ADMINISTRATIVE HEARING OF A LAND USE APPEAL
(Case No. **PLNAPP2018-00507**)
(Appealing Petition Nos. PLNHLC2017-00020, PLNHLC2017-00029, and PLNHLC2017-00030)
August 29, 2018

Appellant:	International Real Estate Solutions, Inc.
Decision-making entity:	Salt Lake City Historic Landmark Commission
Addresses Related to Appeal:	248 West Bishop Place 265/267 West Bishop Place 432 North 300 West Street
Request:	Appealing the historic landmark commission's adoption of the economic hardship review panel's findings.
Brief Prepared by:	Paul C. Nielson, Senior City Attorney

Land Use Appeals Hearing Officer's Jurisdiction and Authority

The appeals hearing officer, established pursuant to Section 21A.06.040 of the *Salt Lake City Code*, is the city's designated land use appeal authority on appeals of historic landmark commission decisions.

Standard of Review for Appeals to the Appeals Hearing Officer

In accordance with Section 21A.16.030.A of the *Salt Lake City Code*, an appeal made to the appeals hearing officer "shall specify the decision appealed, the alleged error made in connection with the decision being appealed, and the reasons the appellant claims the decision to be in error, including every theory of relief that can be presented in district court." It is the appellant's burden to prove that the decision made by the land use authority was erroneous. (Sec. 21A.16.030.F). Moreover, it is the appellant's responsibility to marshal the evidence in

this appeal. Carlsen v. City of Smithfield, 287 P.3d 440 (2012), State v. Nielsen, 326 P.3d 645 (Utah, 2014), and Hodgson v. Farmington City, 334 P.3d 484 (Utah App., 2014).

"The appeals hearing officer shall review the decision based upon applicable standards and shall determine its correctness." (Sec. 21A.16.030.E.2.b). "The appeals hearing officer shall uphold the decision unless it is not supported by substantial evidence in the record or it violates a law, statute, or ordinance in effect when the decision was made." (Sec. 21A.16.030.E.2.c). In this case, the appellant has opted to have the Salt Lake City Mayor serve as the land use appeal authority per Utah Code Section 10-9a-701(6).

This case deals with application of former[1] Subsection 21A.34.020.K (Zoning: Overlay Districts: H Historic Preservation Overlay District: Definition and Determination of Economic Hardship) of the *Salt Lake City Code*. Video of the commission's public meetings are found at http://www.slcgov.com/slctv/slctv-videos-demand**,** and the video of the June 28, 2018 public meeting is part of the record of this matter. (See Video of June 28, 2018 Historic Landmark Commission Meeting).

Background

In July 2017, International Real Estate Solutions, Inc. (Appellant) applied for and was denied permission to demolish nine adjacent residential structures located on Bishop Place in the H Historic Preservation Overlay District. Subsequent to the denial of Appellant's demolition petition (and appeal of that decision), Appellant applied for a determination of economic hardship related to the demolition denial(s).

[1] Subsection 21A.34.020.K was amended by the Salt Lake City Council in March 2018. Because Appellant filed its appeal prior to the effective date of the March 2018 amendments, the former provisions are applicable and shall govern for purposes of this appeal. The provisions of Section 21A.34.020 concerning economic hardship are now located in Section 21A.34.020.L.

An economic hardship panel (the "Panel") was assembled per former Subsection 21A.34.020.K. The Panel reviewed the materials submitted by Appellant, and held public hearings on the matter on April 11, 2018 and May 15, 2018. At its May 15, 2018 meeting, the Panel determined that an economic hardship existed for six of the nine structures denied demolition approval. It determined by a 2-1 vote that no hardship existed for the denial to demolish three structures located at 248 West Bishop Place, 265/267 West Bishop Place[2], and 432 North 300 West Street.

As required by former Subsection 21A.34.020.K of the *Salt Lake City Code*, the historic landmark commission held a public hearing on June 28, 2018 to review the findings of the Panel. At its June 28, 2018 meeting, the historic landmark commission, by a 7-1 vote, accepted and adopted the findings of the Panel with respect to the three structures for which the Panel found no economic hardship.[3]

On July 2, 2018, Appellant submitted an appeal of the historic landmark commission's decision to accept and adopt the Panel's findings with respect to the three structures for which the Panel found no economic hardship.

DISCUSSION

Appellant claims the Panel's findings, as adopted by the historic landmark commission, are arbitrary, capricious and illegal for various reasons. Each of Appellant's arguments is addressed below.

1. Appellant's Claim that Mr. Francis was Unqualified to Serve on the Panel.

[2] 265/267 West Bishop Place is a duplex structure.
[3] The commission made motions concerning the other six structures, which motions failed. This appeal does not concern those six structures.

Appellant, through counsel, argues that "Mr. Francis was utterly unqualified to serve on the Panel" because he lacked the background and experience required by former Subsection 21A.34.020.K of the *Salt Lake City Code*. (Appellant's Brief at pp. 2-3). Whether Appellant's argument on this point may be valid is irrelevant at this point. Appellant was aware of Mr. Francis's appointment shortly after the historic landmark commission formally voted to select Mr. Francis as its panelist at the commission's August 3, 2017 meeting. Despite that awareness and the many grumblings by Appellant's counsel through email regarding Mr. Francis's purported lack of qualifications, Appellant did not appeal the commission's decision to select Mr. Francis when Appellant had the opportunity to do so in a timely manner. At this point, Appellant is without recourse to challenge the historic landmark commission's decision to appoint Mr. Francis to the Panel.

Because Appellant did not appeal Mr. Francis's appointment to the Panel in a timely manner, the hearing officer must reject Appellant's claim regarding Mr. Francis's qualifications to serve. Notwithstanding Appellant's objection, the record reflects Mr. Francis's understanding of the issues and thoughtful deliberation.

2. Appellant's Claim of Mr. Francis's Bias.

Appellant's second argument is that "Mr. Francis was transparently too biased to serve on the Panel." (Appellant's Brief at p. 3). The first reason Appellant gives for that claim of bias is Mr. Francis's membership in the group, Salt Lake Modern. In support of Appellant's claim that Mr. Francis's membership in Salt Lake Modern shows bias, Appellant cites the purpose statement from that group's website, which states that the group is "dedicated to the documentation, preservation, and public education about mid-century modern design and architecture in the Salt Lake region." (Appellant's Brief at p. 4). Merriam Webster's online

dictionary defines “mid-century modern” as “a style of design (as in architecture and furniture) of roughly the 1930s through the mid-1960s characterized especially by clean lines, organic and streamlined forms, and lack of embellishment”. (https://www.merriam-webster.com/dictionary/mid-century%20modern). According to planning division staff research (included in the record of the initial demolition petitions), 248 West Bishop Place was built[4] in 1895, 265/267 West Bishop place was built in 1927 and 432 North 300 West Street was built in 1913.

Given the construction dates of the structures at issue, Appellant’s contention that Mr. Francis was inherently biased because he belongs to an association that seeks to preserve and educate about structures that are not mid-century modern style is misguided, to be kind.

Appellant also claims that Mr. Francis’s bias is exhibited by his failure to approve “a third panel member…who [is] far more qualified to serve than he was.” (Appellant’s Brief at p. 4). First, this is pure opinion (and an exhibition of Appellant’s counsel’s own bias) that lacks any measurable, factual support. Second, the former ordinance anticipated disagreements over whom the first two panelists might select as the third member, and, as noted on page 2 of the Appellant’s Brief, the former ordinance provided for the Salt Lake City Mayor to choose the third panelist. This contention deserves no more attention.

Finally, Appellant states that “Mr. Francis’s actual participation on the Panel showed his bias”, noting that this was due, in part, to Appellant’s counsel baiting Mr. Francis into “revealing that bias” through counsel’s repeated provocation. (Appellant’s Brief at p. 4). If this were, in fact, the case, it is hard to imagine that a judge appointed to the Third District Court would reward Mr. Baird’s antics. Notwithstanding Mr. Baird’s self-congratulatory claim of teasing out

[4] Salt Lake County Assessor records indicate 248 West Bishop Place was constructed in 1906.

Mr. Francis's bias through baiting and provoking him, the record shows that Mr. Francis stayed on subject despite the barrage of insults from Appellant's counsel.

To put it plainly, Appellant's arguments that Mr. Francis was biased in his participation on the Panel is wholly unsupported nonsense. Accordingly, the hearing officer should reject Appellants claim of panelist bias.

3. Appellant's Claim that the Relevant Ordinance Provisions are Ambiguous.

Appellant contends that the ordinance provisions that governed this process are ambiguous and must, therefore, be construed in its favor. The city acknowledges that there were instances during the Panel's review of whether certain standards were met where the Panel noted a lack of clarity in the standards. The city further agrees with Appellant that Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602 (Utah App. 1995) and Utah Code § 10-9a-707 require that ambiguous land use regulations be construed in favor of the property owner. However, Appellant has not specifically identified which ordinance provisions are to be construed in its favor.

To claim that "the numerous ambiguities in the Code on this issue" means that "this case is over" (Appellant's Brief at p. 7) is a misguided declaration of victory. As soon as Appellant can specifically identify the ambiguities to be construed in its favor, the hearing officer may make such a declaration, but no sooner. Appellant seems to contend that the city's entire body of historic preservation regulations--the former ones, anyway--are unintelligible, when, in fact, there were only a couple of instances where the Panel noted that the code language was unclear. Appellant may only benefit from the specific ambiguities that it can identify, but this does not mean that "this case is over." The city requests that the hearing officer require Appellant to

identify each applicable standard where the Panel noted a lack of clarity before any ambiguities are construed in Appellant's favor.

4. Appellant's Claim that No Contrary Evidence Means There is No Substantial Evidence to Support a Finding of No Hardship.

Appellant's fourth argument seems to be that because no evidence was submitted to contradict Appellant's submitted materials and testimony, the historic landmark commission and the Panel had no choice but to accept Appellant's arguments and conclusions. This assertion would have the hearing officer invent a new standard that ignores the law and the nature of this matter.

First, it should be noted that an economic hardship review is not a typical land use decision making process. Most administrative land use decisions take into account whether a proposed use will have some degree of negative impact on adjacent development. In those cases, opponents and proponents of proposed development often submit opposing "evidence" of potential impacts. Oftentimes that "evidence" is in the form of public clamor offered by the opponents and self-serving conclusions by the proponents. In this case, however, the concern is not whether a land use decision will negatively impact the community, but, rather, whether the city's decision may be considered a taking of property without just compensation. Thus, the focus is on what the proponent can prove and not on what may be disproved. This is so because the party advocating for a determination of economic hardship possesses all of the relevant information. The city's role is to evaluate that information--through the Panel and ultimately the landmark commission--and render a defensible decision as to whether the petitioner has adequately proven that an undue economic hardship will result if the permission to develop in a particular way is not granted. If the city were to undertake the very expensive endeavor of

commissioning its own studies and hiring its own experts to disprove Appellant's conclusions, Appellant would very likely have a strong case for a due process violation lawsuit.

All of this is to say that Appellant's assertion that it should prevail because there was no contrary evidence is completely misguided. This type of proceeding simply does not invite contrary evidence. While there were some members of the public who testified as to tax credits available to Appellant, that testimony was really informational highlighting of a hardship analysis factor in the ordinance. Neither the Panel nor the historic landmark commission cited public testimony as a basis of any finding or decision.

In sum, Appellant's argument that there is no substantial evidence to support the historic landmark commission's decision to adopt the Panel's finding because there was no credible contrary evidence submitted is meritless and cannot be supported by any authority.

5. Appellant's Argument that the Panel Misapplied the Law and Facts.

Appellant claims that the Panel erred in its application of the facts to the applicable ordinance provisions, that it misapplied the applicable ordinance provisions, and that the historic landmark commission erred in adopting those mistakes. Rather than pointing to the Panel's formal findings (See "Report of the Bishop Place Economic Hardship Review Panel"), Appellant nitpicks certain statements from the transcript of the Panel's May 15, 2018 meeting to question the basis of the Panel's decision.

As to the first factor, set forth in Section 21A.34.020.K.2.a, Appellant argues that "[t]here is absolutely no evidence that the price paid by IRES was '[un]reasonable'." (Appellant's Brief at p. 8). That argument is strange, given that the Panel made no such conclusion. Rather, the Panel concluded that "The applicant had knowledge of the landmark designation at the time of acquisition." (Report of the Bishop Place Economic Hardship Review Panel at p. 9). Appellant's

submissions and statements and the Panel's discussion all focused on the specifics of the first factor: Appellant's knowledge of the landmark designation at the time it acquired the property. Nothing in that standard or the Panel's findings pertain to the reasonableness of what Appellant paid for the properties in question.

Concerning the second factor (Sec. 21A.34.020.K.2.b), Appellant cites Mr. Francis's comments in the Panel's discussion, again, rather than citing the Panel's actual findings. The city acknowledges that the nature of a three person panel lends itself to persons offering differing thoughts and opinions, but the ultimate conclusion to be challenged is the formal finding made by the Panel and not the comments made in a discussion by Appellant's least favorite panelist. The individual comments are not the findings/decision and Appellant seems to have chosen to not address the specific finding.

As with the first two factors, Appellant has avoided discussing the Panel's actual, formal finding on the third factor regarding marketability of the properties (Sec. 21A.34.020.K.2.c). The Panel's finding was that Appellant did not provide any information pertaining to that standard. Instead, Appellant criticizes Mr. Francis and Ms. O'Grady for not adopting Appellant's worldview.

Continuing a trend, Appellant avoided addressing the Panel's actual finding on the fourth factor (Sec. 21A.34.020.K.2.d). The Panel issued separate findings on each structure in light of Appellant's engineer report, which report the Panel found was largely unhelpful on the three structures at issue.

Finally, as to the fifth factor (Sec. 21A.34.020.K.2.e), Appellant states, "it is undisputed that there is a potential that some tax credits may be available to IRES for rehabilitating the buildings. That is not, with all due respect to the Panel, the end of the question." (Appellant's

Brief at p. 11). Although Appellant did not reference the Panel's formal finding, it seems that Appellant and the Panel agreed on something. The Panel's actual finding is "Depending on whether or not the applicant chooses to use them, there are historic tax credits available to the property owner under certain circumstances." (Report of the Bishop Place Economic Hardship Review Panel at p. 10). Nothing in that language suggests that the availability of tax credits is "the end of the question". Clearly, the availability of tax credits to offset some of the financial impacts of rehabilitation is but one of several factors.

Appellant's review of the Panel's (and, by virtue of adoption, the commission's) findings on the economic hardship analysis is not really a review of the Panel's findings. Perhaps Appellant could address these findings more specifically at the scheduled appeal hearing.

6. Appellant's Assertion of a Taking.

Appellant's final argument is that the city will have taken its property without just compensation if the city does not allow Appellant to demolish the three structures at issue. At least, that's what the argument heading states. The substance of Appellant's sixth point of appeal consists, instead, of an anecdote about Humpty Dumpty and Mr. Baird's obligatory Monty Python reference. Admittedly, humorous, these references make no substantive point about the law of takings or the city's potential liability for a wrongful taking.

CONCLUSION

For the reasons stated above, Appellant's arguments must be rejected and the historic landmark commission's decision to adopt the Panel's findings must be upheld.