

RESOLUTION No. 2025-001

**A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF OURAY COUNTY,
COLORADO, ACTING AS THE BOARD OF ADJUSTMENT,
UPHOLDING THE DENIAL OF ISSUANCE OF CERTIFICATE OF
COMPLETION BY LAND USE STAFF FOR THE BLACKSMITH'S CABIN
LOCATED ON 'PUSS GRAHAM CLAIM,' MS-2209/N004921**

WHEREAS, the Board of County Commissioners (Board) may provide for the enforcement of its zoning regulations by means of the withholding of building permits in the unincorporated areas of Ouray County, and for such purpose, may establish and fill a position of county building inspector or may authorize one or more administrative officials of the county to assume some or all functions of such position, pursuant to Article XIV of the Colorado Constitution, C.R.S. § 30-28-114, Article 11 of Title 30, C.R.S. (county powers and functions), Article 28 of Title 30, C.R.S. (county planning and building codes), and other applicable law;

WHEREAS, the Board acts as the Board of Adjustment (BOA) pursuant to C.R.S. § 30-28-114 and Section 12.5 of the Ouray County Land Use Code (LUC), and the BOA may make special exceptions, approve variances, interpret zoning maps, or similar questions, according to the procedures under C.R.S. § 30-28-114, Section 12.5 of the LUC, and other applicable law;

WHEREAS, appeals to the BOA may be taken by any person aggrieved by their inability to obtain a building permit or by the decision of the land use administrator or other employee of the county made in the course of the administration or enforcement of the land use code, pursuant to C.R.S. § 30-28-114 and Section 12.5 of the LUC;

WHEREAS, the BOA shall make findings of fact and conclusions of law based on a preponderance of the evidence standard and in accordance with other applicable law at the hearing held on November 20, 2024; and

WHEREAS, the BOA hereby issues the following findings of fact in this matter:

1. Applicant: Mark Iuppenlatz of Paradox Mining, LLC, PO Box 755 Ouray, CO, 81427 (Applicant), owns the structure referred to as the Blacksmith's Cabin, located on "Puss Graham Claim," MS-2209/N004921, Parcel # 477712400001, within the unincorporated area of Ouray County (subject property). This matter involves the processing of a building permit application and denial of the issuance of a certificate of completion by the Land Use Department at the subject property for Building Permit # BLD2023-00026.

2. Application: The Applicant applied for a building permit for the purpose of restoring the "Blacksmith's Cabin" on the subject property, which falls under Sections 2, 4, 12, 13, and 24 of the LUC and applicable sections of the International Residential Code (IRC) and International Existing Building Code (IEBC).

3. Hearing Overview: The Board of Adjustment held a properly noticed public hearing on November 20, 2024, and considered the subject Application and its supporting documentation, the Land Use Department Staff Report, and all testimony received at the public hearing from the Applicant, Staff, Expert Witness Loren Lew, and both written and verbal public comments received. The issue for BOA consideration was whether, by a preponderance of the evidence, the Land Use Department properly denied Applicant's request for a certificate of completion. The following documentary evidence was admitted for consideration during the hearing: Land Use Department Staff Report (Staff Report); Staff

Exhibits (Staff Packet, Exhibits A through O); Applicant Exhibits (Applicant Packet, Exhibits 1-39); Written Public Comments Received (Exhibit P); and a Public Comment Sign-up Sheet (Exhibit Q).

4. Staff Report and Staff Testimony: The Staff Report contained a conclusion stating: “It is the opinion of Land Use Staff that the existing subject structure, referred to as the ‘Blacksmith’s Cabin,’ does not qualify for a valid ‘*historic renovation*’ exception[,] and the Board of Adjustment should uphold Staff’s decision to deny the request for issuance of a ‘Certificate of Completion.’” Mark Castrodale, Director of Land Use Department, provided testimony in support of this conclusion during the hearing. Mr. Castrodale stated that Mark Luppenlatz, Applicant, approached the Land Use Department with a proposal for a historical renovation/restoration project of the “Blacksmith’s Cabin” on the subject property in February 2023, which fell under Section 24, High Alpine Development Regulations, of the LUC. Because there was no definition of “historically significant structure” in the LUC, Land Use staff directed the Applicant to consult with a historian, and Donald Paulson of the Ouray County Historical Society (OCHS) provided a letter stating that the original Blacksmith’s Cabin was a “Significant Historic Structure.” Based on this input from the OCHS, the Land Use Department determined that the structure that the Applicant proposed to renovate was a historically significant structure that was exempt from Section 24 regulations under Section 24.2.B.5. Mr. Castrodale emphasized that in the Applicant’s building permit application, the Applicant did not check any boxes for “New Construction,” “Alter existing structure,” or “Demo/Remove existing structure” (Staff Exhibit D). Mr. Castrodale also noted that the Applicant handwrote, “Renovation of Historic Structure,” “Restoration of Significant Historic Structure...for use as warming hut” on the application, explaining that this was the lens through which Land Use Staff processed the application and issued the building permit in April 2023, for the expressed purpose of “repair” and “renovation” of the existing historic structure. Mr. Castrodale noted that from May to December 2023, the Applicant did not call for any interim or phase inspections, such as framing or roof inspections, at a minimum. In late December of 2023, Mr. Castrodale testified that the Land Use Department received an anonymous complaint regarding the Blacksmith’s Cabin, with photos submitted showing that the cabin was complete or near completion and appearing to be already in use, with no final inspection or certificate of completion issued by the Land Use Department. In January 2024, Land Use Staff conducted an on-site inspection and confirmed that the cabin was complete or near completion and in use. Staff also identified items not included or contemplated in the original building permit application, such as a modern deck, bunkbeds, kitchen cabinets and countertop, and propane stove with plumbing. At this time, through observation and conversations with Applicant’s team, Staff became aware that the historic structure had been demolished and removed, and an entirely new structure was in its place. Based on Staff’s inspection, the Land Use Department “red-tagged” the structure, meaning that the owner and contractors were put on notice that no further work was allowed on the structure until approved by the Land Use Department. In March 2024, Mr. Castrodale sent the Applicant a letter outlining the issues identified with the new structure, namely: that the existing structure was not what was originally permitted; that no interim inspections were requested by Applicant; and that Land Use received a complaint from a member of the public. The letter also contained four options for Applicant to consider: 1) remove items not detailed in the original building permit and request a final inspection so that a certificate of completion might be issued; 2) obtain the necessary 35 acres and apply for a proper building permit; 3) submit for an appeal or variance; or 4) apply for a demolition permit to legally remove the structure. In August 2024, Land Use received a demand letter from the Applicant’s attorney, requesting the issuance of a certificate of completion. On August 28, 2024, Land Use responded to Applicant’s attorney’s letter and formally denied Applicant’s request for the issuance of a certificate of completion. In September 2024, Applicant, through counsel, formally appealed the Land Use Staff decision to deny the issuance of the certificate of completion.

In his testimony, Mr. Castrodale emphasized that all staff members of the Land Use Department had reviewed the originally proposed project and that, once the issue of whether the structure qualified as a historically significant structure under Section 24 regulations, there were no red flags for Staff. Mr. Castrodale said that, at the time that he submitted his application, Applicant was an active, respected member of the Planning Commission for the County, and there was no reason to mistrust the

Applicant's intentions to restore the historically significant structure according to the submitted building permit application. Had the Applicant submitted a building permit application that accurately depicted the resulting structure, the Land Use Department would have applied Section 24 regulations in their entirety, and the Department would have required the Applicant to have 35 acres, or trade credits, and a high alpine site development permit, and the project would have looked very differently. Mr. Castrodale then testified that Dave Penny and Matt Hepp, third parties involved in the project, each told him on separate occasions that there were no original materials present in the existing structure.

Bryan Sampson, Senior Planner for the Land Use Department, also briefly testified during the hearing. Mr. Sampson, who has worked for the County for 14 years, worked in private planning for five years, and has held the position of Senior Planner for the past two years, testified that the Applicant presented the project as a restoration or a preservation of the original structure in his initial communications with Staff, which was not the end result (Exh. XX, p. 19 of the Staff packet).

Mr. Castrodale and Mr. Sampson responded to questions from members of the Board of Adjustment, Staff Attorney Leo Caselli, and Applicant's attorney, Joshua Mack. Mr. Castrodale testified that he did not know the exact time that the new structure was built, but it was sometime between the issuance of the permit in April 2023 and December 2023. Mr. Sampson stated that he interpreted the intended use of the structure as a "warming hut" or "camping cabin," meaning that he anticipated that it would be used for individuals to warm themselves while skiing or for shelter from the cold. Mr. Sampson stated that he did not anticipate that the restored structure would become a dwelling unit but rather a warming hut. Mr. Castrodale said there were no internal discussions or concerns from Land Use Staff about the engineering plans and the stated intent of the project at the time and according to the submitted application. Mr. Castrodale stated that the then-building official, Genevieve Shope, would have reviewed the architectural plans submitted with the Applicant's building permit application. Mr. Castrodale confirmed that the architectural plans submitted were entitled, "SJMG Blacksmith's Cabin Replica" (Applicant's Exhibit 5, Staff Exhibit D). Mr. Castrodale confirmed the notes contained under "Section III. Timber" describing the type of timber materials to be used. He also confirmed that under "Section XI. Existing Construction" of the architectural plans, it says, "A. Existing construction is noted as 'Exist' or 'Ex' on the drawings, and is shown for reference purposes only except where indicated otherwise. All items not noted as existing are new construction." (Applicant's Exhibit 5, p. 25 of Applicant's packet; Staff Exhibit D.) Mr. Castrodale said that Land Use Staff members Genevieve Shope and Colleen Henderson were responsible for reviewing the application and approving the permit. He explained that for the section of the building permit entitled "description of project," that the system used by Land Use at that time required Staff to select an option from a drop-down menu, which resulted in the description being written as "renovate a camping cabin," and that Genevieve Shope checked the box, "Plan Review Complete" on the Building Permit Status Sheet (Applicant's packet, p. 33). Mr. Castrodale said that he did not know the identity of the individual who submitted the anonymous complaint to the Land Use Department in December 2023. When reviewing photographs attached to the anonymous complaint (Exhibit F, Staff packet, pages 36-38), Mr. Castrodale stated that the complaint alleged use of the structure by ski guides, that the beds appeared to be prepared for someone to sleep in them, and that he did not observe any ski tracks, footprints, or disturbance of the snow in the photos. On December 14, 2023, the Applicant requested an inspection by email. Then, Mr. Castrodale confirmed that Genevieve Shope received several other requests from Applicant for a final inspection in 2024, and that ultimately, Mr. Castrodale instructed Ms. Shope not to perform the inspection after Land Use discovered the discrepancy between the building permit application and the completed structure, because it was then under legal review.

5. Loren Lew Testimony: Expert Witness Loren Lew, of Klink and Lew (accepted as expert witness by the BOA). Mr. Lew testified generally about his expertise in historic restoration projects and said that he has lived in Silverton for about 50 years and done restoration work for 45 years. He has likely worked on approximately 50 public structures and additional privately owned structures. He testified that not all

restoration projects can be considered true “restoration” projects, depending on the current state of the historic structure and specific criteria. He said that the onus is usually on the client or the person wishing to restore a structure to prove that the project meets the criteria of a historic restoration. Mr. Lew stated that he had reviewed photos and documents sent to him by Land Use Staff, and that it was his opinion that the resulting structure from this Blacksmith’s Cabin project was not a restoration. He explained that, once you take the “fabric” from the original structure and discard it, then the project can no longer be considered a restoration. Mr. Lew confirmed that he still endorsed his opinion contained in an email to Genevieve Shope, that “it is a contemporary designed and executed cabin architecturally and has no historic character or preserved characteristics of any kind, and is actually quite modern” (Applicant’s Exhibit E, p. 140 of Applicant packet). Mr. Lew outlined the general process for a similar historic restoration project. He said that the Blacksmith’s Cabin, due to the way it was originally constructed, would not be a good candidate for a true restoration, as it was not originally built to last a long time. He confirmed that he is familiar with the International Building Code, and that the resulting structure from Applicant’s project would be considered a new structure under the Code. Mr. Lew reviewed a photo (Applicant’s packet, p. 170) and stated that the plaque with the “Ouray National Historic Site” logo on the door of the structure was not an official historic designation from the State. Mr. Lew stated that the deck on the structure was definitely modern and not historic. He also testified that the State typically does not get involved with the interior of historic structures, but he did say that in this case, the original structure used “D-style” logs, which were round on the outside and smooth on the interior. The original roof would have been sod, turf, or planked wood, but not corrugated metal. The logs would have originally been set on a bedding of stone if at all. He emphasized that overall, this structure was not a restoration, and he was not aware of the original footprint, which is also important in a true restoration project. He also testified that he had not personally observed the existing structure or spoken with the engineer involved with this project.

6. Applicant’s Testimony: Mark Iuppenlatz, owner of Paradox Mining, LLC (Applicant), testified at the hearing. He described himself as a history buff, and that he had previously completed a historical renovation project in the Italian Alps. In that project, Applicant said that the first thing you do is tear down the entire structure, due to the old materials, and keep the exterior in keeping with the historical structure. Applicant said that when he first discussed the proposed Blacksmith’s Cabin project with Genevieve Shope, then-Building Inspector, she told him that the building materials would have to meet code and that he would have to hire an architectural engineer to draw up plans. He testified that Matt Hepp did an on-site inspection, noted locations of corners and dimensions, and that he told Applicant that none of the existing materials would meet code, so he began drawing up plans for a replica cabin, which included incorporating the unique notches found in the original logs. Mr. Iuppenlatz submitted the building permit application and accompanying architectural plans by Matt Hepp, which Genevieve Shope approved after several communications to confirm that she had the complete application and plans. Applicant said that he had originally hoped to incorporate original materials into the structure. He hired Frontier Log Homes to build the cabin structure, and, to minimize disturbance in the high alpine area, Mr. Iuppenlatz hired a helicopter crew to deliver the materials and have the structure assembled in one day in late September or early October 2024. He contacted Ms. Shope on December 14, 2023 requesting a final inspection, and they agreed to perform that on February 13, 2024. Ms. Shope asked Applicant why no interim inspections had been requested, and Applicant said he thought the contractor had handled that, and Ms. Shope said she could perform those other inspections at the final inspection. Ms. Shope asked Applicant about the anonymous complaint that Land Use had received. Applicant said that he had the supplies and bedding flown in by helicopter at the time that the helicopter flew in the building supplies, and Ms. Shope accepted his explanation. When Applicant called Ms. Shope on February 12, 2024, to confirm a meeting place for the inspection the following day, Ms. Shope indicated that she could not perform an inspection then because she had to prioritize other pending matters at the Land Use Department. Applicant confronted Ms. Shope about the “red-tag” that had been placed on the door, and Ms. Shope told him someone else from Land Use had put the tag on the door at the direction of the County Attorney. Applicant spoke about his efforts to find an appropriate incinerator or composting toilet that would comply with Regulation 43. He

testified that Mr. Castrodale accused him of deviating from the plans, which Applicant disputes and said he understood he needed to strictly adhere to the approved plans. Ms. Shope conducted an inspection in March 2024, and she identified several items that he needed to complete before Land Use could issue a certificate of completion. After several other requests for her to conduct the inspection, Ms. Shope finally told him that she could not do it because the issue was under legal review. Applicant expressed his frustration in the process and how Land Use Staff handled this project, and that he felt he was very transparent and adhered to the approved project, and that he would have liked to have used more of the original materials, and that the existing structure is a replica of the original cabin. Applicant testified that he spent over \$150,000 on the project. He said that the deck railing was done and that the stove and plumbing were removed, of which he had informed Ms. Shope. He said that San Juan Mountain Guides had nothing to do with the structure.

The Applicant answered questions from members of the Board of Adjustment. He said that he obtained a plaque from the Ouray County Historical Society. The foundation and deck were inspected by Matt Hepp. He said that a portable solar system was present at the structure. Applicant confirmed that the plans did not indicate the re-use of any of the original materials in the new structure. Applicant stated that he did not consult the State Historic Preservation Office or other historical society other than the Ouray County Historical Society at the beginning and end of the project, and that no one requested him to do so. Applicant confirmed that he knew that the plans he submitted with the building permit application on April 25, 2023, did not call for using any of the existing materials in the new structure. He said that his intent was to use the completed structure as a warming hut and for occasional overnight camping, up to 30 days per year, as allowed by the Land Use Code. He obtained the plaque from the OCHS in July 2024, and he did not tell OCHS that the completed structure was a replica as opposed to a restoration or renovation. Applicant said that the Puss Graham claim retained its trade credits. Applicant testified that he was aware of Section 24 regulations when he proposed his project in early 2023. He said that he owns a 49% interest in San Juan Mountain Guides. Staff Attorney Casselli waived cross-examination.

7. Public Comments: During the hearing, eight members of the public provided oral comments, in addition to the written comments that were submitted to the BOA ahead of the hearing and admitted into the record. Except for one speaker who provided comments virtually in support of the Applicant, most of the other written and oral public comments supported the Land Use Department's decision denying the issuance of a certificate of completion. The commenter supporting the Applicant's appeal identified himself as a business partner of the Applicant and asked the BOA to consider a collaborative, good faith way forward in its final decision. Another commenter stated that he was also experiencing problems with his construction project in Ouray County and was frustrated with how the Land Use Department was handling the issue. Generally, most of the commenters expressed that they did not like the resulting structure from the Blacksmith's Cabin project on the subject property, and that they perceived the Applicant as attempting to avoid the application of Section 24 regulations to his construction project in the high alpine area, and that Applicant had not acted in good faith in his communications with the Land Use Department leading up to submitting his building permit application or in his actions overseeing the construction project. The majority of public comments asked the BOA to uphold the Land Use Department's decision to deny the certificate of completion for the structure.

8. Rebuttal and Closings: Staff Rebuttal. Mark Castrodale, Planning Director of the Land Use Department, provided some closing comments. He testified that he had served as Planning Director/County Planner for approximately the past 13-14 years and has worked for the County for the past 18 years, reviewing hundreds of building permit applications. He emphasized that the Land Use Department acted in good faith in its processing of the Applicant's application for a building permit, including with the architectural plans. He suggested that any of the original, historical materials could have been used in the interior even if they could not be used in the structural components of the new building. When Land Use Staff used the term, "camping cabin" from the dropdown option in the system, this did not give the Applicant *carte blanche* to change the use of the structure from that which was

described in conversations and on the application. The overt intent of this project, from its inception, was to avoid the Section 24 site development permit requirements, with the 35-acre/trade credit requirement. None of the boxes on the building permit application were checked for new construction, alter existing structure, demo/remove existing structure, etc. (referring to Exhibit D, Staff packet, p. 25). Mr. Castrodale said that Applicant never mentioned his intent to use the new structure for occasional overnight use before Land Use received the anonymous complaint. In response to questions by Staff Attorney Caselli, Mr. Castrodale reviewed the Building Permit Application again (Exhibit D), opined that the application had not been accurately filled out, and confirmed that Mr. Luppenlatz, Applicant, signed the building permit application underneath the language stating, "I hereby certify that I have read this application completely and that all information provided is correct to the best of my knowledge..." Mr. Castrodale confirmed that the Applicant was a sitting member of the Ouray County Planning Commission at the time he submitted his application, and as such, that he would have been familiar with Section 24 of the Land Use Code. Mr. Castrodale said he had never seen this level of inaccuracy in a permitting application and felt he had been misled by this application. Mr. Castrodale said that Land Use Department uses a "trust but verify" approach when processing applications. Attorney Caselli referred to section 1202.2 in Chapter 12, Historic Buildings, of the 2018 International Existing Building Code (IEBC) (Staff Packet, p. 92) and asked Mr. Castrodale whether this project fell under the definition of a partial replacement, and Mr. Castrodale answered that it did not, that based on the end result, this project was a total replacement. He said that, had the application been submitted accurately, the Land Use Department would have offered options and assistance to the Applicant to help him complete the project, applying the Section 24 high alpine site development regulations. He testified that, after he learned of the discrepancies between the application and the resulting structure, he sent Applicant a letter and presented options for him to come into compliance with this project under Section 24 (Staff Packet, p. 43) but never received a response from the Applicant indicating he wished to pursue those options. Mr. Castrodale reviewed the photo of a pile of old logs (Staff Packet, p. 38) and said he did not see any evidence of skirting using the old wood on the new structure. Mr. Castrodale reviewed another photo showing skirting with old wood (Applicant Packet, p. 169), and he said his staff had not observed this skirting when they inspected the new structure at another time. Mr. Castrodale was asked to review Matt Hepp's November 2024 letter indicating that none of the existing materials were suitable for structural uses (Applicant Packet, p. 173), and Mr. Castrodale indicated that he believed those old materials could have been incorporated into the new structure for non-structural purposes. Mr. Castrodale reflected on Loren Lew's testimony and agreed that some blending of old and new materials would be in keeping with the restoration of a historically significant structure. He again denied ever hearing Mr. Luppenlatz say he intended to use the structure for overnight use before receiving the anonymous complaint. Mr. Castrodale denied instructing Genevieve Shope to prioritize Red Mountain Alpine Lodge over inspecting Blacksmith's Cabin, and he said that he, not the County Attorney, instructed her to issue the stop work order on the structure. Mr. Castrodale emphasized that he was not confused about the Applicant's project but rather, misled by the Applicant.

Applicant Rebuttal: Mark Luppenlatz, the Applicant, said that if he had gone through Section 24 regulations rather than the exemption, he would have had more options and flexibility, including being allowed to build a structure with an area of up to 700 square feet and have a kitchen, bathroom, etc. He said that he never intended to circumvent Section 24 in this project, but he perceived the exemption as the County's way of encouraging this kind of restoration, and that he was genuinely interested in restoring the historically significant structure. The Applicant said that no one from the Land Use Department ever discussed how he could reuse the old materials in the new structure, and he expressed his view that if the old materials cannot be used in the new structural components, and that this fact turns it into a new structure, then a historic restoration becomes a bit of an oxymoron. He said that, in hindsight, he would have been happy to negotiate the appearance of the exterior with the Land Use Department after he submitted the plans. He discussed the porch with Land Use Staff but was never questioned. The Applicant said he felt it was a little late in the game for Land Use to now object to the project. He said that he tried to do the right thing and was naive enough to think that he would be

thanked for this project.

Staff Closing Argument. Staff Attorney Casselli presented a brief closing argument to the BOA, referring to Mr. Castrodale's testimony that he had never seen such a misleading a building permit application during his time with the Land Use Department (Staff Packet, p. 25). He also cited to Loren Lew's testimony that the new structure on the subject property was not a historic structure. Attorney Casselli referenced Applicant's statement of possibly using the historic wood for furniture, which is well outside of the scope of restoring a historically significant structure. Mr. Caselli referred to the stated intent of Section 24 regulations, which is to protect and preserve historic structures. He argued that the new structure contains numerous modern design elements, including a modern deck, modern windows, and modern kitchen cabinets. He argued that this project on the subject property fell well outside of the scope of the Section 24 exemption for historically significant structures, and he asked the BOA to uphold the Land Use Department's denial of the Certificate of Completion. Mr. Casselli also argued that the BOA should give little to no weight to the Applicant's testimony, stating that the Applicant was evasive in answering many of the BOA's questions during the hearing, many of his statements were impeached by Mr. Castrodale's testimony, and due to the Applicant's clear misstatements on his building permit application (Staff Packet, p. 25).

Applicant Closing Argument. Applicant's attorney, Joshua Mack, also presented a brief closing argument to the BOA. Mr. Mack argued that the terms "warming hut" and "camping cabin" were not mutually exclusive, and that it was absolutely possible to have a warming hut that can be used under the non-commercial camping section of the Land Use Code. Mr. Mack then argued that two related legal doctrines applied to this matter. First, he argued that the vested rights doctrine in Colorado means that vested rights in a particular land use arise after a building permit has been issued and a landowner acts in reliance on it. Under the doctrine of estoppel, this doctrine bars a municipal corporation or county from enforcing an obligation by taking a position contrary to a previous representation relied on by the landowner to their detriment. The County is not allowed to approve a structure and then change its mind, Mr. Mack said. The Applicant was issued a permit by the County, and then he relied on it, spending over \$150,000 on the cabin. The Applicant was open about his intent to use the exception to renovate the cabin, and Land Use staff allowed it. Mr. Mack stated that, at this point, the Land Use Department cannot go back and reinterpret this ambiguous section of the code. The time for Land Use to add additional requirements to the project or ask more questions of the Applicant was at the time of the application in April 2023, but Land Use did not do that. Mr. Mack argued that handwritten descriptions on the application did not control over the architectural plans. He emphasized that the County building inspector reviewed the plans, knew exactly what the proposed project was (size, shape, windows, doors, fasteners, etc.), and she approved it. After the building permit was issued, Mr. Mack argued, the County cannot now go back and revoke the Applicant's vested property right.

Staff Attorney Casselli responded to the new issue of estoppel raised by Mr. Mack in his closing argument. Mr. Casselli argued that this argument on estoppel would need to be considered by the courts, not in an administrative agency determination. The issuance of a building permit is a local regulatory matter that is authorized under section 30-28-116, C.R.S. and by Section 24 of the Land Use Code. This is a regulatory proceeding for a building permit, and this is a local planning and building matter. Mr. Casselli argued that there is not a contractual agreement that has been issued pursuant to section 30-11-101(D), C.R.S. Mr. Casselli argued that equitable estoppel is a tort claim and that this type of action is barred under the County's governmental immunity, citing *Berg v. State Bd. of Agriculture*, 919 P. 2d 254 (Colo. Sup. Ct. 1996) and *Lehman v. City of Louisville*, 857 P. 2d 455 (Colo. Ct. of Appeals, 1st Div. 1992). The question for the BOA is whether a preponderance of the evidence supports the denial of the permit, and not a question of equitable estoppel. Mr. Mack than briefly responded that he was not asserting a tort claim in this proceeding, but that estoppel is a defense to an enforcement action being taken by the County. Mr. Casselli then stated that the Applicant's attorney had claimed a taking in his pleadings.

FINDINGS OF FACT

The Board of Adjustment made the following Findings of Fact, by a preponderance of the evidence (Recording 5:19:53):

1. There is evidence that the Applicant intended to mislead the Land Use Department in this matter. The architectural plans show a completion date of April 18, 2023, before the Applicant signed and submitted the building permit application on April 24, 2023. The plans showed that there would be no reuse of existing materials for structural purposes, so it would be a new structure, and Applicant checked the “repair to existing structure” box on his application, after the plans were completed. In the project description section of Applicant’s building permit application, the Applicant wrote, “Restoration of significant historic structure – Blacksmith’s Cabin for use as a warming hut. Construction will match as closely as possible original materials and appearance. No electric or plumbing.” (Staff Packet, p. 25). At the top of that page, none of the boxes were checked except for “repair to existing structure,” and the Applicant also wrote, “Renovation of historic structure.” (Staff Packet, p. 25). Applicant did not check any of the options such as “new construction,” “alter existing structure,” “demo/remove existing structure,” or “shop/storage.” (Staff Packet, p. 25).
2. Based on input from the Ouray County Historical Society, Land Use Staff determined that the structure that the Applicant proposed to renovate was a historically significant structure that was exempt from Section 24 regulations.
3. The original historic structure was removed and replaced, which is supported by the architectural engineering plans and the Applicant’s testimony that none of the original materials were used.
4. There was a specific dynamic and context in this case that is relevant, based on the Applicant’s positions of power and trust at the time, as a sitting Planning Commission member familiar with the Land Use Code and who had pulled other building permits in the County. Based on the lead-up conversations between Applicant and Land Use Staff, combined with Applicant’s position as a Planning Commission member, there was a reasonable expectation from Land Use Staff that the Applicant was somewhat of a subject matter expert in this area. It was entirely reasonable for Staff to take Applicant’s words at face value in his emails to Genevieve Shope, Bryan Sampson, and Mark Castrodale in Land Use; to see that the boxes checked or left unchecked matched up with what Applicant said in his emails to Staff.
5. Land Use Staff assumed good faith with the Applicant, who was accorded a higher level of trust, but Land Use Staff did stumble in not examining the plans more closely due to this higher level of trust towards the Applicant, possibly causing them to overlook the “existing materials” note on the engineering plans. Citing to Applicant’s testimony that “Ex” or “Existing” was not found anywhere on the plans, we do not consider the existing materials note on the plans, submitted with the application, to equate to the Applicant being transparent with Land Use Staff about the plans’ detail that none of the existing materials would be used for structural purposes in the new construction. This language was in fine print, and there was a mismatch between the Applicant’s stated intent on the building application, that construction will match as closely as possible the original materials and appearance, and any belief by Applicant that the absence of “Ex” or “Existing” language on the plans, indicating that no existing materials would be used in the construction, was a transparent communication to Land Use Staff about this detail.
6. Additionally, a reasonable Land Use professional could have fully reviewed the plans in this context, catching the plans’ detail on existing materials, and still reasonably believe that the pre-existing materials would be used for non-structural purposes in the restoration of the historic structure, given the Applicant’s expressed intent of the project. Nothing in the architectural plans

prevented the use of pre-existing, historic materials for non-structural purposes in the restored structure.

7. The Land Use Department was not the reason that interim and final inspections were not completed; Applicant had to be prompted for an inspection. We heard testimony that Land Use Staff reached out to Applicant after receiving the anonymous complaint. We heard testimony that inspections were done by Matt Hepp, but never by Land Use Staff. We heard testimony from the Applicant that there was no feedback from Land Use, but due to Applicant's silence during the building phase, there was no opportunity for Land Use to provide feedback during the project. We find that the communications and emails between Genevieve Shope and Applicant from December 14, 2023, to February 12, 2024, demonstrate that Land Use Staff exercised diligence in this project (see Applicant Packet, pages 34-38).
8. There is a connection between San Juan Mountain Guides and the Applicant, as seen on the block title language of the plans.
9. Through evidence we received in our materials from the Assessor's office, there was a trade credit relationship between the Plata mining claim and Puss Graham claim, and the Plata mining claim appears to have yurts on it that were associated with San Juan Mountain Guides.
10. (5:50) Additions to the new structure changed its use from a warming hut to a dwelling unit. By adding the elements of built-in counterspace that could be construed as an eating area, a cooking stove, bunk beds, and the incineration toilet, these additions converted the structure from a warming hut to a de facto dwelling unit as far as the use piece under the IEBC. In his building permit application, Applicant clearly stated zero bedrooms and zero bathrooms (Staff Packet, p. 25). Additionally, Applicant testified that he changed his intent on the use of the structure on February 22, 2024, in response to negative public comments (Applicant packet, p. 46), but this was after the structure was completed and the additional elements had already been added that changed the use to a dwelling unit.
11. Using a "Reasonably prudent person" standard when viewing the "before" and "after" photos of the structures, no reasonably prudent person could consider this a restoration or renovation of a historically significant structure as it was applied for by Applicant in his building permit application. (Staff packet, p. 85)
12. When Land Use Staff offered Applicant options to correct the use of the structure and to come into compliance with the Land Use Code, those pathways existed up to this hearing, and Applicant chose to not utilize those options.
13. The plaque from the Ouray County Historical Society on the door of the resulting structure does not in itself make this a historic restoration.
14. There was an overt intent by the Applicant for his project to fall under an exemption to the application of Section 24 regulations of the Land Use Code by describing the project as a renovation or restoration of a significant historic structure known as the Blacksmith's Cabin, for the purpose of using it as a simple warming hut; and that overt intent was misleading, and the outcome achieved was not the result that would be reasonably expected by the Land Use Staff or the public.

CONCLUSIONS OF LAW

WHEREAS, the BOA hereby issues the following conclusions of law in this matter:

1. **NOW THEREFORE, BE IT RESOLVED BY THE OURAY COUNTY BOARD OF COUNTY COMMISSIONERS, ACTING AS THE BOARD OF ADJUSTMENT, THAT BASED ON THE FINDINGS OF FACT MADE ON THE RECORD BY A PREPONDERANCE OF THE EVIDENCE,**

- a. We uphold the Land Use Staff decision issued on August 28, 2024, denying the certificate of completion for the Blacksmith's Cabin on Parcel # 477712400001 for Building Permit #BLD2023-00026; and
- b. We require the lawful removal of the resulting structure.

2. NOW THEREFORE, BE IT FURTHER RESOLVED,

- a. That the written public comments submitted ahead of this hearing shall be admitted into the record as Exhibit P;
- b. That the public comment sign-up sheet at today's hearing shall be admitted into the record as Exhibit Q, which shall also include the two public comments provided virtually via Zoom; and
- c. That the advisory counsel for the BOA shall prepare a follow-up, written resolution, and approval of this resolution by the BOA will be the final agency action of the County for purposes of appeal under Section 12.5.D.7 of the Land Use Code or other applicable law, with an effective date that it is stamped by the clerk, and County Attorney Casselli will provide to Applicant's attorney the finalized resolution on the date it is recorded.

APPROVED AS TO FORM:

 Marita Robinson, #53688
 Deputy County Attorney

Approved and adopted this _____ day of _____, 2025.

Voting for: Commissioner Nauer, Commissioner Niece, and Commissioner Padgett
 Voting Against: none

ATTEST:

BOARD OF COUNTY
 COMMISSIONERS OF OURAY
 COUNTY, COLORADO

 Michelle Nauer, Chair

 Cristy Lynn, Clerk & Recorder

 Lynn Padgett, Vice-Chair

 Jake Niece, Commission Member