

**TOWN OF PAGOSA SPRINGS, COLORADO
TOWN COUNCIL**

RESOLUTION NO. 2012-17

**A RESOLUTION AND ORDER DENYING THE APPEAL OF VIVIAN
AND STEVEN RADER AND AFFIRMING RESOLUTION NO. 2012-12
OF THE TOWN OF PAGOSA SPRINGS DESIGN REVIEW BOARD**

RECITALS

WHEREAS, the Town of Pagosa Springs, Colorado (“Town”) is a home rule municipality duly organized and existing under Article XX of the Colorado Constitution and the Pagosa Springs Home Rule Charter of 2003, amended April 3, 2012 (“Charter”); and

WHEREAS, pursuant to the Town’s home-rule powers and Charter, on February 4, 2009, the Town adopted the Town of Pagosa Springs Land Use and Development Code (“LUDC”), which was revised effective January 1, 2011; and

WHEREAS, on April 5, 2012, Wal-Mart Real Estate Business Trust, a Delaware statutory trust (“Wal-Mart” or the “Applicant”) submitted a Major Design Review Development Application (the “Application”) for development of an approximately 92,000 square-foot retail/grocery store (the “Project”) proposed to be located in Phase 4 of the Aspen Village Commercial Development for Block 3, Lots 1-6; and

WHEREAS, the Application was submitted in conjunction with Wal-Mart’s application for Vacation of Public Right-of-Way for Aspen Park Circle, and an application for Lot Consolidation and Boundary Line Adjustment; and

WHEREAS, following public hearings on the Application, the Design Review Board (“DRB”) approved the Application with conditions, pursuant to Resolution No. 2012-12, A Resolution Setting Forth Findings of Fact and Conclusions and Approving the Wal-Mart Major Design Review Development Application (the “DRB Resolution”); and

WHEREAS, Vivian and Steven Rader (collectively, the “Appellants”) are residents of Archuleta County whose property is accessed by Alpha Drive; and

WHEREAS, on August 31, 2012, the Appellants filed a Notice of Appeal with the Town Council requesting review of the DRB decision and the DRB Resolution (the “Appeal”); and

WHEREAS, the Appeal comes before the Town Council pursuant to Section 2.4.13 of the LUDC; and

WHEREAS, pursuant to Section 2.4.13.C of the LUDC, the Town Council may in whole or in part affirm, reverse, or amend the decision of the Design Review Board and may impose reasonable conditions in order to further the purposes and intent of the LUDC; and

WHEREAS, Section 2.4.13.C of the LUDC requires the Town Council's decision to be stated in writing in both the minutes as well as in a written order to be delivered to the Appellants within ten (10) days of the final determination.

BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF PAGOSA SPRINGS, COLORADO, as follows:

FINDINGS OF FACT

1. On February 16, 2012, prior to submittal of the Application, the Town Council held a Public Input Work Session on the possible Application, which was open to the public.

2. Section 2.3.2 of the LUDC recommends, but does not require, that an applicant hold a neighborhood meeting "to provide an informal opportunity to inform the residents and landowners of the surrounding neighborhood(s) of the details of a proposed development and application, how the developer intends to meet the applicable standards of this Land Use Code, and to receive public comment and encourage dialogue at an early time in the review process." Pursuant to the recommendation of the LUDC, the Applicant held an Open House on March 8, 2012.

3. Upon receipt of the Application, the Town contracted with Bohannan Huston, Inc. to conduct an independent third party review of the Application and supporting documents to provide an initial review, analysis and report of the proposed Application and Project as they relate to the LUDC requirements for Major Design Review. Bohannan Huston submitted its report to the Town on May 16, 2012.

4. The DRB held an initial public hearing to consider the Application on May 22, 2012, consistent with Section 2.4.6.D.1 of the LUDC, which public hearing convened for several hours. Due to the number of public comments at the hearing, written comments received by the Town and issues raised by the Bohannan Huston report, the public hearing was initially reconvened and continued for several hours on July 10, 2012, with a second continuation for several more hours and finally concluded on August 21, 2012 (collectively, the "Public Hearings".) Public attendance was so great at the Open House and subsequent Public Hearings, that the location of the meetings was

moved from Town Council chambers to the Pagosa Springs Community Center to accommodate the large number of attendees. Lengthy testimony was provided at the Public Hearings by Town Staff, the Applicant and members of the public, including the Appellants.

5. Public Notices of the Public Input Work Session, Open House, and DRB Public Hearings complied with all notice requirements of the LUDC, specifically Section 2.3.6. In addition to and beyond the requirements of the LUDC, each Public Hearing had two published notifications, and each Public Hearing had two to three on-site notification signs posted on the affected property. Further, certifications of all required public notices were reviewed by the DRB during the Public Hearings and were included as findings of fact in the DRB Resolution.

6. Appellants were in attendance at the February 16th Public Input Work Session, the March 8th Open House, and the May 22nd, July 10th, and August 21st Public Hearings, as evidenced by the record of written public comments, audio recordings of the public hearings, and public comment sign-in sheets.

7. Appellants submitted the Notice of Appeal on August 31, 2012, within ten (10) days after adoption of the DRB Resolution, as required by Section 2.4.13.C.1 of the LUDC.

8. On September 17 and 18, 2012, Town Staff attempted to arrive at a stipulated procedural order with Appellants to be adopted by Town Council resolution (“Procedural Resolution”), to guide the Appeal. The Appellants initially agreed to and signed the stipulated Procedural Resolution, then withdrew their signatures and consent when the resolution number was inserted into the signed stipulated order and the location of the appeal hearing was changed from the Pagosa Springs Town Hall to the adjacent Pagosa Springs Community Center. Appellants have alleged that the Town Staff and Town Attorney have committed fraud and forgery by making these changes. By email on the morning of September 18, 2012, and approximately two hours after sending to the Appellants an execution version of the stipulated Procedural Resolution, the Town Attorney notified the Appellants of the changes regarding the resolution number and hearing location, and that when received, their notarized signature pages would be attached to the revised Procedural Resolution. Approximately two hours after the Town Attorney’s email transmitting the revised Procedural Resolution, Appellants submitted by fax a signed notarized copy of the stipulated Procedural Resolution that did not have the resolution number or the Community Center location inserted. Appellants fax included a cover sheet that stated “a running objection to the fact (1) that you are making up rules and procedures as you go along (2) that there were not rules and procedures already put in place and adopted prior to this appeal (3) the Let’s hurry up and rush this thru so you can catch us off guard.” By email reply on September 20, 2012, the Town Attorney advised Appellants: “If you now find that the resolution is not acceptable, and wish to

withdraw your notarized consent to it, please do so in writing before the Council meeting or appear at the Council meeting and note you do not consent to the Stipulated Order.” Although the Appellants were afforded nine (9) days’ notice of such changes, Appellants made no objections to the changes until appearing before the Town Council on September 27, 2012, at which time they accused Town Staff and the Town Attorney of forgery and fraud.

9. At its September 27, 2007 meeting, Town Council adopted the Procedural Resolution by Resolution No. 2012-15, A Resolution and Order Regarding Procedures Governing the Appeal of Resolution No. 2012-12 of the Town of Pagosa Springs Design Review Board. The Procedural Resolution was adopted without stipulation by the Appellants. The Appellants were in attendance and afforded the opportunity to request modifications to the proposed procedures. The Appellants made general objections to the process, specifically objecting to the adoption of procedures after the submittal of their Notice of Appeal, but made no requests to modify the Procedural Resolution prior to adoption by the Town Council. The date for the Appeal Hearing, as set forth in the stipulated Procedural Resolution that Appellants had signed, was set for October 16, 2012; however, prior to adoption of the unstipulated Procedural Resolution, the Appeal Hearing and briefing schedule were moved back one week in an attempt to accommodate the Appellants’ concern for timing.

10. On October 5, 2012, pursuant to the adopted Procedural Resolution, the Appellants submitted an Opening Brief, dated October 4, 2012.

11. On October 11, 2012, pursuant to the adopted Procedural Resolution, the Town Staff, on behalf of the Design Review Board, filed a Response.

12. Although the Appellants were afforded the opportunity to submit a Reply brief, the Appellants did not submit any Reply brief.

13. Pursuant to Section 2.4.13.C of the LUDC, the Town Council heard the Appeal at a hearing on October 23, 2012 at 12:00 noon (“Appeal Hearing”).

14. Pursuant to the adopted Procedural Resolution, the Town Staff requested the entering of additional evidence into the record, which request was granted by Council. The Appellants were given prior notice of this request and an opportunity to also request additional evidence and to submit rebuttal evidence to the Town’s evidence. The Appellants did not submit a request for additional evidence, provided no rebuttal evidence, and did not object to the Town Staff’s request for additional evidence.

15. Appellants had twenty five (25) days’ notice of the scheduling of the Appeal Hearing on October 23, 2012 and provided no objection to the date of the Appeal

Hearing. Without providing any notice, explanation, or objection to the date, Appellants failed to attend the Appeal Hearing.

16. Pursuant to Section 2.4.13.C of the LUDC, the Appellants have the burden of proving the necessary facts to warrant favorable action of the body hearing the Appeal.

17. Pursuant to Section 2.4.13.D of the LUDC, the Town Council shall consider the following in determining whether to affirm, reverse, or amend a decision or interpretation of the Design Review Board:

- A. The facts involved in the application or request, as presented by the Appellant and the Director, the requirements and intent of the applicable provisions of the Code, and the written decision being appealed;
- B. Evidence of the manner in which the provision has been interpreted in the past;
- C. The positive or negative impact of the requested development on the achievement of the Town's stated development goals and objectives; and
- D. The impact on the Town's ability to implement its Comprehensive Plan.

18. At the conclusion of the Public Hearing, after full consideration of the record of the proceedings before the DRB, the briefs of Appellants and the Town Staff, and the evidence and argument presented at the Appeal Hearing, by motion duly made, seconded and approved by a unanimous vote of 7-0, Town Council denied the Appellants Appeal and directed Town Staff to prepare a written order for consideration by Council.

CONCLUSIONS

19. The Council has considered the Appeal Criteria set forth in Section 2.4.13.D of the LUDC and based on consideration of the record of the proceedings before the DRB, the Appellants' Notice of Appeal and Opening Brief, the Design Review Board's Response, and oral arguments and evidence presented at the Appeal Hearing, hereby finds as follows:

(a) The Town Council has considered the facts involved in the Application and Appeal as presented by the Appellants and the Town Staff, the requirements and intent of the applicable provisions of the LUDC, and the written decision being appealed. The Council finds that the facts overwhelmingly show that the Application met the criteria for approval of a Major Design Review Application as set

forth in Section 2.4.6.E.1.b of the LUDC and the decision by the DRB was not an abuse of discretion. Resolution No. 2012-12 of the DRB approving the Application, and the findings and determinations contained therein are hereby confirmed and approved as findings and determinations of the Town Council, and hereby incorporated into this Order as if set forth fully herein.

(b) The Town Council has considered the manner in which the approval criteria for Major Design Review Applications have been interpreted in the past and finds that the DRB gave more careful and thorough consideration and scrutiny to the Application than most other commercial projects previously approved within the Town. The Town hired a neutral, third-party outside consultant to analyze and provide a detailed review of the Application as it related to the requirements of the LUDC. Further, the Design Review Board imposed design requirements upon the Application prior to approval that exceed requirements imposed on other commercial properties within the Aspen Village subdivision.

(c) The Town Council has considered the impacts of the requested development on the achievement of the Town's stated development goals and objectives and finds the impacts to be net positive. Construction of a retail/grocery store at the proposed location in Phase 4 of the Aspen Village Commercial Development for Block 3, Lots 1, 2,3,4,5 and 6 is permitted and consistent with the zoning of the property. The lots are currently zoned Mixed Use Corridor, in which a retail store is an "Allowed Use" per Table 4.1.4 of the LUDC, "Table of Allowed Uses". The Project and proposed design of the building, lighting, landscaping, parking lot, and similar features are consistent with, and in some cases exceed, the design requirements of the LUDC. The development plan will not substantially alter the basic character of the surrounding area or jeopardize the development or redevelopment potential of the area, but provide attractive and effective landscaping and aesthetic design features consistent with the architecture of the surrounding area which screen and blend the proposed building with the surrounding uses. The Project's development plans maintain separation from existing residential uses while providing retail and grocery store uses within walking proximity, and provide significant pedestrian and vehicular connectivity with the other properties within the subdivision and the Town.

(d) The Town Council finds that the Project will not negatively impact the Town's ability to implement its Comprehensive Plan and will in fact further the goals of the Town's Comprehensive Plan. Specifically, the Town Council finds that the proposed Wal-Mart Project meets the following sections of the Comprehensive Plan, which provisions were set forth in the materials provided to Council for consideration prior to the Public Hearing: Vision Statement (Page 3-1), Future Land Use Plan Map (Figure 4-1), Mixed Use Corridor (Page 4-19), Policy G-6(b) (Page 5-1), Policy G-2(A) (Page 5-3), Goal G-4 (Page 5-4), Goal N-1 (Page 7-2), Goal E-3 (Page 9-4), Lakes

Planning Area and the West Merchant Planning Area (Chapter 15), Goal SP-7, Policy SP-1(a) (Page 15-6), and Goal SP-6 (Page 15-16). No specific evidence has been referenced or presented by the Appellants to the contrary.

20. Appellants also make a number of accusations in their Notice of Appeal and Opening Brief that do not relate to the approval criteria in the LUDC, but which deserve determination. With respect to those allegations, the Town Council finds as follows:

(a) Approval of the Project is not unconstitutional and no specific evidence was presented that approval of the Project will result in “diminished marketability, salability and property values” or “loss of peaceful enjoyment of life, liberty and property.” The LUDC meets all constitutional due process requirements and does not unfairly prejudice any protected class of individuals. In addition, notice of the Application and public hearings was clearly effective as to Appellants based on Appellants’ presence at the public meetings and Public Hearings. Therefore, any claim by Appellants that the notice requirements of the LUDC, or that the specific notice provided for the Application and Public Hearings was insufficient, is moot, as Appellants attendance at the Work Session, Open House and Public Hearings confirms that notice was sufficient. Further, although general allegations were raised in proceedings before the DRB, Appellants failed to provide any reference to specific evidence in their Notice of Appeal, Opening Brief, or at the Appeal Hearing for the Town Council to consider regarding the Project’s effect on property values or how the Project will result in loss of peaceful enjoyment of life, liberty and property for Appellants.

(b) The record shows Appellants had ample notice of and opportunity to object to the procedures for the Appeal adopted pursuant to Resolution No. 2012-15, and in fact consented to and signed such procedures prior to adoption of the Procedural Resolution. It was only after the resolution number was added and the location of the hearing was corrected, neither of which changed the substantive procedures or content of the Resolution, that Appellants withdrew their consent. The actions of the Town Staff and the Town Attorney to add the resolution number and correct the hearing location in the Procedural Resolution after it had been consented to and signed by the Appellants, does not amount to fraud or forgery, as the Appellants were given immediate notice of such changes and multiple opportunities to withdraw their consent because of the changes. Further, while the LUDC provides due process for appeals, Section 2.4.13.C.6 of the LUDC allows the Town Council to “impose reasonable conditions in order to further the purposes and intent of the Code.” The procedures adopted pursuant to the Procedural Resolution without stipulation by the Appellants were not only reasonable and furthered the intent of the Code to allow an aggrieved party to appeal the DRB’s decision, the procedures actually provided additional due process rights to Appellants beyond those provided by the LUDC. The Procedural Resolution gave Appellants additional time to

file briefs that are not called for under the LUDC, and postponed the Appeal Hearing before the Council an additional week from the date initially agreed to by Appellants. Although Appellants were afforded an opportunity to request modifications of the procedures prior to approval by the Town Council, the Appellants offered no suggested modifications.

(c) Appellants have provided no proof that the documents provided as the official record of the Design Review Board decision were corrupt, incomplete, or non-reviewable.

(d) The Council is aware of allegations of bias by Council Members, both for and against the Application. Appellants have made no reference to specific, credible evidence of disqualifying bias by any Council Member. No Council Member has a legal conflict of interest that would prevent him or her from hearing and making a determination regarding the Appeal. No prior actions or statements of the Council or the individual Council Members in any way prejudice the Appellants in this Appeal. At the beginning of the Appeal Hearing, the Council Members affirmed their ability to consider the Appeal without bias. Colorado statutes confirm that an individual may serve on both the Town Council and the Planning Commission/Design Review Board and such service does not rise to the level of a legal conflict of interest or constitute a disqualifying bias. The unanimous denial by a vote of 7-0 of the Appeal also removes any harm if an individual Council Member might have had a bias, although Council reiterates that no bias or conflict of interest has been established or exists that would prevent the Appellants or the Town Staff on behalf of the DRB from receiving a fair hearing on the Appeal.

ORDER

1. The Town Council has reviewed Appellants' Notice of Appeal and Opening Brief, the Design Review Board's Response, the proceedings and record of the DRB, and the supplemental evidence submitted by the Town Staff, and has considered oral arguments presented at the Appeal Hearing on October 23, 2012, and for the foregoing reasons, hereby denies the Appeal and affirms the decision of the Design Review Board as set forth in Resolution No. 2012-12.

2. A copy of this Resolution and Order shall be delivered to Appellants within ten (10) days of the decision, pursuant to Section 2.4.13.C.7 of the LUDC.

ADOPTED AND ORDERED THIS 25th DAY OF OCTOBER, 2012 BY THE TOWN COUNCIL OF THE TOWN OF PAGOSA SPRINGS, BY A VOTE OF 5 IN FAVOR, 1 AGAINST.

TOWN OF PAGOSA SPRINGS

By: 

Ross Aragón, Mayor



April Hessman, Town Clerk