Minutes of the Hearing Officer meeting held on Wednesday, September 13, 2023, at 12:30 p.m. in the Murray City Hall, Poplar Room #151, 10 East 4800 South, Murray UT 84107.

Present: Scott Finlinson, Hearing Officer
Rob Keller, Acting counsel for Mr. Finlinson
Susan Nixon, Senior Planner
Zachary Smallwood, Senior Planner
Phil Markham, CED Director
Mark Richardson, Deputy City Attorney
Chris Zawislak, Senior Engineer
Trae Stokes, City Engineer
Russ Kakala, Public Works Director
Fred C. Cox, Architect
Sonia Cordero, Appellant
Carter Maudsley, Attorney for Ms. Cordero
Jake Christensen, Appellant
Ryan Wallace, Attorney for Applegate LLC

CALL MEETING TO ORDER

Mr. Finlinson called the meeting to order at 12:30 p.m. He stated that he has no conflicts of interest with either of the parties in these cases. He stated that due to the large amount of documents contained in the two appeals, he will take longer than the typical week to reach his Findings and Decision.

APPEALS

CASE #1608 - Sonia Cordero - 20 East Winchester Street - Project #23-086
Appeal of Section 17.24. Allowing Home Occupation Businesses only within a Residential Zone

Ms. Nixon presented an appeal submitted by Sony Cordero regarding the city's home occupation business regulations in residential zones, specifically code sections 17.24.010 and 17.24.030(c). The property in question is located at 20 East Winchester St, on the south side just west of State Street. The property is located in the General Office (G-O) Zone. A few years ago, a subdivision process created two lots - one lot containing the existing home built in the 1950s, and one lot containing a cell tower. The zoning at the time was R-1-8 residential, but was changed to G-O in 2015 by the previous owners. The purpose of G-O zoning is to provide office uses in an attractive environment, distinctly non-residential. The home occupation regulations are intended to allow compatible accessory uses in residential zones without altering the residential character. Ms. Cordero is appealing the sections of code that permit home occupations in residential zones and the “opt-in” business license process. However, the property is zoned G-O, not residential. The city had issued a license to Ms. Cordero's accounting service in error in June 2022. When discovered, the license was promptly canceled, and the fee refunded. Applicable state code allows municipalities to require business licenses and impose regulations. City Code Section 17.24.030(c) relates to the home business opt-in license process. The standard of review includes the full record - staff report, appellant materials, communications, legal brief, etc.

Mr. Finlinson had no questions for staff. He invited the appellant to come forward, stating that his attorney could come forward instead and speak on their behalf.

Attorney, Carter Maudsley, came forward to speak. He stated that the appellant acknowledges that Utah State Code Chapter 10 applies, but alleges the city made an erroneous decision by ignoring the property's nonconforming residential use status established when the home was built in the 1950s. While the property was subdivided and rezoned to office use in 2015, neither of those events eliminated the nonconforming status. The home still exists as a residential property subject to residential zoning regulations, including the right to a minor home occupation business license that Ms. Cordero applied for. Without any action by the city to formally rescind the nonconforming residential use, the property maintains that status. Ms. Cordero was never notified of being noncompliant or provided due process to contest that designation. Instead, the city unilaterally declared the use non-compliant and revoked the license they had incorrectly approved initially. Given the enduring nonconforming residential status, operating a minor home office is permitted under state and city codes with negligible offsite impact. The accounting service constitutes such a permissible minor home occupation. Unless the nonconforming use is formally rescinded via established procedures, Ms. Cordero retains the right to this home business.

Mr. Finlinson asked Ms. Cordero if she is currently living in the house. She replied yes. He asked if the home has continuously maintained residential use since 1952. She said yes. Mr. Finlinson stated that is what he saw in the records when he looked it up. She also said it’s never been vacant.

Mr. Maudsley added that Ms. Cordero is aware that the previous owners were residents of the property as well.

Mr. Finlinson asked Ms. Nixon if the appellant can continue to live there with the current zoning. The question is regarding the license.

Ms. Nixon responded that technically the city has declared the property's use as noncompliant, meaning the nonconforming residential use should be removed or changed to a conforming commercial office use per the G-O zoning. To make it compliant, Ms. Cordero could move the home, go through an official change of use process with planning approvals and potential building permits, or convert the use to an office or other G-O-compliant use. However, she noted there is another issue not being addressed today regarding land use #1113, which the city has conceded to allow Ms. Cordero to pursue. That land use code provides options to bring a non-compliant use into conformance.

Mr. Maudsley added that their contention is there was never an official revocation of the nonconforming use status. No hearing took place giving Ms. Cordero or previous owners the opportunity to be heard on the matter. There were no conditions placed on the subdivision approval or zoning change regarding eliminating the nonconforming use. He respected the city's opinion but did not believe the city can unilaterally declare it non-compliant without a process.

Mr. Finlinson had no additional questions but asked the appellant if she had anything more to add.

Ms. Cordero stated it has been difficult building her business and finances. She just wants to do the right thing - she is pursuing her CPA and understands government regulations, which is why she applied for the license even though probably not required. She was hoping for a positive resolution allowing her to continue operating the home office business. Ms. Cordero stated she just wants to follow regulations and do everything properly on record.

Mr. Cox commented that based on his experience with rezoning and platting properties, when this parcel was subdivided nothing specifically required demolishing the existing home or prohibited residential use. The immediately adjacent three-story office building was approved spanning two parcels without combining them first. No one required that office building be torn down or combine the parcels. Similarly, no documentation or action was taken to mandate removing the home on this property or discontinuing residential occupancy after platting, yet people have continued living there for years. Mr. Cox pointed out that the county taxes still classify it as a house eligible for homeowner reductions. He sees nothing that revoked the ability to maintain a residence there, despite the commercial zoning.

Mr. Finlinson thanked Mr. Cox for sharing those facts. He thanked everyone for attending the hearing for this case and he will now take it under advisement.

<u>CASE #1607 - Applegate LLC - 770 West Applegate Drive (apx) - Project #23-086- Appeal of Planning Commission Conditions of Approval for a Conditional Use Permit and Subdivision Approval</u>

Mr. Finlinson stated that he had communicated with attorney, Ryan Wallace, yesterday and suggested postponing the hearing to wait for an advisory opinion, as he feels that would provide a more persuasive and thorough review. Mr. Finlinson's scope in the hearing is limited to whether it was arbitrary or capricious and to clear up any error in the standards. He believes the advisory opinion can review the case more broadly. Mr. Finlinson wants to avoid contradicting the advisory opinion, which could lead to further litigation and delay. However, Mr. Wallace has the right to proceed with the hearing today if he wants. Mr. Finlinson is willing to do that but is suggesting postponing while waiting for the advisory opinion. Ultimately it is up to him if he wants to move forward today or postpone until the advisory opinion is received.

Mr. Wallace expressed appreciation for considering all the circumstances. He respects the Property Ombudsman and the Hearing Officer and wants the right decision. However, they have time constraints on the project. They understand if the Hearing Officer decides against them and they have to appeal, it will add time. But they would like both tracks (the hearing and advisory opinion) to proceed simultaneously for the sake of time. Mr. Finlinson wants the right decision but also needs to keep moving forward due to project time constraints. They would like the hearing to continue on one track while waiting for the advisory opinion on the other track, so that they can get a decision as soon as possible while still getting a thorough review from the advisory opinion.

Ms. Nixon began by explaining that this is an appeal submitted by Applegate LLC regarding some of the conditions imposed by the Planning Commission on June 15th for two development applications - a subdivision application and a conditional use application. Specifically, the subdivision application involved carving out 5 acres from what is currently the Applegate Homeowners Association condominium plat in order to then build 42 new residential townhomes on that severed parcel. The property is located in the R-M-15 zone, as highlighted on a map she displayed. The conditions being appealed relate to specific requirements imposed on the subdivision and on the conditional use permit. Ms. Nixon offered to review those conditions but felt the details were already known. She clarified that this hearing is on the record, so no new information can be submitted beyond what has already been provided to Scott Finlinson as the hearing officer. Ms. Nixon then displayed a plat map depicting the 5-acre parcel approved to be removed from the condo plat through the subdivision. She also showed the site plan to provide context about some of the appealed conditions related to proposed gate locations and a detention area. Specifically, she pointed out the location of the gate proposed by the appellant on the east end, and the location where the city is requiring an emergency access gate to be installed on the west end She also indicated the detention basin and dog park area relevant to the appeal. Ms. Nixon outlined the full record that has been provided, including the hearing officer report, the appellant's appeals, the city's brief, the Planning Commission staff reports and attachments, the findings of fact, meeting minutes, etc. She briefly noted the standard of review that applies as the appeal authority.

Ms. Nixon stated that for this hearing we are referencing the verbatim Planning Commission transcript minutes.

Mr. Wallace began by explaining that their main concern with the conditions imposed is the inconsistent way the city has addressed these issues throughout the process for both the subdivision approval and conditional use permit. He outlined the process they went through regarding the access gates, where initially the city said no gates were allowed, then wanted an additional gate added. Mr. Wallace feels the presumption should be to allow connecting existing roads unless detrimental impacts can be shown, but they have not been given clear evidence of impacts to address in order to request gates. Mr. Wallace states the findings of fact adopted do not identify any detrimental impacts tied to the conditional use conditions as required. He says the city has not clearly stated the detrimental impacts they aim to address, which has not allowed the appellant to provide evidence on how their proposals address or do not cause detrimental impacts.

Regarding the subdivision application, Mr. Wallace argues it must be approved if it complies with laws and ordinances, not conditionally based on detrimental impacts. He specifically appeals the emergency access gate and masonry wall conditions as not being required by city codes. For the conditional use permit, Mr. Wallace finds it curious the conditions mirror the subdivision conditions despite being very different approval processes. He argues the city should show detrimental impacts and how the conditions mitigate those impacts per code requirements, but only has unsubstantiated public comments rather than evidence. Mr. Wallace explains conditional uses should focus on the incremental impacts versus what is already permitted. For example, condos are permitted here so the impact analysis should focus on any detrimental differences between condos and the proposed attached housing, which has not been done. He states the city has provided no evidence to support the need for masonry

versus vinyl fencing or 8-foot versus 6-foot fence heights to mitigate visual impacts. Mr. Wallace argues that without identifying detrimental impacts tied to the conditions, there is no way for the appellant to address whether the proposed mitigation is sufficient.

Jake Christensen began by emphasizing that the city attorney's response document contains two arguments related to the fence that they are seeing for the first time at this hearing. The first new argument is that the Planning Commission included the 8-foot height condition for the masonry wall due to the grade differential between the site and the adjacent properties. Mr. Christensen states they have never heard this justification before. He further argues the city code actually allows decreasing fence height due to grade differentials, so increasing the height based on grade differential contradicts the code language in 17.64.040. The second new fence argument from the city attorney is that the masonry wall provides a better buffer for visual and sound impacts. Mr. Christensen stresses this potential sound impact mitigation has never been mentioned in the planning staff report, Planning Commission discussion, or findings of fact.

Mr. Finlinson asked where the wall will be going.

Mr. Wallace said it would go along the residential uses, adjacent to the project site. He states his client wants to put in screening between the properties and is required to install a 6-foot-tall fence per existing ordinances. Mr. Wallace expresses concern with increasing the fence height to 8 feet, as that is a significant difference from the typical 6 feet, especially with grade differentials. Some adjacent lots are about 3 feet below the project site, so an 8-foot fence would look like an 11-foot fence from those homes. He argues this 11-foot height is far beyond what is typically permitted for residential zones, which usually allow a maximum of 6 feet. Mr. Wallace feels the substantial increase from 6 feet to 8 feet or 11 feet in perceived height is excessive and unnecessary given the surrounding residential context.

Mr. Finlinson asked if the property is higher the than the residential in certain areas because of being on a hill, and then noted that it slopes down.

Mr. Christensen said the retention wall is not exactly on the property line. He stated that there would be quite a bit of height variation with the fencing that will impact the neighbors.

Mr. Wallace discussed the requirement for the fence to be a masonry wall versus a vinyl fence. He stated it is much more expensive, yet there has been no identification from the city of why masonry is necessary. He acknowledges the city's point that masonry lasts longer but argued that the fence regulations promote a variety of styles for security, privacy and compatibility. If the city wants to limit vinyl, they should change the code rather than arbitrarily prohibiting it here. Given the lack of identified detrimental impacts in the findings, Mr. Wallace feels a 6-foot vinyl fence should be deemed sufficient screening between the residential uses. He noted the city claims this condition has been imposed before, but his research shows that while some projects were required to have 6-foot masonry fences or 8-foot heights, he could not find any case of an 8-foot masonry wall being mandated, especially between residential zones.

Mr. Finlinson asked for clarification about the positioning of the proposed wall in relation to the relocated road and new townhomes. He understands that the road will be moved over, so there will be a row of townhomes constructed. The wall would go between the row of townhomes in

the new development and the existing residential area. The positioning would be a row of townhomes, the new road, another row of townhomes, then the wall which is adjacent to the residential neighborhood.

Mr. Wallace confirmed that is the correct understanding of the wall location. He stated the current plans comply with all required setbacks, with no encroachments. He noted the setback is 25 feet, as can be seen by the red line along the property, and the proposal meets all setback requirements. The wall would be positioned between the new townhomes and existing residential after the road is moved, while still meeting the mandated setbacks.

Mr. Finlinson asked for the appellant to point out to him on the map where the wall would be, as well as to the road, the houses and the road.

Mr. Wallace argued there is no evidence of detrimental impacts from the 4-plexes versus permitted duplexes that would warrant the conditional use screening requirements. Proper process requires the city identify specific detrimental impacts from the conditional use to justify conditions like the masonry wall, but they have not done that analysis here. He stated the proposed buildings are fully compliant with height and density allowances - the same building footprints could be constructed as single-family homes or duplexes in this or the adjacent zone without any conditional use permit. So, it is difficult to identify detrimental impacts versus what could be built by right that would justify the conditional use conditions. Mr. Wallace acknowledged all development has some impacts, and they want to provide reasonable mitigation like a standard fence. However, the 8-foot masonry wall seems arbitrary rather than based on identified detrimental impacts, code requirements, or substantial evidence.

Regarding traffic impacts, Mr. Wallace noted their study showed peak trips from this site would be very minimal, just 4-11 trips in the peak hours. The study found no indication these roads would be overwhelmed by the development's traffic. The city provided only unsupported statements about existing traffic, not evidence of detrimental impacts from this project's traffic to warrant conditions. Mr. Wallace also pointed out the road currently ends at their property line after originally being planned to go through when the subdivision was built in the 1970s. He argued there is a presumption they should be able to utilize that public road adjacent to their property unless there are demonstrated public interests against it that have not been established here.

Mr. Finlinson asked if the road goes through. Mr. Wallace said it doesn't go through.

M. Finlinson pointed to an entrance in a map and confirmed that's where the appellant wanted to put a gate.

Mr. Wallace explained there will be one gate so through traffic cannot increase loads on neighborhood streets - only traffic in and out by condo residents. He showed a map demonstrating the long, winding route out from the connection, forming the basis for the traffic study finding minimal incentive to use this route. Their traffic study showed no significant impacts. The city ordinance allows the city engineer to review and provide an opinion on the consultant's study, or conduct further study if deemed necessary, but they did not do so. Without providing evidence of greater impacts than the appellant's study, imposing the second

gate arbitrarily contradicts the study findings and presumption the adjacent public road should be available for use. Mr. Wallace noted there was discussion at the Planning Commission meeting about traffic and eyewitness accounts. However, the question is what impact the incremental additional trips from this development itself will have. Just because an intersection already fails during certain times is not an issue caused by their project. The city would need to address existing traffic issues separately. He states they cannot find evidence their limited additional trips will decrease the level of service or cause major impacts. There is no substantial evidence in the record of detrimental traffic impacts from this project to warrant conditions like the second gate.

Mr. Finlinson clarified that, with the conditions imposed by the city, the appellant is limited to that one, ingress and egress – everything would go through right there.

Mr. Christensen noted there is a mandatory provision for a development of this size to have two entrances to and from the subdivision. He argues the proposed emergency-only gate does not actually satisfy the requirement for having two full access points. He stated that initially, the appellant wanted a fully gated community with restricted access. But the city raised issues with that. So now when the appellant is proposing a gate for emergency-only access, Mr. Christensen argues that does not meet the code requirement for two full, normal access points in and out of subdivisions of this size.

Mr. Wallace discussed the dog park condition. He noted they have developed parks in detention basins in other cities without health or safety issues. The city has not pointed to any code prohibiting it or identified detrimental health/safety impacts in their findings that would warrant removing it entirely. Instead, the city simply states there are concerns without specifying what they are. Mr. Wallace argues that is not a reasonable basis to require complete removal of the dog park when no evidence of detrimental impacts has been presented. He states that if specific health/safety impacts were identified as detrimental, they could have looked at mitigating conditions. But in the absence of any defined issues or code violations, there is no justification to categorically prohibit the proposed dog park rather than address any legitimate concerns.

Mr. Finlinson said that he had all the information he needed. He thanked everyone for attending the hearing for this case and he will now take it under advisement.

ANNOUNCEMENTS AND QUESTIONS

The next scheduled meeting will be held on Wednesday, October 11, 2023, at 12:30 p.m. MST located at Murray City Hall, Poplar Room #151, 10 East 4800 South, Murray UT 84107.

ADJOURNMENT

Mr. Finlinson adjourned the meeting at 1:30 p.m. MST.

Philip J. Markham, Director
Community & Economic Development Department