

Advisory Opinion #240

Parties: Joseph White, Iron Wood Real Estate, LLC; Tooele County
Issued: June 10, 2021

TOPIC CATEGORIES:

Compliance with Mandatory Land Use Ordinances Interpretation of Ordinances

The third-party appeals of the PUD concept plan approvals by the County planning commission are without merit. Furthermore, the County's failure to require a pre-application conference or review the application for completeness does not erase the property owner's statutorily guaranteed right to review under land use regulations then in effect. Additionally, as there is nothing in the record to suggest that the County had formally initiated proceedings to amend the PUD regulations prior to receiving these applications, the "pending ordinance doctrine" does not apply.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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ADVISORY OPINION

Advisory Opinion Requested By: Joseph White, Iron Wood Real Estate, LLC

Local Government Entity: Tooele County

Applicant for Land Use Approval: Joseph White

Type of Property: Residential

Date of this Advisory Opinion: June 10, 2021

Opinion Authored By: Marcie M. Jones, Attorney
Office of the Property Rights Ombudsman

ISSUES

On April 30, 2020, this Office issued *Advisory Opinion #222, Joseph White, Iron Wood Real Estate v. Tooele County* regarding a third-party appeal of the Sunset Acres PUD concept plan approval by the County planning commission. Several months later, Joseph White submitted two additional requests for Advisory Opinions similarly seeking review of the PUD concept plan approvals for the Erda Estates and Tealby Village developments. In response to the new the Advisory Opinion requests, Tooele County asked that this Office additionally consider whether three legal questions affect the approvals.

Accordingly, this second Advisory Opinion addresses the following issues:

1. Did the lack of a timely pre-application conference, required by a now-repealed ordinance, preclude the proper issuance of these PUD conditional use permits?
2. Does the failure to review the applications for completeness by planning staff prior to acceptance preclude the proper issuance of these PUD conditional use permits?
3. Does the “pending ordinance doctrine” preclude the acceptance of these two applications and/or preclude the proper issuance of these PUD conditional use permits?

SUMMARY

As an initial matter, the third-party appeals of the Erda Estates and Tealby Village PUD concept plan approvals by the County planning commission are without merit. Furthermore, the County’s failure to require a pre-application conference or review the application for completeness does not erase the property owner’s statutorily guaranteed right to review under land use regulations then

in effect. Additionally, as there is nothing in the record to suggest that the County had formally initiated proceedings to amend the PUD regulations prior to receiving these applications, the “pending ordinance doctrine” does not apply.

Therefore, based on the information provided, the County must allow the applicant to proceed to the next steps of the approval process as outlined in the Tooele County Code in effect the date the complete applications were submitted.

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.

Two Requests for an Advisory Opinion were received from Joseph White on November 19, 2020. Copies of each were then sent via certified mail to Marilyn K. Gillette, Tooele County Clerk, 47 South Main, #318, Tooele, Utah 84074.

EVIDENCE

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

1. That evidence submitted in preparation of Advisory Opinion #222.
2. Request for an Advisory Opinion regarding Erda Estates, submitted by Joseph White, received November 19, 2020.
3. Request for an Advisory Opinion regarding Tealby Village, submitted by Joseph White, received November 19, 2020.
4. Response from Tom Tripp, Tooele County Council Chair, submitted February 3, 2021.
5. Additional information from Joseph White and Derald Anderson, submitted February 10, 2021.

BACKGROUND

Please see *Advisory Opinion #222* regarding the Sunset Acres development (the “Sunset Acres Advisory Opinion”) for additional background related to these issues. The condensed facts for this Advisory Opinion are as follows.

Joseph White (“White”) is a property owner and land use applicant for several Planned Unit Developments (“PUDs”) in Tooele County including Sunset Acres, Erda Estates¹, and Tealby Village properties (the “Properties”). The Properties are all located in Tooele County’s RR-5, Rural Residential, 5 Acre Minimum, Zone, which lists PUDs as a conditionally permitted use. Furthermore, Tooele County’s Land Use Ordinances (the “Ordinances”) provide a three-step approval process for approving PUD projects. The Ordinances further grant the planning commission authority to modify or waive certain code requirements as applied to the project upon certain findings.

White submitted separate concept plan applications for the Properties, first for Sunset Acres on June 5, 2019, then on June 12, 2019 for both the Erda Estates and Tealby Village developments.

Planning staff found each of the Properties’ PUD concept plans consistent with neighboring uses, the general plan, and generally compliant with Tooele County Land Use Ordinances. The planning commission approved the PUD concept plans for each of the Properties, each subject to a handful of minor conditions. The Sunset Acres PUD concept plan was approved at the September 4, 2019 planning commission meeting, and the Erda Estates and Tealby Village PUD concept plans were approved at the December 4, 2019 planning commission meeting.

A group of third-party county residents filed appeals (together, the “Appeals”, and individually, an “Appeal”) to the Tooele County Commission challenging the planning commission’s approval of each of the Properties’ PUD concept plans on several grounds, the principal of which was alleging that the County’s existing PUD ordinance was deficient. The County was in the process of amending the ordinance and the County did, in fact, eventually repeal this ordinance. The third-party further argued that the PUD should instead be approved under the new and (then) pending standards.

On October 29, 2019, White requested an Advisory Opinion from this Office to determine whether there was any merit to the third-party appeal of the Sunset Acres development. As detailed in the Sunset Acres Advisory Opinion, the Office of the Property Rights Ombudsman found that regardless of whether the County may have been in the process of amending its PUD ordinances, for perceived deficiencies or otherwise, it was required to apply the standards of the existing ordinances then in effect at the time of the application. Further, because concept plan approval was only the first of several steps toward final approval under the County’s PUD ordinance, the third-party appeal failed to prove any error in the planning commission’s decision granting approval of Sunset Acres at the concept plan stage under the County’s (then) current regulatory scheme for planned unit development. Therefore, the County must allow the applicant to proceed to the next steps of the approval process.

Subsequent to the release of the Sunset Acres Advisory Opinion, White filed the current Advisory Opinion requests for both the Erda Estates and Tealby Village developments. According to those requests, both of these development proposal applications have the same fact pattern as that of

¹ Matt Donaldson is listed as the applicant on the Tooele County Planning Commission meeting agenda and minutes for the Erda Estates PUD. The record does not explain this apparent discrepancy. Ownership does not affect the legal analysis, and Joseph White is listed as the owner on the Advisory Opinion request for this project, so we will refer to Joseph White as the property owner to reduce confusion.

Sunset Estates. Like Sunset Estates, the Erda Estates and Tealby Village PUD concept plan applications were submitted before Tooele County officially initiated changes to the applicable ordinances, were recommended for approval by Planning Staff, approved by the Planning Commission, and appealed by the same third-party group at the concept plan stage.

In response to the Advisory Opinion requests made by White, the County requests that this office consider, specifically, the following three issues:

- Issue 1: No pre-application conference held. Tooele County’s now repealed PUD ordinance required that a pre-application conference be held “prior to” submitting a PUD application. That was not done in either of these two matters. Under the ordinance, did the lack of a timely pre-application conference preclude the proper issuance of these PUD conditional use permits?
- Issue 2: Application not reviewed for completeness. These two applications were not reviewed by planning staff for completeness prior to acceptance. Does the failure to review the applications for completeness prior to acceptance preclude the proper issuance of these PUD conditional use permits?
- Issue 3: “Pending ordinance doctrine” affect approval. Does the “pending ordinance doctrine” preclude the acceptance of these two applications and/or preclude the proper issuance of these PUD conditional use permits?

ANALYSIS

I. Adoption of Analysis from Advisory Opinion 222

As an initial matter, we first note that to the extent White’s current request for an Advisory Opinion asks us to repeat any analysis from our Sunset Acres opinion regarding the County’s decision to review the PUD concept plan applications under the ordinances that existed at the time of application, or whether the application of said standards results in any impermissible spot-zoning, our opinion remains unchanged insofar as the underlying facts in the respective approval processes are analogous.

As we understand the facts, the approval of the Erda Estates and Tealby Village PUD applications follow the same details, information, and roughly similar dates outlined in the original Sunset Acres Advisory Opinion. Having been submitted a week apart, the applicable development standards in effect at the time of respective application were the same, and in approving the Erda Village and Tealby Village concept plans, the planning commission applied those same standards and exercised the same discretion afforded to it by that regulatory scheme. We, therefore, necessarily, come to the same conclusion as to those issues. For the same reasons discussed in the Sunset Acres Advisory Opinion, we likewise find that any alleged errors with the planning commission concept plan approvals of the Erda Estates and Tealby Village developments equivalent to those raised in the Sunset Acres opinion are without merit.

Tooele County next asks whether the three issues they raise affect that conclusion. We will examine each one at a time.

II. Issue 1: Failure to hold pre-application conference does not affect conclusion

Tooele County's now repealed PUD ordinance required that a pre-application conference be held prior to submitting a PUD application. That was not done for any of the applications for the Properties.² Tooele County asks under the ordinance, did the lack of a timely pre-application conference preclude the proper issuance of these PUD conditional use permits?

The Tooele County Code in effect at the time of application states that "Prior to submitting a planned unit development application, an applicant shall participate in a pre-application conference with the zoning administrator, county planner, county engineer, sheriff's department, fire district, and health department . . . The purpose of the pre-application conference is to enable the applicant to present the concept of the proposed development and to discuss the procedures and standards for the planned unit development approval. The conference is intended to facilitate the filing and consideration of a complete application."³

This issue was directly addressed in the Sunset Acres Advisory Opinion as follows:

The Appeal alleges that the planning staff failed to comply with Chapter 9-4 of the Tooele County Land Use Ordinance, which provides that before submitting a PUD application, the applicant is to participate in a pre-application conference with the zoning administrator, county planner, county engineer, sheriff's department, fire district, and the health department to enable the applicant to present the concept of the proposed PUD and discuss the procedures and standards for approval.⁴ The required conference appears to solely benefit the application process itself. It is "intended to facilitate the filing and consideration of a complete filing," and "no representation by [county officials] during such conference shall be binding upon the county with respect to the application subsequently submitted."⁵

The Appeal alleges that Mr. White and county officials did not do the preconference as required, and went straight to the PUD application.⁶ While Chapter 9 of the

² This issue was likewise raised for the Sunset Acres Advisory Opinion. *See* Advisory Opinion 222, Section II, No. 5; *see also*, note 32. The record was unclear, but suggested that due to the many other PUD projects proposed by Mr. White, a pre-application may have formally been held on some other development not the subject of Advisory Opinion 222 (nor this request), but may have been used as an opportunity to confer with Mr. Whites' PUD developments collectively.

³ TOOELE LAND USE ORDINANCE § 9-4.

⁴ TOOELE LAND USE ORDINANCE § 9-4(1)-(2).

⁵ TOOELE LAND USE ORDINANCE § 9-4(2).

⁶ While material submitted by White for this opinion appears to suggest that perhaps the meeting did occur in conjunction with a pre-application conference for another project, the provided material does not clearly establish that, as it shows a request for a pre-application conference for another project specifically. The Appeal states that a Planning Commission member admitted in a meeting that the County felt that with all of Mr. White's other applications for this PUD application would be okay. At exactly which meeting this comment was made is not referenced, and the comment is not found in the available Planning Commission minutes regarding this project. However, the Planning Staff Report for this PUD at least makes several references to communications Mr. White had with the planning staff regarding this project, specifically. The meeting minutes also indicate that Mr. White had obtained approval for the project from the fire department, and suggests he had discussions with the Sheriff, both of whom are listed participants of the pre-application conference.

Tooele County Land Use Ordinance allows the planning commission to waive certain zoning regulations as they apply to a proposed PUD, Chapter 9 expressly provides that “[n]o change, alteration, modification or waiver authorized by this chapter shall authorize . . . a modification with respect to any standard established by this chapter.”⁷

Because Chapter 9 states that prior to submitting an application, “an applicant *shall* participate in a pre-application conference,”⁸ the meeting is clearly mandatory. However, the Appeal has not identified what error, if any, is attributed to the planning commission’s *decision* that directly resulted from the failure to have a pre-application meeting. For purposes of land use appeal, it is not enough to simply allege *an* error in interpreting or administering a land use ordinance. Rather, the erroneous interpretation or administration must manifest as an error in the resulting decision itself, such that the *decision* adversely affects the party filing the appeal.⁹

Because the party seeking appeal bears the burden of proving that the land use authority erred, and the Appeal associates no error *in the decision* due to any failure to hold the pre-application conference, the Appeal has not proved a valid error by the procedural violation.

The Appeals do not establish any adverse affects arising from the County’s failure to require pre-application meetings. Therefore, Tooele County’s failure to require a pre-application conference prior to that application in no way erases White’s statutorily guaranteed right to review under land use regulations. The pre-application meeting was intended to assist White. It’s waiver by the County cannot be held against him where no valid error has been established.

III. Issue 2: Failure to review applications for completeness does not affect conclusion

It is alleged that the Erda Estates and Tealby Village development applications were not reviewed by the Tooele County staff for completeness prior to their acceptance. It has not been alleged that the submitted applications are incomplete, only that that Tooele County staff did not review them for completeness. Furthermore, we are unable to find reference in the Tooele County Code then in effect requiring a review for completeness prior to accepting an application.

Utah State Code stipulates that “a land use application is considered submitted and complete when the applicant provides the application in a form that complies with the requirements of the applicable ordinance and pays all applicable fees.”¹⁰ There is no requirement that the local

⁷ TOOELE LAND USE ORDINANCE § 9-2(2).

⁸ TOOELE LAND USE ORDINANCE § 9-4(1) (emphasis added).

⁹ See *Busche v. Salt Lake County*, 2001 UT App 111, ¶ 17, 26 P.3d 862 (finding four basic elements to a claim for land use appeal: (1) a person adversely affected, (2) a decision administering or interpreting a zoning ordinance, (3) a decision applying the zoning ordinance, and (4) *an error in the decision* administering or interpreting the zoning ordinance); see also *Potter v. S. Salt Lake City*, 2018 UT 21, ¶ 29, 422 P.3d 803 (“we do not overturn a decision of a lower court or administrative body upon a mere showing of error; proof of prejudice is typically required”).

¹⁰ UTAH CODE § 17-27A-508(1)(C).

government review the applications for completeness before the applicant's vested rights are triggered.¹¹

White apparently submitted complete land use applications¹² for the Erda Estates and Tealby Village PUD developments, along with all applications fees. Tooele County's failure to review the application for completeness does not affect White's statutorily guaranteed right to review under land use regulations then in effect.

IV. Issue 3: "Pending ordinance doctrine" does not affect conclusion

The County next asks whether the "pending ordinance doctrine" precludes the acceptance of these two applications and/or precludes the proper issuance of these PUD conditional use permits.

As discussed above, an applicant is entitled to land use application approval if the proposed development meets the zoning requirements in existence at the time of his application. This rule is known as the "vested rights" rule.¹³

There are two statutory exceptions to the vested rights rule. A city does not have to review an applicant's application under the ordinances in effect at the time a complete application is submitted (1) if "the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application," or (2) if, "in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted."¹⁴

Here, the County asks whether the second exception applies. One of the issues raised in the Sunset Acres Advisory Opinion centers around the allegation that Tooele County's then current PUD regulations were deficient, as the County appeared to be in the process of working out a new regulatory scheme for PUDs. However, this regulatory overhaul had not yet occurred. There is nothing in the record to suggest that the County had formally initiated proceedings to amend the PUD regulations before the uncontested date on which White submitted complete land use applications. Therefore, applications must be reviewed under the laws in effect at the time the applications were submitted.

CONCLUSION

The County's failure to require a pre-application conference or review the application for completeness does not erase White's statutorily guaranteed right to review under land use

¹¹ One may question whether the application would be considered complete where a pre-application conference was not held as stipulated in the ordinance. In our opinion, the pre-application conference should have been held "prior to submitting a planned unit development application" and as such, was not as part of the actual application, and therefore, its absence does not affect the completeness of the application.

¹² We have nothing in the record to indicate the applications were anything but complete.

¹³ See also *Western Land Equities v. Logan City*, 617 P.2d 388 (Utah 1980) ("[A]n applicant is entitled to [land use application approval] if his proposed development meets the zoning requirements in existence at the time of his application...").

¹⁴ UTAH CODE § 17-27a-508(1)(a)(ii)(A)-(B).

regulations then in effect. Additionally, as there is nothing in the record to suggest that the County had formally initiated proceedings to amend the PUD regulations prior to receiving White's applications, the "pending ordinance doctrine" does not apply.

Therefore, based on the information provided, the County must allow the applicant to proceed to the next steps of the approval process as outlined in the Tooele County Code in effect the date the complete applications for Erda Estates and Tealby Village were submitted.

Jordan S. Cullimore, 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.

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 provisions, found in UTAH CODE § 13-43-206, 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.

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:

Marilyn K. Gillette, Tooele County Clerk
Tooele County
47 South Main, #318,
Tooele, Utah 84074

On June 10, 2021, 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