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Cache County Board of Adjustments

Minutes for 29 March, 2012

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

Start Time: 6:04:00 (Video time not shown on DVD)

Atwood welcomed everyone.

6:05:00

Rob Smith recused himself due to a conflict of interest.

Minutes

Minutes from the previous meetings will be approved at the next meeting

Agenda

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

6:05

Olsen moved to continue the discussion for the Cherry Peak Ski Area; Tarbet seconded; Passed 4, 0.

Administrative Appeal – Cherry Peak Ski Area

Atwood I appreciate the time that we have taken to review the information presented. I know that land use decisions spark a lot of emotions and they bring a lot of concerns and issues. I've appreciated the week to read over the information and come to a conclusion for myself. I really felt that the planning commission has met the requirements of the ordinance and how they addressed them in the 18 conditions. I think that takes and meets the requirements of those conditions and shows that they went through the correct procedure themselves to meet that conditional use permit.

Gunnell I have some questions. Mr. Robinson, up in that area of the canyon it is zoned as FR-40. Please give me your feeling as to what your party thinks that zone means and what backs it.

Mr. Robinson It is zoned FR-40 and that means forest recreation.

Gunnell That starts us at a ground point zero. Obviously there is a difference of opinion of what that entails. My understanding is that as you go back on the FR-40 that a ski area is acceptable there with a CUP.

Mr. Robinson Not automatically.

Gunnell Not automatically.

Mr. Robinson Yes, if it is approved through the correct process a ski resort is conditionally approved for that area.

Gunnell One other question. I was going through this sheet from the Bear River Water Shed Council. On page 3, it says “the original study is inadequate and lacks sited scientific literature which is demonstrated in exhibits A and B. At a hearing we will provide expert witnesses and prove that the original wildlife study was an insufficient basis for the decision.” I’ve sat and read and weighed the provided information. As I look at what the county brought me back last week there is an answer for all these and I listened to Mr. Wolfe and those others and read some other things. I think it is Bushman and Vance who are with Utah Wildlife Resources and the government and both have said they neither oppose nor endorse this project. When I’m saying there is going to be scientific literature it’s not there and granted it can’t be brought in but I’m having a hard time weighing how the Stantec study and the JUB are insufficient.

Mr. Robinson Did you read the letters by Professor Michael Wolfe and Allison Jones?

Gunnell I did.

Mr. Robinson And you didn’t see anything in either letter to address that question?

Gunnell You get down to a he said, she said situation.

Mr. Robinson I beg to differ that you do not. There is a vast body of literature on impacts of wildlife and various activities and none of that is cited in the original study or review. But there is a very long list of citations by Allison Jones.

Gunnell I went back to Feb. meeting when the county brought in the JUB review. When I was reading the minutes there was no other rebuttal or studies introduced at that time. Why weren’t there any other studies brought forth at that time?

Mr. Robinson Other studies introduced?

Gunnell From the appellant, if they are citing that their side of the story is that there is an exhaustive amount of study out there, shouldn’t that have been brought forth at that time?

Mr. Robinson There isn’t a specific study that the appellants have done themselves. But there is a lot of literature out there in regards to the impacts of the ski resort and vehicles and lights that will happen on wildlife. Also the dependence of wildlife on the riparian areas. Also, the overall view is there will be impacts. But being able to quantify them in advance would take powers that none of us have. Most of those impacts are going to be negative because these species did not evolve in an environment where they can be naturally responsive in a beneficial way to themselves and the local populations. Responding to the kinds of noise and other impacts that will be present will tend to drive species away. In the case of removing foliage, it will remove

cover for hunting and foraging, also for nesting and mating, and things like that. These are the things that are talked about in the literature. We don't need a study to prove that, there is literature that already states that. There is nobody around here more authoritative than Michael Wolfe on that. You can either choose to believe it or not. It's a tough situation. We think there needs to be real mitigation and that is something that will be done after you know the impacts; to ameliorate its affects. We do not regard the conditions as going anywhere near that. The reason that this is hard is because it really is hard to imagine, as Josh Runhaar stated in one of the meetings, what can you do? You are affecting a habitat and making the larger habitat unnatural for these species or in some way causing deterioration. What can really be done to ameliorate that? In wetlands, in the clean water law, they have a thing called wetland banking. This is where you restore or protect wetlands offsite to help to compensate for any negative impacts that you will have to wetlands through development. That's why I said last time one possibility would be to purchase other suitable habitat as winter range for deer and elk. We don't think it is our responsibility to come up with the answer. It may just be that a ski area is incompatible with the wildlife management unit.

Gunnell there lays another question. If I'm a private land owner and own the ground up there, I could go and do a lot of different things that may be incompatible with the wildlife situation next door to me, could I not?

Mr. Robinson you mean legally do a lot of different things?

Gunnell well I can go up there and chop down a tree, shoot something, I can do basically all of those things.

Mr. Robinson on your property.

Gunnell on my property.

Atwood you could go in there and divide that land and do 40 more cabin sites.

Mr. Robinson but there are already cabin sites up there. Yes, they could do that, and it wouldn't be the best thing for wildlife, but it wouldn't have nearly the negative impact that the ski resort will. They can't go up there and set off cannons and can't set off sky rockets. And I don't know about having rock bands up there, I don't think anybody spends a lot of time up there in the cabins during the winter. I have no doubt that people could legally do something that wouldn't be very good for wildlife. In terms of offsite impacts I have serious doubt about that. Just as in the city, you can't do things on your property, which disturb the peace of your neighbors.

Gunnell no, but it's in the realm. While I was hiking up there last weekend, there were four wheelers, side by sides, going up there. Man is there and there is going to be some incompatibility with wildlife.

Mr. Robinson well sure, humans have had an impact all around the globe. I'm sure you would agree with me that that doesn't license the thought that it is okay to do whatever we want any were because we've already mucked it up. We have to respect nature and respect the other kinds of value that it affords many citizens. Skiing is fun and I used to do it and still cross country ski.

I don't have anything against that, but there are other values that people cherish that are somewhat incompatible with that and that is another issue aside from the wildlife. The general point is all property rights are circumscribed by limits and are not absolute. People sometimes talk loosely about property rights and act like they can do whatever they want and that simply isn't true.

Atwood the ski area has never been inside the wildlife management area anyway, so if those areas are taken out where it's going to be a peaceful area for those animals to winter. If they weren't included, those folks felt like that wasn't a use or something that they wanted to set their property aside for. They should have still had some property rights.

Mr. Robinson yes they do. Those folks can still build cabins and enjoy their summers up there. Maybe to some extent you're stuck with what your land affords you.

Atwood right, in this case that is the FR-40 zone that they would have. So that comes with potential cabin sites, recreation activities. Anything that is going to fit under that and some of those activities may require a CUP.

Mr. Robinson I agree with all that. It's just a question of whether or not the new use is compatible with the existing use. People can recreate on their own property. There are certain things that they can do and certain things that they can't do.

Gunnell and the point being, that yes they can. Each of those, with that being their property, based on what you're telling me with the wildlife study and what Mr. Wolfe has said, there would be impacts as well depending on what the property owner wants to do.

Mr. Robinson it would be foolish to say there would be no impact. But cabins up there are almost certainly not going to have the kind of impacts that the ski area will offsite. For one thing there wouldn't be a widening of the road to serve those cabins and one other thing there won't be any night skiing on the hill.

Gunnell there would almost have to be a widening of the road for a new cabin to go in there.

Atwood for fire service I'm almost certain they would have to meet the same requirements for access that the ski area would have to meet to get in rescue and emergency vehicles.

Mr. Robinson that is something that I can't answer. I've been up there and seen the cabin. I know it's periodically used. They didn't see a need to widen the road then and I don't see the need to do that for more cabins.

Atwood the ordinance today would require new cabins to have a wider road.

Mr. Robinson so you think then that the people that use that cabin now are violating the law if they don't widen the road?

Atwood no I didn't say that. That cabin probably has been there prior to adopting ordinances that would require widening the road. A new cabin would require widening of the road same as a CUP or a condition that would be desired to be done on that property.

Mr. Robinson I haven't looked in to that, and don't know.

Olsen I've been up to Beaver Mountain quite a bit and I've stopped several times for deer and elk to cross in front of me. We are also looking for standing here and we want to know why the DWR, the US Forest Service, Richmond City, and some of the private land owners to the north aren't appealing?

Mr. Robinson you are asking me to conjecture. I don't represent them, so why would I know? I'll say one thing about the state, I know that the original letter produced by the DWR that went to the governor's office got chopped down by about 6 or 7 pages. Do the words whirling disease bring anything to mind? That is all conjecture; you don't have the evidence at hand. I understand why somebody might wonder about that. I think the more important issue is whether or not the people who are protesting this have standing. I argue that they do. Certainly the landowners that abut the wildlife property would have standing if we went to court. I think some of the others would too. That is just to get into court, then the issue becomes whether or not the law has been followed.

Olsen my question to that is that we have landowners that are the appellants that have used 85 acres to build homes there. That had to affect the habitat in some way. Every time a man moves in somewhere affects habitat. Here they are applying for a permit that they feel is legal, and everything that has gone into that decision and what is expected of them, it's very hard for me to find standing for appealing. Why had these other parties not come forward when it really adversely affects them? I have dealt with the US Forest service for running cattle up the canyon and I know when they do this they are on top of things when it affects them.

Mr. Robinson we are not claiming that the ski resort would be incompatible with the wilderness. That is not part of our claim. Although obviously the uses are vastly different and there is an issue about having them right next to each other. Ideally a ski resort would be somewhat removed from the wilderness boundary. But there is no precedence in law that requires that or in the wilderness act. It's wilderness. I'm going to have to let Mr. Vance speak for himself, I can't speak for him. But I dare say that they would rather the ski area not be built but they don't feel it is worth fighting because it is costly or whatever, I just don't know.

Gunnell on one of the appellants they are talking about their taxes increasing due to increased road use and stuff like that. Will there not be any financial impact or revenue to Richmond City?

Mr. Robinson I don't know; if it's successful there may be.

Gunnell I would think that people will stop for gas or snacks or something at one of those places there in Richmond and therefore that would seem to mitigate some of that impacts that are being talked about.

Mr. Robinson in the appeal there are a lot of things that are a shot gun approach. I don't think that is one of our better arguments and not one that I intend to use if we carry this forward. If the ski resort is successful there will be economic benefits, but there will also be some detriments. We think some sort of analysis of the detriments should have been done because it's not all economics. Some people may lose economically, some people might benefit. If the revenue stream is strong enough the economic benefit might outweigh the detriments but there are other values referred to. Values that people experience when they go there when it's quiet and they can meditate and watch wildlife and reflect and to things like that, and that is largely incompatible with a ski resort. You don't have symphony orchestras playing during a football game; it's incompatible and doesn't work.

Gunnell that's my point and I agree with you on some of those issues. But at the same time when you say it's incompatible, if I'm a property owner I can go up there and start a bonfire and turn my radio on really loud. Is that compatible with the wildlife management area? I mean all of this becomes an issue.

Mr. Robinson I understand and it complicates things somewhat. I hope you don't think that it's legitimate to argue from the fact that somebody could do something like that, and that it is okay for you to approve a ski resort. It just doesn't follow. Once again because something has already been impacted a greater impact is okay. There are two things wrong with that; it doesn't follow and secondly why grant the assumption? Maybe these people won't go up there and do these things; there is no history of them doing that as far as I know. It's not a logical argument.

Gunnell to me there is basis there. If I'm a property owner I can do something on my property right.

Mr. Robinson something, the question is what.

Gunnell okay, now you're telling me in this argument that there is incompatibility. I'm saying that it's already there in a sense.

Mr. Robinson so what, what is your conclusion?

Gunnell my conclusion is that you're saying that a ski lift is incompatible because of the noise and things going on. That very well may be there no matter what happens.

Mr. Robinson incompatibility is a legal thing in this context. The conflicts that you are talking about, the impacts of wildlife are matters of degree. No one is trying to deny that. I would be willing to grant that even people hiking up there who are very quiet are going to have some kind of impact on wildlife. I doubt that it would be a serious one, but probably won't be a good one. I don't think just because we're concerned about this means that nobody can interfere at any time in nature that just isn't so. But the question is when you do something of this size and impact and there is this other property that is dedicated specifically to serve wildlife in the winter, crucial winter range, when so much of the historical winter range has already been taking up, is that going too far? If you think it goes too far you say incompatible use. My final remark back to you would be what would be more impactful? If this doesn't count as an incompatible use what would? I submit that something surely must count as an incompatible use, we must be able

to conceive something otherwise why we even be talking about incompatible uses? Why would there be regulation or statute, or you even have to deliberate about it? My guess is that having a huge copper mine there would be incompatible, but nobody is talking about that. I can think of other things that would be incompatible.

Gunnell I think my point would be is that I would give it a lot more weight if I saw the adjoining landowners put in an appeal or have an objection to that but I don't see that. If I'm the Richmond Wildlife Association and spent money and they are neither for nor against it, they should take a stand. If they were objecting to what is going on there then it would land more in my understanding of this situation too.

Mr. Robinson well, we could query the audience to see if there are any off those people here.

Gunnell I don't want to bring that forth as this time. Our job is to evaluate that what has gone on before has been done in a correct manner. I don't want to bring in any new evidence. I don't want to get into that point. I appreciate your answers on this.

Mr. Robinson you can be assured that there are people who would do exactly what you are talking about.

Gunnell I would like Chris (Daines) to answer some of those same questions.

Chris Daines The first question I think was what the FR-40 zone means in relation to the ski resort. There is a definition of ski resort in the ordinance. It's in Ordinance 17.07.020. There are a lot of definitions in that section and they are listed alphabetically. Let me explain what I see the zoning actually means and what the commission's job was. Within the FR-40 zone there are certain uses that are allowed with a CUP, ski resort is one of those uses. That was in the county's brief and Mr. Runhaar mentioned that in his presentation. What that means though is you have the ordinance, in 17.06.070, which is the standards and criteria for conditional use. You have two things together, the county zoning map that states it is an FR-40 zone, the list of uses that are allowed in that zone and the standards and criteria for CUP. It's kind of hard to say that it is not this way. The way the county is zoned for uses in the FR-40 is to say that it is allowed for a use with a CUP. That means if you meet the standards and criteria under the ordinance, as a commission you have to approve it. I believe that I cited it ad nauseam in my brief, it states "shall". If it meets these five criteria, and they have only called three in question, then we've already done our job as the county council and we have zoned for a ski resort that meets these criteria. Your job is over and you have to approve it because it has already been zoned for ski resorts that meet the criteria. The list of uses that are allowed with a CUP in that zone and then standards and criteria for conditional use. The way that the county is zoned for uses within the FR-40, if you meet the standards and criteria for a CUP under the ordinance you have to approve it. It states "shall" if you have met the 5 criteria. We've already done our job as the council for the zone and ... your job is over and you have to approve it because you already zoned it for ski resorts that meet the criteria. Under the county ordinance the definition for a ski resort is "Any public or private developed recreational use with the associated facilities and improvements for downhill, or cross country skiing, snowboarding, snow shoeing, snowmobiling, or other snow related activities operated on a commercial or membership basis, whether solely on private owned property or privately owned lots or parcels interspersed with

public land under a special use permit from the US Forest or other public agency primarily for the use of persons who do not reside on the same lot or parcel as that on which the recreational use is located. Associated facilities and improvements include, but are not limited to, lodging, food, retail, and support services, recreational and fitness facilities, parking and other uses of a similar nature specifically authorized in conjunction with the operation of the facilities as a resort.” That is what the county decided. If it meets the five criteria then you can have one of these in an FR-40 Zone. The next question was about the study, about the scientific literature. I feel that they must have looked at a different study than the one I saw. When I looked at the review, there were only two references in the review. But if you look at the actual wildlife study, if you go to the back, the citation of literature starts at page 11. It is really quite astounding the appellants claim is about the lack of scientific support for this study, it blows my mind. Page 11 starts with a, b, f, and g, and then it goes on onto page 12 and it’s a full page of references. Page 13 another fifteen references or so, and it goes on to page 14. There are four pages of references of scientific literature that are supporting the study. I don’t understand how they can claim that there isn’t specific scientific support for the study and hence for the Commission’s work. I was very impressed with Dr. Wolfe’s testimony last week. It really encapsulates the problem. He stated that he knew there would be impacts, but he didn’t know what they would be or how severe they might be. Mr. Robinson followed up with a question asking if all those impacts will be negative. Mr. Wolfe responded that some would be negative and some would be positive. Let me respond with some positive, there are going to be trees removed and then they are going to plant stuff that would be better forage for the wildlife. They may have more stuff to eat than if we didn’t have a ski resort. The point about what the landowners can do without getting a CUP is quite extensive. They could fence their entire property, they might have to do a corridor along the county road, but they could fence off on either side like in Logan Canyon where you can’t get in there without a key. They can build cabins, they can cut down trees. My guess is that they can run a rifle range just like DWR can run a rifle range. I don’t know if that requires a CUP, they don’t intend to do it. There was a comment stating that the rifle range runs only in the summer and that isn’t true, it runs all year round. There are a myriad of things that these private property owners can do that might impact wildlife that the county’s ordinances don’t reach. Have I answered your questions?

Atwood yes.

Mr. Daines are there any other questions you would like me to address?

Atwood I don’t think so.

Don Linton I have some very brief comments from the county. First of all, as was stated by Mr. Daines last time, we would like you to reach the merits as well. And that is whether or not the Planning Commission actually did do their job in looking at this carefully and if a reasonable person in their position could come to the same conclusion. That is important in the case that this is appealed to the District Court. Second of all, I would like to address a few of the comments made by the appellant’s lawyer. Just a couple of things that I have heard and in all due respect, that I find remarkably striking, one is that due process wasn’t accorded in this case. Apart from the public hearings that were held, the hours that the planning and zoning went to, to correlate all of the objections and to look at this thing as objectively and fairly as possible, I find it remarkable that the statement seems to be that they made findings, but they didn’t make

findings to support their findings. Which begs the question, do they need to make findings to support their findings, to support their findings? This is an argument that I found intriguing enough that I went back to my office and did as much research as I could. You might note in their appeal, that they didn't cite to a case. And that reason, I believe, is because they couldn't find a case to support their argument. In all my research, I could not find anything that supported this very unique argument. The fact is that the Planning Commission made a lot of findings and looked at this very carefully. They did a lot of work to make sure that all property rights are afforded the deference that they should under our county land use ordinance. Certainly due process was afforded here and I can't understand that argument. Second of all, as Mr. Daines said, you have a study. Last week there was an opportunity to discuss that study here and very honestly his witness came up and stated that there is some good and some bad. Having tried very many cases, and anybody who has worked in the courts will tell you, that when you provide experts that provide studies you will always have experts on the other side because that is the nature of this game. And the finder of fact has to say at some point "I have experts on this side saying this, and experts on this side saying this", but at some point we have to rely on the finders of facts and say "they chose to rely on these experts." And that is not something that you get to usurp. Your question is whether or not a reasonable person given their objective and strong intent to be fair, given these circumstances, would come to the same conclusion or whether they acted arbitrarily or capriciously. Now finally there was a question with regards to the cabins. Absolutely that road would have to be improved if they put more cabins up there. You are absolutely correct that the reason the road wasn't widened for those cabins that are up there, is because they are grandfathered. Mr. Daines is absolutely correct, at this point in time they could go up there and put a fence up there and there is nothing that these people or this county could do if they decided to cut down every tree on their lot. There is nothing we could do. So we have tried as a county to create a zoning ordinance that is fair for commercial activities. We have tried very hard to meet all the conditions. Folks have to understand that we have competing property interests and the fact that somebody wants to hunt up there and they don't want these people to interfere with that. I'm a hunter and being very frank that there is a certain component there that is a little odd. To say that that is an incompatible use because it might reduce the population, it *might* reduce the population. We have heard a lot of might's, supposition on supposition, speculation on speculation. What the Planning Commission considered was studies, was public comment, reasonably presented in a way that while it may not meet the standards of every expert, we should not second guess their decision based on a lot of speculation of what might happen.

Fonnesbeck I'm going to jump in here really quickly. I have drafted some proposed findings, and I want to be perfectly clear that the Board has not seen this. I am giving them a copy so they can review it and make any changes they would like.

Atwood last week, it was mentioned, were we looking at the county planning commission and had they messed up on their procedure, had they done their due diligence. And I think they have done their due diligence and they have addressed everything with what they were given. It appears, in my opinion that they haven't messed up in their procedure. They have tried to go through and mitigate, or try to alleviate, as many of those things as they can through the process. That is what I've concluded.

Tarbet first of all, I feel like for myself, that I have read and heard enough to make my decision based on the evidence that has been said and especially on what I've read more than what I've heard. With that, I am ready to issue a decision.

Atwood I think we need to look over these findings and decide if we need to make changes.

Mr. Daines may we comment on the proposed findings?

Atwood we'll answer that in a minute.

Mr. Robinson I was wondering if I could have a few minutes of rebuttal.

Atwood rebuttal of?

Mr. Robinson remarks made by the county and Mr. Daines.

Tarbet no.

Olsen I would say no.

Gunnell only if there is something different.

Mr. Robinson I would correct some misunderstandings.

Mr. Linton I would object to a rebuttal.

The Board of Adjustments took a few minutes to decide whether or not to hear rebuttals. Also, members of the Board were impressed with the county's arguments and how they were laid out from the last meeting. Members of the Board also wanted it noted on the record that the county has no say on the water issues that have been raised. There was a contention by the DWR early on that NEPA would be triggered to widen the road. It was the county's contention that NEPA wasn't a requirement to widening the road. However, if that were to arise further on then the road issue would have to be revisited at that time, but it would only apply to the road. The Board of Adjustments decided to not hear any rebuttals to previous remarks. The Board of Adjustments also decided not to hear any comments on the proposed findings. The Board of Adjustments has to determine whether or not the findings of facts below were correct. That language was not included in the proposed findings that Fannesbeck handed out. Wording was added to add the word "correct" into the proposed findings.

Tarbet motioned to close the discussion; **Olsen** seconded; **Passed 4, 0.**

Olsen motioned to deny the appeal and approve the proposed findings of facts as amended, which state:

The Board of Adjustments upholds the decision of the planning commission and the decision is correct in granting a Conditional Use Permit to the Cherry Peak Ski Area and therefore this Board denies the appeal based on the following:

Findings of Fact:

1. *The appellants have no standing to appeal issues of water/waste water as Cache County does not issue the final decision on water/waste water issues.*

The remaining appellants also have no standing to appeal as they are not persons who have or will suffer some distinct and palpable injury.

2. *The planning commission considered substantial evidence when making their determination to grant the conditional use permit. The relevant evidence included, but was not limited to, wildlife studies and reviews, public comment and hearing, information regarding roads and infrastructure, and comments from the Utah Division of Wildlife Resources, the United States Forest Service, and Richmond City.*
3. *The planning commission decision included eighteen (18) detailed conditions to mitigate potential impacts of the Cherry Peak Ski Area project.*

Conclusions of Law:

The planning commission decision was not arbitrary, capricious or illegal and was made in good faith.

Gunnell seconded; Passed 4, 0.

The Board of Adjustments next meeting will be held on April 19, 2012 at 6:00 pm to handle minutes.

Fonnesbeck I'm handing a copy of what was just read into the record with the vote total, and that is the copy that needs to be signed. It just articulates the vote total being 4, 0 with Rob being recused.

7:13

Adjourned.