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August 21, 2018

VIA EMAIL ONLY

Hon. Jackie Biskupski, Mayor  
Salt Lake City  
c/o Mr. Robert C. Keller, Esq.  
Snow Christensen & Martineau

**Re: Bishop Place  
Appeal of HLC Approval of Portions of Economic Hardship Panel Report  
PLNHLC2017-00020 – 248 W Bishop Place  
PLNHLC2017-00029 – 265/67 W Bishop Place  
PLNHLC2017-00030 – 432 N 300 West  
Response to Brief of Salt Lake City**

Dear Mayor Biskupski:

Please consider this letter to be a reply on behalf of IRES, Inc., (“IRES”) to the City’s Brief regarding this appeal. I will respond to the matters raised in the City’s Brief *seriatim*.<sup>1</sup>

**Standard of Review.** The City’s Brief is, for the most part, correct. However, the discussion in the City’s Brief of the requirement of IRES to “marshal the evidence” leaves out one key fact. There is no requirement for an appellant to “marshal the evidence” if no evidence exists to marshal. *See, Wilson Supply v. Fradan*, 2002 UT 94, ¶ 22.<sup>2</sup> *Wilson* shifts the burden to the appellee to provide a “scintilla” of evidence in the record to rebut a “no evidence” challenge to the marshaling standard. Here, the City’s Brief fails to sustain that obligation to reverse the burden-shifting. The City’s Brief does not point to any “evidence” at all contrary to that presented by IRES. Instead, the City’s Brief only points out baseless speculation and legal misunderstanding (primarily by the biased and unqualified Mr. Francis).

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<sup>1</sup> I will not respond in kind to the *ad hominem* attacks on me (and my writing style) in the City’s Brief. I respect Mr. Nielson (as well as Mr. Norris, Ms. Oktay and the rest of the City’s Planning Staff) too much to do so.

<sup>2</sup> Of course, *Wilson* was decided under the ridiculously strict marshalling rules of *Chen v Stewart*, 2004 UT 82. *Chen* was overruled/modified/clarified by *State v. Nielsen*, 2014 UT 10. Instead of being fatal to an appellant’s case, as it was under *Chen*, any failure to marshal (of which there is none here) is not fatal but only goes to the Court’s evaluation of the appellant’s burden of persuasion. *See, generally*, Vogeler and Witherspoon, *Utah Bar Journal*, Vol 28, No. 2., p. 66. [http://www.utahbar.org/wp-content/uploads/2017/11/2015\\_edition\\_02\\_mar\\_apr.pdf](http://www.utahbar.org/wp-content/uploads/2017/11/2015_edition_02_mar_apr.pdf). I am certain that your excellent outside counsel will advise you on this mumbo jumbo.

Also, the standard of review of “correctness” and “substantial evidence” begins to look like the philosophical argument of infinite regress commonly referred to as “turtles all the way down”. The HLC reviewed the Panel on the same standard that you are now directed to use. That standard would also be the standard that a District Court would look at and, further, that an appellate court would use. At some point isn’t a landowner entitled to a real review of the merits of their case regarding private property rights that are protected by the Constitutions of the United States and the State of Utah? Especially when, as noted in detail below and in my original appeal letter, the factual decision maker (i.e., the so-called casting vote) on these 3 buildings was an unqualified and biased hack, the substantive law was ambiguous and the processes Kafkaesque.

**Background.** Again, the City’s Brief is, for the most part, correct. One item that is confusing given the double-back-flip way that the prior Code was written is that the HLC has effectively confirmed the decision of the Economic Hardship Panel (“Panel”) that the six buildings that are not subject to this appeal are now going to be demolished. No one filed a timely appeal to the HLC’s refusal to overturn the Panel’s decision to allow for their demolition. Those 6 buildings are coming down shortly.<sup>3</sup>

#### **1. Mr. Francis was utterly unqualified to serve on the Panel.**

The City’s Brief does not dispute that IRES repeatedly protested Mr. Francis’s utter lack of qualification and does not make any attempt at all to demonstrate that he was, as required by law: “[a] real estate and redevelopment expert [ ] knowledgeable in real estate economics in general, and more specifically, in the economics of renovation, redevelopment and other aspects of rehabilitation” as required by then-effective Section 21A.34.020.K.3. The City does not even, at this late date, attempt to defend Mr. Francis’s lack of qualification.<sup>4</sup> There is no evidence that Mr. Francis is a “real estate and redevelopment expert”. There is no evidence that he is “knowledgeable in real estate economics in general”. There is no evidence that he is specifically knowledgeable in “the economics of renovation, redevelopment and other aspects of rehabilitation”. As noted in my initial appeal letter, Mr. Francis’s law firm biography does not even mention the words “real estate” when everyone knows that many lawyers frequently claim to have practiced in every field they have even remotely touched so that they can bring in business and make more money. Concerning the matters at issue here, Mr. Francis had only the basic knowledge of any person (with perhaps, some expertise in franchising and immigration).

Instead, the City’s Brief now claims, for the very first time, that Mr. Francis’s

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<sup>3</sup> The now-inevitable demolition of these 6 buildings utterly destroys any justification for keeping any of the Bishops Place buildings standing as the “streetscape” for Bishops Place will no longer exist nor will any “historic context”.

<sup>4</sup> In the spirit of candor IRES needs to acknowledge that during the April 11, 2018 Hearing of the Panel Mr. Francis revealed, for the first time, that he had served for “about 5 years” on the “Preservation Utah board [sic]” and on “their [sic] construction committee”. (See p. 78 of the electronic Staff Report for this appeal (also marked as “Page 48 of 131” of the ‘Report of the Economic Hardship Review Panel’ [April 11, 2018]).) All that does is further illustrate his bias.

appointment was somehow an “administrative decision” (even though the City’s Brief does not use that term expressly that is the only possible interpretation of the argument) and should have been appealed earlier by IRES. The City’s Brief cites to no statute or case law for that proposition. The City’s Brief is simply wrong in claiming that Mr. Francis’s appointment was an “administrative decision”.

To the contrary, “Administrative Decision” is defined in Section 21A.62.040 as follows: “Any order, requirement, decision, determination or interpretation made by the Zoning Administrator in the administration or the enforcement of this title.” Simply put, you, the elected Mayor of Salt Lake City, are not the “Zoning Administrator” and thus, by definition, the appointment of the execrable Mr. Francis could not have been an “Administrative Decision.” Therefore, Chapter 21A.16, titled “Appeals of Administrative Decisions” would not have sanctioned an appeal of the appointment of Mr. Francis. Even a cursory reading of the substantive provisions of Chapter 21A.16 fails to provide any succor to the City’s argument in this regard. Finally, Section 21A.06.040.B of the City Code authorizes an “Appeals Hearing Officer” to consider 5 different categories of land use matters (e.g., variances, subdivision disputes, etc.) but none of those are remotely close to challenging the appointment of an unqualified person to the Panel.

The City’s Brief acknowledges that I sent a number of emails to various representatives of the City (these would include Mr. Nielson as well as Mr. Norris, Ms. Oktay and Ms. Coffey). I also made several telephone calls to the same effect. Not once did the City ever advise me that Mr. Francis’s appointment was an “administrative decision” or that it could or should have been appealed in any way. As just one example of the City’s being notified of IRES’s objections to Mr. Francis and the City not indicating any method for challenging his appointment please see the email thread attached as Exhibit “A”. When faced with my attack on Mr. Francis’s qualifications to serve Mr. Nielson responded only: “I will forward your concerns to planning leadership and staff who manage this process.” The City did not, after that email, ever say or imply that Mr. Francis’s appointment could be challenged in any way. It was simply treated as a *fait accompli* and everyone crossed their fingers hoping he wouldn’t be as bad as feared or else Ms. O’Grady as the third member of the Panel would do the right thing.

Mr. Francis was not qualified to serve on the Panel and the City has never argued that he was. Any such argument would have been risible on its face. Further, as noted in my initial letter regarding this appeal and also below, Mr. Francis’s lack of qualifications and biases manifested themselves in his inane participation in this fatally flawed process.

## **2. Mr. Francis was too biased to serve on the Panel.**

The City’s Brief seems to argue that because Mr. Francis’s only even theoretical qualification to serve on the Panel was his membership in “Salt Lake Modern” and because Salt Lake Modern, by its own description, is focused specifically on “preserving and promoting the region’s mid-century modern architecture and design” then his bias towards preserving buildings older than “mid-century” cannot be presumed. First, even if that were true it would merely

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reinforce that Mr. Francis was unqualified to serve on the Panel. Second, it takes only common sense to understand that someone who wants to “preserve” mid-century buildings would want to “preserve” older buildings such as Bishops Place.

The City’s Brief also fails to address at all the undisputed fact that the two listed “Member of the committee” of Salt Lake Modern who authored its “Purpose” statement are Mr. Francis and Cindy Cromer. Ms. Cromer spoke at both hearings of the Panel and at the HLC in opposition to the demolition of Bishops Place. Mr. Francis did not have the common decency or clear the very low ethical bar of even bothering to disclose this clear conflict to anyone and the HLC did not bother to address this impermissible bias either.

Concerning Mr. Francis’s improper and bad faith failure to approve as a third panel member three distinguished persons who were far more qualified to serve than he was, the City’s Brief’s only response is to say that weighing the relative qualifications of those four persons is just my “opinion”. It is my opinion. But it is also an undeniable fact just as much as “Theory of Evolution” is more than just a “Theory”. All that is needed to evaluate that “fact” is found in Exhibit “A”. Mr. Francis had no qualifications. While it is true that the former Code on this matter did “anticipate[] disagreements” about choosing the third panelist that does not excuse the bad faith nature of Mr. Francis’s blackballing Messrs. Lofgren, Sabey and McCandless. That blackball proves Mr. Francis’s bias.

The City’s Brief complains that I treated Mr. Francis during the Panel’s hearing unfairly. That may be true. But it is only true because Mr. Francis was unqualified and the positions he advanced at the hearings were so transparently ridiculous that I had to call him out since no one else would. Because the relevant Code had no guardrails for considering the issues actually at hand (see page 6, below, for Mr. Nielson’s acknowledgement of those procedural problems) I had to try to impose those guardrails. I had to protect the record from Mr. Francis’s abuses.

For some specific examples of bias just consider these. As noted in detail in my initial appeal letter, Mr. Francis claimed that the mere normal increase in value of the Bishops Place properties constituted an “economic return” to IRES that justified finding that there was no “economic hardship” to justify the demolition. Since, “a rising tide raises all boats” the fact that the underlying value of Bishops Place may have increased is irrelevant and did not fool any other members of the Panel. Second, Mr. Francis willfully ignored all of the evidence that none of the Bishops Place properties were structurally sound; i.e., he stated an opinion without any factual basis or any personal expertise.

Third, Mr. Francis misrepresented facts during the first hearing of the Panel. Mr. Francis claimed that IRES had stated that Bishops Place was worth \$10 million if the City had to pay IRES for a taking. That was, simply put, a lie. (See the excerpt from the Transcript of the Panel’ April 11, 2018 hearing attached as Exhibit “B”.)

Fourth, Mr. Francis spent much of the April 11, 2018 hearing trying (ineffectually) to cross-examine and discredit the witnesses and evidence produced by IRES; the only actual

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evidence in the record. (See, e.g., pp. 66, 69, 74 – 77, 80 - 84 of the electronic Staff Report for this appeal (also marked as Pages 36, 38, 39, 44 – 48, 50 – 54 of “131 of the ‘Report of the Economic Hardship Review Panel’ [April 11, 2018]”, respectively.) Mr. Francis continued that biased conduct at the second hearing of the Panel. That included Mr. Francis essentially calling a witness produced by IRES (who was not being paid for his testimony by IRES) a liar without any basis and really only because Mr. Francis was incapable of doing basic math. At the second hearing of the Panel Mr. Francis questioned the sufficiency (and asked for supplementation) of evidence that he had had for months without ever arguing about it before. Then, to add insult to injury, Mr. Francis complained that the IRES appraisals were outdated without even having the grace to acknowledge that the delays in considering the case were, in large part, due to him. Mr. Francis even objected to IRES’s inclusion of its legal fees for going through this horrible process as a part of its costs (and misrepresented the amount of IRES’s legal fees by, literally, more than 1,000%<sup>5</sup>). (See, e.g., pp. 105 – 108, 111 - 113 of the electronic Staff Report for this appeal (also marked as Pages 75 – 78, 81 - 84 of “131 of the ‘Report of the Economic Hardship Review Panel’ [May 15, 2018]”, respectively.)

A review of the transcript of the Panel’s deliberation on May 15, 2018 show that Mr. Francis did not have a basic ability to understand the economics of the Bishops Place rehabilitation issues or, alternatively, that he willfully chose to ignore the economics so that he could enforce his pre-existing bias to keep every old building in the City standing despite an undisputed showing that such endeavors were economically foolish. (See the discussion in Point 5, below.) Finally, even though Mr. Francis acknowledged that the undisputed evidence showed that two of the Bishops Place buildings, 262 and 241 West, were both, in his words, “likely to collapse” he still voted against their demolition. (See, p. 121 of the electronic Staff Report for this appeal (also marked as Page 22 of “131 of the ‘Report of the Economic Hardship Review Panel’ [May 15, 2018]”, respectively.) On this issue of bias that is *Q.E.D.*

**3. The “Hardship” provisions (and almost all of the Historic Overlay District) are unintelligible and thus have to be construed in favor of IRES.**

The City’s Brief acknowledges that because ordinances governing land use “are in derogation of a property owner’s common-law right to unrestricted use of his or her property, provisions . . . restricting property uses should be strictly construed . . . in favor of the property owner.” *Patterson v. Utah Cnty. Bd. of Adjustment*, 893 P.2d 602, 606 (Utah App. 1995). This is particularly true when the ordinance at issue is at all ambiguous—*i.e.*, “if it can be understood by reasonably well-informed persons to have different meanings.” *Id.* (quoting *Miller Welding Supply, Inc. v. Utah State Tax Comm’n*, 860 P.2d 361, 362 (Utah App. 1993)). Utah Code Ann. § 10-9a-707. The City’s Brief also acknowledges that Mr. Nielson and the Panel itself recognized this ambiguity. To quote again:

**O’Grady:** Well I think the ordinance is ambiguous, that’s the problem.

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<sup>5</sup> I can only wish I had been paid \$750,000 by IRES.

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June 14 Memorandum to HLC by Ms. Thompson, p. 86 (Transcript of May 15, 2018 hearing, p. 15).

If the Chairperson of the Panel is candid enough to make this kind of a blanket statement it seems hardly fair to make IRES specify chapter and verse of the ambiguities. Even Mr. Francis acknowledged ambiguity as noted in my initial appeal letter.

The fundamental ambiguity, and the problem that Ms. O'Grady was referring to in the quote above, is that the Code simply listed 5 factors (with several subfactors) to be considered by the Panel without giving any guidance about how to determine, based on the interaction among those factors, whether there was an "economic hardship" and the net effect of that hardship.<sup>6</sup> That ambiguity led directly to the failure of the Panel to be able to properly apply a hardship/takings analysis.

Mr. Nielson, himself, with his typical candor and professionalism, acknowledged that point to the Panel (he has also acknowledged it to the HLC as well):

**Paul:** can [sic] I address a couple of things? Along these lines Mr. Norris and were just consulting on the standards, this language indicated in K2 says standards for determination of economic hardship. And standards may be the wrong word to be used there because these are really factors that when considered collectively should inform the decisions here, whether there is an economic hardship. There's no formula here obviously, and this is the other thing I want to address, is yes the City has acknowledged that the ordinance that was in place when this petition was filed certainly was imperfect.

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**Paul:** yes. [sic] The ordinance has to be amended, it has been published within the last three weeks, we did have a conversation with Mr. Baird yesterday about whether he and his client would prefer to operate under the new ordinance. That's not really the issue here, I'm just establishing the record here that there is a fix to what we're working with. I think we can be guided by some of the principals here that are obvious as to how you make this determination. When I'm criticizing the ordinance, and I think it's fair for anybody here, it's in the process. It's just not laid out. So, if there's something unfair about this process I'd love to have Mr. Baird identify that specifically because he's indicated that there may be a due process implication. If they're ok with the process, if they think it's fair, and if this is a reasonable process, I think that....

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<sup>6</sup> You can consider as proof of the ambiguity and other weaknesses of the Code that Bishops Place is being evaluated under the fact that the City has gotten rid of that Code and replaced it with something at least moderately more intelligible (albeit still with several serious if not fatal flaws).

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**Bruce:** the [sic] process is inherently unfair because there is a complete lack of standards, there is a complete lack of process.

(See, pp. 89 - 90 of the electronic Staff Report for this appeal (also marked as Pages “58 - 59 of 131 of the ‘Report of the Economic Hardship Review Panel’ [April 11, 2018]”, respectively.) (Emphasis added.)

For example, Factor (e) seems to be unambiguous on its face: “Economic incentives and/or funding available to the applicant through federal, state, city, or private programs.” However, the problem is that Factor (e) is only part of a larger analysis and its relationship to those other factors (and the overarching question of “economic hardship”) is hopelessly unclear. Take, for the sake of argument, a hypothetical that some wealthy philanthropist had endowed the City with, for *ad horrendum* purposes, \$1 billion to pay for completely renovating all properties like Bishops Place and that IRES had stubbornly declined to avail itself of this beneficence. Under those facts then Factor (e) is not only unambiguous but also fatal to a finding of “hardship”. However, take the contrary *ad horrendum*: the total third-party munificence available to help restore Bishops Place from all sources is exactly \$1.00 and not a penny more. Under that fact pattern even acknowledging that there are “economic incentives and/or funding available” and putting that in the calculus of hardship would be absurd. Thus, the entire 5 Factor test is ambiguous because it utterly lacks context.<sup>7</sup>

The City’s Brief invites IRES to specify which of the 5 factors (or their subparts) are ambiguous on their face. Even though the individual ambiguities in the 5 factors and their subfactors are not the real problem, concerning the ambiguity of the application of the 5 five factors you have to read no further than pages 117 - 120 of the electronic Staff Report for this appeal dealing with “current economic return” to see how confused the Panel was (also marked as Pages 87 – 90 of “131 of the ‘Report of the Economic Hardship Review Panel’ [May 15, 2018]”). But if you want to read further here is Ms. O’Grady deliberating on another one of the subfactors:

**O’Grady:** Ok. [“]The estimated market value of the property in the current condition after completion of the demolition and proposed new construction and after renovation of the existing property for continued use.[“]<sup>8</sup> This is really confusing to me. What does that mean exactly? Estimated market value of the property in the current after completion of the demolition; we

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<sup>7</sup> This is not just a hypothetical. The unqualified, biased and incompetent Mr. Francis stated during the deliberations of the Panel on this very issue that he didn’t believe that the Panel could even look at whether any potential tax credits could be practically useful for Bishops Place under any fact pattern; merely that the potential that tax credits existed was enough for him to use this as a reason to vote against “economic hardship. (See, p. 125 of the electronic Staff Report for this appeal (also marked as Page 26 of “131 of the ‘Report of the Economic Hardship Review Panel’ [May 15, 2018]”, respectively.) Of course, the stupidity of this position also establishes Mr. Francis’s fatal bias. Unfortunately, Ms. O’Grady seems to have made this same mistake by agreeing, on the same cited page, with Mr. Francis’s ludicrous proposition.

<sup>8</sup> Ms. O’Grady was referring to subfactor d.(3).

don't know there's going to be demolition

(See, p. 124 of the electronic Staff Report for this appeal (also marked as Page 25 of "131 of the 'Report of the Economic Hardship Review Panel' [May 15, 2018]", respectively.)

The City's Brief also fails to address the undeniable fact that the processes for the HLC to review and reject or sustain the Panel's decision is also incomprehensible. The City's Brief ignores the fact that one Member of the HLC stated at the June 28, 2018 hearing that the "process is clear as mud."

**4. There was no evidence before the Panel (or the HLC in reviewing the Panel) contradicting the evidence submitted by IRES and thus any decision by the Panel as sustained by the HLC against IRES cannot be supported by "substantial evidence".**

The City's Brief claims, without any legal support or logic, that "this type of proceeding [an Economic Hardship analysis] does not invite [the presentation of] contrary evidence." If that is so then why were members of the public (including Mr. Francis's fellow Salt Lake Modern Board Member) allowed to make claims (purely speculative and inane though they may have been) about the viability of rehabilitating Bishops Place to both the Panel and to the HLC reviewing whether to sustain the Panel's decision?<sup>9</sup> Why was the public allowed to discuss whether tax credits could be applied to Bishops Place? Why was a trust fund baby who has never had to work a day in her life allowed to speculate on the economics of rehabilitating Bishops Place? Why were members of the Panel and the HLC allowed to speculate on the 5 factors and do their own fantastical (and completed undocumented) "research"?

Further, the City seems willing to spend the legal resources to defend the Panel's absurd decision (Mr. Nielson doesn't work for free). The City could just as easily have commissioned a neutral, third-party analysis of "economic hardship" itself or the underlying 5 factor issues such as structural stability, economic value, etc. The City wrote the terrible Code but now, like the man who murders his parents and asks for the mercy of the court at sentencing because he is an orphan, the City wants to avoid all responsibility for evaluating the facts.

The test here is, as the City's Brief acknowledges, "substantial evidence". "Substantial evidence" is defined as "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *First Nat'l Bank of Boston v. County Bd. Of Equalization*, 799 P.2d 1163,1165 (Utah 1990). In a land use context see, among a score of other cases, *Bradley v. Payson City*, 2003 UT 16, ¶ 15. There is an old saying that "you can't beat a somebody with a nobody" and here, simply put, no one submitted any evidence at all to the Panel or the HLC that any of the 9 buildings could be economically restored to their historical condition (or rehabilitated to any other economically viable use). Unless the evidence submitted by IRES was inherently incredible it had to have been believed and it is therefore

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<sup>9</sup> The City's Brief does not address at all the fact that at the HLC's review of the Panel's decision one member of the public, an architect, who commented opposing the demolition acknowledge that the buildings could not be economically restored.



“substantial”. The mere fact that the incompetent Mr. Francis may have wanted “more” evidence or speculatively disagreed with some of IRES evidence does not defeat IRES’s substantial and unrebutted evidence

**5. The Panel misapplied the law and the facts and the HLC perpetuated that blunder.**

The City’s Brief addresses the challenges that IRES made to the 5 factors set out in Section 21A.34.020.K.2 (including some of the more important subfactors):

**a. The applicant's knowledge of the landmark designation at the time of acquisition, or whether the property was designated subsequent to acquisition;**

**b. The current level of economic return on the property as considered in relation to the following: [ ]**

**c. The marketability of the property for sale or lease, considered in relation to any listing of the property for sale or lease, and price asked and offers received, if any, within the previous two (2) years. This determination can include testimony and relevant documents regarding:**

**d. The infeasibility of alternative uses that can earn a reasonable economic return for the property as considered in relation to the following:**

1. A report from a licensed engineer or architect with experience in rehabilitation as to the structural soundness of any structures on the property and their suitability for rehabilitation,
2. Estimate of the cost of the proposed construction, alteration, demolition or removal, and an estimate of any additional cost that would be incurred to comply with the decision of the historic landmark commission concerning the appropriateness of proposed alterations,

[ ]

**e. Economic incentives and/or funding available to the applicant through federal, state, city, or private programs.**

First, the City’s Brief states that the Panel did not make any finding that the price paid for Bishops Place was excessive. The City’s Brief claims to be bewildered as to why IRES raises this issue at all. As noted in the original appeal letter to you, Factor “a” could only have been

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included in order to help evaluate the “reasonable investment-back expectations” test that is found in some of the regulatory takings cases. To repeat, unless it could be shown that the purchase price paid by IRES at the time was unreasonably high in light of the historical designation of Bishops Place that factor is logically irrelevant to a “reasonable investment-back expectations”. The City’s Brief may not understand but this issue is sort of a two-thirds Goldilocks chair test: the price for Bishops Place was either “too high” (in which the “investment backed expectations” may have been unreasonable) or it was “just right” (in which IRES “investment backed expectations” were perfectly reasonable)<sup>10</sup>.

Second, regarding Factor “b”, the City’s Brief does not even bother to explain how IRES failed to present “substantial evidence” to the Panel that there is absolutely no economic return on the properties because they are not inhabitable (except for one where a caretaker is living at a token rent to try to keep the vandals, homeless and drug dealers away). Mr. Francis’s speculation that the increase in the value of the real estate itself constituted an “economic return” was silly and was rejected by the other two members of the Panel. Merely because the Panel checked a box on a form on this factor adds absolutely nothing to the question of “reasonable investment-back expectations”.

Third, regarding Factor “c”, just because the City’s Brief claims that the Panel checked a box that IRES had supposedly not adequately marketed Bishops Place does not make the fact any more true than King Canute’s commanding the tide not to rise prevented him from getting his royal robes soaked in salty water. IRES’s evidence before the Panel showed that the 3 buildings have been marketed but no one would buy them for the obvious reason that they have to be demolished and that demolition is stuck in this stupid process. Merely filling in a bubble on the SAT with a No. 2 pencil does not get you points if the wrong bubble is blackened nor is it of any help here.

Fourth, concerning Factor “d”, the City’s Brief claims that two members of the Panel (Mr. Francis and Ms. O’Grady, the member with no engineering background at all) thought that IRES voluminous engineering reports were “largely unhelpful”. In making this statement the City’s Brief elides and asks you to ignore the actual statements that Mr. Francis and Ms. O’Grady made during their consideration as noted in my original letter. Both Mr. Francis and Ms. O’Grady seemed to believe that unless each of the 9 buildings was in immediate danger of falling over almost literally tomorrow this factor had not been met.

Again, this shows that the Panel’s view of the issue was not focused on the economic viability but simply on whether the buildings could be rehabilitated irrespective of economic reality. Of course Bishops Place can be rehabilitated. Bishops Place could theoretically be furnished with gold plated toilets. The issue is the cost. Mr. Nielsen and the Planning Staff explained several times that the issue in this case was the economic viability of rehabilitating Bishops Place. Yet the Panel only considered whether the structures could be rehabilitated at all with absolutely no real consideration of the significant financial analysis done by IRES showing

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<sup>10</sup> The same logic applies if Goldie’s chair or IRES’s purchase price was “too low”.

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that rehabilitation would be economically senseless.

As pointed out in my original appeal letter, whether there is a presently “fatal” defect in any of the structures is not even close to the test applicable here. The correct test is whether the prohibition on demolition constitutes an “economic hardship”/regulatory taking. Or, said another way, is rehabilitation economically feasible. The 3 buildings cannot be rehabilitated in an economically sensible manner because they are all about to fall down one way or the other. The City’s Brief does not point to even a scintilla of evidence in the record contradicting this fact which was clearly established in IRES’s submittals to the Panel. The City’s Brief also fails to address at all (or object to) a supplemental report dated June 14, 2018 from Mr. Dean Conder of Webb & Associates that demonstrates beyond doubt the essentially irreparable (at least at any reasonable price) condition of the 3 buildings.

Finally, regarding Factor “e”, the City’s Brief seems to claim that because the Panel checked the box finding that some “Economic incentives and/or funding available to the applicant through federal, state, city, or private programs” that is the end of the argument and there can be no “economic hardship”. As noted on page 7, above, Factor (e) is only part of a larger analysis and the mere existence of potential incentives itself (whether tax credits or otherwise) is not sufficient evidence to show that preventing demolition is not an “economic hardship” to IRES. IRES submitted substantial and un rebutted evidence to the Panel (and clarified that evidence even further to the HLC) that any tax incentives make no practical difference to the analysis of “economic hardship” to IRES.

**6. Unless the 3 buildings are demolished the City will have taken the property of IRES for public purposes without any compensation for which the City will have to pay damages.**

The City’s Brief claims that Point 6 of my initial letter regarding this appeal did not address “takings” at all but, instead, merely cited to Humpty Dumpty and Monty Python. Apparently the PDF copy of my initial appeal letter must have somehow omitted (or the City did not read) the following:

The law on “regulatory takings”, as Mr. Neilson instructed the Panel and the HLC, is that no one property owner can be forced to bear those unreasonable costs so that the public (even the mere 7 or 8 NIMBY opponents of these demolitions and certain biased Members of the HLC) can gawk at [Bishops Place but using an illustrative metaphor]. Keeping the 3 buildings from being demolished would constitute a regulatory taking for which the City will owe IRES “just compensation”.

The reason I tend to cite to Monty Python in land use cases is that the scenes in *The Holy Grail* with the Knights Who Say ‘Ni twice demanding shrubberies is a parody of the absurd planning and development processes in England. (The script for those two scenes is attached as Exhibit “C” so that if I have to appeal this case I get to cite the *Holy Grail* into the appellate record.) IRES brought the Panel and the HLC two shrubberies and arranged them in a “nice,

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two-layer effect” but IRES is not going to cut down the tallest tree in the forest with a herring. Perhaps, the 3 buildings at issue here could be knocked down with that herring before they fall down on their own. But that does not prove that Bishops Place can be economically rehabilitated. If the City does not allow the demolition of the remaining 3 buildings of Bishops Place the City will have taken the property of IRES and thus be liable for paying IRES “just compensation”.

**7. Conclusion.**

The HLC’s approval of the Panel’s recommendation regarding the demolition of the 3 buildings was illegal, arbitrary and/or capricious for the reasons listed above. The Code is horribly ambiguous and for that reason alone the decision must be reversed. To deny this appeal is to sanction a regulatory taking of IRES’s properties. The three structures subject to this appeal cannot be rehabilitated in an economically feasible manner based on the only actual evidence presented to the Panel. I thank for your consideration of this matter and I look forward to presenting this matter to you on August 29, 2018.

Sincerely,



Bruce R. Baird

cc: Don Armstrong (via email only)  
Paul Nielson, Esq. (via email only)  
Ms. Amy Thompson, Principal Planner (via email only)

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### EXHIBIT "A"

**From:** Bruce R. Baird <bbaird@difficultdirt.com>  
**Sent:** Friday, February 9, 2018 4:09 PM  
**To:** 'Nielson, Paul' <paul.nielson@slcgov.com>  
**Cc:** 'Oktay, Michaela' <Michaela.Oktay@slcgov.com>; 'Coffey, Cheri' <Cheri.Coffey@slcgov.com>; 'Thompson, Amy' <Amy.Thompson@slcgov.com>; 'Norris, Nick' <Nick.Norris@slcgov.com>  
**Subject:** RE: Economic hardship Panel - Candidates for Third Panel Member

Thx. brb

Have a nice weekend all of you (and I really mean it; writing this email has put me in a good mood 😊).

I will hold off until next Tuesday at noon before letting Wayne (Brad, Mike and Greg as well as Gamvroulas and Perry) know how Chris and Scott were dissed by the ever-arrogant City nominee, Mr. Francis.

For giggles I include below the links to the law firm bios of Mr. Francis (Franchise Law and Immigration law without a single mention of the words "real estate" – I hope that this doesn't cost me a "green card" or, heaven forfend, a Taco Bell bean burrito) and those of the "unqualified" and inherently biased Mr. Scott Sabey along with the the Sandy City bio of Chris McCandless, also unqualified and biased. (I wonder if Francis even knew who they were before I proposed them? I wonder what Jones Waldo would think about his attack on Scott, the Bar's lobbyist for a decade or so.)

<http://www.joneswaldo.com/attorneys/69/lmf>

Leader, Franchise Law Practice Group  
Leader, Immigration Law Practice Group

**PRACTICE FOCUS:**

Litigation

Franchise Law

**EXPERTISE:**

- Litigating, arbitrating and mediating disputes involving franchise agreements, arbitration clauses, trademarks, copyrights, unfair competition and land use decisions in various state and federal jurisdictions across the United States.
- Has successfully pursued and opposed both preliminary injunctions and permanent relief.
- Well-versed in obtaining the necessary immigration visas for specialized temporary employees, such as those qualifying for H-1B, TN, O or L

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visas, as well as securing U.S. permanent residency ("green card") for immigrant workers.

<http://fabianvancott.com/attorneys/scott-sabey/>

Scott R. Sabey has over 20 years of experience in a practice centered on real estate development and related litigation. He works with clients in development of shopping malls, resort condominiums, water companies and hospitals as well as financing for large scale residential developments. In addition to assisting clients with transactions, Scott is also a litigator with experience in many areas of real estate law. \* \* \* He has served the legal profession as commissioner for the Utah State Bar, chair of the Real Property and Business Law sections of the bar and on the Utah Judicial Counsel. In the community, Scott is chairman of the Sandy City Planning Commission and has served on the city's Board of Adjustments.

<https://sandy.utah.gov/Home/Components/StaffDirectory/StaffDirectory/51/1392>

*Chris McCandless, a long term resident of Sandy City, recalls learning to love the outdoors in his youth by camping in the wilderness, then located where the Waterford School now stands on 9400 South and 1700 East. With that memory, and thousands of other outdoor experiences since, he understands the importance of open space to Sandy's residents. It is critical that our parks and trails have specific links to the incredible asset known as the Wasatch National forest, located on Sandy's eastern border. Chris is an avid skier (and former Ski Patrolman), hiker, biker, and fly fisherman, and has shared his love of outdoors with hundreds of young men through the Boy Scout organization and church youth groups. Service has been another common thread throughout his youth and adult life. In addition to his service on numerous Sandy Committees, Chris is a member of the Rotary Club, a long term board member of the South Valley Boys and Girls Club, an Honorary Colonel of the Sandy City Police Department, and a former member of the Jordan Education Foundation. Recently, Chris, through the Sandy City Sister City program took his 15th humanitarian trip to Piedras Negras, Mexico, this time to deliver a trailer of hospital equipment to a children's hospital. In 2002, he was recognized as the Humanitarian of the Year, by Sandy City, and in 2009, he received the Noel Bateman Service Award, also from Sandy. Since 1981, Councilman McCandless has co-owned and operated a real estate development and management business. His goal, both as a city councilman and in business, has been to create or stimulate job growth. These efforts have always been the key to establishing a continuing tax base that pays for education, police, fire protection and provides for parks and trails as well as other needs found in our great community.*

[ ]

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brb

**From:** Nielson, Paul [<mailto:paul.nielson@slcgov.com>]  
**Sent:** Friday, February 9, 2018 3:35 PM  
**To:** [bbaird@difficultdirt.com](mailto:bbaird@difficultdirt.com)  
**Cc:** Oktay, Michaela <[Michaela.Oktay@slcgov.com](mailto:Michaela.Oktay@slcgov.com)>; Coffey, Cheri <[Cheri.Coffey@slcgov.com](mailto:Cheri.Coffey@slcgov.com)>; Thompson, Amy <[Amy.Thompson@slcgov.com](mailto:Amy.Thompson@slcgov.com)>; Norris, Nick <[Nick.Norris@slcgov.com](mailto:Nick.Norris@slcgov.com)>  
**Subject:** Re: Economic hardship Panel - Candidates for Third Panel Member

I will forward your concerns to planning leadership and staff who manage this process.

Thanks.

PAUL C. NIELSON  
SENIOR CITY ATTORNEY  
[]

----- Original message -----

From: "Bruce R. Baird" <[bbaird@difficultdirt.com](mailto:bbaird@difficultdirt.com)>  
Date: 2/9/18 1:34 PM (GMT-07:00)  
To: "Nielson, Paul" <[paul.nielson@slcgov.com](mailto:paul.nielson@slcgov.com)>  
Subject: FW: Economic hardship Panel - Candidates for Third Panel Member

Paul:

The email below is bullshit. Francis is utterly unqualified. See the Statue below.

And he is insulting to Scott and Chris, both of whom are far more qualified than he is or ever could hope to be. His appointment reeks of bad faith. And his arrogant and condescending refusal to approve either Scott or Chris is *prima facie* ridiculous. His claim that Scott and Chris would have pre-judged this matter is absurd. He should also look at the mote in his own eye at some of the biased individuals he proposed.

K.3. This panel shall be comprised of three (3) real estate and redevelopment experts knowledgeable in real estate economics in general, and more specifically, in the economics of renovation, redevelopment and other aspects of rehabilitation.

I hereby request that the City withdraw Francis's nomination based on his lack of qualifications and bad faith conduct since then in rejecting qualified third panelists.

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I also request a meeting with the City to discuss how to move this matter forward.

The buildings are worthless Trash and every sentient being knows that. This charade is just wasting everyone's time and money. And keeping down the housing stock in the City. And raising the price of the housing that will eventually be built there.

I get paid enough to get housing in the City and elsewhere but I am really tired of having to earn my living dealing with crap like the City's Historic Landmark Code and people like Mr. Francis.

Thx. brb

---

**From:** LEWIS FRANCIS <[LFRANCIS@joneswaldo.com](mailto:LFRANCIS@joneswaldo.com)>  
**Sent:** Friday, February 9, 2018 10:39:55 AM  
**To:** Merlin Taylor  
**Cc:** Thompson, Amy  
**Subject:** RE: Economic hardship Panel - Candidates for Third Panel Member

Merlin, I do not believe that any of the persons which the developer has proposed (through you) meet the regulatory qualifications for the Economic Hardship panel, so I can't agree to one of the as the third member. Obviously you are unwilling to agree to those persons which I have proposed.

As a result, I believe that the Mayor will need to pick the 3<sup>rd</sup> member from the list that has been provided by you and me.

If you truly trusted in the process, you wouldn't be so interested in getting someone on the panel who has already made a decision on the outcome.

In any event, I will wait to hear back from the City on the next steps.

Lewis Francis, Esq.

**From:** Merlin Taylor [<mailto:merlin@merlintaylor.com>]  
**Sent:** Friday, February 09, 2018 10:28 AM  
**To:** Thompson, Amy <[Amy.Thompson@slcgov.com](mailto:Amy.Thompson@slcgov.com)>; LEWIS FRANCIS <[LFRANCIS@joneswaldo.com](mailto:LFRANCIS@joneswaldo.com)>  
**Cc:** Nielson, Paul <[paul.nielson@slcgov.com](mailto:paul.nielson@slcgov.com)>; Coffey, Cheri <[Cheri.Coffey@slcgov.com](mailto:Cheri.Coffey@slcgov.com)>; Oktay, Michaela <[Michaela.Oktay@slcgov.com](mailto:Michaela.Oktay@slcgov.com)>; 'Don Armstrong' <[don@mountainpacificre.com](mailto:don@mountainpacificre.com)>; 'Bruce R. Baird (bbaird@difficultdirt.com)' <[bbaird@difficultdirt.com](mailto:bbaird@difficultdirt.com)>  
**Subject:** RE: Economic hardship Panel - Candidates for Third Panel Member



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Dear Amy,

We have not received a reply or other directives since my email last Friday on the 2<sup>nd</sup>.

It appears we have no say, with regard to a 3<sup>rd</sup> member for the panel.

If the clock was allowed to run out so the Mayor can select the 3<sup>rd</sup> member, I believe that would constitute an act against fairness and solving this issue objectively.

At this moment I am waiting to board a flight out of SLC to Honolulu and may not be able to communicate after 11:00 AM.

However, Don Armstrong and Bruce Baird are cc: with this message and share my same frustrations with this system.

Please respond and advise.

Regards,

**MERLIN TAYLOR**  
**ADVISE AND CONSULT, INC.**

**Exhibit "B"**

2:30:12 PM Lewis I have a question. Mr. Baird, how do you explain the discrepancy between the proformas that were submitted in support of the RDA loan and the proformas you are now submitting?

2:30:23 PM **Bruce:** 4 years

2:30:24 PM Lewis well 4 years, priced have gone up a little and costs of construction, I'll acknowledge that. But also, the value of the property has gone up, probably tenfold over the cost, increased cost, of construction.

2:30:36 PM **Bruce:** you're purely speculating.

2:30:37 PM Lewis well, I'm just asking you to explain to me the discrepancy.

2:30:40 PM **Bruce:** and I'm going to tell you that the fact that you even have the hutzpah to say that real estate values have gone up ten times in 4 years further proves your biased. My house is not worth four times, ten times as much as it was 4 years ago. You said it, I didn't.

(Mr. Breen enters)

2:31:00 PM **Lewis:** well, actually Mr. Baird, you said this property is worth 10 million in your letter suggesting that the City buy it. In the proforma that was submitted with the original application for the RDA loan, it said that the interior and exterior renovation costs for all the properties totaled 1.35 million.

2:31:18 PM **Bruce:** the other answer is that when you get into further investigation of the properties, as required by the building code, and you look at 4 years of additional deterioration, it has become clear that the buildings cannot be effectively rehabilitated at all. We've gone through in detail in our letter and analysis what it would take to rehab these buildings, and we have a Structural Engineer and a Contractor here to talk about that. What it would take, now after 4 years of further investigation, to restore them would be to take them apart piece by piece almost literally with a toothpick, identify the few items of historical nature that are there depending upon whether you want to count them as wooden clap board style or you want to count them as faux gingerbread painted crap. Whichever it is, you would have to take them apart piece by piece, you'd have to move them to another site, you'd have to tear the foundations down, you'd have to build a new foundation, you would have to do all of that work, you'd have to put it up with modern code material. What you saw in the RDA was a proforma, what you're seeing now is detailed cost estimates generated in response to the City's requirements for detailed cost estimates. That and 4 years explained the difference, and I would ask you again, are you really claiming that land values have gone up ten times in the last 4 years? Which is what you just stated, which proved you're biased.

2:32:50 PM **Lewis:** Mr. Baird, what I'm referencing is your client paid \$800,000 for these properties, what 5 years ago. You are now saying that they are worth \$10 million. So, I'm not opining on anything as far as evaluations, I'm just basing it on what you've submitted to us.

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2:33:04 PM **Bruce:** you stated real estate values have gone up by 10 times.

2:33:07 PM **Lewis:** based on what you said...

2:33:08 PM **Bruce:** that's not what you said.

2:33:10 PM **Lewis:** Mr. Baird, are you here to argue with us or answer questions?

2:33:13 PM **Bruce:** I'm here to do both Mr. Francis, but your bias is so transparently evident.

2:33:18 PM **Claudia:** we've noted your opinion of these biases...

2:33:23 PM **Bruce:** the answer is we have not made a claim that the property is worth \$10 million if the City decides to take it. What we have made a claim is that if you deny the demolition, you will have, or you force the rehab, you will cost approximately \$4 million. The value that we would bring, as you can see from our other filings that I don't have the number at my hand, we can tear it down we can build new buildings, the total value of the new buildings we proposed to build on the site works out to \$5.3 million gross if you take a look at paragraph number 2 on the first page. So it's not \$10 million, it's \$5.3 million gross by our own estimates. That's the math on page 1, page 1.

2:34:09 PM **Lewis:** so just so I'm clear on your answer to my question, the difference the costs that were submitted in support of the RDA loan application and the costs that you are now suggesting are a difference of 4 years and additional requirements that the City imposed..

2:34:24 PM **Bruce:** no, that's not what I said at all.

2:34:26 PM **Lewis:** k then clarify it for me.

2:34:28 PM **Bruce:** I guess I'll have to repeat what I said. What I said was, that it's 4 years of time and we did more detailed evaluation. So, it's 4 years of time, the cost increase, the change in quality of the property, and the fact that because the City required this level of detailed analysis for this. We've had to go into more detail to determine what can and cannot be preserved and what it costs to preserve that. And we've determined that the costs are higher than what we originally estimated them.

Exhibit "B"

**Scene 12: The Knights Who Say Ni**

**HEAD KNIGHT OF NI:** Ni!

**KNIGHTS OF NI:** Ni! Ni! Ni! Ni! Ni!

**ARTHUR:** Who are you?

**HEAD KNIGHT:** We are the Knights Who Say... 'Ni'!

**RANDOM:** Ni!

**ARTHUR:** No! Not the Knights Who Say 'Ni'!

**HEAD KNIGHT:** The same!

**BEDEVERE:** Who are they?

**HEAD KNIGHT:** We are the keepers of the sacred words: 'Ni', 'Peng', and 'Neee-wom'!

**RANDOM:** Neee-wom!

**ARTHUR:** Those who hear them seldom live to tell the tale.

**HEAD KNIGHT:** The Knights Who Say 'Ni' demand a sacrifice.

**ARTHUR:** Knights of Ni, we are but simple travellers who seek the enchanter who lives beyond these woods.

**HEAD KNIGHT:** Ni!

**KNIGHTS OF NI:** Ni! Ni! Ni! Ni! Ni!...

**ARTHUR:** Ow! Ow! Ow! Agh!

**HEAD KNIGHT:** We shall say 'ni' again to you if you do not appease us.

**ARTHUR:** Well, what is it you want?

**HEAD KNIGHT:** We want... a shrubbery!

**ARTHUR:** A what?

**KNIGHTS OF NI:** Ni! Ni! Ni! Ni!

**ARTHUR and PARTY:** Ow! Oh!

**ARTHUR:** Please! Please! No more! We will find you a shrubbery.

**HEAD KNIGHT:** You must return here with a shrubbery, or else, you will never pass through this wood... alive.

**ARTHUR:** O Knights of Ni, you are just and fair, and we will return with a shrubbery.

**HEAD KNIGHT:** One that looks nice.

**ARTHUR:** Of course.

**HEAD KNIGHT:** And not too expensive.

**ARTHUR:** Yes.

**HEAD KNIGHT:** Now... go!

\*\*\*

**Scene 18: Shrubby or Herring?**

**ARTHUR:** O Knights of Ni, we have brought you your shrubbery. May we go now?

**HEAD KNIGHT:** It is a good shrubbery. I like the laurels particularly,... but there is one small problem.

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**ARTHUR:** What is that?

**HEAD KNIGHT:** We are now... no longer the Knights Who Say 'Ni'.

**KNIGHTS OF NI:** Ni! Shh!

**HEAD KNIGHT:** Shh! We are now the Knights Who Say 'Ecky-ecky-ecky-ecky-pikang-zoop-boing-goodem-zu-owly-zhiv'.

**RANDOM:** Ni!

**HEAD KNIGHT:** Therefore, we must give you a test.

**ARTHUR:** What is this test, O Knights of-- knights who till recently said 'ni'?

**HEAD KNIGHT:** Firstly, you must find... another shrubbery!

**ARTHUR:** Not another shrubbery!

**RANDOM:** Ni!

**HEAD KNIGHT:** Then, when you have found the shrubbery, you must place it here beside this shrubbery, only slightly higher so you get the two-level effect with a little path running down the middle.

**KNIGHTS OF NI:** A path! A path! A path! Ni! Shh! Knights of Ni! Ni! Ni! Shh! Shh!...

**HEAD KNIGHT:** Then, when you have found the shrubbery, you must cut down the mightiest tree in the forest... with... a herring!

**KNIGHTS OF NI:** A herring!

**ARTHUR:** We shall do no such thing!

**HEAD KNIGHT:** Oh, please!

**ARTHUR:** Cut down a tree with a herring? It can't be done.

[ ]