

# **GUNNISON COUNTY BOARD OF ADJUSTMENT**

**PRELIMINARY AGENDA: June 6<sup>th</sup>, 2024**

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

- 1:30 p.m.**
- **Call to order; determine quorum.**
  - **Approval of minutes from the May 22<sup>nd</sup>, 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.

**Continued 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. Continued from the April 23, 2024 Board of Adjustment Public Hearing.

**Join on Zoom:**

[https://us06web.zoom.us/j/86970942444?pwd=kV9BCuhVATYTH4DyTH1cEdGqAh3VeQ.HciwECstGjrF\\_jM](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  
Wednesday, May 22, 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 – Andy Tocke	Assistant County Manager for Community and Economic Development-Cathie Pagano Planning Director – Hillary Seminick Building Charlie Dominguez County Attorney – Matthew Hoyt Deputy County Attorney – Alex San Filippo-Rosser Planning Technician – Jena Greene Others present as listed in text
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**Absent:** Julie Baca

**Recused:** None

**Zoom:** None

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With a quorum present Chair Laura Puckett Daniels opened the May 22, 2024, meeting of the Board of Adjustment at 1:30 pm.

**Approval of the Minutes:**

Smith made a motion to approve the April 23, 2024, Board of Adjustment minutes with the insubstantial change as noted by Smith. Seconded by Tocke. The motion passed unanimously in support.

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**Unscheduled Citizens** - None

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**APPEAL-24-00004 | Snowmelt Variance request for Crested Butte Fire Protection District**

Sean Caffrey, CEO for the Crested Butte Fire Protection District, was present.

Chair Puckett Daniels asked the applicant to explain his standing to appeal. Caffrey stated that he, as CEO of CBFPD, had standing to appeal on behalf of the Crested Butte Fire Protection District's application for the variance request.

Chair Puckett Daniels asked the Board if there was enough evidence to make a decision. All members agreed that there was enough evidence submitted to make a decision during the meeting, and that a public hearing was not needed.

**Applicant Presentation:** Caffrey introduced the project. The Crested Butte Fire Protection District had applied to build a new emergency services campus on their property north of the Town of

Crested Butte. They were asking for a variance to have a few snowmelt systems for the project. Caffrey gave some background for the Fire Protection District's experience with snowmelt systems, explaining that the system at the Mt. Crested Butte Fire Station was too much, while not having a system in place in front of the north facing bays at the Town of Crested Butte station caused ice berms to build up and emergency vehicles had trouble accessing the bays.

Staff Comments:

Seminick showed the site plan. Explained that staff did support the variance and explained at situations like this was why a variance process existed.

BOA Questions:

Tocke asked if the systems would be melting snow off of the roof or just in front of the garages. Caffrey replied that some would get snow shed, some would melt in front of the garage bays.

Puckett Daniels asked if the Fire Protection District had other energy saving measures planned for the property. Caffrey replied yes. They were anticipating 25 kw of solar on the fire station and 21 kw on the search and rescue building. These efforts were supported by a DOLA Energy Impact grant. Additionally, the heat for both buildings would be generated by high efficiency heat pumps. Caffrey added that they had positive results when they tested using geothermal, but that system was too expensive.

Smith clarified the variance standards and criteria for the variance request with staff. Pagano clarified that this was a building code variance. The standards that were noted in the memo were in accordance with section C-10. Puckett Daniels read the criteria from the memo: application for appeal should be based on a claim that the true intent of the code or the rules legally adopted there under had been incorrectly interpreted, the provisions did not fully apply, or an equally good or better form of construction was provided.

BOA Decision:

Houck added that the adoption of the codes was a big picture concept. These buildings were to be used for fire protection and emergencies. This was a reasonable request for a variance. This variance was being asked for to address safety conditions for staff and personnel. The small areas that they were asking for were a reasonable request and the variance criteria allowed the Board to grant a variance under these circumstances.

Tocke was in support of the variance for addressing the safety issues and he appreciated the control systems that would be used by the ice melt system per the 2021 code.

Smith was also in support and clarified the framework that they were able to grant the variance with staff. Pagano stated that County Building and Environmental Health Official Lamberts's memo stated that the amendment that banned ice and snowmelt systems was adopted to help the County meet its climate goals, and an that the board could determine if the proposal was an equally good or better form of construction was provided.

Puckett Daniels thanked the applicant for the additional energy measures, and for being thoughtful and modest about the limited amount of snow melt and the locations where it would be, and for not asking for the entire paved area. It helped them to see that it was truly needed instead of being just a convenience. Helped to avoid and incident within an incident.

Puck Daniels entertained a motion to approve the variance request for APPEAL-24-00004. So moved by Houck, seconded by Smith. The motion passed unanimously in support.

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**Public Hearing: APPEAL-24-00002 |Appeal of Decision relative to the development of a triplex on Lot 8, Block 9, Crested Butte South, Filing 2**

Chair Puckett Daniels called the public hearing to order at 2:15 pm.

Appellant – Andrew Tyzzer, Susan Tyzzer, Attorney Nancy Essex (Legal Representation for Andrew and Susan Tyzzer), Craig Maestro, Norman Dumas, Rebecca Dumas.

Applicant – South Butte LLC Principle, Brian Moreland, and Attorney Daniel Spivey.

Confirmation of Adequate Public Notice

Planning Technician Greene conferment adequate public notice.

Ex-parte Communications

Members of the BOA confirmed that there were no ex-parte Communications.

Overview and Introduction

Chair Puckett Daniels outlined the proceedings for the hearing, since there was an applicant, and an appellant. The appellant, the applicant, and staff would get 30 minutes to present. Any members of the public that wanted to comment online or on zoom, would get 2 minutes. Then then responses by the applicant, and then the appellant. Then deliberations by the Board of Adjustment deliberation, followed by either a continuance or closure of the public hearing, depending on time. If the public hearing was closed, there would be no more comments, and the Board would make a decision.

Puckett Daniels gave an overview of the process thus far. South Butte LLC requested to rezone a lot purchased to Multifamily, and the CB South BOA made a decision to approve multifamily on that lot. Then South Butte LLC submitted an application which was reviewed and approved by the design review committee and affirmed by the CB South Board of Directors The appellant raised objections at the design review level and the Board of Directors level, and then formally appealed the decision by the Board of Directors to the Gunnison County Planning department, which was reviewed by Assistant County manager for Community and Economic Development Pagano. Pagano issued a ruling on the appeal on April 4, 2024. The appellant then filed an appeal of Pagano's ruling. This hearing was for the April 18<sup>th</sup> appeal of the April 4<sup>th</sup> decision made by Cathie Pagano. The Board would need to decide if there would be a modification, reversal, or remand of Pagano's decision.

Appellant Request for Postponement

The appellant asked to postpone this hearing, and they asked for time to make their case as to why they wanted to postpone the hearing.

County Attorney Hoyt stated that there was no provision in the LUR to postpone, cited LUR 3-113. A.4: Continuance of Public Hearing, which allowed for one continuation.

The BOA gave the appellant the opportunity to make their case for postponement.

Essex, presented on behalf of the appellant. They had asked for a continuance because South Butte's Application was incomplete because it had not been reviewed by the Crested Butte Fire Protection District (CBFPD). Essex referenced section 6.3 from the CB South CAMP design review guidelines, which stated that the plans would need to be reviewed by CBFPD. When the DRC originally reviewed the application, they were told the Fire Protection District had reviewed and approved the plans. Ric Ems of CBFPD stated that the plans had not been reviewed or approved by the CBFPD. Both South Butte LLC and the CB South POA had since admitted that this review had not taken place yet. Essex stated that it would be harmful to the appellants and a waste of theirs and the appellants time to proceed and approve the plans on approval by the CBFPD. Asked the BOA to send the review back to the POA for review, and then the final plan could be reviewed.

Spivey spoke to the continuance request on behalf of the applicant. They opposed the request for continuance since it was based on the merits of the review by the Crested Butte Fire Protection District. Spivey cited the CAMP (CB South Special Area Regulations) stating that there was no requirement of CBFPD review at the time of Design Review, that it just had to happen. He further stated that the appellant had worked to delay the building of the project. Mooreland added that he did review the plans with CBFPD marshals after the first DRC meeting. CBFPD didn't request any changes from the applicant and told the applicant to have the POA reach out to them for next steps. Spivey added that this was another attempt from the appellant to delay the project.

Pagano added that fire review was a separate process that was typically referred out during the Building Permit issuance, and typically happened concurrent to the building permit review. CBFPD approval was required prior to permit issuance, and prior to final driveway approval.

Tocke clarified what CBFPD reviewed. Was it typical for there to be large modifications for a plan to comply? Pagano stated that the building plans were reviewed against the Fire Code, modifications were typically internal and didn't impact the site plan or the outside of the building.

The Board of Adjustment members discussed the appellant's request to postpone the public hearing. Smith stated since the appellant had not added anything substantive for the Board to consider that she felt that it was appropriate to move forward with the public hearing. The rest of the Board agreed.

Smith made a motion to deny the request for continuance. Seconded by Houck. The motion passed unanimously in support.

### Basis for Appeal

This appeal was an appeal of Assistant County Manager Pagano's ruling on the ten points of objection submitted by the Appellants. The appellants submitted six objections as the

basis of their appeal for the Public Hearing before the BOA. Of those six objections, four were a part of the ten reviewed and ruled upon by Pagano, and two were not. The Two new arguments were the CBFPD approval and the setback requirements of the proposed driveway. Before proceeding with the hearing, the BOA needed to determine the basis of the appeal.

The appellant submitted reasons for why they thought the two new objections should be included, and the applicant submitted reasons for why they believed the new objections should not be included. The BOA reviewed the consideration of the appeal section of the Land Use Resolution. 8-103.2.B.1.a. The BOA needed to determine if the appellants had exhausted all administrative remedies for the two new objections.

Houck stated that he wanted to be fair, thoughtful, and efficient. Hoyt spoke to the rights of the appellant and the applicant, noting due process rights for the applicant. Houck asked the applicant what other review body had heard the new arguments.

Andrew Tyzzer (14 Ruland Place, Appellant) had brought both issues to the DRC and to the CB South BOD. The Fire District Approval was discussed at length, but no specific finding was made on the topic in the appellants' appeal to the BOD. In the appellant's written appeal to the CB South BOC, the Fire Protection District's review was not listed as an objection. Essex added that it was included in the transcript which was included as an exhibit in the record.

Spivey stated that specific driveway issue was not brought before the DRC and that the doctrine of preservation had been waived. Further, the issue of the CBFPD approval was presented to the BOD but was not included in the letter to Assistant County Manager Pagano.

After much discussion, and consulting with the County Attorney, the BOA determined that since the two new objections: the Fire Protection District Review, and the driveway setback requirements; had not been reviewed by the appropriate review bodies prior to the BOA hearing, that it would not be appropriate for the BOA to review those objections at the hearing.

Chair Puckett Daniels made a motion to deny the consideration of the two new bases for appeal specifically, the Crested Butte Fire Protection District Review as part of the approval process, and the driveway setbacks as a part of the driveway requirements discussion on the grounds that the Board of Adjustment found that the appellant waived those arguments by failing to preserve them and to exhaust administrative review. Seconded by Smith. The motion passed unanimously in support.

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### Appellant Presentation

Craig Maestro (21 Blackstock Dr). He and his wife had lived in that neighborhood for 27 years. Stated that he thought there was an exceptional amount of abused discretion pertaining to the project. Cited the Design Guidelines that he felt were violated by the project. 2.1 Lots, the proposed building was to be three times the size of any adjacent structure and would not be visually harmonious or have characteristics of adjacent properties. 4.1 Objectives, the proposed

building with shallow roof pitch and asphalt shingles would not allow snow to shed thus creating ice dams and leaks in the roof. This would be poor quality design and would be a disservice to future owners. 4.1 Objectives, a structure that was three times the size of an adjacent structure would not be integrated into its natural surroundings. 4.4 (a) Image, the proposed structure would be three times the size, have three times the amount of people, three times the amount of cars, three times the amount of storage, but the lot was not three times the size. Further, the max height, called attention to itself, and would be overpowering. Maestro argued that these criteria had been ignored by CB South association managers, design review committee, and the CB South Board of Directors, and Gunnison County Commissioners since the fall of 2019. The original actions were not in compliance with CAMP and the project should never have been approved. Explained that personal investments had been spent to protect his investment. Stated that the County Commissioners were in charge of making sure that CB South followed the guidelines.

Andrew Tyzer (14 Ruland Place) – presented three pages of new evidence. Stated that he had been a homeowner in CB South since 1980. The original guidelines for building were in the current residential design guidelines. The CAMP, which adopted zoning in 2020 and restricted multifamily residences to the village center of. Exhibit A showed multifamily residences in CB South, some that were in compliance with CAMP, and some that were not, but were in existence before the adoption of CAMP. Argued that allowing multifamily in the proposed location was inconsistent with the design Guidelines and CAMP because it was not in the commercial area. Tyzzer further explained that the application also didn't comply with open space guidelines or the design requirements of retaining walls, per Exhibit B. Argued that these were incorrectly included in the open space calculations, when they should have been included in the non-open space calculations. The width of the Driveway was not compliant with the LUR, which stated that the driveway should be 24 feet, and the proposed driveway was to be 16 feet. Requested that the BOA reverse the decision of the CB South Property Owner's Association.

Rebecca (Jean) Bell Dumas (36 Ruland Place). Agreed with Craig and Andy. Thought that the large footprint would not match their neighborhood. They had expected that it would be a single-family home or a duplex, and not with a large driveway. Cement creek was a scenic corridor and a wildlife migration corridor. Wanted a design that would match the neighborhood. Stated that the DRC and CB South POA were not following their own rules.

Norman Dumas (36 Ruland Place). His family had lived there for 30 years. Thought that the proposed building was too big for the site and would not fit the neighborhood. Concerns that the one car garages would be too small, what were people going to do with cars, toys, snowmobiles?

Susan Tyzzer (14 Ruland Place). Stated that rules had not been followed in the proposal. Including Section 3.5 and Section 5.1.1. The CB South Board of Directors had not stated any facts as to why the proposal was approved. The structure was wrong for the neighborhood.

Essex spoke to the driveway width, the CAMP Provision, the driveway, and aisle width should be 22 ft. This was brought up in the DRC that the driveway didn't meet that width. Noted that the

BOD didn't make any specific findings and just approved what the design review committee reviewed, leaving nothing for them to appeal.

A. Tyzzer added more on the open space and retaining walls, argued that they were a structure. The landscaping strip should have been 5x5 ft. and measured only 3 feet wide, shown on Exhibit C.

### Applicant Presentation

Brian Moreland introduced himself. He had been working on this project for 5 years and had been "dealing" with the neighbors for 4 years. When he moved to Crested Butte, he wanted to do a project that would be lucrative, and also good for the community. He felt that this project was good for the community due to the housing shortage. Stated that he chose a multifamily lot that was oversized, and therefore had more open space. The lot was close to a major arterial road and had minimal impact on the neighborhood roads. Planned for each unit to have a full yard and outdoor living spaces for families. He proposed extra parking and outdoor seating areas, space which could have been used to build more buildings. Stated that CB South had many examples of single-family residences next to multifamily. Claimed that the quality of construction was superior to that of the neighbors, and personally felt that that project would enhance the parcel. Added that the neighbors had rights and opportunities when they built their homes and now, they were trying to hinder theirs. He was trying to provide housing, but now the cost of these buildings had increased due to this process.

Moreland added that through this process, his personal integrity had been challenged in public, and prolonged the building of his home. He felt that this was a waste of time and money of himself and the CB South POA.

Spivey noted that Chair Puckett Daniels incorrectly stated that this lot had been rezoned. Multifamily was authorized for this lot since the beginning. Stated that the project was compliant with the Design Guidelines, and that the project was unanimously approved by the DRC. Showed other multifamily buildings in the neighborhood, including a 4-plex one lot over. Spivey stated that the appellants had not met their burden of proof and had not given any evidence to show that the CB South BOD had abused its discretion, or that the approval was inconsistent with the LUR or CAMP; and that the BOA should uphold the decision. Spivey further clarified that the delineation of the open space was for snow storage and that the open space requirement had been met.

### Staff Comments

None.

### BOA Questions

Puckett Daniels Clarified the landscaping strip dimensions. It was noted that it needed to be 5 feet wide to count as the landscape buffer, but the property boundary to the edge of the parking area was shown to be 11 feet.

Houck further clarified the width from the property line to the edge of Cement Creek road, including the county right of way,

Tocke asked the applicant about the Driveway Width requirements. Spivey noted that the beginning of the driveway was 24 feet, which tapered to 16 feet. Cited Design Guideline 2.10.(I) and stated that the proposed driveway was compliant with the guidelines.

Tocke asked Mr. Tyzzer to clarify his understand of the driveway requirements. Tyzzer cited LUR 13-110.5. Puckett Daniels noted that there were conflicting regulations between the LUR and the Special Area Regulations. Pagano read from her report, which note that the Special Area regulations were the governing document in this case. It was determined that since this parcel was outside of the village center per figure 8.1 from page 40 of CAMP, resented by CB South POA attorney Beth Appleton, that the Driveway requirements outlined in the Design Guidelines were the requirements to be enforced. The driveway was found to be compliant.

For the objection that the triplex did not meet architectural design guidelines, Smith stated that these were subjective requirements. The objective parts that they could measure against including max height and roof pitch were compliant.

For the objection concerning the open space, it was determined that parking did not count towards open space, but that the minimum open space requirement was still met. CB South Association Manager Derek Harwell noted that the DRC put a condition that the open space ratio would need to be accurate during the final inspection, or the applicant would lose their \$11,000 performance deposit on the project, since the calculation was close.

#### Public Comment

Derrek Harwell – Association Manger for CB South. Harwell explained that he had been heavily involved in the project in the last 2 years. He expressed concerns for misrepresentation and misdirection that had occurred in the appellat process. Noted that while CAMP 8.2 J stated that multi family was encouraged in the village core, that multi family was allowed in the first and second filings, which this lot was.

Close public comment

#### Applicant Response

None

#### Appellant Response

Essex stated that the appellat argument was that there was another section in the code that discussed in the code the goals for where multi family residential should be. Wanted to emphasize that the DRC mentioned that the driveway didn't meet the requirements of the LUR or CAMP.

Mr. Tyzzer stated that the amount of time that occurred throughout the process "carried weight" and argued that it shouldn't. He disagreed that this housing should be used for local housing. Disagreed that the fourplex that had been used as comparison by the applicant was not a good comparison in terms of size and neighborhood context. Stated that the process for the appeal outlined in the LUR, and that there was an inconsistency with the appealing regulations outlined in the CAMP or the Design guidelines, and what was stated in the LUR.

### Staff Response

Pagano clarified that Section 3 of the CAMP says that development w/in the CBS special area shall be exempt from the LUR. Since CAMP special regulations were a part of the LUR, the regulations outlined in CAMP would still apply.

### Board Deliberation

Smith pointed to how CAMP allowed for multifamily in filings 1 and 2 and was encouraged in the commercial core. The term encouraged had some latitude. Didn't think that there was enough of an argument made to overturn the decision.

Houck noted that the open space was close, but believed that the proposal met the requirement, and liked that there was a built-in measure for final inspection to make sure that the open space requirement was met. Architectural requirements and architectural benchmarks change over time this was new mountain modern. Didn't hear a compelling argument that the architectural element didn't meet the standard.

Tocke commented that multifamily not allowed in proximity, and proximity was a subjective term. Didn't feel that CB South had egregiously overstepped their authority. Also didn't think that anything in the big picture was inconsistent.

Puckett Daniels commented that heard the appellant's concerns and understood the desire to have a neighborhood with a consistent look and feel. Acknowledged that CB South had changed substantially since the appellants built their homes. Protection of health, safety, and welfare. Felt that the driveway complied, that the open space complied – with the safety net of the final inspection. Agreed with Smith on the term encouraged concerning the term encouraged. Smith stated that she echoed Puckett's sentiments for the appellants.

Puckett Daniels stated that a motion to affirm the decision of the planning director was needed based on the expressed finding that the appellants did not meet their burden by preponderance of the evidence to justify modification or reversal of the action. So moved by Smith, seconded by Houck. The motion was carried unanimously in support.

Puckett Daniels closed the hearing at 5:28 pm.

Meeting adjourned at 5:28 pm.



**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:** May 30, 2024  
**Meeting Date:** June 6, 2024  
**RE:** Continued Public Hearing for APPEAL-24-00003, McCloud Placer LLC Appeal of Land Use and Building Code Determinations

**1. Update Since April 23, 2024 Public Hearing**

Staff has provided an additional supplemental email communication chronology and legal analysis. Additional Decision-Making Body (Gunnison County) and Appellant (McCloud Placer, LLC) record entries are in Section 10:G and 10:H of this memo. Staff narrative and record entries from the April 23, 2024 public hearing Staff Memo are in [blue text](#).

**2. Email Communication Chronology**

**Table 1. Email Communication Chronology**

Record No.	Date(s)	Record Name	Summary
76	9/20/2022	Email to Sabbato from Dungan for County Pre-Application Conference	Email from Matt Dungan, Campfire Ranch, to Rachel Sabbato requesting a pre-application meeting for "a potential Land Use Change that's outside the Town of Crested Butte."
77	9/20/2022	Campfire Ranch Campground Project Description for Pre-Application Conference (attachment to 9/20/2022 email to Sabbato from Dungan)	Attachment to Record. No. 76 outlining the project description for the pre-application meeting for parcel no. 317700000146, which is adjacent to the subject property. Access to the subject structure is accessed through parcel no. 317700000146. This document was submitted as the project description for LUC-23-00002. Activities described in the pre-application project description related to the subject structure include: <ul style="list-style-type: none"> <li>A. The existing single-family home on the property will be used for lodging as a bed and breakfast, including limited food service for guests.</li> <li>B. Bed and Breakfast lodging and food service</li> </ul> Boundary Adjustments: The property is currently involved in a minor Small Tract Act (STA) boundary adjustment with the USFS. The boundary adjustment has been agreed upon and has been staked on-site by USFS representatives.

			<p>C. Expansion of Existing Uses: Optional food service for guests in the existing single-family home will be provided. The home's existing septic system has been evaluated for the proposed use and is sufficient at its current size, layout, and capacity.</p> <p>D. The existing barn will be used for events, including weddings, in association with camping reservations.</p> <p>E. Number of Units: There is one single-family housing unit on the property that includes 4 bedrooms and 3.5 baths.</p> <p>F. Current Land Use: Residential home, private property, short-term rental home &amp; property have been occupied by previous owner, owner's guests and short-term renters. Gated and fenced private property. Driveway / Roadway throughout private property to access home and barn. Structures: (1) Home, approx. 3,100 sqft; unchanged, (1) well totaling 19' deep; permitted separately, (1) barn, approx. 4,000 sqft ; unchanged, (1) road/driveway totaling 2,090 linear ft; unchanged. (1) fence, totaling 4,340 linear ft, with gated entry.</p>
78	9/22/2022	Email between Houck and Degenhard	Email exchange between Sam Degenhard, Campfire Ranch, and Jonathan Houck, Gunnison County Commissioner between April 19, 2022 and September 22, 2022. Discussion includes scheduling of a meeting to discuss "...some exciting plans for our second location here in Gunnison County and I'd love to share more about it with you. This location will be in unincorporated Gunnison County and will be sure to be an amazing asset for sustainable tourism and managed camping here in the valley. I'd value your advice and guidance as we work on the next steps to get up and running." Over several emails, Houck noted that he cannot discuss any active applications, and Degenhard confirmed they did not have an active Land Use Change application at that time. The correspondence ends with Degenhard inviting Houck to an open house at the subject property.
79	9/27/22-10/5/2022:	Emails between Assessor Staff Regarding McCloud Placer LLC Transfer and Record	Email exchange between Land Title Guarantee Company representatives Whitney Laurien, Todd Selin, Erica Sieve, Christina Cesario and Gunnison County Assessor Office staff Davalyn Hook, Chris Nutgrass, Alexandria Cohen, and William Spicer.  Exchange regarding a discrepancy between the total amount of sale information and the General Warranty Deed sales price. There was general confusion expressed around the conveyance of "vacant land" and that "(t)he home was built on Forest Service property..."; and how the Assessor should document the transaction. The email also states "The buyer has been working with the Forest Service directly to acquire the additional property where the house sits."
2	10/13/2022-10/26/2022	Email messages between C. Lambert and M. Dungan of Campfire Ranch concerning change of use for an existing	Email exchange between Matt Dungan, Design & Development Director for Campfire Ranch, and C. Lambert regarding building code requirements for changing the use of a single-family residence to a commercial use and the use of vault toilets for a campground facility. Specifically, Dungan asked about applicability of regulations for campground vault toilets, code sections pertaining to fire suppression of a single-family residence if converted to commercial use, and occupancy requirements that may trigger sprinkler requirements. Lambert responded outlining OWTS regulations for vault privies and vault systems, and referred Dungan to the 2015 International Building Code, International Residential Code, and International Existing Building Code (IEBC), and the Crested Butte Fire Protection District.

		single-family residence	
80	1/27/2023	Email to Dungan from Sabbato re: Ski Tours and Parking Impacts	<p>1/6/23-1/27/23: Email exchange between Matt Dungan, Rachel Sabbato, Sean Pope, Sam Degenhard, and Drew Fink.</p> <p>The correspondence started with Dungan submitting a Minor Impact Land Use Change application for 6001 CR 811. Sabbato emails the group Commissioner Houck received a comment from Travis Colbert stating that the parking lot and road were "parked out" with snowmobile trailers, and "(t)here was a crew of folks with 5 or 6 sleds and trailers hauling a bunch of gear (mostly beer), including a paraglider and fan to the house that Campfire Ranch bought recently and plans to operate as a commercial lodge." Colbert inquired on the status of any process related to the property, asked if there was or will be any public process, if there was a timeline for approval, and what oversight to expect. He noted the following concerns: septic, winter travel management, parking, and commercial building codes. Sabbato stated to follow up if they had any questions. Dungan responded that, "As stated in our application and pre-application meeting, the residence on the property will be used as a short-term rental when the owners are not using it – which is why it is not included in our land use change application." There is follow up from Sabbato with a separate complaint about ski tours and parking lot congestion. Dungan responds, noting they recommend people carpool and ski as a group and asks how that is any different than the methods other members of the public use the trailhead. He also notes they have not had guests at the property "in weeks and do not plan to have anyone up" for several weeks; therefore, there are no traffic impacts.</p>
14	3/15/2023	Email Exchange Parking Concerns at WG TH	<p>3/15/23-3/20/23: Email exchange between Hillary Seminick, Cathie Pagano, Crystal Lambert, Martin Schmidt, Matt Dungan, Sam Degenhard, and Drew Fink.</p> <p>Email correspondence in follow up from the Public Works Department staff reporting vehicles parked overnight at the Washington Gulch winter trailhead and impacts to snow removal operations; noting that overnight parking is prohibited at this trailhead and requesting any vehicles associated with the subject property be removed in advance of an upcoming storm cycle. Seminick asks about apparent renovations and potential improvements to septic, propane, and a new sauna.</p> <p>Dungan responds asking to set up a call and notes the information provided is conflicting with discussions with relevant parties, that the email has incorrect assumptions, and they have no vehicles parked at the trailhead. The correspondence closes with submittal of permits for a wood burning stove.</p>
15	3/20/2023	CFR Response to Email re Overnight Parking and Campfire Hut Improvements	Email attachment to Record No. 14 outlining all improvements to the subject property, including: sauna, propane, exterior siding, roof repair, interior finishes, faucet and gas range replacement, interior lighting fixture replacement, appliance replacement, and addition of a non-structural interior wall and platform. The letter addresses septic and states: "The existing septic system was designed in alignment with the configuration of the house and was permitted. The system was inspected,

			and a report was provided as required with the Transfer of Title in Gunnison County. The OWTS system meets the requirements for this house and its use.”
17	3/22/2023	Attachment to USFS GC PW Winter TH Use Email	3/22/23: attachment to Record No. 18 and Record No. 14, duplicate of Record No. 15.
18	3/22/2023	USFS GC PW Winter TH Use	<p>3/13/23-3/22/23 email exchange between Martin Schmidt and USFS staff Jon Hare and Dayle Funka.</p> <p>Discussion addresses parking concerns at the Washington Gulch winter trailhead, identifying the new owner and manager, jurisdiction over the trailhead, whether this is a commercial use activity, and a potential site visit. The area recreation management plan is shared that notes snowmobiling is limited in the drainage, commercial use is limited to non-motorized use or via existing snowmobile outfitter, and that USFS staff have not authorized any commercial motorized or non-motorized permits for the Washington Gulch recreation area. The email closes with Schmidt stating he had discussed the issue with Campfire Ranch and the subject property is managed as a short-term rental and they are no longer parking vehicles overnight.</p>
19	4/20/2023	Email Exchange Parking Concerns at WG TH 2	<p>3/29/23-4/20/23: Email exchange between Cathie Pagano, Sam Degenhard, Drew Fink, Martin Schmidt, Hillary Seminick, Crystal Lambert, Matt Dungan.</p> <p>The exchange is a continuation of the Record No. 14 email thread. Discussion included the inability to process a Land Use Change permit with an open violation, notes that the sauna needs to comply with LUR requirements, and requests a site visit. Seminick included a screenshot and notes the Campfire Ranch website appears to be advertising that parking is available at the hut at the Washington Gulch winter trailhead, which conflicts with verbal and written correspondence that vehicles associated with Campfire Ranch are not utilizing the winter trailhead.</p> <p>Dungan responds that they have not utilized the trailhead since March 12, removed the reference to parking at the trailhead from their website, and that they are working with Crested Butte Land Trust and the Allen family to address parking concerns. Dungan continues that a sauna does not require a building permit and in a separate paragraph that “Gunnison County does not have occupancy limits for single family residences within the LUR, so none apply to this home. There are also not any regulations on STRs within unincorporated Gunnison County. The property’s occupancy varies based on seasonality and the owner’s invited guests, as is typical with any home. The septic system is maintained and serviced in alignment with its usage.” He states he is not aware of any potential code violations and he expects review of LUC-23-00002 to continue.</p>

82	5/5/2023	Pagano to Fink Degenhard Dungan	<p>4/24/2023-5/5/23: Email exchange between Cathie Pagano, Sam Degenhard, Drew Fink, Martin Schmidt, Hillary Seminick, Crystal Lambert, Matt Dungan. The exchange is a continuation of the email thread in Record No. 14 and 19, in which Seminick initially clarifies and addresses questions regarding applicability of the LUR and building permits to the sauna.</p> <p>Seminick notes that Assessor records show the subject property is owned by Phil and Teresa Pfeiler and that the adjacent vacant parcel is owner by McCloud Placer LLC; and that the County does not have authorization from the owners of the subject property for the application. She further states it is unclear who owns the land under the residence and sauna, and that more information will be needed to continue review of the Land Use Change permit. That email is closed with two resolution paths, inspection of the sauna when the snow melts or removal.</p> <p>Degenhard responds asking what purpose does inquiring into the ownership into the cabin serve, that the subject property was never a part of the LUC application, and that the information on the assessor site is inaccurate due to the complexity of the real estate transaction, and the Pfeilers no longer hold any interest in either property. The email goes on to state that after the Small Tract Act process is complete the parcel will be a separate, legal parcel and should not impact the review of LUC-23-00002, and that review should continue. The email also addresses OTWS regulations, "The OWTS regulations for sizing describe the minimum design standards for a system at construction. You'll note that our tank is 1250 gallons, so it exceeds the standards for a building of its size. There are no occupancy limits for single family residences in Gunnison County, and there is no evidence that occupancy higher than 6 creates an unsafe condition in this home. Is there language in the OWTS regulations that says a structure could not be used to temporarily house more people than the original design specification? Would family visiting your home from out of town put you legally out of compliance with the OWTS regulations? Please cite specific language. Either way, there is not currently anyone in the structure, and thus there is no compliance issue of any sort that would prevent further review of the LUC application." In closing, the email summarizes the issues, stating all work was preformed lawfully and that no activities are occurring on the property that violate the LUR or OWTS regulations.</p> <p>Fink then responds under the same thread, addressing the complexity of the ownership issues and offers to provide documentation.</p> <p>Pagano responds asking for clarification on parcel configuration and ownership, outlining applicable OWTS and Building Code regulations, processing of the mechanical permit for the sauna, and next steps for processing and review of LUC-23-00002.</p>
83	5/10/2023	Pagano to McCloud Campfire re Campfire Hut Washington Gulch	<p>5/9/23-5/10/23: Email exchange between Cathie Pagano, Sam Degenhard, Drew Fink, Martin Schmidt, Hillary Seminick, Crystal Lambert, Matt Dungan. The exchange is a continuation of the email thread in Record No. 14, 19, 82.</p> <p>Fink follows up, stating the conversations have become muddled in the thread of emails. He offers to share documentation regarding ownership and that there are</p>

		Overnight Parking	no occupants in the subject property utilizing the OWTS. Pagano then follows up noting that while there are no occupants at this time, that the property cannot be rented to more people than the system is designed to accommodate.
84	5/16/2023	Pagano to McCloud Campfire re Campfire Hut Washington Gulch Overnight Parking	<p>5/11/23-5/16/2023: Email exchange between Cathie Pagano, Sam Degenhard, Drew Fink, Martin Schmidt, Hillary Seminick, Crystal Lambert, Matt Dungan. The exchange is a continuation of the email thread in Record No. 14, 19, 82, 83.</p> <p>Fink responds to Pagano email sharing his seven-person family purchased the property in August 2022, asked if they are unable to occupy the home together, and if referencing the International Residential Code (IRC) sections regarding requirement of permits to change occupancy of a structure and that the IRC directs the Building Official to revoke a certificate of occupancy if the structure is in violation of the IRC is a threat if his family were to spend time at the subject property.</p> <p>Pagano follows up, clarifying that the email provided the adopted regulatory requirements for the subject property, that it was not a threat, and recommended consulting with an OWTS design professional if Fink intended to occupy the structure with family or short term rent to the public.</p>
85	5/31/2023	Pagano to McCloud Campfire re Campfire Hut Washington Gulch Overnight Parking	<p>5/16/23-5/31/23: Email exchange between Cathie Pagano, Sam Degenhard, Drew Fink, Martin Schmidt, Hillary Seminick, Crystal Lambert, Matt Dungan. The exchange is a continuation of the email thread in Record No. 14, 19, 82, 83, 84. Duplication of Record No. 3.</p> <p>Fink asks if occupying the home with his immediate family of seven is a violation of the LUR/OWTS regulations and if staff intend to take action if they do so.</p> <p>Pagano responds acknowledging a recently filed open records request, and that comment was not regarding a specific enforcement action, cites OWTS regulations regarding requirements for change of occupancy.</p>
3	6/1/2023	Email to Drew Fink regarding the existing septic capacity	<p>Duplication of Record No. 85.</p> <p>Email exchange between Cathie Pagano, Sam Degenhard, Drew Fink, Martin Schmidt, Hillary Seminick, Crystal Lambert, Matt Dungan.</p> <p>The exchange is a continuation of the email thread in Record Nos. 14, 19, 82, 83, 84.</p>

### 3. Supplemental Legal Analysis

In the April 15, 2024 Staff memorandum to the BOA, the County Attorney explained that the BOA may decide that appellant has engaged in improper claim splitting, and therefore decline to decide appellant’s constitutional claims against the County. At the April 23, 2024 hearing on this matter, appellant disagreed with the County Attorney, contended that appellant is not claim splitting, and promised supplemental briefing on this and other legal issues. Notwithstanding multiple emails from

the County Attorney to counsel for appellant, as of May 29, 2024 this supplemental briefing has not been received.

In any case, the County Attorney recommends that, should the BOA conclude it appropriate to hear and decide appellant's constitutional claims, the Board keep in mind the following (in addition to the legal issues explained in the prior memorandum):

### **Procedural Due Process**

1. "Under Colorado law, the right to use property is fully protected by the Due Process Clauses of the federal and state constitutions, but is subject to a proper exercise of the police power."<sup>1</sup> *Eason v. Bd. of Cty. Comm'rs of Boulder*, 70 P.3d 600, 605 (Colo. App. 2003).
2. "To prove a procedural due process claim . . . [a claimant] must show that (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States." *See Eason*, 70 P.3d at 604 (internal citations omitted).
3. "In evaluating a due process claim, [the decisionmaker] must consider: (1) whether a property right has been identified; (2) whether governmental action with respect to that property right amounts to a deprivation; and (3) whether the deprivation occurred without due process of law." *See id.*; *see also M.S. v. People*, 303 P.3d 102, 105 (Colo. 2013) (requiring a showing of a deprivation of a substantive right to assert a procedural due process claim).
4. "To have a property interest [protected by the due process clause] . . . a person clearly must have more than an abstract need or desire for it. There must be more than a unilateral expectation of it. That person must, instead, have a legitimate claim of entitlement to it." *See Watson v. Colo. Dep't of Soc. Servs.*, 841 P.2d 299, 305 (Colo. 1992).
5. "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)

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<sup>1</sup> "[T]he police power is an inherent attribute of sovereignty with which the state is endowed for the protection and general welfare of its citizens." *Rocky Mt. Gun Owners v. Polis*, 2020 CO 66, ¶ 53, 467 P.3d 314, 327 (internal citation and quotations omitted). "That a [government], in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen." *Sentell v. New Orleans & C. R. Co.*, 166 U.S. 698, 704 (1897). "[T]he exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391, 47 S. Ct. 114, 119 (1926). "Zoning ordinances are generally upheld as valid exercises of the police power to regulate public health, safety, and welfare." *Eason*, 70 P.3d at 605.

6. Appellant relies on the *Eason* case as legal authority it contends supports its Due Process claims. A different case explains the background and holding in *Eason*:

Eason planned to operate a self-storage business for semi-trailers. Boulder County approved the land use proposal, explaining that his use was permitted under the zoning code and that his trailers were exempt from the building code. Eason spent over \$1,000 obtaining a building permit that doubled as a zoning permit. He moved the trailers onto his property. Four years later, the county revoked his permit, and added that Eason could no longer use the trailers following a change in county zoning and building policies. The *Eason* Court decided that under Colorado property law, Eason enjoyed a vested property right in his trailer use. It reasoned that the Colorado supreme court has held that a city permit can provide the foundation for a vested right, and thus be constitutionally protected from impairment by subsequent legislation, if the permit holder takes steps in reliance upon the permit. The *Eason* court extended that logic to zoning classifications. It held that Colorado law recognizes a protected property interest in a zoning classification when a specifically permitted use becomes securely vested by the landowner's substantial actions taken in reliance, to his or her detriment, on representations and affirmative actions by the government. Under this logic, when the county told Eason that his trailer usage was permitted, and Eason responded by purchasing the permit and moving the trailers to his property, he obtained a vested right to that interpretation granting a use-by-right to so employ his property.

*Brown v. Chaffee Cty. Bd. of Cty. Comm'rs*, No. 22-1225, 2023 U.S. App. LEXIS 18160, at \*17-19 (10th Cir. July 18, 2023). In other words, *Eason* established that **“if the government tells a landowner he can use his property in a certain way, and he invests in that use to his detriment, the government cannot then pull the rug out from under him.”** *Id.* at \*17 (emphasis added).

7. Importantly, and as another case explains, “*Eason* plainly requires some affirmative action or representation beyond preliminary approval of a development plan or the mere fact a use is permitted in the zoning classification. Rather, affirmative action or representation may come in the form of a letter, as it did in *Eason*, or some other act or conduct by the relevant authority.” *Jordan-Arapahoe, Ltd. Liab. P'ship v. Bd. of Cty. Comm'rs*, 633 F.3d 1022, 1031 (10th Cir. 2011). See also *Lehman v. Louisville*, 967 F.2d 1474, 1477 (10th Cir. 1992) (rejecting due process claim where property owners “clearly had the resources and the access to the information that would have allowed them to determine that this particular use of the property was not allowed.”).
8. Accordingly, to rely on *Eason* to establish a due process violation by the County, appellant must demonstrate that its decision to 1) operate unvented fuel gas heating appliances; and/or 2) operate a single-family residence for commercial purposes or as a resort was “backed by affirmative actions or representations by county officials” and whether appellant reasonably relied on such actions or representations. See, e.g., *Brown*. at \*19-20. Appellant cannot merely rely on the fact that the property at issue was previously permitted under a prior version of the building code, the LUR, or other

County regulation to establish a Due Process violation. *See Jordan-Araphoe*, 633 F.3d at 1031.

9. Appellant will also have to demonstrate that County's demand that it remove the unvented fuel gas heating appliances was unnecessary to quickly protect public health, safety and welfare and that the County could have waited and conducted a hearing on removal of the appliances before temporarily suspending the subject property's certificate of occupancy. As the County Attorney understands appellant's argument, appellant claims, relying upon *Eason*, that it was entitled to notice and a hearing in front of a County decisionmaker before the CO was temporarily suspended; *i.e.*, a "pre-deprivation process".
10. *Eason* recognizes, as has the United States Supreme Court, that there are "exceptions to the requirement of pre-deprivation process when quick action by the government is needed." *See Eason*, 70 P.3d at 608 (internal citations and quotations omitted).
11. As the United States Supreme Court has explained:

Our cases have indicated that due process ordinarily requires an opportunity for some kind of hearing prior to the deprivation of a significant property interest. The Court has often acknowledged, however, that **summary administrative action may be justified in emergency situations**. Indeed, **deprivation of property to protect the public health and safety is one of the oldest examples of permissible summary action**. Moreover, the **administrative action provided through immediate cessation orders responds to situations in which swift action is necessary to protect the public health and safety**. **This is precisely the type of emergency situation in which this Court has found summary administrative action justified.**

*Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-301 (1981) (emphasis added; internal citations and quotations omitted). *See also, e.g., Watso*, 841 P.2d at 308-09 ("[W]hen a state can demonstrate necessity for immediate action to protect a legitimate interest of its own, adequate post-deprivation hearings may satisfy due process standards."); *Mackey v. Montrym*, 443 U.S. 1, 17 (1979) ("We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety."); *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1220 (10th Cir. 2006) ("In matters of public health and safety, the Supreme Court has long recognized that the government must act quickly. Quick action may turn out to be wrongful action, but due process requires only a postdeprivation opportunity to establish the error."); *S. Commons Condo. Ass'n v. Charlie Arment Trucking, Inc.*, 775 F.3d 82, 86 (1st Cir. 2014) ("The need for speed, in other words, permits the government to take action that may cause a loss to property without first notifying the owner of the property or waiting to hear what that owner has to say, even though the government might have saved itself from making a costly mistake by taking the time to give notice and to wait for a response.").

12. In *Spracklin v. City of Blackwell*, No. CIV-07-0023-F, 2007 U.S. Dist. LEXIS 82770, at \*6 (W.D. Okla. Nov. 7, 2007), a case not binding on this Board but potentially instructive, a city terminated electrical service to a building due to “the possibility of major fire code (or other code) violations based on concerns about the building's structural deficiencies”. *See id.* The city offered “to work with you [the building owners] to correct these deficiencies as quickly as possible.” *Id.* at \*7. Instead of accepting this invitation, the building owners sued, claiming violations of their procedural due process rights. The district court rejected this claim, holding that “[w]hen the stated ground for termination is the possibility of major fire code violations, the court rejects plaintiffs' contention that procedural due process necessarily requires a hearing or an opportunity for plaintiffs to dispute the reasons given for the termination of service before electrical services may be terminated.” *Id.* at \*9.
13. Thus, for appellant to prevail on its procedural due process claim, it will need to come forward with evidence and testimony that Gunnison County’s decision to temporarily suspend the property’s certificate of occupancy until Appellant purportedly removed the unvented fuel gas appliances was **not** a situation in which swift government action was necessary to protect public health and safety.

#### **Substantive Due Process**

14. “[A]bsent invidious discrimination, the presence of a suspect class, or infringement of a fundamental interest, courts have limited their review of quasi-legislative or quasi-judicial zoning decisions in the face of a substantive due process challenge to determining whether the decision was arbitrary and capricious. We believe that **arbitrary and capricious in this context does not mean simply erroneous**. . . . In more recent decisions, the [United States] Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a **claim can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning**. In short, **the doctrine of substantive due process** is a constitutionally imposed limitation, which is **intended only to prevent government from abusing its power, or employing it as an instrument of oppression**.

*Norton v. Vill. of Corrales*, 103 F.3d 928, 932-33 (10th Cir. 1996); *Clark v. City of Draper*, 168 F.3d 1185, 1190 (10th Cir. 1999) (“Any substantive due process claim . . . must shock the conscience.”) (Internal citations and quotations omitted).

15. A Federal court case out of Teller County, while not binding on the BOA, may be instructive. *The Court in Porter v. Teller Cty. Bd. of Cty. Comm'rs*, Civil Action No. 06-cv-02416-LTB, 2007 U.S. Dist. LEXIS 35089, at \*2-3 (Dist. Colo. May 14, 2007), address the following case:

In late 2003, Porter entered into a contract with Laurie Anderson, a Teller County resident, to remodel her home. Due to various problems with this project not specified

in the complaint, Anderson terminated the contract with Porter and filed a complaint against him with the Building Department. The Building Department referred the complaint to the Board of Review, which held a hearing [on] December 1, 2004. The Board of Review considered, and rejected, a one year and a three month suspension of Porter's license. The Board of Review proposed the lesser penalty of one year's probation (even though this is not a penalty available under the Teller County Building Code.) During this probationary period the Building Department would review and supervise Porter's projects with extra care and scrutiny. If the Board of Review received no further complaints against Porter after a year, it would lift his probation and dismiss Anderson's complaint without further action against Porter. However, any new complaints against Porter would be grounds for further action. Porter agreed to these terms.

*Id.* The Court further explained that in order to state a proper substantive due process claim:

**The extent of the deprivation of a property right must be severe.** . . . Neither party disputes that the County Commission's discretionary decision to temporarily suspend Porter's license constitutes executive action. In such a case, only the most egregious official conduct can be said to be arbitrary in the constitutional sense. The abuse of executive power must be so outrageous that it shocks the conscience. The Government action Porter alleges here is that the County, despite Porter's compliance with the terms of his probation, and absent any information about new violations of the Building Code, nevertheless suspended his license for three months. **Porter's three-month suspension is not a deprivation of rights that shocks the conscience of federal judges, or that represents a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience-shocking.** Porter's temporary loss of his contractor's license is insufficient to sustain a claim for violation of substantive due process.

*See* 2007 U.S. Dist. LEXIS 35089, at \*9 (emphasis added).

16. Another Federal court case from the Tenth Circuit, which is controlling law in Colorado with regard to substantive due process claims under the U.S. Constitution, also may provide guidance to this Board. In *Miller v. Campbell Cty.*, 945 F.2d 348, 350-51 (10th Cir. 1991), the Court described the facts as follows:

In February 1987, methane and hydrogen gasses were discovered seeping from the ground in the southern end of the Rawhide Village subdivision located in Campbell County, Wyoming. On February 24 through 26, 1987, the county commissioners ordered the immediate evacuation of nine homes in the subdivision. On March 6, 1987, an additional twenty-two homes were ordered evacuated. Later, on March 26, all but seven of these thirty-one displaced homeowners were allowed to return to their homes.

*Id.* Plaintiffs alleged that the County’s evacuation order violated their substantive due process rights. *Id.* at 351 The Tenth Circuit disagreed:

With regard to plaintiffs’ substantive due process claims, we similarly find no violation. The defendants had an obvious need to act with considerable dispatch because of the potential danger to its citizens. The defendants’ actions were reasonable and measured, with appropriate concern for the situation and the interests of all involved. We cannot say on this record that the defendants’ actions were arbitrary, capricious and unreasonable.

*Id.* at 354.<sup>2</sup>

17. In sum, to prove a substantive due process violation by the County, appellant must demonstrate to this Board that staff’s decision to temporarily suspend occupancy of the subject property was so arbitrary, capricious and unreasonable that it had “no conceivable rational relationship to the exercise” of the County’s building code and land use regulations. See *Porter*, 2007 U.S. Dist. LEXIS 35089 (emphasis added).

#### 4. April 23, 2024 Staff Memo

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,*

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<sup>2</sup> The Court also found no procedural due process violation under these facts. See *id.*

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.

## 5. 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*.

## 6. 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”.

## 7. 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[.]”).

## **8. 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.

## **9. 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.

#### **10. 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.

## **11. 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. 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

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.* 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. The BOA May Be Authorized to Hear Some, But Not All, of Appellant’s Constitutional Challenges

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. The Record Does Not Appear to Support A Finding of An Equal Protection Violation

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.

## 12. 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. Decision-Making Body Record (related to Claims Against the County):
  - 75. 2/23/2024: Gunnison County District Court, Amended Complaint and Jury Demand
  
- G. Decision-Making Body Record (compiled after April 23, 2024 Public Hearing)
  - 76. 9/20/2022: Email to Sabbato from Dungan for County Pre-Application Conference
  - 77. 9/20/2022: Campfire Ranch Campground Project Description for Pre-Application Conference (attachment to 9/20/2022 email to Sabbato from Dungan)
  - 78. 9/22/2022: Email Between Houck and Degenhard
  - 79. 10/5/2022: Emails between Assessor Staff Regarding McCloud Placer Transfer and Record
  - 80. 1/27/2023: Email to Dungan from Sabbato re: Ski Tours and Parking Impacts
  - 81. 5/5/2023: Determination of Completeness Letter to Campfire re: LUC-23-00002 Campground Application
  - 82. 5/5/2023: Pagano to Fink Degenhard, Dungan

83. 5/10/2023: Pagano to McCloud Campfire re Campfire Hut Washington Gulch Overnight Parking
84. 5/16/2023: Pagano to McCloud Campfire re Campfire Hut Washington Gulch Overnight Parking
85. 5/31/2023: Pagano to McCloud Campfire re Campfire Hut Washington Gulch Overnight Parking
86. 4/5/2023: Public Notice: proof of posting at wash gulch TH
87. 4/5/2024: Public Notice: proof of publication Gunnison Country Times
88. 4/8/2024: Public Notice: Appellant Certified Mailing
89. 4/8/2024: Public Notice: Appellant posting at property
90. 4/9/2024: Appellant Second Amended Complaint and Jury Demand
91. 4/16/2024: Public Comment: Assad
92. 4/17/2024: Public Comment: Mooney
93. 4/17/2024: Public Comment: Ronai
94. 4/18/2024: Public Comment: Whiteford
95. 4/19/2024: Public Comment: Norton
96. 4/22/2024: Public Comment: Bona
97. 4/22/2024: Public Comment: Frame
98. 4/22/2024: Public Comment: Hans
99. 4/22/2024: Public Comment: Johndrow
100. 4/22/2024: Public Comment: Keeler
101. 4/22/2024: Public Comment: Kenyon
102. 4/22/2024: Public Comment: May
103. 4/22/2024: Public Comment: Thomas, Schum, Whiteford
104. 4/23/2024: Appellant Request for Recusal
105. 4/23/2024: Appellant Request for Recusal Letter Attachment Text Screenshots
106. 4/23/2024: BOA 4.23.24 Hearing: Agenda
107. 4/23/2024: BOA 4.23.24 Hearing: Staff Memo
108. 4/23/2024: BOA 4.23.24 Hearing: LUR Staff Presentation
109. 4/23/2024: BOA 4.23.24 Hearing: Building Staff Presentation
110. 4/23/2024: BOA 4.23.24 Minutes
111. 4/23/2024: BOA 4.23.24 Meeting Audio Recording
112. 4/23/2024: BOA 4.23.24 Meeting Video Recording
113. 4/23/2024: BOA 4.23.24 Meeting Zoom Generated Transcript
114. 4/24/2024: Video: Campfire Ranch Instagram Story SB24-213
115. 4/25/2024: Screenshots: Campfire Ranch Instagram SB24-213
116. 4/25/2024: Screenshot: Campfire Ranch Instagram Story SB24-213
117. 4/25/2024: Public Comment: Helminski
118. 4/25/2024: Screenshot: Campfire Ranch Senate Letter SB24-213
119. 4/25/2024: Video: Campfire Ranch Senate Letter Full SB24-213
120. 4/30/2024: Gunnison County Motion to Dismiss
121. 5/2/2024: Campfire Newsletter SB24-213
122. 5/3/2024: Article: CO Sun Effort to limit regulations on backcountry huts worries CO counties

- 123. 5/7/2024: Email: CAO to Appellant Counsel re APPEAL-24-00003
- 124. 5/16/2023: Article: Gunnison County Times Homeowner Sues County Over Septic Regulations
- 125. 5/17/2024: Email: Appellant Counsel to CAO re Appeal-24-00003 (response to record 120)
- 126. 5/21/2024: Appellant Response to Gunnison County Motion to Dismiss
- 127. 5/23/2024: Article: Crested Butte News Legislation to Prevent Local STR Oversight Gets Shut Down
- 128. 5/28/2024: County Reply in Support of Motion to Dismiss

H. Appellant Submittal (compiled after April 23, 2024 Public Hearing):

- H. 4/23/2024: Email: Request for Recusal
- I. 4/23/2024: Screenshots: STR Website Listings
- J. 4/23/2024: 1994 Uniform Building Code
- K. 4/23/2024: BOA 4.22.24 Hearing: Appellant Hearing Presentation
- L. 4/23/2024: Certificate of Occupancy: Subject Structure
- M. 4/23/2024: Shums Coda Opinion
- N. 4/23/2024: Spreadsheet: STR Listings Unincorporated Gunnison County (formatted to PDF)
- O. 4/23/2024: Screenshots: STR Marketing
- P. 4/23/2024: Screenshots: STR Concierge Services
- Q. 4/23/2024: Screenshots: STR Seasonal Access
- R. 4/23/2024: Screenshots: STR Listings