Advisory Opinion 263

Parties: Washington School House LLC / Park City

Issued: December 14, 2022

TOPIC CATEGORIES:

Conditional Use Applications

Interpretation of Ordinances

Nonconforming Uses & Structures

Substantive Land Use Review

When an application proposes to change from a legal nonconforming use to some other defined land use, the government must review the proposal on its own merits for compliance with applicable zoning standards, without regard to prior conditions or entitlements of the soon-to-be discontinued nonconforming use.

The owner of a legal nonconforming Bed & Breakfast Inn applied for approval as a Minor Hotel, a defined use allowed in the zone with a conditional use permit. Park City wrongfully denied the CUP by treating the proposal as an "expansion" or "increase" of the existing use, instead of reviewing the proposal for approval on its own merits as a minor hotel. The denial was also based on a misinterpretation of city code finding that certain accessory uses expressly included in the code's definition of hotel were instead standalone uses prohibited in the zone. The denial was arbitrary and capricious as the city's reasons were not legally sufficient.

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ADVISORY OPINION

Advisory Opinion Requested By:	Washington School House LLC
Local Government Entity:	Park City
Applicant for Land Use Approval:	Washington School House LLC
Type of Property:	Residential, Historic Site
Date of this Advisory Opinion:	December 14, 2022
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

Did Park City wrongfully deny a conditional use permit application seeking to convert an existing legal nonconforming Bed & Breakfast Inn use to a Minor Hotel use?

SUMMARY OF ADVISORY OPINION

A local government may deny a conditional use permit only where it makes supportable findings that reasonable conditions cannot mitigate the use's identified detrimental effects to comply with objective, ordinance-based standards. The government must base these required findings on applicable regulations relevant to the application.

Land use ordinances commonly restrict the expansion of a legal nonconforming use; however, when an applicant proposes to change from a nonconforming use to some other defined land use, the government must review the proposal on its own merits for compliance with applicable zoning standards, without regard to prior conditions or entitlements of the soon-to-be discontinued nonconforming use.

The applicant operates a Bed & Breakfast Inn as a legal nonconforming use, but has applied for approval as a Minor Hotel, which is another defined land use allowed with a conditional use permit. Park City wrongfully denied the conditional use permit application by treating the proposal as an "expansion" or "increase" of the prior bed & breakfast use,

instead of reviewing the proposed minor hotel for approval on its own merits. The city made several findings of detrimental effects based on the proposal's noncompliance with prior permits for the bed & breakfast use that do not pertain to a change in use. The city also misinterpreted its code to find that use of dining and meeting facilities within the hotel constituted additional standalone uses that were prohibited in the zone. From this errant basis, the city concluded that the application did not conform with the land use code and that reasonable conditions could not mitigate the detrimental effects it had identified. The denial was arbitrary and capricious as the city's reasons were not legally sufficient.

The application proposes a minor hotel, which is a defined use that includes accessory uses of dining and meeting facilities commonly associated with a hotel, and is allowed in the zone with a conditional use permit irrespective of how the property has been used in the past. Accordingly, the city must review the application as a proposal for a minor hotel use, only, and make appropriate findings regarding compliance with objective, ordinance-based standards. If reasonable conditions mitigate anticipated detrimental effects of the minor hotel use in the zone, the application is entitled to be approved as conditioned.

EVIDENCE

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

1. Request for Advisory Opinion submitted by attorney Wade R. Budge, on behalf of Washington School House, LLC, on June 30, 2022.
2. Letter from Nicole M. Deforge, on behalf of a group of Park City Citizens and Neighbors, on July 22,2022.
3. Letter from Mark D. Harrington, on behalf of Park City, on July 26, 2022.
4. Letter from Wade R. Budge, on behalf of Washington School House, LLC, on August 30, 2022, in response to Ms. Deforge's letter, dated July 22, 2022.
5. Letter from Wade R. Budge, on behalf of Washington School House, LLC, on August 30, 2022, in response to Mr. Harrington's letter, dated July 26, 2022.
6. Letter from Nicole M. Deforge, on behalf of a group of Park City Citizens and Neighbors, on September 9, 2022.

BACKGROUND

Washington School House, LLC ("WSH") owns the historic Washington School House in Park City ("City"), a landmark structure built in in 1889 and considered a historic structure in city code. The property is located in the "Old Town" area, situated between Park Avenue at the front of the property, and Woodside Avenue at the rear. The property is surrounded on three sides by residential housing in the "Historic Residential (HR-1)" zoning district.

Existing Use as a Bed & Breakfast Inn

The property has been operating as a Bed & Breakfast Inn under a conditional use permit ("CUP") initially issued in 1983. At the time, hotels and other lodging facilities were not allowed in the HR-1 zone, but city ordinances gave the Historic District Commission the

authority to approve uses that were not consistent with the zoning regulations when such an approval was necessary to preserve a historic structure.[1] As a result, in order to "save the building from demolition or accidental loss,"[2] the Historic District Commission approved a CUP allowing renovation of the schoolhouse to operate as a Bed & Breakfast together with approved nonconforming parking—a private agreement for 11 parking spots in an off-site parking structure across the street.[3]

Over the years, WSH has received several other approvals in furtherance of the CUP for the Bed & Breakfast use. Of note, in 2001, the City approved a renovation of a detached accessory garage into a flat-roof terrace, concluding it was allowed by the HR-1 zoning and consistent with the 1983 CUP, though cautioning that "programming the flat-roof/terrace for outdoor commercial activities which are inconsistent with the character and scope of bed and breakfast inn operations is not permitted under the 1983 conditional use permit or the HR-1 district regulations."[4]

In 2010, the City approved a "Private Recreation Facility" CUP to construct a lap pool on WSH grounds behind the schoolhouse. Again, the City found that "passive use of the grounds by patrons of the Inn are a permitted use in the HR1 zone and consistent with the 1983 conditional use permit . . . [but] [o]rganized events for the Washington School Inn patrons and/or the general public including parties, weddings, and other public assemblies, are not permitted in the HR1 zone and are outside the scope of the 1983 conditional use permit."[5] Finally, in 2011, the City approved the internal remodel of WSH to reduce the number of rooms from 15 to 12, which is its current operation. The current guest occupancy is approximately 30 as a Bed & Breakfast use.

Application for a Change in use to a Minor Hotel

From the time in 1983 when the schoolhouse was initially approved as a nonconforming bed & breakfast use in the HR-1 district, not only has Bed & Breakfast Inn been added as an allowed use in the district, but several other types of allowed lodging uses have been added, including "Nightly Rental," "Boarding House, hostel," and, "Hotel, Minor."[6]

In 2020, WSH applied for a new conditional use permit to convert the existing 12-room Bed & Breakfast use to a 12-room Minor Hotel use. According to the City's initial staff report reviewing the proposal, "A Bed & Breakfast . . . is limited to guest rooms and facilities for guest meals, whereas a Minor Hotel allows for accessory facilities like

[1] June 8, 2022 Planning Commission Packet, Item 5.B, Exhibit E: 1983 Conditional Use Permit Approval Letter.
[2] *Id.*, Item 5.B, Exhibit D: 1983 CUP Application for Bed & Breakfast.
[3] *Id.*, Item 5.B, Exhibit F. The Staff Report noted that the proposal did not conform to existing parking requirements because "the parking structure would be located off the property, it does not meet side yard setback requirements of the zone, and it exceeds the maximum amount of hard surfaced area allowed for parking." Additionally, "Two parking stalls are 9' x 20' when 10' x 20' is the minimum for outside spaces."
[4] Planning Commission Staff Report, The Washington School Inn, dated April 28, 2021.
[5] *Id.*
[6] *See,* PARK CITY LAND MANAGEMENT CODE ("LMC") § 15-2.2-2 (2022); *see also*, LMC § 15-15-1 (definitions).

restaurants, bars, spas, meeting rooms, group dining facilities, and other activities customarily associated with Hotels."[7]

In WSH's conditional use permit application, WSH asserted that "[f]unctionally, the proposed [Minor Hotel] use will continue much the same as the existing, Bed and Breakfast use," but that the "one exception to the current operation that the applicant seeks to permit[] is the ability of Overnight Guests to invite/host Non-Resident Guests for dining or small gatherings." These small gatherings might include "an informal meeting, corporate meeting, or other social gathering."[8]

When first submitted, WSH's proposal initially sought for both indoor and outdoor facilities to be utilized for special events, and that dining facilities could be available to patrons without overnight accommodations. This proposal received a significant amount of public opposition over the course of four public meetings on the application.[9]

A group of self-organized citizens that reside in the area surrounding the property ("Citizens"), represented by legal counsel, appeared and spoke against the application at scheduled public hearings, and submitted arguments to the Planning Commission as well as to this Office in response to WSH's request for an advisory opinion. Citizens argued, generally, that organized events—including weddings, parties, reunions, and corporate retreats—had already occurred onsite and violated the CUPs for the Bed and Breakfast use. Public comments also focused the gradual but consistent expansion of the use of the property over the years. Citizens' attorney submitted a letter to the Planning Commission lamenting that WSH was "seeking permission to double the use of its property to allow the very things it was expressly prohibited from doing in prior CUPs."

Planning staff also expressed concern that WSH's proposal for its dining facilities effectively opened the use to the general public and likely exceeded the limits of an accessory use of a Minor Hotel, and instead would constitute an additional primary use as a "Restaurant" that could operate irrespective of whether the hotel had any overnight guests (a Restaurant, as a primary use, is not allowed in the HR-1 zone). Planning Staff sought input from the Planning Commission whether the dining facility proposal would constitute an accessory use of a Minor Hotel or a standalone use as a Restaurant.

However, WSH revised the scope of its application in several aspects over the course of the review process with planning staff and public hearing input. As ultimately reviewed by the Planning Commission, the proposed dining and gathering activities would only take place inside the hotel. Non-resident guests were also defined to only include the invitees of overnight guests using the dining facility and indoor gathering areas. WSH proposed a maximum occupancy of 60 guests (plus 8 employees), up to 30 of which would be overnight patrons of the hotel rooms, while the remaining 30 people would be the non-

[7] Planning Commission Staff Report, The Washington School Inn, dated April 28, 2021.
[8] *Id.*
[9] Consisting of two work meetings in 2021 and later two public hearings, the first of which was held in November of 2021 and noted as "brief," and was continued to the second and last public hearing held on June 8, 2022.

resident guests invited by the hotel's overnight patrons. Invited non-resident guests would be limited to certain operating hours, and no walk-ins would be permitted.

Parking Reduction

City code provides an initial parking requirement for a Minor Hotel as 1 parking space per room, but also allows the Planning Commission to approve exceptions. The application sought a parking reduction under city code to satisfy parking requirements for a 12-room Minor Hotel with the existing 11 parking spaces used currently for the Bed and Breakfast Inn. WSH submitted a traffic study concluding that the existing spots were more than sufficient for the demand of the new hotel use.

As for invited non-resident guests, WSH did not anticipate providing any parking for these invitees, who would instead arrive by "private shuttle, ride share, taxi, public transit, or on foot." Finally, delivery and service vehicles serving the hotel would park on Park Avenue with the exception of smaller sized vehicles that could park in the driveway as long as they did not block the sidewalk. Pool service and delivery vehicles would continue to use Woodside Avenue as they had for the Bed & Breakfast Inn use under the 2010 CUP.

As an alternative, should the Planning Commission insist on the full requirement for 12 parking spots under the code, WSH optionally proposed adding one additional parking spot in the rear of the property off of Woodside Avenue to satisfy the required 12th spot. This option, according to Staff Report, would require removal of existing landscaping and vegetation, and a steep slope conditional use permit.

Denial of Conditional Use Permit

WSH notes that it worked with the City's planning department on its current proposal for over two years, and its conditional use application included 42 draft conditions aimed at mitigating any anticipated detrimental effects caused by the Minor Hotel use. Staff recommend approval of the application as ultimately revised by the applicant, and as conditioned by the 42 proposed conditions. At the final Planning Commission meeting, during public comment, Citizens continued to speak against the application.

The Planning Commission ultimately moved to deny the conditional use permit application, the minutes reflecting the reasons being "there was not sufficient parking mitigation for the additional use, there would be a detrimental effect on the surrounding neighborhood, and there were concerns about the number of non-resident guests." The Planning Commission thereafter prepared a written Notice of Planning Commission Action detailing a list of 14 findings of fact, as well as conclusions of law.

The written findings added that the Planning Commission found that (1) the property is subject to two CUPs and that the proposed Minor Hotel use was an "expansion" of the existing Bed & Breakfast use; and (2) the proposed use of dining and other facilities by non-resident guests constituted standalone primary uses of "Restaurant", "Private Event", and "Outdoor Uses", which the Commission found were all prohibited in the HR-1 zone and violated certain restrictions of existing CUPs. Based on these findings, the Planning

Commission additionally found that a parking reduction could not be approved because it would increase traffic and violate existing CUPs, and, alternatively, an added parking space also would increase traffic and violate existing CUPs, and disturb significant vegetation and steep slopes. From these findings, the Planning Commission concluded that the applicant's "request to allow use of the site for Private Events," and to "increase the use of the site" was not compatible with the surrounding structures in use, scale, and circulation and reasonable conditions could not be proposed to mitigate the anticipated detrimental effects of the proposed use.

WSH requested an advisory opinion to determine whether the City erred in denying the application for a conditional use permit.

ANALYSIS

A conditional use is a land use allowed in a particular zoning district, *see* UTAH CODE § 10-9a-507(1), but because of unique characteristics or potential impact of the land use on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas of the district or may be compatible only if certain conditions are required that mitigate or eliminate detrimental impacts. *Id.* § 10-9a-103(8).

A land use authority's decision to approve or deny conditional use is an administrative land use decision, *id.* § 10-9a-507(3), which must be supported by substantial evidence in the record. *Id.* § 10-9a-801(3)(c)(i). If the land use authority imposes conditions, it must "ensure that the conditions are stated on the record and reasonably relate to mitigating the anticipated detrimental effects of the proposed use." *Id.* § 10-9a-507(2)(b). Similarly, in denying an application, the land use authority "must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review." *McElhaney v. City of Moab*, 2017 UT 65, ¶ 35. Findings are "sufficiently detailed [when they] disclose the steps by which [the authority] reaches its ultimate factual conclusions." *Id.* ¶ 36.

A municipality acts arbitrarily and capriciously in denying a conditional use permit where its reasons either have no factual basis or are not legally sufficient. *See, Davis County. v. Clearfield City*, 756 P.2d 704, 713 (Utah Ct. App. 1988).

Here, the Planning Commission made a number of incorrect findings that resulted from mischaracterizing the proposal as well as misinterpreting city code. The City's conclusions were therefore not supported by substantial evidence, and its decision to deny the application was not legally sufficient.

Park City's enacted conditional use ordinance provides three conditional use standards:

1. The Application must comply with all requirements of the land use code;
2. The proposed use must be compatible with surrounding structures in use, scale, mass and circulation; and

3. The effects of any differences in use or scale have been mitigated through careful planning.

See, PARK CITY LAND MANAGEMENT CODE ("LMC") § 15-1-10.D.

The Planning Commission made conclusions for each of these standards in the negative, namely, that: "The Conditional Use Permit is not consistent with the Land Management Code . . . is not compatible with surrounding Structures in Use, scale, mass, and circulation . . . and reasonable conditions cannot be proposed to mitigate the anticipated detrimental effects of the proposed Use." We conclude, however, that the Planning Commission provided either insufficient factual support, or legally insufficient bases for each of the above standards.

First, the Planning Commission made several findings regarding compliance with requirements that were not relevant to the information shown in the application. As a result, the conclusion that the proposal was not compatible with surrounding structures was not supported by substantial evidence as it was based on these irrelevant findings. As to the final standard, the Planning Commission provided no factual support for its conclusion that no reasonable conditions could be proposed to mitigate the anticipated detrimental effects of the proposed use. The applicant had proposed 42 conditions for review, and the Planning Commission's findings are almost silent as to the efficacy of these conditions, instead making conclusory findings that the effects could not be mitigated by condition.

I. The Planning Commission's Findings Were Insufficient Where the Proposal was Reviewed as if it was an Expansion of a Nonconforming Use and Under Regulations Irrelevant to the Use Proposed

Utah's Land Use Development and Management Act ("LUDMA"), as applied to municipalities, provides that a land use application should be substantively reviewed under the land use regulations applicable to the application or to the information shown on the application. UTAH CODE § 10-9a-509(1)(a)(i)(B). That also means that the inverse should be true—if an application does not propose a particular land use, it would be wrong to review the application and make findings under land use regulations not applicable to the application.

A. The application sought a change in use, and prior approvals/conditions for the former Bed & Breakfast Inn have no relevance in determining whether the proposed Minor Hotel complies with applicable conditional use standards.

Here, the applicant proposed a Minor Hotel, a use allowed in the zoning district with a conditional use permit. While the property currently operates as a legal nonconforming Bed & Breakfast Inn, and the applicant's purpose in changing uses sought mostly to "maintain" the current operation with certain exceptions, the Minor Hotel use is legally distinct from a Bed & Breakfast Inn under city code, and as such, should only be reviewed under the land use regulations applicable to a Minor Hotel as a conditional use, without

regard to the existing nonconforming use. By changing land uses, the nonconforming use is being discontinued, and the minor hotel application is therefore not an application that seeks to "expand" or "increase" the nonconforming bed & breakfast use.

This distinction is important because nonconforming use regulations often presume that a nonconforming use should not be expanded or increased, but should rather be reduced—and Park City is no exception.[10] However, conditional use applications are reviewed under an entirely different presumption. Namely, LUDMA considers a conditional use to be a use allowed in the zone, and directs that a land use authority "shall approve a conditional use 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," and may only deny the conditional use "[i]f 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." UTAH CODE § 10-9a-507(2).

Here, the City improperly treated the application as if it were an expansion or increase of a nonconformity. A good portion of the staff report analyzed the proposal according to the differences between the conditions currently imposed on the Bed & Breakfast Inn by prior CUPs and the current Minor Hotel proposal. Public comment on the application, too, largely focused on the proposal as an "increase" or "expansion" of the existing bed & breakfast use. But most importantly, the Planning Commission's findings centered around the proposal as "expanding the Bed & Breakfast Use to a Minor Hotel Use . . . ," Park City, *Notice of Planning Commission Action* ("Notice"), at Findings of Fact #2 (June 27, 2022), and as a request to "increase the use of the site . . . ." *Notice*, Finding #10.

The Planning Commission also explicitly found that the property continued to be subject to prior CUPs, erroneously finding that the proposal violated these CUP conditions in several ways. As a result, the City's conclusion that the application did not conform to enacted conditional use standards wrongfully relied in almost its entirely on the legal fiction that the nonconforming bed & breakfast use still existed for purposes of the application and that this proposal was an "increase [of] the use of the site."

A change in use starts with a clean slate, and is to be reviewed entirely on its own merits for compliance with all existing land use ordinances. The City's conclusions regarding its conditional use standards were legally insufficient because they wrongfully relied on purported noncompliance or other detrimental effects relating to existing CUP conditions, which have nothing to do with a new application for a Minor Hotel use.

[10] Park City has enacted an ordinance on nonconforming uses and structures "intended to limit enlargement, alteration, restoration, or replacement which would increase the discrepancy between existing conditions and the Development standards prescribed by this Code." LMC § 15-9-1 (2000). City Code gives direction that land use applications involving nonconformities "are reviewed to ensure that they are reducing the degree of non-conformity and improving the physical appearance of the Structure and site through such measures as landscaping, Building design, or the improved function of the Use in relation to other Uses." *Id.*

B. The application's proposed use of dining and indoor facilities are accessory uses of a Minor Hotel, not standalone primary uses prohibited by the HR-1 zone

The Planning Commission also wrongfully concluded that WSH proposed operating standalone uses of "Restaurant", certain "Private Events", and/or "Outdoor Uses", all of which are prohibited in the HR-1 district.

First, we note that the finding that Outdoor Uses is prohibited is incorrect on its face as it applies to WSH's application. This is because the ordinance referenced in the Planning Commission's findings, LMC Section 15-4-21 (which does prohibit all outdoor uses unless the zone allows by permit) was not enacted until September of 2020,[11] after WSH submitted its conditional use application on February 18, 2020. Because WSH is "entitled to substantive review . . . under the land use regulations[] in effect on [that] date," UTAH CODE § 10-9a-509, this section prohibiting outdoor uses does not apply to WSH's application.

As for regulations regarding Private Events and Restaurants, when interpreting land use ordinances, the standard rules of statutory construction apply, in which Utah courts will look first to the plain language of the ordinance, *Brendle v. City of Draper*, 937 P.2d 1044, 1047, reading the ordinance "as a whole, [interpreting] its provisions in harmony with other [ordinances] in the same chapter and related chapters." *Foutz v. South Jordan*, 2004 UT 75, ¶ 11. In doing so, the primary goal is "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the [ordinance] was meant to achieve." *Id.*

City code provides that a minor hotel is a hotel with fewer than 16 rooms, *See* LMC § 15-15-1 (2019), while defining "Hotel" as:

> A Building containing sleeping rooms for the occupancy of guests for compensation on a nightly basis that ***includes accessory facilities such as restaurants, bars, spas, meeting rooms, on-site check-in lobbies, recreation facilities, group dining facilities, and/or other facilities and activities customarily associated with Hotels***, such as concierge services, shuttle services, room service, and daily maid service.

Id. (emphasis added). Additionally, the HR-1 zone provides that "Accessory Building and Use[s]" are permitted uses. LMC § 15-2.2-2.A. City code defines Accessory use as "[a] land Use that is customarily incidental and subordinate to the to the primary Use located on the same Lot." LMC § 15-15-1 (2019).

Part of the dispute here is how the use of dining and other facilities was initially submitted, amended, and ultimately reviewed by the Planning Commission. As originally submitted,

[11] *See*, PARK CITY, Ordinance 2020-42. This section on prohibited outdoor uses was previously only part of the Historic Recreation Commercial (HRC) district, but the City amended the Code to move that section to its current location as Section 15-4-22 under the Chapter for "Supplemental Regulations," which "qualify or supplement, as the case may be, the regulations appearing elsewhere in [the] Code." LMC § 15-4-1.

WSH had initially desired that its definition of "non-resident guest" not only mean "guests of overnight guests," but also, "guests using the dining facility and indoor areas that have not reserved overnight accommodations but have made reservations for dining or indoor gathering."

The City's staff report concluded that inasmuch as use of hotel facilities and dining area are tied to guests of the hotel and their invited guests, they should be considered accessory uses of the hotel. However, the as applicant's initial broader definition of non-resident guest would open the inn to anyone, it might no longer be considered an Accessory Use, but rather an additional primary use that would be able to operate irrespective of whether the hotel has any overnight guests. Staff suggested limiting the definition to only "the guests of overnight guests using the dining facility and indoor gathering areas." This amended definition was what was ultimately proposed by WSH when the application came before the Planning Commission at the June 8, 2022 meeting.

We agree that the application's proposed use of dining and indoor meeting facilities by invitees of hotel guests is expressly anticipated in the Code's very definition of minor hotel as "include[d] accessory facilities," as mentioned above. Therefore, as Accessory Uses are a permitted use in the HR-1 zone, and the proposed use pertains to accessory uses of a Hotel, the only relevant land use proposed by WSH's application is a Minor Hotel, and the Planning Commission erred by interpreting its code in a way that considered WSH's application as a proposal for standalone "Restaurant" and "Private Events" uses when plainly permitted as accessory uses of a Minor Hotel. See Utah Code § 10-9a-306(2) ("If a land use regulation does not plainly restrict a land use application, the land use authority shall interpret and apply the land use regulation to favor the land use application").

II. The Planning Commission's Conclusion that the Proposal Was Incompatible with Surrounding Structures was Legally Insufficient as Based on Irrelevant Findings

The City's conditional use standards require that a proposed use be compatible with surrounding structures in use, scale, mass and circulation, or, at least, that the effects of any differences in use or scale have been mitigated. LMC § 15-1-10.D. In other words, a finding that a proposal is ***not*** compatible with surrounding structures is essentially a finding of a detrimental effect under state law. The City's conditional use standards provide a list of 16 items that the Planning Commission "must review" when considering impacts and mitigation, essentially constituting the available "reasons" why a use could be found to be incompatible. *See, id.* § 15-1-10.E.

The Planning Commission's errant findings regarding compliance with the existing CUP conditions or standalone primary uses not applicable to WSH's application are inescapably entangled with its conclusion that the application did not comply with its conditional use standards. Specifically, what the Planning Commission determined was not compatible with surrounding structures in use, scale, and circulation was "the Applicant's request to ***allow use of the site for Private Events***, to allow use of the dining

facilities by non-overnight guests, and to ***increase the use*** of the site from approximately 30 guests to 60 guests for dining ***and Private Events***." (emphases added).

We do not believe that the proper analysis on review would be to attempt to strike out only the illegitimate considerations of the findings and try to make assumptions about to what extent this finding of incompatibility was otherwise partly based on any legitimate factors under the City's conditional use standards. The findings explicitly state as its basis considerations that are irrelevant. This inclusion of irrelevant considerations inherently results in findings of fact and conclusions of law that are inadequate "to permit meaningful appellate review," *See, McElhaney v. City of Moab*, 2017 UT 65, ¶ 35, and are therefore legally insufficient.

As a result, "where [a municipality's] reasons . . . are not legally sufficient," denial of a conditional use permit is arbitrary and capricious. *Davis County*, 756 P.2d 704, at 713.

III. The Planning Commission's Determination that Detrimental Effects Could Not be Mitigated was Conclusory and Not Supported.

A conditional use permit may only be denied if the land use authority finds that 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." Utah Code § 10-9a-507(2).

The applicant worked with planning staff to propose a list of 42 conditions that could be imposed on the proposed use to mitigate anticipated detrimental effects. Other than its findings regarding the applicant's proposed parking reduction, and a conclusory finding that the applicant's "reliance on public parking facilities as a mitigation strategy was unreasonable," the Planning Commission's findings are almost silent as to any possible conditions, either those proposed or those that could be imposed.

Conclusory statements that detrimental effects cannot be mitigated by condition, without any discussion of the efficacy of conditions proposed or able to be imposed, fail to disclose the steps by which the authority reaches its ultimate factual conclusions, and are inadequate for review. *McElhaney,* 2017 UT 65, at ¶ 36.

Here, it would appear that the Planning Commission's findings did not address conditions in detail perhaps because it had concluded, erroneously, that the proposal categorically did not comply with city code as it proposed standalone Restaurant, Private Event, and Outdoor Uses, and otherwise violated prior CUP conditions on the property for the Bed & Breakfast use. Again, these irrelevant findings result in a legally insufficient conclusion regarding whether the identified detrimental effects could be mitigated by reasonable condition. As a result, the decision to deny the conditional use permit was arbitrary, capricious, and illegal.

Ultimately, WSH's application proposed only a minor hotel with relevant accessory uses. The City must therefore review the application as such and make appropriate findings on

that basis. If the application complies with the stated requirements in city ordinances pertaining to a minor hotel use, and the application's 42 proposed conditions—or other reasonable conditions—will mitigate anticipated detrimental effects of that use in the HR-1 zone in accordance with relevant CUP standards outlined in city ordinances, the application is entitled to approval as conditioned.

CONCLUSION

The City's decision to deny WSH's conditional use application for a Minor Hotel in the HR-1 zone was both arbitrary and capricious, and illegal. The decision was illegal as it was based on an incorrect interpretation of applicable ordinances as well as ordinances that were not applicable to WSH's application. The decision was arbitrary and capricious because the Planning Commission's findings were not ordinance-based, not sufficiently detailed, or otherwise not factually supported. The City must review the proposal for compliance with objective code requirements for a Minor Hotel use only, which anticipates the accessory use of its dining and meeting facilities as proposed, and if reasonable conditions will mitigate the anticipated detrimental effects of this Minor Hotel use in this area of the HR-1 zone, the application is entitled to approval.

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Section 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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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 and civil penalty provisions, found in Section 13-43-206 of the Utah Code, 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 § 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:

Matt Dias, City Manager
Park City
445 Marsac Avenue
Park City, Utah 84060

On this ___ Day of _____, 2022, 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