

# Advisory Opinion 218

Parties: Tony Tippetts / Millcreek City

Issued: March 3, 2020

## TOPIC CATEGORIES:

### Compliance with Land Use Ordinances

#### Interpretation of Ordinances

Design standards, when they could be interpreted to conflict with express substantive code requirements, should be interpreted as purpose language. The City was incorrect in interpreting the design standard requiring subdivisions to be designed according to the character of surrounding development so as to allow the City to impose lot frontage requirements greater than the express minimums of the code by determining that the surrounding development's character establishes some other requirement. Since the lot frontages in the property owner's proposed development comply with the express lot frontage requirements in the City's Municipal Code, his development proposal is entitled to approval in that regard.

#### 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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## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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### ADVISORY OPINION

Advisory Opinion Requested By:	Tony Tippetts
Local Government Entity:	City of Millcreek
Applicant for Land Use Approval:	Tony Tippetts
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	March 3, 2020
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

### ISSUE

Can Millcreek City use a design standard requiring subdivisions and conditional uses to be designed according to the character of surrounding development to modify an express lot frontage requirement in the City's Municipal Code?

### SUMMARY OF ADVISORY OPINION

Millcreek City's municipal code design standards require lot arrangements to be designed according to the "character of surrounding development, and to existing requirements." While development "character" is not defined by the municipal code, Millcreek City has interpreted development "character" to be limited to four characteristics only—lot frontage, lot area, lot width, and lot depth. As to these characteristics, the zoning code provides minimum lot requirements for area and width according to each zone. The City has interpreted the design standard requiring subdivisions to be designed according to the character of surrounding development so as to allow the City to impose lot frontage requirements greater than the express minimums of the code by determining that the surrounding development's character establishes some other requirement.

Design standards, when they could be interpreted to conflict with express substantive code requirements, should be interpreted as purpose language. A municipality may not deny a subdivision application, or modify express lot frontage requirements in the municipality's code, based upon a policy determination that the proposed development does not match the character of surrounding development when the proposed lots comply with the minimum requirements specified in the code for that particular zone. Since the lot frontages in Mr. Tippetts' proposed development comply with the express lot frontage requirements in the Millcreek Municipal Code, his development proposal is entitled to approval in that regard.

## **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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 Tony Tippetts on January 7, 2020. A copy of that request was sent via certified mail to Jeff Silvestrini, Mayor of the City of Milcreek, 3330 South 1300 East, Milcreek Utah 84016 on January 9, 2020.

## **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 Tony Tippetts received January 7, 2020, and subsequent additional information.
2. Letter submitted by John N. Brems, Millcreek City Attorney, received January 17, 2020, including Planning Commission Staff Report SD-19-014.

## **BACKGROUND**

Tony Tippetts proposes to subdivide his property located at 3675 South Craig Circle in Millcreek City ("City") to five lots. According to Salt Lake County records the Property consists of four parcels that have a combined acreage of approximately 1.9 acres and has an existing dwelling located on the Property. The Property is in the R-1-8 zone.

The Millcreek Municipal Code provides that the planning commission "may adopt development standards for use as a guide in conditional use review and subdivision design."<sup>1</sup> Under Title 18 "Subdivisions" of the Municipal Code, design standards are established for lot arrangement and

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<sup>1</sup> MILLCREEK MUNICIPAL CODE § 19.02.120.

design, and provide that lots shall be “properly designed according to topography, the character of surrounding development, and to existing requirements.”<sup>2</sup> The Municipal Code requires a minimum lot width within the R-1-8 zone of “65 feet at a distance 25 feet from the front lot line.”<sup>3</sup>

On October 18, 2019, Mr. Tippetts filed a Land Use & Development Application for his proposed five-lot subdivision. The proposed lots of the subdivision all met the required minimum lot widths in the Municipal Code of 65 feet. On December 7, 2019, the City contacted Mr. Tippetts and informed him that his lot frontages did not match the character of surrounding development. The City provided Mr. Tippetts a comparison document constituting a map image showing his property and surrounding lots marked with numbers indicating the width in feet of each lot. The comparison document also defined selected area surrounding his property.

The City explained that according to the comparison, 34 lots were wholly or partially included in the 300 foot perimeter area surrounding his property, with an average lot frontage of 89.5 feet in width. The City told Mr. Tippetts that he should limit his proposed subdivision to four lots as opposed to five, and that he needed to match the lots with the character of surrounding development by ensuring a minimum of 70 foot lot widths and meeting the average frontage of 89.5 feet. The City cited Section 18.20.040 of the Municipal Code to require the additional frontage above the zone minimums.

The map image provided to Mr. Tippetts shows at least three properties in the define area with lot frontages less than 70 feet. The City discounted the relevance of the smaller lots alleging they all front on 2700 East, a minor arterial street. The City determined these were of a different character than the lots fronting on local streets. However, the map image also shows other larger frontages along that same street, up to 100 feet in width, but these properties seem to have been included in the average, rather than excluded with their immediate neighbors of smaller widths, without any explanation.

On December 18, 2019, the Millcreek Planning Commission heard the application and reviewed a Planning Commission Staff Report regarding the subdivision. The Staff Report found that the subdivision meets all the express requirements in the code, but that it did not match the character of the surrounding development. The Staff Report generally summarized the lot comparison, but provided no explanation on how it defined the surrounding area, or how it determined to include or exclude certain properties to define character. The Planning Commission motioned to “continue the subdivision application...until a more suitable and compatible development can be proposed based on staff findings located in the staff report.”<sup>4</sup>

Following the meeting, in response to Mr. Tippetts’ request that the City provide him more specific instructions on how to move forward, the City told Mr. Tippetts to revise his subdivision plat to conform more to the character of the neighborhood to meet the design standards requirement in the Municipal Code regarding subdivision.

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<sup>2</sup> MILLCREEK MUNICIPAL CODE § 18.20.040.

<sup>3</sup> MILLCREEK MUNICIPAL CODE § 19.14.040.

<sup>4</sup> Minutes of the Millcreek Planning Commission December 18, 2019, page 6.

Mr. Tippetts has requested that the Office of the Property Rights Ombudsman provide an Advisory Opinion to determine whether his land use application is entitled to approval under applicable law, and whether the City is correctly interpreting its ordinances to require lot dimensions in excess of the minimums provided by Code based on a determination that the character of surrounding development may establish different requirements.

### ANALYSIS

When interpreting the meaning of ordinances, the standard rules of statutory construction apply.<sup>5</sup> Looking to the plain language of the ordinance is considered the first step of interpretation.<sup>6</sup> The primary goal 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.”<sup>7</sup> Because zoning ordinances are “in derogation of a property owner’s common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.”<sup>8</sup>

Chapter 18.20 of the Millcreek Municipal Code contains “Design Standards” for subdivisions. The section regarding lots reads as follows:

- A. The lot arrangement and design shall be such that lots will provide satisfactory and desirable sites for buildings and be properly designed according to topography, the character of surrounding development, and to existing requirements.
  - B. All lots shown on the preliminary and final plats must conform to the minimum requirements of the zoning title, if any, for the zone in which the subdivision is located, and to the minimum requirements of the health department for water supply and sewage disposal.
- ...<sup>9</sup>

Design standards in a local ordinance usually express general principles and purposes. Sometimes, design standards contain defined, substantive requirements that may be plainly and unambiguously applied to a development proposal. More often, design standards simply contain aspirational or precatory language intended to guide the developer as they configure the layout and setup of their development. This latter type of language should be treated as purpose language, as opposed to language that conveys definite, substantive requirements.

In *Price Development Co. v. Orem City*,<sup>10</sup> the court discussed the role of legislative statements of purpose as opposed to operative provisions. Many ordinances and statutes contain distinct sections of purpose that serve as a ‘preamble’ to the operative provisions of a statute. “[Such language] is nothing more than a statement of policy which confers no substantive rights.”<sup>11</sup> The court explained that these provisions “provide guidance to the reader as to how the act should be

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<sup>5</sup> *Brendle v. City of Draper*, 937 P.2d 1044, 1047 (Utah Ct. App. 1997).

<sup>6</sup> *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208.

<sup>7</sup> *Foutz v. South Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171.

<sup>8</sup> *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995).

<sup>9</sup> MILLCREEK MUNICIPAL CODE § 18.20.040.

<sup>10</sup> *Price Dev. Co. v. Orem*, 2000 UT 26, ¶ 23, 995 P.2d 1237.

<sup>11</sup> *Id.*

enforced and interpreted, but they are not a substantive part of the statute.”<sup>12</sup> 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.”<sup>13</sup>

Here, this is the role that the character language in the Municipal Code’s Design Standards plays. The plain language of the Design Standards states that “lot arrangement and design shall be such that lots will provide satisfactory and desirable sites for buildings and be properly designed according to topography, the character of surrounding development, and to existing requirements.”<sup>14</sup> This is purpose language. It does not contain any unambiguous, substantive requirements that may be objectively applied to a development proposal. The Design Standards, by their plain language, do not impose independent substantive requirements of design and character, but give purpose to the specific, substantive standards contained elsewhere in the Municipal Code.

Moreover, the Municipal Code does not contain an express definition of development “character,” but the City has attempted to define it, apparently by internal policy, as limited to four characteristics only—lot frontage, lot area, lot width, and lot depth.<sup>15</sup> The City applies the Design Standard as an independent requirement that possesses enough substantive weight to form the sole basis of approval or denial of a development proposal, even when the proposal complies with express dimensional requirements in the Municipal Code.

In Mr. Tippetts’ case, the City has told him that he must adhere to a subjective standard created by the character of surrounding development, even though his proposal complies with the written, minimum lot requirements in the Municipal Code. These new requirements cannot be discerned by reference to city ordinances, but originate from the discernment of planning authorities.

Since the Municipal Code does not define “character,” the City may not, by internal policy, attach a seemingly objective definition to a term that is otherwise inherently subjective. Where character is undefined, the substantive requirements of the Municipal Code, such as codified minimum lot frontage requirements, determine the community’s character. Section 19.14.040 of the Municipal Code expressly provides that the minimum lot width for a lot in the R-1-8 zone is “65 feet at a distance 25 feet from the front line.” Since Mr. Tippetts’ proposal meets this requirement, it, by definition, meets the character of the surrounding community, and is entitled to approval.

## CONCLUSION

Land use ordinances restricting the use of property are strictly construed, and provisions permitting property use are liberally construed in favor of the property owner. Moreover, a city must interpret its code according to the code’s plain language, and not by internal policy.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> MILLCREEK MUNICIPAL CODE 18.20.040.

<sup>15</sup> Letter submitted by John N. Brems, Millcreek City Attorney, page 4, received January 17, 2020.

In this case, the City has incorrectly treated its Design Standards as substantive requirements, and interpreted its provisions to require greater restrictions on property use. The City's Design Standards should be interpreted as providing purpose, as opposed to imposing greater restrictions than what the express provisions of the Municipal Code already require. Since Mr. Tippetts' proposed lot frontages comply with the express requirements of the Municipal Code, his application is entitled to approval.

Jordan S. Cullimore, 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 § 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 Jeff Silvestrini  
City of Millcreek  
3330 South 1300 East  
Millcreek, Utah 84016

On this \_\_\_\_\_ day of March 2020, 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