



LAND USE APPEAL HEARING MINUTES

May 29, 2026

Appeal Authority Rob Patterson called the hearing to order at 10:05 am.

In Attendance

Appeal Authority: Rob Patterson

Applicant: Cori Fabian, with Brent Bateman (Attorney)

Alpine City Staff: Shane Sorensen (City Administrator), Caden Lyon (Asst. City Administrator/City Planner), Marla Fox (Building Dept), Jennie Wallace (Building Dept), DeAnn Parry (City Recorder)

Others: David Taylor, Kelly Workman, Andrew Young, Susan Paiser, Mike Paier, Teri Wilson, Jared Bishop, Keith Wilson

Appeal Authority Rob Patterson explained that this is an appeal of the denial for reconstruction or expansion of a nonconforming use by Cori Fabian. He will be reviewing a land use decision made by the City Council, not making a new decision based on new evidence. He will decide if the City Council followed the applicable codes and guidelines and had sufficient evidence for their decision.

This is not a public hearing, and by state law, no public comments will be accepted.

He will hear from Alpine City and the attorney representing the Applicant. Authority Patterson said he will not make a decision today but will review the issue and render a decision within the timeline specified by Alpine City code.

The parties were introduced:

- Brent Bateman, attorney with Denton Durham Jones Pinegar, representing Applicant Cori Fabian
- Caden Lyon, Alpine City Asst. City Administrator/City Planner, representing the city as the land use authority

Authority Patterson said he read all the documents, minutes, and staff reports, and is familiar with the materials. His first question for the parties was about the motion being made with a single finding as a restatement of the first code issue, and how that would be a sufficient finding of fact under the standards for Utah's Land Use, and Management Act (LUDMA)?

The second question was that if he finds the council's decision to be insufficient, does the issue go back to the City Council for additional findings, or does he enter the order the Applicant desires? He invited the parties to make their arguments.

Following the standard appeal process, Mr. Bateman will speak first, followed by Alpine City, and then Mr. Bateman will have the final word.

Attorney Brent Bateman said that the City Council decision was not based on a sufficient finding of fact. He does not blame the council and knows they did not have ill intent. This matter was placed on the agenda as a legislative decision, and during the meeting council members stated multiple times that they had legislative discretion in this matter. Mr. Bateman does not believe the council had legislative discretion and there are no findings of fact. However, the council felt like they had legislative discretion to make subjective decisions. If subjectivity is allowed, findings of fact are not as important because those decisions are based on policy.

Regarding the second question, Mr. Bateman said Authority Patterson could order the city to grant the building permit. There are facts in evidence, even though the City Council did not put them in their motion. The application complies with the ordinances that are in place and the height and setback restrictions. There are sufficient facts to convince a reasonable person that the application should be granted, and those facts were before the council. Based on the facts, Mr. Bateman requests that the application be approved.

Authority Patterson read from the code stating that, "The Hearing Officer shall render his/her decision on the appeal within thirty (30) days from the date that the hearing is held. The Officer may affirm, wholly or partly, or may modify the order, requirement, decision or determination of the Land Use Authority." He asked if Mr. Bateman meant that the Officer could modify the decision in the sense that it was not done correctly the first time because there were not enough findings of fact, so it could be found arbitrary and capricious for that reason.

Mr. Bateman said that Authority Patterson could affirm, deny, or modify. An affirmation would mean the council's decision was right. A denial would mean that the applicant is correct and that there are sufficient facts to grant the permit. The Appeal Authority can modify in whatever way he sees fit. However, they are not asking for a modification, they are asking for a denial.

Authority Patterson asked if a denial would be saying that the Applicant wins or that Alpine City loses?

Mr. Bateman thought that was a great question. If there were not any facts to support either side, then the Authority could require facts. We have the facts.

Caden Lyon said that the final motion made by the City Council was based on the first criteria in 3.22.070. The minutes show that the council considered all four of the criteria extensively. Most of the council thought that one criterion was met by the Applicant, but the other three were not. He is not sure why the motion focused only on one criterion, but it did end the conversation and determine that the criteria were not met.

Authority Patterson noted that the council discussed each factor and debated the issues, however the motion only referenced one criterion and paraphrased the language of the code. They did not say, “We find that it will alter the character of the building or use or its impact upon the area for x, y, and z.” They did not say x, y, and z. There may have been some confusion on the part of the City Council about how to make the motion. There was a discussion, but there are no findings besides the one, and that was just the end conclusion. We do not have the steps to get to that conclusion.

Caden Lyon acknowledged the valid point and said it was a heated discussion that evening. The council was trying to make a decision as a body by considering all the criteria. Four criteria are a lot to consider at once among multiple council members, and with everyone trying to be heard. The code allows that if one of the criteria is not met the application has room for denial. The council felt that multiple criteria were not met, but the one in the motion was grounds for denial.

Authority Patterson said that in documents submitted by Mr. Bateman, he argued that some of the issues brought up, such as the impact on neighbors, the overshadowing, the height change, and nearby one-story homes, constituted public clamor. He felt that this was an administrative decision that did not allow the public to chime in.

Caden Lyon explained that the mayor did allow two neighbors to provide comments about the application at the City Council meeting on April 14, but there is no evidence that the comments were the sole reason for the denial of the application. The minutes demonstrate that the City Council considered the size, height, and other characteristics of the home, not just the neighbor’s comments. For this reason, the public clamor doctrine does not apply.

Authority Patterson mentioned his second question and referenced *McHaney v. City of Moab*. The Court of Appeals basically said “You did not make findings of fact. We are not going to look at the record and pick out what you might have decided. We are just going to say it is arbitrary and capricious for lack of findings and kick it back to do again.” Mr. Bateman is requesting that we kick it back and give his client what she wants.

Caden Lyon responded that it might be fair to kick it back to the council to reconsider, because the motion did not include all the findings of fact but was based on only the first criteria. However, if one criterion is not met that is a foundation for denial.

Authority Patterson said that he sees this as an administrative act and not legislative.

Caden Layon agreed with that statement.

Mr. Bateman said that three of the four criteria are not possible to support with facts. They are all subjective, policy-based findings. If we measured the length of a shadow across a nearby home, it would not be a finding of fact to support a denial of the permit, especially when the proposed height is in line with what the code allows. It would require before and after appraisals to see if there was any impact on property values. Citizens do not have a right to a particular property value, nor that a property value will remain unchanged.

A remand would be the easy answer, but if we go back and get appraisals we will have plenty of evidence to show that this home will not impact property values. There is no way to collect factual evidence for the other criteria because it is all policy-based and subjective. Mr. Bateman referenced the *Dannon* case that he cited in his brief, as it included a claim that construction would cause problems and interfere with business. The court went to some lengths to state that you cannot just make a statement that is assumed. It has to be proven.

If the lot size were conforming, we would not be here. The shadow that has been mentioned and the larger home would be there. The lot is what is nonconforming, not the building. There is no way to go back and come up with facts because they are subjective. What is the “character of the neighborhood”? What one person thinks is different from what another person thinks. You can stand at the front of the lot and see other two-story homes nearby.

Authority Patterson said that in LUDMA, state law has very objective standards for conditional uses and subdivisions. Objective checklists are required with criteria, and if the application meets those standards a city cannot say no. It does not have those rules for all types of administrative decisions.

He mentioned a previous plat amendment case where the court looked at the administrative decision but evaluated language that included “may” and “good cause.”

Mr. Bateman said that good cause is an anomaly for subdivision legal standards. The standard we are talking about here is substantial evidence in the record. Evidence is objective facts. Even if the code gives a body a certain amount of discretion, it cannot be upheld with facts. It is a slippery slope to give local government the ability to say yes or no to a legislative decision based on their preferences or what the public thinks. That has never been the case.

If the city can say in their code, “We get to just look at this and decide if it fits the character of the neighborhood based on personal preferences,” what is to stop them from doing that with everything? Essentially that would mean what is in the code does not matter.

The city is saying that because this lot is a different size than the other lots, we get to decide based on our feelings if something can be built. If the decision is remanded, we will be back

here again. The council will come up with a list of things and Mr. Bateman will come back with an appeal about what is subjective and not based on fact.

Authority Patterson commented on the remand question. Under case law he is not supposed to re-weigh evidence or make his own determination about the facts. He is supposed to see if there is potential evidence to support the decision, not necessarily to see if there is potential evidence to support a different decision.

Mr. Bateman gave an example of the Planning Commission looking at an issue, making a decision, and sending a recommendation to the City Council. The council does not have to follow that recommendation. If they say no to a Planning Commission decision, they have to say yes to something, because the application is still open.

If Authority Patterson decides the City Council did not make the correct decision, do they just get to try again, like a second bite of the apple? He felt that if the council decision is denied it means the Applicant's petition is approved.

Authority Patterson asked for any additional information from either side.

Caden Lyon said that LUDMA has clear laws regarding certain land use decisions and regulations for a municipality. The nonconforming section has certain requirements for existing nonconforming buildings within the zoning code. When the code changes, LUDMA protects those buildings and uses from the new zoning ordinance.

For reconstruction, LUDMA allows it to be in the hands of the municipality as to how they will handle the reconstruction of a nonconforming lot or building. The city followed its correct land use ordinance and the laws that were established long before this application, to make the determination that the conditions the city imposed on nonconforming lots for reconstruction were not met. This decision was not arbitrary or capricious, because it was made based on what LUDMA allows and the current code for nonconforming structures. The main point is that cities are able to determine their own conditions, so there is room for evaluation when the city looks at a case like this to see if it meets the criteria in their current ordinance.

Authority Patterson said that in certain cases LUDMA is very specific about what cities have to do. In the majority of land use matters, LUDMA gives only general direction and policy considerations and allows the cities to make the rules as long as they do not conflict with state law. The nonconforming rules in LUDMA are the floor of what a city can do, but with any kind of zoning, you can always grant something more. The point that LUDMA could allow the city not to adopt this code is not very relevant. We are looking to see if the city followed the code they adopted.

Caden Lyon agreed that LUDMA sets the floor and then allows cities to create their own conditions for the reconstruction of a nonconforming lot or building. The city created

conditions, which LUDMA allowed to happen. In this case the city found that those conditions were not met.

Mr. Bateman agreed with Caden that the city followed the instructions and the code that they had. The point is not that the city did anything wrong. The point is that the statute they followed is illegal. They cannot do this because it requires subjective policy decision making for a matter that needs to be under case law and objectively decided. The council followed what they were told to do, but they cannot do it. This is not a question of a nonconforming building or noncompliant use within state law. This is a nonconforming parcel, which is not covered in state law. Alpine recognizes this as a nonconforming parcel. The building conforms, because it is in a residential area. The city has made a choice to recognize a nonconforming parcel here. That is all that has happened.

Authority Patterson clarified that Mr. Bateman's statement that the city code is illegal was not a facial challenge, but a declaration that there is no legal way to make it apply in this case.

Mr. Bateman agreed with the statement and said that there is one narrow way to use facts to support one of the criteria, but those facts are not here.

Authority Patterson said the question of diminished value could be supported with facts and asked if it was Mr. Bateman's client's job as part of the application to provide that information.

Mr. Bateman said it was absolutely not the Applicant's responsibility. It is the job of the city to prove which facts exist to support their decision. You cannot ask someone to prove a negative. If they made that effort on any one of the criteria to prove facts, Mr. Bateman would want opportunity for due process to respond. He does not know how it would be possible to provide facts on the other criteria. The city is arguing that the bottom line is that they are allowed to make this decision based on subjective policy. That is why we are here. He does not think they are allowed to do that.

Authority Patterson thanked the parties for their contributions and said he will render a decision within the required 30-day timeframe and send it to the parties.

The hearing was concluded at 10:32 am.

FINAL DECISION ON APPEAL

Land Use Hearing Officer: Robert A. Patterson

June 15, 2026

ALPINE CITY LAND USE APPEAL AUTHORITY

CORI FABIAN, Appellant

v.

ALPINE CITY, Appellee

FINAL DECISION ON APPEAL

Land Use Hearing Officer:
Robert A. Patterson

Date: June 15, 2026

This matter is before me as the interim Alpine City hearing officer and appeal authority regarding the appeal by Cori Fabian (“Fabian” or “Appellant”) of the denial of her application for reconstruction of a nonconforming building (“Application”) by Alpine City (“City” or “Appellee”). An in-person hearing on this matter was held on May 29, 2026, at approximately 10:00 am. Appellant Fabian and Appellee Alpine City each appeared and presented arguments.

After careful consideration of the written and oral submissions by the parties and review of the record of proceedings, governing codes, laws, and standards, and applicable caselaw, I hereby grant the appeal and order that the Application be approved.

BACKGROUND

Scope of Record

The following summary of facts is taken from the record of proceedings, consisting of staff reports and meeting agendas from both the Alpine City Planning Commission and City Council and Ms. Fabian’s Application materials, including building plans. The parties were given the opportunity to review the proposed record and no objections were made. Accordingly, I have considered all materials as submitted by the parties as the record of proceedings.

Summary of Facts, Evidence, and Proceedings

Ms. Fabian owns the property located at 480 East 100 South in Alpine City (“Property”). The Property is in the Town Residential Zone (“TR-10,000”), which is a single-family residential zone. The TR-10,000 zone requires lots to have a minimum lot size of 10,000 square feet, a minimum lot width/frontage of 90 feet, and a maximum lot coverage of 50%. Development Code of Alpine (“DCA”) § 3.02.040. The TR-10,000 zone also has regulations regarding building location, setback, and height. *See* DCA § 3.02.050, .060.

The Property consists of only 8,150 square feet with only 80 feet of frontage, rendering it nonconforming. The Property was previously developed and improved with a house and two accessory buildings. Due to the nonconforming status of the lot, that house was considered a nonconforming building. That house and the accessory buildings have since been demolished.

Ms. Fabian desires to replace the now-demolished single-story, single-family house on the Property with a two-story, single-family house. The proposed house will meet all height, setback,

lot coverage, and other zoning requirements of the TR-10,000 zone. But because the Property and the original house were nonconforming, any reconstruction or replacement construction of a home requires review and recommendation by the Planning Commission and approval by the City Council. DCA § 3.22.070. Among other things, that section requires the City Council to find:

- a. The proposed enlargement or extension will not significantly alter the character of the building or use or its impact upon the area.
- b. The building or use, if extended, will not have the effect of diminishing the value of property or the quality of living environment of adjacent properties.
- c. The proposed enlargement will not significantly increase the number of vehicles or pedestrians, or result in the establishment or increase of a safety hazard to the area.
- d. The proposed enlargement will not result in the establishment of a condition incompatible with the neighborhood area and the stated objective of the zone in which it is located.

DCA § 3.22.070(3).

Ms. Fabian filed her Application for approval for the reconstruction of non-conforming building, which was heard by the City Planning Commission on March 31, 2026. The Planning Commission unanimously voted “to recommend approval of the proposed site plan for reconstructing the home at 480 East 100 South as per the submitted site plan.”

The City Council considered the Application on April 14, 2026. The Application was presented to the City Council with a report from City staff. The staff report describes the Council’s review of the Application as legislative, outlines the applicable code provisions, and summarizes the Application and the Planning Commission’s recommendation.

During the April 14, 2026, City Council meeting, the Council discussed the Application and the four factors set out in DCA § 3.22.070(3). Ms. Fabian was present and spoke in favor the Application, noting that while the homes on either side of the Property on the same street are one-story homes, the homes behind the Property sit higher, with three out of four being two-story homes.¹ As to neighborhood impact, Ms. Fabian described the Property as part of the Creekside Park neighborhood, which includes 12 two-story homes and 8 single-story homes, most of which are new builds. She also stated that the house was designed to have the same character as the neighborhood, met all applicable zoning regulations, and would not devalue adjacent property.

Even though the Application does not require a public hearing and was not advertised or noticed as a public hearing, the City Council also heard from three neighboring property owners. One was opposed because she had previously inquired about purchasing the Property and was informed that any reconstruction would be limited to the original footprint of the prior house. She

¹ The minutes indicate two handout were provided to the City Council during this discussion, one from Ms. Fabian’s general contractor and another from a neighboring resident. These handouts were not included in the record provided on appeal.

also believed the proposed house was too large and tall. The other two opposed the Application because of the potential shade on their property if the proposed house were built.

The Council discussed the Application, which included discussion of the difference in size between the original and proposed houses and the fact that City would have to approve the house if the Property were slightly larger. One Councilmember noted that the “council has legislative authority in this situation.” After the discussion, one councilmember outlined potential findings supporting approval and moved to approve the Application. That motion failed in a 2-3 vote.

A different councilmember then moved to deny the Application “based upon the finding that the proposed enlargement or extension will significantly alter the character of the building or use or its impact upon the area as found in the TR-10,000 zone.” After additional discussion regarding the legal definition of “character,” the impact of the house due to size, height, and proximity to other homes, and the house’s demonstrated compliance with other zoning regulations, the Council voted 3-2 to deny the Application.

On April 22, 2026, Ms. Fabian timely filed this appeal.

STANDARD OF REVIEW

As appeal authority, I am required to conduct and decide land use appeals as required by the Utah State Municipal Land Use, Development, and Management Act, Title 10, Chapter 20 of the Utah Code (“LUDMA”) and the Development Code of Alpine. Utah Code § 10-20-1106(1).

Under LUDMA and the DCA, Appellant has the burden of proving that the City’s action was arbitrary, capricious, or illegal. Utah Code § 10-20-1105; DCA § 2.03.040(1)(f). Appellant may do so by demonstrating that the challenged action was illegal, meaning that the decision or action was based on an incorrect interpretation of a land use regulation or that it conflicts with or is contrary to other law. *See* Utah Code § 10-20-1107(4)(a); *Id.* § 10-20-1109(3)(b)-(c); DCA § 2.03.040(1)(e)(v).

With such claims, my role is to “determine the ... plain meaning of the land use regulations,” and “interpret and apply a land use regulation to favor a land use application unless the land use regulation plainly restricts the land use application.” Utah Code § 10-20-1107(4); *see also Patterson v. Utah Cnty Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995) (“[Z]oning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.”).

Appellants may also seek to prove that the City’s action was arbitrary and capricious by demonstrating that the challenged action is not supported by the evidence that was presented to the land use authority. This means that I must “determine whether the record on appeal includes substantial evidence for each essential finding of fact.” Utah Code § 10-20-1107(3); DCA § 2.03.040(1)(e)(v).

“Substantial evidence” is defined in LUDMA as “evidence that is beyond a scintilla and a reasonable mind would accept as adequate to support a conclusion.” Utah Code § 10-20-102(81) (cleaned up). In performing this review, my role is limited. I “must simply determine, in light of

the evidence before the [land use authority], whether a reasonable mind could reach the same conclusion as the [land use authority]. It is not [my] prerogative to weigh the evidence anew.” *Patterson*, 893 P.2d at 605. “Accordingly, [I] will not substitute [my] judgment on matters of public policy normally left to the [land use authority’s] discretion; [I] will simply ensure that the [land use authority] proceeds within the limits of fairness and justice and acts in good faith to achieve permissible ends.” *Id.*

DISCUSSION

Appellant appeals the denial of her Application to reconstruct a two-story home on her Property, arguing that the City Council impermissibly treated this decision as a legislative action, rather than an administrative action, and that there was no evidence that supported the denial.

First, I briefly discuss the administrative nature of the decision at issue. Then I address the Council’s decision, concluding that the Council’s decision was not supported by proper evidence in the record. Accordingly, I conclude that the decision was arbitrary and capricious for lack of substantial evidence. I therefore grant the appeal, reverse the decision of the City Council, and order the Application to be approved as submitted.

I. The Decision Was Administrative, Not Legislative

During the Planning Commission and City Council’s review of the Application, the staff reports and the discussion by the Council suggested that the review of the Application was a legislative decision. On appeal, the City acknowledges that the decision was administrative.

Ms. Fabian’s Application asked the Council to apply Alpine City’s existing code regarding reconstruction of nonconforming buildings to her Property and her proposed house. She was not asking for the creation or amendment of land use regulations to allow her proposed house. Those regulations already existed. So this was indeed an administrative decision. *See Baker v. Carlson*, 2018 UT 59, ¶¶ 13-14, 19, 437 P.3d 333. As such, Ms. Fabian was entitled to have her Application reviewed for compliance with the City’s existing land use regulations and, if it did comply, to have the Application approved. Utah Code § 10-20-902(1).

Unfortunately, the misconception that the Application was subject to legislative review seems to have colored at least some councilmembers’ review of the Application. It appears some members of the City Council believed that their decision on the Application should help establish City policy on allowable massing and bulk of single-family homes or preservation of historic houses and neighborhoods, rather than applying existing policy to Ms. Fabian’s proposed house. This misconception seems to have contributed to the problems with the decision, discussed below.

II. The Council’s Decision Was Arbitrary and Capricious For Lack of Substantial Evidence

Ms. Fabian sought approval of the reconstruction and expansion of a non-conforming structure pursuant to DCA § 3.22.070. In relevant part, that section allows reconstruction and expansion so long as certain conditions are not present:

- a. The proposed enlargement or extension will not significantly alter the character of the building or use or its impact upon the area.

- b. The building or use, if extended, will not have the effect of diminishing the value of property or the quality of living environment of adjacent properties.
- c. The proposed enlargement will not significantly increase the number of vehicles or pedestrians, or result in the establishment or increase of a safety hazard to the area.
- d. The proposed enlargement will not result in the establishment of a condition incompatible with the neighborhood area and the stated objective of the zone in which it is located.

DCA § 3.22.070(3).

The only finding made by the Council—and the sole basis for denial—relates to the first element. The Council found “that the proposed enlargement or extension will significantly alter the character of the building or use or its impact upon the area as found in the TR-10,000 zone.” The councilmembers who moved and seconded the motion to deny based on this finding “focused on the impact of the home due to the square footage, height, and proximity to other homes.”

This is a thread-bare finding. But it is a finding, it does address the standard set out in DCA § 3.22.070, and it does reveal the Council’s reason for denial. *Cf. Ralph L. Wadsworth Construction, Inc. v. West Jordan City*, 2000 UT App 49, (“Although section 10-9-102(f) authorized the City Council to deny appellants’ application if it was ‘deemed ... a nuisance,’ the City Council *did not find that appellants’ storage would actually constitute a nuisance.*”); *McElhaney v. City of Moab*, 2017 UT 65, ¶ 39, 423 P.3d 1284 (“Here, the Council concluded that the proposed bed and breakfast use did not meet the criteria set forth in Moab’s Municipal Code but *prepared no written findings of fact.*”) (emphasis added).

The question, then, is whether “the record on appeal includes substantial evidence for [this] essential finding of fact.” Utah Code § 10-20-1107(3). There must be evidence in the record that “is beyond a scintilla” and that “a reasonable mind would accept as adequate to support a conclusion.” *Id.* § 10-20-102(81). On this point, I agree with Appellant that this finding is not supported by substantial evidence.

In support of the Council’s decision, the record reveals that the proposed house would be a change in the size and height of the building on the Property, which necessarily entails a change in the house’s appearance and its impact upon the area to some extent. But merely identifying a change in appearance and impact is insufficient to warrant denial.

DCA § 3.22.070(3)(a) authorizes reconstruction and expansion of nonconforming buildings so long as the reconstruction will not “*significantly* alter the character of the building or use or its impact upon the area.” A simple change in character, use, or impact due to reconstruction or expansion is insufficient to warrant denial—that change must be *significant*. Indeed, the entire purpose of DCA § 3.22.070 is to authorize extension, enlargement, and reconstruction of

nonconforming buildings, which necessarily entail some degree of change in the appearance, size, or impact of the nonconforming buildings being extended, enlarged, or reconstructed.²

The question is what constitutes a “significant” alteration. In applying City Code, the City Council and the appeal authority are both required to “interpret and apply the land use regulation to favor the land use application.” Utah Code § 10-20-901(2), -1107(4)(b). Again, because this is an administrative decision, the Council cannot interpret the code to favor personal preferences, neighbors’ desires, or community goals. What counts as a “*significant* alteration” of character, use, or impact must be weighed in favor of the applicant—Ms. Fabian in this case.

The primary evidence that the impacts would be “significant” came from complaints from neighbors. “[W]hile there is no impropriety in the solicitation of or reliance on the advice of neighboring landowners, ‘the consent of neighboring landowners may not be made a criterion for ... issuance or denial.’” *Davis Cnty. v. Clearfield City*, 756 P.2d 704, 712 (Utah Ct. App. 1988) (quoting *Thurston v. Cache County*, 6266 P.2d 440 (Utah 1981)). Unfortunately, perhaps due to the misunderstanding of the nature of the decision being made, a majority of the Council did appear to base the denial on the neighbors’ consent. Ms. Fabian was repeatedly asked to work with the neighbors to modify the height and size of her proposed house to satisfy her neighbors’ concerns. One councilmember voting in favor of denial suggested continuing the Application until Ms. Fabian and the neighbors came to an agreement on the proposed house.

If the Council desires to restrict these types of reconstruction projects due to impacts on neighbors, then the land use regulations must “plainly restrict” the projects in that manner. Utah Code § 10-20-901(2), -1107(4)(b). As the City notes in its briefing, LUDMA does generally allow municipalities to regulate and allow or prohibit the reconstruction, expansion, and alteration of nonconforming buildings and uses. *See* Utah Code § 10-20-1003. But if a municipality chooses to authorize reconstruction by ordinance—as Alpine City has done—it must apply that ordinance in favor of allowing such projects to proceed. A preference for preserving historic neighborhoods or protecting neighbors from a change in building height cannot be the basis for denial when those preferences are not made part of the code.

The uncontroverted evidence in the record was that (1) the proposed house was would continue the single-family residential use of the Property as allowed by the TR-10,000 zone; (2) the proposed house would meet all size, lot coverage, height, and setback requirements of the TR-10,000 zone; (3) the homes on either side of the Property were one-story homes; and (4) the other houses in the area and near the neighbors’ property were a mix of older homes and new builds, with both single-story and two-story buildings. As such, the only evidence in the record is that Ms. Fabian’s proposed house will not be any closer to other houses or property or create any visual or shading impact that is different from what is already allowed and existing in the neighborhood and near the neighbors’ property.

FINDINGS AND CONCLUSIONS

For the foregoing reasons, I find and conclude as follows:

² Restoration of a nonconforming building to original condition is separately addressed and permitted under DCA § 3.22.050.

1. DCA § 3.22.070 authorizes the reconstruction or expansion of nonconforming buildings.
2. Reconstruction or expansion under DCA § 3.22.070 may be denied for certain reasons, including if the reconstruction or expansion significantly alters the character of the building or use or its impact upon the area.
3. LUDMA requires the requirements of DCA § 3.22.070 to be interpreted to favor the approval of applications for the reconstruction or expansion of nonconforming buildings. Utah Code § 10-20-901(2), -1107(4)(b).
4. LUDMA also requires that a land use application be approved if it conforms to the requirements of applicable land use regulations. Utah Code § 10-20-902(a)(ii).
5. The Council's denial of the Application was based entirely on its finding that Ms. Fabian's proposed house would significantly alter the character of the building or use or its impact upon the area. The Council did not find that Ms. Fabian's Application and proposed house otherwise failed to meet the requirements of the DCA or section 3.22.070 in particular.
6. The neighbors' complaints constitute impermissible public clamor and are not substantial evidence supporting the Council's decision. Resolving neighbors' concerns and obtaining their approbation are not legitimate bases for the approval or denial of the Application.
7. The only evidence in the record confirms that Ms. Fabian's proposed house would meet all zoning requirements, including height, setback, and lot coverage requirements, continues the historical use of the Property as a single-family residential property, and does not cause any greater impacts or changes than currently exist in the area.
8. The mere fact that the proposed house will be taller and larger than the original house is not substantial evidence of a "significant" change in character, use, or impact, when the term "significant" is interpreted to favor Ms. Fabian's application.
9. There is no substantial evidence in the record to support the finding that the change in height and size of the house on the Property constitutes a significant alteration in the character, use, or impact of the house.
10. Appellant has carried her burden to prove the land use authority erred in its application of DCA § 3.22.070, and that the City Council's decision was arbitrary and capricious. DCA § 2.03.040(1)(e)(v).

I therefore grant the appeal and reverse the decision of the City Council, ordering that Ms. Fabian's Application for Reconstruction of a Non-Conforming Building at 480 East 100 South be approved. This decision may be appealed to district court within 30 days as set forth in DCA § 2.03.050 and Utah Code § 10-20-1109.

/s/ Robert A. Patterson

Robert A. Patterson

Land Use Appeal Authority Hearing Officer