

# Advisory Opinion #146

Parties: Cleon Butterfield and Weber County

Issued: October 31, 2014

## TOPIC CATEGORIES:

### Conditional Uses

A local government has discretion to approve a conditional use permit if it determines that the detrimental impacts associated with the specific use have been mitigated by reasonable conditions. It is not necessary that all impacts be substantially mitigated to the satisfaction of all potentially aggrieved parties, only that the local jurisdiction is satisfied that they have been mitigated.

#### DISCLAIMER

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



The Office of the Property Rights Ombudsman  
Utah Department of Commerce  
PO Box 146702  
160 E. 300 South, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84114

(801) 530-6391  
1-877-882-4662  
Fax: (801) 530-6338  
[www.propertyrights.utah.gov](http://www.propertyrights.utah.gov)  
[propertyrights@utah.gov](mailto:propertyrights@utah.gov)



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*Lieutenant Governor*

# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI  
*Executive Director*

BRENT N. BATEMAN  
*Lead Attorney, Office of the Property Rights Ombudsman*

### ADVISORY OPINION

Advisory Opinion Requested by: Cleon Butterfield

Local Government Entity: Ogden Valley Township (Weber County)

Property Owner: Blair and Stacey Bowman

Type of Property: Conditional Use (Dog Kennel)

Date of this Advisory Opinion: October 31, 2014

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

### Issues

Is it necessary to substantially mitigate all negative impacts before a conditional use permit may be approved?

### Summary of Advisory Opinion

A local government has discretion to approve a conditional use permit, when such uses are authorized by statute. Even generalized standards are sufficient to guide a land use authority's decisions. The detrimental impacts specific to a proposed use must be identified, and conditions imposed to address the impacts. If reasonable conditions mitigate the impacts, the conditional use permit should be approved. It is not necessary that all impacts be substantially mitigated.

### Review

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at

the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Cleon Butterfield on September 10, 2014. A copy of that request was sent via certified mail to Ricky D. Hirsch, Weber County Clerk/Auditor, at 2380 Washington Blvd., Suite #230, Ogden, Utah. According to the return receipt, the County received the Request on September 15, 2014.

## **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 Cleon Butterfield, received by the Office of the Property Rights Ombudsman on September 10, 2014.
2. Response submitted on behalf of Weber County, including attachments, received via email from Christopher F. Allred, Weber County Attorney's Office, on September 25, 2014.
3. Reply submitted by Mr. Butterfield, received September 30, 2014.

NOTE: The property owners, Blair and Stacey Bowman, were also notified of this Opinion, but did not submit any response.

## **Background**

Blair and Stacey Bowman own property in Weber County, which is part of the Ogden Valley Township.<sup>1</sup> Their property is about 3 acres, and is located within an Agricultural Valley ("AV-3") zone. The Bowmans applied for permission to construct and operate a commercial dog kennel on their property.<sup>2</sup> The Bowmans proposed a 30 x 50 foot building which would house between 2 and 20 dogs. The building would include outdoor dog runs, and would adjoin a fenced area with grass and trees. The Bowmans' plan included a driveway with two parking stalls, and possibly signage to identify the business.

In Weber County's ordinances, a dog kennel is listed as a conditional use in the AV-3 zone. The minimum requirements for conditional use permit (CUP) for a dog kennel as an accessory use to a residential building are as follows:

- 1) Minimum lot size: 2 acres
- 2) No more than 10 dogs (10 weeks or older).

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<sup>1</sup> A township is an area of a county established with its own local planning commission. *See* UTAH CODE ANN. § 17-27a-306. A Township planning commission (like the Ogden Valley Township), performs the same functions as any planning commission, including approval of development and other applications when authorized. The township planning commission is subject to the ordinances of the County. Although the Ogden Valley Township acted as the land use authority in this matter, this Opinion shall refer to Weber County as the governing jurisdiction.

<sup>2</sup> The kennel would be in a new structure. There is a home and outbuilding on the lot.

- 3) Buildings shall be at least 100 feet from a public street, and at least 50 feet from the rear and side property lines, and 40 feet from a residential structure.<sup>3</sup>

The Bowmans' proposed Kennel met the minimum requirements.<sup>4</sup> The County's staff recommended these additional conditions:

- 1) Insulation for the building, to minimize noise, and air conditioning to provide comfortable surroundings;
- 2) A commitment to house "excessively noisy" dogs during the day, and to ensure that the Kennel is secure to prevent dogs from running at large;
- 3) Strict observance of operating hours;
- 4) A commitment to daily waste removal, including spraying for urine,
- 5) Landscaping for the grass area (3 trees), and
- 6) Two entrance signs.

The County staff recommended approval of the CUP with these conditions.<sup>5</sup> The Township Planning Commission approved the CUP on August 26, 2014.

Cleon Butterfield owns property adjacent to the Bowman's, and he objects to the Kennel.<sup>6</sup> Mr. Butterfield does not believe that the detrimental impacts of the Kennel have been substantially mitigated. Specifically, he states that noise concerns were not adequately addressed, and that the Planning Commission should have required that the dogs be muzzled.<sup>7</sup> He also wanted more landscaping to visibly screen the Kennel from the street and other properties. Finally, he argues that the Commission did not consider other negative effects, including health, safety, traffic, and parking.<sup>8</sup>

Mr. Butterfield also argues that the Ogden Valley Architectural Landscaping and Screening Design Standards should have been applied to the CUP, meaning that greater landscaping and screening should have been required.<sup>9</sup> He reasons that the Kennel is a commercial business, and

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<sup>3</sup> WEBER COUNTY CODE, § 104-6-5(2)(b).

<sup>4</sup> The building met the minimum distance requirements. The Bowmans proposed to house a maximum of 20 dogs, but the County ordinance limits the number in an accessory structure to 10.

<sup>5</sup> Staff Report, CUP 2014-16, Ogden Valley Planning Commission, August 26, 2014. The Commission did not discuss a limit on the number of dogs that could be boarded, other than what was expressed in the County Code.

<sup>6</sup> Mr. Butterfield owns two lots adjoining the Bowmans. He plans to build a home on his property, but no buildings currently occupy the lots. Mr. Butterfield also stated that other property owners in the area are opposed to the Kennel.

<sup>7</sup> Apparently, the Commission considered this idea, but rejected it as unreasonable.

<sup>8</sup> In the materials submitted for this Opinion, Mr. Butterfield did not identify specific problems in these areas, nor did he suggest any conditions, other than additional landscaping.

<sup>9</sup> The landscaping standards are found at §§ 108-2-4 to -9 of the Weber County Code. Mr. Butterfield and other neighbors argued that the Planning Commission should have applied these standards, but the Commission declined to do so.

the County Code requires the more stringent landscaping requirements on commercial businesses. The Planning Commission rejected this argument, because the Kennel is an accessory use to the Bowman's home, it is exempt from the landscaping standards.<sup>10</sup>

In response, Mr. Butterfield cites § 104-6-5(2)(b), which provides that dog kennels may be approved as accessory uses for residential homes on lots of two acres, but that the number of dogs is limited to ten only.<sup>11</sup> He argues that the exemption from the landscaping requirements for an accessory use should not apply, because the Kennel is on a "conforming three acre lot" and not a "nonconforming" lot (as stated in § 104-6-5(2)(b)). Hence, Mr. Butterfield concludes, the Kennel does not qualify as an "accessory use," and cannot be exempt from the landscaping standards of §§ 108-2-4 to -9.

In addition to these objections, Mr. Butterfield also argues that the CUP should have been denied, because the detrimental impacts of the Kennel were not "substantially" mitigated. The staff report and the Planning Commission's approval state that the negative impacts of the Kennel could be "reasonably" mitigated by the proposed conditions. Mr. Butterfield cites § 17-27a-506 of the Utah Code, which provides that a conditional use permit may be denied if the detrimental impacts of the use cannot be substantially mitigated by reasonable conditions. He argues that the state law requires denial unless the detrimental impacts can be substantially mitigated. The County's approved conditions only provide "reasonable" mitigation, so the CUP should have been denied (or at least have been subject to more stringent conditions).

The County maintains that the Planning Commission acted within its authority, considered the impacts of the Kennel, and imposed reasonable conditions on its operation.

## **Analysis**

### **I. There is no Reason to Conclude That the County Abused its Discretion by Approving the Conditional Use Permit.**

There is no reason to conclude that the County abused its discretion when it approved the conditional use permit for the Bowman's Kennel. The County's ordinances specifically allow dog kennels as conditional uses. The Township Planning Commission considered the impacts of the Kennel, and imposed conditions meant to address those impacts. The County was thus within the authority granted it by the Utah Code and its own ordinances.

#### *A. Conditional Uses*

Local governments may designate uses as conditional, meaning that specific approval of each use is required.

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<sup>10</sup> Weber County Code, § 108-2-3 ("Single-family residential use and its approved accessory uses . . . are exempt [from the landscaping standards].")

<sup>11</sup> Weber County Code, § 104-6-5(2)(b). "Dog breeding and dog kennels on a minimum of two acres, on a legal nonconforming lot, as an accessory use to a single family dwelling, limited to ten dogs of more than ten weeks old." The subsection also requires minimum setbacks for any buildings, which are similar to those found in Subsection (2).

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

(b) If the reasonably anticipated detrimental effects of a proposed 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.

UTAH CODE ANN. § 17-27a-506.<sup>12</sup> The Utah Code anticipates four specific steps: First, a use is designated as conditional in a land use ordinance; Second, standards are adopted to guide evaluation of each application; Third, the reasonably anticipated detrimental effects of each use are identified; and Fourth, conditions are proposed to mitigate the detrimental effects. The use shall be approved if the detrimental effects can be mitigated, and it may be denied only if the effects cannot be substantially mitigated. The County has already completed the first step, by designating dog kennels as conditional uses in the AV-3 zone.

### *B. Applicable Standards*

The Utah Code does not define “applicable standards,” nor does it explain the nature or extent expected of the required standards for conditional use analysis. Several years ago, however, the Utah Supreme Court deferred the choice of standards to a local government’s judgment:

While it is true that a zoning ordinance must set some ascertainable boundaries on the exercise of discretion by a zoning authority, such boundaries are not required to be unduly rigid or detailed. A generalized exposition of overall standards or policy goals suffices to direct the inquiry and deliberation of the zoning authority, and to permit appellate review of its decision.

*Thurston v. Cache County*, 626 P.2d 440, 443-44 (Utah 1981). The reference to the design and landscaping standards of the County’s ordinance thus provides sufficient standards to direct the inquiry and deliberation of the Bowman’s conditional use application.

In order to be considered as a conditional use, a kennel must satisfy minimum criteria (that is, minimum standards) including parcel size, setback distances, etc. Although the County admits that its ordinance contains “very few” applicable standards specifically for dog kennels, the Weber County Code provides general design and landscaping standards. Each application for a conditional use permit shall include:

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<sup>12</sup> “‘Conditional use’ means a land use that, because of its unique characteristics or potential impact on the county, 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.” UTAH CODE ANN. § 17-27a-103(6).

Detailed building plans and site plans [sic] specifications shall be drawn to scale including electronic copies showing details and other applicable zoning requirements as which are outlined in chapter 1 of this title [Title 108] Design review, and chapter 2 of this title, Ogden Valley Architectural, Landscape and Screening Standards.

WEBER COUNTY CODE, § 108-4-3(1)(e). Thus, even though the Bowman's kennel is exempt from compliance with the Ogden Valley Architectural, Landscape and Screening Standards, the Planning Commission could still look to those standards, as well as the Design Guidelines to guide its decision on the Bowman's application.<sup>13</sup> It is within the Commission's discretion to use those standards when evaluating the CUP.

### *C. Reasonably Anticipated Detrimental Effects*

As part of its decision to grant or deny a conditional use permit, a local government must identify the detrimental impacts associated with the specific use proposed in the application. This is necessary to determine what conditions may be imposed to mitigate the detrimental effects. The detrimental impacts, like all aspects of a conditional use application, must be established by substantial evidence. Since local government is claiming the need for additional conditions to address the impacts, the local government has the burden of proving both the existence of the impacts, and the need for conditions.

The detrimental effects must be identified for each particular use in each particular location. The negative effects of the specific use must be shown to be potentially detrimental to the community, neighboring properties, or nearby land uses. It is not sufficient to merely cite generalized conclusions about a use.<sup>14</sup> Moreover, the detrimental effects must be connected to a distinct adverse impact on the use and enjoyment of nearby properties or the community at large.<sup>15</sup> No detrimental impacts may be claimed without substantial evidence of a connection to a negative effect.

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<sup>13</sup> As noted above, uses accessory to a residential building are exempt from *compliance* with the landscaping standards. This does not exclude the Planning Commission from referring to the landscaping and design standards as a guide to decisions on conditional use permits.

<sup>14</sup> Uses are designated as conditional because of potential impacts on the county, neighboring properties or neighboring land uses. Therefore, it must be shown that each specific use has impacts that detrimentally affect the county, neighboring property owners, or nearby land uses. Any reliable and relevant information about a use may serve as evidence of the use's impact, including information based on past experience with similar uses; but all information must be considered in relation to the specific situation being evaluated, and the impacts determined individually for the each use. Generalized information is not by itself sufficient justification to determine detrimental impacts.

<sup>15</sup> Conditional use permits are not evaluated "in a vacuum," but as an actual use in an actual setting. The specific location of the use, and the general characteristics of the surrounding neighborhood are relevant factors when deciding both the extent of the impacts and the conditions which may be imposed. For example, the Bowman's property is located in a rural area. Mr. Butterfield noted the presence of dogs on other properties (he stated that a dog barking could be heard approximately 900 feet away). Those facts are relevant to the Planning Commission's evaluation.

#### *D. Mitigating Impacts With Reasonable Conditions*

Once detrimental impacts associated with a particular use have been established, reasonable conditions to mitigate those impacts may be proposed and evaluated. Since the purpose of the conditions is to mitigate the detrimental impacts, the conditions must directly address those impacts. Conditions not tied to a negative impact cannot be imposed, even if they would be beneficial to the community. As is the case with all land use decisions, the conditions must be established by substantial evidence.<sup>16</sup> The land use authority may consider not only the effectiveness of a proposed condition, but also the cost, convenience, and burden on the property owner (among other things) could also be factors in the analysis.

In this matter, the Planning Commission required landscaping and building design conditions, along with a requirement to curb dogs that were excessively noisy, and to remove waste on a regular basis. These conditions appear to be appropriate and reasonably designed to address the negative impacts expected from a dog kennel. In addition, the Commission limited the number of signs for the Bowman's business, which can be reasonably tied to reducing the overall impact of commercial signs on the neighborhood. In all, there does not appear to be any evidence that the conditions are unreasonable, or not connected to a negative impact. Thus, the Commission did not abuse its discretion when it selected the conditions.

#### *E. "Substantially" Mitigating the Negative Impacts*

The Utah Code allows denial of a conditional use permit only if the detrimental impacts cannot be "substantially" mitigated.<sup>17</sup> Ultimately, the conclusion that the negative impacts have been successfully mitigated rests with the Planning Commission. During review of a conditional use application the Commission may solicit input from the applicant, planning staff, neighbors, and other interested parties, but the final decision rests with the Commission. Even though neighbors, staff, and the applicant may not be completely happy with the decision, the Commission must decide, on behalf of the County, that the negative impacts have been sufficiently mitigated.<sup>18</sup>

"Substantially mitigated" does not mean the same as "completely eliminated." Any land use will impact neighboring properties and the community at large. If a use is allowed in an area, the local government has decided that the impacts of that use on the neighborhood and community are acceptable. Uses may be designated as conditional because the impacts of the use require closer attention and customized conditions to reduce the impacts. Those uses are allowed, despite the impacts, if reasonable conditions address the negative effects.

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<sup>16</sup> "A local government's land use decision [concerning the granting or denial of a conditional use permit] is arbitrary and capricious [only] if it is not supported by substantial evidence." *Uintah Mountain RTC. LLC, v. Duchesne County*, 2005 UT App 565, ¶ 19, 127 P.3d 1270, 1275 (alterations in original).

<sup>17</sup> See UTAH CODE ANN. § 17-27a-506(2)(b).

<sup>18</sup> It is not necessary to mollify every neighbor or even the applicant, but the decision should reflect the County's satisfaction that the impacts have been mitigated. For example, in this matter, the negative impacts of the Bowman's dog kennel included noise from the animals. A neighbor proposed that all animals be muzzled, a condition which would reduce (but not eliminate) the noise. The Planning Commission rejected this idea, but approved a condition that noisy animals be detained in the kennel building. This condition also reduces, but does not eliminate the noise. The Commission made the ultimate decision on how to best mitigate the noise impact of the kennel.



Section 17-27a-506 does not *require* that a conditional use permit be denied if detrimental impacts cannot be substantially mitigated, only that a permit *may* be denied. Mr. Butterfield argues that a conditional use permit may be approved only if the negative impacts are substantially mitigated. He continues that since the Planning Commission concluded only that the impacts could be “reasonably” mitigated (not “substantially”), the Bowman’s CUP should be denied.

This argument, however, focuses only on § 17-27a-506(2)(b), and ignores the requirements of subsection (2)(a). That subsection *requires* approval “if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use . . .” UTAH CODE ANN. § 17-27a-506(2)(a).<sup>19</sup> The statute imposes no requirement that the impacts be either “substantially” or “reasonably” mitigated, only that they be mitigated. It is within the discretion of the Planning Commission to determine that the impacts have been successfully mitigated to the point that the County is satisfied, and that the CUP should be approved.

## **II. The County Code Limits the Number of Dogs to Ten.**

Because the Bowman’s kennel is considered an accessory use to a residential building, the Weber County Code limits the number of animals to ten. It appears that the proposed kennel was determined to be an accessory use, as provided in § 104-6-5(2)(b) of the County Code. The County concluded that the use is exempt from compliance with the Ogden Valley Architectural, Landscape and Screening Design Standards, because it is an accessory use, under paragraph (2)(b), as opposed to a primary use, under paragraph (2).

Kennels which are accessory uses may only house ten dogs at a time. Conditional uses in the AV-3 zone include: “Dog breeding and dog kennels on a minimum of two acres, on a legal nonconforming lot, as an accessory use to a single family dwelling, limited to ten dogs of more than ten weeks old.” WEBER COUNTY CODE, § 104-6-5(2)(b). The Bowman’s proposed kennel is accessory to their residence, and is on three acre lot. It is reasonable to conclude that this language authorizes a dog kennel as a conditional use on the Bowman property.<sup>20</sup> That subsection, however, limits the number of dogs to ten.<sup>21</sup> It is not necessary to impose this limit as a condition, because it is a requirement from the County Code.

## **Conclusion**

The Planning Commission did not abuse its discretion when it approved the Bowman’s Conditional Use Permit. A dog kennel is authorized as a conditional use on the Bowman’s property, and the Commission adopted appropriate conditions to mitigate the detrimental impacts of the kennel. The County Code indicates standards that may be used as a reference for the types of conditions that could have been imposed.

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<sup>19</sup> In contrast, subsection (2)(b) provides that a CUP *may* be denied if the impacts cannot be substantially mitigated.

<sup>20</sup> It would not be plausible to limit the language of subsection (2)(b) by allowing dog kennels on legal nonconforming lots, with a minimum of two acres, and which are accessory to a single-family residence only. If the property meets one of those criteria, a kennel may be allowed as a conditional use.

<sup>21</sup> The limit is ten dogs which are more than ten weeks old.

The Planning Commission has the authority to approve a conditional use on behalf of the local jurisdiction. In doing so, the Commission has discretion to impose conditions that may mitigate negative impacts. It is not necessary to eliminate the impacts, only to mitigate them to the point that the Commission is satisfied. While the Commission should seek input from planning staff, the applicant, neighboring property owners, and other interested parties, it is not required that all parties be satisfied. The ultimate decision rests with the Planning Commission.

If reasonable conditions are proposed to mitigate the detrimental impacts, the conditional use permit should be approved. The Utah Code does not require substantial mitigation of all impacts.

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.**

**The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.**

## 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:

Ricky D. Hatch  
Weber County Clerk/Auditor  
2380 Washington Blvd., Suite 230  
Ogden, Utah 84401

On this \_\_\_\_\_ Day of October, 2014, 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.

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Office of the Property Rights Ombudsman