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File No. ZT-19-002

## Planning Commission Staff Report

**Meeting Date:** 19 June 2019  
**Applicant:** Staff

**Request:** Amendment to Title 19 of the Millcreek Code Regarding Noticing and Hearing Requirements for Land Use Hearings

**Prepared By:** Francis Xavier Lilly, AICP, Director

### SYNOPSIS AND SCOPE OF DECISION

Millcreek staff is requesting the Planning Commission and City Council to consider changes to the City's [process for noticing and conducting hearings of the Land Use Hearing Officer (LUHO), who acts as the City's appeal authority. Section 10-9a-701 of the Utah State Code requires a municipality to establish an appeal authority to hear and decide requests for variances from the terms of the land use ordinances, and appeals of land use decisions and fees assessed. Furthermore, the state mandates that the appeal authority act in a *quasi-judicial* matter – in other words, variances and appeals cannot be handled as administrative matters. State statute gives municipalities the option to designate a single person as an appeal authority, or to establish a board of adjustment to act as the appeal authority. Millcreek established a LUHO to act as its appeal authority.

Specifically, Millcreek's LUHO can make a decision regarding the following matters:

- a) Variances in General (19.92.050)
- b) Variances to the Requirements of Floodplain Hazard Regulations (19.74.190)
- c) Appeals of Planning Commission Decisions (19.76.035, 19.88.140)
- d) Appeals of Conditional Use Decisions (19.84.070)
- e) Appeals of Decisions by the Planning Director regarding Single- and Two-Family Dwellings (19.76.290)
- f) Appeals of Decisions by the Planning Director regarding Minimum Parking Requirements (19.80.040)
- g) Certain approvals of lots and buildings on private rights-of-way (19.76.080)
- h) Clarification on zone boundaries (19.06.040)
- i) Disputes of decisions made regarding the Geologic Hazards Ordinance (19.75.040)
- j) Permits for the establishment of lots that are smaller than the minimum required by zone (19.76.090)
- k) Alterations, Enlargements, Relocations, or Reconstructions of a Noncomplying Structure or a Structure Occupying a Nonconforming Use (19.88.040, -070)

Upon reviewing a number of recent applications to the Land Use Hearing Officer, staff is recommending some changes to the Millcreek Zoning Code regarding Hearings and Hearing Officer Requirements, particularly

pertaining to expansion or relocation of a noncomplying structure. Staff is also recommending the adoption of a public notice procedure for LUHO hearings , and qualifications for public intervention in LUHO proceedings.

Pursuant to **§19.05.030** of the Millcreek Code, the Planning Commission shall make a recommendation to the Millcreek Council for land use ordinances, zoning maps, official maps, and amendments.

## PROPOSED ORDINANCE AMENDMENTS

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Changes to the ordinance are summarized as follows, and the proposed new text is in the attached ordinance, **in red text and highlighted in yellow.**

1. Staff is proposing a requirement that the city mail a written notice to property owners within 150 feet of a property subject to a land use hearing.
2. Staff is also proposing that notice and application shall be sent via e-mail to the chair of the community council for the area in which the subject property is located. Notices will be sent at least 10 calendar days prior to the hearing, and the notice will invite the recipient to submit evidence pertaining to the application at the hearing itself, or in writing at least three days prior to the hearing. This is in keeping with the provisions of Title 2 of our ordinance, which requires staff to send to the community councils "applications for extraordinary relief and exceptions to the City Code of Ordinances."

Because a land use hearing is a *legal* proceeding, and not an administrative or legislative matter, staff is not recommending that the community councils provide a recommendation in a public meeting as they would for an item requiring planning commission or city council approval. However, the community council is encouraged to submit evidence and participate in a land use hearing for a property in the community district, and notice will be sent to the Community Council Chair to that effect.

3. Staff is adding two additional findings that a land use hearing officer will be required to make regarding issuance of a permit for the addition, enlargement, moving, or relocation of a noncomplying structure or a structure occupying a nonconforming use. The additional findings borrow from the City's Residential Compatibility Overlay Zone Option C special exception language, and specifically call out building envelope requirements, if they are applicable to the application. The intent of these additional findings is to ensure that any enlargement or alteration of a noncomplying structure is compliant with the City's RCOZ requirements.
4. Staff is also proposing language that will empower the land use hearing office to impose limitations upon the issuance of a permit to mitigate adverse effects on other properties in the neighborhood. While this is an implied power of the land use hearing officer, and is stated explicitly with regard to variances, staff believes that making this power explicit with regard to noncomplying structure permits will result in better applications, and stronger grounds for approval or denial of a permit application.
5. In order to maintain the integrity of the quasi-judicial proceeding, which is mandated by state law, staff is recommending the addition of language that stipulates that anyone seeking to participate in a land use hearing must file an application to intervene within five days of the hearing.

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## COMMUNITY COUNCIL INPUT

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In March, the Community Councils reviewed the proposed ordinance amendments. The **Mount Olympus Community Council**, **East Mill Creek Community Council** and the **Canyon Rim Citizens Association** recommended the changes be adopted with a unanimous vote of the voting members. The **Millcreek Community Council** voted to approve the proposed text amendment with the following recommended changes:

- Replace noticing parameter to 300 feet from 150 feet (19.92.030 2. A)
- Replace "chair of community council" with "members" (19.92.030 2. C)

The recommended changes came from a discussion amongst community council members where they stated that they would like to have the same notice that all land use applications require. Furthermore, the members felt that each member of the council needed to be noticed and not just the chair because they were experiencing communication issues. Staff also reminded them that all notices and staff memoranda were posted on the Millcreek website in addition to being emailed to the community council chair a full week prior to the meeting.

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## GENERAL PLAN CONSIDERATIONS AND ANALYSIS

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The Millcreek Together General Plan includes a goal in the Unique Neighborhoods element (Goal N-4), to "Inform and engage with neighborhoods, community councils, and individual residents during zoning and rezoning process, capital improvement planning, and decisions on city facilities and services."

Under this goal, the General Plan states as a strategy (4.1): "Create and implement state-of-the-art, transparent, clear, and cost effective methods to inform and involve neighborhoods and affected property owners in zoning and rezoning proposals and City planning projects."

Land Use Hearing Officer proceedings typically do not involve a rezoning initiative, but they can affect neighboring property owners, and staff supports a noticing procedure and the addition of findings to minimize adverse impacts brought by variances and expansions of noncomplying structures, in particular. Notifying potentially affected parties of these changes fulfills the intent of the general plan to properly inform neighborhoods of planning decisions, of which a LUHO administrative order is one.

Constraining the notice to 150 feet captures only those properties that tend to be immediately affected, and requiring affected owners to participate in the proceeding in an orderly and predictable manner maintains the integrity of the quasi-judicial process that is required under state law.

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## PLANNING STAFF RECOMMENDATION

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Staff recommends adoption of the proposed ordinance changes.

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## SUPPORTING DOCUMENTS

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1. Proposed Ordinance – Redlines

**Chapter 19.88 NONCONFORMING USES AND NONCOMPLYING STRUCTURES**[19.88.010 Continuation Of Use](#)[19.88.020 Occupation Within One Year](#)[19.88.030 Maintenance Permitted](#)[19.88.040 Repairs And Alterations Permitted](#)[19.88.050 Addition Of Parking Space](#)[19.88.060 Expansion Of Use Permitted](#)[19.88.070 Additions, Enlargements, Moving And Reconstruction Of A Structure](#)[19.88.080 Nonconforming Use Of Land](#)[19.88.090 Change Of Use](#)[19.88.110 Restoration Of Damaged Structure](#)[19.88.120 Abandonment Or One-Year Vacancy](#)[19.88.140 Application To Have A Use Violation Declared Legal Through Special Exception](#)[19.88.150 Application To Have A Structure Declared A Noncomplying Structure](#)**19.88.010 Continuation Of Use**

The occupancy of a noncomplying structure or of a building or structure by a nonconforming use, existing at the time this title became effective, may be continued, provided that the use has not been abandoned or the building left vacant as provided in MKZ 19.88.120.

**19.88.020 Occupation Within One Year**

A vacant building or structure may be occupied by a use for which the building or structure was designed or intended if so occupied within a period of one year after the use became nonconforming.

**19.88.030 Maintenance Permitted**

A noncomplying structure may be maintained.

**19.88.040 Repairs And Alterations Permitted**

Repairs and structural alterations may be made to a noncomplying structure or to a structure housing a nonconforming use. Any remodel or structural alteration that requires the demolition of an outside wall of a noncomplying structure shall only be allowed upon approval of the land use hearing officer, unless the new construction complies with the zoning ordinance. The land use hearing officer decision regarding applications for the removal and replacement of outside walls of a noncomplying structure shall be based upon the criteria outlined in MKZ 19.88.070(B).

**19.88.050 Addition Of Parking Space**

A building or structure lacking sufficient automobile parking space in connection therewith as required by this title may be altered or enlarged provided additional automobile parking space is supplied to meet the requirements of this title for such alteration or enlargement.

**19.88.060 Expansion Of Use Permitted**

A nonconforming use may be extended to include the entire floor area of the existing building in which it is conducted at the time the use became nonconforming.

**19.88.070 Additions, Enlargements, Moving And Reconstruction Of A Structure**

1. A noncomplying structure or building occupied by a nonconforming use shall not be added to or enlarged in any manner or moved to another location on the lot or reconstructed at another location on the lot except as provided by subsection B of this section unless such additions and enlargements comply with the regulations and intent of this title.
2. A building occupied by a nonconforming use or a noncomplying structure may be added to or enlarged or moved to a new location on the lot or reconstructed at a new location on the lot upon a permit authorized by the land use hearing officer, provided that the land use hearing officer shall find:
  - a. The addition to, enlargement of, moving of, or reconstruction of the structure at a new location on the lot is in harmony with one or more of the purposes of this title as stated in MKZ 19.02.020, and is in keeping with the intent of this title;
  - b. The addition to, enlargement of, moving of, or reconstruction of the structure at a new location of the lot is compatible with existing development within a reasonable distance in terms of height, mass and applicable building envelope requirements, and lot coverage; and
  - c. The addition to, enlargement of, moving of, or reconstruction of the structure at a new location of the lot will not be detrimental to the health, safety and general welfare of persons residing within a reasonable distance of the subject property.
  - d. That the proposed change does not impose any unreasonable burden upon the lands located in the vicinity of the nonconforming use or structure.
3. The Land Use Hearing Officer may impose conditions and limitations upon issuance of a permit for an addition to, enlargement of, moving of, or reconstruction of a structure as necessary to prevent or mitigate adverse effects on other properties in the neighborhood of the subject property, consistent with the standards of this Title.

### **19.88.080 Nonconforming Use Of Land**

The nonconforming use of land, existing at the time this title became effective, may be continued provided that no such nonconforming use of land shall in any way be expanded or extended either on the same or adjoining property, and provided that if such nonconforming use of land, or any portion thereof, is abandoned or changed for a period of one year or more, any future use of such land shall be in conformity with the provision of this title.

### **19.88.090 Change Of Use**

1. A nonconforming use may be changed to any use allowed in the most restrictive zone where such nonconforming use is allowed, provided the planning commission finds that such use would not be more intensive than the most recent existing legal nonconforming use.
2. Structures shall not be enlarged, removed, reconstructed or otherwise changed except for interior remodeling and exterior restoration or renewal that will make the appearance of the structure more nearly conform to the character of the area in which it is located.
3. The existing lot or parcel shall not be enlarged upon or modified except to create landscaping, fencing, curb, gutter and sidewalk, road widening or minimum off-street parking that will provide a safer and more compatible facility.
4. Any change of a nonconforming use to another nonconforming use shall be a conditional use and subject to provisions of MKZ 19.78 and MKZ 19.84, except that the proposed nonconforming use need not conform to the general plan.

5. The planning commission may approve a change of use pursuant to this title even though the nonconforming use may have been abandoned.

**19.88.110 Restoration Of Damaged Structure**

A noncomplying structure or a structure occupied by a nonconforming use which is damaged or destroyed by fire, flood, wind, earthquake or other calamity or act of God or the public enemy and not the result of the intentional or reckless disregard of the owners or occupants, may be restored and the occupancy or use of such structure or part thereof, which existed at the time of such damage or destruction may be continued or resumed, provided that such restoration is started within a period of one year and is diligently prosecuted to completion.

**19.88.120 Abandonment Or One-Year Vacancy**

A structure or portion thereof occupied by a nonconforming use, which is, or hereafter becomes, vacant and remains unoccupied by a nonconforming use for a continuous period of one year, except for dwellings, shall not thereafter be occupied except by a use which conforms to the use regulations of the zone in which it is located. If the use has not applied to the premises for a consecutive period of sixty days during any twelve-month period, the use shall be deemed abandoned.

**19.88.140 Application To Have A Use Violation Declared Legal Through Special Exception**

1. Whenever land or a structure is used in violation of this title, the owner may file an application with the planning commission to have the use declared legal through special exception. The planning commission may approve such an application only when the evidence establishes all of the following:
  1. The use exists on the property at the time of the application and has been in continuous violation of the zoning ordinance for a period exceeding ten years;
  2. No complaint has been made to the development services division concerning the violation for a period exceeding ten consecutive years during which the violation existed;
  3. Continuation of the use will not have a detrimental effect on the health, safety or welfare of persons or property in the vicinity.
2. The planning commission may consider as evidence:
  1. Documents that are part of the public record, such as tax appraisals, utility records, aerial photographs, building permits, etc.
  2. Documentation from third parties, such as affidavits, photographs, etc.
  3. Documentation from current or past property owners, such as tax records, rental/lease agreements, appraisal records, etc.

In approving an application hereunder, the planning commission may set any conditions it deems necessary for protection of adjacent properties or the public welfare including provisions limiting the period of time the use may continue. This section shall in no way be interpreted to permit the continuation of any violation which exists on the effective date of the ordinance codified in this section. Any person shall have the right to appeal to the land use hearing officer a decision

rendered by the planning commission pursuant to this section. Appellants shall follow the appeal procedures set forth in MKZ 19.92.

**19.88.150 Application To Have A Structure Declared A Noncomplying Structure**

Whenever a structure is in violation of the height or setback provisions of this title, the owner may file an application with the director or director's designee to have the structure declared noncomplying. The director or director's designee shall approve the application when the evidence clearly establishes the following:

1. The structure has existed at its current location, with the same size, height and setbacks for at least ten years;
2. The structure is found by the building official or designee to pose no threat to the health or safety of persons in or around the structure, and;
3. The City has not taken enforcement action for the violation for a period exceeding five consecutive years during which the violation existed.

**Chapter 19.92 LAND USE HEARING OFFICER****19.92.010 Creation****19.92.020 Composition And Organization****19.92.030 Hearings And Due Process****19.92.040 Appeal And Time To Appeal****19.92.050 Variances****19.92.060 Special Exceptions****19.92.010 Creation**

A land use hearing officer (“authority”) is hereby created pursuant to the terms of the Municipal Land Use, Development, and Management Act, Utah Code Ann. § 10-9a-101, et seq. It is the intent of the City council that the authority satisfies the requirement of the above referenced statute for an appeal authority to hear and decide requests for variances from the terms of the land use ordinance and appeals from decisions applying land use ordinances.

**19.92.020 Composition And Organization**

1. The authority shall consist of one member who shall be appointed by the mayor, with the advice and consent of the City council, for a term determined at the time of appointment.
2. Any vacancy occurring on the authority shall be promptly filled by the mayor with the advice and consent of the City council for the unexpired term of the member whose office is vacant.
3. The authority shall be organized as deemed appropriate and as approved by the Council.

**19.92.030 Hearings And Due Process**

1. Hearings of the authority shall be held as necessary. The authority shall not have ex parte contacts. The authority shall have authority to administer oaths, provide an opportunity for cross-examination, and direct the proceedings of the authority in a quasi-judicial manner, so that the due process rights of each participant are respected. All hearings shall be open to the public and shall be recorded.
2. Notice Requirements.
  - a. Notices shall be mailed at least fourteen days prior to the addition, enlargement, moving or reconstruction of a nonconforming use or a noncomplying structure hearing to any property owners, as identified in the Salt Lake County recorder's records, within one hundred-fifty-foot radius of the boundary of the property that is subject to the hearing of the authority, informing them of the time and date of the hearing.
  - b. Notice shall be published at least fourteen days prior to the addition, enlargement, moving, or reconstruction of a nonconforming use or a noncomplying structure hearing on the city's website.
  - c. Notice shall be given electronically at least fourteen days prior to the addition, enlargement, moving or reconstruction of a nonconforming use or a noncomplying structure hearing to the chair of the community council for the area in which the subject property is located.

**3. Intervention/Proceedings**

- a. No person may intervene in an addition, enlargement, moving or reconstruction of a nonconforming use or a noncomplying structure hearing unless that person files a timely application to intervene.
- b. A person desiring to intervene shall serve a notice of appearance and a motion to intervene upon the city recorder at least five days before the hearing. The motions shall state the grounds therefor and shall be accompanied by a summary of the evidence intended to be presented. The land use hearing officer shall for good cause allow the applicant to intervene.
- c. Upon request the city will provide copies to all parties of public records in its possession regarding the matter. Otherwise no discovery shall be allowed except as specifically ordered and scheduled by the land use hearing officer.
- d. Hearings shall be conducted with appropriate formality and decorum so that due process rights are protected. Utah Rules of Evidence and Rules of Civil Procedure are used as guidelines, and not strictly followed or applied. Rules of Evidence regarding authorization, foundation, hearsay or relevance shall not be strictly applied. The land use hearing officer shall have authority to administer oaths and all hearings shall be open to the public and shall be recorded.

**19.92.040 Appeal And Time To Appeal**

1. Any person desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some beneficial interest in or any person adversely affected by a decision applying the land use ordinances, may file an appeal to the authority. The party taking the appeal shall file the appeal with the City recorder within ten (10) business days after the date that the land use authority issues its written decision. The appeal must include the filing of an application and payment of a fee as provided in the City's current fee schedule.
2. The appellant shall have the burden of proceeding and shall have the burden of proving that the land use authority erred.
3. The appeal authority shall determine the correctness of a decision of the land use authority in its interpretation and application of land use ordinances based solely on the record (factual matters shall not be reviewed de novo).

**19.92.050 Variances**

1. The authority shall have the following powers to authorize on appeal in specific cases a variance from the terms of this title. The authority may grant a variance only if:
  1. Literal enforcement of this title would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of this title;
  2. There are special circumstances attached to the property that do not generally apply to other properties in the same district;
  3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district;

4. The variance will not substantially affect the general plan and will not be contrary to the public interest; and
5. The spirit of this title is observed and substantial justice is done.
2. In determining whether enforcement of this title will cause unreasonable hardship, the authority may not find an unreasonable hardship unless the alleged hardship is located on or associated with the property for which the variance is sought and comes from circumstances particular to the property, not from conditions which are general to the neighborhood. In determining whether or not enforcement of this title would cause an unreasonable hardship, the authority may not find an unreasonable hardship if the hardship is self-imposed or economic. In determining whether or not there are special circumstances attached to the property, the authority may find that special circumstances exist only if special circumstances relate to the hardship complained of and deprive the property of the privileges granted to other properties in the same district. The applicant shall bear the burden of proving that all the conditions justifying a variance have been met.
3. In granting a variance, the authority may impose additional requirements on the applicant that will mitigate any harmful effects of the variance or serve the purpose of the standard or requirement that is waived or modified.

### **19.92.060 Special Exceptions**

The land use hearing officer may approve any of the following special exceptions to the zoning ordinance where he or she determines the exception is consistent with the purposes of the zoning ordinance and will not be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity:

1. Where a zone boundary line divides a lot in single ownership at the time of the passage of the ordinance codified in this title, the land use hearing officer may permit a use authorized on either portion of such lot to extend not more than fifty feet into the other portion of the lot.
2. The land use hearing officer may permit the enlargement of or addition to a noncomplying structure or a building or structure occupied by a nonconforming use.
3. The land use hearing officer may permit the relocation on a lot of a noncomplying structure or a building or structure occupied by a nonconforming use; or the hearing officer may permit the reconstruction on a lot of a noncomplying structure or a building occupied by a nonconforming use.