

TO: WEBER COUNTY BOARD OF ADJUSTMENTS/OGDEN VALLEY PLANNING COMMISSION

PETITIONERS: CHRIS L. JOHNSON, SUSAN D. JOHNSON, CHRISTINA GRANATH, AND LONI AND CASSIDY VERHAAL

PREPARED BY: ZANE S. FROERER OF THE LAW FIRM FROERER & AHLSTROM PLLC

SUBJECT: APPEAL OF STAFF DECISION TO CLASSIFY GREEN VALLEY ACADEMY AS A SCHOOL

FILE NUMBER: DR 2010-09

DATE: FEBRUARY 24, 2011

INTRODUCTION

On behalf of Chris L. Johnson, Susan D. Johnson, Christina Granath, and Loni and Cassidy Verhaal, the law firm of Froerer & Ahlstrom, PLLC hereby submits this supplement to prior letters of appeal and requests that this Memorandum be treated as a separate request for the review of the matters addressed herein where necessary to preserve any right to appeal such matters. The Petitioners request that in accordance to the Weber County Ordinances, the Planning Commission or the Weber County Board of Adjustments review the decision by the Weber County Planning Staff to classify the proposed use of real property commonly known by the address of 9091 East 100 South, Huntsville, Utah, by Applicant Jared Balmer, on behalf of Green Valley Academy, as a Private Educational Institution. This land is zoned AV-3 under the Zoning Ordinance. The grounds for this objection, the authority to review this decision, and the proper resolution of this matter are contained herein.

SUMMARY OF FACTS

1. On Tuesday, January 25, 2011, the Ogden Valley Planning Commission had on its agenda the application for a Design Review as submitted by Applicant Jared Balmer, agent for Green Valley Academy. The action requested was Design Review approval of the proposed Green Valley Academy private Education Institution under Weber County Zoning Ordinance 36. Prior to the January 25th meeting, Planning Staff prepared a Report for the Commission. *See*

Staff Report to the Ogden Valley Planning Commission for Design Review attached as Exhibit 1. The Report stated “Educational Institution (private)” as the Proposed Land Use. The Staff also recommended that the Commission approve the Design Review because the project was in compliance with applicable county ordinances. As a part of the application process, the Staff determined that the Academy was properly considered an Educational Institution for purposes of the Zoning Ordinance which was a Permitted use under the AV-3 zone. *See* Weber County Zoning Ordinance Chapter 5B.

2. The Design Review Report detailed that the main land use that the Academy intended for the land was a “private specialty school.” This was based upon a narrative provided by the Applicant which detailed the educational aspects of the Academy’s proposed use. *See* Staff Report to Ogden Valley Planning Commission for Design Review, Exhibit C 1-5, attached as Exhibit 1. The narrative proposes that the Academy will be accredited with a curriculum that meets the high school graduation requirements (specifically stating that “students will have the **ability** to obtain a high school diploma...” emphasis added.) It also lists proposed staff positions.
3. The narrative focuses heavily on the supposed education curriculum of the Academy, but ignores or omits any reference to the Academy’s function as a treatment center for troubled youth. The Applicant previously applied to Weber County to amend the zoning use of “Residential Treatment Academy” as a conditional use in the FV-3 zone. The Commission was scheduled to consider this application on Tuesday, May 25, 2010. The report prepared by the Planning Staff contains a description of the Academy’s use that is quite different and revealing about the true intentions of the Academy. *See* Staff Report to Ogden Valley Planning Commission for Zoning Change attached as Exhibit 2. In this report the Staff

provides specific detail about the use and purpose of a Residential Treatment Academy.

Notably, the description of the proposed use in Exhibit 2 more accurately fits the Applicant's intended purpose of operating a Residential Treatment Center for Troubled Youth which is currently a conditional use in the AV-3 zone. This description also fits the required licensing from the Department of Human Services for a Therapeutic School or Residential Treatment Center for Troubled Youth, not a school as defined by the Weber County Zoning Ordinance.

4. Even though the narrative attached to the current Application for Design Review avoids drawing attention to the therapeutic aspects of the Academy, the Applicant still states that the students will receive and require specialized services and particularly therapy "beyond the basic counseling services 'conventional' schools provide." *See* Staff Report to Ogden Valley Planning Commission for Design Review, Exhibit C 4, attached as Exhibit 1. The curriculum actually includes weekly therapy that will be integrated into the daily aspects of the student's life. *See* Staff Report to Ogden Valley Planning Commission for Design Review, Exhibit C 1-5, attached as Exhibit 1. This includes a "life skills curriculum" that teaches students how to shop, cook, and maintain a bank account and self care.
5. The Applicant also submitted a Letter along with his application to amend the Zoning Ordinance for the FV-3 zone. *See* Letter requesting addition of Residential Treatment Academy as Use attached as Exhibit 3. In the first paragraph, the Applicant states that the term "Residential Treatment Academy" reflects the purpose of the use and the nature of the client population because the clients meet the definition of handicapped persons. Throughout this Letter, the Applicant refers to "training" and how the students have a "treatable diagnosis." The Applicant proposes or submits a list of requirements for a Residential Treatment Facility. Eleven requirements listed deal with client population characteristics,

staff qualified to properly supervise the client population, and proper licensing with the Utah Department of Health. Only in one subparagraph does the Applicant address education of the client population.

6. Even more detail about the true nature of the Academy's use is provided in this Letter when the Applicant clearly states that the "purpose is to provide residence and treatment for students." Based upon the Applicant's own assessment, the schooling nature of the Academy is secondary to its primary purpose as a Therapeutic School. The Applicant stated the clients admitted to this facility would be provided continuous supervision and support by trained staff. *See* Letter requesting addition of Residential Treatment Academy as Use attached as Exhibit 3.
7. In the Design Review Report, the Applicant makes reference to other similarly situated schools, including the Daniels Academy. The Daniels Academy considers itself a "therapeutic program" where each student is assigned to a therapist upon admission. *See* Daniels Academy Our Program Web Page attached as Exhibit 4. In its application¹ for a conditional use permit to Wasatch County it declared its proposed uses as a "Therapeutic Boarding School." *See* Daniels Application for Conditional Use Permit as Exhibit 5. The Daniels Academy later amended this application to classify its program as a "Residential Facility for Persons with a Disability." *See* Daniels Amended Application for Conditional Use Permit as Exhibit 6. Part of the curriculum includes giving families therapeutic "assignments" and they are encouraged to attend quarterly workshops at Daniels Academy. A quick review of the Daniels Academy team reveals a strong emphasis on therapy and counseling. *See* Daniels Academy Our Team Web Page attached as Exhibit 7. Daniels

¹ After failing to gain approval through Wasatch County for its facility, the Daniels Academy incorporated and then approved its own use as a State approved Municipality.

Academy also has no more than 18 students at any given time compared to the proposed 36 client residents sought by the Applicant. Finally, in addition to the Daniel's Academy's clear troubled youth marketing emphasis, the Academy is licensed by the Department of Human Services as a Residential Treatment Center. *See* Record of Licensing for Daniels Academy as Exhibit 8. This fits with their Student Profile and their Admissions purpose. *See* Daniel's Academy Student Profile and Admissions as Exhibit 9.

8. This is not the first facility that the Applicant has established and he is well schooled in how to present these facilities as one thing when they are actually something quite different. The Oakley School is licensed with the Department of Human Services as a Therapeutic School. *See* Record of Licensing for Oakley School as Exhibit 10. As part of the admissions process to the Oakley School, prospective clients are required to take a series of psychological and behavioral tests and evaluations, including: any DSM –IV diagnoses, DSM-IV 5 axis panel with a current GAF, and a complete psychological evaluation that includes personality tests and substance abuse evaluations. *See* Oakley School Admissions as Exhibit 11. The Oakley Staff List reveals an emphasis on therapy, structured behavior modification and supervision. *See* Oakley School Staff List as Exhibit 12. Included in the Oakley curriculum is a program called the Recovery Program. This is a substance abuse program for which all students are evaluated for participation suitability. *See* Oakley School Recovery Services as Exhibit 13. This program includes participation in additional therapy as well as attendance at local AA or NA meetings as well as utilizing an on campus 12 step program. The components of this Recovery Program include aspects designed to help individuals recover from severe alcohol or drug abuse. *See* Oakley School Components of Recovery Services as Exhibit 14.

9. The Oakley School works directly with another facility associated with the Applicant called Island View Academy. Island View is licensed as an Intermediate Secure Care Facility for Youth with the Department of Human Services. *See* Record of Licensing for Island View as Exhibit 15. Island View is a non-profit company that was established “to engage in and carry on the business of operating an educational and residential treatment service business for adolescents.” *See* Articles of Incorporation for Island View as Exhibit 16. Jared Balmer, the current Applicant, was one of the original Trustees for Island View. Island View markets itself not as a school but as a residential treatment center and is listed as such in commonly used online directories for those types of facilities. *See* My Troubled Teen Directory as Exhibit 17.
10. There are many facilities that are similar to the one being proposed by the Applicant and all of them emphasize their therapeutic programs and services (sometimes to the point that education is more of a second thought). Cedar Ridge is an example of what Green Valley Academy will bring to the Ogden Valley. Cedar Ridge is a facility for troubled youth located in Uintah on 130 acres with a mission to produce behavioral change. *See* Cedar Ridge Program Overview as Exhibit 18. Clients with “Childhood Trauma,” “Defiant Behavior,” and “Substance Abuse” are admitted for treatment. *See* Cedar Ridge Admissions as Exhibit 19. All clients at Cedar Ridge are assigned a therapist for their entire stay and participate in individual, group and family therapy sessions on a weekly and regular basis. *See* Cedar Ridge Therapy as Exhibit 20. Part of this therapy includes “Behavior Management” and “Drug and Alcohol Use Treatment.” The behavior management program operates on what is called a “Trust Level” program where clients can earn more privileges. *See* Cedar Ridge Behavior Management as Exhibit 21. Apparently this includes the privilege of engaging in

martial arts and access to shoes. Recently three clients from Cedar Ridge assaulted the only on duty staff member, bound the staff member, and then used keys and alarm code to access their shoes and escape from the facility only to be caught when another client called off-duty staff. *See Cedar Ridge Escape News as Exhibit 22.* Cedar Ridge is another facility licensed as a therapeutic boarding school by the Department of Human Services. Clients also receive individual therapy to address “deep emotional issues” related to drug and alcohol abuse at Cedar Ridge. *See Cedar Ridge Drug and Alcohol Program as Exhibit 23.*

11. These “schools” have a common thread in their marketing and focus: it always centers on therapeutic services offered to adolescents. *See New Haven Program Over View as Exhibit 24.* The clients are sent, often involuntarily, by parents who can afford the tuitions which average \$10,000.00 a month. Escapes like the one from Cedar Ridge are not uncommon. *See Provo Canyon Escape as Exhibit 25.* They claim to exclude the types of clients who would act in a violent or dangerous manner, but there is little policing that can be done on this. *See Provo Canyon Exclusionary Criteria as Exhibit 26.*
12. The Commission received a letter from the Petitioners’ attorney, Vincent Rampton of the law firm Jones Waldo, which contained a detailed objection to the classification of the proposed land use of an Educational Institution among other concerns. This letter was directed to the Commission with the express instruction that it be considered notice of Petitioners’ objections. This letter was delivered via express mail and email on January 21, 2011.
13. At the January 25th meeting, the Commissioners were improperly instructed that they were not permitted to consider the contents of this letter or the subject matter of the Petitioners’ objections by the Weber County Attorney’s office and the Applicant’s attorney.

Alternatively, the Commission has failed to take the necessary steps to schedule a review of the written objections presented in the letter.

14. The International Building Code classifies particular buildings based upon certain factors.

Classroom buildings are designated as E (Education) uses. Residential buildings are classified as R. Supervised residential environment that provides personal care services is given an I Occupancy designation. The R-4 Occupancy is for residential facilities containing more than 5 but not more than 16 occupants. This includes residential care/assisted living facilities such as a boarding house, dormitory, or residential treatment center. A residential treatment center includes a supervised residential environment which provides personal care services. Personal care services involves staff who are responsible for the safety of residents while living inside the building. As long as there are fewer than 16 residents, a residential treatment center may be designated as a R-4 occupancy. If a residential facility providing more than 16 persons with a supervised residential environment that provides clients with personal care services, then it can only be classified under the I Occupancy. *See* Letter from Ray Bertoldi on International Building Code as Exhibit 27. Therefore, the proposed school would not be classified as a residential building.

15. Weber County Zoning Ordinance defining the AV-3 zone allows Residential Facilities for Troubled Youth as a conditional use. Such a facility must have less than 8 occupants and the necessary supervision and personal care available is specifically defined in the Ordinance.

THE APPEALS PROCESS

Under the Appeal Process, Staff decisions are appealed to the Planning Commission within 15 days of the decision. The Planning Director is authorized to make certain decisions. *See* Weber County Zoning Ordinance 31-2. Only for the administrative approval process is

public notice given. Appeals from decisions shall be filed within 15 days of the written decision. *See Utah Code Ann. §17-27a-704.* A county is required to give actual notice or the notice required pertaining to specific sections of Utah Statute. *See Utah Code Ann. §17-27a-201.* This can be accomplished by mailing notice to third parties. *See Utah Code Ann. §17-27a-206.* The sufficiency of notice may be challenged within 30 days of the meeting or action. *See Utah Code Ann. §17-27a-209.* In any appeal of a decision by the land use authority, the appellant carries the burden of proving the land use authority erred. *See Utah Code Ann. §17-27a-705.* The review is a de novo review unless the county has an ordinance to the contrary. *See Utah Code Ann. §17-27a-707.*

An application for a land use should be approved if it conforms to the Zoning Ordinance unless; the land use authority has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval. *See Utah Code Ann. §17-27a-508.* A county shall adopt an ordinance providing for residential facilities for disabled persons. *See Utah Code Ann. §17-27a-519.*

MEMORANDUM OF AUTHORITY

The Weber County Planning Staff erred in designating the Applicant's proposed use of 9091 East 100 South, Huntsville, Utah, as a school instead of directing the Applicant to apply for the conditional use of Residential Treatment Center for Troubled Youth or Residential Treatment Center for Disabled persons. The Planning Staff failed to support its decision to call the proposed use a school with substantial evidence and illegally approved the use as a school instead of as a residential treatment center according to the strict requirements of the Zoning Ordinance. By reading the Ordinance in its entirety it is clear that the Applicant's proposed use does not fit the definition of a school as per Weber County Ordinances. The County has ignored

the sections defining residential facilities for educating and treating troubled youth by calling the Applicant's use a school. Therefore, the Board of Adjustments must either reverse the decision to call Green Valley Academy's proposed use a school and declare it a residential treatment center or remand the matter back to the Planning Commission and the Planning Staff and require additional evidentiary support for their decision to approve the use as a school and to justify why the use should not be considered as a residential treatment center.

Standard of Review and burden of proof

The Weber County Board of Adjustments shall review the decision of the Planning Staff and the Planning Commission de novo. *See* §17-27a-707. The appellant has the burden of proving that the land use authority erred. *See* §17-27a-705.

A party seeking appeal of a County decision must demonstrate that they have been adversely affected. Springville Citizens v. City of Springville, 979 P.2d 332 (1999). This means that the property owner has been prejudiced by the decision. *Id.* This prejudice can include the effect of the County disregarding its own ordinances. *See* Culbertson v. Board of County Comm's of Salt Lake County, 177 P.3d 621, 627 (Ut. App. 2008).

Legal Analysis

When enacting land use ordinances and when enforcing those enacted land use ordinances, Weber County must adhere to the County Land Use, Development, and Management Act (CLUDMA) as provided in Utah Code Ann. §17-27a-101 et. al. Under CLUDMA, an Applicant is entitled to land use approval if the application conforms to the applicable zoning ordinances in effect when the complete application is submitted along with application fees. *See* §17-27a-508. The county must strictly comply with the CLUDMA and substantial compliance with its own ordinances is not permitted. *See* Hatch v. Boulder Town Council, 21 P.3d 245 (Utah

App. 2001); Springville Citizens v. City of Springville, 979 P.2d 332 (1999) *citing to* Board of Educ. v. Salt Lake County, 659 P.2d 1030 (Utah 1983). When determining the meaning of an ordinance, the Board of Adjustments should first consider its plain language and meaning. *See* M&S Cox Investments, LLC v. Provo City Corporation, 169 P.3d 789 (Utah App. 2007). Terms within an ordinance should be given their commonly accepted meaning and interpretations that result in blatant contradictions should be avoided in favor of giving effect to the entire ordinance in light of the purpose the ordinance was meant to achieve. Id.

The land use authority must support its decision and interpretations of the ordinance with substantial evidence. *See* Patterson v. Utah County Bd. Of Adjustments, 893 P.2d 602, 604 (Utah App. 1995). Substantial evidence is “that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *See* Bradley v. Payson City Corp., 70 P.3d 47 (2003). The Court determined that Duchesne County had demonstrated by substantial evidence that its ordinances treated Residential Treatment Facilities as group homes and properly limited occupancy to ten individuals. *See* Uintah Mountain RTC, LLC v. Duchesne County, 21 P.3d 245 (Utah App. 2001).

In Carrier v. Salt Lake County, the Utah Supreme Court declared that the Salt Lake County Planning Commission had inappropriately allowed an applicant to operate a gravel quarry under the use of mineral extraction. *See* Carrier v. Salt Lake County, 104 P.3d 1208 (2004). The Court reasoned they would assume that each term included in the ordinance was used advisedly and that an omission was purposeful. *See* Carrier v. Salt Lake County, 104 P.3d 1208, 1216 (2004) *citing to* Biddle v. Wash. Terrace City, 993 P.2d 875 (1999). Specifically, the Court pointed out that the “expression of one should be interpreted as the exclusion of another.” Id. The Court held that the use gravel quarry was expressly provided for in other zones and that

there was not substantial evidence provided supporting the decision to classify its use as mineral extraction in light of the obvious distinctions between open pit mining and shaft mining.

The Utah Supreme Court has taken the opportunity to define the term “school” as applied to the Zoning Ordinances for Utah County. *See Crist v. Bishop*, 520 P.2d 196, 198 (1974). The Court held that the term school as used in that particular ordinance was to be understood within the county to mean “institutions for education and training.” The Court determined that because the term school was not defined within the ordinance that there was no qualification or limitation upon the term. *Id.* Thus, the Court rejected the argument that severe methods discipline and restraint did not make the particular facility a correctional institution. *Id.* In reaching this conclusion, the Court held that the term school must be read in light of the “total text of the ordinance” and when there is doubt or uncertainty about the meaning of a term, it must be considered in relation to the purpose and background circumstances in which the terms are used. *See Crist v. Bishop*, 520 P.2d 196, 198 (1974). In the Utah County Ordinance, there was no provision for a residential treatment facility and the term school was not defined in 1974. Residential Treatment Center was added after this case was decided.

Where the CLUDMA contains specific definitions and the Weber County Ordinances also have definitions, Weber County must strictly adhere to those definitions and also interpret their meaning appropriately. This is particularly important because the Weber County Zoning Ordinance excludes any use which is not specifically defined.

Under the CLUMDA, Educational facility is defined as follows:

A school district’s building at which pupils assemble to receive instruction in a program for any combination of grades from preschool through grade 12 including kindergarten and a program for children with disabilities.

A Residential Facility for persons with a disability is defined as:

A residence: In which more than one person with a disability resides; and is licensed of certified by the Department of Human Services under Title 62 A, Chapter 2, Licensure of Programs and Facilities...

The CLUDMA also requires that each county adopt an ordinance for residential facilities for persons with a disability. *See* Utah Code Ann. §17-27a-519. These facilities are to be reasonably dispersed throughout the county and to limit the number of occupants. Weber County has provided a defined use for two types of Residential Treatment Facilities: a Residential Treatment Facility for Disabled Persons and a Residential Facility for Troubled Youth. *See* Weber County Zoning Ordinance Chapter 1-6. These are the only such facilities that are provided for in the AV-3 zone and are the only such uses permitted. *See* Weber County Zoning Ordinance Chapter 1-3. A facility for disabled persons must be licensed by the Department of Human Services, may not be used to treat persons with substance abuse or violence, and placement must be voluntary. *See* Weber County Zoning Ordinance Chapter 23-13. A facility for troubled youth can be occupied by no more than 8 qualified youth on a 24 hour basis, must be licensed by the Department of Human Services, permanently occupied by a married couple who will function as the house parents and the youth must attend school classes in local schools. *See* Weber County Zoning Ordinance 23-14.

Either a facility for Disabled Persons or a facility for Troubled Youth is a conditional use within Weber County in any Zoning District zoned AV-3². *See* Weber County Zoning Ordinance Chapter 5B-4. Within the AV-3 zone, agriculture is the preferred use and the purpose of the Zone was to “designate farm areas which are likely to undergo a more intensive urban development, to set up guidelines to continue agricultural pursuits, including the keeping of farm

² Agricultural Valley Three Acre Minimum.

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animals, and to direct orderly low density residential development in a continuing rural environment.” *See* Weber County Zoning Ordinance Chapter 5B-1.

On the other hand, Weber County defines the term School as follows:

A public elementary or secondary school, charter, seminary, parochial school, or private educational institution having a curriculum similar to that ordinarily given in grades one through twelve in the public school system. *See* Weber County Zoning Ordinance Chapter 1-6.

For the purposes of the Department of Human Services, Utah law defines a boarding school as a private school that “provides a residence to the school’s students: for the purpose of enabling the students to attend classes at the school; and as an ancillary service to educating the students at the school.” *See* Utah Code Ann. §62A-2-101(2). The primary purpose is to educate and specifically excluded from the definition of a boarding school are therapeutic schools and any treatment services described under the definition for “Residential Treatment.” A facility that provides the services described under “Residential Treatment” is participating in a “Human Services Program.” *See* Utah Code Ann. §62A-2-101(17). Conversely, a boarding school is expressly not included as a “Human Services Program.” Any entity that participates in or operates a Human Services Program must be licensed with the Department of Human Services. *See* Utah Code Ann. §62A-2-108.

“Residential treatment” is a group living arrangement offering specialized treatment, behavior modification, rehab, discipline, emotional growth for persons with emotional, psychological, developmental, or behavioral dysfunctions, impairments or chemical dependencies. *See* Utah Code Ann. §62A-2-101(26)(a). Similarly, a therapeutic school is a group living arrangement that serves students who have a history of failing to function at home and public or private school. *See* Utah Code Ann. §62A-2-101(31). The program offers room and board, academic integration, specialized structure and treatment.

Application of the Law to the Green Valley Academy

The County misapplied the use “Educational Institution” to the proposed Green Valley Academy because it failed to consider the definition of the term “school” as defined in the Weber County Zoning Ordinance and the intent of the Ordinances as a whole when taken in context with the specifically defined use of “Residential Treatment Facility for Troubled Youth” which better fits the Applicant’s proposed use. Not only are the examples of schools cited by the Applicant at best on the very edge of the definition of school, the Daniels Academy and the Applicant’s prior application for a land use amendment demonstrate that Green Valley Academy really is a Residential Facility for Troubled Youth that seeks to have more residents than permitted by the Zoning Ordinance. Defining the Applicant’s use as a facility for Troubled Youth as opposed to a school is supported by the licensing requirements imposed by the Utah Department of Human Services as well as the International Building Code. Because the definition of a school fails to address many material aspects of the Applicant’s proposed use which are directly addressed under the requirements of a facility for Troubled Youth, the Board of Adjustments must reject the Planning Staff’s decision and give meaning to the intent and the entire context Ordinance and declare the Applicant’s proposed use a Residential Facility for Troubled Youth.

I. The facts, as presented by the Applicant and in light of other similarly situated facilities, demonstrate that the Applicant is going to operate a Residential Facility for Troubled Youth.

The actual and more accurate description of the Applicant’s proposed use is a Residential Facility for Troubled Youth which can be obviously and easily ascertained by reviewing the Applicant’s own statements and by looking at similarly situated facilities directly associated with the Applicant, referenced by the Applicant, or as demonstrated by purpose and intent. *See Staff*

Report to Ogden Valley Planning Commission for Zoning Change attached as Exhibit 2. The Staff has failed to adequately justify how the Academy is a school and has ignored the Applicant's own prior admissions that its primary purpose is to provide therapy to troubled youth with problems that amount to a disability. *See* Staff Report to Ogden Valley Planning Commission for Zoning Change attached as Exhibit 2. The Applicant's own assertions regarding the specialized nature of the curriculum and therapy undermine his own position that the Academy is a school having a curriculum similar to an ordinary public school. The fact that the Academy will offer what the Applicant claims is not available in a public school should signal that there is a marked difference between what goes on at a "conventional" school and the Academy.

When the Applicant first attempted to establish a facility within Weber County, the Applicant appealed to the County for the creation of a new Conditional Use termed "Residential Treatment Academy." *See* Staff Report to Ogden Valley Planning Commission for Zoning Change attached as Exhibit 2. In the documents that the Applicant submitted, the Applicant provided more detail regarding the residential treatment and therapy of his operation than he has provided in his current application for a school. The Applicant acknowledged that the purpose and operation of his facility would be similar to that of a Residential Facility for Disabled Persons with one notable exception that would not fit under the current zoning ordinance: the occupancy limits. *See* Staff Report to Ogden Valley Planning Commission for Zoning Change attached as Exhibit 2. Under the current zoning, such a facility is a conditional use, but it is limited to 8 occupants. *See* Weber County Zoning Ordinance 23-14. The Applicant wanted more than three times this number of residents. *See* Staff Report to the Ogden Valley Planning Commission for Design Review attached as Exhibit 1.

The Applicant now seeks to have that same use permitted in the AV-3 zone as a school, even though there is the conditional use of the facility for troubled youth or even for disabled persons that more closely fits. Just as with the Daniels Academy and other such facilities, this proposed “school” would provide “continuous supervision and support” as well as therapy and substance abuse treatment for 36 occupants. *See* Letter requesting addition of Residential Treatment Academy as Use attached as Exhibit 3; Daniels Academy Our Program Web Page attached as Exhibit 4. Such a use, with a facility housing more than 16 residents, as applied to the International Building Code requires an **I** designation in line with other large treatment facilities. If the Applicant instead complies with the requirements for a Residential Facility for Troubled Youth, the International Building Code would consider this an R-4 facility, which is a residential use fitting with the purpose of the AV-3 zone. *See* Letter from Ray Bertoldi on International Building Code as Exhibit 27. If the use is approved as a school, there are no limitations to the number of residents. That is because the intent of meaning of the term school clearly did not incorporate resident facilities³; thus, the purpose of the conditional use for a Residential Facility for Youth which does provide for such a use. *See* Weber County Zoning Ordinance Chapter 5B-4. Where a boarding school or residential academy is not specifically provided for as an AV-3 use, it is not an allowed use. *See* Weber County Zoning Ordinance Chapter 1-3. As proposed by the Staff, there is nothing to restrict the proposed “school” from growing far beyond the proposed 36 occupants. *See* Staff Report to the Ogden Valley Planning Commission for Design Review attached as Exhibit 1. Since 36 students along with staff and visitors would already stretch the use of the land beyond the guiding purpose of the General Plan and the AV-3 zone, imagine the effect that any expansion would have upon the surrounding

³ The definition of a school and that of an educational institution does not include a residential component.
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community. *See* Weber County Zoning Ordinance Chapter 5B-1. In light of the fact that if properly treated as a Residential Facility for Troubled Youth at most the seven acre lot could be subdivided to permit a maximum of 16 occupants, the proposed occupancy under the school use places a significant residential burden upon the land and imposes a substantial change in the residential nature of the community.

Additional support for rejecting the Planning Staffs' decision can be found in the licensing requirements that the Applicant must comply with in establishing his proposed "school." Virtually every other facility, including the proposed facility as described by the Applicant, must be licensed with the Department of Human Services as a Residential Treatment Center. *See* Utah Code Ann. §62A-2-101(17); Record of Licensing for Daniels Academy as Exhibit 8; Record of Licensing for Oakley School as Exhibit 10; Record of Licensing for Island View as Exhibit 15. Because the Applicant's proposed "school" will also be treating substance abuse and behavioral dysfunction, it cannot be licensed as a Therapeutic School. *See* Utah Code Ann. §62A-2-101(26)(a); Utah Code Ann. §62A-2-101(31); Letter requesting addition of Residential Treatment Academy as Use attached as Exhibit 3. The Department of Human Services specifically excludes boarding schools because they do not include a Human Services Program. *See* Utah Code Ann. §62A-2-101(2). This is an indication that the Department of Human Services does not consider these facilities as mere schools and that they are clearly something more than that since they participate in a human service program. The examples cited by the Applicant include two schools that are really schools: Washington High and the Deaf and Blind school. Of course, these are both specialized schools offering specialized curriculum. The Deaf and Blind school isn't even a public school so it does not aid in defining a school for the purpose of the Ordinance. The Applicant's proposed facility will go far beyond

the specialized curriculum offered in either of these schools making it even less comparable to a school as defined in the Ordinance. Both Washington High and the Deaf and Blind School are operated as schools and do not require licensing by the Department of Human Services. On the other hand, the Applicant's facility must be licensed, as with all other similarly situated facility for troubled youth. *See* Utah Code Ann. §62A-2-108.

Consideration of the Daniels Academy is insightful and provides context to the type of human services program that the Green Valley Academy seeks to operate. The primary marketing and promoting theme of the web site is the therapy centered program. This makes it clear that a student's experience will not be anything like that of a student at a public school which is the benchmark for what is a permitted use in the AV-3 zone. *See* Weber County Zoning Ordinance Chapter 1-6. This position appears to strongly resonate with the first description of the Academy's use provided by the Applicant. *See* Staff Report to Ogden Valley Planning Commission for Design Review, Exhibit C 4, attached as Exhibit 1. Even when the Applicant attempts to hide its true purpose, the information provided to the Staff clearly expresses an intention to go far beyond the curriculum provided in a public school, including six hours of *formal* therapy each week which will be integrated into the student's daily curriculum, life skills, continuous 24 hour supervision of students. *See* Staff Report to Ogden Valley Planning Commission for Design Review, Exhibit C 4, attached as Exhibit 1.

The County either ignored these aspects of the Applicant's use, or overlooked them to achieve a purpose other than enforcing the entirety of the Zoning Ordinance as it is drafted in its purpose and intent. *See* Weber County Zoning Ordinance Chapter 5B-1; Carrier v. Salt Lake County, 104 P.3d 1208 (2004); Crist v. Bishop, 520 P.2d 196, 198 (1974); M&S Cox Investments, LLC v. Provo City Corporation, 169 P.3d 789 (Utah App. 2007). The Applicant's

proposed use does not have to be denied in its entirety, but it should comply with the listed uses within the AV-3 zone.

II. The Board of Adjustments must revoke the decision of the Planning Staff because it is not supported by substantial evidence, ignores the intent of the Ordinance, and fails to consider the definition of a Facility for Troubled Youth in context of their decision.

By forcing the use into the classification as an Educational Institution, the Planning Staff has stretched the meaning of that use beyond the intent of the Ordinance and has failed to consider the term in context with the rest of the Ordinance. *See Crist v. Bishop*, 520 P.2d 196, 198 (1974); *M&S Cox Investments, LLC v. Provo City Corporation*, 169 P.3d 789 (Utah App. 2007). This is the same mistake that the Salt Lake County Planning division made when it creatively classified a gravel pit as a mineral extraction use in *Carrier v. Salt Lake County*. The Planning Staff has essentially called a Residential Facility for Troubled Youth a school even though it is a separate and distinct use under the AV-3 zone much like Salt Lake County distorted the meaning of a gravel pit. *Carrier v. Salt Lake County*, 104 P.3d 1208 (2004). This decision has clearly overlooked obvious distinctions between a school, as the term is defined and as it is commonly accepted, and the overall purpose and intent of the Zoning Ordinance in light of the inclusion of the Residential Facility for Troubled Youth as a use. *See Carrier v. Salt Lake County*, 104 P.3d 1208, 1216 (2004) *citing to Biddle v. Wash. Terrace City*, 993 P.2d 875 (1999). Even taking into consideration the Supreme Court case where a similar institution was called a school, this decision is improper because considering the Weber County Ordinance in its entirety provides a definition for a school and a use that clearly fits the Applicant's proposed use. *See Weber County Zoning Ordinance Chapter 5B; Crist v. Bishop*, 520 P.2d 196, 198 (1974);

Carrier v. Salt Lake County, 104 P.3d 1208, 1216 (2004) *citing to* Biddle v. Wash. Terrace City, 993 P.2d 875 (1999).

In the Crist case, Utah County had not defined the term school at all and there was no use similar to the Residential Facility use in Weber County so there was no such term to give purpose to. *See* Weber County Zoning Ordinance Chapter 5B-4; Carrier v. Salt Lake County, 104 P.3d at 1216 (2004). The Utah Supreme Court found that with no limitations in the ordinance, the proposed use fit the definition of a school which differs from this situation where school is specifically defined and any residential component was specifically omitted. *See* Weber County Zoning Ordinance Chapter 1-6; M&S Cox Investments, LLC v. Provo City Corporation, 169 P.3d 789 (Utah App. 2007). By strictly following in lockstep with the outcome in Crist, the Board would fail to give meaning to omitted terms within that definition and would ignore the purpose of additional terms. Id. The current situation presented to the Board clearly differs from the situation in the Crist case. Weber County has limited the meaning of the term school in at least two ways: directly by defining the term school to mean a facility that provides a curriculum similar to that of a public school; indirectly by creating a use that more appropriately fits the Applicant's proposed use – Residential Facility for Troubled Youth. Weber County Zoning Ordinance Chapters 1, 5B. The Crist Court expressly reasoned that the term “school” had to be viewed in light of the whole ordinance, which in this case would include the conditional use of a Residential Facility for Troubled Youth. Crist v. Bishop, 520 P.2d 196 (1974). Finally, a critical difference between the Crist analysis and the question being presented to the Board here is the residential component. In Crist the residential nature of the facility had no bearing on the Court's analysis. On the other hand, the Applicant's proposed use encompasses residential uses

which are directly addressed by the Weber County Ordinances in a manner that must not be ignored.

The better guide for the Board on this issue is the reasoning in the more recently decided Carrier v. Salt Lake County where the Utah Supreme Court pointed out that reading the entire Zoning Ordinance means giving effect to omitted terms and when terms have been included at the exclusion of other terms. With no provision for residential accommodation and with such provisions provided within the Residential Facility for Troubled Youth, the County should have labeled the proposed Green Valley Academy not as a school, but as a residential facility for troubled youth. The County was wrong when it forced the residential elements of the facility into a use (Educational Institution) that omits any provision for such use. The fact that there is no specific use that would accommodate everything the Applicant demands (36 residents, supervision, substance abuse treatment etc.) should not be interpreted as an opportunity to stretch existing uses to fit, but must be interpreted as a purposeful omission that bars the use. *See* Weber County Zoning Ordinance Chapter 1-3. The County should have presented the Applicant with the available uses and invited the Applicant to conform his use to what was described within the Ordinance; instead the County stretched the meaning of the Applicant's preferred use to fit whatever use the Applicant wanted.

CONCLUSION

In its consideration of this matter, the Board should ask itself one question the answer of that question should weigh heavily upon the Board's determination: why is this facility not a Residential Facility for Troubled Youth. The Applicant is seeking to establish a facility where troubled youth can receive therapy, education, substance abuse counseling, and medication, all within a supervised residential environment. Applying the common meaning of the term school

and residential facility for troubled youth one clearly fits this proposed use more appropriately than the other. A mere cursory comparison of the Zoning Ordinance and the Applicant's own prior and current description of the proposed activities makes it clear that this is a residential facility for troubled youth. An obvious purpose in trying to stretch the meaning of the term school to fit the Applicant's use is to avoid the occupancy requirements which give effect to the purpose of the AV-3 zone. There are many answers to why this facility would not be a school; but aside from the high density occupancy proposed by the Applicant, there is no reason why this should not easily be classified as a Residential Facility for Troubled Youth. A court will review the County's decision to determine whether it was arbitrary and capricious or illegal. The Staff's decision is arbitrary and capricious because it is not supported by substantial evidence when compared to the clear evidence that this is a Residential Facility for Youth. It is also illegal because it violates the Zoning Ordinance by rendering the provisions of the Ordinance that define Residential Facility for Troubled Youth as ineffective and imposing omitted residential aspects to the definition of a school. The opposite is not true. Since the Ordinance must be read in its entirety and every provision must be given effect, the Board must consider carefully how the conditional use of a residential facility should be given effect in light of the Applicant's proposed use which must include future applications and uses by the Applicant. How do you restrict the Applicant from increasing the number of occupants to 50 students or even 100 students as proposed? Snowcrest Junior High has approximately 700. Would it be arbitrary and capricious to restrict the Green Valley Academy when another "school" operates without similar restriction? It is obvious that the Zoning Ordinance cannot answer these questions in the context of a school as a use. In that respect, the Staff's decision appears to be the most short-sighted. Therefore, the Board must find that the actual use is a Residential Facility for Troubled Youth or

at a minimum must remand to the Planning Staff for a proper inquiry into the true use of the Green Valley Academy and the impacts of the residential component to its use.

/s/
Zane S. Froerer