

**MORGAN COUNTY APPEAL AUTHORITY  
Morgan County Courthouse - Room 29  
Wednesday, July 17, 2013**

**Meeting started at 11:10 a.m. and ended at 12:00 p.m.**

**Present**

Doug Durbano, Applicant, Fernwood L.C.  
Jacob Briggs, Representative Fernwood L.C.

Megan Ryan, Appeal Authority for Morgan County  
Charles Ewert, Morgan County Planner

**\* \* \* M I N U T E S \* \* \***

Ms. Ryan noted this is the continuation of a hearing on the appeal that was filed June 6, 2013 for the appeal of the Morgan County's denial of the Ponderosa Preliminary plat.

Ms. Ryan noted Mr. Durbano has had discussion with the County with regard to their correspondence and processes and that is not a subject of today. The position she is taking is that she does not have another appeal that was filed, or before her to review at this meeting, so she is going to deal with the preliminary plat. She needs to review and talk about what was said at the last meeting.

Mr. Durbano noted he understands her understanding and would need to make a record.

Ms. Ryan reviewed the denial of the preliminary plat on June 6, 2013. She noted she would like to make it clear, so that there was no mis-understanding that Mr. Durbano had brought another item before her and she made a decision that it was not an appeal because there was no final action that had been taken. They also discussed that there was a process that Mr. Durbano needed to go through with the County; Mr. Durbano had proceeded and done that. She noted they had also talked about Mr. Durbano having the option of trying to understand what he wanted to do and what action he wanted to take.

She asked Mr. Ewert if they needed to address the three day review process for this meeting. Mr. Ewert noted there is an e-mal in the file that the request was to continue the appeal today. However, for the record it needs to be noted that the three day notice of the information was sent to Mr. Durbano yesterday. He noted Mr. Durbano was comfortable moving forward with the hearing today.

Ms. Ryan clarified that we are back today based on the decision of the last meeting to move forward, but procedurally they did not have three days based on when the information was submitted. She noted she needs to have verbal confirmation from Mr. Durbano that he acknowledges this and wishes to proceed.

Mr. Durbano stated, "So Acknowledged".

Ms. Ryan noted she had reviewed with the applicant what the state statute was compared with what the Morgan County statute on Appeal Authority was, what her role and limitations were, and what she is bound to do. She indicated that she had reviewed section 8-3-1 on appeal, and the Morgan County code specifically sets up a process for review which is allowed by the state statute to review cases on a "on the record" process instead of "de novo". On the record meaning she is bound to see what was submitted to the land use authority and that is what she needs to base her decision on. The application, which was filed on June 6<sup>th</sup>, is what she is looking at and will be discussing today. She noted there has been more new information submitted but she believes, in her role as an Appeal Authority, she is not open to look at that information. That information should have been submitted within the appeal period. She noted she would write this in her findings and have them to the County by the end of the Day, Monday July 22, 2013.

Ms. Ryan noted that today she would like to discuss Mr. Durbano's response to the denial letter of May 9, 2013 that was sent to him by the County Staff listing why the preliminary plat was not ready to be approved. She noted there was discussion in the previous meeting of a couple of references that were found in Mr. Durbano's documents. She would like Mr. Durbano to focus on where he believes that an error was made, and the action was arbitrary, capricious, or illegal as per Morgan County Code 8-3-11d #2

Doug Durbano, Applicant –

Mr. Durbano noted they would like to make a record relative to the issue of the building permit, which he understands is her understanding that she will not hear that today.

Ms. Ryan noted she does not have an appeal application for that before her so there is nothing to respond to.

Mr. Durbano asked if this would be a good time to make that record.

Ms. Ryan stated she is making a statement that she does not have an appeal application before her on a building permit.

Mr. Durbano stated respectfully they disagree. They believe that the Appeal Authority, as granted by both Utah Code, specifically 17-27-a -702, 703-8 of the Utah code supplemented by the current County ordinance found in 8-3-11 provides that *the appeal must be taken administratively, initially, on any action which is considered a land use authority action relative to the issuance of a permit or other final written action*; sub paragraph D of the County ordinance. They believe that is sufficient to bring the question before the Appeals Board relative to the primary question they asked in the original appeal and then emphasized in the supplemental appeal that the primary intent of Fernwood, their client, was to have a land use permit issued which has been in the past and would apparently be denied in the future. He noted they looked then at sub paragraph D, of the Morgan County Code which is duplicative of the Morgan County Appeal Authority Minutes

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State statute.

He noted in Paragraph D-1 it provides that the hearing office shall determine the correctness of a decision of the land use authority and they believe in this case the land use authority would be Morgan County Planning and Development Services. He noted they have before them written statements from the land use authority, particularly Charlie Ewert, Zoning Administrator, pursuant to a formal written request made the same day as their hearing that was continued on July 3, 2013. That afternoon Fernwood requested a formal interpretation of the position of the County relative to the issuance of a building permit and specifically referenced the property by parcel number and a fee of \$50 was paid. On July 10, 2013 a written interpretation regarding the issuance of a building permit, on an un-plated lot, was sent to them and they received it; an opinion was offered and he noted it was part of the record today; he asked if it was in the record. Ms. Ryan re-iterated that it can be submitted, but it is not a matter that is before her, that is a process Mr. Durbano had before the County. She had an appeal application to review and that was not an appeal application, that is a letter that was sent; a correspondence. What she is trying to say is this is not a matter that is before her.

Mr. Durbano asked if the letter of July 10<sup>th</sup> along with an amended appeal of Fernwood, LLC submitted prior to this meeting, was not before Ms. Ryan. Ms. Ryan reiterated that is exactly what she spoke about. She was given information yesterday that there was an amended appeal submitted which is not allowed on the record, under this process for the plat. She did not see an appeal application she saw language about information but not an application for a separate issue. For the record she is not allowed to accept new information, after what was submitted within the 30 day timeline allowed, by state statute according to 8-3-11d. This is not a de novo review; she can't keep taking information, she does not have that authority. She noted that is her interpretation and that is what she is sticking to. She noted Mr. Durbano has his due process rights after this process.

Mr. Durbano noted he understood he just wanted to verify Ms. Ryan had received it. She noted she had received it last night from the County and that is why she is saying that is information that is irrelevant to her decision.

Mr. Durbano noted his understanding, based on the last hearing, was that they should submit whatever information to her by the County Planning office.

Ms. Ryan clarified and stated she gave Mr. Durbano deference because there was some confusion on his part about what the process was. She noted he had indicated to her that he would like to follow the correct process; whatever that process may be. She noted that Mr. Durbano had received a letter from the county stating; item #1 that the application received on June 6<sup>th</sup> was something that the County had declined as being ready for appeal. She noted that the discussion was that Mr. Durbano was going to look at that, get the information and do whatever needed to be done to follow the process; which it seems has been done to some part. She noted Mr. Durbano had asked for an interpretation and now if he believes he has the right to appeal that then he can fill out an appeal application, which he has 30 days from the date that letter was submitted and then he can come before the Appeal Authority and have them make a decision on that. She further noted she also tried to state that on the issue that we were continuing today, that her job was to look at the evidence that Mr. Durbano had provided to see that the County error'd. She noted, yes, in the sense that he needed to figure out the process and submit information. If she was unclear on that she apologizes. She noted she had stated several

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times that this was an “on the record” review and that under State law it is pretty clear; it is not subject to amendments, or new information. She is sticking to that for the preliminary plat and she is sticking to the first item that the applicant needs to follow the process, which it appears he is in the process. There is still another step the applicant needs to follow according to County code, but that is his choice and not something that is before her today.

Mr. Durbano ask if it was her understanding that the due process parameters, provided in both the State statues and the County ordinance, precludes submitting to her additional legal authority, argument, or other evidences of in-appropriate or arbitrary, capricious, and un-lawful interpretation of County ordinances.

Ms. Ryan noted when the County has decided “on the record” and not de novo, which the state allows them to make that choice, and they have said “On the record” which mean the application that was submitted at that time within the 30 day appeal process; this is what was submitted, this is what she is going on, and that is the way the she believes the law reads in her understanding.

Mr. Durbano noted they would argue that is an incorrect interpretation. She noted Mr. Durbano would have the right to argue that if he wishes to challenge the Appeal Authority decision.

Mr. Durbano noted he would like to finish with his objection to the “On the record”. He noted now that he has confirmed that the documents he submitted to the County, which include the County’s interpretation pursuant to their formal request and payment of fee, as well as their response which was titled the “amended appeal” that Ms. Ryan had received those.

Ms. Ryan asked Mr. Durbano to clarify what he meant by “amended appeal” she ask, amended to what issue?

Mr. Durbano referred to the Application for appeal to the Morgan County Board of Appeals and noted that Ms. Ryan has referred several times to that being the only document she was allowed to review. Ms. Ryan noted that the June 6, 2013 application was filed within the 30 day time restriction.

It would be their position that based upon the postponement of the hearing and some suggestions that there was a procedural hurdle that still needed to be met before issues were right; That they complied with those suggestions, meeting those procedural hurdles and then file an amended notice of appeal, which according to their understanding of the law dates back to the initial appeal that they filed. It is their position that their amended appeal of Fernwood LLC, dated July 15<sup>th</sup> does relate back to a Morgan County application for board of appeal.

Mr. Briggs noted that July 15<sup>th</sup> documents do outline the arguments they would have presented July 3<sup>rd</sup>, but they elected to continue the hearing on today’s date.

Ms. Ryan noted that the new information and action taken was not submitted to her by July 3<sup>rd</sup> or part of the original appeal. Mr. Briggs noted it would have been had they not continued the hearing.

Mr. Durbano stated once the written decision was issued on July 10<sup>th</sup> it is clear to them that Morgan County Appeal Authority Minutes

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under both the State statute that the Appeal Authority 707(3) shall determine the corrections of a decision of the Land Use Authority in its interpretation and application of the land use ordinances; which in their opinion is a very broad authority. You get both, you get the interpretation and the application and offer a decision that could be very broad as well and it should be in a written form.

Mr. Durbano further noted she has, as the authority, the right to determine the correctness of the decision in its interpretation and its application. The County has argued that only those decisions in which the Land Use Authority has interpreted and applied its decision would allow the hearing officer to rule and they believe that is wrong. They believe it is opposite of what the next sentence is, which is a verbatim statement of paragraph 4 in the Utah Code. *“Only those decisions in which a land use authority has applied this title to a particular application, person, or parcel that may be an appeal.* And then the land use officer has the broad authority to deal with both interpretation and application.

Mr. Durbano referred to the case of Brown vs. Sandy City, Utah.

Mr. Durbano noted they believe the Appeal Authority has the ability to interpret the primary question here, which is, can a building permit be issued on a parcel of property that has not been platted; they believed that was named in the first appeal as well as supplemented by the amended appeal.

Mr. Briggs noted, for the record, they understand the meaning of de novo review a little differently. They understand it to mean that only evidence that was presented to the Council or Zoning Administrator before they made their decision, only factual evidence, which was before them, can be reviewed in the appeal. They do not understand de nova review to limit the arguments or legal theories that may be discussed before the appeals officer or before a district court; it is a limitation of the evidence so that only what was before the County Council or Zoning Administrator when they issued their final decision should be before this appeals officer.

Ms. Ryan asked if there was anything else the applicant would like to add.

Mr. Durbano stated there was not.

She asked if they would they like to respond to the information submitted on June 6, 2013 where it discusses the preliminary plat that was denied; this begins on page 4, #21. Would they like to expand on the items 21 – 31 that they have already submitted just to have further discussion about these items on the record?

Mr. Durbano stated they would like to respond. He noted if he understands correctly, the Appeal Officer would not look at the written arguments presented in the amended notice of appeal.

Ms. Ryan noted that would be correct; she is focusing only on the June 6, 2013 application.

Mr. Durbano noted that they would point out, on the June 6<sup>th</sup> application, that the first issue that the County suggests is that the application is missing a map delineation of site geological units pursuant to the current County code 8-12-24. Ms. Ryan asked what section of the application submittal they were referring to.

Mr. Biggs noted paragraph A on the May 9, 2013 letter. Ms. Ryan noted she is looking at their Morgan County Appeal Authority Minutes

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response to the May 9<sup>th</sup> letter which is items 21-31.

Mr. Durbano noted they were referencing the response that the County gave as a basis for their appeal and asks if that was not a part of the record? Ms. Ryan stated the May 9<sup>th</sup> letter is. The applicant's response was submitted on June 6<sup>h</sup>.

Mr. Durbano asked if she was suggesting that they are not able to give her any additional information other than what was placed in writing at the original application dated in June. Ms. Ryan reiterated that is the interpretation she has been trying to make is that, that is the case on the record which they have said they disagree with. She noted that once she makes a finding, they have another course of action they can take if they disagree.

Mr. Durbano noted this sounds vaguely familiar because when he met in front of the Council he was not able to speak either and it troubles him this is called due process. Ms. Ryan noted Mr. Durbano is being given the opportunity to speak.

Mr. Durbano stated they would like to present to her the evidence that they believe is found in the record. Ms. Ryan asked that Mr. Durbano site where that is in the record. He noted he may not be able to do that as handily as she would like, he did connect the two and thought this appeal process was a little less informal than that. He noted if it is more informal than that, they were unaware and apologizes for lack of understanding. Ms. Ryan noted it seems this is a pretty formal submittal that was submitted on June 6<sup>th</sup>. Mr. Durbano noted he did not come prepared to connect the Counties final decision letter to each paragraph of their complaint.

Ms. Ryan noted that is apparently a miss-understanding because last time she tried to explain and state the State law that said in the County code where the burden of proof is on the appellants to make the case and that was needed to be filed within 30 days of the appeals decision, which Mr. Durbano did; and this is what she believes to be the case that he is making. Again, they have the right, after she makes the final decision, to make a decision of what action they would like to take. She noted she is happy to hear what he has to say, but would ask that he please, to the best extent possible, try to refer to the documents that he is referencing in his discussion. She noted if the applicant feels they are not being given the right to be heard, she is happy to take as much time as he believes is necessary to put it on the record.

Mr. Durbano referred to the letter that Fernwood, LLC received relative to the denial for the preliminary plat. He was reading from the July 15, 2013 amended appeal application and addressed the following.

In that letter of May 9, 2013, paragraph A, the County gave 13 justifications as to why the preliminary plat should be denied. It started off by indicating that this was a request for approval of a preliminary plat, not the final plat approval. He noted it is also important to point out that at this preliminary plat stage the zoning office had made a request that the platting be required before a building permit be issued. Finally the County planning office made recommendation, specifically, that the development agreement, which both benefitted and burdened the property in question, should be abandoned in favor of the property being developed, pursuant to current County ordinances. He noted with those in mind, the current County code was used, starting with sub-paragraph A, as a basis to suggest that the application was missing the map delineation of site geological units. Their point now on that is simple. The development agreement nowhere requires site geological delineation of units nor do they find that in the former code but that the application of the current code would be in opposite of what the development agreement called for, which was development pursuant to the existing PRUD.

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Sub paragraph B – The plat is missing the source protection area of applicable well. It has been pointed out on numerous times that there is no well on the property; hence it is not applicable and should not be a basis for denial; particularly of a preliminary plat.

Sub paragraph C - The application is missing a copy of the protective covenants. He noted that is a requirement in the development agreement of the Rollins Ranch but it is not required until the final plat is recorded and this is the preliminary plat stage.

Sub paragraph D - The application is missing a fire protection plan. Pursuant to the current County code and the 2006 wild land urban interface code both of which were passed after the PRUD and development agreement were executed against the property and therefore may not be used to deny a preliminary plat at this juncture.

Sub paragraph E - The application had not been presented to the Mountain Green Fire official by the applicant for review and approval. No written approval has been provided in accordance with 8-12-46. He noted again, that is current County code and we know that the fire official had been notified and received the plat but apparently there was a mix up in the process as to whether that went to the County and then the fire official or vice versa. But again, not a requirement under the development agreement or the PRUD and therefore to implement this as a requirement to a preliminary plat was inappropriate.

Sub paragraph F - Street light proposal was missing. Again that was referenced to the current code as well as the development agreement section 2.7. This particular point indicates a duplicitous nature on the part of the County Administrator and in its application of the rules. While true the development agreement has an exhibit that identifies street lights, the applicant Fernwood was prepared to put in street lights, but was advised by the County Administrator that none would be required because there was a question as to the cost of maintenance of the street light and that the local HOA association has requested that no street light be put in. They did not want to bear the cost, nor did the county. However if they are actually required they could have been included on the final.

Sub paragraph G - The proposal is missing open space and open space amenities within the subdivision pursuant to 2.4 of the development agreement. A review of the preliminary plat, which was submitted, had ample open space identified and was simply in error. The preliminary plat is generally consistent with the size and location of open space provided for in the development agreement as amended. He noted the development agreement was amended just a month or so prior to this disapproval.

Sub paragraph H - The proposal does not provide adequate frontage for all the lots as otherwise, graphically depicted in the development agreement concept plan. As they reviewed the plat submitted, it looks to them as if the lots had ample frontage. They note that the concept plan does not provide lot widths. However, they can take a general wager by looking and see that the lots in its preliminary plat exceed all other lots approved previously in the Rollins Ranch subdivision.

Sub paragraph I - The proposal does not adequately show the extension of public or private street approval of adjacent properties in a manner that meets the counties adopted street standards or the concept plan of the Rollins Ranch development agreement. They believe the County focuses on the fact that there is a preliminary plat but does not currently provide platting for the entire property. This 1<sup>st</sup> phase was just roughly 10 acres of 88 acres. It showed conceptually roads going through it but it did not show that the roads would be completed at this time; hence we have a phase one. This is consistent with the development agreement and the concept plan. Section 4.2 of the development agreement allows the property to be developed in phases as determined by the developer. Orderly development is required. They cannot see where the County has indicated that the preliminary plat would not facilitate an orderly development of the property.

Sub paragraph J - The proposed preliminary plat does not meet all aspects of the County code 8-12, as addressed in exhibit C of the February 21, 2013 staff report. If we are going to use the current code section that is simply an inappropriate basis to rely given the property has the benefit of a development agreement that references the PRUD that was adopted in 2005.

Sub paragraph K - There are engineering concerns presented by Wasatch Engineering that are yet to be adequately addressed. Fernwood would respond that these concerns which related to storm water retention and handing of a dirt road located on the property were dealt with in a subsequent meeting with Mark Miller, Charlie Ewert, and himself. The engineering concerns were noted, redlined on the engineering plat and placed in the hands of Keith Russell, Ensign Engineering. Mr. Russell made the revisions and consulted with Mark Miller and as they understand, completed those revisions and submitted to the County on April 9, 2013

Sub paragraph L - The survey concerns are yet to be adequately addressed. They believe all the survey concerns were addressed and the property has been surveyed several times.

Sub paragraph M - Due to the incomplete nature of the submittal, County officials have not been able to provide an effective and complete review of the plans. They do not believe this is worthy of a basis to deny the plat; it's a catch all.

Mr. Dubano noted it became clear to them, and is still clear to them today, that the basis for denying the preliminary plat was because the County Council denied the request to amend the development agreement. And the basis for denial to amend the development agreement was because the County adopted the planning office recommendation that the development agreement should be abandoned as to the Ponderosa, and the Ponderosa should develop under the current County code. This is an inappropriate extraction of property rights that the property was entitled to and therefore not a legal basis to deny the preliminary plat. They believe that the County refusal to adopt the preliminary plat is a breach of law and is arbitrary and capricious and based upon that, at least it's illegal. They may have been motivated to make this denial because the County's desire to extract certain development rights from Fernwood. It would also be a violation of constitutional rights as a taking. The County may disagree with its predecessor's decision relative to what to do with this property, but under both statutory and case law it is bound to those deals made by its predecessors. We have asked that they be enforced and ask that the appeals process find that it be approved as a preliminary plat.

Ms. Ryan asked Mr. Durbano if there was anything else he would like to discuss. He stated no. She further noted she would like to take a moment and go over her dates that she believed were generally correct. She would like to review her understanding of the following:

- That the plat was filed on August 15, 2012.
- In September and October of 2012 the applicant was notified by the County of areas that were deficient in the submittal.
- In December of 2012 the applicant submitted revision based on County code citation given by the County in those letters.
- On January 24, 2013 it was noticed by the applicant that they were still missing items.
- On February 28, 2013 the Planning Commission denied the preliminary plat based on a request from the applicant requesting a thumb up/thumbs down based on state code citation. She noted she did not see that it was a formal recommendation that Mr. Durbano submitted but that is what was stated in the minutes that a decision was requested. She asked for clarification from the applicant if he had made the request to bring this before the Planning Commission pending the final ability of staff to go through their process. She asked if she was correct in her understanding. Mr. Durbano noted it seemed like there were numerous postponements of the decision and they agreed to those postponements, but to the extent that we were anxious to have the matter progress, and their desire to have decision made, is correct.

Mr. Briggs referred to page 19 of 41 of the Planning Commission meeting minutes of February 28, 2013. Ms. Ryan asked that he read from those minutes.

*Chairman Haslam ask Mr. Durbano if he would be willing to withdraw his request of final preliminary plat approve and accept a postponement at this time?  
After discussion of possible time frame, Mr. Durbano stated he would be willing to do that.*

***Member Sessions withdrew her previous motion.***

***Member Stephens moved to postpone a decision for the preliminary plat for the Ponderosa Subdivision, application #12.086 until April 25, 2013, with a progress report on March 28, 2013. Second by Member Wilson.***

*Member Toone asked if there was anything presented tonight that would not need to be reviewed again.  
Mr. Ewert noted a lot of the items Mr. Durbano presented tonight were new and have not been reviewed.*

*The Chairman called for a vote. The vote was unanimous. The motion carried.*

Ms. Ryan asked Mr. Ewert if after the February 28, 2013 meeting there was another meeting. Mr. Ewert noted they requested two things at that time. They requested a final time frame which a decision could be rendered. They initially requested a month and staff indicated they did not believe they could get it done in a month. He noted to the best of his recollection, a month later they wanted a staff report and a month later they requested a final decision. He noted March 28, 2013 would have been the update and April 25, 2013 would have been the Planning Commission's final recommendation to the County Council.

- Ms. Ryan clarified that the applicant had stated earlier that on April 9, 2013 they submitted a revised submittal while this process of the request for preliminary plat was going through its process.
- May 7, 2013 the Council heard the decision for denial of preliminary plat that was taken on April 25, 2013.

Mr. Ewert clarified, noting that the plat that was received by the planning department on April 25, 2013 was never sent to the Planning Commission for their meeting on the 25<sup>th</sup>. It was a week late for Planning Commission packets; it was not an April 9, 2013 submittal it was an April 25, 2013 submittal. It was designed April 9, 2013 by Ensign Engineering as shown on the side of the plat.

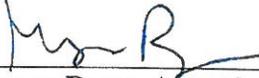
Ms. Ryan clarified that there were two processes that were proceeding and then there was also some revised submittals on the plat, but then on May 7, 2013 the County Council made a decision based on the earlier decision as requested by the applicant.

Mr. Ewert noted that at no point in time should it be construed that the County made this go forward for final decision. He noted that was all based on request by Mr. Durbano both in verbal conversation on the December 26, 2012 and by written confirmation on December 27, 2012 that final decision was requested. He noted the County wanted to be observant and cognizant of Mr. Durbano's due process rights under state law when he asked for final decision. He noted in his opinion it was sent to final decision prematurely. There was no reason we could not have worked out the reasons why the plat was not in compliance with code.

Ms. Ryan asked if Mr. Durbano had any comments. He stated no. She noted she would conclude this meeting and have a final decision by the end of the day on Monday, July 22, 2013.

She thanked everyone for their comments.

Mr. Durbano asked about the minutes and if they would be available. Mr. Ewert noted as soon as they are available they will be made available to the public. The audio minutes will be recorded and posted online.

  
 \_\_\_\_\_ Date: 8/16/13  
 Megan Ryan, Appeal Authority

ATTEST:   
 \_\_\_\_\_ Date: 8/19/13  
 Charles D. Ewert, Director  
 Planning and Development Services