

Advisory Opinion #128

Parties: Charles D. Crippen and North Ogden City

Issued: July 31, 2013

TOPIC CATEGORIES:

B: Conditional Use Applications

Other Topics: (v) Interpretation of Ordinances

(viii) Appealing Land Use Decisions

When no party appeals the final decision of the appeal authority to uphold the issuance of a conditional use permit to the district court within 30 days, a party may no longer challenge the conditional use permit, even if it was issued in violation of applicable law. In addition, the City has discretion regarding whether to revoke a conditional use permit for violation of conditions.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov



GARY R. HERBERT
Governor

GREG BELL
Lieutenant Governor

State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Charles D. Crippen

Local Government Entity: North Ogden City

Applicant for the Land Use Approval: Tom's Auto Service, L.L.C.

Type of Property: Home Occupation (Automobile Repair)

Date of this Advisory Opinion: July 31, 2013

Opinion Authored By: James S. Wright
Office of the Property Rights Ombudsman

Issue

Did a city violate its ordinances when it issued a conditional use permit allowing an automobile repair business as a home occupation in a residential zone?

Summary of Advisory Opinion

The Utah Municipal Land Use, Development, and Management Act requires a person to file a petition for review with the district court within 30 days after a final local land use decision. If a party does not file a timely petition for review, then the legality of a final local land use decision may no longer be challenged. In this case, Tom's Auto Service, L.L.C. ("Tom's Auto Service") filed for a conditional use permit ("CUP") in North Ogden City, Utah ("North Ogden" or the "City") in 2010. The North Ogden Planning Commission (the "Planning Commission") decided to approve the CUP and this decision was appealed to the North Ogden City Council (the "City Council") as the appeal authority. The City Council reviewed this matter in October of 2010 and upheld the Planning Commission's decision to issue the CUP to Tom's Auto Service. No one appealed this final land use decision to the district court within 30 days and therefore the decision to issue the CUP to Tom's Auto Service is final and can no longer be challenged regardless of whether it was issued in violation of any applicable ordinance. In addition, North Ogden City is within its discretion to decide not to revoke the CUP for violations of its conditions.

Review

Under the provisions of UTAH CODE ANN. § 13-43-205, a party may file a Request for an Advisory Opinion with the Office of the Property Rights Ombudsman (“Office”) at any time prior to the rendering of a final decision by a local land use appeal authority. An Advisory Opinion provides an early review of significant land use questions before any duty to exhaust administrative remedies arises so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. This review hopefully 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 Advisory Opinion, may have some effect on the long-term cost of resolving such issues in the courts.

The Office received a Request for an Advisory Opinion from Charles Crippen on May 28, 2013. A copy of that request was sent via certified mail to S. Annette Spendlove, City Recorder, City of North Ogden at 505 East 2600 North, North Ogden, Utah 84414. The City received that copy on June 4, 2013.

Evidence

The Office reviewed the following relevant documents and information in preparing this Advisory Opinion:

1. Request for an Advisory Opinion submitted by Charles Crippen and received by the Office on May 28, 2013.
2. Response and attachments from North Ogden submitted by Jonathan Call and received by the Office on June 11, 2013.
3. Letter and attachments submitted by Jolyon R. Walker and received by the Office on June 18, 2013.
4. Letter and attachment submitted by Jolyon R. Walker and received by the Office on June 26, 2013.
5. Letter and attachments submitted by Charles Crippen and received by the Office on June 27, 2013.

Background

Tom Baguley operates Tom’s Auto Service, an automobile repair business, out of his residence in North Ogden pursuant to a CUP received from the City in 2010. The Planning Commission considered the CUP application and voted to approve the CUP. Some neighbors who opposed locating an auto repair business in a residential neighborhood appealed this decision to the City Council. The City Council affirmed the issuance of the CUP in October of 2010 and no party appealed this final land use decision to the district court. Mr. Baguley has operated his auto repair business in his garage since that time.

The CUP contains multiple conditions relating to the operation of the auto repair business, including the requirement that the City review the CUP after the first six months from the issuance date and then review it every year after that. The Planning Commission has conducted the initial six-month review and then the annual reviews through the present time, and has determined that the CUP should continue during each review.

Multiple residents made complaints about Tom's Auto Service to the City prior to the Planning Commission's most recent annual review of the CUP, which occurred on May 1, 2013. The City received complaints that Mr. Bagley failed to comply with a variety of the CUP conditions both before and during the meeting. The Planning Commission reviewed the complaints and other information about the CUP and ultimately approved its continuation.

Mr. Crippen and other neighbors (the "Appellants") appealed this decision to the City Council, the proper appeal authority for Planning Commission decisions. After reviewing evidence and testimony both in support and opposition of the Planning Commission's decision, the City Council upheld the Planning Commission's decision to allow the CUP to continue. The Appellants disagree with this decision and believe the City's approval of the CUP back in 2010 violated its ordinances.

Analysis

I. The Deadline to Challenge the Legality of the CUP Has Passed.

Under Utah law, "A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances." UTAH CODE ANN. § 10-9a-509(2). This means that North Ogden may not issue conditional use permits in violation of its own ordinances. Mr. Crippen and some other neighbors have alleged that North Ogden violated the terms of its ordinances in granting the CUP and it should therefore be revoked.

Utah law also provides a deadline for appealing a final land use decision to district court as follows:

(2) (a) Any person adversely affected by a final decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court *within 30 days after the local land use decision is final.*

UTAH CODE ANN. § 10-9a-801(2)(a) (emphasis added). This means that in order to appeal any alleged violation of a city's land use ordinances, the aggrieved party must file suit in district court within 30 days after the final local land use decision or lose the right to appeal a final decision.

In this case, more than 30 days have passed since the final decision by North Ogden to issue the CUP for the operation of Tom's Auto Service. This means that regardless of whether the City

issued this CUP in violation of its ordinances, the time to challenge this decision has passed under state law.

II. The City Has Discretion to Revoke the CUP for Violations of Its Conditions.

The North Ogden City Code (“N.O.C.C.”) allows the City Council to revoke conditional use permits in case of violations of their conditions after a review and recommendation by the Planning Commission. It states:

B. Revocation of Permit. A conditional use permit *may* be revoked by the city council after review and recommendation by the planning commission upon the permittee’s failure to comply with the conditions imposed with the original approval of the permit.

N.O.C.C. § 11-14-2(B) (emphasis added). Under this provision, the Appellants have an avenue to request the revocation of the CUP if they can show that Mr. Baguley has violated the conditions of the CUP in his operation of Tom’s Auto Service. The plain language meaning of the permissive word “may” in this ordinance gives the City discretion regarding whether it revokes the CUP or not, even if Tom’s Auto Service violated the CUP conditions. *See Carrier v. Salt Lake County*, 104 P.3d 1208, 1216 (Utah 2004).

In this case, the City has decided not to revoke the CUP. This decision is proper based on the discretion the ordinance gives North Ogden as to whether or not it revokes a conditional use permit in case of violations of the permit’s conditions. The Appellants may make further requests that the City revoke the CUP based on violations of its conditions and the City has indicated it is willing to accept complaints alleging CUP violations at any time.

Conclusion

Under Utah law, the time has passed to seek review of North Ogden’s issuance of the CUP. The Appellants may still challenge the CUP if Tom’s Auto Service violates any of the CUP conditions. North Ogden’s ordinances give the City discretion about whether or not to revoke the CUP in case of any violations if its conditions.

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

NOTE:

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

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

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

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

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.

These provisions of state code require the delivery of the Advisory Opinion to the agent at the address 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.

The person and address designated in the Governmental Immunity Act database is as follows:

S. Annette Spendlove, City Recorder
City of North Ogden
505 East 2600 North
North Ogden, Utah 84414

On this _____ day of July, 2013, I caused the attached Advisory Opinion to be delivered to the foregoing 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