

ADMINISTRATIVE HEARING OF A LAND USE APPEAL

(Case No. **PLNAPP2019-01035**)

(Appealing Petition No. PLNHL2019-00132)

February 13, 2020

Appellant:	Preserve Partners
Decision-making entity:	Salt Lake City Historic Landmark Commission
Address Related to Appeal:	171 West 300 North Street
Request:	Appealing the historic landmark commission’s denial of a certificate of appropriateness for a minor alteration to paint three masonry façades of a multi-family structure.
Brief Prepared by:	Paul C. Nielson, Senior City Attorney

Historic Preservation Appeal Authority’s Jurisdiction and Authority

*Salt Lake City Code* Section 21A.16.020 allows a land use applicant who wishes to appeal a decision of the Salt Lake City Historic Landmark Commission the option of either having an appeals hearing officer or the city’s historic preservation appeal authority hear and decide the appeal. *Salt Lake City Code* Section 21A.06.080 establishes that the historic preservation appeal authority is the Salt Lake City Mayor. In this matter, Preserve Partners (“Appellant”) initially opted to have the historic preservation appeal authority hear and decide this matter, however, due to the timing of a change in mayoral administrations, Appellant subsequently opted to have the matter heard by an appeals hearing officer.

Standard of Review for Appeals to the Historic Preservation Appeal Authority

In accordance with Section 21A.16.030.A of the *Salt Lake City Code*, an appeal of the historic landmark commission “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 or Historic Preservation Appeal Authority shall review the decision based upon applicable standards and shall determine its correctness.” (Sec. 21A.16.030.E.2.b). “The Appeals Hearing Officer or Historic Preservation Appeal Authority 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).

This case deals with application of Section 21A.34.020.G (Standards for Certificate of Appropriateness for Alteration of a Landmark Site or Contributing Structure Including New Construction of an Accessory Structure) of the *Salt Lake City Code*. Video of the commission’s June 6, 2019, September 5, 2019, and October 3, 2019 public meetings are part of the record of this matter and are found, respectively, at <https://www.youtube.com/watch?v=twccsthy9dg> (from 17:36 to 56:22), <https://www.youtube.com/watch?v=FRwzEymXaQ8&list=UUqynFcxRXAgQ7kBMVDaZt8A&index=44> (11:55 to 38:50), and <https://www.youtube.com/watch?v=p4Vr8GtIpaY&list=UUqynFcxRXAgQ7kBMVDaZt8A&index=37> (12:36 to 1:05:18).

## **Background**

This matter was initially heard by the historic landmark commission on June 6, 2019 on a petition by Appellant for a certificate of appropriateness for a minor alteration to a contributing structure, namely to allow paint previously applied to the masonry of three façades of a multi-family dwelling located at 171 West 300 North Street (the “Property”).

Planning division staff prepared a report for the historic landmark commission’s June 6, 2019 meeting in which staff determined that the proposal to allow the painted masonry did not meet the standards for approving a certificate of appropriateness. (See Planning Division Staff Report Dated June 6, 2019).

At its June 6, 2019 meeting, the historic landmark commission heard presentations from planning division staff, the applicant, and received testimony from members of the public. Following these presentations and testimony, the commission voted to table the matter until they could receive additional information on the viability of removing the paint that had already been applied to the masonry. (See Video of June 6, 2019 Historic Landmark Commission Meeting at 53:19 to 56:22).

The commission held a public meeting on September 5, 2019, at which they received additional information regarding the removal of the paint applied to the masonry at the Property. Planning division staff prepared a report that included correspondence from Abstract Masonry Restoration, which indicated that it is possible to remove the paint, while preserving the integrity of the mortar, at a cost of \$58,280. (See Correspondence from Abstract Masonry Restoration dated August 6, 2019 and August 14, 2019 included in the Planning Division Staff Report dated September 5, 2019).

At the September 5, 2019 meeting, it was discovered that notice had been given that a public hearing would be held at the September 5, 2019 meeting, despite the agenda stating that there would be no public hearing on the matter. For that reason, the commission voted to postpone a decision on the matter until its October 3, 2019 meeting at which a public hearing would be held. (See Video of September 5, 2019 Historic Landmark Commission Meeting at 35:02 to 36:28).

At its October 3, 2019 public meeting, the historic landmark commission received additional presentations from planning division staff and the applicant, and reopened the public hearing. Following the presentations and testimony, the commission voted to deny the application based on the findings and rationale presented by planning division staff, as those findings were presented in the October 3, 2019 staff report (which report also included the June 6, 2019 and September 5, 2019 staff reports). (See Video of October 3, 2019 Historic Landmark Commission Meeting at 1:03:24 to 1:04:33).

On December 1, 2019, Appellant filed an appeal of the commission's decision denying Appellant's petition for a certificate of appropriateness for minor alteration to allow painted masonry on three façades of the multi-family structure on the Property.

### **Discussion**

Appellant's appeal presents four arguments which seem to be: **1)** that Sections 21A.04.010 (Organization of Title), 21A.02.020 (Authority), 21A.02.050 (Applicability), and 21A.02.030 (Purpose and Intent) of the *Salt Lake City Code* do not regulate the application of paint to structures; **2)** that the Statement of Intent in Section 21A.34.010 pertaining to overlay districts should allow Appellant to paint the masonry of the multi-family structure on the

Property; 3) that the applicable design guidelines are not mandatory and, therefore, do not prohibit painting the subject masonry; and 4) that the cost of removing the applied paint is too high. These arguments are addressed below.

**A. Appellant’s Argument Pertaining to “Organization of Title, Authority, Purpose and Intent” of Title 21A.**

Appellant’s preliminary argument, as contained in Part I of its appeal brief is a collection of citations introductory provisions of Title 21A of the Salt Lake City Code that are a bit challenging to connect. The city believes that the intent of Appellant’s initial argument is, as stated on page 5 of its brief, that Title 21A only regulates certain structural development activity and does not regulate the application of paint to structural surfaces. (See Appellant’s Brief at p. 4-6)

This argument completely ignores that not only does Subsection 21A.34.020.G.7 specifically state that “[c]hemical or physical treatments...that cause damage to historic materials shall not be used”, but that the *Salt Lake City Code* regulates design throughout Title 21A, including the majority of Section 21A.34.020 and chapter (21A.37) specifically adopted for that purpose. Planning division staff specifically found that the proposal to allow the painted masonry did not comply with four of the relevant standards set forth in Subsection 21A.34.020.G. (See Planning Division Staff Report Dated June 6, 2019 at Attachment E).

Part I of Appellant’s brief misses the mark as it ignores the pertinent, substantive provisions of the city’s land use regulations. Accordingly, Appellant’s first argument fails to provide credible arguments and should be rejected.

**B. Appellant’s Argument Pertaining to the Commission’s “Creation, Jurisdiction and Authority”.**

Part II of Appellant’s brief is, frankly, difficult to comprehend. It cites Section 21A.06.050 of the *Salt Lake City Code*, which establishes the general “jurisdiction and authority” of the historic landmark commission and then jumps to intent language in Section 21A.34.010 regarding conflicts of law between overlay district regulations and those of the underlying zoning districts, and then jumps to the permissive and mandatory nature of “may” and “shall”, and then lands on the conclusion that because some unidentified provision is permissive, painting masonry is apparently consistent with Title 21A’s purpose statement. (See Appellant’s Brief at p. 6-7).

Appellant should, at the very least, clarify what this argument means. However, even if Appellant can clarify this argument, it should be noted that, while the policy pronouncements found in purpose statements are often helpful in setting context of the substantive provisions of ordinances and may serve to clarify ambiguities, the Supreme Court of Utah, in Price Development Co. v. Orem City, 995 P.2d 1237 (Utah 2000) held that “a preamble is nothing more than a statement of policy which confers no substantive rights.” Id. at 1246.<sup>1</sup> That court further stated that “[w]hile some statutes have a policy section and some have a preamble, the effect to be given these provisions is the same: they provide guidance to the reader as to how the act should be enforced and interpreted, but they are not a substantive part of the statute.” Id. (citing Norman J. Singer, *Sutherland Statutory Construction* §§ 20.03, 20.12 (5th ed. 1993)).

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<sup>1</sup> Plaintiff’s claim that the legislative purpose statements (or “preambles”) preceding the substantive provisions of the Local Sales and Use Tax Act should be given equal weight as the substantive provisions was rejected by the court.

Thus, the Statement of Intent cited by Appellant should be considered as helpful guidance and not as a substantive requirement or standard.<sup>2</sup>

Whatever Appellant's second argument may be, it doesn't seem to address anything relevant to the applicable standards and should be rejected.

### **C. Appellant's Argument Pertaining to the Design Guidelines.**

Appellant's third argument is that the Design Guidelines for Historic Apartment & Multifamily Buildings in Salt Lake City are not mandatory, and should, therefore, not be treated as mandatory. (See Appellant's Brief at p. 7-8). This argument would have the appeals hearing officer ignore the actual code standards relied upon by the planning division staff and the commission when it adopted staff's findings.

Staff's findings with respect to the applicable standards are found in Attachment E of the June 6, 2019 staff report, which conclude that the application failed to meet the standards set forth in Subsections 21A.34.020.G.2, 21A.34.020.G.5, 21A.34.020.G.7, and 21A.34.020.G.9 of the code. While it is true that the staff report cites the guidelines and it is also true that the guidelines do not stand on their own, the definition of "Design Guidelines" set forth in Subsection 21A.34.020.B of the code (as noted by Appellant on p. 7 of its brief) stated that the guidelines "provide guidance for the interpretation of the zoning ordinance standards." That is to say, the design guidelines inform the standards adopted in Section 21A.34.020. As part of the process of applying for a certificate of appropriateness, an applicant is required to provide "[a] narrative including a complete description of the project and how it meets review standards with citation of supporting adopted City design guidelines".

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<sup>2</sup> Utah courts follow the same rules of statutory construction when interpreting local ordinances as they do when construing the meanings of state statutes. (*Thompson v. Logan City*, 221 P.3d 907, 911 (Ut. App. 2009) ("In interpreting the meaning of...[o]rdinance[s], we are guided by the standard rules of statutory construction.")).

It is clear that the guidelines are an aid to the standards of review. It is clear that the planning division staff findings adopted by the historic landmark commission were findings that the proposal did not meet all of the required standards set forth in Subsection 21A.34.020.G of the code, and that application of those standards was informed by, but not dependent upon, the design guidelines. And it is clear that Appellant did not address any of the standards in its appeal brief. Accordingly, Appellant's argument pertaining to design guidelines fails to meet the basic obligation to address the standards and what is in the record, and must be rejected.

**D. Appellant's Argument Pertaining to the Cost of Removing Applied Paint.**

Appellant's final argument is a mixture of arguments that contends, among other things, that the design guidelines are not mandatory, that the paint improves the look and value of the Property, that removing the paint will be difficult and may damage the structure, and that removing the paint will be "excessively costly". (See Appellant's Brief at p. 8-10).

None of these arguments nor any others that may reside in Part IV of Appellant's brief addresses a relevant standard of review. In fact, nowhere in Appellant's brief is there a citation to the standards of review for a certificate of appropriateness for a minor alteration to a contributing structure in the H Historic Preservation Overlay District, which are set forth in Subsection 21A.34.020.G of the *Salt Lake City Code*. Appellant's failure to cite, discuss, or even acknowledge the relevant standards in their brief is fatal to its appeal and requires the appeals hearing officer to deny the appeal. Moreover, Appellant has also not addressed any part of the record in any of its arguments. Rather, Appellant's arguments are merely conclusory statements loosely attached to code sections that are not on point. Despite the critical fact that Appellant bears the burden of proving that the historic landmark commission erred in its application of relevant standards to the facts in the record, Appellant has not once cited those standards and has



failed to identify an error committed by the commission in the application thereof. These failures render the appeal defective and leave the appeals hearing officer without any choice but to deny the appeal.

### **CONCLUSION**

For all of the reasons stated above, Appellant's arguments must be rejected and the historic landmark commission's decision be upheld.