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*Attorney for Mike Lewis*

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BEFORE THE SALT LAKE CITY APPEAL OFFICER

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MIKE LEWIS, : **APPEAL OF ADMINSTRATIVE DECISION**  
Appellant, : **EXCESSIVELY TALL GARAGE**  
v. : **BRIEF OF APPELLANT**  
SALT LAKE CITY CORPORATION : **PLNAPP2017-00532**  
and STACI WHITE :

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**INTRODUCTION**

Mike Lewis owns a home at 965 South Fairview Avenue and is appealing the issuance of a building permit by Salt Lake City Corporation (“City”) for an excessively tall garage at 961 South Fairview Avenue. The City incorrectly issued the building permit based on a clearly erroneous interpretation of City Code 21A.34.120(E), which limits the height of an accessory structure in the Yalecrest Overlay to fifteen feet. Despite the plain language of the ordinance the City incorrectly interpreted “fifteen feet” to mean “twenty-one feet” allowing Ms. White to measure the height from grade to the midpoint of the roof rather than from grade to the top of the roof. This is an incorrect interpretation of the ordinance because: (1) the ordinance is clear on its face; and (2) the City’s interpretation renders meaningless at least three other sections of the City’s zoning code.

**FACTS**

1. The garage being built at 961 S. Fairview Avenue is approximately 672 square feet on each floor, for a total of over 1300 square feet of usable space. The garage is over 21 feet tall and has a bathroom with a shower. See attached final plans for garage, Exhibit A.
2. 961 S. Fairview Avenue is located in the R1-5000 zone and the Yalecrest Compatible Infill Overlay Zone (“Yalecrest Overlay”).
3. In the R1-5000 zone, “the height of accessory buildings with pitched roofs shall not exceed seventeen feet (17’) measured as the vertical distance between the top of the roof and the established grade at any given point of building coverage.” City Code 21A.40.050(C)(2).

4. However, in the Yalecrest Overlay, the “Maximum Height for Accessory Structures with a Pitched Roof: Fifteen Feet (15’).” City Code 21A.34.120(E).
5. “Height” is defined in City Code as: “height, building – in the FR, FP, R-1, R-2 and SR Districts” as “the vertical distance between the top of the roof and established grade at any given point of building coverage.” City Code 21A.62.040.
6. On February 22, 2017, Staci White, the owner of 961 S. Fairview Avenue, applied to the City for an excessive height exception to build the garage. See attached excessive height application, Exhibit B.
7. Ms. White’s application included plans for a garage that was twenty-one feet tall, with a 672-square foot second story, dormer windows on two sides, and a full bathroom with shower on the main floor. *Id.*
8. Mr. Lewis protested the excessive height application on the basis that a two story, twenty-one-foot-tall garage with over 672 feet of livable space on the second floor is not compatible with the neighborhood. See attached email from Mike Lewis to City Planner John Anderson, Exhibit C and C2.
9. The City denied the excessive height application noting that “staff visited the site and found that the additional height would not be compatible with other accessory structures in the neighborhood as there were no existing over height structures.” See attached Findings and Orders, Exhibit D.
10. The City approved Ms. White’s application for a hobby shop under City Code 21A.52.030(A)(14). *Id.*
11. However, the City’s Findings and Orders specifically stated that the hobby shop must comply with all City ordinances which would include, presumably, height, size, massing and square footage requirements. *Id.*
12. The City also informed Mr. Lewis that “we have not approved the request for an over height structure at 961 S. Fairview Avenue. We have approved the use of the ground floor of the structure as a hobby shop. The applicant has decided that she will redesign the structure to meet the maximum height standard.” See attached email from Planner John Anderson to Mike Lewis, Exhibit C and C2.
13. The City subsequently allowed Ms. White to modify the garage plans to remove windows facing the alley and lower the dormer windows on the front, but the garage remained twenty-one feet tall, with a 672-square foot second story and dormer windows on the front. See attached final plans for garage, Exhibit A.
14. The City issued the building permit apparently based on an interpretation of City Code 21A.34.120(E) that the height of an accessory structure in the Yalecrest Overlay should be measured from grade to the midpoint of the roof, which, in this case, gave the garage an additional 6 feet of height.
15. Ms. White’s contractor began construction on the second story of the garage on June 26, 2017 and that was the first day Mr. Lewis discovered the projected height of the garage.
16. Mr. Lewis filed this appeal (with the assistance of counsel since City staff initially refused to accept the appeal) on June 30, 2017. See attached appeal, Exhibit E.

17. The garage is taller than the principal structure at 961 S. Fairview and taller than Mr. Lewis's house.

**Principal structure-  
home at 961 S. Fairview Avenue**

**Garage**



18. The garage looms over Mr. Lewis's backyard.



19. The garage has a bank of four windows on the second floor that look down into Mr. Lewis's backyard.





20. The second floor of the garage has a direct sightline into Mr. Lewis's master bedroom.







21. The garage is not compatible with the neighborhood or block, and adversely affects Mr. Lewis's property value and privacy.

### APPEAL OFFICER'S STANDARD OF REVIEW

In reviewing a municipality's land use decision the appeal authority's review is *de novo*. The appeal authority must step into the shoes of the land use authority and make the decision anew. Utah Code 10-9a-705. In interpreting the meaning of zoning ordinances the previous decision that is being reviewed is not entitled to any deference and the appeal officer should review the matter for correctness. *Carrier v. Salt Lake County*, 104 P.3d 1208, 1216 (Utah 2004). Mr. Lewis has the burden of proving that an error has been made. To do so, Mr. Lewis needs only to establish an error in the interpretation since the issue is whether the decision applying the ordinance was correct. *Brown v. Sandy City Board of Adjustment*, 957 P.2d 207 (Utah Ct. App. 1998).

The appeal authority, acting *de novo*, should interpret the ordinance first by looking at its plain language. *Toone v. Weber County*, 57 P.3d 1079 (Utah 2002). The appeal authority should interpret the ordinance with the primary goal of giving effect to the City Council's legislative intent, as evidenced by the plain language, in light of the purpose the ordinance was meant to achieve. *Mouty v. Sandy City*, 2005 UT 41. Additionally, if there is an apparent conflict between ordinances, it is the appeal authority's duty to harmonize and reconcile the ordinances' provisions because the appeal authority cannot presume that the City Council intended to create a conflict. *Bennion v. Sundance Development*, 897 P.2d 1232, 1235-1237 (Utah 1995).

Here, the Yalecrest Overlay zone is absolutely clear on its face that an accessory building is limited to being no higher than fifteen feet from grade to the top of the roof. This is also supported by the City Council's legislative mandate that accessory structures must be compatible with the neighborhood and subordinate to the principal structure, must not have livable space on the second floor, and cannot be an accessory dwelling unit. To interpret the ordinance as the City has and allow a twenty-one-foot-tall garage with 672 square feet of livable space on the second floor is to nullify at least three other City ordinances and ignore the plain language of City Code.<sup>1</sup> For these reasons, Mr. Lewis's appeal should be approved and the maximum height of Ms. White's garage should be fifteen feet from grade to the top of the roof.

### ARGUMENT

**A. The City incorrectly ignored the plain language of the City's zoning ordinance which requires the maximum height of an accessory structures in the Yalecrest Overlay to be fifteen feet from grade to the top of the roof.**

961 South Fairview Avenue is in the R1-5000 base zone and overlaid by the Yalecrest Overlay. The City incorrectly interpreted the Yalecrest Overlay's fifteen-foot maximum height for an accessory structure and concluded that the Yalecrest Overlay allows an accessory structure that is twenty-one feet tall. In the R1-5000 zone, "the height of accessory buildings with pitched roofs shall not exceed seventeen feet (17') measured as the vertical distance between the top of the roof and the established grade at any given point of building coverage." City Code 21A.40.050(C)(2). In the Yalecrest Overlay, the "Maximum Height for Accessory Structures with a Pitched Roof [is] Fifteen Feet (15')." City Code 21A.34.120(E). "Height" is defined in City Code as: "height,

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<sup>1</sup> Mr. Lewis is not briefing to the appeal officer on the issue of zoning estoppel because that issue is not ripe at this hearing. However, if the appeal officer approves Mr. Lewis's appeal, Ms. White cannot prevail on a zoning estoppel claim because she continued to build much of the second story of the garage after Mr. Lewis filed this appeal rendering any claim of zoning estoppel moot.

building – in the FR, FP, R-1, R-2 and SR Districts” as “the vertical distance between the top of the roof and established grade at any given point of building coverage.” City Code 21A.62.040.

In reviewing the City’s interpretation of an ordinance, the appeal officer must “begin first by looking to the plain language of the ordinance.” *Carrier v. Salt Lake County*, 104 P.3d 1208, 1216 (Utah 2004). Here, the plain language of the ordinance is blindingly obvious: the height of an accessory structure in the Yalecrest Overlay must be measured from grade to the top of the roof. The City incorrectly, and contrary to the plain language of the ordinance, interpreted this provision to allow measurement of the height of the accessory structure to be from grade to the midpoint of the roof, which added six additional feet to Ms. White’s garage. End of argument, *Q.E.D.*

The City Council knows how to require the height of a building to be measured from the grade to the midpoint of the roof. In the Yalecrest Overlay the Council allows the measurement of principal building height to be from grade to midpoint of the roof. See City Code 21A.34.120(C) (principal building height, pitched roofs: “twenty seven and one half feet (27.5’) measured to the midpoint of the roof”). The City Council did not add that language to the maximum building height for an accessory structure in the Yalecrest Overlay.

Since the City Council did not explicitly say that garage heights in the Yalecrest Overlay should be measured from the midpoint of the roof it was incorrect for the City staff to independently add that language to the ordinance. Under Utah law, “omissions in statutory language should be taken note of and given effect.” *Biddle v. Washington Terrace*, 1999 UT 110, 14. City staff appears to have assumed that since principal buildings in the Yalecrest Overlay are measured from grade to the midpoint of the roof that accessory structures automatically should be too. However, the City Council’s decision to treat the height of accessory structures differently than the height of principal structures in the Yalecrest Overlay was deliberate and the City staff incorrectly ignored the omission. Of course, the reason that such mid-point was not included in the Yalecrest Overlay by the City Council is that, ironically, it would have led to precisely the perverse result that is happening here with the “accessory use” towering over the principal use and adjacent homes.

The City should have applied the plain language of the zoning ordinance, which defines “height, building – in the FR, FP, R-1, R-2 and SR Districts” as “the vertical distance between the top of the roof and established grade at any given point of building coverage.” City Code 21A.62.040. By interpreting the plain language of the ordinance—which says fifteen feet—to actually mean twenty-one feet, the City created an unreasonable and absurd result—the issuance of a building permit for a garage that is taller than the principal structure, has 672 square feet of livable space on the second floor, and is completely incompatible with the neighborhood and block. An ordinance interpretation “should be given a reasonable and sensible construction and that the legislature did not intend an absurd or unreasonable result.” *State ex rel. Div. of Consumer Prot. v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988). Here, the City’s interpretation is incorrect because it is not supported by the plain language of the ordinance and it creates an absurd and unreasonable result.

The plain language of the Yalecrest Overlay also supports the interpretation that fifteen feet plainly means fifteen feet from grade to the top of the roof. The purpose of the Yalecrest Overlay is to:

“[E]stablish standards for new construction, additions, and alterations of principal and accessory residential structures within the Yalecrest community. The goal is to encourage compatibility between new construction, additions, or alterations, and the existing character and scale of the surrounding neighborhood.”

City Code 21A.34.120(A).

“Compatible” is, in turn, defined as:

“[A] use of land and/or building(s) that, in terms of development intensity, building coverage, design, bulk and occupancy, traffic generation, parking requirements, access and circulation, site improvements, and public facilities and service demands, is consistent with and similar to neighboring uses and does not adversely affect the quality of life of persons in surrounding or nearby buildings.”

City Code 21A.62.040.

The City Council was explicitly concerned about integrating new construction with existing residences and wanted to ensure that any new construction would not adversely affect the quality of life of people in neighboring residences. In this case, the City’s interpretation of maximum garage height to mean twenty-one feet ignores the express mandate that new construction must be compatible with the existing neighborhood, nullifies the definition of “height” in City Code and creates the absurd and incorrect result of allowing a garage that is taller than the homes on the block face and taller than garages in the underlying zone. That result guts the purpose of the Yalecrest Overlay.

**B. The City incorrectly interpreted the maximum height for the accessory structure in the Yalecrest Overlay to be twenty-one feet and in doing so, nullifies the City’s ordinances requiring accessory structures to be subordinate to the principal structure, and renders meaningless the City’s excessive height exception ordinance and its accessory dwelling unit (ADU) ordinance.**

The appeal officer has no obligation to defer to the City’s interpretation of the Yalecrest Overlay and this is particularly true when the City’s interpretation renders meaningless other portions of the City’s zoning code. Utah law requires an appeal officer to determine whether there is an apparent conflict between the ordinances, then interpret the ordinance so as to reconcile the conflict. *Bennion*, 897 P.2d 1235. Here, the City’s transmogrifying interpretation that “fifteen feet” actually allows “twenty-one feet” nullifies the zoning code’s requirement that accessory structures must be less than a total to 720 square feet and subordinate to the principal structure and renders the City’s excessive height exception process and accessory dwelling unit ordinances meaningless.

- i. The City erred by interpreting the zoning ordinance to allow the twenty-one-foot-tall garage because that interpretation nullifies the requirement that accessory structures must be less than 720 square feet in size and must be subordinate to the principal structure.

City Code defines an accessory building or structure as one that is “a subordinate building or structure, located on the same lot with the main building, occupied or devoted to an accessory use.” City Code 21A.62.040. Further, the zoning ordinance has an entire section devoted regulations for to accessory structures. See City Code 21A.40. The accessory structure section of City Code reiterates that “an accessory use, building, or structure shall be incidental and subordinate to the principal use or structure, in area, extent, and purpose.” City Code 21A.40.040(A). Under this section, in the R-1 residential district, the maximum building coverage “shall not exceed fifty percent of the building footprint of the principal structure up to a maximum of seven hundred twenty (720) square feet for a single-family dwelling and one thousand (1,000) square feet for a two family dwelling.” City Code 21A.40.050(2)(a). Further, “accessory buildings with greater building height may be approved as a special exception, pursuant to Chapter 21A.52 of this title, if the proposed accessory building is in keeping with other accessory buildings on the block face.” City Code 21A.40.050(C)(2).

As discussed above, the Yalecrest Overlay establishes fifteen feet as the maximum height for accessory structures with a pitched roof. If the overlay district is silent on the City’s interpretation then the underlying zoning regulations will apply. In this case, the City’s interpretation that fifteen feet means twenty-one feet rendered meaningless the provisions in City Code 21A.40 that regulate maximum square footage, subordination to the

principal use and the requirement that a garage can only be overly tall if it is in keeping with other accessory buildings on the block face.

First, by issuing a building permit for the twenty-one-foot-tall garage, the City would allow Ms. White to build an accessory building that has over 1,300 square feet of livable space. This is in direct conflict with City Code 21A.40.050(2)(a), which prohibits any accessory structure from being over 720 square feet in total size. By allowing Ms. White to build a 672-square foot second story on the garage, the City violated its own restrictions on size of accessory structures. Second, by allowing a twenty-one-foot-tall garage the City made meaningless the requirement that an accessory structure be subordinate in area, extent, and purpose to the principal building. Here, the garage as built is taller than the principal structure. It is not subordinate in area or extent to the existing low-slung bungalow at 961 S. Fairview Avenue. Finally, the twenty-one-foot-tall garage is not in keeping with other accessory buildings on the block. Mr. Lewis measured detached garages on either side of the alley on the Fairview Avenue/Greenwood Terrace block and there are none with second stories and all are approximately fifteen feet from grade to the top of the roof. The City acknowledged this in its Findings and Orders when it initially denied Ms. White's excessive height application stating, as noted above, that "staff visited the site and found that the additional height would not be compatible with other accessory structures in the neighborhood as there were no existing over height structures." If the accessory structure ordinance would not allow a twenty-one-foot-tall garage if it is not compatible with the block face, and if City staff acknowledged in writing that there are no twenty-one-foot-tall garages on the block face, it is incomprehensible that Ms. White should receive a permit for a twenty-one-foot-tall garage based on an interpretation by City staff that fifteen feet actually means twenty-one feet. This nullifies the intent of the zoning ordinance and is a clearly erroneous interpretation of the Yalecrest Overlay.

Further, although the City granted Ms. White a special exception to build a hobby shop, the Findings and Orders were explicit that the hobby shop in the garage had to conform to all the City's ordinances. The hobby shop exception did not automatically allow Ms. White to build a garage that is oversized by almost twice the allowable square footage and did not allow Ms. White to build a garage that is excessively tall.

- ii. The City incorrectly interpreted the Yalecrest Overlay to allow a twenty-one-foot-tall garage because this interpretation nullifies the City's excessive height exception process under City Code 21A.52.030

In the Yalecrest Overlay, a garage must be fifteen feet tall from grade to the top of the roof, unless the property owner applies for and is granted a special exception for height. City Code 21A.52.030 allows the City to grant a special exception for height of an accessory structure if certain standards are met:

- a. The extra height is for architectural purposes only, such as a steep roof to match existing primary structure or neighborhood character.
- b. The extra height is to be used for storage of household goods or truss webbing and not to create a second level.
- c. No windows are located in the roof or on the second level unless it is a design feature only.
- d. No commercial use is made of the structure or residential use unless it complies with the accessory dwelling unit regulations in this title.

In this case, the City initially denied Ms. White's application for a special exception for height because the City believed the dormers on the windows in the front of the garage were too high. Once the dormers were lowered, the City issued Ms. White a permit for the twenty-one-foot-tall garage based on its interpretation that fifteen feet height measured from grade to the midpoint of the building, not from grade to the top of the roof. However, this interpretation nullifies and ignores the specific processes for obtaining special exceptions for excessive height. By staff giving Ms. White twenty-one feet she received more than what she could have obtained had an application for excessive height been approved.

This is because the garage as permitted has a second story that is over 672 square feet, a bank of four windows on the west and a large window on the north, and a bathroom and shower on the first floor. The extra height is not for “architectural purposes only”. Instead, the extra height is only so that Ms. White can have a large space on the second floor with sufficient headroom for a livable use. Further, the extra height is for a second level. As shown on the plans for the garage, the second floor is reached by stairs and has sufficient headroom and space to be a comfortable second story<sup>2</sup>. The windows are also much more than a mere “design feature”. The windows are on two sides of the garage. The windows in front are at least five feet wide. These windows provide ample natural light to the second story for livable use. If Ms. White had obtained an excessive height exception she would not have been allowed to have a second story with windows and livable space. The City denied her excessive height application but then, paradoxically, gave her a permit to build a 672-square foot second story, with four big windows on the west side and another big window on the north. It is absurd and an unreasonable interpretation of the zoning code to first deny the application for excessive height and then interpret “fifteen feet” in height to actually mean twenty-one feet, giving Ms. White more than what is allowed (i.e. a second story with windows and livable space) if she had been granted the excessive height exception. *GAF Corp.*, 760 P.2d at 313.

- iii. The City incorrectly interpreted the maximum height in the Yalecrest Overlay to mean twenty-one feet and in doing so, rendered meaningless the City’s accessory dwelling unit ordinance.

Under City Code 21A.40.200, accessory dwelling units (“ADUs”) are allowed in some areas of the City. They are currently not permitted in the Yalecrest Overlay. The City is considering expanding the areas of the City where ADUs are allowed, but even under the proposed expansion, they would not be allowed in the Yalecrest Overlay. The maximum height on an ADU “shall not exceed the principal structure; and shall be designed and constructed to be compatible with the principal structure.” City Code 21A.40.200(D)(9)(a) and (b). “Compatible” is defined in City Code to mean “a use of land and/or building(s) that, in terms of development intensity, building coverage, design, bulk and occupancy, traffic generation, parking requirements, access and circulation, site improvements, and public facilities and service demands, is consistent with and similar to neighboring uses and does not adversely affect the quality of life of persons in surrounding or nearby buildings.” City Code 21A.62.040.

Here, the City interpreted fifteen feet to mean twenty-one feet, and in doing so, allowed Ms. White to build a structure that has more than what would be allowed under the accessory dwelling unit ordinance. She cannot build an ADU in the Yalecrest Overlay, and even if it was permitted, that ADU could not be taller than the principal structure and must be compatible with the neighborhood. However, because of the City’s incorrect height interpretation, Ms. White was issued a permit to build a structure that is taller than the principal structure and is not compatible with the neighborhood because it is larger than any other garage on the block and directly adversely affects Mr. Lewis’ quality of life, privacy, and property value. (And a structure that almost inexorably will metamorphize into an ADU.) It is absurd and unreasonable that the City can allow a property owner to build a structure that is bigger and less compatible than an ADU, which is prohibited in the Yalecrest Overlay, based on an interpretation that changes the plain meaning of the ordinance from fifteen feet to twenty-one feet. *GAF Corp.*, 760 P.2d at 313.

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<sup>2</sup> Ms. White may claim that the second story is only for “storage” and that the windows are decorative. The Hearing Officer is invited to take judicial notice (by, for example, looking at the number of cars parked in driveways everywhere in the City) that spaces get converted to other purposes such as living spaces, and that monitoring/enforcing such future transformations is virtually impossible.

## CONCLUSION

The City incorrectly interpreted the maximum height of accessory structures in the Yalecrest Overlay and, in doing so, issued a permit for a garage at 961 S. Fairview that is twenty-one feet tall, over 1,300 square feet in total size and is incompatible with the neighborhood, block and common sense. The City's interpretation was obviously incorrect based on the plain language of the ordinance and because it renders meaningless multiple other sections of the City's zoning code. For these reasons, Mr. Lewis's appeal should be granted and the maximum height of Ms. White's garage should be fifteen feet from grade to the top of the roof.

The Hearing Officer is invited to visit the site and see the egregious result of the City's erroneous interpretation and the fact that Ms. White's garage is in complete violation of the character of the neighborhood.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of August.

A handwritten signature in blue ink, appearing to read 'B. Baird', with a long horizontal flourish extending to the right.

Bruce R. Baird