



## Appeal Hearing

John Ely / Labrie

### Time and Location:

- Mr. Ely's appeal will be heard on Tuesday, September 13, 2022, at 1:00 pm in the Old Church Meeting Chamber. 114 S Mill Street Virgin, Utah 84779

### Appeal Authority:

- Per Section 16.04 (specifically subsections F.4. and G.7. of the Virgin Town Code, the appeal authority for both Level 1 and Level 2 conditional use permits is the Virgin Town Council. They will be the body hearing Mr. Ely's appeal.

### Scope of Appeal:

- Pursuant to Section 16.06.A. of the Virgin Town Code, only the applicant, the Town or an "Affected Entity" may bring an appeal. Mr. Ely needs to be prepared to show how he is an "Affected Entity" in light of the Town's definition of "Affected Entity" found in Section 2.12 of the Virgin Town Code or how he is an adversely affected person as their term is used in 16.12.A of the Virgin Town Code.
- Pursuant to Section 16.06.A.1. of the Virgin Town Code, the appeal will be *De Novo* (meaning that it will be all new). A *De Novo* review means the Town Council need not take any findings of the Zoning Administrator or the Planning Commission as fact and can independently weigh the evidence presented. A *De Novo* review means that the appellant and the Town (or the CUP recipient) and provide new evidence to the Town Council during the appeal.
- Using all of the evidence previously presented to the CUP issuing body (and any new evidence) the Town Council's job is to determine whether the issuer made the correct interpretation and application of the law when issuing the CUPs. This is called the "Correctness" standard of review and it is codified in Utah Code 10-9a-707.
- Pursuant to the Utah Land Use & Management Act (LUDMA) and Section 16-04.C. the Town can issue a CUP if the issuing body (Zoning Administrator or P&Z) finds that, with designated conditions applied, the applicant can fully mitigate all identified adverse impacts of the proposed use.

### Hearing Procedure:

- Chapter 16 of the Virgin Town Code (Conditions and Conditional Uses) refers the Town Council back to the procedure followed by an appeal authority hearing the appeal of other types of land use decisions as stated in Chapter 6 of the Virgin Town Code.
- *Threshold Matters.* As a matter of efficiency and judicial economy, the Town Council need to address the issues of Standing and Subject Matter Jurisdiction. Essentially the Town Council needs to decide up front:
  - Whether Mr. Ely is an Affected Entity or an adversely affected party.
  - Whether there is subject matter of the appeal is ripe for decision by being asserted timely before the running of the 15-day appeal period found in Sections 16.04.F.4., 16.04.G.7 and 6.12.A.



- Of importance is to note several procedural high points set forth in Chapter 6:
  - The Appellant, the City and the Permit Holder all have the opportunity to be present with legal counsel of their choosing and the opportunity speak to defend their interests (Section 6.12.J).
  - Mr. Ely should not be allowed to present written documents or tangible evidence that were not presented to the Town Clerk when the appeal was filed. (Section 6.12.D)
  - The Hearing will be recorded (and later transcribed by a certified court reporter if a petition for review is later filed with the District Court by one of the parties). (Section 6.18.D)
  - The Hearing is a public meeting to which the public may attend. However, the mayor or chair of the meeting should not allow statements from the audience to be made unless requested to do so by the Town Council. Cheering and boo'ing is not appropriate and any persons doing that should be asked to leave. Public clamor has no place in an Appeal Hearing.
  - The Appellant will be asked to go first and set forth all facts and every theory of error and relief it could raise in District Court. (Section 6.12.E)
  - Both the City and the Permit Holder will be given the opportunity to respond and provide its evidence in support of retention of the permit. (Section 6.12.J)
  - The appellant (Mr. Ely) has the burden of proof. Meaning he must show via credible evidence that the land use authority (Planning Administrator or P&Z) erred. (Section 6.12.H)
  - The rules of evidence will be relaxed; however, the parties (or their legal counsel) can make objections if they would like to preserve those objections on the record (incase the Town Council's decision is appealed to District Court)
  - For the sake of time, the parties may call witnesses however if a witness is present, the party or their legal counsel can proffer (summarize) the testimony of the witnesses followed by a request to have the witness affirm that is what they would have testified under oath if called to the stand.
  - The Town Council, may (and likely will) ask questions of any party while they are making their oral argument
  - After all parties have presented their evidence the Town Council should allow each party to make a summary closing statement.
  - After all, three parties have had their opportunity to present their positions to the Town Council, the Council may do one of 2 things:
    - Take the matter under advisement and issue a written decision within a reasonable time thereafter. (Section 6.12.J)
    - Take time to deliberate privately (via executive session) and then go back into the public meeting and issue a summary of its ruling. Even if the Town Council chooses to issue a summary oral ruling it may exercise its rights to issue a more formal written ruling outlining its findings and conclusions within a reasonable time thereafter. The Town Council should advise the parties if that is their intent.

#### Further Appeal:

- Please be advised that if you disagree with the Town Council's ruling on your appeal, you may petition the 5<sup>th</sup> District Court in and for Washington County to review the Council's decision so long as:



- The petition for review is filed within 30 days of the Town Council's ruling.
- The petitioner is adversely affected by the Town Council's ruling; and
- The ruling of the Town Council is deemed final 30 days after a written decision has been issued by the Town Council or waived by the Council.

Issues Mr. Ely should be prepared to address:

- How he has standing to appeal (ie how he is an "Affected Entity" or an "adversely effected person").
- How he is not time barred from making this appeal as the two CUP's being challenged were issued months prior to his appeal.
- What adverse effects of the uses permitted in the two CUPs were not addressed or mitigated with conditions issued by the Zoning Administrator or the Planning & Zoning Commission.