Minutes of the Hearing Officer meeting held on Wednesday, July 26, 2017 at 12:30 p.m. in the Murray City Municipal Council Chambers, 5025 South State Street, Murray, Utah.

Present: Jim Harland, Hearing Officer
Jared Hall, Community & Economic Development Supervisor
Jim McNulty, Development Services Manager
Frank Nakamura, City Attorney
Nathan Bracken, Attorney for appellant, Smith-Hartvigsen
Ken Jones, Attorney for the applicant, Parkview Properties
Kathleen Stanford, Appellant
Residents

Mr. Harland opened the meeting and welcomed those present. He reviewed the public meeting rules and procedures.

CONFLICT OF INTEREST

Mr. Harland stated that he has no conflict of interest for this agenda item.

CASE #1545 – KATHLEEN STANFORD – Project #17-110 - Appeal of Certificate of Appropriateness for Vine Street Senior Living - 4998, 5000 & 5004 South Jones Court, 184 & 190 East Vine Street for Project #17-04

Jared Hall stated the Murray City Community Development Division has prepared a staff report regarding this appeal and based on the consent of the two parties involved we would like to submit it for the record. We understand that the legal counsels for both parties have no objection to this and we prepared copies for them.

Mr. Hall reviewed the location and request to appeal the decision of the Murray City Planning Commission to grant a Certificate of Appropriateness for application #17-04, the proposal known as the Vine Street Senior Living Facility on the properties addressed 184, 186 and 190 East Vine Street, and 4998, 5000 and 5004 South Jones Court.

Jared Hall referred to the staff report and stated that staff asserts that the Planning Commission followed all the processes outlined in the Murray City Land Use Ordinance for this application. He stated that the information in the record clearly shows that the process was followed, the application was considered carefully, and the Planning Commission's decision regarding the application was not reached arbitrarily. Murray City understands the need to balance between historic preservation and the property rights of individuals. The process that the Planning Commission followed is intended to strike that balance. Today we will hear from the legal counsel for the appellant and applicant. Staff is concerned with the potential for the introduction of new information that was not part of the Planning Commission's review by both parties. The decision regarding the appeal should be based on the information contained in the record. Staff's assertion is that the Planning Commission acted reasonably based on the information they had at the time which is contained in the record, they followed the processes outlined for them as they understood them, and therefore the action that they took cannot be considered arbitrary or capricious. The Planning Commission's decision should be upheld as indicated in the staff report.

Nathan Bracken, Smith-Hartvigsen, 257 East 200 South, stated his concern is that the record does not show that the proper process was followed in this instance. Mr. Bracken

referred to the staff report that was submitted and stated there are two process by which the City can approve a demolition permit. The first, is under 17.170.070.D, the demolition of historic buildings shall be discouraged and the Planning Commission shall not issue a Certificate of Appropriateness unless three factors are satisfied. There is no information or indication in the record that cites this provision in the Code that discusses it in any way. The second, is the value of the owner's property would be substantially diminished. Mr. Bracken referred to page 55 of the proposed project estimated assessed value vs existing assessed value document and stated this document was not prepared as part of the required analysis, rather under paragraph D, discretionary analysis. It includes the current value and the proposed valuation after it is built. Mr. Bracken pointed out that this document does not ask the question of what is the value of the owners' property and how would it be substantially diminished, only what it would be worth if we build it. It does not show what it would be worth if these buildings are included. In the opinion of Mr. Bracken, the document does not show that any of the required processes have been discussed or followed. The Code has two provisions, which are the terms "shall not", and Section 17.170.07.E which states "an exception may be considered". Mr. Bracken stated statutory construction in Utah Code which defines the term "shall" as action that is required or mandatory, and "may" as an action that is authorized as permissive. The staff report seems to indicate that there is not much choice that the Planning Commission has if those exceptions are satisfied, it is a mandatory approval. The Historic Advisory Board noted on page 50 of the record "we appreciate the wording that states the Planning Commission may consider an exception providing a balance between historic preservation and competing with new development poses." Mr. Brecken stated they read the Code the same way and interpret it as discretionary, but first have to go through the analysis. The required analysis that states "shall not" means you have to look at what the property is worth on its own. Then move on to the discretionary analysis.

Mr. Bracken stated that even if the discretionary analysis had been the only analysis that was required, it still does not satisfy the requirements of the Code. The exception process has five factors that need to be completed, and he does not believe all the steps have been completed. Of note, the Code states "a development agreement must be executed between the City and a property owner regarding the project, the development agreement shall be approved by the City Council prior to the issuance of the COA." The concern is that there is nothing in the record to show that the developer owns the property, and also was authorized to operate on behalf of the property owner. The staff report shows that there was some paperwork filed to authorize the developer to act on behalf of the property owners, but those affidavits are not included in the record. This would make Ms. Stanford unable to verify that this element has been satisfied.

Mr. Bracken stated another concern is in respect to the issuance of a development agreement prior to the issuance of COA. The staff responded by stating the COA included a condition that states "that the certificate is conditioned upon later execution of a development agreement". The problem with that is the development agreement is not included anywhere in the record, so again Ms. Stanford or any other resident has no way

of knowing if the development agreement complies with the specific requirements that are outlined in the Murray City Code. There are parts of the record that do address some of the requirements, but not all. The most concerning is the missing requirement that the developer needs to provide some sort of financial certainty about being able to pay for the project of one hundred and twenty five percent of the estimated cost. How can Ms. Stanford appeal a development agreement that she disagrees with if it's not in the record?

Mr. Bracken further points out that there is no discussion in the record about looking into federal or state tax credits, the concern is that they could significantly reduce the cost of the project. If this was discussed the analysis would have had a different outcome. The staff report states it would be improper to consider this but the Historic Advisory Board made the recommendation to do this. Quoting them from page 50 of the record "balance with the potential for rehab and reuse with the available state and federal funding sources" and quoted from page 51 "the board believes several of the buildings could be successfully restored using state or federal funding resources". There is nothing in the record that shows this discussion ever took place. If the primary reason for allowing these buildings to be demolished is due to the cost of restoring them and not using the stated and federal funds then this would seem to be in error. Mr. Bracken closed by saying that nobody has acted in bad faith and Ms. Stanford does not oppose this project, she thinks this would be very good for the City, but this project will set the precedence for future projects and that is why she filed the appeal. What we are asking for is for this to be remanded, to follow the proper process, go through the required analysis, look at the exceptions, and make sure we have a development agreement, collect the proper affidavits, and follow the recommendation of the History Advisory Board which is to look at the tax exemptions to reduce the cost of the project.

Ken Jones, representing Parkview Properties, stated that there was not a timely appeal made in this case by Ms. Stanford. The Murray requirements for a timely appeal state it must be filed within thirty days, and must identify with specificity the error that was made by the Planning Commission. The only thing that was filed timely was a very brief statement that said "we wish to appeal". There was zero identification of the error and this appeal does not satisfy the Code requirement for filing an appeal. Under the Murray Code and State Law, this is a jurisdiction item, if it's not filed timely the decision of the Planning Commission is final, and not subject to extension by the City or later filings by the applicant or the applicant's counsel. It cannot be appealed as it was not filed timely. This is the starting point for this matter and nothing else should be considered by the Hearing Officer and it is jurisdictionally required before it can even go to the Hearing Officer.

Mr. Jones addressed the issues that have been raised and stated with the standard of review the burden of proof is specifically on the appellant to show that an error has been made. It was an administrative decision that applied the law and not exercising legislative discretion. The standard under both the Murray Ordinance and Utah State Law is the decision can't be arbitrary and capricious, and this means that there has to be some substantial evidence in the record, not a preponderance of the evidence and it's not the

Hearing Officer substituting his judgment for the Planning Commission, but it is simply that there be substance of an error in the record.

Mr. Jones explained that the MCCD had an elaborate and extensive process for any development within the City and that includes that any development must obtain a Certificate of Appropriateness per the City ordinance. A COA effectively is a conditional use under the Utah statutes. Under Utah Code Annotated 10-9A-507, a land use ordinance may include conditional uses and provisions for conditional uses that require compliance with standard set forth in the applicable ordinance. Essentially that's what we have here but, the (City) calls it a different name, but in order to develop in the MCCD everyone is required to obtain a COA. The process requires staff review, consultations with staff, going through Design Review Committee, involvement with the History Advisory Board, and a Planning Commission review and decision. The standard that was applied here is correct as the conditions have been met, which is a requirement for the approval for a COA.

Mr. Jones addressed the concern that the appeal was not filed by the appellant herself, instead it was filed as a supplement to her appeal by counsel even later and clearly did not meet any of the time deadlines. The requirements of 17.170.070.D state that one of three factors have to be identified before there is a COA issued. There is only one that is applicable, which is the value of the owner's property would be substantially diminished. The language of the Code allows for a provision, item D addresses demolition and item E provides the exception and states an exception may be considered by the Planning Commission to allow demolition of a significant building if the development proposal is presented with a proposal meeting the following criteria. Therefore it states that E is an exception to D, not an additional requirement of D. Even though the record does not specifically address D there are substantial provisions in the record that support the decision that this factor was met. Page 52 of the record shows the additional cost analysis for why the property is not financially feasible for other uses or use with the existing building. Meaning the value of the property would be substantially diminished if there is not another use. Staff has shown the properties' significant increase in value as a result of this project. The record also shows statements from Mr. Hall that reflect there have only been very limited other considerations of this property presented over numerous years presented to the City. This supports the fact that there are no other uses that can provide this type of value to the owner of the property.

Mr. Jones summarized and stated first, this decision is an alternative, E is the exception for this. If E is met there is no requirement that D be satisfied. Secondly, there is evidence in the record that supports D.

Mr. Jones further stated the appellant has raised the issue of the timing of the development agreement as opposed to the issuance of the COA. The City and the Planning Commission completely met the substance of the requirement by conditioning the COA so there can be no building permitted issued and no demolition until that factor

has been satisfied that there has been a development agreement entered into with the City. This in fact has occurred. The appellant was at the meeting on June 20, 2017 when it happened and they did address City Council with regard to that very point. The (Agreement) has been met by the requirements, beyond that under Utah Law the appellant not only has to show that there was error but that, they were shown prejudice. Under the City of Springville case the requirement is as follows, "rather plaintiffs must establish that they were prejudiced by the City's noncompliance with its ordinances, or in other words how, if at all, the City's decision would have been different and what relief if any they are entitled to as a result". It's not enough to show simply that there was an error, in this case the substance has been completely satisfied, the development agreement process has gone forward, and there has been approval of that. There is no showing of prejudice or that there would be any different result by the Planning Commission if in fact you found the substance was not sufficient here.

Mr. Jones stated one of the other conditions under E that has been challenged by the appellant is number one. That exception is condition of a building, the applicant has demonstrated to the Planning Commission that incorporation of the significant historic building in the proposed development is impracticable based on the condition of the existing building, structural compatibility, or similar restraints. The record is full of substantial evidence to the effect that this has been satisfied.

Mr. Jones read quotes from several pieces in the record that address these issues, first with regard to the project as a whole and then with regard to each specific building that is involved.

Mr. Jones reads from page 184 of the record, Stan Hoffman speaks on behalf of the applicant "on all the building in the project areas whether they are duplexes or four-plexes or church we made a real effort to integrate every building in that project one way or the other and in every scheme I ran through four or five development scenarios with operations to try and get it to work".

Mr. Jones reads from page 179 of the record and quotes Mr. Hall "it looks a lot different today than it did the first day we saw it as well, based on the recommendations of the Design Review Committee, the developers and applicants have tried to work with those comments and bring it around to a point that we feel like it was meeting requirements".

Mr. Jones reads the staff report from page 19 of the record "initial development plans were modified in order to preserve the Carnegie Library building in response to the recommendation from the HAB and DRC. The Murray First Ward building could not be included as a portion of the assisted living facility or reasonably repurposed for use as an office building because of structural issues needed for building stabilization". Going on "due to complications incorporating the Jones Court Duplexes and the four-plex building the DRC and HAB recommended exploring the possibility of relocating the buildings; however, due to building condition and the nature of the original construction, moving those structures is likely to fail and cannot be insured".

Mr. Jones reads from page 44 of the record "this is an assisted living use with specific access requirements".

Mr. Jones reads an excerpt from Mr. Hoffman later in the record "they considered several layout schemes, locations, relocations of buildings, and the hire of an operator that will demonstrate these qualities. Mount Vernon Academy which is the church, was originally under consideration to integrate it into the assisted living facility, but due to the condition and unfeasible amount of investment to remodel and re-stabilize it the cost was too large to keep it".

Mr. Jones reads an excerpt from Mr. Hall from the transcript for the Planning Commission page 124 "staff's analysis of that is that it can't be reasonably repurposed for money that can be put back into the building".

Mr. Jones states that he points all this information from the record that reflects that there were multiple plans considered, in fact, the record includes three different sets of plans. There was a large amount of work done to try and incorporate them into the project. With regard to the church building, page 52 of the record shows that there were valuations that the configuration does not lend itself to inclusion other than an office building which is not consistent with the project. Multiple scenarios for inclusion in the assisted living concept were not functional. The history board statement on page 51 of the record states the board recognizes the structural and safety issues related to Murray First Ward. Mr. Hall's statements on page 222 of the hearing transcripts state "from what I have read on LDS history sites and things online, they just outgrew the use of the building, they needed a new modern building, weren't interested in making seismic upgrades to that structure". On page 219 Mr. Hall states "the Murray First Ward building presented unique challenges in moving because of the nature of the structure and additions over the years". In regard to the duplexes Mr. Hall states "lots of walls in the duplex buildings are unenforced adobe and can't be jacked up and moved to other parts of the City".

Mr. Jones stated there is substantial information in the record which shows that the church building is not practical for incorporation into this development with the standard required under E(1) of the Ordinance. With regard to the other buildings, page 53 of the record there is quite a bit of detail on why those buildings could not be included. A, Plans that left the buildings in place and would not work for potential assisted living operators given the impacts on configuration potential unit count. Separate operators assessed the site. B, the operators all struggle with the concept of a new modern facility abutting structures that created setbacks, fire separation and access complications that could not be properly mitigated and still leave sufficient space for a class A facility. Multi-family schemes are listed with the reasons why, and then further an experienced home mover was contracted to provide estimates in feasibility of moving it. There are multiple physical constraints, no basements to allow jacking, thick unstable adobe brick walls, current signs of cracking, surrounding roads narrower than the buildings etc. That also shows substantial information in the record with regard to the other buildings being incorporated into the project.

Mr. Jones addressed the concern that the appellant has raised the issue that there is nothing in the record in regard to availability or use of historic funds. That is not one of the requirements of the Ordinance. The appellant had adequate opportunity to present evidence of this, instead they are trying to spin this and turn it into something that they could have done into something that is a requirement of the ordinance which is not the case. The requirement that we need to meet is that there is substantial evidence in the record in order for the decision to be upheld, and that has been met through the many provisions in the record that was just read and the provision identified in the staff reports.

Mr. Harland asked Mr. Hall if he would like the opportunity to address the mentioned issues.

Mr. Hall stated he believed the report speaks for itself to the same issues very well, and would rather rely on it. Staff determined that the Planning Commission acted appropriately based on the items.

Mr. Harland asked if the development agreement has been completed. Mr. Hall stated it has been completed and approved by City Council. Mr. Harland asked if a copy of the development agreement is available. Mr. Hall answered that there is not a copy of the document in the record, and he is unsure and referred him to City Council staff. Mr. Harland asked if the Conditional Use Permit that was approved is because senior living is a Conditional Use. Mr. Hall said yes, the land use categories list indicates it as a Conditional Use.

Mr. Hall addressed the question of tax credits and stated that it was addressed in the staff report and staff would agree with Mr. Jones, it's not a requirement. Those kind of issues were treated in other ways. We felt the Planning Commission acted reasonably in talking and considering the statements from the experts that the applicant relied upon for cost, removing, the ability to incorporate and what the tax credits might have meant, no we don't have that information in the record.

Mr. Harland referred to page 6 of Mr. Bracken's supplemental report about how it states "there is no supporting information to show how the Planning Commission determined the buildings most valuable economic use," but the applicants attorney indicated there is information in the record about the value of the property and asked Mr. Bracken to address the statement. Mr. Bracken stated he is referring to the document on page 52 in the record that states "the most economic value is an office building". Mr. Bracken stated there is nothing in the record that states how he got to this conclusion; where are the other possible uses of this building that have been considered and why is an office building the most likely use rather than this one.

Mr. Harland asked Mr. Hall if the owner's affidavit is part of the record. Mr. Hall stated that the City does require affidavits from property owners for applications that are made for property that is not in their ownership. That applies to the land use application that we receive not to the development agreement. This authorizes the applicant to take action on

behalf of the property owner. Mr. Bracken stated he reviewed the application and there is no record of this document anywhere, and it is not on the cite list because it is not in the record. On page 32 the application name states it is Parkview Properties and did not reference the property owner's name. The development agreement states you must have a development agreement with the property owner yet there is nothing listed under the property owners name, only the developer. There is nothing that can be found in the record that show the developer is authorized to act on behave of the property owner.

Mr. Bracken responded to the difference between D and E and stated he agreed that E is an exception, but usually with an exception you do the required process first, the record shows that the required D process was not followed. There is an analysis that shows what was required in D to show how the property would be diminished versus how much the property can be increased if the buildings aren't there. There is nothing in the record to show what the dollar amount would be if the buildings were incorporated into this project.

Mr. Bracken addressed the issue that Ms. Stanford could have been potentially prejudiced by this decision. She had to file our appeal on June 17, 2017. The development agreement was approved, after on June 20, 2017. When the appeal was filed we did not have the development agreement to review to determine if it met the statutory factors. Mr. Bracken reads E, "the Planning Commission shall make a determination after all these criteria have been addressed by the applicant and evaluated through the design review process, if the Planning Commission determines that any of the criteria are not met they shall deny requested demolition". Mr. Bracken posed the question of how Ms. Stanford or any other citizen of Murray is to know that the development agreement has been satisfied if it's approved after our appeal is through, and it's not part of the record. Mr. Bracken further addressed the concerns about the exceptions that are listed under E, it was stated that the primary argument is number one. Mr. Bracken stated that he believes this is a misstatement and his primary argument deals with number five; a development agreement must be executed between the City and the property owner regarding the project. The Development Agreement shall be approved by City Council prior to the issuance of the COA. There is nothing in the record of an affidavit that authorizes the developer to act on behalf of the propery owner and the development agreement was issued after the COA, which is the primary concern. Mr. Bracken addressed the issue that was brought up that consideration of the tax credits is not required and refers to paragraph one of subsection E, and reads "is impractical based on the condition of the existing building, structural incompatibility and other similar constraints". It was determined that it was too difficult and expensive to fix the building as the estimate was five point two million dollars to repurpose it as an office building, if it's impracticable because of cost than it behooves the Planning Commission to follow the advice of the History Advisory Board and look into state and federal funding to offset the cost. We think it's arbitrary and capricious within this context of determining the practicality of fixing up these buildings and the cost did not do that.

Mr. Jones responded to the question of ownership and stated he also has not seen the affidavit in the record; however discussion with City staff has determined that the record

that has been provided is in some ways incomplete. If you reference the standard for review of this under the Murray Code it states "the review by the hearing officer as is appeal authority of appeal request" and the key is "shall be limited to the record of the land use application process resulting in the decision made by the land use authority". This means the record of the land use process, not just what was given to the Planning Commission, it is referring to the entire process. This process incudes the affidavit showing the authority to act on behalf of the owner. Under Utah Law at the point there is a purchase agreement entered into with the property owner, the buyer has equitable title to that property prior to closing upon or entering into the purchase agreement. This is exactly the situation we are entering into here. As a matter of law we (the applicant) are the equitable owner of the property under Utah Law anyway. If this is an issue that becomes determinable in this case I would suggest that the City correct the record to include this document and the other copies of plans that show the efforts to include the other buildings into the project. This is really about the process as a whole, the Planning Commission's decision is a culmination of a much bigger process. The staff, DRC and HAB all saw pieces of things that show the requirements have been met as the record shows. In follow-up to the issues that the appellant has raised directed to the procedures under D and E (1), the appellant's position is essentially that one must go through D even if the result does not apply in order to get to E. This is nonsensical because E stands alone as it is an exception to the provisions that allow demolition to take place if the requirements of E are met. The appellant claims that monies from possible State and Federal funds have to be considered and this is just a cost issue. It is absolutely wrong that this is just a cost issue as earlier stated this is also about layout as well as the cost, it is impractical to incorporate these old buildings into this kind of assisted living facility where there are specific requirements that go with it. The record does not include every underlying report, many of those reports the City has seen. They are not in because the entire application process has not been submitted to you, but it's also not a requirement. There is plenty of evidence in the record that the buildings are not practical for both the layout and the cost reasons.

Mr. Harland reminded all that no new information can be heard today.

Ms. Stanford stated she had reviewed the record and noticed the contract, cost analysis and affidavits were missing. Ms. Stanford felt that the entire process should be redone. Ms. Stanford said she is willing to work with the developer on this and has no other desire than to make this a win-win situation for the citizens of Murray.

Mr. Hall commented that the City appreciated the civility and willingness to work together. Mr. Hall added that staff still maintains that the Planning Commission followed the process in the Ordinance as they understood it, they dealt with the information they had, although they did not have some of the information in the record that we would like to have seen there. The Planning Commission dealt appropriately with the information they had in front of them that night based on the standards for review they had. We do feel that their decision should be upheld. Therefore, staff recommends denial of the appeal.

Mr. Harland stated he feels that all the pertinent information has been heard and he has reviewed the volumes of information and read almost every piece of paper included. Mr. Harland added he has quite a bit more work to do on this and will not make any decision today.

Mr. McNulty informed Mr. Harland that he has the opportunity to take up to two weeks to make a final decision as it was discussed and approved with City legal counsel if he felt it necessary.

Mr. Harland stated he felt it was appropriate and will take the extra extension of time in case there are unforeseen complications with his decision, but will still try to have his final decision within one week, if possible.

Mr. McNulty stated that once the decision is submitted to City, staff will make all parties aware that it has been received.

Mr. Harland stated he will forward his written decision to the Community Development Office at 4646 South 500 West, by noon on Wednesday, August 09, 2017.

Mr. Harland thanked the large number of people for their attendance and closed the hearing.

There was no other business.

The meeting was adjourned at 1:34 p.m.

Jared Hall, Community & Economic
Development Supervisor