

Advisory Opinion #13

Parties: Pam Wixom and the City of West Haven

Issued: March 15, 2007

TOPIC CATEGORIES:

E: Entitlement to Application Approval (Vesting)

The decision to deny an application for a lot split was supported by substantial evidence in the record and was not arbitrary, capricious, or illegal.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

Advisory Opinion

Advisory Opinion Requested by: Attorney Will Rodgers for Pam Wixom

Local Government Entity: City of West Haven

Applicant for the Land Use Approval: Terry and Pam Wixom

Project: Lot Split – Lot 43, Stonefield Estates Phase 2
4629 South 4875 West

Date of this Advisory Opinion: March 15, 2007

Issues

Was the decision by the West Haven Planning Commission to deny an application to divide a subdivision lot legal and enforceable?

Summary of Advisory Opinion

The decision by the West Haven Planning Commission to deny the Wixom's application for a lot split was supported by substantial evidence in the record and is therefore not arbitrary, capricious, or illegal.

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 Annotated Section 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.

The request for an advisory opinion in this matter was received from Will Rodgers, attorney for Terry and Pam Wixom, by the Office of the Property Rights Ombudsman on January 2, 2007. A letter with the request attached was sent by certified mail, return receipt requested, to Timothy R.

Wayment at 2440 South 2050 West in West Haven, UT 84401. Mr. Wayment is the individual whose name is listed as the designated agent on the records of the Division of for the receipt of notice under the Utah Governmental Immunity Act. The statute governing the processing of requests for advisory opinions requires that this notice be sent to the designated agent, but the information on the state register is out of date for West Haven City, so the notice was returned to this office as undeliverable on January 22, 2007. Subsequent telephone calls and fax transmissions resulted in the city receiving a copy of the request on January 24, 2007.

The parties did not appoint a neutral to write the opinion, so the office has proceeded to prepare it. Prior to preparing this opinion, I visited on several occasions with Will Rodgers and also with Ken Bradshaw, the West Haven City Attorney.

Evidence

The following documents were reviewed prior to completing this advisory opinion:

1. Minutes – West Haven Planning Commission, October 8, 2003
2. Minutes – West Haven Planning Commission, June 14, 2006 (page four only).
3. Minutes – West Haven City Council Meeting, June 21, 2006.
4. Minutes – West Haven Planning Commission, September 27, 2006.
5. Plat – Stonefield Estates Subdivision Phase 2 prepared by Reeve and Associates, dated May 2003.
6. Plat – Stonefield Estates Subdivision Phase 2 prepared by Reeve and Associates, dated June 2003. (Attached to this Advisory Opinion as Exhibit “A”)
7. Request for an advisory opinion, dated December 22, 2006, including an attachment entitled “Facts”.
8. Subdivision Ordinance of the City of West Haven, effective 15 January, 1992.

Assumed Facts

1. Terry and Pam Wixom own lot 43 in Stonefield Estates Subdivision Phase 2. See Exhibit “A” attached.
2. Lot 43 includes 4.4 acres of ground.
3. The zoning in the area would allow lot 43 to be split into two lots.
4. Lot 43 has adequate frontage to meet the minimum street frontage requirements for two or more lots. Lot 43 abuts 5100 West Street, 4875 West Street and on 4600 South Street.
5. The Plat for the Stonefield Subdivision Phase II was approved in 2003. At the time the Plat was approved, the developer asked to reduce the size of lot 43 to 1.4 acres. That request was denied by the Planning Commission on October 8, 2003.

6. Subsequent to the filing of the subdivision plat, the Wixom's purchased lot 43 and applied for a lot split in 2006. The request was denied by the planning commission on June 14, 2006.
7. The West Haven City Council denied the lot split on June 21, 2006.
8. The Wixoms again applied for permission to split their property into two lots, and the issue was heard again on September 27, 2006. The request was again denied.

Analysis

Land use decisions by municipal officials in the land use context are afforded great deference.

This court has long recognized that municipal land use decisions should be upheld unless those decisions are arbitrary and capricious or otherwise illegal. Indeed, municipal land use decisions as a whole are generally entitled to a "great deal of deference." . . . Given this deferential disposition, we have held that it is "the court's duty to resolve all doubts in favor" of the municipality, and the burden is on the plaintiff challenging a municipal land use decision to show that the municipal action was clearly beyond the city's power.

Bradley v. Payson City Corp., 2003 UT 16, at p. 10, 12, 14. (Citations omitted).

(3) (a) The courts shall:

(i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.

(b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal.

(c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.

(d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

Utah Code Annotated Section 10-9a-801(3).

Substantial Evidence

According to the Utah appellate courts, administrative land use decisions will only be considered valid if supported by substantial evidence in the record. See Utah Code Ann. Sec. 10-9a-801(3)(c), *Bradley v. Payson City Corp.*, 2003 UT 16 and *Wadsworth Construction v. West Jordan*, 2000 UT App 49.

Substantial evidence is defined to be “more than a scintilla of evidence, but less than the weight of the evidence”. *Patterson v. Utah County Board of Adjustments*, 893 P.2d 602 (UT App. 1995). By this standard, if there is credible evidence on both sides of an issue, the land use decision maker will be supported and its decisions upheld whichever way the decision goes. On the other hand, if there is no credible evidence to support the decision, then it will be overturned.

Substantial evidence is not “the concerns expressed by neighboring landowners” (*Wadsworth*, at para. 16). It is also not “vague reservations expressed by either the (neighbors) or the commission members. . . (The) reasons did not justify denial of the permit even though they would have been legally sufficient if the record demonstrated a factual basis for them. . . the denial of a permit is arbitrary when the reasons are without sufficient factual basis . . .” (*Davis County v. Clearfield*, 756 P.2d 704 (Utah Ct. App. 1988)). Local government must rely on facts, and not mere emotion or local opinion in making such a decision. Substantial evidence is that evidence, which if standing alone and without contradiction, would be sufficient to support the decision.

“We have defined substantial evidence as ‘that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.’” (citation omitted) *Bradley v. Payson City Corp.*, 2003 UT 16, P15.

The decision in an administrative land use decision must be based on evidence, not conjecture or speculation. Under the case law and statutes that govern this matter, therefore, the City’s administrative decision to deny the Wixom’s application to subdivide their existing lot will be upheld if the decision is supported by substantial evidence in the record.

Record - Wixom Application

In the current case, the West Haven City Ordinances provide:

No lot within a subdivision approved by the Planning Commission of West Haven, Utah and recorded in the County Recorder’s Office in accordance with the provisions of this Ordinance, shall be further divided, rearranged, added to or reduced in area nor shall the boundaries of any lot be altered in any manner so as to create more lots than initially recorded or any non-conforming lot without first obtaining the approval of the Planning Commission and the City Council.

Subdivision Ordinance of the City of West Haven at Chapter 1, Section 2, Scope of Ordinance. Version of January 15, 1992. There are no standards of review in the ordinance, so it is assumed that the burden placed on the City to support its decisions with regard to this provision of the code is higher than if standards were provided for.

The only portion of a record of this matter submitted by either party is the minutes of the planning commission meeting held on September 27, 2006. In those minutes there are sixteen

lines related to this issue, and the only evidence relied upon by the planning commission in denying the application for a lot split is found in this paragraph:

“Chairman Morin stated to Mr. and Mrs. Wixom that their 4.4 acre lot was part of the 50 acre total subdivision approval which included open space and so their lot cannot be divided.”

Minutes of the West Haven Planning Commission, September 27, 2006, Page 2. There was likely more argument and evidence provided in the hearing, but I do not have a transcript of the meeting or a copy of a audio recording. In order to be considered as sufficient to meet the substantial evidence standard, any statement relied upon by the planning commission must be relevant, fact-based, and credible. In responding to the applicant’s request for this advisory opinion, the City offers the minutes of several other meetings to support the conclusion that the Chairman of the Planning Commission was speaking with personal knowledge and stated the true facts of the matter. The information about the history of the previous requests and applications also was provided by the City to clarify what the Chairman meant by his rather abbreviated reference to the facts of the matter on the record with the Wixom’s September application for a lot split. This information from other previous records therefore goes to the credibility of the speaker and the meaning of his comments, which is enhanced by the minutes of a meeting held on June 14, 2006. At that time the Wixom’s also appeared before the Planning Commission, and with reference to item 11, which was for discussion and not for motion, the current Chairman was in attendance when it was stated:

“Planning Commission stated to the Wixom’s that their 4.4 acres was part of the 50 acre total subdivision approval which included open space and therefore the property could not be divided.”

Minutes of the West Haven Planning Commission, June 14, 2006, Page 4, item 11. The City also provided minutes of the City Council meeting held June 21, 2006 at page 1 item 6 G (Request to Divide Stonefield Estates Lot 43 into Two Lots), which states:

“Councilmember Jensen moved to support the recommendation of the Planning Commission and deny the request to divide Lot 43 as requested on the basis that it would be in conflict of the city’s general plan, the zoning ordinance and the original approved subdivision by changing the density of the subdivision.”

While these statements are not part of the record for purposes of supporting the September 27, 2006 decision of the Planning Commission to deny the lot split application of the Wixom’s, they support the credibility of the Chairman of the Commission in his statement that the issue is governed by the density of the subdivision and the requirement of open space. The statement of the Chairman is barely evidence, but it meets the minimal requirement of a factual statement made by a credible source that is relevant to the issue at hand. The Chairman was in a position to know of the applicable zoning district that the property is within, the density recommendations of the General Plan, and the process of approval that was conducted when the subdivision plat

was approved in 2003. As the Chairman, Mr. Morin would have the expertise to provide reliable information about the local planning and zoning ordinances and the general plan. While it is not necessary to his ultimate credibility, the Chairman may have also been aware of statements made in the Planning Commission hearing of October 8, 2003, where the following entry is included in the minutes at Page 1, item 2 when the Stonefield Subdivision, Phase II was originally approved:

“Developer made an informal request to amend the plat by deleting three acres from lot 43. Planning members stated that this plan is what allowed the developer to achieve the density they wanted, and therefore could not change the plat.”

Again, this statement from 2003 was not entered into the record of the decision by the Planning Commission to deny the lot split request in this case on September 27, 2006, but it would provide some foundation to support the truth of the Chairman’s factual statement. That statement is the only evidence before me as I determine whether the decision to deny the lot split is based on substantial evidence provided by a credible source.

Since the courts have stated that land use decisions by local government entities are entitled to deference, I would conclude that this single sentence, entered onto the record by a credible source, constitutes sufficient evidence to support the decision. Although the evidence provided is barely adequate to survive this standard of review, I believe a court would hold it to be sufficient to uphold the decision of the Planning Commission to deny the lot split.

It would have been far better if the City adopted standards for review that would be used when determining whether a lot split is to be granted, and then that the minutes reflect a more complete and clear statement of the evidence upon which a land use decision is made. Formal findings of fact and conclusions of law may not be necessary in every decision, but the record in this case could easily have included a few references to specific documents such as the city’s general plan, the previous density goals and other factors which would have made the results of this review far more predictable.

Conclusion

The decision by the West Haven Planning Commission to deny the Wixom’s application for a lot split was supported by substantial evidence in the record and is therefore not arbitrary, capricious, or illegal.

Craig M. Call, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, 13-42-205. 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

Utah Code Annotated Section 13-43-206(10)(b) requires delivery of the attached advisory opinion to the governmental entity involved in this matter in a manner that complies with U.C.A. Section 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:

Timothy R. Wayment
2440 South 2050 West
West Haven, UT 84401

On this _____ Day of March, 2007, 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