

# Advisory Opinion #131

Parties: Lawrence Meadows and Park City

Issued: October 18, 2013

## TOPIC CATEGORIES:

Other Topics (viii): Appealing Land Use Decisions

A local government may designate different appeal authorities to hear different types of appeals, even if different aspects of the same land use application must be appealed to the different authorities. Dividing issues amongst appellate bodies does not violate the Utah Code's prohibition on successive or duplicative appeals.

An Advisory Opinion is not a substitute for the appeal procedure established by ordinance.

## 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, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84114

(801) 530-6391  
1-877-882-4662  
Fax: (801) 530-6338  
[www.propertyrights.utah.gov](http://www.propertyrights.utah.gov)  
[propertyrights@utah.gov](mailto:propertyrights@utah.gov)



GARY R. HERBERT  
*Governor*

SPENCER J. COX  
*Lieutenant Governor*

# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

### ADVISORY OPINION

Advisory Opinion Requested by: Lawrence M. Meadows  
Local Government Entity: Park City  
Applicant for the Land Use Approval: 505 Woodside Development, LLC  
Type of Property: Residential Building  
Date of this Advisory Opinion: October 18, 2013  
Opinion Authored By: Elliot R. Lawrence  
Office of the Property Rights Ombudsman

### Issues

May a local government divide issues raised in an appeal, and designate different appeal authorities to consider the issues separately?

### Summary of Advisory Opinion

The Utah Code authorizes local governments to designate different bodies as the appeal authorities for different types of issues. Different types of issues raised in one appeal action may be reviewed concurrently by the appropriate appeal authorities. If the designation is established by a local ordinance, the Utah Code requires that the appeal be conducted according to that ordinance.

If no appeal is sought after a decision by an administrative body, the decision stands. The Office of the Property Rights Ombudsman may issue Advisory Opinions, but the Opinion is not a substitute for the appeal procedure established by statute. Finally, the Office of the Property Rights Ombudsman may decline to analyze an issue if the analysis will have no effect on the outcome of an administrative decision.

## **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 § 13-43-205. An advisory 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 Lawrence Meadows on March 19, 2013. A copy of that request was sent via certified mail to Janet Scott, Park City Recorder, at 445 Marsac Ave., Park City, Utah 84060. The return information indicates that the City received the Request on March 22, 2013.

## **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, with attachments, submitted by Lawrence Meadows, received by the Office of the Property Rights Ombudsman, March 19, 2013. Additional materials were submitted on March 26 and April 3, 2013.
2. Materials submitted on behalf of the property owner, 505 Woodside Development, by Bradley Cahoon and Graham Gilbert, received April 3, 2013.
3. Response submitted on behalf of Park City by Polly Samuels McLean, Assistant City Attorney, received April 24, 2013.
4. Materials submitted by Park City, received June 13, 2013.
5. Materials submitted by 505 Woodside Development, received July 12, 2013.

## **Background**

This Opinion revisits a proposal to remodel a home located at 505 Woodside Avenue in Park City. In July of 2010, the Office of the Property Rights Ombudsman issued an Advisory Opinion requested by Lawrence Meadows, concerning the same property and a proposal to remodel the home. Mr. Meadows has requested this Opinion to evaluate aspects of a new remodeling proposal.

The property is owned by 505 Woodside Development, LLC. The home has been designated by the City as being “historically significant,” because the original portion was built around 1904,

and is representative of the City's development during its mining heyday.<sup>1</sup> According to the materials submitted for this Opinion, there have been additions to the rear of the original 505 Woodside structure, while the front portion retains the original design. The home sits a few feet above the street level, with a retaining wall along the front.

The City's historic preservation ordinance governs replacement or renovation of structures deemed to be historically significant. Any changes to historic structures requires specific evaluation and approval under the City's Historic District Design Review code ("HDDR"). Decisions concerning historic structures made by the City may be appealed to the Historic Preservation Board.

In March of 2009, Woodside applied for a permit to remodel the 505 Woodside structure. The proposed remodeling included replacing much of the rear portion with new construction, and removing about 5 feet from one end of the front portion. Because the proposed remodeling included alteration of a historic structure, an application was subject to the City's HDDR code. Lawrence Meadows, who owns a neighboring property, objected to that proposal.

As the application was being processed, it was discovered that the owners mistakenly believed that the 5-foot portion was a later addition to the home, and so could be removed without compromising the historic nature of the structure. Mr. Meadows requested an Advisory Opinion to evaluate, among other things, whether the application was complete and eligible to be considered for approval. The Opinion concluded that due to the mistake concerning the 5-foot portion of the home, the application was not complete, and could not be processed further.<sup>2</sup> The property owners withdrew the application.

In the Summer of 2012, the owners submitted a new application, which entailed excavating a space beneath the structure for a garage, with the home above the garage.<sup>3</sup> This addition would require reconstruction of at least a portion of the historic structure, as well as changes to the front yard and the retaining wall, including removal of some vegetation from the front yard.<sup>4</sup> The new application was also subject to the HDDR. The City's staff approved the application with some conditions on February 4, 2013.

In addition, the City's Land Management Code required a conditional use permit for construction on lots where the grade was greater than 30% (a "Steep Slope Conditional Use Permit").<sup>5</sup> The

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<sup>1</sup> The home was designated as "historically significant" after a city-wide survey in 2008. The home is considered historic because it dates from the "mature mining era" (*i.e.*, 1894-1930), but it has no other historic or cultural significance.

<sup>2</sup> The Opinion reasoned that the mistake made the application incomplete, because it concerned a significant aspect of the application. The applicant could have been revised and resubmitted, but the owner could not claim vested rights until the revised materials were submitted.

<sup>3</sup> The construction also involved removal and replacement of the more recent additions on the rear of the home. Woodside's application also proposed a "green roof" with vegetation on a roof portion connecting the older part of the structure to the new additions. This green roof portion does not require modification to the historic portion of the structure.

<sup>4</sup> Removal of vegetation, particularly mature trees, requires approval from the City.

<sup>5</sup> According to the Park City Land Management Code, any structure or access located on a slope greater than 30% must obtain a conditional use permit. *See* PARK CITY MUNICIPAL CODE, § 15-2.2.6.

City concluded that slopes that had been created artificially did not require conditional use permits, even if they were greater than 30%. The City stated that it had evaluated the lot, and determined that the “natural” grade of the lot was 21%, so a conditional use permit was not necessary.

Mr. Meadows objected to the proposal, and submitted an appeal in which he not only disagreed with the HDDR decision, but also with the City’s conclusion that Woodside did not need Steep Slope Conditional Use Approval. On February 13, just before the deadline for an appeal to the Historic Preservation Board, Mr. Meadows submitted a brief letter requesting an appeal of the HDDR approval. The letter also states that he City should have required a Steep Slope Conditional Use Approval.<sup>6</sup> On February 28, he submitted a “Supplemental Brief,” consisting of a spiral bound book with roughly 300 pages. In this supplement, Mr. Meadows expanded his objection to the City’s position on the Steep Slope Conditional Use Permit, and, for the first time, raised specific objections to the decision made by the Historic Preservation Board.

The Supplemental Brief raised seven issues: 1) The Woodside Application was not complete; 2) The City should have required a Steep Slope Conditional Use Permit; 3) New retaining walls required a conditional use permit; 4) The Application did not show significant vegetation, and there was no mitigation for lost vegetation; 5) There was no preservation plan for the historic building; 6) The Board approved demolition of the structure without a proper permit; and 7) The historic structure and roof forms were not preserved.

The City evaluated the Supplemental Brief and concluded that the two issues concerning conditional use approvals fell under the jurisdiction of the Planning Commission, while the remaining five objections should have been considered by the Historic Preservation Board. Based on this, the City scheduled two hearings, the first before the Historic Preservation Board on March 20, 2013, and the second before the Planning Commission, held on March 27. In the meantime, Mr. Meadows requested this Advisory Opinion on March 19.

The Planning Commission upheld the City’s decision on the conditional use permits. At its March 20 hearing, the Historic Preservation Board dismissed or rejected four of the five issues before it, and continued the remaining issue to April 3.<sup>7</sup> On that date, the Board rejected the final issue and the HDDR decision remained intact, with conditions imposed by the Board. Mr. Meadows did not file an appeal of either decision.<sup>8</sup>

In the materials submitted for this Opinion, Mr. Meadows complains that dividing the issues in his appeal between the two bodies violates § 10-9a-701 of the Utah Code, which prohibits “duplicate or successive appeals.” He cites a decision from the Third District Court involving Park City and another land owner in a historic district.<sup>9</sup> In that case, the property owner was denied HDDR approval, so he appealed to the Historic Preservation Board, which granted

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<sup>6</sup> The letter also reserved the right “to supplement or amend” the appeal.

<sup>7</sup> The remaining issue was number seven, concerning the structure and roof form.

<sup>8</sup> Mr. Meadows could have appealed either decision to the Third District Court within 30 days, but did not choose to do so.

<sup>9</sup> Findings of Fact, Conclusions of Law, and Order, *Jeff Love v. Park City Municipal Corp., et al.*, Case No. 110500561 (Third District Court, July 20, 2012).

approval. A group of neighboring property owners objected, and filed an appeal to the City's Board of Adjustment, which overturned the decision. The property then filed an appeal to the District Court. The Court held that the City violated § 10-9a-701 because the landowner was required to pursue successive appeals. Mr. Meadows argues that he also has been required to pursue duplicate or successive appeals.

Woodside, through its attorney, disagrees with Mr. Meadows, and argues (as does the City) that the divided appeal process does not violate § 10-9a-701. Moreover, Woodside argues that the appeal to the Historic Preservation Board should not have been heard at all, because Mr. Meadows did not file a proper appeal within ten days after the HDDR decision. Woodside points to the appeal letter of February 13, 2013, which states that the appeal is based on the Steep Slope Conditional Use Permit, and not on any factor that should have been heard by the Historic Preservation Board.<sup>10</sup> Finally, Woodside notes that the issues for this Opinion are moot, because Mr. Meadows did not appeal the decisions from either body.<sup>11</sup>

## Analysis

### I. Mr. Meadows was not Required to Pursue Duplicate Appeals.

The concurrent hearings before the City's Planning Commission and Historic Preservation Board did not constitute "duplicate or successive appeals" prohibited by § 10-9a-701(4)(d) of the Utah Code. Different appeal authorities may consider different types of appeals. A city may "designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions." UTAH CODE ANN. § 10-9a-701(4)(b). Thus, the same subsection that prohibits duplicate or successive appeals allows cities to process appeals through more than one appeal authority.

There are no decisions from a Utah appellate court explaining what constitutes a duplicate or successive appeal. "Duplicate" implies identical, an exact copy, or to "repeat, esp[ecially] unnecessarily." *Oxford Dictionary and Thesaurus* (American Edition, 1996) p. 447. Accordingly, a duplicate appeal would be one that is identical to another appeal, or repeats an appellate process.

The City explains that it "bifurcated" Mr. Meadows's requested appeal to the Planning Commission and Historic Preservation Board, because the division was required by City ordinance. "Any decision by either the Planning Director or Planning Staff regarding Application of this [Land Management Code] to a Property may be appealed to the Planning Commission. Appeals of decisions regarding the Design Guidelines for Historic Districts and

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<sup>10</sup> Woodside does not dispute that the dispute concerning a Steep Slope Conditional Use Permit was properly appealed and decided by the City's Planning Commission.

<sup>11</sup> Mr. Meadows also argues that the decisions reached by the Planning Commission and the Historic Preservation Board were erroneous. Woodside countered by arguing that the decisions were correct and supported by substantial evidence.

Historic Sites shall be reviewed by the Historic Preservation Board . . .” PARK CITY LAND MANAGEMENT CODE, § 15-1-18(A).

The questions about conditional use permits arose from the Land Management Code, and should have been appealed to the Planning Commission. The other appeals raised by Mr. Meadows concerned the design guidelines for a historic district, and so should have been considered by the Historic Preservation Board. The Utah Code requires that local governments “conduct each appeal . . . request as provided in local ordinance.” UTAH CODE ANN. § 10-9a-706(1). Thus, the City’s decision to have the different appeals reviewed by different appeal authorities was appropriate and did not constitute a duplicate or successive appeal.

## **II. The Decision to Proceed With the Appeals and the Decisions of the Two Administrative Bodies are Moot, Because No Appeal was Made to District Court**

Because Mr. Meadows did not appeal the decisions from the Planning Commission or the Historic Preservation Board, the decisions of the two bodies must stand, and this Opinion will not disturb them. An Advisory Opinion is a means to review land use decisions and help resolve disputes, but an Opinion is not a substitute for review by a district court, and does not stay any land use decision, including any appellate rights. “[A] request for an advisory opinion under Section 13-43-205 does not stay the progress of a land use application, or the effect of a land use decision.” *Id.*, § 13-43-206(13). Thus, the decisions made by the two administrative bodies must stand.

Along the same lines, the City’s initial decision to proceed with an appeal of all the objections raised by Mr. Meadows is also moot. Woodside argues that the appeal should have been confined to the Steep Slope Conditional Use Permit only, because the original appeal letter filed by Mr. Meadows only referred to that issue. The remaining issues were raised in the Supplemental Brief, which was not filed until after the ten-day appeal period had passed. However, the City decided to proceed with the appeal on all of the points raised by Mr. Meadows, and the final decisions have been made. An analysis of whether the City should have processed all of the objections raised by Mr. Meadows would not affect the final outcome of the administrative appeals, so this Opinion will not address the matter.<sup>12</sup>

## **Conclusion**

The City’s decision to “bifurcate” the appeal sought by Mr. Meadows, dividing the issues between the City’s Planning Commission and its Historic Preservation Board, was not a “duplicate or successive” appeal prohibited by the Utah Code. In fact, local governments may designate different bodies to consider different types of appellate questions, and there is no reason why the different types of issues raised in one appeal cannot be heard concurrently by the appropriate bodies. Moreover, the City was required to comply with its own ordinances regarding how the appeal was processed, which meant that the issues had to be separated.

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<sup>12</sup> See *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 15 (An appeal is moot if the requested relief would have no effect.) Furthermore, the City did not address its decision to process the appeal, so any analysis would be incomplete. This does not mean that a similar issue could be reviewed in a future Advisory Opinion.

The decisions of the Planning Commission and the Historic Preservation Board were not appealed to the district court, and so will stand. An Advisory Opinion is not a substitute for the established appeal procedure, and so this Opinion will not disturb the decisions that were made. The objection to the City's decision to process the appeal in the first place also will not be disturbed, since any conclusion will not affect the final decisions that have already been made.

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. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

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

Marci Heil, City Recorder  
Park City  
445 Marsac Avenue  
Park City, UT 84060

On this \_\_\_\_\_ Day of October, 2013, 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.

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Office of the Property Rights Ombudsman