

DECISION
OF THE
BOARD OF ADJUSTMENT
OF
COTTONWOOD HEIGHTS, UTAH

On April 20, 2016, the Cottonwood Heights Planning Commission (the “Commission”) approved an application by Dana Middlemiss (the “Applicant”) for a conditional use permit (the “PC Decision”) for a home preschool located at 3571 East Summerhill Drive (the “Preschool”) in Cottonwood Heights City (the “City”). Joe Thomas, for and on behalf of himself and other residents (the “Appellants”), timely filed an appeal (the “Appeal”) with the City’s Board of Adjustment (the “Board”) pursuant to Cottonwood Heights City Code (the “Code”) § 19.92.070. The Appellants allege the Commission erred for reasons outlined in their written Appeal. This is the Board’s written decision on review of the Appeal.

MEETING DATES: July 7, August 4, 2016

DECISION DATE: August 4, 2016

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 PC Decision on the grounds that it finds the PC 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 Appeal.

As more specific grounds in support of its decision, the Board makes the following findings and conclusions with respect to the issues and arguments raised by the Appellants, noting at the outset that it reviewed the PC Decision as a mixed question of both factual and legal

issues. The Board will address the Appellants' contentions in the order of their presentation in the written submittal dated June 15, 2016:

1. The argument based upon interpretation of Code provisions governing the R-1-8 Zone under these particular facts and circumstances. Appellants first assert that the R-1-8 Zone does not expressly allow daycare/preschool operations as either a permitted or conditional use. The Board notes, however, that while the provisions of Chapter 19.26 of the Code identifying land use regulations for the R-1-8 Zone do not specifically list daycare/preschool operations as a permitted or conditional use, the Preschool was approved as a "home occupation", which is a separate conditionally permitted use in the R-1-8 Zone.

In making its decision on this issue, the Commission relied on the interpretation of the Code by Community and Economic Development Director Brian Berndt (the "Director") in his Memorandum dated March 21, 2016 (PA-023-024). That interpretation determined that the use as proposed by the Applicant complied with the requirements for a home occupation under Section 19.76.040(F) of the Code. For the reasons more fully discussed in §2 below, the Board finds that the interpretation by the Director and Commission was not arbitrary, capricious or illegal.

Appellants also point out that the R-2-8 Zone specifically allows "day care/pre-school" as a conditionally permitted use. However, the Board does not find that Code provision to be controlling or persuasive in addressing this Appeal.

2. The argument that home occupation and daycare/preschool are separate uses. Appellants next allege that the City's Code, although not specifically defining home occupation, makes a distinction between home occupations and daycare/preschool as separate uses. The Board notes that all parties, including the Director and City Staff, agree that home occupations

and preschools are referred to in an inconsistent manner throughout the Code. Therefore an interpretation of the Code as applied to the specific facts and circumstances presented by the application for approval of the Preschool as a home occupation through the conditional use permit process is necessary. In affirming the PC Decision, the Board relies upon two important principles. First, the City has previously approved at least five preschools as home occupations in the R-1-8 Zone (PA-011). Although not necessarily determinative of the issue in and of itself, such an interpretation is afforded a level of nonbinding deference. *See Carrier v. Salt Lake Co.*, 2004 UT 98. Secondly, since local land use regulations are regarded as being in derogation of private property rights, any provisions restricting use of property are liberally construed in favor of the property owner. *See Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995). Under the circumstances, the Board concludes that whatever ambiguity may exist in the Code regarding the definition of “home occupations”, it weighs in favor of the Applicant and supports the determination that the PC Decision on that issue was not arbitrary, capricious or illegal.

3. The argument that the list of conditional uses does not include preschool operations. Appellants next argue that there are only five conditional uses allowed under the R-1-8 Zone in the Code, which does not specifically include daycare/preschool operations. As discussed in Section 1 above, however, the Preschool was approved as a home occupation, which is a conditionally permitted use in the R-1-8 Zone.

4. The argument regarding the definition of home occupations and home daycare/preschool under the Supplementary and Qualifying Rules and Regulations in Chapter 19.76 of the Code. Appellants emphasize an argument made before the Planning Commission that since home occupations and two categories of home daycare/preschools are defined in

Chapter 19.76 of the Code, those must be mutually exclusive categories. In addition, Appellants further assert that daily outside recess for students of the home preschool violates the definition of home occupation as being a use conducted entirely within the dwelling. The Board observes, however, that the cited portion of Chapter 19.76 goes on to state that the emphasized restriction only applies “if the use of accessory buildings or outside activity, for the purpose of carrying on a home occupation, violates the rule of the use being clearly incidental and secondary to the use of the dwelling for dwelling purposes.” The Board concludes that the use of a portion of the outside yard for play purposes during preschool operations is not inconsistent with the primary use as a dwelling. In fact, the conditions of approval as reflected in the Code provide that the play yard shall not be located in the front yard and shall only be used between 8:00 a.m. and 7:00 p.m. Furthermore, the definition of “Home day care/preschool, small” in §19.76.040(D) of the Code expressly exempts that use from the home occupation requirements, which provides further support for the conclusion that a “Home day care/preschool” as defined in §19.76.040(E) is allowed as a home occupation.

5. The argument based upon the General Plan. Appellants’ final argument is that the City’s General Plan states: “the community wishes to protect low-density residential neighborhoods from incompatible uses”. Under Utah law, however, the General Plan, by definition, is an advisory guide for land use decisions. *See* Utah Code Ann. § 10-9a-405. As previously noted, the Preschool was approved as a conditionally permitted use under the definition of home occupation. Utah Code Ann. § 10-9a-507 provides that a conditional 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. The Board concludes that the more specific provisions of the Code prevail over the

General Plan and that the Planning Commission imposed conditions under applicable standards found in the Code to reasonably mitigate the anticipated detrimental effects of the Preschool.

DATED THIS _____ DAY OF AUGUST, 2016.

**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)	_____	_____