

Advisory Opinion #133

Parties: Vicki Kartchner, Cottonwood Heights and Canyons School District

Issued: October 22, 2013

TOPIC CATEGORIES:

K: Compliance with Mandatory Land Use Ordinances
Other Topics: (v) Interpretation of Ordinances

A school district complied with its legal obligation to submit and review development plans to a land use authority. The district and the city coordinated throughout the development planning process and, although late, the district submitted formal plans to the city, thus meeting its obligation. Moreover, a city is not required to impose additional parking requirements for each ancillary use in a development when its ordinance gives it discretion to impose parking requirements for the more general use.

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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ADVISORY OPINION

Advisory Opinion Requested by: Vicki Kartchner

Local Government Entity: Cottonwood Heights

Applicant for the Land Use Approval: Canyons School District

Type of Property: School and Associated Facilities

Date of this Advisory Opinion: October 22, 2013

Opinion Authored By: James S. Wright
Office of the Property Rights Ombudsman

Issues

- 1) Did a school district and a municipality comply with the submission and review requirements under Utah law relating to the school district's project's plans?
- 2) Does a school district's project comply with the applicable parking requirements?

Summary of Advisory Opinion

1) The Utah Municipal Land Use, Development and Management Act and R277-471-4 of the Utah Administrative Code require a school district to submit development plans to the land use authority and coordinate with the land use authority prior to developing a school site. In this case, while the Canyons School District (the "District") did not initially formally submit plans for its redevelopment of the Butler Middle School site (the "Project") to the city of Cottonwood Heights (the "City" or "Cottonwood Heights"), it coordinated with the City throughout the planning process. In addition, after the District realized it had not formally complied with the legal requirement to submit plans to the City for review, it did so and the appropriate City official reviewed them to achieve technical compliance with the law.

2) The Cottonwood Heights Code of Ordinances (the "CH Code") gives the City discretion about whether to impose additional parking requirements for ancillary uses in a development. In this case, the Project meets the parking requirements for its main use as a middle school and

otherwise complies with applicable CH Code parking provisions. This means that the Project's parking plans comply with applicable law even though the City did not apply a parking requirement for each ancillary use contained in the Project.

Review

Under the provisions of UTAH CODE ANN. § 13-43-205, a party may file a Request for an Advisory Opinion with the Office of the Property Rights Ombudsman ("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.

The Office received a Request for an Advisory Opinion from Vicki R. Kartchner on May 21, 2013. A copy of that request was sent via certified mail to Linda W. Dunlavy, City Recorder at City of Cottonwood Heights, 1265 E. Fort Union Blvd, #250, Cottonwood Heights, Utah 84047 and to Keith Bradford, General Counsel, Canyons School District at 9150 South 50 West, Sandy, Utah 84070. The City and the District both received the copy on May 24, 2013.

Evidence

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

1. Request for an Advisory Opinion submitted by Vicki R. Kartchner and received by the Office on May 21, 2013.
2. Response and attachments from Cottonwood Heights submitted by its attorney Wm. Shane Topham and received by the Office on June 3, 2013 ("Topham Letter").
3. Response and attachments from the District submitted by its attorney Daniel R. Harper and received by the Office on June 14, 2013 ("Harper Letter").
4. Letter from Vicki Kartchner responding to the District's submission and received by the Office on June 20, 2013 ("Kartchner Letter").
5. Response from Cottonwood Heights submitted by its attorney Wm. Shane Topham and received by the Office on June 22, 2013.
6. Letter from Vicki Kartchner responding to Cottonwood Heights' submission and received by the Office on July 1, 2013.
7. Letter from Vicki Kartchner responding to the District's submission and received by the Office on July 8, 2013.
8. Response from the District submitted by Daniel R. Harper and received by the Office on July 16, 2013.

Background

The District owns property (the “School Property”) in Cottonwood Heights where it has operated Butler Middle School and its surrounding grounds for many years. The School Property has many playing fields available for community use outside of school hours. The District recently moved forward with their plans to redevelop the School Property. The Project includes demolishing and rebuilding Butler Middle School with a new auditorium available for City-sponsored productions and events during non-school hours, redesigning the playing fields and adding eight tennis courts on the School Property.

The School Property is located in the Public Facilities zone (the “PF Zone”). Schools are a permitted use in the PF Zone. The District and the City informally discussed the plans relating to the Project as the District developed them. The City, however, did not formally review the Project’s plans prior to the commencement of construction. After construction had already started, the City requested that Jody Hilton, an engineer with Sunrise Engineering, review the plans for conformity with applicable requirements. Mr. Hilton issued a letter indicating that he had previously reviewed the building plans and that they complied with applicable law. Brian Berndt, the City’s Community Development Director, subsequently reviewed the parking for the Project and issued a written analysis as well.

Ms. Kartchner has lived near the Southwest corner of the School Property for many years. She, along with other Cottonwood Heights residents, have had longstanding concerns about the adequacy of the parking at the School Property. Ms. Kartchner and other concerned citizens raised concerns about the adequacy of the parking during the Project’s planning and development.

The District has demolished the old Butler Middle School and has commenced construction of the new school and the reconfiguration of the surrounding fields. Ms. Kartchner maintains that the District and the City did not comply with state law requiring the submission and review of this Project’s plans prior to the commencement of construction. In addition, she maintains that the District has not complied with the parking requirements for this Project under the CH Code.

Analysis

I. The District and the City Have Complied with their Obligations to Submit and Review Plans and to Coordinate Matters Relating to the Project.

Under UTAH CODE ANN. § 10-9a-305(8)¹, a school district that develops its land must submit a development plan and schedule to the municipality’s land use authority, and the land use authority must respond to the submission with reasonable promptness. This statute states:

(8) (a) A specified public agency intending to develop its land shall submit to the land use authority a development plan and schedule:

¹ Prior to the amendment made to UTAH CODE ANN. § 10-9a-305 in the 2013 General Session, this same provision was found at UTAH CODE ANN. § 10-9a-305(9).

(i) as early as practicable in the development process, but no later than the commencement of construction; and

(ii) with sufficient detail to enable the land use authority to assess:

(A) the specified public agency's compliance with applicable land use ordinances;

(B) the demand for public facilities listed in Subsections 11-36a-102(16)(a), (b), (c), (d), (e), and (g) caused by the development;

(C) the amount of any applicable fee described in Section 10-9a-510;

(D) any credit against an impact fee; and

(E) the potential for waiving an impact fee.

(b) The land use authority shall respond to a specified public agency's submission under Subsection (8)(a) with reasonable promptness in order to allow the specified public agency to consider information the municipality provides under Subsection (8)(a)(ii) in the process of preparing the budget for the development.

UTAH CODE ANN. § 10-9a-305(8). In addition, under Utah Administrative Code R277-471, the District must coordinate with the City to ensure that the Project will comply with applicable land use laws. This rule states in relevant part:

A. Prior to developing plans and specifications for a new public school, or the expansion of an existing public school, school districts and charter schools shall coordinate with affected local government land use authorities and utility providers to:

(1) ensure that the siting or expansion of a school in the intended location will comply with applicable local general plans and land use laws and will not conflict with entitled land uses. . . .

Utah Administrative Code R277-471. In this case, the District and the City have complied with these laws because they have consulted with each other about the Project's plans to ensure they comply with applicable land use law, the District formally submitted plans for the Project to the City for review and the City's land use authority reviewed these plans and gave a formal written response. Even though it appears that the District did not technically comply with UTAH CODE ANN. § 10-9a-305(8) by not submitting the Project's plans prior to the commencement of construction, its subsequent actions, along with the actions of the City, amend this technical noncompliance, as allowed by Utah law.

A. The District and the City Have Complied with the Obligation to Coordinate, Submit and Review the Project's Plans.

The District and the City have complied with the requirements of Utah Administrative Code R277-471 relating to the obligation to coordinate with each other to ensure the Project complied with applicable land use laws and with UTAH CODE ANN. § 10-9a-305(8). This compliance with Utah Administrative Code R277-471 occurred because the District consulted with the City about

the Project's plans prior to the commencement of construction and the City determined they were code compliant. Topham Letter, p. 2. The compliance with UTAH CODE ANN. § 10-9a-305(8) came after an initial failure by the parties to technically comply with its requirements.

Initially, even though the District made the City aware of the Project plans and the City had the chance to give the District any response it had, the District did not formally submit a development plan and schedule to Cottonwood Heights' land use authority and the City did not formally respond to this submission, as required by law. When Ms. Kartchner made the District and the City aware that they had not fully complied with UTAH CODE ANN. § 10-9a-305(8), the District formally submitted the Project's plans to Cottonwood Heights for review. Harper Letter, p. 2. This statute requires the District to submit the plans to the City's land use authority. UTAH CODE ANN. § 10-9a-305(8)(a). The land use authority is the "person, board, commission, agency, or other body designated by the local legislative body to act upon a land use application." UTAH CODE ANN. § 10-9a-103(23).

Under Section 19.02.100 of the CH Code, the director of the City's community development department or his/her designee is the person charged with reviewing applications for building permits and land uses and is therefore the "land use authority" for the purposes of UTAH CODE ANN. § 10-9a-305(8)(a). Brian Berndt is the director of the City's community development department, and he asked Jody Hilton, an engineer who had already reviewed the plans on behalf of the District, to review these plans.² Mr. Hilton confirmed in a letter dated January 10, 2013 addressed to Brian Berndt that he had reviewed the plans for the construction of the middle school and that they complied with all applicable codes. Attachment to the Topham Letter. In addition, Mr. Berndt reviewed the parking requirements for the Project and summarized his conclusion that the Project complied with applicable parking requirements in a document entitled "Plan Review" dated May 30, 2013. Attachment to the Topham Letter.

While there is some ambiguity as to whether or not Mr. Hilton reviewed the Project's parking plans for legal compliance based on his letter dated January 10, 2013, it is clear that the director of the City's community development department did so and communicated his conclusions in his May 30, 2013 Plan Review. This action by Mr. Berndt fulfills the requirement to review the Project's parking plans for compliance and to communicate the results of the review. Combined, these reviews fulfill the obligations of the City and the District under UTAH CODE ANN. § 10-9a-305(8)(a), and as explained below, Utah law allows the City and the District to remedy their formal technical noncompliance with this statute.

B. The District Remedied Its Technical Noncompliance with Utah Law.

Utah law allows governments to remedy prior technical failures to comply with the law. *See Ward v. Richfield*, 798 P.2d 757, 759 (Utah 1990) (allowing a city to remedy a failure to give proper public notice of a city council meeting by giving proper notice of a subsequent council meeting where the council ratified the actions taken at the meeting with the defective notice). This means that even though the District did not technically comply with the requirement in

² No prohibition appears to exist on having the City also hire the same engineer the District already had hired to review the Project's plans on its behalf.

UTAH CODE ANN. § 10-9a-305(8)(a) to submit its development plans to Cottonwood Heights' land use authority prior to construction of its Project despite consulting with the City about these plans, Utah law allows its subsequent formal submittal and reviews to cure this technical noncompliance. This means that when the District formally submitted the Project's plans to the City and the City's land use authority confirmed the plans comply with all applicable law, the District remedied the prior technical failure to comply with this law.

II. The Project's Parking Plans Comply with Applicable Parking Ordinances.

The CH Code governs the required parking for the Project. Chapter 19.80 of the Zoning title of this code contains the requirements for off-street parking. In interpreting an ordinance, Utah law requires to "begin first by looking to the plain language of the ordinance." *Carrier v. Salt Lake County*, 104 P.3d 1208, 1216 (Utah 2004). In addition, Utah law provides that a city's interpretation of its own zoning ordinances is allowed "some level of non-binding deference." *Fox v. Park City*, 200 P.3d 182, 185 (Utah 2008) (other citations omitted). The City's Community Development Director, Brian Berndt has issued a Plan Review dated May 30, 2013 analyzing the Project's parking and concluding that it complies with applicable City law. Based on the plain language of the City's parking provisions in its code and the nonbinding level of deference given to a city's interpretation of its own ordinances, the CH Code supports Mr. Berndt's conclusions that both the quantity and location of the parking comply with the applicable ordinances.

A. The Number of Parking Spaces Complies with Applicable Law.

Cottonwood Heights has adopted the ITE manual of parking generation rates (the "ITE Manual") to determine the parking requirements for particular uses. CH Code § 19.80.120. The ITE Manual provides that a middle school (land use 522) requires 0.11 vehicles per student or 1.2 vehicles per employee. Attachment to the Harper Letter. Based on the student enrollment number of 905 provided by the District, the middle school will require 100 parking spaces. Attachment to the Harper Letter. The Project will provide a total of 340 spaces and therefore meets the required parking spaces for the middle school. Ms. Kartchner does not appear to dispute the fact that the middle school itself has sufficient parking, rather she argues that the tennis courts, playing fields and auditorium that comprise part of the Project mean that the Project needs significantly more parking. The CH Code, however, does not require imposing a separate parking requirement on each of these ancillary uses to the middle school.

Section 19.80.050(C) of the CH Code states: "When a development contains multiple uses, more than one parking requirement *may* be applied." (emphasis added). The plain language of this provision gives the City the ability to require separate parking for each separate use in the Project, but does not require it to do so. This means that so long as the middle school development includes the courts, playing fields and auditorium as ancillary parts of the Project, the City is under no obligation to require additional parking for each one of these separate uses.

Mr. Berndt's May 30, 2013 Plan Review concludes that even if the City decided to require parking for tennis courts and for the recreational fields as part of a park, the Project would still meet the requirement under the ITE Manual requirements. Ms. Kartchner argues that the City

needs to require additional parking spaces for the auditorium in the school and that the proper ITE Manual designation for the field is “soccer complex,” not a city park. Kartchner Letter p. 1. Given that the CH Code does not require the City to apply parking requirements for these ancillary uses, the auditorium within the school does not necessitate any further parking spaces than those provided for the middle school and this Advisory Opinion does not need to determine whether the City correctly determined that the soccer fields fall under the ITE Manual designation for a city park as opposed to a soccer complex.

B. The Location of the Parking Complies with Applicable Law.

Ms. Kartchner also argues that the District does not provide parking within 600 feet of some of the playing fields, as required under the CH Code. Section 19.80.020(E) of the CH Code states: “Required off-street parking areas for nonresidential uses shall be placed within 600 feet of the main entrance to the building.” The City provides information that the District provides parking within 600 feet from the main entrance to the middle school. This complies with the plain language of the CH Code. The CH Code does not contain language that appears to contradict the City’s position that the District does not need to provide parking for all of the playing fields within 600 feet of the fields, particularly when the CH Code does not require any separate parking for the fields in addition to what it requires for the middle school.

This Advisory Opinion’s conclusion that the parking for the Project meets the applicable legal requirements does not mean that Ms. Kartchner’s concerns were baseless. She raised legitimate questions about the ultimate legality of the issues addressed in this Advisory Opinion. In addition, this Advisory Opinion does not pass any judgment on whether the Project will contain sufficient parking for those who use it—it only concludes that the Project’s parking meets the legal requirements under the CH Code.

Conclusion

The CH Code gives the City discretion about whether to mandate parking requirements for each ancillary use in the Project. The Project’s parking meets the requirement for a middle school and the City has not required the District to provide additional parking for every ancillary use in the Project. In addition, parking is located within 600 feet from the front door of the middle school, and therefore the Project’s parking plans comply with applicable law. The Project may or may not have sufficient parking based on its actual use, however, this is a separate issue from whether or not the parking complies with applicable CH Code provisions.

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. § 63G-7-401.

These provisions of state code require the delivery of the Advisory Opinion to the agent at the address 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.

The persons and addresses designated in the Governmental Immunity Act database are as follows:

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

Keith Bradford, General Counsel
Canyons School District
9150 South 500 West
Sandy, Utah 84070

On this 22nd day of October, 2013, I caused the attached Advisory Opinion to be delivered to the foregoing governmental offices by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the persons shown above.

Office of the Property Rights Ombudsman