Advisory Opinion #85

Parties: Estate of JoAnne L. Shrontz and Town of Alta

Issued: March 10, 2010

TOPIC CATEGORIES:
R(v): Other Topics (Interpretation of Ordinances)
R(viii): Other Topics (Appealing Land Use Decisions)

The Town's natural waterways determination is not arbitrary or capricious because it is supported by substantial evidence on the record. The decision is not illegal because the Town's interpretation conforms to the plain language of the ordinance. The principle that ordinances prohibiting a proposed use should be strictly construed in favor of allowing the use does not require abandonment of an ordinance's plain language.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Alan Sullivan, Snell & Wilmer
Local Government Entity:	Town of Alta
Applicant for the Land Use Approval:	Estate of JoAnne L. Shrontz c/o Herbert C. Livsey
Project:	Patsey Marley Hill Subdivision
Date of this Advisory Opinion:	March 10, 2010
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Office of the Property Rights Ombudsman

Issues

(1) Did the Town's 2009 Natural Waterways Determination properly construe the Town Ordinance when it identified multiple Natural Waterways on the Estate's property; and (2) was the Town's 2009 Natural Waterways Determination supported by substantial evidence in the record, and consistent with the text of the land use ordinance, and consistent with the Town's previous interpretations and applications of its land use ordinance?

Summary of Advisory Opinion

The Town's natural waterways determination is not arbitrary or capricious because it is supported by substantial evidence on the record. The decision is not illegal because the Town's interpretation conforms to the plain language of the ordinance, and is entitled to deference under Utah law. The principle that ordinances prohibiting a proposed use should be strictly construed in favor of allowing the use is important and should be followed, but it does not require abandonment of the plain language of the ordinance in favor of a more strained interpretation. Accordingly, to the extent that the Town's denial of the Estate's application was based upon the natural waterways ordinance, that decision will be upheld.

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 November 11, 2009, from Alan L. Sullivan of Snell & Wilmer, attorneys for the Estate of JoAnne L. Shrontz. The request included several supporting documents. A letter with the request attached was sent via certified mail, return receipt requested, to William H. Leavitt, Mayor, Town of Alta, 10201 E U-210, Alta, Utah 84092-8016. Mr. Leavitt's name was listed on the State's Governmental Immunity Database as the contact person for the Town. By a letter dated December 10, 2009, Kimberly K. Chytraus of Parsons Behle & Latimer, attorneys for the Town of Alta, submitted the Town's response to the Advisory Opinion request. The response also included several supporting documents. By a letter dated January 5, 2010, Mr. Sullivan submitted a response to the Town's submission, with attachments. On February 8, 2010, Ms. Chytraus submitted a further response to the Estate's submission on behalf of the Town. On February 24, 2010, the Mr. Sullivan submitted a further response to the Town's submission on behalf of the Estate. The Town made no further submissions.

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 November 11, 2009, filed with the Office of the Property Rights Ombudsman by Alan L. Sullivan, Snell & Wilmer, attorneys for the Estate of JoAnne L. Shrontz, with attachments and supporting documentation.
2. Response to Request, dated December 10, 2009, from Kimberly K. Chytraus, Parsons Behle & Latimer, attorneys for the Town of Alta, consisting of a letter, attachments, and supporting documentation.
3. Letter dated January 5, 2010, from Alan L. Sullivan, with attachments.
4. Letter dated February 8, 2010 Kimberly K. Chytraus.
5. Letter dated February 24, 2010 from Alan L. Sullivan.

Background

The Estate of JoAnne L. Shrontz ("Estate") is the owner of approximately 25.16 acres of property ("Property") in Town of Alta ("Town"). The Property is zoned FR-1, which allows

development of one home per net developable acre. Under Alta Town Ordinance § 22-1-6(49) "Net Developable Acreage" is defined as

> the area of ground within a lot that satisfies all of the following conditions:
> (a) Slope less than thirty percent (30%), and
> (b) Soils of a suitable depth and type based on soil exploration and percolation tests in accordance with the regulations of the Utah State Department of Health to insure against detriment to surface and groundwater quality, and
> (c) Minimum distance from the high water line of any natural waterway of 50 ft, and
> (d) Free from unreasonable risk of harm to the property and the general public from natural hazards such as flood, landslide, avalanche, a high water table, or inordinate soil erosion after full compliance with applicable provisions of the Building Code governing topographic, structural, and general design standards necessary to meet the maximum foreseeable risk of such hazards.

Further, the Town Ordinance § 22-1-6(48) defines "Natural Waterways" as "those areas varying in width along streams, creeks, gullies, or washes which are natural drainage channels as determined by the Building Official and in which areas no buildings shall be constructed."

On July 17, 2007, the Estate submitted a subdivision application to the Town, proposing to create a 10 lot residential subdivision called the Patsey Marley Hill Subdivision. According to the Town, the proposed subdivision made no reduction in net developable acreage due to the natural waterways provision of Alta Town Ordinance § 22-1-6(49)(c).

On October 14, 2008, the Town Planning Commission directed the Town's Building Official, Clarence Kemp, to visit the Property and formally identify the natural waterways. On October 21, 2008, Mr. Kemp visited the Property and on November 11, 2008, provided the Planning Commission with a memo and map identifying four natural waterways thereon. The Estate filed an appeal of that determination. The Town refused to accept the appeal, arguing that the Building Official is not the land use authority and therefore, Mr. Kemp's determination is not a final land use decision, and therefore not directly appealable.[1]

Because of concern that Mr. Kemp's identification of the natural waterways on the Property may be incomplete because it was done in late fall, the Town Planning Commission in its November

[1] Appeals of land use decisions are largely controlled by local ordinance, in accordance with Part 7 of the Municipal Land Use Development and Management Act, UTAH CODE § 10-9a-701, *et seq*. According to LUDMA, the town must provide a local appeals process of land use decisions. However, the identity of the appeal authority and matters heard before the appeal authority are left largely up to the municipal body. UTAH CODE § 10-9a-701. Accordingly, although some method of appeal must be provided, reference must be made to local ordinances to determine local procedures. Requesting an Advisory Opinion through this Office is not part of the appeals process. UTAH CODE § 13-43-206(13). If the local jurisdiction has not designated the Building Official as a land use authority, then the Building Official's findings must be advisory to the land use authority, which in this case appears to be the Town Council. The Building Official's findings would therefore be appealed by appealing the final decision of the Town Council that adopted those findings, whether through local or district court appeal.

11, 2008 extended the application until July, 2009. This would give the Building Official the opportunity to observe the property during spring run-off.

On June 21, 2009, Mr. Kemp revisited the Property, and on July 2, 2009 delivered to the Planning Commission a revised memo and map identifying the natural waterways on the Property. Mr. Kemp identified thirteen drainages on the Estate's property, and determined that seven of those drainages, numbers 4, 6, 8, 9, 10, 12, and 13, were natural waterways. The Estate appealed this determination, but the appeal was again rejected by the Town for the same reason.

Under protest, the Estate submitted to the Town for consideration by the Town Council along with its original ten lot subdivision, a revised seven lot subdivision, apparently showing a reduction in net developable acreage due to the Building Official's determination of the natural waterways. After visiting the site and considering both the seven lot and ten lot configurations, the Town Council on November 12, 2009 denied the Application. The Town indicates that such denial was not based upon the natural waterways determination, but upon the Town's determination that the applications were not in compliance with Town ordinances or State law.[2]

The Estate believes that the Town has misapplied its Net Developable Acreage ordinance, and that the waterways identified cannot be natural waterways under the ordinance. In addition, the Estate claims that the Town's interpretation of the natural waterways ordinance renders several acres of the Estate's property unusable without adequate justification. The Estate also argues that the Town's interpretation of the ordinance is invalid because it is inconsistent with how the Town has interpreted the ordinance on previous occasions.

The Town argues that the determination by the Town Council identifying the natural waterways on the Property is supported by substantial evidence on the record, and therefore proper. Further, the Town maintains that it has applied the natural waterways ordinance consistently.

Analysis

I. The Standard of Review of Land Use Decisions

A. The Arbitrary, Capricious, and Illegal Standard

The Town has interpreted its Natural Waterways Ordinance, and has used that interpretation to identify seven natural waterways on the Property, thereby reducing the net developable acreage on the Property. The Town argues that the decision to deny the Estate's application, to the extent that the denial relied upon the Building Official's natural waterways determination, is proper under the "arbitrary, capricious, and illegal" standard, because it is supported by substantial, relevant evidence on the record.

[2] The Estate disputes that the denial was not based upon the natural waterways determination. A review of the record indicates that the natural waterways determination may have been a factor in the denial. However, there may have been other reasons for the denial unrelated to the natural waterways determination. The Advisory Opinion will assume that, to some extent, the denial was based upon the natural waterways determination.

The Estate has also offered an interpretation of the Natural Waterways Ordinance. The Estate argues that the ordinance establishes four requirements for determination of a natural waterway,[3] and that the Town's interpretation of the ordinance is incorrect. The Estate further applies its interpretation of the ordinance to the various waterways, concluding that no natural waterways are found on the Property.[4] The Estate asks that this Office adopt its interpretation of the ordinance, rather than the Town's, because of *Rogers v. West Valley City*, 2006 UT App 302, ¶15, which states that

> [B]ecause 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.

Accordingly, the Estate argues that since the natural waterways ordinance will restrict the Estate's use of its Property, this Advisory Opinion must adopt the Estate's more liberal interpretation, which will allow greater use of the property.

Unfortunately, neither the Town nor the Estate has fully articulated or applied the standard of review for land use decisions, as formulated by Utah Courts. The very recent case of *Fox v. Park City*, 2008 UT 85 is instructive. As the Utah Supreme Court explained, a review of a decision by a land use authority "is limited to whether a land use authority's decision is arbitrary, capricious, or illegal." *Id*. at ¶11. *See* UTAH CODE ANN. § 10-9a-801(3)(a)(ii). The Court goes on to explain that there are two parts to the "arbitrary, capricious and illegal" analysis:

> First, a land use authority's decision is arbitrary or capricious only if it is not "supported by substantial evidence in the record." A land use authority's decision is illegal if it "violates a law, statute, or ordinance in effect at the time the decision was made." Because a determination of illegality is based on the land use authority's interpretation of zoning ordinances, we review such determinations for correctness, but we also afford "some level of non-binding deference to the interpretation advanced by the land use authority." *Id.*

In other words, a decision is not arbitrary and capricious if it is supported by substantial evidence on the record. An examination of whether a decision is illegal, where examination of that decision requires interpretation of an ordinance, requires a determination of correctness. *See also*

[3] To summarize, the Estate argues that, first, the drainage must be "natural." Next, the drainage must be located within a naturally occurring channel. Next, the natural channel must be a stream, creek, gully, or wash. Finally, the drainage must have a high water line.

[4] The Estate requests that this Office review the facts surrounding each waterway to determine whether each is a natural waterway under the Ordinance. Doing so would require this Advisory Opinion to make extensive findings of fact. This Office's review is limited to opining upon the legal positions of the parties. This Office lacks both the authority and expertise to analyze the facts surrounding each designated waterway. Moreover, despite the urging of the Estate, for this Office to take it upon itself to make extensive findings of disputed facts in its Advisory Opinions would be highly inappropriate from a due process perspective, as it would require a site visit, questioning and cross-examination of witnesses, certification of experts, *etc*., activities that this Office has no authority to undertake.

Carrier v. Salt Lake County, 2004 UT 98, ¶30, 104 P.3d 1208, 1216. In the correctness review, the land use authority's interpretation is afforded some non-binding deference.

B. Principles of Ordinance Interpretation

Review of an ordinance for correctness requires consideration of the principles of statutory interpretation. "In interpreting the meaning of . . . [o]rdinance[s], we are guided by the standard rules of statutory construction." *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207, 210 (Utah Ct. App. 1998). Interpretation of an ordinance begins with the plain language of the ordinance, and a court is to "give effect to the plain language unless the language is ambiguous." *Lovendahl v. Jordan School Dist.*, 2002 UT 130, ¶ 21; *see also Mountain Ranch Estates v. Utah State Tax Comm'n*, 2004 UT 86, ¶ 9. 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." *Foutz v. City of South Jordan*, 2004 UT 75 ¶ 11. Statutes should be construed so that "all parts thereof [are] relevant and meaningful." *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996). Furthermore, it must be presumed "that each term included in the ordinance was used advisedly." *Carrier*, 2004 UT 98, ¶30. "If the plain language of the ordinance is ambiguous, we may resort to other modes of construction." *Id*., at ¶31.

Our examination of the plain language of the Ordinance comes with a qualifier that the review "afford[s] some level of non-binding deference to the interpretation advanced by the land use authority." *Fox*, 2008 UT 85 ¶11. *See also Carrier*, 2004 UT 98, ¶28; *Save Our Canyons v. Bd. of Adjustment*, 2005 UT App 285 ¶12. The expertise of local zoning authorities bestows a degree of validity upon their interpretation and application of ordinances:

> Due to the complexities of factors involved in the matter of zoning, as in other fields, where courts review the actions of administrative bodies, it should be assumed that those charged with that responsibility . . . have specialized knowledge in that field. Accordingly, they should be allowed a comparatively wide latitude of discretion; and their actions endowed with a presumption of correctness and validity . . . .

Cottonwood Heights Citizens Ass'n v. Board of Commissioners, 593 P.2d 138, 140 (Utah 1979). When a local government interprets the terms of its zoning ordinance, "a better approach is [to] . . . review [the] interpretation of ordinances for correctness, but . . . afford some level of non-binding deference to the interpretation advanced by the local agency." *Carrier*, 2004 UT 98, ¶28.[5]

The Estate cites the axiom that "any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use," *Carrier*, 2004 UT 98, ¶ 31, to support its interpretation over the Town's. The *Carrier* court cites both this principle and the non-binding deference rule,

[5]In the *Carrier* decision, the court applied that rule to an ordinance interpreted by a "lay" planning commission, rather than by a professional staff. Using the reasoning of the *Carrier* decision, the approach should be the same, however, and the interpretation advanced by the Town's zoning staff should be given the same degree of non-binding deference. *See Carrier*, 2004 UT 98, ¶¶ 25-28, 104 P.3d at 1215-16.

and demonstrates that they are not necessarily in conflict. The *Carrier* court instructs that the plain language is the primary consideration. Axioms of ordinance construction come into play when an ordinance is ambiguous. Where ambiguity exists, the primary consideration is the land use authority's "intent, in light of the purpose that the [ordinance] was meant to achieve" *Id*. The court then states that they remain cognizant of the "strictly construed in favor of the use" rule. *Id*.

Accordingly, interpretation of an ordinance is done through examination of its plain language. Where further construction is needed, Town's intent in light of the ordinance's purpose is considered, giving some deference to the Town's interpretation, while narrowly construing ordinances that restrict the use of land. This pattern has been followed in several Utah cases, including *Fox v. Park City*, 2008 UT 85, *Carrier v. Salt Lake County*, 2004 UT 98, and the case cited by the Estate, *Rogers v. West Valley City*, 2006 UT App 302. Those cases should be the model for interpretation and application of the Town of Alta's ordinances.

II. Interpretation of the Natural Waterways Ordinances

There is ample substantial evidence in the record to support denial of the application by the Town.[6] Therefore, to the extent that the denial arose from the finding by the Building Official of natural waterways on the property, the decision was not arbitrary or capricious. Although the Estate raises issues and provides substantial evidence that could support a different finding, the Town provides substantial evidence in support of its finding. Therefore, the decision is not arbitrary and capricious.

The decision will therefore be upheld if it is not illegal. This requires a review for correctness. As stated, a review of the interpretation of the ordinances starts with the plain language. Alta Town Ordinance § 22-7-4 for the FR-1 zone permits one dwelling per net developable acre. Alta Town Ordinance § 22-1-6(49) defines a "net developable acre" in relevant part as "the area of ground within a lot that satisfies all of the following conditions: . . . Minimum distance from the high water line of any natural waterway of fifty, (50), feet." Accordingly, by the plain language of this ordinance, "net developable acreage" excludes property within fifty feet from the high water line of any natural waterway. Alta Town Ordinance § 22-1-6(48) defines "Natural Waterways" as "those areas varying in width along streams, creeks, gullies, or washes which are natural drainage channels as determined by the Building Official and in which areas no buildings shall be constructed."

Accordingly, by the plain language of the ordinance, a natural waterway is an area, varying in width, along a stream, creek, gully, or wash. A stream and a creek both indicate bodies of running water, with the difference being a stream may be larger than a creek. The *Merriam-Webster Online Dictionary* defines "gully" as "a trench which was originally worn in the earth by running

[6] Note that "Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. It is more than a mere 'scintilla' of evidence . . . though 'something less than the weight of the evidence.'" *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 604 n.6. Accordingly, it does not matter whether the Estate's evidence is more substantial or more persuasive than the Town's evidence. If the Town includes more than a mere scintilla of evidence adequate to convince a reasonable mind, then the Town's decision is not arbitrary or capricious.

water and through which water often runs after rains" or "a small valley or gulch." The plain meaning of "gully" does not imply constantly running water, but does imply a channel where water can collect and run should the opportunity arise. A "Wash" is defined in the same dictionary as "a piece of ground washed by the sea or river." This implies an area for water flow, but not necessarily large or constant flow. It could include a "dry wash." A *Wash* also is not necessarily limited to a channel with defined banks. To the contrary, a *wash* may also include an area where the water flow goes beyond defined banks – where the banks have washed out. Nevertheless, under a narrow reading a "wash" it is probably something less than sheet flow. It must at least be channeled.

In addition, a natural waterway must be natural, which plainly means not artificially created or man-made. Natural waterways under the ordinance are "areas varying in width," indicating a channel of varying size where water flows or may flow. Also, the ordinance states that a natural waterway is to be "determined by the Building Official." This must also be given meaning.[7] Therefore, a simple, plain reading of the ordinance indicates that a natural waterway is an area, large or small, where water constantly or occasionally flows naturally, as the Building Official determines.

The Estate follows a similar path in parsing the ordinance, but achieves a strained result. The Estate indicates its belief that "natural" would mean "not formed nor altered by the influence of human activity." This is certainly reasonable within a narrow reading of the ordinance. Water that has been rechanneled by unnatural means would certainly not be natural. But the Estate strains the meaning by arguing that in order to determine where the water flows naturally, one must return to the "original topography." This goes beyond the plain meaning of the word "natural," and would be impossible.[8] Also, the Estate argues that a channel must be an identifiable stream, creek, gully, or wash. This is accurate. But the Estate goes beyond that to argue that such waterway must have an identifiable bed and banks. The ordinance specifically states that the channel may be "varying in width." This could certainly include a very, very small channel. Even a narrow reading of the terms does not necessitate a finding of an identifiable bed and banks, as long as water is channeled through. The Estate also argues that the waterway must have a discernable high water mark. The term "high water mark" is not used in the ordinance as a condition to identification of a natural waterway, but as a limitation regarding how far from the natural waterway to demark the net developable acreage. In addition, "high water mark" means the watermark when the water flow is highest, but does not exclude the possibility that occasionally, the water may be lower or not present at all. In these respects, the Estate's interpretation goes beyond the plain language of the ordinance, even beyond a narrow reading of the plain language.

Conversely, the Building Official appears to have generally acted in compliance with the plain language of the ordinance. As shown in the memo of July 6, 2009, and in the letter of October

[7] As stated above, ordinances should be construed so that "all parts thereof [are] relevant and meaningful." *Perrine v. Kennecott Mining Corp.,* 911 P.2d 1290, 1292 (Utah 1996).

[8] Topography may change for various reasons, man-made or otherwise. Even nebulous causes like a footprint or pollution far upstream can cause changes in water flow. These causes would not necessarily make the water flow in the area below not "natural." In addition, topography changes constantly over time. This begs the question of how far back one must go to find "original topography."

15, 2009, the Building Official reviewed each waterway, and eliminated those where water had been unnaturally diverted. The Building Official reports that water was actually seen flowing in each identified natural channel. Areas where water is seen to naturally flow may be channels that are streams, creeks, gullies, or washes of varying size, as determined by the Building Official.[9]

The Estate is correct that land use ordinances are to be interpreted narrowly to favor the use of the land. The Estate's interpretation of the ordinance does result in a greater use of the land, inclining one to find in favor of the more expansive use. However, the pattern established in the case law, discussed above, compels a different result.[10] The important axiom requiring narrow interpretation in favor of the use of land does not, in the case law, override the plain language rule or the deference rule. The plain language of the ordinance is the primary consideration. The Town has complied with the plain language. The Estate's interpretation is strained. In addition, the Town's interpretation is entitled to some deference. In this matter, the Town's interpretation of the ordinance is more in line with the plain meaning of the ordinance than the Estate's. That, combined with the deference afforded the Town, compels a finding that the Town has correctly interpreted its ordinance.

III. Inconsistent Application of the Natural Waterways Ordinance

Finally, the Estate argues that the Town has inconsistently applied its land use ordinances, applying it harshly to the Estate while previously failing to find significant natural waterways on a neighboring property, a planned unit development called Powder Ridge. The Estate claims that the other property contains natural features significantly larger and more defined that those on the Property, but those areas were not eliminated from the net developable acreage as natural waterways.

Conversely, the Town argues that the approval for the PUD development for the other property was granted more than 25 years ago, and the net developable acreage was determined at that time and has not been reopened. However, the Town also indicates that when building permits are requested by the other property owner, natural waterways will be determined again for the purpose of siting buildings, in accordance with the ordinance.[11]

The Estate relies upon *Uintah Mt. RTC, L.L.C. v. Duchesne County*, 2005 UT App 565, for the proposition that inconsistent treatment indicates that a land use decision is not supported by substantial evidence on the record, and therefore is arbitrary or capricious. In that case, the Court found that the City's denial of a conditional use permit for a care facility was arbitrary and capricious because the City had granted a conditional use permit for an even larger care facility

[9] Moreover, as stated above, a review of the ordinance carries with it a level of non-binding deference to the interpretation advanced by the Town. That deference is justified in this matter because of the expertise of the Building Official as a professional engineer. The Estate has provided only its opinion that "we believe there are no naturally occurring gullies or washes on the Estate's property," without establishing any level of professional expertise.

[10] It is the responsibility of this Office to apply the law *as it is* when preparing an Advisory Opinion, not as it should be. *See* UTAH CODE § 13-43-204(3)(d).

[11] The ordinance does employ the determination of natural waterways for two separate and distinct purposes; determining net developable acreage, and determining allowable building siting.

in a similar neighborhood some years previously. The Court stated that "Given the similarities in both neighborhood and use, it is unlikely that [the older facility] would be a compatible use while [the newer facility] would not." Based upon that, the court found that there was not substantial evidence on the record to support the decision.

In *Uintah Mt. RTC*, the county in the later decision found that the care facility use was not compatible with the surrounding area. The county had earlier decided that a similar facility *was* compatible with a similar surrounding area. The second decision directly contradicted the first decision. Thus, the court found that there was not substantial evidence in that case. In this matter, the substantial evidence is more concrete: the Building Official saw water flowing through the channels designated as natural waterways. The previous decision in the Powder Ridge development does not contradict the finding that there is water flowing on the Estate's Property. The substantial evidence of flowing water remains, no matter what happened 25 years ago on Powder Ridge.[12] Since the substantial evidence remains in this matter despite the earlier decision, unlike in *Uintah Mt. RTC*, the decision is not arbitrary or capricious.

Conclusion

The principle that an ordinance should be narrowly interpreted in order to allow use of the land by the property owner is valid and important, but in this matter does not compel substitution of the Estate's interpretation of the ordinance for the Town's. The primary consideration is the plain language of the ordinance, which favors the Town's interpretation. In addition, the Town is entitled to some deference in interpreting its own ordinances. Accordingly, to the extent that the Town relied on the natural waterways determination of the Building Official to deny the Estate's application, the decision is not arbitrary, capricious, or illegal, and will be upheld.

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

[12] If anything, proving inconsistent treatment in this matter would go toward a finding that the previous failure to find natural waterways on the Powder Ridge property was arbitrary and capricious. Using that decision to dictate the result in this decision would not correct a wrong, but rather propagate an error. Application of an ordinance consistently is less important than application of an ordinance correctly. *See* UTAH CODE § 10-9a-509(2).

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:

Tom Pollard
Mayor, Town of Alta
10201 E. Highway 210
Alta, Utah 84092-8016

On this _____ day of _____, 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