Supplemental Legal Memorandum

To: County Council

From: David L. Thomas, Chief Civil Deputy

Date: July 2, 2019

Re: Trails at Jeremy Ranch Gate Appeal

1. **Introduction.**

The Chair of the Council has requested that the parties address "use" under the 1994 Snyderville Basin Development Code (the "1994 Code") and the approval of a "vehicle control gate" at Moose Hollow. We have been provided a copy of the 1994 Code and a copy of the Moose Hollow planning file by Margaret Olson, Summit County Attorney, to assist us in our arguments.

2. **"Use" is defined broadly in the 1994 Code and includes a Vehicle Control Gate.**

The 1994 Code, Section 2.2 defines "use" as follows:

> The purpose or purposes for which land or a building is occupied, maintained, arranged, designed, or intended. (emphasis added).\(^1\)

This definition is plainly broad in scope.\(^2\)

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1. Record at 000833.

2. See Evansville Outdoor Advertising, Inc. v. Board of Zoning Appeals of Evansville and Vanderburgh County, 757 N.E.2d 151, 159 (Indiana App. 2001) ("The term "use," as employed in the context of zoning, is generally described as a word of art denoting the purpose for which a parcel of land or building is utilized. "Both zoning in general and 'uses' in particular focus on how a building or parcel of land is utilized, not upon who receives the benefit from that use.”) (citations omitted)); Mayor and City Council of Baltimore v. Bruce, 420 A.2d 1272, 1277 (Maryland App. 1980) ("We agree with the trial judge that the Board erred in selecting the meaning of the word "use" which appeared to it to be most reasonable under the circumstances. In the light of the clear and unequivocal definition of "use" set out in the zoning ordinance, the Board was bound to accept that definition as the intended meaning of that word.”) (citations omitted)).
“Vehicle control gate” is not a defined term within the 1994 Code. In fact, a vehicle control gate is never mentioned anywhere in that code, and not because there are no natural locations wherein references to such mechanisms could have been found. A natural location would be in Section 5.5(d)(1)(c), which discusses “Traffic Control.” The mechanisms mentioned to control traffic include “Stop signs,” “Yield signs,” and other “Road signs,” but not vehicle control gates.  

Consequently, the best definition of a vehicle control gate is found in Summit County Code, Section 10-11-1:

Any gate, barrier, or other mechanism to limit vehicular access on or across the street.

The vehicle control gate is “designed and intended” to prevent vehicular access across a roadway. It controls traffic. That is the purpose for which the land is “occupied, maintained, arranged, designed or intended.” This is also the intent of the vehicle control gate proposed by the original developer. His stated intent was to control vehicular access to the subdivision. The application of the factual predicate (purposeful traffic control) to the definition of “use” under the 1994 Code, results in a finding that such vehicle control gate is indeed a “use.”

Appellants argued at the June 19th hearing that a vehicle control gate was a “feature,” not a “use,” asserting that the two were distinct and separate in nature. However, “the function, rather than the form of a structure,” is most relevant in defining a use under the 1994 Code. Consequently, under the broad definition of “use” in the 1994 Code, a feature can also be a use.

3. Record at 000926.

4. See Record at 000442, Legal Memorandum of County Manager, Exhibit C, Summit County Planning Commission meeting minutes, March 21, 1995, pp. 8 (Developer Ceccarelli testified: “A private road had been planned with the desire to have a gated community which would control motorized traffic.”).

5. Borthn v. Town of Sullivan’s Island Board of Zoning Appeals, 813 S.E.2d 874, 882 (South Carolina App. 2018) (“A use in the zoning context is the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained…. A determination by a zoning board that a particular purpose or activity does or does not constitute a “use” is a finding of fact.”) (internal citations and quotation marks omitted). But see Rangely Crossroads Coalition v. Land Use Regulation Commission, 955 A.2d 223, 227 (Maine 2008) (“Whether a proposed use falls within a given category contained in a zoning ordinance is a question of law.”); Southco, Inc. v. Concord Tp., 713 A.2d 607, 609 (Penn 1998) (“Whether a proposed use, as factually described in an application or in testimony, falls within a given category specified in a zoning ordinance is a question of law.”).

6. Fritts v. Carolinas Cement Co., GP, 551 S.E.2d 336, 339 (Virginia 2001) (“We agree with the trial court’s analysis that, generally, the function, rather than the form of a structure, is relevant to defining the use under the zoning ordinance.”) (emphasis added). See also Moyer v. Board of Zoning Appeals, 233 A.2d 311, 318 (Maine 1967) (“The name by which a building or use is designated or called has some evidentiary value but is not of controlling importance in determining whether such a building or use is within one of the permitted institutions or types of operations under the zoning ordinance involved. It is rather the nature of the activities or the character of the business or service to be carried on which will settle the construction to be given to the legislative language.”) (citation omitted) (emphasis added).
The evaluation of such looks to its function, not simply to the name of the physical structure. This is seen throughout the 1994 Code, Section 3.6, Schedule of Uses (the "Use Table"). For example, the Use Table lists "Local Utility Facilities" and then defines it in Section 2.2 as "minor utility structures, such as lines and poles, which are necessary to support principal development." In this example, a telephone pole is both a feature and a use. The same can be said of "Communication Facilities" within the Use Table, which expressly includes "antennae," "satellite dish antennas," and "communications tower." Again, "antennae" is a defined term in Section 2.2, "a device for sending and/or receiving radio, television or similar communication signals." A device is certainly a feature, but it's also a use in the Use Table. Yet another example is "Base Area Lifts" in the Use Table. Section 2.2 defines that as "any passenger tramway which skiers ordinarily use without first using some other passenger tramway." Again, it's a piece of mechanical equipment, which is both a feature and a use. "Trails" are a use, but they are also most definitely a feature. It's a constructed artifice. One could assert that it is an "Outdoor Recreation" use in the Use Table, but it is listed as a distinct use, separate and apart from "Outdoor Recreation." All of these "uses" speak to a broad interpretation of the definition, which is tied to function and activity. Consequently, a vehicle control gate is defined by its function, which is to control access to the subdivision — that is its use.

Further, in Crist v. Bishop, 520 P.2d 196, 198 (Utah 1974), the Utah Supreme Court dealt with the interpretation of a "use" within a Use Table. Said the Court, "where there is doubt or uncertainty as to the meaning of terms, they should be analyzed in the light of the total context of

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7. Record at 000844 – 000849.

8. Record at 000845.

9. Record at 000833.

10. Record at 000845.

11. Record at 000788.

12. Record at 000848.

13. Record at 000790.

14. Record at 000849.

15. Record at 000849.

16. The 1994 Code combines features and uses in other sections as well. Section 3.9 discusses "Special Standards Applicable to Particular Uses," and then delineates those uses to include: (a) "Signs," including billboards, (b) "Manufactured Housing," (c) "Accessory buildings," inclusive of "Patios and decks," "Private swimming pools," "Outdoor storage sheds," and "Trash dumpsters," and (d) "Recreational Vehicles." All references to these types of uses relate to their status as both features (physical structures) as well as uses. See Record at 000856 – 000885.

While the 1994 Code Section 5.10(c) does discuss privacy fences for screening and buffering purposes, such relates either to (a) the screening of incompatible uses (nonresidential from multifamily) or (b) the fencing of property lines between residential lots. See Record at 000941 – 000943. They do not relate to a vehicle control gate.
the ordinance (or statute or instrument); and also in relation to the purpose, and the background circumstances, in which they are used.” Ultimately, the Court interpreted a “school” use in Crist broadly. Here, the statutory scheme used by the County Commission is clear. “Uses shall be limited to those identified in the Schedule of Uses as a Permitted Use or Conditional Use.” To make sure there was no ambiguity, the 1994 Code went on to clarify “any use category not expressly permitted or conditional shall be deemed prohibited . . . .” This type of land use scheme is not unusual. The 1994 Code then provided a method by which an applicant could obtain a “use determination” for uses that did not appear in the Use Table, as an alternative to the use simply being prohibited. That is embodied within the 1994 Code, Section 3.3(b). Such a land use scheme is also not unusual. These provisions comprise the plain language of the 1994 Code. There is no ambiguity. The statutory scheme in Summit County provides an unambiguous standard and a procedural mechanism designed to assist applicants through the process. The definition of “use” was intentionally broad in its scope. Specified uses within the Use Table are both expansive (“Resource Extraction”) and specific (“Base Area Lifts”). Anything outside the Use Table was prohibited. A vehicle control gate is a use, which was prohibited under the 1994 Code. As a matter of law, such a vehicle control gate erected prior to 2006 cannot be a legal nonconforming use.

17. Record at 000842, 1994 Code, Section 3.5(d).

18. Id.

19. See City of Stamford v. Ten Rugby Street, LLC, 137 A.3d 781, 787 (Conn. Appeal 2016) (“Where the regulations are permissive in character . . . the uses which are permitted in each type of zone are spelled out. Any use that is not permitted is automatically excluded.”) (internal citation and quotation marks omitted); People’s Counsel for Baltimore County v. Surina, 929 A.2d 899, 914 (Maryland App. 2007) (“It must be conceded, as general rule, that, when a zoning ordinance enumerates specifically the permitted uses within a particular zone, the ordinance ‘establish[es] that the only uses permitted in the [ ] zone are those designated as uses permitted as of right and uses permitted by special exception. Any use other than those permitted and being carried on as of right or by special exception is prohibited.’”) (citations omitted); Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County, 626 S.E.2d 374, 382 (Virginia 2006) (“The 1941 Ordinance was a permissive zoning ordinance. Under such an ordinance ‘“only those uses which are specifically named are permitted, and so the burden is on the property owner to show that the use he proposes is one that is included or permitted.”’”) (citations omitted); Wright v. County of Du Page, 736 N.E.2d 650, 658 (Illinois App. 2000) (“Generally, a zoning ordinance that specifies numerous permissible uses and was intended to be specific with respect to such uses will be construed to not permit uses that are not specified in the ordinance.”) (citations omitted); Lex v. Zoning Hearing Bd. of Hampton Tp., 725 A.2d 236, 238 (Commonwealth Court of Pennsylvania 1999) (“Where a local ordinance enumerates permitted uses, all uses not expressly permitted are excluded by implication.”) (citations omitted).

20. Record at 000840 - 000841.

21. See Shamrock-Shamrock, Inc. v. City of Daytona Beach, 169 So.3d 1253, (Florida App. 2015) (“A “catchall” or “similar use” provision in an ordinance allows certain uses that are not otherwise delineated in the comprehensive zoning ordinance; however, the “catch all” or “similar use” provision should not be used where, like here, the particular use is described elsewhere in the LDC.”) (internal citation omitted).

22. Rogers v. West Valley City, 142 P.3d 554, 556 - 557 (Utah App. 2006) (“To guide our interpretation on this issue, we first turn to the ordinance’s plain language and need not consult legislative history to determine legislative intent unless the ordinance is ambiguous.”).
3. There is no evidence of an approval of a vehicle control gate in the Moose Hollow planning file.

There is no express approval of a vehicle control gate within the Moose Hollow planning file. Further, there is no reference to a vehicle control gate in the CC&Rs for the Moose Hollow development, which CC&Rs were contained within the Moose Hollow planning file. The CC&Rs were contemporaneous with the approval of the subdivision plat and very detailed, but contained no reference to a vehicle control gate. Further, the vehicle control gate is not contained on the subdivision plat in the Moose Hollow planning file, nor was it ever discussed by either the planning commission or the county commission.

In fact, Planning Commissioner Hillyard, who was opposed to the vehicle control gate here and voted against it at the planning commission, had no opposition to the Moose Hollow development a year earlier in 1994. It is a reasonable conclusion that had there been a proposed vehicle control gate, Planning Commissioner Hillyard would have voiced opposition to such and voted in opposition, just as he did with the present case.

The most that can be said of a vehicle control gate was made in a one-off comment by the developer, but by the Park City Fire Service District (the “Fire District”) in its letter to the County, dated March 3, 1994, wherein the fire chief stated:

The Fire District requests that before any entry control devices are installed which may or may not impede emergency services response to Moose Hollow, that the Fire District be involved in the review and selection of such devices.

Consequently, it appears quite clearly that no vehicle control gate had been approved by the Fire District. In fact, the Fire District placed Moose Hollow on advanced notice that if it proposes in the future a vehicle control gate, said gate must be reviewed and approved by the Fire District. Notwithstanding this comment by the Fire District, there is nothing in the actual County approval which references such a gate or excuses Moose Hollow from obtaining proper permits for such through the County.

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23. Record at 000568 - 000770.

24. Record at 000575 - 000610.

25. Record at 000611 - 000616; 000683; 000698; 000758 - 000759.

26. Record at 000684 - 000724; 000727 - 000759.

27. Record at 000713.

4. **Conclusion.**

The 1994 Code is unambiguous. Uses that are not listed on the Use Table are prohibited. The definition of “use” within the 1994 Code is broad. It encompasses features which are also uses. A *vehicle control gate* is both a feature and a use. That the County would view it as such is clear by the plain language of the 1994 Code and by subsequent action of the County in 2006 when it officially inserted *vehicle control gate* into the Use Table as a conditional use.\(^{29}\) In 1994, a *vehicle control gate* was not listed in the Use Table. Consequently, in 1995 and 1997, a *vehicle control gate* was a prohibited use. It could not legally have been approved by the County Commission through a preliminary subdivision plat in 1995 or a final subdivision plat in 1997.

Further, there is no precedent for the County approving a similar *vehicle control gate* in 1994 at Moose Hollow. The absence of any type of approval for a gate at Moose Hollow is clear from the Moose Hollow planning file.

For these reasons, and those set forth in the Manager's Legal Memorandum, dated May 1, 2019 (the **Legal Memorandum**), and the Manager's Determination of Legal Nonconforming Use, dated March 1, 2018 (the **Manager's Decision**), the Council should deny the Appeal (defined in the Legal Memorandum) and affirm the Manager's Decision.

\(^{29}\) Summit County Code, Section 10-2-10.
July 5, 2019

Via E-mail Transmittal

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Re: Supplemental Legal Memorandum Regarding Appeal of the County Manager’s Determination of Nonconforming Use Regarding a Vehicle Control Gate at The Trails at Jeremy Ranch

Dear Council:

The Trails at Jeremy Ranch (the “Trails”) respectfully submits this supplemental legal memorandum as requested at the hearing held on June 19, 2019 wherein the Summit County Council (“Council”), sitting as the appeal authority, requested additional evidence and briefing regarding the 1994 Syderville Basin Development Code (the “1994 Code”) and the Moose Hollow planning file and related documents. After argument and discussion at the hearing on
June 19, 2019, the hearing and matter was continued until July 10, 2019 so that additional evidence could be gathered. The additional evidence requested by the Council is relevant to whether a gate restricting access to private roads in the Trails was expressly prohibited by the 1994 Code and whether the County engaged in a similar approval process for the gate installed at the Moose Hollow subdivision. The Trails also raises objections to this process and submits that the County should also consider additional relevant information relating to the County’s past interpretation of this issue.

A. THE 1994 CODE DOES NOT DEFINE OR RESTRICT A GATE ON PRIVATE ROADS NOR IS A GATE APPROPRIATELY CLASSIFIED AS EITHER A “USE CATEGORY” OR A “LAND USE” THEREIN.

The County Manager relies upon Section 3.5(d) as the basis for its position that the Trails’ gate (the “Gate”) is expressly prohibited by the 1994 Code. See County Manager Memorandum, May 1, 2019 at pg. 3, ¶3. Section 3.5(d) provides in relevant part as follows:

“Limitation on Uses. Uses shall be limited to those identified in the Schedule of Uses as a Permitted or Conditional Use. In addition to those uses expressly prohibited within a zoning district, any use category not expressly permitted or conditional shall be deemed prohibited . . . .” (emphasis added). R. at 000842.

The County’s argument has focused on whether the “Gate” is a “use”, but the correct question is whether the Gate is a “use category.” Section 3.5(d) only prohibits “uses expressly prohibited within a zoning district” or a “use category” not expressly permitted. The Manager, as he must, relies upon the “not expressly permitted” language because a gate is not a “use” that is “expressly prohibited.” Section 2.2 (61) of 1994 Code defines a “Land use Category” as “the applicable land use categories as set forth in the Land Use Element of the General Plan, as follows:

Critical/Sensitive Lands
Country Side
East Canyon Creek Conservancy Corridor
Enhancement Corridors
Low Density Residential
Medium Density Residential
High Density Residential
Special Residential
Neighborhood-Commercial
Service Commercials
Resort Commercial
Light Industrial"

The “use categories” defined by the 1994 Code are broad categories of land uses, not

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1 In order for the County Manager to overcome the presumption in favor of the Gate, “that presumption can only be rebutted by a regulation which plainly restricts the land use.” See County Legal Memorandum, May 1, 2019 at pg. 2, ¶1.
specific or narrowly defined “uses”. The Manager does not even attempt to argue that a gate located on a private road is a “use category” as referenced in Section 3.5(d) or defined by Section 2.2(61). Consequently, according to the plain language of the 1994 Code, the Gate would only be prohibited if it qualified as an unlisted “use category” (which it is not) or a “use expressly prohibited within a zoning district” (which it is not). Said another way, “uses” are only prohibited if expressly prohibited, but “use categories” are prohibited unless specifically permitted. Because the Gate is not “plainly restricted” by the 1994 Code, the Manager has failed to overcome the presumption in favor of the Trail’s Gate.

Moreover, even if the Manager was correct that Section 3.5(d) of the 1994 Code expressly prohibits “uses” that are not “expressly permitted” and not just “use categories” (which it does not), the Gate is not a use similar to those uses identified in Section 3.6 – Schedule of Uses and Bulk Regulations by Zoning District. See R. 000842-849. The Schedule of Uses contains uses consistent with implementing the land use policies of the General Plan and Land Use Element - such as in a Low Density Residential Zoning District, denying hotels, mixed use retail, ski runs, and base area lifts, for instance. These uses regulate activities, operations, or purposes that are appropriate in a particular parcel or tract of land and ensure that a low density residential district is not used for commercial uses and maintains the characteristics of a low density zone. Installing the Gate on the Trails’ private road does not change the “use category” or “use” as the prohibited uses would. Moreover, nowhere does Section 3.6 prohibit installation of a gate on a private road within a residential zone. Therefore, the 1994 Code did not require a use determination process in accordance with Section 3.3(b) because only those uses expressly prohibited within a zoning district require such a determination.

Similarly, comparing the “Low Density Residential Permitted and Conditional Uses” chart in the 1994 Code (the Appendix (R. 001020)) reinforces the conclusion that a gate is not the type of “use” that was considered to be a “use” for which the “purpose of land” was “occupied, maintained, arranged, designed or intended.” See R. 000833.

2 The 1994 Code defines “Use” as “[t]he purpose or purposes for which land or a building is occupied, maintained, arranged, designed, or intended.” R. 0083. The “use” for which the Trails subdivision is occupied is for low density residential use. A gate does not change that use. While a “gate” is not defined in the 1994 Code, a “fence” is defined as “[a] man-made barrier of any material or combination of materials erected to enclose or screen areas of land.” R. 000800. But fences are not identified as a permitted use within a low-density residential zone. If the Manager’s argument was consistent, he must conclude that all fences in low density residential zones are prohibited because they are not expressly permitted.

3 While the 1994 Code regulates the types of barriers and traffic control devices that can be installed on public roads, there is no regulation on erecting a gate on a private road. See R. 000926.

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LOW DENSITY RESIDENTIAL PERMITTED AND CONDITIONAL USES

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R. 001020.

The only reasonable interpretation of the 1994 Code that harmonizes all of its provisions and explains the silence from the County staff during the Trails' approval process is that the Gate is a feature or an amenity to the Trails' subdivision – not a separate “use” distinct from the low density residential use for which it was designated.5

4 During the Trails and Moose Hollow review and approval process, there is nothing in the record to suggest that County staff ever raised the issue of an entry gate being a land use that would have triggered a use determination pursuant to Section 3.3(b). If it was so clear that entry gates were prohibited by the 1994 Code as the Manager now asserts, surely one of the County staff or attorneys who reviewed the application and participated in the process would have raised it.

5 This interpretation has also been adopted by the County Attorneys’ office as recently as 2013. In 2013, the Red Hawk development made a vested rights argument under a consent agreement as to why it should be allowed a gate, the question of whether a gate qualified as a “use” was opined upon by Ms. Jami Brackin. The exchange is recorded as follows in April 21, 2013 BCC minutes:

Deputy County Attorney Jami Brackin explained that the Snyderville Basin Development Code does define “use” as the purpose or purposes for which land or a building is occupied, maintained, arranged, designed, or intended. She disagreed with Mr. Tesch’s representation that a gate is a use, as it does not meet the definition. She believed a gate is an amenity, which is not necessarily vested under the provisions in the consent agreement. She confirmed that the uses are vested under the conditions of the consent agreement, and that is why the agreement is written as it is. She noted that the consent agreement says that nothing in the agreement shall limit the future exercise of police powers and change of the laws. It specifically states that the County can change the laws as they may apply to the agreement and especially after the expiration of the agreement, that would allow the County to use its police powers to make the rules over gates and say whether they are allowed or not, which is not in conflict with vesting. She noted that gates were not allowed, except by specific provision, until 2006. (emphasis added).

While these minutes were provided in an email to the Council on June 20, 2019, Roger Armstrong requested that all of the communications by both counsel that day be stricken. The Council should consider these minutes as they are clearly relevant to the County's prior interpretation of the same “use” definition as it applies to a gate and it is within the Council's authority to request and consider additional documentation that is relevant to the question at hand. The County Attorney’s office cannot be the final arbiter of what evidence the Council reviews and considers especially when it involves contradictory positions of this very issue.

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Finally, there is nothing in the 1994 Code requiring the BCC, as part of the preliminary subdivision plat review or final approval process, to address or comment on concerns raised by County staff. Further, there is no requirement that discussions must be documented in detail. In the June 26, 1995 Preliminary Subdivision Plat presentation to the BCC there were five issues the staff recommended BCC discuss. There is no documentation that any of these five issues were discussed. According to the Manager’s position, unless there is affirmative evidence in the record that the BCC actually discussed and rendered a decision on an issue raised by the staff, that issue must have been rejected. Instead, it is clear from the minutes that the BCC approved the Preliminary Subdivision Plat on June 26, 1995 on condition that the project comply with all of the conditions of approval as forwarded by the Planning Commission (March 21, 1995) wherein the Planning Commission specifically discussed and voted to remove the gate restriction. R. 000055-56.

B. THE MOOSE HOLLOW SUBDIVISION APPROVAL PROCESS PROVES THAT THE COUNTY DID NOT CONSIDER A GATE TO BE A LAND USE OR NECESSITATING A LAND USE DETERMINATION.

The Moose Hollow file requested by the Council has no discussion in either the Planning Commission or the BCC with respect to a private entry gate. The word “gate” does not even appear in the file or in the drawings produced for Moose Hollow. The absence of any substantive discussion in the planning file for the Moose Hollow subdivision proves that a private entry gate was not a prohibited land use at the time, otherwise the staff would have surely noted the use determination process and the need to document the approval process for an entry gate. Instead, nowhere in the Moose Hollow file is there any discussion about whether a private entry gate is an appropriate land use or any type of “use determination” the Manager asserts would have been necessary. However, we know that an entry gate was approved and installed by Moose Hollow, because the Fire District issued a request to be consulted on the entry control device. R. 000646 (Fire District Letter to County, March 3, 1994). The Moose Hollow gate was also referenced in the discussion at the Planning Commission for the Trails’ application on March 21, 1995. R. 00034. (“It was noted that Moose Hollow was also approved to be a gate community...”) The minutes of the Planning Commission discussion regarding the Trails’ Gate also questioned why a gate would be appropriate in Moose Hollow and not the Trails. R. 000036. The lack of a specific, documented approval process for the Moose Hollow gate proves beyond any reasonable doubt that the Trails’ approval was consistent with the process in place at the time, the staff’s understanding and interpretation of the 1994 Code, and level of input that would have been expected by the Fire District. R. 00036 (March 21, 1995 Planning Commission Minutes) (“Staff explained that they were not aware of a clear reason why the Fire District supported private gates in Moose Hollow but not in this development. The applicant felt he had alleviated many of the Fire District’s concerns”)

Finally, no building permits were included in the Moose Hollow file for the construction of its entry gate. Consequently, to avoid any doubt, the Trails filed a GRAMA request with the County on Thursday, June 20, 2019 (15 days ago) requesting any building permits issued to Moose Hollow for the construction of its gate. As of the date of this filing, the County has not responded to the Trails’ GRAMA request. Either no building permit was ever approved by the County because it was not required at the time, or the permit has been lost. The absence of
a building permit for the Moose Hollow gate does prove, however, that lack of a structural building permit for the Trails' Gate should not guide this Council's decision. The inability of the County to locate a structural building permit is not proof that the gate was illegally installed especially given the existence and issuance of at least one building permit for the Trails' Gate. Rather, the lack of any building permit for the Moose Hollow gate is evidence that it was either not required at the time because a gate was not considered a "structure" or a building permit was applied for and issued but it cannot be found.

C. THE TRAILS IS ENTITLED TO HAVE A FAIR HEARING WITH ITS DUE PROCESS RIGHTS PROTECTED.

This is a quasi-judicial proceeding where the Council has designated itself as an appeal authority. Procedural due process requires that the Trails' be given a fair hearing. See Utah Code Ann. 17-27a-706(2) ("Each appeal authority shall respect the due process rights of each of the participants."); Utah Const. art. I, § 7. ("No person shall be deprived of life, liberty or property without due process of law."); Dairy Product Services v. City of Wellsville, 13 P.3d 581, 593 (2000) (owner entitled to due process protections, including a fair hearing by an impartial decision maker); V-1 Oil Co., v. Dept of Env. Quality, 939 P.2d 1192, 1197-98 ("procedural due process applies to adjudicative government decisions").

Mr. Thomas has at times during the proceeding provided not only legal argument on behalf of the Manager, but also purported to provide factual testimony. For instance, Mr. Thomas stated that he began working at the County in 1996 while the Trails' application was still pending and explained to the Council how the County interpreted and handled matters during relevant periods. Mr. Thomas also explained to the Council that he was one of the persons who signed the Trails' subdivision plat and at one point he instructed the staff to not take enforcement action because of what he concluded was a statute of limitations issue. R. 000108 (November 13, 2012 Minutes). He was also one of the attendees at the final BCC meeting on April 21, 1997 where the minutes reflect that the BCC reviewed construction drawings and stated that all documents have been reviewed and approved by the County Engineer and all requirements of Synderville Basin Dev. Code have been met. R. 000058-60. Mr. Thomas, however, cannot answer questions about what was said at that hearing or what was discussed at the County level about this application or the Gate, because he cannot act as both a fact witness and legal counsel in this case. See Rules of Professional Conduct, 3.7 ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness..." unless the testimony relates to an uncontested matter...)

In addition to being a material and necessary fact witness on contested matters, Mr. Thomas also has an established attorney-client relationship with the Council. Consequently, the Council looks to Mr. Thomas for legal advice and representation in other matters. See, e.g., Citizens for Alignment vs. Summit County Council, Case No. 110500840 (Mr. Thomas representing the Council). The Trails is entitled to have the appeal authority who does not present a significant risk of impermissible bias. Here the risk is substantial because the Council is hearing legal argument from its own attorney. See V-1 Oil, at 1197 ("Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decision making.")
(citations omitted). The problem is highlighted by the email exchange on June 20, 2019 when an objection was raised to Mr. Thomas providing the Council with factual testimony. Mr. Thomas responded by accusing counsel of impugning his integrity. To be clear, there was absolutely no intention to attack Mr. Thomas' integrity. Mr. Thomas is a fine lawyer and represents the County well. Nevertheless, the Trails concluded that it needed to raise an objection out of fairness and for a potential appeal to Third District Court. Regardless, some members of the Council likely do not appreciate what Mr. Thomas described as an attack on his integrity because he has a long-standing attorney-client relationship with the Council. Normally this type of objection would have no impact on the decision maker because he or she does not have an existing attorney-client relationship with the counsel appearing before them. In this case, however, the impartiality of the decision maker is reasonably called into question because of an existing attorney-client relationship and the likelihood that some members of the Council (even if unintentionally or subconsciously) may be more inclined to accept arguments advanced by their own attorney.

The Trails submits that given the continued involvement of Mr. Thomas in these proceedings its due process rights have been violated because of the likelihood of prejudice and impermissible bias. The Council should recuse itself and designate a separate appeal authority to decide this matter.

CONCLUSION

Unless the Council determines that it will recuse itself as the appeal authority, the Trails respectfully requests that the Council find that the Gate is a legal nonconforming use, or alternatively that the County is estopped by virtue of the equitable doctrines of estoppel and/or laches.

/s/ Justin P. Matkin
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Encl.
cc: Client