

**BEFORE THE TOWN COUNCIL OF THE TOWN OF CRESTED BUTTE, COLORADO**

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IN THE MATTER OF THE APPEAL BY MICHAEL R. HANEY OF THE BOARD OF ZONING AND ARCHITECTURAL REVIEW'S DECEMBER 18, 2018, DECISION TO DENY AN APPLICATION FOR DEMOLITION OF A NON-HISTORIC STRUCTURE.

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**APPLICANT'S REPLY IN SUPPORT OF STATEMENT OF APPEAL**

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Michael R. Haney, the owner of real property located at 20 Third Street in the Town of Crested Butte, submits the following Reply in Support of his Statement of Appeal:

As the Town Staff's Response (the "Response") makes clear, the BOZAR's initial denial of a demolition application for the subject property was viewed in isolation from the proposed new residence. The denial was based on BOZAR's failure to follow the Town's long-standing, well-known and uncontested policy: if a structure is not historic, it can be demolished. The Response identifies alleged harmful effects associated with the loss of "attainable housing," a phrase that has no definition within the Code, and a concept that is irrelevant for purposes of reviewing this (or any) demolition application. *See* Response, p.5. Under Code Section 16-22-100(a)(5), BOZAR's scope of review is limited to architectural and historic matters, not matters related to housing. Recent precedent reinforces this conclusion. There is no dispute that affordable housing is an issue of paramount importance in the Town of Crested Butte, but under the Code, it has nothing to do with whether the Town should allow the demolition of Mr. Haney's residence.

The Response concedes that the structure is not historic; it is not architecturally significant (as the Response acknowledges, it is a fake Victorian constructed in 1977), and it is not deed restricted. There is no rational basis for denying the demolition application. The Town Council should overturn the BOZAR decision and approve demolition with or without conditions.

## I. KEY FACTS IMPORTANT TO THIS APPEAL

1. The Applicant did not submit a demolition application in isolation. Pursuant to Code Section 16-14-190, the demolition application included plans for a new residential structure on the property. *See* Exhibit N. The proposed plans for the new home have met with general approval of the BOZAR. *See* Exhibits A, C, H, I. Despite this, the BOZAR did not allow review of the proposed new structure on December 18, 2018. *See* Exhibit D, p.44.

2. The Applicant accepts the Conditions identified on page 5 (paragraphs 6.(1), (2) and (3)) of the Response. **The Applicant does not and has never contested those conditions.**

3. Both the Applicant and the Staff agree the existing structure is non-historic. *See* Response, p.1.

4. The structure was built in 1977, twenty-five (25) years *after* the Town's only identified Period of Significance. *See* Response, p.1; Ordinance 1, Series 2019 (identifying the Period of Significance as 1880 to 1952). It does not represent the Period of Significance.

5. The Town Staff has not contested that there is no record, report, or other document that identifies the subject structure as having architectural significance. *See* Statement of Appeal, p.11.

6. The Town has acknowledged it does not have appropriate criteria and standards to regulate demolition. *See* Ordinance 1, Series 2019, p.1. ("WHEREAS, demolition of structures without appropriate criteria and standards can threaten the Town's historic, unique character[.]")

7. The uncontested policy of the Town is clear: "[t]he policy of the Town has been [to] allow the demolition of existing structures as part of a site redevelopment plan which is approved by the Board (16-14-190)." Exhibit E, p.1.

8. The Town Staff's statement that the subject structure "emulates" Western Victorian

architecture is an admission that the subject structure’s architecture is fake – it is not historic, it is only an imitation. *See* Response, p1. If this structure sets the standard for protected architecture in Crested Butte, the Town Council will have adopted a policy of embracing and protecting “fake” architecture, not real architecture, with no notice to property owners. This devalues not just Crested Butte as a whole, but also the value and importance of its truly historical structures.

9. The Town Staff does not contest that denying the appeal will create substantial uncertainty, nor that this uncertainty will negatively impact property values throughout Town. *See* Statement of Appeal, pp.11-16.

**II. STANDARDS REFERENCED IN THE TOWN STAFF’S RESPONSE ARE NOT INCLUDED IN THE MUNICIPAL CODE, ARE VAGUE, OR ARE ENTIRELY LACKING IN GUIDANCE OR DEFINITION.**

As BOZAR Member David Russell correctly observed, the Town Code does not include criteria to support the denial of a demolition application. Exhibit C (12/3/18 DRC Meeting Minutes), p.1. Supporting this sentiment, Molly Minneman agreed that “[t]he [Town of Crested Butte Municipal] Code is vague.” Exhibit C (12/3/18 DRC Meeting Minutes), p.1.

It is a generally accepted legal principle that overly vague laws invite arbitrary and discriminatory enforcement. Within the Response, several vague phrases are used to justify denial of the application. The Town Council should not rely on these phrases, many of which are not referenced (much less defined) within the Town Code. Specific phrases follow:

1. The subject structure “conveys relationships with historic buildings.”

This conclusory statement is repeated in the Response on pages 1 and 2 but is not found or explained within the Code. There is no indication as to why, or how, the existing structure “conveys relationships” to “historic buildings,” nor which existing historic buildings are

somehow related to the structure. Moreover, the Code provides no indication that this characteristic is relevant to the review of this (or any) demolition application.

No individual property owner can reasonably identify the meaning of this phrase, much less apply it to their property or their prospective purchase. Embracing this subjective standard to justify a denial will create substantial uncertainty for all property owners within Town, ultimately contributing to a destabilization of property values. The assertion that the subject property “conveys relationships with historic buildings,” and thus should not be demolished, should be rejected by the Town Council.

2. The structure “exemplifies the most appropriate development” for the property.

This conclusory statement is found in the Response on page 2. As the Applicant argues on pages 15 and 16 of his Statement of Appeal, the only reasonable and rational way to define the “most appropriate development” for property in Town is by reference to the Code’s zoning provisions and the Design Guidelines. Any other determination is arbitrary. A simple example demonstrates this point: if the structure’s FAR, 0.226, represents the “most appropriate development” for the subject property, why does the Code allow an FAR in the R1 Zone of up to 0.4, with a maximum of 0.5 on the entire property? *See* Code Section 16-4-50(3). The answer is simple: because a structure with an FAR of up to 0.4 in the R1 Zone demonstrates the “most appropriate development” within this Zone District.

Embracing the notion that the structure “exemplifies the most appropriate development” for the property casts aside the Code and the Design Guidelines, in favor of an arbitrary determination that is inherently vague and cannot be applied on a consistent basis to other properties or structures throughout Town, much less the R1 Zone. Such a determination will create substantial uncertainty for owners of property within Town, ultimately contributing to a

destabilization of property values. The assertion that the existing structure exemplifies the “most appropriate development” for the property, and thus should not be demolished, should be rejected by the Town Council.

3. Denying the Application will “protect[] the existing/unique character of Town.”

This conclusory statement is repeated in the Response on page 2. The Code is entirely devoid of any criteria that would guide BOZAR or the Town Council in deciphering what represents a threat to the character of Town, much less how to protect the character of the Town. There are no published or unpublished standards indicating that demolition of the subject structure – or any other structure - represents a threat to the character of the Town.

The recently-enacted moratorium will allow the Council to engage in a thoughtful and public process to develop criteria for demolitions that can be applied prospectively and consistently. But such standards do not exist now (as the moratorium ordinance itself recites), and the Town’s counsel has confirmed that the moratorium does not apply to this application. It is impossible to identify criteria on which demolition of this structure can be denied, especially given the recently-enacted demolition moratorium and the acknowledgement that no such standards exist. Denial, here, in view of the express language of the moratorium legislation, would be a quintessential example of arbitrary and capricious decision making.

As noted above, this structure should not set the standard for protected architecture in Crested Butte. To do so would devalue not just Crested Butte as a whole, but also the value and importance of its truly historical structures.

If the Town Council determines that demolition of this structure will threaten the character of the Town, the Town Council should adopt a policy to address such a threat in the least restrictive manner possible, while respecting the Applicant’s property rights. In this

situation, adopting such a policy would call for a conditional approval consistent with the options described on pages 18 through 20 of the Applicant’s Statement of Appeal. To do otherwise will create and promote substantial uncertainty for all property owners within Town, ultimately contributing to a destabilization of property values.

4. Allowing the demolition will result in “the loss of period of significance that this house represents.”

This assertion, referenced on page 2 of the Response, is entirely unsupported by facts. There is only one identified Period of Significance for the Town of Crested Butte: 1880 through 1952. If citizens believe another era is worthy of consideration as a new Period of Significance, the only fair approach is for the Town Council to take testimony on the matter during the moratorium period, specifically identify a proposed new Period of Significance, follow the correct procedures to obtain certification of that Period of Significance – and apply any new regulations *prospectively*, not retroactively.

Neither the Town Council nor the BOZAR should create a new Period of Significance on an ad hoc basis, as is suggested in the Response. To do so invites arbitrary decision-making, ultimately contributing to a destabilization of property values.

5. Allowing the demolition application will result in “wastefulness and unsustainability.”

This assertion, referenced on page 2 of the Response, is certainly a concern to the Applicant. However, sustainability is not identified as a criterion for BOZAR or the Town Council to consider in analyzing a demolition application. Code Section 18-15-10 indirectly references sustainability, but only *suggests* (and does not mandate) that an applicant “recycle, reuse or resell 50% of existing materials” by carrying out a recycling plan which is due two

weeks prior to demolition. Through that recycling plan, an applicant is only required to identify the destination for recycled materials or make major components available to the public for a period of two (2) weeks. Notably, an applicant cannot even use the Town's right-of-way to assist with recycling major components of a structure. Regardless of the Code's lack of mandatory recycling efforts, the Applicant does intend to work hard at recycling as much of the structure as possible, if not the entire structure (through a donation).

Based on the plain language of Code Section 18-15-10, concerns regarding "wastefulness and sustainability" are not appropriate at the initial application stage and cannot be used as the basis for denial of this application. This issue should be addressed through a recycling plan, delivered at least two (2) weeks before demolition is planned.

6. Allowing the demolition will impact the availability of "attainable housing."

The phrase "attainable housing" is continually referenced on page 5 of the Response in describing the alleged harmful effects of approval. The Applicant can find no reference to, or a definition of, this phrase within the Town Code. In fact, there does not appear to be a reasonably consistent definition within the public domain, a fact shown by a simple Google search.

The subject property is not deed restricted in any way. Redevelopment of the property will not have an impact on the availability of housing in Town. The existing structure will be replaced with a new structure, inhabited by the Applicant.

In addition to the lack of any reference to "attainable housing," the Code lacks any indication that the Town Council should consider impacts to housing when analyzing a demolition application (except Resident-Occupied Affordable Housing [ROAH] fees collected at the time of building permit). There is no precedent for considering impacts on housing. In fact, recent precedent weighs entirely against considering impacts on housing, as shown by BOZAR's

approval of a demolition application at 222 Gothic.

At 222 Gothic, described on page 10 of the Applicant’s Statement of Appeal, five (5) existing structures – which were both historic and classified as affordable housing – were approved for demolition, without any readily apparent concern for the impact on affordable or “attainable” housing, nor for their historic or architectural importance. The Town’s authorization for the demolition of these five structures stands in stark contract to BOZAR’s denial of the application here.

The reference to impacts on “attainable housing” is intended to exploit the Town Council’s concerns for affordable housing by importing this issue into the demolition realm, where it does not currently exist. If the Town Council believes that such considerations belong in the demolition realm, then it can, and should, develop actual standards during the moratorium, and then apply these new standards going forward. Under the current Code, the Town Council should reject all the conclusory assertions that this specific demolition will have a negative impact on the availability of “attainable housing.” To the contrary, this application will have no net impact on housing availability within the Town.

**III. THE HARMFUL EFFECTS ALLEGED BY THE TOWN STAFF ARE NOT LEGITIMATE**

On page 5 of the Response, several new alleged harmful effects are presented for Town Council’s consideration, none of which were discussed at the December 18, 2018 BOZAR meeting. In addition, none of these claimed harmful effects relate to the architecture of the subject property – nearly all relate to a threatened loss of “attainable housing,” a phrase that, as set forth above, does not exist within the Town Code and is not defined by the Town Staff. None of the alleged harmful effects are legitimate, nor should they be used as a basis for denying the

subject application.

1. First, in subparagraphs 4.a., b. and c., the Town Staff claim that allowing this demolition will remove or diminish “attainable housing” from the marketplace. As a result, the Town Staff conclude that the “stability and value” of property in Town will be negatively impacted, the “occupancy of existing property” in Town will be negatively impacted, and the “fabric of the neighborhood” will be degraded. These conclusions have no merit.

As noted above, the Code makes no mention of “attainable housing.” Regardless, the subject property is not deed restricted, and the proposed redevelopment will not result in a net loss of housing in Town.

It is entirely counterintuitive that the stability and value of property in Town will be negatively impacted by redevelopment of this particular property. The Town Staff’s argument proves this point: The Staff allege that redevelopment will lead to higher values for the new residence, thus making it a less “attainable” property. Simultaneously, the Staff allege that redevelopment will negatively impact values of this property and neighboring properties throughout Town (presumably through decreased values). Common sense (and a review of publicly-available real estate records, as well as revenues from the Real Estate Transfer Tax) tells this Town Council what it needs to know: redevelopment will not impair stability or values of the subject property, much less neighboring properties.

Conversely, a denial of the application risks destabilizing property values in the Town, as the Applicant’s Statement of Appeal described on pages 11 through 16. None of the Applicant’s arguments in the Statement of Appeal were contested by the Town Staff.

Adopting the position urged by the Town Staff sets a very problematic precedent. The rule, as the Staff would have it, would be to prohibit any demolition if the new structure would

have a greater value than the demolished structure. In other words, the Staff is urging the Town Council to adopt a policy that, for all practical purposes, flatly prohibits demolition under all circumstances. Adopting this policy would undoubtedly result in destabilized values, as well as substantial litigation, and perhaps most importantly, the gradual decline and degradation of buildings within the Town.

Finally, the Staff's assertion that redevelopment of the property will "degrad[e] the fabric of the Town" because of increased property values is insulting to part-time residents. This harkens back to the days of controversy over "I hope you can afford it"-type statements. The Town Council cannot adopt one policy for full-time residents, and another for part-time residents, a fact that BOZAR openly acknowledged. *See* Exhibit D, p.38.

The Town Council should reject all the alleged harmful effects identified in subparagraphs 4.a., b. and c. of the Response. None of these harmful effects are likely to occur. None justify denying this demolition application.

2. In subsections 4.d. and e., the Town Staff concludes that demolition will "prevent the most appropriate development" on the property. As explained on page 4 of this Reply, the "most appropriate development" is development that is consistent with the Code and the Design Guidelines. The new residence will meet these requirements.

3. Finally, the Town Staff claim that demolition will "fail to protect the unique character of the Town." This vague conclusion should be rejected wholesale by the Town Council. The Town's "unique character" is not based on the forced preservation of an admittedly fake Western Victorian structure, to the Applicant's detriment and against his wishes. The Design Guidelines are intended to protect the character of the Town. If the new structure complies with the Design Guidelines, then there is no rational basis to believe the unique

character of the Town will be impacted by approving this demolition.

**IV. THE TOWN CODE CONTAINS NO REQUIREMENT FOR A MITIGATION PROPOSAL, NO DEFINITION FOR WHEN SUCH A PROPOSAL IS APPROPRIATE, NOR ANY SUGGESTION OF WHAT SUCH A PROPOSAL SHOULD INCLUDE**

On page 5 of the Response, the Town Staff cast aspersions upon the Applicant because he “propose[d] no mitigation” for the alleged “harmful effects” noted in the Response. First and foremost, the Applicant does not agree that these harmful effects are real, or will come to pass (and therefore, there is no need for mitigation). Second, there is currently no Code provision, formal or informal requirement, or other mandate requiring an applicant to prepare or propose a mitigation plan within a demolition application. A mitigation plan requirement could of course be developed during the moratorium and legally applied in the future, but not here. Third, there are no formal or informal criteria for what mitigation would be appropriate for any demolition, much less this specific application. Fourth, the Applicant has already demonstrated an interest in following prior informal precedent of donating the structure. Discussion of an approval conditioned on donation was not allowed at the December 18, 2018 BOZAR meeting.

Code Section 18-15-10 provides the only identifiable reference to anything resembling a mitigation plan, encouraging (but not requiring) an applicant to “recycle, reuse or resell 50% of existing materials.” In addition, the applicant must make major elements of the structure available to the public for a period of two (2) weeks. The recycling plan is not required at the time of initial application, but rather shortly before demolition.

The Town Council should reject any requirement that impacts be mitigated. The Applicant has made abundantly clear that he is willing to donate the structure to the Town or

give it away to a third party.

## **V. RECOMMENDED CONDITIONS OF APPROVAL**

The Applicant has no objection to the proposed conditions set forth on page 5 of the Response. For purposes of convenience, the Applicant proposes the following conditions of approval, which incorporate possible donation of the structure:

1. Within 45 days from the date of application approval, the Town will determine if it will accept a donation of the structure. Should it choose to accept the donation, the Applicant and the Town will work together to remove the structure from the property by June 15, 2019 or such later date that is acceptable to Applicant.

2. If the Town declines to accept the donation of the structure, the Applicant shall use his reasonable best efforts for a period of 45 days (from the date of Town's notice of declining the donation) to donate the structure to a local nonprofit organization, a local (i.e. Gunnison County) resident or other party. If a donee is found, the Town will cooperate with the donee's efforts to re-locate and re-use the structure by June 15, 2019.

3. If the Town declines to accept the donation of the structure, and no third party is willing or able to accept the structure prior to June 15, 2019 (or such later date that is acceptable to Applicant), the Town shall allow the Applicant to demolish the structure subsequent to Applicant's delivery of a standard recycling plan to Town pursuant to, and in accordance with, Code Section 16-14-190.

4. Prior to demolition or removal, architectural approval must be granted by BOZAR for the construction of a new residential building.

5. Prior to demolition or removal, permits for a residence to be constructed on the property for which construction drawings have been submitted to and approved by the Building inspector

and necessary fees paid to commence construction.

## **VI. CONCLUSION**

Based on the arguments and reasons stated above, Michael R. Haney respectfully requests that the Town Council overturn the denial of his demolition application, approve the demolition application with or without conditions, and direct the BOZAR to review the design plans for a new residential structure on the subject property.

/s/ Aaron J. Huckstep

Huckstep Law, LLC

Aaron J. Huckstep, Attorney for Applicant

EXHIBIT N  
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