

ADMINISTRATIVE HEARING OF A LAND USE APPEAL
(Case No. PLNAPP2019-00774)
(Appealing Petition No. PLNHLC2017-00722)
October 10, 2019

Appellant:	Olympus Development, LLC, CityMOD 100 LLC
Decision-making entity:	Salt Lake City Historic Landmark Commission
Address Related to Appeal:	613 East 100 South
Request:	Appealing the historic landmark commission’s partial denial of a request for modifications to a certificate of appropriateness for new construction.
Brief Prepared by:	Allison Parks, Assistant City Attorney

Statement of the Case

This case arises from a situation where what is being built is different from what was initially approved by the Historic Landmark Commission (the “Commission”). The certificate of appropriateness for this new row house project (the “Project”) was issued in February 2018. In July 2019, Appellants Olympus Development and CityMod 100 (collectively “Olympus”) ¹ requested after-the-fact approval of modifications made to the Project. The Commission partially denied Olympus’ request to approve these modifications to the certificate of appropriateness. Because the modifications do not meet the standards set forth in City ordinance, the Commission’s decision should be upheld.

¹ The appeal letter is from both Olympus Development, LLC and CityMod 100, LLC. However, throughout the letter, the Appellants refer to themselves as “Olympus.” The City will similarly refer to the Appellants collectively as “Olympus.”

Standard of Review and Relevant Ordinances

When a land use applicant decides to appeal a decision made by the Commission, the applicant may appeal to either an appeals hearing officer or the historic preservation appeal authority.² In this case, Olympus has opted to have the appeals hearing officer serve as the appeal authority.

An appeal from a decision of the Commission shall specify the decision being appealed, the alleged error, and the reasons the appellant claims the decision was made in error.³ In reviewing the Commission's decision, the appeals hearing officer's decision shall be based on the record below.⁴ The appeals hearing officer must then review the decision based on the applicable standards and shall determine its correctness. The decision shall be upheld unless it is not supported by substantial evidence in the record or it violates a law, statute, or ordinance in effect at the time the decision was made.⁵ It is the appellant's burden to prove that the decision that was made was incorrect and the appellant's responsibility to marshal the evidence.⁶

The decision being appealed in this case applies the legal standards set forth in the applications for certificates of appropriateness for new construction in an historic district.⁷ When considering such an application, the Commission determines whether the project substantially complies with the standards found at 21A.34.020.H and applies the adopted design guidelines as a key basis for the Commission's evaluation.

² *Salt Lake City Code* §§ 21A.06.060; 21A.06.080; 21A.16.020.

³ *Salt Lake City Code* § 21A.16.030.A.

⁴ *Salt Lake City Code* § 21A.16.030.E.2. Additionally, no new evidence shall be heard unless it was improperly excluded from consideration in front of the Commission.

⁵ *Salt Lake City Code* § 21A.16.030.E.2.

⁶ *Salt Lake City Code* § 21A.16.030.F; *Carlsen v. City of Smithfield*, 2012 UT 260, 287 P.3d 440; *State v. Nielsen*, 2014 UT 10, 326 P.3d 645; *Hodgson v. Farmington City*, 2014 UT App 188, 334 P.3d 484.

⁷ See 21A.34.020.H. The relevant ordinances and design guidelines are included in the staff report at pages 45-67.

As set forth in more detail below, because the Commission’s decision was based on substantial evidence in the record, correctly applied the legal standards, and Olympus failed to meet their burden and marshal the evidence, the Commission’s decision should be upheld.

Background

Olympus is in the process of constructing a new three unit multi-family row house at 613 East 100 South. This appeal concerns Olympus’ petition for modifications to a previously approved certificate of appropriateness. The petition requests modifications to certain design elements and construction materials that are markedly different from the initial certificate of appropriateness granted in 2018.⁸

This Project, initially owned by Tag SLC,⁹ came to the City’s planning division in 2017. Prior to the Project’s initial consideration by the Commission, Tag SLC’s architect and planning staff worked together to guide the application so the Project was aligned with the City’s design guidelines.¹⁰ One of the main concerns with the Project’s initial design was that its proposed larger mass and scale did not fit in with the neighborhood, especially as it would be the only flat-roofed structure.¹¹ In response to this concern, the Project’s architect reduced the perceived width of the front of the building by deepening the front window reveals and recessing the entire right corner of the building.¹² To reduce the perceived height, the architect introduced a tripartite window design with a horizontal emphasis to break up the Project’s verticality.¹³ In addition to these updates, the large amounts of glass, large window openings, differentiated building materials, and modulated building walls all contributed to the planning staff’s initial

⁸ Planning Div. Staff Report dated Aug. 1, 2019, at 1.

⁹ Olympus’ Appeal Pet. at 1.

¹⁰ See Planning Div. Staff Report at 2-3.

¹¹ See *id.*

¹² *Id.*

¹³ *Id.*

recommendation that the Commission approve the Project as it met the standards for a certificate for appropriateness for new construction.¹⁴

The Project was originally approved by the Commission in December 2017 with the condition that certain final details were delegated to planning staff.¹⁵ In response to this condition, the Project architect further modified the plans in collaboration with planning staff.¹⁶ After finalizing the design, the certificate of appropriateness was issued on February 26, 2018.¹⁷ On October 2018, before the building permit was issued, Olympus purchased the Project from Tag SLC.¹⁸

During a recent inspection, it was discovered that many changes had been made to the Project that were inconsistent with the initial certificate of appropriateness, including modifications to the windows, doors, and building materials. According to Olympus, these changes were unauthorized, made by the contractor, and admittedly “built outside of the scope of the plans as approved.”¹⁹

In an attempt to obtain post-hoc approval, Olympus submitted their petition seeking approval to the as-built modifications to the certificate of appropriateness.²⁰ Through a detailed staff report, the planning division recommended the Commission partially deny Olympus’ request.²¹ The staff report details the as-built changes through written descriptions of the modifications, as well as side-by-side renderings of the approved and the as-built Project.²² The

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Id.

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See Planning Div. Staff Report at 2.

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Id.

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Id.

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Id. at 2, 19.

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See Olympus’ Petition, Planning Div. Staff Report at 19.

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Id.

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See id. at 1.

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Id. at 3-10.

report highlights the change in window design, window material, and alignment: the approved plans call for large fiberglass windows on the south, east, and west façades, which has the effect of breaking up the building’s perceived height and overall mass.²³ On the south façade, the three-part window design was meant to mimic existing historic structures on the Project’s block face.²⁴ The as-built design now has shorter, vinyl windows, which is inconsistent with the design standards, the design is not compatible with existing surrounding structures, and the reduced amount of glass creates an unbalanced solid to void ratio (too short of windows for the amount of the walls). Further, the approved alignment of the south façade windows and balcony were meant to emphasize the building’s horizontal lines and reduce its verticality.²⁵ The as-built structure loses this emphasis and increases the unbalanced solid to void ratio even further.²⁶ Similar changes were made to the balcony doors and door material on the east façade, where the original plans called for larger, fiberglass sliding glass doors, the as-built design uses less glass and has replaced the fiberglass with vinyl.²⁷ Other changes were made to the Project, including changing the garage door material, modifications to the door detail on the ground floors, and modifications to the north façade.²⁸

In addition to detailing the difference between the approved design and the as-built structure, the staff report contains a complete analysis of Olympus’ petition concerning the relevant standards.²⁹ An analysis of the standards for a certificate of appropriateness is informed

²³ *Id.*

²⁴ *Id.* at 3-4.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 6-7.

²⁸ Historic Landmark Commission transcribed meeting, at line 805, August 1, 2019, (attached to Olympus’ Appeal Pet.). Hereinafter, the transcription will be referred to as “Commission Meeting Transcription”.

²⁹ Planning Div. Staff Report at 45-67.

by the design guidelines provided in the city council-adopted policy document *Design Guidelines for Historic Apartment and Multi-Family Buildings in Salt Lake City*. The planning division staff report identifies how these modifications change the analysis under the design guidelines and whether specific aspects of the Project no longer comply.³⁰

At its August 1, 2019 public meeting, the Commission heard presentations from planning division staff, Olympus, and testimony from members of the public. Based on the findings in the planning staff report and the information presented during the public hearing, the Commission unanimously voted to partially deny the petition.³¹ Specifically, the Commission rejected the modifications to the:

- pattern, dimensions, and materials of the windows on the south, east, and west façades;
- balcony doors and materials on the south façade; and
- balcony doors and door materials on the east façade on the third story of each unit.³²

However, the Commission did not deny all the proposed modifications. The Commission approved the modifications to the garage door material, the front and back doorway detail on the ground floor of each unit, and all modifications on the north façade of the building. Notably, the modification to the color of the brick had been approved prior to the Commission's hearing and, as such, was not a part of the Commission's decision.³³

³⁰ Planning Div. Staff Report at 45-67.

³¹ Commission Meeting Transcription at 805-844.

³² *Id.*

³³ *See* Planning Div. Staff Report at 11.

The record of decision was sent to Olympus on August 5, 2019. On August 20, 2019, Olympus filed an appeal of the portion of the Commission's decision that denied certain modifications to the certificate of appropriateness.

Discussion

The Commission's decision to partially deny the requested modifications to the certificate of appropriateness should be upheld because it was based on substantial facts and correctly applies the legal standards and guidelines in effect at the time the decision was made. The record reflects the Commission's decision was based on facts and analysis in the staff report, the presentation by the planning staff and property owners, and testimony during the public hearing.³⁴ Additionally, the Commission's reliance on the staff report's detailed analysis of the standards and guidelines correctly applies the legal standard.³⁵

Olympus puts forth multiple meritless arguments in their appeal: 1) the decision was erroneous because it would result in economic waste; 2) the decision improperly considered the color of the bricks; 3) the Commission improperly considered precedent; and 4) the Commission impermissibly considered the change to the window materials.³⁶ While Olympus sets forth these various arguments in an attempt to overturn the Commission's decision, Olympus fails to (and cannot) assert the lack of substantial facts or that the Commission applied the incorrect standards and guidelines.

³⁴ Commission Meeting Transcription at 805-806.

³⁵ Planning Div. Staff Report at 45-67.

³⁶ Olympus' Appeal Pet. at 2. Olympus also briefly asserts that the Commission's decision was not based on any findings of fact or conclusions of law. However, this assertion was only noted in one sentence on the second page of their appeal letter and is not supported later in the letter by any facts or legal arguments. As such, this argument should be dismissed on the basis that Olympus failed to meet their burden and marshal the evidence.

Olympus first argues that the Commission’s decision should be overturned because their decision would result in economic waste.³⁷ Olympus is effectively arguing that because portions of the Project were built contrary to the scope of the approved plans, such error should be excused because fixing the error would cost money. However, the City’s standards and guidelines cannot be circumvented simply because it would cost money to fix a construction error and re-construct portions of the Project consistent with the approved plans.

Olympus improperly relies on the case of *Western Land Equities v. City of Logan* in support of their economic waste argument.³⁸ However, *Western Land* does not stand for the proposition that economic waste should never be allowed. In *Western Lands*, the plaintiff argued that it was impermissible for the city to retroactively apply a newly passed law to their property in the middle of land use application process.³⁹ The court discussed the theory of economic waste in the context of when a permitted development has incurred substantial costs in reliance on the laws in effect at the time the permit was obtained, but the project is later halted after the municipality amends the law.⁴⁰ In ruling for the developer, the court held that the city had impermissibly denied plaintiff’s request by effectively changing the rules in the middle of the process.⁴¹ Rejecting a categorical rule that *all* economic waste should be avoided, the court articulated a rule that equally balanced the interests of the city and developer: Competing interests between development and the city are best accommodated by “adopting the rule that an applicant is entitled to . . . approval if his proposed development meets the zoning requirements

³⁷ Olympus’ Appeal Pet. at 2-3.

³⁸ Olympus’ Appeal Pet. 2; 617 P.2d 388 (Utah 1980).

³⁹ 617 P.2d at 389-91.

⁴⁰ *Id.* at 391-95.

⁴¹ *Id.* at 396.

in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest.”⁴²

The rule articulated in *Western Lands* does not support Olympus’ position that all economic waste should be avoided. Olympus applied for and was granted a certificate of appropriateness based on a specific development plan for the Project. It is undisputed that the initial certificate met the zoning requirements in existence at the time of the application. And unlike the facts in *Western Lands*, the City is not attempting to apply different laws or design standards to Olympus mid-construction. Rather, it is Olympus that failed to proceed under the approved plans and the ordinances in effect at the time the decision was made. Because the theory of economic waste does not apply to the facts here, Olympus cannot rely on this theory to obtain relief.

Olympus’ second argument claims that because the Commission discussed the change in brick color, the entirety of the decision should be overturned. Frankly, it is unclear to the City why Olympus would raise this point when the change to the brick color was *approved* before the public hearing and was not before the Commission. This was clarified during the hearing when Commissioner Hyde asked if the color of the brick was before the Commission, and Commissioner Svendsen responded: “No, that’s not before us.”⁴³ Further, because the Commission was not tasked with approving or denying the change to the brick color, the issue is not properly before the appeals hearing officer through this appeal.⁴⁴ And while it may not have been a wise use of time for the Commission to discuss the brick color, such discussions were not

⁴² *Id.* at 396.

⁴³ Commission Meeting Transcription 649-51.

⁴⁴ *See Salt Lake City Code* § 21A.16.020 (noting that the appeals hearing officer hears and decides appeals on *decisions* made by the Commission).

relevant or a part of the Commission’s final decision. Consequently, this argument should be dismissed.

Similarly, Olympus’ third argument that the Commission impermissibly considered precedent should be dismissed. While the Commission discussed precedent during the public hearing,⁴⁵ much of the conversation around precedent was whether it was proper to consider precedent all.⁴⁶ Resoundingly, the Commissioners rejected the idea that they should consider precedent and concluded that they should be concerned with complying with the standards and guidelines applicable to this project.⁴⁷ Further, it is clear from the record that the Commission considered the unique facts and circumstances of this Project and whether the proposed modifications were consistent with the standards and guidelines.⁴⁸ For these reasons, Olympus’ third argument should be dismissed.

Finally, Appellants argue that it was improper for the Commission to consider the change of the window materials from fiberglass to vinyl. As an initial matter, Appellants briefly raise this argument on the second page of their appeal, yet fail to provide any arguments or point to

⁴⁵ See, e.g., Commission Meeting Transcription at 585 (“I’m also thinking about precedent. Um, so what happens now, would this set up precedent um, in the future. And it- it’s really hard to make a decision on this because we’ve all – we have all made mistakes, right? . . . I’m feeling really torn, but there is a reason we have guidelines, right? So, I’m leaning towards respecting those guidelines.”); *id.* at 611 (“Um, third, northern aid was the question of precedent. Are we setting ourselves up for a situation like Robert referred to where everyone is going to say, “Well, the guys on first south got away with this, can we?” Shelly’s point as well taken to as each project has taken on its own-on an- on its own merits. But we may see that, I don’t know that the public will see that.”); *id.* at 727 (“[W]hat do others people think of this case as precedent?”).

⁴⁶ See, e.g., *id.* at 589-590 (“Can I just put a weigh in briefly on precedent? Because we don’t set precedent. . . . I’m more concerned about complying with guidelines and standards.”); *id.* at 591 (“Are we gonna enforce our rules, or we’re not gonna enforce them?”); *id.* at 729-735 (in response to a question about what does the Commission thinks about precedent, David responds and asks that the Commission reframe the issue to be whether the Commission is going to enforce what they approved. In response, the Commissioner agrees that that’s a better way to look at this issue).

⁴⁷ *Id.*

⁴⁸ See, e.g., *id.* at 805.

any facts in the record that support this argument. Because Appellants have failed to meet their burden and marshal the evidence, this argument should be dismissed.⁴⁹ Even so, the Commission's decision to reject the modification to the window material from fiberglass to vinyl was proper and consistent with the applicable design guidelines.⁵⁰

Conclusion

For all of the reasons stated above, Olympus' arguments must be rejected and the Commission's decision be upheld.

⁴⁹ *Salt Lake City Code* § 21A.16.030.F; *Carlsen*, 2012 UT 260; *Nielsen*, 2014 UT 10; *Hodgson*, 2014 UT App 188.

⁵⁰ See Planning Div. Staff Report at 62. Specifically, this section highlights the guideline under 12.74 that state that vinyl should be avoided as a non-durable material in the regional climate. Further, it should be noted that Olympus' application requests approval of, among other things, the modifications to the window material. By the very face of the application, it was permissible to consider the window material because that is what the Commission was tasked with. If Olympus wanted to challenge whether the change in window material is contrary to the certificate of appropriateness, Olympus should have challenged such decision through an enforcement action.