Advisory Opinion #104

Parties: Jeff Love and Park City

Issued: July 27, 2011

TOPIC CATEGORIES:
J: Requirements Imposed upon Development
R(v): Other Topics (Interpretation of Ordinances)

Interpretation of ordinances starts with the language of the ordinance, and the purposes the ordinance is intended to promote. Although local governments have some discretion to control land use, a property owner's right to the use and enjoyment of property must be honored. Decisions must be based upon objective standards and provable facts. It is inappropriate to inquire into the motivations and sincerity of a property owner, or the nature and timing of property acquisition.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Jeff Love
Local Government Entity:	Park City
Applicant for the Land Use Approval:	Jeff Love
Project:	Permit to Move Building
Date of this Advisory Opinion:	July 27, 2011
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

Did a local government properly interpret and apply an ordinance intended to protect historic structures, by focusing on the plans and motivations of the property owner?

Summary of Advisory Opinion

Interpretation of ordinances starts with the language of the ordinance, and the purposes the ordinance is intended to promote. Although local governments have authority and discretion to control land use, a property owner's right to the use and enjoyment of property must be strictly honored. Local governments are not authorized to incorporate requirements not found in the language of the ordinance, or unrelated to the ordinance's intent. Decisions must be based upon objective standards and provable facts.

It is inappropriate to inquire into the motivations and sincerity of a property owner, or the nature and timing of property acquisition. Such inquiry is not guided by standards or objective measures, and leads to decisions based on emotions or public clamor, not facts. In addition, the motivations of a property owner are not relevant to whether the owner may be entitled to approval under a land use ordinance. Proper interpretation and application of any ordinance must be tied to objective criteria and provable facts.

Review

A request for an advisory opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE ANN. § 13-43-205. The opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A request for an Advisory Opinion was received from Jeff Love on May 26, 2011. A copy of that request was sent via certified mail to Janet M. Scott, City Recorder of Park City. A certified mail receipt, indicating that the City received the letter, were delivered to the Office of the Property Rights Ombudsman on June 2, 2010.

Evidence

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

1. Request for an Advisory Opinion, including attachments, from Jeff Love, filed May 26, 2011 with the Office of the Property Rights Ombudsman
2. Agenda and Transcript of the May 17, 2011 meeting of the Park City Board of Adjustment.
3. Response from Park City, submitted by Polly Samuels McLean, Assistant City Attorney, received July 14, 2011.

Background

Jeff Love owns property located at 811 Norfolk Avenue in Park City. The property is located in the older part of the City, and includes a home and a garage. The property is part of a subdivision that was originally recorded in the 1880s. The lots in that subdivision are only 25 feet wide. When Mr. Love purchased the property in June of 2010, it included one-half of Lot 2 all of Lots 3 and 4, and three feet of Lot 5. The home is located on Lot 3, but encroaches a few feet onto Lot 4. Shortly after Mr. Love purchased the property, he sold Lot 4 and the portion of Lot 5 to a Mr. Ludlow, who was a friend of Mr. Love's. At the time of the purchase, Mr. Ludlow was aware that the home encroached onto Lot 4. There were no other structures on the property purchased by Mr. Ludlow.

The City considers the home a "Landmark Site," because it was built in 1880s, and is characteristic of the homes built during Park City's mining heyday.[1] Other than its age and location in the older portion of the City, the building has no particular historic significance. Because of its status as a Landmark Site, the home is subject to special regulations in the Park City Land Management Code. The City adopted historic preservation ordinances "[t]o encourage the preservation of Buildings, Structures, and Sites of Historic Significance . . .." PARK CITY MUNICIPAL CODE, § 15-11-9.

According to Mr. Love, when the home was built, a portion of it encroached onto Lot 4, which was then in separate ownership. Apparently, no one objected to the encroachment, and both lots eventually became owned by the same person, and the lots continued to be part of one parcel up until the time Mr. Love divided it. The sale of Lot 4 to Mr. Ludlow raised the issue of the encroachment, and so Mr. Love proposed moving the home about six feet (*i.e.,* Lot 3 and one-half of Lot 2). This would eliminate the encroachment, and would also make the home compliant with the City's set-back ordinance. Moving the home would also make development of Mr. Ludlow's property possible.

According to Mr. Love, he discussed the encroachment issue with Mr. Ludlow at the time of the sale. They considered creating an easement, whereby Mr. Love's home could remain in its original location. However, Mr. Love stated that both he and Mr. Ludlow decided that an easement was not an acceptable solution, because it would possibly have a negative impact on the value of the properties, and would restrict development of Mr. Ludlow's property. Consequently, Mr. Ludlow would not agree to an easement on Lot 4. Since the easement could not be obtained, Mr. Love believed that moving the home was the only available option.

Despite discussions with Mr. Love, the City's staff denied approval for the home to be moved, and so Mr. Love appealed to the Historic Preservation Board (HPB). The HPB determined that Mr. Love could not obtain an easement, and so the City's Historic Preservation Ordinance allowed him to move the home. The HPB also noted that the City's Historic Preservation consultant found that the home would still meet the criteria for Landmark Site status.[2]

Five individuals who own property near Mr. Love's objected, and appealed the decision to the City's Board of Adjustment (BOA).[3] The BOA overruled the HPB, and denied Mr. Love permission to move the home. The BOA considered the nature of the transaction between Mr. Love and Mr. Ludlow, finding that Mr. Love could have secured an easement on Lot 4 for the home, but intentionally chose not to. The BOA reasoned that Mr. Love owned the entire parcel, and he could have created the easement at the time of the sale to Mr. Ludlow. The BOA felt that

[1] The materials submitted for this Opinion do not indicate the exact date when the home was built, but both Mr. Love and the City agree that it qualifies for Historic Building status.

[2] The HPB approval included several conditions, most of which relate to preserving the historic character of the home and property. For example, any restoration work must be according to accepted standards for historic preservation, including restoring windows or doors that were part of the original structure but had been boarded over.

[3] The procedure to seek review before the Historic Preservation Board and appeal to the Board of Adjustment are established in the City Code.

Mr. Love had not "sincerely" sought an easement in "good faith," and never intended to seek one. Since Mr. Love created the problem himself, he should be disqualified from seeking approval to move the home.

Following the BOA hearing, but before the board approved the final decision, Mr. Love requested this Opinion, seeking an evaluation of the process that led to the BOA's denial. Mr. Love expressed concern that the BOA acted improperly by allowing "ex parte" communications between board members and other persons involved in this controversy, and he also objected to the board's procedure, stating that it should not have accepted new evidence when it reviewed the HPB's decision. Finally, Mr. Love feels that the City is misinterpreting its ordinance, and that he should have been granted permission to move the house.

In response, the City denies that the BOA acted improperly, or that Mr. Love was not given his due process rights. The City also maintains that it correctly interpreted the Historic Preservation Ordinance, and that the BOA's decision was a proper application of that ordinance.

Analysis

The Interpretation and Application of § 15-11-13 Must be Based on the Language and Purpose of the Ordinance, and on Objective Criteria and Provable Facts.

The City's application of § 15-11-13 is not justified by the language of the ordinance. Section 15-11-13(A)(1) allows a property owner to move an encroaching historic building if an easement cannot be secured. Permission to move the structure is not dependent upon the motivations or plans of the property owner, but only on whether an easement for the encroachment can be obtained. The City must follow the plain language of the ordinance, which does not include investigation into the nature of the property ownership, any transactions affecting the property, or whether the property owner created the problem.

A. Standards of Statutory Interpretation

Statutory interpretation begins with the language of the ordinance. *See Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875, 879. The "primary goal . . . is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75 ¶ 11, 100 P.3d 1171, 1174. "In addition 'statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and . . . interpretations are to be avoided which render some part of a provision nonsensical or absurd.'" *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996) (*quoting Millet v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980). It must also be presumed "that each term included in the ordinance was used advisedly." *Carrier v. Salt Lake County*, 2004 UT 98, ¶30, 104 P.3d 1208, 1216.

Two more paradigms of statutory interpretation are important to this analysis: First, "the expression of one should be interpreted as the exclusion of another." *Biddle*, 1999 UT 110, ¶ 30, 993 P.2d at 879. In other words, an omission in an ordinance should be given effect by a presumption that an omission was purposeful. *See Carrier*, 2004 UT 98, ¶ 30, 104 P.3d at 1216. Secondly, "since zoning ordinances are in derogation of a property owner's use of land . . . any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use." *Id.* 2004 UT 98, ¶31, 104 P.3d at 1217.

B. The Language and Purpose of § 15-11-13.

Section 15-11-13 of the Park City Municipal Code provides that historic structures can be moved in certain circumstances. The City's Planning Department makes the initial determination whether a structure may be relocated or reoriented, if one of the following criteria can be met:

> (1) A portion of the Historic Building(s) and/or Structure(s) encroaches on an adjacent Property and an easement cannot be secured; or
>
> (2) The proposed relocation and/or reorientation will abate demolition of the Historic Building(s) and/or Structure(s) on the Site; or
>
> (3) The Planning Director and the Chief Building Official determine that unique conditions warrant the proposed relocation and/or reorientation on the existing Site; or
>
> (4) The Planning Director and the Chief Building Official determine that unique conditions warrant the proposed relocation and/or reorientation to a different Site.

PARK CITY MUNICIPAL CODE, § 15-11-13(A). An applicant may appeal a decision of the Planning Department to the Historic Preservation Board. Decisions of the Historic Preservation Board may be appealed to the City's Board of Adjustment. *See id.*, § 15-13-12(E).

The purpose and intent of the section is expressed in the following paragraph:

> It is the intent of this section to preserve the Historic and architectural resources of Park City through limitations on the relocation and/or orientation of Historic Buildings, Structures, and Sites.

Id., § 15-11-13; *see also id.*, § 15-11-9. Thus, approval to move a structure should be granted if the conditions are met, and moving or reorienting the building preserves the City's architectural resources.

C. Interpretation and Application of § 15-11-13.

When deciding whether to grant permission to move a historic structure, the focus of the inquiry should center on whether the property meets the conditions listed in § 15-11-13, and whether

granting permission preserves the City's historic and architectural resources. The application to move the home located at 811 Norfolk concerned only one of the four conditions listed in the ordinance. It encroaches on an adjacent property, and, according to the property owner, an easement cannot be secured.[4] There is no dispute that the home encroaches on an adjoining parcel which is now owned by Mr. Ludlow.

The dispute centers almost entirely on whether Mr. Love could secure an easement from Mr. Ludlow, which would allow the home to remain at its original location. The Historic Preservation Board agreed with Mr. Love that an easement was not practical or possible, because Mr. Ludlow did not wish to grant an easement. The City and a group of neighboring landowners argue that the Mr. Love should not have been given permission to move the home, because he did not seek an easement with enough "sincerity" or diligence, and that the division of the original lot was not an "arm's-length transaction."[5] The City points to the close business and personal relationship between Love and Ludlow, and claims that the two owners planned to circumvent the historic preservation ordinance.[6]

The City also points out that Mr. Love could have created an easement when he divided the property. Since he owned the entire parcel, he could have deeded a portion to Mr. Ludlow, subject to an easement for the home. The City argues that since Mr. Love "created" the hardship (by not securing an easement when the property was divided) he is not entitled to permission to move the home by claiming that he cannot get an easement. The ordinance only provides that a move may be granted if an easement cannot be secured. There is no basis for excluding a property owner based on past behavior, even if the problem could have been avoided.[7]

The City's focus on the how the property was divided, or if Mr. Love "sincerely" sought an easement is not justified by the plain language and intent of the ordinance. Section 15-11-13(A)(1) provides that the City will grant permission to move a home that encroaches on adjacent property when "an easement cannot be secured." The ordinance does not require or justify investigation into the nature of the transaction dividing the property. Since it must be presumed that such a requirement was purposefully left out of the ordinance, the City cannot incorporate it as part of its analysis. The only inquiry is whether an easement could be secured. An owner's plans for the property or the motivations leading to the property's acquisition are also not part of the ordinance. It is no secret that both owners hope to enhance the value of their

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[4] The other three conditions are not at issue, because demolition of the home is not threatened, it is not proposed that the home be moved to another site, and the property owner has not argued that there are unique conditions which warrant the move.

[5] An "arm's length" transaction refers to business or contractual dealings "negotiated by unrelated parties, each acting in his or her own self interest . . ." BLACK'S LAW DICTIONARY 109 (6th Ed. 1990).

[6] The City notes that Mr. Love has the same business address, phone number, and email as Mr. Ludlow, and that they have retained the same attorney. The nature of the property division, which occurred immediately after Mr. Love completed the purchase, is also presented as evidence that the transaction was not at "arm's length." In other words, the property division was not a "normal" business transaction, but was concocted as a ruse to obtain permission to move the home and construct a new building on a portion of the property.

[7] It appears that the City borrowed the "self-created hardship" language from the statutes governing variances. (*See* UTAH CODE ANN. § 10-9a-702(2)(b)(ii)). Since the language of § 15-11-13 contains no provision prohibiting self-created hardships, there is no justification to incorporate it into the ordinance.

properties.[8] Such a desire, however, does not taint the transaction dividing the original parcel, and it has no bearing on whether an easement could be obtained.[9]

The ordinance provides no criteria to guide a decision no whether an easement could be secured. Without specific guidance, the City (including the HPB and the Board of Adjustment) could develop reasonable and objective criteria to apply and administer the ordinance.[10] The City's authority to interpret the ordinance, however, must be tempered by the proviso that land use ordinances should be strictly interpreted in favor of the property owner.[11] With this in mind, then, it would be reasonable to consider whether an easement is economically feasible and whether it would practical light of the proposed use of the property, including such factors as topography, placement of access and utility lines, and the configuration and size of the lot. These factors are objective and can be reliably measured or ascertained. On the other hand, parsing the details of a property transaction in an attempt to deduce the motivation or sincerity of a purchaser is highly subjective, and has no relation on whether an easement can reasonably be secured.[12] This approach strays from decision-making based on facts and measurable standards, leading to decisions based on emotion and preferential treatment, which is not acceptable.[13] This approach been condemned by appellate courts, because it erodes the property owner's right to the use and enjoyment of his property.[14]

Finally, and perhaps most significantly, the purpose of the ordinance is satisfied by objectively determining whether an easement can reasonably be secured. The ordinance should be interpreted based on its language, in light of the purpose the ordinance was meant to achieve. Seemingly lost in all the discussion of whether Mr. Love's motivations were sincere is the finding by the City's Historic Preservation consultant that moving the home meets the criteria for

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[8] Mr. Love proposed building an addition onto the rear of the home after it was moved. Mr. Ludlow also indicated plans to develop his lot, but did not offer specifics.

[9] The fact that the two property owners worked "in conjunction" with each other to purchase and subsequently divide the original parcel hardly means that the transaction was not "arm's length." Business transactions between individuals with a preexisting business or personal relationship are very common. The record also shows that Mr. Love approached the City about dividing the parcel to accommodate new development. This is not an improper motivation, so there appears to be nothing nefarious about the transaction between Mr. Love and Mr. Ludlow. The City appears to be affixing a negative label on the transaction as an attempt to "prove" that Mr. Love does not deserve permission to move the home.

[10] *See Carrier*, 2004 UT 98, ¶28, 104 P.3d at 1216 (interpretation of ordinances by local governments given a degree of "non-binding deference").

[11] *Carrier*, 2004 UT 98, ¶ 31, 104 P.2d at 1217 ("since zoning ordinances are in derogation of a property owner's use of land . . . any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use").

[12] The City's argument that Mr. Love did not "sincerely" seek an easement raises the question of how that conclusion was reached. At what point is an applicant's "sincerity" proven? What factors contribute to such a finding? Since that determination is highly subjective and based on personal motivations and prejudices rather than objective standards, the City should avoid making assumptions about an applicant's sincerity, especially when such an inquiry is not justified by the ordinance upon which it relies.

[13] *See Davis County v. Clearfield City*, 756 P.2d 704, 712 (Utah Ct. App. 1988) ("A [local government] must rely on facts, and not mere emotion or local opinion, in making [a land use] decision."); *accord Bradley v. Payson City*, 2003 UT 16, ¶ 27, 70 P.3d 47, 55.

[14] There is also the very real possibility that no property owner could be found "worthy" enough to be allowed to move a historic home. This interpretation would effectively nullify § 15-11-13, which is not an acceptable approach. *See Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996).

Landmark Sites, and would preserve the home as a Landmark Structure. The intent of the Historic Preservation Ordinance is to preserve the City's historic and architectural resources, so the interpretation and application of the ordinance should be aimed at fulfilling that intent.

To conclude, the City's investigation into the nature of the property's acquisition and division are not justified by the language or intent of the ordinance. The only inquiry is whether an easement for the encroachment could be reasonably secured. The motivations of the property owner, and the relationship between the owner and another purchaser are not relevant. The determination of whether permission to move should be granted must be based on the standards expressed in the ordinance, on objective measures and standards directly related to the intent of the ordinance, and on established facts. The decision may not be based on speculation as to whether the property owner was sincere or on opinions about the business relationship with a subsequent purchaser.[15]

Conclusion

Section 15-13-11 of the Park City Municipal Code provides that a historic structure may be moved if encroaches on an adjacent parcel, and the owner cannot secure an easement for the building. The plain language of the ordinance must be applied, and the focus of the inquiry is whether the property owner can secure an easement. Although the ordinance provides no criteria upon which to judge whether an easement can be secured, it is appropriate to base a decision on objective measures, including cost, feasibility, practicality, and such factors as topography, and parcel size. Application of the ordinance should also focus on promoting the purpose of the ordinance, which is preserving the City's architectural resources.

It is inappropriate to focus on the nature of property transactions, and the motivations of the property owner. Such an inquiry is not justified by the language or intent of the ordinance, and tends to decision-making based on emotion, public clamor, and opinion, rather than objective standards and provable facts. The motivation or sincerity of a property owner, business relations with other purchasers, and the timing or nature of property transactions are not relevant to determining whether an easement could be secured.

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

[15] In the Request for Advisory Opinion, Mr. Love raised concerns about the nature of the process, including improper communication between the City staff and decision-makers, the procedures used by the public bodies, and insufficient notice. While these concerns are important, and should be addressed as appropriate, they are outside of the scope for Advisory Opinions. Section 13-43-205 lists the topics for Advisory Opinions. The Office of the Property Rights Ombudsman must limit its analysis to those topics. Therefore, this Opinion does not address the concerns raised by Mr. Love.

NOTE:

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

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

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

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

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63G-7-401 (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:

Janet M. Scott, City Recorder
Park City
445 Marsac Avenue
Park City, Utah 84060

On this _____ Day of July, 2011, 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