

October 4, 2022

VIA EMAIL

Planning Commission
City of Cottonwood Heights
2277 Bengal Blvd.
Cottonwood Heights, Utah 84121
Email: planning@ch.utah.gov

Re: Applicant Comments concerning Project CUP-22-011

Dear Commissioners:

Our firm represents Robert and Ashleigh Byrne, the owners of 7275 Caladora Cove in Cottonwood Heights, Utah (the “Property”). On May 9, 2022, the Byrnes submitted an application for an 8’ wall height extension (the “Application”). In anticipation of the Commission’s October 5th meeting wherein the Byrne’s Application will be considered, we wanted to provide the following comments to add context to the report prepared by City Staff, as well as provide more information regarding the Byrne’s need for the wall height extension. We hope these comments will be helpful as the Commission considers this application.

I. Cottonwood Heights City Code supports approval of the Application.

As a threshold matter, the City of Cottonwood Heights permits eight foot tall fences as a conditional use without neighbor consent. City Code § 19.76.050(E)(3). City Staff confirmed that the constructed fence does not exceed eight feet. Staff Report at 3. Therefore, no neighbor consent is required to support the Application. Rather the only requirement is that the Commission conclude that there exists “unique or special circumstances of a natural, material and adverse nature relating to the property that will be substantially minimized or eliminated by the increased height of the requested fence; and [t]he erection of such fence is the most reasonably solution under the circumstances.” City Code § 19.76.050(E)(3).

In applying this ordinance, the City has determined in the past that this standard is met when an applicant justifies the requested height increase on the basis of a need for additional privacy. As stated in the Staff Report: “There is substantial precedence for privacy being an acceptable and uncontested rationale for warranting fence height increases. Since 2019, the city has received 10 conditional use applications for fence height increases, all of which stated that added privacy was the primary rationale for the request. Each of those applications was approved.” Therefore, as this Application is seeking the identical permitting on the same basis as those prior ten applicants, then on this precedent alone the Commission should approve the

Application. Failure to do so would be blatantly arbitrary and capricious. Utah Code § 10-9a-801(a) (a land use decision is invalid if it is arbitrary and capricious).

The Byrnes have ample need for additional privacy and security. Within the last year they have faced unique security threats as a former acquaintance has caused property damage multiple times in an effort to terrorize the family. The Byrnes currently have a protective order against Jonathan Hanley. Enclosed is a copy of the Order; see also KSL.com, “[Charges: Man planted homemade explosive, threatening to settled debts](#)”, Nov. 15, 2021. Mr. Hanley has thrown a rock through the Byrnes’ window and trespassed into their backyard and contaminated their pool. To provide security the family has installed an extensive security camera system. The addition of an opaque fence on the northwest corner of the home will thwart efforts to access the Byrne’s backyard, screen side entrances that would be more vulnerable to intrusion, and provide additional privacy. The wall height extension is crucial to providing this screening as the terrain of the Property slopes significantly at the rear of the side yard.

The pronounced slope of the yard constitutes the “natural, material and adverse” condition of the Property necessitating the increased fence height. City Code § 19.76.050(E)(3). By having the height of the wall increase only at the rear of the side yard (where the slope begins) the benefits to the Property are two-fold. First, this increased height screens the gate leading to the backyard. Second, the wall is more architecturally pleasing and fits with the surrounding neighborhood in both its materials and design. Because the functional purpose of the wall reasonably achieves the additional privacy and security required by the Byrnes, and is in harmony with surrounding uses, the Application should be approved.

We echo the conclusion in the Staff Report that the Application satisfies each of the findings appropriate to conditional uses. Furthermore, state law further compels approval of the Application as there is no indication that the additional wall height presents any reasonably anticipated detrimental effects. Utah Code § 10-9a-507 (“A land use authority shall approve a conditional use if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.”) The additional wall height does not inflict any detrimental effect on any property, and in fact improves the neighborhood by providing an opaque barrier that is likely to decrease the noise of barking dogs (the opaque wall prevents the adjoining property’s animals from seeing and barking at one another) and screens unsightly HVAC equipment.

II. The City cannot deny the Application simply because the wall is already constructed.

The Byrnes have, in good faith, attempted twice now to obtain the requested conditional use permit. As set forth in the Staff Report, the Byrnes initially applied for a conditional use permit to allow for a wall height extension back in February 2022. Based on exchanges with City Staff during that application process, Mr. Byrne no longer believed that he was required to obtain

a permit, and thus withdrew the initial permit application. Specifically, he believed that because the average height of the constructed wall does not exceed six feet, no permit was required. There is a basis in the Code to make this determination. Specifically, structures “shall be measured by taking the average vertical distance ... from the original natural grade.” City Code § 19.76.030(D). Based on this understanding, the Byrnes constructed the wall.

After contacting legal counsel the Byrnes reapplied and submitted the pending Application. The Staff Report implies that the Byrnes only submitted the Application in response to a City enforcement process. The record amply shows that that simply was not the case. While the City may have had *internal* discussions regarding some kind of enforcement process, the Byrnes were completely without notice of such process. The City never issued any kind of warning, much less a citation, to the Byrnes for constructing the wall.¹ The Byrnes have at all times attempted to comply with City Code of their own volition, and without enforcement pressure from the City. Any attempts to characterize the Application as a response to such enforcement process is done without a basis in the record.

While the Byrnes may have erred in constructing the wall without obtaining a permit first, the Commission cannot now deny the Application on that basis. No provision in City Code allows the City to deny an application for a use that could be permitted on the basis that the use is already in existence. Instead, the City Code sets forth enforcement tools that the City could have used to enforce the City Code and encourage the Byrnes to cure the violation. Specifically, the City could have issued a written notice to warn of the violation and direct the Byrnes to cure it, and if the violation remained uncured, impose civil penalties. *See* City Code § 19.94.060. The City elected not to pursue those enforcement tools – likely because the Byrnes had already commenced a cure of their own volition. The City cannot now deny the Application as an exercise of the City’s zoning enforcement powers for the wall having already been constructed as such an exercise is not provided by City Code. Rather, the City Code entitles the Byrnes to cure the violation, and so long as the Application meets the standards for approval set forth in the City Code, there is no basis for the Commission to prohibit such cure.

III. The Application is for a fence, not a building, and does not violate setback or fence requirements.

¹ The only enforcement process the City pursued was to, without a prior warning, notice, or citation to cease constructing the wall or to apply for a conditional use permit, charge Mr. Byrne criminally with a “fence/wall violation” more than two months after the Application was submitted and while the Byrnes’ administrative appeal of the City’s failure to process the Application was pending. The Byrnes prevailed in appealing the Community & Economic Development Director’s refusal to process the Application and the City withdrew the criminal complaint.

We understand that a neighboring property owner has submitted an appeal related to City Staff's determination that the wall constitutes a "fence" under the City Code. Staff Report at 3. In an effort to more fully apprise the Commission on the objections raised by this neighbor, we address those objections now for context.

The Byrnes' neighbor raised four objections to the wall height extension, as follows: (1) that it would "violate the setback requirements of City Code § 19.26.060(B)"; (2) "the fence height will be greater than 8' and no neighbor consent was obtained"; (3) "[t]he Conditional Use Permit criteria to have a fence >6' but <8' have not been met"; and (4) "[t]he structure violates the City-approved plat by encroaching on the 8' P.U.E. and violating the 10' side building setback required by the plat." We address each objection in turn.

First, the appeal claims that the wall would violate setback requirements in City Code § 19.26.060(B). These setback requirements apply to (1) "buildings intended for human inhabitants", (2) accessory buildings, and (3) attached garages. City Code § 19.26.060(B). The wall does not meet the definition in the City Code of a building: "Any structure intended for shelter, occupancy, housing or enclosure for persons, animals or chattel. As demonstrated by the pictures submitted with the Application, the wall is not enclosed (there is no roof) thus it provides no shelter and it not designed to house/enclose humans or animals to any greater extent than any fence. As the wall does not fit within any of the structures identified in Section 19.26.060(B), the setback requirements do not apply.

Second, as already determined by staff, the height of the fence does not exceed eight feet. Thus, this objection is moot.

Third, the Commission will determine whether the Application meets the standards for approval set forth in City Code § 19.76.050(E)(3). As set forth above, and as staff concluded, the Application has provided clear and convincing evidence required by City Code that it meets those standards because of the additional privacy required by the Byrnes.

Fourth, the wall does not impair the City's public utility easement (no utilities were disturbed in the construction of the wall) and there is no indication on the plat that fences cannot be constructed within the utility easement. Generally, uses of property that do not impair an easement holder's rights can be maintained. *Wykoff v. Barton*, 646 P.2d 756 (Utah 1982). And finally, the plat indicates at ten foot side building setback. As the wall is not a building, as defined by City Code, this limitation does not apply.

Conclusion

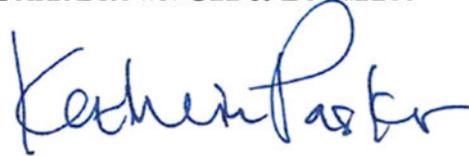
As more fully elaborated herein, and in accordance with the recommendation by City Staff, we respectfully request that the Application be approved. We appreciate the opportunity to present the Commission with these additional details, and request that this letter be included in the

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information available for the meeting to be held on Wednesday, October 5, 2022. We plan to be in attendance to address any questions by the Commission related to the Application. In the meantime, if any reader of this letter has any questions or concerns related to these comments, please contact me.

Sincerely,

PARR BROWN GEE & LOVELESS

A handwritten signature in blue ink that reads "Katherine Pasker". The signature is written in a cursive style with a large initial "K" and a long, sweeping underline.

Katherine Pasker

cc: Robert Byrne

Temporary Civil Stalking Injunction



Court: 3rd District Court Salt Lake
Case No: 210904436 District: THIRD
County: SALT LAKE State: Utah
Judge: KENT HOLMBERG

Name of Petitioner ASHLEIGH BYRNE Address: 7275 SOUTH CALADORA COVE , COTTONWOOD HEIGHTS, UT 84007 Phone #: Date of Birth: Petitioner's Attorney: SKYE LAZARO Attorney's Phone: [REDACTED]	Name of Respondent JONATHAN HANLEY Address: [REDACTED] Phone #: Date of Birth: Respondent's Attorney: Attorney's Phone:
Other Person(s) Protected by this Order: Name: ROBERT BYRNE Age: Relationship to Respondent: Other Name: JOSIE BYRNE Age: Relationship to Respondent: Other Name: BROOKS BYRNE Age: Relationship to Respondent: Other Name: CADEN BYRNE Age: Relationship to Respondent: Other	Respondent Identifying Information: Sex: M Race: White Height: 6 ft 01 in Weight: Eyes: Brown Hair: Brown Date of Birth: SSN: xxx-xx-xUNK Driver License #: State: Expiration: Distinguishing Features (Scars, Marks, Tattoos, etc): Other Names Used:

Findings: The Court has reviewed the Petitioner's *Request for Stalking Injunction*, finds there is reason to believe it has jurisdiction over the parties and this case, that stalking has occurred, and that the Respondent is the stalker. The Respondent has the right to a hearing, if he or she asks for it. (Utah Code 76-5-106.5)

The Court orders the Respondent to obey all orders entered on this document.

This order ends 3 years after it is served.

Warnings to the Respondent:

- Attention: This is an official court order. If you disobey this order, the court may find you in contempt. You may also be arrested and prosecuted for the crime of stalking and any other crime you may have committed in disobeying this order. (Note to committee: See Utah Code 78B-7-105(7)(b) (line 1519)).
- No one except the court can change this order.
- If you do not agree with this order, you can ask for a hearing to tell your side. Your request must be in writing, and must be filed at the court listed below within 10 days of the date you were served with this order. If you do not ask for a hearing within 10 days, this order will last for 3 years after it is served. You can still ask for a hearing after 10 days, but then you must persuade the court that the injunction is not needed.
- Court address to ask for a hearing: **450 South State Street PO Box 1860 Salt Lake City UT 84114-1860**

- This order is valid in all U.S. states and territories, the District of Columbia, and tribal lands. If you go to another U.S. state, territory or tribal land to violate this order, a federal judge can send you to prison.
- No guns or firearms!** It may be a federal crime for you to have, possess, transport, ship, or receive any firearm or ammunition, including hunting weapons, while this civil stalking injunction is in effect.

Obey all orders specified on this document. Violation of these orders is a criminal Class A Misdemeanor, punishable by up to one year in jail and a fine. A second or subsequent violation can result in more severe penalties.

1 No Contact Order

Do not contact, phone, text, mail, e-mail, or communicate in any way with the Petitioner and any person listed below, either directly or indirectly.

Other people you must not contact:

ROBERT BYRNE, JOSIE BYRNE, BROOKS BYRNE, CADEN BYRNE

2 Stay Away Order

Stay away from: The Petitioner's current or future vehicle, job, school, home, premises and property:

Including but not limited to:

Home address: **7275 CALADORA CV, MIDVALE, UT 84047**

Work address: [REDACTED]

School address: [REDACTED]

Vehicle:

Other:

Dated: August 23, 2021
01:01:59 PM

/s/ **KENT HOLMBERG**
District Court Judge



Disability and Interpreter Services Assistive listening systems, sign language and oral language interpreter services are available at no charge in stalking proceedings. Contact the clerk's office at least 5 days before your hearing.

This is a private record.

Request for Hearing



Case Number: 210904436 District: 3RD
County: Salt Lake State: Utah
Judge: Gardner

Petitioner (person who asked for the stalking injunction):

Ashleigh Byrne
First Middle Last

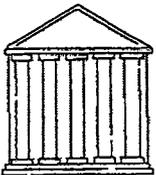
Respondent (person asking for a hearing):

Jonathan Hanley
First Middle Last

Respondent's Address and Phone #:

Street City State Zip Phone #

Please, Judge, I am asking you to:



- Schedule a court hearing so that I can tell the court why I disagree with the *Temporary Civil Stalking Injunction* that was issued on (date): _____

Respondent's Signature: _____ Date: _____



Charges: Man planted homemade explosive, threatening to settle 'debts'

SANDY — A Salt Lake man who police say placed a homemade explosive under another man's car while threatening that "debts will get settled tonight," now faces serious criminal charges.

Jonathan Hanley, 43, was charged Nov. 10 in 3rd District Court with use, transportation or possession of an explosive device, a first-degree felony, and criminal mischief, a class B misdemeanor.

On Nov. 2, a Sandy resident called police to report he had found a possible homemade explosive under his car, in addition to tire spikes placed under his wheels. An officer arrived and found a two-liter bottle in the driveway "filled with a liquid and multiple aluminum balls at the bottom," according to charging documents.

Caltrops, or four-pronged spikes, were also found "in various locations in his front yard," according to the charges. The man explained to police that prior to discovering these items, he had received threatening text messages from an unknown number stating, in part, that "debts will get settled tonight."

A bomb squad was called and police confirmed the bottle was an actual explosive and not a fake. Members of the bomb squad "disarmed the bomb and destroyed the bottle," the charges state. A roommate had already run over one of the caltrops, causing a flat tire.

Detectives used police databases to trace the unknown number from which the message was sent and found the phone was registered to Hanley, the charging documents allege. Police were also able to obtain surveillance video from the neighborhood.

"In the video you can see a vehicle drive up and down the street multiple times, stop up from the address, an individual exits the vehicle and walks towards the driveway where the items were placed," the police affidavit states.

The vehicle was found to be registered to Hanley's ex-wife. Police say the alleged victim knew both Hanley and his ex-wife prior to the incident and he began spending time with the woman after she became divorced, according to the charges. The man said he declined her advances, but she may have told Hanley about spending time with him while trying to reconcile with Hanley, according to police.

Prosecutors believe Hanley is a flight risk and have asked a judge to have him remain in jail without bail, pending trial.