

Advisory Opinion #5

Parties: Deep Water Distribution Company and Wasatch County

Issued: August 14, 2006

TOPIC CATEGORIES:

B: Conditional Uses

R(viii): Other Topics (Appealing Land Use Decisions)

A conditional use permit shall be approved if conditions mitigate the detrimental effects of the proposed use. The burden is on the local government to show that the detrimental effects cannot be mitigated by reasonable conditions. Since the proposed use was listed as conditional, the Developer was entitled to have the application considered within a reasonable time.

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Advisory Opinion

Advisory Opinion Requested by:	Sean Brown Deep Water Distribution Company
Local Government Entity:	Wasatch County
Applicant for the Land Use Approval:	Deep Water Distribution Company
Project:	Buried water storage tank Brighton Estates Wasatch County
Date of this Advisory Opinion:	August 14, 2006

Issue: Was the refusal by the Wasatch County Community Development staff to allow the applicant for a conditional use permit to be heard before the planning commission legal?

Review:

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on July 6, 2006. A letter with the request and all the attachments included was sent by certified mail, return receipt requested, to Wasatch County on July 7, 2006. The letter was addressed to Thomas Low, the Wasatch County Attorney, at the address shown on the Governmental Immunity Act Database at the Utah State Department of Commerce, Division of Corporations and Commercial Code as required by statute. The letter to the County Attorney was sent certified mail, with return receipt requested, and was received by the County on July 10, 2006. A copy of the letter was also sent to Doug Smith of the Wasatch County Planning Department.

My decision to proceed with the preparation of the opinion was made on July 28, 2006 and the parties were notified of that decision via a letter sent on that date.

Prior to the preparation of this opinion, I visited via telephone several times with Sean Brown, the person requesting the opinion. I also met with Doug Smith and Michael Henke planners in the Wasatch County Planning Department on August 8, 2006, where they made available to me a number of documents related to the application which is the subject of this opinion. After narrowing the issues by this process, I sent an email to Doug Smith asking for input on issues raised. Doug responded with some comments on the role of the Development Review Committee.

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Documents:

The documents that I have reviewed include:

1. Wasatch County Code, Title 16 - Land Use and Development Code, particularly provisions related to administration, development standards, appeals, conditional use permits, and the Mountain Zone.
2. Application for a Conditional Use Permit, dated March 12, 2006, showing Deepwater Distribution Company, Inc. as the applicant.
3. Undated topographic map of the lot in Brighton Estates where a proposed buried water storage tank is to be located.
4. DRC Comment/Action Sheet, describing actions of the Wasatch County Development Review Committee Meeting held April 10, 2006.
5. DRC sign off for Planning Commission items document, undated, referring to an intended Planning Commission meeting to be held May 11, 2006.
6. DRC Comment/Action Sheet, describing actions of the Wasatch County Development Review Committee Meeting held June 5, 2006.
7. Letter dated March 17, 2006 from Michael Henke, Planner, to whom it may concern, advising the reader that a proposed conditional use permit for Sean Brown is to go before the planning commission on May 11, 2006.
8. Letter dated April 19, 2006 from Michael Henke, Planner, to Deepwater Distribution Company, Inc. advising the company that the County is unable to notice the conditional use permit for a planning commission meeting to be held May 11 because required signatures have not been obtained.
9. Request for an Advisory Opinion filed with my office on July 6, 2006.

Facts:

1. Deepwater Distribution Company, Inc. (DDC) is a Utah corporation which provides water to a few lots located in Brighton Estates, a subdivision in Wasatch County, Utah.
2. The area where DDC provides water is within the Mountain Zone as defined in the Wasatch County Code – Title 16 – Land Use and Development Code (LUDC).
3. Underground water tanks are allowed in the Mountain Zone if a conditional use permit (CUP) is obtained under the LUDC.
4. Sean Brown, on behalf of DDC, applied for a conditional use permit to install a new underground water storage tank as required by the LUDC on March 12, 2006.
5. On or about March 17, 2006, letters were sent to neighboring landowners, advising them that the proposed conditional use permit was to go before the Wasatch County Planning Commission on May 11, 2006.

6. On April 10, the Wasatch County Development Review Committee (DRC) met and discussed the proposed CUP for DDC.
7. On April 19, the Wasatch County Planning Department notified Sean Brown in writing that the DDC application for a CUP would not be heard because “the required signatures for that meeting have not been obtained.”
8. On June 5, 2006, the DRC again considered the CUP application by DDC.
9. The application of DDC for a CUP has not been placed on the agenda for the Wasatch County Planning Commission as of the date of this advisory opinion.

Analysis:

What Deference is Given by the Courts to Administrative Land Use Decisions?

In reviewing local land use decisions the standard is:

A municipality's land use decisions are entitled to a great deal of deference. See *Xanthos v. Board of Adjustment*, 685 P.2d 1032, 1034 (Utah 1984); *Triangle Oil, Inc. v. North Salt Lake Corp.*, 609 P.2d 1338, 1339-40 (Utah 1980); *Cottonwood Heights Citizens Ass'n v. Board of Comm'rs*, 593 P.2d 138, 140 (Utah 1979); *Naylor v. Salt Lake City Corp.*, 17 Utah 2d 300, 410 P.2d 764 (Utah 1966). Therefore, "the courts generally will not so interfere with the actions of a city council unless its action is outside of its authority or is so wholly discordant to reason and justice that its action must be deemed capricious and arbitrary and thus in violation of the complainant's rights." *Triangle Oil*, 609 P.2d at 1340. Indeed, the statute that forms the basis of this appeal requires the courts to "presume that land use decisions and regulations are valid." Utah Code Ann. § 10-9-1001(3)(a) . However, this discretion is not completely unfettered, and the presumption is not absolute. If a municipality's land use decision is arbitrary, capricious, or illegal, it will not be upheld. See *id.* § 10-9-1001(3)(b).

Springville Citizens v. Springville, 1999 UT 25 p.23.

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 Ann. 17-27a-801(3)(a).

Mandatory provisions of state statute related to conditional use permits:

The state code provides some mandatory guidelines for the review of conditional use permits:

- (1) A land use ordinance may include conditional uses and provisions for conditional uses that require compliance with standards set forth in an applicable ordinance.
- (2) (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 conditions to achieve compliance with applicable standards, the conditional use may be denied.

Utah Code Ann. Sec. 17-27a-506. The state statute was written to limit very general and wide-ranging forays into nebulous concepts, and requires a more defined and specific approach in reviewing conditional use permit applications. 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 with reasonable conditions.

If the detrimental effects can be mitigated, the land use authority must approve the conditional use. If they cannot, and substantial evidence in the record demonstrates that they cannot, then the permit can be denied.

Wasatch County has a list of applicable guidelines for CUP review, which includes:

These standards shall be in addition to any standards set forth in this Land Use Ordinance for the zoning district wherein the proposed Conditional Use will be established. If there is a conflict between these standards and those set forth for the appropriate zoning district, the more specific standard control. The County shall not issue a Conditional Use Permit unless the issuing department or commission finds:

- (1) The application complies with all requirements of this Title;
- (2) The business shall maintain a business license if required;
- (3) The use will be compatible with surrounding structures in use, location, scale, mass, design and circulation;
- (4) The visual or safety impacts caused by the proposed use can be adequately mitigated with conditions;
- (5) The use is consistent with the Wasatch County General Plan;
- (6) The effects of any future expansion in use or scale can be and will be mitigated through conditions;
- (7) All issues of lighting, parking, the location and nature of the proposed use, the character of the surrounding development, the traffic capacities of adjacent and collector streets, the environmental factors such as drainage, erosion, soil stability, wildlife impacts, dust, odor, noise, and vibrations have been adequately mitigated through conditions;
- (8) The use will not place an unreasonable financial burden on the County or place significant impacts on the County or surrounding properties, without adequate mitigation of those impacts; and
- (9) The use will not adversely affect the health, safety or welfare of the residents and visitors of Wasatch County.
- (10) Any land uses requiring a building permit shall conform to the International Uniform Building Code Standard.

Section 16.23.07, Wasatch County LUDC. While this language appears to place the burden on the applicant to provide substantial evidence to support findings on each of the ten items listed, the state statute supersedes the county language. Rather than the burden being on the applicant to prove that the conditional use permit should be granted, the statute quoted above places the burden on the county to prove that it should be denied.

The standards provided in the ordinance are, of course, very helpful in the process of CUP review. When an application is received, under the terms of the Wasatch County LUDC, the staff is to review the issue and determine what information must be provided so that the application is complete. Notices are sent to property owners within 500 feet of the property involved in the CUP application. If there is no objection from neighbors, the staff can decide to allow the CUP. If there is an objection, or if the staff otherwise considers it appropriate, it refers the matter to the Planning Commission.

The determination of who will hear a CUP application is to be made “in a reasonable time”. LUDC 16.23.02. The staff is to prepare a report for the Planning Commission.

There is no specific process stated in the LUDC for the staff’s review of a CUP application. The practice is apparently to allow the Wasatch County Development Review Committee (DRC) to review a CUP application prior to its being placed on the agenda for the Planning Commission. This is not specifically provided for in the

ordinance, but would appear to be completely appropriate. Such a thorough review would seem in order, and would likely result in the application being considered from all angles and thus increase the chance that CUP applications would be properly analyzed and acted upon.

The code does not, however, require a DRC review, nor does it provide for the DRC to have control of the agenda for the Planning Commission. The chapter of the LUDC that describes the DRC refers to “development” without defining it to include a CUP application. The chapter appears to refer to the need to review subdivisions and other development, but does not give the DRC veto power over a CUP.

If the DRC review were part of the staff review of a CUP, and the staff decided to issue or deny a CUP application, then the code would appear to allow for that. But in the instant case, the staff notified the applicant that without the approval of the DRC, his application would simply not be heard at all. No decision would be made.

Vested Rights

Citizens who submit land use applications are entitled to have their applications considered in light of the applicable codes and statutes. Recent revisions in state statute provide:

(a) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the county's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all fees have been paid, unless:

(i) the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application; or

(ii) in the manner provided by local ordinance and before the application is submitted, the county has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted.

Utah Code Annotated Sec. 17-27a-508(1). In the current case, the County staff did not deny the application, stating on the record how the application did not conform with mandatory provisions of the county code. The staff did not identify any detrimental effects of the propose use and discuss how to mitigate them. It did not propose any conditions, but simply stated that the DRC had not signed off, and therefore the matter would not be heard until it does.

Was this denial of a hearing or formal decision based on some missing information in the application? It would not appear to be so and was not stated to be so in the April 19 letter

from the staff denying a hearing. Prior to sending that letter, the staff processed the application and sent notices to the neighboring landowners without indicating that for some reason the application was not complete or otherwise ready for consideration. It is to be noted that under the provisions of Section 16.23.04 of the LUDC, the staff may waive any requirement or request reasonable additional information. The applicant states that there was no request made of him for additional information, but he was simply provided a refusal to consider his application.

This is counter to state law as noted above. The state statute also provides: “Each county shall process and render a decision on each land use application with reasonable diligence.” Utah Code Annotated Sec. 17-27a-508(3).

Again, as stated above, 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 with reasonable conditions.

If the detrimental effects can be mitigated, the land use authority must approve the conditional use. If they cannot, and substantial evidence in the record demonstrates that they cannot, then the permit can be denied.

Conclusion of the Advisory Opinion:

The county’s action to deny a hearing of Deepwater Distribution Company’s application for a conditional use permit until the Development Review Committee’s concerns were addressed was illegal in that it violated the applicant’s right to have his application processed and a decision rendered with reasonable diligence.

The duty of the County under the Wasatch County Land Use and Development Code is to respond to applications and either grant, conditionally grant, or deny the requested CUP. In this case, the applicant was told that its application would simply not be heard unless certain staff members signed off before a hearing. This answer is not provided for in the County ordinances nor in the state code.

The Wasatch County Development Review Committee does not have the authority under the Wasatch County Land Use and Development Code or state statute to deny a CUP. Consideration by the DRC may be an appropriate and beneficial part of the review process, however. Under the LUDC, the staff (which may include the DRC) must participate in the approval or denial of a CUP. In those situations where the staff (with or without review by the DRC) acts to make a final decision on the CUP application, a record of the decision made must be provided to the applicant indicating, with substantial

evidence on the record, what the detrimental aspects of the proposed use are, and why the DRC and staff has concluded that those detrimental effects cannot be mitigated.

In any event, it is obvious that the DDC application for a CUP was to be a planning commission issue, not a staff issue. In such a case, the applicant is entitled to a final decision by the planning commission, not the DRC. This right granted the applicant under the County Code and the state statutes was illegally denied.

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

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, 13-43-205. 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.

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