

**PARK CITY MUNICIPAL CORPORATION
BOARD OF ADJUSTMENT
COUNCIL CHAMBERS, CITY HALL
September 23, 2014**



AGENDA

MEETING CALLED TO ORDER - 5:00 PM

ROLL CALL

ADOPTION OF MINUTES OF June 17, 2014

PUBLIC COMMUNICATIONS – *Items not scheduled on the regular agenda*

STAFF AND BOARD COMMUNICATIONS/DISCLOSURES

REGULAR AGENDA – *Discussion, possible public hearing, and possible action as outlined below*

30 Sampson Avenue – Variance to section 15-2.1-5 Building Height to allow
four (4) stories.
Quasi-Judicial hearing

PL-14-02425
*Planner
Whetstone*

Pg.7

ADJOURN

A majority of Board of Adjustment members may meet socially after the meeting. If so, the location will be announced by the Chair person. City business will not be conducted.

Pursuant to the Americans with Disabilities Act, individuals needing special accommodations during the meeting should notify the Park City Planning Department at (435) 615-5060 24 hours prior to the meeting.

PARK CITY MUNICIPAL CORPORATION
BOARD OF ADJUSTMENT
MINUTES OF JUNE 17, 2014

BOARD MEMBERS IN ATTENDANCE: Ruth Gezelius – Chair; Richard Miller, Travis McGhee, Mary Wintzer, Dave Robinson

EX OFFICIO: Thomas Eddington, Anya Grahn, Polly Samuels McLean, Makena Hawley

ROLL CALL

Chair Gezelius called the meeting to order at 5:03 p.m. and noted that all Board Members were present except Jennifer Franklin who was excused.

ADOPTION OF MINUTES OF APRIL 15, 2014

MOTION: Board Member Fuegi moved to Approve the minutes of April 15, 2014 as presented. Board Member Wintzer seconded the motion.

VOTE: The motion passed unanimously.

PUBLIC COMMUNICATIONS

There was no comment.

STAFF/BOARD MEMBERS COMMUNICATIONS AND DISCLOSURES

Director Thomas Eddington welcomed the new Board Members.

REGULAR MEETING – Discussion, Public Hearing and Possible Action

129 Main Street – Variance request regarding removing the requirement of a 10-foot horizontal step on third story façade (Application #PL-14-02297)

Planner Anya Grahn reviewed the request for a variance to the required ten foot (10') minimum horizontal step in the downhill façade for the third story of a structure, given that the first story is not completely under the finished grade on all sides of the Structure. She stated that due to the substandard size of the lot, unique circumstances on this site limit the size of development and prohibit design consistent with the surrounding historic sites without a variance. Exhibits in the Staff report included the existing conditions survey, a preliminary site plan, and photographs of the site. A large two-story structure previously existed on the property, but it was demolished in the 1980's due to its deteriorated condition.

Planner Grahm outlined the several variances that have been granted by the Board of Adjustment over the years. In January of 2014 the applicant submitted an HDDR application to the Planning Department. Last month the Planning Commission approved a Steep Slope CUP which is necessary to build on slopes greater than 30%.

Planner Grahm explained that a typical Old Town lot is 25' x 75' or 1875 square feet. This applicant is working with a lot size of 1,208 square feet, which was permitted by a 2005 variance. The maximum building footprint for a standard lot is 565 square feet and the applicant was granted 533 square feet. The height is 27 feet and there has been no variance request for height. The total house size for a typical Old Town lot is approximately 2300 square feet, whereas this property as proposed is 1,379 square feet.

Planner Grahm noted that the 10-foot horizontal step in a house usually occurs around the third floor and amounts to approximately 29% of the structure. In this case it is 35%, The total impact on the total square footage of the house is typically 8%, but in this case it is closer to 14%. Planner Grahm presented photos of the existing site with the current proposal superimposed to show what was being proposed. She also presented a streetscape elevation.

Planner Grahm reviewed the criteria for a variance found on Page 11 of the Staff report. Criteria 1 - Literal enforcement of the LMC would cause an unreasonable hardship for the Applicant that is not necessary to carry out the general purpose of the LMC. She noted that the small size of the property creates special circumstances that are not applied to other properties in the same zone. The ten-foot step was introduced into the LMC as a way to limit the mass and bulk of structures on hillsides. However, in this case, the Staff finds that the 10-foot horizontal step would alter the rhythm and the pattern of the existing streetscape. Overall, the step would reduce the square footage of this level of the house by 34%.

Criteria 2 - There are special circumstances attached to the Property that do not generally apply to other Properties in the same zone. Planner Grahm stated that this lot is in a unique neighborhood. It is the portion of Main Street that climbs up the hill as it reaches Park Avenue and there are a number of historic properties in the neighborhood. Historic Structures per the LMC are not required to provide parking. Historic homes were not built to the same setbacks required today and some of the structures like the Alaska House take up most of the lot. Granting the variance would allow additional building area to compensate for the limited lot size and the already reduced footprint and house size.

Criteria 3 - Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone. Planner Grahm remarked that the gain in the additional square footage of this already small house and small lot would be very much appreciated by the owner. It would also

allow him a property that is more comparable in size to neighbors in that same zone.

Criteria 4 - The variance will not substantially affect the General Plan and will not be contrary to the public interest. Planner Grahm stated that one of the major goals of the General Plan is to maintain the character, the context and the scale of the Historic District with compatible infill development. The Staff has been working with the applicant to come up with a design that is compatible with the Design Guidelines. The Staff finds that the front gable façade is very much in keeping with the look and feel of the Historic District. It also follows a predominant pattern in the neighborhood in terms of scale and height.

Criteria 5 - The spirit of the Land Management Code is observed and substantial justice is done. Planner Grahm reiterated that the reason for the 10' horizontal step was to reduce the mass and bulk of structures on steep slopes. While this is an uphill steep slope lot, the overall house is so small that the massing and the bulk of the house is hidden behind the façade. She believed the step would diminish what is already a very small house and could possibly create a design that contrasts with the historic adjacent properties.

The Staff recommended that the Board of Adjustment review the proposed variance, conduct a public hearing and consider granting the variance. Planner Grahm had provided the Board Members with copies of public comment she had received from the neighbors who were unable to attend this evening.

Planner Grahm noted that Condition of Approval #1 on page 17 of the Staff report was incorrect and did not pertain to this application. Condition #1 should be eliminated and the Conditions of Approval renumbered.

Board Member Wintzer asked whether the Planning Commission had offered recommendations with their approval. Planner Grahm replied that the Planning Commission had concerns with the staircase and they were hoping that it would be clad in stone. Director Eddington stated that the Planning Commission had no issues with regard to the structure as proposed on the steep slope and believed that it mitigated the criteria for steep slopes. The Commissioners had concerns with the stone cladding around the driveway and the Staff was working with the applicant to address that issue. The owner, Jeff Creveling, noted that the Planning Commission favored the proposal pending a decision by the Board of Adjustment. He explained that if the BOA voted against the application, he would have to redesign the building and submit it for another review by the Planning Commission. Director Eddington recalled that the Planning Commission also requested that the Staff work with the applicant on landscaping.

Hans Fuegi understood that the impact of doing the required 10-foot stepback would impact the size of the structure by 34%. Planner Grahm replied that this was correct. Director Eddington presented a slide of a typical Old Town lot and

explained how the 10-foot step on this particular house on a smaller lot would result in a 35% reduction of the total interior space on the third floor. Planner Grahn reviewed a floor plan on page 28 of the Staff report and noted that the lost space was essentially the size of a bedroom.

Mr. Creveling presented a drawing of the proposed footprint and the neighboring buildings. He noted that the 10-foot step would but a portion of the structure behind a neighboring building. A graph showed how the 10-foot reduction on the third floor impacts the third. Mr. Creveling thanked the Staff for helping him achieve a more appropriate design through the Historic District Design Review process. He believed the size and materials were consistent with the Historic District. Mr. Creveling pointed out the hardships associated with the lot and noted that the irregular shape creates the setbacks that are different from a normal lot. This particular parcel is required to provide two on-site parking spots; whereas other lots in the zone do not have to provide on-site parking. Mr. Creveling remarked that the ordinance in its literal enforcement requires the third floor to be setback 10-feet, but it does not give a dimension of where that point is taken. This building is already pulled back off of the front yard setback line by 3-1/2 feet. The 10-foot step puts the structure at 13 feet, which creates an additional hardship and impediment to the feel of the building.

Mr. Creveling presented elevations showing what the building would look like in two renditions. If parking was not required on the site there would be no need for a variance because there would not be a third level. Mr. Creveling commented on the definition of the terms. During the discussions of the ordinance, the terms codified related specifically to the third floor. Most of the steep slopes in Old Town rise significantly going back 75'. He noted that the intent was to have the building reduce its scale as it goes up versus taking an average or maximum height. In either case, the intent was to reduce the scale, but that language did not get into the Code. Therefore, the Code requires a ten-foot minimum horizontal step on the downhill façade; and the horizontal step shall take place at a maximum height of 23' from where the building footprint meets the lowest point. Based on that language, Mr. Creveling pointed out that if someone wanted a 27' first floor, it would also have to stepback 10-feet at the 23' point. He noted that several factors resulted in the application for a variance request.

Board Member Wintzer asked if the 1379 square feet included the garage. Mr. Creveling replied that it was without the garage. He explained why the square footage was actually less than 1379 square feet.

Chair Gezeliuss opened the public hearing.

Ruth Meintsma, 305 Woodside Avenue, referred to the Analysis on page 9 of the Staff report. There has been a lot of discussion about the LMC and the 10-foot horizontal stepback at 23 feet, as well as the language regarding the third story. Ms. Meintsma noted that the LMC used to talk about the third story but it created

confusion and was later taken out. She believed the language was inadvertently left in error. She had a copy of the current LMC and noted that the language had been removed.

Planner Grahn noted that the 23' height still impacts the third story.

Ms. Meintsma agreed. However, a one-story house could have a step at 23'. She clarified that the language regarding the third story was no longer in the Code. Ms. Meintsma thought the paragraph in the LMC under Heights that talk about the 10-foot horizontal step was very clear, and that a little more articulation is allowed on the 10-foot horizontal step.

Ms. Meintsma referred to page 10 of the Staff report under the Analysis, and she agreed with the additional hardship that the 10-foot stepback would impose on the structure. However, she asked if there could possibly be a stepback between zero and ten feet. She believed that the intent is for articulation and in this particular instance they could still achieve that intent with less than 10-feet. Ms. Meintsma read from page 10 of the Staff report under the Analysis. "The surrounding historic structures do not have a ten-foot minimum stepback at 23 feet. The Staff finds that this stepback will create an incompatible design." She struggled with the comparison to other historic structures in the area because those structures were pre-2009. The new rules were implemented to solve the problems caused by the previous structures. She commented on the different elements of several of the historic structures to show why she did not believe this structure should be compared to those structures.

Ms. Meintsma referred to page 11 of the Staff report under the Analysis and agreed that the new design was in keeping with the requirements of the HDDR. However, the scale and height would not cover the wall that would loom from the driveway. She pointed out that there is no reference to the visual height from the driveway.

Ms. Meintsma commented on Criteria 1 and the literal enforcement of requiring the 10-foot step. She thought literal enforcement was the problem and suggested allowing flexibility from zero to ten feet. The language states that the purpose is to limit the mass and bulk on the hillsides and prevent a wall effect along the streetscapes. In some cases the 10-foot step would alter the pattern and rhythm and a smaller step back would be better. She believed there was room for compromise. Ms. Meintsma stated that as proposed the house has two bedrooms, but the 10' step would reduce it to one bedroom. She recognized that it was a hardship and suggested that a compromise might allow for a smaller step and still leave room for the second bedroom.

Ms. Meintsma commented on Criteria 2 and the comparison to historic structures in the neighborhood; and the fact that the other structures have advantages that were not extended to this property. She stated that historic structures are not

considered because of their advantages. There are so many regulations and restrictions that any advantage is canceled out when someone tries to lift and rebuild a deteriorated house. Ms. Meintsma did not believe that particular analysis applied.

Ms. Meintsma commented on Criteria 4 and addressed the General Plan regarding historic character. She noted that Planning Strategy 15.7 under Goal 15 says, "to encourage pedestrian oriented development, minimize visual impacts of automobiles and parking." She noted that there was not a pedestrian view showing how it would look if the setback was eliminated. Ms. Meintsma noted that the detailed strategy says that the new structure should contribute rather than detract. She remarked that a garage and driveway automatically detract. Ms. Meintsma commented on Criteria 5 and noted that the Staff analysis says that the façade of this house will not create a wall effect; however, that was not shown in any of the images.

Ms. Meintsma addressed some of the comments in the applicant's letter that was included in the Staff report. She lives in a 1300 square foot home with three bedrooms and two baths. She had researched the standard bedroom size and found that it was smaller than what the applicant was proposing. The proposed house has three baths and the bedrooms have a large walk-in closet and a bay window which adds to the size of one bedroom. She thought the 10' step was too much but zero was too little for the pedestrian on the street. Ms. Meintsma believed a three foot step and a porch would break up the wall and solve the problems without hardship to the applicant.

Douglas Stephens stated that he lives at 133 Main Street and 146 Main Street and both properties are listed on the National Historic Register. He has served on the Board of Trustees for the Utah Heritage Foundation, and he was asked by Salt Lake City to represent them in an economic review on the hardship for a large permanent building in Salt Lake City. He commented on his background and experience in restoring historic homes. Mr. Stephens stated that the subject property was located in an interesting part of Park City that is fairly intact as far as historic structures on the street. There are three vacant lots and one new home. The area is also heavily traveled by pedestrians looking at the historic homes. He believed the pedestrian impact on the area was important to consider.

Mr. Stephens referred to Criteria 5 regarding the wall effect and disagreed with the Staff analysis that the house minimizes the wall effect. The distance from the bottom of the driveway to the top of the ridge line is 35-1/2 feet and he believed it would create a wall effect that would be very visual from the sidewalk. Mr. Stephen pointed out that the lot at 129 Main Street is a non-complying lot. He asked if this variance was granted on the 10' setback, whether the two remaining lots at the top of Main Street would be allowed the same variance. Mr. Stephens stated that two of the vacant lots are next to his house. He would be

impacted because his one-story house would be juxtaposed by a three-story high house on each side.

Mr. Stephens commented on Criteria 1 and read from the Staff report the language stating that literal enforcement of the LMC would cause unreasonable hardship for the applicant. He stated that the hardships the owner was applying for was not particular to the property. It is actually general to the entire street. Mr. Stephens commented on the size of the individual structures on the west side of Main Street from Grappa's to the top of the street, and noted that all the structures were on non-conforming lots per the LMC. They might be 25' wide but all of them were less than 75' feet. Mr. Stephens went through the same exercise with the houses on the east side of the street to show that small homes on smaller, irregular lots were the norm on the street, and people have found a way to fit enough living space to make them work adequately. Mr. Stephens pointed out that the small blue house at 109 Main Street is 600 square feet and it recently sold last fall. It was apparent that there is a market for smaller houses.

Mr. Stephens stated that out of all the homes he mentioned, there is only one home on the street that has a ridgeline running east to west. It was a new house built on the west side of the street. The primary ridgeline of all the other houses runs north to south, which mitigates the wall effect on the street. In addition, all the houses on the street have some type of landscaping that softens the front and adds to the street. He recognized that the driveway requirement for 129 Main Street minimizes that ability and the wide staircase on the front porch adds to the difficulty. He pointed out that the two new homes would be the only homes on the street with ridgelines running east to west.

Craig Knightstead, a resident at 148 Park Avenue did not believe that going from a requirement of ten to zero would meet the spirit of the Code. He suggested a compromise of seven or eight feet.

Ralph Santangelo stated that he and his wife live at 115 Main Street. They favored the idea of building a house on the lot at 129 Main Street. They moved into their home in 2008 when the building codes were different. Rather than be too aggressive they remodeled the inside of their home. After meeting Mr. and Mrs. Creveling, he was confident that they would do what was right for the neighborhood. Mr. Santangelo liked the design, but he did not understand dimensions enough to comment. He and his wife would like to see good neighbors move in because currently the lot is unattractive and constrained. Mr. Santangelo believed a home would increase the value of all the properties on the street.

Nancy Santangelo supported the applicant's variance request because it would be nice to have a house on this lot. She believed the proposed house would look like it belonged on the street and the variance would allow for a little green space in the front. Ms. Santangelo thought that a house on the lot would improve that

end of Old Town. She greatly appreciated the Board's consideration for the variance.

Chair Gezelius closed the public hearing.

Board Member Wintzer understood the desire of the neighbors to have this house built. However, she thought Mr. Stephens had made a reasonable point by showing that this house was not unique to the problems when compared to the size of the other houses on the street. Ms. Wintzer stated that the ordinance was adopted to make things better and she was uncomfortable ignoring the ordinance. She understood the explanation that the intent of the 10' step was to reduce mass and scale; however, the hardship was identified as only having one bedroom. She could not legitimately consider that a hardship because there are many one-bedroom homes in town. Ms. Wintzer was struggling to meet all five criteria.

Board Member Fuegi stated that the Board continually struggles with the question of what is a hardship. He understood the comments by Board Member Wintzer and Mr. Stephens. This is an unusual lot, but within the scheme of the City it does not appear to be that unusual in this area. Mr. Fuegi thought that good ideas were presented this evening about a compromise between zero and ten. Unfortunately, the BOA is tasked with looking at the variance and not to discuss re-designing the project. They were being asked to either approve or deny the application, and at this point he struggled with the idea of reasonable hardship. Mr. Fuegi was unsure whether the hardship was applicable in this case. He understood that part of the problem was created by the parking requirement, and if there were no parking requirement the appearance of the house may look softer. However, the requirement exists and the Board has to make the appropriate decision on whether or not to grant the variance based on the plan presented.

Board Member McGhee understood both sides, but in looking at the application before them and the LMC, he was having a difficult time meeting the criteria for unreasonable hardship. He agreed that the BOA was not here to redesign the building, but he favored the idea of finding something between zero and ten and suggested that it could be based on a mathematical equivalent. Mr. McGhee was concerned about setting a precedent because there are three other vacant lots that could come before the BOA requesting a variance. In the spirit of the General Plan and the LMC, Mr. McGhee had difficulty finding hardship.

Board Member Robinson also questioned the unreasonable hardship. The LMC specifically states that the BOA cannot find an unreasonable hardship if it was self-imposed or economic. He believed there was an economic factor in reducing the square footage of the home. Mr. Robinson did not believe that the hardship was self-imposed; however, like his fellow Board Members, he was

struggling to find an unreasonable hardship. He thought the other criteria were in line with what the applicant discussed and the materials provided.

Chair Gezelius stated that she walks by this section of upper Main Street every day. In her opinion, unusual challenges are created when new rules are passed and there are still vacant lots. The issue of requiring two parking places by a new rule creates a situation for a vacant lot that did not exist for the historic homes that were built along the way. Chair Gezelius stated that in this neighborhood people have taken matters into their own hands and built their own parking places right beside the house because parking is so limited. She remarked that one occupant on the street contributes 9 or 10 cars and does not have a single parking place. Fortunately, the City purchased the vacant parcel at the trolley turnaround that provides overflow parking for this neighborhood because on-street parking is not allowed. Chair Gezelius remarked that the hardship imposed on this property versus the historic properties was the requirement to provide two parking spaces when others have none. She was sympathetic to the burden it places on planning the site. However, even though larger spaces and having more bedrooms is deemed as desirable, it is an individual judgment call. They cannot legislate for people to have larger homes than what the current Code allows. Wanting a larger property than what the Code allows is a self-imposed hardship. Chair Gezelius was also sympathetic to the east-west/north-south alignments in terms of creating a wall as a result of granting this potential variance, because the original historic home that was located on this site had a façade and roofline similar to the homes it aligned. It was also very tall and steep. It was perceived as a much larger house than the home to the north of it. The historic home also had no parking. Chair Gezelius was sorry to send the applicant back to design review at this stage in the process, but she agreed that it was very difficult to justify this as a hardship in order to have extra square footage, based on the balance of the neighborhood and vacant lots.

Mr. Creveling stated that he has lived in Park City since 1976. He went to the University of Utah and studied planning and he was on the team that drafted the original Park City Master Plan. He has been practicing as a licensed architect since 1986. He also sat on the Salt Lake County Board of Adjustment for five years. Mr. Creveling remarked that the self-imposed portion of this aspect was described in the Staff report. He stated that self-imposed means something you do to yourself. He agreed that economics is not a decision-making factor, but he felt that self-imposed definitely was. Mr. Creveling provided a history of the property since he purchased it in 2008 and the times he applied for variances for various reasons. He explained that his request for a footprint variance was denied because the Staff had deemed his application incomplete. He was unaware that his application was incomplete for six months. In 2012 he came into the Planning Department thinking that his previous variance and his special exception were intact. At that point he learned that a new ordinance applied and he needed to reduce the third floor by 10'. Mr. Creveling stated that this was not

self-imposed because it came in after he owned the property and went through the process. He has been before the BOA several times, had HDDR reviews, and worked with the Staff repeatedly over the ten years he has been working on this project. The language was changed from the 2009 application and re-modified last year. The language still needs to be tweaked before it can be fully understood how the codification of those words are applied. He noted that the words "Third Floor" was removed from the ordinance so now it can be first, second or third floor. Mr. Creveling pointed out that these decisions were not self-imposed by the applicant. Another issue is to determine where the 10' line is drawn. His request was for a modest adjustment. He has already done his mitigation and negotiation. He stated that the language reads, "If Literal enforcement of the ordinance applies an undue hardship". Mr. Creveling remarked that in his application he makes the point that the literal enforcement is producing an undue hardship.

Assistant City Attorney McLean stated that since the Staff's recommendation was to support the variance, the Findings of Fact in the Staff report would need to be modified if the Board chooses to deny the variance. She recommended that the Board vote on a motion and if the decision is to deny, they could take a short recess to allow the Staff time to revise the Findings to support denial based on their comments. The Board could then resume the meeting and adopt the Findings of Fact.

MOTION: Board Member Wintzer moved to deny the request for a variance to remove the 10-foot horizontal step requirement at 129 Main Street, subject to the revised Findings of Fact that would come back to the Board of Adjustment for adoption, as well as the Conclusions of Law and the Order and Conditions of Approval, with the omission of Condition #1. Board member Fuegi seconded the motion.

VOTE: The motion passed unanimously.

Chair Gezelius adjourned the meeting for a ten minute recess.

Chair Gezelius resumed the meeting.

Assistant City Attorney McLean reported that the applicant had asked whether the Board would consider a third option of working with the Staff on a variance that was less than what he initially asked for, based on their discussion this evening. He requested that the Board reconsider their previous motion and move for a Continuance to consider an amended variance of the horizontal stepback. Ms. McLean clarified that the Board could deny his request and retain the motion to deny, or they could continue and allow Mr. Creveling the time he has requested to work with Staff and modify the variance.

Chair Gezelius favored a continuance from the standpoint of the applicant having worked so hard with the City over time and the number of times the rules have changed. She believed it becomes onerous and difficult for anyone to complete the process based on the rules and the variances required for this type of parcel. Chair Gezelius thought the obvious choice for this lot would be to build a house, because a vacant lot does not benefit the community or the neighborhood. She encouraged the Board members to consider the third alternative presented and have it come back to the Board of Adjustment. Chair Gezelius personally felt it was a hardship for anyone to accommodate two parking spaces on such a small lot. She believed they could come up with a solution that would avoid having the applicant start over and pay all the fees again.

Board Member Fuegi concurred. He could understand the applicant's frustration throughout the process and trying to deal with the all the changes in the Code. Board Member Fuegi would not want the applicant to have to start over and he was willing to look at compromises.

Chair Gezelius asked about procedure. Assistant City Attorney McLean stated that the Board would amend the existing motion to allow for a Continuation in order for the applicant to come back with an amended application.

Board Member Wintzer was open to a continuation. She stated that the two points made by Chair Gezelius and Board Member Fuegi were well taken; however, the applicant should understand that this lot has constraints that are not necessarily considered hardship.

Mr. Creveling clarified that he was requesting the opportunity to work with the Staff. Dimensions are difficult to define in this arena and with the Staff's help he was certain they could come up with a number that makes sense and still meets the intent of the LMC, without being the full 10-foot requirement. A continuance would keep the application open and reconvene with the determined dimension. If it was still unacceptable to the Board at that time, he would accept that decision.

MOTION: Board Member Wintzer amended the previous motion to CONTINUE 129 Main Street to a date uncertain. Board Member Fuegi seconded the motion.

VOTE: The motion passed unanimously.

Chair Gezelius adjourned the meeting at 6:46 p.m.

Approved by _____
Ruth Gezelius, Chair
Board of Adjustment

Board of Adjustment Staff Report



Application #: PL-14-02425
Subject: 30 Sampson Avenue
Author: Kirsten Whetstone, MS, AICP
Date: September 23, 2014
Type of Item: Variance

Summary Recommendations

Staff recommends that the Board of Adjustment review the proposed variance request, conduct a public hearing, and consider granting the variance based on the following findings of facts and conclusion of law.

Description

Applicant: Michael and Laurie Jorgensen, owners
Location: 30 Sampson Avenue
Zoning: Historic Residential Low Density (HRL) District
Adjacent Land Uses: Historic and non-historic single family houses, open space and trails
Reason for Review: Variances require Board of Adjustment approval

Proposal

The applicant proposes to construct a single family house on a vacant platted lot located at 30 Sampson Avenue within the HRL zoning district. The applicant requests a variance from the number of stories (allowing 4 stories instead of 3) pursuant to LMC Section 15-2.1-5 (A) Building Height, that was in effect at the time application was made for a Steep Slope Conditional Use Permit (February 14, 2012). LMC Section 15-2.1-5 (A) reads as follows:

15-2.1-5. BUILDING HEIGHT.

No Structure shall be erected to a height greater than twenty-seven feet (27') from Existing Grade. This is the Zone Height. Final Grade must be within four vertical feet (4') of Existing Grade around the periphery of the Structure, except for the placement of approved window wells, emergency egress, and a garage entrance. The following height requirement must be met:

(A) A Structure may have a maximum of three (3) stories. A basement counts as a Story within this zone. Attics that are not Habitable Space do not count as a Story.

The applicant is requesting a variance due to unique conditions of the lot, in that the lot has an odd hour glass shape, is steeply sloped, and has an unusually large grade

difference between the elevation at the street front of the lot and the elevation of the main building pad area. The applicant is requesting four stories which will allow an underground tunnel connection between the garage at the street level and the main house at the upper level.

Purpose of the HRL District

The purpose of the Historic Residential Low-Density (HRL) District is to:

- (A) Reduce density that is accessible only by substandard Streets so these Streets are not impacted beyond their reasonable carrying capacity,
- (B) Provide an Area of lower density Residential Use within the old portion of Park City,
- (C) Preserve the character of Historic residential Development in Park City,
- (D) Encourage the preservation of Historic Structures,
- (E) Encourage construction of Historically Compatible Structures that contribute to the character and scale of the Historic District, and maintain existing residential neighborhoods.
- (F) Establish Development review criteria for new Development on Steep Slopes which mitigate impacts to mass and scale and the environment, and
- (G) Define Development parameters that are consistent with the General Plan policies for the Historic core.

Background

On January 5, 1995, the City Council approved the Mill Site Reservation Supplemental Amended Plat (Exhibit A), which was a combination of 13 whole and partial lots, and a portion of platted un-built Utah Avenue, within the original Mill Site addition to the Park City Subdivision Plat to create three (3) lots of record. The Mill Site Reservation Supplemental Amended Plat was recorded with a note that limited the “maximum size for residential structures” to 3,000 square feet for Lots 1 and 3, and 3,500 square feet for Lot 2. An additional 400 sf was allowed for a garage. Lot 3 of the Mill Site Reservation Supplemental Amended Plat contains 7,089 sf of lot area.

On March 30, 1998, a letter was written by Richard E. Lewis, acting Community Development Director, to the owners of Lots 1, 2, and 3, clarifying that the maximum size for residential structures as noted on the plat, excluded basements as defined by the LMC. The letter also clarified the 400 sf garage allowance.

On February 14, 2012, the City received a completed application for a Conditional Use Permit (CUP) for “Construction on a Steep Slope” at 30 Sampson Avenue for a new single family house. On April 9, 2012, the application was deemed “complete”. On August 22, 2012, the application came before the Planning Commission for a public hearing and discussion. The Commission voted unanimously to continue the item to a date uncertain for the purpose of reviewing the LMC definition of “stories” as it relates to the maximum number of stories allowed in the HR-1 and HRL districts. The Commission requested Staff prepare LMC amendments to the Building Height sections for the

historic districts to more clearly identify height, massing, and articulation. The LMC discussions continued for several months and eventually the applicant requested to have the application put back before the Planning Commission for consideration.

LMC Amendments to Height and Story were adopted by the Council on November 21, 2013. Because the Steep Slope CUP application was submitted prior to publication of an ordinance for the LMC amendments this application is subject to the LMC in effect at the time of application. The City Council adopted revisions to Section 15-2.1-5. Building Height that removed the limitation on the number of stories and replaced that language with the following:

15-2.1-5. BUILDING HEIGHT.

No Structure shall be erected to a height greater than twenty-seven feet (27') from Existing Grade. This is the Zone Height. Final Grade must be within four vertical feet (4') of Existing Grade around the periphery of the Structure, except for the placement of approved window wells, emergency egress, and a garage entrance. The following height requirement must be met:

(A) A Structure shall have a maximum height of thirty five feet (35') measured from the lowest floor plane to the point of the highest wall top plate that supports the ceiling joists or roof rafters.

On April 10, 2013, the Planning Commission denied the Steep Slope CUP. There were several meetings before this date including the public hearing on August 22, 2012 and a work session on December 12, 2012. At the April 10th meeting the Commission requested Planning Staff prepare Findings of Fact and Conclusions of Law consistent with the April 10th discussion. These Findings and Conclusions were ratified by the Planning Commission on June 26, 2013 (Exhibit E).

On July 12, 2013, the applicant submitted to the City Recorder, within the required ten day appeal period, an appeal of the Planning Commission decision (Exhibit F). On August 5, 2013, the application requested a continuation of the appeal (to be heard by the City Council) in order to submit a request for an Advisory Opinion from the State of Utah Office of Property Rights. Staff agreed to continue the appeal to a date uncertain.

On March 28, 2014, Planning Staff received a copy of the Advisory Opinion (Exhibit G) and after reviewing the document scheduled a meeting with the applicant to discuss the CUP application and appeal. At the meeting the Applicant indicated willingness to consider revisions to the design related to the exterior elevator element, connector element, and the garage.

In April of 2014 Staff reviewed a plan set showing potential revisions and found that these revisions to 1) incorporate the elevator into the main house, 2) reduce the massing of the garage, and 3) reduce the amount of paving and impervious area at the street allowing for more landscaping, result in less visible massing and a more

historically compatible design. Because the revised design connects the house with the garage, a variance to the three story limitation would be required in order to move forward with a revised Steep Slope CUP application. The revised design results in a total of four stories within a single structure due to the fact that the first story (the garage is not buried).

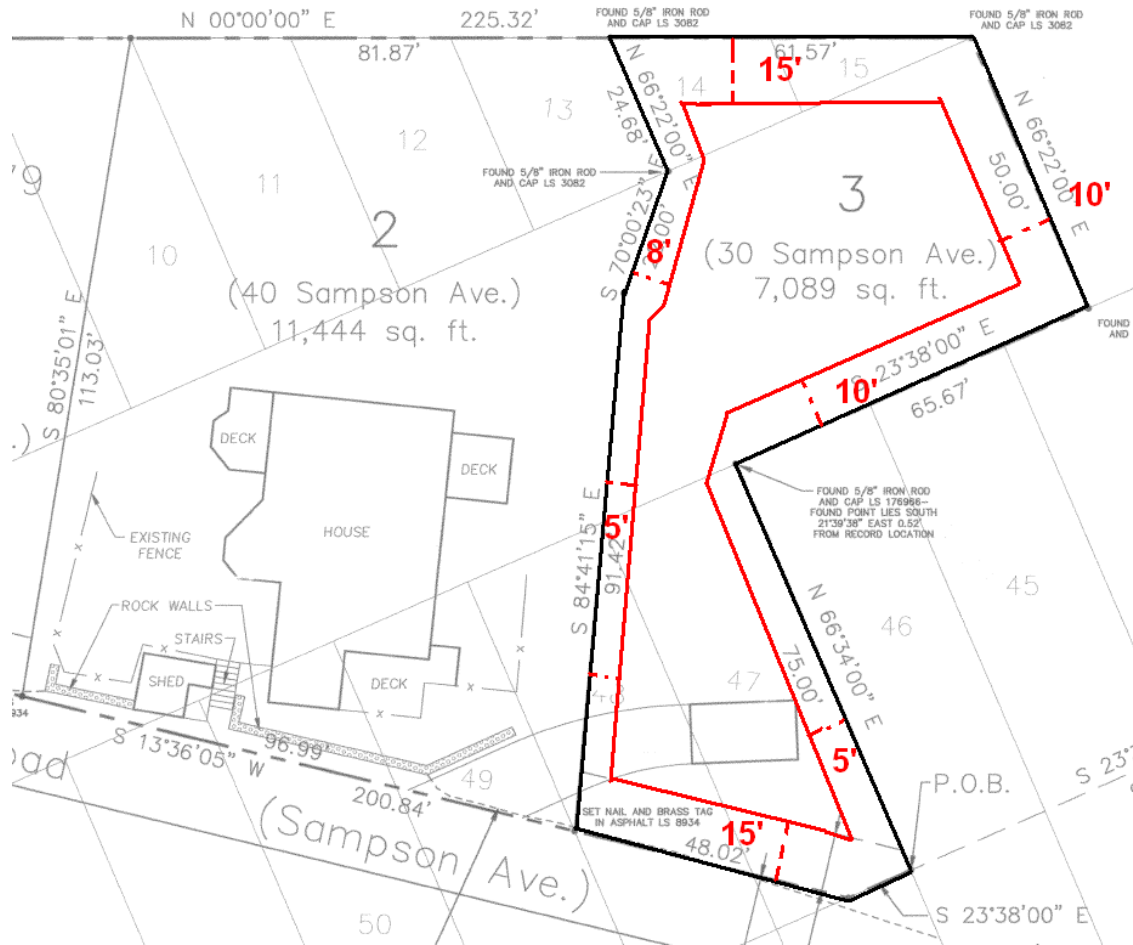
The design reviewed and denied by the Planning Commission, though technically disconnected, visually appeared to be five stories. Prior to final review by the Planning Commission, the applicant clarified in the design that the garage and subterranean walk-way (tunnel) from the main house was detached. The walkway leads to an exterior placed elevator with an exterior walkway and patio area that leads to the front of the main house. With a detached garage Staff found that the design did not violate the 3 stories height restriction in the code. This is the design that the Planning Commission denied (see Exhibit E).

On July 7, 2014, the City received an application for a variance to Section 15-2.1-5 (A) Building Height for the property located at 30 Sampson Avenue, including a letter from the owner stating why he believed the variance should be granted (Exhibit D).

On July 31, 2014, the City Council remanded the appeal of the Steep Slope CUP denial to the Planning Commission for the Planning Commission to reevaluate the Steep Slope CUP in light of the Ombudsman Opinion and for the applicant to make a variance request. The Steep Slope CUP application is pending review by the Planning Commission. If a variance is granted the applicant intends to revise the Steep Slope CUP application and Staff will prepare a report and notice the application for a public hearing by the Commission. The Historic District Design Review is pending resolution of the Steep Slope CUP application.

Analysis

Staff has reviewed the proposed design for compliance with the Land Management Code, plat notes, and Planning Director determinations, including setbacks, floor area calculations, etc. The following illustrates the required setbacks and the hardship created by the hour glass shaped lot.



The total floor area square footage proposed excluding the basement and 400 sf of garage area is 2,996 square feet which is compliant with a 1998 clarification letter written by Community Development Director Lewis and plat notes that allow a total floor area of 3,000 sf. The letter clarified that basement area is not included in the maximum allowed floor area and that an allowance for 400 sf for a garage is provided, consistent with the LMC. Underground circulation, tunnel, and below grade elevator areas are also excluded from the total floor area, to the extent that they are below final grade.

Staff made the following LMC related findings:

Requirement	LMC Requirement	Proposed
Building Footprint	2,355.5 square feet (based on lot area) <u>maximum</u>	2,272 square feet, <u>complies.</u>
Building Square Foot Maximum	No LMC Requirement – 3,000 sf maximum floor area allowed per plat note.	2,996 sf floor area (1,216 sq. ft. basement and 400 sq ft garage are

		excluded), <u>complies.</u>
*Front and Rear Yard	10 feet minimum (20 feet total) 15 feet per Planning Director	15 feet (front), <u>complies.</u> 15 feet (rear), <u>complies.</u>
*Side Yard	5 feet minimum, (10 feet total)	*Various – see notes
Height	27 feet above existing grade, <u>maximum.</u>	Various heights all less than 27 feet above existing grade, <u>complies.</u>
Number of stories	A structure may have a maximum of three (3) stories.	4 stories, <u>does not comply- variance requested.</u>
Final grade	Final grade must be within four (4) vertical feet of existing grade around the periphery of the structure.	4 feet or less, <u>complies.</u>
Vertical articulation	A ten foot (10') minimum horizontal step in the downhill façade is required for the third story unless the 1 st story is completely below finished grade.	Horizontal distance from roof of garage to third story is approximately 70', <u>complies.</u>
Roof Pitch	Roof pitch must be between 7:12 and 12:12 for primary roofs. Non-primary roofs may be less than 7:12.	7:12 for all primary roofs with a minor “green roof” for the garage between the primary roof pitch, <u>complies.</u>
Parking	Two (2) off-street parking spaces required	2 spaces within the garage, <u>complies.</u>

* Planning Director Determination of setbacks based on the fact that the lot has more than four sides. Planning Director can require greater setbacks in this instance.

In order to move forward with a revised Steep Slope CUP application for the house that incorporates an underground connection between the house and the garage and incorporates the vertical circulation elements (elevator and stairs) within the house, the applicant requests a variance from LMC Section 15-2.1-5 (A) Building Height, that was in effect at the time application was made for a Steep Slope Conditional Use Permit (February 14, 2012). That LMC Section 15-2.1-5 (A) reads as follows:

15-2.1-5. BUILDING HEIGHT.

No Structure shall be erected to a height greater than twenty-seven feet (27') from Existing Grade. This is the Zone Height. Final Grade must be within four vertical feet (4') of Existing Grade around the periphery of the Structure, except for the placement of approved window wells, emergency egress, and a garage entrance. The following height requirement must be met:

(A) A Structure may have a maximum of three (3) stories. A basement

counts as a Story within this zone. Attics that are not Habitable Space do not count as a Story.

The LMC defined Story as follows:

- **15-15-1.249 STORY.** The vertical measurement between floors taken from finish floor to finish floor. For the top most Story, the vertical measurement is taken from the top finish floor to the top of the wall plate for the roof Structure.

The applicant is requesting a variance to the maximum number of stories due to unique conditions of the lot, in that the lot has an odd hour glass shape, is steeply sloped, and has an unusually large grade difference (approximately forty feet (40')) between the elevation at the street front of the lot and the elevation of the main building pad area. The property lines also are at an angle to the street further constraining the development area. The applicant is requesting four stories to allow an underground tunnel connection between the garage at the street level and the main house at the upper level, allowing the vertical circulation (elevator or stairs) to be incorporated within the main house (Exhibit B). The lowest level of the main house is buried and the design presents visually only three stories.

With the original disconnected design the garage was considered a detached structure. As a separate structure from the house it was designed with two stories at the street and the main house was designed with the maximum allowable three stories (a fully buried basement and two stories). While not technically five stories because of the detached garage, the perceived or effective massing of the disconnected design is greater than a design that would be possible if a variance to the three story limitation is granted in order to put the elevator inside. Additionally, the disconnected elevator element, proposed to comply with the LMC, is an awkward element that increases the visually massing on the upper portion of the lot.

The variance requested is to the three story limitation because the application was submitted under the previous LMC, prior to amendments to Building Height that removed the three story limitation and added a total overall height limit of thirty-five (35') feet. The connected plan would not meet the current LMC requirement of a thirty-five (35') foot total overall height.

Due to the steepness of the lot, grade difference from the street to the main building pad, and odd hour glass shape lot a design that connects these elements as one single family house will contain four stories. If a variance is granted the elevator/stair element can be incorporated within the house resulting in a design that is more consistent with the Historic District Design Guidelines. See Exhibit C for perspective drawings.

Staff recommends a condition that the elevator and stairs be constructed within the house and that the house is constructed to appear to be a three story house from the exterior.

LMC Review Criteria for a Variance

In order to grant the requested variance to the aforementioned code section, the Board of Adjustment must find that all five (5) criteria located in LMC § 15-10-9 are met. The Applicant bears the burden of proving that all of the conditions justifying a variance have been met (see Exhibit D).

Criteria 1. Literal enforcement of the LMC would cause an unreasonable hardship for the Applicant that is not necessary to carry out the general purpose of the LMC. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under the BOA 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 peculiar to the Property, not from conditions that are general to the neighborhood. In determining whether or not the enforcement of the LMC would cause unreasonable hardship the BOA may not find an unreasonable hardship if the hardship is self-imposed or economic.

The alleged hardship is a function of the hour glass shape of the lot and the steepness of the lot. The elevation difference between the street level and the main building pad exceeds forty (40') feet. The hour glass shape and required setbacks create an unreasonable hardship that is not necessary to carry out the general purposes of the LMC. The shape and steepness of the lot requires the main house to be located at the upper portion of the lot in order to meet the required building setbacks and also places the house on the flatter portion of the lot. The alleged hardship is located on the Property for which the variance is sought. The hardship comes from circumstances of this Property and not from conditions that are general to the neighborhood and the hardship is not self-imposed or economic.

Criteria 2. There are special circumstances attached to the Property that do not generally apply to other Properties in the same zone. In determining whether or not there are special circumstances attached to the Property the BOA may find that special circumstances exist only if the special circumstances relate to the hardship complained of and deprive the Property of privileges granted other Properties in the same zone.

There are special circumstances attached to the Property that do not apply to other Properties. These special circumstances include the shape of the platted lot as well as the steepness of the slope and difference in elevation, approximately 40', from the street level to the main building pad. These special circumstance relate to the hardship complained of that deprives the property of privileges granted to other property in the same zone. The property is subject to the same LMC requirements regarding building height, story, and setbacks as other similar sized property in the zone and due to the hardships as described above, the applicant complains that the Property is deprived of privileges granted to other Properties in the HRL zone.

Criteria 3. Granting the variance is essential to the enjoyment of a substantial Property right possessed by other Property in the same zone.

Granting of the variance allows essential enjoyment of a substantial Property right as possessed by other property owners in the HRL zone. Granting the variance allows the property owner to construct an historically compatible garage at the street, construct an underground connection through the narrow portion of the lot, and incorporate an internal vertical circulation (elevator or stairs) within the main house, in order to utilize the main portion of the lot for the house where the required building setbacks can be met.

Criteria 4. The variance will not substantially affect the General Plan and will not be contrary to the public interest.

Granting of the variance will not substantially affect the General Plan and will not be contrary to the public interest as the internal connection is underground and not visible from the street. The perceived massing is three stories. The variance allows construction of an underground tunnel connection between the garage at the street and the main house at the upper portion of the lot that is approximately forty feet (40') higher. The variance allows an elevator, or other vertical circulation system, to be incorporated within the house resulting in a more historically consistent design and allows removal of an awkward external disconnected elevator element mid lot. One of the goals identified in the current General Plan is to ensure that the character of new construction is architecturally-compatible to the existing historic character of Park City. The variance allows a design with an internal connection that meets the Historic District Design Guidelines, while the design with the disconnected exterior elevator structure is awkward and is not a typical design in the historic district.

Criteria 5. The spirit of the Land Management Code is observed and substantial justice done.

The variance as proposed will not conflict with the spirit of the zoning ordinance. Granting the variance will allow the applicant to comply with the spirit of the LMC and to construct a more compatible design, utilize the main portion of the lot and provide an internal, underground, non-visible connection from the garage to the main house. The spirit of the Land Management Code is observed and substantial justice is done in that the variances allow the owner to provide an internal connection to the main house that is protected from the weather, is compatible with the Historic Design Guidelines, and allows utilization of the main portion of the lot that is approximately forty (40') feet above the grade at the street.

Future Process

Approval of the variance by the Board of Adjustment constitutes Final Action. The Board's decision may be appealed by petition to the District Court in Summit County for a review of the decision following the procedures found in LMC § 15-10-12. Approvals of a Historic District Design Review or "HDDR" for the house, as well as approval of a Steep Slope Conditional Use Permit, are necessary prior to the issuance of a building permit.

If the variance is granted the applicant could submit a revised Steep Slope Conditional Use permit for review by the Planning Commission. If a variance is not granted, the applicant can pursue review of the remanded appeal and the Advisory Opinion with the Planning Commission.

Department Review

The Variance application has been reviewed by the Planning, Building and Legal Departments. Issues raised and clarifications are reflected in this report.

Notice

On August 5, 2014, the property was posted and notice of the variance request was mailed to property owners within 300 feet of the property in accordance with requirements of the Land Management Code. Legal notice was published in the Park Record on August 2, 2014, according to requirements of the Code.

Public Input

No public input on this variance application has been received.

Significant Impacts

There are no significant fiscal or environmental impacts from this application.

Consequences of not taking the Suggested Recommendation

The applicant would not be able to move forward with the internally connected tunnel and elevator design. The applicant could pursue review of the appeal of the disconnected design and the Advisory Opinion with the Planning Commission.

Recommendation

Staff recommends that the Board of Adjustment review the proposed variance request, conduct a public hearing, and consider granting the variance based on the following findings of facts and conclusion of law.

Findings of Fact (for Approval)

1. The property is located at 30 Sampson Avenue.
2. The property is located within the Historic Residential Low Density (HRL) District.
3. The property is Lot 3 of the Mill Site Reservation Supplemental Amended Plat, approved by City Council on January 19, 1995 and recorded at Summit County on August 31, 1995. Plat notes restrict the size of a house (in terms of floor area) on Lot 3 to a maximum of 3,000 sf. A 400 sf allowance for a garage is allowed and basement area is not included in the house size.
4. On July 7, 2014, the owner submitted an application requesting a variance to LMC Section 15-2.1-5 (A) to allow a total of four stories for the proposed single family house due to the odd hour glass lot configuration, steepness of the lot, and approximately forty feet (40') of grade change between the street level and the main building pad area.
5. On August 5, 2014, the property was posted and notice of the variance request was mailed to property owners within 300 feet of the property. Legal notice was

published in the Park Record on August 2, 2014, according to requirements of the Code.

6. The Lot is currently vacant and the owner desires to construct a single family house on the lot.
7. The unreasonable hardship is the configuration and steepness of the Lot. The lot has an odd hour glass shape and includes a large grade difference between the lot area at the street and upper building pad area for the main house. The shape of the lot limits the location of the building pad for both the garage and the main house due to required setbacks from the property line. At the waist of the hourglass shape the lot is twenty-one feet with required side yard setbacks of five feet on either side. The property lines also are at an angle to the street further constraining the development area.
8. The difference in grade between the street and the main building pad is approximately 40'. This grade change combined with the odd shape of the lot creates a hardship in complying with the three story limitation of the zone.
9. The applicant is requesting four stories to allow an underground connection between the garage at the street level and the main house at the upper level, allowing the vertical circulation (elevator or stairs) to be incorporated within the main house.
10. The alleged hardship is a function of the hour glass shape of the lot and the steepness of the lot. The elevation difference between the street level and the main building pad is approximately forty (40') feet.
11. The hour glass shape and required setbacks create an unreasonable hardship that is not necessary to carry out the general purposes of the LMC.
12. The shape of the lot requires the main house to be located at the upper portion of the lot in order to meet the required building setbacks.
13. The alleged hardship is located on the Property for which the variance is sought.
14. The hardship comes from circumstances of this Property and not from conditions that are general to the neighborhood and the hardship is not self-imposed or economic.
15. Granting of the variance allows to the applicant the same rights as other property owners in the district.
16. There are special circumstances attached to the Property that do not apply to other Properties These special circumstances include the odd hour glass shape of the platted lot as well as the steepness of the slope and difference in elevation, approximately forty feet (40'), from the street level to the main building pad.
17. These special circumstance relate to the hardship complained of that deprives the property of privileges granted to other property in the same zone.
18. The property is subject to the same LMC requirements regarding building height, story, and setbacks as other similar sized property in the district and due to the hardships as described above, the applicant complains that the Property is deprived of privileges granted to other Properties in the HRL zone.
19. Granting of the variance allows essential enjoyment of a substantial Property right as possessed by other property owners in the HRL zone.
20. Granting the variance allows the property owner to construct an historically compatible garage at the street, construct an underground connection through the narrow portion of the lot, and incorporate an internal vertical circulation

(elevator or stairs) within the main house, in order to utilize the main portion of the lot for the house where the required building setbacks can be met.

21. Granting of the variance will not substantially affect the General Plan and will not be contrary to the public interest as the internal connection is underground and not visible from the street. The perceived massing is three stories.
22. The variance allows construction of an underground tunnel connection between the garage at the street and the main house at the upper portion of the lot that is approximately forty feet (40') higher. The variance allows an elevator, or other vertical circulation system, to be incorporated within the house resulting in a more historically consistent design and allows removal of an awkward external disconnected elevator element mid lot. The variance allows a design with an internal connection that meets the Historic District Design Guidelines, while the design with the disconnected exterior elevator structure is awkward and is not a typical design in the historic district.
23. Granting the variance will allow the applicant to comply with the spirit of the LMC and to construct a more compatible design, utilize the main portion of the lot and provide an internal, underground, non-visible connection from the garage to the main house.
24. The spirit of the Land Management Code is observed and substantial justice is done in that the variances allow the owner to provide an internal connection to the main house that is protected from the weather, is compatible with the Historic Design Guidelines, and allows utilization of the main portion of the lot that is approximately forty (40') feet above the grade at the street.
25. One of the goals identified in the current General Plan is to ensure that the character of new construction is architecturally-compatible to the existing historic character of Park City. The applicant will be required to go through the HDDR process for compatibility with the adopted Historic District Design Guidelines prior to the construction of the house.

Conclusion of Law (for approval)

1. Literal enforcement of the Historic Residential Low Density (HRL) District requirements for this property regarding the number of allowable stories causes an unreasonable hardship that is not necessary to carry out the general purpose of the zoning ordinance.
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 substantial property right possessed by other property owners in the same district.
4. The proposal is consistent with the General Plan.
5. The spirit of the zoning ordinance is observed by this application.
6. It can be shown that all of the conditions justifying a variance, pursuant to LMC § 15-10-9, have been met.

Conditions of Approval

1. The vertical circulation elevator and stairs shall be constructed within the house.
2. The house shall be constructed to appear as three (3) stories on the exterior.

Order (for approval)

1. A variance to LMC Section 15-2.1-5 (A) is hereby granted to allow up to four stories on Lot 3 of the Mill- Site Reservation Supplemental Amended Plat.
2. The variance runs with the land.

Exhibits

Exhibit A – Existing Plat

Exhibit B – Site Plan, Floor Plans, Elevations

Exhibit C – Photos and Perspectives

Exhibit D – Applicants letter requesting the variance

Exhibit E – Findings and Conclusions and plans of the June 26, 2013 Commission denial

Exhibit F– Appeal of Planning Commission decision (not including exhibits)

Exhibit G – Advisory Opinion (not including exhibits)

Note that all exhibits to the Appeal and the Advisory Opinion are available at the City Planning Department and can be provided electronically if requested. This information is provided as background information and is not specific to the findings that are required in order to grant a Variance for this Lot.

MILL-SITE RESERVATION SUPPLEMENTAL AMENDED PLAT
A SUBDIVISION OF BLOCK 78 AND 79 OF SUBDIVISION NO. 1 OF MILL-SITE RESERVATION,
PARK CITY, SUMMIT COUNTY, UTAH, DATED JUNE 25, 1987 AND RECORDED AT THE SUMMIT
COUNTY, UTAH RECORDERS OFFICE.



THE JACK
JOHNSON
COMPANY

1000 Pennsylvania Avenue • P.O. Box 1114 • Dallas, TX 75201
(800) 444-4000 • Fax: (800) 444-1010

RECORDED

436 448

Utah

SUMMIT

Dark City Title

Time: 09:01 AM

0-Dec-08 09:15

Fee: \$3.00

Alonso Pizarro

APPROVAL AS TO FORM

11th

AUGUST 1945

M. D. H. J.

11th

AUGUST 1945

M. D. H. J.

SEWER DISTRICT APPROVAL

DATE OF FIELD TEST: 7-10-1946
BY: JAMES R. BAIRD
LOCAL AGENCY APPROVAL (PRINT)
DATE: 7-25-1946
BY: JAMES R. BAIRD

CITY PLANNING COMMISSION

ADMINISTRATIVE AND SUPPORT STAFF OF THE
CITY PLANNING COMMISSION ON THE
DATE OF MEETING

Robert
1/11/12

B. L.
THOMAS

CITY ENGINEER

APPROVED FOR THE CITY ENGINEER

11th AUGUST 95

ONE W. O'Brien

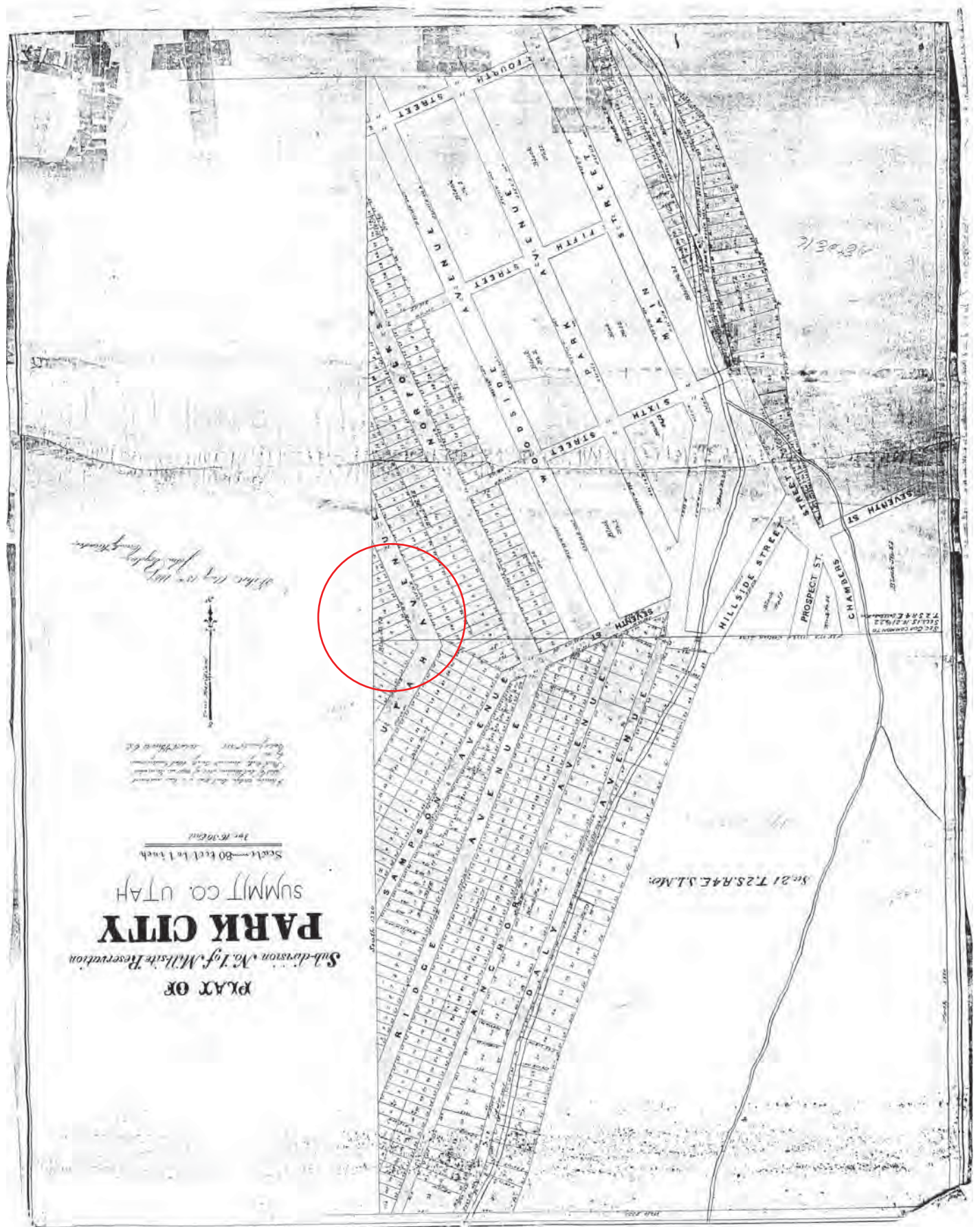
CITY COUNCIL APPROVAL

JANUARY 1978
CITY OF PARK

Evelyn D. ...

Anita L. Sheldon

PUBLISHED FOR THE EDITORIAL BOARD



JORGENSEN RESIDENCE

HISTORIC DISTRICT DESIGN REVIEW / STEEP SLOPE CONDITIONAL USE APPLICATION SET
30 SAMPSON AVENUE
PARK CITY, UTAH 84060

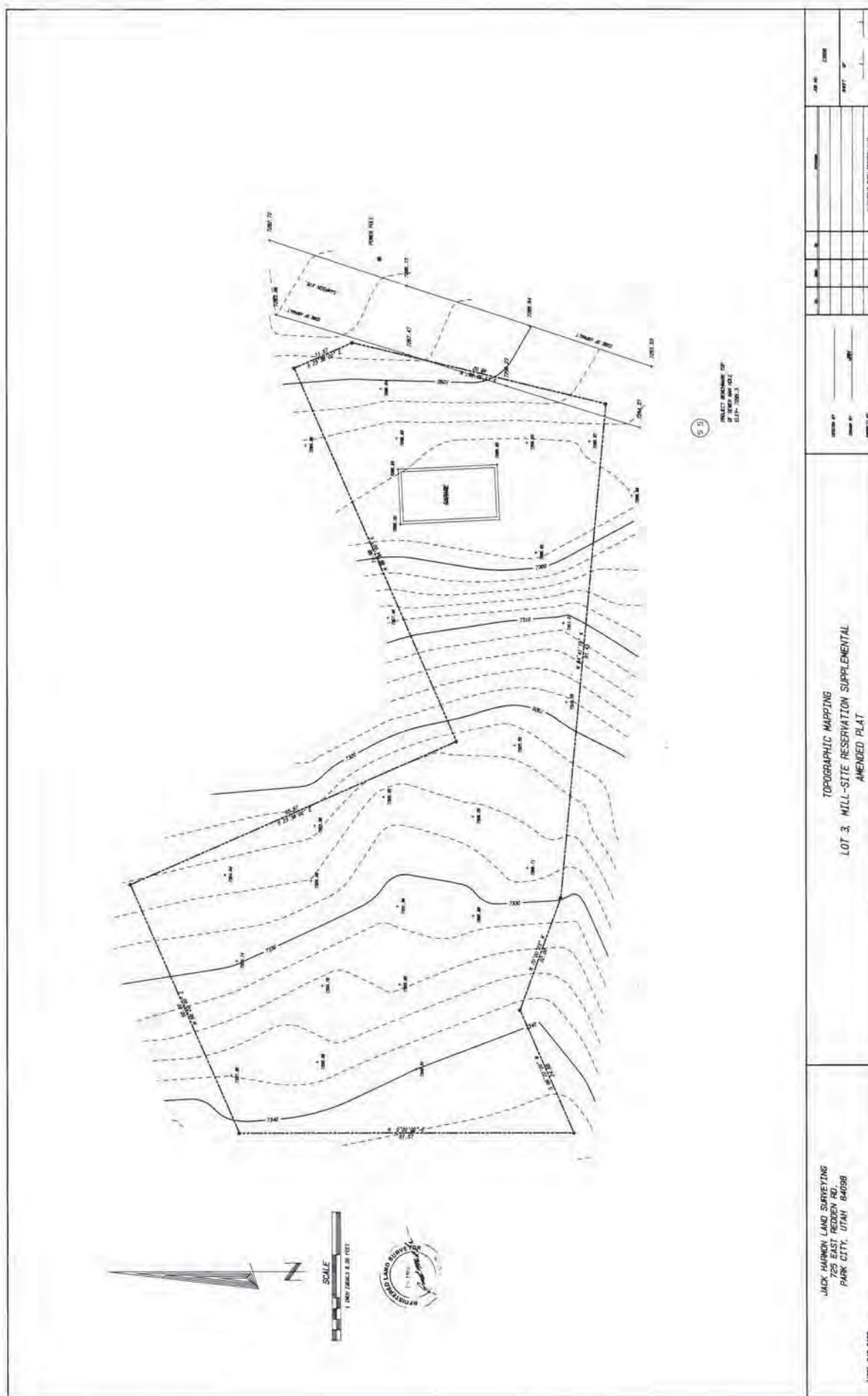
CONSULTANTS

LEGEND	
	BRICK & STONE
	SAWN
	CONCRETE
	CONCRETE MASONRY UNIT
	FILLER (GYPSUM SCALE)
	GLASS INSULATION
	RIGID INSULATION
	WOOD SIDING
	BLOCKWORK
	ALUMINUM (GYPSUM SCALE)
	GYPSUM
	PAINTED WOOD
	BATT OR BLANK INSULATION
	PLASTER AND BRICK MORTAR
	STEEL SMALL SCALE
	INSULATED LATHING
	PLYWOOD
	OTHER BOARD
	ROOM WALL
	FLOOR (FIRST ELEV)
	CEILING LINE
	JOIST LINE
	CHANNEL
	ANGLE
	DETAIL
	SECTION CUT (DETAIL)
	BUILDING SECTION
	KEYED NOTES
	WINDOW TYPE
	DOOR NUMBER
	ELEVATION
	INTERIOR WALL ELEV.
	WALL TYPE

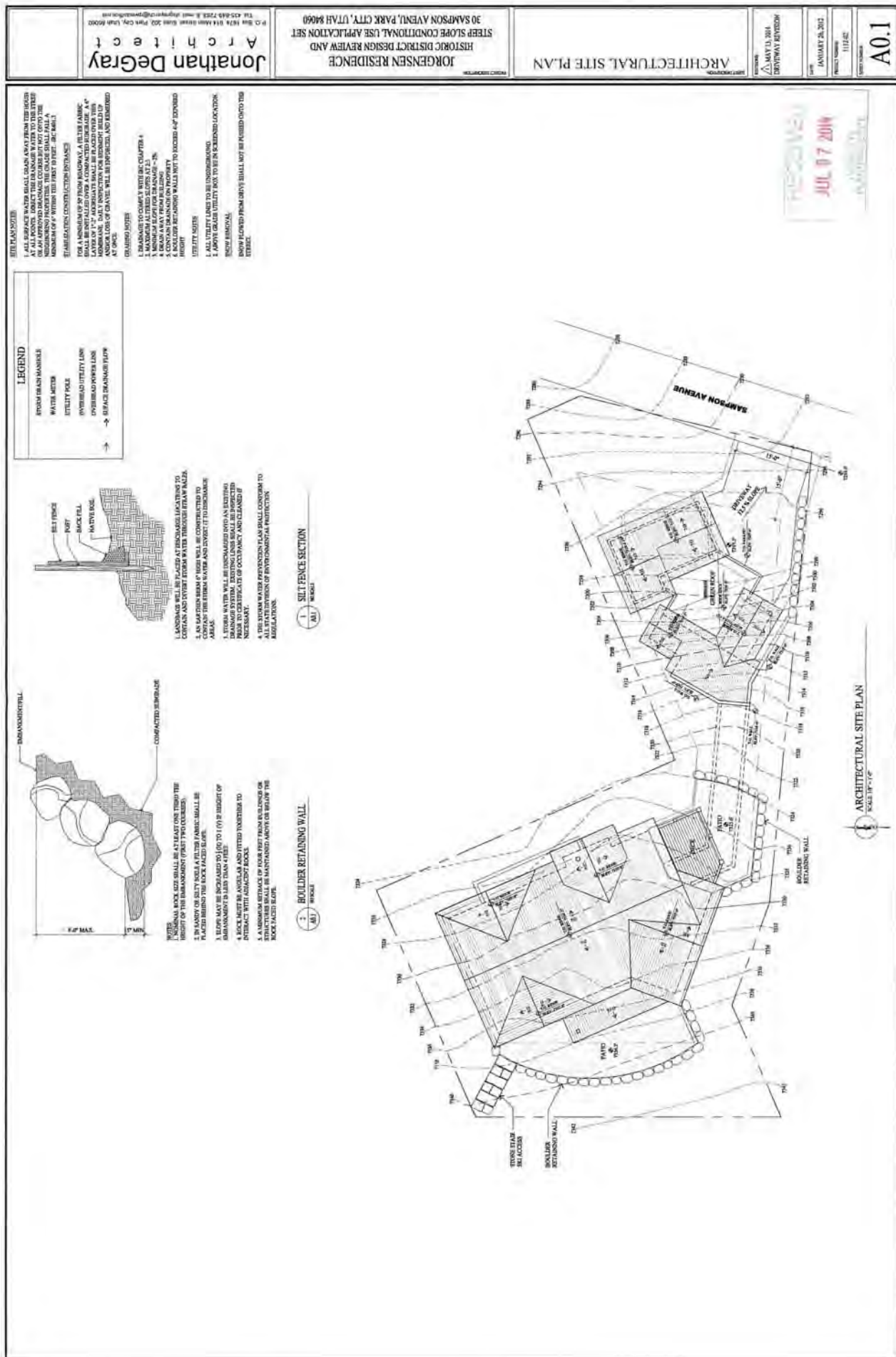
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#	SHEET#	COVER SHEET	SHEET DESCRIPTION
1	AK		URBURY
2	16F1	TOPOGRAPHIC MAP	
3	A5.1	ARCHITECTURAL SITE PLAN	ARCHITECTURAL
4	A1.1	DAMAGE LEVEL PLAN	
5	A1.2	WIND DAMAGE PLAN	
6	A1.3	LOWELL LEVEL PLAN	
7	A1.4	MAIN LEVEL PLAN	
8	A1.5	ROOF PLAN	
9	A5.1	NORTH AND SOUTH ELEVATIONS	
10	A5.2	EAST AND WEST ELEVATIONS	
11	A5.3	SECTION ELEVATIONS	
12	A2.1	DAMAGE EAST AND NORTHEAST ELEVATIONS	
13	A2.2	DAMAGE AND REPAIR SOUTH ELEVATION	
14	A3.1	BUILDING SECTIONS	
15	A3.2	BUILDING SECTIONS	

Board of Adjustment - September 23, 2014



SITE PLAN



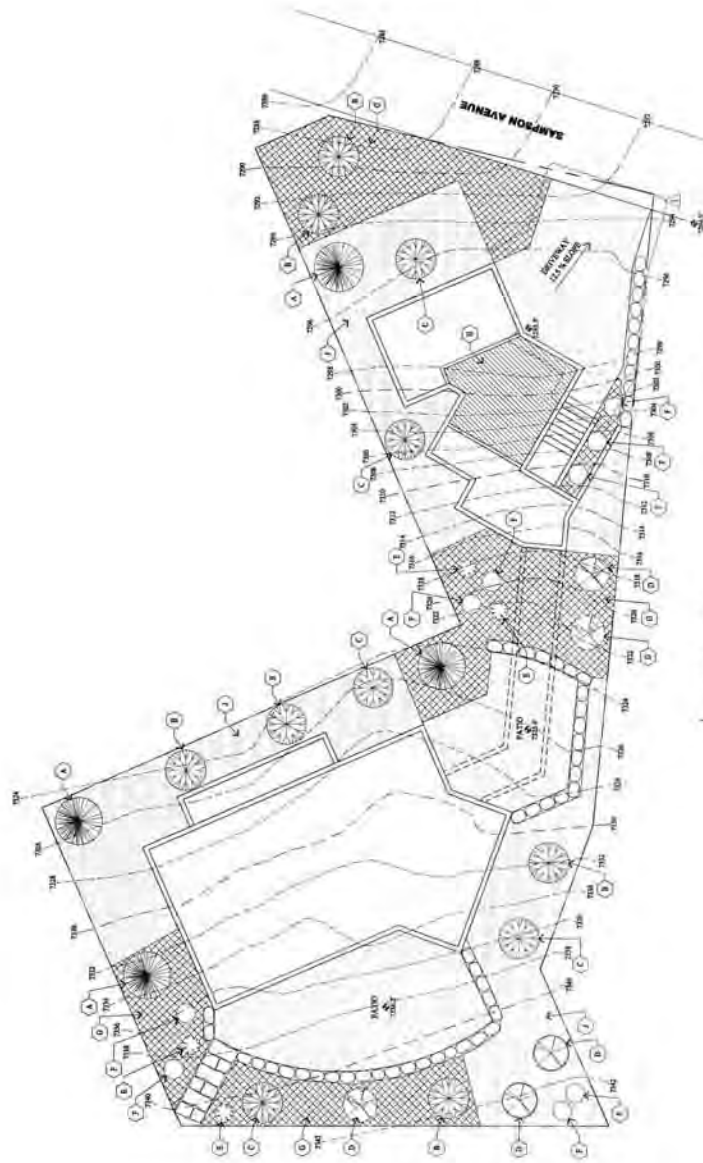
LANDSCAPE PLAN

PLANT SCHEDULE				
DATE: 11/25/2018		DRAWN BY: JMM		
ITEM NO.	PLANT QUANTITY	PLANT NAME	SIZE	NOTES
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2	1	1" X 12" TIE BAR	#12	
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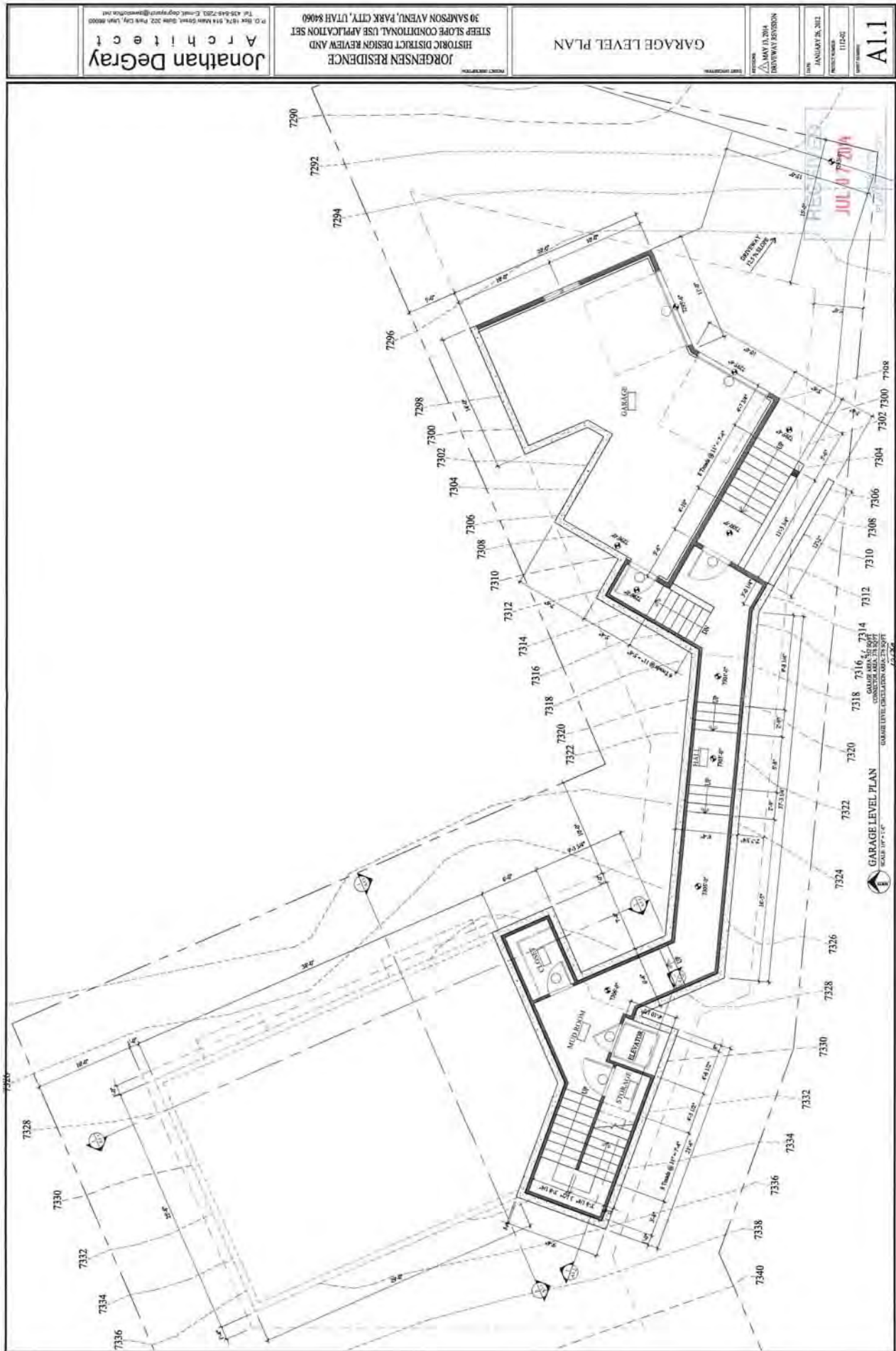
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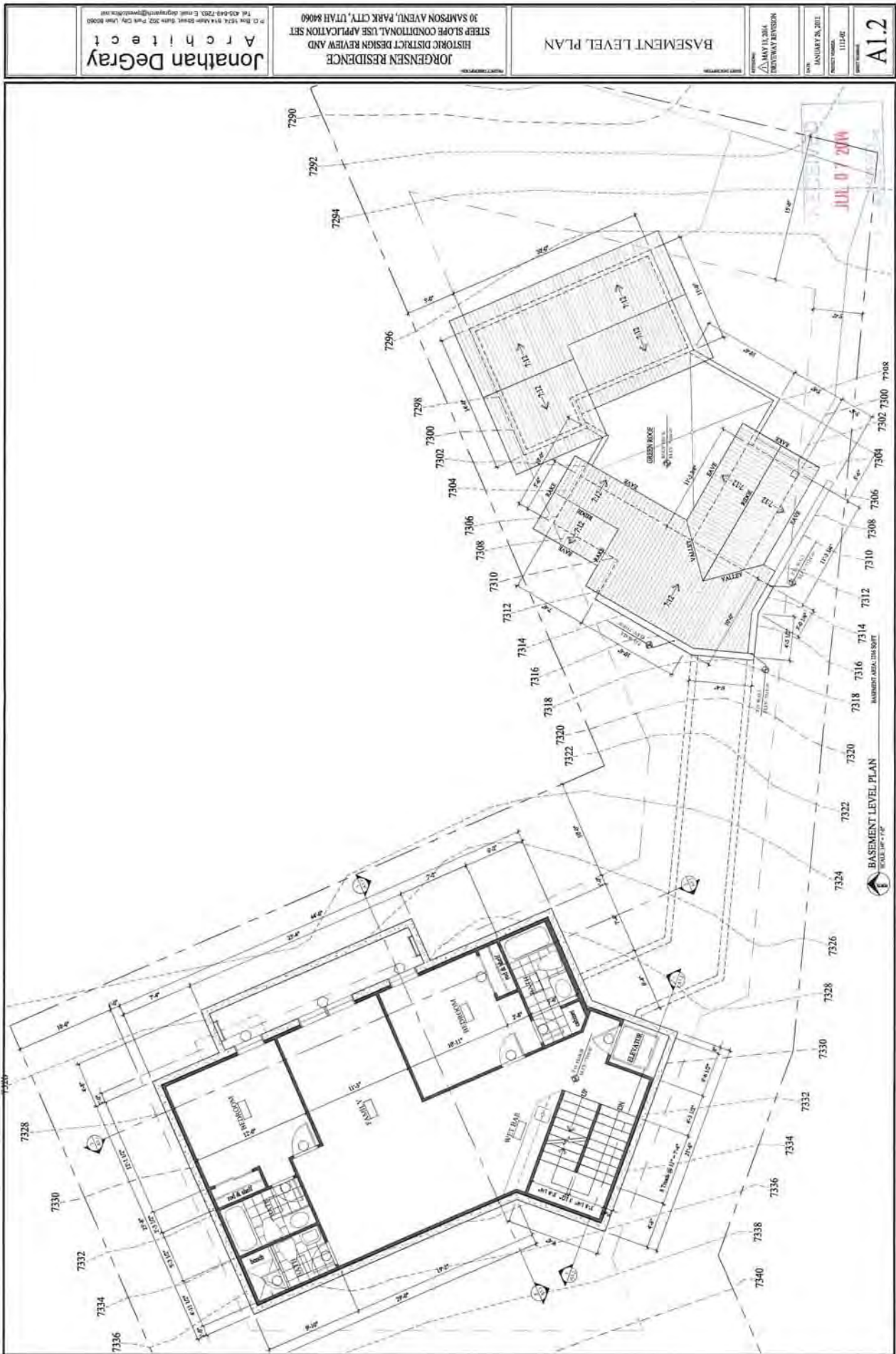
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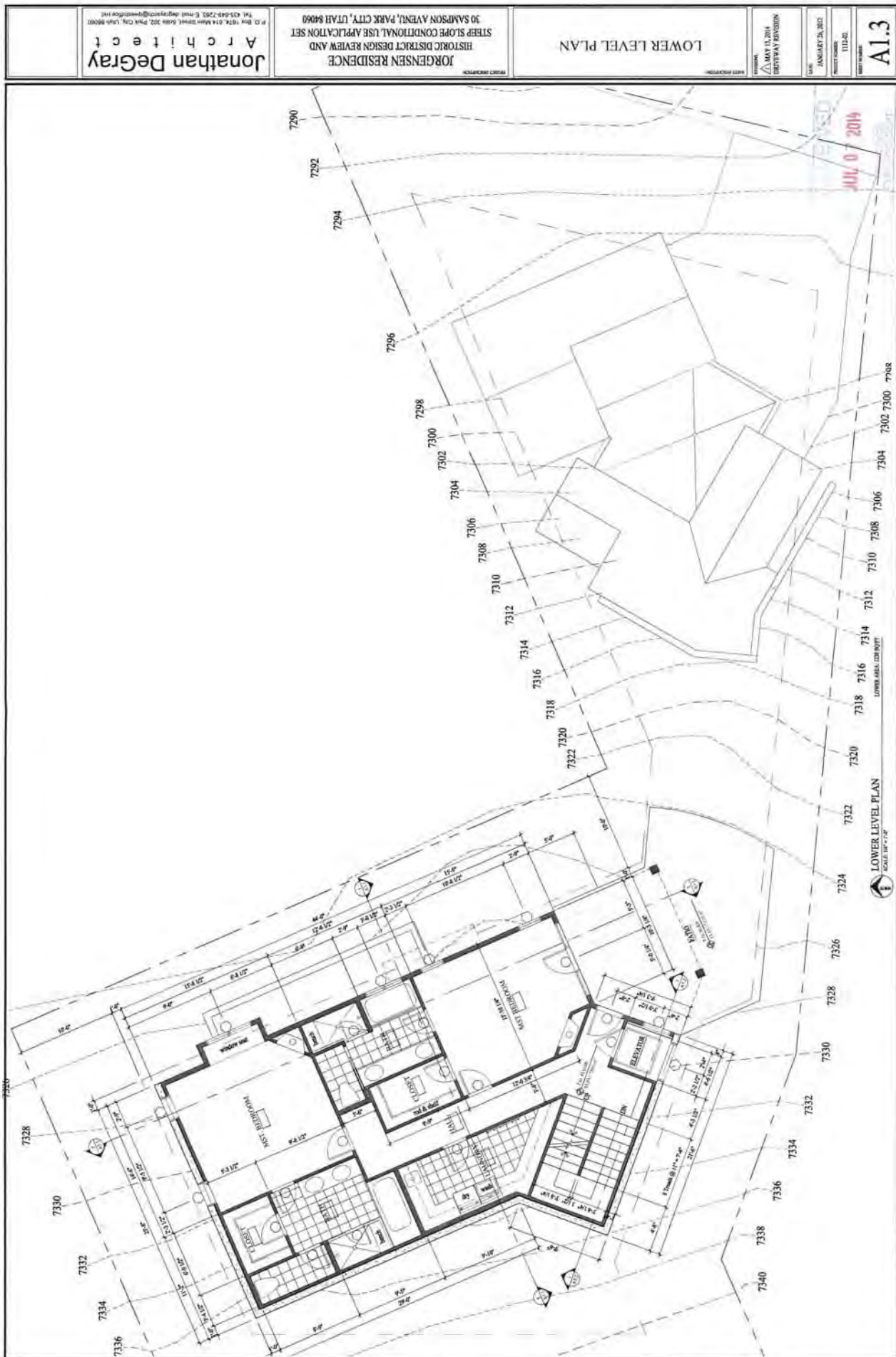
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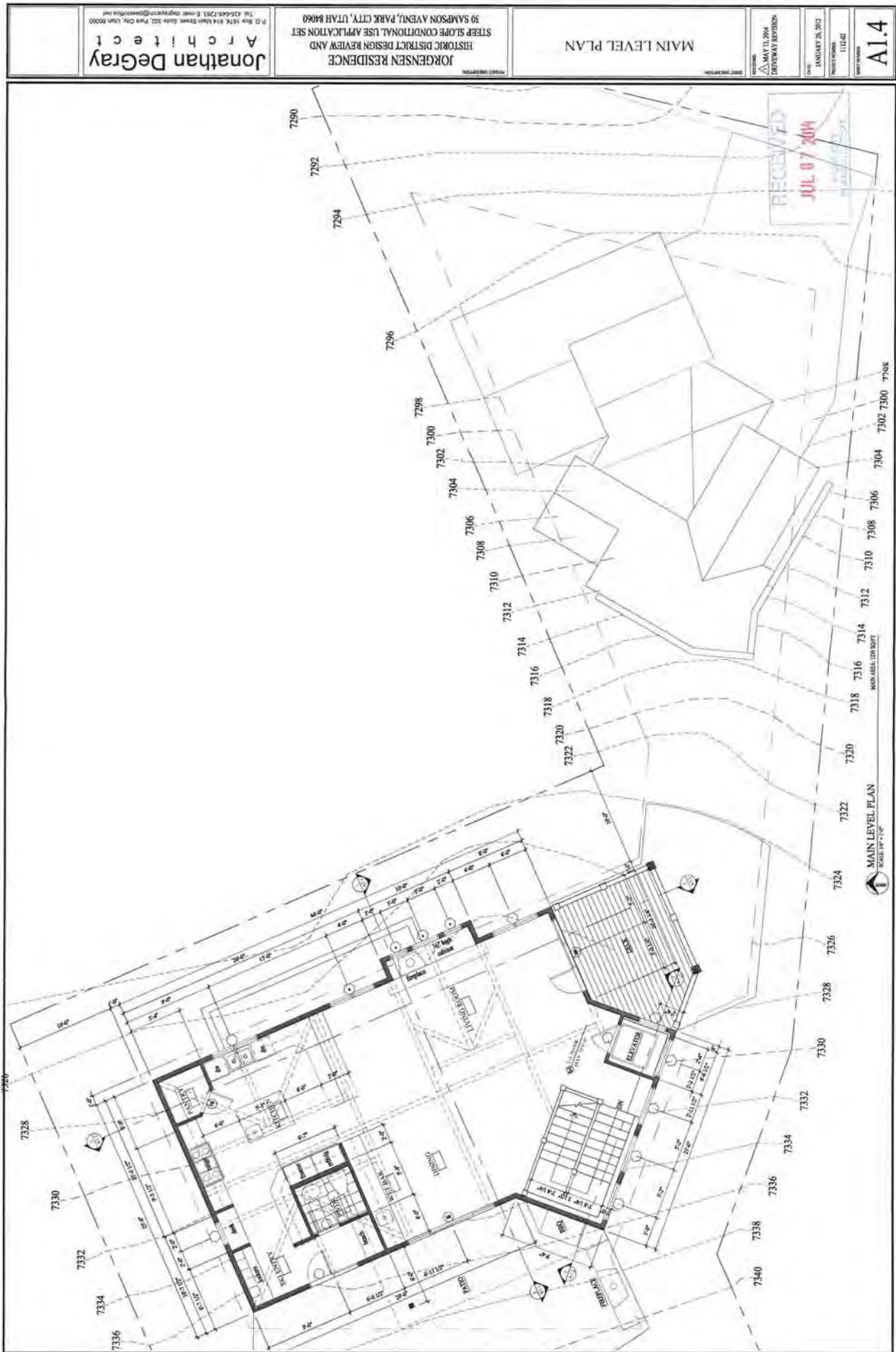
LANDSCAPE PLAN
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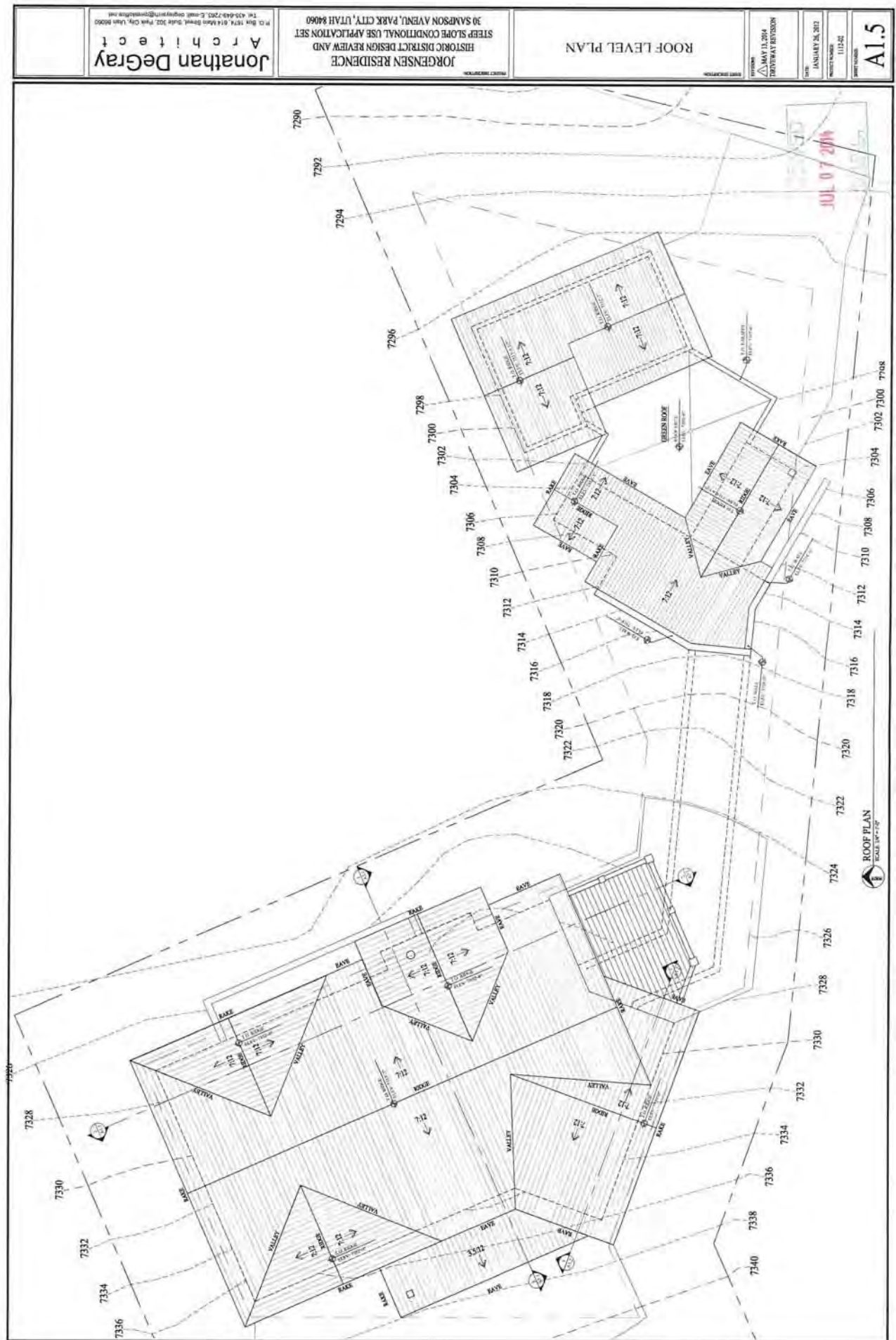
FLOOR PLANS



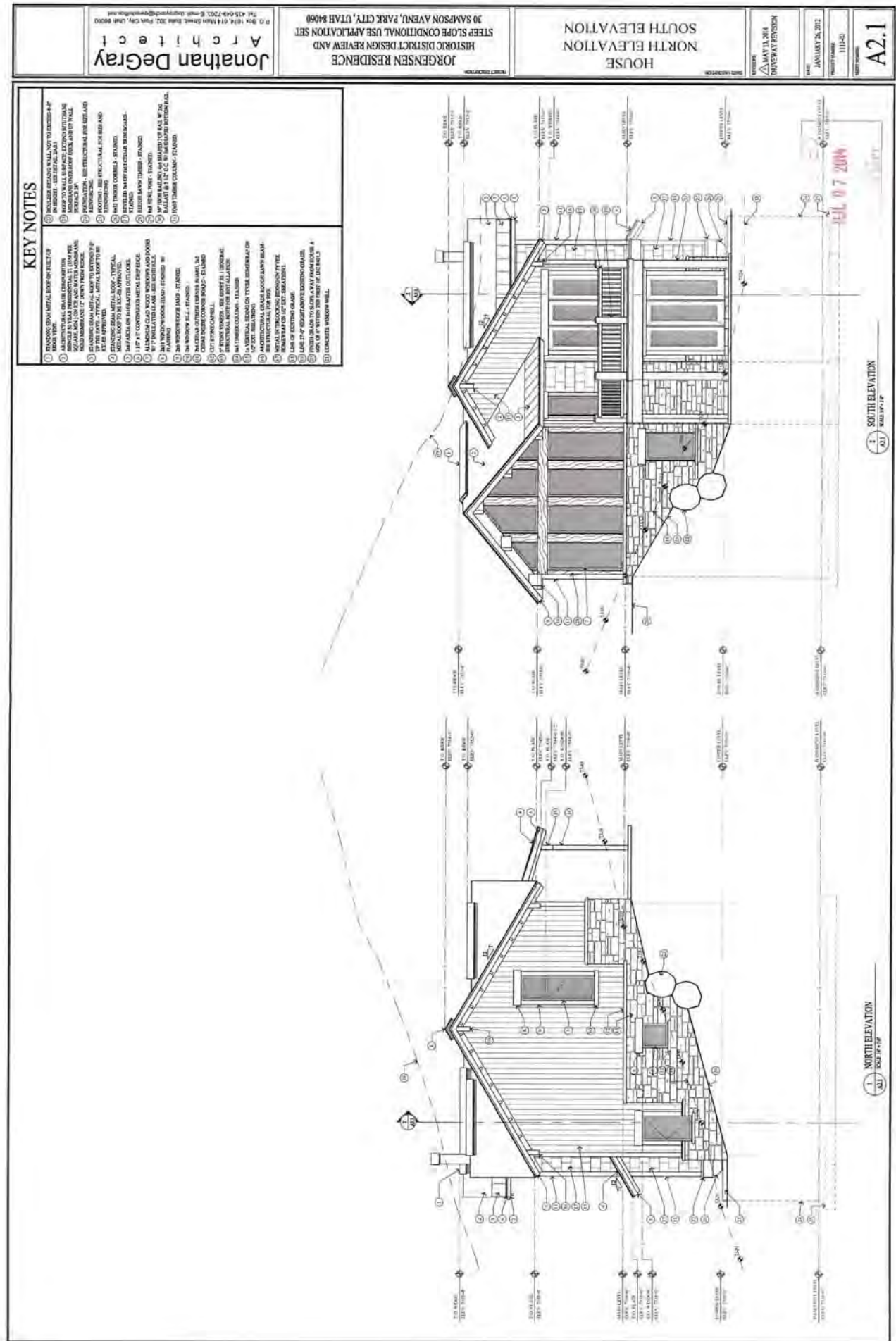


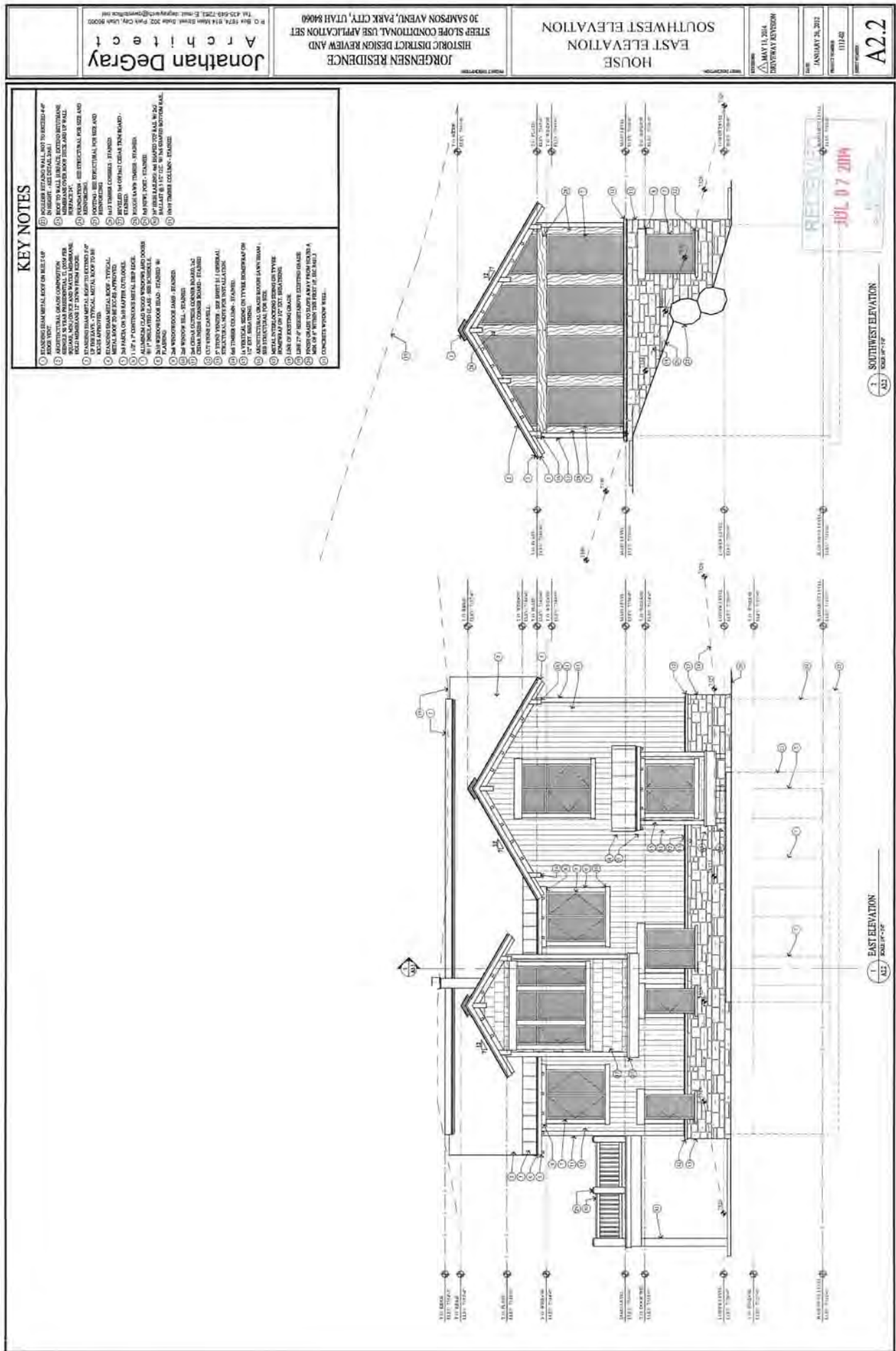


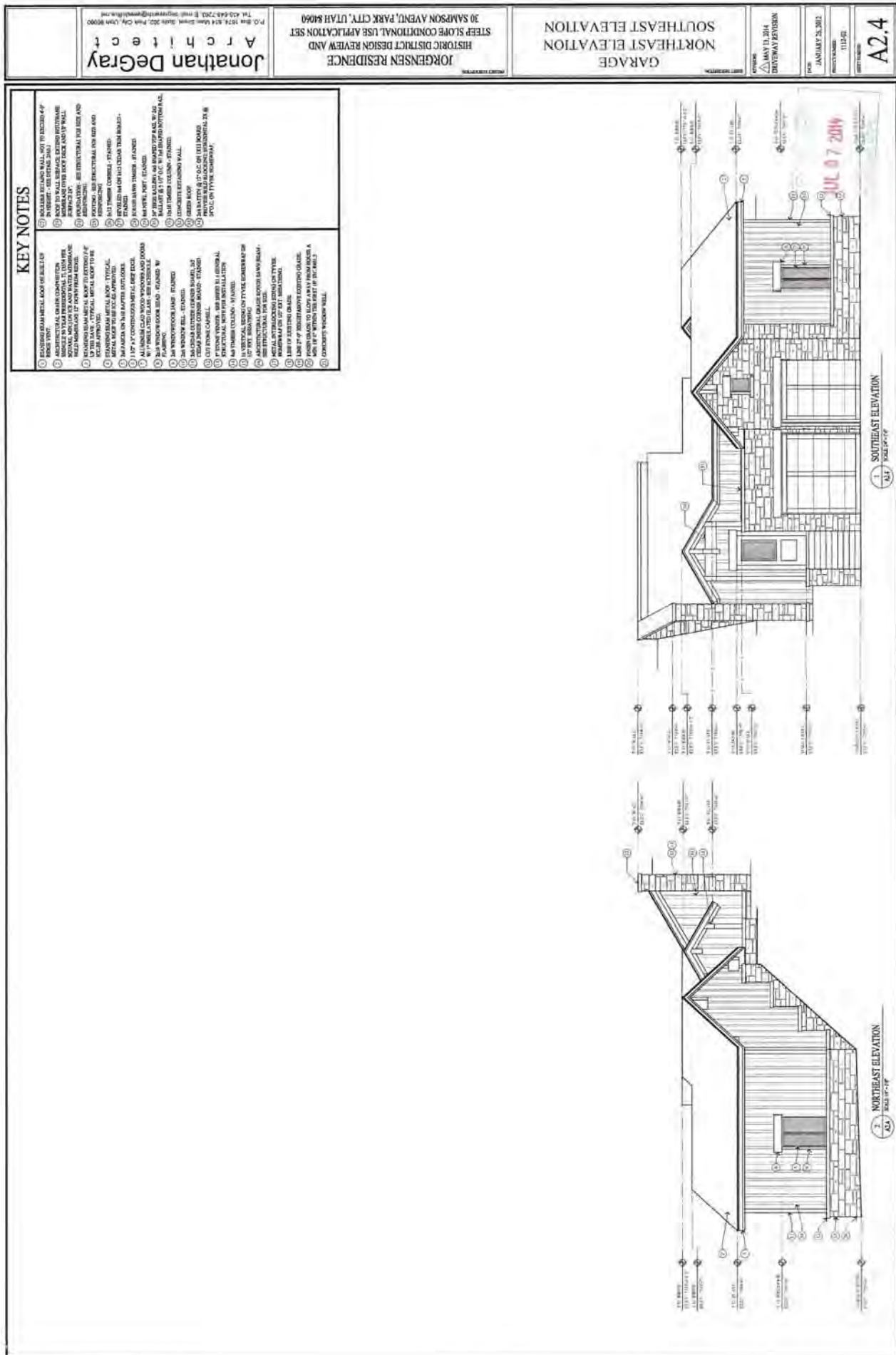


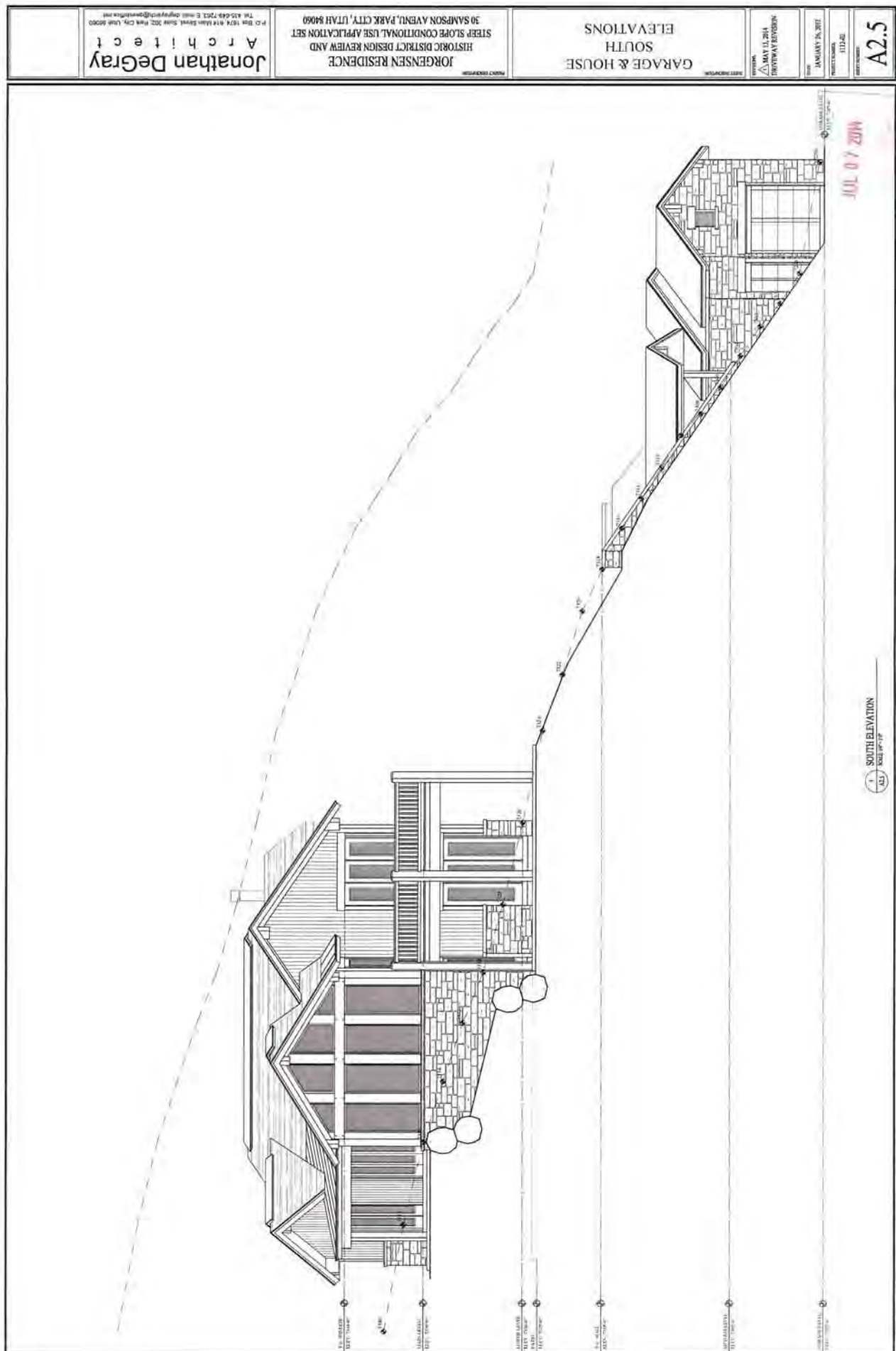


ELEVATIONS









*Mill-Site Reservation Supplemental Amended Plat
a Subdivision of Block 78 and 79 of Subdivision No.1 of Mill-Site Reservation
Lot 3 (30 Sampson Avenue)*

NARRATIVE

1. Survey requested by Kenneth Jorgensen.
2. Purpose of survey: locate the specified topographic relief.
3. Basis of survey: found property monuments as shown.
4. Date of survey: September 5, 2012.
5. Property monuments found as shown.
6. Location of survey: Township 16S, Range 4E, Section 16S, Township 2 South, Range 4 East, Salt Lake Base & Meridian.
7. See the official plat of the Mill-Site Reservation Supplemental Amended Plat for other possible easements, restrictions or setbacks.
8. The owner of the property should be aware of any items affecting the property that may appear in a title insurance report.
9. The elevations are based on an elevation of 7295.3 feet at the silver manhole lid, from the previous topographic survey of the property by Jack Harman Land Surveying.

LEGAL DESCRIPTION

Lot 3, Mill-Site Reservation Supplemental Amended Plat, according to the Official Plat thereof, on file and of record in the Office of the Summit County Recorder.

SURVEYOR'S CERTIFICATE

I, J.D. Gentry, a Registered Land Surveyor as prescribed by the laws of the State of Utah, do hereby certify that I have supervised a survey of this heretofore described property and that this plat is a true representation of said survey.



Sept 11, 12 Date
J.D. Gentry License No. 3559005

- Legend
- Found nail & witness
 - Found record cap—US 178396E
 - Found record cap—US 3082
 - Found manhole
 - Found manhole
 - Utility pole

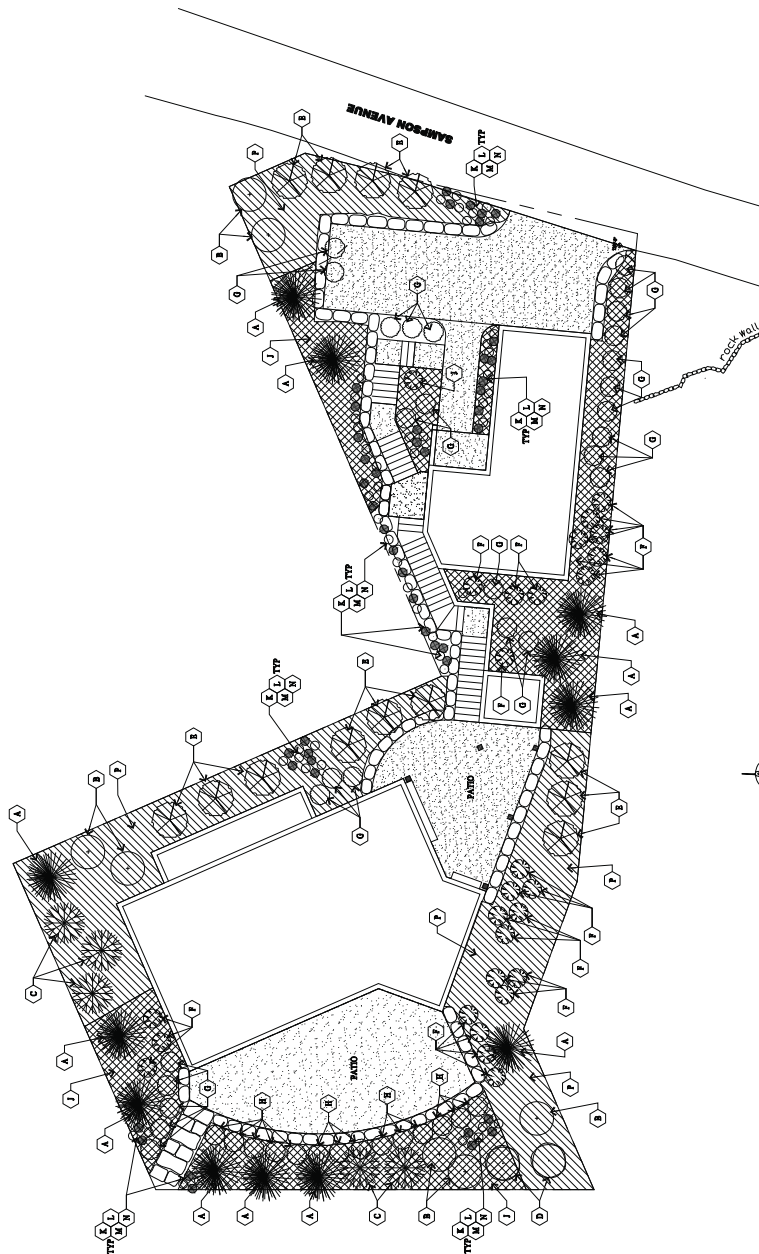


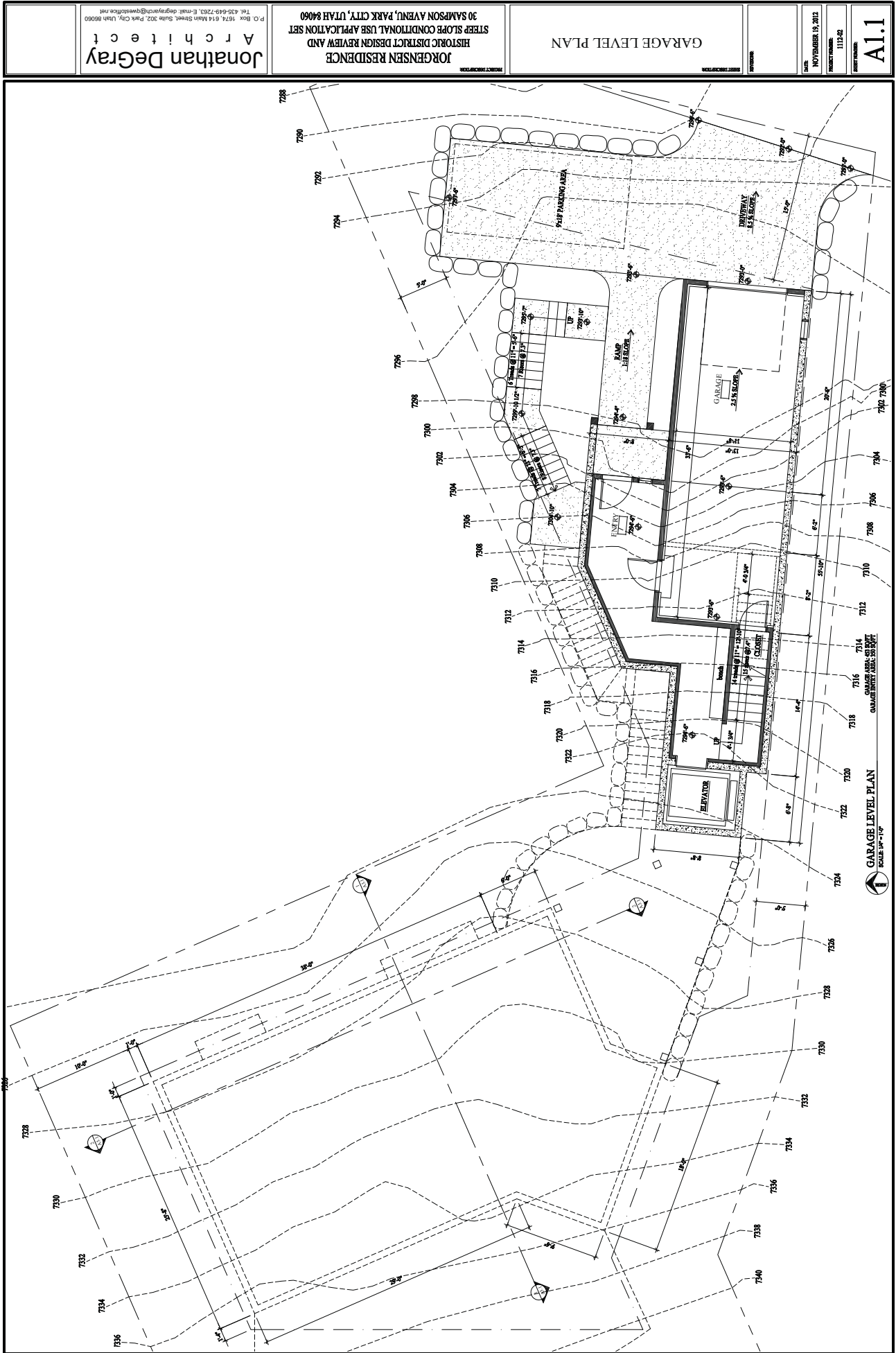
Lot 3

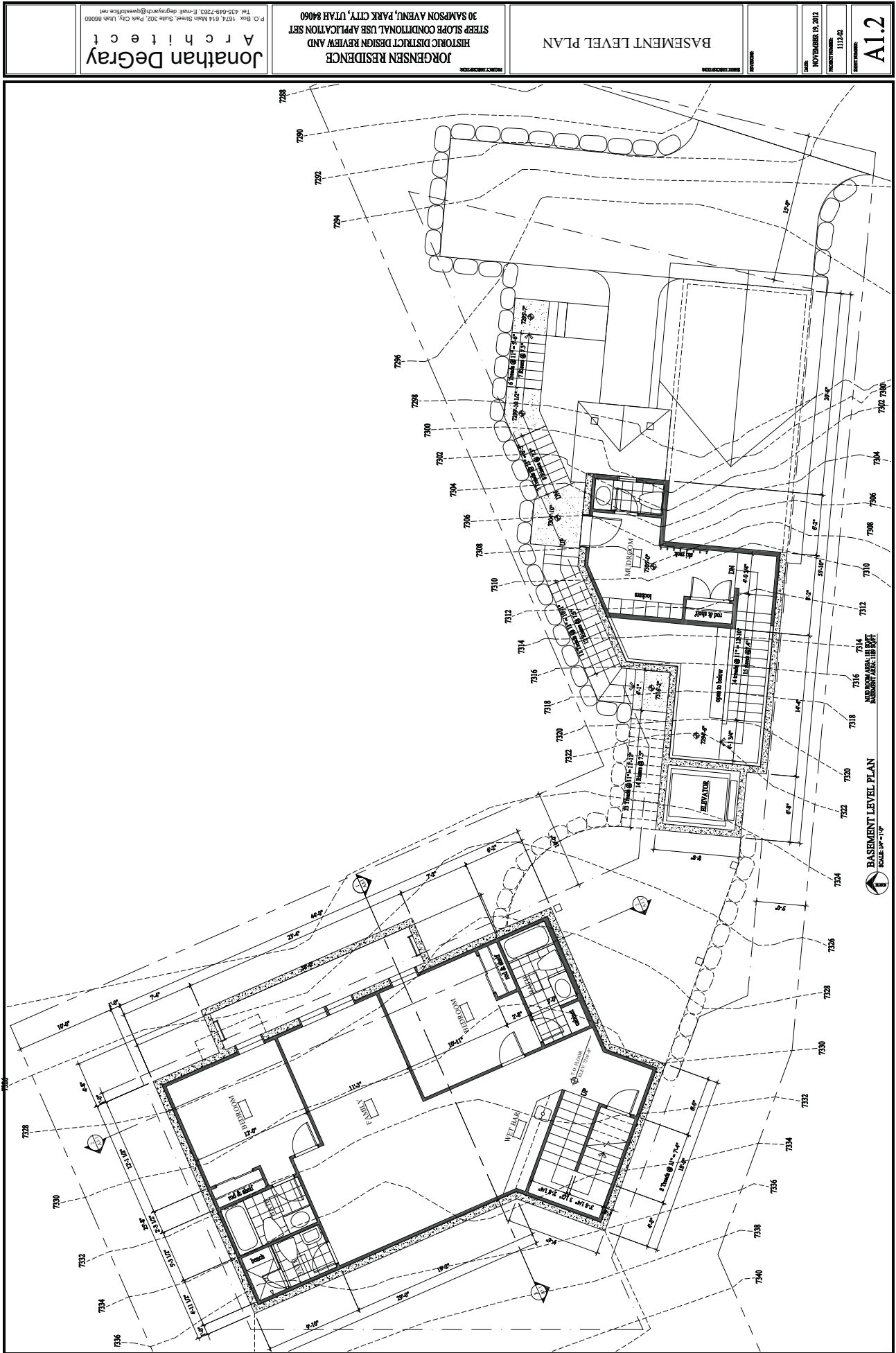


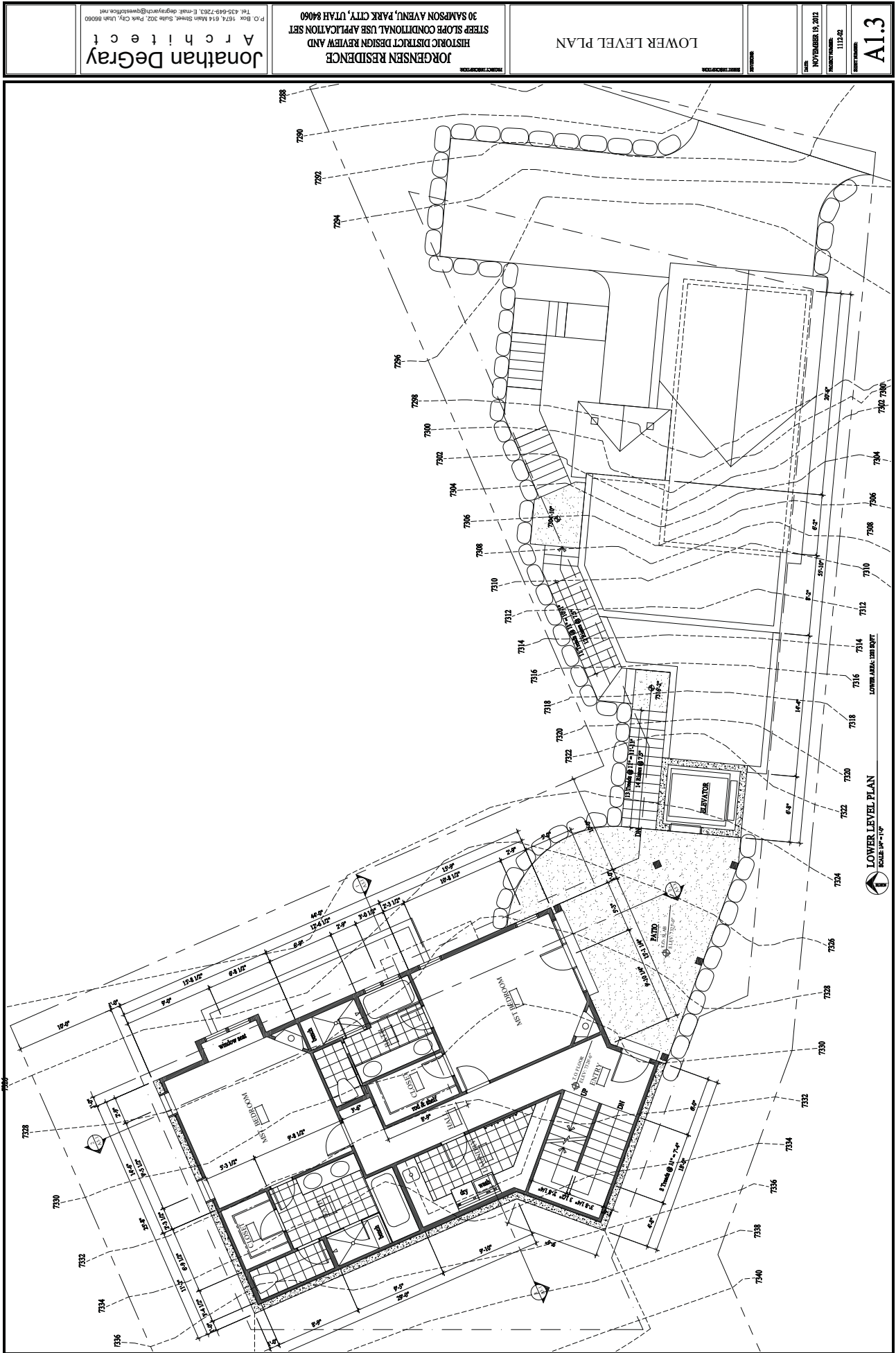
The authors declare that they have no conflict of interest. Copyright © 2015, the copyright holder for this article (which was not certified by peer review) is the author/funder, who has granted bioRxiv a license to display the preprint in perpetuity. It is made available under aCC-BY-NC-ND 4.0 International license.

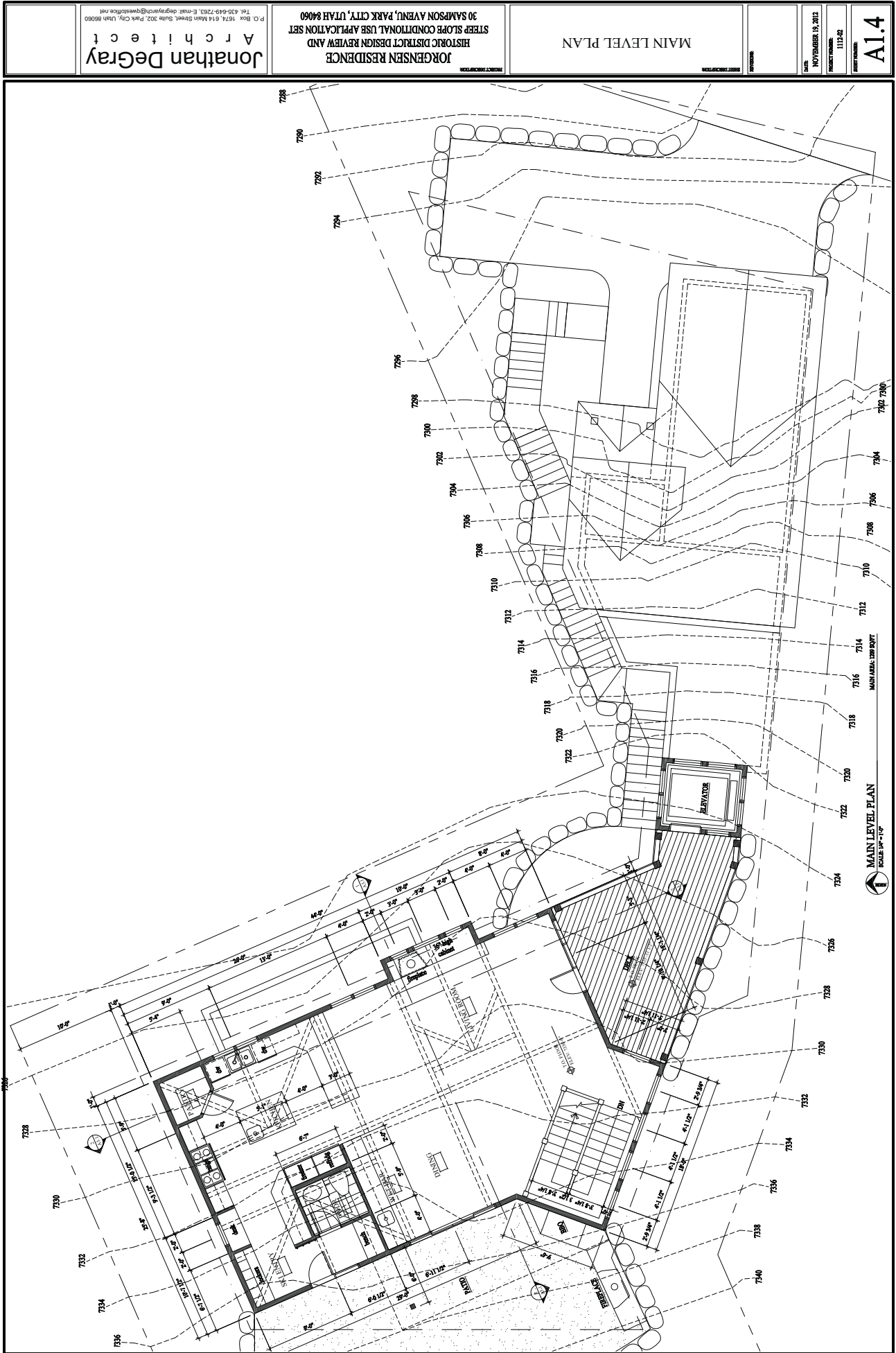
ONLY BY EMAIL EXPIRES 7 NO LIMITS NO CASH GOOD FOR THAT'S ANYWHERE TO ENJOY	Jonathan DeGray A r c h i t e c t P.O. Box 1674, 614 Main Street, Suite 302, Park City, Utah 84060 Tel: 435-648-7253, E-mail: degrayarch@qwestwest.net
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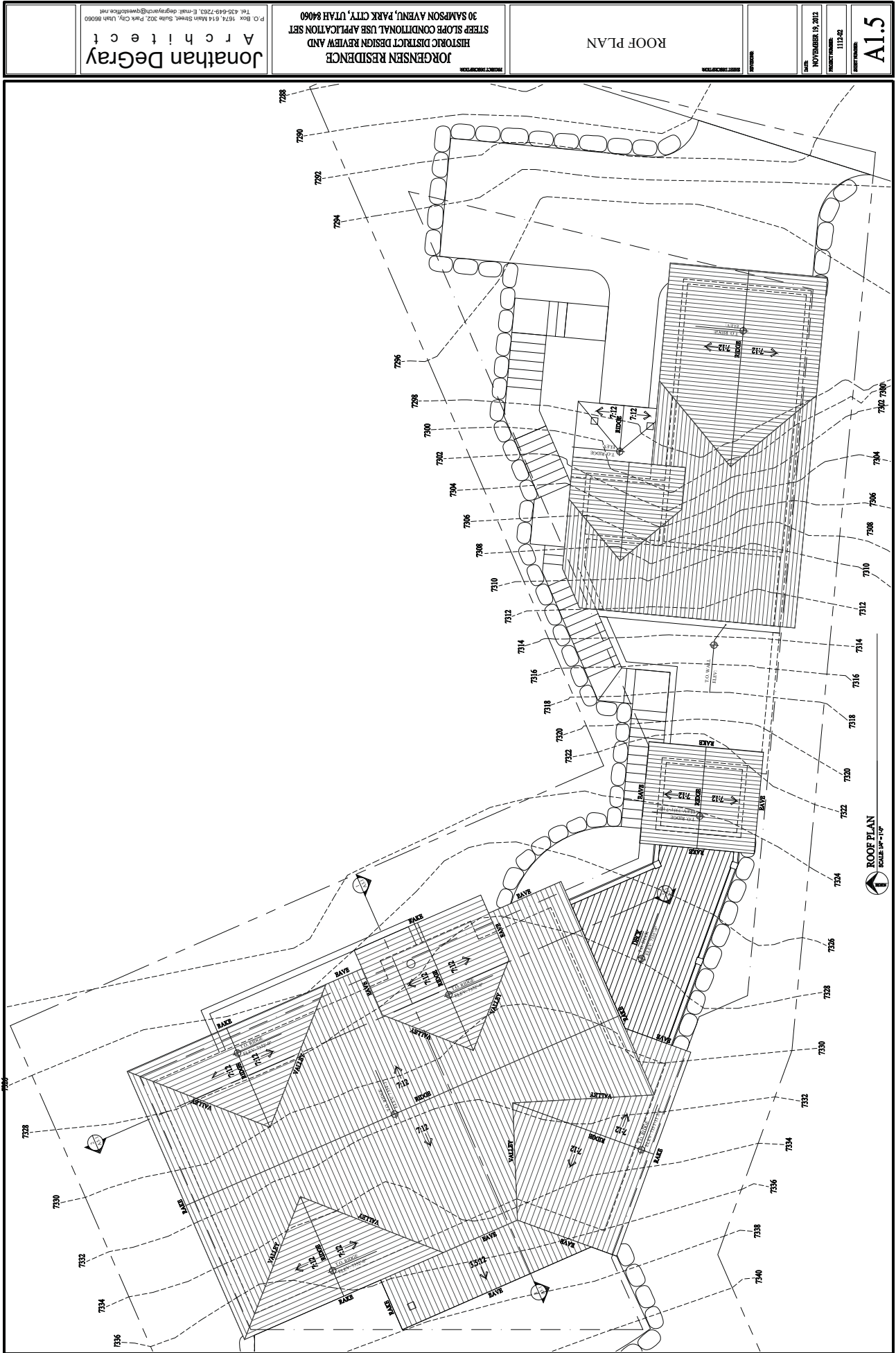
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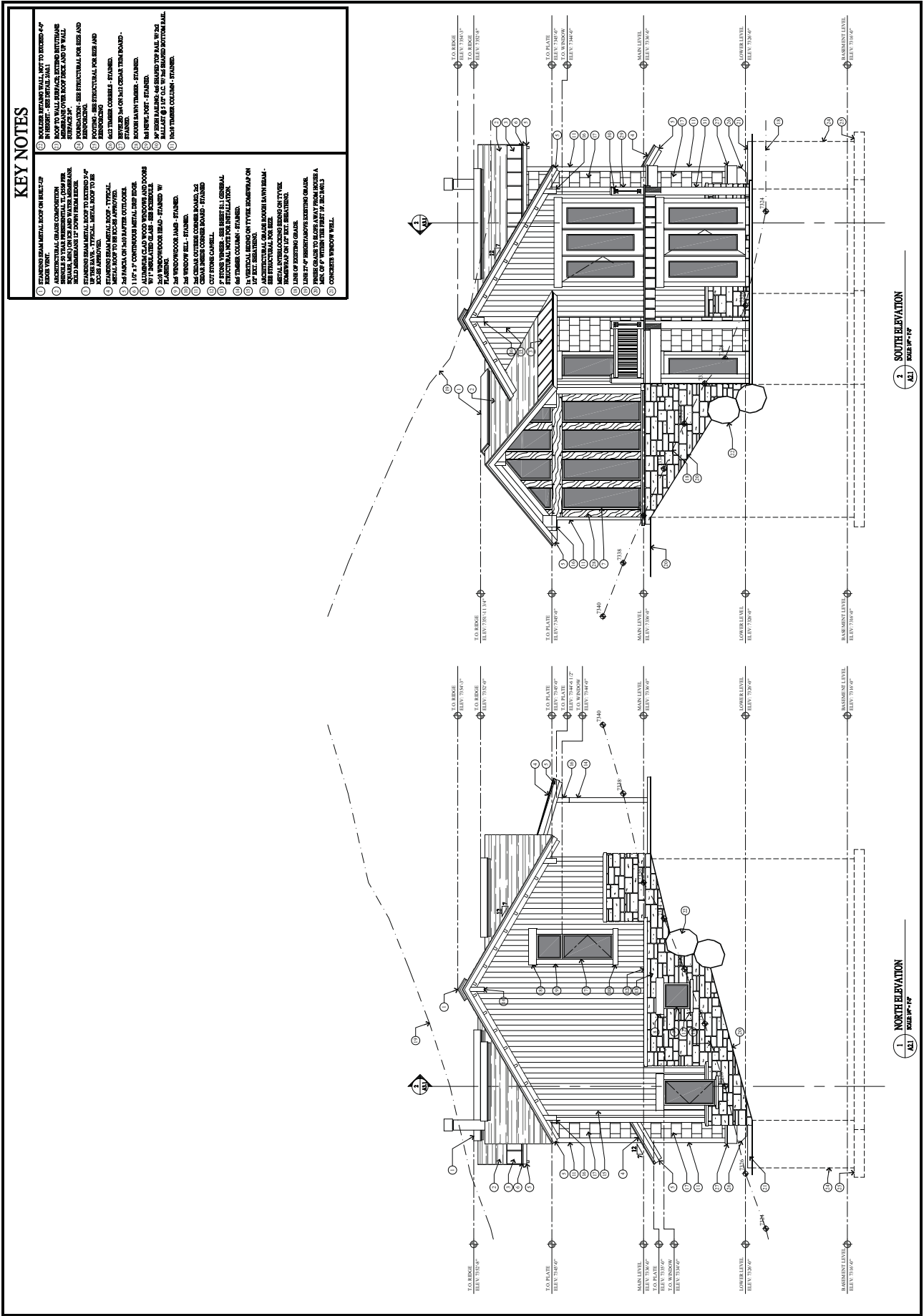




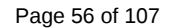


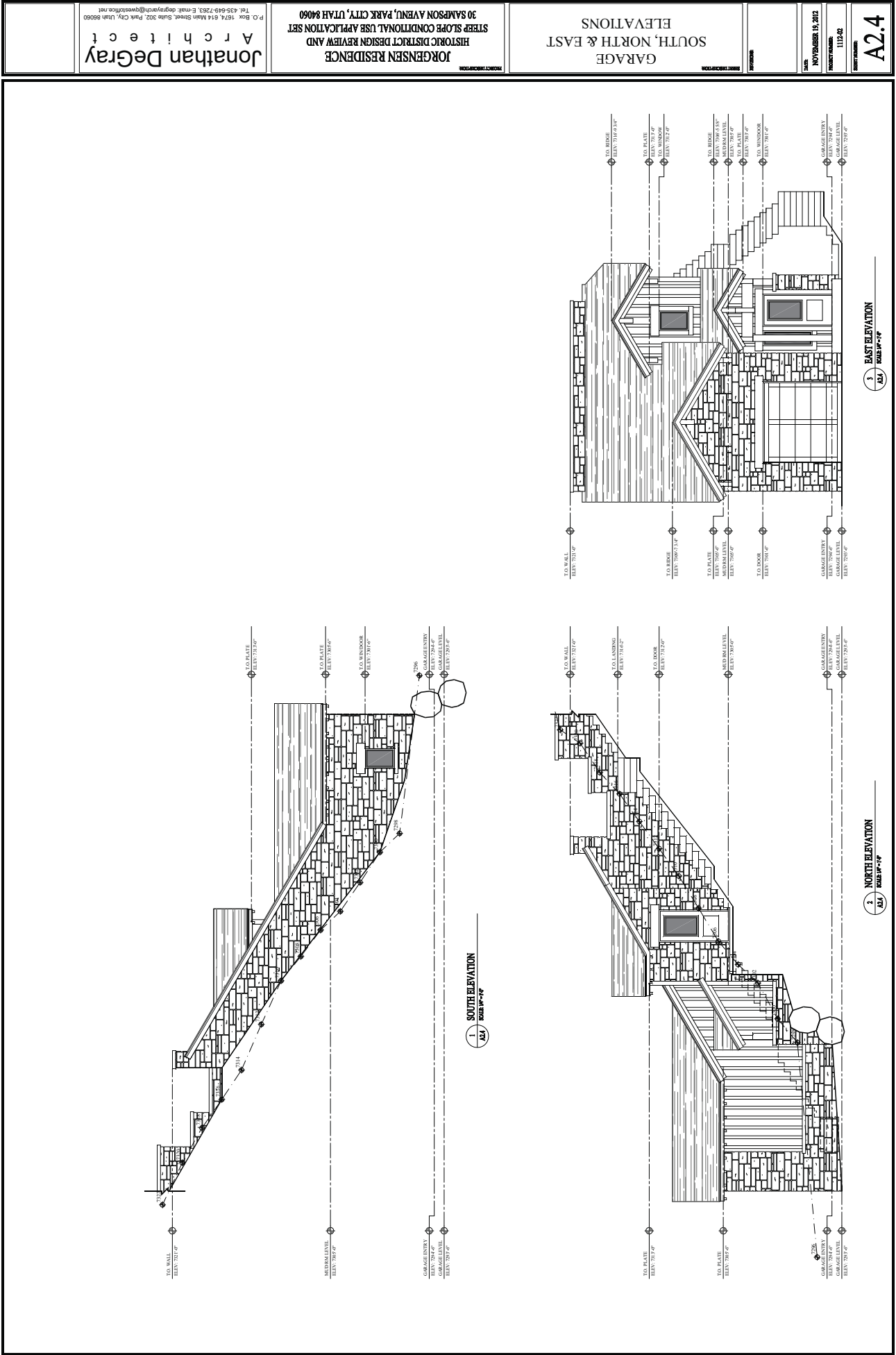






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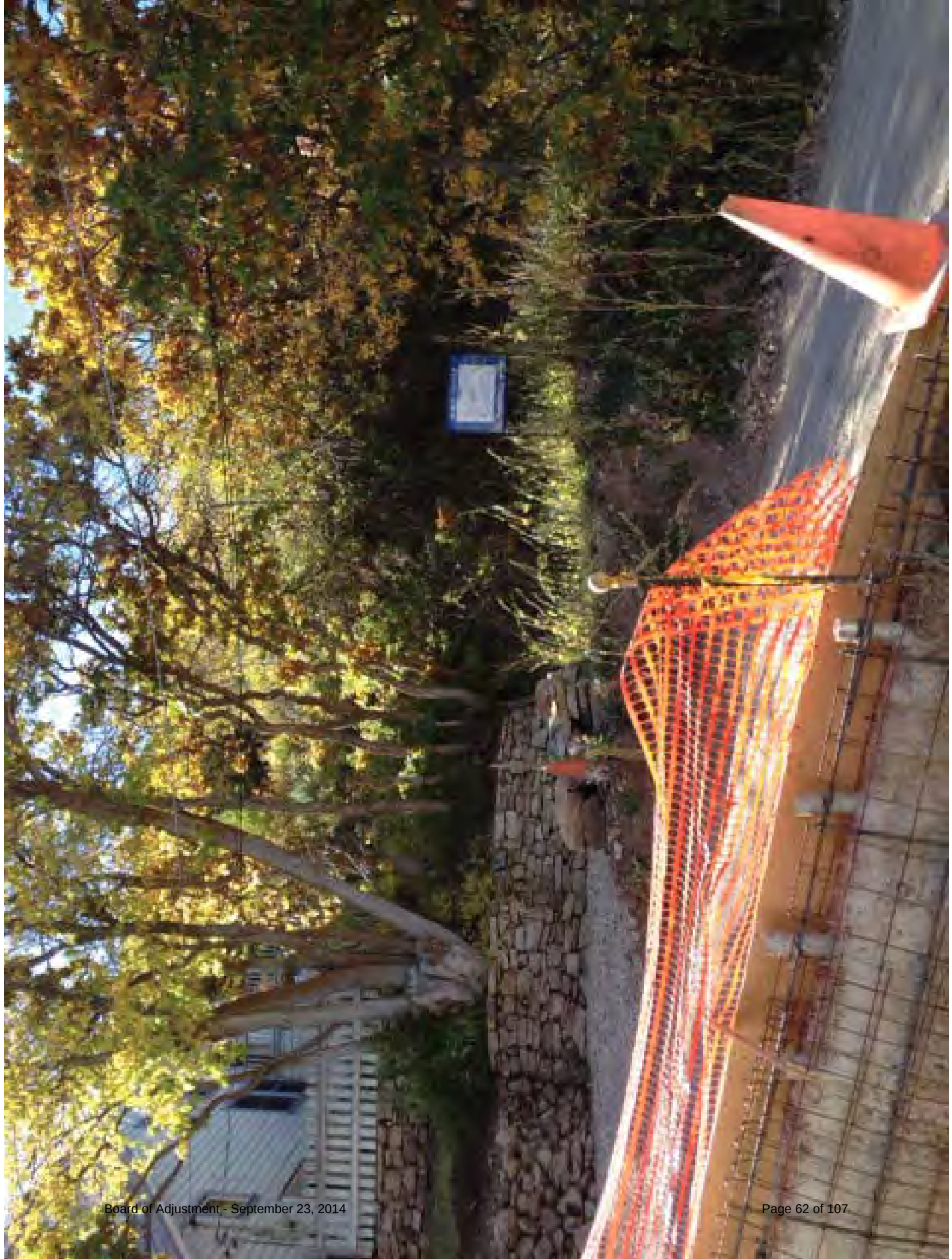
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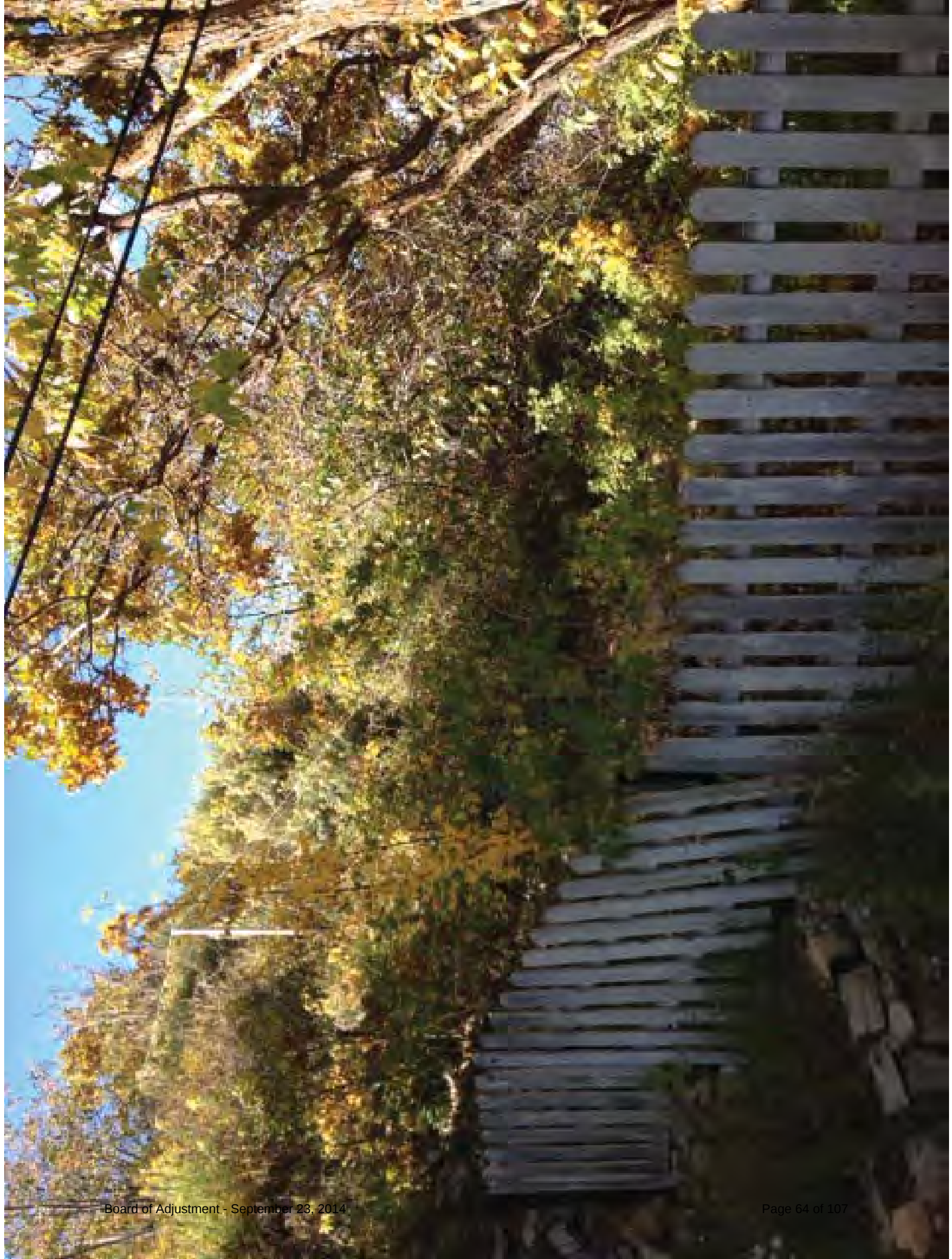
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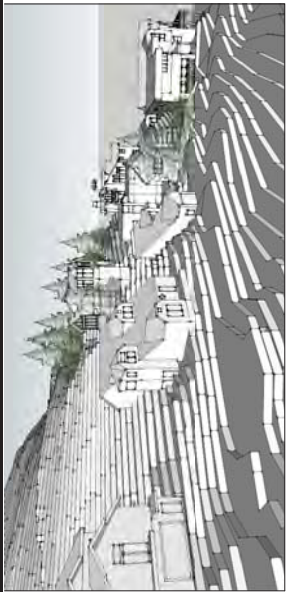
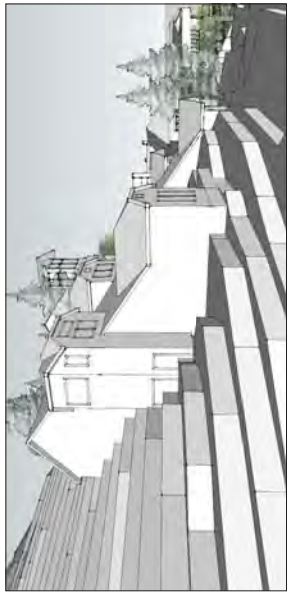
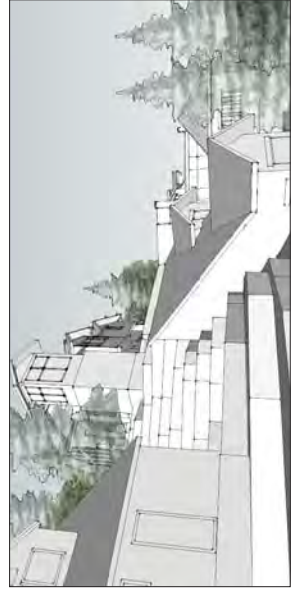
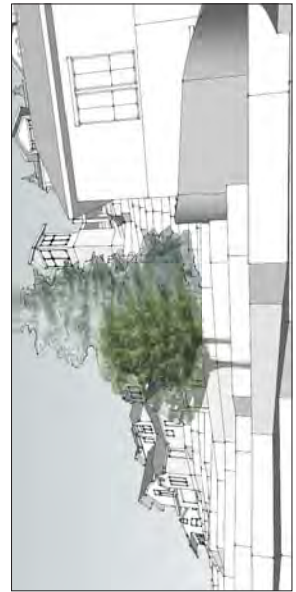




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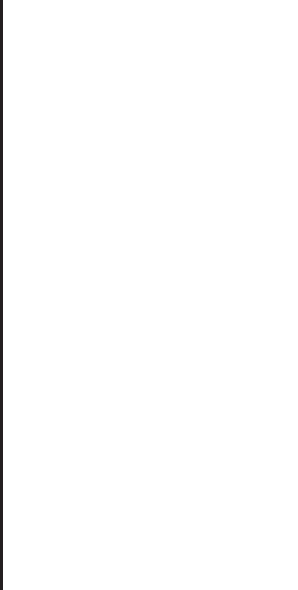
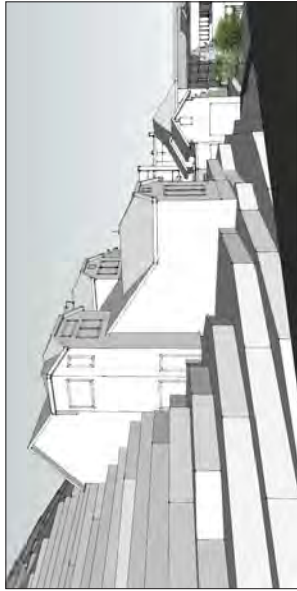




PERSPECTIVES
VIEWS WITH NO ELEVATOR

JORGENSEN RESIDENCE
HISTORIC DISTRICT DESIGN REVIEW AND
STEEP SLOPE CONDITIONAL USE APPLICATION SET
30 SAMPSON AVENUE, PARK CITY, UTAH 84060

Jonathan DeGray
Architect
P.O. Box 1574, 614 Main Street, Suite 302, Park City, Utah 86060
Tel. 435-649-7263, E-mail: degrayarch@qwestnet.net



June 30, 2014

Park City Municipal Corporation
Board of Adjustment
443 Marsac Avenue
Park City, Utah 84060

Attn: Board of Adjustment

Re: 30 Sampson Avenue Request for Variance

Dear BOA,

My wife and I have owned the property at 30 Sampson Avenue since approximately 2000 and have been trying to gain Historic District Design approval since 2012. The site is lot 3 of the Schneckloth subdivision which was approved in the 1990's. It is an hour glass shaped lot with two distinct building areas. The first buildable area is closer to Sampson Avenue, where we propose to build a garage and the second buildable area is up the hill, approximately forty plus feet vertically, where we propose to build our home.

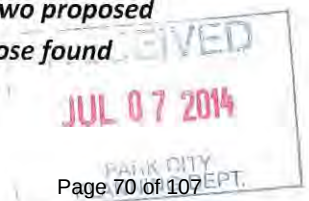
In our initial discussions with staff in 2012 we had proposed to connect the garage and home with a tunnel. This would provide a 4 season connection that was not visible and would allow the two structures to appear independent. This idea was rejected by staff, at the time, because the tunnel connection, even though completely below grade, constituted a connection and therefore the garage and home would be one structure having more than three levels.

With this plan rejected we developed a code compliant solution with an elevator that was connected to the garage and allowed access to the home via an exterior deck. While this plan is code compliant Planning Commission denied it in 2013. We then filed an appeal with the city and also submitted our plans and the Planning Commissions action to the Utah State Ombudsman's office for a review. There review has been completed and is favorable to us. Instead of continuing with the city appeal of the elevator connection at this time staff now sees that the tunnel may be a better option and has asked if we would bring it before you and request a variance to allow the tunnel connection between the two structures. The zone allows a maximum of three levels. Since the tunnel will connect the one level garage to the three level home, total of 4 levels, we are asking for a variance for the additional one level.

The tunnel is for circulation only and is counted as part of the allowable building area and footprint. We are only asking that due to the steep access and the odd shape of the lot that we be allowed to connect the garage and home with a tunnel.

We believe that the requirements for variance are met as follows:

1. Literal enforcement of the land management code would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land management code. ***The code stipulates a maximum 3 levels for buildings in the zone but it cannot take into consideration all possible lot configurations and topographic situation. If the two proposed buildings can be connected without visually creating a bigger building then those found***



currently in the zone then literal enforcement of the code is not necessary to carry out the general purpose of the LMC

2. There are special circumstances attached to the property that do not generally apply to other properties in the same zone. ***The lot is unusually shaped and is steep at the connection area, even by old town standards.***
3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone. ***Other newer homes along Sampson Avenue and in the HRL zone have garages connected to their homes. We have shown that it is possible to gain a code compliant connection between the garage and home, but in this case, it is not as good an esthetic solution as the tunnel solution.***
4. The variance will not substantially affect the general plan and will not be contrary to the public interest. ***The buildings will appear separate, as a one level garage and two level home, thus the intent of the code limiting structures to 3 levels will have been met***
5. The spirit of the land management code is observed and substantial justice done. ***Because of the unusual shape and steepness of the lot literal application of the code is possible but yields a visually less desirable outcome. With the proposed tunnel solution the buildings will appear separate and each structure less than 3 levels tall thus the spirit of the code is observed.***

Please let us know if you have any questions regarding this variance request.

Sincerely,



Dr. Michael and Laurie Jorgensen



July 3, 2013
Michael and Laurie Jorgensen
3648 Wrangler Way
Park City, Utah 84098

NOTICE OF CITY COUNCIL ACTION

Project Description: Steep Slope Conditional Use Permit
Project Numbers: PL-12-01487
Project Address: 30 Sampson Avenue
Date of Final Action: June 26, 2013

Action Taken

On April 10, 2013, the Planning Commission held a regularly scheduled Public Hearing to consider the approval of a Steep Slope Conditional Use Permit (SS-CUP) application for 30 Sampson Avenue. During that same meeting, the Planning Commission voted to deny the requested SS-CUP and directed Staff to draft findings of fact in support of the decision to deny the request based on the evidence and reasoning put forth by the Planning Commission during the same meeting. The Planning Commission met on the June 26 2013, and voted unanimously to ratify the following Findings of Facts and Conclusions of Law:

Findings of Fact:

1. The property is located at 30 Sampson Avenue.
2. The property is within the Historic Residential (HRL) District.
3. The property is Lot 3 of the Millsite Reservation Supplemental Plat, which was recorded in 1995.
4. The Lot area is 7,088 square feet, the minimum lot size in the HRL district is 3,570 square feet.
5. The subject property is very steep ranging from flat areas near Sampson Avenue and climbing uphill with slopes reaching between 30-40% before reaching the main body of the lot.
6. The proposal consisted of a single family dwelling of 4,585 square feet which includes a 453 square foot detached garage, a 350 square foot garage entry and a 106 square foot access tunnel which is located below ground.
7. Plat notes indicate the maximum square footage allowed for this lot is 3,000 square feet with an additional allowance of 400 square foot for a garage.

8. A 1998 letter from the (then) Community Development Director Richard Lewis, determined that the 3,000 square foot maximum only applied to the above ground portion of the future dwelling, and that basement areas would not count against the 3,000 square foot maximum so long as they were constructed fully below the finished grade. This letter was recorded on the title of the property.
9. The Land Management Code has been amended numerous times since 1998.
10. An overall building footprint of 2,272 square feet was proposed. Under the current LMC, the maximum allowed footprint is 2,355.5 square feet, based on the total lot area.
11. The applicant submitted a visual analysis, and renderings showing a contextual analysis of visual impacts.
12. No streetscape analysis was presented to the Planning Commission as requested by the Planning Commission.
13. The cross canyon view contains a back drop of both structures, a two (2) story home up the hill with a two (2) story garage building in front.
14. The proposed design incorporates a driveway from Sampson Avenue on the top slope of the street and provides two (2) legal off-street parking spaces, which meets the minimum parking requirement.
15. The detached garage/elevator building is set back fifteen feet (15') from the front property line, and the main portion of the building (the habitable portion of the overall dwelling) is located approximately 77 feet from the street.
16. At their closest points, the two buildings are approximately nine (9) feet apart from each other and are attached by a deck with footings, which attaches the elevator building to the upper (second) floor of the main house.
17. The proposed height of the main building (home) and the elevator building is twenty seven feet (27').
18. 2,996 square feet of the total 4,041 square feet of building space is above ground.
19. The building locations and the proposed building designs both climb up the hill from Sampson Avenue. The proposal utilizes virtually the entire lot rather than concentrating the structure on one portion of the lot. The structures by their placement, massing and height are not located on the lot in a manner that reduces the visual impact.
20. The lot has been deemed to have eight (8) different sides, and thus a Planning Director determination for setbacks has previously been determined and calculated as outlined within the analysis section of the report.
21. The proposed home attempts to maximize the minimum setbacks on each of the property lines. The proposed garage building maximizes the setbacks on the front and on the south property line.
22. There is no proposed screening of the home from Sampson Avenue due to the fact that the home climbs up the hill from the right-of-way, and that there is proposed parking and driveway area in front of the garage. There is no proposed screening of the home between the elevator building and the home due to the fact that the applicant has proposed an attached deck and patio connecting the two structures, thus minimizing any screening opportunities with exception of adjacent properties that are already screened by existing "Gamble Oaks" and other existing vegetation.

23. The scope of the project requires extensive retention of the hillside, and no substantial mitigation has been proposed to reduce the detrimental impacts to the hillside and the design is not appropriate to the topography of the site. The revised design provided by the applicant since the original inception shows substantial retention and retaining walls around the south property line and substantial retention and retaining walls around the garage building on the north property line.
24. The visual analysis cannot include what could potentially be built around the proposed home as doing so would be purely hypothetical.
25. The lot analysis presented by staff for Sampson Avenue and adjacent properties to the subject property are irrelevant for comparison because the study only takes into consideration lot size and home size, and does not take into consideration the height, setbacks, mass and scale of existing historic homes located on adjacent property, or nearby properties, including those located within the same District on King Road, thus making the analysis dissimilar for compliance with the LMC and General Plan.
26. The Existing Home Size Analysis for neighboring properties in the Staff Report does not reflect current LMC requirements, and most of the homes in the area were built prior to the current code requirements and considerations, and thus should not be used when looking at comparable home sizes consider that some of the homes in the analysis could not be built under the current LMC requirements.
27. There are existing historic homes as listed in the Historic Sites Inventory near the proposed site on Sampson Avenue, including the adjacent 40 Sampson Avenue, (approximately 1,700 square feet), 41 Sampson which is across the street from the subject property (approximately 900 square feet) as well as nearby 60 Sampson Avenue and 115 Sampson Avenue.
28. The proposal does not meet the purpose statement of the Historic Residential-Low (HRL) district, specifically §15-2.1-1(C) *preserve the character of Historic residential Development in Park City.*
29. The proposal does not meet purpose statement (LMC §15-2.1-1)(E) *encourage construction of Historically Compatible Structures that contribute to the character and scale of the Historic District, and maintain existing residential neighborhoods.*
30. The proposal does not meet purpose statement (LMC §15-2.1-1)(F) *establish Development review criteria for new Development on Steep Slopes which mitigate impacts to mass and scale and the environment.*
31. The proposed development has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(1) “Location of Development” due to the fact that the building locations and the proposed building designs do not reduce visual and environmental impacts because both climb up the hill from Sampson Avenue, and because the proposal utilizes virtually the entire lot rather than concentrating the structure on one portion of the lot. The structures are not located on the lot in a manner that reduces the visual impact.
32. The proposed development has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(2) “Visual Analysis” because the proposal does not provide screening, vegetation protection, or other design opportunities that could have been incorporated into the design to help mitigate these issues.

33. The proposed development has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(5) "Building Location" due to the fact that the proposal does not coordinate with adjacent properties to maximize opportunities for open areas and preservation of natural vegetation to minimize parking areas.
34. The proposal has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(6) "Building Form and Scale" because the applicant is not proposing "smaller components" nor are they proposing low-profile buildings that orient with the existing contours. Both buildings are large and are not broken into the smaller components as encouraged by this sub-section of the LMC.
35. The proposed has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(7) "Setbacks" due to the fact that the proposed setbacks only help to maximize the building site and are not compatible with other historic structures in the neighborhood.
36. LMC §15-2.1-6(B)(7) requires that the variation in setbacks will be a function of the site constraints, proposed building scales and setbacks from adjacent structures, and the proposed buildings do not consider the site constraints and thus cannot be substantially mitigated.
37. The proposed home has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(8) "Dwelling Volume" due to the fact that the proposed basement adds significant volume to the building, which was an issues that was raised by the City Council in the minutes of the 1994 City Council meeting to approve the Subdivision that created the subject lot.
38. The proposed home is not compatible with existing historic homes in the neighborhood with respect to height, setbacks, mass or scale, and the proposed home and garage buildings offer no substantial mitigation measures necessary to show compatibility with the nearby existing structures.
39. Height within the HRL District is limited to three (3) stories, and the proposal is for two buildings a main structure (home) and a garage with an elevator building that connects to the home by a patio and a deck. The two buildings appear by their placement to be a five (5) story building. Connecting the buildings in this manner does not meet the intent of the LMC §15-2.1-5(B).
40. The basement proposed does not meet the criteria for not having it count against the overall building size maximum of 3,000 square feet as noted on the 1995 Millsite Supplemental Plat, because there are windows and a window well in the basement, making the basement not fully below grade, which was the criteria as described in the Plat note for the property, as stated in Finding of Fact #8.
41. The visual mass of the proposed dwellings have not been mitigated by this home design.
42. Additional parking beyond the minimum two (2) required spaces might be necessary due to the location of the home on a sub-standard street that offers no off-site parking.
43. This Ratification was continued from the April 24, 2013 Planning Commission meeting.

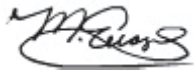
Conclusions of Law:

1. The proposed development does not meet the "Purpose" of the HRL District, specifically with respect to LMC §15-2.1-1(C)(E) and (F).
2. The proposed does not meet the criteria for development on steep slopes, specifically Land Management Code §15-2.1-6(B)(1-2), and (6-9).
3. The proposal is not historically compatible with other buildings within the HRL District, or areas nearby with respect to setbacks, height, mass or scale.
4. The proposed development does not meet the intent of the maximum height requirement restriction of no more than three (3) stories as required in LMC §15-2.1-5(B).
5. The reasonably anticipated detrimental effects of the proposed home and garage buildings on a steep slope cannot be substantially mitigated by the proposal or imposition of reasonable conditions to achieve compliance with the applicable standards specifically LMC §15-2.1-6(B)(1-2) and (6-9).

Order: The Steep Slope Conditional Use Permit for the proposed new single-family dwelling 30 Sampson Avenue is hereby denied for the reason specified within the Findings of Fact and Conclusions of Law listed herein.

The action taken by the Planning Commission can be appealed to the City Council if said appeal is filed within ten (10) days of this final action letter. If you have any questions or concerns regarding this letter, please do not hesitate to call me at 435-615-5063.

Sincerely,



Mathew Evans
Senior Planner

Park City Planning Department
PO Box 1480
Park City, UT 84060

Copy: File

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15 West South Temple
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801.257.1900
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(801) 257-1906
wbudge@swlaw.com

DENVER
LAS VEGAS
LOS ANGELES
LOS CABOS
ORANGE COUNTY
PHOENIX
SALT LAKE CITY
TUCSON

PL-13-01988

July 12, 2013

VIA HAND DELIVERY

Park City City Council
445 Marsac Avenue
Park City, UT 84060

Re: Appeal of Planning Commission's Denial of Steep Slope Conditional Use Permit
Application for 30 Sampson Avenue

Dear Council Members:

This firm represents Michael and Laurie Jorgensen (the "Jorgensens") and this letter is their appeal of the Planning Commission's denial of their application to construct a new home at 30 Sampson Avenue ("30 Sampson") pursuant to a steep slope conditional use permit ("Steep Slope CUP").

Background

The City Council created the very steep lot known as 30 Sampson in 1995 when it approved Craig Schneckloth plat entitled "30, 40, and 50 Sampson Avenue Amended Plat," which was also referred to as the Millsite Supplemental Plat Amended Subdivision ("Amended Plat"). A copy of the Amended Plat is attached as Exhibit A. The 30 Sampson property is labeled as Lot 3 on the Amended Plat and is located in the Historic Residential ("HRL") zoning district. As the Amended Plat shows, Lot 3 totals approximately 7,089 square feet and is of a highly irregular shape. It climbs the mountain towards the west of Sampson Avenue and has slopes in excess of 30%.

When the City Council approved the Amended Plat there was a great deal of analysis and discussion about the suitability of Lot 1 and Lot 3 for a home (Lot 2 already had the Schneckloth's home located on it). As a result of this analysis, the City Council determined the maximum appropriate size for each of the lots on the Amended Plat. In the case of Lot 3 (30 Sampson), the City Council placed a notation that the "maximum size for residential structures" on the lot is 3,000 square feet. This "maximum size" does not include a garage so long as the garage is no larger than 400 feet and does not include area located within a basement.

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Section 15-2.1-6(C) of the LMC, enacted by the City Council, exempts Lot 3 (30 Sampson) from Planning Commission steep slope review because of prior approval of the Amended Plat and related plat notes and conditions of approval. On February 14, 2012, the Jorgensen's filed a completed Steep Slope CUP Application ("Application"). The Application sought approval for construction of a new single family dwelling, including a detached garage ("Project"). When they filed their Application, they did not invoke the Steep Slope CUP exception because they were not aware of it. Instead, they decided to proceed with their Steep Slope CUP.

From the outset, the Jorgensens have worked closely with staff on their application. They solicited and obtained input on the appropriate setbacks for this location and carefully considered the dimensional restrictions that apply to this lot. They also analyzed the relative sizes of the structures surrounding the lot and the development potential of those other lots. After considerable work and careful evaluating of all available feedback, the Jorgensens readied themselves for their first of several Planning Commission meetings.

The first Planning Commission hearing was held August 22, 2012. At the hearing, the staff presented a Staff Report that found that the Project complied with the LMC's requirements for building footprint size; building square foot maximum; setbacks; height; number of stories; final grade; vertical articulation; roof pitch; and parking. *Id.* at 205—206. The Staff Report carefully evaluated each of the 9 criteria required for a Steep Slope CUP.¹ Importantly, the August 22nd Staff Report found that in analyzing each of the 9 criteria that there were "no unmitigated impacts." A copy of the August 22nd report is attached as Exhibit B.

Notwithstanding the careful analysis and determination by the staff that the Application complied with the 9 criteria that the City Council had set for evaluating a Steep Slope CUP, the Planning Commission refused to approve the Application. Instead, they voted to continue the Application for the purpose of reviewing the definition of "stories."

More than 3 months later, on December 12, 2012, the Planning Commission conducted its next meeting on the Application at a work session. The Work Session Report addressed the definition of "stories." The report observed that the proposed home has three stories, including a basement level, a main level, and a top level. The Project also includes a detached garage and an ADA accessible elevator². The Work Session Report concluded that, because the garage is detached, the proposed home does not violate the three-story height restriction. WORK

¹ Section 15-2.1-6 of the LMC provides that the Application "shall be subject to the following criteria": (1) Location of Development; (2) Visual Analysis; (3) Access; (4) Terracing; (5) Building Location; (6) Building Form and Scale; (7) Setbacks; (8) Dwelling Volume; and (9) Building Height.

² An ADA accessible elevator is critical to the Jorgensens given a relationship they have with an individual in a wheelchair.

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SESSION REPORT, 30 SAMPSON AVENUE 56—57 (December 12, 2012), a copy is attached as Exhibit C.

Notwithstanding the staff's prior careful work, and its determination that the Project met all story requirements for the HRL zone, the Planning Commission again delayed any action and did not schedule a time to approve the Application. Rather, it identified new issues, including a complaints that the home's façade is not adequately historic, the basement has safety egress features that make it not a basement and the potential issue of snow shedding.

After four more months, and a request from the Jorgensens for a decision, the Planning Commission placed a revised Application on its April 10th, 2013 agenda. The Application had changed from the one first submitted by the Jorgensens. Notably, the Jorgensens redesigned the garage from a side-by-side two door configuration to a one door, tandem configuration. This reduced the mass and scale of the garage as observed by passersby on Sampson Avenue. The redesign complemented existing design features. Specifically, the garage is detached and completely subordinate to the main home. Because the garage is detached and the main home is located on the upper portion of the lot, passersby on Sampson Avenue will not likely be able to see the proposed home. A copy of the drawing showing the revised Application's elevations is attached as Exhibit D.

Even though the Jorgensens had revised their plans in a way that reduced the visual impacts to those on Sampson, some on the Planning Commission continued to express concerns with the Application. All of the concerns, however, were essentially visual in that some on the Planning Commission expressed distaste for the mass, scale and the impacts created by having a home on a residential lot in a neighborhood. Importantly, of the 2 who spoke at the hearing, their concern focused on the Sampson Avenue road, not with having a home at 30 Sampson. Nevertheless, the Planning Commission voted to deny the Application for 30 Sampson.

The Planning Commission requested that Planning Staff prepare Findings of Fact and Conclusions of Law consistent with its April 10th discussion and vote. The Planning Commission ratified the Findings of Fact and Conclusions of Law denying the Application at a June 28, 2013 meeting. Generally, the Planning Commission found that the Application doesn't meet the purposes of the HRL Zone; the Project is not compatible with existing historic homes with respect to height, setbacks, mass, or scale; the design doesn't reduce visual impacts; and placement of the Project doesn't maximize open space.

Analysis

The Planning Commission improperly denied the Application. First, it violated the Land Use, Development, and Management Act ("LUDMA") by failing to identify conditions to

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mitigate anticipated impacts from the Project. Second, the Planning Commission lacked substantial evidence to support denial of the Application. Third, it relied on unconstitutionally vague standards when it denied the Application. Finally, the Planning Commission improperly relied on criteria outside the LMC to deny the Application.

First, the Planning Commission violated LUDMA because it did not attempt to impose conditions that would mitigate the anticipated impacts of the Project. Section 10-9a-507(2)(a) of the Utah Code requires that “[a] conditional use shall be approved 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).

The 1995 Amended Plat approved a single-family residence at 30 Sampson. Based on approval of the Amended Plat, the Jorgensens submitted the Application. In the August 22nd Staff Report, Planning Staff determined that the Project complied with all applicable numeric criteria, including requirements for building footprint size; building square foot maximum; setbacks; height; number of stories; final grade; vertical articulation; roof pitch; and parking. PLANNING COMMISSION STAFF REPORT, 30 SAMPSON AVENUE 205—206 (Aug. 22, 2012). Moreover, the Staff Report concluded that there were no unmitigated impacts associated with the nine criteria used to evaluate the Steep Slope CUP. The Planning Commission expressed progressively more concern about the Project over the course of hearings and work sessions held in August 2012, December 2012, and April 2012. In June 2013, more than one year after submission of the Application, the Planning Commission denied the Application.

The Planning Commission made no attempt to impose conditions on the Project. In doing so, the Planning Commission functionally determined that no single family home may be constructed at 30 Sampson. This conflicts with the 1995 Amended Plat in which the City Council approved 30 Sampson as a lot appropriate for a single-family home. Moreover, it ignores the Jorgensens’ efforts to modify the Application to meet expressed concerns. For instance, in an effort to reduce the mass and scale of the garage, the Jorgensens’ redesigned their garage from a side-by-side two-door configuration to a one-door tandem garage. PLANNING COMMISSION STAFF REPORT, 30 SAMPSON AVENUE 82 (Apr. 10, 2013). Most importantly, however, the decision violated LUDMA’s mandate that conditions be proposed or imposed that would mitigate the anticipated detrimental impacts of the Project. UTAH CODE ANN. § 10-9a-507(2)(a); ADVISORY OPINION NO. 117, OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN *7 (October 15, 2012); *Trisko v. City of Waite Park*, 566 N.W.2d 349, 357 (Minn. Ct. App. 1997) (“Evidence that a municipality denied a conditional use permit without suggesting or imposing conditions that would bring the proposed use into compliance may support a conclusion that the denial was arbitrary.”).

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Second, the Planning Commission lacked substantial evidence to support denial of the Application. A land use authority's decision must be supported by substantial evidence. The Planning Commission must have substantial evidence to support its decision. UTAH CODE ANN. § 10-9a-801(3)(c). Substantial evidence exists when "a reasonable mind might accept as adequate the evidence supporting the decision." *Long v. Ethics and Discipline Comm. of the Utah Supreme Ct.*, 2011 UT 32, ¶ 50, 256 P.3d 206.

The Planning Commission found that the height, setbacks, volume, mass, and scale of the Project caused impacts that could not be substantially mitigated. But the Planning Commission lacked substantial evidence to support this determination. To the contrary, Planning Staff determined that the Project complied with the numeric criteria for floor area, building footprint, setbacks, and height. PLANNING COMMISSION STAFF REPORT, 30 SAMPSON AVENUE 86—88 (Apr. 10, 2013). Planning Director Thomas Eddington assigned the minimum setbacks. *Id.* at 86. Chief Building Official Chad Root determined that the proposed basement met the International Building Code's definition of basement. PLANNING COMMISSION STAFF REPORT, 30 SAMPSON AVENUE 157 (June 28, 2013). Because it qualified as a basement, the basement was permitted in addition to the maximum residence size, as explained in Director Lewis's 1998 letter. Finally, Mr. Root determined that the proposed home and garage were not connected and, as a result, did not exceed the maximum three story height. *Id.*

The Planning Commission also lacked substantial evidence for its finding that the Project is not compatible with existing historic homes. The Planning Commission discounted an existing home size analysis prepared by Planning Staff because the analysis did not consider height, setbacks, mass, scale, or existing LMC requirements. But the analysis provides a useful basis for comparing the Project to existing homes. The proposed floor area for the Project is 4,585 square feet. 60 Sampson, an existing historic home has a total size of approximately 4,246 square feet on a lot smaller than 30 Sampson's lot. 16 Sampson was recently approved for construction of a home of approximately 4,141 square feet. Moreover, two homes located on Norfolk in the HR-1 District sit adjacent to 30 Sampson. Both of these homes are larger than the Project. These data show that 30 Sampson is comparable to several neighboring properties, including adjoining properties. The Planning Commission did not offer quantitative height, setback, mass, and scale data that show the Project is not compatible with existing homes.

In addition to its other findings, the Planning Commission found that the Project failed to maximize open space, would cause visual impacts, and did not provide screening. When it approved the Amended Plat, the Planning Commission understood that 30 Sampson was an irregular lot. The majority of buildable area is located on the rear of the lot, where the proposed home is located. PLANNING COMMISSION STAFF REPORT, 30 SAMPSON AVENUE 92 (Apr. 10, 2013). The Project covers only 31% of the overall lot. *Id.* at 91. Thus, the Project preserves open space to the extent possible on this irregular and very steep lot. The Project

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minimizes visual impacts because it is broken into smaller pieces that step with the grade. *Id.* at 93. Notably, the proposed garage is detached and completely subordinate to the proposed home. *Id.* Lastly, the Jorgensens' plan to screen the Project by planting 40 new trees on the lot. *Id.* at 91. In summary, the Planning Commission lacked substantial evidence to support its findings that the Project is not compatible with existing homes and that it will have detrimental visual impacts.

Third, the provisions the Planning Commission relies upon to analyze compatibility with existing historic homes are unconstitutionally vague because they provide no guidance for the Jorgensens to prepare designs and an application. An ordinance is unconstitutionally vague when it either "(1) fail[s] to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, or (2) [is] written in a way that encourages arbitrary and discriminatory enforcement." *Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 55, 225 P.3d 153 (internal quotation marks omitted).

The Planning Commission found that the Project does not contribute to the character and scale of the HRL District. In particular, it found that the Project is not compatible with the height, setbacks, mass, or scale of existing historic homes. The Planning Commission appears to have based its decision, in part, on the purpose statements for the HRL District. LMC § 15-2.1-1(C), (E)-(F). The Planning Commission also appears to have relied on language permitting it to minimize the visual mass or mitigate differences in scale between existing and proposed structures. LMC § 15-2.1-6(B)(8)-(9).

The Project complies with the quantitative criteria in the LMC for floor area, building footprint, setbacks, and height. PLANNING COMMISSION STAFF REPORT, 30 SAMPSON AVENUE 86—88 (Apr. 10, 2013). The provisions relied on by the Planning Commission fail to provide guidance to applicants and design professionals as to when compliance with quantitative criteria will not be adequate to satisfy Steep Slope CUP requirements. Moreover, there is no guidance as to what additional criteria may exist and how they will be applied. Indeed, in this case, the Planning Commission's decision making appears to be driven by subjective standards developed on an ad hoc basis. Because they provide no meaningful guidance to the Jorgensens, the provisions relied upon by the Planning Commission are unconstitutionally vague.

Finally, the Planning Commission impermissibly relied on grounds outside the LMC to deny the Application. UTAH CODE ANN. § 10-9a-801(3)(d); *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 565 S.E.2d 9, 17 (N.C. 2002) ("The [Planning Commission] . . . is without power to deny a permit on grounds not expressly stated in the ordinance and it must employ specific statutory criteria which are relevant." (internal quotation marks omitted)).

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The Planning Commission found that the Project maximizes the minimum setbacks; violates the intent of the three-story requirement, and may require more than two parking spaces. There is no dispute that 30 Sampson falls within the minimum setbacks established for the lot. The LMC defines a setback as “[t]he required minimum distance between a Building Pad and the closest of the following: (A) Property Line; (B) platted Street; or (C) existing curb or edge of a Street,” LMC § 15-15-1.234. Based on this definition, the building pad for the Project may permissibly extend to the minimum setback line. Pursuant to section 15-2.1-5(A) of the LMC, “[a] Structure may have a maximum of three (3) stories.” According to Mr. Root, the proposed home and garage are separate structures. Both are less than three stories. Thus, the proposed home and garage satisfy the story requirement. The LMC provides no additional criteria regarding the intent of the story requirement. The LMC requires two parking spaces per Single Family Dwelling unit; it provides no basis for requiring additional parking spaces. LMC § 15-3-6(A). The Project has the required two parking spaces. The Planning Commission may not use bases outside the LMC to impose conditions on 30 Sampson or to deny the Application.

The Jorgensens filed the Application in February 2012. The Planning Commission denied the Application without proposing any conditions to mitigate anticipated detrimental impacts of the Project. In doing so, the Planning Commission violated LUDMA, acted without substantial evidence, applied unconstitutionally vague provisions of the LMC, and relied on impermissible, uncodified grounds for its decision. Further, in the absence of conditions, the Jorgensens may not build a home at 30 Sampson. This outcome contradicts the Amended Plat, which expressly permitted a single-family residence at 30 Sampson.

Should you have any questions, please feel free to contact me.

Very truly yours,

Snell & Wilmer



Wade R. Budge

WRB



GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

BRENT N. BATEMAN
Lead Attorney, Office of the Property Rights Ombudsman

EXHIBIT G

ADVISORY OPINION

Advisory Opinion Requested by: Michael and Laurie Jorgensen
By Wade Budge, Attorney for the Jorgensens

Local Government Entity: Park City

Applicant for the Land Use Approval: Michael and Laurie Jorgensen

Type of Property: Residential

Date of this Advisory Opinion: March 28, 2014

Opinion Authored By: Elliot R. Lawrence
Office of the Property Rights Ombudsman

Issues

What is the extent and obligation of a land use authority's evaluation of conditional use permit applications?

Summary of Advisory Opinion

Conditional uses are valuable aspects of a local zoning ordinance, and must be administered as part of the overall zoning scheme, respecting the ordinance's design standards and approvals previously granted by the local government. Conditional uses involve four steps: Designating the use as conditional; adopting standards to guide decision makers; identifying detrimental impacts associated with a particular use; and evaluation of conditions to mitigate the use's impacts. Before a conditional use permit may be denied, specific detrimental impacts must be identified, and conditions considered. The denial is justified only if the impacts cannot be substantially mitigated by reasonable conditions. Any decision made by a land use authority as part of the conditional use evaluation process must be supported by substantial evidence.

Review

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205.

An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Wade R. Budge, Attorney for Michael and Laurie Jorgensen, on August 9, 2013. A copy of that request was sent via certified mail to Janet M. Scott, City Recorder for Park City, at 445 Marsac Ave., Park City, Utah. According to the return receipt, the City received the Request on August 19, 2013.

Evidence

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, with attachments, submitted by Wade R. Budge, attorney for Michael and Laurie Jorgensen, received by the Office of the Property Rights Ombudsman on August 9, 2013.
2. Response submitted on behalf of Park City, by Polly Samuels-McLean, Assistant City Attorney for Park City, received on December 2, 2014.
3. Reply submitted by Mr. Budge, received on January 17, 2014.
4. Reply submitted by Ms. McLean, dated March 5, 2014.
5. Reply submitted by Mr. Budge, dated March 18, 2014.
6. Section 15-2.1-6 of the Park City Municipal Code.

Background

Michael and Laurie Jorgensen own a lot in Park City, located at 30 Sampson Avenue ("30 Sampson"). The lot was created by a subdivision plat approved in 1995, along with two other lots along the same road. The lot has an "irregular hour-glass" shape: The south boundary, adjoining another lot, is essentially straight, but the north boundary "zig-zags" at sharp angles, creating a wedge-shaped section on the east (adjoining Sampson Avenue) and a "squarish" area on the west, with a narrow area in the middle of the lot.¹ The total area of the lot is 7,089 square feet, but the narrowing in the middle limits the area available for a larger building such as a home. The upper, or western portion, is larger than the lower, or eastern portion.² The slopes on the lower portion leading the to the middle appear to be in excess of 30%, but area immediately

¹ The property boundary with the parcel to the north forms a right angle jutting into the middle of 30 Sampson. The western portion is slightly larger than the eastern. The City's staff noted that due to the sharp angles, the lot actually has eight sides.

² The western portion could also be deemed the "northwest" portion, as that part of the lot veers to the northwest. The lower portion is basically oriented on an east-west axis.

adjacent to the street is fairly level. The upper portion levels off somewhat, with the slope appearing to be between 20-30%. The lot has about 48 feet of frontage on Sampson Avenue.

Despite the slope and unusual configuration of 30 Sampson, the owners are confident that a home may be constructed. The lot is located within an "HRL" (Historic Residential-Low Density) zone district. The City Code requires that buildings larger than 1,000 square feet which are located on steep slopes obtain a conditional use permit (a "Steep Slope CUP").³ The Steep Slope CUP process addresses several criteria associated with the development, including size and mass of the building, height, location on the lot, and access.

In the HRL zone, the allowable building footprint size is a function of the lot size. Larger lots allow larger building footprints.⁴ According to the City, the maximum building footprint allowed on 30 Sampson is 2,355.5 square feet.⁵ Because of the unusual configuration, the City Planner determined the setbacks, as provided in § 15-4-17 of the City Code. Each of the lot's eight sides was assigned a setback.

The subdivision plat that created 30 Sampson in 1995 includes a note stating that 3,000 square feet is the "maximum size[] for residential structures" on the lot.⁶ The City determined that it would honor the maximum size approved by that plat. In March of 1998, the City issued a letter, stating that a basement could be included with a home on the lot, provided it met the requirements of the City Code ("March 1998 Letter").⁷ Importantly, the area of a basement would not count towards the 3,000 square foot maximum for the home.⁸ The March 1998 Letter was recorded with the Summit County Recorder's Office. The City acknowledges this Letter, and the development rights that it grants.

In February of 2012, the Jorgensens designed a home for 30 Sampson, and applied for a Steep Slope CUP, because a portion of their development is located on the steep portion constituting the middle of their lot.⁹ The proposed home is located on the western (or upper) portion of the lot (approximately 77 feet from Sampson Avenue), with a garage building located at street level. The garage building extends into the slope face, and includes a below-ground entry room and an elevator leading to the home on the upper portion. The elevator was connected to a deck or bridge leading to the main entrance of the home.¹⁰ A parking area and stairway next to the garage were also shown in the home's drawings. The final design considered by the City was about

³ PARK CITY MUNICIPAL CODE, § 15-2.1-6.

⁴ PARK CITY MUNICIPAL CODE, § 15-2.1-3. A building's "footprint" is the area it occupies, regardless of height. It is not the total floor area of a building.

⁵ "Findings of Fact and Conclusions of Law, June 26, 2013," Park City Planning Commission (Attached as Exhibit A), Finding No. 10.

⁶ The subdivision created three lots, including 30 Sampson. One of the lots is 6,956 s.f., and the other is 11,444 s.f. The smaller lot also has a 3,000 s.f. limit for structures, while the larger may build up to 3,500 s.f.

⁷ At the time of the March 1998 Letter, a basement was required to have four walls at least 80% underground. An outside entrance from the basement was not to be visible from a public street.

⁸ In other words, only the "above ground" portion of the home would be counted against the maximum area.

⁹ It appears that the City's planning staff determined that a Steep Slope CUP was necessary. *But see* Analysis Section II, *infra*.

¹⁰ Other than an outside stairway, the elevator would be the only access from the garage to the home. The Jorgensens included the elevator to make the home fully accessible.

4,041 total square feet, with 2,996 square feet above ground.¹¹ The overall footprint for the project was 2,272 square feet.¹²

After working with the City's staff for nearly six months, the matter was brought to the Park City Planning Commission on August 22, 2012. At that meeting, the staff recommended approval of the Steep Slope CUP, stating that there were no unmitigated impacts associated with the proposed home. The staff report concluded that all of the criteria required by the City's Code supported the permit.¹³ Despite the staff's recommendation, the Planning Commission continued the application, requesting clarification on the definition of "story" in the City Code.¹⁴

In December of 2012, the Planning Commission reviewed the application at a work meeting. At that meeting, the staff reported that the Jorgensen's home met the City's height and story restrictions. The Planning Commission again delayed a decision on the application, citing new issues about the proposed home. Specifically, the commission identified complaints that the home did not suit the historic nature of the area, issues about whether the basement area should be included in the total, and concerns about snow shedding.

In April of 2013, after a request from the Jorgensens, the Commission again considered the application. The Jorgensens had made changes to their home's design, in order to address the concerns raised at the December commission meeting. In particular, the garage was changed to lessen its apparent size and visual impact from Sampson Avenue.¹⁵

At the April meeting, it appears that members of the public expressed concerns about parking on Sampson Avenue, but said nothing about the home itself. During discussion, members of the Planning Commission expressed dislike for the size and visual impacts of the home. The Commission denied the Steep Slope CUP application, concluding that the home was too large for the neighborhood, did not satisfy the "intent" of the HRL zone, was not compatible with the historic development of the area, and that the reasonably anticipated detrimental impacts of the home could not be mitigated through reasonable conditions. On June 26, 2013, the Commission approved its Findings of Fact and Conclusions of Law, formally denying the Jorgensen's application.

¹¹ Findings of Fact and Conclusions of Law, Finding No. 18. It appears from the design information as well as the City's conclusions that the garage and elevator constituted one building, and the home was a separate building. The City code exempts a garage area up to 400 s.f. from the calculation of total area.

¹² Findings of Fact and Conclusions of Law, Finding No. 10.

¹³ Section 15-2.1-6(B) requires evaluation of nine criteria: (1) Location of Development; (2) Visual Analysis; (3) Access; (4) Terracing; (5) Building Location; (6) Building Form and Scale; (7) Setbacks; (8) Dwelling Volume; and (9) Building Height. The staff report also concluded that the proposed home also met the City's requirements, such as height, setback, etc.

¹⁴ Section 15-2.1-5 limits structures to three stories, with a maximum height of 27 feet (above grade). The City staff concluded Jorgensen's home has three stories: a basement, a main floor, and an upper level. The maximum height is below 27 feet.

¹⁵ As stated above, the final design had a building footprint of 2,272 s.f. Based on the analysis by the City's staff, the proposal has a total above-ground floor area of 2,996 s.f. The basement floor area was 1,189 s.f. The total area included 509 square feet of the garage/elevator building, because the first 400 s.f. of the garage was excluded from the total floor area.

In its final order, the Commission made 43 Findings of Fact, including finding that the proposed home did not meet the criteria for a Steep Slope CUP. Specifically, the Commission found that the home was not compatible with existing historic homes in the neighborhood “with respect to height, setbacks, mass or scale . . .”¹⁶ It also found that the home did not meet the purpose of the HRL zone, specifically paragraphs (C), (E), and (F) of § 15-2.1-1.¹⁷ A copy of the Findings of Fact is attached as Exhibit A.¹⁸

Analysis

I. The Planning Commission Does Not Have Discretion to Ignore Approvals Previously Granted by the City or to Reinterpret City Ordinances.

The Planning Commission abused its discretion when it concluded that the Jorgensen’s home did not meet the “purposes” of the HRL zone, and by ignoring terms in the City Code. It is true that interpretation of ordinances by a local planning board enjoys “some level of non-binding deference” *Fox v. Park City*, 2008 UT 85 ¶ 11, 200 P.3d 182, 185. However, the Planning Commission’s deference is limited, and its authority must operate within the terms of the City Code. The Commission does not have discretion to ignore an ordinance or approvals already made regarding the Jorgensen’s property.

A. A 3,000 Square Foot Home May Potentially Be Built on the Lot.

Because the maximum size for a home on 30 Sampson has already been approved by the City, the Steep Slope CUP could not be denied based on an opinion that the home does not meet the purposes of the HRL zone. In its Findings of Fact, the Planning Commission determined that the Jorgensen’s home did not “meet the purpose” of the HRL zone in part because the home did not “preserve the character of Historic residential development in Park City” (Finding No. 28) and because it did not “encourage construction of Historically Compatible Structures that contribute to the character and scale of the Historic District . . .” (Finding No. 29).¹⁹ The basis for these findings is evidently because the Planning Commission felt that the proposed home is too large for the City’s Historic District.

The Planning Commission does not have discretion to decide that the home is too large for the HRL zone, because the maximum size has already been approved by the City. When the 30 Sampson lot was created in 1995, the City determined that a 3,000 square foot home could be built.²⁰ A few years later, the City agreed that the area of a basement level would not be counted

¹⁶ Findings of Fact and Conclusions of Law, June 26, 2013, Finding No. 38.

¹⁷ That sections lists the purpose of the HRL zone, which includes “preserving historic character” (paragraph (C)); “encourage historically compatible structures” (paragraph (E)); and “review criteria for development on steep slopes” (paragraph (F)).

¹⁸ The document is entitled “Notice of City Council Action” although it is the Findings of Fact and Conclusions of Law for the Planning Commission.

¹⁹ The Findings quote paragraphs (E) and (F) of § 15-2.1-1 of the Park City Code, which lists the purposes of the HRL zone.

²⁰ Along the same lines, the City also has approved the size of a building’s “footprint,” which is a function of the lot area. The size of a building’s footprint acceptable on 30 Sampson has already been approved by the City, and so the

against the total area of a home on that lot. Since the building size has already been approved, the Planning Commission cannot dictate the allowable size of a building simply because it feels that the “purpose” of the HRL zone is better served with smaller homes. In essence, Park City has already determined that on 30 Sampson, a home of 3,000 square feet suitably preserves the character of historic residential development and contributes to the character and scale of the historic district.²¹ The Planning Commission does not have discretion to change what the City Council has already approved.

Furthermore, the Jorgensens have a vested right for a home up to 3,000 square feet in floor area. The 1995 subdivision plat includes the specific approval for a home of that size on 30 Sampson. An approved subdivision plat grants vested rights to the owner. “Some courts have recognized that the filing of a subdivision plat gives a vested right to individual lot owners as to the lots’ size . . .” *Stucker v. Summit County*, 870 P.2d 283, 288 (Utah Ct. App. 1994).²² If an owner is entitled to a vested right in the size and configuration of a lot created by a subdivision, then an owner may claim vested rights in other development or design criteria approved on a subdivision plat. This would include specific building pads or setbacks, and building sizes. Since the City approved a 3,000 square foot home on 30 Sampson as part of the 1995 subdivision plat, the Jorgensens may claim the vested right to build a home up to that size.²³

B. The Jorgensens May Build Within the Approved Setbacks

In a similar vein, the Planning Commission abused its discretion by denying the CUP based on its position that the home “attempts to maximize the minimum setbacks.” (See Findings of Fact, Finding No. 21).²⁴ Because of the unusual configuration of the lot, the minimum setbacks for 30 Sampson have been determined by the Park City Planning Director, as provided in the City Code.²⁵ The buildings (the garage and home) are placed within the required setbacks, and there is no issue that the setbacks need to be adjusted.

Because the proposed home conforms to the established setbacks, the Planning Commission does not have discretion to deny approval simply because the home’s plan “maximizes” those setbacks. The Jorgensens have the right to build within the approved building pad. The buildable area of the lot, as defined by the required setbacks, has been decided by the City. As long as the building complies with the setbacks, the Planning Commission does not have discretion to deny the Steep Slope CUP because of an opinion that the proposed building is “too close” to what has

Planning Commission cannot presume the authority to determine what size building best suits the “purpose” of the HRL zone.

²¹ This is further reinforced by the fact that the proposed home and garage would be a permitted use if the lot had a slope less than 30%, and no Steep Slope CUP were required.

²² See also *Wood v. North Salt Lake*, 15 Utah 2d 245, 390 P.2d 858 (1964) (Property owners had vested right in lot sizes created by subdivision plat, even though a subsequent zoning ordinance required larger lots)

²³ Even if development criteria on a subdivision plat granted a vested right, development would still need to comply with other zoning requirements, including the Steep Slope CUP, if required by the City Code.

²⁴ The Planning Commission’s application of §15-2.1.6(B)(7) of the City Code (Setbacks as part of the CUP analysis) is discussed below.

²⁵ See PARK CITY MUNICIPAL CODE, §15-4-17 (Setback Requirements for Unusual Lot Configurations). The buildable area, or “building pad” is “the Lot Area minus required Front, Rear and Side Yard Areas.” *Id.*, § 15-2.1-3(C).

already been approved.²⁶ Otherwise, the Planning Commission would be overruling the City's determination by effectively increasing the setbacks, which would be an abuse of its discretion.

C. The Planning Commission Does Not Have Discretion to Ignore the Established Meanings of Terms Used in the City Code.

The Planning Commission must follow the terms and definitions adopted by the City, and does not have discretion to adopt its own definitions. "A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances." UTAH CODE ANN. § 10-9a-509(2). If a term is defined in either the City's ordinances or the State Code, the Planning Commission is bound to follow that definition, and does not have discretion to change the established meaning of the term.

The terms of the City's ordinances are interpreted according to the plain language used.

When interpreting statutes, [the] primary objective is to give effect to the [legislative] intent. To discern . . . intent, . . . look first to the statute's plain language. . . . [P]resume that the [legislative body] used each word advisedly and read each term according to its ordinary and accepted meaning. Additionally, . . . read the plain language of the statute as a whole and interpret its provisions in harmony with other statutes in the same chapter. When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.

Selman v. Box Elder County, 2011 UT 18, ¶ 18, 251 P.3d 804, 807 (citations and alterations from original omitted). In addition, "since zoning ordinances are in derogation of a property owner's use of land . . . any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use." *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208, 1216. If a term is not defined by ordinance or statute, the ordinary meaning and usage of the word is used.

1. The Jorgensen Home Includes a Basement.

The City's planning staff concluded that the basement proposed for the Jorgensen home satisfied the definition stated in the March 1998 Letter, and so the basement area was not included when calculating the total floor area allowed.²⁷ Defying this analysis, along with the provisions of the City Code and the actions of the City Council, the Planning Commission decided that the

²⁶ The Planning Commission apparently objects to having the building located within the area the City has approved for building (*i.e.*, the building pad, or the area within the established setbacks). Admittedly, the home building occupies nearly all of the buildable area on the upper portion of the lot. Although the Planning Commission may prefer greater setbacks, it does not have discretion to deny the Steep Slope CUP based on the amount of buildable area being used. As discussed below, the Steep Slope CUP ordinance grants the Planning Commission a limited amount of discretion over setbacks as part of the conditional use analysis. That discretion, however, only involves setback adjustments in limited circumstances, and is not authority to question how a property owner uses the area approved for building.

²⁷ Excluding the basement floor area meant that the "above ground" portion of the home had 2,996 s.f., just under the 3,000 s.f. limit.

basement level of the Jorgensen home did not meet its conception of a basement, and so it concluded that the area of that level was to be included in the total area of the home.²⁸

The March 1998 Letter stated that the area of a basement level would not be included in the total area allowed on the lot, if all four walls of the basement were at least 80% underground.²⁹ The Planning Commission misquoted that definition, stating that a basement must be “constructed *fully* below the finished grade.” Findings of Fact, Finding No. 8 (emphasis added).³⁰ Moreover, the City Code currently defines “basement” as “[a]ny floor level below the First Story in a Building.” PARK CITY MUNICIPAL CODE, § 15-15-4(1.25) (Definition of “basement”).³¹ The Planning Commission decided that the basement was not “fully below the finished grade” because it had windows and a light well (or window well).³² Therefore, according to the Planning Commission, it was not eligible for floor area exemption provided by both the March 1998 Letter and the City Code.³³

Using the City Code’s definition, the Jorgensen home has a basement. It is a level below the first story. The City Code does not mention windows—as long as the level is below the first story, it could presumably have as many windows as the homeowner wants. In addition, windows are required by the building code. The March 1998 Letter requires that all four walls of a basement be at least 80% underground. It also does not mention windows, but it is reasonable that the requirement could be fulfilled if the walls of window wells were considered as part of the basement walls.³⁴ The March 1998 Letter allows an exterior door leading to a basement (including a garage door), so it would seem that windows are also a possibility.³⁵

²⁸ See Findings of Fact and Conclusions of Law, Finding No. 40.

²⁹ According to the March 1998 Letter, this was the definition of basement from the City Code. That letter provided that the area of a basement would not be included in the total floor area for a home. See Findings of Fact and Conclusions of Law, Finding No. 8. The design drawings submitted for this Opinion show that the basement walls are completely below ground, including the wall for the “light well.”

³⁰ See also Findings of Fact, Finding No. 40.

³¹ “First Story” means “[t]he lowest Story in a Building provided the floor level is not more than four feet (4’) below Final Grade for more than fifty percent (50%) of the perimeter. PARK CITY MUNICIPAL CODE, § 15-15-4(1.103). The Jorgensen’s plans show that only the basement of their home is below grade, and the so the first level would qualify as a “First Story.”

³² The windows are required by the building code, and provide light and emergency access. A portion of one basement wall includes three windows with a “light well,” which is basically a sunken window well extending across all three windows (about 20 feet total) allowing light and access. The outside wall for the light well is connected to the basement wall and extends a few feet from the main structure. There was evidently no analysis or measurement showing that the basement was less than 80% below ground, or that the basement was not below the First Story of a building.

³³ See *id.*, § 15-15-4(1.105) “Basement and Crawl Space Areas below Final Grade are not considered Floor Area.”

³⁴ It is also worth noting that most people would agree that a basement includes windows and even exterior doors.

³⁵ The March 1998 Letter states that an exterior door, including a garage door, may not be visible from a public street. Thus, it was at least considered possible that a basement with a garage door could still have 80% of its walls underground. Since windows are smaller than garage doors, a basement could also feasibly include windows. The HRL zone anticipates window wells and light wells, allowing them to extend into side and rear yard setbacks, and excluding the depth of window wells from defining existing grade. See *id.*, §§ 15-2.1-3(G)(3) and (I)(3), and 15-2.1-5.

The Planning Commission abused its discretion by not allowing the basement area to be exempted from the total floor area allowed for the Jorgensen home. Their conclusions are not supported by any reasonable interpretation of the City Code or the March 1998 Letter, particularly given the building code's requirement that windows be included. The conclusions reached by the Planning Commission place homeowners in a "catch-22" situation: A basement must have windows; but if it has windows, the Planning Commission would no longer consider it a basement.³⁶ This approach also nullifies the exemption granted by the City, depriving the Jorgensens of a valuable property right.³⁷ Finally, since the terms of the area exemption must be construed in favor of the property owner, there is no reasonable basis to conclude that the basement in the Jorgensen home does not meet the definitions of both the City Code and the March 1998 Letter.

2. The Home Meets the Height Requirements of the HRL Zone.

The proposed home satisfies the height requirements of the HRL zone. "No structure shall be erected to a height greater than twenty-seven feet (27') from Existing Grade." PARK CITY MUNICIPAL CODE, § 15-2.1-5. According to the materials submitted for this Opinion, the Jorgensen home, as well as the garage and elevator building, are both at or below 27 feet in height, measured from the existing grade. In addition, a structure may not have more than three stories within the 27-foot maximum.³⁸ For the purpose of defining maximum height, a basement level is considered a story, according to the City Code. *Id.*, § 15-2.1-5(A).³⁹

The Planning Commission focused on the height and the number of stories in the two structures proposed for 30 Sampson, eventually concluding that "[t]he two buildings appear by their placement to be a five (5) story building." Findings of Fact, Finding No. 39. However, both the home and the garage/elevator buildings satisfy the City's height requirement. The maximum height is 27 feet above the existing grade, regardless of how tall the building "appears" to be, or its location on a hillside. The Planning Commission does not have discretion to alter the definition found in the City Code.

The City Code does not define "story," but it does define how to measure a story.⁴⁰ The ordinary understanding of the term "story" is "each of the stage or portions one above another of which a building consists; a room or set of rooms on one floor or level." OXFORD ENGLISH DICTIONARY, Vol. XVI (2nd ed. 1989) p. 789.⁴¹ Using this as the plain language meaning of the term, the two

³⁶ "Catch-22" refers to a circumstance or situation that presents a dilemma because of mutually conflicting or dependent conditions. See THE OXFORD DICTIONARY AND THESAURUS, AMERICAN EDITION (1996), p. 219.

³⁷ The Planning Commission's conclusion also does not solve their concerns over the size of the structure. If the basement were eliminated, the structure would still have the same dimensions above ground—eliminating the basement would only reduce the total floor area, not the overall size and mass of the structure.

³⁸ The City Code allows additional height for an elevator building. See *id.*, § 15-2.1-5(3). It appears, however, that no extra height was requested for the Jorgensen's elevator.

³⁹ A basement would count as a "story," but only the portion of a structure above ground would be measured for the maximum height.

⁴⁰ *Id.*, § 15-15-32(1.251) "STORY. The vertical measurement between floors taken from finish floor to finish floor."

⁴¹ "Story" usually refers to the horizontal divisions of a building. A building's stories usually include space between floors to house electrical wiring, plumbing, etc.

structures comply with § 15-2.1-5. The home has three levels, including a basement. The garage/elevator building has only one story.⁴² The Planning Commission must abide by the plain language of the City ordinance, and does not have discretion to adopt a new interpretation not supported by the City Code. Since both buildings are less than 27 feet high and have no more than three stories, they both satisfy the required height limitation.

II. The City's Steep Slope CUP Ordinance Only Applies to Substantial Structures Actually Located on Steep Slopes.

The Steep Slope CUP ordinance only applies to substantial structures actually located on a steep slope, and may not be extended to regulate structures which are not placed on a slope. "A Conditional Use permit is required for any Structure in excess of one thousand square feet (1000 sq. ft.) if said Structure and/or Access is *located* upon any existing Slope of thirty percent (30%) or greater." PARK CITY MUNICIPAL CODE, § 15-2.1-6(B) (emphasis added).⁴³ In other words, the Planning Commission only has authority to add additional conditions on a structure which is actually placed on an area with a slope greater than 30%, if the structure exceeds 1,000 square feet. It does not apply to structures placed on more level areas of a lot, even if other portions of the lot have a steep slope, or to buildings which are smaller than 1,000 square feet.⁴⁴

It appears, based on the materials submitted for this Opinion, that only the lower portion of 30 Sampson has an area where the slope exceeds 30%.⁴⁵ The upper portion is more level.⁴⁶ If this is so, then the only portion of the lot subject to the Steep Slope CUP is whatever portion has a slope greater than 30%, and which has a substantial structure placed upon it. Structures on more level areas do not require conditional use approval.

The Jorgensen's proposal consists of two buildings: The home on the upper portion, and the garage/elevator structure on the lower portion. The City's review treated the two buildings as separate. The Planning Commission agreed that the home is a separate structure from the garage.

⁴² There was no indication that the elevator shaft would comprise two stories. At any rate, since the garage is a separate structure, it may have as many as three stories, so long as the height does not exceed 27 feet.

⁴³ Note that the ordinance language only applies to a structure located on an existing slope greater than 30%, in contrast, the ordinance would not apply simply when a structure is built on a level portion of a lot that also includes a steep slope.

⁴⁴ This interpretation is based on the plain language of § 15-2.1-6(B). In addition, the provision that a zoning ordinance must be narrowly construed in favor of the property owner demands this conclusion.

⁴⁵ See Findings of Fact, Finding No. 5: "The subject property is very steep ranging from flat areas near Sampson Avenue and climbing uphill with slopes reaching between 30-40% before reaching the main body of the lot." This is, of course, not a final conclusion that the slope on the upper portion is less than 30%, but is consistent with the information submitted for this Opinion. The City maintains that its staff concluded that a Steep Slope CUP is required, and that the Jorgensens failed to appeal that determination.

⁴⁶ This observation is based upon topographic data listed on the plans submitted for this Opinion. The lower portion of 30 Sampson has a small level area along the street, and the elevation rises sharply in the middle, where the lot narrows. The garage and elevator structure requires excavation into this slope face. The upper portion appears to be more level (the data on the plans suggests that the slope is less than 30%). According to the plans, the home structure will be entirely above ground (except for the basement), without extensive excavation into a slope face. A more thorough analysis is needed to accurately ascertain the slope of the upper portion.

See Findings of Fact, Finding Nos. 6, 13, 15, 16, 17, 22, 34 and 39. In addition, the conclusion that the buildings are separate is supported by the facts. Both the home and the garage have separate foundations, and are not connected, except by a walkway. The garage and elevator could be removed without changing the home, and the home could be altered without any changes to the garage. Simply providing access via a deck or bridge does not unite the two separate buildings.

If the slope on the upper portion of the lot is less than 30%, then the Planning Commission does not have authority to impose any additional conditions on a structure placed on that portion. If the home is located on an area with a steeper slope, then the Steep Slope CUP ordinance would apply. The garage/elevator building is located on a steep slope, and requires excavation into the slope face. However, the garage and elevator are less than 1,000 square feet, so a Steep Slope CUP should not be required.⁴⁷

In short, § 15-2.1-6 of the City Code requires a Steep Slope CUP not merely because a lot has a slope greater than 30%, but because a substantial structure is proposed to be built on that slope. That section must be construed narrowly, in favor of allowing the use and enjoyment of property. The City may not require a conditional use permit except where one is mandated by the City Code. Despite a desire to improve the City, the Planning Commission does not have discretion to exceed the authority granted to it.

According to the materials submitted for this Opinion, the Jorgensens object to being subject to the Steep Slope CUP for the same reasons. The City maintains that its planning staff decided that the CUP was necessary, and that the Jorgensens cannot object at this point. It is not clear if the Jorgensens raised their objections before the Planning Commission, however. If it is determined that the Steep Slope CUP ordinance does not apply to the Jorgensen's proposal, the Planning Commission's decision would possibly be void as an unauthorized act, even if its actions were supported by substantial evidence.⁴⁸

III. Before it May Deny a Conditional Use, the City Must Show the Detrimental Impacts of the Use, and the Conditions Which Were Considered to Mitigate Those Impacts.

In order to justify denying an application for a conditional use permit, the City must establish the detrimental impacts of the development, and show by substantial evidence that reasonable conditions would not mitigate those impacts. Conditional uses are governed by the Land Use,

⁴⁷ See Findings of Fact, Finding 6. "The proposal . . . includes a 453 square foot detached garage, a 350 square foot garage entry and a 106 square foot access tunnel which is located below ground" The areas listed total 909 square feet, but 400 s.f. is excluded from the total floor area.

⁴⁸ A zoning decision may be overturned if it is arbitrary, capricious, or illegal. UTAH CODE ANN. § 10-9a-801(3). A decision is arbitrary and capricious if it is not supported by substantial evidence. *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 10, 70 P.3d 47, 51. It is illegal if the action taken was not authorized, or if it violated a statute or ordinance. UTAH CODE ANN. § 10-9a-801(3)(d).

Development, and Management Act (or “LUDMA”), found in Title 10, chapter 9a of the Utah Code.⁴⁹ A “‘Conditional use’ means a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.” UTAH CODE ANN. § 10-9a-103(5). Section 10-9a-507 provides the framework for consideration of conditional use permits:

(1) A land use ordinance may include conditional uses and provisions for conditional uses that require compliance with standards set forth in an applicable ordinance.

(2) (a) A conditional use shall be approved 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.

(b) If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied.

Id., § 10-9a-507. The Utah Code thus anticipates four specific steps: First, a use must be designated as “conditional” in a land use ordinance; Second, standards must be adopted to guide evaluation of a conditional use; Third, reasonably anticipated detrimental impacts associated with the particular circumstances being evaluated must be identified by a land use authority; and Fourth, conditions must be proposed to mitigate those detrimental impacts. The use may be denied only if the proposed conditions cannot substantially mitigate the detrimental impacts.⁵⁰

A. Standards for Conditional Use Evaluation

In § 15-2.1-6, the City adopted some standards to govern evaluation of a Steep Slope CUP. “Development on Steep Slopes must be environmentally sensitive to hillside Areas, carefully planned to mitigate adverse effects on neighboring land and Improvements, and consistent with the Historic District Design Guidelines.” PARK CITY MUNICIPAL CODE, § 15-2.1-6. The section covers nine specific criteria: Location of Development, Visual Analysis, Access, Terracing, Building Location, Building Form and Scale, Setbacks, Dwelling Volume, and Building Height. *See id.*, § 15-2.1-6(B).

The Utah Code does not define “applicable standards,” nor does it explain the nature or extent expected for such standards that would be acceptable for conditional use analysis. Several years

⁴⁹ UTAH CODE ANN. §§ 10-9a-101 to -803 (applicable to municipalities); *see also id.*, §§ 17-27a-101 to -803 (applicable to counties). This Opinion will cite to the provisions in Title 10, because they apply to Park City.

⁵⁰ As has already been discussed, Park City has designated that a substantial structure located on a steep slope is a conditional use, thus fulfilling the first step.

ago, however, the Utah Supreme Court deferred decisions on standards to a local jurisdiction's judgment:

While it is true that a zoning ordinance must set some ascertainable boundaries on the exercise of discretion by a zoning authority, such boundaries are not required to be unduly rigid or detailed. A generalized exposition of overall standards or policy goals suffices to direct the inquiry and deliberation of the zoning authority, and to permit appellate review of its decision.

Thurston v. Cache County, 626 P.2d 440, 443-44 (Utah 1981). Thus, even though the standards listed in § 15-2.1-6 basically consist of fairly broad policy statements, they are nevertheless sufficient for conditional use analysis. The Planning Commission's discretion, however, is limited to these standards.

For example, § 15-2.1-6(B)(7) establishes standards to evaluate the setbacks of a structure subject to a Steep Slope CUP. The Planning Commission may vary setbacks only to "minimize the creation of a 'wall effect' along the Street front and/or the Rear Lot Line." PARK CITY MUNICIPAL CODE, § 15-2.1-6(B)(7). Unless it is shown by substantial evidence that there is "wall effect" on the front or rear of the lot, the Planning Commission may not consider a variation in setbacks, and it may not deny the Steep Slope CUP on the basis that there is some other "detrimental impact" associated with setbacks.

Moreover, the Steep Slope CUP, like any conditional use, is not to be evaluated in a vacuum, but as part of an overall zoning scheme. The Steep Slope CUP ordinance not only requires evaluation according to the standards listed, but also requires consideration "consistent with the Historic District Design Guidelines." Therefore, the CUP must also take into consideration the requirements and guidelines of the Historic District Zone. The design guidelines, allowed uses, and vested rights established as part of a zoning ordinance must factor into a conditional use evaluation.⁵¹ Otherwise, a conditional use regulation becomes "spot zoning" on individual parcels, rather than an aspect of a community's comprehensive zoning regulation.⁵²

⁵¹ This approach to conditional uses helps resolve the dichotomy between individual property rights and a community's legitimate interest in promoting the public welfare. Uses are designated as conditional because of unique aspects (including location) that warrant a more careful evaluation than that provided by generally applicable zoning regulations. If a locality makes a use conditional, the property owner has the right to carry out that use, by complying with the reasonable conditions meant to mitigate detrimental impacts. The owner may also rely on the design and use standards adopted in a zoning ordinance, and also on approvals previously granted. Conditional use evaluation does not negate other aspects of a zoning ordinance, but is an individualized consideration of an allowed use, consistent with the terms of a community's overall zoning scheme.

⁵² "[S]pot zoning occurs when a municipality either grants a special privilege or imposes a restriction on a particular small property that is not otherwise granted or imposed on surrounding properties in the larger area. *Tolman v. Logan City*, 2007 UT App 260, ¶ 15, 167 P.3d 489, 495. This does not mean that a local government may never identify a use as conditional, only that the conditional use permit must recognize the overall zoning regulation for the area. Conditional use evaluation is not an excuse to fashion a completely new zoning scheme applicable to a single property.

Thus, although the City Code requires conditional use evaluation for a structure located on a steep slope, that evaluation does not stand alone, and is not an excuse to ignore other zoning provisions. Instead, the Steep Slope CUP constitutes an individualized evaluation of the impacts made by a structure on a steep slope. That evaluation must consider the overall zoning scheme for the area, and must recognize the zoning and design standards as well as approvals previously granted by the City.

Finally, conditional use analysis must include consideration of the specific setting and circumstances of the proposed use. The possible impacts and potential conditions are inextricably tied to the location of the proposed use, and a determination of impacts and conditions must be specific to the unique aspects of the location.⁵³ Generalized statements about the use will not suffice. In the Jorgensen's situation, the lot has a very unusual configuration and a steep slope, which limits its usable area. Any design evaluation affecting 30 Sampson, including consideration of a conditional use permit, must take into account the specific needs and limitations of that parcel and the circumstances of the surrounding area as well as the provisions of the HRL zone.

B. Identifying Detrimental Impacts

In order to grant or deny a conditional use permit, and impose conditions on the use, a local government must identify the reasonably anticipated detrimental impacts associated with that specific use. This follows from the language of the Utah Code, which provides that a conditional use may be approved with conditions to mitigate the detrimental impacts, but denied only if the impacts cannot be mitigated by reasonable conditions.⁵⁴ In order to determine what conditions may be imposed—and whether they will be effective—the use's detrimental impacts must first be identified.

In order to justify additional conditions, the use's impacts must not only be identified, but shown to be potentially detrimental to the municipality, neighboring properties, or nearby land uses. The Steep Slope CUP ordinance focuses on two distinct areas: Protection of hillside environments, and mitigation of "adverse effects on neighboring land and improvements." *Id.*, § 15-2.1-6. This implies that before conditions may be imposed, it must be shown that a structure on a steep slope would have negative effects on nearby properties or to the hillside's environment. It is not necessary that actual injury be shown, but the detrimental impacts must nevertheless be connected to some distinct adverse effect on the use and enjoyment of nearby properties or an effect on an environmental concern. In other words, there must be a "nexus," or a link between

⁵³ See UTAH CODE ANN. § 10-9a-103(5) (A use may be designated conditional because of its potential impacts on neighboring properties or land uses).

⁵⁴ *Id.*, § 10-9a-507(2) and (3).

the use and a potential negative effect. No detrimental impacts may be established without substantial evidence of a connection to a negative effect.

The reasonably anticipated detrimental impacts must be identified specifically for each particular use in each particular location. It is not sufficient to cite general conclusions about the use.⁵⁵ Detrimental impacts, like all aspects of a conditional use, must be established by substantial evidence.⁵⁶ Since the municipality is claiming the need for additional conditions to mitigate a use's detrimental impacts, the municipality has the burden of identifying the specific detrimental impacts.

The Planning Commission's Findings of Fact and Conclusions of Law repeatedly state that the Jorgensen's home has "impacts that cannot be substantially mitigated." However, there is little discussion showing what detrimental impacts were considered, or how they were established. The Commission worked through seven of the nine subsections in the Steep Slope CUP ordinance, finding that the Jorgensen home has impacts that cannot be mitigated.⁵⁷

a. Subsection (1): Location of Development.

In Findings of Fact Number 31, the Commission found that the Jorgensen home "has impacts that cannot be substantially mitigated with respect to LMC § 15-2.1-6(B)(1) 'Location of Development . . .'"⁵⁸ The Commission noted that the proposed buildings "climb up the hill" and "utilize[] virtually the entire lot."⁵⁹ The buildings "are not located on the lot in a manner that reduces the visual impact." These are generalized objections to the proposal, but the Finding does not show that the proposed buildings cause or may cause adverse effects on neighboring properties, or the hillside environment. In short, the Planning Commission did not establish that the location of the Jorgensen home would be

⁵⁵ Uses are designated as conditional because of potential impacts on the municipality, neighboring properties or neighboring land uses. Therefore, it must be shown that each specific use has impacts that detrimentally affect the municipality, neighboring property owners, or nearby land uses. Any reliable and relevant information about a use may serve as evidence of the use's impact; but, that information must be considered along with the specific situation being evaluated, and the impacts determined individually for the each use. Generalized information is not by itself sufficient justification to determine detrimental impacts.

⁵⁶ "A municipality's land use decision concerning the granting or denial of a conditional use permit is arbitrary and capricious only if it is not supported by substantial evidence." *Wadsworth v. West Jordan City*, 2000 UT App 49, ¶ 9, 999 P.2d 1240, 1242 (citations and alterations omitted). Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Bradley*, 2003 UT 16, ¶ 15, 70 P.3d at 52 (citation omitted).

⁵⁷ The Planning Commission's analysis does not address subsections (3), "Access" or (4) "Terracing." Evidently, there were no significant issues stemming from those aspects.

⁵⁸ "LMC" means the "Land Management Code," part of the Park City Municipal Code. The standard guiding criterion (1) of the Steep Slope CUP ordinance states that "[d]evelopment is located and designed to reduce visual and environmental impacts of the Structure." PARK CITY MUNICIPAL CODE, § 15-2.1-6(B)(1).

⁵⁹ As has been discussed, the proposed buildings are situated within the building pad (or setbacks) approved by the City. Since a property owner is entitled to use as much of an approved building pad as desired, the amount of the buildable area taken up by a building footprint is, by itself, not a detrimental impact.

associated with any detrimental impacts. It also did not include the design guidelines of the Historic District in its analysis.

b. Subsection (2): Visual Analysis.

The Planning Commission next found that the proposed home “has impacts that cannot be substantially mitigated” based on the language of § 15-2.1.6(B)(2) “Visual Analysis.” See Findings of Fact, Finding Number 32. The Commission determined that the proposal did not include “screening, vegetation protection, or other design opportunities” that could have mitigated visual issues. However, the Commission’s finding does not demonstrate any detrimental impacts on nearby properties or the hillside environment resulting from the proposed home. Instead, it concludes that the proposal does not include conditions to mitigate the unspecified impacts.

The subsection actually requires the applicant to provide a visual analysis, to identify potential impacts and the “potential for Screening, Slope stabilization, erosion mitigation, vegetation protection, and other design opportunities” PARK CITY MUNICIPAL CODE, § 15-2.1-6(B)(2)(b). The language of the subsection thus calls for information needed to properly address these specific factors, and does not provide a standard guiding the type of conditions that could be imposed.⁶⁰

c. Subsection (5): Building Location.

Turning to subsection (5), “Building Location,” the Commission again found that the home has impacts that could not be mitigated, without identifying the specific adverse effects associated with the proposal.⁶¹ Subsection (5) calls for coordination with adjoining properties to “maximize opportunities for open Areas and the preservation of natural vegetation, to minimize driveway and Parking Areas, and to provide variation of the Front Yard.” *Id.*, § 15-2.1-6(B)(5). The Commission cited this language, and concluded that impacts could not be mitigated. However, there was no analysis showing how much open space would be desired, the amount of vegetation that ought to be preserved, or the acceptable size of parking areas; nor was there a showing of a negative effect on adjacent properties associated with those factors.⁶²

⁶⁰ The Utah Code requires that conditional uses be analyzed according to standards. See UTAH CODE ANN. § 10-9a-507. Subsection (2) requires analysis of a few visual aspects, but “determining impacts” and “identifying potential conditions” are basically what constitutes conditional use evaluation, so that language cannot be considered as suitably directing the inquiry and deliberation of the Planning Commission. See *Thurston v. Cache County*, 626 P.2d 440, 443-44 (Utah 1981).

⁶¹ Findings of Fact, Finding No. 33.

⁶² Like the Visual Analysis required by Subsection (2), the language of Subsection (5) requires “coordination” with adjacent properties, but does not provide standards to direct the Planning Commission’s decision-making.

d. Subsection (6): Building Form and Scale.

Subsection (6) focuses on the form and scale of the building, and encourages low-profile buildings and smaller components rather than a single building. Again, the Planning Commission cited the language of Subsection (6), and concluded that unidentified impacts could not be mitigated. The language of the subsection suggests possible actions (low-profile homes or small components) that could be taken when a proposed building is "orient[ed] against the Lot's existing contours," but these are the potential conditions, not the impacts which would justify denying the Steep Slope CUP.⁶³

In addition, the City's planning staff concluded that the home and garage are oriented with existing contours, and that significant portions of both buildings are below ground, reducing the profile of the buildings.⁶⁴ Although the Planning Commission is not required to adopt the recommendations of the City Staff, it must accept the staff's factual representations and interpretations of the proposed building. If the staff determines that the home and garage are oriented to the existing slope, the Planning Commission must abide by that conclusion. If the buildings are oriented with existing slopes, then the Commission cannot find that there are detrimental impacts stemming from the form and scale of the buildings.

e. Subsection (7): Setbacks

According to the City code, the setbacks for a structure subject to a Steep Slope CUP may be increased, to minimize a "wall effect" along a street front or the rear of a lot. *Id.*, § 15-2.1-6(B)(7). If there is no wall effect created by a structure, no increase in the setbacks may be required. In its analysis, the City's staff concluded that there are no "wall effects" on either the front or rear yards. The staff's conclusions are supported by the drawings and plans included in the materials submitted for this Opinion. The garage/elevator building is set back several feet from the street, and the home is situated several feet from the rear property line.

Nevertheless, the Planning Commission found that the Jorgensen's home had impacts that could not be mitigated which related to the building's setbacks. The Commission's findings ignore any perceived "wall effect" and are based on the amount of the building

⁶³ This is also an example of how the specific conditions and limitations of the property should be included in the analysis. Given the limited amount of usable space on 30 Sampson, it is unclear how breaking the buildings into smaller components could feasibly make a difference in the overall impact of the development.

⁶⁴ The Staff's analysis stated that "[t]he top floor of the home walks out to the existing grade of the top of the lot, and the main floor walks out to the existing downhill side of the lot." In addition, approximately 1/3 of the home is below ground, which lowers the profile of the building.

pad occupied by the two structures.⁶⁵ The Planning Commission exceeded its authority with regards to Subsection (7). Setbacks may be increased only to mitigate a “wall effect,” not because the Commission feels that too much of an approved building pad is being used.

Furthermore, the Commission exceeded its discretion by misapplying a portion of Subsection (7). If an increase in setbacks is proposed, “[t]he Setback variation will be a function of the Site constraints, proposed Building scale, and Setbacks on adjacent Structures.” *Id.* This language limits discretion over setback changes, but the Planning Commission turned that language on its head, making it the basis for a finding that the home has impacts that cannot be mitigated. *See Findings of Fact, Finding Number 36.*⁶⁶ This distortion of the ordinance’s language cannot reasonably support the Planning Commission’s findings regarding setbacks.

f. Subsection (8): Dwelling Volume.

Subsection (8) focuses on the volume of a structure subject to a Steep Slope CUP. The volume or mass of a structure may be reduced “to minimize its visual mass and/or mitigate differences in scale between a proposed Structure and existing Structures.” The Planning Commission found that the basement “add[ed] significant volume to the building . . .” *Findings of Fact, Finding Number 37.* There was no discussion of why the basement level constituted a detrimental impact, or how it negatively affected nearby properties.

The Commission further concluded that the Jorgensen’s home was “not compatible with existing historic homes in the neighborhood with respect to height, setbacks, mass, or scale, and the proposed home and garage buildings offer no substantial mitigation measures necessary to show compatibility with the nearby existing structure.” *Id.*, *Finding Number 38.* Although there is a reference to nearby homes, there is again no finding that the volume of the two buildings constituted a potential adverse effect on those properties.

It not sufficient to point out that a proposed structure is larger than nearby buildings. As long as a structure fits within the size limitations of the City’s ordinances, it should be allowed, even if it is significantly larger than nearby buildings. Subsection (8) authorizes the Planning Commission to reduce a structure’s volume. That authority, however, may only be exercised as a condition to mitigate a detrimental impact. Unless it is shown that

⁶⁵ As has been discussed, the building pad is defined by the setbacks approved for the lot. The buildings may be located within that building pad, and the City does not regulate how much of the building pad may be occupied.

⁶⁶ As with the other criteria, the Planning Commission did not identify a specific detrimental impact related to the setbacks for 30 Sampson.

a building's volume is linked to an adverse effect on a nearby property, the Planning Commission may not order a reduction, nor may it simply deny the conditional use permit.⁶⁷

To conclude, the Planning Commission failed to identify any detrimental impacts caused by the Jorgensen home, and so its findings and conclusions are missing a critical analytical component.⁶⁸ The Commission's blanket statements that the home has "impacts that cannot be substantially mitigated" are not supportable without identifying the adverse impacts on neighboring properties (or the hillside environment) attributed to the home. The detrimental impacts must be ascertained and defined in order to decide what conditions could be imposed, as well as find that the proposed conditions cannot substantially mitigate the impacts. It is also insufficient to state generalized impacts associated with a building or use. The impacts must be directly attributable to the particular building or use being scrutinized, and must be based on distinct adverse effects on nearby properties or the hillside environment. Once the specific impacts are identified, the analysis turns to conditions to mitigate those impacts.

IV. Before a Conditional Use Permit May be Denied, Conditions to Mitigate Detrimental Impacts Must be Considered.

After the detrimental impacts associated with a specific use have been identified, the next step is selection and evaluation of conditions to mitigate the impacts. A conditional use permit may be denied only if it is shown, by substantial evidence, that the impacts *cannot* be substantially mitigated by reasonable conditions.⁶⁹ The conditions, therefore, must directly address adverse effects attributed to the use. A land use authority may not impose conditions which are not associated with a use, even if the conditions would be beneficial to the neighborhood.

The Park City Planning Commission denied the Steep Slope CUP for the Jorgensen property without considering any conditions, and without determining by substantial evidence that reasonable conditions could not mitigate detrimental impacts associated with the use. The Commission's analysis is therefore incomplete. It cannot justify denying the CUP without considering conditions to mitigate detrimental impacts. The City argues that it is not obligated to propose conditions, but that the Jorgensens have that responsibility. The Jorgensens counter that the City has the responsibility to propose conditions before the CUP may be denied.

⁶⁷ The Commission's consideration of the ninth criterion, "Building Height" was discussed above, in Section I.C.2, *supra*.

⁶⁸ This does not mean that the Planning Commission has no authority to deny the Steep Slope CUP. If conditional use analysis is needed for the Jorgensen home or the garage/elevator building (see Section II, *supra*), then denial remains within the Commission's authority. As long as it shows, with substantial evidence, that the detrimental impacts associated with the buildings cannot be mitigated with reasonable conditions, the CUP may be denied.

⁶⁹ UTAH CODE ANN. § 10-9a-507(2)(b). "Substantially mitigated" does not mean "completely eliminated." If the adverse effects of a particular use can be reduced in an appreciable manner through reasonable conditions, then the CUP should be approved. The land use authority may also determine that an impact has been sufficiently mitigated, even if neighboring property owners complain about the use.

In reality, both parties have a responsibility to propose conditions that would mitigate the impacts of the use, although it starts with the City. The City correctly notes that it is not obligated to redesign the Jorgensen's home, and the Jorgensen's are also correct that they should not be required to "guess" the type of conditions desired and be asked to submit repetitive plan changes. Evaluation of a conditional use permit, like consideration of most land use applications, is a process involving input from the property owner, a local planning staff, and the land use authority.⁷⁰ As an application is reviewed by staff members, evidence of concerns may be received and addressed, and conditions incorporated into the design before a land use authority considers the application. At a public hearing on the application, if one is held, concerned neighbors and the land use authority itself may provide evidence to identify potential impacts, and may suggest possible conditions. The land use authority bears the responsibility to identify the detrimental impacts, and also should provide guidance on how the impacts may be mitigated. The process reaches a conclusion, of course, when the land use authority approves the conditional use permit with reasonable conditions, or denies it, after finding that the impacts cannot be substantially mitigated.

Because the Park City Planning Commission did not propose or consider any specific condition, this Opinion cannot evaluate that aspect of the conditional use process. By failing to consider conditions, however, the Planning Commission's analysis was incomplete and its denial not supported by substantial evidence. At the very least, the Commission should have indicated how the detrimental impacts could have been mitigated (assuming that detrimental impacts were identified), or suggested conditions to the Jorgensens.

Conclusion

Conditional uses are valuable components of a community's planning and zoning regulation. Some uses require extra scrutiny because of unique characteristics or impacts, including impacts directly associated with a use's location. A local government may choose to more closely evaluate a use before it is approved, in order to address possible detrimental impacts to a community or to neighboring properties.

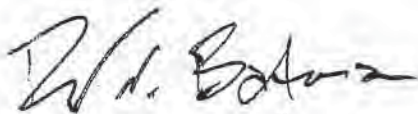
Conditional uses are part of a community's zoning scheme, and must be administered as part of an overall zoning ordinance, not as an exception to it. When considering conditional use applications, local governments should include the design and use standards of the zoning ordinance, plus any approvals previously granted on the property. A local government has some discretion over conditional uses, but that discretion must be limited to the authority granted by the state code and a local ordinance. All determinations associated with a conditional use evaluation must be supported by substantial evidence

⁷⁰ In many locations, conditional use permits are considered by a planning commission. However, other bodies may be designated as the "land use authority," which is the term used in the Utah Code. See UTAH CODE ANN. § 10-9a-103(23).

In order to properly evaluate a conditional use application, the detrimental impacts attributed to that use must be identified. The impacts must derive from the specific use being evaluated. It is not necessary to show an actual injury to a neighboring property, but only the reasonable likelihood that the use will have some adverse effect. Generalized conclusions about the use, without consideration of the particular circumstances will not suffice to show detrimental impacts.

Once the impacts are identified, conditions can be proposed to mitigate the adverse effects. The evaluation is not complete unless reasonable conditions have been considered. Conditions must be directly tied to mitigating detrimental impacts, and may not be imposed as a means to accomplish other objectives. Because conditional use evaluations are processes rather than single actions, the responsibility to propose reasonable conditions is shared with the property owners, planning staff, and the land use authority. At any point in the evaluation process, conditions may be proposed by any party and incorporated into the plans for the conditional use if supported by substantial evidence.

Ultimately, the land use authority has the final decision on whether to grant the use. If the land use authority identifies specific detrimental impacts associated with the use, it must consider conditions to mitigate those impacts. The application may be denied only if the detrimental impacts associated with the use cannot be substantially mitigated by reasonable conditions. A decision to deny the conditional use application requires consideration of conditions, and must be supported by substantial evidence.



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Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Marci Heil
City Recorder
Park City
445 Marsac Avenue
Park City, Utah 84060

On this 28 Day of March, 2014, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.



Office of the Property Rights Ombudsman

Exhibit A

Findings of Fact and Conclusions of Law

**Park City Planning Commission
June 26, 2013**

SEE ATTACHED AS EXHIBIT E