

October 18, 2022

VIA EMAIL

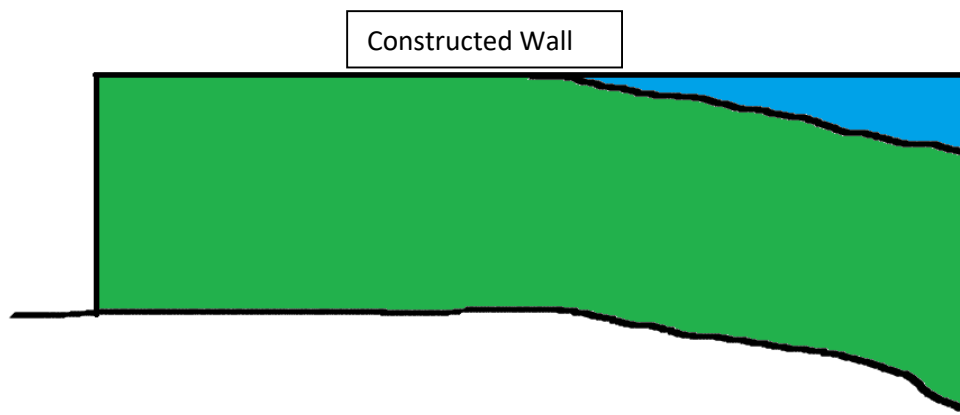
Planning Commission
City of Cottonwood Heights
2277 Bengal Blvd.
Cottonwood Heights, Utah 84121
Email: planning@ch.utah.gov

Re: Applicant Comments concerning Project CUP-22-011

Dear Commissioners:

As you know, 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”). Following the Commission’s October 5th meeting wherein the Byrne’s Application was considered, and the record was left open for additional public comment, we wanted to provide the following comments to focus the Commission’s attention on the legal standards applicable to this Application.

As set forth in our prior letter, as well as staff’s report in preparation for last meeting and the forthcoming meeting on October 19th, the only issue before the Commission is whether an additional two feet of fence along approximately a 12-foot span of the fence constructed by the Byrnes can be permitted as a conditional use. Pictorially, based on a rough sketch of the wall, the “use” the Commission is considering is shown in blue below:



The remainder of the fence, shown in green, is a permitted use under City code, for which no permit is required. Any public comment as to the desirability – or undesirability – of the green portion of the fence is completely irrelevant to the City’s determination relating to the small portion of the fence that exceeds six feet in height (roughly depicted in blue above) as, again, fences of six feet or less are a permitted use.

I. Utah law and City code requires the Planning Commission to approve the Application.

In order to deny the Application, the City must conclude (1) that the additional fence height poses reasonably anticipated detrimental effects, and (2) that those effects cannot be mitigated by reasonable conditions. 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.”) (emphasis added). Neither the City nor any other member of the public has identified detrimental effects posed by this additional fence height. Thus, the Application must be approved under Utah law.

As outlined in our prior letter, the slope of the Byrne’s yard presents the “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). By having the height of the wall increase only at the rear of the side yard (where the downward slope begins) the increased height screens the side entrance to the backyard. Additionally, by remaining at a static plane, the wall is more architecturally pleasing and fits with the surrounding neighborhood in both its materials and design.

Based on past City precedent, the screening provided by the wall is ample justification for the increased wall height requested in the Application. “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.” Staff Report at 5. Therefore, the Byrnes’ request, grounded in their need for additional privacy and security, should likewise be approved.

II. There is substantial evidence that the Byrnes need additional security and privacy and that the fence provides the most reasonable solution.

While other applicants appear to have been able to merely allege the desire for additional privacy, the Byrnes’ need is based on prior backyard intrusions from a former acquaintance. This is not an imagined threat as the family has had to obtain a protective order against this individual. This acquaintance has thrown a rock through the Byrnes’ window and trespassed into their backyard and contaminated their pool. The wall is just one element of a series of security measures they have implemented to protect their family and property from future threats. The addition of an opaque fence on the northwest corner of the home will thwart efforts to access the Byrnes’ backyard, screen side entrances that would be more vulnerable to intrusion, and provide additional privacy. In line with prior City determinations on granting wall height extensions, the Byrnes have shown that the additional wall height reasonably achieves the goal of providing them greater privacy and security.

III. The City cannot consider “public clamor”.

We acknowledge that the Byrnes’ neighbor objects to the wall in its entirety on various grounds. Fundamentally, however, so long as the wall meets the definition of a “fence” set forth in the City Code, those objections are meritless and the Planning Commission must discard them. *See Davis County v. Clearfield City*, 756 P.2d 704 (Utah Ct. App. 1988). Administrative land use decisions, such as those evaluating conditional use permits, cannot be based on public comments that are not both relevant to the standards set forth in City code and supported by substantial evidence. *See Uintah Mountain Rtc, L.L.C. v. Duchesne County*, 127 P.3d 1270 (Utah 2005).

As set forth in the Staff Report, the City has already determined that the Byrnes’ wall is a “fence” as defined in City code. A “fence” is “a barrier of any material or combination of materials erected to enclose, screen or separate areas.” § 19.76.050(E)(1)(a). As the area enclosed by the fence does not have a roof and is not designed for human or animal occupancy it cannot be a building. Because the wall is not a building, it cannot violate setbacks. City Code § 19.26.060(B).

While the Byrnes’ neighbor may not desire the wall to be constructed where it was, their preference is not relevant, as the City code is clear that the Byrnes have the right to build a 6 foot wall in the location that they did. The fact that the wall is now partially in excess of that height does not open the door to broad challenges to their property rights to build the fence itself where they did. The only issue for the City is to determine if there are any detrimental effects, and if so,

if there is any way to mitigate them by reasonable conditions. No detrimental effects have been raised and included in the record at all, let alone any substantiated by substantial evidence as required. Therefore in accordance with applicable state law, we request that the Application be approved.

IV. Conclusion

As more fully elaborated herein, and in accordance with the recommendation by City Staff, we respectfully request that the Application be approved. We request that this letter be included in the information available for the meeting to be held on Wednesday, October 19, 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 the undersigned at 801.257.7951.

Sincerely,

A handwritten signature in blue ink, appearing to read "James S. Wright", with a large, stylized initial "J" and a flourish at the end.

James S. Wright

cc: Robert Byrne