Advisory Opinion 219

Parties: Clark Van Buren / Hooper City

Issued: April 9, 2020

TOPIC CATEGORIES:

Compliance with Land Use Ordinances

Interpretation of Ordinances

The City Code contains a requirement that restricts total coverage of all impervious surfaces on a lot in the R2 Medium Density Residential Zone. Accordingly, the City may enforce this requirement on the applicant's lot located in the R2 Zone, pursuant to his building permit.

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ADVISORY OPINION
(Revised)[1]

Advisory Opinion Requested By:	Clark Van Buren
Local Government Entity:	Hooper City
Applicant for Land Use Approval:	Clark Van Buren
Type of Property:	Residential
Date of this Advisory Opinion:	April 9, 2020
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUE

Can Hooper City require Mr. Van Buren to reduce the coverage of impervious surfaces on his lot under the ordinances that existed at the time Mr. Van Buren applied for a building permit in 2017?

SUMMARY OF ADVISORY OPINION

The Hooper City Code contains a requirement that restricts total coverage of impervious surfaces on a lot in the R2 Medium Density Residential Zone. Accordingly, the City may enforce this requirement on Mr. Van Buren's lot located in the R2 Zone, pursuant to his building permit.

Nevertheless, we urge the City to resolve this matter in a measured, prudent, and understanding manner. It appears that aspects of the City's development review and approval process may have led to confusion and misunderstanding. There may also be evidence to suggest that the provision

[1] On March 24, 2020, the Office of the Property Rights Ombudsman issued an Advisory Opinion in this dispute between Clark Van Buren and Hooper City. Shortly after, Mr. Van Buren contacted the Office to point out a mistake of fact in the Opinion. The original Opinion indicated that Mr. Van Buren did not dispute that the City amended its ordinance to allow 40 percent impervious surface, up from 25 percent. During the information gathering stage of the Advisory Opinion process, Mr. Van Buren did in fact dispute the City's assertion that it amended its ordinance. In the interest of accuracy, we issue this Revised Opinion to reflect this, and to remove portions of the analysis that relied on the misstatement. Otherwise, the analysis and the outcome remain the same.

the City seeks to enforce in this case has been rarely enforced in the past. This does not exempt Mr. Van Buren from the rules. However, these considerations may warrant an approach that updates the City ordinances to accurately reflect community values and preferences and allows for legalization of Mr. Van Buren's current configuration, as determined by the City's elected officials.

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 Clark Van Buren on February 6, 2019. A copy of that request was sent via certified mail to Korry Green, Mayor for Hooper City, on February 7, 2019.

EVIDENCE

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

1. Request for an Advisory Opinion, including previously submitted documentation, submitted by Clark Van Buren, on February 6, 2019.
2. Reply submitted by Brandon R. Richards, Attorney for Hooper City, on June 3, 2019.
3. Additional response submitted by Brandon R. Richards, Attorney for Hooper City, on September 6, 2019.
4. Email message submitted by Clark Van Buren, dated October 29, 2019.
5. Reply submitted by Brandon Richards, Attorney for Hooper City, dated November 5, 2019.

BACKGROUND

In spring 2017[2], Mr. Van Buren applied for a building permit to build a home on his lot in Hooper City (the City). Mr. Van Buren's lot is located in the City's R2 Medium Density Residential Zone. At the time Mr. Van Buren submitted his permit, Title 10 of the Hooper City Code (the Code) contained the following table, applicable to development in the City's residential zones:

[2] The submitted documents indicate the permit was applied for some time during March or April of 2017. For purposes of this opinion, the exact date is not relevant.

Table 10-2B-3: Dimensional Standards in Residential Zones

Dimensional Standard	R1	R2	R3	R4	ROS	HDR
Minimum Property Size: 1. Single family detached dwelling	40,000	20,000	13,000	10,000	13,000	N/A
Roadway frontage (in feet)	150	100	100	85	100	N/A
Principle Structure: Setback (feet) from: 1. Any property line on an arterial or collector street	30	30	30	25	30	25
2. Front Property line on a local street or private road	25	25	25	20	25	25
3. Front property line where alley provides access to garage or where the garage is side loaded or located behind the front plane of the house	20	20	15	15	20	15
4. Interior side property line	10	5/story	5/story	5/story	5/story	5/story
5. Side property line on local street	20	20	20	20	20	20
6. Rear property line	20	15	15	15	15	15
Maximum coverage Impervious Surface (in percent)	20	25	25	35	25	N/A

The City claims that the final row in Table 10-2B-3 identifies the amount of a lot, by percentage, a property owner may cover with "impervious surface." According to the table, the amount allowed in the R2 Zone is 25 percent of the lot. The City claims this number was updated by ordinance in 2016, before Mr. Van Buren applied for his building permit, to allow up to 40 percent of a lot to be covered with impervious surface. The copy of the Code provided to our office does not reflect this change, and Mr. Van Buren disputes whether the ordinance claimed 2016 amendment occurred. He further asserts that the City has failed to produce conclusive evidence that the City formally amended its ordinance to allow up to 40 percent coverage instead of 25 percent.

On July 31, 2018, after Mr. Van Buren had presumably built most of his home and improved much of his lot, but before the City had performed a final inspection and issued a Certificate of Occupancy for the home, the Hooper City Building Official sent an email to Mr. Van Buren. In the email, the Building Official indicated he believed Mr. Van Buren had violated the City Code's impervious surface requirement by pouring a "sizeable amount of concrete" on the lot exceeding both the 25 and 40 percent thresholds. The Building Official requested a site plan

showing the location and amount of impervious surface on the lot, and explained that "impervious surface" includes "the home, concrete, and any pavers or similar surface."

After some email exchanges and discussions with the City, Mr. Van Buren submitted a Request for Advisory Opinion to this Office. In his request, Mr. Van Buren asks us to determine whether the City has "the right and the ordinance in place to require [Mr. Van Buren] to remove concrete (RV pad & patio) on [his] property." Mr. Van Buren asserts that the impervious surface requirement in Table 10-2B-3 applies only to the principal structure. The City, however, as indicated above, claims that the impervious surface requirement applies to coverage of the entire lot.

ANALYSIS

I. Interpretation of Hooper City's Ordinance

The relevant question this opinion examines is whether the final row of Table 10-2B-3 of the Hooper City Code restricts coverage of the principal structure only, or coverage of the entire lot generally. While the parties dispute whether the number is 25 or 40 percent, the actual number is immaterial to the question presented.[3]

The resolution of this question depends upon the proper interpretation of the Hooper City Code, as it applies to Mr. Van Buren's situation. Ordinance interpretation begins with an analysis of the plain language of the applicable ordinance. *Carrier v. Salt Lake County*, 2004 UT 98 ¶ 30, 104 P.3d 1208. The primary goal of 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, 100 P.3d 1171.

Ordinances should be construed in a manner that renders all parts of the ordinance "relevant and meaningful," *Foutz*, 2004 UT 75, ¶ 11, 100 P.3d 1171, and a correct reading should not "impose an unreasonable and unworkable construction," *Miller v. Weaver*, 2003 UT 12, ¶ 19, 66 P.3d 592, or "render some part of a provision nonsensical or absurd." *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996).

Here, the plain language of the Code dictates that the impervious surface requirement in Table 10-2B-3 applies to the entire lot, not simply the principle structure. Table 10-2B-3 addresses "Dimensional Standards in Residential Zones." The first two rows address dimensional standards applicable to the *entire lot*. The next several rows of the table present, in a numbered list, standards applicable only to the principal structure.

The final row of the table, which contains the impervious surface requirement, is not numbered as a requirement applicable to the principal structure. However, Mr. Van Buren nonetheless believes that, because the requirement is positioned below a list of requirements applicable only to the principal structure, the impervious surface requirement is also applicable only to the principal structure. The plain meaning of the provision does not support this interpretation. The requirement, by its plain and ordinary language, states that it addresses maximum coverage of

[3] Moreover, the amendment asserted by the City would favor Mr. Van Buren.

impervious surface, not maximum coverage of the principal structure. The courts, when interpreting an ordinance, cannot append additional meaning to ordinance language that is not expressed in the ordinance. *See Krejci v. Saratoga Springs*, 2013 UT 74 ¶ 9, 322 P.3d 662. Hooper City Code apparently does not specifically define the term, "impervious surface." We therefore look to the ordinary meaning of the term. "Impervious" is generally defined as "not allowing entrance or passage : impenetrable." *Impervious*, Merriam-Webster Dictionary, at https://www.merriam-webster.com/dictionary/impervious. It is generally understood that an "impervious surface" is a surface that does not allow water to pass through it into the ground, such as a building, asphalt, or concrete.

Consequently, the impervious surface requirement in Table 10-2B-3 of the Hooper City Code restricts impervious surface coverage on the lot generally, not just coverage of the principal structure specifically. Accordingly, Hooper City may require Mr. Van Buren, in accordance with the Hooper City Code, to limit the amount of impervious surface on his lot. As the Code is presented here, the City may require Mr. Van Buren to restrict coverage of his lot to 25 percent. If it is determined that the City amended the ordinance in 2016 to allow up to 40 percent coverage, then the City may restrict coverage to that number only.

II. Apparent Ambiguities in the Approval Process

Mr. Van Buren, in his submittals to our office, has indicated that despite the express language of the City's Code, the City's permit approval process has been misleading in many respects, and, at least in his experience, has led to confusion and ambiguity. For example, Mr. Van Buren asserts that when the City issued him his building permit, he was given a document that could be interpreted to mean that the only coverage requirement applicable to his lot was a requirement that the *principal structure* not cover more than 25 percent of the property. The City has not directly addressed this assertion to agree or disagree.

Legally speaking, a guidance document given to someone with a building permit carries no legal significance. The City Code will still control and govern development under the permit. *See* UTAH CODE § 10-9a-509(1)(f), (2). However, the existence of such a document that may have the effect of unintentionally misleading property owners and builders is nonetheless troubling, and should not be taken lightly. Mr. Van Buren claims, and the City has not refuted, that the City subsequently admitted that certain information and drawings on its website were incorrect.

Mr. Van Buren also refers to another guidance document on the City's website that indicates the "impervious surface ratio [on a residential lot] is calculated by identifying all hard surface between the rear yard setback and the rear property line." This, again, is not an express provision in the Code that carries legal weight, but it appears to be some sort of "internal policy." Neither party has given any background information regarding how, or the extent to which, this statement has been implemented in practice. Ultimately, the City, like the courts, may not read additional requirements into the express language of the Code, and our analysis of the Code above reaches the correct conclusion. However, while this document has no legal significance, the document is

troubling to the extent that a property owner may rely on it for accurate information regarding what they can and cannot do with their property.[4]

In light of these considerations, we strongly recommend that the City approach resolution of this matter in a measured, prudent, and understanding manner. The City cannot unilaterally grant exceptions to its ordinances. It must follow its Code. UTAH CODE § 10-9a-509(2). However, in light of the apparent confusion the City's guidance documents may have created, the City may consider revising its guidance documents to be clearer, and amending its ordinances to potentially allow for legalization of Mr. Van Buren's situation.[5] To be clear, the City has no obligation to pursue this course, but principles of good governance may nonetheless encourage such a result.

CONCLUSION

The Hooper City Code contains a requirement that restricts total coverage of impervious surfaces on a lot in the R2 Medium Density Residential Zone. Accordingly, the City may enforce this requirement on Mr. Van Buren's lot located in the R2 Zone, pursuant to his building permit.

Nevertheless, we urge the City to resolve this matter in a measured, prudent, and understanding manner. It appears that aspects of the City's development review and approval process may have led to confusion and misunderstanding. There may also be evidence to suggest that the provision the City seeks to enforce in this case has been rarely enforced in the past. This does not exempt Mr. Van Buren from the rules. However, these considerations may warrant an approach that updates the City ordinances to accurately reflect community values and preferences and allows for legalization of Mr. Van Buren's current configuration, as determined by the City's elected officials.

Jordan Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

[4] Furthermore, such representations may potentially give rise to a zoning estoppel claim under certain circumstances. *See Fox v. Park City,* 2008 UT 85, 200 P.3d 182 (provides a general overview of the zoning estoppel doctrine). This type of a claim is outside of our statutory grant of authority to address, and would therefore be beyond the scope of this opinion.

[5] Mr. Van Buren has also asserted that there are many other lots in the City that have impervious surface coverage greater than 40 percent. We have been given no evidence to support or refute this claim, but if it is the case, it may be appropriate for the City to amend its Code to reflect appropriate standard practices within the City.

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 Korry Green
Hooper City
5580 West 4600 South
Hooper, Utah 84315

On this 10th day of April 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.

_____
Office of the Property Rights Ombudsman