



Midway City Board of Adjustment Regular Meeting June 4, 2019

Notice is hereby given that the Midway City Board of Adjustment will hold their regular meeting at 6:00 p.m.,
June 4, 2019, at the Midway City Community Center
160 West Main Street, Midway, Utah

6:00 P.M. Regular Meeting

Call To Order

- Welcome and Introductions; Opening Remarks or Invocation; Pledge of Allegiance

Regular Business

1. Potential approval of minutes from March 21, 2017
2. Stephen Quesenberry, agent for Jeannette S. Higginson Trust and T & M Holdings LLC, is requesting a variance from Section 16.18.14 (C) regarding private driveways. City code allows five homes to be accessed from one driveway in a rural preservation subdivision, the applicant is petitioning for access to nine homes on one driveway. The property is located at 1170 South Center Street and is in the RA-1-43 zone.
 - a. Report/presentation of proposed variance
 - b. Public hearing
 - c. Discussion of the proposed variance
 - d. Approval/Denial/Continuance
3. Adjournment

The order of individual items on this agenda is subject to change to accommodate the needs of the Commission and those in attendance. All times are approximate.

Midway City is happy to provide reasonable accommodations for individuals with disabilities. For assistance, please call Michael Henke at 435-654-3223 X 05.

**Midway City Board of Adjustment Meeting
March 21, 2017**

Notice is hereby given that the Midway City Board of Adjustment will hold a meeting at
6:00 p.m., March 21, 2017, at the Midway City Community Center
160 West Main Street, Midway, Utah

Attendance:

Rick Tatton
Elizabeth Crittenden
Judith Griffin

Staff:

Michael Henke – City Planner
Lindy Rodabough – Admin Assistant
Brad Wilson – City Recorder

Excused

None

Others in attendance

Justin & Lindsay Bowen - Applicants

6:00 Board Member Training

- Planner Henke will do a brief training with the board members

City Recorder Brad Wilson swore in board members

6:30 P.M. Board of Adjustment Meeting

Call to Order

- Welcome and Introductions; Opening Remarks or Invocation; Pledge of Allegiance
Opening Remarks or Invocation.
 - ❖ Invocation was given by Member Tatton
 - ❖ Member Tatton led the Pledge of Allegiance.

Regular Business

ITEM: 1

Midway City has received a proposal from Lindsay Bowen for a Variance from the terms of Section 16.13.33 (B) which requires that all fences within 30' of any street right-of-way not exceed 4' in height. The property is located at 211 South 200 East which is Lot 9 in Timpanogos View Estates.

Member Tatton: Is there any problem with the fence being too close to the sidewalk?

Planner Henke: That is a good question. Usually the City owns about a foot or two behind the sidewalk. I do not know exactly where it falls in this neighborhood without surveying to find out where boundary line is. Typically, the City has allowed fences close to the sidewalk like this so in my opinion it is not a problem.

Board Member Tatton turned the time over to the applicants

Applicants; Justin and Lindsay Bowen:

Lindsay: There is an LDS church to the east of us and so every single Sunday from around eight or nine am until five pm there are people parked on both sides of 200 South as well as in the parking lot. Midway Elementary is to the west of us and Monday through Friday; 180 days a year we have cars parked out in the cul-de-sac we live on and in front of our house and in the church parking lot 2 times per day. There have been times that I have had to ask someone to move just so that I could get into my driveway, because they were parked in front of my driveway. Now to the north of us is a proposal for 11 duplexes totaling 22 residences and that development will have an exit coming on to 200 South and they will be constantly coming past our home too. We do not have a back yard at all we just have this side yard. This is our only place for our kids to be so when there is constantly cars parked here potentially six (6) days per week throughout the day at different times they are all looking into our yard. When these 22 families pull out they are going to see right into our yard. Our home does not have an hvac system it has radiant heating so we have no potential for air conditioning. In the summer we live with our windows open 24/7. On the ground floor is my little girls' bedroom and by having only a four (4) foot tall fence they will be seen by any person pulling out of this 22 resident duplex subdivision and they will be able to see right into that window.

Justin: When a left-hand turn is made from 200 East onto 200 South the lights shine right into our living area.

Lindsay: For me as a mom it is really concerning that all of these people are going to see not only in my yard but seeing that my kids room windows are open all the time. The other thing is our lawn is sloped so it is hard to keep the fence even at four (4) feet tall so it is taller because we were trying to keep a level top.

Justin: Just to be clear, we are not trying to make this six (6) feet. The only reason that it is higher than four (4) feet now is because we started at four (4) feet and to make a level fence we had to go with the lay of the land. We aren't asking to make all of this six (6) feet tall. Unless you want to, but if not we just want 56.5 feet of the NE corner to be six (6) feet tall. We've tried to follow the City ordinance of keeping it four (4) feet around the rest of the yard. We were not trying to break a City ordinance just to break a City ordinance because we wanted it, we understood that and we are trying to follow it. What we really want is 56.5 feet of our NE property to be able to have a six (6) foot fence. I'm not sure when this happened because it sounds like the previous restrictions on fences were stricter, but across the street there is 600 feet of six (6) foot chain link fence. I asked Mr. Henke if it mattered what kind of fencing was used, he said that it didn't matter it just couldn't be six (6) feet tall no matter what material was used to build the fence. The reason I'm pointing that out is because there is already 600 feet of six (6)

foot fence across the road. We are only asking for 56.5 feet to be six (6) feet tall for the safety of our children and our pets. We have four (4) children from six (6) to thirteen, and this is our yard. There is less than 10 feet of space in the back yard and it is a concrete slab and then there is a six (6) foot tall chain link fence that the church owns. If we had another option, we would take it in a heartbeat, but the way this house sits on this plot of land is really strange. I do not know why they tucked it in that corner and I'm sure ordinances now wouldn't allow a house to be that close to a property line, but we inherited that. This house was built in 1990. I did measure over in Bowden Fields and they have triple the space in the back.

Lindsay: Justin just covered number one (1) out of the five (5) we have to cover. So that helps us understand the unreasonable hardship just as far as people getting in and out of their cars they are literally touching us. Number two (2) There are special circumstances attached to the property that do not generally apply to other properties in the same district. I think you can see that this is a local road, but our circumstance where we have a church next to us to the north there is going to be 22 families living here, there is an elementary school and there is another property that is for sale that is zoned for duplexes as well. So even though we are on a local road we are in this really unique setting of all these high-density areas maybe not 24/7, but high density non-the-less. So, there is just this little piece where we just want a little bit of privacy for our kids to play and especially from the future exit that will be coming out of Alder Meadows Subdivision. That is my biggest concern. I feel that we can see the special circumstances how our house sits on the lot and we would have the four (4) foot fence everywhere but just in this little section we want it to be six (6) feet tall to have privacy especially since we have our windows open all summer.

Justin: Number three (3) it says, "Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone."

Lindsay: Most homes in our same zone they have a back yard, they have somewhere they can enjoy and feel that they live in a rural community, like Midway. So, we are just asking for that, we just want that little bit of privacy. Number four (4) "The variance will not substantially affect the general plan and will not be contrary to the public interest." The six (6) foot chain link fence across the street hasn't bothered anybody.

Justin: You can see here. We mailed out 38 letters and it was in the Wave for two (2) weeks and we have one person here and we have not yet heard from him and one person called Planner Henke and told him that they are for it and not against it. It's pretty clear that it is not a huge thing that we are asking, and I do not think that it is contrary to the public interest.

Lindsay: The last one number five (5) "The spirit of the zoning ordinance is observed and substantial justice is done." When I was writing this proposal I read through the land trust ordinance and I think that it is really great I appreciate it especially as a home owner right here when I know how this is (Alder Meadows Subdivision) potentially going to bring my home value down. I appreciate Midway trying to keep everything looking nice and safe, but I also feel like this is a special circumstance. We moved here because we wanted to raise our family here. We dedicated our lives to be here and it feels awful to me that I would be uncomfortable having my girls sleep in their bedroom at night and on a hot summer day because I do not want to have their window open because all these people lights are shining and can see that my little girls windows are

open on that bottom floor. It's my lifestyle that I moved up here for I want to be able to have my kids go play out in the yard without people seeing right through and see my kids right there.

Justin: The other thing is the spirit of the zoning ordinance observed and substantial justice is done. What comes to me is aesthetically pleasing, what it's doing to the town, what it's doing to the neighborhood. This home is not the prettiest architecture or style of home, it's ugly. Since we moved here we planted flowers painted the exterior we are going to put some siding on the front and the fence is a good-looking fence in my opinion. We are trying to improve the looks of this home. Somehow in 27 years no one has planted one (1) plant in this whole yard. We have dug out flower beds and have planted flowers, we are trying to make it as beautiful as we can. I care about my family and my dog and asking for 56.5 feet of six (6) foot fence when all these factors are into play doesn't seem like we are asking too much.

Member Crittenden: Planner Henke; regarding the slope and the grade. If they were to keep it to a four (4) foot fence does it allow for natural grade?

Planner Henke: It is my interpretation of the code is that it has to follow the natural grade. Otherwise people would build up their yards and you'd end up with even taller fences.

Member Griffin: Bowens; how long have you lived in your house?

Applicant; Lindsay: We bought the house in June 2016.

Member Griffin: When you decided to move to this house, I'm thinking about the due diligence. Your girls that you speak of were already here, so you were moving in as a whole family. So, these issues, did they not come to you at that time?

Applicant; Lindsay: I had this conversation with the realtor. I said there is no yard, we have to fence this yard. Can we fence this yard is that okay? We used to live in Cobble Stone over in Heber and they have a very strict HOA. I had HOA on my mind so I asked a lot of questions about building a fence. I asked that question if we could build a fence and the realtor said yes you can build a fence, but it has to be four (4) feet tall from that corner so people can see for safety. We were fine with that and we planned on doing that. The realtor said that if we want to do something then we will just have to get the approval of our neighbors because of the CCRs, they haven't met for years but you can do what you want because you do not have an HOA. I thought okay as long as we follow the City ordinances which I thought we were following by doing the four (4) foot fence all the way up to that corner where we want to have the six (6) foot fence.

Justin: We have become a little bit more knowledgeable on the City ordinances since then. I saw six (6) foot fences, I could take you there now. I've learned of the local and collector roads since then.

Lindsay: All a long Michie Lane is six feet tall fence, because eventually that will be a busy road. I knew that the only way that this house would work for us is if we fenced in our yard and we could provide that space for our kids.

Member Griffin: You mentioned landscaping. Have you considered doing more landscaping?

Justin: Yes, but in the ordinance a shrub and a fence is the same thing and either of them cannot be taller than four feet tall.

Member Griffin: Having done some of your due diligence the fence does look like a wall

I do not know if it is your intention to paint it, let it weather or whatever. I do not find any other fences that are solid, the chain link I cannot even see in the pictures in your neighborhood and granted your lot is different, but the point I'm making is that this was all known to you the church and school had certainly been there for a long time.

Justin: The six-foot fence was not known to us. I see them everywhere. I always knew on a corner you cannot have a six-foot fence on a corner because it is not safe. The thought of not being able to have a six-foot fence on our side yard never crossed my mind especially when there was a six-foot fence across the street six-hundred feet of it, ten times what we want.

Member Crittenden: Do we want to address the chain link fence and what it's future is. I'm assuming it is a non-conforming use.

Planner Henke: That would be my take right now. I don't know when the first fence ordinance was adopted by the City, I don't know what the year was. That chain link fence does look like it has been there for a couple of decades, it probably predates the zoning code though I am not 100% sure of that or maybe it was just ignored when it was put up. Most likely there are fences around town that are legal non-conforming, they don't conform with the code, but they predate the code. I'm assuming that is what that chain link fence is, but I can't say that it is a fact. This fence will be going away with the new development that is coming in. You are correct. You can go around town and see some fences that probably predate the code, but the ones that have gone up then we have enforced.

Justin: In my opinion a wood fence is a lot more aesthetically pleasing than an old nasty chain link fence.

Lindsay: We do plan on staining it, but we've been at a standstill. We cannot build our gates until we know how tall it is going to be. With regards to the due diligence see how close that six-foot tall chain link fence is, in my head I think why wouldn't it be allowed. Now I understand, but upon purchasing the home and seeing that six-foot-tall fence that is right across the street we thought that we could put in 56.5 feet of six-foot tall fence on our side yard.

Member Crittenden: We are bound by the rules, but I can see the frustrating situation that you are in. I think that a variance is not the best approach in your situation. Unless Midway decides to make this a collector road and that by allowing a six-foot fence on your side yard, but I think until that point some other approaches might be more suitable for you guys. Maybe you can talk to the City and the school and talk about some parking regulations for school pick up. That sound like that is a real nascence and a safety concern.

Lindsay: I've been to the elementary school and they told me that they have told the parents and students not to allow that.

Planner Henke: The City is planning on building Michie Lane this summer. Really the idea of making that road is that we do not have very many east/west connectors in Midway. The main one is Main Street. If we have a Swiss Days Parade or an accident, there really is no other way of getting around the center part of the City. For that reason, the City is going to spend over a million dollars on this road and hopefully that will alleviate some of that congestion in that area. Recently we have talked to the school district about possibly having a bus pull out along Michie Lane so that the busses never enter 2nd south north of the school.

Justin: We have four children it comes down to their safety and wellbeing. There are 22 homes coming into the north of us that are transient. They will never own these houses, they are privately held. They are transient and they are not going to be neighbors that you are going to get know real great because they will be in and out. A four-foot fence, I can literally step over that. The lay of the land and the way our house sits, I understand that this is a variance and that is why we are going through this whole process. If we are talking about these five criteria's it is pretty clear that we have shown that those five criteria are met. We are asking for 56.5 feet of six-foot fence. I can show you fences and shrubs that are taller than six feet tall. If we are going to do these rules and city ordinances, we have to do it all around. We cannot pick and choose. Our corner is a unique corner. If you see the amount of traffic that passes our house and the amount of cars that park on this corner, then you could see for yourself that this is a unique corner. There is no other corner like this in Midway. Our neighbors do not care that we are putting this fence up. It is clear that they do not care. We have sent letters out to them they've seen our fence for five months and none of them have said a negative thing.

Lindsay: I do not think that the busses are a problem. It doesn't matter where the busses go, it will not affect us. It is all of the parents that park on the road.

Justin: The other option is to have this road changed to a collector street, and that is not going to happen. This road was put as a local road before Bowden Fields, Fox Den and now Alder Meadow Subdivision was put in.

Member Crittenden: Maybe it would be a better approach to address a change in the code would be a better route. I feel like the real problem is the placement of the house on the lot, and it is pretty clear in the law that it does not justify a variance.

Justin: Nobody here is against this, and if they were they would be here. I have seen people when they are against something they fill up this room.

Planner Henke: I did get one call right in the beginning, probably the day after I talked to you Justin. Someone from your neighborhood did call and asked why a fence that tall was being allowed to be put up.

Justin: That was when all the posts were first set and they were seven feet tall. It is clear that this is not a huge deal to the neighbors. If they were against it they would be here, because I have seen it.

Lindsay: We were asked to prove these five things and with the wording in every single one I do feel like this is an unreasonable hardship this is about the safety and privacy of our children this is about our lot/house being different than any other house in our district. We want the privacy and enjoyment that everybody else in this same zone enjoys with their family. We appreciate the zoning ordinances and we want to make this house a beautiful place. I feel that we are just exactly the right candidates for this situation. To me we do have this unique circumstance. We are on this weird corner between the church, new transient housing and a school.

Board Member Tatton: You knew all of this when you bought the house. I agree with you that you might not have known about the fence, but that is the way it is sometimes.

Justin: You are right, but nowhere in those five things does it say that if you didn't know. It's saying that we need to tell you why those five things apply to us, that is the criteria of this.

Lindsay: When we knew that we were going to buy this house, this duplex was not in the plan.

Member Crittenden: From what I have seen of these duplexes they are going to be pretty nice and they will not fall under the low-income bracket. If I were you I would explore landscaping. You have a right to build a four-foot fence just as anyone else does and that is a buffer it's not as much as you'd like, it still creates a yard feeling.

Justin: Four-feet and six-feet are very close looking at it with necked eye. When someone is walking by or if a car is driving by, they can see over a four foot fence, but they couldn't see over a six-foot fence.

Lindsay: The difference between a four-foot fence and a six-foot fence to us is our kids having their every move seen or not.

Lindsay: When I read these five criteria's I thought this is us. We just want privacy for our kids because of the changes around us and because of the unforeseen things that we did not know were going to happen around us. This really matters to us, I dread summer with a four-foot fence and my girls will not sleep in their bedrooms I will not have them in a window wide open for 22 cars looking directly in their window I won't do it! This 56.5 feet that we are asking for is a big deal to us for a good quality of life.

Board Member Tatton opened the meeting to the public

Jamie Jespersen: I am for the fence I have lived there for 13 years I have always wondered why someone does not build a fence or landscaping on that lot. When they started putting in there fence I thought it was a good idea then they told me that they could not have a fence that high it through me in a loop. It will not block any traffic. I think it looks really good with the fence there. I personally would like to see a landscaped yard with a fence than a row of parked cars every Sunday or during school. I actually think that it helps with our property value. For the 13 years that I have lived here no one has done anything with this property. I have wondered how this house was able to be built so close to the fence line. This property has always been very unique because of that issue. I really do think that they inherited a unique property that should be looked at completely different. I'm not sure how this house was able to be built there. There is nothing that this fence is going to block that is going to affect any traffic. I want to see someone do something with that yard because it is a unique property and make it look good.

Jacqui Jespersen: Doesn't look like many people showed up. Thank you for being here. I'm a broker for a reality pad I sold the home on the corner across from the property that we are discussing tonight to a 91-year-old woman (Betty Sue Elliott) who I introduced to Board Member Tatton's mother (Judy) a little connection there. They have wondered what is going on with the new development as well and how that would pertain to Betty Sue Elliott's corner lot. I'm going to point out the history of the home and what we have seen since the Loertscher who I understand built the home. We've all talked about that it is unique and certain things that wouldn't fit to code now for some reason were able to do including setbacks and things like that. When the Loertschers sold this home is sat on the market for a while. Since then and seeing the different hands that it has gone through as far as who purchased the home how long it was on the market depending on what the market was doing in those different times. This home hasn't been one that is sold easy. There has been people renting the home, for instance owners coming in and thinking this is a good purchase per square foot, this is a screaming deal. These kind

neighbors come along and see this house and see potential and based off of that potential they bought the home. They were told good luck, we hope you're happy in your new home. It sounds like they looked for quite awhile. Once they bought the home, they got a little dog and we are animal people and so we seemed to connect with their dog before we connected with them. We knew their dogs name before we actually knew their name. They've gone through a lot of work to be able to build a six-foot fence there are things in place that sounds like you have to do in order to get a variance and they've done this. So, my question is what's the issue with getting a variance? As neighbors we've been a little checked out, but we see the growth and there is a feeling of holy smokes look at that field, there goes that field. Traffic has picked up; I can see from my home when I sit in my dining room or up in my bedroom just a rolling thing of traffic that just comes on through. What this has done for me personally seeing our neighbors they are really making something of this house. That is nice to see a family come in and take the time and have it as a home they want to raise their kids in instead of something they want to flip or rent. They opened my eyes through their struggles with just building a fence of I need to check in as a citizen as far as what is going on in my neck of the woods. Because of that I've signed on to Pure Midway. This is all from their fence, just some little thing and as a neighbor watching just a little spark of boy that doesn't seem right. It doesn't seem right this seems to be brought to my attention in a manner of other things have not including Alder Meadows. I've read the minutes and reviewed the history in terms of how it all played out. I think it will leave a scar or a dark mark, because that is so many units, that is such a high number of density. They have done everything they need to do, what they were asked to do and I don't see what a variance would hurt.

Board Member Tatton closed the public comment period

Member Tatton: Do any of the board members have additional questions? If not I'll entertain a motion.

Member Crittenden: I think there are other options that will address their hardship without changing the code.

Member Griffin: I feel that the solid fence is a barrier it changes the personality of that neighborhood. The growth issue that has been mentioned, that happens. I think there is another subdivision that is going to be happening to the south very quickly too. Perhaps there is a way to make the cul-de-sac a no parking zone or residence only parking from the City. The landscaping thing which we've brought up. I feel that a four-foot fence is better than no fence. I wish that we didn't even have to have a four-foot fence because nobody else has a fence.

Member Tatton: Is there anything else you would like to discuss?

Motion: Board Member Tatton: I find that there is no unreasonable hardship created by having a four-foot fence where it is required. I also find that there are no special circumstances to this property. I also find that there is no enjoyment of substantial property right being denied, granting a variance would affect the General Plan and be contrary to the public interest, I find that. I find that the zoning ordinances observed as

substantial justice is done. I also find that the fence is located within 30 feet of a right of way so the maximum height is to be four-feet. I also accept the staff report that was presented. I also agree with the findings and facts number one (1) two (2) and three (3) and also number four (4) the requirements to grant a variance by this board has not been met. Also, the fence that has been built is too high, it has to meet the four-foot. If you want to take this matter further and appeal the case it can be taken to the fourth district court in Heber City.

Seconded: Board Member Crittenden

Board member Tatton asked if there were any further discussion; there was none

Ayes: Board Members Griffin, Tatton Crittenden

Nays: None

Motion: Denied

ITEM: 2

Adjournment

Motion: Board member Crittenden: I move to adjourn our board of adjustment meeting.

Seconded: Board Member Griffin

Ayes: Board Members Griffin, Tatton Crittenden

Nays: None

Motion: Passed

Meeting end time: 7:30pm

Board Member - Rick Tatton

Admin. Assistant – Lindy Rodabough



BOARD OF ADJUSTMENT STAFF REPORT

DATE OF MEETING: June 4, 2019

NAME OF PROJECT: Bowen Fence Height Variance

NAME OF APPLICANT: Stephen Quesenberry, agent for Jeannette S. Higginson Trust and T & M Holdings LLC

AGENDA ITEM: Shared Driveway Variance

LOCATION OF ITEM: 1170 South Center Street

ZONING DESIGNATION: RA-1-43

ITEM: 2

Stephen Quesenberry, agent for Jeannette S. Higginson Trust and T & M Holdings LLC, is requesting a variance from Section 16.18.14 (C) regarding private driveways. City code allows five homes to be accessed from one driveway in a rural preservation subdivision, the applicant is petitioning for access to nine homes on one driveway. The property is located at 1170 South Center Street and is in the RA-1-43 zone.

BACKGROUND:

Stephen Quesenberry, agent for Jeannette S. Higginson Trust and T & M Holdings LLC, is requesting a variance for a property located at 1170 South Center Street. The petitioned variance is based on the number of homes that can be accessed from a shared driveway in a rural preservation subdivision. The applicant is proposing that nine homes are allowed to access from a shared driveway which is greater than the five homes that are allowed by the City's Land Use Code. The applicant feels there are special circumstances that apply to the property that should be considered in this situation which will be discussed later in this report.

The City's Land Use Code states the following regarding access in rural preservation subdivisions (staff has highlighted parts C. and E. because of their pertinence to the variance petition):

Section 16.18.14 Access

Each lot must have access from a private driveway that complies with the following standards:

A. A 20' wide gravel driveway is the minimum standard for non-shared driveways less than 80' in length.

B. Driveway standards for shared driveways or any driveway over 80' in length is a minimum of 20' wide gravel road base and must have 5' wide clear zones on both sides of the driveway.

1. If conditions exist that promote erosion and storm water discharge such as the length of the driveway, grade of the driveway, and or soil conditions of the surrounding area then the City Council may require the driveway to be paved.

B. 50' diameter turnaround located near the future dwelling.

C. Up to five homes can share one private driveway.

D. Each private driveway and shared private driveways must connect to a road built to City standards.

E. Private driveways must be located at least 200' from any other private driveway where the driveway connects to the City standard road.

F. Shared driveways located within a Rural Preservation subdivision plat shall be located on an easement that is at least 30' wide.

G. No gates are allowed on the shared driveway easements.

H. Proof of access from a public street to the boundary of a Rural Preservation subdivision must be submitted to the City with the subdivision application.

I. A Rural Preservation subdivision with a shared driveway shall record CCRs with the recording of the subdivision plat with a shared driveway maintenance plan.

As stated, the code does allow up to five homes to access from one shared driveway. The applicant is requesting a variance to allow nine homes on one driveway. The applicant feels there are special circumstances that should be considered with this request that justify the granting of a variance. He feels the hardship is because of UDOT's spacing requirements for driveway accesses to a UDOT road with the classification of Hwy 113. The spacing requirement is 500' between access points and the developer currently has two access points but is unable to develop a third because of UDOT's spacing requirements. Whereas the City's code, as previously stated, would allow a third access point because only 200' are required between access points. The applicant feels the he is unfairly burdened because of UDOT's spacing requirements for access.

The applicant feels that his situation is unique in nature and warrants the granting of a variance (please see the attached letters from the applicant that explains his reasoning.) A variance is a waiver or modification of zoning regulations made necessary because some unique aspect of a particular parcel makes application of the regulation burdensome or unfair. To justify a variance, a hardship must not be self-imposed or financial, and it must relate to a unique condition of the property. Importantly, it must not be personal in nature. For a variance to be granted five criteria from Utah State Code must be analyzed and **all** five of the following standards must be met:

1. Literal enforcement of the land use ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the ordinance.
2. There are special circumstances attached to the property that do not generally apply to other properties in the same district.
3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone.
4. The variance will not substantially affect the general plan and will not be contrary to the public interest.
5. The spirit of the zoning ordinance is observed and substantial justice is done.

These five standards will be discussed further in this report.

ANALYSIS & CONSIDERATONS:

Findings of Fact:

- The City allows up to five homes on one shared driveway.
- The City requires 200' distance between driveways where they connect to a public road.

- UDOT requires 500' distance between driveways where they connect to a public road.
- The developer has two access points that comply with UDOT standards.
- The developer desires to create 14 lots on 76.43 acres which requires, at a minimum, three separate driveways.
- UDOT's 500' driveway spacing requirement is based on safety of reducing access points to a state highway.
- Regardless of staff's feelings on the issue, the requirements that enable the Board of Adjustment to grant a variance must be met.

The following are issues that must be satisfied for a variance to be granted. The italicized statement is the staff opinion as to whether the item has been met.

1. Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance;

Literal enforcement of the code would create an unreasonable hardship for the applicant because the developer would not be able to create the proposed rural preservation subdivision even though the proposed subdivision would comply with all code requirements. The zoning ordinance and the City's General Plan promote open space and a rural atmosphere which is what the applicant is proposing therefore the general purpose of the zoning ordinance would be upheld.

2. There are special circumstances attached to the property that do not generally apply to other properties in the same district;

The special circumstances that apply to this property are UDOT's driveway spacing requirements. It is unlikely that any other rural preservation subdivisions will be proposed along a property with a large amount of frontage. The main advantage that the rural preservation subdivision gives is the ability for the developer to save money by not building internal roads but incases such as the property in question, which has over 1000' of frontage the developer will most likely use the existing frontage and not choose to develop using rural preservation standards. It seems that there will most likely not be another case where a rural preservation is proposed on a property with a relatively large amount of frontage. Most rural preservation subdivisions are proposed on properties with little or no frontage so it seems unique that this particular issue will most likely only impact this property.

3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district;

The applicant would like to subdivide the property which is a right shared by all property owners in the same district or zone. Granting the variance will allow the developer enjoy property rights like others in the same area.

4. The variance will not substantially affect the General Plan and will not be contrary to the public interest;

The General Plan promotes open space and a rural atmosphere which is what the applicant proposing through developing the property as a rural preservation subdivision. It is possible for the developer to propose a subdivision of, potentially, 114 dwellings. It appears to better comply with the community vision, a rural preservation subdivision will better comply with the general plan and will be in the best interest of the community. Also, by minimizing access points on to a state highway, the community will have a safer road as they travel past the development.

5. The spirit of the zoning ordinance is observed and substantial justice done.

The spirit of the zoning ordinance in regards to the number of homes on a shared driveway appears to be observed in the fact that a rural preservation subdivision will be created that will better comply with the vision as described in the general plan.

Burden is upon the applicant to prove to the Board that all requirements can be satisfied.

POTENTIAL MOTIONS:

Option 1 – Approval

“I move to grant the petitioned variance that allows nine homes to access from one shared driveway as described in the staff report and supporting documents.”

Findings:

1. The application has been noticed as a public hearing.
2. The request is consistent with the General Plan.
3. The request will allow the property owner to enjoy substantial property rights.

Conditions:

1. The developer will only be allowed to build the subdivision as proposed in the accompanying concept plan.

Option 2 – Denial

“I move to deny the variance that would allow nine homes to access from one shared driveway as described in the staff report and supporting documents:”

Findings:

1. The applicant has failed to comply with the five state code standards that allow a variance to be granted.
 2. The proposal is caused by a self-imposed hardship.
 3. The request is contrary to the public interest because of _____.
- _____.

Option 3 - Continuance

“I move to continue the proposed variance to another meeting on [DATE], with direction to the applicant and/or Staff on information and / or changes needed to render a decision, as follows:

1. _____
2. _____
3. _____

EXHIBITS:

Stephen Quesenberry Explanation Letter

Aerial Photograph

Rural preservation Concept Plan

Land Use Appeals and Variances Information Packet

STEPHEN QUESENBERRY

Stephen Quesenberry, LLC
Attorney at Law
1190 Spring Creek Place, A2
Springville, UT 84663
(801) 885-2872
steve@kittsgroup.com

May 13, 2019

Midway City
Board of Adjustments
c/o Michael Henke
75 N 100 W
Midway, UT 84049

Re: Explanation Letter

To Whom It May Concern:

The owners of the 68 acres at 1170 S. Center in Midway (the parcels to the west and south of the LDS church building) are in the process of requesting a rural subdivision on the property. The southern nine lots (i.e. those south of Snake Creek) are all on the same lane, which exits onto the highway (Midway Center Street). The applicable Midway code only allows 5 lots on a lane like this. The reason why there is only one access point for the 9 lots is UDOT access restrictions, which only allow one access point onto the highway every 500 feet. There is an existing paved access for the LDS church on the north side of Snake Creek which will provide access to the four proposed lots, but with the restrictions by UDOT, only one more access to the 68 acres is allowed.

Literal enforcement of the ordinance would cause an unreasonable hardship for the owners. The rural subdivision, which preserves the open look of the 68 acres (with a total of 13 lots rather than the 100 that had been previously submitted) is desirable and within the look and fee that Midway wants. Given the existing road that serves the LDS church building, along with the UDOT access rule, there is really no other option, and the choice to build only 9 lots on this road is very reasonable.

There are special circumstances created by the existing entrance combined with the UDOT access rules, which only allow the one additional access. Normally, this would not be the case.

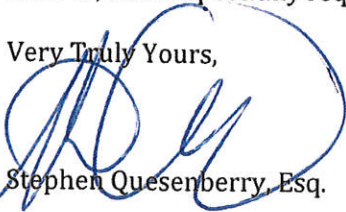
Granting this variance is essential to the owners being able to develop this small rural subdivision which is in harmony with neighboring uses- it preserves forever a "country" and open look and use of this land, which is what exists in the area.

The variance will not substantially affect the General Plan and is not contrary to the public interest. In fact, this variance helps keep a 68 acres piece of land very rural, forever, which is exactly what Midway and the public would like to see. Having a beautiful rural subdivision on this land is very much in the public interest, and consistent with Midway city goals in the area. It showcases Snake Creek instead of it running through a large subdivision of small lots.

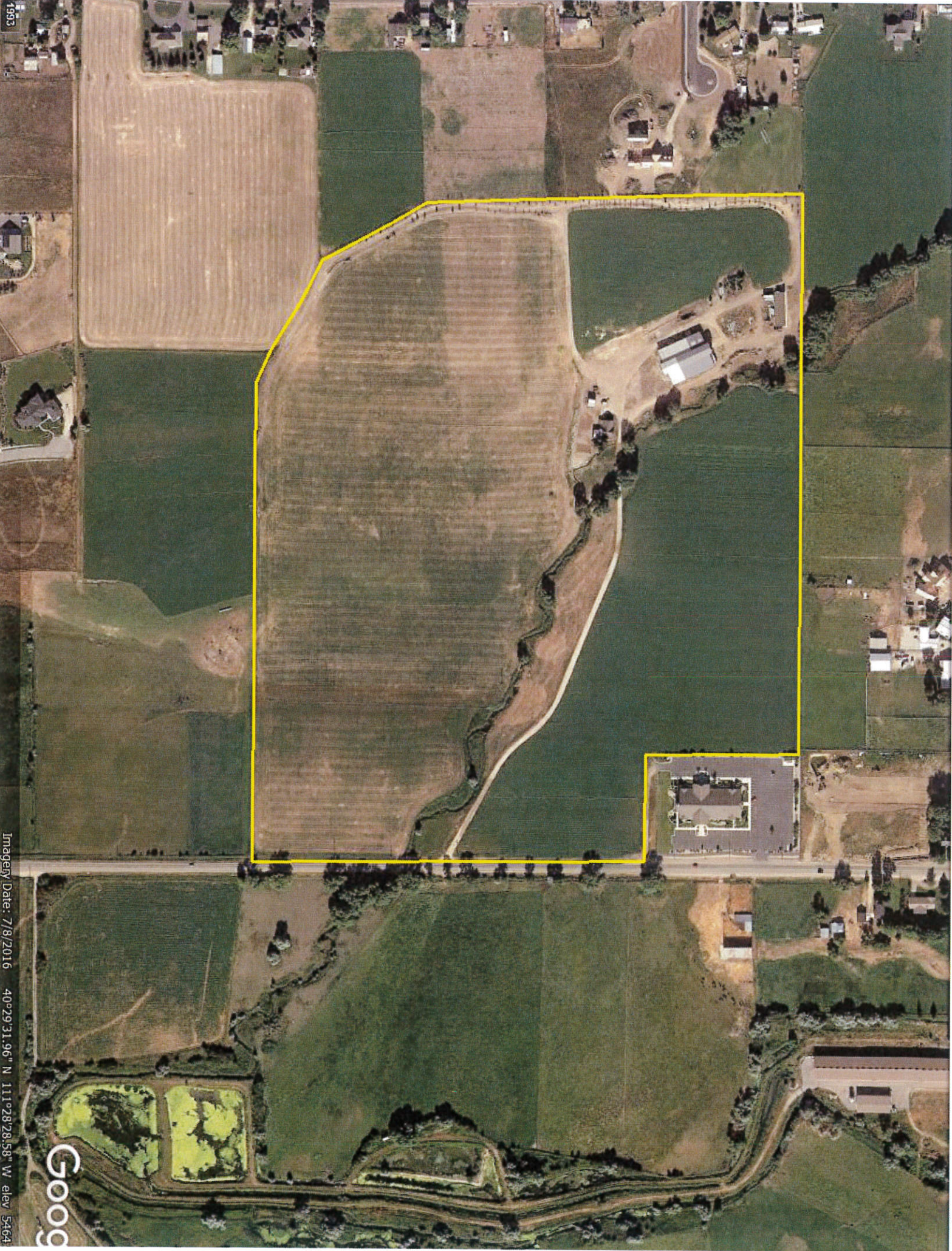
The existing ordinance allows 5 lots on a single access, and allowing 4 more on such a large parcel of land in in harmony with the land use ordinance and allowing this is just and right.

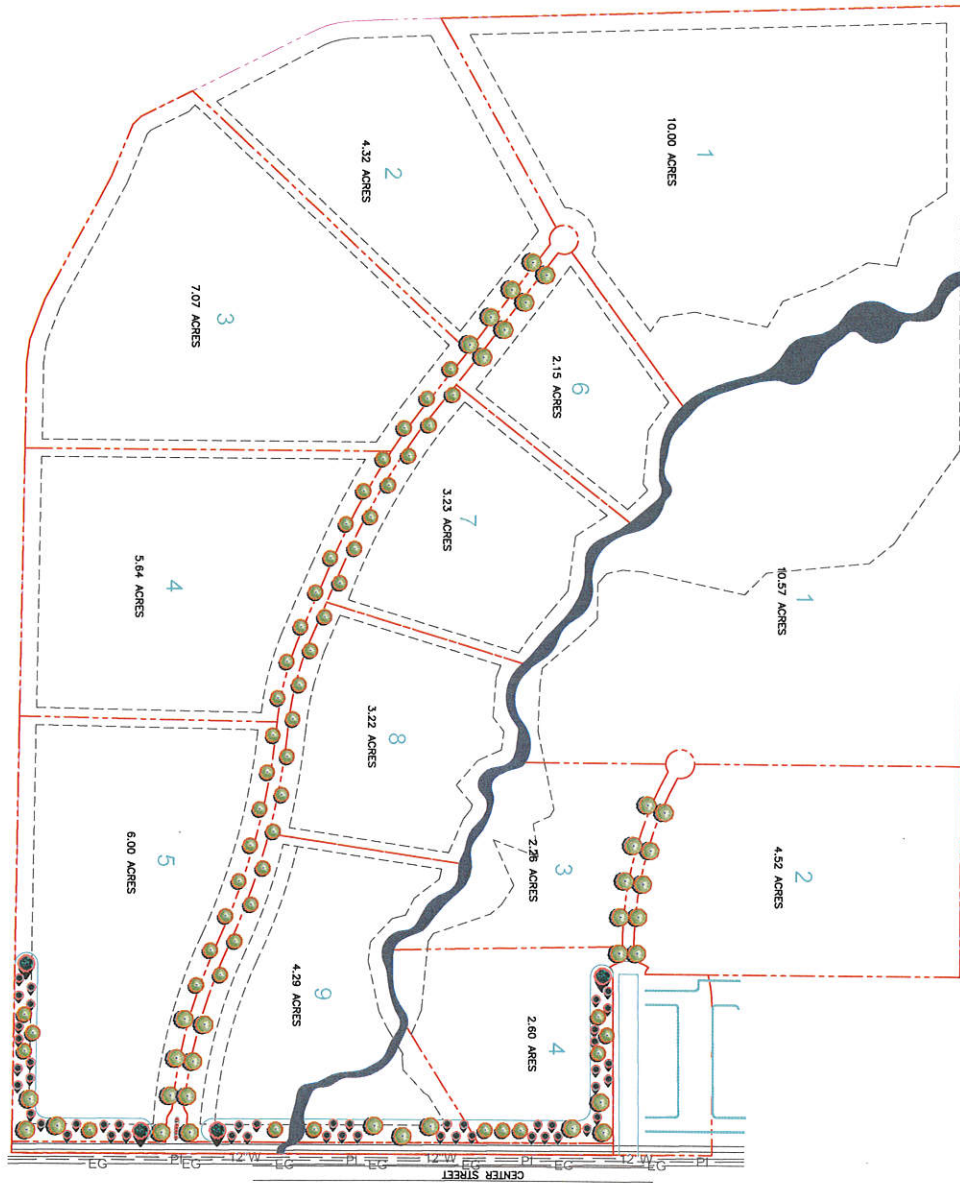
We are grateful for the opportunity to create a beautiful rural subdivision that will be there forever, and respectfully request this variance.

Very Truly Yours,

A handwritten signature in blue ink, appearing to read "Stephen Quesenberry", is written over the closing "Very Truly Yours,".

Stephen Quesenberry, Esq.





HAVEN FARMS



DECORATIVE
LANDSCAPING

design | build | sustain

SHEET TITLE:
LANDSCAPE CONCEPT

SCALE:
1" = 200'

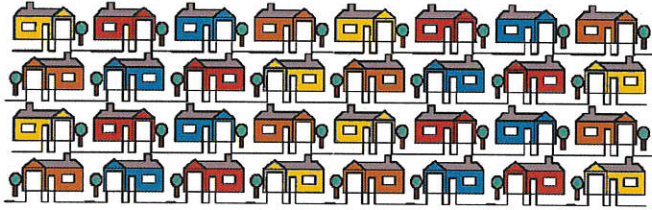
DESIGNER:
DECORATIVE ENT.

ADDRESS:
MIDWAY, UT

DATE:
3/18/19

SHEET NUMBER:
1.0 - 11x17

LAND USE APPEALS AND VARIANCES



Origin of land use appeals

It was during the drafting of the first comprehensive zoning ordinance in the United States (New York City in 1916) that the concept of a board of zoning appeals was originated. It had become evident to the drafters that no ordinance attempting to regulate land use could be written in a way that anticipates all of the unusual circumstances or conditions that may exist. A process for granting relief from any injustices that may arise in the strict application of standards was needed. The concept of a board of appeals was that it will be a quasi-judicial function to review practical difficulties or unnecessary hardships created by the strict application of land use regulations.

The model state enabling code that was developed in the 1920s by the U.S. Department of Commerce for use throughout the country, suggested the term "board of adjustment" or "board of zoning appeals." The code recommended that an appeal board be required whenever a community adopts a zoning ordinance. Provisions for the establishment of boards of adjustment were incorporated into Utah State enabling statutes for zoning for cities and towns in 1925, and for counties in 1941.

Utah enabling acts

In 2005, the Utah Legislature adopted a revised *Land Use Development and Management Act*. The Act modified the previous planning and zoning enabling statute that was introduced in 1991. The purpose of the 1991 modifications was to up-date the earlier enabling statutes to bring the language closer to current practice and to draw the enabling language for cities and counties to resemble each other more closely. These objectives were accomplished. The 2005

revisions offer greater flexibility in the treatment of appeals and variances.

Land appeal authority based upon planning commission recommendation

Utah Code Sections 10-9a-302/17-27a-302, provide that the planning commission (city, countywide or township) shall make a recommendation to the legislative body for:

an appropriate delegation of power to at least one appeal authority to hear and act on an appeal from a decision of the land use authority.

The primary purpose of the land use appeals board is to allow a variance from regulations to a property owner who may suffer because a physical limitation or abnormality of a particular parcel of property unfairly precludes a use that is enjoyed by all other properties in the same zoning district. These are properties so uniquely circumstanced by physical limitations that there exist practical or real difficulties in conforming to the applicable zoning regulations. The boards are also empowered to hear appeals from disputed decisions based upon land use regulations.

Function and purpose

An appeals board is not granted legislative authority to substitute its judgment for that of the legislative body, nor is it charged with the routine administration of the zoning ordinance. The board must uphold the meaning and the spirit of the zoning ordinance as enacted by the legislative body, even if its members may disagree with the governing body's judgment as to the proper content of the ordinance. Where particular provisions of the ordinance seem to lead to uncertainty or injustice, the board should recommend to the planning commission and governing body that the ordinance be amended.

Unfortunately, it has been quite common for local governments to ignore or misinterpret the state legislative requirements regarding appeal board authority. This generated a spate of decisions from Utah courts, including the Utah Supreme Court, during the 1980s that have redirected attention to the purpose and authority of the board.

LAND USE DEVELOPMENT AND MANAGEMENT ACT

Title 10- Chapter 9a - CITIES, and Title 17- Chapter 27a - COUNTIES PART 7 Appeal Authority and Variances

(Part 7 for both titles is reprinted in full in the Appendix to this handbook)

***THE LAW DESCRIBING THE LAND USE APPEAL AUTHORITY
MUST BE STUDIED VERY CAREFULLY -THE APPEAL AUTHORITY
CAN BE MISUNDERSTOOD AND MISUSED.***

An appeal authority is required for all local governments that have adopted a land use ordinance (zoning, subdivision, etc.)

10-9a-103/17-27a-103, Definitions

(2) "Appeal authority" means the person, board, commission, agency, or other body designated by ordinance to decide an appeal of a decision of a land use application or a variance.

10-9a-701/17-27a-701 - Appeal Authority required

(1) Each municipality [county] adopting a land use ordinance shall by ordinance establish one or more appeal authorities to hear and decide:

- (a) requests for variances from the terms of the land use ordinances; and*
- (b) appeals from decisions applying the land use ordinances.*

The appeal authority and its procedures must be created by local ordinance

(2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.

The conduct of an appeal authority

(3) An appeal authority:

(a) shall:

(i) act in a quasi-judicial manner; and (ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances; and.

(b) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.

Quasi-judicial manner

An appeal authority is not a court of law; however, its hearings and discussions must follow many of the procedures practiced by a judicial court. The boards hold public meetings on matters for which they are authorized, avoid ex parte contacts, and provide opportunity for cross examination. Its records are frequently used in subsequent judicial proceedings, therefore, it is important that the hearings of the board be conducted with dignity and with an established procedure. The board must review and draw conclusions from facts presented by the complainant regarding a specific parcel of property following procedures that resembles those that are followed by a court of law. The proceedings of the meetings must be recorded completely and accurately and a permanent public record, in writing, maintained. Because of the nature of its function it is important that each member of the board, or an alternate, be present at all hearings.

Final Arbiter

A decision by the authorized local appeal authority shall be the final step of the local appeal process.

Separation of powers

There may be a temptation to appoint a member of the planning commission or the city or county legislative body to a dual membership on the appeal board. Subsection (b), above, clarifies the importance of assuring that an individual appeal authority, or member of an appeal board, is not passing judgment on a decision in which that person participated as a decision-maker. A member of the planning commission or city or county council may have a conflict of interest with the many issues that come before an appeal board that are an appeal from a decision of the planning commission.

It is sometimes recognized as useful to have a member of the planning commission in attendance at the board meetings. A planning commission member may be able to explain or interpret planning commission actions or objectives. A possible resolution would be to appoint a member of the planning commission or council as a non-voting member of the appeal board.

With respect to the involvement of members of the legislative body in the deliberations of an appeal board, it must be remembered that there is a *separation of powers* in local government. The board is an administrative agency that also performs quasijudicial functions. The legislative body must not interfere with board decision-making. It is not advisable for a member of the legislative body to serve also as a member of the board of adjustment.

More than one appeal body is possible

(4) *By ordinance, a municipality [county] may:*

(a) *designate a separate appeal authority to hear requests for variances from the appeal authority it designates to hear appeals;*

(b) *designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions ...*

Subsection (1), above, provides that the appeal authority is created to hear and act upon requests for variances and appeals of decisions applying land use regulations. The planning commission may recommend an authority with the responsibility to confront both variances and appeals - much as the former board of adjustment. By Subsection (4)(a) the planning commission is granted the option to recommend two authorities, one that will focus upon variances and the other to decide appeals. This subsection also implies the option of delegating the appeal authority to a knowledgeable individual who would function similarly to an administrative judge.



Variances

The term "variance" has been interpreted as a variation from the land use ordinance that can be issued at will by an appeal board. It should be noted at the outset that a variance has a special legal meaning and can only be issued under certain circumstances. Sections 10-9a-702 and 17-27a-702 are identical. This section should be reviewed very carefully.

Essentially, a land use variance is a modification of regulations contained in the land use ordinance allowed in order to provide relief to a property owner in cases where the ordinance imposes *undue hardship* or *practical difficulties* to the property owner in the use of land. The hardships must not have been created by the actions or omissions of the landowner, or a previous landowner.

Generally, in the law, there are two kinds of variances: variances for minor departure from the ordinance, and use variances which involve changes in land use rather than just modifications of land use regulations. The Utah Supreme Court, in the case of *Walton v. Tracy Loan & Trust Co.*, 92 P2d 724 (1939), confirmed that the board of adjustment (appeal board) in Utah has jurisdiction only in cases of variances for minor departures from the regulation. The court strictly prohibited the board from granting variances of land use, i.e., use variances. This rule is often overlooked or abused by boards.

Approving a "variance" to allow a rental apartment in a single family house in a single family district, for example, would constitute a "use" variance - and thus an abuse of the authority of an appeal board.

 The statutory language provides that each of the following five basic criteria for a variance must be satisfied before a variance can be approved:

10-9a-702/17-27a-702 Variances.

- (2) (a) The appeal authority may grant a variance only if:**
- (i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinance;**
 - (ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;**
 - (iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;**
 - (iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and**
 - (v) the spirit of the land use ordinance is observed and substantial justice done.**

Some of the definition problems for the courts have been with the term "unreasonable hardship." Courts have interpreted this phrase to mean that if the property owner complies with the provisions of the ordinance, he or she must be able to demonstrate an inability to make reasonable use of the property. The definition of hardship that is recognized by the law does not allow for special privileges. The board is without authority to grant a request for a variance that is based upon a personal hardship. The hardship must relate to the property, not to the owner or user. The following are factors which have been used by courts to determine if a land user has incurred undue hardship that qualifies for consideration of a variance:

The difficulties encountered must be caused by conditions unique to the property in question. If the hardship is common to several properties, the variance cannot be granted. The proper remedy under such circumstances is a land use amendment.

The property owner cannot create the hardship. An example would be a home built too close to the property line when the site plan showed a proper setback. This applies although the illegal structure may have been constructed by a previous landowner; it applies also if the structure was constructed without a building permit.

The hardship must result from the application of a land use ordinance, not from the operation of a deed restriction or some other disability of the property.

A potential for economic loss, or something less than the maximum potential economic return to the property user, are not considered hardships by this definition.

The proposed modification must not alter the essential character of the area and must not be in conflict with the general plan.

Thus, “hardship” means more than just personal inconvenience. The courts have interpreted hardship very narrowly. Since use variances are not allowed, variances can only be applicable in those cases where the owner, because of odd-shaped lots or lot remnants, is unable to meet the dimensional standards of the land use ordinance. It should also be noted that special restrictions can be imposed in those cases where a variance is granted. The main purpose for the variance is to serve as a safety valve in those areas where a landowner incurs a hardship as a result of the application of the land use regulations. If the issuance of a variance for relief from the strict application of regulations were not allowed in the face of legitimate hardship, many land use ordinances would probably be held by the courts to be unconstitutional.

Case Study – In the case of *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P2d 1032 (1984), the Utah Supreme Court dealt with standards of judicial review of a decision of a board of adjustment, but also expressed its interpretation of “hardship”:

Therefore, in order to justify a variance, the statute requires that the applicant show at a minimum that the variance would not substantially affect the comprehensive zoning plan; that there are special conditions with regard to the property; that unnecessary hardship would result if the variance were not granted; and that substantial property rights enjoyed by other property in the area would be denied.

It is not enough to show that the property for which the variance is requested is different in some way from the property surrounding it. Each piece of property is unique. What must be shown is that the property itself contains some special circumstance that relates to the hardship complained of and that granting a variance to take this into account would not affect the zoning plan.

The evidence adduced does not support respondent's claim of special circumstance. The property is neither unusual topographically nor by shape, nor is there anything extraordinary about the piece of property itself.

Variances that are granted should be recorded with the deed in order that the nature of the variance, and any conditions imposed with the variance, will run with the land and will be a continuing obligation of all subsequent landowners.

The City of West Valley City offers a checklist to potential applicants for a variance. Applicants are asked to determine if their request is justifiable or not by considering the following examples:

VARIANCE REQUESTS THAT MAY BE JUSTIFIABLE

An extra wide utility easement which interferes with the buildable area of a lot may justify encroachment into a required yard area.

Unusual size, shape or topography of a lot may justify some variance from what would normally be required under the ordinance.

VARIANCE REQUESTS THAT ARE NOT CONSIDERED JUSTIFIABLE

A hardship is not a problem that the property owner creates. For instance, if the house is built in such a manner that you cannot expand the living room without encroaching into a required yard, you will be creating the situation/problem and the ordinance does not recognize that as a legitimate hardship. Likewise, the fact that it might cost you less money to add an extension in a required front yard rather than adding to the house where the addition would be permitted out right, is not a hardship.

The important point is whether the owner is deprived of property rights, not desires. Financial hardship is not considered a legitimate reason for seeking a variance, nor are personal health situations.

Often you will not be aware of the fact that your proposed addition or other desired improvements do not comply with city ordinances until you apply for a building permit. The staff of the Planning and Zoning Department will work with you if it is determined that you have a justifiable hardship situation. You will be assisted in making application to the appeal authority.

In the granting of the variance, the board must take care to assure that the public safety and welfare are preserved and that substantial justice has been done. The board of appeals has an especially high calling to serve as an advocate of the public interest. The board should place great importance upon this consideration, rather than looking upon its duties as that of simple arbitration of disputes among private parties.

The board should consider and anticipate the potential impact of any proposed variance upon neighboring properties. Experience has shown that in many cases, variances are in reality requests for special favors that, if granted, could negate the intent of the ordinance. In such cases, the board should suggest that the applicant approach the planning commission and request an amendment to the ordinance.

Important points relative to variances (from 10-9a-702/17-27a-702):

- The applicant shall bear the burden of proving that all of the conditions

- justifying a variance have been met;
- Variances run with the land;
- The appeal authority may not grant a use variance;
- In granting a variance, the appeal authority may impose additional requirements on the applicant that will:
 - (a) mitigate any harmful affects of the variance; or
 - (b) serve the purpose of the standard or requirement that is waived or modified.

Appeals

County and municipal boards are authorized to hear appeals to decisions or orders of a land use authority when a person or entity is adversely affected by a decision administering or interpreting a land use ordinance. When a person is aggrieved by a decision of an official charged with the enforcement of the land use ordinance, the person so aggrieved should file a petition directly to the appeal authority for hearing. Recourse beyond the appeal authority is to the court of competent jurisdiction.

When considering cases of interpretation, the board should first determine the facts and then apply what it thinks is the proper interpretation of the ordinance. For instance, where there may be some question as to the exact interpretation of the language in the ordinance on the basis of which the enforcement officer is denying a particular use, the board should make every effort to determine the legislative intent of the text of the ordinance prior to making its decision. In all cases the board must be guided by the *intent* of the ordinance, and must reach a judgment doing its best to uphold fairness and equity within the general purpose of the land use ordinance.

There are often problems that are brought to the city or county offices for board of appeals consideration that are relatively routine and can be resolved by administrative staff. Guidelines for making such determinations must be clearly outlined and adopted. The decisions of the administrator as provided here can be appealed to the board of appeals.

ETHICS OF THE MEMBERS OF THE BOARD OF APPEALS

The expectation of ethical behavior by a member of a planning commission, or governing body, applies equally to a member of a board of appeals. A section of the handbook entitled *Planning Commission* provides a description of the basic subjects of "Conflict of Interest," "Gifts and Favors" and "Political Activity." The main points are repeated here.

Conflicts of Interest

A board member to whom some private benefit may be derived as the result of a board action should not be a participant in the action.

- The private benefit may be direct or indirect, create a material personal gain or provide an advantage to relatives, friends or groups and associations which hold some share of a person's loyalty. Mere membership itself in a group or organization, however, shall not be considered a conflict of interest as to board action concerning such group or association unless a reasonable person would conclude that such membership in itself would prevent an objective consideration of the matter.
- Board members experiencing a conflict of interest, should declare their interests publicly, abstain from voting on the action and excuse themselves from the room during consideration of the action. The vote of board members with a conflict of interest who fail to disqualify themselves shall be disallowed.
- A conflict of interest may exist under these rules although a board member may not believe he or she has an actual conflict; therefore, a member who has any question about a conflict of interest under these rules should raise the matter with the other board members and the county or city attorney's office in order that a determination may be made as to whether a conflict of interest exists.
- No board member should engage in any transaction in which that member has a financial interest, direct or indirect, unless the transaction is disclosed publicly and determined to be lawful.
- Board members should not become personally involved in cases presented before the board. If an applicant should attempt to discuss a pending matter with any board member outside of an official meeting, the board member should advise the applicant that if the applicant persists it will be necessary for the board member to abstain from voting. Ex parte communications (relevant information sent directly to a member) or information received by a board members should be made public by the board member who was contacted.
- Public officials making appointments to the board of appeals should not attempt to exclude whole categories or associations of business, professional, or other persons in anticipation of conflict of interest problems. The service of competent people of

good character need not be sacrificed. Their withdrawal from participation in board matters is necessary only in those specific cases in which a conflict of interest might arise.

Gifts and Favors

Gifts, favors or advantages must not be accepted if they are offered because the receiver holds a position of public responsibility. Even small gifts that come in the form of business lunches, calendars or office brick-a-brac may arouse suspicion. The best rule to follow regarding gifts and favors is this: In cases of doubt, *refuse*. In cases of even marginal doubt, *refuse*.

Treatment of Information

It is important to distinguish between information that belongs to the public and information that does not.

- Reports and official records of a board of adjustment must be open on an equal basis to all inquiries. Information should not be furnished to some unless it is available to all.
- Information or private affairs learned in the course of performing board duties must be treated in confidence. Private affairs become public affairs when an official action, such as a variance or an appeal is requested. Only then is a disclosure of relevant information proper.
- Prearranged private meetings between a member of a board of adjustment and applicants, their agents, or other interested parties are prohibited. Partisan information on any application received by a member whether by mail, telephone, or other communication should be made part of the public record.

Political Activity

Membership in a political party and contributions to its finances or activities are matters of individual decision and should neither be required of, nor prohibited to, members of the board of adjustment. The extent of participation in political activities should be governed by professional judgment as well as limited by an applicable civil service law or regulations.

These rules for ethical conduct should serve as a guideline for all board members. Because each situation is unique, a board member should use his/her best judgment. All decisions made by the board of adjustment *must* be conducted with total fairness.

THE IMPORTANCE OF MAKING AND KEEPING GOOD RECORDS



The records of the proceedings of the board will form the basis for the district or higher court's review of its actions. Care should be taken, therefore, to ensure that all pertinent information is included in the record. This information should include evidence of proper notice for the case, as well as all evidence upon which the board based its decision. As an example, the board may have been required to show that its decision would not have adverse impacts on neighboring property. Their consideration should go beyond a statement in the proceedings that the decision did not appear to have adversely affected a neighbor's property.

Where the record is not sufficient, the court may refer it back to the board for clarification, or the court may be forced to rehear the case. Either way, delays and embarrassment will occur if records of the board's proceedings and findings are inadequate.

NOTE - The Open and Public Meetings Act provides that "only written minutes shall be evidence of the official action taken..."

Case Study – The need for the board to follow its decisions with a clear and concise explanation was abundantly illustrated by the decision by the Utah Court of Appeals in the 1997 case of *Pamela Wells, et. al. vs. Board of Adjustment of Salt Lake City Corp.*, Case No. 960347-CA, 1997. A restaurant owner acquired an old fire station building in Salt Lake City and converted it to a restaurant. The half of the block on which the building is located is zoned for commercial; the other half of the block, separated by an alley, is zoned residential. The zoning ordinance required a rear set back of ten feet for commercial uses, and where the commercial lot abuts residential, the ordinance requires that the rear yard become an unobstructed, landscaped buffer.

The owner applied to the Board of Adjustment for a variance to allow them to construct an enclosure for the dumpsters in the setback area. The Board held a hearing on the application. The applicants testified that the restaurant needed two dumpsters, and that they had been in that location without the enclosure for a period of time. Residents of the area protested the application. The residents testified that they believed that any hardship suffered by the restaurant was the result of its own success rather than any difficulty with the lot. The residents alleged that the owners had failed to make adequate provisions for the

dumpsters during remodeling. It was pointed out also that the restaurant's dilemma was not unique to this lot; other business in this zone district were faced with the same requirement. The Board granted the variance.

The Board found that "the neighborhood would be better served by addressing the garbage issue and that only available space should be used as a buffer after both dumpsters are enclosed." The Board made no other express findings.

Residents took the case to the District Court. The Court granted summary judgment in the Board's favor. The Courts decision was appealed to the Court of Appeals. The Court of Appeals reversed the District Court and provided the following conclusion:

We conclude the Board's decision to grant the variance was illegal because the Board failed to make the required statutory findings. In addition, even assuming it silently made these statutory findings, the Board's decision was also arbitrary and capricious because it was not supported by substantial evidence. We therefore reverse the trial court's order granting respondents' motion for summary judgment and vacate the Board's decision granting the restaurant's variance.

MISUSE OF THE APPEAL AUTHORITY

Board members must be willing to place commitment to the rule of law above personal relationships, or fear of criticism!

The discussion of appeal authority would not be complete without some discussion of the potential for misuse of the authority. Board members must be careful to keep focused on the broad public interest, avoiding favoritism or bias that may lead to financial gain or advantages for family or acquaintances. There are often instances, especially in smaller communities, in which a board member must confront a neighbor, friend or relative who has a request that is very difficult to turn down. A person should not accept an appointment to an important public decision-making body without the awareness that while functioning in that role, they are committed to carrying out the letter of the law and representing the public interest. If the personal relationship is stronger than that commitment, the board member should acknowledge that there is a conflict of interest and withdraw from deliberation.

There may be an inclination on the part of board members to attempt to cure an individual's problem, when often such efforts are not in the interest of the public in general. Some observers of the function of boards of appeal have observed that over the years if all variances issued by the boards were carefully scrutinized, a very high proportion of them would be found to be invalid.

An appeal body does not have legislative power. For that important reason, it may not amend a land use ordinance or disregard its provisions.

Boards have limited powers and must act within the limits of those powers granted to it by the enabling act and the local land use ordinances. It is true also, that the powers granted to an appeal authority by the enabling statutes cannot be arbitrarily transferred to another agency.

The board should not attempt to amend the land use ordinance through its decisions. To attempt to do so would be an unauthorized assumption of legislative authority. The cases in which the courts have challenged actions of an appeal board as an attempt to exercise forbidden legislative powers are primarily cases where the board has granted variances in which the evidence presented would not support the claim of the property owner stating his circumstance, or in which the spirit of the ordinance would not be observed, nor public safety and welfare secured or substantial justice done.

Where the evidence does not reveal that a hardship exists or that it is unique to the specific property but arises through conditions which are common to other properties in the area, an attempt by the board to grant a variance would be equivalent to relieving the situation by amending the land use ordinance and that is a function reserved to the legislative body.

Variances should be granted only on an individual lot basis.

Another example of misuse of the power to grant variances is where the subject property embraces a large area and a petition for a change in zoning was denied. It is assumed that a large enough area and its surrounding conditions were considered by the legislative body and that the correct and appropriate zoning was enacted in the zoning ordinance at that time. A variance granted with respect to such a large area may affect substantial change in the comprehensive plan adopted for the community by the legislative body and would be contrary to the spirit and intent of the ordinance.

A legislative body cannot assume the role of the board of adjustment

A strictly legislative body cannot displace the board of adjustment in issuing variances. In municipalities in which there is a strong mayor-council form of government, constituting a clear separation of powers, the city council cannot be empowered by the local ordinance to assume the responsibilities of the board of adjustment. The Utah Supreme Court in the case of *Chambers v. Smithfield City*, 714 P2d 1133 (1986), interpreted Utah Code as expressing a clear legislative intent to vest the authority to grant variances solely with the board of adjustment. The Smithfield ordinance that was the issue in that case required that variance requests be submitted to both the board of adjustment and the planning commission, with appeal to the city council. The court found that the

city's procedures conflicted with the enabling act by vesting the city council, rather than the board of adjustment, with the final authority over the determination whether or not to grant variances.

The point of law was emphasized again in the case of *Scherbel v. Salt Lake City Corp.*, 81 Utah Adv. Rep. 15 (1988), where the Utah Supreme Court stated, "We therefore hold that the board of adjustment is the proper body to hear zoning appeals from the planning commission under the council-mayor form of government."

It should be repeated here that the statute authorizes a municipal government to designate a body other than the board of adjustment to hear appeals from the planning commission regarding conditional uses (but the amendment did not include variances). Such body could be the city council.

The board of adjustment may not change specified uses and may not alter boundary lines of zoning districts. The board cannot alter the uses intended within a zone; it cannot grant a "use" variance. The board also may not change the boundary lines of the zoning districts on the zoning map.

The board of adjustment cannot pass judgment on the validity of the zoning ordinance or the reasonableness of a legislative determination with respect to the restrictions placed upon land within the community. In an application to the board of adjustment for a variance, the applicant is conceding for the purposes of the application that the ordinance is valid.

SUMMARY

The process of land use administration requires enlightened and sound judgment because of its importance to the conduct of local government. The intent of the legislative body and planning commission to guarantee orderly and meaningful growth can be inhibited if the authority of the land use appeal authority is either misunderstood, misused or under-estimated. In order to preserve and enhance the proper function of local government as it relates to the regulation and determination of land conversion, it is necessary for each office of local government to understand its own role, as well as its relationship to the other branches and agencies. When these relationships as described by state statute and local ordinances are violated by the parties involved, mistrust, confusion and poor government administration will result. This can only destroy the intent of government to serve its people, as it may become government by whim rather than government by law.

APPENDIX

Utah Code Land Use Development and Management Act

Title 10, Chapter 9a - Municipalities

10-9a-701. Appeal authority required -- Condition precedent to judicial review -- Appeal authority duties.

- (1) Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide:
 - (a) requests for variances from the terms of the land use ordinances; and
 - (b) appeals from decisions applying the land use ordinances.
- (2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.
- (3) An appeal authority:
 - (a) shall:
 - (i) act in a quasi-judicial manner; and
 - (ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances; and
 - (b) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.
- (4) By ordinance, a municipality may:
 - (a) designate a separate appeal authority to hear requests for variances than the appeal authority it designates to hear appeals;
 - (b) designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions;
 - (c) require an adversely affected party to present to an appeal authority every theory of relief that it can raise in district court;
 - (d) not require an adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of the adversely affected party's duty to exhaust administrative remedies; and
 - (e) provide that specified types of land use decisions may be appealed directly to the district court.
- (5) If the municipality establishes or, prior to the effective date of this chapter, has established a multiperson board, body, or panel to act as an appeal authority, at a minimum the board, body, or panel shall:
 - (a) notify each of its members of any meeting or hearing of the board, body, or panel;
 - (b) provide each of its members with the same information and access to municipal resources as any other member;
 - (c) convene only if a quorum of its members is present; and
 - (d) act only upon the vote of a majority of its convened members.

10-9a-702. Variances.

- (1) Any person or entity desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest may apply to the applicable appeal authority for a variance from the terms of the ordinance.
- (2) (a) The appeal authority may grant a variance only if:
 - (i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;
 - (ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;
 - (iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;
 - (iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and
 - (v) the spirit of the land use ordinance is observed and substantial justice done.

- (b) (i) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship unless the alleged hardship:
 - (A) is located on or associated with the property for which the variance is sought; and
 - (B) comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.
- (ii) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic.
- (c) In determining whether or not there are special circumstances attached to the property under Subsection (2)(a), the appeal authority may find that special circumstances exist only if the special circumstances:
 - (i) relate to the hardship complained of; and
 - (ii) deprive the property of privileges granted to other properties in the same zone.
- (3) The applicant shall bear the burden of proving that all of the conditions justifying a variance have been met.
- (4) Variances run with the land.
- (5) The appeal authority may not grant a use variance.
- (6) In granting a variance, the appeal authority may impose additional requirements on the applicant that will:
 - (a) mitigate any harmful affects of the variance; or
 - (b) serve the purpose of the standard or requirement that is waived or modified.

10-9a-703. Appealing a land use authority's decision.

The applicant, a board or officer of the municipality, or any person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may, within the time period provided by ordinance, appeal that decision to the appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance.

10-9a-704. Time to appeal.

- (1) The municipality shall enact an ordinance establishing a reasonable time of not less than ten days to appeal to an appeal authority a written decision issued by a land use authority.
- (2) In the absence of an ordinance establishing a reasonable time to appeal, an adversely affected party shall have ten calendar days to appeal to an appeal authority a written decision issued by a land use authority.

10-9a-705. Burden of proof.

The appellant has the burden of proving that the land use authority erred.

10-9a-706. Due process.

- (1) Each appeal authority shall conduct each appeal and variance request as provided in local ordinance.
- (2) Each appeal authority shall respect the due process rights of each of the participants.

10-9a-707. Standard of review for appeals.

- (1) A municipality may, by ordinance, designate the standard of review for appeals of land use authority decisions.
- (2) If the municipality fails to designate a standard of review of factual matters, the appeal authority shall review the matter de novo.
- (3) The appeal authority shall determine the correctness of a decision of the land use authority in its interpretation and application of a land use ordinance.
- (4) Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority.

10-9a-708. Final decision.

- (1) A decision of an appeal authority takes effect on the date when the appeal authority issues a written decision, or as otherwise provided by ordinance.

(2) A written decision, or other event as provided by ordinance, constitutes a final decision under Subsection 10-9a-801(2)(a) or a final action under Subsection 10-9a-801(4).

Utah Code Land Use Development and Management Act Title 17, Chapter 27a - Counties

17-27a-701. Appeal authority required -- Condition precedent to judicial review -- Appeal authority duties.

(1) Each county adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide:

- (a) requests for variances from the terms of the land use ordinances; and
- (b) appeals from decisions applying the land use ordinances.

(2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.

(3) An appeal authority:

(a) shall:

- (i) act in a quasi-judicial manner; and
- (ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances; and
- (b) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.

(4) By ordinance, a county may:

- (a) designate a separate appeal authority to hear requests for variances than the appeal authority it designates to hear appeals;
 - (b) designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions;
 - (c) require an adversely affected party to present to an appeal authority every theory of relief that it can raise in district court;
 - (d) not require an adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of the adversely affected party's duty to exhaust administrative remedies; and
 - (e) provide that specified types of land use decisions may be appealed directly to the district court.
- (5) If the county establishes or, prior to the effective date of this chapter, has established a multiperson board, body, or panel to act as an appeal authority, at a minimum the board, body, or panel shall:
- (a) notify each of its members of any meeting or hearing of the board, body, or panel;
 - (b) provide each of its members with the same information and access to municipal resources as any other member;
 - (c) convene only if a quorum of its members is present; and
 - (d) act only upon the vote of a majority of its convened members.

17-27a-702. Variances.

(1) Any person or entity desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest may apply to the applicable appeal authority for a variance from the terms of the ordinance.

(2) (a) The appeal authority may grant a variance only if:

- (i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;
- (ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;

(iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;

(iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and

- (v) the spirit of the land use ordinance is observed and substantial justice done.
- (b) (i) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship unless the alleged hardship:
 - (A) is located on or associated with the property for which the variance is sought; and
 - (B) comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.
- (ii) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic.
- (c) In determining whether or not there are special circumstances attached to the property under Subsection (2)(a), the appeal authority may find that special circumstances exist only if the special circumstances:
 - (i) relate to the hardship complained of; and
 - (ii) deprive the property of privileges granted to other properties in the same zone.
- (3) The applicant shall bear the burden of proving that all of the conditions justifying a variance have been met.
- (4) Variances run with the land.
- (5) The appeal authority may not grant a use variance.
- (6) In granting a variance, the appeal authority may impose additional requirements on the applicant that will:
 - (a) mitigate any harmful affects of the variance; or
 - (b) serve the purpose of the standard or requirement that is waived or modified.

17-27a-703. Appealing a land use authority's decision.

The applicant, a board or officer of the county, or any person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may, within the time period provided by ordinance, appeal that decision to the appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance.

17-27a-704. Time to appeal.

- (1) The county shall enact an ordinance establishing a reasonable time of not less than ten days to appeal to an appeal authority a written decision issued by a land use authority.
- (2) In the absence of an ordinance establishing a reasonable time to appeal, an adversely affected party shall have ten calendar days to appeal to an appeal authority a written decision issued by a land use authority.

17-27a-705. Burden of proof.

The appellant has the burden of proving that the land use authority erred.

17-27a-706. Due process.

- (1) Each appeal authority shall conduct each appeal and variance request as described by local ordinance.
- (2) Each appeal authority shall respect the due process rights of each of the participants.

17-27a-707. Standard of review for appeals.

- (1) A county may, by ordinance, designate the standard of review for appeals of land use authority decisions.
- (2) If the county fails to designate a standard of review of factual matters, the appeal authority shall review the matter de novo.
- (3) The appeal authority shall determine the correctness of a decision of the land use authority in its interpretation and application of a land use ordinance.
- (4) Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority.

17-27a-708. Final decision.

(1) A decision of an appeal authority takes effect on the date when the appeal authority issues a written decision, or as otherwise provided by local ordinance.

(2) A written decision, or other event as provided by ordinance, constitutes a final decision under Subsection **17-27a-801(2)(a)** or a final action under Subsection **17-27a-801(4)**.