

**PARK CITY MUNICIPAL CORPORATION
BOARD OF APPEALS**
CITY HALL, COUNCIL CHAMBERS
July 30, 2013



AGENDA

MEETING CALLED TO ORDER – 11 AM

ROLL CALL

PUBLIC COMMUNICATIONS – *Items not scheduled on the regular agenda*

STAFF AND BOARD COMMUNICATIONS/DISCLOSURES

REGULAR AGENDA – *Discussion, public hearing, and possible action as outlined below*

Election of Chair and Vice-Chair

Approval of Meeting Minutes 6-13-2013

41 Sampson Avenue– Remand of the appeal of the expiration of a
building permit

BD-11-16092

Quasi-judicial hearing

ADJOURN

MINUTES OF PARKCITY BOARD OF APPEALS
CITY HALL WEST CONFERENCE ROOM
JUNE 13, 2013

IN ATTENDANCE: Jonathan Degray, Clint Magee, Mike Eberlien, Bruce Taylor
EX OFFICIO: Chadley Root, Secretary; Polly Samuels-Mclean, City Attorney; Roger Evans, Deputy Building Official; Jennifer Barclay, Analyst

I. ROLL CALL

Chair Jonathan Degray called the meeting to order at 9:06 a.m. and noted that a quorum was present with Clint Magee, Mike Eberlein and Bruce Taylor the alternate in attendance.

II. PUBLIC COMMUNICATION

There was no comment

III. STAFF & BOARD COMMUNICATIONS

City Attorney Mclean addressed scheduling complications and requested updated contact information for each member. City Attorney Mclean stated we are anticipating several meetings in the near future and would like a 24 to 48 hour response for scheduling purposes. She anticipates we will have a meeting in the next 30 days, Chadley Root passed around a paper to update the contact information. Clint Magee asked what constitutes a Quorum. City Attorney Mclean stated there are three members with one alternate but ideally we would like to have three members. Procedure for short meetings includes ratification of the minutes after the hearing since the Board of Appeals meets so infrequently. If the meeting is too long and additional meeting will be held to ratify the minutes.

IV. REGULAR AGENDA

1. 41 Sampson Avenue- Appeal of Notice and Order of a dangerous Building
-Chairmen Jonathan Degray recused himself, Mike Eberlien motioned to continue to a date uncertain the appeal of the notice and order of a dangerous building. Clint Magee seconded the motion. Motion unanimously carried

2. 41 Sampson Avenue- remand of Appeal to expire issued building permit City Attorney Mclean reminded the board the board of a prior appeal that the court has remanded back to the Board. The court indicated the Board of Appeals previous decision was based off a technicality. A copy of the order and a transcript of the judge's decision will be provided prior to the next meeting. Mike Eberlien motioned to continue to a date uncertain the remand of Appeal to expire issued building permit. Clint Magee seconded the motion. Motion unanimously carried.

V. WORK SESSION

City Attorney Mclean presented proposed changes to the rule and procedures. The Board made minor changes to these two years ago. Looking at this we thought we should update this again. We won't be able to take action today as this is a work session but felt we should get your feedback so we can update the rules next time we meet. This was originally adopted in 1980; section 204 of the Uniform Building code no longer applies to the board of Appeals. We

MINUTES OF PARKCITY BOARD OF APPEALS
CITY HALL WEST CONFERENCE ROOM
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felt an annually meeting was best to update contact info and conduct required Open Public Meeting Act training as required by Utah State Law. This meeting would be the third Thursday in March at 10 a.m. Additional meetings would be held as needed preferable on the third Thursday of the month. John Degray asked about Quorum requirements. Chadley Root supported three members to satisfy the quorum requirement. City Attorney Mclean said a change will be made to require three voting members and the alternate can be used to satisfy the quorum requirement. Bruce Taylor asked what the public notice requirements are. City Attorney Mclean responded 24 hours is the required. We changed the requirement for mailing notices to contacting applicants such as email, and using the required Utah Public Notice Website. I put in this is the form of appeal was listed as a requirement for the appeals in the IBC and in other building codes. Jonathan Degray asked about emergency meeting voting, the City Attorney feels that an emergency meeting is highly unlikely. City Attorney Mclean also changed witness against application to allow public input regarding the appeal. A clarification that decisions and findings should be in writing. Reconsideration of applications was in the policy before but we are clarifying when the 10 days was from. Sub section five covered matters for review your jurisdiction under the IBC/UEC clarified what the timing is and that they have to pay the fee when they appeal a decision Basis for appeal is limited to those issues raised in the appeal. Focus on what is being appealed and not go into extraneous matters. Mike Eberlien asked what the time frame for appeal was. City Attorney Mclean explained general for the IBC is 30 days unless it is a dangerous building order to vacate can be 10 days. Limitations of authority, the board have no authority to waive requirements of the IBC. The board of appeals has no authority over the relative to the interpretation of the administrative provision of this code of the abatement of dangerous building or the uniform housing code. City Attorney Mclean stated she is not familiar with what these administrative provisions are. The standard of review shall be factual matter de novo determine the correctness of the building officials decision/ interpretation and application. Maybe this should be changed to say that the Board will determine the correctness of the building official's decision factually and interpretation so application of applicable code. City Attorney Mclean is not sure if there is a need for a factual determination. Chad Root said there could be if there are multiple code sources, the board could determine which code is correct. John Degray is more comfortable with determining the correctness of the Building Official. Mike Eberlien and Clint Magee agreed. Mike Eberlien asked about Board members being citizens of Park City. Mclean stated since the board requires professionals this increases the number of potential members. City Attorney Mclean excused herself to run downstairs and grab documents for the Public Meeting Training.

VI. City Attorney Mclean provided training for public meetings.

Mike Eberlien motioned to adjourn the meeting at 9:46 AM
Clint Magee Seconded the motion. Motion unanimously carried.

Minutes prepared by: Jennifer Barclay

Board of Appeals Staff Report

Subject: 41 Sampson Remand of Appeal of Building Permit Expiration
Author: Chadley Root, Chief Building Official
Date: July 30, 2013
Type of Item: Quasi-Judicial

Summary Recommendations

Staff recommends the Board review the remand order from the District Court, review the denial of the building permit extension request on the merits and consider upholding the Chief Building Official's decision to deny the request for an additional extension of the building permit based upon the attached draft findings of fact and conclusions of law.

Topic

Appellant: 41 Sampson, LLC (aka King Development, LLC)
represented by one of its members, Jerry Fiat
Location: 41 Sampson, Park City Utah 84060
Reason for Review: Remand from the District Court

Background

The owners first submitted the plan review for this project to the building department on May 6, 2007. After going through plan review (completed by Building Department on July 2, 2007), and the applicant requesting an extension of the plan check, the building department issued a footing and foundation permit on March 12, 2009.

The owners requested an extension of the building permit on September 4, 2009, the day after a meeting between Jerry Fiat and former Chief Building Official ("CBO") Ron Ivie. Mr. Ivie extended the permit to July 2, 2010 and put a note on the file indicating no more extensions will be granted after July 2, 2010. On April 8, 2010, the architect for the project Jon DeGray requested an extension from July 2, 2010 to January 2011 based on request from owners which was also approved by the building department.

During the week of January 24, 2011, the attorney for the applicants, Joe Tesch, met with interim Chief Building Official Roger Evans. At that meeting they discussed a request for an extension and Mr. Tesch stated that his clients were requesting the extension because of the downturn of the economy and the difficulty of finding a lender. On January 31, 2011, Mr. Tesch made a 6 month extension request in writing. Interim CBO Evans reviewed the request and denied the extension on February 3, 2011 due to no justifiable reason for an extension. Mr. Evans also denied applicant's request to reconsider his decision on February 9, 2011.

On April 21, 2011, the Board of Appeals held a hearing on the appeal of the expiration of the permit. The Board based its decision to uphold the decision of the Interim CBO on narrow procedural grounds that the letter submitted requesting the extension was in

an improper format and did not include justifiable cause.

The owners appealed the decision to the District Court. On May 31, 2013, the District Court issued an order remanding the case to the Board of Appeals. It ruled that upholding the appeal on the technical ground that the letter submitted requesting the extension was in an improper format and did not include justifiable cause was illegal since the International Building Code (IBC) only required the justifiable cause be demonstrated and that it could be demonstrated orally. The Court interpreted IBC 105.5 to give the CBO wide discretion first to determine whether justifiable cause exists and if it does, to make a determination whether to authorize an extension. The CBO may determine that there is justifiable cause but not authorize an extension so as long as his decision isn't based on arbitrary or capricious reasons. The Court sent the appeal back to the Board to review the CBO's determination and make a determination.

The owners submitted a Motion to Clarify on four respects to the Court. The Court issued a minute entry on July 9, 2013 which denied three out of the four requests. The Court modified its ruling as to one item. The remand is now before the Board.

Appeal and Standard of Review

This appeal is under the International Building Code. IBC § 113.1 says the Board of Appeals exists to "hear and decide appeals of orders, decisions and determinations made by the building official relative to the application and interpretation of this code." IBC § 113.2 says the Board has no authority to waive any requirements of the IBC.

District Court's Ruling

The Court issued a ruling which also includes instructions and legal interpretations regarding the Board's discussion regarding whether or not they have to grant permit extension applications that are submitted to them. Along with the Ruling and the minute entry, staff has attached the transcript of the ruling as it helps in understanding the Court's reasoning.

The Court found that under IBC § 105.5 demonstrated does not have to be in writing. Therefore, oral proffer of justifiable cause can be considered. The Court instructed the Board that in your review of the CBO's decision, you should consider that the standard under IBC § 105.5 is a very deferential standard that gives the building official the authority to grant an extension but does not mandate that the building official do so. The Court believes that it is contrary to the language of the Code and unwise policy that parties are entitled to an infinite number of extensions upon showing justifiable cause.

The Court instructs that even if justifiable cause is demonstrated, the CBO is not required to grant an extension. However, the decision may not be arbitrary, capricious or illegal. It is for the CBO to decide whether justifiable cause exists. If the CBO finds there is justifiable cause, then the CBO is authorized to but need not grant an extension. However, in the event the CBO determines not to issue an extension after justifiable cause has been demonstrated, the reasons for the determination should be clearly set forth so it can be determined if the reasons are arbitrary or capricious.

The Court also ruled that, "The Court cannot make a blanket finding that dire economic conditions always as a matter of law constitutes justifiable cause. Certainly, economic conditions could potentially constitute justifiable cause in certain situations, but this determination must be made on a case-by-case basis."

The Court also denied the owners' claim of "equitable estoppel." Therefore, any arguments by the owners' based that they relied upon CBO Evans telling them what should be in the letter or that they would get an extension during the meeting the week of January 24, 2011 have been ruled upon and rejected by the District Court.

Analysis

The owners are asking the Board to review whether CBO Evans interpreted IBC § 105.5 correctly. IBC § 105.5 states:

Every *permit* issues shall become invalid unless the work on the site authorized by such *permit* is commenced within 180 days after its issuance, or if the work authorized on the site by such *permit* is suspended or abandoned for a period of 180 days after the time the work is commenced. The *building official* is authorized to grant, in writing, one or more extensions of time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.

Mr. Tesch on behalf of 41 Sampson, LLC met with interim CBO Evans the week of January 24, 2011 to discuss a request for an extension for the building permit for 41 Sampson. At that meeting, Mr. Tesch, according to his affidavit, "stated words to the effect that because of the severe downturn in the building economy and home industry that there simply was not money available from lenders to build this project." Mr. Tesch formalized his request in writing on January 31, 2011. No work occurred under the footing and foundation permit. Excavation had not begun and no work had been done on the site.

CBO Rogers reviewed the request and the file and found that based upon the review of the files and previous extension requests there is no justifiable reason to grant the request for an extension.

Mr. Tesch on February 9, 2011 requested CBO Evans reconsider his decision asked if the owners could submit a new letter which would set forth justifiable cause as part of the letter. Mr. Rogers denied that request for reconsideration.

At the April 21, 2011 hearing before the Board of Appeals, there was further discussion of the CBO Evans' decision regarding his finding that there was no justifiable cause. CBO Evans stated that his determination was based on the following:

- This was the fourth extension for the property over a long period of time. (Plan review was originally received on May 6, 2007. An extension was requested for the plan check on February 2, 2009. The footings and foundation permit was issued March 12, 2009. Two additional extensions were requested on

September 4, 2009 and April 8, 2010. This fourth extension request was on January 31, 2011.)

- The default under IBC § 105.5 is expiration. (“Every permit issued shall become invalid unless the work on the site authorized commences within 180 days.”)
- Generally two extensions give an owner 360 days to commence work. Sometime within the 360 days the owner should have the capability of being able to put in a footing and foundation.
- Having outstanding permits has a large impact on the neighborhood.
- Owners stated in their February 2, 2009 request for extension that they wanted to start construction in the spring. However, they never started construction and instead submitted more extension requests.
- From Mr. Evans’ experience of the last 38 years, he has never considered financing or the economy as a justifiable reason.
- Weather as justifiable cause disappears once you get past 360 days.

Also during the hearing, there were statements by Jerry Fiat, on behalf of the ownership, that the ownership group has quite a few properties in Park City and they have a number of them under construction currently. The group is trying to see which projects to do and which ones not do and to prioritize it. Also there was testimony from a neighbor, Debbie Schneckloth who stated that the ownership group started two other projects in old town during this time frame. There was no indication that the owners were going to move forward with the project or that the economic conditions which existed when they pulled their permit would change for them. Even in their January 31, 2011 letter, it does not commit to having the work ready for inspection by early July. It was discussed during the hearing as well as through testimony by neighbors Ms. Schneckloth and Mr. Vrabel that the Land Management Code had changed while the permit was open. Due to that change, the discretionary extension of the building permit allows for a non-complying structure to be built under the new Code.

The IBC doesn’t address exactly what is justifiable cause. It does, in non-binding commentary, discuss that “reasonable cause” in the context of permit application extensions include delays beyond the applicant’s control, such as pre-requisite permits for approvals from other authorities within the jurisdiction or state. (IBC Commentary 105.3.2)

For the hearing, Mr. Tesch submitted a large binder with documents generally about the economic down turn in the United States, other permit applications in Park City and weather conditions and argued that these document support that there is justifiable cause for an extension.

Future Process

Final Actions by the Board of Appeals may be appealed to Third District Court within thirty calendar days.

Alternatives

- **Deny Appeal** - The Board of Appeals may deny the appeal and affirm the determination of the CBO to deny the extension of the building permit for 41 Sampson; or
- **Grant Appeal** - The Board of Appeals may grant the appeal and overturn the determination of the CBO to deny the extension of the building permit for 41 Sampson; or
- **Remand to the CBO**- The Board of Appeals may remand the matter back to the CBO for consideration of the materials submitted at the hearing and to request further explanation in writing of his decision; or
- **Continue to another date**- The Board of Appeals may continue the discussion to a specified or unspecified date and provide direction on any additional information needed, or items and issues that require further discussion.

Staff Recommendation

Staff recommends the Board review the remand order from the District Court, review the denial of the building permit extension request on the merits and consider upholding the Chief Building Official's decision to deny the request for an additional extension of the building permit based upon the following findings of fact and conclusions of law:

Findings of Fact:

1. The appeal is over a request to extend a building permit for the property at 41 Sampson in Park City
2. The applicant first submitted the plan review for this project to the building department on May 6, 2007.
3. After going through plan review (completed by Building Department on July 2, 2007), and the applicant requesting an extension of the plan check on February 2, 2009, the building department issued a footing and foundation permit on March 12, 2009.
4. An extension of the building permit was requested on September 4, 2009, the day after a meeting between Jerry Fiat and former Chief Building Official ("CBO") Ron Ivie. CBO Ivie extended the permit to July 2, 2010 and put a note on the file indicating no more extensions will be granted after July 2, 2010.
5. On April 8, 2010, the architect for the project Jon DeGray requested an extension from July 2, 2010 to January 2011 based on request from owners which was approved by the building department.
6. Mr. Tesch on behalf of 41 Sampson, LLC met with interim CBO Evans the week of January 24, 2011 to discuss a request for an extension for the building permit for 41 Sampson. At that meeting, Mr. Tesch, according to his affidavit, "stated words to the effect that because of the severe downturn in the building economy and home industry that there simply was not money available from lenders to build this project."
7. On January 31, 2011, Mr. Tesch requested in writing an extension from January 31, 2011 until July 31, 2011.
8. On February 3, 2011 Interim CBO Rogers reviewed the request and the file and found that based upon the review of the files and previous extension requests

- there is no justifiable reason to grant the request for an extension.
9. Mr. Tesch on February 9, 2011 requested CBO Evans reconsider his decision asked if the owners could submit a new letter which would set forth justifiable cause as part of the letter. Mr. Rogers denied that request for reconsideration. on February 9, 2011.
 10. On April 21, 2011, the Board of Appeals held a hearing on the appeal of the expiration of the permit. The Board based its decision to uphold the decision of the Interim CBO on narrow procedural grounds that the letter submitted requesting the extension was in an improper format and did not include justifiable cause.
 11. The applicants appealed the decision to the District Court. On May 31, 2013, the District Court issued an order remanding the case to the Board of Appeals to review the evidence and make a determination.
 12. The owners submitted a Motion to Clarify on four respects to the Court. The Court issued a minute entry on July 9, 2013 which denied three out of the four requests. The Court modified its ruling as to one item which is incorporated below.
 13. The Court ruled that upholding the appeal on the technical ground that the letter submitted requesting the extension was in an improper format and did not include justifiable cause was illegal since the International Building Code (IBC) only required the justifiable cause be demonstrated and that it could be demonstrated orally.
 14. The Court instructed the Board that in review of the CBO's decision, the Board should consider that the standard under IBC § 105.5 is a very deferential standard that gives the building official the authority to grant an extension but does not mandate that the building official do so.
 15. The Court stated that it is contrary to the language of the Code and unwise policy that parties are entitled to an infinite number of extensions upon showing justifiable cause.
 16. The Court instructed that even if justifiable cause is demonstrated, the CBO is not required to grant an extension. However, the decision may not be arbitrary, capricious or illegal. It is for the CBO to decide whether justifiable cause exists. If the CBO finds there is justifiable cause, then the CBO is authorized to but need not grant an extension. However, in the event the CBO determines not to issue an extension after justifiable cause has been demonstrated, the reasons for the determination should be clearly set forth so it can be determined if the reasons are arbitrary or capricious.
 17. The Court stated it cannot make a blanket finding that dire economic conditions always as a matter of law constitutes justifiable cause. Certainly, economic conditions could potentially constitute justifiable cause in certain situations, but this determination must be made on a case-by-case basis.
 18. The Court also denied the owners' claim of "equitable estoppel." Therefore, any arguments by the owners' based that they relied upon CBO Evans telling them what should be in the letter or that they would get an extension during the meeting the week of January 24, 2011 have been ruled upon and rejected by the District Court.

19. This appeal is subject to the International Building Code. IBC § 113.1 says the Board of Appeals exists to “hear and decide appeals of orders, decisions and determinations made by the building official relative to the application and interpretation of this code.”
20. The Board has no authority to waive any requirements of the IBC. (IBC § 113.2).
21. The owners through this appeal requested the Board review whether CBO Evans erred or was arbitrary and capricious when he denied the permit extension request.
22. The relevant language of the IBC reviewed by the CBO is 105.5 “Expiration.” It states, “Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance. . . . The building official is authorized to grant, in writing, one or more extension of time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.”
23. Despite the permit being valid for over 22 months, no work occurred under the footing and foundation permit. Excavation had not begun and no work had been done on the site.
24. At the April 21, 2011 hearing before the Board of Appeals, CBO Evans verbalized the reasons he found there was no justifiable cause under IBC 105.5.
25. This was the fourth extension request for the property over a long period of time
26. The default under IBC § 105.5 is expiration. (“Every permit issued shall become invalid unless the work on the site authorized commences within 180 days.”)
27. Generally two extensions give an owner 360 days to commence work. Sometime within the 360 days the owner should have the capability of being able to put in a footing and foundation.
28. Outstanding permits have a large impact on the neighborhood.
29. Owners stated in their February 2, 2009 request for extension that they wanted to start construction in the spring. However, they never started construction and instead submitted more extension requests.
30. There was no indication that the owners were going to move forward with the project. Even in their January 31, 2011 letter, it does not commit to having the work ready for inspection by early July.
31. From Mr. Evans’ experience of the last 38 years, he has never considered financing or the economy as a justifiable reason.
32. Weather as justifiable cause disappears once you get past 360 days.
33. During the hearing, Jerry Fiat, the owner representative, stated that the ownership group has quite a few properties in Park City and they had a number of them under construction currently. The group was trying to see which projects to do and which ones not do and to prioritize it.
34. Neighbor, Debbie Schneckloth stated at the hearing that the ownership group started two other projects in old town during this time frame.
35. The IBC doesn’t address exactly what is justifiable cause. It does, in non-binding commentary, discuss that “reasonable cause” in the context of permit application extensions include delays beyond the applicant’s control, such as pre-requisite permits for approvals from other authorities within the jurisdiction or state. (IBC Commentary 105.3.2)

36. The justifiable cause presented to the CBO in requesting an extension to the building permit at the meeting the week of January 24, 2011 was based on the dire economic conditions and the lack of lenders.
37. The economic downtown began in 2007, before owners pulled their permit.

Conclusions of Law:

1. CBO Evans did not err in his interpretation of IBC 105.5 in finding there was no justifiable cause to extend the building permit.
2. CBO Evans did not err when he determined that economic conditions was not justifiable cause under IBC 105.5 in 41 Sampson's request for a building permit extension.
3. CBO Evans did not err when he factored in his determination that there wasn't justifiable cause due to economic conditions that there had been three (3) prior extension requests and the permit had been open for over 22 months without any work commencing.
4. The Board finds the reasons put forth by CBO Evans both in writing and verbally at or before the April 21, 2011 Hearing to be correct interpretations and applications of the IBC.
5. The Board finds that finds the reasons put forth by CBO Evans both in writing and verbally at or before the April 21, 2011 Hearing were not arbitrary and capricious.
6. The Board finds that it considered the additional information provided by the Owner at the April 21, 2011 hearing and still finds CBO Evans' decision to be correct.
7. Weather in the case of this application is not justifiable cause, because the owners had ample opportunity to commence work over 22 months.
8. Economic conditions is not justifiable cause in this case where the owner was working on other projects in Park City at the same time.
9. Even if CBO Evans found that the economic conditions met the requirement of justifiable cause, the Board finds that the CBO was correct to deny the extension requests based upon any or all of the following reasons: there being 3 prior extensions, the permit already being open for over 22 months without any work commencing, no indication that the condition would change and the facts put forth that the owners had the economic ability to work on and continue other projects in Park City.
10. The CBO did not find justifiable cause and did not consider the Land Management Code changes. However, if justifiable cause was shown, it is relevant and rational to consider that the LMC changes as the discretionary extension of the permit would permit a non-complying structure under the new Code. Such a change has an impact to the community.
11. Economic Conditions after 22 months are too general to be justifiable cause where there is no indication that the project will get built in a timely manner and are distinguishable from specific delays such as approvals from other authorities or litigation.

Order: The Chief Building Official's decision is upheld denying the extension of the building permit for 41 Sampson for the reasons specified within the Findings of Fact and Conclusions of Law listed herein.

Exhibits

Exhibit A – Transcript of Court Ruling
(Owners have submitted a binder to the Board which includes the Court Rulings and the Record from the April 21, 2011 hearing. That Record includes the minutes, transcript and decision and findings from April 21, 2011 hearing, handouts given at the meeting such as a timeline and IBC 105.5 and Owners' binder of materials).

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

* * *

41 SAMPSON, LLC, a Utah)
limited liability)
company,)
)
Petitioner/Plaintiff,)
)
and)
)
PARK CITY MUNICIPAL)
CORPORATION, a Utah)
Municipal Corporation,)
and PARK CITY BOARD OF)
APPEALS, a)
quasi-judicial Utah)
Municipal entity,)
)
Respondent/Defendant.)
)

Case No: 110500406

Judge Ryan Harris

RULING

9th April 2013

* * * * *

BE IT REMEMBERED, that the above-captioned cause came on to be heard on this, the 9th day of April, 2013, before the Honorable Ryan Harris, Judge presiding, when and where the following proceedings were had, to wit:

* * *



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• A TRADITION OF QUALITY •

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A P P E A R A N C E S

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I N D E X

RULING OF THE COURT: Page
4

E X H I B I T S

No.	Description	Page
	THERE WERE NO EXHIBITS MARKED.	

REPORTERS CERTIFICATE: Page
11

1 P R O C E E D I N G S

2 THE COURT: Okay. I appreciate the 20:31:45
3 arguments, and I appreciate the request for additional 20:31:47
4 briefing, but I think I'm going to go ahead and make a 20:31:51
5 ruling. And I think I'm in a position to do that at 20:31:56
6 this point. 20:31:58

7 This -- this argument has been very helpful. 20:31:58
8 I'm going to make a ruling that, to the extent it makes 20:32:01
9 either one of you or both of you feel any better, it's 20:32:04
10 a ruling that's, at least in some respects, different 20:32:07
11 than what I intended to do when I came in here. So 20:32:15
12 your argument has been helpful to me to -- to help me 20:32:18
13 work through these issues and try to find a solution 20:32:25
14 here that makes the most sense, given this rather 20:32:30
15 tricky situation. 20:32:34

16 And let me start with this: 20:32:35
17 I -- procedurally, I think Ms. Samuels-McClean 20:32:42
18 has -- has it. I think that's the right answer, 20:32:51
19 procedurally, is that I need to review what the Board 20:32:59
20 did, is the -- 20:33:02

21 You know, I wish I could look in -- and it 20:33:03
22 probably would be easier, and it -- maybe save you 20:33:06
23 folks a step, if I were to look more broadly at -- at 20:33:14
24 the actions of Park City, as a municipality throughout 20:33:18
25 this case as a whole, but I don't think I can do that, 20:33:22

1 sitting as a -- as a Court that is reviewing, for 20:33:25
2 illegality, arbitrariness, or capriciousness, the 20:33:30
3 decision of the Board. 20:33:35

4 And so when I limit my review to the 20:33:38
5 decision of the Board, that decision was very narrow. 20:33:41
6 That decision was, We're going to deny this. We're 20:33:46
7 going -- well, they're going to uphold Mr. -- what 20:33:50
8 Mr. Evans did, but we're going to do so on a very 20:33:54
9 narrow ground. 20:33:57

10 We don't think that the letter was in the 20:33:58
11 proper format, because justifiable cause was not 20:34:00
12 proffered therein in writing. And on that technical 20:34:04
13 basis, that's what the Board did. 20:34:10

14 As a legal matter, as -- as an 20:34:13
15 interpretation of the International Building Code, I 20:34:24
16 disagree with the Board. 20:34:29

17 "The extension shall be requested in writing 20:34:30
18 and justifiable cause demonstrated." It doesn't say 20:34:33
19 therein, or demonstrated in writing, or in some other 20:34:36
20 way we should be requested in writing and justifiable 20:34:40
21 cause demonstrated. To me, that indicates -- at least 20:34:43
22 in -- they're at least averting to the possibility that 20:34:48
23 justifiable cause can be demonstrated orally or in some 20:34:54
24 other way, which I think comports with practice, given 20:34:57
25 that a lot of times these things are handled by 20:34:59

1 face-to-face meetings between the building official and 20:35:04
2 the landowner. 20:35:06
3 And that's certainly the way Park City had 20:35:07
4 done it for many years, as evidenced by the, I think 20:35:11
5 eight references in the record that Ms. Matsumura 20:35:18
6 pointed me to. 20:35:23
7 So based on those things, I just interpret 20:35:24
8 the last sentence of 105.5 in a different way than the 20:35:27
9 Board did. And -- and because I think they were wrong 20:35:32
10 about that, I think -- I think I can go ahead and 20:35:36
11 classify their decision as illegal. I think they 20:35:40
12 misinterpreted what the -- the last sentence of 105.5. 20:35:52
13 And so to that extent, I think 41 Sampson's 20:35:57
14 application is a valid one; however, I am going to 20:36:06
15 remand -- what I'm going to do is remand to the Board, 20:36:12
16 because I don't think I can consider the rest of what 20:36:17
17 Park City's done. I don't think I can consider what 20:36:20
18 Mr. Evans did directly. I think it's up to the Board 20:36:23
19 to consider that, and I need to remand it to them to 20:36:26
20 let them do that. 20:36:32
21 And when they do, I want -- I think it would 20:36:34
22 be useful to the Board and to the parties to have my 20:36:37
23 thoughts on what -- what the Board's and what the 20:36:41
24 City's discretion is with regard to whether or not they 20:37:05
25 have to grant permit applications that are submitted to 20:37:10

1 them. 20:37:20

2 And with regard to the remainder of 105.5, 20:37:20
3 as I've said, I think the last sentence, the City and 20:37:25
4 the Board are interpreting incorrectly. 20:37:28

5 But with regard to the first couple of 20:37:31
6 sentences, I think the City and the Board are 20:37:37
7 interpreting it correctly. 20:37:41

8 Specifically, where it says "the building 20:37:42
9 official is authorized to grant, in writing, one or 20:37:52
10 more extensions of time for periods of not more than 20:37:56
11 180 days each," to me, that doesn't use the word 20:38:04
12 "must," or "shall," or even "should." That uses a very 20:38:08
13 deferential standard to the City. Allows the City 20:38:13
14 to -- gives them the authority to grant these 20:38:18
15 extensions. It does not mandate that they do so. 20:38:23

16 Even if justifiable cause is demonstrated, 20:38:26
17 it's up to the City. The City, however, has to have a 20:38:29
18 reason that is not arbitrary and capricious for 20:38:33
19 not -- for refusing to authorize the extension. They 20:38:37
20 just can't do it because they don't like the cut of his 20:38:41
21 jib, as Mr. Tesch says. That would be arbitrary and 20:38:46
22 capricious. 20:38:52

23 But there's nothing in 105.5 that required 20:38:53
24 them to grant the permit, grant the extension for 20:39:00
25 another 180 days, just merely because justifiable cause 20:39:05

1 is demonstrated. It's up to the City, based on the 20:39:16
2 situation, to do that or not do that, and to provide 20:39:26
3 some sort of rational reason for doing that. 20:39:33

4 And so when I remand it to the Board to make 20:39:36
5 that determination, the Board is going to need to 20:39:41
6 consider whether justifiable cause exists here; and 20:39:46
7 even if it does, whether or not they should grant the 20:39:57
8 permit application, one way or the other. 20:40:02

9 Just because -- in other words, just because 20:40:07
10 41 Sampson may or may not be able to show justifiable 20:40:14
11 cause, doesn't necessarily require the City to grant 20:40:17
12 the permit application. The City has the authority to 20:40:20
13 do so if they wish. 20:40:23

14 I hope that's useful to you and to the 20:40:24
15 Board. 20:40:31

16 It seems to make sense to me, given a permit 20:40:31
17 application -- or permits being 180 days. They're, by 20:40:36
18 their terms, 180 days long. They can be extended by 20:40:41
19 180 days, but they're not infinite. And the way that 20:40:48
20 41 Sampson appears to be reading that -- the Code, 20:40:51
21 which would allow them infinite number of extensions as 20:40:54
22 long as they can show justifiable cause, I don't think 20:40:58
23 that's what the Code says, and I don't think that would 20:41:01
24 be good policy. 20:41:03

25 So for those reasons, I interpret the first 20:41:04

1 part of 105.5 in the same way the City does. 20:41:09

2 Now, with regard to the remainder of the 20:41:16

3 declaratory relief that is sought by 41 Sampson, I -- I 20:41:19

4 think -- I think I've already said justifiable cause 20:41:27

5 doesn't have to be in writing. So I think 20:41:33

6 you -- you've got my thoughts on that. 20:41:35

7 Whether or not economic conditions, dire 20:41:37

8 economic conditions can be justifiable cause, I think 20:41:41

9 is going to be not something I can determine with a 20:41:44

10 blanket statement. 20:41:47

11 I'm not going to grant declaratory relief on 20:41:49

12 that ground. It certainly could be, but I can envision 20:41:51

13 situations where it may not be, and I think that's 20:41:54

14 going to be a case-by-case kind of situation. 20:41:56

15 And with regard to the equitable estoppel, I 20:41:59

16 am not going to second guess the Board's decision on 20:42:05

17 that, to the extent they made one. The "no promises" 20:42:08

18 part of that affidavit, I think, is -- is troubling to 20:42:23

19 me, with regard to a whole concept of estoppel. 20:42:27

20 If there weren't any promises made, it's 20:42:30

21 hard for somebody to be in a position of reasonable 20:42:33

22 reliance upon those promises or upon those statements 20:42:36

23 made. So I'm going to not grant the declaratory relief 20:42:42

24 on that ground. 20:42:47

25 So I think that covers what you asked me 20:42:48

1 for, Ms. Matsumura.

20:42:49

2 Are there other things you'd like guidance

20:42:52

3 on? As we send this back to the Board?

20:42:53

4 (Whereupon, the ruling
5 was concluded.)

20:43:01

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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Debra A. Dibble, Registered Professional Reporter for the State of Utah, do hereby certify that the foregoing transcript was taken down by me stenographically from electronically recorded tapes and thereafter transcribed under my direction.

That the foregoing pages contain a true and accurate transcript of the electronically recorded proceedings, or requested portions thereof, and was transcribed by me to the best of my ability from the tapes given me.



Debra A. Dibble; RMR/CRR/CBC/CCP/SCC