

Advisory Opinion #74

Parties: Howard Western and City of Delta

Issued: September 3, 2009

TOPIC CATEGORIES:

B: Conditional Uses

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

Utah law requires that neighboring landowners file an administrative appeal of land use decisions within a limited time frame. Failure to file a local appeal is failure to exhaust administrative remedies, which deprives neighboring landowners of their right to challenge the decision in the district court.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Howard Western

Local Government Entity: Delta City

Applicant for the Land Use Approval: The KEG Company

Project: Telecommunications Tower

Date of this Advisory Opinion: September 3, 2009

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

Issues

Did Delta City properly issue a conditional use permit and/or a building permit to construct a large telecommunications tower in the City's RR1 (Rural Residential) zone?

Summary of Advisory Opinion

The City may have violated state law and local ordinances when it issued a conditional use permit and/or a building permit to construct the telecommunications tower. However, Utah law requires that the neighboring landowners file an administrative appeal of the decisions of local governments within a limited time frame. Failure to file a local appeal is failure to exhaust administrative remedies, which deprives neighboring landowners of their right to challenge the decision in the district court. Mr. Western has failed to file a local appeal to the issuance of the conditional use permit or the building permit. Therefore, he is unable to challenge the now complete construction of the cell tower.

Review

A request for an advisory opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205.

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 this Advisory Opinion was received on June 15, 2009 from Howard Western. A letter with the request attached was sent via certified mail, return receipt requested, to Gregory J. Schafer, City Recorder/Finance Director, 76 North 200 West, Delta, Utah 84624-9440. Mr. Schafer's name was listed on the State's Governmental Immunity Database as the contact person for the District. By a letter dated July 9, 2009, Gayle Bunker, Mayor of Delta City, submitted the City's response to the Advisory Opinion request. By a letter dated July 25, 2009, Howard Western submitted a response to the City's submission. On August 18, 2009, Mayor Bunker by telephone indicated that the City had no further response.

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 dated May 20, 2009, filed with the Office of the Property Rights Ombudsman by Howard Western, with attachments.
2. Letter from Mayor Gayle Bunker dated July 9, 2009, with attachments.
3. Letter from Howard Western dated July 25, 2009, with attachments.

Background

Howard and Betty Jo Western ("Western") are owners of a parcel of property in Delta, Utah. Near their home, on property owned by the "Millard County Motor Posse," is a chain link fenced enclosure containing a tall (196 feet) lattice telecommunications tower ("Cell Tower") and accompanying electronic equipment. Mr. Western believes that the Cell Tower has been wrongly located and constructed in violation of city ordinance.

According to the minutes of the Delta City Planning and Zoning Commission, the Commission approved a conditional use permit to construct the Cell Tower on September 18, 2008, and granted the permit on September 22, 2008. The Commission added two conditions on the permit; that the equipment building be constructed in earth tone colors approved by Delta City, and that the area be enclosed by a chain link fence. On November 11, 2008, a building permit application was submitted to the City. Delta City issued a building permit for construction of the Cell Tower on February 25, 2009.

According to the January 22, 2009 minutes of the Delta City Council, construction was underway by this date, even though it appears that no building permit had issued. At that

meeting, City Councilwoman Betty Jo Western, wife to Howard Western, raised the issue of the Cell Tower being erected near her home.

The Cell Tower appears to now be fully constructed. The documents provided indicate that the Cell Tower has been constructed in the Rural Residential zone. The Rural Residential zone does not specifically list telecommunications towers as a permitted or conditional use. It does, however, list as a conditional use “essential public utility and public service installations.” The zoning code also states that the maximum height restriction within the zone is 35 feet. The Cell Tower appears to exceed that restriction significantly. Mr. Western raises numerous other objections to the Cell Tower construction, the Building permit process, and the conditional use permit process, which he believes violates state statutes and local ordinances.

In the City’s response, Mayor Bunker indicates, among other things, that Mr. Western has never filed an appeal of the planning and zoning decision to grant the conditional use permit. Moreover, it appears that no appeal was filed against the issuance of the building permit. Mr. Western indicates that when he, his wife Councilwoman Western, or other neighbors raised objection to the tower, they were told by the Mayor or other city personnel that there was nothing that they could do about it, and were not told that they could appeal. Mr. Western states that he was not aware of the appeals process.

Analysis

I. The Challenger Must Appeal the Decision Locally in Order to Exhaust Administrative Remedies and Be Eligible to Bring a Challenge to the District Court.

The Westerns raise numerous issues and facts which they claim violate Delta City zoning ordinances and state statutes. Some appear to have merit. However, for the reasons stated below, these violations must be properly challenged in order to be enforced by Mr. Western. As the alleged violations have not been properly challenged, they are not addressed in this Advisory Opinion.¹

UTAH CODE § 10-9a-802 provides that an adversely affected owner of real estate within a municipality may bring a legal action to abate zoning violations and remove unlawful buildings. However, under UTAH CODE § 10-9a-801, a person may not bring such an action until the person has exhausted his administrative remedies—meaning that person has brought an appeal to the local appeal authority under the local ordinances in accordance with UTAH CODE § 10-9a-701 *et seq.* If administrative remedies are not exhausted, a court challenge to the land use decision is not available. *See Patterson v. Am. Fork City*, 2003 UT 7.

¹ Mr. Western challenges the actions of the City on several bases, including but not limited to inadequate notice, prohibited use within the zone, zoning violations with regard to height and lot size, failure to abide by conditions in conditional use permit, conflicts of interest, failure to properly obtain a building permit, and other substantive and procedural grounds. Had the permit decisions been properly challenged, some of these bases may have invalidated the granting of the conditional use permit or the building permit.

II. Mr. Western Has Not Filed a Timely Appeal

UTAH CODE § 10-9a-704 states that a municipality must establish an ordinance providing a deadline to appeal decisions by a land use authority.² If the municipality does not establish a deadline for appealing, then under this statute an appeal must be brought within ten days. According to the ordinances provided, Delta City has designated the Planning Commission as the land use authority with regard to granting or denying conditional use permits. DELTA CITY CODE § 12-412. Under the Delta City Code, appeals of a decision administering or interpreting a zoning ordinance must be brought within 30 days of the date of the decision. DELTA CITY CODE § 12-335.

The Conditional Use Permit was issued in this matter on September 22, 2008. According to local ordinance, Mr. Western had until 30 days after that decision was issued—until October 22, 2009—to appeal the granting of the permit. Failure to appeal by that time represents a failure to exhaust administrative remedies, and an appeal to the district court is not permitted.

It could be that the Westerns were not aware of the issuance of the conditional use permit before October 22, 2009.³ If that were true, the very recent and similar case of *Fox v. Park City*, 2008 UT 85, controls. In *Fox*, the plaintiffs were property owners living near a lot upon which buildings were being constructed. The building permit was issued on July 14, 2005, and construction began soon after. Several weeks later, the neighbors noticed that the buildings appeared to violate the height limitation provisions of the Park City zoning code.

The plaintiffs in *Fox* immediately reviewed the plans, found that the zoning ordinances were being violated, and filed an appeal on January 19, 2006, but their appeal was denied because it was not brought within ten days of the issuance of the building permit as required by the local ordinance. The plaintiffs appealed. The Supreme Court held that “A right to appeal a decision is meaningless, however, if the person possessing the right has no actual or constructive notice of the decision.” *Id.* at ¶23. However, the Court further held that “if a party does not receive actual notice of the issuance of the permit, the party receives constructive notice that a building permit has been issued when construction begins.” *Id.* at ¶27. In other words, once construction begins, a person is put on notice that permits have been issued. The Court further held that the person is responsible at that time to obtain and review the permits, and determine whether to bring an appeal. The *Fox* court held that the plaintiffs should have appealed within ten days of the beginning of construction, and not after construction was nearly complete. The Supreme Court affirmed the dismissal the plaintiff’s case.

In this case, there is no question that Ms. Western was aware of the construction of the Cell Tower by January 22, 2009, because at the City Council meeting on that date she raises a

² A “land use authority” is defined in state statute as “a person, board, commission, agency, or other body designated by the local legislative body to act upon a land use application.” UTAH CODE § 10-9a-103(22). Thus, a land use authority is the person designated in local ordinance to act upon a land use application. The issuance of a conditional use permit and the issuance of a building permit are both land use decisions, and the person designated to make those decisions is the land use authority under this statute.

³ The Westerns have not claimed that they lacked notice of the issuance of the Conditional Use Permit.

concern that construction has begun. Even assuming that date was the earliest date that the Westerns were aware of the issuance of the Conditional Use Permit, no appeal was brought before the thirty days after this date. Moreover, it should be pointed out that the Westerns had an additional opportunity to appeal after construction began. The building permit was issued on February 25, 2009. A building permit is a land use decision that can be appealed. The Westerns could have appealed the issuance of the building permit within 30 days after it was issued, but failed to do so.⁴ Because they failed to appeal, the Westerns have not exhausted their administrative remedies. They are therefore unable to challenge the issuance of the conditional use permit or the building permit in the district court.

Conclusion

The Westerns have failed to file a local appeal to the issuance of the conditional use permit or the building permit. Utah courts strictly uphold the requirement that administrative remedies be exhausted. Despite the fact that there may be legal and procedural problems with the issuance of the permits and the construction of the Cell Tower, the Westerns may not challenge those permits in the District Court.

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

⁴ It is of no consequence that the Westerns did not know of their appeal rights, or that they were told by City personnel that nothing could be done. The *Fox* court places the responsibility to determine whether to appeal upon the landowner. *See id.* at ¶34. Moreover, it is likely that a court would assume that Ms. Western was aware of the appeal process, or at least the availability of an appeal, due to her position as a city councilperson.

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with UTAH CODE § 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:

Gregory J. Schafer
City Recorder/Finance Director
76 North 200 West
Delta, Utah 84624-9440

On this 3rd day of September, 2009, 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