Advisory Opinion 236

Parties: Town of Leeds / Lynn Potter

Issued: February 11, 2021

TOPIC CATEGORIES:

Compliance with Land Use Ordinances

Interpretation of Ordinances

Entitlement to Approval (Vested Rights)

Proceeding with Reasonable Diligence

The Town's Hillside Protection Overlay Zone contains an exception to its applicability for "developments or subdivisions" approved before 1999. The Town's official minutes from that time period are seemingly deficient as they do not reflect all official actions taken by the Town. Despite record of the landowner seeking subdivision approval from the Town prior to 1999, there was no record in Town meeting minutes of a final approval given by the Town Council. The Town reviewed the record and other evidence provided by the landowner and concluded that no qualifying subdivision occurred and the Hillside Overlay therefore applied.

A land use authority must support any of its factual or discretionary decisions with substantial evidence in the record. Where the applicability of a regulation depends on a determination that a factual event or condition exists, and the available evidence does not conclusively establish the same, an authority's decision to apply—or not apply—the regulation is not arbitrary and capricious so long as the authority provides reasons for its decision and a reasonable mind could reach the same conclusion with the evidence available. While there may be sufficient circumstantial evidence to conclude that subdivision did occur, The Town's basing its decision to apply the overlay zone on the record's absence of final subdivision approval similarly satisfies the substantial evidence standard.

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ADVISORY OPINION

Advisory Opinion Requested By:	Town of Leeds
Local Government Entity:	Town of Leeds
Applicant for Land Use Approval:	Lynn Potter
Type of Property:	Residential
Date of this Advisory Opinion:	February 11, 2021
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUE

Is a landowner's property subject to the Town's Hillside Protection Overlay Zone?

SUMMARY OF ADVISORY OPINION

The Hillside Protection Overlay Zone applies to all base zoning districts within the Town of Leeds and restricts certain development activity based on geographic conditions. The Overlay contains an exception to its applicability for "developments or subdivisions" approved before 1999. The exception applies to all decisions by the Town Council approving the division of property for residential development, including dividing a single developable lot from a larger parcel.

In applying land use regulations to applications for development, a land use authority must support any of its factual or discretionary decisions with substantial evidence in the record. Where the applicability of a regulation depends on a determination that a factual event or condition exists, and the available evidence in the record is not conclusive to establish the same, an authority's decision to apply—or not apply—the regulation is not arbitrary and capricious so long as the authority provides reasons for its decision and a reasonable mind could reach the same conclusion with the evidence available.

The Town has reviewed available Town records and evidence provided by the landowner to determine whether the property was an approved development or subdivision eligible for the Hillside Overlay exception. The Town has concluded that the Hillside Overlay applies because there is no record of a final subdivision approval given by the Town Council as the designated body with authority to grant such approvals, and the exception therefore does not apply.

While the Town's records are seemingly deficient, the available evidence demonstrates that a sale of a break-off parcel occurred following Town proceedings seeking approval of that parcel as a developable lot for residential purposes, and strongly suggests that the Town Council gave conditional approval of the lot at the time it rezoned the proposed parcel to residential zoning. However, because the Town imposed requirements that needed to be met before it would grant final approval, and there is no explicit record of a subsequent Town Council decision granting the final approval thereafter, a reasonable mind could reach the same conclusion as the Town that the subdivision was not finally approved. Therefore, a land use decision that the Hillside Ordinance applies to the landowner's property would be upheld by a court under the applicable substantial evidence standard.

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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 Mayor Wayne Peterson, Town of Leeds, on April 20, 2020. A copy of that request was sent via certified mail to Brent Bateman, attorney for Lynn Potter, 3301 North Thanksgiving Way, Suite 400, on June 26, 2020.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Mayor Wayne Peterson, Town of Leeds, received on April 20, 2020.
2. Response to Advisory Opinion Request, submitted by Brent Bateman, attorney for Lynn Potter, dated May 19, 2020.
3. Town Reply to Mr. Potter's Response to Request for Advisory Opinion, submitted by H. Craig Hall, attorney for Town of Leeds, dated June 12, 2020.
4. Potter Response to June 12, 2020 letter from Town of Leeds, submitted by Brent Bateman, dated July 10, 2020.

5. Town Reply to Mr. Potter's July 10, 2020 Response, submitted by H. Craig Hall, dated August 6, 2020.
6. Response to Town's August 6, 2020 letter, submitted by Lynn Potter, dated August 11, 2020.

BACKGROUND

Lynn Potter and Dianna Powell acquired an 11.94-acre parcel of undeveloped land ("Potter property")[1] within the Town of Leeds in 2017, and recently approached the Town with plans to develop. The Town has determined that the Potter property is subject to the Town's Hillside Protection Overlay Zone, and that aspects of the proposed development would violate that ordinance. Mr. Potter believes the property is not subject to the Hillside overlay because of a stated exception in the applicability of the Hillside overlay to developments and subdivisions approved prior to 1999.

The Potter property was once part of a larger tract of undeveloped land owned by Alberta Pace/Lee ("Alberta"). There are a number of incidents in Town records between 1996-1997 that reflect proceedings before the Town Planning Commission and Town Council regarding Alberta's property, inclusive of the portion now comprising the Potter property. Mr. Potter believes that the record evidences Town approval of his parcel for development purposes sufficient to qualify for the Hillside overlay exception; the Town disagrees. About the only thing the two parties do agree on regarding the record is that it leaves us wanting in the present matter, and both parties have tried to fill in the gaps to reach their respective conclusions.

Undisputed Material Facts

From the available record, the relevant undisputed material facts can be distilled and summarized as follows:

The land now comprising Mr. Potter's parcel was part of a larger remainder following Alberta's 3-lot minor subdivision in June 1996. On February 5, 1997, Alberta presented a proposal to the planning commission, noted as follows:

> Alberta presented a proposal for selling 12 acres of her land for a couple wishing to build only 1 or 2 dwellings. There was a general agreement but details fo [sic] 2 dwellings may require additional discussion. Not with regard to acceptability, but rather as to how to make it meet the proposed zoning requirements.

Shortly thereafter, this 12-acre portion of Alberta's property was rezoned residential (R-R-2) by the Town Council at the February 26, 1997 Town Council Meeting. In that same meeting, the Town Council also amended its minor subdivision ordinance from requiring that minor subdivision lots front on an existing, dedicated road, to requiring that lots front on an existing, dedicated, and

[1] We refer to the property as the "Potter property" because the City's submittals refer to the property as "Mr. Potter's parcel", and the responding documents presented to this Office are provided by legal counsel stating to represent Lynn Potter, specifically.

improved road. Finally, later in the same meeting, there was further discussion on "Complications of Alberta Lee Subdivision." This entry, in its entirety, notes as follows:

> Some of the questions Alberta had were whether a guest house was permissible on 5 acres in a R-R-2 Zone? A quit-claim deed was also to be prepared for a portion of Paul Felt's property that would be deeded to the Town.

At the March 5, 1997 Planning Commission Meeting, there was discussion on "Alberta Lee: Plans for Property." The entry notes as follows:

> Alberta has received conditional approval to split her lot located at approximately 600 North Main Street. She need [sic] to obtain a Quit-Claim Deed from Paul Felt before the final approval is given. The Quit-Claim Deed is for an access road to the 12 acres that will be sold. The Deed will be to the Town of Leeds for the access road.

The Town Council noted on March 12, 1997 that the quit-claim deed for the property Paul Felt was deeding to the Town was being written, but no minute entries regarding Alberta or the property exist after this point.

The quit-claim deed from Paul Felt dedicating property for a road was thereafter recorded on April 22, 1997, and a March 1997 survey depicting the road dedication and the creation of a 11.942 parcel from Alberta's remainder property was recorded on May 12, 1997. That parcel is depicted as a distinct parcel under new ownership in the January 1998 County Ownership Map, and is the parcel now owned by Mr. Potter.

Diverging Conclusions

From the above-stated facts, both parties fill in whatever information each feels is missing and what conclusions should be drawn therefrom.

Town's Narrative – Prerequisite Approvals for Abandoned Subdivision Efforts

The Town finds that Mr. Potter's parcel, as it now exists, was not created at the time of the June 1996 subdivision, but simply comprised part of the property left over from Alberta's minor subdivision. As to all of the subsequent proceedings involving Alberta's property, due to the lack of any submitted documents in Town records, the Town generally casts doubts on any and all conclusions as to whether the 12 acres discussed in subsequent entries is the same tract now owned by Mr. Potter or some other portion of Alberta's property.

However, in entertaining Mr. Potter's arguments, the Town concludes that even if the 12 acres discussed is the parcel now owned by Mr. Potter, no approval by the Town Council—as the Town's land use authority—had been given. Rather, the Town believes that approval of a parcel, as well as the zone change and quit-claim deed, were all prerequisites to any minor subdivision proposal. The Town believes that to make a finding that a given parcel is a qualifying subdivision under the

Hillside exception would require evidence of a subsequent proposal to further divide an approved lot into small lots—at least two or more.

The Town further believes that the "conditional approval" acknowledged by the planning commission was, if anything, given by the planning commission, likely at the February 5, 1997 meeting, to approve the 12-acre parcel, but was *not* an approval by the Town as a minor subdivision. The Town also believes that because the minor subdivision ordinance was amended February 26, 1997 to require lots to front on an existing "improved" road, Alberta's property would not have qualified for a minor subdivision until the lots fronted on an existing and improved road.

This, according to the Town, explains why neither the Planning Commission or the Town Council issued any final approval after the quit-claim deed was provided to the Town. In other words, Alberta secured only the prerequisite approvals needed in order to later *apply* for a minor subdivision. However, Alberta instead sold her lot to the Spears, and it remained undeveloped.

Mr. Potter's Narrative – Approving the Parcel as a Developable Lot under Minor Subdivision Ordinance

Mr. Potter maintains that Alberta's February 5, 1997 proposal to sell a 12-acre parcel to "a couple wishing to build only 1 or 2 dwellings" refers to the parcel he now owns, and was a proposal for a single-lot subdivision to break off the Potter parcel from the larger remainder from the June 1996 minor subdivision. Mr. Potter notes that there "was a general agreement" regarding the proposal, and that the additional discussion needed was "[n]ot with regard to acceptability", but rather how to meet zoning requirements.

Because this proposal, together with approval of Alberta's rezone petition, occurred prior to the Town amending the subdivision ordinance, Mr. Potter asserts that Alberta's proposal vested under the prior minor subdivision ordinance, and accordingly that the record evidences that the Town did not intend to subject the proposal to the amended ordinance to require an existing, improved street. Rather, Mr. Potter argues that the "conditional approval" noted in the March 5, 1997 planning commission minutes, was, in fact, conditional approval for the lot under the minor subdivision ordinance, given by the Town council "sometime prior" to that meeting.

The only stated condition for approval—namely, that Paul Felt dedicate a portion of his property for an access road—occurred on April 22, 1997. Mr. Potter believes that because the proposal had vested under the prior minor subdivision ordinance only requiring an existing, dedicated road, and because the stated condition was fulfilled, the lot was therefore automatically approved.[2] This, Mr. Potter contends, explains why the survey was thereafter recorded and no further proceedings were held before the Planning Commission or Town Council—the lot was already approved as a minor subdivision for purposes of selling the property.

[2] Mr. Potter alternatively argues that even if the approval was not automatic, fulfillment of the stated condition secures vested rights, which Mr. Potter argues continue to remain valid to the present time. *See infra,* discussion at III(C).

Adequacy of Town Records

In order to reach their respective conclusions, each party fills in what they allege to be missing from the Town's records. This only shows that the record may not be entirely reliable. This is a critical point to Mr. Potter's contentions. For example, Mr. Potter takes the planning commission's reference that Alberta had "received conditional approval" to illustrate that an approval had been given by the Town Council previously, and is simply omitted from the official minutes.

However, in the Town's attempt to defend the integrity of the record and rebut the allegation that official actions of the Town have been omitted, the Town does little to improve the situation. Particularly, the Town asserts that the "conditional approval" referenced must have come from the planning commission, and likely at the February 5, 1997 meeting. Such approval action is admittedly absent from the February 5, 1997 minutes.

There are additional examples in the record of omitted actions by the planning commission and Town Council that are unrebutted. In light of this, it is reasonably established that not all official actions of the Town have been reflected in recorded minutes.

ANALYSIS

I. Standard of Review

Under Utah's Land Use Development and Management Act ("LUDMA"), the local government's land use authority reviews requests for development and applies the plain language of its regulations to either approve or deny the request, supporting any factual or discretionary decisions with substantial evidence in the record.

This matter presents both issues of ordinance interpretation and factual dispute. Because the Town has asked us to opine on an issue involving disputed facts, we will treat this issue the same as a court would in reviewing a request for summary judgment, and view the facts and all reasonable inferences drawn therefrom in the light most favorable to the responding party, [3] which in this case, would be Mr. Potter.

Under LUDMA, a land use authority's decision is presumed to be valid, and will only be overturned if the decision is arbitrary, capricious, or illegal.[4] A decision is arbitrary or capricious if it is not, as indicated previously, supported by substantial evidence in the record.[5] A decision is illegal if it based on an incorrect interpretation of a land use regulation or violates a law, statute, or ordinance in effect at the time the decision was made.[6]

This opinion therefore addresses interpretive issues of the meaning of the Hillside ordinance exception, and also reviews whether substantial evidence supports the Town's factual conclusion

[3] *See, e.g., Bad Ass Coffee Co. of Haw. Inc. v. Royal Aloha Int'l LLC*, 2020 UT App 122, 473 P.3d 624.
[4] UTAH CODE § 10-9a-801(3)(b).
[5] UTAH CODE § 10-9a-801(3)(c).
[6] *Id*; *see also Fox v. Park City*, 2008 UT 85, ¶11.

that Mr. Potter's property was not subdivided prior to 1999, and that the exception therefore does not apply to the Potter property.

II. Interpreting the Scope of the Hillside Protection Overlay Zone's Exception

The Town of Leeds Land Use Ordinance ("Ordinance") establishes the Hillside Protection Overlay Zone, which applies to all base zoning districts within the Town and regulates the development of properties on terrain of certain slope and other characteristics. The overlay also contains an explicit exception to its applicability, which reads:

> **20.10. DEVELOPMENTS OF RECORD.**
> The requirements of this Chapter shall not apply to developments or subdivisions that were approved prior to January 1, 1999.[7]

The relevant interpretive issue for reviewing the applicability of the above to Mr. Potter's land use application is: What constitutes "[approved] developments or subdivisions" under the Hillside overlay exception? More specifically, both parties appear to agree that the relevant issue is whether the property was approved or entitled to approval under the Town's provisions for a "minor subdivision."[8]

The Town argues that the meaning of "subdivision" is limited to a division of land creating two or more parcels, and that the Potter property—even if a recognized parcel—was never approved for subdivision. Mr. Potter argues, on the other hand, that a decision to formally recognize his parcel as a developable lot would constitute a "single-lot subdivision" sufficient for the Hillside overlay exception to apply.

A. Defined Land Terms

The Town's Land Use Ordinance defines "Subdivision" as follows:

> "includes the division of land whether by deed, metes, and bounds description, devise and testacy, lease, map, plat, or other recorded instrument; and divisions of land for all residential and nonresidential uses, including land used or to be used for commercial, agricultural, and industrial purposes."[9]

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[7] TOWN OF LEEDS, UTAH, LAND USE ORDINANCE 2008-04, Chapter 20.10, amended by ORDINANCE 2015-02 (May 13, 2015).

[8] A minor subdivision allows for a streamlined subdivision approval for five lots or less under qualifying circumstances. While the Town concedes that the Hillside exception is applicable to either approved subdivisions *or* "developments", the parties did not brief the meaning or the applicability of the term "developments"; therefore, this opinion will assume the parties agree that this portion of the exception does not apply and focus on the parties' arguments as to whether approved "subdivisions" applies to the property in question.

[9] TOWN OF LEEDS, UTAH, ORDINANCE #2-95, Chapter 1, Section 3(h) (Aug 23, 1995).

The Ordinance defines "Lot" to mean any parcel of land "occupied or to be occupied" by buildings, together with "such yards, spaces, lot width and lot area as are required by this Ordinance and having frontage upon a street.[10]

Finally, "Remainder" is defined as "[t]hat portion of an existing parcel which is not included as part of the proposed subdivision. The remainder is not considered as part of the subdivision but must be shown on the required maps as part of the area surrounding subdivision development."[11] The Ordinance uses the term "Acreage" to refer to any parcel of land of at least one acre that has not been previously subdivided, or else declared to be acreage as a result of a subdivision.[12]

In summary, acreage and vacant parcels of land become buildable "lots" that are suitable for development through the process of subdivision.

B. Meaning of "Subdivisions" in Hillside Overlay Exception

When interpreting the meaning of ordinances, the standard rules of statutory construction apply.[13] Looking to the plain language of the ordinance is considered the first step of interpretation.[14] The primary goal is "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve."[15] Because zoning ordinances are "in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner."[16]

In 1996, the Town's Ordinance 2-95 provided the regulatory process to approve "subdivisions", which applies to "all divisions of land in which two or more parcels are created."[17] In addition, a separate ordinance, Ordinance 4-5, also provided for a "Minor Subdivision of Land."[18] This ordinance has its own approval criteria separate from the process for approving conventional subdivisions, and applies where "[t]he division of a Parcel of Land will not exceed more than 5 lots," among other conditions.[19] Town minutes reflect usage of the term "new subdivision" as a way to distinguish a conventional subdivision from a minor subdivision.

While Ordinance 2-95 states that the term "subdivisions" (*noun*) referenced in its approval process applies to approved divisions of land where "two or more parcels are created,"[20] the Ordinance's

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[10] TOWN OF LEEDS, UTAH, LAND USE ORDINANCE 2008-04, Ch 1 General Provisions, Amended by Ordinance 2009-18A, 1.6 ("Lot. A parcel of land occupied or to be occupied by a main building, or group of buildings (main and accessory), together with such yards, open spaces, lot width and lot area as are required by this Ordinance and having frontage upon a street").
[11] *Id*.
[12] *Id.* ("Acreage. Any parcel of land, of one (1) or more acres and those areas where a legal subdivision has not been made previously, or where a legal subdivision has declared the parcel as acreage").
[13] *Brendle v. City of Draper*, 937 P.2d 1044, 1047 (Utah Ct. App. 1997).
[14] *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208.
[15] *Foutz v. South Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171.
[16] *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995).
[17] Ord. #2-95, Chapter 1, Section 2.
[18] TOWN OF LEEDS, UTAH, ORDINANCE #4-95, Town of Leeds Minor Subdivision of Land (August 23, 1995).
[19] *Id*.
[20] Ord. #2-95, Chapter 1, Section 2.

overarching definition of "subdivision" (*verb*) generally anticipates any "division" of land by written instrument for residential or nonresidential uses.[21] Additionally, because the concurrent minor subdivision ordinance is not plainly restricted to the creation of two or more parcels, but instead applies where the "division of a Parcel of Land will not exceed more than 5 lots,"[22] a single-lot subdivision—as creating one new lot from a larger parcel—does not appear to be an impermissible process that eludes regulatory oversight by the Town.[23]

The "subdivision" subject of the Hillside overlay exception in the Town's code is therefore any division of land approved by the Town's land use authority under either the conventional subdivision ordinance or the minor subdivision ordinance, including single-lot subdivisions divided from a larger parcel, as applicable.

III. Application to Mr. Potter's Development Request

Upon a correct interpretation of the Town's ordinances, as detailed above, the relevant issues and disputed facts narrow in this matter. In particular, the Town had partly concluded that a recognition of the 11.942-acre parcel as a lot *could not* amount to a "subdivision", and that some additional approval would need to be shown, in that the Town would have needed to approve the further division of the 11.942-acre parcel itself into smaller lots in order to constitute a subdivision, which undisputedly did not occur.

However, as detailed above, because "[approved] developments or subdivisions" is not limited to subdivisions creating two or more lots, but instead also includes single-lot subdivisions divided from a larger parcel, the Town's conclusion involves an incorrect interpretation of its ordinance.

The remaining issue, therefore, is to review the evidence in the record to evaluate the Town's conclusion that no final approval—even for a single-lot subdivision as a minor subdivision—had actually been given by the Town Council.

A. Minor Subdivision Requirements

The Town's subdivision ordinance provides that the Planning Commission is "designated as the Advisory Agency with respect to subdivisions and shall have all the powers and duties with respect to the preliminary maps thereof, and the procedure relating thereto."[24] Accordingly, the Planning Commission approves preliminary and final plats, or may even "waive any of the . . . preliminary or tentative map content requirements if [determined] that the type of subdivision does not justify compliance with these requirements,"[25] and then submit the approved plat to the Town Council for final approval.[26] Additionally, "the Leeds Town Board may vary the requirements of this

[21] *Id.*, Section 3.
[22] Ord. #4-95, Description, 1.
[23] All this to say that it does not appear that the Town intended to either prohibit or abstain from regulating single-lot subdivisions, specifically. Because a single-lot subdivision is still a division of land for offer, sale, lease, or development, it appears to be the legislative intent of the Town's ordinances is to regulate that division the same as any other.
[24] Ord. #2-95, Ch 1, Section 2.
[25] *Id.*, Ch 2, Section 3(n).
[26] *Id.*, Ch 1, Section 4(5).

Ordinance after receiving recommendations of the Planning Commission, provided that such variations will not substantially impair the intent of this Ordinance."[27]

As a minor subdivision, Alberta's proposal was governed by Ordinance 4-95,[28] which states that "[w]hen the following conditions exist the subdivision of a Parcel of Land within the Town of Leeds may be designated a Minor Subdivision."[29] In order to get approved as a Minor Subdivision, a Plat Map consisting of a metes and bounds description is "submitted to the Planning Commission." Consistent with the Planning Commission's powers and duties with respect to preliminary and final plats, it would appear that the Planning Commission makes the determination that the proposal qualifies for a minor subdivision, and recommends the proposal to the Town Council with the appropriate platting requirements.[30] Ordinance 4-95 makes clear that "this method of subdivision by Metes and Bounds must be approved by the Council of the Town of Leeds."[31]

Here, the record merely reflects that the planning commission noted, on March 5, 1997, that "Alberta has received conditional approval to split her lot," but that a quit-claim deed "for an access road to the 12 acres that will be sold" was needed "before the final approval is given." Based on this entry, the parties disagree whether a Town Council approval had been given.

Mr. Potter argues that the "conditional approval" must have come from the Town Council sometime prior, and is omitted from Town records. Mr. Potter further argues that as a conditional approval, the approval was satisfied upon the subsequent fulfillment of the condition, without need for any further proceedings.

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[27] *Id.*, Ch 1, Section 5.

[28] The parties disagreed whether Ordinance 4-95, or the amended Ordinance 2-97, enacted February 26, 1997, applied to Alberta's proposal under Utah's vesting laws. *See* Utah Code § 10-9a-509(1)(a). For purposes of this opinion, and drawing all reasonable inferences drawn from the record in favor of Mr. Potter as the party responding to this advisory opinion request, it is reasonable that the Planning Commission's February 5, 1997 review of Alberta's proposal evidences her complete application for lot approval prior to enactment of Ordinance 2-97 on February 26, 1997. Additionally, the record does not support that the Town preempted Alberta's complete application by first formally initiating any proceedings for the ordinance amendment, as there is no record of prior planning commission review of the amendment, and official notice of the Town Council's Public Hearing for Ordinance 2-97 was dated February 6, 1997, the day following the planning commission's review of Alberta's proposal. Finally, as there is subsequent reference to a "conditional approval" for an unimproved road for access despite Ordinance 2-97's requiring an existing, *improved* road, it appears that the Town reviewed the proposal under Ordinance 4-95 and not Ordinance 2-97.

[29] Ord. #4-95.

[30] Minor subdivision, of themselves, enjoy a simplified "metes and bounds" plat map requirement. However, Ordinance 2-95 further provides that a minor subdivision "may be exempted from the plat map process, and sold by metes and bounds, *without the need for recording the plat*," under some additional requirements. Ordinance 2-95, Ch 2, Section 1(g). One of those additional conditions is if the proposed lots all front on "fully *improved* public street[s]." *Id*. (emphasis added). In its submittals, the Town appears to have erroneously conflated these recording exemption requirements as the qualifications for minor subdivision approval itself, concluding that because Ordinance 2-95 specifically mentioned improved streets, they must have always been required for minor subdivision approval, regardless of the later addition of the "improved" standard to the minor subdivision ordinance (Ordinance 2-97), specifically. This is not supported by the plain language of Ord 2-95 that these additional conditions allowed an exemption to recording requirements, which otherwise would apply to minor subdivisions approved under Ord 4-95.

[31] Ord. #4-95.

The Town, on the other hand, believes that the "conditional approval" must have been given by the planning commission—not the Town Council—and that the note "before the final approval is given" references that the proposal would still need to come back before the Town Council for the necessary final approval action following fulfillment of the condition.

Under either party's contention, the Town's official minutes are either missing record of a prior Town Council approval decision, or else a prior Planning Commission approval decision, respectively.

Our reading of the record is that the conditional approval of the proposed 12-acre parcel was likely given by the Town Council during the February 26, 1997, meeting, at the same time it approved a rezone for that very parcel. As noted in the minute entry discussion of "Complications of Alberta Lee Subdivision," the Town Council first notes that "[a] quit-claim deed was also to be prepared for a portion of Paul Felt's property that would be deeded to the Town." The very next entry following this discussion was the March 5, 1997 planning commission where it is noted that Alberta "has received conditional approval," subject to the sole condition that a quit-claim deed be deeded for an access road, just as discussed by the Town Council in the previous meeting.

However, because the planning commission notes that the condition must be met "before the final approval is *given*," it can be reasonably inferred that a subsequent, final approval was still needed from the Town Council. To that point, the record does, in fact, reflect that the subdivision proposal was subsequently discussed at the March 12, 1997 Town Council meeting, though the official minutes only reflect that the Mayor informed the Council "that a quit-claim deed is being written for the portion of property that Paul Felt is quit-claiming to the Town. The location of the property is approximately 650 North Main Street."

Considering that the record suggests that the "conditional approval" may have been an undocumented decision of the Town Council at the February 26, 1997 meeting, it could likewise be reasonable to infer that the subsequent recording of the quit-claim deed and recording of the metes and bounds survey map with the County supports a similar contention that the Town Council gave its final approval at the March 12, 1997 meeting, wherein the Town Council discussed that the stated condition was being fulfilled.

Ultimately, both an initial conditional approval by the Town Council, as well as a subsequent final approval by the same body, are simply not reflected in the available record. The Town, however, must nevertheless decide on whether it will apply the Hillside Overlay exception to the current land use application with what information is available.

B. Arbitrary and Capricious

We now turn to whether the Town's determination that the Hillside zone applies to Mr. Potter's property is proper under Utah law. LUDMA provides that a land use authority shall substantively review a land use application under applicable land use regulations and shall approve or deny the application.[32] Upon review, a land use authority's decision is presumed to be valid, and will only

[32] UTAH CODE § 10-9a-509(1).

be overturned if the decision is arbitrary, capricious, or illegal.[33] A decision is illegal if it violates a law, statute, or ordinance in effect at the time the decision was made.[34] A decision is arbitrary or capricious only if it is not supported by substantial evidence found in the record.[35]

As discussed, the Town's decision not to apply the Hillside Overlay exception to Mr. Potter's development request was partly based on incorrectly interpreting its ordinances to mean that a single-lot subdivision did not amount to an approved "subdivision" for purposes of the exception. The Town's decision is illegal to the extent that it relies on an incorrect interpretation of the law.

However, the Town's decision not to apply the exception is additionally based on a conclusion that, even accepting the eligibility of an approval of a single-lot subdivision, it has not been shown that such approval had occurred. The Town's decision on this basis will be upheld so long as it is supported by substantial evidence found in the record.

"Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion."[36] In determining whether substantial evidence supports the Town's decision, we "consider all the evidence in the record, both favorable and contrary, and determine whether a reasonable mind could reach the same conclusion as the [Town]."[37]

Viewing reasonable inferences in the factual record in favor of Mr. Potter, it can be reasonably inferred that the 11.942-acre parcel owned by Mr. Potter constitutes the same parcel proposed by Alberta for lot approval as a single-lot subdivision for purposes of a sale, as reflected in the Town's official minute entries beginning with the February 5, 1997 planning commission meeting, and subsequently discussed on February 26, 1997, March 5, 1997, and March 12, 1997 meetings.

Mr. Potter has produced evidence that Alberta sold the property constituting the Potter parcel following these Town proceedings, including the Town Council's approving a rezone of this break-off parcel, and discussion in later Town Council meetings that the previously stated condition for approval was being fulfilled. This may lead one to infer that the sale occurred pursuant to subdivision approval, and is circumstantial evidence that the Town's approval may have actually been given. However, there is also evidence, or, more precisely, a lack of evidence, that the Town never took formal action to give the required final approval for a subdivision of the property. It is therefore also plausible that the sale occurred based on the assumed blessing of the Town for having met the previously stated condition for approval, but without having actually obtained the last step of formal, final approval by the Town Council.

The Town Council's decision to approve the subdivision—*not* that the land was actually subdivided and sold—is what needs to be established in order for the Hillside overlay exception to unquestionably apply. Ultimately, there is no explicit approval action by the Town Council, specifically, reflected in the record respective to the proposal.

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[33] UTAH CODE § 10-9a-801(3)(b).
[34] *Fox v. Park City*, 2008 UT 85, ¶11.
[35] UTAH CODE § 10-9a-801(3)(c).
[36] *Caster v. West Valley City*, 2001 UT App 212, ¶ 4, 29 P.3d 22 20080472-CA 10 (internal quotation marks omitted).
[37] *M & S Cox Invs., LLC v. Provo City Corp*., 2007 UT App 315, ¶ 36, 169 P.3d 789.

The Town's role here is to determine whether the Potter property meets the criteria of the Hillside Overlay exception, and to support its determination with substantial evidence. The Utah Supreme Court has explained that, "in an administrative context, the statutory phrase 'substantial evidence' is a 'term of art,' which includes within its meaning the requirement 'that localities must provide reasons' [for their] determinations."[38]

The Town has concluded that the exception does not apply to Mr. Potter's property because there is no record in Town minutes that the Town granted final subdivision approval, and the Town is not otherwise convinced that evidence of a subsequent sale of the parcel conclusively shows that subdivision approval was in fact given. This is substantial evidence in support of the Town's conclusion. The Town has provided sufficient reasons to support its conclusion. Admittedly, under the same standard, there likewise appears to be *substantial* evidence to support a conclusion that formal subdivision, with approval, did occur; nevertheless, the Town has made its decision.

Alleging that Town records are deficient, of itself, does not overcome the Town's decision. It would be incumbent on Mr. Potter, as the party asserting the deficiency in the record, to conclusively establish through other forms of relevant evidence that the approval was in fact given. Unless such evidence is provided to fill in the gaps of a deficient record, a "reasonable mind could reach the same conclusion" that the absence of a final approval decision in available records reflects the absence of final approval being given. While the Town's conclusion may not be the *only* conclusion reachable by a reasonable mind, it is nevertheless a reasoned determination supported by the evidence, and is therefore not arbitrary or capricious. Accordingly, the Town may properly apply the requirements of the Hillside overlay in this case.

C. Proceeding with Reasonable Diligence

Mr. Potter makes one final argument that even if no final approval had been obtained from the Town Council, because Alberta's application complied with the minor subdivision ordinance then in effect, and because the only stated condition of approval was fulfilled, the conditionally approved single-lot subdivision continues to be entitled to final approval as a vested right.

Understandably, Mr. Potter's primary argument is that final approval had actually been given by the Town Council. However, if it is conceded that no final approval had been given by the Town Council, Mr. Potter cannot likely rely on the vested rights rule as an alternative argument to say that a conditional approval remains valid over twenty years later.

Utah law provides that "the continuing validity of an approval of a land use application is conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence."[39] While Utah courts have never defined a time limit on reasonable diligence, it is not accurate to say that the vesting rule "contains no expiration", as argued by Mr. Potter.

[38] *McElhaney v. City of Moab*, 2017 UT 65, ¶ 34, 423 P.3d 1284 (cleaned up).
[39] UTAH CODE § 10-9a-509(1)(e).

The entitlement expires if the applicant fails to "proceed[] after approval to implement the approval with reasonable diligence."[40] There is no evidence of efforts to obtain a final Town Council approval following fulfillment of the condition stated in the conditional approval. Instead, the record reflects that Alberta thereafter sold the property, which subsequently changed hands a number of times and remained undeveloped up until the time of Mr. Potter's current application for development. If obtaining final Town Council approval is what is needed to "implement the [conditional] approval" that had been given, intending to do so only after twenty years of inaction does not satisfy the reasonable diligence standard for continued validity of the approval.

CONCLUSION

The Hillside overlay exception for developments of record applies to approved single-lot subdivisions from larger parcels, which require a final approval decision of the Town Council. The record is clear that Mr. Potter's predecessor underwent Town proceedings to subdivide a developable lot from her larger acreage for purposes of a sale, and that Mr. Potter's parcel was subsequently partitioned off and in fact sold. However, because there is a lack of evidence that the Town Council took action to give final approval of the single-lot subdivision, the Town's conclusion not to apply the Hillside overlay exception to the Potter property satisfies the substantial evidence standard for a land use decision, and is appropriate and lawful.

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Office of the Property Rights Ombudsman

[40] *Id.*

NOTE:

This is an advisory opinion as defined in Section 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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees and civil penalty provisions, found in Section 13-43-206 of the Utah Code, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.