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# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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### ADVISORY OPINION

Advisory Opinion Requested by: Randy Sauer

Local Government Entity: Morgan County

Applicant for the Land Use Approval: Randy Sauer

Type of Property: Residential

Date of this Advisory Opinion: October 1, 2014

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

### Issues

- I. Is a conditional use permit required under the Morgan County Code for a grading or excavation project?
- II. Are the conditions imposed by the conditional use permit appropriate?
- III. Does Morgan County Code §8-5I-9 apply to Mr. Sauer's property?

### Summary of Advisory Opinion

A conditional use permit is properly required, pursuant to the Morgan County Code, when a grading or excavation project exceeds certain specified limits. Conditions imposed by a conditional use permit must be in compliance with applicable standards set forth in the County Ordinances. The conditions imposed by Morgan County sufficiently relate to applicable standards and are not arbitrary, capricious, or illegal.

Property not noted in the recorded plat as restricted for geologic hazards do not fall under the jurisdiction of Morgan County Code §8-5I-9. Applicants for land use approval within a geologic hazard study area are subject to Morgan County Code §8-5I-12. Morgan County Code §8-5I-12 applies to Mr. Sauer's project, and he must comply with the conditions imposed.

## **Review**

Under the provisions of UTAH CODE § 13-43-205, a party may file a Request for an Advisory Opinion with the Office of the Property Rights Ombudsman (“OPRO” or “Office”) at any time prior to the rendering of a final decision by a local land use appeal authority. An Advisory Opinion provides an early review of significant land use questions before any duty to exhaust administrative remedies arises so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. This review hopefully 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 Advisory 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 Randy Sauer on June 20, 2014. A copy of that request was sent via certified mail to Jann L. Farris, Morgan County Attorney’s Office at 48 Young Street PO Box 886, Morgan, Utah 84050. The return receipt was signed and delivered on June 23, 2014, indicating the County received it.

## **Evidence**

The Office reviewed the following relevant documents and information in preparing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Randy Sauer and received by the Office of the Property Rights Ombudsman on June 20, 2014.
2. Response submitted on behalf of Morgan County by Ronda Kippen, Morgan County Planner, received on July 8, 2014.
3. Reply submitted by Mr. Sauer, received on July 15, 2014.
4. Email received by Ronda Kippen on July 26, 2014

## **Background**

Randy Sauer owns a building lot located at 6502 N. Highland Dr., Mountain Green, in Morgan County. On January 15, 2013 Mr. Sauer applied for a building permit to construct a single-family home on the lot. The property has a steep grade and the proposed home would require significant excavation, structural engineering, and geotechnical/geological engineering.

On January 21, 2013, after an initial review, Charles Ewert, Morgan County Zoning Administrator, sent Mr. Sauer a list of deficiencies with Mr. Sauer’s application. Mr. Ewert then notified Mr. Sauer that a conditional use permit would be necessary, and that the property was likely within a Geologic Hazard Study Area, and would therefore be subject to additional regulation. Mr. Ewert and Mr. Sauer then met to discuss the necessary steps to create a suitable building pad on the subject property as required by Morgan Code.

On February 2, 2013, Mr. Sauer reluctantly submitted an application for a Conditional Use Permit for mass excavation to the Morgan County Planning Department. The County Council approved the Conditional Use Permit on January 7, 2014. However, shortly after approval, Mr. Sauer informed Morgan County of his desire to modify/redesign the site plan. Mr. Ewert directed the building permit application to start moving forward awaiting reconsideration of the revised site plan.

Mr. Sauer submitted the new site plans and design for the Conditional Use Permit and on April 1, 2014, the County Council approved the request for reconsideration of the Conditional Use Permit with the following conditions:

1. That all work shall be conducted in compliance with the revised and approved Engineered Site Plan dated December 19, 2013 by Reeve and Associates and as made part of GeoStrata's reports dated March 6, 2014 & March 17, 2014.
2. That the applicant will hold a preconstruction meeting with the County Engineer, County Geologist, Zoning Administrator, Applicant's Engineer for the rock walls, Applicant's Geologist and Applicant's Contractor prior to commencement of any site work.
3. That all final administrative comments/corrections from the County Engineer are complied with prior to any on site improvements.
4. That an access easement is executed and recorded on Lot 51 of the Highlands Addition No. 1 Subdivision for the proposed driveway access to Lot 50 of the Highlands Addition No. 1 Subdivision prior to beginning on site improvements.
5. That an erosion control and revegetation/reseeding plan is submitted to the Morgan County Planning Department for review and approval by the County Engineer and Zoning Administrator.
6. That a cash bond for the erosion control and revegetation/reseeding plan is submitted to the County with a Cash Escrow agreement and Engineer's Cost Estimate in an amount and on forms as are acceptable by the County Engineer, County Attorney, and County Zoning Administrator.
7. That all graded or disturbed surfaces of excavations, and all equipment materials and driveways on the site shall be dampened or suitably treated, managed or contained to prevent the deposit of debris, dust or dirt on neighboring streets and properties; all materials transported to or from the site shall be so contained during transportation as to prevent spillage on streets or other property outside of the site, and all vehicles going to or from the site shall be clean and free from dirt or debris that may track into the public right of way.
8. All County outsourced review costs are paid current prior to commencement of construction.
9. Enforcement of these conditions may be attained by the issuance of a stop work order until infractions are corrected, among any other legal means.
10. The applicant will provide all documentation, reports, and certificates for review and approval by the County Engineer and County Geologist as required in Morgan County Code §8-5I-12 prior to scheduling a preconstruction meeting.
11. The applicant will provide a letter from a structural engineer certifying that the proposed residence on Lot 50 of the Highlands Addition No. 1 Subdivision has been designed

based on the recommendations and conditions of the Geotechnical Engineer and Geologist.

12. The project adheres to all other local, state, and federal requirements.
13. If additional information becomes available regarding the unsatisfactory site conditions related to geologic or geotechnical issues as determined by the County Engineer, then the Conditional Use Permit may be re-reviewed for additional conditions or revocation.

Mr. Sauer objects to these conditions. Specifically, Mr. Sauer challenges the obligation to obtain a conditional use permit for the excavation. Next, Mr. Sauer claims that the conditions imposed are illegal because they are open-ended and excessive. Further, he believes Morgan County should have enforced §8-5I-9 instead of §8-5I-12. He contends that the requirements to obtain a building permit are found in Morgan County Code §8-5I-9, and thus, among other things, he should not be required to pay for reviews from experts outsourced by the County.

## **Analysis**

### **I. Mr. Sauer Must Obtain a Conditional Use Permit**

According to the Morgan County Code, a person seeking to perform grading or excavation on a building lot must first obtain a conditional use permit if the grading or excavation will exceed specified limits:

No person shall commence or perform any grading or excavation, including those in gravel pits and rock quarries, in excess of the limits specified below without first obtaining a conditional use permit for such grading or excavation.

....

- a. Excavation, fill or any combination thereof exceeding one thousand (1,000) cubic yards.
- b. Fill exceeding five feet (5') in vertical depth at its deepest point measured from the adjacent undisturbed ground surface.
- c. An excavation exceeding five feet (5') in vertical depth at its deepest point.
- d. An excavation, fill or combination thereof exceeding an area of one acre.
- e. Vegetation removal from an area in excess of one acre.

Morgan County Code §8-8-7(B). Morgan County has determined that Mr. Sauer will exceed these limits when excavating his lot. Mr. Sauer argues that this finding by the County is based on an unfounded opinion, and that excavation is not an issue because the site is "balanced," meaning that nearly all excavated material will remain on the site to provide fill on the downhill slope. Mr. Sauer also argues that many other properties in the subdivision have not been required to obtain a conditional use permit to similarly excavate.

Although direct evidence is lacking on whether Mr. Sauer will exceed those limits, Mr. Sauer does not deny that he will exceed those limits in some respects. Unfortunately, the ordinance does not relieve the obligation to obtain a conditional use permit because the excavation is

balanced. The ordinance simply refers to *excavation* of material, but there is no reference to removal of material from the site. This ordinance contains suitably objective and measurable limits. If those limits are exceeded – for example, if excavation will be deeper than five feet – a conditional use permit is required.

Any number of reasons may exist to explain why the County did not, as Mr. Sauer alleges, require neighboring properties to obtain conditional use permits when they exceeded these excavation limits. For example, it could be that those limits were different (or did not exist) due to a code amendment when previous lots were excavated. Ordinances can change frequently, and a developer is subject to the ordinances in place when he submits a complete application. See UTAH CODE § 17-27a-508.

Nevertheless, even if the ordinances were in place previously and not enforced by the County against other builders, the lack of enforcement against other lots does not entitle Mr. Sauer to escape enforcement on his lot. See *Salt Lake County v. Kartchner*, 552 P.2d 136, 138 (Utah 1976). Local ordinances have the force of law, and not only are citizens bound to comply with those ordinances, but local jurisdictions are likewise bound to comply with them: “A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances.” UTAH CODE § 17-27a-508(2). Thus, since the Ordinance is mandatory, Morgan County must require a conditional use permit when excavation exceeds those limits. If the County previously failed to comply with the law, the County should not and cannot perpetuate the problem by failing to comply with the law here as well.

Finally, it is unknown whether the County has actual evidence or merely opinion to support its finding that the excavation will exceed the limits in the ordinance. Certainly that evidence is objective and available. If the County has substantial evidence to show that the excavation will exceed those limits, the County’s finding will be upheld. Conversely, if Mr. Sauer can provide evidence that unequivocally proves that he will not exceed any of those limits, i.e., he will not move excavate more than five feet or move more than 1000 cubic yards of material, then Mr. Sauer will not be required to obtain a conditional use permit. However, if Mr. Sauer falls under one or more of the stated limitations, he is required to obtain a conditional use permit for such grading or excavation.

## **II. The Conditions Comply with Applicable Standards**

A conditional use is a land use with unique characteristics or impacts that warrant special consideration. Conditions may be imposed to mitigate any negative impacts of the use. UTAH CODE §17-27a-506(1)-(2)(a) states:

- (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 reasonable anticipated detrimental effects of the proposed use in accordance with applicable standards.

Mr. Sauer states that the conditions imposed upon him are open-ended and excessive. Nevertheless, he does not specify which specific conditions he objects to (excepting the condition requiring him to pay for outsourced review costs), or the basis of his objections.

A county's land use decision is entitled to a degree of deference. When reviewing a land use decision, a district court must presume 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." UTAH CODE §17-27a-801(3)(a)(i-ii). If the decision is supported by substantial evidence in the record, then it is not arbitrary or capricious. UTAH CODE §17-27a-801(3)(c). Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Bradley v. Payson City*, 70 P.3d 47, 52 (Utah 2003)(citation omitted). A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted. UTAH CODE §17-27a-801(3)(d).

Our own review of the conditions imposed does not compel the conclusion that the conditions are arbitrary, capricious, or illegal. Generally, they appear to comply with the law and relate to standards contained in the ordinances. For example, one condition requires that all graded or disturbed surfaces of excavations, and all equipment materials and driveways on the site be dampened or suitably treated, managed or contained to prevent the deposit of debris, dust or dirt on neighboring streets and properties. This condition complies with the standards in Morgan County Code §8-8-7(f)(3) – Dust and Dirt Control. Moreover, none of the conditions appear to be unreasonable or impermissibly open ended. The conditions imposed appear generally reasonable and relate to the standards set forth in the Morgan County Code. They are thus valid under UTAH CODE §17-27a-506(1)-(2)(a).

### **III. Morgan County Code §8-5I-9 Does Not Apply to Mr. Sauer's Property**

Finally, Mr. Sauer argues that Morgan County Code §8-5I-9 should be applied instead of Morgan County Code §8-5I-12. This has significant bearing on what Mr. Sauer must submit to the County, and whether the County can require Mr. Sauer to obtain a conditional use permit for excavation, and thus pay the costs of an independent engineering review of his application. Significantly fewer submittals are necessary under §8-5I-9.

Morgan County Code §8-5I-9(A) states:

The following submittals and process are required prior to the issuance of a building permit for a new or replacement structure designed for human occupancy, and additions to structures designed for human occupancy for all lots within subdivisions recorded prior to the effective date hereof which are *on property noted as restricted for geologic hazards reasons on a recorded plat*. (Emphasis added).

Morgan County Code §8-5I-12 states:

[A]ll applicants for land use approval *within a geologic hazards study area* shall prepare and submit geologic hazard reports pursuant to the requirements of this article prior to any consideration for...any conditional use permit which requires site plan approval. (Emphasis added).

Morgan County Code §8-5I-9(A) contains language restricting its application to new structures in older subdivisions (which does describe Mr. Sauer's property), but also where the recorded plat notes that the property is restricted for geologic hazards. According to the County, Mr. Sauer's plat contains no such descriptions. The County states that the plat was recorded during the 1960s, prior to any knowledge of any geologic hazards at the site. If this is true, that the plat contains no such restrictions, then Morgan County Code §8-5I-9 cannot apply to Mr. Sauer's property. Thus, if Mr. Sauer's property is within a geologic hazards study area, which the County indicates that it is, then Morgan County Code §8-5I-12 applies.

### Conclusion

The requirements and conditions imposed upon Mr. Sauer are indeed significant. They may be heavier than he would encounter in many other areas throughout the state. But Morgan County generally has discretion, so long as they do not go too far, to determine that additional regulation is necessary in certain areas and where excavation is required. These additional regulations may increase the expense, time, and effort Mr. Sauer must expend, so he is justified in further inquiry. However, nothing can be found here to indicate that Morgan County has exceeded its discretion in how these regulations have been applied to Mr. Sauer.

Where the law imposes certain requirements, the County and its citizens are obligated to follow those requirements. Thus, if in this matter Mr. Sauer's excavation will exceed the limits set forth in the ordinances, Mr. Sauer will need to obtain a conditional use permit.



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

**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 Utah Department of Commerce. This Advisory Opinion's conclusions are based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the conclusions reached in another matter with different facts and circumstances or where the relevant law has changed.**

**While the author is an attorney and has prepared this opinion after reviewing and analyzing the relevant law; he does not represent anyone involved in this matter. Anyone with an interest in these issues desiring to protect that interest should seek the advice of legal counsel and no party may rely on this document to protect any legal 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 be awarded 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.**

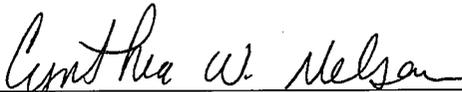
## MAILING CERTIFICATE

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 § 63G-7-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the Advisory Opinion to 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:

On this 18<sup>th</sup> day of October, 2014, I caused the attached Advisory Opinion to be delivered to the foregoing 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