



**NOTICE OF THE REGULAR MEETING OF THE GENERAL ASSEMBLY**

**TOWN OF OPHIR, CO 81426**

**REGULAR MEETING: TUESDAY 7:00 PM, JANUARY 16, 2024**

OPHIR TOWN HALL 36 PORPHYRY ST.

[Join Zoom Meeting](#)

Meeting ID: 618 946 1254

+16699006833,, 618 946 1254 #,,,,\*373146# US (San Jose)

**AGENDA**

1. CALL TO ORDER
2. ADOPTION & SIGNATURE OF December 19, 2023 Regular GA minutes
3. APPROVAL OF AGENDA
4. BUSINESS ITEMS
  - a. Executive Session for Purposes of discussion with Town Attorney
  - b. Consideration of Possible Response to Waller/Cornwall/Whitaker Litigation Threat Communication
  - c. Creation of Charter Review Committee
5. STAFF REPORTS
  - a. Town Manager
  - b. Other Staff
    - i. Open Space/Weed Management- John H. for OEC
6. NEW BUSINESS
7. ADJOURN

## General Assembly Meeting Memorandum

To: Ophir General Assembly

From: John Wontrobski, Ophir Town Manager

Date: January 12, 2024 for January 16, 2024 GA meeting

4a. On November 10, 2023 Ophir received a letter from David Peters, attorney for the Waller/Cornwall/Whitaker party, in response to the Town of Ophir's letter of August 25, 2023 regarding the Waller/Whitaker/Cornwall property. The letter is included in the meeting packet. Ophir Town Attorney Steve Johnson and Special Counsel David McConaughy will be meeting with Ophir Town Staff prior to the January 16<sup>th</sup> GA meeting, then may meet with General Assembly members in executive session to discuss a response, if any, to the Peters letter.

4b. This would be a possible Action Item coming out of the Executive Session, as action cannot be taken inside of an executive session.

4c. It was announced at the December GA meeting that a Charter Review Commission will be formed to review the Town of Ophir Charter and to review the Town Charter and subsequently make recommendations for possible changes and/or updates that would then be voted upon by the GA in an election at a TBD date.

5.b.i. Background materials are in the packet for this item, an update from OEC Member John Humphries on Open Space Vegetation Management within the Town of Ophir.

Item #2

**MINUTES OF THE REGULAR MEETING OF THE GENERAL  
ASSEMBLY**

**TOWN OF OPHIR, CO 81426**

**TUESDAY DECEMBER 19TH, 2023 7:00 PM**

**OPHIR TOWN HALL 36 PORPHYRY ST.**

Video and audio recording available upon request

**1) CALL TO ORDER**

Andy Ward calls the meeting to order at 7:03pm

**VOTING MEMBERS PRESENT:** Andy Ward, Ben Foster, Mark Rosenthal, John Gerona, Emma Gerona, Dayna Baer, Janice Gerona, Daniel Forgrave, Dave Chew, Eric Beerman, Kelton Wright, Shoshanna Pollack, Phil Hayden, Larry Rosen, Jacey DuPriest, Marc Campbell, Sue Hehir, Heather Rosen, Catherine Gockley

**NON-VOTING MEMBERS:** Cindy Wyszynski, Terry Schuyler, Wiley Freeman

**2) APPROVAL OF AGENDA**

Andy Ward motions to approve and adopt September agenda, Ben Foster seconds

All in Favor (Yay): Unanimous

**3) ADOPTION & SIGNATURE OF October 24, 2023 and November 14, 2023 Regular GA minutes**

Eric Beerman motions to approve and adopt, Kelton Wright seconds

All in Favor (Yay): Unanimous

**4) BUSINESS ITEMS**

**a. EcoAction/SMPA Annual Presentations**

Emma Girona presents on behalf of EcoAction. Wile Freeman presents for SMPA

**b. Broadband Loan Payoff- Vote on Resolution 2023-02**

**A RESOLUTION AUTHORIZING PAYMENT IN FULL OF THE BROADBAND LOAN ADMINISTERED BY ALPINE BANK.**

Mark Rosenthal motions and Janice Gerona seconds.

All in favor (yay): Unanimous

**c. Budget- Second Reading- Vote on Resolution 2023-03**

**A RESOLUTION SUMMARIZING EXPENDITURES AND REVENUES FOR EACH FUND, AND ADOPTING A BUDGET FOR THE TOWN OF OPHIR, COLORADO, FOR THE CALENDAR YEAR BEGINNING THE FIRST DAY OF JANUARY 2024 AND ENDING ON THE LAST DAY OF DECEMBER 2024.**

Mark Rosenthal addresses Ken Page's concerns regarding budgeting. The water fund doesn't have enough funds so It's coming from the main fund. Ken is not comfortable with this arrangement. John Wontrobski is looking into increasing the water budget for 2025 and will also be looking to do a more long term budget, planning for between 5-10 years.

Mark Rosenthal asks what is going to be done for planning for future big expenditures. John Wontrobski is going to meet with a DOLA consultant to get guidance.

Marc Campbell asks about a line of credit for the town. John Wontrobski will look into it.

Sue Hehir asks about \$7k for weed budget, seems to expensive and would like to cut it. Mark Rosenthal agrees. Could volunteerism make up for some of the budget cut? Jacey responds that John Humphries feels very strongly that the invasive weeds need to be dealt with. Andy proposes to reduce the weed budget to \$5k and move \$2k to the mayors fund and support volunteer weed days. John Wontrobski notes he's trying to get data on what we're accomplishing regarding invasive weed removal.

Andy asks if there is a motion to approve

Cindy proposes to create a new line for open space mayor's money.

Jacey motions and Mark Rosenthal seconds.

All in favor (yay): Unanimous

## 5. STAFF REPORTS

### a. Town Manager

i. Lead and Copper Line Inventory Grant  
- Worker will need home access

ii. Looking for new Water Committee members (Ken, Dayna)

iii. Home Rule Charter Amendment Committee Creation

Discussion between Mark Rosenthal and John Wontrobski on whether committee members need to be elected. Mark is worried an election could reduce the diversity of the committee.

iv. John Wontrobski notes that Ophir mass text will be re-introduced. It will be used for general town communication, agendas, and possibly small local emergencies.

## 6. NEW BUSINESS

No new business

## 7. ADJOURN

Andy motions to adjourn @ 8:45pm

*Minutes prepared by Ben Foster, Town Clerk*

*Audio and video recordings of all General Assembly Meetings are available to the public. Please contact the Town Clerk if you would like a copy of this month's audio of the meeting minutes.*



November 10, 2023

ANDREW L.W. PETERS  
303 575 7507  
APETERS@OTTENJOHNSON.COM

Via E-Mail: [steve@8750law.com](mailto:steve@8750law.com);  
[dmcconaughey@garfieldhecht.com](mailto:dmcconaughey@garfieldhecht.com)

General Assembly  
Town of Ophir  
c/o Stephen Johnson, Town Attorney  
David McConaughy, Special Counsel  
36 Porphyry Street  
Ophir, Colorado 81426

Re: Response to Town Letter of August 25, 2023 (Communication Pursuant to CRE and FRE 408)

Dear General Assembly Members:

As you know, this firm represents Joseph Waller (“**Mr. Waller**”) in connection with the entitlement and disposition of Lots 1-10, Block 2 (collectively, the “**Property**”) in the Town of Ophir (the “**Town**”). It now also represents David T. Cornwall, Linda A. Cornwall, Joyce A. Whitaker, and Gary W. Whitaker, the Property’s owners (“**Owners**” and collectively, with Mr. Waller, “**Clients**”), with respect to the same matters. I am in receipt of your letter dated August 25, 2023 and write once more to propose a path forward.

Your letter invited Mr. Waller to submit an application to amend the Town’s Land Use Code (the “**LUC**”) to, perhaps, allow development on properties identified as having “moderate” avalanche risk. My Clients appreciate the invitation but respectfully decline. The Town legislatively adopted the restriction that eliminates all economically viable uses of the Property, then denied my Clients’ request to amend that restriction. The Town could adopt a legislative remedy now, and my Clients are not inclined to pay the Town (in the form of review and attorney fees) to exercise its legislative responsibilities. It is the Town that has effected an unconstitutional taking, and it is the Town that should remedy it.

To be clear, my Clients would prefer a legislative remedy, not litigation, and a ready-made solution exists. The Town of Alta, Utah faces avalanche hazards similar to those in the Town and therefore imposes the follow requirements for building permits:

10-7-22: AVALANCHE HAZARD REVIEW:

Prior to the building official issuing a building permit for the construction of a dwelling unit, building or other structure to be occupied by one or more persons, the applicant must provide to the town and its building official for review by the town and the planning commission:

- A. A written report analyzing the potential avalanche hazards and the potential physical forces created thereby upon the proposed improvement or structure. Said report to be prepared and signed

by an avalanche expert recognized by the building official. Said report shall also be recorded on the plat map for the property.

B. A structural analysis of the proposed building prepared and signed by a state licensed structural engineer reflecting an engineering analysis and design that takes into account the potential force from an avalanche as set forth in the avalanche report referred to in subsection A of this section. (Ord. 1992-O-2, 4-9-1992)

C. No building permit shall be issued to any applicant unless the state licensed structural engineer submitting the written report analyzing the potential avalanche dangers required in this section certifies, in writing, that the proposed building design and construction or proposed structural modification of an existing structure, will protect human life throughout the dwelling unit, building or structure from the anticipated one hundred (100) year avalanche forces for the location of the proposed dwelling unit, building or structure or proposed addition or modification thereto. (Ord. 1996-O-3, 8-8-1996; amd. Ord. 2021-O-1, 3-10-2021)

My Client proposes that the Town adopt this approach. Doing so will address the Town's concerns regarding avalanche hazards while avoiding an uncompensated, and unconstitutional, ban on development.

There is no need for an expensive, applicant-led land use application to consider this proposal. There is no need for expensive, years-long litigation. There is instead, a successful approach that works for a town of 216 people at the end of one of the snowiest, most avalanche-prone valleys on earth. I urge you to adopt it.

My Clients would like to avoid conflict with the Town, and the proposal above does just that. Yet if the Town instead maintains its ban on development, my Clients will have no choice but to protect their constitutional rights in federal district court. (See attached for a copy of a draft complaint.) They will succeed, and the Town with either be prevented from enforcing its development ban or forced to pay the Property's fair market value. It will not receive title to Property. Pursuant to 42 U.S.C. 1988, it will also pay my Clients' attorneys' fees in addition to its own.

Again, there is no need for this. The Town can adopt a costless, constitutional policy that furthers its expressed goals, or it can defend, at significant expense, an unconstitutional one. Both paths arrive at the same place: authorization for limited and thoughtful development in avalanche hazard zones. My Clients understand that the General Assembly meets infrequently. They therefore respectfully request that the General Assembly make a good faith effort to adopt the proposal above by the end of the year.

As before, I look forward to your careful consideration.

Very truly yours,



Andrew L.W. Peters  
For the Firm

ALWP/lm

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. \_\_\_\_\_

DAVID T. CORNWALL; LINDA A. CORNWALL; JOYCE A. WHITAKER; and GARY W. WHITAKER, individuals,

**Plaintiffs,**

v.

TOWN OF OPHIR, COLORADO, a Colorado municipal corporation,

**Defendant.**

---

**COMPLAINT**

---

Plaintiff David T. Cornwall, Linda A. Cornwall, Joyce A. Whitaker, and Gary W. Whitaker (collectively, “**Owners**”), by and through their undersigned counsel, state the following as their Complaint:

**STATEMENT OF THE CASE**

1. The Town of Ophir (the “**Town**” or “**Ophir**”) lies near the bottom of an alpine valley in Colorado’s San Juan Mountains, one ridgeline south of Telluride’s famed slopes. Summer is idyllic. In winter, snow blankets the valley walls, and with it comes a risk: avalanches.

2. Ophir is not alone among mountain communities in facing that risk, but its chosen tool for managing it—a total and uncompensated ban on new development in so-called avalanche hazard zones—takes property without just compensation in violation of the Fifth Amendment. Means and methods exist to mitigate avalanche risks, like thicker foundations, limitations on window orientation, and protective walls. Other governments facing avalanche hazards demand mitigation, not a ban. Ophir could too. Its chosen approach, though, presents the rare case in which a regulation deprives a property owner of all economically beneficial or productive use of land.

3. This case concerns the Town’s prohibition as applied to Owners’ ten lots that form the entire block of Aurum Street between 1st and Bobtail. All ten lots are located in what the town has designated a “high” avalanche hazard zone. They are therefore subject to the ban. Owners have disputed that classification, and its effect on their intention to sell the lots for



development as five homes. Earlier this year, they pursued the Town’s process for removing the property from the hazard zone. The result: a vote of forty-nine to two against removal.

4. The extent of Owners’ development rights under Ophir’s code is now clear, the Town has declined to legislatively adopt a mitigation policy, and this action presents Owners’ only means to vindicate their constitutional rights. Because the Town has taken property without just compensation, Owners seek an order invalidating the ban as applied to their property, or in the alternative, an award of just compensation.

### **PARTIES, JURISDICTION, AND VENUE**

5. Owners are the owners of certain real property legally described as Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), and Ten (10), Block 2, Town of Ophir, Colorado (collectively, the “**Property**”).

6. Plaintiffs David and Linda Cornwall own as joint tenants an undivided fifty percent interest in the Property.

7. Plaintiffs Joyce and Gary Whitaker own as joint tenants an undivided fifty percent interest in the Property.

8. Defendant Town of Ophir, Colorado (the “**Town**”) is a Colorado home rule municipality.

9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Owners’ claim arises under the Fifth Amendment’s Taking Clause, the Fourteenth Amendment’s Due Process Guarantee, and 42 U.S.C. § 1983.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, because the Owners’ claim arises from conduct occurring in the Town, which is located in San Miguel County, Colorado, and because the Property is located in the Town.

11. Owners have standing to bring this action because they own the taken Property.

### **THE PROPERTY AND THE HAZARD MAP**

12. The Town is located in an alpine valley, where avalanche hazards add to the typical considerations for any development.

13. The Town therefore maintains a Hazards Overlay Map (the “**Hazard Map**”) identifying and classifying, among other things, the Town’s assessment of avalanche risk. The Hazard Map classifies all properties in the Town as within one of three zones: “high” risk, “moderate” risk, and areas outside those zones of risk.

14. In connection with the Hazard Map the Town of Ophir Land Use Code (the “**LUC**”) includes an “Avalanche Hazard Overlay Zone District” or “Avalanche Hazard Zone

District” (the “**Avalanche Overlay**”). The Avalanche Overlay applies to areas of high and moderate risk as designated on the Hazard Map.

15. An overlay augments a property’s underlying zoning. So, for example, a property may be located in a Residential zone district, and then may, or may not, be subject to an overlay district as well.

16. The Avalanche Overlay’s stated purpose is in part to “restrict development.”

17. The uses permitted by right in an area subject to the Avalanche Overlay are limited to those permitted by right in the Open Space Zone District. The Open Space Zone District permits the following uses by right: “Nature trails for walking, hiking, and biking with natural surfaces and not more than twenty-four (24) inches in width.”

18. The Avalanche Overlay prohibits all new structures or accessory buildings.

19. The Avalanche Overlay does not require the removal of existing dwellings and does allow for additions to and reconstruction of those dwellings. Many additions have been completed to homes in the Avalanche Overlay over the years.

20. There is a strong market for homes located in the Avalanche Overlay, as reflected by recent transactions.

21. The Property is located in the Town’s Residential Zone District, which permits, among other things, single family dwellings.

22. The Property is also subject to the Avalanche Overlay.

23. As applied to the Property, the Avalanche Overlay deprives the Property of all economically beneficial uses.

24. Without the Avalanche Overlay’s restriction, the Property could be developed with five single-family homes.

### **OWNERS ATTEMPT TO LIFT THE RESTRICTION**

25. Recognizing that the Hazard Map may contain errors and that new and better information regarding avalanche hazards may become available, the Town’s land use code (the “**LUC**”) supplies a specific process by which an applicant can seek an amendment to the Hazard Map.

26. The LUC provides that the Town’s governing body, the General Assembly (the “**GA**”), must approve any such amendment.

27. Pursuant to the Town’s home rule charter, the GA consists of essentially every registered voter in the Town: “any person eighteen (18) years of age or older who has resided

within the Town of Ophir for twenty-two (22) days immediately preceding any meeting of the General Assembly in which the person offers to vote and has registered to vote with the Town Clerk on or before the date of the meeting or election at which the person offers to vote.” (Charter, Art. II, Sec. 2.B.)

28. In the spring of 2019 Owners’ agent, Joe Waller, submitted an application to amend the Hazard Map to correct the Property’s mistaken assignment to the “high” hazard zone (the “**Amendment**”), and, by extension, extension to allow for the Property’s development.

29. Although Mr. Waller first submitted the Amendment in 2019 and received a generally favorable response at the time, the COVID-19 pandemic intervened and the Town Manager departed. This effectively paused the application for some time.

30. The Town took up the Amendment again in January 2022.

31. Following staff review, the Amendment proceeded to the Town’s Planning and Zoning Commission (“**P&Z**”), which, after several meetings at which a GA member repeatedly advocated against the Amendment, recommended denial.

32. On January 17, 2023, the Amendment arrived before the GA for first reading.

33. At the conclusion of the January 17, 2023 hearing, a member of the GA moved to adopt the draft resolution denying the Amendment.

34. Twenty-seven members of the GA were present for the January 17, 2023 hearing on the Amendment. Their votes on the motion to adopt the Denial Resolution were as follows:

- (a) Ten members voted for the motion
- (b) Nine members voted against the motion
- (c) Eight members abstained.

35. The Town thereafter took the position that this vote constituted a denial.

36. Following the January 17, 2023 denial of the Amendment, Mr. Waller brought an action in state district court asserting substantive and procedural deficiencies with the GA’s purported denial.

37. With the state court litigation pending, the GA scheduled a revote on the Amendment.

38. On March 23, 2023, fifty-one members of the GA appeared to consider the Amendment. Mr. Waller presented the case in favor, and a member of the GA itself presented the case against it.

39. By a vote of forty-nine to two, the GA voted to deny the Amendment for the reasons set forth in an accompanying denial resolution (the “**Denial Resolution**”).

40. The Town’s position with respect to the effectiveness and finality of this re-vote has been:

- (a) The re-vote was effective;
- (b) the re-vote adopted the Denial Resolution, which had the effect of denying the Amendment; and
- (c) the Denial Resolution was the GA’s final decision on the Amendment.

41. Owners have now pursued the only available process to remove the development restriction on the Property, and the Town’s 49-2 vote against removal has clarified and finalized the status of the restriction.

**FIRST CLAIM FOR RELIEF**  
**(Regulatory Taking Under the U.S. Constitution – 42 U.S.C. § 1983)**

42. The allegations set forth above are incorporated herein.

43. The Takings Clause of the Fifth Amendment prohibits governments from taking private property for public use without paying just compensation.

44. The Town’s March 23, 2023 denial of the Amendment clarified Owners’ knowledge of the permissible uses of the Property to a reasonable degree of certainty.

45. The Town’s March 23, 2023 denial of the Amendment constitutes the Town’s final position regarding how it will apply its regulations under the Hazard Map and Avalanche Overlay with respect to the Property.

46. The Town’s enforcement of its regulations under the Hazard Map and the Avalanche Overlay will deny all economically beneficial or productive use of the Property.

47. Owners are entitled to an order invalidating the Avalanche Overlay’s development restriction as applied to the Property, and in the alternative to an award of just compensation for the Town’s regulatory taking in an amount to be proven at trial, as well as pre- and post-judgment interest.

48. Owners are entitled to actual damages pursuant to 42 U.S.C. § 1983 and C.R.S. §§ 38-1-101 *et seq.* and attorneys’ fees pursuant to 42 U.S.C. § 1988(b).

**REQUEST FOR RELIEF**

WHEREBY, Owners respectfully request that the Court enter judgment in their favor and against the Town and grant the following relief:

- A. For an order invalidating the Avalanche Overlay’s development restrictions as applied to the Property;
- B. In the alternative, for an award of damages and just compensation in an amount to be proven at trial, plus pre- and post-judgment interest;
- C. For award of their attorneys’ fees, expenses, and court costs; and
- D. For such further and different relief as the Court deems just and proper.

Respectfully submitted this \_\_\_ day of XXXXXX, 2023.

OTTEN, JOHNSON, ROBINSON, NEFF  
& RAGONETTI, P.C.

By: /s/ Andrew L.W. Peters  
Andrew L.W. Peters  
Nate D. Arrington  
Otten, Johnson, Robinson, Neff  
& Ragonetti, P.C.  
950 Seventeenth Street, Suite 1600  
Denver, Colorado 80202  
Telephone: 303 825 8400  
apeters@ottenjohnson.com  
narrington@ottenjohnson.com

**Attorneys for Plaintiffs**

## **The Ophir Garden:**

### ***The Importance of Vegetation Management for Native Pollinators: 25 minutes***

- The Ophir Valley is a remnant home to ancestral plant communities and native pollinators. This wild sanctuary of diversity contains plants, pollinators and mycelium that have existed for hundreds of thousands of years and intact since the end of the last ice age.
- Today, Ophir and the high San Juans are an increasingly vulnerable Sky Island of life surrounded by warming deserts and habitat fragmentation.
- As a town, Ophir is unique in that the biodiversity in and around its town-site are unmatched.
- Ophir's decade-long efforts to manage its vegetation is vitally important in the preservation of the bee species and other pollinators that depend on each summer's continuous May through September wildflower cycle.
- For their survival, bee species depend on up to 8 flower varieties per month. When invasive weeds largely introduced from road base material and disturbances in Ophir are allowed to move into the town's meadows and open space, this flower cycle is reduced to one or even no blooms a summer. This reduction in both nectar and pollen results in a loss of pollinators and the diversity of life both in Ophir and into the high country surrounding town.
- As a town, the preservation of this life has been and remains a top priority for Ophir.

## **Ophir Wild**

- The Colorado Plateau and the San Juans have over 1,000 species of wild independent mountain bees. This diversity is greater than anywhere else in North America. Birds and bats migrate to Ophir from as far away as Central and South America.

- As bee populations worldwide decline due to the fragmentation of habitat, invasive weeds, disease and pesticides, the Ophir Valley's importance and recognize as a vital unique sanctuary of life will continue to grow.

### **Vegetation Management of Ophir's Open Space**

- Often called "weeding", Ophir's contracted work over the past 5 years with *Bee Happy Lands* aims to sustain native vegetation and pollinators through the "gardening" out of introduced invasive weeds so that Ophir's native wildflowers & plants continue to exist.
- In this gardening process, after the weeds are pulled, native seed and **bio-char** are spread to enrich the soil to help native plants and mycelium growth.
- NOTE: With dense roots structures that extend downward for over a meter, Ophir's intact meadows serve as an important carbon sink.
- After decades of inattention to its Open Space, Ophir's recent vegetation management strategy has stemmed the tide of invasive weed growth. The pictures below show before and after gardening images of Ophir's meadows.
- **Read about Colorado Governor Polis signing a study for the 308-page Colorado Native Pollinating Insects Health Study which was released in January of 2024. The study signals the importance of protecting native pollinators:** [https://www.telluridenews.com/news/article\\_a996b176-ab65-11ee-b9df-3758c6b2bba1.html](https://www.telluridenews.com/news/article_a996b176-ab65-11ee-b9df-3758c6b2bba1.html)





