Advisory Opinion 244

Parties: Fuja / Woodland Hills City

Issued: October 14, 2021

TOPIC CATEGORIES:

Appealing Land Use Decisions

Compliance With Land Use Ordinances

Interpretation of Ordinances

Requirements Imposed on Development

Any alterations to construction approved in a building permit requires the applicant to submit amended plans for review. The proposed amendments must likewise comply with applicable land use regulations, and may require additional approval by a land use authority.

Amended construction plans were submitted on a building permit that was mistakenly issued in violation of the City's zoning and development standards. Pursuant to the City's ordinances, the building inspector's review and acceptance of the amended plans constitutes an appealable land use decision by a land use authority under state law. Because the work described did not clearly comply with city ordinances, the building inspector's approval of the plans violated procedural provisions of City ordinances.

The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
www.propertyrights.utah.gov
propertyrights@utah.gov

SPENCER J. COX
Governor

DEIDRE M. HENDERSON
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

MARGARET W. BUSSE
Executive Director

JORDAN S. CULLIMORE
Division Director, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested By:	Dr. and Mrs. Tannin Fuja
Local Government Entity:	Woodland Hills City
Applicant for Land Use Approval:	John and Jennifer Adams
Type of Property:	Residential
Date of this Advisory Opinion:	October 14, 2021
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUE

Did the City of Woodland Hills comply with the mandatory provisions of its ordinances in accepting amended construction plans for a mistakenly issued building permit?

SUMMARY OF ADVISORY OPINION

Any alterations to construction approved in a building permit requires the applicant to submit amended plans for review. The proposed amendments must likewise comply with applicable land use regulations, and may require additional approval by a land use authority, depending on the nature of the changes and pursuant to local ordinances.

Woodland Hills City ordinances provide that the planning commission is the land use authority to approve site plans before a building permit is issued. The City building inspector/zoning enforcement officer may issue permits only where the work clearly complies with city ordinances, and may not grant variances. Amended construction plans were submitted on a building permit that was issued in violation of the City's zoning and development standards. The building inspector's review and acceptance of the amended plans constitutes a land use decision by a land use authority under state law. Because the work described did not clearly comply with city ordinances, the building inspector's approval of the plans violated procedural provisions of City ordinances.

REVIEW

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of Title 13, Chapter 43, Section 205 of the Utah Code. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Dr. Tannin Fuja on November 23, 2020. A copy of the request was sent via certified mail to Jody Stones, City Recorder for the City of Woodland Hills, 200 South Woodland Hills Drive, Woodland Hills Utah 84653, on December 2, 2020.

EVIDENCE

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

1. Request for an Advisory Opinion, submitted by Dr. Tannin Fuja, received on November 23, 2020.
2. City of Woodland Hills Response to Fuja Advisory Opinion Request, submitted by J. Craig Smith, attorney for Woodland Hills, dated January 15, 2021.
3. Response to Woodland Hills' January 15, 2021 submission, submitted by Dr. Tannin & Megan Fuja, dated January 22, 2021.
4. City of Woodland Hills Supplemental Response to Fuja Advisory Opinion Request, submitted by J. Craig Smith, dated February 18, 2021.
5. Second Supplemental Response to Woodland Hills, submitted by Dr. Tannin & Megan Fuja, dated March 10, 2021.
6. Findings of Fact and Conclusions of Law, entered December 23, 2019, *Fuja v. Adams*, Fourth District Court, Case No. 190401270.

BACKGROUND

Dr. Tannin and Megan Fuja ("The Fujas") are homeowners immediately adjacent to and downhill from the property of John and Jennifer Adams in the Thousand Oaks at Woodland Hills Subdivision in the City of Woodland Hills. While the Fuja home was built several years ago, construction of the Adams's home more recently began in July 2019 following Woodland Hills's issuance of a building permit for a single-family home on July 5, 2019.

This case has a long and involved history. But for purposes of this opinion only, the relevant background is as follows:

Building Permit Issuance and Initial Litigation

The City approved and issued a building permit to the Adams on July 5, 2019, and construction began some days later. Then, on July 21, 2019, the Fujas discovered a discrepancy in the Adams's site plan and the Adams's topographic survey. The Fujas reported this difference to the City and the Adams, who said they would look into it. The Fujas were also concerned that the Adams planned to build according to a setback of 15ft after consulting with the City, whereas the Fujas contended that applicable CC&R's required a 20ft setback.

In early August of 2019, the Fujas filed a lawsuit against the Adams alleging that the construction breached applicable restrictive covenants on the property regarding the building setback, and initially obtained an injunction halting construction of the Adams home the day concrete walls had been poured. Following a trial, the court found that the structure did, in fact, violate an applicable 20ft lot line setback found in CC&R's, but concluded that the Adams were "innocent parties" to the violation, having consulted with the City regarding setback requirements and being told that the legal setback was 15ft. In balancing the equities, the court concluded that the violation did not warrant removal of the foundation; having prevailed, the Adams were allowed to continue construction of the home.

March 31, 2020 Appeal

As construction on the home continued to framing, the Fujas—believing the structure being erected violated the City's building height ordinance[1]—submitted a letter to the City dated February 21, 2020, detailing the alleged building height violation. The letter concluded that if the City did not respond to the letter by February 25, 2020, it would be presumed that the City had reviewed the issue and made an interpretive decision that the home did not violate the City's ordinances. After receiving no response, the Fujas filed an appeal with the City's Board of Adjustments ("BOA") on March 31, 2020, asserting that the land use decision being appealed was the City's decision—upon being notified by the Fujas of the noncompliance—refusing to enforce the building permit.

In response to the building height appeal, the City characterized the claim as an enforcement matter, asserting that the only appealable land use decision at hand was the issuance of the building permit in 2019, and that the appeal was untimely. Following a hearing on July 9, 2020 the BOA ultimately ruled that the appeal was not timely filed and therefore denied the appeal.

Continued Construction

Throughout the litigation with the Adams, and over the course of the appeal process with the City, the Fujas obtained more information suggesting that the Adams's building permit application materials contained errors and/or may not have been thoroughly reviewed, resulting in an approved building permit that violated the City's zoning and development standards in various ways.

[1] Woodland Hills City Ordinances, Chapter 109.04 through 109.05.

Moreover, as construction ensued, the Fujas also alleged that the actual structure, as being built, deviated even from the plans as approved. The City had some internal discussions about red-tagging the project, and discussed certain changes with the developer that would be required before occupancy, but ultimately no stop-work orders were issued.

November 17, 2020 Appeal

Following the July 9, 2020 BOA hearing, the Adams' submitted amended construction plans to the City on July 13, 2020. The Fujas contend that the changes in these amended plans result in the structure's further noncompliance with city ordinances and state construction code, as well as introduce more instances of noncompliance.

On November 5, 2020, the Fujas became aware that the City had performed a 4-way inspection on August 19, 2020 of work contained only in the amended plans and not found in the originally approved plans, and assert that the City's allowance for inspection of this new work constituted an approval of the amended plans, as a new land use decision. The Fujas therefore filed an appeal on November 17, 2020 to challenge the City's acceptance of the amended plans.

The Fujas filed a Request for an Advisory Opinion on November 23, 2020 to review whether the City had complied with applicable land use ordinances in its apparent acceptance of the amended plans and whether the Adams' were entitled to approval for conformance with City ordinances.

ASSUMPTIONS

This Office's opinions are intended as a dispute resolution tool, and are at their most effective when the parties more or less agree on material facts, but simply disagree on a matter of law answerable by the opinion. Our Office relies on the parties to present their representations of the facts from both perspectives to discern which material facts are undisputed. However, in this case, while the Fujas have presented an overwhelming amount of information to support their version of the facts, the City has never presented its own version of the facts, nor has it attempted to refute any of the information provided by the Fujas, opting instead to challenge the Fujas' appeals and request on procedural and jurisdictional grounds.

We also heavily rely on the parties' submissions to obtain facts because, as a dispute resolution tool, advisory opinions are typically utilized as a pre-litigation measure aimed at keeping parties *out* of court. Here, however, the involved parties are already deep into litigation, with some findings of fact and conclusions of law having already been entered by courts on the subjects of this opinion. We will therefore also draw upon these court findings and conclusions for our opinion. Based on the above, we make two key assumptions, as follows:

1. The Adams Building Permit was Mistakenly Issued.

The Fujas have submitted a significant amount of information[2] to support their allegations that the initial building permit approval did not comply with City ordinances in several aspects,[3] and that the City, after issuance of the Adams building permit, may have acknowledged this noncompliance.[4] As mentioned, the City has not formally responded directly to these allegations, opting instead to challenge the Fujas' request on other grounds.

For purposes of this opinion, we will assume that the initial building permit approved by the City and issued to the Adams did not comply with applicable ordinances and development standards, in at least some regard, recognizing that issuance of the initial permit is no longer legally challengeable.[5]

2. The Adams' Obtained the Permit In "Good Faith."

In assuming that the permit was illegally issued, we will also assume, however, that in obtaining such a mistakenly issued permit, the Adams' were "innocent parties," and acted in good faith. While not admitting that the permit was issued by mistake, the City has several times taken the position that even were it to try to revoke the Adams's permit, it would be precluded from doing so under the theory of zoning estoppel, which "estops a government entity from exercising its zoning powers to prohibit a proposed land use when a property owner, relying reasonably and in good faith on some governmental act or omission, has made a substantial change in position or incurred such extensive obligations or expenses that it would be highly inequitable to deprive the owner of his right to complete his proposed development."[6]

Utah courts have stated that issuance of a building permit applied for in good faith is "clearly an affirmative action of the municipality upon which a developer should be able to rely."[7] As for good faith, the applicant's duty is "to inquire and confer with the local zoning authority regarding the uses of the property that would be permitted."[8]

The information provided by the Fujas suggests that the building permit was issued to the Adams following the submission and review of all required documentation outlined in the City's building

[2] The Fujas presented several reports from various civil engineers that concluded that both the structure as proposed, and as being built, was not compliant with the City's development standards. It should be noted that other than providing copies of these actual engineer reports, much of the rest of the information provided has been paraphrased or informally transcribed by the Fujas, or purport to be quotations of documents or emails, as opposed to copies of documents or the emails themselves.

[3] Perhaps a more salient example of which is a citation to an April 9, 2020 email from Wayne Frandsen to David Church stating that "due to some miscommunication somewhere along the line in years past, the city has not been reviewing site plans for the last many years, including back to 2007, so the use of any document to determine a building's height was not being done."

[4] For example, this citation to a May 4, 2020 email from David Pratt to other city officials stating, "The challenge we face right now is the [Fujas] have a stamped engineering report that essentially says the Adams should never have been allowed to build that house on that lot. Without another engineer (with a stamp) going through and refuting their facts we are left with no evidence to suggest otherwise."

[5] On appeal from the BOA's decision, the district court entered summary judgment in the City's favor. *See* Ruling and Order re: Respondent's Motion for Summary Judgement, *Fuja et al. v. City of Woodland Hills*, entered September 17, 2021, Fourth District Court case no. 200401123.

[6] *Fox v. Park City*, 2008 UT 85, ¶ 35, 200 P.3d 182, 191.

[7] *Id*. ¶ 36.

[8] *Utah Cty. v. Young*, 615 P.2d 1265, 1268 (Utah 1980).

permit packet, including review by the City's architectural committee. Additionally, court findings reflect that the building official carefully reviewed the site plan and other materials in the Adams's building permit application, resulting in the Adams' submitting several iterations of their plans.[9] Because of this, in considering equitable remedies,[10] the court found that the Adams' were "innocent parties" as to a violation of the CC&R setback, because they had specifically relied on the City's representations regarding applicable setbacks. We believe the same conclusion of good faith is just as applicable to other ordinance violations found in the City's issuance of the permit.

ANALYSIS

I. Our Jurisdiction Allows Only for Review of the City's Action Regarding Acceptance or Approval of the Amended Plans, As Submitted

When it comes to an adversely affected party directly challenging the land use of another property owner, Utah's Land Use Development and Management Act (LUDMA) contains separate sections for two distinct courses of action—judicial review after a local appeal of a land use decision as provided in the Appeals section,[11] and an Enforcement section providing injunctive relief through the enforcement of land use regulations.[12]

Under LUDMA's Enforcement section, the adversely affected party may seek redress from an alleged ordinance violation in circumstances where the alleged violation is not authorized by or embodied in a municipal land use decision; however, when the alleged violation arises directly from a municipal land use decision, the party must comply with LUDMA's Appeal section.[13]

The difference matters because an action under the Appeals section is allowed only after the party has first exhausted administrative remedies, i.e., an appeal to a local appeal authority, and then must be within 30 days of a final decision resulting from such local appeal.[14] Contrariwise, no such limitations are placed on an action under the Enforcement section. Parties seeking redress from a municipal land use decision are obligated to comply with the requirements of the Appeals section. This is because as "virtually every challenge to a land use decision could be alternatively characterized as an 'enforcement' action, allowing a challenge to a municipality's land use decision under the Enforcement section would nullify the very existence of the exhaustion and timing requirements specified in the Appeals section."[15]

The difference additionally matters for our purposes, as the Office only has jurisdiction to author an Advisory Opinion on a local government's compliance with select provisions of LUDMA dealing with decisions taken on land use applications. We do not opine on enforcement matters arising after or outside of the land use decision process.

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[9] Findings of Fact and Conclusions of Law, Conclusion of Law #26, entered December 23, 2019, *Fuja v. Adams*, Fourth District Court case no. 190401270.
[10] The type of injunctive relief sought by the Fujas against the Adams is an equitable remedy. Zoning estoppel is, likewise, an equitable remedy. *See, generally, Utah Cty. v. Baxter*, 635 P.2d 61 (Utah 1981).
[11] UTAH CODE § 10-9a-801.
[12] UTAH CODE § 10-9a-802.
[13] *Foutz v. City of S. Jordan*, 2004 UT 75, ¶ 17, 100 P.3d 1171, 1175.
[14] UTAH CODE § 10-9a-801(1)-(2).
[15] *Foutz*, 2004 UT 75, at ¶ 14.

For purposes of our jurisdiction, a request for an advisory opinion may be made at any time before a final decision on a land use application by a local appeal authority, or, the deadline to file an appeal with district court if no local appeal authority is designated to hear the issue.[16]

The Fujas' Request for Advisory Opinion reiterates some of the arguments raised in the March 31, 2020 appeal that was denied by the City's Board of Adjustment ("BOA") as untimely. Because the BOA's action was a "final decision" on the issues, an advisory opinion is foreclosed as to those issues, including review of the City's actions or interpretations leading to the issuance of the Adams building permit. Therefore, only appealable decisions made separate from and subsequent to those addressed in the March 31, 2020 appeal will be considered for this Advisory Opinion.

To that end, the Fujas' request alleges that certain actions taken by the City following the BOA's July 14, 2020 appeal decision amount to newly appealable decisions. Namely, the Fujas allege that the City received amended plans for the Adams's residential construction that violated the City's ordinances, and that the City approved those amended plans. The scope of this opinion is therefore limited to this one issue—whether the actions taken by the City in regards to amended site plans received amount to a land use decision that violates the City's land use ordinances.

II. The City's Review of Amended Plans Resulted in Appealable Land Use Decision

A. Defining "Land Use Regulations" and "Land Use Authority"

The City advances several untenable arguments that many of the issues raised by the Fujas either do not involve a decision by a land use authority or do not involve an interpretation or application of land use regulations, and therefore are not reviewable for a land use appeal. The City's ordinances categorize and title certain provisions under "Zoning Ordinances," while its "Subdivision Ordinance" and "Development and Construction Standards" (which are "supplementary to the Subdivision Ordinance") are found in a different chapter or title. We do not accept the City's arguments that simply because a provision is found under "Development and Construction Standards" and not housed under "Zoning Ordinances" chapter, it is excluded as a zoning ordinance and not considered a "land use regulation."

Under LUDMA, a land use regulation is "a legislative decision enacted by ordinance, law, code, map, resolution, specification, fee, or rule that governs the use or development of land."[17] There is simply no basis to conclude that the City's Development and Constructions Standards—which provide the conditions under which property may or may not be developed—are not land use regulations.

Similarly, LUDMA defines "land use authority" as "a person, board, commission, agency, or body . . . designated . . . to act upon a land use application." The administrative decision of such a designated person or body is a "land use decision."[18]

[16] UTAH CODE § 13-43-205(1).
[17] UTAH CODE § 10-9a-103(33) (2021).
[18] UTAH CODE § 10-9a-103(33) (2021).

The City's zoning ordinance provides that the administration of the zoning ordinance is vested in various officials, including "City council," "Planning commission," "City engineer," Building inspector," and "Zoning enforcement officer."[19] The Zoning Ordinance defines the Zoning Enforcement Officer as "The person authorized by the City to issue building permits, review all proposed site plans, proposed new construction, renovation, or additions *to assure compliance with all provisions of the Zoning Ordinance and Map*."[20] Similarly, the City's Subdivision Ordinance provides that the Building Inspector is "[t]he city official charged with the enforcement of this title." City ordinances clarify that the Zoning Enforcement Officer and Building Inspector "may be the same person."[21]

Just as the labels within the City's ordinances do not define what is or is not a land use regulation, similarly, as to land use decisions or land use authorities, we look instead to the nature of the terms as provided by state law,[22] and apply the plain language of Utah's Land Use Development and Management Act in reviewing the actions of any official taken in their designated capacity and on behalf of the City regarding a land use application or permit, to determine whether it constitutes a land use decision.

B. Amendments to Permits May Require Additional Review by Land Use Authority

The continued validity to land use approval after issuance of a land use permit is conditional. Namely, "[t]he continuing validity of an approval of a land use application is conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence."[23]

Departing from the proposed land uses or structures that were approved in an issued land use permit is not "implement[ing] the approval" obtained by the land use authority, and may result in invalid or illegal uses or structures unless subsequent approval is obtained. For example, the State Construction Code, in its adoption of the International Residence Code (IRC),[24] provides that "[w]ork shall be in accordance with the approved construction documents, and any changes made during construction that are not in compliance with the approved construction documents shall be resubmitted for approval as an amended set of construction documents."[25]

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[19] Woodland Hills City Ordinances, Chapter 125.02.
[20] Woodland Hills City Ordinances, Chapter 103.82 (emphasis added).
[21] *See* Woodland Hills City Ordinances, Chapter 103.82 Zoning Enforcement Officer: "The person authorized by the City to issue building permits, review all proposed site plans, proposed new construction, renovation, or additions to assure compliance with all provisions of the Zoning Ordinance and Map. *The Zoning Enforcement Officer and Building Inspector may be the same person*." (emphasis added). *See also* Chapter 103.10 Building Inspector: "The person authorized by the City to issue certificates of occupancy and to perform all inspections on Building Code compliance for all structures – newly constructed or renovated. *The Building Inspector and zoning Enforcement Officer may be the same person*." (emphasis added).
[22] *See*, *e.g*, *Croft v. Morgan County*, where the Court declined to rely on the legislature's chosen labels to resolve a question the Supreme Court's jurisdiction as a matter of constitutional law, and in doing so, comparing with *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544, 565 (2012) (explaining that "Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other" or by using "[m]agic words." (emphases in original); *cf., also, Salt Lake Cty. v. Bd. of Educ. of Granite Sch. Dist.*, 808 P.2d 1056, 1060 (Utah Sup.Ct. 1991) (agreeing that a school district's statutory exemption from payment of local assessments should not be denied it by the simple expedient of calling a local assessment by another name).
[23] UTAH CODE § 10-9a-509(1)(e).
[24] UTAH CODE § 15A-2-103(1)(b) (Utah adopts the 2015 version of the International Residence Code).
[25] 2015 IRC R106.4.

It follows, then, that where approved plans are later sought to be amended, additional land use approval may be needed if any of the changes proposed questionably would result in putting the project out of compliance with applicable land use regulations. As to a project that was already out of compliance when approved, while the City may be correct that zoning estoppel might prevent the City from enforcing its ordinances contrary to the permit as issued, this only anticipates that "the developer [has] the right to *finish* construction of the building *pursuant to the permit*."[26]

Not all changes to construction plans would require subsequent approval from the land use authority, however. For example, changes to the placement of a window may be a deviation from approved plans, requiring at least resubmittal of construction plans, but insofar as that change does not implicate any compliance issues with the state and local standards that had been applied to the application and approved by the land use authority—including adopted construction codes—such changes may likely be handled by the appointed building official within the scope of his/her authority.

The City's Zoning Ordinance provides that "no work shall be started on the relocation, construction, reconstruction or structural alteration of a building until the proposed building or use is found to comply with all the provisions of the Zoning Ordinance."[27] Further, it provides that "site improvements shall not be started, or buildings or structures, or parts thereof, shall not be erected, altered or moved until a building permit has been applied and issued by the Building Inspector."[28] From this, the City's ordinances adequately address the situation where even if a permit is issued, any alteration to that approved permit must (1) comply with all provisions of the Zoning Ordinance, and (2) be issued as an amended building permit by the Building Inspector.

As to what standards are applied in reviewing a request for an amended permit, the standard for the initial permit, Chapter 125.03, is just as applicable:

> A. Approval of Site Plans: Whenever a site plan has been submitted by the developer as required by this Ordinance, the preliminary plan and final plan of the project area shall have been approved by the Planning Commission . . . before a building permit may be issued by the Building Inspector . . .
>
> B. Compliance to Zoning Regulations: Permits for the construction of a building or improvements or change in use may be issued by the Zoning Enforcement Officer only if the work described in an application clearly complies with all provisions of the Zoning and other ordinances of the City. If the proposed building or use does not clearly comply, the Zoning Enforcement Officer shall not have the power to grant variances or make exceptions unless specifically so empowered.[29]

[26] *Fox*, 2008 UT 85, at ¶ 37 (emphasis added).
[27] Woodland Hills City Ordinances, Ch. 125.01.
[28] Woodland Hills City Ordinances, Ch. 125.03.
[29] Woodland Hills City Ordinances, Ch. 125.03(A).

In other words, the Building Inspector/Zoning Enforcement Officer is designated to act upon the application for an amended permit by discerning whether the work described "clearly complies" with city ordinances. If he/she determines that it does, an amended building permit may be issued while continuing to rely on the same final plan approved previously by the Planning Commission. If the work does not clearly comply, a new final plan[30] may have to return to the Planning Commission for further approval.

In this capacity, the City's Zoning Enforcement Officer is considered a land use authority under LUDMA, as a person designated to act upon a land use application, and the Zoning Enforcement Officer's decision that amended plans continue to comply with all zoning provisions amounts to a land use decision, which is appealable to determine whether there was any error in the administration or interpretation of a land use ordinance.[31] To say otherwise, as the City suggests, would amount to a system of land use development where, once a building permit is issued, it could be amended indiscriminately without any oversight by a land use authority, as the Building Inspector is the ultimate gatekeeper of the amended plans, and his/her decision could never be challenged as a land use decision. This is not what state law allows.

Here, the Fujas allege that the Building Inspector's proceeding with, and approving, a 4-way inspection on work contained only in the amended plans is evidence of the City's land use decision to accept the amended plans as compliant.[32] According to the City's own ordinances, that would seem to be the case, as the Zoning Enforcement Officer/Building Inspector is charged with reviewing all submitted site plans for compliance with zoning ordinances, and may only issue permits—or, in this case, moving forward on the issued permit with amended plans—where the work clearly complies with all provisions of the zoning ordinance. Such a decision to move forward without sending the amended plans to the planning commission is, itself, an appealable land use decision approving the amended plans.

III. The Building Inspector Acted Outside of His Scope in Accepting Amended Plans

We've established that proposing any changes to an issued building permit, no matter how minor, requires the submission of amended plans for review. We've also established that the planning commission must approve final plans before the building inspector/zoning enforcement officer may issue a permit. Finally, we've established that the building inspector acts as a land use authority in reviewing amended plans, if he decides to permit the amended plans as complying with all zoning provisions.

Because the Building Inspector/Zoning Enforcement Officer may only permit construction or uses "if the work described in an application clearly complies with all provisions of the Zoning and other ordinances of the City," it would seem that any amendment to a permitted project that was

[30] The final plan is "prepared by a developer based upon the approved preliminary plan of a proposed development or development area, which consists of detailed drawings, specifications, and agreements for the construction of the site improvements and buildings for the proposed development or development area. *See* Ch. 103.53(B) Site Plan (Final).
[31] UTAH CODE § 10-9a-703(1).
[32] We view this issue not as a contention that the inspection was performed incorrectly, but rather, that proceeding with the inspection was a result of some determination that the amended plans did not present any compliance issues with applicable land use regulations. As noted by the city, a review of the 4-way inspection itself—meaning the inspection of framing, electrical, plumbing, and HVAC—has its own review procedure. *See* UTAH CODE § 15A-1-210.

acknowledged to not conform with applicable development standards to begin with, and that didn't correct the nonconformity, would, as a threshold, not meet this standard.

As a result of the Fujas' February 21, 2020 letter and subsequent appeals, the City appears to have been aware of compliance issues with the approved permit in early 2020, if not earlier. City officials discussed red-tagging the project in March 2020. These discussions included the City's building inspector. It follows, then, that by the time amended plans were submitted in August 2020, the building inspector charged with reviewing said plans would have had notice that whereas the amended plans continued to include the same structure mistakenly approved in the initial permit, the proposed amendments could not "clearly compl[y] with all provisions of the Zoning and other ordinances of the City."

Acting as a land use authority, the building inspector/zoning enforcement officer's decision is a land use decision, which is valid unless it is "arbitrary and capricious," or "illegal."[33] A land use decision is arbitrary and capricious if "not supported by substantial evidence in the record;" a land use decision is illegal if it is "based on an incorrect interpretation of a land use regulation," or is otherwise "contrary to law."[34]

The Building Inspector therefore does not appear to have discretion to accept or approve these amendments under city ordinances, and should likely have referred the matter to the planning commission for a new final plan approval. The Building Inspector's decision was therefore illegal, as being "contrary to law" as provided by City ordinances.

CONCLUSION

Zoning estoppel may require that a municipality allow a developer to finish a structure that does not comply with applicable development standards pursuant to a mistakenly issued building permit. Regardless, amendments to an issued building permit must comply with applicable land use regulations, and may require additional review and approval by a land use authority. City ordinances allow the building inspector/zoning enforcement officer to issue permits—including amended permits—only when the work clearly complies with all ordinances. The building inspector's approval of amended plans on a noncompliant structure exceeded his authority amounting to an illegal land use decision.

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

[33] UTAH CODE § 10-9a-801(3)(b).
[34] UTAH CODE § 10-9a-801(3)(c).

NOTE:

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

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

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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

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