

Brett Walker, agent for Probst Raspberry LLC, is requesting preliminary/final approval of The Willows at Midway, a rural preservation subdivision. The proposal is for a 5-lot subdivision on 36.72 acres. The property is located at about 100 South and 500 West and is in the RA-1-43 zone.



PLANNING COMMISSION MEETING STAFF REPORT

DATE OF MEETING: November 12, 2019

NAME OF PROJECT: The Willows at Midway –
A Rural Preservation Subdivision

**AUTHORIZED
REPRESENTATIVE:** Brett Walker

NAME OF OWNER: Probst Raspberry LLC

AGENDA ITEM: Preliminary/Final Approval

LOCATION OF ITEM: 500 West Main

ZONING DESIGNATION: RA-1-43

ITEM: 1

Brett Walker, agent for Probst Raspberry LLC, is requesting preliminary/final approval of The Willows at Midway, a rural preservation subdivision. The proposal is for a 5-lot subdivision on 36.72 acres. The property is located at about 100 South and 500 West and is in the RA-1-43 zone.

BACKGROUND:

This request is for preliminary/final approval of a Rural Preservation Subdivision on 36.72 acres and will contain five lots. There are no existing structures on the property and the property is currently in agricultural production. The property will be deed restricted so no further subdividing of any kind will be allowed within the subdivision plat. The density of the 36.72-acres will never be more than five dwelling units. If the property were developed using the density for the RA-1-43 zone, then there could potentially be dozens of lots on the property. If the proposal is approved and recorded the density of five dwellings will remain in perpetuity.

The Rural Preservation subdivision was developed and approved by Midway to secure open space, lower potential density, and preserve the rural atmosphere of Midway. Basically, the City allows lots, at a base density of five acres per dwelling, to be created without requiring the construction of much of the cost prohibitive infrastructure that is normally required but in return, the lots are deed restricted so that they can never be resubdivided.

LAND USE SUMMARY:

- RA-1-43 zoning
- 36.72-acre parcel
- Proposal contains five lots
- Access from Main Street
- The lots will have septic tanks, connect to Midway City's culinary water line, and Midway Irrigation Company's secondary water line

ANALYSIS:

Access – The developer must submit an access plan, and potentially, documents that provides access. The code requires 30' of access that includes a 20' driveway with 5' clear areas on both sides of the driveway.

Geotechnical Study – A Geotechnical Study has not been required or submitted to the City.

FEMA Floodplain – There is a FEMA floodplain in the west side of the property along Snake Creek. All future structures will need to comply with Section 16.14.8 that requires a 50' setback from the floodplain and all habitable floors in the future dwelling must be at least elevated 18" above the base flood elevation shown on the FEMA flood insurance rate maps. The required 50' setback will be drawn on the plat.

Water Connection – The lots will connect to a water line that will be built by the developer and connect to the City's water line in Main Street. A fire hydrant is required to be installed for fire protection of the future dwelling and any future accessory structures.

Sewer Service – The future lot owners will install septic tanks that will provide septic service for the lots. Percolation tests will be performed by the developer on each lot and approved by the Wasatch County Health Department before the plat is recorded to verify the area is suitable for septic drain fields.

Secondary Water Connection – The lots will connect to Midway Irrigation Company's secondary which is already servicing the property. A secondary water meter will be installed to monitor secondary water use on the property.

Trails – The developer will construct trail T-022 per the Midway City Master Trails Plan along Snake Creek, which is planned as an 8' wide paved trail along the eastern side of the property. A public trail easement will also be deeded to the public for the trail. The developer will also be responsible for paying for half of two pedestrian bridges that will cross Snake Creek just as what was required for the Ray Farm Rural Preservation Subdivision. It is possible that an existing bridge crossing will be used for the crossing at the north end of the property. If the bridge is used, then the developer will be responsible the cost of for only half of a pedestrian bridge that will connect to the Ray Farm subdivision. There is evidence that the City has a prescriptive public access easement from the intersection of 400 West and Main that runs west about 600' and crosses onto Kem Gardner's property and then runs south about another 600' to the current concrete bridge that crosses Snake Creek. Staff has found documents from 1975 between Calvin Probst and the Midway City Council that an agreement was made for public access and maintenance. This access will be used as a public trail from the intersection of 400 West and Main to the trail T-022 that runs through the proposal along Snake Creek.

Deed Restriction – The 36.72 acres within the plat will be deed restricted so no further subdividing of any kind will be allowed within the subdivision plat. The density of the 36.72 acres will never be more than five dwelling units. A note will also be placed on the plat indicating the restriction. The deed restrictions will contain the following language:

The deed restriction prohibiting further subdivision of the lots within the development is created for the benefit of all of the lots within the development, all of the neighboring lots to the development, and Midway City. This deed restriction cannot be altered in any way without written consent from all of the above. This deed restriction is a covenant that runs in perpetuity with the land, and it shall inure to the benefit of the owners of each lot within the development, the owners of neighboring lots of the development, and Midway City, including all parties' heirs, successors or assigns.

The aforementioned language requires all the lot owners in the subdivision, all the contiguous landowners, and the City to all consent before a deed restriction can be altered or removed. This language has been tailored specifically to make it very difficult for any change to take place.

WATER BOARD RECOMMENDATION:

The Water Board has not made a water requirement recommendation. This proposal is scheduled for the January 6th Water Board meeting.

POSSIBLE FINDINGS:

- The proposal does meet the intent of the General Plan for the RA-1-43 zone
- The proposal does comply with the land use requirements of the RA-1-43 zone
- The proposal does comply with the requirements for the Rural Preservation Subdivision code
- There are questions regarding access that need to be resolved

ALTERNATIVE ACTIONS:

1. Recommendation of Approval (conditional). This action can be taken if the Planning Commission finds that conditions placed on the approval can resolve any outstanding issues.
 - a. Accept staff report
 - b. List accepted findings
 - c. Place condition(s)
2. Continuance. This action can be taken if the Planning Commission finds that there are unresolved issues.
 - 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. Recommendation of Denial. This action can be taken if the Planning Commission finds that the request does not meet the intent of the ordinance.
 - a. Accept staff report
 - b. List accepted findings
 - c. Reasons for denial

PROPOSED CONDITIONS:

- Access is finalized before plat is recorded
- Details to the public trail and easement with pedestrian bridge are finalized before the plat is recorded
- An access plan and or documents are submitted to the City for review and approval that provides the required 30' for the driveway.

September 20, 2019

Midway City
Attn: Michael Henke
75 North 100 West
Midway, Utah 84049

**Subject: The Willows at Midway A Rural Preservation Subdivision, Preliminary /
Final Review**

Dear Michael:

Horrocks Engineers recently reviewed The Willows at Midway A Rural Preservation Subdivision plans for Preliminary / Final Approval. The following issues should be addressed.

General Comments

- The proposed plans is a rural preservation subdivision. The plan proposes five lots on 36.7 acres. All red-line comments will be addressed and turned into the City Engineer.

Water

- Midway City encourages The Willows at Midway and Walker Farm subdivisions to work together to connect to the existing culinary water system at Main Street and 400 West. An 8" line will need to be installed from that point to each subdivision and will be served from Gerber Mahogany pressure zone.
- A fire hydrant should be installed within 250 feet of the proposed structures.

Irrigation

- The proposed development should meet with the water board to determine the outside water requirements and the source of the outside water.

Roads

- No public road improvements will be required for the five lots within the proposed rural preservation subdivision.
- The proposed plan does show an upgrade to the existing 14' gravel road to a 24' paved access driveway from 400 West and Main Street heading west to the subdivision. Again, Midway City encourages The Willows at Midway and Walker Farm subdivisions to work together on this private driveway.

Trails:

- Midway City Master Trail Plan requires a trail to be installed along Snake Creek. The proposed development will need to install a public trail and bridge as part of the development and provide a public trail easement.
- As the Ray Farm Rural subdivision received approval, a trail fund was paid to Midway City for the installation of 568' of trail and one-half the cost to install a bridge across Snake Creek. As part of this this development, they will receive this trail deposit and install the complete bridge and trail system within both the proposed subdivision and the Ray Farms subdivision.

Storm Drain

- It is not anticipated that this subdivision will generate any additional storm water above the historical amount.

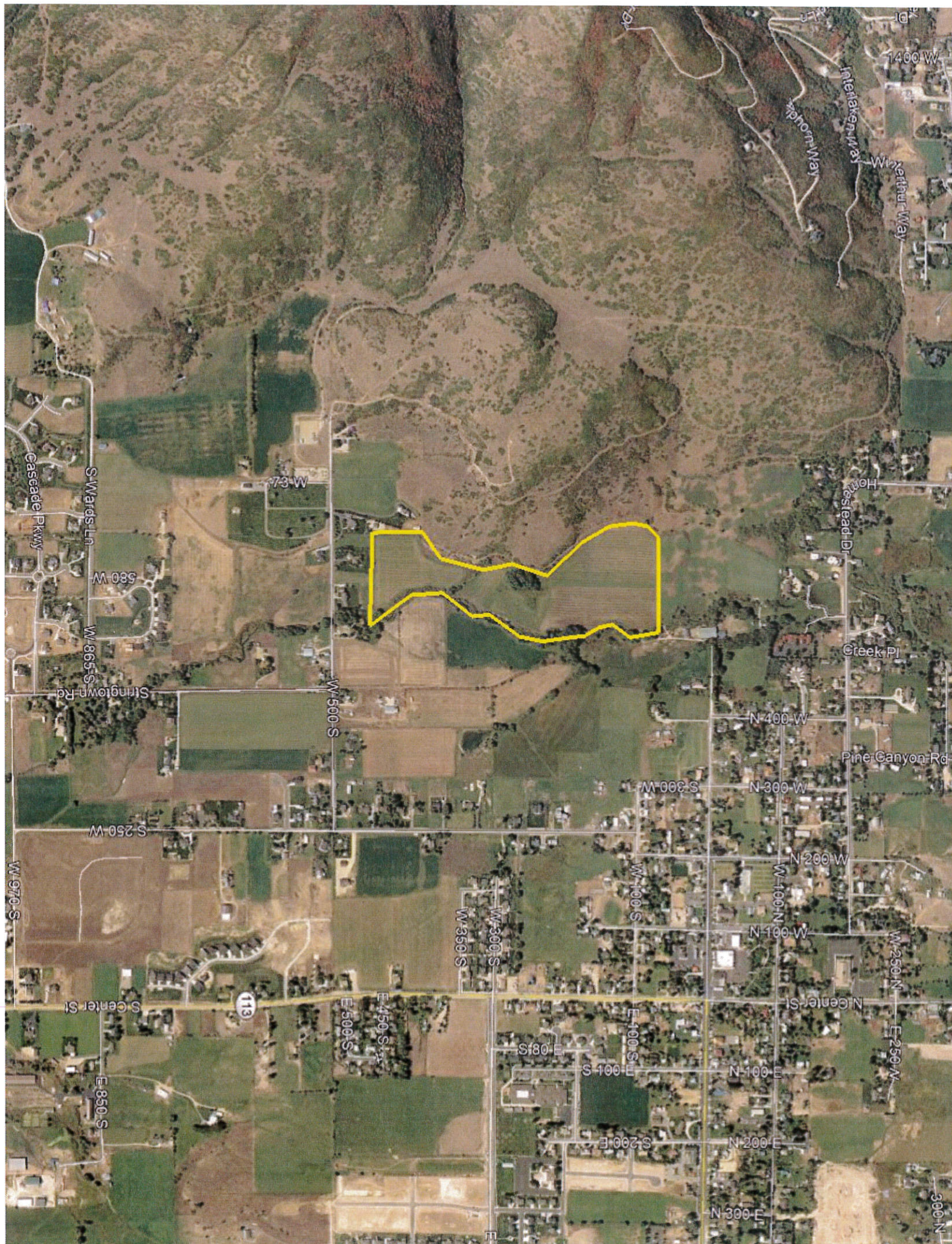
Please feel free to call our office with any questions.

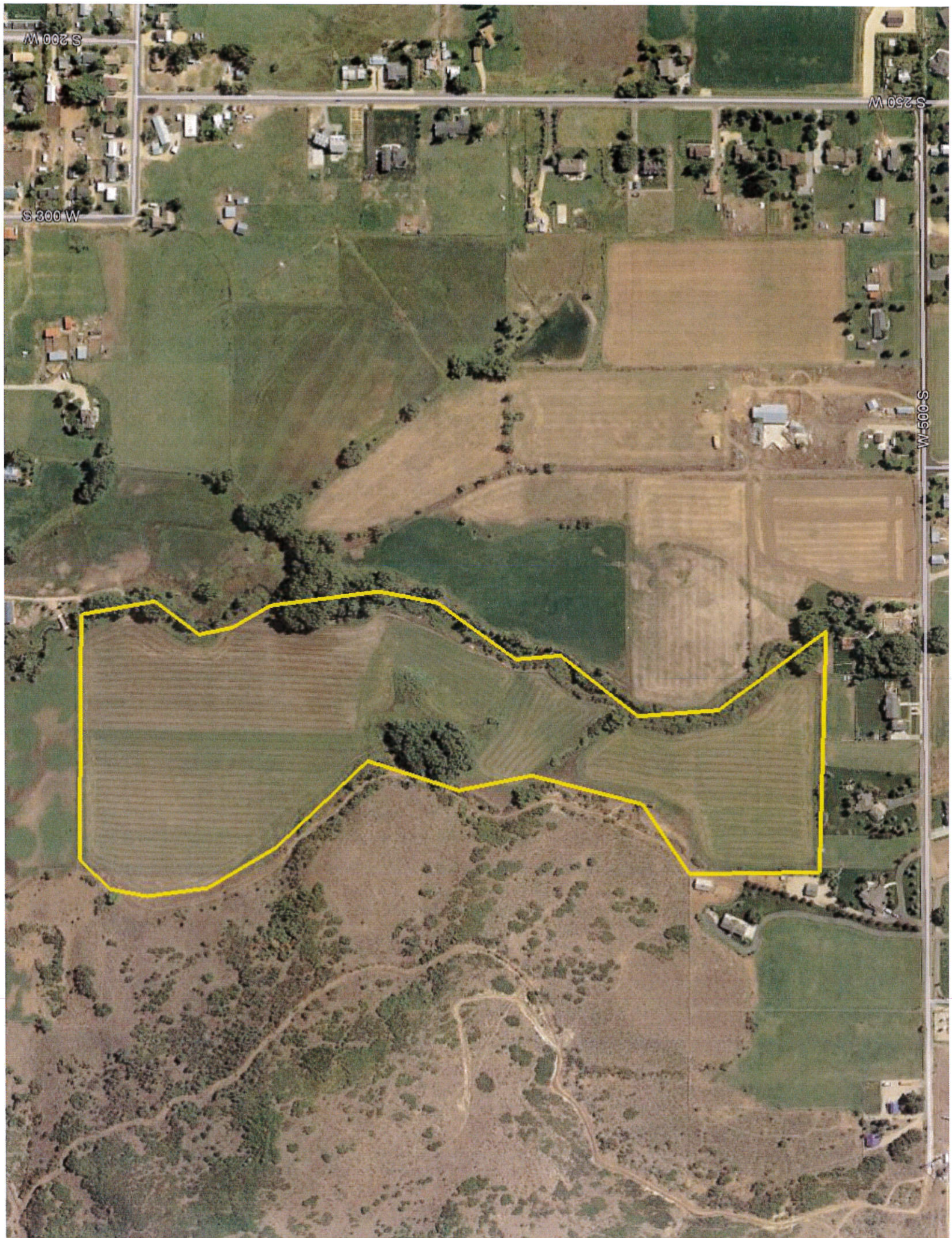
Sincerely,
HORROCKS ENGINEERS



Wesley Johnson, P.E.
Midway City Engineer

cc: Paul Berg Berg Engineering, (sent by Email)





S 200 W

S 300 W

S 250 W

S 009 W



RURAL PRESERVATION SUBDIVISION NOTES:

1. THE SUBDIVISION IS A RURAL PRESERVATION SUBDIVISION UNDER SECTION 16.18 OF THE MICHIGAN CITY CODE.
2. ALL LOTS WITHIN THE SUBDIVISION ARE RESTRICTED FROM FURTHER DEVELOPMENT PER SECTION 16.18.6 OF THE MICHIGAN CITY CODE.
3. ALL LOTS WITHIN THE SUBDIVISION EXCEED THE 5 ACRE LOT SIZE REQUIREMENT.

RURAL PRESERVATION SUBMISSION NOTES:

1. THE SUBDIVISION IS A RURAL PRESERVATION SUBDIVISION UNDER SECTION 16.18 OF THE MIDWAY CITY CODE.
2. ALL LOTS WITHIN THE SUBDIVISION ARE RESTRICTED FROM FURTHER DEVELOPMENT PER SECTION 16.18.6 OF THE MIDWAY CITY CODE.
3. ALL LOTS WITHIN THE SUBDIVISION EXCEED THE 5 ACRE LOT SIZE REQUIREMENT.

BERG
ENGINEERING
RESOURCE GROUP P.C.
380 E Main St. Suite 204
Midway, UT 84049
Tel: 801-735-3000
Fax: 801-735-3000

THE WILLOWS AT MIDWAY
RURAL PRESERVATION
SUBDIVISION
SITE PLAN

THIS DOCUMENT IS RELEASED
FOR REVIEW ONLY. IT IS NOT
INTENDED FOR CONSTRUCTION
UNLESS SIGNED AND SEALED.

PAUL D. BORG _____ P.E.
SERIAL NO. 295593 _____
DATE: 11 SEPTEMBER 2019 _____

DESIGN BY: PDB	DATE: 11 SEP 2019	SHEET
DRAWN BY: PDB	REV:	1

**PARR BROWN
GEE & LOVELESS**

ATTORNEYS AT LAW

JUSTIN P. MATKIN
ATTORNEY AT LAW
jmatkin@parrbrown.com

October 17, 2019

VIA FEDEX

Midway City Planning Commission
160 West Main Street
Midway, UT 84049

Re: *Kem C. Gardner Family Partnership LTD's Objection to Use of Private Land for Access to The Willows at Midway proposed Subdivision*

Dear Commissioners:

The law firm of Parr Brown Gee & Loveless represents the Kem C. Gardner Family Partnership LTD ("Gardner LTD") with respect to the matters set forth herein. The purpose of this letter is to inform you of Gardner LTD's objection to The Willows at Midway (the "Willows") proposed use of a private road and/or property owned by Gardner LTD for access to the Willows proposed subdivision. Gardner LTD, and its immediate predecessor, Kem C. Gardner Family Partnership, has owned the properties in question since 2000 and 2001.¹ A copy of an aerial photograph showing the existing private lane (the "Private Lane") and a recent survey of the relevant portion of Gardner LTD's property is attached. The Private Lane is a narrow, dirt two-track road used by Gardner LTD for access to its barn and agricultural fields. It has also been used historically by the Calvin Probst (and more recently Probst Raspberry, LLC) for access to his agricultural land – i.e., the same land that Probst Raspberry LLC proposes to subdivide into The Willows.

To Gardner LTD's knowledge, there is no easement of record in favor of Probst (or anyone else) or a public dedication of the Private Lane for use by the public.² Gardner LTD has

¹ The Gardner Family Partnership purchased a number of lots from different owners and assembled them into their current configuration.

² Gardner LTD understands that Calvin Probst is purported to have granted certain rights to Midway City in 1975. Gardner LTD has never seen a copy of any such document and none were referenced in the title reports when the properties were purchased from Verle Young (and others, including Mr. Probst) in 2001. Moreover, Mr. Probst did not own that portion of the property where the Private Lane extends from Main Street. It is axiomatic that one cannot grant an easement over property which he does not own, and in any event, we do not believe that any such grant was of record in 2000 or 2001. If Midway City believes that the public has a right of access over any portion of Gardner LTD's property, we would like to see the information so it can be thoroughly evaluated.



no objection to the continued use of the Private Lane for agricultural purposes by the owners of the adjacent property. Indeed, Gardner LTD recognizes that there has likely been established a prescriptive easement for use of the Private Lane for agricultural purposes. However, any use of the Private Lane has been limited to agricultural use.

Utah law is absolutely clear that a prescriptive easement may not be enlarged beyond its historic use. *See, e.g., McElpranger v. Jones*, 2007 UT App. 118 (“The general rule is that the extent of a prescriptive easement is measured and limited by its historic use during the prescriptive period. The right cannot be enlarged to place a greater burden or servitude on the property”; *Judd v. Bowen*, 397 P.3d 686 (Utah Ct. App. 2017) (“‘purpose for which the easement was acquired’ limits both the extent of the easement right granted as well as the physical boundaries of the easement itself.”) (citations omitted).

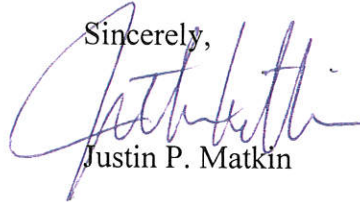
The Willows proposes, however, to use either portions of the Private Lane, or adjacent property owned by Gardner LTD for its 30’ access road for ingress and egress to 5 new residential lots. Use of the Private Lane for 5 residential lots would increase the burden on the Gardner LTD property exponentially and is a materially different type of use that the historical agricultural use. Moreover, the Private Lane is narrow and would need to be expanded and paved to accommodate the new proposed 30’ road. Alternatively, if the proposed new 30’ road is intended to run adjacent to the Private Lane, that land is also owned by Gardner LTD and it is not aware of a legal right The Willows would have to construct a new road on its property without its permission.³

Furthermore, to the extent The Willows plans to run utilities through Gardner LTD’s property, there is no easement (prescriptive or otherwise) that would permit this.

Gardner LTD was not aware of the Commission’s October 8, 2019 meeting, and therefore, did not attend. Gardner LTD learned of the issues related The Willow’s plan to use its Private Lane and/or other portions of its property only after the meeting. We understand that the decision was tabled while several issues (including access) were further investigated and discussed. While Gardner LTD does not wish to restrict the use and reasonable development of others’ private property, it is nevertheless compelled to protect its own property interests and rights. Therefore, Gardner LTD formally objects to the Planning Commission’s recommended approval of The Willows on the grounds that the proposed access road for ingress and egress and utilities appears to use Gardner LTD’s property without prior agreement or established rights-of-way.

³ A recent survey (attached) does show a small deed overlap between the Gardner LTD property and property owned by CJP Family II, LLC to the east. However, this deed overlap has never been resolved, and in any event, would not provide The Willows a legal basis to use or improve this area for its subdivision without Gardner LTD’s consent or resolution by a court.

If you have additional questions, please feel free to contact me at 801-532-7840.

Sincerely,

Justin P. Matkin

Attachments

cc: Kem C. Gardner

Planning Commission

500 W Main St - Google Maps

500 W Main St

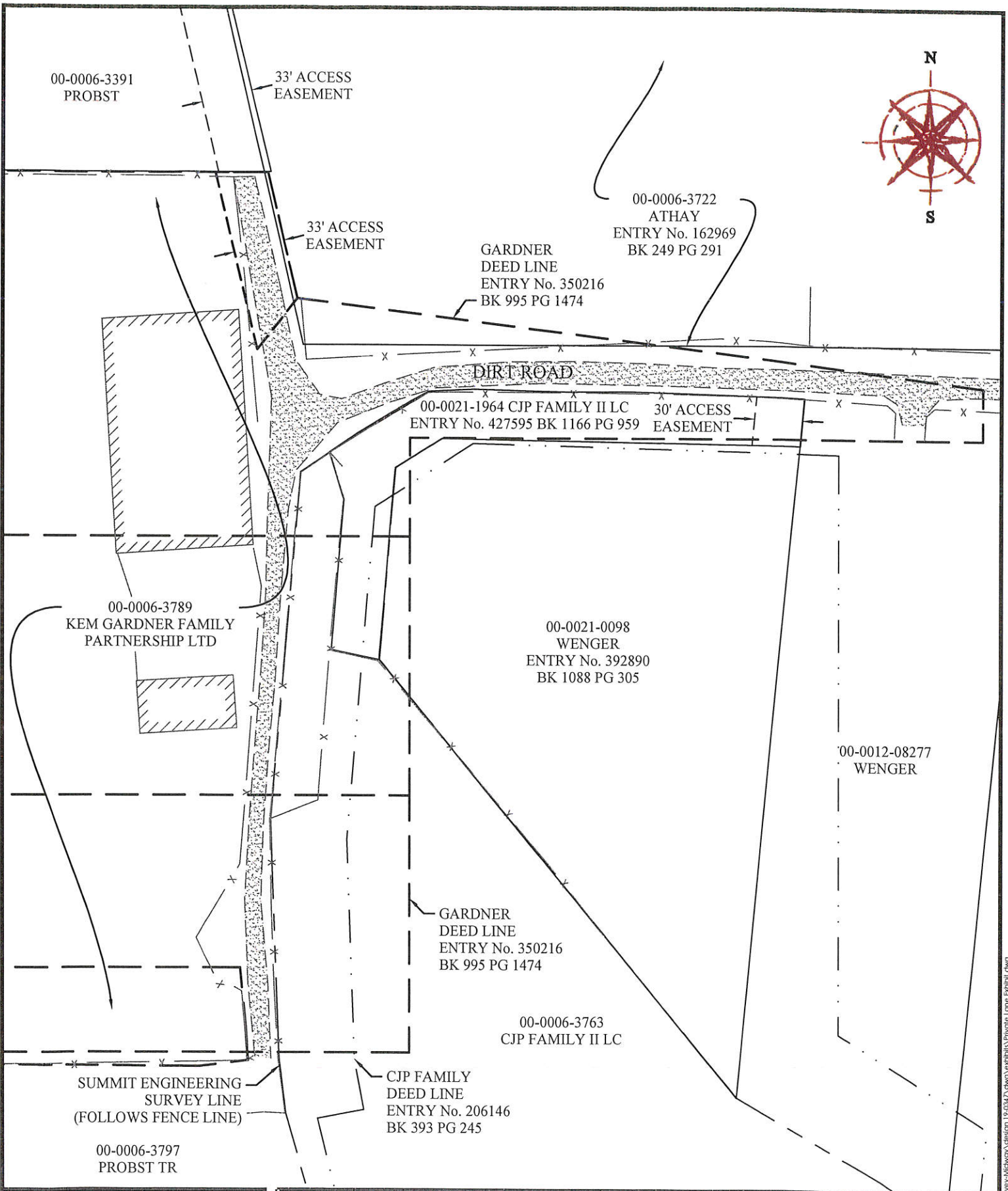
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500 W Main St

Cancel

Print





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www.focusutah.com

KEM C. GARDNER FAMILY PARTNERSHIP
PRIVATE LANE EXHIBIT

Date Created:	09/27/19
Scale:	N.T.S.
Drawn:	BCD
Job:	19-0347
Sheet:	01

Z:\2019\19-0347 Gardner Private Lane Survey-Midway\design\19-0347.dwg\oribatib\Private Lane Exhibit.dwg

Michael Henke

From: Dennis Wenger <wenger.dr@gmail.com>
Sent: Thursday, October 10, 2019 12:20 AM
To: Michael Henke
Cc: Celeste Johnson
Subject: midway planning commission - "the Willows at Midway" proposal

hello mr jim kohler, mr mike henke and commission members,
(and please forward to all commission members, if appropriate)

We were happy that we could attend the 8 October 2019 planning commission meeting. We own the property at 425 West Main St with extensive frontage on the "extension" of West Main St. Accordingly, we have a strong interest in the nature and quality of the proposed rural preservation development. we support the new sub-division if important changes to their proposal can be made.

We first want to compliment the committee chair, mr jim kohler and you on the civility of last night's meeting--and appreciate your allowing attendees to provide input. small town government at its best.

Our concerns regarding the current proposal focus on what we believe the term "rural preservation subdivision" should mean.

In our thinking it should focus on several issues:

1. a sense of quiet and spaciousness
2. maintaining a rural appearance
3. encouraging "rural uses" (horses, hay baling, hiking etc)
5. benefit not only those who will live within the new sub-division but also those who live nearby (a key to good governance)

The current initial entry to the proposed subdivision is the extension of west main st. which classically illustrates rurality. The road is gravel and not very wide. There are nice wooden fences on either side at the initial entry and "farm fences" as you proceed westward. There is a nice horse pasture on the right and a hay field on the left (our property). In addition, there is a long established horse riding/hiking path across the north end of the proposed Willows at Midway acreage. These important rural features should be maintained if the so-called "rural preservation" land use term has validity in midway.

We understand the inevitability of development in our part of town and will support a proposal that maintains a rural sensibility.

The developers proposal should be modified so that this "western extension" of Midway maintains its rural sense. This includes:

- Keep west main street extension looking as it currently does
- Keep road at minimum required width with a gravel surface
- The gravel surface road should extend down to the crossing of Snake Creek (if the new homeowners in area west of snake creek desire asphalt roads, we would not dispute their choice)
- Maintain willow trees that currently overhang the road (as name of proposed subdivision implies)
- work with the developer to maintain the current established, intensely used horse trail/walking path along the north edge of the proposed subdivision.

(Personal note--we have a legal easement for entry to our hayfield which comprises much of the southern boundary of the current West Main St. extension. We will need assurance that the current gate entry for farm machinery will be maintained.)

Summary: We support the proposed subdivision under discussion. The developers/owners are requesting that it be a "rural preservation subdivision". because this is not a typical "in city" development where rules and regulations for multiple units on smaller spaces are followed, the planning commission and city council should set an example for this subdivision - and perhaps future similar proposals - by requiring the maintenance of rural features that benefit all citizens in the area of the new development. fortunately, last nights meeting, with extensive attendee participation, nicely clarified what these features are. we look forward to the city's response.

sincerely,
dennis and kathy wenger
425 w. main st midway, UT