

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

**Thursday, April 9, 2015  
6:00 p.m.  
Cottonwood Heights City Council Room  
1265 East Fort Union Boulevard, Suite 250**

***ATTENDANCE***

**Members Present:** Chair Noor Ul-Hasan, Doug Folsom, Don Antczak, Rich Robinson, James Adinaro, Pete Ellison

**Staff Present:** Community and Economic Director Brian Berndt, Senior Planner Glen Goins, City Engineer Brad Gilson, Associate Planner Mike Johnson, Attorney Spencer Topham, Special Legal Counsel Jody Burnett

**BUSINESS MEETING**

**1.0 WELCOME/ACKNOWLEDGMENTS**

Chair Ul-Hasan called the meeting to order at 6:00 p.m. and welcomed those attending. She explained that the function of the appeal board is not to re-decide the proceeding of what took place by the planning commission. Their function is to review the records of the proceedings before the planning commission and any information that was submitted with the appeals. No new information can be submitted. She explained the procedure of the meeting.

**2.0 ACTION ITEMS**

**2.1 (Project #BOA 15-010) Action on a request for a variance by AMP Development, Under Section 19.92.070 of the Cottonwood Heights Code, for a Variance to the Setbacks for a Flag Lot, Concerning the Property Located at 1388 East Milne Lane**

The above matter was not addressed, the application was withdrawn.

**2.2 (Project #BOA 15-090) Action on a request for an expansion of a non-complying structure by David and Abby Johnson, Under Section 19.88.070 of the Cottonwood Heights Code, for Approval of an Enclosure of an Existing Deck and Addition of a Breezeway on the Property Located at 7344 South Winesap Circle**

Senior Planner, Glen Goins, presented the staff report and stated that the request is for the expansion of a non-conforming structure at 7344 South Winesap Circle. The intent is to expand and enclose an existing deck and add a breezeway that would tie into a future garage addition that is in compliance with the Code. The zoning of the property is R-1-8. The lot shape is unusual and creates an awkward rear setback. As a result, the setbacks are askew. The existing deck is currently non-conforming. The Code allows the Board of Adjustment to expand a non-complying structure if it is found to be in harmony with the purpose of the chapter. It can also be allowed if it

does not impose an unreasonable burden on the neighbors. In examining the proposal, staff did not find that it poses an unreasonable burden. An aerial photo of the property was displayed.

Mr. Goins explained that a portion of the existing deck is considered non-complying, which was identified on the rendering displayed. The portion of the property the Board was asked to address is triangular in shape. It was noted that, if approved, the distance to the back fence would not increase. Staff reviewed the request and determined that it meets the intent of the Code and recommended approval. In response to a question raised, Mr. Goins confirmed that no objections were raised by the neighbors. It was noted that the proposed structure will comply with the required setbacks other than a small triangular portion of the breezeway.

***Motion: Board Member Adinaro moved to approve the request for the expansion of a non-complying structure based on the following:***

***Findings:***

- 1. The proposal will not negatively affect the health, safety, convenience, order, prosperity, and welfare of the present and future inhabitants of the City because the use is the same as now exists.***
- 2. The proposal will not create any additional congestion in the streets or roads.***
- 3. The proposal will not create a fire safety issue. The enclosure and breezeway will be constructed according to current building codes.***
- 4. The proposal will not affect air flow or block natural light from adjoining properties by observing all height regulations.***
- 5. The proposal is permitted in the R-1-8 Zone and is the same land use type as surrounding properties, and will cause no negative effect on the City's tax base.***
- 6. The proposal will not place any type of unreasonable burden upon neighboring properties.***
- 7. The proposal is in keeping with the intent of this title.***

***The motion was seconded by Board Member Robinson. The motion passed unanimously on a voice vote.***

**3.0 Hearing on Consolidated Appeals by Gray Smith and Cynthia Smith, Kent Anderson, Pamela Palmer and Glenn Palmer, Gary McGee and Jill McGee, Janie Wilson and Paul Smith, Ken Hostetter Representing Residents of Golden Hills and Top of the World Subdivision, and Green Hills Homeowners and Residents of the Planning Commission's Approval of a Conditional Use Permit Application from Richard Cook, for the Giverny PUD located at 9160 South Wasatch Boulevard**

Chair Ul-Hasan acknowledged the presence of Special Legal Counsel-Jody Burnett, Attorney-Spencer Topham, and City Engineer-Brad Gilson.

Mr. Goins presented the staff report stating that the hearing involves consideration of seven appeals relating to approval of a PUD located at 9160 South Wasatch Boulevard. The PUD was approved in January 2015 after a number of months of deliberations, iterations, changes, and multiple hearings to address various items. The proposal provides an opportunity for a developer to utilize the Code, as it addresses open space subdivisions, to take advantage of the provision of open space and in return receive consideration for smaller lot sizes and different standards for setbacks and streets. A number of changes were made to the proposed project with regard to such things as open space, which requires a minimum of 20%. It was noted that this project exceeds that requirement. It also requires approval of a varying degree of lot sizes that range from over 4,000 to over 15,000. The open spaces areas were delineated as well.

Mr. Goins reported that the entrance road was moved to the north because of the Planning Commission process. Lots along the adjacent subdivision to the north were increased in size to match the adjacent R-1-8 subdivision. Some of the lots to the south of the McGees were eliminated and the lots immediately to the south were increased in size to over 15,000 square feet, which was the minimum lot size prior to a zone change that occurred in 2013. All geology and traffic issues were addressed by the City's experts. Traffic studies were submitted and negotiated to the point of acceptance by the City.

Mr. Goins indicated that the Board Members were provided with a staff report outlining the approval specifics of the Planning Commission. Staff and the applicant each prepared a memorandum responding to the seven appeals. He described the City's position on a few points outlined in the memo. He stated that the Planning Commission's decision was not illegal and the alleged improper communication issues were addressed. The issue surrounded a number of discussions and whether they influenced the Commissioners' decision. In the City's memorandum there were a number of issues that staff addressed specifically. He feels it is prudent to leave those to the Board's discretion. Mr. Goins stated that a number of traffic studies were submitted and the City Engineer has reviewed them. Because of the scale of the project staff wanted to error on the side of caution. The City Engineer contracted with an outside transportation expert who reviewed the plans, which were submitted and eventually accepted. Mr. Goins stated that the numbers dictate and mandate mitigation measures that have to be adhered to. The Planning Commission did not act on the PUD and was not prepared to act until that vital issue was addressed to the satisfaction of the experts. A significant increase in on and off-site improvements were required to mitigate the traffic to the point that it mitigated the impact of the project.

Chair Ul-Hasan reported that there were seven appellants who would each be given 15 minutes to make a presentation to the Board.

Attorney Steve Call from the law firm of Ray, Quinney & Nebeker was present representing Gray and Cynthia Smith. They are appealing the decision of the Planning Commission's 4-to-3 vote in favor of the preliminary plat for the Giverny PUD application. The Smiths believe their due process rights were violated in the process. Mr. Call stated that a 1997 decision of the Utah Supreme Court addressed prejudice and bias in a decision-maker and what constitutes a prejudicial bias that requires action. The court did not require the person making the adjudication have a

financial interest but only that there be a displayed significant bias that could have affected the decision of the Commissioner. The Smiths believe that occurred in this case.

Mr. Call identified the Smith's property on the site plan displayed. When the proposal for the development was made, the Smith's primary objection had to do with access. The Smiths have a non-exclusive right-of-way off of Wasatch Boulevard to their home. The 45 acres that are under contract by the developer had a separate larger main entrance road 50 to 75 feet to the north. The Smiths' concern was that if the developer planned to develop the property, which he has a right to do, the project ought to have its own entrance and use the historical entrance off of Wasatch Boulevard.

Mr. Call stated that the Smiths envision that on a snowy day traffic could back up significantly at the new entrance road and prevent them from leaving their property. Other concerns were also expressed to the Commission by the Smiths. Mr. Call claimed that rather than consider the Smiths' concerns, there was ex parte communication that indicated that the Smiths had contracted to sell their property. The Smiths found out about the communication after the fact and were furious. They asked Mr. Call to write a letter to the developer, which he did, expressing their concerns. Claims were later made that the developer made an offer to buy the Smiths property for \$697,000, which the Smiths believe is much less than the property is worth. An effort was made to make it appear that the Smiths were unreasonable by not being willing to sell their property and indicated that they asked for over \$1 million in private negotiations. Comments were made by the developer and Commission Members after a planning commission meeting who encouraged the Smiths to take the developer's offer.

Mr. Call stated that when an adjudicator is biased and is involved in ex parte communication, the system doesn't work. He claimed that is what occurred in this case. For that reason, the Commission set up specific rules. He stated that a meeting is defined as two or more persons who meet to discuss a common interest. In this case, there was a private meeting between the developer and Commissioner Guymon. It was communicated further to Chair Walker who developed a prejudice against the Smiths that they would not sell their property unless they were paid over \$1 million for it. Mr. Call and his clients believe that partiality was prejudicial and requires disqualification of the votes by Commissioner Guymon and Chair Walker. The Smiths do not object to the proposed development going forward provided that the list of contingencies drafted by Mr. Goins specifies that the development only be approved on the condition that the main entrance be located where the historical entrance was.

Board Member Robinson asked about the new road running next to the Smiths' property and asked if it is actually on their property.

Mr. Call stated that it is not. It runs over the non-exclusive easement that the Smiths obtained when they purchased the property. The new entrance is not on their fee interest and is only on their right-of-way. The developer agreed to move the right-of-way if the main entrance is placed over the historic site and access their home from the new development.

In response to a question raised by Board Member Robinson as to whether it is legal for the developer to place the road there,

Mr. Call stated that it would violate their property rights if it interferes with the non-exclusive right-of-way to their home.

Board Member Robinson asked about the alleged private meeting that took place and the fact that Mr. Call indicated that it is illegal. He stated that staff investigated the matter and indicated that it was not illegal.

Mr. Call stated the rule is that there are to be no private meetings. He stated that two private meetings were held immediately following the September 3 public hearing.

Chair Ul-Hasan stated that the purported meetings took place following a meeting where the public was nearby and could overhear the conversation. She does not consider that a private meeting.

Mr. Call considered the two types of meetings to be mutually exclusive. Anything that is not a public meeting where substantive issues are discussed before the Board or Commission is a private meeting.

Chair Ul-Hasan informed the Board that they are to determine whether staff's investigation was accurate in regard to stating that this was not a private meeting or that it biased the individual from his vote.

Mr. Call clarified that Mr. Smith witnessed the first meeting upstairs. The second meeting that occurred with Commissioner Guymon and Mr. Rose, the developer's legal counsel, was overheard by Cindy Smith. The Smiths found both to be offensive. In addition, after those two meetings occurred, an email was sent by the developer to Mr. Goins and City Special Legal Counsel, Jody Burnett, to which letters were attached that included communications regarding the potential sale of the property, the developer's comparables, their offer, and the counter offer from the Smiths. The email was then forwarded on to the Planning Commission Members with a message from Mr. Goins.

Mr. Smith read from an email that was sent to Mr. Goins and then forwarded to the Planning Commission. Mr. Smith stated that he was not aware that Commissioner Guymon had information about correspondence between himself and the developer when Mr. Guymon spoke very clearly and directly to the Planning Commission at the meeting and asked very pertinent questions about the location of the entrance road and whether it properly mitigated the Smiths.

Chair Ul-Hasan stated that the Board is aware of what took place and needs to determine whether the Planning Commission was biased in some way and render a decision.

Mr. Goins stated that there were additional emails referred to by Mr. Smith and the correspondence included email transmittals.

Staff's findings after conducting research of whether the ex parte communication was detrimental to the decision and bias of a Commissioner were discussed. Mr. Goins stated that the conclusion is set forth on page 7 of the City's Responsive Memorandum. It was determined that the conversations that took place were within eye sight and earshot of other interested persons on both

sides of the issue. The Commissioners did not initiate conversations and often tried to avoid them along with discussions of the project. The subject matter of the conversations was essentially the same as the information presented previously to the Planning Commission. The interaction did not impair the ability of any Commissioner prior to the January 7 vote. Additionally, the interaction did not impair the ability of any Commissioner to make an unprejudiced decision. Mr. Goins stated that inquiries determined that communication took place between two Commissioners outside some of the aforementioned parameters. They did, however, change the ultimate outcome of the vote because only one Commissioner's vote could have been cast improperly and she voted against approval.

The next presentation was made by the residents of Golden Hills and Top of the World. The Appellant, Ken Hostetter, introduced Jamie Leroy and Paul Garner who would also be assisting with the presentation. Mr. Hostetter reported that he has lived in the Golden Hills neighborhood for 28 years. During that time the traffic on Wasatch Boulevard has been a problem and has not changed much. There have been many accidents and even deaths at the subdivision entrance. A traffic study was conducted by staff. The residents are concerned that the traffic is already horrendous and an additional 1,700 cars per day that will be generated by the subdivision will only exacerbate the traffic situation. The residents do not believe the traffic study has gone far enough or that the safety of the existing residents was taken into consideration. They believe that in the process the issue that affects every resident is the safety of the traffic on Wasatch Boulevard. Mr. Hostetter stated that one of the problems with Kings Hill is identified as trying to enter Wasatch Boulevard going south. The intersection is very dangerous and there is a blind corner. Another problem results from making a right turn from Kings Hill traveling north.

Jamie Leroy stated that she lives on Kings Hills Drive and has for 40 years. She described another exit from their subdivision and stated that there are two lanes feeding in near their exit and they have to cross both. It is also dangerous to enter from the north since it requires motorists to use a turn lane, which is the main lane coming down the canyon. Motorists are traveling at 50 miles per hour and have to see a vehicle and go around the small turn lane.

Paul Garner stated that he lives on Kings Hill Drive and has for 37 years. The issue for current residents pertains to safety. He does not want to additional danger imposed to the existing residents.

Mr. Hostetter does not believe a traffic study can illustrate the everyday risk of living in the neighborhood and experiencing it firsthand every day. He asked the Board to carefully consider the impact on the subdivision when making a decision.

Board Member Adinaro asked how far the Kings Hill intersection is from the main entrance.

Mr. Hostetter estimated that it is three-quarters of a mile away.

Board Member Robinson thought the estimation that each home in the subdivision will use the road 12 times per day is far too high.

Chair Ul-Hasan's understanding is that the traffic report allowed for snow. She stated that this year wasn't a heavy snow season so the traffic study did not include an adjustment for snow.

Mr. Goins stated that the trips per day calculation is based on 10 vehicle trips per unit per day.

Board Member Antczak commented that the intersection is very poorly designed. He travels it every day and is well aware of the situation. He is not sure that adding more units will change that. He feels that something drastic needs to happen to improve safety. He considers it a hazard that needs to be addressed.

Chair Ul-Hasan explained that the Board's purpose is not to determine whether the decision was correct or not but determine whether the Planning Commission did something that was not within their scope or if certain criteria was not considered when they made their decision.

The next Appellant, Kent Anderson, stated that he lives on Danish Road and has lived in the City for the past 47 years. He is very interested in the development and asked that the PUD be overturned. His appeal set forth his complaints and he asked if there had been any consideration given to the additional sewage disposal and water supply. He feels that it must have been considered given the number of home sites. He next addressed Cottonwood Heights Municipal Code Section 19.78.140, Effect on Adjacent Properties and expressed concern that the reduced lot sizes would have a negative impact on the adjacent property values. Section 19.78.150, Access Standards, was next addressed. Mr. Anderson considers the present traffic situation to be dangerous and will be exacerbated with the approval of the PUD. He stressed the severity of the issue.

Mr. Anderson disagrees with the appeal process as it relates to Sections 19.78.030, Planned Unit Development, and 19.78.100, Design Criteria. He considers both sections to be very important to the process but were not made a priority before or after the appeal was due. Mr. Anderson reported that he visited with 54 residents in the Danish Road area and provided them with a copy of his appeal. All residents agree with the issues raised and the recommendations set forth in his appeal. He believes those he spoke to are a representative sample of the opposition to the Giverny PUD. Mr. Anderson stressed that his objective is to have the preliminary approval overturned.

Board Member Adinaro asked Mr. Anderson about his claim and if he had new information that the Planning Commission did not have.

Mr. Burnett stated that the binder of information Mr. Anderson received was compiled by staff after the appeal was filed, he said that staff would not have prepared information in anticipation of an appeal being filed.

Mr. Anderson feels that the appeal process needs work.

Chair Ul-Hasan asked Mr. Anderson what information he did not have in order to file an appeal.

Mr. Anderson stated that he did not have the information in Sections 19.78.030 and 19.78.100 prior to the appeal being filed.

Chair Ul-Hasan feels that Mr. Anderson should have had everything he needed available to him to file the appeal.

Mr. Goins stated that when an appeal comes in staff does not know the nature of it. At the time an appeal is received staff begins assembling a binder right away. In this case, 750 pages of records were assembled to establish what they feel has been addressed. He explained that after an appeal is submitted appellants can request additional information. It was noted that Planning Commission records were available for all of the previous proceedings in time for an appeal to be filed.

Mr. Burnett stated that any citizen can make a GRAMA request for specific information. He reported that the Code provisions are available online and a matter of record. In addition, all of the Planning Commission Meetings agendas and minutes that occurred over the past year are also available.

Mr. Anderson contended that meeting minutes are not readily available except for on the internet.

Chair Ul-Hasan stated that the public is welcome to obtain information by visiting the City offices in person.

The next Appellant, Pamela Palmer, she stated that she is prepared to present substantial facts that the Cottonwood Heights Planning Commission's approval of the Giverny PUD does not comply with Cottonwood Heights Municipal Code Section 19.78.150, Access Standards. She read from the Code section and stated that all PUDs must be served by a public street, which shall not be at or over its traffic capacity at the time the development is approved, including the traffic projections that can be attributed to the proposed development. Ms. Palmer stated that this is a clearly written regulation against which the Giverny PUD should have been assessed in meeting access standards.

Ms. Palmer reviewed each section of the access standard regulations against the Planning Commission's approval of the Giverny PUD. First, it is served by a public street, Wasatch Boulevard. Second, Wasatch Boulevard is over capacity including added traffic from the Giverny PUD and currently carries 13,000 cars per day. The present road capacity is 13,000 cars per day based on a count collected in 2001. She finds it difficult to believe that the traffic count has remained the same since that time. Ms. Palmer contacted a UDOT Traffic Engineer, Nicolas Vigen, who estimated the average daily traffic to be 14,380 cars per day. He also stated that UDOT feels that Wasatch Boulevard traffic is at capacity. The traffic study states that the intersection in question currently operates at a level of service rating of F without the Giverny development.

Ms. Palmer stated that Joseph Perrin, a registered professional engineer and Principal of A Trans Transportation Engineering, wrote in an August 8, 2014, letter to City Engineer, Brad Gilson, that he calculated the average daily traffic on Wasatch Boulevard to be 14,680 cars at the a.m. peak volume and 14,863 at the p.m. peak volume. He concluded that the current traffic had already approached, if not exceeded, its capacity. The Giverny development is expected to add 1,690 vehicle trips per day to Wasatch Boulevard resulting in it being 2,570 cars per day over capacity.

Ms. Palmer stated that Wasatch Boulevard was over capacity at the time the Planning Commission approved the Giverny development. As a result, the approval is not in compliance with Section



19.78.150, Access Standards. This section of Code is meant to force the City to remedy at capacity conditions prior to additional traffic being added to an already at capacity road. The only mitigating action the authors deemed correct was that the City act to mitigate the impact of current and additional traffic prior to the approval of any new development. She claims that the planning approval process was compromised when the Planning Commission arbitrarily chose to ignore regulation 19.78.150 in granting approval of the Giverny PUD. This one regulation plays a significant role in ensuring that those who use Wasatch Boulevard do not bear the burden of traffic congestion on an over capacity road or sacrifice safety. Ms. Palmer asked the Board of Adjustment to overturn the Planning Commission's approval of the Giverny PUD until after traffic problems have been mitigated.

Board Member Folsom asked if the UDOT statistics were available to the Planning Commission at the time the decision was made.

Ms. Palmer stated that she made her inquiry after the decision was made.

Chair Ul-Hasan asked if the information provided by Ms. Palmer was of record at the time the Planning Commission made its decision.

Ms. Palmer stated that Dr. Perrin's figures were available to the Planning Commission at the time the decision was made.

Chair Ul-Hasan stated that the Board is only permitted to discuss issues that were discussed with the Planning Commission. If the data was provided to the Planning Commission when they made their decision, the Board can consider it in making a decision on the appeal.

Ms. Palmer stated that the only thing that might not be on record is the exact UDOT number. The other numbers were taken from the binder prepared as part of the appeal.

Mr. Goins stated that the transportation expert, Dr. Perrin, included the UDOT numbers as part of his study and the Planning Commission had access to those numbers. In response to a question raised, it was noted that the State has jurisdiction over Wasatch Boulevard, however, Salt Lake County has jurisdiction where it fronts the subject property.

The Appellant, Janie Wilson, stated that she, along with her husband, Paul Smith, are representing their neighbors in the Alta Hills Subdivision. She reported that she has worked for 35 years in health care in various capacities. She is responsible for setting standards of care and defining quality and safety processes within a health care organization. She focuses her efforts on what is likely to happen. She does not feel things that might happen are reasonable to address. She learned early on that she can not use hope as a strategy. When she initially became concerned about the Giverny subdivision she recommended the City focus on what is likely to happen, build infrastructure for safety and best possible outcomes, and not use hope as a strategy. Ms. Wilson reviewed hundreds of documents relative to the project and it is clear that staff, the developer, and a host of consultants spent a tremendous amount of time, energy, and resources on the proposed development. She feels that the project still needs work and modifications in order to have a better outcome for all involved.

Ms. Wilson described the concerns of the residents and stated that the Alta Hill Subdivision consists of approximately 110 homes and one access road, which is Danish Road. It is challenging due to the volume of cars and bikes that use it regularly. Danish Road has sidewalks on one side of the road in some places and no sidewalk in other places. It also has a lot of twists and turns. For this reason, most of her neighbors do not consider it to be safe. Similarly the Giverny subdivision will have 165 homes on a smaller plot of land with a much busier access road, Wasatch Boulevard. This will limit many residents to the neighborhood for recreating. The Alta Hills residents feel that having sidewalks on both sides of the road is a reasonable accommodation for being landlocked. They are a key safety feature and heavily used.

Ms. Wilson is concerned that of the 165 proposed homes in the Giverny development, only 54 have a sidewalk in front of them. It is expected that on-street parking will be heavier in a neighborhood with smaller lots resulting in less available street space for vehicles, which adds to the safety concerns. The Alta Hills residents are also concerned about adding more traffic to Danish Road, which is already challenging to navigate. They feel that the traffic studies do not address the likelihood that as traffic backs up on Wasatch Boulevard, many cars will cut over to Bingham Creek, Danish Road, and Sutton to get around the delays.

Last, the residents are concerned that as the largest PUD in Salt Lake County, a precedent is being set. They feel strongly that the value of the subdivision is far more than the cost or exterior look of a home. The key value of the subdivision lies in the infrastructure and safety for residents. Ms. Wilson feels that despite a lot of hard work, negotiation, and good intent that staff made a mistake in approving the modified pedestrian system that was subsequently approved by the Planning Commission. They hope to see the approval overturned so that adjustments can be made to plan for what is reasonably and likely to occur. Ms. Wilson recommends the plans be modified to be more consistent with surrounding neighborhoods, provide sidewalk access to all homes within the development, and evaluate the traffic impact on key roads that connect to Wasatch Boulevard. Ms. Wilson reported that she spoke to the majority of her neighbors and without exception all are very concerned about the size of the subdivision and impact.

The Appellant representing the Green Hills Homeowners identified himself as Jordan Schweitzer and stated that he lives on Green Hills Drive. He is representing families who have invested their futures and life savings in the neighborhood. More than 50 people are represented in the appeal. He urges the Board to understand that the decision will affect the safety and well-being of the residents. Their vision is for a PUD with amenities such as trails that connect to other trails and open spaces that are useful and well planned out, water features, and a private pool that would be available to Green Hills and Giverny residents. Mr. Schweitzer stated that it is the responsibility of the Planning Commission to structure developments so that the current residents are not adversely affected. The residents, however, feel this has largely been ignored in the case of Giverny.

The next Appellant, Dave McReynolds, stated that he is a 16-year resident of Cottonwood Heights. He addressed the issue of traffic through Green Hills, 9055 South, Treasure Way, and Despain Way. Mr. McReynolds objects to creating thoroughfares through existing neighborhoods to service new developments. Adding traffic to the Green Hills Drive intersection by allowing thru traffic will not benefit the new development and will do nothing to improve the already challenging traffic issues. Currently the intersection has a level of service rating of F. The traffic

study focused on Wasatch Boulevard and the associated intersections but did not address the increase of thru traffic in the adjacent neighborhood. Mr. McReynolds has noticed in other parts of the City that methods are being used to prevent neighborhoods from becoming thoroughfares. The residents consider crash gates to be a viable option because they keep the streets from becoming thoroughfares and allow full access to the Fire Department, municipal workers, and EMS-related services. Additionally, no modification to the current plat would be required by the developer.

Mr. McReynolds displayed the Giverny fencing plan and stated that several gates are proposed within the Giverny development including crash gates, traffic calming gates, and entry gates. He noted that within the Giverny project they are mitigating traffic within the development. Traffic to Green Hills Drive, Treasure Way, and Despain Way, however, will be unmitigated. McReynolds sees no reason to have Green Hills Drive, Despain Way, and Treasure Way used to access the adjacent PUD. He acknowledged that there is a traffic issue on Wasatch Boulevard. Currently there are no sidewalks or safe bike lanes out of the Green Hills neighborhood. If area children want to safely access local parks and trailheads they must drive there and add to the already challenging traffic conditions that exist on Wasatch Boulevard. Mr. McReynolds observed the proposed start of a trail system in the Giverny project and considers it a small step in the right direction. He encourages the City to tie it together so that it benefits the entire community.

Mr. Schweitzer commented that the feeling is that an oversight was made by the City Engineer with regard to allowing through traffic with control gates. He noted that PUDs are supposed to enhance adjacent neighborhoods, which will not occur in this case. He indicated that traffic is mitigated for the residents of Giverny through the crash gates but they will be forcing the traffic on to their neighborhood.

Lisa Marcy identified herself as the attorney representing the Appellants, Gary and Jill McGee and CH Voters, including Mark Machlis. They agree that if the Giverny PUD goes into effect there will be adverse impacts. The point of tonight's meeting is to determine if there has been enough mitigation. Ms. Marcy stated that the standard of review for the Board is whether or not the decision of the Planning Commission was either arbitrary and capricious or illegal. She stated that "arbitrary and capricious" means that if a reasonable person cannot think otherwise, it is arbitrary and capricious. If there is a lack of substantial evidence it is considered arbitrary and capricious. Ms. Marcy commented that the developer has not and cannot show that he has mitigated the detrimental effects of the project. Another standard in the court system is that if you cannot mitigate the adverse impacts, the development cannot proceed.

The adverse impacts were discussed. Ms. Marcy stated that the applicant claims in his brief that the detrimental effects were mitigated by eliminating eight townhomes. She claims that that action was not mitigation but instead a requirement imposed on the developer because the property was zoned for eight townhomes. The developer then claims to have eliminated four townhomes, which again was a requirement. Other claimed mitigation measures taken by the developer were listed and discounted as being required by the City. Ms. Marcy explored the term "illegal" and stated that an action by a planning commission is illegal if it violates an ordinance or a rule. What was illegal in Ms. Marcy's view is the fact that a lot of time was spent discussing traffic. She stated that it does not matter that a traffic study was conducted or the number of cars. What matters is whether at the time the development was proposed was Wasatch Boulevard at or over

capacity. Also, the fact that there was a separate “meeting” between the developer and two Commission Members was inappropriate, improper, and ultimately illegal.

Ms. Marcy next commented on negative impacts on property values and stated that the developer told a resident that once he starts building property values will decrease. That statement was included in an Affidavit that is classified as newly discovered evidence. Ms. Marcy stated that her clients are seeking to have the matter remanded back to the Planning Commission after the traffic issue has been resolved.

Chair Ul-Hasan stated that the affidavit referred to cannot be accepted at this time because anything received after the time of appeal cannot be considered by the Board.

The Board took a short break.

Attorney Dade Rose was present on behalf of the applicant, Richard Cook. He reported that the Board’s review is to be limited solely to the record. He noted that certain items could not be found in the record. They included:

1. Exhibit A to Gray Smith’s Brief.
2. Smith Brief, page 3, verbal conversations with Glen Goins.
3. Smith Brief, page 4, description of site visit on June 18, 2014.
4. Smith Brief, page 8, Exhibits A and P, John Stahl communications regarding right-of-way.
5. Smith Brief, pages 9 and 10, Exhibit S, minutes of February 5, 2015, Planning Commission Meeting. (By its terms it could not have been part of the record.)
6. The addition of a Brief, page 7, communications with Chair Walker, Vice Chair Guymon, and unnamed City Council Member.
7. Palmer Brief, page 1, alleged conversation with UDOT official.

Mr. Rose explained that the decision of the Planning Commission must be supported unless it was so unreasonable as to be arbitrary and capricious. The Board should approach the matter with the presumption that the Planning Commission’s decision was correct and validly taken. Mr. Rose addressed why the Planning Commission’s decision was not arbitrary and capricious. A thorough investigation was conducted that the Planning Commission engaged in. There were at least three public hearings conducted, multiple work sessions and multiple comments made by the public at large, the applicant, and various experts. It was a very thorough process and a great deal of information was presented and improved upon. Follow up requests were made and answers were given, which ultimately led to the decision of the Planning Commission to approve the PUD.

Mr. Rose reported that the original proposal in January 2014 was for 246 lots. Subsequently the applicant met with the Planning Commission in a work session in February and had multiple meetings with staff. The proposal was to include a townhome product on the north consisting of

three, four, and five-plexes. During the winter and spring of 2014, a number of revisions were made and a decision was made to eliminate the townhomes. Mr. Rose noted that they could have proceeded with the townhomes as a conditional use. Instead they opted for a detached product. Various aspects of the project were described along with changes made.

Mr. Rose reported that they reduced the number of lots from 236 to 169 and increased the average size of all of the lots. From June 18, 2014, until September 2014 they tried to provide better mitigation. The size of some of the lots was increased to 8,000 square feet, which conforms to the R-1-8 Zone. The main entry road was also moved 33 feet off the northeast corner of the Smith's property line. Mr. Rose stated that that road could have been much closer because they own the land. They also made changes required by the City and added the additional sidewalk. Additional off-street parking was added and the number of homes was reduced from 169 to 165. The green space areas were also increased and a pond was added. The easement was granted to the Golden Hills residents giving them vehicular access to the project. Other improvements were described.

With regard to the Smith property, Mr. Rose stated that the Smiths have a non-exclusive easement that gives them the right to use the right-of-way to access their property. It does not give them any additional rights or prevent the applicant from using the easement. The Smiths did not want to share the easement. As a result, the applicant shifted the parkway so that it encompassed all of the non-exclusive access easement. That required them to shift some of the lots further north. They also moved the property line further from the Smith's home.

Mr. Rose stated that many aren't aware of the mitigation measures the applicant has taken to make Wasatch Boulevard better. Because of what they are doing, many of the issues will be improved. He reported that the applicants are widening Wasatch Boulevard, which allows them to add a third turn lane. They also added deceleration lanes that allow for cars to slow down. A sidewalk and a bicycle lane were also added along this stretch of Wasatch Boulevard.

With respect to traffic, the applicant provided the City with a Traffic Impact Study dated June 28, 2014. They provided another historic study in 2013. The applicants were also asked to provide additional studies with respect to existing and future conditions. A letter from Joe Perrin dated August 8, 2014, cited a UDOT study that specified that the 2012 daily traffic count for Wasatch Boulevard was 10,600 average daily trips, rather than the more than 14,000 represented. In contrast, the experts hired measured the traffic count and found it to be 13,000 in 2014. Mr. Rose noted that Wasatch Boulevard has a capacity of 13,500 and the proposed improvements will add capacity to the road. Mr. Rose referenced page 11 of his brief and stated that after the improvements are made, the traffic capacity will have increased to 16,500 average daily trips whereas the traffic load after build out of their project will be 14,690. Similar changes were noted when looking at the level of service summary described in Table 3. After the improvements are made, during peak hours Wasatch Boulevard will have gone from a level of service F to E.

Mr. Rose stated that the due process right means that citizens have a right to be heard. The Smiths have spoken in three public hearings, submitted at least four letters, and countless emails to the Planning Commission. He feels their voice has been heard throughout the process. He stated that an ex parte meeting was never held but instead a conversation took place. In contrast, the Smiths and McGees actually held documented meetings.

In response to a question raised, Mr. Rose stated that the traffic studies did not focus solely on Wasatch Boulevard and included SR-210, SR-209, and Green Hills.

Mr. Burnett reported that the Board has the right to conduct their deliberations regarding the appeals in private under applicable Utah case law. Another option is to continue the meeting to another date and time for the purpose of those deliberations. The decisions regarding the appeals, however, will have to be made in an open and public meeting and eventually in a written form, at which time it would be made final.

***Motion: In consideration of the depth of material to be considered, Board Member Adinaro moved to continue the deliberations to a closed meeting and reconvene at a later time in a public meeting to issue a decision. The motion was seconded by Board Member Robinson.***

Chair Ul-Hasan suggested that deliberations not take place in a closed meeting because of the public who are present, the depth of the case itself, and the appeal.

Mr. Burnett stated that that decision does not have to be made tonight. He explained that for the purpose of tonight's meeting the matter could simply be continued.

***Board Member Adinaro amended his motion to continue deliberations to another date. Board Member Robinson seconded the amended motion. The motion passed unanimously on a voice vote.***

The matter was continued until Thursday, April 16 at 5:30 p.m.

#### **4.0 ACTION ITEMS**

##### **4.1 Action to Elect a New Chair and Vice Chair**

***Motion: Board Member Adinaro moved to nominate Noor Ul-Hasan continue to serve as Chair. Board Member Robinson seconded the motion. The motion passed unanimously on a voice vote.***

***Motion: Board Member Antczak moved to nominate Rich Robinson to serve as Vice Chair. Board Member Ellison seconded the motion. The motion passed unanimously on a voice vote.***

##### **4.2 Approval of the April 9, 2015, Minutes**

It was clarified that the Board will have five days from the date they receive the minutes to submit corrections. The corrected minutes and the same process will be followed until there are no further changes. Chair Ul-Hasan recommends this be done as quickly as possible since deliberations will be the following week.

***Motion: Board Member Adinaro moved to approve the minutes of April 9, 2015 by following the standard approval process. The motion was seconded by Board Member Folsom. The motion passed unanimously on a voice vote.***

## 5.0 ADJOURNMENT

*Motion: Board Member Folsom moved to adjourn. The motion was seconded by Board Member Antczak. The motion passed unanimously on a voice vote.*

The Board of Adjustment meeting adjourned at 9:00 p.m.

Minutes approved: 04/30/2015