MEMORANDUM

To: Planning Division: Nick Norris, Michaela Oktay, Amy Thompson
From: Paul C. Nielson, Senior City Attorney
Date: April 10, 2018
Re: Economic Hardship/Takings

Salt Lake City Planning Division staff asked the Salt Lake City Attorney's Office to prepare a brief memo on regulatory takings in light of the present inquiry before the economic hardship panel concerning Bishop Place.

The United States Supreme Court first acknowledged the concept of a "regulatory taking" in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), wherein the Court announced "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id. at 415. However, as recently noted by the Court in Murr v. Wisconsin, 137 S.Ct. 1933, 1942 (2017), the Mahon Court did not establish any clear guideposts as to when a land use regulation could be considered going "too far".

In recent years, the Court has developed two tests for determining whether a land use regulation has gone "too far" to constitute a regulatory taking. The "categorical" takings test announced in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) establishes that a regulatory taking will be found "where regulation denies all economically beneficial or productive use of land." Id. at 1015. This test is reflected in Section 21A.34.020.K of the *Salt Lake City Code*, which informs the present economic hardship analysis.

The second test, originating in the Court's decision in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), is less concrete. There, the Court opined that,

> [i]n engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. (Citation omitted). So, too, is the character of the governmental action.

Id. at 124.

Thus, determining whether specific applications of the city's land use regulations to property within an historic district may constitute a taking should include an analysis of whether the regulations "deprive[ ] the applicant of all reasonable economic use or return on the subject property" as prescribed by Salt Lake City Code Section 21A.34.020.K (and Lucas), in addition to an examination of (1) the economic impact on the property owner; (2) the degree to which the applicable regulations thwart the property owner's "reasonable investment-backed expectations";

and (3) whether application of the city's land use regulations under the specific circumstances is reasonable.[1]

The Court has acknowledged that "[a] central dynamic of the Court's regulatory takings jurisprudence…is its flexibility." Murr, 137 S.Ct. at 1943. The Court attributed its reluctance to formulate more concrete guidance to the varying nature of local regulations and the uniqueness of the economic circumstances affecting property.

Since the process of determining economic hardship is effectively an exercise in avoiding a regulatory taking, it would be prudent for the economic hardship panel--and, ultimately, the historic landmark commission--to consider the above principles extracted from the United States Supreme Court's decades of addressing this complex issue.

This memorandum may be shared with both the panel and the HLC if the Salt Lake City Planning Division deems it appropriate.

[1] Though not terribly clear within the Court's pronouncements and reiterations of the "character of the government action" prong of Penn Central, the Court in Palazzolo appears to indicate that reasonableness under the circumstances is how it analyzes that factor. See Palazzolo, 533 U.S. at 627.