

Advisory Opinion #115

Parties: Garyn Perrett and Wellsville City

Issued: August 28, 2012

TOPIC CATEGORIES:

B: Conditional Use Applications

Other Topics(v): Interpretation of Ordinances

An ordinance should be interpreted to give effect to its intent, as evidenced by its plain language. Discretion allowed to a local government to interpret and apply its own ordinances cannot extend to the point where the ordinance's language is completely ignored. A use that is not listed as an allowed use cannot be "implied" because some similar uses are listed, if the proposed use is significantly different from those listed.

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.



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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Garyn Perrett

Local Government Entity: Wellsville City

Applicant for the Land Use Approval: Greenville Corner LLC

Type of Property: Commercial Development

Date of this Advisory Opinion: August 28, 2012

Opinion Authored By: Elliot R. Lawrence
Office of the Property Rights Ombudsman

Issues

May a City's zoning ordinance be interpreted as allowing a truck stop se when that use is not allowed by the ordinance's language?

Summary of Advisory Opinion

A statute or ordinance should be interpreted to give effect to the intent of the ordinance, as evidenced by its plain language. It must be presumed that the language used was chosen advisedly, including terms which were not included. The City's ordinance does not include "truck stop" as an allowed use, and it must be presumed that the City Council could have included the term if it so chose.

Statutory construction rules which favor approval of land uses, and allow discretion to local governments must respect the language of the ordinance, and are not excuses to ignore ordinances or insert terms that were not adopted through the legislative process. Because a truck stop is a distinct land use, with unique impacts, it cannot be implied as an allowable use because a truck stop is similar to allowed uses. The distinction between the allowed uses and a truck stop is too great to simply ignore the plain language of the ordinance.

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 Garyn Perrett on April 16, 2012. A copy of that request was sent via certified mail to Ruth P. Maughan, of Wellsville City, at 75 East Main Street, Wellsville, Utah. 84339. The City received that copy on April 25, 2012.

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, with attachments, submitted by Garyn Perrett, received by the Office of the Property Rights Ombudsman on April 16, 2012.
2. Additional Materials submitted by Mr. Perrett, received May 10, 2012.
3. Additional Materials submitted by Mr. Perrett, received May 15, 2012.
4. Response from Greenville Corner, LLC (property owner), submitted by Steve Kyriopoulos, received May 17, 2012.
5. Reply to Greenville Corner, submitted by Garyn Perrett, received May 30, 2012.
6. Response from Wellsville City, submitted by Bruce L. Jorgensen, Olson & Hoggan, PC, received June 1, 2012.
7. Reply submitted by Mr. Perrett, received June 20, 2012.
8. Reply submitted by Mr. Kyriopoulos, received June 21, 2012.
9. Material submitted by Robert Bolton, received July 2, 2012.
10. Reply submitted by Mr. Jorgensen, received July 10, 2012.
11. Reply submitted by Mr. Perrett, received July 17, 2012.
12. Reply submitted by Mr. Jorgensen, received July 23, 2012.
13. Reply submitted by Mr. Perrett, Received July 25, 2012.

Background

Greenville Corner, LLC owns 12 acres in Wellsville, at the intersection of Highway 89/91 and 400 South.¹ The property consists of three parcels, all of which are zoned “CH” (Highway

¹ A map of the area identifies the cross street as both “400 North” and “4700 South” (which may be the designation from another jurisdiction).

Commercial) by the City. The property is located on the east side of the highway, and the surrounding properties on that side of the road are also zoned commercial. There are a few residential properties directly across the highway, and some commercial businesses across 400 South.² A railroad track borders these commercial properties. The Greenville Corner property is not developed, but the owners have allowed a temporary produce stand to be placed near the intersection during summer months. The property's owners indicate that a service station was located on the property in the past, but that building was demolished several years ago.

Greenville Corner proposes to construct and operate a truck stop on the property. According to the preliminary plans, access to the truck stop would be directly from Highway 89/91, a short distance from the intersection, with another access point located on 400 North.³ The proposed truck stop facility described in the application is fairly typical: A convenience store, vehicle maintenance, a car wash, and fuel sales. It would provide fuel, food, and other supplies for travelers and truck drivers. A site plan indicates a pad for a future restaurant, a future RV parking area, and parking areas for semi trucks and trailers. It is not clear whether the facility would include amenities such as showers and a laundry for truck drivers.

The 400 North access point appears to align with the intersection of 900 East, a local road that leads in a southeasterly direction to join "Main Street" (also designated as State Highway 101). There are several homes along 900 East, all south of the railroad tracks, and several hundred feet away from the Greenville Corner property.

All uses in the CH zone are conditional. There are no permitted uses.⁴ "Only such uses and facilities as are specifically authorized in this chapter and title as permitted and conditional uses shall be allowed. All other uses and facilities are prohibited." WELLSVILLE CITY CODE, § 10-17-6.⁵ There are 17 conditional uses approved for the CH zone including "Automobile service station, auto accessories;" "Car and/or truck wash;" "Convenience store, including self-service gas pumps;" "Repair and maintenance of motor homes, campers, RV trailers and utility trailers;" and "Restaurant or drive-in café." *Id.*, 10-9E-3.

The proposed truck stop garnered opposition from neighboring property owners, including at least one who owns a home on 900 East. These citizens claim that a truck stop will have adverse effects on the community, such as reduced property values, smoke and particulate matter from truck exhausts, increased noise, and increased traffic in residential neighborhoods. The citizens submitted materials detailing the health effects of diesel smoke, noise studies conducted at truck facilities, and crime statistics from Perry, Utah, which has a truck stop.⁶ Realtors provided opinions on how the proposed facility might impact the values of nearby properties. The citizens also cited to the City's subdivision ordinance, stating that the proposed truck stop didn't meet the criteria listed in that ordinance. Finally, the citizens argued that a truck stop is not specifically

² Overall, the immediate area around the property appears to be rural, with some commercial development along Highway 89/91, and a few homes. The property is bounded on the east and north by agricultural land.

³ The access from Highway 89/91 requires approval from the Utah Department of Transportation.

⁴ "The purpose of the CH zone is to provide commercial areas on major highways for the location of traveler services and highway oriented commercial uses." WELLSVILLE CITY CODE, § 10-9E-1.

⁵ Title 10 of the City Code is the "Zoning Ordinance of Wellsville City, Utah". *Id.* § 10-1-1.

⁶ Perry is located along I-15. It is approximately the same size as Wellsville.

included on the list of conditional uses in the City's ordinance, and so the City cannot approve the truck stop.

The City and Greenville Corners answer that any nuisance conditions would be dealt with through regulation, in the same way that nuisance conditions would be dealt with on any property. In a similar manner, any problems with crime would be dealt with through enforcement. The City noted that the proposed truck stop was not a subdivision, so the subdivision ordinance did not apply.

The City argues that because a truck stop is similar to other uses listed in the CH zone, it is reasonable to conclude that a truck stop should be allowed. The City explains that the CH zone is intended for travel-related commercial uses on highways, and that the list of conditional uses includes automotive sales and service, RV and motor home sales and service, fuel sales, car/truck wash, and restaurant. The City and Greenville Corners argue that these allowed conditional uses are all components of truck stops, so it is reasonable to conclude that a truck stop may be approved in a CH zone.

Analysis

The City's Zoning Ordinance Does Not Include "Truck Stop" as an Allowed Conditional Use, so the Proposed Facility Cannot be Approved as a Truck Stop.

Because the City's zoning ordinance does not list "truck stop" as an allowed conditional use, Greenville Corner's proposed facility cannot be approved. It is acknowledged that the proposed facility consists of component parts which are allowed as conditional uses. Some of the approved uses are typical components of a truck stop, such as fuel sales, automobile service station, convenience store, restaurant, and car or truck wash. Any or all of these components could be approved on the Greenville Corner property, but a truck stop is more than just a combination of uses approved for the CH zone. It is improper to presume that by including such individual components on the list of allowed conditional uses the City had impliedly chosen to allow truck stops as well.

The City's ordinances cannot be interpreted to allow a truck stop on the parcel. There is no question that "truck stop" is not on the list of allowable uses in Wellsville City's CH zone. Section 10-9E-3 of the Wellsville City Code lists 17 conditional uses which are allowed in the CH zone. Those listed uses do not include "Truck stop," or any term similar to "truck stop." In fact, the term does not appear at all in the City's ordinances. As is explained below, the City's code cannot be reasonably interpreted to allow truck stops in the CH zone.

A. Standards of Statutory Interpretation.

Statutory interpretation begins with the plain language of the ordinance. "When interpreting statutes, our primary objective . . . is to give effect to the legislature's intent. To discern legislative intent, we look first to the statute's plain language. In doing so, we presume that the legislature used each word advisedly and read each term according to its ordinary and accepted

meaning. Additionally, we read the plain language of the statute as a whole and interpret its provisions in harmony with other statutes in the same chapter.” *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804, 807 (quotations and alterations omitted).

Three specific paradigms of statutory interpretation are important to this analysis: First, “the expression of one should be interpreted as the exclusion of another.” *Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 30, 993 P.2d 875, 879. In other words, an omission in an ordinance should be given effect by a presumption that the omission was purposeful. *Id.*; see also *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208, 1216. Secondly, “since zoning ordinances are in derogation of a property owner’s use of land . . . any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use.” *Id.* 2004 UT 98, ¶ 31, 104 P.3d at 1217. Finally, a local government’s interpretation of its own ordinances is allowed “some level of non-binding deference . . .” *Fox v. Park City*, 2008 UT 85, ¶ 11, 200 P.3d 182.

B. The City’s Ordinances Cannot be Interpreted as Allowing a Truck Stop as an “Implied” Use Based on Possible Similarity to Other Allowed Uses.

Using the statutory interpretation rules listed above, the language of the City’s ordinance cannot support a conclusion that a truck stop may be approved because it is somewhat similar to allowed conditional uses. The plain language of § 10-9E-3 approves 17 conditional uses for the CH zone.⁷ It must be presumed that the City Council chose those 17 uses advisedly, and also chose not to include certain uses, including truck stops.⁸ Thus, the legislative intent, evidenced by the plain language of § 10-9E-3, is that truck stops are not allowed uses in the CH zone.

The 17 listed conditional uses allow a fair range of activity, but that range cannot be stretched to include a truck stop. Although a truck stop is similar to some of the allowed uses, it is nevertheless a significantly different land use than those listed in the CH zone. The City and the property owner argue that a truck stop should be allowed because that use is similar enough to some of the uses listed, particularly automotive sales and service, fuel sales, repair and maintenance of RV and motor homes, and even farm equipment sales. Admittedly, this argument is not without merit. In fact, the proposed facility is comprised of four allowed uses: (1) Fuel sales, (2) convenience store, (3) car wash, and (4) auto/truck service.⁹ The plans also show a truck parking area, a future restaurant site, and an RV parking area.¹⁰ Truck stops generally include these components.¹¹

⁷ There are no permitted uses in the CH zone. WELLSVILLE CITY CODE, § 10-9E-2; see also *id.*, § 10-17-6 (Uses not listed as permitted or conditional are prohibited.)

⁸ It is not necessary to prove that the City Council expressly rejected “truck stop” as an allowable use. It is presumed that if the City Council had wished to include “truck stop” as an allowed use, it would have.

⁹ “Convenience store, including self-service gas pumps” is listed as a use in the CH zone.

¹⁰ RV parking is not a listed use, but “parking lot” is. It is not clear whether the proposed RV parking would include hookups for short-term RV camping.

¹¹ The City code does not have a definition of “truck stop,” nor is one found in the Utah Code. Salt Lake City adopted the following definition, which appears to be typical: “TRUCK STOP: A building site and structures where the business of maintenance, servicing, storage or repair of trucks, tractor-trailer rigs, eighteen (18) wheel tractor-trailer rigs, buses and similar commercial or freight vehicles is conducted, including the sale and dispensing of motor fuel or other petroleum products and the sale of accessories or equipment for trucks and similar commercial

A truck stop, however, is a different and distinct land use, and not just a group of component parts. A truck stop is commonly understood to be a business catering to larger tractor-trailer rigs, in addition to automobile traffic. In general, a truck stop requires a large parcel and large buildings.¹² They also alter traffic patterns, because they are intended to attract commercial trucking traffic.¹³ Accommodations for the larger tractor-trailers is a unique impact of a truck stop, and so it is more than just a “supersized” gas station. In addition, a combination of component uses in a single location would have a greater impact than simply the sum of the impacts attributed to each individual part. Accordingly, this Opinion must conclude that a truck stop is more than just a combination of component parts. Even though the proposed facility is an aggregate of allowed uses, those uses cannot somehow combine to allow a different and unique use that is not included in the City’s ordinances.

As stated above, the City’s interpretation of its own ordinances enjoys a level of “non-binding deference.” This deference, however, must operate within the language of the ordinance, and cannot justify inserting uses or terms not found in the language approved by the City. If the City approved a distinct land use not listed in its ordinance simply because that use is somewhat similar to allowed uses, the City would effectively be amending its ordinance without proper approval.¹⁴ This position undermines the City’s authority to regulate land use, and would dilute the City’s ordinances to little more than general guidelines. In fact, if this approach is followed, a truck stop could be approved in any of the City’s other commercial zones, because they include uses “similar” to a truck stop, such as service stations, restaurants, motels, fuel sales, etc. The City could, of course, amend § 10-9E-3 to include “truck stop” as an allowable use.¹⁵ It cannot, however, ignore its own ordinances and grant approval to a use that is not listed.¹⁶

C. The City Could Approve Any of the Uses Listed in § 10-9E-3.

Although the current language of § 10-9E-3 does not allow a truck stop on the Greenville Corner property, the City may approve any of the other listed uses. Local governments may designate uses as being “conditional,” meaning that approval may require compliance with additional conditions meant to mitigate the impact of the use. *See* UTAH CODE ANN. § 10-9a-507(1).¹⁷ If a

vehicles. A truck stop may also include overnight sleeping accommodations and restaurant facilities.” SALT LAKE CITY CODE, § 21A.62.040.

¹² The Office of the Property Rights Ombudsman researched how other jurisdictions regulate truck stops. There were fairly consistent references to the area and size of buildings, as well as commercial trucking traffic.

¹³ The primary customers of a truck stop are not from the local area, although local citizens may stop there as well.

¹⁴ Along the same lines, the rule that land use ordinances should be construed in favor of the property owner must also respect the language of the ordinance. While the rule favors property owners, it is not justification to simply ignore an ordinance in order to achieve a desirable outcome.

¹⁵ This Opinion should not be read as disparaging truck stops. They are perfectly acceptable businesses providing valuable services to travelers.

¹⁶ *See* UTAH CODE ANN. § 10-9a-509(2) (“A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances”).

¹⁷ “Conditional use” means a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts. *Id.*, § 10-9a-103(5).

use is designated as conditional, the local government must also adopt standards that the conditional uses must meet. *Id.*¹⁸ Conditional uses cannot be designated unless standards of compliance are also adopted by ordinance.

Uses are often designated as conditional because there may be detrimental impacts associated with the use. The existence of detrimental impacts, however, does not doom a proposed use. An application for a conditional use may only be denied if the detrimental impacts cannot be mitigated through reasonable conditions.

- (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.

Id., § 10-9a-507(2). In essence, standards are goals or objectives, and the conditions are the means to meet those goals. Adopting objective, measureable standards encourages fairness and provides the means to gauge success or failure of the conditions.

Conclusion

A local government may designate uses as conditional, but must also adopt compliance standards for the uses. The Wellsville City Code does not provide for a “truck stop” as a conditional use in the CH zone. It must be presumed that the City Council left the term out advisedly, and if it wants to include truck stop, it may amend the ordinance. A truck stop is a distinct land use with significantly different impacts than those associated with the component parts. It is therefore inappropriate to conclude that a “truck stop” may be “implied” because other allowed uses are somewhat similar. Even if the proposed facility consists of a combination of otherwise allowed uses, because a truck stop is substantially different, it cannot be allowed without an ordinance amendment.

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

¹⁸ The standards do not necessarily need to apply to all conditional uses. An ordinance may designate conditional uses, and also adopt standards tailored to apply to specific uses, or even to conditional uses in specific zones.

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 G. Bailey, Mayor
City of Wellsville
75 E. Main Street
Wellsville, UT 84339

On this _____ day of August, 2012, 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