

BOARD OF ADJUSTMENT MEETING
Thursday, August 4, 2011 6:00 p.m.
Public Safety Building
3925 W Cedar Hills Drive, Cedar Hills, Utah

NOTICE is hereby given that the Board of Adjustment of the City of Cedar Hills, Utah, will meet Thursday, August 4, 2011, beginning at 6:00 p.m.

BOARD OF ADJUSTMENT MEETING

1. Call to Order
2. General Training (approximately 30 minutes)

SCHEDULED ITEMS

3. Mr. Dearing's Application for the Board of Adjustment for Enforcement of the Zoning Regulations and Interpretation of the Zoning Ordinance Text Regarding the Community Recreation Center Located at 10640 N Clubhouse Drive, Cedar Hills, Utah

ADJOURNMENT

4. Adjourn

Posted this 2nd day of August, 2011.

Kim E. Holindrake, City Recorder

- Supporting documentation for this agenda is posted on the City's Web Site at www.cedarhills.org.
- In accordance with the Americans with Disabilities Act, the City of Cedar Hills will make reasonable accommodations to participate in the meeting. Requests for assistance can be made by contacting the City Recorder at 801-785-9668 at least 48 hours in advance of the meeting to be held.

CITY OF CEDAR HILLS

BOARD OF ADJUSTMENT

STATUTES

Title 10. Utah Municipal Code. Chapter 9a. Municipal Land Use, Development, and Management	Part 7. Appeal Authority and Variances
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§ 10-9A-701.	Appeal Authority Required-Condition Precedent to Judicial Review-Appeal Authority Duties
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- (1) Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide:
- (a) requests for variances from the terms of the land use ordinances;
 - (b) appeals from decisions applying the land use ordinances; and
 - (c) appeals from a fee charged in accordance with Section 10-9a-510.
- (2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.
- (3) An appeal authority:
- (a) shall:
 - (i) act in a quasi-judicial manner; and
 - (ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances; and
 - (b) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.
- (4) By ordinance, a municipality may:
- (a) designate a separate appeal authority to hear requests for variances than the appeal authority it designates to hear appeals;
 - (b) designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions;
 - (c) require an adversely affected party to present to an appeal authority every theory of relief that it can raise in district court;
 - (d) not require an adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of the adversely affected party's duty to exhaust administrative remedies; and
 - (e) provide that specified types of land use decisions may be appealed directly to the district court.
- (5) If the municipality establishes or, prior to the effective date of this chapter, has

established a multiperson board, body, or panel to act as an appeal authority, at a minimum the board, body, or panel shall:

(a) notify each of its members of any meeting or hearing of the board, body, or panel;

(b) provide each of its members with the same information and access to municipal resources as any other member;

(c) convene only if a quorum of its members is present; and

(d) act only upon the vote of a majority of its convened members.

§ 10-9A-702.

Variances

(1) Any person or entity desiring a waiver or modification of the requirements of a land use ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest may apply to the applicable appeal authority for a variance from the terms of the ordinance.

(2)(a) The appeal authority may grant a variance only if:

(i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;

(ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;

(iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone;

(iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and

(v) the spirit of the land use ordinance is observed and substantial justice done.

(b)(i) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship unless the alleged hardship:

(A) is located on or associated with the property for which the variance is sought; and

(B) comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.

(ii) In determining whether or not enforcement of the land use ordinance would cause unreasonable hardship under Subsection (2)(a), the appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic.

(c) In determining whether or not there are special circumstances attached to the property under Subsection (2)(a), the appeal authority may find that special circumstances exist only if the special circumstances:

(i) relate to the hardship complained of; and

(ii) deprive the property of privileges granted to other properties in the same zone.

(3) The applicant shall bear the burden of proving that all of the conditions justifying a variance have been met.

(4) Variances run with the land.

(5) The appeal authority may not grant a use variance.

(6) In granting a variance, the appeal authority may impose additional requirements on the applicant that will:

(a) mitigate any harmful affects of the variance; or

(b) serve the purpose of the standard or requirement that is waived or modified.

§ 10-9A-703.	Appealing a Land Use Authority's Decision-Panel of Experts for Appeals of Geologic Hazard Decisions
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(1) The applicant, a board or officer of the municipality, or any person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may, within the time period provided by ordinance, appeal that decision to the appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance.

(2)(a) An applicant who has appealed a decision of the land use authority administering or interpreting the municipality's geologic hazard ordinance may request the municipality to assemble a panel of qualified experts to serve as the appeal authority for purposes of determining the technical aspects of the appeal.

(b) If an applicant makes a request under Subsection (2)(a), the municipality shall assemble the panel described in Subsection (2)(a) consisting of, unless otherwise agreed by the applicant and municipality:

- (i) one expert designated by the municipality;
- (ii) one expert designated by the applicant; and
- (iii) one expert chosen jointly by the municipality's designated expert and the applicant's designated expert.

(c) A member of the panel assembled by the municipality under Subsection (2)(b) may not be associated with the application that is the subject of the appeal.

(d) The applicant shall pay:

- (i) 1/2 of the cost of the panel; and
- (ii) the municipality's published appeal fee.

§ 10-9A-704.	Time to Appeal
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(1) The municipality shall enact an ordinance establishing a reasonable time of not less than 10 days to appeal to an appeal authority a written decision issued by a land use authority.

(2) In the absence of an ordinance establishing a reasonable time to appeal, an adversely affected party shall have 10 calendar days to appeal to an appeal authority a written decision issued by a land use authority.

§ 10-9A-705.	Burden of Proof
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The appellant has the burden of proving that the land use authority erred.

§ 10-9A-706.	Due Process
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(1) Each appeal authority shall conduct each appeal and variance request as provided in local ordinance.

(2) Each appeal authority shall respect the due process rights of each of the participants.

§ 10-9A-707.	Standard of Review for Appeals
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(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.

§ 10-9A-708.	Final Decision
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(1) A decision of an appeal authority takes effect on the date when the appeal authority issues a written decision, or as otherwise provided by ordinance.
(2) A written decision, or other event as provided by ordinance, constitutes a final decision under Subsection 10-9a-801(2)(a) or a final action under Subsection 10-9a-801(4).

Title 10. Utah Municipal Code. Chapter 9a. Municipal Land Use, Development, and Management	Part 8. District Court Review
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§ 10-9a-801.	No District Court Review Until Administrative Remedies Exhausted-Time for Filing-Tolling of Time-Standards Governing Court Review-Record on Review-Staying of Decision
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(1) No person may challenge in district court a municipality's land use decision made under this chapter, or under a regulation made under authority of this chapter, until that person has exhausted the person's administrative remedies as provided in Part 7, Appeal Authority and Variances, if applicable.
(2)(a) Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local land use decision is final.
(b)(i) The time under Subsection (2)(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the property rights ombudsman under Section 13-43-204 until 30 days after:
(A) the arbitrator issues a final award; or
(B) the property rights ombudsman issues a written statement under Subsection 13-43-204(3)(b) declining to arbitrate or to appoint an arbitrator.
(ii) A tolling under Subsection (2)(b)(i) operates only as to the specific constitutional taking issue that is the subject of the request for arbitration filed with the property rights

ombudsman by a property owner.

(iii) A request for arbitration filed with the property rights ombudsman after the time under Subsection (2)(a) to file a petition has expired does not affect the time to file a petition.

(3)(a) The courts shall:

(i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and

(ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.

(b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if it is reasonably debatable that the decision, ordinance, or regulation promotes the purposes of this chapter and is not otherwise illegal.

(c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.

(d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

(4) The provisions of Subsection (2)(a) apply from the date on which the municipality takes final action on a land use application for any adversely affected third party, if the municipality conformed with the notice provisions of Part 2, Notice, or for any person who had actual notice of the pending decision.

(5) If the municipality has complied with Section 10-9a-205, a challenge to the enactment of a land use ordinance or general plan may not be filed with the district court more than 30 days after the enactment.

(6) The petition is barred unless it is filed within 30 days after the appeal authority's decision is final.

(7)(a) The land use authority or appeal authority, as the case may be, shall transmit to the reviewing court the record of its proceedings, including its minutes, findings, orders, and, if available, a true and correct transcript of its proceedings.

(b) If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this Subsection (7).

(8)(a)(i) If there is a record, the district court's review is limited to the record provided by the land use authority or appeal authority, as the case may be.

(ii) The court may not accept or consider any evidence outside the record of the land use authority or appeal authority, as the case may be, unless that evidence was offered to the land use authority or appeal authority, respectively, and the court determines that it was improperly excluded.

(b) If there is no record, the court may call witnesses and take evidence.

(9)(a) The filing of a petition does not stay the decision of the land use authority or authority appeal authority, as the case may be.

(b)(i) Before filing a petition under this section or a request for mediation or arbitration of a constitutional taking issue under Section 13-43-204, the aggrieved party may petition the appeal authority to stay its decision.

(ii) Upon receipt of a petition to stay, the appeal authority may order its decision stayed pending district court review if the appeal authority finds it to be in the best interest of the municipality.

(iii) After a petition is filed under this section or a request for mediation or arbitration of a constitutional taking issue is filed under Section 13-43-204, the petitioner may seek an injunction staying the appeal authority's decision.

§ 10-9A-802.	Enforcement
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N/A.

§ 10-9A-803.	Penalties
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N/A.

ORDINANCES

TITLE 9 - MUNICIPAL PLANNING AND DEVELOPMENT	Chapter 1 – MUNICIPAL PLANNING - ARTICLE C. BOARD OF ADJUSTMENT
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9-1C-1	ESTABLISHED; TERMS; MODE OF APPOINTMENT; REMOVAL:
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A. Established: Pursuant to authority granted in Utah Code Annotated section 10-9a-701, as amended, the city council hereby creates a board of adjustment within and for the city. Said board of adjustment shall consist of five (5) regular members and one ex officio member.

B. Terms: The terms of the regular members appointed shall be five (5) years. The term of the ex officio member shall be as determined by action of the city council.

C. Mode Of Appointment:

1. Ex Officio Member: The ex officio member shall be appointed by the city council, from its own members and shall be the council representative to the board of adjustment and shall serve without authority to vote on matters coming before the board.
2. Reappointment Of A Regular Or Alternate Member: Within thirty (30) days prior to the term expiration of a regular or alternate member, the mayor shall make a recommendation to the city council on whether to reappoint the member to another term or not. The mayor will send written notification to the member thirty (30) days prior to the term expiration notifying him of the decision. The city council will then vote on whether to reappoint the member or not. If the member is not reappointed by a vote of the city council, then a vacancy shall be declared.

3. Appointment Of New Regular Or Alternate Members: Within thirty (30) days of the declaration of a vacancy on the board, the mayor shall make a recommendation to the city council on appointments to the board. If the city council does not confirm the mayor's recommendation within forty five (45) days of the vacancy, then the city council may vote to appoint a new regular or alternate member.

D. Removal: The mayor may remove any member of the board of adjustment for cause if written charges are filed against the member with the mayor. The mayor shall provide the member with a public hearing if he requests one. (Ord. 4-1-2008A, 4-1-2008).

9-1C-2

**ORGANIZATION; MEETINGS;
RECORDS; DECISIONS:**

A. Chairperson; Rules Adopted: The board of adjustment shall:

1. Organize and elect a chairperson; and
2. Adopt rules that comply with any ordinance adopted by the city council.

B. Meetings: The board of adjustment shall meet at the call of the chairperson and at any other times that the board of adjustment determines.

C. Oaths Administered; Compelling Witnesses: The chairperson, or in the absence of the chairperson, the acting chairperson, may administer oaths and compel the attendance of witnesses.

D. Open And Public Meetings: All meetings of the board of adjustment shall comply with the requirements of Utah Code Annotated title 52, chapter 4, open and public meetings. (Ord. 2-1-2000C, 2-1-2000)

E. Records:

1. The board of adjustment shall file its records in the office of the city recorder.
2. All records of the board of adjustment are public records. (Ord. 4-1-2008A, 4-1-2008)

F. Voting: The concurring vote of three (3) members of the board of adjustment is necessary to reverse any order, requirement, decision or determination of any administrative official or agency or to decide in favor of the appellant.

G. When Decisions Effective: Decisions of the board of adjustment become effective at the meeting in which the decision is made, unless a different time is designated in the board's rules or at the time the decision is made.

H. Compensation: The city council may fix per diem compensation for the members of the board of adjustment based upon necessary and reasonable expenses and on meetings actually attended. (Ord. 2-1-2000C, 2-1-2000)

9-1C-3

POWERS AND DUTIES1

The board of adjustment shall have the following powers and duties:

A. Appeals: To hear and decide appeals from zoning decisions applying the zoning ordinance, subject to the following: (Ord. 2-1-2000C, 2-1-2000)

1. The applicant or any other person or entity adversely affected by a decision administering or interpreting a zoning ordinance may appeal that decision applying the zoning ordinance by alleging that there is error in any order, requirement, decision or determination made by an official in the administration or interpretation of the zoning ordinance; provided, that any such appeal shall be received at the office of the city recorder within forty five (45) days from the date of action on the matter for which the appeal is requested.

2. Any officer, department, board or bureau of a city affected by the grant or refusal of a building permit or by any other decisions of the zoning administrator in the administration or interpretation of the zoning ordinance may appeal any decision to the board of adjustment. (Ord. 2-1-2000C, 2-1-2000; amd. 2004 Code)

3. The board of adjustment shall hear and decide appeals from planning commission decisions regarding conditional use permits, unless the zoning ordinance designates another body to hear conditional use permit appeals.

4. The person or entity making the appeal has the burden of proving that an error has been made.

5. Only zoning decisions applying the zoning ordinance may be appealed to the board of adjustment. A person may not appeal, and the board of adjustment may not consider, any zoning ordinance amendments.

6. Appeals may not be used to waive or modify the terms or requirements of the zoning ordinance.

B. Special Exceptions: To hear and decide special exceptions to the terms of the zoning ordinance, but only if authorized to do so by the zoning ordinance and based only on the standards contained in the zoning ordinance.

C. Variances: To hear and decide variances to the requirements of the zoning ordinance, subject to the following:

1. Any person or entity desiring a waiver or modification of the requirements of the zoning ordinance as applied to a parcel of property that he owns, leases, or in which he holds some other beneficial interest, may apply to the board of adjustment for a variance from the terms of the zoning ordinance.
2. The board of adjustment may grant a variance only if:
 - a. Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is: 1) not necessary to carry out the general purpose of the zoning ordinance; and 2) consistent with the criteria set forth under subsections C3 and C4 of this section;
 - b. There are special circumstances attached to the property that do not generally apply to other properties in the same district and which are consistent with the criteria set forth under subsection C5 of this section;
 - c. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district;
 - d. The variance will not substantially affect the general plan and will not be contrary to the public interest; and
 - e. The spirit of the zoning ordinance is observed and substantial justice done.
3. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under subsection C2a of this section, the board of adjustment may not find an unreasonable hardship unless the alleged hardship:
 - a. Is located on or associated with the property for which the variance is sought; and
 - b. Comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.
4. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under subsection C2a of this section, the board of adjustment may not find an unreasonable hardship if the hardship is self-imposed or economic.
5. In determining whether or not there are special circumstances attached to the property under subsection C2b of this section, the board of adjustment may find that special circumstances exist only if the special circumstances:
 - a. Relate to the hardship complained of; and
 - b. Deprive the property of privileges granted to other properties in the same district.
6. The applicant shall bear the burden of proving that all of the conditions justifying a

variance have been met.

7. Variances run with the land.

8. The board of adjustment and any other body may not grant use variances.

9. In granting a variance, the board of adjustment may impose additional requirements on the applicant that will:

a. Mitigate any harmful affects of the variance; or

b. Serve the purpose of the standard or requirement that is waived or modified.

D. Modifications To Nonconforming Uses: The board of adjustment may make determinations regarding the existence, expansion or modification of nonconforming uses, but only if that authority is delegated to them by the city council. (Ord. 2-1-2000C, 2-1-2000)

9-1C-4

APPEALS FROM BOARD DECISIONS

A. Authority: Any person adversely affected by any decision of a board of adjustment may petition the district court for a review of the decision.

B. Allegations Permitted: In the petition, the plaintiff may only allege that the board of adjustment's decision was arbitrary, capricious or illegal.

C. Time Limit For Filing Petition: The petition is barred unless it is filed within thirty (30) days after the board of adjustment's decision is final.

D. Transmittal Of Proceedings: The board of adjustment shall transmit to the reviewing court the record of its proceedings, including its minutes, findings, orders and, if available, a true and correct transcript of its proceedings. If the proceeding was tape recorded, a transcript of that tape recording is a true and correct transcript for purposes of this subsection.

1. If there is a record:

a. The district court's review is limited to the record provided by the board of adjustment.

b. The court may not accept or consider any evidence outside the board of adjustment's record unless that evidence was offered to the board of adjustment and the court determines that it was improperly excluded by the board of adjustment.

2. If there is no record, the court may call witnesses and take evidence.

E. Evidence Justifying Affirmation: The court shall affirm the decision of the board of adjustment if the decision is supported by substantial evidence in the record.

F. Stay Of Proceedings: The filing of a petition does not stay the decision of the board of adjustment.

1. Before filing the petition, the aggrieved party may petition the board of adjustment to stay its decision.

2. Upon receipt of a petition to stay, the board of adjustment may order its decision stayed pending district court review if the board of adjustment finds it to be in the best interest of the city.

3. After the petition is filed, the petitioner may seek an injunction staying the board of adjustment's decision. (Ord. 2-1-2000C, 2-1-2000)

9-1C-5

**PROVISIONS OF STATE CODE
APPLICABLE**

Any provisions of Utah Code Annotated section 10-9-700 et seq., as amended, relating to decisions by the board of adjustment, not specifically addressed in this article, shall be considered as part of this article, and shall be considered and adhered to in making any determination upon any matter upon which the board is required to act. (Ord. 2-1-2000C, 2-1-2000)

Footnotes - Click any footnote link to go back to its reference.

Footnote 1: See also subsection 10-3-3D of this code.

10-3-3

BOUNDARIES OF ZONES

Where uncertainty exists with respect to the boundaries of various zones, the following rules shall apply:

A. Where the indicated boundaries on the official zone map are approximately street or alley lines, said street or alley lines shall be construed to be the zone boundaries.

B. Where the indicated boundaries are approximately lot lines, said lot lines shall be construed to be the zone boundaries, unless otherwise indicated.

C. Where land has not been subdivided into lots and blocks, the zone boundaries shall be

determined by use of the scale of measurement shown on the map.

D. Where other uncertainty exists, the board of adjustment shall interpret the map. (Ord. 6-20-78A, 6-20-1978)

**CITY OF CEDAR HILLS BOARD OF ADJUSTMENT
VARIANCE WORKSHEET**

In order to grant a variance, ALL CONDITIONS MUST BE MET. In order to deny a variance, you only need to be lacking on ONE condition.

- (1) Would granting the variance change the intended use of the property?

The answer must be NO.

Explanation: A variance may never change the use of the given zoning. Such a change can only be accomplished through an amendment to the zoning ordinance. For example, a Board of Adjustment cannot grant a variance to: Allow a commercial use in a residential zone; allow an apartment in a single-family zone; provide for any use that does not appear as a permitted use for the zone.

Findings _____
of _____
Fact _____

- (2) Are there special circumstances ATTACHED TO THE PROPERTY that do not generally apply to other properties in the same district?

The answer must be YES.

Explanation: There must be something ABOUT THE PROPERTY that is unusual. That may include a geographic feature such as a steep slope, or a stream. There may be a legal right-of-way, or an approved platted lot that is irregularly shaped, or be a legally non-conforming lot that no longer meets minimum requirements.

Findings _____
of _____
Fact _____

- (3) Do those circumstances in (2) cause an unreasonable hardship on the applicant, denying use of the property, that others in the same district enjoy or that he/she has a right to expect?

The answer must be YES.

Explanation: By definition, a hardship may not be economical, esthetic, or self-imposed. In other words, it cannot be a hardship if it will merely add value, look better, or be more convenient. In addition, if the hardship was created by the applicant, it cannot be considered a legal hardship. An example would be "I have a hardship because I would have to tear down the garage..." Such is not a hardship because the applicant apparently built the garage illegally, and has therefore created the hardship.

Findings _____
of _____
Fact _____

(4) Is the variance essential to a substantial property right?

The answer must be YES.

Explanation: If the applicant can accomplish his/her needs without a variance, you may not grant a variance. The most difficult part of this requirement is defining the term "substantial." What may be a substantial right in one neighborhood may not be in another. Find out what one is "expected" to have in this neighborhood. Ask: "How necessary is this specific request to the enjoyment of the property?" The expansion of a little old house for a laundry room may be a more substantial right than the addition of a playroom or an extra bedroom. This is one where you will be expected to use good and fair judgement.

Findings _____
of _____
Fact _____

(5) Will granting the variance substantially affect the goals of the general plan or be contrary to the public interest?

The answer must be NO.

Explanation: Again, you must define what constitutes a substantial affect. Rule of thumb is: If others will say, "Who the heck let them do that?" There is probably a negative substantial affect and the variance should not be granted. Likewise, if granting the variance will negatively impact the neighbor's property values, the variance should be denied.

Findings _____
of _____
Fact _____

(6) Is the "spirit" of the zoning ordinance observed and is the Board being fair to all involved?

The answer must be YES.

Explanation: Like the previous two questions, this requires good judgement on the part of the Board. In addition, it requires that the Board understand the intent and spirit of the zoning ordinance. If the variance would allow a major violation of the intent of the ordinance, differ from the character of the underlying zoning, or appear to be out of place, the variance should not be granted.

Findings _____
of _____
Fact _____

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In the Matter of:

JERRY DEARINGER'S APPLICATION TO
BOARD OF ADJUSTMENT

**CITY OF CEDAR HILLS'
MEMORANDUM IN SUPPORT OF THE
BUILDING PERMIT ISSUED FOR THE
COMMUNITY RECREATION CENTER**

The City of Cedar Hills (hereinafter "the City"), by and through undersigned counsel of record, hereby submits this Memorandum in Support of the Building Permit Issued for the Community Recreation Center ("CoRC").

INTRODUCTION

Mr. Dearinger's application and demand that the Board of Adjustment rescind the building permit issued on May 16, 2011 should be denied because it is a deficient request. The CoRC is a permitted public recreational facility in the TR-1 zone and the building permit was properly issued in this case.

Mr. Dearinger's objection to the building of the CoRC and request for review is not only without merit, but it does not change the fact that Mr. Dearinger has completely failed to meet

his burden of proof as required in demonstrating that any error occurred here. As a result, the Board of Adjustment should deny Mr. Dearinger's request to rescind or revoke the building permit issued.

ARGUMENT

I. AS THE PERSON MAKING THE APPEAL, MR. DEARINGER HAS THE BURDEN OF PROVING THAT AN ERROR HAS BEEN MADE

Under Utah statute, “[t]he appellant has the burden of proving that the land use authority erred.” See UCA § 10-9A-705. Furthermore Utah Courts address that “... *land use decisions are presumed valid*, and the party challenging the decision bears ‘the burden of proving that the land use authority erred. ...’” See *Morra v. Grand County*, 230 P.3d 1022, 1030 (Utah 2010) (emphasis added). In the City of Cedar Hills’ Ordinances, at Title 9, Ordinance 9-1C-3 A.1, that language is replicated, “[t]he person or entity making the appeal has the burden of proving that an error has been made.”

Mr. Dearinger filed his application with the City Recorder on June 30, 2011 (on the forty-fifth and last permissible day to file under Ordinance 91-C-3 A.1) and requested that the Board of Adjustment “[r]escind the building permit issued for construction of the Community Events and Recreation Center and stop all construction at the site[.]” because “[t]he zoning administrator erred by issuing the building permit and notice to proceed for the Community Events and Recreation Center as recreation facilities are not permitted uses in the TR-1 zone.” See Mr. Dearinger’s Board of Adjustment Application attached hereto as Exhibit A. Mr. Dearinger attaches no evidence proving that the CoRC, as a public recreation facility, is not a permitted use

in the TR-1 zone. In fact, the CoRC is a permitted public recreational facility in the TR-1 zone as outlined in the Ordinances. Therefore, Mr. Dearing's conclusory statements are not correct and the building permit was properly issued by the building inspector.

II. THE CITY HAS THE LEGISLATIVE POWER TO BUILD THE CORC.

The City of Cedar Hills has the legislative power to apply for a permit for the CoRC and have it built to promote the general welfare of the community:

The municipality is a creation, a creature of the legislature. It has only such powers as are granted to it by the state and such as are necessary or reasonably implied to enable it to perform the duties and functions and exercise the privileges conferred upon it... The power to restrict and regulate the size and use of buildings, structures and land for trade, industry, residence and other purposes, *is granted to the legislative body of cities* for the purpose of promoting the health, safety, morals and general welfare of the community by the provisions of Article 3 of Title 15, Revised Statutes of Utah 1933, Section 15-8-89.

See Walton v. Tracy Loan & Trust Co., 92 P.2d 724, 725 (Utah 1939) (internal citations omitted and emphasis added).

III. THE ZONING ORDINANCES OF THE CITY OF CEDAR HILLS PERMIT THE CORC TO BE BUILT

Pursuant to Ordinance 10-1-1, the "title shall be known as and shall be entitled the *ZONING ORDINANCE OF THE CITY OF CEDAR HILLS, UTAH*, and may be so cited and pleaded. The zoning ordinance of the City of Cedar Hills, Utah (zoning ordinance), together with the official zoning map, (zone map) adopted as a part thereof, as may be amended from time to time, shall constitute a portion of the land use ordinances of the City of Cedar Hills, Utah. ..."

Under Article I, TR-1 Townsite Residential Zone, recreation facilities are permitted uses in the TR-1 zone. Ordinance 10-4I-1 states as follows:

A. The TR-1 townsite residential zone is established to provide for the coordinated planning and development of large areas within the city. Typical uses within the zone are a combination of single-family detached housing units and also attached housing units located in a coordinated design setting, together with a commingling of parks and open space areas, playgrounds, schools, churches and other private and **community facilities** designed to serve the residents of the city and neighborhood. The zone is characterized by dwellings interspersed with significant amounts of park and open space areas at a base density of approximately one dwelling unit per acre, but with the opportunity for a substantial increase in density above the base density, through a combination of factors, including, but not limited to, extensive clustering of residential and other urban uses; use of innovative design concepts that will result in an increased sense of community within the project area and decreased need for public funding of services to the area; preparation of a coordinated design within the project area and surrounding territory that effectively accommodates the physical constraints to development within and adjacent to the project area (i.e., steep slopes, existing highways, flood areas, drainage channels, etc.); providing increased levels of open space area and amenities above the base required amount; and providing unique and extensive project and/or community amenities and facilities. (Ord. 8-17-2000A, 8-17-2000; amd. 2004 Code).

B. The zone is consistent with and intended to facilitate implementation of the areas designated on the general plan as planned townsite projects. Owners and developers of property within this zone should bear in mind that **primacy is given to residential development and other complementary facilities such as** schools, churches, **recreational facilities** and open space and should maintain their properties in recognition thereof.

C. The specific regulations necessary for the accomplishment of the intent of the zone are hereinafter set forth. (Ord. 8-17-2000A, 8-17-2000).

(emphasis added).

In addition, there are permitted uses found at Ordinance 10-4I-2 and conditional uses found at Ordinance 10-4I-3 within this division. The CoRC is further a permitted building according to the conditional uses addressed below:

The following buildings, structures and uses of land shall be permitted upon compliance with the applicable requirements of this title, and after approval has been given by the designated review agency:

Accessory apartment.

Small animal units. All barns, sheds, coops, pens, hutches, paddocks, stables, corrals or similar structures used for the enclosure, housing or confinement of animals or fowl in a small animal unit shall be located not less than fifty feet (50') to an existing dwelling on an adjacent lot.

Townsite residential projects, subject to the provisions of chapter 6, article D of this title. (Ord. 8-17-2000A, 8-17-2000; amd. Ord. 1-19-2010A, 1-19-2010; Ord. 11-9-2010B, 11-9-2010)

See Ordinance 10-4I-3. Conditional Uses. (emphasis added).

Review of Chapter 6, Article D, demonstrates that the CoRC is permitted as a public recreational facility and townsite residential project after review by the appropriate entities, and approved by the City Council, the HOA and, finally, the City's Building Inspector. Under Ordinance 10-6D-2: Permitted Uses:

The following buildings, structures and uses of land may be permitted within a planned townsite project: Any use permitted within the underlying zone and those authorized under this section. ***Common areas and recreational facilities (public and private), including, but not limited to, golf courses,*** swimming pools, tennis courts, ***club houses, recreational buildings,*** landscape pond areas and features, and ***similar recreational facilities*** for the use and enjoyment of the residents. Common utility systems and facilities, recreational vehicle storage area, private streets (when so provided in the plan), also private driveways serving individual dwellings, fences, walls, accessory buildings, and similar structures and uses incidental to the main use. ***Public parks, recreation buildings and areas,*** water

tanks and reservoirs, schools and similar public facilities, *when owned and operated by the city*, or if owned and operated by another public governmental agency, following approval of the city. (Ord. 8-17-2000A, 8-17-2000).

Here, the CoRC was approved by the Cedars HOA Board of Directors (hereinafter the “Board”) and the Cedars Architectural Review Committee (hereinafter the “ARC”) after they met and reviewed the plans for the CoRC on April 14, 2011. “The plans were approved by the Board and ARC as presented.” *See* Exhibit B attached hereto. On May 5, 2011, the ARC formally approved the plans for the CoRC, on May 10, 2011 the City applied for a building permit and on May 16, 2011, the City’s Building Inspector issued a permit. *See* Exhibit C attached hereto. The permitting process was proper, and the CoRC is a permitted building to be built at its current location and within the current Zoning Ordinances.

IV. THE CORC IS A PERMITTED FACILITY UNDER THE TR-1 ZONE

Mr. Dearinger previously addressed the golf-related elements incorporated into the plans for the CoRC and now states its recreational use violates the uses allowed under the TR-1 Zone. The reasons the building is permitted has been addressed above. In addition, review of the definition of recreational facilities in other cases, demonstrates that the CoRC is a permitted recreation facility as currently designed and the building permit was properly issued. *See* Exhibit D to this Memorandum.

When faced with what is a recreational facility or activity, other courts have considered recreational facilities with mixed purposes and still considered them recreational. In *Johnson v. Salt Lake City Corp.*, 629 P.2d 432 (Utah 1981), the court found that “Defendant owns and operates the *Mountain Dell Golf Course. This recreational facility operates as a golf course*

most of the year, but it is open to the public for skiing, tubing, and sledding in the winter months.” *Id.* at pg. 432 (emphasis added). “Golf is a very common activity; it is not ‘abnormal’ in any sense of the word. Its value to the community outweighs its dangerous attributes. Indeed, most, if not *all recreational sports* involve some degree of risk of injury, yet plaintiff has cited to no Kansas case applying strict liability principles to *a recreational sport*. Moreover, in this case, the defendant was golfing on a golf course, which is absolutely an appropriate place to be playing the sport.” *See Ludwikoski v. Kurotsu*, 840 F.Supp. 826, 829 (D. Kans. 1993) (emphasis added).

Mr. Dearinger implies that the building is not appropriate if it is related to golf or recreational uses under the TR-1 Zone. That position is simply not the case. The CoRC is a permitted recreational facility.

V. THE ROLE OF THE BOARD OF ADJUSTMENT

Here, the Board of Adjustment is authorized to hear and decide Mr. Dearinger’s application as indicated in U.C.A. § 10-9A-701: “(1) Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide: ... (b) appeals from decisions applying the land use ordinances; and ...” The Board of Adjustment’s role as an administrative body is to objectively review the evidence presented and address the City Inspector’s decision related to the building permit only. Mr. Dearinger’s request regarding stopping construction at the site would fall beyond the purview of the Board of Adjustment.

It is the Board of Adjustment’s role [] to review the City Inspector’s decision to issue the permit only and not to go beyond to other issues more appropriately addressed by the legislative power of the City “... [T]he powers of the Board are

the same as the powers of the Inspector and ... on appeals the Board may do only that which the Inspector may have done in the first instance.” [The appeal authority]... is intrusted with the duty of enforcing the provisions of the ordinance; it is an administrative body, without a vestige of legislative power. It cannot therefore modify, amend, or repeal what the ordinance itself designates as its ‘general rules and regulations’; ...

See Walton v. Tracy Loan & Trust Co., 92 P.2d 724, 725, 726, 728 (Utah 1939).

In this case, if the Board determines there is evidence to support that the building permit was properly issued in this case, it will be upheld by any district court review if “the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.” *See* § 10-9a-801(3)(c). Accordingly, the City has presented substantial evidence and authority to support the decision of the City Inspector; therefore, the Board of Adjustment should deny Mr. Dearing’s request to rescind the building permit issued on May 16, 2011.

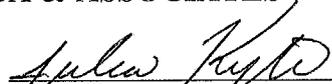
CONCLUSION

The City properly applied for a permit and the CoRC is a permitted facility in the TR-1 zone in which it is being built. There is no evidence to support Mr. Dearing’s claim that the CoRC as designed is not a permitted facility in the TR-1 zone. For the reasons addressed above, Mr. Dearing’s request that the Board of Adjustment should rescind the building permit for the CoRC and stop construction at the site should be denied.

DATED this 1st day of August, 2011.

STIRBA & ASSOCIATES

By:


PETER STIRBA

JULIA D. KYTE

Attorneys for the City of Cedar Hills

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of August, 2011, I caused to be served a true copy of the foregoing **CITY OF CEDAR HILLS' MEMORANDUM IN SUPPORT OF THE BUILDING PERMIT ISSUED FOR THE COMMUNITY RECREATION CENTER** by the method indicated below, to the following:

Craig Carlile
RAY QUINNEY & NEBEKER, P.C.
Suite 430
86 North University Avenue
Provo, Utah 84601

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Facsimile
- E-Mail

/s/ Jane Wiscomb

Assistant

Exhibit “A”



RECEIVED
6-30-2011
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CITY OF CEDAR HILLS
BOARD OF ADJUSTMENT APPLICATION

Date: 6/30/11 Name: Jerry Dearing* Phone: 801-796-1777

Mailing Address: 4211 Manilla Creek Drive, Cedar Hills, UT 84062

Location of property covered by appeal: 10640 N. Clubhouse Drive
Cedar Hills, Utah 84062

Zoning District: TR-1 Tax I.D. No.: 36:903:0105

I (we) hereby apply to the Board of Adjustment of the City of Cedar Hills, Utah, for the following: (Check the provision that describes the type of request.)

- 1. An error by the Zoning Administrator in the enforcement of the Zoning Regulation.
- 2. An interpretation of the Zoning Ordinance text or zone boundary lines.
- 3. A variance in the requirements relating to front, side or rear yards, or size of lot or building. (You must show a property-related hardship.)

SUMMARY OF REQUEST (Please be very specific.)

Rescind the building permit issued for construction of
the Community Events and Recreation Center and stop all
construction at the site.

*Please send all notices and correspondence to Mr. Dearing's attorney: Craig Carlile, Ray Quinney & Nebeker, 86 N. Univ. Ave., #430, Provo, UT 84601-4420, (801-342-2400), ccarlile rqn.com



EXPLANATION AND SUPPORTING DOCUMENTATION

State the facts fully. Use additional sheets if necessary and attach a plot plan where appropriate, showing the location of existing and proposed buildings on the lot and buildings on adjacent lots.

The zoning administrator erred by issuing the building permit and notice to proceed for the Community Events and Recreation Center as recreation facilities are not permitted uses in the TR-1 zone.

Adjoining Neighbors (Names and Mailing Addresses):

Darren Adamson 3976 Sawgrass
Crystal Budge 3982 Sawgrass
Bryce Nelson 4014 Sawgrass
Tim Rowberry 3988 Sawgrass

FOR OFFICIAL USE

Date Received 6-30-2011 By Kimi E Splendiale Title City Recorder
Fee Paid \$100 (\$100) Check # 02351 Cash

Exhibit “B”



THE CEDARS HOMEOWNERS ASSOCIATION

P.O. Box 233 • Pleasant Grove, Utah 84062

(801) 898-3685 Office / (801) 676-0885 Fax

Email: ecmcedars@gmail.com

July 5, 2011

City of Cedar Hills
Attention: City Recorder
3925 W. Cedar Hills Drive,
Cedar Hills, UT 84062

Regarding: ARC Approval of the CoRC

To Whom It May Concern,

The Cedars HOA Board of Directors and ARC met on April 14, 2011 and reviewed the plans for the City's new Community Recreation Center. The plans were approved by the Board and ARC as presented.

Regards,
The Cedars HOA Board of Directors

CC: Trent Augustus
TeJay Rasband
Boyd Wilkins
Dax Fossum
Gretchen Gordon

at, Suite 400
 ah 84111
 801) 401-9438
rum-engineers.com

ING INC.
 rth
 7
) 802-8993
@neutah.com

- A452 ENLARGED RAMP FLOOR PLAN AND SECTION
- A453 STAIR DETAILS
- A501 ARCHITECTURAL DETAILS
- A502 ARCHITECTURAL DETAILS
- A503 ARCHITECTURAL DETAILS
- A504 ARCHITECTURAL DETAILS
- A551 MILLWORK DETAILS
- A601 DOOR SCHEDULE AND HARDWARE
- A602 DOOR TYPES
- A603 WINDOW TYPES
- A604 WINDOW TYPES
- A605 WINDOW TYPES
- A606 WINDOW TYPES
- A607 DOOR AND WINDOW DETAILS
- A608 WINDOW DETAILS
- A701 MISCELLANEOUS DETAILS
- A702 MISCELLANEOUS DETAILS
- AI100 BASEMENT FURNISHINGS PLAN
- AI101 MAIN LEVEL FURNISHINGS PLAN

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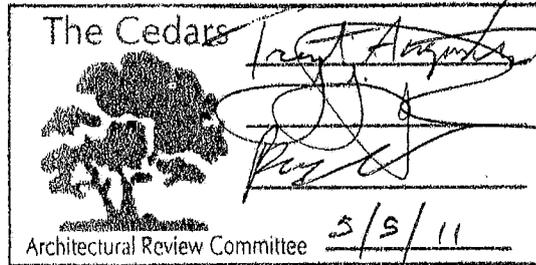
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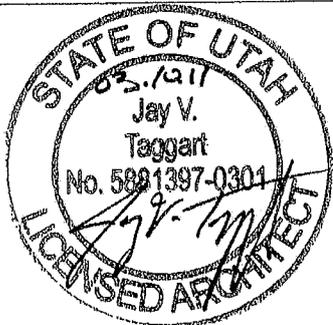
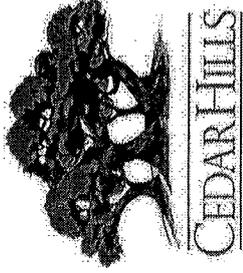
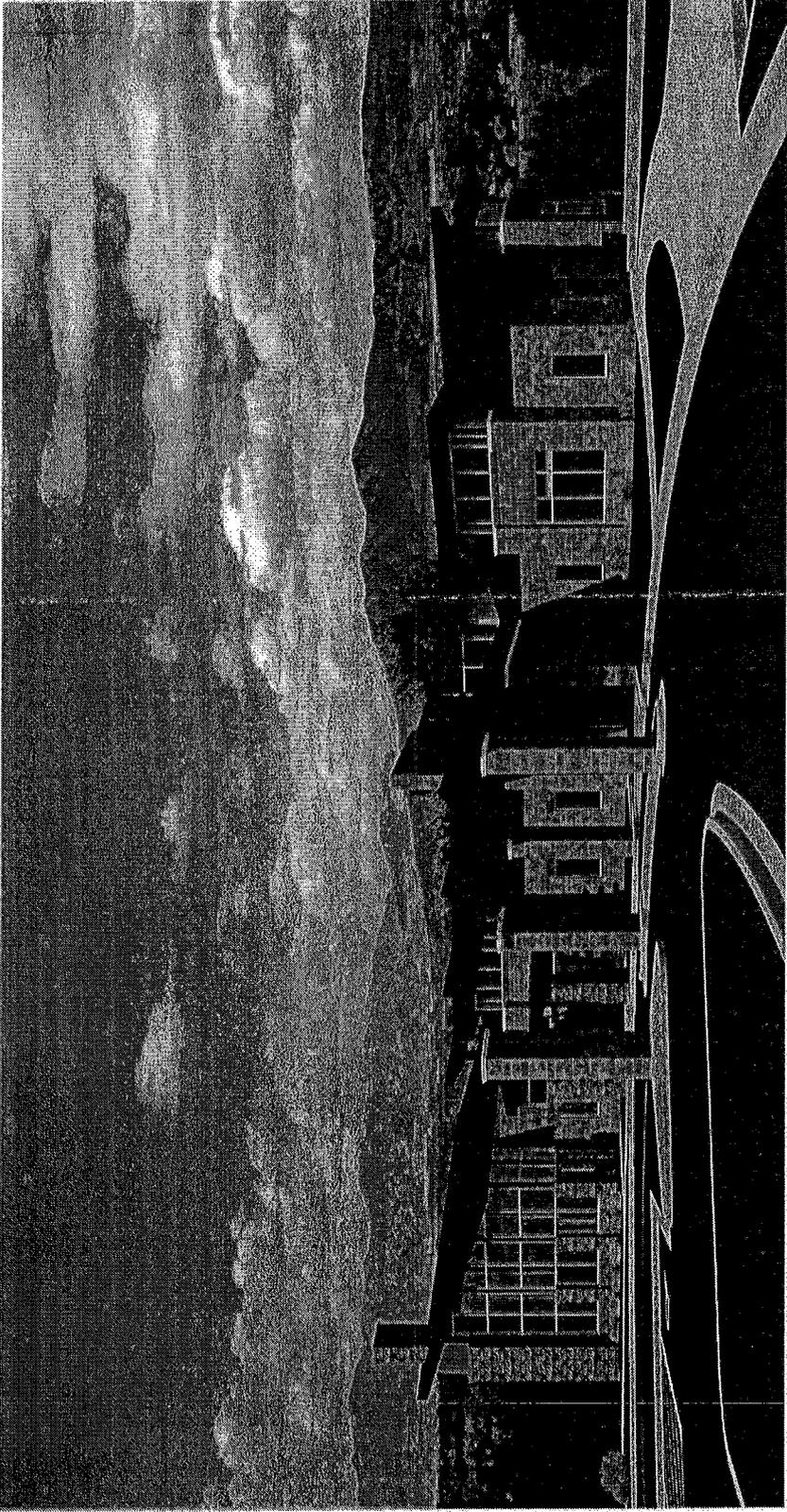
 CURTIS MINER ARCHITECTURE	233 SOUTH PLEASANT GROVE BLVD. SUITE #105 PLEASANT GROVE, UTAH 84062 PHONE: (801) 769-3000 FAX: (801) 769-3001 cma@cmautah.com	DATE: 03.10.2011
		PROJECT #: CMA1044
		PROJ. MAN.: NCM
		CHECKED BY: JVT
<small>THE INFORMATION HEREIN IS THE PROPERTY OF CURTIS MINER ARCHITECTURE AND MAY NOT BE REPRODUCED WITHOUT WRITTEN CONSENT. © 2011 CURTIS MINER ARCHITECTURE, LLC</small>		
PROJECT:	CEDAR HILLS CERC EVENTS CENTER 10640 N Clubhouse Drive Cedar Hills, Utah 84062	
SHEET DESCRIPTION:	COVER SHEET	SHEET: G000

Exhibit “C”

Exhibit “D”



Project Designed By:
OMA
CURTIS MINER
ARCHITECTURE
(801) 769-3000

CEDAR HILLS CoRC RECREATION CENTER

NO.	REVISION	DATE

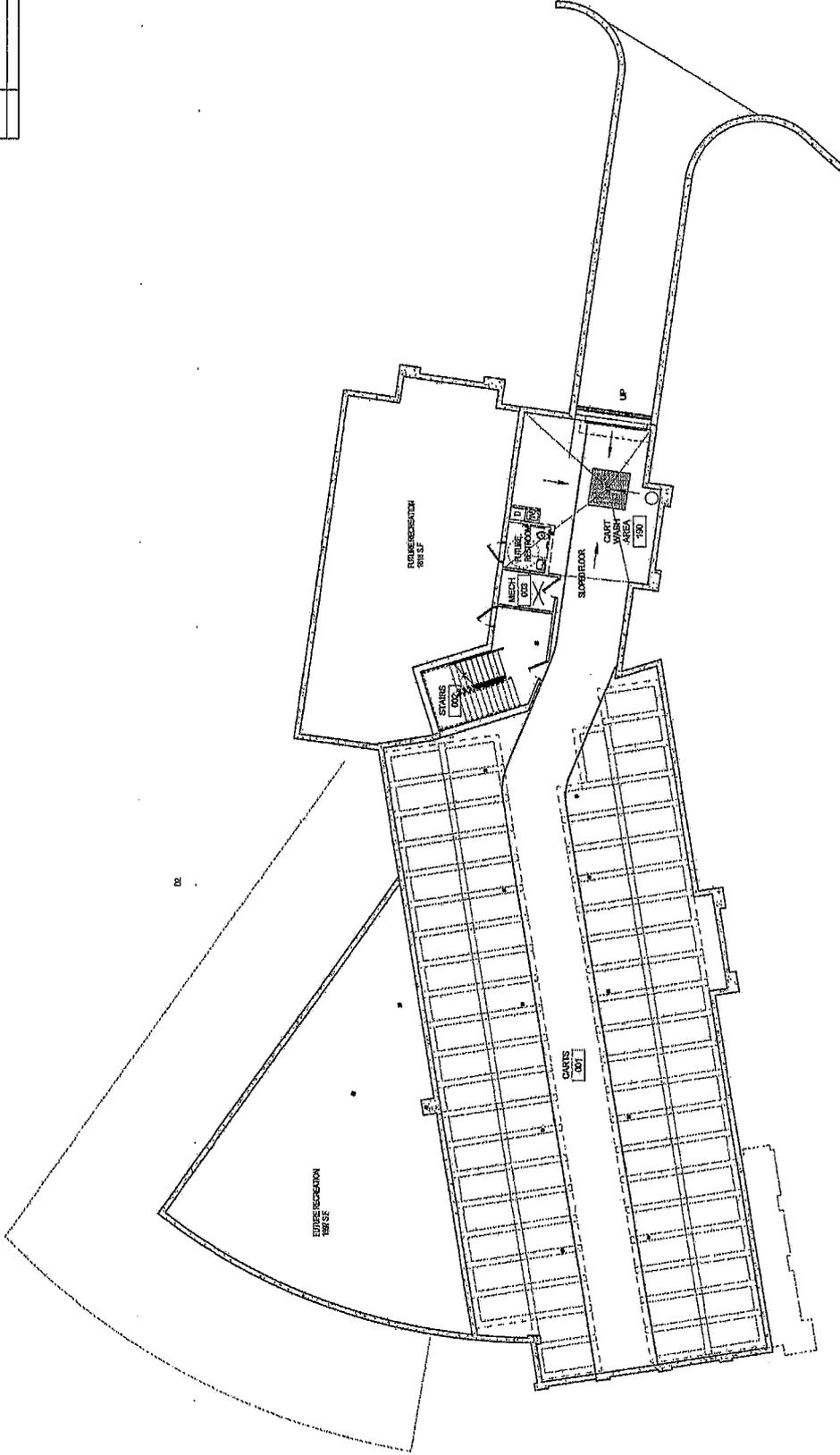
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LOWER LEVEL FLOOR PLAN
SCALE: 1/8" = 1'-0"

 OJA ARCHITECTS 211 WEST 1000 SOUTH SALT LAKE CITY, UT 84119 (801) 466-1000 www.oja.com	DATE: 07/20/2011 PROJECT: CEDAR HILLS DRAWN BY: J. HARRIS CHECKED BY: JAT
	PRODUCT: CEDAR HILLS CASC RECREATION CENTER 10540 N. Clubhouse Drive Cedar Hills, Utah 84002 FOR CONSTRUCTION SET
SHEET DESCRIPTION: LOWER LEVEL FLOOR PLAN	
SHEET: A100	

NO.	REVISION	DATE

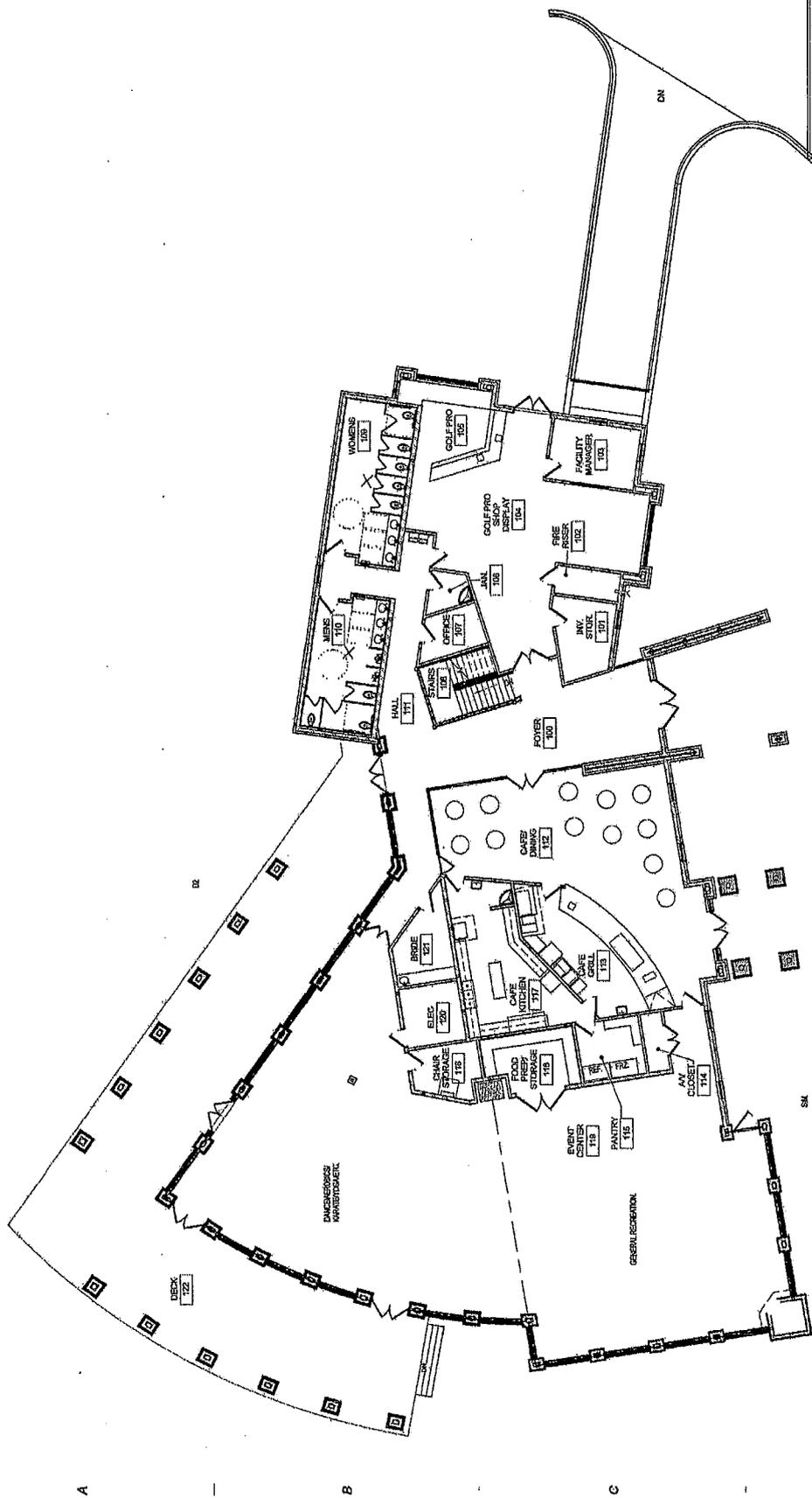
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 OTM OTHMER TRIMMER CIVIL ENGINEER 1000 N. COLUMBIA DRIVE COLUMBIA, MISSOURI 65201 (314) 733-1000 www.otm-engineers.com	DATE: 04/20/01 PROJECT: CEDAR HILLS GOLF & RECREATION CENTER CHECKED BY: JAT DRAWN BY: JAT
	PROJECT: CEDAR HILLS GOLF & RECREATION CENTER 1000 N. COLUMBIA DRIVE COLUMBIA, MISSOURI 65201
SHEET DESCRIPTION: FOUR CONSTRUCTION SET	
SHEET: A101	



101 MAIN LEVEL FLOOR PLAN
 SCALE: 1/8" = 1'-0" (AS SHOWN)