

**WHITEFISH BOARD OF ADJUSTMENT
MAY 3, 2016**

CALL TO ORDER AND ROLL CALL

The meeting was called to order at 6:00 p.m. Members present were Josh Akey, Brandon Jacobson, Herb Peschel, Scott Sorenson and Steve Qunell.

COMMUNICATIONS FROM THE PUBLIC-None.

APPROVAL OF THE BOARD OF ADJUSTMENT MINUTES OF THE JANUARY 5, 2016 MEETING

Josh Akey made a motion, seconded by Steve Qunell, to approve the January 5, 2016 minutes. The motion passed unanimously.

OLD BUSINESS- NONE

PUBLIC HEARING

Consideration of an administrative appeal by the Whitefish Hotel Group, LLC, of an interpretation of the zoning administrator that a condition placed by the City Council on the Conditional Use Permit approval for the Firebrand Hotel which states: "Under no circumstances shall the roof top facilities be used as a bar, for music, or for other entertainment or for anything other than a patio" precludes putting a hot tub on the roof of the facility. The subject property is located at 205 Spokane Avenue.

Planning & Building Director Dave Taylor gave the staff report. Director Taylor said on February 2, 2015 the Whitefish City Council approved a CUP (Conditional Use Permit) request by the Whitefish Hotel Group, LLC (WHG) to build the Firebrand Hotel in excess of 7,500 square feet in the Old Town Central District part of the WB-3 zone. During the public hearing, due to concerns from neighboring residential property owners about potential noise from roof top activities, the City Council added the following condition to the approval:

22. Under no circumstances shall the roof top facilities be used as a bar, for music or other entertainment or for anything other than a patio.

Director Taylor said none of the plans submitted and approved for the CUP, the approved plans by the Architectural Review Committee, nor the building permit and subsequent addendums showed a hot tub facility on the roof. There was no discussion of locating a hot tub on the roof by the applicants during the CUP approval process. This was brought to the Planning department when the Building department saw that the hotel was looking at changing their plumbing and structural plans to facilitate putting a hot tub on the roof top. Director Taylor said staff met with members of the WHG team to discuss the hot tub, and explained why it was prohibited. The applicant had several options to resolve the issue, such as asking the City Council to clarify or revising their CUP application with a new or revised condition. They chose to appeal the zoning administrator's interpretation of the condition to the Board of Adjustments.

Director Taylor said the City of Whitefish zoning code does not define patio. When a term is a generally understood term it is not always codified, and in those cases standard dictionary definitions suffice. Patio is defined by Merriam-Webster as:

“A flat area of ground that is covered with a hard material (such as bricks or concrete), is usually behind a house, and is used for sitting and relaxing.

1: courtyard; especially: an inner court open to the sky

2: a recreation area that adjoins a dwelling, is often paved, and is adapted especially to outdoor dining”

While someone may choose to put a hot tub on a patio, it is not implied to be standard feature of a patio in any definition available.

Director Taylor said per Zoning Code section 11-7-6-A: Any Person may file an appeal when aggrieved by a decision or interpretation made by the zoning administrator; provided, that the appeal is based on an allegation that:

1. The zoning administrator made an error in interpretation of these regulations; and that
2. The erroneous interpretation specifically aggrieves the applicant.

The appellant appealed a February 22nd email he sent with an interpretation of the city council imposed condition to their CUP within the required 30-day window, but there is a question of whether the interpretation made by the zoning administrator was related to interpreting Title 11 of the zoning regulations. The appellant is arguing in the attached letter from Judah Gersh written on March 18, 2016 that the zoning code does not prohibit hot tubs in any way, nor does it preclude a hot tub from being placed on a patio. They are also arguing that prohibiting a hot tub aggrieves the appellant because a hot tub is a typical high end hotel accessory.

Director Taylor said the points of appeal cited in their appeal letter fail to show that the Zoning Administrator erred in the interpretation of City Code, as the interpretation is related to interpreting a broad condition placed on the CUP by the City Council. No other activities except a patio are allowed. While the code doesn't define patio, standard definitions do not assume hot tubs are standard on patios, and a hot tub would violate the terms and intent of the City Council condition, which was placed to prevent disturbance to neighboring properties.

The staff's recommendation is for the Board of Adjustment should review the facts and decide whether the Zoning Administrator erred in his interpretation of the code. Staff believes that the appellants have failed to demonstrate that the zoning code was interpreted improperly. Staff recommends that the Board of Adjustments uphold the decision of the Zoning Administrator to prohibit the hot tub based on the following findings:

Finding 1: The appellant failed to demonstrate that the Zoning Administrator made an error in interpreting the city's zoning regulations.

Finding 2: The City Council placed a condition on the CUP limiting activity on the roof to anything but a patio, and a hot tub exceeds that limitation.

Steve asked if this is not approved can they go back to City Council and either do another CUP or amended the current one and Director Taylor said they could.

Judah Gersh spoke for Whitefish Hotel Group, LLC who are the owners of the property at 205 Spokane Avenue. Judah said the plans had shown a hot tub in the basement and in going through everything they felt that the basement would work better for laundry and meeting rooms. Judah said that Dave Taylor

said a patio does not include a hot tub and they do not agree with this and this is where they are at. He said there are not any codes concerning hot tubs, patios are for sitting and relaxing and that is also what hot tubs are for. The hours for the hot tub will be 10 a.m. to 10 p.m. Judah showed a new drawing on where the hot tub would be located on the roof and they will be having a glass wall on the north and west side and on the east side will be a solid 8' cedar wall which will help with noise, the south side is where the elevator is at. He said it will be a hardship for the owners as it should be on the roof top and not in the basement.

Some of the concerns the board had was if it was just a hot tub and no swimming pool, how sound proof it was going to be, if the structure will be strong enough to support the hot tub and do they have room elsewhere in the building where they could put the hot tub.

Aaron Wallace with Montana Creative said it would only be the hot tub, he did not know the specific on the sound proof as the top is open so some sounds would be there, the structure was built strong enough to hold the weight of the hot tub and they really do not have any other place to put the hot tub as there is no room in the motel and if they put it outside they would lose parking spaces. He said the hot tub would be fully ADA so with the lift it would not fit in the basement.

Steve asked when they decided on putting the hot tub on the roof top as nothing was said during the CUP process or even when they were before the Board of Adjustment in January. Aaron said it was about 3 months after getting the CUP that they decided the roof top would be a good place for the hot tub and not the basement.

Jeff Badelt, 157 Ariel Way, said the hot tub is 10' by 22' stainless steel with decking and cost around \$200,000. He does not know how many can sit in the tub.

Herb asked if there was anything else they could do to soften the noise and they really do not believe it will be that loud as it will be monitored by the staff and will have limited hours.

Brian Averill said the hot tub is over their two big suites with balconies and they will want to keep the noise down because of the suites. There will not have alcohol served and there is time limits on the use. Brian said that the Downtowner has two hot tubs on their roof.

PUBLIC COMMENT

Jim Goble, 716 2nd Street, said he would hate to see what happened at Casey's with their roof and all the noise that it creates. He said the shielding all around might help some with the noise. He said it is a fair question on what a patio is. He also asked if this was the only water feature and that 10 p.m. is the closing time.

Ray Boksich, 223 Columbia Avenue, asked if the roof access was limited at 10 p.m. and if the elevator will be locked at that time. He is also very concerned about when the bars close and people up on the roof as noise does travel.

Brian Averill said that the guests with key cards will be able to access the roof at all hours and this is where security will come into play. The hot tub area would be closed at 10.

Leo Rosenthal, 236 Columbia Avenue, said during the CUP he was opposed to the noise with the extra traffic being caused by the motel. He said there was a reason why the City Council put the condition on

the CUP for just a patio. They did not have plans about the hot tub until later in the process and they are just trying to sneak one by the City. He asked the board to uphold Dave's interpretation and stay with what the City Council wanted.

Mayre Flowers, Citizens for a Better Flathead, 35 4th Street West, Kalispell, said Citizens for a Better Flathead have reviewed this appeal, supports the determination of the zoning administrator that, since the intent of the condition imposed by the council was to prevent noise related disturbances which a hot tub might incur, and the condition very broadly prohibits "anything other than a patio," that a hot tub is clearly precluded. She said they do agree with the two findings that Dave had but provided additional findings of fact and information that she wished to be part of the public record:

Finding 3: None of the plans submitted and approved for the CUP, the approved plans by the Architectural Review Committee, nor the building permit and subsequent addendums showed a hot tub facility on the roof. (See MEMORANDUM To: Whitefish Board of Adjustment From: David Taylor, AICP, Director of Planning & Building Date: May 3, 2016)

Finding 4: Testimony by Sean Averill, recorded at the Feb. 2, 2015 Whitefish City Council meeting at which the CUP for the Firebrand Hotel was approved, made no reference to a hot tub as a feature of the rooftop patio. Mr. Averill responded to direct questioning by City Councilor Richard Hildner regarding rooftop uses and potential noise sources as part of that hearing record. Averill's response was recorded for that hearing record and is found at 2:10:30 of that tape ¹. Sean Averill stated as follows in describing the patio and uses that would occur there:

*It is designed as a sun deck. It is not designed for events. It doesn't have any services or amenities. It is not going to be a Casey's. **There is nothing up there but an open patio.***

Mayre Flowers asked that this tape found at

<http://www.cityofwhitefish.org/large-files/audio/council-2015/15%2002%2002.mp2> be made a part of this official hearing record.

Finding 5: The Whitefish Growth Policy states: "Conditional Use Permits (CUPs) are only granted after public hearings before the Planning Board and City Council, and permitting decisions are made based upon criteria that are set forth in the zoning ordinance. Also, **reasonable conditions to avoid and/or mitigate adverse impacts may be imposed as conditions of the CUP.**"

Finding 6: The Whitefish City Council has the authority to limit and condition uses like hot tubs allowed at the Firebrand Hotel under City Code 11-7-8 (E) 6. "Upon receipt of the recommendation of the planning board, the city council shall hold a public hearing and render a determination whether to approve, **conditionally approve** or deny the application for a conditional use permit **based on public input, the staff report and findings of the planning board.**"

Finding 7: Public testimony at both the Whitefish Planning Board and the Whitefish City Council establish the concerns of adjoining property owners and other residents that

noise from a proposed rooftop patio area would be detrimental to their health, safety and welfare.

Finding 8: Montana State statutes define a public nuisance as "**45-8-111. Public nuisance.** (1) "Public nuisance" means: (a) a condition that endangers safety or health, is offensive to the senses, or obstructs the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or by any considerable number of persons;"

Finding 9: The Whitefish City Council had a reasonable basis for its decision to limit patio uses to prevent noise related disturbances. The adverse impacts of noise pollution have been well documented by the World Health Organization and others.² Studies recognize that inadequately controlled noise adversely affects people's health, safety, and welfare, property values, and the environment.

According to American Journal of Preventive Medicine May 25, 2015, noise pollution may increase your risk of hearing loss, stress, sleep disturbances, and heart disease. A new analysis conducted an environmental assessment of US noise pollution as a cardiovascular health hazard, and revealed small decreases in noise could add up to major economic savings. The analyses suggested that a 5-decibel noise reduction would reduce the prevalence of high blood pressure by 1.4 percent and coronary heart disease by 1.8 percent. The annual economic benefit was estimated at \$3.9 billion. There is also the issue of sleep disturbances, which is why nighttime noise pollution is thought to be worse than daytime exposures. If you can't sleep because of noise, it can cause a cascade of negative health repercussions.³

Finding 10: A hot tub is a form of entertainment consistent with the definition of entertainment. [Emphasis added below]

en·ter·tain·ment⁴,
en(t)ar'tanmant/ un noun:
entertainment

the action of providing or being provided with amusement or enjoyment.

² http://www.medscape.com/viewarticle/554566_3

³ http://articles.mercola.com/sites/articles/archive/2015/06/20/noise-pollution.aspx#_edn3

⁴ <https://www.google.com/search?q=entertainment&ie=utf-8&oe=utf-8#q=entertainment+definition>

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"everyone just sits in front of the TV for entertainment"

synonyms: amusement, pleasure, leisure, **recreation, relaxation**, fun, enjoyment, interest, diversion, "he reads for entertainment", an event, performance, or **activity designed to entertain others.**

Finding 11: Excess noise associated with hot tub use is a common complaint.⁵

Trip Advisor comment section has frequent complaints about excessive and disruptive noise from hot tub use including a recent posting for The Lodge at Whitefish owned by the Averill's.

From a Trip Advisor review of the Lodge at Whitefish Lake:

The huge problem we had is that we got room 233, a room that I don't think is really rentable!! It is located right directly above the outdoor patio restaurant and across from the pool - both created incredible noise that made the room totally unrestful. Even with all windows closed it was noisy - not enjoyable! ☹️ We are seasoned travellers and my husband & I discussed these issues when we got to the room and saw this poor location, but after a 9 nine hour car ride to get there we were tired and stupidly said "it probably will be OK - this class of hotel would not let the outside restaurant get crazy late - wrong!! The outdoor patio is very busy and noisy all day, and then late at night the weddings moved to the patio, hot tub etc. with a lot of very loud drunks. That night was terrible! this deadbeat crowd was yelling and drinking on the patio - at 1:20 I called the front desk asking them to move the people inside.

https://www.tripadvisor.com/Hotel_Review-g45402-d251765-Reviews-Lodge_at_Whitefish_Lake-Whitefish_Montana.html

Finding 12: "The City of Whitefish zoning code does not define patio. When a term is a generally understood term it is not always codified, and in those cases standard dictionary definitions suffice. Patio is defined by Merriam-Webster as:

"A flat area of ground that is covered with a hard material (such as bricks or concrete), is usually behind a house, and is used for sitting and relaxing.

1: courtyard; especially: an inner court open to the sky

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While someone may choose to put a hot tub on a patio, it is not implied to be a standard feature of a patio in any definition available.

(See MEMORANDUM To: Whitefish Board of Adjustment From: David Taylor, AICP, Director of Planning & Building Date: May 3, 2016)

In conclusion, these findings support denial of the appeal before you asking you to overturn the zoning administrator's ruling that hot tubs are allowed under the conditional use permit. Hot tubs are a form of entertainment, which is not permitted.

5 <http://www.olmpichottub.com/hot-tubs-sauna-blog/2011/05/hot-tub-noise/>
<https://www.gottrouble.com/noise-law-legal-limits-and-nuisance-law/>

Judah Gersh said he is objecting to having Mayre's comments be part of the records as they were not able to see her handout prior so they could not respond. Herb and Dave both said she has a right to comment and she pretty much read the whole thing word for word so it will be in the record and legally they are required to accept written comments.

Rhonda Fitzgerald said she attended the Planning Board and City Council meetings on the CUP. The Downtown Master Plan shows a boutique motel and this is not a boutique motel they have 86 rooms and a boutique motel is about 36 rooms. She said everyone is very concerned about the size and they do not want to ruin the great neighborhood. The CUP clearly stated nothing but a patio was allowed. Rhonda said Brian said nothing else would go up on the roof. She feels that if this is changing it needs to go back to the City Council.

Scott Sorenson made a motion, seconded by Steve Qunell, to uphold the Zoning Administrator's interpretation of the code and that no hot tub will be allowed on the rooftop. The motion passed on a 4 to 1 vote with Herb Peschel voting in opposition.

NEW BUSINESS- NONE

GOOD AND WELFARE

Matters from Board: None

Matters from staff: None

ADJOURNMENT

Meeting adjourned at 7:20 p.m.