Salt Lake City Land Use Appeals Hearing Officer
Appeals Decision
PLNAPP2021-01026
(Appealing Petition No. PLNPCM2021-00372)
March 31, 2022

This is an appeal by Jeff Black ("Appellant"), of a decision by the Salt Lake City Planning Commission to approve a special exception to for building height and grading for a residence to be constructed at 1484 East Tomahawk Drive (the "Property").

Ruling. The decision here is to uphold the Planning Commission's approval of the special exceptions and deny the Appellant's petition.

A hearing on this matter was held before the Appeals Hearing Officer on March 17, 2022. Mr. Black, the appellant, appeared. Appearing on behalf of the City was Paul Nielsen, Senior City Attorney. Appearing on behalf of the original applicant for the special exception was Mr. Mitchell Peterson ("Applicant").

The application for the special exception was reviewed and a public hearing held by the Planning Commission on September 22, 2021. The appeal was timely filed on September 29, 2021. The Appellant's appeal brief identified three grounds for reversal. An extended discussion, including the identification and review of some of the evidence in the record from the Planning Commission, was conducted at the Appeals hearing.

Standard of Review

The standard of review for a planning commission decision under Utah law, found at *Utah Code Annotated* §10-9a-801, is the same for all administrative decisions. The decision is reviewed to determine if it conflicts with any applicable law, and whether it is supported by substantial evidence in the record. In discussing an administrative decision by a board of adjustment, the Utah Court of Appeals stated:

> The Board will be found to have exercised its discretion within the proper boundaries unless its decision is arbitrary, capricious, or illegal. Further, "[t]he court shall affirm the decision of the board . . . if the decision is supported by substantial evidence in the record." *Utah Code Ann.* Sec. 17-27-708(6) (1991). Together, these concepts mean that the Board's decision can only be considered arbitrary or capricious if not supported by substantial evidence. [6] In determining whether substantial evidence supports the Board's decision we will consider all the evidence in the record, both favorable and contrary to the Board's decision. See *First Nat'l Bank of Boston v. County Board of Equalization of Salt Lake County*, 799 P.2d 1163, 1165 (Utah 1990); *Grace Drilling Co. V. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989). Nevertheless, our review, like the district court's review, "is limited to the record provided by the board of

> adjustment…. The court may not accept or consider any evidence outside the board[‘s] record….” *Utah Code Ann*. Sec. 17-27-708(5)(a) (1991). We must simply determine, in light of the evidence before the Board, whether a reasonable mind could reach the same conclusion as the Board. It is not our prerogative to weigh the evidence anew. See Xanthos, 685 P.2d at 1035 [7]

Patterson v. Utah County Bd. Of Adj. 893 P.2d 602, 604 (UT App. 1995). The footnote cited in this citation is as follows:

> “‘Substantial evidence’ is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *First Nat’l Bank of Boston v. County Bd. Of Equalization of Salt Lake County,* 799 P.2d 1163, 1165 (Utah 1990). It is “more than a mere ‘scintilla’ of evidence. . . though ‘something less than the weight of the evidence.’” *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 68 (Utah App. 1989) (quoting *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 715 P.2d 927, 930 (1985)).

Id at f.6. With regard to legality, the burden of proof is also on the Appellant here. *Utah Code Ann*. §10-9a-705. In order to successfully raise a legal issue, Appellant must specifically cite the applicable code, statute or case law and then show how the decision is inconsistent with that law. Under *Utah Code Ann*. §10-9a-509, if an application complies with the law, it must be approved. Appellants must show that the application does not comply with a specific law and cannot succeed by making policy arguments or general claims about what the law should be. The Appeal Authority cannot change the law, but only interpret it and apply specific sections of the codes or statutes to these particular decisions.

City Code further confirms that “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” (*Salt Lake City Code* Section 21A.16.030.E2).

Discussion

The Applicant, desiring to build a single-family residence on the Property, applied for special exceptions to the maximum building height regulations, as well as grade change limitations found in City Code.

The Appellant raises three issues for consideration on appeal, which I will address below:

Issue #1: No Third Story Allowed

Appellant argues that the City has a “3 story rule” that would prohibit any residence from having a third story, and that the Planning Commission is specifically limited in granting additional stories on structures through a special exception. The Appellant cites Subsection 21A.24.010.P.2 of the City Code which does in fact state that the Planning Commission “shall not have the authority to grant additional stories.” However, I am compelled to take judicial notice of a Salt

Lake City Ordinance 13 of 2004 which did away with any story limitations and instituted a maximum building height limitation. According to city staff testimony, since the time of passage of Ordinance 13 of 2004. Notwithstanding, the City failed to remove the story limitation language from the City Code. As a result, the City has potentially competing provisions in the City Code, creating ambiguity in the interpretation of City Code.

Utah Code Subsection 10-9a-707(4)(b) requires that I construe the ambiguity in favor of the land use applicant, and can therefore reject the Appellant's insistence that the Planning Commission follow the part of the Code that favors his arguments in limiting the Planning Commission's authority to provide for a special exception for height. Because the Planning Commission only granted a special exception for height consistent with City Code, and did not grant additional stories, Appellant's arguments here are unpersuasive.

Issue #2: Grade Change Approval

As with the height and extra story issue above, the Appellant identifies an inconsistent portion of the Code that creates ambiguity in what the Planning Commission can do with regarding to grade changes. The Appellant argues that the Planning Commission cannot grant more than six (6) feet of grade change for a proposed driveway. He cites and relies on a portion of the grade change portion of City Code which appears to not allow grade changes of more than six (6) feet. However, with the Section of the City Code on grade changes, other language exists that makes the grade change limitations ambiguous. Salt Lake City Code Subsection 21A.24.010.P.6.c seems to limit grade changes beyond six (6) feet. But Code Subsection 21A.24.010.P.6.a actually permits grade changes beyond six (6) feet with a special exception.

Notwithstanding the ambiguous sections of the City Code, City staff established that the City had simplified its restrictions on grade changes that would allow from grade changes beyond a certain point, rather than restricting them entirely in certain situations. I am persuaded that the apparent contradictory sections of the City Code cannot be harmonized in any reasonable way. Utah State law requires that I must look to the plain language of the regulation when an application of such regulation is not clearly prohibited and construe such sections in favor of the property owner, in this case, the Applicant. Therefore, in my attempt to construe the regulation for the grade change special exception that is not clearly prohibited by the City Code, combined with the City's intent and consistent use applying the City Code to allow for these grade change special exceptions, I am required to rule in favor of the Applicant where any ambiguity exists.

Issue #3: Subdivision

The final issue raised by the Appellant relates to whether the proposed residence would be prohibited on a greater than 30% slope on a lot subdivided after 1994. Appellant argues that a 1987 deed created a "subdivision" according to City Code. There are two problems with this argument. First, the 1987 was prior to 1994, and thus the timing does not prohibit such a development even if it were considered a subdivision. Second, the 1987 deed created a lot line

adjustment, and not an actual subdivision, according to the plain language of the State's definition of a subdivision in Subsection 10-9a-103(65). Thus, Appellant's argument fails.

Conclusion

The Appellant failed to identify either in its appeal brief, nor in the appeals hearing, that the Planning Commission decision violated any law, statute or ordinance when the decision was made and failed to show that the decision was not supported by substantial evidence. The Appellant, whose burden it was, failed to show that there was not substantial evidence in the record for the Planning Commission to make its decision. The Appellant, whose burden it was, also failed to show that the decision violated any law. Rather, the record of the Planning Commission was full of substantial evidence upon which the Planning Commission based its decision to approve the special exception. Any other decision or issue is outside the scope of this appeals hearing or the authority of this appeals hearing officer.

The decision of the Planning Commission is upheld because its decision was based on substantial evidence in the record and did not violate any law. Thus, the special exceptions decision in favor of the applicant stands.

Matthew T. Wirthlin, Appeals Hearing Officer