

Advisory Opinion #34

Parties: H. Blaine Walker and City of Cottonwood Heights

Issued: March 25, 2008

TOPIC CATEGORIES:

B: Conditional Uses

According to Utah law, a conditional use permit may only be denied if it is shown that the detrimental effects of the use cannot be mitigated by imposing reasonable conditions. A local government must first identify the possible detrimental effects of the use and then determine if those effects can be mitigated. Administrative decisions are afforded judicial deference and will be upheld if they are supported by substantial evidence.

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.



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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: H. Blaine Walker

Local Government Entity: Cottonwood Heights

Project: Conditional Use Approvals
7755 South Wasatch Blvd

Opinion Authored By: Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

Date of this Revised Advisory Opinion: March 25, 2008

Issue

Did the City of Cottonwood Heights properly and legally approve the conditional use application for the Wasatch Office Project?

Summary of Advisory Opinion

The conditional use application was properly and legally approved, subject to the conditions set forth by the City and the mandatory provisions of City Ordinances. Utah Law requires approval of an application for a conditional use permit if reasonable conditions can mitigate negative impacts of the use. The City has imposed reasonable conditions to mitigate those negative impacts. The approval of the application and conditions imposed are supported by substantial evidence on the record.

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. 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.

The request for this Advisory Opinion was received from H. Blaine Walker on February 13, 2008. As provided in statute, a letter with the request attached was sent via certified mail, return receipt requested, to Linda W. Dunlavy, City Recorder, at 1265 Fort Union Blvd., #250, Cottonwood Heights, Utah 84047. The return receipt was signed and was received on February 15, 2008, indicating that it had been received by the City. A copy of the letter along with the request was also sent to James Brown, 7696 Quicksilver Drive, Cottonwood Heights, UT 84121. Mr. Brown has previously submitted an appeal of the Planning Commission Decision on January 31, 2008. Mr. Brown did not respond. W. Shane Topham, attorney for the City of Cottonwood Heights, spoke with the Office of the Property Rights Ombudsman regarding the request on February 14, 2008. The City submitted its staff report to the Planning Commission to the Office of the Property Rights Ombudsman on February 20, 2008.

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, submitted by H. Blaine Walker, and received by the Office of the Property Rights Ombudsman on February 13, 2008.
2. Full Staff Report to the Planning Commission, prepared by Michael Black, City Planning Director, dated January 3, 2008, with all attached documents.
3. Minutes of the Cottonwood Heights City Planning Commission Meeting dated Wednesday, January 9, 2008.
4. Board of Adjustment Application – Appeal by James Brown, dated January 31, 2008, and all attached documents.

Background

H. Blaine Walker (“Applicant”) has an ownership interest in two parcels of property located in the City of Cottonwood Heights, Utah (“City”). Both parcels front on Wasatch Boulevard, and together comprise 5.18 acres of land (the “Property”). There are five residential properties that abut the Property, and the remainder of the Property is bounded by public roads. The property is currently within the RM Zone. “Offices, professional and general business” are listed in the Cottonwood Heights Code as conditional uses within the RM zone. (Cottonwood Heights Code of Ordinances § 19.34.030(11)). In addition, the Property is subject to the Gateway Overlay Zone (Cottonwood Heights Code of Ordinances § 19.49), the Sensitive Lands Ordinance (Cottonwood Heights Code of Ordinances § 19.34.72), Geological Hazards Area Ordinance (Cottonwood Heights Code of Ordinances § 19.34.75), and various other ordinances.

Sometime before September 8, 2004, Mr. Walker submitted to Salt Lake County a Conditional Use permit requesting approval to develop office buildings on the Property. On January 4, 2005,

the City of Cottonwood Heights officially incorporated, and on or about that date, Salt Lake County closed the conditional use application file without rendering a decision.

On October 17, 2005, the Applicant submitted a new conditional use application to the City. Between that date and January 9, 2007, the City and the Applicant appear to have prosecuted the Conditional Use Application with some diligence. According to the City staff report, the Application had been reviewed multiple times by city planning staff, city engineers, the city geologist, and UDOT. It appears that the Applicant worked closely with City to address issues raised during these reviews. In addition, the City provided multiple opportunities for public comment on the development, including public hearings on the conditional use application. These public comment opportunities appear to have been availed by many.

On January 9, 2008, the Cottonwood Heights City Planning Commission Meeting met and, after much discussion, voted to approve the Conditional Use Permit for the property. In approving the application, the City imposed approximately 44 conditions.¹ In the discussion preceding the motion, the County discussed the history of the project, the work of staff in reviewing the project, and the standard for imposing conditions. In the motion, the Commission found that “the facts seemed to have been exhaustively reviewed and reasonable mitigating conditions can be imposed.”

It appears that subsequent to the approval of the application, a neighbor or group of neighbors to the project appealed the approval of the Conditional Use Permit to the Cottonwood Heights Board of Adjustments. Subsequent thereto, the Applicant requested that this Office provide an Advisory Opinion under UTAH CODE ANN. § 13-43-205, to determine whether the Conditional Use Permit was properly granted by the City.

Analysis

I. The Standard for Reviewing Approval of a Conditional Use Application

A. The City Must Approve A Conditional Use Application Where Reasonable Conditions Can Be Imposed To Mitigate Detrimental Effects.

Utah statutes set forth the standard under which a City is to review a proposed conditional use:

(a) A conditional use shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.

(b) If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable

¹ The final list of conditions imposed appears to have been modified to some extent by the discussion and motion in the January 9, 2008 Planning Commission meeting. A final list of the conditions containing the modifications has not been provided.

conditions to achieve compliance with applicable standards, the conditional use may be denied.

UTAH CODE ANN. § 10-9a-507(2).² Accordingly, in dealing with a conditional use application, the reviewing authority is to: (1) Identify detrimental effects of the proposed use, using standards from applicable land use ordinances, and then (2) determine whether those effects can be mitigated by imposing reasonable conditions. If the detrimental effects can be mitigated, the land use authority must approve the conditional use.

Rather than the burden being on the applicant to prove that the conditional use permit should be granted, this statute indicates that approval must be granted unless the City proves that the application should be denied. To deny a conditional use permit, the City must show that the detrimental effects cannot be mitigated by the imposition of reasonable conditions.³ In other words, when considering conditional uses, the question is not “why allow the use?” The question is “why not allow the use?”

B. The City’s Decisions will be Upheld if Supported by Substantial Evidence on the Record.

The determinations by the City regarding what are the detrimental effects of the use, whether those effects can be mitigated by reasonably imposed conditions, and what conditions to impose, are entitled to a degree of judicial deference. *See Springville Citizens for a Better Cmty. v. City of Springville*, 1999 UT 25. The Courts have determined that such decisions will be upheld unless they are found to be “arbitrary, capricious, or illegal.” *Uintah Mt. RTC, L.L.C. v. Duchesne County*, 2005 UT App 565. When a land use decision deemed an exercise of a City’s administrative powers, Utah Courts have upheld such decisions “if they are supported by substantial evidence.” *See Xanthos v. Bd. of Adjustment of Salt Lake City*, 685 P.2d 1032, 1034-35 (Utah 1984). A conditional use permit review is an administrative act and therefore will be upheld if supported by substantial evidence on the record. *Davis County v. Clearfield City*, 756 P.2d 704 (Utah Ct. App. 1988). Utah Courts have defined substantial evidence to be “that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *Bradley v. Payson City Corp.*, 2003 UT 16, P10.

Moreover, UTAH CODE ANN. § 10-9a-507(2) reminds us that a City must follow the mandatory provisions of its own ordinances: “A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances.” Whether a decision is illegal “requires a determination that the . . . decision violates a statute, ordinance, or existing law.” *Uintah Mt. RTC*, at ¶ 19.

Therefore, the City is entitled to determine whether there are reasonable conditions that can be imposed to mitigate the detrimental effects of the development. Once the City has made that

² There is a parallel section applicable to counties found at UTAH CODE ANN. § 17-27a-506.

³ This is because of the presumption that conditional uses should generally be allowed since the ordinance would not list the use as allowable if the use were not desirable in the first place. If certain uses are not desirable at that location, they should not be listed in the zoning ordinance as permitted or conditional uses in that area.

decision, it will be upheld unless it is arbitrary, capricious, or illegal. If it is supported by substantial evidence on the record, it will not be held to be arbitrary or capricious. If it complies with the provisions of the City's applicable ordinances and standards, it will not be held to be illegal.

II. The City's Decision is Supported by Substantial Evidence on the Record

In *Springville Citizens v. Springville*, 1999 UT 25, the Utah Supreme Court indicated that "substantial evidence" can be found where there were repeated hearings and meetings, multiple submissions of information, and extended public discussion. If the required documentation was before the land use authority and "numerous conditions" are imposed, then substantial evidence will be found to exist for the decision:

The undisputed facts demonstrate that the City's decision was not arbitrary or capricious but was the result of careful consideration and was supported by substantial evidence. Of significant import, consideration of the P.U.D. spanned nearly a year and a half and involved more than a dozen separate meetings wherein public input was heard, objections voiced, and modifications to the P.U.D. imposed. . . . Moreover, throughout the approval process and in an effort to meet the P.U.D. requirements, the city council required Peay to satisfy numerous conditions concerning the proposed development, all of which Peay eventually fulfilled. In short, the undisputed evidence reveals without question that substantial evidence supported the City's decision.

As was the case in the *Springville Citizens* case, it is undisputed in the present case that there were extensive discussions held over the course of many months regarding the Property. A multitude of documents have been produced by both the City and the Applicant, and those documents have been reviewed and commented upon by City staff, engineers, and geologists. Repeated public hearings and meetings were held. Public comments have received responses. The issues of geologic stability and fault lines were discussed extensively. The concerns of the neighbors and other third parties were well known by the Commission as it deliberated. (See the Minutes of the Cottonwood Heights City Planning Commission Meeting dated Wednesday, January 9, 2008.)

Finally, in granting approval, the Commission has imposed upon the project an extensive list of conditions. Among the conditions imposed, at least twenty-five concern project planning issues such as access, lighting, height restrictions, and construction hours; at least 11 concern engineering issues such as erosion control, storm water runoff, and utilities; and at least five more concern geologic concerns, primarily addressing the fault lines.

Considering the comprehensiveness of the record, the extent to which the matter has been reviewed, the number of hearings held, and the number and breadth of the conditions imposed, it would be difficult to find that there was not substantial evidence to support the decision by the Commission. In addition, nothing in the record indicates that the City has failed to comply with

its own ordinances and standards in approving the application and imposing the conditions. A court would not upset the local government's discretion in this matter.

Conclusion

Under § 10-9a-507 of the Utah Code, conditional use application for the Wasatch Office Project was properly approved by the Planning Commission. The Commission, staff, and public has reviewed and commented on the project over the course of several years. Substantial evidence on the record exists to show that the detrimental effects of the conditional use can be mitigated by the imposition of certain conditions. The City has imposed those conditions as part of the approval. Therefore, the City has properly approved the Applicant's Conditional Use Application.⁴

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

⁴ This Advisory Opinion does not consider and expresses no opinion regarding the merits of any appeal that may have been filed by any party. The Office of the Property Rights Ombudsman has received a copy of the Appeal filed in this Matter by James Brown, who represents that the appeal is brought also in behalf of other concerned citizens. No party has requested that this Office review that Appeal on the merits, and such review would be inappropriate topic for this Opinion. The Board of Adjustments should review and consider the appeal in accordance with the standards set forth by state law and city ordinance.

NOTE:

This is an advisory opinion as defined in UTAH CODE ANN. § 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 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:

Liane Stillman
City Manager
1265 E Fort Union Blvd #250
Cottonwood Heights, Utah 84047

On this _____ Day of March, 2008, 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