IN THE UTAH SUPREME COURT

WHITNEY CROFT, ROBERT BOHMAN, BRANDON PETERSON, SHELLEY PAIGE, AND DAVID PIKE, **Petitioners/Appellants,** **v.** **MORGAN COUNTY AND STACY NETZ CLARK, in her official capacity as Morgan County Clerk,** **Respondents/Appellees.** **and** **WASATCH PEAKS RANCH, LLC,** **Intervenor/Appellee.**	**Case No. 20200373-SC**

BRIEF OF APPELLEE WASATCH PEAKS RANCH, LLC

On appeal from the Second Judicial District Court, Morgan County
Honorable Noel Hyde, District Court No. 190500095

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INTRODUCTION

Appellants Whitney Croft, Robert Bohman, Brandon Peterson, Shelley Paige, and David Pike (the "Sponsors") are the sponsors of a failed application for a referendum petition (the "Application") relating to a Morgan County land-use ordinance. Upon rejection of the Application by appellee Morgan County through its clerk, Stacy Netz Clark (collectively, the "County"), the Sponsors appealed to the district court. The district court held that the applicable appeal provisions of the Utah Election Code provided district court jurisdiction over such an appeal only if the Sponsors were prohibited from appealing directly to this Court by extraordinary writ, i.e., if appeal to this Court were not possible. The district court concluded that the Sponsors had failed to make this showing and dismissed their appeal.

The Sponsors now appeal from the district court's decision, arguing that they were permitted under Utah Code § 20A-7-602.8(4)(a) to appeal to the district court because they could not satisfy the requirements of Rule 19 of the Utah Rules of Appellate Procedure to appeal by extraordinary writ to this Court. The Sponsors' argument ignores the plain language of Section 602.8 and improperly relies on this Court's decisions interpreting other, inapplicable statutes using markedly different language to establish the appeal procedure. Accordingly, the Sponsors have not demonstrated—and cannot demonstrate—that the district court erred in concluding it lacked jurisdiction where the Sponsors failed to show they were prohibited from pursuing their appeal by extraordinary writ to this Court. The district court's order dismissing the Sponsors' appeal for lack of jurisdiction should be affirmed. Alternatively, this Court should affirm on the alternative

ground that the Application was facially deficient under the Utah Election Code and the County did not err in rejecting it.

STATEMENT OF ISSUES

ISSUE 1: Whether the district court erred in concluding it could exercise jurisdiction only if the Sponsors demonstrated they were prohibited from pursuing their appeal by extraordinary writ to this Court.

Standard of Review: This Court reviews questions of jurisdiction for correctness. *Savely v. Utah Highway Patrol*, 2018 UT 44, ¶ 11, 427 P.3d 1174. This Court also reviews questions of statutory interpretation for correctness. *Id*.

Preservation: Preserved. This issue was addressed by the parties and expressly ruled on by the district court. (R. 292-97; 418-22; 442-447; 513.)

ISSUE 2: Whether the district court erred in concluding that the Sponsors had failed to demonstrate they were prohibited from pursuing an extraordinary writ to this Court, either by Rule 19 of the Utah Rules of Appellate Procedure or otherwise.

Standard of Review: This Court reviews questions of statutory interpretation for correctness. *Savely v. Utah Highway Patrol*, 2018 UT 44, ¶ 11, 427 P.3d 1174. This Court reviews the interpretation of rules of procedure for correctness. *Holmes v. Cannon*, 2016 UT 42, ¶ 6, 387 P.3d 971.

Preservation: This issue was preserved in part. The Sponsors argued below only that they could not satisfy Rule 19's requirement of a "statement explaining why it is impractical or inappropriate to file the petition for a writ in the district court." (R. 421; 446-47; 501-02.) The Sponsors did not argue below that they could not satisfy Rule 19's

requirement of a statement that "no other plain, speedy, or adequate remedy exists," and the Court was not presented with and did not rule on that issue. (R. 421; 555-56.) Accordingly, that portion of the Sponsors' argument to this Court that they were precluded from seeking a writ because another "plain, speedy, or adequate remedy" existed are unpreserved.[1]

ISSUE 3: Whether this Court can affirm the dismissal of the Sponsors' appeal on the alternative ground that the Application was facially deficient and the Sponsors' appeal was without merit as a matter of law.

Standard of review: This Court has the discretion to "affirm [a] judgment on an alternative ground if it is apparent in the record." *Olguin v. Anderton*, 2019 UT 73, ¶ 20, 456 P.3d 760. Whether a party is entitled to summary judgment is a legal question that this Court reviews for correctness. *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600.

Preservation: Preserved. WPR moved for summary judgment on the merits in the alternative to its motion to dismiss for lack of jurisdiction. (R. 297-305; R. 422-26; 451-

[1]In their Statement of the Case, the Sponsors assert that they "explained" to the district court that they could not satisfy Rule 19 because "there was, fact, another 'plain, speedy, or adequate remedy' available in the district court," citing page 420 of the record. (Br. of Appellant at 5.) However, the cited portion of the Sponsors' briefing below merely quoted this Court's statement that "[p]etitions for extraordinary writ are appropriate only where 'no other plain, speedy, or adequate remedy exists.'" (R. 442, quoting, without citation, *Krejci v. City of Saratoga Springs*, 2013 UT 74, ¶ 10, 322 P.3d 662.) The Sponsors offered no analysis or explanation of this requirement of Rule 19 in their brief, and the district court did not understand Sponsors to be making that argument. (R. 412-26; R. 555.) Further, the Sponsors did not raise this argument at the hearing on the motion, and the district court did not rule on it. (R. 531-63; 507-15.) Accordingly, contrary to the Sponsors' representation in their brief, this argument was not raised below.

54.) The district court did not reach this issue in light of its ruling that it lacked jurisdiction to consider the merits. (R. 560.)

STATEMENT OF THE CASE

I. The Ordinance and Application for Referendum

Wasatch Peaks Ranch, LLC ("WPR") owns approximately 12,000 acres of land located in Morgan County, Utah, on which it plans to develop a residential community with recreational amenities known as Wasatch Peaks Ranch. (R. 289.) In March 2019, WPR submitted a Resort Special District Rezoning Application to Morgan County's planning office requesting the creation of the Wasatch Peaks Ranch Resort Special District, encompassing approximately 11,000 acres of WPR's land. (R. 290.) WPR's planning commission and county counsel reviewed WPR's rezoning application over a period of approximately six months, during which numerous work sessions and public hearings on the application were held. (R. 290-291.) On October 30, 2019, Morgan County adopted Ordinance No. CO19-10, approving WPR's requested rezoning and a development agreement with Morgan County (the "Ordinance"). (R. 2, 7, 11.)

On November 6, 2019, the Sponsors submitted to Morgan County, through its County Clerk, Stacy Netz Clark (together, the "County"), an application for a citizen referendum of the Ordinance (the "Application"). (R. 3, 7-11, 398-402.) The Application bears the names of five sponsors, the minimum required under the statute: Whitney A. Croft, Robert Bohman, Brandon B. Peterson, Shelley W. Paige, and David E. Pike. (R. 7-11.) Ms. Croft's signature on the Application was acknowledged by Kaylee M. Cain. (R. 8.) The remaining four Sponsors' signatures were acknowledged by Ms. Croft. (R. 8-11.)

The Application does not contain a certification that each of the sponsors is a resident of Utah. (R. 7-11.) Ms. Croft submitted the Application to the Clerk's office at 5:05 p.m on November 6, 2019, five minutes after the expiration of the statutory deadline. (R. 399-400.) A representative of the County Clerk's office noted on the Application the date and time it was received and initialed the document. (R. 7, 399-400, 402.)

On November 21, 2019, the County rejected the Application by letter to the first three sponsors as required by Utah Code Ann. § 20A-7-602.8(1)(b). (R. 404.) The County concluded that the Application did not include a certification that each sponsor was a resident of Utah and did not include a copy of the challenged ordinance. (*Id.*) On November 27, 2019, the Sponsors appealed from that rejection by filing their appeal petition in the district court. (R. 1-6.)

II. Proceedings Below

WPR moved to intervene in the district court appeal on December 20, 2019. (R. 15-27.) The district court granted WPR's motion on January 23, 2020, making WPR a party for all purposes. (R. 277.) WPR filed its motion to dismiss for lack of jurisdiction and, in the alternative, for summary judgment, on January 24, 2020. (R. 288-306.) WPR argued that the district court lacked jurisdiction over the Sponsors' appeal because Utah Code § 20A-7-602.8 required them to appeal by extraordinary writ to the Supreme Court rather than to the district court. (R. 292-97.) WPR argued in the alternative for summary judgment on the basis that the Application was not timely filed, that the acknowledgments of four of five sponsors were invalid under Utah's Notaries Public

Reform Act, and that the Application did not contain a statutorily required certification that each sponsor was a resident of Utah. (R. 297-305.)

The Sponsors opposed WPR's motion, arguing that the appeal provisions of Utah Code § 20A-7-602.8 were "permissive" and thus did not require filing an appeal in any particular court and that, in any event, the Sponsors could not satisfy the requirements for an extraordinary writ under Rule 19 of the Utah Rules of Appellate Procedure because they could not establish that filing a petition for an extraordinary writ in the district court was "impractical or inappropriate." (R. 418-422.) On the merits, the Sponsors argued that the County had erred in rejecting their petition for failure to include the certification that each sponsor was a resident of Utah, and asserted that the district court should ignore WPR's other merits arguments because the County had not relied upon them in rejecting the Application. (R. 422-26.)

The district court held a hearing on the motion on March 11, 2020. (R. 487-88.) The district court acknowledged that it could exercise appellate jurisdiction over Sponsors' claims only as provided by statute. (R. 509.) The district court concluded that the controlling statute is Utah Code § 20A-7-602.8(4)(a), which permits appeal to "(i) the Supreme Court, by means of an extraordinary writ, if possible" or to "(ii) a district court, if the sponsor is prohibited from pursuant an extraordinary writ under Subsection (4)(a)(i)." (R. 509-10.) The district court ruled that this provision does include a grant of appellate jurisdiction to the district court but that this grant of appellate jurisdiction is "conditional." (R. 510.) The district court thus concluded that it could exercise appellate jurisdiction over the rejection of an application for referendum petition only if "the

condition is satisfied"—i.e., if the Sponsors were prohibited from pursuing an extraordinary writ" to this Court. (R. 510, ¶¶ 14, 16.)

The district court then addressed the Sponsors' argument that Rule 19 "prohibited" them from pursuing an extraordinary writ because, in their view, they could not meet Rule 19's requirement that they include "a statement explaining why it is impractical or inappropriate to file the petition for a writ in the district court." (R. 511-12.) The district court rejected that argument, explaining both that this language was not a prohibition on the "pursuit" of a writ to the Supreme Court and that the required "explanation" for not filing in the district court would be that Section 20A-7-602.8(4)(a)(ii) "expressly provides that parties are to pursue an appeal by writ to the Utah Supreme Court." (R. 513.) The district court explained that "there is neither a rule nor statute that precludes pursuit of a writ in the Utah Supreme Court, and there has been no factual or legal argument suggesting that pursuit of an extraordinary writ would be or was impossible." (R. 514.) The district court thus concluded that the Sponsors were not prohibited from pursuing an extraordinary writ in the Utah Supreme Court and that the condition on the district court's appellate jurisdiction was not met. (R. 515.) Accordingly, the district court dismissed the Sponsors' appeal with prejudice and entered its order and final judgment on April 6, 2020.[2] (*Id.*) Sponsors timely appealed on May 6, 2020. (R. 518.)

[2] The County filed an answer to the Sponsors' appeal petition but did not otherwise participate in the proceedings below. (R. 257-62.)

SUMMARY OF THE ARGUMENT

The district court correctly concluded that it lacked jurisdiction over the Sponsors' appeal because they were not "prohibited" from pursuing their appeal by extraordinary writ to this Court. Under Utah law, district courts do not possess general appellate jurisdiction. Rather, they may exercise appellate jurisdiction only as provided by statute. Where a party seeks to appeal the rejection of an application for referendum of a land-use law, the operative appeal statute is Utah Code § 20A-7-602.8(4)(a). And that statute permits appeal to a district court only if the application sponsor "is prohibited from pursuing an extraordinary writ" to appeal to this Court. Thus, the district court correctly concluded that it could exercise appellate jurisdiction only if the Sponsors showed that they were prohibited from pursuing their appeal by extraordinary writ to this Court.

The district court correctly rejected the Sponsors' argument that Rule 19 prohibited them from pursuing an extraordinary writ by requiring a "statement explaining why it is impractical or inappropriate to file the petition for a writ in the district court." As the district court observed, this requirement does not impose any prohibition at all on the pursuit of an extraordinary writ. Rather, it merely contains a requirement that must be included when the writ is pursued. Moreover, that requirement would have been easily satisfied here because the operative statute requires appeal by extraordinary writ to this Court if possible, and does not permit appeal to the district court unless appeal to this Court is otherwise prohibited. The Sponsors' argument that they could not satisfy Rule 19's requirement that they show no "plain, speedy, or adequate remedy exists" is unpreserved and should not be considered by this Court. Regardless, it fails for the same

reason because appeal to this court was not viable unless appeal to this Court was not possible. And the Sponsors' reliance on *Low v. City of Monticello*, 2002 UT 90, 54 P.3d 1153, and its progeny is misplaced, as those cases interpreted a different appeal provision of the election code that did not expressly allocate jurisdiction between this Court and the district court like Utah Code § 20A-7-602.8(4)(a) does.

Because the Sponsors offered no factual or legal basis for the district court to conclude they were prohibited from pursuing their appeal by extraordinary writ to this Court, the district court correctly concluded it lacked jurisdiction over the appeal and dismissed.

Alternatively, this Court can affirm the district court's ruling on the alternative ground that the Sponsors' appeal petition was without merit as a matter of law. As WPR set forth in its alternative motion for summary judgment, the undisputed facts demonstrate that the Application failed to comply with the requirements of Utah Code § 20A-7-602(1) and was therefore properly rejected by the County. Specifically, the Application (1) did not include the required certification that each of the sponsors is a resident of Utah, (2) did not include acknowledged signatures of the minimum five sponsors because four of the signatures were invalidly acknowledged by a signor of the document, and (3) was not timely filed. Each of these grounds was an independent and adequate basis for rejection of the Application, and the County correctly rejected the Application. Accordingly, the district court could have affirmed the rejection of the Application on any of these grounds, and this Court should exercise its discretion to do the same.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED IT LACKED JURISDICTION OVER THE SPONSORS' APPEAL.

The district court correctly concluded that it lacked jurisdiction over the Sponsors' appeal. "As a threshold matter," a reviewing court must first determine whether it has jurisdiction to hear an appeal. *Am. W. Bank Members, L.C. v. State*, 2014 UT 49, ¶ 9, 342 P.3d 224. "If [the court] lacks jurisdiction, [it] must dismiss the appeal." *Id*. The district court here correctly concluded that it lacked statutory authority to entertain the Sponsors' appeal, and this Court should affirm the dismissal of the Sponsors' appeal on this ground.

A. The District Court Lacked Jurisdiction over the Sponsors' Appeal unless they were Prohibited from Pursuing an Extraordinary Writ to This Court.

First, the district court correctly concluded that it could exercise jurisdiction over the Sponsors' appeal only if the Sponsors demonstrated the requirements of Utah Code § 20A-7-602.8(4)(a)(ii) were satisfied. "In Utah, jurisdiction to decide a case 'derives from the Utah Constitution, state statute, or a combination of the two.'" *Downs v. Thompson*, 2019 UT 63, ¶ 12. Although district courts enjoy broad jurisdiction to entertain matters in the first instance, the authority of district courts to consider appeals is expressly circumscribed by the Utah Constitution: "The district court shall have appellate jurisdiction as provided by statute." Utah Const. art. VIII, § 5. As this Court has recognized, this provision authorizes the legislature to grant appellate jurisdiction to the district court, but also to "define a court's appellate jurisdiction." *Monticello v. Christensen*, 788 P.2d 513, 518 (Utah 1990); *W. Jordan City v. Goodman*, 2006 UT 27,

¶ 12, 135 P.3d 874 (recognizing that "the legislature has enacted a statute giving the district courts jurisdiction over appeals from justice court convictions").

A district court's jurisdiction to review a matter on appeal must therefore be found in some positive statutory enactment by the legislature. Here, the Sponsors sought to appeal from the County's rejection of their application for a referendum petition regarding the Morgan County ordinance approving WPR's re-zoning request and development agreement. The Sponsors' application and appeal were thus governed by Utah Code § 20A-7-602.8, which addresses the referability to voters of local land use law. Utah Code Ann. § 20A-7-602.8(1), (4).[3] That section provides, in relevant part,

> If a county, city, town, or metro township rejects a proposed referendum concerning a land use law, a sponsor of the proposed referendum may, within seven days after the day on which a sponsor is notified under Subsection (1)(b), challenge or appeal the decision to:
>
> (i) the Supreme Court, by means of an extraordinary writ, if possible; or
>
> (ii) a district court, if the sponsor is prohibited from pursuing an extraordinary writ under Subsection (4)(a)(i).

Utah Code Ann. § 20A-7-602.8(4).

As the district court correctly recognized, this appeal provision establishes two avenues by which an appeal may be sought: first, to this Court by extraordinary writ, if

[3] To the extent the County's grant of WPR's application for a re-zoning of its land could be understood as a "land use decision" under Utah Code § 17-27a-103(34) and thus not a "land use law" under Utah Code § 20A-7-101(9)(b), the Sponsors' application and appeal would be governed by Utah Code Ann. § 20A-7-602.7. However, that distinction has no bearing on the determination whether the district court had jurisdiction over the Sponsors' appeal because the appeal provisions of Sections 602.7 and 602.8 are identical except for the time in which an appeal may be sought. *Compare* Utah Code Ann. § 20A-7-602.7(4), *with* Utah Code Ann. § 20A-7-602.8(4).

possible, and second, to the district court only if appeal by extraordinary writ is "prohibited." (R. 513, ¶¶ 37-39) And the legislature established "no limitation" on the right to appeal to this Court, but expressly imposed a "limitation" or "condition" on the right to appeal to the district court—that such an appeal is available "only if the sponsor is prohibited from pursuing a writ in the Utah Supreme Court." (*Id*.)

The appeal in this case is unlike those addressed in *Low v. City of Monticello*, 2002 UT 90, 54 P.3d 1153, and this Court's cases following it, *Carpenter v. Riverton City*, 2004 UT 68, 103 P.3d 127, and *Anderson v. Provo City*, 2016 UT 50, 387 P.3d 1014. Each of these cases interpreted Utah Code § 20A-7-607 which, then and now, included substantially different appeal language from that which appears in Utah Code § 20A-7-602.8:

> If the local clerk refuses to accept and file any referendum petition, any voter may apply to the Supreme Court for an extraordinary writ to compel him [or her] to do so within ten days after the refusal. Utah Code Ann. § 20A-7-607(4)(a) (1998).

Low, 2002 UT 90, ¶ 16; *Carpenter*, 2004 UT 68 ¶ 4 n.3; *Anderson*, 2016 UT 50, ¶¶ 4-5. And while this Court has "rejected the assumption . . . that Utah Code section 20A-7-607 mandates that a petition be filed in this court," it did so on the basis that "section 20A-7-607 'does not limit either the remedies that can be sought or the court in which those remedies can be pursued.'" *Anderson*, 2016 UT 50, ¶ 4. On that basis, the Court has concluded that section 20A-7-607 does not "designate this court as the exclusive location where relief may be sought" and thus permits relief to be sought by extraordinary writ to the district court unless it is impractical or inappropriate to do so. *Id*. ¶ 6.

Utah Code § 20A-7-602.8, however, does what section 20A-7-607 did not: it expressly provides that appeal should be sought by extraordinary writ to the Supreme Court and permits appeal to the district court only if such a writ is prohibited. In doing so, the legislature enacted the very limits on the "remedies that can be sought" and the "court in which those remedies can be pursued" that were absent from section 20A-7-607. That the Legislature expressly adopted such limitations is not surprising, as the legislature enacted Utah Code sections 20A-7-602.7 and -602.8 to "modif[y] requirements relating to local initiatives and referenda, including . . . appeals and other challenges." H.B. 119, 2019 Gen. Sess. (Utah), available at https://le.utah.gov/~2019/bills/static/HB0119.html.

This Court has long "presumed the Legislature" is aware of this Court's prior holdings and viewed its legislative enactments in light of that knowledge. *See State Tax Comm'n v. Logan*, 54 P.2d 1197, 1203 (Utah 1936); *see also Rueda v. Labor Comm'n*, 2017 UT 58, ¶ 107, 423 P.3d 1175 (explaining that "we presume that the legislature is aware of legal terms and their meanings"). Thus, at the time it adopted H.B. 119 in 2019, the legislature was aware that this Court had previously interpreted the appeal provisions of Utah Code section 20A-7-607 to permit appeal to the district court. Further evidence that the Legislature was aware of this construction can be found in its amendment to section 20A-7-607 in the same bill, which amended that section to conform to this Court's interpretation by permitting a party to seek an extraordinary writ from "a court" rather than from this Court. Utah Code Ann. § 20A-7-607(4)(a).

Armed with knowledge of this Court's interpretation of section 20A-7-607, the Legislature elected not to adopt the same appeal provision for the newly enacted Utah

Code § 20A-7-602.8. Instead, the legislature crafted a new appeal procedure for section 602.8, one that expressly requires appeal by extraordinary writ first to this Court, and permits appeal to the district court only if appeal to this Court is "prohibited." Utah Code Ann. § 20A-7-602.8(4)(a) (emphasis added); H.B. 119. The legislature's conscious decision to adopt a different standard by imposing a limitation on the district court's authority to hear appeals under this section must be given effect. *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (interpreting statute under assumption that "the legislature used each term advisedly").

The district court thus correctly concluded it lacked jurisdiction to consider the Sponsors' appeal unless the Sponsors demonstrated that pursuit of an appeal by extraordinary writ to this Court was "prohibited."

B. The District Court Correctly Concluded the Sponsors Did Not Demonstrate They Were Prohibited from Pursuing an Extraordinary Writ to This Court.

Next, the district court correctly concluded that the Sponsors failed to demonstrate they were prohibited from pursuing their appeal by extraordinary writ to this Court. As the parties seeking to invoke the district court's appellate jurisdiction, the Sponsors had the burden of demonstrating jurisdiction was proper. *See Brown v. Div. of Water Rights of the Dep't of Nat. Res. of Utah*, 2010 UT 14, ¶ 14, 228 P.3d 747.

Here, the Sponsors argued that jurisdiction was proper in the district court because they were "prohibited" from seeking an extraordinary writ due to Rule 19's requirement that a person seeking an extraordinary writ from this Court explain why it was "impractical or inappropriate" to seek the writ from the district court. (R. 421.) Rule 19 of

the Utah Rules of Appellate Procedure governs the pursuit of extraordinary writs to Utah's appellate courts. That section sets forth certain requirements that must be included in a petition for extraordinary relief including, as applicable here, a "statement explaining why it is impractical or inappropriate to file the petition for a writ in the district court." Utah R. App. P. 19(b)(5). As the district court recognized, (R. 513-14, ¶¶ 40-41), the Sponsors offered no other argument or evidentiary basis for concluding that pursuit of an extraordinary writ was "prohibited," and their petition is devoid of any such allegations. (R. 1-6.) *See Brown*, 2010 UT 14, ¶ 14 (providing that allegations in a pleading are generally necessary to establish jurisdiction at the pleading stage). Rather, as the Sponsors concede in their brief, they "declined to file a petition for an extraordinary writ in this court" because they did not believe they could satisfy the requirements of Rule 19. (Br. of Appellant at 4.) As the district court's analysis aptly demonstrates, the Sponsors were incorrect.

1. Rule 19 Imposes No Prohibition on Pursuit of an Extraordinary Writ.

First, the plain terms of Rule 19 do not in any way "prohibit[]" a party "from pursuing an extraordinary writ." Utah Code Ann. § 20A-7-602.8(4)(a)(ii). Rather, as the district court recognized, the requirement that a party explain why it is "impractical or inappropriate" to file in the district court is only a "requirement that must be included when [a] writ is pursued," it does not itself "preclude the pursuit of an extraordinary writ" in any way. (R. 513.) The statute does not speak in terms of whether an extraordinary writ is successfully pursued to this Court, i.e., when the sponsor "has pursued and been

denied the opportunity to obtain a writ," but rather whether pursuit of such a writ is possible or prohibited. (R. 512.)

Thus, whether the petition for an extraordinary writ has merit, or whether the petitioning party can persuade this Court that a grant of the writ is a proper exercise of its discretionary authority, *see Count My Vote, Inc. v. Cox*, 2019 UT 60, ¶ 8, 452 P.3d 1109, is irrelevant to the question of whether the district court may exercise appellate jurisdiction under Utah Code § 20A-7-602.8. Rather, by its plain terms, the statute permits appeal to the district court only when the very pursuit of an extraordinary writ is "prohibited." Utah Code Ann. § 20A-7-602.8(4)(a)(ii). As the district court correctly concluded, Rule 19 includes no such prohibition and, accordingly, cannot provide a basis for the Sponsors to argue that jurisdiction was proper here.

2. Filing in the District Court was Impractical or Inappropriate under the Plain Terms of the Statute.

Second, even if the inability to successfully establish one of Rule 19's requirements could be understood as a "prohibition" on the pursuit of an extraordinary writ, the Sponsors could have easily demonstrated that filing their appeal in the district court would have been "impractical or inappropriate." By the plain terms of Utah Code § 20A-7-602.8, a filing in the district court would have been "impractical or inappropriate" because the statute requires appeal by extraordinary writ to this Court in the first instance, permitting appeal to the district court only where an extraordinary writ is otherwise prohibited. Utah Code Ann. § 20A-7-602.8(4)(a)(ii). The district court correctly concluded that the Sponsors could have provided such an explanation in a

petition for extraordinary writ, had they elected to pursue one. (R. 513, ¶ 36.) Accordingly, the Sponsors were not "prohibited" from pursuing a petition for an extraordinary writ under Rule 19, (R. 515, ¶ 47), and their decision not to pursue such a writ did not vest the district court with authority to hear their appeal.

The authorities cited by the Sponsors are not to the contrary. In *Zonts v. Pleasant Grove City*, 2017 UT 71, ¶ 5, 416 P.3d 360, this Court denied a petition for extraordinary relief filed under Utah Code § 20A-7-508 because their petition included no "discussion of the possibility of filing in the district court" and thus the petitioners "failed to meet their burden of persuading [this Court] that they could not have asked the district court to review their contentions in the first instance." 2017 UT 71, ¶ 4-5. And while this Court has observed that "tight timelines" related to a ballot dispute may make pursuit of a filing in the district court impractical or inappropriate under other provisions of the election code, *Anderson*, 2016 UT 50, ¶ 4, this Court has never held or suggested that tight electoral timelines are a requirement to seek relief from this Court under Rule 19 in general or under Utah Code § 20A-7-602.8 in particular.

Regardless, such a "tight timeline" did exist in this case. Pursuant to Utah Code § 20A-7-607(6)(b), for the referendum petition to be placed on the election ballot for the "next general election," i.e., in November of 2020, Sponsors would have needed to complete signature gathering and certification with the county clerk by no later August 30, 2020. Given the timelines set forth in Utah Code §§ 20A-7-604 to -607, a final resolution on the validity of the Sponsors' appeal would have had to be reached by June 9, 2020 at the very latest. As the proceedings in this case have amply demonstrated,

resolution of the Sponsors' appeal through a district court proceeding following by an appeal to this Court within that time frame was—and has proven—impossible. As a result, even if the Sponsors were to prevail in this appeal and demonstrate below that their Application was improperly rejected, the earliest the Ordinance could possibly appear on the ballot is November 2022, over three years after it was adopted by Morgan County. *See* Utah Code §§ 20A-7-607(6)(b) (requiring land use laws to appear on general election ballot); 20A-1-201 (providing that regular general elections occur in "each even-numbered year").[4]

3. The District Court's Interpretation Does Not Create an Absurd Result.

The Sponsors' final argument on this point is that, under the district court's analysis of the statute, all appeals under Utah Code § 20A-7-602.8 must be filed in this Court and would be reviewed as extraordinary writs. Sponsors assert, without any analysis, that "[t]his cannot be—and is not—what the statute requires." (Br. of Appellant at 17.) But the Sponsors offer no explanation for why this is so, other than their apparent disagreement with this interpretation of the statutory language. While it appears Sponsors may be attempting to invoke some species of the absurd results doctrine, which provides that "a court should not follow the literal language of a statute if its plain meaning works

[4] As noted above, the Sponsors' argument that a "plain, speedy, and adequate remedy exists in [the district court]" is unpreserved, because the Sponsors' failed to present that argument to the district court. *Supra* Note 1. (R. 421; 555-56.) Generally, this Court "will only review an issue on appeal if it has been preserved." *T.D.G. v. L.R.* (*In re A.T.I.G.*), 2012 UT 88, ¶ 15, 293 P.3d 276. However, the Sponsors' presentation of this argument

(continued...)

an absurd result," *Garfield Cty. v. United States*, 2017 UT 41, ¶ 22, 424 P.3d 46, the Sponsors neither explain how such a result would be absurd nor demonstrate that "the legislative history from the pertinent legislative body shows that the absurd result was unintended." *Id*. ¶ 23.

Indeed, there is every reason to believe that placing disputes over the sufficiency of an application for a referendum petition before this Court is precisely what the Legislature intended to do. As discussed above, H.B. 119 (1) was adopted with the express purpose of "modif[ying] requirements relating to local initiatives and referenda, including . . . appeals and other challenges," (2) was enacted with knowledge that this Court had previously interpreted the appeal provisions of the election code to permit such disputes to be appealed to the district court, and (3) enacted a more specific structure which allocated appellate jurisdiction over such challenges between this Court generally and the district court only if appeal to this Court was prohibited. H.B. 119, 2019 Gen. Sess. (Utah). Far from demonstrating that the Legislature "cannot" have intended to require appeals under Utah Code § 20A-7-602.8 to be taken to this Court, the history of the enactment of this section and its plain language demonstrate the opposite. Regardless, Sponsors have failed to demonstrate either that a legislative assignment of this limited class of appeals to this Court is absurd, or that the legislative history shows that such a

(...continued)
on appeal is essentially indistinguishable from their argument that it was not "inappropriate" to file in the district court and thus also fails on the merits.

result was unintended. *Garfield Cty.*, 2017 UT 41, ¶¶ 22-23. Accordingly, this Court cannot disregard the plain language of the statute on this basis.

For the foregoing reasons, this Court should affirm the district court's determination that it lacked subject matter jurisdiction over the Sponsors' appeal.

II. THIS COURT SHOULD AFFIRM ON THE ALTERNATIVE GROUND THAT THE SPONSORS' APPLICATION FOR REFERENDUM PETITION DID NOT COMPLY WITH THE STATUTE.

Additionally, this Court may affirm on the alternative ground that the Sponsors' Application was invalid as a matter of law and thus their appeal fails on the merits. This Court has the discretion to "affirm [a] judgment on an alternative ground if it is apparent in the record." *Olguin v. Anderton*, 2019 UT 73, ¶ 20, 456 P.3d 760. In addition to its motion to dismiss on jurisdictional grounds, WPR moved for summary judgment on the basis that the Application was properly rejected on the merits. Although the district court did not reach the merits of the Sponsors' appeal due its determination that it lacked subject matter jurisdiction, in the event this Court concludes the district court erred in its jurisdictional analysis, this Court should affirm on the alternative ground that the district court should have granted WPR's motion for summary judgment.

"If there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law, then summary judgment is appropriate." *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 20, 70 P.3d 1. Here, the basis for the Sponsors' appeal was that the County erred in rejecting their Application. However, as discussed below, the Application was legally flawed in three independent respects and thus failed to comply with the requirements of Utah Code § 20A-7-602(2). The County

thus properly rejected the Application under Utah Code § 20A-7-602.8(1)(b)(ii) and (2)(d), and the Sponsors' appeal is without merit. Accordingly, this Court should affirm the dismissal of the Sponsors' appeal petition on this ground.

A. The County Properly Rejected the Sponsors' Application.

Under the Election Code, an eligible voter who seeks to sponsor a referendum petition must file an application with the local clerk. Utah Code Ann. § 20A-7-602(1). An application for a referendum petition must contain:

> (a) the name and residence address of at least five sponsors of the referendum petition;
>
> (b) a certification indicating that each of the sponsors is a resident of Utah;
>
> (c) a statement indicating that each of the sponsors has voted in an election in Utah in the last three years;
>
> (d) the signature of each of the sponsors, acknowledged by a notary public; and
>
> (e) (i) if the referendum challenges an ordinance or resolution, one copy of the law; or
>
> (ii) if the referendum challenges a local law that is not an ordinance or resolution, a written description of the local law, including the result of the vote on the local law.

Id. § 20A-7-602(2). "Sponsors of any referendum petition challenging . . . any local law passed by a local legislative body shall file the application before 5 p.m. within seven days after the day on which the local law was passed." *Id*. § 20A-7-601(5)(a).

With respect to a land use law, a proposed referendum is not legally referable if "the application for the proposed referendum was not timely filed or does not comply with the requirements of this part." *Id*. § 20A-7-602.8(2)(d). If a proposed referendum is not legally referable, the county must, "[w]ithin 20 days after the day on which an

eligible voter files an application to circulate a referendum petition," notify the first three sponsors that the proposed referendum is "rejected as not legally referable to voters." *Id.* § 20A-7-602.8(1). The Application was filed on November 6, 2019, at 5:05 p.m., and the County rejected the Application on November 21, 2019, by notifying the first three sponsors. (R. 7, 399-400, 402, 404.)

In rejecting the Application, the County concluded the Application did not comply with the requirements of Utah Code § 20A-7-602(2)(b) and (e) insofar as it did not include the required certification that each of the sponsors is a resident of Utah and did not include a copy of the challenged ordinance. (R. 404.) In addition to those grounds identified by the County, the Application also failed to comply with Utah Code § 20A-7-602(2)(d) because four of five sponsors' signatures were not validly acknowledged, and it was untimely under Utah Code § 20A-7-601(5)(a).

1. <u>The Application Did Not Include the Required Certification That Each Sponsor Was a Resident of Utah.</u>

The Application does not comply with Utah Code § 20A-7-602(2)(b) because it does not contain a required certification that each sponsor is a resident of Utah. In interpreting a statute, courts "read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Monarrez v. Utah DOT*, 2016 UT 10, ¶ 11, 368 P.3d 846. In doing so, they must "avoid [a]ny interpretation which renders parts or words in a statute inoperative or superfluous in order to give effect to every word of a statute." *Id.* (internal quotation marks omitted) (alteration in original).

Utah Code section 20A-7-602(2) contains two separate requirements relating to a sponsor's residence: that the Application contain "the name and residence address of at least five sponsors of the referendum petition," Utah Code Ann. § 20A-7-602(2)(a), and, separately, that it also contain "a certification indicating that each of the sponsors is a resident of Utah," *id*. § 20A-7-602(2)(b). To instill these separate provisions with meaning and to avoid rendering one superfluous, these two subsections must be understood to set forth separate, mandatory requirements of an application for a referendum petition—i.e., that the certification of Utah residency is different from and in addition to the identification of the sponsor's residence address.

Here, as required under subsection (2)(a), the Application includes residence addresses of each of the sponsors. However, nowhere in the Application is there a certification that each of the sponsors is a resident of Utah as required under subsection (2)(b). (R. 7-11.) The Application contained no "formal attestation" of the truth of this fact or any other certification, document, or attestation that each sponsor was a resident of Utah. *See* Ballentine's Law Dictionary, *certification* ("a formal attestation of a matter of fact, that is, the making of a certificate of any kind"; Black's Law Dictionary, *certificate* ("A document in which a fact is formally attested."); Webster's Ninth New Collegiate Dictionary 223 (*certify*, "to attest authoritatively," "to present in formal communication" or "to attest as being true").

Below, the Sponsors argued only that they complied with Utah Code § 20A-7-602(2)(a) and (c) by setting forth each Sponsors' residence address and a statement that they had voted in an election in the last three years. (R. 424.) And the Sponsors argued it

would be "unreasonable" to read these statements and conclude that the Sponsors were not residents of Utah. (*Id.*) But the question that was before the district court and is now before the Court is not whether one can discern the residency of the Sponsors from the Application—it is whether the Application contained "a certification indicating that each of the sponsors is a resident of Utah." Utah Code § 20A-7-602(2)(b). As the Sponsors effectively concede, it did not, and the Application accordingly did not comply with this requirement of the law.

The statutory language is clear and unambiguous that this certification is required in addition to the address of each sponsor. Because the Application contains no such certification, it fails to satisfy the requirements of Utah Code § 20A-7-602(2)(b). Because the Application failed to satisfy the requirements of Utah Code section 20A-7-602, the County properly rejected the Application as not legally referable to voters. Utah Code Ann. § 20A-7-602.8(2)(d).

2. Four of the Five Sponsors' Signatures Were Not Validly Acknowledged.

Additionally, the Application fails to comply with Utah Code § 20A-7-602(2)(d) because it does not contain validly acknowledged signatures of all five Sponsors. Rather, the acknowledgement of the signatures of Robert Bohman, Brandon Peterson, Shelley Paige, and David Pike were acknowledged by Ms. Croft—a signatory to the document—and were therefore made in violation of Utah' Notaries Public Reform Act and are illegal and invalid.

The signature of each sponsor of a referendum petition must be "acknowledged by a notary public." Utah Code Ann. § 20A-7-602(2)(d). An acknowledgment is "a notarial act in which a notary certifies that a signer, whose identity is personally known to the notary or proven on the basis of satisfactory evidence, has admitted, in the presence of the notary, to voluntarily signing a document for the document's stated purpose." Utah Code Ann. § 46-1-2(1). A notary is disqualified from and may not perform a notarial act with respect to a document if the notary is a signer of the document or is named in the document.[5] Utah Code Ann. § 46-1-7(1), (2). And a notary must remain impartial, and "may not influence a person to enter into or to refuse to enter into a lawful transaction involving a notarial act by the notary." *Id*. § 46-1-8(1).

Here, Ms. Croft both signed the Application and acknowledged the signatures of the other four Sponsors. (R. 8, 9-10.) Because she is both a signer of the document and is named in the document, she was disqualified as a notary and "may not perform a notarial act" with respect to the Application. Utah Code Ann. § 46-1-7(1), (2). With respect to each of the four Sponsors whose signatures Ms. Croft acknowledged, she was disqualified from and prohibited from performing the acknowledgements because she is a sponsor of the document. And her purported acknowledgements are accordingly invalid and of no effect because she was disqualified from acknowledging the Application. *See In re Williamson*, 43 B.R. 813, 824 n.9 (Bankr. D. Utah 1984) (concluding that an oath

[5] Except as to a self-proved will or other limited exceptions not relevant here. Utah Code Ann. § 46-1-7(1), (2).

and acknowledgement in a lien notice was "void," rendering the notice "invalid," because the lien claimant notarized the instrument and, "in Utah, a notary is disqualified from notarizing an instrument in which he is named as a party"). Additionally, because Ms. Croft acted as both a sponsor of the Application and the notary for other sponsors, Ms. Croft violated her duty of impartiality when she induced others to enter into a transaction involving her (invalid) notarial acts. *Id.* § 46-1-8(1).

As a result of Ms. Croft's violations of the Notaries Public Reform Act and disqualification to perform a notarial act with respect to the Application, Ms. Croft's acknowledgments of each of the other four Sponsors' signatures are invalid and of no effect. Because the Application does not contain valid acknowledgments for each of its five sponsors—the statutory minimum, Utah Code Ann. § 20A-7-602(2)(a)—the Application fails to comply with the law and the County properly rejected it, *id.* § 20A-7-602.8(2)(d).

3. The Application was Untimely.

Last, the Application was properly rejected because it was not timely filed under Utah Code §20A-7-601. An application for a referendum petition must be rejected if it "was not timely filed." Utah Code Ann. § 20A-7-602.8(2)(d). Here, the Application was untimely because it was filed after the deadline for submitting an application for a referendum petition with respect to the Ordinance. "Sponsors of any referendum petition challenging . . . any local law passed by a local legislative body shall file the application before 5 p.m. within seven days after the day on which the local law was passed." Utah Code Ann. § 20A-7-601(5). Unless a time period under the Election Code is specified in

"business days" or "working days," any "Sundays, Saturdays, and holidays shall be included in all computations of days made under [the Election Code]." Utah Code Ann. § 20A-1-104(2), (3). Because the seven-day referendum application period in Utah Code § 20A-7-601(5) is specified in "days" rather than "business days" or "working days," any application for a referendum petition must be filed before 5:00 p.m. within seven calendar days after the local law is passed, including all intervening weekends and holidays. *Id*.

This Court has concluded that similar statutes require strict compliance to give effect to the legislature's intent. The statute "uses the word 'shall,' which is 'usually presumed mandatory and has been interpreted as such previously in this and other jurisdictions.'" *Pugh v. Draper City*, 2005 UT 12, ¶ 13, 114 P.3d 546 (quoting *Bd. of Educ. v. Salt Lake County*, 659 P.2d 1030, 1033 (Utah 1983)); *see also* Utah Code Ann. § 68-3-12(1)(j) ("In the construction of a statute in the Utah Code . . . 'Shall' means that an action is required or mandatory."). Moreover, "[w]here statutes governing the conduct of elections require something to be done before the election, so it might have some influence on the election's outcome, it is usually held that the time requirement is mandatory." *Pugh*, 2005 UT 5, ¶ 15 (quoting *Sjostrom v. Bishop*, 393 P.2d 472 (Utah 1964)).

Thus, in *Pugh*, this Court found that a campaign disclosure requirement found in the Municipal Code, which required disclosures to be filed by no later than 5:00 p.m.

seven days before the election, required strict compliance.[6] *Id*. ¶ 17. Based on both the mandatory language and the pre-election nature of the filing, the Court concluded that the legislature intended the requirements were to be strictly complied with. *Id*. ¶¶ 13-16.

Here, the County's council passed the Ordinance effecting the zoning change requested by WPR and approving the Development Agreement between WPR and the County, on October 30, 2019. (R. 2, 7, 11.) Any application for referendum petition challenging the passage of the Ordinance was accordingly due filed with the County clerk before 5:00 p.m. on Wednesday, November 6, 2019. Utah Code Ann. § 20A-7-601(5). However, the Application was not submitted to the County clerk's office until 5:05 p.m. on November 6, 2019. (R. 7, 399-400, 402.) Because the Application was submitted after the deadline for filing, it was not timely under Utah Code section 20A-7-601(5). And because the Application was not timely, the referendum petition is not legally referable and was properly rejected by the County. Utah Code Ann. § 20A-7-602.8(2)(d).

[6] *Pugh* addressed deadlines set forth in the Municipal Code, and expressly declined to apply the provisions of the Election Code and the "substantial compliance" standard set forth in Utah Code § 20A-1-404(2)(b)(ii). That standard is also inapplicable here. Although the deadlines at issue do arise under the Election Code, this is not an "election controversy" to which Section 20A-1-404 applies. Rather, an "election controversy" is a dispute between "any election officer or other person or entity charged with any duty or function under this title" on one side, and "any candidate, or the officers or representatives of any political party, or persons who have made nominations" on the other. Utah Code Ann. § 20A-1-404(1)(a)(i). By its own terms, the "substantial compliance" standard in Utah Code § 20A-1-404 applies only to review of an "election controversy" under that section, and it accordingly is not applicable here. Utah Code Ann. § 20A-1-404(2)(b)(ii).

The Sponsors' attempted to create a disputed issue of fact regarding when the Application was submitted by presenting to the district court declarations from certain of the Sponsors, Brandon Peterson, Shelley Paige, and Whitney Croft. (R. 415-17, 428-37.) The declarations of Brandon Peterson and Shelley Paige both aver that they do not know when they signed the Application, include no averments about when the Application was submitted, and include no averments that they have any personal knowledge regarding when the application was submitted. (R. 433-37.) These declarations were accordingly insufficient to create a material issue of fact regarding when the Application was submitted.

For her part, Whitney Croft avers that, "[t]o the best of her knowledge," she submitted the Application prior to the 5:00 p.m. deadline. (R. 429.) However, the surrounding averments of her declaration demonstrate that she did not know what time she submitted the Application and this averment is based purely on speculation. Ms. Croft admits that she "was not checking the clocks" when she submitted the Application because she believed she had until 6:00 p.m. to submit it. (R. 430.) And the remaining averments of Ms. Croft's declaration—assuming for purposes of a summary-judgment analysis that they are true—establish only that Ms. Croft submitted the Application sometime between 4:55 p.m. and 5:04 p.m. (R. 429-31.) Ms. Croft's speculation that she may have submitted the Application prior to 5:00 p.m. is insufficient to create an issue of fact in the face of undisputed evidence that she did not submit the Application until 5:05 p.m. (R. 7, 399-400, 402.) Accordingly, based on the undisputed facts that were before

the district court, the Application was untimely and properly rejected under Utah Code Ann. § 20A-7-602.8(2)(d).

In sum, the County properly rejected the Application both because it was deficient under Utah Code section 20A-7-602 and because it was untimely under Utah Code section 20A-7-601. Because the Sponsors' appeal is premised on its argument that the County improperly rejected the Application, this Court should affirm the district court's dismissal of the Sponsors' appeal on the ground that the Application was properly rejected and the Sponsors' appeal fails as a matter of law.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of the Sponsors' appeal.

DATED this 1st day of October, 2020.

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CERTIFICATE OF COMPLIANCE

Word Count

Pursuant to Utah R. App. P. 24(f)(1), I certify that the brief complies with the type-volume limitation because it contains 8,390 words.

Type Face

The brief complies with the typeface requirement of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman font.

Rule 21 Compliance

This brief complies with Utah R. App. P. 21(g) because the brief contains no non-public information.

DATED this 1st day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct of copy of the foregoing **BRIEF OF APPELLEE WASATCH PEAKS RANCH, LLC** was served to the following this 1st day of October 2020, in the manner set forth below:

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