

**BEFORE THE ADMINISTRATIVE HEARING OFFICER
FOR THE TOWN OF SPRINGDALE, UTAH**

IN THE MATTER OF THE APPEAL FILED BY ZION WEST PROPERTIES REGARDING THE DENIAL OF A DESIGN/DEVELOPMENT REVIEW FOR A TRANSIENT LODGING FACILITY LOCATED AT 358 ZION PARK BOULEVARD IN THE TOWN OF SPRINGDALE, UTAH

FINDINGS AND DECISION DISMISSING THE APPEAL OF THE DENIAL OF A DESIGN/DEVELOPMENT REVIEW FOR A TRANSIENT LODGING FACILITY LOCATED AT 358 ZION PARK BOULEVARD IN THE TOWN OF SPRINGDALE, UTAH.

PUBLIC MEETING DATE: APRIL 13, 2021.

This matter came before the Appeal Authority for the Town of Springdale on April 13, 2021 for a public meeting on Appellant Zion West Properties (Luke Wilson) appeal of the denial of a design/development review for a transient lodging facility located at 358 Zion Park Boulevard. Mr. Wilson represented Zion West Properties at the meeting. The Town was represented at the meeting by its counsel, Devin Snow. Having considered the written submissions and oral presentations of the parties, and based on a review of the administrative record, the Appeal Authority makes the following findings and decision.

Background

Application and Appeal Timeline

1. On November 18, 2020, the Town Planning Commission considered an application for design/development approval to build a vacation rental home on Parcel No. S-102-B-4-A (the "Property").
2. The proposed building site on the Property (the "Site") is adjacent to the toe of the Balanced Rock landslide that occurred in 1992. Geotechnical Investigation dated November 17, 2020 by Geotechnical Testing Services, Inc. (hereafter "GTS Report").
3. Town Staff noted in response to the application that there were unresolved issues with geotechnical testing that the planning commission should address with the Appellant. Specifically at issue was compliance with Section 10-11B-12(A) of the Springdale Town Code (hereafter referred to as the "Geologic Hazards Ordinance"), which provides:

Natural Hazards: Construction of permanent structures shall not be permitted, erected, established or performed in such a manner as to place real or personal property and/or individuals at unreasonable risk of harm or injury from natural, geographic or topographic hazards such as landslides, floods or excessive soil erosion. In addition to compliance with the provisions of the Building Code governing standards to meet the maximum foreseeable risk of such hazards, persons developing, improving, managing or owning such property shall have the obligation to bear the burden of so developing and/or improving the property

in such a manner that the property and/or general public are safeguarded from unreasonable risk of harm or injury from such natural hazards.

4. After considerable discussion at the November 18 meeting, the planning commission tabled the application in order to provide “time to review the applicant’s geotechnical report, seek a third-party geotechnical analysis, and review a landscape plan along with digital renderings to scale of the structure placed within the context of the current surroundings on the site, to be provided by the applicant.”
5. Appellant’s engineer, Geotechnical Testing Services, Inc. (“GTS”), issued the GTS Report regarding the proposed vacation rental at the Site. The GTS Report advises that based on GTS’s review of aerial photographs taken between 1960 and 2020 the Site was not affected by the landslide, and that GTS did not observe any movement of the hillside. GTS Report at 2.
6. But the GTS Report also included this caution: “Even though we did not observe any movement in the aerial photographs, the owner should be aware that movement could occur. The owner needs to be aware of the fact that movement of the slide could cause damage to the structure.” GTS Report at 2.
7. The Town engaged Terracon Consultants, Inc. to provide the third-party geotechnical analysis. A Report Review (the “Terracon Report”) was submitted to the Town on January 15, 2021.
8. As indicated in the Terracon Report, Terracon was asked to review the GTS Report and the Applicant’s application materials relative to the Geologic Hazards Ordinance.
9. Among other things, Terracon noted that the Property site is at the toe of the 1992 Springdale landslide.
10. Terracon noted that geological mapping by the Utah Geologic Survey identifies the landslide mass as having a “Very High” hazard rating and is identified as a Category A feature. Category A areas (existing landslides) are considered the most likely units in which new landslides may initiate. Id.
11. The Terracon Report also opined, much like the GTS Report, that “[p]otential movement of the landslide could impact the planned development.”
12. The Terracon Report further concluded that, “It is the reviewer’s opinion that placing an occupied residential building at the toe of a very high classified landslide may involve above normal risk, possibly unreasonable risk, to the structure and occupants.” Terracon Report at 2.

13. The Terracon Report notes that the GTS Report “does not specifically address landslide stability or provide an opinion of site suitability or if any predevelopment stabilization methods should be considered.” Terracon Report at 2.
14. Thus, Terracon concluded that the GTS Report was not “sufficient to evaluate the risk associated with the Springdale Landslide on the planned development.” And, accordingly opined that “further geotechnical and geologic analysis should be required.” *Id.*
15. To that end, the Terracon Report recommended that “[a]t a minimum, an experienced geologist should work with the geotechnical engineer to perform a field reconnaissance to better identify location of the landslide and potential impacts to the planned development.” *Id.*
16. The Terracon Report was provided to Appellant. However, Appellant did not hire a geologist to help identify the potential impacts of the Landslide at the Site.
17. Instead, Appellant had GTS respond to the Terracon Report. GTS’s response was to “reword[]” the GTS Report to state that the Site was not at the “toe of the slide” but instead “about 40 feet north” of the Site.
18. With this rewording, GTS concluded that “[s]ince the proposed development is located off the slide, we do not anticipate that it will affect the movement of the slide.” GTS Response at 1.
19. Appellant also obtained a review from Landmark Testing & Engineering, dated January 28, 2021.
20. The Landmark Response states that “it does not appear” that the building site is located on the actual Balanced Rock Slide. Landmark Response at 2. It also states that it is “our understanding that ongoing monitoring of the slide through the surveying of fixed markers indicated that no measurable movement of the slide has occurred of the period which has been monitored.” But it also included a cautionary note: “While this is reason to be optimistic, 30 years is not very long when discussing geologic processes.” Landmark Response at 2.
21. The Landmark Response concludes that while it does not appear that the proposed building site is located on the Balanced Rock Slide, “it should be understood that movement of the adjacent Balanced Rock Slide is possible, and cannot be predicted. The owner and contractor should understand these risks prior to proceeding with planning and construction.” Landmark Response at 5.
22. Terracon reviewed both Landmark’s and GTS’s responses, reporting to the Town that, “It remains our opinion that placing an occupied residential building adjacent to or near the toe of a very high hazard classified landslide may involve above normal, and possibly prohibitive risk.”

23. The Planning Commission resumed deliberations of the application at its meeting on February 17, 2021. All parties acknowledged that the application hinged on the geologic aspects of the proposal, and compliance with the Geologic Hazards Ordinance.
24. After considerable discussion and deliberation focusing on the risks and uncertainties involved with the project, the planning commission voted 4-1 to deny the application “on the basis that the development does not meet the ordinance as related to building structures on unstable soils per Town Code 10-11B-12A.”
25. Zion West Properties filed a Notice of Appeal of the planning commission decision on March 18, 2021.
26. The Town Administrative Hearing Officer considered the appeal at a public meeting held on April 13, 2021.

Standard of Review

Under Utah’s Municipal Land Use, Development, and Management Act, the appeal authority must act in a quasi-judicial manner and serve as the final arbiter of issues involving the interpretation or application of land use ordinances.

The Springdale Town Code at 10-3-11C states the person or entity making the appeal has the burden of proving that an error has been made. Every appeal shall refer to the specific provisions of the ordinance involved and shall exactly set forth the error that is claimed.

“[M]unicipal land use decisions should be upheld unless those decisions are arbitrary and capricious or otherwise illegal.” *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 10, 70 P.3d 47. The planning commission decision is “endowed with a presumption of correctness and validity” which will not be interfered with “unless it is shown that there is no reasonable basis to justify the action taken.” *Dairy Product Servs., Inc. v. City of Wellsville*, 2000 UT 81, ¶ 41, 13 P.3d 581 (quoting *Xanthos v. Board of Adjustment*, 685 P.2d 1032, 1034 (Utah 1984) (citation omitted)).

The burden is always on the appellant to demonstrate that the Town Planning Commission decision was arbitrary, capricious, or illegal. See Utah Code § 10-9a-705; Springdale Town Code § 10-3-11(C).

Analysis and Decision

Basis of Appeal

As stated in their Notice of Appeal, Appellants based their appeal on the argument that “the commission either overlooked the format of the FINAL letter (with conclusions) from Terracon...or didn’t understand the conclusions therein.” The Notice goes on to cite several instances where planning commissioners stated concerns based upon initial comments, which according to the Notice were rectified in the Reply/Conclusions section of the reports. The Notice goes on to point out other similar projects “at the same or higher risk that have been recently approved.”

A Memorandum submitted by the Town, through its counsel Devin Snow, dated April 2, 2021, detailed the opinions and conclusions the various reports, asserted that “at the very least, a reasonable mind could conclude, based on the abundant expert evidence in the record, that the Applicant’s proposed structure would place real or personal property and/or individuals at unreasonable risk of harm or injury from natural, geographic or topographical hazards.”

Appeal Authority Findings and Decision

Findings

The record demonstrates ample evidence that the Property is subject to a variety of natural hazards that triggered the extensive analysis and reviews provided over a period of more than four months as the proposed structure was reviewed.

The abundant expert evidence from both the Appellant and the Town’s consultant repeatedly points to concerns regarding soil movement, slope stability, liquefaction, and appropriate site stabilization methods. The Appellant asserted that such concerns would be adequately addressed during the engineering and construction process. The Town’s consultant concluded that “it remains our opinion that placing an occupied residential building adjacent to or near the toe of a very high hazard classified landslide may involve above normal and possibly prohibitive risk.”

After considerable deliberation, the planning commission denied the design/development review, citing Town Code 10-11B-12A:

Natural Hazards: Construction of permanent structures shall not be permitted, erected, established or performed in such a manner as to place real or personal property and/or individuals at unreasonable risk of harm or injury from natural, geographic or topographic hazards such as landslides, floods or excessive soil erosion. In addition to compliance with the provisions of the Building Code governing standards to meet the maximum foreseeable risk of such hazards, persons developing, improving, managing or owning such property shall have the obligation to bear the burden of so developing and/or improving the property in such a manner that the property and/or general public are safeguarded from unreasonable risk of harm or injury from such natural hazards.

Based upon the evidence in the record, a reasonable mind could reach the same conclusion as the planning commission. As detailed above, this matter essentially came down to engineering reviews and reports. As the fact finder, the planning commission was free to review and weigh the differing reports and come to its own conclusions. *See State in re K.C.*, 2013 UT App 201, ¶ 13, 309 P.3d 255 (explaining that courts, juries, and administrative fact finders are never bound to accept any expert’s opinions but are “free to judge the expert testimony as to its credibility and its persuasive influence in light of all of the other evidence in the case”) (quoting *State v. Maestas*, 2012 UT 46, ¶ 200, 299 P.3d 892).

Terracon twice opined that the proposed development created an above normal and possibly prohibitive risk. While not stating the risk as strongly as Terracon, the Appellant’s own reports recognized and cautioned of some risk involved in the proposed construction. Landmark cautioned that 30 years is not a very long geologic period within which to assess whether the Landslide would move again. It also cautioned that future movement “cannot be predicted” and that the contractor should

understand the risks associated with development of the Site. Against Terracon's initial opinions, GTS was forced to "reword" its initial report but could only say that it did not "anticipate" the proposed development would affect movement of the slide.

Put differently, according to every engineer who expressed an opinion about the Site, the Landslide risk remains. Based on these reports, a reasonable mind could come to the same conclusion as the planning commission: that the proposed development created an "unreasonable risk of harm or injury from natural, geographic or topographic hazards such as landslides, floods or excessive soil erosion." Town Code 10-11B-12A.

Thus, the planning commission's decision to deny the application under the Geologic Hazards Ordinance was not arbitrary, capricious, or illegal.

Conclusion

The appeal, as presented, did not demonstrate that the planning commission's decision was arbitrary, capricious, or illegal. The decision of the planning commission stands, and the appeal is therefore dismissed.

Dated this 16th day of April 2021

ADMINISTRATIVE HEARING OFFICER

Kenneth L. Sizemore

**BEFORE THE ADMINISTRATIVE HEARING OFFICER
FOR THE TOWN OF SPRINGDALE, UTAH**

IN THE MATTER OF THE APPLICATION OF ZION WEST PROPERTIES FOR A VARIANCE FROM THE FRONT AND SIDE SETBACK REQUIREMENTS OF THE VILLAGE COMMERCIAL ZONE IN THE TOWN OF SPRINGDALE, UTAH

**FINDINGS AND DECISION APPROVING
REQUEST FOR VARIANCE**

PUBLIC MEETING DATE: April 13, 2021

Introduction and Background

1. Zion West Properties, LLC, represented by Luke Wilson, applied for a variance to reduce the front and side setback requirement at 358 Zion Park Boulevard (parcel S-102-B-4-A) from 30 feet to five feet for a proposed retail and transient lodging building. The property is currently developed with a public paid surface parking area, a building housing a coffee shop and a transient lodging unit, and a building housing a bike rental company.
2. The property is located on the west side of SR-9, at the intersection with Balanced Rock Road. Balanced Rock Road is adjacent to the southern property line. SR-9 is adjacent to the eastern property line. There is approximately 25 feet of UDOT right-of-way between the back of the sidewalk on SR-9 and the front of the property. The property is surrounded on three sides by steep, undeveloped hillsides. The property measures approximately 1.5 acres in size. Roughly half of that area is steep slopes. Most of these steep hillside slopes experienced significant movement and displacement during the massive Springdale Landslide, triggered in 1992. The Town's engineer and geologic hazard experts from the Utah Geologic Survey (UGS) have both cautioned against any development that would disturb the toe of these landslide slopes.

Previous Development Approvals on the Subject Property

1. In 2017 the applicant requested a zone change to the Parking Structure Overlay Zone (PSOZ) which would have allowed the construction of a 220-space parking structure. The PSOZ zone change received initial approval from the Town Council. Part of that initial approval allowed a setback reduction from 30 feet to five feet for both the front and side property lines on the subject property. Although the PSOZ received initial approval it was never finalized, and the front and side setbacks remained the standard Village Commercial zone setbacks.
2. In 2018 the applicant applied for a variance to reduce the front and side setbacks to five feet to allow the development of a public paid surface parking area. The Administrative Hearing Officer granted the requested variance. The paid parking area was constructed in 2018 and remains in use.

3. In 2019 the applicant applied to construct a coffee shop and transient lodging building on the property. The building is in the north east corner of the property and is setback five feet from the front property line.
4. In 2021 the applicant applied to construct a structure to store e-bikes as part of an e-bike rental business on the property. That building is located near the rear of the paid parking area.

Public Meeting Review

A Public meeting was scheduled and conducted by the Administrative Hearing Officer on April 13, 2021 at 1: 00 p. m. in the Springdale Town Council Chambers. At the public meeting Mr. Luke Wilson, agent for the applicant, summarized the points listed in the application for a variance, including:

- a. Adjacent slopes and drainage channels severely constrain the amount of usable space.
- b. Adequate circulation cannot be accomplished without the proposed setbacks.
- c. The wide SR9 right of way creates a de facto 30-foot setback from the pavement.
- d. No adjacent property owners will be affected due to terrain at the site.
- e. Many parcels in the immediate vicinity have been granted reduced setbacks.

One member of the public expressed concerns regarding the appearance of the proposed structures in such close proximity to SR-9.

Findings

1. Title 10-3-3(B) of the Springdale Town Code provides the following standards to the Appeal Authority when considering variance requests:
 - a. **Literal enforcement of the provisions of this title would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of this title**

FINDING:

Evidence presented documents the extreme limitations presented by the terrain on the site. Geotechnical constraints, steep slopes, and drainage patterns do not allow for commercial uses that conform to Village Commercial zone standards. These constraints present an unreasonable hardship, particularly with the inability to disturb toes of slopes on the site.

- b. **There are special circumstances attached to the property that do not generally apply to other properties in the same district.**

FINDING:

The site contains slopes disturbed during a 1992 landslide event. Professional engineers have cautioned against any disturbance of the slopes. This severely constrains the ability to adjust or contour slopes, as is typically done to accommodate proposed uses.

- c. **Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district.**

FINDING:

Four setback variances have been approved for properties within 1, 100 feet of the subject parcel. These variances have recognized the terrain features that inhibit the ability to conform to set back standards imposed by the zoning code.

- d. **The variance will not substantially affect the general plan and will not be contrary to the public interest.**

FINDING:

The Town Council has authorized the development of a parking structure on the site with the same setbacks as the proposed structures. A surface parking lot with five-foot setbacks was approved in 2018. An additional structure was approved in 2020 with a five-foot setback.

- e. **The spirit of this title is observed, and substantial justice done.**

FINDING:

The proposed setbacks will facilitate pedestrian oriented uses as envisioned in the General Plan: “A streetscape that is focused and oriented on the pedestrian provides amenities for pedestrians to use, linkages to other forms of transportation and limits conflict between pedestrians and vehicles” and “A pedestrian-oriented town has certain aspects that are focused on the pedestrian, rather than the automobile. Amenities such as benches, shade areas, gathering spaces, buffers from cars and trucks, *reduced front yard setbacks*, storefront windows, and adequate sidewalks all support the use of the space by pedestrians.” (emphasis added)

- 2. After consideration of the evidence provided by the applicant, and consideration of the request, the administrative hearing officer determines that the variance request should be granted with the following conditions:
 - a. The variance in no way authorizes any use or design presented in the application, only the requested setbacks. A design/development review must still be approved by the planning commission.
 - b. The variance in no way authorizes any use of the UDOT right of way. Appropriate encroachment permits must be approved by the Town and UDOT.

Dated this 16th day of April 2021

ADMINISTRATIVE HEARING OFFICER

Kenneth L. Sizemore