

Advisory Opinion #81

Parties: Kim C. Datwyler, Neighborhood Nonprofit Housing Corporation and City of Corrine

Issued: January 14, 2010

TOPIC CATEGORIES:

B: Conditional Uses

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

Any affected party may challenge an action to approve or deny a conditional use permit. A person who can show that the proposed permit may lead to an actual or potential injury has standing to challenge the action. The land use authority is obligated to address detrimental impacts and, if warranted, impose reasonable mitigating conditions. Failure to comply with notice and procedural requirements may void any approvals that have been given.

DISCLAIMER

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ADVISORY OPINION

Advisory Opinion Requested by: Neighborhood Nonprofit Housing Corporation
By Kim C. Datwyler

Local Government Entity: Corrine City

Applicant for the Land Use Approval: Bear River Valley Co-op

Project: Fertilizer Storage

Date of this Advisory Opinion: January 14, 2010

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

Did the City properly consider a conditional use application in which the proposed use was shown to have detrimental impacts on a neighboring residential area?

Summary of Advisory Opinion

Any affected party may challenge an action to approve or deny a conditional use permit. A person who can show that the proposed permit leads to an actual or potential injury has standing to challenge the action. If detrimental impacts are established, the land use authority is obligated to address those impacts and, if warranted, impose reasonable mitigating conditions. Any application must comply with procedural and notice requirements. Failure to comply voids any approvals that have been given.

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.

A request for an Advisory Opinion was received from Kim C. Datwyler, of Neighborhood Nonprofit Housing Corporation on November 5, 2009. A copy of that request was sent via certified mail to Deverle Wells, registered agent for Corrine City. The return certificate, indicating that the City received the copy of the Request, was received by the Office of the Property Rights Ombudsman on November 23, 2009. The City submitted a response that was received on December 17, 2009.

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, filed November 5, 2009 with the Office of the Property Rights Ombudsman by Kim C. Datwyler.
2. Response from Corinne City, received on December 17, 2009, by J. Gregory Hardman, Attorney for the City.
3. Copy of “Petition to the Corinne City Board of Adjustment”, submitted December 1, 2009 by Kim C. Datwyler.

Background

The Neighborhood Nonprofit Housing Corporation (“NNHC”) owns a parcel of land in Corinne, Utah. The parcel has been developed by NNHC as a residential neighborhood. The development has a total of 65 lots, and by the fall of 2009, 21 homes had been completed. The homes were developed using grant money for low and moderate income housing.

The NNHC development borders a parcel owned by the Bear River Valley Co-op, a farm cooperative. The Co-op uses its parcel for storage of agricultural supplies. The parcel is located within a “CBZ” zone, which allows commercial and business uses. Beginning in October of 2009, the Co-op sought a conditional use permit to construct a fertilizer storage building on a rear corner of its property. The City’s Planning Commission scheduled a public hearing on the application for November 10, 2009.

The City mailed letters to adjoining property owners, informing them of the application, and the date of the planning commission’s hearing. However, the letter identified the property address as “4555 W. Highway 86,” which does not appear to be a valid address within the City. The Co-op property is evidently located on Highway 83, one of the City’s main roads. It is not clear what other public notices were posted or published by the City, but the aforementioned letter was sent to property owners within a 100-foot radius of the Co-op parcel.

NNHC objected to the fertilizer building, because it was located very near homes in the NNHC subdivision. The objections were based on concerns about health and safety, because of dust drifting onto the adjoining property plus a danger of fire and explosion. The NNHC presented evidence from expert sources supporting those health and safety concerns. That evidence included studies and materials from U.S. Environmental Protection Agency, Material Safety Data Sheets, and report from the United Nations on an explosion at an ammonium nitrate storage facility. NNHC felt that dust from the storage would not only be a nuisance, but would constitute a health threat. In addition, NNHC states that the storage building may jeopardize their funding for the subdivision.

The planning commission recommended approval of the conditional use permit, with some conditions.¹ On November 17, the City Council approved the permit, with the same conditions. NNHC appealed the decision to the City's Board of Adjustment. On December 16, the Board of Adjustment upheld the conditional use permit, with no changes to the conditions.²

Analysis

I. NNHC has Standing to Challenge the Conditional Use Permit.

As an affected property owner, NNHC has standing to challenge and dispute the City's action approving the conditional use permit. "Any person adversely affected by a final decision made in the exercise of . . . the [Municipal Land Use, Development and Management Act] may file a petition for review of the decision with the district court within 30 days after the local land use decision is final" UTAH CODE ANN. § 10-9a-801(2)(a). By showing the potential for harm to its property arising from the nearby storage of ammonium nitrate, NNHC has demonstrated that it is an affected person with standing to challenge the conditional use permit.

Standing may be established even through potential harm, and even though NNHC is not an applicant. "To establish standing, an alleged harm can be actual or potential." *Cedar Mountain Environmental v. Tooele County*, 2009 UT 48, ¶ 13, 214 P.3d 95, 100. A person does need to show a "particularized" injury arising from the dispute. "[A]n adverse effect [is] an actual or potential injury that is sufficiently particularized to give a party a personal stake in the outcome of the dispute." *Id.*, 2009 UT 48, ¶ 9, 214 P.3d at 98.

NNHC is the owner and developer of a residential subdivision that borders the Co-op's property. The fertilizer storage building is proposed to be located about 125 feet from the homes in that subdivision. The potential harm from dust contamination and explosion directly affects NNHC's property and those homes. Thus, NNHC has identified a potential injury that is sufficiently particularized to give NNHC a stake in the dispute.

¹ The conditions were not included with the materials submitted for this Opinion, although it appears that none of the conditions addressed dust or fire control.

² The Request for Advisory Opinion was submitted on November 5, before the Board's decision. The City's response was received on December 16, only hours before the Board met. The response provides only sketchy information, and states that "the City vigorously disputes [NNHC's] version of events."

II. NNHC Identified Possible Detrimental Impacts of the Fertilizer Storage Building, Which Should Have Been Addressed When the Conditional Use Permit was Considered.

The City should have addressed the detrimental impacts identified by the NNHC as part of the conditional use permit approval. Since the impacts were raised, the City was obligated to address them, and impose conditions to mitigate them. Section 10-9a-507 of the Utah Code provides that an application for a conditional use may be approved if the detrimental impacts of the use can be mitigated by reasonable conditions. “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.” UTAH CODE ANN. § 10-9a-507(2)(a).³

A decision to grant or deny a conditional use application should be overturned if the decision was arbitrary and not supported by substantial evidence. “A municipality’s land use decision [concerning the granting or denial of a conditional use permit] is arbitrary and capricious [only] if it is not supported by substantial evidence.” *Ralph L. Wadsworth Construction, Inc. v. West Jordan*, 2000 UT App 49, ¶ 9, 999 P.2d 1240, 1242 (alterations in original).⁴ “‘Substantial evidence’ is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *Vial v. Provo City*, 2009 UT App 122, ¶ 9, 210 P.3d 947, 950; *see also Patterson v. Utah County Board of Adjustment*, 893 P.2d 602, 604 n.6 (Ct. App. Utah 1995).

The City’s code states that

[n]o conditional use permit shall be issued unless the town finds that the application complies with all requirements of [the zoning ordinance]; that the use will be compatible with surrounding structures in use, scale, mass and circulation; that the use is consistent with the general plan; and that effects of an differences in use or scale have been mitigated through careful planning.

Corinne City Code, § 9-1-14(4)(G). The ordinance specifically requires fencing or screening, and measures to mitigate “noise, vibration, pollution, odors, steam or other mechanical that might affect people and property off site.” *Id.*, 9-1-14(4)(G)(12). The size, use, and placement of buildings on adjoining properties must also be considered.⁵

The fertilizer storage building is proposed to be placed approximately 125 feet from residential homes. NNHC states that the City did not adequately consider the impacts on the adjoining property, including the design and placement of the storage building and noise and pollution

³ *See also* UTAH CODE ANN. § 17-27a-506 (applicable to counties). If the detrimental effects cannot be substantially mitigated, the conditional use application may be denied.

⁴ *See also* UTAH CODE ANN. § 10-9a-801(3)(c): “A final decision of a land use authority or an appeal authority is valid if the decision if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.” This language was adopted by the Utah Legislature in 2005, after the *Wadsworth* decision quoted above.

⁵ The City’s code also requires a six-foot masonry wall between commercial and residential properties. According to NNHC, the City has not required the Co-op to construct a wall.

control, as is required under the City's own ordinance. Without substantial evidence in the record showing that those required factors received due consideration, the action taken to approve the conditional use permit is suspect.

NNHC presented evidence showing that the proposed storage building posed a substantial threat to the families living nearby. NNHC provided expert reports explaining the health and safety risks presented by ammonium nitrate storage. This constitutes substantial evidence, and the City is therefore bound to consider that information as part of the conditional use analysis.⁶ The language of § 10-9a-507(2) allows approval of a conditional use permit, but if reasonably anticipated detrimental effects are identified, the local government is obligated to propose conditions to mitigate those effects. Failure to adequately address detrimental effects constitutes sufficient grounds to overturn a decision granting a conditional use permit. The City may find that the information is inaccurate, that the threat not significant, or that the proposed conditions provide sufficient mitigation. Such findings, however, must be supported by substantial evidence in the record of the approval proceedings before the planning commission and city council.

III. The Co-op Must Follow City Ordinances Governing How the Application is to Be Processed.

All applicants must follow the procedures for a land use application, and all are subject to design requirements found in city ordinances. NNHC states that the Co-op did not submit a complete application until the day of the planning commission hearing. They argue that the City's ordinances require review of a complete application by the City's staff. The application may be submitted for review only after the staff has reviewed it, and recommended approval, denial, or alteration. The Co-op's failure to submit a complete application until the day of the public hearing violates this process.

If that is true, then the approvals by the planning commission and the city council are void. *See Carter v. Salina*, 773 F.3d 251, 255 (10th Cir. 1985) (under Utah law, approvals which do not comply with statutory notice and procedural requirements are void). Allowing an applicant to submit a "last minute" application prevents the public from being adequately notified of the nature of the approval being considered. This violates the principle of public notice, and public bodies should not consider applications until complete information is made available to the public.

Conclusion

The NNHC has standing to challenge the conditional use permit because it is an adjoining property owner facing potential injury due to the proposed building. The NNHC has identified a

⁶ This is not "public clamor" against the proposed building, because NNHC has provided substantial evidence to support the concerns. A decision to deny a conditional use permit may not be based solely on adverse public comments. *See Wadsworth Construction*, 2000 UT 49, ¶ 17, 999 P.2d at 1243. Unsubstantiated claims based on fears, bias, or generalizations (*i.e.*, "public clamor") are not substantial evidence. NNHC, however, has provided substantial evidence to support its claims. The City must either mitigate the detrimental effects or provide equally-compelling substantial evidence in the record which supports a finding that the NNHC evidence may be disregarded.

particularized injury, which is sufficient to give it an interest in the outcome of a challenge to the permit. It therefore may pursue a challenge, if it so desires.

The NNHC has identified detrimental impacts from the proposed building that must be addressed by the City. State law provides that a conditional use permit shall be approved, but only if detrimental impacts can be adequately mitigated. The detrimental impacts not speculative, but are supported by documentary evidence. The City is therefore obligated to address those concerns, and impose reasonable conditions to mitigate those impacts.

Any applicant for land use approval must comply with procedural requirements, and failure to comply voids any approvals that may be granted. If it is true that the Co-op was allowed to submit its application on the day of the public hearing, then the City should have postponed the hearing so that the public could have an adequate opportunity to be informed of the proposal.

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

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 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:

Deverle Wells
Corinne City
3920 West 2550 North
Corinne, Utah 84307

On this _____ Day of January, 2010, 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