

providing detailed findings and conclusions that disclose the steps by which the Planning Commission reached its ultimate factual conclusions. The findings and reasons for the partial decision and request to supplement the record are as follows:

FINDINGS OF FACT

1. The property (the “Property”) which is central to this appeal is located at 3682 Craig Circle in Millcreek, Utah and is zoned R-1-8. The Property is Lot 1 in the Boyd Circle Subdivision, a 4-lot subdivision plat which was recorded on March 21, 2022. which is a recently platted subdivision. (Planning Commission Staff Report dated October 26, 2022 (the “Staff Report”).

2. The Applicant supplied additional evidentiary information with this appeal. That information is outside the scope of the appeal and will be disregarded in accordance with §19.92.040(C) Millcreek Code.

3. The record below, which has been provided on this appeal, consists of the minutes of the of the October 26, 2022 Special Meeting of the Millcreek Planning Commission in which the Applicant’s application was denied, the Planning Commission Staff Report which was prepared by City staff, and a letter and other materials from the Applicant’s architect which assert that the Option C criteria has been met.

8 The Planning Commission failed to provide specific, detailed, findings of fact and conclusions that explain the basis for its decision.

APPLICABLE LAW

1. The Millcreek Code sets forth the scope of review as “The appeal authority shall determine the correctness of a decision of the land use authority in its interpretation

and application of its land use ordinances, based solely on the record (factual matters shall not be reviewed de novo)". §19.92.040(C) Millcreek City Code.

3. The Millcreek Code specifies that the burden of proof in this appeal is on the Applicant. §19.71.040(C). Pursuant to Utah Code §10-9a-707(3), an appeal authority may only conduct a de novo review if the municipality has failed to provide a scope of review.

4. Applicable provisions of the Millcreek Code Residential Compatibility Overlay Zone:

19.71.010 Purpose Of Provisions

A. The general purpose of the residential compatibility overlay zone ("RCOZ") is to promote public welfare and to balance neighborhood compatibility with the private property interests of those who wish to expand, develop, improve or otherwise make exterior modification to their residential property.

B. Recognizing the wide variation of circumstances incident to a residential application and the need for architectural freedom, the City is adopting a three-tiered approach:

1. Option A provides for strict standards of height, area, and setback with permits issued by the City (the "division").

2. Option B allows the City to consider deviations from one or more of the standards provided in Option A based upon the compatibility of the proposed residential application with other houses in the immediate neighborhood.

3. Option C allows a planning commission to consider at a public hearing a special exception for unusual or extraordinary circumstances that justify deviations from one or more of the limitations under Options A and B.

19.71.050 Option C Special Exception; Planning Commission

Review

A. An applicant whose proposed residential structure meets neither the requirements of Option A nor of Option B may seek extraordinary relief and exceptions to the limitations of MKZ

19.71.030.B.5, B.6, or B.7 or MKZ 19.71.040.D.1, D.2, D.3 or D.4 by submitting an original and seven copies of an application to the applicable planning commission setting forth in detail:

1. The specific provisions from which the applicant seeks exceptions and the requested relief;

2. Detailed information and explanation establishing that:

a. The proposed residence will be in harmony with the purpose of this chapter, the general plan and any other land use document applicable to the area.

b. The proposed residence will be compatible with existing residential development within a reasonable distance in terms of height, mass and lot coverage, with particular focus on the proximate neighborhood.

c. The proposed residence will not be detrimental to the health, safety and general welfare of persons residing within a reasonable distance, with particular focus on the proximate neighborhood.

d. Each point on the highest ridge of the structure will be no more than forty feet above the point on the original grade vertically below it (with allowances for chimneys and vent stacks).

e. The front yard setback will be at least eighteen feet.

3. Additional factors that the planning commission may consider in deciding whether to grant an exception under this Part include:

a. Unusual lot shape;

b. Unusual or difficult terrain;

c. Drainage problems;

d. Situations that appear not to be clearly addressed by the provisions of Options A or B.

4. An application for an exception under this Option C will be subject to a public evidentiary hearing before the planning commission, for which notice of no less than ten days prior to the hearing will be given to:

a. All property owners appearing on the latest plat in the Salt Lake County recorder's office who own property within three hundred feet of the boundary of the subject lot; and

c. The chair of the community council for the area in which the subject lot is located.

B. A decision on the application shall be based on the evidence presented at the hearing. The burden of proof shall rest with the applicant. The planning commission may impose such conditions and limitations upon the approval of an exception to the requirements of this chapter necessary to prevent or mitigate adverse effects on other properties in the neighborhood of the subject properties, consistent with the standards of this chapter.

4. Pertinent sections of the Municipal Land Use, Development and Management Act ("LUDMA") found in Title 10, Chapter 9A, Utah Code Annotated.

10-9a-102 . Purposes -- General land use authority.

(2) To accomplish the purposes of this chapter, a municipality may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that the municipality considers necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing:

(d) structures;

(e) buildings;

(o) considerations of surrounding land uses to balance the foregoing purposes with a landowner's private property interests and associated statutory and constitutional protections.

10-9a-104. Municipal standards.

(1) This chapter does not prohibit a municipality from adopting the municipality's own land use standards.

(2) Notwithstanding Subsection [\(1\)](#), a municipality may not impose a requirement, regulation, condition, or standard that conflicts with a provision of this chapter, other state law, or federal law.

10-9a-501. Enactment of land use regulation, land use decision, or development agreement.

- (1) Only a legislative body, as the body authorized to weigh policy considerations, may enact a land use regulation.
- (2) (a) Except as provided in Subsection [\(2\)\(b\)](#), a legislative body may enact a land use regulation only by ordinance.
(b) A legislative body may, by ordinance or resolution, enact a land use regulation that imposes a fee.
- (3) A legislative body shall ensure that a land use regulation is consistent with the purposes set forth in this chapter.
- (4) (a) A legislative body shall adopt a land use regulation to:
 - (i) create or amend a zoning district under Subsection [10-9a-503\(1\)\(a\)](#); and
 - (ii) designate general uses allowed in each zoning district.(b) A land use authority may establish or modify other restrictions or requirements other than those described in Subsection [\(4\)\(a\)](#), including the configuration or modification of uses or density, through a land use decision that applies criteria or policy elements that a land use regulation establishes or describes.

10-9a-509. Applicant's entitlement to land use application approval -- Municipality's requirements and limitations -- Vesting upon submission of development plan and schedule.

- (1) (a) (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.(ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect

when the applicant submits a complete application and pays application fees, unless:

- (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or
- (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.

(c) A land use application is considered submitted and complete when the applicant provides the application in a form that complies with the requirements of applicable ordinances and pays all applicable fees.

10-9a-705. Burden of proof.

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

10-9a-707. Scope of review of factual matters on appeal -- Appeal authority requirements.

- (1) A municipality may, by ordinance, designate the scope of review of factual matters for appeals of land use authority decisions.
- (2) If the municipality fails to designate a scope of review of factual matters, the appeal authority shall review the matter de novo, without deference to the land use authority's determination of factual matters.
- (3) If the scope of review of factual matters is on the record, the appeal authority shall determine whether the record on appeal includes substantial evidence for each essential finding of fact.
- (4) The appeal authority shall:
 - (a) determine the correctness of the land use authority's interpretation and application of the plain meaning of the land use regulations; and
 - (b) interpret and apply a land use regulation to favor a land use application unless the land use regulation plainly restricts the land use application.
- (5) (a) An appeal authority's land use decision is a quasi-judicial act.

ANALYSIS

The Applicant in this case applied for a special exception from the front yard setback requirements of the Millcreek Code. The application was denied by the Planning Commission. This timely appeal followed.

The scope of this appeal is governed by §19.92.040(C) Millcreek Code, which restricts the review solely to the record below and prohibits de novo review of the facts. The City's determination of the scope of review is in accordance with its authority as set forth in §10-9a-707 Utah Code Annotated. The record in this case consists of the materials contained in the Planning Commission Staff Report (which includes the materials submitted to the City by the Applicant prior to the October 26, 2022 Planning Commission hearing) and the minutes of the Planning Commission meeting at which a public hearing was held, evidence was provided by the Applicant and the City, and the application was unanimously denied. The Applicant has the burden of proving that the land use authority, in this case the Planning Commission erred. §10-9-705 Utah Code Annotated.

The Applicant requested a Special Exception, rather than a Variance, to the applicable front yard setback ordinance in order to accommodate a home he plans to build on the Property. The request for a Special Exception is subject to certain criteria set forth in the Millcreek Code and the Planning Commission is the land use authority that, following an evidentiary hearing, determines if the Applicant's Property meets the criteria. The burden of proof that the criteria has been met is on the Applicant. In this case the Planning Commission determined that the Property did not meet the criteria and voted unanimously to deny the application. A written denial was issued by the Planning Commission on November 3, 2022.

The Applicant believes that the Planning Commission erred and has asserted essentially two grounds for that belief. First, that the Planning Commission did not act in accordance with applicable state law and, therefore acted illegally and second, that there is substantial evidence to support the approval of the application.

Illegality

The applicant makes numerous arguments related to the legality of the Planning Commission denial and the process followed by the City. Primarily they center around the application of §10-9a-509, Utah Code annotated.

The core of the argument is that the Planning Commission was obligated to approve the Application, and therefore, a denial is illegal because it conflicts with §10-9a-509(1)(a)(ii) Utah Code Annotated which provides that:

(ii) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application and pays application fees, unless:

- (A) the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or
- (B) in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted.

The Applicant's argument is essentially that, once he has submitted a completed application the Planning Commission is required by §509(1)(a)(ii) to approve the Special Exception. *Applicant January 30, 2023 Memoranda, Page 3*. In this interpretation of the statute, it would be inappropriate for the Planning Commission to hold an evidentiary

hearing, a public hearing, or to determine if the Applicant met his burden of proof – all requirements of the Millcreek Code. He argues that once the application is complete, and contains the required information, the Planning Commission is merely an administrative body that has no choice but to approve the request for a Special Exception.

Such an interpretation of the statute is plainly in error and is in direct conflict with the application of other state statutes. Millcreek City clearly has the authority to provide for a process that includes an evidentiary element and the weighing of that evidence. For example, §10-9a-102(2) Utah Code Annotated, which sets forth the purposes and general land use authority of LUDMA states that:

To accomplish the purposes of this chapter, a municipality may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that the municipality considers necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing:

- (d) structures;
- (e) buildings;
- (o) considerations of surrounding land uses to balance the foregoing purposes with a landowner's private property interests and associated statutory and constitutional protections.

Similarly, §10-9a-501(4)(b), Utah Code Annotated provides that:

A land use authority may establish or modify other restrictions or requirements other than those described in Subsection [\(4\)\(a\)](#)¹, including the configuration or modification of uses or density, through a land use decision that applies criteria or policy elements that a land use regulation establishes or describes.

¹ The code section referred to, §10-9a-501(4)(a) provides for the adoption of zoning districts and the general uses allowed in each zone.

Finally, §10-9a-104(1) Utah Code Annotated, states that “This chapter does not prohibit a municipality from adopting the municipality’s own land use standards”.

Clearly, LUDMA specifically grants the City the authority to enact land use regulations that govern the subject of this appeal. This is in addition to the broad powers granted to Utah municipalities by the general welfare provisions of §10-8-84 of the Utah Code. See *State v. Hutchinson*, 624 P.2d 1116 Utah 19800. The only restriction on the City’s ability to adopt the land use standards that it deems appropriate is that it “may not impose a requirement, regulation, condition, or standard that conflicts with a provision of this chapter, other state law, or federal law. §10-9a-104(2) Utah Code Annotated. Once the City has established those regulations, it is bound by them and must comply with the provisions of its own regulations. §10-8-509(2) Utah Code Annotated. The Applicant has failed to provide any legal authority that indicates that the City’s process or the actions of the Planning Commission conflicts with LUDMA, other state law, or federal law. To the contrary, the City’s adoption of an ordinance that includes certain criteria and an evidentiary process and the Planning Commission actions based on that ordinance are allowed by LUDMA and, pursuant to §10-9a-30(1) Utah Code Annotated, the Planning Commission is required to apply the plain language of those regulations.²

The requirements of §509(1)(A)(ii) still apply to this case, however, they apply after the relevant provisions of the Millcreek Code have been followed. In other words, if the Planning Commission, after its evidentiary hearing, concludes that the Applicant has met the applicable criteria for a Special Exception, then it is obligated to grant the exception. In this case, the Planning Commission did not make that determination.

² §10-9a-509(2) UCA requires that “A municipality is bound by the terms and conditions of applicable land use regulations and shall comply with mandatory provisions of those regulations.”

The Applicant had numerous other quibbles with the City process, however, he provided no evidence that the City's process or requirements are in conflict with other provisions of LUDMA, other state law or federal law. For the reasons described above, those arguments also fail.

Finally it should be noted that the Applicant raised public clamor as an issue. The only public input in the record is a denial recommendation by the local community council and one resident who spoke unfavorably in the public hearing before the Planning Commission. This input by citizens certainly does not seem to rise to the level of public clamor, unless any unfavorable comment constitutes public clamor. The Applicant has pointed to no evidence in the record that the Planning Commission was unduly swayed by those comment or favored those comments over the weight of the evidence that was presented.

The process followed by the Planning Commission, as set forth in the Millcreek Code, was in accordance with the law and the Planning Commission did not err.

Substantial Evidence

The scope of review in this case is limited to the record before the Planning Commission. The review is for the purpose of determining if the Planning Commission erred. The standard for review is if each of the findings of the Planning Commission are supported by substantial evidence. The only body authorized to accept and weigh evidence in this case is the Planning Commission.

The Planning Commission failed to provide detailed findings of fact and conclusions of law to support their decision. The sole supporting statement was that they

“determined that the property located at 3682 South Craig Circle is not sufficiently ‘unusual or extraordinary’ to the extent that would warrant a special exception ...”

On February 16, 2023, the Utah Court of Appeals issued a decision in the case of *Northern Monticello Alliance LLC, v. San Juan County Commission, Sustainable Power Group LLC, and Latigo Wind Park LLC*, 2023 UT App 18 (Utah App. 2023). The Appeals Court’s ruling in this case is dispositive of the matter at hand.

In *Northern Monticello*, the San Juan County Commission issued a land use decision regarding a conditional use. The Planning Commission failed to provide adequate written findings of fact or conclusions of law about how it arrived at its decision. The decision was appealed to the appropriate appellate authority, the San Juan County Commission (the “County Commission”). Despite the inadequate findings by the planning commission, the County Commission upheld the decision of the planning commission. In a subsequent appeal to district court, the court reviewed the decision of the County Commission and again upheld the decision of the planning commission. The Court of Appeals held that that since the planning commission had failed to provide adequate findings, an appellate body, limited to a review on the record, could not make a substantial evidence determination. As a result, it reversed the decision of the district court and remanded it for further proceedings. A part of the rationale for the decision is that “Without findings against which to judge whether substantial evidence exists to support them, review of the evidence is-in reality-a de novo review. *Northern Monticello*, at ¶21.

A similar case is *McElhaney v. City of Moab*, 2017 UT 65. The *McElhaney* court reviewed a district court decision regarding a land use decision made by the city council (sitting as the land use authority). Like the facts in *Northern Monticello* and the case at

hand, the city council in the *McElhaney* case failed to produce adequate written findings of fact. The *Northern Monticello* court quoted the *McElhaney* decision stating:

Without sufficiently detailed findings that disclose the steps by which an administrative agency reaches its ultimate factual conclusions, this court cannot perform its duty of reviewing the order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action. On appeal, a court can perform its duty only if the [land use authority] has created findings revealing the evidence upon which it relies, the law upon which it relies, and its interpretation of the law. *Northern Monticello* at ¶23, quoting *McElhaney* at ¶36.

In this case, the Planning Commission's short statement that the Property is not sufficiently "unusual or extraordinary" are insufficient to allow for an appellate review. As the court stated in *Northern Monticello*, "...cursory declarations are wholly inadequate." *Northern Monticello*, at ¶25.

Based on the foregoing caselaw, it is apparent that the Planning Commission did not provide adequate findings and conclusions for an full appellate review. However, this situation can be remedied by the Planning Commission if it supplements the record by providing findings and conclusions that provide a detailed explanation of how it reached its decision to deny the application.

At the hearing on October 26, 2022, each party was present, submitted evidence, and had the opportunity to refute the other party's evidence. Therefore, it is not necessary for the Planning Commission to hold a new hearing unless it has the power and desire to do so.³

CONCLUSION

Based on the forgoing, this case will proceed as follows:

³ Also, there appears to be no statutory support for this hearing officer's ability to order such a rehearing.


1. A partial decision on the issue of the legality of the process set out in the Millcreek Code and the interpretation of applicable state statutes and caselaw has been decided in favor of the City as set forth in the Analysis set forth above.

2. The open issue in this case is whether or not the Planning Commission has substantial evidence to support its decision. It is hereby requested that the Planning Commission supplement the record by providing detailed findings of fact and conclusions which explain the basis for its decision in this case.

3. The Planning Commission will be given the opportunity to supplement the record as described above until the close of business on March 6, 2023. Any supplementation of the record should be delivered by email to the hearing officer by that time and date.

4. Upon receipt of the supplemented record, if any, from the Planning Commission, this case will proceed to a final decision which will be issued within 5 days of receipt of the supplementation. If the Planning Commission fails to supplement the record by the date and time set forth above, then a final decision on the appeal will be made without such findings.

Dated this 23rd day of February, 2023.



J. Richard Catten
Millcreek City Land Hearing Officer