
BEFORE THE WASHINGTON CITY COUNCIL, IN ITS CAPACITY AS
CONDITIONAL USE PERMIT APPEALS AUTHORITY, WASHINGTON CITY, UTAH

In the matter of:

APPEAL OF THE DENIAL OF REQUEST
FOR A CONDITIONAL USE PERMIT FOR
AN INDOOR SHOOTING RANGE
BUSINESS AT 400 WEST TELEGRAPH
STREET, WASHINGTON CITY

By: Dixie Gunworx LLC and Chris Michel and
Jacob Cooper, APPELLANT

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION RE: APPEAL
OF CONDITIONAL USE PERMIT
DENIAL**

Conditional Use Permit Number C-13-10

Before the Washington City Council
In Its Capacity as the Washington City
Conditional Use Permit Appeals Authority

INTRODUCTION

This matter came before the Washington City Council (“City Council”), in its capacity as the Washington City Appeals Authority for conditional use permit decisions, pursuant to an appeal (the “CUP Appeal”) by Dixie Gunworx LLC/Chris Michel and Jacob Cooper (“Appellant” or “Applicant”) of the denial by the Washington City Planning Commission (“Planning Commission”) of Appellant’s application for a conditional use permit for an indoor shooting range business (the “CUP Request”) at 400 West Telegraph Street, Washington City, Utah, (the “CUP Location”). On July 3, 2013, the Planning Commission denied Appellant’s CUP Request by a 3-2 vote (“CUP Denial”) following a public hearing and discussion by the Planning Commission (“CUP Hearing”). Appellant timely filed an appeal of the Planning Commission’s denial of its CUP Request.

This Appeal came before the City Council at a Special City Council public meeting on July 23, 2013 (“Appeal Meeting”). The City Council was present and consisted of the current City Councilmembers (*alphabetically*, Bill Hudson, Thad Seegmiller, Kress Staheli, Ronald Truman and Jeff Turek) and Mayor (Kenneth Neilson). Prior to and at the Appeal Meeting, the City Council was

provided with the draft minutes from the CUP Hearing. In addition to the draft minutes, City Council was provided with the City Staff's written review and recommendations to the Planning Commission regarding the CUP Request ("Staff's CUP Recommendation"), documents provided to the Planning Commission for the CUP Hearing pertaining to Applicant's business and CUP Request ("Applicant's CUP Request Documents"), and Applicant's written Appeal of the CUP Denial. A copy of the foregoing documents is attached hereto as "Attachment A (To Appeal Decision)". Additionally, the City Council always has the Washington City Zoning Ordinance and complete City Code available.

At the Appeal Meeting, the City Council explained the procedural process to be undertaken at the Appeal Hearing; reviewed the documents found in Attachment A (To Appeal Decision); requested and received clarification from City Staff, Applicant, and representatives of the Erin Kimball Foundation (among others) pertaining to information presented/provided at the CUP Hearing (including comments and/or information reflected in the CUP Hearing draft minutes, Staff's CUP Recommendation, and/or the CUP Request Documents); discussed the CUP Appeal generally; and finally convened to a closed session to deliberate and consider their decision pursuant to the City's conditional use appeal ordinance and based on the evidence before them that was relevant and credible to the CUP Request and Appeal.¹

Out of respect to the interest shown by the public, and because this may be the first instance in which the City Council is acting in its capacity as the Washington City Appeal Authority for an appeal of a conditional use permit decision by the Planning Commission (in accordance with Chapter 17 of the Washington City Zoning Ordinance, entitled "Conditional Uses"), the City Council explained the conditional use permit appeal procedure at the beginning of the Appeal

¹ See Land Use Training Handbook for Effective Land Use and Decision Making, pg. 59, prepared and published by Utah League of Cities and Towns and Utah Local Governments Trust, May 2012.

Meeting, and finds it beneficial to include a description of that procedure in this Decision, as well as the standard of review for such appeals procedure.

PROCEDURE

Pursuant to Utah Code Ann. § 10-9a-701, “[e]ach municipality . . . [must] establish one or more appeal authorities to hear and decide: . . . (b) appeals from decisions applying the land use ordinance.” The Utah law goes on to direct each designated appeal authority within a municipality to “act in a *quasi-judicial manner*, and serve as the final arbiter of issues involving the interpretation or application of land use ordinances.”² (*Italics not in original text*).

As part of the Washington City Zoning Ordinance (or “land use ordinance” in Utah State statutory vernacular), conditional use permit applications are determined by the Planning Commission as the City’s designated land use authority for such applications.³ Section 9-17-6 of the Washington City Zoning Ordinance, adopted in 2008, sets forth the instructions for appealing a conditional use application decision by the Planning Commission, designates the City Council as the appeals authority for such decisions, and establishes the process by which the City Council undertakes its responsibility as the City’s appeal authority for such appeals:

9-17-6: APPEAL OF DECISION:

Any person shall have the right to appeal to the city council any decision rendered by the planning commission in relation to conditional use permit decisions. Appeals to the city council are made by submitting an application to appear before the city council to the community development department and stating the reason for the appeal, within ten (10) working days following the date upon which the decision was made by the planning commission. After receiving said appeal, a meeting with the city council shall be scheduled within twenty (20) working days, and the city council may affirm, reverse or alter any action taken by the planning commission, based on their review of the planning commission's decision and the application of the standards listed in section 9-17-5 of this chapter.

(Ord. 2008-29, 8-13-2008)

² Utah Code Ann. § 10-9a-701(3)(a)(i) & (ii). Hopefully, this answers questions which may have arisen at the Appeal Hearing regarding the source of the use of the term “quasi-judicial” when referring to the City Council’s role as the appeals authority for City conditional use permit appeals.

³ Washington City Zoning Ordinance, Chapter 17 “Conditional Uses.”

Despite how often the distinction is written about, explained and discussed, there continues to be confusion—or at least frustration—when it comes to understanding the legal and practical distinctions between municipal “public meetings” and “public hearings.”⁴ Cities and towns in Utah are required to hold public hearings on some matters involving land use control policies and ordinances, such as a general plan adoption/amendment, annexation declarations, zone changes, and subdivision ordinances. Specific timing, manner and location notices for public hearings vary, depending on state statute (or local ordinance, if more specific or more rigorous than state law).⁵ Although not required by Utah law, Washington City has long held “public hearings” for CUP applications. City Code requires that written notices of applications for conditional use permits be “mailed to all property owners appearing on the latest ownership plats in the county recorder’s office within a three hundred foot (300’) radius of any property for which actions of the planning commission are being requested” (§ 9-17-3, Washington City Zoning Ordinance), and CUP applications are regularly listed on the Planning Commission agendas as “public hearings.”

Prior to the July 3, 2013 Planning Commission meeting, the requisite notices were mailed out, and the CUP application was listed as a public hearing on the agenda. Therefore, pursuant to Chapter 17 of the Washington City Zoning Ordinance, as part of its responsibility in rendering a decision on Applicant’s CUP Request, the Planning Commission was given the responsibility to not only consider Staff’s CUP Recommendation and Applicant’s CUP Request Documents, but also to

⁴ A well-recognized municipal law attorney and long-time legal counsel to the Utah League of Cities and Towns puts it this way:

“There is a difference between a public meeting and a public hearing. All public hearings are public meetings but not all public meetings are public hearings. In general a public meeting is one in which the public is invited to come and watch [city councils] deliberate on and decide matters. There is no right for any individual member of the public to actively participate in the meeting ... In a public hearing the public has the right to participate by giving information or testimony about the topic of the hearing.”

Church, David, “*Public Hearings*” article, as included in Land Use Training Handbook for Effective Land Use and Decision Making, pg. 22, prepared and published by Utah League of Cities and Towns and Utah Local Governments Trust, May 2012.

⁵ Examples of Utah State law pertaining to, and mandating, municipal public hearings include Utah Code Ann. §§ 10-2-401.5(2), 407(3)(b)(ii), 419(2), 502.5; § 10-3-818; § 10-5-108; § 10-6-113; and §§ 10-9a-204, 205.

listen to and evaluate testimony, comments, evidence, and other information from the Applicant and members of the public as part of a public hearing. From that information, the Planning Commission was to render a decision approving the CUP, denying the CUP, or approving the CUP with appropriate conditions required by law or as deemed necessary for the “protection of adjacent properties and the public health, safety, welfare and aesthetics of the city.” (§ 9-17-5, Washington City Zoning Ordinance.) As required, during the July 3, 2013 CUP Hearing, the Planning Commission opened the public hearing and entertained multiple comments, evidence, and testimony from the Applicant and from many members of the audience, including those both in favor of and against the CUP proposal. The Planning Commission then deliberated and made its decision.

To further clarify the Planning Commission’s legal duty, the Utah Legislature, pursuant to Utah Code Ann. § 10-9a-507, has mandated the following laws, which must be complied with for all conditional use applications:

Utah State Code, § 10-9a-507. Conditional uses.

...

(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.

(Amended by Chapter 245, 2005 General Session; italics not in original.)

In other words, by Utah law, conditional use permit applications for uses of property located within municipal zones for which such use qualifies as a “conditional use” are entitled to approval, unless “*reasonable conditions [cannot be] proposed, or ... imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.*” (Utah Code Ann. § 10-9a-507(2)(a).)

Pursuant to Utah law, once the land use authority/planning commission has rendered its decision and an appeal of that decision is made, the city’s/town’s designated appeal authority (for

conditional use permits, Washington City Council) must proceed according to local ordinance to set a meeting for the appeal, conduct the appeal meeting (a public hearing is not required by Utah law and is not provided for by City ordinance--nor would it be appropriate, as further explained below), consider the appeal and the appropriate standard of review as prescribed by local ordinance, and, finally, to deliberate in its capacity as a quasi-judicial body and render a decision. (Utah Code Ann. § 10-9a-707.)⁶

In its capacity as the conditional use permit appeal authority, the City Council must comply with Utah Code Ann. § 10-9a-707 by following the plain language of the process described in the appeal provision(s) of its own conditional use permit ordinance, § 9-17-6: APPEAL OF DECISION (*as quoted above*). The critical language of § 9-17-6 directs the City Council's actions in processing the CUP Appeal: "... a *meeting with the city council shall be scheduled* within twenty (20) working days, [following which] the *city council may affirm, reverse or alter any action taken by the planning commission, based on their review of the planning commission's decision and the application of the standards listed in section 9-17-5 ...*" (Emphasis added.) Here, after receiving the CUP Appeal, the City Council set a meeting at which time the City Council reviewed all the relevant information from which the Planning Commission had made its decision and used its best efforts to solicit information from individuals *in order to clarify for the City Council as a body (or as*

⁶ See, generally, Utah Code Ann. § 10-9a-707. Standard of review for appeals.

(1) A municipality may, by ordinance, designate the standard of review for appeals of land use authority decisions.

(2) If the municipality fails to designate a standard of review of factual matters, the appeal authority shall review the matter de novo.

(3) The appeal authority shall determine the correctness of a decision of the land use authority in its interpretation and application of a land use ordinance.

(4) Only those decisions in which a land use authority has applied a land use ordinance to a particular application, person, or parcel may be appealed to an appeal authority.

(Enacted by Chapter 254, 2005 General Session)

individual members of that body) any information, recommendations, documents or comments to assist them only in “their review of the planning commission’s decision and the application of the standards listed in section 9-17-5 ...” New or additional information, arguments, public comments, and the like were not taken by the City Council at the CUP Appeal Meeting because—simply stated—the procedure and standard of review required by the existing conditional use permit appeal ordinance did not provide, nor allow for it. Permitting testimony, presentations, or other evidence in this “meeting” beyond the limited requests for clarification could have/may have been inappropriate or, at the least, unfair to members of the public who chose not to attend the Appeal Meeting assuming the City Council would, indeed, comply with the City’s conditional use permit appeal ordinance.

Lastly, Utah appellate courts have clarified any confusion about the City Council’s review and weighing of the evidence presented to the Planning Commission at the CUP Hearing. The evidence (as presented to the Planning Commission at the CUP Hearing) shall be reviewed by the City Council—giving no weight or presumption to the Planning Commission’s findings—to decide whether the decision to deny Applicant’s CUP Request was arbitrary and capricious. And a determination of arbitrary and capricious shall be based upon the City Council’s whether there was substantial evidence in the record to support the decision to deny. (See Ralph L. Wadsworth Constr., Inc v. West Jordan City, 2000 UT App 49, 999 P.2d 1240; and locally see In the matter of WHEELER MACHINER CO.’s appeal to the Washington City Council, Ruling on Motion for Summary Judgment, Civil No. 020500091, entered August 12, 2002, Judge G. Rand Beacham, a copy of which is attached hereto, as “Attachment B (To Appeal Decision)”.)

Having considered all the applicable information it deemed relevant and necessary, including the information contained in Attachment A (To Appeal Decision), the applicable provisions of the Washington City Zoning Ordinance, and the clarifying information solicited and received at the

CUP Appeal Meeting, the City Council hereby makes the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

1. Appellant is the owner or lawful occupant of the property located at 400 West Telegraph Street, Washington City, Utah (the “CUP Location”).

2. On the Washington City Zoning Designation Map, the CUP Location is zoned as C-2, or service commercial, pursuant to the Washington City Zoning Ordinance. (Washington City Zoning Ordinance, § 9-10B-2.)

3. Applicant’s CUP Request was for a CUP permit to develop and operate an indoor shooting range business (“Indoor Shooting Range”) at the CUP Location.

4. At all times relevant to its CUP Request, Applicant had already received a Washington City business permit for, and was operating, a gun repair business at the CUP Location (the “Gun Repair Business”) as a “Permitted Use” in the C-2 zone.

5. The City’s Zoning Ordinance does not specifically identify Indoor Shooting Range as either a permitted or conditional use in the C-2 zone. (Washington City Zoning Ordinance, § 9-10B-2.)

6. Section 9-10B-2C of the Zoning Ordinance provides for other uses not specifically designated: “Other uses, not listed as permitted or conditional uses in other zones, that are determined by the planning commission to be compatible and in harmony with the intent of this zone, according to the designated and approved development plan.”

7. City Staff was of the opinion that the Indoor Shooting Range, as requested in Applicant’s CUP Request, and as otherwise provided in the Staff’s CUP Recommendation and verbal report to the Planning Commission at the CUP Hearing, was compatible and in harmony with the intent of the C-2 zone at the CUP Location. (This Finding is based on imposing those

conditions listed in the Staff's CUP Recommendation, which, among other things, mitigated the reasonably anticipated detrimental effects of the Indoor Shooting Range, and resulted in Staff's opinion that there was sufficient evidence supporting Subsections 9-17-5(C.) (3.) (a.), (b.), (c.) and (d.) of the Zoning Ordinance.)

8. The Erin Kimball Foundation was/is in the process of making improvements to an existing residential structure on adjacent property that is intended to provide shelter, protection and care for families (primarily mothers and children) fleeing domestic violence. (The "Erin Kimball Foundation Project".) (For clarity, those families/individuals for whom the Erin Kimball Foundation Project is intended shall be referred to herein as "Foundation Residents".)

9. The Erin Kimball Foundation Project is located on property that is on the same side of Telegraph Street as the CUP Location and borders the CUP Location directly to the West and within the same C-2 zone.

10. When completed, the Erin Kimball Foundation Project would have three (3) apartments and three (3) bedrooms, with approximately nine (9) to ten (10) Foundation Residents at any given time.

11. Statements from several people (including some directly associated with the Erin Kimball Foundation Project) at the CUP Hearing expressed concerns, objections, and opinions about the negative emotional health impact the Indoor Shooting Range could have on Foundation Residents based upon: (a) Foundation Residents potentially witnessing guns being carried to and from the entrance of the CUP Location ("Visual Detrimental Impact"); (b) Foundation Residents potentially hearing the discharge of ammunition from inside the CUP Location ("Sound Detrimental Impact"); and (c) Foundation Residents general knowledge that the CUP Location was being used as an Indoor Shooting Range ("Awareness Detrimental Impact").

12. The CUP Hearing record reflected that police organizations, hunter safety programs, self-defense courses, concealed weapon programs, scouting organizations, and the local community in general were in need of a local indoor shooting range.

13. The CUP Hearing record reflected no evidence (including no personal opinions) that the Indoor Shooting Range was not an appropriate use in a C-2 zone.

14. The CUP Hearing record reflected specific information (including documentation, comments and direct verbal testimony) that the Indoor Shooting Range physical facilities would include many design and improvements that would have significant noise abatement impact ("Noise Abatement Improvements") such that the sounds of gunfire may not even be detectable as close as twenty feet (20') from the Indoor Shooting Range.

15. The Noise Abatement Improvements as proposed by the Applicant (and as could be imposed as conditions by the City) would substantially mitigate the possible Sound Detrimental Impact on future Foundation Residents. (As required by Utah Code Ann. § 10-9a-507(2)(a) & (b).)

16. The CUP Hearing record reflected specific information (including documentation, comments and direct verbal testimony) that the Indoor Shooting Range physical facilities would include many design improvements that would address safety issues for protection of the public and those using the facilities from bullets.

17. The CUP Hearing record reflected specific information that the Indoor Shooting Range physical facilities would include on site security personnel and cameras as additional safety elements of the facilities.

18. The CUP Hearing record reflected no specific information that, following installation of the Noise Abatement Improvements, the sounds of gunfire would be heard by Future Foundation Residents at the Erin Kimball Project, or even from the public in general.

19. No local or state laws or private restrictions, prevent customers of the Gun Repair business at the CUP Location from openly carrying guns into and from the Gun Repair Business.

20. The CUP Hearing record reflected no specific information supporting the possibility that there would be any increase (material increase or otherwise) in the potential Visual Detrimental Impact or Awareness Detrimental Impact on Foundation Residents by operation of the Indoor Shooting Range business at the CUP Location over the current operation of the Gun Repair Business.

21. The CUP Hearing record reflected no evidence (testimony or otherwise) from experts or health care professionals of the mental health impact the proposed Indoor Shooting Range could have on individuals fleeing from domestic violence in general or specifically Foundation Residents, including Awareness Detrimental Impact, Sound Detrimental Impact or Visual Detrimental Impact.

22. There was no substantial evidence in the record supporting a finding that the CUP Location was not compatible with the C-2 zone and was not a compatible and harmonious fit with the existing Gun Repair business at the same location.

23. The CUP Hearing record reflected that the CUP Location was compatible with the C-2 zone and could, and does, support findings that the proposed Indoor Shooting Range use met each of the four criteria in Section 9-17-5(C.) (3.) (a., b., c. and d.) of the Washington City Zoning Ordinance. (This Finding of Fact incorporates the associated Findings of Fact that the comments and concerns regarding the possible Visual Detrimental Impact and Awareness Detrimental Impact would not be significantly increase, if at all, over current use of CUP Location; and that the comments and concerns regarding the possible Sound Detrimental Impacts on future Foundation Residents would be “substantially mitigated” as proposed by the Applicant (and as could be imposed as conditions by the City) and consistent with Utah law.))

24. If Applicant's CUP Request were approved, a condition could be placed upon the Indoor Shooting Range CUP requiring that a yearly written review confirming Applicant's compliance with the CUP would be required to be provided to the City by a professional/expert (acceptable to the City) regarding safety, operations and soundproofing of indoor shooting ranges. This "Annual Review Condition" could be required yearly as a condition to renewal/continuation of the Indoor Shooting Range CUP to assure the City that any conditions proposed by Applicant, or imposed by City, substantially mitigated any reasonably anticipated detrimental impacts. The cost of such Annual Review Condition could be placed on Applicant as part of the condition.

HAVING MADE THE PRECEDING FINDINGS OF FACT, the Washington City Council hereby makes the following Conclusions of Law:

CONCLUSIONS OF LAW

A. Applicant's CUP Location is located within a zone (C-2) for which Applicant's CUP Request (for an Indoor Shooting Range) is appropriate, because the CUP Hearing record reflects that, pursuant to § 9-10B-2C of the Washington City Zoning Ordinance, the Indoor Shooting Range was "compatible and in harmony with the intent of this zone, according to the designated and approved development plan."

B. Applicant's CUP Request complied with, and contained all information and fees required by, the City.

C. The CUP Hearing was appropriately noticed, scheduled and held.

D. Applicant was already lawfully engaged in, and had appropriately obtained a business license for, a Gun Repair Business at the CUP Location.

E. Because Applicant's CUP Request complied with local ordinance, Utah Code Ann. § 10-9a-507 required Applicant's CUP Request be approved unless reasonably anticipated detrimental

effects of the proposed use could not be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards.⁷

F. The Staff's CUP Recommendation provided conditions acceptable by the Applicant and the Planning Commission, except those addressed in the following Conclusions of Law, and sufficient to address any possible "reasonably anticipated detrimental impacts" that might have been associated with the CUP Request.

G. There was not substantial evidence to so support that the Visual Detrimental Impact, Sound Detrimental Impact or Awareness Detrimental Impact were reasonably detrimental impacts of the CUP Request and therefore did not provide a legal justification to deny the CUP Request.

H. Even if the Sound Detrimental Impact, which appeared to be the reason the Planning Commission denied the CUP Request, the Staff Recommendations for conditions along with those proposed by Applicant to mitigate (and significantly reduce or eliminate) the Sound Detrimental Impact, met Utah State Code, § 10-9a-507 "substantial mitigation" requirements and, therefore, could not be used as the basis for denial.

I. Imposition of the additional "Annual Review Condition" would add an additional layer of protection from any potential detrimental safety impacts or Sound Detrimental Impact and should be required.

⁷ **Utah State Code, § 10-9a-507. Conditional uses.**

...

(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.

(Amended by Chapter 245, 2005 General Session; italics not in original.)

DECISION

Applicant's CUP Appeal of the CUP Denial and request that the Applicant's CUP Request is approved Applicant's CUP Request is approved as follows:

All requirements and conditions as indicated and recommended by the Staff's Recommendation are imposed and shall act as conditions upon Applicant's CUP Request; and

The additional Annual Review Condition as provided in "Findings of Fact No. 24" hereof be added to the CUP Permit.

ISSUED ON THIS 2nd day of August, 2013.



WASHINGTON CITY COUNCIL


KENNETH F. NELSON, MAYOR

ATTEST:


DANICE B. BULLOCH, CITY RECORDER