Advisory Opinion #103

Parties: Sean Brown, Deepwater Distribution Co., Inc. and Wasatch County

Issued: July 6, 2011

TOPIC CATEGORIES:

F: Complete Land Use Application
J: Requirements Imposed upon Development
P: Application Review Fees

An application is not considered complete until all fees are paid, and all information needed to process the application is submitted. A local government may, by ordinance, require that some information be submitted prior to processing. Fees must be based on the reasonable costs to process an application, and not on a percentage of a project's cost.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Sean Brown
Local Government Entity:	Wasatch County
Applicant for the Land Use Appeal:	Deepwater Distribution Co., Inc.
Type of Property:	Culinary Water System
Date of this Advisory Opinion:	July 6, 2011
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

What information may a local government require before a land use application is processed?

Summary of Advisory Opinion

Even if an applicant disputes the fees and the information required, an application cannot be considered complete until all fees are paid, and all required information is submitted. A local government may mandate compliance with specific, objective, ordinance-based requirements. In addition, because local governments have fairly broad discretion to administer their ordinances and their application review processes, they may determine when required information should be submitted. Thus, a local government may insist that required information be submitted before an application is processed. However, required information must derive from a requirement in state law or local ordinance. Fees are limited to the reasonable cost to process an application or perform an inspection. A fee based on a percentage of a project's estimated cost is not valid, because a project's estimated cost does not measure the reasonable cost to process an application or perform an inspection.

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 ANN. § 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 Sean Brown on January 26, 2011. A copy of that request was sent via certified mail to Thomas L. Low, County Attorney for Wasatch County. The County submitted a response to the Office of the Property Rights Ombudsman, which was received on March 14, 2011. Mr. Brown submitted a reply on March 29, 2011

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, including attachments, filed January 26, 2011 with the Office of the Property Rights Ombudsman by Sean Brown.
2. Response from Wasatch County, submitted by Kevin S. Thurman, County Attorney, received on March 14, 2011.
3. Reply from Mr. Brown, received March 29, 2011.
4. Reply from Wasatch County, received April 27, 2011.

Background

Deepwater Distribution Company, Inc. ("Deepwater") proposes to install a culinary water system to serve a portion of Brighton Estates, a subdivision located in Wasatch County.[1] Deepwater applied to the County for approval to construct the water system in the Summer of 2010. When the application was submitted, Deepwater did not include an application fee. According to the County, Deepwater was promptly informed that a fee was required before the application could be processed. Deepwater disputed the fee amount, including an attempted appeal to the County's Board of Adjustment. After some discussions with the County, Deepwater paid $125 in December of 2010.[2]

Following receipt of the $125 payment, the County informed Deepwater that the application was incomplete, and so could not be processed. Specifically, the County required the following submissions:

1. An itemized engineer's estimate and cost of project;

[1] Brighton Estates is located in a canyon above Midway. The subdivision was created many years ago, but because of its remote location, has very little infrastructure and almost no public services.
[2] Deepwater contends that discussions with the County concluded that the application fee was $125. The County, on the other hand, maintains that the parties agreed that the proper fee appeared to be $125, but that the County reserved the right to charge a higher fee.

2. The proper application fee;

3. An inspection fee, calculated as 5% of the estimated cost of the work to be done;

4. Creation of an "out of pocket" account with the County, with sufficient money for the review engineer to review the plans;

5. A performance bond, equal to 110% of the estimated project cost;

6. A franchise agreement from the County, authorizing the use of County roads for the water system;

7. A certificate of convenience and necessity from the Public Service Commission.[3]

8. The name of the contractor performing constructing the system, and the name of the bonding company providing any performance bonds.

The County also noted that the project would require an excavation permit and an excavation performance bond at the time of construction, although neither would be required to process the application. Because the application was incomplete, the County returned the $125. Deepwater then requested this Advisory Opinion, requesting review of the County's application fee, and whether the application was complete.

In a reply submitted for this Opinion, the County explains that the fee based on 5% of the estimated cost was actually a sort of "prepayment" of application and inspection fees. The money would be placed in an "out of pocket" account, which the County could access to cover the actual costs of application processing and inspection. Any money left over from the 5% that was prepaid would be refunded to Deepwater.

The County maintains that Deepwater's application cannot be considered complete until the application fees have been paid, and all required information has been submitted. The County also states that Deepwater would need to submit an excavation permit before the application could be considered, an apparent reversal from its December letter. The response also clarified that Deepwater did not need to submit a performance bond with its application, it merely needed to identify the bond company, along with the names of any contractors that are to be used.[4] The County also stated that it had responded to Deepwater's queries in a timely fashion, and explained what information would be needed to process Deepwater's application.

Analysis

I. Deepwater's Application is Not Complete Until All Required Information is Submitted and All Fees Paid.

[3] The Public Service Commission approves plans for privately owned culinary water systems. According to Deepwater, this approval has been or can be obtained.

[4] The County's application form requests the name, address, and telephone numbers of contractors and bond companies.

Deepwater's application cannot be processed, because it is not complete. "An application for a land use approval is considered submitted and complete when the application is provided in a form that complies with the requirements of applicable ordinances and all applicable fees have been paid." UTAH CODE ANN. § 17-27a-508(f). Until an application is complete, a local government is not obligated to grant approval or even begin the process of approval. "Each land use authority shall substantively review a ***complete application*** . . . , and shall approve or deny each application with reasonable diligence." *Id.* § 17-27a-509.5(2)(a) (emphasis added).[5]

Deepwater's application cannot be considered complete until it has fully paid the required fees, and the County is satisfied that all required information has been submitted. This Opinion recognizes that Deepwater disputes the County's requirements and the fee. Those issues will be discussed below. However, until the disputes are resolved, the application cannot be considered complete, and the County is not obligated to grant any approvals.

The Utah Code also requires that a local government explain why an application is incomplete within a reasonable time. "Each county shall, in a timely manner, determine whether an application is complete for the purposes of subsequent, substantive land use authority review." *Id.* § 17-27a-509.5(1)(a).[6] An applicant may request either a determination that the application is complete, or an explanation of what needs to be submitted to make the application complete. *See id.*, § 17-27a-509.5(1).[7] In this matter, it appears that the County and Deepwater have had extensive discussions about what information should be submitted with the application, including written analyses from the County. Therefore, the County has satisfied its obligation to inform Deepwater about the status of its application.

II. The County may Require Specific, Objective, Ordinance-based Requirements as Conditions to Process Deepwater's Application.

The County may require that Deepwater's application include information that is required by state law or the County's ordinance. The Utah Code provides that local governments may require that applicants meet "specific, objective, ordinance-based requirement[s]." *See id.*, § 17-27a-509.5(1). These requirements may include submission of specific information or compliance with reasonable pre-conditions. The County has a fair degree of discretion to decide what conditions are required and at what point in the approval process they should be submitted. A local government has "great latitude in creating solutions to the many challenges it faces, unless the action 'is arbitrary, or is directly prohibited by, or is inconsistent with the policy of, the state or federal laws or the constitution of Utah or of the United States.'" *Price v. Orem City*, 2000 UT 26, ¶ 10, 995 P.2d 1237, 1243 (*quoting State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980)). The requirements chosen by the County must derive from ordinances or state laws, and

[5] Note that the Utah Code requires substantive review of a "complete application" within a reasonable time. Substantive review is not required for applications that are not complete.
[6] *See also* UTAH CODE ANN. § 10-9a-509.5 (Applicable to cities).
[7] If the local government does not act within a reasonable time, an applicant may request that the land use authority determine whether the application is complete and ready for review, or whether additional information is needed. Upon receipt of a written request for such a determination, the local government must act within 30 days. *Id.*, § 17-27a-509.5(1).

should promote the health, safety, and welfare of the public. *See* UTAH CODE ANN. § 17-27a-102(1).[8]

In the materials submitted for this Opinion, the County identified six specific requirements that must be completed and submitted before it will process Deepwater's application: The name of the contractor who will perform the work, the name of the bonding company providing the performance bond, a performance bond, a franchise agreement approved by the County Council, a certificate of convenience and necessity from the Public Service Commission, and an excavation permit from the County.[9] (The fee requirements are discussed in the next section). To begin with, it is not entirely clear if the performance bond listed as a requirement is different from the bond that would be required for an excavation permit. The County's response cited to § 14.02.04(1), which establishes the requirements for an excavation permit, including an excavation performance bond.

Ordinarily, a performance bond ensures completion of improvements that are to be dedicated to the public. Section 16.27.21 of the Wasatch County Code establishes the requirements for performance and bonds. "A performance bond shall be posted with Wasatch County in a principal amount of one hundred ten (110) percent of the total estimated cost of any improvement or other performance required by or promised to Wasatch County as part of the development." WASATCH COUNTY CODE, § 16.27.21(2). It does not appear that Deepwater's proposed water system includes construction of public improvements, so a performance bond may not be necessary. An excavation performance bond, on the other hand, ensures restoration of County roads following excavation and installation of the water system, and would therefore be appropriate.

The County has not identified any provision in its ordinances which requires that an applicant identify any contractors and the company providing the performance bond. All requirements must derive from state law or a local ordinance. *See* UTAH CODE ANN. § 17-27a-509.5(1). Furthermore, it also has not been shown why such information is necessary at the onset of the application review process. The name of the contractor who will perform the work has no bearing on the design of any project, or whether it will be approved by the County. Along the same lines, the name of the bond company is also not necessary to process and approve an application.[10]

A franchise agreement, granting permission to use County roads, is required by the Wasatch County Code.[11] Requiring such permission is reasonable and it helps promote the safe and

[8] *See also Gardner v. Wasatch County*, 2008 UT 6, ¶ 19, n. 4, 178 P.3d 893, 900, n.4 ("The purpose of CLUDMA (the County Land Use, Development, and Management Act) is to 'provide for the health, safety, and welfare . . . of each county' . . . .) (*quoting* § 17-27a-102(1)).

[9] The December letter to Deepwater noted that an excavation permit (and an excavation performance bond) would be required at the time of construction, but not at the time of application. However, the County's response for this Opinion stated that an excavation permit would be required in order to process the application. This discrepancy will need to be resolved.

[10] The identity of the bonding company would be included in any bond document which would be required under §§ 16.27.21 or 14.02.04 of the County Code. However, neither of those sections requires that the bond company be identified before an application may be processed.

[11] WASATCH COUNTY CODE, § 5.01.01.

efficient use of the County's roadways. The County Code, however, does not require a franchise agreement as a precursor to processing an application.

It seems reasonable that Deepwater's application could be processed simultaneously with some of the other required approvals. For example, although Deepwater will need to obtain an excavation permit and a franchise agreement before construction, neither would be considered an essential precursor to a review of the proposed water system. In fact, both the excavation permit and the franchise agreement necessarily depend upon the design of the water system.[12] The permit and franchise agreement could therefore be considered simultaneously with the application. However, the County has discretion to administer its ordinances and approval processes, and so nothing stops the County from requiring that Deepwater obtain an excavation permit and franchise agreement prior to processing the application for the water system. Even though a reasonable argument could be made for delaying required information until later in the approval process, the County may decide to require ordinance-based information at the beginning of its approval process.

To conclude, the County has fairly broad discretion to administer its ordinances and its approval and inspection processes. This discretion allows the County to determine when required information should be submitted. Thus, the County may validly require Deepwater to obtain a franchise agreement and even an excavation permit at the onset of the approval process, rather than at the conclusion. The County could possibly require a performance bond (in addition to an excavation performance bond), provided that a bond is required to ensure completion of public improvements. On the other hand, the County has no ordinance which requires that an applicant identify any contractors, so that requirement is not valid.[13]

III. The County May Charge Fees Equal to the Reasonable Costs of Processing the Application and Inspecting the Work Performed.

The County states that it charges the actual cost to process the application and conduct inspections, and that it requires a payment equal to 5% of the estimated cost as a sort of "prepayment" of the actual fees. The initial payment is to be placed in an account that the County can access to pay for the actual costs, and that any funds left over will be refunded to Deepwater. Fees for processing a land use application and performing inspections must not exceed the actual costs of processing and inspection.

> A county may not impose or collect
>
> (a) a land use application fee that exceeds the reasonable cost of processing the application; or
>
> (b) an inspection or review fee that exceeds the reasonable cost of performing the inspection or review.

[12] It stands to reason that the final design of the water system affects how much excavating will be necessary, and how much of the County's road system will be needed.

[13] According to the materials submitted for this Opinion, Deepwater has obtained a certificate of convenience and necessity. Therefore, that requirement will not be addressed in this Opinion.

Id., § 17-27a-509(4). Furthermore, an applicant may request an itemized statement of each fee charged, which must show how the fee was calculated. *See id.*, § 17-27a-509(5).[14]

According to the County, the fees that are ultimately collected are the actual costs. An applicant is required to pay 5% of the project's estimated cost as a sort of prepayment, and the County will withdraw the actual fees from that initial payment, as the costs are incurred. The County Code, however, does not establish such a prepayment scheme, but simply imposes a fee equaling 5% of a project's estimated cost.

> Engineering Department:
>
> (a) Zoning, Planning, Engineering, Administration, and Inspection Fees for Subdivisions and Capital Improvements, five percent (5%) of development engineer's cost estimate of the capital improvement or improvements to be constructed in the subdivision, as approved by the County's Engineering Coordinator.

WASATCH COUNTY CODE, § 4.09.02(6)(a). The County is subject to the limits imposed by state law, and its fees must reflect the actual processing and inspection costs.

Local governments have fairly broad discretion to administer and implement land use ordinances. *See Price v. Orem City*, 2000 UT 26, ¶ 10, 995 P.2d at 1243. This discretion presumably includes the authority to implement the type of prepayment scheme claimed by the County. However, in order to protect applicants and ensure fairness, the County must adopt such a provision by ordinance.

Requiring payment of an amount of money which will be applied to the actual costs of processing and inspection is a valid approach, if it is adopted by ordinance which establishes procedures. It is not prohibited by state law, and does not appear arbitrary or inconsistent with state or federal law or policy. The prepayment approach promotes the public interest, by establishing a fund to cover costs, while still limiting fees to the actual costs. There does not appear to be any reason why the County can't require, through its ordinances, that application fees be "prepaid."[15]

To conclude, a "prepayment" requirement is a valid approach to collect application fees. The burden on applicants is small, because the fees would have to be paid anyway. This approach, however, must be adopted by ordinance, and it must include safeguards to ensure fair treatment of all applicants. Such safeguards should include a process to determine the actual costs that are charged, and how funds are distributed or refunded. Adopting an ordinance will also help protect

[14] The 2011 Utah Legislature reaffirmed and clarified this requirement in H.B. 78 (2011 Utah Legislature, effective May 11, 2011). The bill clarifies that any applicant who was charged a fee may request an itemized statement, and that local governments must respond to such requests within 10 days.

[15] It could be argued that prepayment of application fees "commits" an applicant, and ensures that the County does not waste time processing an application that will be withdrawn later. Prepayment of fees also satisfies § 17-27a-508, which provides that a land use application is not complete (and thus not eligible to be processed) until all fees have been paid.

the County against claims that funds were mishandled. An ordinance should also provide a process to challenge or appeal any cost determinations that are made.

Conclusion

Deepwater's application for approval to construct a culinary water system is not complete, because it does not have all required information, and the fees have not been fully paid. Even though Deepwater disputes the County's fees and requirements, its application is not complete until all information is submitted and all fees are paid. The County has fulfilled its obligation to inform Deepwater of the application status, and what needs to be submitted to make the application complete.

The County may impose specific, objective, ordinance-based requirements on applicants. The County also has fairly broad discretion to administer its ordinances and its approval and inspection processes. That discretion allows the County to determine that some information may be required at the onset of an application review process, as opposed to the conclusion of the application review. Therefore, the County may request that Deepwater comply with ordinance-based requirements, and submit the information before the application can be reviewed. However, information that is not required by ordinance may not be made a required part of the application.

Application and inspection fees must be limited to the reasonable costs necessary to conduct those activities. The County's approach, in which applicants "prepay" funds to be applied to the costs for processing the application, is acceptable, but should be adopted as part of the County's Code. An ordinance governing the funding approach will help ensure fairness, and should establish guidelines for how costs are calculated, how funds are distributed, and how cost determinations could be appealed.

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 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:

Thomas L. Low, County Attorney
Wasatch County
805 West 100 South
Heber City, Utah 84032

On this _____ Day of July, 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