

Advisory Opinion #246

Parties: Neighbors, Summit County

Issued: November 16, 2021

TOPIC CATEGORIES:

Appealing Land Use Decisions

Conditional Use Applications

Summit County Council had a legal obligation to approve a conditional use permit for a commercial horse boarding facility in the Rural Residential zone where the proposed building would be much larger than surrounding homes because they concluded that the building met all relevant development code requirements and the project's anticipated detrimental effects could be mitigated.

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ADVISORY OPINION

Advisory Opinion Requested By: Neighbors to subject property

Local Government Entity: Summit County

Applicant for Land Use Approval: Valerie Geist

Type of Property: Rural Residential

Date of this Advisory Opinion: November 16, 2021

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

ISSUE

Did the County Council correctly approve a conditional use permit for a commercial horse boarding facility in the Rural Residential zone where the proposed building would be much larger than surrounding homes?

SUMMARY OF ADVISORY OPINION

The Summit County Council had a legal obligation to approve the commercial horse boarding and accessory building conditional use permit application because they concluded that the building met all relevant development code requirements and the project's anticipated detrimental effects could be mitigated. The Council found that the proposed conditional use permit met the objective requirements specified in the development code, and understood that shifting the disputed horse barn to the eastern edge of the property away from nearby residences would mitigate the "human scale" imbalance.

A court will uphold the County's decision to issue the conditional use permit unless the decision was arbitrary and capricious, or illegal. In this case, the County's decision to issue the conditional use permit is supported by substantial evidence, and is therefore not arbitrary and capricious. Further, the Council followed the ordinances and applicable law, so the decision was not illegal. Therefore, the decision to approve the proposed CUP was proper.

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. 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 Polly McLean, Peak Law on March 30, 2021. A copy of that request was sent via certified mail to Thomas C. Fisher, County Manager, Summit County, 60 North Main, Coalville, Utah 84017 on March 30, 2021.

EVIDENCE

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

1. Request for Advisory Opinion submitted by Polly McLean, Attorney for Neighbors of 7664 North Whileaway Road (the "Neighbors"), on March 30, 2021.
2. Email from Polly McLean, Attorney for the Neighbors, on April 26, 2021.
3. Letter from Jami R. Brackin, Attorney for Summit County, on May 2, 2021.
4. Email from Polly McLean, Attorney for the Neighbors, on May 6, 2021.
5. Email from Polly McLean, Attorney for the Neighbors, on May 18, 2021 regarding the attached complaint.
6. Letter from Brent N. Bateman, Attorney for Valerie Geist, on May 19, 2021.
7. Letter from Polly McLean, Attorney for the Neighbors, on June 14, 2021 regarding the attached complaint.

BACKGROUND

In August 2020, Valerie Geist (the "Applicant") submitted (1) a building permit application for a single-family home, (2) a low impact permit for an accessory building in excess of 10,000 square feet, and (3) a Conditional Use Permit ("CUP") request to use that accessory building as a commercial riding arena and stables on a 2.65-acre parcel in the Silver Creek subdivision in Summit County.

The building and low impact permits were reviewed and issued administratively by the Community Development Department, as required by local ordinance. However, the Snyderville Basin County Development Code (the "Development Code") requires that the Snyderville Basin Planning Commission ("Planning Commission") review the Conditional Use Permit ("CUP") for administrative approval.

As required by local ordinance, a public hearing for the CUP application was first held on October 27, 2020, and continued to November 10, 2020 where the Planning Commission adopted a motion

denying the application based on the findings that it did not meet the architectural requirements of the Summit County Development Code (“Development Code”). In particular, the Planning Commission had concerns that the “human scale” requirement of Development Code § 10-3-5 had not been met, and the architectural provisions of Development Code § 10-4-19 including a prohibition on pre-fabricated metal buildings for commercial use and long expanses of façade without architectural interest had been violated. At the November 10th public hearing, several neighbors spoke out against the CUP voicing similar concerns.

The Applicant appealed the decision to the Summit County Council (the “Council”), in conformance with local ordinance. The matter was heard before the Council on February 10, 2021. The Applicant requested the opportunity to come into compliance with the architectural requirements and suggested that the matter be remanded to provide that opportunity. The County did not object to this course of action, and because this was a local land use appeal rather than a public hearing, the Council did not entertain input from concerned neighbors who were not a party to the dispute.

The Council expressed concerns about the findings of the Planning Commission and agreed to remand with the directive to the Planning Commission to review the revisions the Applicant made and to make further and more complete findings in three areas: 1) the specific provisions of the architectural requirements that are or are not met; 2) further findings on whether the CUP application complied with the “human scale” requirement of the Development Code; and 3) whether the application violates the prohibition on metal buildings found in the Development Code.

The Applicant submitted an amended application depicting revised architectural components, and on March 9, 2021 the Planning Commission considered the application on remand. As stucco had been substituted for the metal and uninterrupted façades were now broken up, the application apparently met the requirements of the Development Code. However, the Planning Commission determined that the application still did not meet the “human scale” requirement, finding the size of the riding arena and stables were not consistent with adjacent development nor appropriate to residential uses. Again, because this was not a public hearing, the Commission did not hear input from concerned neighbors at that time.

On April 21, 2021, the County Council again heard the appeal for a final decision. Testimony at this meeting included a presentation by Peter Barnes, a professional architect and the County Planning and Zoning Administrator, who explained at length the meaning of “human scale”, and who opined that the amended application met this aspect of the Development Code. His recommendations were reflected in the staff report, as well as in the minutes of the meeting. Because the meeting was to consider a land use appeal, and concerned neighbors were not party to the appeal, the Council did not give the neighbors the opportunity to give input.

After some deliberations in a closed session, the Council determined that the application met the architectural requirements of the Development Code and the human scale concerns could be mitigated. The Council thus granted approval of the CUP subject to the condition that the large horse barn and arena be located on the eastern end of the property, away from nearby residences.

Concerned residents of the neighboring Whileaway Road (the “Neighbors”) object to the proposed project and have submitted this Request for Advisory Opinion to this office asking us whether the County Council approval of the CUP was proper. The Neighbors object to both the scale of the proposed development and to the process in which it was approved. The Neighbors state that the average home size in the area is just under 2,400 square feet, and the average size of accessory buildings is approximately 1,450 square feet. They maintain that the scale of an accessory building which is almost 10 times larger than the average accessory building exceeds the “human scale consistent with adjacent development and residential uses.”¹ They further maintain that their due process rights were violated because they were not allowed to comment during the appeal and on changes to the application, and that the Applicant was given too many opportunities for approval.

ANALYSIS

I. Legal standard for considering Conditional Use Permit applications

State law gives local governments authority to designate certain uses as conditional uses within their individual zoning districts.² A conditional use is defined as “a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.”³

Consequently, in addition to ensuring that the proposed conditional use complies with all general, relevant, non-discretionary requirements in the local code that any other *permitted* use must comply with in the same zoning district⁴, a county must review and permit conditional uses in accordance with the following:

- (1) (a) A county may adopt a land use ordinance that includes conditional uses and provisions for conditional uses that *require compliance with objective standards* set forth in an applicable ordinance. . . .
- (2) (a) (i) A land use authority *shall approve a conditional use if reasonable conditions are proposed*, or can be imposed, to *mitigate the reasonably anticipated detrimental effects* of the proposed use in accordance with applicable standards.
(ii) The requirement described in Subsection (2)(a)(i) to reasonably mitigate anticipated detrimental effects of the proposed conditional use does *not require elimination of the detrimental effects*.⁵

¹ Neighbors first submittal dated April 26, 2021.

² UTAH CODE § 17-27a-103(9).

³ UTAH CODE § 17-27a-506.

⁴ Such requirements may include density ratios, minimum lot sizes, setbacks, parking lot and landscaping requirements, building and fire code requirements, etc.

⁵ UTAH CODE § 17-27a-506 (emphasis added).

In accordance with state law, a county must adopt applicable standards for conditional uses. These standards guide and limit the county's discretion in imposing specific conditions in addition to generally applicable code requirements.

Utah law also provides that a county's CUP application decision is entitled to a degree of deference. When reviewing a county land use authority's land use decision, a district court must presume that the land use decision is valid and the court's determination is limited to determining "whether or not the decision, ordinance or regulation is arbitrary, capricious or illegal."⁶ A decision to grant a CUP "is arbitrary and capricious [only] if it is not supported by substantial evidence."⁷ Utah courts have defined substantial evidence as "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion."⁸ "A determination of illegality requires a determination that the decision . . . violates a law, statute or ordinance in effect at the time the decision was made. . ."⁹

The Council determined that Applicant could mitigate the reasonably anticipated detrimental impacts of the proposed commercial horse boarding and accessory building in accordance with its ordinances and approved the CUP pursuant to Section 17-27a-506 of the Utah Code. This decision is proper because it is supported by substantial evidence on the record and it is not illegal.

A. The Council decision to approve the CUP is not arbitrary and capricious

The Council's decision to approve the CUP allowing the commercial horse boarding and accessory use is not arbitrary and capricious because it is supported by substantial evidence. Utah courts have given some analysis of what constitutes substantial evidence and what does not. For instance, in *Springville Citizens v. Springville*, the Utah Supreme Court analyzed whether substantial evidence supported a municipality's decision to approve a planned unit development. The court noted that the decision to approve the development came after an extended time, multiple public meetings, documentation in support of the decision, and ultimately, multiple imposed conditions.¹⁰ The court held that a reasonable mind could have reached the same conclusion as the municipality given the nature and extent of the evidence and the court upheld the decision.¹¹

By contrast, in *Ralph L. Wadsworth Constr., Inc. v. West Jordan City*, the Utah Court of Appeals examined whether substantial evidence supported a county's decision to deny a CUP. The court held that substantial evidence did not support the City's decision when the evidence in the record consisted primarily of adverse public comment and reversed the denial.¹²

In this matter, the County held multiple public meetings on the Application, including a public hearing and two additional meetings before the Planning Commission, as well as two appeal hearings before the Council. The Council considered evidence and testimony from experts on

⁶ UTAH CODE § 17-27a-801(3).

⁷ *Ralph L. Wadsworth Constr., Inc. v. West Jordan City*, 999 P.2d 1240, 1242 (Utah Ct. App. 2000) (alterations in original) (other citations omitted).

⁸ *Bradley v. Payson City*, 70 P.3d 47, 52 (Utah 2003) (citation omitted).

⁹ UTAH CODE § 17-27a-801(3).

¹⁰ *Springville Citizens*, 979 P.2d at 337.

¹¹ *Id.*

¹² *Ralph L. Wadsworth Construction, Inc.*, 999 P.2d at 1243.

whether the Application met the architectural standards within the Development Code, and whether it fit the “human scale” requirement. The record includes discussion by several individuals regarding the term’s meaning and application. The record includes findings of fact establishing that they considered this evidence when determining whether to grant the CUP. In addition, the Council imposed conditions to mitigate any impact of the proposed use on the neighboring properties. Considering the foregoing, the record contains adequate information to convince a reasonable mind to support the Council’s conclusion to approve the conditional use. This means the Council’s decision is supported by substantial evidence in the record and is therefore not arbitrary and capricious.

It is worth noting that a great deal of deference is given to the land use authority’s decision. Utah state law grants the land use authority the legal right and stewardship to investigate and approve or deny land use applications. Where a land use authority has made a decision that is supported by substantial evidence, the law does not contain any provision allowing a court, or this office, to compare and weigh anew the available evidence to determine whether a different conclusion could be reached. There is no allowance for substituting the court’s judgment, or our judgment, for that of the local land use authority.¹³

B. The Council decision to approve the CUP is not illegal

The Council’s decision to approve the CUP allowing the commercial horse boarding and accessory use is not illegal because it followed the laws, statutes, and ordinances in effect at the time of its decision.

It is undisputed that the proposed use is a Conditional Use within the Rural Residential zone. As stated above, the proposed project complies with relevant local ordinances, and the condition that the large barn be built on the eastern edge of the property away from adjacent residences mitigates the “human scale” concerns. The proposed development therefore adequately meets the requirements of the local Development Code.

The Neighbors allege that there are issues related to due process and the number of meetings, and thus opportunities for approval, afforded the Applicant. The Neighbors also object to their not being allowed to give input after the first public hearing and to the closed session deliberations held by Council during the appeal process.

The decision to approve or deny a conditional use permit is an administrative land use decision and Summit County is required to abide by any due process procedures established to protect third-parties in both state law and local ordinance.¹⁴ Neither the Utah Constitution nor the Utah Code give third-parties an entitlement to participate in administrative land use decisions or any subsequent appeal. State law does not require that conditional use permit applications be considered at either a public hearing or a public meeting, nor is notice to the public or neighbors required.¹⁵

¹³ See *Springville Citizens v. Springville*, 979 P.2d 332, 337 (Utah 1999).

¹⁴ UTAH CODE § 17-27a-506.

¹⁵ See UTAH CODE § 17-27a.

However, the Summit County Development Code does require that conditional use permits are considered at a public hearing at some point in the review process. This requirement was apparently fulfilled on October 27, 2020, and again on November 10, 2020. There are no other relevant “due process” requirements afforded third-parties in the conditional use permit approval process.

Furthermore, when the Council heard the appeal, it was acting in its capacity as the land use appeal authority. When acting as the appeal authority, the Council is functioning as a quasi-judicial body, and not as a legislative decision-making body.¹⁶ As such, the requirements of the Open and Public Meetings Act would not apply.¹⁷ There is no law prohibiting closed deliberations during land use appeals.

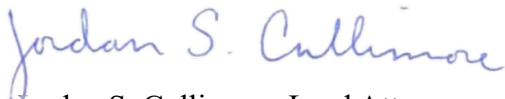
The Neighbors further argue that due process was not provided because the Applicant got so many opportunities to be heard and they received only one. There is nothing in state or local code which hampers the ability of the County to continue Planning Commission meetings, nor to remand and revisit issues. The Neighbors have identified an inherent imbalance in rights afforded the various players in the legal system. The Applicants do, in fact, receive deference and consideration not afforded other, arguably less affected parties. This difference is not a lack of due process.

It appears that at each step in the CUP consideration process the rights of the relevant parties, including the Neighbors, were upheld. It follows that the Council followed its ordinances and applicable law, and therefore the decision to approve the commercial horse boarding and accessory use was legal.

Conclusion

Summit County Council had a legal obligation to approve the commercial horse boarding and accessory use CUP application because, it concluded that the project’s anticipated detrimental effects could be mitigated. The Council found that the proposed CUP met the objective requirements specified in the Development Code, and understood that shifting the horse barn to the eastern edge of the property away from local residences would mitigate any “human scale” imbalance.

A court will uphold the County’s decision to issue the CUP unless the decision was arbitrary and capricious or illegal. In this case, the County’s decision to issue the CUP is supported by substantial evidence, and is therefore not arbitrary and capricious. Further, the Council followed the ordinances and applicable law during the review process and therefore the decision was legal. Accordingly, the decision to approve the proposed CUP was proper.



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¹⁶ UTAH CODE § 17-27a-701(3).

¹⁷ *Dairy Prod. Svcs, v Wellsville*, 2000 UT 81, ¶60 (“the ‘decision making’ or deliberation of a public body during a judicial process may be held in private and is exempt from the requirements of the Act.”).

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.