

**MINUTES OF THE COTTONWOOD HEIGHTS BOARD OF ADJUSTMENTS WORK SESSION MEETING HELD THURSDAY, JULY 7, 2016 AT 5:30 P.M. IN THE COTTONWOOD HEIGHTS CITY COUNCIL CONFERENCE ROOM LOCATED AT 1265 EAST FORT UNION BLVD., SUITE 250, COTTONWOOD HEIGHTS, UTAH**

Members Present: Board Chair Noor Ul-Hasan, Board Member James Adinaro, Board Member Don Antczak, Board Member Pete Ellison, Board Member Doug Folsom, and Board Member Rich Robinson, Board Counsel Mr. Jody Burnett

Staff Present: Community and Economic Development Director Brian Berndt, City Attorney Shane Topham, City Recorder Paula Melgar, and Community and Economic Development Planner Michael Johnson.

**5:30 p.m. WORK SESSION (suite 250)**

**1.0 Review Business Meeting Agenda**

The Board was introduced to Paula Melgar, the new City Recorder. The Board introduced themselves to Ms. Melgar.

Mr. Michael Johnson, City Planner, gave a brief overview of Action Items on the Business Meeting Agenda.

The Board reviewed and discussed the hearing of an appeal by Joe Thomas of the Planning Commission's approval of HOC-16-001, conditional use approval of a home preschool at 3571 E Summer Hill Drive; and a request for the expansion of a noncomplying structure, under Section 19.88.070 of the Cottonwood Heights Zoning Ordinance, for approval of an addition to the home at 6743 S 2240 E, scheduled for the 6:00 business meeting. A copy of this presentation is attached and incorporated to these minutes by this reference.

The City Recorder interrupted the meeting to fix audio issues (was not recording or transmitting). During this brief period no discussion was held.

At 5:27 pm the audio issues were fixed and meeting proceeded with discussion of Mr. Johnson's presentation.

**Meeting adjourned at 5:58 pm**

*Minutes Approved: July 7<sup>th</sup>, 2016*



1 The south side, where the new garage will be located, increases to 8'10" for a total side yard  
2 setback of 16'2", which is still non-conforming but more in compliance than the current structure.

3  
4 The applicant, Refika Bajrektarevic, gave her address as 6743 South 2240 East and was present to  
5 answer questions from the Board.

6  
7 A question was raised about the shape of the lot. Mr. Johnson stated that an area in the back of  
8 the lot appears to have been added after the lot was created.

9  
10 ***Board Member Adinaro moved to approve the expansion of a non-conforming use based on the***  
11 ***following:***

12  
13 ***Findings:***

- 14  
15 ***1. The proposal will not negatively affect the health, safety, convenience, order, prosperity***  
16 ***and welfare of the present and future inhabitants of the City because the use is the same***  
17 ***as currently exists.***  
18  
19 ***2. The proposal will not create any additional congestion in the streets or roads.***  
20  
21 ***3. The proposal will not create a fire safety issues. The carport enclosure and addition will***  
22 ***be required to be constructed to meet all current applicable building codes.***  
23  
24 ***4. The proposal will not affect air flow or block natural light from the adjoining properties***  
25 ***by conforming with all height regulations.***  
26  
27 ***5. The proposal is permitted in the R-1-8 zone and is the same land use type as surrounding***  
28 ***properties, and will cause no negative effect on the City's tax base.***  
29  
30 ***6. The proposal will not place any type of unreasonable burden upon neighboring***  
31 ***properties.***  
32  
33 ***7. The proposal is in keeping with the intent of the Cottonwood Heights zoning ordinance.***

34  
35 ***Board Member Robinson seconded the motion. The motion passed with the unanimous consent***  
36 ***of the Board.***

37  
38 **3.0 HEARING**

39  
40 **3.1 Hearing on an Appeal by Joe Thomas of the Planning Commission's Approval of**  
41 **HOC-16-001, Conditional Use Approval of a Home Preschool at 3571 East Summer**  
42 **Hill Drive.**

43  
44 (18:10:02) Chair Ul-Hasan explained that the Board's charge is to determine whether the Planning  
45 Commission did its duty with due diligence on the Middlemiss Preschool matter.

1 Mr. Johnson gave a brief overview of the Commission’s approval and reported that it involved  
2 approval of a home preschool in a residential area. The subject property is in the R-1-8 zone as  
3 are the majority of the surrounding single-family dwellings. The request was initially heard by the  
4 Planning Commission on April 6, 2016 with approval granted at the April 20, 2016 meeting. The  
5 conditions imposed on the approval were discussed.

6  
7 The Appellant, Joe Thomas, gave his address 3570 Summer Hill Drive and was present  
8 representing 50 homeowners in the immediate neighborhood of the Middlemiss Preschool, which  
9 was approved as a home occupation. The appellants intend to show that errors by the Director of  
10 Community and Economic Development and the Planning Commission violated the existing  
11 zoning ordinance and created confusion in the law. He asked that the Board of Adjustment assess  
12 the legality of the decision made by the Planning Commission and determine whether it was made  
13 in accordance with the ordinance. Section 1.5 of the General Plan was referenced which states  
14 that “The community wishes to protect low density residential neighborhoods from incompatible  
15 uses.” Page 1.4 of the Community Vision Statement states that “Cottonwood Heights is a  
16 community that values its history of a well-maintained community and residents have chosen to  
17 live here because they enjoy the current quality of life, aesthetics, recreational opportunities, mix  
18 of land uses, and patterns of development that the City provides.” Mr. Thomas stated that the  
19 community likes Cottonwood Heights the way it is and the intent of the General Plan is to “protect  
20 the characteristics of the City that residents value.”

21  
22 Mr. Thomas stated that in this case the City wants to include home preschools as a home  
23 occupation. Chapter 19.76 lists the two in Sections E and F and defines them separately. Section  
24 F concerns home occupations and states that, “Any use connected entirely within a dwelling and  
25 carried on by one person residing in the dwelling unit and one additional person who may or may  
26 not reside in the dwelling unit, which use is clearly incidental and secondary to the use of the  
27 dwelling for dwelling purposes, and does not change the character of the dwelling or property for  
28 residential purposes.” Mr. Thomas considered the key word to be “incidental” which means that  
29 a home occupation has virtually no impact on the residential neighborhood. He stated that there  
30 are currently a few home occupations where many of the surrounding neighbors are not aware that  
31 they exist, which is as it should be in a low-density single-family neighborhood.

32  
33 Section E lists home daycare/preschools as “keeping for care and/or preschool instruction of 12 or  
34 fewer children, including the caregiver’s own children, aged six or under and not yet in full day  
35 school within an occupied dwelling and yard.” With the Middlemiss application, the front of the  
36 home will be a permanent classroom for nearly 10 months of the year. The activities will spill into  
37 the backyard daily for recess and here will be 24 pickup and drop off events daily which will  
38 impact the front yard and street. The applicant hopes to have an afternoon session ultimately,  
39 which will double that number to 48 events per day and 240 traffic events per week.

40  
41 Mr. Thomas considered this to not be incidental in terms of a secondary use and violates the  
42 restriction that home occupations be conducted entirely within the dwelling. It also points to the  
43 fact that the language in the ordinance indicates that the two categories should be treated  
44 separately. Mr. Thomas commented on what he believed were errors in past decisions by the  
45 Planning Commission on this application, the Community and Economic Development Director  
46 in his clarification statement with regard to this case, and the current zoning ordinance. One error

1 occurred during an attempt to clarify the ordinance after the application from the Summerhill  
2 Preschool came in in January 2016. More than one member of staff thought the ordinance was  
3 confusing and as a result, the Director of Community and Economic Development deemed it  
4 necessary to add his interpretation and determined that the use complies with the provision listed  
5 under 19.76.040.e.

6  
7 Mr. Thomas considered this to be a serious distortion of the existing zoning. He claimed that the  
8 Director erred because the preschool does not meet the conditions of the home occupation because  
9 it is much more than incidental to the use of the dwelling. It also changes the residential character  
10 of the dwelling and violates the primary restriction that home occupations must be conducted  
11 within the dwelling. The impact of the home occupation should be negligible. The proposed  
12 preschool would have a significant impact on the residential nature of the home and the character  
13 of the neighborhood.

14  
15 (18:20:16) Mr. Thomas displayed a chart prepared to summarize the current ordinance with regard  
16 to home preschools and has been validated by the City Administrator of a nearby city. It shows  
17 clearly where home daycare/preschools are permitted and where they are not. A chart was next  
18 displayed showing the history of the City approving preschools in residential neighborhoods. All  
19 are in R-1-8 zones with the exception of one project in the R-1-6 zone. It is also allowed in the R-  
20 2-8 zone, which is residential/multi-family. The subject property is located in the R-1-6 zone  
21 which more restrictive than the R-1-8 in that it does not permit conditional uses and prohibits home  
22 occupations.

23  
24 Mr. Thomas stated that staff's position is that the home occupation conditional use overrides the  
25 fact that the daycare/preschool use is not specifically listed in the single-family residential zoning  
26 ordinance chapters. He claimed that this fundamentally changes the zoning ordinance in that it  
27 ceases to be an instrument protecting low density single-family neighborhoods and further  
28 confuses rather than clarify the issues. Mr. Thomas next referenced the minutes from the Planning  
29 Commission Work Session held on April 20, 2016 prior to the approval of the preschool and the  
30 discussion that took place. Mr. Thomas stated that there seemed to be confusion on the part of the  
31 Commission Members. He next referenced the transcript on the vote on the application and the  
32 basis for each. He believed that the comments made by the Commission Members have no bearing  
33 on the law and the existing zoning ordinance.

34  
35 Mr. Thomas referenced an exchange between Commissioner Orr and Mr. Johnson that he believed  
36 to be at the heart of the appeal. Mr. Johnson indicated that the only conditional uses in the R-1-8  
37 zone are the ones mentioned and are intentionally very limited in the zone. Mr. Thomas remarked  
38 that home daycare/preschools are not allowed as a possible conditional use. Staff wants to believe  
39 that home daycares are a conditional use and home occupation in the R-1-8 zone but they are not.  
40 He claimed that a home daycare/preschool is a separate and distinct use from home occupation.  
41 Commissioner Orr ultimately voted against the approval of the Middlemiss Preschool. He  
42 believed the operation of a preschool is incompatible with the neighborhood and will change the  
43 nature of it. Mr. Thomas commented that as citizens they have the right to the protection of the  
44 continuity, integrity, and character of residential neighborhoods. They depend on public servants  
45 to ensure that happens with the zoning currently in place. He indicated that under the ordinance  
46 the current approved application for a preschool must be reversed.

1  
2 (18:40:00) The applicant, John Middlemiss, addressed the application for the home preschool at  
3 his residence, the clarity or confusion within the Code, and how it has been interpreted in the past  
4 and still applies to the current proposed location. He explained that the use falls under the  
5 conditional use of a home occupation and the Commission properly interpreted the use. The  
6 confusion arises in Section 19.26 and specifies that the preschool use does not fall under home  
7 occupation. He explained that the home occupation is a conditional use of a single-family  
8 dwelling, however, a home is necessary for a home preschool. Mr. Middlemiss referenced Section  
9 19.21 and clarified that no reference is made to “home daycare/preschool” although mention is  
10 made of a “daycare/preschool”.

11  
12 Mr. Middlemiss stated that the question of where a home daycare/preschool is or is not allowed  
13 has come before the Board a total of six times and each time it has been interpreted to fall under a  
14 home occupation. He reiterated that a home preschool requires the use of a home and not a  
15 business. Mr. Middlemiss indicated that the preschool will be conducted inside the dwelling with  
16 use of the rear yard. He clarified that only one session is proposed per day and the use is for a  
17 preschool and not a daycare. The home occupation shall not involve the use of an accessory  
18 building, yard space, or activity outside of the main building if the use of the accessory building  
19 or outside activity for the purpose of carrying on a home occupation with the use being clearly  
20 incidental and secondary to the use of the dwelling. Mr. Middlemiss stressed the meaning of the  
21 term “incidental”. He argued that a home is necessary, or incidental to, the use of a home  
22 occupation and is needed for a home preschool.

23  
24 Mr. Middlemiss next referenced Section 19.76.04(d) which states that a “home occupation small”  
25 goes through the effort of negating or excluding itself from the home occupation regulations. He  
26 argued that a home occupation being stated in the section references or appoints that during the  
27 writing of the zoning that it was considered a home occupation as a home daycare/preschool and  
28 clearly states that it exempts itself from the home occupation section allowing it to be within a  
29 home without the need for Planning Commission approval. Mr. Middlemiss stated that staff  
30 carefully reviewed and sought approval before they presented the request to the Planning  
31 Commission to ensure that it fit within the Code. He believed the use fits within the definition of  
32 a home occupation and it is reasonable to assume that the reversal of the Commission’s decision  
33 would require a show of rational basis or grave governmental or community need without  
34 discrimination. It would have to be shown that the Board is going against a precedent that has  
35 already been set for home daycare/preschools that have already been approved in the R-1-8 zone  
36 since the incorporation of the City of Cottonwood Heights. Mr. Middlemiss asked that the Board  
37 carefully review the request to make sure that they are comfortable with the Planning  
38 Commission’s decision and interpretation and uphold the approval of the home daycare/preschool.

39  
40 (18:53:40) *Board Member Ellison moved to adjourn to a closed session for the purpose of*  
41 *deliberation and continue a decision on the matter until the next meeting scheduled for*  
42 *August 4, 2016 at 6:00 p.m. Board Member Robinson seconded the motion. The motion passed*  
43 *with the unanimous consent of the Board.*

44  
45 **4.0 ACTION ITEMS**

1 **4.1 Approval of July 7, 2016, Minutes.**

2

3 (18:54:51) Chair Ul-Hasan reported that approval of the minutes is done electronically. She  
4 encouraged the Board Members to review the minutes to ensure that they are correct.

5

6 **5.0 ADJOURNMENT**

7

8 The Board of Adjustment Meeting adjourned at 6:55 p.m.

1 *I hereby certify that the foregoing represents a true, accurate, and complete record of the*  
2 *Cottonwood Heights City Board of Adjustment Meeting held Thursday, July 7, 2016.*

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Teri Forbes  
T Forbes Group  
Minutes Secretary

Minutes approved: July 12<sup>th</sup>, 2016