Advisory Opinion #139

Parties: Mike & Laurie Jorgensen, Park City

Issued: March 28, 2014

TOPIC CATEGORIES:

Conditional Use Applications

Conditional uses are important components of land use regulation. Land use authorities have discretion over granting conditional uses, but that discretion must be exercised within the limits placed by local ordinances and state statutes. The Utah Code establishes four basic elements for a conditional use: (1) Designation of a use as conditional; (2) adoption of standards to guide decision-making; (3) determination of detrimental impacts; and (4) consideration of conditions. All aspects of a conditional use analysis must be established by substantial evidence.

Detrimental impacts must be particularized to the specific use and setting being evaluated. Conditions must be tailored to those impacts. A conditional use may only be denied if conditions were considered, but were found to be inadequate to mitigate the impacts.

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ADVISORY OPINION

Advisory Opinion Requested by:	Michael and Laurie Jorgensen By Wade Budge, Attorney for the Jorgensens
Local Government Entity:	Park City
Applicant for the Land Use Approval:	Michael and Laurie Jorgensen
Type of Property:	Residential
Date of this Advisory Opinion:	March 28, 2014
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

What is the extent and obligation of a land use authority's evaluation of conditional use permit applications?

Summary of Advisory Opinion

Conditional uses are valuable aspects of a local zoning ordinance, and must be administered as part of the overall zoning scheme, respecting the ordinance's design standards and approvals previously granted by the local government. Conditional uses involve four steps: Designating the use as conditional; adopting standards to guide decision makers; identifying detrimental impacts associated with a particular use; and evaluation of conditions to mitigate the use's impacts. Before a conditional use permit may be denied, specific detrimental impacts must be identified, and conditions considered. The denial is justified only if the impacts cannot be substantially mitigated by reasonable conditions. Any decision made by a land use authority as part of the conditional use evaluation process must be supported by substantial evidence.

Review

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205.

An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Wade R. Budge, Attorney for Michael and Laurie Jorgensen, on August 9, 2013. A copy of that request was sent via certified mail to Janet M. Scott, City Recorder for Park City, at 445 Marsac Ave., Park City, Utah. According to the return receipt, the City received the Request on August 19, 2013.

Evidence

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, with attachments, submitted by Wade R. Budge, attorney for Michael and Laurie Jorgensen, received by the Office of the Property Rights Ombudsman on August 9, 2013.
2. Response submitted on behalf of Park City, by Polly Samuels-McLean, Assistant City Attorney for Park City, received on December 2, 2014.
3. Reply submitted by Mr. Budge, received on January 17, 2014.
4. Reply submitted by Ms. McLean, dated March 5, 2014.
5. Reply submitted by Mr. Budge, dated March 18, 2014.
6. Section 15-2.1-6 of the Park City Municipal Code.

Background

Michael and Laurie Jorgensen own a lot in Park City, located at 30 Sampson Avenue ("30 Sampson"). The lot was created by a subdivision plat approved in 1995, along with two other lots along the same road. The lot has an "irregular hour-glass" shape: The south boundary, adjoining another lot, is essentially straight, but the north boundary "zig-zags" at sharp angles, creating a wedge-shaped section on the east (adjoining Sampson Avenue) and a "squarish" area on the west, with a narrow area in the middle of the lot.[1] The total area of the lot is 7,089 square feet, but the narrowing in the middle limits the area available for a larger building such as a home. The upper, or western portion, is larger than the lower, or eastern portion.[2] The slopes on the lower portion leading the to the middle appear to be in excess of 30%, but area immediately

[1] The property boundary with the parcel to the north forms a right angle jutting into the middle of 30 Sampson. The western portion is slightly larger than the eastern. The City's staff noted that due to the sharp angles, the lot actually has eight sides.

[2] The western portion could also be deemed the "northwest" portion, as that part of the lot veers to the northwest. The lower portion is basically oriented on an east-west axis.

adjacent to the street is fairly level. The upper portion levels off somewhat, with the slope appearing to be between 20-30%. The lot has about 48 feet of frontage on Sampson Avenue.

Despite the slope and unusual configuration of 30 Sampson, the owners are confident that a home may be constructed. The lot is located within an "HRL" (Historic Residential–Low Density) zone district. The City Code requires that buildings larger than 1,000 square feet which are located on steep slopes obtain a conditional use permit (a "Steep Slope CUP").[3] The Steep Slope CUP process addresses several criteria associated with the development, including size and mass of the building, height, location on the lot, and access.

In the HRL zone, the allowable building footprint size is a function of the lot size. Larger lots allow larger building footprints.[4] According to the City, the maximum building footprint allowed on 30 Sampson is 2,355.5 square feet.[5] Because of the unusual configuration, the City Planner determined the setbacks, as provided in § 15-4-17 of the City Code. Each of the lot's eight sides was assigned a setback.

The subdivision plat that created 30 Sampson in 1995 includes a note stating that 3,000 square feet is the "maximum size[] for residential structures" on the lot.[6] The City determined that it would honor the maximum size approved by that plat. In March of 1998, the City issued a letter, stating that a basement could be included with a home on the lot, provided it met the requirements of the City Code ("March 1998 Letter).[7] Importantly, the area of a basement would not count towards the 3,000 square foot maximum for the home.[8] The March 1998 Letter was recorded with the Summit County Recorder's Office. The City acknowledges this Letter, and the development rights that it grants.

In February of 2012, the Jorgensens designed a home for 30 Sampson, and applied for a Steep Slope CUP, because a portion of their development is located on the steep portion constituting the middle of their lot.[9] The proposed home is located on the western (or upper) portion of the lot (approximately 77 feet from Sampson Avenue), with a garage building located at street level. The garage building extends into the slope face, and includes a below-ground entry room and an elevator leading to the home on the upper portion. The elevator was connected to a deck or bridge leading to the main entrance of the home.[10] A parking area and stairway next to the garage were also shown in the home's drawings. The final design considered by the City was about

[3] PARK CITY MUNICIPAL CODE, § 15-2.1-6.
[4] PARK CITY MUNICIPAL CODE, § 15-2.1-3. A building's "footprint" is the area it occupies, regardless of height. It is not the total floor area of a building.
[5] "Findings of Fact and Conclusions of Law, June 26, 2013," Park City Planning Commission (Attached as Exhibit A), Finding No. 10.
[6] The subdivision created three lots, including 30 Sampson. One of the lots is 6,956 s.f., and the other is 11,444 s.f. The smaller lot also has a 3,000 s.f. limit for structures, while the larger may build up to 3,500 s.f.
[7] At the time of the March 1998 Letter, a basement was required to have four walls at least 80% underground. An outside entrance from the basement was not to be visible from a public street.
[8] In other words, only the "above ground" portion of the home would be counted against the maximum area.
[9] It appears that the City's planning staff determined that a Steep Slope CUP was necessary. *But see* Analysis Section II, *infra*.
[10] Other than an outside stairway, the elevator would be the only access from the garage to the home. The Jorgensens included the elevator to make the home fully accessible.

4,041 total square feet, with 2,996 square feet above ground.[11] The overall footprint for the project was 2,272 square feet.[12]

After working with the City's staff for nearly six months, the matter was brought to the Park City Planning Commission on August 22, 2012. At that meeting, the staff recommended approval of the Steep Slope CUP, stating that there were no unmitigated impacts associated with the proposed home. The staff report concluded that all of the criteria required by the City's Code supported the permit.[13] Despite the staff's recommendation, the Planning Commission continued the application, requesting clarification on the definition of "story" in the City Code.[14]

In December of 2012, the Planning Commission reviewed the application at a work meeting. At that meeting, the staff reported that the Jorgensen's home met the City's height and story restrictions. The Planning Commission again delayed a decision on the application, citing new issues about the proposed home. Specifically, the commission identified complaints that the home did not suit the historic nature of the area, issues about whether the basement area should be included in the total, and concerns about snow shedding.

In April of 2013, after a request from the Jorgensens, the Commission again considered the application. The Jorgensens had made changes to their home's design, in order to address the concerns raised at the December commission meeting. In particular, the garage was changed to lessen its apparent size and visual impact from Sampson Avenue.[15]

At the April meeting, it appears that members of the public expressed concerns about parking on Sampson Avenue, but said nothing about the home itself. During discussion, members of the Planning Commission expressed dislike for the size and visual impacts of the home. The Commission denied the Steep Slope CUP application, concluding that the home was too large for the neighborhood, did not satisfy the "intent" of the HRL zone, was not compatible with the historic development of the area, and that the reasonably anticipated detrimental impacts of the home could not be mitigated through reasonable conditions. On June 26, 2013, the Commission approved its Findings of Fact and Conclusions of Law, formally denying the Jorgensen's application.

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[11] Findings of Fact and Conclusions of Law, Finding No. 18. It appears from the design information as well as the City's conclusions that the garage and elevator constituted one building, and the home was a separate building. The City code exempts a garage area up to 400 s.f. from the calculation of total area.

[12] Findings of Fact and Conclusions of Law, Finding No. 10.

[13] Section 15-2.1-6(B) requires evaluation of nine criteria: (1) Location of Development; (2) Visual Analysis; (3) Access; (4) Terracing; (5) Building Location; (6) Building Form and Scale; (7) Setbacks; (8) Dwelling Volume; and (9) Building Height. The staff report also concluded that the proposed home also met the City's requirements, such as height, setback, etc.

[14] Section 15-2.1-5 limits structures to three stories, with a maximum height of 27 feet (above grade). The City staff concluded Jorgensen's home has three stories: a basement, a main floor, and an upper level. The maximum height is below 27 feet.

[15] As stated above, the final design had a building footprint of 2,272 s.f. Based on the analysis by the City's staff, the proposal has a total above-ground floor area of 2,996 s.f. The basement floor area was 1,189 s.f. The total area included 509 square feet of the garage/elevator building, because the first 400 s.f. of the garage was excluded from the total floor area.

In its final order, the Commission made 43 Findings of Fact, including finding that the proposed home did not meet the criteria for a Steep Slope CUP. Specifically, the Commission found that the home was not compatible with existing historic homes in the neighborhood "with respect to height, setbacks, mass or scale . . .."[16] It also found that the home did not meet the purpose of the HRL zone, specifically paragraphs (C), (E), and (F) of § 15-2.1-1.[17] A copy of the Findings of Fact is attached as Exhibit A.[18]

Analysis

I. The Planning Commission Does Not Have Discretion to Ignore Approvals Previously Granted by the City or to Reinterpret City Ordinances.

The Planning Commission abused its discretion when it concluded that the Jorgensen's home did not meet the "purposes" of the HRL zone, and by ignoring terms in the City Code. It is true that interpretation of ordinances by a local planning board enjoys "some level of non-binding deference" *Fox v. Park City*, 2008 UT 85 ¶ 11, 200 P.3d 182, 185. However, the Planning Commission's deference is limited, and its authority must operate within the terms of the City Code. The Commission does not have discretion to ignore an ordinance or approvals already made regarding the Jorgensen's property.

A. *A 3,000 Square Foot Home May Potentially Be Built on the Lot.*

Because the maximum size for a home on 30 Sampson has already been approved by the City, the Steep Slope CUP could not be denied based on an opinion that the home does not meet the purposes of the HRL zone. In its Findings of Fact, the Planning Commission determined that the Jorgensen's home did not "meet the purpose" of the HRL zone in part because the home did not "preserve the character of Historic residential development in Park City" (Finding No. 28) and because it did not "encourage construction of Historically Compatible Structures that contribute to the character and scale of the Historic District . . .." (Finding No. 29).[19] The basis for these findings is evidently because the Planning Commission felt that the proposed home is too large for the City's Historic District.

The Planning Commission does not have discretion to decide that the home is too large for the HRL zone, because the maximum size has already been approved by the City. When the 30 Sampson lot was created in 1995, the City determined that a 3,000 square foot home could be built.[20] A few years later, the City agreed that the area of a basement level would not be counted

[16] Findings of Fact and Conclusions of Law, June 26, 2013, Finding No. 38.
[17] That sections lists the purpose of the HRL zone, which includes "preserving historic character" (paragraph (C)); "encourage historically compatible structures" (paragraph (E)); and "review criteria for development on steep slopes" (paragraph (F)).
[18] The document is entitled "Notice of City Council Action" although it is the Findings of Fact and Conclusions of Law for the Planning Commission.
[19] The Findings quote paragraphs (E) and (F) of § 15-2.1-1 of the Park City Code, which lists the purposes of the HRL zone.
[20] Along the same lines, the City also has approved the size of a building's "footprint," which is a function of the lot area. The size of a building's footprint acceptable on 30 Sampson has already been approved by the City, and so the

against the total area of a home on that lot. Since the building size has already been approved, the Planning Commission cannot dictate the allowable size of a building simply because it feels that the "purpose" of the HRL zone is better served with smaller homes. In essence, Park City has already determined that on 30 Sampson, a home of 3,000 square feet suitably preserves the character of historic residential development and contributes to the character and scale of the historic district.[21] The Planning Commission does not have discretion to change what the City Council has already approved.

Furthermore, the Jorgensens have a vested right for a home up to 3,000 square feet in floor area. The 1995 subdivision plat includes the specific approval for a home of that size on 30 Sampson. An approved subdivision plat grants vested rights to the owner. "Some courts have recognized that the filing of a subdivision plat gives a vested right to individual lot owners as to the lots' size . . .." *Stucker v. Summit County*, 870 P.2d 283, 288 (Utah Ct. App. 1994).[22] If an owner is entitled to a vested right in the size and configuration of a lot created by a subdivision, then an owner may claim vested rights in other development or design criteria approved on a subdivision plat. This would include specific building pads or setbacks, and building sizes. Since the City approved a 3,000 square foot home on 30 Sampson as part of the 1995 subdivision plat, the Jorgensens may claim the vested right to build a home up to that size.[23]

B. The Jorgensens May Build Within the Approved Setbacks

In a similar vein, the Planning Commission abused its discretion by denying the CUP based on its position that the home "attempts to maximize the minimum setbacks." (*See* Findings of Fact, Finding No. 21).[24] Because of the unusual configuration of the lot, the minimum setbacks for 30 Sampson have been determined by the Park City Planning Director, as provided in the City Code.[25] The buildings (the garage and home) are placed within the required setbacks, and there is no issue that the setbacks need to be adjusted.

Because the proposed home conforms to the established setbacks, the Planning Commission does not have discretion to deny approval simply because the home's plan "maximizes" those setbacks. The Jorgensens have the right to build within the approved building pad. The buildable area of the lot, as defined by the required setbacks, has been decided by the City. As long as the building complies with the setbacks, the Planning Commission does not have discretion to deny the Steep Slope CUP because of an opinion that the proposed building is "too close" to what has

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Planning Commission cannot presume the authority to determine what size building best suits the "purpose" of the HRL zone.

[21] This is further reinforced by the fact that the proposed home and garage would be a permitted use if the lot had a slope less than 30%, and no Steep Slope CUP were required.

[22] *See also Wood v. North Salt Lake*, 15 Utah 2d 245, 390 P.2d 858 (1964) (Property owners had vested right in lot sizes created by subdivision plat, even though a subsequent zoning ordinance required larger lots)

[23] Even if development criteria on a subdivision plat granted a vested right, development would still need to comply with other zoning requirements, including the Steep Slope CUP, if required by the City Code.

[24] The Planning Commission's application of §15-2.1.6(B)(7) of the City Code (Setbacks as part of the CUP analysis) is discussed below.

[25] *See* PARK CITY MUNICIPAL CODE, §15-4-17 (Setback Requirements for Unusual Lot Configurations). The buildable area, or "building pad" is "the Lot Area minus required Front, Rear and Side Yard Areas." *Id.*, § 15-2.1-3(C).

already been approved.[26] Otherwise, the Planning Commission would be overruling the City's determination by effectively increasing the setbacks, which would be an abuse of its discretion.

C. The Planning Commission Does Not Have Discretion to Ignore the Established Meanings of Terms Used in the City Code.

The Planning Commission must follow the terms and definitions adopted by the City, and does not have discretion to adopt its own definitions. "A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances." UTAH CODE ANN. § 10-9a-509(2). If a term is defined in either the City's ordinances or the State Code, the Planning Commission is bound to follow that definition, and does not have discretion to change the established meaning of the term.

The terms of the City's ordinances are interpreted according to the plain language used.

> When interpreting statutes, [the] primary objective is to give effect to the [legislative] intent. To discern . . . intent, . . . look first to the statute's plain language. . . . [P]resume that the [legislative body] used each word advisedly and read each term according to its ordinary and accepted meaning. Additionally, . . . read the plain language of the statute as a whole and interpret its provisions in harmony with other statutes in the same chapter. When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.

Selman v. Box Elder County, 2011 UT 18, ¶ 18, 251 P.3d 804, 807 (citations and alterations from original omitted). In addition, "since zoning ordinances are in derogation of a property owner's use of land . . . any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use." *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208, 1216. If a term is not defined by ordinance or statute, the ordinary meaning and usage of the word is used.

1. The Jorgensen Home Includes a Basement.

The City's planning staff concluded that the basement proposed for the Jorgensen home satisfied the definition stated in the March 1998 Letter, and so the basement area was not included when calculating the total floor area allowed.[27] Defying this analysis, along with the provisions of the City Code and the actions of the City Council, the Planning Commission decided that the

[26] The Planning Commission apparently objects to having the building located within the area the City has approved for building (*i.e,* the building pad, or the area within the established setbacks). Admittedly, the home building occupies nearly all of the buildable area on the upper portion of the lot. Although the Planning Commission may prefer greater setbacks, it does not have discretion to deny the Steep Slope CUP based on the amount of buildable area being used. As discussed below, the Steep Slope CUP ordinance grants the Planning Commission a limited amount of discretion over setbacks as part of the conditional use analysis. That discretion, however, only involves setback adjustments in limited circumstances, and is not authority to question how a property owner uses the area approved for building.

[27] Excluding the basement floor area meant that the "above ground" portion of the home had 2,996 s.f., just under the 3,000 s.f. limit.

basement level of the Jorgensen home did not meet its conception of a basement, and so it concluded that the area of that level was to be included in the total area of the home.[28]

The March 1998 Letter stated that the area of a basement level would not be included in the total area allowed on the lot, if all four walls of the basement were at least 80% underground.[29] The Planning Commission misquoted that definition, stating that a basement must be "constructed *fully* below the finished grade." Findings of Fact, Finding No. 8 (emphasis added).[30] Moreover, the City Code currently defines "basement" as "[a]ny floor level below the First Story in a Building." PARK CITY MUNICIPAL CODE, § 15-15-4(1.25) (Definition of "basement").[31] The Planning Commission decided that the basement was not "fully below the finished grade" because it had windows and a light well (or window well).[32] Therefore, according to the Planning Commission, it was not eligible for floor area exemption provided by both the March 1998 Letter and the City Code.[33]

Using the City Code's definition, the Jorgensen home has a basement. It is a level below the first story. The City Code does not mention windows—as long as the level is below the first story, it could presumably have as many windows as the homeowner wants. In addition, windows are required by the building code. The March 1998 Letter requires that all four walls of a basement be at least 80% underground. It also does not mention windows, but it is reasonable that the requirement could be fulfilled if the walls of window wells were considered as part of the basement walls.[34] The March 1998 Letter allows an exterior door leading to a basement (including a garage door), so it would seem that windows are also a possibility.[35]

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[28] *See* Findings of Fact and Conclusions of Law, Finding No. 40.

[29] According to the March 1998 Letter, this was the definition of basement from the City Code. That letter provided that the area of a basement would not be included in the total floor area for a home. *See* Findings of Fact and Conclusions of Law, Finding No. 8. The design drawings submitted for this Opinion show that the basement walls are completely below ground, including the wall for the "light well."

[30] *See also* Findings of Fact, Finding No. 40.

[31] "First Story" means "[t]he lowest Story in a Building provided the floor level is not more than four feet (4') below Final Grade for more than fifty percent (50%) of the perimeter. PARK CITY MUNICIPAL CODE, § 15-15-4(1.103). The Jorgensen's plans show that only the basement of their home is below grade, and the so the first level would qualify as a "First Story."

[32] The windows are required by the building code, and provide light and emergency access. A portion of one basement wall includes three windows with a "light well," which is basically a sunken window well extending across all three windows (about 20 feet total) allowing light and access. The outside wall for the light well is connected to the basement wall and extends a few feet from the main structure. There was evidently no analysis or measurement showing that the basement was less than 80% below ground, or that the basement was not below the First Story of a building.

[33] *See id*., § 15-15-4(1.105) "Basement and Crawl Space Areas below Final Grade are not considered Floor Area."

[34] It is also worth noting that most people would agree that a basement includes windows and even exterior doors.

[35] The March 1998 Letter states that an exterior door, including a garage door, may not be visible from a public street. Thus, it was at least considered possible that a basement with a garage door could still have 80% of its walls underground. Since windows are smaller than garage doors, a basement could also feasibly include windows. The HRL zone anticipates window wells and light wells, allowing them to extend into side and rear yard setbacks, and excluding the depth of window wells from defining existing grade. *See id.*, §§ 15-2.1-3(G)(3) and (I)(3), and 15-2.1-5.

The Planning Commission abused its discretion by not allowing the basement area to be exempted from the total floor area allowed for the Jorgensen home. Their conclusions are not supported by any reasonable interpretation of the City Code or the March 1998 Letter, particularly given the building code's requirement that windows be included. The conclusions reached by the Planning Commission place homeowners in a "catch-22" situation: A basement must have windows; but if it has windows, the Planning Commission would no longer consider it a basement.[36] This approach also nullifies the exemption granted by the City, depriving the Jorgensens of a valuable property right.[37] Finally, since the terms of the area exemption must be construed in favor of the property owner, there is no reasonable basis to conclude that the basement in the Jorgensen home does not meet the definitions of both the City Code and the March 1998 Letter.

2. The Home Meets the Height Requirements of the HRL Zone.

The proposed home satisfies the height requirements of the HRL zone. "No structure shall be erected to a height greater than twenty-seven feet (27') from Existing Grade." PARK CITY MUNICIPAL CODE, § 15-2.1-5. According to the materials submitted for this Opinion, the Jorgensen home, as well as the garage and elevator building, are both at or below 27 feet in height, measured from the existing grade. In addition, a structure may not have more than three stories within the 27-foot maximum.[38] For the purpose of defining maximum height, a basement level is considered a story, according to the City Code. *Id.*, § 15-2.1-5(A).[39]

The Planning Commission focused on the height and the number of stories in the two structures proposed for 30 Sampson, eventually concluding that "[t]he two buildings appear by their placement to be a five (5) story building." Findings of Fact, Finding No. 39. However, both the home and the garage/elevator buildings satisfy the City's height requirement. The maximum height is 27 feet above the existing grade, regardless of how tall the building "appears" to be, or its location on a hillside. The Planning Commission does not have discretion to alter the definition found in the City Code.

The City Code does not define "story," but it does define how to measure a story.[40] The ordinary understanding of the term "story" is "each of the stage or portions one above another of which a building consists; a room or set of rooms on one floor or level." OXFORD ENGLISH DICTIONARY, Vol. XVI (2nd ed. 1989) p. 789.[41] Using this as the plain language meaning of the term, the two

[36] "Catch-22" refers to a circumstance or situation that presents a dilemma because of mutually conflicting or dependent conditions. *See* THE OXFORD DICTIONARY AND THESAURUS, AMERICAN EDITION (1996), p. 219.
[37] The Planning Commission's conclusion also does not solve their concerns over the size of the structure. If the basement were eliminated, the structure would still have the same dimensions above ground—eliminating the basement would only reduce the total floor area, not the overall size and mass of the structure.
[38] The City Code allows additional height for an elevator building. *See id.*, § 15-2.1-5(3). It appears, however, that no extra height was requested for the Jorgensen's elevator.
[39] A basement would count as a "story," but only the portion of a structure above ground would be measured for the maximum height.
[40] *Id.*, § 15-15-32(1.251) "STORY. The vertical measurement between floors taken from finish floor to finish floor."
[41] "Story" usually refers to the horizontal divisions of a building. A building's stories usually include space between floors to house electrical wiring, plumbing, etc.

structures comply with § 15-2.1-5. The home has three levels, including a basement. The garage/elevator building has only one story.[42] The Planning Commission must abide by the plain language of the City ordinance, and does not have discretion to adopt a new interpretation not supported by the City Code. Since both buildings are less than 27 feet high and have no more than three stories, they both satisfy the required height limitation.

II. The City's Steep Slope CUP Ordinance Only Applies to Substantial Structures Actually Located on Steep Slopes.

The Steep Slope CUP ordinance only applies to substantial structures actually located on a steep slope, and may not be extended to regulate structures which are not placed on a slope. "A Conditional Use permit is required for any Structure in excess of one thousand square feet (1000 sq. ft.) if said Structure and/or Access is *located* upon any existing Slope of thirty percent (30%) or greater." PARK CITY MUNICIPAL CODE, § 15-2.1-6(B) (emphasis added).[43] In other words, the Planning Commission only has authority to add additional conditions on a structure which is actually placed on an area with a slope greater than 30%, if the structure exceeds 1,000 square feet. It does not apply to structures placed on more level areas of a lot, even if other portions of the lot have a steep slope, or to buildings which are smaller than 1,000 square feet.[44]

It appears, based on the materials submitted for this Opinion, that only the lower portion of 30 Sampson has an area where the slope exceeds 30%.[45] The upper portion is more level.[46] If this is so, then the only portion of the lot subject to the Steep Slope CUP is whatever portion has a slope greater than 30%, and which has a substantial structure placed upon it. Structures on more level areas do not require conditional use approval.

The Jorgensen's proposal consists of two buildings: The home on the upper portion, and the garage/elevator structure on the lower portion. The City's review treated the two buildings as separate. The Planning Commission agreed that the home is a separate structure from the garage.

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[42] There was no indication that the elevator shaft would comprise two stories. At any rate, since the garage is a separate structure, it may have as many as three stories, so long as the height does not exceed 27 feet.

[43] Note that the ordinance language only applies to a structure located on an existing slope greater than 30%, in contrast, the ordinance would not apply simply when a structure is built on a level portion of a lot that also includes a steep slope.

[44] This interpretation is based on the plain language of § 15-2.1-6(B). In addition, the provision that a zoning ordinance must be narrowly construed in favor of the property owner demands this conclusion.

[45] *See* Findings of Fact, Finding No. 5: "The subject property is very steep ranging from flat areas near Sampson Avenue and climbing uphill with slopes reaching between 30-40% before reaching the main body of the lot." This is, of course, not a final conclusion that the slope on the upper portion is less than 30%, but is consistent with the information submitted for this Opinion. The City maintains that its staff concluded that a Steep Slope CUP is required, and that the Jorgensens failed to appeal that determination.

[46] This observation is based upon topographic data listed on the plans submitted for this Opinion. The lower portion of 30 Sampson has a small level area along the street, and the elevation rises sharply in the middle, where the lot narrows. The garage and elevator structure requires excavation into this slope face. The upper portion appears to be more level (the data on the plans suggests that the slope is less than 30%). According to the plans, the home structure will be entirely above ground (except for the basement), without extensive excavation into a slope face. A more thorough analysis is needed to accurately ascertain the slope of the upper portion.

See Findings of Fact, Finding Nos. 6, 13, 15, 16, 17, 22, 34 and 39. In addition, the conclusion that the buildings are separate is supported by the facts. Both the home and the garage have separate foundations, and are not connected, except by a walkway. The garage and elevator could be removed without changing the home, and the home could be altered without any changes to the garage. Simply providing access via a deck or bridge does not unite the two separate buildings.

If the slope on the upper portion of the lot is less than 30%, then the Planning Commission does not have authority to impose any additional conditions on a structure placed on that portion. If the home is located on an area with a steeper slope, then the Steep Slope CUP ordinance would apply. The garage/elevator building is located on a steep slope, and requires excavation into the slope face. However, the garage and elevator are less than 1,000 square feet, so a Steep Slope CUP should not be required.[47]

In short, § 15-2.1-6 of the City Code requires a Steep Slope CUP not merely because a lot has a slope greater than 30%, but because a substantial structure is proposed to be built on that slope. That section must be construed narrowly, in favor of allowing the use and enjoyment of property. The City may not require a conditional use permit except where one is mandated by the City Code. Despite a desire to improve the City, the Planning Commission does not have discretion to exceed the authority granted to it.

According to the materials submitted for this Opinion, the Jorgensens object to being subject to the Steep Slope CUP for the same reasons. The City maintains that its planning staff decided that the CUP was necessary, and that the Jorgensens cannot object at this point. It is not clear if the Jorgensens raised their objections before the Planning Commission, however. If it is determined that the Steep Slope CUP ordinance does not apply to the Jorgensen's proposal, the Planning Commission's decision would possibly be void as an unauthorized act, even if its actions were supported by substantial evidence.[48]

III. Before it May Deny a Conditional Use, the City Must Show the Detrimental Impacts of the Use, and the Conditions Which Were Considered to Mitigate Those Impacts.

In order to justify denying an application for a conditional use permit, the City must establish the detrimental impacts of the development, and show by substantial evidence that reasonable conditions would not mitigate those impacts. Conditional uses are governed by the Land Use,

[47] *See* Findings of Fact, Finding 6. "The proposal . . . includes a 453 square foot detached garage, a 350 square foot garage entry and a 106 square foot access tunnel which is located below ground" The areas listed total 909 square feet, but 400 s.f. is excluded from the total floor area.

[48] A zoning decision may be overturned if it is arbitrary, capricious, or illegal. UTAH CODE ANN. § 10-9a-801(3). A decision is arbitrary and capricious if it is not supported by substantial evidence. *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 10, 70 P.3d 47, 51. It is illegal if the action taken was not authorized, or if it violated a statute or ordinance. UTAH CODE ANN. § 10-9a-801(3)(d).

Development, and Management Act (or "LUDMA"), found in Title 10, chapter 9a of the Utah Code.[49] A "'Conditional use' means a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts." UTAH CODE ANN. § 10-9a-103(5). Section 10-9a-507 provides the framework for consideration of conditional use permits:

> (1) A land use ordinance may include conditional uses and provisions for conditional uses that require compliance with standards set forth in an applicable ordinance.
>
> (2) (a) A conditional use shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.
>
> (b) If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied.

Id., § 10-9a-507. The Utah Code thus anticipates four specific steps: First, a use must be designated as "conditional" in a land use ordinance; Second, standards must be adopted to guide evaluation of a conditional use; Third, reasonably anticipated detrimental impacts associated with the particular circumstances being evaluated must be identified by a land use authority; and Fourth, conditions must be proposed to mitigate those detrimental impacts. The use may be denied only if the proposed conditions cannot substantially mitigate the detrimental impacts.[50]

A. Standards for Conditional Use Evaluation

In § 15-2.1-6, the City adopted some standards to govern evaluation of a Steep Slope CUP. "Development on Steep Slopes must be environmentally sensitive to hillside Areas, carefully planned to mitigate adverse effects on neighboring land and Improvements, and consistent with the Historic District Design Guidelines." PARK CITY MUNICIPAL CODE, § 15-2.1-6. The section covers nine specific criteria: Location of Development, Visual Analysis, Access, Terracing, Building Location, Building Form and Scale, Setbacks, Dwelling Volume, and Building Height. *See id.*, § 15-2.1-6(B).

The Utah Code does not define "applicable standards," nor does it explain the nature or extent expected for such standards that would be acceptable for conditional use analysis. Several years

[49] UTAH CODE ANN. §§ 10-9a-101 to -803 (applicable to municipalities); *see also id.*, §§ 17-27a-101 to -803 (applicable to counties). This Opinion will cite to the provisions in Title 10, because they apply to Park City.

[50] As has already been discussed, Park City has designated that a substantial structure located on a steep slope is a conditional use, thus fulfilling the first step.

ago, however, the Utah Supreme Court deferred decisions on standards to a local jurisdiction's judgment:

> While it is true that a zoning ordinance must set some ascertainable boundaries on the exercise of discretion by a zoning authority, such boundaries are not required to be unduly rigid or detailed. A generalized exposition of overall standards or policy goals suffices to direct the inquiry and deliberation of the zoning authority, and to permit appellate review of its decision.

Thurston v. Cache County, 626 P.2d 440, 443-44 (Utah 1981). Thus, even though the standards listed in § 15-2.1-6 basically consist of fairly broad policy statements, they are nevertheless sufficient for conditional use analysis. The Planning Commission's discretion, however, is limited to these standards.

For example, § 15-2.1-6(B)(7) establishes standards to evaluate the setbacks of a structure subject to a Steep Slope CUP. The Planning Commission may vary setbacks only to "minimize the creation of a 'wall effect' along the Street front and/or the Rear Lot Line." PARK CITY MUNICIPAL CODE, § 15-2.1-6(B)(7). Unless it is shown by substantial evidence that there is "wall effect" on the front or rear of the lot, the Planning Commission may not consider a variation in setbacks, and it may not deny the Steep Slope CUP on the basis that there is some other "detrimental impact" associated with setbacks.

Moreover, the Steep Slope CUP, like any conditional use, is not to be evaluated in a vacuum, but as part of an overall zoning scheme. The Steep Slope CUP ordinance not only requires evaluation according to the standards listed, but also requires consideration "consistent with the Historic District Design Guidelines." Therefore, the CUP must also take into consideration the requirements and guidelines of the Historic District Zone. The design guidelines, allowed uses, and vested rights established as part of a zoning ordinance must factor into a conditional use evaluation.[51] Otherwise, a conditional use regulation becomes "spot zoning" on individual parcels, rather than an aspect of a community's comprehensive zoning regulation.[52]

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[51] This approach to conditional uses helps resolve the dichotomy between individual property rights and a community's legitimate interest in promoting the public welfare. Uses are designated as conditional because of unique aspects (including location) that warrant a more careful evaluation than that provided by generally applicable zoning regulations. If a locality makes a use conditional, the property owner has the right to carry out that use, by complying with the reasonable conditions meant to mitigate detrimental impacts. The owner may also rely on the design and use standards adopted in a zoning ordinance, and also on approvals previously granted. Conditional use evaluation does not negate other aspects of a zoning ordinance, but is an individualized consideration of an allowed use, consistent with the terms of a community's overall zoning scheme.

[52] "[S]pot zoning occurs when a municipality either grants a special privilege or imposes a restriction on a particular small property that is not otherwise granted or imposed on surrounding properties in the larger area. *Tolman v. Logan City*, 2007 UT App 260, ¶ 15, 167 P.3d 489, 495. This does not mean that a local government may never identify a use as conditional, only that the conditional use permit must recognize the overall zoning regulation for the area. Conditional use evaluation is not an excuse to fashion a completely new zoning scheme applicable to a single property.

Thus, although the City Code requires conditional use evaluation for a structure located on a steep slope, that evaluation does not stand alone, and is not an excuse to ignore other zoning provisions. Instead, the Steep Slope CUP constitutes an individualized evaluation of the impacts made by a structure on a steep slope. That evaluation must consider the overall zoning scheme for the area, and must recognize the zoning and design standards as well as approvals previously granted by the City.

Finally, conditional use analysis must include consideration of the specific setting and circumstances of the proposed use. The possible impacts and potential conditions are inextricably tied to the location of the proposed use, and a determination of impacts and conditions must be specific to the unique aspects of the location.[53] Generalized statements about the use will not suffice. In the Jorgensen's situation, the lot has a very unusual configuration and a steep slope, which limits its usable area. Any design evaluation affecting 30 Sampson, including consideration of a conditional use permit, must take into account the specific needs and limitations of that parcel and the circumstances of the surrounding area as well as the provisions of the HRL zone.

B. Identifying Detrimental Impacts

In order to grant or deny a conditional use permit, and impose conditions on the use, a local government must identify the reasonably anticipated detrimental impacts associated with that specific use. This follows from the language of the Utah Code, which provides that a conditional use may be approved with conditions to mitigate the detrimental impacts, but denied only if the impacts cannot be mitigated by reasonable conditions.[54] In order to determine what conditions may be imposed—and whether they will be effective—the use's detrimental impacts must first be identified.

In order to justify additional conditions, the use's impacts must not only be identified, but shown to be potentially detrimental to the municipality, neighboring properties, or nearby land uses. The Steep Slope CUP ordinance focuses on two distinct areas: Protection of hillside environments, and mitigation of "adverse effects on neighboring land and improvements." *Id.*, § 15-2.1-6. This implies that before conditions may be imposed, it must be shown that a structure on a steep slope would have negative effects on nearby properties or to the hillside's environment. It is not necessary that actual injury be shown, but the detrimental impacts must nevertheless be connected to some distinct adverse effect on the use and enjoyment of nearby properties or an effect on an environmental concern. In other words, there must be a "nexus," or a link between

[53] *See* UTAH CODE ANN. § 10-9a-103(5) (A use may be designated conditional because of its potential impacts on neighboring properties or land uses).
[54] *Id.*, § 10-9a-507(2) and (3).

the use and a potential negative effect. No detrimental impacts may be established without substantial evidence of a connection to a negative effect.

The reasonably anticipated detrimental impacts must be identified specifically for each particular use in each particular location. It is not sufficient to cite general conclusions about the use.[55] Detrimental impacts, like all aspects of a conditional use, must be established by substantial evidence.[56] Since the municipality is claiming the need for additional conditions to mitigate a use's detrimental impacts, the municipality has the burden of identifying the specific detrimental impacts.

The Planning Commission's Findings of Fact and Conclusions of Law repeatedly state that the Jorgensen's home has "impacts that cannot be substantially mitigated." However, there is little discussion showing what detrimental impacts were considered, or how they were established. The Commission worked through seven of the nine subsections in the Steep Slope CUP ordinance, finding that the Jorgensen home has impacts that cannot be mitigated.[57]

a. Subsection (1): Location of Development.

In Findings of Fact Number 31, the Commission found that the Jorgensen home "has impacts that cannot be substantially mitigated with respect to LMC § 15-2.1-6(B)(1) 'Location of Development . . ..'"[58] The Commission noted that the proposed buildings "climb up the hill" and "utilize[] virtually the entire lot." [59] The buildings "are not located on the lot in a manner that reduces the visual impact." These are generalized objections to the proposal, but the Finding does not show that the proposed buildings cause or may cause adverse effects on neighboring properties, or the hillside environment. In short, the Planning Commission did not establish that the location of the Jorgensen home would be

[55] Uses are designated as conditional because of potential impacts on the municipality, neighboring properties or neighboring land uses. Therefore, it must be shown that each specific use has impacts that detrimentally affect the municipality, neighboring property owners, or nearby land uses. Any reliable and relevant information about a use may serve as evidence of the use's impact; but, that information must be considered along with the specific situation being evaluated, and the impacts determined individually for the each use. Generalized information is not by itself sufficient justification to determine detrimental impacts.

[56] "A municipality's land use decision concerning the granting or denial of a conditional use permit is arbitrary and capricious only if it is not supported by substantial evidence." *Wadsworth v. West Jordan City*, 2000 UT App 49, ¶ 9, 999 P.2d 1240, 1242 (citations and alterations omitted). Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Bradley*, 2003 UT 16, ¶ 15, 70 P.3d at 52 (citation omitted).

[57] The Planning Commission's analysis does not address subsections (3), "Access" or (4) "Terracing." Evidently, there were no significant issues stemming from those aspects.

[58] "LMC" means the "Land Management Code," part of the Park City Municipal Code. The standard guiding criterion (1) of the Steep Slope CUP ordinance states that "[d]evelopment is located and designed to reduce visual and environmental impacts of the Structure." PARK CITY MUNICIPAL CODE, § 15-2.1-6(B)(1).

[59] As has been discussed, the proposed buildings are situated within the building pad (or setbacks) approved by the City. Since a property owner is entitled to use as much of an approved building pad as desired, the amount of the buildable area taken up by a building footprint is, by itself, not a detrimental impact.

associated with any detrimental impacts. It also did not include the design guidelines of the Historic District in its analysis.

b. Subsection (2): Visual Analysis.

The Planning Commission next found that the proposed home "has impacts that cannot be substantially mitigated" based on the language of § 15-2.1.6(B)(2) "Visual Analysis." *See* Findings of Fact, Finding Number 32. The Commission determined that the proposal did not include "screening, vegetation protection, or other design opportunities" that could have mitigated visual issues. However, the Commission's finding does not demonstrate any detrimental impacts on nearby properties or the hillside environment resulting from the proposed home. Instead, it concludes that the proposal does not include conditions to mitigate the unspecified impacts.

The subsection actually requires the applicant to provide a visual analysis, to identify potential impacts and the "potential for Screening, Slope stabilization, erosion mitigation, vegetation protection, and other design opportunities" PARK CITY MUNICIPAL CODE, § 15-2.1-6(B)(2)(b). The language of the subsection thus calls for information needed to properly address these specific factors, and does not provide a standard guiding the type of conditions that could be imposed.[60]

c. Subsection (5): Building Location.

Turning to subsection (5), "Building Location," the Commission again found that the home has impacts that could not be mitigated, without identifying the specific adverse effects associated with the proposal.[61] Subsection (5) calls for coordination with adjoining properties to "maximize opportunities for open Areas and the preservation of natural vegetation, to minimize driveway and Parking Areas, and to provide variation of the Front Yard." *Id.*, § 15-2.1-6(B)(5). The Commission cited this language, and concluded that impacts could not be mitigated. However, there was no analysis showing how much open space would be desired, the amount of vegetation that ought to be preserved, or the acceptable size of parking areas; nor was there a showing of a negative effect on adjacent properties associated with those factors.[62]

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[60] The Utah Code requires that conditional uses be analyzed according to standards. *See* UTAH CODE ANN. § 10-9a-507. Subsection (2) requires analysis of a few visual aspects, but "determining impacts" and "identifying potential conditions" are basically what constitutes conditional use evaluation, so that language cannot be considered as suitably directing the inquiry and deliberation of the Planning Commission. *See Thurston v. Cache County*, 626 P.2d 440, 443-44 (Utah 1981).

[61] Findings of Fact, Finding No. 33.

[62] Like the Visual Analysis required by Subsection (2), the language of Subsection (5) requires "coordination" with adjacent properties, but does not provide standards to direct the Planning Commission's decision-making.

d. Subsection (6): Building Form and Scale.

Subsection (6) focuses on the form and scale of the building, and encourages low-profile buildings and smaller components rather a single building. Again, the Planning Commission cited the language of Subsection (6), and concluded that unidentified impacts could not be mitigated. The language of the subsection suggests possible actions (low-profile homes or small components) that could be taken when a proposed building is "orient[ed] against the Lot's existing contours," but these are the potential conditions, not the impacts which would justify denying the Steep Slope CUP.[63]

In addition, the City's planning staff concluded that the home and garage are oriented with existing contours, and that significant portions of both buildings are below ground, reducing the profile of the buildings.[64] Although the Planning Commission is not required to adopt the recommendations of the City Staff, it must accept the staff's factual representations and interpretations of the proposed building. If the staff determines that the home and garage are oriented to the existing slope, the Planning Commission must abide by that conclusion. If the buildings are oriented with existing slopes, then the Commission cannot find that there are detrimental impacts stemming from the form and scale of the buildings.

e. Subsection (7): Setbacks

According to the City code, the setbacks for a structure subject to a Steep Slope CUP may be increased, to minimize a "wall effect" along a street front or the rear of a lot. *Id.*, § 15-2.1-6(B)(7). If there is no wall effect created by a structure, no increase in the setbacks may be required. In its analysis, the City's staff concluded that there are no "wall effects" on either the front or rear yards. The staff's conclusions are supported by the drawings and plans included in the materials submitted for this Opinion. The garage/elevator building is set back several feet from the street, and the home is situated several feet from the rear property line.

Nevertheless, the Planning Commission found that the Jorgensen's home had impacts that could not be mitigated which related to the building's setbacks. The Commission's findings ignore any perceived "wall effect" and are based on the amount of the building

[63] This is also an example of how the specific conditions and limitations of the property should be included in the analysis. Given the limited amount of usable space on 30 Sampson, it is unclear how breaking the buildings into smaller components could feasibly make a difference in the overall impact of the development.

[64] The Staff's analysis stated that "[t]he top floor of the home walks out to the existing grade of the top of the lot, and the main floor walks out to the existing downhill side of the lot." In addition, approximately 1/3 of the home is below ground, which lowers the profile of the building.

pad occupied by the two structures.[65] The Planning Commission exceeded its authority with regards to Subsection (7). Setbacks may be increased only to mitigate a "wall effect," not because the Commission feels that too much of an approved building pad is being used.

Furthermore, the Commission exceeded its discretion by misapplying a portion of Subsection (7). If an increase in setbacks is proposed, "[t]he Setback variation will be a function of the Site constraints, proposed Building scale, and Setbacks on adjacent Structures." *Id.* This language limits discretion over setback changes, but the Planning Commission turned that language on its head, making it the basis for a finding that the home has impacts that cannot be mitigated. *See* Findings of Fact, Finding Number 36.[66] This distortion of the ordinance's language cannot reasonably support the Planning Commission's findings regarding setbacks.

f. **Subsection (8): Dwelling Volume.**

Subsection (8) focuses on the volume of a structure subject to a Steep Slope CUP. The volume or mass of a structure may be reduced "to minimize its visual mass and/or mitigate differences in scale between a proposed Structure and existing Structures." The Planning Commission found that the basement "add[ed] significant volume to the building . . .." Findings of Fact, Finding Number 37. There was no discussion of why the basement level constituted a detrimental impact, or how it negatively affected nearby properties.

The Commission further concluded that the Jorgensen's home was "not compatible with existing historic homes in the neighborhood with respect to height, setbacks, mass, or scale, and the proposed home and garage buildings offer no substantial mitigation measures necessary to show compatibility with the nearby existing structure." *Id.*, Finding Number 38. Although there is a reference to nearby homes, there is again no finding that the volume of the two buildings constituted a potential adverse effect on those properties.

It not sufficient to point out that a proposed structure is larger than nearby buildings. As long as a structure fits within the size limitations of the City's ordinances, it should be allowed, even if it is significantly larger than nearby buildings. Subsection (8) authorizes the Planning Commission to reduce a structure's volume. That authority, however, may only be exercised as a condition to mitigate a detrimental impact. Unless it is shown that

[65] As has been discussed, the building pad is defined by the setbacks approved for the lot. The buildings may be located within that building pad, and the City does not regulate how much of the building pad may be occupied.
[66] As with the other criteria, the Planning Commission did not identify a specific detrimental impact related to the setbacks for 30 Sampson.

> a building's volume is linked to an adverse effect on a nearby property, the Planning Commission may not order a reduction, nor may it simply deny the conditional use permit.[67]

To conclude, the Planning Commission failed to identify any detrimental impacts caused by the Jorgensen home, and so its findings and conclusions are missing a critical analytical component.[68] The Commission's blanket statements that the home has "impacts that cannot be substantially mitigated" are not supportable without identifying the adverse impacts on neighboring properties (or the hillside environment) attributed to the home. The detrimental impacts must be ascertained and defined in order to decide what conditions could be imposed, as well as find that the proposed conditions cannot substantially mitigate the impacts. It is also insufficient to state generalized impacts associated with a building or use. The impacts must be directly attributable to the particular building or use being scrutinized, and must be based on distinct adverse effects on nearby properties or the hillside environment. Once the specific impacts are identified, the analysis turns to conditions to mitigate those impacts.

IV. Before a Conditional Use Permit May be Denied, Conditions to Mitigate Detrimental Impacts Must be Considered.

After the detrimental impacts associated with a specific use have been identified, the next step is selection and evaluation of conditions to mitigate the impacts. A conditional use permit may be denied only it is shown, by substantial evidence, that the impacts *cannot* be substantially mitigated by reasonable conditions.[69] The conditions, therefore, must directly address adverse effects attributed to the use. A land use authority may not impose conditions which are not associated with a use, even if the conditions would be beneficial to the neighborhood.

The Park City Planning Commission denied the Steep Slope CUP for the Jorgensen property without considering any conditions, and without determining by substantial evidence that reasonable conditions could not mitigate detrimental impacts associated with the use. The Commission's analysis is therefore incomplete. It cannot justify denying the CUP without considering conditions to mitigate detrimental impacts. The City argues that it is not obligated to propose conditions, but that the Jorgensens have that responsibility. The Jorgensens counter that the City has the responsibility to propose conditions before the CUP may be denied.

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[67] The Commission's consideration of the ninth criterion, "Building Height" was discussed above, in Section I.C.2, *supra*.

[68] This does not mean that the Planning Commission has no authority to deny the Steep Slope CUP. If conditional use analysis is needed for the Jorgensen home or the garage/elevator building (see Section II, *supra*), then denial remains within the Commission's authority. As long as it shows, with substantial evidence, that the detrimental impacts associated with the buildings cannot be mitigated with reasonable conditions, the CUP may be denied.

[69] UTAH CODE ANN. § 10-9a-507(2)(b). "Substantially mitigated" does not mean "completely eliminated." If the adverse effects of a particular use can be reduced in an appreciable manner through reasonable conditions, then the CUP should be approved. The land use authority may also determine that an impact has been sufficiently mitigated, even if neighboring property owners complain about the use.

In reality, both parties have a responsibility to propose conditions that would mitigate the impacts of the use, although it starts with the City. The City correctly notes that it is not obligated to redesign the Jorgensen's home, and the Jorgensen's are also correct that they should not be required to "guess" the type of conditions desired and be asked to submit repetitive plan changes. Evaluation of a conditional use permit, like consideration of most land use applications, is a process involving input from the property owner, a local planning staff, and the land use authority.[70] As an application is reviewed by staff members, evidence of concerns may be received and addressed, and conditions incorporated into the design before a land use authority considers the application. At a public hearing on the application, if one is held, concerned neighbors and the land use authority itself may provide evidence to identify potential impacts, and may suggest possible conditions. The land use authority bears the responsibility to identify the detrimental impacts, and also should provide guidance on how the impacts may be mitigated. The process reaches a conclusion, of course, when the land use authority approves the conditional use permit with reasonable conditions, or denies it, after finding that the impacts cannot be substantially mitigated.

Because the Park City Planning Commission did not propose or consider any specific condition, this Opinion cannot evaluate that aspect of the conditional use process. By failing to consider conditions, however, the Planning Commission's analysis was incomplete and its denial not supported by substantial evidence. At the very least, the Commission should have indicated how the detrimental impacts could have been mitigated (assuming that detrimental impacts were identified), or suggested conditions to the Jorgensens.

Conclusion

Conditional uses are valuable components of a community's planning and zoning regulation. Some uses require extra scrutiny because of unique characteristics or impacts, including impacts directly associated with a use's location. A local government may choose to more closely evaluate a use before it is approved, in order to address possible detrimental impacts to a community or to neighboring properties.

Conditional uses are part of a community's zoning scheme, and must be administered as part of an overall zoning ordinance, not as an exception to it. When considering conditional use applications, local governments should include the design and use standards of the zoning ordinance, plus any approvals previously granted on the property. A local government has some discretion over conditional uses, but that discretion must be limited to the authority granted by the state code and a local ordinance. All determinations associated with a conditional use evaluation must be supported by substantial evidence

[70] In many locations, conditional use permits are considered by a planning commission. However, other bodies may be designated as the "land use authority," which is the term used in the Utah Code. *See* UTAH CODE ANN. § 10-9a-103(23).

In order to properly evaluate a conditional use application, the detrimental impacts attributed to that use must be identified. The impacts must derive from the specific use being evaluated. It is not necessary to show an actual injury to a neighboring property, but only the reasonable likelihood that the use will have some adverse effect. Generalized conclusions about the use, without consideration of the particular circumstances will not suffice to show detrimental impacts.

Once the impacts are identified, conditions can be proposed to mitigate the adverse effects. The evaluation is not complete unless reasonable conditions have been considered. Conditions must be directly tied to mitigating detrimental impacts, and may not be imposed as a means to accomplish other objectives. Because conditional use evaluations are processes rather than single actions, the responsibility to propose reasonable conditions is shared with the property owners, planning staff, and the land use authority. At any point in the evaluation process, conditions may be proposed by any party and incorporated into the plans for the conditional use if supported by substantial evidence.

Ultimately, the land use authority has the final decision on whether to grant the use. If the land use authority identifies specific detrimental impacts associated with the use, it must consider conditions to mitigate those impacts. The application may be denied only if the detrimental impacts associated with the use cannot be substantially mitigated by reasonable conditions. A decision to deny the conditional use application requires consideration of conditions, and must be supported by substantial evidence.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Marci Heil
City Recorder
Park City
445 Marsac Avenue
Park City, Utah 84060

On this _____ Day of March, 2014, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

_____
Office of the Property Rights Ombudsman

Exhibit A

Findings of Fact and Conclusions of Law

Park City Planning Commission

June 26, 2013

July 3, 2013
Michael and Laurie Jorgensen
3648 Wrangler Way
Park City, Utah 84098

NOTICE OF CITY COUNCIL ACTION

Project Description: Steep Slope Conditional Use Permit

Project Numbers: PL-12-01487

Project Address: 30 Sampson Avenue

Date of Final Action: June 26, 2013

Action Taken
On April 10, 2013, the Planning Commission held a regularly scheduled Public Hearing to consider the approval of a Steep Slope Conditional Use Permit (SS-CUP) application for 30 Sampson Avenue. During that same meeting, the Planning Commission voted to deny the requested SS-CUP and directed Staff to draft findings of fact in support of the decision to deny the request based on the evidence and reasoning put forth by the Planning Commission during the same meeting. The Planning Commission met on the June 26 2013, and voted unanimously to ratify the following Findings of Facts and Conclusions of Law:

Findings of Fact:

1. The property is located at 30 Sampson Avenue.
2. The property is within the Historic Residential (HRL) District.
3. The property is Lot 3 of the Millsite Reservation Supplemental Plat, which was recorded in 1995.
4. The Lot area is 7,088 square feet, the minimum lot size in the HRL district is 3,570 square feet.
5. The subject property is very steep ranging from flat areas near Sampson Avenue and climbing uphill with slopes reaching between 30-40% before reaching the main body of the lot.
6. The proposal consisted of a single family dwelling of 4,585 square feet which includes a 453 square foot detached garage, a 350 square foot garage entry and a 106 square foot access tunnel which is located below ground.
7. Plat notes indicate the maximum square footage allowed for this lot is 3,000 square feet with an additional allowance of 400 square foot for a garage.

8. A 1998 letter from the (then) Community Development Director Richard Lewis, determined that the 3,000 square foot maximum only applied to the above ground portion of the future dwelling, and that basement areas would not count against the 3,000 square foot maximum so long as they were constructed fully below the finished grade. This letter was recorded on the title of the property.
9. The Land Management Code has been amended numerous times since 1998.
10. An overall building footprint of 2,272 square feet was proposed. Under the current LMC, the maximum allowed footprint is 2,355.5 square feet, based on the total lot area.
11. The applicant submitted a visual analysis, and renderings showing a contextual analysis of visual impacts.
12. No streetscape analysis was presented to the Planning Commission as requested by the Planning Commission.
13. The cross canyon view contains a back drop of both structures, a two (2) story home up the hill with a two (2) story garage building in front.
14. The proposed design incorporates a driveway from Sampson Avenue on the top slope of the street and provides two (2) legal off-street parking spaces, which meets the minimum parking requirement.
15. The detached garage/elevator building is set back fifteen feet (15') from the front property line, and the main portion of the building (the habitable portion of the overall dwelling) is located approximately 77 feet from the street.
16. At their closest points, the two buildings are approximately nine (9) feet apart from each other and are attached by a deck with footings, which attaches the elevator building to the upper (second) floor of the main house.
17. The proposed height of the main building (home) and the elevator building is twenty seven feet (27').
18. 2,996 square feet of the total 4,041 square feet of building space is above ground.
19. The building locations and the proposed building designs both climb up the hill from Sampson Avenue. The proposal utilizes virtually the entire lot rather than concentrating the structure on one portion of the lot. The structures by their placement, massing and height are not located on the lot in a manner that reduces the visual impact.
20. The lot has been deemed to have eight (8) different sides, and thus a Planning Director determination for setbacks has previously been determined and calculated as outlined within the analysis section of the report.
21. The proposed home attempts to maximize the minimum setbacks on each of the property lines. The proposed garage building maximizes the setbacks on the front and on the south property line.
22. There is no proposed screening of the home from Sampson Avenue due to the fact that the home climbs up the hill from the right-of-way, and that there is proposed parking and driveway area in front of the garage. There is no proposed screening of the home between the elevator building and the home due to the fact that the applicant has proposed an attached deck and patio connecting the two structures, thus minimizing any screening opportunities with exception of adjacent properties that are already screened by existing "Gamble Oaks" and other existing vegetation.

23. The scope of the project requires extensive retention of the hillside, and no substantial mitigation has been proposed to reduce the detrimental impacts to the hillside and the design is not appropriate to the topography of the site. The revised design provided by the applicant since the original inception shows substantial retention and retaining walls around the south property line and substantial retention and retaining walls around the garage building on the north property line.
24. The visual analysis cannot include what could potentially be built around the proposed home as doing so would be purely hypothetical.
25. The lot analysis presented by staff for Sampson Avenue and adjacent properties to the subject property are irrelevant for comparison because the study only takes into consideration lot size and home size, and does not take into consideration the height, setbacks, mass and scale of existing historic homes located on adjacent property, or nearby properties, including those located within the same District on King Road, thus making the analysis dissimilar for compliance with the LMC and General Plan.
26. The Existing Home Size Analysis for neighboring properties in the Staff Report does not reflect current LMC requirements, and most of the homes in the area were built prior to the current code requirements and considerations, and thus should not be used when looking at comparable home sizes consider that some of the homes in the analysis could not be built under the current LMC requirements.
27. There are existing historic homes as listed in the Historic Sites Inventory near the proposed site on Sampson Avenue, including the adjacent 40 Sampson Avenue, (approximately 1,700 square feet), 41 Sampson which is across the street from the subject property (approximately 900 square feet) as well as nearby 60 Sampson Avenue and 115 Sampson Avenue.
28. The proposal does not meet the purpose statement of the Historic Residential-Low (HRL) district, specifically §15-2.1-1(C) *preserve the character of Historic residential Development in Park City.*
29. The proposal does not meet purpose statement (LMC §15-2.1-1)(E) *encourage construction of Historically Compatible Structures that contribute to the character and scale of the Historic District, and maintain existing residential neighborhoods.*
30. The proposal does not meet purpose statement (LMC §15-2.1-1)(F) *establish Development review criteria for new Development on Steep Slopes which mitigate impacts to mass and scale and the environment.*
31. The proposed development has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(1) "Location of Development" due to the fact that the building locations and the proposed building designs do not reduce visual and environmental impacts because both climb up the hill from Sampson Avenue, and because the proposal utilizes virtually the entire lot rather than concentrating the structure on one portion of the lot. The structures are not located on the lot in a manner that reduces the visual impact.
32. The proposed development has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(2) "Visual Analysis" because the proposal does not provide screening, vegetation protection, or other design opportunities that could have been incorporated into the design to help mitigate these issues.

33. The proposed development has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(5) "Building Location" due to the fact that the proposal does not coordinate with adjacent properties to maximize opportunities for open areas and preservation of natural vegetation to minimize parking areas.
34. The proposal has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(6) "Building Form and Scale" because the applicant is not proposing "smaller components" nor are they proposing low-profile buildings that orient with the existing contours. Both buildings are large and are not broken into the smaller components as encouraged by this sub-section of the LMC.
35. The proposed has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(7) "Setbacks" due to the fact that the proposed setbacks only help to maximize the building site and are not compatible with other historic structures in the neighborhood.
36. LMC §15-2.1-6(B)(7) requires that the variation in setbacks will be a function of the site constraints, proposed building scales and setbacks from adjacent structures, and the proposed buildings do not consider the site constraints and thus cannot be substantially mitigated.
37. The proposed home has impacts that cannot be substantially mitigated with respect to LMC §15-2.1-6(B)(8) "Dwelling Volume" due to the fact that the proposed basement adds significant volume to the building, which was an issues that was raised by the City Council in the minutes of the 1994 City Council meeting to approve the Subdivision that created the subject lot.
38. The proposed home is not compatible with existing historic homes in the neighborhood with respect to height, setbacks, mass or scale, and the proposed home and garage buildings offer no substantial mitigation measures necessary to show compatibility with the nearby existing structures.
39. Height within the HRL District is limited to three (3) stories, and the proposal is for two buildings a main structure (home) and a garage with an elevator building that connects to the home by a patio and a deck. The two buildings appear by their placement to be a five (5) story building. Connecting the buildings in this manner does not meet the intent of the LMC §15-2.1-5(B).
40. The basement proposed does not meet the criteria for not having it count against the overall building size maximum of 3,000 square feet as noted on the 1995 Millsite Supplemental Plat, because there are windows and a window well in the basement, making the basement not fully below grade, which was the criteria as described in the Plat note for the property, as stated in Finding of Fact #8.
41. The visual mass of the proposed dwellings have not been mitigated by this home design.
42. Additional parking beyond the minimum two (2) required spaces might be necessary due to the location of the home on a sub-standard street that offers no off-site parking.
43. This Ratification was continued from the April 24, 2013 Planning Commission meeting.

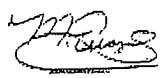
Conclusions of Law:

1. The proposed development does not meet the "Purpose" of the HRL District, specifically with respect to LMC §15-2.1-1(C)(E) and (F).
2. The proposed does not meet the criteria for development on steep slopes, specifically Land Management Code §15-2.1-6(B)(1-2), and (6-9).
3. The proposal is not historically compatible with other buildings within the HRL District, or areas nearby with respect to setbacks, height, mass or scale.
4. The proposed development does not meet the intent of the maximum height requirement restriction of no more than three (3) stories as required in LMC §15-2.1-5(B).
5. The reasonably anticipated detrimental effects of the proposed home and garage buildings on a steep slope cannot be substantially mitigated by the proposal or imposition of reasonable conditions to achieve compliance with the applicable standards specifically LMC §15-2.1-6(B)(1-2) and (6-9).

Order: The Steep Slope Conditional Use Permit for the proposed new single-family dwelling 30 Sampson Avenue is hereby denied for the reason specified within the Findings of Fact and Conclusions of Law listed herein.

The action taken by the Planning Commission can be appealed to the City Council if said appeal is filed within ten (10) days of this final action letter. If you have any questions or concerns regarding this letter, please do not hesitate to call me at 435-615-5063.

Sincerely,



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