Advisory Opinion #95

Parties: Lisa and Brad Wilson and Park City

Issued: January 31, 2011

TOPIC CATEGORIES:

B: Conditional Uses

A conditional use permit was properly granted, because it was not shown that the amount of open space was miscalculated.

DISCLAIMER

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

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: Lisa & Brad Wilson

Local Government Entity: Park City Municipal Corporation

Applicant for the Land Use Approval: SR Silver Lake LLC

Type of Property: Commercial Condominium Development

Date of this Advisory Opinion: January 31, 2011

Opinion Authored By: Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

Issues

Did Park City properly and legally approve the conditional use application for a condominium project ("Project") on the North Silver Lake Subdivision Lot 2B?

Summary of Advisory Opinion

The rules governing the Office of the Property Rights Ombudsman limit this Advisory Opinion to the question of whether the Conditional Use Permit, issued by Park City to develop the Silver Lake Lodge, was properly granted. The Wilsons contend that the Conditional Use Permit was illegally granted, because it lacks the required open space. According to the Wilsons, the development lacks the required open space because the acreage allocation was improperly and illegally increased several years ago. It is unnecessary, however, to determine whether or not the acreage was properly adjusted years ago. Even assuming that the Wilsons are correct that the acreage was improperly adjusted, the development still meets the open space requirement when the improper adjustment is removed. Accordingly, the Wilsons have failed to establish that granting the conditional use permit was an illegal act.

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 Lisa & Brad Wilson on June 7, 2010. A copy of that request was sent via certified mail to Janet M. Scott, City Recorder for Park City, at 445 Marsac Ave, P.O. Box 1480, Park City, Utah 84060. The return receipt was signed and delivered on June 16, 2010, indicating it had been received by the City. A copy of the materials regarding the request was also sent to Thomas G. Bennett, attorney for SR Silver Lake LLC ("SRSL"), at Ballard Spahr LLP, One Utah Center, Suite 800, 201 South Main Street, Salt Lake City, Utah 84111. Polly Samuels McLean, assistant attorney for Park City, submitted a response via email to the Office of the Property Rights Ombudsman, which was received on June 16, 2010 and which included a copy of the City's staff report on the appeals of the Planning Commission's conditional use approval of the Project. Mr. Bennett submitted a response on June 18, 2010. Over the ensuing several weeks, both parties sent multiple submissions, by email and regular mail, some with attachments and exhibits.

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, submitted by Lisa and Brad Wilson, and received by the Office of the Property Rights Ombudsman, June 7, 2010.
2. Response submitted on behalf of the City by Polly Samuels McLean, assistant attorney, dated June 16, 2010.
3. Response submitted on behalf of SR Silver Lake LLC by Thomas G. Bennett of Ballard Spahr, dated June 18, 2010, and all attached documents.
4. City Council Staff Report on the appeals of the Planning Commission's conditional use approval, dated June 24, 2010, and all attached documents.
5. Letter dated June 30, 2010 from Mr. Bennett.
6. City Council Staff Report approval of the conditional use permit, dated July 2, 2010.
7. Letter dated July 9, 2010 from Ms. Wilson, with attachments.
8. Letter dated July 22, 2010 from Mr. Bennett, with attachments.
9. Letter dated August 16, 2010 from Ms. Wilson, with attachments.
10. Letter dated September 7, 2010 from Mr. Bennett, with attachments.
11. Letter dated September 14, 2010 from Ms. Wilson.

12. Letter dated October 7, 2010 from Ms. McLean, with attachments.
13. Email dated October 12, 2010 from Ms. Wilson, with attachments.
14. Letter dated November 18, 2010 from Ms. McLean.
15. Request for a Record Review, submitted by Lisa Wilson, dated December 2, 2010, and all attached documents.
16. Email dated December 3, 2010 from Ms. McLean.
17. Letter dated December 6, 2010 from Ms. Wilson, with attachments.
18. Letter dated January 14, 2011 from Ms. McLean.

Background

SR Silver Lake LLC is the owner and developer of a 5.96-acre parcel of real property located in Park City, Utah known as Lot 2B. Lot 2B is located within the Deer Valley Master Plan Development ("DVMPD"), and is part of the North Silver Lake Subdivision. Under the DVMPD, Lot 2B is a development lot and permitted a density of 54 residential units, 14,552 square feet of commercial and support space, a height limit of 45 feet, and most importantly for this Advisory Opinion, a minimum open space requirement of 60%.

Lot 2B was created in 1997 by the recording of a plat that divided a lot of approximately ten acres into two lots – Lot 2B and a 4.03 acre parcel titled Lot 2D. Lot 2D was expressly reserved on the plat as open space for the benefit of adjoining lots 2A and 2B.[1] Lot 2A has been developed, and ¼ of Lot 2D has been allocated as open space to that development. Accordingly, three quarters of the acreage of lot 2D, 3.02 acres, remains allocated as open space to Lot 2B. Lot 2B has remained undeveloped since that time.

Since the DVMPD plan was first adopted in 1977, it has been amended multiple times.[2] Relevant to this matter are the 6th, 7th, and 8th amendments. In the sixth amendment, issued October 10, 1990, the total acreage of the North Silver Lake Development was shown to be 108.34 acres. The seventh amendment, dated April 14, 1993, showed the total acreage to be 105.94 acres, a decrease of 2.4 acres. The eighth amendment, dated April 25, 2001,[3] shows the total acreage of the North Silver Lake as 108.22 acres, an increase of 2.28 acres. Those increases and decreases are totals for the entire development. Each amendment shows multiple adjustments to the size of various lots, both increases and decreases, with the 2.4 decrease (7th Amendment) and the 2.28 increase (8th Amendment) being the net sum of the various adjustments. Neither amendment contains an express or ready explanation of the reasons for the adjustments.

In 2008, SR Silver Lake LLC applied for a conditional use permit to develop lot 2B with a 54-unit condominium project. The project consists of 38 units in four multi-story buildings in the center of Lot 2B and 16 single family and duplex condominiums situated around the perimeter. After many appearances before the Park City Planning Commission, including one approval that

---

[1] The plat contains a notation stating that "Pursuant to the NORTH SILVER LAKE MASTER PLAN DEVELOPMENT AMENDMENT, portions of Lot 2D are allocated to Lot 2A and 2B for purposes of open space calculation."
[2] The DVMPD is currently on its tenth amendment.
[3] The eighth amendment was issued nearly four years after the Plat that created lots 2B and 2D was recorded.

was appealed and remanded, the commission finally approved the revised conditional use permit on April 28, 2010. According to the City, the Project site plan as finally approved contains 70.6% of open space, including the available open space from lot 2D.

On May 10, 2010, Lisa Wilson filed an appeal of the CUP approval with the City.[4] Ms. Wilson's appeal raised several allegations, primarily concerning failure to properly provide notice of several recent and past actions by the City, and also concerning compatibility of the development with surrounding properties. She also alleges that the 60% open space requirement for North Silver Lake has not been met with the proposed development on Lot 2B. On June 24, 2010 the Park City Council reviewed the appeal and denied it. On June 7, 2010, Ms. Wilson submitted a request for Advisory Opinion.

Analysis

I. An Advisory Opinion is Available to the Wilsons on the Conditional Use Permit Approval

Park City has asked this Office to review whether an Advisory Opinion in the present matter is available to the Wilsons. Park City points out that the Wilson's request consists of a challenge to the propriety and legality of the 1993 7th Amendment and the 2001 8th Amendment to the Deer Valley Master Plan, and the 1997 Subdivision Plat. Park City argues that those documents, being more than a decade old, are beyond review and are not properly subjects of an Advisory Opinion.

Advisory Opinions from the Office of the Property Rights Ombudsman are limited in both subject matter and timing. The timing limitation permits Advisory Opinions only when they have been requested prior to the final appeal decision on the related land use application. UTAH CODE § 13-43-205.[5] A local appeal authority's involvement becomes final not only when it issues its final decision, but also when the deadline to appeal passes. Advisory Opinions are unavailable when requested after that date.

The revised conditional use permit in this matter was granted on April 28, 2010, and was appealed by the Wilsons on May 10, 2010. The appeal was heard and denied by the City on June 24th, 2010. Ms. Wilson submitted her request for Advisory Opinion on June 7th, 2010, several days before the final decision on her appeal by the local appeal authority. Therefore, her request for Advisory Opinion was timely with respect to the propriety of the Conditional Use Permit.

There is no question, however, that the deadlines to challenge the 1993 7th Amendment, the 1997 Plat, and the 2001 8th Amendment have passed. Accordingly, an Advisory Opinion to directly challenge those Amendments would be improper. The appropriate question, therefore, is not whether those previous amendments were properly adopted, properly noticed, or legal, but only

---

[4] This appeal was filed within the time limit for filing an appeal under the Utah Code and the Park City Land Management Code.

[5] "At any time before a final decision on a land use application by a local appeal authority . . . a local government or a potentially afflicted person may, in accordance with Section 13-43-206, request a written advisory opinion . . . ." UTAH CODE § 13-43-205.

whether the present conditional use permit, based on those prior amendments, was properly granted.[6]

II. The Wilsons have Failed to Establish that the CUP was Improperly Granted

In the request for Advisory Opinion, the Wilsons contend that Deer Valley's approval of a permit to develop a 330,000 square foot hotel is inappropriate in a residential neighborhood. The Wilsons' request mentions the requirement that the Silver Lake development maintain 60% open space, and questions whether the open space requirement was changed in 2001 without proper notification. Extensive information related to the Wilsons' appeal of the conditional use permit was then provided with or closely following the request, most of which raised questions about whether the actions of the City were properly noticed, and whether the ski runs shown on the plat are properly designated open space. In accordance with OPRO policy, the request was provided to the City, and the City responded. Materials submitted by the City were provided to the Wilsons, and so forth as each of the multiple submissions were exchanged. Through the course of those submissions, the issue in contention distilled and focused somewhat to a question of whether the development violates the minimum open space requirement. Although the history and arguments are complicated, the issue in contention can be summarized thus: in the 1993 7th Amendment to the Deer Valley Master Plan, the North Silver Lake Development reduced by 2.4 acres. Then, with the 2001 8th Amendment, the North Silver Lake Development was increased by 2.28 acres. However, the perimeter of North Silver Lake did not change in either of these Amendments. The Wilsons contend that the two-acre reduction occurred because the Silver Dollar and Belleterre ski runs were excluded from the North Silver Lake Development 1993, and that in 2001, they were improperly returned. The Wilsons contend that those ski runs should not have been returned as they are now commercial private property owned by Deer Valley. Without those acres, the Wilsons contend, the North Silver Lake development lacks the required 60% open space.

In Utah, a land use decision will be upheld if it is not arbitrary, capricious, or illegal. *See* UTAH CODE § 10-9a-801(3)(a)(ii); *Fox v. Park City*, 2008 UT 85 ¶11. A decision to grant or deny a conditional use permit is not arbitrary or capricious if it is supported by substantial evidence on the record, and is not illegal if it complies with the applicable laws, statutes, and ordinances: "First, a land use authority's decision is arbitrary or capricious only if it is not "supported by substantial evidence in the record." A land use authority's decision is illegal if it "violates a law, statute, or ordinance in effect at the time the decision was made." *Id.*

---

[6] The very recent Utah Supreme Court case of *Gillmor v. Summit County*, 2010 UT 69, raises some interesting questions about whether and how the 1993 7th Amendment, the 1997 Plat, and the 2001 8th Amendment can be challenged alongside the present challenge. *Gillmor* holds that "once petitioners have satisfied the jurisdictional requirements . . . of CLUDMA, they may assert any and all claims related to the alleged arbitrary, capricious, or illegal nature of a county's land use decision--including facial challenges to the zoning ordinance upon which the decision was based." The Wilson's challenge to the present Conditional Use Permit is based upon perceived discrepancies in the open space calculations in the 1993 7th Amendment to the Deer Valley Master Plan, and the 2001 8th Amendment to the Deer Valley Master Plan. An interesting question arises whether *Gillmor* extends to the present matter, and would permit the Wilsons to challenge the 1993 and 2001 amendments as part of their present challenge of the Conditional Use Permit. *Gillmor* does differ somewhat from the present case. However, we need not decide whether *Gillmor* applies to the present matter, because, as will be shown, the conditional use permit was properly granted no matter how the prior plan amendments are interpreted.

The Wilsons argue the approval of the conditional use permit was illegal, because it violates the open space requirement. Under Utah law, the Wilsons have the burden to prove that the decision to grant the conditional use permit was in error. UTAH CODE § 10-9a-705. The Wilsons have not met this burden. Specifically, they have not shown that the development does not meet the open space requirements.

There appears to be no dispute that, if the 2.28 acres are included in the development (as the City contends they should be), the development has over 70% open space and the 60% minimum open space requirement is met. The Wilsons contend that the 1993 acreage is correct, and the 2.28 acres added in the 2001 Amendment should not be included.[7] They contend further that if those acres are not included, the open space requirements are not met. However, the Wilsons' calculations are in error. The Wilsons have removed the 2.28 acres only from the allocated open space, rather than from the entire development. The following chart illustrates the difference between the Wilsons' and the City's calculation of the open space requirement:

	2.28 acres included (undisputed)			**2.28 acres removed**		
	Total Acreage in Development	Open space acreage	Open space % (open /total)	Total Acreage in Development	Open space acreage	Open space % (open/total)
Wilson	**9.74**	**6.915**	**70%**	**9.74**	**4.635** (6.915-2.28)	**48%**
Park City	**9.74**	**6.915**	**70%**	**7.46** (9.74-2.28)	**4.635** (6.915-2.28)	**62%**

Despite their calculations, the Wilsons have not argued that the 2.28 acres should be subtracted from the open space allocation only but not removed from the entire development. In fact, they argue that the 2.28 acres represent private property, ski runs owned by Deer Valley Resort, and have not been part of the Silver Lake development since 1993. Accordingly, given the Wilsons' own arguments, the 2.28 acres should be subtracted from the total acreage for Silver Lake.

[7] With regard to their argument that the 2.28 acres should not be included, the Wilsons have done a remarkable job uncovering the history of the project. However, despite their diligence and persistence in uncovering evidence more than a decade old, many factual gaps remain, and it is not clear that the 2.28 acres should not be included. Although it is clear that the total allocation reduced in 1993 by 2.4 acres, and that in increased in 2001 by 2.28 acres, nothing in those documents explain those variations, or indicate that those variations have an easy explanation. The Amendments themselves each show variances in multiple lots, both increases and decreases, on the lots in question and other lots not in question. The Wilsons assume that those variations represent the removal and the return of the ski runs, but nothing has been provided to show conclusively that the 2.4 acre reduction was to create the ski run, or that the 2.28 increase was returning the ski run to the development allocation. The Wilsons do point to a letter from Bob Wells, Vice President of Deer Valley Resort's Real Estate Development, dated November 16, 1996. The letter discusses the history of the development and open space allocation, and discusses the creation of the ski runs, but cannot be conclusively read to indicate that the 1993/2001 discrepancy represents the ski runs, nor that the 2.28 acres should not be included in the open space allocation for the development.

The 1993 and 2001 Amendments themselves also support that conclusion. The 2.4 acre decrease in 1993, and the 2.28 acre increase in 2001, represent a net decrease and increase after adjustments are made to multiple lots in the development, including lots that are not in controversy. In fact, in 2001, when the development was said to increase by 2.28 acres, Lot 2B is shown to have *decreased* 2.09 acres. The amendments show the 2.28 increase belongs to the entire development, not just to the open space allocation. Accordingly, if the 2.28 increase was improper, the acres can only be removed from the entire development, not just from the open space allocation.

Moreover, for the Wilsons' calculation to be accurate, the ski runs would still need to be part of the development, but not available to be counted as open space. This would require a showing that the 2.28 acre increase was specifically allocated in 2001 to lots 2B and/or 2D as open space. Nothing in the documents provided could be found to support that conclusion. Indeed, if the 2.28 acres represent the ski runs, they are open ski runs, and appear to meet the definition in the Park City Land Management Code for open space.[8] Accordingly, if they are part of the development, and are also open space, very clear evidence would appear necessary to justify a finding that open space *in* the project is not available open space *for* the project. To the contrary, the documents available, and in particular the 1997 subdivision plat that creates Lot 2B and 2D clearly indicates the opposite – that the ski runs are part of Lot 2D and *all of* Lot 2D is reserved open space for Lot 2B. This cuts strongly in favor of the City's calculation. Accordingly, if the 2.28 acres are excluded, the development still has more than the required 60% open space.

As shown, the Wilsons believe that without the 2.28 acres in the allocation, the development has only 48% open space. However, the Wilsons have failed to meet their burden to show that the 2.28 acres should be subtracted only from the open space allocation and not from the entire development. With the 2.28 acres removed, the development still has approximately 62% open space. Accordingly, it is not necessary to determine whether the 2.28 were illegally or improperly added in 2001.

Conclusion

The Wilsons have failed to meet their burden to prove that the 2.28 acre discrepancy makes the decision to grant the conditional use permit illegal. Whether or not the 2.28 acres are included, the development still meets the 60% open space requirement. The Conditional Use Permit was therefore legally granted.

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

---

[8] The Park City Land Management Code defines Open Space in relevant part as follows:

> 1.170. OPEN SPACE.
>
> (A) **Open Space, Landscaped**. Landscaped Areas, which may include local government facilities, necessary public improvements, and playground equipment, recreation amenities, public landscaped and hard-scaped plazas, and public pedestrian amenities, but excluding Buildings or Structures.

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:

Janet M. Scott
Park City Recorder
445 Marsac Avenue
Park City, Utah 84060

On this ___________ Day of January, 2011, 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