BRUCE R. BAIRD PLLC

ATTORNEY AND COUNSELOR

2150 SOUTH 1300 EAST, FIFTH FLOOR

SALT LAKE CITY, UTAH 84106

TELEPHONE (801) 328-1400

BBAIRD@DIFFICULTDIRT.COM

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VIA ELECTRONIC SUBMISSION AND EMAIL

Mr. Nick Norris. Director
Salt Lake City Planning Department

Re: Edison Street Design Review (D1- CBD)
PLNPCM2023-00707
220 and 250 South 200 East
Appeal of Planning Commission Denial of Design Review

Dear Nick:

I am counsel for JF Luxe Partners II QOZB, LLC, and J. Fisher Companies, LLC, the owner and developer, respectively, of the above-referenced properties and project. This letter sets out the legal basis for my clients' contemporaneously-filed appeal of the Planning Commission's decision on December 13, 2023, to deny the requested design review in the D1-CBD Zone.

I will not go into extensive detail about the project as the Staff Report from Amanda Roman of your office does an excellent job of that. The same Staff Report also explains why your Department recommended approval of the proposed exceptions so I will not go into that either. It should suffice to say that the Staff Report would provide, at the very least, "substantial evidence" to support the granting of the design review exception.

Instead, I will focus only on the Planning Commission's denial. Simply put, that denial was both illegal and illogical. It was illegal because it directly violates a Utah Supreme Court decision and it was illogical because it violates the logic explained in an opinion from the Ombudsman's Office on a very similar issue.

I watched the recording of the Commission's hearing. Contrary to the Record of Decision that was issued after the hearing, the sole basis of the motion to deny at time stamp 1:47:35 of the recording https://www.youtube.com/watch?v=O1geHGiMa80 was that the requested design review exceptions had not established that it met the standards in the Code because it did not comply with the "intent" of the recently adopted changes to

some aspects of the design review standards. That was all there was in the motion. Nothing more.

That basis for the Planning Commission's denial was illegal, arbitrary and capricious. I will not waste a lot of my client's time and money explaining this illegality when there is an opinion from the Utah Supreme Court and the Ombudsman directly on point. As often happens, the Ombudsman's opinion is from a case of mine. https://propertyrights.utah.gov/advisory-opinions/advisory-opinion-164

The following introduction is tightly paraphrased from Ombudsman's Opinion 164. In 2015, a developer proposed to construct a multi-family project located in Pleasant View City's Transportation Oriented Development (TOD) Zone. A stated purpose of the TOD Zone was, among others, to provide standards for development of areas close to Pleasant View's major transportation hubs, and "[p]rovide for development of compatible mixed uses in close proximity to one another to provide a blend of retail, service, office, dining and residential uses."

Pleasant View believed that the proposal was not consistent with the requirements of the TOD Zone because the "Purpose and Intent" section of Pleasant View's City Code contemplated mixed use development and the proposal at issue included only residential uses. If the development were approved as proposed, the entire TOD Zone would have consisted only of multi-family residential housing (as the rest of the similarly zoned property had already been developed in that manner) which Pleasant View believed would not fulfill the intent of the zone. On behalf of the developer, I responded to the City's concern by asserting that the proposal complied on its face with the requirements of the TOD Zone because "multi-family high density residential" was a conditionally permitted use in the zone. I also cited relevant case law which will be discussed below.

Subsequently, the Planning Commission denied the development application determining that the "purpose and intent" of the TOD Zone was not met since the development proposal consisted of a single use (multi-family residential) and did not incorporate other compatible non-residential uses. Mr. Peterson appealed that decision to the City Council as was provided for at the time. Wisely, Pleasant View City's staff appeared to assume that the City Council would make the same mistake and preemptively requested that the Ombudsman provide an opinion about whether the City properly interpreted its ordinance in denying the request for approval.

Section C of the Ombudsman's Opinion is quoted directly below and is dispositive here:

> *C. Legal Effect of the "Purpose and Intent" Section of the TOD Ordinance.*
>
> Pleasant View City asserts that it can require Mr. Peterson to include a mix of uses in its project proposal because of the "Purpose and

> Intent" section of the TOD ordinance. One of the stated purposes of the TOD Zone is to "[p]rovide for development of compatible mixed uses in close proximity to one another to provide a blend of retail service, office, dining and residential uses…." Pleasant View City Code § 18.39.010(A)(2).
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> In *Price Development Co. v. Orem City*, 2000 UT 26[1], ¶ 23, 995 P.2d 1237, the court discussed the role of a policy section in a statute. The court "referred to a statement of legislative purpose as a 'preamble' to the operative provisions of a statute." *Id.* As such, "a preamble is nothing more than a statement of policy which confers no substantive rights." *Id.* The court further explained that these provisions "provide guidance to the reader as to how the act should be enforced and interpreted, but they are not a substantive part of the statute." *Id.* Accordingly, these provisions "may be used to clarify ambiguities, but they do not create rights that are not found within the statute, nor do they limit those actually given by the legislation." *Id.* Since the substantive text of the TOD ordinance unambiguously allows multi-family housing as a standalone use, we need not look to the statement of purpose and intent for clarification.
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> Further, in the event that the "Purpose and Intent" section of the ordinance were considered binding on an applicant for development approval, the plain language of the section states that the purpose of the zone is to "*[p]rovide for* development of compatible mixed uses…." Pleasant View City Code § 18.39.030(A)(2) (emphasis added). The dictionary defines "provide for something" as "[making] it possible for something to happen in the future," *Macmillan Dictionary*, *www.macmillandictionary.com/us/dictionary/american/provide-for*, or encourage it, as opposed to requiring a certain outcome. Thus, the "Purpose and Intent" section by its plain language does not *require* mixed-use development.

The *Price* case is still good law. Therefore, the Planning Commission's decision is illegal (as well as arbitrary and capricious).

To hold that the "intent" of an ordinance is not met merely because there is an exception to the ordinance, which is specifically allowed by the ordinance itself, is nonsensical. Borderline sad. It might even be tragicomic except that the impact on my client is all too real. The intent is, obviously, to allow exceptions.

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[1] https://propertyrights.utah.gov/find-the-law/appellate-decisions/price-development-co-v-orem-city/#:~:text=2000%20UT%2026%2C%20995%20P.2d%201237&text=Public%20property%20is%20held%20in,in%20exchange%20for%20the%20property. I will refrain here from offering a detailed exegesis of *Price* because I think that the Ombudsman's opinion is sufficient.

There was some discussion at the Planning Commission hearing about this application's potential for creating a "precedent".[2] That confusion may have been engendered at least in part by an unfortunate reference to that issue in the otherwise excellent Staff Report. To be clear, the concept of "precedent" in a land use case decision-making process (other than a judicially created "precedent" such as *Price*) makes no sense.

A "precedent" is something that is legally or morally binding on a future consideration of the same or a similar issue under the same or similar facts. Of course, 99.99 % of land use matters do not involve similar facts, issues or laws. The simple fact is that almost all land use decisions involve issues and facts that are, quite literally, *sui generis*. Almost no two properties and their potential or actual development are alike. Properties and developments vary in size, location, surroundings, legal and economic timing as well as details, both large and small, of the design and building plans.

In providing for exceptions from the D1-CBD's presumptive "minimum" height the City Council clearly recognized that mere vertical size was not the be all and end all of the determination of the quality and desirability of any particular development proposed for any particular location.[3] One size does not necessarily fit all. The Council specifically provided a process and standards for evaluating and appreciating quality over mere quantity.

But, instead of thoughtfully considering those carefully enumerated factors, or even looking at the analysis of those factors in the Staff Report, the majority of the Planning Commission just said, essentially, "you are the first application and we don't even want to bother looking at the details because we just don't like it and we are scared to exercise our powers because of what might happen in the future". The Planning Commission, in effect due to a fear of future imaginary horribles, re-wrote the D1-CBD ordinance to eliminate the Council's intended plans and standards for the zone. This, the Planning Commission does not get to do. "Stop me now because at some point in the future I might exercise my powers of discretion in a bad way" is not how government works. At least not how it is supposed to work. Instead, that is the very definition of illegal, arbitrary and capricious.

Fear of making a future mistake is not "substantial evidence" justifying ignoring the "substantial evidence" in favor of the application as presented in the Staff Report and as presented to the Planning Commission at the hearing. The decision must be overturned.

I may need to supplement this letter but given that the 10-day appeal clock is so short and it is the holiday season (and I am traveling in Costa Rica) this should be

[2] By among others, Commissioner Gayle at time stamps 1:18:34 and 1:31:27.
[3] Commissioner Barry got this right in her analysis. See, time stamp 1:32:30. Unfortunately, only she and the Chair actually voted the right way based on the correct legal analysis.

sufficient for now. I would also welcome the opportunity to speak with you and Paul Nielson about this.

I would be remiss if I didn't wish you and your staff a happy holiday season. So, cheers to you and all of your friends, families and staff.

Sincerely,

Bruce R. Baird

cc: Clients