APPELLANT'S REPLY

Date:	August 22, 2020 (submitted electronically)
Date of Appeal:	August 2, 2020
Appellant:	Michael J. Radford 5200 Bear Ridge Drive, Unit A Park City, UT 84098 Phone: 619-392-6870 mike@radfordlaw.com
Land Use Authority:	Summit County Planning Division Summit County Community Development Department P.O. Box 128 60 North Main Street Coalville, Utah 84017 Phone: 435-615-3124 www.summitcounty.org
Property:	Unit A, Bldg. 8B, The Cove at Sun Peak (Parcel No. CSP-8B-A)
Building Permit No.:	20313
Re:	Appeal from July 23, 2020 final determination by the Director, Community Development Department confirming need for a plat amendment and confirming Summit County Planning Division disapproval of Building Permit Application No. 20313

Appellant submits the following evidence and argument in reply to the Department's Response filed on August 17, 2020.

Introduction

In the introduction to its response the Department asserts that "Appellant's extension would extend beyond the allowed square footage for each unit presented in the recorded subdivision plat." That statement, and the reference on page 3 to the Department's earlier position that the deck extension somehow violated a 12' setback

requirement, are not issues properly before the Council. Those claims are nonsense in the context of a condominium and were the subject of Appellant's first appeal filed on June 8, 2020[1], a true and correct copy of which is included with this electronic submission[2].

After review of Appellant's June 8, 2020 Initial Appeal and supporting documents, the Department abandoned the "12' setback" and "allowed square footage" arguments. The June 8, 2020 Initial Appeal was deemed an application for internal review by the Community Development Director. On July 23, 2020 the Director issued a response to the June 8, 2020 Initial Appeal which set forth the Department's current basis for denying the building permit and invoking the SBDC Appeal Procedures.

The Director's July 23, 2020 determination is the formal action which is the subject of this appeal. That determination does not mention a 12' setback or purported "allowed square footage" on the subdivision plat. Those bases for denial of the permit were abandoned in favor of the "Common Area to Private Area" position now before the Council.[3]

The only issue before the Council in this matter is whether Appellant's proposed six foot deck extension constitutes an illegal attempt to convert "Common Area" into

[1] Appeal of Land Use Determination filed June 8, 2020 in response to the Department's May 1, 2020 and May 29, 2020 submittals denying Appellant's building permit application (the "June 8, 2020 Initial Appeal").

[2] The Service List for this appeal was not prepared by the Department until August 17, 2020, a few hours before the Department filed its Response. Appellant is not sure if the Board has been given copies of materials cited in Appellant's Initial Submission filed on August 7, 2020. For that reason, and for convenience, the initial June 8, 2020 appeal is included as an attachment to the email submitting Appellant's Reply. Appellant will try to get a copy of the record on appeal before the hearing. It has apparently been prepared and was cited by the Department in its Response.

[3] If the Council decides to entertain those arguments, Appellant's explanation of why they are in error may be found in the June 8, 2020 Initial Appeal, Description of the Appeal, at pages 7-9 and 11-13.

"Private Area" without a plat amendment supported by a vote of 2/3 of the owners in The Cove at Sun Peak. As a matter of simple statutory interpretation, it does not.

The Department's narrow and selective interpretation of the basic statutes and codes governing the subject is in error. The deck extension within the condominium's "limited common area" created by the declaration filed concurrently with the plat, is specifically authorized by statute.

Applicable Law

The Department's standard of review and rules of statutory construction are correct and well stated. Appellant particularly agrees with and wishes to emphasize the following statutory construction maxims cited by the Department:

- It is the plain language of a statute that controls absent an ambiguity;
- The Council should presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning;
- The Council should presume that the expression of one term should be interpreted as the exclusion of another;
- The Council should interpret statutes to give meaning to all parts, and avoid rendering portions of the statute superfluous; and, of most importance in this appeal
- The Council should read the plain language of the statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters.

Having correctly described those rules, the Department then ignores them in its Response -- narrowly focusing on a single definition in a single code section and distorting the meaning of another without regard to the system of definitions and statutes applicable to condominium developments in Utah and related land use regulations.

Although not cited by the Department in it Response, it is the public policy of the State of Utah that "[i]f a land use regulation does not plainly restrict a land use application, the land use authority shall interpret and apply the land use regulation to favor the land use application."[4] It will be argued that in addition to being in error, the Department's action is against the statutorily declared public policy of the State of Utah.

Issues

Appellant accepts the Department's description of the issues.

As will be discussed below, there is substantial evidence supporting Appellant's building permit application as meeting the provisions of the Utah Code and Snyderville Basin Development Code.

That evidence consists of the declaration of CC&Rs for The Cove at Sun Peak and the plain wording of the relevant statutes and code sections, taken together and read as a whole.

A third issue should be added to the list: Has the Department met its burden of showing there is a land use regulation that plainly restricts Appellant's application to construct a deck extension in the "limited common area" granted by the condominium declaration filed concurrently with the condominium plat? The Department has not submitted any competent evidence showing a land use regulation plainly restricting Appellant's land use application.

The Council must decide whether the Department's position is consistent with or contrary to state law[5]; whether a land use regulation plainly restricts Appellant's land

[4] Utah Code Ann. § 17-27a-308(2)

[5] Utah Code Ann. § 17-27a-104(1) and (2).

use application[6]; whether the Department is seeking to impose on Appellant a requirement that is not expressed in a statute or county ordinance[7]; and whether the applicable land use regulations, taken as a whole, can be interpreted to favor Appellant's building permit application[8].

Background and Procedural History

As noted in the introduction, the Department's initial bases for denial of the building permit (12' setback and allowable square feet on the plat) are nonsense, were abandoned by the Department in favor of the "Common Area to Private Area" argument. They are not the subject of this appeal and are restrictions found nowhere in statute, code, the SBDC, on the plat or in the Declaration.

On the other hand, the Department's reference to the Director's statement that "there are CC&R provisions for the Cove at Sun Peak which address the use of the Common Area; however, Summit County is not a party to, or cannot administer, these private agreements" [9] raises an additional issue of particular importance to this appeal. It is an admission that the Declaration authorizes the work described in Appellant's application. And it is an incorrect statement of the law and the County's relationship and reliance on private property rights found in recorded documents.

Argument

The Department's Response does little to contradict or even address the facts. The argument section is limited to three points and misstates the law. Before

[6] Utah Code Ann. § 17-27a-308(2).

[7] Utah Code Ann. § 17-27a-508(e).

[8] Utah Code Ann. § 17-27a-707(4).

[9] Response, p. 6, ¶ 3.

considering those points, the Council should be mindful of the undisputed facts in this appeal.

Undisputed Facts

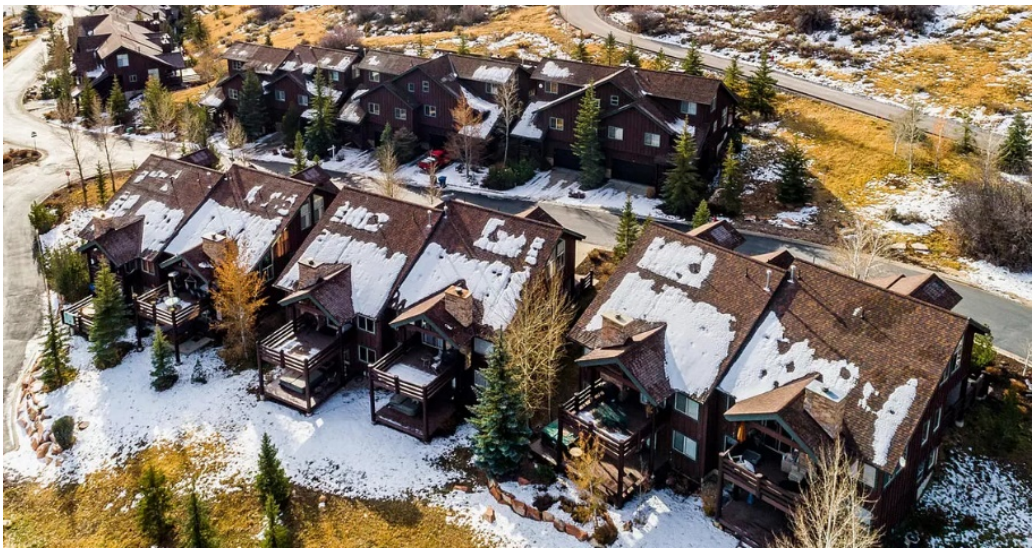
Those undisputed facts are:

1. Appellant's property is a condominium and part of a condominium plat. It is not a subdivision lot with lot lines, setbacks, or maximum square feet for structures.

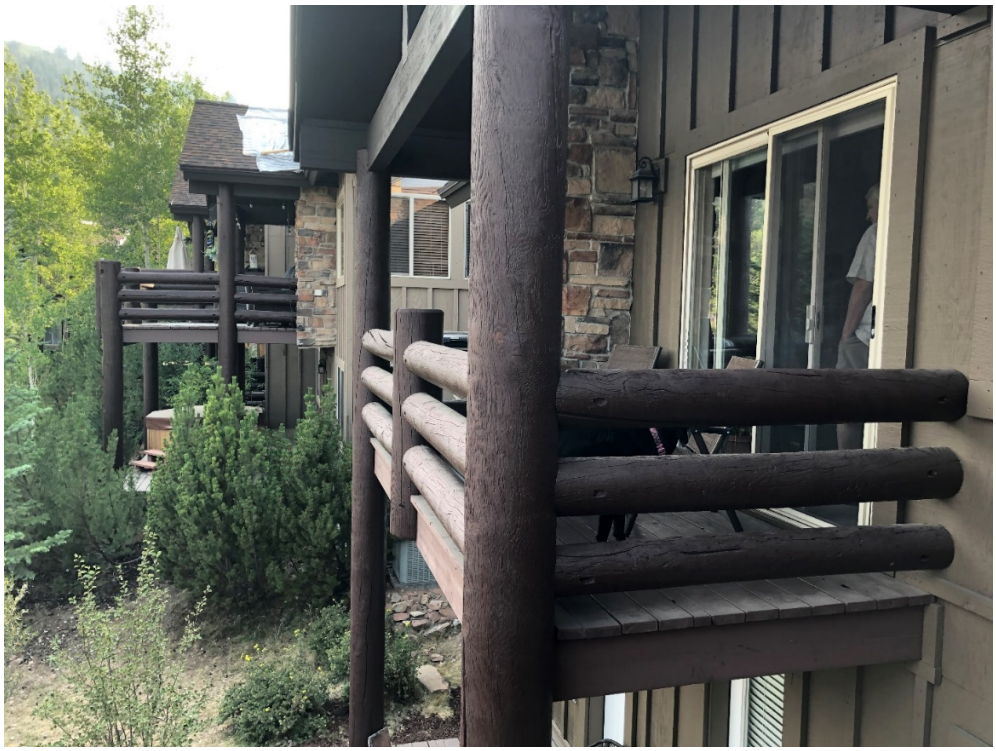
2. Appellant's condominium unit was created on June 12, 1996 by concurrent recording of a plat as Entry No. 00456153 (the "Plat") and Declaration of Protective Covenants, Agreements, Conditions and Restrictions for The Cove at Sun Peak as Entry No. 00456155 (the "Declaration").

3. Appellant's unit is one of eighteen (18) building type "B" units in The Cove at Sun Peak.

4. Of those 18 units, only three (3) units have original six-foot decks. The other 15 units have extended decks similar to Appellant's application, if not larger. Below is an aerial picture of six building type "B" units in The Cove at Sun Peak with extended decks.



5. Appellant's existing deck is very small and of limited use, extending only to the roof line of the gabled section around the chimney, as shown in the picture below.



6. Of the eight (8) building type "B" units on Appellant's street, six (6) have extended decks similar to Appellant's application, including the neighbors on each side of Appellant's unit. (Note the neighbor's deck extension in the picture above.) (See Exhibit F to the Description of Appeal filed August 2, 2020 for other pictures of units on Appellant's street.)

7. The Declaration (Cove at Sun Peak CC&Rs) describes and identifies limited common areas. (Exhibit E to the Description of Appeal filed August 2, 2020, ¶ 3 on p. 6 and ¶ 3.4 on p. 7.)

8. The limited common area for Appellant's unit is defined as follows: "That portion of the Property of up to a maximum of 12 feet at the rear yard of the twin home units is deemed as Limited Common Area." (Id., ¶ 3.4 (a) on p. 7.)

9. Appellant's deck extension application complies with the Declaration and the HOA Exterior Work Guidelines.

10. The Homeowners Association for The Cove at Sun Peak has approved Appellant's deck extension.

11. The Department has raised and then abandoned two unmeritorious grounds for denying Appellant's application before arriving at the current "Common Area to Private Area" argument.

So, given these undisputed facts, what is the land use regulation that plainly restricts Appellant's right to build a small deck extension in Appellant's Limited Common Area as permitted by the Declaration and authorized by the Condominium Ownership Act? It does not exist.

Reply to Section 1 – "Common Area" Definition

The Department's entire argument and position, that Appellant is trying to convert Common Area to Private Area, depends on a single definition in Utah Code section 17-27a-606(1)(b) referencing section 57-8a-102(5) of the Condominium Association Act.

The Department misrepresents the facts when it suggests the Plat shows the disputed area as "common area" without regard to Appellant's limited common area rights granted by the Declaration. The Plat describes the area as "COMMON AREA 3 (CONDOMINIUMS) 4.313 ACRES", refers to the Declaration in General Note No. 2[10] and recognizes the existence of limited common areas in General Note No. 11[11]. Common Area 3 is part of a condominium plat and even the "Dedication of Common Areas on the Plat" refers to and incorporates the Declaration regarding designation and description of common area uses[12].

[10] "2) A DECLARATION OF CONDITIONS, COVENANTS AND RESTRICTIONS FOR THIS PROJECT HAS BEEN RECORDED HEREWITH."

[11] "11) THE LIMITED COMMON AREA SHALL NOT BE PERMITTED FOR FENCING."

[12] "THE COMMON AREAS ARE NOT DEDICATED FOR USE BY THE GENERAL PUBLIC, BUT ARE FOR THE COMMON USE AND ENJOYMENT OF THE OWNERS IN THE COVE AT SUN PEAK ***AS SET FORTH IN THE DECLARATION OF PROTECTIVE COVENANTS, AGREEMENTS, CONDITIONS AND RESTRICTIONS OF THE COVE AT SUN PEAK, WHICH ARE HEREBY INCORPORATED BY REFERENCE***." (Emphasis added.)

Common Area 3 is part of a condominium plat. Condominiums are governed by the Condominium Ownership Act.[13] The Department relies on some references and definitions from the Community Association Act[14] which was enacted in 2004, eight years after The Cove at Sun Peak was created. Both Acts demonstrate the error in the Departments analysis and reliance on an isolated definition.

Like the section cited by the Department in its Response, the Condominium Ownership Act has a definition of "common area and facilities" in section 57-8-3, subdivision (5).[15] That same section, in subdivision (24) has another, more specific, definition relevant to Appellant's application: "(24) 'Limited common areas and facilities' means those common areas and facilities ***designated in the declaration*** as reserved for use of a certain unit or units to the exclusion of the other units."[16] (Emphasis added.)

The later enacted Condominium Association Act, upon which the Department bases its argument, also has definitions of both "common areas"[17] and "limited common areas"[18] in the same section. Subsection (14) provides: "'Limited common areas' means common areas ***described in the declaration*** and allocated for the exclusive use of one or more lot owners."[19] (Emphasis added.) The Department has simply

[13] Utah Code Ann. § 57-8-1, et seq.

[14] Utah Code Ann. § 57-8a-101, et seq.

[15] Utah Code Ann. § 57-8-3(5).

[16] Utah Code Ann. § 57-8-3(5).

[17] Utah Code Ann. § 57-8a-102(5).

[18] Utah Code Ann. § 57-8a-102(24).

[19] Id.

ignored the concept of limited common areas in its decision and Response, even though the property which is the subject of the appeal is, in fact, limited common area.

The Declaration, which creates the limited common areas, defines "Limited Common Areas" as part of "Common Areas": "Some Common Areas [Limited Common Areas] have been designated as for the exclusive use and possession of the Units to which they are appurtenant."[20]

Section 57-8-10, subsections 2(a) (iv) and (v), of the Condominium Ownership Act states that for every condominium project the **declaration** shall describe both the common areas and facilities of the project **and any limited common areas** and facilities. (Emphasis added.) Section 57-8-10 makes it clear that the Act does not require limited common areas to be shown on the condominium plat: "(c) The condominium plat recorded with the declaration ***may*** provide or supplement the information required under Subsections (2)(a) and (b)." (Emphasis added.) Even the Snyderville Basin Development Code does not require condominium plats to show limited common areas.[21]

The Department cannot read one definition, in isolation, without considering other definitions and statutes that qualify that definition based on its context. The statutes must be read as a whole and in harmony with related statutes and regulations. The

[20] Declaration, p. 7, ¶ 3.4, Exhibit E to Appellant's Description of the Appeal, under the section entitled "Limited Common Areas".

[21] SBDC § 10-11-1 defines a condominium as "[a]ny structure which has been submitted to condominium ownership under the provisions of the Utah condominium ownership act". SBDC § 10-3-8A states that the condominium plat "shall contain the information required for ***a final site plan*** as identified in section 10-3-15 of this chapter." (Emphasis added.) SBDC § 10-3-8A also requires that CC&Rs be submitted for review by the Summit County attorney's office prior to recording of the condominium plat. The final site plan requirements, SBDC § 10-3-15, do not require either common areas or limited common areas to be shown on the plat.

Department's interpretation renders "limited common areas" superfluous and is in direct conflict, rather than harmony, with more specific statutes dealing with the property rights involved in this appeal.

It is as if the Department is straining to find isolated wording in a statute to support its position rather than perform its duty to favor an applicant if there is an ambiguity. Building permit applicants are not adversaries, they are members of the community trying to follow the rules with the expectation that the County will do the same.

It is the Department's, and the County's, duty to properly read and interpret statutes, ordinances and other regulations and grant a land use application if there is no regulation clearly restricting what is sought. If there is an ambiguity, the Department must favor the land use application in its interpretation. The opposite appears to be the case here.

The Department cites an isolated phrase from section 57-8-13 to further support its position.[22] Again, the Department takes wording in a statute out of context and strains to imply a meaning that does not exist.

Reading the section as a whole, it is plain that the quoted subsection (3) deals with "convertible space", a specific type of use similar to easements, convertible lands, leased land, withdrawable lands and encroachments, which must be shown and labeled on the condominium plat.[23] Nothing in that section requires limited common areas to be shown on the plat or require a plat amendment for their initial creation.

[22] Department's Response, p. 4, quoting Utah Code Ann § 57-8-13.

[23] Utah Code Ann § 57-8-13, subsections (1)(a)(iv) thru (xi).

Reply to Section 2 – Necessity for a Plat Amendment

Utah Code § 17-27a-606 applies to subdivisions and subdivision plats under Part 6 of the CLUDMA. It does not apply to condominium plats or rights conferred by declaration pursuant to the Condominium Ownership Act.

Note that Summit County has separate subdivision plat and condominium plat approval provisions in the SBDC and defines condominiums as governed by the Condominium Ownership Act.[24] Although missing from the SBDC, the County's Eastern County Development Code even defines "condominium plat" as a plat governed by the Condominium Ownership Act, not the general subdivision plat regulations: "A plat of land and units prepared in accordance with Utah Code Annotated section 57-8-13 or successor law."

Appellant's property is part of a condominium plat -- not a basic subdivision plat. The Department may not simply disregard the Condominium Ownership Act in the exercise of its power.

Reply to Section 3 -- Summit County is not a Party to and Cannot Administer Private CC&R Agreements

The County is not being asked to administer or enforce a private agreement. The Declaration is a document required by statute for formation of a condominium development. It is a recordable document which creates property rights.

It is not clear what the County's role is in "administering" private property rights created by recorded documents. The Department gives no authority for its position that

[24] SBDC §§ 10-3-8, 10-3-15 and 10-11-1.

it must ignore the Declaration because the County does not administer or enforce private agreements.

In fact, the County does recognize and enforce property rights created by private, agreements all the time -- rights such as easements, licenses, encumbrances and even CC&Rs and design guidelines if they restrict an act or improvement. The concept that the County, and specifically the Department, cannot recognize or consider "limited common areas" created by a duly recorded condominium declaration, as authorized by statute, is absurd.

As discussed above, it is the Declaration and not the Plat that creates the condominium and defines the limited common area property rights. For condominiums, the condominium plat is a secondary document to be recorded with the declaration.[25] Ignoring the "limited common area" rights created by the Declaration is an abuse of power.

Conclusion

The Council should overturn the Director of Community Development's July 23, 2020 determination and direct that Appellant's application be approved. The Department's determination is erroneous, contrary to state law and constitutes a violation of statutorily mandated public policy in the interpretation and enforcement of land use regulations.

Appellant apologizes for the length of this Reply, even double-spaced. Although a small project, the application concern's the use, enjoyment, and value of Appellant's

[25] Utah Code Ann. §§ 57-8-10 and 57-8-13.

home, and Appellant knows the importance of a complete record if it is necessary to seek review.

Appellant does not require time for a presentation to the Council and is willing to submit on the papers and record on appeal. Appellant will be available to answer questions by the Council and respond to points raised by the Department at the hearing.

Respectfully submitted this 22nd day of August 2020,

Michael J. Radford, Appellant