CACHE COUNTY CORPORATION
DEVELOPMENT SERVICES DEPARTMENT

JOSH RUNHAAR, AICP
DIRECTOR / ZONING ADMINISTRATOR
PAUL BERNTSON
CHIEF BUILDING OFFICIAL

179 NORTH MAIN, SUITE 305 LOGAN, UTAH 84321♦ (435)755-1640 ♦ FAX (435)755-1987

Board of Adjustments Minutes: 22 March 2012

Item **Page**

1. Administrative Appeal: Cherry Peak Ski Area 2

Cache County Board of Adjustments

Minutes for 22 March 2012

Present: Chris Harrild, Josh Runhaar, Brooks Tarbet, Lee Atwood, Nolan Gunnell, Hal Olsen, Angela Fonnesbeck (legal counsel for the Board), Megan Izatt

Start Time: 4:01:00 (Video time not shown on DVD)

Atwood welcomed everyone.

4:02:00

Rob Smith recused himself due to a conflict of interest.

Minutes

Will be approved at next meeting.

Agenda

Tarbet *motioned to pass the agenda,* ***Gunnell*** *seconded;* ***Passed* 4, 0.**

4:06

Administrative Appeal – Cherry Peak Ski Area

Kirk Robinson I am here representing the appellant. The planning commission has their place to look out for the county, as does this body. A conditional use permit (CUP) is something that there should be in case a proposed use of land is incompatible with the existing use of adjacent use of land. Otherwise the CUP would make no sense. The difficulty of that is trying to determine whether that use is compatible or not. Here we have a ski area and it would involve taking out vegetation in areas, such as to improve the road, denuding the slopes and drilling a well. That road does intersect the DWR (Division of Wildlife Resources) management area which was set aside in 1989 explicitly for crucial winter range for deer and elk. Sportsmen fund and local citizens helped that to happen. Our main contention, one of two, is that this ski resort is incompatible with that purpose due to the kinds of impacts that are required for building and maintaining a ski resort. A study was done which didn't address any of the literature concerning offsite impacts. A review of that study was done but basically repeated what the Stantec wildlife study said. Both studies agree that there would be impacts and recommend superficial ways to combat those impacts. Before continuing with that, there are citizens that have donated property to the wildlife area. Some of the peoples are here and live right on the edge of this. I think under any reading of all the requirements for standing under a traditional test, that many of them will have standing.

Olsen Why hasn't the DWR, and so forth, come forth with an appeal?

Mr. Robinson That is not a question I feel obligated to answer. We know a representative for the DWR spoke against this and so did local biologists. I don't know why they aren't speaking up now. I would suggest politics. Members of the Rocky Mountain Mule Deer and Elk foundation did and are speaking up now. We know and recognize that reasonable people can come to different conclusions from the same information. But we also know that it is no good just listening to evidence and deciding with no rational connection between the evidence and the decision. That rational connection needs to be demonstrated and needs to be in the record and our contention is that it isn't there. What you have is a list of findings of fact without any discussion with how those findings of facts were derived. Then you have a list of best management practices that concern only onsite issues; none of the offsite issues that we are concerned with. Then in the developer's brief you only have one sentence about the issues that we are concerned with and in the County's brief the offsite issues aren't even discussed. I submit that your challenge is to look and see if there is a rational connection in the record between the evidence and the decision. As you do that you should also listen to the discussion by the commissioners following the meeting on Feb. 2. I am going to read a few of the comments from that meeting. Commissioner Ellis said "If someone is willing to spend their money I'm fairly well satisfied that they can be the judge of whether that is worthwhile. We've always pretty well had to leave the judgment of business viability to the private interests that are spending the money and taking their own risks." That's just a way of sloughing off the responsibility as I see it. If they are willing to get involved in this they obviously have a business plan and it's going to work out fine and be a benefit to the community. Well, I'm sorry but that doesn't cut it. There is no rational connection between the evidence and that response. One more, Commissioner Larson says "We never get into the business of evaluating business plans." When David Rosenberg stated that we we're talking about the impact on the community and the communities' welfare, not whether we are evaluating business plans. He just got cut off and the issue wasn't even addressed. Another commissioner stated "in a case like this, I'm just not smart enough to decide on the wisdom of this. My decision will be made on my understanding of the ordinance not necessarily if that is the best course or a wise course that provides for the general well being." What we think is required is something in the way of how the offsite impacts are going to be compensated for. You've got to do something to offset or compensate for the impacts that will occur from the activity of the resort. The only thing I can think of is to purchase land somewhere else and set it aside. But there is no discussion of that at all. One final thing to the welfare and wellbeing issue, what happens if this goes under? This is not just speculative. I've done a lot of research on this.

Atwood We'll give you a wrap up and could you please address Mr. Olsen's question about the DWR?

Mr. Robinson I did address that.

Olsen You said you didn't have to answer that.

Mr. Robinson I don't have an answer for that. They are not my client.

M. Atwood Obviously they would feel as much impact or more.

Mr. Robinson They did state that they were against this. Why they haven't come forth now I don't know and I don't have an answer.

Atwood You have one minute to wrap up.

Mr. Robinson The base of this resort is 5600 feet and the top is only 600-800 above that. We are having warmer winters and fewer cold days. There is going to be less snow in the future according to science. This resort will not have any of the amenities that make other resorts viable like condos, snowmobiling, horseback riding in the summer, mountain biking. They will have a zip line in the summer. I think the citizens of this community deserve to feel confident that this is going to make it. If it doesn't survive the canyon is going to be destroyed. I have it detailed out in my brief if you would like to look more at that.

Atwood The county will have 10 minutes.

Josh Runhaar I am going to use PowerPoint. In looking at this issue, the appeal of the CUP that was issued by the Planning Commission, there are a couple of things when discussing land use authority. One is there is a substantial body of case law that shows that county's and municipality's land use decisions are entitled to a great deal of deference. Essentially when you are looking at land use decisions, the County in this case, is typically held to be valid unless proved otherwise. The burden of proof lies on the appellant. When looking at standing, the traditional test is that an appellant must suffer a distinct and palpable injury that gives them a personal stake in the outcome of the dispute. Then you have the alternative test for standing that is an interest necessary to assist to resolve any actual injury. They have also made the claim that the decision was arbitrary, capricious, or illegal. What that means is that the decision is not supported by substantial evidence, see Wadsworth v. West Jordan. Substantial evidence is typically referred to, which means that there is more than a mere scintilla; it means such relative evidence that a reasonable mind might accept or adequate supported conclusions. That is what we really are looking at, did we have substantial evidence when we made this decision.

Atwood Back to Mr. Olsen's question, did the Richmond wildlife management area contact you or put in any information, or the National Forest, or Richmond City?

Mr. Runhaar I'll address that issue later in this presentation. Looking at water/waste water issues, the issue here is that the County does not have the final decision making authority on water/waste water issues. The County does not issue the final decision on water or waste water issues. The State of Utah does. That doesn't mean that we didn't place conditions on this, because we do have County Code that dictates to some degree how this works, but they basically have three options and we tell them that they need a permit from the State; we have no authority over it. The issue is not ripe for appeal as no final decision has been made by the State of Utah about that service provision and the county has no say in that decision.
On the wildlife issues the applicant did complete a wildlife study and that was later amended to address sharp-tail grouse issues based on the State of Utah concerns and comments. Due to the public and staff concerns as to the completeness of the study the county had an independent review of the study completed by JUB. The independent review provided some additional comments and best management practices that were incorporated into the conditions of approval. JUB found that in regards to the Stantec Wildlife study that "the conclusions that were derived in

terms of potential wildlife impacts are consistent with the caliper of the proposed project action". The Planning Commission weighed the issues and evidence made a decision based on the facts. That is their job. When there are competing facts and interests, they have to make a decision. They made that decision based on the evidence and facts. Additionally they required a number of mitigating strategies for the concerns that were raised in the public and administrative record. We see issues, we raise those issues, and mitigate those issues or change the projects as needs be.

Atwood Is that your answer to the wildlife management?

Runhaar We are getting there. When looking at impacts to wildlife, there is no debate that there that there will some impact to habitat by the ski resort. If you look at the map enclosed, there are number of appellants that have either developed land or built homes within the habitat range of the elk and mule deer. The amount of acreage that has been disturbed by the appellants is about 84 acres. We impact habitat no matter how we develop. The question is how much do we impact and how do we deal with those impacts.

Atwood The 84 acres that have been impacted by those homes, are in the yellow?

Runhaar Yellow and orange. Whether or not the entire site has been disturbed I can't tell you.

Atwood So at least one home in that area.

Runhaar At least one home on those parcels. We try to look at those issues and mitigate them the best we can. In regards to general well being and financial concerns the county's responsibility is limited to ensuring that the infrastructure improvements are built. When we deal with projects of this size, or smaller, we have development agreements and financial surety that are put in place for those infrastructure improvements that ensure they are built. This limits liability issues on Cache County. If the ski resort goes ahead, but doesn't have the road and water taken care of, the County has a way to ensure those improvements are done. The County does not review business plans of prospective business operations. If those businesses thrive or fail that is private market economy. We don't deal with those things. We hope businesses thrive, but whether or not they do is not something we look at for land use decisions.
Regarding issues of due process, CUP's are not required to have a public hearing. We do hold public meetings and take public comment at those meetings. We have had over 5 hours of discussion on this issue and nearly 2 hours of that was spent on wildlife issues. We had a great depth of information that we dealt with on this. In addition to the time spent in meetings we had a volume of public comment that came in. Each and every item was gone through by staff or the planning commission and we provided a synopsis of what the types of comments are and how we were dealing with them in the staff report. We dealt with it this way to ensure that all the public comment was heard. It's up to the Planning Commission to hear the evidence and when faced with competing experts or facts, to make a decision based on the evidence presented. The Planning Commission did make their decision based on substantial evidence. The anecdotal evidence provided by the appellants is not substantial. There is no factual evidence on the part of the appellant's showing substantial impact.
On compatibility issues, we look at compatibility as being capable of existing or living together in harmony; able to exist together with something else; consistent or congruous. It doesn't mean that we have to make land uses decisions that are completely satisfactory to everyone. If that

were the case, we would never build anything again, anywhere. The U.S. Forest Service and the DWR, the two primary landowners adjacent to this property, have not appealed. There is private property to the north, but the county has had no comment from them. If you look at the appellants, they are more than 1 mile away, some as far as 13 or 14 miles away.

Atwood Did the planning commission submit letters to agencies to let them know what is happening, and provide information so that they were aware of it?

Runhaar Yes. We submit the project to a state based website and any state divisions that would like to comment may do so and we receive that comment and review it. Any state division that would like to review the project and comment may comment on it. We have also requested and received comment from the City of Richmond concerning water. This won't be the first time that roads are built or rebuilt over pipelines.

Atwood The DWR sent the planning commission comments but they have not joined the appeal?

Runhaar Correct, DWR commented and several other State departments commented. We have received no comment from Richmond City, or the U.S. Forest Service or the Utah DWR regarding the appeal.

Atwood But they did comment on the conditional use permit?

Runhaar Correct. Most of the issues were addressed as matters of conditions or best management practices or other items in the action taken.
Final slide, we request that the Board of Adjustments uphold the planning commission's decision. The appellants have no standing to appeal the issue of water/waste water as the issue is not ripe for appeal; no final decision has yet been made. And because the final decision is outside of the jurisdiction of Cache County the State has jurisdiction in these matters.

Chris Daines I represent the developers who are defending the Commission's decision to grant a CUP for Cherry Peak Ski Resort. I am here to ask you to reach two to basic findings or rulings; number one that the appellants have not proved their allegations that the commission messed up. There are two ways that this conclusion can be reached. The first is to say that the Commission's decision that the ski resort meets the criteria for a CUP is supported in the record. The second way is that even if none of the criteria were met, the commission has the discretion to grant the CUP anyway and that the commission did not abuse its discretion. The second thing I would like you to find is that the appellants have not been adversely affected by the Commission's decision, in other words, they do not have standing to bring the appeal. We want you to reach all of these issues, in other words if your decision is that the appellants don't have standing we would still like you to go ahead and make your decision with regards to the merits and substance of the question of whether the commission messed up.
Did the commission mess up in deciding to grant the CUP? At the heart of the appeal is the allegation that the project doesn't meet three of the five standards for approval of a CUP. Here is what the appellants in their own words allege about the commission's work regarding those three criteria. "Appellants' contend that the standards and criteria for conditional use set forth in 17.06.070 in the County Code were not properly consulted in the granting of the CUP."
Another quote "the commission acted inappropriately and without sufficient data or evidence to

make an informed decision." That is what they have to prove to you to overturn the decision. The have the burden of proving that. It's simple to look at the record and see that the commission properly consulted the standard and had sufficient evidence to make an informed decision. The commission met 4 times over the course of five months and heard public comment and looked at reams of material submitted by the developer and those opposed to the ski resort. The data included a separate traffic study, wildlife study, an independent review of the wildlife study, not to mention a very detailed master plan. Here is another quote "this represents a rushed and hurried decision making process", end quote. Here's another one "the commission probably just wanted to get this matter out of its inbox." There isn't enough time in this hearing to go through the appellants particular assertions one by one and point out the flaws in their arguments and absence of fact. The stretched out and continuation of discussion is the stated goal of these appellants. Their desire for more studies and analysis is insatiable and they will never be satisfied with a study that doesn't agree with their position.

They express a concern for deer and elk, some of the appellants want to hunt and kill elk. Some of them would like to watch the surviving deer and elk; the wildlife study discusses some potential negative impacts and suggests ways to address those. The review also covered the same territory. According to the appellants the study and the review were not good enough and they wanted to discuss what additional studies might show. They cling to the hope that if enough scientists weigh in, other than those that performed the study and review, that there can be a consensus that the deer and elk will come to harm other than being shot and that there is nothing that can be done about it. Should we talk about whether the studies were good enough? That is what the appellants want, and you don't need to do that. Notice what happens if you descend in to this way of thinking. One is that you set aside common sense. They claim the noise will disturb the elk and deer. What has to be more disturbing is the rifle range on DWR property. The appellants say that the wildlife use the Cherry Creek stream for water during winter, but it doesn't flow during the winter. There won't be enough snow for the resort but there is plenty of snow for them to enjoy back country skiing within earshot of the resort. The second problem with descending into their way of thinking is that you ignore the property rights of the owners. These owners purchased the property in the 1960s, 10 or 15 years before the wilderness area was established and 20 years before the DWR purchased land. For nearly half a century, these property owners have been paying taxes on this land. DWR doesn't own the ground, Richmond City doesn't, the federal government doesn't own the land and the appellants don't own the ground. The owners haven't given away or sold a conservation easement. If you indulge the appellants in their endless requests for more studies you will indefinitely postpone the development and encourage a sense of entitlement to control the use of property that does not belong to them. The third problem if you descend into their way of thinking is that you lose site of the criteria that is established by law. They imagine and speculate that some deer and elk will be lost if the development were to go forward. Even if that were shown, and it hasn't been shown, it would not be contrary to the well being of the area. The ability of the public to ski and recreate on nearby private land is worth something. These appellants urge the commission and are urging you now to imagine that the criteria put an absolute premium on a small patch of forest habitat in the midst of millions of acres, but when you focus on the ordinance rather than in the thicket of self contradiction of the appellants a clear picture can be seen. The ski resort would be beneficial. The appellants say that they enjoy skiing, hiking, and viewing wildlife, so do others in Cache Valley. The developer is seeking to open up private property to the general public so that the public can have more opportunities to enjoy these activities. In the appellant's narrow view, their enjoyment of public lands is lessened by the enjoyment of others on nearby

private land. The general well being standard that is in the ordinance allows the Commission to take a less selfish approach to the approval of a CUP. The appellants also worry about the traffic generated by a busy resort. On the one hand, and we heard about the problems of derelict buildings and ski lifts when they imagine the resort will go belly up; the call for a cost benefit analysis and financial projections assumes that the ordinance has an invisible criterion, profitability. The appellants are not the County Council and they do not get to conjure up a new standard. And thank goodness because this is still a land of opportunity where people who are willing to risk their time, land, and money are constitutionally allowed to pursue happiness. Without a government body saying no, we don't believe you will succeed so we aren't going to let you try. The Commission did not mess up. They carefully considered all of the criteria in the ordinance and addressed legitimate concerns, and any reasonably anticipated detriments they handled through mitigation. You should uphold the Commission's work.
As far as the DWR comments and the comments from the state, this summary you were handed gives a very good outline of the interactions between staff and others. The comments are divided by sections, staff and the commission did an excellent job in fielding those comments and boiling those down to 63 types of comments they fielded. Every one of those has a comment or response by the commission or staff and how it will be dealt with. Even if the appellants had some material to back up their case, and I'm not saying their concerns aren't legitimate or sincere, as long as there is something there to counter balance or support what the Commission did, the Commission is at liberty to disregard that. The comments show they didn't disregard a thing. They took everything into account and did good work on behalf of the citizens and especially on following the law.

Atwood The appellants may respond now.

Mr. Robinson There were a number of points made there I will try to be quick. First of all, yes you should grant a certain degree of deference to the commission and nobody denies that. And yes, they are supposed to make their decisions based on substantial evidence. What I emphasized before and will do now is that it is not good enough to just receive evidence and make a decision. You need to make a rational connection between your judgment and the evidence to show that you really assessed it and thought about it. I maintain that that is not there and I haven't heard anyone say that it is. As far as the water and traffic goes I don't want to address it now. I want to stick to the wildlife issue. There was a very extensive review of the Stantec study presented by Allison Jones a conservation biologist with Wild Utah Project citing an expansive literature on the offsite impacts to deer, elk and other animals from the kinds of activities that will go along with the development and the operation of this ski resort. Professor emeritus of wildlife science at USU Mike Wolfe said the same thing. I would like him to answer one question, as a wildlife biologist with your expertise and understanding is it your opinion that this development will more likely than not have a fairly extensive impact to wildlife on that parcel such that it won't support the same quantity and diversity of wildlife? I'm not asking for certainty on this, but Mr. Daines said we didn't have anything. Well this should refute that I think.

Emeritus Professor Mike Wolfe I'm not going to say necessarily extensive, but there will be impacts. I think this is true of what the DWR gentleman Mike Bushman said when he responded to that. The DWR's response has been muted, but there will be impacts. We cannot say how many there will be, but the idea might be, may be, and this sort of thing, there will be impacts.

Mr. Robinson Will they be negative in the sense of reducing the ability of that land to support the wildlife?

Professor Wolfe I don't thing I can say that they will all be negative. There is a question about that, and as brought up before, elk and deer do habituate to disturbance. So there will probably be some of that, but we don't know how much they will and what the impacts will be ultimately because not all of them will habituate.

Mr. Robinson What about the riparian zone when they widen and realign the road what will that do?

Professor Wolfe Certainly there will be negative impacts on birds in the riparian corridor when they widen the road. This is a given that a lot of the studies that Allison Jones was talking about. In my view, this is probably more important than the onsite impacts themselves. And the JUB study still went with the footprint of the development and not the offsite impacts.

Tarbet How many acres are in the wildlife management?

Harrild About 1600.

Tarbet How many acres is the ski resort?

Runhaar 203.

Mr. Robinson Josh claimed that our evidence isn't substantial; he didn't provide any arguments as to how he knows that. However, the Commission has to come up with the evidence and they have to demonstrate a rational connection between their decision and the evidence they were provided with. They can't just say that we received and heard this and we make this decision, that just doesn't cut it. The map he showed was very misleading of the property he said was on the winter range. They made it look like it was on the WMA (wildlife management area), and the WMA is owned by the state. Moreover that property was there before the WMA was created and those people donated property to help create the WMA. So they haven't done anything to harm the WMA, they've done something to benefit the wildlife. Mr. Daines said that even if none of the criteria was met, the decision is still okay. I don't know where that is from, if that's true then they can make any decision they want no matter what the evidence. If that is true then what good are all the codes and regulations? That is just not the case; it's a refusal to think about it. I agree that reasonable people can arrive at different conclusions based on the same evidence, but that is not a license to just make a decision. You've got to show a rational connection between the decision and the evidence. You've got to say we compared these things, we've made these analyses and these evaluations and on the balance we think this. None of that was really done. Also, one last thing about the appellants not being adversely affected, I beg to differ. For one thing you don't have to be adversely affected now, it can be in the future. All the case law states this. For instance the Sierra Club of Utah vs. Utah Air Quality Board. If there is a distinct probability that you will be adversely affected in the future by some development, you have standing if the other criteria are met; you don't have to already be suffering. Regarding the rifle range, it's closed in the winter. These are red herrings, I can't imagine why they are thrown

in here except may to obfuscate the issue. What I think needs to be done is more illumination and that requires really looking at the data and thinking about it. Thank you very much.

Tarbet Three questions. We still come back to the same question. DWR is not here to oppose it, Richmond City is not here to oppose it, and the State of Utah is not here to oppose it. Why aren't they here?

Mr. Robinson And to you want me to try to answer that or what?

Tarbet Yes.

Mr. Robinson I can understand if they have a concern about this but I can't address why they aren't speaking. Citizens have a concern here, and I don't know if they (the State, Richmond City, and DWR) do or not. Mayor Hall from Richmond City is here, and I don't know if he would like to speak or not but I guess you have the right to ask him.

Mr. Daines Can I raise an objection?

Board Yes.

Mr. Daines Since Richmond City did not appeal I don't think it is appropriate for Richmond City to now get in their two bit on this appeal.

The Board discussed if they wanted to receive comment from Richmond City.

Fonnesbeck I just want to make sure that you know you can't hear new evidence.

Atwood That was just what we were discussing. We are going to forego information from Richmond City's Mayor Hall. The objection will stand.

Mr. Robinson I did want to note that Ron Vance from the Forest service is also here and I think that this at least shows they have a concern. I don't know why they didn't appeal, and secondly it's not my responsibility to deal with that. I'm representing these citizens. Most of the people in this room I'm sure are opposed to this. If you have any further questions I'll do my best to address them.

Gunnell I have a question. There has been a lot of time and a lot of material here. Mr. Wolfe talked about there would be some extent of impact on wildlife. I went up to the site and walked all the way up through there. No matter what, we as human beings have put some footprint into there because there is a trail going up there and the night that I walked up it there was a side by side came driving up through there. I note that Richmond City has to access their water through there. Either way, we've got something going on there now. The importance is that there is habitat, and people did donate property to the wildlife management association. We've got wilderness up there and all of that has to be weighed. But have to really sit back and look at this and it's been noted that Mayor Hall has stated he is neither for nor against this. Several other people have talked about what is going on up there, and I weigh that heavily. But you also have to weigh and give credence to the property owner and their rights.

Mr. Robinson Of course human beings have impacts on the natural environment. I urge just to look at one thing, in connection with the wildlife management area; did they do a thorough job of evaluating the impacts and offset or compensate them in some way? Little preventive measures on site are not mitigation offsite and our contention is they just didn't do that. Secondly, they didn't demonstrate in the record that they made a rational connection between all that information and their decision. Yes we acknowledge they received it and spent many hours but you have to apply reasoning. Yes, there isn't one definite conclusion, but you have to demonstrate that you thought about it. Otherwise what else would it take to make it arbitrary and capricious?

Atwood Does the Board have any questions. We are at the point then that we have three choices, to remand, to deny…

Olsen Can I make a motion? I'd like to table this for a week to allow me to spend more time reviewing this.

The Board, Runhaar, Mr. Daines, and Mr. Linton Discussed the difference between tabling and continuing a motion.

Mr. Robinson Noted that the Board has 15 days to make a decision.

Fonnesbeck Do you want to make a decision now and then come back in a week?

Mr. Linton You can't deliberate behind closed doors.

Olsen I'd just like a few more days to look at this.

Olsen *motioned that the item be continued until Thursday, March 29 at 6:00 P.M. to allow the Board more time to review the submitted material;* ***Tarbet*** *seconded;* ***Passed*** **4, 0.**

5:05

Olsen *moved to adjourn,* ***Tarbet*** *seconded;* ***Passed 4, 0.***

Adjourned