a previously issued Building Permit for the Construction of a 361-Square-Foot Sauna, a Detached Accessory Building, for Lot 4 of the Willow Ranch Subdivision. PL-22-05126**

City Special Counsel, Margaret Plane reported that the Board of Adjustment (“BOA”) would be considering an appeal. The BOA was provided with an Appeal Order of Presentation, which established the framework for this meeting should that be agreeable with the Chair and the Board. She recommended that Staff present first to introduce the appeal. The proposed time limits were recommended in an effort to administer the meeting fairly and provide attendees with the opportunity to be heard.

Staff recommended 15 minutes for the initial presentation by Staff, followed by questions. The appellant would then have 15 minutes to provide rebuttal to Staff’s presentation. The owner/applicant would then have 15 minutes to present, should they so choose. Public comment would then be opened for feedback on the recommended dismissal based on the jurisdictional issue. Special Counsel Plane explained that if Staff’s recommendation to dismiss based on jurisdiction was denied or the Board wished to proceed, then the hearing would proceed with more substantive presentations on the appeal.

City Planner, Browne Sebright presented the appeal for 2704 Meadow Creek Drive. He stated that Planning Director, Gretchen Milliken; Assistant Planning Director, Rebecca Ward; Senior City Attorney, Mark Harrington; and Chief Building Official, Dave Thacker joined him. Planner Sebright reported that the appeal involves the construction of a detached Accessory Structure, specifically a 361 square-foot sauna located in the rear yard of the home. The structure is a single-story and contains a sauna and changing areas.

The home is a single-family home located in a subdivision of the Park Meadows neighborhood. It is located in the Estate Zoning District and directly abuts the Single-Family Zoning District. The home is also known as Lot 4 of the Willow Ranch Subdivision, which was constructed in 1993 and contained seven single-family lots. He explained that within this subdivision there are four larger lots, numbered 1, 2, 6, and 7, known as the equestrian lots on the plat. The three smaller lots are numbered 3, 4, and 5.

Planner Sebright reported that after the plat was recorded in 1993, a single-family dwelling was developed on the property. In January 2021, the owner submitted a Building Permit to construct the detached Accessory Building. In April 2021, Planning Staff clarified that additional documents and information were needed for the Building Permit. He stated that on May 17, 2021, Staff spoke with the Engineering Department to verify the location of a 10-foot rear yard easement. The applicant uploaded revised plans for review on May 28, 2021, and in early June the Planning Department verified compliance with the Land Management Code and the Subdivision Plat. Planner Sebright reported that on June 9, 2021, the

Engineering Department verified compliance with its standards and requirements, and then on August 9, 2021, the Building Department completed its review and issued the Building Permit.

On September 10, 2021, the appellant emailed Planning Staff regarding the construction, and Staff provided the appellant with a Code violation form found on the Community Code Compliance website. On November 10, 2021, the appellant submitted a complaint regarding the sauna construction. He noted that on December 21, 2021, the Chief Building Official responded to the complaint and stated that the City found that no enforcement action was justified. On December 30, 2021, the appellant submitted an appeal to this Board. The appellant submitted updated materials on February 2, 2022, which was one day prior to publication of the Staff Report.

Planner Sebright explained that there were two sections to Staff's analysis of this appeal. The first was that the Board of Adjustment did not have jurisdiction to hear the appeal. He stated that Staff found that there was no timely appeal of the Building Permit and noted that Building Permit appeals were to be heard by the Building Code Board of Appeals or the Planning Commission, depending on the circumstances or grounds for appeal.

In addition, he stated that the BOA did not have jurisdiction over enforcement matters, which are neither final actions nor final decisions of a Land Use Application. More specifically, a Code enforcement action provides the opportunity to request a hearing in front of an Administrative Law Judge pursuant to the Municipal Code. Municipal Code provides that the revocation of the Building Permit is appealable before the Building Code Board of Appeals, whereas certain provisions of the Land Management Code make the revocation of the Building Permit appealable to the Planning Commission.

Planner Sebright stressed that there was no path for an appeal before the BOA provided in City codes. He added that there was no appeal path for a third party where the City declined to prosecute or take enforcement action on a complaint. The Land Management Code confirms that a party may file their own action in court. Planner Sebright stated that based on the foregoing, Staff requested that the BOA dismiss the appeal.

With respect to the second area of analysis contained in the Staff Report that addressed the Complaint and the Appeal, he reported that Staff concluded that no enforcement action was justified based on the determinations.

On the jurisdictional issue, Attorney Harrington added that the City has always been reluctant to make these kinds of requests to a Board or Commission, as they know it forecloses review of an appellant's claim on the merits. He stressed that they never take these positions lightly. He stated that they took a similar position in the Fox case on two occasions. He added that dismissal of this appeal would not preclude the appellant from pursuing additional action. He noted that the appellant lives adjacent to the subject property and would be an adversely affected party to decisions regarding that property; however, the appellant is not part of the subdivision and not part of that subdivision's Covenants, Codes,

and Restrictions ("CC&Rs") so there would be no basis for the appellant to independently sue within the Homeowners Association to obtain enforcement.

Attorney Harrington argued that the appellant was beyond the 10-day deadline to appeal the Building Permit. He explained that the narrow issue was whether the disposition of a complaint could be appealed to the BOA. It was a question of first impression for this Board and the City as they have never had anyone attempt to appeal an enforcement decision to the BOA or to the Planning Commission outside of a pending application. All of the City's Codes and State Codes are written toward "final land use decisions" and "final actions," which are terms that apply to applications of the Code to a particular piece of property in an application. He explained that this not only protects the applicant and those adversely affected through the due process of the City's decision-making process but ensures that there is both a balancing of the ability to raise issues and the finality of decisions to allow an owner to move forward.

Attorney Harrington submitted that the Building Permit in question was initiated in January 2021 for a 361 square-foot Accessory Building. The process took over six months to review due to the need to verify the easement and landscape plans. He added that Staff looks at these applications carefully and when a permit is issued, it is considered a "final action" and starts the running of the 10-day appeal time.

Attorney Harrington submitted that the appellant has not alleged that he is within the 10-day period; rather, the appeal raised the issue of the subsequent process by which the appellant argued illegality and requested the Department re-evaluate its decision. The only path that the appellant had with the City was to file a complaint, which did not require a new land use decision. Rather, the complaint asked the City to use its discretion to look at the facts to determine whether there was a basis for enforcement. Attorney Harrington stressed that this is different than the issuance of a permit. He argued that when the application for the Building Permit is filed, it is reviewed and signed off by the different departments. Those determinations are appealable, and the timeline was set out in the Staff Report. He stated that in this case, those determinations were made in July, and then the Building Department ultimately signed off on October 9, 2021.

Attorney Harrington noted that an enforcement action raises the issue of whether the City has a right to use its police power to find non-compliance. This is very different from the issuance of the permit. Compliance decisions can be based on a number of factors in addition to and different from the underlying compliance with the Code. He provided examples of the City declining prosecution based on bad witnesses, affirmative defenses, and other legal avenues best served in civil or criminal venues. He explained that in a civil setting, enforcement matters are heard before an Administrative Law Judge; in a criminal venue, the courts hear the matter. If the public is unhappy with the decisions in the courts, there are two avenues of recourse. One avenue is administrative and political. Attorney Harrington stressed that the appellant availed himself of that avenue through his numerous meetings with the Mayor and the City Manager to review the Planning Department's administration and process of this permit. This review is considered a supervisory review.

The second avenue of recourse is the ability to file an action in court with or without the City as a defendant and where the third-party citizen can seek to remedy an incorrect decision. He noted that an illegal permit could be voided after the fact by a court of law. Attorney Harrington explained that it is Staff's position that these two avenues are the only ones available to the appellant moving forward. This appeal, however, does not meet the definition of "final determination," or "final action" as provided for in the Code. He referenced the appellant's citation to a provision that contains broader language occasioned by "legislative tinkering." He provided examples of amendments that brought in the BOA to hear Historic District appeals, and then later removed those provisions.

Attorney Harrington referenced the appellant's rebuttal that cited Section 15-10-7 and pointed out that this section implements Section 15-10-3, which specifically states that five distinct types of appeals shall be heard in the categories of variances and appeals. Section 15-10-7 provides the process for variances and the process for appeals. He argued that Section 15-10-7 does not expand the jurisdiction beyond Section 15-10-3, nor Section 15-1-18, which provides that the Planning Commission, not the BOA, shall hear decisions under the Land Management Code.

Attorney Harrington reiterated the claim that the BOA lacks jurisdiction to hear an enforcement action. The final letter, attached as Exhibit F, is not a determination or "final land use decision" because it does not delineate compliance with specific Codes; rather, it just described the process of review and determination. He stressed that Exhibit F was not a "decision" and not final; the City could revisit prosecution at any time as provided in the Code.

Board Member Wilson asked if the BOA was being asked to decide whether City authorities should reconsider the permit, or whether they were being asked to interpret the Code and decide whether the permit was valid. Special Counsel Plane explained that with regard to the Board's appeal authority, the standard was *de novo*, in which the Board would look at all of the facts that went into the land use decision with fresh eyes. Staff bifurcated its recommendations by starting with the jurisdictional question, which is whether the appellant timely appealed a decision over which this Board has jurisdiction.

Special Counsel Plane further explained that jurisdiction is a threshold question and goes to whether the BOA has the authority to provide the review being requested by the appellant and whether the appeal was filed timely and in compliance with the Code.

Board Member Wilson commented that if they were to determine jurisdiction, they would need to know what they were being asked to decide. She asked if the Board was to interpret the Land Management Code and decide whether the Building Permit is valid, or if they were being asked to send it back for reconsideration.

Special Counsel Plane deferred to Attorney Harrington for a response to this substantive question. Attorney Harrington stated that the threshold question needed to be decided first, with the Board deciding whether it should hear the appeal at all. He continued by stating that Staff's position was that the Board has the ability to dismiss the appeal without

remanding it. The appellant could then avail himself of the two options previously outlined. He added that the appellant could also obtain legal advice on whether there are additional remedies, however, Staff felt that the two options were the appropriate venues to hear this appeal since the 10-day appeal deadline on the Building Permit had passed.

Attorney Harrington explained that if the Board agreed with Staff, it could dismiss the appeal after hearing both sides. He noted that the applicant/owner was not expected to participate in this hearing. He stated that if the Board agreed to hear the appeal, then the appellant would present first on the substantive issue, followed by Staff's response.

Board Member Franklin asked how this appeal came before the BOA. Attorney Harrington responded that the appellant filed the appeal requesting that it be heard by the BOA. He also referenced the appellant's second submittal that referenced the BOA or the Planning Commission but noted that the appeal was initially filed with the BOA. He relayed that despite Staff's previous advice to the appellant that the BOA did not have jurisdiction, he still filed the appeal with the BOA.

Attorney Harrington added that Staff viewed the jurisdiction of the Planning Commission under Section 15-1-18 to be even more narrow and felt that this venue was more appropriate for the jurisdictional question to be addressed. He confirmed that the appellant had argued that the enforcement issue under Section 15-10-3 would be under the BOA's authority.

Board Member Franklin asked how the procedural recommendation was tied to the Fox decision. She noted that the Staff recommendation was based on the provisions in the Land Management Code, whereas the Fox decision said that the Land Management Code should not have been used. Attorney Harrington stated that the Code had been changed to define "final action" more broadly and State Code was changed to address distinctions between "final action" and "final decisions." He submitted that it was a distinction without a difference because the Codes get the same result. Whether it is a "final decision" under State Code or "final action" under the Land Management Code, there was still a ten-day appeal period from the date of notice of issuance of the Building Permit. He added that those facts were not at issue in this case.

Board Member Franklin addressed the user experience of the online building application portal and asked what triggered the delivery of the applications to the various City authorities for review. Planning Director Gretchen Milliken stated that the upload of CC&Rs for a subdivision are not something reviewed by the City and are not required to be uploaded to the portal.

Attorney Harrington added that CC&Rs are publically recorded with the Summit County Recorder and available for review if needed, but they would not be uploaded to the portal unless they were part of an application. He added that they also do not upload the Code to that portal; rather, Code provisions would be separately linked to allow the Code to be checked by the reviewing department.

Board Member Franklin referenced the April 26, 2021, details and documents and understood that an application would also require Homeowners' Association ("HOA") approval and all documents would be shared as part of the application.

Attorney Harrington explained that it would be different for every project. Most projects require affirmative notice to the HOA, and while the notice requirement might be satisfied by affirmative approval, an HOA approval was not required. He added that notice to the HOA had its' own process, but stressed that this would be a notice function, not a substantive approval process or requirement.

Director Milliken added that individual HOAs may require HOA approval before applying for a Building Permit, however the City does not require HOA approval.

Board Member Franklin found it curious that the maps before the Board were not shown by the original applicant and only came to light via the appellant. Attorney Harrington noted that this would not be unusual as these documents were not required as part of an application for a Building Permit.

Chair Pro Tem Wintzer questioned whether it would be standard procedure to review a plat as part of a Building Permit application. Director Milliken confirmed this in the affirmative.

Chair Pro Tem Wintzer inquired whether there was a requirement for the neighbor to notify certain neighbors within a certain distance. Director Milliken answered in the negative.

It was noted by Chair Pro Tem Wintzer that in addition to the request to dismiss, Staff provided the Board three other actions that could be taken. Attorney Harrington clarified that the options presented would be available should the BOA deny the request to dismiss and decide to hear the entire appeal.

Special Counsel Plane commented that this highlighted why the jurisdictional question was a threshold question. If the appellant did not timely file the appeal, then that would be a basis to dismiss. She stressed that a core principle of appellate practice is that if an appellant misses a deadline, the reviewing bodies will not get to the substantive issues because they do not have jurisdiction.

She reiterated that it is common for appellate boards, commissions, and courts to first review the threshold question of whether the appeal was timely filed. The question before the BOA was whether the 10-day appeal time started from the issuance of the Building Permit, or whether it started when the appellant was on actual or constructive notice of the Building Permit. She referenced the dates in the Staff Report, as well as the appellant's argument that the appeal time ran from the Thacker letter declining to undertake any enforcement action. Attorney Harrington confirmed that the Thacker letter was sent on December 21, 2021,, and this appeal was filed within ten days of that date. He argued, however, that the December 21, 2021, date was irrelevant as the appellant had other available civil and criminal enforcement avenues.

In response to a request for clarification of the dates, Attorney Harrington confirmed that it was Staff's position that the 10-day appeal time ran from the issuance of the Building Permit on August 9, 2021. He added that Staff felt that the enforcement action and complaint were irrelevant for purposes of this appeal.

Board Member Franklin referenced pages 77-78 of the Fox decision and sought clarification on the issue of constructive knowledge of the issuance of the Building Permit. She quoted language from the Fox decision as follows: "The interest of both the permit holder and the neighboring landowners are best balanced by the rule that the appeal period begins when the aggrieved party has actual or constructive knowledge of the issuance of the permit."

She felt that the knowledge would be different than the issuance of the permit and was concerned that they were limiting the appeal time to ten days after August 9, 2021, when it could be the date that ground was broken, and the appellant immediately emailed the City to express concerns about the project.

Attorney Harrington argued that the notice dates did not appear to be specifically at issue in the appellant's submission. However, even with that additional time, construction began almost immediately after issuance of the Building Permit and the appellant had several meetings with Staff. In September, Staff provided the appellant with a complaint form, which the appellant did not file until November 2021. He added that the appellant had a Government Records Access and Management Act ("GRAMA") request pending to obtain additional information and stated that they could go further into that if the BOA decided to hear the appeal; he argued, however, that it was irrelevant.

He continued by stating that in terms of some of the issues raised by the Fox case, the plat was public record and none of that information or the information contained on the Building Permit was hidden from common knowledge. He argued that even if there was extended tolling from the time the appellant met with Staff, the appeal would still be untimely considering that the structure was largely complete by November. He added that the Fox decision also addressed affirmative notice and noted the fact of the posting of the Building Permit on the property and the actual construction of the structure.

Attorney Harrington noted that if the BOA wanted a separate hearing on the issue of tolling, there could be discussion on further bifurcating this appeal, but argued that the tolling issue was not plead appropriately and not before the Board in this appeal. Board Member Wilson asked if the appellant was advised, either by Staff or by the form, of the ten-day deadline after he sent his initial email to Staff in September. Attorney Harrington recalled that as part of his communications with the appellant beginning in October 2021, they did not believe that there was an appeal period that the appellant had already missed. He did not know if specific appeal dates were communicated to the appellant during the early meetings in August and September.

Attorney Harrington noted that the appellant would have been on notice of the Code provisions that the City did not have an affirmative obligation to provide notice because he

was not the applicant. The appellant's inquiry was on a different permit at one point before he started to inquire about the subject Building Permit.

Chair Pro Tem Wintzer invited Bob Theobald, the appellant, to present his position to the Board. Mr. Theobald stated that his attorney would present the arguments on the jurisdictional issues. Mr. Theobald provided some initial rebuttal to some of the points made by Staff. He stated that he became involved in this because his next-door neighbor within the same subdivision was building a pickleball court that was unpermitted, and that neighbor stated that he did not require a permit. As they went through that process, he heard rumors that the neighbor on the other side was building a sauna. He spoke to the HOA President, who advised that they had approved the applications earlier in the year.

Mr. Theobald reported that he immediately began submitting GRAMA requests to find out about the sauna project. He noted that it takes up to ten days to receive a response to a GRAMA request and believed that they received their final GRAMA response on October 15, 2021. He noted that he recently received the Site Plan, which had not been produced in response to his requests. Mr. Theobald reported that the City would not provide the Site Plan based on claims that it was proprietary.

He asked how anyone could file an appeal or a complaint without the Site Plan. Mr. Theobald submitted that the final documents were provided only a few days ago. He also referenced discussions with the HOA wherein they stated that Willow Ranch was not registered for HOA notification. He differentiated this from an HOA Certificate of Approval and argued that Staff did not understand the difference. HOA approval indicates that the Architectural Committee of the HOA has reviewed the requirements, many of which involve compliance with the plat. Therefore, if an applicant reports that they have HOA approval that creates an inference.

He stressed that he really does not want to be here and gave the City multiple chances to look at this. He wanted to talk with someone prior to the elections, and as a result, held the complaint back. Mr. Theobald stated that he finally had a chance to raise his concerns during the non-Agenda public comment time during the City Council Meeting on October 28, 2021. He stated that he sticks by the serious allegations he made at that meeting. He recounted that had Planning Staff made the correct decision, it would not have been a permitted approval; it would have been a plat amendment because the plat is what sets forth the limits of disturbance. He argued that the limits of disturbance have been violated by this project. He continued by stating that had Staff recognized the limits of disturbance, this would have had a different outcome. Instead, Staff made a mistake.

Mr. Theobald argued that the City Council was abdicating their responsibility to amend the plat and they were abdicating their responsibility to enforce an ordinance. He added that Planning Staff was also usurping their authority. He turned his time over to his attorney, Steven Bergman from Richards, Brandt, Miller & Nelson, to address the jurisdictional issues.

Mr. Bergman initially argued that the Fox v. Park City case was irrelevant to this appeal because Mr. Theobald's appeal was made from the erroneous decision by the City to not

enforce its Land Management Code, found in Dave Thacker's letter of December 21, 2021. The appeal was filed on December 30, 2021, which would make it timely under the Code.

Mr. Bergman noted that to the extent that Staff argued that the appeal had to be triggered by the issuance of the Building Permit, the Fox case discussed actual versus constructive notice. With respect to constructive notice, Fox talked about having access to all of the permit materials. As just stated by Mr. Theobald, he received relevant materials just six days ago. Therefore, Mr. Bergman argued, access to all of the materials was not available until just recently. Alternatively, Mr. Bergman noted serious questions about the representations made in the original Building Permit, which is another reason why the Fox case would not apply.

He submitted that timeliness was not really the issue; rather, the issue was whether the City's decision to not enforce its ordinances and plats was a decision that was appealable to the BOA. He noted that the first paragraph of Land Management Code Section 15-10-7 spells out the BOA's authority. He explained that this section refers to Section 15-1-18 for additional authority and noted that there was no limitation or reference to Section 15-10-3, as argued by Attorney Harrington.

Mr. Bergman argued that Section 15-10-7 provides that "The Board shall hear and decide appeals from an applicant or any other person or entity, including any officer or Board of the City, adversely affected by a final decision administering or interpreting the Land Management Code which alleges that there is an error in any order, requirement, decision or determination of the Land Management Code." He submitted that this provision set forth five factors that must be met for an appeal to be within the jurisdiction of the BOA. First, the appeal must be from an "applicant or other person" who is adversely affected. Mr. Bergman submitted that as an adjoining neighbor, Mr. Theobald was an "adversely affected person," and satisfied the first requirement.

Mr. Bergman went on to discuss the second factor, which was that there has to be someone "adversely affected." He argued that the "adverse effect" in this case was the failure of the City to enforce its Land Management Code, specifically its 1992 Ordinance that authorized the plat.

Third, the appeal must be from a "final decision." Mr. Bergman referenced the City's argument that they could always opt to enforce the Code at a later date, therefore the decision was not "final." He argued that the Thacker letter was clear that the City was not going to do anything, which was a "final decision." He added that the decision on whether to enforce were both "final decisions" because there was a "final decision" by a City authority. He acknowledged the correctness of the City's argument that its decision to not enforce other ordinances was not appealable to the BOA. However, he stressed that what is appealable to the BOA were "final decisions administering or interpreting the Land Management Code." There also must be an allegation of an "error in the order, requirement, decision or determination."

Mr. Bergman referenced the Thacker letter of December 21, 2021, which he cited as the key document conferring jurisdiction on the BOA. He read the following from that letter: "The decision to initiate and additional review is over..." He noted that the letter also noted that the City "worked frequently with the prosecutor on issues of Land Management and Building Code compliance."

Mr. Bergman argued that this language clearly showed discussion of a Land Management issue, and went on to reference the last paragraph of the letter as follows: "The results of the independent review confirmed [that] no enforcement action was justified...upon determinations that the LMC regulations were followed..." He argued that this demonstrated a clear decision interpreting or administering the Land Management Code because there was a determination that the LMC regulations were being followed.

He added that Mr. Thacker concluded, "...the detached...structure [was] permitted in accordance with applicable PCMC codes and ordinances." Mr. Bergman argued that this was an incorrect statement, and is the error being appealed. There was a violation of the plat, which was enacted pursuant to an ordinance passed 29 years ago.

Mr. Bergman reiterated that the first paragraph of Section 15-10-7 sets forth the jurisdiction of the BOA. Each of the elements of that paragraph was met in this appeal. There is an "adversely affected person," appealing from a "final decision" to not enforce based on a review and administration of the Land Management Code. He next addressed the issue of timeliness of the written submission contained in the second paragraph of Section 15-10-7. He argued that the City conceded that if the December 21, 2021, decision to not enforce was the trigger, then the written appeal filed on December 30, 2021, was timely. Because the appellant filed a timely appeal that falls within the BOA's authority, Mr. Bergman argued that jurisdiction was satisfied.

Additionally, Mr. Bergman referenced the second paragraph of Section 15-10-7 that addresses what the Board can do if it has jurisdiction over an appeal. He stated that the Board could "reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination...as ought to be made, and to that end shall have all the powers of the administrative official, board or commission from whom the appeal is taken."

Mr. Bergman argued that the BOA could effectively direct the City to enforce its Land Management Code and the ordinance establishing the plat that was violated by the sauna structure. He submitted that the jurisdiction of the Board was clear based on Section 15-10-7.

In response to the City's suggestion that Section 15-10-7 was some sort of legacy provision that no longer belongs in the statute or does not apply, Mr. Bergman argued that it remains an active part of the current Park City Municipal Code and sets forth the BOA's authority and jurisdiction. Therefore, he submitted that the Board has the jurisdiction to hear this appeal because the elements required by the first paragraph of Section 15-10-7 were met, there was a timely written appeal filed, and the appeal is of a decision that this Board can affirm, reverse or adjust to require the City to enforce its plat.

Mr. Bergman then turned to the third paragraph of Section 15-10-7 that specifically identifies matters that are not within the Board's jurisdiction. Nothing identified in that paragraph includes enforcement decisions or decisions not to enforce, which is the "final decision" that is the subject of this appeal. He concluded by arguing that this Board had jurisdiction and the appeal should be allowed to proceed.

Mr. Theobald added that this should be heard at some point in time and hoped that the Council was following this appeal since they would ultimately have to pass a Plat Amendment and would ultimately have to enforce the plat. The Council was not aware of what was going on with this appeal and was isolated from this process. He noted that the Council refused to look at this because it might ultimately come before them, which he felt was a huge problem. He noted that this is why he raised this issue during a City Council meeting because no matter where this appeal goes, the City Council would be in the hot seat.

Chair Pro Tem Wintzer clarified that the owner/applicant was not present to speak. She opened a public hearing on the jurisdictional issue. There being no public comment, Chair Pro Tem Wintzer closed the public hearing. She noted that the Board could dismiss the case due to timeliness, take the case under advisement and continue it to another date, or grant the appeal and prepare Findings of Fact. Attorney Harrington clarified that the substantive arguments on the appeal had not yet been presented to the Board and reminded that the sole issue at this stage was the jurisdictional question. The appellant did not object to a brief rebuttal by the City to the appellant's jurisdictional arguments. Mr. Bergman noted that if the City raised anything new in the rebuttal, he would request the opportunity to respond.

Attorney Harrington stated that it was important to understand this issue from the owner/applicant's perspective, because it is one distinct land use process. The process begins with a Building Permit application and the City has affirmative obligations to process that application in accordance with the Code. He explained that this process culminates with the issuance of a permit. At this point, the owner expects to be through with the due process of the City, and any appeals flow from that point. He explained that complaints were entirely different and could arise months or years down the road. Complaints about Code violations can be filed at any time and are governed by Section 15-14-5. Attorney Harrington argued that "enforcement" was not a land use decision; rather, it is a discretionary enforcement decision. The enforcement decision could include reopening a permit or revoking a permit that would then put the matter back into the appeal cycle and due process cycle.

Attorney Harrington stressed that a decision of "no action" maintains the status quo and does not put the property owner on notice that their application was again subject to City review. He noted that the Planning Department does not re-issue a decision in the context of that due process. He added that 90% of complaints involve field compliance to assess whether the property owner complied with the Building Permit. The findings in the field are

also not appealable because it is an enforcement issue, not an application of the Code to a pending application.

Attorney Harrington referenced the first line in Section 15-14-5, which states that the “City has sole discretion in deciding whether to file civil, criminal or pursue administrative enforcement action for a violation.” This does not apply to a Building Permit; rather, the City has the affirmative obligation to issue a permit subject to the Code, unless the Code affirmatively restricts the property. He submitted that the City is required to construe the Code affirmatively in favor of the private property rights unless they are specifically restricted. He offered that this was a much different standard than the discretionary decision regarding enforcement. Attorney Harrington argued that the enforcement decision was not a re-decision, because if it were, there would be multiple bites of the apple with the filing of each complaint, and there would never be any finality on the Building Permit. He submitted that this was not the meaning of Fox, nor the meaning of “final action.”

With respect to the arguments regarding appellant’s GRAMA request, Attorney Harrington explained that the City responds to those requests for “records.” The copyrighted, full size Site Plan is excluded from the definition of “records.” The City cannot produce copyrighted site plans without the architect’s permission. He added that site plans are available for inspection any time at the Building Department.

Mr. Bergman stated that he would not have any additional rebuttal.

Chair Pro Tem Wintzer invited discussion from the Board. Board Member Franklin felt that both arguments were compelling. She commented that it is difficult to separate the jurisdictional issue from the timeliness issue. She struggled with the fact that it appeared there was a great deal of thought by the City Council in the design of this neighborhood to have the larger setbacks. She expressed concern that if there was not a way that these plats were reviewed in this process, they would be looking at situations like this in the future, and the complaint process could then be triggered over and over again. Board Member Franklin added that she was concerned that the plat was not submitted by the applicant/owner for the Building Permit.

Board Member Wilson agreed that both the City and the appellant submitted very compelling arguments. She felt that the Thacker letter was compelling because he was making a decision interpreting the Land Management Code, and the appellant filed a timely appeal from that decision. She struggled with whether the Building Permit was the “final action,” or whether the Thacker letter was the “final action.” She understood that if they are interpreting the LMC and decisions made on that, it would be within the Board’s authority.

Chair Pro Tem Wintzer concurred with the previous comments that both sides presented good arguments. She noted that this was a difficult situation because much of the responsibility was on the homeowner to ensure that they were following the rules. She felt that this issue was within the Board’s purview.

Chair Pro Tem Wintzer added that she agreed that this subdivision of larger lots was laid out specifically, and this issue presented a precarious situation that could affect every neighborhood if the plat was not referenced. She noted that people make errors but did not feel that there was any ill intent in this instance. It was clarified that a motion was not required; rather the Board could give direction to incorporate the disposition denying the City's motion to dismiss. Chair Pro Tem Wintzer confirmed that they would proceed with the appellant's presentation on the substance of the appeal.

Mr. Theobald showed the Board a map of the involved homes and surrounding area to show why the neighbors are so concerned about what goes on at Willow Ranch. He expressed that one of his issues is the lack of accountability and noted that the Staff Report was submitted as a team. He was unsure who actually made the decisions and recommendations.

Mr. Theobald addressed his initial comments to some of the information contained in the Staff Report. He noted that Staff claimed and questioned why the Willow Ranch Subdivision outlines different regulations for the remaining three lots and why they were excluded from the table on the plat.

He referenced the plat, which contains a legend and a table. Staff questioned why this information was so different in terms of Limits of Disturbance designations. Mr. Theobald explained that the developer explained that the table was intended to distinguish information on the residences and the barn for only Lots 1, 2, and 7. The absence of Lots 3, 4, and 5 from the table indicates that they were different and did not require further identification, other than the illustrated setbacks. He referenced Appellant's Submission, Exhibit F.

Mr. Theobald presented the 1992 Land Management Code that described how Subdivisions were reviewed and designed, as well as the requirements for each Subdivision. Limits of Disturbance could either be building pad lines or building pads, or they could be Limits of Disturbance. The Limits of Disturbance were designated depending upon the lot configuration and the distance from various boundaries.

He noted that the plat showed that the large equestrian lots could not be designated with a dashed-line setback. As a result, those lots were surveyed and called out separately on the legend. He submitted that the Limits of Disturbance did not need to be called out on Lots 3, 4, and 5, because they were designated by the commonly used dashed lines on the plat. The developer confirmed that this was how these lots were designated.

Mr. Theobald stated that square footage for the homes on Lots 3, 4, and 5 was capped at 4400 square feet. He noted that these homes fit nicely within their Limits of Disturbance and reported that Lot 3 has 15,000 square feet, Lot 4 has 12,700 square feet and Lot 5 has 8700 square feet. On any one of those lots, the owner could build a 4400 square foot home within the Limits of Disturbance, plus improvements. He argued that the sauna could be constructed within the Limits of Disturbance, but the owner could go outside of it. He stated that the owner had flexibility and decided to construct a sauna without the required room for

it. The decision was already made when the house was built, and they cannot now build outside the Limits of Disturbance without a Plat Amendment.

Mr. Theobald argued that there is a path for each of these owners to build what they want outside the Limits of Disturbance; that path is an application for a Plat Amendment. He noted that Plat Amendments had been utilized on four other occasions within this Subdivision. He added that Lots 3, 4, and 5 contain more restrictive setbacks for the residences than otherwise in the Single-Family Estate District, and each lot's setbacks are different from each other. He reported that the setbacks range from 35 – 50 feet. Mr. Theobald referenced the plat, which showed a 50-foot setback on the south end of Lot 5 and a 35-foot setback on the north end of the lot. He explained that these setbacks were established to separate that space from McCloud Creek.

Mr. Theobald noted that the setbacks on Lot 3 were 40 feet all around the lot. He stressed that these were different due to the sensitivity as explained by the developer. With respect to the Legend on the plat for Lots 1, 2, and 6, he argued that it was necessary to identify what the polygons were intended to depict.

Mr. Theobald responded to Staff's claim that he improperly referenced the CC&Rs in his argument. He stated that referencing CC&Rs is not the same as enforcing them and the notion that you cannot refer to the CC&Rs as part of the plat is untrue. He added that when CC&Rs describe, define or have a nexus to the plat, they could certainly be referenced for clarity. Mr. Theobald stated that this was done in April on Planning Commissioner Sarah Hall's lot.

He presented the Staff Report for Planning Commissioner Hall's Plat Amendment and pointed out the numerous references to the CC&Rs in that Staff Report. He reiterated that a review of the CC&Rs provides clarity, cross-reference, and information that cannot be obtained from the plat. The notion that you cannot even open the book to look at the CC&Rs is terribly wrong for a Planning Department to claim, and they never looked at the applicable CC&Rs in this instance when reviewing the application for the Building Permit.

Mr. Theobald added that the Planning Department should have reviewed the CC&Rs as part of their review, which would have solved a number of questions early on in this process. He stated that the lot is considered an equestrian lot and has a maximum house and barn size as noted in the 1999 CC&Rs and the plat. Mr. Theobald referenced language that "a plat note shall indicate lot line fencing is required and must be maintained in accordance with the CC&Rs." One could not know what this means without consulting the CC&Rs. He reiterated that referencing the CC&Rs is not done for enforcement; rather, it is done to clarify the plat and the plat notes.

The Staff report for the April Plat Amendment mentioned the CC&Rs 12 times; the application at issue should have had the same measure of review.

Mr. Theobald argued if there are competing regulations, the more restrictive one should always be applied. The Willow Ranch Subdivision Plat that illustrated the Limits of

Disturbance was adopted by ordinance. The more restrictive Master Planned Development ("MPD") provisions would apply, and the landowner and the City must abide by them. He referenced Article 3.3 of the CC&Rs that specifically allowed and obligated the City to review and, if deemed appropriate, approve a variance and a Plat Amendment. The applicant violated these CC&Rs and the Code because that was never done in this instance.

In response to Staff's claim that the residence was the only structure subject to the Limits of Disturbance, Mr. Theobald argued that statement was untrue. Everything on the lot is subject to the Limits of Disturbance.

He referenced the definition of Limits of Disturbance contained in the 1992 Land Management Code as follows: "The Limits of Disturbance lines indicate the areas in which construction activity must be contained." He averred that this would include all construction, no matter the type. If the term "Limits of Disturbance" was used, that means something, whereas if there is no intent to enforce Limits of Disturbance, then the term should not be used. He noted that throughout the application process, the term "Limits of Disturbance" was used. He added that the CC&Rs provide that all portions of the dwelling and any other improvements are to be within the Limits of Disturbance or setbacks designated or revised by Article 3.3 for a plat amendment, for each lot. He emphasized that each lot has its own Limit of Disturbance.

Mr. Theobald referenced Article 5 of the CC&Rs, which states: "The following uses and improvements are permitted within the subdivision in the area property designated." He noted that there are four different areas within the property: the Limits of Disturbance for the lot, the barn, the open space, and the wildlife corridor. This provision defined what could be done in each of those areas.

Article 5.1 of the CC&Rs provided for "uses and improvements permitted within the Limits of Disturbance areas" for the lot. He continued by quoting as follows: "The construction, maintenance and use of those improvements generally and customarily associated with the use and enjoyment of a single-family dwelling" which would include driveways, accessory dwelling units, garages, retaining walls, spas, pools, and sports courts. He acknowledged that these are all permitted uses under the CC&Rs, but they must be within the Limits of Disturbance.

Mr. Theobald referenced further language that one dwelling was permitted on each lot. No other habitable structures, sheds, storage buildings, or outbuildings were permitted, with the exception of barns or accessory dwellings. He argued, therefore, that these structures would not be permitted outside the Limits of Disturbance. This conclusion is attested to by the zoning that would require a Plat Amendment to construct these additional structures.

He stressed that the CC&Rs served notice to the HOA and lot owners that if they want to build outside the Limits of Disturbance, they must obtain a variance from the HOA and obtain a Plat Amendment from the City. Mr. Theobald argued that the applicant/owner risked construction and violated the plat, and also risked that the City would not catch it.

He referenced Chapter 10 of the LMC that addresses how Limits of Disturbance are to be included on a plat and stated that it must be designated.

Mr. Theobald noted that in August 2020, before the application was filed, Planning Staff recognized the issue involving the Limits of Disturbance and sent an email to the builder/contractor to discuss how to address it. At some point in time after August 2020, the Planning Department forgot about this issue and decided that there were no Limits of Disturbance lines on the plat. He questioned how this happened and commented that there was a communication issue within the Planning Department.

Mr. Theobald noted that the variances as provided for in Article 3.3 of the CC&Rs “may be granted when strict application creates an unforeseen or unreasonable hardship to the owner of any lot.” He averred that there was no hardship to this owner who wanted to build a sauna. He conceded that there might be a hardship to this applicant due to his health problems and stated that he would probably support a Plat Amendment because of that but stressed that the owner must go through the Plat Amendment process and let the City Council decide. He continued by referencing the following language: “No such variance may be granted without the unanimous consent of the Committee and City approval.” He argued that this could not be waived.

Mr. Theobald submitted that the City must enforce its laws and cannot pick and choose which laws to enforce. He moved on to his primary presentation on the appeal. He stated that the pivotal question was “What is the meaning of the setback lines illustrated on Lots 3, 4, and 5 of the Willow Ranch Subdivision Plat?” The Planning Director responded, “Lot 4 includes arrows showing what staff interprets to be setbacks for the Single-Family Dwelling constructed on the site.” In Staff’s opinion, which was the old Estate District Zone that allowed Accessory Buildings outside of the setbacks. He noted that this was an Estate MPD with very specific boundaries on each of the lots.

While the Planning Director’s statement was correct, he added that it was also the Limits of Disturbance, and outside of those was the Natural Area which was defined in the CC&Rs where no other buildings are permitted. He argued that the Planning Director made the determination of a very critical and consequential meaning as a matter of expedience and without diligent research. He understood that Planning Staff did not review the CC&Rs and did not review the 1992 Planning documents. With these questions of such a critical nature, Staff should have reviewed all available information.

He offered that the purpose of the setback lines was to define the Limits of Disturbance for construction and that they were in compliance and consistent with the zoning. The developer, Richard Dudley, expressed that in detail, as do the CC&Rs, the LMC requirements of the MPD, and Planning Staff’s August 2020 email. He questioned why a different decision was made.

Mr. Theobald referenced Exhibit F of the CC&Rs, which states “per setbacks.” He interpreted this as meaning that the plat must be reviewed since the setbacks are not included in the CC&Rs. This further demonstrates the nexus between the plat and the

CC&Rs. He asked the City to determine if there were Code violations, and only received a re-hash of what the City did in approving the Building Permit. There was no investigation into the old Planning documents or CC&Rs; otherwise, he felt there would have been a different decision.

Mr. Theobald was befuddled by the August 2020 email from Planning Technician, Heather Wasden, which he included in his submittal. That email states, in part: "Todd, As per our conversation I hit my first hurdle, please see the attached plat and read through the details on it. There are restrictions on Limits of Disturbance and home square footages." Mr. Theobald averred that Ms. Wasden caught the issue and notified people about it, but it disappeared.

He stated that Planning Staff acknowledged the issue early in the process, yet a decision was made to turn that recognition around. The Plat Amendment processes could have been reviewed, the CC&Rs could have been reviewed or they could have reviewed all of the approval documents. He noted that he did that through GRAMA requests and found the information.

Mr. Theobald argued that the planning restrictions are applicable to any current and all future development in Willow Ranch. The Planning Department had no authority to disregard or modify legally binding setbacks illustrated in the Limits of Disturbance on the plat and ordinance. Only the City Council is authorized and obligated to amend and enforce the plat. He submitted that the Planning Department usurped the City Council's authority and amended the plat itself. As part of his contacts with the City, he notified them of the construction of the sauna and explained that someone was going to lose a lot of money if he was correct. He described this as a firestorm that culminated in one big mistake.

Mr. Theobald mentioned the recusal of Chair Gezelius and stated that he had hoped that she would testify as to what she voted on when the plat was approved. He felt that her inability to comment at all was not appropriate and indicated that if this matter proceeded further, she would be called to testify. He referenced a December 2, 1992, document that showed the intense study of this area. This was the first area that had a conservation easement and the City had just adopted the Sensitive Lands Overlay. He asked Director Milliken to read his exhibit, as he was unable. She read it as follows:

"The property will be zoned Estate and ROS (Recreation Open Space). The entire development parcel (parcel D) will be zoned Estate with the understanding that the development will be limited to those areas shown on the master plan. The only exception is a small strip of ROS along Meadows Drive where the zone boundary will be set in compliance with the Sensitive Lands Ordinance 50 feet back from the edge of the stream. The balance of the property will be zoned ROS."

Mr. Theobald noted that the key phrase was "The entire development parcel (parcel D) will be zoned Estate with the understanding that the development will be limited to those areas shown on the master plan." This was adopted by City Council. He then showed the setbacks

and argued that nothing is to be built outside of those Limits of Disturbance, as dictated by the Planning Department.

Mr. Theobald next referenced the letter from the developer, Richard Dudley. Mr. Dudley was surprised that the owner and the HOA were so blatant to risk getting this project done. Mr. Dudley did not want to get involved, but he recognized what was happening and had to come forward. Mr. Theobald highlighted the following from Mr. Dudley's letter, attached as Exhibit E to Appellant's Submission:

"We did however fully intend and thus designed each lot to have prescribed Limits of Disturbance (LOD's) and for 3, 4 & 5 the easier description of a setback was all that was needed."

Mr. Theobald argued that there should have been no question as to what those lines represented, and if there were questions, other documents should have been reviewed. He continued by referencing Appellant's Submission and noted that Section 4 showed the frequency in which the City, and its various departments, referenced the CC&Rs.

Section 5 outlined the Building Permit Process. Mr. Theobald did not want to condemn the Planning Staff and Planning Department, because he knows they work hard to get things right. The Planning Department is understaffed and overworked and working remotely. However, there should have been more diligence throughout, not only by the Planning Department but also by the Building Department. He understood that Council intended to take a hard look at how those departments function and operate.

He referenced the emails from August 2020 that showed Ms. Wasden's recognition of the issue of Limits of Disturbance and the owners' response. Mr. Theobald noted the suggestion of a telephone call between Ms. Wasden and the builder, but the GRAMA request did not result in any information as to what was discussed. He surmised that the cancellation of the permitting for the project some months later was ostensibly due to the owner wanting to act as the owner/builder and build the project for less money.

Mr. Theobald directed the Board to the logbook included in Appellant's Submission, entitled 'Park City Plan Review Report.' He referenced the entry on 1/20/2021 where an HOA letter was requested. He argued that HOA approval might not be mandatory, but it could address potential issues that the HOA was on board with what was being built. No such letter was ever received, but the builder/owner inferred that he had HOA approval. He then referenced the 1/22/21 entry by Ms. Wasden identifying a document that was never provided pursuant to the GRAMA request. He felt that this would be a key document.

The log reflected that on 4/26/21, it was recognized that square footage was a problem. He read from this entry as follows: "The addition would exceed what is allowed. It appears a Plat Amendment to change the allowed maximum square footage would be needed..." Mr. Theobald averred that this was a red flag that should have been investigated. He commented that there were several entries with no resolution indicated.

Mr. Theobald referenced Appellant's Submission Exhibit I, which references the first time he received any rationale for the issuance of the permit. This rationale was provided on or before November 9, 2021. Mr. Theobald responded to each of the City's points, and he felt that the City's rationale was written in hindsight and served only to justify the actions taken. He concluded that the plat was subject to mandatory enforcement in compliance with the expressly stated zoning provision that is reflected on the plat. The Planning Department usurped the authority of the City Council by amending the Limits of Disturbance as shown on the plat. The City Council also abdicated its duties by allowing the Planning Department to do so. He stressed that the Council did not know that they were abdicating this authority to the Planning Department because there has been no pathway to the Council. The Mayor could not be expected to attend a couple of meetings and then educate the Council.

Mr. Theobald argued that it is the City that writes the CC&Rs with the developer and the declarant. In the final approval of the plat in 1993, the City had significant information to adopt the plat. Prior to recordation of the plat, the Community Development Department (now called the Planning Department) and the City Attorney shall have reviewed and approved the CC&Rs, which included restrictions on architecture and use, before turning it over to the homeowners. He questioned why the Planning Department should not now look at those CC&Rs. He added that Staff is required to revise the language in the CC&Rs before adopting the plat. The City knew what it was doing; they wrote the CC&Rs, they developed the plat, and owners were not allowed to build outside the Limits of Disturbance.

Mr. Theobald concluded his presentation and recognized that the decision on this appeal would be very consequential to the City. He felt that Council was required to enforce the Code.

Chair Pro Tem Wintzer thanked Mr. Theobald as a citizen for his energy and effort in his presentation. She also thanked Staff and understood that this hearing was difficult for everyone. She appreciated everyone's willingness to look at things and allow the Board to evaluate them.

The Board took a short recess.

Chair Pro Tem Wintzer asked Mr. Theobald's attorney if there was anything he wished to add. Mr. Bergman indicated that he did not have any additional comments but emphasized that this case was about the enforcement of a City plat. Special Counsel Plane stated that if the Board did not have any questions for Mr. Theobald, then Staff would present their case.

Assistant Planning Director, Rebecca Ward thanked Mr. Theobald for his time and energy on this appeal. She stated that they have spent many hours meeting and discussing various land use concerns over and above the instant matter. She remarked that the Planning Department recognized that this was a serious matter involving the way that plats are recorded and interpreted, the underlying Codes, and how Building Permits are evaluated. She added that the Planning Department is very familiar with plats and spends a great deal

of time evaluating plats as part of their functions. She explained that the Planning Department was looking at this plat from the beginning when this application was filed.

Assistant Planning Director Ward offered clarifications on what this plat says and what it does not say. She acknowledged that the City approves CC&Rs, typically with respect to affordable housing. However, the property owners may amend CC&RS because they are part of the governance of the particular neighborhood. She explained that the Planning Department looked to the Land Management Code and the ordinances that enacted and approved the plat and interpreted the plat according to the governing documents. She stated that this property was thoroughly analyzed in several public meetings as part of the annexation process, originally referred to as the Peterson Property, and then eventually as a Subdivision and MPD.

The thoughtful analysis of this property was reflected on the plat. The subtleties of what is and is not shown on the plat are reflected in the CC&Rs; however, the CC&Rs are not governing for purposes of Staff's interpretation. She commented that in this case, the CC&Rs support what was proposed and built on this lot.

Assistant Planning Director Ward explained that the Subdivision Plat was a detailed document that delineated and distinguished things such as the wildlife corridor, building pads, and Limits of Disturbance. She noted that Limits of Disturbance were specifically defined for Lots 1, 2, 6, and 7, whereas Lots 3, 4, and 5 had different parameters for their development. She stated that Lots 1, 2, 6, and 7 were governed by a house building pad, a barn building pad, and the wildlife corridor. The 1992 Land Management Code stated: "The Limits of Disturbance line indicates the area in which construction activity must be contained. Construction disturbance may not extend beyond the Limits of Disturbance line as indicated on the plat or Master Plan unless the Community Development Director has amended the Limit..." per two subsequent sections in the Code.

Assistant Planning Director Ward continued by explaining that Limits of Disturbance or building pad lines were and still are not required for all subdivisions. There is discretion at the time of subdivision review. The Code states: "Limits of Disturbance or building pad lines must be designated for all new Master Planned Developments...if the Staff determines that there is significant vegetation on the site, or if it is important to clearly designate future building locations."

She stated that when Staff reviewed this plat, as well as the Planning Commission meetings and City Council review, there were no Limits of Disturbance for Lots 3, 4, and 5 that were specifically discussed. The recorded plat was attached to the Planning Commission and City Council reviews and includes the Legend and Defined Terms for the future development of this subdivision.

Lots 3, 4, and 5 are subject to different regulations from the larger equestrian lots. She stated that these lots were excluded from the Limits of Disturbance table and are governed by setbacks. Pursuant to the Land Management Code, there are some exceptions to setbacks for Accessory Structures. Assistant Planning Director Ward offered that Lots 3, 4,

and 5 have designated home square footages for the single-family dwelling. The more restrictive setbacks for this Subdivision are beyond what would normally be required for single-family dwellings within the Estate Zoning District.

She reiterated that the Planning Department reviewed the applications for the Building Permits against the plat and the documents approving the plat. Staff determined that the sauna was an Accessory Building and was an allowed use in this zoning district for this lot, which does not have a Limit of Disturbance indicated on the plat. She presented sections of the Land Management Code pertaining to Accessory Buildings.

Assistant Planning Director Ward stated that Staff had not received any public input other than from Mr. Theobald and persons affiliated with Mr. Theobald. She reiterated that in this plat, the subtle details indicate how the future development of these lots was contemplated. Staff recognized the concern over how this interpretation might apply to other lots within this subdivision; however, based on the documents and discussions that went into approving this plat, they found that the sauna complied with the Willow Ranch Subdivision, as well as the Land Management Code.

Attorney Harrington stated that the City does not write CC&Rs. They approve them as to form, especially in Condominium plats. With regards to Appellant's reference to Planning Commissioner Hall's application, he argued that the context of that application was left out of Mr. Theobald's presentation. He explained that the context was that a prior owner had requested a Plat Amendment to change away from the CC&Rs and received approval to do something different that was previously in the plat and matched the CC&Rs.

After Planning Commissioner Hall purchased the property, they wanted to be consistent with the CC&Rs. He stressed that the City did not require certain things in the CC&Rs. Attorney Harrington referenced the impact of CC&Rs on nightly rentals. He stressed that referencing CC&Rs as part of an application does not mean that the City enforces or references them in the land use determinations because it is not allowed. The City can only base a land use decision on a land use regulation as defined by the State Code. He emphasized that CC&Rs are not land use regulations, therefore, the City cannot support a denial based on an interpretation of the CC&Rs or the developer's interpretation of the CC&Rs. He argued that the Planning Department must base their land use decisions on the plat, the ordinance, and the zone in effect at the time of application. This is all that the planner can look at as a basis for their decision.

Attorney Harrington reiterated that the City retained its right to object on the ground that if the appeal is based on the decision of the Building Official to rely upon a previously issued permit, for which the appeal period has expired, the Board's review would be limited to that issue. The file reflects that there was a properly issued Building Permit, so the Board cannot re-evaluate the issuance of that permit. He argued that the Building Department Officer properly determined that a Building Permit was validly issued, which formed the crux of the response to the complaint. For purposes of disposition of the complaint, he urged the Board to uphold that determination. He added that if the appellant wanted to challenge the legality outside of the process of this complaint, there were other avenues as previously outlined.

Chair Pro Tem Wintzer asked the Board if they understood the scope of review as outlined by Attorney Harrington. In response to an inquiry from Board Member Franklin, Attorney Harrington stated that the Board's ability to review a written decision was focused on the letter from the Building Department Officer in response to a complaint. Justification for the original decision would be a different decision for this Board because the Board does not have before them a written record of the Planning Department's decision from December. Normally, there would be a record demonstrating the basis for review of a Staff decision. Here, the Board has before it a conclusion without a basis to enforce, which is the December action.

Notwithstanding the foregoing, Attorney Harrington submitted that Staff correctly issued the Building Permit.

Special Counsel Plane explained that they started with the fundamental question of what triggered the appeal being the issuance of the Building Permit, appellant's actual or constructive notice of the Building Permit, or the December 21, 2021, letter from Mr. Thacker declining to pursue an enforcement action.

Staff's position was that the first two events were land use decisions that would trigger the ten-day appeal time under State law and City Code. She went on to explain that if this is viewed as an appeal from the discretionary decision to not pursue an enforcement action, the December 21, 2021, Thacker letter, then the appeal would be timely. She explained that Attorney Harrington made the point that the Board does not have a record of that determination. Special Counsel Plane highlighted Assistant Planning Director Ward's presentation demonstrating the legal standard by which Staff issued the Building Permit. That decision was non-discretionary if the applicant met the requirements outlined in the Code.

Special Counsel Plane stated that if the Board viewed this as an appeal from the December 21, 2021, letter, there was no basis in the record to make a determination and from Staff's perspective, which is because that decision was not a land use decision. Rather, it was a follow-up to a complaint that was a discretionary decision by the Building Official not to pursue an enforcement action. She reiterated that Attorney Harrington's position was that the Board did not have a record of the basis of that denial was, other than they reviewed what the Planning Department had done. If the "appealable decision" were the December 21, 2021, letter, then they would need to discuss the basis for the findings whether they reverse or uphold that decision.

Chair Pro Tem Wintzer sought clarification from Special Counsel Plane as to whether they could not consider whether there was a possible error by Staff. Special Counsel Plane clarified that she was not recommending any particular appealable event, but if they were going to rely on Mr. Thacker's letter, the Board would have to determine the basis for either upholding or reversing Mr. Thacker's decision because there were no specific Findings of Fact, Conclusions of Law, Conditions of Approval, or anything else normally available.

Chair Pro Tem Wintzer did not recall anyone directing that Staff provide Findings of Fact. Board Member Franklin asked whether the Board needed to define their thinking in terms of constructive notice to arrive at a trigger date, or whether the Thacker letter was the final action.

Special Counsel Plane agreed that whatever decision the Board makes, the people drafting the decision would need to understand what decision is either being upheld or overturned. If it was the decision to issue the Building Permit, the Board must identify the trigger date to determine if the appeal was timely. If the Board upholds or reverses the December 21, 2021, discretionary decision to not enforce, then Board must give Staff some basis for its decision.

Mr. Theobald stated that part of his submission clearly stated that the City writes CC&Rs, or portions of them. The City writes CC&Rs and makes sure that they comply with the plat on architecture and uses.

Chair Pro Tem Wintzer understood that Appellant claimed that in 1992, the Planning Department had contributed to the CC&Rs and asked if he was claiming that the City presently wrote the CC&Rs. Mr. Theobald could not respond and referenced his prior exhibit.

Mr. Theobald next referenced Assistant Planning Director Ward's statement that there was no Limit of Disturbance on the Site Plan. He noted that there is a Limit of Disturbance on the survey, which accompanies the Site Plan. The survey showed it but did not describe it; the Site Plan did not show it and it should have.

He further stated that he filed his complaint on certain matters, which Mr. Thacker denied. Mr. Theobald stated that he filed another complaint to add to the original complaint and included a complaint against the City for not enforcing. He stressed that this was a separate addition to his original complaint.

Chair Pro Tem Wintzer confirmed that Attorney Harrington had concluded his presentation. She noted the owner would not make any presentation. Director Milliken confirmed that the owner was not present.

Chair Pro Tem Wintzer invited comments or questions from the Board on Staff's presentation. There being none, she opened the public hearing.

Frode Jensen gave his address as 2812 Holiday Ranch Loop Road and is the neighbor to the Willow Ranch Subdivision and Mr. Theobald. He stated that he lives closer to the sauna building than Mr. Theobald does. He lauded Mr. Theobald for explaining the concerns that several of the neighbors have. He read the Appellant's Submission and felt it made a compelling case that the setbacks and Limits of Disturbance area on Lot 4 identified on the plat override the exception in the Code for Accessory Buildings. He argued that the City should not have granted the Building Permit.

Mr. Jensen felt that Mr. Theobald meticulously researched the circumstances relating to the approval of the Subdivision in 1992/1993. The appellant spoke with the developer and officials involved at the time. Mr. Jensen noted that there was significant controversy about developing this tract and it seems clear that the intent was that construction inside the setbacks and outside the Limits of Disturbance was to be prohibited. He offered that Mr. Theobald made a clear and compelling case that the CC&Rs explained the plat restrictions and was not asking the City to enforce the CC&Rs. Mr. Jensen concluded by stating that the City made a mistake in issuing the Building Permit. He believed that the applicant should have been told to seek a Plat Amendment and that would be the correct result.

There were no further public comments. Chair Pro Tem Wintzer closed the public hearing.

Board Member Franklin asked about the Record of Survey and Topographical Map contained in the Staff Report. She noted that it appeared that the Record of Survey was commissioned by the first applicant, and wondered if when the application was withdrawn, the Record of Survey was withdrawn as well. She asked if the Record of Survey was used in the application that was ultimately approved. Chief Building Official Thacker responded that by comparing the Survey in the packet with the one that is currently with the Building Permit, they match.

The Board then began its deliberations. Chair Pro Tem Wintzer asked about the first note on the plat that referenced "Buildings shall be constructed within the limits of shown building pad." Assistant Planning Director Ward explained that pursuant to the Legend, only Lots 1, 2, 6, and 7 have building pads for the home and barn. For the equestrian lots, the buildings could only be constructed on those pads as designated by the Legend on the plat.

Board Member Franklin understood this structure would be an approved Accessory Building on Lots 3, 4, and 5 and could fit within the definition of "Buildings." Assistant Planning Director Ward explained that for Lots 3, 4, and 5, Staff did not interpret those to be "building pads." Board Member Franklin felt the clarification of "pads" versus the Limits of Disturbance Area being the exterior perimeter of the defined line, and the defined line should not be called a "building pad" for Lots 3, 4, and 5. Chair Pro Tem Wintzer felt this was the crux because the dotted line for Lot 4 shows the space in which the owner could build. She understood that all buildings had to be within that area. She recalled that she had the benefit of remembering how this was set forth.

Board Member Franklin mentioned that item number 8 on the Record of Survey stood out to her. She felt this to be an unfortunate situation and did not feel that there was any malfeasance or negligence. She also felt it unfortunate that there was no attentiveness by the owner, and this put themselves and City Staff in a difficult situation due to the absence of information. Board Member Franklin expressed that the plat of record clearly identified the boundaries in which the owner was allowed to build.

Board Member Wilson agreed with these statements and felt that there was no willful deceit. She felt it was clear that the spirit and intent of everything that went into drawing this plat

was that there should not be building in that area; however, as a City Planner approving a permit, it was not clear when just looking at the lines on the plat. Board Member Wilson added that she could not say that the homeowner knew they were doing anything wrong, nor did the City feel like they were issuing a permit that should not have been issued. She questioned who should bear the brunt of this mistake.

Chair Pro Tem Wintzer agreed with the statements of Board Members Franklin and Wilson. She added that the way that Staff reviewed it is different now; she felt that Mr. Theobald was correct when he commented about the climate, because the City was going through turmoil following the death of Bruce Erickson, and felt it was a prime medium for mistakes to happen.

Chair Pro Tem Wintzer added that it was the homeowner's responsibility to ensure that he gathered all of the required documents. She felt that looking at the plat along with the intent, all of these lots are large, and it made sense that the dotted lines for Lots 3, 4, and 5 would be the Limit of Disturbance. She offered that it was illogical to think that the original intent was to allow an owner to encroach on the other neighbors by going outside of these boundaries. She understood it was not the City's responsibility to enforce CC&Rs, but it is the City's responsibility to study the plat. Had the homeowner done his job correctly, the City would have easily been clued in to what was going on. She appreciated the work done by Mr. Theobald as a citizen.

Special Counsel Plane walked the Board through the standard of review to be applied to this appeal. She reiterated that the Board was reviewing this matter *de novo*, which means that they would look at it with fresh eyes and not rely on Staff's determination. The Board was to determine if the decision was correct. She affirmed that the review was limited to the issues brought before the Board. She commented that the appellant had the burden of demonstrating that an error occurred. The burden was not on the City to demonstrate that they were correct. The Board's authority was to determine the correctness of the Staff's interpretation and application of the plain meaning of the regulations.

Special Counsel Plane added that under Utah law, the land use authority must interpret and apply land use regulations in favor of the applicant unless the land use regulation plainly restricts the land use application. She highlighted the importance of this because zoning ordinances are in derogation of private property owners' common law right to use their property as desired.

Chair Pro Tem Wintzer noted her statement that Mr. Theobald demonstrated to her that the Land Management Code was not correctly followed by not referring back to the plat for Lot 4. Board Member Wilson stated that the appellant demonstrated what was intended with the approval of the plat. She referenced the emails where the City Planner pointed out the hurdle caused by the Limits of Disturbance, and the homeowner pushed it through rather than investigating more thoroughly.

Chair Pro Tem Wintzer also stated that Mr. Theobald demonstrated that this is something that the City needed to pay attention to, for as Park City continues to grow, they must remember that they are a community that tries to respect neighborhoods. The neighbors of

the Willow Ranch Subdivision spoke up and were assured that there would be protections put in place. She commented that in this instance, protection was taken away.

Board Member Wilson agreed that the appellant demonstrated the interpretation or application of the plain meaning of land use regulations restricted the land use application. She felt that the plat showed the setbacks within the Limits of Disturbance space. She added that she would like to put the same focus that the BOA puts on historic site reviews to the sensitivity to the lands, including wetlands and open space. She added that just because they have open space, does not mean that there needs to be something on it.

Chair Pro Tem Wintzer added that the homeowner should have known that they had a limit of 4400 square feet.

Special Counsel Plane looked to Staff for input on the Findings of Fact. Attorney Harrington expressed that the Board's comments provided Staff with a basis for preparing proposed Findings. He clarified the owners' intent and noted that the comments made included a lot of assumptions on things that Staff addressed in their review. While the Board might determine that those were incorrect, he stressed that the level of review and conclusions were based on the appropriate information. He added that there was no obligation that was not fulfilled by the owner. He added that the characterization of this as a perfect storm might be most accurate in that Staff felt that they did what the State required of them to strictly apply land use regulations, whether they were correctly written or not. He noted that reasonable minds might disagree about whether the plat clearly stated that there were limits of disturbance. In support of the integrity of Staff and the owner, he reiterated that the State required Staff to interpret it narrowly.

Chair Pro Tem Wintzer clarified that the Board did not believe that the owner was trying to be deceitful. She felt that this was a good example of the life all were living at the moment. She noted that it was highly possible that the owner had no idea of these rules and regulations. She stressed that the Board was not implying that there was anything deceitful on the Staff's part; she felt it was a good example of the pressure that would allow them to recalibrate. She felt that this would help everyone.

Mr. Theobald expressed that there was a path for the applicant to keep the sauna, and that path was a Plat Amendment.

Board Member Franklin commented that the Board's intent was not to make any of this punitive.

In response to an inquiry from Chair Pro Tem Wintzer, Attorney Harrington felt that the Board could make a motion to direct Staff to propose Findings consistent with the Board, which would then be presented in a meeting to ensure that they reflect the basis for the decision.

In terms of the proper wording for the motion, Special Counsel Plane suggested that the motion include a direction to City Staff to prepare Findings of Fact and Conclusions

consistent with the Board's discussions that Appellant met his burden that the land use decision was incorrect.

MOTION: Board Member Franklin moved to GRANT the appeal and direct the Staff to return with Findings as summarized by the City Attorney. Board Member Wilson seconded the motion.

VOTE: The motion passed with the unanimous consent of the Board.

Special Counsel Plane indicated that pursuant to Code, Staff had 15 days to provide the Findings to the Board for review. Attorney Harrington asked if the Board would consider an electronic meeting to review the Findings.

Mr. Theobald asked about next steps. It was noted that the Planning Director would begin to move forward by returning with the Findings of Fact. Chair Pro Tem Wintzer suggested that the Planning Director and Chief Building Official begin to start thinking about a path forward. Special Counsel Plane reminded that this involved a highly regulated land use process that is dictated by State law and City Code.

7. ADJOURN

The Board of Adjustment Meeting adjourned at 8:39 p.m.

Approved by _____
Mary Wintzer, Board of Adjustment Chair Pro Tem