

SALT LAKE CITY LAND USE APPEALS HEARING OFFICER
APPEAL OF PLANNING COMMISSION
DENIAL OF CONDITIONAL USE
PETITION NO. PLNAPP 2023-00303
2111 S. 1300 East
PUBLIC HEARING HELD JUNE 15, 2023
DECISION ISSUED JULY 5, 2023

On April 12, 2023, the Salt Lake City Planning Commission heard a request for a Conditional Use by Kum & Go Company to construct and operate a gas station and convenience store at 2111 South, 1300 East. The Planning Commission rejected the application, and Kum & Go now appeals. A hearing on this matter was held before the Salt Lake City Land Use Appeals Hearing Officer on June 15, 2023. Kum & Go (the Applicant) was represented by Christopher R. Hogle. Salt Lake City was represented by Katherine D. Pasker. The record in this matter consists of the record before the Planning Commission, the video recording of the Planning Commission meeting on April 12, 2023, written submissions and briefs directed to the Hearing Officer and oral argument presented at the hearing. The decision of the Planning Commission is affirmed.

The Decision of the Planning Commission should be affirmed unless it is not supported by substantial evidence in the record or violates a statute, ordinance or law in effect when the decision was made. The applicant argues that the decision below was both illegal and not supported by substantial evidence. In prosecuting this appeal, the burden is on the Applicant to marshal the evidence in support of the Planning Commission's decision and to prove that the Commission acted in derogation of the law and the evidence.

The Planning Commission was presented with a substantial staff report, including more than 500 written comments, the majority of which opposed the gas station project, mostly because of its immediate proximity to Sugarhouse Park but also due to concerns about the traffic in the area. The applicant made an oral presentation and submitted substantial written materials including excerpts from a traffic report and professional materials supporting the safety measures being taken with respect to the storage, transfer and pumping of gas at the site.

In reviewing the application, the Planning Commission has a duty to approve the proposal if the anticipated detrimental effects of a proposal can be mitigated by the imposition of reasonable conditions. Utah Code § 10-9a-507(2)(a). But if those effects cannot be mitigated, the Planning Commission may deny the application. Utah Code § 10-9a-507(2)(c). The rule requires mitigation but not elimination of detrimental impacts. Utah Code § 10-9a-507(2)(a)(ii). Moreover the impacts and detriments must be tied to applicable standards; e.g. those set forth in law or adopted ordinance. Utah Code § 10-9a-507(1). The Planning Commission voted to deny the application on the grounds that the potential for detrimental impacts could not be

mitigated. In so doing, the commission cited the eight considerations set forth in the staff report.¹ The Applicant argues that the Planning Commission decision was illegal, arbitrary and capricious.

In this case, the Planning Commission adopted the staff report finding that there were a number of negative impacts that could not be mitigated. These included traffic, the environmental impact of having a gas station next to a park with a secondary drinking water source, the intensity of the use in an area designated as low intensity in the City's Master Plan, and impacts to air and water at Sugarhouse Park.

Utah law is clear that public clamor is not a legally acceptable basis to deny a conditional use permit. So despite the fact that the Planning Commission was faced with substantial public opposition to the project, this outcry cannot form a substantial basis sufficient to support the decision to deny the conditional use application. Moreover, the Planning Commission did not engage in debate or very much discussion about how the project tracked the legal standards governing its decision. At the end of the hearing, the Commission moved and voted 9-1 to adopt the findings of the staff report without much explanation.

Nonetheless, the Planning Commission must be affirmed if there is a substantial evidentiary basis in the record to do so. "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 21A.16.030 I.2.c. The parties present semantic disagreement about how conditional uses are treated under the law but in effect, they both agree and acknowledge that such uses are subject to a higher level of scrutiny than permitted uses and must be analyzed for whether their potential detrimental impacts can be substantially mitigated. Utah Code §10-9a-507(2)(a)(i). Condition use "means a land use that, because of the unique characteristics or potential impact of the land use on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts." Utah Code §10-9a-103(8). This presumes that a use may be conditional but still subject to denial based on the circumstances of its placement or characteristics. This appeal arises in the context of whether the applicant's proposed gas station use is or can be made compatible with a city park, secondary water sources and a street already burdened by traffic.

Although some of the findings by the Planning Commission were debatable based on the record, the decision below is supported by the findings that the traffic impact was detrimental and could not be mitigated. Thus, the decision below can be and is affirmed.

¹ In fact, there were only seven considerations in the Staff Report supporting denial. The eighth referred to impacts that could be mitigated.

The Commission was required to find that “access to the site does not reasonably impact the service level of any abutting or adjacent street” in order to approve the project. If the Commission found evidence that the service level of surrounding streets would be impacted and no mitigation was possible, denial of the application on this ground alone would be supported. . Utah Code § 10-9a-507(2)(a)(ii) The staff report proposed that detrimental impacts in this area could not be mitigated stating:

Based on the applicant’s Traffic Impact Study (TIS) submitted, the proposal would add a significant increase in the number of daily trips taken in and out of the subject site. The intersection currently operates at a Level D, which is labeled as “less stable vehicle flow.” The proposal would cause a decrease in the intersection mobility causing the intersection to run at a Level E, which is labeled as “Unstable vehicle flow.” The proposal creates approximately 364 more trips to the location than the previous use of a restaurant.

The record before the Planning Commission also included substantial first person testimony, both during the hearing and in written comments that the intersection was already suffering negative impacts from traffic. In the testimony before the commission was the following:

“I am a long-time resident residing about one-half block south of Sugarhouse Park.... Finally, there have been so many high-rises built between 2100 South and Stratford Avenue and Highland Drive and 1300 East that it is practically impossible to exit the neighborhood streets onto 1300 East during most of the daytime hours. I have seen neighborhood cars lined up for more than two blocks trying to access 1300 East near the I-80intersections.” p.746²

“What this plan will do is cause a hell of a lot more traffic than there already is. Like seriously have you been in that area during rush hour?? It is 100% a nightmare.” p.430.

“Please don’t put the gas station in the old Sizzler spot at Sugarhouse park. The traffic there is already nuts. Have you ever tried to cross that intersection on foot? It’s scary and gross because of all the cars and congestion and this gas station will make it so much worse.” p. 442

“There are days when traffic begins to slow down as I approach Westminster traveling southbound. When returning, northbound traffic is often backed up from the corner where the Kum & Go would be sited to or past the light--often approaching the off-ramp from the 80. As that neighborhood has built up, the situation has already worsened significantly. I believe that adding a business like the Kum & Go would exacerbate the situation further.” p. 636

² Page citations are to the record before the hearing officer.

“Finally, from the point of view of access, the northbound traffic at the 1300E / 2100S intersection regularly backs up, blocking access to the location in this planning request. When the Sizzler was still there, the egress from the site back on to 1300E was a constant cause of issues with people trying to turn north into the already-congested junction, as the majority of vehicles were attempting to cut across two lanes of traffic to go straight ahead. This in turn blocked the right turn lane at the intersection, which the Salt Lake City transportation division has already noted as one of the busiest right-turn lanes in the city. Egress from the plot to the north directs traffic on to 2100 South heading east, and historically this caused a problem with that traffic cutting across the three lanes of the road in an attempt to U-turn back to the west at View Street.” p. 689 (lives in Sugarhouse)

“Hi Diana, I live nearby and go thru that intersection several times per day. There is already significant traffic congestion from the nearby Highland High and Westminster College. And for the people who are walking or on a bike and trying to cross that intersection it's a disaster. Drivers get impatient and do not respect the pedestrians, even if they are in the crosswalk. The traffic backs up on 13th East for those who are attempting to travel southbound, much of which is caused by the Chevron traffic. For someone traveling westbound on 21st south and attempting to turn left to travel south, it's a nightmare doing that with vehicles in and out of the Chevron.” p. 697

“Hi Diana- as a very close resident to the proposed location of new The Kum and Go Gas Station in Sugarhouse. My vote is NO! We already have terrible traffic, especially at that intersection, and we need to keep our kids, friends, family pets as safe as possible!” p. 778

The applicant correctly states that the Planning Commission cannot deny an application based on public clamor and certainly some of the comments opposing the project do not provide any factual information related to the standards, but the testimony cited above conveys specific first-hand knowledge relating to the conditions at the site where the project is intended to be built.

And the Planning Commission was within its purview to take notice that the purpose of the project is to service car traffic and to bring cars to that site in order to be a successful business. “Land use authorities are permitted to consider the “natural consequences” of land uses. *Staker v. Town of Springdale*, 481 P.3d 1044 (Utah App . 2020) In this case, it was within the scope of the Planning Commission to consider that a gas station off a freeway exit would bring additional

traffic to an already difficult intersection and that given the purpose of the use, mitigation in the form of fewer cars is not possible. As a result, the Planning Commission conclusion that increased traffic at the site could not be mitigated is not illegal, arbitrary or capricious and is supported by evidence in the record.

The applicant states “[t]o substantiate it’s claim, Staff should have presented data about the characteristics of 1300 East and 2100 South. No such data is included in the record.” Applicant fails to acknowledge, either in its argument or marshalling of the evidence, the record information provided during the written and public comment portion of the Planning Commission process. In fact, the evidence includes substantial material information about the problematic status of traffic at 1300 East and 2100 South.

The applicant argues that only “data” presented by experts qualifies as relevant evidence. This interpretation would make public comment irrelevant except when offered by experts. "By making a promise to zone before a zoning hearing occurs, a municipality denigrates the statutory process because it purports to commit itself to certain action before listening to the public's comments on that action." *Wallingford v. Moab City*, 459 P.3d 1039, ¶24 (Utah App. 2020). Public comment is not simply there to be heard and dismissed out of hand.

Moreover, while the Planning Commission may not require the consent of neighboring landowners when considering a conditional use, it is entitled to consider public comment when making decisions. *Staker* at ¶ 30. “While it is true that the consent of neighboring landowners may not be made a criterion for the issuance or denial of a conditional use permit, there is no impropriety in the solicitation of, or reliance upon, information which may be furnished by landowners in the vicinity of the subject property at a public hearing.” *Thurston v. Cache County*, 626 P. 2nd. 440, 445 (Utah 1981). Here, close residents and users of the 1300 East and

2100 South provided factual information about their experience with the streets to be used for access to the project.

Moreover, the Applicant's own traffic study provided data from which the Commission might find cause for concern regarding traffic. Applicant's TIS states that upon completion, the project will bring approximately 679 net new weekday daily trips. Applicant's own data indicates that access may degrade from their current A levels of service to B, C, and D levels during peak hours of traffic. Although the TIS indicates these level impacts will result in negligible drops in service, the Commission was entitled to find otherwise, based on the applicant's own data, combined with other testimony and information in the record. The applicant asserts that an expected increase in "background" traffic is a greater threat to the stability of the intersection, but this bolsters the Planning Commission's determination that the project, whose purpose is to service car traffic, will negatively impact an already and increasingly difficult service pattern.

The Planning Commission decision was not illegal in that it has a duty to assess the project pursuant to the City's ordinances and state law regarding the parameters of conditional use review. The Applicant suggests that some language in the City's master plan; for instance a preference for low intensity uses; is not sufficiently concrete to be legally binding. It is not within the scope of the Hearing Officer's review to ignore or set aside language in the City's master plans and deem them unenforceable. The role of the Appeals Hearing Officer is to "review the decision based upon applicable standards and . . . determine its correctness." Salt Lake City Code §16.030.I.2. Nonetheless, the City's adopted ordinance requiring that the project not impact the service level of adjacent streets is a sufficient basis for the Planning Commission decision.

Because the Planning Commission decision with regard to the inability of the Applicant to mitigate traffic impacts is supported by the record, the decision below is not arbitrary, capricious or illegal. The decision of the Planning Commission to deny the conditional use application is affirmed.

Dated this 5th day of July.

/s/Mary J. Woodhead
MARY J. WOODHEAD