Kanab City Council Decision Regarding
Taxpayer Association of Kane County
Site Plan Appeal, Viresco Energy
November 1, 2011

Based on our careful consideration of the arguments submitted by the parties and our review of the record of proceedings before the Kanab City Planning Commission, we find that the Planning Commission's approval of the Viresco Energy site plan was supported by substantial evidence and was not arbitrary, capricious or illegal. Therefore, we hereby DENY the appeal filed by the Taxpayer Association of Kane County. This Decision constitutes our final decision under Utah Code Ann. Sec. 10-9a-708. Below are our findings.

The Kanab City Council is the correct appeal authority.
Sec. 9-4 of the of the Kanab City Land Use Ordinance reads "Denial or approval by the Kanab City Planning Commission may be appealed to the Kanab City Council, as provided for in the appeals section of this Ordinance." We find this language controlling and therefore conclude that the City Council is the correct appeal authority.

In addition, we note that the Tax Payer Association previously agreed with our conclusion. Appeal was made directly to the Kanab City Council by John M. Barth, Attorney on behalf of the Tax Payer Association by way of letter dated May 26, 2011, that specifically states: "(t)his appeal is being submitted to the Kanab City Council...we believe that the appropriate appeal body is the Kanab City Council."

The Kanab City Council need NOT recuse itself because of the participation of Councilmember Jim Sorenson in the Planning Commission of the site plan.
Pursuant to Utah Code Ann. Sec. 10-9a-701(3)(b) an appeal authority "may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority." Councilmember Jim Sorenson excluded himself from this appeal authority and had no participation in the appeal, nor any dialog, verbal or written, with members of the appeal authority on this matter. Therefore, neither the appeal authority (the City Council) nor any participating member acted as the land use authority in this case.

The Kanab City Council need NOT recuse itself because of communications between members of the City Council and lawyers from Snow Jensen & Reece.

It is no secret that Snow Jensen & Reece serves as the City's new general counsel. It is likewise no secret that Snow Jensen & Reece serves specifically as the Planning Commission's legal counsel in this Site Plan Appeal. This is a practical reality of a small municipality's legal representation. Recognizing this reality, the Mayor and the City Council Members took painstaking efforts to avoid, and did avoid, any and all discussions and communication with Snow Jensen & Reece having anything at all to do with the substantive issues of the Site Plan Appeal or the merits of any party's position. In addition, to ensure fairness to the parties the City undertook the additional expense to hire special legal counsel, David Elmont of the law firm Barney McKenna & Olmstead, to advise it on all substantive and procedural matters of this Site Plan Appeal.

The Kanab City Council need NOT recuse itself because of Snow Jensen & Reece participating in the drafting of Resolution 8-4-11.

Similarly, Snow Jensen & Reece's assistance in preparing Resolution 8-4-11 was not inappropriate. Examination of Resolution 8-4-11 demonstrates that it is merely a set of non-substantive housekeeping rules that were meant to address the fact that no detailed procedural rules existed for conducting City Council appeals. These rules were meant for broader use by the city in future appeals and therefore required the assistance of the City's general counsel. The rules were not specific to the TPA appeal and there is no mention of the TPA, Mr. Guthrie, or Viresco in Resolution 8-4-11. Further, since Resolution 8-4-11 did not favor the Planning Commission or Viresco and was not prejudicial to the TPA's rights to fairly and completely present its appeal, the TPA's due process and equal protection rights could not have been violated in its drafting or promulgation.

We separately note with regard to Resolution 8-4-11 that Mayor Laycook made certain procedural rulings at the appeal hearing, based on her role as Chief Quasi-judicial Officer under this resolution. The City Council hereby adopts and approves each of those rulings as if it made them in the first instance at the hearing.

The Land Use Ordinance does contain a standard of review.

Under Utah Code Ann. Sec. 10-9a-707(2): "If the municipality fails to designate a standard of review of factual matters, the appeal authority shall review the matter denovo."

Under Section 9-4, appeals to the City Council are to be made "as provided for in the appeals section of this Ordinance." The only appeals section of the Land Use Ordinance is Chapter 3. Section 3-2 does have a designated standard of review: "The standard of review shall be limited to the record to determine only whether or not the original decision, ordinance, or regulation is arbitrary, capricious, or illegal."

It was not erroneous for the site plan and CUP to be considered separately.
Section 9-3 provides that "For buildings and uses covered by conditional use permits and Planned Development, design review shall be incorporated within such conditional use permit and Planned Development and **need not be a separate application**, provided the requirements of this Chapter are met." (emphasis added). Just because there "need not be" a separate application does not mean that the Planning Commission was forbidden from considering the conditional use permit separately from the site plan. Further, the only "building and use" covered by conditional use permit was a smoke stack. Thus, there was very little overlap between the conditional use permit and site plan application in this case.

The site plan was NOT required to be signed in order to be final
The Appellant cites Exhibit A, Sec. 1-17E of the zoning ordinance. That exhibit only applies to a Downtown Overlay, not the Manufacturing Zone.

The Planning Commission was the correct body to hear the site plan application.
Appellant argues that Utah Code Ann. Sec. 10-9a-302 only authorizes planning commissions to hear uncontested applications, and that the City Council should have heard the site plan application.

However in Section 10-9a-302(3) it provides that the Planning Commission shall make a recommendation to the legislative body for an appropriate delegation of power to at least one designated land use authority to hear and act on a land use application. Nothing in this language states that the Kanab City Planning Commission cannot rule on a contested application. Instead, the Utah Code provides that the local legislative body may delegate power to at least one land use authority to act on a land use application. In the present matter, the Kanab City Council has delegated power to the Planning Commission to hear and act on the site plan application along with other land use applications. Accordingly, Sec. 10-9a-302 does not prohibit the Kanab City Planning Commission from approving the site plan.

A public hearing was not required.
Appellant argues that under Sec. 10-9a-302(5) the City Council should have heard the contested application and should have held a public hearing.

Sec. 10-9a-302 only applies to planning commission powers, rather than city council powers, and only provides that when there is a public hearing, each participant should be heard. Appellant has identified no applicable provision requiring a public hearing.

The Planning Commission held meetings on January 13, 20 and 27, 2011, in which they received public comments regarding Viresco. In addition, the record reflects numerous, sometimes highly detailed and lengthly emails from the public that were received by the Planning Commission. We find that no one was deprived of an opportunity to be heard before the Planning Commission reached its decision.

The potential incompleteness of the application should not have prevented the Planning Commission from acting on the application.
Appellant argues that application was not made in the name of the property owner; fails to contain a legal description of the property; the site plan was not complete at the time if approval; and the application didn't include names and addresses of all owners of property within 300 feet.

We find that even if the application was initially incomplete, any necessary missing information was provided before the approval by Planning Commission (see *Springville Citizens* case below). Regarding the names and addresses of all owners of property within 300 feet, examination of page 3 of the Application reveals that it only requires the names and addresses of owners of property within 140 feet from the outer boundary. While this information was initially missing from the Application, it was all eventually provided to the Planning Commission.

In *Springville Citizens*, certain neighbors of land use applicant challenged the city's issuance of final approval for a planned unit development. The neighbors argued that the applicant had not provided all of the required information at the time of approval. In response to this argument the Utah Supreme Court determined as follows:

> Although certain materials were not timely submitted, the **majority** of the required documentation was before the planning commission and the city council when the P.U.D. ultimately was approved. That documentation, as

> well as other evidence before the commission and the council, supported approval of the P.U.D. Moreover, throughout the approval process and in an effort to meet P.U.D. requirements, the city council required [the applicant] to satisfy numerous conditions . . . all of which [the applicant] **eventually** fulfilled. In short, the undisputed evidence reveals without questions that substantial evidence supported the City's decision and that a reasonable person could have reached the same decision as the City. We conclude, therefore, that the City's decision to approve the P.U.D. was not arbitrary or capricious.

1999 UT 25, ¶ 25 (emphasis added).

Additional comments regarding the Planning Commission's discretion to approve an allegedly incomplete application.

The only issue on appeal is the Planning Commission's approval of the site plan – not the conditional use permit. Therefore, our findings are limited to the issues of the site plan, not the conditional use permit. Many land use applicants apply for land use entitlements before they commit resources to acquire legal interests in or ownership of the property to be developed. Such applications are often updated and perfected during the various phases and reviews of the entitlement process as receipt of the desired entitlement becomes imminent. Then, after the applicant secures the entitlement, the real estate purchase contact is effectuated by the conveyance of a deed, installment payments are made on a land contract or the land lease is signed. Jim Guthrie/Viresco Energy simply did what most other land use applicants would have done.

The TPA has alleged that the site plan application is incomplete because it was not made in the name of the legal owner of the property. Although the application for the site plan review designated Jim Guthrie/Viresco Energy as the owner of the property this is not dispositive. The Planning Commission was aware that the property was actually owner by the State of Utah School and Institutional Trust Lands Administration (SITLA). In fact, the Planning Commission received a draft of the SITLA "Special Use Lease Agreement No. 1684" between SITLA and Viresco Utah, LLC, which demonstrated that SITLA was aware of the intended use of its property. Since the Planning Commission was apprised of who was the presently the owner of the property and of Jim Guthrie/Viresco Energy's prospective interest, the discrepancy did not prohibit the Planning Commission from approving the site plan.

In addition, the TPA has alleged that the application is incomplete because it failed to contain the legal description of the subject property certified by a licensed land surveyor in the State of Utah as required on page 2 of the application. However, page 2 of the Application for Site Plan Review contains no such requirement. Additionally, page 1 of said Application requests the property location; however, it only asks for the property location using an east-west/north-south street address, which Mr. Guthrie/Viresco provided.

Finally, TPA argues that the site plan was incomplete because of matters such as utility lines and a proposed detention pond being insufficiently shown, for example, to show prevention or mitigation of potential ground water contamination. We again note that this appeal is solely for the site plan approval, not the conditional use permit. The relevant portion of the Ordinance for site plan approval is Chapter 9, which contains Section 9-5 identifying the matters generally to be considered and contains Section 9-8 providing that when the Planning Commission finds that "the application meets the intent of this Chapter, the design approval shall be granted, subject to such conditions as are necessary . . . ." Based on the extensive record, containing for example at least seven engineering reviews by the City's retained engineering firm, we conclude that a reasonable person could conclude that the Planning Commission correctly granted Viresco's application. We believe that in such circumstances there was substantial evidence in support of the Planning Commission's decision. Finding substantial evidence and failing to see any prejudicial error demonstrated by the TPA, we find the TPA has failed to meet its burden to show that the decision was arbitrary, capricious, or illegal. Therefore, the appeal is DENIED.

Signed:

Nina Laycook, Mayor (non-voting)

Cheryl Brown, Councilmember

Tony Chatterley, Councilmember

Ed Meyer, Councilmember

Steve Mower, Councilmember