Advisory Opinion #196

Parties: Russell & Maraly Frandsen; Provo City
Issued: May 25, 2018

TOPIC CATEGORIES:
Conditional Use Applications
Entitlement to Application Approval

The City improperly denied the applicants' conditional use permit. The City Code allows a residence to concurrently operate both a legal accessory apartment and a Family Group Day Care, in accordance with applicable standards and requirements. The City has not presented evidence that reasonably anticipated detrimental effects of the proposed Family Group Day Care cannot be substantially mitigated through reasonable conditions.

In light of this conclusion, the City must specifically identify the parking standard that will apply to the applicants' proposal and approve a reasonable pickup/drop off plan that complies with the plain requirements of the City's parking ordinance.

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:	Russell & Maraly Frandsen
Local Government Entity:	Provo City
Type of Property:	Residential
Date of this Advisory Opinion:	May 25, 2018
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUE

Did the City lawfully deny the applicants' conditional use permit application to operate a preschool in their residence, which also contains an occupied student apartment?

SUMMARY OF ADVISORY OPINION

The City improperly denied the applicants' conditional use permit. The City Code plainly allows a residence to concurrently operate both a legal accessory apartment and a Family Group Day Care, in accordance with applicable standards and requirements. The City has not presented evidence that reasonably anticipated detrimental effects of the proposed Family Group Day Care cannot be substantially mitigated through reasonable conditions.

In light of this conclusion, the City must specifically identify the parking standard that will apply to the applicants' proposal and approve a reasonable pickup/drop off plan that complies with the plain requirements of the City's parking 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 § 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 Maraly Frandsen on March 8, 2018. A copy of that request was sent via certified mail to Amanda Ercanbrack, Recorder for Provo City, at 351 West Center Street, Provo, 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 Maraly Frandsen on March 8, 2018.
2. Provo City March 15, 2018 Board of Adjustment Staff Report, submitted by Maraly Frandsen on March 10, 2018.
3. Response from Provo City, submitted by Marcus Draper, Attorney for Provo City, on April 3, 2018.
4. Rebuttal letter, submitted by Maraly Frandsen on April 9, 2018.

BACKGROUND

Russell and Maraly Frandsen own a home located at 997 Briar Avenue in Provo City (the "City"). Briar Avenue is located in an area of the City locally referred to as the "tree streets". This area of the tree streets is zoned R1.8(S), which is a single family residential district that also allows accessory apartments in owner-occupied residences on certain conditions. The tree streets area is located in close proximity to Brigham Young University, making the apartments a convenient housing option for students attending the university. According to the materials submitted, the Frandsens' home has a legal accessory apartment that may house up to four unrelated individuals, in addition to the Frandsens' family.

In June 2015, the Frandsens also began operating a Montessori school in their home under a City-issued "Home Occupation" permit. The Provo City Code (the "City Code") allows a "family day care service" serving up to 6 children as a "minor home occupation". To operate a minor home occupation in a residence, the property owner must simply obtain a Home Occupation Permit and comply with conditions outlined in the Home Occupation Chapter of the City's zoning ordinance. *See* PROVO CITY CODE § 14.41.040.

Over time, the school's enrollment increased beyond the 6-child limit, and sometime during the summer of 2016, the Frandsens began the process of applying for a conditional use permit to allow them to operate a "Family Group Day Care", which would allow the Frandsens to legally serve up to 12 children. *See* PROVO CITY CODE § 14.34.270(2).

Between that time and February 2018, the Frandsens progressed through the development review process, which involved several conversations with staff, and submitting and revising plans

prepared both by the Frandsens and licensed engineers in an attempt to comply with City Code requirements related to parking and access concerns, among others.

Subsequently, on February 7, 2018 a City administrative hearing officer considered the Frandsens' conditional use permit application and denied the application based upon the finding that "[t]he impact of a single-family home having a 12 student preschool and a 4 bedroom accessory apartment is disproportionate to the single-family character of the neighborhood." Administrative Hearing Report of Action, dated February 7, 2018.

The Frandsens subsequently appealed the denial of their permit application to the City Board of Adjustment and also submitted an advisory opinion request to our office, asking us to examine whether it is legal under the Provo City Code and state law to use the legal accessory apartment and also operate a Family Group Day Care serving up to 12 children in their home simultaneously.

ANALYSIS

The City denied the Frandsens' conditional use permit application on the basis that "[t]he impact of a single-family home having a 12 student preschool and a 4 bedroom accessory apartment is disproportionate to the single-family character of the neighborhood."

Both the City and the Frandsens agree that the Frandsens' home at 997 Briar Avenue contains a legal accessory apartment that may house up to four unrelated individuals. Both parties additionally agree that the City Code does not explicitly prohibit the operation of a Family Group Day Care in a home with a legal accessory apartment. Where the parties appear to disagree is on the question of whether the City may deny the Frandsens' conditional use permit based upon the findings above and others discussed below.

I. The City Improperly Denied the Frandsens' Conditional Use Permit to Operate a 12-Student Family Group Day Care

A. Conditional Uses Generally

State law grants local governments authority to designate certain land uses as conditional uses within their individual zoning districts. UTAH CODE § 10-9a-507(1)(a). Utah State Code defines a conditional use as "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." UTAH CODE § 10-9a-103(5).

State law recognizes that in certain cases a city may deny a conditional use permit if the proposed use is wholly incompatible in a given situation. UTAH CODE § 10-9a-507(2)[1] clarifies, however, that such a result is exceptional:

[1] The State Legislature amended portions of Utah Code Section 10-9a-507 in the 2018 Legislative session. The changes, which took effect May 8, 2018, did not affect the substance of the provisions involved here, so we cite the amended provisions for clarity and ease of reference.

> (2)(a)(i) A [city] *shall approve* a conditional use 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.
> …
> (c) 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 [city] may deny the conditional use.

UTAH CODE § 10-9a-507(2)(a)(i), (2)(c) (emphasis added).

Thus, a city must approve a conditional use if the proposed use satisfies the local code's plain and objective requirements, and, in accordance with applicable standards, the city can impose or the applicant can propose reasonable conditions to substantially mitigate "reasonably anticipated detrimental effects" of the proposed use. This is the default rule.[2]

If, however, an applicant proposes to establish a conditional use in a location that, because of extraordinary circumstances, would create detrimental impacts that could not be reasonably mitigated, essentially causing the use to operate as a "per se" nuisance, state law allows for denial of the use. To reach this result, however, the city would need to present substantial and competent evidence[3] that there is no possible way to *mitigate*[4] the use's identified detrimental effects through reasonable conditions.

B. Denial of the Frandsens' Conditional Use Permit

Here, the City improperly denied the Frandsens' conditional use permit application. The materials submitted to this office indicate that both city staff and the applicant have acknowledged that the applicant has proposed, and the City could have imposed reasonable conditions to substantially mitigate the use's anticipated detrimental effects related to parking and traffic impacts. It appears that the City denied the permit largely because City staff feels that a residential dwelling should not operate an accessory apartment and a Family Group Day Care concurrently. This is not a sufficient basis to deny a conditional use.

[2] The City asserts that, pursuant to PROVO CITY CODE § 14.02.040, the City may deny a proposed conditional use if "the subject use will be detrimental to the health, safety, or general welfare of persons residing in the vicinity or injurious to property in the vicinity," unless "the applicant [proposes] or consent[s] to curative measures which will make the proposed use not contrary to" applicable standards. This standard is not the governing state law on conditional uses. The City must apply the standard articulated in UTAH CODE § 10-9a-507(2).

[3] This excerpt from a Pennsylvania appellate court decision, quoted in 8-44 *Zoning and Land Use Controls* § 44.01 (2018), is instructive and applicable: "The law on conditional uses is well-settled. A conditional use is one that has been legislatively approved for a particular zoning district, so long as the proposed use satisfies the standards for such a use set forth in the zoning ordinance. Once that burden is satisfied, the applicant is entitled to the conditional use, and the burden shifts to the objectors. The objectors must prove, to a high degree of probability, that aspects of the proposed use will adversely impact the health, safety and welfare of the community in ways not expected by the legislative body when it established its list of approved, conditional uses. Speculation of possible harms is not sufficient to satisfy this burden." *HHI Trucking & Supply, Inc. v. Borough Council*, 990 A.2d 152 (Pa. Commw. Ct. 2010) (internal citations omitted).

[4] Note that this word is not "*eliminate*".

1. Health & Safety Considerations

The City advances several justifications for denying the Frandsens' conditional use permit application. The City contends that the Frandsens' proposed day care use is "detrimental to the health, safety, and general welfare of persons residing in the vicinity and injurious to property in the vicinity because the proposed use creates 'unreasonable risks to the safety of persons or property because of vehicular traffic or parking, large gatherings of people, or other causes,' 'unreasonably interfere[s] with the lawful use of surrounding property.' and 'create[s] a need for essential municipal services which cannot be reasonably met.'"

The City asserts it could not impose conditions to safely mitigate conflicts related to student drop-off and pick-up along Briar Avenue, or that "the extent to which mitigation would occur would substantially alter the character of the residential neighborhood." To support this conclusion, the City presents observational evidence that on-street parking on Briar Avenue is highly volatile, which causes parents to stop in the middle of the street to drop of children. Staff also observed parents and children crossing the street outside of designated crosswalks. From this evidence, the City concluded that the use obstructs ingress and egress to surrounding properties, and creates unreasonable risks to the safety of persons.

On the contrary, these are conditions common and attendant to any use of land that involves drop off and pick up of children. Both the City and the Frandsens acknowledge there are other permitted Family Group Day Care facilities throughout the city that harmoniously exist in residential neighborhoods. The city may impose reasonable conditions to *mitigate* the detrimental effects identified, but it may not outright deny the use simply because vehicles may occasionally stop along the road or parents and children may choose to cross the street where there isn't a crosswalk.

2. Neighborhood Character

The City further asserts that the impact of a single-family residence that includes a 12-student preschool and a 4-bedroom accessory apartment is "disproportionate to the single-family character of the neighborhood." This argument fails because the operative provisions of the City Code allow concurrent occupation of an accessory apartment and operation of a Family Group Day Care in a single-family dwelling in the R1.8(S) zoning district.

Utah courts interpret local zoning ordinances in favor of allowing the property owner's desired use. *See Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995) (concluding that since zoning ordinances are "in derogation of a property owner's common-law right to unrestricted use…of property," provisions restricting or permitting land uses should be construed in favor of the property owner's desired use); *see also Carrier v. Salt Lake County*, 2004 UT 98 ¶ 31.

Provo City Code explicitly allows accessory apartments in the R1.8(S) zone, *see* PROVO CITY CODE § 14.30.030, and the City acknowledges that the Frandsens' home has a legally established apartment. The City Code also allows a Family Group Day Care as a conditionally permitted use

in all homes within the City, without qualification. *See* PROVO CITY CODE § 14.34.270(2). Consequently, as long as the property owner can comply with applicable code provisions, the City must allow both uses, even where the property owner conducts both uses concurrently. The City has not identified any provisions in the City Code that would compel a different conclusion.

Moreover, it is not City staff's role to make subjective determinations of neighborhood character. The substantive, legislatively-enacted provisions of the Code principally establish neighborhood character. The Utah Supreme Court recently articulated this principle in *McElhaney v. Moab City*, 2017 UT 65. In *McElhaney*, the court overturned Moab City's denial of a conditional use permit to operate a bed and breakfast. One of the reasons the City gave for denying the conditional use permit was that the proposed use was "inconsistent with [the City's] general plan…." *Id.* at ¶ 39. The court rejected this explanation as insufficient, observing that, without further explanation, "it is difficult to see how placing a bed and breakfast in an area zoned R-2—which specifically permits bed and breakfasts—is inconsistent with Moab's general plan." *Id.*

The same reasoning applies here. The City Code specifically allows accessory apartments in the R1.8(S) zoning district, and it also specifically permits Family Group Day Care facilities as conditional uses in residences. Nowhere does the Code prohibit a property owner from establishing these two uses concurrently. By way of analogy, it is difficult to see how placing a Family Group Day Care in a location the City Code permits is inconsistent with the character of the neighborhood.

3. Secondary and Incidental

The City further argues that allowing the Family Group Day Care in addition to the accessory apartment would violate the "secondary and incidental" clause in the "Purpose and Intent" section of the City's Home Occupation ordinance. The provision, in whole, provides:

> **14.41.010. Purpose and Intent**
> To encourage the majority of business activities to be conducted in appropriate commercial zones. Business activities may be conducted within a residence on a limited basis if such activities comply with standards of this Section. All home occupations shall be secondary and incidental to the residential use. The use should be conducted so that neighbors, under normal conditions, would not be aware of its existence. Home occupations are a temporary privilege which can be revoked if disruption of the residential neighborhood occurs.

PROVO CITY CODE § 14.41.010.

The City argues that the Frandsens' proposed configuration creates a situation in which the Family Group Day Care will operate in a manner that is not secondary and incidental to the residential use of the property and that it may deny the permit on this basis. The Frandsens, on the other hand, provide a detailed analysis of why, in their opinion, the Family Group Day Care, as proposed, satisfies the "secondary and incidental" provision. Ultimately, this question is irrelevant because the operative provisions of the City Code allow the Family Group Day Care.

The Utah Supreme Court has explained the role of a "Purpose and Intent" section of an ordinance. In *Price Development Co. v. Orem City*, the court "referred to a statement of legislative purpose as a 'preamble' to the operative provisions of a [law]." 2000 UT 26, ¶ 23. The court explained that "a preamble is nothing more than a statement of policy which confers no substantive rights." *Id.* As such, the court explained, "purpose and intent" provisions "provide guidance to the reader as to how the act should be enforced and interpreted, but they are not a substantive part of the statute." *Id*. Accordingly, these provisions "may be used to clarify ambiguities, but they do not create rights that are not found within the statute, nor do they limit those actually given by the legislation." *Id*.

In the present case, since the operative language of the Provo City Code plainly allows a Family Group Day Care as a conditional use in a residence, there is no need to look to the "purpose and intent" provision for clarification. The proposed use is inherently "secondary and incidental" if it complies with substantive code requirements.

II. The City Must Clearly Articulate the Parking Requirement and Approve a Plan that Complies with that Requirement

Finally, the City contends that the Frandsens have not been able to demonstrate compliance with various aspects of the City Code and conflicts that multiple uses of the property create. This is a valid concern. State law provides that the City "is bound by the terms and standards of applicable land use regulations and shall comply with mandatory provisions of those regulations." UTAH CODE § 10-9a-509(2). The City must reject the proposal if it cannot satisfy a stated parking standard or some other articulated code requirement.

It appears, however, that this issue has not been fully addressed. In the materials submitted the parties advance arguments regarding the extent to which the Frandsens' parking and pickup/drop off proposal complies with City Code requirements. It appears that the City didn't take a clear position on compliance until the appeal stage of the application process.

To that point, the Frandsens argued that the Code doesn't require any more than five off-street parking spaces for all proposed uses. They further asserted they had presented a plan to comply with this requirement. The City, in its March 15, 2018 Board of Adjustment Staff Report, contends that, under a "most comparable use" analysis[5], the Frandsens would need four spaces for the single-family home and accessory apartment, and an additional three spaces for the Family Group Day Care. This 7-stall analysis assumes the preschool will have one outside employee and will serve 12 students. It does not appear the City has given the Frandsens an opportunity to present a compliant proposal in light of this parking analysis.

In light of the conclusion that the City may not deny the conditional use for reasons discussed above, the City must work with the Frandsens to find a parking configuration that reasonably complies with City Code requirements.

[5] The City indicates that a Family Group Day Care is a "use not specified" in the parking ordinance. For such situations, the City Code indicates that "[t]he parking requirements for land uses which are not specified…shall be determined by the Community Development Director. Said determination shall be based upon the requirements for the most comparable use specified [in the Code]." PROVO CITY CODE § 14.37.070.

Up until March 15, it appears that the City's primary concerns regarding parking and pickup/drop off had involved compliance with AASHTO[6] design standards. It does not appear, however, that the Code requires compliance with AASHTO standards in this type of situation. Consequently, the City may not require compliance with unreferenced, third-party design standards. Moreover, the City should exercise any discretion afforded them by the City Code to reasonably allow the property owner's desired use. *See Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995). It would be improper for the City to use the parking and pickup/drop off plan as a means to effectually prohibit establishment of the otherwise allowed use.

CONCLUSION

Provo City improperly denied the Frandsens' conditional use permit. The City Code plainly allows a residence to concurrently operate both a legal accessory apartment and a Family Group Day Care, in accordance with applicable standards and requirements. The City has not presented evidence that reasonably anticipated detrimental effects of the proposed Family Group Day Care cannot be substantially mitigated through reasonable conditions.

In light of this conclusion, the City must specifically identify the parking standard that will apply to the Frandsens' proposal and approve a reasonable pickup/drop off plan that complies with the plain requirements of the City's parking ordinance.

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

[6] This acronym stands for the "American Association of State Highway and Transportation Officials".

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:

Amanda Ercanbrack, Recorder
Provo City
351 West Center Street
Provo, UT, 84061

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