

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PATRICK B. KIERNAN BUILDING PERMIT APPEAL  
TOWN OF CARBONDALE BOARD OF ADJUSTMENT  
HEARING ON MAY 11, 2017**

**A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.**

1. Applicant: Patrick B. Kiernan (“Applicant”)
2. Appellants: Mark Mahoney  
Meredith and Dan Bullock  
Rita and Richard Marsh  
Frank and Sally Norwood  
Jerome and Mary Whalen  
Mitch and Arne Alamag  
Mark Chain  
Diane Vaughn  
Margaret Mathers  
Andy Taylor and Linda Halloran  
Don Gunther  
(collectively “Appellants”)
3. Type of Hearing: De novo appeal of building permit issued by the Building Official (John Plano) on March 31, 2017 for a proposed residential structure to be located at 728 Euclid Avenue (the westerly 1.5 feet of Lot 3, all of Lots 4 and 5, and the easterly 12.5 feet of Lot 6, Block 24, Original Townsite, Town of Carbondale) (hereinafter the “Property”).
4. Existing Zoning: OTR (Old Town Residential).
5. In 2015, the Applicant submitted a land use (infill) application to construct a single family residence and a detached accessory dwelling unit (ADU) upon the property, which application included requests for the following variances:
  - a. a variance to allow the detached dwelling unit (the code requires that accessory dwelling units be attached to the primary dwelling unit);
  - b. a variance from the maximum building height of 25 ft. for a principal dwelling unit and maximum building height of 21 ft. for an accessory building to allow a 28 ft. high principal dwelling and a 23 ft. high accessory building;
  - c. a rear yard setback variance to allow a roof overhang to extend 4 ft. into the 5 ft. rear yard setback;

- d. a design variance to allow the dominant ridgeline to run east/west rather than parallel to the long dimension of the lot;
- e. a design variance from the requirement that structures step down in scale as the structure approaches the alley; and
- f. a design variance to allow the vertical walls of the principal structure within 5 ft. of the side yard setback to exceed 20 ft. in height

This 2015 application was denied by the Town's Planning and Zoning Commission because the then-proposed project was not designed in a fashion to result in the minimum amount required in order to achieve the purposes of the variance request, and that the project was not in scale with the existing neighborhood. The Planning and Zoning Commission also noted that the proposed variances were inconsistent with the spirit and the purpose of the zoning code as the OTR zone district was created to better accommodate the historical structures and the present and future land use patterns within this unique residential area. A number of the neighbors who filed this appeal were present at the 2015 public hearing concerning this prior land use application.

- 6. On September 16, 2016, the Applicant submitted an application for a building permit to the Town in order to construct a different residential structure upon the Property. The plans submitted depicted a building (approx. 4000 square feet) to include space for 6 bedrooms, 6 1/2 bathrooms, a common kitchen area, and three separate outside entrances. The building permit application, including the plans, are part of the official record of this appeal.
- 7. In response to the application, the Town Building Official (Mr. John Plano) had ongoing dialogue and correspondence with the Applicant concerning the layout and proposed use of the structure.
- 8. That correspondence included a letter from the Building Official dated October 21, 2016 noting that the building appeared to be laid out to rent rooms. The Building Official noted that the Town has strict occupancy standards and requested a written statement of understanding that this building would not be used in violation of applicable zoning, which is for single family residential use only<sup>1</sup> and does not permit hotels or boardinghouses. In response, the Applicant wrote a letter dated December 16, 2016 stating that it was not his intention to use this proposed home in violation of the Town occupancy standards *as currently enforced*. This letter would not bind future property owners, and it was not a clear commitment to abiding by applicable standards due to the enforcement

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<sup>1</sup> Accessory dwelling units (ADUs) can be permitted in the OTR zone district.

qualification (most zoning enforcement actions in Carbondale are complaint driven).

9. Subsequently the Planning Director authored a memo to the Building Official dated December 30, 2016 noting that the design of the structure appeared to lend itself to a more intense use such as a Boardinghouse. A boardinghouse is not an allowed use in the OTR zone district. The definition of boardinghouse is: “a building, other than hotels, motels, bed and breakfasts, or multifamily dwellings, arranged or used for lodging for compensation, with or without meals, and not occupied as a single-family unit.”
10. After a discussion with the Town Attorney, and a review of the Town’s Unified Development Code (Chapter 17 of the Municipal Code) (“UDC”), the Planning Director and the Building Official determined that the UDC does not limit the number of bedrooms and/or bathrooms within a residence in Carbondale. Staff therefore determined that the site plan and building were in compliance with the zoning. Therefore, the Building Official issued a permit to the Applicant on March 31, 2017.
11. That same day, on March 31, 2017, certain of the above-listed Appellants initiated an appeal of the issuance of the building permit pursuant to Chapter 17.02, Section 2.7.2.B.1, of the Municipal Code. The appeal was determined by Town Staff to be timely and complete.
12. Town staff thereafter established that the appeal would be heard by the Board of Adjustment at a noticed public hearing to commence on May 11, 2017, and that, due to a present lack of membership on the Board of Adjustment, members of the Town’s Planning and Zoning Commission would be appointed to serve as members of the Board of Adjustment for purposes of the appeal hearing as allowed by Chapter 17.02, Section 2.4.8.C.1 of the Municipal Code. Town staff also established a briefing schedule pursuant to which the Appellants would have until April 20, 2017 to file statements in support of their appeal, the Applicant would have until April 27, 2017 to file a statement in opposition to the appeal, and the Appellants would then have until May 1, 2017 to file a rebuttal statement. The Appellants and the Applicant proceeded to file written statements and supporting materials generally according to this schedule. Other letters supporting and opposing the building permit application were also filed by interested parties. Copies of all such written submittals were provided to all parties and were included in the record of this matter for consideration by the Board of Adjustment at the public hearing on May 11, 2017.

13. The Appellants' statements in support of their appeal generally outline three reasons why the Appellants contend that the building permit was wrongfully issued or why it should have been further conditioned:
  - a. The structure as designed is laid out to easily accommodate a large multi-rental situation and it therefore constitutes an impermissible boardinghouse, not a single family residence;
  - b. The structure as designed is not consistent with the historic character of Old Town Carbondale as required by the OTR zone district; and
  - c. If the structure is built as designed it should be required to include additional parking, as would other multi-family rental facilities.

Certain of the Appellants' submittals also noted that the Applicant had not provided a landscaping plan or a solar access plan as required by the Municipal Code.

14. The Applicant's statement in opposition to the appeal generally outlines the following reasons why the building permit should issue:
  - a. The plans as submitted meet or exceed applicable building and planning standards.
  - b. The structure would be "net zero" in terms of energy efficiency.
  - c. Shared use of the structure would not exceed four unrelated persons, which is allowed by the Town's zoning code and possible future uses in excess of this limit are not a basis to deny a building permit application for a structure that could be used in compliance with applicable occupancy standards.
15. On May 11, 2017, after all required public notices, the Board of Adjustment held a public hearing in order to receive evidence and argument as to whether the Building Official's issuance of a building permit was proper.
16. During the hearing, the Board of Adjustment received documentary evidence and live testimony from Town Staff, the Applicant, the Appellant, and other neighbors and other interested parties.
17. After hearing all testimony in favor of and in opposition to the appeal, the Board of Adjustment passed motion unanimously to close public comment on this matter and commence substantive deliberations. After significant deliberations, the Board of Adjustment continued this matter until May 31,

2017 for purposes of entry of written findings of fact and conclusions of law, and directed Town staff to prepare draft findings and conclusions determining that, while the possible future use of the structure for multi-family occupancy is not grounds to deny a building permit application for a structure that can function as a single family residence, the structure, as designed, is not consistent with the requirements of the OTR zone district.

**B. STANDARD OF REVIEW.**

1. Town Code Section 18-1-50 vests the Building Official with authority to process and issue building permits pursuant to the various building codes adopted by the Town, including the International Residential Code.
2. Chapter 17 of the Municipal Code (the UDC) further provides in Chapter 17.02, Section 2.8.5.C., that the Building Official “shall issue applications for permits and permits related to construction in accordance with the above regulations . . .”
3. As to appeals of Building Official Determinations, Chapter 17.02, Sections 2.7.2.B and –B.1, combine to provide that “appeals may be made by the decision of any administrative office or agency, based upon or made in the course of the administration or enforcement of this Code” and that “appeals of all administrative decisions shall be to the Board of Adjustment.”
4. Chapter 17.02, Section 2.7.2.C.2, provides that “every decision shall be based upon findings of fact,” “. . . every finding shall be supported in the record of the proceedings,” and “all hearings on appeals shall be conducted de novo.”
5. Chapter 17.02, Section 2.7.2.C.3, provides that:
  - a. The Board of Adjustment “shall consider the following in determining whether to affirm, reverse or amend a decision of another decision-making body:
    - i. The facts involved in the application or request, as presented by the appellant and the [Planning] Director, the requirements and intent of the applicable provisions of the Code, and the written decision being appealed;
    - ii. Evidence of the manner in which the provision has been interpreted in the past;

iii. The positive or negative impact of the requested development on the achievement of the Town's stated development goals and strategies; and

iv. The impact on the Town's ability to implement its Comprehensive Plan.

b. In granting a decision on an appeal of any administrative officer, the decision-making body may reverse an officer in whole or in part or may modify the decision or determination appealed from. The decision-making body may require reasonable safeguards or conditions to be imposed.

c. Any further appeals from the Board of Adjustment . . . may be to the courts, as provided by law; provided, however, that such appeal is in accordance with C.R.C.P. 106(a)(iv)."

### **C. REASONS FOR THE DECISION.**

1. After a de novo review of the application, staff reports, and various additional written submittals from and testimony by Town staff, the Appellants, the Applicant, and other neighbors and interested parties, the Board of Adjustment agrees with the Appellants that the Building Official should not have issued a building permit.
2. In particular, the Board of Adjustment determines that, while the proposed structure could be used for permitted single family residential purposes, its design is not consistent with the historic character of Old Town Carbondale as it does not sufficiently integrate the unique scenic, historic, natural and design features of this area, and does not provide special emphasis on the unique home sizes characteristic of the original Townsite as required by Chapter 17.03, Section 3.2.3, of the Municipal Code.
3. The Board of Adjustment also finds and determines that the proposed structure is inconsistent with other stated Town development goals and strategies and would impede implementation of the Town's 2013 Comprehensive Plan.
4. The Board of Adjustment also finds and determines that the decision of the Building Official should be reversed because the Applicant did not submit, and the Building Official did not review or consider, a landscape plan pursuant to Chapter 17.05 Sections 5.4.4.A and 5.6.6.B, or a shading analysis as required by Chapter 17.05 Sections 5.12.2.A and 5.12.4, of the Municipal Code.

## D. FINDINGS AND CONCLUSIONS.

1. The Board of Adjustment finds that Building Official acted appropriately in finding that the structure is designed as a single family residence despite any potential future use for multi-family residency. Among other things, while the structure may ultimately contain 6 bedrooms, 6 1/2 bathrooms, and three separate entrances, it only would contain one kitchen area, and it could therefore be used as a single “dwelling” by a “family” as defined in Chapter 17.08 of the Municipal Code (UDC definitions section).
2. However, the Board of Adjustment finds that the Building Official nonetheless should not have issued a building permit because: (1) the structure, as designed, does not meet the requirements of the OTR zone district and is otherwise inconsistent with the Town’s development goals and the Town’s 2013 Comprehensive Plan; and (2) the Applicant did not prepare and submit, and the Building Official did not review or consider, required additional submittals including a landscape plan, and shading/solar access plan.
  - i. Findings re: lack of compliance with OTR zoning.

Pursuant to Chapter 17.03, Section 3.2.3.A, of the Municipal Code, “[t]he purpose of the Old Town Residential district *is to allow residential uses and densities that are consistent with the historic character of Old Town Carbondale. This area has unique scenic, historic, natural, and design features that should be preserved and integrated into new development. Special emphasis shall be placed on the quality and character of the built environment in this district, and the unique lot and home sizes characteristic of the original Townsite.* The OTR district should emphasize pedestrians more than cars. Single-family dwelling units continue to be the predominant development type in this district.” (emphasis added). Additionally, the OTR zone district was established by the Town pursuant to Ordinance No. 5, Series of 2008, after a few controversial large homes had been constructed in the neighborhood in the years immediately prior. Ordinance No. 5 states that one intended purpose was to “better accommodate the historical structures and present and future land use patterns within this unique residential zoning area that is adjacent to downtown Carbondale.”

When applying these standards to this proposed project, the Board of Adjustment finds that the project, as proposed, is not consistent with the historic character of Old Town Carbondale. The record, which includes the plans for the Applicant’s proposed new structure as well as photographs of many other area homes, shows that Applicant’s proposed structure, as designed, does not contain or integrate the variety of design elements, such as mass and scale variations, common in historic

architecture. Compliance with the UDC is not just about quantitative dimensional standards—qualitative standards apply too. *See* Municipal Code, Chapter 17.05, Section 5.6.2.B.1 (“all requirements in this chapter are standards unless explicitly labeled as guidelines”). Existing homes in the OTR zone district are generally designed as not just one box, but rather a series of connected boxes. *See* photos attached to and included in April 27, 2017 letter to the Board of Adjustment. In contrast, the Applicant’s design consists of just one large box with two-above ground floors and one below ground. *Id.* (see 3-D figures, in particular SW and SE views, included in Applicant’s submittal to the Board of Adjustment). Multiple masses, multiple materials, multiple points of interest are evidenced in the other photographs shown, but not in the design of the proposed structure.

The Board of Adjustment also finds that the proposed building presents too much mass and scale for the neighborhood, resulting in non-compliance with the purpose section of the OTR zone district (Section 3.2.3.A.) as this section states that special emphasis shall be placed on the unique home sizes characteristic of the OTR zone district.

ii. Lack of compliance with Residential Site and Building Design standards.

Chapter 17.05, Section 5.6 of the Municipal Code sets forth residential site and building design standards in all zone districts, which standards are intended to:

- A. Promote new residential developments that are distinctive, have character, and relate and connect to established neighborhoods.
- B. Provide variety and visual interest in the exterior design of residential buildings;
- C. Enhance the residential streetscape and diminish the prominence of garages and parking areas;
- D. Enhance public safety by preventing garages from obscuring main entrances or blocking views of the street from side residences; and
- E. Improve the compatibility of infill projects, particularly attached and multi-family residential development, with the residential character of surrounding neighborhoods.

*See* Chapter 17.05, Sub-Sections 5.6.1.A through –E, inclusive. The Board of Adjustment finds and determines that these goals are not met by the



proposed design, as it does not relate or connect to the established neighborhood, it will not enhance the residential streetscape as a landscape plan was not submitted, it does not provide variety and visual interest as the shape of the building is rectangular with no varying masses or architectural details, it will be much larger in mass and scale than other houses on the block, and it is not compatible with the residential character of the surrounding neighborhood.

- iii. The project would negatively impact Town development goals and impede the implementation of the Comprehensive Plan.

Chapter 17.02, Section 2.7.2.C.3, of the Municipal Code requires the Board of Adjustment to also consider “the positive or negative impact of the requested development on the achievement of the Town’s stated development goals and strategies” and “[t]he impact on the Town’s ability to implement its Comprehensive Plan.” The Town’s 2013 Comprehensive Plan reflects in Section 4.2 that “Old Town is collectively the oldest residential neighborhood in town. This designation encompasses the portion of the historic residential town grid that was zoned as Old Town Residential in 2008. This zone district emphasizes the historic character of the Old Town neighborhood.” The Comprehensive Plan also reflects in Section 4.1 on Page 40 that the Town’s infill development goals for existing neighborhoods require that “special care shall be taken to ensure mass and scale conform to the existing neighborhoods *beyond what is allowed in the current underlying zoning.*” (Emphasis added). The Board of Adjustment finds that the Applicant’s design does not demonstrate that such special care was taken here, as the mass and scale do not conform to historical homes in the neighborhood. Nor is the design reflective of the “historical character” of the neighborhood that the Comprehensive Plan seeks to protect and preserve.

- iv. The application was deficient as it lacked required submittals concerning landscaping and solar access.

The Applicant did not submit and, prior to issuing a building permit, Town staff did not review and consider, a landscape plan or a shading analysis. Both of these submittals are required by Town Code. See Chapter 17.05 Section 5.4.4.A (landscape plan) and Chapter 17.05 Sections 5.12.2.A and 5.12.4 (shading analysis). Without these items, the application was not complete and inconsistent with Town Code. A landscape plan would potentially affect the view of the proposed structure from Town streets and neighboring properties. A shading analysis would elucidate whether the proposed structure might impermissibly shade any other bordering lot within the OTR zone district as prohibited by Chapter 17.05, Section 5.12.5.C to a greater degree than a solar fence 25 feet in height. Without

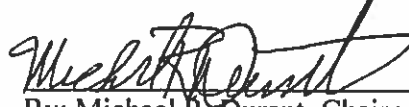
review and analysis of these documents, it was erroneous for the Building Official to approve a building permit.

**E. FINAL DECISION AND RIGHT TO JUDICIAL REVIEW.**

For the foregoing reasons, the Appellants' appeal is granted and the Building Official's decision to issue a building permit to the Applicant is reversed. The approval of these findings and conclusions by the Board of Adjustment represents a final decision of the Town of Carbondale that may be appealed to the Garfield County District Court within 28 days of the date that this decision is entered below pursuant to C.R.C.P. 106(a)(iv).

Entered and adopted by a vote of 5 to 0 this 31st day of May, 2017.

BOARD OF ADJUSTMENT  
TOWN OF CARBONDALE, COLORADO



By: Michael R. Durant, Chairperson