

**GUNNISON COUNTY BOARD OF ADJUSTMENT  
REGULAR MEETING MINUTES  
Wednesday, June 25, 2024**

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The Gunnison County Board of Adjustment conducted a regular meeting in the Planning Commission Meeting Room in the Blackstock Government Center, 221 N. Wisconsin, Gunnison, Co. and on Zoom

**Present:**

Chairperson-Laura Puckett Daniels Vice-Chairperson- Liz Smith BOCC – Jonathan Houck Board of Adjustment Member – Andy Tocke Board of Adjustment Member – Juile Baca	Assistant County Manager for Community and Economic Development-Cathie Pagano Planning Director – Hillary Seminick Building and Environmental Health Official-Crystal Lambert County Attorney – Matthew Hoyt Deputy County Attorney – Alex San Filippo-Rosser Planning Technician – Jena Greene Others present as listed in text
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**Absent:** None

**Recused:** None

**Zoom:** Juile Baca

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With a quorum present Chair Laura Puckett Daniels opened the June 25, 2024, meeting of the Board of Adjustment at 1:32 pm.

**Approval of the Minutes:**

Baca made a motion to approve the June 6, 2024, Board of Adjustment minutes with the change as noted by Smith, Houck, and Pucket Daniels. Seconded by Smith. The motion passed unanimously in support.

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**Unscheduled Citizens** - None

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**APPEAL-24-00003 | McCloud Placer LLC.**

Puckett Daniels opened the meeting. She noted that the public hearing was complete and had closed at the end of the June 6<sup>th</sup> meeting. Today the Board of adjustment was meeting to deliberate and determine whether to affirm, reverse, modify, or remand the decisions concerning s) Building and Septic regulations: The notification to correct violation of the Gunnison County on site, waste water treatment system regulations, notification of violation of the international building code and notification of suspension of certificate of occupancy; b) the decisions concerning the stop order pertaining to the Land Use Resolution; and c) the constitutional claims made by the appellant.

The appeal of decisions made concerning the building code on December 28th was considered. The appellant claimed the decisions were made without credible evidence and challenged staff actions.

**Building Code and Suspension of CO:** Smith asserted that there was credible evidence supporting the decisions. BOA Discussion focused on building code compliance and safety measures related to detectors and heaters. Puckett Daniels reviewed the 1994 UBC, noting that staff demonstrated the change of use, showing increased activity aligning with building codes. Smith emphasized the clear definitions in the 1994 UBC regarding occupancy. Tocke discussed occupancy definitions and their relevance to the appellant's property use.

Comments from BOA Members:

- Baca - the initial outreach stemmed from an emergency situation, which made sense.
- Puckett Daniels – the decision was based on authority of building code- making decisions based in building codes. The decisions were anchored in the interest of health, safety, and welfare, felt it was in the scope of what staff was authorized to do.
- Smith – agreed that this was a unique situation. The CO considered the dwelling unit for 10 people or less. Even if a family was visiting a home, they weren't familiar with it, and the 1994 code was clear about that. Thinking about how the use/users of the home interacted with the safety of the home, there was a logical connection to why higher safety measures were required with higher occupancy groups.
- Houck – clarified that the source of the violation was a video that showed that there was an unsafe appliance, which triggered the violation. Didn't hear a compelling argument from the appellant that staff was wrong.

**Change of Use and Notice of Violation:** Triggered by the move from 1994 UBC to 2021 IBC. Houck noted the staff's rationale in changing the code and ensuring public safety. Baca, LPD, and Smith agreed staff acted within their authority and the decision was reasonable.

Comments from BOA Members:

- Smith - a lot of conversation focused on this question concerning commercial use. Evidence that was in the public record, it was clearly commercial when you look at the standards. Read definition of commercial. Did the staff decision have credible evidence concerning commercial use, And the same for resort.
- Smith – noted that the stop order letter framed the commercial piece first, and the goods and services offer triggered the definition of resort – read into record. LUR 2-102, establishments used for housing, or providing, provided all operational opportunities onsite
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**Abuse of Discretion/Jurisdiction:** The board found staff had credible evidence and acted within their jurisdiction. Houck reviewed evidence and found the appellant's arguments unconvincing.

**Commercial Use and Resort Definition:**

Smith focused on public records showing commercial use and the definition of a resort. Baca and Tocke agreed on commercial use but found the resort designation challenging. Houck highlighted integrated branding and commercial activities justifying the commercial use designation.

**Constitutional Claims:**

The December 28<sup>th</sup>, notice of violation was an emergency and the January 8<sup>th</sup>, notice of violation was rescinded. While there was an occupancy max placed, and the appellant had the ability to use and/or rent the house, with limitations, but chose not to. Didn't get a compelling argument that they weren't given the opportunity to be heard.

Procedural Due Process: The appellant was provided opportunities to be heard and the emergency notices were justified.

Substantive Due Process: After thoroughly discussing, the BOA found that staff actions were neither arbitrary nor capricious; the appellant failed to prove personal hostility or bad faith.

**Final Decisions and Actions:**

There was a consensus to affirm staff decisions. Houck proposed drafting a decision document with all findings for board review.

Houck made a motion to direct staff to draft a decision document. Seconded by Smith. The motion passed unanimously in support.

**Closing Remarks:**

Puckett Daniels encouraged collaboration between staff and the appellant. Houck thanked participants for their diligence and proposed future steps.

Meeting Adjourned: 3:58 PM

## **FINDINGS OF FACT**

### **Introduction**

1. This proceeding is an administrative appeal relating to McCloud Placer LLC’s (“McCloud” or “Appellant”) property at 6001 County Road 811 in Gunnison County (the “Property”). Rec. A at 1; *see also* Gunnison County, Colorado Land Use Resolution (“LUR”) Section 8-103:C; 1994 Uniform Building Code (“UBC”) Section 105.

2. On January 19, 2024, McCloud requested an appeal hearing in front of the Gunnison County Board of Adjustment (“Board” or “BOA”) on a variety of issues relating to correspondence from the Gunnison County Community and Economic Development Department (“Department”). Rec. A at 14.

3. McCloud’s appeal statement made the following claims: (1) the Department never had any basis to temporarily suspend McCloud’s certificate of occupancy or to allege an unlawful change of use under the applicable building codes (“building code appeal”); (2) the Department improperly concluded that the activity at the Property requires a commercial land use change permit under the LUR (“LUR appeal”); (3) the Department violated McCloud’s procedural due process rights; (4) the Department violated McCloud’s substantive due process rights; and (5) the Department violated McCloud’s equal protection rights. Rec. A.

### **The Property**

4. The Property is located north of Mount Crested Butte, Colorado in Washington Gulch at an elevation of 10,400 feet. Rec. 7. Access to the property by automobile is seasonal; during the winter and spring, the Property is accessed via four miles of backcountry travel by means such as skiing or snowmobiling. Rec. 7. The Property contains a three-bedroom residence. Rec. 1 at 1.

5. The residence on the Property received its Final Building Inspection under the 1994 UBC on July 8, 2005. Rec. 1 at Ex. D. The Final Building Inspection noted that three unvented appliances existed in the bathrooms and that such appliances were not allowed under the UBC. *Id.*

6. On July 12, 2005, McCloud’s predecessor-in-interest claimed in writing that the unvented appliances had been removed. Rec. 1 at Ex. E.

7. Given the location of the Property, the residence cannot be tied into a sewer system. In 1997, McCloud’s predecessor-in-interest obtained a Gunnison County Waste Disposal Permit for an on-site wastewater treatment system designed to serve six persons. Rec. 1 at Ex. B.

8. A building permit was issued in 2001 for the construction of a single-family residence. Rec. 109 at 1. The certificate of occupancy for the Property states that the Property is a “Group R-3” building under the 1994 UBC. Rec. A at 5. A “Group R-3” building under the 1994 UBC includes dwellings, lodging houses, and congregate residences (accommodating ten persons or less). 1994 UBC § 310.1; Rec. A at 5.

9. Prior to McCloud’s purchase of the Property, the Property was used exclusively as a single-family residence. Rec. 77 at 1; Rec. 107 at 3, 10.

### **McCloud Placer LLC, Campfire McCloud, LLC, and Campfire Ranch**

10. McCloud Placer LLC, a Colorado limited liability company, is the owner of the Property. Andrew Fink is a principal of McCloud. Rec. A at 2.

11. Mr. Fink hired Campfire McCloud, LLC (“Campfire McCloud”) to manage rentals of the Property. Ex. A at 2-3. Samuel Degenhard is the founder and CEO of Campfire McCloud. June 5, 2024 Declaration of Samuel Degenhard at 1. Campfire McCloud is a limited liability company created to handle the management of the Property; Campfire McCloud does not manage any other properties. *See id.*; *see also* statements made by Samuel Degenhard during hearing. Campfire McCloud does not engage in any other business other than that related to the Property. *See* June 5, 2024 Declaration of Samuel Degenhard at 1-2; *see also* statements made by Samuel Degenhard during hearing.

12. Campfire McCloud operates as part of Campfire Ranch, a business entity that that advertises services at Campfire Ranch on the Taylor (a campground in Gunnison County), Campfire Ranch Red Mountain Pass (a backcountry hut near Silverton, CO), and Campfire Ranch Wash Gulch (the Property). Rec. 51. Campfire Ranch does not offer property management services to property owners generally; instead, Campfire Ranch focuses on properties that offer distinctive outdoor experiences. *See id.*; *see also* statements made by Samuel Degenhard during hearing.

13. Mr. Fink participated in various activities, such as marketing, with Campfire McCloud in promoting and preparing the Property for use in Campfire Ranch’s portfolio of properties. *See* statements made by Andrew Fink during hearing.

### **Use and Advertised Use of the Property**

14. Campfire McCloud advertised and branded the Property across multiple mediums as “Campfire Ranch Washington Gulch” or “Campfire Ranch Wash Gulch.” *E.g.*, Rec. 1 at Ex. A; Rec. 25. This branding appeared on the Campfire Ranch website (on which the Property could be booked), social media, YouTube (where the narrator of the advertisement states, “So when I brought up the idea of the perfect winter hut experience, if you imagine something similar to me, well my friends, welcome to Campfire Ranch”), Google Maps, Beacon

Guidebooks (a map and guide of backcountry skiing in the Crested Butte, Colorado area), and Outside Magazine. *E.g.*, Rec. 1 at Ex. A; Rec. 65; Rec. 66; Rec. 68-70. The branding advertised the Property as a Campfire Ranch property and the Campfire Ranch logo appeared prominently on the Campfire Ranch website and social media. *Id.*

15. Mr. Fink ensured that the Property appears on Google Maps as “Campfire Ranch Wash Gulch”. Statements by Andrew Fink during hearing. On Beacon Guidebooks, the Property is marked on the map as “Campfire Ranch Wash Gulch Hut”. Rec. 66.

16. Skiing guidebooks were offered for sale at the Property where billing occurred through Campfire Ranch. Rec. 26.

17. The Property was advertised as a backcountry “hut” offering “a wide variety of backcountry skiing & snowboarding terrain”. Rec. 7. The Campfire Ranch website advertised “a multitude of backcountry route options” including the following routes as described by Campfire Ranch:

- a. Anthracite Mesa (“One of our go-to routes from the property. Skin up the Washington Gulch road and stay on private land. Incredible views at the top and multiple options for descents right back to the hut.”).
- b. Playground Hill (“Head out the backdoor and up to the top of Playground Hill! There are various options for ascents and descents in this area”). Rec. 56 at 3-6.

18. The Property is surrounded by National Forest land, and the Property’s land was advertised as an integrated part of backcountry skiing in the National Forest. *E.g.*, Rec. 56 at 3; Rec. 66.

19. On its website, Campfire Ranch offered detailed mapping of skiing opportunities on and surrounding the Property. *E.g.*, Rec. 56.

20. The Property could be rented for up to twelve people and offered “ample room for gear storage and drying”. Rec. 1 at Ex. A. The Property provided fifteen beds with room for at least twenty people. Rec. 107 at 7.

21. Campfire Ranch offered rental gear at the Property for an additional charge. Rec. 9.

22. Campfire Ranch advertised that professional ski guides could be arranged to meet guests at the hut, and that billing for the guide’s services would occur through Campfire Ranch. Rec. 22; *see also* statements by Samuel Degenhard during hearing. Campfire Ranch offered ski guiding through Irwin Guides, an organization that Campfire Ranch called “our partner”. Rec. 61. On its website, Campfire Ranch stated, “Take your trip to the next level with a day of guided skiing and riding from the doorstep!”. *Id.*

23. Campfire Ranch offered an “Adventure Concierge Service” that could meet a variety of skill levels, and the Adventure Concierge page on Campfire Ranch’s website included guided backcountry skiing “leaving right from Campfire Ranch Wash Gulch”. Rec. 24; Rec. 55. The Adventure Concierge was advertised “to help you get organized for just about any adventure you can dream up”. Rec. 55.

24. For a fee of \$80 each way, Campfire Ranch offered to transport gear to and from the Property via snowmobile. Rec. 25. Campfire Ranch did not permit guests to use snowmobiles to get to the Property. Rec. 64. The Forest Service requires a permit for the commercial transportation of gear by snowmobile across Forest Service lands. Rec. 17 at 2; May 30, 2024 Department Memo. at 4.

25. Campfire Ranch offered “brand experiences” where the Property could be used “as a launchpad for your brand” and where Campfire Ranch “can help bring to life whatever you have in mind.”<sup>1</sup> Rec. 48.

26. Campfire Ranch advertised that the Property was available for “event & group pricing” at \$1,500 per day with catering options available. Rec. 49. The Property was specifically offered for group retreats where the Property could be packed together with the adventure concierge service “for an unbelievable team experience.” Rec. 51; Rec. 53.

27. Campfire Ranch advertised micro weddings and elopements for up to nineteen people at the Property. Rec. 52.

28. Campfire Ranch advertised video and photo shoots at the Property where “our properties are located on private land, which allows us to grant permission for filming without boat loads of paperwork.” Rec. 54.

29. On September 30, 2023, a “Family Supper” was held at the Property that was open to the public for \$100 per person for up to thirty people. Recs. 58-60. The “Family Supper” was organized by Campfire Ranch. *Id.*

30. Taken as a whole, McCloud and Campfire McCloud promoted the Property as a curated product with coordinated branding centered around adventure experiences, particularly backcountry skiing. In addition to the rental of the Property itself for lodging, goods and services were offered to guests by Campfire Ranch at additional charge. These additional goods

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<sup>1</sup> McCloud stated that it has agreed to remove certain offerings such as “brand experiences” and “micro-weddings” as a sign of good faith, but McCloud asserts that such removal is not required. See statements made by Appellant’s counsel during hearing. Regardless, the Board evaluates the appeal of the Department’s December 28 Letter and the January 11 Stop Order based on information available to the Department at the time the correspondence was issued.

and services could be processed by Campfire Ranch and settled on one bill. *See* statements made by Samuel Degenhard during hearing.

### **The December 28 Letter**

31. Given its small staff, the Department typically does not go out and look for code violations. *E.g.*, statements made by Cathie Pagano and Crystal Lambert during hearing. Instead, the Department typically relies on citizen complaints to learn about potential code violations. *Id.*

32. Prior to December 2023, the Department was aware of the existence of the Property because of a previous land use change application (LUC-23-00002). *See, e.g.*, Ex. 82. LUC-23-00002 was a proposed plan to create a commercial camping site next to, and potentially involving, the Property. Rec. 77 at 1.

33. In correspondence with Mr. Fink and Mr. Degenhard related to LUC-23-00002, the Department provided its position on various issues regarding the residence on the Property. For example, on April 24, 2023, Planning Director Hillary Seminick advised Mr. Fink and Mr. Degenhard that to “ensure the protection of life safety, health, and the environment; the building occupancy shall be no more than 6 persons. Occupancy greater than 6 persons is considered a violation of the OWTS regulations.” Rec. 83 at 8. On May 5, 2023, Assistant County Manager for Community & Economic Development Cathie Pagano advised Mr. Fink and Mr. Degenhard that the International Residential Code requires a permit to increase the occupancy of a structure and that the Building Official had the authority to suspend a certificate of occupancy for violations of the Code. Rec. 83 at 3.

34. LUC-23-00002 was withdrawn in the middle of 2023, and no further action was taken related to that land use change application. Statements by Hillary Seminick during hearing.

35. After the withdrawal of LUC-23-00002, the Property again came to the attention of the Department through Campfire Ranch’s advertising of the Property on the social media feeds of Department staff, including Building and Environmental Health Official Crystal Lambert. Statements of Crystal Lambert during hearing. On social media, Campfire advertised overnight hut trips at the Property for up to twelve people. *Id.* When the residence on the Property was originally constructed, Gunnison County issued Waste Disposal Permit No. 97-091 to allow waste disposal service for six persons. Rec. 1. at Ex. B. Ms. Lambert concluded that the Property was being advertised for double the permitted capacity of the on-site wastewater treatment system. Rec. 1 at 1-2.

36. As part of her investigation into the on-site wastewater treatment system violation at the Property, Ms. Lambert reviewed the virtual tour of the Property available on the Campfire

Ranch website. Statements of Crystal Lambert during hearing. The virtual tour revealed that the Property contained three unvented fuel gas heating appliances. *Id.*

37. Unvented fuel gas heating appliances can cause carbon monoxide poisoning. Rec. 107 at 4. Carbon monoxide poisoning can lead to death. *Id.*

38. Given the danger to health and safety posed by the unvented fuel gas heating appliances, Ms. Lambert determined that she should work on a violation letter on an expedited basis. Statements of Crystal Lambert during hearing. Specifically, Ms. Lambert decided that the suspension of the certificate of occupancy should occur prior to the first bookings visible on Campfire Ranch’s website. *Id.* Based on her prior experience, Ms. Lambert concluded that communication regarding a violation and a suspension of the certificate of occupancy should occur in writing. *Id.*

39. Accordingly, on December 28, 2023, the Department issued a Notification to Correct Violation of the Gunnison County On-Site Wastewater Treatment System Regulations<sup>2</sup>, Notification of Violation of the International Building Code, and Notification of Suspension of Certificate of Occupancy (“December 28 Letter”). Rec. 1. at Ex. B.

40. The December 28 Letter suspended the Property’s Certificate of Occupancy. Rec. 1 at 4. In order to reinstate the Certificate of Occupancy, the December 28 Letter stated that the unvented fuel gas heating appliances had to be removed. *Id.*

41. On Friday, January 5, 2024, McCloud asked that the certificate of occupancy be reinstated because the basis for the immediate suspension of the certificate of occupancy – the unvented fuel gas heating appliances – had been cured. Rec. 45 at 2. McCloud provided video evidence that the unvented fuel gas heating appliances had been removed. *Id.*

42. On Monday, January 8, 2024, based on McCloud’s video evidence of the removal of the unvented fuel gas heating appliances, the Department reinstated the Property’s certificate of occupancy. *Id.* at 1.

43. The Property’s certificate of occupancy was temporarily suspended from December 28, 2023 until January 8, 2024. Rec. 1 at 4; Rec. 45. The suspension of the certificate of occupancy occurred primarily because of the risk of carbon monoxide poisoning posed by illegal unvented fuel gas heating appliances. Statements of Crystal Lambert during hearing; Rec. 1 at 4.

44. In addition to the issue of carbon monoxide poisoning, the December 28 Letter also determined that using the Property primarily as a backcountry hut for lodging

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<sup>2</sup> In this appeal to the BOA, the Appellant is not appealing the Notification to Correct Violation of the Gunnison County On-Site Wastewater Treatment System Regulations. Statements by Appellant’s counsel during hearing; see *also* Rec. A at 6, 14.

accommodations and services for twelve guests required the submission of a building permit application. Rec. 1 at 4. Citing to the 1994 UBC, the 2015 edition of the International Building Code, and the 2015 edition of the International Residential Code, the December 28 Letter recommended that the Property owner submit a building permit application for a change of use and occupancy to a Residential Group R-1 in accordance with the International Building Code. *Id.* at 2-4.

45. Under the section titled “Violation of the Gunnison County OWTS Regulations”, the December 28 Letter stated that compliance with Gunnison County’s On-Site Wastewater Treatment System (“OWTS”) Regulations required (1) adjusting all advertisements for rental of the Property to six people, and (2) limiting current and future use of the existing OWTS to a maximum of six people. Rec. 1 at 4.

46. The December 28 Letter provided time to cure the OWTS violation until January 29, 2024. Rec. 1 at 2.

47. Other than the temporary suspension of the certificate of occupancy (which was lifted after the unvented fuel gas heating appliances were shown to have been removed) and the six-person occupancy limit (imposed based on Gunnison County’s OWTS Regulations), the December 28 Letter did not impose any specific limitations on the use of the Property. *See id.* at 1-4.

48. The December 28 Letter noted that the Letter may not be inclusive of all violations present at the Property. *See id.*

### **The January 11 Stop Order**

49. On January 11, 2024, the Department issued its Stop Order Pursuant to the Gunnison County Land Use Resolution and Notification to Correct Violation of the Gunnison County Standards and Specifications for New Construction of Roads and Bridges<sup>3</sup> (“January 11 Stop Order”). Rec. 6.

50. The January 11 Stop Order found that the Property was being used or advertised for commercial activities (such as offering rental equipment, maps and guidebooks, an adventure concierge service, and shuttle services) and was being operated as a resort. *Id.* at 2-3. The Department ordered the Property owner to stop all commercial activities by January 29, 2024. *Id.* at 3. To come into compliance with the LUR, the Department stated that the Property must submit a Minor Impact Land Use Change Permit for a new commercial use. *Id.*

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<sup>3</sup> The Notification to Correct Violation of the Gunnison County Standards and Specifications for New Construction of Roads and Bridges is not at issue in this Appeal. Rec. A at 10-11. Appellant stated that it complied with the corrective action requested in the Notification. *Id.*

51. The Department has historically considered backcountry huts to be a commercial use under the LUR. For example, the Department issued a Certificate of Minor Impact Approval for the Alfred A. Braun Hut System in 2012 where an 848 square-foot backcountry ski hut was proposed. Rec. 39 at 1. The Alfred A. Braun Hut System applied for a Land Use Change Permit based on a new commercial use. Rec. 27 at 3.

52. Appellant presented evidence that numerous other properties in Gunnison County offer recreational activities and concierge services similar to those available at the Property. Rec. G; Rec. I; Recs. L-P. In response to this evidence, the Department said that it would consider whether code violations are occurring at the other properties and may pursue enforcement action if necessary regarding those other properties. *E.g.*, statements made by Cathie Pagano and Crystal Lambert during hearing.

53. Mr. Fink stated that he believed that the Department was discriminating against him when it issued the December 28 Letter and the January 11 Stop Order. Statements made by Andrew Fink during hearing. When asked why he thought that the Department was discriminating against him, Mr. Fink did not articulate a reason for the perceived discrimination. *Id.*

## **CONCLUSIONS OF LAW**

### **Building Code Appeal**

1. Pursuant to the UBC, 1994 edition, Section 105.1, “decisions or determinations made by the building official relative to the application and interpretation” of the code may be appealed. *See also* International Building Code, 2021 edition, Section 113 (allowing “appeals of orders, decisions, or determinations made by the building official relative to the application and interpretation of this code[.]”). Rec. 107 at 2.

2. Under the 1994 UBC, Section 105.2, the Board of Appeals “shall have no authority relative to interpretation of the administrative provisions” of the UBC. The Board of Appeals that exists pursuant to C.R.S. § 30-28-118 is the BOA as described in LUR Section 8-103. Rec. 107 at 2. Under the 2021 International Building Code, “An application for appeal shall be based on a claim that the true intent of this code or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of this code do not fully apply or an equivalent or better form of construction is proposed.” Feb. 22, 2024 Department Memo at 3-6.

3. Because the standards are substantially similar, and Appellant has not argued otherwise, the Board finds it appropriate to consider the building code issues in this appeal both under the UBC and under the LUR.

4. Under LUR Section 8-103, an original action shall only be modified, reversed or remanded, as provided in Section 8-103:C.3.a, if the appellant establishes that:

- a. No Credible Evidence. There is no credible evidence in the record to support the original decision;
- b. Original Action Inconsistent with This *Resolution*. The original action was inconsistent with the applicable requirements of this *Resolution*; or
- c. Review Body Action Inappropriate. The initial decision-making body exceeded its jurisdiction or abused its discretion.

#### Suspension of the Certificate of Occupancy

5. To the extent that McCloud argues that there was no basis to suspend the Property’s certificate of occupancy, *see* Rec. A at 6, the Board finds no basis under the UBC or the appeal standard described in Section 8-103:C.3.a of the LUR to modify, reverse or remand the Building Official’s decision to temporarily suspend the certificate of occupancy.

6. To the contrary, McCloud’s predecessor-in-interest had affirmatively stated that the unvented fuel gas heating appliances had been removed.

7. Unvented fuel gas heating appliances are illegal under the 1994 UBC and all subsequent building codes adopted by Gunnison County. *See* Rec. 1 at 4.

8. Based on information available to the Building Official, the unvented fuel gas heating appliances were still present on the Property as of December 28, 2023.

9. Such appliances presented a risk of carbon monoxide poisoning and therefore the possibility of death. The Building Official therefore acted reasonably based on credible evidence when she temporarily suspended the certificate occupancy. *See* 1994 UBC § 109.6 (“The building official may, in writing, suspend or revoke a certificate of occupancy issued under the provisions of this code whenever the certificate is issued in error, or on the basis of incorrect information supplied, or when it is determined that the building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this code.”).

10. Once the Building Official saw evidence that the appliances were removed, the certificate of occupancy was reinstated.

11. Accordingly, the Building Official’s suspension of the certificate of occupancy pursuant to the December 28 Letter is affirmed.

#### Change of Use

12. Similarly, the Board finds no basis under the UBC or the appeal standard described in Section 8-103:C.3.a of the LUR to modify, reverse or remand the Building Official’s

determination that a change of use occurred at the Property under the 1994 UBC, thereby triggering review under the current building codes adopted by Gunnison County.

13. Under the 1994 UBC, the definition of Group R, Division 3 includes dwellings, lodging houses, and congregate residences (accommodating ten persons or less). Rec. A at 5; 1994 UBC § 310.1.

14. Appellant argued that the Property was a “dwelling” or “lodging house” under the 1994 UBC. Rec. A at 5.

15. The Building Official instead determined that the Property was being used as a “congregate residence” for more than ten people. Rec. 107 at 6-7. The Board perceives no error under the 1994 UBC or the appeal standard described in LUR § 8-103:C.3.a for this determination.

16. The Property was advertised for short-term rental (with an emphasis on use as a backcountry hut for skiing) for up to twelve people at a time, the Property could accommodate up to twenty people based on the number of beds, and the Property was advertised for micro-weddings of up to nineteen people. Such use is consistent with the definition of “congregate residence” under the 1994 UBC: “any building or portion thereof which contains facilities for living, sleeping and sanitation, as required by this code, and may include facilities for eating and cooking, for occupancy by other than a family.” 1994 UBC § 204.

17. Moreover, the 1994 UBC differentiates between occupancies of more than ten people and occupancies of ten people or less. *See, e.g.*, 1994 UBC § 205 (defining “dwelling unit” as a certain type of building “for not more than one family, or a congregate residence for 10 or less persons”; and defining “dwelling” as any building “which contains not more than two dwelling units); § 207 (defining “family” in part as “a group of not more than five persons (excluding servants) who need not be related by blood or marriage living together in a dwelling unit”); § 213 (defining “lodging house” in part as a building “containing not more than five guest rooms”).

18. Congregate residences accommodating more than ten persons are classified under the 1994 UBC as Group R, Division 1. 1994 UBC § 310.1; *see also* Rec. 107 at 7.

19. Accordingly, the Board finds no error with the Building Official’s determination that the Property is best categorized as a Group R, Division 1 occupancy.

20. Under the 1994 UBC § 109.1, no “building or structure shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made until the building official has issued a certificate of occupancy therefor[.]” Furthermore, the 1994 UBC § 3405 states that no “change shall be made in the character of occupancies or use of any building which would place the building in a different division of the

same group of occupancy or in a different group of occupancies[.]” The Board finds that the Building Official determined, based on credible evidence and consistent with the 1994 UBC, that a change in the character of occupancies or use occurred at the Property – the residence at the Property was permitted as a Group R, Division 3 occupancy, and McCloud’s use of the Property was reasonably determined to be a Group R, Division 1 occupancy.

21. Any change in use or occupancy triggers review of that change under current buildings codes.

22. Accordingly, the Building Official’s determination that a change in use or occupancy occurred at the Property is affirmed.

### **LUR Appeal**

23. Under LUR § 8-103, an original action shall only be modified, reversed or remanded, as provided in Section 8-103:C.3.a, if the appellant establishes that:

- a. No Credible Evidence. There is no credible evidence in the record to support the original decision;
- b. Original Action Inconsistent with This Resolution. The original action was inconsistent with the applicable requirements of this Resolution; or
- c. Review Body Action Inappropriate. The initial decision-making body exceeded its jurisdiction or abused its discretion.

24. The Property owner – here, Appellant – has the burden of proof that a project is in compliance with the LUR. LUR § 16-101:B. To the extent that McCloud argued that it did not know the extent of activities carried out on the Property by Campfire McCloud, Appellant carries ultimate responsibility for demonstrating compliance with the LUR. *Id.*

### Commercial Activities

25. The LUR defines “commercial” as “any establishment engaged in the retail or wholesale sale of goods or services that is open to the general public or that may be open to members only. This does not include farm or ranch stands.” LUR § 2-102; Rec. 107 at 10. New commercial uses require a Land Use Change Permit. LUR § 6-102:J.

26. The advertising for “micro-weddings” without applying for a Minor Impact Land Use Change Permit runs afoul of LUR § 6-103:U, which specifically describes “commercial wedding sites” as a Minor Impact Project. *See* LUR § 6-103:U (stating that the “site on which weddings are regularly or frequently conducted as a commercial operation, irrespective of the number of people or vehicles generated by the wedding event” constitutes a Minor Impact Project).

27. Guidebooks were available for sale through Campfire Ranch at the Property. Such sales constitute the retail sale of goods. *See* LUR § 2-102 (defining “commercial”).

28. Numerous services were available for sale at the property. *See id.* For example, Campfire Ranch offered guided skiing trips through Irwin Guides, video and photo shoots with minimal paperwork, the “Family Supper” dining event, gear rental, and gear transportation. Such services constitute the retail sale of services. *See id.*

29. The Property was curated as a product centered on adventure experiences with coordinated branding. The Property was branded as “Campfire Ranch Wash Gulch” and the Property was skillfully marketed across several mediums, including Google Maps, Beacon Guidebooks, Outdoor Magazine, social media, and Campfire Ranch’s website.

30. Take as a whole, the Board finds credible evidence supporting the Department’s conclusion that the Property was being used and advertised for commercial purposes because the Property engaged in the retail sale of goods and services. *See* LUR § 2-102 (defining “commercial”).

31. Appellant failed to meet its burden under LUR § 8-103:C.3.a. Accordingly, the Department’s January 11 Stop Order determining that the Property was being used commercially, thereby necessitating that Appellant apply for a Land Use Change Permit for such use, is affirmed.

### Resort

32. The LUR defines “resort” as “those establishments used for housing and providing either organized entertainment or recreational opportunities for overnight lodging, generally several nights in duration. This type of facility either provides all recreational opportunities on-site, or as part of an organized or duly licensed and/or permitted recreational activity on public or private lands in the vicinity of the inn, lodge or guest ranch.” LUR § 2-102; Rec. 107 at 10. LUR § 9-303 identifies specific standards that resorts must meet.

33. Through Campfire Ranch, guests at the Property could book Irwin Guides for backcountry skiing directly from the residence on the Property, and Campfire Ranch provided detailed mapping of ski routes from the residence.

34. Although the question of whether the Property is a “resort” under the LUR is a closer call, the Board does not find that the Department acted without credible evidence, inconsistently with the LUR, beyond its jurisdiction, or by abusing its discretion.

35. Accordingly, Appellant failed to meet its burden under LUR § 8-103:C.3.a. The Department’s January 11, 2024 Stop Order determining that the Property was being used as a resort, thereby necessitating that Appellant apply for a Land Use Change Permit, is affirmed.

### Procedural Due Process

36. “Under Colorado law, the right to use property is fully protected by the Due Process Clauses of the federal and state constitutions, but is subject to a proper exercise of the police power.” *Eason v. Bd. of Cty. Comm'rs of Boulder*, 70 P.3d 600, 605 (Colo. App. 2003). “To prove a procedural due process claim . . . [the Appellant] must show that (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.” *See id.* at 604 (internal citations omitted). “In evaluating a due process claim, a court must consider: (1) whether a property right has been identified; (2) whether governmental action with respect to that property right amounts to a deprivation; and (3) whether the deprivation occurred without due process of law.” *Id.*

#### Whether a Property Right Has Been Identified

37. Colorado “recognizes a protected property interest in a zoning classification when a specifically permitted use becomes securely vested by the landowner’s substantial actions taken in reliance, to his or her detriment, on representations and affirmative actions by the government.” *Id.* at 605-06; *see also Brown v. Chaffee Cty. Bd. of Cty. Comm’rs*, No. 22-1225, 2023 U.S. App. LEXIS 18160, at \*17-19 (10th Cir. July 18, 2023).

38. Appellant identifies the following property rights: the right to use the Property as a short-term rental, Rec. A at 11, and the right to use the home as a three-bedroom single-family residence consistent with the building permit and the certificate of occupancy.<sup>4</sup> Appellant letter dated June 3, 2024 at 6.

39. The Board finds that Appellant may have the property rights described above, but that those rights are limited as described in the building permit, the certificate of occupancy, and regulations necessary to protect the public health and safety. *See Eason*, 70 P.3d at 605-06; *see also Houston v. Wilson Mesa Ranch Homeowners Ass’n*, 360 P.3d 255 (Colo. App. 2015).

40. Both the building permit and the certificate of occupancy were premised on the representation from Appellant’s predecessor-in-interest that the unvented fuel gas heating appliances had been removed. The Department never told Appellant, by representation or affirmative action, that the Property could be used with unvented fuel gas heating appliances.

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<sup>4</sup> Because Appellant failed to include this assertion of a property right in its January 9 statement of appeal, the Board finds that this argument was waived pursuant to LUR Section 8-103:C.1, which required appellant to state the complete basis for its appeal. However, even if not waived, the Board finds that Appellant has failed to meet its burden to establish a Due Process violation for this alleged property interest, for the reasons stated within these findings and conclusions.

41. Similarly, the Appellant failed to identify evidence where the Department told Appellant, by representation or affirmative action, that the Property could be used (1) in excess of the OWTS capacity, (2) after a change in use or occupancy under the building code, or (3) for commercial or resort purposes.

42. To the contrary, the record shows that the Department expressed reservations with various aspects of LUC-23-00002 and had previously advised Appellant that the Property would have to comply with OWTS regulations and the applicable building code(s). *See Eason*, 70 P.3d at 605-606; *see also Lehman v. Louisville*, 967 F.2d 1474, 1477 (10th Cir. 1992) (finding no justifiable reliance where appellants clearly had the resources and the access to information that would have allowed them to determine whether a particular use was not allowed).

#### Whether Governmental Action Resulted in a Deprivation of Identified Property Rights

43. As described above, the Board finds that Appellant did not have a property interest in using the Property with illegal unvented fuel gas heating appliances where the building permit was issued based upon materially false information (i.e., that the unvented fuel gas heating appliances were removed). To the extent there was any deprivation of a property right by the temporary suspension of the certificate of occupancy, the deprivation lasted until the certificate of occupancy was reinstated on January 8, 2024.

44. The January 11 Stop Order and the December 28 Letter identifying a change in use under the building code do not constitute a deprivation of identified property rights. The January 11 Stop Order and the December 28 Letter do not prevent Appellant from short-term renting the property or using the property as a single-family residence consistent with the building permit and the certificate of occupancy.

45. Short-term rental or single-family use by Mr. Fink, his family, or invited or paying guests does not, in and of itself, constitute commercial uses under the LUR or a change in occupancy under the building code. This is not, however, the only way either McCloud Placer, Campfire Ranch, Campfire McCloud or Mr. Fink used the property during the relevant time period.

#### Whether the Deprivation Occurred Without Due Process of Law

46. The December 28 Letter suspending the certificate of occupancy was issued without a prior opportunity to be heard. Appellant argues that the Department should have provided pre-deprivation notice and hearing prior to suspending the certificate of occupancy. *See Rec. A at 12* (citing *Eason*, 70 P.3d at 608).

47. However, the *Eason* court recognized that there are “exceptions to the requirement of predeprivation process when quick action by the government is needed.” *Eason*, 70 P.3d at 608. As the United States Supreme Court has explained,

Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is one of the oldest examples of permissible summary action. Moreover, the administrative action provided through immediate cessation orders responds to situations in which swift action is necessary to protect the public health and safety.

*Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300-01 (U.S. 1981) (citations and quotations omitted); *see also Watso v. Colorado Dep't of Social Services*, 841 P.2d 299, 308 (Colo. 1992) (“when a state can demonstrate necessity for immediate action to protect a legitimate interest of its own, adequate post-deprivation hearings may satisfy due process standards”); *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1220 (10th Cir. 2006) (“In matters of public health and safety, the Supreme Court has long recognized that the government must act quickly. Quick action may turn out to be wrongful action, but due process requires only a postdeprivation opportunity to establish the error.”).

48. Here, the Building Official identified a serious risk to public health and safety – the existence of unvented fuel gas heating appliances, which posed a risk of death by carbon monoxide poisoning. The Building Official determined that the certificate of occupancy should be suspended prior to guests beginning to rent the property, and that quick action was therefore necessary. This determination is reasonable on the facts before this Board.

49. The Board finds that the absence of a pre-deprivation hearing did not deprive Appellant of due process of law.

50. A post-deprivation hearing may provide due process of law. *Camuglia*, 448 F.3d at 1220. Due process is a flexible concept that calls for such procedural protections as the particular situation demands. *Eason*, 70 P.3d at 607 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). When determining what procedural protections the Constitution requires, courts must weigh (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards, and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* (citing to *Mathews*, 424 U.S. 319). Here, the second and third *Mathews* factors support a conclusion that the hearing before this Board satisfies due process. Regarding the second *Mathews* factor, Appellant was represented by counsel throughout the hearing, and Appellant submitted written and oral statements with supporting facts and argument. Indeed, Appellant has failed to articulate what additional safeguards, if any, would be necessary to minimize the risk of erroneous deprivation. Regarding the third *Mathews* factor, additional

procedural safeguards would be burdensome on the public interest, particularly in a small rural county.

51. Accordingly, the post-deprivation hearing provided by this Board provides Appellant with procedural due process of law.

### Conclusion

52. In sum, Appellant has failed to meet its burden demonstrating that the Department violated Appellant’s right to procedural due process.

### **Substantive Due Process**

53. “[S]ubstantive due process ensures the state will not deprive a party of property for an arbitrary reason regardless of the procedures used to reach that decision.” *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000).

54. To establish a substantive due process violation, Appellant “must show conduct that shocks the judicial conscience, defined as deliberate government action that is arbitrary and unrestrained by the established principles of private right and distributive justice.” *Cross Continent Dev., LLC v. Town of Akron, Colo.*, 742 F.Supp.2d 1182, 1191 (D. Colo. 2010) (quotations omitted).

55. Appellant failed to come forward with evidence that the Department acted arbitrarily, with bias, or by maliciously targeting Appellant. Indeed, when asked to identify why he felt the Department was discriminating against him, Mr. Fink could not identify a reason. The Department learned of the violations based on Campfire Ranch’s own marketing.

56. Similarly, Appellant failed to come forward with any evidence that the Department’s conduct shocks the judicial conscience. The suspension of the certificate of occupancy was brief and was tied to the risk of carbon monoxide poisoning that unvented fuel gas heating appliances pose. The rest of the December 28 Letter and the January 11 Stop Order were tied to violations of Gunnison County codes. The Department’s actions were reasonable and proportionate to the violations observed. *See Miller v. Campbell County*, 945 F.2d 348, 354 (10th Cir. 1991) (finding no violation of substantive due process where a local government ordered the evacuation of homes in a subdivision after finding methane and hydrogen gasses seeping from the ground). Indeed, this Board would find it shocking if the Department did *not* enforce Gunnison County regulations.

57. Accordingly, Appellant has failed to meet its burden to establish a violation of its substantive due process rights.

## Equal Protection

58. “To establish an equal protection claim under section 1983, a party must show that the defendant acted under color of state law to create a classification that arbitrarily singled out a group of persons for disparate treatment and did not treat similarly situated people in the same manner.” *Beaver Creek Prop. Owners Ass’n v. Bachelor Gulch Metro. Dist.*, 271 P.3d 578, 586 (Colo. App. 2011).

59. Appellant presented no facts or argument to suggest that it is part of suspect class or has any constitutionally recognized trait that would merit a level of stricter scrutiny; accordingly, the Board finds that Appellant’s equal protection claim is subject to the rational basis test. *See id.*; *see also Heller v. Doe*, 509 U.S. 312, 319-320 (U.S. 1993).

60. Under the rational basis test, there is no equal protection violation “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Heller*, 509 U.S. at 320. A “classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Id.* (quotations omitted).

61. The Appellant’s presentation of evidence regarding other properties with similar characteristics to the Property does not persuade this Board that an equal protection violation occurred. *See People v. Kurz*, 847 P.2d 194, 196 (Colo. App. 1992) (“The conscious exercise of some selectivity is not in itself a constitutional violation unless the selection is based upon an unjustifiable standard such as race, religion, or any other arbitrary classification. . . . the fact that some people escape prosecution under a statute is not a denial of equal protection unless selective enforcement of the statute is intentional or purposeful”) (citation omitted); *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660, 670 (Colo. 1972) (“The right of officials to meet statutory evils as they arise and according to the manner in which they arise must always remain within the sound discretion of the statute’s enforcement officer”); *Heckler v. Chaney*, 470 U.S. 821, 831 (U.S. 1985) (“an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion”).

62. After all, the Department has to start somewhere with code enforcement, and the Department learned about the violations based principally on the advertising of Campfire Ranch. Moreover, the Department stated that other properties brought to its attention by Appellant may be subject to future enforcement action, and the Department previously permitted a different backcountry ski hut as a commercial land use. The Board does not find evidence that the Department’s enforcement actions against the Property stemmed from purposeful or intentional discrimination.

63. Moreover, there is evidence that the Property and the uses at the Property are unique. For example, Campfire Ranch is not comparable to other property managers because it offers specialized services to unique mountain properties, the Property appears on a backcountry

ski map, and the Property offers a curated adventure experience under branding as “Campfire Ranch Wash Gulch”.

64. Overall, the Board finds that Appellant has failed to present evidence of an equal protection violation.

### **Conclusion**

65. The Board therefore finds that Appellant failed to meet its burden to reverse, remand or modify the decisions of Department staff with regard to either the building codes or the LUR. The decisions of staff in relation to this Property are therefore affirmed.

66. These Findings of Fact and Conclusions of law constitute the Board’s final decision and action with regard to this Appeal.

Adopted this \_\_\_\_\_ day of July, 2024, by the Gunnison County Board of Adjustment.