DECISION
OF THE
BOARD OF ADJUSTMENT
OF
COTTONWOOD HEIGHTS, UTAH

On January 7, 2015, the Cottonwood Heights Planning Commission (the "Commission") granted a conditional use permit and site plan approval (the "Decision") for a project known as the Giverny Planned Unit Development (the "Project") located on approximately 45 acres at 9160 South Wasatch Blvd (the "Property") in Cottonwood Heights City (the "City"). A total of seven persons or entities consisting of (1) Gray and Cynthia Smith; (2) Kent Anderson; (3) Pamela Palmer and Glenn Palmer; (4) Gary McGee, Jill McGee and CH Voters, Inc.; (5) Janie Wilson and Paul Smith representing residents of Alta Hills Subdivision; (6) Ken Hostetter representing residents of Golden Hills and Top of the World Subdivisions; and (7) Alex Wheeler and others representing residents of Green Hills Subdivision; filed appeals with the City's Board of Adjustment (the "Board") pursuant to Cottonwood Heights City Code (the "Code") § 19.92.070 alleging an error in the Commission's Decision on various grounds addressed herein. The following represents the Board's written decision on the appeals which were consolidated for the purposes of presentation and decision.

MEETING DATES:	April 9, April 16 and April 27, 2015
DECISION DATE:	April 27, 2015
MEMBERS PRESENT:	Noor Ul-Hasan, Chair; James Adinaro; Pete Ellison; Doug Folsom; Rich Robinson; Don Antczak (alternate)

On motion duly made and seconded, the Board affirms the Commission's Decision because it finds the Decision is supported by substantial evidence in the record before the Commission so as not to be arbitrary and capricious; and is not illegal. Accordingly, the Board denies the consolidated appeals.

As more specific grounds in support of its decision, the Board finds and concludes as follows with respect to the particular issues raised by each appellant, which the Board will address in the order of their presentation during the hearing before the Board:

(1) Gray Smith and Cynthia Smith ("Smiths") Appeal.

a. The Denial of Due Process Argument.

The Smiths first assert that the Commission's Decision should be reversed or remanded because one or more members of the Commission were sufficiently biased that the Smiths or other appellants were deprived of their rights to procedural due process during the proceedings before the Commission. They base this argument on what they allege were inappropriate "private" communications between Commission members and the applicant or others outside of Commission meetings.

The Board notes initially that due process requirements are satisfied in this context if persons or entities in the Smiths' position are given notice and an adequate opportunity to be heard before unbiased decision makers. Bias is not presumed, however, and a person claiming bias on the part of an administrative tribunal must overcome a presumption of honesty and integrity in those serving as members of that body. The Smiths or others making this claim must make a substantial showing of personal bias in order to disqualify a Commission member or tribunal, and generally a board or other authority reviewing the record of such administrative

proceedings must be able to the discern that the appearance of unfairness is sufficiently obvious that a reasonable person would find the hearing unfair.

In this regard the Smiths allege that communications occurred between Commission members and others outside of Commission hearings in violation of Rules and Procedures the Commission has adopted (the "Rules"), specifically the rules of ethical conduct for the Commission contained in section XI(C)(4) of the Rules. The City's responds to these allegations asserting: 1) the communications involving any Commission member voting in favor of the Decision were casual conversations while entering or exiting the place of a meeting or walking to and from cars in the parking lot are not "private meetings" as defined by the Rules; 2) any information allegedly conveyed in any of the informal meetings or communications was presented to the entire Planning Commission as the ethical rules require; and 3) there is no evidence that any such casual conversations impaired the ability of any of the Commissioners who voted for the Project to make an unprejudiced decision.

The Board concludes that it is not necessary to make a determination as to what constitutes a "private meeting" under the Rules because even assuming for the sake of argument that a technical violation of the Commission's Rules occurred, that does not render the Decision of the Commission "illegal" or demonstrate a denial of procedural due process. A determination of illegality under Utah Code Ann. § 10-9a-801(3)(d) requires a violation of a law, statute or ordinance, and the Rules adopted by the Planning Commission for the conduct of its affairs do not rise to that level. Moreover authorities make clear that failure to comply with local procedural requirements does not necessarily constitute any denial of due process; the alleged violation must result in a procedure which itself falls short of due process standards.

In this instance there were a total of three (3) meetings where public comment was taken by the Commission before rendering their Decision -- June 18, 2014, August 6, 2014, and September 9, 2014. One or more of the Smiths spoke at all three of those public hearings and submitted written materials to the Commission regarding the Project. The Board's review of the record of those meetings and the Smiths' submissions does not allow the Board to conclude the meetings were conducted with any degree of unfairness or that any Commission member demonstrated any discernable, actual bias sufficient to disqualify the Commission member or render the member unfit to make an unbiased decision as bias has been defined by Utah law. [1] The Board concludes that the Smiths have failed to produce evidence showing actual bias on the part of any member of the Commission who voted in favor the approval of the conditional use permit for the Giverny Project sufficient to render any such Board member unfit as a decision maker as such bias has been defined.

In addition, the Board concludes that Smiths and the other appellants have waived this issue. The allegedly improper communications occurred prior to the final public hearing on the Giverny Project before the Commission and the Smiths were apparently aware of the communications.[2] However, at no time prior to the vote by the Commission resulting in the Decision they challenge did the Smiths or any other appellant request that any members of the Commission recuse themselves or be disqualified from voting on the Project based on the allegedly inappropriate communications. Because this issue could have and should have been

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[1]For example, a situation where a local decision maker personally stands to gain or lose financially based on the outcome of the Decision being challenged.

[2]Illustratively see Giverny Appeal Record ("GA") pp. 141-186 (references herein will cite to the pagination of the Record by the City's Staff).

initially presented to and resolved by the Commission itself, the Smiths failed to preserve the issue for the Board's review.

b. Smiths' Arguments Relating to Mitigation of Impacts on Adjacent Property Owners.

The Smiths also allege that the Planning Commission failed to impose reasonable conditions to mitigate potential detrimental impacts caused by the Project to assure adjacent properties would not be materially adversely affected, citing Code sections 19.78.020, 19.78.140, and 19.78.170. To support this argument, however, the Smiths rely exclusively on their contention that the Commission should have required the main entrance to the Giverny Project to be located further to the north away from their property, and not on the nonexclusive easement which provides access to the Smiths' property.

The Smiths acknowledge, however, that their easement is nonexclusive and that they are not the fee title owners of the property in question. No evidence has been presented to suggest that the new road would interfere with the Smiths' nonexclusive easement and the road has been designed in a manner that it will continue to provide reasonable access to the Smith property. This argument does not establish any error in the Decision.

c. New evidence not part of the Record of the Commission.

In support of their appeal, the Smiths attached photographs, documents and materials, and tried to introduce these and other materials at the hearing before the Board, and afterward, that were not part of the Record presented to and considered by the Commission. That additional information includes Exhibits A, O, P and S to the Smith's appeal brief, references to verbal conversations on pages 3 and 4 of their brief, and a letter with attachments from the Smith's attorney, Steven W. Call, to independent counsel to the Board Jody Burnett dated April 15, 2015.

Pursuant to §19.92.080(A) of the Code, the Board is authorized to hear and decide appeals of decisions of the Commission, but that review is limited to "the record of the planning commission decision . . . ." Accordingly, and as the Code requires, the Board declines to consider the new information that was not part of the Record before the Commission. In doing so, however, the Board notes that the new information consists primarily of allegations concerning conversations or unsupported lay opinion concerning the devaluation of the Smiths' property that even if considered, is not sufficiently supported to be relevant or adequate to establish error in the Decision.

(2) Ken Hostetter on behalf of the Residents of Golden Hills and Top of the World Subdivisions ("Golden Hills").

a. The Traffic and Access Argument.

Golden Hills and a number of the other appellants challenge the Decision on the basis that traffic and access issues were not adequately addressed as required by Section 19.78.150 of the Code. As a threshold matter, the Board notes a fundamental problem with this argument arises from the fact that in 2013 the City Council made the legislative decision to rezone the property at issue to an R-1-8 designation. (See Giverny Appeal Record ("GA"), p. 92). That legislative decision was not before the Commission and is not within the purview of either the Commission or the Board.

Significantly, the net density of the Giverny Project is actually less than what would be allowed if the Property were developed as a standard R-1-8 subdivision allowed by the zoning (see GA, p. 94), and therefore it follows that development of the Property as a standard R-1-8 subdivision would create at least as much traffic, if not more, than the proposed Project. It would do so, however, under circumstances in which the City would not have the same ability to

require the traffic mitigation measures that were imposed by the Commission in their Decision. (See GA, pp. 134-135, conditions 37-44).

Under the circumstances, the Board concludes that the conditional use and planned unit development approval process at issue must be understood and the relevant Code provisions read and interpreted in light of Utah Code Ann. § 10-9a-507, which provides that a conditionally permitted use "shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards." It would be illogical and inconsistent with that statutory framework to interpret §19.78.150 of the Code as requiring that mitigation measures, which it is undisputed would adequately address the additional traffic that will be generated by the Project, be actually and physically completed before an applicant could receive approval from the Commission in the first instance. Such an interpretation would create an insurmountable "chicken and egg" problem and be contrary to the normal sequence of receiving approval before actually completing public improvements required as a condition of the development approval.

Against that backdrop, the City Staff, with the assistance of the City Engineer, Brad Gilson, and with additional input from independent professional traffic engineering consultant Joe Perrin, determined that the Project complied with Section 19.78.150 of the Code (see GA, p. 97). Based on that initial determination, the Staff and engineers focused on measures to mitigate the traffic impacts of the proposed development. The Applicant provided a traffic study for the Project prepared by an independent engineering firm, Fehr & Peers (see GA, pp. 255-310), which evaluated the roadway capacity of Wasatch Boulevard adjacent to the Project and determined that average daily traffic ("ADT") measured in 2014 was approximately 13,000 vehicles, with an estimated capacity as a two-lane suburban collector of 13,500 ADT. The study

further concluded that the Giverny Project will add approximately 1,690 ADT to Wasatch Boulevard, which would result in about 14,690 ADT after build-out of the Project. With the proposed mitigation measures including, but not limited to, a third center two-way turn lane, that would increase the carrying capacity of Wasatch Boulevard adjacent to the Giverny Project from 13,500 ADT to 15,000 ADT, in compliance with the requirements of the Code. (See GA, p. 298). The City's independent traffic engineering consultant, Joe Perrin, agreed with that analysis (See GA, pp. 533-534).

Under the circumstances, the Board finds that the reasonably anticipated detrimental effects of the traffic and access issues raised by Golden Hills and other appellants were adequately addressed and mitigated in accordance with applicable standards as required by Utah law.

(3) Kent Anderson ("Anderson").

a. The Traffic and Access Argument.

In response to Anderson's arguments on these issues, the Board incorporates by reference its response outlined in section (2) a., above.

b. The Sewage Disposal and Water Argument.

Mr. Anderson also questions whether the Decision addressed pre-application requirements of Section 19.78.050 of the Code with respect to sewage disposal and water supply. As that Code provision reflects, however, utility capacity issues like these are addressed in a pre-application conference with the City's Development Review Commission in coordination with staff. Staff reports noted that utilities for the Project are adequate, (illustratively see GA. p. 98); and the Commission's Decision includes a specific finding that existing and proposed utility services will be adequate for the proposed development. (See GA, p., 138, Finding 6(j)). In

addition, the Salt Lake City Department of Public Utilities as the third-party provider of culinary water service to the Project has confirmed its willingness to serve and that adequate facilities are available. (See GADD (Giverny Addendum), p.158). Accordingly this argument does not establish any error in the Decision.

c. Other Anderson Arguments relating to Effect on Adjacent Properties and Related Issues.

Mr. Anderson also alleges in a conclusory fashion that the Project will have an adverse effect on adjacent properties and asserts that the appeal process is somehow flawed. However, he does not produce any specific evidence in support of those assertions. Although Mr. Anderson cites some 54 residents on Danish Road as supporting his position, he fails to recognize that the Decision is administrative, rather than legislative, and the mere fact that some residents oppose the Project, without citation to the Record as to why the approval of the Project does not comply with the relevant provisions of the Code, is not sufficient to establish any error in the Decision.

(4) Pamela Palmer and Glenn Palmer ("Palmers").

The Palmers appeal focuses exclusively on traffic and access standards related to Section 19.78.150 of the Code. The Board has addressed those grounds for appeal under Section (2) a. above and incorporates that section by reference.

The Board further notes that the Palmers sought to introduce evidence of conversations that occurred after the Decision with Nicolas Vigen of UDOT, but did not provide any written documents or oral information from Mr. Vigen or UDOT to the Commission, other than what is contained in the traffic studies prepared by Fehr & Peers. Therefore, for the same reasons

discussed in Section (1) c. above, the Board declines to consider that information and it does not establish any error in the Decision.

(5) Janie Wilson and Paul Smith Representing Residents of Alta Hills Subdivision ("Alta Hills").

a. The Traffic and Access Argument.

Alta Hills also focused primarily on the traffic and access issues and the alleged failure to comply with Section 19.78.150 of the Code. Again, the Board addressed those issues in Section (2) a. above, which the Board incorporates by this reference.

b. The Effect on Adjacent Properties and Sidewalks Argument.

Alta Hills and its residents also expressed vague concerns with respect to the nature of the Project as a planned unit development, but fail to include any supporting citations to the Record to demonstrate how the Commission failed to address the applicable criteria and requirements of the Code with respect to the approval of a PUD. In addition, they attach a list of 62 Alta Hills' residents who support their appeal. Once again, however, the Decision at issue is administrative, rather than legislative, and the simple fact that a number of persons might oppose the Project does not establish any basis on which the Commission erred. Indeed, it would have been error for the Commission to base its decision on such general expressions of opposition to the Project.

Alta Hills also questions whether sufficient sidewalks have been required as part of the approval of the Project in compliance with Section 19.78.130 of the Code, which addresses pedestrian movement. However, the Board finds that the Commission specifically addressed those issues as part of its Decision. (See GA, pp., 131-135, Conditions 7 and 49.) (See also GA, p.138, Finding 6(i).)

(6) Alex Wheeler and Others Representing Residents of Green Hills Subdivision ("Green Hills").

a. The Traffic and Access Argument.

Green Hills also challenges compliance with Section 19.78.150 of the Code regarding traffic and access standards. In response, the Board incorporates its determination described in Section (2) a. above by reference.

In addition, however, Green Hills complains about the connection of stub streets from the Green Hills Subdivision to the Giverny Project. While they disagree with the Decision, Green Hills does not point to any provision of the Code with which the Decision failed to comply regarding this issue. The Commission determined that the connection of the stub streets provided a secondary access for the Green Hills residents that was currently lacking as reflected in the approved site plan. (See GA, p. 754) and Decision GA, p. 134, Conditions 38 and 39). The Board finds Green Hills fails to establish any error in the Decision with respect to stub streets.

b. The Open Space and Trails Argument.

Green Hills disagrees with the provision in Code section 19.78.120 requiring that a PUD contain a minimum open space of 20%. However, they do not dispute that the Decision verifies compliance with that requirement, and in fact, that the Project exceeds it by providing 28% open space (See GA, p. 97). In addition to the trails designated in the approved site plan, the Decision specifically addresses the use of trails in lieu of sidewalks (See GA, p. 135, Condition 49). This argument does not establish any error in the Decision.

(7) Gary McGee, Jill McGee and CHVoters, Inc. ("McGee").

a. The Traffic and Access Argument.

The McGees make the same assertions with respect to the alleged failure of the Commission to adequately address traffic and access in compliance with Code section 19.78.150 as those made by the Smiths, and in response the Board incorporates by reference Section (2) a. above.

b. The Denial of Due Process Argument.

The McGees also assert basically the same due process arguments the Smiths made in their appeal. In response, the Board incorporates by reference section (1) a., above.

c. The Effect on Adjacent Properties Argument.

The McGees allege that the Project has an adverse effect on the value of their property, but they fail to cite to any evidence in the Record in support of those assertions. At the hearing before the Board, counsel for the McGees sought to introduce an affidavit from Mary L. Erkelens dated April 9, 2015. Following the conclusion of the hearing on April 13, 2015, McGees counsel, Lisa A. Marcy, sent a letter along with a copy of the affidavit to independent counsel for the Board, Jody Burnett. The affidavit was not timely submitted, is not part of the Record before the Commission and therefore was not considered by the Board for the reasons discussed in Section (1) c. above. However, the Board also notes that Ms. Erkelens attended and spoke at the Public Hearing before the Planning Commission on June 18, 2014, but declined to raise or address the concerns now being described by the McGees as newly discovered evidence. (See GA, p.120). Accordingly, this argument does not establish any error in the Decision.

DATED THIS 27th DAY OF APRIL, 2015.

COTTONWOOD HEIGHTS BOARD OF ADJUSTMENT

By: _____
Noor Ul-Hasan, Chair

VOTING:

	Aye	**Nay**
Noor Ul-Hasan, Chair	✓	
James Adinaro	✓	
Pete Ellison	✓	
Doug Folsom	✓	
Rich Robinson	✓	
Don Antczak (alternate)		

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