

OCTOBER 4TH 2022

Planning Commission
Cottonwood Heights

Re: CUP-22-011

To whom it may concern:

I (Vamsee M. Yaganti, M.D) along with my wife Snigdha Ancha, M.D live next door to the Property identified above in CUP-22-011. The owner of the Property, Robert S. Byrne, applied for a conditional use permit to allow a "fence" in excess of six feet on or about February 8, 2022. **See Exhibit A.** I, through my attorney Mr. Dan McDonald objected to the application, contending, among other things, that the "fence" was not really a "fence" but an enclosed dog run building and/or structure. **See Exhibit B.** A public hearing was held on March 9, 2022, regarding the Applicant's conditional use application. The Applicant did not get conditional use approval. Instead, the hearing was continued for two weeks. And then, while the continued hearing was pending, the Applicant withdrew the conditional use application. **See Exhibit C.**

Mr. Byrne represented to the City planning director, Mike Johnson, in a formal withdrawal letter that he would be constructing a fence that complied with the City's existing fence ordinance:

WITHDRAWAL LETTER

Byrne Project
7275 S. Caladora Cove
Cottonwood Heights
Utah, 84047

3/17/2022

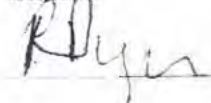
To whom it may concern:

Please withdraw our permit application we are trying to have granted for the
Eight-foot (8') security fence on the west side of the property
at 7275 S. Caladora Cove in Cottonwood Heights, UT.

We will be keeping the finished height under the 72" (six feet) from the existing natural ground height.

Thank you,

Robert Byrne

 3/17/2022

Ex. C.

I was not notified of Mr. Plyer's withdrawal of the CUP application and, when I noticed construction of the enclosed dog run structure taking place at the Property, I promptly notified Mr. Johnson of my concerns. **See Exhibit D.** Mr. Johnson replied to my complaint with an email, stating that, in Mr. Johnson's view, the dog run structure was not a dog run but merely a fence, which was allowed by code, so long as it was six feet or less in height. **See Exhibit E.** He stated, "If a violation of permitted fence standards is observed or expected, the city's code enforcement is responsible for the investigation of all potential code violations. *Id.* at p. 2.

Thereafter, Mr. Byrne blatantly ignored his representation to Mr. Johnson, the City's conditional use requirements, and its building code requirements by constructing his dog run structure—which Mr. Byrne calls a "fence"—without a building permit and in excess of six feet tall. **See Exhibit F.** Indeed, the dog run walls are more than 93" in places. **See *id.***

Since the construction of dog run, the barking noise has in fact increased but not decreased. Most of the barking is unprovoked and not triggered by visual or auditory cues. The dog run is also in close proximity to our first floor bedroom which adds noise nuisance while the animals are left in the dog run structure. I empathize with the security concerns mentioned in Mr Byrne's CUP application, however, when the entire backyard is not surrounded by 8 feet fence (including parts of dog run) I fail to understand how a part of the fence above 6 feet will increase security. Moreover, by Mr Byrne's own account these "security incidences" occurred through the rear fence of his property and not where the dog run is.

As mentioned by Mr. Guymon in his appeal decision and agreed upon by Ms Pasker, Mr. Byrne decision to construct a wall above 6 feet without going through the CUP carried an inherent risk of denial of CUP and being asked to demolish the unauthorized structure. **See Exhibit H at p. 7.** Nonetheless, Mr. Byrne constructed the structure. The City should not tolerate Mr. Byrne's blatant and knowing violations of the City Code and his misrepresentations to the City. As explained in my objection to the conditional use application, this really isn't a "fence"—it is a dog run structure that has footings and a foundation that are tied to and a part of the home's footings and foundation, and that is an appendage to the home's garage, as Mr. Byrne has repeatedly stated and admitted. **See Exhibit G & Exhibit A at p. 15.** But even if you disagree that this is a dog run structure, and consider it merely a "fence", the "fence" structure nevertheless violates the City's fence ordinance in multiple ways.

Consequently, it appears to us that at least the following violations presently exist:

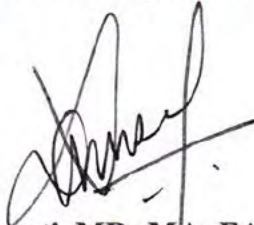
1. No building permit was obtained for the dog run building/structure.
2. The dog run structure violates the setback requirements of City Code § 19.26.060.B, as explained in my March 8, 2022, objection. **See Exhibit B at pp. 2-4.**
3. The dog run structure violates the City-approved plat by encroaching on the 8' P.U.E. and violating the 10' side building set back. **See Exhibit B at pp. 13-15, & 18.**
4. Even if you do not consider this a dog run structure that is an appendage to the home, and even if you merely consider the structure a "fence", it nevertheless violates City Code §

19.76.050.E.2.b because it exceeds six feet in height. ***See Exhibit F & Exhibit B at pp. 5-10.***

5. The "fence" height is greater than 6' in parts and no conditional use permit was obtained in violation of City Code §§ 19.76.050.E.3. and -4. ***See Exhibit F & Exhibit B. at pp. 5-10, 115-17.***

These are serious violations of the City Code that adversely affect my quality of life, my property value, and the safety of his vehicles. For example, the setback results in a situation where vehicles backing into my car port are now at risk of hitting the dog run structure, which is too close to my property line. We respectfully request that you deny take immediate and appropriate action to remedy these knowing and blatant violations of the City Code.

Regards,



Vamsee Yaganti, MD; MA; FACC, FSCAI
Interventional Cardiologist

[REDACTED]

Exhibit A - CUP Application



ADMINISTRATIVE HEARING STAFF REPORT

Wall Height Extension: 7275 S. Caladora Cove.

Meeting Date: March 9th, 2022

Staff Contact: Maverick Yeh, Assistant Planner
(801-944-7018, myeh@ch.utah.gov)

Summary

Project #:

CUP-22-002

Subject Property:

7275 S. Caladora Cove.

Action Requested:

Conditional use Wall Height
Extension

Owner:

Robert Byrne

Applicant:

John Elkins

Recommendation:

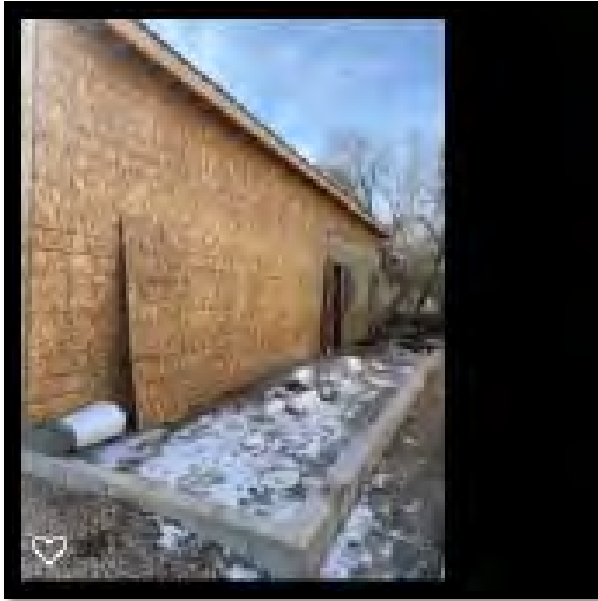
Approve, with conditions



This aerial image shows the subject property in context of the neighborhood. The blue line shows the location of the proposed wall height extension. Red lines show the other property lines of the home

APPLICANT'S PROPOSAL

The applicant is proposing to build a new eight-foot wall along their northwest the property line. The proposed wall, comprised of cinder block stuccoed to match existing residence, is proposed to encase the dog run and assist with noise reduction and security.



Existing

- Only the wall foundation
- Neither the applicant nor their neighbor have privacy at this time.



Proposed

- Eight feet of cinder block stuccoed to match existing residence
- The proposed fence format will provide significant privacy to both the applicant and their neighbor.

BACKGROUND

Zoning

The zoning designation of the property is R-1-8 (Residential Single-Family). Fences and walls may be allowed to a maximum height of eight feet in any zone as a conditional use, and up to 12 feet as a conditional use with neighbor consent, as outlined in section 19.76.050.E CH Code.

As this proposal is requesting only eight feet, consent was not required.

Conditional use. Fences in the side and rear yards may be erected to a maximum height of eight feet as a conditional use upon a clear and convincing showing by the property owner in accordance with subsections (a) and (b) below:

- a. The existence of 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
- b. That erection of such a fence is the most reasonable solution under the circumstances. Any such conditional use permit may be granted by the director or his designee following

an administrative hearing preceded by all required notifications. A building permit shall be required for all fences approved as a conditional use.

Neighbor consent. *Side and rear yard fences may exceed eight feet in height to a maximum height of 12 feet in cases where the applicant has neighbor consent, and has received conditional use approval in accordance with subsection 19.76.050(E)(3).*

IMPACT ANALYSIS

Staff Analysis: Staff finds the increased fence height proposed by this application to be a reasonable privacy and safety enhancement effort to address the nuisances resulting from the neighboring dogs.

Noticing

Property owners within 300 feet of the subject property have been mailed notices. Notices were mailed, as well as posted on noticing websites and the City Hall bulletin board, on February 23rd, 2022.

Conditional Use Permit Determining Criteria

Staff has found enough evidence that the standards for the issuance of a conditional use permit have been satisfied (see Section 19.84.080 CH Code).

FINDINGS FOR APPROVAL

1. There is clear and convincing evidence shown by the property owner relating to privacy and safety that will be substantially minimized or eliminated by the implementation of the requested wall and fence combination; (19.76.050.E.1.a)
2. That construction of such wall and fence is the most reasonable solution under the circumstances. The additional fence height is necessary to ensure mitigation of aforementioned issues.
3. The conditional use permit is granted by the director or his designee following an administrative hearing preceded by all required notifications. (19.76.050.E.1.b)
4. The evidence presented with the proposed conditional use has been found to be compliant with the requirements of section 19.84.080 (Conditional Uses – Determination) and section 19.76.050.E (Miscellaneous – Fences).
5. There is sufficient evidence that the standards for the issuance of a conditional use permit as outlined in Section 19.84.080 CH Code have been satisfied.

RECOMMENDED CONDITIONS OF APPROVAL

1. A building permit and all necessary inspections shall be obtained and completed.
2. The building permit will clearly state materials, design, and shall not exceed a total height of 8 feet from existing grade.
3. The proposed wall may not be enclosed. No additions to the home or accessory structures are permitted within the side yard setback area.

MODEL MOTIONS

- Approval
 - o “I move to approve item CUP-22-002 pursuant to the conditions of approval outlined in the item’s staff report.”
 - o Add any additional conditions of approval....
- Denial
 - o “I move to deny item CUP-22-002 based on the following findings...”
 - o List reasons for denial...

ATTACHMENTS:

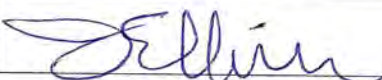
1. **Applicant Application**
 - a. Existing conditions
 - b. Proposed layout
 - c. Proposed materials
 - d. Owner permission form



CONDITIONAL USE

Application Number

Community & Economic Development | 2277 East Bengal Boulevard | 801-944-7000 | www.ch.utah.gov

Property Address	7275 So. CaladORA Cove
Project Description	Residence
Property Owner	Robert Byrne
Property Owner Name	Robert Byrne
Property Owner Mailing Address	7275 So. CaladORA Cove Cottonwood Heights, UT 84047
Applicant (if different from owner)	John Elkins
Applicant Phone	801-608-6614
Applicant Mailing Address	9160 So. 300 W. Suite 7 SANDY UT 84070
Applicant Email	john@toppconstruction.com
Zoning Designation	
Overlay Zoning	
Application Date	2/8/22
Fee Paid	
Owner / Applicant Signature	 Topp Construction Inc.

(2) copies 24"x36" and a digital copy with PDFs of all plans must be submitted. During the pre-application meeting a staff planner will identify which items are required for submittal. Please note that ALL items check will be required at the time of formal submittal. An application will not be considered complete until all checked items are submitted in an acceptable manner.

GENERAL

- ☐ Application Fee (See Consolidated Fee Schedule for current fees)
- ☐ Owner's name, address, and telephone number
- ☐ Signed consent form, if applicant is different than property owner
- ☐ Pre-printed labels, envelopes and stamps for owners of property within 300 feet
- ☐ Comments from pre-application review
- ☐ Title Report (not older than 60 days of application date) for all affected parcels of land

WRITTEN NARRATIVE

- ☐ Project title
- ☐ Conditional use proposed
- ☐ Architect, landscape architect, planner/engineer's name, address, and telephone number
- ☐ General Plan and zoning ordinance purpose compliance statement
- ☐ Describe all measures that will be used to buffer your development from nearby residential properties
- ☐ Explain how your proposal will blend in with the surrounding area

SITE PLAN REQUIREMENTS

- ☐ Date, graphic scale and north arrow
- ☐ Zoning classifications and current uses of adjacent properties
- ☐ Plat or survey of parcel showing all easements and dedications
- ☐ ALTA survey
- ☐ Impervious surface calculations
- ☐ Open space calculations
- ☐ Utility line layout (i.e. water, sewer, gas, electric, cable, etc)
- ☐ Topographic information (existing and proposed, min. two-foot intervals)
- ☐ Grading plan
- ☐ Storm water calculations
- ☐ Drainage and erosion control plan
- ☐ Access points, acceleration/deceleration lanes, and vehicular circulation
- ☐ Sidewalks, paths, bicycle lanes, and pedestrian circulation
- ☐ Business and on-site circulation signage
- ☐ Parking calculations and dimensions
- ☐ Off-street loading areas
- ☐ Fire hydrants and fire lanes
- ☐ Trash receptacles and enclosures
- ☐ Setbacks and buffer areas
- ☐ Statement of ADA compliance
- ☐ FEMA flood zone information

LANDSCAPE PLAN REQUIREMENTS

- ☐ Planting plan
- ☐ Plant schedule
- ☐ Irrigation plan
- ☐ Tree protection plan
- ☐ Landscape coverage calculation

SITE LIGHTING PLAN REQUIREMENTS

- ☐ Date, graphic scale, and north arrow
- ☐ Location plan
- ☐ Light levels plan
- ☐ Fixture schedule
- ☐ Manufacturer's photometric plan
- ☐ Lighting details and elevations

STRUCTURE DETAIL REQUIREMENTS

- ☐ Exterior elevations
- ☐ Roof equipment
- ☐ Screening and buffering provisions
- ☐ Materials
- ☐ Colors and material board
- ☐ Elevation of all accessory structures
- ☐ Lot coverage calculation

SITE CONTEXT PHOTOGRAPHS

- ☐ Showing the site and the context of surrounding buildings/property (No panoramic view photos)
- ☐ Taken at the curb and along the property boundaries
- ☐ Show adjacent improvements and existing on-site conditions
- ☐ Aerial photographs of the site

SENSITIVE LANDS (AS REQUIRED BY THE DEVELOPMENT REVIEW COMMITTEE)

WETLANDS

- ☐ Jurisdictional determination
- ☐ Application package to the State of Utah
- ☐ Wetland boundary survey
- ☐ Elevations at high ground and surface water
- ☐ Impact analysis
- ☐ Wetlands alteration plan and efforts to minimize alteration
- ☐ Storm water management and mitigation implementation plan
- ☐ Restrictive covenants

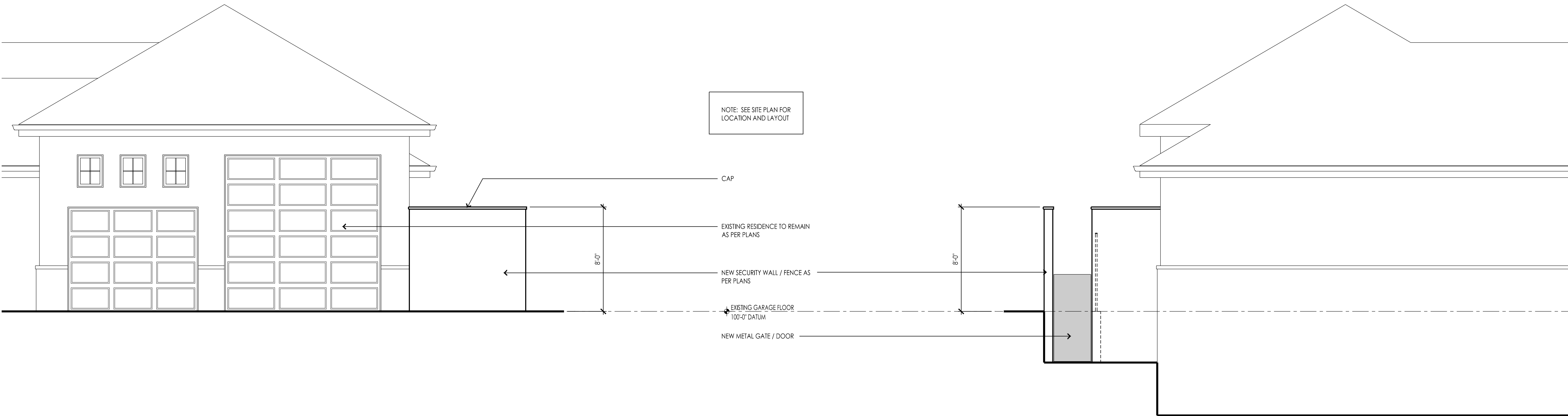
GEOLOGY REPORTS

- ☐ Surface fault rupture hazard study
- ☐ Liquefaction investigations and evaluations
- ☐ Debris flow and/or rock fall hazard study
- ☐ Ground water source, riparian corridor and watershed protection
- ☐ Slope stability analysis
- ☐ Geotechnical report

HEALTH DEPARTMENT APPROVAL

- ☐ Water and sewer will-serve letters
- ☐ Air and water quality

OTHER ITEMS

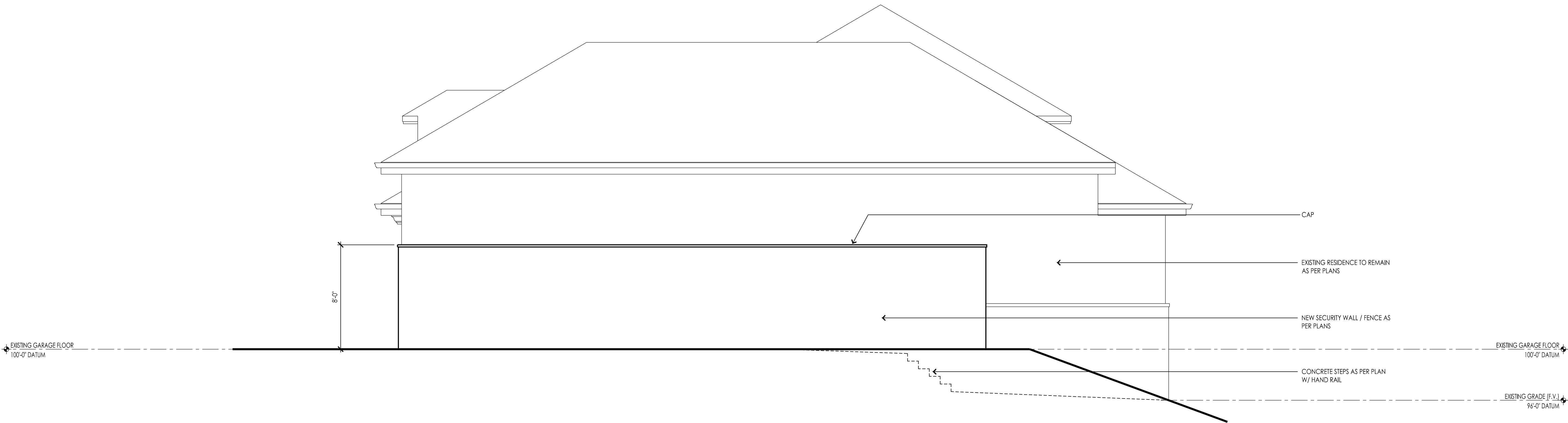


EXISTING FRONT ELEVATION
SCALE: 1/4" = 1'-0"

1
A300F

EXISTING FRONT ELEVATION
SCALE: 1/4" = 1'-0"

2
A300F



NEW FRONT ELEVATION
SCALE: 1/4" = 1'-0"

3
A300F



Topp Construction
9160 South 300 West
Suite 7
Sandy, Utah 84070
(801) 831-0264

THE DESIGNS SHOWN AND DESCRIBED HEREIN INCLUDING ALL TECHNICAL DRAWINGS, GRAPHIC REPRESENTATION, AND SPECIFICATIONS ARE PROPRIETARY AND CANNOT BE COPIED, DUPLICATED, OR COMMERCIALY EXPLOITED WITHOUT WRITTEN PERMISSION. THESE DRAWINGS ARE AVAILABLE FOR LIMITED REVIEW AND EVALUATION BY CLIENTS, CONSULTANTS, GOVERNMENT AGENCIES, VENDORS, ETC. ONLY IN ACCORDANCE WITH THIS NOTICE.

TOPP CONSTRUCTION AND/OR DESIGN WRIGHT, L.L.C. ITS INDIVIDUAL MEMBERS OR ASSOCIATES SHALL NOT BE HELD LIABLE FOR ANY ACTIONS OR INACTIONS FOR ANY DESIGNS SHOWN OR DESCRIBED HEREIN INCLUDING TECHNICAL DRAWINGS, INFORMATION, MODIFICATIONS, OPINIONS EXPRESSED, ETC. THESE DOCUMENTS ARE THE RESULT OF GOOD FAITH AND EXERCISE OF JUDGMENT AND WITHOUT MALICE.

consultant engineer

L.R. Nelson
Engineering
51 West 9000 South
Sandy, Utah 84070
(801) 565-8580

project

Byrne
Residence
Garage
Addition

7275 South Caladora
Cove
Cottonwood Heights,
Utah

project information

2021-15 Byrne

date

28 February 2022

sheet description

Exterior
Elevations
(Fence)

sheet

A300F



OWNER'S PERMISSION FORM

***This sheet must be completed if the applicant is not the owner of the property.

I/we, the Undersigned, do hereby grant permission to:

Topp Construction

to act on my/our behalf for the purpose of obtaining a Zone Change, Conditional Use permit, Site Plan Review, or Variance on the following described property:

Residential Home Cottonwood Heights

7275 S. Caladara CV, 84047

Owner(s) Robert S. Byrne

Address 7275 S. Caladara CV

Cottonwood Heights, UT 84047

Telephone (305) 645 9113

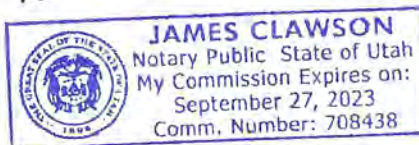
SIGNATURE OF OWNER RB

DATE SIGNED 2/16/2022

State of UTAH

County of _____

ss.



On this 16 day of February, 2022 before me, the undersigned Notary Public,

personally appeared Robert S. Byrne, personally known to me, or whose identity I

verified on the basis of his/her Utah Driver License, or on the oath of
(type of identification)

_____, a credible witness whose identity I verified on the basis of

his/her _____, to be the person(s) whose name(s) is/are
(type of identification)

subscribed to in this instrument and acknowledged that he/she executed the same.

[Signature]
(Notary Public)

September 27, 2023
(Commission Expiry Date)



COTTONWOOD HEIGHTS CITY
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

ADMINISTRATIVE HEARING AGENDA

March 9th, 2022

NOTICE is hereby given that the Cottonwood Heights Community and Economic Development Director or designee will hold an Administrative Hearing Meeting on **Wednesday, March 9th, 2022, beginning at 12:00 p.m.** in the Cottonwood Heights City Council Chambers located at 2277 E. Bengal Blvd., Cottonwood Heights, Utah 84121.

12:00 p.m. ADMINISTRATIVE HEARING MEETING

1.0 Business Items

1.1. (Project CUP-22-002)

Request from John Elkins, on behalf of Robert Byrne for an 8-foot wall along the northwest property line at 7275 S. Caladora Cove.

1.2. (Project CUP-22-003)

Request from Lanny and Cammie Derby for an 8-foot fence along the north property line at 6997 S. Canyon Creek Cir.

2.0 Consent Agenda

2.1. Approval of Minutes for March 9th, 2022

(The Director will move to approve the above-mentioned minutes after the following process is met. The recorder will prepare the minutes and email them to the Director and present staff members. The Director and members will have five days to review the minutes and provide any changes to the recorder. If, after five days there are no changes, the minutes will stand approved. If there are changes, the process will be followed until the changes are made and the Director and members agree, at which time the minutes shall be deemed approved.)

3.0 Adjournment

Meeting Procedures

Items will generally be heard in the following order:

1. Staff Presentation
2. Applicant Presentation
3. Open Public Hearing (if item has been noticed for public hearing). Each speaker during the public hearing will be limited to three minutes.
4. Close Public Hearing
5. Community and Economic Development Director Deliberation
6. Community and Economic Development Director Decision

Administrative Hearing applications may be tabled if: 1) Additional information is needed in order to act on the item; OR 2) The Community and Economic Development Director feels there are unresolved issues that may need further attention before the Director is ready to make a decision. The Community and Economic Development Director may carry over agenda items to the next regularly scheduled meeting.

Submission of Written Public Comment

Written comments on any agenda item should be received by the Cottonwood Heights Community and Economic Development Department no later than 12:00 p.m. the day of the meeting. Comments should be emailed to myeh@ch.utah.gov. After the public hearing has been closed, the Community and Economic Development Director will not accept any additional written or verbal comments on the application.

Notice of Compliance with the American Disabilities Act (ADA)

In compliance with the Americans with Disabilities Act, individuals needing special accommodations or assistance during this meeting shall notify the City Recorder at (801)944-7021 at least 24 hours prior to the meeting. TDD number is (801)270-2425 or call Relay Utah at #711.

Confirmation of Public Notice

On Thursday, March 3rd, 2022, a copy of the foregoing notice was posted in conspicuous view in the front foyer of the Cottonwood Heights City Offices. The agenda was also posted on the City's website at www.cottonwoodheights.utah.gov and the State Public Meeting Notice website at <http://pmn.utah.gov>.

DATED THIS 3rd Day of March 2022
Paula Melgar, City Recorder

To whom it may concern,

I am looking to put up an 8' fence/ wall next to my garage which will encase the dog run. The fence is needed for security reasons as I and my family have been threatened repeatedly by a known felon and currently have a Stalking Injunction against.

The dog run will be accessed from the garage man door and the back yard. The wall is needed for security and noise reduction, for my family and my neighbors. The finished stucco wall will match the existing house.

Thank you for your consideration.

Robert Byrne



Cottonwood Heights
"City between the canyons"
2277 E Bengal Blvd
Cottonwood Heights UT 84121

801-944-7000

Receipt No: 1.030805

Feb 18, 2022

Byrne, Robert

Permits & Fees - Planning Applications- Permit # CUP-22-002	250.00
Total:	250.00
XBP - Credit Cards - GS Check No: 115524707 Payor: Byrne, Robert	250.00
Total Applied:	250.00
Change Tendered:	.00

02/18/2022 2:20 PM

ACCT: XXXXXXXXXXXX
APPROVAL: 115524707

X _____
Byrne, Robert



Dan McDonald
P.O. Box 1184
Pleasant Grove, Utah 84062
Email: dan@mcdonaldfielding.com
Telephone: (801) 372-0055
www.mcdonaldfielding.com

March 8, 2022

Mike Johnson
Cottonwood Heights City
Community and Economic Development Director
Via Email: mjohnson@ch.utah.gov

Maverick Yeh
Assistant Planner
Via Email: myeh@ch.utha.gov

**Re: Conditional Use Application of Robert Byrne / John Elkins (“Applicant”)
7275 S. Caladora Cove (the “Property”)**

Honorable Community and Economic Development Director:

This firm represents Dr. Vamsee M. Yaganti and Snigdha Ancha (collectively, “Dr. Yaganti”), who live next door to the Applicant’s Property identified above. The purpose of this letter is to set forth Dr. Yaganti’s objections to the Application, which should be denied for the following reasons:

1. The dog run/fence structure 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. The Conditional Use Permit criteria to have a fence >6’ but <8’ have not been met.
4. The structure violates the City-approved plat by encroaching on the 8’ P.U.E. and violating the 10’ side building set back required by the plat.

Each of these independent bases for denial of the Application is discussed more fully below.

1. **The dog run/fence structure would violate the setback requirements of City Code § 19.26.060.B**, which provides as follows:

- B. Accessory buildings in the R-1-8 zone shall maintain a minimum distance from property lines as follows:

1. Front: Accessory buildings, including detached garages, shall maintain a setback of at least six feet from the main building in the rear yard of the particular property.
2. Sides: Three feet on interior lots; 20 feet on the street side of corner lots.
3. Rear: Three feet on interior lots; 20 feet on the street side of corner lots.

The dog run/fence structure is a “building” and an “accessory building” under the following definitions found in the City Code:

19.04.010 Accessory Building (Residential)

In a residential district, a subordinate **building** that is attached or detached and is used for a purpose that is customarily incidental to the main structure but not involving the conduct of a business (i.e., the building area must be significantly less than that of the main structure). Examples include, without limitation, the following: a private garage for automobile storage, tool shed, greenhouse as a hobby (no business), home workshop, children's playhouse, storage building, garden shelter, etc.

19.04.380 Building

Any structure intended for shelter, occupancy, housing or enclosure for persons, **animals** or chattel. When separated by dividing walls without openings, each portion of such structure so separated shall be deemed a separate building.

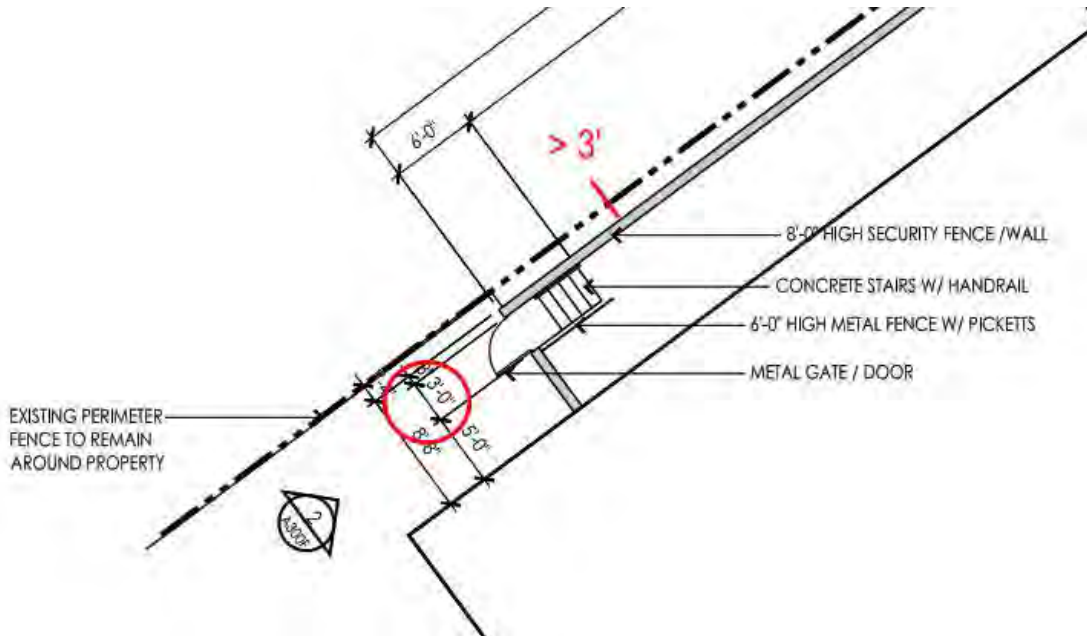
The subject Property is an interior lot (**Figure 1.a**):



The dog run/fence structure is closer than 3 feet from the Yaganti property line (**Figure 1.b**):



Even the Applicant's own scaled plans and drawings show this (**Figure 1.c**):



Measurements taken by Dr. Yaganti confirm this, as shown in the following photographs, which show that the Applicant intends to build the structure just 2'3" from Dr. Yaganti's property:

(Figure 1.d)



(Figure 1.e)

2. The fence height will be greater than 8' and no neighbor consent was obtained.

Under City Code § 19.76.050 the definition of “Fence height” is as follows:

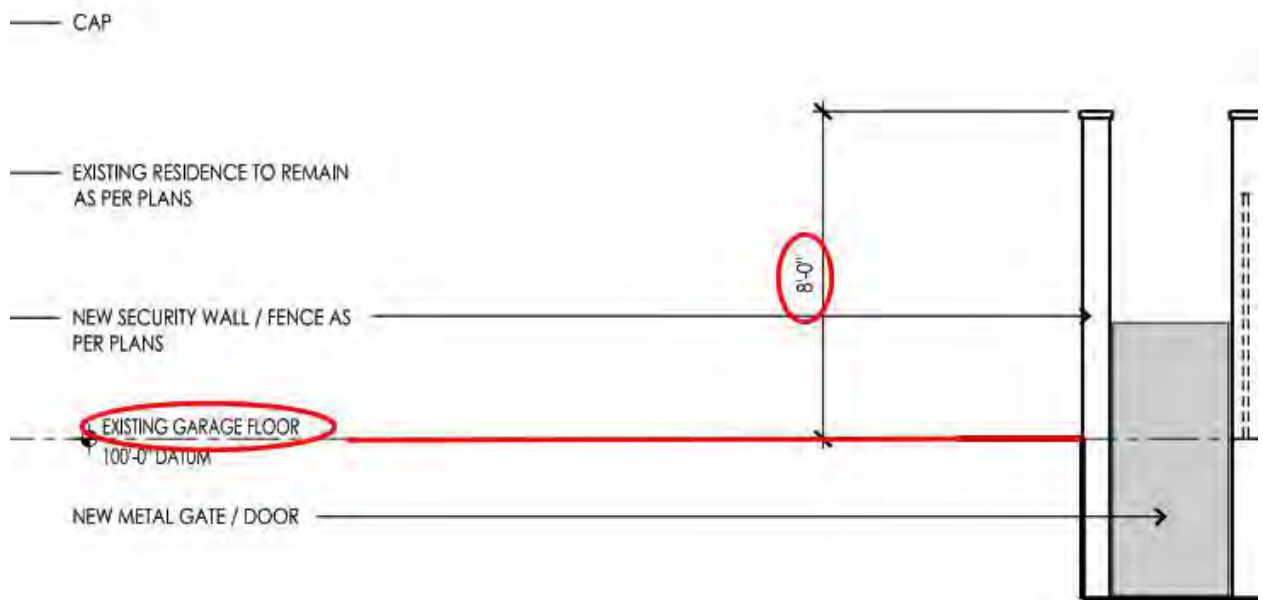
“Fence height” means that a fence or wall shall be measured from the adjacent existing ***natural grade at the base*** of the fence or wall, to the top edge of the fence or wall.”

City Code § 19.76.050.E.1.b. (emphasis added).

The Applicant’s plans are defective and do not satisfy the Applicant’s clear and convincing evidentiary burden because they measure the height from the “EXISTING GARAGE FLOOR”, which is contrary to the code’s specifications of measuring from the base of the natural grade.



(Figure 2.a)



(Figure 2.b)

Moreover, the Applicant's own evidence/site pictures show(s) that the natural grade of the Property is below the garage floor level:



(Figure 2.c)

This picture taken by Dr. Yaganti also shows this:



(Figure 2.d)

If the fence is built according to the Applicant's plans and specifications it will clearly exceed 8' in height under the "Fence height" definition in the City Code because the Applicant is measuring 8' from the level of the garage floor. But when the measurements are taken from the base of the "existing natural grade" as required by City Code § 19.76.050.E.1.b., the Applicant's depicted fence clearly exceeds 8' in height.

If the fence is built 8' from the existing garage floor it will be 10'3" to 11'8.75"—almost 12' tall—when measured from the base of the natural grade as these pictures of the back half and back corner of the proposed dog run (measured from the base natural grade) taken by Dr. Yaganti show:



(Figure 2.e)



(Figure 2.f)



(Figure 2.g)

This evidence demonstrates that if the fence is built 8' from the existing garage floor it will be 10'3" to 11'8.75"—almost 12' tall—when measured from the base of the natural grade. Dr. Yaganti has not given his consent to have the fence exceed 8' in height, which is required by City Code § 19.76.050.E.4.

3. The Conditional Use Permit criteria to have a fence >6' but <8' have not been met.

City Code § 19.76.050.E.3 provides as follows:

3. Conditional use. Fences in the side and rear yards may be erected to a maximum height of eight feet as a conditional use upon a clear and convincing showing by the property owner in accordance with Subsections (a) and (b) below:
 - a. The existence of 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
 - b. That erection of such a fence is the most reasonable solution under the circumstances. Any such conditional use permit may be granted by the director or his designee following an administrative hearing preceded by all required notifications. A building permit shall be required for all fences approved as a conditional use.

The Applicant has not met the standard of “clear and convincing” evidence. This is the highest burden of proof known in the civil law, ranking just below the standard of “beyond a reasonable doubt” utilized in the criminal courts. *See Essential Botanical Farms, LLC v. Kay*, 2011 UT 71, ¶ 24, 270 P.3d 430. It is a burden of proof that requires much more from an applicant than the usual preponderance of evidence standard normally used in most circumstances under the civil law, including land use law. *See id.*

In *Kirchgestner v. Denver & R.G.W.R.R.*, 118 Utah 41, 233 P.2d 699 (1951), our Supreme Court said the following about this standard of proof:

[F]or a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion.

....

That proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable to the mind.

....

[P]roof is not "clear and convincing" if the court entertains a reasonable doubt.

Id. at 44 (internal quotation marks omitted).

Further, there is no presumption of approval. *See* City Code § 19.84.020.A. It is clear from the Application materials that the Applicant has not met and cannot meet this exacting standard.

a. No unique or special circumstances.

City Code § 19.76.050.E.3.a. requires that the Applicant show, by clear and convincing evidence, "[t]he existence of 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." *Id.*

The Applicant's Application utterly fails to identify what the unique and special circumstances are that justify his proposed 8' fence, let alone that they are of a "natural, material and adverse nature" The Application doesn't even mention City Code § 19.76.050.E.3.a., nor does it produce a shred of evidence in support of these criteria.

The staff report alludes to the fact that the purpose of the structure is for a dog run to "assist with noise reduction and security." But voluntarily putting noisy dogs in the enclosure is certainly not a "natural" condition of the land—it's a self-imposed one.

The staff report alludes to the fact that the fence is needed as a "**safety enhancement effort to address the nuisances resulting from the neighboring dogs.**" An "animal causing a nuisance" is a defined term under the City Code. *See* City Code § 8.24.015. There has been no showing that the neighbors have an "animal causing a nuisance." The staff report makes the bare allegation of this with no evidentiary support whatsoever. Moreover, again, the condition to be addressed must be a "natural" condition—this does not meet that standard.

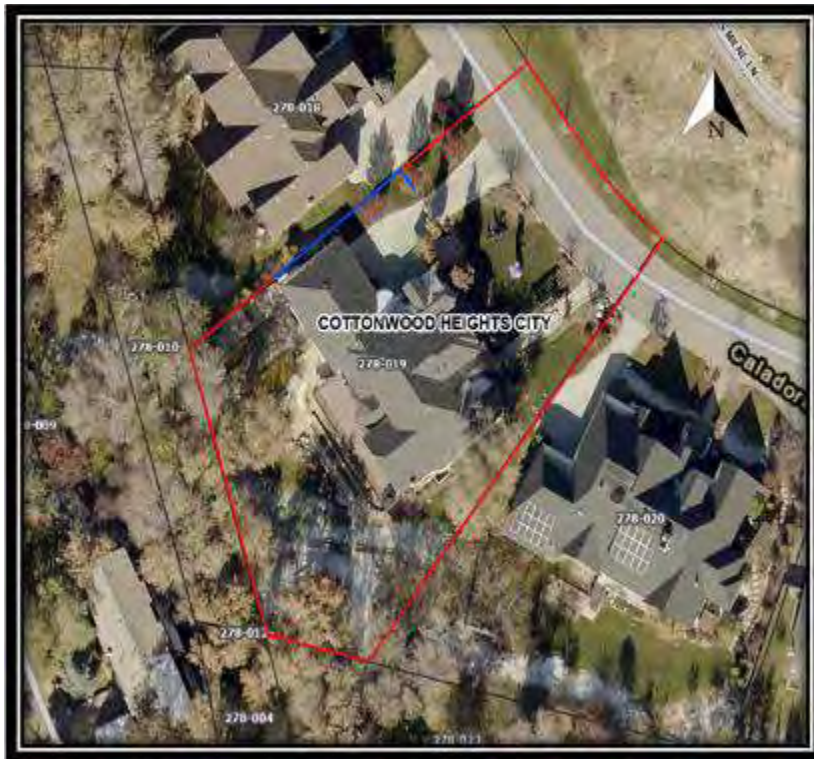
b. Not the most reasonable solution.

City Code § 19.76.050.E.3.b. requires that the Applicant prove, by clear and convincing evidence, "[t]hat erection of such a fence is the most reasonable solution under the circumstances." *Id.* The Applicant has not met this standard.

Why can't the Applicant build the dog run in the back of his Property?

If the problem is containing dogs and/or preventing dog noise then why is the solution to move the dogs **closer** to the neighbor instead of moving the dogs further away from the neighbor (i.e. along the back yard fence) where the setbacks aren't so tight or elsewhere?

The Applicant has a very large backyard with plenty of room for a dog run as the staff report's aerial photo of the Property shows:

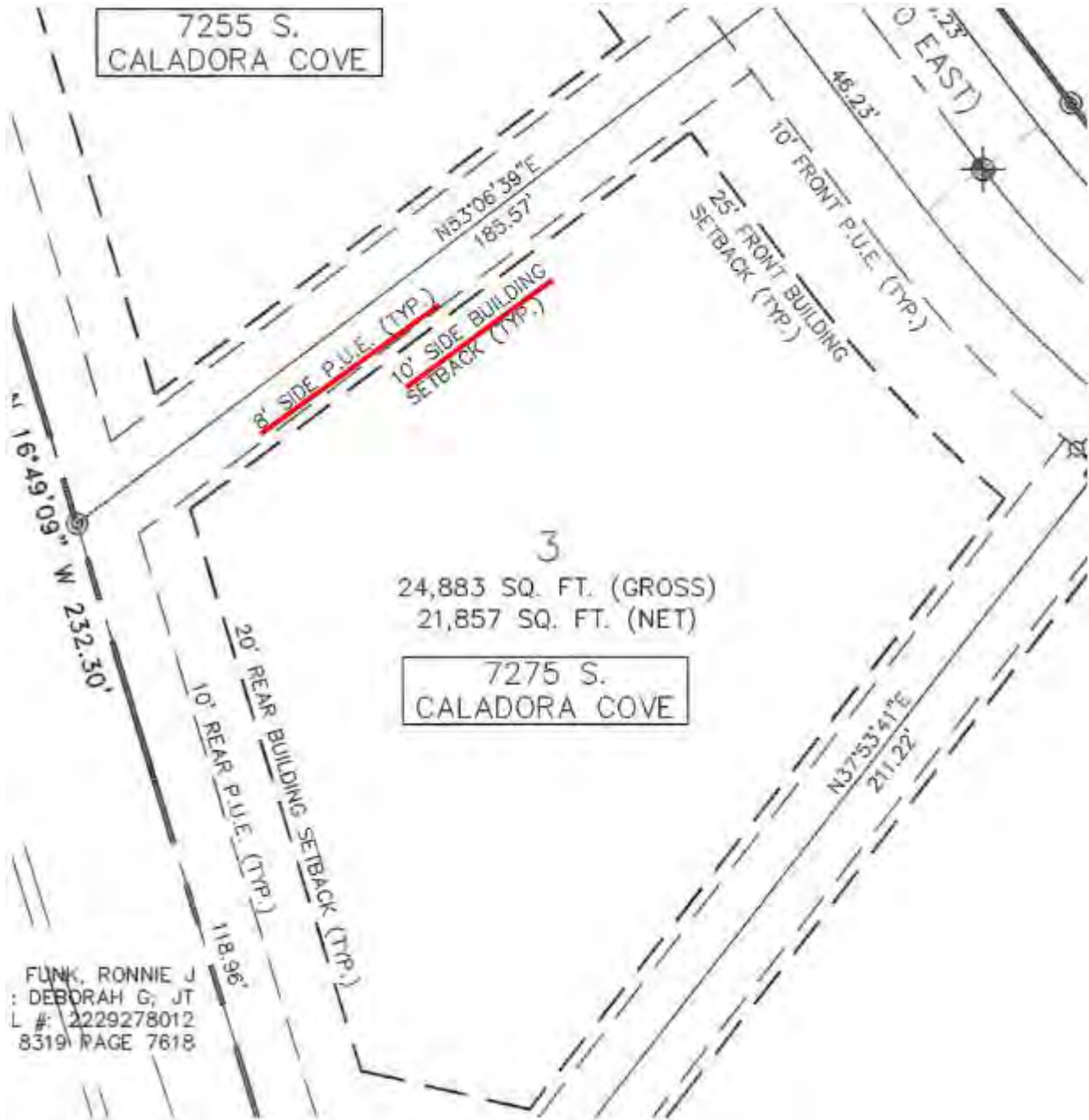


(Figure 3.a)

Simply stated, the Applicant has not met his burden of showing, by clear and convincing evidence, that his proposal is the most reasonable solution.

4. The structure violates the City-approved plat by encroaching on the 8' P.U.E. and violating the 10' side building set back.

The City approved "The Cove at the Cottonwoods Subdivision Amended" plat on condition that each home maintain an 8' public utility easement and a 10' side building setback as shown on the official, city-approved plat, an excerpt of which is shown below in **Figure 3.b**:



(Figure 3.b)

Under Utah law, plats create contractual rights and servitudes that run with the land. See *The View Condo. Owner's Ass'n v. MSICO, LLC*, 2005 UT 91, ¶¶ 24, 27127 P.3d 697; *Rowley v. Marrcrest Homeowners' Ass'n*, 656 P.2d 414, 417 (Utah 1982).

It would, therefore, constitute a government-effected taking of private property rights to allow the dog run structure/fence to be constructed in violation of the 10' side building setback shown on the plat. Dr. Yaganti has an enforceable contractual right and protected property interest in the 10' side setback created by the plat. Approval of the Application would take that away from Dr. Yaganti. It would also unduly encroach upon and encumber the 8' P.U.E. shown on the plat to grant approval for this structure, which is not in the public interest.

Conclusion

In sum, the Application should be denied for the following reasons:

1. The dog run/fence structure 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. The Conditional Use Permit criteria to have a fence >6' but <8' have not been met.
4. The structure violates the City-approved plat by encroaching on the 8' P.U.E. and violating the 10' side building set back required by the plat.

Sincerely,

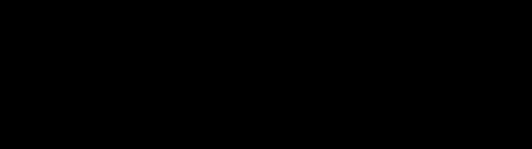
MCDONALD FIELDING PLLC



Daniel J. McDonald

Encl.: Declaration of Vamsee M. Yaganti; Recorded Subdivision Plat

Daniel J. McDonald (#07935)
MCDONALD FIELDING, PLLC



Attorneys for Vamsee M. Yaganti

CITY OF COTTONWOOD HEIGHTS

*IN RE CONDITIONAL USE
APPLICATION – 7275 S. Caladora Cove;
John Elkins/Robert Byrne (Applicant)*

**DECLARATION
OF
VAMSEE M. YAGANTI**

Hon. Mike Johnson
Community and Economic Development
Director

I, Vamsee M. Yaganti, declare and state as follows:

1. I am more than 18 years of age.
2. I am competent to testify concerning the matters stated in this declaration.
3. I have personal knowledge of the matters stated in this declaration.
4. I live at 7255 S. Caladora Cove, Cottonwood Heights, Utah, 84047 and have lived

there at all relevant times during this Conditional Use Application, including at the time of the Application being filed with the City.

5. My home is immediately adjacent to the Applicant's property (the subject "Property").

6. I have carefully reviewed the written objections prepared by my attorney, Daniel J. McDonald of McDonald Fielding, PLLC, submitted contemporaneously herewith (the "Objections").

7. I took the photographs and measurements that are depicted in Figures 1.b, 1.d, 1.e, 2.d, 2.e, 2.f., and 2.g of the Objections on or about March 3, 2022, to March 7, 2022.

8. The depicted measurements were taken with a standard tape measure that was not altered in any way.

9. To the best of my knowledge and recollection everything stated in the Objections is true and correct.

I declare under criminal penalty under the law of Utah that the foregoing is true and correct.

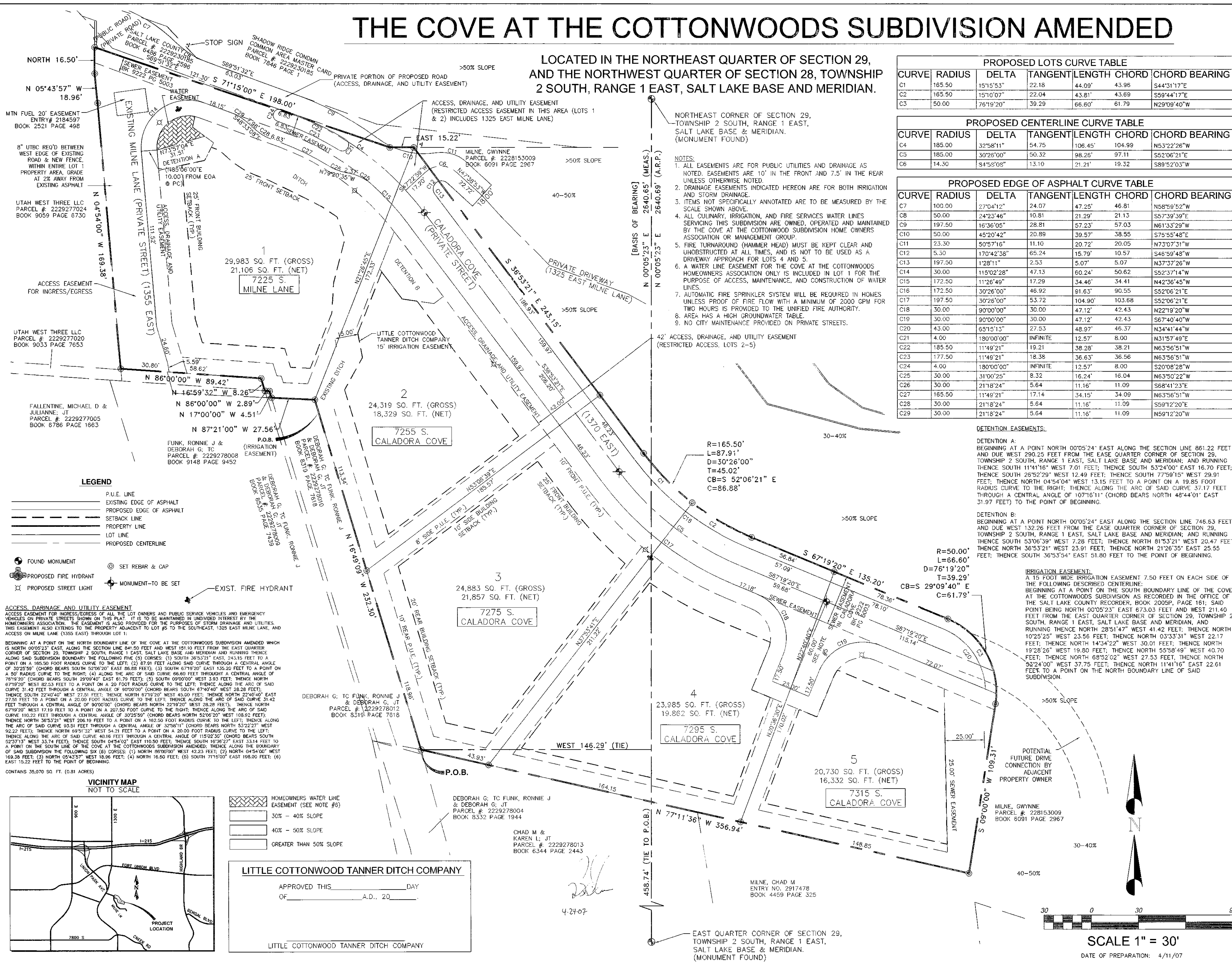
DATED this 7th day of March, 2022.

/s/

Vamshee M. Yaganti

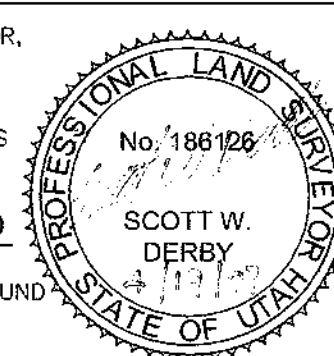
THE COVE AT THE COTTONWOODS SUBDIVISION AMENDED

LOCATED IN THE NORTHEAST QUARTER OF SECTION 29,
AND THE NORTHWEST QUARTER OF SECTION 28, TOWNSHIP
2 SOUTH, RANGE 1 EAST, SALT LAKE BASE AND MERIDIAN.



SURVEYOR'S CERTIFICATE:

I, SCOTT W. DERRY, DO HEREBY CERTIFY THAT I AM A REGISTERED LAND SURVEYOR, AND THAT I HOLD CERTIFICATE NO. 186126 AS PRESCRIBED BY THE LAWS OF THE STATE OF UTAH. I FURTHER CERTIFY THAT, BY THE AUTHORITY OF THE OWNER, I HAVE MADE A SURVEY OF THE TRACT OF LAND SHOWN ON THIS PLAT AND DESCRIBED BELOW, AND THAT I HAVE SUBDIVIDED SAID TRACT OF LAND INTO LOTS AND STREETS, HEREINAFTER TO BE KNOWN AS:



THE COVE AT THE COTTONWOODS SUBDIVISION AMENDED

AND THAT THE SAME HAS BEEN CORRECTLY SURVEYED AND STAKED ON THE GROUND AS SHOWN ON THIS PLAT.

LEGAL DESCRIPTION

BEGINNING AT A POINT WHICH IS NORTH 00°05'23" EAST, ALONG THE SECTION LINE 458.74 FEET AND WEST 146.29 FEET FROM THE EAST QUARTER CORNER OF SECTION 29, TOWNSHIP 2 SOUTH, RANGE 1 EAST, SALT LAKE BASE AND MERIDIAN AND RUNNING THENCE NORTH 16°49'09" WEST, 232.30 FEET; THENCE NORTH 87°21'00" WEST, 27.56 FEET; THENCE NORTH 17°00'00" WEST, 4.51 FEET; THENCE NORTH 86°00'00" WEST, 2.89 FEET; THENCE NORTH 18°50'32" WEST, 8.26 FEET; THENCE NORTH 36°00'00" WEST, 89.42 FEET; THENCE NORTH 04°54'00" WEST, 169.38 FEET; THENCE NORTH 05°45'57" WEST, 18.96 FEET; THENCE NORTH, 16.50 FEET; THENCE SOUTH 71°15'00" EAST, 198.00 FEET; THENCE EAST, 15.22 FEET; THENCE SOUTH 36°53'21" EAST, 243.15 FEET TO A POINT ON A 165.50 FOOT RADIUS CURVE TO THE LEFT; THENCE 87.91 FEET ALONG SAID CURVE THROUGH A CENTRAL ANGLE 302°06'21" (CHORD BEARS SOUTH 52°06'21" EAST, 88.88 FEET); THENCE SOUTH 67°19'20" EAST, 135.20 FEET TO A POINT ON A 50.00 FOOT RADIUS CURVE TO THE RIGHT; THENCE 66.60 FEET ALONG SAID CURVE THROUGH A CENTRAL ANGLE OF 76°19'20" (CHORD BEARS SOUTH 29°09'40" EAST, 61.79 FEET); THENCE SOUTH 09°00'00" WEST, 109.31 FEET; THENCE NORTH 77°11'36" WEST, 356.94 FEET TO THE POINT OF BEGINNING.

CONTAINS: 2.84 ACRES

BASIS OF BEARINGS

THE BASIS OF BEARINGS FOR THIS SURVEY IS NORTH 00°05'23" EAST ALONG THE SECTION LINE BETWEEN THE FOUND EAST QUARTER CORNER AND NORTHEAST CORNER OF SECTION 29, TOWNSHIP 2 SOUTH, RANGE 1 EAST, SALT LAKE BASE AND MERIDIAN.

NARRATIVE

THIS PLAT AMENDS THE COVE AT THE COTTONWOODS SUBDIVISION, ENTRY # 9383395, BOOK 2005P, PAGE 161. IN AMENDING THIS PLAT THE FOLLOWING CHANGES WERE MADE:

1. MEDIAN IN ROAD WAS AMENDED.
2. BOUNDARY BETWEEN PUBLIC AND PRIVATE ROAD MOVED TO INTERSECTION AT THE NORTHWEST CORNER OF THE PROPERTY.
3. IRRIGATION EASEMENT CHANGED TO REFLECT CHANGES IN CONVEYING THE DITCH WATER THROUGH THE PROPERTY. THE DITCH REMAINS OPEN TO A POINT NEAR WHERE IT CROSSES UNDER THE PRIVATE STREET ON THE NORTH SIDE OF THE SUBDIVISION.
4. SIGNATURES FOR COTTONWOOD HEIGHTS CITY REPLACE SALT LAKE COUNTY SIGNATURE BLOCKS.
5. ADJACENT PROPERTIES SHOWN.
6. NATURAL SLOPES GREATER THAN 30% SHOWN.
7. EASEMENTS FOR SEWER MOVED TO REFLECT CHANGES IN SEWER ALIGNMENT. A NEW SEWER LINE RUNS UNDER THE PRIVATE STREET, MORE OR LESS.
8. FIRE HYDRANTS MOVED.
9. THE SOUTHERLY BOUNDARY LINES OF LOTS 4 AND 5 REFLECT CHANGES AFTER DILIGENT RESEARCH RECOVERED THE OUT-CLAIM DEED FOR CHAD M. MILNE FOUND AT THE SALT LAKE RECORDERS OFFICE. ENTRY# 2917478, BOOK 4459, PAGE 325.

OWNER'S DEDICATION

KNOW ALL MEN BY THESE PRESENTS THAT WE THE UNDERSIGNED OWNER(S) OF THE ABOVE DESCRIBED TRACT OF LAND, HAVING CAUSED SAME TO BE SUBDIVIDED TO BE HEREAFTER KNOWN AS:

COVE AT THE COTTONWOODS SUBDIVISION AMENDED

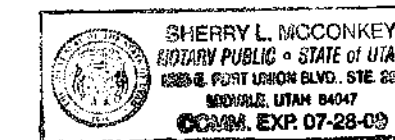
DO HEREBY DEDICATE FOR PERPETUAL USE OF THE PUBLIC ALL PARCELS OF LAND AND EASEMENTS SHOWN ON THIS PLAT AS INTENDED FOR PUBLIC USE.

IN WITNESS WHEREOF, WE HAVE HEREUNTO SET OUR HANDS THIS 14th DAY OF April, A.D., 2007

ACKNOWLEDGMENT

STATE OF UTAH
COUNTY OF SALT LAKE

ON THE 14th DAY OF April, A.D., 2007, PERSONALLY APPEARED BEFORE ME JOE FREED, WHO BEING DULY SWORN OR AFFIRMED, DID SAY THAT HE IS THE MANAGER OF GRANITE HEIGHTS DEVELOPMENT, LLC AND THAT THE WITHIN OWNER'S DEDICATION WAS SIGNED BY THE LIMITED LIABILITY COMPANY BY AUTHORITY OF ITS OPERATING AGREEMENT/ARTICLES OF ORGANIZATION AND HE ACKNOWLEDGED TO ME THAT SAID GRANITE HEIGHTS DEVELOPMENT EXECUTED THE SAME.

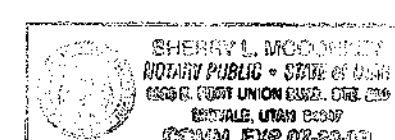


NOTARY PUBLIC
MY COMMISSION EXPIRES: 07-28-09

ACKNOWLEDGMENT

STATE OF UTAH
COUNTY OF SALT LAKE

ON THE 14th DAY OF April, A.D., 2007, PERSONALLY APPEARED BEFORE ME Joe Freed, WHO BEING DULY SWORN OR AFFIRMED, DID SAY THAT HE IS THE MANAGER OF GRANITE HEIGHTS DEVELOPMENT, LLC AND THAT THE WITHIN OWNER'S DEDICATION WAS SIGNED IN BEHALF OF SAID CORPORATION BY AUTHORITY OF ITS BYLAWS, OR (RESOLUTION OF ITS BOARD OF DIRECTORS), AND SAID Joe Freed ACKNOWLEDGED TO ME THAT SAID CORPORATION EXECUTED THE SAME.



NOTARY PUBLIC
MY COMMISSION EXPIRES: 07-28-09

THE COVE AT THE COTTONWOODS SUBDIVISION AMENDED

LOCATED IN THE NORTHEAST QUARTER OF SECTION 29,
AND THE NORTHWEST QUARTER OF SECTION 28, TOWNSHIP
2 SOUTH, RANGE 1 EAST, SALT LAKE BASE AND MERIDIAN.

7225 SOUTH EAST MILNE LANE COTTONWOOD HEIGHTS, UTAH

OWNER
LAND DIRECT USA, INC.
11576 SOUTH STATE STE 101A
DRAPER, UTAH 84020
(801) 523-8228
CONTACT: JOE FREED

DESIGN ENGINEER:
WILDING ENGINEERING
14721 SOUTH HERITAGE CREST WAY
BLUFFDALE, UTAH 84065
(801) 553-8112 (801) 641-0923
CONTACT: DAVID WILDING, P.E.

Exhibit C - Byrne Withdrawal of CUP

WITHDRAWAL LETTER

Byrne Project

3/17/2022

7275 S. Caladora Cove

Cottonwood Heights

Utah, 84047

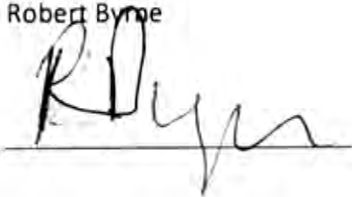
To whom it may concern:

Please withdraw our permit application we are trying to have granted for the Eight-foot (8') security fence on the west side of the property at 7275 S. Caladora Cove in Cottonwood Heights, UT.

We will be keeping the finished height under the 72" (six feet) from the existing natural ground height.

Thank you,

Robert Byrne

A handwritten signature in black ink, appearing to read 'R. Byrne', written over a horizontal line.

3.17.2022



Dan McDonald
P.O. Box 1184
Pleasant Grove, Utah 84062
Email: dan@mcdonaldfielding.com
Telephone: (801) 372-0055
www.mcdonaldfielding.com

March 21, 2022

Mike Johnson
Cottonwood Heights City
Community and Economic Development Director
Via Email: mjohnson@ch.utah.gov

Maverick Yeh
Assistant Planner
Via Email: myeh@ch.utha.gov

**Re: Conditional Use Application of Robert Byrne / John Elkins (“Applicant”)
7275 S. Caladora Cove (the “Property”)**

Honorable Community and Economic Development Director:

As you know, this firm represents Dr. Vamsee M. Yaganti and Snigdha Ancha (collectively, “Dr. Yaganti”), who live next door to the Applicant’s Property identified above. As you know, a public hearing was held on March 9, 2022, regarding the Applicant’s conditional use application. The Applicant did not get conditional use approval. Instead, the hearing was continued for two weeks.

Nevertheless, the Applicant appears to be moving forward with the construction of his dog run structure—this is not a fence; this is a dog run addition to the house posing as a fence—despite not having conditional use approval to do so. The enclosed pictures were taken by my client over the weekend and show that the Applicant is continuing to build his structure without the City’s approval or authorization.

Also, the enclosed group text screen shot involving the Applicant shows that he intends to complete his project before the next hearing is even held. The City should immediately order the Applicant to stop work and red tag his project. This is unacceptable behavior that should not be tolerated by the City.

Sincerely,

MCDONALD FIELDING PLLC

A handwritten signature in blue ink, appearing to read "D J McDonald".

Daniel J. McDonald

Encl.





8:24

45%



(No subject)

Yes other than the garage doors which won't be ready for 4 weeks possibly the Driveway hoping to be done within 2 weeks but that can be done any day and will be scheduled ahead of time. It will lately be done by his coming weekend. Stucco .. rock work... the dog walk all in the next two weeks. So the only other stuff is specific detail stuff like electrical boxes and my graffiti guy who are not the issue anyway. I am going to order some trees on the side of the dog walk but that can be done any day as well. I see the light!! At least with this project. 🤔🤔🤔🙌



Copy text



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More



From: [Dan McDonald](#)
To: [VAMSEE YAGANTI](#); [Michael Johnson](#); [Maverick Yeh](#)
Subject: [EXT:]Re[2]: [EXT:]Complaint
Date: Monday, March 21, 2022 3:05:14 PM

My client is correct. We disagree with your interpretation of this structure as a "fence" under the city code. It is not a "fence." It is an appendage to the home and main building structure, which violates the city-approved set back, among other things. You have essentially made an administrative code interpretation determination that we disagree with. Please consider this as our notice of appeal and send us to the next level of appeal.

Dan McDonald

Dan McDonald

McDonald Fielding, PLLC

Attorney at Law

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

----- Original Message -----

From: "VAMSEE YAGANTI" [REDACTED]
To: "Michael Johnson" <MJohnson@ch.utah.gov>; "Dan McDonald" [REDACTED]
"Maverick Yeh" <MYeh@ch.utah.gov>
Sent: 3/21/2022 11:12:55 AM
Subject: Re: [EXT:]Complaint

Mr. Johnson.,

Thank you for your response. I have a couple of questions

1. Since there is a natural grade on which structure stands, where should the 6 ft height of this structure be measured from. The height of the foundation from the natural grade in the back was already 3 ft and 9 in. So is the neighbor allowed to build an additional 6 ft on top of this foundation or is the 6 ft measurement made from the land to the top of the structure.
2. As my attorney Mr. McDonald mentioned during the open hearing that we contest that this is not a fence but a structure (dog run). What is the next step if he want to appeal the definition of fence versus structure.

Thanks

Vamsee

Vamsee Yaganti, MD; MA; FACC, FSCAI
Interventional Cardiologist

[REDACTED]

From: Michael Johnson <MJohnson@ch.utah.gov>
Sent: Monday, March 21, 2022 10:13 AM
To: Dan McDonald <[REDACTED]>; Maverick Yeh <MYeh@ch.utah.gov>
Cc: VAMSEE YAGANTI <[REDACTED]>
Subject: RE: [EXT:]Complaint

Mr. McDonald:

The adjacent property owner formally withdrew his application for an 8' fence last week and indicated that he intends to construct a code-compliant 6' fence, which is a permitted use that does not require additional city approval or permitting. As such the subsequent administrative hearing has been cancelled. They are required to comply with all city fence standards and height measurements.

If a violation of permitted fence standards is observed or expected, the city's code enforcement is responsible for the investigation of all potential code violations.

Thank you,

Mike Johnson
Community & Economic Development Director
Cottonwood Heights

From: Dan McDonald <[REDACTED]>
Sent: Monday, March 21, 2022 9:42 AM
To: Michael Johnson <MJohnson@ch.utah.gov>; Maverick Yeh <MYeh@ch.utah.gov>
Cc: VAMSEE YAGANTI <[REDACTED]>
Subject: [EXT:]Complaint

Mr. Johnson/Mr. Yeh:

It appears that Vamsee Yangani's neighbor is moving forward with construction despite not having conditional use application approval. Please see the attached letter and let me know at your earliest convenience if the City intends to do anything about this. Thank you.

Dan McDonald

Dan McDonald

McDonald Fielding, PLLC

Attorney at Law

[REDACTED]

[REDACTED]

[REDACTED]

www.mcdonaldfielding.com

EXTERNAL ATTACHMENT: Only Open if you trust this sender.

Exhibit F - Photographic Evidence

The natural grade slopes towards the back of the dog run and the fence height in these areas exceeds 93" as the following pictures demonstrate:



(Photo taken on or about 4/10/2022).







(Photos taken on or about 4/14/2022)



Exhibit G - Byrne admits this is a dog run

Owner: Robert S. Byrne

Dr. Ashleigh A. Byrne

7275 S. Caladora Cove

Coltonwood Heights, VT 84047

- A foundation has been poured for a Dog run on the side of our home. We are applying for approval of a eight foot fence. See drawing.

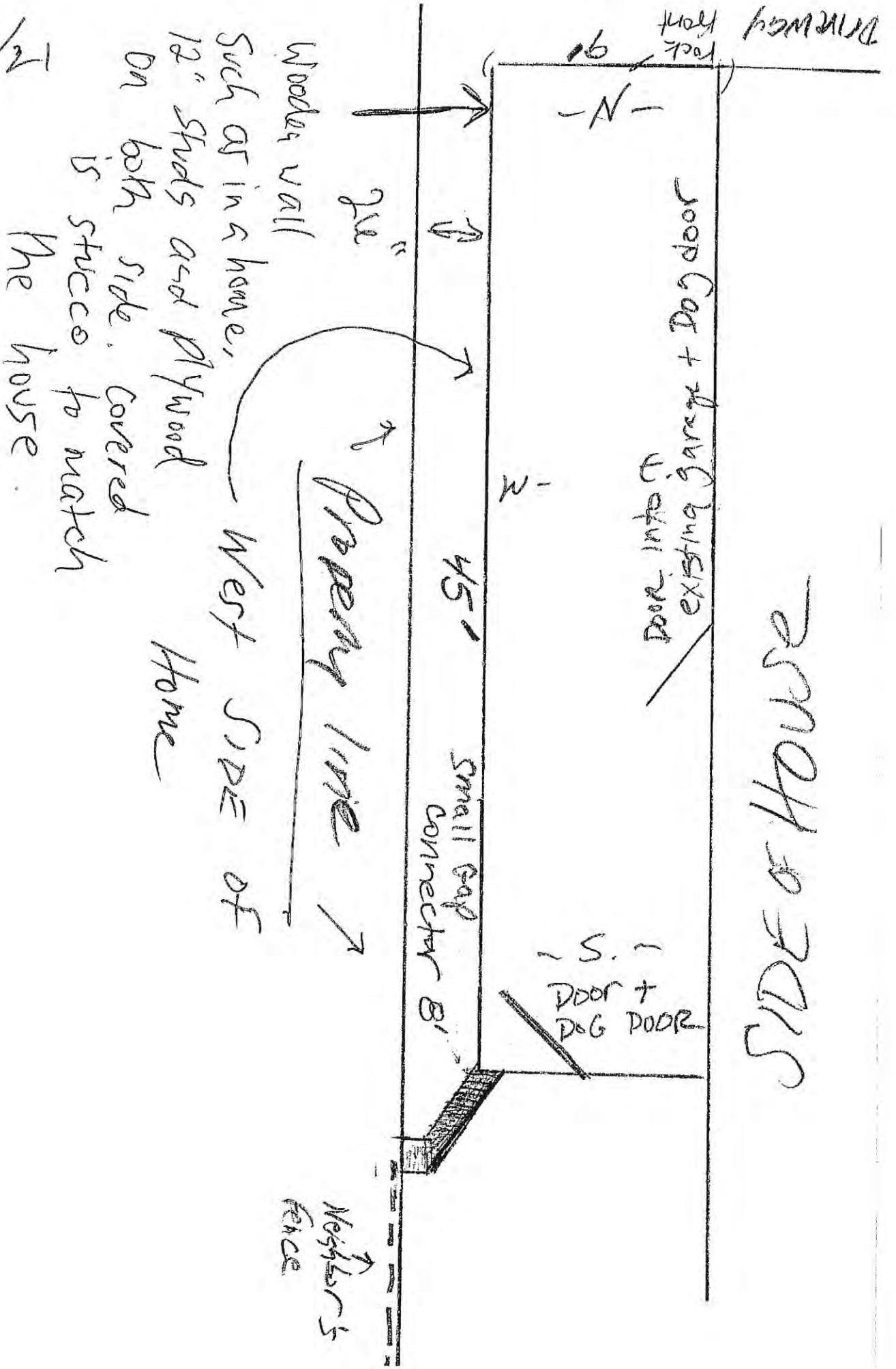
The additional two feet (over a 6 ft) is for security mainly and potential reduction of noise from dogs barking. An individual who is currently in jail for attempting to kill a person with a bomb has threatened our lives and trespassed on our property several times. He is currently in jail for a 1st class felony awaiting trial in a maximum security lockup. He has made it

very clear he is going to try and kill my family if he gets out; He has already thrown a large rock through our window in our bedroom and almost killed my son.

Secondly, I am asking for an eight foot fence to help with noise reduction. It is a proven fact that noise such as a loud dog barking is reduced significantly at 8ft. Even better at 10ft but I am happy with 8ft. This is more of a benefit for my neighbor as my dog barks very loud. Therefore the height is a huge concern for us more for safety issues but equally to appease to my neighbors.

— The footing is level with the house foundation as per code. The fence will be eight feet higher.

SIDE of HOUSE



12/31/21

Handwritten signature or mark.

**TOPP REMODELING
& CONSTRUCTION**
DESIGN • BUILD • REMODEL
Excellence in Building for over 25 years

APPEALS HEARING OFFICER DECISION

HEARING DATE: July 21, 2022
PROJECT: Appeal of Decision to Refuse to Accept or Process CUP Application
LOCATION: 7275 Caladora Cove, Cottonwood Heights, Utah
APPELLANT(S): Robert and Ashleigh Byrne, represented by Katherine D. Pasker, Esq.

APPEALS HEARING OFFICER AUTHORITY

Section 19.92.010(A) of the Cottonwood Heights Code of Ordinances (the “City Code”) created the position of an “appeals hearing officer” for land use decisions in the City of Cottonwood Heights (“City”). It provides as follows:

- A. Position Created. The position of appeals hearing officer is created pursuant to authority granted by the Municipal Land Use, Development, and Management Act, UTAH CODE ANN. § 10-9a-101 *et seq.* (the “Act”). The appeals hearing officer shall replace in all respects the previous duties of the city’s board of adjustment.

Section 19.92.010(B) of the City Code describes the powers and duties of an appeals hearing officer, and includes the following language applicable to the matter at hand:

- B. Powers and Duties. The appeals hearing officer is the city’s appeal authority pursuant to Section 10-9a-701 of the Act, and shall have the following powers and duties:
1. Hear and decide appeals where it is alleged that there is an error in any order, requirement, decision or determination made by an administrative official or the planning commission in the enforcement or interpretation of this title or of any ordinance adopted pursuant thereto, including conditional use decisions.

In addition, Section 19.92.040(A) of the City Code confirms that the appeals hearing officer “shall hear and decide appeals alleging an error in any decision made by a city administrative official as well as administrative decisions of the planning commission.”

Because this matter involves an appeal from a decision of the City’s Community & Economic Development Director to refuse to accept and process a conditional use permit application, which is an administrative decision (not a legislative decision), the undersigned appeals hearing officer is authorized to hear and decide this matter pursuant to the above-quoted provisions of the City Code.

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

Robert and Ashleigh Byrne (the “Byrnes”) desired to construct a new wall in the side yard of their property. Below is an image of the “Subject Property” showing the concrete foundation area before the wall was constructed.



Under the Cottonwood Heights City Code, no fence or wall over six (6) feet in height is permissible in a side yard except as an approved conditional use. See CHC 19.76.050(E)(2) & (3). For a conditional use permit to be approved for a fence or wall that exceeds six (6) feet in height, the property owner must show the following by “*clear and convincing*” evidence:

1. The existence of 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
2. That erection of such a fence is the most reasonable solution under the circumstances. Any such conditional use permit may be granted by the director or his designee following an administrative hearing preceded by all required notifications. A building permit shall be required for all fences approved as a conditional use.

CHC 19.76.050(E)(3).

Moreover, if a property owner wants to install a side yard fence that exceeds eight (8) feet in height (up to a maximum height of twelve (12) feet), the City Code imposes the additional requirement of obtaining neighbor consent. See CHC 19.76.050(E)(4).

In February 2022, the Byrnes' contractor (John Elkins) submitted an application for a conditional use permit to construct a wall along the side yard of the Byrnes' property ranging between six (6) and eight (8) feet in height. In accordance with CHC 19.84.060, an Administrative Hearing Staff Report was prepared, and it recommended approval of the application with conditions. An administrative hearing was then conducted on March 9, 2022. Before a decision was made on the application, however, the Byrnes withdrew the application by submitting a written "Withdrawal Letter" requesting a withdrawal of their application and stating, "[w]e will be keeping the finished height under the 72" (six feet) from the existing natural ground height."

Following their withdrawal of the conditional use application, and despite their written representation that they would keep the height of the wall under 72" (six feet), the Byrnes proceeded to construct a wall in their side yard that exceeds six (6) feet in height. In their brief, the Byrnes themselves admit that the wall they installed is "*eight (8) feet [high] at the point furthest from the front of the Property....*" See Brief of Appellant, p. 2. The wall was completed in early April 2022. Below is an image of the newly-constructed wall (on the left-hand side):



After completing construction of the new wall, the Byrnes filed a new application with the City for a conditional use permit for the wall with a cover letter from their attorney dated May 9, 2022 (the "May Application"). Recognizing that the completed wall violates the City Code unless it is approved as a conditional use, the May Application seeks after-the-fact (or retroactive) conditional use approval. See Brief of Appellant, pp. 3-5.

In response to the May Application, the City's Community & Economic Development Director (the "Director") sent an email to the Byrnes' attorney stating, "[g]iven the current pending enforcement action active on this property, the city will not accept or begin processing this conditional use application until the enforcement action is properly concluded." The Byrnes' attorney replied by email stating that she and her client had not received any notice of an enforcement action, and asking what section of the City Code allows the City to refuse to process an application in this circumstance. The Director's response to the Byrnes' attorney's email is copied below. Notably, the Director's response does not identify any provision of the City Code that allows the City to refuse to process a conditional use application due to a pending code enforcement action.

Ms. Pasker:

Building a fence over six feet in height in a side or rear yard is permissible in Cottonwood Heights only upon issuance of a conditional use permit and a building permit. See CHC 19.76.050(E)(3). The portion of your client's fence that exceeds six feet in height, as measured under the city's ordinances, is a non-conforming structure that was illegally built without (a) a conditional use permit, in violation of CHC 19.76.050(E)(3); or (b) a building permit, in violation of various city ordinances, including CHC 19.76.050(E)(3) and CHC 9.09.090 and 9.02.100.

Issuance of a conditional use permit cannot retroactively cure the fact that the nonconforming portion of the fence was built without a building permit and therefore is illegal. The city's code enforcement personnel and prosecutor now are investigating the situation and how to proceed, which may include, without limitation, finding that the illegal portion of the fence is a nuisance that must be abated by its owner (see CHC 9.05.070). Although city ordinance provides an express remedy for a noncomplying structure under CHC 19.88.140, that approach doesn't appear to be capable of resolving this particular situation due to both the facial nonconformity with at least the timing requirements of that ordinance as well as the fact that the building permit violation would remain unresolved. Therefore, the city intends to proceed with its enforcement action until that process is concluded.

Thank you,

Mike Johnson
Community & Economic Development Director
Cottonwood Heights

The Director's determination to refuse to accept or process the Byrnes' May Application, as reflected in the subject email correspondence (the "Director's Decision"), is the decision that is the subject of this appeal. The Byrnes timely filed an appeal of the Director's Decision on May 26, 2022. A hearing on this appeal was held on July 21, 2022. Legal counsel for both the Byrnes and the City presented arguments in favor of their clients' respective positions.

STANDARD OF REVIEW

Under the Cottonwood Heights City Code, appeals of administrative land use decisions of city officials are appealable to the City's designated appeals hearing officer. See CHC 19.92.040(A).

The Director's Decision was a "land use decision" under Utah law because it was a decision regarding a land use application. See Utah Code Ann. § 10-9a-103(31).

As the appellant, the Byrnes bear the burden of proving that the Director's Decision was incorrect. CHC 19.92.040(H). Appeals of such administrative decisions are reviewed by the appeals hearing officer on a de novo basis, giving no deference to the decision below. CHC 19.92.040(I). Under the City Code, the undersigned appeals hearing officer is required to uphold the Director's Decision *"unless it is not supported by substantial evidence in the record or it violates a law, statute, or ordinance in effect when the decision was made."* CHC 19.92.040(J). A land use decision is illegal if it "is based on an incorrect interpretation of a land use regulation ... or is contrary to law." Utah Code Ann. § 10-9a-801(3)(c)(ii).

ANALYSIS AND DECISION

The central question at issue is whether the Director had the authority to lawfully refuse to accept or process the Byrnes' May Application. In analyzing this question, the undersigned hearing officer has carefully reviewed the parties' written briefs, the applicable legal standards, and the arguments presented by the parties' legal counsel at the hearing. For the reasons explained below, the undersigned appeals hearing officer concludes that the Director did not have the lawful authority to refuse to accept or process the May Application, and that it was a violation of applicable law to refuse to accept and process the May Application.

The City Code explains that the conditional use process is initiated upon submittal of a conditional use permit application to the planning department. See CHC 19.84.050. The City Code sets forth the information and materials that must be included with a conditional use permit application. Id. The City Code then explains that [o]nce the department has determined the application is complete, a staff report evaluating the conditional use application shall be prepared and forwarded" CHC 19.84.060 (underlying added). The mandatory language of the wording "*shall be prepared and forwarded*" indicates that if a CUP application has been filed, and if the planning staff determines that the application is complete, the City is required to proceed with the preparation of a staff report evaluating the application and forwarding the report to the applicable land use authority. The City is not required to process or evaluate the merits of a conditional use application unless the application is complete and the application fees have been paid. Significantly, the City Code does not contain any provisions allowing complete CUP applications to be refused.

The Director's Decision to refuse to accept the Byrnes' May Application appears to be based on the Director's own reasoning that if there is a pending code enforcement action or building permit violation regarding the subject property (or the subject use), the City can refuse to accept or process a conditional use application regarding the same use. The undersigned hearing officer, however, could find no support for that position in the provisions of the City Code (nor did the parties identify any such provisions in the City Code in their written briefs or during the hearing). Indeed, there is nothing in the City Code stating that code enforcement actions and conditional use proceedings are mutually exclusive. The one does not preclude the other. Both can proceed simultaneously.

Moreover, in Utah, when City officials make land use decisions, they are not only required to follow applicable city ordinances, but they must also comply with State law, namely, the applicable provisions of the Municipal Land Use, Development, and Management Act found in Utah Code Ann. § 10-9a-101 et seq. (the “State Code”) and governing Utah case law. And with respect to the acceptance and processing of complete land use application, the State Code is very clear. It provides:

- (i) An applicant who has submitted a complete land use application as described in Subsection (1)(c), including the payment of all application fees, is entitled to substantive review of the application under the land use regulations:
 - (A) in effect on the date that the application is complete; and
 - (B) applicable to the application or to the information shown on the application.

Utah Code Ann. § 10-9a-509(1)(a)(i).

In other words, under the State Code, if an applicant has submitted a complete land use application and paid the required application fees, the applicant is entitled to substantive review of the application under the land use regulations in effect on the date that the application is complete. The applicant’s statutory right (entitlement) to a “*substantive review of the application*” necessarily requires the municipality to accept, process, and evaluate the application on its substantive merits. This statutory right is not lost simply because a code enforcement action may already be in process regarding the subject use.

This interpretation is consistent with the statutory presumption in favor of a land use application when the land use regulations do not plainly restrict (or prevent) the application. Section 10-9a-306(2) of the State Code provides: “*If a land use regulation does not plainly restrict a land use application, the land use authority shall interpret and apply the land use regulation to favor the land use application.*” (Underlining added).

Furthermore, under the “vested rights” doctrine in Utah case law, the act of filing of a complete land use application is given certain protections, such as the protection against a city attempting to impose new requirements or standards that are adopted after the filing of the complete application. See, generally, Western Land Equities v. City of Logan, 617 P.2d 388 (Utah 1980). This is consistent with the statute that prohibits a city from imposing on an applicant who has submitted a complete application a requirement that is not clearly expressed in the State Act or the municipal ordinances. See Utah Code Ann. § 10-9a-509(1)(f). The protections afforded under the vested rights doctrine could be thwarted if a city could simply refuse to accept or process a complete land use application.

CONCLUSION AND DECISION

For the reasons explained above, the Director did not have the authority to lawfully refuse to accept or process the Byrnes’ May Application. The Director’s Decision to refuse to accept the Byrnes’ May Application violated applicable law in effect when the decision was made. Accordingly, the Director’s Decision is hereby reversed. The Byrnes’ May Application shall be accepted and processed by the City. As set forth in the City Code, the planning staff shall

determine whether the Byrnes' May Application is complete and whether the necessary applications fees have been paid. If the May Application passes these initial screening criteria, then the State Code entitles the Byrnes to a substantive review of their May Application. Pursuant to the City Code, this means a staff report evaluating the conditional use application shall be prepared and forwarded to the applicable land use authority for public hearing and decision. See CHC 19.84.060.

As a note of clarification, the decision set forth herein is one of procedure only. This decision does nothing more than allow the Byrnes' May Application to go through the normal process of review and consideration. At this time, the undersigned appeals hearing officer expresses no views or analysis as to whether the subject CUP application should be granted or what conditions, if any, can or should be imposed if the CUP application is approved. The Byrnes made the calculated decision to construct and install a wall that exceeds six (6) feet in height, presumably understanding the risks involved of building the same without first going through the required conditional use application and approval process. To quote the Byrnes' attorney, "[o]bviously, this approach would not be recommended and would be risky for any property owner to pursue, as work done without a [required] permit could be targeted for enforcement by a jurisdiction and required to be removed if a later applied-for permit was subsequently denied...." Brief of Appellant, p. 4.

The parties are reminded of their right to appeal this final decision of the undersigned Appeals Hearing Officer under Section 19.92.050 of the City Code, which provides for a petition for review to be filed with the district court within thirty (30) days after this decision is rendered.

DATED this 22nd day of July, 2022.



Paxton R. Guymon, Esq.
Appeals Hearing Officer
City of Cottonwood Heights, Utah