

Advisory Opinion #209

Parties: Housel Family v. City of Francis

Issued: February 28, 2019

TOPIC CATEGORIES:

Compliance with Land Use Ordinances
Conditional Use Applications
Interpretation of Ordinances
Requirements Imposed On Development

Francis City ordinance requires landowners to “minimize” the effects of lighting spillage onto neighboring properties and to “prevent” exposure of light sources to the view of residents. It appears that this ordinance has not been followed or enforced. The ordinance must be given meaning and effect according to its plain language. No interpretation of the terms “minimize” or “prevent” matches the small to nonexistent efforts apparently taken here to manage the light exposure to the residents. The City must enforce this ordinance in a meaningful and effective way.

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: Housel Family

Local Government Entity: City of Francis

Type of Property: Commercial

Date of this Advisory Opinion: February 28, 2019

Opinion Authored By: Brent N. Bateman
Office of the Property Rights Ombudsman

ISSUES

Did Francis City properly issue, and has the developer complied with, the Conditional Use Permit with respect to lighting? Also, has Francis City correctly interpreted and applied its ordinances with respect to the lighting on the developer's property?

SUMMARY OF ADVISORY OPINION

The Conditional Use Permit issued by Francis City did not contain a condition with respect to lighting, so the City cannot enforce a lighting condition as a way to mitigate the potential detrimental effects from the spillage of lighting onto neighboring residential properties.

The City does have an ordinance that requires landowners to "minimize" the effects of lighting onto neighboring properties and to "prevent" exposure of light sources to the view of residents. It appears that this ordinance has not been followed or enforced. The ordinance must be given meaning and effect according to its plain language. No interpretation of the terms "minimize" or "prevent" matches the small to nonexistent efforts apparently taken here to manage the light exposure to the residents. The City must enforce this ordinance in a meaningful and effective way.

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 Dena Housel, on behalf of the Housel Family, on October 10, 2018. A copy of that request was sent via certified mail to Mayor Byron Ames, City of Francis, 2317 So. Spring Hollow Road, Francis, Utah 84036.

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 Dena Housel, on behalf of the Housel Family, on October 10, 2018.
2. Received a response from Brad Christopherson, Attorney for the City of Francis, on November 19, 2018.
3. Received a response from Dena Housel on November 26, 2018 including pictures of the facility.
4. Received an email from Mr. Christopherson including pictures of the lighting at the Storage facility.

BACKGROUND

The Housel family and other homeowners (collectively "Housel") live adjacent to the storage facility owned by Premier Storage Inc., ("Premier") in the City of Francis, Utah. The Storage facility is located in a commercial zone, operates under a duly issued conditional use permit, and became operational sometime in 2018.

Housel has requested this Advisory Opinion because, they allege, the "intensity of the lights" from the storage facility "is extremely bright and they shine directly into our homes." They allege that the lights from the storage facility violate the conditional use permit, violate the City ordinances, and/or violate the development lighting plan. Presuming that the information and photographs provided to this Office are accurate and authentic, which has not been disputed, multiple bright lights do appear to shine directly onto the Housel properties from the Premier property.

The City argues that the lighting at the Premier facility in all respects complies with the Francis City ordinances and the conditional use permit. In addition, the City argues that the deadline to appeal the conditional use permit has passed, and cannot be challenged. The City also points out that it did require the developer to place a solid fence between the facility and the residential area, in order to better block some light. Also, it is expected that the next phase of the development will block more of the light from reaching the Housel properties. Thus, according to the City, the ordinance requirements have been met.

ANALYSIS

I. The Premier Storage Facility is Not in Violation of the Conditional Use Permit

A conditional use permit is a land use entitlement that allows a particular use to take place on a property. The use is conditional because the municipality recognizes that although the use is allowed, it may carry some detrimental effects. *See* UTAH CODE § 10-9a-507. The conditions are imposed in order to mitigate those effects, and help meet the community's established standards. A conditional use permit must be obtained, and the conditions met, before the developer can engage in the particular use of the property.

At Premier's conditional use permit hearings in 2015, Housel raised questions regarding the lighting as a detrimental effect. These questions were sufficient to merit consideration by the City. However, the City elected not to include any condition regarding the lighting in the issued conditional use permit. Housel now alleges that the matter was not further pursued and conditions not imposed due to assurances received from Premier that the lighting effects would be mitigated by various means. Some of the documents provided could support that theory. However, whether because of those assurances or for some other reason, the fact remains that City did not impose any condition relating to the lighting.

Because the City did not issue a condition regarding the lighting, the conditional use permit cannot be used to mitigate any detrimental effects of the lighting. Thus, Premier's refusal to control the lighting spillage is not a violation of the conditional use permit. Whether the lighting is a detrimental effect that should have been considered, or whether exclusion of those conditions was an oversight, or even if the conditions were excluded due to some false assurances, the conditions regarding lighting were not included in the CUP, and the time to appeal the CUP and have the conditions added has passed. The developer's refusal to mitigate the effects of the lighting does not amount to a violation of the conditional use permit.

II. The Premier Storage Facility Violates Francis City Ordinances.

The City ordinances, however, are a separate matter. Independent of whether they correlate with conditions in the CUP, the property owner must comply with ordinance requirements placed upon it. If the property owner violates the ordinances, the City should enforce them.

Francis City has at least one ordinance that applies to this situation:

Where differing uses are to be developed adjacent to existing residential areas, special consideration shall be made to protect the privacy of residents and requirements shall be the discretion of the Planning Commission and City Council. As a minimum, the negative effects of noise and artificial lighting shall be minimized to protect existing residents.

Service areas shall be properly screened. Outdoor lighting shall be designed to prevent exposure of light source to the view of residents. Facilities that require late-night customers and activities shall be located away from residential areas to reasonably prevent disruption of privacy.

Francis City Code 18.45.160

The City has interpreted this ordinance and at first, in a letter dated July 30, 2018, notified Premier that it was not in compliance and must remedy the situation. Then, in a later undated letter, indicated that the Premier facility complies with the ordinance. This question thus turns on the interpretation of the ordinance, which requires use of the principles of ordinance interpretation. The primary goal of ordinance interpretation is “to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.” *Foutz v. City of South Jordan*, 2004 UT 75, ¶11. An analysis of the plain language of the ordinance always comes first. *Carrier v. Salt Lake County*, 2004 UT 98 ¶30. If the plain language of an ordinance is sufficiently clear, the analysis ends there. *General Construction & Development, Inc. v. Peterson Plumbing Supply*, 2011 UT 1, ¶ 8.

Further, it is presumed that the legislative body used each word advisedly. *Selman v. Box Elder County*, 2011 UT 18, ¶18. “When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.” *Id.* “In addition ‘statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and . . . interpretations are to be avoided which render some part of a provision nonsensical or absurd.’” *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996). Finally, when interpreting its own ordinances, the City is entitled to some non-binding deference. *Fox v. Park City*, 2008 UT 85, ¶11. So the City’s interpretation of the ordinance matters. However, this deference has limits, *see* UTAH CODE § 17-27a-508(2), and must yield to the plain meaning of the ordinance terms. The City is not entitled to interpret its ordinance to the point that the plain meaning is ignored and without effect.

Francis City Code 18.45.160 contains certain key terms that have plain and straightforward meanings. The ordinance states that “the negative effects of noise and artificial lighting shall be **minimized** to protect existing residents.” Moreover, “Outdoor lighting shall be designed to **prevent** exposure of light source to the view of residents.” The term *minimize*, although it does not mean eliminate, means (according to Google) to “reduce (something, especially something unwanted or unpleasant) to the smallest possible amount or degree.” The term *prevent* (according to Google) means to “keep from happening or arising.” By its plain language, this ordinance can only mean that some action must be taken so that the lighting shall have very little impact on existing residents.

It is difficult to see how this ordinance has been followed in this matter. Assuming the information received by this Office is accurate, lights are shining directly from the development into the residential area, and onto homes. Measures apparently taken to reduce that light have been marginal (the requirement to install a solid fence) or nonexistent (the promise that future phases may block light). Neither apparently *minimizes* or *prevents* the light from reaching the residences. Although the fixtures appear to be downward facing, the bulbs are fully exposed and visible to the residences. Thus the downward-facing aspect of the light fixtures does not minimize or prevent light exposure. Thus, it appears that according to the plain language of the ordinance, the owner is in violation now. The City should enforce its ordinance.

Note that the plain language of the ordinance does not require that *all* light effects be eliminated. However, exposure to the residences must be “minimized” and “prevented.” Moreover, the ordinance does not require that Housel select or even approve of the mitigation measures taken. How to meet the ordinance remains within the discretion of the City. Nevertheless, effective mitigation measures must be taken in accordance with Francis City Code in order to give this ordinance consequence and meaning. It appears that as of now, none have.

CONCLUSION

The Conditional Use Permit issued by Francis City did not contain a condition with respect to lighting, so the City cannot enforce a lighting condition as a way to mitigate the potential detrimental effects of the lights.

However, the City does have an ordinance that requires landowners to “minimize” the effects of the lighting onto neighboring properties and to “prevent” exposure of light source to the view of residents. It appears that this ordinance has not been followed or enforced. The ordinance must be given meaning and effect according to its plain language.

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:

Mayor Byron Ames
City of Francis
2317 So. Spring Hollow Road
Francis, Utah 84036

On this 1st Day of March, 2019, 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