

Advisory Opinion #195

Parties: Melanie Grant; South Jordan City

Issued: March 16, 2018

TOPIC CATEGORIES:

**Entitlement to Application Approval
Compliance with Mandatory Land Use Ordinances**

This Office lacks authority to review approval of a permit once the period within which a third party may appeal the approval lapses.

The City correctly approved the developer's site plan application. The approval was proper because the decision was supported by substantial evidence in the record and the application complied with applicable mandatory provisions of the South Jordan City Code.

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: Melanie Grant

Local Government Entity: City of South Jordan

Type of Property: Residential

Date of this Advisory Opinion: March 16, 2018

Opinion Authored By: Jordan S. Cullimore
Office of the Property Rights Ombudsman

ISSUE

Did the City of South Jordan illegally approve a site plan application to construct an assisted-living facility?

SUMMARY OF ADVISORY OPINION

Since Ms. Grant failed to timely appeal the building and land disturbance permits, this Office lacks authority to review the approval and issuance of those permits, and Mr. McCullough possesses a vested right to perform work approved under the permits.

The City correctly approved Mr. McCullough's site plan application. The approval was supported by substantial evidence in the record and complied with applicable mandatory provisions of the South Jordan City Code.

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 Melanie Grant on February 22, 2017. A copy of that request was sent via certified mail to Anna M. West, Recorder, City of South Jordan at 1600 West Town Center Drive, South Jordan, Utah.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Melanie Grant on February 22, 2017.
2. Reply from Steven R. Schaefermeyer, Attorney for South Jordan City, received June 29, 2017.
3. Email messages submitted by Melanie Grant on March 12-13, 2018.

BACKGROUND

On March 31, 2016, South Jordan City (the "City") issued Dan McCullough a land disturbance permit (the "disturbance permit") to allow him to prepare his land, located at 3440 West 11400 South, for development. Under the disturbance permit, Mr. McCullough brought in fill dirt to level the grade of the lot. The City also issued Mr. McCullough a building permit on June 16, 2016 to construct a retaining wall to support and retain the fill dirt on the east end of the property. This wall, once constructed, created an abrupt 10 foot 8 inch drop in elevation from Mr. McCullough's lot to the neighboring residential lot, owned and occupied by Melanie Grant.

It appears that around the time the height of the retaining wall became apparent to Ms. Grant, she approached the City and began to express her concerns that the wall would ultimately lead to safety and drainage problems on her lot, and would reduce her property's value.

Meanwhile, Mr. McCullough moved forward with the development by applying for site plan approval of a 24-bed assisted living facility on November 22, 2016. Over the course of the next few months, the City reviewed Mr. McCullough's application. On January 24, 2017, the City's Planning Commission approved the site plan application subject to further review and approval by the city engineer. Ms. Grant timely appealed this approval, arguing that the City incorrectly and illegally approved the application.

On March 22, 2017, a hearing officer concluded that the City failed to follow procedural requirements of the South Jordan City Code (the "City Code") requiring code compliance and city engineer approval *prior* to Planning Commission review. *See* SOUTH JORDAN CITY CODE §§ 16.24.040(B) & 16.24.050. Since the Planning Commission reviewed and approved the site plan application before the city engineer gave final technical approval of the site plan, the hearing officer vacated the Planning Commission's January 24, 2017 grant of approval. The hearing officer ordered the City to process the application in accordance with the applicable Code

procedures. The hearing officer did not review the City’s substantive approval of the site plan application.¹

Accordingly, the City reconsidered Mr. McCullough’s site plan application in the correct order. Prior to scheduling the application for Planning Commission review, the city engineer approved the plans. The Planning Commission then considered and approved the site plan on May 23, 2017. On June 23, 2017, Ms. Grant timely appealed this approval.

Ms. Grant has asked this Office to review the City’s approval of Mr. McCullough’s development.

ANALYSIS

I. This Office Lacks Authority to Review the Land Disturbance and Building Permits

Many of Ms. Grant’s concerns regarding Mr. McCullough’s development relate to the retaining wall separating her property from Mr. McCullough’s property and the fill dirt the wall was constructed to support. Thus, Ms. Grant’s challenge implicates the land disturbance permit and the wall building permit. This Office does not have authority to review approval of these permits. Ms. Grant failed to timely appeal the building permit authorizing construction of the retaining wall, as well as the disturbance permit authorizing fill and grading of the lot.² *See* UTAH CODE § 13-43-205(1)(b) (allowing a potentially aggrieved party to request an advisory opinion prior to final decision on a land use application).

Because Ms. Grant failed to timely appeal the permits, this Office may not provide an opinion on their validity. Moreover, once the time period for appeal lapsed, Mr. McCullough obtained a vested right to perform work under the permits.³

Nonetheless, Ms. Grant claims the City granted Mr. McCullough approvals based upon misrepresentations and deceit. Misrepresentation and deceit can be difficult to prove, but such circumstances may extend the timeframe within which an affected property owner may appeal a permit approval.

The Utah Supreme Court, in discussing the deadline to appeal the approval of a building permit, has stated that “there may be exceptional circumstances that may allow an affected party to bring an appeal even after the appeal period has run,” including cases of “fraud on the part of the permit applicant or bribery of municipal officials to secure the building permit.” *Fox v. Park City*, 2008 UT 85, ¶ 29, 200 P.3d 182. The Court further explained that “[t]hese types of actions

¹ The hearing officer’s March 22, 2017 order noted that the “order reflects a major procedural error.” He further explained that the “decision did not include a review of...the merits of the Site Plan. A review of the record under the ‘substantial evidence scope of review’ did not occur and is left for another day.”

² The City asserts that the appeal periods for the land disturbance permit and the building permit expired no later than August 2016 and July 2017 respectively, and that Ms. Grant never appealed the issuance of either permit. Ms. Grant does not dispute these conclusions.

³ “[W]hen a landowner has been granted a permit to make a particular use of his land, he is entitled to know when that decision will become final and no longer be subject to review or reversal by [an appeal authority]. Only in such circumstance may such a landowner feel secure in putting the land to the use granted him by the permit.” *Fox v. Park City*, 2008 UT 85, ¶ 20 n.23 (quoting *Hardy v. Zoning Bd. of Review*, 321 A.2d 289, 292 (R.I. 1974)).

so severely undermine the permit process that the appeal period would not begin until the affected parties have notice of them.” *Id.*

Nevertheless, this Office likewise does not possess authority to provide an opinion regarding claims of fraud and deceit, or whether a permit appeal period has been extended as a result. Ms. Grant would need to pursue such claims by filing a legal action in district court. This Office’s Advisory Opinion review is limited to the subjects enumerated in UTAH CODE § 13-43-205, all of which concern compliance with administrative land use laws and ordinances. Claims based upon fraud and misrepresentation are factually based and not subject to the review of this Office. Accordingly, we decline to provide an opinion on these claims.

II. The City Properly Approved Mr. McCullough’s Site Plan Application

The only remaining question for this Office to consider is whether the City legally approved Mr. McCullough’s site plan application and supported its decision with substantial evidence in the record. *See* UTAH CODE § 10-9a-801(3)(b)-(c); *see also* SOUTH JORDAN CITY CODE § 17.16.020.020(H)(2). A court will overturn a city’s approval of a site plan application only if the city issued the approval based on incorrect interpretations of the applicable land use ordinance, or if the approval’s conclusions were not supported by substantial evidence⁴ in the record. *Id.*; *see also Bradley v. Payson City Corp.*, 2003 UT 16 ¶ 10.

A court will uphold a planning commission’s land use decision as supported by substantial evidence as long as the commission carefully reviewed and considered the submitted application and made a reasonable, evidence-based determination in accordance with the applicable ordinances. *See Springville Citizens v. City of Springville*, 1999 UT 25, ¶¶ 25-30, 979 P.2d 332 (holding that the city’s decision was based upon substantial evidence, and not arbitrary or capricious, because it held required meetings, carefully considered the materials submitted, and reached a decision that a reasonable person could have reached).

Ms. Grant argues that the approved site plan application does not comply with various City Code provisions addressing curbing, lighting, storm drainage, and fencing. Furthermore, Ms. Grant generally argues that the approved site plan does not comply with various subjective, discretionary, and prefatory provisions of the Code. The City, conversely, cites to applicable Code provisions and asserts that the site plan application satisfies all relevant and mandatory requirements. The City further asserts that the approval is supported by substantial evidence in the record, as required by law.

The materials submitted to this Office indicate that City staff and the Planning Commission properly approved Mr. McCullough’s site plan application and supported the approval with substantial evidence in the record. For each of Ms. Grant’s contentions, the City has provided relevant Code citations justifying the City’s decision to approve the site plan. The City reviewed and considered the submitted site plan application, and made a reasonable, evidence-based determination in accordance with applicable ordinances and standards. *See id.*

⁴ Substantial evidence is “that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *First Nat’l Bank of Boston v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990).

Moreover, the City correctly interpreted applicable Code provisions related to curbing, lighting, storm drainage, and fencing and applied the provision in accordance with their plain meaning.⁵ The submitted materials give no indication that the City approved Mr. McCullough's site plan application illegally or in a manner unsupported by substantial evidence. Consequently, the City's approval was proper.

CONCLUSION

Since Ms. Grant failed to timely appeal the building and land disturbance permits, this Office lacks authority to review the approval and issuance of those permits, and Mr. McCullough possesses a vested right to perform work approved under the permits.

The City correctly approved Mr. McCullough's site plan application. The approval was supported by substantial evidence in the record and complied with applicable mandatory provisions of the South Jordan City Code.

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

⁵ The Utah Code states that "a land use authority shall apply the plain language of land use regulations," and that "if a land use regulation does not plainly restrict a land use application, the land use authority shall interpret and apply the land use regulation to favor the land use application. UTAH CODE § 10-9a-306.

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:

Anna M. West, Recorder
City of South Jordan
1600 West Town Center Drive
South Jordan, UT, 84095

On this _____ Day of _____, 2018, 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