

Midway City Council
7 February 2023
Regular Meeting

Appeal of Administrative Decision
/ 55 South Center Project

Michael Henke

From: Michael Henke
Sent: Wednesday, November 9, 2022 12:27 PM
To: Glen K. Lent
Subject: Application for Conditional Use Permit

Glen,

I hope all is well. I have reviewed your Conditional Use Permit application for a mixed-use development at 55 South Center Street and found that the application does not comply with code requirements. Mixed-use developments on parcels less than 1 acre are allowed one dwelling unit (Section 16.5.3.H). The application is for four dwelling units and therefore does not comply with the code. Further, short-term rental units may not include kitchens and/or laundry facilities (Section 16.13.7). The application will not be considered vested until it complies with code requirements. Also, we are unable to place your proposal on any agendas until it does comply with code requirements.

I'm happy to meet with you and discuss options on how to move forward. Please let me know if you have a time next week that we can meet.

Also, please let me know if you have any questions.

Thanks,

Michael



Midway

Michael Henke, MPA, AICP

City Planning Administrator

H: Mon-Thurs 7:30-5:30

P: 435-654-3223 ext 105

E: mhenke@midwaycityut.org

75 N 100 W – P.O. Box 277

Midway, UT 84049

www.midwaycityut.org

KIRTON | M^CCONKIE

Daniel Dansie
50 E. South Temple, Suite 400
Salt Lake City, UT 84111
ddansie@kmclaw.com
801.321.4839

December 8, 2022

Via Hand Delivery, U.S. Mail and Email

Midway City Council
Celeste Johnson, Mayor
160 W. Main Street
Midway, Utah 84049
cjohnson@midwaycityut.org

Midway City Planning & Zoning
Michael Henke, City Planning Administrator
75 N. 200 W.
P.O. Box 277
Midway, Utah 84049
mhenke@midwaycityut.org

Re: Notice of Appeal Regarding Development Application

Mayor Johnson and Mr. Henke:

This law firm represents Alpine Development, LLC (“**Applicant**”) and its principal, Glen Lent, and Calvin and Stephanie Collins (collectively, “**Owner**”). As you know, on October 27, 2022, Applicant submitted to Midway City (“**City**”) a development application for a conditional use permit (“**Application**”) with respect to real property owned by Owner which is located at 55 S. Center Street, Midway, Utah (“**Property**”).

On November 9, 2022, the City’s Planning Administrator, Michael Henke (“**Administrator**”), sent an email (“**Denial Notice**”) to Mr. Lent. The Denial Notice stated that after reviewing the Application, the Administrator had determined “that the [A]pplication does not comply with code requirements.” The Midway City Code (“**City Code**”) clearly states that an application for a conditional use is to go before the City’s planning commission (“**Planning Commission**”) at the “next available regular meeting” after an application is filed. City Code Section 16.26.120(B). Despite the clear language of the City Code requiring that the Application go before the Planning Commission, the Denial Notice states that “we are unable to place your proposal on any agendas until it does comply with code requirements.” The Administrator’s denial of the Application was improper and this communication constitutes the notice of appeal to the

Midway City Council (“**City Council**”), as contemplated by Section 16.26.060(4) of the Midway City Code (“**City Code**”).¹

1. Background.

The Property has a zoning designation of C-2 (“**Zone**”), a commercial zone. Mixed use structures are a conditional use in the Zone, as shown in the table of uses at Section 16.05.020(B). As defined in Section 16.02, the term “mixed use” means: “A development in the commercial zone that blends a combination of residential and commercial uses where structural functions are physically and functionally integrated and provide a stronger neighborhood character and more compact development.”

The Application was submitted on a form prepared by the City. A true and correct copy of the application is enclosed herewith as **Exhibit A**. The Application requests approval for the following mixed-use project (“**Project**”):

A mixed-use building in front along Center Street containing commercial office space on the ground floor, a full-time residence on the top, and three short-term rental townhomes in back.

In addition to the Application, Applicant provided renderings of a proposed site plan for the Project and proposed floor plans and elevations for the Project (collectively, the “**Renderings**”). A true and correct copy of the Renderings is enclosed herewith as **Exhibit B**.

Applicant delivered the Application and the associated materials to the City and paid all the applicable fees on October 27, 2022. A true and correct copy of a Midway City Receipt (“**Receipt**”) is enclosed herewith as **Exhibit C**.

2. City’s Bases for Denial.

The Denial Notice, a true and correct copy of which is attached hereto as **Exhibit D**, identifies two reasons for denying the Application. The basis for denial is the City’s assertion that the Application requests approval for four (4) dwelling units. The second basis for denial is the City’s assertion that short-term rental units may not include kitchens and/or laundry facilities.

3. The Administrator Lacked Authority to Deny the Application.

As noted above, the Application is required to go before the Planning Commission “at its next available meeting.” City Code Section 16.26.120(B). At such a meeting, “the Planning Commission shall recommend the granting or denying of the conditional use permit **based on standards set forth in this section.**” *Id.* (Emphasis Added.) Following the Planning

¹ To the extent the Denial Notice is not, in fact, a denial of the Application, then this communication should be construed as a request under Utah Code § 10-9a-509.5(2)(b) that the City take final action on the Application.

Commission’s recommendation, a conditional use application goes before the City Council for final decision. *Id.* There is no mechanism in the City Code for the Administrator to preemptively deny a conditional use application. Thus, the Administrator lacked authority to deny the Application or otherwise prevent the Application from proceeding to the Planning Commission as required under City Code Section 16.26.120.

4. The Application was Vested on October 27, 2022.

An initial matter is whether the Applicant’s rights are “vested,” and if so, when did they vest. The Denial Notice states that “[t]he application will not be considered vested until it complies with code requirements.” Despite the Administrator’s assertion that the City did not consider the Application to be vested, the Application was, in fact, vested on October 27, 2022.

Under Utah Code § 10-9a-509(1)(a)(i), a development application is “vested” on the date when a complete application is submitted and fees are paid. “A land use application is considered submitted and complete when the applicant provides the application in a form that complies with the requirements of applicable ordinances and pays all applicable fees.” Utah Code § 10-9a-509(1)(c). Here, the Application was submitted on a form prepared by the City and the Applicant paid all the applicable fees. See Exhibit A, Exhibit B, and Exhibit C.

In claiming the application is not vested, the Denial Notice appears to conflate the Administrator’s substantive assessment—based on his review of the merits of the application—that the “application does not comply with code requirements” with the procedural process (under Utah Code § 10-9a-509(1)(c)) for submitting an application “in a form” that complies with the municipality’s codes.

Utah law makes it clear that the evaluation of a development application is a two-step process. First, a municipality evaluates an application to determine whether it “is complete for the purposes of subsequent, substantive land use authority review.” Utah Code § 10-9a-509.5(1)(a). Second, a municipality “substantively review[s] a complete application” in order to approve or deny the application. Utah Code § 10-9a-509.5(2)(a). The Administrator appears to think his assessment that the Application does not substantively comply with the City Code somehow means the Application was not in a form consistent with the City Code. In this case, the Denial Notice did not allege that the Application was incomplete or that the form of the Application did not comply with Midway’s codes. Indeed, the Application was on a form actually provided by the City. The fact that the Administrator conducted a substantive review of the Application supports the conclusion that the Applicant’s rights under the Application were vested on October 27, 2022. For the administrator to be able to conduct the substantive review of the Application, he had to—at least implicitly—make a determination that the application was complete, and therefore that the Applicant’s rights had vested.

5. The Project Includes Only One (1) Dwelling Unit.

The City Code only allows one (1) residential unit on a mixed-use development, such as the Project, which is less than one (1) acre. City Code 16.05.030(I)(1)(b). The Administrator

erroneously construed the Application as seeking approval for four (4) dwelling units. The Application itself states that it is seeking approval for “a full-time residence on top, and **three short-term rental townhomes** in the back.” See **Exhibit A** (emphasis added).

Only the “full-time residence” qualifies as a dwelling unit. Section 16.02 of the City Code contains the following definition for the term dwelling unit:

Dwelling Unit. Any building, structure or portion thereof which is occupied as, or designed or intended for occupancy as, **a residence** by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(Emphasis added.)

In this case, the Application clearly states that three (3) of the units are intended to be “short-term rental townhomes.” Because they are not intended for occupancy as a residence, the three (3) units in the back do not meet the City Code’s definition of dwelling unit. Indeed, in the very next sentence, the Denial Notice acknowledges that the three (3) units in back are “short-term rental units.” Short-term lodging facilities are a permitted use in the Zone. See City Code 16.05.020(B). Thus, the Project does not violate the City Code and there is no basis to deny the Application based on number of dwelling units.²

6. The Application was Vested Before any Change to the City Code Prohibiting Kitchens in Short-Term Rental Units.

The Administrator cites to City Code Section 16.13.070 claiming that “short-term rental units may not include kitchens and/or laundry facilities.” That section was recently amended and recodified. A true and correct copy of Midway City ordinance 2022-27 (“**Ordinance**”), which amended Section 16.13.070, is attached hereto as **Exhibit E**. The Ordinance was approved by the City Council on October 4, 2022. Importantly, however, the Ordinance did not **take effect** immediately. Rather, the Ordinance specifically states that it would “take effect **upon publication** as required by law.” See **Exhibit E** (emphasis added).

According to the “Certificate of Passage, Posting, and Publication,” attached to the Ordinance, “The ordinance became effective on 2 November 2022 upon publication.” Thus, the City concedes that the provisions of the Ordinance prohibiting kitchens and laundry facilities in short-term rentals **were not** in effect when the Applicant’s rights vested on October 27, 2022.

7. Under the Prior Code, Kitchens and Laundry Facilities Were Allowed.

Kitchens and laundry facilities were not prohibited in short-term rental units under the prior version of the City Code. In fact, the City specifically intended to change that fact by passing the

² As noted below, the City could require additional conditions to be placed on the Project—for example a deed restriction—to ensure and confirm that the three (3) short-term rental townhome units in back are not used as dwelling units.

Ordinance. The Staff Report for the Ordinance, attached hereto as **Exhibit F**, explicitly notes that the prior City Code did not prohibit kitchens and laundry units in short-term rentals in the Zone. The Staff Report states:

In the C-2 and C-3 zones, mixed use is permitted as a conditional use and allows for one residence per acre along with any permitted commercial uses. **One of the permitted uses is short-term lodging facilities.** This allows for a residence to be built on a parcel along with any type of short-term lodging facility that could include a hotel, motel, transient rental unit, (VRBO, AIRBNB, etc.). Potential land buyers have inquired if transient rental units could be built with kitchens and laundry facilities. The **code is currently silent** regarding laundry facilities, but it does regulate when kitchens are allowed, **though the current code is almost unusable with the current language.**

(Emphasis added.) Thus, by the City’s own admission, the prior version of the City Code did not provide a basis to prohibit kitchens or laundry facilities in short-term rentals in the C-2 Zone. The Administrator erred in using that as a reason to deny the Application.

8. Conditional Uses Must be Approved Unless No Conditions Could Mitigate Anticipated Harms.

The City cannot deny a development application seeking approval of a conditional use without adequate cause. In fact, a conditional use, such as that contemplated by the Application, **must be approved** “if reasonable conditions are proposed, or can be imposed, to mitigate the reasonable anticipated detrimental effects of the proposed use in accordance with applicable standards.” Utah Code § 10-9a-507(2)(a)(i); *see also* City Code Section 16.26.120.

In this case, the City has the right to identify and impose reasonable and tailored conditions on the Project. However, the Denial Notice does identify any harms which must be mitigated with conditions. Further, the Denial Notice does not assert that the City would not be able to fashion conditions to mitigate any such anticipated detrimental effects of the Project. Because the City (a) has not identified any specific harms associated with the Project, and (b) conditions could reasonably be imposed to address such harms if they were identified, the Application must be approved.

9. Conclusion.

The Application was vested on October 27, 2022. The Application only seeks approval for one (1) residential unit. The other units are short-term rental units, a permissible use in the Zone. The changes to the City Code which address kitchens and laundry facilities were not in effect when Applicant’s rights under the Application vested. For these reasons, the Denial Notice was improper and should be reversed. The Application should be placed on the Planning Commission’s agenda for consideration under City Code Section 16.26.120.

Please contact me with any further questions regarding this matter.

Midway City Council
Michael Henke
December 8, 2022
Page 6

Best regards,

KIRTON | MCCONKIE

A handwritten signature in blue ink that reads "Daniel Dansie". The signature is written in a cursive style with a large initial 'D'.

Daniel Dansie

Exhibit A

MIDWAY CITY

- Planning Office -

75 North 100 West
Midway, Utah 84049

Phone: 435-654-3223 x 105
Fax: 435-654-2830
mhenke@midwaycityut.org

Application for Conditional Use Permit

Application Fee: \$500 + \$.50 per letter + Professional Review Deposit: \$1000.00 (required at staff's discretion and \$.50 per letter and any Engineering Review expenses and legal noticing)

Owner(s) of Record:

Name: Cal Collins Phone: _____
Mailing Address: _____ City: Midway State: UT Zip: 84049
E-mail Address: _____

Applicant or Authorized Representative:

Name: Glen K Lent Phone: _____
Mailing Address: _____ City: Midway State: UT Zip: 84049
E-mail Address: _____

Reason for Conditional Use: A mixed-use building in front along Center street containing commercial office space on the ground floor, a full-time residence on the top, and three short-term rental townhomes in the back

Property Location: 55 S. Center street

Parcel Number(s): 00-0005-9696

Zoning District: C-2

FOR OFFICE USE ONLY

STAFF:		Application Number
Date Received:		Zone:
Received By:		Tax ID Number:
Fee Paid:		
PLANNER:		
Complete / Incomplete		
Date:	Reviewed by:	

Our Vision for the City of Midway is to be a place where citizens, businesses, and civic leaders are partners in building a city that is family-oriented, aesthetically pleasing, safe, walkable and visitor friendly. A community that proudly enhances our small-town Swiss character and natural environment, as well as remaining fiscally responsible.

Please give us a detailed statement on how the proposal will help implement our vision (i.e. architecture, landscaping, trails, etc.). Visit our website to view our General Plan.

see attached

Please read and sign before application submittal

I declare under penalty of perjury that I am the owner or authorized agent of the property subject to this request and the foregoing statements, answers and attached documents are true and correct. As the applicant for this proposal, I understand that my application is not deemed complete until the Planning Office has reviewed the application. I further understand I will be notified when my application has been deemed complete. At that time I expect that my application will be processed within a reasonable time, considering the work load of the Planning Office.

I fully understand that I am responsible for the payment of any back taxes and declare that I am responsible for all fees incurred.

Signature of Owner or Agent:  Date: 10/27/22

IMPORTANT: Your application cannot be processed until determined complete by the Planning Staff. An application shall be considered complete when all applicable fees are paid (such as: Midway Water Board, Midway Sanitation District, out-of-pocket expenses, etc.) and all items listed herewith are provided or considered not applicable by the Planning Office. All application fees are non-refundable.

CONDITIONAL USE APPROVALS AND REGULATIONS:

Section 16.26.12 Conditional Use Approvals and Regulations

The consideration of an application for a conditional use shall be governed by the following standard of Utah Code:

- (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 mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied. The following approval requirements and regulations shall apply to all conditional use applications. These requirements are in addition to any conditions specifically or requirements specifically listed for a given conditional use. In the case of conflicting requirements, the more restrictive shall apply.

A. General Standards for Conditional Use Approval. An applicant for a conditional use approval shall provide within the application information to clearly demonstrate to the City compliance with the following, in addition to any specific requirements of this Section attached to the conditional use applied for:

1. General Welfare Standard. The establishment, maintenance or conducting of the use for which a use permit is sought will not, under the particular case, be detrimental to the public welfare or injurious to property or improvements in the neighborhood.
2. Nuisance Standard. Any use found to be objectionable or incompatible with the character of the City and its environs due to noise, light, traffic, dust, odors or other undesirable characteristics may be prohibited.
3. General Plan Consistency Standard. To obtain a use permit, the applicant must generally show that the contemplated use is compatible with the City's land use policies in terms of the general plan and zoning ordinances, and that such use would be essential or desirable to the public convenience or welfare, and will not impair the integrity and character of the zoned district or be detrimental to the public health, safety, morals or welfare.

B. After receiving the application at its next available regular meeting, the Planning Commission shall recommend the granting or denying of the conditional use permit based on the standards set forth in this Section. The Planning Commission may also recommend conditions to be imposed on the use if the permit is granted. After the Planning Commission makes its recommendation, the City Council shall advertise and hold a public hearing in the same manner specified above. After the public hearing, the City Council shall make a decision whether to grant or deny the proposed conditional use permit. The Council shall record its decision in writing and shall recite the findings upon which the decision is based. The City Council may approve and/or modify a conditional use or special exception permit application in whole or in part, with conditions, only if all of the following findings are made:

1. The proposed use is conditionally permitted within the Land Use Title, and would not impair the integrity and character of the intended purpose of the subject zoning district and complies with all of the applicable provisions of this Code.
2. The proposed use is consistent with the General Plan.
3. The approval of the conditional use or special exception permit for the proposed use is in compliance with the requirements of state, federal and Midway City or other local regulations.
4. There will be no potential, significant negative effects upon environmental quality and natural resources that could not be properly mitigated and monitored.
5. The design, location, size, and operating characteristics of the proposed use are compatible with the existing and future land uses with the general area in which the proposed use is to be located and will not create significant noise, traffic, or other conditions or situations that may be objectionable or detrimental to other permitted uses in the vicinity or adverse to the public interest, health, safety, convenience, or welfare to the City.
6. The subject site is physically suitable for the type and density/intensity of the use being proposed.
7. There are adequate provisions for public access, including internal and surrounding traffic flow, water, sanitation, and public utilities, and services to insure that the proposed use would not be detrimental to public health and safety.

C. The Planning Commission may recommend, and the City Council may impose, conditions on the requested use which are additional to any conditions which are specifically listed in conjunction with all conditional uses or special exceptions prescribed within this Ordinance Title. All conditions imposed shall meet the following criteria:

1. The condition is within the police powers of Midway City.
2. The condition must substantially further a legitimate public purpose.
3. The condition must further the same public purpose for which it was imposed.
4. The property owner may not be required to carry a disproportionate load in furthering the public purpose.
5. Dedications of land and other contributions as conditions of approval must be "reasonably related" to the use of the property for which the conditional use or special exception permit is requested. There must also be a "rough proportionality" between the extent of the condition and the particular demand or impact of the project. In addition, a performance bond cannot be required for the installation of public improvements that are not reasonably related to the property use. The conditions which are imposed on a conditional use permit must be expressly attached to the permit and cannot be implied. For example, if a conditional use permit contains language that restricts a building's height to 25 feet and requires the developer to submit and obtain Planning Commission and City Council approval of a landscaping plan, among other things, the permit itself does not imply a height limitation on trees within the development.

D. Public Participation and Notification. The public participation requirements for conditional use permits and special exceptions, as outlined in Title 16, shall be required. Public notice shall be per Utah law and per Title 16 of the Midway City Municipal Code.

E. Appeal. The decision of the City Council on the granting or denying of the conditional use permit or special exception shall be the final decision of the City on the matter. Appeal shall be to a court of competent jurisdiction in the manner and within the time prescribed by Utah law.

F. Right to Conditional Use. The right to a conditional use shall benefit only the particular land applied for by the applicant and shall not be transferable to other land. A conditional use approval shall remain valid for only one year, i.e., if the approved use has not begun in one year from approval, the approval shall expire and must be applied for again, unless otherwise specified in the approval conditions.

G. In the event that complaints concerning a conditional use or special exception are filed with the City, the Zoning Administrator shall investigate problems identified in the complaint to determine if the conditional use is in violation of this Title. If the Zoning Administrator determines the conditional use is in violation of this Title, the Administrator shall pursue the elimination of the violating activity in accordance with pertinent sections of this Title.

CHECKLIST:

- A detailed statement of how your application supports the General welfare Standard, the Nuisance Standard, and the General Plan Consistency Standard (see A. 1, 2, 3);
- Completed application and all fees paid; Fees include the application fee, \$.50 per letter and the cost of any engineering review expenses and legal noticing;
- An accurate list of the names and addresses of all property owners of current record within six hundred (600) feet of the property, including your own. This information is available in the Wasatch County Recorder's Office;
- Unsealed stamped envelopes addressed to each property owner on the list above;
- One (1) 24"x36" copy of plans drawn to scale of 1"=100' if applicable
- Three (3) 11"x17" copies of plans
- Any other requirements as identified by staff

The Vision:

This proposal meets Midway City's goals of the *Community Vision Goals and Guidelines* document. The proposal will remove a 1960's house with no significant historical value and replace it with a mixed-use building that resembles small town rural Midway. It will provide opportunities for local housing, a travel destination, and offices for business development. The architecture will resemble that of a historical building in the critical entry corridor of the downtown area.

The location will be ideal for vacationers who want to visit town square and attend the many festivals throughout the city. Accommodations will provide a central location and a walkable experience to many of the town's restaurants and significant sites. The short-term rentals will provide the City much-needed tax revenue. The commercial component of building will provide a unique privilege for a lucky tenant to be close to the up-and-coming vibrant downtown area. It will also complement the City goals of business growth and economic development.

General Standards for Conditional Use Approval

General Welfare Standards: The proposal will not be detrimental to the public welfare or injurious to any property or improvements in the neighborhood.

Nuisance Standard: The proposal is compatible with the character of the City in this location. We are surrounded by commercial entities on 2 of 4 sides. The proposal will be no more impactful with regards to noise, light, traffic, dust, odors, or any other uses in the area.

General Plan Consistency: The proposal is consistent with the general plan in regards to all of the following:

- Economic development
- Protecting commercial zones for commercial mixed-use buildings
- Architecture (historic)
- The vision of the central business district
- Creation, growth and retention of Midway business
- Beautification of Main Street and Entry corridors
- Pedestrian-friendly downtown

Exhibit B

SITE PLAN

The current building is replaced with a new mixed-use building that accommodates a retail space and four residential units; one flat located on the second floor above the retail space and three townhouses located behind. A shared surface parking located at the rear serves for the retail and residential flat. Townhouses are served by their own double-car garages.

RETAIL SPACE: 1,192 s.f.

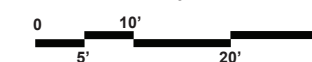
RESIDENTIAL FLAT: 1,128 s.f.
 2 Bedrooms, 2 baths, balcony and terrace.
 1,104 s.f. upper floor, 24 s.f. ground floor entrance.

TOWNHOUSE: 1,480 s.f. (excludes basement)
 2 Bedrooms, 3 baths (excludes basement bath)
 loft space, porch facing north,
 second floor balconies facing south,
 high ceiling over dining, basement (540 s.f.)

PARKING PROVIDED:
 Townhouse garages: 6 spaces
 Surface parking: 9 spaces
 Total: 15 spaces



Scale: 1" = 20'

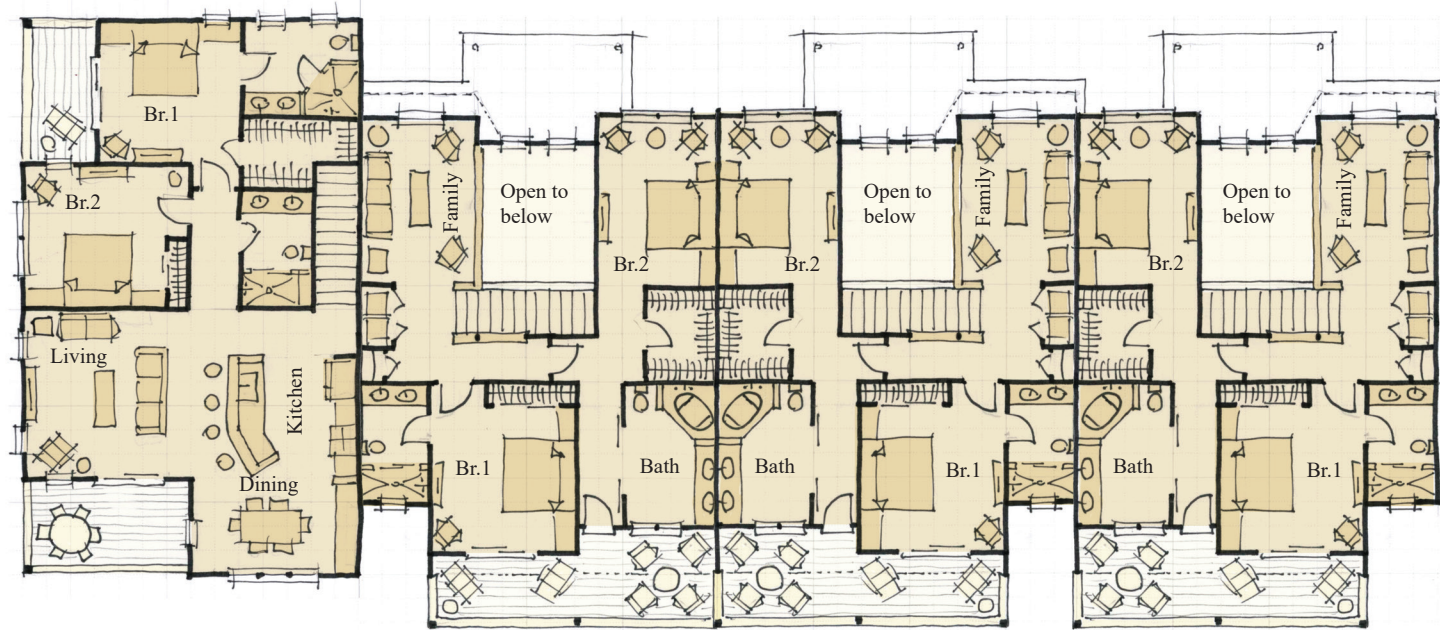


P E L • O N A
 ARCHITECTS AND URBANISTS

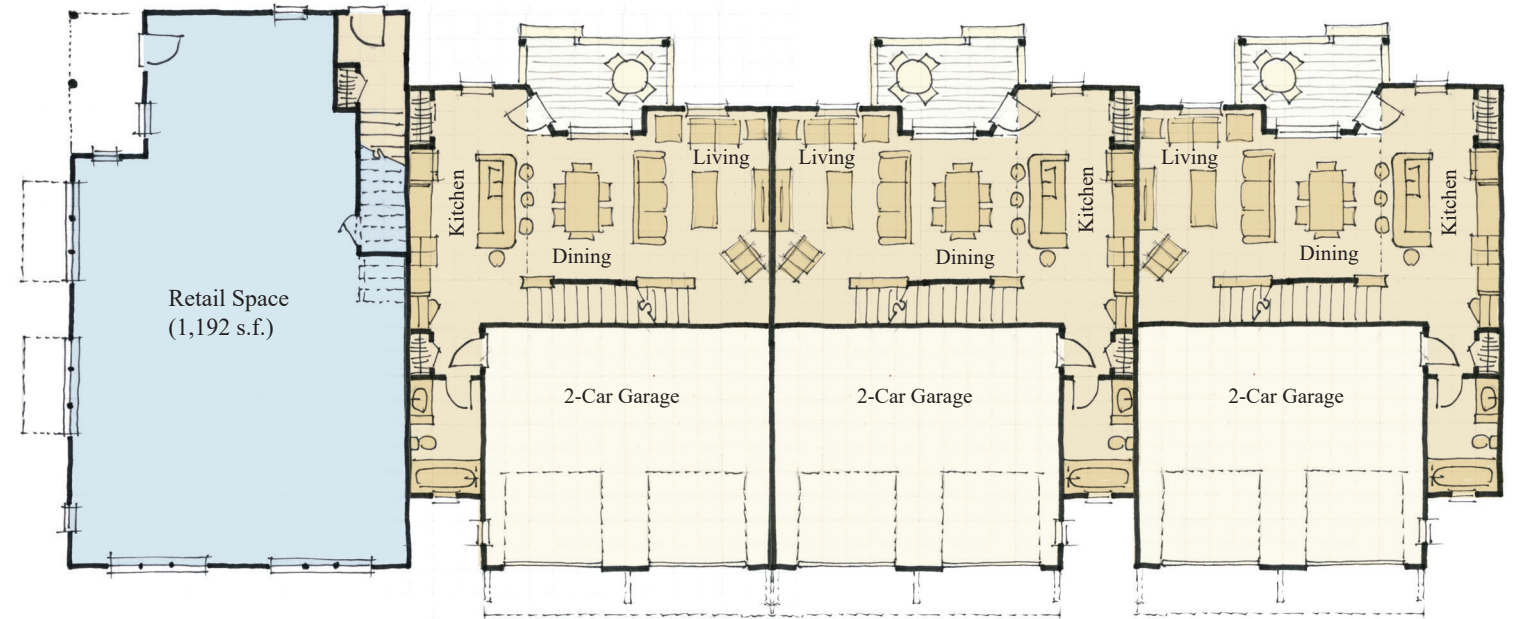
RONNIE PELUSIO, AIA, LEED AP • KORKUT ONARAN, PH.D., CNU AP

4696 BROADWAY, BOULDER, CO 80304 / 303.443.7876 / WWW.PEL-ONA.COM

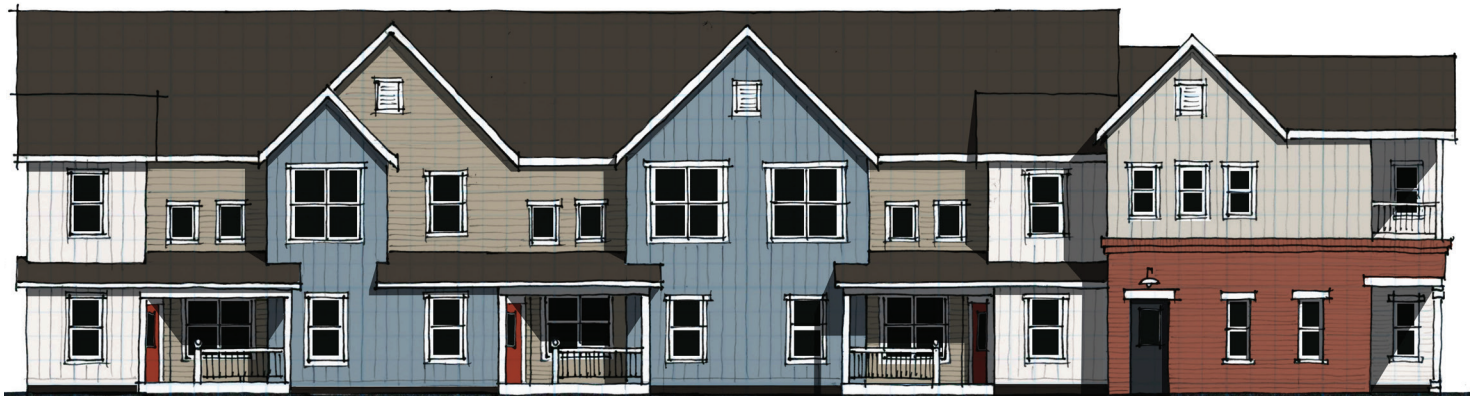
CONCEPTUAL ARCHITECTURE



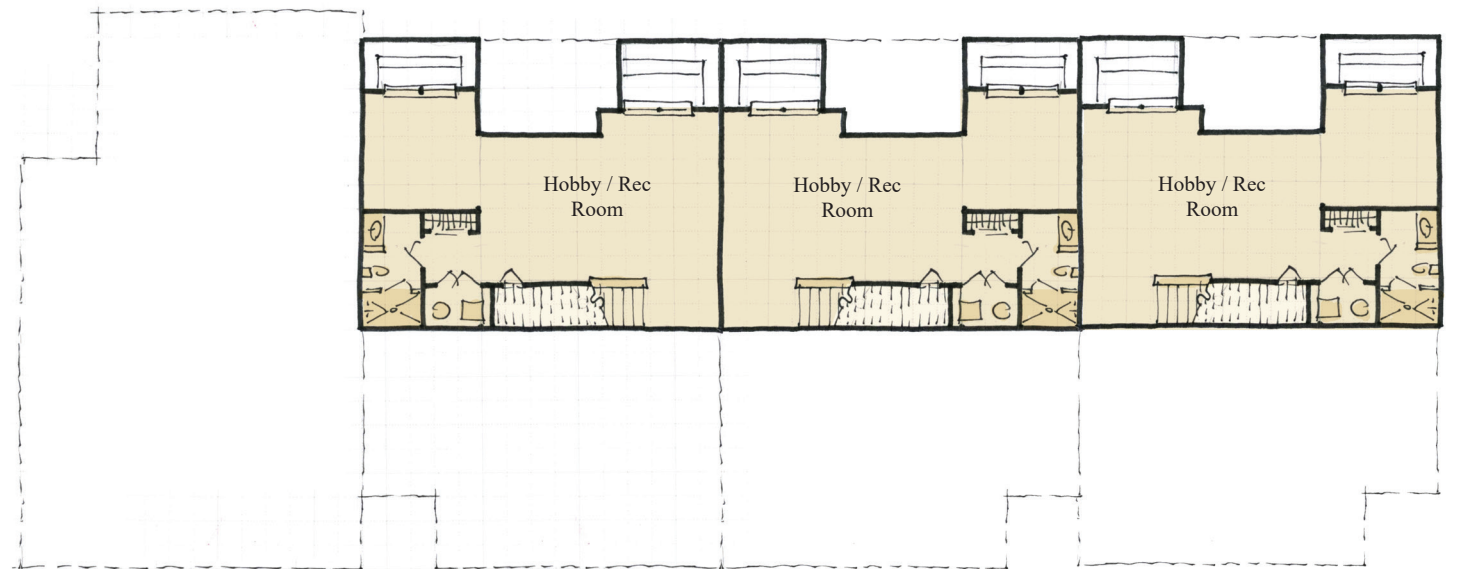
UPPER FLOOR PLAN
SCALE: 1" = 16'



GROUND FLOOR PLAN
SCALE: 1" = 16'



NORTH ELEVATION
SCALE: 1" = 16'



BASEMENT PLAN
SCALE: 1" = 16'

Exhibit C

21087

MIDWAY CITY
RECEIPT

Date 10.27.22

Name Glen Lent - Alpine Dev LLC

		Amount
Water	<u>Commercial COP</u>	<u>paid 34.00</u>
Cemetery	<u></u>	<u>App - 500.00</u>
Building & Zoning	<u></u>	<u>OOD - 1000</u>
General	<u></u>	<u>CH/211</u>
		<u>1534.00</u>

Melannie Egan
Signature

Exhibit D

From: [Michael Henke](#)
To: [Glen K. Lent](#)
Subject: Application for Conditional Use Permit
Date: Wednesday, November 9, 2022 12:27:08 PM
Attachments: [image001.png](#)

Glen,

I hope all is well. I have reviewed your Conditional Use Permit application for a mixed-use development at 55 South Center Street and found that the application does not comply with code requirements. Mixed-use developments on parcels less than 1 acre are allowed one dwelling unit (Section 16.5.3.H). The application is for four dwelling units and therefore does not comply with the code. Further, short-term rental units may not include kitchens and/or laundry facilities (Section 16.13.7). The application will not be considered vested until it complies with code requirements. Also, we are unable to place your proposal on any agendas until it does comply with code requirements.

I'm happy to meet with you and discuss options on how to move forward. Please let me know if you have a time next week that we can meet.

Also, please let me know if you have any questions.

Thanks,

Michael



Michael Henke, MPA, AICP

City Planning Administrator

H: Mon-Thurs 7:30-5:30

P: 435-654-3223 ext 105

E: mhenke@midwaycityut.org

75 N 100 W – P.O. Box 277
Midway, UT 84049

www.midwaycityut.org

Exhibit E



ORDINANCE 2022-27

AN ORDINANCE TO AMEND SECTION 16.13.070(C) OF THE MIDWAY CITY LAND USE CODE TO CLARIFY IF, AND UNDER WHAT CIRCUMSTANCES, KITCHENS AND LAUNDRIES ARE ALLOWED IN RENTALS, MOTELS, AND HOTELS

WHEREAS, pursuant to Utah Code Section 10-9a-509 the Midway City Council may formally initiate proceedings to amend city ordinances; and

WHEREAS, the Midway City Council and City Staff have recently discussed the need to clarify if, and under what circumstances, kitchens and laundries are allowed in rental units, motels, and hotels; and

WHEREAS, the current section of the code dates back to 1977 and it is difficult to interpret how it applies to the current land use code; and

WHEREAS, Midway City Staff are receiving an ever-increasing number of inquiries about creating rental units that include kitchens and laundry facilities; and

WHEREAS, the Midway City Council desires to amend Section 16.13.070 to address these concerns.

NOW THEREFORE, be it ordained by the City Council of Midway City, Utah, as follows:

Section 16.13.070 shall be amended to read as follows:

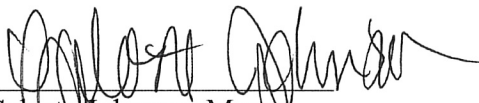
Kitchen and laundry facilities for individual short-term rental units (hotels, motels, Airbnb, VRBO, etc.) are not allowed in the C-2 and C-3 zones except for a residence that has been approved by the Land Use Authority as part of a mixed-use development and any dwellings that are legal nonconforming.

This ordinance shall take effect upon publication as required by law.

PASSED AND ADOPTED by the City Council of Midway City, Wasatch County, Utah this 4th day of October 2022.

Council Member Steve Dougherty	<u> Aye </u>
Council Member Jeff Drury	<u> Aye </u>
Council Member Lisa Orme	<u> Aye </u>
Council Member Kevin Payne	<u> Aye </u>
Council Member JC Simonsen	<u> Aye </u>

APPROVED:



Celeste Johnson, Mayor

ATTEST:



Brad Wilson, City Recorder

APPROVED AS TO FORM:



Corbin Gordon, City Attorney





Certificate of Passage, Posting and Publication

I certify that on 4 October 2022 the Midway City Council adopted Ordinance 2022-27 (Kitchen Units in Motels and Hotels).

I certify that a copy of the ordinance was deposited in the office of the municipal recorder.


I certify that a full, true, and correct copy of the ordinance was posted on 24 October 2022 at the following locations:

Midway City Office Building
Midway Community Center
United States Post Office (Midway)
Ridley's Express
7-Eleven (Midway)

I certify that a summary of the ordinance was published on the Utah Public Notice Website on 24 October 2022.

I further certify that a summary of the ordinance was published in The Wasatch Wave on 2 November 2022.

The ordinance became effective on 2 November 2022 upon publication.


Brad Wilson, Midway City Recorder

Dated 2 November 2022



Exhibit F

Midway City Council
4 October 2022
Regular Meeting

Ordinance 2022-27 /
Kitchen Units in Motels and Hotels



Midway

CITY COUNCIL MEETING STAFF REPORT

DATE OF MEETING: October 4, 2022
NAME OF APPLICANT: Midway City
AGENDA ITEM: Code Text Amendment of Section 16.15.8.C

ITEM: 13

Midway City is proposing a code text amendment of Section 16.13.7: Kitchen Units in Motels and Hotels. The proposed code will clarify if, and under what requirements, kitchens and laundries are allowed in rental units, motels, and hotels.

BACKGROUND:

Midway is proposing a code text amendment to the Midway Municipal Code. The proposed change will clarify when kitchen and laundry facilities are allowed in transient rental units. The current code states the following in Section 16.13.7 Kitchen Units in Motels and Hotels:

Lot area per dwelling unit shall apply to motels and hotels for those that include kitchen facilities.

This section of code dates to, at least, the 1977 Midway Zoning Code and it is difficult to interpret how it applies to the current land use code. Staff receives an ever-increasing number of inquiries regarding creating rental units that include kitchens and laundry facilities. The aforementioned code does regulate kitchens for motels and hotels, but it is difficult to interpret what lot area means in a zone that does not have a minimum lot area. Staff is proposing to amend the code so that it will better regulate when kitchen facilities are allowed in rental units, specifically for the C-2 and C-3 zones.

Midway allows rental units in the Transient Rental Overlay District (TROD). The TROD covers commercial, resort, and portions of some residential zones. The issue of kitchens in residential zones and resort zones is not an evident problem because those zones regulate when kitchens are allowed, and those zones also do not allow apartments. The problem lies in the commercial zones where mixed-use is allowed along with short-term lodging facilities.

In the C-2 and C-3 zones, mixed-use is permitted as a conditional use and allows for one residence per acre along with any permitted commercial uses. One of the permitted uses is short-term lodging facilities. This allows for a residence to be built on a parcel along with any type of short-term lodging facility that could include a hotel, motel, transient rental unit (VRBO, AIRBNB, etc.). Potential land buyers have inquired if transient rental units could be built with kitchens and laundry facilities. The code is currently silent regarding laundry facilities, but it does regulate when kitchens are allowed, though the current code is almost unusable with the current language.

The concern is if any short-term rental unit has a kitchen, and possibly laundry facilities, then the unit is really an apartment. The only difference between a short-term lodging unit, that includes a kitchen, and an apartment, is the amount of time each is rented. Currently the code does not allow apartments in the C-2 zone, except for properties over two acres, so staff has stated that any short-term lodging facilities are not allowed to have kitchens, based on Section 16.13.7.

Short-term lodging facilities are useful to Midway in a couple of ways. They do help produce transient rental tax, they help Midway qualify for the resort tax, and they do help other businesses by creating lodging opportunities for visitors that will spend money in Midway businesses. If a short-term lodging facility has a kitchen, then it is less likely that visitors will eat out as much in Midway businesses. Further, making sure the unit is not rented on a long-term basis becomes more problematic for the City to enforce. It is unlikely that anyone will live long-term in a unit without a kitchen, but it is more likely that that will happen if the unit does have a kitchen and laundry. The City does want to address attainable housing issues, and this will happen in the future after the General Plan has been revised and adopted, but this issue must also be addressed.

To address the aforementioned issues and concerns, staff is proposing the following language:

Section 16.13.7 Transient Rental Units in Commercial Zones

Kitchen and laundry facilities for individual short-term rental units (hotels, motels, Airbnb, VRBO, etc.) are not allowed in the C-2 and C-3 zones except for a residence that has been approved by the Land Use Authority as part of a mixed-use development and any dwellings that are legal nonconforming. Short-term rental units may include a wetbar (sink, fridge, dishwasher, and microwave but does not include a stove or an oven).

The proposed language would assure that short-term rental units are built as traditional hotel rooms except for the one full unit that is allowed as part of a mixed-use development in the C-2 and C-3 zones. The proposed language is clearer than the current language and accomplishes the same goal, but it also helps make administration of the code much easier for staff and it is also easier for the public to understand.

PLANNING COMMISSION RECOMMENDATION:

Motion: Commissioner Simons: I make a motion that we recommend approval for the code text amendment of Section 16.13.7: Kitchen Units in Motels and Hotels. The proposed code will clarify if, and under what requirements, kitchens are allowed in rental units, motels, and hotels. Accept staff findings and add a condition that defines a wet bar.

Seconded: Commissioner Garland

Chairman Nicholas: Any discussion on the motion?

Chairman Nicholas: All in favor.

Ayes: Commissioners: Ream, Wardle, Osborne, Lineback, Garland and Simons

Nays: None

Motion: Passed

POSSIBLE FINDINGS:

- The current code is dated and is difficult to interpret for staff and the public.
- The proposed language is clearer than the current language and accomplishes the same goal, but it also helps make administration of the code much easier for staff and it is also easier for the public to understand.
- The proposed language will require the creation of traditional short-term lodging rooms that will in turn help the local economy by generating more taxes and may stimulate more economic activity.

ALTERNATIVE ACTIONS:

1. Approval. This action can be taken if the City Council finds that the proposed language is an acceptable amendment to the City's Municipal Code.
 - a. Accept staff report
 - b. List accepted findings

2. Continuance. This action can be taken if the City Council would like to continue exploring potential options for the amendment.
 - a. Accept staff report
 - b. List accepted findings
 - c. Reasons for continuance
 - i. Unresolved issues that must be addressed
 - d. Date when the item will be heard again

3. Denial. This action can be taken if the City Council finds that the proposed amendment is not an acceptable revision to the City's Municipal Code.
 - a. Accept staff report
 - b. List accepted findings



Midway

ORDINANCE

2022-27

AN ORDINANCE TO AMEND SECTION 16.13.070(C) OF THE MIDWAY CITY LAND USE CODE TO CLARIFY IF, AND UNDER WHAT CIRCUMSTANCES, KITCHENS AND LAUNDRIES ARE ALLOWED IN RENTALS, MOTELS, AND HOTELS.

WHEREAS, pursuant to Utah Code Section 10-9a-509 the Midway City Council may formally initiate proceedings to amend city ordinances; and

WHEREAS, the Midway City Council and City Staff have recently discussed the need to clarify if, and under what circumstances, kitchens and laundries are allowed in rental units, motels, and hotels ; and

WHEREAS, the current section of the code dates back to 1977 and it is difficult to interpret how it applies to the current land use code; and

WHEREAS, Midway City Staff are receiving an ever-increasing number of inquiries about creating rental units that include kitchens and laundry facilities; and

WHEREAS, the Midway City Council desires to amend Section 16.13.070 to address these concerns.

NOW THEREFORE, be it ordained by the City Council of Midway City, Utah, as follows:

Section 16.13.070 shall be amended to read as follows:

Kitchen and laundry facilities for individual short-term rental units (hotels, motels, Airbnb, VRBO, etc.) are not allowed in the C-2 and C-3 zones except for a residence that has been approved by the Land Use Authority as part of a mixed-use development and any dwellings that are legal nonconforming. Short-term rental units may include a wetbar (sink, fridge, dishwasher, and microwave but does not include a stove or an oven).

This ordinance shall take effect upon publication as required by law.

PASSED AND ADOPTED by the City Council of Midway City, Wasatch County, Utah
this ____ day of _____, 2022.

	AYE	NAY
Council Member Steve Dougherty	_____	_____
Council Member Jeff Drury	_____	_____
Council Member Lisa Orme	_____	_____
Council Member Kevin Payne	_____	_____
Council Member JC Simonsen	_____	_____

DRAFT

APPROVED:

Celeste Johnson, Mayor

ATTEST:

Brad Wilson, City Recorder

APPROVED AS TO FORM:

Corbin Gordon, City Attorney

(SEAL)

 **MAILED**
1.4.23
Certified
Return Receipt



Midway

TO: Daniel Dansie, Counsel for Alpine Development, LLC
FROM: Michael Henke, Midway City Planning Administrator
DATE: January 4, 2023
RE: Administrative Decision on Conditional Use Permit Application

Midway City (the “City”) is in receipt of Alpine Development, LLC’s (“Applicant”) Notice of Appeal dated December 8, 2022.

An informal, initial decision on Applicant’s application for a conditional use permit regarding the property located at 55 S. Center Street (the “Application”) was provided by email on November 9, 2022. The purpose of this correspondence is to provide Applicant with the City’s formal administrative decision regarding the Application and to provide clarity for why the initial denial was made.

As you are aware, a hearing on this matter has been scheduled for January 17, 2023. Applicant may choose to keep the January 17 hearing, or it may choose to postpone the hearing to have a full 30 days to respond to this formal administrative decision.

The Administrator has Authority under the City Code to Determine Violations of the City Code.

Applicant’s Notice of Appeal claims that “there is no mechanism in the City Code for the Administrator to preemptively deny a conditional use application” and that “the Administrator lacked authority to deny the Application or otherwise prevent the Application from proceeding to the Planning Commission.”

Applicant’s claim is incorrect. There is a mechanism in the City Code whereby the Administrator may determine if a proposed conditional use violates the City’s Land Use Code. City Code Section 16.26.120(G). If the Administrator determines that a conditional use violates the Land Use Code, the Administrator then has the duty to “pursue the elimination of the violating activity” in accordance with the Land Use Code. *Id.*

Additionally, the Code grants the Administrator authority to “advise the City Council and Planning Commission regarding regulation of and requests for development.” City Code Section 2.01.080(A). The Code also provides that it is the Administrator’s duty to administer, enforce and interpret the provisions of the Code. City Code Section 2.01.090(B).

In accordance with these provisions and in my capacity as the City’s Planning and Zoning Administrator, I reviewed Applicant’s application and determined that the proposed conditional use would violate the Land Use Code.

The Application requested approval of a mixed-use building “containing commercial office space on the ground floor, a full-time residence on the top, and three short-term rental townhomes in back.” A review of the plans showed that each of the proposed “short-term rental townhomes” would contain kitchen and laundry facilities. My interpretation of the City Code—both prior and current—is that the inclusion of such amenities make a unit a “residence” under the Code’s definition of a “dwelling unit,” and disqualify the unit from being a short-term rental. The City Code only allows one residential unit in a mixed-use development less than one acre in size, such as Applicant’s proposed project. City Code 16.05.030(I)(1)(b).

After interpreting the Code and determining that the Application would violate it, I sent what was intended to be a courtesy email to Applicant. The purpose of my November 9 email to Glen Lent was to pursue the elimination of the violating activity by offering to meet with Glen to discuss options on how he could move forward in compliance with the Code.

Neither the Prior Code nor the Current Code Allows Kitchens and/or Laundry Facilities in Short-Term Rentals.

Whether Applicant’s Application vested before or after City Code Section 16.13.070 was amended is not relevant because neither version of the Code allows for kitchens and/or laundry facilities in short-term rentals.

Because the City amended the Code to provide increased clarity regarding kitchens and laundry facilities in short-term rentals does not mean that kitchens and/or laundry facilities were allowed prior to the clarification. As stated in the Staff Report you cite in the Notice of Appeal, the prior code was silent on whether short-term rentals could have laundry facilities and **did regulate when kitchens were allowed.**

It is implied in the City Code’s definition of a “Dwelling Unit” that such a unit is a building or structure in which a family can “reside” on a full-time basis. If a unit has a kitchen and laundry facility, a family can reside there full-time. If it does not, a family cannot reside there long term, thus making it a short-term rental. It is true that the City Code has been amended to make this point explicitly clear, but the understanding that a “dwelling unit” is a “residence” that contains a kitchen and/or laundry facility was also contained in the previous code’s language.

Applicant’s three proposed townhomes contain kitchens and laundry facilities, thus qualifying them as possible full-time residences and “dwelling units” under the Code. As a result,

Applicant's project does not include only one dwelling unit, but four, and is not allowed. For these reasons, I informed Applicant that its proposal must be revised before it can move forward to the Planning Commission.

The City Will Identify and Impose Reasonable and Tailored Conditions on the Project Once the Project Complies with the City Code.

Applicant's Notice of Appeal accurately states that "the City has the right to identify and impose reasonable and tailored conditions on the Project."

DATED this 4th day of January 2023.



Michael Henke
Midway City Planning Administrator

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Sent To Daniel Dansie, Attorney
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KIRTON | McCONKIE

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Salt Lake City, UT 84111
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February 2, 2022

Via Hand Delivery, U.S. Mail and Email

Midway City Council
Celeste Johnson, Mayor
160 W. Main Street
Midway, Utah 84049
cjohnson@midwaycityut.org

Midway City Planning & Zoning
Michael Henke, City Planning Administrator
75 N. 200 W.
P.O. Box 277
Midway, Utah 84049
mhenke@midwaycityut.org

Re: Response to Administrative Decision on Conditional Use Permit Application

Mayor Johnson and Mr. Henke:

As you know, this law firm represents Alpine Development, LLC (“**Applicant**”) and its principal, Glen Lent, and Calvin and Stephanie Collins (collectively, “**Owner**”). Applicant and Owner have previously provided correspondence to you dated December 8, 2022 (“**Notice of Appeal**”). The Notice of Appeal was sent in response to Applicant’s receipt of an email dated November 9, 2022, from the City’s Planning Administrator, Michael Henke (“**Administrator**”). In that email, the Administrator discussed Applicant’s development application for a conditional use permit (“**Application**”), which was submitted to Midway City (“**City**”) on October 27, 2022. The Application was made with respect to real property owned by Owner and located at 55 S. Center Street, Midway, Utah (“**Property**”). In the November 9, 2022, email, the Administrator stated that the Application did not comply with requirements of the Midway City Code (“**Code**”). In response to the Notice of Appeal, the Administrator sent a letter dated January 4, 2023 (“**Administrative Decision**”).

Applicant reiterates and restates the points and authorities in the Notice of Appeal and incorporates the same into this correspondence by this reference. The purpose of this letter is to:

(a) formally appeal the Administrative Decision; (b) explain why the Administrative Decision is erroneous in advance of a meeting of the Midway City Council which is scheduled for February 7, 2023 (“**Meeting**”); and request that the Application be granted.

1. The Administrator’s Advisory Role and Authority to Determine Violations of the Code Do Not Provide a Mechanism to Pre-emptively Deny a Conditional Use Application or Prevent Its Review by the Planning Commission.

In the Administrative Decision, the Administrator relies on Section 16.26.120(G) and Section 2.01.080(A) of the Code as the basis for pre-emptively denying and preventing the review of the Application by the Planning Commission. Those provisions provide, respectively, that: (a) if the Administrator determines that a conditional use violates the Land Use Code, the Administrator then has the duty to “pursue the elimination of the violating activity” in accordance with the Land Use Code; and (b) the Administrator has authority to “advise the City Council and Planning Commission regarding regulation of and requests for development.” Neither provision gives the Administrator the power to circumvent the otherwise applicable provisions of the Code relating to conditional uses.

Pursuing the elimination of the activity being carried on in violation of the Code is an activity wholly unrelated from the review of a conditional use application. The authority to do the former does not allow the Administrator to unilaterally deny a conditional use application—such as the Application—or prevent it from being heard by the Planning Commission. In this case, the Code required that the Application go before the Planning Commission “at its next available meeting.” City Code Section 16.26.120(B). At such a meeting, “the Planning Commission shall recommend the granting or denying of the conditional use permit based on standards set forth in this section.” *Id.* By pre-emptively denying an application or preventing its hearing by the Planning Commission, Administrator not only usurped a power reserved to the Planning Commission and went beyond the scope of his advisory role, but he also failed to exercise his duty to “administer, enforce and interpret” the provisions of the Code—a provision which the Administrator cited in his own Administrative Decision. *See* City Code Section 2.01.090(B).

There is no basis in the Code for the Administrator’s position. He wrongfully denied the Application without allowing the Applicant the process to which Applicant is entitled under the Code: a hearing before the Planning Commission. The Administrator’s decision must be reversed.

2. The Administrator’s Contention that Neither the Prior Code nor the Current Code Allows Kitchens and/or Laundry Facilities in Short-Term Rentals is Erroneous.

The Administrator also is mistaken when he states that neither version of the Code allows for kitchens and/or laundry facilities in short-term rentals. This detail is significant in light of the Application’s vesting date of October 27, 2022 under Utah Code § 10-9a-509(1)(a)(i)—as explained in the Notice of Appeal.

In the Administrative Decision, the Administrator argues that “[b]ecause the City amended the Code to provide increased clarity regarding kitchens and laundry facilities in short-term rentals [that] does not mean that kitchens and/or laundry facilities were allowed prior to the clarification.”

This circumlocution highlights the obvious: prior to the ordinance taking effect “upon publication as required by law” on November 2, 2022—kitchens and laundry facilities **were not prohibited** in short-term rentals. If they were, the Administrator would have said so. As referenced in our Notice of Appeal, the City Council acknowledged in the Staff Report for the Ordinance that the prior code was “silent regarding laundry facilities” and its regulation of kitchens was “almost unusable with the current language.”

Despite this, the Administrator interprets—based on implication rather than explicit language—that “if a unit has a kitchen and laundry facility, a family **can reside** there full-time” and it is therefore a “Dwelling Unit” under the Code. (Emphasis added.) Apparently, the Administrator is trying to turn the short-term rental units into full time residences based solely on his conjecture about what **could** happen. While the presence of a kitchen and laundry facility may create the potential for short-term rental units to function as apartments, that possibility does not convert the short-term rental units into a residence or “dwelling unit.” The Code’s explicit text defines a dwelling unit as a space which is “occupied as, or designed, or intended for occupancy as a residence.” The Application clearly states that only one (1) of the units in the Project will be used as a residence whereas the remaining three (3) will be short-term rental units—regardless of the interior appliances—which is in full compliance with the Code requirements.

In sum, given the Application vested before the amended Code took effect, at that time the Code did not restrict kitchens or laundry facilities in short-term units. Because the Project only has one (1) dwelling unit and (3) three short-term rental units, the Project fully complies with the Code.

3. The City Has Not Identified Harms that Need to be Mitigated with Reasonable and Tailored Conditions.

The Administrative Decision also suggests that conditions for the Project will only be imposed “once the Project complies with the City Code”. For the reasons mentioned above, and in the Notice of Appeal, the Project as described in the Application **already complies** with the version of the Code applicable when the Applicant’s development rights were vested on October 27, 2022.

The Administrative Decision—like the Administrator’s November 9, 2022 email—does not identify any harms which must be mitigated with conditions. In the absence of any articulation of identifiable harms, and based on the Application’s consistency with the Code, the Application should be approved pursuant to Utah Code § 10-9a-507(2)(a)(i) and Section 16.26.120 of the Code, as further described in the Notice of Appeal.

4. Conclusion

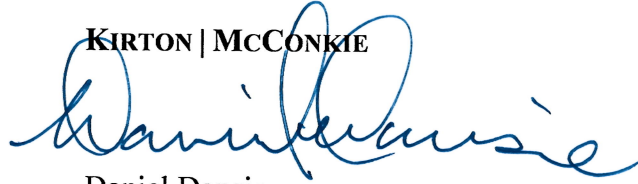
In conclusion, the Administrator lacked authority to deny the Application. Because the Application complies with the Code, it should be forwarded to the Planning Commission for review.

Midway City Council
Michael Henke
February 2, 2023
Page 4

Please contact me with any further questions regarding this matter.

Best regards,

KIRTON | MCCONKIE

A handwritten signature in blue ink that reads "Daniel Dansie". The signature is fluid and cursive, with the first name "Daniel" and last name "Dansie" clearly legible.

Daniel Dansie