

NOTICE OF APPEAL
(Dev. Plan. App. #DP 2018-04)

(Citations denoted by a bold font # in brackets reference the corresponding notation in the Appendix)

This Notice is filed by the undersigned parties-in-interest (“the undersigned”) to Dev. Plan. App. #DP 2018-04 (the “Decision”) It is directed to the Board of Commissioners of Larimer County, the Estes Valley Board of Adjustment (“Board of Adjustment”), and the Estes Valley Planning Commission (“Planning Commission”), involving as it does aspects of use classification, code interpretation, development plan review, and location and extent review. The Town development review staff (“staff”, “Community Development Department”, or “CDD”) has previously indicated that appeals of the subject decision should be made exclusively to the Board of Commissioners of Larimer County; however, the staff later reversed itself and stated that at least a portion of the appeal should be taken to the Estes Valley Planning Commission. The undersigned find it necessary to file the appeal with all of the bodies which the applicable codes, confusingly, appear to make possibly responsible to consider and decide an appeal in the circumstances of this matter. In the event that any argument presented herein is addressed to the incorrect appellate body in connection with the aforementioned inconsistencies, all arguments contained herein are addressed to each appellate body.

The undersigned request specific findings and explanations from each of the bodies to which the appeal is addressed as set forth in the Appendix, attached to and incorporated by reference into this Notice of Appeal.

The undersigned find inconsistent language in the Estes Valley Development Plan, the Intergovernmental Agreement, and the Governance Policies of the Board of Trustees of the Town of Estes Park as to authority of the Estes Valley Planning Commission (decision maker or advisor to both the Town and Larimer County) and to responsibility (between Larimer County and the Town of Estes Park) at the decision making stage of this process for management and direction of the Town staff in their work in their relationship with Larimer County. Therefore, any reference to the Town of Estes Park (Town) in this Notice of Appeal includes Larimer County in the alternative.

Decision appealed: August 6, 2018 decision issued in writing by Randy Hunt, Community Development Director of Estes Park, concerning Development Plan Application No. DP 2018-04, Estes Mountain Coaster (the “staff decision”).

In support of the following positions, the undersigned cite that portion of the Estes Park Municipal Code known as the Estes Valley Development Code (“EVDC”). This appeal is filed pursuant to EVDC Sections 12.1 A., C., F., G. Where known, specific sections of the EVDC are given; the undersigned reserve the right in the appeal hearing(s) to cite other and further provisions of the EVDC, the Estes Park Municipal Code, or statutes and constitutions whose applicability and relevance are later determined.

Use Classification/EVDC Interpretation

The staff classified the Estes Mountain Coaster as a “ ‘Recreation Facility’, per Section 13.2 of the EVDC under ‘parks and recreation facilities’ ”. As such, the staff determined the Estes Mountain Coaster was permitted by right in the zoning district of the subject property, RE-1 Rural Estate Zoning District. This decision is appealable to the Board of Commissioners of Larimer County, because the subject property is in unincorporated Larimer County. (Table 2-1, Note [1]; see also EVDC Section 3.12.B.3)

Despite the staff decision, the use in fact and in law fits exactly that of a “Commercial Recreation or Entertainment Establishment, Outdoor”, as defined and illustrated in EVDC Section 13.2.C.13. Commercial Recreation or Entertainment Establishment, Outdoor is not permitted in the RE-1 Rural Estate Zoning District and, therefore, the Estes Mountain Coaster is not allowed in the RE-1 Rural Estate Zoning District.

The general catch-all definition of “Park and Recreation Facilities” is not nearly as specific and appropriate for the subject use as the definition of “Commercial Recreation or Entertainment Establishment, Outdoor.” The specific should always control over the general, and it is very appropriate in this case that the specific control the general because the specific criteria of Section 13.2.C.13. make clear that the Estes Mountain Coaster is a commercial enterprise, that is, a “Commercial Recreation or Entertainment Establishment, Outdoor” “whose main purpose is to provide the general public with an amusing or entertaining activity, where tickets are sold and fees collected at the gates of the activity”. Examples of “Commercial Recreation or Entertainment Establishment, Outdoor” include go-cart tracks, outdoor mazes, and amusement parks; the Estes Mountain Coaster fits perfectly into this category. These specific, exceedingly similar uses to the subject use are contrasted with the general definition of Section 13.2.C.34. of “parks, playgrounds, recreation facilities and open spaces.” The examples there include many public facilities such as public parks, public squares, public recreation areas and cemeteries. If the Town were to include “mountain coaster” in addition to the examples of “Park and Recreation Facilities,” a layman could easily delineate that one of these examples is not like the other examples.

It is noted that “Recreational Facilities” are defined at EVDC Section 13.3.197 as “a place designed and equipped for the conduct of sports or passive and/or active recreational activities.” “Recreation, Active” is defined at Section 13.3.195. as “leisure-time activities, usually of a formal nature and often performed with others, requiring equipment, non-motorized or otherwise, and taking place at prescribed places, sites or fields”. Included activities are “swimming, tennis and other court games, baseball and other field sports, track and playground activities.” (“Recreation, Passive” is defined at Section 13.3.196., but does not appear applicable.) Missing from these general definitions of recreation-oriented activities that the staff relies on is any aspect of *commercialism*. However, commercialism is at the heart of the Estes Mountain Coaster, which is intended to be sited squarely in the non-commercial RE-1 Rural Estate Zoning District. The Estes Mountain Coaster is plainly a commercial use. The EVDC defines “Commercial Use” as “activity involving the sale of goods or services carried out for profit.” (Section 13.3.54.) The Estes Mountain Coaster is a for-profit business to be continually

operated in that service. For the staff to ignore that principal characteristic (without which the applicant surely would not be proposing the use), particularly where the EVDC provides a specific recreational use that *is* commercial, is completely inappropriate and unexplainable.

The Staff's use classification also ignores the fact that in Table 4-1 "Park and Recreation Facilities" are listed under the category of "Institutional, Civic and Public Uses". The Estes Mountain Coaster is a private, for-profit enterprise. Under accepted plain English rules, "private" is the opposite of "public", and therefore the categorization excludes private uses. In addition, if it should be suggested (as has been done by the Estes Park Town Manager, explanation to follow) that both the Park and Recreation Facility use AND the Commercial Recreation or Entertainment Establishments, Outdoor use could apply is in error because EVDC §4.2 (B) [5] expressly states that the classifications on the use tables are "intended to be mutually exclusive" (emphasis added) and, "if a use type is specifically listed in the table, that use type is allowed only in the districts indicated, not within the districts that may allow the broader classification." The commercial outdoor recreation use is not allowed in residential zones. EVDC §4.2 [C] further states: "Uses not specifically listed as permitted by right or by special review in a specific zoning district, as depicted in Use Tables 4-1 and 4-4, are prohibited [unless other steps are taken which are not relevant here]".

While "Park and Recreation Facilities" are indeed listed in Table 4-1, the commercial recreational facility use is not listed as being allowed in residential zones, and one or another must be excluded. If the use fits perfectly under both of those uses, then there is no reason at all to have two different use descriptions in the EVDC for the same type facilities.

Applying use criteria for a use that expressly disallowed in a zoning district is prohibited. All of the criteria applied fit the Commercial Recreation or Entertainment Establishments, Outdoor use, which Table 4-1 shows, but their absence, is prohibited in the RE-1 Rural Estate Zoning District, under both EVDC. §4.2 [C] and. A.2 [5]

In addition, the Decision fails to make findings and/or correctly apply the use classifications Standards of Review in §3.12 C.[5A]. While none of the criteria are mentioned, it failure to consider the character of RE-1 Rural Estate Zoning District is glaringly ignored – the Decision on this use is completely against "the stated intent and purposes of this EVDC and the zoning district in which it is to be located." [13] Undersigned request specific determinations from the Commissioners on each code-specified criteria judgment by the staff and on the adequacy of the bases the staff used. Especially important are use criteria 1, 3, 8, 11, 12, & 13.

The undersigned assert that the staff's use classification is patently incorrect, fails to meet standards, all as set forth herein, and the Estes Mountain Coaster is not permitted in the RE-1 Rural Estate Zoning District. The Board of County Commissioners should reverse the staff decision and deny the proposal.

* * *

The foregoing use classification involves code interpretation, which the staff is empowered to perform pursuant to Section 13.1. The proceeding paragraphs under this section

(Use Classification/ EVDC Interpretation) apply to this appeal to the Board of Adjustments and are incorporated herein. As such, the interpretation is reviewable on appeal to the Board of Adjustment per Table 2-1. The Board of Adjustment should reverse the staff decision for the reasons given above and deny the proposal.

What is more, Sections 13.2.C.13. and 13.2.C.34. appear to be directly in conflict with one another as regards the Estes Mountain Coaster, because the former prohibits the use in the RE-1 Rural Estate Zoning District and the latter allows it. When confronted with this inconsistency, the Estes Park Town Manager, Mr. Lancaster, expressed a belief that the EVDC is to be construed liberally in favor of the free use of land in a June 19, 2018 email in which he discussed Section 13.2.C.13. and Section 13.2.C.34. in connection with the Estes Mountain Coaster, “Clearly these two definitions and zoning restrictions appear to be contradictory and both can legitimately fit the Mountain Coaster”. (As noted, however, the “fit” of Section 13.2.C.13 is tighter.) The fact that the definitions are contradictory is the point of having the two definitions. Under Mr. Lancaster’s interpretation, no use allowed under “Commercial Recreation or Entertainment Establishment, Outdoor” is not allowed under “Park and Recreation Facilities” and the EVDC should have a single definition of “Park and Recreation Facilities” that examples list reads as “public parks, cemeteries, public squares, plazas, playgrounds, ballfields, public recreation areas, nonprofit botanical gardens, nature preserves, go-kart tracks, outdoor mazes, riding academies, roping arenas, livery stables, equestrian arenas, amusement parks, golf driving ranges, miniature golf facilities and zoos.”

Mr. Lancaster went on in that email to give his opinion that the classification/interpretation should be made “in favor of the free use of property by the owner.” In this case, that would mean adopting the definition of “Park and Recreation Facilities” over that of “Commercial Recreation or Entertainment Establishments, Outdoor” as being the less restrictive regulation on the exercise of private property, that is, the regulation that would permit the use in the RE-1 Rural Estate Zoning District. Of course, that is exactly what Mr. Lancaster’s staff has done. While not agreeing with other comments Mr. Lancaster made in the same email to the effect that the definition of outdoor commercial recreation entertainment establishments is vague or at all ill-fitting the Estes Mountain Coaster, the undersigned believe that there is an equally glaring problem with how the staff, consistent with Mr. Lancaster’s view, has handled the conflict between these two EVDC provisions. While the EVDC does not contemplate or instruct the interpreter to construe the EVDC provisions in favor of free use of land, Section 1.8.A.1. does instruct that “When the provisions of this EVDC are inconsistent with one another, or when the provisions of this EVDC conflict with provisions found in other ordinances, codes or regulations adopted by the Town of Estes Park or Larimer County, the more restrictive provision shall govern unless the terms of the provisions specify otherwise.” In this case, if the staff truly believes that the “Park and Recreation Facilities” definition applies to the Estes Mountain Coaster just as much as the more specific and accurate “Commercial Recreation or Entertainment Establishment, Outdoor” definition does, then the staff nevertheless still misinterpreted the EVDC in preferring and selecting the less restrictive of the conflicting provisions. This interpretation choice by the staff, again, is reviewable on appeal to the Board of Adjustment, which should overturn it and deny the proposal. To the degree the next section hereof involves code interpretation, the Board of Adjustment should, for the reasons given in that

section, interpret the EVDC as requiring Location and Extent Review of the proposal by the Planning Commission.

Location and Extent Review

If the staff believes that the Estes Mountain Coaster is a “Park and Recreation Facility” and is, as the staff’s decision letter stated, “permitted as a use-by-right in the RE-1 Rural Estate Zoning District per Section 4.3, Table 4-1 of the EVDC”, then the same Table 4.1 requires as an “additional regulation” that *any* park and recreation facilities in the RE-1 Rural Estate Zoning District undergo a Location and Extent Review pursuant to Section 3.13. This use has not undergone such a review. No further approvals and no further permits of any kind should be issued by the Town until it does. Additionally, and as a further argument that the Estes Mountain Coaster is not a “ ‘Recreation Facility’”, per Section 13.2 of the EVDC under ‘Parks and Recreation Facilities’”, Section 3.13.B.1.a. provides, with regard to the applicability of the Location and Extent Review, “These public uses are listed in Chapter 4, ‘Zoning Districts,’ (Tables 4-1 and 4-4) with the notation under the ‘additional regulations’ column that Public Facility/Use Location and Extent review may be applicable.” As noted, Table 4-1 does require Section 3.13 Location and Extent Review for any Park and Recreation Facilities in the RE-1 Rural Estate Zoning District. Therefore, all such uses are regarded in the EVDC as *public uses*. The staff apparently is of the opinion, and it has been suggested by the Town Manager in his June 19, 2018 email mentioned above, that “Recreational Facilities” as defined in 13.3.197. do not differentiate between public recreational facilities and private recreational facilities. The undersigned respectfully disagree, believing that a fair review of that section does make quite clear that it is public facilities that are intended; moreover, as noted above, the “Park and Recreation Facilities” use described in Table 4-1 (uses in residential zones) falls under the express category heading of “Institutional, Civic and Public” uses, which are the opposite of “private” uses. Table 4-1 and Section 3.13.B.1.a. clearly indicate that any “Park and Recreation Facilities” as are allowed in the RE-1 Rural Estate Zoning District are *public* facilities requiring Location and Extent Review. These are considerations both for the Planning Commission and for the Board of Adjustment. The undersigned hereby request that the Decision be denied by the Board of Adjustment and the Planning Commission on this appeal, for misinterpretation of the requirement for a Location and Extent Review and its absence.

Development Plan

The staff mistakenly arrogated to itself decision-making authority for the Development Plan here. For the time being, therefore, that decision is appealable to the Planning Commission. (Table 2-1, Note [3])

The staff acknowledges that “utilities would be extended to serve the facility, and including electric, water and wastewater service. A new access is proposed. Limited on-site parking would be provided...” Pursuant to EVDC Section 3.8 and Table 3-3, if a development plan has a “Determining Factor” described as, “Major alterations that also entail alterations to the number of parking spaces, the configuration of parking, ingress, egress, water, sewer, drainage or lighting on the premises” that comprise more than 10,000 square feet in area, Planning Commission review is required. The area of the new access, the new parking, and the new utility

corridors far exceeds 10,000 square feet for this Development Plan. The staff erroneously omitted the square footage for the new access/driveway, new parking area, and utility corridors in calculating square footage to determine whether Section 3-8 and Table 3-3 permitted the staff to make the decision on the Development Plan. Obviously, the Development Plan entails alterations to the number of parking spaces, the configuration of parking, ingress, egress, water, sewer, drainage, or lighting on the premises (and notice that major alterations of just one of these things requires Planning Commission approval – pursuant to Section 1.6-Rules of Construction and Interpretation, Subsection G., the word “or” indicates that one or more of the connected items, conditions, provisions or events shall apply). The Development Plan should have gone to the Planning Commission for review and decision.

Underscoring this conclusion is the applicant’s cynical ploy to provide only 19 on-site parking spaces when there is easily room for at least 12 more, because to provide 21 or more on-site spaces would require Planning Commission review of the proposal. (Table 3-3). (Senior Civil Engineer Traci Shambo recommended less off-site parking and the addition of 6-12 on-site spaces – something the applicant blithely ignored.)

Additionally, as has been explained, Planning Commission Location and Extent Review of the Development Plan, as a central component of the general proposal, is required.

Finally, the staff incorrectly determined that the use will not require a right turn lane at the Ptarmigan/Dry Gulch Road intersection. The data and charts from the applicant show that traffic volumes will exceed 150 dhv, which the Larimer County Rural Area Road Standards fix as the threshold for turning lane installation. If when it reviews the proposal the Planning Commission resolves to approve it, the installation of one or more turning lanes should be a required condition. There are a number of other traffic/parking, wetlands, and environmental issues whose details the 30-day appeal period does not permit time to properly investigate or fully articulate and as to which the undersigned reserve the right to discuss in the appeal hearing(s). The undersigned hereby request that the Decision be denied by the Board of Adjustment and the Planning Commission on this appeal, for misinterpretation of the requirement for a Planning Commission review, and its absence, and to the Planning Commission, for a denial of the Decisions failure to include sufficient findings and applicable standards on the development plan.

Staff Effectively Has Rezoned Much of the Estes Valley without Proper Procedure

The staff’s determination that the Mountain Coaster (a for-profit, ticket selling, commercial amusement ride to be continually, as opposed to occasionally, in that service) is one of the Institutional, Civic, and Public Uses specified in EVDC Table 4.1, specifically “Park and Recreation Facilities”, makes this a permitted use by right in the RE-1 Rural Estate Zoning District.

As a “Park and Recreation Facility”, this type of use also then would be a permitted use by right in all remaining residential zones, RE, E-1, E, R, R-1, R-2 and RM (Table 4.1).

By right, this type of use also, then, would be a permitted Institutional, Civic & Public Use (“Park and Recreation Facilities”) in 5 of the 7 Nonresidential Zoning Districts, specifically A, A-1, CD, CO, and O, per EVDC Table 4.4.

The undersigned assert that this determination is the CDD staff effectively (de facto) rezoning the entire Estes Valley Development Zone (“EVDZ”) with the exception of two nonresidential zones, specifically, CH and I-1. Such de facto rezoning needs to follow proper procedures specified throughout Chapter 3 of the EVDC, findings of consistency with the provisions of Chapter 4 of the EVDC (zoning districts), involvement of the EVPC, findings of consistency with the Estes Valley Comprehensive Plan (“EVCP”), and approval by the Board of Trustees and the Larimer County Commissioners.

Such broad changes in interpretations of use throughout 12 of the 14 zones in the EVDZ need to follow proper procedures specified throughout Chapter 3 of the EVDC, findings of consistency with the provisions of Chapter 4 of the EVDC, involvement of the EVPC, findings of consistency with the Estes Valley Comprehensive Plan, and approval by the Board of Trustees and the Larimer County Commissioners.

The Board of County Commissioners should reverse the staff decision and deny the application and proposal for the reasons stated herein.

Estes Valley Comprehensive Plan

As a general observation, all of the decisions made concerning this proposal should be consistent with the provisions of the Estes Valley Comprehensive Plan. That is “especially” so with regard to location and extent review, pursuant to Section 3.13.A.

For its part, the development plan review process has as one of its purposes “encouraging quality development in the Estes Valley reflective of the goals, policies and objectives found in the Comprehensive Plan.” (Section 3.8.A.). Section 1.3 provides, “...the regulations of this EVDC are intended to implement the 1996 Estes Valley Comprehensive Plan, as amended...”, including, more specifically, to “encourage non-residential development that preserves and protects the character of the community, including its natural and cultural landscape, and that minimizes objectionable noise, glare, odor, traffic and other impacts of such development, especially when adjacent to residential uses or to the historic downtown core”. The proposal is non-residential development that does not preserve and protect the character of the community, including its natural and cultural landscape, and does not minimize objectionable noise, glare, odor, traffic and other impacts of such development, which will be adjacent to and within sight of many residential uses.

Chapter 4 of the Comprehensive Plan proposes that there be only “limited development on steep slopes, visually sensitive areas, wildlife migration routes and habitat...” The proposal violates all of these, as it is on a steep slope and very visible, and will impact historic wildlife migration routes and habitat.

Similarly, Chapter 6, Part 6.6 provides that the Comprehensive Plan shall “ensure that new development minimizes the impacts to visual and environmental quality within the valley”. The proposal does not minimize the visual impact or environmental quality within the valley.

Specifically, with regard to the North End, Chapter 6, Planning Area 1 of the Comprehensive Plan states, “The North End is visible from a number of locations within the Estes Valley, and perceived openness of this area, if lost, will affect the image of the entire valley.” The topography of the North End makes it difficult but very important to protect slopes on the hillsides, hilltops, and ridges. The proposal scars these in a starkly visible way which will be permanent and, as the Comprehensive Plan notes, will affect the image of the entire valley.

Why have a comprehensive plan in an area as beautiful as the Estes Valley if not to protect that beauty? Why have such a plan if it is not to be followed and enforced?

The staff as the sole decision-maker in this proposal ignored these questions. The reviewing appellate bodies should not make the same mistake.

Conclusion and Request

For the above reasons, the proposal should be determined by the Board of Adjustments EVDC interpretation and by the Board of County Commissioners to be an outdoor Commercial Recreation or Entertainment Establishment, not a Recreation Facility, and therefore should be denied as not allowed by the EVDC in the RE-1 Rural Estate Zoning District.

In the alternative, the project should be regarded as one which will feature alterations on the premises to the number of parking spaces and to the configuration of parking, ingress, egress, water, sewer, drainage or lighting that are over 10,000 square feet in area. The staff decision should be vacated and the proposal required to undergo full public Planning Commission development plan review.

Also in the alternative, if the use is regarded as a Recreation Facility, the proposal should be required to undergo Location and Extent Review by the Planning Commission.

The undersigned also seeks specific findings, determinations, and explanation of the basis of such conclusions as described in the Appendix, which is incorporated by reference herein for all purposes.

* * *

Respectfully submitted by the undersigned parties-in-interest, all of whom are owners of property within 500 feet of the boundaries of the parcel which is the subject of Development Plan Application No. DP 2018-04. The attached Appendix is incorporated herein by this reference.

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