

**FINDINGS AND CONCLUSIONS OF BOULDER TOWN COUNCIL
APPEAL HEARING AUGUST 6, 2020 AT 7:00 P.M.**

INTRODUCTION

Mark Nelson, (“Nelson”) a resident of Boulder, Utah, filed an appeal contesting the issuance of a Conditional Use Permit (“CUP”) to Jacqui Smalley, Boulder Creek Canyon Ranch, LLC (“Smalley”) by the Boulder Town Planning Commission (the “PC”) acting in its designated capacity as the Land Use Authority for CUP applications. A Motion to Dismiss Nelson’s appeal was filed by Smalley on the basis that Nelson lacked standing, contending that his appeal was barred by state statute. The Town Council (the “TC”) heard the Motion to Dismiss and ruled that Nelson did not meet the statutory criteria as an appellant, thus denying his appeal.

A numbered index of 11 Exhibits is attached hereto on page 4, and is referred to accordingly within the text of these Findings and Conclusions.

BACKGROUND

On June 11, 2020 at a regularly scheduled PC meeting, a virtual Public Hearing was held (via Zoom) to consider the application of Smalley for a CUP to construct and operate a nonprofit, community-based Arts and Cultural Center on her land (the “Property”) adjacent to her ranch entry on Highway 12 (the “Project”). The Project proposed a structure with a 4,000 s.f. footprint containing a 112 seat performance space, a small gallery, a basement area for workshops and storage, and a 50 stall parking area adjacent to the structure as mandated by UDOT and other applicable building codes. (Ex. 1a)

The Project is to be funded 100% and maintained by Smalley with no financial involvement by the Town, or other organizations. Smalley’s proposal and CUP approval is for a nonprofit facility for the sole benefit of the community, and not as a tourist venue or commercial enterprise by expressed condition of the CUP. (Ex 1b, conditions for approval)

The PC ruled that Smalley met the criteria set forth in the Town ordinances and thus approved the CUP by a vote of 3 to 2 with 6 conditions, containing 17 sub-sections, addressing the structure, its uses, parking, buffering, lighting, noise, property management, et al. (Ex. 1, 1(a) and 1(b))

On June 21, 2020, Nelson filed an appeal setting forth eleven grounds with multiple attachments. (Ex. 2)

On July 15, 2020, Smalley through her attorney filed a Motion to Dismiss the appeal on statutory grounds. (Ex. 3)

On July 23, 2020 in a letter to Nelson the Town informed him of the TC hearing date to consider the Motion to Dismiss. If the Motion was denied, a separate TC hearing would then be scheduled to consider Nelson’s appeal on the merits. If the Motion was granted, that decision of the TC would be final. (Ex. 4)

On July 30, 2020, Nelson submitted a written response to the Motion. (Ex. 5)

On July 28 and August 4, 2020, the town attorney submitted opinions advising the TC to hear the Motion to Dismiss first, and then, depending upon the outcome of that hearing, to schedule a subsequent hearing, if necessary, to consider the merits of Nelson's appeal. (Ex. 6 & 7)

On August 6, 2020, the hearing went forward with both Smalley (represented by counsel) and Nelson present. Each was afforded the opportunity to present testimony and evidence relevant to the issue of Nelson's statutory qualifications as an appellant. (Ex. 8, transcript of hearing.)

At the August 6th hearing, the TC determined that Nelson did not meet his burden of proof under the statute, that the statute therefore posed a bar to his appeal, and on that basis granted the Motion to Dismiss appeal by a vote of 3 to 1. (Ex. 8, transcript pgs 18 to 35)

ISSUES

Does the appellant, Nelson, have standing to appeal the PC decision on June 11, 2020 granting the applicant, Smalley, a Conditional Use Permit?

Did Nelson meet his burden of proof by presenting testimony or evidence sufficient to prove standing as a qualified appellant under the terms of amended Utah Code §10-9a-703, taken together with amended Utah Code §10-9a-103(2)? To do so, Nelson must prove at least one of the following elements by demonstrating that:

- 1- he is the applicant; or
- 2- he is an "officer" of the Town as defined by Utah Code; or
- 3- he owns real property adjoining the subject Property; or
- 4- he "will suffer a damage different in kind than, or an injury distinct from, that of the general community as a result of the land use decision."

FINDING OF FACTS

Nelson did not assert or prove that he is the applicant or that he owns property that adjoins Smalley's Property. (Ex. 2, 5 & 8)

Nelson is an appointed member of the Town Board of Adjustments. He asserts that such an appointment qualifies him as an "officer" of the Town. However, the TC found that to be an officer one had to be elected to the position and Nelson submitted no evidence that he held elected office. (Ex 2, 5 & 8)

Due to the virtual nature of the meeting, many in the community submitted letters, in addition to testimony at the hearing, expressing their opinions of the project. Of the 23 letters submitted, 18 supported the project, while 5 opposed it. The letters and testimony in favor of the CUP were couched in terms of generalized benefits to the community; the letters in opposition were couched in term of generalized harm to the community. (Ex. 1(c))

Nelson asserts many of the same things found in the letters and testimony in opposition to the Project, specifically that "The entire Town and Landscape is our Art

Center and is doing just fine without risking the creation of Destination Tourism, Amenities Culture, Real-Estate Development, etc, that have followed projects of this kind . . .” (quoting Nelson letter to Smalley, see Ex. 1(c) page 20)

Nelson also asserts that his residency in the Town and community involvement therein, set him apart. He alleges that tenure and community involvement grant him unique status and an inherent stake in the Town. (Ex 8 pgs 8 to 15) He contends that those factors alone constitute standing to appeal and comprise “damage different in kind than, or an injury distinct from, that of the general community.” (Ex 5 & Ex 8, transcript pg 23, & pgs 18 to 35) The TC, however, found that Nelson’s assertions of damage or injury were not unique to Nelson, rather they were the same or similar objections raised by other member of the community who opposed the Project. (Ex 1c, Ex 8 transcript pgs 18 to 35)

Nelson did not allege, nor did the TC find, that Nelson would be uniquely or individually damaged or injured by the Project in terms of his ability to earn a living, or his health, or damage to his property or its value, or any other type of damage or injury unique to him or that would set him apart from alleged generalized harm to the community at large. (Ex 5 & Ex 8, transcript pg 23, & 18 to 35)

CONCLUSIONS OF LAW

In 2020, the Utah Legislature amended Utah Code §10-9a-703 and §10-9a-103(2) narrowing the definition of who may appeal land use decisions. Previously, about anyone who disagreed with the decision could appeal. The legislative history of these two Code sections documents the increasing numbers of appeals that were without merit, and which consumed substantial time and resources of municipalities. These 2020 amendments set forth with clear intent and purpose a heightened standard narrowing the field of who may appeal.

The TC determined, upon advice from the Town Attorney (Ex 6 & 7), that it was in the public interest and within their power to hear the Motion to Dismiss separately and initially in order to spare the parties the burden of full preparation for a hearing on the merits. (Ex 4, 6, 7, & 8 transcript 21 to 32)

The amended 2020 Utah Code provisions above are more restrictive than the Boulder zoning ordinance §1803(2) passed in 2008, which previously defined who may appeal. (See Nelson, Ex 8 transcript pgs 13, 14 & Andrews pgs 17, 18) However, Utah Code §10-9a-104(2) states that “a municipality may not impose a requirement, regulation, condition, or standard that conflicts with a provision of this chapter, other state law, or federal law.” Utah Code §10-9a-103(2) is part of “this chapter”. Accordingly, the TC found that it must apply the amended definition of who may appeal. (Ex 8 transcript pgs 18 to 35)

Nelson also claims (Ex 5) that he has the right to appeal by virtue of amended Utah Code §10-9a-703(1) as an “adversely affected party.” However, Utah Code §10-9a-103(2) defines “adversely affected party” more narrowly than Nelson has alleged or proven. (Ex 8 pgs 18 to 35)

Nelson contends that he is an "officer" of the Town by virtue of his being an appointee to the Town Board of Adjustments. (Ex 8 transcript pg 26; Ex 5 attachments) Utah Code §20A-1-102(42) states that "Municipal officer" means those municipal officers that are required by law to be elected." (Ex 8 transcript pg 23) Nelson claims, by reference, that Utah Code §10-3-1303, Municipal Officer's and Employees' Ethics Act, defines appointees to be officers. (Ex 5, attachments). However, the Code section from which he quotes explicitly clarifies the earlier language by stating "The use of the word "officer" in this part is not intended to make appointed persons or employees "officers" of the municipality." Utah Code §10-3-1303(1).

Nelson, as the appellant, has the burden of proof. Boulder ZO §1809, Utah Code §10-9a-705. His burden is set forth by the United States Supreme Court in 467 U.S. 310 (1984) holding that "clear and convincing" means that the evidence is highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable."

The TC ruled that Nelson failed to present testimony or evidence sufficient to meet his burden of proof, ie. that the Project would cause him "damage different in kind than, or an injury distinct from, that of the general community" as required by the amended Utah Code §10-9a-103(2). (Ex 8 transcript pgs 18 to 35)

Accordingly, the TC granted Smalley's Motion to Dismiss. (Ex 8 transcript pgs 33 to 35)

On behalf of the Boulder Town Council, the forgoing represents the Written Decision, the Finds and Conclusions, of the hearing conducted on August 6, 2020 and the disposition of the above matter.

Acknowledged by Steven Cox Title Mayor Date 9/1/2020

List of Exhibits

- 1- Minutes of PC meeting 6/11/20 granting CUP
 - a. Application CUP Smalley
 - b. Staff report w/conditions
 - c. Written public comments
- 2- Mark Nelson appeal, 6/21/20, 11 points with attachments available as shown
- 3- Smalley motion to dismiss, Letter from Andrews 7/15/20
- 4- Letter from Town on 7/23/20 to Nelson setting date for hearing motion to dismiss
- 5- Nelson response to Motion to Dismiss 7/30/20
- 6- Town attorney letter 7/28/20 regarding hearing on motion
- 7- Town attorney letter 8/4/20 regarding Motion to Dismiss
- 8- Transcript of Town Council hearing on 8/6/20