

FINAL

**MINUTES OF THE COTTONWOOD HEIGHTS CITY
BOARD OF ADJUSTMENT MEETING**

Thursday, August 9, 2012

6:30 p.m.

**Cottonwood Heights City Council Room
1265 East Fort Union Boulevard, Suite 250**

ATTENDANCE

Board Members:

Bob Wilde
James Holtkamp
James Adinaro
Noor Ul-Hasan
Gary Barnes
Don Antczak (Alternate)

City Staff:

Brian Berndt, Director
Community & Economic Development
Jody Burnett, Special Legal Counsel
Spencer Topham, City Attorney
Kory Solorio, Deputy Recorder

BUSINESS MEETING

1.0 Welcome/Acknowledgements.

Chair James Holtkamp called the meeting to order at 6:30 p.m.

2.0 ACTION ITEMS

2.1 Action to Elect a New Chair and Vice Chair.

(18:30:00) Chair Holtkamp indicated that City ordinance requires the Board of Adjustment to elect a Chair every year. He asked for nominations for the position.

Board Member Noor Ul-Hasan nominated Board Member Bob Wilde as Chair. There were no other nominations. All present voted in favor.

Chair Holtkamp asked for nominations for Vice Chair.

Board Member Ul-Hasan nominated Chair Holtkamp for the position of Vice Chair. There were no other nominations. All present voted in favor.

Board Member Holtkamp turned the meeting over to the new Chair, Bob Wilde.

2.2 Action to Approve Proposed Amendments to the Rules and Procedures of the Board of Adjustment.

(18:31:48) Chair Wilde outlined the proposed amendments to the Rules and Procedures of the Board of Adjustment.

(18:32:16) *Board Member Holtkamp moved to approve the amendments. Board Member Ul-Hasan seconded the motion.*

Chair Wilde suggested changing the language to read “All written submissions *by any person* shall be submitted by 5:00 p.m.”

Board Member Holtkamp amended his motion to include the proposed language. All present voted in favor of the motion.

3.0 HEARING OF APPEAL

3.1 Hearing of an Appeal of the Planning Commission’s Approval of a Proposal from Cottonwood Partners to Construct Two Office Buildings located at 2750, 2770, and 2800 E. Cottonwood Parkway.

(18:33:57) Mr. Brian Berndt, Community and Economic Development Director, explained that the subject property is a nine-acre parcel in the Cottonwood Corporate Center. The parcel, which is the last vacant parcel in the Center, is located at the southwest corner of the Corporate Center at the end of Cottonwood Parkway. The Blue Cross Blue Shield complex adjoins the property on the east and the Cottonwood Corporate Center is to the north. The subject property is zoned ORD. The residential property adjacent to the subject property is zoned R-1-8.

(18:34:46) The approved site plans and architectural elevations were displayed. The City approved the construction of a six-story building (with a maximum height of 85 feet) on the north side of the subject property, a four-story building (with a maximum height of 58 feet) on the east side of the property, and a two-story parking structure. The development would be accessed via Cottonwood Parkway. The two buildings have approximately 250,000 square feet, with a 13,000 square-foot lobby. The setbacks are approximately 140 feet and 350 feet from the residential properties.

Chair Wilde explained the role and function of the Board of Adjustment. He reminded meeting attendees that the Board will not take new evidence or comments. It will hear only the presentations from the attorneys representing each side of the appeal. Individuals should consult with the attorney representing his or her side to make information known to the Board.

(18:37:50) Mr. Wade Budge, counsel for the Mill Hollow group (Appellant), addressed the Board. He pointed out that his clients have yards bordering on the subject property. He acknowledged that the subject property will be developed at some point, but argued that the Planning Commission erred when it approved the development in violation of Cottonwood Heights Ordinances and other applicable standards.

Mr. Budge stated that Cottonwood Heights ordinance governing the ORD zone restricts buildings to a maximum height of 35 feet, which may be increased through a Conditional Use Permit if certain standards are satisfied. Mr. Budge argued that the Planning Commission’s decision incorrectly states that “the Commission cannot properly deny the applicants request for a CUP for the project if the Commission can impose reasonable conditions to mitigate reasonably anticipated adverse effects of the development.” Mr. Budge explained several acronyms including CUP (Conditional Use Permit) and LUDMA, which is a State law applying to the City and County.

Mr. Budge disputed the City's assertion that if reasonable conditions can be imposed, the requirements of the CUP have been satisfied. He indicated that the City has given the development its own section and created an additional requirement for a conditional use permit. Mr. Budge then displayed a section of the City code, which allows the Planning Commission to permit additional height up to a maximum of six stories upon finding that the additional height will not adversely affect the surrounding land uses.

Mr. Budge also noted that LUDMA, Utah Code Ann. § 10-9a-104, allows a municipality to enact an ordinance imposing stricter requirements or higher standards on conditional use permits than the State requires. He indicated that the Planning Commission decision seems to equate "adverse" with "detrimental." The terms are not specifically defined in the Cottonwood Heights Code, but *Webster's Dictionary* defines "detriment" as a damage, harm, or loss and "adverse" as failing to promote one's interests or welfare or being actively opposed. Thus, while damage, harm, or loss may be mitigated or lessened through conditions, the Code requires the City to consider whether the additional height will be actively opposed. He encouraged the Board members to focus on the neighboring land uses. He pointed out the properties that will be right next to the new office building.

Mr. Budge argued that the purpose of the conditional use permit requirements is to make it harder for taller buildings to be constructed in the ORD zone. He also reminded the Board that each specific term in the ordinance must be carefully considered, as each term is assumed to have been used advisedly.

Mr. Budge also noted that the standard side yard setback in the ORD zone is 50 feet. The ordinance allows the Planning Commission to reduce the setback to 20 feet if it finds that the applicant has reasonably demonstrated that a need exists to decrease the standard setback, but any reduction in the setback must be based on a finding that no harm to health, safety, or general welfare of the City exists or would be created by the decrease. The side yard setback on the proposed four-story building is only 28'2", but the Planning Commission failed to make any findings regarding any potential harm. He noted that, if the 50' setback had been complied with, the building's impact on neighboring properties would have been mitigated. Mr. Budge reminded the Board members that a City may not ignore its own ordinances.

Board Member Holtkamp asked whether Mr. Budge was suggesting that the building should be moved to comply with the setback requirement, or whether the building size should be reduced. Mr. Budge recommended a reduced building size, which would also reduce the lot coverage percentage. He thinks the coverage, as it stands, is nearly fifty percent.

(18:52:45) Mr. Gary Sackett, counsel for Cottonwood Partners (the Appellee), objected on the ground that the subject is beyond the scope of the brief submitted by Mr. Budge. Accordingly, he is unprepared to rebut such a claim. Chair Wilde noted the objection, and pointed out that Mr. Budge is merely responding to Board questions.

In response to a Chair Wilde's request, Mr. Budge again explained the difference between an adverse impact and a detrimental impact. He pointed out that the ordinance allows taller buildings only if there is no adverse impact on surrounding properties. He argued that an adverse effect cannot be mitigated. Mr. Budge also pointed out that the conditional use ordinance requires the Planning Commission to consider other factors besides any potentially detrimental impact. Board Member Holtkamp stated that where a land use ordinance contains ambiguity, courts have generally

held that the ambiguity should be resolved in favor of the property owners. Mr. Budge argued that the ordinance is not ambiguous. It advisedly uses the word “adverse,” and points to *Webster’s Dictionary* for a definition. Mr. Budge is pointing out that “adverse” and “detrimental” are not synonymous.

(18:58:55) Mr. Budge also argued that Section 19.46.060 of the Code requires all developments in the ORD zone to be subject to a master development plan approved by the Planning Commission, but there is no approved master development plan for this development. He asserted that all of the parties involved, including the neighbors, considered the subject parcel to have been part of a larger project. The initial master plan for the area, which was approved by the County, allowed two one-story buildings and one two-story building. In 1995, the Cottonwood Corporate Center circulated a brochure with the same building configuration. He reminded the Board members that all three buildings planned for the area were moved to the north side of the property in 1996 as the result of a lawsuit.

The planned buildings were originally to be two stories and only 25,000 square feet. The larger buildings generate more traffic and require more parking. When families purchased property in the nearby neighborhoods, they were told that the development would consist only of the smaller two-story buildings. Mr. Budge noted that, because the Planning Commission never replaced the master plan, the original plan is still in place.

Mr. Budge also challenged the lighting decision as arbitrary and capricious. He reminded the Board members that the Planning Commission’s decision must be supported by substantial evidence on the record. He pointed out that an expert testified that lighting on poles only eighteen feet tall would impact neighbors’ backyards and bedrooms. No contrary expert analysis was submitted, but the Planning Commission approved lights mounted on twenty foot poles. The zone restricts lights to a maximum height of eighteen feet.

Mr. Budge disputed the claim that the proposed development is better than the maximum use allowable on the parcel. He pointed out that the “maximum use” presupposes a number of variables that are unlikely to be met.

Mr. Budge also noted that the developer has many avenues open to him – such as a legislative fix. But the residents do not have other options available to them. He refuted the claim that denying the project would amount to a taking of the property, since the property owner would still have many economic uses available to him.

Mr. Budge summarized his arguments stating that the ordinance requires findings, which were not made. The decision is, therefore, illegal. The City must abide by its ordinances.

Board Member Ul Hasan pointed out that the light poles are twenty feet from grade level, but only eight feet above the neighborhoods. Mr. Budge clarified that it is unclear whether the lights would be at grade at the north side of the development.

Chair Wilde pointed out that the developer could approach the Planning Commission at any point to develop and approve a master plan for the subject property. Mr. Budge agreed, but again noted that the decision as it stands does not meet the requirements of the ordinances. If the Planning Commission were to begin the master plan process, the City residents would have a say in that process.

(19:10:08) Mr. Sackett addressed the Board. He reminded the Board that the purpose of the hearing is not to determine whether the project is attractive or desirable. The Board may consider only whether the Planning Commission's decision complies with State law and City ordinances, and whether the decision was arbitrary and capricious. He noted that the Planning Commission was very thorough in its opinion regarding the development.

Mr. Sackett agreed that the Planning Commission had an obligation to determine that the additional building height would not adversely affect the surrounding land uses. He also acknowledged that the Commission's decision was governed by the requirements set forth in the conditional use chapter. The ordinances, however, do not require a project to have complete community support. One home owner claiming an adverse impact is not enough to justify rejecting the project. The "adverse effect" language must be considered in conjunction with the rest of the ORD ordinance, which is intended to promote the construction of office buildings.

Mr. Sackett also acknowledged that the Planning Commission understood that some of the neighbors would be negatively impacted by the development, so it went to great lengths to require a number of mitigating conditions. In response to Board Member Holtkamp's question, Mr. Sackett indicated that the term "adverse" is not defined in the ordinance. In consulting dictionaries, however, Mr. Sackett was unable to find a distinction between "adverse" and "detrimental."

(19:16:33) Mr. Sackett also indicated that even if the Planning Commission's decision was based on incorrect reasons, the Utah Supreme Court has held that as long as the record supports the decision it will be affirmed. He argued that the Commission's actions are fully supported by the record. He noted that the decision addresses, in detail, each of the fifteen steps required by Section 1984.082.2(a)-(o).

Mr. Sackett pointed out that the neighbors are closest to the parking structure, which is a permitted use. The office buildings are some distance away from the homes. Mr. Sackett again objected to Mr. Budge's setback argument, as the issue was not raised in Mr. Budge's brief. He also indicated that the Planning Commission dealt with the setback requirements and imposed additional restrictions to mitigate any impact on neighboring homes.

Mr. Sackett stated that the term "master development plan" is not defined in the ordinance. He pointed out that, although the term master plan is often used with respect to master planning cities and towns, that is not the way the term is used in the ordinance. Mr. Sackett argued that the City never adopted the County's master plan for the project, so there is no master plan for the property.

Mr. Sackett reminded the Board that the taller light poles will be used only for the parking garage, which is a permitted use. He stated that the light standard of eighteen feet does not require the pole be at ground level. He pointed out that many other parking areas have light poles taller than twenty feet. In this development, the Planning Commission approved the installation of lights at twenty feet above ground level, which is shorter than the poles could have been under the permitted use. The zoning ordinance allows luminaire up to eighteen feet above the top of the building.

(19:26:20) Mr. Sackett also argued that the development is subject to the discretion of the Planning Commissioners. Despite various expert opinions as to the impact the project will have on surrounding property values, there is evidence on the record to support the Planning Commission's

finding that the value impacts are not detrimental. He also noted that the developer has never claimed that the City's rejection of the project would result in a taking.

Mr. Sackett concluded by stating that the Planning Commission's decision was reasonable, supported by evidence on the record, and it was reached in accordance with the law.

Chair Wilde asked about the coverage percentage of the property. Mr. Sackett indicated that he did not know the percentage because the issue was not raised in the appeal. Mr. Berndt stated that, although he is unsure as to the exact percentages, the development falls within the allowable coverage percentage.

(19:29:47) Mr. Budge, in rebuttal, stated that the Board is not permitted to find alternate grounds for supporting the Planning Commission's decision. He pointed out that the Board's rules state that appeals may not be used to waive or modify the terms or requirements of the zoning ordinance. Under LUDMA, the Board is an appeal authority, not a land use authority. Only a land use authority may approve applications and authorize development.

Mr. Budge explained that the City advisedly chose to include the "adverse" standard, as well as the "detrimental" standard. He argued that the words have different meanings. To support his claim, he read the definitions from *Webster's Dictionary*, which states that detriment is damage, harm, or loss, but adverse is actively opposed or failing to promote one's interest or welfare. Mr. Budge indicated that the Planning Commission has the authority to weigh claims and make decisions. There should have been a specific finding as to whether there is an adverse effect on neighboring properties.

Board Member Ul-Hasan pointed out that the ordinance addresses situations where there are *significantly* adverse impacts. She asked Mr. Budge to explain how the neighboring properties have been subject to significant adverse impacts. Mr. Budge explained that, although his clients presented numerous negative impacts on them as a result of the development, the Planning Commission failed to even address the question. Board Member Ul-Hasan asked about negative impacts caused by emissions from cars using the parking facility. Mr. Budge indicated that, although there are numerous comments in the record, no expert analysis regarding automobile emissions was conducted.

Mr. Budge referred to expert analysis regarding property values and lighting impacts. The expert compared the impact of two-story buildings on property values with the impact of the project as proposed on property values. He pointed out that the property owners on the west side of the project will have a driveway next to their homes, which subjects them to traffic headlights.

Mr. Budge emphasized that his clients are asking for the right to participate in the master planning process.

Mr. Jody Burnett, City Attorney, asked Mr. Budge about his argument regarding side yard setbacks. Mr. Budge offered to find the reference in his pleading in response to Mr. Sackett's objection.

Mr. Berndt clarified that the lot coverage is 16 percent with the buildings alone, and 45 percent with the buildings and the parking structure.

(19:40:00) Board Member Holtkamp moved to postpone the decision to allow Board members to consider the arguments and evidence. He noted that the Board members would not meet to discuss the matter outside of an open forum, and they would not contact any of the interested parties.

Board Member Ul-Hasan asked for a copy of the County's master plan. Other Board members pointed out that the plan is included in the appeal materials.

Mr. Burnett noted that the Board will convene, deliberate, and render a decision. But the decision will not be final until it is adopted, in writing, by the Board.

Board Member Ul-Hasan feels it would be inappropriate for the Board to make a quick decision when the Planning Commission considered the matter for a substantial period of time. She would like to review the paperwork and arguments, then return to deliberate and issue a decision.

(19:41:51) Board Member Ul-Hasan seconded Board Member Holtkamp's motion. All present voted in favor of the motion.

The Board members agreed to reconvene on Wednesday, August 22nd.

(19:43:11) Board Member Adinaro requested, and was granted, permission to ask Mr. Budge an additional question. Board Member Adinaro noted that, with respect to a master plan, the subject property is the last empty parcel in the development. It is unthinkable that a new master plan would require the demolition of existing buildings, so a new "master plan" would deal with the subject property only, which is what the site plan does. Mr. Budge explained that a master plan can contemplate many different issues, such as redevelopment, future changes in uses, and so forth. He argued that the community has a right to be involved in master planning an area, including use changes. As it stands, the community has many years of expectations that were not met with respect to the proposed development. He also pointed out that the proposed development concerns three separate parcels.

4.0 ADJOURNMENT.

(19:45:10) The Board of Adjustment Meeting adjourned at 7:45 p.m.

I hereby certify that the foregoing represents a true, accurate, and complete record of the Cottonwood Heights City Board of Adjustment Meeting held Thursday, August 9, 2012.

A handwritten signature in black ink that reads "Teri Forbes". The signature is written in a cursive style and is positioned above a horizontal line.

Teri Forbes
T Forbes Group
Minutes Secretary

Minutes approved: 09/06/12