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SERVED _____ RELATION _____
TIME 1402 DATE 8/1
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**IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, OGDEN DEPARTMENT, STATE OF UTAH**

CAROL C. BROWNING,

Petitioner,

vs.

WEBER COUNTY, a body politic, WEBER
COUNTY COMMISSION AND WEBER
COUNTY BOARD OF ADJUSTMENTS,

Respondents.

**SUMMONS
(21 Day)**

Case No. 140904054

Honorable W. Brent West

Serve: **WEBER COUNTY,
WEBER COUNTY COMMISSION, and
WEBER COUNTY BOARD OF ADJUSTMENTS
c/o: Weber County Recorder
2380 Washington Blvd Suite #370
Ogden, Utah 84401**

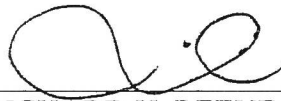
THE STATE OF UTAH TO THE ABOVE-NAMED RESPONDENTS:

You are hereby summoned and required to file an answer in writing to the AMENDED PETITION FOR REVIEW AND FOR DECLARATORY AND INJUNCTIVE RELIEF with the Clerk of the above-entitled Court at 2525 Grant Avenue, Ogden, Utah 84401, and to serve upon, or mail to Richard H. Reeve, Petitioner's Attorney, at 372 24th Street, Suite 400, Ogden, Utah

84401, a copy of said answer, within 21 days after service of this Summons upon you.

If you fail so to do, judgment by default will be taken against you for the relief demanded in said Petition, which has been filed with the Clerk of said Court.

Dated this 30th day of July, 2014.

A handwritten signature in black ink, appearing to read 'R. H. Reeve', written over a horizontal line.

RICHARD H. REEVE

Attorney for Petitioner, Carol C. Browning

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**AMENDED
PETITION FOR REVIEW AND
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Case No. 140904054

Honorable W. Brent West

COMES NOW the Petitioner, CAROL C. BROWNING ("Petitioner"), by and through her counsel of record, Richard H. Reeve of VANCOTT, BAGLEY, CORNWALL & McCARTHY, pursuant to *Utah Code Ann.* § 17-27a-101, *et seq.*, 1953 (as amended), and amends her Petition for Review and for Declaratory and Injunction Relief and claims and petitions the Court for a review of decisions made by the Weber County Commission and Weber County Board of Adjustments as follows:

I. THE PARTIES

1. Petitioner, Carol C. Browning, is an individual residing in Weber County, State of

Utah.

2. Respondent, Weber County, is a political subdivision of the State of Utah.
3. The Weber County Commission (hereinafter referred to as “Commission”), is a county commission charged with, among other things, approving or denying building permits and building designs in accordance with the Weber County zoning ordinances.
4. The Weber County Board of Adjustments (hereinafter referred to as the “Board”), is an appointed county board responsible for, among other things, hearing and deciding appeals from zoning decisions of the Weber County Commission. The Board is expressly intended to function as the “appeal authority” required by *Utah Code Ann.* § 17-27a-701(1), 1953 (as amended.)

II. JURISDICTION AND VENUE

5. This Court has jurisdiction to review the final action/decision of the County, Commission, and Board, as complained of herein, pursuant to *Utah Code Ann.* § 17-27a-708, 1953 (as amended.)
6. Venue for this action is appropriate, pursuant to *Utah Code Ann.* § 78B-3-303, 1953 (as amended.)

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

7. Pursuant to the requirements of *Utah Code Ann.* § 17-27a-701(2), 1953 (as amended), Petitioner made a timely and specific challenge to the Weber County Commission’s Decision on April 1, 2014 to grant a right-of-way access, pursuant to zoning ordinance section 108-7-31, to a developer of land adjacent to Petitioner’s property.

8. Petitioner's challenge to the Commission's Decision was made in accordance with Weber County's Ordinance.

9. Appeal was made to the Weber County Board of Adjustments.

10. The Board of Adjustments, after considering Petitioner's appeal, declined to hear the appeal on grounds of jurisdiction by (i) erroneously identifying the land use decision at issue; and (ii) determining that the grant of a right-of-way under the Weber County's Land Use ordinance was not a land use decision. The Board of Adjustments decision was issued on July 7, 2014 and a copy is attached hereto and incorporated herein by this reference.

11. The Board has issued its final Decision and Petitioner has met all administrative conditions, precedent to seeking judicial review of the decisions of the Commission, and Petitioner has exhausted her administrative remedies.

IV. STANDARD OF REVIEW/LIMITATION OF ACTION

12. In an appeal of a Decision by the land use authority (Commission and the Board), the Petitioner bears the burden of proving the land use authority erred. See, *Utah Code Ann.* § 17-27a-705, 1953 (as amended.)

13. Review to the Board of Adjustment and, subsequently, to the District Court is *de novo*, unless the County has adopted an ordinance to the contrary.

14. Weber County has not adopted an ordinance modifying the standard of review.

15. Pursuant to *Utah Code Ann.* § 17-27a-701(3)(c), the County could, by ordinance, require an adversely-affected party to present every theory of relief that it can raise in the district court to the appeal authority.

16. Weber County has not adopted an ordinance requiring an adversely affected party to present every theory of relief that it can raise in the district court to the appeal authority.

17. The review of Petitioner's claims is a *de novo* review and Petitioner's available theories of relief are not limited to those presented to the appeal authority—the Board of Adjustments.

V. REVIEW OF THE DECISION OF THE WEBER COUNTY COMMISSION.

18. Petitioner hereby incorporates by reference each and every allegation set forth above as though fully set forth herein and claims and alleges for cause of action as follows:

19. Appellant asserts that the Commission erred in its interpretation and application of Weber County Code § 108-7-31(1)(b) when it failed to find substantial evidence to support its Decision and failed to consider any other alternative points of access available to the owner/developer of the Pas De Calais Subdivision.

Weber County Land Use Code § 108-7-31

108-7-31. Lots/parcels which do not have frontage on a street, but which have access by a private right-of-way or access easement may, under certain circumstances, use a private right-of-way or access easement as the primary access. Approval is subject to the applicant demonstrating compliance with the following criteria and conditions:

(1) Criteria

- a. The lot/parcel is a *bona fide* agricultural parcel that is actively devoted to an agricultural use that is the main use; or
- b. Based on substantial evidence, it shall be shown that it is unfeasible or impractical to extend a street to serve such lot/parcel. Financial adversity shall not be considered; however, circumstances that may support an approval of a private right-of-way/access easement as access to a lot/parcel may include but not be limited to unusual soil, topographic, or property boundary conditions.

(2) Conditions

- a. It shall be demonstrated that the agricultural parcel or other lot/parcel has appropriate and legal access due to historic use, court decree, or the execution of an easement, right-of-way, or other instrument capable of conveying or granting such right; and
- b. The landowner of record or authorized representative shall agree to pay a proportionate amount of the costs associated with developing a street if, at any time in the future, the county deems it necessary to have the landowner replace the private right-of-way/easement with a street that would serve as a required access to additional lots. The agreement shall be in the form considered appropriate and acceptable to the office of the Weber County Recorder and shall recite and explain all matters of fact, including a lot/parcel boundary description, which are necessary to make the agreement intelligible and show its successive nature.

20. As indicated above, the Code requires the Commission to determine whether there is substantial evidence to show that there is no other practical or feasible way to extend a street to serve the property at issue. See § 108-7-31(1)(b). To emphasize, the Commission's Decision must be "based on substantial evidence." *Id.* While this standard is less than the clear and convincing standard of proof, it is higher than the proof required by most of the County's land use provisions.

21. The Code specifically provides what the Commission CANNOT consider, when determining whether or not there is another practical or feasible way to service the property. See § 108-7-31(1)(b). The Commission cannot consider financial adversity. *Id.*

22. The Code goes on to provide a number of non-exclusive factors that the Commission may consider in making its determination. These factors are listed as "soil conditions, topographic, or property boundary conditions."

23. In this case, the owner/developer of the Pas De Calais Subdivision, an unrecorded and unapproved subdivision, requested that the County grant it a non-exclusive and permanent

easement across public land so that he could access his otherwise land-locked property. In exchange, the developer offered to give the County a piece of property on which was located a berm of a County-retention pond. The record before the Commission indicated that this berm had been in place and on the developer's land for more than 40 years.

24. Jared Anderson presented this issue to the Commission on March 25, 2014, and recommended approval. Mr. Anderson's presentation focused on the piece of property that was being offered by the developer and only parenthetically addressed the issue of whether there was some other practical or feasible way to access the planned subdivision. After public comments, there was some discussion about the language of the Code and Attorney Dave Wilson instructed the Commission about the "substantial evidence" language in the Code. During the public comments, neighbors presented two (2) key pieces of information to the Commission: first, that there was a vacant residential lot with sufficient frontage on the market that could be purchased by the developer and used to extend a road to the planned subdivision. Second, that the area of the proposed easement was a historic pond bed and that the area had a history of high-risk for landslides. Neighboring landowners implored the Commission to make the developer and County staff evaluate the vacant lot that was on the market and to allow the neighbors to have a soil analysis of the road site conducted so the Commission could evaluate soil conditions.

25. The developer responded by indicating that purchasing the vacant lot would make his subdivision financially impractical. The developer did not want any soils analysis done on his property, but indicated that soils work would be done as part of the subdivision approval process. The County ultimately voted to table the item so more discussion could take place.

26. The issue was continued one week, until April 1, 2014. At the meeting, the Commission seemed anxious to make a decision on the issue. Even though they were warned by Appellant's counsel about the requirement of a finding of substantial evidence, the Commission did not have any discussion of such evidence. The Commission approved the easement request by a vote of two (2) to one (1).

27. The Commission erred. It did not follow the Code and did not enter any discussion of substantial evidence into the record. In fact, there was no discussion by the Commission of any evidence showing that there was no other practical or feasible way for the developer to access his property. The Commission did not discuss the vacant lot and seemed to accept the developer's representation that it would be financially difficult for him to purchase the lot for the purpose of obtaining access. Finally, the Commission erred in considering the special soil conditions and topography of the area. In sum, it appeared that the Commission essentially ignored the County Code in making its Decision.

VI. REVIEW OF THE DECISION OF THE WEBER COUNTY BOARD OF ADJUSTMENTS.

28. Petitioner timely appealed the Commission's April 1, 2014, decision to the Weber County Board of Adjustment.

29. In her appeal, Petitioner asserted that the "County Commission erred in its decision approving the easement requested by the owner/developer of the Pas De Calais Subdivision."

30. In Petitioner's brief to the Board of Adjustment, she focused on challenging the County Commission's application of the code section when it granted an access exception and

easement under Weber County Code Section 108-7-31.

31. The Board of Adjustment denied to hear Petitioner's appeal by erroneously determining that the applicable land use decision had been made on August 9, 2013, when Planning Director Robb Scott accepted the application for right of way access. This decision was made without any public notice or comment, making it impossible for any party to appeal this "decision" within the required timeframe.

32. The Board of Adjustment also determined that the grant of an easement was not a land use decision that could be subject to a review by the Board of Adjustment.

33. The Board of Adjustment erred. It determined that an administrative decision made by the Planning Director, without the benefit of public notice or public comment and with no possibility of any timely appeal, was the land use decision that had to be appealed within 15 days of the decision. It also erred in determining that the grant of a right of way easement, pursuant to a provision of the County's land use code, was not a land use decision.

FIRST CLAIM FOR RELIEF
DECISION OF THE COMMISSION AND BOARD WAS ARBITRARY AND CAPRICIOUS

34. Petitioner hereby incorporates by reference each and every allegation set forth above as though fully set forth herein and claims and alleges for cause of action as follows:

35. The Commission acted arbitrarily and capriciously in granting a right-of- way without any evidence, let alone substantial evidence, and by an erroneous application of the relevant statute.

36. The Board acted arbitrarily and capriciously in deciding that it did not have jurisdiction to hear Petitioner's appeal from the Weber County Commission and by tying the

appeal time line to a decision that was not published, broadcasted, or otherwise noticed—thereby making the appeal right impossible to use and meaningless.

37. The decisions have damaged Petitioner and have the potential of damaging Petitioner because the proposed Right-of-Way and subsequent subdivisions are to be built and developed in an area that is subject and includes underground springs, unstable soils, and a history of land-slides and sedimentary soils.

SECOND CLAIM FOR RELIEF
TEMPORARY RESTRAINING ORDER/INJUNCTION

38. Petitioner hereby incorporates by reference each and every allegation set forth above as though fully set forth herein and claims and alleges for cause of action as follows:

39. Petitioner is an owner of real property within Weber County.

40. Petitioner is adversely affected by the Decision of the County, Commission, and/or Board in interpreting and enforcing County ordinances and the County Land Use, Development, and Management Act, *Utah Code Ann.* § 17-27a-101 *et. seq.*, 1953 (as amended), as complained of herein.

41. Pursuant to *Utah Code Ann.* § 17-27a-802 *et. seq.*, 1953 (as amended), Petitioner may institute: “(i) injunctions, mandamus, abatement, or any other appropriate actions; or (ii) proceedings to prevent, enjoin, abate, or remove the unlawful...use, or act.”

42. Respondents’ failure to enforce the purposes, intent, and plain language of Weber County Code 108-7-31 constitutes harm to the Petitioner that has adversely affected Petitioner.

43. Petitioner is powerless to prevent the Respondent from engaging in such conduct, except by seeking relief by this Court.

44. Petitioner is informed and believes, and therefore alleges, that there is a significant likelihood that, unless restrained by this Court, the Respondents will continue to engage in conduct consistent with the allegations in this Petition, that the Pas De Calaise development will move forward and that such will be to the detriment of the Petitioner.

45. Petitioner has already suffered, and will continue to suffer irreparable harm if this Court does not restrain the Respondents. Specifically, Petitioner will lose the protection of the County ordinances and the laws of the State of Utah; she will be denied constitutional and statutory due process rights; and her complaints will be barred by zoning estoppel, laches, waste, and other legal and equitable principals.

46. The harm to the Petitioner if an injunction is not issued, outweighs any injury that the injunction may cause to the Respondents. Petitioner seeks only to preserve the status quo until such time as her Petition can be heard by the courts.

47. The injunction requested herein is not adverse to the public interest.

48. Petitioner is entitled to this Court's temporary restraining order, preliminary injunction, and injunction, as outlined in Petitioner's accompanying Application for Temporary Restraining Order and Preliminary Injunction.

WHEREFORE, the Petitioner PRAYS FOR RELIEF AS FOLLOWS:

1. A Declaration from this Court that the various actions of the County, Commission, and/or Board complained of herein above were, and are, arbitrary and capricious and/or illegal.

2. A Declaration from the Court that the various actions of the County,

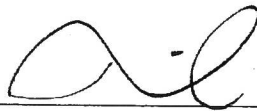
Commission, and/or Board complained of herein above denied the Petitioner her constitutional and statutory due process rights.

3. That the final Design Review approval of the Commission, as upheld by the Board of Adjustments, be declared null and void and that it be vacated and rejected, due to the Commission and the Board having failed to follow the requirements of law, as set forth herein above.

4. That the final Decision of the Board of Adjustments approving and upholding the final Design Review approval be stayed and/or enjoined during the pendency of these proceedings, pursuant to *Utah Code Ann.* § 17-27a-802 1953 (as amended.)

5. That the Petitioner be granted any other and further relief as the Court deems just, proper, and appropriate.

DATED this 29 day of July, 2014.



Richard H. Reeve
VAN COTT, BAGLEY, CORNWALL & McCARTHY
Attorneys for Petitioner

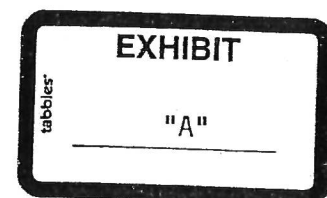
WEBER COUNTY BOARD OF ADJUSTMENT

Carol Browning, : DECISION ON APPEAL OF WEBER
 : COUNTY'S DECISION TO GRANT AN
 : EASEMENT
Appellant. :
 :

The Appellant, Carol Browning, filed this appeal with the Weber County Board of Adjustment asserting that "the County Commission erred in its decision approving the easement requested by the owner/developer of the Pas De Calais Subdivision." Having reviewed the ordinances at issue, and after hearing oral argument from the Appellant, Mr. Rasmussen, and Weber County planning staff, the Board finds as follows:

FINDINGS

1. On June 14, 2013, Matt Rasmussen submitted the Pas De Calais subdivision to the Weber County Planning Division to be reviewed for completeness and for compliance with county ordinances.
2. The proposed subdivision consisted of three lots, two of which were proposed to have access from a private ROW over property owned by Weber County.
3. Because two of the lots would require access from a private ROW, the subdivision could only be approved with an access exception pursuant to the Weber County Land Use Ordinance, §108-7-31.
4. Rasmussen submitted an "application for access to a lot/parcel using a private right-of-way or access easement" to the Weber County Planning Division.
5. Pursuant to §102-1-2 of the Weber County Land Use Ordinance, the Weber County Planning Director is authorized to approve or deny applications for "access to a lot/parcel using a private right-of-way or access easement."
6. On August 9, 2013 Planning Director Rob Scott approved the application for access to a lot/parcel using a private right-of-way or access easement, thus allowing the subdivision application to move forward in the development process. Mr. Scott's approval was conditioned upon Rasmussen acquiring the needed ROW from Weber County.
7. On December 27, 2013, the Planning Division held a public hearing to take input on the subdivision; notice of the hearing was provided to residents within 500 feet of the subdivision boundary, including the Appellant, Carol Browning.



8. Several of the residents, including the Appellant, attended this meeting and expressed concerns with the subdivision and the proposed private ROW. Based on these concerns, no decision was made at the meeting and the subdivision was sent to the Western Weber Planning Commission for review.

9. The Planning Commission met to consider the proposed subdivision on January 14, 2014. Notice of the Planning Commission meeting had also been sent to residents within 500 feet of the subdivision boundary, including the Appellant, Carol Browning.

10. Residents again attended and expressed their concerns, but the Planning Commission unanimously recommended approval of the subdivision to the Weber County Commission, subject to the requirements of all review agencies and the County Commission granting the necessary ROW.

11. With the recommendation for subdivision approval in place, Mr. Rasmussen approached the Weber County Commission about conveying the ROW on March 25, 2014.

12. The Commission opted to receive additional information prior to making a decision and held the item for the April 1st meeting. At this meeting the County Commission agreed to grant a ROW to Rasmussen.

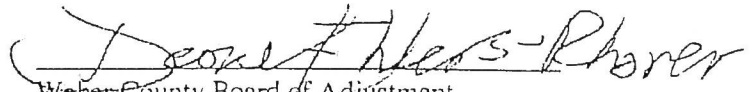
CONCLUSIONS

Based on the above findings, the Board reaches the following conclusions:

1. The Planning Director was acting as a "Land Use Authority", as that term is defined in Section 17-27a-103(27) of the Utah Code, when he decided to approve Rasmussen's application for access to a lot/parcel using a private right-of-way or access easement on August 9, 2013. This was a decision of a land use authority applying the land use ordinance.
2. The Appellant did not appeal this land use decision within the 15-day time period set forth in the Weber County Land Use Ordinance.
3. The Weber County Commission's expression of willingness to convey a ROW to Rasmussen is not a land use decision subject to review by the Board of Adjustment.

The minutes of the Board of Adjustment meeting are available at the Planning Department Office upon the Board's approval of the minutes.

DATED this 7th day of July, 2014.


Weber County Board of Adjustment
Chair