

# GRAND COUNTY BOARD OF ADJUSTMENT

## Minutes

April 14, 2008

A public meeting of the Grand County Board of Adjustment (BOA) met on the above date at 6:00 p.m. in the County Council Chambers of the Courthouse.

**Members Present:** Chair Kelly Thornton, Jared Rasmussen, and Judy Tangreen. Lance Christie recused himself due to his sitting on the Planning Commission for the initial hearing on Cloudrock and a letter written to the media regarding the merits of the project.

**Others Present:** Kristine Killoy, County Planner; Mary Hofhine, BOA Secretary; Scott Barrett, Deputy County Attorney; Shawn Warnke, County Council Administrator; Gene Ciarus, Council Member; Appellant's Attorneys, Lyle Fuller and Nancy J. Delacenserie; Attorney for Moab Mesa Land Company, Wade Budge; and Cloudrock Land Company LLC, Vice President Mark Oligschlaeger. Many of the Appellants listed in the appeal were also in attendance.

The meeting was called to order at 6:00 p.m. by the Chair, Kelly Thornton. Ms. Thornton explained that this is an appeal of the Grand County Planning Commission's December 12, 2007 approval of the Johnson's Up-On-Top special exception applications for road design and wilderness lodge unit size.

The Chair asked if the Board if anyone had had any conflicts of interest or ex-parte communications to declare. Jared Rasmussen disclosed that he is a realtor, but stated that he does not have any agreements with Cloudrock developers.

The Chair informed the Board that she had received a letter from Holyoak's in opposition of the Cloudrock project. This letter was given to her as part of her duties as a City Planning Commissioner.

The Chair introduced herself, BOA members, and staff and further explained that the BOA is a volunteer board. The Chair also reminded the audience that the meeting is not a public hearing, the audience will not be called on to speak. Procedure for the meeting will allow for each side to present for 15 minutes on each basis of appeal. The Board will direct questions to specific parties and reminded individuals to keep responses on point, i.e. to be as concise as possible.

The two bases of appeal are:

- 1) *"The Planning Commission's approval of Cloudrock's application for the unit size exception violates the Code in that the application was incomplete and the record does not support the required findings of the Code."*
- 2) *"Cloudrock's Original preliminary plat is invalid and any action, including the approval of special exception applications, on and invalid plat is itself invalid."*

The Chair asked for the staff report. Staff read into the record the Grand County General Plan adopted by Resolution #2301 on August 5, 1996, and the Grand County Land Use Code (LUC) as adopted on January 4, 1999 and amended through February 22, 2000. Additionally staff read into the record the staff report as well as the following previously agreed upon materials which were included in the packet for BOA members:

- 1) The Appellants Appeal
- 2) Defendants response to appeal
- 3) Appellants reply
- 4) Additional documents listed as items A-R
- 5) And additional technical reports and url's listed as items A-H

Appellants have submitted an appeal of the Grand County Planning Commission's December 12, 2008 administrative approval of Cloudrock Land Company LLC special exception applications for road design and wilderness lodge unit size. Cloudrock is the successor in rights and approvals on approximately 1,900 acres of SITLA land. The County has entered into a development agreement with Cloudrock which along with preliminary plat, master plan, and PUD approves the general use, density and configuration of the project.

Special exceptions are allowable deviations from otherwise applicable standards. The Planning Commission is the land use authority in this instance and may approve a special exception application in a public hearing in accordance with the Grand County Land Use Code (LUC).

In order for the BOA to overturn the decision of the Planning Commission a vote of three members of the BOA will be needed.

The Chair asked if the Board had questions. Judy Tangreen asked Ms. Hofhine to give a history of the development agreement.

Ms. Hofhine stated that in 2001 the Moab Mesa Land Company, now Cloudrock Land Company, went through the public process and got their preliminary plat and development agreement approved by County. In late 2006 into early 2007 Cloudrock Land Company went through the public process and amended their preliminary plat and reinstated the agreement which was approved by the County.

With no more questions the Chair gave the floor to the attorneys.

Mr. Fuller introduced his staff and reiterated their objection to procedural issues that were brought up last week, including the composition of the board. Mr. Fuller renewed the request that the Board table this hearing and reconvene with a full five members.

We also maintain our position that the vote of all three Board members should not be required.

Mr. Fuller contended that state law is clear on this matter and that the Board need only act on the majority of its convened members.

Mr. Fuller states that in regard to Mr. Rasmussen we have a discomfort of the appearance of impropriety in that he has not recused himself. Mr. Fuller asked Mr. Rasmussen to provide more information about his employment for the record. Mr. Rasmussen stated that he is employed by Anasazi Realty as an Associate Broker.

Mr. Fuller also asked Mr. Rasmussen if Anasazi have an adjacent development where they will be selling lots. The Chair interrupted with a point of order and explained that questions are not to be asked of the members. The Chair asked Mr. Rasmussen if he had anything further to add regarding his employment. Mr. Rasmussen disclosed that there is a potential to sell Cloudrock lots in the future if developers decided to post them on the multiple listing service. Furthermore, Mr. Rasmussen stated he has a 50% ownership in a project in the City limits. Mr. Rasmussen stated Cloudrock could be viewed as a detriment to the project he is working on; Cloudrock could be viewed as competition. Mr. Rasmussen reiterated that he has no agreements, verbal or written, with the Cloudrock group.

Mr. Fuller also asked that Mr. Horowitz be added to the Board this evening. Mr. Fuller explained that Mark Horowitz was a member of the Board who previously sent a letter of resignation, but that the Board did not act on this letter in a convened meeting. Mr. Horowitz is here tonight and we would ask that he be allowed to sit on the Board this evening.

Mr. Fuller asked if Mr. Horowitz will not be allowed to sit on the Board. The Chair explained that her understanding of the process is that Mr. Horowitz did resign and without by-laws there are no written requirements as to the acceptance and re-commitment of Mr. Horowitz.

Staff stated that there is an accepted resignation by Mr. Horowitz and at this time he would need to reapply for a vacancy and be appointed by the County Council.

The Chair noted Mr. Fuller's concerns for the record.

Mr. Fuller stated that the standard for review requires the Board to hear the appeal denoveau, or new / fresh. It is our burden or job to show the Board that a mistake was made. He reiterated that the Board has a duty to provide an independent review.

Last point is that we would like the Board to table the hearing and retain independent counsel. Mr. Fuller gave the floor to his colleague Ms. Delacenserie to address the second basis of appeal regarding the preliminary plat.

Ms. Delacenserie questioned the validity of the preliminary plat. In reviewing state law, the Land Use Development and Management Act (LUDMA) entitles a developer to approval as long as the application is complete and conforms to applicable County ordinances. LUDMA establishes the laws that govern the development under the Land Use Code (LUC) in effect at the time of development. This provides the developer the certainty and comfort it needs to proceed with the development without concerns that the law will change.

LUDMA provides the continued validity of an approval of a land use application is conditioned upon the applicant proceeding after approval to implement the approval with diligence in order for its approval to remain valid.

A county may enact a stricter requirement and Grand County has done that. Grand County requires either: (1) submission of a final plat application within 12 months of the preliminary plat approval, or (2) request for an extension. Cloudrock did not submit an application within the 12 months nor did they request an extension. Additionally, Ms. Delacenserie notes there was not an approval to extend.

The staff report notes that Ordinance 454 is a legislative matter currently scheduled to be heard in District Court. Ms. Delacenserie contends the issue before Judge Andersen is the validity of Ordinance 454 not the validity of the preliminary plat. Further she states the approval of a preliminary plat is administrative. Ms. Delacenserie states that while it is true that we have challenged Ordinance 454 on the basis of the validity preliminary plat, the court could easily conclude that Ordinance 454 is invalid without ever addressing the issue of preliminary plat.

The Board's obligation tonight is to apply the facts to the law and decide for itself if the Planning Commission acted within the bounds of the law in approving Cloudrock's application.

The approval of Ordinance 454 was subject to Cloudrock perfecting the record in regards to the road design exceptions. The preliminary plat was only valid for 12 months. The Council could not extend an approval that did not exist and could not extend the approval after the 12 month

period. The Planning Commission should have reviewed the special exceptions (the road exception and the lodge unit size) anew and not as a “housekeeping” matter. Further it would be inappropriate for the Board to not act on Appellants challenge by stating the issue of the preliminary plat is not proper before it.

The Chair called the 15 minute time limit for Ms. Delacenserie.

Mr. Budge was asked to make his presentation and was reminded that he is also limited to a 15 minute presentation.

Mr. Budge introduced himself and Mark Oligschlaeger, Vice President of Cloudrock Land Company LLC, as well as Michael Zimmerman with the law firm of Snell & Wilmer.

Mr. Budge stated that they do not share the objections of Mr. Fuller and Ms. Delacenserie. They see no conflicts of interest and thanked the Board for their service. Mr. Budge disagreed with the Appellants argument that the concurring vote of only two members would be required to upset the Planning Commission’s decision. Mr. Budge stated the County has enacted a stricter requirement than state law and that the vote of three members is required to overturn the Planning Commission’s decision.

Hardcopies of a power point presentation was given to the board. Mr. Budge gave a brief description of the Planning Commission’s review of the special exception for road design. Mr. Budge explained that the special exception request was for a narrower road system on the private streets within the development. Mr. Budge stated that the internal private roads were a separate issue from the main access road from Spanish Valley Drive. Mr. Budge explained that the special exception for lodge size was to increase the square footage of the lodge units from 600 square feet to 1000 square feet.

The Planning Commission approved the special exception for road design unanimously and approved the special exception for lodge size six in favor and one against.

For the record we don’t believe the appeal that “*Cloudrock’s Original Preliminary Plat is Invalid and any Action, Including the Approval of Special Exception Applications, On and Invalid Plat is Itself Invalid*”, is an appropriate basis. Mr. Budge stated this is not an appropriate basis for appeal because this was not an issue before the Planning Commission.

Mr. Budge explained that the Planning Commission’s review was for a new plan, the 2001 plan was never part of that record. The new plan with the special exception to the road is what the Planning Commission was considering. The plan that was reviewed by the Planning Commission was the May 8, 2007 plan.

Mr. Budge states that the section of the code that Ms. Delacenserie sites, regarding the lapse of time between preliminary and final plat is correct, but is not applicable. (slide 20) The County has a contract (development agreement, Section 2.1) which takes precedence and provides Cloudrock with vested rights as to the projects: uses, density and general configuration as vested in Section 1.1. What the Appellants cite is not applicable in the case of a development agreement. In 2007 when we decreased the number of units we had to prepare a new plan. The Appellants argue that we should have prepared final plats for 2000 acres. This is not possible and is what the development agreement addresses. We did not lose the development agreement rights because it would have been impossible to plat those lots and the code cannot take away rights entered into by the County in the development agreement. Mark Oligshlaeger reiterates that this is not a new argument, but rather was made in late 2006 / early 2007. There

was no expiration to the original development agreement. Once the project was approved it was vested indefinitely. The new May 8, 2007 development agreement seeks to work cooperatively with the County and sets a term on the agreement and because of the size and nature of the project seeks to call out specific diligence items. The May 8, 2007 development agreement specifically acknowledges that the developers have pursued this project diligently.

We request that the Board of Adjustment dismiss this appeal and affirm the County Council's decision to approve Cloudrock's Use-on-Review configuration. The County Council's approval must be respected and the Planning Commission's unanimous positive recommendation bolsters that decision.

The Chair asked the Board if there were any questions on the appeal of: "*Cloudrock's Original Preliminary Plat is Invalid and any Action, Including the Approval of Special Exception Applications, On and Invalid Plat is Itself Invalid*".

With no questions from the Board the Chair asked if both sides would explain why the development agreement supersedes the preliminary plat.

Ms. Delacenserie stated that in the development agreement Section 1.1 is subject to approval of a Preliminary Project Plan, as long as the approval is valid they have vested rights, but the plat lapsed in time without an extension. This development agreement was executed in October 2001, the preliminary plat and other approvals were not granted until February 2002. It is inconceivable that the Council would have approved, indefinitely, a preliminary plat that had not been approved yet.

Mr. Rasmussen asked Ms. Delacenserie to reaffirm the dates, which she did.

The Chair asked what constitutes a preliminary project plan. Staff explained that a Preliminary Plat PUD allows for modifications of dimensional standards and cannot go over the density of the underlying base zone district. The development agreement was signed in 2001, but not effective until 2002. Council recognized that the February 2002 had not yet been done. The County wanted to know what they would be approving and based on those commitments they approved the project plan in 2002. This is not unusual. LUDMA gives Counties the ability to enter into development agreements. We wanted to honor the agreement of 2001 and preserve the vestment of those rights.

When Lucadia took over the project from Moab Land Company in late 2006 we adhered to and honored the development agreement to preserve those vested rights.

Ms. Delacenserie responded that the Council had no authority nor is it good policy to attempt to approve for an indefinite period of time a preliminary plat which the Council had not formally and legally adopted. Also the development agreement states in Section 1.3 Compliance, *The County and the Developer agree that each shall comply with the standards and procedures of the Code and the General Plan with respect to all required development approvals of the uses, densities and general configuration of the Project as set forth in Section 1.1 above.* The County and Cloudrock specifically agree to adhere to the requirements of the code. All Cloudrock needed to do was present its case for good cause for the Council to extend it.

The Chair opened the decision on the first basis. The second basis of appeal was heard first. *The Planning Commission's Approval of Cloudrock's Application for the Unit Size Exception*

*Violates the Code in that the Application was Incomplete and the Record Does Not Support the Required Findings of the Code.*

Each party will have 15 minutes to make their case. The Chair called on the Appellants to make their case. Mr. Fuller stated that counties are obligated by law to follow their county procedures and county law. They disagree that the development agreement supersedes the code. Mr. Fuller contends that the development agreement states that Cloudrock will follow the code.

The second part of the appeal which states, *the record does not support the required findings*, the staff report to the Planning Commission states that they must find and subsequently, the Board of Adjustment must find, before the special exception can be granted. In the Staff report to the Planning Commission the report does not have the required findings; the Planning Commission minutes dated December 12, 2007 did not have the required findings needed for the special exceptions.

In our view the point is the record is devoid of any information that would have allowed the Planning Commission to make the required findings that they must make by law for a valid decision. There are eight items in General Purpose Section of the LUC for special exceptions and we did not discover findings in the minutes. Cloudrock will say in their response that if you look at other documents some of those findings are found elsewhere. The law requires that the Planning Commission make findings on those items. We believe that it is this Board's duty to overturn that decision. If there are findings in the other documents we invite Cloudrock to provide that evidence. Mr. Fuller reminds the Board that this appeal is based on the record. Mr. Fuller states that the required information is not found in the record.

The Chair called the Respondents for their presentation on the first basis of appeal.

Mr. Budge declared that the applications for the special exceptions were complete and the Planning Commission's motion did make accurate findings based on the complete application. The motion states specifically that "the applicant has complied with all submittal requirements necessary to show the following", which then lists the submittal requirements.

The Appellants have stated that the findings are not complete, but we do not know in what regard. They have failed to show what is incomplete. They are required to show evidence that these findings are erroneous; it is their burden. The Planning Commission was fully informed and made accurate findings for the record and this body should accept their decision.

Mr. Budge made a presentation showing that each finding was made by the Planning Commission (slide 9). It is not eight findings that need to be made it is four. If you look at requirement #4 the special exception criteria has language that states "generally consistent with the purposes of this code" that are listed in 1.E. this language is saying to the decision makers, keep this information in your mind when you are evaluating a special exception request. Finding #4 does not require a finding for each of the eight elements.

The Planning Commission did make the following findings for the special exceptions regarding the following:

(slide 10) **Compatible with surrounding uses.**

- The proposal to increase the average size of Wilderness Lodge units from 600 square feet to 1,000 square feet is compatible with the land use of a Wilderness Lodge, the surrounding land uses in the development, and the RG District.

(slide 11) **Will not adversely affect surrounding uses.**

- The proposed unit size increase will not negatively impact the surrounding land uses and will not place additional demands on the environment or public infrastructure. There was discussion about how the requirements of this project will mitigate visual impact, incorporating aesthetic themes, and encouraging a development that is sensitive to the environment.

(slide 12) **Property Values.**

- The proposed unit size increase will not lower property values on the development or on neighboring properties. There was discussion (slide 13) of a letter from a commercial appraiser. The conclusion was that this project may increase property values. The Planning Commission was considering the record when making decisions.

**Conforms with Code standards.**

- Comparable developments in competing communities have average unit sizes that are larger than the size requested by Applicant and the request to increase the unit size to 1,000 square feet per unit will increase the ability of the Wilderness Lodge to compete with those communities and enhance the County's tax base. This is a component of Article 1 (protect the tax base). Testimony is reflected in the minutes.
- The proposed unit size increase is consistent with prior approvals granted by the County and furthers the County's goal of promoting predictability and attractive developments. These are the same concepts that are incorporated in Article 1 Section E.

Also the Planning Commission made the appropriate findings in regards to the road design / thoroughfare special exception findings. The appellants do not give a reason in their appeal why the thoroughfare special exception standards are inappropriate, but we would like to state for the record that the Planning Commission also made appropriate findings for the thoroughfare request. They found that the request would minimize the impact on sensitive lands and increase the overall scenic aesthetics of the development. Additionally, the Planning Commission found that by allowing the thoroughfare standards more land will be available for open space and strict enforcement of the default standards would create greater impact on the sensitive lands. Additionally, they found the approval would not necessitate buffering or screening methods and would (slide 18) conform to code standards. Evidence was presented by Corky Brewer that these standards were appropriate under the fire code. These finding shows that the Planning Commission considered the record and did more than just rubber stamp the approval. The Planning Commission passed the thoroughfare special exception unanimously.

The Planning Commission has knowledge and understanding of the County and the uses allowed in zones, the Planning Commission voted appropriately and made the required findings based on the consideration of the evidence provided them.

The Appellants have not shown how they have been damaged with the decisions of the Planning Commission and we respectfully ask that you do not overturn the Planning Commission's decision.

The Chair asked Mr. Barrett, Deputy County Attorney, how much proof is the Planning Commission required to have - is there some kind of standard. Mr. Barrett stated that the general standard is in the preponderance of the evidence provided, unlike a criminal matter which is beyond a reasonable doubt.

The Chair stated that since it is a legal term could you further explain. Mr. Barrett explained that preponderance of evidence means that the weight is on one side based on the Planning

Commission's judgment. They did approve the special exception based on the evidence given the Commission.

Mr. Fuller explained his understanding of the Board of Adjustment is to hear the project anew or fresh and make their decision based on information presented them. Our position also is that any information Mr. Barrett presents is as an advocate of Cloudrock due to the County Attorney's previous decision.

Mr. Wade addressed that their findings set forth the code and evidence that relates to that. This is a lay board and the burden is on the body that challenges to show the decision is erroneous. There were a number of findings made that covered the four required areas and absence of information showing that that was incorrect.

Mr. Fuller commented increasing the size to 1000 square feet causes concerns regarding waste water and storm water, the larger the building the more people will be using the facilities. We don't know what would have happened if the Planning Commission would have gone through and looked at Article 1E. We are asking that you send it back to the Planning Commission and have them make a finding to each of the issues so we can be sure that they heard and considered the entire project. Mr. Oligshlaeger states that the finding is there in the minutes (slide 14) that the granting of the special exception will be generally consistent with the purposes of this code. Ms. Thornton agrees the minutes do make this finding.

The Chair also disclosed that Mr. Horwitz approached her on the way into the building tonight and asked about his being on the Board. Ms. Thornton explained to Mr. Horwitz it is not her position to decide that tonight and that he should make an application to the Council and also encouraged everyone to apply.

The Chair reread the first bases of appeal *The Planning Commission's Approval of Cloudrock's Application for the Unit Size Exception Violates the Code in that the Application was Incomplete and the Record Does Not Support the Required Findings of the Code* and asked the board if there was further discussion.

Jared Rasmussen asked staff if the applications were complete. Staff relayed that all information needed to hear the proposed project were given to Planning Commission. Staff accepted the application as complete and the Planning Commission reviewed the proposal as a complete application.

The Chair called for a motion: Judy Tangreen moved to deny the appeal for the incomplete application finding that the Planning Commission met all the legal requirements and that the application was complete. Jared seconded and all voted in favor.

The Chair reread the second bases of appeal; *Cloudrock's Original Preliminary Plat is Invalid and any Action, Including the Approval of Special Exception Applications, On and Invalid Plat is Itself Invalid*, and opened up for discussion.

Jared Rasmussen stated that based on the development agreements, the County code and Ordinance 454, the Planning Commission made the appropriate decisions.

Judy Tangreen stated in her opinion she feels the same as Mr. Rasmussen they acted on the same laws and made the appropriate decision on the special exception.

The Chair was still uncertain on this issue without a clear definition of an administrative and a legislative decision. The Chair entertained a motion.

Judy Tangreen reiterated that the County Planning Commission acted appropriately when they granted special exception. Jared seconded

Judy Tangreen and Jared Rasmussen voted in favor of the motion and Kelly Thornton abstained.

The Chair explained that the abstention is considered a none vote, so the vote is in the affirmative, the motion is approved and the appeal is denied.

The Chair stated for the record, this Board cannot remand a decision back to the Planning Commission.

The Board discussed getting by-laws in place. The Chair recommended that draft by-laws be circulated to the board by email and be posted for public comment.

**ADJOURNMENT: Meeting Adjourned at 7:45 P.M.**

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Kelly Thornton, Chair