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APPEAL HEARING
ZION WEST PROPERTIES, LLC

Taken at The Canyon Community Center
126 Lion Boulevard
Springdale, Utah

on September 27, 2022
At 10:04 A.M.

Reported by: Karen A. Haworth, CCR, RPR, CM, CRR

A P P E A R A N C E S

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ALSO PRESENT:

LUKE WILSON
Zion West Properties, LLC
Applicant/Appellant

DARCI CARLSON
Springdale Town Clerk

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WITNESS(ES) PAGE NO.

OPENING STATEMENT

By: Mr. Pattison 5

APPLICANT/APPELLANT STATEMENT

By: Mr. Neilson 6, 45,
53

RESPONDENT STATEMENT

By: Mr. Hardman 29, 52

E X H I B I T S

NO./DESCRIPTION PAGE NO.

NONE

P R O C E E D I N G S

* * *

(Time noted: 10:00 a.m.)

(COMPUTER-GENERATED VOICE: Recording in progress.)

ADMINISTRATIVE HEARING OFFICER: Good morning.

This is a public hearing. We have two matters on the agenda for today.

The first is an appeal hearing, and the second is a variance hearing.

We'll start with the appeal hearing, which is an appeal from a decision of the Springdale Planning Commission to deny a proposed design development review application for a building located at the rear of parcel S-102-B-4-A or 438 Zion Park Boulevard.

The appellant/applicant is Luke Wilson, for Zion West Properties, represented by Darren Neilson, who is here, and the -- the respondent is the Springdale Planning Commission, represented by Greg Hardman.

I think we had discussed in our -- in our pre-meeting that I would give each side around 30 minutes to present their case, and then give -- give

1 the appellant, Zion West Properties, about ten or 15
2 minutes of -- of rebuttal.

3 So, Mr. Neilson, please proceed.

4 MR. NEILSON: Yeah. Thank you.

5 I -- honest, I don't think I'm gonna need all 30
6 minutes.

7 (Mr. Neilson's microphone difficulty rectified
8 by Darci Carlson.)

9 MR. NEILSON: Yeah. Darren Neilson, for the
10 record.

11 And, you know, I think everybody will be happy
12 to know that I don't think I'm gonna take or need all
13 30 minutes. I believe our appeal was thorough and --
14 and long and lengthy, and I don't think it helps
15 anybody to sit and rehash everything in there.

16 I will -- I would like to address three issues
17 that were brought up in Springdale's reply brief. I
18 don't know if that what -- what it's called, but
19 that's what I've been calling it.

20 The first is the issue of slope versus
21 landslide. Somewhere along the line or somewhere
22 along the way, these two words got separated. And
23 Springdale started looking at both slope and, also,
24 landslide.

25 But, in order to measure a landslide, you

1 measure the slope's stability. They are one and the
2 same thing. All right?

3 And specifically, in code section 10-15F-8A,
4 which -- which discusses the reports that must be
5 provided by applicant or the specified hazards,
6 section A is entitled Landslides. And if you -- and
7 indulge me for a little minute, we're gonna to read
8 specifically from it.

9 ADMINISTRATIVE HEARING OFFICER: Let me -- let
10 me catch up with you. You're in 15-F-8, subparagraph
11 A, Landslides?

12 MR. NEILSON: Yes.

13 ADMINISTRATIVE HEARING OFFICER: Okay. Go
14 ahead.

15 MR. NEILSON: And then it says that -- and I'm
16 scanning down about halfway through. It says that,
17 you know, "requires a submittal and review of,"
18 number 1, "a site-specific geological hazard
19 investigation and report discussing landslide
20 hazards."

21 And in the next sentence: "The applicant must
22 retain a qualified engineering geologist and
23 geotechnical engineer to perform the slope stability
24 analysis. Considering the complexity inherent in
25 performing slope stability analyses, additional

1 efforts beyond the minimum standard presented herein
2 may be required at some sites to adequately address
3 slope stability."

4 And I bring that up because -- for two reasons.

5 Number one, each report is -- is site-specific.
6 Right? So, it is discussing this site, you know,
7 what -- what we've been -- what we've -- what has
8 been defined as the site.

9 It doesn't take into effect, you know, adjacent
10 parcels or other parcels, you know, next to or around
11 or further down. I mean, the analysis is this site.
12 Okay?

13 Then furthermore, in order to determine whether
14 a landslide is present at this site, the way the
15 experts do it is to look at slope stability, which
16 the reports have said that -- have been provided to
17 the approval board and to this meeting, state that
18 there is slope stability. We meet the definition of
19 slope stability. Therefore, there is no risk of a
20 landslide.

21 And, in fact, in Springdale's -- in Springdale's
22 reply, it says that -- and this is on Page 16 of 26.
23 It states that -- this is the middle paragraph --
24 "The suggested mitigation measures submitted by
25 applicant's experts do not mitigate every identified

1 geological hazard to an acceptable reasonable level."

2 And then it states: "Rockfall, slope,
3 earthquake, and ground shaking can be mitigated to a
4 reasonable extent, but the risk of landslide cannot."

5 That is simply not a true statement.

6 The first part is. "Rockfall, slope," which, by
7 the way, let's -- let's say what it really says.

8 "Rockfall, slope and landslide, earthquake, and
9 ground shaking can be mitigated to a reasonable
10 extent."

11 Landslide and slope are one and the same thing
12 or you measure landslide by slope.

13 And the -- the analysis done by Landmark states
14 that the -- the site is stable.

15 In fact, the -- in fact, the improvements to
16 this -- to the land make it more stable.

17 The -- the -- the building -- or the property is
18 -- is more safe if the planning committee would be
19 allowed -- or would allow the appellant to develop
20 the property as he sees fit.

21 The second issue that I would like to discuss is
22 the issue of --

23 Oh. Let me -- let me -- let me back up a little
24 bit, tying a bow on this. Right?

25 This is --

1 If --

2 To have --

3 Let's see here. The definition of arbitrary or
4 capricious, right, is -- is --

5 Let's see here. What did we say in our brief?
6 I should have had this earmarked. I apologize.

7 But, the -- the fact of the matter is, is that
8 arbitrary and "contritious" -- capricious means that
9 there is no -- make -- making a decision that is not
10 founded in the facts. All right? And that's what's
11 happened here.

12 Either -- either the site is stable and,
13 therefore, there is no landslide issues or what --
14 what may be happening and what I think is also
15 capricious and arbitrary is that the Planning
16 Commission is taking properties outside of the
17 site-specific report and projecting them onto this
18 report, which is not required by the geological
19 hazard, not required by the application, wasn't a
20 part of the analysis done by any parties involved.
21 And any decision based on that would be, by its
22 definition, arbitrary and capricious.

23 ADMINISTRATIVE HEARING OFFICER: Let me -- let
24 me ask you while you're there.

25 MR. NEILSON: Yeah.

1 ADMINISTRATIVE HEARING OFFICER: Didn't Landmark
2 -- and I'm looking at -- at the record, Page 24 --
3 didn't Landmark compare this site with -- with other
4 recently developed sites in the town of Spring --
5 Springdale to come to its conclusion about undue risk
6 of public safety?

7 It stated, "While" -- "while the site does pose
8 risks and challenges, we do not feel that this site
9 poses an undue risk to public safety when compared to
10 other recently developed sites in the town of -- of
11 Springdale."

12 So, isn't that what -- what the engineer was
13 doing?

14 MR. NEILSON: No, it's not.

15 ADMINISTRATIVE HEARING OFFICER: Okay.

16 MR. NEILSON: I -- I understand that's what it
17 says, that's -- that's what he wrote, but if we look
18 at the actual report, right --

19 Let's look at -- let's look at the geological
20 report done by Western. Right?

21 Western lays out and says, as required under the
22 -- under the code, it says there are four listed
23 potential hazards that we need further analysis on.
24 Right?

25 And this is -- this is --

1 They have a nice chart on it. It's cited in
2 Springdale's brief. They've got a nice picture of
3 it. I forget what page.

4 But, the four issues were earthquake, landslides
5 and slopes -- and again, let's pay attention to the
6 fact that they are connected, they are together,
7 landslides and slopes -- rockfalls, and problem soil
8 and rock. Okay? Those are the four potential issues
9 with this site.

10 Appellants then went out and -- and hired
11 Landmark to do these additional research or
12 additional reports. And as to earthquakes, they
13 said, look, we live in a very seismic -- seismic
14 area. The town code has enough safe laws that, if
15 you follow the town code, then we don't think the
16 earthquake's going to be an issue.

17 The landslides and slopes issue is to say -- you
18 know, they recommended a stability study. And then
19 again, this is -- this was -- this is back to kind of
20 my first point, which is, we did a stability study,
21 and what we found is, is that, you know, not
22 intuitively, but a -- a higher number is a good thing
23 for an FS score.

24 And the FS score -- let me find it --

25 All right. The higher the FS value -- and this

1 is on Page 3 of our -- of our appeal brief. "The
2 higher value indicates a greater resistance to
3 failure."

4 Factor of Safety is what it's called for slope
5 ability.

6 The industry standard is anywhere from 1. -- at
7 least 1.4 to 1.5. Right?

8 On the west/east slope, we had a Factor of
9 Safety score of 1.62, above the recommended minimum.
10 And then on the north/south slope, we had a Factor of
11 Safety score of 2.24, which, again, is -- is -- is
12 above the minimum or industry standards.

13 Landmark found that it was stable.

14 Furthermore, they found that the mitigations
15 that they -- that they suggested and that Springdale
16 could require appellant to do would -- would raise
17 that FS score to make it even more safe.

18 So, the other issue was -- too many books here.
19 The other issue was rockfall, which all sides of --
20 of experts have agreed that rockfall is not an issue
21 and that there are, despite --

22 In -- in Terracon's reports early on, he -- they
23 pare it back to say rockfall is not an issue, and at
24 some point along the line, there was a -- a
25 misstatement that says rockfall is an issue.

1 But, the reports from Landmark and from -- from
2 Landmark state that -- that rockfall isn't an issue
3 and that there are some boulders that need to be
4 removed, but they can do that during construction.

5 And then the -- the final issue was problem soil
6 and rock. St. George or southern Utah, as -- as we
7 all know, has a clay problem. And there are
8 engineering tools for the appellant to overcome that.
9 And there was recommendations to do so, and it was
10 about directing water away from the -- from the site,
11 which appellant would be willing to do and the town
12 commission could -- could require.

13 Did that answer your question?

14 ADMINISTRATIVE HEARING OFFICER: Not -- not
15 entirely. I mean, I -- I -- I guess it goes back to
16 your answer that -- that yeah, that's what it's --
17 back to -- to Page 24, yeah, that's what it says, but
18 that's -- that's not what it means, if -- if I
19 understood your -- your answer correctly.

20 I mean, it just seems that -- that Landmark is
21 -- is -- you know, if we just take this as its -- as
22 its final conclusion, that it's safe -- or -- or not
23 necessarily that it's safe, that it just poses a
24 similar risk to other properties.

25 MR. NEILSON: Yeah.

1 ADMINISTRATIVE HEARING OFFICER: And -- and
2 isn't the Planning Commission entitled to look at
3 that and say, well, you know, we adopted this new
4 ordinance to -- you know, regardless of the risk
5 everywhere else and what has historically happened,
6 we adopted this new ordinance to get away from these
7 types of risks and impose these risks on -- on --

8 MR. NEILSON: Let me --

9 ADMINISTRATIVE HEARING OFFICER: -- the
10 community.

11 So...

12 MR. NEILSON: Let -- let me -- let me flesh this
13 out a little bit.

14 ADMINISTRATIVE HEARING OFFICER: Please.

15 MR. NEILSON: And -- and -- and one of the
16 problems that we have and -- and, frankly, the city
17 has, too, is -- is that we're kind of going outside
18 of the scope of what was presented. I --

19 My client, Mr. Wilson, has -- is -- is a
20 developer down here. He's done many, many
21 developments. He knows lots of people and knows lots
22 of -- of developments.

23 Part of this was, is that there are, currently,
24 approved developments that were approved post
25 geological hazard amendment that are at a higher risk

1 than ours. Right?

2 But -- but, my problem in bringing this up is
3 that, yeah, absolutely, the -- the town could --
4 could say, hey, we are entitled to look at it. But,
5 it -- frankly, it was our decision -- it's -- it's --
6 it's our position that -- that, you know --

7 The problem being is, is the town could have
8 looked at it. They didn't. And -- and therefore,
9 it's hard to discuss it here on an appeal when the
10 record didn't -- and the city didn't look at it. We
11 don't have the city analyzing these other
12 developments. We don't have references to which
13 these developments are.

14 And so, while we think that it actually cuts in
15 our favor, knowing or understanding what an appeal
16 is, we have not fleshed that out, because, you know,
17 inevitably, it would require evidence outside of what
18 was presented to the commission.

19 And then the -- the final bit is, is I -- I
20 would -- I would, again, point back to, while this is
21 a summary of the report, a -- a -- a better analysis
22 of it is to actually look at the report itself.
23 Right? Which, again, pointing back to the various
24 issues that -- that they -- that they pointed.

25 And this brings me to my next issue that I

1 wanted to talk about, which is that of -- the issue
2 of unreasonable risk. Okay?

3 Springdale's brief and -- and a theme of the
4 Planning Commission's meeting was the statements that
5 this would be -- pose -- pose an unreasonable risk.

6 What is not addressed in both the brief and in
7 the Planning Commission's record is that of what
8 reasonable risk is.

9 We've -- we've thrown out this it's
10 unreasonable, it's unreasonable, unreasonable, but we
11 all know -- most of us here are attorneys. We all
12 know that there's risk in everything and it is
13 impossible to fully mitigate risk.

14 So, what is reasonable risk? And the code tells
15 us what reasonable risk is. And reasonable risk is
16 -- and this is section 10-15F-2. And it says that:
17 "Acceptable or reasonable risk" is, "No loss or
18 significant injury to occupants, no release of
19 hazardous or toxic substances, and minimal structural
20 damage to buildings or infrastructure during a hazard
21 event, allowing occupants egress outside."

22 Somewhere along the line at the Planning
23 Commission, they -- they substituted their own
24 definition of reasonable risk, and their own
25 definition was no risk at all equals reasonable.

1 Right?

2 That -- that total mitigation is what's required
3 under the law. And that's simply not true.

4 And -- and to apply that standard is, you know,
5 capricious and arbitrary.

6 The final thing that I want to talk about is
7 that of Terracon's role and the record provided to
8 the city. Right?

9 And they --

10 We -- we believe that -- we believe that --

11 Again, understanding that the ombudsman's
12 decision in Neilson adversary opinion is not binding
13 on -- on -- before this tribunal, we -- we believe
14 that it is helpful in reviewing this.

15 If you read --

16 Going back to the code, there is -- there is
17 some disagreement between appellants and the city as
18 to the role of Terracon and -- and what -- and what
19 the advisor is to do. Right?

20 And in -- in section 10-15F-9A, it says: "If a
21 geological hazard investigation report is required
22 under section 10-15F-D5, the applicant shall prepare
23 and submit a geological hazard investigation report.
24 It may be combined with geotechnical and/or other
25 geological reports that meet the requirements of this

1 chapter with an" -- "with an application for a
2 subdivision" development. We'll just call it a
3 development. Okay?

4 So, number one, it's a geological hazard report.
5 It can be combined with geotechnical and geological
6 reports.

7 This is exactly what we have. Right? We have
8 the appellant/applicant getting a geological report
9 from Western, requiring additional geother --
10 geotechnical and geological reports that we got from
11 Landmark. And that is the report. It's a singular
12 report. Okay?

13 In subsection E of the same section, it says:
14 "Springdale will review any proposed land use that
15 requires preparation of a geological report under
16 this chapter to determine compliance with the
17 standards as well as the other standards referenced
18 in this chapter."

19 Subsection 2 does say that, "including a third
20 party reviewer." And I would bring the attention to
21 "reviewer" as -- as -- as a definition.

22 And then 3, subsection 3: "Springdale will
23 determine whether the proposed land use or
24 development, as documented by the report, complies
25 with the following standards," okay, as documented by

1 the report.

2 If you look at the report, the report meets all
3 of the standards.

4 Terracon's own expert says it meets all of the
5 standards. Terracon then opines --

6 You know, first off, Terracon says, hey, by the
7 way, I only reviewed the report. You can't -- you
8 can't rely on anything I say as to any of this, but
9 the report looks good, but, hey, let me also tell you
10 that, hey, this is kind of near an old landslide and
11 I'm -- and -- and I'm -- and -- and that's a
12 mitigation risk we can't have, that we can't
13 mitigate.

14 Nowhere did Terracon make a report. Nowhere did
15 they review the site.

16 This is -- this is, you know, equivalent of
17 hearsay evidence that was provided to the -- to the
18 commission.

19 And I understand that the city's gonna stand up
20 here and say, well, hey, look, the commission can
21 look at whatever they want. Right?

22 And that's probably true.

23 But, the problem is, is that the capricious and
24 arbitrary standard that we must then always go back
25 to is that the city put too much weight in Terracon's

1 opinion.

2 And, in fact, in the report, they reference --
3 the Planning Commission, in the minutes -- they
4 reference the Terracon report. They don't call it an
5 opinion, they don't call it a letter, they don't call
6 it a recommendation. They call it a report.

7 So, the Planning Commission members relied on
8 Terracon's -- Terra -- Terracon's, you know -- what's
9 the word I'm looking for -- relied on Terracon's --

10 LUKE WILSON: Review.

11 MR. NEILSON: -- review.

12 I was gonna add a little bit more to it, but
13 we'll just -- we'll say review.

14 And they relied upon it as if it was a competing
15 report, with the same rigors, the same analysis, and
16 the same requirements that the appellant had to do.

17 In -- in -- in relying on that, number one, we
18 would argue, number one, they shouldn't have even
19 relied on it. It shouldn't even have come in. Okay?

20 Because the -- the statute says, you know, they
21 have to rely on the report. Period. Okay?

22 If the city says, oh, no, no, no, we -- it's
23 expansive, we can rely on whatever we want, then I
24 would argue that they -- they put way too much weight
25 on a one-off statement by Terracon that, frankly --

1 frankly, was not even backed up by the report itself.

2 ADMINISTRATIVE HEARING OFFICER: And the one-off
3 statement you're referring to I -- I assume, is the
4 email correspondence where Mr. Chestnut is referring
5 to this as an above average risk for residential
6 structure? Page 21 of the record?

7 MR. NEILSON: Yeah.

8 And actually, it's not. It is -- it's actually
9 Page 26.

10 ADMINISTRATIVE HEARING OFFICER: Where they use
11 the term, "above normal risk" --

12 MR. NEILSON: Well, it --

13 ADMINISTRATIVE HEARING OFFICER: -- "for an
14 occupied structure."

15 MR. NEILSON: -- it -- it goes -- it goes even
16 further.

17 It says that: "The risks associated with
18 proximity to a known landslide and its potential
19 effects, should it" reactive -- I'm assuming it's
20 should be reactivate -- or re -- I'm sorry -- "should
21 it reactivate, as has occurred in the past, cannot
22 reasonably be completely removed at this site. Full
23 mitigation and risk elimination are likely cost
24 prohibitive."

25 And then the next sentence, which you picked up

1 on, is: "In our opinion, the site has above normal
2 risk for an occupied structure."

3 Which, by itself, is also another issue, which
4 was clarified in his email that you previously talked
5 about, which is when he's talking about a above --
6 above -- above normal risk for an occupied structure,
7 he's talking about one that's not in the middle of a
8 canyon, like all of Springdale. He's talking about a
9 regular residential house, you know, in the flats of
10 -- of St. George.

11 But, it's -- it is -- it is this statement that
12 can't --

13 "Full mitigation and risk elimination are likely
14 cost 'productive' or cannot be completely removed,"
15 it was globbed on -- glommed onto by the -- by the
16 city, makes it's --

17 It's pervasive through Springdale's brief. And
18 it is their, you know, stated reasoning as to why
19 reasonable minds could -- could -- could agree that
20 it's -- it's an unreasonable risk.

21 Again, my problem with this statement is
22 two-fold. Number one, mitigation -- total mitigation
23 is never, you know, an option.

24 And two, this is -- this is outside the scope of
25 what we are retained to do. It is not found within

1 the report.

2 And furthermore, the report --

3 You know, and then his next sentence is -- next
4 paragraph: "As requested, the purpose of our scope
5 of work has been to review the subject reports
6 relative to" conform -- conformation -- confor --
7 "conformance to the Springdale town code. The author
8 firm for the reports are responsible for the accuracy
9 of the information, recommendations, and data
10 contained therein. Under no circumstances should
11 Terracon be considered responsible for the accuracy
12 of the reports."

13 It makes a sweeping, broad statement and then
14 says, oh, by the way, I don't -- I didn't do anything
15 in this report. You can't rely, you know --

16 And -- and to us, whether or not --

17 Number one, again, back to my point. Number
18 one, we don't think it should have even been -- a
19 talking point even should be allowed.

20 Number two, even if it was allowed, it was given
21 way too much weight.

22 And if you read the -- the minutes at the
23 hearing and throughout Springdale's brief, they talk
24 about it a -- a lot.

25 ADMINISTRATIVE HEARING OFFICER: Let me -- let

1 me ask you, before you --

2 MR. NEILSON: Yeah.

3 ADMINISTRATIVE HEARING OFFICER: -- finish out.

4 Under your interpretation of -- of E and -- dash
5 15F-9E --

6 MR. NEILSON: Right.

7 ADMINISTRATIVE HEARING OFFICER: And the report
8 does --

9 If -- if an applicant submits an engineering
10 report that checks all these boxes, does the Planning
11 Commission have any discretion at all to -- to deny
12 the application, or must they accept --

13 Whatever the engineer is, as long as he's -- as
14 long as he's, you know, licensed and can opine to
15 these things, is it your view that the Planning
16 Commission has no discretion at all, they have to
17 accept that report and approve the application?

18 MR. NEILSON: Yes.

19 ADMINISTRATIVE HEARING OFFICER: Okay. So, when
20 it says "Springdale will determine whether the
21 proposed land use development," it's -- it's
22 Springdale making sure that they're checking off the
23 boxes, essentially, --

24 MR. NEILSON: Yes.

25 ADMINISTRATIVE HEARING OFFICER: -- not

1 necessarily making an independent determination.

2 MR. NEILSON: And -- and again -- and we talk
3 about this in our brief.

4 It makes sense. Right? There's a public policy
5 for this. It's that, while I've spent, countless
6 hours reviewing these reports, I'm not an expert in
7 -- in geological hazards. And -- and frankly,
8 neither are the laypeople of the town.

9 And it's understandable why Springdale would
10 want to get out of the business of lay people making
11 highly technical reviews of -- of every technical
12 issues.

13 That's why -- as we put in our brief, that's why
14 there's an insurance provision, that's why there are
15 minimal requirements that the -- that the geological
16 research team have to have.

17 And -- and while this one goes the other way,
18 which is, yes, the -- the -- Landmark and -- and --
19 and -- and Western say we think that this is safe, go
20 ahead and build, while Springdale city said,
21 actually, you know what, we're gonna disagree with
22 the report and we're gonna say it's not safe, could
23 you imagine an instance on the flip side, where the
24 report says we don't think it's safe and the city
25 says, yeah, go ahead and build? You know, do you

1 think the -- you know, Western or -- or -- or
2 Landmark's insurance company's gonna cover that --
3 that claim when it's made?

4 So, it makes -- it makes sense. And I
5 understand why it is.

6 And that's why I think, you know, back to the
7 revised geological hazard statute, that was the
8 purpose of it; is to take the guesswork out of this.
9 Let's give it to the professionals, let the
10 professionals decide, and then the -- the town can --
11 can check all of its boxes and have its liabilities
12 and waivers and everything in its pocket.

13 ADMINISTRATIVE HEARING OFFICER: Thank you.

14 MR. NEILSON: With that, I believe my time's up.

15 Do you have any more questions before I --

16 ADMINISTRATIVE HEARING OFFICER: I -- I do. And
17 it's a quick one.

18 MR. NEILSON: Yeah.

19 ADMINISTRATIVE HEARING OFFICER: You've argued
20 that -- that if I don't reverse the order that --
21 that I should award -- I mean, I should look at the
22 takings. Do you -- do you have --

23 I -- I imagine that's just a shot across the bow
24 to the town that I don't --

25 You don't -- you don't know anywhere where I

1 have any authority to --

2 MR. NEILSON: We --

3 ADMINISTRATIVE HEARING OFFICER: -- award just
4 compensation.

5 Right?

6 MR. NEILSON: No. We --

7 You know, as -- as everybody's aware, right, the
8 penalty for not, you know, timely appealing and not
9 raising all of your appeals at one time is -- is
10 harsh and you lose them. It is a use it or lose it
11 situation.

12 And -- and from the -- the length of our motion,
13 as you can see, we -- we threw in the kitchen sink,
14 just because we wanted to make sure that we were
15 preserving all -- all appeals issues.

16 And so, again, I --

17 You know, there's a due process argument. I'm
18 not --

19 I -- I -- I don't think it --

20 I think it wastes everybody's time bringing that
21 up and saying with the -- with the takings. I
22 believe that's -- that's just setting up for the next
23 step.

24 ADMINISTRATIVE HEARING OFFICER: Okay. That's
25 what I thought.

1 Thank you.

2 Mr. Hardman.

3 MR. HARDMAN: I have a small workspace here, so
4 thank you for giving me a moment to get my materials
5 organized here.

6 So, I think, given the format for -- for this
7 proceeding, the fact that, as Mr. Neilson said, the
8 parties have already submitted comprehensive briefs
9 on the issue, I will --

10 I'd like to just pick up where the appeal
11 authority left off and respond to Mr. Neilson's
12 arguments in reverse order, his -- the -- the three
13 position statements that he articulated in reverse
14 order, and then, time permitting, I may go back to --
15 just draw attention and refocus the appeal authority
16 to some of the more significant arguments in the
17 Planning Commission's opposition memorandum.

18 So, the third item that -- that the appellant
19 discussed in it -- in its oral presentation is
20 Terracon's role in the record.

21 And it's important to read to the end of the
22 section that Mr. Neilson referred to, 10-15F-3 --

23 So -- or subpart E-3C is where he -- he quoted
24 talking about the -- the application.

25 But, if you continue through the -- the portion

1 of the statute, it says, reading to the end of the
2 subpart E: "The applicant must include with the
3 geologic report, a mitigation plan that defines how
4 the identified hazards or limitations will be
5 addressed without impacting or adversely affecting
6 off-site areas."

7 And then this next part here. "If the report
8 identifies multiple options for mitigation, the town,
9 after consulting with its geologic hazard expert, may
10 mandate which of the options must be implemented.
11 Mitigation measures must be reasonable and practical
12 to implement, especially if such measures require
13 ongoing maintenance by property owners."

14 So, as -- as the appellant has done throughout
15 its briefing and here again in oral arguments, it's
16 -- it's made selective reference to particular code
17 sections or case law or statutes without including
18 the entirety of -- of the analysis or the -- the code
19 itself. And, obviously, extracting -- such will be
20 extracting sections from any of those documents,
21 making arguments to the exclusion of the entirety of
22 what they're actually saying is -- is inappropriate,
23 as evidenced here.

24 It's clearly required for the town to --

25 Well, the town has discretion as to whether to

1 involve a third party review, as it did in this
2 instance, Terracon. And once it does so, it -- it's
3 -- it --

4 It says here, "after consulting with its
5 expert."

6 And that's exactly the process that the town
7 followed.

8 Mr. Neilson repeatedly referred to the -- the
9 two-page letter from -- from Terracon's
10 representatives as a report. It's not a report.

11 And, in fact, what the code sets out is that the
12 -- the applicant is required, and, in fact, did so,
13 to prepare or provide comprehensive reports, which it
14 did, from the -- the two entities that it retained,
15 Landmark and Western Geologic. And then the town
16 Planning Commission, and, if it retains an expert,
17 again, which it did in this instance, is first tasked
18 with identifying whether those reports contained all
19 of the requisite information, studies, analyses,
20 et cetera.

21 And as noted in the two-page letter in Terracon,
22 the required content was present. Then the letter
23 offers the third party reviewer's analysis of the
24 content.

25 And in contravention to what Mr. Neilson and the

1 applicants are stating, Terracon determined that the
2 landslide risk was one that would be, you know, very
3 difficult to mitigate. And -- and because of that
4 fact, would create, you know, all kinds of potential
5 hazards to, you know, future occupants of -- of the
6 intended transient lodging facilities, as well as,
7 potentially, other adjoining property owners.

8 And again, reading through to the end of this
9 section, the last sentence: "Mitigation measures
10 must be reasonable and practical to implement,
11 especially if such measures require ongoing
12 maintenance by property owners."

13 So --

14 And then relative to this -- or related to this
15 third -- this third argument point, the last of which
16 that Mr. Neilson made, you know, criticizing the role
17 of -- of Terracon as the Planning Commission's
18 technical advisor, there would be no purpose to even
19 have a technical advisor if the Planning Commission
20 were not entitled to follow and incorporate the
21 recommendations of that technical advisor in
22 consideration of whether to approve the application.

23 And as -- as the appeal authority so aptly
24 noted, referencing the section of the -- the code
25 that you did, it says that Springdale, through its

1 Planning Commission, will determine whether the
2 application is -- or meets all of the requisite
3 elements in the -- in the code.

4 So, contrary to Mr. Neilson's representation and
5 the appeal authority's summation of his argument that
6 it, in effect, is this just a -- a list of boxes that
7 the town must check, after which it's a forgone
8 conclusion that the application is to be permitted,
9 that is, in fact, not the case, and that argument's
10 directly contradicted by the very provisions of the
11 ordinance upon which -- which they rely.

12 It's the Planning Commission in this instance,
13 designated as the land use authority, that -- that
14 must consider all of this evidence and then decide.
15 So, it's far more than a box-checking exercise, as
16 suggested by the -- the appellant.

17 ADMINISTRATIVE HEARING OFFICER: Before you
18 leave that, --

19 MR. HARDMAN: Sure.

20 ADMINISTRATIVE HEARING OFFICER: -- it seems
21 like both Terracon and -- and Landmark, if they
22 agreed on -- on anything, it's -- it's that -- that
23 risk could not be eliminated.

24 Is -- is that --

25 Did -- did the Planning Commission adopt kind of

1 a --

2 In determining whether it represents an
3 unreasonable risk, did they adopt this risk
4 elimination standard that if -- that if an expert
5 can't say that -- that, you know, with this
6 mitigation, you know, risk is eliminated, that --
7 that it is now unreasonable? And is that the
8 standard the Planning Commission was --

9 MR. HARDMAN: Well, I -- I don't --

10 ADMINISTRATIVE HEARING OFFICER: -- looking at?

11 MR. HARDMAN: -- I don't read the minutes of the
12 meeting as suggesting that's the standard.

13 ADMINISTRATIVE HEARING OFFICER: Okay.

14 MR. HARDMAN: So, I -- I --

15 ADMINISTRATIVE HEARING OFFICER: So, it's your
16 view that they -- they -- it was unreasonable under
17 the record, not because they -- they had this risk
18 elimination in mind.

19 MR. HARDMAN: Well, I think -- I think risk --
20 risk elimination is certainly a -- a part of -- of
21 the analysis, but they --

22 I mean, they also, I'm sure, relied upon the --
23 the statement from Terracon in the -- in the letter
24 that any effort to mitigate the risk would be very --
25 you know, very difficult and -- and cost prohibitive.

1 So, I think they were --

2 I mean, it's evident, I think, that they were
3 aware of -- of a --

4 I mean, to -- to your specific question, I -- I
5 don't think they were fixated on the fact that risk
6 could not be entirely eliminated; I just think that,
7 under the circumstances and based on all of the
8 information and the deference, that the -- that the
9 town is absolutely entitled to accord to all of this
10 information when adopting, as the state code allows,
11 an ordinance that enables a municipality to put in
12 place, you know, an ordinance scheme to address
13 geologic hazards, as the state code does, that, you
14 know, they -- they followed that and were well
15 positioned in how they examined it.

16 ADMINISTRATIVE HEARING OFFICER: Okay.

17 MR. HARDMAN: Then the second point that a --
18 all correctly, that Mr. Neilson focused upon is the
19 definition of "reasonable risk."

20 And again, this is quoting from the definition
21 section of the geologic hazard ordinance, 10-15F-2,
22 where it states: "Acceptable and reasonable risk:
23 No loss or significant injury to occupants, no
24 release of hazardous or toxic substances, and minimal
25 structural damage to buildings or infrastructure

1 during a hazard event, allowing occupants egress
2 outside."

3 So, you know, I think they've -- they've
4 misapplied the -- the definition there in -- in their
5 arguments.

6 And, you know, reading through that definition,
7 then if you go over to --

8 Really, we're -- we're kind of transitioning
9 into the -- the first argument and -- and how I was
10 intending to continue this.

11 And so that -- that --

12 Their -- their first argument, if I understood
13 the argument, is that landslide and slope stability
14 are, essentially, the same thing. They -- they are
15 -- they are clearly not.

16 And -- and if you go through the reports, both
17 those submitted by -- well, the reports submitted by
18 Landmark and Western Geologic and the -- you know,
19 the letter by Terracon, and examine all of those
20 materials, it's very apparent that what --

21 The issue here is --

22 I mean, in this context, slope stability and
23 landslide can never be the -- the same thing because
24 the -- the slope stability that these reports were
25 focusing on is the -- the slope itself where the

1 proposed structure is supposed to be erected -- or
2 proposed to be erected within a larger parcel that is
3 contiguous to the historic landslide itself.

4 So, basically, you have the --

5 The landslide area is above and adjacent to the
6 site. That's where the landslide is that has the
7 potential to cause all the problems. It's not the
8 site upon which -- or the slope upon which this --
9 the structure's proposed to be erected.

10 So -- so, that whole argument is just completely
11 untenable.

12 ADMINISTRATIVE HEARING OFFICER: So, the -- the
13 landslide --

14 When you're talking about landslide, you're --
15 you're talking about a -- a location, the -- the
16 historic landslide that happened whenever, what, 19
17 --

18 MR. HARDMAN: 1992. Yeah.

19 ADMINISTRATIVE HEARING OFFICER: -- '92 or
20 something.

21 That's what -- in your brief, when you say
22 "landslide," that's what you're referring to?

23 MR. HARDMAN: Well, more -- more specifically --

24 I mean, yes. And -- and it -- and more
25 importantly, that's what Landmark was referring to

1 and Western Geologic was referring to and Terracon
2 was reviewing and understanding in all of their
3 discussions about landslide. They're not talking
4 about --

5 I mean, slope is -- slope stability --

6 The -- the entire application of slope stability
7 has to do with what is the slope of the site, where
8 the proposed development is supposed to, you know,
9 occur, is proposed to occur. And so that's what was
10 examined.

11 And -- and -- and, you know, in and around that
12 slope, upon --

13 I mean, if you look at our -- if our -- within
14 our brief -- and maybe this is -- I should have done
15 this to -- for purposes of kind of orienting everyone
16 to this explanation.

17 But, if you look in our -- in the town's brief,
18 at Page -- it's near the beginning. There's a
19 photograph of -- of the --

20 On Page 4. The first photograph there on the --
21 on the top of the page, you can see where the -- you
22 know, the proposed structure is. And all around that
23 structure is the --

24 Well, in the -- in the nearground and to the
25 left and -- and -- and, presumably, to the rear

1 that's not depicted in the photo, that's, basically,
2 the slope.

3 And so, in all of the -- the reporting analyses
4 from the engineers, that -- the slope that they're
5 referring to is the slope leading up to where the
6 proposed structure is.

7 The landslide is, like, everything all around
8 and above and adjacent to -- to the proposed site.

9 ADMINISTRATIVE HEARING OFFICER: Wouldn't -- and
10 I'm not an engineer, either, but wouldn't the --

11 When I think of a landslide, wouldn't the
12 analysis on seismic activity cover that as well? I
13 mean, as I'm thinking about it, if you have a -- a
14 seismic activity, doesn't that trigger the landslide?
15 So, then wouldn't it be covered in their analysis
16 just under the -- the -- the -- the seismic activity
17 that they were reporting on?

18 MR. HARDMAN: Yeah. I -- I mean --

19 ADMINISTRATIVE HEARING OFFICER: Is --

20 Isn't it industry standards?

21 MR. HARDMAN: I -- I think that that's, you
22 know, an -- an apt observation.

23 But, I mean, the --

24 I think the critical issue for purposes of --
25 of, you know, the town's rebuttal argument to the --

1 to the three points that Mr. Neilson made, is that
2 it's -- it's plainly evident, from a thorough
3 examination of Landmark's reports, Western Geologic's
4 reports, Terracon's analysis of those documents, that
5 none of those professionals were referring to slope
6 stability and landslide as -- as one and the same as
7 the applicant suggests the appeal authority ought to
8 be doing, and the Planning Commission should have
9 done for the -- the whole argument that followed, in
10 that, in effect, if I understood the argument, it
11 was, quite simply, well, because slope stability and
12 -- and landslide are, by definition, the same thing,
13 and the minutes, the -- the engineer's reports,
14 Terracon's letter all uniformly observed that slope
15 wasn't an issue. Therefore, landslide can't be an
16 issue.

17 I mean, that's, in effect, what I understood of
18 their argument. And that's just fundamentally flawed
19 and, in this application of all the information and
20 all of those documents, they're -- they're two
21 separate things. What --

22 The slope that was under examination and the --
23 and the associated -- or not associated -- the -- the
24 -- you know, the locationally relevant landslide
25 potential.

1 So, backing up from -- you know, from all of
2 this and these -- these arguments and --

3 And, certainly, I don't take issue with
4 Mr. Neilson's observation about the comprehensiveness
5 of the briefs and, hence, the -- you know, the need
6 to probably not spend too much time hashing through
7 those principles, other than to just point out the
8 very clear, long-standing, Utah case law in this
9 whole area of administrative review, "Municipal land
10 use decisions are entitled to a great deal of
11 deference and must be accorded a presumption of
12 validity."

13 The Utah Supreme Court has stated that:
14 "Municipal land use decisions should be upheld unless
15 those decisions are arbitrary and capricious or
16 otherwise illegal.

17 "A land use authority's decision is considered
18 arbitrary and capricious only if it is not supported
19 by substantial evidence in the record.

20 "Substantial evidence is defined as that quantum
21 and quality of relevant evidence that is adequate to
22 convince a reasonable mind to support a conclusion.

23 "Therefore, the land use authority's decision is
24 supported by substantial evidence if a reasonable
25 mind could reach the same conclusion based on the

1 evidence in the record."

2 Here, the record evidence is that Landmark and
3 Western Geologic, through -- through their reporting
4 and analyses, determined that, you know, rockfall, it
5 was a potential issue that could be mitigated, and
6 the -- the slope issue could be addressed, but
7 landslide was a problem.

8 And -- and Terracon certainly singled that out
9 in its -- in its letter.

10 And contrary to the representation of the
11 applicant, Terracon did not agree that landslide was
12 -- was a non-issue.

13 On Page 172 of the record, the second full
14 paragraph on Page 2 of Terracon's letter dated April
15 19, 2022: "Based on the investigations completed,
16 the site comes with inherent risks, including
17 expansive soils, steep slopes, rockfall, and
18 proximity to a known landslide."

19 So, again, there, Terracon has, in accordance
20 with all of what Landmark and Western Geologic
21 observed and opined, appropriately included and
22 identified these are the four issues for which the
23 applicant and its engineers were -- were tasked with
24 examination. That's what Terracon reviewed.

25 And -- and -- and -- and so in that -- in that

1 context, the -- the reporting was sufficient and
2 appropriate in terms of meeting the requirements
3 under the ordinance.

4 Then the letter continues. "However, the risk
5 associated with proximity to a known landslide and
6 its potential effects, should it reactivate, as has
7 occurred in the past, cannot reasonably be removed at
8 this site."

9 So, to your earlier question, are -- are they
10 saying that all risk had to be eliminated, I don't --
11 I don't -- I mean, I think this statement right here
12 upon which the -- the Planning Commission relied
13 wasn't suggesting that -- that all risk had to be
14 eliminated, but that the -- that the, you know,
15 potential risks had to -- could -- could not
16 reasonably or -- be completely removed.

17 Full -- "Full mitigation and risk elimination
18 are likely cost-prohibitive. Due to these factors,
19 it is our opinion that this site has above normal
20 risk for an occupied structure."

21 So, again, back to the -- you know, the earlier
22 argument, as is often the case with many applicants
23 in these administrative land use appeals, where
24 they're having to challenge such a well-settled,
25 long-standing body of case law that accords, you

1 know, near absolute deference to the underlying land
2 use authorities, this applicant, as many do, has
3 tried to, you know, make arguments by taking things
4 out of context or citing to specific sections of the
5 ordinances or the case law or an advisory opinion.

6 It's interesting that they didn't even really
7 respond to that argument that was put in the town's
8 briefing. When you go in and actually read the
9 entire advisory opinion, I mean, it comes with the
10 disclaimer. On the very front page it says it's --
11 you know, it's -- in effect, it's limited to the
12 facts of the underlying opinion; it shouldn't be
13 relied upon for more than that, and people need to go
14 consult an attorney and apply the general principles
15 to the facts of their particular case.

16 The -- the code section that was at issue in an
17 advisory opinion 83 from Draper City had different
18 particular requirements. It --

19 Unlike the Springdale ordinance, it required the
20 Draper land use authority to do more of a
21 box-checking exercise, whereas here, within the town
22 of Springdale, it's -- it -- which is subject to the
23 different ordinance structure, where Springdale
24 brings in consultants and evaluates things and --
25 and, from that, makes a determination, you're --

1 you're applying apples to oranges, and -- and that
2 advisory opinion is an opposite to -- to what we're
3 trying to resolve here and -- and -- and the facts.

4 And so, for the reasons articulated today and --
5 and more broadly and -- and are more detailed or
6 articulated in the -- in the town's brief, we believe
7 and -- and submit and request that the appeal
8 authority uphold the decision of the Planning
9 Commission to deny the application.

10 ADMINISTRATIVE HEARING OFFICER: Thank you.

11 Mr. Neilson, I'll give you the last word.

12 MR. NEILSON: Yes. Thank you.

13 Just touching, quickly, on a few of the points
14 Mr. Hardman brought up.

15 The code section's long. Right? I'm not gonna
16 read the whole thing and -- and I -- and -- and --
17 and --

18 But, let's go back to -- let's go back to the
19 point that Mr. Hardman made, which is that
20 10-15F-9-3(c). Did I get that right? Where it says:
21 "If the report identifies multiple options for
22 mitigation, the town, after consulting with its
23 geological hazard expert, may mandate which of the
24 options must be implemented."

25 This is checking the box. This isn't saying

1 meet with the geological hazard expert, do your own
2 report, figure it out. They're saying that if -- if
3 you meet the things that there is an issue, right --

4 You don't get a report unless there's a hazard.
5 Right?

6 So, clearly, if you have a hazard, there's an
7 issue that needs to be mitigated.

8 If you meet the -- the -- the report, the
9 hazards, and there are mitigations that -- that --
10 that -- that meet the requirements, then it is up to
11 the town, with consulting the hazard expert, which --
12 which mitigation they want to implement.

13 This isn't -- this isn't, you know, talk to them
14 and -- and debunk the report. Right?

15 This is checking the box. That's what this is.
16 Okay?

17 The other thing, too, is, is --

18 ADMINISTRATIVE HEARING OFFICER: So, it's -- it
19 -- it --

20 Just so I understand that, it's your view that
21 this language, if -- allows the town to consult an
22 expert only for the purpose of selecting which
23 mitigation option, but not --

24 MR. NEILSON: Exactly.

25 ADMINISTRATIVE HEARING OFFICER: -- as your --

1 -- debunk the report, second-guess the report.

2 MR. NEILSON: Exactly.

3 If -- it required repeating -- competing reports
4 or for the geological town expert to not -- again,
5 review the report, right --

6 This isn't -- this isn't a zero sum gain. The
7 -- the city wants to make it out to say, oh, it's
8 either -- it's either the city has no ability at all
9 or they have all of the ability. And that's not what
10 it is. Right?

11 What it is, is --

12 The purpose of the reviewer is to make sure that
13 the data is correct. Right?

14 It would be one thing if the city did the
15 report. But, we can all imagine what would happen to
16 them, what kind of litigation that would happen. So,
17 what they say is, fine, you choose the report.
18 Right?

19 And then it's the town's ability to say is the
20 math correct, is the report right.

21 That's what the reviewer's for.

22 The reviewer could absolutely say, hey, I don't
23 like this, have -- run it this way.

24 And guess what? He did. They --

25 He came back and said, hey, I -- I want a more

1 expansive test. I want you to --

2 And again, I --

3 A lot of things going on.

4 But -- but, he went back multiple times and
5 said, hey, do this now. And they did it. And they
6 came back and said, here's our report. Right?

7 This isn't a situation where the hand -- the
8 city -- the city sits on their hands and that's it.
9 Right?

10 The other thing, too, is, is, you know, in the
11 record meeting, in minutes, right, the applicant
12 says, oh, I'm gonna put in micropiles of 25 feet.
13 And the -- the commission rightfully noticed and
14 said, hey, your report says 50, minimum. Right?

15 That's what -- that's what the expert's for; is
16 to say, hey, okay, we're gonna approve this, but we
17 need you to do -- you know, we require these five or
18 six mitigating factors.

19 It's not a competing report. Right?

20 Once the report meets -- checks those boxes,
21 it's then up to the city to say, okay, we're gonna
22 approve it, but you must do these things. And that's
23 what they're consulting the experts on. Okay?

24 I don't want to get too bogged down into that.

25 ADMINISTRATIVE HEARING OFFICER: So, what if --

1 Let me ask you this. So, remove the expert.
2 What if -- what if a member of the Planning
3 Commission -- this is hypothetical -- I don't know
4 the members of the Planning Commission, but, you
5 know, one -- one of the members is professor emeritus
6 of engineering from Colorado School of Mines and is
7 steeped in knowledge of this stuff and he reads the
8 report and just disagrees with it, just based on his
9 own knowledge. Does he, as a member of the Planning
10 Commission, have any discretion to second-guess the
11 report as just -- junk engineering? I mean, would it
12 --

13 Under -- under --

14 As I understand your interpretation of the
15 ordinance, it wouldn't, because the report has
16 already checked the boxes, --

17 MR. NEILSON: So --

18 ADMINISTRATIVE HEARING OFFICER: -- so to speak.

19 So...

20 MR. NEILSON: So, to answer your question,
21 number one, that's not the situation here, just so
22 that we're all clear.

23 Number two, yes. Right? That he would not be
24 able to. Right?

25 He could probably, in consultation with the

1 expert report -- or the -- the town's geological
2 hazard expert, say, hey, here's some issues I have
3 with this. Maybe you should bring it up to them.
4 Right?

5 They don't have to accept the report. Right?
6 That's -- that's what I think we're missing. They
7 don't have to accept the report.

8 And, in fact, they can -- (d): "Should the town
9 determine the geological report is deficient, the
10 town will provide the applicant with a letter
11 summarizing the specific deficiencies."

12 If it does it three times --

13 If -- "If a submitted report is found" -- "is
14 found deficient three times or a report was
15 excessively deficient, Springdale will notify the
16 Utah Division of Occupational and Professional
17 Licensing about the licensed professionals" --

18 And they were not in compliance with Utah.

19 They don't have to accept the report.

20 Terracon accepted the report. They said it
21 meets all the standards. Okay?

22 And then --

23 Do you've any questions before I jump to the
24 next one?

25 ADMINISTRATIVE HEARING OFFICER: No. No. Go

1 ahead.

2 MR. NEILSON: The -- the next part is, oh, this
3 landslide. Right?

4 The issue is this. Right?

5 Again, let's go back to the -- the statute. The
6 statute says that the applicant must -- and this is
7 10-15F-7. "Each geological hazard investigation" --
8 "shall be site-specific." Right?

9 What we have in this situation, if the town, if
10 -- if Mr. Hardman -- if I am gathering what
11 Mr. Hardman's saying, what the town said is, look at
12 this wonderful site-specific report that you have,
13 that you've paid for. You've done -- you know, two
14 separate professionals have prepared. We are going
15 to disregard that, point out something that is not
16 site-specific, that has no report, that has no
17 analysis to it, and say that's why we're denying
18 this. Okay?

19 That's not in the code. That's not the
20 geological standard. That is arbitrary and
21 capricious. Right?

22 It would be one thing if Terracon said, hey,
23 Landmark and Western, we have concerns over this
24 issue. Right?

25 It's not --

1 Again, they accepted the report. Right?

2 So, this is the definition of arbitrary and
3 capricious. They are --

4 The city is citing to some hazard that wasn't
5 part of the report, wasn't requested of the
6 applicant. Nobody said to the applicant, hey, we --
7 we need more information on this. At --

8 In the eleventh hour, at the hearing, they
9 glommed onto something that was outside the report,
10 not part of the geological hazard ordinance, and said
11 that's why we're denying this, if -- if -- if the
12 city is to believe that they say it's this 1992
13 landslide.

14 With that, I'll -- I'll end, unless you have any
15 questions.

16 ADMINISTRATIVE HEARING OFFICER: I don't. Thank
17 you.

18 MR. HARDMAN: Could I just make a 15 second
19 response --

20 ADMINISTRATIVE HEARING OFFICER: Sure.

21 MR. HARDMAN: -- to one thing that was said, if
22 that's okay?

23 If -- if the appeal authority, again, reads the
24 entirety of the ordinance that -- from which
25 Mr. Neilson was making his last argument about going

1 off-site and how that was inappropriate, the last
2 clause of the first full sentence of 10-15F-7 states:
3 "Both on and adjacent to the property."

4 "Each" --

5 ADMINISTRATIVE HEARING OFFICER: Let me catch up
6 with you here. The --

7 MR. HARDMAN: 10-15F-7.

8 ADMINISTRATIVE HEARING OFFICER: Okay.

9 MR. HARDMAN: So, the full --

10 It's a -- it's a two-and-a-half line sentence.
11 "Each geologic hazard investigation and report shall
12 be site-specific and shall identify all known or
13 suspected potential geologic hazards, whether
14 previously identified or unrecognized, that may
15 affect the subject property, both on and adjacent to
16 the property."

17 So, things happening adjacent to the site are
18 clearly relevant and appropriate and should have been
19 considered.

20 Thank you.

21 ADMINISTRATIVE HEARING OFFICER: Go ahead.

22 MR. NEILSON: And my -- my -- my point is, is
23 that let's -- let's assume that that -- that is true.
24 This wasn't -- this wasn't raised. This issue wasn't
25 --

1 We weren't allowed to do the report.

2 If this was an issue and Terracon noticed that
3 it was an issue, they should have said, hey, by the
4 way, have you thought about this. Nobody asked.

5 Then, at the hearing, they say, oh, hey, we
6 don't have a report on this, we don't actually know
7 if what we're saying is true, but we think there's a
8 risk over here. Arbitrary and -- arbitrary and
9 capricious.

10 ADMINISTRATIVE HEARING OFFICER: Thank you.

11 Thank you for your arguments and briefs. It was
12 very helpful.

13 I'm gonna take the matter under advisement and
14 will issue a written decision. I think I get 60 days
15 by ordinance. I may be making that up. But, I -- I
16 don't anticipate taking 60 days.

17 But, I will issue a written decision on this.

18 Thank you.

19 That concludes our hearing -- appeal hearing on
20 the Zion West property appeal.

21

22 (This hearing concluded at 11:17 a.m.)

23

24

25

REPORTER'S CERTIFICATION

STATE OF UTAH)
)
COUNTY OF WASHINGTON)

I, KAREN A. HAWORTH, a Utah Certified Court Reporter (CCR), nationally certified Registered Professional Reporter (RPR), nationally certified Certificate of Merit holder (CM), nationally certified Certified Realtime Reporter (CRR), nationally certified Certified LiveNote™ Reporter (CLR), and Notary Public of the State of Utah, hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was placed under oath to tell the truth, the whole truth, and nothing but the truth; that the proceedings were taken down by me in stenographic form and, thereafter, my notes were transcribed through computer-aided transcription; and the foregoing transcript constitutes a full, true, and accurate record of such testimony adduced and oral proceedings had, and of the whole thereof.

I further certify that I am not a relative or employee of any attorney of the parties, nor do I have a financial interest in the action.

I have subscribed my name on the date stated.

Karen A. Haworth
KAREN A. HAWORTH, CCR, RPR, CM, CRR
Certified Court Reporter (UT)
Registered Professional Reporter (RPR)
Certificate of Merit holder (CM)
Certified Realtime Reporter (CRR)
Notary Public of the State of Utah

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VARIANCE HEARING
THE TOWN OF SPRINGDALE

Taken at The Canyon Community Center
126 Lion Boulevard
Springdale, Utah

on September 27, 2022
At 11:17 A.M.

Reported by: Karen A. Haworth, CCR, RPR, CM, CRR

A P P E A R A N C E S

ADMINISTRATIVE HEARING OFFICER:

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FOR THE TOWN OF SPRINGDALE:

THOMAS DANSIE
Planning Department
Town of Springdale

RICK WIXOM
Town Manager
Town of Springdale

NIALL CONNOLLY
Principal Planner
Town of Springdale

DARCI CARLSON
Town Clerk
Town of Springdale

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I N D E X

WITNESS(ES)	PAGE NO.
OPENING STATEMENT	
By: Mr. Pattison	4
TOWN PLANNER STATEMENT	
By: Mr. Dansie	5

E X H I B I T S

NO./DESCRIPTION	PAGE NO.
NONE	

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P R O C E E D I N G S

* * *

(Time noted: 11:17 a.m.)

ADMINISTRATIVE HEARING OFFICER: Mr. Dansie, do we want to take a break before doing the variance appeal --

MR. DANSIE: At your pleasure.

ADMINISTRATIVE HEARING OFFICER: -- or --

MR. DANSIE: I'm ready to proceed. If you'd like a little, short break, that's fine as well

ADMINISTRATIVE HEARING OFFICER: I'm -- I'm ready to go forward if -- if the town is.

The second item for appeal is an application for a variance.

The applicant is the town of Springdale.

The affected property is Lion Boulevard.

The variance seeks an application -- or excuse me -- a variance from section 10-15B-9A to allow disturbance on slopes that exceed 30 percent in grade.

The request is being made to allow improvement of "Zion" [pronounced incorrectly] Boulevard, with additional paved space for on-street parking.

1 Go ahead.

2 MR. DANSIE: I --

3 ADMINISTRATIVE HEARING OFFICER: Mr. Dansie.

4 MR. DANSIE: Thank you, Mr. Pattison.

5 So, the --

6 I -- I'm presenting this on behalf of the town.

7 So, full disclosure, the -- the town is the
8 applicant. So, my presentation is -- is -- is on
9 behalf of the town of Springdale as the applicant
10 today.

11 So, the -- the -- the town has been awarded
12 money to improve Lion Boulevard with additional paved
13 on-street parking, sidewalks, curb, and gutter
14 improvements.

15 This work is proposed to be contained completely
16 within the Lion Boulevard right-of-way.

17 As the town has been working with the
18 engineering company to lay this out, in one section
19 of the project, the -- there are some steep slopes in
20 excess of 30 percent grade that encroach into the
21 right-of-way and make the full usable width of the
22 right-of-way constrained because of the town's
23 prohibition on disturbance of slopes 30 percent grade
24 or greater.

25 The town has already reduced the scope of the

1 project in this location. We've removed on-street
2 parking from one side of the street. We've removed
3 the sidewalks from the side of the street. But, even
4 with those reductions in the scope of the project,
5 the proposed improvements will still impact some
6 slopes that are 30 percent grade or greater.

7 We're seeking a variance to allow the
8 disturbance. The reasons the town is seeking this
9 disturbance is we feel there is an unreasonable
10 hardship for us to try to include all of the required
11 improvements in the right-of-way that will benefit
12 the public with the constraints that the 30 percent
13 slopes place on us.

14 And we feel this is a unique circumstance
15 because the right-of-way was originally planned and
16 -- in its width to accommodate all of these
17 improvements, but because of the slopes, the -- the
18 -- the location of the slopes in the right-of-way,
19 we're unable to use the entirety of the planned
20 right-of-way. And we feel that's a -- a unique
21 circumstance that is not generally applicable in
22 other portions of the right-of-way throughout the
23 town.

24 And we feel this will not be detrimental to the
25 public interest and will be in keeping with the

1 general plan, because the slopes that are proposed to
2 be modified are not part of a larger slope system.
3 They're fairly minor and minimal. The largest -- the
4 -- the -- the greatest impact -- or -- or the -- the
5 greatest extent of the impact will be on slopes that
6 are about four feet in height. And so there won't be
7 any significant community viewsheds or important
8 sensitive slopes that will be disturbed. These
9 slopes are already adjacent to a public right-of-way
10 and don't serve a -- a critical function as part of a
11 larger natural slope system that needs to be
12 disturbed.

13 So, for all of these reasons, we feel that a
14 variance is justified and are seeking a variance to
15 allow this project to move forward.

16 ADMINISTRATIVE HEARING OFFICER: When you --
17 when you say "important and sensitive slopes," I -- I
18 -- I gather that we're not in these landslide-type
19 areas on this -- on this requested variance? That --
20 that's what you're referring to, that --

21 We don't have those same issues with this
22 disturbance?

23 MR. DANSIE: That -- that -- that is correct.

24 And -- and -- and even more than that. When I
25 say "sensitive slopes," these -- these slopes aren't

1 going to be -- the -- the disturbance on these slopes
2 and the cut slope and -- and the scarring of the
3 hillside is not gonna be in an important community --
4 or -- community viewshed. It's not gonna be
5 something that's going to impact the view of -- of
6 the cliffs of Zion, and it's not going to be in an
7 area that provides -- or -- or the disturbance,
8 rather, will not impact the -- the function of the
9 slopes in order to provide habitat for wildlife and
10 -- and other things, other reasons why the ordinance
11 seeks to preserve the 30 percent slopes.

12 ADMINISTRATIVE HEARING OFFICER: And it's within
13 the right-of-way. The town already owns the
14 property?

15 MR. DANSIE: That's correct.

16 ADMINISTRATIVE HEARING OFFICER: Has any
17 objection been received to the variance, any public
18 comments?

19 MR. DANSIE: There has been none.

20 ADMINISTRATIVE HEARING OFFICER: I don't have
21 any other questions if --

22 I'll -- I'll take this under advisement as well
23 and issue a written decision rather quickly.

24 MR. DANSIE: Thank you.

25 ADMINISTRATIVE HEARING OFFICER: All right.

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That concludes our public hearing for today.

(This public hearing concluded at 11:22 a.m.)

REPORTER'S CERTIFICATION

STATE OF UTAH)
)
COUNTY OF WASHINGTON)

I, KAREN A. HAWORTH, a Utah Certified Court Reporter (CCR), nationally certified Registered Professional Reporter (RPR), nationally certified Certificate of Merit holder (CM), nationally certified Certified Realtime Reporter (CRR), nationally certified Certified LiveNote™ Reporter (CLR), and Notary Public of the State of Utah, hereby certify:

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