Advisory Opinion 181

Parties: William A. Kershaw, Janet F. Kershaw, Liliana Ines Pienzi-Joseau,

and Thomas L. Simpson, Park City

Issued: March 7, 2017

TOPIC CATEGORIES:

Entitlement to Application Approval (Vested Rights)

The Park City Planning Department's Determination of Significance application was properly submitted and did not expire prior to the Historic Preservation Board meeting in which it was considered.

Nevertheless, the property owners' demolition permit application is entitled to approval. The amended ordinance that went into effect on December 26, 2015, modifying historic site designation criteria, did not automatically designate the 569 Park Avenue residence to the Historic Sites Inventory. Since there was no longer a pending ordinance in place after the amended ordinance went into effect, the pending ordinance rule no longer prevented consideration of the property owners' demolition permit application. Therefore, on that date, the demolition application vested and was entitled to approval.

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ADVISORY OPINION

Advisory Opinion Requested By:	William A. Kershaw, Janet F. Kershaw, Liliana Ines Pienzi-Joseau, & Thomas L. Simpson
Local Government Entity:	Park City
Type of Property:	Residential
Date of this Advisory Opinion:	March 7, 2017
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUES

1. Whether the Park City Planning Department's August 7, 2015 Determination of Significance application was properly submitted and whether it expired before the Historic Preservation Board considered it;
2. Whether the property owners possess a vested right to demolish the residence at 569 Park Avenue;
3. Whether the Historic Preservation Board erroneously listed the 569 Park Avenue residence as a significant site on the Park City Historic Sites Inventory;
4. Whether Park City has effected a taking of private property without just compensation by denying the owners' demolition permit application and preventing the construction of two residences on the two lots at 569 Park Avenue.

SUMMARY OF ADVISORY OPINION

The Park City Planning Department's Determination of Significance application was properly submitted and did not expire prior to the Historic Preservation Board meeting in which it was considered.

Nevertheless, the property owners' demolition permit application is entitled to approval. The amended ordinance that went into effect on December 26, 2015, modifying historic site designation criteria, did not automatically designate the 569 Park Avenue residence to the Historic Sites Inventory. Since there was no longer a pending ordinance in place after the amended ordinance went into effect, the pending ordinance rule no longer prevented consideration of the property owners' demolition permit application. Therefore, on that date, the

demolition application vested and was entitled to approval. That fact that the City's Planning Department submitted a Determination of Significance application nominating the residence to the Historic Sites Inventory prior to the property owners' submittal of a demolition permit application does not act as an exception to the vesting rule.

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 William A. Kershaw, *et. al.*, on May 23, 2016. A copy of that request was sent via certified mail to Diane Foster, City Manager for Park City, at 445 Marsac Avenue, Park City, Utah. The City received the request on May 26, 2016.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, with attachments, submitted by Wade Budge & Graham J. Gilbert, Attorneys for William A. Kershaw, *et. al.*, on May 23, 2016.
2. Supplemental Submission Letter submitted by Jordan Lee, Attorney for William A. Kershaw, *et. al.*, on August 16, 2016.
3. Response from Justin J. Keys, Attorney for Neighbors to the Property, received August 18, 2016.
4. Response from Polly Samuels McLean, Assistant City Attorney for Park City, received September 6, 2016.
5. Supplemental Response Email from Polly Samuels McLean, Assistant City Attorney for Park City, received Friday, October 7, 2016.

BACKGROUND

This dispute involves a residence located at 569 Park Avenue in Park City, Utah. The residence straddles lots 17 and 18 of Block 5, Amended Plat, Park City Survey. The original cross-wing structure was constructed sometime prior to 1889. That residence was either significantly remodeled or replaced in 1923 with a bungalow-style residence that now sits on roughly the same footprint as the original home. From 1923 until 1987, components of the residence, such as exterior materials, the porch, and the roof, were periodically updated and modified in ways that

materially altered the original look and form of the structure as a bungalow.[1] In 1978, the Utah State Historical Society evaluated the home as a historic structure and deemed it "Not Contributory" because, at that time, it was "a one-story frame with a gable roof, and aluminum siding." The Society concluded that these "major" alterations disqualified the residence from historic status according to the Society's evaluation criteria, "since the structure originally appeared as a framed bungalow with hip roof."

Park City subsequently registered a National Historic District that included the home, and began a Historic Preservation Grant program. In 1987, the then-owner of the residence, Tim Lee, obtained a $5,000 Historic Preservation Grant to perform renovations. According to Mr. Lee, the purpose of the grant was to restore some of the historic features of the home by "remov[ing] the 50's aluminum siding and rebuild[ing] a sun porch and sloping front roof to match the old tax photos." Letter from Justin J. Keys, dated August 18, 2016, Exhibit B. In restoring the roof to a hipped design[2], Mr. Lee requested that he be able to "keep a small part of the gable to allow for attic ventilation." The Park City Planning Department accommodated the proposal on the condition that the original roof framing be left in place, which it was.

In 2008 or 2009, the residence was placed on the City's Historic Site Inventory (the "HSI") based on a reconnaissance level survey conducted by Preservation Solutions that concluded the home was a "significant site." Subsequent to this listing the current owners (the "Families") purchased the home. In 2010, the City's Historic Preservation Board (the "HPB"), the administrative body tasked with designating sites to the HSI, reevaluated the structure under the City's criteria for HSI designation and delisted the property.

In the spring of 2015, several Park City Historical Community stakeholders and neighbors (the "Neighbors") learned that the residence, along with several other properties, had been delisted from the HSI. The Neighbors approached the Park City Planning Department about the delisting with concerns that the 2010 delisting hearing was not properly noticed. In addition, the Neighbors argued that the reasons for the delisting may have been based on inaccurate information and municipal code interpretations. The Neighbors subsequently raised these concerns with the City Council at a July 30, 2015 City Council meeting.

In response to the Neighbors' concerns, the City Council scheduled an August 6, 2015 City Council meeting in which the HSI and standards and interpretations used to list and delist structures to the inventory were discussed. The Neighbors used this forum to express their concerns about the 569 Park Avenue residence and the circumstances under which it was delisted from the HSI. As a result of this meeting, the City Council expressed a desire to revisit standards in the City Code for listing and delisting properties on the HSI, and directed staff to initiate a pending ordinance. On the following day, August 7, 2015, the Planning Department published notice for an ordinance amendment entitled, "Ordinance Amending the Land Management Code Section 15, Chapter 11 and all Historic Zones to Expand the Historic Sites Inventory and Require Review by the Historic Preservation Board of Any Demolition Permit in a Historic District."

[1] Specifically, the roof was modified from a hipped roof to a gabled roof, aluminum siding was added, and the porch was enclosed.

[2] The submitted documents present inconsistent accounts regarding when each of the improvements to the roof and porch were made. Regardless, the changes were completed by 1995, and the discrepancies do not affect our analysis.

Also on August 7, 2015, the Park City Planning Director submitted an application for a Determination of Significance ("DOS") involving the 569 Park Avenue property. The intent of this application was to nominate the residence to the HSI. Between August 13 and December 17, 2015, the Historic Preservation Board and the Planning Commission each met several times to discuss and draft the pending ordinance. In the midst of these meetings, the property owner of 569 Park Avenue filed an application for a demolition permit to tear down the 569 Park Avenue residence on September 2, 2015. The City did not approve the permit at that time, citing the pending ordinance and the pending DOS application as reasons for delaying consideration.

On December 17, 2015, the City Council adopted Ordinance 15-53, amending the criteria the HPB must consider when determining whether to designate a site to the HSI. The effective date of the Ordinance was December 26, 2015. With the new criteria now in place, the Planning Department scheduled a DOS hearing for February 3, 2016 to consider the Planning Director's DOS application involving the 569 Park Avenue property. This hearing was rescheduled to March 2, 2016 at the request of the attorney representing the Families.

On March 2, 2016, the HPB held a public hearing to consider the DOS application. During the hearing, the HPB issued findings that the 569 Park Avenue property met the new criteria for a "significant site" and designated the property to the HSI. The Families appealed this determination to the Board of Adjustment (the "BOA") on March 14, 2016, and a hearing was scheduled for May 24, 2016. Prior to the BOA hearing, the Families submitted a Request for Advisory Opinion to this office on May 23, 2016 and the City and Families mutually agreed to postpone the BOA hearing until after our consideration.

The property owners, in their request for an advisory opinion, have asked us to examine the following questions:

1. Whether the Planning Department's August 7, 2015 Determination of Significance application was properly filed and whether it expired 30 days after it was submitted;
2. Whether the property owners possess a vested right to demolish the residence at 569 Park Avenue;
3. Whether the HPB erroneously listed 569 Park Avenue as a significant site on the Park City Historic Site Inventory
4. Whether the City has effected a taking of private property without just compensation by denying the owners' demolition permit and preventing the construction of two homes at 569 Park Avenue.

ANALYSIS

I. The Determination of Significance Application was Properly Submitted and Did Not Expire Prior to the March 2, 2016 Historic Preservation Board Hearing

The Families contend that the Planning Department's DOS application was improperly filed and also expired prior to the March 2, 2016 Historic Preservation Board meeting in which it was considered. The Families assert that the application was improperly filed because Park City

Municipal Code only allows property owners or the City's Planning Department, and not third-parties, to nominate sites to the HSI. They conclude that because the Planning Department filed the application based on a request from neighbors of the 569 Park Avenue property, the application came from a third-party, and the City shouldn't have accepted the application.

Additionally, the Families assert that the application expired prior to the March 2, 2016 Historic Preservation Board meeting because the hearing was not held within 30 days of receipt of the application, as required by Park City Municipal Code § 15-11-10(B)(1).[3] They assert that because the application expired, the Historic Preservation Board lacked authority to consider the application, and the Planning Department should have been required to submit a new application after 30 days from the original application date lapsed.

A. Rules of Ordinance Interpretation

This question concerns the proper interpretation of a City's ordinance. Courts apply established rules to determine the correct interpretation of a municipal ordinance. This begins with an analysis of the ordinance's plain language. *Carrier v. Salt Lake County,* 2004 UT 98, ¶ 30, 104 P.3d 1208. The primary goal of interpretation is "to give effect to the legislative intent, *as evidenced by the plain language*, in light of the purpose the statute was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171 (emphasis added). "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.

Moreover, ordinances should be construed in a manner that renders all parts of the ordinance "relevant and meaningful," *Foutz*, 2004 UT 75, ¶ 11, 100 P.3d 1171, and a correct reading should not "impose an unreasonable and unworkable construction," *Miller v. Weaver,* 2003 UT 12, ¶19, 66 P.3d 592, or "render some part of a provision nonsensical or absurd." *Perrine v. Kennecott Mining Corp.,* 911 P.2d 1290, 1292 (Utah 1996).

Applying these interpretive rules, we conclude that the Planning Department's DOS application was properly submitted, and that it did not expire prior to the March 2, 2016 Historic Preservation Board meeting.

B. The Planning Department Properly Filed the Determination of Significance Application

First, the ordinance governing which parties may nominate a site to be listed on the HSI states that a property owner or "[t]he Planning Department may nominate a…Structure for listing in the Park City Historic Sites Inventory." PARK CITY MUNICIPAL CODE § 15-11-10(B). This provision gives the Planning Department express authority to nominate a structure to the Historic Sites Inventory. Since the Planning Director, who is the head of the Planning Department, submitted the DOS application, the application was legally and properly submitted pursuant to Park City Municipal Code requirements. It is immaterial that neighbors asked the Planning Department to

[3] "Upon receiving a Complete Application for designation, the Planning staff shall schedule a hearing before the Historic Preservation Board within thirty (30) days." PARK CITY MUNICIPAL CODE § 15-11-10(B)(1).

designate the residence to the HSI. The Planning Department possessed independent authority to submit an application, and appropriately exercised its discretion to do so.

C. The Determination of Significance Application Did Not Expire Prior to the March 2, 2015 Historic Preservation Board Meeting

Second, the ordinance supporting the Families' proposition that the Planning Department's DOS application expired 30 days after it was submitted on August 7, 2015, states that "[u]pon receiving a Complete Application for designation, the Planning staff shall schedule a hearing before the Historic Preservation Board within thirty (30) days." PARK CITY MUNICIPAL CODE § 15-11-10(B)(1). The plain language of this provision does not express an expiration date for an application. It simply states that City staff has an affirmative duty to schedule the application for a hearing within 30 days of submission, presumably to avoid delays.

The fact that the Planning Department failed to schedule a hearing within 30 days, presumably for reasons related to the pending ordinance under consideration, does not mean the application expired. Such an interpretation would be unfair to applicants, and would result in an unreasonable and nonsensical construction and result. A local government should not possess the ability to cause a development application to expire due to its own inaction. In this case, the rule is designed to protect applicants from delays. As long as the applicant acquiesces to postponing a hearing beyond the 30 day limit, such an extension is appropriate. Under the current ordinance, it makes no difference whether the applicant is a private property owner or a government entity. Accordingly, we conclude that because the plain language of the ordinance does not expressly establish an expiration date for a Determination of Significance application, there isn't one.[4]

II. The Families Obtained a Vested Right to Demolish the Existing Home at 569 Park Avenue When the Amended Ordinance Went Into Effect on December 26, 2015

A. The Families' Demolition Permit Application was Entitled to Approval

The Families next argue that the demolition permit application they submitted on September 2, 2015 was entitled to approval when the amended ordinance went into effect on December 26, 2015. They contend that because the amended ordinance did not automatically designate the residence to the HSI, nothing should have prevented their application from receiving approval. The Utah Land Use, Development, and Management Act ("LUDMA") provides that "[a]n applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's…applicable land use ordinance in effect when a complete application is submitted and all application fees have been paid…." UTAH CODE § 10-9a-509(1)(a)(ii). This is known in Utah as the "vesting rule."

[4] This interpretation is further supported by PARK CITY MUNICIPAL CODE § 14-1-14, which contains the only provision cited by the parties addressing when an application may be terminated. This provision gives the Planning Director discretion to terminate *inactive* applications. There is no evidence that the Planning Director terminated the application in this case. To the contrary, the Planning Director kept the application active through March 2, 2016, evidenced by the fact that the application was considered at the HPB meeting.

Accordingly, if the existing local ordinances allow the activity proposed by the application when a permit application is submitted, the applicant is entitled to have his or her permit reviewed and approved under that ordinance.

State law articulates two exceptions to the vesting rule. The first exception states that an application is not entitled to approval under the provisions of a current ordinance if "the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application." UTAH CODE § 10-9a-509(1)(a)(ii)(A).[5] The second exception states that an application is not entitled to approval if "in the manner provided by local ordinance and before the application is submitted, the municipality has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted." UTAH CODE § 10-9a-509(1)(a)(ii)(B).

The City and the Neighbors argue that while the property was not listed on the HSI when the Families submitted their demolition application on September 2, 2015, the City had nonetheless "formally initiated proceedings to amend its ordinance in a manner that would prohibit approval of the application as submitted." *Id.* Specifically, the City and Neighbors argue that the City initiated proceedings to amend its ordinance in the applicable manner no later than August 8, 2015[6], nearly a month before the Families submitted their demolition permit application.

The Families, in response to this claim, concede that consideration of their demolition permit application was postponed by the pending ordinance, and that their application was subject to the resulting amended ordinance passed on December 17, 2015. However, they contend that even after the amended ordinance went into effect on December 26, 2015, their permit was entitled to approval because the amended ordinance, at the time of passage, did not designate their residence to the HSI.

We conclude that, as long as the demolition permit application was complete and complied with all other local requirements related to non-HSI residences, the Families' demolition permit application became entitled to approval after enactment of the amended ordinance. The amended ordinance did not designate the 569 Park Avenue residence to the HSI, it simply broadened the criteria for inclusion of a site on the HSI. The 569 Park Avenue residence had previously been delisted from the HSI by the HPB. The HPB had not considered the DOS application under the new ordinance to designate the residence to the HSI. Thus, as of December 26, 2015, the 569 Park Avenue residence was not listed on the HSI. Since the pending ordinance rule no longer

[5] The Neighbors argue that the first listed exception involving a compelling, countervailing public interest applies to this case because "the record and Park City [Land Management Code] make clear that preservation of Park City's historic homes is a compelling public interest." They support this argument by citing Goal 15 of the Land Management Code addressing preservation of historic resources for future generations. However, this "public interest" exception only applies when, in this case, the land use authority reviewing the demolition permit finds, *on the record,* that approving the application would jeopardize a compelling, countervailing public interest. *See* UTAH CODE § 10-9a-509(1)(a)(ii)(A). None of the parties have presented evidence that the land use authority in this case has made such a finding on the record. As will be made evident below, it appears that the correct land use authority has yet to review the demolition permit application since the Historic Preservation Board does not have authority to review demolition permit applications for structures not listed on the HSI. Consequently, we decline to further address the argument at this time.

[6] The Families do not dispute this date as the initiation date of the pending ordinance.

allowed the City to postpone consideration of the demolition permit application, the demolition application vested, obligating the City to approve it.

B. The City's DOS Application Did Not Prevent Consideration of the Families' Demolition Permit Application Once the Pending Ordinance Rule No Longer Applied

The City and the Neighbors maintain that because the Planning Department submitted its DOS application before the Families submitted their demolition permit application, the DOS application became a "vested pending application" entitled to review *prior to* consideration of the Families' demolition permit application. They assert that the demolition permit application wasn't entitled to review until after the HPB considered the DOS application and designated it to the HSI. In other words, they argue that the demolition permit application was not entitled to approval because the DOS application, having vested first, eliminates the vesting of the second.

This argument misapplies the pending ordinance rule. A Determination of Significance application seeks an administrative determination, as opposed to a legislative enactment such as a municipal ordinance. This type of administrative application does not create rights or obligations relative to other pending administrative applications, such as demolition permit applications. In other words, a pending application is not a pending ordinance, and thus the pending ordinance rule does not apply. We are unaware of any authority that would establish this "first in time, first in right" principle the City and Neighbors assert regarding administrative applications. Moreover, neither the City nor the Neighbors have directed us to any statute, local ordinance, or case law entitling the DOS application to review prior to consideration of the demolition permit application.

Moreover, assuming that the City's DOS application is eligible for vesting, it can vest only in the same sense that any other administrative application vests—it is entitled review under the ordinance in effect at the time of application. At the time of the DOS application, the 569 Park Avenue residence was not listed on the HSI, nor does it appear it was eligible for listing on the HSI.

The City asserts that "[i]t would be absurd to require the City to ignore a vested DOS application and allow the demolition permit to be processed and the destruction of the house while the status of the house was still pending." To the contrary, the status of the residence was clear following the effective date[7] of the amended ordinance: it was not listed on the HSI because the HPB had not yet designated it to the HSI. The fact that there was an in-process application requesting a determination of the structure's historic significance does not affect the Families' vested right to approval of their demolition application under UTAH CODE § 10-9a-509(1)(a).

III. The Remaining Issues the Families Have Raised are Moot

Because we conclude that the Families are entitled to approval of their demolition permit application, there is no need to address the additional questions of whether the 569 Park Avenue residence was properly designated to the HSI, or whether designation of the residence to the HSI

[7] The effective date of the amended ordinance was December 26, 2015.

would constitute a taking of private property without just compensation under the US and Utah Constitutions. The Families may certainly choose to forego demolition of the residence and voluntarily comply with the regulations imposed by the HSI and associated provisions, but because they are entitled to approval of their demolition permit application, they are not obligated to do so.

CONCLUSION

The Park City Planning Department's Determination of Significance application was properly submitted and did not expire prior to the Historic Preservation Board meeting in which it was considered.

Nevertheless, the property owners' demolition permit application is entitled to approval because the amended ordinance that went into effect on December 26, 2015, modifying historic site designation criteria, did not automatically designate the 569 Park Avenue residence to the HSI. Since there was no longer a pending ordinance in place after the amended ordinance went into effect, the pending ordinance rule no longer prevented consideration of the Families' demolition permit application and the application was entitled to approval. That fact that the City's Planning Department submitted a Determination of Significance application nominating the residence to the Historic Sites Inventory prior to the Families' submittal of a demolition permit application does not legally postpone consideration of the demolition permit application.

The City's Determination of Significance application vested only in the sense that it, like the demolition permit application, was entitled to be reviewed under the standards articulated in the amended ordinance. The City's Determination of Significance application had no binding effect or priority status relative to the Families' demolition permit application.

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:

Diane Foster
City Manager, Park City
445 Marsac Avenue
Park City, UT 84060

On this _____ Day of _____, 2017, 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