PARK CITY MUNICIPAL CORPORATION
APPEALS PANEL MEETING
SUMMIT COUNTY, UTAH
MARSAC MUNICIPAL BUILDING
JUNE 17, 2024

MEMBERS IN ATTENDANCE: Adam Strachan, Esteban Nunez, Matthew Day

EX OFFICIO: Rebecca Ward, Planning Director; Jacob Klopfenstein, Planner I

1. ROLL CALL

Chair Adam Strachan called the meeting to order at 5:00 p.m.

2. MINUTES APPROVAL

A. Consideration to Approve the Appeal Panel Meeting Minutes from June 3, 2024.

Matthew Day moved to APPROVE the June 3, 2024 Appeal Panel Meeting Minutes as presented. Esteban Nunez seconded the motion. The motion passed with the unanimous consent of the Panel.

3. PUBLIC COMMUNICATIONS

There were no public comments.

4. STAFF AND BOARD COMMUNICATIONS AND DISCLOSURES

There were no Board or Staff communications or disclosures.

5. REGULAR AGENDA

A. Appeal of 1115 Aerie Drive Final Plat – The Appeal Panel will Hear an Appeal of the Planning Commission's May 8, 2024, Approval of a Conditional Use Permit for a Sports Court at 1115 Aerie Drive in the Estate Zoning District. PL-24-06135.

Planner I, Jacob Klopfenstein, presented the Staff Report. A Grading and Landscaping Permit was issued for the subject property on January 21, 2021. On September 8, 2021, Code Compliance issued two Stop Work Orders due to work being performed outside the scope of the permit. Specifically, a sports court and retaining walls were constructed that encroached into setbacks and crossed property lines. On December 20, 2021, the Applicant submitted an Administrative Conditional Use Permit ("CUP") application in relation to the subject property. On July 13, 2022, the Planning Commission reviewed the application for a CUP. The application was denied due to non-compliance with LMC § 15-1-10 and a lack of information submitted by the

Applicant. They also found that the proposal was not consistent with the General Plan because it allowed for disturbance of Sensitive Lands without adequate mitigation.

On August 1, 2022, the Applicant appealed the Planning Commission's denial of a CUP and asked the Utah Property Rights Ombudsman's Office to issue an Advisory Opinion. That opinion was issued on November 16, 2023. They concluded that the sports court did not violate any plat note or building area restriction and that the Planning Commission erred in denying the application for insufficient evidence. They also concluded that the Applicant should be allowed to supplement the application.

On March 4, 2024, the Appeals Panel considered the denial of the CUP. The appeal was granted in part and remanded in part back to the Planning Commission. After that decision, the Applicant submitted an updated project narrative, included in the Staff Report as Exhibit F, with additional steep slope analysis, drainage plans, and plans for a reduction in the size of the sports court.

On April 24, 2024, the Planning Commission reviewed the Applicant's updated proposal. They approved the CUP for the sports court and directed Staff to draft a Final Action Letter. The letter was ratified on May 8, 2024. On May 15, 2024, the Appellant appealed the Planning Commission's CUP approval.

The Appellant, Craig Kipp, presented the Appeal, which was filed the appeal in conjunction with several neighboring residents. His property is within 150 feet of the pickleball court, which he noted is less than the minimum separation required in the City Code. He stated that the essence of the appeal is the final usage of the sports court, not the original intent. He disagreed with the Planning Commission's decision that the sports court is grandfathered and a permit is not required. He noted that there have been four years of permitting, construction, and appeals, and stated his position that 1115 Aerie Drive has discovered a way around the Park City Pickleball Ordinance. If he decides to obtain a permit for a sports court today and use it as a pickleball court tomorrow, he assumes the City would require that he obtain a Pickleball Permit. He expressed his belief that the current ruling would allow anyone in Park City to permit a sports court, baseball field, soccer field, etc., then later use it as a pickleball court without obtaining the proper permit.

He noted that the decision to use the sports court as a pickleball court was part of a settlement with the City in 2024, well after the Pickleball Ordinance was approved. He does not believe that the State of Utah's early vesting status, and therefore this grandfathering, applies. It was not defined as a pickleball court until after the passage of the Pickleball Ordinance, which is a difference in final usage versus original intent. In a 2022 Planning Commission meeting, 1115 Aerie Drive's counsel said that it would not be used as a pickleball court. Aerie Drive residents thought the matter was settled at that time, only to be surprised later. He summarized that, as a reward for a four-year process that included unpermitted construction, hitting the Aerie Drive gas line, not receiving a Park City Pickleball Permit, a State of Utah appeal, a promise to residents not to build a pickleball court, and a pickleball court that is clearly within the minimum separation required for nearby property owners, the Commission is now allowing the owner to downsize the sports court into a pickleball court with no permit required. The Appellant is requesting that the pickleball court be removed in its entirety.

Michael Hutchings from the law firm of Snell and Wilmer spoke on behalf of the Applicant. His colleague, Jason Boal, was also present. Mr. Hutchings indicated that this is the second time the application has been before the Appeals Panel. An appeal was first submitted after the Planning Commission denied the application for insufficient information. The application was unanimously

remanded to the Planning Commission at that time. On remand, the Applicant supplemented the application with additional information. The Planning Commission visited the site, saw the sports court and neighboring houses, examined the sound-mitigating pickleball equipment, and saw firsthand the impact it would have on the area. They later unanimously approved the CUP based on careful findings in the supplemented application and their experience during the site visit. He presented an aerial site map indicating the sports court, which he noted will be reduced in size once the appeal is finalized.

Mr. Hutchings noted that the Appellant has the burden of showing that the Planning Commission's unanimous decision was wrong and that they committed a legal error in approving the application. Based on the written submittals to the Appeals Panel and Mr. Kipp's presentation, the Applicant's position is that that was not shown.

The Appellant's first claim is that in 2022, the Applicant's counsel stated that they would not have pickleball. That was a result of negotiations to mitigate detrimental effects at that time and was a good-faith effort to bring the sports court into compliance. That condition was rejected by the Planning Commission when the application was denied and is no longer applicable. After a lengthy process of creating supplemental drawings and information, the Planning Commission found that the Applicant was able to mitigate any detrimental effects of a pickleball court.

Chair Strachan asked Mr. Hutchings to point out where in the record the Planning Commission considered and rejected the condition that the court would not be used for pickleball. Mr. Hutchings stated that there was considerable discussion on the suggested conditions with both the Planning Commission and Staff. At that time, the Planning Commission focused on other legal issues. In rejecting the appeal, they rejected the proposed conditions offered at that time. That was at the July 13, 2022 meeting.

Mr. Day asked if the tradeoff at that time was they could keep the full court but would not use it for pickleball. Mr. Hutchings responded that he did not believe that was the case. The size of the court was being reduced in order to meet setback requirements. In order to negotiate approval of the sports court, that condition was offered to the Planning Commission at that time. The Planning Commission did not accept that offer and denied the application.

Mr. Hutchings addressed the Appellant's claim that the Applicant is proposing a simple chain-link fence for the pickleball court. An express condition of approval is that the Applicant must supply a sound-mitigating fence. The Applicant has not decided if that will be an acoustic fence or a chain-link fence with sound-mitigating materials placed over it, but that issue will be addressed in the Building Permit phase and will be in compliance with the Conditions of Approval.

The Appellant also raised a concern that the CUP encompasses a putting green and playground. Mr. Hutchings indicated that those are separate issues. The application was for a sports court. The putting green and playground on the property are unrelated and were not considered by the Planning Commission. They also mention lighting related to these fixtures, which Mr. Hutchings again asserted is not applicable. He noted that the Planning Department has been to the site and approved the lighting.

The neighbors expressed concerns about lighting at the sports court. A Condition of Approval is that there will be no lighting on the sports court, and the Applicant will comply with that requirement. Some lights will be installed to illuminate the path that leads to the sports court. A Condition of Approval is that those lights will be completely in compliance with the Park City

Lighting Ordinance, and that can be verified by the Planning Department. Based on those facts, Mr. Hutchings asserted that there was no lighting issue.

With regard to noise, odors, and other detrimental effects related to Conditional Use Permits, Mr. Hutchings indicated that there will be mitigating measures such as the sound-mitigating fence and court materials to reduce any sound emanating from the court. The Planning Commission examined the materials during their site visit, and that was considered in their decision.

Regarding Mr. Kipp's argument that the Applicant is required to comply with Park City's current Pickleball Ordinance, Mr. Hutchings stated that the application was originally submitted in December 2021. The Pickleball Ordinance was adopted on April 8, 2022. Under Utah law, the laws in effect at the time a complete application was submitted must apply. The Appellant has not argued that the application was not complete. The application was for a Private Recreation Facility, which at the time was defined as, "A facility that is not open to the general public, including facilities that are typically associated with a homeowner or condominium association such as pools, tennis courts, playgrounds, spas, picnic areas, and similar facilities for use by owners and guests." The pickleball court falls into that category. At the time of the application, it was well-known that the sports court would be used for sports. It will not be used solely for pickleball. The Planning Commission found that pickleball could be mitigated through the materials used and soundproofing, which brings the court into compliance with the Ordinance that existed at the time of application.

Mr. Hutchings stated that steps have been taken to comply with the current Pickleball Ordinance, even though that is not required. Those steps relate to mitigation measures that the Planning Commission can impose. Although the Applicant does not have to comply with the current Ordinance, they used it as a guide to help the Planning Commission get to a place where they were comfortable approving the CUP. For example, the current Ordinance requires sound planning and sound mitigating measures. Those inspired the Applicant's proposed conditions to use unique materials and install soundproof fencing. He believes they comply with the intent of the Pickleball Ordinance while not being in strict compliance with it.

The Applicant, Gary Sutton, spoke on his behalf. He indicated that the original intent was for the sports court to include pickleball. He asserted that he has worked hard to mitigate any potential disturbance to his neighbors. He referred to a letter from a neighbor who approved of the application and noted that he listened to his concerns and tried to address them. The sports court will be blocked off with trees and soundproofed to the best of his ability. His desire is to be a good neighbor.

Mr. Hutchings indicated that there has been a significant amount of cooperation with Staff and good faith attempts to bring the property into compliance. Additionally, a significant amount of work and thought have gone into sound mitigation. They do not want the sports court to be a nuisance to the neighbors. Landscape, architecture, and engineering drawings of the court were submitted to the Planning Commission to show the Applicant's willingness to make the sports court work in the neighborhood. In closing, he asked that the Appeals Panel affirm the Planning Commission's decision.

Mr. Klopfenstein provided additional information on the Planning Commission's decision. When the Final Action Letter was issued on May 8, 2024, they applied conditions to ensure that the Conditional Use is compliant with Code requirements and that any differences in use or scale have been mitigated through careful planning and Conditions of Approval. Specifically, they

reviewed the 16 criteria for Conditional Use Permit review which address size, location, traffic, utility capacity, emergency vehicle access, noise, and a number of other items. The Appeals Panel's task was to determine whether the Planning Commission incorrectly applied the Conditional Use Permit Review Standards to this application. In reviewing the materials submitted by the Applicant, the Planning Commission found that any reasonably expected detrimental effects could be mitigated through Conditions of Approval.

With regard to the question of vesting, the application was submitted and the fees were paid on December 20, 2021. Pursuant to the Land Management Code, the application was vested at that time under the definition of a Private Recreation Facility.

The Planning Commission evaluated the impacts of noise and imposed Conditions of Approval to mitigate any detrimental effects from noise. The Applicant also must comply with Park City Noise ordinance PCC $ 6-3. Conditional Use Permit approval does not exempt them from complying with that code. Conditions of Approval I, J, K, and L from May 8, 2024, Final Action Letter restrict the use of the sports court and use of pickleball on the sports court, and require suppression materials to be integrated into the sports court. Condition of Approval H addresses any impacts from lighting by requiring any exterior lighting to be down-directed and comply with the City Lighting Code.

With respect to the Standards of Review, Mr. Klopfenstein noted that the Appellant had the burden of proof in this case.

Chair Strachan opened the public hearing.

Virginia Schulman noted that she also submitted a letter regarding the appeal. She indicated that the matter has been going on since 2022. At the July 13, 2022, Planning Commission meeting, Mr. Wade Budge stated that the sports court would not be used as a pickleball court and that there was no intention to install lighting. Then Planning Commission Chair Phillips mentioned at that meeting that perhaps Mr. Sutton would be willing to bring the property back to its original condition. Ms. Schulman noted that there are no minutes from that meeting, but she listened to it in its entirety, and Mr. Sutton said at that time that he would be willing to go back to that point and forget the sports court. Then Commissioner Kenworth moved to deny the Private Recreation Facility Conditional Use Permit, citing LMC § 15-1-10(E)(12), "Noise, vibration, odors, steam and other mechanical factors that might affect the property and offsite." The motion was then denied. Then the property owner went to the Ombudsman.

Ms. Schulman read from Page 4 of the Ombudsman's Advisory Opinion, which states, "The applicant provided an explanation of the proposed use of the sports court as well as lighting, and stated that the owner would accept certain conditions regarding use and lighting that he felt would mitigate anticipated detrimental impacts and address the comments by neighbors." On March 22, 2024, after the Ombudsman gave them permission to go outside of the original building pad and have a sports court, the owner supplemented his application. At that time, the owner's representative stated that the sports court would not be used as a pickleball court.

Ms. Schulman expressed her concern that the proposed chain-link fence is not an acoustical fence, and she does not know how an acoustical fence will stop the noise from coming up the hill. She noted that they exceeded the Sensitive Land area and installed astroturf, hardscapes, and retaining walls that far exceed the Land Management Code. Additionally, the Building Department has received no plans since 2021 regarding the retaining walls, steep slopes, and astroturf. She

also does not believe the existing lighting is not to Code. She reiterated that both the owner and his attorney stated that it would not be a pickleball court or be lighted, both of which are allowed in the final approval. She believes the Planning Commission was wrong in approving the application, and appeared before the Appeals Panel in the hope that they would reverse the decision.

There were no further public comments. The public hearing was closed.

Mr. Kipp restated his position that they are building a pickleball court with no permit that is within the minimum distance from adjacent property which is not allowed in the Ordinance. This is a rental property, and he believes that the probability that renters will use the proper paddles for noise mitigation is low so neighbors will have to police that. Mr. Kipp asked what the economic consideration was in obtaining the letter of support from one neighbor because it is his understanding that there was one. He does not know of any property owners in the area who believe it is a good idea other than the neighbor who allegedly received economic consideration. Mr. Hutchings asked if he had any evidence of such consideration. Mr. Kipp stated that the violation for the setback into that neighboring property was suddenly no longer an issue. Mr. Hutchings responded that Mr. Sutton did not make that comment and did not comment at the public hearing, so it was not evidence on the record.

Mr. Day stated that this was a vesting issue; the Appellant's position was that the application shouldn't be vested due to the Applicant's intent. Mr. Kipp acknowledged that that is one part of it. Mr. Nunez clarified that the scope of the appeal is the approval of the Private Recreational Facility. The other issues that were brought up at the hearing are outside the scope of that decision.

Mr. Day stated that he understands the Appellant's frustration, but existing items cannot be held to the standards of Ordinances that were not in place at the time. The Ordinance was enacted within four months of its submission, but the application was submitted prior to the adoption of the Pickleball Ordinance. As a consequence, his opinion is that the Planning Commission's decision should stand. The question before the Appeals Panel was whether the Planning Commission went through the correct process under the CUP to approve the Private Recreational Facility. He noted that they reviewed all 16 criteria and imposed appropriate conditions. In his opinion, the Planning Commission did what it was supposed to do. The application was vested in the previous Ordinance, and he would not uphold the appeal.

Chair Strachan agreed. He reviewed the Pickleball Ordinance and believes it is a question of mitigation. The Planning Commission went through the mitigation analysis that they would have gone through if the Pickleball Ordinance applied. The Ordinance has time restrictions of 8:00 a.m. to 8:00 p.m., and they imposed that as a condition of approval. Condition of Approval I indicates that no lighting is allowed. Condition of Approval L addresses pickleball. It is clear that the Planning Commission knew pickleball would be one of the uses of the sports court, and they conditioned the approval appropriately to mitigate potential detrimental impacts. He fully agreed with the vesting analysis. The Ordinance was enacted after the application was submitted.

Mr. Nunez revisited the vesting issue. He asked what is considered a complete packet. The application was submitted and the fee was paid, but when it was presented to the Planning Commission, it was denied based on insufficient information. When the Appeals Panel heard the appeal after the Ombudsman reviewed the matter, there was supplemental information. He questioned if the information was in fact complete when it was submitted as there was information

lacking, but he noted that the burden of proof is on the Appellant to make that case, and he did not hear evidence of that.

Mr. Nunez summarized LMC § 15-1-17(A), which indicates that vesting occurs upon submission of a development plan and schedule. An application is entitled to approval of a Land Use application if the application conforms to the requirements of the applicable Land Use regulations, Land Use decisions, and development standards in effect when the applicant submits a complete application and pays application fees unless:

1. The Land Use Authority on the record formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or

2. In the manner provided by the local Ordinance and before the application is submitted, the municipality formally initiates proceedings to amend the municipality's Land Use regulations in a manner that would prohibit approval of the application as submitted.

Mr. Nunez noted that he did not know if the City was discussing the Pickleball Ordinance prior to submission of the application, because the Land Use Ordinance for Pickleball was approved in April of 2022. He expressed his belief that there may be a case that vesting does not apply in this situation. However, he was also of the opinion that it was the Appellant's responsibility to submit that proof, which was not done. He believed that the matter has been heard and deliberated, and in this case, they could not rule in favor of the appeal. The Planning Commission imposed conditions on the CUP, and it was appropriate to rule in favor of the Applicant, not the Appellant.

Chair Strachan clarified that the term "complete application" has a body of case law behind it. There is no dispute that a complete application was submitted. It may not have addressed a pickleball court, but that was not necessary in order for the application to be considered complete. It was noted that part of the issue before the Ombudsman was the Planning Commission's decision that they did not have sufficient information to act. The Ombudsman took issue with that legally and stated that it was not a good basis for denial. The application was processed, heard, and decided, so it was complete enough for consideration.

MOTION: Adam Strachan moved to direct Staff to draft a Final Action Letter denying the appeal, based on the deliberated discussions of the Appeals Panel, with a finding of No Error by the Planning Commission. Esteban Nunez seconded the motion. Vote on motion: Matthew Day-Aye; Esteban Nunez-Aye; Adam Strachan-Aye. The motion passed with the unanimous consent of the Panel.

6. ADJOURNMENT

MOTION: Chair Strachan moved to adjourn.

The meeting adjourned at approximately 5:52 p.m.