ADMINISTRATIVE HEARING OF A LAND USE APPEAL
(Case No. **PLNAPP2021-01026**)
(Appealing Petition No. PLNPCM2021-00372)
December 9, 2021

Appellant:	Jeff Black
Decision making entity:	Salt Lake City Planning Commission
Address Related to Appeal:	1484 East Tomahawk Drive
Request:	Appealing the planning commission's special approval of special exceptions for building height and grading
Brief Prepared by:	Paul C. Nielson, Senior City Attorney

Land Use Appeals Hearing Officer's Jurisdiction and Authority

The appeals hearing officer, established pursuant to Section 21A.06.040 of the *Salt Lake City Code*, is the city's designated land use appeal authority on appeals of planning commission decisions as provided in Chapter 21A.16 of the *Salt Lake City Code*.

Standard of Review for Appeals to the Appeals Hearing Officer

In accordance with Section 21A.16.030.A of the *Salt Lake City Code*, an appeal made to the appeals hearing officer "shall specify the decision appealed, the alleged error made in connection with the decision being appealed, and the reasons the appellant claims the decision to be in error, including every theory of relief that can be presented in district court." It is the appellants' burden to prove that the decision made by the land use authority was incorrect. (Sec. 21A.16.030.F). Moreover, it is the appellants' responsibility to marshal the evidence in this

appeal. Carlsen v. City of Smithfield, 287 P.3d 440 (2012), State v. Nielsen, 326 P.3d 645 (Utah, 2014), and Hodgson v. Farmington City, 334 P.3d 484 (Utah App., 2014).

"The appeals hearing officer shall review the decision based upon applicable standards and shall determine its correctness." (Sec. 21A.16.030.E.2.b). "The appeals hearing officer shall uphold the decision unless it is not supported by substantial evidence in the record or it violates a law, statute, or ordinance in effect when the decision was made." (Sec. 21A.16.030.E.2.c).

This case deals with application of Chapter 21A.52 (Special Exceptions) of the *Salt Lake City Code*.[1]

Background

This matter was heard by the planning commission on September 22, 2021 via electronic meeting on a petition by Mitchell Peterson ("Applicant") for special exceptions to the general limitations on maximum building height and grade changes in order for Applicant to construct a new, single-family structure at 1484 East Tomahawk Drive (the "Property"). Video of the commission's September 22, 2021 public meeting is part of the record of this matter and is found at https://www.youtube.com/watch?v=fFv3Erp_hGs (0:18:56 to 1:06:20).

Planning division staff prepared a report for the commission's September 22, 2021 meeting in which staff provided findings that the petition for special exceptions met the applicable standards set forth in Chapter 21A.52 and Subsection 21A.24.010.P. (See Planning Division Staff Report Dated September 17, 2021). The staff report was initially prepared by Linda Mitchell, but the petition was presented to the commission by Wayne Mills, Planning Manager. The report includes an overview of the proposal and a discussion of the applicable

[1] The Salt Lake City Council eliminated special exceptions from Title 21A of the Salt Lake City Code subsequent to this matter being considered by the planning commission.

standards on pages 2-11 and a point-by-point analysis of those standards applied to the specific facts of the proposal in Attachments C, D, and E.

At the September 22, 2021 meeting, Mr. Mills presented an overview of the proposed development project, provided a slide show reflecting materials and information in the staff report, and offered a recommendation to approve the petition. (See Video of September 22, 2021 Planning Commission Meeting at 0:20:00 to 0:33:30). Applicant provided his own narrative of the proposed development, provided additional slides depicting the proposed single-family structure, and responded to commissioners' questions. (See Video of September 22, 2021 Planning Commission Meeting at 0:34:00 to 0:46:55).

The commission held a public hearing at the September 22, 2021 meeting (see Video of September 22, 2021 Planning Commission Meeting at 0:46:57 to 1:00:05).

Following the commission's brief discussion, Commissioner Christensen moved to approve the special exceptions "based on the information in the [September 17, 2021] staff report, the information presented, and the input received during the public hearing", which motion was seconded by Commissioner Urquhart and approved by the commission on a 7-0 vote. (See Video of September 22, 2021 Planning Commission Meeting at 1:04:28 to 1:06:19).

Appellant, Jeff Black ("Appellant"), submitted an appeal of the planning commission's decision on or about October 1, 2021.

Discussion

Appellant's appeal consists of three arguments: 1) that the planning commission did not have authority to allow a third story on the structure, 2) that the commission did not have authority to grant a grade change for the driveway in excess of six feet, and 3) that the

commission should not have allowed development on slopes greater than 30% because the Property's dimensions had been altered from how it was originally subdivided.

A. Appellant's First Argument: The Planning Commission Improperly Authorized a Third Story.

Appellant contends that the planning commission improperly granted a special exception for additional building height because the text of Salt Lake City Code Subsection 21A.24.010.P.2 prohibits the commission from granting additional stories in the FR-3/12,000 zoning district. In doing so, Appellant assails the staff report stating, "[t]he staff report on the requested Height Special exception repeatedly refers to the house as a three story house but never addresses the 3 story rule in any of the attachment tables which supposedly list all of the FR-3/12000 Special exception standards…." (Appellant's Appeal Document at p. 4). The problem with that assertion is that there is no three story rule.

While it is true that Subsection 21A.24.010.P.2 does state that the planning commission "shall not have the authority to grant additional stories", as explained by Mr. Mills at the September 22, 2021 commission meeting, that language is a remnant of a former regulatory scheme that *did* limit building heights by stories. (See Video of September 22, 2021 Planning Commission Meeting at 0:26:15 to 0:28:35). It appears that Ordinance 13 of 2004 eliminated the former 2 ½ story limitation in the FR-3/12,000 district[2] in favor of a simple maximum building height limitation, which the appeals hearing officer may take judicial notice of. Unfortunately, the language pertaining to the commission not granting additional stories was not deleted and needlessly remains to this date. Where the city's land use regulations no longer regulate building height by stories, the language pertaining to the commission not granting additional stories is

[2] Formerly codified in Subsection 21A.24.010.O.1.d of the Salt Lake City Code (see 1999 edition of the Salt Lake City Code).

clearly ambiguous and, therefore, must be construed in favor of the land use application pursuant to Utah Code Section 10-9a-306 (which the city did), and the hearing officer is likewise compelled to construe that ambiguity in favor of the land use application pursuant to Utah Code Subsection 10-9a-707(4)(b).

Most importantly, the planning commission did not grant any additional stories--it granted a special exception for 4' 1.5" of additional building height above the 28-foot maximum. Although Appellant is correct that the staff report described a three-story residential structure, that was merely descriptive; planning staff could just have easily described the structure by its proposed height, but staff chose to mention the proposed structure in relatable terms. Significantly, the planning commission accepted planning staff's longstanding interpretation of this provision of code as reasonable, and Commissioner Berry specifically explained that when voting on the motion. (See Video of September 22, 2021 Planning Commission Meeting at 1:05:33 to 1:05:54).

For these reasons, Appellant's argument pertaining to whether the planning commission could grant additional stories fails on its face and must be rejected by the hearing officer.

B. Appellant's Second Argument: The Planning Commission Improperly Authorized Excessive Grade Change for the Driveway.

Appellant contends that the planning commission erred by granting more than six feet of grading to allow for a proposed driveway, citing the language of Salt Lake City Code Subsection 21A.24.010.P.6.c.

Subsection 21A.24.010.P.6 reads:

> 6. Grade Changes: No grading shall be permitted prior to the issuance of a building permit. The grade of any lot shall not be altered above or below established grade more than four feet (4') at any point for the construction of any structure or improvement except:

a. Within the buildable area. Proposals to modify established grade more than six feet (6') shall be reviewed as a special exception subject to the standards in chapter 21A.52 of this title. Grade change transition areas between a yard area and the buildable area shall be within the buildable area;
b. Within the front, corner side, side and rear yard areas, proposals to modify established grade more than four feet (4') shall be reviewed as a special exception subject to the standards found in chapter 21A.52 of this title; and
c. As necessary to construct driveway access from the street to the garage or parking area grade changes and/or retaining walls up to six feet (6') from the established grade shall be reviewed as a special exception subject to the standards in chapter 21A.52 of this title.

Once again, Appellant has identified a drafting glitch in the city's land use regulations. Where Subsection 6.a clearly states that modifying the established grade more than six feet in the buildable area requires a special exception and Subsection 6.b states that modifying the established grade more than four feet in the required yard areas also requires a special exception, Subsection 6.c seems to indicate that a special exception is required for any grade change for a driveway in the FR-3/12,000 district up to six feet. Appellant suggests that six feet is the maximum allowed grade change for a driveway.

As Mr. Mills noted at the September 22, 2021 meeting, the city's land use regulations were amended in 2012 to loosen restrictions on how grade changes would be approved. (See Video of September 22, 2021 Planning Commission Meeting at 0:28:38 to 0:32:52). One of those amendments pertaining to driveway grade changes modified the former provision that stated that a grade change of up to six feet for a driveway could be done without requiring any special permission from the city to what the code unfortunately now states. The intent was to continue to allow grade changes for driveways by right up to a certain point and require a special exception for grade changes greater than that.[3]

[3] The proposed revisions were addressed at a November 30, 2011 meeting of the planning commission at which the commission discussed the driveway grade change provision. The planner was instructed by the commission to amend the proposed text to make grade changes for driveways consistent with the proposed requirements for grade

Notwithstanding Mr. Mills's explanation of the text amendment snafu, reading Subsection 21A.24.010.P.6.c to require a special exception for driveway grading up to six feet and prohibiting any such grading above six feet would be in direct conflict with Subsections 6.a and 6.b, which allow grade changes up to six feet in the buildable area and up to four feet in the required yard areas and both allow grade changes to exceed those limits with a special exception. A driveway will always be located in the required yard area of a lot or parcel and in nearly every case will also be situated in the buildable area. As a matter of statutory construction, if the hearing officer were to accept Appellant's preferred reading of the code, doing so would lead to absurd results. As noted above, Utah Code Section 10-9a-306 provides that where the plain language of a land use regulation does not clearly prohibit a land use application, the regulation must be construed in favor of the property owner.[4] A reading of the plain language of Salt Lake City Code Subsections 21A.24.010.P.6.c cannot be harmonized in any reasonable way with Subsections 6.a and 6.b to be workable where a residential development project in the FR-3/12,000 district requires a grade change for a driveway, whether greater or less than six feet.

For these reasons, Appellant's argument that the planning commission was prohibited from granting a special exception for a driveway grade change in excess of six feet must be rejected.

---

changes in the required yard areas (up to four feet by right, and requiring a special exception above that), but the planner never made the changes recommended by the planning commission. The city will gladly provide audio of that November 30, 2011 meeting to the hearing officer. The city contends that the hearing officer is allowed to take judicial notice of these official records that were not specifically included in the record materials considered by the commission.

[4] The hearing officer is bound by the same standard as set forth in Utah Code Subsection 10-9a-707(4). See also, Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602 (Ut. App. 1995) (holding that, because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." (Citation omitted)).

C. Appellant's Third Argument: The Planning Commission Improperly Authorized Development on Slopes Greater Than 30%.

Appellant's final argument is that it was error for the planning commission to allow development of the Property on slopes greater than 30% because the Property was purportedly subdivided after 1994. Appellant's assertion is incorrect.

As mentioned by Mr. Mills at the September 22, 2021 meeting, the lots at 1484 and 1474 East Tomahawk Drive were subdivided in 1975 as part of the Arlington Hills Plat G Subdivision. (See September 17, 2021 Staff Report at p. 9 and Video of the September 22, 2021 Planning Commission Meeting at 0:25:22 to 0:26:16). Mr. Mills also explained that a warranty deed showed that the common lot line between the properties at 1474 and 1484 East Tomahawk Drive was moved in 1987, but that there was some uncertainty as to the exact timing of that lot line adjustment. (See id.).

Mr. Mills correctly explained that the lot line adjustment that occurred between those two lots is not a subdivision as defined in state law. Utah Code Subsection 10-9a-103(38) defines "lot line adjustment" and reads:

> (38) (a) "Lot line adjustment" means a relocation of a lot line boundary between adjoining lots or between a lot and adjoining parcels in accordance with Section 10-9a-608:
> (i) whether or not the lots are located in the same subdivision; and
> (ii) with the consent of the owners of record.
>
> (b) **"Lot line adjustment" does not mean a new boundary line that**:
> (i) **creates an additional lot; or**
> (ii) **constitutes a subdivision.**
>
> (c) "Lot line adjustment" does not include a boundary line adjustment made by the Department of Transportation.
>
> (Emphasis added).

Subsection 10-9a-103(65) defines what a subdivision is and what is not a subdivision, and reads:

(65) (a) “Subdivision” means any land that is divided, resubdivided, or proposed to be divided into two or more lots or other division of land for the purpose, whether immediate or future, for offer, sale, lease, or development either on the installment plan or upon any and all other plans, terms, and conditions.

(b) “Subdivision” includes:

(i) the division or development of land, whether by deed, metes and bounds description, devise and testacy, map, plat, or other recorded instrument, regardless of whether the division includes all or a portion of a parcel or lot; and

(ii) except as provided in Subsection (65)(c), divisions of land for residential and nonresidential uses, including land used or to be used for commercial, agricultural, and industrial purposes.

(c) **“Subdivision” does not include:**

(i) a bona fide division or partition of agricultural land for the purpose of joining one of the resulting separate parcels to a contiguous parcel of unsubdivided agricultural land, if neither the resulting combined parcel nor the parcel remaining from the division or partition violates an applicable land use ordinance;

(ii) a boundary line agreement recorded with the county recorder's office between owners of adjoining parcels adjusting the mutual boundary in accordance with Section 10-9a-524 if no new parcel is created;

(iii) a recorded document, executed by the owner of record:

(A) revising the legal descriptions of multiple parcels into one legal description encompassing all such parcels; or

(B) joining a lot to a parcel;

(iv) **a boundary line agreement between owners of adjoining subdivided properties adjusting the mutual lot line boundary in accordance with Sections 10-9a-524 and 10-9a-608 if:**

(A) no new dwelling lot or housing unit will result from the adjustment; and

(B) the adjustment will not violate any applicable land use ordinance;

(v) a bona fide division of land by deed or other instrument if the deed or other instrument states in writing that the division:

(A) is in anticipation of future land use approvals on the parcel or parcels;

(B) does not confer any land use approvals; and

(C) has not been approved by the land use authority;

(vi) a parcel boundary adjustment;

(vii) **a lot line adjustment**;

(viii) a road, street, or highway dedication plat;

(ix) a deed or easement for a road, street, or highway purpose; or

(x) any other division of land authorized by law.

(Emphasis added).

Appellant contends that whatever transaction occurred that moved the westerly ten feet of Lot 1 of the Arlington Hills Plat G into the land identified as Lot 2 of that subdivision constituted an additional subdivision or resubdivision. As cited above, a subdivision divides land in a way that creates additional lots and simply shifting a lot line does not constitute a subdivision as long as it does not create a new building lot. "Resubdivision" is not defined in the state or city codes, but several states and local jurisdictions in those other states do define resubdivision in a way that one might expect: the further division of subdivided land or the recombination of lots, either of which changes the number of lots in a subdivision. Here, there were no new lots created in the Arlington Hills Plat G Subdivision after its original recording in 1975. Thus, the prohibition on development of steep slopes in lots subdivided after 1994 does not apply to the lots at 1474 and 1484 East Tomahawk Drive.

Because it is clear that the Arlington Hills Plat G Subdivision was not created after 1994 and because it is clear that no new subdivision of Lots 1 and 2 thereof (1484 and 1474 East Tomahawk Drive, respectively) occurred after 1994, the Property is not subject to the steep slope development restrictions set forth in Salt Lake City Code Subsection 21A.24.040.G and Appellant's arguments with respect to same must be rejected.

Conclusion

Appellant has failed to meet his burden of proving that the Salt Lake City Planning Commission's decision to approve the Applicant's special exceptions for building height and excess grading was in any way arbitrary, capricious, or illegal. For this reason and all of the reasons stated above, Appellant's arguments must be rejected and the planning commission's decision must be upheld.