

**BEFORE THE SALT LAKE CITY  
APPEALS HEARING OFFICER**

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**IN RE APPEAL OF APPROVAL OF  
DESIGN REVIEW APPLICATION  
PLNPCM2021-00024**

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Appeal No.: PLNAPP2021-00776

Hearing Officer: Matthew Wirthlin

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This matter came before the Salt Lake City Appeals Hearing Officer (“**Hearing Officer**”) in a hearing dated October 14, 2021 (“**Hearing**”), on an Appeal (“**Appeal**”) filed by Emilee Gorham on behalf of various appellants (“**Appellants**”). The Appeal seeks to overturn the Salt Lake City Planning Commission’s (“**Planning Commission**”) decision (“**Decision**”) approving Design Review Application No. PLNPCM2021-0024 (“**Application**”) filed by Dwell Design Studio on behalf of Hines Acquisitions, LLC (“**Hines**”). At the Hearing, Hines was represented by Bruce Baird, the City by Senior City Attorney Paul Nielson, and the Appellants by Craig Smith.

**SUMMARY**

Appellants lack standing to challenge the Decision because they do not own real property adjacent to the Project (defined below), are not land use applicants, and have not demonstrated that they are uniquely harmed. Such a conclusion requires the dismissal of the Appeal without reaching the merits.

**STANDARD OF REVIEW**

“An appeal from a decision of the . . . planning commission shall be based on the record made below. No new evidence shall be heard by the appeals hearing officer unless such evidence was improperly excluded from consideration below. “The appeals hearing office shall review the decision based upon applicable standards and shall determine correctness. 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.” City Code §

21A.16.030E.2. The Appellants bear “the burden of proving the that the land use authority erred.” Utah Code § 10-9a-705; City Code § 21A.16.030F. Finally, the Hearing Officer must “interpret and apply a land use regulation to favor a land use application unless the land use regulation plainly restricts the land use application.” Utah Code § 10-9a-707(4)(b).

### **FINDINGS OF FACT**

#### **A. Project Background**

1. Hines intends to construct a project located at 136, 144, and 158 South Main Street, Salt Lake City, Utah (the “**Project**”). The Project consists of a 400-unit high-rise apartment building and includes affordable housing, open space, a mid-block walkway, a contribution of \$1 million to historic preservation, public art installation, and 8,400 square feet of commercial space.

2. The Project will be privately owned but the open space area and mid-block walkway will be publicly accessible.

3. The Project is to be built on one parcel that is indirectly owned by Hines and two parcels that are currently owned by the Salt Lake City Redevelopment Agency (the “**RDA**”).

4. The RDA owned parcels constitute the site of the 100-year old Utah Pantages Theater (the “**Theater**”).

5. In 2019, the RDA determined that the Theater could not feasibly be restored. Thus, the RDA entered into a contract to sell it to Hines. The RDA decision to sell the Theater to Hines was never legally challenged.

6. The Project requires that the Theater be demolished (the “**Demolition**”) which requires its own permits through the City appointed process.

7. Appellants are a group of individuals and entities that purport to be owners and employees of businesses located near the Project or residents living within six blocks of the Project.

8. Appellants do not own any real property adjacent to the Project and are not land use applicants.

## **B. The Application and Staff Report**

9. On January 11, 2021, Hines submitted its Application for the Project. Relevant here, the Application requested a building height of 392 feet and a ten-foot setback from Main Street.

10. On March 8, 2021, Salt Lake City's (the "**City**") principal planner, David Gellner, acted as the City's Zoning Administrator and deemed the Application complete, thus commencing the required public engagement period required by the Salt Lake City Code ("**City Code**").

11. A public hearing for the Application was scheduled for July 14, 2021, and prior to the July 14<sup>th</sup> hearing, the City's staff prepared a staff report (the "**Staff Report**").

12. The Staff Report recommended that the Planning Commission approve the request for additional building height. In reaching this conclusion, City Staff analyzed the Application against the City's Downtown Plan, the City's design review criteria, and the City Code. *See* Staff Report at 8–12, 103–111.

13. The Staff Report also contains Hines' renderings, plans, and designs for the Project, including, specific renderings addressing the City's design review criteria. *See* Staff Report at 35–54, 56–57. And a narrative of how the Project complied with the City's design review standards. *See* Staff Report at 97–103.

14. Prior to the public hearing, the City received over eighty (80) written public comments which were included in the Staff Report. *See* Staff Report at 113–219.

## **C. The Planning Commission Hearing**

15. Pursuant to City Code Section 21A.59.020, the Planning Commission held a public hearing for the Application on July 14, 2021.

16. At the public hearing David Gellner, a Senior Planner for the City, presented the Staff Report to the Planning Commission and addressed the Planning Commission's questions. *See, e.g.,* Transcript at p. 7–8. ll 22–25, 1–6.

17. Hines also presented to the Planning Commission how the Project complied with the design review criteria and would benefit the City. *See, e.g.*, Transcript at p. 68–69. ll 23–25, 1–23. In doing so, Hines responded to the Planning Commission’s questions and concerns. *See, e.g.*, Transcript at p. 74. ll 11–25.

18. The Planning Commission allowed the public to comment on the Project.

19. The Planning Commission carefully considered the Staff Report, the City Staff’s presentation, Hines’ presentation, the public’s comments, and voted 6-1 in favor of the Application.

20. On September 30, 2021, Appellants submitted to the City “Additional Written Materials in Support of Appeal Application PLNAPP2021-00776—Appeal of Approval of Design Review Application PLNPCM2021-00024” which included seven declarations (“**Declarations**”) of persons claiming they could not remotely access the Planning Commission hearing and four additional arguments (“**Additional Arguments**”) for overturning the Decision.

## CONCLUSIONS OF LAW

### **A. Appellants Lack Standing to Challenge the Decision.**

1. Only land use applicants or “adversely affected” parties have standing to appeal and administrative decision of the Planning Commission. *See* City Code § 21A.16.020; Utah Code § 10-9a-701(2). An “adversely affected party” means “a person other than a land use applicant who [ ] owns real property adjoining the subject property or will suffer damage different in kind than, or an injury distinct from, that of the general community as a result of a land use decision”. *See* Utah Code § 10-9a-103(2).

2. The Utah Supreme Court has ruled that if there are statutorily created grounds for standing then an appellant must meet these statutory standing requirements as “traditional or alternative standing cannot excuse a lack of statutory standing where the [appellant] is a statutory claimant.” *McKittrick v. Gibson*, 2021 UT 48, ¶ 48, --- P.3d ---. This is because an appellant must be “within the class of parties that the legislature has authorized to file suit” and not simply a party

that can “identify some sort of ‘distinct or palpable injury’ or a basis for ‘public interest’ standing.” *Id.* (quoting *Haik v. Jones*, 2018 UT 39, ¶ 41, 427 P.3d 1155 (Lee, A.C.J., concurring in part and concurring in the judgment)).

3. The Hearing Officer concludes that Appellants lack standing because: i) they are not land use applicants; ii) do not own real property adjoining the subject property; and iii) will not suffer damage different in kind than, or distinct from, the general community as a result of a land use decision.

4. Specifically, Appellants are not the land use applicants. The only land use applicant here is Hines.

5. Appellants do not own any real property adjoining the subject property. The Hearing Office takes judicial notice from publicly available records of the Salt Lake County Recorder that all surrounding property is owned by Kearns Building Joint Venture, Utah Power & Light Co., Salt Lake County, 160 South Main, LLC, and 200 South Main Street Investors, LLC. None of which are Appellants here.

6. Appellants have never alleged or hinted at any harm or causation between the Decision and any injury, let alone any unique or distinct injury different in kind than the public.

7. The harm alleged by the Appellants is related to the Demolition and not related to the Decision related to an additional height allowance and to amend the setback requirements.

8. Appellants do not have standing based on their status as owners or employees of nearby businesses because they have failed to explain why the Decision—dealing with building height and setbacks—would uniquely harm their (unspecified) business(es). Indeed, those Appellants that simply live or work within six blocks of the Project have no injury distinct from that of the general public.

9. Moreover, the two entity Appellants, Friends of the Utah Pantages Cinematic Theater and the Utah Pantages Cinematic Theater, LLC, are both registered to the same person (“Michael Patton”) at the same apartment more than ½ mile away from the Project (90 East 600

South). These entities make no attempt to explain what unique injury they would suffer ½ a mile away from the Project.

10. Even the “business owners operating on Main Street between 100 and 200 south” never state how they will be harmed, let alone uniquely harmed.

### **CONCLUSION**

For the reasons stated above, the Hearing Officer hereby dismisses Appellants’ appeal and thereby affirms the Decision of the Planning Commission.



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Matthew Wirthlin, Hearing Officer

Dated: October 25, 2021