Advisory Opinion #92

Parties: Christine Erickson Davis and City of Cottonwood Heights

Issued: November 1, 2010

TOPIC CATEGORIES:

B: Conditional Uses

Since the City has deemed short-term rentals a conditional use within the zone, it has determined that short-term rentals are a desirable use, and the City must grant the use unless it can be shown that detrimental effects of the use cannot be mitigated. The City's determination that too many short-term rentals may constitute a detrimental impact is valid.

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
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov

GARY R. HERBERT
Governor

GREG BELL
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Christine Erickson Davis
Local Government Entity:	Cottonwood Heights City
Applicant for the Land Use Approval:	Christine Erickson Davis
Project:	The Oaks at Wasatch Condominiums
Date of this Advisory Opinion:	November 1, 2010
Opinion Authored By:	Brent N. Bateman, Lead Attorney Office of the Property Rights Ombudsman

Issues

Is a numerical cap on short-term rental units a valid condition on conditional uses within the zone?

Summary of Advisory Opinion

The property owner cannot challenge the enactment of the conditional use permit ordinance, because such a challenge is time-barred. An Advisory Opinion on such a challenge is not available. Nevertheless, the property owner has also requested an Advisory Opinion on the application of the conditional use ordinance to her property, which is a proper subject for an Advisory Opinion and is not time-barred.

The City must accept and process conditional use applications for short-term rentals. The City has deemed short-term rentals a conditional use within the zone. Accordingly, the City has determined that short-term rentals are a desirable use within the zone, and the City must grant the use unless it can be shown that detrimental effects of the use cannot be mitigated. The law and City ordinances require a case-by-case determination that the detrimental effects of the use cannot be mitigated.

The City's determination that too many short-term rentals are a detrimental effect in a residential zone is valid. Upon review of a conditional use application, the City may only deny the use of it

can show by substantial evidence on the record that this detrimental effect cannot by mitigated by imposing reasonable conditions upon the property owner's use.

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 Christine E. Davis, by her attorney Stevan R. Baxter of Olsen Skoubye & Nielson LLC, on July 12, 2010. A copy of that request was sent via certified mail to Linda W. Dunlavy, City Recorder, registered agent for Cottonwood Heights City. The return certificate, indicating that the City received the copy of the Request, was received by the Office of the Property Rights Ombudsman on July 15, 2010. The City, by its attorney Jody K. Burnett of Williams & Hunt, submitted a response that was received on July 26, 2010. Mr. Baxter submitted a reply on Ms. Davis' behalf which was received on August 23, 2010.

Evidence

The following documents and information with relevance to the issue involved in this advisory opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, dated July 12, 2010 with the Office of the Property Rights Ombudsman by Christine E. Davis, by her attorney Stevan R. Baxter, with attachments.
2. Response from Cottonwood Heights City, received on July 26, 2010, by Jody K. Burnett, Attorney for the City.
3. Reply of Christine E. Davis by her attorney Stevan R. Baxter received on August 23, 2010.

Background

Christine Erickson Davis owns a condominium at 3573 E. Rustic Springs Lane in Cottonwood Heights. Her condo is located in the Oaks at Wasatch development, which contains approximately 121 units. The development is located between Big and Little Cottonwood Canyons and is accessible to ski areas. The property is zoned for residential uses, with short-term rentals designated as a conditional use within the zone, as the area attracts out of state skiers. According to the property owner, 55 of the 121 units currently have conditional use permits for short-term rentals.

In 2006, when Ms. Davis purchased the condominium, there was no cap on the number of conditional use permits that would be issued for short-term rentals. Ms. Davis purchased her property with the intent to use it as a primary residence, and did not apply for a conditional use permit. In 2007, the City amended its zoning ordinance to, among other things, limit the number of conditional use permits issued for short-term rentals. The City indicates that it did so because it concluded that an excessive number of short-term rentals would fundamentally change the community to more of a resort rental community and less of a neighborhood residential zone. The City determined that it would notify affected property owners of the change, and accept conditional use permit applications for short-term rentals until January 31, 2008. This would give property owners that still desired a conditional use permit the opportunity before the limit was imposed. The City capped the number of available conditional use permits for short term rentals to the number issued as of January 31, 2008. After that time, permits could only by obtained when existing permits were revoked or otherwise made available. Ms. Davis did not apply for a conditional use permit for short-term rental prior to January 31, 2008.

Ms. Davis no longer uses the condo as her primary residence, and would now like to obtain a conditional use permit for short-term rental. Ms. Davis alleges that she tried to obtain a conditional use permit application from a City employee, but that employee indicated that the City was not accepting applications for short-term rentals and would not issue an application to Ms. Davis. Ms. Davis later obtained and submitted an old application.[1] The City notified Ms. Davis on August 5, 2010 that it would not process her application.

Analysis

I. Ms. Davis' Challenge to the Enactment of the Ordinance is Time-Barred.

Ms. Davis has requested an Advisory Opinion to address three questions:

> 1. Is a numerical cap limiting the number of conditional use permits that the City will issue for short term rentals as found in section 19.89.170 of the City's municipal ordinance, arbitrary and capricious?
>
> 2. Does the City's numerical cap violate Ms. Davis' and other like situated homeowner's substantive and/or procedural due process rights?
>
> 3. Can the City deny Ms. Davis the opportunity to apply for a conditional use permit where Ms. Davis can meet the requirements imposed by the City to mitigate any reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards?

The City argues that Advisory Opinions on the first two of these questions are not available because, among other reasons, they amount to a facial challenge to the ordinance and are time-barred.

[1] The Request for Advisory Opinion was submitted to the Office of the Property Rights Ombudsman prior to Ms. Davis filing her application for a conditional use permit.

The first question by the property owner concerns whether the cap on short-term rentals imposed in the ordinance is arbitrary and capricious. The second question posed by the property owner concerns whether the ordinance has deprived Ms. Davis and others similarly situated of their due process rights. With both of these questions, the property owner is challenging the ordinance itself, rather than application of the ordinance to Ms. Davis' property. The passage of the ordinance itself is a legislative act. A challenge to the enactment of the ordinance must be made within 30 days of its enactment. Utah Code § 10-9a-801 states that "If the municipality has complied with Section 10-9a-205 [concerning notice], a challenge to the enactment of a land use ordinance or general plan may not be filed with the district court more than 30 days after the enactment." There is no allegation that Ms. Davis did not receive notice of the enactment of the ordinance. Accordingly, Ms. Davis had thirty days from the enactment to challenge the ordinance.[2] That deadline has passed.

II. The City Must Accept and Process Conditional Use Permit Applications for Short-Term Rentals.

The third question posed by Ms. Davis, however, concerns whether the City can deny her the opportunity to apply for a conditional use permit, where she can meet the requirements to mitigate the reasonably anticipated detrimental effects of the proposed use. This question concerns not the passage of the ordinance, but the application of the ordinance to Ms. Davis' property – the denial (or rejection) of her land use application. This is an appropriate subject for an Advisory Opinion under Utah Code § 13-43-205(1). The question is not time-barred because the Advisory Opinion has been requested before the final decision on the application has been made by a local appeal authority. *See* Utah Code § 10-9a-801, Utah Code § 13-43-205.[3]

The City cannot deny Ms. Davis the opportunity to be considered for a conditional use permit. If a municipality does not desire a particular use within a zone, it need only prohibit that use in its

[2] Even if the challenge were not time-barred, an arbitrary and capricious challenge to an ordinance would be subject to the "reasonably debatable" standard accorded to all legislative decisions. Under that standard, the ordinance will not be found arbitrary and capricious if "it is reasonably debatable that the decision, ordinance, or regulation promotes the purposes of this chapter [LUDMA]." Utah Code § 10-9a-801. This standard is so high that it is unlikely that the ordinance, if challenged, would be found to be arbitrary or capricious. It is certainly reasonably debatable that a limit on short-term rentals advances the public welfare. The same is true for a challenge to the due process validity of an ordinance. *Smith Inv. Co. v. Sandy City*, 958 P.2d 245 (1998) explains that the court "will sustain the due process validity of a rezoning ordinance so long as it is reasonably debatable that it is in the interest of the general welfare." *Id.* at 253.

[3] The City argues that "The authority to give an advisory opinion has a threshold requirement, i.e., that there be a pending land use application awaiting a final decision." There is no requirement in Utah Code § 13-43-205 that there be a pending land use application in order to request an Advisory Opinion. The language in Utah Code § 13-43-205 states "At any time before a final decision on a land use application by a local appeal authority" a party can request an Advisory Opinion. This does not create a requirement that a land use application be pending, but by its plain language creates a cut-off by which time an Advisory Opinion must be requested. Nothing in the statute prohibits an Advisory Opinion from being requested because a dispute has arisen before a land use application has been filed (although in many such cases the controversy may not be ripe for an Advisory Opinion). In some such cases, an Advisory Opinion may be very helpful in settling a dispute. In addition, some Advisory Opinion subjects, such an impact fees or nonconforming uses/noncomplying structures, do not necessarily require a land use application in order to become ripe. Moreover, a condition may arise, such as here, where a City does not permit a land use application to be filed. The Advisory Opinion can still serve its purpose in such cases.

land use ordinances. If a use is deemed a conditional use, the presumption is that the municipality has found that use to be desirable within the zone. Utah Code § 10-9a-507 states that the municipality must approve a conditional use if it can impose reasonable conditions that mitigate the detrimental effects of the use:

> (1) A land use ordinance may include conditional uses and provisions for conditional uses that require compliance with standards set forth in an applicable ordinance.
>
> (2) (a) A conditional use shall be approved 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.
>
> (b) If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied.

Accordingly, under this statute a conditional use may only be denied where no reasonable conditions can be imposed that can substantially mitigate the detrimental effects of the use. This contemplates that a showing must be made that no reasonable conditions can be imposed to mitigate the detrimental effects. Such a showing requires individualized determination of the detrimental effects of the use.

The City's refusal to accept or process applications for conditional uses – uses it has designated as acceptable in its own ordinances – amounts to a pre-determination by the City that no conditions could ever be imposed that would mitigate the detrimental effects of the use. In such a case the use has been, by all effects, prohibited. The City should not presume that no property owner could ever propose or agree to any conditions that would mitigate the detrimental effect of the use. The statute requires a case-by-case determination of the detrimental effects of the application, and review of possible mitigating conditions.

In addition, the Cottonwood Heights zoning ordinance states that

> each proposed conditional use *shall be evaluated on an individual basis*, in relation to its compliance with the standards and conditions set forth in this chapter and with the standards for the zoning district in which it is located, in order to determine whether the conditional use is appropriate at the particular location.

COTTONWOOD HEIGHT CODE OF ORDINANCES § 19.84.020 (emphasis added). The City therefore by its own ordinances mandates an individualized review of conditional use applications. The City must comply with the mandatory provisions of its own ordinances. Utah Code § 10-9a-509(2). Furthermore, the City ordinances contain a process for processing conditional use applications. *See* COTTONWOOD HEIGHT CODE OF ORDINANCES 19.84. Nothing could be found in the City ordinances that exempt it from following that process with every conditional use

application, or authorizing it to summarily reject, refuse to accept, or refuse to process conditional use applications. Accordingly, the City must accept, process, and consider all applications for conditional uses.

III. The Determination to Limit Short-Term Rentals is Valid and Within the City's Discretion

As stated above, the decision by the City to pass an ordinance capping the number of short-term rentals was legislative. Legislative land use decisions by the City are presumed to be valid, Utah Code § 10-9a-801(3)(a), and are subject to the reasonably debatable standard of discretion. Utah Code § 10-9a-801(3)(b).

The City states that the limitation on short-term rentals arose out of concern that too many short-term rentals would change the character of the neighborhood to more of a resort type area, and have a detrimental effect on single family nature of the community. Preserving the single-family nature of an area is a legitimate public concern. *Anderson v. Provo City Corp.*, 2005 UT 5 ¶21 ("The objective of preserving the character of single-family residential neighborhoods is, we think, a legitimate one."). The City then determined to address that concern by placing a cap on the number of short-term rentals. That condition is reasonably related to the harmful condition, and is reasonably debatable that it furthers the City's objectives. *See id.* at ¶21 ("We believe the municipal council could reasonably conclude that limiting accessory apartment rental to occupying owners would further this objective."). Accordingly, the City has legitimately determined that having too many short-term rentals has a detrimental effect, and has legitimately determined to address that detrimental effect by limiting short term rentals.

The City's decision whether to grant Ms. Davis' request for a conditional use permit (or refuse to accept or process Ms. Davis' conditional use application), is an administrative act. An administrative act must be supported by substantial evidence on the record and not be otherwise illegal in order to be upheld. *Ralph L. Wadsworth Constr., Inc. v. West Jordan City*, 2000 UT App 49, ¶9 ("A local government's land use decision [concerning the granting or denial of a conditional use permit] is arbitrary and capricious [only] if it is not supported by substantial evidence."). Accordingly, if the City denies Ms. Davis' application for a conditional use permit, it must show, by substantial evidence on the record, that the detrimental effects of the use cannot be substantially mitigated "by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards." Utah Code § 10-9a-507(2)(b).

The situation that leaves is this: Because long term rental housing is a conditional use within the zone, the City must accept and process applications for that conditional use. The City has legitimately determined that having additional short term rentals would have a detrimental effect upon the community. The City may therefore impose conditions on short-term rentals to mitigate that detrimental effect. The City has legitimately determined that a condition to substantially mitigate that detrimental effect is to not allow any short term rentals beyond the imposed cap. The City must then show by substantial evidence on the record that no conditions can be imposed to mitigate the detrimental effect of the proposed use. Only under those circumstances can the City deny the conditional use permit.

The OPRO is aware that this appears to be overly formalistic, and appears to create unnecessary work for City staff, since it appears that most conditional use applications for short-term rentals will likely be denied. This arises from the assumption that nothing but termination of an existing short-term rental permit could ever mitigate the detrimental effects of the use. This may generally be a safe assumption, but the law and City ordinances require that all conditional use applications be processed, and that the City show by substantial evidence that no conditions could be imposed that could mitigate the detrimental effects. Accordingly, where something is deemed a conditional use, property owners ought to be given the opportunity to propose or agree to conditions that would mitigate the effects of that use, or propose a way to employ that use that would comply with the condition. If the use is to be denied, the property owner is entitled to a record containing substantial evidence to show that no reasonable conditions can be imposed.[4]

Conclusion

The property owner's first two questions are challenges to the enactment of the conditional use ordinance, and are time-barred. The third question, however, concerns the application of the conditional use statute to the property owner, is not time barred, and is a proper subject for an Advisory Opinion.

By state law and its own ordinances, the City must accept and process conditional use applications for short-term rentals. The City has validly limited short-term rentals in the residential zone because of the detrimental effect. However, the City must show by substantial evidence on the record that no reasonable conditions can be imposed to mitigate those harmful effects, before the City can deny the conditional use permit.

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

[4] The procedure selected by the City to award an available conditional use permit for a short-term rental, what the property owner calls a "lottery," has not happened to Ms. Davis' application. Accordingly, although the "lottery" may be suspect, it remains to be seen whether it can be conducted in accordance with the state and local procedures as discussed. Certainly, this "lottery" system, an attempt by the City to ensure fairness in awarding a permit when one becomes available, does not excuse the City from its obligation on each application to provide substantial evidence on the record showing that no reasonable conditions can be imposed to mitigate the harmful effects. Evidence of a random selection may not be substantial evidence sufficient to support denial of the application. Nevertheless, since it has not happened, it cannot be determined whether it can or will be done in accordance with the law. The issue is not ripe for consideration in this Advisory Opinion.

NOTE:

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

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

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

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

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 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:

Linda W. Dunlavy, City Recorder
City of Cottonwood Heights
1265 E. Fort Union Blvd, #250
PO Box 71024
Cottonwood Heights, Utah 84047

On this _____ Day of November, 2010, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

_____
Office of the Property Rights Ombudsman