

Advisory Opinion 252

Party: Kim Haslem / Uintah County

Issued: March 29, 2022

TOPIC CATEGORIES:

Conditional Use Applications

Interpretation of Ordinances

Requirements imposed upon development

A County's Planning Commission may lawfully amend rather than revoke a Conditional Use Permit for a cement batch plant even where there are three documented violations of operations outside current Conditional Use Permit parameters.

A court will uphold the County's decision to amend rather than revoke the Conditional Use Permit unless the decision was arbitrary and capricious or illegal. The Commission's decision was supported by evidence in the record, a reasonable mind could support the conclusion, and the appropriate statutes and ordinances were following in making that decision.

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ADVISORY OPINION

Advisory Opinion Requested By: Kim Haslem
Local Government Entity: Uintah County
Applicant for Land Use Approval: Burdick Materials
Type of Property: A1 – Agriculture Zone
Date of this Advisory Opinion: March 29, 2022
Opinion Authored By: Marcie M. Jones, Attorney
Office of the Property Rights Ombudsman

ISSUE

Did the Planning Commission err when it amended rather than revoked the Conditional Use Permit for a cement batch plant that had violated the conditions of its CUP?

SUMMARY OF ADVISORY OPINION

In this case, the record of the Planning Commission's decision to amend rather than revoke the Conditional Use Permit for the cement batch plant includes evidence that the three documented violations of operating trucks outside the permitted hours of operation were minor and not overly burdensome to the neighboring properties. Furthermore, the decision is supported by evidence relating to additional complaints such as on-going dust control measures, dead vegetation being replaced in the screening berm, and whether or how trucks which may be speeding could be controlled.

A court will uphold the County's decision to amend rather than revoke the Conditional Use Permit unless the decision was arbitrary and capricious or illegal. The Planning Commission's decision to amend the Conditional Use Permit was supported by evidence in the record, and therefore, not arbitrary and capricious. A reasonable mind could support the conclusion to amend the Conditional Use Permit rather than revoke it. Furthermore, the appropriate statutes and ordinances were followed in making that decision, and it was not otherwise illegal.

Therefore, the Uintah County Planning Commission did not err when it decided to amend rather than revoke the Conditional Use Permit for the cement batch plant.

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 Kim Haslem on September 22, 2021. A copy of that request was sent via certified mail to Michael W. Wilkins, Clerk/Auditor, Uintah County, 152 East 100 North, Vernal, UT 84078 on October 15, 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 Kim Haslem on September 22, 2021.
2. The following documents from the Uintah County record provided by Uintah County attorney, Jon Stearmer:
 - a. Appeal Decision by Cameron Beech dated September 28, 2021 submitted by Uintah County;
 - b. Decision of the Uintah County Planning Commission Regarding an Amendment/Revocation Hearing for Conditional Use Permit held by Burdick Materials dated September 21, 2021;
 - c. Deed conveying the property from Kim Haslem to Travis and Michelle Barlow Stockwell, entry number 2021012458;
 - d. A decision of the Uintah County Commission Approving a Conditional Use Permit (#065) for Burdick Materials dated January 25, 2016;
 - e. Uintah County Land Information Reports number 06 031 0068 and 0065; and
 - f. [Uintah County tax records] account history indicating Kim Haslem sold property, now owned by Travis and Michelle Barlow Stockwell.
3. Response from Kim Haslem submitted on March 4, 2022.

BACKGROUND

Burdick Materials operates a cement batch plant on approximately 60 acres in the A1 – Agriculture Zone in unincorporated Uintah County, between 2500 South and 4000 South, just off Vernal Avenue (the “Batch Plant”). The Batch Plant has been in operation since approximately 2003. Kim Haslem, until recently, owned a residence on approximately fourteen acres adjacent to the plant (the “Neighbor”).

The Batch Plant currently operates under a Conditional Use Permit which was issued in 2016 (the “CUP”). The CUP stipulates that the Batch Plant must:

1. maintain the site plan as approved;
2. follow state and local requirements for dust control and associated permitting;
3. follow state and local requirements for noise control;
4. the speed limit on the access road must be posted at 25 mph;
5. “jake breaks” and “engine breaks” may not be used on the access road;
6. a berm with vegetation must be installed around the facility; and
7. the hours of operation are limited to 5 am to 7 pm Monday through Saturday.

Furthermore, according to the CUP, the Uintah County Community Development Department may approve working outside those hours of operation if it is adequately shown that there is no reasonable alternative and if the exception for working outside the hours of operation is used sparingly. Neighboring property owners could request to be notified when the Batch Plant asked to work outside the established hours.

Neighbor complains of violations to these conditions and submitted the following three documented violations to the County:

1) Violation: Hours of Operation.

Tuesday, February 16, 2021, semi-truck left yard at 7:17pm which is 17 minutes outside the allowed hours of operation of 5:00 am to 7:00 pm Monday through Saturday.

2) Violation: Hours of Operation.

Thursday, April 1, 2021, semi-truck left the yard at approximately 7:40 – 7:50 pm which is outside the allowed hours of operation.

3) Violation: Hours of Operation.

Sunday, May 23, 2021, a water truck came in to the yard, filled up with fuel, spending about 6.5 minutes there, and left the yard. May 23, 2021 was a Sunday, so this occurred outside the allowed days of operation.

Batch Plant has confirmed the violations occurred. Uintah County Code requires that if there are three or more documented violations in a twelve-month period, the land use authority must hold a revocation/amendment hearing for the Conditional Use Permit.¹

In the Advisory Opinion Request, Neighbor lists several complaints beyond operating outside the allowed hours of operation. For instance, Neighbor alleges that the Batch Plant has added a fueling station, stages commercial vehicles onsite, including maintenance, and uses an agriculture building as a shop/office. Neighbor maintains that a cement truck recently exploded as it was being welded and that trucks exceed the posted 25 mph speed limit. Neighbor further alleges that unused cement

¹ Uintah County Zoning Code § 17.08.100(C).

is being disposed of onsite, as well as equipment being jackhammered without use of a water truck to minimize the cement dust.

Neighbor also maintains that the “CUP was not supposed to lessen property values. I have been unable to sell [my residence]. The housing market is booming in Utah. Comments from potential buyers is they’re concerned with health, safety, and aesthetics of the cement batch plant . . .” and that a cement batch plant is no longer a conditional use in the A1 – Agricultural Zone.²

It is not clear from the record why these additional complaints were not clarified or substantiated, nor whether they would violate the conditions of the CUP even if documented. Regardless, based on the three documented violations involving trucks operating onsite outside of the allowed hours, the Uintah County Planning Commission (“Planning Commission”) held a public hearing on July 21, 2021 to discuss the possible revocation or amendment of the current CUP (“Public Hearing”).

At the Public Hearing, Uintah County staff presented the issue and recited the conditions of the current CUP and the three documented violations as well as a bit of the history of Neighbor’s complaints regarding the Batch Plant.

A Batch Plant representative then responded to the documented violations, saying two were for a vendor dropping off cement powder late in the day because they are not always mindful of the hours of operations restrictions. The third violation was for a water truck that required fuel on a Sunday and was not aware that operations at the facility were prohibited that day. The Batch Plant representative also discussed ongoing compliance with dust control measures, on-going replacement of dead trees and shrubs in the buffer area, efforts to monitor and reduce speeding, and that the current hours of operation are extremely limiting and affect the Batch Plant financially. The representative noted that they are often unable to service customers who work full-time jobs and require after-work deliveries. The representative noted that the Batch Plant has requested and received permission from the County to operate outside of established hours on five occasions in six months in able to pour cement at night which they argue is “sparingly” as required by the CUP.

Neighbor presented information next, emphasizing that the Batch Plant was an industrial use on agricultural ground, and that the current zoning code would not allow a cement plant to begin operations at that location anymore. Neighbor also argued that the Batch Plant has affected property values in the area and undermines the integrity of agricultural land and the neighbors’ health, safety, and overall welfare. Neighbor believes the Batch Plant should be moved to a different location.

The Planning Commission discussed the violations and the general complaints, soliciting further responses from their attorney, the Batch Plant representative, and Neighbor. Evidence was

² There is, apparently, a long history of friction between the Batch Plant and Neighbor, as sometimes occurs between adjoining industrial and residential uses. This Advisory Opinion does not opine on whether this Batch Plant was ideally located in proximity of a residence. The Batch Plant has spent millions of dollars to legally establish operations at this location and has vested legal rights to continue to do so. Accordingly, this Advisory Opinion focuses on the sole question before us of whether the Planning Commission erred when it did not revoke the Conditional Use Permit for the Batch Plant based on the evidence presented at the amendment/revocation hearing on July 21, 2021.

presented at the meeting that the documented violations were minor and not frequent, and that expanding the allowed hours of operation was an appropriate step that would not significantly negatively impact neighboring properties. Despite not being documented violations, the Planning Commission also considered many of Neighbor’s other complaints. Evidence was presented that dust control measures were being followed, dead trees were being replaced along the buffer area, and efforts were being made to stop speeding, for instance.

Based on the evidence presented, the Planning Commission did not revoke the CUP, instead, they approved an amendment to the CUP, expanding the hours of operation to 5:00 am through 8:00 pm (rather than 7:00 pm as had previously been conditioned).

Neighbor appealed that decision by the Planning Commission to the local Appeal Authority, attorney Cameron Beech (“Appeal Authority”). The appeal hearing was heard on September 14, 2021. Neighbor requested this Advisory Opinion while waiting for the Appeal Authority to issue their appeal decision. The County has noted that Neighbor has since sold the property.

In accordance with the request, this Advisory Opinion will address whether the Planning Commission erred in their decision to not revoke the Conditional Use Permit at the July 21, 2021 public hearing.

ANALYSIS

I. Legal standard for considering Conditional Use Permit revocation

State law gives local governments authority to designate certain uses as conditional uses within their individual zoning districts.³ 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.”⁴

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 district⁵, 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

³ UTAH CODE § 17-27a-103(9).

⁴ UTAH CODE § 17-27a-506.

⁵ Such requirements may include density ratios, minimum lot sizes, setbacks, parking lot and landscaping requirements, building and fire code requirements, etc.

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*.⁶

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. Uintah County has, accordingly, passed standards for conditional uses, and the Batch Plant, in following those established procedures and standards, received a Conditional Use Permit, the most recent in 2016, which outlines conditions within which it must operate.

Utah law also provides that the Planning Commission's decision to amend or revoke a CUP, like all land use decisions, 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."⁷ A land use decision "is arbitrary and capricious [only] if it is not supported by substantial evidence."⁸ Utah Code defines substantial evidence as evidence that "is beyond a scintilla; and a reasonable mind would accept as adequate to support a conclusion."⁹ Furthermore, "[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. . ."¹⁰

Therefore, to determine whether the Planning Commission erred in its decision not to revoke the CUP, we must first inquire whether their decision was arbitrary and capricious because it was not supported by substantial evidence in the record, and second, determine whether the decision was illegal.

A. The Planning Commission's decision to amend rather than revoke the CUP is not arbitrary and capricious

The Planning Commission's decision to amend the CUP rather than to revoke the CUP 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.¹¹ The court

⁶ UTAH CODE § 17-27a-506 (emphasis added).

⁷ UTAH CODE § 17-27a-801(3).

⁸ *Ralph L. Wadsworth Constr., Inc. v. West Jordan City*, 999 P.2d 1240, 1242 (Utah Ct. App. 2000) (alterations in original) (other citations omitted).

⁹ UTAH CODE § 17-27a-103(72).

¹⁰ UTAH CODE § 17-27a-801(3).

¹¹ *Springville Citizens*, 979 P.2d at 337.

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.¹²

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.¹³

In the matter at hand, the Planning Commission held a public meeting where County staff, the Batch Plant representative, and Neighbor were given an opportunity to present information. The Planning Commission heard and discussed at some length not only the documented violations, but the additional complaints alleged by Neighbor. The Planning Commission clarified issues with their attorney, other staff, the Batch Plant representative, and Neighbor. The record includes findings of fact establishing that they considered this evidence when determining whether to amend or revoke the CUP.

Ultimately, the Planning Commission determined to loosen the hours of operation restriction on the Batch Plant, rather than revoke the CUP. The record contains adequate information to convince a reasonable mind to support the Commission's conclusion to amend rather than revoke the CUP. Therefore, the Planning Commission's decision is supported by substantial evidence in the record and is therefore not arbitrary and capricious.

B. The Planning Commission's decision to amend rather than revoke the CUP is not illegal

The Planning Commission's decision to amend the CUP to expand the permitted hours of operation, rather than to revoke the CUP, is not illegal because it followed the laws, statutes, and ordinances in effect at the time of its decision.

It is undisputed that the Batch Plant operates under a CUP legally granted in 2016 and that the ordinances in place governing that CUP process of approval were legal. Furthermore, the Planning Commission held a public hearing, as required by the Uintah County Zoning Ordinance where three violations of the conditions of that CUP were documented. There have been no allegations that the CUP or the process of its amendment violates state or local law.

The Uintah County Zoning Code grants the Planning Commission discretion in deciding whether or not to revoke or enforce a Conditional Use Permit, even if there has been a failure to observe a condition or requirement. Uintah County Zoning Ordinance § 17.08.100(C) states that "The holder or user of the conditional use permit will be given a reasonable opportunity to correct a violation in the same manner as provided for other violations of the land use ordinances"¹⁴ and further, that "[n]o conditional use permit shall be amended or revoked against the wishes of the holder or user of the permit without first giving him or her an opportunity to appear before the land use authority and show cause as to why the permit should not be amended or revoked."¹⁵

¹² *Id.*

¹³ *Ralph L. Wadsworth Construction, Inc.*, 999 P.2d at 1243.

¹⁴ Uintah County Zoning Ordinance § 17.08.100(C)(2)(a).

¹⁵ Uintah County Zoning Ordinance § 17.08.100(C)(2)(d).

Neighbor has alleged that operation of the Batch Plant is a nuisance, and lowers surrounding property values. Sufficient evidence that the Batch Plant legally qualifies as a nuisance has not been presented, and no findings have been made that it is such.

State law governing Conditional Use Permits requires that proposed uses be allowed “*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” and further, that to “reasonably mitigate anticipated detrimental effects of the proposed conditional use does *not require elimination of the detrimental effects.*”¹⁶ The decision of the Planning Commission to amend the CUP is consistent with the mandate to mitigate detrimental effects, but not eliminate them, and is therefore legal.

Accordingly, since the Planning Commission followed state and local laws in deciding to amend rather than revoke the Batch Plant CUP, the decision was legal.

Conclusion

The Uintah County Planning Commission did not err in its decision to amend rather than revoke the Conditional Use Permit for the cement batch plant. A court will uphold the County’s decision to amend rather than revoke the CUP unless the decision was arbitrary and capricious or illegal.

In this case, the decision to amend the CUP was supported by evidence in the record and is therefore not arbitrary and capricious. The record includes evidence that the documented violations of operating trucks onsite outside the hours of operation were very minor and not a frequent occurrence, and that expanding the allowed hours of operation was an appropriate step that would not significantly negatively impact neighboring properties. Furthermore, evidence relating to other complaints was considered regarding on-going dust control measures, dead vegetation being replaced, and whether or how trucks which may be speeding could be controlled. A reasonable mind could support the County’s conclusion.

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

¹⁶ UTAH CODE § 17-27a-506 (emphasis added).

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.