GUNNISON COUNTY BOARD OF ADJUSTMENT

AGENDA: April 23rd, 2024

Blackstock Government Center 221 N. Wisconsin, Suite D
In Person and Zoom

1:25 p.m.

- **Call to order; determine quorum.**
- **Approval of minutes from the February 27th, 2024, Board of Adjustment meeting**

Unscheduled citizens: A brief period in which the public is invited to make general comments or ask questions of the Board or Planning Staff about items which are not scheduled on the day's agenda. .

1:30 p.m. **Public Hearing: APPEAL-24-00003 | Law of the Rockies representing McCloud Placer LLC**
Appeal of 12/28/23 Notification of Violation of the International Building Code; Appeal of 1/11/24 Stop Order Pursuant to the Gunnison County Land Use Resolution.

Join on Zoom:

https://us06web.zoom.us/j/86970942444?pwd=kV9BCuhVATYTH4DyTH1cEdGqAh3VeQ.HciwECstGjrF__jM

Adjourn

NOTE: Unless otherwise noted, all meetings are conducted in the Blackstock Government Center Meeting Room at 221 N. Wisconsin St. in Gunnison, across the street from the Post Office. This is a preliminary agenda; agenda times may be changed by the staff up to 24 hours before the meeting date. If you are interested in a specific agenda item; you may want to call the Planning Department (641-0360) ahead of time to confirm its scheduled time. Anyone needing special accommodations, please contact the Planning Department before the meeting.

GUNNISON COUNTY BOARD OF ADJUSTMENT
REGULAR MEETING MINUTES
Thursday, February 27, 2024
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The Gunnison County Board of Adjustment conducted a regular meeting in the Planning Commission Meeting Room in the Blackstock Government Center, 221 N. Wisconsin, Gunnison, Co. and on Zoom

Present:

Chairperson-Laura Puckett Daniels Vice-Chairperson- Liz Smith BOCC – Jonathan Houck Board of Adjustment Member - Julie Baca Board of Adjustment Member – Andy Tocke	Director of Community and Economic Development-Cathie Pagano County Attorney – Matthew Hoyt Deputy County Attorney – Alex San Filippo-Rosser Planning Technician – Jena Greene Others present as listed in text

Absent: None
Recused: None
Zoom: Laura Puckett Daniels

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With a quorum present County Commissioner Liz Smith opened the February 27, 2024, meeting of the Board of Adjustment at 1:30 pm.

Approval of the Minutes:
Baca made a motion to approve the February 8, 2024, Board of Adjustment minutes with the changes as amended by Smith. Seconded by Houck. The motion passed unanimously in support.

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Unscheduled Citizens - None

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APPEAL-24-00003: Law of the Rockies representing McCloud Placer LLC

At 1:34 p.m. Vice Chairperson Smith invited the appellants to the join meeting. Smith asked for the criteria for standing to appeal as written in the LUR to be brought up for everyone to see.

Standing to Appeal (Spivey): The appellant, Drew Fink, principal member of McCloud Placer LLC, represented by Attorney Daniel Spivey, established their standing to appeal was by claim of right and substantial burden placed on the appellant, LUR Section 8-103: B.2, from two notifications of alleged violations of the Building Code and the Land Use Resolution from Gunnison County, adding that there were property rights.

Spivey established the claim of right as a property right; and claimed that a substantial burden was placed on McCloud Placer LLC as a result of the violation letters sent out by Gunnison County. Spivey gave the example that there were over 150 reservations that McCloud Placer had to cancel, causing loss in revenue in addition to associated damages including reputational and administrative. The letters also resulted in the appellant being unable to use his property as a short-term rental or to host more than 6 individuals.

Smith asked staff if they would like to respond to the appellants standing to appeal. Staff had nothing to add. Members of the BOA had no further comment or question for the appellant.

BOA Determination Whether to Conduct a Public Hearing: The appellant had requested a public hearing, noting that this appeal should be considered then as a full evidentiary hearing, citing LUR Section 8-103:C.2.b. Spivey stated that since McCloud Placer received no notice of the alleged violations prior to receiving the notice of violation letters from the County that were issued on December 28, 2023, and January 11, 2024, that the additional testimony or documents could not have reasonably been presented to the decision making body. Spivey further added that the additional testimony and evidence related to the use of the property would be significant.

Pagano stated that staff also recommended that the BOA hold a public hearing concerning this appeal.

Houck made a motion in reference to BOA Appeal-23-00003 to get through the necessary requirements for posting to provide the opportunity for a public hearing. Second by Baca. The morion passed unanimously in support.

The date of the next meeting was to be determined. It would need to be scheduled to allow for the 15-day notice requirement to be met. Staff would work with Board of Adjustment members and the appellants to schedule the public hearing.

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APPEAL-24-00002: Appeal CB So. POA Decision Lot 8, Blk 9, CB So. Filing 2:

At 1:46 p.m. Vice Chairperson Smith invited the appellants to join the meeting.

Appellants Andrew Tyzzer, Susan Tyzzer, and Norman Dumas attended the meeting on Zoom. They stated that their representative would not be attending the meeting.

Andrew Tyzzer stated that the county had skipped a procedural step and stated that they thought the appeal should be first heard by the County Planner, and also added that South Butte and also submitted a letter the day of the meeting. County Attorney Matthew Hoyt stated that standing to appeal, before any entity, needed to be established before determining who they would be appealing to. Tyzzer disagreed and requested that this appeal should be remanded to the planning department, and not be heard by the Board of Adjustment. Smith denied the request and asked Tyzzer and the rest of the appellants to establish their Standing to appeal per the LUR.

Standing to Appeal: Smith asked each of the appellants, and the applicant, South Butte LLC, to individually demonstrate how they met any of the criteria under LUR Section 8-103: B.

Andrew Tyzzer explained that he was a person aggrieved (8-103: B.2), stating that he wanted to protect value of homes and to get a correct application in order to protect the value of their homes. Tyzzer had additional information to add but Smith encouraged Tyzzer to save the additional information until the next step in this appeal was determined.

Susan Tyzzer stated that she was aggrieved (8-103: B.2), suffering from an infringement and denial of her rights. She stated that she wanted the regulations applied, and argued that neither the applicant, the CB South DRC, nor the CB South POA followed the rules. Stated that they were appealing the approval of the proposed triplex to protect surrounding single-family homes and their value.

Craig Maestro attended the meeting in person. He stated that he was aggrieved (8-103: B.2) as an adjacent property owner. He argued that the project did not follow the guidelines.

Norman Dumas stated that he was aggrieved (8-103: B.2) as an adjacent property owner. He objected to the structure being built in this neighborhood and stated that it belonged in the commercial district.

The applicant, South Butte LLC, represented by attorney Daniel Spivey, was present at the meeting. They established standing to appeal as the applicant (8-103: B.1). Spivey further contested that the appellants did not establish standing, noting that no evidence had been submitted or presented to demonstrate that. He further argued that the sperate appeal submitted by Holly Emerson did not meet any of the standards of standing.

Smith clarified that there was no appeal being heard from Holly Emerson by the BOA at this time.

County Attorney Hoyt recommended that the Board clarify with each appellant if they were adjacent property owners, adjacent meaning sharing a property line. It was later clarified that being an adjacent property owner under Colorado Common Law and Colorado Case Law, would satisfy the criteria to establish standing under LUR Section 8-103: B.2. All appellants, Andrew Tyzzer, Susan Tyzzer, Norman Dumas, Craig Maestro, stated that they were adjacent property owners. It was noted that Rebecca J. Bell Dumas was listed as a Co-owner with Norman Dumas on the Gunnison County Assessor Website, and therefore an adjacent property owner.

The BOA discussed the appellant's standing to appeal, and if the threshold for standing to appeal had been met as persons aggrieved by a decision. After much discussion and consulting with the County Attorney, the BOA members determined that they were comfortable with establishing standing for the appellants as adjacent property owners. Rebecca J. Bell Dumas, also listed as an appellant, was not able to attend the meeting due to family matters. County Attorney Hoyt stated that the BOA had the option between failure to appear meant failure or continuing Rebecca J. Bell Dumas' appeal due to the circumstances, however the BOA agreed they were comfortable with determining her standing to appeal as an adjacent property owner even though she was absent from the meeting.

Spivey on behalf of South Butte noted that this lot was zoned and authorized for multifamily, and therefore, there was no land use issue.

Baca made a motion to bundle the five appellants and provide standing. Houck seconded with the amendment to include all names: Andrew Tyzzer, Susan Tyzzer, Craig Maestro, Norman Dumas, and Rebecca J. Bell Dumas. The motion passed unanimously in support.

BOA Determination Whether to Conduct a Public Hearing

The BOA discussed whether or not to conduct a public hearing for this appeal, and who was the right body to hear this appeal. There was a late submission of information that had not been reviewed by the BOA at the time of the meeting. BOA members wanted to work towards expediting the process for all parties involved and determined that a public hearing would allow for them to be able to consider all evidence, testimony, and information.

Houck made a motion for Appeal-24-00002, that the BOA set forth a public hearing as detailed in the LUR, with all noticing as described in the LUR. Seconded by Baca. The motion passed unanimously in support.

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Smith Adjourned the meeting at 2:56 pm.

GUNNISON COUNTY
COMMUNITY & ECONOMIC DEVELOPMENT

To: **Gunnison County Board of Adjustment**

From: **Gunnison County Attorney's Office, Gunnison County Planning Office, and Gunnison County Environmental Health and Building Office**

Date: **April 15, 2024**

Meeting Date: **April 23, 2024**

RE: **Public Hearing for APPEAL-24-00003, McCloud Placer LLC Appeal of Land Use and Building Code Determinations**

McCloud Placer, LLC, owner of 6001 County Road 811, (the Appellant) has appealed the decision of the Gunnison County Community Development Department relative to a "Notification to Correct Violation of the Gunnison County On-site Wastewater Treatment System Regulations, Notification of Violation of the International Building Code and Notification of Suspension of Certificate of Occupancy" letter issued to the Appellant on December 28, 2023, and a Stop Order pursuant to the Gunnison County *Land Use Resolution* ("LUR") issued to the Appellant on January 11, 2024.

McCloud Placer, LLC is appealing the following determinations from the Community Development Department ("Department"):

a. The determination from the Building Official that the current primary occupancy and use of the structure does not appear to be within the scope applied for in the building permit or assigned at permit issuance; and,
b. The use of the property meets the definition of Commercial and Resort as defined in Article 2: *Definitions* of the Gunnison County *Land Use Resolution* (LUR) which requires a land use change permit.

And more specifically:

> *"Owner (McCloud Placer, LLC)) requests a full evidentiary hearing before the BOA to determine the County's allegations under the building code and LUR. If the parties are unable to resolve the building codes and LUR issues informally, a full evidentiary hearing before the BOA will be needed. Consider this a letter of notice of appeal under the building code and LUR"* (*See* Record, Appellant Submittal, A. 1/19/2024: Letter and request for appeal from Daniel P. Spivey, Law of the Rockies, to Gunnison County).

The purpose of this memo is two-fold. First, it provides an outline of the recently adopted and amended appeal process as it relates to Board of Adjustment ("BOA") decision-making. Second, it explains the staff's analysis of the issues raised on appeal.

1. Applicable Regulations

The Appeal is pursuant to the following regulations:

a. LUR Section 8-103: *Appeals*;
b. The *International Building Code* (IBC), 2021 edition, Section 113: *Means of Appeal* which was adopted and amended under Gunnison Board of County Commissioners Resolution No: 23-22 on November 7, 2023 and became effective on January 1, 2024; and
c. The *Uniform Building Code* (UBC), 1994 edition, Section 105: *Board of Appeals* which was adopted under Gunnison Board of County Commissioners Resolution No: 1995-16 on March 21, 1995.

The Gunnison County Board of Commissioners Resolution No: 23-22, recorded in the office of the Clerk and Recorder at Reception No. 694082, Attachment A: *Amendments to the IBC, 2021 edition* replaces Section 113: *Means of Appeals*, Subsection 113.1 *General* with the following:

> The Gunnison County Board of Appeals pursuant to C.R.S. § 30-28-118 shall be the Gunnison County Board of Adjustment as described in the Gunnison County *Land Use Resolution* Section 8-103: *Appeals*.

2. When A Public Hearing Is Conducted

On February 26, 2024, the Board of Adjustment determined that it will conduct a public hearing; therefore, the following procedure applies to the meeting pursuant to LUR Section 8-103:C.2.d:

> *BOA CONSIDERATION OF RECORD AND NEW EVIDENCE; PUBLIC HEARING CONDUCTED. If the BOA determines that a public hearing shall be conducted on the appeal, the BOA shall make its decision de novo based on consideration of the record of the initial decision-making body and any evidence presented at the public hearing.*

Gunnison County staff has prepared the record and new evidence identified in section 8. "Record of Appeal".

The record can be accessed on https://permitdb.gunnisoncounty.org/citizenaccess/, click on the "Projects" button, then click the "Application Number" button, type "APPEAL-24-00003" into the search field, click "Search", select the result, then click on "Attachments".

3. Actions that may be appealed to the BOA

Pursuant to LUR Section 8-103:A.12, review and potential amendment of Stop Orders pursuant to Section 16-105: *Stop Order; Immediate Compliance* may be appealed to the BOA.

Pursuant to the Uniform Building Code, 1994 edition, Section 105, "decisions or determinations made by the building official relative to the application and interpretation" of the code may be appealed. *See also* International Building Code, 2021 edition, Section 113 (allowing "appeals of orders, decisions, or determinations made by the *building official* relative to the application and interpretation of this code[.]").

4. Appeal Decision Criteria

The BOA shall make a decision to affirm, reverse, modify or remand, in whole or part, the appealed action. When the BOA reverses or modifies a decision, the BOA shall set forth its findings and state its

reasons. Reversal of a decision shall require the concurring vote of four of the five members. When the BOA elects to remand the matter back to the initial decision-making body, the BOA shall include a statement explaining the reasons for the remand and the action to be taken. LUR Section 8-103:C.3.

The original action shall only be modified, reversed or remanded, as provided in Section 8-103:C.3.a of the LUR, if the appellant establishes that:

a. No Credible Evidence. There is no credible evidence in the record to support the original decision;

b. Original Action Inconsistent with This *Resolution*. The original action was inconsistent with the applicable requirements of this *Resolution*; or

c. Review Body Action Inappropriate. The initial decision-making body exceeded its jurisdiction or abused its discretion.

The IBC, 2021 edition, Section 113.2 provides that "An application for appeal shall be based on a claim that the true intent of this code or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of this code do not fully apply or an equivalent or better form of construction is proposed. The board shall not have authority to waive requirements of this code or interpret the administration of this code."

The UBC, 1994 edition, states that the board "shall have no authority relative to interpretation of administrative provisions of this code nor shall the board be empowered to waive requirements of this code." Section 105.2.

5. Appeal of the Building Official's December 28, 2023 Determination Regarding Building Code Violations

Appellant has changed the use and occupancy of the Property from what was originally permitted in 2001 - which was a single-family residence - to a commercial use for 12 people without obtaining the required building permit and without working with the Department to understand and verify code compliance. The new use and occupancy of the Property runs afoul of the building codes, be it the 1994 UBC or the 2021 IBC or anything in between. This matters because such changes in use and occupancy put basic life safety at risk; our building codes are adopted to ensure reasonable levels of safety for residents, guests, and first responders.

The Property was permitted in 2001 as a single-family residence under the 1994 Uniform Building Code. Under that code, the single-family residence use designation was a Group R Division 3 which also includes Lodging Houses (bed-and-breakfast establishment with a permanent occupant) and Congregate Residences with fewer than 10 people. The changes made to the use and occupancy of the Property completely departs from the Group R Division 3 designation. The Property was not designed to safely accommodate the current intended occupant load or transient occupants, i.e., those unfamiliar with their surroundings. The lodging for 12 people is a change in use and occupancy at the Property and requires a building permit in addition to a new certificate of occupancy.

In the following content staff will address the violations noticed at the Property which include three unvented fuel gas heaters and the changes in use and occupancy. Appellant's response letter, dated January 19, 2024 (Rec. No. A Appellant Letter) provided arguments regarding the change in use and occupancy; the Department's responses to those arguments are provided.

As described in the December 28, 2023 violation letter issued by the Department (Rec. No.1) there were two primary violations related to the building code that warranted issuance of the violation letter. The most disturbing violation was the presence of three unvented fuel gas heating units which produce carbon monoxide and can cause death. This violation warranted the suspension of the certificate of occupancy because staff had knowledge that bookings were open and starting to fill up for lodging at the property. The second building code violation described in the December 28, 2023 violation letter is related to proposed use and occupancy at initial permitting and construction versus the current intended use and occupancy made apparent on the Campfire website which includes, among other things, at least a doubling of occupant accommodations.

Staff has reviewed video evidence that the three unvented fuel gas heating units have been uninstalled. In the video provided by Law of the Rockies on January 5, 2024 the three units were shown together laying on the fireplace hearth in the main room of the house. The video also showed the three locations where the units were removed with the propane lines capped. After receiving the video evidence, the suspension of the certificate of occupancy was lifted on January 8, 2023 pending resolution of other violations (Rec. No. 46). Staff has requested to inspect the work in order to verify adequate mitigation of the violation.

Concerning the building code violation related to use and occupancy, the December 28, 2023 violation letter described both the increase in the number of occupants (up to 12 persons) and the length of occupant stay as being a trigger for additional building code review and approval. Section 111.1 of the then adopted building code was cited and provided to show that a change in the existing use or occupancy classification of a building or structure should not be made until approval has been received. *See* IBC*, 2015 edition, Section 111.1*. At that time staff was operating off of the facts provided on the Campfire website which indicated both an increase in the number of occupants and a change in the nature of the occupancy. Staff anticipated that the next step would be engagement with the property owner towards achieving building code compliance, which would have included providing staff details of intended use and occupancy necessary to apply the appropriate building codes and ensure the intended minimum level of occupant safety.

Appellant's response letter, dated January 19, 2024 (Rec. No. A Appellant Letter) provides the following arguments with staff's issuance of the December 28, 2023 violation letter. Those arguments are below in italics, and Staff's response to Appellant's arguments follow each argument in turn.

1. *The County references and relies on the 2015 International Building Code for its allegations regarding change in use when the 2015 International Building Code is irrelevant. The certificate of occupancy for the Property was issued in 2005 when building in the County was governed by the 1994 Uniform Building Code. Moreover, currently, the County uses the 2021 International Residential Code to govern buildings consisting of one- and two-family residences not more than three stories above grade.*

At the time the initial Violation letter was written, in December of 2023, the 2015 editions of the International Code Council (ICC) codes were in effect, including but not limited to, the IBC and International Residential Code (IRC). The 2021 editions of the ICC codes became effective on January 1, 2024 and superseded the previously adopted 2015 editions. The IBC, 2021 edition, addresses existing buildings in Section 101.4.7 and states "The provisions of the *International Existing Building Code* shall apply to matters governing the *repair*, *alteration*, *change of occupancy*, *addition to* and relocation of

existing buildings." Additionally, the IRC, 2021 edition, Section R110.2 states that "changes in the character or use of an existing structure shall not be made except as specified in Sections 506 and 507 of the *International Existing Building Code*." Both the IBC and the IRC will direct users to the International Existing Building Code for a change in use, occupancy or character of an existing structure.

2. *The County's failure to point to any violation based on the 1994 UBC [Uniform Building Code] renders any attempt to limit or prohibit use or occupancy of the Property meaningless. C.R.S. 30-28-209(1)(b)(I) provides that it "is unlawful to use any building or structure in violation of any…building code" but that "[n]othing in [this statute] prohibits the use of any building or structure in violation of an otherwise applicable building code where the use complies with any building code that was in effect at the time the building or structure was erected, constructed, reconstructed, or altered." Unless the County can point to any provision of the building code in effect at the time the certificate of occupancy was issued in 2005, the County cannot limit or prohibit the use of the Property based on building code violations. Should the County proceed to interfere with Owner's property rights based on any building code other than the 1994 UBC, such conduct would be in direct violation of C.R.S. 30-28-209(1)(b)(I).*

Even if staff accepts Appellant's argument that the 1994 UBC exclusively governs this case, applying what we know of the current intended use and occupancy of the structure to the 1994 UBC exposes issues related to the occupant load, the details of the exit system including number of exits, their locations, exit travel distance and illumination, handrail returns, in addition to adequate sanitation. Simply put, there are numerous violations even under the 1994 UBC. As a "dwelling" or "congregate residence" for 12 occupants, at least two exits meeting the requirements of Chapter 10 are required. *See 1994 Uniform Building Code, Table 10-A and Section 1003.1*. From what staff can determine on available evidence, the Property contains only one exit that meets the definition of exit provided in the 1994 UBC, that is "an unobstructed means of egress to a public way". *See 1994 UBC, Section 1001.2*. Similarly, as a Congregate Residence or a Lodging House for 12 occupants at least two exits would have been required with adequate illumination and the second level (or third if you include the garage as a level) would needed at least two separate exits from that level. *See 1994 UBC, Section 1003.1.* Additionally, the building permit would have been withheld until a permit to provide an adequately sized septic system that reflected the intended number of occupants was approved by the Environmental Health Office and the permit was issued. *See 1995 Gunnison County Individual Sewage Treatment System (ISDS) Regulations, Section 3-102 Building Permit To Be Withheld.* Accordingly, even when analyzed under the 1994 UBC, the use of the Property as a backcountry ski hut for up to twelve people creates numerous building code violations.

3. *Even if the County had applied the correct building code, the County's argument about change in use fails for at least three reasons. First, the County argues there has been a change in use because the Property is short-term rented. The County argues that under the 2021 International Building Code the Property has changed in use from an "R-3" classification to an "R-1" classification. The certificate of occupancy for the Property was issued in 2005 and notes that the Property is a Group R-3 building. Under the 1994 UBC (which governs here) the definition of Group R, Division 3:*

> *Division 3. Dwellings and lodging houses*
>
> *Congregate residences (each accommodating 10 persons or less)*

Under the definitions provided in the 1994 UBC, the Property is a "dwelling" and potentially a "lodging house, but not a "congregate residence". The 1994 UBC contains no occupancy limit for a dwelling or lodging house and there is no delineation between long-term and short-term rentals. There has been no change in use under the 1994 UBC and Owner's use and occupancy of the Property complies with the 1994 UBC. If Owner's use of the Property complies with the 1994 UBC, the County cannot use the 2021 IBC to limit or prohibit use or occupancy of the Property.

The definition of a "dwelling" provided in the 1994 UBC is "Any building or portion thereof which contains not more than two dwelling units" and the definition of a "dwelling unit" is "Any building or portion thereof which contains living facilities, including provisions for sleeping, eating, cooking and sanitation, as required by this code, for not more than one family, or a congregate residence for 10 or less persons". *See 1994 UBC, Section 205.* Further, "family" is defined as "an individual or two or more persons related by blood or marriage or a group of not more than five persons (excluding servants) who need not be related by blood or marriage living together in a dwelling unit." *See 1994 UBC, Section 207.* Plainly, the 1994 UBC contains occupancy limitations of within the definitions for "dwelling" and "family" – effectively, these definitions contemplate ten-person occupancy limit for structures like the Property. *See 1994 Uniform Building Code, Sections 204 – 205.*

The definition for "Lodging House" provided in the 1994 UBC is "Any building or portion thereof containing not more than five guest rooms where rent is paid in money, goods, labor or otherwise". *See 1994 Uniform Building Code, Section 213*. Updated building code editions are published every three years to keep up with evolving trends, new materials and construction techniques. When the 1994 UBC was published bed-and-breakfast style lodging provided out of someone's own home was a common situation. The traditional bed-and-breakfast style lodging house of the 1994 UBC era is becoming less common and the trend is towards complete transient occupancy of buildings. The definition for "Lodging House" provided in the 2021 IBC is "A one-family dwelling where one or more occupants are primarily permanent in nature and rent is paid for guest rooms" and the commentary for this section further provides "The code establishes a lodging house as a Group R-3 occupancy where there are five or fewer guest rooms. This definition provides a distinction from Group R-1 occupancies where the occupants are expected to be transient. For a lodging house, there are one or more occupants who are permanent; this is their home." *See 2021 IBC and Commentary, Section 202*. The occupancy classification for Lodging houses in *Section 310.4.2* of the *IBC* provides permission to utilize the *International Residential Code* when there are 10 or fewer total occupants: "Owner-occupied *lodging houses* with five or fewer *guest rooms* and 10 or fewer total occupants shall be permitted to be constructed in accordance with the *International Residential Code*, provided that an *automatic sprinkler system* is installed in accordance with Section 903.3.1.3 or Section P2904 of the *International Residential Code*." The commentary for this section provides additional clarity: "This section allows sprinklered bed-and-breakfast type hotels that are owner occupied and have five or fewer rooms to rent to be constructed under the IRC, provided that a sprinkler system is installed in accordance with NFPA 13D or Section P2904 of the IRC. In addition, there is also a maximum of 10 occupants permitted". Accordingly, staff concludes that the current proposed use of the Property does not meet the definition of "lodging house" even under the 1994 UBC. The current use of the Property does not fit within the scope of a dwelling or lodging house and is a departure from the permitted use and occupancy.

As shown on the Campfire website, two of the bedrooms contain six beds each (one queen-over-queen bunk and two twin-over-twin bunks) and the third bedroom contains three beds (one queen and one

twin-over-twin trundle). Considering two people per queen and one person per twin, there are easily sleeping accommodations with the 15 beds provided for at least 20 people. The rooms containing numerous beds, similar to a dormitory, demonstrate closer alliance with the definition of a "congregate residence" more so than the definition of a "dwelling" as provided in the 1994 UBC. The definition of a "congregate residence" provided in the 1994 UBC is "any building or portion thereof which contains facilities for living, sleeping and sanitation, as required by this code, and may include facilities for eating and cooking, for occupancy by other than a family. A congregate residence may be a shelter, convent, monastery, dormitory, fraternity or sorority house but does not include jails, hospitals, nursing homes, hotels or lodging houses." *See 1994 Uniform Building Code, Section 204.* A congregate residence for at least 12 people is classified as a Group R, Division 1 which is different than the building permit issued for the structure in 2001 as a single-family residence or dwelling as a Group R Division 3 under the 1994 UBC.

The original building permit application for the structure, signed by the property owner, identifies the requested building permit for the proposed structure as a "Single Family Residence". The building permit (2001-073) for the structure, signed by the Building Official at the time and dated May 15, 2001, identifies the building permit is for the construction of a "Single Family Residence". The certificate of occupancy for the structure, dated July 8, 2005, was granted for the completed building constructed under building permit 2001-073. Similarly, the permit for the septic system that serves this structure, signed by the property owner at the time and dated July 21, 1998, identifies that the system is intended for a residence and sized to serve at least three bedrooms and six people. The County, including the Offices of Planning, Building, and Environmental Health, reviewed and permitted the proposed development plan for this structure and property as a single-family residence and nothing else. Certainly, the Property was not reviewed or permitted as a "congregate residence" for occupancy of up to twelve people.

The 1994 UBC required that no change in the existing occupancy classification of a building or structure be made until a certificate of occupancy therefor was issued. *See 1994 UBC, Section 109.1*. Additionally, the 1994 UBC required that no changes in the character of occupancy or use of any building which would place the building in a different division of the same group of occupancy or in a different group of occupancies, unless the building was made to comply with the requirements of the code for such division or group. *See 1994 UBC, Section 3405*.

4. *Even if the Property was being used in a way that changed its occupancy under the 1994 UBC (which it is not), the 2021 IBC would still not apply. On November 7, 2023, the County adopted the 2021 IBC and the 2021 IRC. The 2021 IBC applies to "every building or structure" but there is an "exception" for: [d]etached one- and two-family dwellings…not more than three stories above grade [which] shall comply with this code or the International Residential Code." Further, the IBC states that it "applies to all occupancies, including one- and two-family dwellings…not more than three stories above grade". The 2021 IRC's definition of "dwelling" is [a]ny building that contains one or two dwelling units used, intended, or designed to be built, used, rented, leased, let or hired out to be occupied, or that are occupied for living purposes." There are no occupancy limits in the 2021 IRC as to the number of occupants of a single family home or delineation between long-term and short-term rentals.*

The IBC will provide direction to another code, including the IRC, if appropriate. *See 2021 IBC, Sections 101.2 and 310.4.2.* The IBC is the correct code to start with especially when considering changes in use and occupancy. *Section 102.6 Existing Structures* of the *IBC, 2021 edition* states that "The legal occupancy of any structure existing on the date of adoption of this code shall be permitted to continue without change, except as otherwise specifically provided for in this code, the *International Existing Building Code*, the *International Property Maintenance Code* or the *International Fire Code*." (Emphasis added). Further, *Section 101.4.7* of the *IBC, 2015* and *2021 editions* state "The provisions of the *International Existing Building Code* shall apply to matters governing the *repair, alteration, change of occupancy, addition* to and relocation of *existing buildings*." Further, the IBC defines a Change of Occupancy as:

> Either of the following shall be considered as a change of occupancy where this code requires a greater degree of safety, accessibility, structural strength, fire protection, *means of egress*, ventilation or sanitation than is existing in the current building or structure:
>
> 1. Any change in the occupancy classification of a building or structure.
> 2. Any change in the purpose of, or a change in the level of activity within, a building or structure.

See IBC, 2021 edition, Section 202.

The *International Existing Building Code* ("IEBC"), *2021 edition*, *Section 202,* defines a Change of Occupancy as:

> Any of the following shall be considered as a change of occupancy where the current *International Building Code* requires a greater degree of safety, accessibility, structural strength, fire protection, means of egress, ventilation or sanitation than is existing in the current building or structure:
>
> 1. Any change in the occupancy classification of a building or structure.
> 2. Any change in the purpose of, or a change in the level of activity within, a building or structure.
> 3. A change of use.

The *IEBC, 2021 edition, Section 202* defines a Change of Use as "a change in the use of a building or a portion of a building, within the same group classification, for which there is a change in application of the code requirements."

Further, Section 105.1 of the IEBC, 2021 edition states that "Any owner or owner's authorized agent who intends to repair, add to, alter, relocate, demolish, or change the occupancy of a building or to repair, install, add, alter, remove, convert, or replace any electrical, gas, mechanical, or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, shall first make application to the code official and obtain the required permit."

In the "Unsworn Declaration of Eric Nelson, PE", dated January 19, 2024, and included as part of the response from Law of the Rockies received on January 19, 2024, Mr. Nelson explained that "the property is intended to be used by the owner's family of seven for approximately 31 days per year and short-term rented for up to 200 days per year with an average of around 10 guests and a maximum of

12 guests per stay". With this information the property owner intends to utilize this structure as permitted as a single-family residence less than 10% of the year and provide lodging with an increased occupant load and in a transient capacity more than 50% of the year. The primary intended use of this structure is for transient occupant use for an occupant load of 12 guests.

The owner intends to use the structure as permitted (i.e., use as a single family residence for his family) less than 10% of the year. Such use is aligned with the permit and certificate of occupancy granted under the 1994 UBC and is also in alignment with the currently adopted building codes, including the IRC and IBC because the legal occupancy granted is not changing and is protected under Section 102.6 of the IBC and Section 102.7 of the IRC for existing structures. However, for more than half the year, the primary intended use and occupancy that the owner intends is not compliant with Chapter 10: Means and Egress of the 1994 UBC or the certificate of occupancy granted under the 1994 UBC. According to the IBC, this would be likely be classified as a Residential Group R-1, Congregate living facility (transient) with more than 10 occupants. *See IBC, 2021 edition, Section 310.2*.

The 2021 IBC defines transient as "Occupancy of a dwelling unit or sleeping unit for not more than 30 days". *See IBC, 2021 edition, Section 202.* The commentary further describes why this is a consideration: "There is an expectation that the occupants are not as familiar with the building as those residents in nontransient facilities such as apartment buildings and single-family dwellings. If occupants are unfamiliar with their surroundings, they may not recognize potential hazards or be able to use the means of egress effectively". *See IBC Commentary, 2021 edition, Section 310.2.* The definition of "transient" and the term's inclusion in the code make it quite apparent that length of stay is a consideration.

5. *Even if the Property was being used in a way that changed its occupancy or use under the 1994 UBC rendering the need for the Owner to seek approval from the County, the 2021 IRC would apply, not the 2021 IBC. The 2021 IRC does not contain any "R" classifications and does not limit the occupancy or type of rentals for single family residences. There is no basis under the 2021 IRC for the County's allegation that there has been a change in occupancy or use necessitating any action from Owner to seek approval from the County.*

The code commentary provided in the 2021 IBC regarding Residential Group R-1 occupancies, where the occupants are primarily transient in nature, explains how transient living facilities may be able to comply with the requirements for an R-3 occupancy and potentially even the IRC: "Transient congregate living facilities and boarding houses with 10 or fewer occupants can be constructed to the standards of Group R-3 occupancies rather than the general category of Group R-1. The primary intent of this provision is to permit bed-and-breakfast-type facilities to be established in existing single-family (one-family) structures. In comparison to the provision under Group R-2, which permits congregate living facilities with fewer than 16 nontransient occupants to be built as a Group R-3, the Group R-3 "transient" facility is limited to 10 or fewer occupants in reflection of the nonfamiliarity of guests with the building and its evacuation routes." *See 2021 IBC Commentary, Section 310.2* And "A lodging house with five or fewer guest rooms and 10 or fewer total occupants can be classified as a Group R-3 occupancy or, under Section 310.4.2, can be constructed under the provisions of the IRC provided that a sprinkler system is installed in accordance with NFPA 13D or Section P2904 of the IRC. The definition of lodging house allows the rental of guest rooms to transients, provided that there are one or more occupants who are permanent in nature. While Section 310.4.2 requires owner occupancy of the dwelling unit in order for it

to be built in compliance with the IRC, there is no owner occupancy requirements for lodging houses that are established in compliance with the Group R-3 requirements. The broad intent of the lodging house provisions is to allow bed-and-breakfast and similar facilities under the Group R-3 category even though transient housing generally falls under the Group R-1 classification." *See 2021 IBC Commentary, Section 310.4.*

The *International Property Maintenance Code* (IPMC) referenced in the *IBC, Section 102.6 Existing Structures* provides occupancy limitations for dwelling units, hotel units, rooming units and dormitory units. The 2021 *IPMC, Section 404.4.1* requires that sleeping rooms contain at least 50 square feet of floor area for each occupant. The two upstairs bedrooms each contain six beds (one queen-over-queen bunk and two twin-over-twin bunks). The rooms at full bed occupancy would need to be at least 400 square feet each to provide enough space for the guests. According to the Assessor's Office Property Record and the Campfire website the bedrooms appear to be between 220 and 250 square feet.

Among other things, the building codes provide us with tools to ensure that different occupancy types and specific uses are equipped with minimum features to ensure a reasonable level of fire and life safety for occupants as well as for fire fighters and emergency responders.

Staff believes that the combination of changing to a primarily transient occupancy and increasing the occupant load, especially as indicated with the concentration of beds in the two upstairs sleeping rooms, has created a potentially dangerous situation for guests at this property. Staff recommends that the property owner work with a design professional to propose a plan that complies with the County's adopted building codes for the intended use and occupancy of the structure which could include, and may not be limited to, the 2021 editions of the International Existing Building Code, International Building Code and the International Residential Code. Staff is available to engage on details of a proposed plan ahead of receiving a proposed plan for review and approval.

6. Appeal of the January 11, 2024 Determination that the Property is Used Commercially and Is a Resort Under the LUR

The Property was originally permitted as a single-family residence, and to the best of staff's knowledge, was historically used as a single-family residence. After learning that Campfire Ranch had begun advertising the Property as a backcountry ski hut for up to twelve people, staff concluded that Appellant's new use of the Property constituted both a commercial use and a resort under the LUR. The LUR defines "commercial" and "resort" as follows:

- COMMERCIAL means any establishment engaged in the retail or wholesale sale of goods or services that is open to the general public or that may be open to members only. This does not include farm or ranch stands. "Commercial" shall also mean "business."
- RESORT (INCLUDING INNS, LODGES, DUDE RANCHES AND GUEST RANCHES) means those establishments used for housing and providing either organized entertainment or recreational opportunities for overnight lodging, generally several nights in duration. This type of facility either provides all recreational opportunities on-site, or as part of an organized or duly licensed and/or permitted recreational activity on public or private lands in the vicinity of the inn, lodge or guest ranch.

New commercial uses of a certain size require a Land Use Change Permit review as a Minor Impact Project pursuant to LUR Section 6-102:J *New Commercial, Industrial 10,000 sq. ft., or Five Acres or Less.* LUR Division 9-300 *Commercial and Industrial Uses* Identify the standards for commercial and industrial Land Use Change Permits, and LUR Section 9-303 *Dude Ranches and Resorts* includes additional standards for resorts.

Planning Staff has reviewed the January 19, 2024 letter from Mr. Spivey (Rec. No. A) ("Appellant Letter"), and prepared responses and recommendations to the Board of Adjustment on the following issues:

A. Appellant Appeal Pertaining to Applicability of Violation

1. Appellant Claim:
   The County fails to recognize that Campfire is simply the property management company and is a separate and distinct entity from Owner and the Property.

Activity by a property management company or other authorized agent in management of real property does not absolve the owner of responsibility of its agents' actions. Owners are required to ensure compliance with the LUR under *Article 16, Section 16-101-B. Owner has Burden of Proof of Compliance* in that "The burden of proof that a project is in compliance with this Resolution lies with the owner of the land on which the project is occurring." Staff recommends that the Board of Adjustment find that the January 11, 2024 Stop Order (Rec. No. 6) to Andrew Fink, owner of the subject properties as depicted in Rec. No. 13, 21, 72, 73, and 74 was appropriately issued.

2. Appellant Claim:
   The County issued a Stop Order, Immediate Compliance requiring Owner to stop all short-term rental activity until a land use change permit has been approved for a commercial use of the Property.

The County issued a Stop Order for operating a Resort, a Commercial Use, as defined by the *Land Use Resolution*; not an order to "stop all short-term rental activity." In fact, the County *Land Use Resolution* does not have a definition for short-term rental, nor is the term mentioned in the Stop Order. *See* Rec. No. 6.

3. Appellant Claim
   The County's argument is directly at odds with Colorado law. In Houston v. Wilson Mesa Ranch Homeowners Ass'n, Inc., 360 P.3d 255 (Colo. App. 2015), the Court of Appeals held that short-term renting a property does not change the use of the property from a residential one to a commercial one. The Houston Court thoroughly analyzed case law in Colorado and other jurisdictions to conclude that "mere temporary or short-term use of a residence does not preclude that use from being 'residential.' " Id. at 259. Rather, the court agreed with other courts that held when there is a prohibition of "commercial or business uses", that such prohibition does not bar "short-term vacations rentals of residences where a renter uses the premises for residential activities such as eating and sleeping and not for commercial activities such as running a business." Id. at 260. Here, guests are not running a business at the Property, but are short-term renting the property. Under Houston, such use is residential and not commercial.

Tellingly, Appellant's argument above does not even cite to the LUR. Instead, it cites to *Houston*, a case that did not address the LUR at all. In *Houston*, the court analyzed the "scope of restrictive covenants" in a private subdivision in San Miguel County – specifically, whether the short-term rental of a residence qualified as a "commercial" purpose under the subdivision covenants. *Houston v. Wilson Mesa Ranch Homeowners Ass'n*, 360 P.3d 255, 256-57 (Colo. App. 2015). Relying on the dictionary for definitions of "commercial" and "residential", the court determined that the subdivision's covenants did not bar short-term vacation rentals. The LUR has specific definitions for the terms "commercial" and "resort", and the BOA bases its decisions on the regulations applicable in Gunnison County. *See* LUR Section 2-102.

B. Appellant's Use of the Property Constitutes a Commercial Use under the LUR

Gunnison County has the authority to regulate commercial uses and activities pursuant to Division 9-300: *Commercial and Industrial Uses*, and more specifically Section 6-103.U. *Commercial Wedding Site*, Section 9-301: *Applicability and General Standards*, and Section 9-303: *Dude Ranches and Resorts*; *See* also LUR Section 6-102:J (requiring a Minor Impact Project for a new commercial use on five acres or less). The LUR defines commercial uses as:

> *LUR Section 2-102, Definitions, Commercial: means* ***any establishment engaged in the retail*** *or wholesale* ***sale of goods*** *or* ***services*** *that is open to the general public or that may be open to members only. This does not include farm or ranch stands. "Commercial" shall also mean "business."* (Emphasis added).

The Appellant claims "Neither Campfire nor the Owner have ever organized or provided entertainment or recreation, either on or off site, nor have they sold goods or rented equipment at the Property (except for making two-way radios available)". In addition to the recreational opportunities outlined in Section titled Appellant's Use of the Property Constitutes a Resort Under the LUR of this memorandum, the Appellant has advertised several commercial uses and offered goods and services to guests of Campfire Ranch Washington Gulch including:

a. Shuttling of equipment for a fee (*See* Rec. No. 24) on County Road 811. The provision of paid gear shuttling is a *service* and considered a commercial use. Additionally, all Washington Gulch snowmobile users are required to obtain a permit from the USFS. Dayle Funka, District Ranger, USFS, confirmed that there are no "authorized commercial permits in both motorized and non-motorized," *See* Rec. No. 17. The offering of a paid service is a commercial use that supports the overall commercial and resort uses at the subject property.
b. Brand experiences, advertising that the property can be used "as a launchpad for your brand", and can promote services, products, and host guests (Rec. No. 48, 51).
c. Hosting of events and groups for a site fee of $1,500 per 24-hour period (Rec. No. 49, 50). Rec. No. 54 contains a quote stating "The ICELab couldn't be more delighted with the service, professionalism, and quality of the venue provided by Campfire Ranch for multiple events and multiple locations."
d. Unspecified group retreats (Rec. No. 49, 51).
e. Backcountry weddings, elopements, and micro weddings for 20 people or less (Rec. No. 51, 52).
f. Team retreats for "business, team building or a getaway" (Rec. No. 53).

g. Video and photo shoots, noting that "all of our properties are located on private land, which allows us to grant permission for filming without boat loads of paperwork." (Rec. No. 54).
h. "Family supper" events, an "outdoor plated dinner" (Rec. No. 57, 58, 59, 60, 62).
i. It appears that there may be an on-site manager as evidenced in the "Add-On Options" that are available to guests, including onsite sales and "gear shuttles, rental gear, guidebooks" (See Rec. No. 9, 10 23). In addition to the ability to purchase and rent gear on premise, Campfire Ranch has advertised a "Hut Keeper" job (See Rec. No. 16).

Given the offering of various commercial uses and a commercial wedding site, staff recommends the Board of Adjustment uphold the determination that this activity meets the definition of Commercial use.

C. Appellant's Use of the Property Constitutes a Resort Under the LUR

The LUR definition of resort includes the provision of recreational opportunities by licensed, third-party outfitters on public lands, more specifically,

> LUR Section 2-102, Definitions, Resort (Including Inns, Lodges, Dude Ranches, and Guest Ranches): *means those establishments used for housing and **providing** either **organized** entertainment or **recreational opportunities for overnight lodging**, generally several nights in duration. This type of facility either provides all recreational opportunities on-site, or as part of an organized or duly licensed and/or **permitted recreational activity on public** or private **lands** in the vicinity of the inn, lodge or guest ranch.* (Emphasis added).

The Appellant argues that *"…neither Campfire nor Owner "provide . . . organized . . . recreational opportunities." Those "recreational opportunities" are provided by other businesses—Campfire merely directs visitors to other small businesses within the County."* The Appellant provides guided recreational opportunities, in this case, backcountry skiing, through Irwin Guides operating under a USFS Special Use Permit. The Appellant advertises that Irwin Guides will meet guests at Campfire at Washington Gulch Hut (*See* Rec. No. 9, 22, 24, 61), guiding them directly onto adjacent USFS public lands (*See* Rec. No. 56). Additionally, guided recreational opportunities are advertised though the Campfire Ranch's "Adventure Concierge Services", including guided skiing from the hut onto USFS land (*See* Rec. No. 8, 24, 55). Both guided and unguided backcountry skiing, a recreational activity on USFS land, is initiated and concluded at the Campfire Ranch at Washington Gulch property. Campfire at Wash Gulch advertises that guided and unguided guests can access a variety of backcountry skiing terrain on USFS land directly from the hut, including the following backcountry zones and recommended routes to and from the hut in described in Rec. No. 56:

a. *Anthracite Mesa:* described as a "go- route from the property" with a route depicted from the hut to the top of this zone;
b. *Playground Hill:* where guests can "head out the backdoor and up to the top of Playground Hill'
c. *Coney's*: described as "located just south of our property in Washington Gulch…We typically skin from the hut, do a few laps and skin back to the hut on the road". The map of Coney's shows an approach route to the top of the zone and a return route on Washington Gulch Road;

d. *The Double Barrel and Three Kings*: is located to the east of the hut and the map shows a route from the hut to the top of this zone; and
e. *Baldy*: the description of the access to and from Baldy Mountain says, "Decent access to and from the property via the Washington Gulch Road/skin track." An approach to the peak is shown in the zone map.

The Appellant argues that "The services provided by Campfire for the Property are no different than services other short-term rental property management companies provide" and references several property management websites. An inherent difference between the services provided by property management companies and those at Campfire Ranch Wash Gulch is that guided commercial skiing services are offered on adjacent USFS land directly from the hut as described above and in Rec. No. 56.

The Appellant also argues that "the County's example of the Opa's Taylor Hut is off base. The Opa's Taylor Hut is not a residence but is solely a winter use recreation hut on federal land operating under the Braun Hut special use permit". The Appellant advertises the property as a backcountry hut and backcountry skiing destination. While the ownership structure may not be the same, the use and impacts to surrounding area is similar, if not more intense at the Campfire at Washington Gulch property due to its relatively short and safe winter approach, year-round use, utilities and internet, concierge services and gear shuttling. The Taylor Pass Hut Proposal (Opa's Taylor Hut) Environmental Assessment (*See* Rec. No. 29) evaluated the impacts of an estimated 500 user nights and noted that some users may rely on permitted outfitters and/or guides to access the hut (p. 13). The Assessment evaluated the impacts of the number of snowmobile trips to support an estimate of 3-5% of user nights. While individual guests are prohibited from winter motorized access, Campfire Wash Gulch provides an unknown number of snowmobile trips for a fee across USFS land to support overnight guests. Impacts of skier compaction was also evaluated in the Assessment. While an Environmental Assessment is specific to a proposal on federal land, LUR Section 11-106 *Protection of Wildlife Habitat Areas* would require referral of an application for a new commercial use to be referred to Colorado Parks and Wildlife (CPW). If CPW found the project was located in sensitive wildlife habitat, the applicant would be required to submit a site-specific wildlife habitat analysis that evaluates direct and cumulative impacts to wildlife, and federally and state listed species. The report would also include a mitigation plan that describes how the proposal would avoid or mitigate these potential impacts.

Additionally, resorts are required to comply with additional standards in LUR Section 9-303 *Dude Ranches and Resorts*, including LUR Section 9-303.A, *Access to Public Land*. This standard requires that when activities associated with a resort require use of public lands, regardless of these activities being unguided or guided, a Special Use Permit or equivalent will be obtained from the appropriate public land agency, in this case, the USFS.

Beacon Guidebooks features three huts in its *Crested Butte Backcountry Ski Map Series* (*See* Rec. No. 66). The huts identified are Campfire Wash Gulch, Crystal, and Maroon. The Crystal and Maroon Huts are located in Gothic at the Rocky Mountain Biological Lab (RMBL) (*See* Rec. No. 67). RMBL is a non-profit that has received several Land Use Change permits over the years for the commercial uses at the property. During winter months, Campfire Wash Gulch functions in a similar capacity as Opa's Taylor, Crystal, and Maroon Huts.

Additionally, Campfire at Washington Gulch has been featured as a "new stay" in Outside Magazine's 2024 Travel Awards on Instagram (Rec. No. 68), on Outside Magazine's website (*See* Rec. No. 69), and in

print (*See* Rec. No. 70); in addition to an article in the Gunnison Country Times highlighting support from Gunnison River Partnership (*See* Rec. No. 71).

The Campfire Wash Gulch location allows for guests to stay multiple days in a row in a backcountry setting and those impacts to the surrounding area have not been evaluated pursuant to, but not limited to, LUR Section 6-102:J, Division 9-300 *Commercial and Industrial Uses*, Section 9-303 *Dude Ranches and Resorts,* and Section 11-106 *Protection of Wildlife Habitat Areas* as they were during the Minor Impact Land Use Change Permit review of the Opa's Taylor Hut; nor was the public afforded the ability to comment on possible impacts. Staff recommends the Board of Adjustment uphold the determination that this activity meets the definition of Resort.

7. Owner's Claims Against the County

Staff requested that the County Attorney provide analysis of those legal issues raised by Appellant's January 19, 2024 statement of appeal "under the building code and the LUR." *See* January 19, 2024 Ltr. from D. Spivey (Rec. No. A) ("Appellant Letter") at 14. Those issues include:

1. Whether Appellant's contention that Community Development staff's "singling out" Appellant in its decision to enforce the County's building code(s) and LUR is relevant to whether staff properly applied such regulations? *See, e.g.* Appellant Letter at 8, 9, 10, 12, 13.

2. Whether the Board of Adjustment has jurisdiction to decide the Due Process and Equal Protection claims contained in the Appellant Letter? *See* Rec. No. A, Appellant Letter at 11-13.

The County Attorney's analysis and recommendations to the Board of Adjustment are as follows:

A. <u>Evidence that Appellant was "Singled Out" is Probably Not Relevant to the Question of the Whether Staff Properly Applied the Building Code(s) or the LUR; Such Evidence May be Relevant to Appellants' Constitutional Claims</u>

The short answer to the first question is "no." The LUR affords the Board of Adjustment discretion to hear Appellant's evidence regarding its contention that it was "singled out." *See* LUR 8-104(C)(2)(d). However, the Community Development Department's decisions to enforce or not to enforce the County's land use regulations as to Appellant has no bearing as to whether the Department properly determined that Appellant's change in use requires approval under the LUR. (Note that such evidence may have bearing on Appellants' Constitutional claims, as discussed below.)

It has long been and remains well established in the law that reviewing bodies, particularly courts, should be reluctant to second guess the decisions of regulators to enforce or not to enforce their regulations. *See, e.g.*, *People ex rel. Dunbar v. Gym of Am., Inc.*, 177 Colo. 97, 117, 493 P.2d 660, 670 (1972) ("The right of officials to meet statutory evils as they arise and according to the manner in which they arise must always remain within the sound discretion of the statute's enforcement officer."); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (finding that agency's decision to enforce or not enforce rules, "whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"); *accord*, *Colo. Ethics Watch v. Indep. Ethics Comm*, 2015 Colo. Dist. LEXIS 728, *4-5 (Colo. Dist. Ct. Aug. 10, 2015). *See also*, *e.g.*, *Zavala v. City & Cty. of Denver*, 759 P.2d 664, 668 (Colo. 1988) (noting that "the fact that some other individuals escape prosecution under an ordinance is insufficient to establish intentional selective enforcement of the ordinance."); *accord*, *May v. People*,

636 P.2d 672, 681-82 (Colo. 1981) ("The fact that some people escape prosecution under a statute is not a denial of equal protection unless selective enforcement of the statute is intentional or purposeful."); *Archibold v. PUC*, 58 P.3d 1031, 1039 (Colo. 2002) (explaining that courts "typically refrain from ordering the executive branch to take an action committed to prosecutorial discretion."). *Cf., e.g.*, Fire House Car Wash, Inc. v. Bd. of Adjustment for Zoning Appeals, 30 P.3d 762, 766 (Colo. App. 2001) ("In addition, the interpretation of a rule by the agency charged with its enforcement is entitled to great deference.").

The United States Supreme Court's opinion in *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958), illustrates and explains this reluctance. The Federal Trade Commission ("FTC") concluded that two businesses' pricing practices were unfair and ordered the businesses to cease and desist from those practices. *Id.* at 412. The businesses sought judicial review on the basis that the pricing practices in which it engaged were widespread in the industry and that they would go out of business if they were required to cease practices that were still available to their competitors. *Id.* It They asked two Circuit Courts of Appeals to hold FTC's cease and desist order in abeyance until the agency had issued similar orders against their competitors. *Id.* The lower courts declined to do so and affirmed the FTC's orders, and the affirmed the lower courts' decisions. *Id.* at 414. The Supreme Court emphasized that an agency's decision whether to proceed simultaneously against an entire industry or instead to begin by prosecuting a single firm requires the agency to exercise specialized, experienced judgment regarding how "to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *See id.* at 413. Thus, the Court concluded, the agency is in the best position to determine whether a practice is widespread or concentrated in a few firms. *Id.* Accordingly, even if a practice is widespread, an agency may conclude that its most effective enforcement strategy requires it to move initially against a single business that it believes to be engaging in an unlawful practice. *See id.*

Here, Appellant has presented no evidence of an improper motive or improper intent to selectively prosecute it; the only evidence presented is that there are other businesses in Gunnison County arguably operating in the same manner. Regardless, the issue before the Board of Adjustment is whether the Appellant's business operations are contrary to the LUR and the applicable building code(s), not whether Appellant is being unfairly prosecuted. This so-called "singling out" issue, therefore, has no bearing on the Board of Adjustment's decision with regard to this appeal, and we recommend to the Board of Adjustment that it give little to no weight to evidence of this so-called "singling out" when deciding whether the building code(s) and the LUR were properly applied here.

B. <u>The BOA May Be Authorized to Hear Some, But Not All, of Appellant's Constitutional Challenges</u>

With regard to the second question – whether the Board of Adjustment is authorized by law to weigh in on Appellant's Constitutional challenges -- the answer is both "yes and no." It is also well established that:

> Where the constitutionality of a statute, under which an administrative agency acts, is challenged, the administrative agency cannot pass upon its constitutionality. That function may be exercised only by the judicial branch of government. The proper forum for this is the district court, where a declaratory judgment action can be initiated by the party.

Arapahoe Roofing & Sheet Metal, Inc. v. Denver, 831 P.2d 451, 454 (Colo. 1992) (internal citations and quotations omitted). *See also Welch v. Colo. State Plumbing Bd.*, 2020 COA 130, ¶ 14, 474 P.3d 236, 240 ("Administrative agencies do not have the authority to determine the constitutionality of statutes they are charged with enforcing."). Thus, and to the extent the Appellant is facially challenging the constitutionality of either the LUR or the County building codes, the Board of Adjustment probably lacks jurisdiction to hear such questions.

However, Appellant appears not to be challenging the constitutionality of either the County building codes or the LUR, but whether the application of these regulations was constitutional. "Although administrative agencies do not have authority to pass on facial challenges to the constitutionality of statutes, they have authority to determine whether an otherwise constitutional statute has been unconstitutionally applied." *Pepper v. Indus. Claim Appeals Office*, 131 P.3d 1137, 1146 (Colo. App. 2005). "Distinguishing between facial and as-applied challenges, we have noted that a facial challenge considers the restriction's application to all conceivable parties, while an as-applied challenge tests the application of that restriction to the facts of a plaintiff's concrete case." *Harmon v. City of Norman*, 61 F.4th 779, 789 (10th Cir. 2023) (internal citation and quotations omitted). "Though the same substantive standard applies to both facial and as-applied challenges, the latter demands a developed factual record and the application of a statute to a specific person." *Id.* Therefore, the Board of Adjustment arguably can decide Appellant's constitutional claims to the extent they are directed at the application of the regulations by staff rather than the regulations themselves.

C. Appellants May be Engaging in Improper Claim Splitting

Before doing so, the Board of Adjustment must first determine whether Appellant is engaging in improper claim splitting. As the Federal Court of Appeals for our Circuit, which includes Colorado, explains:

> *"The rule against claim-splitting requires a plaintiff to assert all of its causes of action arising from a common set of facts in one lawsuit. By spreading claims around in multiple lawsuits in other courts or before other judges, parties waste scarce judicial resources and undermine the efficient and comprehensive disposition of cases."*

Katz v. Gerardi, 655 F.3d 1212, 1217 (10th Cir. 2011) (internal citation and quotations omitted). In addition to bringing this appeal, Appellant has sued the Board of County Commissioners in Colorado District Court, alleging "violations of procedural and substantive due process" against the County, and attached a Notice of Violation which is also the subject of this appeal. *See* Am. Compl. and Jury Demand, *McCloud Placer v. Bd of Cnty. Cmrs. of Gunnison Cnty.*, Colo. Dist. Ct. No. 2024CV30002 (Rec. No. 75). The Appellant Letter reveals that Appellant is bringing these exact same claims as part of this appeal. *See* Rec. No. A, Appellant Letter at 11-13. Appellant may contend that the lawsuit is limited to its onsite wastewater treatment system (OWTS) violations and, therefore, this appeal is not claim splitting. The Board of Adjustment would therefore need to decide whether the OWTS violations arise from a set of facts common to Appellant's building code and LUR violations.

Appellant may also argue that it was required to split its claims because of the requirement under Colorado law to exhaust administrative remedies. "If complete, adequate, and speedy administrative remedies are available, a party must pursue these remedies before filing suit in district court." *City & Cty. of Denver v. United Air Lines*, 8 P.3d 1206, 1212 (Colo. 2000). "If a party fails to exhaust these

remedies, the district court may lack subject-matter jurisdiction over the action." However, "the requirement to exhaust administrative remedies is no excuse for claim-splitting." *See Barr v. Bd. of Trs.*, 796 F.3d 837, 840 (7th Cir. 2015); *see also McClain v. Canadian Cty. ex rel. Bd. of Cty. Comm'rs*, No. CIV-22-1091-SLP, 2024 U.S. Dist. LEXIS 12520, at *9 (W.D. Okla. Jan. 24, 2024) (finding argument that split claims "were unexhausted" to be "unavailing.").

Based on the record, the County Attorney concludes that although the OWTS regulations are different from the building codes and the LUR, all of Appellants' violations of the rules stem from Appellants' commercial uses and 12-person (or more) occupations of the property at issue, and therefore arise from a common set of facts. Where claims arise out of such set of facts, and where a party can amend its complaint or request a stay in the pending court action to allow it "to exhaust administrative remedies for [its] . . . other claims[,]" courts normally find improper claim splitting. *See*, *e.g.*, *Juarez-Galvan v. UPS*, 577 F. App'x 886, 888 (10th Cir. 2014).

Should the Board of Adjustment consider Appellants' separate cases as improper claim splitting, the only constitutional claim possibly germane to this proceeding would be Appellants' Equal Protection claim because of the fact that this claim is not pled in the court action. On the other hand, the law requires Appellant to "assert **all** of its causes of action arising from a common set of facts in one lawsuit." *See Katz*, 655 F.3d at 1217 (emphasis added). Therefore, the BOA could properly conclude that even though not pled in the court action, Appellant could seek to amend its complaint to also bring its Equal Protection claim in that case, and the BOA need not decide any of Appellants' constitutional claims.

In sum, the County Attorney recommends that the Board of Adjustment find inappropriate claim splitting by the Appellant and decline to hear and decide Appellants' constitutional claims. Upon such a decision, the BOA has the discretion to decline to hear Appellants' "singling out" evidence as irrelevant to the matters before the BOA.

D. <u>The Record Does Not Appear to Support A Finding of An Equal Protection Violation</u>

Should the BOA decide that the Equal Protection Claim is not the product of inappropriate claim splitting, it will need to apply the law surrounding the Equal Protection clause of the United States Constitution, and similar such laws surrounding the Colorado Constitution. In essence, Appellant claims that it was improperly targeted for code enforcement actions by the County to such an extent that its Equal Protection rights were violated, citing to *Beaver Creek Prop. Owners Ass'n v. Bachelor Gulch Metro. Dist.*, 271 P.3d 578, 586 (Colo. App. 2011). *See* Rec. No. A, Appellant Letter at 13. The citation to *Beaver Creek* is somewhat confusing to us, as this case addresses a facial challenge to a special district's regulation as opposed to an as applied challenge. *See id*. The BOA may want to ask Appellant to clarify if it is bringing a facial or an as-applied Equal Protection challenge to the County building code(s) and the LUR. If the former, as explained above this is outside of the BOA's jurisdiction. If the latter, the BOA may decide the issue.

"The Fourteenth Amendment to the United States Constitution states that 'no state . . . shall deny to any person within its jurisdiction the equal protection of the laws.' The right to equal protection also finds support in . . . . the Colorado Constitution. Colo. Const. art. II, § 25." *Indus. Claim Appeals Office v. Romero*, 912 P.2d 62, 65-66 (Colo. 1996). Under the Equal Protection clause:

> "A facial challenge is supported where the law by its own terms classifies persons for different treatment. In contrast, a statute, even if facially benign, may be unconstitutional as applied where it is shown that the governmental officials who administer the law apply it with different degrees of severity to different groups of persons who are described by some suspect trait."

Zerba v. Dillon Cos., 2012 COA 78, ¶ 13, 292 P.3d 1051, 1055. Importantly, mere "[d]epartures from administrative procedures or policies, use of illegitimate criteria, and amorphous allegations of bias, bad faith, malice, conspiracy, and corruption do not amount ordinarily to a cognizable equal protection claim; a plaintiff must allege actions akin to actual corruption or a bad faith intent to injure based upon personal hostility." *See Ewy v. Sturtevant*, 962 P.2d 991, 996 (Colo. App. 1998). And, the mere "fact that some people escape prosecution under a statute is not a denial of equal protection unless selective enforcement of the statute is intentional or purposeful." *See People v. Kurz*, 847 P.2d 194, 196-97 (Colo. App. 1992). Accordingly, to establish an as-applied Equal Protection violation in this matter, Appellant has the burden to prove that "purposeful discrimination or abuse of discretion" by County staff in the enforcement of the regulations at issue rose to the level of an Equal Protection violation. *See May*, 636 P.2d at 681-82.

Should the BOA decide to hear Appellants' Equal Protection claim, it has the discretion to allow Appellant to present evidence that it was "singled out." That said, review of the record in the light most favorable to Appellant reveals that, at best, that there are other property owners in Gunnison County engaged in similar activities who have not (or at least, not yet) been prosecuted by staff for code violations. The County Attorney is unaware of any direct or even circumstantial evidence that would establish purposeful or intentional discrimination against Appellant by County staff. Keeping in mind "[t]he right of officials to meet statutory evils as they arise and according to the manner in which they arise[,]" *see Gym of Am.*, 493 P.2d at 670, the County Attorney therefore recommends no finding of an Equal Protection clause here should the BOA elect to take up the question.

8. Record on Appeal

The record can be accessed on https://permitdb.gunnisoncounty.org/citizenaccess/, click on the "Projects" button, then click the "Application Number" button, type "APPEAL-24-00003" into the search field, click "Search", select the result, then click on "Attachments".

The record for this appeal consists of the following exhibits:

A. Appellant Submittal:
   A. 1/19/2024: Letter and request for appeal from Daniel P. Spivey, Law of the Rockies, to Gunnison County
   B. Appellant Letter Exhibit A
   C. Appellant Letter Exhibit B
   D. Appellant Letter Exhibit C
   E. Appellant Letter Declaration of Eric Nelson

B. Decision-Making Body Record (related to Building Code up to December 28, 2023):

1. 12/28/2023 Notification to Correct Violation of the Gunnison County On-site Wastewater Treatment System Regulations, Notification of Violation of the International Building Code, Notification of Suspension of Certificate of Occupancy
2. 10/13/2022-October 26, 2022 email messages between C. Lambert and Matt Dungan of Campfire Ranch concerning change of use for an existing single-family residence
3. 6/1/2023 email to Drew Fink from C. Pagano regarding existing septic capacity
4. 12/28/2023 email to Drew Fink from C. Lambert providing the December 28, 2023 Violation and Suspension of Certificate of Occupancy letter
5. Gunnison County Assessor's Office Property Record for 6001 County Road 811

C. Decision-Making Body Record (related to Land Use Resolution up to January 11, 2024):

6. 1/11/2024: Stop Order Pursuant to the Gunnison County *Land Use Resolution*, Notification to Correct Violation of the Gunnison County *Standards and Specifications for New Construction of Roads and Bridges*
7. 1/11/2024: Stop Order Pursuant to the Gunnison County *Land Use Resolution*, Notification to Correct Violation of the Gunnison County *Standards and Specifications for New Construction of Roads and Bridges*, Exhibit A. Access
8. 1/11/2024: Stop Order Pursuant to the Gunnison County Land Use Resolution, Notification to Correct Violation of the Gunnison County Standards and Specifications for New Construction of Roads and Bridges, Exhibit B. Adventure Concierge Services
9. 1/11/2024: Stop Order Pursuant to the Gunnison County Land Use Resolution, Notification to Correct Violation of the Gunnison County Standards and Specifications for New Construction of Roads and Bridges, Exhibit C. Goods and Services
10. 1/6/2023: LUC-23-00002 Improvement survey plat
11. 1/6/2023: LUC-23-00002 Warranty deed
12. 1/6/2023: LUC-23-00002 Well permit for the subject structure
13. 1/6/2023: LUC-23-00002 Standard response excerpt
14. 3/15/2023: Email exchange regarding overnight parking at the Washington Gulch Winter Trailhead, property improvements, and sauna between H. Seminick, M. Schmidt, C. Pagano, C. Lambert; Sam Degenhard and Matt Dungan of Campfire Ranch; and D. Fink, McCloud Placer LLC
15. 3/20/2023: Campfire Ranch response to overnight parking and Campfire Hut improvement concerns
16. 3/14/2023: Screenshot of a Hut Keeper job advertisement
17. 3/22/2023: Email exchange between M. Schmidt; D. Funka and Jon Hare, USFS regarding overnight parking at the Washington Gulch Winter Trailhead, and commercial uses
18. 3/22/2023: Attachment to Record #22, Campfire Ranch response to overnight parking and Campfire Hut improvement concerns. Duplicate of Record #20
19. 4/20/2023: Follow-up email exchange regarding overnight parking at the Washington Gulch Winter Trailhead, property improvements, and sauna between H. Seminick, M. Schmidt, C. Pagano, C. Lambert; Sam Degenhard and Matt Dungan of Campfire Ranch; and D. Fink, McCloud Placer LLC
20. 9/28/2023: LUC-23-00002 Application Withdrawal

21. 10/31/2023: Land conveyance of property under subject structure from USFS to McCloud Placer, LLC
22. 12/10/2023: Screenshot, guiding from hut
23. 12/20/2023: Screenshot, Add On Options
24. 12/20/2023: Screenshot, Adventure Concierge Services
25. 12/20/2023: Screenshot, Gear Shuttle
26. 12/27/2023: Screenshot, Onsite Sales Onsite Manager
27. 3/21/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Application
28. 3/21/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Site Plan
29. 3/21/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Environmental Assessment
30. 3/21/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Decision Notice/FONSI
31. 3/26/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Determination of Completeness - Incomplete
32. 4/10/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Town of Crested Butte Comments
33. 4/25/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Division of Water Resources Comment
34. 4/25/2012: 3/21/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Staff Report
35. 4/30/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Environmental Health Comment
36. 5/25/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Public Comment
37. 6/1/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Public Hearing Sign-In
38. 6/5/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Planning Commission Decision
39. 6/6/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Certificate of Minor Impact Approval No. 4, Series 2012
40. 6/28/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Town of Mt. Crested Butte Comments
41. 6/28/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, City of Gunnison Comments
42. 6/28/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, BOCC Comments
43. 7/31/2012: LUC-12-00012, Alfred Braun Hut Minor Impact Review, Vested Rights

D. Decision-Making Body Record (related to Building Code after December 28, 2023):
44. 1/1/2024: Email exchange between C. Lambert and Drew Fink responding to the Violation and Suspension of the Certificate of Occupancy letter
45. 1/5/24-1/8/2024: Emails between Alex San Filippo-Rosser and Daniel Spivey
46. 1/19/2024: Gunnison County staff analysis of existing septic system
47. 1/26/2024: Building Code violation update and clarification

E. Decision-Making Body Record (related to the Land Use Resolution *after* December 28 2023):
48. 1/24/2024: Screenshot, Brand Experiences
49. 1/24/2024: Screenshot, Event and Group Pricing

50. 1/24/2024: Screenshot, Event and Group Request Form
51. 1/24/2024: Screenshot, Group Retreats Micro Wedding Elope Brand Experiences
52. 1/24/2024: Screenshot, Micro Weddings Elopements
53. 1/24/2024: Screenshot, Team Retreats
54. 1/24/2024: Screenshot, Video Photo Shoots
55. 1/25/2024: Screenshot, Adventure Concierge Page
56. 1/25/2024: Screenshot, BC Skiing at Hut
57. 1/25/2024: Screenshot, Event Photos
58. 1/25/2024: Screenshot, Family Supper Event
59. 1/25/2024: Screenshot, Family Supper Event 2
60. 1/25/2024: Screenshot, Family Supper Event 3
61. 1/25/2024: Screenshot, Guided Skiing from Hut
62. 1/26/2024: Screenshot, Family Summer IG
63. 2/12/2024: Screenshot, Parking at Winter Trailhead
64. 2/12/2024: Screenshot, FAQ
65. 2/20/2024: YouTube Video of Campfire Hut
66. Beacon Guidebooks Map
67. 4/4/2024: Screenshots, RMBL Crystal and Gothic Huts
68. 3/29/2024: Screenshots, Outside Magazine 2024 Travel Awards Instagram Post
69. 3/29/2024: Screenshots, Outside Magazine 2024 Travel Awards Website Article
70. 3/15/2024: Outside Magazine 2024 Travel Awards Print Article
71. 3/14/2024: Gunnison Country Times Bizcents Article
72. 4/2/2024: Quit Claim Deed
73. 4/2/2024: Quit Claim Deed
74. 4/2/2024: Quit Claim Deed

F. <u>Decision-Making Body Record (related to Claims Against the County):</u>

75. 2/23/2024: Gunnison County District Court, Amended Complaint and Jury Demand